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ARTICLE

THE CLAIM AND THE RELIEF: REVEALING MISCONCEPTIONS AND MISSTEPS IN THE U.S. SUPREME COURT'S JURISPRUDENCE FOR §1983 ACTIONS AND BLACK LIVES MATTER

Simona Grossi†

This article explores the persistent challenges in addressing police brutality through civil rights litigation, focusing on the limitations imposed by federal jurisdiction and justiciability doctrines post-Lyons. It argues that the Supreme Court's approach, which conflates jurisdictional inquiries with procedural or remedial ones, has significantly hindered access to justice for plaintiffs seeking to vindicate their constitutional rights under §1983. By examining the foundational jurisdictional and procedural principles at stake, the article reveals the Court's missteps and suggests ways to disentangle these concepts, aiming to restore §1983's essential role in defending constitutional rights and ensuring that victims of police misconduct can obtain full redress in federal courts.

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I. INTRODUCTION

Nearly four decades after *City of Los Angeles v. Lyons* was decided,[1] we are still unable to challenge police brutality effectively via injunctive relief, and are instead confined to seeking damages for "past conduct"—for the brutalities and the use of deadly force that may have resulted in deaths—over and over again, all because the plaintiff before, and the one before that, could only bring to court, if they were lucky enough to make it that far, their "past exposure to illegal conduct."

Our post-*Lyons*[2] history is perhaps the strongest possible signal that the Court's approach to the problem has not proven successful, for the problem persists and dramatic violations of fundamental constitutional rights continue to occur, leading to the creation of movements like Black Lives Matter (BLM), a decentralized political and social movement advocating against the racism, discrimination, and inequality experienced by Black people. Their advocacy has provided a tremendous contribution to social justice and equality, but more needs to be done. Namely, federal jurisdiction and justiciability doctrines should be tools that the social justice and equality movements can draw upon, rather than obstacles that they must continually struggle to overcome.

Presently, the relevant doctrines and their interpretations do not allow federal courts to act within their province and perform their duty to say what the law is, thereby defending the Constitution. This article offers some ideas to help courts facilitate that mission and restore to §1983 its essential role in defending our constitutional system.

The core problem in current §1983 litigation derives from both a mistaken blurring of the jurisdictional and the remedial or procedural, and from a surgical fragmentation of the claim, in the erroneous belief that the plaintiff has a separate claim for each injury and each form of relief sought. But a "claim" in federal court is not the same as a "cause of action" in state court, and the difference between the two is not merely stylistic.

A federal court "claim" is a set of operative facts that give rise to one or more rights of action. Thus, it may comprise one or more injuries that are related to the same underlying set of facts. By contrast, a "cause of action," in state courts like California that have adopted the primary rights approach, is a set of operative facts giving rise to one right of action, with the result that there is a separate cause of action for each right sought to be vindicated. The more rights violated, the more causes of action, even if they all arose from the same transaction or occurrence. The federal "case or controversy" analysis doesn't apply in state courts since they are not subject to the jurisdictional limitations of Article III, §2. Nor, conversely, should state "cause of action" analysis apply in federal courts. However, the result of these two parallel but very different approaches to defining "cause of action" and "claim" is that federal courts have unwittingly blended the two concepts, thereby creating severe obstacles to plaintiffs obtaining complete relief on §1983 claims in federal court.

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[1] 461 U.S. 95 (1983).

[2] Id.

By examining some of the foundational jurisdictional and procedural principles at stake, this article reveals some of the Supreme Court's missteps in its constitutional rights jurisprudence and the source of these misunderstandings. In doing so, I hope to provide the federal courts with a means of applying these principles in a way that will allow those whose constitutional rights have been violated to obtain full redress in a forum uniquely qualified to dispense justice in such cases.

Starting with *Linda R.S. v. Richard D.*,[3] and *City of Los Angeles v. Lyons*,[4] the Supreme Court has slowly but steadily imported categories taken from the "injunctive relief" realm into the analysis of standing, conflating the claim and the relief, and thus frontloading the analysis of the merits of the claim, making access to justice increasingly difficult, especially in constitutional rights actions brought under §1983.[5] The recurring language in the Supreme Court's and lower courts' decisions – that "past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief…if unaccompanied by any continuing, present adverse effects",[6] or that "plaintiff who alleges past harm lacks standing to seek injunctive relief",[7] or even more troubling, that "plaintiff must demonstrate standing separately for each form of relief sought"[8] – reveals the source of the problem.

Because standing calls for a jurisdictional inquiry, while relief calls for a procedural or remedial one, the standard for satisfying the former cannot be the same as the one applicable to deciding whether relief can be granted, and the consequences of failing to show entitlement to the relief

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[3] 410 U.S. 614 (1973).

[4] 461 U.S. 95 (1983).

[5] 42 U.S.C. §1983.

[6] Lyons, 461 U.S. at 102 (quoting O'Shea v. Littleton, 414 U.S. 488, 495-496 (1974); *see also* Thompson v. Lengerich, 798 Fed. Appx. 204, 210-211 (10th Cir. 2019); Abbott v. Pastides, 900 F.3d 160, 176 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 1292 (2019)) ("As the district court explained, a plaintiff seeking prospective injunctive relief 'may not rely on prior harm' to establish Article III standing. 'Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief…if unaccompanied by any continuing, present adverse effects.' Because the plaintiffs are pursuing prospective injunctive relief in connection with their facial challenge to STAF 6.24, they may not rest on the University's past conduct, but they must instead 'establish an ongoing or future injury in fact.'") (internal citations omitted); Rezaq v. Nalley, 677 F.3d 1001, 1008 (10th Cir. 2012) ("When prospective equitable relief is requested, the requesting party must show an ongoing, personal stake in the controversy, a likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law. 'Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief.' 'Similarly, in the context of an action for declaratory relief, a plaintiff must be seeking more than a retrospective opinion that he was wrongly harmed by the defendant.'") (internal citations omitted).

[7] *See* Black Lives Matter D.C. v. Trump, 544 F.Supp.3d 15 (D.D.C. 2021).

[8] *See*, *e.g.*, Perez v. San Diego County, 2021 WL 3533322, *2 (S.D. Cal. 2021); Ward v. City of Barstow, 749 Fed. *Appx.* 529, 530 (9th Cir. 2018); Center for Bio-Ethical Reform, Inc. v. Black, 234 F.Supp.3d 423, 431 (W.D.N.Y. 2017); Wisconsin Carry, Inc. v. City of Milwaukee, 35 F.Supp.3d 1031, 1036 (E.D. Wis. 2014); Cooke v. Wood, 2011 WL 1542825, *6 (D. Del. 2011); MacIssac v. Town of Poughkeepsie, 770 F.Supp.2d 587, 593-549 (S.D.N.Y. 2011) ("'[A] plaintiff must demonstrate standing separately for each form of relief sought'… Past injury alone does not establish a present case or controversy for injunctive relief. Rather, 'the injury alleged must be capable of being redressed through injunctive relief at the moment.'") (internal citations omitted); Schirmer v. Nagode, 621 F.3d 581, 585 (7th 2010); Discovery House, Inc. v. Consolidated City of Indianapolis, 319 F.3d 277, 280 (7th Cir.), *cert. denied*, 540 U.S. 879 (2003).

sought cannot be dismissal of the action on the theory that there is then "no case or controversy." For, among other things, a federal judge may in fact grant the plaintiff a form of relief more limited than the one sought, or even a relief different from the one requested,[9] if the facts and the rights to which those facts give rise have been properly pleaded and proven. Thus, this article addresses the improper conflation of the requirements for establishing standing (a jurisdictional question) with the criteria for granting the specific relief sought (a procedural or remedial question), demonstrating the need for clearly distinguishing between these two different types of analysis to ensure proper judicial handling of claims and remedies within the context of jurisdiction, access to justice, and enforcement of individual claims of right.

By mistakenly conflating the claim and the relief—the jurisdictional and the remedial or procedural—the Court has created high barriers to access to justice and has made it much harder to use tools like §1983[10] for the vindication of constitutional rights.

II. THE CLAIM AND THE RELIEF

The proponents of the primary-rights model viewed the law as a collection of relatively stable, enforceable right-duty relationships, each of which could be discerned as a matter of natural law and distilled into a manageable primary right.[11] Early twentieth-century reformers, such as Roscoe Pound, rejected the natural law premise of the primary-rights theorists and viewed law as a morphing, sociological phenomenon that, at its optimum, should reflect a balancing of interests dependent on time and circumstance.[12] For Pound and others of his generation,[13] the law was in a constant state of becoming. Such a morphing legal landscape was not reducible to identifiable primary rights; nor could it operate under a rigid procedural framework. Indeed, Clark, who was heavily influenced by Pound's work, questioned the coherence of the primary-rights approach. To

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[9] *See* FED. R. CIV. P. 54(c). ("A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.")

[10] 42 U.S.C. §1983.

[11] *See, e.g.*, JOHN NORTON POMEROY, THE "CIVIL CODE" IN CALIFORNIA 45-48 (1885) (extolling the virtues of permanent and stable law). On the other hand, Pomeroy did recognize the value in the "elasticity" of the common law. *Id.* at 52-53.

[12] Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 605-606 (1908):

> Law is not scientific for the sake of science. Being scientific as a means toward an end, it must be judged by the results it achieves, not by the niceties of its internal structure; it must be valued by the extent to which it meets its end, not by the beauty of its logical processor the strictness with which its rules proceed from the dogmas it takes for its foundation. …Law has the practical function of adjusting every-day relations so as to meet current ideas of fair play. It must not become so completely artificial that the public is led to regard it as wholly arbitrary.

Id.

[13] Wesley Newcomb Hohfeld, who also influenced Clark's work, believed that there was no universally ideal system of legal rights and that legal rights were the result of socially contingent policy choices. For Hohfeld's idea of right and legal relations, *see* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L. J. 16 (1913).

Clark and other legal reformers of his era, a system of pleading premised on facts seemed most conducive to the promotion of their preferred sociological jurisprudence.[14]

Consistent with that goal, asC a claim in federal court was understood not as a specified right of action, but rather, as the confluence of the operative facts and the rights of action arising out of them,[15] i.e., "a group of operative facts giving rise to one or more rights of action."[16] According to Clark, a right of action pertained to a "'remedial right,' that is the particular *right-duty* legal relation which is being enforced in the particular legal action under consideration."[17] A claim, on the other hand, was intended as a nontechnical, fact-driven narrative suggestive of a legal theory that would entitle the pleader to relief. Clark thought that this approach to the claim would be most conducive to "the convenient, economic, and efficient conduct of court business, the enforcing of rules of substantive law with as little obtrusion of procedural rules as possible."[18]

The claim controls the scope of discovery, provides the focal point for summary judgment, and determines the relevance of evidence to be presented at trial, should there be one. It is the heartbeat of the case. Beyond that, a claim presents a demand for justice under the law. As such, the judicial recognition and enforcement of claims are essential components of the rule of law. As famously stated in *Marbury v. Madison*,

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection…
>
> The government of the United States has been emphatically termed a government of laws, and not of men. It will

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[14] Robert Bone suggests the following distinction between the advocates of primary rights and the reform movement that led to the adoption of the Federal Rules:

> Late nineteenth century jurists believed in a fundamental dichotomy between right and remedy and in the right-remedy-procedure hierarchy that held that procedure was instrumental to granting the ideal remedy, which, in turn, was instrumental to protecting legal rights rooted in natural law beliefs. Early twentieth century reformers, on the other hand, rejected the right-remedy dichotomy and the natural law assumptions that supported it. For these reformers, there was no fixed social ideal that gave content to legal rights. Instead, legal rights, duties, privileges and a host of other legal institutions were all shaped by the changing facts of social life.

Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 97 (1989).

[15] CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING *supra* note 12, at 477 (2d ed. 1947).

[16] *Id*. at 477; *see also id*. at 137 ("The cause of action must, therefore, be such an aggregate of operative facts as will give rise to at least one right of action…."). While the quoted materials specifically refer to the code-pleading phrase "cause of action," Clark made it clear that his pragmatic definition of cause of action was embraced by the term "claim" under the federal rules. *Id*. at 146-148.

[17] *Id*. at 824 (emphasis in original).

[18] Charles E. Clark, *The Code Cause of Action*, 33 YALE L.J 817, 820 (1924).

> certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.[19]

The relief is not part of the claim or a part of standing. It is rather the type of remedy that can partially or fully compensate the plaintiff for the injury and the violation of the right suffered, as shown by the relevant set of operative facts. Douglas Laycock defines the remedy as "anything a court can do for a litigant who has been wronged or is about to be wronged."[20] The two most common remedies are monetary damages and injunctions, i.e., orders requiring defendants to refrain from their wrongful conduct or to undo its consequences.[21] "The court decides whether the litigant has been wronged under the substantive law that governs primary rights and duties; it conducts its inquiry in accordance with the procedural law. The law of remedies falls somewhere in between procedure and primary substantive rights. Remedies are substantive, but they are distinct from the rest of the substantive law, and sometimes their details blur into procedure."[22] Laycock also notes that "[f]or long periods in our past, remedies were casually equated with procedure."[23] And while substantive rules define the standards of conduct applicable to everyday life, procedural rules specify the manner or means through which claims arising under the substantive law may be adjudicated.[24] An injunction is an order of the court commanding or preventing an action. More specifically,

> an injunction is a judicial process or mandate operating *in personam* by which, upon certain established principles of equity, a party is required to do or refrain from doing a particular thing. An injunction has also been defined as a writ framed according to the circumstances of the case, commanding an act which the court regards as essential to justice, or restraining an act which it esteems contrary to equity and good conscience; as a remedial writ which courts issue for the purpose of enforcing their equity jurisdiction; and as a writ issuing by the order and under the seal of a court of equity.[25]

An injunction can be preliminary (or temporary) or permanent. A preliminary injunction is "issued before or during trial to prevent an irreparable injury from occurring before the court has a chance to decide the case" and it is "issued only after the defendant receives notice and an opportunity to be heard."[26] A permanent injunction, on the other hand, is

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[19] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

[20] DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 1 (4th ed. 2010).

[21] Id.

[22] Id.

[23] Id.

[24] ALLAN IDES, CHRISTOPHER N. MAY & SIMONA GROSSI, CIVIL PROCEDURE: CASES AND PROBLEMS 466 (5th ed. 2016).

[25] HOWARD C. JOYCE, A TREATISE ON THE LAW RELATING TO INJUNCTIONS §1, at 2-3 (1909).

[26] BLACK'S LAW DICTIONARY, "injunction" (11th ed. 2019).

granted after a final hearing on the merits.[27] In order to get a permanent injunction, a movant is required to show that it has suffered irreparable injury; that the remedies available at law are inadequate to compensate for that injury; that, considering the balance of hardships between the parties, a remedy in equity is warranted; and that the public interest would not be disserved by a permanent injunction.[28] To obtain a preliminary injunction, a plaintiff must show that without such relief it will suffer irreparable harm before final resolution of its claims; that traditional legal remedies would be inadequate; and that it has some likelihood of success on the merits.[29] Thus, it is evident how the law of injunctions would fall, as Laycock observed, somewhere in between procedure and substantive rights.[30]

But the standing doctrine, intended to ensure satisfaction of the "case or controversy" requirement under Article III, §2 of the Constitution, is neither substantive law nor remedial or procedural law. Rather, it is jurisdictional and constitutional law.

III. STANDING [31]

Standing is an aspect of justiciability. The term *justiciability* refers to a body of judicially created doctrines that define and limit the circumstances under which an Article III federal court may exercise its constitutional authority, including its authority to engage in judicial review. These doctrines are derived in part from an interpretation of Article III's "case or controversy" requirement, and in part from prudential policy considerations involving perceptions of the proper role of the federal judiciary within the constitutional structure of government.

Stated very broadly, a matter is deemed justiciable if it's capable of judicial resolution.[32] To that end, the doctrines of standing, ripeness, mootness, and political questions are designed to ensure that Article III courts do not become embroiled in matters of a nonjusticiable nature that would take a federal court beyond the sphere of activity commonly associated with judging.

Article III, § 2 provides that the "judicial Power shall extend to" certain enumerated categories of "cases" and "controversies." These words have been interpreted as being not merely descriptive of the business of Article III federal courts, but as imposing a specific constitutional limitation on the circumstances under which an Article III court may exercise its judicial authority. This limitation "helps to ensure that the legal questions presented to the federal courts will not take the form of abstract intellectual problems resolved in the 'rarified atmosphere of a

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[27] Id.

[28] *See, e.g.,* eBay Inc. v. MercExchange, LLC, 547 U.S. 388, at 391 (2006).

[29] *See*, *e.g.*, Courthouse News Service v. Brown, 908 F.3d 1063, 1068 (7th 2018), *cert. denied*, 140 S. Ct. 384 (2019).

[30] LAYCOCK, *supra* note 1.

[31] For a more extensive analysis of justiciability and the doctrine of standing *see* ALLAN IDES, CHRISTOPHER N. MAY, AND SIMONA GROSSI, CONSTITUTIONAL LAW: NATIONAL POWERS AND FEDERALISM (9th ed. 2022); *see also* SIMONA GROSSI, ALLAN IDES, FEDERAL COURTS: PRINCIPLES, CASES & PRACTICES, WEST ACADEMIC PUBLISHING, forthcoming.

