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Student Articles

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Cumming v. Richmond County Board of Education: The Great Dissenter's Great Betrayal

Mark Dorosin[*]

Justice John Marshall Harlan's place in legal history was established by his impassioned and eloquent dissents defending the civil rights of Black Americans in *The Civil Rights Cases*[1] and *Plessy v. Ferguson*.[2] The former slave owner's powerful and solitary dissents in those cases, and in several others regarding the Equal Protection Clause and the rights of Black Americans, established Harlan's reputation as a radical champion of civil rights. Those opinions are also credited with establishing the analytical foundation upon which the legal strategy to challenge segregation would eventually be built.

But Harlan's most impactful civil rights opinion severely *limited* the Fourteenth Amendment and the ability of Blacks to challenge racial discrimination. Just three years after *Plessy*, where he insisted that "our Constitution is color-blind, and neither knows nor tolerates classes among citizens,"[3] Harlan wrote the opinion for a unanimous Court in *Cumming v. Board of Education of Richmond County*.[4] There, he affirmed the school board's decision to close the

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1. 109 U.S. 3 (1883).
2. 163 U.S. 537 (1896).
3. *See id.* at 559 (Harlan, J., dissenting).
4. 175 U.S. 528 (1899).

only public high school for Black students while maintaining separate high schools for white students.[5] Specifically emphasizing that the board's decision was driven by economic reasons, and not "with any desire or purpose . . . to discriminate against any of the colored school children of the county on account of their race," Harlan established the principle that the Equal Protection Clause reached only intentional racial discrimination and has no application to discriminatory impacts of state actions purportedly based on any nondiscriminatory justification.[6]

Cumming was the Court's earliest statement of the intent versus effects interpretation of the Equal Protection Clause, and its impact was sweeping. The ruling helped catalyze and entrench discrimination in all facets of life in America. To this day, it remains the controlling judicial construct of the Fourteenth Amendment and the biggest impediment to addressing the continuing impacts of institutional racism. This is Harlan's true civil rights legacy—the Great Dissenter's great betrayal.

1. THE ROAD TO THE BENCH

John Marshall Harlan was raised in a Kentucky slave-owning family.[7] He followed his father into the practice of law, but unlike most lawyers of that era, the young Harlan attended law school.[8] After graduating, in addition to practicing law, Harlan became engaged in politics. In 1854, he was elected the Frankfort City Attorney, and later county judge.[9] He was staunchly against abolition, but opposed secession, and in 1861, he resigned his judgeship to lead a Union regiment of the Kentucky infantry.[10] After his father died in 1863, Harlan left the military and was elected Attorney General.[11] He remained steadfast in his opposition to emancipation and publicly refused to support ratification of the Thirteenth

5. *Id.* at 545. The lower-cased "white" reflects the author's stated preference and comports with the reasons described here. *See* John Daniszewski, *Why We Will Lowercase White*, ASSOC. PRESS (July 20, 2020), https://blog.ap.org/announcements/why-we-will-lowercase-white.

6. *Cumming*, 175 U.S. at 544–45.

7. Jennifer Szalai, *A Supreme Court Justice Who Moved From Defending Slavery to Championing Civil Rights*, N.Y. TIMES (June 18, 2021), https://www.nytimes.com/2021/06/14/books/review-great-dissenter-john-marshall-harlan-peter-canellos.html.

8. TINSLEY YARBOROUGH, JUDICIAL ENIGMA: THE FIRST JUSTICE HARLAN 22–23 (Oxford Univ. Press 1995).

9. *Id.* at 28.

10. LINDA PRZYBYSZEWSKI, THE REPUBLIC ACCORDING TO JOHN MARSHALL HARLAN 34–36 (Univ. of North Carolina Press 1999) (noting that Harlan insisted the war was not about slavery but the protection of the nation).

11. *Id.* at 37–38.

Amendment.[12] But he was also dismayed by the ascendancy of the pro-Confederacy Democratic Party in Kentucky, and especially the extrajudicial racial violence which accompanied it.[13]

Harlan became a Republican in the late 1860s; by 1870, he emerged as a leader in the Kentucky Republican Party and was its candidate for Governor in 1871.[14] While he strongly endorsed the party platform defending Reconstruction and civil rights for Black Americans, he drew the line at integrating public schools.[15] Despite running an impressive campaign in which he garnered almost twice as many votes as any Republican that ever ran in Kentucky, Harlan lost to the incumbent Democrat.[16] His performance earned him a national reputation, and he was considered as a possible running mate for President Grant in 1872.[17] He ran for Governor again in 1875 and was again defeated by the Democrat, who ran a racist campaign that excoriated Harlan's support for civil rights.[18]

Harlan remained a leader of the Kentucky Republican party, and at the 1876 national convention, following six deadlocked ballots, he delivered the state's votes to Rutherford B. Hayes, securing him the nomination.[19] This effort did not go unnoticed, and following the resolution of the disputed election and Hayes' inauguration, Harlan was the top choice for Attorney General.[20] Ultimately, Hayes decided to appoint him to the Supreme Court instead.[21] The confirmation was slowed by Radical Republican leaders who questioned Harlan's early political opposition to the abolition of slavery and the Thirteenth and Fourteenth Amendments.[22] As a result of the political tensions within the party, there was an unusual forty-five-day delay before Harlan's nomination was finally approved by the Senate in November 1877.[23]

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12. *Id.* at 37–38.
13. *Id.* at 38–39.
14. *Id.* at 84.
15. YARBOROUGH, *supra* note 8, at 76.
16. *Id.* at 79–80.
17. *Id.* at 80. The party ultimately chose to keep the incumbent Vice President Schuyler Colfax on the ticket. *Id.*
18. *Id.* at 83–84.
19. *Id.* at 94–95.
20. *Id.* at 99.
21. *Id.* at 108, 114.
22. *Id.* at 109–10.
23. *Id.* at 110. Vermont Senator George F. Edmunds, the Chairman of the Judiciary Committee, was a stalwart Radical Republican and expressed doubts about the sincerity of Harlan's Republican commitment. *Id.* He was also on the short list for the Court seat that Hayes gave to Harlan. *Id.* In 1897, Edmunds represented the plaintiffs in *Cumming* before the Supreme Court. *Id.*

2. THE GREAT DISSENTER

a. The Civil Rights Cases

Two years before Harlan ascended to the bench, and as their power was starting to recede, the Radical Republicans passed the last major civil rights law for almost a century—the Civil Rights Act of 1875 (Act).[24] A direct response to both the Court's decision in *The Slaughterhouse Cases* severely limiting the scope of the Fourteenth Amendment and the rising tide of racial segregation by law and practice across (but not limited to) the former Confederate states,[25] the Act prohibited racial segregation in hotels, theaters, public houses, and on railroads or other forms of transportation.[26] The law included civil and criminal penalties, subjecting owners that segregated such establishments to fines of up to $1,000 and imprisonment up to a year.[27]

The congressional debates over the Civil Rights Act were intense. Correctly anticipating that this would likely be their last opportunity to protect the rights of Black Americans, Radical Republican leaders originally introduced and pushed a far more sweeping bill that also prohibited segregation in schools, cemeteries, and churches.[28] Those more controversial elements were eventually removed to help secure the bill's passage. [29]

During legislative deliberation of the bill, opponents argued that the regulation of private businesses and actors went beyond the

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24. 18 Stat. 335 (1875), invalidated by The Civil Rights Cases, 109 U.S. 3 (1883).

25. 83 U.S. 36 (1872).

26. *See* Senate Historical Office, *Landmark Legislation: Civil Rights Act of 1875*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/generic/CivilRightsAct1875.htm (last visited Jan. 20, 2024).

27. 18 Stat. 335, 335–36 (1875). The primary provisions of the Act provide:

> Sec. 1. That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.
>
> Sec. 2. That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall, for every such offense, forfeit and pay the sum of $500 to the person aggrieved thereby, to be recovered in an action of debt, with full costs; and shall, also, for every such offense, be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than $500 nor more than $1,000, or shall be imprisoned not less than 30 days nor more than one year.

28. *See Landmark Legislation: Civil Rights Act of 1875*, *supra* note 26.

29. *See id.*

scope of the Fourteenth Amendment, which they noted was only a constraint on the states.[30] Although supporters disagreed with that narrow interpretation of the Amendment, they also specifically grounded the authority for the legislation in the Thirteenth Amendment, which contained no similar "state action" limitation.[31] The Act passed the Senate by a vote of thirty-eight to twenty-six and became law on March 1, 1875.[32]

Relying on the arguments of the Act's congressional opponents, constitutional challenges were filed against the statute almost immediately, and by 1883, the issue had made its way to the Court.[33] *The Civil Rights Cases* were five separate cases regarding violations of the Act: two at hotels, two at theaters, and one on a railroad (from Kansas, California, Missouri, New York, and Tennessee, respectively).[34] The first four were criminal cases; however, the railroad case dealt with a civil penalty.[35]

Justice Bradley, writing for an almost-unanimous Court, concluded that the Civil Rights Act exceeded congressional power under both the Thirteenth and the Fourteenth Amendments and was therefore unconstitutional.[36] The opinion ruled the latter was inapplicable because its equal protection provision did not reach the discriminatory actions of private actors.[37] Justice Bradley wrote, "It is *state action* of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment. . . . It does not authorize Congress to create a code of municipal law for the regulation of private rights."[38]

Regarding the Thirteenth Amendment, Bradley recognized that it contained no similar state action requirement.[39] He also conceded

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30. *See id.*

31. *See* CONG. GLOBE, 42d Cong., 2d Sess. 728 (1872) (statement of Sen. Charles Sumner) (asserting that Congress could pass the Civil Rights Act of 1875 because of their authority "founded on the [T]hirteenth [A]mendment"); *see also* George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 VA. L. REV. 1367, 1370 (2008) ("The Thirteenth Amendment stands out in the Constitution as the only provision currently in effect that directly regulates private action. . . . All the other provisions of the Constitution regulate the structure and function of government, and if they confer individual rights, they protect only against 'state action,' in the broad sense of action by the federal government as well as by the states.").

32. *Landmark Legislation: Civil Rights Act of 1875*, *supra* note 26.

33. *Id.*

34. The Civil Rights Cases, 109 U.S. 3, 8 (1883).

35. *Id.*

36. *Id.* at 25–26.

37. *Id.* at 13.

38. *Id.* at 21 (emphasis added).

39. *Id.* at 20 ("This amendment . . . is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force it abolished slavery, and established universal freedom. Still, legislation

that the Amendment authorized Congress "to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."[40] He simply concluded, however, that racial segregation in public accommodations like theaters, railroad cars, hotels, or other places of public amusement "has nothing to do with slavery."[41]

But then Bradley went a step further, presenting a rationale against civil rights that is now commonplace but remains astounding considering that, at the time it was written, the Fourteenth Amendment was only fifteen years old and the Thirteenth Amendment just eighteen. The opinion asserts that the time for any particular legal protections for rights the of Black Americans has passed, and that the nation (and Black people) needed to move on:

> When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.[42]

For Justice Bradley and almost all of his colleagues on the Court, the government and the law had done all that was constitutionally required to secure and protect the rights of Black people.

Harlan's powerful dissent took on the majority's rationale bit-by-bit. He began with a historical summary of the use of American law, including express provisions of the U.S. Constitution, to enforce the institution of racial slavery.[43] Reviewing the expansive scope of the power Congress asserted, and the Court approved, to preserve and protect the legal rights of slave owners,[44] Harlan explained that the

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may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. *And such legislation may be primary and direct in its character; for the amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States*.") (emphasis added).

40. *Id.*

41. *Id.* at 24.

42. *Id.* at 25. Relying on the fact that even free Blacks in the United States were often subjected to racial discrimination, Bradley concluded that throughout the antebellum era "[m]ere discriminations on account of race or color were not regarded as badges of slavery." *Id.*

43. *Id.* at 34–35 (Harlan, J., dissenting).

44. *Id.* at 28–32. Harlan's recitation included the Constitution's Fugitive Slave Clause (U.S. CONST. art. IV, § 2); the Fugitive Slave Act of 1793, 1 Stat. 302 (1793); the Court's pro-

Court must acknowledge and similarly defend those powers when exercised—as in the adoption of the Reconstruction Amendments and the Civil Rights Act of 1875—in defense of the civil rights of the formerly enslaved persons. He stated:

> This court has uniformly held that the national government has the power . . . to secure and protect rights conferred or guaranteed by the constitution. That doctrine ought not now to be abandoned, when the inquiry is not as to an implied power to protect the master's rights, but what may congress do, under powers expressly granted, for the protection of freedom, and the rights necessarily inhering in a state of freedom.[45]

Harlan then began a detailed discussion of the express language of the Thirteenth Amendment, the broad enforcement power it gave to Congress, and the context of its passage.[46] Based on that analysis, Harlan concluded that the promise of freedom the Amendment guaranteed must mean more "than to forbid one man from owning another as property," but also demands removing the badges and incidents of slavery, which indisputably included racial segregation.[47] He continued:

> [S]ince slavery . . . rested wholly upon the inferiority, as a race, of those held in bondage, their freedom necessarily involved immunity from, and protection against, all discrimination against them, because of their race, in respect of such civil rights as belong to freemen of other races. Congress, therefore, under its express power to enforce that amendment, by appropriate legislation, may enact laws to protect that people against the deprivation, *on account of their race*, of any civil rights[.][48]

Just as Bradley's opinion foreshadowed modern anti-civil rights rhetoric about creating "special rights" for minority groups, here Harlan anticipated what would become the groundbreaking racial justice premise of *Brown v. Board of Education*,[49] that segregation is itself inherently unequal and, because of the continuing impacts of the legacy of slavery (i.e., its "badges and indicia"), necessarily

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slavery holding in *Prigg v. Pennsylvania,* 41 U.S. 539 (1842); the Fugitive Slave Act of 1850, 9 Stat. 462 (1850); and the *Dred Scott* decision, 60 U.S. 393 (1857).

45. *The Civil Rights Cases*, 109 U.S. at 34 (Harlan, J., dissenting).
46. *Id.* at 34–35.
47. *Id.* at 34–35.
48. *Id.* at 36 (emphasis added).
49. 347 U.S. 483 (1954).

subordinates Black people. His rejection of the majority's overly narrow reading of the Thirteenth Amendment recognizes that its language, context, and purpose anticipated and was designed to prevent the institutionalization of racism in American society, which he presciently recognized would be the result of declaring the Civil Rights Act of 1875 unconstitutional.

Harlan was similarly critical of the majority's argument that the Fourteenth Amendment had no effect because the segregationist parties were all private actors.[50] He stressed that the theaters, hotels, railroads, and other accommodations covered by the Act, despite being privately owned, all had specific public or quasi-public duties (and reaped significant public benefits).[51] These facilities had been established for the public's use, often at public expense, and as such could be prohibited from discriminating on the basis of race to the same extent that state actors were prohibited from doing so.[52]

The dissent closed with an eloquent excoriation of Bradley's "special favorite" claim that describes what we now recognize as structural racism, as well as the need for affirmative laws to undue it.[53] Harlan also explained that guaranteeing equality for Black people benefits society as a whole.[54] This argument would become the underpinning of civil rights advocacy in the 20th century, and established Harlan's reputation as a champion of civil rights.

> It is, I submit, scarcely just to say that the colored race has been the special favorite of the laws. The statute of 1875, now adjudged unconstitutional, is for the benefit of citizens of every race and color. What the nation, through congress, has sought

50. *The Civil Rights Cases*, 109 U.S. at 42 (Harlan, J., dissenting).

51. *Id.* at 39–42.

52. *Id.* at 37–43. Harlan also emphasized that all of these entities were licensed by the state and only permitted to operate pursuant to that formal state approval, thereby satisfying the majority's demand for state action. Notably, neither Harlan nor the majority considered the issue of state enforcement of purportedly private discrimination, presumably because these cases arose in the context of criminal charges against the discriminating party. But consider the scenario where a Black person demanded to enter a segregated setting. If the owner called the police and had the person charged with trespass, or if some criminal charge was levied (e.g., disorderly conduct), it would seem that would constitute sufficient state action to invoke the Fourteenth Amendment. However, the Court rejected such arguments until its decision in *Shelley v. Kramer*, where it held that judicial enforcement of otherwise private racially restrictive covenants in deeds was state action. 334 U.S. 1, 22–23 (1948). Harlan also criticized the Court's restrictive and limiting interpretation of the scope Fourteenth Amendment in *The Slaughterhouse Cases*, 83 U.S. 36 (1872), insisting that the civil rights that had been "granted by the nation" could be protected by affirmative congressional legislation and that the federal government was not limited merely to responding to state laws that interfered with the rights of Black people. *The Civil Rights Cases*, 109 U.S. at 56 (Harlan, J., dissenting).

53. *Id.* at 61.

54. *Id.* at 61–62.

> to accomplish in reference to that race is—what had already been done in every State of the Union for the white race—to secure and protect rights belonging to them as freemen and citizens; nothing more. . . . The difficulty has been to compel a recognition of the legal right of the black race to take that rank of citizens, and to secure the enjoyment of privileges belonging, under the law, to them as a component part of the people for whose welfare and happiness government is ordained. . . . [T]here cannot be, in this republic, any class of human beings in practical subjection to another[.][55]

The *Civil Rights Cases* attracted widespread public attention, and Harlan's dissent was heralded by civil rights advocates across the country. Frederick Douglass sent the Justice a letter enthusiastically praising his opinion and noting it was on par with Justice Curtis' defense of Black citizenship in his dissent in *Dred Scott*.[56] Similar praise came from other high-profile persons, including former Supreme Court Justices and even former President Hayes.[57] With this dissent, Harlan established himself as the leading civil rights voice on the Court and one of the leading racial equality advocates in the nation.

b. Plessy v. Ferguson

Even though the Court's opinion in *The Civil Rights Cases* was premised on the Act's attempt to limit private discrimination (and ostensibly the lack of state action), in the wake of the decision states quickly began to adopt legislation mandating racial segregation in public places and facilities. Florida passed the first the first law segregating railroad cars in 1887.[58] Mississippi adopted a similar law the following year, and Texas followed in 1889.[59]

In 1890, Louisiana adopted "An Act to promote the comfort of passengers," which required all railroads in the state to "provide equal but separate accommodations for the white and colored races."[60] There was an immediate determination by Black leaders in New Orleans to bring a test case to challenge the law.[61] The

55. *Id.* at 61–62.
56. *See* PRZYBYSZEWSKI, *supra* note 10, at 95.
57. *See* YARBOROUGH, *supra* note 8, at 152.
58. *See Plessy v. Ferguson (1896)*, NAT'L ARCHIVES (Feb. 8, 2022), https://www.archives.gov/milestone-documents/plessy-v-ferguson/.
59. RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 72 (Vintage Books 2004).
60. *Id.*
61. *Id.* at 73.

litigation strategy was carefully planned. Homer Plessy was chosen as the plaintiff in large part because he was very light skinned, and his arrest for violating the law would also expose the ambiguity and artificiality of the definition of race.[62] Two years after the segregation law was passed, Plessy bought a ticket and sat in the whites-only car.[63] When he refused the conductor's order to move to the Black car, he was removed from the train and arrested.[64] Plessy challenged the constitutionality of the law; the Louisiana Supreme Court concluded that "in such matters, equality, and not identity or community, of accommodations, is the extreme test of conformity to the requirements of the Fourteenth amendment."[65] Given the Court's emphasis on state action in *The Civil Rights Cases* and the tide of Jim Crow legislation sweeping across the South, activists supporting Plessy looked hopefully to the Supreme Court.

The Court, however, saw no inconsistency with its prior Fourteenth Amendment reasoning in rejecting Plessy's appeal. Writing for the majority, Justice Henry Billings Brown initially agreed that while the purpose of the Fourteenth Amendment was to establish "absolute equality" between whites and Blacks under law, "it could not have been intended to abolish distinctions based on color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either."[66] Building on this distinction, Justice Brown concluded that even though legislatively-mandated racial segregation would qualify as state action, it "neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the law[.]"[67]

Justice Brown dismissed the Thirteenth Amendment arguments in much the same vein as Justice Bradley. "A statute which implies merely a legal distinction between the white and colored races . . . has no tendency to destroy the legal equality of the two races or re-establish a state of involuntary servitude."[68] And not to be outdone by his predecessor's conclusion that Black people were no longer a "special favorite" of the law, Justice Brown asserted that the argument that *de jure* racial segregation was designed to enforce the subordination of Blacks was "a fallacy."[69] If segregation somehow

62. *Id.*
63. *Id.*
64. Plessy v. Ferguson, 163 U.S. 537, 541–42 (1896).
65. *Ex parte* Plessy, 11 So. 948, 950 (La. 1892).
66. *Plessy*, 163 U.S. at 544.
67. *Id.* at 548.
68. *Id.* at 543.
69. *Id.* at 551.

made Black people feel inferior, "it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."[70]

Once again the sole dissenter, Harlan castigated the majority's endorsement of racial segregation and its white supremacist rationalization for upholding Louisiana's separate railroad car statute. Relying on the Equal Protection Clause, Harlan made what is a germinal argument for later civil rights advocacy:

> [I]n the view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is therefore regretted that this high tribunal . . . has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.[71]

The jurisprudential dexterity of the Court's seemingly irreconcilable interpretations of the Fourteenth Amendment in *The Civil Rights Cases* and *Plessy* (e.g., the Fourteenth Amendment can only prevent racial segregation based on *de jure* state action and racial segregation by express state legislation does not violate the Fourteenth Amendment) demonstrated the institution's—and by extension the federal government's—commitment to white supremacy and Black subordination, which is one of the only consistent threads running between the reasoning of these opinions. The other is Harlan's eloquent dissenting language in support of Black civil rights. That support proved ephemeral however, and Harlan himself demonstrated a similar willingness to ignore his own arguments and undermine the struggle for racial justice the next time the Court had the opportunity to do so.

3. *CUMMING V. RICHMOND COUNTY BOARD OF EDUCATION*

Cumming was the first racial segregation case to reach the Court after *Plessy*.[72] Just three years after that opinion, the Court—this

70. *Id.*
71. *Id.* at 559 (Harlan, J., dissenting).
72. Cumming v. Richmond Cnty. Bd. of Educ., 175 U.S. 528 (1899).

time *led* by Harlan—again demonstrated that its commitment to entrenching white supremacy was the dominant factor in its reasoning, rather than precedent, logic, or sincere legal analysis. There was little question, at the time *Plessy* was decided, that the Court ever seriously considered the actual equality of facilities in its "separate but equal" formulation or that states that enforced segregation by law were providing equal accommodations. In *Cumming*, the Court abandoned the separate element as well.

Before turning to the analysis of *Cumming*, it is worthwhile to briefly review the Court's central role in obstructing the effort to recognize and protect the civil rights of Black Americans and the convoluted and contradictory rulings it issued to entrench their oppression. The Court's notorious ruling in the *Dred Scott* case, that Black people could never be citizens of the United States and had "no rights which the white man was bound to respect,"[73] was specifically what Congress was focused on and expressly reversed with the Civil Rights Act of 1866 and the Fourteenth Amendment.[74] Despite the clear legislative intent to recognize and protect the equal civil rights of Blacks however, just five years after the Amendment's ratification, the Court interpreted its language so narrowly as to render its protections almost meaningless.[75] Congress again pushed back against the racially reactionary Court, and passed the Civil Rights Act of 1875 just two years after *The Slaughterhouse Cases*.[76] The progressive measure was designed to circumvent the Court's limited reading of the Fourteenth (and Thirteenth) Amendment and ensure racially equal access in public accommodations.[77] Unimpressed, the Court declared the statute's attempt to reach private, rather than state action, unconstitutional.[78]

With this precedent, a ruling in favor of Homer Plessy seemed inevitable. The Court had made clear that the Fourteenth

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73. Dred Scott v. Sandford, 60 U.S. 393, 407 (1857).

74. The opening sentence of the Civil Rights Act of 1866 says "That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States. . . ." 14 Stat. 27-30, (1866); the Fourteenth Amendment, which was adopted in part to constitutionalize the Civil Rights Act, begins "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." U.S. CONST. amend. XIV.

75. In *The Slaughterhouse Cases*, the Court held that the Fourteenth Amendment's promise that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" only applied to a very limited set of so-called "national" rights, which did not include any of the most basic or substantive rights enjoyed by whites or that directly impacted the day-to-day lives of Black Americans, leaving those to the unimpeded control of state legislatures and state courts. 83 U.S. 36, 79–80 (1873).

76. Civil Rights Act of 1875, 418 Stat. 335 (1875).

77. *See* YARBOROUGH, *supra* note 8, at 152.

78. *See* PRZYBYSZEWSKI, *supra* note 10, at 5–6.

Amendment was only applicable to state-mandated racial segregation.[79] But when faced with exactly that circumstance, the Court again moved against civil rights for Blacks.[80] Now the issue was not public versus private discrimination, but rather the nature of the segregation itself, and as long as Black people were afforded purportedly equal accommodations, *de jure* segregation did not offend the Constitution.[81] Implicit in Court's decision was the existence of and access to separate facilities for Black people. By its own logic and reasoning, the constitutionality of "separate and equal" requires there be a separate; the wholesale exclusion or denial of services to Black citizens would necessarily be unconstitutional.[82] Yet when confronted with that exact scenario just three years after *Plessy*, the Court—led by Justice Harlan—defied that logic.[83]

a. The Origin Story

The Richmond County, Georgia Board of Education (Board) was established in 1872, and its authorizing legislation required that it:

> make all the necessary arrangements for the instruction of the white and colored youths in separate schools. They [the Board] shall provide the same facilities for each, both as regards school–houses and fixtures, attainments and abilities of teachers, length of term time, and all other matters pertaining to education; but in no case shall white and colored children be taught together in the same school.[84]

The legislation also authorized the Board, at its discretion, to establish public high schools.[85] In 1876, pursuant to that authority, it established the first high schools in the county, but for white

79. The Civil Rights Cases, 109 U.S. 3, 11 (1883).

80. Plessy v. Ferguson, 163 U.S. 537, 551–52 (1896).

81. *Id.* at 543, 544.

82. After *Plessy v. Ferguson*, the legal meaning of equality under the Equal Protection Clause was reduced to a requirement of "identical treatment" in the provision of public services. That is, as long as there was an *opportunity* for both whites and Blacks to ride the train, access the courthouse, or attend a public school, there could be no constitutional violation (the racial segregation of those facilities or the relative quality of them was of no legal significance). *Id.* at 551. As noted *infra*, the claim in *Cumming* was made squarely within this identical treatment framework. Cumming v. Richmond Cnty. Bd. of Educ., 175 U.S. 528, 529 (1899).

83. It is also important to highlight the incredibly rapid timeline of these decisions and the Court's speed in turning back the demand for racial equality. The Fourteenth Amendment was ratified in 1868; *Plessy*'s endorsement of state sanctioned racial discrimination comes only twenty-eight years later.

84. Bd. of Educ. of Richmond Cnty. v. Cumming, 29 S.E. 488, 490 (Ga. 1898).

85. *Id.*

students only.[86] Four years later, following organized and persistent advocacy by the local Black community, the Board created Ware High School, the only public high school for Black students in the state and one of only four in the South.[87]

The school quickly became a central element and focus of pride for the Black community in Augusta.[88] But in 1897, after seventeen years of successful operation, the Board voted to close Ware, asserting that the funds allocated to the school were needed to support the growing number of Black elementary school age children in the county.[89] Cumming and other Black parents were outraged, and when their demands that the school be reopened were ignored, they filed suit against the county tax collector and school board.[90]

The Black parents claimed that the decision to close Ware while continuing to provide high schools for white students violated the Equal Protection Clause as defined by the Court's recent ruling in *Plessy v. Ferguson*.[91] The lawsuit sought to enjoin both the collection of future taxes to support high schools that Black children were prohibited from attending, as well any expenditure of existing funds to support those schools while there was no high school for Black students.[92] This requested relief was firmly grounded in the "separate" prong of *Plessy* and the premise that although the school district did not have to provide high schools for anyone, if it provided those schools for whites, then it also had to provide schools for Blacks. More plainly, to comply with the Fourteenth Amendment, the Board could either reopen Ware or, alternatively, close the white high schools.[93] The latter suggestion became a key element in Harlan's opinion and allowed him to reframe the issue from racial discrimination against Black students to the potential unfairness to white ones.

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86. *Id.*

87. JAMES ANDERSON, THE EDUCATION OF BLACKS IN THE SOUTH 1860-1935 188 (Univ. of North Carolina Press 1988).

88. *Id.* at 188–92.

89. *Id.* at 192.

90. *Id.* at 192–93.

91. *Id.* at 192.

92. Bd. of Educ. of Richmond Cnty. v. Cumming, 29 S.E. 488, 489 (Ga. 1898).

93. *Id.* at 489. This is a similar framing, with the focus on the "separate" element in *Plessy*, that Charles Hamilton Huston and Thurgood Marshall used in the first phase of the NAACP's legal attack on segregation. *See* Missouri *ex. rel.* Gaines v. Canada, 305 U.S. 337, 342 (1938). Focusing on law schools, the NAACP argued that providing those opportunities for whites but not for Blacks violated the Fourteenth Amendment's mandate for separate but equal facilities. *Id.* Unlike the plaintiffs in *Cumming* however, the NAACP argued that unless separate facilities for Black students were provided, white institutions would have to be integrated. *See id.* at 349–50. That idea was never considered in 1897. In fact, Black parents and their lawyers expressly argued that that their ultimate goal was the reestablishment of the segregated public high school for Black students, not the integration of public schools.

The trial court ruled in favor of Cumming and enjoined the Board from operating the white high schools "until the board shall provide or establish, for such colored children of high-school grade in the county . . . equal facilities in high-school education as are now maintained for white children."[94] The Board appealed and the Georgia Supreme Court reversed the decision.[95] Writing for a unanimous court, Chief Justice Thomas Jefferson Simmons emphasized that the legislation creating the Board gave it "broad discretion in establishing high schools," that this discretionary power was legislative in character, and that the court "will not control its discretion unless it is manifestly abused."[96] The court then stated that the section of the legislation compelling the Board to provide "separate but equal" schools for Black and white children "relates, in our opinion, entirely to the common [elementary] schools, and not the matter of high schools."[97] Those schools, the court explained, were included in the next section of the statute, and therefore not covered by the mandatory requirement for segregated facilities.[98] Chief Justice Jefferson continued, "We think that they were certainly not required to establish a high school for negroes whenever they established one for whites."[99] Although the court referred in passing to the Board's proffered economic justification for closing Ware, its ruling was grounded in its assessment of the Board's sweeping discretion in regarding high schools.[100]

b. Harlan's Opinion

The plaintiffs then appealed to the Supreme Court.[101] There, they were represented by former U.S. Senator—and Harlan's nemesis—George Edmunds.[102] In their argument to the Court, the parents made clear that they were *not* making a direct attack on system of segregated schools in Georgia, but merely asking the Court to enforce its holding in *Plessy* and compel the county to fulfill the "separate" element that ruling required.[103]

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94. *Bd. of Educ. of Richmond Cnty.*, 29 S.E. at 489. The claim against the tax collector was dismissed. *Id.*
95. *Id.* at 491.
96. *Id.* at 498–90.
97. *Id.* at 490.
98. *Id.*
99. *Id.* at 489.
100. *Id.* at 490.
101. Cumming v. Bd. of Educ. of Richmond Cnty., 175 U.S. 528, 529 (1899).
102. *See* YARBOROUGH, *supra* note 8, at 109.
103. Harlan specifically noted that "the plaintiffs distinctly state that they have no objection to the tax in questions so far as levied for the support of . . . schools, in the management of which the rule as to separation of races in enforced." *Cumming*, 175 U.S. at 543–44.

This argument was reflected in the equitable relief sought by the parents throughout the litigation, that the Board be enjoined from spending any public money on the operation of the white high schools in the county until high school opportunities were also available to Black students. The plaintiffs relied on the plain language and implicit reasoning of the Court's opinion in *Plessy* that its constitutional imprimatur on racial segregation meant that the refusal to provide *any* public services to Blacks that the state provided to whites violated the Constitution.[104]

Despite the Court's express language in that case (as well as his own righteous dissent condemning racial discrimination), Harlan rejected their plea. In so doing, he began by specifically criticizing the plaintiffs' requested relief that the Board be required to close its white high schools until Ware was reopened.[105] He wrote that preventing the school board from operating the white high schools "would only be to take from the white children educational privileges enjoyed by them, without giving to the colored children additional opportunities."[106] By focusing narrowly on the potential impacts on white students, Harlan took no account of fact that Black high school age students were completely denied the equal treatment that *Plessy* required.

The rest of Harlan's brief opinion—for a unanimous Court—established two legal premises that not only sealed the fate of Black high school students in Richmond County but would fundamentally undermine the ability of Black Americans to secure racial justice through the courts, and particularly in the area of education, for decades to come. First, Harlan determined that to establish a claim under the Fourteenth Amendment, a plaintiff must show that an administrative decision or policy of a government agency was taken with "a desire or purpose" to discriminate because of race.[107] Additionally, he wrote that education is a matter fundamentally left to the discretion to state and local governments and that federal intervention into that sphere "cannot be justified" absent a "clear and unmistakable" constitutional violation.[108]

In defending the Board's decision, Harlan focused on the Board's proffered reason for closing Ware:

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104. *See supra* note 82.
105. *Cumming*, 175 U.S. at 544.
106. *Id.*
107. *Id.* at 544–45.
108. *Id.* at 545.

> The board had before it the question whether it should maintain, under its control, a high school for about 60 colored children or withhold the benefits of education in primary schools from 300 children of the same race. It was impossible, the board believed, to give educational facilities to the 300 colored children who were unprovided for, if it maintained a separate school for the 60 children who wished to have a high-school education.[109]

He then went on to state that there was no evidence that the Board was motivated by racial animus or acted with any intent to discriminate against Black students because of their race.[110] In fact, he credited the Board with the exact opposite motivation, explaining that "[i]ts decision was in the interest of the greater number of colored children."[111] Harlan then established a new, impossibly high bar for equal protection claims—one that appears nowhere in *Plessy* or any of the other Fourteenth Amendment cases preceding it. There is no violation of the Equal Protection Clause unless the action of the government agency was taken "in hostility to the colored population because of their race" or "with any desire or purpose . . . to discriminate . . . on account of race."[112] This new constitutional requirement, to prove that the government acted with discriminatory intent, became a nearly insurmountable obstacle to using the Equal Protection Clause to challenge any policy, practice, or statute that disproportionately impacted Black people, even if the harms they suffered as a result were foreseeable, predictable, and objectively demonstrated. And it is an obstacle that continues to define Fourteenth Amendment jurisprudence to this day.[113]

As portentous and sweeping as this part of the opinion was, Harlan and the Court went further, elevating the bar even higher for plaintiffs challenging discrimination in education. Courts, he explained, must be particularly circumspect in such matters, because

> the education of the people in schools maintained by state taxation is a matter belonging to the respective states, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a

109. *Id.* at 544.
110. *Id.*
111. *Id.*
112. *Id.* at 544–45.
113. *See infra* Section IV.

> clear and unmistakable disregard of rights secured by the supreme law of the land.[114]
>
> Harlan then concluded by simply stating that no such disregard was shown here, and affirmed the decision of the Georgia Supreme Court.[115] Like the demand that plaintiffs prove intentional discrimination, this elevated deference to the control of public education by state governments became a mainstay of the jurisprudence regarding discrimination in schools—later morphing into the exaltation of "local control"—that also persists today and works to the detriment of those seeking to expand educational equity and access for historically excluded and marginalized students.[116]

c. Some Early Impacts

In his award-winning book, *The Education of Blacks in the South 1860-1935*, historian James Anderson highlights the opinion in *Cumming* as the primary element "that shaped the discriminatory nature of black secondary education during the first three decades of the of the twentieth century."[117] The Court's ruling "meant that southern schools boards did not have to offer public secondary education for black youth,"[118] and its impact was swift and widespread. Anderson notes that a Black high school was not reestablished in Richmond County until 1945;[119] the same denial of public secondary education was generally true for Black youth across the South.[120] Meanwhile, public high schools for white students became widespread in the years following *Cumming*.[121] By 1915, in southern cities with over 20,000 residents, there were thirty-six public high schools for white students.[122] There were none to serve the 48,765 Black high school age students in those cities.[123]

The implications of the discrimination *Cumming* authorized are obvious and sweeping. By denying Black students a high school education, southern states could maintain the structure of white supremacy and the economic, social, and political subordination of

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114. *Cumming*, 175 U.S. at 545.
115. *Id.*
116. *See infra* note 104.
117. ANDERSON, *supra* note 87, at 188.
118. *Id.* at 192.
119. *Id.* at 193.
120. *Id.*
121. *Id.* at 204
122. *Id.* at 193–95.
123. *Id.*

Black residents. Limiting educational opportunities necessarily meant limiting economic opportunities, social mobility, and the development of a Black middle or professional class. It also helped whites "prove" racist stereotypes about the innate intelligence of Black people and their capacity to learn, which in turn was used to justify their continued oppression. When southern cities finally began to provide public high school for Blacks in the late-1920s and early 1930s,[124] the motivation for extended schooling was primarily a reaction to migration patterns and the growing number of unsupervised Black teens on the streets in those communities.[125] As Anderson explains, concerns about juvenile delinquency and related social tensions outweighed southern leaders fears about the educational advancement of Black youth. [126]

Harlan's rationale was soon being cited by other courts reviewing state and local policies and practices that denied educational access to Black children. In striking a state statute that established an agricultural high school for whites only but not a separate one for Black students, the Missouri Supreme Court relied on the issue of intent to distinguish *Cumming*.[127] In that case, the court explained, the school board closed the Black high school

> for the reason that the available funds were needed for primary schools for a much larger number of colored children than attended the high school. In short, the administrative school board was making the best application of the funds on hand in order to bring about the greatest service, and the United States Supreme Court held that in so doing they were not denying the colored children the equal protection of the law[.][128]

Because the court could find no similar non-discriminatory justification in the Missouri law's express exclusion of a similar high school Black students, it ruled that the statute violated the Fourteenth Amendment.[129]

School segregation was back before the Court in 1927, this time on the question of whether a Chinese-American student could attend the segregated white schools in Mississippi.[130] In affirming the state supreme court's decision that she could not—because racial

124. *Id.* at 203.
125. *Id.*
126. *Id.*
127. McFarland v. Goins, 50 So. 493, 494 (Miss. 1909).
128. *Id.*
129. *Id.*
130. Gong Lum v. Rice, 275 U.S. 78, 80 (1927).

segregation in America meant white and not white, as opposed to Black and not Black—Chief Justice William Howard Taft cited *Cumming*.[131] He stated, "The right and power of the state to regulate the method of providing for the education of its youth at public expense is clear."[132] He then concluded that the question of whether the segregation of students by race rose to the "clear and unmistakable disregard" of constitutional rights demanded by Harlan had long been settled.[133]

Other cases continued to rely on the limiting language of *Cumming*, prioritizing deference to local authorities and requiring proof of intentional discrimination to resist challenges to educational access. In *Trustees, Pleasant Grove Independent School District v. Bagsby*, for example, the court upheld the district's policy to transport Black students to a neighboring school system for high school rather than provide such schools itself, which were available for white students.[134] Relying on and paraphrasing *Cumming,* the court said that the school board's action was

> nothing more than the exercise of the discretion committed to them by the law and that they exercised such discretion according to their judgment of what was best for the school children involved. We are convinced further that there was no evidence of prejudice against appellees, or the Negro school children.[135]

A federal court in Virginia relied on the same reasoning to affirm a school district's practice of sending its Black high school students to a segregated high school outside the county rather than build and operate one within the district.[136] The court stated:

> The matter of providing education for its children is a state function, and I can see no legal or common sense reason why this State may not establish and maintain within the State

131. *Id.* at 85.

132. *Id.*

133. *Id.* at 85–86. Courts did not limit *Cumming*'s application to education cases. The Virginia Supreme Court relied on Harlan's deference to state authority and the requirement for "clear and unmistakable" discrimination to uphold Richmond's race-based residential segregation zoning ordinance. *See* Hopkins v. City of Richmond, 86 S.E. 139, 147 (Va. 1915). The court concluded that the law did not violate the Fourteenth Amendment because its purpose was not to discriminate on the basis of race, but rather to protect the public health, safety, and morals of all residents of the city. *Id.* at 144. Following the U.S. Supreme Court ruling in *Buchanan v. Warley*, 245 U.S. 60, 82 (1917), which held racial zoning unconstitutional, Virginia overruled *Hopkins* in *Irvine v. City of Clifton Forge*. 97 S.E. 310, 310 (1918).

134. 237 S.W.2d 750, 756 (Tex. Civ. App. 1950).

135. *Id.*

136. Corbin v. Cnty. Sc. Bd. of Pulaski Cnty., Va., 84 F. Supp. 253, 259–60 (W.D. Va. 1949), *rev'd in part and vacated in part*, 177 F.2d 924 (4th Cir. 1949).

> consolidated schools to serve more than one political subdivision of the State. This view seems to me to be supported by the pronouncement of the Supreme Court of the United States in *Cumming v. Board of Education*.[137]

Although this constitutional analysis resolved the matter, the court added, evoking the paternalistic rationale in *Cumming*, that compelling the school district to build a high school for Black students would "render a disservice to the cause of Negro education."[138]

Cumming was also used to turn away a challenge to racially disparate teacher salaries in Maryland (the matter failed to rise to the level of injustice to warrant intrusion by the federal court);[139] to affirm the discretion of a school superintendent regarding funding determinations and categorizing segregated schools;[140] and to justify disparities in segregated schools as plaintiffs began to challenge *Plessy* and the "equal" prong of separate but equal.[141]

It would be reasonable to expect that the continuing relevance of *Cumming*—a decision that rested on a broad reading of the "separate but equal" premise of *Plessy*— would have ended with the Court's decision in *Brown v. Board of Education* expressly rejecting that premise.[142] That has proven not to be the case, however.[143] And while courts continued to rely on *Cumming* in various education decisions regarding race, its most significant impacts are the

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137. *Id.* at 259.

138. *Id.* at 260.

139. Mills v. Lowndes, 26 F. Supp. 792, 803–04, 806 (D. Md. 1939).

140. Sch. Dist. No. 7, Muskogee Cnty., Okla., v. Hunnicutt, 51 F.2d 528, 529 (E.D. Okla. 1931) (citing *Cumming* to support its conclusion that "[e]ven a suspension of a separate school, for economic reasons under some conditions, may be justified"), *aff'd*, 283 U.S. 810 (1931).

141. Many of these cases, decided in the early 1950s, were subsequently reversed on appeal after *Brown*. *See, e.g.*, State *ex rel.* Hawkins v. Bd. of Control, 60 So. 2d 162, 165 (Fla. 1952), *vacated,* 347 U.S. 971 (1954), *vacated*, 350 U.S. 413 (1956) ("[E]quality of treatment need not mean identity of treatment, with respect to a tax-supported facility."); Carr v. Corning, 182 F.2d 14, 22 (D.C. Cir. 1950) ("[I]t appears that the treatment accorded these Negro plaintiffs, of which they complain, would have been accorded them had they been white. If the separation of the races in and of itself is not constitutionally invalid, such treatment, indiscriminate as to race, is not the unequal extension of privileges which violates constitutional prohibitions."); McSwain v. Cnty. Bd. of Ed. of Anderson Cnty., Tenn., 104 F. Supp. 861, 871 (E.D. Tenn. 1952), *rev'd and remanded*, 214 F.2d 131 (6th Cir. 1954) (affirming decision to bus Black students to high school in adjoining county rather than build separate high school within the district, the court held that the school board "is succeeding in its effort, to furnish these Negro students educational advantages equal to those furnished to white students. The riding of a bus . . . is a small contribution upon their part and that of their parents toward the success of this effort, too small to be regard as a denial of constitutional rights.").

142. 347 U.S. 483 (1954).

143. Westlaw cites *Cumming* with a yellow flag and notes that its holding is "limited" (not "reversed") by *Brown*; Lexis Shepard's shows its status as "Questioned."

persistent and oppressive demand that an equal protection claim requires litigants to prove intentional discrimination and its veneration of the idea that education must remain a matter exclusively of state regulation.

4. THE CONTINUING LEGACY OF *CUMMING*

In the wake of *Brown* and the Civil Rights Act of 1964, few references to *Cumming* appear in court opinions beyond passing mentions in general summaries of the history of segregation in education. It is still directly cited, however, in cases related to attempts by Black students, families, and communities to meaningfully integrate public schools. Those cases relied on *Cumming* for the provision that education is fundamentally a matter for the states to which the federal government must generously defer, as well as its holding that there could be no Fourteenth Amendment violation absent proof of intentional invidious discrimination.[144]

For example, in *Higgins v. Board of Education of City of Grand Rapids, Michigan*, Black parents challenged the continuing racial segregation of the city schools.[145] Although the court concluded that several discrete practices of the district were racially discriminatory (e.g., teacher assignment and hiring), such practices did not create a "de jure" segregated school system.[146] Looking at the overall actions of the board, the court was "unable however, to find that they were motivated by segregative intent."[147]

In *Olson v. Board of Education of Union Free School District No. 12, Malverne, New York*, a white parent claimed the State Commissioner of Education's decision to redraw attendance areas to achieve greater racial balance in the schools in Malverne violated his equal protection rights.[148] The court noted that although there was a racial element in the attendance plan, it was adopted based on the non-discriminatory finding that the existing racial imbalance "constitutes a deprivation of equality of educational opportunity" for students.[149] Expressly citing *Cumming*'s instruction that federal courts should not intervene "except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land," the case was dismissed.[150]

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144. *See supra* note 141.
145. 395 F. Supp. 444, 448 (W.D. Mich. 1973), *aff'd*, 508 F.2d 779 (6th Cir. 1974).
146. *Id.* at 490.
147. *Id.* at 465.
148. 250 F. Supp. 1000, 1003 (E.D.N.Y. 1966).
149. *Id.* at 1008.
150. *Id.* at 1010.

The continuing impact of Harlan's analysis in *Cumming* and its impediment to addressing institutional discrimination under the Equal Protection Clause extends far beyond the cases that expressly cite the 1899 decision. Despite *Brown*'s powerful substantive holding, its lack of guidance on the process of desegregation—beyond *Brown II's* amorphous "with all deliberate speed" instruction—[151] and massive resistance by southern legislatures meant no serious racial changes in schools for over a decade.[152] Sustained, meaningful school integration did not begin until after the Court's 1968 decision in *Green v. New Kent County School Board*, which held not only that segregated school districts had "an affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch,"[153] but also established specific educational factors by which progress toward that affirmative obligation would be measured.[154] *Green* also reiterated *Brown*'s instruction that federal district courts would have continuing jurisdiction over these school districts until integration was achieved and the formerly segregated systems became "unitary."[155]

In the wake of *Green*, hundreds of school districts across the south that had segregated students pursuant to expressly racialized state laws came under federal court jurisdiction in the late 1960s and early 1970s.[156] In those states, there could be no question that these school districts acted "with any desire or purpose . . . to discriminate . . . on account of race,"[157] and which in light of *Brown,* was "a clear and unmistakable disregard of rights secured by the supreme law of the land."[158] Less clear however, was how the Court would reconcile the Fourteenth Amendment predicate Harlan laid down with school segregation in states without laws mandating such separation.

That question, and indirectly whether an equal protection claim would still require proof of discriminatory intent, was presented by *Keyes v. Denver School District No. 1*.[159] Although the schools in Denver were as racially segregated as those across the south,

151. Brown v. Bd. of Educ. *(Brown II)*, 349 U.S. 294, 301 (1955).
152. KLUGER, *supra* note 59, at 754–58.
153. 391 U.S. 430, 437–38 (1968).
154. *Id.* at 436.
155. *Id.* at 439.
156. These included districts in every state of the former Confederacy. *See* Yue Qui & Nikole Hannah Jones, *A National Survey of School Desegregation Orders*, PROPUBLICA (Dec. 23, 2014), https://projects.propublica.org/graphics/desegregation-orders.
157. Cumming v. Bd. of Educ. of Richmond Cnty., 175 U.S. 528, 544 (1899).
158. *Id.* at 545.
159. 413 U.S. 189 (1973).

because neither the state of Colorado nor the Denver School Board had ever adopted a formal statute or policy requiring the segregation of students,[160] the Court was provided with an opportunity to jettison the restrictive intent-to-discriminate requirement. It refused to do so.[161]

As a result of the *Keyes* decision and its affirmation of *Cumming*'s requirement to prove intentional discrimination, the ability to challenge school segregation was severely circumscribed. A year after *Keyes*, the Court considered an inter-district integration remedy crafted in response to the massive exodus of white students from the Detroit central school district to majority white suburban school systems ringing the city.[162] While the Court recognized that intentional discrimination has segregated the Detroit schools and that those schools had been subject to severe white flight, it nevertheless rejected the inter-district integration plan because there had been

> no showing of significant violation by the 53 outlying school districts and no evidence of any interdistrict violation or effect. . . . To approve the remedy ordered by the court would impose on the outlying districts, not shown to have committed any constitutional violation, a wholly impermissible remedy.[163]

Despite the fact that the demographic shifts were a clear reaction to desegregation and meant that meaningful integration within Detroit alone would be virtually impossible, the *Milliken* Court

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160. *Id.* at 201.

161. The majority still found a Fourteenth Amendment violation, concluding that the school district had established segregative programs and practices that were tantamount to *de jure* segregation and thus circumstantially demonstrated the intentional "desire and purpose" to discriminate on the basis of race. *Id.* There were actually five votes on the Court to eliminate Harlan's intent requirement and hold that *de facto* racial segregation—i.e., racially disparate effects or impacts—would suffice to establish an equal protection violation. Justice Powell, the former chair of the Richmond, Va. school board, was the critical fifth vote, but in exchange for his support, he wanted his colleagues to abandon their position in *Swann v. Charlotte-Mecklenburg County Bd. of Ed.*, 402 U.S. 1 (1971), endorsing the use of busing to achieve integration. Powell had authored an *amicus* brief in that case supporting the school board. His colleagues refused, so Powell wrote separately, concurring in part and dissenting in part, and made a compelling argument for abandoning the intent requirement first announced in *Cumming*:

> I would not, however, perpetuate the de jure/de facto distinction nor would I leave to petitioners the initial tortuous effort of identifying 'segregative acts' and deducing 'segregative intent.' I would hold, quite simply, that where segregated public schools exist within a school district to a substantial degree, there is a prima facie case that the duly constituted public authorities (I will usually refer to them collectively as the 'school board') are sufficiently responsible to warrant imposing upon them a nationally applicable burden to demonstrate they nevertheless are operating a genuinely integrated school system.

Keyes, 413 U.S. at 224 (Powell, J., concurring in part and dissenting in part).

162. Milliken v. Bradley, 418 U.S. 717, 722–23 (1974).

163. *Id.* at 745.

insisted on shoring up its commitment to the intentional discrimination requirement first established in *Cumming* and readopted in *Keyes*.[164] In so doing, the Court also put its imprimatur on white flight, and any purportedly race-neutral policies that might facilitate it, as a means of avoiding integration.[165]

Milliken has another important connection to *Cumming* and its limiting power to address racial disparities in schools. In addition to its determination that there had been no showing of discriminatory intent or purpose by the suburban districts that would justify including them in the desegregation remedy,[166] the Court also criticized what it considered the lower court's significant overreach.[167] Echoing Harlan's warning that education is a matter for the states into which federal interference must be severely limited, the Court emphasized:

> No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process. . . . [T]hat local control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation, and a healthy competition for educational excellence.'[168]

Milliken's post-*Brown*, post-Civil Rights Act, reaffirmation of the twin limiting elements of *Cumming* became the jurisprudential touchstone for school desegregation cases for the next thirty-three years. During that time, school districts that had been found liable for race discrimination and placed under federal court jurisdiction would regularly invoke local control and the absence of any continuing intentional discrimination, even when stark racial disparities remained, in their demands to be declared unitary and released from court oversight. The arguments in these cases, many of which made their way to the Supreme Court during the 70s, 80s, and 90s, show a direct through line to Harlan's reasoning in *Cumming* and

164. *Id.*
165. *Id.* at 746.
166. *Id.* at 745.
167. *Id.* at 742–43.
168. *Id.* at 741–42 (internal citations omitted).

worked to similar effect—that is, to limit the prospects of meaningful racial justice in education.[169]

In its last major case on desegregation and integration in K-12 public schools, the Court issued its definitive pronouncement on the centrality of intentional discrimination and the Fourteenth Amendment in the education context, and ironically also a strong rebuke to claims of local control that countermanded that mandate. *Parents Involved in Community Schools v. Seattle School District No. 1* consolidated cases involving two school districts that had adopted "voluntary" student integration programs, one from Seattle (which had never been subject to a desegregation order) and the other from Jefferson County, Kentucky (which had been, but had previously been declared "unitary" and released from court oversight).[170] Both school districts were sued by white parents who claimed that these integration programs constituted intentional race discrimination

169. *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70, 116 (1995) (Thomas, J., concurring) (rejecting inter-district remedial plan beyond courts remedial authority, which is limited to intentional discrimination and noting "[t]hat certain schools are overwhelmingly black in a district that is now more than two-thirds black is hardly a sure sign of intentional state action"); Crawford v. Bd. of Educ. of City of L.A., 458 U.S. 527, 537–38 (1982) (rejecting equal protection challenge to California state constitutional amendment banning use of busing to achieve voluntary school integration "[e]ven when a neutral law has a disproportionately adverse effect on a racial minority, the Fourteenth Amendment is violated only if a discriminatory purpose can be shown"); Columbus Bd. of Ed. v. Penick, 443 U.S. 449, 464 (1979) (clarifying that although there had been evidence of disparate impact presented to the District Court, the judge had focused on "intentional state action. . . . [T]hat is, that the school officials had intended to segregate" and properly recognized that "disparate impact and foreseeable consequences, without more, do not establish a constitutional violation.") (internal citations omitted); Freeman v. Pitts, 503 U.S. 467, 506 (1992) (Scalia, J., concurring) ("We must soon revert to the ordinary principles of our law, of our democratic heritage, and of our educational tradition: that plaintiffs alleging equal protection violations must prove intent and causation and not merely the existence of racial disparity"). On the preeminent importance of local control of schools, *see, e.g.*, *Jenkins*, 515 U.S. at 99 (1995) ("[L]ocal autonomy of school districts is a vital national tradition and that a district court must strive to restore state and local authorities to the control of a school system operating in compliance with the Constitution."); *Freeman*, 503 U.S. at 489-90, 112 S. (1992) ("[T]he court's end purpose must be to remedy the violation and, in addition, to restore state and local authorities to the control of a school system. . . . Returning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system."); Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 410 (1977)("[L]ocal autonomy of school districts is a vital national tradition."); Bd. of Educ. of Oklahoma City Pub. Sch., Indep. Sch. Dist. No. 89, Okla. Cnty., Okla. v. Dowell, 498 U.S. 237, 248 (1991) ("Local control over the education of children allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit local needs.").

170. 500 U.S. 701, 720–21 (2007). The integration programs in these districts were labeled "voluntary" to distinguish them from programs that had been adopted by school districts operating under a court order to desegregate. The programs themselves were not "voluntary" for students living in these districts.

against their white children and violated of the Equal Protection Clause.[171] The Court agreed.[172]

As an initial matter, the Court noted that it had only ever permitted the use of race in student assignment to remedy past intentional discrimination.[173] Because Seattle had never been subject to court-ordered desegregation and Jefferson County had fully remedied its legacy of discrimination, neither district met the condition precedent.[174] The school districts defended their plans by arguing that the limited use of race in student assignment was necessary to reduce racial segregation in schools resulting from segregated housing patterns in their communities and to deliver the educational benefits of racially diverse learning environments.[175] The Court rejected those arguments, however, citing its precedents holding "that remedying past societal discrimination does not justify race-conscious government action."[176]

The proffered benign motives for the districts' consideration of race in student assignment was of no import to the Court. Because neither district was under court supervision and thus compelled to remedy segregation, these integration programs amounted to the type of intentional race discrimination the Court had banned in *Brown*. Quoting extensively from the plaintiffs' brief in that landmark case, the Court asked, "What do the racial classifications at issue here do, if not accord differential treatment on the basis of race?"[177] Persistent racial disparities in student assignment, educational opportunities, or learning outcomes—*absent proof of intentional discrimination*—could not be addressed by district programs or plans that considered race, and in fact, were themselves a violation of the Fourteenth Amendment. Chief Justice Roberts concluded simply:

> For schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as Jefferson County, the way "to achieve a system of determining admission to the public schools on a nonracial basis," is to stop assigning students on a racial basis. The way to stop

171. *Id.* at 714, 718–19.
172. *Id.* at 748.
173. *Id.* at 720.
174. *Id.*
175. *Id.* at 725–26.
176. *Id.* at 731.
177. *Id.* at 747.