[32] *Flast v. Cohen*, 392 U.S. 83, 94 (1968).

debating society' but instead … will be presented 'in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.'"[33]

Because of the fact-intensive nature of the inquiry, "the precise boundaries of the 'case or controversy' requirement are matters of 'degree…not discernible by any precise test.' At the same time, the Court has developed a subsidiary set of legal rules that help to determine when the Constitution's requirement is met."[34] The essence of this limitation is that an Article III court may only exercise jurisdiction over those matters in which there is an actual dispute involving the legal relations of adverse parties, and for which the judiciary can provide some type of effective relief.[35] In other words, "[a] justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot."[36]

An important corollary to the case or controversy requirement is that an Article III court may not issue an advisory opinion—i.e., an opinion issued outside the context of a justiciable case or controversy.[37] The proscription against advisory opinions, however, does not preclude an Article III court from providing declaratory relief when requested to do so in the context of an actual case or controversy.[38]

While the case or controversy requirement establishes the constitutional minimum for the exercise of Article III authority, the mere satisfaction of that minimum is not always sufficient to establish justiciability. Prudential considerations may also sometimes operate to divest an otherwise constitutional case of its justiciable character. These prudential considerations are premised on a combination of concerns derived from principles of separation of powers, federalism, and sound judicial administration. At the heart of "prudence" is the Court's perception of the federal judiciary's proper function within the structure of government, and the Court's desire to avoid unnecessary clashes with other government institutions. These are essentially the same principles that inform the Court's interpretation of the case or controversy requirement. The prudential overlay, however, allows the Court to expand the application of those principles beyond the established minimum requirements of constitutional justiciability. Since prudential limitations are not constitutionally required, the Supreme Court can (and does) develop exceptions to its prudential rules. For example, an exception to the rule against third-party claims, allows plaintiffs standing to raise such claims if there are substantial obstacles that prevent the absent third party from doing so itself. Similarly, Congress can mandate exceptions to the Court's prudential rules.

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[33] Clapper v. Amnesty International USA, 568 U.S. 398, 423 (2013) (Breyer, J., et al., dissenting).

[34] Id.

[35] Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, 300 U.S. 227, 240-241 (1937).

[36] Id. at 240.

[37] Hayburn's Case, 2 U.S. 409 (1792).

[38] Aetna Life Ins., 300 U.S. 227.

Standing is one of the justiciability doctrines and requires the presence of an injury-in-fact, causation, and redressability. These elements of a case or controversy are intended to ensure the presence of an actual dispute between adverse parties that is capable of judicial resolution. Taken together, these elements—injury-in-fact, causation, and redressability—form what the Court has described as Article III's "irreducible constitutional minimum" for standing."[39] The standing doctrine examines that constitutional minimum from the perspective of the individual seeking to invoke the court's authority, typically a plaintiff in a civil suit, and it asks whether the plaintiff has established, through injury, causation, and redressability, a personal stake in the outcome of a justiciable controversy.[40] With respect to each of these elements, the party invoking federal court jurisdiction bears the burden of pleading and proof.[41] And when a plaintiff asserts a number of different claims, plaintiff must separately establish standing as to each of those claims.[42] If the suit is brought as a class action, plaintiffs must show that each class member individually satisfies the requirements of standing for each form of relief that they seek.[43]

Since the injury, causation, and redressability requirements of standing define what constitutes an Article III "case or controversy," an objection to standing may be raised at any time, in the trial court or on appeal, by a party or by a judge. "As a jurisdictional requirement, standing to litigate cannot be waived or forfeited. And when standing is questioned by a court or an opposing party, the litigant invoking the court's jurisdiction must do more than simply allege a nonobvious harm.… [T]he litigant must explain how the elements essential to standing are met."[44]

To satisfy the injury-in-fact requirement, a plaintiff must show that he or she has suffered a "concrete and particularized" invasion of a legally protected right.[45] An injury is concrete if it is actual—i.e., if it exists in fact.[46] It is particularized if it affects the plaintiff in a personal way.[47] And

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[39] McConnell v. Federal Election Comm'n, 540 U.S. 93, 225 (2003).

[40] *See* Horne v. Flores, 557 U.S. 433, 445-447 (2009) (party subject to an injunction has "personal stake" in outcome of proceeding seeking relief from the underlying judgment), *see also* Department of Commerce v. United States House of Representatives, 525 U.S. 316, 329-330 (1999); Bennett v. Spear, 520 U.S. 154, 162 (1997).

[41] TransUnion LLC v. Ramirez, 141 S. Ct.. 2190, 2207-2208 (2021); Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992); *and see* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 342 & n.3 (2006) (when a case is removed from state to federal court, defendant has the initial burden of showing that the case meets federal justiciability requirements).

[42] DaimlerChrysler Corp., 547 U.S. at 349-353 (rejecting theory of "ancillary standing" and holding that plaintiff must separately satisfy standing as to each claim asserted).

[43] TransUnion LLC,141 S. Ct. at 2208.

[44] Virginia House of Delegates v. Bethune-Hill, 139 S. Ct. 1945, 1950-1951 (2019) (party who intervened as a defendant in the federal district had suffered no cognizable injury that would have given it standing below or allowed it to appeal to the Supreme Court).

[45] Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016).

[46] Id.

[47] Id.

it is legally protected if it is recognized as such by law. The typical individual rights case easily satisfies this standard.[48]

The injury-in-fact requirement will usually be met if there has been a violation of any of the plaintiff's rights that are recognized by the Constitution, federal or state statute, or by the common law, although this is not invariably true in the case of statutorily conferred rights. The requirement will also be satisfied by any other type of harm to the individual, so long as a federal court does not believe the interest invaded is too abstract or too novel to satisfy Article III's case or controversy requirement. The injury may be either a present injury or a threatened injury, so long as the threatened future injury is not too speculative or remote.

There is no test to determine whether an asserted interest or harm is adequate to satisfy the injury-in-fact requirement. But as harms become more creative, courts become increasingly reluctant to find the Article III injury-in-fact requirement satisfied. For example, in *Lujan v. Defenders of Wildlife*,[49] the Court rejected three creative theories of harm (ecosystem nexus, animal nexus, and vocational nexus), explaining that "[s]tanding is not 'an ingenious academic exercise in the conceivable,' but as we have said requires…a factual showing of perceptible harm."[50]

Thus, the *Lujan* Court was unwilling to credit as constitutionally sufficient the supposed harm a person interested in an endangered species would experience whenever government action threatened that species' chances for survival, a so-called animal nexus. The Court did concede that it was "plausible…to think that a person who observes or works with animals of a particular species in the very area of the world where that species is threatened by a federal decision is facing [constitutionally sufficient] harm, since some animals that might have been the subject of his interest will no longer exist."[51] But regardless of that more concrete possibility, the claims of a generalized "animal nexus" were inadequate to satisfy Article III, ingenious though the theory may have been. However, the threatened injury might have sufficed in *Lujan* had plaintiff already purchased her ticket or had made specific arrangements to visit the area where the endangered species lived, at a definite point in the future.

In a case where plaintiff seeks damages, the injury or harm in question has already occurred. In other cases, however, where plaintiff seeks prospective injunctive relief, the injury that plaintiff relies upon for standing purposes is some threat of future harm. Such allegations require the court to predict the likelihood of that harm occurring. To satisfy the injury-in-fact standard, the prediction must be based on concrete,

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[48] For example, suppose a public school fires a teacher because of her religious beliefs. The teacher's First Amendment claim against the school would satisfy the injury-in-fact requirement since her dismissal constitutes an actual abridgment of her personal right to religious freedom as protected by the First Amendment. Cf. Gill v. Whitford, 138 S. Ct. 1916 (2018) (to establish standing in a vote-dilution challenge to legislative redistricting, a voter must show that his or her voting strength was in fact diluted).

[49] 504 U.S. 555, 565-567 (1992).

[50] Id. at 566.

[51] Id. at 566-567.

nonspeculative facts that establish a sufficient "imminence" of that injury occurring to the plaintiff.[52] "An allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur."[53] If a court deems the chances of such injury ever occurring are too speculative or remote, the injury-in-fact requirement for prospective relief will not be satisfied.

In threatened future harm cases, it is harder to satisfy the injury-in-fact test. In *Clapper v. Amnesty International USA*,[54] plaintiffs sought a declaratory judgment that the Foreign Intelligence Surveillance Act (FISA) was unconstitutional. FISA allowed the federal government to obtain secret court approval for the surveillance of electronic communications between persons within the United States and certain persons thought to be in foreign territories. Plaintiffs in the case included lawyers who represented persons imprisoned in Guantanamo Bay, Cuba, or who had been subject to C.I.A. rendition, and whose communications with their lawyers might be intercepted under FISA. The suit was filed on the day FISA became law. The district court dismissed it for lack of standing because plaintiffs had not yet suffered any injury. The Court of Appeals reversed, concluding that plaintiffs had alleged a sufficient threatened injury, i.e., an "objectively reasonable likelihood" their communications with foreign contacts would be intercepted at some point in the future. The Supreme Court reversed in a 5 to 4 decision, holding that for a "threatened injury" to qualify for standing, it is not enough that there be an "objectively reasonable likelihood" of a harm occurring. Instead, plaintiffs must "demonstrate that the threatened injury is *certainly impending*…."[55] Here, there was no such certainty that the harms alleged by these particular plaintiffs would ever come to pass. While this "certainly impending" phrase had appeared in earlier opinions, the phrase is not necessarily synonymous with "impending with certainty." Instead, the word "certainly" may simply mean "definitely" or "at least." Or, as the dissent suggested, "certainly" may equate to "reasonable probability,"[56] a standard that plaintiffs clearly met in this case.

Standing also requires that the injured plaintiff establish a causal link between the claimed injury and the conduct of the defendant. As the Court has often phrased it, the injury must be "fairly traceable" to defendant's conduct.[57] The causation requirement is essentially identical to the concept of proximate cause in torts. The more direct the link between the plaintiff's injury and the defendant's conduct, the more likely it is that a court will find this element satisfied. And as was the case with injury-in-fact, one can expect the Court to be somewhat reluctant to accept what may be characterized as speculative or elongated chains of causation,

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[52] Id. at 562-567.

[53] Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158 (2014) (internal citations omitted).

[54] 568 U.S. 398 (2013).

[55] Id. at 401 (emphasis added).

[56] Id. at 431-433 (Breyer, J., et al., dissenting).

[57] California v. Texas, 141 S. Ct. 2104, 2113 (2021); Department of Commerce v. United States House of Representatives, 525 U.S. at 329-330; Bennett v. Spear, 520 U.S. 154, 162 (1997); Allen v. Wright, 468 U.S. 737, 750-751 (1984).

particularly so when the actions of absent third parties are a factor in that causal chain.[58]

The third standing requirement, redressability, focuses on the relationship between the injury and the relief sought. The relief requested must be designed to alleviate the injury caused by defendant's conduct. In fact, the redressability requirement is quite similar to the causation requirement, and in many cases—particularly those involving injunctions—merely serves as another perspective from which to examine the causal chain. Here the question, however, is not whether the defendant caused the plaintiff's injury, but whether the relief sought from the court will alleviate or otherwise redress that injury. The mere possibility of redress is not enough. Rather, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'"[59]

For the redressability requirement to be met, the relief sought need not correct or compensate for all the injury plaintiffs may have suffered. Instead, it is enough that the relief sought will alleviate or lessen that injury, even if only to a minimal extent.[60] And, as was the case with causation, redressability becomes somewhat more difficult to establish when alleviation of plaintiff's injury depends upon the action of an absent third party.[61]

When describing several exceptions to the ordinary tripartite standing inquiry, the Court in *Lujan* noted that Article III standing would exist in "the unusual case in which Congress has created a concrete private interest in the outcome of a suit against a private party for the government's benefit, by providing a cash bounty for the victorious

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[58] For example, in *Warth v. Seldin*, several low-income individuals filed suit challenging the constitutionality of a town's zoning ordinance that, according to their allegations, had the purpose and effect of excluding persons of low income from residing within the town. Even though the Court accepted plaintiffs' allegation that the zoning ordinance had such an exclusionary effect, the Court concluded that plaintiffs had not established causation with respect to their personal injuries. For there were no facts establishing that any builder had specific plans to develop low-cost housing within the town that plaintiffs could afford. According to the Court, in the absence of such a showing, the "cause" of plaintiffs' injuries—the inability to purchase low-cost housing within the town—was not the zoning ordinance, but "the economics of the area housing market…." 422 U.S. 490, 506 (1975). Of course, one could certainly argue that "the economics of the area housing market" were, in part, a product of the exclusionary zoning ordinance. But regardless of the merits of this argument, the Court's attitude was clear: causation, like injury-in-fact, cannot be established through conjecture, but must be premised on specific and plausible allegations of fact establishing a tangible causal link between plaintiff's injury and the defendant's conduct.

[59] Arizona Christian School Tuition Organization v. Winn, 563 U.S. 125, 134 (2011) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992)). *And see* Collins v. Yellen, 141 S. Ct. 1761, 1779 (2020) (it must be shown that "a decision in the [plaintiffs'] favor could easily lead to the award of at least some of the relief that the [plaintiffs] seek").

[60] Uzuegbunam v. Preczewski, 141 S. Ct. 792, 801 (2021) ("nominal damages" of but "a single dollar often cannot provide full redress, but the ability 'to effectuate a partial remedy' satisfies the redressability requirement.").

[61] *See* Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976). *But see* Utah v. Evans, 536 U.S. 452 (2002) (finding redressable a state's claim that it was deprived of a congressional seat by a census miscount when a correction of the count could add a seat to the state's congressional delegation, but only if the President and House of Representatives chose to honor the recount); *see also id.* at 510-515 (Scalia, J., dissenting).

plaintiff."[62] The Court explicitly reaffirmed this reasoning in *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*,[63] holding that an individual who brings suit under a structured "bounty" statute like the False Claim Act's *qui tam* provision has Article III standing.[64] The *Stevens* Court reasoned that the government suffers a cognizable injury when it is defrauded, and that the False Claims Act's *qui tam* provision may be construed as a partial assignment of the government's claim to damages.[65] Thus, the Court, through a "representational standing," found the plaintiffs' injury sufficient to support standing.

But while the presence of a cash bounty may signal the existence of an interest, does it also prove the existence of an injury? In *Stevens*, the Court noted:

> There is no doubt, of course, that as to this portion of the recovery—the bounty he will receive if the suit is successful—a *qui tam* relator has a "concrete private interest in the outcome of [the] suit."[66] But the same might be said of someone who has placed a wager upon the outcome. An interest unrelated to injury in fact is insufficient to give a plaintiff standing. The interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right. A *qui tam* relator has suffered no such invasion—indeed, the "right" he seeks to vindicate does not even fully materialize until the litigation is completed and the relator prevails. This is not to suggest that Congress cannot define new legal rights, which in turn will confer standing to vindicate an injury caused to the claimant. As we have held in another context, however, an interest that is merely a "byproduct" of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes.[67]

Also, in *Steele Co. v. Citizens for a Better Environment,*[68] the Court held that "a plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit."[69] Thus, it seems logical to conclude that Congress (or a state legislature) may not satisfy Article III standing by merely imposing a duty and conferring a cause of action with statutory damages, as it's only a particularized injury, personal to the

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[62] 504 U.S. at 572-73.

[63] 529 U.S. 765, 773-774 (2000).

[64] *Id*.

[65] "We believe, however, that adequate basis for the relator's suit for his bounty is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor. The [False Claims Act] can reasonably be regarded as effecting a partial assignment of the Government's damages claim.... We conclude, therefore, that the United States' injury in fact suffices to confer standing on [the qui tam relator]." 529 U.S. at 773-774.. *See also* Bauer v. Marmara, 942 F.Supp.2d 31, 35-37. (2013).

[66] *Lujan*, *supra* note 59, at 573.

[67] 529 U.S. at 772-773 (internal citations omitted).

[68] 523 U.S. 83 (1998).

[69] *Id*. at 107.

individual, one that distinguishes that individual from the citizens at large, that can confer standing.

In *Vermont Agency for Natural Resources v. U.S. ex rel Stevens,*[70] the Court held that Congress can "define new legal rights, which in turn will confer standing,"[71] but "an interest that is merely a 'byproduct' of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes."[72] Thus, the prospect of a cash bounty cannot be a substitute for the injury. It's therefore quite interesting that the Court may approve of the cash bounty situation as an exception to the traditional tripartite standing test,[73] while nevertheless insisting upon a strict "certainly impending" injury standard to find standing in non-cash-bounty cases. Isn't the prospect of the cash-bounty at least as speculative as an "objectively reasonably possible" injury? And isn't the cash-bounty just remedial or procedural rather than jurisdictional? This inconsistency reveals a disingenuous aspect of the Court's stance, suggesting that while the Court's classic standing analysis endorses a stringent standard for "injury in fact," the Court completely ignores this criterion when it allows for cash bounties, where the injury is merely fictional.

IV. LINDA R.S. V. RICHARD D. AND CITY OF LOS ANGELES V. LYONS

The relationship between the claim, the remedy, and jurisdiction is a complex and nuanced one. As explained above, the claim is the operative set of facts and the rights to which those facts give rise, while a remedy pertains to the specific relief a court may grant in response. Jurisdiction, on the other hand, determines a court's authority to hear a case and adjudicate the matters presented. Each of these elements operates under its own set of rules designed to meticulously address their respective nuances. Blurring the lines among these foundational legal concepts can significantly impede an individual's capacity to vindicate their rights, potentially obstructing access to justice and infringing upon constitutional guarantees. The cases of *Linda R.S. v. Richard D.*[74] and *City of Los Angeles v. Lyons*[75] serve as poignant illustrations of the complications that can arise when these critical legal elements are conflated.

In *Linda R.S. v. Richard D.*[76] the plaintiff, alleging that she was the mother of an illegitimate child, brought a class action on behalf of herself, her minor daughter, and all other women and minor children who had sought relief, were seeking, or will in the future seek child support from their father. Plaintiffs sought to establish the unconstitutionality of a Texas child-support law that had been interpreted as not being enforceable against the fathers of children born out of wedlock. Plaintiff sought a declaratory judgment and a court order barring the state from denying

[70] 529 U.S. 765 (2000).

[71] *Id.* at 773.

[72] *Id.*

[73] *Lujan*, *supra* note 59, 504 U.S. at 572-573.

[74] 410 U.S. 614 (1973).

[75] 461 U.S. 95 (1983)

[76] 410 U.S. 614 (1973).

enforcement of the child support law solely on the basis of the father's unmarried status. And because her goal was to obtain child support from the father,[77] she also sought an order requiring Richard D., the putative father, "to pay a reasonable amount of money for the support of his child."[78] The three-judge federal district court dismissed Linda R.S.'s action for want of standing.

On appeal, the Supreme Court, focusing on the probability of success on this ultimate "remedy"—the collection of child support—concluded that Linda's claim was not redressable because it was not clear that the father would pay that support, even if the law were enforced against him.[79] But had the Court attended to the plaintiff's equal protection claim, it would have realized that the plaintiff had asserted a well-recognized right of action—the equal enforcement of the laws—that, if meritorious, would entitle her to relief, namely, a wedlock-neutral application of prosecutorial discretion.

The Court noted,

> Before we can consider the merits of appellant's claim or the propriety of the relief requested, however, appellant must first demonstrate that she is entitled to invoke the judicial process. She must, in other words, show that the facts alleged present the court with a "case or controversy" in the constitutional sense and that she is a proper plaintiff to raise the issues sought to be litigated. The threshold question which must be answered is whether the appellant has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[80]

The Court also observed that while it had "greatly expanded the types of 'personal stakes' which are capable of conferring standing… 'broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury.'"[81] The Court went on to note that "[a]lthough the law of standing has been greatly changed in the last 10 years, we have steadfastly adhered to the requirement that, at least in the absence of a statute expressly conferring standing, federal plaintiffs must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction."[82]

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[77] Id. at 620 (White, J., dissenting).

[78] Id.

[79] *Linda R.S.*, supra note 3, 410 U.S. at 618 ("The prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed only speculative. Certainly the 'direct' relationship between the alleged injury and the claim sought to be adjudicated, which previous decisions of this Court suggest is a prerequisite of standing, is absent in this case.") *Id.*

[80] 410 U.S. 614, 616 (1973) (internal citations omitted).

[81] Id. at 616-617.

[82] Id. at 617.

Applying the stated law of standing to the facts of the case, the Court found that the plaintiff had "failed to allege a sufficient nexus between her injury and the government action which she attacks to justify judicial intervention."[83] In fact, even if she had suffered an injury (the failure of her child's father to contribute support payments), she had not shown that her failure to secure the payment resulted from the non-enforcement of the discriminatory law. After all, the father could still not pay and there was high likelihood of such occurring.[84]

"The party who invokes (judicial) power" added the Court, "must be able to show . . . that he has sustained or is immediately in danger of sustaining some direct injury as the result of (a statute's) enforcement'… and must show 'a logical nexus between the status asserted and the claim sought to be adjudicated . . . Such inquiries into the nexus between the status asserted by the litigant and the claim he presents are essential to assure that he is a proper and appropriate party to invoke federal judicial power.'"[85] If the plaintiff were granted the requested relief, i.e. the non-discriminatory enforcement of the criminal statute, that "would result only in the jailing of the child's father. The prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed only speculative."[86] In other words, "the 'direct' relationship between the alleged injury and the claim sought to be adjudicated, which previous decisions of this Court suggest is a prerequisite of standing, is absent in this case."[87]

Noting that the Court had confused the right with the relief, Justices White and Douglas, dissenting, observed that: "Obviously, there are serious difficulties with appellant's complaint insofar as it may be construed as seeking to require the official appellees to prosecute Richard D. or others, or to obtain what amounts to a federal child-support order. But those difficulties go to the question of what *relief* the court may ultimately grant appellant. They do not affect her *right* to bring this class action."[88] Justice White also noted that, while the father, if prosecuted under the state provision, would have had standing to seek to enjoin enforcement of the statute against him for under-inclusiveness, it was hard to see why the plaintiff and her class would not have standing to assert the same claim. "They are not, after all, in the position of members of the public at large who wish merely to force an enlargement of state criminal laws."[89] He pointed out how the plaintiff, her daughter, and the children born out of wedlock whom the plaintiff was attempting to represent had all allegedly been excluded intentionally from the class of persons protected by a particular criminal law, that is, how they did not get the protection of the laws that other women and children get.[90]

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[83] Id. at 617-618.
[84] Id. at 618.
[85] Id.
[86] Id.
[87] Id.
[88] Id., at 620 (White, J., and Douglas, J., dissenting) (emphasis added).
[89] Id.
[90] Id., at 620-621.

Justice White then added:

> The Court states that the actual coercive effect of those sanctions on Richard D. or others 'can, at best, be termed only speculative.' This is a very odd statement. I had always thought our civilization has assumed that the threat of penal sanctions had something more than a 'speculative' effect on a person's conduct. This Court has long acted on that assumption in demanding that criminal laws be plainly and explicitly worded so that people will know what they mean and be in a position to conform their conduct to the mandates of law. Certainly, Texas does not share the Court's surprisingly novel view. It assumes that criminal sanctions are useful in coercing fathers to fulfill their support obligations to their legitimate children.[91]

It's truly hard to understand how the Court could find lack of standing under the circumstances of the case, and why it conflated, as Justice White noted, the *right* and the *relief*. The only possible explanation one might give for such a reading and outcome is, as the Court noted, the case arose "in the unique context of a challenge to a criminal statute…."[92]

Ironically, ten years later, Justice White authored another problematic opinion, *City of Los Angeles v. Lyons*,[93] in which he would take a very different and less welcoming view of standing. In *Lyons*, an African American male was stopped for a traffic violation by the Los Angeles police. He offered no resistance to the officers, and without provocation or justification, they seized him and applied a "chokehold." Lyons filed a §1983 action seeking damages and injunctive relief barring the Los Angeles police from using chokeholds except in situations where the detained individual reasonably appeared to be threatening the immediate use of deadly force. The trial court granted defendant's motion to dismiss on standing grounds, the Court of Appeals reversed, but the Supreme Court, in agreement with the trial court, found that the plaintiff indeed had no standing. The Court reached this result by conflating the claim and the relief. The Court began by stating that "[t]he issue here is whether respondent Lyons satisfied the prerequisites for seeking injunctive relief in the federal district court."[94] To answer the question, it said:

> It goes without saying that those who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy. Plaintiffs must demonstrate a "personal stake in the outcome" in order to "assure that concrete adverseness which sharpens the presentation of issues" necessary for the proper resolution of constitutional questions. Abstract injury is not enough. The plaintiff must show that he "has sustained or is

[91] Id. at 621.
[92] Id., at 617.
[93] 461 U.S. 95 (1983).
[94] Id. at 97.

> immediately in danger of sustaining some direct injury" as the result of the challenged official conduct and the injury or threat of injury must be both "real and immediate," not "conjectural" or "hypothetical."[95]

Then, after describing *O'Shea v. Littleton*[96] and *Rizzo v. Goode*,[97] two equitable injunctive relief cases, the Court found that "[n]o extension of *O'Shea* and *Rizzo* is necessary to hold that respondent Lyons has failed to demonstrate a case or controversy with the City that would justify the equitable relief sought. Lyons' standing to seek the injunction requested depended on whether he was likely to suffer future injury from the use of the chokeholds by police officers."[98]

After fragmenting Lyons' claim in two[99]—a claim for damages and a claim for injunctive relief—the Court explained:

> That Lyons may have been illegally choked by the police on October 6, 1976, while presumably affording Lyons standing to claim damages against the individual officers and perhaps against the City, does nothing to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part. The additional allegation in the complaint that the police in Los Angeles routinely apply chokeholds in situations where they are not threatened by the use of deadly force falls far short of the allegations that would be necessary to establish a case or controversy between these parties.[100]

But if a claim is a set of operative facts giving rise to one or more rights of action, why were there two, rather than only one claim? In *Lyons* it's clear that the nucleus of facts that gave rise to the claim was the traffic stop and the attendant use of a chokehold. This set of facts gave rise to one right of action, the right not to be injured. And there are two injuries at stake here, one (past) to Lyons' larynx, and another (future) that he's trying to prevent via the injunctive relief request. It is, after all, these very types of cases for which the declaratory and injunctive relief were designed, i.e., to avoid an injury from happening again. Sometimes, seeking relief only after the injury would be of no remedy to the petitioner, as we sadly know from all the cases where police brutalities culminated in the death of the victims.

As we said earlier, there was only one claim here, for there was but one set of operative facts and all the rights and the injuries related to the same. Fragmenting the claim in two, treating the past injury and the

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[95] Id., at 101-102 (internal citations omitted).

[96] 414 U.S. 488 (1974).

[97] 423 U.S. 362 (1976).

[98] *Lyons*, *supra* note 6, 461 U.S. at 105.

[99] This view was shared by Justice Marshall, dissenting in *Lyons*. He objected to the majority's decision to "fragment[ ] a single claim into multiple claims for particular types of relief." *Lyons*, *supra* note 6, 461 U.S. at 122 (Marshall, J., dissenting).

[100] *Lyons*, *supra* note 6, 461 U.S. at 105.

future injury as injuries giving rise to different rights of action would perhaps be appropriate in a system taking a primary right approach. But this is not appropriate in the federal system which has endorsed the transactional approach to the claim. However, by taking the approach that it did, the Court was able to dismiss the case on standing grounds, thereby avoiding any need to confront the merits of plaintiff's constitutional claim.

The *Lyons* Court also conflated standing with entitlement to the relief sought, speaking of these two interchangeably. Thus, in referring to two equitable relief cases, the Court noted that "[u]nder *O'Shea* and *Rizzo,* these allegations were an insufficient basis to provide a federal court with *jurisdiction* to entertain Count V of the complaint" seeking injunctive relief.[101] In note 8, the Court again imported words from the injunctive relief realm into the realm of jurisdiction:

> Lyons alleged that he feared he would be choked in any future encounter with the police. The reasonableness of Lyons' fear is dependent upon the likelihood of a recurrence of the allegedly unlawful conduct. It is the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions. The emotional consequences of a prior act simply are not a sufficient basis for an injunction absent a real and immediate threat of future injury by the defendant. Of course, emotional upset is a relevant consideration in a damages action.[102]

And to the risk that this could happen again to Lyons (or someone else), the Court's response was:

> Of course, it may be that among the countless encounters between the police and the citizens of a great city such as Los Angeles, there will be certain instances in which strangleholds will be illegally applied and injury and death unconstitutionally inflicted on the victim. As we have said, however, it is no more than conjecture to suggest that in every instance of a traffic stop, arrest, or other encounter between the police and a citizen, the police will act unconstitutionally and inflict injury without provocation or legal excuse. And it is surely no more than speculation to assert either that Lyons himself will again be involved in one of those unfortunate instances, or that he will be arrested in the future and provoke the use of a chokehold by resisting arrest, attempting to escape, or threatening deadly force or serious bodily injury.[103]

According to the Court, what should Lyons have alleged to have had standing to obtain the desired injunctive relief? The Court proclaimed,

> In order to establish an actual controversy in this case, Lyons would have had not only to allege that he would have

[101] Id. (emphasis added).
[102] Id. at n. 8 (emphasis in original).
[103] Id. at 108.

> another encounter with the police but also to make the incredible assertion either, (1) that *all* police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation or for questioning or, (2) that the City ordered or authorized police officers to act in such manner.[104]

The *Lyons* Court made it incredibly difficult to challenge a pattern or practice of police brutality, one that has been responsible for tens of deaths over the past four decades in Los Angeles. And, no, Justice White did not predict this correctly, for the price of the Court's doctrinal choice has translated into more than just "certain instances" [105] and the grievances inflicted afterwards on our community were more than mere "speculation."[106] Justice Marshall, in dissent, warned that the majority's approach was going to lead to dangerous results: "[s]ince no one can show that he will be choked in the future, no one—not even a person who, like Lyons, has almost been choked to death—has standing to challenge the continuation of the policy. The City is free to continue the policy indefinitely as long as it is willing to pay damages for the injuries and deaths that result. I dissent from this unprecedented and unwarranted approach to standing."[107]

Justice Marshall, also pointed out that "by *fragmenting* a single claim into multiple claims for particular types of relief and requiring a separate showing of standing for each form of relief, the decision today departs from this Court's traditional conception of standing and of the *remedial* powers of the federal courts."[108] And, Marshall continued,

> [b]ecause Lyons has a claim for damages against the City, and because he cannot prevail on that claim unless he demonstrates that the City's chokehold policy violates the Constitution, his personal stake in the outcome of the controversy adequately assures an adversary presentation of his challenge to the constitutionality of the policy. Moreover, the resolution of this challenge will be largely dispositive of his requests for declaratory and injunctive relief. No doubt the requests for injunctive relief may raise additional questions. But these questions involve familiar issues relating to the appropriateness of particular forms of relief, and have never been thought to implicate a litigant's standing to sue. The denial of standing separately to seek injunctive relief therefore cannot be justified by the basic concern underlying the Article III standing requirement.[109]

According to Justice Marshall,

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[104] Id. at 105-106 (emphasis in original).
[105] Id. at 108.
[106] Id.
[107] Id. at 113 (Marshall, J., dissenting).
[108] Id. at 122-123 (emphasis added).
[109] Id. at 126.

> [b]y fragmenting the standing inquiry and imposing a separate standing hurdle with respect to each form of relief sought, the decision today departs significantly from this Court's traditional conception of the standing requirement and of the remedial powers of the federal courts. We have never required more than that a plaintiff have standing to litigate a claim. Whether he will be entitled to obtain particular forms of relief should he prevail has never been understood to be an issue of standing. In determining whether a plaintiff has standing, we have always focused on his personal stake in the outcome of the controversy, not on the issues sought to be litigated, or the "precise nature of the relief sought."[110]

Thus, Justice Marshall had understood that the Court had reached the result it had reached by distorting the traditional, foundational ideas of jurisdiction, claim, and remedy, perhaps because conflating the three seemed to be the only way to respectfully deal with "the unique context of a challenge to a criminal statute."[111] But was it? Would it have been better to achieve the same result by just finding that the plaintiff had failed to meet the "irreparable injury" standard required to get an injunctive relief? The effects on §1983 litigation and the enforcement of fundamental constitutional rights would have not been as harsh as they ended up being, and perhaps today, forty years later, we would not need to have a "Black Lives Matter" movement, as police brutalities would have been stopped already.

If the judiciary was willing to uphold the cash-bounty stratagem—that, by artificially creating an injury overcame any Article III hurdle—to make the system work, it's hard to understand why the Court would, in the name of protecting the strictures injury-in-fact requirement, fragment the claim and conflate the remedial and jurisdictional analysis, thus denying §1983 plaintiffs a meaningful and effective chance of litigating their claims and enforcing their fundamental constitutional rights.

V. STATING A CLAIM, SEEKING RELIEF, AND ESTABLISHING STANDING IN §1983 ACTIONS[112]

In the realm of §1983 actions, plaintiffs are confronted with the intricate task of delineating their claims, seeking appropriate relief, and establishing the requisite standing to proceed. Title 42, United States Code §1983, serves as a pivotal tool for individuals to challenge deprivations of their constitutional or federal statutory rights under the color of state law. Nevertheless, the effectiveness of this statute is frequently undermined by contemporary judicial interpretations that blur the distinctions between claims, remedies, and standing. This approach complicates the analysis,

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[110] Id. at 127.

[111] Id., at 618.

[112] For a more extensive analysis of §1983 actions, standing, and the Eleventh Amendment jurisprudence *see* ALLAN IDES, CHRISTOPHER N. MAY, AND SIMONA GROSSI, CONSTITUTIONAL LAW: NATIONAL POWERS AND FEDERALISM (9th ed. 2022); *see also* SIMONA GROSSI, ALLAN IDES, FEDERAL COURTS: PRINCIPLES, CASES & PRACTICES, WEST ACADEMIC PUBLISHING, forthcoming.

often hindering the statute's foundational aim to provide a robust avenue for redress against state-level infringements of federal rights. This conflation within the judicial process not only obfuscates legal principles, but also places significant impediments in the path of plaintiffs seeking justice under §1983.

Title 42 of the United States Code §1983,[113] provides in relevant part that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.[114]

The statute, first enacted in 1871, provides a cause of action for legal or equitable relief against any "person" who, while acting "under color of" state law, violates someone's federal constitutional or statutory rights. Those who may be sued as "persons" under this statute include cities, counties, and other political subdivisions of a state, as well as individual state and local governmental officials. However, the Eleventh Amendment to the Constitution bars suits against a state itself or against a state-level agency. The state is therefore not a "person" who may be sued under § 1983.