> discrimination on the basis of race is to stop discriminating on the basis of race.[178]

With *Parents Involved*, the requirement to prove intentional discrimination to challenge the segregation of Black children from educational opportunities became the means to prevent school districts from pursing racial integration. Justice Harlan's holding in *Cumming* had come full circle.

* * *

The narrowed scope of the Fourteenth Amendment and its power to address racial inequality that Justice Harlan established in *Cumming* transcends discrimination in education. In 1971, the Court interpreted Title VII of the Civil Rights Act of 1964, which covered employment discrimination, to prohibit facially neutral employment practices which nonetheless had a racially discriminatory impact.[179] In *Griggs v. Duke Power Co.*, the Court struck down the use of an employment test that was unrelated to any job skills and that excluded Black workers from any opportunity for advancement.[180] This landmark decision was the first time the Court formally recognized "not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[181]

Five years later the Court considered a case factually identical to *Griggs*. However, because the plaintiffs in *Washington v. Davis* were Washington, D.C. police officers, their complaint about the discriminatory impacts of an employment test was brought directly

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178. *Id.* at 747–48. In his dissent, Justice Breyer took the majority opinion to task for failing to honor its commitment to local control. He stated, "I do not understand why this Court's cases, which rest the significance of a 'unitary' finding in part upon the wisdom and desirability of returning schools to local control, should deprive those local officials of legal *permission* to use means they once found necessary to combat persisting injustices." *Id.* at 845 (Beyer, J, dissenting). While not discounting the primacy of the principle of local control and deference to local control generally, "Such deference is fundamentally at odds with our equal protection jurisprudence. We put the burden on state actors to demonstrate that their race-based policies are justified." *Id.* at 744 (majority opinion) (internal citations omitted). After *Parents Involved*, the discriminatory intent requirement became even more entrenched in education cases. *See, e.g.*, Gary B. v. Whitmer, 957 F.3d 616, 636–37 (6th Cir. 2020*), reh'g en banc granted, opinion vacated*, 958 F.3d 1216 (6th Cir. 2020) ("Nor do Plaintiffs sufficiently point to policies implemented or enforced by Defendants, other than school assignments, that separate students into discrete groups and deprive one or more of them of a basic minimum education. . . . But they fail to make any specific allegations showing Defendants' different treatment of predominantly white schools.").

179. Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971).

180. *Id.* at 431–32.

181. *Id.* at 431. The Court has similarly recognized disparate impact discrimination pursuant to other civil rights statutes, including the Fair Housing Act, the Voting Rights Act, and until 2001, Title VI of the Civil Rights Act.

under the Constitution.[182] This difference proved to be critical. Although the appellate panel, applying the reasoning from *Griggs*, found in favor of the Black officers, the Supreme Court was adamant in its summary rejection of that holding.[183] Disparate impact, Justice White wrote:

> [I]s not the constitutional rule. . . . The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race. . . . But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.[184]

To bolster its determination that only intentional discrimination was actionable under or prohibited by the Constitution, the Court pointed to its education jurisprudence.

> The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause. The essential element of De jure segregation is a 'current condition of segregation resulting from intentional state action. The differentiating factor between De jure segregation and so-called De facto segregation . . . is Purpose or Intent to segregate.'[185]

That line of reasoning, developed over decades of cases considering race discrimination in education, was first established in *Cumming*.[186]

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182. 426 U.S. 229, 252 (1976). At the time the case was brought, federal employees were not protected under Title VII.

183. *Id.* at 252.

184. *Id.* at 239.

185. *Id.* at 240.

186. *Washington v. Davis* not only remains good law, but its requirement for proof of intentional discrimination has been relied on in a broad range of cases challenging racial inequities. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 93 (1986), *modified*, Powers v. Ohio, 499 U.S. 400 (1991) (jury selection); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–65 (1977) (zoning); Lewis v. Casey, 518 U.S. 343 (1996) (prison conditions); City of Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found., 538 U.S. 188, 194 (2003) (housing); Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 203–04 (2008) (voter id).

5. CONCLUDING THOUGHTS

How can Harlan's eloquent and forceful dissents in defense of equal rights for Black Americans be reconciled with his opinion endorsing the denial of those same rights in *Cumming*? The dissents in *The Civil Rights Cases* and *Plessy* became the foundational arguments in the struggle to end segregation (and later, ironically, to declare race-conscious efforts to achieve integration unconstitutional).[187] How does one square the progressive vision of those opinions with what was a clear violation of the admittedly skewed but controlling "separate but equal" version of the Fourteenth Amendment in 1899?

Harlan's biographers suggest that a coordinated and close reading of all three cases (*The Civil Rights Cases*, *Plessy*, and *Cumming*) shows that the Justice must have considered public schools as fundamentally different than other public accommodations, and that he subscribed to the 19th century idea that there was a hierarchy of civil rights and that only the ones at the top were entitled to constitutional protection.[188] Those included property rights (to buy, sell, inherit, rent), the right to make and enforce contracts, and "judicial" rights (to file litigation, testify in court, serve on a jury, and be subject to same legal penalties).[189] What was described at the time as "social rights" — including education and marriage—were at the bottom of the ranking and not within the protective ambit of the Equal Protection Clause.[190]

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

188. PRZYBYSZEWSKI, *supra* note 10, at 100 (noting that Harlan did not mention schools in either of his dissents, even though the majority opinions in both *The Civil Rights Cases* and *Plessy* did expressly raise the specter of integrate public schools. "The fact that he did not mention public schools indicates that he did not expect to treat them the same way he treated public highways."). *See also* YARBROUGH, *supra* note 8, at 160–62 (recounting correspondence between Justice Felix Frankfurter and Harlan's grandson, Justice John Marshall Harlan II in which Frankfurter also cited the failure of the elder Harlan to mention schools in his pro-civil rights dissents). Yarbrough also points to Harlan's dissent in *Berea Coll. v. Commonwealth of Kentucky*, 211 U.S. 45 (1908), where while vehemently opposing a law mandating segregation in a private college, he took pains to note "what I have said has no reference to regulations prescribed for public schools, established at the pleasure of the state and maintained at the public expense." YARBOROUGH, *supra* note 8, at 162.

189. Notably, these were the rights specifically enumerated in the Civil Rights Act of 1866. The Fourteenth Amendment, which was adopted in part to constitutionalize the Act, was written much more broadly.

190. *See, e.g.*, The Civil Rights Cases, 109 U.S. 3, 22 (1883) ("Congress . . . undertook to wipe out these burdens and disabilities . . . and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property as is enjoyed by white citizens[.]Plessy v. Ferguson 167 U.S. 537, 551 (1896) ("[T]he argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured

There are two problems with this analysis. First, equal access to public accommodations was also relegated to the category of social rights,[191] and Harlan's vigorous dissents in *The Civil Rights Cases* and *Plessy* undercut the argument that he accepted that the constitution broadly excluded discrimination regarding those rights. Additionally, this theory discounts the fundamental facts of *Cumming*. The plaintiffs were specifically *not* seeking the integration of schools in Richmond County; they only wanted the equal albeit separate treatment the Court had promised them in *Plessy*.[192] Whatever objections Harlan may have had to integrating public schools, that was never the issue before the Court in *Cumming*.

There is a more straightforward explanation of Harlan's analysis in *Cumming*: he believed that race discrimination, at least as definable by law, could only mean actions taken with the specific and hostile intent to harm Black people. This seems logical, given that the dominant issues of racial discrimination at that time—segregation, Jim Crow, disenfranchisement, vigilante violence—all were characterized by the express, invidious, racism the Fourteenth Amendment was plainly meant to address. Conversely, when the obviously discriminatory facts of *Cumming* were framed in a way to at least suggest the absence of the overt racial hostility that so dominated American culture, Harlan simply saw no discrimination. This was, lamentably, a glaring gap in his otherwise progressive civil rights jurisprudence. It was a gap even more troubling in light of some of the sweeping language of his dissents, where Harlan recognized that segregation and the unequal access to basic public resources imposed "burdens or disabilities that constitute badges of slavery or servitude."[193] With that analysis, Harlan identified early on what we now know as institutional racism and the absolute impediment it presents to the achievement of racial justice and inequality. Regrettably, this potentially transformative insight was limited to only the most overt racism Harlan witnessed, and not to

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to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals.").

191. *See* The Civil Rights Cases, 109 U.S. at 22 ("Congress did not assume, under the authority given by the Thirteenth Amendment, to adjust what may be called the social rights of men and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship.").

192. Cumming v. Bd. of Educ. of Richmond Cnty., 175 U.S. 528, 530 (1899).

193. *Plessy* , 163 U.S. at 555 (Harlan, J., dissenting). *See also The Civil Rights Cases*, 109 U.S. at 35 (Harlan, J. dissenting) ("That there are burdens and disabilities which constitute badges of slavery and servitude, and that . . . the Thirteenth Amendment may be exerted by legislation of a direct and primary character, for the eradication, not simply of the institution, but of its badges and incidents.").

the structural and intractable racial disparities that would result from restricting the Fourteenth Amendment to "a desire or purpose . . . to discriminate . . . on account of race."[194] This was the Great Dissenter's great betrayal.

194. *Cumming*, 175 U.S. at 545.

Foreword: Major 2022–23 Supreme Court Cases

Richard L. Heppner Jr.[*]

Last year, *Duquesne Law Review* published a symposium issue about the United States Supreme Court's momentous 2021 Term.[1] In it, faculty from the Thomas R. Kline School of Law of Duquesne University analyzed that Term's historic rulings, from *Dobbs* overruling *Roe v. Wade*[2] to *Kennedy v. Bremerton School* and *Carson v. Makin* upending years of freedom-of-religion jurisprudence.[3] We explored the Court's apparent interest in arrogating more power to itself[4] and how two controversial new doctrines—the major questions doctrine and the independent state legislature doctrine—would or would not allow it to do so.[5]

The Court's 2022 Term largely continued those trends, but not entirely. Therefore, on September 22, 2023, the Duquesne Kline faculty presented another symposium and continuing legal education program, *Major 2022–23 Supreme Court Cases: Duquesne Kline School of Law Faculty Explain*. And *Duquesne Law Review* once again graciously invited the faculty presenters to share and expand upon their presentations in this issue. Their insights are gathered below.[6]

Professor Dana Neacşu uses the Court's decision in *Sackett v. EPA (II)*—which rejected the EPA's and the Court's own prior definitions of "wetlands"—to critique the Court's reliance on the fiction

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1. 61 Duq. L Rev. 38–114 (2023).

2. *See* Rona Kaufman, *Privacy: Pre- and Post*-Dobbs, 61 DUQ. L. REV. 62 (2023).

3. *See* Ann L. Schiavone, *A "Mere Shadow" of a Conflict: Obscuring the Establishment Clause in* Kennedy v. Bremerton, 61 DUQ. L. REV. 40 (2023); Wilson Huhn, *Analysis of* Carsin v. Makin, 61 DUQ. L. REV. 50 (2023).

4. *See* Richard L. Heppner, Jr., *Let the Right Ones In: The Supreme Court's Changing Approach to Justiciability*, 61 DUQ. L. REV. 79 (2023).

5. *See* Dana Neacşu, *Applying Bentham's Theory of Fallacies to Chief Justice Roberts' Reasoning in* West Virginia v. EPA, 61 DUQ. L. REV. 95 (2023); Bruce Ledewitz, *An Alternative to the Independent State Legislature Doctrine*, 62 DUQ. L. REV. 114 (2023).

6. Other Duquesne Kline faculty presented remarks at the symposium but chose not to publish: Professor Rona Kaufman spoke about *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023). Professor Ann Schiavone spoke about *National Pork Producers Council v. Ross*, 598 U.S. 356 (2023). And I spoke about *Mallory v. Norfolk Southern Railway Co.*, 600 U.S. 122 (2023).

of plain meaning interpretation, especially as applied to technical statutes.[7]

Professor Maryann Herman explains how, in *Tyler v. Hennepin County*, the Court expanded the reach of the takings clause to strengthen protections for individual property rights, to the detriment of local municipalities' ability to govern.[8]

Professor Marissa Meredith discusses the Court's dismantling of higher-education affirmative-action policies *Students for Fair Admissions v. Harvard* and explores the potential effects outside of academia.[9]

Professor Bruce Ledewitz discusses *Moore v. Harper*, where the Court rejected a strong form of the independent state legislature doctrine but adopted a "wounded and diminished" version of the doctrine whereby the Court could continue to police the boundaries of state-court control over federal elections.[10]

Professor Wilson Huhn provides an overarching critique, arguing that the Court is repeating the misguided jurisprudence of the *Lochner* era by elevating property rights over personal rights, striking down civil rights legislation, and arrogating power to itself, while ignoring legislative intent and administrative expertise and relying on tradition instead of evidence-based reasoning to interpret the law.[11]

Collectively, these essays shine a light on the Court's efforts last Term to strengthen certain individual rights, to weaken protections for others, and to further concentrate power in the Court itself. And they reflect the Duquesne Kline faculty's commitment to critical inquiry, to the rule of law, and to the motto of the Duquesne Kline School of Law, *salus populi, suprema lex.*

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7. *See* Dana Neacşu, *The Ersatz of the Plain-Meaning Rule of Statutory Construction in* Sackett v. EPA (II), *infra* pp. 275–95.

8. *See* Maryann Herman, *Not Everything Has to Be a Taking:* Tyler v. Hennepin County, *infra* pp. 296–311.

9. *See* Marissa Meredith, *The Domino Effect: Discussing The Future Implications of* Students for Fair Admissions, Inc. v. Harvard, *infra* pp. 312–26.

10. *See* Bruce Ledewitz, Moore *News About the Independent State Legislature Doctrine*, *infra* pp. 327–44.

11. *See* Wilson Huhn, *Another* Lochner *Era?*, *infra* pp. 345–60.

The Ersatz of the Plain-Meaning Rule of Statutory Construction in *Sackett v. EPA (II)*

Dana Neacşu[*]

INTRODUCTION

This essay uses the United States Supreme Court second decision in *Sackett v. EPA*,[1] or *Sackett (II)*, to stress the obvious: judges are tasked with decoding the nation's laws for everyone's understanding. Or, in the words of John Marshall: "It is emphatically the province and duty of the judicial department to say what the law is."[2] Later that century, Justice Oliver Wendell Holmes, Jr. further clarified that judicial duty: "Thereupon we ask, not what this man meant, but what those words would mean in the mouth of a normal

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1. Sackett v. EPA, 598 U.S. 651 (2023).
2. Marbury v. Madison, 5 U.S. 137, 177 (1803).

speaker of English, using them in circumstances in which they were used . . . ."[3] Decades later, Justice Holmes would presciently add: "*A word is not a crystal, transparent and unchanged, it is the skin of a living thought*, and may vary greatly in color and content according to the circumstances and the time in which it is used."[4]

It is this author's opinion that this judiciary duty is heightened when judges encounter ordinary sounding words, such as "water" or "wetlands," as used in technical statutes like the Clean Water Act (CWA).[5] It is this author's opinion that when in doubt, rather than be afraid of acknowledging ignorance, as some comedians do,[6] judges should aspire to incorporate scientific expertise in their legal reasoning[7] and avoid the fiction of the plain-meaning rule.

Given the scientific context of the CWA,[8] the judge's duty is even more complex because the judiciary needs to decipher "terms of art" even when they sound ordinary to a lay person, or a "normal speaker of English."[9] Thus, any time a learned judge cannot explain the meaning of a word without the use of a specialized dictionary, then the rule should be that the word is used in its specialized meaning of a technical or scientific "term of art." Moreover, if the judiciary needs a dictionary to define "water" and "adjacent," so the composite "wetlands"—lands adjacent to bodies of water—can be snuck in as non-technical and ordinary, this essay argues that those judges are engaged in the ersatz of the plain-meaning rule.[10] In the process, as shown here, statutory language risks becoming superfluous [11] and judges risk violating Marshall's rule, a fact that would

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3. Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 417–18 (1899) (emphasis added).

4. Towne v. Eisner, 245 U.S. 418, 425 (1918).

5. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816.

6. Sandeepan Bose, *The Standups - Nate Bargatze [Audio] English | Prison - Lasik Surgery - Cape Fear Serpentarium*, YOUTUBE (Aug. 8, 2021), https://youtu.be/ZQZ0IGBb7_c?si=knAwa72j6qG1g_l8&t=1155 ("You can't ask someone how water works . . . ." at 19:15).

7. As this author discovered writing this essay, the meaning of "water" and "wetlands," demands scientific guidance, and she would like to thank David Kahler, PhD., Assistant Professor, Center for Environmental Research and Education, Duquesne University for his expertise about the many ways to define water and wetlands.

8. 86 Stat. 816.

9. Holmes, *supra* note 3, at 417–18 (emphasis added).

10. *See* discussion below.

11. For a brief discussion of the rule against superfluities, see for example Ethan J. Leib & James J. Brudney, *The Belt-and-Suspenders Canon*, 105 IOWA L. REV. 735, 769 (2020); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV., 901, 933 (2013) (The rule against superfluities is defined as "statutory words are intended to have independent meanings and are not intended to overlap with other terms . . . ."); but *see*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS

destroy the principle of checks and balances, usurp the role of the legislator, and create law, rather than just "say what the law is."[12]

BRIEF REVIEW OF THE CLEAN WATER ACT'S GOAL: POLLUTION ABATEMENT

The rise of densely populated urban areas in the late 19th to early 20th centuries resulted in the release of significant amounts of sewage, often with little to no treatment in the waters of the United States:

> Our Nation's waters—our most precious natural resource—are rapidly being transformed into a vast, rancid sewer. . . . In every part of our country, industries and municipalities have used our waterways as cheap dumping grounds in which to unload their wastes.[13]

This was particularly evident with discharges into the Great Lakes, a notable illustration of the severe extent of water pollution being the 1969 fire on the Cuyahoga River in Cleveland.[14] Prompted to regulate public health as scientifically thoroughly as possible, the federal legislature enacted the 1972 amendments to the Federal Water Pollution Control Act,[15] known as the Clean Water Act (CWA).[16] Its expressed objective was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters"[17] for everyone's wellbeing. The Environmental Protection Agency (EPA), jointly with the Army Corps of Engineers (the Corps), were authorized to implement the necessary measures to achieve this

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174–79 (2012); WILLIAM ESKRIDGE JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION (UNIVERSITY TREATISE SERIES) 112–14 (2016) ("[a]nti-[s]urplusage (-[r]edundancy) [c]anon").

12. Marbury v. Madison, 5 U.S. 137, 177 (1803).

13. *The Federal Water Pollution Control Act Amendments of 1972: Hearing on H.R. 11896 Before the H. Pub. Works Comm.*, 92nd Cong. 8805 (1972) (views of Hon. Bella S. Abzug & Charles B. Rangel).

14. *See* Jonathan H. Adler, *Fables of the Cuyahoga: Reconstructing a History of Environmental Protection*, 14 FORDHAM ENVTL. L.J 89, 92 (2002) ("Today, the 1969 fire is regularly referenced in discussions of environmental quality. The image endures as a symbol of rampant environmental despoliation prior to the enactment of federal environmental laws."); Mark Latham, *(Un)Restoring the Chemical, Physical, and Biological Integrity of our Nation's Waters: The Emerging Clean Water Act Jurisprudence of the Roberts Court*, 28 VA. ENVTL. L.J. 411, 415 (2010).

15. Water Pollution Control Act., Pub. L. No. 80-845, 62 Stat. 1155 (1948).

16. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816.

17. 33 U.S.C.A. § 1251(a) (West).

national objective.[18] Defining the meaning of the "Nation's waters"[19] became an agency prerequisite for implementing its requirements, and the agencies complied.[20] The scientific definition of wetlands incorporated in the regulatory definition is: (c) In this section, the following definitions apply:

> (1) Wetlands means those *areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in*

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18. § 1251(d) (West).

19. § 1251(a) (West).

20. The agency definition changed over the years to encompass both the science and the reality of waters. Below is the codification of more than three decades of agency work: 58 FR 45036, Aug. 25, 1993; 80 FR 37104, June 29, 2015; 83 FR 5208, Feb. 6, 2018; 84 FR 56667, Oct. 22, 2019; 85 FR 22338, April 21, 2020; 88 FR 3142, Jan. 18, 2023; 88 FR 61968, Sept. 8, 2023.

(a) Waters of the United States means:

(1) Waters which are:

(i) Currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) The territorial seas; or

(iii) Interstate waters;

(2) Impoundments of waters otherwise defined as waters of the United States under this definition, other than impoundments of waters identified under paragraph (a)(5) of this section;

(3) Tributaries of waters identified in paragraph (a)(1) or (2) of this section that are relatively permanent, standing or continuously flowing bodies of water;

(4) Wetlands adjacent to the following waters: (emphasis added)

(i) Waters identified in paragraph (a)(1) of this section; or

(ii) Relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3) of this section and with a continuous surface connection to those waters;

(5) Intrastate lakes and ponds not identified in paragraphs (a)(1) through (4) . . . .

(b) The following are not "waters of the United States" even where they otherwise meet the terms of paragraphs (a)(2) through (5) of this section:

(1) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act;

(2) Prior converted cropland designated by the Secretary of Agriculture . . . ;

(3) Ditches . . . ;

(4) Artificially irrigated areas that would revert to dry land if the irrigation ceased;

(5) Artificial lakes or ponds created by . . . ;

(6) Artificial reflecting or swimming pools or other small ornamental bodies of water created by . . . ;

(7) Waterfilled depressions created in . . . ; and

(8) Swales and erosional features (e.g., gullies, small washes) characterized by low volume, infrequent, or short duration flow.

33 C.F.R. § 328.3 (2024).

> *saturated soil conditions*. Wetlands generally include swamps, marshes, bogs, and similar areas.[21]

Given the general welfare nature of the CWA,[22] the tension between general welfare and individual property interests have overflown in litigation. But irrespective of the judges' philosophical bent, until *Sackett (II)*, courts have showed deference to science,[23] all in accord to their duty "to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed."[24] In *Sackett (II)*, the Court adamantly ignored the statute's objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters,"[25] when the Justices repudiated the hydrological science of water for visual aesthetics: wetlands is what can be contiguously seen.[26]

THE LAW AND THE SCIENCE BEHIND WATERS AND WETLANDS IN SACKETT (I) AND SACKETT (II)

Sackett (I)

When Damien M. Schiff of Pacific Legal Foundation, Sacramento, California (PLF) and counsel of record for Michael and Chantell Sackett in both *Sackett (I)*[27] and *Sackett (II)*[28] wrote for the Cato

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21. § 328.3(c)(1) (emphasis added).

22. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816. The General Welfare Clause is found in the Preamble and more specifically within Article I, Section 8 of the United States Constitution. The relevant portion of Article I, Section 8 reads:

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

U.S. CONST. art. I, § 8, cl. 1.

For an expansive interpretation of the clause, see JAMES FRANCIS LAWSON, GENERAL WELFARE CLAUSE: A STUDY OF THE POWER OF CONGRESS UNDER THE CONSTITUTION OF THE UNITED STATES (1934).

23. *See, e.g.*, Adam S. Ward & Adell Amos, *The Supreme Court Is Bypassing Science—We Can't Ignore It*, EOS (Sept. 6, 2023), https://eos.org/opinions/the-supreme-court-is-bypassing-science-we-cant-ignore-it ("The court's exclusion of scientists from the environmental rulemaking process comes full circle as the EPA strips federal protections for wetlands.").

24. Montclair v. Ramsdell, 107 U.S. 147, 152 (1883).

25. 33 U.S.C.A. § 1251(a) (West); *see also* Richard J. Lazarus, *Judicial Destruction of the Clean Water Act:* Sackett v. EPA, U. CHI. L. REV. ONLINE 1, 1 (2023), http://eelp.law.harvard.edu/wp-content/uploads/Lazarus-Chicago-Law-Review-Sackett.pdf.

26. Sackett v. EPA, 598 U.S. 651 (2023).

27. Sackett v. EPA, 566 U.S. 120 (2012).

28. *Sackett*, 598 U. S. 651.

Supreme Court Review in 2012,[29] he stated that his clients were mere U.S. "citizens doing ordinary, everyday activities."[30] Absent any empirical data, Attorney Schiff suggested that every day, ordinary people purchased wetlands and, without proper permits, filled them with gravel to support building structures.[31] Rather, in 2005, only his clients, the Sacketts, purchased 0.63-acre lot 300 feet away from Priest Lake,[32] Idaho, and, despite lacking a permit from the Corps, "trucked in" over 1700 cubic yards of gravel to fill the wetlands on their lot, so it could stand a home structure.[33] Alerted, probably by well-intentioned neighbors, the EPA and the Corps agents visited the Sacketts and ordered them to stop filling their wetland with gravel absent proper authorization.[34]

Ignoring that administrative order for three years, so they could describe themselves as "ensnared" in the "Clean Water Act . . . nationwide regulatory net," the Sacketts sued the EPA in Idaho District Court in 2008.[35] They asked the court to review the EPA's compliance order, demanding them to restore their land to its natural wetland composition.[36] The Sacketts lost and appealed.[37] They lost again, and then they reached the Supreme Court, which granted certiorari.[38] In 2012, the Roberts Court heard argument in *Sackett (I)* on the question of whether the EPA compliance order issued under the CWA was in fact reviewable by courts under the Administrative Procedure Act (APA) and its judicial review process.[39]

The Court in *Sackett (I)* held that the APA overruled the CWA provisions.[40] Justice Alito filed a concurring opinion.[41] He showed unease at the thought that wetland property owners had to "dance to the EPA's tune."[42] Doing so, Justice Alito noted that:

> Congress did not define what it meant by "the waters of the United States"; the phrase was not a term of art with a known

29. Damien M. Schiff, Sackett v. EPA*: Compliance Orders and the Right of Judicial Review*, CATO SUP. CT. REV. 113 (2011–2012).
30. *Id.* at 113.
31. *Id.* at 114.
32. *Id.*
33. Brief for Respondent at 4, Sackett v. EPA, 598 U. S. 651 (2023) (No. 21-454).
34. *Id.*
35. Schiff, *supra* note 29, at 113–14, 117.
36. *See generally* Sackett v. EPA, No. 08-cv-185-N, 2008 U.S. Dist. LEXIS 60060 (D. Idaho Aug. 7, 2008).
37. Sackett v. EPA, 566 U.S. 120, 125 (2012).
38. *Id.*
39. *Id.* at 125.
40. *Id.* at 131.
41. *Id.* at 132 (Alito, J., concurring).
42. *Id.*

> meaning; and the words themselves are hopelessly indeterminate. [Worse,] [f]or 40 years, Congress has done nothing to resolve this *critical ambiguity*.[43]

While referencing the Amicus Brief for Competitive Enterprise Institute, as support for siding with so-called "aggrieved property owners,"[44] Justice Alito showed exasperation at the task Justice Marshall extended to all justices in perpetuity: that of explaining the law even when it seemed a superfluous task. Justice Alito showed exasperation when describing the Clean Water Act's words as "hopelessly indeterminate,"[45] presumably absent scientific guidance. A decade later, Justice Alito took on himself to solve that perceived problem, again absent scientific guidance. In the process, when the Court assigned him the job of writing the decision in *Sackett (II)*,[46] Justice Alito violated Justice Marshall's command of limiting himself to just "say what the law is"[47] and substituted the Court's will to that of the legislator, thus engaging in creating law, as shown below.

Sackett (II)

On remand,[48] having previously decided like all the district courts of the nation[49] that the APA did not apply to CWA compliance orders, the Idaho District Court had to decide whether the EPA order was arbitrary and capricious, under the APA standards of administrative decisions review.[50] Again, the Sacketts lost at the

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43. *Id.* at 133 (emphasis added).
44. *Id.*
45. *Id.*
46. Sackett v. EPA, 598 U.S. 651 (2023).
47. Marbury v. Madison, 5 U.S. 137, 177 (1803).
48. *Sackett*, 566 U.S. 120.
49. Schiff, *supra* note 29, at 118 ("The district court's opinion did not break any new ground, but simply followed the significant body of case law ruling the same way.")
50. The "arbitrary and capricious" standard of review is a principle of administrative law in the United States and is codified in the Administrative Procedure Act (APA). This standard allows courts to invalidate agency actions, findings, or conclusions if they find them to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The relevant part of 5 U.S.C. § 706 reads:

> "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> . . .
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> . . .

district court[51] and appellate levels.[52] But, as they did a decade earlier, the Sacketts impressed the Supreme Court and made a second appearance on the Supreme Court roll call, with *Sackett (II)*.[53] Yet, again they were represented *pro-bono* by PLF.[54]

In the intervening years, the Sacketts remained wetland owners of their Priest Lake, Idaho land, though their property value might have gone down given fifty-year-old plaintiff Michael Sackett's sudden claim to fame. Mr. Sackett pleaded guilty to coercion and online sexual enticement of a twelve-year-old minor, was sentenced to a year in prison in 2015, and made the Idaho sex offender list.[55]

This second time around, when the Sacketts' story reached the Supreme Court's roll call, the issue was philosophical. It regarded how much wetland preservation this nation could endure for everyone's benefit under the statutory language of the CWA, when such wetland status interfered with a couple's individual private property rights. In legal terms it became an issue of statutory interpretation and meaning-making.[56] As shown here, the Court had a choice of defining wetlands scientifically or as an amateur linguist going for what is "adjacent" to bodies of "water."

> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute;
>
> . . .

5 U.S.C.A. § 706 (West).

When asked, ChatGPT4 said:

> Under this "arbitrary and capricious" standard, courts are not supposed to substitute their judgment for that of the agency. Instead, they review whether the agency made a clear error in judgment, failed to consider important aspects of the problem, offered an explanation that runs counter to the evidence, or is so implausible that it can't be the result of a difference in viewpoint or the product of agency expertise.

AI for lawyers, CHAPTGPT4 (on file with author).

51. Sackett v. EPA, No. 2:08-cv-00185, 2019 WL 13026870, at *13 (D. Idaho Mar. 31, 2019) (granting the EPA summary judgment).

52. Sackett v. EPA, 8 F.4th 1075, 1079 (9th Cir. 2021) (affirming the district court decision), *cert. granted in part sub nom.* Sackett v EPA, 142 S. Ct. 896 (2022), *rev'd and remanded sub nom.* Sackett v. EPA, 598 U.S. 651, 684 (2023).

53. *Sackett*, 598 U.S. 651.

54. *Id.* at 656.

55. Robin Bravender, *Winner of Major SCOTUS Wetlands Case in Jail for Sex Crime*, GREENWIRE (Mar. 31, 2016, 1:05 PM), https://www.eenews.net/articles/winner-of-major-scotus-wetlands-case-in-jail-for-sex-crime/#:~:text=According%20to%20an%20indictment%2C%20Sackett,a%20Supreme%20Court%20permitting%20dispute. As part of a North Dakota sting operation, Sackett was indicted for having exchanged text messages with an undercover police officer in 2013 in which he agreed to pay for sex with a 12-year-old girl. *Id.* His profile is on the Idaho sex offender register, because in Idaho, according to Idaho Code 18-8310, convicted sexual offenders face a life-long registration, but first-time offenders may be released from the register after 10 years. IDAHO CODE § 18-8310 (2023).

56. For more about legal meaning-making, *see, e.g.*, DANA NEACŞU, THE BOURGEOIS CHARM OF KARL MARX & THE IDEOLOGICAL IRONY OF AMERICAN JURISPRUDENCE (2019).

In 2023, all nine justices of the Supreme Court ignored the delegated role of agency employees in knowingly discharging their jobs, and ably defining "wetlands."[57] The majority of justices chose to define wetlands aesthetically, rather than scientifically, to cover those "indistinguishably part of a body of water that itself constitutes 'waters' under the [Clean Water Act]."[58] The hydraulic cycles of the bodies of water, and thus wetlands, were flattened to their hightide levels, despite the fact that water is not static throughout the year. Wetlands, therefore, are not always contiguous. Thus, one may ask whether the CWA is supposed to have different meanings at high tide or in different seasons.

By refusing to interpret the Clean Water Act in a scientific manner, the only one which would offer a stable interpretation of the CWA, the United States Supreme Court seems to have forgotten that "[t]he government of the United States has been emphatically termed a government of laws, and not of men."[59] At best, the Supreme Court chose to out itself as highly uncomfortable with scientific knowledge. At worst, this is yet another example of the Justices playing fast and loose with the basic common law principle of *stare decisis*.

Sackett (II) Departs from the Court's Unanimous Stare Decisis Definition

The decision in *Sackett (II)* further cements the Roberts's Court departure from the time-honored principle of *stare decisis*. *Sackett (II)* thus joins the likes of *Dobbs v. Jackson Women's Health Organization*,[60] which ignored the precedent of *Roe v. Wade*[61] as recognized by *Planned Parenthood of S.E. Pennsylvania v. Casey*.[62]

The Court in *Sackett (II)* had the opportunity of following the unanimous precedent penned by Justice White in *Riverside Bayview* in 1985,[63] or finding inspiration in the 2006 decision in *Rapanos v. United States*[64]—either the plurality decision penned by

57. *See* 33 C.F.R. § 328.3 (2024).

58. *Sackett*, 598 U.S. at 676 (majority opinion); *id.* at 715–16, 728 (Kavanaugh, J., concurring, joined by Sotomayor, Kagan, & Jackson, J.J.); *See* Lazarus, *supra* note 25, at 4.

59. Marbury v. Madison, 5 U.S. 137, 163 (1803).

60. 597 U.S. 215 (2022).

61. 410 U.S. 113 (1973).

62. Planned Parenthood v. Casey, 505 U.S. 833, 845–46 (1992) ("After considering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity, and the rule of stare decisis, we are led to conclude this: the essential holding of *Roe v. Wade* should be retained and once again reaffirmed."), *overruled by Dobbs*, 597 U.S. 215.

63. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 123 (1985).

64. Rapanos v. United States, 547 U.S. 715 (2006).

Justice Scalia[65] or the concurring opinion penned by Justice Kennedy.[66] As shown here, the Roberts Court chose not to follow the *Riverside Bayview* unanimous precedent, but to endorse Justice Scalia's plurality opinion in *Rapanos*.[67]

The main issue in *Riverside Bayview* was whether adjacent wetlands came within the definition of "waters of the United States" under the Clean Water Act.[68] Given the scientific nature of the CWA and its regulatory structure, the Court refused to engage in judicial activism and deferred to the U.S. Army Corps of Engineers' definition.[69] Thus, Justice White's opinion in *Riverside Bayview* incorporated the Corps' definition for wetlands as "lands that are 'inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.'"[70]

For clarity, Justice White added, "Indeed, the regulation could hardly state more clearly *that saturation by either surface or ground water is sufficient to bring an area within the category of wetlands, provided that the saturation is sufficient to and does support wetland vegetation.*"[71]

In *Riverside Bayview*, Justice White acted in the mold of Justice Holmes's call for justice and translated such technical "terms of art," like "wetlands," for the understanding of a normal English speaker, while still refraining himself from making law.[72] In 1985, the Supreme Court was content to defer to the Corps' standards that any land saturated with water (by surface or underground) to such an extent that wetland vegetation appeared became a CWA-regulated wetland.[73]

The second time the Supreme Court encountered the issue of wetlands was in 2006, in *Rapanos*.[74] Justice Scalia, whose ascent to the highest court of the realm happened in September 1986 after *Riverside*, signaled a new era of judicial activism in the Court's jurisprudence, under the stewardship of Justice Rehnquist. This new judicial activism has only increased its tenure since 2005, under the

65. *Id.* at 715.
66. *Id.* at 717 (Kennedy, J., concurring).
67. Sackett v. EPA, 598 U.S. 651, 671 (2023) (citing *Rapanos*, 547 U.S. at 739).
68. *Riverside Bayview Homes, Inc.*, 474 U.S. at 123.
69. *Id.* at 134–35.
70. *Id.* at 129 (quoting 33 C.F.R. § 323.2(c) (1985)).
71. *Id.* at 129–30 (emphasis added).
72. *See generally Riverside Bayview Homes, Inc.*, 474 U.S. 121.
73. *Id.* at 134–35.
74. Rapanos v. United States, 547 U.S. 715 (2006).

Roberts Court.[75] Both eras are defined by a departure from the Court's history of following precedent absent new intervening law, and unease with the judiciary's administrative deference.[76] Simultaneously with this activist revolution, the ordinary, plain-meaning rule was re-evaluated and used in an expansive way. Justices, even when confused by the technical use of the English language, were determined to make it "ordinary" by use of handpicked dictionaries, including technical, legal dictionaries.[77] Ergo, the ersatz of the plain-meaning rule forced on words lacking a plain meaning.

In *Rapanos*,[78] Justice Scalia, after having ignored the wetlands precedent of *Riverside*, which incorporated the Corps' technical and scientific definition, engaged in lawmaking through unnecessary statutory construction based on his version of the plain-meaning rule.[79] To impose his new definition of wetlands as "continuous surface" connected to permanent bodies of water, Justice Scalia mischaracterized the *Riverside Baywatch* holding as not applicable because it did not define wetlands in connection with permanent bodies of water.[80] Indeed, as already stated, in *Riverside*, Justice White did not engage in judicial activism, nor in expanding the Court's role outside that of checks and balances. In *Riverside*, Justice White incorporated the Corps' scientific definition of wetlands.[81] In 1985, the Court acted within its role of checks and balances. It did not engage in rulemaking. If the Corps were delegated to define wetlands, there was no need for the Court to find the wetlands' nexus to the US waters, defined as "permanent" according to Webster's New International Dictionary (2.ed 1954).[82]

Justice Scalia's plurality opinion in *Rapanos*[83] is a master class in playing fast and loose with meaning-making. Rather than acknowledging that "wetlands" is a term of art with scientific content, Justice Scalia focused on the wetlands' adjacent bodies of water,

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75. See supra and infra for more details.

76. For a review of the Supreme Court's view of administrative deference, see for example Catherine M. Sharkey, Note, *The Anti-Deference Pro-Preemption Paradox at the U.S. Supreme Court: The Business Community Weighs in*, 67 CASE W. RSRV. L. REV. 805 (2017); but also Michael Sammartino, *Supportive yet Skeptic:* Kisor v. Wilkie *Casts Further Doubt on Deference Doctrine's Longevity*, 79 MD. L. REV. ONLINE 61 (2020).

77. *See* text and notes infra, discussing the use of dictionaries by the Roberts Court generally and in Sacket (II).

78. *Rapanos*, 547 U.S. 715.

79. *Id.*

80. *Id.* at 757.

81. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 129 (1985); 33 C.F.R. § 328.3(c)(1) (2024); *see also* U.S. ARMY CORPS OF ENG'RS, WETLANDS RESEARCH PROGRAM TECHNICAL REPORT Y-87-1 (1987).

82. *Rapanos*, 547 U.S. at 732.

83. *Id.* at 718–757.

which given their "water" component seem simpler to define.[84] Justice Scalia did not explore the wetland's scientific meaning. He denied its complex hydrological nature by visually connecting it to navigable waters.[85] He stated that the "definition" of "waters of the United States" is clear, and then based on their connection to CWA's "navigable waters," he qualified the wetland's meaning as "simple."[86]

In the process, Justice Scalia produced his own plain-meaning rule, that of traditional understanding: "the meaning of 'navigable waters' in the Act is broader than the *traditional understanding* of that term."[87] A devout Catholic, Justice Scalia seemed comfortable stating that "navigable waters" were more than the traditional understanding of that term. But for the definition of "wetlands," Justice Scalia went for less. He defined wetlands as what can only be seen: The CWA would have jurisdiction only over those wetlands with a continuous surface connection with the relative permanent body of water "making it difficult to determine where the 'water' ends and the 'wetland' begins."[88] Justice Scalia became the sudden friend of the "I know it when I see it" rule of jurisprudence.

Penning his concurring opinion in *Sackett (I)*, Justice Alito showed unease with Justice Scalia's "traditional understanding" of "Nation's waters," deploring its critical ambiguity for a natural English speaker.[89] Thus, perhaps, it was only expected that in *Sackett (II)*[90] Justice Alito would erase that ambiguity from the term of art "waters of the United States" and declare them ordinary by misusing the plain-meaning rule of statutory construction, indeed, with help from seven hand-picked dictionaries and decades of *pro-bono* work from Pacific Legal Foundation (PLF).[91]

BRIEF REMARKS ON STATUTORY CONSTRUCTION AND ORDINARY MEANING

To start with, our courts do not have jurisdiction over plain and ordinary. They have jurisdiction over controversies.[92] Paraphrasing

84. *Rapanos*, 547 U.S. 715.
85. *Id.*
86. *Id.*
87. *Id.* at 731 (emphasis added).
88. *Id.* at 742.
89. Sackett v. EPA, 566 U.S. 120, 133 (2012) (Alito, J., concurring).
90. Sackett v. EPA, 598 U.S. 651 (2023).
91. *Id.* at 671–72, 676. PLF was the Sacket's attorney from their first law suit against EPA.
92. The exact constitutional language is found in Article III, Section 2 of the United States Constitution. It states:

Raymond M. Kethledge of the Sixth Circuit, *plain* or *ordinary* meaning is a misnomer.[93] Searching for the plain and ordinary in our laws is tantamount to searching for one's childhood when smelling little cookies (in Proust's case, madeleines) as an adult. Plain or ordinary meaning serves as a linguistic conduit for professional adversaries zealously representing their clients and attempting to persuade professional arbiters that their client's interests fit the linguistic mold of a technical statute better than their opponents'.[94]

Laws are technical. Had they been easy to understand and follow there would be no controversies. There would be neither lawyers to rephrase clients' interests in technical language for the benefit of judges, nor judges to understand the technicality behind the lawyers' demands. To make the truth behind their decisions recognizable to a normal speaker of English, judges must employ clear and transparent reasoning, so no question of arbitrariness can be implied. Perhaps like Kafka who enabled even those who never read a line of his works to say of certain situations, "This is Kafkaesque," and to know what was implied,[95] judges are expected to make meaning clear.

That task is not simple, especially in the case of the Clean Water Act, passed to protect the general wellbeing of our great Nation.[96] For that end, it incorporated the science of the day, which commanded our waters stop being the cheapest sewage system of the nation.[97] Section 304(a)(1) of the Clean Water Act provides that the

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> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S CONST. art. III, § 2, cl. 1.

93. Hon. Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 VAND. L. REV. EN BANC 315, 319 (2017) (emphasis added).

94. Sam Kalen, Refining Statutory Construction: *Contextualism & Deference*, 21 U. N.H. L. REV. 261, 308–09 (2023).

95. SHIRLEY HAZZARD, WE NEED SILENCE TO FIND OUT WHAT WE THINK 55 (Brigitta Olubas ed., 2016).

96. According to the General Welfare Clause of the Preamble and Article I, Section 8, The General Welfare Clause is found in the Preamble and more specifically within Article I, Section 8 of the United States Constitution. The relevant portion of Article I, Section 8 reads: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;" U.S. CONST. art. I, § 8, cl. 1; For an expansive interpretation of the clause, see for example LAWSON, *supra* note 22.

97. *See Hearing on H.R. 11896 Before the H. Pub. Works Comm.*, *supra* note 13.

Environmental Protection Agency (EPA) shall publish "criteria for water quality accurately reflecting the latest scientific knowledge" on various biological and ecological effects of pollutants.[98] The water quality criteria contain two essential types of information: (1) discussion of available scientific data on the effects of pollutants on public health and welfare, aquatic life and recreation, and (2) quantitative concentrations or qualitative assessments of the pollutants in water which will generally ensure water quality adequate to support a specified water use.[99]

Given the complex task of statutory interpretation, the Congressional Research Service, informing the legislative debate since 1914, periodically updates its view in *Statutory Interpretation: Theories, Tools, and Trends*.[100] Prepared for Members and Committee of Congress, the report reads:

> In the tripartite structure of the U.S. federal government, it is the job of courts to say what the law is, as Chief Justice John Marshall announced in 1803. When courts render decisions on the meaning of statutes, the prevailing view is that a judge's task is not to make the law, but rather to interpret the law made by Congress.[101]

It continues by adding that regardless of their interpretive theory, judges rely on five types of interpretive tools:[102]

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98. 33 U.S.C. § 1314(a)(1).

99. *See, e.g.*, U.S. ENV'T PROT. AGENCY, QUALITY CRITERIA FOR WATER 1986 (1986); *see also*, Jeffrey M. Gaba, *Federal Supervision of State Water Quality Standards Under the Clean Water Act*, 36 VAND. L. REV. 1167, 1211 (1983).

100. CONGRESSIONAL RESEARCH SERVICE, R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS (2023).

101. *Id.*

102.

> Second, judges interpret specific provisions by looking to their broader statutory context, including the surrounding phrases and overall structure of the law. This context can inform whether a word's ordinary meaning applies in the circumstances covered by the statutory scheme. A judge might look to whether a term or phrase is used elsewhere in the statute in a way that sheds additional light on a disputed provision. A judge might also ask whether Congress used different language elsewhere in a meaningful way. . . .
>
> Third, judges may turn to the canons of construction, which are presumptions about how courts ordinarily read statutes. . . .
>
> Fourth, judges may look to a statute's legislative history, or the record of Congress's deliberations when enacting a law. . . .
>
> Finally, a judge might consider statutory implementation: the way a law has been applied in the past, or might be applied in the future. Judges may look to past agency enforcement of a law, or simply think through how a particular interpretation might operate.

Id.

> First, judges often begin by looking to the ordinary meaning of the statutory text, asking ***how a word is understood in common parlance***. Judges ***may look*** to dictionaries, books, or databases for evidence of a word's ordinary usage. . . . Nonetheless, judges may disagree about what a word's ordinary meaning is, or whether a particular statutory term may instead be a term of art—that is, a word with a specialized meaning in a particular context or field.[103]

In case of doubt, judges reference contextualism. In the words of Justice Marshall, "the whole law needs to be taken together,"[104] so the judge can understand "the meaning annexed by the legislature itself to the ambiguous phrases."[105]

The Roberts Court, filled with textualists surpassing the mold of the late Justice Scalia,[106] "focus on the words of a statute, emphasizing text over any unstated purpose."[107] Or, as former Scalia clerk Justice Amy Coney Barrett[108] explained, modern textualists are more focused on how an ordinary (albeit well-educated) person would read the law, rather than "on the legislator who wrote the law."[109]

But if we believe that "all happy families are alike," our textualists justices do not believe that a word's ordinary meaning is always alike. For instance, the late Justice Scalia noted that "to speak of 'using a firearm' is to speak of using it for its distinctive purpose . . . ."[110] Ergo, its meaning is functional and contextual.

That brief example amplifies the problem with ordinary meaning, as so many legal scholars have remarked. It lacks rhyme—and its reason is disingenuous.[111] That is where our title of the ersatz of the plain-meaning rule comes from. It merely masks the judges' own policy preferences.[112] Judge Easterbrook, for instance, noticed that those using the so-called plain meaning rule of statutory

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103. *Id.* (emphasis added).
104. Postmaster-General v. Early, 25 U.S. 136, 152 (1827).
105. *Id.*; *see also* LAWSON, *supra* note 22, at 71.
106. Lawrence M. Solan, *Can Corpus Linguistics Help Make Originalism Scientific?*, 126 YALE L. J. F. 57 (2016) (explaining Justice Scalia's adherence to the ordinary meaning rule).
107. CONGRESSIONAL RESEARCH SERVICE, *supra* note 101, at 14.
108. Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193 (2017).
109. *Id.* at 2194.
110. Smith v. United States, 508 U.S. 223, 242 (1993) (Scalia, J., dissenting).
111. *See, e.g.*, Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 536 (1983).
112. *See* CONGRESSIONAL RESEARCH SERVICE, *supra* note 101, at 24.

interpretation do it to sweep "under the rug the process by which meaning is divined."[113]

LEGAL MEANING IS TECHNICAL, NOT ORDINARY AND JUDGES ARE TASKED WITH MAKING IT UNDERSTANDABLE

If a word has an ordinary meaning, then no extrinsic sources should be needed. Justice Holmes assumes it available to all normal English-speaking people. But Professor Miranda McGowan of University of San Diego persuasively demonstrated the difficulty of ascertaining the ordinary meaning of a word. In fact, the more ordinary meaning is evoked by those using it, the more they rely on extrinsic sources.[114] Case in point was the late Justice Scalia, who started with the assumption of ordinary meaning, only to reverse himself. [115] McGowan used forty-two randomly selected statutory interpretations from dissents written by Justice Scalia between 1986 and 2002.[116] In 72% of the cases studied, that presumption was overcome.[117]

Justice Brewer's statutory construction of ordinary meaning in *Church of the Holy Trinity v. United States*[118] should be another sufficient example of the elusiveness of the plain-meaning rule given the ambiguity[119] of the English language. The statute at hand there made it a crime to prepay the transportation of an alien to perform labor in the United States.[120] Under that statute, a church was convicted for having prepaid the transportation of a rector from England to the United States.[121] Writing for a unanimous Court, Justice Brewer distinguished between the dictionary definition of labor and the ordinary meaning of labor, and he chose the one that he thought fit the scope of the statute.[122] Now, his conclusion, elitist as it was, framing ordinary meaning of labor as to mean only manual work, shows the perils of treating laws as ordinary. Laws are

113. Easterbrook, *supra* note 112 at 536; *see also* Jonathan D. Varat, *Supreme Court Forward, October Term 2011: Federalism Points and the Sometime Recognition of Essential Federal Power*, 46 LOY. L.A. L. REV. 411, 452 (2013) ("[O]rdinary meaning is itself [] a matter of some discretionary interpretive choice.").

114. Miranda McGowan, *Do as I Do, Not as I say: An Empirical Investigation of Justice Scalia's Ordinary Meaning Method of Statutory Interpretation*, 78 MISS. L. J. 129 (2008).

115. *Id.* at 154.

116. *Id.* at 144.

117. *Id.* at 171.

118. 143 U.S. 457 (1892).

119. For more on the ambiguity of language, see for example Michael Davis & Dana Neacşu, *The Many texts of Law*, 3 BR. J. AM. LEG. STUD. 481 (2014).

120. *Church of the Holy Trinity*, 143 U.S. at 458.

121. *Id.*

122. *See Church of the Holy Trinity*, 143 U.S. 457.

technical instruments used to organize a society. For better or worse, Judges should be transparent about how they apply such instruments. Maybe then, labor did not cover English rectors, or maybe they did not represent an immigration scare.[123]

The presumption of ordinary meaning is further contradicted by recent studies. Scholars have found that ordinary people do not overwhelmingly presume that terms in legal texts take "ordinary" meanings. Ordinary, normal English-speaking people understand law in a complex manner, as expressing both ordinary and legal meanings.[124]

Furthermore, the Roberts Court's very use of dictionary definitions, more than any other court before it, and in almost every other case,[125] while continuing the Rehnquist trend,[126] mirrors modern life and its reliance on specialized knowledge given the pervasiveness of technology. However, this reality contradicts the very foundation of a plain-meaning rule, based on "traditional understanding," as Justice Scalia would have said.

That is why this essay argues that from a presumption of ordinary meaning, the judiciary should start with a presumption of technical vocabulary whose meaning they have the duty to decipher for the plain-speaking person. This reversal of the first rule of statutory construction is clearly exemplified by the overuse of dictionaries in *Sacket (II)*. There were seven dictionaries at use to explain a noun (water) and a qualifier (adjacent). The wetland was inferred from its visual connection to the water. Assuming everyone speaks English, then the words were technical, endowed of technical meaning, unclear to the ordinary person.

1. Webster's New International Dictionary 2882 (2d ed. 1954);
2. Black's Law Dictionary 1426 (5th ed. 1979);
3. Black's Law Dictionary 62 (rev. 4th ed. 1968);
4. Random House Dictionary of the English Language 2146 (2d ed. 1987);

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123. For a discussion of the case, see LAWRENCE M. SOLAN, THE LANGUAGE OF STATUTES 54 (2010).

124. Kevin Tobia et. al., *Ordinary Meaning and Ordinary People*, 171 U. PA. L. REV. 365, 419 (2023).

125. If, in its first five terms, the Roberts Court incorporated dictionary definitions in 138 opinions, in its subsequent terms, from 2010 through 2022, it used them in 320 cases. Search done in the Westlaw S.Ct. database for "dictionary". James Brudney & Lawrence Baum, *Oasis of Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483, 485 (2013).

126. From 1800 until 1969, the Court used dictionary definition 145 times. Then, during the Burger era (1969–1986), there were 89 cases where dictionaries were used. Dictionaries were used in 234 cases for 186 years (slightly more than one case each year). While now, almost in every other case, if we consider the Court hears two cases each day, or about 100 each year. *Id.*

5. Webster's Third New International Dictionary 26 (1976);
6. Black's Law Dictionary 50 (11th ed. 2019); and
7. Oxford American Dictionary & Thesaurus 16 (2d ed. 2009).

All these dictionaries were used to evidence ordinary meaning of water, waters, and adjacent.[127] The overall effect of calling this overuse of dictionaries a mere exercise in ordinary meaning-making is that of a lack of acknowledging the limits of one's expertise. Moreover, why would an English-speaking justice reference an international dictionary as evidence of ordinary meaning? Or why would a technical legal dictionary offer any insight into ordinary, presumably, non-legal meaning? And then, do the years of publication matter? Why would the justices use a dictionary published either before or long after the CWA was enacted to prove ordinary meaning? Whose ordinary meaning is the rule supposed to provide?

Dogmatically applying a presumption of ordinary meaning for technical statutes, such as environmental laws, turns Justice Holmes's judicial duty to employ plain, English meaning on its head. In the words of Judge Eskridge, using it makes it mere "window-dressing for interpretations reached on other grounds."[128] Environmental statutes, given their specialized knowledge, rely on words used as "terms of art" because their goal is to achieve scientifically-proven goals. The CWA is the result of legislators agreeing with scientists that the nation's waters should not be the nation's sewage system.

In *Sackett (II)*, the Supreme Court was asked to clarify the controversy regarding its coverage of bodies of water, whether it included adjacent wetlands, and to what extent.[129] That very question is scientific. Ordinarily, water references the liquid we drink or otherwise use,[130] rather than an ecosystem which requires pollution abatement for the general welfare.

In *Sackett (II)*, all nine Supreme Court Justices refused to follow the unanimous 1985 precedent,[131] which embraced a hydrological understanding of water:[132] "[w]ater moves in hydrologic cycles and

127. Sackett v. EPA, 598 U.S. 651, 671–72, 677, 718–19 (2023).

128. William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. CHI. L. REV. 671, 674 (1999).

129. *See Sackett*, 598 U.S. 651.

130. For an example of ordinary meaning of water usage, see, a list of the most popular English language songs with "water" in the title. For a Google search, see, Popular Songs with Water in the Title, GOOGLE, google.com (insert the phrase "Popular Songs with Water in the Title" into the search bar, then search.).

131. *See Sackett*, 598 U.S. 651.

132.

> Section 404 originated as part of the Federal Water Pollution Control Act Amendments of 1972, which constituted a comprehensive legislative attempt "to restore and

it is essential that discharge of pollutants be controlled at the source."[133]

Furthermore, the majority in *Sacket (II)* endorsed a plurality definition offered by Justice Scalia in 2006 in *Rapanos*.[134] Distancing himself from scientific knowledge, Justice Scalia adopted a "I know-it-when-I-see-it" definition, which hailed a visually pleasing surface contiguous-test: visually wetlands and nearby waters create one body of water. Justice Alito stamped it as the new judicial interpretation of the CWA. In doing so, the *Sackett (II)*[135] majority impaired the very goal of the CWA, that of restoring and maintaining "the chemical, physical, and biological integrity of the Nation's waters."[136] Wetlands may or may not form a contiguous surface with the adjacent bodies of water at all times during the year, though scientifically they continue to perform their protective role within pollution abatement. By emphatically choosing to force a so-called ordinary meaning of "adjacent" and discard the substantial nexus between wetlands and the neighboring bodies of water, the Supreme Court in *Sackett (II)*[137] arguably treated the expressed scope of the CWA: "protecting and enhancing [the Nation's] water quality"[138] as either unattainable or mere surplusage.[139]

Analyzing how the Roberts Court employs dictionaries, Eskridge and Nourse noted that it only encourages skeptics to question the

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> maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C.A. § 1251(a) (West). This objective incorporated a broad, systemic view of the goal of maintaining and improving water quality . . . . Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for "[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source." In keeping with these views, Congress chose to define the waters covered by the Act broadly. . . . [T]he evident breadth of congressional concern for protection of water quality and aquatic ecosystems suggests that it is reasonable for the Corps to interpret the term "waters" to encompass wetlands adjacent to waters as more conventionally defined. Following the lead of the Environmental Protection Agency, *see* 38 Fed.Reg. 10834 (May 2, 1973), the Corps has determined that wetlands adjacent to navigable waters do as a general matter play a key role in protecting and enhancing water quality.

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 132–33 (1985) (citation omitted).

133. *Id.* at 133.

134. *Sackett*, 598 U.S. 651.

135. 598 U.S. 651.

136. 33 U.S.C.A. § 1251(a) (West).

137. *Sackett*, 598 U.S. 651.

138. *Riverside Bayview Homes, Inc.*, 474 U.S. at 133.

139. *See, e.g.*, Chickasaw Nation v. U.S., 534 U.S. 84, 97 (2001) (O'Connor, J., dissenting) ("This goes beyond treating statutory language as mere surplusage."); *see* Potter v. United States, 155 U.S. 438, 446 (1894) (the presence of statutory language "cannot be regarded as mere surplusage; it means something."); Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 697–698 (1995) (noting that surplusage is redundant statutory language).

very idea of "plain meaning."[140] For anyone analyzing the Justices' use of dictionaries in the Roberts Court, it becomes apparent they do so "to create an arbitrary façade of plain meaning."[141] For critics, "[s]uch manipulations too often, . . . allow judges to trump congressional policy with their own frameworks and preferences."[142] In the process, it seems the Roberts Court may even seem to have forgotten that "[t]he government of the United States has been emphatically termed a government of laws, and not of men."[143]

CONCLUSION

In *Sackett (II)*, writing for the majority in a unanimous judgment, Justice Alito redefined the scope of the 1972 and 1977 amendments to the Federal Water Control Act of 1948,[144] known as the Clean Water Act (CWA),[145] in the mold of his own concurring opinion in *Sacket (I)*,[146] effectively treating the expressed language of the statute's goal as superfluous.[147] Justice Alito did so by invoking the fiction of ordinary meaning rule of statutory interpretation. Defining wetlands in a non-technical manner, the Supreme Court made it impossible for the two agencies charged with the statute's enactment to implement it when the hydraulic cycles do not align to the contiguous demand of Justice Alito's ersatz interpretation of the ordinary meaning rule.

By refusing to follow *Riverside Bayview Homes*,[148] in favor of Justice Scalia's plurality definition from *Rapanos*,[149] the Roberts Court chose to ignore the pillar of our rule of law*: stare decisis*, or the principle of settled law, in favor of ideological arbitrariness. In *Riverside Bayview Homes*, Justice White's 1985 unanimous statutory construction of wetlands as waters of the United States relied only on the scope of the CWA, scientific expertise, and deference to agency work.[150] It lacked an expansive political agenda. It also refused to invoke dictionary definitions.

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140. William N. Eskridge, Jr. & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 N.Y.U. L. REV. 1718, 1725–26 (2021).
141. *Id.* at 1726.
142. *Id.*
143. Marbury v. Madison, 5 U.S. 137, 163 (1803).
144. Water Pollution Control Act., Pub. L. No. 80-845, 62 Stat. 1155 (1948).
145. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816.
146. Sackett v. EPA, 566 U.S. 120, 132–33 (2012).
147. *See* Sackett v. EPA, 598 U.S. 651 (2023).
148. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985).
149. Rapanos v. United States, 547 U.S. 715 (2006).
150. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 .

By refusing to follow *stare decisis*, the Roberts Court yet again solidifies its interpretation of our liberal rule of law as departing from the Montesquieu-Madisonian check and balances principle of government, where all branches of the government are engaged in the act of governing, to a more Hobbesian social contract, Smithian laissez-faire liberalism,[151] where the market, as interpreted by the Supreme Court, defines the rules of governing.

Because in *Sackett (II)* the Roberts Court favored administrative anti-deference and overall skepticism over expert knowledge,[152] ironically, it engaged in Kafkaesque arbitrariness. Or, aiming perhaps to become the only face of the law, it tells us that it aims to become America's king.[153]

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151. Instead, the Roberts Court entrenched itself into a search for laissez-faire liberalism unseen since the Lochner Era:

> The Lochner Era refers to a period of history in the United States characterized by strong judicial protections for economic liberties, especially freedom of contract. The period takes its name from a landmark case, Lochner v. New York, 198 US 45 (1905), in which the Supreme Court struck down labor regulations based on the court's interpretation of the 14th Amendment's due process clause.

Lochner Era, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/lochner_era (last updated June, 2023).

152. *See Sackett*, 598 U.S. 651.

153.

> But where says some is the King of America? I'll tell you Friend, he reigns above, and doth not make havoc of mankind like the Royal Brute of Britain. Yet that we may not appear to be defective even in earthly honors, let a day be solemnly set apart for proclaiming the charter; let it be brought forth placed on the divine law, the word of God; let a crown be placed thereon, by which the world may know, that so far as we approve as monarchy, that in America [THE LAW IS KING]. For as in absolute governments the King is law, so in free countries the law ought to be King; and there ought to be no other. But lest any ill use should afterwards arise, let the crown at the conclusion of the ceremony be demolished, and scattered among the people whose right it is.

THOMAS PAINE, COMMON SENSE 75 (1776).

Not Everything Has to Be a Taking: *Tyler v. Hennepin County*

*Maryann Herman**

I. INTRODUCTION

In *Tyler v. Hennepin County*, we see the United States Supreme Court's continuation of the strengthening of individual property rights. The Court endeavored to address two issues in this case: 1) whether the seizing and selling of property to satisfy a tax debt without returning the surplus violates the Takings Clause; and 2) whether the forfeiture of the surplus resulting from a tax sale is an excessive fine under the Eighth Amendment. The Court answered the first question in the affirmative and, thus, did not address the second question.

II. BACKGROUND

A. Tyler v. Hennepin County, Minnesota

The case stems from the tax sale of 94-year-old Geraldine Tyler's one-bedroom condo in Minneapolis, Minnesota.[1] Ms. Tyler had lived

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1. Tyler v. Hennepin Cnty., 598 U.S. 631, 635 (2023).

alone in the condo for more than a decade, but as she aged, the neighborhood purportedly went downhill. In 2010, she and her family decided that she should move to a senior community.[2] At that time, Ms. Tyler stopped paying the property taxes on the condo, and in 2015, she had accumulated about $2,300 in unpaid taxes and $13,000 in interest and penalties.[3] So, via the authority of Minnesota statute,[4] Hennepin County seized the condo and sold it for $40,000, which extinguished Ms. Tyler's debt.[5] But, also via the authority of state statute,[6] the County retained the balance of the sales price.[7]

Ms. Tyler sued Hennepin County, asserting that the County's act of retaining the excess sales price of almost $25,000 violated the Takings Clause of the Fifth Amendment and the Excessive Fines Clause of the Eighth Amendment.[8] The district court dismissed the suit for failure to state a claim, and the U.S. Court of Appeals for the Eighth Circuit affirmed, reasoning that because the Minnesota statute recognized no property interest in the surplus proceeds of the sale, there could be no unconstitutional taking.[9] The Supreme Court reversed, holding that there was, in fact, an unconstitutional taking without just compensation.[10]

The County made three arguments: 1) Ms. Tyler lacked standing to bring the case; 2) Failure to return the surplus of a tax sale was not a taking in violation of the Takings Clause; and 3) Ms. Tyler

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2. *Id.*
3. *Id.*
4. MINN. STAT. ANN. § 280.01 (West 2012).
5. *Tyler*, 598 U.S. at 635.
6. MINN. STAT. ANN. § 282.08 (West 2012), stating,

> The net proceeds from the sale or rental of any parcel of forfeited land, or from the sale of products from the forfeited land, must be apportioned by the county auditor to the taxing districts interested in the land, as follows:
>
> . . .
>
> (4) Any balance must be apportioned as follows:
>
> (i) The county board may annually by resolution set aside no more than 30 percent of the receipts remaining to be used for forest development on tax-forfeited land and dedicated memorial forests[.]
>
> (ii) The county board may annually by resolution set aside no more than 20 percent of the receipts remaining to be used for the acquisition and maintenance of county parks or recreational areas[.]
>
> (iii) Any balance remaining must be apportioned as follows: county, 40 percent; town or city, 20 percent; and school district, 40 percent[.]

Id.

7. *Tyler*, 598 U.S. at 635.
8. *Id.* at 635–36.
9. *Id.* at 636.
10. *Id.* at 647.

abandoned her home by failing to pay the taxes. The Court, necessarily, disagreed with all three.[11]

B. Standing

The Court first addressed the County's argument that Tyler lacked standing to bring the claim.[12] The property was subject to a $49,000 mortgage and a $12,000 lien for unpaid HOA fees, which exceeded $25,000—the value of the surplus of the tax sale.[13] Therefore, the County argued, because Tyler would ultimately not realize any of this surplus, she suffered no financial harm from the sale and thus had no standing.[14] The Court rejected this argument, stating that even though the liens on the property would be extinguished, Ms. Tyler would remain personally liable for any debt that would not be paid by the tax sale.[15] Reasoning that she could have used the surplus from the sale to pay these debts, the Court stated Ms. Tyler suffered financial hardship and thus had standing to bring the takings claim.[16]

C. Taking

The Court then moved on to address Tyler's contention that this was an unconstitutional taking without just compensation. The Fifth Amendment, made applicable to the states through the Fourteenth Amendment, states that, "private property [shall not] be taken for public use, without just compensation."[17] To determine whether property was taken from a private party without just compensation, it first must be determined whether that party had an interest in the property.[18] Here, neither the taxes themselves nor the seizure and sale of the property to fulfill tax liability were takings, which raised the question of whether the surplus value resulting from the sale was property and subject to the Takings Clause.[19] The Constitution protects property rights, and it does not create them. Therefore, property interests are determined by other

11. *Id.* at 637, 639, 646–47.
12. *Id.* at 636.
13. *Id.*
14. *Id.* at 637.
15. *Id.*
16. *Id.*
17. *Id.* (quoting U.S. CONST. amend. V).
18. Tyler v. Hennepin Cnty., 505 F. Supp. 3d 879, 890 (D. Minn. 2020). ("A litigant does not plead a viable takings claim under either the federal or state constitution unless the litigant plausibly pleads that the government took something that belonged to her." *Id.*)
19. *Tyler*, 598 U.S. at 638.

sources, such as state law.[20] Thus, the Court was left to determine whether state law created a property interest in Ms. Tyler in the surplus sales funds.

The lower courts, of course, also addressed this issue. The district court analyzed the question of whether the surplus was property belonging to Tyler when title to the condo passed to the state prior to the sale.[21] This analysis was necessitated by the tax sale process set out by the Minnesota tax judgment statute: First, the State purchased the property subject to a tax sale for the amount owed plus costs and interest; at this time, title to the property was vested in the State.[22] This was followed by a period in which the debtor could redeem the property for the amount owed, costs, and interest.[23] If the debtor could not redeem the property, she could make a confession of judgment, which allowed her to consolidate her debt into one obligation payable over five or ten years; this also allowed the debtor to avoid forfeiture of the property.[24] If the debtor failed to either exercise her right of redemption or make a confession of judgment, she forfeited the property, and absolute title vested in the state.[25] Once forfeited, all liens on the property were extinguished, and the county would either sell the property to a private party or retain the property for public use.[26]

Because the debtor forfeited the property and title transfered from the debtor to the state prior to the sale, the debtor had no interest in the property when it was sold. Thus, under the statute, the debtor had no interest in the proceeds of the sale. Instead, the proceeds were distributed as prescribed by the statute.[27] The court relied on the case *Nelson v. City of New York* to advance the Constitutionality of the Minnesota statutory scheme.[28] In *Nelson*, after notice and a seven-week redemption period, the debtors' properties were foreclosed on by the City of New York due to unpaid water bills.[29] The debtors could have filed an answer during the

20. *Id.* (citing Phillips v. Wash. Legal Found., 524 U.S. 156, 164 (1998)).
21. *Tyler*, 505 F. Supp. 3d at 890.
22. MINN. STAT. ANN. § 280.41 (West 2012); *see also Tyler*, 505 F. Supp. 3d at 883–84 (stating that "each parcel with an unsatisfied judgment is sold to the state through a procedure by which the county (acting on behalf of the state) 'bids in' (i.e., purchases the property for) the amount of delinquent taxes, penalties, costs, and interest. At this time, title vests in the state subject to the right of redemption . . . ." (citations omitted)).
23. *Tyler*, 505 F. Supp. 3d at 884.
24. *Id.*
25. *Id.*
26. *Id.* The debtor may also repurchase the property at this point. *Id.*
27. *See* MINN. STAT. ANN. § 282.08 (West 2012).
28. *See Tyler*, 505 F. Supp. 3d at 891 (citing Nelson v. City of New York, 352 U.S. 103 (1956)).
29. *Id.*

foreclosure procedures establishing that their interest in the property was greater than the amounts owed; this would have awarded any surplus to the former landowners.[30] However, they did not file such an answer, and the City sold one property and retained the surplus sales price; it retained the other property.[31] The debtors claimed that the City's retention of the sales price and property were takings in violation of the Fifth Amendment Takings Clause.[32] The *Nelson* Court held that because the debtors were given adequate notice of the charges due and of the foreclosure proceedings, the City's retention of any surplus was Constitutional.[33] Importantly for the district court in *Tyler*, the *Nelson* Court found that the debtors had no property interest in the surplus even though they had once owned the properties.[34]

The district court also held that Ms. Tyler had no property interest in the surplus under the common law.[35] Arguing that because an 1884 case required tax sale surplus to be returned to the debtor, Ms. Tyler claimed that under Minnesota common law, she has an interest in the surplus.[36] The court, however, disagreed, reasoning that the decision was based on the interpretation of the 1881 statute—which differed from the current statute—and did not create a common law property interest in tax surplus.[37]

Rejecting both Ms. Tyler's statutory and common law claims to a property interest in the tax sale surplus, the district court dismissed her takings claim.[38] On appeal, the Eighth Circuit affirmed the dismissal of Ms. Tyler's takings claim.[39]

The United States Supreme Court, in reviewing the Eighth Circuit's affirmation of the district court's decision, also undertook the task of defining "property" for purposes of the Takings Clause by looking to "existing rules or understandings."[40] The Court asserted that although state law is a source of "existing rules or understandings," such law cannot be used to circumvent the Takings Clause.[41] Thus, the existence of the Minnesota statute—which failed to give

30. *Id.* at 891–92
31. *Id.* at 892.
32. *Id.* at 891
33. *Id.* at 892
34. *Id.*
35. *Id.* at 894–95.
36. *Id.* at 893 (citing Farnham v. Jones, 19 N.W. 83 (1884)).
37. *Id.* at 894.
38. *Id.* at 894–95.
39. Tyler v. Hennepin Cnty., 26 F.4th 789, 794 (8th Cir. 2022).
40. Tyler v. Hennepin Cnty., 598 U.S. 631, 638 (2023).
41. *Id.* (citing Hall v. Meisner, 51 F.4th 185, 190 (6th Cir. 2022) (Kethledge, J., for the court) ("[T]he Takings Clause would be a dead letter if a state could simply exclude from its definition of property any interest the state wished to take.")).

the debtor an interest in the surplus—could not alone define "property."[42] So, the Court moved on to look at other sources. As this Court tends to do, it first and foremost looked to "traditional property law principles," plus historical practice and the Court's own precedent.[43] With this commenced the Court's discussion of what a government can take from a tax debtor, beginning with the Magna Carta.[44]

Under English law, the Crown could seize property to satisfy debt, but it could not keep the surplus from a tax sale.[45] This concept made its way to the new United States, where the government could seize and sell land to satisfy tax debt, but only so much land as necessary to satisfy the debt.[46] Shortly after the founding, ten states enacted statutes similar to that of the United States.[47] Although Virginia at one point adopted a complete forfeiture scheme, allowing its government to seize and take title to all of a tax debtor's land—not just the amount that would satisfy the debt—this change was short-lived and was changed back to allow seizure of only the amount of land necessary to satisfy the debt.[48]

The Court further explained that once the Fourteenth Amendment was passed, states—including Minnesota—required that no more land be seized and sold than necessary to fulfill the tax debt.[49] At the time only three states allowed complete forfeiture.[50] Now, thirty-six states, as well as the Federal Government, require that surplus value from a tax sale be returned to the tax debtor, so states that retain the surplus are still in the minority.[51]

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42. *Id.* at 638–39.

43. *Id.* at 638. This Court adopted originalist tests in lieu of precedent in several cases in recent terms. *See, e.g.*, *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231 (2022) (stating "[w]e hold that *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'"); New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 17 (2022) (stating "[t]o justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'").

44. *Tyler*, 598 U.S. at 639.

45. *Id.* at 639–40.

46. *Id.* at 640.

47. *Id.*

48. *Id.* at 640–41.

49. *Id.* at 641.

50. *Id.* at 642.

51. *Id.*

The result of this examination of "traditional property law principles" and historical practice was that the Court seemed to equate the amount of land to be seized and sold with tax sale proceeds. That is, historically, governments could not seize and sell more land than necessary to fulfill a tax debt; contemporarily, thirty-six states cannot retain the surplus value from the tax sale of a property that was seized in its entirety. The prior is real property—literal property; the latter is proceeds gained from a government-conducted sale of the real property, and this was what the Court was trying to define in this case. Whether these two things are really the same is debatable—but equating them allowed the Court to set up this issue as one of a taking rather than a fine.

The Court also looked to its own precedent to support the proposition that a tax debtor is entitled to the surplus of a tax sale, citing to cases that required return of a tax-sale surplus when the United States collected a tax to finance the Civil War.[52] It later extended that right in a case where the government retained the property instead of selling it, and the debtor sought the excess value of the property.[53] In both these cases, the Supreme Court held that the debtors were entitled to the surplus value, regardless of whether the statute allowing seizure and sale of the property provided for the return.[54]

The Court distinguished the *Nelson* case—which the district court relied on in its opinion—based on the fact that the debtor had almost two months to pay off the debt after the City filed for foreclosure, then an additional twenty days to request the surplus from the sale.[55] Although the debtor was required to file an answer in the foreclosure proceedings stating that the failure of the property exceeded the debt owed, the process did not absolutely preclude the debtor from recovering the surplus sales price.[56] The critical difference between the New York City ordinance at issue in *Nelson* and the Minnesota statutory scheme at issue in the present case seemed to be the ability to recover the proceeds; the Minnesota statutes afford the debtor various opportunities to reclaim the property—both before and after forfeiture—but, according to the Court, this was not enough. Thus, the property interest was not in the real property itself, but the money gained by the County's sale of the real property the debtor forfeited.

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52. *Id.* at 642–43 (discussing United States v. Taylor, 104 U.S. 216 (1881)).
53. *Id.* at 643 (discussing United States v. Lawton, 110 U.S. 146 (1884)).
54. *Id.*
55. *Id.* at 644 (discussing Nelson v. City of New York, 352 U.S. 103, 104–105 (1956)).
56. *Id.* (citing *Nelson*, 352 U.S. at 110).

Finally, the Court cited to other circumstances in Minnesota itself where a debtor is entitled to the surplus in excess of the debt.[57] These included private creditors and bank foreclosures as well as income tax and personal property tax sales.[58] For these reasons, the Court reversed the Eighth Circuit to hold that a tax debtor holds a property interest in the surplus revenue from the tax sale, stating, "Minnesota may not extinguish a property interest that it recognizes everywhere else to avoid paying just compensation when it is the one doing the taking."[59]

D. Abandonment

The Court then addressed the County's argument that Ms. Tyler had no interest in the surplus because she constructively abandoned her home by failing to pay taxes.[60] The County posited that compliance with reasonable conditions placed on property ownership had been upheld by this Court, and the payment of property taxes is a reasonable condition.[61] Consequently, because Ms. Tyler did not comply with this reasonable condition, she abandoned her property.[62] Thus, she had no interest in the surplus of the tax sale, so the County's retention of the surplus could not be a taking.[63]

Again, the Court rejected this argument, reasoning that abandonment requires a property owner to relinquish all rights in the property.[64] Minnesota's statute, however, did not consider the owner's use of the property at all. All it considered was the payment of taxes. Thus, the failure to pay taxes could not be considered abandonment.[65]

So, in rejecting each of these three arguments made by the County, the Court reversed the judgment of the Eighth Circuit and held that the seizing and selling of property to satisfy a tax debt without returning the surplus to the debtor violates the Takings Clause.[66] Because of this, the Court declined to address whether the County's retention of the surplus amounted to an excessive fine under the Eighth Amendment.[67]

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57. *Id.* at 645.
58. *Id.*
59. *Id.* (citing Phillips v. Wash. Legal Found., 524 U.S. 156, 167 (1998)).
60. *Id.* at 646.
61. *Id.* (discussing Texaco, Inc. v. Short, 454 U.S. 516 (1982)).
62. *Id.* at 646.
63. *Id.*
64. *Id.* at 647.
65. *Id.*
66. *Id.* at 647–48.
67. *Id.*

E. Concurrence

Although the majority failed to consider whether the County's retention of the surplus amounted to an excessive fine, Justice Gorsuch, joined by Justice Jackson, wrote separately to address that issue.[68] In their concurrence, the Justices agreed that the failure to return the surplus violates the Takings Clause; however, their opinion corrected stated "mistakes" in the district court's excessive fines analysis.[69]

The district court determined that the County's retention of the tax sale surplus was not, in fact, a fine.[70] Both criminal and civil penalties are subject to the Excessive Fines Clause of the United States Constitution.[71] Yet, the district court explained, neither the Supreme Court nor the Eighth Circuit has found a tax-related penalty or forfeiture to be an excessive fine in violation of the Eighth Amendment.[72] Thus, the district court proceeded to address this issue through a two-step analysis: First, it was required to determine whether the County's retention of the any tax sale surplus constituted a "fine" for purposes of the Excessive Fines Clause; and, second, if the first inquiry was answered in the affirmative—that is, the County's retention of the surplus was, in fact, a fine—whether that fine was "excessive."[73] Because the district court answered the first question in the negative, it did not address the second.[74]

The district court applied the test set out by the Supreme Court to determine whether the County's retention of the tax sale surplus was a fine.[75] This test required the court to determine whether Ms. Tyler's forfeiture of the tax sale proceeds functioned as a punishment, or was merely remedial.[76] If the forfeiture was a punishment, then it was a fine; if it was remedial, it was not.[77] Although "punishment" and "remedial" seem not to be expressly defined,

68. *Id.* at 648 (Gorsuch, J., concurring).
69. *Id.*
70. Tyler v. Hennepin Cnty., 505 F. Supp. 3d 879, 896 (D. Minn. 2020).
71. *Id.* at 895 (citing Austin v. United States, 509 U.S. 602, 607–09 (1993)). The Excessive Fines Clause of the Eighth Amendment reads, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. IIX.
72. *Tyler*, 505 F. Supp. 3d at 895. The court, however, also cites to *Wilson v. Commissioner of Revenue*, 656 N.W.2d 547 (Minn. 2003), where the Supreme Court of Minnesota found that a tax penalty assessed against a corporate officer in his personal capacity based on the corporate officer's failure to withhold employee wages amounted to an excessive fine under both the United States and Minnesota Constitutions. *See Tyler*, 505 F. Supp. 3d at 895. Thus, under Minnesota law, a tax-related penalty could, in fact, be an excessive fine.
73. *Tyler*, 505 F. Supp. 3d at 895.
74. *Id.* at 897.
75. *Id.* at 896 (citing *Austin*, 509 U.S. at 610).
76. *Id.*
77. *Id.*

precedent provides that a fine "can only be explained as serving in part to punish."[78] On the other hand, forfeitures that "remove[ ] dangerous or illegal items from society or compensate[ ] the government for a loss" are remedial, and thus do not constitute fines.[79]

The County argued that its retention of the surplus was remedial—and thus not a fine—because its primary purpose was to compensate the government for the loss of tax revenue.[80] It also asserted that the forfeiture was clearly not intended to be punitive, as some tax debtors' forfeited property was worth less than the debt they owed, and a tax debtor had multiple opportunities to avoid foreclosure.[81] Contrarily, Ms. Tyler asserted that the Minnesota statutory scheme allowing for retention was not merely remedial because in many cases the government retained more than what was owed by the tax debtor.[82] The district court indicated that the Supreme Court previously rejected the proposition that a penalty or a forfeiture is a fine merely because it results in a government windfall.[83] With this, the district court agreed with the County's rationale and rejected that of Ms. Tyler.[84]

Additionally, the district court distinguished Minnesota's tax sale forfeiture scheme from earlier Supreme Court cases where forfeitures were found to be punitive and, thus, fines.[85] In doing so, the district court cited the Supreme Court's reliance on the forfeitures in these cases being "closely connected to criminal proceedings."[86] Appearing to equate the criminal proceedings with punishment, the district court reasoned that because Minnesota's tax forfeiture scheme was not reliant on a criminal conviction or criminal behavior, it was not punitive, and thus not a fine.[87]

The Supreme Court's concurrence took issue with three aspects of the district court's analysis in determining that the Minnesota

78. *Id.* (quoting *Austin*, 509 U.S. at 610).

79. *Id.* (citing *Austin*, 509 U.S. at 621; United States v. Bajakajian, 524 U.S. 321, 329 (1998)).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* (citing *Bajakajian*, 524 U.S. at 331).

84. *Id.* at 896–97.

85. *Id.* (discussing Austin v. United States, 509 U.S. 602, and *Bajakajian*, 524 U.S. 321). In *Austin*, the Court found that a federal statute allowing for the forfeiture of "vehicles and real property used or intended for use in drug-trafficking crimes was punitive." *See Tyler*, 505 F. Supp. 3d at 896–97 (citing *Austin*, 509 U.S. at 619–20). In *Bajakajian*, the Court found that a federal statute provided for forfeiture of property for various offenses, including transport currency valued at greater than $10,000 outside of the country without reporting it—which was the offense at issue in the case—was punitive. *See Tyler*, 505 F. Supp. 3d at 897 (citing *Bajakajian*, 524 U.S. at 328).

86. *Tyler*, 505 F. Supp. 3d at 897.

87. *Id.*

tax forfeiture scheme was not a fine: First, the district court relied on the "primary purpose" of the scheme as non-punitive; second, the district court cited the fact that some tax debtors—those whose property is worth less than the debts they owe—will incur a windfall due to the scheme; and, third, the district court depended on the scheme's lack of criminal proceedings.[88] As to the first point, Justice Gorsuch wrote that the "primary-purpose test finds no support in our law."[89] Instead, the Excessive Fines Clause applies when the scheme does not "*solely* . . . serve a remedial purpose[.]"[90] Regarding the second contention, the Justice implied that the scheme did not lose its punitive qualities merely because some tax debtors would have benefitted from it.[91] Benefitting from the scheme would simply cause a fine not to be excessive, but it is still a fine.[92] As to its third point, the concurrence stated that a scheme need not be related to criminal proceedings to be punitive—it is sufficient that it was intended to deter noncompliance.[93]

The concurrence declined to explicitly conclude as to whether the Minnesota tax forfeiture scheme was punitive and thus a fine. However, it seemed to indicate that because it served as a deterrent, it could be considered as such.[94] Consequently, the fine—that is the surplus tax sale proceeds retained by the County—must not be excessive.[95]

III. Analysis

A. Is it a taking or is it a fine?

The result the Supreme Court's decision in *Tyler* is that government retention of a tax sale surplus is an unconstitutional taking, so it is necessarily not a fine. However, the concurring opinion indicates that if it were not, in fact, an unconstitutional taking, it could be fine.[96] Consider whether the County's failure to return the surplus is better viewed as a taking or as a fine: A taking occurs when

88. Tyler v. Hennepin Cnty., 598 U.S. 631, 648–49 (2023).
89. *Id.* at 648 (citing *Austin*, 509 U.S. at 610).
90. *Id.*
91. *Id.* at 649 (stating "[s]ome prisoners better themselves behind bars; some addicts credit court-ordered rehabilitation with saving their lives. But punishment remains punishment all the same.").
92. *Id.*
93. *Id.* at 649–50.
94. *Id.*
95. *Id.* (stating "[e]conomic penalties imposed to deter willful noncompliance with the law are fines by any other name. And the Constitution has something to say about them: They cannot be excessive.").
96. *See* discussion *supra* Section II.D.

the government seizes private property for public use; a fine is essentially a payment extracted from a wrongdoer to compensate and punish for the wrongdoing. A taking can apply to personal property, but applying it to money seems inefficient, at best; when a taking occurs, the former property owner must be awarded just compensation—money—so when the government takes money, the former property owner would need to be awarded money. But, in the case of the tax-sale surplus, it is worth considering why the government is taking the money in the first place: To remediate the wrongdoing—failure to pay taxes—and to punish the wrongdoer—again, for the failure to pay taxes.[97] This begins to look more like a fine than a taking—which really has no compensatory nor punitive component. In the latter case, the property is taken simply because the government ostensibly needs it to serve the public good.

This is illustrated by the similarity between the circumstances in *Tyler* and those of *Austin v. United States*[98] and *United States v. Bajakajian*.[99] In *Austin*, the petitioner, Richard Lyle Austin was convicted of a South Dakota drug offense.[100] Pursuant to federal statute allowing for forfeiture of property involved in drug crimes, the United States government sought forfeiture of Austin's mobile home and auto body shop.[101] The Court found that this forfeiture was subject to the Excessive Fines Clause of the Eighth Amendment.[102] In *Bajakajian*, the respondent, Hosep Bajakajian, attempted to board a flight leaving the United States carrying $357,144 without reporting it in violation of federal statute.[103] Also pursuant to federal statute, Bajakajian was required to forfeit the entire $357,144 he failed to declare.[104] The Court held that this forfeiture was punishment, and is thus a fine subject to the Excessive Fines Clause.[105]

Similarly, in *Tyler*, Ms. Tyler failed to pay taxes due on her home. Pursuant to statute, the home was forfeited to the government and sold. The government then retained the entire sales price of the

97. *See* United States v. Bajakajian, 524 U.S. 321, 328 (1998) ("The Excessive Fines Clause thus 'limits the government's power to extract payments, whether in cash or in kind, "as punishment for some offense."'" (quoting Austin v. United States, 509 U.S. 602, 609–10 (1993)).
98. 509 U.S. 602.
99. 524 U.S. 321.
100. *Austin*, 509 U.S. at 604.
101. *Id.* at 604–05 (citing 21 U.S.C. §§ 881(a)(4), (a)(7)).
102. *Id.* at 622.
103. *Bajakajian*, 524 U.S. at 324.
104. *Id.* (citing 18 U.S.C. § 982(a)(1)).
105. *Bajakajian*, 524 U.S. at 324

home.[106] Unlike *Austin* and *Bajakajian*, the forfeiture in *Tyler* was not a component of a criminal punishment, nor was it forfeiture explicitly directed by statute.[107] However, the *Tyler* concurrence indicated that neither of these features are necessary for a forfeiture to be considered punitive, and thus a fine.[108] Richard Lyle Austin and Hosep Bajakajian had property interests in their mobile home and body shop and money, respectively, prior to the forfeitures just as Ms. Tyler had a property interest in her home before the forfeiture. Yet, in the former cases, the forfeitures were considered fines and in the latter, the forfeiture was considered a taking.

But the Court held that that the surplus tax sale proceeds from Ms. Tyler's forfeited condo was property, thus it was taken by the state without just compensation.[109] Now the courts must determine exactly what constitutes just compensation. Surely, it cannot be the entire surplus, so it remains to be seen how compensation will be calculated in this instance. However, if the Court were to have found this not to be a taking, but rather a fine, Ms. Tyler may still have been entitled to a portion of the surplus. Under the Excess Fines Clause of the Eighth Amendment, the fine must be proportional to the offense.[110] A forfeiture is excessive "if it is grossly disproportional to the . . . offense"[111] and the courts "must compare the amount of the forfeiture to the gravity of the defendant's offense."[112] If the fine is grossly disproportional, it is unconstitutional.[113] So, it is possible that Ms. Tyler's forfeiture of $25,000 for the offense of nonpayment of $15,300 in taxes, interest, and penalties would be unconstitutional even without deeming it a taking.[114]

Yet, as part of its mission to strengthen individual property rights, this Court extended the takings jurisprudence to encompass tax sale forfeiture schemes. Pacific Legal Foundation, who brought this suit on behalf of Geraldine Tyler, is a public interest law firm that exists to support and strengthen individual rights.[115] It is very effective at achieving its mission; its attorneys have won seventeen of the nineteen United States Supreme Court cases they have

106. *See* discussion *supra* Section II.A.
107. *See* discussion *supra* Section II.A.
108. *See* discussion *supra* Section II.D.
109. *See* discussion *supra* Section II.C.
110. *Bajakajian*, 524 U.S. at 334.
111. *Id.* at 334.
112. *Id.* at 336–37.
113. *Id.* at 337.
114. *See* discussion *supra* Section II.A.
115. *About Pacific Legal Foundation*, PACIFIC LEGAL FOUND., https://pacificlegal.org/about/ (last visited Dec. 21, 2023).

appeared in.[116] Specifically, the Pacific Legal Foundation adopted the goal to "resist uncompensated takings."[117] Ms. Tyler was the perfect plaintiff to help achieve this goal; a 94-year-old grandmother who lost her home equity to the government is an extremely sympathetic plaintiff.[118]

But consider how sympathetic Geraldine Tyler really is. While it is true that she is 94-years old, there is no indication that she is not of sound mind or her health is failing. The condo was not her primary home; she moved from the condo to escape the purportedly declining neighborhood.[119] She had $61,000 worth of liens on the condo.[120] It is possible that this property would not have been easy for her to sell. By failing to pay the taxes, it became the County's responsibility to sell the condo. The liens on the condo were extinguished and became unsecured debt; although Ms. Tyler remained personally liable for the amount owed, upon her death, any amount not paid off by her estate just remains unpaid.[121]

But, even considering Ms. Tyler sympathetic, certainly not all tax debtors are. What about a slumlord who instead of repairing property chooses to not pay the taxes and have it seized by the government? He too is entitled to the surplus from the sale. If this failure to return the surplus were found to be a fine rather than a taking, the fine would be deemed excessive if it were grossly disproportional to the gravity of the offense. In this case, Ms. Tyler and the slumlord would be treated differently based on their differing levels of culpability.

B. Implications of Calling It a Taking

Minnesota, along with states having similar statutes, now must change its tax sale schemes to comply with the Supreme Court's holding.[122] Local governments claim that this decision will be

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116. *Id.*

117. *Our Property Rights Goals*, PACIFIC LEGAL FOUND., https://pacificlegal.org/property-rights/ (last visited Dec. 21, 2023).

118. *See Victory! Supreme Court Declares Home Equity Theft Unconstitutional:* Tyler v. Hennepin County, PACIFIC LEGAL FOUND., https://pacificlegal.org/case/mn_home_equity_theft/ (last visited Dec. 21, 2023).

119. *See id.*; *See also*, Tyler v. Hennepin Cnty., 598 U.S. 631, 635 (2023).

120. *Tyler*, 598 U.S. at 636 (stating "[a]ccording to the County, public records suggest that the condo may be subject to a $49,000 mortgage and a $12,000 lien for unpaid homeowners' association fees.").

121. *See id.* at 637.

122. *See* Kristi Marohn, *U.S. Supreme Court's Property Forfeiture Decision Spurs Class-Action Lawsuit in Minnesota*, MPR NEWS (July 5, 2023, 4:00 AM), https://www.mprnews.org/story/2023/07/05/us-supreme-courts-property-forfeiture-decision-spurs-classaction-lawsuit-in-minnesota (explaining that Hennepin County has continued its

devastating to their budgets.[123] The total revenue from Hennepin County tax forfeiture sales do not cover the debts owed by the former property owners plus the costs associated with selling the property.[124] Now that the County cannot retain the surplus, this cost will inevitably be passed onto taxpayers.[125]

Further, Minnesota enacted the tax-sale forfeiture scheme to encourage counties to "eliminate nuisances and dangerous conditions and to increase compliance with land use ordinances."[126] This has left counties in the position of spending money to make repairs on the property, to improve the property to attract a better sales price, to keep utilities current, and to hire real estate agents.[127] Thus, the equity belonging to the former property owner and that which actually belongs to the county is difficult to assess, and courts will be burdened with the allocation.[128] Property taxes are an essential resource in enabling local governments to provide vital services;[129] forfeiture is a necessary tool in remediating the damage caused by unpaid taxes, such as lost tax revenue, vacancy and abandonment, and lower property value for nearby properties.[130]

IV. CONCLUSION

The Supreme Court's assertion that this is in fact a taking shows its willingness—or perhaps desire—to use the takings clause as a measure to further protect individual property rights, as it did in *Cedar Point v. Hassid* in the previous sitting.[131] We are likely to see the Takings Clause used in future cases where property owner's rights have been violated. In the January 2024 sitting, the Court heard yet another takings cases, *Sheetz v. County of El Dorado,*

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tax-forfeiture sales but is not distributing the surplus until it receives further direction from the legislature).

123. *See* Abbey Machtig & Kirsti Marohn, *When a County Seizes a Home Over Taxes, Who Should Get to Eeep the Equity?*, MPR NEWS (Apr. 24, 2023, 4:00 AM), https://www.mprnews.org/story/2023/04/24/tyler-hennepin-property-forfeiture-equity.

124. *Id.*

125. *Id.*

126. Brief for Local of Amici Curiae Loc. Gov't Legal Ctr. et al. as Amici Curiae Supporting Respondents at 20–21, Tyler v. Hennepin Cnty., 598 U.S. 631 (2023) (No. 22-166) (Quoting MINN. STAT. ANN. § 282.01. subd. 4(c)).

127. *Id.*

128. *Id.* at 23.

129. *Id.* at 24.

130. *Id.* at 24–25.

131. *See* 594 S. Ct. 2063 (2021). In *Cedar Point*, the Court held that a California statute requiring agricultural employers to allow access to their property to labor organizers was a taking. *Id.*

California.[132] In Sheetz, the Court held that the Takings Clause applies to a scheme enacted by the Califiornia legislature, which requires building permit applicants to pay a traffic mitigation fee.[133] In the future, takings challenges are likely to be seen in the areas of rent control and affordable housing requirements. The Court, as well as legislatures, has various means to protect individual property rights while providing for the needs of local governments. Not everything has to be a taking.

132. Sheetz v. Cnty. of El Dorado, 300 Cal. Rptr. 3d 308 (2022), *cert. granted*, 92 U.S.L.W. 3063 (U.S. Sept. 29, 2023) (No. 22-1074).

133. *See* Sheetz v. Cnty. of El Dorado, 144 S. Ct. 893 (2024).

The Domino Effect: Discussing the Future Implications of *Students for Fair Admissions, Inc. v. Harvard*

*Marissa C. Meredith**

"Deeming race irrelevant in law does not make it so in life."
-Justice Ketanji Brown Jackson

INTRODUCTION

Since 1978, the United States Supreme Court has grappled with creating fair policies and just parameters to enable institutions of higher education to incorporate race-conscious admission policies to diversify students' educational experience.[1] The Court began this vital discussion with its landmark ruling in *Regents of the University of California v. Bakke*, where it determined not just that diversity in education was a compelling state interest that could survive strict scrutiny,[2] but also that it could not be achieved through the

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1. *See generally* Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 600 U.S. 181 (2023); Fisher v. Uni. of Tex., 579 U.S. 365 (2016); Schuette v. Coal. to Def. Affirmative Action, 572 U.S. 291 (2014); Fisher v. Uni. of Tex., 570 U.S. 297 (2013); Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003); Regents of the Uni. of Cal. v. Bakke, 438 U.S. 265 (1978).

2. *Bakke*, 438 U.S. at 314–16, 321–24.

use of a quota system or a specialized track.[3] The Court continued shaping the parameters of higher education admission policies through several other landmark cases, such as *Fisher v. the University of Texas*; *Schuette v. Coalition to Defend Affirmative Action*; *Gratz v. Bollinger*; and *Grutter v. Bollinger*, to the present with the consolidated case of *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*.[4] Although the Court's previous decisions highlighted the importance of race-conscious admissions policies to provide students with a robust educational experience, its most recent decision shifted gears—removing the foundational principles of affirmative action.

This paper argues that the Supreme Court's overruling of affirmative action policies will have a domino effect in other aspects outside of higher education policies. Specifically, because race impacts opportunities outside of education, such as the workforce, diversity initiatives may be curtailed in these areas. Part I of this paper extensively reviews the United States Supreme Court's decision in *Students for Fair Admissions v. President and Fellows of Harvard College*. Part II discusses the decision's impact on higher education admission policies, the workforce, and the domino effect that this decision will have on diversity initiatives generally.

I. STUDENTS FOR FAIR ADMISSIONS, INC. V. THE PRESIDENT AND FELLOWS OF HARVARD COLLEGE

In November of 2014, Students for Fair Admission, Inc. (SFFA),[5] a nonprofit created to end racial classification and preferences in the college admissions process, filed a § 1983 claim against both Harvard College (Harvard) and the University of North Carolina

3. *Id.*

4. *See generally Students for Fair Admissions, Inc.*, 600 U.S. 181; *Fisher*, 579 U.S. 365; *Schuette*, 572 U.S. 291; *Fisher*, 570 U.S. 297; *Gratz*, 539 U.S. 244; *Grutter*, 539 U.S. 306 (2003); *Bakke*, 438 U.S. 265.

5. Students for Fair Admissions, Inc. is a nonprofit established to end racial classification and preferences in the college admissions process. *About*, STUDENTS FOR FAIR ADMISSIONS, https://studentsforfairadmissions.org/about/ (last visited Dec. 2, 2023). The group deems the use of "racial classifications and preferences in college admissions [as] unfair, unnecessary, and unconstitutional." *Id.* Its "mission is to support and participate in litigation that [would] restore" what it deems "the original principles of [the] nation's civil rights movement," that "[a] student's race and ethnicity should not be factors that either harm or help [them] gain admission to a competitive university." *Id.* The president of the organization is Edward Blum, who happens to be the face of other organizations with the purpose to end race and ethnicity-based distinctions in society, such as the American Alliance for Equal Rights. *See, e.g.*, *id.*; *Contact Us*, THE AM. ALL. FOR EQUAL RTS., https://americanallianceforequalrights.org/contact-us/ (last visited Dec. 2, 2023).

(UNC) in the district court of their respective jurisdictions.[6] In these § 1983 actions, SFFA challenged the race-conscious admission policies of both Harvard and UNC, alleging the admissions policies violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.[7] After years of litigation in various district and federal courts, the case was brought before the United States Supreme Court, which, on June 29, 2023, rendered its decision in the case of *Students for Fair Admission, Inc. v. Harvard College*, effectively reversing affirmative action.[8] The ruling sent shockwaves through the higher education community as it essentially gutted the admissions principles that had become prevalent since the Court's ruling in *Regents of the University of California v. Bakke*.[9]

At the district court level, the SFFA alleged that Harvard's admissions procedures[10] were "racially and ethnically discriminatory

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6. *Students for Fair Admissions, Inc.*, 600 U.S. at 190–93, 197–98; Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d 580, 585 (M.D.N.C. 2021); Students for Fair Admissions v. President and Fellows of Harvard Coll., 980 F.3d 157, 165–79 (1st Cir. 2020).

7. *Students for Fair Admissions Inc.*, 600 U.S. at 190–93, 197–98; *Univ. of N.C.*, 567 F. Supp. 3d at 585; *President and Fellows of Harvard Coll.*, 980 F.3d at 165–79.

8. *Students for Fair Admissions Inc.*, 600 U.S. at 230.

9. *See* Nina Totenberg, *Supreme Court Guts Affirmative Action, Effectively Ending Race-Conscious Admissions*, NPR (June 29, 2023, 7:52 AM), https://www.npr.org/2023/06/29/1181138066/affirmative-action-supreme-court-decision; Lawrence Hurley, *Supreme Court Strikes Down College Affirmative Action Programs*, NBC NEWS (June 29, 2023, 10:14 AM), https://www.nbcnews.com/politics/supreme-court/supreme-court-strikes-affirmative-action-programs-harvard-unc-rcna66770; Piper Hudspeth Blackburn, *What the Supreme Court's Ruling on Affirmative Action Does and Does Not Do*, CNN POL. (June 29, 2023, 10:54 PM), https://www.cnn.com/2023/06/29/politics/what-affirmative-action-ruling-does-scotus/index.html; Kira Alfonseca, *Supreme Court Affirmative Action Decision Could Impact Racial Equity in Higher Ed*, ABC NEWS (June 29, 2023, 10:47 AM), https://abcnews.go.com/US/experts-scotus-affirmative-action-decision-highlights-diversity-higher/story?id=99942281; Sarah Hinger, *Moving Beyond the Supreme Court's Affirmative Action Rulings*, ACLU (July 12, 2023), https://www.aclu.org/news/racial-justice/moving-beyond-the-supreme-courts-affirmative-action-rulings.

10. Because the admission policies were the basis for the assertions by SFFA, the courts involved in the lawsuit did an extensive review of Harvard's and UNC's admissions guidelines at each stage of the lawsuit. *See* Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 397 F. Supp. 3d 126, 133–47 (D. Mass. 2019); *President and Fellows of Harvard Coll.*, 980 F.3d at 165–79; *Students for Fair Admissions*, 600 U.S. at 192–97. When reviewing Harvard's admissions procedures, the courts found that Harvard engaged in an extensive process to narrow its approximate 35,000 or more applicant pool down to an incoming class of approximately 1600 students annually. *President and Fellows of Harvard Coll.*, 980 F.3d at 165. Because of the competitive nature of entry into Harvard, the institution engaged in a six-part admissions process. *Id.* The six-part admissions process included:

> (1) Harvard's pre-application recruitment efforts; (2) students' submission of applications; (3) Harvard's 'first read' of application materials; (4) admissions officer and alumni interviews; (5) subcommittee meetings of admissions officers to recommend applicants to the full admissions committee; and (6) full admissions committee meetings to make and communicate final decisions to applicants.

. . . [which] violat[ed] . . . Title VI of the Civil Rights Act of 1964 [(Title VI)] and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution."[11] This case took a slightly different stance than many affirmative action cases as it alleged that Harvard favored all other minority applicants over the school's Asian American applicants.[12] Specifically, the SFFA made four claims in support of its allegations that the race-conscious admission program at Harvard was not in compliance with precedent.[13] First, the SFFA alleged that the admissions policies of Harvard violated the Equal Protection Clause as the admissions process did not use race as a "plus factor" as allowed by precedent, but rather Harvard engaged in "racial balancing.[14]"[15] Second, it alleged that race was used for more than a "plus factor" in the admission process.[16] Third, it alleged that the policies employed by Harvard intentionally discriminated against Asian American applicants, which caused a significant number of qualified Asian American applicants to be denied admission to the institution.[17] Lastly, the SFFA asserted that there were race-neutral alternatives that the

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Id. During the review of the lower court's decision by the United States Supreme Court, the Court focused on Harvard's admissions process beginning at the "first read" stage. *Students for Fair Admissions, Inc.*, 600 U.S. at 194. The Court also did a thorough review of UNC's admissions program. *Id.* at 195–97. Although entry to UNC is just as competitive as Harvard, having close to 43,500 applicants annually and an incoming class of approximately 4,200 students, UNC's process is not as extensive as Harvard's. *See generally id.* at 195. The admissions process at UNC begins with an initial review of applicants by one of their admissions officers. *Id.* Among several factors, including academics, test results (SAT/ACT), extracurricular activities, etc., the initial reviewers are required to consider the race/ethnicity of an applicant. *Id.* at 195–96. Like Harvard admissions officers, the UNC reviewers can give applicants a plus (boost) based on their race. *Id.* at 196. It was noted by the Court during the period of time at issue when reviewed minority applicants from underrepresented backgrounds scored higher than white and Asian-American in the personal categories but were rated lower in most other categories. *Id.* The initial reviewer provides a recommendation regarding admissions of the individual to the larger review committee ("school group review"). *Id.* Based on the feedback of the initial reviewer and their own review of the student's files, the larger review committee may accept or reject the initial reviewer's recommendation. *Id.*

11. Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 261 F. Supp. 3d 99, 102 (D. Mass. 2017).

12. *President and Fellows of Harvard Coll.*, 980 F.3d at 163.

13. *Id.*

14. Racial balancing is a concept usually used in education that involves ensuring that the racial demographic of a school mirrors that of the community as a whole. *See generally* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No.1, 551 U.S. 701 (2007); Grover J. Whitehurst, et al., *60 Years After* Brown v. Board of Education*, How Racially Balanced Are America's Public Schools*, BROOKINGS (Nov. 20, 2017), https://www.brookings.edu/articles/60-years-after-brown-v-board-of-education-how-racially-balanced-are-americas-public-schools/.

15. *President and Fellows of Harvard Coll.*, 980 F.3d at 163.

16. *Id.*

17. *Id.*

admissions department could deploy to provide the institution with a diverse campus.[18]

Although Harvard admitted in its response that it does consider race in its admissions process, it argued that it is just one of many factors considered throughout the process.[19] Furthermore, it contended that its practices complied with "applicable law."[20]

Similarly, in its case against UNC, the SFFA again alleged that using a race-conscious admissions process violated the Equal Protection Clause of the Fourteenth Amendment and Title VI.[21] In support of its allegation, the SFFA claimed that UNC "intentionally discriminated" against certain members of its organization based on race, color, or ethnicity by:

> (1) employing an undergraduate admissions policy that does not merely use race as a 'plus' factor in admissions decisions [to] achieve student body diversity; (2) employing racial preferences in undergraduate admissions where there are available race-neutral alternatives capable of achieving student body diversity; and (3) employing an undergraduate admissions policy that uses race as a factor in admissions.[22]

UNC contested these allegations on grounds similar to those of Harvard.[23] First, it argued that its admissions would pass strict scrutiny as "the University[ ] [had a] compelling interest in the educational benefits that flow from a diverse student body."[24] Second, UNC argued that the application process employed by its admissions department was "consistent with Supreme Court guidance [as it] engage[d] in an individualized, holistic review of each application for admission, considering race flexibly, as only one factor . . . ."[25] Lastly, it argued that it has, in good faith, considered race-neutral alternatives, but has found them ineffective and uneconomical in achieving its diversity goals.[26]

Based on a thorough review of the admissions processes and different diversity reports from the institutions and third parties, both

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18. *Id.*
19. Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 397 F. Supp. 3d 126, 131–32 (D. Mass. 2019).
20. *Id.*
21. Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d 580, 585–86 (M.D.N.C. 2021).
22. *Id.* at 586.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*

the District Court of Massachusetts and the Middle District Court of North Carolina found that Harvard and UNC, respectively, did not violate the Equal Protection Clause.[27] The SFFA appealed the decision against Harvard, and the First Circuit affirmed the district court's decision.[28] It also appealed the district court's decision in the case against UNC; however, unconventionally, the SFFA petitioned the United States Supreme Court to hear the appeal before the U.S. Court of Appeals for the Fourth Circuit rendered judgment.[29] In January 2022, the United States Supreme Court granted *certiorari* and consolidated the two cases.[30]

Although at the district and circuit court level, the SFFA argued that the admissions policies of Harvard and UNC violated Title VI and the Equal Protection Clause, the Supreme Court of the United States focused *solely* on the issue of whether the admissions practices of the institutions violated the Equal Protection Clause.[31] In its opinion, the Court began by foreshadowing its decision on the issue by discussing the purpose behind establishing the Equal Protection Clause.[32] It noted that the Equal Protection Clause was designed to ensure that all citizens were treated equally under the law and that there were to be no distinctions based on race or color.[33] Thus, the Court highlighted that for this reason, any exceptions to the Equal Protection Clause must pass strict scrutiny—meaning the government must demonstrate a compelling interest in utilizing racial classifications and that its use of racial classifications was narrowly tailored to achieve the interest.[34] The Court recognized that its "acceptance of race-based state action has been rare" because, as it reasoned, "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."[35]

The Court then began a thorough review of its past decisions that served as the guidelines for using race-conscious admissions

27. *Id.* at 666; Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 397 F. Supp. 3d 126, 203 (D. Mass. 2019).

28. Students for Fair Admissions v. President and Fellows of Harvard Coll., 980 F.3d 157, 204 (1st Cir. 2020).

29. Petition for Writ of Certiorari Before Judgment at *10, Students for Fair Admissions, Inc. v. Univ. of N.C., 2021 WL 5343495 (U.S. 2021).

30. Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 600 U.S. 181, 198 (2023).

31. *Id.* at 190–91.

32. *Id.* at 201–08.

33. *Id.*

34. *Id.* at 206–07.

35. *Id.* at 208 (quoting Rice v. Cayento, 528 U.S. 495, 517 (2000)).

policies.[36] First, the Court began its review with *Bakke*.[37] In *Bakke*, the plaintiff was denied admission to the University of California, Davis, medical school.[38] The plaintiff alleged that despite having a higher grade point average and MCAT score than some minority-admitted students, he was denied admission two years in a row because of the admissions practices of the medical school.[39] Therefore, the plaintiff sued the medical school, alleging that its admissions practices violated the Equal Protection Clause.[40]

At the time, the medical school's admissions practice was to hold 16 of its 100 seats for applicants who identified as part of certain minority groups.[41] Additionally, applications seeking one of the 16 held seats were reviewed under a different admission track than those in the main admission pool.[42] In support of its admission practices, the defendant provided four rationales and goals of its policy: (1) "reducing the historic deficit of traditionally disfavored minorities in medical schools;" (2) "remedying . . . the effects of 'societal discrimination;'" (3) "increase[ing] the number of doctors working in underserved areas;" and (4) "obtaining the educational benefits that flow from a racially diverse student body."[43]

The Court only found the defendant's last rationale compelling to allow race to be utilized in the admissions process.[44] However, the Court determined that although it was compelling, the means by which the school created its diverse student body was not permissible.[45] The Court stated that a university could not use a quota system to reserve a specific number or percentage of seats for a particular racial group.[46] Furthermore, it could not create a different admission track for a certain number of applicants of a particular racial background.[47] The Court emphasized that the use of race must be limited; therefore, it could only be used as a plus factor for an applicant as other aspects of an applicant's file could be used to demonstrate the diversity contribution of that potential student.[48]

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36. *Id.*
37. *Id.*
38. *Id.* (citing Regents of the Uni. of Cal. v. Bakke, 438 U.S. 265, 276–77 (1978)).
39. *Id.*
40. *Id.*
41. *Id.* at 208 (citing *Bakke*, 438 U.S. at 272–275).
42. *Id.*
43. *Id.* at 208–09 (citing *Bakke*, 438 U.S. at 306–07, 310–12).
44. *Id.* at 209.
45. *Id.*
46. *Id.* (citing *Bakke*, 438 U.S. at 315).
47. *Id.*
48. *Id.* at 209–10 (citing *Bakke*, 438 U.S. at 317).

To illustrate this point, Justice Powell utilized Harvard's then-existing admission program as described by them in its *amicus* brief.[49] As described, Harvard advocated for the use of race in the admissions process because, in its opinion, "the race of an applicant may tip the balance in favor just as [the] geographic origin or a life [experience] may tip the balance in other candidates' cases."[50] To demonstrate this point further, Harvard noted that "[a] farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer."[51] In his opinion, Justice Powell believed in this more holistic approach to using race in the admissions process.