Yet if that Amendment were construed as barring all private suits instituted against nonconsenting states, *including state officials*, it would be virtually impossible to bring a federal or state court action to force a state to honor the Constitution and laws of the United States. The Court has therefore recognized an exception to the Eleventh Amendment which allows suit to be brought to enjoin a state official from violating the Constitution or laws of the United States. In *Ex parte Young*,[115] the Court explained this exception through the fiction that when a state official acts contrary to federal law, the official is thereby "stripped" of any state garb and transformed into an ordinary private individual. The stripping doctrine rests on the Supremacy Clause,[116] which prohibits a state from violating the Constitution or laws of the United States. Since the state itself has no authority to violate federal law, it cannot confer such authority on its officials. A state official who acts contrary to federal law is therefore illegally attempting to use the name of the state to engage in conduct that the state is powerless to perform. A suit to enjoin that state official from violating federal law is therefore not a suit against the state for purposes

[113] 42 U.S.C. §1983.
[114] Id.
[115] 209 U.S. 123 (1908).
[116] U.S. CONST., Art. VI, cl. 2.

of the Eleventh Amendment, and thus falls within §1983 and is not barred by the Constitution.

The stripping doctrine is a fiction since in nearly every instance where a state official violates a person's federal rights, the official has acted within the scope of his or her official duties and pursuant to a custom, policy, or law of the state. Whether or not the state *in theory* could authorize such conduct, the state *in fact* authorized or permitted the violation to occur, with the result that someone was injured. It is a fiction to pretend that the injury was caused by an ordinary private individual rather than by an official representative of the state. Yet if, as the fiction suggests, state officials cease to be representatives of the state the moment they violate federal law, a state could never violate the Constitution. The state itself is a legal abstraction that can act only through its officers, agents, and employees. Unless the conduct of these individuals is deemed to be that of the state, it would frankly be impossible for a state ever to violate the Fourteenth Amendment[117] or any other constitutional provision that restrains the state's behavior. The Court has therefore held that the stripping doctrine applies only to the Eleventh Amendment and not to other constitutional provisions. As the Court has noted, there is "the 'well-recognized irony' that an official's unconstitutional conduct constitutes state action under the Fourteenth Amendment but not the Eleventh Amendment."[118]

While the *Ex parte Young* stripping doctrine is an exception to the Eleventh Amendment's ban on suits against a state, the doctrine is consistent with *Hans v. Louisiana,*[119] *and it*s view that the Eleventh Amendment incorporated the doctrine of sovereign immunity. The ancient doctrine of sovereign immunity rested on the precept that "the king can do no wrong." The king's officers, however, were not shielded by sovereign immunity and could be sued when they violated the law. The stripping doctrine recognizes a similar distinction. Thus, while the Eleventh Amendment shields the state from suit in federal or state court, the state's officers, agents, and employees, as well as the state's political subdivisions

[117] The Fourteenth Amendment plays a critical role in the analysis of the stripping doctrine by underpinning the principle that state action can infringe upon individual rights, thereby necessitating redress under federal law. This amendment establishes a substantive legal framework that defines and prohibits certain state behaviors, specifically those that violate the rights and liberties guaranteed to individuals. When state officials, acting within their official capacities, contravene federally protected rights, they engage in "state action" as construed under the Fourteenth Amendment. This concept is pivotal because it enables individuals to seek remedies against state actors who, while ostensibly operating within their lawful prerogatives, infringe upon constitutionally enshrined protections. Thus, while the stripping doctrine facilitates actions against state officials by conceptually disassociating their unlawful conduct from state authority under the Eleventh Amendment, the Fourteenth Amendment ensures that such conduct remains attributable to the state for the purpose of enforcing constitutional rights. This dichotomy underscores the nuanced interplay between individual rights and state responsibilities, reinforcing the essential checks on state power envisioned by the framers of the Fourteenth Amendment to safeguard individual liberties against state encroachments.

[118] Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 105 (1984).

[119] 134 U.S. 1 (1890).

such as cities and counties, enjoy no similar immunity and may be sued if they violate the federal Constitution or laws.

The stripping doctrine sometimes allows a federal court to enforce obligations on state officials that go beyond those specifically imposed by federal law. This may occur in situations where a suit brought against state officials to enforce some provision of federal law results in a settlement that is reduced to a so-called *consent decree*. Under the terms of the decree, state officials may have agreed to provisions that go beyond what the federal statute specifically requires. It might be argued that the stripping doctrine should not allow judicial enforcement of such provisions, on the theory that as to them, the state was not acting contrary to federal law. However, the Supreme Court has rejected this contention, noting that a consent decree "is a federal court order that springs from a federal dispute and furthers the objectives of federal law."[120] As such, it "reflects a choice among various ways that a State could implement" federal law; therefore, "enforcing the decree vindicates an agreement that the state officials reached to comply with federal law."[121]

To invoke the stripping doctrine, plaintiff must sue a *named state official* rather than the *state* itself, a *state agency*, or a *state office.* This is necessary to preserve the fiction on which the stripping doctrine rests, namely, that the suit is against an individual and not against the state. At the same time, a plaintiff alleging a constitutional violation must also clarify to the court that the conduct complained of was action of the state and not that of a purely private individual, for otherwise the Constitution would not apply to the challenged action. To satisfy these seemingly contradictory requirements, plaintiffs must sue the defendant state officials *by name*, and must indicate that the officials are being sued both in their "individual capacity" *and* in their "official capacity." The "individual capacity" designation preserves the fiction on which the Eleventh Amendment stripping doctrine rests; the "official capacity" designation reveals that the action complained of was that of the state for purposes of establishing a constitutional violation.

Yet the fact that a plaintiff is careful to sue a state official rather than the state, a state agency, or a state office will not always guarantee that the suit will survive an Eleventh Amendment challenge. The Court has warned that "even though a State is not named a party to the action, the suit may nonetheless be barred by the Eleventh Amendment.… '[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.'"[122]

The prohibition against suits to recover money from the state is also the basis for the Court's having limited the stripping doctrine to claims for *prospective* relief—i.e., relief directed toward the future behaviour of the

[120] Frew ex rel. Frew v. Hawkins, 540 U.S. 431, 438 (2004).
[121] Id. at 439.

[122] Edelman v. Jordan, 415 U.S. 651, 663 (1974).

defendant, such as an injunction to prevent a continuing violation of federal law. The stripping doctrine thus excludes claims for *retroactive* relief—i.e., relief designed as a remedy for past behaviour, such as damages, compensation, or an injunction directed at undoing a completed transaction. The Eleventh Amendment bars claims for retroactive relief. Even if a suit is nominally against a state official, it is still barred by the Eleventh Amendment if the retroactive relief will require payment of funds from the state treasury. On the other hand, a federal court may order state officials to pay money that will come from the state's treasury in connection with the award of prospective relief; this is permitted, for example, when a court awards plaintiff's attorney's fees or costs in a suit for injunctive relief, or where a state official is fined for contempt in violating a federal injunction.

The relief sought in *Ex parte Young* was consistent with these limitations on use of the stripping doctrine. Plaintiffs there sued the Minnesota attorney general to enjoin continued enforcement of a railroad rate statute that violated the Fourteenth Amendment. Such prospective injunctive relief to bar a state official from violating the Constitution in the future did not run afoul of the Eleventh Amendment. While the defendant official's compliance with the injunction would cost the state money in the form of fines it could no longer collect from railroads that ignored the rate law, this incidental impact on the state treasury was an inevitable consequence of requiring that state officials comply prospectively with federal law. On the other hand, the plaintiffs in *Young* would have been barred by the Eleventh Amendment from attempting to recoup any fines they may have paid to the state under the challenged rate statute.

Even though prospective relief is usually injunctive in nature, ordering governmental officials to take or refrain from taking certain specified action, relief sometimes takes monetary form. For example, if, under the stripping doctrine, a federal court issues an injunction and the state official to whom it is directed then fails in good faith to comply with the order, a federal court may award attorney's fees to the plaintiff's lawyers, to be paid from the state treasury. Though such an order may have the appearance of a damages award, it is distinguishable in that instead of being based on past behaviour, it is ancillary to and an inseparable part of a federal court's authority to enforce a prospective injunction.[123]

Despite the Eleventh Amendment, a plaintiff may be able to obtain retroactive relief against state officials for past violations of federal law if it is clear that the recovery is being sought solely from the official's own pocket and not from the state treasury. Under these circumstances, the fiction on which the stripping doctrine rests—i.e., that the suit is against the individual official personally and not against the state—is preserved and the suit is not barred by the Eleventh Amendment. This is true even if

[123] As the Supreme Court explained, "In exercising their prospective powers under *Ex parte Young* and *Edelman v. Jordan*, federal courts are not reduced to issuing injunctions against state officers and hoping for compliance. Once issued, an injunction may be enforced.…If a state agency refuses to adhere to a court order, a financial penalty may be the most effective means of insuring compliance. *See* Hutto v. Finney, 437 U.S. 678, 690-691 (1978)

the state has agreed to indemnify the official for any damages the official is ordered to pay. While a damages judgment against the official may ultimately result in money being paid from the state treasury, this is a consequence of the state's voluntary decision to indemnify its officials. If the mere existence of an indemnity agreement were sufficient to block a damages claim against a state official under the Eleventh Amendment, every state would make such an agreement since it would cost them nothing. The very fact of such an agreement would prevent the official from ever being found liable and the obligation to indemnify would therefore never arise.

Although the Eleventh Amendment will pose no bar to recovering retroactive damages from a state official personally, the official may be shielded by common law immunity. Because the Supreme Court has read this immunity into 42 U.S.C. § 1983, the immunity applies whether the § 1983 action is brought in federal or state court. The purpose of common law immunity is to ensure that government officials will not be unduly inhibited in discharging their duties, out of fear that they could be subject to personal monetary liability.[124]

The extent of an official's common law immunity from civil liability will depend on the type of function the official was performing when he or she violated the plaintiff's rights. If the function was legislative in nature, the official is absolutely immune from civil suit—including both damages claims and claims for declaratory or injunctive relief. If the function was prosecutorial or judicial in nature, the immunity is likewise absolute, but only as to damages claims; as to the latter, however, the immunity attaches no matter how blatant or wilful the violation may have been. The same absolute immunity extends to government officials who appear as witnesses before a grand jury or at trial.[125] For other types of governmental functions, such as executive and ministerial actions, the official possesses a qualified immunity but solely with respect to claims for damages.

Under qualified immunity, a defendant official will not be held liable for damages if a reasonable person in the defendant's shoes would not have realized that his or her conduct was in violation of federal law. This shields an official from damages liability if, in light of pre-existing law, the legal rule or right in question was not "clearly established" at the time the violation occurred. The test is one of "objective legal reasonableness."[126] In order to be "clearly established, a right must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right."[127] The question must have been "'beyond debate' at the time [the official] acted…."[128] Because the test is an objective rather than a subjective one, the Court has suggested that if qualified immunity would otherwise exist, it cannot be defeated by alleging that a government official

[124] It is also designed to free them from the burden of having to defend against lawsuits based on insubstantial claims, a burden that could seriously impair government's ability to function. These common law immunities protect both state and local governmental officials.

[125] Rehberg v. Paulk, 566 U.S. 366 (2012).

[126] Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982).

[127] Taylor v. Barkes, 575 U.S. 822, 825 (2015).

[128] Lane v. Franks, 573 U.S. 228, 246 (2014).

acted with an improper motive, for this would defeat the goal of allowing such suits to be dismissed at an early stage.[129] Private individuals who are temporally retained by the government to help carry out its work likewise enjoy a qualified immunity in suits brought against them under § 1983.[130]

The Supreme Court has not resolved the question of what sources of law are sufficient to "clearly establish" a right for purposes of the qualified immunity doctrine. In the case of a federal statutory right, the statute itself may be sufficiently clear to satisfy the requirement. With respect to constitutional rights, or statutory rights that are facially unclear, the rights must be clarified and refined by case law. For this purpose, some federal courts have insisted on a definitive ruling from the U.S. Supreme Court, while others have suggested it is enough that there is some consensus among the courts of appeals, while some have looked simply at whether the matter had been settled by the court of appeals for that particular circuit. However, the Supreme Court has recently cast doubt on these latter approaches. Thus, it has questioned whether "a 'robust consensus of cases of persuasive authority' could itself clearly establish the right" in question.[131] The Court has also expressed uncertainty about the idea "that a right can be 'clearly established' by circuit precedent despite disagreement in the courts of appeals…."[132] These decisions suggest that the qualified immunity hurdle may be an increasingly difficult one for plaintiffs to clear when seeking to recover damages for violation of their constitutional rights.

In deciding, for qualified immunity purposes, whether a legal right or rule was clearly established at the time defendant acted, the Supreme Court has "repeatedly told courts…not to define clearly established law at a high level of generality."[133] The test is one of reasonable notice. "[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances…. Although earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding."[134] In other words, the question is whether "at the time of the challenged conduct, the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing

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[129] *See* Wood v. Moss, 572 U.S. 744, 761-763 (2014) (upholding Secret Service agents' qualified immunity despite allegation that they engaged in viewpoint discrimination prohibited by the First Amendment).

[130] Filarsky v. Delia, 566 U.S. 377 (2012).

[131] City and County of San Francisco v. Sheehan, 575 U.S. 600, 617 (2015).

[132] Taylor v. Barkes, *supra* note 127, 575 U.S. at 826. See also City of Escondido v. Emmons, 139 S. Ct. 500, 503-504 (2019) (questioning whether "a court of appeals decision may constitute clearly established law for purposes of qualified immunity," noting that "a body of relevant case law is usually necessary to clearly establish the answer…" (internal quotation marks omitted); Carroll v. Carman, 574 U.S. 13, 17 (2014) (questioning whether "a controlling circuit precedent could constitute clearly established federal law").

[133] Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011). "[T]he crucial question [is] whether the official acted reasonably in the particular circumstances that he or she faced." Plumhoff v. Rickard, 572 U.S. 765, 779 (2014) (emphasis supplied); accord Kisela v. Hughes, 138 S. Ct. 1138, 1152-1153 (2018) (per curiam); White v. Pauly, 137 S. Ct. 548, 552 (2017) (per curiam) (particularized to the facts of the case); Mullenix v. Lewis, 577 U.S. 7 (2015) (per curiam) (in light of the specific context of the case).

[134] Hope v. Pelzer, 536 U.S. 730, 741 (2002).

violates that right."[135] Similarly, where there is a substantial and credible difference of opinion among lower courts as to the proper interpretation of a controlling Supreme Court precedent, the standard emanating from that precedent will not be treated as "clearly established" in cases falling within the bounds of that interpretive disagreement.[136] The Supreme Court has made it clear that in applying the qualified immunity doctrine, all doubts are to be resolved in favour of the defendant. This is a strict standard, one that is designed to give federal and state "officials breathing room to make reasonable but mistaken judgments about open legal questions. When properly applied, it protects 'all but the plainly incompetent or those who knowingly violate the law.'"[137]

However, there may be rare occasions when a constitutional violation is so blatant and egregious that the right in question will be deemed clearly established, despite the absence of any fact-specific prior precedent.[138]

The doctrine of sovereign immunity incorporated into the Eleventh Amendment is broader than the common law doctrine of sovereign immunity. At common law, the king's officers enjoyed no immunity from suit if they violated people's rights under the law. By contrast, the Eleventh Amendment shields state officials from suit for any violations of state law.

As noted earlier, the stripping doctrine is a judge-made exception to the Eleventh Amendment. When it applies, the doctrine has the consequence of allowing claims that arise under federal law to be brought against state officials. Congress has the power to narrow the lower federal courts' subject matter jurisdiction by excluding certain cases, even those that may arise under federal law. Consistent with these principles, Congress may direct that the stripping doctrine not be employed in selected federal question cases, with the result that these claims against state officials would be barred from federal court. Thus, Congress can in effect expand the states' Eleventh Amendment immunity beyond that established by the Supreme Court.

Congress's intent to limit use of the stripping doctrine may be either express or implied. In *Seminole Tribe of Florida v. Florida*,[139] the Court found an implied intent to bar use of the stripping doctrine in a case where plaintiffs sought a federal injunction requiring the governor of Florida to negotiate with local Indian tribes, as required by the federal Indian Gaming Regulatory Act. In the Court's view, for a federal judge to issue an injunction that could be enforced through the court's contempt powers would impose a more drastic mode of enforcement than the "modest set of sanctions" provided for under the "carefully crafted and intricate remedial scheme" created by Congress.[140] Since the stripping doctrine could not be

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[135] Ashcroft v. al-Kidd, *supra* note 133, 563 U.S. at 741.

[136] *See* Safford Unified School District #1 v. Redding, 557 U.S. 364, 377-379 (2009) (so holding).

[137] Ashcroft v. al-Kidd, *supra* note 133, 563 U.S. at 743 (federal official); and see Messerschmidt v. Millender, 565 U.S. 535, 546-548 (2012) (state officials).

[138] *See, e.g.*, Taylor v. Riojas, 141 S. Ct. 52 (2020).

[139] 517 U.S. 44 (1996).

[140] Id. at 73-76.

used in this particular setting, plaintiffs' case against the governor was barred by the Eleventh Amendment as a suit against the state.

In cases involving federal *constitutional* rights, the Court may be less willing to infer a congressional intent to bar use of the stripping doctrine than it was in *Seminole Tribe*, where only a *statutory* right was at stake. Before finding that the stripping doctrine cannot be employed in a case involving constitutional rights, the Court might insist that Congress's intent be stated expressly and that the alternative remedies available to plaintiff be adequate. Where these conditions were met, Congress could bar use of the stripping doctrine even in a constitutional case. Although the Court has not addressed this question in terms of the Eleventh Amendment, it has allowed Congress to selectively deny lower federal courts the power to grant injunctive relief in constitutional cases. In such instances plaintiffs must litigate their constitutional claims in state court, with possible review in the Supreme Court.

The Eleventh Amendment's prohibition against bringing a suit against a non-consenting state does not protect "political subdivisions such as counties and municipalities even though such entities exercise a 'slice of state power.'"[141] The reason for this is that the states' immunity from suit derives from the sovereignty they possessed prior to ratification of the Constitution, a sovereignty that was not enjoyed by cities, counties, or other political subdivisions of a state. As a result, under the Eleventh Amendment, "only States and arms of the State possess immunity from suits authorized by federal law."[142] The Eleventh Amendment's narrow definition of "state" stands in sharp contrast to many other constitutional provisions such as the Fourteenth Amendment, in which the word "state" is deemed to embrace all of a state's political subdivisions.

Governmental entities other than cities, counties, and political subdivisions of the state may qualify for Eleventh Amendment immunity if it is determined that they are in effect acting as arms of the state. However, it may at times be difficult to decide whether a particular governmental entity should be treated as part of the state and therefore shielded by the Eleventh Amendment, or whether it is instead a political subdivision of the state and hence enjoys no Eleventh Amendment protection. Some cases are easy. The various departments, offices, and bureaus of the state government are part of the state. These could include such entities as the state Office of Education, the state Department of Highways, and the attorney general's office. At the opposite extreme, cities, counties, mosquito abatement districts, community college districts, and metropolitan water districts are political subdivisions of the state.

The Court has identified several factors that may be helpful in determining an entity's status for purposes of the Eleventh Amendment. The most important of these is the source of the entity's funding. If the entity is funded largely or entirely by the state, so that a judgment against the entity will operate against the state treasury, it is very likely the entity

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[141] Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 401 (1979).

[142] Northern Insurance Company of New York v. Chatham County, 547 U.S. 189, 193 (2006).

will be protected by the Eleventh Amendment. On the other hand, if the entity receives funding from sources other than the state, or if it has been given the power to generate its own funds, such as through taxation or the issuance of bonds, it is more likely to be treated as an independent non-state entity. Other relevant factors, besides funding, include the extent of state control over the entity; the type of functions the entity performs; and how the state has designated the entity. In *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, the Court applied these factors in concluding that a bi-state agency created by a compact between California and Nevada enjoyed no Eleventh Amendment immunity. The agency was funded by the counties in which it operated, not by the states; the agency's governing board was controlled by counties and cities rather than by the states; the agency performed land use functions of a type traditionally undertaken by local governments; and the states had identified the agency as being a "separate legal entity" and "a political subdivision."[143]

An entity that is normally not protected by the Eleventh Amendment because it is deemed to be a political subdivision of a state may sometimes be immunized from suit in federal court. If a judgment against the entity would in effect be a judgment against the state treasury, the court will ignore the fact that the suit is nominally against a political subdivision and treat the action as being one against the state or a state officer. Whether or not the suit is barred will then depend on whether any of the exceptions to the Eleventh Amendment apply. The fact that cities, counties, and other political subdivisions of the state are usually not shielded by the Eleventh Amendment means that federal and state courts can potentially issue money judgments against these entities. Thus, it is beneficial for a plaintiff to sue, if possible, a political subdivision of the state rather than the state, a state agency, or a state-level official.

However, to sue a political subdivision of the state, the plaintiff must have a cause of action – i.e., the law must afford plaintiff the right to recover for the injury complained of. As we noted earlier, a federal statute, 42 U.S.C. § 1983, gives a cause of action against any "*person*" who, while acting "*under color of state law*," deprives a plaintiff of a federal constitutional or statutory right. Section 1983 is the primary vehicle used for asserting claims against state and local officials have violated a plaintiff's federal rights. The Supreme Court has held that neither states nor state-level agencies are "persons" within the meaning of § 1983. A plaintiff may therefore only sue the individual state officials or employees who impaired her federal rights; she may not sue the state itself or the state agency or state entity for whom the individual defendant was working.

Cities, counties, and other political subdivisions of the state, on the other hand, are "persons" within the meaning of § 1983. Suits for legal or equitable relief may be brought directly against these entities, but only if plaintiff can prove that the conduct causing her injury was taken pursuant to an official policy or custom of the entity.[144] Liability may not be imposed

[143] 440 U.S. at 401.

[144] Monell v. Department of Social Services, 436 U.S. 658, 694 (1978).

on a political subdivision simply on a theory of *respondeat superior* or vicarious liability.[145] Absent a proven custom or policy, the entity cannot be held liable for damages or made subject to prospective injunctive relief.[146]

A subdivision's policy or custom need not be written in order to trigger § 1983 liability. Instead, it may consist of "deliberate indifference" on the entity's part to a pattern or practice of constitutional violations by its employees, where the entity has taken no steps to prevent such violations through the provision of adequate training.[147] If a custom or policy is shown to exist, plaintiff may then seek both damages and prospective relief from the entity and from the individuals who acted on its behalf. Moreover, while the entity's officers or employees may be shielded from damages liability by absolute or qualified common law immunity, the entity itself enjoys no common law immunity. This rule encourages cities and counties to respect the people's federal rights, even in areas where the precise scope of these rights may be unclear. Thus, while a lack of clarity will shield an individual defendant from liability through the doctrine of common law immunity, the entity, because it can be held liable even in cases of doubt, is likely to err on the side of over rather than under-protecting an individual's federal rights.

The "under color of state law" requirement of § 1983 is satisfied in cases brought against political subdivisions of the state as long as the action complained of was within the scope of the officer's or employee's official duties or responsibilities, as opposed, for example, to action that was taken after hours or while the employee was on vacation. And if the action was within the scope of the employee's duties, there is no requirement that a state law also have sanctioned the conduct.

The final exception to the Eleventh Amendment comes into play where Congress has passed a law abrogating the states' immunity from suit. We saw earlier that Congress may quite easily *expand* the states' Eleventh Amendment immunity by prohibiting the federal courts from using the stripping doctrine. It is more difficult, however, for Congress to *narrow* the states' Eleventh Amendment immunity through abrogation. An attempt by Congress to abolish the states' sovereign immunity from suit will be upheld by the Court only if two requirements are met. First, Congress must have made its intention to abrogate the immunity "unmistakably clear in the language of the statute."[148] Since the intent "must be both unequivocal and textual," any "recourse to legislative history will be unnecessary…."[149] Second, the law abrogating the states' immunity must not have been enacted under one of Congress's Article I powers, such as the Commerce Clause (Art. I, § 8, cl. 3) or the Patent Clause (Art. I, § 8,

[145] Id. at 691.

[146] *See* Lozman v. City of Riviera Beach, 138 S. Ct. 1945, 1951 (2018); Los Angeles County v. Humphries, 562 U.S. 29, 36 (2010).

[147] Connick v. Thompson, 563 U.S. 51, 60-62 (2011).

[148] Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985).

[149] Dellmuth v. Muth, 491 U.S. 223, 230 (1989).

cl. 8), but must have been adopted pursuant to the Fourteenth Amendment.[150]

The first requirement constitutes a "clear statement" rule. It is designed to protect the states by ensuring that they have notice and an opportunity to defend themselves when legislation to abolish their Eleventh Amendment immunity is being debated in Congress. Unless it is clear at the time of enactment that the law will subject the states to suit, the states' members in the U.S. House and the Senate have no chance to oppose the measure on this ground. The Court relied on the clear statement principle in *Raygor v. Regents of the University of Minnesota*,[151] where it held that the tolling provision of the supplemental jurisdiction statute, 28 U.S.C. § 1367(d), could not be construed to toll the statute of limitations on a federal claim against a state that was first filed in federal court but dismissed on Eleventh Amendment grounds, and then refiled in a state court after the statute of limitations had run out. As the Court noted, the text of § 1367 did not specifically refer to claims filed against a state or to dismissals premised on the Eleventh Amendment. As such Congress had not made its intent to abrogate a state's sovereign immunity on such claims unmistakably clear.[152]

The second requirement bars Congress from abrogating the states' Eleventh Amendment immunity under any of its Article I powers. This requirement logically follows from the fact that the Eleventh Amendment is, in part, a constitutional limitation on the subject matter jurisdiction of the federal courts—i.e., it removes certain cases from the federal judicial power as originally defined by Article III, § 2. The Court has long held that Congress cannot expand the federal courts' subject matter jurisdiction beyond the limits defined by the Constitution. Just as Congress may not use its commerce power (Art. I, § 8, cl. 3) to give federal courts jurisdiction over tort claims between motorists from the same state, it may not use its Article I powers to give the courts jurisdiction over cases that are excluded from the federal judicial power by the Eleventh Amendment.

In *Seminole Tribe of Florida v. Florida*,[153] the Court, on this basis, struck down a law enacted by Congress under the Indian Commerce Clause,[154] which had allowed Indian tribes to file suit against a state in federal court to enforce the Indian Gaming Regulatory Act. *Seminole Tribe* overruled *Pennsylvania v. Union Gas Co.*,[155] a short-lived decision in which a bare majority of the Court ruled that the states' Eleventh Amendment immunity may be abrogated by Congress under any of its law-making

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[150] Allen v. Cooper, 140 S. Ct. 994, 1001-1003 (2020) (Copyright Clause); Seminole Tribe of Florida v. Florida, 517 U.S. 44, 57-73 (1996) (Indian Commerce Clause); Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627, 635 (1999) (Interstate Commerce Clause and Patent Clause); Alden v. Maine, 527 U.S. 706, 755 (1999) (Interstate Commerce Clause).

[151] 534 U.S. 533 (2002).

[152] *Id.* at 544-545. Cf. Nevada Department of Human Resources v. Hibbs, 538 U.S. 721, 724-726 (2003) (statutory provision that allows party to seek money damages against a "State or political subdivision thereof" or "any agency of State" constitutes a clear statement).

[153] 517 U.S. 44 (1996).

[154] U.S. CONST., Art. I, § 8, cl. 3.

[155] 491 U.S. 1 (1989).

powers, including those contained in Article I. In *Alden v. Maine*,[156] the Court subsequently held that "the States' immunity from private suits in their own courts" is likewise "an immunity beyond the congressional power to abrogate by Article I legislation." Were the rule otherwise, said the Court, "the National Government would wield greater power in the state courts than in its own judicial instrumentalities."[157]

Even though Congress may not use its Article I powers to lift the states' Eleventh Amendment immunity, Congress may do so through a law enacted pursuant to the Fourteenth Amendment. The Fourteenth Amendment was ratified in 1868, 70 years after the Eleventh Amendment. Section 5 of the Fourteenth Amendment expressly authorizes Congress to enforce the Amendment "by appropriate legislation"; this may include legislation that allows suit to be brought against a state.

In *Fitzpatrick v. Bitzer*,[158] the Court thus upheld provisions of Title VII of the 1964 Civil Rights Act to the extent that they authorized state workers to sue the state for gender discrimination in employment. The Court reasoned that the Fourteenth Amendment, which prohibits the states from denying equal protection of the laws, in effect modified the Eleventh Amendment by authorizing Congress to subject the states to suit in federal or state court, if Congress believed this was necessary to enforce the Equal Protection Clause. As the Court later explained:

> *Fitzpatrick* was based upon a rationale wholly inapplicable to the Interstate Commerce Clause, viz., that the Fourteenth Amendment, adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution, operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment.[159]

If Congress intends to abrogate a state's sovereign immunity pursuant to § 5 of the Fourteenth Amendment, the abrogation must be both "congruent" and "proportional" to the actual violation of judicially recognized Fourteenth Amendment § 1 rights.[160] This means that Congress must identify a pattern of state violations of a judicially recognized constitutional right, create a statute that is plainly designed to ameliorate the violation of those constitutional rights, and devise a remedy that is tailored to the demonstrated pattern of state-induced constitutional violations. In recent years, the Court has applied the congruence and proportionality requirements rather strictly, severely limiting Congress's ability to use its § 5 power to abrogate a state's sovereign immunity.

For example, in *Board of Trustees of the University of Alabama v. Garrett*,[161] the Court held that the attempted abrogation of state sovereign

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[156] 527 U.S. at 753-754.
[157] Id. at 752.

[158] 427 U.S. 445 (1976).
[159] Seminole Tribe of Florida, supra note 153, 517 U.S. 44 at 65-66.

[160] *See* ALLAN IDES, CHRISTOPHER N. MAY & SIMONA GROSSI, CONSTITUTIONAL LAW: INDIVIDUAL RIGHTS § 1.5.2 (9th ed. 2022).
[161] 531 U.S. 356 (2000).

immunity in Title I of the Americans with Disabilities Act (ADA) was ineffective since the substantive provisions of Title I, prohibiting disability discrimination in public employment, were neither congruent with nor proportional to any established pattern of state violation of constitutional rights of the disabled in the public employment setting. Because Title I in essence sought to create and protect rights that went beyond those guaranteed by § 1 of the Fourteenth Amendment, it exceeded Congress's § 5 power.

Four years later, in a case involving access to courthouses and court proceedings, the Court upheld Title II of the ADA, which prohibits discrimination against the disabled in the provision of public services.[162] In contrast to Title I, Congress in enacting Title II had amassed a large "volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services," including specifically their access to the courts.[163] In addition to there being far more evidence of past discrimination in this Title II setting, the Fourteenth Amendment § 1 rights at issue in *Lane* were also more fundamental than the Title I right involved in *Garrett*, making it far easier to show that the rights had been violated in the past. As the Court noted in *Lane*, the Title I equal employment right at stake in *Garrett* triggers mere rational basis review under the Equal Protection Clause; by contrast, Title II "seeks to enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review"—including the right of access to the courts.[164]

Once the *Lane* Court concluded that Title II sought to protect a group whose § 1 Fourteenth Amendment rights had in fact been violated, it went on to hold that Congress, in invoking its § 5 power, may enact remedial, as well as preventative or prophylactic measures, the latter not being limited to state conduct that would itself violate § 1. With adequate findings, Congress may thus invoke its § 5 power to prohibit state conduct that might not itself be found unconstitutional, as long as the legislation is congruent and proportional to the past § 1 violations.[165]

More recently, in *Allen v. Cooper*,[166] the Court rejected Congress's use of § 5 to adopt the Copyright Remedy Clarification Act of 1990 (CRCA).

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[162] Tennessee v. Lane, 541 U.S. 509 (2004).

[163] Id. at 526-528.

[164] Id. at 522-523.

[165] *Compare* Nevada Department of Human Resources v. Hibbs, 538 U.S. 721 (2003) (Family and Medical Leave Act (FMLA) provision authorizing state employees to sue their employer for failure to grant spousal or parental leaves, as required by Act, was proper exercise of § 5 enforcement powers given history of gender discrimination in public and private employee benefit plans, even though this statutorily prohibited conduct might not itself be unconstitutional), *with* Coleman v. Court of Appeals of Maryland, 566 U.S. 30 (2012) (plurality opinion) (FMLA provision authorizing state employees to sue their employer for failure to grant sick leave, as required by the FMLA, was invalid exercise of § 5 enforcement power where there was no evidence that states had discriminatory sick-leave policies and where nothing in the Congressional Record suggested that Congress had reason to believe women were being discriminated against in this respect).

[166] 140 S. Ct. 994 (2020).

That act amended federal copyright law to expressly allow infringement actions to be brought against the states, thereby remedying the problem of states' uncompensated takings of private property through copyright infringement. CRCA met the clear statement rule. Moreover, before enacting it, Congress received a 158-page report from the Register of Copyrights which, based on a year-long study, concluded that "copyright owners … will suffer immediate harm if they are unable to sue infringing states in federal court."[167] Yet despite this "headline-grabbing conclusion," said the Court, neither the report nor the legislative history suggested that this was a serious problem. The report identified a dozen cases of possible state infringement, only two of which appeared to involve intentional or reckless state conduct that would violate the Takings Clause. "This is not, to put the matter charitably, the stuff from which Section 5 legislation ordinarily arises."[168]

Moreover, Congress's CRCA solution—allowing states to be sued in all instances of copyright infringement—failed the congruence and proportionality tests. For it reached all state copyright infringements, including those lacking the requisite intent element, and allowed those suits even if state law afforded other means of redress sufficient to satisfy due process, such as through contract or unjust enrichment lawsuits.

Even though the Court struck down CRCA, it went out of its way to encourage Congress to give it another shot. The Justices noted that CRCA was enacted before *Seminole Tribe* made clear that Article I would not suffice, and before the Court came up with the congruence and proportionality requirements. "But going forward," said the Court, "Congress will know those rules. And under them, if it detects violations of due process, then it may enact a proportionate response. That kind of tailored statute can effectively stop States from behaving as copyright pirates. Even while respecting constitutional limits, it can bring digital Blackbeards to justice."[169] It remains to be seen what if anything Congress now does.

The Court's rationale in *Seminole Tribe* would seemingly allow Congress to abrogate the states' Eleventh Amendment immunity through legislation enacted under other, later-adopted amendments that expressly restrict conduct on the part of the states—such as the Thirteenth and Fifteenth Amendments. To date, however, the Court has limited Congress's power to abrogate to legislation passed pursuant to the Fourteenth Amendment.

The effect of the Eleventh Amendment may be to make it extremely difficult to hold a state accountable for having violated the Constitution or laws of the United States. Through the stripping doctrine, state officials can usually be enjoined by a federal or state court from engaging in future illegal conduct. Redress for *past* violations, however, is generally impossible other than through whatever remedies a state may itself have consented to provide. And since Congress's ability to abrogate the states' Eleventh Amendment immunity is essentially limited to enforcing the

[167] Id. at 1006.
[168] Id.
[169] Id. at 1007.

Fourteenth Amendment, courts can award damages for a state's violation of federal environmental, welfare, and other federal laws only if the state has waived its sovereign immunity, or if those damages will come from the pocket of an individual state official—a pocket that will often be either empty or protected by common law immunity.