Because there was no majority opinion in *Bakke*, it led to an inconsistent application of the ruling.[52] Due to this, the United States Supreme Court addressed the issue again in *Grutter v. Bollinger*.[53] Based on Justice Powell's opinion in *Bakke*, the Court ruled similarly that achieving a diverse student body was "a compelling state interest that [could] justify the use of race in university admissions."[54] It also affirmed the limits imposed by Justice Powell in *Bakke* when it came to using race in admissions programming.[55] Particularly, in using race-conscious admission programs, institutions could not (1) establish quotas for members of a specific race; (2) create separate admissions tracks that would "insulate . . . [a] certain racial or ethnic group[ ] from the competition of admission;" nor (3) try to obtain a "specific percentage of a particular group merely because of its race or ethnic background."[56] The Court explained that these requirements were necessary to safeguard against two dangers that could arise through the use of racial classification—using race as a stereotype or as a negative.[57]

Although the Court in *Grutter* affirmed the principles established in Bakke, the Court was hesitant about using racial classifications in admissions programs and in general.[58] Because of this, the Court imposed an additional limit on institutions of higher education that decided to use race in their admissions procedure. Specifically, it

49. *Id.* at 210 (citing *Bakke*, 438 U.S. at 316).
50. *Id.* (quoting *Bakke*, 438 U.S. at 316).
51. *Id.* (quoting *Bakke*, 438 U.S. at 316).
52. *Id.* at 211.
53. *Id. (*citing Grutter v. Bollinger, 539 U.S. 306 (2003)).
54. *Id. (*citing *Grutter*, 539 U.S. at 325).
55. *Id.*
56. *Id.* (citing *Grutter*, 539 U.S. at 329–30, 334).
57. *Id.* at 211–212 (citing *Grutter*, 539 U.S. at 333, 341).
58. *Id.* at 212.

required that race-conscious admissions programs must have a "reasonable durational limit[ ]."[59] The Court reasoned in *Grutter* that "it [had] been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. . . . We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[60]

With the principles established in *Bakke* and *Grutter* in mind, the Court turned to the case before it and determined that Harvard's and UNC's admissions programs failed to comply with applicable law.[61] First, the Court stated that the admission programs at the institutions failed strict scrutiny because they were not "sufficiently measurable to permit judicial [review]."[62] Furthermore, the Court noted that Harvard and UNC failed to demonstrate a correlation between the admissions practices and their goals.[63]

Harvard and UNC provided the Court with educational benefits achieved using race-conscious policies. Some of the benefits that Harvard noted were: (1) to "train[ ] future leaders;" (2) "prepar[e] graduates to adapt to an increasingly pluralistic society;" and (3) "better educat[e] its students through diversity."[64] Similarly, UNC mentioned that its students would benefit from: (1) a "robust exchange of ideas;" (2) "broadening and refining [their] understanding;" and (3) "enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes."[65] Despite the Court noting that these interests were "commendable," it stated they failed strict scrutiny because they could not sufficiently measure whether these goals were achieved and whether the use of race would assist in achieving them.[66] Additionally, the Court found that while both institutions worked to ensure that there was not a year where their incoming class failed to have individuals from underrepresented classes, the Court did not understand how categorizing the students by their racial classification and then making admissions decisions based on them assisted the institutions in meeting the educational benefits they outlined.[67]

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59. *Id.* (citing *Grutter*, 539 U.S. at 342).
60. *Id.* at 213 (quoting *Grutter*, 539 U.S. at 343).
61. *Id.* at 214.
62. *Id.*
63. *Id.* at 215–217.
64. *Id.* at 214.
65. *Id.*
66. *Id.*
67. *Id.* at 216.

Second, the Court found that the admissions practice of both institutions failed because the practices allowed for race to be used as a negative and a stereotype.[68] It reasoned that based on the findings of the First Circuit, Harvard's consideration of race has led to, at minimum, "an 11.1% decrease in the number of Asian-American [applicants being] admitted."[69] Moreover, based on the institutions' responses, if they did not consider race in the admissions process, the overall racial demographic of their incoming classes would change drastically.[70] Taking these things into account, the Court found that the only conclusion that could be found is that race was being used as a negative in the admissions process.[71] Additionally, the Court determined that the admissions programs were using race as a stereotype because their practices assumed that there was an educational benefit in an applicant to the diversity of their campuses solely because of the applicant's race.[72] Again, the Court emphasized the institutions' statements, specifically that, in their view, "race in itself 'says [something] about who you are.'"[73] The Court rejected this argument as it demonstrated stereotyping and ran contrary to the underlying principles of the Equal Protection clause.[74]

Lastly, the Court stated that the institutions' admissions policies did not comply with the limitations established in *Grutter*.[75] Particularly, the race-conscious admissions programs at the institutions did not have a "reasonable durational limit[ ]."[76] The institutions provided the Court with four reasonings as to when they believed the use of race would end.[77] First, the institutions stated that the need for the use of race would end when "there [was] meaningful representation."[78] Second, the use of race would end when "students[, in their absence] receive[d] the educational benefits of diversity."[79] Third, alluding to the twenty-five years mentioned in *Grutter*, the institutions stated that their race-conscious admissions policies should be allowed for at least five more years.[80] Finally, the

68. *Id.* at 218.
69. *Id.*
70. *Id.* at 219.
71. *Id.*
72. *Id.* at 219–20.
73. *Id.* at 220.
74. *Id.* at 219–20.
75. *Id.* at 221.
76. *Id.* at 212, 221.
77. *Id.* at 221–25.
78. *Id.* at 221.
79. *Id.* at 224.
80. *Id.*

institutions argued that their use of race should not have to end because "they frequently review them to determine whether they remain necessary."[81]

The Court found none of these reasonings compelling.[82] For the first two reasons provided by the institutions, the Court noted that they were not measurable.[83] Furthermore, even if they were measurable, the processes employed by the institutions ensured that the use of race would not end.[84] It contended that because no precise number or percentage was provided for "meaningful representation and diversity," it was unknown when this would occur, causing the end of the need for race-based admissions.[85] In furtherance of this assertion, the Court highlighted that both institutions admitted to ensuring that the racial demographics of one class were similar to the previous; therefore, it was unclear how continuing to use race would assist the institutions in meeting their educational goals.[86] For the last two reasons provided by the institutions, the Court found them to be arbitrary.[87]

Ultimately, based on the reasons as mentioned above, the Court found that the admission policies of Harvard and UNC did not comply with the guarantees of the Equal Protection Clause.[88] The Court stopped short of explicitly overruling its ruling in *Grutter*, but it did limit how race could be considered in the admissions process in the future.[89] Instead of using race as a standalone factor in the admissions process, the Court has made it permissible to be considered only if the applicant "discuss[es] . . . how race [may have] affected his or her life, be it through discrimination, inspiration, or otherwise."[90] The Court emphasized that this use of race was acceptable because "the student [would] be treated based on his or her experiences as an individual—not on the basis of race."[91]

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81. *Id.* at 225.
82. *Id.* at 221–25.
83. *Id.* at 221–24.
84. *Id.* at 223–24.
85. *Id.* at 221.
86. *Id.* at 221–24.
87. *Id.* at 225.
88. *Id.* at 230.
89. *Id.*
90. *Id.*
91. *Id.* at 231.

II. FUTURE IMPLICATIONS OF *SFFA V. HARVARD* DECISION

Although many scholars have discussed how the landmark ruling in *SFFA v. Harvard* will affect higher education,[92] the impact of this decision will extend further.[93] It will have a domino effect in other sectors of our lives that the Court did not consider at the time of its ruling.

A. Undergraduate, Graduate, and Professional Schools May Have Admissions Impacts

Before the Supreme Court's decision in June of 2023, nine states, including Arizona, California, Florida, Idaho, Michigan, Nebraska, New Hampshire, Oklahoma, and Washington, had already banned the use of race in public institutions' undergraduate admissions programs.[94] Public institutions within these states have reported that it has been challenging to maintain the racial diversity of their campuses, with many noting that there was a significant decline in the number of underrepresented minorities enrolling immediately after the ban.[95]

To attempt to sustain a diverse campus despite the ban, many institutions within these states began implementing creative diversity initiatives.[96] Some of these creative initiatives included

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92. *See generally* David Hinojosa, *The Absurd Reach of a "Colorblind" Constitution*, 72 AM. U. L. REV. 1775 (2023); Margaret Kruzner, *Redlining Reimagined: Exploring "Race-Neutral Alternatives" in the Likely Wake of Affirmative Action*, 18 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 323 (2023); Uma M. Jayakumar et al., *Race and Privilege Misunderstood: Athletics and Selective College Admissions in (and Beyond) the Supreme Court Affirmative Action Cases*, 70 UCLA L. REV. DISCOURSE 230 (2023).

93. *See generally* Rana L. Freeman, *Admissions Denied: The Effects on Corporate America Jobs if Race Is Excluded as a Factor in University Admissions*, 50 S. U. L. REV. 111 (2023).

94. *See* Mark C. Long & Nicole A. Bateman, *Long-Run Changes in Underrepresentation After Affirmative Action Bans in Public Universities*, 42 ED. EVAL. & POL'Y ANALYSIS 188, 188–91 (2020); Marissa Meredith, *Future Implications of* SFFA v. Harvard*: Potential Curtailing of Diverse Environments*, AM. BAR ASS'N (July 12, 2023), https://www.americanbar.org/groups/diversity/DiversityCommission/publications/the-innovator/vol7-issue2/feature2/; Edwin Rios, *'A Cautionary Tale': Colleges in States with Affirmative Action Bans Report Racial Disparities*, THE GUARDIAN (June 30, 2023, 6:00 PM), https://www.theguardian.com/law/2023/jun/30/affirmative-action-ban-state-colleges-racial-disparities-supreme-court; Stephanie Saul, *Affirmative Action Was Banned at Two Top Universities. They Say They Need It.*, N.Y. TIMES (Oct. 31, 2022), https://www.nytimes.com/2022/08/26/us/affirmative-action-admissions-supreme-court.html; Stephanie Saul, *9 States Have Banned Affirmative Action. Here's What That Looks Like*, N.Y. TIMES (Oct. 31, 2022), https://www.nytimes.com/2022/10/31/us/politics/affirmative-action-ban-states.html.

95. Long & Bateman, *supra* note 94, at 188; Meredith, *supra* note 94; Rios, *supra* note 94; *Affirmative Action Was Banned at Two Top Universities. They Say They Need It.*, *supra* note 94; 9 *States Have Banned Affirmative Action. Here's What That Looks Like*, *supra* note 94.

96. *See* Long & Bateman, *supra* note 94, at 190.

considering socio-economic factors and dropping legacy status in their admissions process, increasing diversity outreach programming, and increasing financial aid awarded based on need, such as the Blue and Gold opportunity offered by the University of California system.[97] Another prevalent plan to increase underrepresented minority enrollment was automatically admitting top students from the local high schools within the state.[98] For example, in Texas in the 1990s, they implemented a plan to automatically admit the top 10% of high school graduates from each high school within the state.[99] Despite these different initiatives, it has still been challenging for some institutions to obtain the diversity they achieved before the ban.[100]

Based on the outcomes experienced by these states, it is apparent that it will take more than mere outreach for some higher education institutions to maintain diverse campuses. However, the lack of diversity will not merely impact the undergraduate level. Undergraduate campuses are the pipeline for graduate and professional programs and the workforce. Therefore, if the undergraduate campus is not diverse, the pool of candidates in other areas is limited.

B. Lawsuits Contesting Diversity Initiatives

Outside of higher education, the Court's decision has spurred lawsuits that further challenge diversity in other areas of society.[101] Individuals and non-profits similar to the Students for Fair Admissions, Inc. have filed lawsuits to contest diversity initiatives in corporate America on several fronts. These attacks on diversity may have a chilling effect on the well-intentioned efforts of corporations and individuals to assist communities of color and diversify

97. *Id.* at 190–91.
98. *Id.* at 190.
99. *Id.*
100. When looking at the data submitted by California institutions, you will see that despite spending approximately $500 million on outreach and changing its admissions approach to consider factors outside of the GPA and test scores, the number of underrepresented minorities enrolled does not reflect the number of minorities graduating from local institutions. *See* Rios, *supra* note 94; Long & Bateman, *supra* note 94, at 191–204. The University of Michigan has had a similar experience to that of the public institutions in the UC system, experiencing significant drops in students enrolled representing Black and Indigenous Americans. *See* Rios, *supra* note 94.
101. *See* Jessica Guynn, *DEI Under Siege: Why More Businesses Are Being Accused of 'Reverse Discrimination'*, USA TODAY (Dec. 20, 2023, 11:07 AM), https://www.usatoday.com/story/money/careers/2023/12/20/dei-reverse-discrimination-lawsuits-increase-woke/71923487007/.

professional industries, such as medical and legal, whose numbers do not represent the community they serve.[102]

1. American Alliance for Equal Rights v. Fearless Fund Management, LLC

In August of 2023, shortly after the ruling in June, the American Alliance for Equal Rights (AAER)[103] filed a lawsuit against a black-owned venture capital firm called Fearless Fund.[104] The Fearless Fund "invests in women of color led businesses seeking" financing.[105] Its mission is to "bridge the gap in venture capital funding for women of color founders building scalable, growth aggressive companies."[106] Aligned with its mission, the Fearless Fund established a grant contest to award $20,000 grants to Black-women-owned small businesses.[107] To compete for the grant, an individual must be a black woman who owns or, in conjunction with other black women, owns a 51% interest in her business.[108]

The lawsuit filed by the AAER challenges the Fearless Fund's contest and argues that its limit to access to the competition to members of a certain race violates Section 1981 of the Civil Rights Act of 1866 (The Act).[109] It sought a declaratory judgment asserting that the contest violated the Act and injunctive relief to stop the Fearless Fund from disbursing funds or continuing the competition.[110] Although the AAER's preliminary injunction was denied initially,[111] it was later granted on appeal.[112]

2. Internship Programming

Outside of challenging the legality of private sector funding organizations, the AAER has also filed lawsuits challenging diversity

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102. *See* Gregory Curfman, Bakke *Redux—Affirmative Action and Physician Diversity in Peril*, 50 J. L. MED. & ETHICS 619 (2022).

103. The AAER is run by its president, Edward Blum, who also filed the lawsuit by the SFFA against Harvard and UNC. *See generally Contact Us*, *supra* note 5.

104. *See About*, FEARLESS FUND, https://www.fearless.fund/about (last visited Feb. 2, 2024); Am. All. for Equal Rts. v. Fearless Fund Mgmt., LLC, No. 1:23-CV-3424-TWT, 2023 U.S. Dist. LEXIS 172392, at *3 (N.D. Ga. Sept. 27, 2023).

105. *See About*, *supra* note 104.

106. *Id.*

107. *Am. All. for Equal Rights*, 2023 U.S. Dist. LEXIS 172392, at *3–4.

108. *Id.* at *4.

109. *Id.* at *5.

110. *Id.*

111. *Id.* at *26–27.

112. Am. All. for Equal Rts. v. Fearless Fund Mgmt., LLC, No. 23-13138, 2023 U.S. App. LEXIS 26854, at *1–2 (11th Cir. Sept. 30, 2023).

fellowships.[113] Specifically, the organization sued two large law firms, Perkins Coie and Morrison Foerster, in Texas and Florida, respectively.[114] The two firms' diversity fellowships were specifically designed to offer law students from underrepresented groups a means to obtain an internship within their law firm.[115] However, instead of contesting the lawsuit, the law firms opened their fellowship to all in response.[116]

This has been the story of many organizations with internships, fellowships, financial aid, or other opportunities designed specifically for underrepresented groups. They are now faced with two choices: open these opportunities to all or face legal action.

CONCLUSION

In conclusion, despite the Supreme Court's colorblind ruling in *Students for Fair Admissions, Inc. v. Harvard*, the aftermath will impact initiatives designed to assist people and communities of color. From obtaining a college education to funding start-ups, the ruling of the Court has led to an assault on diversity initiatives throughout different sectors of our society. In order to continue to assist underrepresented communities, champions of DEI will have to find creative and indirect means to continue to their work.

113. *See generally* Court Docket, Am. All. for Equal Rts. v. Morrison & Foerster LLP, No. 1:23-cv-23189 (S.D. Fla. filed Aug. 22, 2023); Court Docket, Am. All. for Equal Rts. v. Perkins Coie LLP, No. 3:23-cv-01877 (N.D. Tex. filed Aug 22, 2023); Taylor Telford, *Law Firm Opens Diversity Fellowship to All Students After Lawsuit*, THE WASH. POST (Sept. 6, 2023, 2:20 PM), https://www.washingtonpost.com/business/2023/09/06/morrison-foerster-diversity-lawsuit-white-applicants/.

114. Telford, *supra* note 113.

115. *Id.*

116. Kathryn Rubino, *Biglaw Caves: Morrison Foerster Changes Diversity Fellowship Criteria Following Lawsuit*, ABOVE THE LAW (Sept. 7, 2023, 11:14 AM), https://abovethelaw.com/2023/09/biglaw-caves-morrison-foerster-changes-diversity-fellowship-criteria-following-lawsuit/; Telford, *supra* note 113.

Moore News About the Independent State Legislature Doctrine

*Bruce Ledewitz**

INTRODUCTION

The big news about the Independent State Legislature Doctrine (Doctrine) is that, despite the expectations of most observers, including me,[1] the Supreme Court did not fully adopt the Doctrine in *Moore v. Harper*.[2] The majority opinion, written by Chief Justice Roberts, and joined by Justices Sotomayor, Kagan, Kavanaugh, Barrett, and Jackson, held that state courts may apply their state constitutions to state legislation affecting federal elections in the course of what the opinion called the "ordinary exercise of state judicial review."[3]

It is equally clear, however, that the Court in *Moore* federalized state constitutional decision-making in the context of federal elections to an extent. Thus, the Doctrine, though wounded and

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1. See Bruce Ledewitz, An Alternative to the Independent State Legislature Doctrine, 61 DUQ. L. REV. 114, 114 (2023).

2. 600 U.S. 1 (2023).

3. *Id.* at 23.

diminished, is not dead. The state of the Doctrine after *Moore*, and the context and nature of its future use, are the subjects of this paper.

The political stakes were high in *Moore*. If the Doctrine had been adopted in full, political gerrymandering in congressional districting, already non-justiciable in federal court,[4] would have been beyond the reach of state constitutional review as well. In addition, other kinds of state legislative initiatives concerning voting, from voter ID laws to ballot counting laws, would have been beyond the reach of state judicial review. It is fair to say that if the Doctrine had been adopted in full, the potential for partisan abuse by state legislatures in federal elections would have been increased.

On the other hand, had the Doctrine been rejected in full, there would have been no restriction on the potential partisan abuses by state court judges in federal election decision-making short of extraordinary measures, such as impeachment or jurisdiction restrictions imposed by state legislatures. Had the Doctrine been rejected in full, the potential for state constitutional crises would have been increased.

Perhaps by recognizing and adopting the Doctrine in part, the Court in *Moore* got the matter just right. That cannot be asserted with confidence, however, because, as this paper demonstrates below, *Moore* ends up as a skeleton-like hint of what federal court review of state court decision-making in the context of federal elections may look like in the future. Hopefully, this paper fills in that skeleton as fully as possible.

Part I of this article examines the Doctrine.[5] Part II explores the way in which the Doctrine, though not fully adopted in *Moore*, still constrains state court decision-making in the context of federal elections.[6] Part III analyzes why the Doctrine was not adopted fully in *Moore*.[7] Part IV examines what the federal issue is that remains in state federal election cases.[8] Part V explains by what standard those cases are to be decided.[9] And, perhaps most importantly, Part VI examines which courts will be deciding these issues.[10]

4. Rucho v. Common Cause, 139 S. Ct. 2484, 2506–07 (2019).
5. *See infra notes* 11–22 and accompanying text.
6. *See infra notes* 23–32 and accompanying text.
7. *See infra* notes 33–44 and accompanying text.
8. *See infra* notes 45–49 and accompanying text.
9. *See infra* notes 50–71 and accompanying text.
10. *See infra* notes 72–80 and accompanying text.

I. WHAT IS THE DOCTRINE?

The Elections Clause of the U.S. Constitution provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof."[11] Although not at issue in *Moore*, Article II similarly vests in "the Legislature" the power to prescribe how presidential electors are appointed.[12] So, whatever the Doctrine means, it applies to Presidential elections as well as elections for U.S. Representatives and Senators.

Although there is no one definition of the Doctrine, it may be understood as the assertion that since the power to make laws governing federal elections is given by the federal Constitution, legislation enacted pursuant to this power cannot be restricted by state law, including provisions in a state's constitution. The Doctrine may be understood as asserting that "[r]ather than delegating power to regulate federal elections to each state as an entity, the U.S. Constitution confers it specifically upon each state's legislature."[13]

In *Moore*, plaintiffs challenged the North Carolina congressional map in state court as a partisan gerrymander invalid under the North Carolina Constitution.[14] The North Carolina Supreme Court reversed the holding of a lower court that partisan gerrymandering was not a justiciable issue, and instead held that this partisan gerrymander violated the "free elections" Clause of the North Carolina Constitution,[15] as well as other provisions, and enjoined use of the map. The court remanded the case for selection of a new map and subsequently affirmed the lower state court decision to draw a new congressional district map itself.[16]

The defendants, essentially representatives of the two Houses of the state legislature, filed for a stay of the North Carolina Supreme Court's decision, which was denied, and review of the decision, which was granted. As Chief Justice Roberts posed the issue of the Doctrine, the defendants argued that when a state legislature acted under the authority of the Elections Clause, it did so "free from restrictions imposed under state law."[17]

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11. U.S. CONST. art. I, § 4, cl. 1. The Clause goes on to specify Congress's power to review actions taken by state legislatures pursuant to federal elections. *Id.*
12. *Id.* art. II, § 1, cl. 2.
13. Michael T. Morley, *The Independent State Legislature Doctrine*, 90 FORDHAM L. REV. 501, 503 (2021).
14. 600 U.S. at 7–8.
15. *Id.* at 8–9. *See also* N.C. CONST. art. I, § 10: "All elections shall be free."
16. 600 U.S. at 12.
17. *Id.*

That formulation—that in federal election cases, a state legislature operates freely from the restrictions of state law, including state constitutional provisions—may be said to be a classic statement of the Doctrine. But the Doctrine is not always defended in such absolute terms. Illustrating the Doctrine's slipperiness and inexactness, the defendants in *Moore* did not actually argue that a state legislature should be treated as free from all state court review under a state's constitution, but only from review under "vague" provisions like the Free Elections Clause.[18]

The problem the defendants in *Moore* faced in defending the Doctrine in full is that state constitutions often specifically prescribe aspects of election law generally. Since federal elections are held at the same time as state elections, it would be awkward, to say the least, to have different standards and rules for the federal part of an election as opposed to the state part. Consider what would happen, for example, if a state court ruled that a state mail-in balloting law violated the state constitution[19] but could not apply that holding to the elections of U.S. Representatives, Senators, and Presidents. Unless the state legislature amended the mail-in ballot law in response to the ruling, there would have to be a mail-in ballot just for federal offices, and voters who utilized that option would have to have a special in-person ballot just for state and local offices. Obviously, this scenario would prove hopelessly confusing and expensive. This may be one reason the defendants were willing to limit the application of the Doctrine to "vague" state constitutional provisions.

Another difficulty for the defendants in promoting the Doctrine in full is that state constitutions constitute state government and prescribe how any legislation is adopted. Even proponents of the Doctrine recognize that this aspect of state judicial review cannot really be dispensed with.[20] This is why Justice Thomas argued in dissent in *Moore*, joined on this point by Justice Gorsuch,[21] that state constitutions "may specify *who* constitute 'the Legislature' and prescribe *how* legislative power is exercised"—and thus some state constitutional claims can be brought against state federal

18. *See* Ledewitz, *supra* note 1, at 115.

19. This was the subject of the *McLinko* litigation in Pennsylvania, *see infra* note 62 and accompanying text.

20. *See* Morley, *supra* note 13, at 541 ("Historically, the independent state legislature doctrine was not applied to exempt state laws governing federal elections from the ordinary legislative process.").

21. 600 U.S. at 40 (Thomas, J., dissenting). Justice Alito joined the Thomas dissent on the mootness issue only. *Id.* at 40–55.

election legislation—but "they cannot control *what* substantive laws can be made for federal elections."[22]

Thus, for Justice Thomas, it is not the vagueness of the Free Elections Clause that renders it inappropriate as a basis to strike down state election law. Rather, the problem is that the Clause imposes a substantive limit on the choices the state legislature may make in regard to federal elections, as opposed to state constitutional provisions regulating the legislative process or defining where the legislative authority to write election law resides.

This would mean, for example, that if a state had a constitutional provision that legislation must contain only one subject, Thomas would agree that a state election law could be challenged in state court on the ground that the bill in question contained more than one subject. Thomas wanted a more robust version of the Doctrine to be adopted than did the majority in *Moore*, but even he did not defend the Doctrine in full.

As will become clear below, although the specific application of the Doctrine was denied in *Moore*, and thus the action of the North Carolina Supreme Court enforcing the Free Elections Clause was not struck down, the Doctrine was not rejected in full.

II. Does the Doctrine Still Constrain State Judicial Decision-Making?

The answer to that question is clearly yes. To paraphrase Mark Twain, the reports of the Doctrine's demise are greatly exaggerated.[23]

Roberts's majority opinion begins with the history of state court judicial review of actions by state legislatures under state constitutions and then argues that the Elections Clause does not create an exception to that practice. Roberts concludes that "state legislatures remain bound by state constitutional restraints when exercising authority under the Elections Clause."[24]

If the opinion had stopped at that point, the Doctrine would indeed be dead. Instead, Roberts added in Section V that state courts, nevertheless, do not have "free rein" and must not "evade federal

22. *Id.* at 60.

23. *Mark Twain is Dead at 74*, N.Y. Times (Apr. 22, 1910), https://www.nytimes.com/1910/04/22/archives/mark-twain-is-dead-at-74-end-comes-peacefully-at-his-new-england.html. When a newspaper prematurely published news of Twain's death, Twain replied, "The report of my death is greatly exaggerated." *Id.*

24. 600 U.S. at 32.

law,"[25] citing among other areas, federal cases in which novel interpretations of state law have been rejected under the adequate and independent state ground doctrine.[26]

Citation to this line of cases came as no surprise—prior to the decision, I had suggested this as an alternative to the full Doctrine myself.[27] But if state legislatures were really entirely subject to state constitutional limits in legislating election law for federal elections, there would be no federal interest to vindicate. Violation of a state constitution is purely a state law issue. And a bad state court decision, even an unreasonable one, does not transform a state law issue into a federal one. Unreasonable judicial decisions on matters of state law are state law issues only and, generally speaking, may not be reviewed by the Supreme Court.

The only reason that there is any federal issue present when a state court interprets its state constitution in terms of state election law in a federal election is that, as Roberts conceded, the Elections Clause names the "Legislature" and not state courts as the appropriate policy maker in regulating federal elections.[28] If a state court is substituting its own policy—or worse, partisan—preferences for those of the state legislature, it transgresses that federal interest.

But, of course, this means that the heart of the Doctrine was actually upheld in *Moore*. State constitutional challenges to state election law governing federal elections can be heard by state courts, but there is a federal constraint on the extent to which those courts are permitted to overturn or modify those state laws.[29]

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25. *Id.* at 34.

26. *Id.* at 35 (citing NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 457– 58 (1958)).

27. Ledewitz, *supra* note 1, at 121–22.

28. "[T]he Elections Clause expressly vests power to carry out its provisions in 'the Legislature' of each State, a deliberate choice that this Court must respect." *Moore*, 600 U.S. at 34.

29. Vikram David Amar writes that suggestions, like mine here, that *Moore* "embrac[es] a mild version of [the Doctrine] are simply wrong." Vikram David Amar, *Huzzah for the Court in* Moore v. Harper, VERDICT (July 5, 2023), https://verdict.justia.com/2023/07/05/huzzah-for-the-court-in-moore-v-harper. But Amar is unable to specify just what the federal issue would be if it were not this mild version—that is, that state courts may not substitute policy or partisan preferences for those of state legislatures, which is essentially the Doctrine. *Id.* Amar writes that the federal issue in such a case would not be enforcement of the Elections Clauses but could be the enforcement of "particular federal statutes and federal constitutional provisions relating to elections (such as the Voting Rights Act, the Fifteenth, Nineteenth, and Twenty-Sixth Amendments, etc.) that reflect particular concerns (often relating to equality), and due process/rule-of-law/republican-government principles that prevent courts, acting as courts, from making things up in ways that upset settled expectations of voters." *Id.* But not only does the Court not say that, but without some form of the Doctrine, there is no federal issue in a case in which a state court "upsets the settled expectations of voters" in regard to an election. If, instead of a Presidential election in *Bush v. Gore*, for example, the Florida Supreme Court had ordered a recount outside the bounds of state election law in a state election, no one would imagine that the U.S. Supreme Court would have

If Thomas is wrong that the distinction between state court challenges that are proper and those that are not lies along the procedural/substantive divide—and Roberts specifically rejected Thomas's position[30]—it is hard to explain why some state court decisions in election matters are permissible while others are not.

Roberts never actually states that the fear justifying federal court intervention is runaway state courts substituting their policy preferences—or even partisan preferences—for those of the state legislature, but that must be what the opinion in *Moore* means. Will any federal court be candid enough to clarify this?

The political Left expected the conservative majority on the Supreme Court to adopt the Doctrine for partisan reasons.[31] This is how some on the Left view much recent Supreme Court decision-making.[32] But, contrary to this expectation, the Doctrine was not fully adopted in *Moore*. It is fair to ask, why were the fullest implications of the Doctrine rejected?

III. WHY WAS THE DOCTRINE NOT FULLY ADOPTED IN *MOORE*?

It is obvious why observers were predicting that the Doctrine would be adopted in *Moore*. For years, conservative Justices have bristled at "runaway" state court decisions expansively changing state election law in federal elections, from the concurrence in *Bush v. Gore* by Chief Justice Rehnquist, joined by Justices Scalia and Thomas,[33] to the various criticisms of the three-day voting

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had jurisdiction over that decision simply because it was outside the bounds of state election law. A lawless state Supreme Court is simply an issue of state law even if it does upset the settled expectations of voters. Certainly, a state court decision in regard to an election might violate federal Equal Protection, Due Process or even Free Speech. But *Moore* is not about any of that. As Amar acknowledges, the issue is a state court "making things up." *Id.* In matters of state law, nothing in the federal constitution or statutes keeps a state court "from making things up"—except the Doctrine. *Id.* This is unrelated to the valid claim that Amar makes that *Moore* recognizes the right of a State to vest legislative authority where it will. But once that decision is made, the "mild version" of the Doctrine that the Court adopted in *Moore* insists that the body that state law grants legislative authority to must be the body that determines federal election law policy unless a state court is enforcing state constitutional law, or other state law limits, in good faith. Only because of the Elections Clauses does the Supreme Court have jurisdiction to ensure that is the case. This is the mild version of the Doctrine that *Moore* adopts, contrary to Amar.

30. 600 U.S. at 31.

31. *See e.g.*, Michael Sozan, *Supreme Court May Adopt Extreme MAGA Election Theory That Threatens Democracy*, CAP 20 (Sept. 26, 2022), https://www.americanprogress.org/article/supreme-court-may-adopt-extreme-maga-election-theory-that-threatens-democracy/. The opening sentence illustrates the political context: "The U.S. Supreme Court, which is dominated by a radical right-wing majority, is again on the precipice of deciding a case that would be a major setback for free and fair elections and democracy." *Id.*

32. *Id.* That is what the word "again" means in the opening sentence.

33. 531 U.S. 98, 114–15 (2000) (Rehnquist, C.J., concurring).

extension granted by the Pennsylvania Supreme Court for receipt of ballots in the 2020 election.[34]

In addition, Roberts himself seemed to rely on the Doctrine, or some variant of the Doctrine, in dissenting, joined by Justices Scalia, Thomas, and Alito, in the Arizona redistricting case,[35] in which a state ballot proposition removed redistricting authority from the state legislature and vested it in an independent commission.[36] In that dissent, Roberts certainly took the position that the Elections Clause vested authority in a state's legislature that a state constitutional provision allowing for popular initiatives could not remove.[37]

Although it is impossible to know what might have influenced the Justices in the majority, especially Roberts, Kavanaugh, and Barrett, to vote as they did in *Moore*, it was apparent in the oral argument in *Moore* that something had happened to lessen the attractiveness of the Doctrine to some of the conservatives on the Court.[38]

It seems to me that the biggest change that occurred during the consideration of the case was an outpouring of opposition from state court jurists to the full implications of the Doctrine, including most notably an amicus brief filed by the Conference of Chief Justices opposing the Doctrine.[39] And, of course, from the perspective of originalism, it was always hard to sustain the image of any legislative body unconstrained by its founding constitution.

The decision in *Moore* was all the more surprising given that the later actions of the North Carolina Supreme Court might well have been considered to have mooted the case, as Thomas argued in his

34. *See* discussion in Jason Nagel, *Standardizing State Vote-By-Mail Deadlines in Federal Elections*, CARDOZO L. REV. DE NOVO, 2022, at 1, 24.

35. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787 (2015).

36. *Id.* at 792.

37. *Id.* at 825 (Roberts, C.J., dissenting). Thomas's dissent in *Moore* seems to concede that a state's constitution can specify where lawmaking authority resides without violating the Elections Clause. *See* discussion *supra* notes 21–22, 30 and accompanying text.

38. This was apparent before *Moore* was decided. *See* Ledewitz, *supra* note 1, at 118 n.22.

39. Debra Cassens Weiss, *State Chief Justices Oppose 'Independent State Legislature' Theory in Supreme Court Election Case*, ABA J. (Sept. 8, 2022, 3:00 PM), https://www.abajournal.com/web/article/state-chief-justices-oppose-independent-state-legislature-theory-in-supreme-court-amicus-brief. For an earlier example of a state court rejecting the Doctrine, though not by name, *see Erfer v. Commonwealth*, 794 A.2d 325, 331 (Pa. 2002) ("It is true that the U.S. Constitution has granted our legislature the power to craft congressional reapportionment plans. Yet, we see no indication that such a grant of power simultaneously suspended the constitution of our Commonwealth vis-à-vis congressional reapportionment."). In other respects, *Erfer* was abrogated by *League of Women Voters v. Commonwealth*. 178 A.3d 737 (Pa. 2018).

dissent.[40] Following the 2022 midterm elections, partisan control of the Supreme Court of North Carolina shifted from Democratic to Republican.[41] Then, the court voted to rehear the case, withdrew its decision upholding the state-court drawn map, and reversed its earlier decision that political gerrymanders present a justiciable issue under the North Carolina constitution.[42]

Thomas argued in dissent that these actions rendered the case moot.[43] The majority opinion disagreed, holding that even though political gerrymander cases are no longer justiciable in North Carolina, and even though the legislature is therefore free to draw any map it wishes, the original judgment by the Supreme Court of North Carolina remained binding.[44] Granted, this narrow view may be enough to uphold the case as not technically moot. But even if those state court actions did not technically render the case moot, they certainly could have been relied upon to dismiss the grant of cert. as improvident. Why decide such a momentous issue in a case in which there could be no effect from the decision? Because of the change in outcome on the North Carolina Supreme Court, the state legislature in North Carolina became free to adopt any map it wanted, notwithstanding the earlier decision in *Moore*.

It is hard to avoid the conclusion that the case was not dismissed specifically to reject the Doctrine. In other words, having decided that the Doctrine is an affront to state court independence and sovereignty, Roberts, Kavanaugh, and Barrett wanted to lay the Doctrine to rest as soon as possible.

But if the majority opinion may be said to reinstate ordinary state court judicial review of state legislature decision-making in federal elections, it also still retained federal court oversight of state court decisions in those cases. What is the federal issue that remains in state court cases considering legislation governing federal elections?

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40. 600 U.S. at 45–55 (Thomas, J., dissenting). Justice Thomas went on to discuss the merits of the case and Doctrine in a portion of the dissent joined by Justice Gorsuch, but not by Justice Alito. *Id.* at 55–65.

41. Hansi Lo Wang, *A North Carolina Court Overrules Itself in a Case Tied to a Disputed Election Theory*, NPR (Apr. 28, 2023, 12:25 PM), https://www.npr.org/2023/04/28/1164942998/moore-v-harper-north-carolina-supreme-court.

42. 600 U.S. at 14–15 (majority opinion).

43. *Id.* at 40–41 (Thomas, J., dissenting).

44. *Id.* at 15.

IV. What is the Federal Issue that Remains in State Court Federal Election Cases?

The Supreme Court decision in *Moore* is reminiscent of Justice Stewart's description of obscenity in his concurrence in *Jacobellis v. Ohio*.[45] Stewart admitted that obscenity "may be indefinable."[46] Stewart was clear that the category of unprotected sexually graphic speech is "limited to hard core pornography" thus implying that the category does not embrace most sexual depictions.[47] He did not "attempt further to define" it.[48] "But," he added famously, "I know it when I see it."[49]

The *Moore* majority and concurring opinions are like Stewart's approach to obscenity. Most of the time, state courts are free to engage in judicial review under state constitutions and other sources of state law, just as they would do in state election cases, or indeed, any other kind of state law case. The federal constitution generally does not constrain these applications of state law to decisions of state legislatures.

But, and really this is all one can say, state courts may go too far. In some extraordinary cases, it may be that state courts are not applying state law to limit what state legislatures may enact, but may be thought to be doing something else—applying state judges' policy or partisan preferences? Apparently, the Supreme Court will know it when they see it.

Unlike Stewart, however, the *Moore* opinion could not really avoid defining the federal issue further. Stewart apparently felt that the definition of hardcore pornography was not that important. Lower courts and prosecutors did not need guidance in applying the obscenity standard. Perhaps he thought everyone would know it when they see it. Or maybe he thought that the country could live with very little obscenity enforcement. Since only consenting adults would be affected, what difference did the definition of obscenity really make? How much would the country be harmed if some hardcore pornography remained available?

In *Moore*, however, the Justices, especially Roberts in the majority and Kavanaugh in concurrence, plainly did not feel the same way Stewart did. They are aware that litigation will be brought in future high-stakes political cases challenging state legislation law

45. 378 U.S. 184 (1964).
46. *Id.* at 197 (Stewart, J., concurring).
47. *Id.*
48. *Id.*
49. *Id.*

in the context of federal elections. Although they may have also felt that "going too far" was undefinable, they did give some guidance, or at least, they wrote in a way to suggest what the standard for a violation of the Doctrine might be.

V. What is the Standard By Which State Court Decisions Will Be Judged As Going Too Far?

Roberts was careful not to supply any sort of clear test to be applied in *Moore*-type cases in which state courts have either modified or overturned state election law in federal elections. Both he and Kavanaugh adverted to the Rehnquist concurrence in *Bush v. Gore*, which is generally regarded as the origin of the modern concern with state court interpretation in light of the Elections Clause.[50]

For Kavanaugh, this means that a state court may not "'impermissibly distort[ ]' state law," or, quoting Justice Souter,[51] "exceed[ ] 'the limits of reasonable interpretation,'" or, quoting the Solicitor General's argument in Moore itself, "reach[ ] a 'truly aberrant' interpretation." For Kavanaugh, these three standards amount to the same thing.[52]

Roberts also invoked Rehnquist and Souter, but he wrote that the Court's holding, and presumably therefore the standard that lower courts will utilize, is "that state courts may not transgress the ordinary bounds of judicial review."[53]

Thomas had fun pointing out how unhelpful this standard is,[54] but I am not sure he is right about that. We can see how the *Moore* decision may actually work by contrasting the reception that three recent decisions by the Supreme Court of Pennsylvania might receive under *Moore*.

In the oldest case, *League of Women Voters v. Commonwealth*,[55] in 2018, the court held the 2011 Pennsylvania congressional map to be a violation of the Pennsylvania Constitution's Free and Equal Elections Clause and substituted a judicially created map.[56] Thus,

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50. Moore v. Harper, 600 U.S. 1, 36 (2023); *see id.* at 39–40 (Kavanaugh, J., concurring). In *Bush v. Gore*, the relevant federal constitutional provision concerned the role of state legislature in Presidential elections. 531 U.S. 98, 103 (2000) (per curiam).

51. 600 U.S. at 38–39 (Kavanaugh, J., concurring).

52. *Id.* at 39 n.1.

53. *Id.* at 36 (majority opinion).

54. *Id.* at 63 (Thomas, J., dissenting) ("As the majority opinion offers no clear rationale for its interpretation of the Clause, it is impossible to be sure what the consequences of that interpretation will be.").

55. 178 A.3d 737 (Pa. 2018).

56. *Id.* at 741; *see also* PA. CONST. art. I, § 5.

in broad outline, the court's decision parallels the original decision of the Supreme Court of North Carolina in the *Moore* litigation.

Under the *Moore* standard, it seems to me that the substantive judgment of the court that the existing map was unconstitutional clearly represents ordinary judicial review, while the remedy imposed does not.

Substantively, the existing map was grotesquely gerrymandered to partisan advantage, including the infamous 7th District that earned the nickname "Goofy kicking Donald Duck."[57] All of the Justices on the court expressed some level of sympathy with the idea that such a level of partisan influence raises a serious state constitutional issue.[58] In addition, instead of imposing a general standard for partisan gerrymander cases in the future, Justice Todd's majority opinion made reference to traditional districting considerations, including the state constitutional requirement of "compact and contiguous" state legislative districts.[59] This is precisely the sort of restrained standard that allows for plenty of legislative discretion but deters radically partisan line-drawing. This aspect of the decision seems to fit well under the Roberts standard of ordinary judicial review.

On the other hand, in terms of the remedy, the court in *League of Women Voters* gave the legislature and Governor only three weeks to craft a new map,[60] and otherwise so speeded up the litigation,[61] as to raise the question of the court's own partisan agenda. The procedural recklessness of the case clashed with any notion of ordinary judicial review, and that aspect of the case might well be reviewable under *Moore*.

In the most recent case, *McLinko v. Department of State*, the court, in 2022, upheld Act 77, the Pennsylvania mail-in voting law.[62] Oddly, despite the nationwide controversy over the Doctrine,

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57. *See League of Women Voters*, 178 A.3d at 775, 819.

58. Justice Baer agreed with the majority that the 2011 congressional map constituted an unconstitutional partisan gerrymander because "partisan considerations predominate over all other valid districting criteria." *Id.* at 826 (Baer, J., concurring and dissenting). Justice Baer agreed with Justice Saylor, joined by Justice Mundy, however, in dissenting against the "very little time" accorded the legislature to create a new map and the lack of "an ordinary deliberative process" in the case, held open the possibility of a finding of unconstitutionality of the 2011 map. *Id.* at 834 (Saylor, J., dissenting) ("[T]he Court may be faced with a scenario involving extreme partisan gerrymandering" to be remedied "if there was [a standard] which I could conclude would be judicially manageable.").

59. *Id.* at 794; *see also* PA. CONST. art. II, § 16.

60. 178 A.3d at 822.

61. *See* Bruce Ledewitz, *A Lost Opportunity to Reach a Consensus on Gerrymandering*, JURIST (Feb. 13, 2018), https://www.jurist.org/commentary/2018/02/pennsylvania-gerrymandering-bruce-ledewitz/.

62. 279 A.3d 539, 582 (2022).

and the grant of certiorari in *Moore* itself, no party to the litigation even raised the question whether invalidating Act 77 in the context of a federal election might violate the Doctrine.

Of course, since the court upheld the legislation at issue, its decision could not be in violation of *Moore*. But, the Commonwealth Court invalidated Act 77, which certainly could have raised an issue under the Doctrine.[63]

Even though the decision to invalidate Act 77 was plainly substantive, and thus would be considered a violation of the Doctrine by Thomas, the mail-in voting litigation seems to be exactly the kind of ordinary state constitutional interpretation that Roberts has in mind as legitimate. The text and history of the Pennsylvania Constitution have plainly been concerned with the issue of in-person voting and just as plainly have given the legislature a great deal of discretion in delineating modes of voting. Thus, the issue of the constitutionality of Act 77 could have justifiably gone either way. Despite the unfortunate partisan lineup of the vote in the Pennsylvania Supreme Court,[64] there is nothing here to suggest anything other than state courts doing their best to interpret their state's fundamental law. That is probably why the Doctrine never even came up.

The last case to consider is *Pennsylvania Democratic Party v. Boockvar*,[65] the controversial three-day voting extension that the court granted in the 2020 election, which was the subject of a great deal of Republican Party denunciation as an illustration that the 2020 election had been stolen or had improperly been interfered with.[66]

Since Thomas, Alito, Gorsuch, and Kavanaugh voted to stay the three-day extension,[67] it is likely that this state judicial decision represents exactly the sort of decision that remains unconstitutional under the Doctrine, even after *Moore*.

This makes sense when the context of the decision is taken into account. The Supreme Court of Pennsylvania did not decide that

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63. *Id.* at 547.

64. Justice Donohue, elected to the court as a Democratic Party candidate, wrote the majority opinion, joined by three other Democrats on the court and joined in large part by the remaining Democratic Justice. *Id.* at 582. The two Justices elected to the Court as Republicans dissented. *Id.* at 595 (Mundy, J., dissenting); *see also id.* at 608 (Brobson, J., dissenting).

65. 238 A.3d 345, 371 (2020).

66. *See e.g.*, Sam Dunklau, *Dozens of GOP State Lawmakers Wanted Pa.'s Electoral Votes Overturned. Two Reflect on Their Decision*, WITF (Feb. 11, 2021, 3:32 PM), https://www.witf.org/2021/02/11/dozens-of-gop-state-lawmakers-wanted-pa-s-electoral-votes-overturned-two-reflect-on-their-decision/.

67. Republican Party of Pa. v. Boockvar, 141 S. Ct. 643 (Mem.) (2020).

the statutory requirement of receipt of ballots by election day was facially unconstitutional. Rather, all of the Justices acknowledged that the statutory schedule set forth in the state election statute could not be followed because of mailing delays. At that point, the only question was one of remedy.[68] The majority ruled that the time to receive the ballots would be extended by three days.[69]

But surely Justice Donohue's position in dissent,[70] that the legislative policy of receiving ballots by the end of voting on election day was the crucial legislative commitment, was more judicially restrained and much more convincing. Thus, if the statutory calendar was to be changed out of necessity, it made sense to curtail the period in which mail-in ballots could be requested and not extend the time such ballots could be received. In this way, the fundamental policy decision by the state legislature—that all ballots be received by the end of voting—could have been maintained. The majority gave insufficient weight to the crucial policy decision of the state legislature in a context of apparent partisan benefit to the Democratic Party majority on the Supreme Court of Pennsylvania. After *Moore*, that decision still violates the Doctrine.

The final, remaining issue is in what court all of the above will be decided. Thomas indicated in his *Moore* dissent that the burden of applying Roberts's standard would fall on "federal courts," presumably he meant lower federal courts, "in the midst of quickly evolving, politically charged controversies."[71] Thomas probably had in mind filings in lower federal courts close to election day and with attendant public controversy and partisan sniping. This is exactly the sort of highly charged political fight that federal judges would obviously like to avoid.

But, despite Thomas' expectation, it is not clear at all that election controversies under the Doctrine will end up in the lower federal courts.

VI. Where Will Issues Under the Doctrine be Litigated?

Moore eliminates the argument that state courts generally lack authority to review state election law in federal elections for

68. *See* Bruce Ledewitz, *Alito, Conservative Justices Are Fighting Old Ghosts in Pa. Count All the Ballots*, PA. CAPITAL-STAR (Nov. 5, 2020, 6:30 AM), https://www.penncapital-star.com/commentary/alito-conservative-justices-are-fighting-old-ghosts-in-pa-count-all-the-ballots-bruce-ledewitz/.

69. 238 A.3d at 371.

70. *Id.* at 392 (Donohue, J., concurring in part and dissenting in part).

71. Moore v. Harper, 600 U.S. 1, 65 (2023) (Thomas, J., dissenting).

compliance with state constitutional standards. So, how will issues under the Doctrine arise in the future?

Plainly, as Thomas assumed,[72] such issues only arise because of a decision by a state court—likely a State Supreme Court if the case is important enough—that invalidates or modifies some aspect of state election law in the context of a pending federal election. That means that the initial challenge to state election law will be heard, as it was in the three Pennsylvania cases discussed above, and in *Moore* itself, in state court. After all, the premise of *Moore* is a case in which state election law applying to a federal election is challenged under some aspect of state law, especially state constitutional law. Such a challenge would normally be brought in state court in the first instance.

But what happens after that state court decision is rendered? In *Boockvar*, the three-day mail-in ballot extension case, the losing party sought review in the U.S. Supreme Court.[73] That would be the only possible recourse at that stage because the *Rooker-Feldman Doctrine* would preclude the losing party from seeking review of the state court decision in a lower federal court.[74]

As a practical matter, the Supreme Court can only grant review, especially preliminary review of a request for a stay, which is what would be happening close to an election, in a relative handful of cases. In proposing a role for lower federal courts in interpreting the Doctrine, Thomas appears to be assuming that, in most cases, the Supreme Court will deny any kind of review, even though a state court decision might have arguably violated the Doctrine.

But, under *Rooker-Feldman*, the losing party in a state court decision cannot seek federal court review of a state court decision even after certiorari is denied. That party has no recourse at all. That is not necessarily the end of any potential litigation, however. Anyone harmed by the violation of the Doctrine would have standing to file suit in federal court challenging the state court interpretation of state election law. So, after Supreme Court review was denied, in my hypothetical case, any candidate for a federal office, could sue in federal court, alleging that the three-day ballot reception decision violated the Doctrine. A candidate for federal office would have standing to file suit in federal court asking for an injunction against

72. This is what Thomas means when he writes that federal courts will have to apply "some generalized concept of 'the bounds of ordinary review[.]'" *Id.* Thomas is referring to review of state court decision-making being within those bounds, or not.

73. Republican Party of Pennsylvania v. DeGraffenreid, 141 S. Ct. 732 (2021).

74. The Rooker-Feldman Doctrine provides that lower federal courts "lack jurisdiction to hear appeals from state court decisions." Adam McLain, *The Rooker-Feldman Doctrine: Toward a Workable Role*, 149 U. PA. L. REV. 1555, 1590 n.213 (2001).

state election officials counting mail-in ballots received after the polls closed. Counting such ballots illegally would certainly constitute a harm grounding standing for a candidate in that election.

Even so, would there be a federal question in such a lawsuit? After all, this hypothetical plaintiff cannot argue that there is a federal issue simply in counting mail-in ballots after the polls close. There is no such federal law violation. Many states, including Pennsylvania, allow ballots to be counted after the polls close for all sorts of reasons, including counting overseas ballots.[75] Rather, this hypothetical plaintiff would have to argue, first, that counting the late ballots violates state law. State law, after all, could provide for counting such late ballots without violating federal law.

The violation of the Doctrine only arises later in the case, as a counter to the state defendant's defense that counting the late ballots does not violate state law because the State Supreme Court had ruled otherwise. Only at this point would a federal issue of the Doctrine arise—the plaintiff counters this state defense, arguing that the State Supreme Court decision is not binding as a matter of federal law because it violated the Doctrine.

But, as any student of a Federal Courts class can appreciate, this means that raising the issue of the Doctrine, from the perspective of a well-pleaded complaint, may not constitute a statutory federal question grounding federal court jurisdiction.[76] There is no federal question in the hypothetical plaintiff's original complaint. Without that, there is no federal court jurisdiction over the case.

Of course, the hypothetical plaintiff can still file suit in a lower state court. That lower court state judge would presumably be bound, however, by the State Supreme Court's likely prior determination that its decision did not violate the Doctrine. And, on appeal, the State Supreme Court surely would just repeat that earlier conclusion. So, the hypothetical plaintiff would be back to asking the U.S. Supreme Court for a stay and/or a grant of review.

This is only one example. It may be that other violations of the Doctrine can be raised in independent federal court litigation. I

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75. Pennsylvania allows seven days after voting ends for such ballots to be received. *See Information for Military and Overseas Voters*, DOS VOTING & ELECTION INFO., https://www.vote.pa.gov/Voting-in-PA/pages/military-and-overseas-voters.aspx (last visited Mar. 11, 2024).

76. "One of the best known tests for statutory federal question jurisdiction in the district courts is the 'well-pleaded complaint' rule, which is associated with *Louisville & Nashville Railroad v. Mottley*. There the Court insisted that the federal question necessarily appear on the face of the plaintiff's well-pleaded complaint." Donald L. Doernberg, *There's No Reason For It; It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction*, 38 HASTINGS L.J. 597, 598 (1987).

raise the issue here only to indicate that the question of lower court federal jurisdiction is a serious one in cases implicating the Doctrine. I am not convinced that any of this likely litigation will be decided in the lower federal courts. While it is likely that the Supreme Court in *Moore* created future problems in cases involving highly contested federal elections, as Thomas complained, the Justices may have created those problems not for the lower federal courts, as all of the Justices may have assumed, but for the Supreme Court itself.

CONCLUSION

Chief Justice Roberts is concerned about the legitimacy of the Supreme Court in an era of partisan division. He prefers that the Court proceed in small steps in controversial areas. This can be seen in his concurrence only in the judgment in the momentous *Dobbs*, which overturned nearly fifty years of precedent and changed the fraught national debate about abortion.[77] Roberts argued in *Dobbs* in favor of a "simple yet fundamental principle of judicial restraint: If it is not necessary to decide more to dispose of a case, then it is necessary *not* to decide more."[78] In *Dobbs*, that meant for Roberts modifying the viability rule of *Roe* and *Casey* and retaining a form of the constitutional right to choose abortion, rather than overruling the two entirely.[79] That would have been enough to decide that the fifteen-week prohibition on abortion at issue in *Dobbs* was constitutional. Roberts argued that a change in the law more fundamental than that should have been left to another day.[80]

The Roberts opinion in *Moore* bears the hallmarks of this restrained approach. The fundamental change in the law that the full adoption of the Independent State Legislature Doctrine would have constituted was avoided. That was enough to decide that the decision of the Supreme Court of North Carolina did not violate the federal Constitution. At the same time, state court decision-making in cases affecting federal elections was subjected in *Moore* to federal judicial review to some extent. That was enough to decide the case and that was all that the Roberts opinion held.

In some ways, this judicially restrained approach is admirable. But it can lead, as it did in the Roberts concurrence in *Dobbs*, to

77. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022) (overruling *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* in holding that there is no fundamental right to abortion).

78. *Id.* at 348 (Roberts, C.J., concurring in the judgment).

79. *Id.* at 353.

80. *Id.* at 348–49.

confused and undertheorized results. This is certainly so in *Moore*. Why is it that there is any federal issue at all in a case in which a state court is deciding a state law issue under its state constitution? The answer to that question will determine the role that the Constitution will play in the future in state election cases. Presumably the answer to that question has to do with state court abuses of judicial review and the substitution of policy and politics for law in state court decisions affecting federal elections. But deciding that sounds like a very difficult and controversial task for any federal court. Future guidance from the Supreme Court will certainly be needed.

Nor does any of that address another issue, which is not even mentioned in the *Moore* opinions—where will this future litigation take place? This paper argues that it is not likely to be in the lower federal courts. If that turns out to be so, the Supreme Court is going to be deciding a lot of federal election cases in highly partisan and rushed contexts. That result, ironically, might be the very challenge to the Court's legitimacy that Roberts was looking to avoid in his careful and limited majority opinion in *Moore*.

Another Lochner Era?

*Wilson Huhn**

INTRODUCTION

Many legal scholars have observed that the current Supreme Court is returning to the doctrines, values, and methods of reasoning that were employed between 1873 and 1937—the *Lochner* era and the era immediately preceding it.[1] As it did during the *Lochner* era, the current Supreme Court elevates property rights over

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1. *See, e.g.*, Julie Novkov, *Death Drop: the Roberts Court, Legitimacy, and the Future of Democracy in the United States*, 83 MD. L. REV. 77, 89, 93, 97 (2023) (criticizing the decisions of the Roberts Court curtailing individual rights, reducing the power of administrative agencies, and limiting voting rights); *see id.* at 135 (accusing the Roberts Court of "dressing in the style of the Fuller Court"); Tamara M. Gomez, *You've Got Yourself a Deal! Or do you?: How the Expansion of the Federal Arbitration Act Triggers the New* Lochner *Era*, 15 ELON L. REV. 205, 239–40 (2023) (arguing that the Supreme Court's aggressive enforcement of arbitration clauses echoes the concern of the *Lochner* era Court for protecting "freedom of contract" over the statutory rights of workers).

personal rights;[2] strikes down major civil rights legislation;[3] arrogates power to itself by ignoring legislative intent and administrative expertise;[4] and relies on tradition instead evidence-based reasoning to interpret the law.[5]

A. THE ERAS OF THE SUPREME COURT

We can divide the history of the Supreme Court into different eras. Since 1873, there have been four principal groupings of eras in the history of the Supreme Court.

1. 1871–1937, the post-Reconstruction Era and the Lochner Era.