Thus, as the Supreme Court noted in a case where a state withheld welfare benefits in violation of federal law, "whether or not the [plaintiffs] will receive retroactive benefits rests entirely with the State, its agencies, courts, and legislature, not with the federal court."[170] To the extent that the Eleventh Amendment deprives plaintiffs of federal redress for harms they suffer at the state's hands, the Amendment may thus encourage a state to ignore federal law. If a state violates an individual's federal constitutional or statutory rights, the worst that will ordinarily happen *to the state* is that one of its officials will be enjoined by a federal court from continuing to violate the law. While such relief may cost the state money in the future, the state will normally not have to compensate for any of the injuries it has already caused.

Yet in *Alden v. Maine*,[171] the Supreme Court rejected the proposition that its broad reading of the Eleventh Amendment

> confer[s] upon the State a…right to disregard the Constitution or valid federal law.…We are unwilling to assume that States will refuse to honor the Constitution or obey the binding laws of the United States. The good faith of the States thus provides an important assurance that "[t]his Constitution, and the Laws of the United States…shall be the supreme Law of the Land."[172]

The Court also noted that states are not necessarily shielded from damages liability, even in situations like *Alden* where Congress lacks the power to abrogate the state's sovereign immunity because the federal law in question (e.g., the Fair Labor Standards Act (FLSA)) was enacted under Article I. In these situations, said the Court, Congress may authorize a suit to be brought against the state in the name of the United States, thereby invoking one of the recognized exceptions to the Eleventh Amendment. The FLSA, under which the private employees unsuccessfully sued the State of Maine in *Alden*, in fact *authorizes* the United States to sue the states in federal court to recover damages on behalf of aggrieved state workers. Yet as Justice Souter noted in his dissent:

> [U]nless Congress plans a significant expansion of the National Government's litigating forces to provide a lawyer whenever private litigation is barred by today's decision and *Seminole Tribe*, the allusion to enforcement of private rights by the National Government is probably not much more than whimsy. Facing reality, Congress specifically found…"that the enforcement capability of the Secretary of Labor is not alone sufficient to provide redress in all or even

[170] Quern v. Jordan, 440 U.S. 332, 348 (1979).

[171] 527 U.S. 706 (1999).

[172] Id. at 755.

> a substantial portion of the situations where compliance is not forthcoming voluntarily."…One hopes that such voluntary compliance will prove more popular than it has in Maine, for there is no reason today to suspect that enforcement by the Secretary of Labor alone would likely prove adequate to assure compliance with this federal law in the multifarious circumstances of some 4.7 million employees of the 50 States of the Union.[173]

While Congress might try to deal with this problem by authorizing private parties to bring a so-called *qui tam* action on behalf of the United States, thereby relieving the U.S. Justice Department of the litigation burden, the Supreme Court has cast doubt on whether a *qui tam* action against a state would qualify as a suit by the United States so as to trigger one of the exceptions to the Eleventh Amendment.[174]

The Court in *Alden* asserted that "[t]he principle of sovereign immunity as reflected in our jurisprudence strikes the proper balance between the supremacy of federal law and the separate sovereignty of the States."[175] Yet the notion that a state is effectively immune from damages—no matter how wilful or flagrant its violation of the Constitution or laws of the United States—seems fundamentally at odds with the principle of federal supremacy. This anomaly is a result of the Court's reinterpretation of the Eleventh Amendment in *Hans v. Louisiana*[176] and its progeny. Had the Court instead adhered to the text of the Eleventh Amendment—which merely bars suits against a state by citizens of another state, or by citizens or subjects of foreign countries—rather than expanding its scope to enshrine a broad doctrine of sovereign immunity, federal and state courts would have been able to entertain damages actions against a state on the basis of the state's violation of federal law. Such actions would not have been affected by the Eleventh Amendment's repeal of the Citizen-State and Alien-State Clauses in Article III, for they could have entered federal court as cases "arising under" federal law. In recent years some Justices have called for overturning *Hans*'s interpretation of the Eleventh Amendment,[177] but a majority of the Court has so far at least declined the invitation.

Besides the above doctrinal barriers to §1983 actions, framing the proper injury and seeking the right relief seem to have become a particularly challenging task in §1983 actions. More recently, in *Gill v. Whitford*,[178] democratic voters filed § 1983 action against members of Wisconsin Elections Commission, claiming that the state legislative redistricting plan drafted and enacted by a Republican-controlled Wisconsin legislature was unconstitutional partisan gerrymander that

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[173] Id. at 810.

[174] Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765, 786-787 (2000).

[175] 527 U.S. at 757.

[176] 134 U.S. 1 (1890).

[177] *See, e.g.*, Atascadero State Hospital v. Scanlon, 473 U.S. 234, 247-302 (1985) (Brennan, J., Marshall, J., Blackmun, J., and Stevens, J., dissenting).

[178] 138 S.Ct. 1916 (2018).

systematically diluted voting strength of Democratic voters statewide based on their political beliefs. Thus, the state legislative redistricting plan violated the Equal Protection Clause and First Amendment rights of association and free speech, by two gerrymandering techniques known as "cracking," or dividing party's supporters among multiple districts so they fell short of majority in each one, and "packing," or concentrating one party's backers in a few districts that they won by overwhelming margins. A three-judge panel of the issued an injunction for the plaintiffs, but the Supreme Court reversed, finding that the plaintiffs had no standing:

> The plaintiffs' mistaken insistence that the claims in *Baker* and *Reynolds* were "statewide in nature" rests on a *failure to distinguish injury from remedy*. In those malapportionment cases, the only way to vindicate an individual plaintiff's right to an equally weighted vote was through a wholesale "restructuring of the geographical distribution of seats in a state legislature." Here, the plaintiffs' claims turn on allegations that their votes have been diluted. Because that harm arises from the particular composition of the voter's own district, remedying the harm does not necessarily require restructuring all of the State's legislative districts. It requires revising only such districts as are necessary to reshape the voter's district. This fits the rule that a "remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established."[179]

However, it is hard to see how the plaintiffs' injury was limited to the injury that they had suffered as individual voters and did not instead extend to the statewide harm to their interest in their collective representation in the legislature and in influencing the legislature's overall composition and policymaking, as in fact the plaintiffs described in their brief.[180] And it is difficult to understand how the Court would downplay this injury and downgrade it to "generalized grievance,"[181] to then conclude that the case was not justiciable.

The examination of § 1983 actions within this context brings to the forefront the substantial hurdles imposed by the Eleventh Amendment and the doctrine of sovereign immunity, which collectively form a formidable barrier against claims directed at the state. These constitutional and legal constructs emphasize the deeply rooted principle of state sovereignty, effectively shielding states from being unwilling defendants in federal courts. The nuanced interplay between the Eleventh Amendment and sovereign immunity not only complicates the pursuit of redress under § 1983 but also delineates the boundaries of legal recourse available against state entities and officials. Particularly, the Eleventh Amendment presents a nuanced barrier that requires plaintiffs to navigate a legal landscape where states are generally immune from suit in federal court, except under specific circumstances where such immunity is abrogated or waived. The

[179] Id., at
[180] Id., at 1931.
[181] Id.

doctrine of sovereign immunity further complicates this terrain, reinforcing the state's protection against legal actions that seek redress from the state treasury or challenge state sovereignty directly. These doctrines underscore the meticulous care with which plaintiffs must frame their § 1983 claims, ensuring they target individual state officials in their personal capacity or invoke established exceptions like the *Ex parte Young* doctrine for prospective relief. In essence, the Eleventh Amendment and the doctrine of sovereign immunity serve as critical filters through which § 1983 actions must be processed, underscoring the delicate balance between upholding state sovereignty and ensuring accountability for violations of federal rights. For practitioners and scholars, understanding these hurdles is paramount, as it shapes the strategies employed in litigating § 1983 actions and influences the evolving jurisprudence surrounding state accountability under federal law. The emphasis on these doctrines in this analysis highlights their central role in defining the contours of legal action against state actors, a fundamental aspect for those seeking justice through the federal legal system.

VI. THE EFFECTS OF THE PRECEDENT AND HOW TO REVERSE THE TREND

The § 1983 actions that have been filed since *Lyons* have often encountered insurmountable standing barriers. Those seeking injunctive relief based on specific wrongful conduct have typically seen their claims dismissed on standing grounds because, as the Court said in *Atascadero*, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief…if unaccompanied by any continuing, present adverse effects.'"[182]

Black Lives Matter D.C. v. Trump[183] is one of the many [most recent] *Lyons* repeats. There, among other things, the plaintiffs brought a class action against former President Trump, former Attorney General William Barr, the District of Columbia police, and various other federal and local officials. Plaintiffs asserted *Bivens* constitutional as well as federal statutory claims arising from law enforcement's response to plaintiffs' protests near the White House on June 1, 2020. Plaintiffs alleged that peaceful protesters had assembled in Lafayette Park across from the White House to protest racial injustice after the death of George Floyd and other Black people at the hands of law enforcement and that, in response to the peaceful protest, officials, wielding batons, sprayed the crowd with tear gas, flash-bang grenades, smoke bombs, and rubber bullets. Although the law enforcement officers provided warnings before dispersing the crowd, plaintiffs alleged that those warnings were inadequate because they were given via a megaphone 50 yards away from the closest protestors, and thus were "barely audible. The plaintiffs Black Lives Matter ("BLM") alleged that the purpose of the law enforcement response was to clear the area to permit the President to walk to a photo opportunity at a nearby church. What resulted was unprovoked violence. The crowd fled Lafayette

[182] Abbott v. Pastides, 900 F3d 160, 176 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 1292 (2019); *see also* Thompson v. Lengerich, 798 Fed. Appx. 204, 210-211 (10th Cir. 2019); Rezaq v. Nalley, 677 F.3d 1001, 1009 (10th Cir. 2012).

[183] 2021 WL 2530722 (D.D.C. June 21, 2021).

Square only to be met by additional District of Columbia police officers who fired tear gas at the fleeing crowd.[184] The plaintiffs alleged that they suffered injuries, both physical and psychological, as a result of the law enforcement response to the protest, and that they "fear[ed] further retaliation in the future…if they continue to observe, record, or participate in constitutionally protected activity."[185]

Plaintiffs sought injunctive relief against the defendants under the First, Fourth, and Fifth Amendments, alleging that the practices of "deploying physical force against demonstrators to remove them from places in which they have gathered with others to express their political opinions," and "deploying physical force without provocation, warning, or legal grounds to do so, against demonstrators to force them to halt or move,"[186] violated their constitutional rights.

The Court, after relying on *Lujan* for the elements of standing, noted that:

> When plaintiffs seek injunctive relief, as they do here, "past injuries alone are insufficient to establish standing." Instead, "[a]n allegation of future injury may suffice if the threatened injury is *certainly impending*, or there is a substantial risk that the harm will occur." Of note, "allegations of *possible* future injury are not sufficient." Future injuries—even those with an "objectively reasonable likelihood" of occurring—are not adequate to establish standing.[187]

Even an "objectively reasonable likelihood" is not enough to give access to justice. Instead, the future harm must be "certainly impending," a standard that few future harms will ever be able to meet.

The Court held that the defendants' clearing of Lafayette Square on the day of the protest did not itself establish "either an ongoing injury or an immediate threat of future injury," for the June 1 assembly was over. Plaintiffs therefore lacked standing to seek an injunction requiring defendants to change their practice of using physical force against protestors.[188] In an effort to show that their injury was in fact "ongoing," plaintiffs alleged "ongoing chilling effects resulting from the events of June 1, 1920."[189] But, said the court, "such allegations of a *subjective* chilling effect resulting from the defendants' past actions are insufficient to confer standing.[190] And the plaintiffs likewise failed to establish standing based on an immediate threat of future harm,[191] for even if they alleged that they planned to continue demonstrating in or near Lafayette Square, and that they feared law enforcement officers might again disperse or attack them again, those fears still rested on the isolated event of the day of the protest,

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[184] Id., at *1-2.
[185] Id., at *2.
[186] Id., at *8.
[187] Id., at *8 (some emphasis added) (internal citations omitted).
[188] Id. at *8.
[189] Id. at *9.
[190] Id. (emphasis added).
[191] Id.

and not on a law or policy as the basis for this claimed risk of future harm.[192] "[P]laintiffs do not challenge a large-scale policy—or any policy at all. Rather, Plaintiffs challenge...the implied threat to take similar actions in the future at the President's whim."[193] Because the plaintiffs "do not claim that a law or policy has 'ordered or authorized police officer[s] to act in such manner' as allegedly occurred on June 1, the plaintiffs' claims of impending future harm are too speculative to confer standing to seek an injunction."[194]

Thus, as in *Lyons*, in order to prevail against an objection to standing, the plaintiffs would be required to prove that they would again demonstrate in Lafayette Square; that agencies headed by the official-capacity defendants would again respond to the demonstration; that federal officers would again use that same law enforcement response as a cover to deliberately target non-violent peaceful demonstrators; and that one or more of the plaintiffs would again be targeted.[195] Only then would their threatened harm be "certainly impending." By contrast, their "hypothetical chain of events [was] simply too speculative to confer standing for injunctive relief."[196]

Similar problems encountered the plaintiff in *MacIssac v. Town of Poughkeepsie*.[197] In his complaint, MacIssac alleged that, when operating his vehicle on a public highway in the Poughkeepsie, he was stopped by police officers, who arrested him on suspicion of driving while intoxicated, and that after he was handcuffed, the officers used a Taser stun gun on him three times; bent his back, arms, and legs in a manner that caused significant pain; and used excessive force beyond that needed to control him. He did not resist arrest.[198] MacIssac filed a §1983 action against the Town and the police officers, seeking compensatory and punitive damages against the officers, compensatory damages and injunctive relief against the Town, and attorneys' fees and costs under §§ 1983 and 1988.

Under the Supreme Court's decision in *Lyons*, the plaintiff here clearly had standing to seeking damages. However, the Town moved to dismiss plaintiff's claim for injunctive relief on standing grounds. In granting the motion, the court focused on the redressability requirement:

> The third prong of this test—redressability—has been interpreted to mean that a plaintiff's standing depends on the form of relief requested. *See Friends of the Earth*, 528 U.S. at 185 ("[A] plaintiff must demonstrate standing separately for each form of relief sought.") In seeking prospective relief like an injunction, a plaintiff must show that he can reasonably expect to encounter the same injury again in the future—otherwise there is no remedial benefit that he can derive from such judicial decree. Past injury

[192] Id.
[193] Id.
[194] Id.
[195] Id.
[196] Id.
[197] 770 F.Supp.2d 587 (S.D.N.Y. 2011).
[198] Id., at 592.

> alone does not establish a present case or controversy for injunctive relief. Rather, "the injury alleged must be capable of being redressed through injunctive relief 'at that moment.'"[199]

After describing *Lyons* as the case that seemed most on point, the court noted that *Lyons* had long been criticized because "the restriction that [it] places on the availability of injunctive relief in Section 1983 cases is significant."[200] The court suggested that little attention had been paid to the fact that *Lyons* requires a more stringent showing by plaintiff for standing to *seek* equitable relief than *Monell v. Department of Social Service*[201] "requires for the same plaintiff to *receive* that relief."[202] In other words, the factual allegations that, if proven, may entitle a plaintiff to an injunction under *Monell* seems not enough for the same plaintiff to have standing to seek injunctive relief under *Lyons*.[203] To put it differently, the Court's decisions seem to allow a plaintiff to *receive* injunctive relief on a basis that would not afford standing to *seek* it. The court suggested that this anomaly may have come about for two reasons:

> First, under *Lyons* and its progeny, "a plaintiff seeking injunctive relief must demonstrate *both* a likelihood of future harm *and* the existence of an official policy or its equivalent." An official policy sanctioning the illegality is required for a plaintiff to have *equitable standing*, but this by itself is not enough if there exists no reasonable likelihood that the plaintiff, in going about his everyday activities, will be affected by the implementation of that policy in the future. In contrast, an official policy theoretically is sufficient to enjoin the unconstitutional acts of a municipality and its officers under *Monell*.[204]

"Logically then," said the court, "equitable relief ought to be available in a Section 1983 case, if the court deems it appropriate, on the same record on which damages are available.[205]

Moreover, said the court,

> Because a plaintiff must prove an official policy to hold a municipality liable for any and all forms of relief, and because the relief requested has no bearing on what constitutes an official policy, then proof of an official policy ought to entitle the plaintiff to whatever relief the court considers appropriate. So long as the plaintiff has proved municipal liability under *Monell*, it is within the power and discretion of the court to remedy the constitutional deprivation by awarding monetary damages or equitable

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[199] Id. at 593-594 (some internal citations omitted).
[200] Id., at 594-595.
[201] 436 U.S. 658 (1978).
[202] Id., at 595 (emphasis in original).
[203] Id.
[204] Id. (internal citations omitted) (emphasis added).
[205] Id., at 596 (internal citations omitted).

> relief or both, depending on its assessment of what the particularities of the case require."[206]

The court went on to suggest that the Supreme Court appears to have endorsed this view in *Los Angeles County v. Humphries*,[207] where it held that "*Monell*'s 'policy or custom' requirement applies in §1983 cases irrespective of whether the relief sought is monetary or prospective."[208] It follows then, "[l]ogically," said the *MacIssac* court, that "equitable relief ought to be available in a Section 1983 case, if the court deems it appropriate, on the same record on which damages are available."[209]

> Ironically, this view—now seemingly endorsed by the Supreme Court in *Humphries*—was first expressed by the four dissenting justices in *Lyons*. The *Lyons* dissenters flatly rejected the notion that a court could have jurisdiction to adjudicate a request for damages but not for injunctive relief, where both depended on a demonstration that an official policy was unconstitutional. They clamored against the majority's decision to "fragment a single claim into multiple claims for particular types of relief." Now, twenty-seven years later, an [sic] unanimous Supreme Court similarly has rejected a "relief-based bifurcation" of the logic of *Monell*. While nothing in *Humphries* suggests an intention to retreat from the holding of *Lyons*, which does bifurcate standing to bring a *Monell* claim on the basis of the relief sought, how the two are to be squared remains to be seen.[210]

The second possible reason for this anomaly—i.e., that it's easier to obtain relief under *Monell* than it is to have standing under *Lyons*—is that *Lyons* defines its "official policy" requirement in a significantly more limited way than the courts have interpreted this same requirement under *Monell*.[211] "Both standing under *Lyons* and municipal liability under *Monell* require an official policy sanctioning the unconstitutional conduct at issue. But a policy sufficient to hold a municipality liable may be too 'unofficial' to give the plaintiff standing to sue for equitable relief in the first place."[212] This is not so under *Lyons*.[213]

"In sum," continues the court, "'*Lyons* ha[s] effectively rendered injunctive relief against police misconduct virtually unobtainable, even

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[206] Id.

[207] 131 S. Ct. 447 (2010).

[208] Id. at 453-454.

[209] *MacIssac, supra* note 8, 770 F.Supp.2d at 596.

[210] Id.

[211] Id.

[212] *MacIssac*, at 596-597. As the court points out, under *Monell*, a municipality's failure to train its officers may constitute a "policy" actionable under §1983 where (1) "the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact," and (2) there is a causal link between the "identified deficiency in a city's training program" and the constitutional injury suffered.

[213] Id. *See also* Part IV.

where the misconduct involves patterns of abuse or unconstitutional official policies' that would entitle a plaintiff to relief under *Monell*."[214]

And thus, when trying to resolve "the incongruous result of *Lyons* that an equitable claim on which *Monell* liability properly could be found will fail virtually every time for lack of standing suggests to this Court that the issue of justiciability ought remain separate from the appropriateness of a particular remedy."[215] This is because *Lyons*, "by requiring that a complaint demonstrate not that some form of judicial relief is capable of redressing the plaintiff's alleged injury but rather that injunctive relief is the appropriate and necessary redress, effectively denies litigants the opportunity to be heard on the merits and denies federal courts their power to remedy constitutional harms as they see fit."[216]

And of course the court notes that injunctive relief should be granted with caution, especially when plaintiffs in §1983 actions are seeking a judicial decree to get a structural reform of a local law enforcement agency.[217] "But whether a plaintiff has met the 'likelihood of irreparable harm standard for injunctive relief should be decided by the court *after* the parties have developed a factual record,"[218] as "[o]nly after the facts have unfolded can a court intelligently weigh the potential threat of harm in light of other factors bearing on whether an injunction is the most effective and appropriate remedy…[o]n a developed record/ the failure to demonstrate a likelihood of irreparable harm, or a "real and immediate threat of injury' as *Lyons* termed it, should be a remedial barrier, but not a jurisdictional one."[219]

Applying the law to the facts of the case, though, the court granted the defendant's motion to dismiss because the case was distinguishable from *Lyons*, as he had failed to allege facts demonstrating with any credibility that he himself would suffer the same injury again. Among the reasons for such failure was the fact that he had not been stopped for a minor traffic violation but on suspicion of DWI, an offense to which he later pled guilty.[220] And this distinguishes this case from those in which the plaintiffs had standing to sue for injunctive relief in part because their likelihood of suffering the same harm again did not depend on them

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[214] Id., at 596. In *Cadiz v. Kruger*, 2007 WL 4293976, at *10 n. 9 (N.D.Ill. Nov. 29, 2007), the court noted that "[w]e are mindful ... that some plaintiffs may seek not only monetary damages on a *Monell* claim, but also may seek injunctive relief against specific police practices.... However, in the typical excessive force case that would give rise to an accompanying *Monell* claim, a plaintiff would lack standing to seek prospective injunctive relief for a past event that (as to that plaintiff) has no foreseeable likelihood of recurring." *Id.*

[215] Id., at 598.

[216] Id. *See also See* Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV., 1, 7 (1984) ("*Lyons* forecloses a federal court from obtaining pertinent information about the lawfulness of the defendant's conduct and from balancing the various interests, before deciding whether relief ought to be provided").

[217] Id., at 598.

[218] Id.

[219] Id.

[220] Id., at 601.

willfully breaking the law.[221] And even if MacIssac faced a realistic threat of being stopped on suspicion of DWI again, nothing in the complaint suggested a reasonable likelihood that, during such a stop and possible arrest, the Town's officers again would use a Taser stun gun.[222] The court then notes that "[w]hether these allegations, if proven, would give rise to municipal liability under *Monell* is irrelevant because they do not confer standing to sue for injunctive relief under *Lyons*."[223]

Although the *MacIssac* opinion endorses much of our theory of standing and jurisdiction and relief, it falls short of fully embracing such theory, applying it to the facts of the case accordingly and truly giving meaning to §1983 actions and injunctive relief there sought. The judge, in fact, concluded that the plaintiff had no standing because, like in *Lyons*, "[the] *likelihood of suffering* the same harm again did not depend on them willfully breaking the law."[224] This conclusion again conflates right, injury, jurisdiction, and remedy. Whether this *likelihood* existed or not should be a merits inquiry, not a jurisdictional injury. In other words, an "objectively reasonable likelihood" should be enough to show a "case or controversy" within Article III, § 2 of the Constitution, a case capable of judicial resolution.

In any event, *MacIssac* remains a powerful opinion that could be used to reverse the problematic trend that originated with *Lyons* and that is increasingly making a mockery of injunctive reliefs in §1983 actions. What will be required is a clear identification of the claim and relief, insisting on the idea that the relief is not part of the claim, and that the injunctive relief is remedial or procedural not jurisdictional, and that, as the court in *MacIssac* says, "[o]nly after the facts have unfolded can a court intelligently weigh the potential threat of harm in light of other factors bearing on whether an injunction is the most effective and appropriate remedy…[o]n a developed record/ the failure to demonstrate a likelihood of irreparable harm, or a "real and immediate threat of injury' as *Lyons* termed it, should be a remedial barrier, but not a jurisdictional one."[225]

VII. CONCLUSION

Over forty years after *Lyons*, police brutalities, deaths, and the consequences of those brutalities continue. We have tools to revert the trend, and the above considerations and analysis should help return to §1983 its meaning and force, for the preservation of our constitutional system and through the enforcement and protection of constitutional rights. As Martin Luther King put it, "[i]njustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly."[226]

To effectively reverse the restrictive trend established by the Lyons decision regarding access to injunctive relief, it's important to emphasize a

[221] Id.
[222] Id.
[223] Id.
[224] *Id.* (emphasis added).
[225] Id.
[226] Martin Luther King, Jr., *Letter from Birmingham Jail*, April 16, 1963.

nuanced judicial approach. This approach should recognize the distinction between the claim of a constitutional violation and the type of relief being sought. The emphasis here is on ensuring that individuals who allege a breach of their constitutional rights have a clear pathway to the courts, whether they are seeking damages or an injunction. A more flexible understanding of standing is also essential. Rather than narrowly focusing on whether the same individual is likely to suffer the same harm again, the judiciary should consider the broader implications of systemic or policy-driven misconduct. This understanding would allow for the acknowledgment of potential impacts on the community or individuals who might encounter similar policies or their effects in the future. Additionally, courts should allow for the thorough development of the factual record before making determinations about the appropriateness or feasibility of injunctive relief. This approach would enable more informed decisions that accurately consider potential ongoing harms and the realities of implementing specific remedies. Furthermore, acknowledging the systemic implications of certain misconduct is vital. When actions stem from broader policies or widespread practices, understanding these broader contexts can help in preventing future violations and ensuring community-wide protections. Lastly, by facilitating access to injunctive relief in cases of constitutional violations, courts can affirm their critical role in safeguarding civil rights and liberties. This not only helps in addressing individual grievances effectively but also plays a crucial part in deterring and rectifying systemic issues, reinforcing the judiciary's role in upholding justice and equity.

In my manuscript, I have delved into the complex interplay between the precedent and the ongoing struggle for racial justice, particularly through the lens of §1983 actions. This exploration is deeply relevant to the field of racial justice work for several reasons. First, my analysis addresses the significant challenges related to standing and the obstacles individuals and groups face when pursuing justice for constitutional violations, especially in scenarios involving law enforcement misconduct. By evaluating how decisions like *Lyons* have erected formidable barriers for those seeking injunctive relief, my work underscores the pressing need to dismantle these legal hurdles to better combat systemic racial discrimination and police brutality.

Furthermore, my focus on reversing the restrictive trends set by precedents like *Lyons* resonates with a broader imperative in racial justice advocacy: the need to challenge and reform institutional practices that uphold racial inequities. In advocating for a more accessible and responsive legal framework, my manuscript is inherently linked to efforts aimed at ensuring that victims of racial injustice have viable pathways to demand accountability and systemic change.

Moreover, by examining cases such as *Black Lives Matter D.C. v. Trump*, my work situates itself within the vital national discourse on race, protest, and state power. It highlights the role of legal strategies within the larger racial justice movement, illustrating how litigation can serve as a powerful mechanism to redress wrongs, mobilize public awareness, and catalyze institutional reform.

My contribution to the field of racial justice work is, therefore, multifaceted. Through my analysis, I aim to provide a detailed critique of current legal barriers and propose pathways for reform, thereby offering insights that could inform both legal strategies and broader advocacy initiatives. By situating my work within the context of ongoing racial justice efforts, I am engaging with and contributing to a critical dialogue aimed at reshaping the legal landscape to better reflect the principles of equity and justice.

In doing so, my work builds upon and contributes to a rich tradition of racial justice scholarship and activism. It echoes and amplifies the calls for justice articulated by organizations like the NAACP Legal Defense and Educational Fund, the American Civil Liberties Union, and the Movement for Black Lives and Black Lives Matter, all of which have employed legal advocacy as a tool to confront and dismantle systemic racism. By critically analyzing legal precedents and advocating for change, my manuscript aims to be part of this vital continuum of efforts to secure racial justice and equality.

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ARTICLE

BAILING OUT THE PROTESTER

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The United States cash bail system unconstitutionally hinders protest rights enshrined in the First Amendment. Protesting on controversial issues, while protected activity, often risks arrests and other interactions with police. Unfortunately, studies show that protesters of color are arrested at higher rates than white protesters.

Cash bail, in turn, increases the cost associated with the arrests related to protests, further disincentivizing protesters from engaging in lawful activity. Although the overwhelming majority of these protests and demonstrations are peaceful, and many of the charges in these arrests are eventually dropped, arrested protesters are still required to put up hundreds—sometimes even thousands—of dollars to be released pretrial. If they cannot, they must remain in jail until their trial, until the charges are dropped, or until they are able to raise enough money to be released. This pretrial detention, even if it only lasts a few days, has significant consequences. Furthermore, these consequences are not shared evenly: the cash bail system disparately impacts people of color, who are imposed bail at higher rates and at higher amounts, meaning they will also experience negative consequences at a disproportionate rate.

Because states are criminalizing more conduct, elevating charges from misdemeanors to felonies, and continuing to impose bail amounts on protesters, the intersection between cash bail and protests is unavoidable. In turn, many people could be afraid to protest because they do not have enough money to afford their bail if they are arrested at the protest, and because they cannot afford the negative consequences of awaiting their trial in jail.

This Article discusses how cash bail dissuades First Amendment expression by compounding existing consequences created by government action that also curtails lawful protests. Furthermore, the disparate rates at which

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protesters of color are arrested and later imposed bail raises an equal protection concern, deterring people of color from expressing constitutional rights. Removing cash bail in limited circumstances associated with otherwise lawful protesting, measured reform may help alleviate some of the disparate risks involved with protected activity. While eliminating bail altogether is the ultimate goal, this measured reform would be an incremental step towards broader change, building public support for holistic reform.

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INTRODUCTION

Protests are a fundamental aspect of progressing societies, acting as catalysts for necessary change. The United States, in particular, is a country that has benefited from protests throughout its existence and has since recognized protesting as protected activity under the First Amendment.

Expressing fundamental freedoms, however, should not risk significant consequences if you do not have access to sufficient financial resources. Though many protests are lawful and peaceful, protesters often face arrests, and institutional obstacles exacerbate the consequences of those arrests. More specifically, participating in protests can entail significant risks for those who lack sufficient financial resources to pay their bail amount in the event of their arrest.

The protests in Akron, Ohio between April of 2022 and July of 2023, exemplify this issue. Thousands of protesters marched in Downtown Akron after eight officers fatally shot Jayland Walker.[1] During the demonstrations, Akron police used chemical agents on, such as tear gas and pepper spray, and arrested non-violent protesters.[2] Though the federal judge would later issue an injunction prohibiting the unjustified use of these chemicals,[3] the court order did not prohibit wrongfully arresting protesters. Despite many of their charges were eventually dropped, the set bail amounts forced many of those arrested to remain in jail until they could pay.[4] Fortunately, activists, bail funds, and companies got them released generously posted bail on protester's behalf.[5]

Unfortunately, many people are not as lucky and are unable to pay their bail fees, dissuading constitutional expression of their protest rights.[6] Unable to afford bail, the arrested protester would have to wait in jail pretrial, joining the over half a million people incarcerated in local jails, most of whom

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[1] *See Complete Coverage of the Jayland Walker Police Shooting in Akron, Ohio*, AKRON BEACON J. (Apr. 9, 2023), https://www.beaconjournal.com/story/news/local/2023/04/09/what-happened-to-jayland-walker-read-about-akron-police-shooting/70007086007/.

[2] Conor Morris, *Akron Police, Mayor Stand by Officers' Use of Chemical Irritants during Jayland Walker Protest*, IDEASTREAM (April 22, 2023), https://www.ideastream.org/law-justice/2023-04-22/akron-police-mayor-stand-by-officers-use-of-chemical-irritants-during-jayland-walker-protest.

[3] *See* Joint Temporary Stipulated Order, Akron Bail Fund v. City of Akron, No. 5:23-cv-837 (N.D. Ohio April 21, 2023).

[4] Doug Livingston, *What we Know about 61 People Arrested in July During Jayland Walker Protests in Akron*, AKRON BEACON J. (Sept. 23, 2022), https://www.beaconjournal.com/story/news/crime/2022/09/23/jayland-walker-protest-arrests-akron-police/69512399007/.

[5] Abbey Marshall, *$50,000 Raised to Bail out Activists Jailed During Jauland Walker Protests in Akron*, AKRON BEACON J. (July 13, 2022), https://www.beaconjournal.com/story/news/2022/07/13/50000-raised-bail-activists-jailed-akron-jayland-walker-protests-police-shooting-serve-the-people/10016945002/.

[6] *See, e.g.*, Katelyn Smith, *Judges Reduce Bail for 9 People Arrested after Riot in Lancaster Following Fatal Police Shooting*, WGAL (Sept. 17, 2020), https://www.wgal.com/article/judges-reduce-bail-for-nine-people-arrested-after-riot-following-fatal-police-shooting-in-lancaster/34056851#.

simply because they are too poor to pay for their pretrial release.[7] While cash bail is used as a collateral guarantee to ensure a defendant's return to future court appearances,[8] its use is felt unevenly.[9] As reports demonstrate that Black people are arrested at as high as five times the rate as white people,[10] it does not come as a surprise that 43% of the pretrial population is Black.[11] These disparate arrest rates continue in the context of protests, with protesters of color arrested, and later imposed bail, at significantly higher rates than white protesters[12]—some jurisdictions arresting people of color ten times as often as their white counterparts.[13]

This Article discusses how cash bail dissuades First Amendment expression by compounding existing consequences created by government action that also curtails lawful protests. Protesting is a constitutionally protected right, but protesting on controversial issues often risks arrest and the subsequent consequences involved with that arrest. Such as bail. Thus, because the cash bail system increases the potential consequences to arrested protesters—such as higher likelihoods of pleading guilty, losing housing, and damaging an individual's reputation[14]—it increases, in tandem, the disincentive provided by the risk of arrest.

Part I discusses the effect protests have on society and its legal protections. This part also addresses the recent rise in legislation that increases punishments for engaging in certain forms of demonstrations, despite consistent data demonstrating the overwhelming majority of protests remain peaceful. Part II then provides an overview of cash bail, discussing how it works, the consequences involved for those unable to post bail, and disparate impacts involved in the system. Part III connects how cash bail exacerbates the consequences of arresting protesters, emphasizing how disincentives to

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[7] Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2023*, PRISON POL'Y INITIATIVE (March 14, 2023), https://www.prisonpolicy.org/reports/pie2023.html [hereinafter Mass Incarceration Report]. Since writing this piece, the Prison Policy Initiative has released a new report, adding data from 2023 and 2024. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2024*, PRISON POL'Y INITIATIVE (March 14, 2024), https://www.prisonpolicy.org/reports/pie2024.html.

[8] Trujillo v. State, 483 S.W.3d 801, 805–06 (Ark. 2016) (noting the purpose of bail is to ensure presence of defendant).

[9] *See infra* Section II(C).

[10] Pierre Thomas, John Kelly & Tonya Simpson, *ABC News Analysis of Police Arrests Nationwide Reveals Stark Racial Disparity*, ABC NEWS (June 11, 2020), https://abcnews.go.com/US/abc-news-analysis-police-arrests-nationwide-reveals-stark/story?id=71188546.