America underwent immense changes in the late 19th and early 20th centuries. After the Civil War, slaves were freed and granted equal rights,[6] women demanded equality[7] and were granted right to vote,[8] and the Industrial Revolution turned America from a nation of farmers and small merchants into a manufacturing powerhouse.[9] Armed with the knowledge generated by the emerging social sciences, such as sociology and economics, the American Progressive Movement strove to improve people's lives in many ways, including by fostering equality and protecting workers.[10] The

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2. *See infra* notes 41–43 and accompanying text.
3. *See infra* note 44 and accompanying text.
4. *See infra* notes 52–67 and accompanying text.
5. *See infra* notes 68–87 and accompanying text.
6. *See* U.S. CONST. amend. XIII (abolishing slavery); *id.* amend. XIV (making all persons born in the United States citizens of the United States, citizens of the state where they reside, and guaranteeing to every person due process and the equal protection of the laws).
7. *See generally* Tracy A. Thomas, *More Than the Vote: The Nineteenth Amendment as Proxy for Gender Equality*, 15 STAN. J. C.R. & C.L. 349, 350 (2020) ("This nearly century-long movement for suffrage, however, was never just about the vote.").
8. *See* U.S. CONST. amend. XIX (granting women the right to vote).
9. *See The Industrial Revolution in the United States*, LIBR. OF CONG., https://www.loc.gov/classroom-materials/industrial-revolution-in-the-united-states/ (last visited Jan. 8, 2024) ("The Industrial Revolution took place over more than a century, as production of goods moved from home businesses, where products were generally crafted by hand, to machine-aided production in factories. This revolution, which involved major changes in transportation, manufacturing, and communications, transformed the daily lives of Americans as much as—and arguably more than—any single event in U.S. history. . . . [T]he Industrial Revolution began the transition of the United States from a rural to an urban society. Young people raised on farms saw greater opportunities in the cities and moved there, as did millions of immigrants from Europe. Providing housing for all the new residents of cities was a problem, and many workers found themselves living in urban slums; open sewers ran alongside the streets, and the water supply was often tainted, causing disease. These deplorable urban conditions gave rise to the Progressive Movement in the early twentieth century; the result would be many new laws to protect and support people, eventually changing the relationship between government and the people.").
10. *See Progressivism in the Factory*, NAT'L HUMANS. CTR., https://americainclass.org/progressivism-in-the-factory/ (last visited Jan. 8, 2024) ("During the Progressive

Supreme Court resisted these changes, however, and proved hostile to both equal rights and workplace reform. The Court narrowly interpreted the Fourteenth and Fifteenth Amendments and struck down many of the civil rights laws passed during Reconstruction.[11] The Court also upheld state laws requiring segregation of the races,[12] and limiting the right to vote.[13] During the *Lochner* era, the Court upheld laws prohibiting interracial marriage,[14] as well as laws requiring persons with developmental delay to be sterilized.[15] Despite all of this, the *Lochner* era Court is best known for striking down hundreds of laws intended to protect workers and regulate the economy.[16] To accomplish this, the Supreme Court invoked a

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Era, from the 1890s through the 1920s, the idea of progress manifested itself in a variety of ways from cleaning up slums to eliminating government corruption to Americanizing immigrants to standardizing industrial practices. Such initiatives often sought to improve life by applying insights derived from the newly emerging social sciences—disciplines like sociology, psychology, economics, and statistics. Relying on extensive data gathering, professional expertise, and careful management, this scientific strand of Progressivism sought to bring rationality and efficiency to legislative chambers, factory floors, even household kitchens."). *See also infra* notes 11–20 and accompanying text.

11. *See*, *e.g.*, Hodges v. United States, 203 U.S. 1, 14, 20 (1906) (overturning convictions of a group of Whites for interfering with the civil rights of others in violation of Civil Rights Act of 1866, in part because the statute could not be grounded upon the 14th Amendment); Baldwin v. Franks, 120 U.S. 678, 689–94 (1887) (following *Harris* in finding the Ku Klux Klan Act to be unconstitutional insofar as it applies to private action); United States v. Harris, 106 U.S. 629, 643–44 (1883) (declaring a civil rights law, the Enforcement Act of 1871, to be unconstitutional, and reversing the convictions of a lynch mob); Cruikshank v. United States, 92 U.S. 542, 559 (1876) (reversing the convictions of the perpetrators of the Colfax Massacre, on the ground that the indictment had simply stated that the victims were Black, instead of stating that the murders were committed because the victims were Black); United States v. Reese, 92 U.S. 214, 220–22 (1876) (striking down civil rights law protecting the right to vote); Blyew v. United States, 80 U.S. 581, 595 (1871) (reversing the murder conviction of two Whites who had killed members of a Black family on the grounds that removal of this case to federal court was improper because the rights of the victim and the witness were not "affected" by the fact that Blacks were not allowed to testify in State courts).

12. *See* Gong Lum v. Rice, 275 U.S. 78, 87 (1927) (upholding racial segregation in the public schools); Cumming v. Richmond Cnty. Bd. of Educ., 175 U.S. 528, 545 (1899) (refusing to intervene when the City of Richmond closed the high school for Blacks but kept the school for Whites open); Plessy v. Ferguson, 163 U.S. 537, 551–52 (1896) (upholding Louisiana law requiring segregated passenger cars on trains).

13. *See* Williams v. Mississippi, 170 U.S. 213, 225 (1898) (upholding Mississippi election laws that were designed to disenfranchise Black citizens).

14. *See* Pace v. Alabama, 106 U.S. 583, 585 (1883) (upholding Alabama statute forbidding Blacks and Whites from marrying or having sex with each other).

15. *See* Buck v. Bell, 274 U.S. 200, 207–08 (1927) (upholding a state law allowing sterilization of persons with mental disabilities); *see id.* at 207 (Holmes, J., dictum) ("Three generations of imbeciles are enough."); *see also* Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on* Buck v. Bell, 60 N.Y.U. L. REV. 30, 30 (1985) (demonstrating that Carrie Buck was not an "imbecile" and that her own attorney cooperated in getting her sterilized in order to support the evil eugenics legislation).

16. *See*, *e.g.*, GEOFFREY R. STONE, ET AL., CONSTITUTIONAL LAW 764 (7th ed. 2015) (stating that during the *Lochner* era the Court struck down approximately 200 economic laws and regulations).

variety of doctrines, such as economic substantive due process,[17] states' rights,[18] the nondelegation doctrine,[19] and the concept of "regulatory takings."[20]

2. 1937–1969, the Roosevelt Court and the Warren Court.

During Franklin Roosevelt's second term in office, the Democratic Party obtained a majority of the positions on the Supreme Court and maintained control for thirty-two years.[21] In contrast to the *Lochner* era, the Supreme Court outlawed *de jure* racial segregation[22] and upheld major pieces of civil rights legislation.[23] The Roosevelt Court and the Warren Court recognized a broad range of individual rights including freedom of expression,[24] freedom of

17. *See, e.g.*, Adkins v. Childs. Hosp. of D.C., 261 U.S. 525, 560–62 (1923) (striking down a federal law that set minimum wages for women and children in the District of Columbia); *see id.* at 546 ("[F]reedom of contract is . . . the general rule and restraint the exception, and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances."); Lochner v. New York, 198 U.S. 45, 53 (1905) (striking down maximum hour legislation on the ground that "[t]he general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment to the Constitution").

18. Specifically, during the *Lochner* era the Supreme Court subscribed to the concept that the power to regulate farming, mining, and manufacturing belongs to the states and not to the federal government. *See, e.g.*, Hammer v. Dagenhart, 247 U.S. 251, 276 (1918) (striking down federal law outlawing child labor on the ground that it invaded the power of the states).

19. *See*, *e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 550–51 (1935) (striking down provision of NIRA prohibiting "unfair methods of competition," including violations of minimum wage and maximum hour rules); *see id.* at 537–38 ("Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry."); Panama Refin. Co. v. Ryan, 293 U.S. 388, 433 (1935) (striking down provision of NIRA regulating the interstate transport of petroleum products)*; see id.* at 429 (quoting Marshall Field & Co. v. Clark, 143 U.S. 649, 692 (1892) (upholding Tariff Act of 1890 for the proposition that "the Congress cannot delegate legislative power")).

20. *See, e.g.*, Pa. Coal Co. v. Mahon, 260 U.S. 393, 414 (1922) (holding that a regulatory act may constitute a taking if the regulation unduly diminishes the value of the property).

21. *See generally* Wilson Ray Huhn, *In Defense of the Roosevelt Court*, 2 FLA. A & M U. L. REV. 1 (2007) (describing the reforms of the Roosevelt Court).

22. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (striking down state laws requiring racial segregation in the public schools); McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637, 642 (1950) (prohibiting state graduate schools from segregating Black students in the classroom); Sweatt v. Painter, 339 U.S. 629, 635–36 (1950) (prohibiting a state law school from rejecting the application of a Black student on account of his race); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 351 (1938) (prohibiting a state law school from rejecting a Black applicant on account of race).

23. *See, e.g.*, South Carolina v. Katzenbach, 383 U.S. 301, 315 (1966) ("The Voting Rights Act of 1965 reflects Congress's firm intention to rid the county of racial discrimination in voting."); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261 (1964) (upholding Title II of Civil Rights Act of 1964).

24. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969) (reversing conviction of KKK leader on the ground that his statements did not present a threat of imminent lawless action); W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (prohibiting the punishment of schoolchildren who refused to say the pledge of allegiance).

religion,[25] and the right to privacy.[26] Finally, during the period of Democratic control, the Supreme Court rejected the anti-regulatory prejudice of the *Lochner* era, and it overruled the doctrine of economic substantive due process;[27] expanded Congress's power to enact laws regulating the economy;[28] and upheld laws granting broad authority to administrative agencies.[29]

3. 1970–2015, the Burger Court, the Rehnquist Court, and the first part of the Roberts Court.

In 1970, control of the Supreme Court passed back into the hands of Republican Justices. But, because of subsequent Republican Justices like Harry Blackmun, Sandra Day O'Connor, Anthony Kennedy, and David Souter, the Court remained socially liberal even as it grew more conservative on economic issues.[30] During this period, the Court upheld affirmative action in college admissions[31] and expanded the right to privacy.[32] The Court of this period extended

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25. *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296, 311 (1940) (striking down a law for the first time as a violation of the freedom of religion).

26. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967) (striking down Virginia law prohibiting interracial marriage); Griswold v. Connecticut, 381 U.S. 479, 530–31 (1965) (striking down Connecticut law prohibiting the use of contraceptives); Skinner v. Oklahoma, 316 U.S. 535, 546–47 (1942) (striking down Oklahoma law requiring sterilization of persons convicted of certain crimes).

27. *See* West Coast Hotel v. Parrish, 300 U.S. 379, 400 (1937) (upholding law establishing a minimum wage for women); *see id.* at 391 ("In each case the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law.").

28. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 128–29, 133 (1942) (upholding the Agricultural Adjustment Act which authorized the federal government to set production quotas for certain farm products); N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 49 (1937) (upholding the National Labor Relations Act which protected the rights of workers to organize unions and bargain collectively).

29. *See, e.g.*, Nat'l Broad. Co. v. United States, 319 U.S. 190, 225–27 (1943) (upholding the power of the Federal Communications Commission to regulate the broadcasting industry as the "public interest, convenience, or necessity require").

30. *See, e.g.*, Laurence Blum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L. J. 1515, 1570–71 (2010) ("In the current era, the Court's doctrines on controversial social issues are more consistent with the views of highly educated people than with the views of the populace as a whole.").

31. *See* Grutter v. Bollinger, 539 U.S. 306, 341–43 (2003) (upholding affirmative action admissions program of the University of Michigan Law School which took race into account as a "plus factor"); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 319–20 (1978) (majority of Justices ruled that affirmative action in admissions is constitutional).

32. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 681 (2015) (recognizing a fundamental right to same-sex marriage); Lawrence v. Texas, 539 U.S. 558, 578 (2003) (protecting the right of same-sex individuals to engage in intimate association); Troxel v. Granville, 530 U.S. 57, 75 (2000) (holding that parents have a constitutional right to determine whom their child will visit); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 845–46 (1992) (reaffirming *Roe v. Wade*); Zablocki v. Redhail, 434 U.S. 374, 389–91 (1978) (invalidating a Wisconsin statute that required marriage applicants with unfulfilled support obligations to secure court

Equal Protection to women,[33] persons with disabilities,[34] and LGBTQ persons.[35] Although the Court issued some decisions protecting business and property rights from government regulation,[36] it also issued landmark decisions ordering the courts to defer to the judgment of administrative agencies in their interpretation of the laws that Congress had empowered the agencies with enforcing.[37]

4. 2018 to present, the current Court.

In 2018, the Supreme Court took a hard right turn. As in the *Lochner* era, the current Supreme Court is insensitive to civil rights,[38] individual rights,[39] and is once again blocking governmental regulation of business and property.[40] The Supreme Court is reversing many of the principal decisions and doctrines that were issued between 1937 and 2015. The principal case of this new era is *Dobbs v. Jackson Women's Health Organization*,[41] reversing *Roe* and *Casey* and reneging on a woman's right to choose whether or not to carry a pregnancy forward.[42] This is the first time in American history that the Supreme Court has taken away a previously recognized fundamental right. Not only did the Court deprive

approval as violative of the fundamental right to marry); Moore v. City of E. Cleveland, 431 U.S. 494, 505–06 (1977) (recognizing a right to live with extended family); Roe v. Wade, 410 U.S. 113, 154 (1973) (holding that the right of personal privacy encompassed the choice to have an abortion); Eisenstadt v. Baird, 405 U.S. 438, 453–55 (1972) (extending the right to use contraception to unmarried persons).

33. *See* Reed v. Reed, 404 U.S. 71, 77 (1971) (protecting women from discrimination under the Equal Protection Clause for the first time in striking down Idaho law preferring males to females to serve as administrators of intestate estates).

34. *See* City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 450 (1985) (protecting persons with disabilities under the Equal Protection Clause for the first time in striking down a zoning ordinance requiring a special use permit for a group home for persons with developmental delay).

35. *See Lawrence*, 539 U.S. at 578 (protecting gays and lesbians under Equal Protection for the first time and striking down state law making it a crime to engage in same-sex intercourse).

36. *See* John G. Sprankling, *Property and the Roberts Court*, 65 U. KAN. L. REV. 1, 1 (2016) ("[U]nder the leadership of Chief Justice Roberts the Court has expanded the constitutional and statutory protections afforded to owners to a greater extent than any prior Court.").

37. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) (ruling that the courts must defer to an administrative agency's interpretation of the law that it is authorized to enforce so long as "the agency's answer is based on a permissible construction of the statute"); Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 525 (1978) (ruling that the courts may not require agencies to utilize procedures beyond what is required by the Administrative Procedure Act).

38. *See infra* notes 41–43 and accompanying text.

39. *See infra* notes 44–45 and accompanying text.

40. *See infra* notes 46–50 and accompanying text.

41. 597 U.S. 215, 231 (2022).

42. *See generally* Rona Kaufman, *Privacy: Pre- and Post-*Dobbs, 61 DUQ. L. REV. 62, 76–78 (2023) (describing the impact of *Dobbs* on the right to privacy).

women of the right to make this choice; the Court also destroyed the concept of the right to privacy that had been carefully crafted and repeatedly reaffirmed by the Court between 1942 and 2015.[43]

Several of the decisions that the Supreme Court handed down during its most recent term continued the trend of returning to the doctrines and values of the *Lochner* era. In *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*,[44] the Court effectively overruled *Grutter* and struck down the use of race as a "plus factor" in university admissions.[45] In *303 Creative, LLC v. Elenis*,[46] the Supreme Court ruled that the owner of a business creating websites for weddings could not be prosecuted under a public accommodations law for refusing, on the basis of religious beliefs, to create websites celebrating the marriage of a same-sex couple.[47] And in *Sackett v. EPA*,[48] the Court once again weakened the nation's environmental laws by depriving the Environmental Protection Agency of the power to enforce those laws in the absence of "clear congressional authorization" or "exceedingly clear language" allowing the agency to act.[49]

The most striking features of the current Court's reasoning are its reliance on textual analysis in place of deference to the intent of the legislature or to administrative expertise.[50] Moreover, the substitution of tradition in place of evidence-based reasoning has become a prominent feature of the current Court's jurisprudence.[51]

The remainder of this paper describes how the current Supreme Court is abandoning the scientific approach to legal reasoning that requires careful consideration of the purposes of the law and balancing the possible consequences that will flow from the Court's interpretation of the law. In its place, the Supreme Court is employing deceptively simple reasoning based on plain meaning and tradition.

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43. *See supra* note 32.

44. 600 U.S. 181, 230 (2023) (holding that the race-based admissions programs of Harvard and the University of North Carolina could not be "reconciled with the guarantees of the Equal Protection Clause").

45. *See id.*; *see also* Marissa C. Meredith, *The Domino Effect: Discussing the Future Implications of* Students for Fair Admissions, Inc. v. Harvard, 62 DUQ. L. REV. 312 (2024).

46. 600 U.S. 570 (2023).

47. *Id.* at 602–03.

48. 598 U.S. 651 (2023).

49. *Id.* at 679, 681. The Court made a similar ruling the previous year in *West Virginia v. EPA*. 597 U.S. 698, 724, 735 (2022) (applying the "major questions doctrine" and ruling that Congress did not clearly grant the EPA the authority to reduce emissions at existing power plants). *See generally* Dana Neacşu, *Applying Bentham's Theory of Fallacies to Chief Justice Robert's Reasoning in* West Virginia v. EPA, 61 DUQ. L. REV. 95 (2023).

50. *See infra* notes 52–67 and accompanying text.

51. *See infra* notes 68–87 and accompanying text.

B. THE NECESSITY FOR JUDICIAL DEFERENCE TO LEGISLATIVE INTENT AND ADMINISTRATIVE EXPERTISE IN PLACE OF "PLAIN MEANING"

In her insightful article presented at this symposium, Professor Neacşu proposed: "[J]udges should aspire to incorporate scientific expertise in their legal reasoning, and avoid the fiction of the plain-meaning rule."[52]

This is entirely correct. This same proposition was the principal point of Roscoe Pound's masterpiece *Sociological Jurisprudence*.[53] The end of the 19th century and beginning of the 20th marked a renaissance in the social sciences. Sociology, psychology, economics, and political science were born and came to maturity. Pound, who was the dean of Harvard Law School, urged lawyers and judges to incorporate this new knowledge into their interpretations of the law. Pound declared: "A radical change in jurisprudence began when the social utilitarians turned their attention from the nature of law to its purpose."[54] Leading legal historians describe the legal reasoning of the 19th century as "categorical" in nature, as distinguished from the "legal realism" of the 20th century.[55] Our greatest judges—Oliver Wendell Holmes, Benjamin Nathan Cardozo, Louis Brandeis, and Learned Billings Hand—embraced legal realism in place of categorical reasoning, and collectively they revolutionized American law.[56]

The conservative Justices of the current Supreme Court frequently rely on plain meaning to interpret the law. Adam Feldman measured the number of times that Justices of the Supreme Court analyzed the meaning of statutes utilizing plain meaning,

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52. Dana Neacşu, *The Ersatz of the Plain-Meaning Rule of Statutory Construction in* Sackett v. EPA, 62 DUQ. L. REV. 275 (2024).

53. *See* Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence I*, 24 HARV. L. REV. 591 (1911); Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence [Continued]*, 25 HARV. L. REV. 140 (1911); Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence [Concluded]*, 25 HARV. L. REV. 489 (1912).

54. *Sociological Jurisprudence [Continued]*, *supra* note 53, at 140.

55. *See generally* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960 16–18, 199–200 (1992) (distinguishing legal formalism from realism); GRANT GILMORE, THE AGES OF AMERICAN LAW 41–67 (1977) (same).

56. *See*, *e.g.*, Abrams v. United States, 250 U.S. 616, 627–28 (Holmes, J., dissenting) (1919) (arguing that the constitutional right to freedom of expression depends upon how likely the speech is to cause harm and how serious the harm is likely to be); Whitney v. California, 274 U.S. 357, 373 (Brandeis, J., concurring) (1927) (same); Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 355–56 (1928) (defining "proximate cause" by reference to the precise circumstances of the case and the known risks of the conduct in question); United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (assigning liability in negligence for damage to vessel that broke from its moorings based upon three factors: "(1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions.").

legislative history, congressional intent, statutory purpose, and other methods of interpretation.[57] While most of the Justices employed a variety of approaches, Justices Gorsuch, Alito, and Thomas were more likely to employ a plain meaning approach, while Justices Sotomayor, Breyer, Ginsburg, and Kagan were more likely to rely on Congressional intent, legislative history, and statutory purpose.[58]

Traditionally, the touchstone of statutory interpretation is *not* for the courts to impose their own preferred meaning onto the law, but rather to discover and enforce the intent of the legislature.[59] Unlike the courts, the legislature is composed of representatives of the people, freely chosen in regular elections. The intent of the legislature is the will of the people, and in the United States, the people are sovereign. Respect for the separation of powers requires that the "plain meaning" of a statute should always be subservient to legislative intent.

Deference to administrative agencies in the interpretation of their enabling acts is even more important. Administrative agencies are legislated into being to address complex social problems that the legislatures, the courts, and the police cannot resolve. The three traditional branches of government lack the time, the resources, and the expertise to regulate many of the institutions of modern civilization. Virtually every aspect of modern life—our securities markets, labor markets, the banking system, transportation systems, social welfare programs, consumer protection, worker protection, environmental protection, homeland security, and national security—cannot be monitored by judges or elected officials but rather require expert oversight.

A landmark case on the Separation of Powers is *Youngstown Sheet & Tube v. Sawyer*.[60] In that case, the Court ruled that the President could not, under the Constitution, seize control of the nation's steel mills during war without more specific congressional authorization.[61] While Justice Hugo Black characteristically reasoned

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57. Adam Feldman, *Empirical SCOTUS: Interpretive Dance*, SCOTUSBLOG (Mar. 18, 2018, 12:53 PM), https://www.scotusblog.com/2018/03/empirical-scotus-interpretive-dance/.

58. *See id.*

59. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 325 (1990) ("Traditional treatises on statutory interpretation generally acknowledge the primacy of legislative intent[.]"); 2A NORMAN J. SINGER, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION 22 (5th ed. 1992) ("For the interpretation of statutes, 'intent of the legislature' is the criterion that is most often recited.").

60. 343 U.S. 579 (1952).

61. *Id.* at 589 (affirming the decision of the district court granting an injunction against enforcement of the President's Executive Order seizing control of the steel industry).

from the text of the Constitution,[62] Justice Robert Jackson rejected naked textualism in his concurring opinion and based the Court's decision on the underlying purpose of the doctrine of Separation of Powers.[63] He stated:

> The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.[64]

The current Supreme Court has forgotten that the doctrine of Separation of Powers does not authorize the Court to insist that every question of national policy must be specifically resolved by legislation. Instead, it is the duty of the Court to interpret the Constitution in accordance with the intent of the framers to create a "workable government" and the intent of Congress to place investigative, rulemaking, and adjudicatory authority in the hands of administrative agencies. In reviewing the actions of an administrative agency, the Court should confine itself to determining whether the agencies' interpretation of their enabling acts is reasonable,[65] and whether the agency has taken a "hard look" at the evidence before it.[66] By arrogating to itself the power to block administrative agencies from addressing "major questions," the Court is reanimating the anti-regulatory bias that was characteristic of the *Lochner* era. As Joseph Guerra warns:

> What is at stake in the debate over *Chevron* is the power to make policybased interstitial law. This is not a "core" judicial power, but a highly restricted one that Congress can readily displace by conferring lawmaking power on an administering agency. It will be a crowning irony if, in its zeal to tame the

62. *Id.* at 585 ("The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.").

63. *Id.* at 635 (Jackson, J., concurring).

64. *Id.*

65. *See supra* note 37 (describing *Chevron* deference).

66. *See* Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 52 (1983) (requiring administrative agencies to explain their actions in light of the evidence presented to the agency).

> powers of the administrative state, the Court arrogates this power to the judiciary.[67]

C. The Necessity for Evidence-Based Reasoning in Place of Tradition

What changed between the *Lochner* era and the era of reform that followed? It is simply this: The Supreme Court abandoned the pretense that broad terms like "liberty" and "equal protection" can be defined with any precision, and it stopped trying to align the interpretation of the Constitution with ever-changing American traditions. Instead, the Supreme Court turned to evidence-based reasoning. The Court strived to ascertain the actual effect of our laws on the lives of individuals, on our economy, and on our society as a whole, and the Court carefully evaluated whether those effects were consistent or inconsistent with our constitutional ideals of liberty, equality, and limited government.

We have already discussed the necessity for the courts to defer to the expertise of administrative agencies in the field of administrative law. But science plays an equally important role in the field of equal rights.

In 1896, in *Plessy v. Ferguson*,[68] the Supreme Court upheld a Louisiana statute requiring separate railroad cars for persons of color because this law was consistent with the customs and traditions of the American people.[69] But fifty-eight years later in *Brown v. Board of Education*,[70] the Supreme Court struck down state laws requiring racial segregation in the public schools on the ground that the separation of children based on race "may affect their hearts and minds in a way unlikely ever to be undone."[71] To support its

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67. Joseph R. Guerra, *The Possibly Imminent – and Deeply Ironic – Demise of Chevron Deference*, 26 Green Bag 2d 303, 313 (2023).

68. 163 U.S. 537 (1896).

69. The Court stated:

> In determining the question of reasonableness, it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the fourteenth amendment than the acts of congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.

Id. at 550–51.

70. 347 U.S. 483 (1954).

71. *Id.* at 494 ("To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.").

conclusion in *Brown*, the Supreme Court cited seven sociological studies proving the effect of racial segregation on children.[72]

We see the same pattern in the gender discrimination cases. In 1873, in *Bradwell v. Illinois*,[73] Justice Bradley circumscribed women's destiny and opined how it was contrary to the law of nature for a woman to enter the legal profession.[74] But after *Reed v. Reed*,[75] *United States v. Virginia*,[76] and other cases, the Court made it abundantly clear that women must be given the same freedom and opportunity as men in order to forge their own destiny.[77]

Or compare the reasoning of the Court in *Bowers v. Hardwick*,[78] with its reasoning in *Lawrence v. Texas*.[79] In *Bowers*, Chief Justice Warren Burger voted to uphold a Georgia statute that made same-sex intercourse a crime, citing "millennia of moral teaching."[80] But, in *Lawrence*, Justice Kennedy found that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice[.]"[81] And Justice O'Connor wrote that "[m]oral

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72. *Id.* ("Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority."). *See also id.* n.11 (citing K. B. CLARK, EFFECT OF PREJUDICE AND DISCRIMINATION ON PERSONALITY DEVELOPMENT (1950); HELEN L. WITMER & RUTH KOTINSKY, PERSONALITY IN THE MAKING (1952); Max Deutscher & Isidor Chein, *The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion*, 26 J. PSYCH. INTERDISC. AND APPLIED 259 (1948); Isidor Chein, *What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?*, 3 INT. J. OP. AND ATTITUDE RSCH. 229 (1949); THEODORE BRAMELD, EDUCATIONAL COSTS, IN DISCRIMINATION AND NATIONAL WELFARE 44–48 (MacIver ed. 1949); FRANKLIN FRAZIER, THE NEGRO IN THE UNITED STATES 674—81 (1949). And see generally GUNNAR MYRDAL, AN AMERICAN DILEMMA (1944)).

73. 83 U.S. 130, 139 (1873) (holding that practicing law was not among the privileges of the Privileges and Immunities Clause of the Fourteenth Amendment and therefore women could be refused admission to the bar).

74. *Id.* at 141 (Bradley, J., concurring) ("[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.").

75. 404 U.S. 71, 77 (1971) (striking down state law that favored males over females for appointment as administrators of intestate estates).

76. 518 U.S. 515, 557 (1996) (requiring Virginia to admit women to the Virginia Military Institute on the same basis as men under the Equal Protection Clause).

77. *See id.* at 540 ("However 'liberally' this plan serves the Commonwealth's sons, it makes no provision whatever for her daughters. That is not equal protection.").

78. 478 U.S. 186, 196 (1986) (upholding Georgia law making same-sex intercourse a crime).

79. 539 U.S. 558, 578 (2003) (striking down state laws making same-sex intercourse a crime).

80. 478 U.S. at 197 (Burger, C.J., concurring) ("To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.").

81. *Lawrence*, 539 U.S. at 577–78 (quoting and adopting Justice Stevens's dissenting opinion in *Bowers*).

disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause."[82] At the heart of equal protection is the idea that persons who are similarly situated must be treated alike.[83] It is *not* our constitutional ideal that existing social roles must be frozen forevermore.

We see the same pattern in the right to privacy cases. Between 1937 and 2015, the Supreme Court defined the right to privacy by reference to the effect of the law on individuals and their families.[84] The Court ruled that the right to privacy consists of those "intimate and personal choices" relating to health care, sexuality, marriage, parenting, and living arrangements.[85] But in *Dobbs*, the Supreme Court reverted to the "tradition" test and conveniently ignored the tradition of the immediately previous half century during which women had been entrusted with the right to make this decision over their own destiny.[86]

If the "tradition" test is applied to equal protection analysis as it is to due process, then the equal rights of minority races, women, the disabled, and LGBTQ persons will all be on the chopping block.[87]

The meaning of the Constitution necessarily changes from one Supreme Court era to the next. As Chief Justice Marshall reminded us in the foundational case of *McColloch v. Maryland*,[88] the Constitution is not a prolix legal code that is capable of precise definition;

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82. *Id.* at 582 (O'Connor, J., concurring).

83. *See* City of Cleburne, Tex. V. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) (stating that the language of the Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike.").

84. *See*, *e.g.*, *Lawrence*, at 574 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) ("'These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.'").

85. *See id.* at 574 (quoting *Casey*, 505 U.S. at 851).

86. *See* Aaron Tang, *Lessons from* Lawrence: *How "History" Gave Us Dobbs – and How History Can Help Overrule It*, 133 YALE L.J. FORUM 65, 65 (2023) (challenging the "dubious history" that the Supreme Court relied on in *Dobbs*).

87. *See* Reva B. Siegel, *The History of History and Tradition: The Roots of* Dobbs*' Method (and Originalism) in the Defense of Segregation*, 133 YALE L.J. FORUM 99, 101 (2023) (arguing that the current Court's reliance on history and tradition is the same argument that was made in support of racial segregation).

88. 17 U.S. 316, 424 (1819) (upholding the creation of the Bank of the United States as within the powers of Congress).

rather "we must never forget that it is a *constitution* we are expounding."[89]

The concept of the living Constitution presupposes that as we gain knowledge about ourselves, our perspectives about human potential will become more rational, and this gathered wisdom will call the existing social order into question. This notion instills hope and served as an impetus for the Progressive Era, which was coextensive with the *Lochner* era, but completely opposite in its foundational beliefs.[90] The Labor Movement, the Child Labor Movement, the Women's Movement, the Civil Rights Movement, the Public School Movement, the Chautauqua Movement, Jane Addams' Settlement House Movement, Dorothea Dix's Liberation Movement, movements to end poverty and reform the prisons—all were based on the premise that we can improve ourselves, our lives, our laws, and our society.

Abraham Lincoln was devoted to human progress not just as a possibility but as a moral imperative. Lincoln instructed us what the founders demanded of us when they declared that "all men are created equal." In his Address at Springfield on June 26, 1857,[91] Lincoln taught us that the founders did not mean to say that all people were then equal in all respects; they meant that all people are equal in their inalienable rights.[92] He stated:

> They meant to set up a standard maxim for free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere.[93]

How did this idea reveal itself to Lincoln? We have a clue in the notes of William Herndon, his longstanding law partner, friend, and

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89. *Id.* at 407 ("A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. . . . [W]e must never forget that it is a *constitution* we are expounding.") (emphasis added).

90. *See Progressivism in the Factory*, *supra* note 10 and accompanying text.

91. *See* COLLECTED WORKS OF ABRAHAM LINCOLN VOLUME 2 398 (1953), https://quod.lib.umich.edu/l/lincoln/lincoln2/1:438?rgn=div1;view=fulltext.

92. *Id.* at 406. ("They did not mean to say all were equal in color, size, intellect, moral developments, or social capacity. They defined with tolerable distinctness, in what respects they did consider all men created equal—equal in 'certain inalienable rights, among which are life, liberty, and the pursuit of happiness.' This they said, and this meant.").

93. *Id.* at 405–06.

biographer. Herndon states that Lincoln's belief that the framers did not intend to create a static society but rather that they abjured us to constantly labor for a more just society was deeply influenced by the theory of evolution, which Lincoln had carefully studied.[94] The idea that life itself is constantly evolving means that our society as well can change and improve. Science and empirical truth are essential to social progress and are the key to the rational interpretation of the law and its continued development.

CONCLUSION

Aside from Native Americans, we are a nation of immigrants,[95] people who left their homes, extended families, language, and culture behind in our quest for freedom and opportunity. As colonists, we broke away from the mother country, and we replaced monarchy with democracy. The American spirit is a product of the frontier that moved across a continent, shaping our very soul, as Frederick Jackson Turner observed:

> The result is that, to the frontier, the American intellect owes its striking characteristics. That coarseness and strength combined with acuteness and inquisitiveness, that practical, inventive turn of mind, quick to find expedients, that masterful grasp of material things, lacking in the artistic but powerful to effect great ends, that restless, nervous energy, that dominant individualism, working for good and for evil, and withal that buoyancy and exuberance which comes with freedom -- these are traits of the frontier, or traits called out elsewhere because of the existence of the frontier.[96]

Our national poet, Stephen Vincent Benet, describes us: "Americans are always on the move . . . The stream uncrossed, The promise still untried, The metal sleeping in the mountainside."[97]

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94. EMANUEL HERTZ, THE HIDDEN LINCOLN 406–07 (1938). Herndon's notes dated August 31, 1886 recall how about the year 1846–1847 Lincoln borrowed and "thoroughly read and studied" the book *The Vestiges of Creation* (actually, *The Vestiges of the Natural History of Creation*). Herndon credits this book for stimulating Lincoln's belief that the Declaration of Independence "was a grand truth set up as a standard, an ideal standard, it may be, but to be ever worked for, struggled for, and approached[.]" *Id.* at 407.

95. *See generally* JOHN F. KENNEDY, A NATION OF IMMIGRANTS (1963).

96. FREDERICK JACKSON TURNER, THE SIGNIFICANCE OF THE FRONTIER IN AMERICAN HISTORY 59 (1893).

97. STEPHEN VINCENT BENÉT, WESTERN STAR 6, 7–8 (1943) (quoted in DORIS KEARNS GOODWIN, TEAM OF RIVALS 29 (2005)).

The home-grown, can-do philosophy of America, what William James called Pragmatism,[98] makes us goal-oriented and willing to try whatever works. America is like Chicago, the City of the Big Shoulders, as Carl Sandburg described us: "building, breaking, rebuilding."[99]

There is a fundamental difference between those who wish to preserve the past and those who seek to make our society live up to the ideals in the Constitution. The Constitution is not a dead letter bound by tradition but rather is an enduring set of principles that we must constantly aspire to and build upon as our society gains more knowledge and constantly evolves into one that is fairer and freer.

98. WILLIAM JAMES, PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING 46–47 (1907).

99. Carl Sandburg, *Chicago*, POETRY FOUND., https://www.poetryfoundation.org/poetrymagazine/poems/12840/chicago (last visited Jan. 8, 2024).

Dobbs Demands Education: Education as a Fundamental Right through Substantive Due Process

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I. INTRODUCTION

The importance of education cannot be overstated.

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> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[1]

However, education is still not a fundamental right guaranteed by the United States Constitution.[2]

While gaining an education in the United States has never been easier, the quality and opportunities greatly vary, because education is not recognized as a fundamental right, allowing for inequity in the system.[3] Today, most of the United States' education problems are inextricably linked to wealth, rather than race.[4] Due to this disparity, an academic gap results from the difference in rich children's and poor children's preparedness before they enter kindergarten, and literacy rates are a crucial component of rich children's success.[5] That initial disparity leads to an astonishing difference in standardized math and reading test scores between rich and poor students; that disparity has increased over time as it is 40% greater today than it was three decades ago.[6]

After more than forty years of trying every "proven practice," there has been no improvement in high school math and reading

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1. Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 493 (1954) (declaring the fundamental principle that racial discrimination in public education is unconstitutional).

2. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) (holding that education is "not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.").

3. Areto A. Imoukhuede, *The Fifth Freedom: The Constitutional Duty to Provide Public Education*, 22 U. FLA. J.L. & PUB. POL'Y 45, 49 (2011).

4. Sean Reardon, *Income Inequality Affects Our Children's Educational Opportunities*, WASHINGTON CTR. FOR EQUITABLE GROWTH (Sept. 1, 2014), https://equitablegrowth.org/income-inequality-affects-our-childrens-educational-opportunities/.

5. *Id.*

6. Susan Dynarski & Katherine Michelmore, *Income Differences in Education: The Gap Within the Gap*, ECONOFACT (Apr. 20, 2017), https://econofact.org/income-differences-in-education-the-gap-within-the-gap.

scores on the National Assessment of Educational Progress.[7] Over thirty countries now outperform the United States in mathematics at the high school level, and many of those countries are also ahead in science.[8] The past decades of failure in public education in the United States have created the worst-educated workforce in the industrialized world.[9] Some critics believe that "without judicial action equal educational opportunity will never exist."[10]

An investment in education is clearly needed in the United States, and this potential investment could have great returns. Education has an overall 10.5% private return on investment, compared to the average 2.4% return on stocks and bonds.[11] In reality, the true rates of return on education investments are underestimated because of the omission of externalities.[12] The increasing inequality in academic achievement by income undermines education's potential to counter widening income disparity in the United States.[13] Further, public school funding is in a generational decline, which is exacerbating the inequality in public schools.[14]

Unfortunately, in *San Antonio v. Rodriguez*, the seminal case regarding the fundamental right to education, the Court held that education was "not among the rights afforded explicit protection under our Federal Constitution."[15] Now, after *Rodriguez*, there is no longer a plausible argument that the Fourteenth Amendment protects a broad, generalized right to education. Although the Court refused to recognize a right to education, in part, due to the self-

7. *See 2022 Age 9 Long-Term Trend Reading and Mathematics Highlights Report*, U.S. DEP'T OF EDUC., INST. OF EDUC. SCIENCES (Sept. 12, 2022), https://www.nationsreportcard.gov/highlights/ltt/2022/.

8. Marc Tucker, *Why Other Countries Keep Outperforming Us in Education (and How to Catch Up)*, EDUC. WEEK (May 13, 2021), https://www.edweek.org/policy-politics/opinion-why-other-countries-keep-outperforming-us-in-education-and-how-to-catch-up/2021/05; *Highlights of U.S. PISA 2018 Results Web Report, U.S. Department of Education*, INST. OF EDUC. SCIENCES NAT'L CTR. FOR EDUC. STAT. (2018), https://nces.ed.gov/surveys/pisa/pisa2018/index.asp.

9. Millennials in our workforce tied for last on tests of mathematics and problem solving among the millennials in the workforces of all the industrial countries tested. Tucker, *supra* note 8.

10. Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 111 (2004).

11. George Psacharopoulos & Harry Anthony Patrinos, *Returns to Investment in Education: A Decennial Review of the Global Literature*, WORLD BANK (2018), https://openknowledge.worldbank.org/bitstream/handle/10986/29672/WPS8402.pdf?sequence=1&isAllowed=y.

12. *Id.*

13. *See* Michael Leachman, Kathleen Masterson & Eric Figueroa, *A Punishing Decade for School Funding*, CTR. ON BUDGET AND POL'Y PRIORITIES (Nov. 29, 2017), https://www.cbpp.org/research/state-budget-and-tax/a-punishing-decade-for-school-funding (finding that twenty-nine states were still funding education below prerecession levels).

14. *Id.*

15. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).

acknowledged "lack of specialized knowledge" in education policy,[16] it has continued to facilitate federal control over education.[17] Thus, education must be considered a fundamental right in order to expand high-quality public education in the United States.

In this article, the question of education as a right is revisited from the perspective of the Supreme Court's most recent Substantive Due Process Clause case in an attempt to establish a fundamental right to education. The Due Process Clause provides a better approach to education as a right because the clause "specifically addresses the preservation of rights as a 'liberty interest.'"[18]

Section II.A of this article gives a brief overview of substantive due process analysis, including the requirement that courts consider United States history and tradition.[19] Section II.B provides the legal background of education as a fundamental right in the U.S., particularly the four Supreme Court cases that failed to establish education as a right.[20] Section III will analyze the methods by which one may establish a fundamental right to education under the *Dobbs v. Jackson Women's Health Organization* methodology. Section III.A suggests a framework for courts to apply the *Dobbs* due process methodology to conclude that education is "rooted in our Nation's history and tradition and . . . is an essential component of what we have described as 'ordered liberty.'"[21] Section III.B suggests a framework for courts to apply the *Dobbs* due process methodology to conclude that education is "part of a broader entrenched right that is supported by other precedents."[22] Finally, Part IV provides concluding remarks.[23]

16. *Id.* at 42.

17. *See* Sarah G. Boyce, *The Obsolescence of* San Antonio v. Rodriguez *in the Wake of the Federal Government's Quest to Leave No Child Behind*, 61 DUKE L.J. 1025, 1025 (2012).

18. Thomas J. Walsh, *Education as a Fundamental Right Under the United States Constitution*, 29 WILLAMETTE L. REV. 279, 296 (1993) (arguing that "[u]nder a 'rights combination' argument, a claim could be made that education is required for Americans to effectuate their various rights under the Constitution . . . [because] the ordinary person . . . cannot participate in such a government without an adequate education. Thus, the very structure of our government depends on ordinary citizens' right to a minimum education.").

19. *See infra* Section II.A.

20. *See infra* Section II.B.

21. *See infra* Section III.A.

22. *See infra* Section III.B.

23. *See infra* Part IV.

II. BACKGROUND

A. The Right to Education Before Dobbs

There are four important Supreme Court cases that directly address education as a right. When the opportunity for education to be recognized as a fundamental right has been before the Supreme Court, they have refused, despite the Court agreeing on the importance of education in all the cases addressing the issue.[24] First, in *Rodriguez*, the Court made it clear that education is "not among the rights afforded *explicit* protection" under the Equal Protection Clause of the Fourteenth Amendment of the Federal Constitution.[25] Second, *Plyler* established that a denial of education via discrimination to a suspect class "must be justified by a showing that it furthers some substantial state interest."[26] Third, in *Papasan*, the Court upheld a law that disbursed education funds according to school districts within the land where the funds were generated and left open the question of "whether a minimally adequate education is a fundamental right."[27] Finally, in *Kadrmas*, the Court refused to apply the "heightened" scrutiny standard of review it applied in *Plyler* and, similar to its decision in *Rodriguez*, the Court ruled that wealth is not a suspect classification requiring heightened scrutiny.[28]

While the Supreme Court has never recognized education as a fundamental right, it has acknowledged that education is "the very foundation of good citizenship"[29] and that it "has a fundamental role in maintaining the fabric of our society."[30] Thus, the jurisprudence regarding education as a right raises the question: Why does education not trigger a heightened scrutiny, like the right to vote or the right to marry?[31]

i. San Antonio v. Rodriguez

San Antonio v. Rodriguez is the seminal case regarding the fundamental right to education where Justice Powell, writing for the

24. San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).
25. *Id.* (emphasis added).
26. Plyler v. Doe, 457 U.S. 202, 230 (1982).
27. Papasan v. Allain, 478 U.S. 265, 285 (1986).
28. Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 458 (1988).
29. Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 493 (1954).
30. *Plyler*, 457 U.S. at 221.
31. *See* Obergefell v. Hodges, 576 U.S. 644 (2015) (holding under the Due Process and Equal Protection Clauses of the Fourteenth Amendment that the right to marry is a fundamental right after applying strict scrutiny to a law placing restrictions on the right to marry for same-sex couples).

majority, held that education was not a fundamental right because it "is not among the rights afforded explicit protection under our Federal Constitution. [And there is no] basis for saying it is implicitly so protected."[32] In *Rodriguez*, the plaintiffs challenged Texas' school finance system formula, which heavily relied on local property taxes.[33]

The parents of children in the Edgewood Independent School District,[34] one of the poorest school districts in the country, argued that the school's finance formula did not allocate sufficient funds to schoolchildren in their district or other poor school districts throughout the State because the formula relied largely on a property tax base.[35] In the 1967–68 academic year, with the Texas formula in place, children attending Edgewood School District, the poorest district in San Antonio, Texas, received 356 dollars in funding per pupil. [36] In contrast, children attending Alamo Heights School District, the most affluent district in San Antonio, received 594 dollars per pupil.[37] This clearly showed those residing in low income neighborhoods received less money.[38] The parents contended that this formula provided unequal educational opportunities because of their socioeconomic class and that the discrimination violated the children's right to equal protection under the Fourteenth Amendment.[39]

In general, when a statute is under an equal protection attack, so long as the challenged statute is rationally related to a legitimate governmental purpose, it will survive.[40] Generally, only if a statute invokes "strict judicial scrutiny," because it interferes with a "fundamental right" or discriminates against a "suspect class," will it be unconstitutional.[41] When evaluating the equal protection claim, the Court questioned "whether the Texas system of financing public education operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution[.]"[42] The plaintiff's theory was that education should be a fundamental right implicitly found in the Constitution as it is a virtual prerequisite to the meaningful exercise of free

32. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).
33. *Id.* at 4–5.
34. *Id.*
35. *Id.*
36. *Id.* at 12.
37. *Id.* at 12–13.
38. *Id.* at 14.
39. *Id.* at 17.
40. *Id.* at 40.
41. *Id.*
42. *Id.* at 17.

speech under the First Amendment and to the right to vote.[43] Ironically, after recognizing "the vital role of education in a free society," and its requirement "in the performance of our most basic public responsibilities, even service in the armed forces,"[44] the Court rejected the plaintiff's argument and refused to use strict scrutiny for two reasons.[45] First, the Court held that the Texas school finance system did not "operate to the peculiar disadvantage of any suspect class," because indigent plaintiffs are not protected.[46] The Court stated that wealth was not considered a suspect classification, because America does not have a history of discriminating against people based on their wealth.[47] Second, the Court concluded that the right to education is not explicitly or implicitly guaranteed by the Constitution.[48]

Absent a reason to apply strict scrutiny, Texas' school financing plan was only subject to the traditional rational basis review.[49] Thus, the school financing system needed to be rationally related to a legitimate state interest, and the Court held that the plan "abundantly satisfies this standard."[50]

In his dissent, Justice Marshall emphasized the importance of education by stating that "the majority's holding can only be seen as a retreat from our historic commitment to equality of educational opportunity and as unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential as citizens."[51]

The implications of the decision in this case are evident throughout schools in America today. The financing system clearly leads to achievement disparities among schoolchildren of different socioeconomic statuses.[52]

ii. Plyler v. Doe

Less than a decade later, in *Plyler v. Doe*, the Court again stated that education is not a fundamental right,[53] while declaring a Texas

43. *Id.* at 35–36; *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech[.]").
44. *Rodriguez*, 411 U.S at 30.
45. *Id.* at 35.
46. *Id.* at 28–29.
47. *Id.*
48. *Id.* at 35.
49. *Id.* at 40.
50. *Id.* at 55.
51. *Id.* at 70–71 (Marshall, J., dissenting).
52. Reardon, *supra* note 4.
53. Plyler v. Doe, 457 U.S. 202, 223 (1982).

law unconstitutional under the Equal Protection Clause of the Fourteenth Amendment because it effectively excluded undocumented immigrants from the state's public schools.[54] The Texas Legislature had granted local school districts the authority to deny enrollment to undocumented, non-citizen children.[55] Further, if a school district did enroll an undocumented child, the Texas Legislature withheld state funding, thus requiring the child to pay.[56]

Justice Brennan, writing for the Court, addressed the equal protection claim and reasoned that specifically excluding innocent undocumented immigrant children "raise[d] the specter of a permanent caste of undocumented resident aliens,"[57] classifying the plaintiff children as members of a suspect class.[58]

Although the Court upheld *Rodriguez* by concluding that "public education is not a 'right' granted to individuals by the Constitution[,]" it added that education is not "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation."[59] Therefore, the Court did not review the Texas legislation under a strict scrutiny standard and also did not use the rational relationship test, the least rigorous standard of review, that was used in *Rodriguez*.[60] Instead the *Plyler* majority applied an intermediate heightened scrutiny standard of review, similar to a rational basis of review but seeking a "substantial state interest[.]"[61]

Again, the Court emphasized the fundamental role of education in maintaining the "fabric of our society" as it is "[the] most vital civic institution for the preservation of a democratic system of government" that provides the "basic tools by which individuals might lead economically productive lives to the benefit of us all."[62] Further, the Court emphasized that "[w]e cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests."[63] Lastly, the Court stated that "[i]f the State is to deny a discrete group of innocent children the free public education . . . that denial must be justified by a showing that it furthers some

54. *Id.* at 230.
55. *Id.* at 205.
56. *Id.*
57. *Id.* at 218–19.
58. *Id.* at 219.
59. *Id.* at 221.
60. *Id.* at 230.
61. *Id.*
62. *Id.* at 221.
63. *Id.*

substantial state interest[,]"[64] despite education not being a fundamental right.

Without a fundamental right to education, immigration and education advocates fear that undocumented children are in jeopardy of having their education protections overturned by a conservative Supreme Court.[65]

iii. Papasan v. Allain

In 1986, through *Papasan v. Allain*, the Court upheld a Mississippi law that disbursed education funds according to school districts within the land where the funds were generated.[66] The plaintiffs, which included school officials and schoolchildren from the Chickasaw Cession, alleged, *inter alia*, that the statute in Mississippi unequally distributed funds across the state[67] and violated the Equal Protection Clause because the disparity deprived schoolchildren of the right to a minimally adequate education.[68]

It is essential to understand the history and purpose of these land grants in order to understand the plaintiffs' claim. In 1785, Congress established requirements for surveying and selling the Northwest Territory in positioning the nation for westward expansion.[69] One of those requirements was that each township reserve the Sixteenth Section of its territory to be held in trust by the state for the benefit of public schools.[70] But, in Mississippi, the Chickasaw Nation, one of the indigenous people of the Southeastern United States, held the state's northern lands.[71] As a result, no public school land could be set aside in that portion of the state[72] until 1832, when the Chickasaw Nation ceded its lands to the state.[73] The state ended up selling all of these lands to private parties, and the

64. *Id.* at 230.

65. Dan Soleimani, *Plyler in Peril: Why the Supreme Court's Decision in* Plyler v. Doe *Is at Risk of Being Reversed-and What Congress Should Do About It*, 25 GEO. IMMIGR. L.J. 195 (2010) (arguing that, unfortunately, if *Plyler* were to be challenged, the Supreme Court would probably apply a rational basis review instead of a heightened scrutiny standard leading to an overturn).

66. Papasan v. Allain, 478 U.S. 265, 292 (1986).

67. *Id.* at 273. In 1984, the legislative appropriation for the plaintiffs resulted in an estimated average per pupil income relative to the Sixteenth Section substitute appropriation of $0.63 per pupil. *Id.* at 273. The average Sixteenth Section income in the rest of the State, in comparison, was estimated to be $75.34 per pupil. *Id.*

68. *Id.* at 274.

69. C. Maison Heidelberg, Note, *Closing the Book on the School Trust Lands*, 45 VAND. L. REV. 1581, 1584 (1992).

70. *Id.*

71. *Papasan*, 478 U.S. at 271.

72. *Id.*

73. *Id.*

state retained no Sixteenth Section lands.[74] The state instead set aside "lieu lands" for the benefit of students in the so-called "Chickasaw Counties."[75] Those lands were eventually sold to invest in state railroads, but those railroads were destroyed in the Civil War.[76] To compensate the Chickasaw Counties for the missing land grants, the state paid them from a fund, but that payment did not equal the funding that land grants generated for students in the rest of Mississippi.[77] The plaintiffs alleged that the unequal funding between different areas of the state deprived the students in the Chickasaw Counties of their right to a minimally adequate education.[78]

Justice Byron White, writing for the Court, noted that the complaint did not allege that students in these counties were "not taught to read or write," nor did the plaintiffs "allege that they receive[d] no instruction on even the educational basics[.]"[79] Thus, because the plaintiffs alleged "no actual facts in support of their assertion that they have been deprived of a minimally adequate education[,]"[80] and only alleged a funding disparity, the case ended up being dismissed in part and remanded in part. Under the equal protection argument, the Court did not think the plaintiffs' argument adequately alleged that the education provided by the land fund was insufficient in providing a "minimally adequate education."[81]

The *Papasan* Court referenced both *Rodriguez* and *Plyler*, and the Court pointed out that the "question[] whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review" had not yet been definitively settled.[82] Though the Court in *Papasan* did not directly address the question of whether there is a fundamental right to some amount of education, the Court's opinion is important as it gave an indication that a Fourteenth Amendment guarantee to some minimal amount of education is still an open issue after *Rodriguez*.[83]

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74. *Id.* at 271.
75. *Id.* at 271–72, 286.
76. *Id.* at 272.
77. *Id.* at 273.
78. *Id.* at 274.
79. *Id.* at 286.
80. *Id.*
81. *Id.* at 286, 292.
82. *Id.* at 285.
83. Gary B. v. Whitmer, 957 F.3d 616, 642 (6th Cir.), *reh'g en banc [granted]*, *vacated*, 958 F.3d 1216 (6th Cir. 2020) ("While the Supreme Court has repeatedly discussed this issue, it has never decided it, and the question of whether such a right exists remains open today.").

iv. Kadrmas v. Dickinson

Two years after *Papasan*, in *Kadrmas v. Dickinson*, the Court reiterated that poverty is not a suspect classification, refused to apply the strict scrutiny standard, and reaffirmed that education is not a fundamental right under the Equal Protection Clause.[84] *Kadrmas* involved a North Dakota statute that allowed some local school boards, but not others, to charge a fee for a bus service for students between their homes and the public schools.[85]

In 1947, North Dakota was a sparsely populated state, and the legislature authorized sparsely populated school districts to consolidate or "reorganize" themselves into larger districts.[86] The Dickinson Public Schools chose not to participate in the reorganization and thus could continue to charge for transportation without voter approval.[87] In 1973, they began to charge a fee of $97 a year for one child or $150 a year for two children for door-to-door bus service.[88] Due to a 1979 state law, non-reorganized school districts could continue to charge fees for transporting students.[89] The Kadrmas family had two small children and their income was at or near the poverty level.[90] In 1985, they refused to sign a contract for the transportation fee, and the school bus no longer stopped for the Kadrmas children.[91]

The plaintiffs argued that the user fees unconstitutionally deprived indigent children of "minimum access to education" and urged the Court to subject the North Dakota statute to the "heightened" scrutiny standard of review it applied in *Plyler*.[92] The Court rejected this argument because education was not denied since the fee did not preclude the student from attending school via private transportation (rather than on the school bus).[93] The Court distinguished the facts in *Plyler* to the ones in *Kadrmas*, stating that *Plyler* provided a "unique circumstance[]."[94] Thus, rational basis review was the appropriate standard, not the heightened scrutiny test.[95] Further, the Court concluded that the plaintiffs "failed to

84. Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 458 (1988).
85. *Id.* at 452.
86. *Id.* at 452–53.
87. *Id.* at 453.
88. *Id.* at 453–54.
89. *Id.* at 454.
90. *Id.* at 454–55.
91. *Id.* at 455.
92. *Id.* at 458–59.
93. *Id.* at 459.
94. *Id.*
95. *Id.* at 461–62.

carry the 'heavy burden' of demonstrating that the challenged statute is arbitrary and irrational."[96]

The Court still has not "accepted the proposition that education is a 'fundamental right' [that] should trigger strict scrutiny when government interferes with an individual's access to it."[97] But an argument for education as a fundamental right via the Due Process Clause has yet to be made.

B. Substantive Due Process Before Dobbs

Substantive due process derives from the Due Process Clause of the Fourteenth Amendment of the United States Constitution.[98] The Due Process Clause provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law[.]"[99] While the Supreme Court has never defined the exactness of the liberty guaranteed by the Due Process Clause, it has interpreted this clause to mean that some liberties are so "essential to the orderly pursuit of happiness by free men" that the government cannot restrict them without a compelling state interest.[100] The most familiar substantive liberties include those rights listed in the Bill of Rights, as well as implicit ones, which extend to other rights and liberties recognized by the courts to be "fundamental."[101]

In the early twentieth century, despite the *Slaughter-House* Court's suggestion that the Fourteenth Amendment was relevant only to cases involving the equal rights of formerly enslaved African Americans and their descendants, there was an expansion to the Amendment, and a broader interpretation began with cases like *Lochner*.[102] In *Lochner*, the Court used the Due Process Clause to hold invalid a New York Statute forbidding employment in a bakery for more than sixty hours per week or ten hours per day.[103] The Court claimed that the statute interfered with the "right [to] contract" between the employers and the employees, a liberty of the

96. *Id.* at 463.
97. *Id.* at 458.
98. *See* Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 65 (2006).
99. U.S. CONST. amend. XIV, § 1.
100. Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (finding that a state may not interfere with the fundamental liberty interest of a parent to control his or her child's education and may not prohibit the teaching of foreign languages to a young child in school when such teaching has been requested by the child's parent).
101. *See* Gary B. v. Whitmer, 957 F.3d 616, 643 (6th Cir.); Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997).
102. *See* Slaughter-House Cases, 83 U.S. 36 (1872); Lochner v. New York, 198 U.S. 45 (1905).
103. *Lochner*, 198 U.S. at 52.

individuals protected by the Fourteenth Amendment.[104] In *West Coast Hotel Co. v. Parrish*, the Court stated, "[w]hat is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law." This statement signaled that the Court would proceed carefully in the area of unenumerated rights.[105] Since then, the Court has abandoned the *Lochner* rationale, holding it to be a "paradigmatic example[] of what is not the law."[106]

Determining what constitutes a fundamental right continues to be challenging as it "has not been reduced to any formula" and is still left to adjudication on a case-by-case basis.[107] That, coupled with the fact that the Supreme Court has embraced competing and inconsistent theories of analysis for substantive due process, makes the proper analysis to undertake when determining whether a right is fundamental unclear. There have been two major theories in deciding substantive due process cases.

One theory broadly used is rooted in the 1965 case *Griswold v. Connecticut*, where the Court provided more clarity of a potential formula when it upheld the right of married couples to use contraception and struck down the state ban on the ground that it violated their "right [t]o privacy."[108] Although, like the "freedom of contract," the "right to privacy" is not explicitly guaranteed in the Constitution, the Court reasoned that certain fundamental rights may be inferred from rights that are enumerated.[109] This theory provided the doctrinal foundation for decisions that came later and expanded the Due Process Clause of the Fourteenth Amendment to protect an array of liberties.[110]

This theory was most recently demonstrated in *Obergefell v. Hodges*, a case dealing with the fundamental right to marriage.[111] Justice Kennedy, writing for the majority, stated that in a due process analysis, "[h]istory and tradition guide and discipline the

104. *Id.* at 53.
105. 300 U.S. 379, 391 (1937) (upholding a state minimum wage law for women).
106. Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 245 (1998).
107. Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (maintaining that the identification of fundamental rights "has not been reduced to any formula.").
108. Griswold v. Connecticut, 381 U.S. 479, 486 (1965).
109. *Id.* at 483–84.
110. Amanda Hainsworth, Dobbs *and the Post*-Roe *Landscape*, BOS. BAR J. 9, 10 (2022); *See* Loving v. Virginia, 388 U.S. 1 (1967) (protecting the right of interracial couples to marry); Eisenstadt v. Baird, 405 U.S. 438 (1972) (extending *Griswold* to unmarried couples); Lawrence v. Texas, 539 U.S. 558 (2003) (protecting the right to liberty in individual decisions concerning the intimacies of their physical relationships); Obergefell v. Hodges, 576 U.S. 644 (2015) (protecting the right to marriage of same-sex couples).
111. 576 U.S. 644.

inquiry but do not set its outer boundaries."[112] This approach leaves more room for interpretation.

The second theory is best summarized in *Washington v. Glucksberg*, where the Court came close to establishing a definitive test for new fundamental rights.[113] In *Glucksberg*, the Court considered whether assisted suicide is a fundamental right when evaluating whether a Washington law prohibiting physician-assisted suicide offended the Fourteenth Amendment to the United States Constitution.[114] To determine whether the "right to assistance in committing suicide" is fundamental under the Due Process Clause, the Court considered the "established method of substantive-due-process analysis," where the Court seeks a right that is "objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'"[115]

The Court has also used a third and more expansive theory when deciding what a fundamental right is. For instance, the approach used in *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* did not limit the creation of fundamental rights to "historical tradition" but rather permitted the Court to identify rights independently through a process that amounted to philosophical analysis.[116] It is an unlikely theory to be used, however, as *Dobbs* has overturned *Roe*.[117]

C. Substantive Due Process After Dobbs

In *Dobbs v. Jackson*, the Supreme Court held, in a majority opinion written by Justice Alito, that "abortion is not a fundamental constitutional right because such a right has no basis in the Constitution's text or in our Nation's history."[118] Alito's approach to substantive due process in *Dobbs* follows the approach by then-Chief Justice William Rehnquist's 1997 decision in *Washington v. Glucksberg*, where the Court declared that the Due Process Clause of the Fourteenth Amendment guarantees "some rights that are not mentioned in the Constitution," which "must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of

112. *Id.* at 664.
113. *See* 521 U.S. 702 (1997) (holding that there is not a fundamental right to physician assisted suicide).
114. *Id.* at 705–06.
115. *Id.* at 720–21.
116. *See* Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood v. Casey, 505 U.S. 833 (1992).
117. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).
118. *Id.* at 2283 (2022).

ordered liberty.'"[119] *Dobbs* revived the *Glucksberg* methodology and set forth a new method by which unenumerated rights are to be discerned.[120]

The *Dobbs* Court asked two questions to conclude whether the Constitution "confers a right" to determine what "liberty" refers to in the Fourteenth Amendment.[121] First, the Court considered whether the issue is "rooted in our Nation's history and tradition and whether it is an essential component of what we have described as 'ordered liberty.'"[122] Second, the Court considered whether the right is a "part of a broader entrenched right that is supported by other precedents."[123]

When confronted with a standard like the "rooted in our Nation's history" consideration, many questions arise. How does the Court gather that historical information? And further, how does the Court interpret that history to affect what is considered to meet this standard? Like many legal standards, the answer is not completely clear, which can be a principal source of disagreement among Justices. Yet, these questions are especially important when critics of such standards state that this type of discretion allows for judges to freely "cherry-pick" from history to support their preconceived opinions.[124] It is helpful to understand why courts analyze an asserted right's historic roots: the primary rationale for analyzing history is rooted in judicial restraint. By limiting fundamental rights to those that are longstanding and recognizable in American life, "judges of diametrically opposed opinions on the wisdom or justice of [a] challenged law should reach the same legal conclusion, since the decision will hinge on objective historical fact rather than on normative judgment."[125]

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119. *Id.* at 2242 (quoting *Glucksberg*, 521 U.S. at 721 (holding that there is no right to assisted suicide under the Due Process Clause)).

120. *Id.* at 2239. Four current Justices agree that *Glucksberg*'s reasoning is the method by which any unenumerated rights are to be discerned in the Fourteenth Amendment. The fifth, Justice Clarence Thomas, would like to see the doctrine of substantive due process abandoned but still supported overturning *Roe*.

121. *Id.* at 2244.

122. *Id.*

123. *Id.*

124. John C. Toro, *The Charade of Tradition-Based Substantive Due Process*, 4 NYU J.L. & LIBERTY 172, 194 (2009) (noting that judges have discretion in characterizing the relevant tradition; and, even if a court determines that an asserted right is supported by history and tradition, it must still engage in the value-laden endeavor of determining whether the right should be given contemporaneous protection—a step in the analysis that the Court has not yet acknowledged but which is critical to prevent the inquiry from becoming absurd.).

125. Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 672 (1997).

Unsurprisingly, judges like everyone else find themselves able to disagree about a host of historical claims. This disagreement likely stems from the reality that judges, like everyone else, can fall victim to "law office history," a term employed by historians when lawyers or judges cherry-pick certain quotations or happenings to support a given legal argument.[126] This "cherry picking" of historical facts leaves only pieces of the historical analysis, and not the analysis itself, which fails to take into consideration the implications of the history and can lead to history being "manipulable."[127] This leads to possibly too much judicial restraint especially in the fundamental right to privacy.[128]

Now, with *Dobbs*, the Supreme Court considered many different types of evidence, especially discussing if evidence of a right's deep roots is limited to the time surrounding the enactment of the Fourteenth Amendment or if there are any other limits.[129] To better understand this methodology applied to education as a fundamental right, we consider the Supreme Court's most recent substantive due process case: *Dobbs*.

III. ANALYSIS

A. Applying Dobbs *to Education: Using Substantive Due Process to Establish a Right to Education.*

To begin addressing the question of whether the "liberty" referred to in the Fourteenth Amendment "confers a right" to education, we must, like the *Dobbs* Court, consider whether the right at issue, education, is "rooted in our Nation's history and tradition and whether it is an essential component of what the Court has described as 'ordered liberty.'" [130] The *Dobbs* Court does this in three steps. First, by explaining the standards used in past cases that have determined whether the Fourteenth Amendment's reference to "liberty" protects a particular right.[131] Second, the analysis begins, and the Court considers whether the issue is "rooted in our Nation's history and tradition and whether it is an essential component of what we

126. Thomas Hilbink, *Schooling: History as Handmaiden*, 5 LAW, CULTURE & HUMANS. 43, 44 (2009).
127. *Id.*
128. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (overturning *Roe* and *Casey* because abortion could not be found to be deeply rooted due to a former "Court's flawed account of history").
129. *Id.* at 2244.
130. *Id.*
131. *Id.*

have described as 'ordered liberty.'"[132] Finally, the Court considers whether the right is a "part of a broader entrenched right that is supported by other precedents."[133]

B. Education's Deep Roots in this Nation's History and Tradition

Since the beginning of the United States, education has been recognized as essential to this Nation, and "American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance."[134] In *Dobbs*, the Court writes about historical evidence relating to abortion and concludes that it is not a fundamental right because the evidence shows "an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973."[135] In regards to education, however, the historical evidence relating to education favors education as a fundamental right.

Before the United States was founded, "education was a protected interest and considered implicit to ordered liberty," with colonies establishing local schools before the local government required parents to teach their children basic literacy.[136] Since the eighteenth century, both the Land Ordinance of 1785 and the Northwest Ordinance of 1787, which were created nearly a decade after the establishment of this country, set aside a portion of land granted to new states to be used to fund public schools.[137] While the Founding Fathers were influential in laying the groundwork for education in America, education for citizens continued to evolve. In the early 1800s, a Massachusetts legislator, Horace Mann, began advocating for the idea of public schools that would be available to all children.[138] Mann and other proponents of public schools coined a

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132. *Id.*
133. *Id.*
134. Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (holding that a Nebraska law that prohibited the teaching of foreign language to a young child in school violated the Due Process Clause because this law interfered with the fundamental liberty interest of a parent to control his or her child's education).
135. *Dobbs*, 142 S. Ct. at 2253–54.
136. Emily Barbour, *Separate and Invisible: Alternative Education Programs and Our Educational Rights*, 50 B.C. L. REV. 197, 225–26 (2009).
137. *See* Nancy Kober, *History and Evolution of Public Education in the US*, CTR. ON EDUCATION POLICY 1, 2 (2020), https://files.eric.ed.gov/fulltext/ED606970.pdf; *Northwest Ordinance (1787)*, NATIONAL ARCHIVES (2022), https://www.archives.gov/milestone-documents/northwest-ordinance?_ga=2.4897653.779121390.1667084648-1444490150.1667084648; Papasan v. Allain, 478 U.S. 265, 268–69 (1986) (although these ordinances were approved by the Continental Congress before the adoption of the Constitution in 1789, they remained the law of the land in the new United States, just as anything enacted or ratified by the Continental Congress was binding after 1789).
138. Kober, *supra* note 137, at 3.

"common school" and emphasized that "investment in education would benefit the whole nation by transforming children into literate, moral, and productive citizens."[139] These schools were funded by local property taxes and advocated for a statewide curriculum.[140]

Although the path toward providing universal access to free education has been gradual throughout the nineteenth century, public schools took hold in some communities at a faster pace than in others.[141] At the beginning of the 1900s, the common school era came to an end because of the shift from local control to regional control over schools.[142] This is seen today through the functionality of school districts. Since then, the federal government has continued to be involved in extensive legislation governing a wide range of public and private education.[143] The Court has also continued to facilitate federal control over education.[144] In contrast, it was not until the latter part of the twentieth century when support in American law for a constitutional right to obtain an abortion began.[145]

Further, the *Dobbs* Court emphasized that unlike other recognized fundamental rights, abortion is "critically different from any other right that this Court has held to fall within the Fourteenth Amendment's protection of 'liberty.'"[146] In *Dobbs*, the right to abortion was not found to be "rooted in our Nation's history and tradition," since at the time of the adoption of the Fourteenth Amendment, three-quarters of the States had made abortion a "crime" at any stage of pregnancy and no state constitutional provision had recognized abortion as a right until the latter part of the twentieth century.[147] Unlike the right to abortion, there are stark differences when it comes to education.[148] In 1868, at the time of the Fourteenth Amendment's passage, nearly every state in the Union imposed a

139. *Id.*
140. *Id.*
141. *Id.* at 4 (noting that public schools were more common in cities than in rural areas and in the Northeast than in other parts of the country).
142. *Id.*
143. *See, e.g.*, Individuals with Disabilities Education Act, 20 U.S.C. § 1400 (2004); No Child Left Behind Act, 20 U.S.C. § 6301 (2001); Every Student Succeeds Act, 20 U.S.C. § 6301 (2015).
144. *See* Boyce *supra* note 17, at 1025.
145. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242–43 (2022).
146. *Id.* at 2243.
147. *Id.* at 2248 (2022).
148. Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 108 (2008) ("Thirty-six out of thirty-seven states in 1868 . . . imposed a duty in their constitution on state government to provide a public-school education as a matter of their formal, positive state constitutional law" compared to only three states even mentioning segregation in education in their state constitutions.).

constitutional duty on state governments to provide a public school education.[149]

The question of whether education is an essential component of "ordered liberty" has been recognized in all of the leading Supreme Court cases regarding education as a right. Specifically, in *Brown*, where the Court stated that education is "required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship . . . [and] is a right which must be made available to all on equal terms."[150]

A right to a public-school education is deeply rooted in American history and tradition and is implicit in the concept of ordered liberty as it "is essential for the exercise of constitutional rights, for economic opportunity, and ultimately for achieving equality."[151]

C. Education as an Entrenched Right that is Supported by Other Precedents

Unlike abortion,[152] there are identifiable pre-*Rodriguez* authorities, like state constitutional provisions and statutes, that support the right to education.[153] In the absence of a federal right to education, a number of state courts have interpreted respective state constitutions as establishing a fundamental right to education.[154] The California Supreme Court so ruled prior to the *Rodriguez* decision, and the state judicial scoreboard has been mixed since then despite all state constitutions explicitly charging legislative bodies to provide for free public schooling.[155] Although there is a right to education at a state level, there is a necessity for a federal right to education, as some states with similar education clauses in their state constitutions have reached different conclusions as to the fundamental status of a right to education.[156] A federal right would establish a national standard, hopefully leading to fewer disparities across states and within different communities in the same state.

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149. *Id.*

150. Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 493 (1954).

151. Chemerinsky, *supra* note 10, at 123 (arguing that decisions such as *Rodriguez* and *Kadrmas* "are wrong--tragically wrong--in holding that there is not a fundamental right to education.").

152. *Dobbs*, 142 S. Ct. at 2248.

153. *See* Emily Parker, *50-State Review*, EDUC. COMM'N OF THE STATES (2016), https://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf.

154. *Id.*

155. *Id.*

156. *See* Perry Zirkel, *An Updated Tabular Overview of the School Finance Litigation*, 379 EDUC. L. REP. 453 (2020); *See* William Thro, *Originalism and School Finance Litigation*, 335 EDUC. L. REP. 538 (2016).

Additionally, the State's interest in protecting education is necessary and legitimate.[157] As mentioned previously, the Court has agreed on the importance of education in all cases addressing education.[158] With declining test rates and millennials tied in last place on math and problem-solving tests among the millennials in the workforces of all the industrial countries tested, it is clear that education needs to be recognized as a fundamental right to begin the process of establishing a proper U.S. education system.[159] Declaration of a federal right would allow challenged legislative action affecting fundamental rights to be subject to strict judicial scrutiny, and plaintiffs would have an important weapon to contest unfair educational policies and practices.

IV. CONCLUSION

Education is more critical now than ever, given the surge in misinformation that spreads online and the lack of media literacy and general education among citizens.[160] We can no longer leave the fate of education to the legislature. The statement "if courts do not equalize educational opportunity, no one will" remains true today.[161] If argued under the *Dobbs* methodology, the Supreme Court conceivably will take a stand that education is an implied fundamental right under the U.S. Constitution, thus overturning the *Rodriguez* precedent. It is difficult to argue that the right to education is not necessary to exercise other rights, especially those involving expression, voting, and access to justice, or that the glaring educational inequities across school districts are justified. In the midst of a new Due Process methodology and the uncertainty regarding whether the Fourteenth Amendment protects a right to education, the continuance of a failing U.S. education system is proving to be unable to provide fundamental skills, especially to the most marginalized Americans.[162] The judiciary can improve American education and begin the process of making it equitable for all children. [163]

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157. *Contra Dobbs*, 142 S. Ct. at 2261 (noting that there is an absence of any serious discussion in the dissent of the legitimacy of the States' interest in protecting fetal life).

158. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 29–30 (1973).

159. Dynarski & Michelmore, *supra* note 6; Tucker, *supra* note 8.

160. Tiffany Hsu, *As Covid-19 Continues to Spread, So Does Misinformation About It*, N.Y. TIMES (Dec. 28, 2022), https://www.nytimes.com/2022/12/28/technology/covid-misinformation-online.html.

161. Chemerinsky, *supra* note 10, at 112.

162. *Adult Literacy in the United States*, NAT'S CTR. FOR EDUC. STAT. (July 2019), https://perma.cc/257J-XEY6.

163. *See* Aaron Tang, Ethan Hutt & Daniel Klasik, Opinion, *A Constitutional Right to Literacy for Detroit's Kids?*, N.Y. TIMES (Apr. 26, 2020),

https://www.nytimes.com/2020/04/26/opinion/gary-whitmer-detroit.html (arguing that systemic inequality in U.S. education cannot be properly addressed solely in federal courts).

Busting the Union Buster: Why a Fair Balance of Employees' Right to Unionize and Employer Free Speech Requires Workplace Meetings Discussing the Employer's Views on Unionization to be Voluntary

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I. INTRODUCTION

On April 7, 2022, National Labor Relations Board (the "Board") General Counsel Jennifer Abruzzo sent shockwaves through American industries when she issued GC Memo 22-04. The memo announced that she would be asking the Board to find a violation of the National Labor Relations Act ("the Act" or "the Wagner Act") for mandatory meetings in which employees are required to listen to employer speech concerning the exercise of their statutory labor rights.[1] Days later, Abruzzo filed a brief in a case pending before the Board, *Cemex Construction Materials Pacific, LLC*, asking the Board to ban such meetings.[2] These meetings are famously referred to as "captive audience meetings."[3] While the Board has previously held that companies can require employees to attend anti-union meetings, the agency's current General Counsel views such meetings as inherently coercive and illegal.[4] Accordingly, her office is actively pursuing cases that could recast precedent by overturning the presumption long-enjoyed by employers: the Act affords them the privilege to require employees during the workday to listen to the company's anti-union rhetoric leading up to a union election.[5]

Captive audience meetings create a direct conflict between the rights of the employer and the rights of the employee enumerated

1. Memorandum GC 22-04, Jennifer A. Abruzzo, General Counsel, All Regional Directors, Officers-in-Charge, and Resident Officers, The Right to Refrain from Captive Audience and other Mandatory Meetings, NLRB (Apr. 7, 2022).

2. Brief in Support of General Counsel's Exceptions to the Administrative Law Judge's Decision at 45, Cemex Constr. Materials Pac., LLC (Apr. 11, 2022).

3. *Id.* at 46.

4. *Id.*

5. *NLRB General Counsel Jennifer Abruzzo Issues Memo on Captive Audience and Other Mandatory Meetings*, NLRB (Apr. 7, 2022), https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-jennifer-abruzzo-issues-memo-on-captive-audience-and.

within the Act.[6] While Section 8(c) of the Act affords employers free speech rights in the workplace,[7] Section 7 protects employees' rights to organize.[8] Employers' free speech rights are limited, however, because Section 8(c) does not protect expression that contains a "threat of reprisal or force or promise of benefit."[9] Further, under Section 8(1)(a), it is an unfair labor practice for an employer to interfere with or coerce employees in the exercise of the rights guaranteed in Section 7.[10]

This conflict is currently settled in favor of the employer. For example, even though recent polls have found that 71% of Americans approve of unions, private-sector union membership remains around 6%.[11] Many argue that captive audience meetings have contributed to the disparity between union approval and membership.[12] Indeed, with the rise in levels of unionization efforts being seen across the United States since the beginning of the Covid-19 pandemic,[13] the conflict between the language protecting employer free speech rights and the language protecting employee unionization rights under the Act has come under scrutiny. While employers retain free speech rights in the workplace, some argue that a reasonable employee would understand that their refusal to attend a mandatory workplace meeting discussing unionization would result in reprisal, or that requiring attendance to anti-union meetings would amount to coercion.[14] Thus, General Counsel Jennifer Abruzzo is currently seeking to overrule judicially created precedent allowing employers to hold captive audience meetings.[15]

Most recently, for example, Apple, the world's most valuable company, has been facing an unprecedented wave of organizing at its retail stores this year.[16] Even so, in May of 2022, organizers in a

6. National Labor Relations Act, 29 U.S.C. §§ 151–169.
7. *Id.* § 158.
8. *Id.* § 157.
9. *Id.* § 158.
10. *Id.*
11. Bobby Lindsay & Dustin Loosbrock, *What Captive Audience Meetings Are—And Why Minnesota's Labor Movement Wants to Ban Them*, WORKDAY MAG. (Mar. 21, 2023), https://workdaymagazine.org/what-captive-audience-meetings-are-and-why-minnesotas-labor-movement-wants-to-ban-them/.
12. *Id.*
13. Jennifer Elias & Amelia Lucas, *Employees Everywhere Are Organizing. Here's Why It's Happening Now,* CNBC (May 7, 2022, 9:15 AM), https://www.cnbc.com/2022/05/07/why-is-there-a-union-boom.html.
14. Brief in Support of General Counsel's Exceptions, Cemex Constr. Materials, LLC, *supra* note 2 at 47.
15. *Id.*
16. Josh Eidelson, *Apple's Anti-Union Tactics in Atlanta Were Illegal, US Officials Say*, BLOOMBERG (Dec. 5, 2022, 6:42 PM),

retail store located in Atlanta withdrew their petition to unionize.[17] Thereafter, the Communications Workers of America (CWA) submitted an unfair labor practice complaint on the workers' behalf, citing alleged misconduct by Apple.[18] In response, the Board's Atlanta regional director concluded that Apple held mandatory anti-union meetings.[19] The regional director threatened to issue a complaint if Apple did not settle.[20] In a statement issued by CWA, the group applauded the Board for taking action, emphasizing that "holding an illegal forced captive audience meeting is not only union-busting, but an example of psychological warfare."[21] The CWA went on to commend the Board for "recognizing captive audience meetings for exactly what they are: a direct violation of labor rights."[22] If filed, the regional director's complaint will be considered by the agency's judges, whose ruling can be appealed to the Board's members in Washington, and from there can go to federal court.[23]

The current conflict surrounding this issue has been well-debated since the Act's inception in 1935 and its subsequent amendments, illustrating the competing interests of employer free speech and employee rights to self-organization under the Act's language. Because captive audience meetings are conducted by the Board's general counsel, making the meetings unlawful will result in an arduous battle. Part II of this article presents the relevant legislative and judicial history behind the competing interests of the employer versus the employee. Part III argues that an employer's right to free speech under Section 8(c) of the Act should not outweigh an employee's right to refrain from listening to speech implicating their Section 7 rights. Finally, part IV argues for a workable solution to the conflict, which includes allowing employers to hold these meetings so long as they manifest to employees that their attendance is voluntary and their choice will not result in a benefit or reprisal.

II. BACKGROUND

In 1935, President Franklin Roosevelt signed the National Labor Relations Act into law as part of the New Deal program advanced

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https://www.bloomberg.com/news/articles/2022-12-05/apple-s-anti-union-tactics-in-atlanta-were-illegal-us-officials-say.

17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*

by Democrats to counter the Great Depression.[24] When President Roosevelt signed the Act into law on July 5, 1935, he declared:

> A better relationship between labor and management is the high purpose of this Act. By assuring the employees the right of collective bargaining it fosters the development of the employment contract on a sound and equitable basis. By providing an orderly procedure for determining who is entitled to represent the employees, it aims to remove one of the chief causes of wasteful economic strife. By preventing practices which tend to destroy the independence of labor, it seeks, for every worker within its scope, that freedom of choice and action which is justly his.[25]

The Act, commonly referred to as the Wagner Act, was spearheaded by United States Senator Robert F. Wagner of New York.[26] Wagner deeply believed in the New Deal's goal to provide economic security to low-income groups.[27] Accordingly, the Act explicitly protects the right of workers to collective bargaining, while also establishing a new independent National Labor Relations Board with enforcement powers to protect this right.[28] To this day, these enforcement powers include the ability to conduct elections, investigate charges, facilitate settlements, and decide cases.[29] Additionally, the Board can require remedies, such as the posting of notices and reversals of policies or punishments; however, it does not have the authority to impose punitive damages on companies.[30] Further, under the new law, employee union elections were certified by the Board.[31] Accordingly, the so-called "company unions," previously used by management to flout collective bargaining rights, were outlawed.[32] Finally, when faced with complaints on behalf of workers,

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24. *Labor Management Relations Act of 1947 (Taft-Hartley Act)*, INFLUENCE WATCH, https://www.influencewatch.org/legislation/labor-management-relations-act-of-1947-taft-hartley-act/ (last visited Sept. 12, 2023).

25. *FDR and the Wagner* Act, FRANKLIN D. ROOSEVELT PRESIDENTIAL LIBR. AND MUSEUM, https://www.fdrlibrary.org/wagner-act (last visited Sept. 12, 2023).

26. *Id.*

27. *Id.*

28. *Id. See also What We Do,* NLRB, https://www.nlrb.gov/about-nlrb/what-we-do (last visited Sept. 12, 2023) (explaining that the Board is an independent federal agency vested with the power to safeguard employees' rights to organize and to determine whether to have unions as their bargaining representative). The agency also acts to prevent and remedy unfair labor practices committed by private sector employers and unions. *Id.*

29. *Id.*

30. Eidelson, *supra* note 16.

31. *FDR and the Wagner* Act, *supra* note 25.

32. *Id.*

the Board was empowered to hold hearings and compel compliance by management.[33]

Among its provisions, Section 7 of the Act explicitly guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,"[34] as well as the right "to refrain from any or all such activities."[35] As originally enacted, however, the Act's language did not include any provision that specifically addressed the intersection between employee organizational rights and employer speech rights.[36] Parties typically disputed the interpretation of Section 8(a)(1), which makes it an unfair labor practice for employers to "interfere with, restrain, or coerce employees in the exercise of their rights under Section 7."[37] For over a decade, the Board took the position that Section 8(a)(1) demanded complete employer neutrality during organizing campaigns, reasoning that any partisan employer speech about unions would interfere with the employees' Section 7 rights.[38] Specifically, the Board held in *NLRB v. Clark Bros.* that captive audience meetings were *per se* coercive and therefore unlawful.[39] And, over the next twelve-year administration of the Wagner Act, unions won victories in over 80% of NLRB-conducted elections.[40] Although the Act led to increased union membership, it also created a power imbalance between labor unions and employers.[41] In fact, a wave of strikes followed the conclusion of World War II, most prominently a 113-day strike by the United Auto Workers against General Motors in the winter of 1945–46.[42] In total, an estimated 4.6 million workers, amounting to over 10% of the workforce, went on strike during this time period.[43]

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33. *Id.*
34. 29 U.S.C. § 157.
35. *Id.*
36. *Id.* §§ 151–169.
37. *Id.* § 158.
38. NLRB v. Clark Bros. Co., 70 N.L.R.B. 802 (1946).
39. *Id.* at 812 (ruling that employers could not compel employees to listen to anti-union speeches). The Board explained that because the employer wielded its "economic power" to hold an employee audience captive and because the employees were not "free to determine whether or not to receive" the employer's information, the employer committed an unfair labor practice. *Id.* at 805. The Board noted that it was not limiting the expression of opinion but only the compulsion to listen, which was not "an inseparable part of . . . speech." *Id.* at 830.
40. *1959 Landrum-Griffin* Act, NLRB, https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1959-landrum-griffin-act (last visited Sept. 12, 2023).
41. *Labor Management Relations Act of 1947*, *supra* note 24.
42. *Id.*
43. *Id.*

Concerned that the Wagner Act had pushed labor relations balance too far in favor of the unions, Congress overrode President Truman's veto in order to pass the Labor Management Relations Act, commonly referred to as the Taft-Hartley Act, in 1947.[44] The Taft-Hartley Act was a set of amendments to the Wagner Act passed after World War II to correct the pro-organized-labor bias of the New Deal-era Wagner Act.[45] The amendments sought to improve a power imbalance between labor unions and employers, one seemingly created by the Wagner Act.[46] Consequently, the Taft-Hartley Act made major changes to the Wagner Act. While Sections 7 and 8(a)(1) were retained, new language was added to protect employees from unfair labor practices by *unions*.[47] Additionally, the amendment contained Section 8(c), known as the "free speech clause," which read that:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter if *such expression contains no threat of reprisal or force or promise of benefit.*[48]

This language was intended to encourage free debate on issues dividing labor and management.[49] In essence, it codified an employer's First Amendment rights in the workplace to speak on labor relations issues long debated by courts.[50] This privilege was not without limits, however, as expressions containing the threat of reprisal or force or promise of benefit were not protected.[51] Regardless of any limitations, in the first year after the passage of the Taft-Hartley Act, unions only won around 70% of the representation elections conducted by the NLRB, signaling an immediate decline from just one year prior.[52]

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44. *Id.*
45. *Id.*
46. *Id.*
47. 29 U.S.C. § 158.
48. *Id.* (emphasis added).
49. Linn v. Plant Guard Workers, 383 U.S. 53, 62 (1966).
50. *See* NLRB v. Va. Elec. & Power Co., 314 U.S. 469, 477 (1941) (holding nothing in the NLRA prevents an employer from expressing its view on labor policies or problems unless the employer's speech amounts to coercion); Thomas v. Collins, 323 U.S. 516, 537–38 (1945) (characterizing *Virginia Electric* as recognizing the First Amendment right of employers to engage in noncoercive speech about unionization).
51. 29 U.S.C. § 158.
52. *1959 Landrum-Griffin* Act, *supra* note 40.

Then, in a single sentence and without explanation, the Board reversed its position in *Clark Bros.* and held that an employer could lawfully compel its employees to listen to speech on self-organization.[53] The Board doubled down on its holding in *The Babcock & Wilcox*, later concluding that there must be no Section 7 right to refrain from attending captive audience meetings.[54] While the Board has placed some limitations to employer tactics leading up to a union election,[55] its current position on captive audience meetings is substantively unchanged since *The Babcock & Wilcox*.[56]

Since the Board's decision in *The Babcock & Wilcox*, the playing field has tilted toward big business and management, making union organizing drives and elections unreasonably difficult.[57] As a result, the percentage of wage and salary workers belonging to unions have declined.[58] Indeed, the percentage of workers who are members of unions—the union membership rate—has fallen from 20.1% in 1983 to 10.1% as of 2022.[59] This decline is attributable to several factors, among them the intensity of employer resistance encountered by employees attempting to unionize a non-union workplace.[60] Employers commonly utilize captive audience meetings during labor organizational campaigns. These meetings, which have become a cornerstone of large companies like Amazon's anti-union strategy,[61] are a highly effective weapon because they give employers'

53. The Babcock & Wilcox Co., 77 N.L.R.B. 577, 578 (1948) ("The language of Section 8(c) of the amended Act, and its legislative history, make clear that the doctrine of the *Clark Bros* case no longer exists as a basis for finding unfair labor practices in circumstances such as this record discloses.").

54. Litton Sys., Inc., 173 N.L.R.B. 1024, 1030–31 (1968). "An employee has no statutorily protected right to leave a meeting which the employees were required by management to attend on company time and property to listen to management's noncoercive antiunion speech designed to influence the outcome of a union election." *Id.* The Board continued, "For if he had such a statutory right, then management's compulsory requirement to attend such a meeting would interfere with and restrain him in the exercise of that right in violation of Section 8(a)(1) of the Act." *Id.*

55. Peerless Plywood Co., 107 N.L.R.B. 427, 429 (1953) (holding employers and unions alike are prohibited from making election speeches on company time within twenty-four hours of a union election).

56. The Babcock & Wilcox Co., 77 N.L.R.B. at 578.

57. Don Gonyea, *House Democrats Pass Bill That Would Protect Worker Organizing Efforts*, NPR (Mar. 9, 2021, 9:18 PM), https://www.npr.org/2021/03/09/975259434/house-democrats-pass-bill-that-would-protect-worker-organizing-efforts.

58. *News Release: Bureau of Labor Statistics*, U.S. DEP'T OF LAB. (Jan. 19, 2023), https://www.bls.gov/news.release/pdf/union2.pdf.

59. *Id.*

60. Elizabeth J. Masson, *"Captive Audience" Meetings in Union Organizing Campaigns: Free Speech or Unfair Advantage?*, 56 HASTINGS L.J. 169, 170 (2004).

61. Katherine Long, *Amazon Held 25 Mandatory Anti-Union Meetings Each Day in the Weeks Leading up to the Staten Island Union Vote*, BUS. INSIDER (June 15, 2022, 6:41 PM), https://www.businessinsider.com/amazon-anti-union-meetings-staten-island-vote-2022-6.

direct access to workers to discredit union drives at a company.[62] In essence, Congress's attempt to curtail union power with the Taft-Hartley Act instead handed the reins over to employers, and management has remained in the driver's seat for the past seventy-five years. In fact, as recently as 2021, the United States Supreme Court has continued to chip away at workers' Section 7 rights.[63]

A handful of states have since attempted to outlaw captive audience meetings at the state level with varying degrees of success.[64] Because the Supreme Court has said that, in passing the Wagner Act, Congress did not intend to regulate the entire field of labor relations,[65] states have some room to regulate in this area. However, the Court has created two specific preemption theories to protect the Wagner Act from state and local infringement.

Garmon preemption prohibits states and municipalities from regulating "activity that the [Act] protects, prohibits, or arguably protects or prohibits."[66] Machinists preemption bars states and municipalities from regulating conduct that Congress intended to "be unregulated because it has been left to be controlled by the free play of economic forces."[67] Oregon became the first state to successfully curb employer power leading up to a union election by outlawing captive audience meetings.[68] Enacted in 2010, the law provides that an employer may not discharge, discipline or otherwise penalize an employee, or threaten to do the same, because the employee "declines to attend or participate in an employer-sponsored meeting or communication with the employer if the primary purpose of the communication is to communicate the opinion of the employer about political matters."[69] The statute defines political matters to

62. Masson, *supra* note 60 at 170.

63. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2080 (2021) (holding that a government regulation granting labor organizations a right to access an employer's property to meet with employees for temporary periods without providing proper notice violated the Takings Clause).

64. *Will Connecticut's Captive Audience Law Survive Legal Challenge?*, CBIA (Dec. 6, 2022), https://www.cbia.com/news/issues-policies/ct-captive-audience-law-legal-challenge (stating "[t]he County of Milwaukee and State of Wisconsin enacted similar laws and failed in their efforts to defend them. The Seventh Circuit struck down a 2000 Milwaukee County captive audience ban because it was preempted by the NLRA. In Wisconsin, when a lawsuit was filed claiming its 2010 captive audience ban was preempted by the NLRA, the state did not defend the law and agreed not to enforce it. In 2006, the Colorado legislature passed a similar ban; the governor vetoed it.").

65. *See* San Diego Bldg. Trades Council, Millmen's Union, Loc. 2020 v. Garmon, 359 U.S. 236, 244 (1959).

66. *Will Connecticut's Captive Audience Law Survive Legal Challenge?*, *supra* note 64.

67. *Id.*

68. *See* OR. REV. STAT. ANN. § 659.785 (West, Westlaw Edge through 2023 Reg. Sess. of the 82nd Legis. Assemb.).

69. *Id.*

include "the decision to join, not join, support or not any lawful political or constituent group," and further defines "constituent group" to include labor organizations.[70] During the Trump presidency, the Board sued the state of Oregon claiming the statute was invalid under a theory of *Garmon* preemption, but the suit was dismissed for lack of standing.[71] Since *NLRB v. Oregon*, no court has held that Oregon's statute would be preempted by the NLRA, signaling states' ability to regulate in this area free from federal reach.

Ten years later, a second attempt was made, this time by Congress, to level the playing field between management and workers with the introduction of the Protecting the Right to Organize Act (the Pro Act).[72] Among other provisions, the bill sought to make it an unfair labor practice to require or coerce employees to attend employer meetings designed to discourage union membership.[73] It was passed by the House of Representatives in March of 2021; however, the bill is not expected to survive the Senate, due to a lack of Republican support for the legislation.[74]

Then, in April of 2022, General Counsel for the Board Jennifer Abruzzo lit the match to ignite the fire when she issued GC Memo 22-04, followed by the *Cemex* brief. As the chief enforcer of the Board, Abruzzo dictates how the law is to be administered by the regional offices across the country.[75] Accordingly, the General Counsel shapes the direction and content of Board law to a great degree.[76] As stated above, Abruzzo argued in the *Cemex* brief that employers violate the Act by forcing employees to attend meetings on work time regarding the exercise of their Section 7 rights.[77] She further contended that if employers want to hold such meetings, they should be required to manifest to employees that their attendance is voluntary so as not to be in violation of the Act.[78]

Then, in May of 2022, Connecticut became the second state to successfully enact a law protecting workers from being forced to listen to anti-union speeches.[79] Connecticut's Act Protecting Employee

70. *See Id.* § 659.780 (West, Westlaw Edge through the 2023 Reg. Sess. of the 82nd Legis. Assemb.).

71. NLRB v. Oregon, No. 6:20-cv-00203, 2021 WL 4433161 (D. Or. Sept. 27, 2021).

72. Protecting the Right to Organize Act, H.R. 842, 117th Cong. (2021–2022).

73. *Id.*

74. Gonyea, *supra* note 57.

75. James R. Redeker, *Promise Kept: National Labor Relations Board's Pro-Union Bias*, EMP. RELS. L.J. (Winter 2022).

76. *Id.*

77. Brief in Support of General Counsel's Exceptions, Cemex Constr. Materials, *supra* note 2.

78. *Id.*

79. *Starbucks Baristas Unionize After Connecticut Bans Bosses' Anti-Union 'Captive Audience' Meetings*, PEOPLE'S WORLD (July 15, 2022, 11:14 AM),

Freedom of Speech and Conscience makes it illegal for an employer to threaten to or actually discipline or discharge an employee

> on account of such employee's refusal to: (A) attend an employer-sponsored meeting with the employer or its agent, representative or designee, the primary purpose of which is to communicate the employer's opinion concerning religious or political matters; or (B) listen to speech or view communications the primary purpose of which is to communicate the employer's opinion concerning religious or political matters.[80]

The definition of "political matters" includes topics "relating to . . . the decision to join or support any labor organization."[81] In November of 2022, national and Connecticut-based business interest groups sued in federal district court to invalidate the state's law under theories of constitutional law and federal preemption, the outcome of which remains to be seen.[82]

While captive audience meetings remain lawful at the federal level, their protected status faces imminent risk. Even though the Board has yet to rule on the *Cemex* case or move forward in the Apple dispute in Atlanta, given the political makeup of the Board—three Democrats and two Republicans—it is likely that the General Counsel's recommendations will be accepted.[83] Moreover, if the Board's future decision is made to retroactively apply to pending cases, as it has done in the past, the employer holding a lawful captive audience meeting today will have nevertheless committed an unfair labor practice.[84] For these reasons, this article offers a balancing approach of the competing interests on the topic to ultimately argue in favor of General Counsel Abruzzo's recommendations as a way to balance the scale that has tipped in favor of employers for the past seventy-five years.

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https://peoplesworld.org/article/starbucks-baristas-unionize-after-connecticut-bans-bosses-anti-union-captive-audience-meetings.

80. CONN. GEN. STAT. ANN. § 31-51q (West, Westlaw Edge through 2023 Reg. Sess. of 2023 Sept. Special Sess.).

81. *Id.*

82. *Will Connecticut's Captive Audience Law Survive Legal Challenge?*, *supra* note 64.

83. *NLRB General Counsel Files Brief To Ban "Captive Audience" Meetings, Install Back-Door Card Check*, LAB. UNION NEWS (Apr. 12, 2022), https://laborunionnews.substack.com/p/in-major-move-nlrb-general-counsel. Whether the Board's decision is appealed at the federal level, and what the outcome of such an appeal might be, is outside the scope of this comment.

84. Michael Pavlick, *What Happens if NLRB Cuts Captive Audience Meetings*, BL (Oct. 4, 2022, 4:48 PM), https://news.bloomberglaw.com/us-law-week/what-happens-if-nlrb-cuts-captive-audience-meetings.

III. AN EMPLOYER'S RIGHT TO FREE SPEECH UNDER SECTION 8(C) OF THE ACT DOES NOT OUTWEIGH AN EMPLOYEE'S RIGHT TO REFRAIN FROM LISTENING TO SPEECH REGARDING THE EXERCISE OF THEIR SECTION 7 RIGHTS

A. Mandatory Workplace Meetings Discussing Employees' Section 7 Rights are per se Unlawful, and an Employer Must Manifest that Such Meetings are Voluntary

Based on the foregoing, this article argues that the pendulum has swung too far in favor of employers and management. Specifically, the Board should overturn *The Babcock & Wilcox* and hold that mandatory meetings—where an employer forces employees during the workday to listen to their anti-union presentations—violates employees' Section 7 right to refrain from such speech. These meetings also violate Section 8(c) because a reasonable employee would perceive an implicit threat of reprisal for refusing to attend such meetings.

This article acknowledges that there are two legitimate competing interests at odds in the context of a union campaign and election captive audience meetings have long created an advantage enjoyed by employers that stands in stark contrast with the plain language and intent of the NLRA. Importantly, this article does not argue that employers should be banned from voicing their opposition to unions. To protect their Section 8(c) rights, employers may lawfully express their opinion on unions, so long as they manifest that such meetings are *voluntary*, and an employee may leave at any time without reprisal or discipline. Such an approach would allow employees to have a choice in attending meetings which discuss their statutory rights to unionize. Further, it would harmonize the objective of the Act to protect workers' rights with the employers' competing interests in free speech.

If an employer fails to manifest the voluntary nature of such meetings, the Board should hold that management commits an unfair labor practice, because a reasonable employee would perceive a threat for declining to listen to speech concerning the exercise of their Section 7 rights. Additionally, the Board should assert that any requirement forcing employees to listen to such speech, whether express or implied, inherently contains such a threat in violation of Section 8(c).

The following section of this article is broken up by types of argument on either side of the issue: statutory intent, constitutional principles, current legislative trends, and policy. Each section

discusses the merits of each argument supporting the proposed position, as well as those opposing it. This article concludes with an analysis of why the argument supporting the proposed approach is more persuasive.

B. Captive Audience Meetings Conflict with the Policy Goals of the Act

It is more important now than ever for the Board to revisit its prior holdings on captive audience meetings. After years of decline, the American labor movement is experiencing a resurgence.[85] Organizing campaigns regularly lead headlines with major companies like Amazon, Starbucks, and Apple experiencing a push from employees for collective bargaining.[86] Experts attribute the rise in union organizing, in part, to the pandemic.[87] During the global crisis, many companies called their employees "essential workers" but did not treat them as such when it came to wages, benefits, and safety.[88] The situation motivated workers to organize, but they are faced, at every turn, with fierce opposition from employers equipped with management-friendly precedent.[89] Overall, there were 53% more union representation petitions filed in the 2022 fiscal year than in the previous year, according to NLRB data.[90] While the successful labor drives of the past year have caught public attention, unionization rates in the U.S. are still much lower than they were half a century ago.[91] Just 6% of the private sector workforce belongs to unions today, even though approval of labor unions in the U.S. is at 71%,[92] the highest approval rate since 1965. And as recession fears loom,[93] there is also the possibility of employers making layoffs,[94] further weakening workers' leverage.

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85. Michael Sainato, *US Sees Union Boom Despite Big Companies' Aggressive Opposition*, THE GUARDIAN (July 27, 2022, 5:00 EDT), https://www.theguardian.com/us-news/2022/jul/27/us-union-boom-starbucks-amazon.

86. *Id.*

87. Rani Molla, *How Unions are Winning Again, in 4 Charts*, VOX (Aug. 30, 2022, 6:00 AM), https://www.vox.com/recode/2022/8/30/23326654/2022-union-charts-elections-wins-strikes.

88. *Id.*

89. *Id.*

90. *Election Petitions Up 53%, Board Continues to Reduce Case Processing Time in FY22*, NLRB (Oct. 6, 2022), https://www.nlrb.gov/news-outreach/news-story/election-petitions-up-53-board-continues-to-reduce-case-processing-time-in.

91. Alana Semuels, *Some Companies Will Do Just About Anything to Stop Workers from Unionizing*, TIME (Oct. 13, 2022, 10:12 AM), https://time.com/6221176/worker-strikes-employers-unions.

92. *Id.*

93. *Id.*

94. *Id.*

Based on the above, the Board should outlaw captive audience meetings, because the primary goal of the Act, as well the Board's purpose, is to protect the collective bargaining rights of private sector workers in the United States. As such, the Act should be interpreted in accordance with this intent to make it unlawful for an employer to require employees to attend meetings during the workday discussing their Section 7 rights. Rather, to harmonize the incongruities of the policy goals of the Act with the language of Section 8(c) protecting employer free speech rights, a balance must be struck. That balance can be attained merely by the employer communicating to employees that meetings involving discussion of Section 7 rights are voluntary, and employees may leave at any time.

i. Historical Perspective of the Act

By 1935, the United States was in the depth of the Great Depression.[95] Unemployment had reached national levels as high as 25% and, in some factory towns, could be found at levels as high as 75%.[96] Based on the assumption that the power of the federal government was needed to get the country out of the depression,[97] President Roosevelt signed legislation into law under his New Deal program.[98]

> [The] New Deal [was] [a] domestic program between . . . 1933 and 1939, which took action to bring about immediate economic relief as well as reforms in industry, agriculture, finance, waterpower, labor, and housing, vastly increasing the scope of the federal government's activities. The term was taken from Roosevelt's speech accepting the Democratic nomination for the presidency on July 2, 1932. Reacting to the ineffectiveness of the administration of Pres. Herbert Hoover in meeting the ravages of the Great Depression, American voters the following November overwhelmingly voted in favor of the Democratic promise of a "new deal" for the "forgotten man." Opposed to the traditional American political philosophy of laissez-faire, the New Deal generally embraced the concept of a government-

95. Bashar H. Malkawi, *Labor and Management Relationships in the Twenty-First Century: The Employee/Supervisor Dichotomy*, 12 N.Y. CITY L. REV. 1, 2 (2008).

96. *Id.* at 2.

97. *President Franklin Delano Roosevelt and the New Deal*, LIBR. OF CONG., https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/great-depression-and-world-war-ii-1929-1945/franklin-delano-roosevelt-and-the-new-deal/ (last visited Sept. 12, 2023).

98. *See New Deal United States History*, BRITANNICA (Jan. 8, 2023), https://www.britannica.com/event/New-Deal.

> regulated economy aimed at achieving a balance between conflicting economic interests.[99]

Part of that program was the National Labor Relations Act.[100] One of the primary goals of the Act was to secure American workers the basic right to organize and benefit from collective bargaining in negotiations.[101] In the first decade of its existence, union membership, beginning at approximately three million members representing about 12% of the workforce in 1935, had skyrocketed to almost twelve million members representing one-third of the workforce by 1945.[102]

By 1946, though, a huge wave of strikes had swept across the United States.[103] During wartime, unions had promised not to strike to keep defense production running smoothly.[104] Soon after the war ended, however, unions across the nation began demanding new contracts.[105] As a result, 1946 saw a record number of strikes, with almost five million American workers walking out on their jobs that year alone.[106] As industries across the nation came to a standstill,[107] Congress worried that labor unions were becoming too powerful under the Act.[108] At the same time, Republicans had gained control of the House of Representatives and Senate for the first time since 1931.[109] Against this backdrop, the 80th Congress in 1947 enacted the Labor-Management Relations (Taft-Hartley) Act, passed over President Truman's veto, and adopted it as an amendment to the NLRA of 1935.[110] The purpose of the Taft-Hartley Act, according

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99. *Id.*

100. *Id.* It is important to note that, at the point of President Roosevelt signing the Act into law, it was still a question of whether Congress had the authority to regulate labor relations among the states. In *NLRB v. Jones & Laughlin Steel*, the Court held that even purely intrastate activity might have serious implications on interstate commerce and thus could be regulated by Congress. With this, the Act assumed the full force of the law. *See* Malkawi, *supra* note 95, at 3.

101. As stated above, the Act also defined what constituted unfair labor practices and established the Board to investigate claims of unfair labor practices and ensure fair union elections. *See id.*

102. Malkawi, *supra* note 95, at 3–4.

103. *U.S. Labor Unions in the 1940s*, CROSS CURRENTS, http://www.crosscurrents.hawaii.edu/content.aspx?lang=eng&site=us&theme=work&subtheme=UNION&unit=USWORK010 (last visited Apr. 2, 2023).

104. *Id.*

105. *Id.*

106. Malkawi, *supra* note 95, at 5.

107. *Taft Hartley Act: Everything You Need to Know*, UPCOUNSEL, https://www.upcounsel.com/taft-hartley-act (last visited Sept. 12, 2023).

108. *Id.* At this time, there was also another concern about the rise in unions: fear of communism heated by the political and social environment brought on by the Cold War. *Id.*

109. *Id.*

110. *1947 Taft-Hartley Passage and NLRB Structural Changes*, NLRB,

to sponsors and supporters, was to "restore a more balanced relationship between labor and management."[111] Among its many provisions,[112] the Taft-Hartley Act included a free speech clause for employers and workplace management, protecting their legal capacity to express their views and opinions about labor issues.[113] This clause greatly reduced the power of labor unions, and the number of strikes in the 1950s dropped considerably.[114] The following year, the free speech provision was interpreted to allow employers to hold captive audience meetings.[115]

ii. Current Debate of the Act as Amended

Those in favor of captive audience meetings argue that if the Board overturns existing precedent, it would usurp the role of Congress by modifying the statutory intent of the Act.[116] This argument emphasizes that it was the intent of Congress in amending the NLRA, specifically by adding Section 8(c), to explicitly clarify that employers have a lawful right to hold mandatory meetings with employees to communicate their views on unionization.[117] This side argues that the Board has repeatedly acknowledged that Congress added Section 8(c) to the Act, at least in part, to overrule the *Clark Bros.* decision.[118] Therefore, under this argument, overturning precedent should be initiated by democratically-elected representatives of Congress, not by politically-appointed members of the Board.

This argument ignores one glaring fact: the Taft-Hartley Amendments never expressly allowed employers to hold captive audience meetings. Rather, the Board interpreted Section 8(c) to allow these meetings.[119] While the Board may have based its holding on what it believed to be Congress's intent, Congress itself never expressly

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https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1947-taft-hartley-passage-and-nlrb-structural-changes (last visited Apr. 2, 2023).

111. *Taft Hartley Act: Everything You Need to Know*, *supra* note 107.

112. For example, under Taft-Hartley, unions were prohibited from organizing localized strikes and targeting other businesses and industries in "secondary boycotts." *Id.* Taft-Hartley authorized the Attorney General to issue an eighty-day injunction if a strike "imperiled the national health or safety, required union leaders to give employers at least 60 days' notice in advance of a strike." *Id.*

113. *Id.*

114. *U.S. Labor Unions in the 1940s*, *supra* note 103.

115. The Babcock & Wilcox Co., 77 N.L.R.B. 577 (1948).

116. Brief for Respondent Answering Brief to Exceptions Filed by the General Counsel at 42, Cemex Constr. Materials Pac., LLC v. Int'l Bhd. of Teamsters, No. 28-CA-230115 (N.L.R.B. May 25, 2022).

117. *Id.*

118. *See, e.g.*, Livingston Shirt Corp., 107 N.L.R.B. 400, 406 (1953); Litton Sys., Inc., 173 N.L.R.B. 1024, 1030–31 (1968); Beverly Enters.-Haw., Inc., 326 N.L.R.B. 335, 352–53 (1998).

119. The Babcock & Wilcox Co., 77 N.L.R.B. at 578.

created this privilege. Further, because *Wilcox* was decided in the wake of the great strike wave of 1946, citizens and politicians alike were undoubtedly concerned with the recent economic discord brought on by the massive wave of striking workers across American industry.[120] It is far more likely that the economic and political climate at the time of the Board's decision in *Wilcox* had more to do with such an interpretation than congressional intent. Moreover, drafters of the Taft-Hartley Amendments reaffirmed that the intent of the Act, as amended, was still to protect workers' rights to form or join unions and to engage in collective bargaining with their employers.[121] While it is clear that Congress intended to control the American workforce, enabled by the union-friendly Wagner Act, it does not follow that Congress expressly intended to permit employers to lawfully require employees to attend meetings during the work day to speak against the workers' right to unionize. The drafters took precaution to reiterate the Act's purpose to protect these rights, even as amended.[122] At best, the Act's language, specifically Section 8(c) and Section 7, creates ambiguity that warrants more analysis than one sentence from a court opinion.[123] As such, a court should re-evaluate the Board's unsupported conclusion in *Wilcox*. Specifically, the ambiguity between the provisions in the amended Act should be resolved with the disparity in bargaining power between employer and employee in mind.

In sum, to interpret the employer free speech provision in Section 8(c) as permitting an employer to *require* that employees listen to their anti-union rhetoric during worktime goes beyond the intent of Congress's Taft-Hartley Amendments. Moreover, a court's decision to overhaul existing precedent would not "usurp the role of Congress" because it was never explicit from the language of the Taft-Hartley Amendments that Congress intended to allow captive audience meetings. One sentence from one case without further analysis is not enough to support this argument. A court's decision to overturn *Wilcox* and hold that mandatory meetings during the workday discussing an employee's Section 7 rights is unlawful would more properly balance the employer's rights to free speech with the employee's right to refrain from listening to such speech about their Section 7 rights—rights that both the original Act and the Act as amended were intended to protect.

120. *Labor Management Relations Act of 1947*, *supra* note 24.
121. *Taft Hartley Act: Everything You Need to Know*, *supra* note 107.
122. *Id.*
123. *See* The Babcock & Wilcox Co., 77 N.L.R.B. at 578.

C. Captive Audience Meetings Unreasonably Interfere with an Employee's Constitutional Rights

Since the passage of the Taft-Hartley Act and the free speech provision of Section 8(c), the discussion of workplace captive audience meetings has largely centered on the employer's right to freedom of speech.[124] However, as with all constitutionally protected rights, the right to free speech is not absolute.[125] For example, the Supreme Court has repeatedly upheld the right of the unwilling listener to be free from unwanted communication in other contexts and, in so doing, has deemed constitutional restrictions on speech made to individuals in a captive audience setting.[126] In fact, "[t]he notion that, in certain circumstances, the unwillingness of persons to receive a message outweighs another's right to speak has been a part of First Amendment analysis for over fifty years."[127] However, captive audience meetings "are now considered to be integral to the employer's right to freedom of speech, even though in most other contexts there is no First Amendment right to speak to a captive audience."[128] This inconsistency undermines the First Amendment by exempting the workplace from its protection.[129] Such an outcome is improvident and unworkable. Not only do employees spend most of their time in the workplace, but the employment relationship is one where there exists unequal bargaining power. Inequitable results follow where an employee is forced to choose between attending a required meeting during the workday and abstaining and being subject to consequences, which often include discharge and loss of income.[130] Indeed, the Court has stated that economic dependence on an employer can make employees perceive implicit threats even if an

124. Allie Robbins, *Captive Audience Meetings: Employer Speech vs. Employee Choice*, 36 OH. N. U. L. REV. 591, 601 (2010).

125. *Id.*

126. *See, e.g.*, Packer Corp. v. Utah, 285 U.S. 105, 110–11 (1932) (acknowledging that the presence of billboards can create a captive audience of unwilling viewers); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 72 (1983) (finding that recipients of mailings are not captive because they can easily throw them away); Hill v. Colorado, 530 U.S. 703, 716–17 (2000) (determining that employees on their way to and from work are a captive audience).

127. Robbins, *supra* note 124, at 601.

128. Kate E. Andrias, *A Robust Public Debate: Realizing Free Speech in Workplace Representation Elections*, 112 YALE L.J. 2415, 2439 (2003).

129. Robbins, *supra* note 124, at 601.

130. *See, e.g.*, NLRB v. Prescott Indus. Prod. Co., 500 F.2d 6, 7–8, 11 (8th Cir. 1974) (upholding the firing of an employee for demanding to ask questions in a mandatory meeting at which the employer told employees of its anti-union position); Litton Sys., Inc., 173 N.L.R.B. 1024, 1027–28, 1030–31 (1968) (upholding the discharge of an employee who left a mandatory meeting early in which the employer spoke about a union organizing drive).

outsider may not.[131] Despite these very real consequences, the jobsite has been placed incongruently outside of the Supreme Court's captive audience jurisprudence.[132]

Thus, the Court's constitutional jurisprudence regarding captive audiences in other contexts should apply within the workplace to allow employees the ability to refrain from attending meetings meant to discourage the exercise of their protected right to unionize.

D. An Employer's Right to Engage in Political Speech Does Not Outweigh an Employee's Right to Refrain from Listening to Speech Regarding the Exercise of Their Section 7 Rights

Those in favor of captive audience meetings further contend that the doctrine of "employer free speech" casts the employer as a "candidate" in the election.[133] To support this argument, proponents point to *Thomas v. Collins*,[134] where the Court presupposed that employers and unions are rival candidates in representation elections, construing employer speech as political speech, entitled to protection.[135] Accordingly, a union election requires "robust, and wide-open debate,"[136] and necessary to that debate is the opportunity for the employer to voice its views on the election.

This argument endorses the use of captive audience meetings as a method of enhancing employees' freedom of choice by contributing to the creation of a "marketplace of ideas."[137] Proponents contend that employee free choice is furthered by hearing both sides of an issue, and workers should have the opportunity to hear and evaluate employer speech during union campaigns.[138] But this argument conveniently fails to consider that labor unions lack anywhere near equal access to employees during a campaign.

Even if the employer is viewed as a "candidate" whose political speech rights require the opportunity for "robust, and wide-open

131. *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 617–18 (1969) ("[s]tating these obvious principles is but another way of recognizing that what is basically at stake is the establishment of a nonpermanent, limited relationship between the employer, his economically dependent employee and his union agent, not the election of legislators or the enactment of legislation whereby that relationship is ultimately defined and where the independent voter may be freer to listen more objectively and employers as a class freer to talk.").

132. Robbins, *supra* note 124, at 601.

133. Masson, *supra* note 60 at 183.

134. Thomas v. Collins, 323 U.S. 516 (1945).

135. Masson, *supra* note 60, at 183.

136. Chamber of Com. of U.S. v. Brown, 554 U.S. 60, 68 (2008).

137. Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 BERKELEY J. EMP. & LAB. L. 356, 383 (1995).

138. Masson, *supra* note 60, at 182.

debate," this right cannot equate to mandated attendance. The freedom to express one's opinions and to invite others to assemble to hear those opinions does not contain the legal right to force others to listen. Moreover, that argument rests on the precarious assumption that granting employees an opportunity to become informed on both sides of the issue of a union election amounts to an ability to require attendance. As defined by Black's Law Dictionary, an "opportunity" is a "[s]ituation in which the commitment of resources may lead to unforeseen gains but contain[s] an element of risk."[139] Implicit in this definition is the choice to commit resources (here, the employee's attention) or to forego commitment because of the element of risk (here, disinterest in the speech).

While an employer's speech may be vital to making an informed decision, their legal right to give that opinion presents the employee with an *opportunity* to become informed and nothing more. Indeed, citizens cannot be required to attend a candidate's political speeches, when that candidate's ideology stands in direct opposition to that citizen, merely to become informed on all sides of political issues. Such citizens may capitalize on an *opportunity* to listen to such speech, but it would be preposterous to argue that the speaker can mandate attendance.

In sum, captive audience meetings cannot be upheld under the guise that the workplace is a marketplace for ideas that permit employers to require their "opponents" to listen to their political speech.

E. A Growing Number of States Have Passed Laws Prohibiting Employers from Holding Mandatory Meetings During the Workday to Discuss Employees' Right to Unionize

Increasingly, state legislatures across the country are passing laws that prohibit captive audience meetings altogether. Currently, four states specifically outlaw such meetings. While Oregon has had its law on the books since 2009,[140] the other three states (Connecticut,[141] Maine,[142] and Minnesota[143]) passed almost identical laws within the past year. Additionally, on June 10, 2023, New York

139. *Opportunity*, BLACK'S LAW DICTIONARY (2d ed. 2023).

140. *See* OR. REV. STAT. ANN. § 659.785 (West, Westlaw Edge through 2023 Reg. Sess. of the 82nd Legis. Assemb.).

141. *See* CONN. GEN. STAT. ANN. § 31-51q (West, Westlaw Edge through 2023 Reg. Sess. of 2023 Sept. Special Sess.).

142. *See* Melinda Caterine et al., *Maine Legislative Roundup: New Employment Laws Were Enacted This Session*, LITTLER (July 14, 2023), https://www.littler.com/publication-press/publication/maine-legislative-roundup-new-employment-laws-were-enacted-session.

143. *See* MINN. STAT. ANN. § 181.531 (West, Westlaw Edge through 2023 Reg. Sess.).

passed a bill making it a violation of state labor law for an employer to discriminate against an employee because they refuse to attend an employer sponsored meeting.[144] The law will go into effect as soon as the Governor signs it. Going one step further, the law will require employers to post signage informing employees of their rights.[145] Similar legislation is likely to be passed in other states including California, Vermont, Illinois, Washington, Massachusetts, New Jersey, and Maryland.[146]

While these laws are seeing legal challenges in some states,[147] no such lawsuit has been successful. Rather, four states (and likely more to come) having laws in place outlawing captive audience meetings suggests three things. First, and most importantly, states recognize that labor law, as it is currently interpreted, lends employers too much power when it comes to unionization efforts. Union support hit near-record levels last year,[148] with high-profile organizing at Amazon and Starbucks grabbing headlines.[149] With an upswing in union activity in the past few years, one might expect membership numbers to increase. Interestingly enough, union membership hit an all-time low in 2022.[150] The shortcomings can be pinned on a powerful mix of forces, namely well-funded corporate pushback in the form of captive audience meetings enabled by a currently weak Act.[151] In response, a growing number of states are reacting by passing laws to make labor laws more even-handed.

Second, with none of the states' laws banning captive audience meetings having been held to be preempted by federal law suggests that nothing in the Act, not even Section 8(c), explicitly allows employers to compel employees to attend these meetings.

Finally, the growing trend suggests that the Board should interpret the Act and find it illegal to require employees to attend meetings during the workday where the employer is discussing their Section 7 rights. Because many companies operate across state borders, a federal rule would create a clear and consistent standard

144. *See* S.B. S4982, 2023 Reg. Sess., at 4 (N.Y. 2023).
145. *Id.*
146. Robert Iafolla, *Anti-Union Captive Audience Meetings Are Risky With Law in Flux*, BL (July 27, 2023, 5:45 AM), https://news.bloomberglaw.com/daily-labor-report/anti-union-captive-audience-meetings-are-risky-with-law-in-flux.
147. *See* Complaint at 14, Chamber of Com v. Bartolomeo, No. 3:22-cv-1373 (D. Conn. 2022) (alleging NLRA preemption and unlawful employer free speech infringement).
148. The record was hit in the 1950s. *See* Emily Peck & Nathan Bomey, *Why Labor's Surging Popularity Isn't Translating to Union Membership,* AXIOS (Jan. 23, 2023), https://www.axios.com/2023/01/23/union-members-fall-labor-popularity-rises.
149. *Id.*
150. *Id.*
151. *Id.*

across the nation that employers may not mandate attendance at meetings discussing the right to unionize.

F. The Choice Between Employment and Refusing to Attend Workplace Meetings Discussing Section 7 Rights is No Choice at All

Finally, companies often contend that, because the employment relation is purely voluntary, employees can avoid exposure to the unwanted speech by quitting their employment.[152] However, such legal formalism ignores reality: employees offended by anti-union rhetoric in a captive audience meeting listen because that is their only real option.[153] Indeed, the "choice" to sacrifice one's livelihood to enjoy liberty is no choice at all.[154] It is unlikely that the drafters of the Act as amended intended for the legislation to present workers with this Hobson's choice. People need to work. Should an employee be denied protection under the Act from forced workplace listening because the employee is free to "choose" discharge as an alternative to forced listening?[155] Expecting them to choose between medical benefits, vacation time, and a salary, or facing the natural consequences for refusing to attend a required worktime meeting is not supported by the policy goals of the Act. Because the reality is that employees who are offended by anti-union propaganda listen because that is their only real option,[156] the Board must overturn *Wilcox*.

IV. MAKING WORKPLACE MEETINGS WHERE EMPLOYEES' SECTION 7 RIGHTS ARE DISCUSSED VOLUNTARY RESOLVES THE CONFLICT BETWEEN THE FREE SPEECH OF THE EMPLOYER AND THE EMPLOYEE'S PROTECTED RIGHT TO UNIONIZE

Based on the foregoing, there is no justifiable argument in support of captive audience meetings when weighed against the interests of the employee, as well as the intent of the Act as amended.

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152. Roger C. Hartley, *Freedom Not to Listen: A Constitutional Analysis of Compulsory Indoctrination Through Workplace Captive Audience Meetings*, 31 BERKELEY J. EMP. & LAB. L. 65, 90 (2010).

153. *Id.*

154. *Id.* at 90–91 ("For many, if not most, employment is a practical necessity, and the economic and other costs of changing jobs would often be prohibitive."). *See also* Resident Advisory Bd. v. Rizzo, 503 F. Supp. 383, 402 (D. Pa. 1980) (holding that the workers are powerless to avoid bombardment by derisive speech short of giving up their jobs. Workers testified that they would have quit the job except that there was no other work available to them).

155. Hartley, *supra* note 152, at 90.

156. *Id.*

Pre-election captive audience meetings intimidate employees and have a chilling effect on the workers' organizing campaign. Indeed, statistics show that such meetings are pervasive and effective.[157] While Section 8(c) of the Act provides that an employer may lawfully express "views, argument, or opinion" so long as "such expression contains no threat of reprisal or force or promise of benefit," the Supreme Court of the United States has recognized "an employer's rights cannot outweigh the *equal* rights of the employees to associate freely."[158] The employee's rights, which are embodied in Section 7 of the Act, are further protected by the language of Section 8(a)(1), which makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."[159] Continuing to allow employers to implement captive audience meetings as a tool to combat unionization efforts would undermine the very language of the Act. Thus, to fully protect free speech of employers as well as the Section 7 rights of employees, the Board must revisit its holding in *Wilcox*.

A commonsense approach would be to allow the employer to voice its opposition to a union election in a way that does not amount to coercion of the employee. To do so, the Board should provide a clear framework under which employers who choose to address employees on paid time concerning employees' Section 7 rights can ensure that employees who choose to listen do so only on a voluntary basis.[160] Accordingly, every time an employer uses paid work time to meet and discuss the employees' Section 7 rights, it must satisfy the following requirements. First, the employer must explain the purpose of the meeting.[161] Second, the employer must assure the employees that: a) attendance is voluntary; b) employees who attend will be free to leave at any time; c) nonattendance will not result in reprisal or retaliation; and d) attendance will not result in rewards or benefits.[162] Finally, the employer must also post signage

157. *See What Captive Audience Meetings Are, supra* note 11 (citing an Economic Policy study which found that when captive audience meetings have been used, the union's election win rate dropped by 26%); *see also Mandatory Meetings Reveal Amazon's Approach to Resisting Unions*, N.Y. Times (Feb. 21, 2023), https://www.nytimes.com/2022/03/24/business/amazon-meetings-union-elections.html (reporting that Amazon, which hired over thirty outside consultants to hold captive audience meetings last year, alone, at a rate of $3,200 per consultant, held more than twenty meetings per day leading up to a union election).

158. NLRB v. Gissel, 395 U.S. 575, 617 (1969) (emphasis added).

159. 29 U.S.C. § 158.

160. *See* Brief in Support of General Counsel's Exceptions, Cemex Constr. Materials, supra note 2 at 56–57.

161. *Id.* at 59.

162. *Id.*

informing employees of their right not to attend such meetings under the NLRA.

By adopting this approach, the Board would appropriately protect the employers' free speech rights without unduly infringing on the Section 7 rights of employees to refrain from listening. This approach would merely eliminate the implicit threat of discharge that reasonable employees perceive when forced to choose between unwanted listening and not attending a meeting required by their employer. Further, as a practical matter, the above safeguards would cause employees to make an observable choice—attending or refraining from attending—that would demonstrate their own Section 7 views to the employer. This would provide employers with valuable insight into where they stand with employees in any forthcoming election, based on voluntary meeting attendance.

Moreover, there are ways to encourage employee attendance without making it mandatory. For example, managers could encourage attendance by advertising open question and answer sessions or providing refreshments for those in attendance. In practice, this would also be helpful to employers. The employer could communicate their message to the employees willing to attend the voluntary meetings, gauge support based on attendance, and encourage them to talk to their coworkers who did not attend. Additionally, nothing would stop the employer from sending company-wide emails to employees stating its opinion on unionization, so long as the employee can choose whether or not to view it.

In sum, a ban on captive audience meetings and an adoption of the above safeguards would adequately balance the competing interests of employers and employees in the context of unionization. Additionally, it would further the democratic aims of the First Amendment by allowing free, rather than forced, deliberation.[163] Indeed, there is no justifiable argument in favor of continuing to allow employers to require employees to participate in unwanted listening in the context of their Section 7 right. Finally, because adopting the above approach would allow employers to continue to hold these meetings while also giving employers valuable insight as to the outcome of an upcoming union election, the Board's decision to overturn *Wilcox* would not end in a windfall to the workers resulting in a repeat of the strike wave seen across America in the 1940s.

163. *See* Robbins, *supra* note 124, at 602 (citing Andrias, *supra* note 128, at 2456).

V. CONCLUSION

Considering the foregoing, the existing precedent empowering employers to hold captive audience meetings leading up to a union election was erroneously created in reaction to an imperfect pro-union Act that weighed too heavily in favor of workers and resulted in an unprecedented wave of strikes after World War II. However, since 1948, employers have too easily stifled workers' attempts to unionize by weaponizing their right to hold captive audience meetings. To correct this, the Board should outlaw captive audience meetings as a violation of Section 8(c) and 8(a)(1) of the Act. Instead, the Board should hold that employers may lawfully exercise their free speech rights enunciated under Section 8(c) and hold meetings during the workday meant to discourage unionization, so long as employees understand that their attendance is voluntary. This approach balances the rights of employers with the rights of employees enunciated under the Act and stays true to the Act's purpose and intent. That intent, stated by President Roosevelt when he signed it into law, was to assure employees the right of collective bargaining and foster the development of the employment contract on a sound and equitable basis. Continuing to permit captive audience meetings under the law undermines this intent. Similarly, the Supreme Court has deemed restrictions on speech made to individuals in a captive audience setting constitutional. Yet in the context of employment, it has found the employers may host such meetings.[164] This inconsistency undermines the First Amendment by exempting the one place where most people spend most of their time from its protection: the workplace.[165] Accordingly, the Board should overturn *The Babcock & Wilcox* because it erroneously amounts to a categorical denial to individuals in the employment context the recognized right of the unwilling listener to be free from unwanted communication.

164. *See* Packer Corp. v. Utah, 285 U.S. 105, 110–11 (1932) (acknowledging that the presence of billboards can create a captive audience of unwilling viewers); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 72 (1983) (finding that recipients of mailings are not captive because they can easily throw them away); Hill v. Colorado, 530 U.S. 703, 716–17 (2000) (determining that employees on their way to and from work are a captive audience).

165. Robbins, *supra*, note 124, at 602.

Updating Standby Letter of Credit Practice for the 21st Century: Modernizing the International Standby Practices for Digital Transactions

*Samuel P. Baycer**

I. INTRODUCTION

Developing technology and digitalization have impacted nearly every aspect of our lives, including domestic finance and international trade.[1] Letters of credit, in some ways,[2] naturally lend themselves to an electronic transaction.[3] Because of this, some experts note that letters of credit have "one foot in the world of electronic commerce and one foot in the world of paper documentation."[4] However, there have not been any updates or supplements to the

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1. James G. Barnes & James E. Byrne, *E-Commerce and Letter of Credit Law and Practice*, 35 INT'L LAW. 23, 23 (2001).

2. Generally, issuance and payment of letters of credit via electronic means has been common practice for many decades. *Id.* at 24.

3. *Id.* at 23.

4. *Id.*

standard standby letter of credit rules since their issuance in 1999.[5] While the current International Standby Practices (ISP98)[6] does account for some electronic aspects in letter of credit transactions,[7] much is left to be desired.[8]

The most recent form of the ISP98 came into effect in 1999,[9] making the document over twenty-three years old.[10] For reference, many standby letters of credit are incorporating a set of standardized rules that were created when Bill Clinton was President.[11] The ISP98 predates critical events that changed the business and finance world, such as the Enron Scandal,[12] the 2008 Financial Crisis,[13] and the Coronavirus Pandemic.[14] Similarly, advances in technology, including the popularization of smart phones, occurred more recently than the ISP98.[15] Artificial intelligence, machine learning, and blockchain technology also provide new ways in which business and transactions may occur.[16]

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5. The leading document for standby letter of credit rules is the ISP98 which came into effect in 1999 and has not been updated, nor has any supplement been issued, since. *See generally* JAMES E. BYRNE, THE OFFICIAL COMMENTARY ON THE INTERNATIONAL STANDBY PRACTICES (James G. Barnes et al. eds., 1998) [hereinafter *ISP98 Official Commentary*].

6. The abbreviation to "ISP98" reflects the fact that the rules were approved in the year 1998. *Id.* at vii.

7. "[V]irtually all [letters of credit] have an electronic component in their issuance . . . ." and "electronic payment is not new to the [letter of credit] field." Barnes & Byrne, *supra* note 1, at 24.

8. While some aspects of letter of credit transactions have been done electronically, the presentation of documents has traditionally been paper-based. This is based on several factors, including outdated government requirements and tradition in the letter of credit field. *Id.* at 25.

9. Gao Xiang & Ross P. Buckley, *The Unique Jurisprudence of Letters of Credit: Its Origin and Sources*, 4 SAN DIEGO INT'L L. L.J. 91, 115 (2003).

10. This article focuses on standby letters of credit, which are addressed by the ISP98. However, elements of documentary letters of credit, which are governed under Uniform Customs and Practice for Documentary Credits (UCP 600) and the Uniform Customs and Practice for Documentary Credits Supplement for Electronic Presentation (eUCP), are utilized to criticize and propose revisions to standby letter of credit rules.

11. *See* William Jefferson Clinton, CLINTON HOUSE MUSEUM, https://clintonhousemuseum.org/bill-clinton/ (last visited Nov. 1, 2022).

12. *See* Simon Constable, *How the Enron Scandal Changed American Business Forever*, TIME MAG. (Dec. 2, 2021, 1:06 PM), https://time.com/6125253/enron-scandal-changed-american-business-forever/.

13. *See* Renae Merle, *A Guide to the Financial Crisis – 10 Years Later*, WASH. POST (Sept. 10, 2018, 1:47 PM), https://www.washingtonpost.com/business/economy/a-guide-to-the-financial-crisis--10-years-later/2018/09/10/114b76ba-af10-11e8-a20b-5f4f84429666_story.html.

14. *See* Kathy Katella, *Our Pandemic – A COVID-19 Timeline*, YALE MED. (Mar 9, 2021), https://www.yalemedicine.org/news/covid-timeline.

15. The iPhone was first announced in 2007, eight years after the adoption of the ISP98. *See* David Pierce & Lauren Goode, *The WIRED Guide to the iPhone*, WIRED MAG. (Dec. 7, 2010, 8:00 AM), https://www.wired.com/story/guide-iphone/.

16. For an overview of how blockchain, smart contracts, and the Internet of Things can benefit letter of credit transactions, *see generally* Dakota A. Larson, *Mitigating Risky*

Additionally, monumental events and changes in technology have fundamentally changed how business commonly takes place in the United States and globally.[17] As the ISP98 has not been updated since its adoption, many of these changes are not reflected in the ISP98 rules. While the Uniform Commercial Code ("U.C.C.") and letter of credit rules have allowed for portions of letter of credit transactions to be done electronically,[18] there is more that can be done.

This article examines letters of credit and proposes the adoption of a supplement to the ISP98 to reflect changes in business that have occurred in the past twenty-five years, including evolving technology, digital trade finance, smart contracts, artificial intelligence, and machine learning.[19] Section II provides an overview of letters of credit and bodies of law which govern them. Section III discusses current deficiencies in the ISP98. Section IV argues specific changes that should be adopted in letter of credit rules (or, alternatively, incorporated in letters of credit) to modernize letter of credit transactions.[20]

II. OVERVIEW OF LETTERS OF CREDIT

A. Defining a Letter of Credit

Generally, letters of credit are irrevocable undertakings for the payment of money which functionally act like guarantees of specific obligations that are requested by an applicant for the benefit of a beneficiary.[21] Letters of credit may be defined differently depending on the "industry guides" or law which reference them.[22] Notably,

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Business: Modernizing Letters of Credit with Blockchain, Smart Contracts, and the Internet of Things, 2018 MICH. ST. L. REV. 929 (2018).

17. Technology, such as blockchain, smart contracts, and the internet have created for more complicated and flexible business environments. *See id.* at 933–34.

18. *See* U.C.C. § 5-102(a)(6) (AM. L. INST. & UNIF. L. COMM'N 1995).

19. Unif. Customs & Prac. for Documentary Credits Supplement for Elec. Presentation Version 2.0 (INT'L CHAMBER OF COM. BANKING COMM'N 2019) [hereinafter eUCP] at 3.

20. The proposed rules and alternative incorporation are not intended to be for exclusively electronic letter of credit transactions, but rather to address situations where both paper-based and electronic components are involved in the letter of credit transaction. This is because some letter of credit experts have noted that a combined approach is essential as some paper-based documents are required, such as in government documents. *See* Barnes & Byrne, *supra* note 1, at 25, 27.

21. A. David Reynolds & Brita Siepker, *Letters of Credit in Financing Transactions: Overview*, THOMSON REUTERS, 2, https://1.next.westlaw.com/Document/I1c631145ef2811e28578f7ccc38dcbee/View/FullText.html?transitionType=Default&contextData=(sc.Default) (last visited Nov. 1, 2022).

22. U.C.C. § 5-102(10); INTERNATIONAL CHAMBER OF COMMERCE, COMMENTARY ON UCP 600: ARTICLE-BY-ARTICLE ANALYSIS BY THE UCP 600 DRAFTING GROUP 16 (2007) [hereinafter *UCP 600 Commentary*]; *ISP98 Official Commentary*, supra note 5, at 2.

the drafters of the ISP98 declined to incorporate a precise definition of a letter of credit[23] and, instead, defined the narrower term of standby letter of credit as, "[a]n undertaking subject to [the ISP98] is herein referred to as a 'standby.'"[24]

In the absence of a general letter of credit definition, definitions provided in U.C.C. Article 5 or as incorporated in the UCP 600 provide guidance. However, a functional definition has been adopted by some letter of credit scholars as "an instrument, issued to a beneficiary by an issuer for the account of the applicant, by which the issuer promises it will honor a draft or a demand for payment provided [that] the terms specified in the credit are met."[25] The terms "beneficiary,"[26] "applicant,"[27] and "issuer"[28] may be further defined by referencing the ISP98, or other sources.[29] Courts in the United States have defined a letter of credit as "a [mechanism which] provides that an issuer, upon presentation of documents specified in the credit, will pay the beneficiary a designated sum of money or deliver to the beneficiary a particular item of value."[30]

To illustrate this interaction, in a simple letter of credit transaction,[31] an applicant could approach an issuer to seek a letter of credit which the beneficiary may later demand payment on.[32] In these situations, generally, for a successful demand for a letter of credit, the beneficiary must fulfill its requirements specified in the

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23. *ISP98 Official Commentary*, *supra* note 5, at 2.

24. INT'L STANDBY PRACS. § 1.01(d) (INST. OF INT'L BANKING L. & PRAC., INC. 1998).

25. Xiang & Buckley, *supra* note 9, at 95.

26. INT'L STANDBY PRACS. § 1.09(a) (defining a beneficiary as "a named person who is entitled to draw under a standby").

27. *Id.* (defining applicant as "a person who applies for issuance of a [letter of credit] or for whose account it is issued . . . .").

28. *Id.* § 2.01(a) (defining an issuer as "[a person or entity which] undertakes to the beneficiary to honor a presentation that appears on its face to comply with the terms and conditions in the [letter of credit] in accordance with [the ISP98] supplemented by standard [letter of credit] practice.").

29. In some situations, there may be a fourth party, often referred to as a confirmer or confirming bank, that exists (herein referred to as confirmer). A confirmer is a party who "upon an issuer's nomination to do so, adds to the issuer's undertaking its own undertaking to honor a standby." *See id.* at § 1.09(a). A confirming bank is often located in the beneficiary's country. Practical Law Finance, *Standby Letter of Credit in Trade Finance*, THOMAS REUTERS, 4, https://content.next.westlaw.com/practical-law/document/I8417da001cb111e38578f7ccc38dcbee/Standby-Letter-of-Credit (last visited Nov. 1, 2022).

30. Louisville Mall Assocs., LP v. Wood Ctr. Props., LLC, 361 S.W.3d 323, 330 (Ky. Ct. App. 2012).

31. Letters of credit are often more complicated in practice and may involve additional parties, such as advising banks, which helps confirm the authenticity of the presentation. Letters of credit may also be subject to amendment. *See* Practical Law Finance, *supra* note 29, at 12.

32. *See* Reynolds & Siepker, *supra* note 21, at 2.

letter of credit which often includes the submission of documents.[33] The delivery of these documents is referred to as a "presentation."[34] Once a presentation is submitted to the issuer, the issuer shall examine the documents to determine whether the presentation "on its face" complies with the terms and conditions of the letter of credit.[35] If the presentation complies,[36] the issuer shall "honor" the complying presentation by, generally,[37] paying the amount demanded.[38] Typically, when a presentation is honored and payment is distributed to the beneficiary, the applicant reimburses the issuer for the payment made.[39] Letters of credit are often entered into to satisfy payment obligations in an underlying transaction.[40] The letter of credit benefits the applicant and beneficiary by providing an independent third party that can add security to a transaction and reduce the risk of non-payment.[41] The issuer in a letter of credit transaction benefits by collecting administrative fees or interest from the applicant.[42]

If the issuer determines that the presentation does not comply with the letter of credit, the issuer shall give "notice of dishonor" to the person from whom the documents were received.[43] In the event of dishonor, the issuer may refuse to pay or perform its obligations under the letter of credit.[44] After dishonor, the presenter may request that the issuer seek a waiver of the discrepancies from the applicant.[45] The issuer, however, has no obligation to waive the discrepancy even if the applicant agrees to waive it.[46] Together, the parties in a letter of credit transaction each have different duties and obligations that create unique benefits and drawbacks.

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33. Practical Law Finance, *supra* note 29, at 4.
34. *Id.*
35. INT'L STANDBY PRACS. § 2.01.
36. "[The letter of credit] should indicate the time, place and location within that place, person to whom, and medium in which presentation should be made. If so, presentation must be so made in order to comply." *Id.* § 3.01.
37. In lieu of immediate payment, the beneficiary may accept deferred payment or expressly allow for negotiation upon complying presentation. *See ISP98 Official Commentary*, *supra* note 5, at 64.
38. INT'L STANDBY PRACS. § 2.01(b).
39. Reynolds & Siepker, *supra* note 21, at 2.
40. *Id.* at 7.
41. Practical Law Finance, *supra* note 29, at 3.
42. Ronald J. Mann, *The Role of Letters of Credit in Payment Transactions*, 98 MICH. L. REV. 2494, 2515 (2000).
43. INT'L STANDBY PRACS. § 5.01(a) & (c).
44. Practical Law Finance, *supra* note 29, at 4.
45. INT'L STANDBY PRACS. § 5.06.
46. *Id.* § 5.06(c)(iii).

B. Benefits of Letters of Credit

There are two unique aspects of letters of credit that make them an attractive transactional tool: (1) the principle of independence, which makes the letter of credit independent from the underlying transaction; and (2) the strict compliance principle, which obligates issuers to honor presentations that comply "on their face."[47]

The principle of independence, sometimes referred to as the "independence principle," separates the obligation of the issuer to act under a letter of credit from the obligations owed between parties in an underlying transaction.[48] In essence, the obligations created under the letter of credit are independent from "the underlying commercial transaction between the applicant and the beneficiary."[49] This means, as described in the ISP98, "[a]n issuer's obligations toward the beneficiary are not affected by the issuer's rights and obligations toward the applicant under any applicable agreement, practice, or law."[50] The Official Commentary expands on this principle by stating "[n]o defense or claim, . . . non-reimbursement, [or otherwise] . . . can excuse the issuer's obligations under the [letter of credit]."[51] Further, even reference in the letter of credit to a reimbursement agreement or underlying transaction will be determined to have no impact on the issuer's obligation.[52] Thus, the only duty the issuer owes to an applicant is to exercise reasonable care that documents presented in a demand for payment are in compliance with the terms of the letter of credit.[53] The benefit and drawback of this principle are related: the beneficiary can reduce the risk of non-payment due to claims by the applicant, but the applicant risks that an issuer may correctly honor a draft even though the beneficiary failed to perform a critical function in the underlying transaction.[54]

Regarding the strict compliance principle under a letter of credit, all parties must strictly comply with the terms of the letter of credit, including terms related to a demand for payment.[55] Thus, the

47. Practical Law Commercial Transactions & Practical Law Finance, *Commercial Letters of Credit*, THOMAS REUTERS, 4, https://1.next.westlaw.com/Document/Ibb0a3b94ef0511e28578f7ccc38dcbee/View/FullText.html?transitionType=Default&contextData=(sc.Default)&firstPage=true (last visited Nov. 1, 2022).
48. Xiang & Buckley, *supra* note 9, at 119.
49. Practical Law Finance, *supra* note 29, at 5.
50. INT'L STANDBY PRACS. § 1.07.
51. *ISP98 Official Commentary*, *supra* note 5, at 29.
52. *Id.*
53. Xiang & Buckley, *supra* note 9, at 121.
54. *Id.* at 122.
55. Practical Law Finance, *supra* note 29, at 6.

beneficiary must present documents that strictly comply with the terms of the letter of credit, and if those documents are presented in strict compliance, then the issuer must fulfill its obligations accordingly.[56] This principle protects the applicant as it provides security that it will not have to reimburse the issuer (when the issuer distributes payment) unless the terms of the letter of credit are met.[57] Thus, failure to precisely follow the terms of the letter of credit can result in the issuer dishonoring the letter of credit.[58] Further, the issuer need not inquire into the underlying transaction and scrutinize each document "[beyond] the scope of its normal business."[59]

When combined, both the principle of independence and the principle of strict compliance allow the letter of credit to be an effective financial tool by providing additional security and certainty in a letter of credit transaction.[60]

C. Types of Letters of Credit

While letters of credit have been categorized differently throughout their development,[61] modern letters of credit can be broken down into two basic types: (1) documentary letters of credit[62] and (2) standby letters of credit.[63]

A documentary letter of credit is often used as a payment mechanism in international trade.[64] Here, a letter of credit is often used in addition to an underlying contract between an importer and an exporter to create confidence that the exporter will be paid for its goods and has complied with its obligations under the contract.[65] Documents used in a documentary letter of credit presentation often include transport documents and other international trade

56. *Id.*

57. Xiang & Buckley, *supra* note 9, at 124.

58. *See* Bd. of Trade v. Swiss Credit Bank, 597 F.2d 146, 147 (9th Cir. 1986) (where an advising bank refused to honor a demand on the basis that goods were shipped via air transport rather than by ocean shipment, which was specified in the letter of credit).

59. Xiang & Buckley, *supra* note 9, at 124 (it is important to note here that many issuers are banks which may not be intimately familiar with underlying transactional law agreements).

60. Practical Law Finance, *supra* note 29, at 5–6.

61. For an overview of the development of the letter of credit in history, *see* Xiang & Buckley, *supra* note 9, at 103–04.

62. A documentary letter of credit may also be referred to as a "commercial letter of credit," "commercial credit," or by the broader, and more ambiguous term, "credit." Practical Law Commercial Transactions & Practical Law Finance, *supra* note 47, at 2.

63. Xiang & Buckley, *supra* note 9, at 95.

64. Practical Law Commercial Transactions & Practical Law Finance, *supra* note 47, at 2.

65. *Id.*

documents.[66] The documentary letter of credit is often used instead of paying the purchase price directly, and payment is typically made directly from the issuer to the beneficiary.[67] Instead of paying the seller directly, the buyer provides a documentary letter of credit that the seller draws upon once the underlying transaction has been fulfilled.[68] This creates assurance in the transaction, since the issuer acts as an independent third party in cases where the buyer and seller may not fully trust each other.[69]

In contrast, a standby letter of credit supports an obligation independent of the letter of credit, which may include a sales contract, but is not intended to be the primary payment source under a letter of credit.[70] In a standby letter of credit, generally, the applicant may attempt to make payment to the beneficiary itself as part of the underlying contract.[71] However, should the applicant fail to pay the beneficiary, the beneficiary may seek alternative compensation by making a demand on the letter of credit to receive "immediate payment from the [issuer] in the amount of the defaulted payment."[72] In noting the difference between a documentary and a standby letter of credit, United States courts have noted that documentary letters of credit "serve the sale of commodities," whereas standby letters of credit "guarantee the performance of an obligation."[73]

In addition to the distinctions of how the different types of letters of credit are used, documentary and standby letters of credit have different bodies of standardized rules that are traditionally applied to them.[74] The intersection of differing standardized rules, technology, and applicable law, creates a complex of potentially applicable provisions that may be difficult for parties to navigate.

D. Bodies of Law, Rules, and Use of Technology Related to Letters of Credit

Banking custom is one of the primary forces influencing the development of letter of credit law.[75] Many of these practices were

66. *See generally UCP 600 Commentary*, *supra* note 22, at 77–129.
67. Practical Law Finance, *supra* note 29, at 1.
68. Louisville Mall Assocs., LP v. Wood Ctr. Props., LLC, 361 S.W.3d 323, 330 (Ky. Ct. App. 2012).
69. Mann, *supra* note 42, at 2495.
70. Practical Law Finance, *supra* note 29, at 1.
71. *Id.*
72. *Id.*
73. *Louisville Mall Assocs., LP*, 361 S.W.3d at 330.
74. *See* Reynolds & Siepker, *supra* note 21, at 13.
75. Xiang & Buckley, *supra* note 9, at 108.

sought to be captured and reflected in the ISP98[76] and UCP 600.[77] The UCP 600 has also been supplemented with the eUCP.[78] In the United States, the primary source of law governing letter of credit transactions is the U.C.C.[79] However, in an international context, other bodies of law may apply to letters of credit.[80] While letters of credit may not always technically be contracts,[81] courts in the United States have applied contract law principles, such as principles of interpretation on ambiguous contracts, to help understand letters of credit.[82]

Similarly, U.C.C. Article 5 applies to "letters of credit and to certain rights and obligations arising out of transactions involving letters of credit."[83] U.C.C. Article 5 was most recently updated in 2022 and has been adopted in some form in all fifty states, as well as the District of Columbia and many United States territories.[84] U.C.C. § 5-116(c) explicitly allows for parties to adopt rules of custom or practice, such as the UCP.[85] In the event of a conflict of rules between the ISP98 and U.C.C. Article 5, if a letter of credit explicitly states that it is subject to the ISP98, then the U.C.C. is deemed to be varied to accommodate the ISP98 interpretation, subject to several exceptions.[86]

In addition to domestic model statutes, international-focused groups have also developed model rules for letter of credit transactions.[87] The UCP 600 was created by the International Chamber of Commerce ("ICC") and first published in 1933.[88] The UCP 600

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76. *ISP98 Official Commentary*, *supra* note 5, at vi ("The purpose of the ISP[98] is to articulate current practice and usage in the standby markets and to simplify and standardize the usage of standbys.").

77. Xiang & Buckley, *supra* note 9, at 108.

78. BURTON V. MCCULLOUGH, LETTERS OF CREDIT § 1.03(1) (2022).

79. *Id.*

80. For an overview of applicable law governing international letters of credit, *see* Xiang & Buckley, *supra* note 9, at 114.

81. MCCULLOUGH, *supra* note 78, § 1.03(3)(b)(i); *see* U.C.C. § 5-102(a)(10); (AM. L. INST. & UNIF. L. COMM'N 1995); U.C.C. § 5-104.

82. MCCULLOUGH, *supra* note 78, § 1.03(3)(b)(i) & (iii).

83. *See* U.C.C. § 5-103(a).

84. Most of the 2022 changes are aimed to reduce confusion with wording and do not create substantive differences. *See* U.C.C. Amendments (AM. L. INST. & UNIF. L. COMM'N 2022) at 69; MCCULLOUGH, *supra* note 78, § 1.03(2)(a).

85. *See* U.C.C § 5-116(c).

86. Exceptions include prohibitions on disclaiming the obligation of good faith, the independence principle, and limits on a perpetual letter of credit. Practical Law Finance, *supra* note 29, at 10.

87. Note that despite the U.C.C. being drafted by the National Conference of Commissioners of Uniform State Laws and the American Law Institute for adoption, international standardized rules, such as the UCP 600 and ISP98, have great influence in the United States. *See* Xiang & Buckley, *supra* note 9, at 118.

88. MCCULLOUGH, *supra* note 78, § 1.03(4)(b)(i).

aimed to formalize many of the trade practices related to documentary letters of credit and organize them in an easily adoptable format.[89] The provisions of the UCP 600 may be modified by the parties in a letter of credit transaction.[90] The UCP has been revised several times since its original creation in 1933.[91] However, the UCP 600 is not law and is not automatically incorporated into letter of credit transactions.[92] The UCP 600 may be applied to standby letters of credit[93] but doing so may create confusion in instances where a letter of credit is subject to both the UCP 600 and ISP98 due to conflict of rules provisions.[94]

The ISP98 was designed to provide a separate set of standardized rules for standby letters of credit.[95] The Institute of International Banking Law & Practice, Inc. ("Institute") coordinated the creation of the ISP98 at the requests of the U.S. Department of State.[96] The U.S. Department of State made this request to formulate standardized rules applicable to standbys after the ICC Banking Commission declined to adjust the UCP to make it more compatible with standby letters of credit.[97] The ISP98 came into effect in 1999[98] and has not been revised since.[99] Rules provided in the ISP98 include rules related to presentations, examination of presentations, rules to be provided in the instance of a conflict, and more.[100] In addition to the text of the ISP98, the Institute published *The Official Commentary on the International Standby Practices* ("Official Commentary")[101] to accompany the ISP98 text.[102] The commentary to the ISP98 provides beneficial information in interpreting the

89. *Id.*
90. *Id.*
91. Previous versions of the UCP 600 have had slightly different names, such as UCP 82 in 1933, UCP 400 in 1983, and UCP 500 in 1993. *See id.*
92. In some cases, the UCP has been presumed to be incorporated in communications through SWIFT. *Id.*
93. *UCP 600 Commentary*, *supra* note 22, at 11.
94. *ISP98 Official Commentary*, *supra* note 5, at 10 ("In the case where [a letter of credit] is deemed to be a standby . . . , ISP98 would supersede any conflicting provisions in the UCP.").
95. *Id.* at xvi.
96. *Id.* (Several banks and prominent law firms also contributed to the development of the ISP98).
97. *Id.*
98. Xiang & Buckley, *supra* note 9, at 115.
99. Practical Law Finance, *supra* note 29, at 10.
100. *See generally* INT'L STANDBY PRACS.
101. *See generally ISP98 Official Commentary*, *supra* note 5.
102. The Official Commentary was written by James E. Byrne, who was a distinguished letter of credit scholar, a former Director of the Institute, and who reported on the ISP Working Group. The Official Commentary was edited by James G. Barnes, who served as vice chair of the ISP Working Group. Both Byrne and Barnes worked on "the task force that reported on the original U.C.C. Article 5." *See id.* at 354.

standardized rules provided for in the ISP98.[103] While the ISP98 does allow for electronic presentations by providing an optional glossary that parties can incorporate,[104] important figures involved in the drafting of the ISP98 note that "[w]hile these provisions represent an important step forward, they do not provide a clear distinction . . . [and] leave many other important issues to the actual drafting of the text of the standby itself."[105]

Finally, in response to the increasing use of digital communications in the early 2000's, the ICC published the eUCP.[106] The publishing of the eUCP followed a previous attempt to allow for electronic and digital elements in documentary letter of credit transactions.[107] The eUCP supplies provisions that can be applied to letter of credit transactions "that involve some or all electronic documents."[108] The eUCP also includes definitions and rules related to electronic recordation,[109] electronic signatures,[110] and data corruption.[111] Further, the eUCP provides rules regarding the authenticity of electronic communications, risk allocation, and other critical electronic considerations.[112] Originally published in 2002,[113] the most recent update to the eUCP, version 2.0, came into effect in July of 2019.[114] While the eUCP was unanimously formally adopted by the ICC Banking Commission,[115] carefully formed,[116] and lacked substantive criticism,[117] letter of credit participants have been hesitant to incorporate the eUCP into letter of credit agreements.[118]

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103. *See generally id.*
104. Terms that can be incorporated include "electronic record," "authenticate," "electronic signature," and "receipt." *ISP98 Official Commentary*, *supra* note 5, at 45–47.
105. Barnes & Byrne, *supra* note 1, at 26.
106. Practical Law Commercial Transactions & Practical Law Finance, *supra* note 47, at 12.
107. Previous attempts at allowing for electronic elements in the preparation and presentation of letter of credit documents had generally created confusion in courts and the letter of credit community, with the exception of several instances, such as SWIFT. James E. Byrne, *The Four Stages in the Electrification of Letters of Credit*, 3 GEO. MASON J. INT'L COM. L. 253, 266–68 (2012).
108. Practical Law Commercial Transactions & Practical Law Finance, *supra* note 47, at 12.
109. *eUCP*, *supra* note 19, § e3(b)(iv); *see generally id.* § e5.
110. *Id.* § e3(b)(iv).
111. *Id.* § e3(b)(i); *see id.* § e12.
112. Byrne, *supra* note 107, at 270.
113. Practical Law Commercial Transactions and Practical Law Finance, *supra* note 47, at 12.
114. *eUCP*, *supra* note 19, at 3.
115. *Id.*
116. Byrne, *supra* note 107, at 270.
117. *Id.*
118. *Id.*; Larson, *supra* note 16, at 938.

Technology has been used in letter of credit transactions in some form for over 100 years.[119] However, this primarily occurred in the issuance of a letter of credit and in the payment once a letter of credit has been honored.[120] While technology and electronic elements have been beneficial in these stages of letter of credit transactions, letter of credit parties have been more reluctant to utilize new developments in the preparations and presentation of documents.[121]

III. DEFICIENCIES IN THE ISP98

The ISP98 has become an outdated document in modern transactions in several ways. Some of these reasons can be seen in the rationale for creating the eUCP.[122] Specifically, the eUCP drafters noted the increasing use of electronic presentations and even envisioned technological advances that could allow for automated compliance checking systems.[123] To evidence this, the eUCP drafters noted the use of technology in the finance world, including smart contracts, artificial intelligence, machine learning, and other developments.[124] Further, the eUCP drafters recognized that while existing letter of credit rules are invaluable in paper letter of credit transactions, the current rules provide little guidance and protection when applied to electronic transactions.[125] This inadequate support is significant as the eUCP drafters envisioned letter of credit transactions moving "towards a mixed ecosystem of paper and digital, and, ultimately, to electronic records alone."[126]

Making changes to the ISP98 and standby letter of credit rules would also coincide with the intent and purpose of the ISP98. The drafters of the ISP98 noted that future supplements of the ISP98 and the accompanying official commentary should be issued to address "issues which will inevitably arise as [the] ISP98 comes into use and standby practices continue to evolve."[127] Significant figures that helped develop the standby letter of credit rules pointed out

119. Letters of credit have often been issued via telegraph. Byrne, *supra* note 107, at 258.
120. Electronic payment has occurred since at least the beginning of the twentieth century. *Id.* at 258. However, it is not uncommon for banks to also send a paper copy of the letter of credit. *Id.* at 263. In cases where both electronic and paper documents were sent, the paper document was viewed as the operative document prior to 1983 under the UCP. *Id.*
121. *Id.* at 258–59.
122. *eUCP*, *supra* note 19, at 3.
123. *Id.*
124. *Id.*
125. *Id.* at 4.
126. *eUCP*, *supra* note 19, at 4–5.
127. *ISP98 Official Commentary*, *supra* note 5, at xvii.

the flaws with the current, optional, standard digital presentation rules as early as 2001.[128]

Further, the ISP98 Official Commentary notes that it is the intention of the ISP98 to reflect letter of credit transactions.[129] Thus, accounting for changes in technology in finance and letter of credit markets would be in line with the purpose of the document. Additionally, the drafters of the ISP98 intended the standardized rules to be flexible "as the standby [letter of credit] adapts itself to new markets."[130] Finally, because standby letters of credit are less likely to have "a unique original document presented," they are more adaptable to electronic presentations than documentary letters of credit.[131]

Therefore, due to the emergent changes in technology and finance, the ISP98 provides inadequate rules, guidance, and protections in modern letter of credit transactions. These deficiencies can leave gaps and create confusion in determining the rights and obligations of parties in the presentation and examination stages of a letter of credit transaction.[132] Fixing the current deficiencies could also appropriately create updated liability protections that would give banks more flexibility and security when entering into letter of credit transactions.[133] Finally, updating the current letter of credit rules would uphold several ideals of letters of credit, including: (1) ensuring the applicability and relevance of the standardized letter of credit rules; (2) minimizing the risk of complications from outdated rules; (3) creating a shared understanding of terms; and (4) increasing confidence in the independent letter of credit rules.[134]

IV. REMEDIES TO ISP98 DEFICIENCIES

This article proposes two potential solutions to remedy the current technology issues in the ISP98: (1) the creation of a supplement to the ISP98 that would provide critical definitions and terms related to the digitalization of financial services; and (2) incorporation of the eUCP into standby letter of credits. These solutions could be applied to entirely electronic letter of credit transactions or hybrid

128. Barnes & Byrne, *supra* note 1, at 26.
129. *ISP98 Official Commentary*, *supra* note 5, at 13.
130. *Id.*
131. Byrne, *supra* note 107, at 271.
132. *See infra* notes 145, 179 and accompanying text.
133. *See infra* notes 148–51 and accompanying text.
134. The eUCP drafters also note that the standardization and prominent use of letter of credit rules can support international trade between regions that may have differing financial and judicial structures through conformity to the standardized set of rules as opposed to "divergent local, national and regional practice." *eUCP*, *supra* note 19, at 4.

paper and electronic transactions.[135] In addition to resolving many deficiencies regarding electronic documents in the ISP98, many of these provisions could provide cost savings to banks and other parties in the financial industry.[136]

A. Supplement to the ISP98

One way to modernize the standardized standby letter of credit rules involves the creation of a supplement for electronic presentations for the ISP98 (herein referred to as "eISP").[137] The "eISP" would remedy several current issues with the ISP98 electronic presentation rules and modernize the standardized rules overall, including updating definitions, presentation requirements, and liability protections related to electronic presentation.

These revisions should occur in the ISP98 because the ISP98 provides guidelines and default rules that sophisticated contract parties can otherwise provide for or negate through express terms.[138] Further, the drafters of the ISP98 noted that the document may need to address issues with the ISP98 as standby letter of credit practices evolved.[139] Producing a supplement to the ISP98 as opposed to adopting the eUCP, which is designed for documentary letters of credit, would avoid confusion that may come with adopting standardized rules designed for a different type of letter of credit.[140]

Significantly, an "eISP" could address current issues with definitions in the ISP98. The ISP98 section on electronic presentations defines only four terms: (1) "electronic record;" (2) "authenticate;" (3) "electronic signature;" and (4) "receipt."[141] In contrast, the eUCP provides fourteen unique terms related to digital letter of credit transactions, including definitions for an electronic place of

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135. It is likely that letter of credit transaction will not be solely electronic based and will be a combination of paper-based and electronic-based documents. *See* Byrne, *supra* note 107, at 255–56.

136. "The use of paperless documents [in trade finance] could save up to $50 million per year." Larson, *supra* note 16, at 957–58.

137. This abbreviation is based off of the naming used for the eUCP, originally titled the UCP 600 Supplement for Electronic Presentation. *eUCP*, *supra* note 19, at 3.

138. "Many provisions of law relating to standby letters of credit [including sections of the U.C.C.] are not mandatory." *See ISP98 Official Commentary*, *supra* note 5, at 9.

139. *Id.* at xvii.

140. There are several articles in the eUCP that, if incorporated into the ISP98, may create confusion. This includes Article e2 on the eUCP and UCP relationship and Article e11, which provides rules relating to the transport of goods. *See eUCP*, *supra* note 19, §§ e2(a), e12. Notably, Article e2 provides that a letter of credit will be subject to the UCP without express incorporation. *See eUCP*, *supra* note 19, § e2(a). This could create conflicting provisions in the eUCP, UCP 600, and ISP98. *See generally id.*

141. INT'L STANDBY PRACS. § 1.09(c).

presentation,[142] format of data organization,[143] and a separation of the general term "document" and a more specific definition of "paper document."[144] The increase in definitions may allow for parties to be more precise when drafting their obligation under the letter of credit.

Further, the overlapping definitions between the current ISP98 and eUCP demonstrate how the ISP98's language is outdated. An example of this can be seen in the term "electronic record," where the eUCP includes a phrase allowing "all information logically associated with or otherwise linked together" and requires the electronic record to be capable of being authenticated to determine the identity of the sender, the data contained in the document, and whether the data has remained complete and unaltered.[145] In contrast, the ISP98 requires more ambiguously that an electronic record be "capable of being authenticated and then examined for compliance with the terms and conditions of the standby."[146] Further, the term "received" in the eUCP includes language stating that system generated confirmation of receipt of sending does not imply that the record has been "viewed, examined, accepted, or refused," which is not included in the ISP98 definition of "receipt."[147]

Additionally, an "eISP" could provide presentation and examination provisions similar to those in the eUCP, such as rules related to hyperlinks, external links, or indications that an "electronic record may be examined by reference to an external system" shall be examined as part of the electronic record.[148] Further, the eUCP provides that "failure of the external system to provide access to the required electronic record at the time of examination shall constitute a discrepancy."[149] These provisions can be critical in determining whether a document complies "on its face" with the express terms of the standby letter of credit.[150] Because the inability to reference or adequately examine an external source included in a

142. *eUCP*, *supra* note 19, § e3(a)(iii).

143. *Id.* § e3(b)(v).

144. The general term "Document" in the eUCP explicitly states that the term "shall include an electronic record," where the term "Paper document" only includes a document in paper form. The differing definitions could allow for issuers or parties in a letter of credit transaction to expressly specify using standardized rules whether a document must be presented in paper form only or if other formats are acceptable. *Id.* §§ e3(a)(ii), e3(b)(vi).

145. *Id.* § e3(b)(iii).

146. INT'L STANDBY PRACS. § 1.09(c)(iii).

147. With this, one could see how, under the ISP98 terms, that an automatic confirmation of receipt could create confusion whether the sending of the documents has started the presentation or examination processes. *See id.* at 1.09(c); *eUCP*, *supra* note 19, § e3(b)(vii).

148. *Id.* § e7.

149. *Id.* § e7(d)(ii) (providing exceptions).

150. Practical Law Finance, *supra* note 29, at 5.

document could create confusion as to an issuer's duty to honor or dishonor a presentation under a letter of credit,[151] providing for rules to remedy this situation can reduce confusion and the risk of dispute in a letter of credit transaction.

While the definitions and provisions included in the "eISP" need not be based entirely from the eUCP, the eUCP can act as a starting point in creating an "eISP" due to the similarity between the documentary and standby letter of credit types.[152] Further, basing the provisions off of the eUCP may be additionally beneficial as the eUCP has received wide approval from international letter of credit communities.[153]

A critical drawback of an "eISP" would be the acceptability of the document and the impact on the stability of the document on the standby letter of credit community. If changes were made to standby letter of credit practice, it could create uncertainty in the standby letter of credit community, as new and untested practices could create hesitation within the community. This is especially true as the widely accepted practices "are given currency and credibility" in part by widespread use.[154] However, another way standby letter of credit practice acquires credibility is through acceptance by "endorsement of recognized national and international organizations."[155] The "eISP" would likely need to be adopted by an authoritative body with credibility in the standby letter of credit community, such as the ICC.[156] The process of drafting and approving a document with the ICC would likely be a lengthy process spanning several years.[157] Because of the lengthy process of creating and approving an "eISP," banks and other letter of credit parties may wish to incorporate already-existing rules into their letter of credit transactions.[158]

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151. *See supra* notes 37, 43 and accompanying text.

152. While documentary and standby letters of credit may differ in their "function and usage," they hold many of the same principles and definitions, as the ISP98 was developed in part from the UCP. Xiang & Buckley, *supra* note 9, at 95.

153. The eUCP received 100% approval from voting countries at ICC Banking Commission in 2019. However, the eUCP is not widely adopted in letter of credit transactions. *eUCP*, *supra* note 19, at 3; Larson, *supra* note 16, at 938.

154. *ISP98 Official Commentary*, *supra* note 5, at 8.

155. *Id.*

156. The ICC would likely be the body accrediting the eISP as the ICC Banking Commission approved the ISP98, eUCP, and other international standardized rules in the banking community. *See id.* at vi; *eUCP*, *supra* note 19, at 2.

157. For example, the working group that would later develop the eUCP was announced in June of 2017, with the eUCP not being adopted until March 2019. *Id.*

158. This is a significant point as letter of credit scholars note the difference between creating a "legal framework, rules, and systems" and acceptance in the market, as bankers are often conservative to accept new changes. Byrne, *supra* note 107, at 263, 268.

Another drawback of an "eISP" allowing for digital presentation would be difficulties in sending all of the documents required for a presentation to occur, as there may be cases where the sender of documents could be different entities.[159] While this may be more of an issue with documentary letters of credit,[160] this could create a problem in determining when the time for examination under a presentation begins.[161] However, this can be remedied if the issuer explicitly provides in the letter of credit or determines when a presentation begins, so the issuer may examine and timely honor or dishonor the presentation.[162]

B. Incorporation of the eUCP into Standby Letters of Credit

Instead of creating an "eISP," issuers and negotiating parties in letter of credit transactions could expressly incorporate the eUCP into standby letters of credit.[163] The first benefit of this is immediately apparent, as the eUCP has been updated to Version 2.0 in 2019.[164] Further, the eUCP already has international approval, as it received unanimous approval from the ICC Banking Commission.[165] However, the eUCP does not have a high adoption rate in practice.[166] Despite this, pre-existing approval would be beneficial to standby letter of credit parties, as the unanimous approval by a knowledgeable rule-making body likely bolsters trust in the rules, which is a critical component of letters of credit.[167] Having pre-existing rules also would likely reduce legal fees for parties to a letter of credit transaction if used in lieu of drafting, reviewing, and negotiating provisions independently. This is especially beneficial as the writers of the ISP98 have noted that standby letters of credit have suffered from overdrafting in absence of standardized rules.[168] This overdrafting is contrary to the intention of the ISP98, as the rules

159. Barnes & Byrne, *supra* note 1, at 28.

160. This is because documentary letters of credit often involve shipping, transport, and government documents. Practical Law Commercial Transactions & Practical Law Finance, *supra* note 47, at 2.

161. Barnes & Byrne, *supra* note 1, at 29.

162. *Id.*

163. While the eUCP was originally intended for documentary letters of credit, the eUCP could be incorporated into standby letters of credit, as "the eUCP shall apply where the [letter of] credit indicates that it is subject to the eUCP . . . ." *eUCP*, *supra* note 19, § e1(b).

164. The eUCP was updated to Version 2.0 when the document came into effect on July 1st, 2019. *Id.* at 3.

165. The eUCP Version 2.0 received 100% approval from forty-eight voting countries, with two countries abstaining from the vote. *Id.*

166. Larson, *supra* note 16, at 938.

167. Byrne, *supra* note 107, at 268.

168. *ISP98 Official Commentary*, *supra* note 5, at 24.

are intended to be non-complicated and flexible.[169] Maintaining the simplicity of the ISP98 is also important to the purpose of the document as the rules were drafted to be understood by bankers and merchants, rather than lawyers.[170]

By incorporating the eUCP into the standby letter of credit, several notable provisions would be included. This includes definitions related to the electronic records and presentation, including terms for "data corruption," "data processing system," "electronic record," "electronic signature," and more.[171] The eUCP also provides standardized rules related to the format that an electronic record should be presented in,[172] how electronic presentations should occur,[173] and rules for examining digital records and presentations.[174] Additionally, several provisions of the eUCP give banks extra discretion and liability protection related to digital records and presentations.[175]

Despite the many benefits of the eUCP, there are some considerations for banks before incorporating the rules into standby letter of credit transactions. Notably, this includes automatic incorporation of the UCP 600 into the letter of credit, as a letter of credit subject to the eUCP is also automatically, and without express incorporation, subject to the UCP.[176] An issuing bank could expressly decline to incorporate Article e2(a), thus circumventing the automatic incorporation of the UCP,[177] or only choose to incorporate the Articles that are beneficial to the standby letter of credit.

In the event that the eUCP, UCP, and ISP98 are incorporated into a letter of credit, there is potential likelihood that there may be a conflict of provisions within the letter of credit. In the event of a dispute, it may be important to understand the hierarchy of authority. Article e2(b) states that the eUCP provisions shall prevail "to the extent that they would produce a result different from the . . . UCP."[178] Further, the ISP98 states that its provisions shall supersede conflicting UCP provisions if the letter of credit is a standby

169. *Id.* at 12.
170. *Id.*
171. *eUCP*, *supra* note 19, § e3(b).
172. *Id.* § e5.
173. *Id.* § e6.
174. *Id.* § e7.
175. This includes protections in the event of data corruption of an electronic record, liability in the event of satisfying the apparent authenticity of an electronic record, and a force majeure clause that protects a bank from interruptions of business arising from electronic and digital complications resulting from acts beyond the bank's control. *eUCP*, *supra* note 19, §§ e12–14.
176. *Id.* § e2(a).
177. *Id.*
178. *Id.* § e2(b).

letter of credit.[179] To ensure that a letter of credit's interpretation is in accordance with the issuing bank's intention, it may be worthwhile for the bank to expressly state the relationship between the ISP98 and the eUCP when the standby letter of credit is subject to both. An example of an express provision accounting for this could be, "Where the eUCP applies, its provisions shall prevail to the extent that they would produce a result different from the application of the ISP98."[180] In summary, if the ICC or similar authoritative body does not create an "eISP," banks and other letter of credit parties may wish to incorporate the eUCP and create express terms providing the interaction between the several incorporated sets of rules.

It is also important to note that market acceptance of an "eISP," or eUCP incorporation into standby letter of credit transactions, is critical to the success of the proposed ideas.[181] Specifically, some letter of credit experts have noted that "while it is relatively easy to create a [letter of credit] legal framework, rules, and systems, it is much more difficult to obtain market acceptance of them."[182] This acceptance would have to be supported by banks, beneficiaries, and applicants.[183] As some letter of credit experts observe, adoption of electronic means in letter of credit transactions may not occur homogenously.[184] Thus, one may see an uneven adoption of technology in different aspects of the letter of credit transaction.

V. CONCLUSION

The intersection of technology and finance is a constantly changing field. The drafters of the eUCP and ISP98 envisioned that standard letter of credit practice would change inside the inception of the rules and reasoned that it is important to continually monitor changes in developing technology and letter of credit practice and may consider enacting updates or future changes to the ISP98 and the eUCP.[185] Starting the process of updating the standby letter of credit rules for modern transactions is a critical step in ensuring the reliability of the standardized rules. This could be done in part

179. *ISP98 Official Commentary*, *supra* note 5, at 10.

180. This language is adapted from a similar provision in the eUCP and UCP relationship. *eUCP*, *supra* note 19, § e2.

181. One letter of credit scholar states that "electronic acceptability . . . mandate[ed] by [legislation] or enticement are bound to fail absent market acceptance." Byrne, *supra* note 107, at 273.

182. *Id.* at 268.

183. *Id.* at 273.

184. *Id.* at 261.

185. *eUCP*, *supra* note 19, at 3; *ISP98 Official Commentary*, *supra* note 5, at 12.

through the creation of an "eISP" supplement, which would provide standardized terms and provisions related to new technologies and environments.[186] Doing so will help the provisions remain relevant in coming years, where significant changes in technology and finance will likely change the way parties conduct business.[187]

186. *See supra* notes 143 and 145 and accompanying text.
187. Larson, *supra* note 16, at 933–34.

Gender Dysphoria and the Americans With Disabilities Act: The Shameful Wall of Exclusion

*Victoria Lynn Smith**

I. INTRODUCTION

On July 26, 1990, President George H.W. Bush signed the Americans with Disabilities Act ("ADA") and celebrated the moment that the "shameful wall of exclusion finally [came] tumbling down."[1] At that moment, the President promised that this legislation was a proverbial sledgehammer marking the end of discrimination in

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1. George H. W. Bush, U.S. President, Remarks by the President During Ceremony for the Signing of the Americans with Disabilities Act of 1990 (July 26, 1990).

America.[2] Nevertheless, over thirty years later, individuals at the intersection of disability rights and transgender rights are still struggling against exclusion as they attempt to receive the promised protections of the ADA.[3]

Despite the otherwise broad scope of this law, it explicitly excludes gender identity disorders not resulting from physical impairments.[4] This exclusion has prevented transgender individuals with gender dysphoria from receiving protection and reasonable accommodations under the ADA.[5] In August 2022, a United States Court of Appeals addressed this issue for the first time and held that gender dysphoria is categorically not a gender identity disorder.[6] Therefore, transgender individuals with gender dysphoria may have grounds for a claim under the ADA.[7]

This Note discusses the groundbreaking ruling in *Williams v. Kincaid*. Part I of this Note discusses the history of the disability rights movement and the Americans with Disabilities Act. Part II addresses the gender identity disorder exclusion and reviews relevant case law. Part III begins with a review of the facts and procedural history of the landmark case, *Williams v. Kincaid*, and then discusses the majority and the concurrence in part/dissent in part in detail. Part IV argues that while the holding in *Williams* should be celebrated as a victory for the transgender rights and disability rights movements, it was decided on the wrong grounds. Rather than allowing the claim to proceed due to statutory construction, the majority should not have avoided the constitutional question of whether the gender identity exclusion violates the Equal Protection Clause of the Fourteenth Amendment.[8]

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2. *Id.*

3. *See generally* Devan Cole, *GOP Lawmakers Escalate Fight Against Gender-Affirming Care with Bills Seeking to Expand the Scope of Bans*, CNN (Feb. 11, 2023, 9:11 AM), https://www.cnn.com/2023/02/11/politics/gender-affirming-care-bans-transgender-rights/index.html; Linda Bond Edwards & Alexander Melvin, *Gender Dysphoria and the ADA: What it Means for Employers*, JD SUPRA (Aug. 24, 2022), https://www.jdsupra.com/legalnews/gender-dysphoria-and-the-ada-what-it-7737751/.

4. 42 U.S.C.A. § 12211 (Westlaw through Pub. L. No. 118-30).

5. Kevin M. Barry, *Disabilityqueer: Federal Disability Rights Protection for Transgender People*, 16 YALE HUM. RTS. & DEV. J. 1, 1–8 (2014).

6. Williams v. Kincaid, 45 F.4th 759, 769 (4th Cir. 2022), *reh'g denied*, 50 F.4th 429 (4th Cir. 2022).

7. *Id.*

8. Before beginning, it is important to note that nothing in this Note should be construed to suggest that all transgender individuals are disabled and require protection under the Americans with Disabilities Act. Importantly, some transgender advocates are concerned that permitting gender dysphoria to be protected further "pathologizes" transgender identity as an "impairment in need of a cure" and "compounds the harms already facing transgender individuals." Julia Reilly, Bostock*'s Effect on the Future of the ADA's Gender Identity Disorder Exclusion: Transgender Civil Rights & Beyond*, 59 S.D. L. REV. 181, 191 (2022) (citing Ali

II. HISTORY OF THE AMERICANS WITH DISABILITIES ACT

The Americans with Disabilities Act (ADA) has four express purposes:

> (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
>
> (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
>
> (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
>
> (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.[9]

These purposes reflect a disability rights movement that began long before any form of legislation.[10] The path to the ADA began when people with disabilities and parents of children with disabilities challenged "societal barriers that excluded them from their communities," and local groups were established to advocate for the rights of people with disabilities.[11] The Independent Living Movement, which began in the early 1970s, challenged the long-held notion that people with disabilities needed to be separated from

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Szemanski, *When Trans Rights are Disability Rights: The Promises & Perils of Seeking Gender Dysphoria Coverage Under the Americans with Disabilities Act*, 43 HARV. J.L. & GENDER 137, 159–60 (2020)). *See also* Kayley Whalen, *(In)Validating Transgender Identities: Progress & Trouble in the DSM-5*, NAT'L LGBTQ TASK FORCE (Dec. 13, 2012), https://www.thetaskforce.org/invalidating-transgender-identities-progress-and-trouble-in-the-dsm-5/ ("As long as gender variance is characterized by the medical field as a mental condition, transgender people will find their identities invalidated by claims that they are "mentally ill . . . ."). However, others argue that because gender dysphoria, which is a stigmatized medical condition, is separate from transgender identity, which is *not* a medical condition, gender dysphoria ought to be protected. *See* Reilly, *supra* note 8, at 191–192 (citing Kevin Barry & Jennifer Levi, Blatt v. Cabela's Retail, Inc. *& A New Path for Transgender Rights*, 127 YALE L.J. FORUM 373, 386–87 (2017)). Generally, the "overwhelming consensus among transgender rights advocates is strongly in favor of ADA coverage of gender dysphoria." *Id.* at 389.

9. 42 U.S.C.A. § 12101 (Westlaw through Pub. L. 118-30).

10. Arlene Mayerson, *The History of the Americans with Disabilities Act: A Movement Perspective*, DISABILITY RTS. EDUC. & DEF. FUND (1992), https://dredf.org/about-us/publications/the-history-of-the-ada/.

11. *Id.*

society and institutionalized.[12] The furtherance of this movement, and the disability rights movement as a whole, required "reversing the centuries long history of 'out of sight, out of mind' that the segregation of disabled people served to promote."[13]

The first major legal shift was the implementation of Section 504 of the Rehabilitation Act of 1973 ("Section 504"), which banned discrimination on the basis of disability by recipients of federal funds.[14] The implementation of Section 504 was the first time that the exclusion or segregation of people with disabilities was legally qualified as discrimination.[15] The regulations of Section 504 included both the dissolution of policy barriers and the mandate of affirmative conduct to accommodate people with disabilities.[16] However, this legislation only applies to programs or activities receiving federal financial assistance, so no legislation existed that prohibited discrimination on the basis of disability in the private sector prior to 1990.

In the intervening years, teams of lawyers and disability rights activists advocated for more comprehensive protections.[17] In 1986, the National Council on Disability issued a report titled "Toward Independence: An Assessment of Federal Laws and Programs Affecting Persons with Disabilities – With Legislative Recommendations."[18] Within the report, the council recommended "the enactment of a comprehensive law requiring equal opportunity for individuals with disabilities, with broad coverage and setting clear, consistent, and enforceable standards prohibiting [disability] discrimination."[19] This led to the formation of the Congressional Task Force on the Rights and Empowerment of Americans with Disabilities and the introduction of the first draft of the ADA during the 100th Congress in 1988.[20] Between then and 1990, the House of Representatives and the Senate revised and passed the ADA, which

12. *Id.*; *See also The History of the Independent Living Movement*, NE. INDEP. LIVING MOVEMENT, https://www.nilp.org/history-of-independent-living-movement/ (last visited Nov. 5, 2023).
13. Mayerson, *supra* note 10.
14. 29 U.S.C.A. § 794 (Westlaw through Pub. L. No. 118-30).
15. Mayerson, *supra* note 10.
16. *Id.*
17. *Id.*
18. *Toward Independence: An Assessment of Federal Laws & Programs Affecting Persons with Disabilities - With Legislative Recommendations*, NAT'L COUNCIL ON DISABILITY (Feb. 1986), https://www.ncd.gov/publications/1986/February1986.
19. *Id.*
20. *Timeline of the Americans with Disabilities Act*, ADA NAT'L NETWORK, https://adata.org/ada-timeline (last visited Nov. 5, 2023).

received bipartisan support in both houses.[21] Finally, President George H. W. Bush signed the ADA into law on July 26, 1990.[22]

The initial passage of the ADA had an underwhelming impact because of many courts' narrow interpretations of the statute, as was evidenced by low success rates from plaintiffs who attempted to bring disability discrimination claims.[23] Data from 1998 revealed "both the trial and appellate court processes yielded results that were not hospitable to plaintiffs' discrimination claims."[24] Defendants in ADA actions prevailed in 94% of the cases at the trial court level and in 84% of instances in which plaintiffs appealed these judgments.[25] Of the small number of cases when plaintiffs prevailed at the trial and appellate levels, plaintiffs' rewards were often reduced on appeal.[26]

This "windfall for defendants" was exacerbated by two United States Supreme Court cases that significantly narrowed the intended scope the of ADA. In *Sutton v. United Air Lines, Inc.*, the Court held that corrective and mitigating factors should be considered in determining whether a person is disabled.[27] For example, the petitioners, individuals with poor vision, were not considered disabled under the statute because corrective measures would rectify their vision.[28] In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, the Court interpreted what it means for a physical impairment to "substantially limit" any "major life activity."[29] The Court stated that these "terms need[ed] to be interpreted strictly to create a demanding standard for qualifying as disabled . . . ."[30] These Supreme Court cases significantly narrowed the ADA, and plaintiffs' success rates decreased to 3% in 2004.[31] In 2006, more than 97% of the employment discrimination decisions that resolved a claim under the ADA ended in the dismissal of the claim in favor of the defendant.[32]

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21. *Id.*
22. Timeline, *supra* note 20.
23. Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 108 (1999).
24. *Id.*
25. *Id.*
26. *Id.*
27. Sutton v. United Air Lines, Inc., 527 U.S. 471, 475 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2009).
28. *Sutton*, 527 U.S. at 481.
29. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 187 (2002), *overturned due to legislative action* (2009).
30. *Id.* at 197.
31. Stacy A. Hickox, *The Underwhelming Impact of the Americans with Disabilities Act Amendments Act*, 40 U. BALT. L. REV. 419, 424 (2011).
32. *Id.* at 424–25.

The Supreme Court's "pinched construction of the ADA" effectuated a "harmful rollback of the civil rights of people with disabilities."[33] Following a push from disability rights advocates, President George W. Bush signed the ADA Amendments Act ("ADAAA") into law in 2008.[34] The ADAAA was intended to restore the broad scope of the ADA originally intended by Congress and specified that the term "disability" should be construed in favor of broad coverage.[35] Congress found that the Court's narrow interpretations of the ADA in *Sutton* and *Toyota* were incongruent with the "broad scope of protection intended to be afforded . . . , thus eliminating protection for many individuals whom Congress intended to protect."[36] Congress explicitly rejected the standards set by the Court, stating that the determination of whether an impairment qualifies shall be made without regard to the ameliorative effects of mitigating measures, and that an impairment that substantially limits one major life activity need not necessarily limit other major life activities in order to be a disability.[37]

III. THE GENDER IDENTITY DISORDER EXCLUSION

Despite the broader definition of disability, the ADA is still neither absolute nor all-encompassing. Section 12211 of the ADA lists specific exclusions to protection.[38] First, it states that homosexuality and bisexuality are not impairments; therefore, such are not disabilities under the ADA.[39] Then, it states that the term 'disability' does not include "(1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, *gender identity disorders not resulting from physical impairments*, or other sexual behavior disorders; (2) compulsive gambling, kleptomania, or pyromania; or (3) psychoactive substance use disorders resulting from current illegal use of drugs."[40]

While most of these exclusions are understandable given societal and policy concerns, the presence of "gender identity disorders" amongst disorders like pedophilia, exhibitionism, and pyromania is questionable. It reflects the stigma and discrimination that

33. *Righting the Americans with Disabilities Act*, NAT'L COUNCIL ON DISABILITY (Oct. 16, 2002), https://ncd.gov/publications/2002/oct162002.
34. Timeline, *supra* note 20.
35. ADA Amendments Act of 2008, Pub. L. No. 110–325, 122 Stat. 3553 (2009); *See also* 154 CONG. REC. H 8286 (2008).
36. *Id.*
37. *Id.*
38. 42 U.S.C.A. § 12211 (Westlaw through Pub. L. No. 118-30).
39. *Id.*
40. *Id.* (emphasis added).

transgender people face, and it seemingly implies that transgender people are socially deviant and sexually predatory.[41] Scholars opine that the exclusion of gender identity disorder was motivated by moral concerns, and there is substantial evidence of this motivation in the legislative history of the ADA.[42] Thus, it seems that gender identity disorder is "explicitly excluded from the ADA not because people with [gender identity disorder] are not impaired, but rather because, in 1989, several members of Congress believed that people with [gender identity disorder] were morally bankrupt, dangerous, and sick."[43]

In recent years, there has been a notable expansion in the protection of the rights of transgender individuals. For example, in 2015, in the landmark case of *Obergefell v. Hodges*, the Supreme Court ruled that people have a right to marry without regard to sex, with the result that an individual's sex assigned at birth cannot be used to determine their eligibility to marry.[44] In 2020, in *Bostock v. Clayton County*, the Supreme Court ruled that Title VII of the Civil Rights Act of 1964 (Title VII) protects employees against discrimination "because of sex," which includes discrimination on the basis of sexual orientation and gender identity.[45]

Despite these important strides, transgender individuals still face considerable discrimination, especially those with gender dysphoria who are at the intersection of transgender rights and disability rights.[46] Despite the outdated beliefs underlying the gender identity disorder exclusion, transgender litigants with gender dysphoria have been unsuccessful in obtaining protections under the ADA until recently.[47] Inclusion under the ADA is desirable because it compels a "more proactive regime" than Title VII as it confers "an affirmative obligation on employers and public entities to provide reasonable accommodations to disabled individuals."[48] Unlike Title VII, which provides remedial relief, the ADA could compel an employer to provide a wide-range of accommodations, from modifying dress-code standards to granting leave to accommodate an

41. *See Understanding the Transgender Community*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/understanding-the-transgender-community (last visited Nov. 5, 2023).

42. Barry, *supra* note 5, at 6.

43. *Id.* at 4.

44. Obergefell v. Hodges, 576 U.S. 644, 681 (2015).

45. Bostock v. Clayton Cnty., Ga., 140 S. Ct. 1731, 1747 (2020).

46. *See generally Gender Dysphoria Discrimination*, THE ADA PROJECT, http://www.adalawproject.org/gender-dysphoria-discrimination (last visited Nov. 5, 2023).

47. *See generally* Williams v. Kincaid, 45 F.4th 759 (4th Cir. 2022), *reh'g denied*, 50 F.4th 429 (4th Cir. 2022).

48. Szemanski, *supra* note 8, at 145.

individual's need to seek hormone therapy or reassignment surgery.[49] Furthermore, the ADA is far more expansive than Title VII, which applies only to employers, whereas the ADA applies to public entities and accommodations as well.[50]

Until August 2022, no federal appellate court had ruled on whether gender dysphoria falls within the gender identity disorder exclusion.[51] While district courts have come to different conclusions, a growing number of district courts have begun to recognize a distinction between gender identity disorder and gender dysphoria.[52]

This shift began in 2017 with *Blatt v. Cabela's Retail, Inc*.[53] In that case, a transgender woman with diagnosed gender dysphoria alleged that her employer discriminated against her on the basis of her sex and disability.[54] Her employer required her to wear a name-tag with a traditionally male name, required the woman to work in a secluded section of the store, and denied her access to the female bathroom.[55] Moreover, other employees continually harassed her and called her derogatory names, and she was eventually terminated.[56] In response, the woman brought a case under Title VII and the ADA.[57] The employer filed a motion to dismiss on the basis that gender dysphoria was barred from protection under the ADA through the gender identity disorder exclusion.[58] In response, the woman argued that the gender identity disorder exclusion violated the Equal Protection Clause.[59]

In its reasoning, the court reflected on "the mandate of the Court of Appeals for the Third Circuit that the ADA, as 'a remedial

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49. *Id.*
50. *Id.*
51. *Williams*, 45 F.4th at 766.
52. *See, e.g.*, Doe v. Triangle Doughnuts, LLC, 472 F. Supp. 3d 115, 134–35 (E.D. Pa. 2020) (denying a motion to dismiss because of the "dynamic nature of both the legal and medical precedent" regarding gender identity and gender dysphoria); Iglesias v. True, 403 F. Supp. 3d 680, 688 (S.D. Ill. 2019) (denying a motion to dismiss because the court could not categorically say that gender dysphoria fell within the exclusionary language of the Rehabilitation Act, which is identical to the exclusionary language of the ADA); Venson v. Gregson, No. 3:18-CV-2185, 2021 WL 673371, at *2–3 (S.D. Ill. Feb. 22, 2021) (denying a motion to dismiss because "the unsettled state of the law" prevented the court from saying with certainty whether gender dysphoria is excluded); Tay v. Dennison, No. 19-cv-00501, 2020 WL 2100761, at *3 (S.D. Ill. May 1, 2020) (permitting a claim to proceed because the court could not determine that gender dysphoria was categorically within the exclusionary language of the ADA).
53. Blatt v. Cabela's Retail, Inc., No. 5:14-CV-04822, 2017 WL 2178123 (E.D. Pa. May 18, 2017).
54. *Id.* at *2.
55. *Id.* at *4.
56. *Id.* at *2.
57. *Id.* at *1.
58. *Id.* at *2.
59. *Id.*

statute, designed to eliminate discrimination against the disabled in all facets of society, . . . must be broadly construed to effectuate its purposes.'"[60] Thus, the court stated, any exceptions to the statute, such as the gender identity exclusion, "should be read narrowly in order to permit the statute to achieve a broad reach."[61] Therefore, the district court interpreted the gender identity exclusion narrowly

> to refer to only the condition of identifying with a different gender, not to encompass (and therefore exclude from ADA protection) a condition like [the woman's] gender dysphoria, which goes beyond merely identifying with a different gender and is characterized by clinically significant stress and other impairments that may be disabling.[62]

The court held that the employee's gender dysphoria was not excluded by Section 12211 of the ADA, and the employer's motion to dismiss was denied.[63] In doing so, the court avoided the constitutional challenge posed by the woman and instead resolved the matter on other grounds.

Despite this significant decision, not all district courts followed the same reasoning.[64] In *Parker v. Strawser Construction, Inc.*, an Ohio district court held that a transgender employee with gender dysphoria could not state a claim for disability discrimination under the ADA.[65] The court disagreed with the outcome in *Blatt* and reasoned that "Congress intended to exclude from the ADA's protection both disabling and non-disabling gender identity disorders that do not result from a physical impairment."[66] Importantly, the court automatically categorized gender dysphoria as a gender identity disorder, without addressing any distinctions between the terms.[67]

The employee cited medical journal articles "that individuals with gender dysphoria exhibit differences in brain structure and physiological responses compared to control groups."[68] However,

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60. *Id.* at *3 (quoting Disabled in Action of Pa. v. Se. Pa. Transp. Auth., 539 F.3d 199, 208 (3d Cir. 2008)).
61. *Id.* (citing Bonkowski v. Oberg Indus., 787 F.3d 190, 195 (3d Cir. 2015)).
62. *Id.* at *2.
63. *Id.* at *5.
64. *See* Doe v. Northrop Grumman Sys. Corp., 418 F. Supp. 3d 921 (N.D. Ala. 2019) (holding that gender identity disorders and gender dysphoria are "legally synonymous," so claims under an individual's gender dysphoria must result from a physical impairment in order to move forward in an ADA claim).
65. Parker v. Strawser Constr., Inc., 307 F. Supp. 3d 744, 755 (S.D. Ohio 2018).
66. *Id.* at 754.
67. *Id.*
68. *Id.*

the court was limited in its review under Rule 12(b)(6) to the employee's allegations within her complaint, which did not include any allegations that her gender dysphoria was caused by a physical impairment.[69] The court was not convinced that "a mere difference in brain structure or physiology, by itself, is necessarily a 'physical impairment'—it may have physical underpinnings in the brain, but not every physical difference between two groups implies that one of the groups is impaired in some way."[70] Consequently, the court dismissed the employee's ADA claim because the employee failed to allege that her gender dysphoria was the result of a physical impairment.

IV. *WILLIAMS V. KINCAID*

A. Procedural History and Facts

On August 16, 2022, the United States Court of Appeals for the Fourth Circuit issued a landmark decision holding that gender dysphoria may qualify as a protected disability under the ADA and Section 504 of the Rehabilitation Act.[71]

Kesha Williams is a transgender woman with gender dysphoria who spent six months incarcerated in prison beginning on November 16, 2018.[72] Prison deputies originally assigned Williams to housing on the women's side of the prison and gave her uniforms typically provided to female inmates.[73] On the same day as this assignment, Williams met with the prison nurse and informed the nurse that Williams is transgender and suffers from gender dysphoria, an impairment for which she had received hormone medical treatment for fifteen years.[74] Although Williams brought the hormone medication with her to the prison, the prison nurse did not return the medication to Williams but instead instructed her to fill out a medical release form.[75] However, Williams did not receive her hormone medication until December 10, almost a month after her initial incarceration.[76] In the interim, Williams experienced significant mental and emotional distress as a result of her gender dysphoria.[77]

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69. *Id.* at 755.
70. *Id.*
71. Williams v. Kincaid, 45 F.4th 759, 779–80 (4th Cir. 2022).
72. *Id.* at 763.
73. *Id.* at 764.
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*

Upon realizing that Williams had not undergone transfeminine bottom surgery, the prison nurse labeled Williams as "male" and changed Williams' prison records to reflect the new label, pursuant to the prison's policy.[78] Following Williams' new classification, the prison deputies required Williams to live on the men's side of the prison and wear the uniforms typically provided to male inmates.[79] While housed on the men's side of the prison, prison deputies repeatedly harassed Williams regarding her sex and gender identity and refused her requests for accommodations, such as allowing Williams to shower privately and having her body searches be conducted by a female deputy.[80] Throughout her incarceration, Williams continued to encounter prolonged lapses in her hormone medical treatment, harassment by other inmates, and intentional misgendering by the prison deputies.[81]

Following her release, Williams filed a Section 1983 action against various defendants, alleging violations of the ADA and Section 504 of the Rehabilitation Act, amongst other claims.[82] The defendants moved to dismiss the case and contended that the ADA and Section 504 afforded Williams no basis for relief because gender dysphoria is not a disability under the ADA.[83]

The district court identified the issue as "whether gender dysphoria is the result of a physical impairment and thus excluded from the scope of the ADAA [*sic*.] and [Rehabilitation Act]."[84] The court automatically categorized gender dysphoria as a gender identity disorder without addressing the possibility of any distinction between the two.[85] Furthermore, the court found that Williams had not adequately demonstrated that her gender dysphoria was the result of a physical impairment within her complaint.[86] Because the definition of gender dysphoria within the complaint only referenced physical features "when it mention[ed] genitalia not corresponding to a person's perception of her own gender," the court found that it did not assert that Williams' genitalia were an impairment.[87] Although Williams cited the congressional record and committee hearing transcript, the court was "unwilling to delve into legislative

78. *Id.*
79. *Id.*
80. *Id.* at 764.
81. *Id.*
82. *Id.* at 765.
83. *Id.*
84. Williams v. Kincaid, No. 1:20-CV-1397, 2021 WL 2324162, at *2 (E.D. Va. June 7, 2021), *rev'd and remanded*, 45 F.4th 759 (4th Cir. 2022).
85. *Id.*
86. *Id.*
87. *Id.*

history" because it believed the plain language of the statute to be unambiguous.[88] Therefore, the district court granted the defendants' motion to dismiss.[89]

Williams appealed and challenged the district court's holding on two grounds: 1) that gender dysphoria is categorically not a gender identity disorder; and alternatively, 2) if gender dysphoria is a gender identity disorder, it results from a physical basis and is outside the scope of the ADA's exclusion from protection.[90] The United States Court of Appeals of the Fourth Circuit held that Williams plausibly alleged that gender dysphoria does not fall within the ADA's exclusion for "gender identity disorders not resulting from physical impairments" and reversed the district court's dismissal.[91]

B. Majority Opinion

The court reversed the motion to dismiss for three primary reasons. First, the court found that gender dysphoria is categorically not a gender identity disorder; therefore, the ADA's exclusion of gender identity disorders does not affect whether gender dysphoria is protected.[92] Second, the court held that even if gender dysphoria is a gender identity disorder, then it falls within the "ADA's safe harbor" for gender identity disorders resulting from physical impairments.[93] Third, the court stated that if "there were any doubt that § 12211(b) does not foreclose Williams' ADA claim on a motion to dismiss," then the court "would interpret that statute to permit that claim to proceed to avoid a serious constitutional question."[94]

The court found that gender dysphoria was distinct from gender identity disorders first by looking to "the meaning of the ADA's 'terms at the time of its enactment.'"[95] The court found that in 1990, when President Bush signed the ADA into law, the medical community had not yet acknowledged gender dysphoria "either as an independent diagnosis or as a subset of any other condition."[96] The medical community, however, had acknowledged a diagnosis of gender identity disorder.[97] According to the then-current Diagnostic and Statistical Manual of Mental Disorders, gender identity disorder

88. *Id.*
89. *Id.*
90. Williams v. Kincaid, 45 F.4th 759, 766 (4th Cir. 2022).
91. *Id.* at 779–80.
92. *Id.* at 769.
93. *Id.* at 770.
94. *Williams*, 45 F.4th at 772.
95. *Id.* at 766 (quoting Bostock v. Clayton Cnty., Ga., 140 S. Ct. 1731, 1738 (2020)).
96. *Id.* at 767.
97. *Id.*

was "'an incongruence between assigned sex (i.e., the sex that is recorded on the birth certificate) and gender identity.'"[98]

In 2013, advances in medical understanding led the American Psychiatric Association to remove "gender identity disorder" from and add "gender dysphoria" to the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders.[99] In this edition, gender dysphoria is defined as "the 'clinically significant distress' felt by some of those who experience 'an incongruence between their gender identity and their assigned sex.'"[100] The court recognized that this revision suggests a meaningful difference between these diagnoses, and the contrasting definitions "confirm[] these revisions are not just semantic."[101]

Gender identity disorder and gender dysphoria are characterized by different symptoms and may affect different populations.[102] Importantly, the "obsolete diagnosis [gender identity disorder] focused solely on cross-gender identification; the modern one [gender dysphoria] [focused] on clinically significant distress."[103] While any transgender person could have been diagnosed with gender identity disorder under the previous edition, only a person experiencing "clinically significant distress" could be diagnosed with gender dysphoria.[104] Therefore, the court held that "nothing in the ADA," at the time of its enactment and at the time of this decision, "compels the conclusion that gender dysphoria constitutes a 'gender identity disorder' excluded from ADA protection."[105]

Crucially, the court recognized Congress' "express instruction that courts construe the ADA in favor of maximum protection for those with disabilities" and concluded that it "could not adopt an unnecessarily restrictive reading of the ADA."[106] Therefore, the court determined that it could not add gender dysphoria "to the ADA's list of exclusions when Congress has not chosen to do so itself."[107]

Finally, the court reiterated the generosity with which complaints are to be reviewed and stated that the difference between

98. *Id.* (quoting AM. PSYCH. ASS'N, DIAGNOSTIC & STATISTICAL MANUAL 71 (3d ed., rev. 1987)).
99. *Id.*
100. *Id.* (quoting AM. PSYCH. ASS'N, DIAGNOSTIC & STATISTICAL MANUAL 451–53 (5th ed., rev. 2013)).
101. *Id.* at 767.
102. Szemanski, *supra* note 8, at 146–47.
103. *Williams*, 45 F.4th at 769.
104. *Id.* at 768.
105. *Id.* at 769.
106. *Id.* at 769–70.
107. *Id.* at 770.

gender identity disorders and gender dysphoria would be "more than enough support to 'nudge [Williams'] claims . . . across the line from conceivable to plausible.'"[108]

Alternatively, Williams contended, and the court agreed, that the dismissal of her ADA claims should be reversed because her gender dysphoria has a "known physical basis."[109] While the defendants conceded that gender dysphoria sometimes may result from a physical impairment, they argued that Williams failed to explicitly and adequately plead that her gender dysphoria was the result of a physical impairment.[110] This was the precise reasoning adopted by the district court.[111] Nevertheless, as above, the Court of Appeals was "again guided by Congress' mandate that [courts] must construe the definition of 'disability' as broadly as the text of the ADA permits."[112]

While the ADA does not define the phrase "physical impairments," the court looked to Equal Employment Opportunity Commission regulations, which "defin[e] the term expansively as '[a]ny physiological disorder or condition . . . affecting one or more body systems, such as neurological . . . and endocrine.'"[113] Williams alleged that her medical treatment for gender dysphoria consisted primarily of hormone therapy, a physical treatment which she had received for fifteen years.[114] Furthermore, when the "prison failed to provide this treatment, she experienced, inter alia, 'emotional, psychological, and *physical* distress.'"[115]

Although Williams did not use the precise language stating that her gender dysphoria was the result of physical impairments, the court reasoned that a plaintiff is not required to plead specific words to overcome a motion to dismiss.[116] Thus, the defendants contention to the contrary "would return us to 'the hypertechnical, code-pleading regime of a prior era.'"[117] Thus, considering the broad scope of

108. *Id.* at 769 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

109. *Id.* at 770 (quoting Reply Brief of Appellant at 36, Williams v. Kincaid, 45 F.4th 759 (4th Cir. 2022) (No. 21-2030)).

110. *Id.* (citing Brief of Appellees at 15, Williams v. Kincaid, 45 F.4th 759 (4th Cir. 2022) (No. 21-2030)).

111. Williams v. Kincaid, No. 1:20-CV-1397, 2021 WL 2324162 (E.D. Va. June 7, 2021), *rev'd and remanded*, 45 F.4th 759 (4th Cir. 2022).

112. *Williams*, 45 F.4th at 770 (citing 42 U.S.C. § 12102(4)(A)).

113. *Id.* at 770 (quoting 28 C.F.R. § 35.108(b)(1)(i) (2023)); *See also* Summers v. Altarum Inst., Corp., 740 F.3d 325, 332 (4th Cir. 2014) (requiring courts to defer to the Equal Employment Opportunity Commission's reasonable interpretations of ambiguous terms in the ADA).

114. *Williams*, 45 F.4th at 764.

115. *Id.* at 770–71 (quoting Amended Complaint ¶ 14, Williams v. Kincaid, 45 F.4th 759 (4th Cir. 2022) (No. 21-2030)).

116. *Id.* at 771.

117. *Id.* (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678–79 (2009)).

the ADA and the Equal Employment Opportunity Commission's regulations, the court concluded that Williams' allegations did "suffice to raise 'the reasonable inference' that Williams' gender dysphoria results from a physical impairment."[118]

Furthermore, the court recognized that "'courts typically lack sufficient expertise in physiology, etiology, psychiatry, and other potentially relevant disciplines to determine the cause or causes of gender dysphoria.'"[119] Therefore, it would be "wholly 'premature and speculative' to dismiss a case based on so many unknowns."[120]

Finally, the court reasoned that although the gender identity disorder exclusion may raise a serious constitutional question, this question may be avoided under the doctrine of constitutional avoidance.[121] The court stated that "when a statute 'raises 'a serious doubt' as to its constitutionality,' [the court] must 'first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'"[122]

Many transgender people experience gender dysphoria, and "both gender dysphoria and 'gender identity disorder' (as it existed in 1990) are very 'closely connected to transgender identity.'"[123] Thus, the court concluded that excluding both would "discriminate against transgender people as a class, implicating the Equal Protection Clause of the Fourteenth Amendment."[124] As discussed above, there was evidence of discriminatory animus toward transgender people at the time of drafting the gender identity disorder exclusion. The exclusion of gender identity disorder, which at the time was focused solely on cross-gender identification, "implicitly 'brands all [transgender people] as [equivalent to] criminals, thereby making it more difficult for [them] to be treated in the same manner as everyone else.'"[125]

The court noted that "this is not the first time that courts have confronted a law that 'withdraws from [one group], but no others, specific legal protection from the injuries caused by

118. *Id.* (quoting *Iqbal*, 556. U.S. at 678).

119. *Id.* at 772 (quoting Doe v. Pa. Dep't of Corr., No. 1:20-cv-000230, 2021 WL 1583556, at *9 (W.D. Pa. Feb. 19, 2021)).

120. *Id.* (quoting Bd. of Trs., Sheet Metal Workers' Nat'l Pension Fund v. Four-C-Aire, Inc., 929 F.3d 135, 152 (4th Cir. 2019)).

121. *Id.*

122. *Id.* (quoting Zadvydas v. Davis, 533 U.S. 678, 689 (2001)).

123. *Id.* (quoting Brief for Glbtw Legal Advocs. & Defs. & Nat'l Ctr. for Lesbian Rts. et al. as Amici Curiae Supporting Plaintiff-Appellant, at *21, Williams v. Kincaid, 45 F.4th 759 (4th Cir. 2022) (No. 21-2030)).

124. *Id.*

125. *Id.* at 772–73 (quoting Lawrence v. Texas, 539 U.S. 558, 581 (2003) (O'Connor, J., concurring)).

discrimination.'"[126] In 1996, the Supreme Court repealed municipal antidiscrimination ordinances "to the extent they prohibit discrimination on the basis of 'homosexual, lesbian or bisexual orientation, conduct practices, or relationships.'"[127] The Court held that "'laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.'"[128] In fact, the court in *Williams* recognized that the Fourth Circuit had previously cited the ADA's exclusion of gender identity disorders as evidence of discriminatory animus.[129] The only reason for this exclusion that the court could "glean from the text and legislative record is 'a bare . . . desire to harm a politically unpopular group[, which] cannot constitute a legitimate governmental interest.'"[130]

Nevertheless, the court reasoned that construction of this statute that permits avoidance of this constitutional question is readily available.[131] As discussed above, the court found that "Williams' complaint amply supports" two inferences that permit the court "to stop short of deciding this case on constitutional grounds: first, that gender dysphoria does not constitute a 'gender identity disorder[ ],' and second, that Williams' gender dysphoria 'result[s] from a physical impairment.'"[132] Therefore, the court expressly rejected a reading of the gender identity exclusion that would exclude gender dysphoria from ADA protections.[133]

C. Judge Quattlebaum Opinion

Judge Quattlebaum concurred in part and dissented in part, and he provided compelling textual counterarguments to the majority's reasoning.[134] Additionally, he noted that his opinion here "is not in any way a value judgment on Williams" or the broader transgender community.[135] He emphasized that his opinion that Williams' ADA claim should be dismissed is based on the principles of statutory construction, not on any views of proper policy decisions.[136]

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126. *Id.* at 773 (quoting Romer v. Evans, 517 U.S. 620, 627 (1996)).
127. *Id.* (quoting *Romer*, 517 U.S. at 624).
128. *Id.* (quoting *Romer*, 517 U.S. at 634).
129. *Id.* (citing Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 611 (4th Cir. 2020), *as amended* (Aug. 28, 2020)).
130. *Id.* (quoting *Romer*, 517 U.S. at 634).
131. *Id.*
132. *Id.* at 773–74 (quoting 42 U.S.C. § 12211(b)(1)).
133. *Id.* at 773.
134. *Id.* at 780 (Quattlebaum, J., concurring in part and dissenting in part).
135. *Id.*
136. *Id.* at 780.

First, Judge Quattlebaum criticized the majority's assertion that the 1990 understanding of gender identity disorder referred generally to individuals with cross-gender identification and not to those who experience distress and discomfort from that identification.[137] He stated that such an assertion is "belied by the actual language" of the then-current Diagnostic and Statistical Manual of Mental Disorders.[138] That publication "provide[d] that, even in mild cases, gender identity disorders involve 'discomfort and a sense of the inappropriateness about the assigned sex,'" and it even listed such distress as the first diagnostic criteria.[139] Thus, gender identity disorders, as understood at the time the statute was written, included distress and discomfort.[140] Nevertheless, even if Williams and the majority were correct about the changing understanding, "linguistic drift cannot alter the meaning of words in the ADA when it was enacted . . . [a]nd at the time, the meaning of gender identity disorders included gender dysphoria as alleged by Williams."[141] Moreover, contrary to the majority opinion, Judge Quattlebaum maintained that statements made by the American Psychiatric Association indicate that the decision to remove gender identity disorder and add gender dysphoria was motivated primarily by changes in nomenclature.[142]

Judge Quattlebaum also found the majority opinion to be inconsistent with the plain language of the ADA.[143] The statutory exclusion says, "gender identity disorders," and Judge Quattlebaum emphasized that the "plural use of the term should not be overlooked."[144] This language indicates that Congress considered this class to include more than one diagnosis.[145] Consistent with this notion, the then-current Diagnostic and Statistical Manual of Mental Disorders specified the existence of multiple gender identity disorders and included a category of "'Gender Identity Disorder Not Otherwise Specified.'"[146] Therefore, Judge Quattlebaum opined that whether gender dysphoria is a "new diagnosis or a replacement for

137. *Id.* at 781–84.
138. *Id.* at 784.
139. *Id.* at 783 (quoting AM. PSYCH. ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL 71–73, 77 (3d ed., rev. 1987)).
140. *Id.*
141. *Id.* at 780.
142. *Id.* at 784.
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.* (quoting AM. PSYCH. ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL 77–78 (3d ed., rev. 1987)).

gender identity disorder" is unimportant.[147] As the phrase "gender identity disorders" was understood at the time the ADA was drafted, it included a "disability involving discomfort or distress caused by a discrepancy between one's gender identity and the sex assigned at birth."[148]

Judge Quattlebaum then addressed the majority's reliance on the ADAAA and Congress's instruction to construe the term "disability" broadly.[149] He was unconvinced that gender dysphoria may be covered, even under a broad construction, because "[e]ven in cases in which a statute is 'entitled liberal construction and application in order [to] properly to effectuate the Congressional intent,' that 'salutary policy does not justify ignoring plain words of limitation.'"[150] Moreover, Quattlebaum opined that the ADAAA bolstered his view, because despite the opportunity to amend to reflect new understandings, "Congress . . . left intact the provision that placed gender identity disorders outside the scope of the ADA."[151]

Judge Quattlebaum acknowledged the ADA "safe harbor" for gender identity disorders resulting from physical impairments.[152] Nevertheless, he maintained that the complaint did not identify any part of Williams' body as impaired.[153] Judge Quattlebaum criticized the majority's stance that the discussion of Williams' hormone therapy within the complaint was enough to plead the existence of a physical impairment.[154] Additionally, he emphasized the use of the word "resulting" within the exclusion, meaning that the "physical impairment must come first."[155] Although hormone therapy may be helpful physical treatment to treat gender dysphoria, Williams' arguments that the use of such therapy equates to physical impairment "ignore the sequence compelled by the statute."[156]

Furthermore, Judge Quattlebaum indicated that the only physical condition that Williams alleged is addressed by the hormone therapy is the distress and discomfort because of the incongruity of Williams' gender identity and sex assigned at birth.[157] Under this interpretation, any individual with gender identity disorder would qualify, but it would render "not resulting from a physical

147. *Id.*
148. *Id.*
149. *Id.* at 785.
150. *Id.* (quoting Clifford F. MacEvoy Co. v. United States, 322 U.S. 102, 107 (1944)).
151. *Id.* at 786.
152. *Id.* at 787.
153. *Id.*
154. *Id.*
155. *Id.* at 788.
156. *Id.*
157. *Id.*

impairments" meaningless.[158] Doing so would violate the "'duty to give effect, if possible, to every clause and word of a statute.'"[159]

On appeal, Williams argued that the gender identity exclusion raises a serious constitutional question because of its disparate treatment of transgender individuals in violation of the Equal Protection Clause.[160] Although the majority did not adopt this argument as a substantive constitutional challenge, it used this reasoning under the doctrine of constitutional avoidance.[161] However, Judge Quattlebaum noted that "before the constitutional avoidance canon may be employed, a statute first must be ambiguous."[162] According to Judge Quattlebaum, the gender identity disorder exclusion is unambiguous and "plainly include[s] the gender dysphoria Williams alleges entitles her to ADA benefits."[163] Thus, constitutional avoidance is not appropriate.[164]

D. Petition for Rehearing

In October 2022, the Court of Appeals denied the appellees' petition for rehearing en banc in an eight to six vote.[165] Judge Wynn wrote an opinion concurring in the denial of rehearing en banc to highlight the majority's viewpoint in opposition to Judge Quattlebaum's dissent, which was joined by five others on the panel.[166] Judge Wynn countered Judge Quattlebaum's scathing remarks and stated that the majority "faithfully applied Congress's mandate to construe the ADA broadly, and thus its exclusions narrowly" and "did not simply rely on changing definitions or societal norms . . ."[167]

Judge Quattlebaum dissented again, and he, focusing on the separation of powers, accused the court of "judicially modif[ying] the Americans with Disabilities Act in a way that ignores the law that Congress enacted and the President signed into law 32 years ago."[168] Judge Quattlebaum characterized the distinction between gender identity disorder and gender dysphoria as a mere "linguistic

158. *Id.* (quoting 42 U.S.C. § 12211(b)).
159. *Id.* (quoting Duncan v. Walker, 533 U.S. 167, 174 (2001)).
160. *Id.* at 786.
161. *Id.*
162. *Id.*
163. *Id.*
164. *See id.*
165. Williams v. Kincaid, 50 F.4th 429, 429 (4th Cir. 2022).
166. *Id.* at 429–30.
167. *Id.* at 431.
168. *Id.* at 432.

drift."[169] He stated that the decision to make changes to the ADA's exclusions is "outside of [the] job descriptions [of] judges" and whether a judge "like[s] a policy choice or not, Congress's policy judgment, not [a judge's], should be the law."[170] Judge Quattlebaum found it especially "remarkable" that the issues presented did "not even warrant en banc review," despite reflecting "a novel and far-reaching interpretation of an influential federal statute . . . ."[171]

V. A SLEDGEHAMMER TO THE SHAMEFUL WALL OF EXCLUSION

A. Constitutional Avoidance was Inappropriate

Although the holding of *Williams* reflects an important and necessary broadening of the scope of the ADA, the case was incorrectly decided on the grounds of statutory construction. Therefore, the use of the doctrine of constitutional avoidance was inappropriate. The gender identity disorder exclusion cannot pass constitutional muster, as it denies transgender individuals equal protection.

The majority's statutory construction of the gender identity disorder exclusion is weak and verges on a judicial modification to the language of the statute. As Judge Quattlebaum correctly points out, the majority's primary argument is based on a mischaracterization of the 1990 understanding of gender identity disorder.[172] The majority asserted that because the diagnosis of gender dysphoria "concerns itself primarily with *distress* and other disabling symptoms" it is distinguishable from the diagnosis of gender identity disorder.[173] However, the then-current Diagnostic and Statistical Manual of Mental Disorders listed distress as the first diagnostic criteria of gender identity disorders and "provide[d] that, even in mild cases, gender identity disorders involve 'discomfort and a sense of the inappropriateness about the assigned sex.'"[174] Thus, contrary to the majority's assertions, gender identity disorders, as understood at the time the ADA was drafted, included distress and discomfort.[175]

Furthermore, the majority attempted to assert that Williams adequately pled that her gender dysphoria resulted from a physical

169. *Id.*
170. *Id.* at 431–32.
171. *Id.* at 432.
172. Williams v. Kincaid, 45 F.4th 759, 781–84 (4th Cir. 2022) (Quattlebaum, J., concurring in part and dissenting in part).
173. *Id.* at 768. (emphasis in original).
174. *Id.* at 782 (quoting AM. PSYCH. ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL 71–73, 77 (3d ed., rev. 1987)).
175. *Id.* at 783.

impairment because she used hormone therapy to treat her symptoms.[176] As Judge Quattlebaum explained, however, this is a "backwards" understanding of the language of the statute.[177] The plain language unambiguously requires that the physical impairment *causes* the gender identity disorder.[178] It is illogical to assert that a physical treatment, such as hormone therapy, is the cause of what it is seeking to remedy.

Nevertheless, this case could have and should have been resolved on constitutional grounds, and the majority failed to substantively address any constitutional issues. The doctrine of constitutional avoidance requires courts to construe statutes to avoid rendering them unconstitutional, if fairly possible.[179] However, the construction of the statute proposed by the majority is not a fair and dependable construction on which future transgender litigants can rely. Besides the weaknesses in the majority's argument, not all judges apply the methods of statutory construction consistently.[180] Furthermore, the construction of the statute set forth by Judge Quattlebaum may remove transgender individuals with gender dysphoria from the law's scope. Such an interpretation cannot survive constitutional scrutiny.

B. The Gender Identity Disorder Exclusion Violates Equal Protection

The Equal Protection Clause of the Fourteenth Amendment restricts a state's ability to "deny to any person within its jurisdiction the equal protection of the laws."[181] In *Bolling v. Sharpe*, the United States Supreme Court held that the Due Process Clause of the Fifth Amendment extends equal protection to actions of the federal government through reverse incorporation.[182]

To determine whether a government action violates equal protection, a court must first determine what class of people the government has distinguished.[183] Next, the court must determine the appropriate level of scrutiny based on the class of people affected.[184] Discrimination against a suspect class and interferences with

176. *Id.* at 770.
177. *Id.* at 788 (Quattlebaum, J., concurring in part and dissenting in part).
178. *Id.*
179. *See generally* Zadvydas v. Davis, 533 U.S. 678, 689 (2001).
180. *See* Arthur W. Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 Colum. L. Rev. 1299, 1317 (1975).
181. U.S. CONST. amend XIV, § 1.
182. Bolling v. Sharpe, 347 U.S. 497, 498–99 (1954).
183. *See* Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 606–07 (4th Cir. 2020).
184. *Id.*

fundamental rights are subject to strict scrutiny; discrimination against a quasi-suspect class is subject to intermediate scrutiny; and any other discrimination is subject to a rational basis review.[185] Finally, after determining the appropriate level of scrutiny, the court must review the government action.[186] Under a strict scrutiny review, the court analyzes whether the law is necessary to achieve a compelling government interest.[187] Under an intermediate scrutiny review, the court analyzes whether the law is substantially related to achieving an important government purpose.[188] Under a rational basis review, the court analyzes whether the law is rationally related to a legitimate government purpose.[189]

Gender dysphoria and gender identity disorder are so closely intertwined with transgender identity that "categorically excluding these conditions would facially discriminate based on transgender status."[190] Transgender people are at least a quasi-suspect class. Although the United States Supreme Court has not ruled on this issue yet, courts have commonly equated a transgender classification to a gender classification for the purposes of an equal protection analysis.[191] Sex-based classifications are subject to intermediate scrutiny.[192] However, even if the transgender classification is considered separately from the gender classification, it will be subject to at least intermediate scrutiny. The Supreme Court has established four factors to determine whether a classification is suspect or quasi-suspect.[193] All of these factors weigh in favor of the transgender classification being subject to a heightened form of scrutiny.

First, the Court considers the history of discrimination against the class.[194] The transgender community has faced a considerable history of discrimination, and the community continues to suffer from high rates of harassment, physical assault, employment

185. *See generally* Grutter v. Bollinger, 539 U.S. 306, 326 (2003); Clark v. Jeter, 486 U.S. 456, 461 (1988); Heller v. Doe by Doe, 509 U.S. 312, 319–20 (1993).
186. *See Grimm*, 972 F.3d at 613–15.
187. *Grutter*, 539 U.S. at 326.
188. *Clark*, 486 U.S. at 461.
189. *Heller*, 509 U.S. at 330.
190. Brief of Amici Curiae, *supra* note 123, at *21.
191. *See* Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 607 (4th Cir. 2020); *See also* Karnoski v. Trump, 926 F.3d 1180, 1200–01 (9th Cir. 2019) (evaluating discrimination against transgender people under intermediate scrutiny); Ray v. McCloud, 507 F. Supp. 3d 925, 937 (S.D. Ohio 2020) (holding that transgender people are a quasi-suspect class entitled to intermediate scrutiny).
192. *See* City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 441 (1985).
193. *Grimm*, 972 F.3d at 611.
194. Bowen v. Gilliard, 483 U.S. 587, 602 (1987).

discrimination, economic instability, and homelessness.[195] Furthermore, the plain language and legislative history of the ADA itself is particularly revealing of the discriminatory animus against transgender individuals. The location of the gender identity disorder exclusion is particularly telling. Section 12211, where the exclusion is listed, includes, inter alia, pedophilia, pyromania, and kleptomania.[196] There are clear and important public policy reasons for the exclusion of these conditions from ADA protection. It would be abhorrent to even imply that a place of public accommodation should be required to provide reasonable accommodations for pedophiles, pyromaniacs, and kleptomaniacs. The placement of gender identity disorder, which is closely tied to transgender identity, amongst these undisputedly harmful conditions associates transgender individuals with their harmful characteristics. It implies that gender identity disorder is "dangerous, despicable, and undeserving of protection—like pedophilia, kleptomania, and pyromania."[197]

Second, the Court determines if the class has a defining characteristic that relates to its ability to perform or contribute to society.[198] Being transgender has no such relation: "[F]oremost medical, mental health, and public health organizations agree that being transgender 'implies no impairment in judgment, stability, reliability, or general social or vocational capabilities.'"[199] Third, the Court determines whether the defining characteristic of the group is immutable.[200] Courts and medical authorities agree that "being transgender is not a choice."[201] Instead, it is "as natural and immutable as being cisgender."[202] Finally, the Court considers whether the class is a political minority.[203] A study from June 2022 estimated that approximately 0.5%, or 1.3 million, of adults in the United States identify as transgender.[204] Clearly from the small

195. *Grimm*, 972 F.3d at 611–12.
196. 42 U.S.C.A. § 12211 (Westlaw through Pub. L. No. 118-30).
197. Barry, *supra* note 5, at 27.
198. City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 440–41 (1985).
199. *Grimm*, 972 F.3d at 612 (quoting Am. Psychiatric Ass'n, Position Statement on Discrimination Against Transgender and Gender Variant Individuals 1 (2012)).
200. Bowen v. Gilliard, 483 U.S. 587, 602 (1987).
201. *Grimm*, 972 F.3d at 612.
202. *Id.* at 612–13.
203. *Id.* at 613.
204. Jonathan Allen, *New Study Estimates 1.6 Million in U.S. Identify as Transgender*, REUTERS (June 10, 2022, 6:01 PM) https://www.reuters.com/world/us/ new-study-estimates-16-million-us-identify-transgender-2022-06-10/.

percentage, transgender people are a political minority. Moreover, transgender people are underrepresented in government.[205]

All four of these factors weigh in favor of discrimination against transgender people being held to heightened scrutiny. Thus, the law must either be necessary to achieve a compelling government interest or substantially related to achieving an important government purpose. Under either level of scrutiny, the gender identity disorder exclusion violates equal protection because "there is no legitimate reason to exclude transgender people from the law's protection, much less an important or compelling one."[206]

VI. CONCLUSION

Despite the significance of the ADA, it is important to remember that there is still a "shameful wall of exclusion" built into its text. Due to the judgment against transgender individuals at the time of its passage, the ADA has excluded individuals with gender identity disorder since its inception. The holding in *Williams* is historic and represents a breakthrough at the intersection of transgender rights and disability rights. In order for this breakthrough to be sustainable, rather than the "gender dysphoria" versus "gender identity disorder" issue becoming a circuit split, the gender identity disorder exclusion must be challenged constitutionally.

205. *See* Brooke Sopelsa, *Meet 2017's Newly Elected Transgender Officials*, NBC NEWS (Dec. 28, 2017, 9:06 AM) https://www.nbcnews.com/feature/nbc-out/meet-2017-s-newly-elected-transgender-officials-n832826; Barbara DiTullio, *First Two Openly Transgender Judges in the U.S. Appointed Last Month*, WOMEN'S L. PROJECT (Dec. 7, 2010) https://www.womenslawproject.org/2010/12/07/first-two-openly-transgender-judges-in-the-u-s-appointed-last-month/.

206. Brief of Amici Curiae, *supra* note 123, at *21.

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