[11] Wendy Sawyer, *How Race Impacts who is Detained Pretrial*, PRISON POL'Y INITIATIVE (Oct. 9, 2019), https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/.

[12] *E.g.*, Christian Davenport, Sarah A. Soule & David A. Armstrong II, *Protesting While Black? The Differential Policing of American Activisms, 1960 to 1990*, 76 AM. SOCIOLOG. REV. 152 (2011) [hereinafter Protesting While Black].

[13] *E.g.*, Pierre Thomas, John Kelly & Tonya Simpson, *ABC News Analysis of Police Arrests Nationwide Reveals Stark Racial Disparity*, ABC NEWS (June 11, 2020), https://abcnews.go.com/US/abc-news-analysis-police-arrests-nationwide-reveals-stark/story?id=71188546.

[14] *See infra* Section II(C).

protest increase due to the effects of cash bail. Lastly, Part IV discusses avenues for change, providing attainable ways to reform to ensure that a person's finances do not determine whether they can exercise their constitutional rights.[15] Though eliminating bail is the ultimate goal, this final section's limited measures aim to serve as an incremental step to build public support for more comprehensive reform.

I. PART 1 – THE BEDROCK RIGHT TO PROTEST

Historically, protesting has positively impacted societies, often acting as a catalyst for necessary change. Recognizing its importance, countries16 and international organizations17 protect this right in an effort to encourage its expression, collectively understanding that in the absence of protests, significant societal change may not occur. While limited restrictions on protest rights have been rationalized and upheld, obstacles that may otherwise hinder or discourage the right to peacefully protest have not. Unfortunately, while the vast majority of protests are peaceful, recent legislation heightens the risks associated with engaging in protests, threatening its future expression.

A. Rich History of Protests

For centuries, protests have centered and uplifted the voices of marginalized communities to help effectuate change.[18] As one commentator put it, "Protests are signals."[19] Constituents signal to their officials that they are unhappy and refuse to sit silently and put up with the status quo.[20] While it may take time to address the plights involved—as protests do not always present solutions—this should not minimize the impact protests can have.

In the same respect, protests are a defining aspect of United States history. In 1773, American colonists protested a tax on tea by throwing several thousand pounds of tea into the Boston Harbor.[21] The "Boston Tea Party" is commonly seen as the first significant protest by American colonist against the British, sparking the First Continental Congress in 1774, the American Revolution beginning in 1775, the Declaration of

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[15] This Article is limited in its scope to only address the intersection of protesting and bail, but this is not to qualify the system's use in other contexts.

[16] *E.g.*, Art. 31 of the 1987 Constitution of the Republic of Haiti (as amended) ("Freedom of unarmed assembly and association for political, economic, social, cultural or any other peaceful purposes is guaranteed."). For a discussion on how various countries and international bodies recognize and protect protest rights, *see* Alireza Nourani-Dargiri, *The Universal Effort to Curtail Protests*, 62 UNIV. LOUISVILLE L. REV. (forthcoming 2024).

[17] *E.g.*, *Global Assessment on Protest Rights 2022*, CIVICUS (2022), https://protestrights2022.monitor.civicus.org/.

[18] *See* Patrick Manning et al, *Earliest Evidence of Social Protest*, H-NET LIST FOR WORLD HIST. (May 1996), http://www.hartford-hwp.com/archives/20/005.html.

[19] Zeynep Tufekci, *Do Protests Even Work?*, THE ATLANTIC (June 24, 2020), https://www.theatlantic.com/technology/archive/2020/06/why-protests-work/613420/.

[20] *Id.*

[21] *Boston Tea Party*, ENCYCLOPAEDIA BRITANNICA (June 8, 2023), https://www.britannica.com/event/Boston-Tea-Party.

Independence in 1776, and British recognition of independence in 1783.[22] Thus, the Boston Tea Party was a powerful catalyst in transforming the colonies into the United States.

Protesting is not limited to independence movements; it has also proven to be effective in advocating for individual rights, such as women's suffrage. After nearly sixty years of women fighting for suffrage, more than 5,000 people demonstrated during President Woodrow Wilson's inauguration to bring attention to the movement.[23] The Women's Suffrage Parade successfully revived attention around women's voting rights, leading to seven more years of protests, and the adoption of the Nineteenth Amendment in 1920.[24] Had the Parade not happened, women's suffrage may have taken much longer to become a reality.

Importantly, more general protests have also been fruitful in spurring change. In 1963, approximately 250,000 people gathered to voice their outrage against racial inequalities prevalent in the United States.[25] While the focus of this protest is less issue-specific than the Boston Tea Party and the Women's Suffrage Parade, the "March on Washington for Jobs and Freedom" still effectively brought around necessary reform.[26] This protest, the largest civil rights gathering of its time, led to civil rights leaders meeting with President John F. Kennedy and Vice President Lyndon B. Johnson, ultimately resulted in the enaction of the Civil Rights Act of 1964.[27]

As some commentators have noted, protesting is *at least* as important as voting to spur societal change.[28] Since studies indicate that only the affluent wield significant influence over policymaking, protesting is one of the primary ways less-wealthy citizens can impact policy.[29] Lobbying, for instance, can undermine constituents' ability to receive adequate representation, often "allowing lobbyists to advance the priorities of their wealthy and corporate clients at the expense of the public interest."[30] Even if influence through voting was equally accessible,

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[22] *See* BENHAMIN L. CARP, DEFIANCE OF THE PATRIOTS: THE BOSTON TEA PARTY AND THE MAKING OF AMERICA (Yale Univ. Press 2010); *see also* Nicole Dudenhoefer, *7 Influential Protests in American History*, UCF TODAY (July 2, 2020), https://www.ucf.edu/news/7-influential-protests-in-american-history/.

[23] *Marching for the Vote: Remembering the Women Suffrage Parade of 1913*, LIBR. OF CONG. (Sept. 6, 2018), https://guides.loc.gov/american-women-essays/marching-for-the-vote.

[24] *Id.*

[25] *March on Washington for Jobs and Freedom*, NAT'L PARK SERV., https://www.nps.gov/articles/march-on-washington.htm

[26] *Id.*

[27] *Id.*; *see also* Dudenhoefer, *supra* note 24.

[28] Andre M. Perry & Carl Romer, *Protesting is as Important as Voting*, BROOKINGS INST. (Aug. 28, 2020), https://www.brookings.edu/articles/protesting-is-as-important-as-voting/.

[29] *E.g.*, Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSPECTIVES ON POL. 564 (2014); MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA (Princeton Univ. Press 2012).

[30] Sam Hananel, *Fighting Special Interest Lobbyist Power Over Public Policy*, CTR. FOR AM. PROG. (Sept. 27, 2017), https://www.americanprogress.org/wp-content/uploads/sites/2/2017/09/LobbyingSpecialInt-factsheet1.pdf.

protests can influence voting outcomes.[31] Protests can successfully drive media coverage, inform public opinion, and catalyze congressional action.

Change may not happen overnight, but a protest can still have other immediate impacts.[32] Protests force people to listen to the plights of the marginalized and encourage the necessary dialogue.[33] Furthermore, protesting can make "an apathetic majority sympathetic to the demonstrators' cause."[34] Without protests, societies would stick to the status quo and not appropriately progress to make their communities better.

Admittedly, while protests can inspire positive change, they can also have a negative impact on public opinion or result in reactionary backlash to protest demands. Particularly when a protest is perceived as violent, "people may perceive them as less reasonable[,] . . . lead people to identify with them less, and ultimately become less supportive."[35] Largely, however, research seems to refute that stance. Coupled with research that demonstrates "news organizations have struggled to accurately and fairly portray protests that challenge the political and societal status quo,"[36] studies continue to validate that protests can lead to meaningful change.[37]

B. The Protected Right to Protest

Governments also regularly seek to protect the right to protest. Internationally, the 1966 International Covenant on Civil and Political Rights Articles 18 to 22 enumerate how protests are a human right. "Everyone shall have the right to freedom of thought,"[38] "to hold opinions without interference,"[39] and to peacefully assemble in which "[n]o restrictions may be placed on [their] exercise."[40] Additionally, the U.N.'s Human Rights Committee has further interpreted this right in its General Comment No. 37.[41] In addition to providing a comprehensive overview on

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[31] Daniel Q. Gillion, *Why Protests Matter in American Democracy*, PRINCETON UNIV. PRESS (June 02, 2020), https://press.princeton.edu/ideas/why-protests-matter-in-american-democracy.

[32] *See* Mae Cromwell *7 Times that Protests Changed U.S. History*, ASPEN INST. (Dec. 15, 2016), https://www.aspeninstitute.org/blog-posts/7-times-protests-changed-us-history/.

[33] Keith Allen, *Understanding Protests: The Importance of Meaningful Dialogue*, 36 ABA J. (2021), https://www.americanbar.org/groups/communications_law/publications/communications_lawyer/fall2020/understanding-protests-importance-meaningful-dialogue/.

[34] Omar Wasow, *Agenda Seeding: How 1960s Black Protests Moved Elites, Public Opinion and Voting*, 114 AM. POL. SCI. REV. 638 (2020).

[35] Melissa D. Witte, *Violence by Protesters can Lead the Public to Support them Less, Stanford Sociologist Says*, STAN. NEWS (Oct. 12, 2018), https://news.stanford.edu/2018/10/12/how-violent-protest-can-backfire/.

[36] D.K. Brown & S. Harlow, *Protests, Media Coverage, and a Hierarchy of Social Struggle*, 24 INT'L J. OF PRESS/POL. 508, 509 (2019).

[37] *See, e.g.*, Belinda Archibong, Tom Moerenhout & Evans Osabuohien, *Protest Matters: The Effects of Protests on Economic Redistribution*, BROOKINGS GLOB. WORKING PAPER (April 2022).

[38] International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 18, 6 I.L.M. 368, 999 U.N.T.S. 171.

[39] *Id.* at art. 19.

[40] *Id.* at art. 21.

[41] Human Rights Committee, General Comment no. 37, U.N. Doc. CCPR/C/GC/37 (Sept. 17, 2020).

the importance of the right, the Human Rights Committee discusses state responsibility to codify, promote, and protect the right to protest.[42]

> Domestic law must recognize the right of peaceful assembly, clearly set out the duties and responsibilities of all public officials involved, be aligned with the relevant international standards[,] and be publicly accessible. States must ensure public awareness about the law and relevant regulations, including any procedures to be followed by those wishing to exercise the right, who the responsible authorities are, the rules applicable to those officials, and the remedies available for alleged violations of the rights.[43]

Furthermore, in instances of alleged violations, the U.N.'s Office of the High Commission on Human Rights has a mandate to "promote and protect the right of peaceful assembly."[44] More regional international bodies have also clearly defined these rights to ensure that protest rights are codified, promoted, and protected in every country in those regions.[45]

Similarly, the United States protects the right to protest in its Constitution. While there is no specific mention of "protest," the U.S. Constitution's First Amendment provides "Congress shall make no law . . . abridging the freedom of speech . . . or the right of people peaceably to assemble, and to petition the Government for a redress of grievances."[46] Therefore, the right to protest is found in the manifestation of the rights to speech, assembly, and petition. In fact, the U.S. Supreme Court recognizes "the right to peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental. . . . [O]ne that cannot be denied without violating those fundamental principles which lie at the base of all civil and political institutions."[47]

Recognizing the importance of protesting, many institutions seek to keep governments accountable for protecting protest rights. Outside the U.S., nongovernmental agencies such as Human Rights Watch and Amnesty International document and report instances where the right has been abridged in order to put pressure on individual governments.[48] Domestically, groups like the American Civil Liberties Union will take a similar approach, but will also take further action in providing public

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[42] *Id.*

[43] *Id.*

[44] *OHCHR and the Right of Peaceful Assembly*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, https://www.ohchr.org/en/peaceful-assembly.

[45] *See, e.g.*, European Convention on Human Rights, arts. 9–11, Sept. 4, 1950, 213 U.N.T.S. 222.

[46] U.S. Const. amend. I.

[47] Jonge v. State of Oregon, 299 U.S. 353, 364 (1937).

[48] *E.g.*, *USA: Rights Expert Decries Wave of Anti-Protest Laws 'Spreading Through the Country,'* UN NEWS (May 5, 2021), https://news.un.org/en/story/2021/05/1091322; *Protect the Protest*, AMNESTY INT'L, https://www.amnesty.org/en/what-we-do/freedom-of-expression/protest/; *The Enduring Power of Protest*, HUM. RTS. WATCH, https://www.hrw.org/news/2019/12/09/enduring-power-protest.

information about protest rights, as well as filing lawsuits on behalf of people who have had their rights violated.[49]

In response to those lawsuits, courts consistently protect this right in the face of violations or unlawful restrictions. Specifically, the judicial system found First Amendment freedoms to be "delicate and vulnerable, as well as supremely precious in our society."[50] In a case concerning a statute that *could* abridge First Amendment expression, the Court held that even the threat of sanction was improper "[b]ecause First Amendment freedoms need breathing space to survive."[51] Governments, therefore, may only regulate with "narrow specificity."[52]

This applies to protests' speech and conduct. While protests are not unconditionally protected, any restrictions on how its expression must be content-neutral, fairly administered, and be narrowly tailored to achieve a governmental interest. For instance, the First Amendment does not protect speech that is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[53] This is different from speech made in the heat of the moment, because it is not a "serious" expression of an intent.[54] Further, mere advocacy of lawbreaking or violence remains protected speech as long as it is not intended to, and unlikely to provoke, immediate unlawful action.[55]

Similarly, expressive conduct, also referred to as symbolic speech, have similar protections. While different that verbal speech, symbolic speech is sufficiently imbued with elements of communication that qualifies to receive First Amendment protection.[56] Non-expressive conduct, however, does not receive First Amendment protection because it is not sufficiently imbued with elements of communication that would convey a message.[57]

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[49] *Know Your Rights*, ACLU, https://www.aclu.org/know-your-rights/protesters-rights; *ACLU of Hawaii Filed Federal Lawsuit on Behalf of Peaceful Protesters*, ACLU (Aug. 8, 2006), https://www.aclu.org/press-releases/aclu-hawaii-files-federal-lawsuit-behalf-peaceful-protesters.

[50] NAACP v. Button, 371 U.S. 415, 433 (1963).

[51] NAACP v. Button, 371 U.S. 415, 433 (1963). Similarly, true threats are also not protected. True threats are "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." Virginia v. Black, 538 U.S. 343 (2003). The speaker "need not actually intend to carry out the threat." *Id.*

[52] NAACP v. Button, 371 U.S. 415, 433 (1963), citing Cantwell v. Connecticut, 310 U.S. 311 (1940).

[53] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

[54] *See* Watts v. United States, 394 U.S. 705 (1969) (holding that political hyperbole is not a true threat).

[55] *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

[56] For instance, the U.S. Supreme Court has found First Amendment protection for wearing an armband at school to protest a war as well as upholding the ability to burn the U.S. flag. Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503 (1969); Texas v. Johnson 491 U.S. 397 (1989). Interestingly, the Supreme Court upheld, however, a governmental prohibition against burning draft cards stating it was justified to maintain an efficient and effective military draft system. United States v. O'Brien, 391 U.S. 367 (1968).

[57] For instance, engaging in property damage, while it could be part of an otherwise justified protest, does not convey a message that can be understood by the listeners. Wisconsin v. Mitchell, 508 U.S. 476 (1993) (holding physical assault of another person is not expressive

Governments *may*, however, place limitations based on the manner in which the speech is made.[58] In *Cox v. New Hampshire*, the U.S. Supreme Court upheld the convictions for parading without a permit because permits were a valid time, place, and manner restriction.[59] There, the Court stressed that the regulations were set to create order and safety for the community, rather than restrict the protest's content.[60] Additionally, the regulation had no opportunity to wield undue or arbitrary power, nor was there evidence that the statute had been administered unfairly.[61] Thus, the Court found the regulation's limited, content-neutral scope did not infringe on constitutional rights.

Similarly, in *Heffron v. International Society for Krishna Consciousness*, the Court upheld a state's prohibition against selling or distributing written material at a state fair except from designated, fixed-location booths.[62] The Society for Krishna Consciousness challenged the regulations, arguing it violated their First Amendment rights because Krishna religious doctrines commanded its members to go out into public spaces.[63] Still, the Court upheld the regulation, ruling that since the regulations applied equally, didn't restrict based on content, and the state had an important interest in protecting the safety of the fair's patrons, it was a valid time, place, and manner restriction.[64]

In *Ward v. Rock Against Racism*, the Court held that the government does not need to choose the least restrictive alternative[65] in imposing time, place, and manner restrictions.[66] After receiving high-decibel complaints, New York City mandated the use of city-provided sound systems and technicians for all concerts in Central Park.[67] Rock groups challenged this mandate, claiming the inability to use their own sound equipment and technicians in a public forum interfered with their First Amendment rights.[68] Again, the Court upheld the mandate, giving broad deference to the government's interest in protecting citizens from unwelcome and excessive noise.[69] As long as "the means chosen are not substantially broader than necessary to achieve the government's

conduct). *See also* Spence v. Washington, 418 U.S. 405, 409–11 (1974) (protecting protects expressive conduct so long as that conduct conveys a particularized message and is likely to be understood in the surrounding circumstances).

[58] Such restrictions come in many forms, such as imposing limits on noise levels, permit requirements, capping the number of protesters who can occupy an area, barring early-morning or late-evening demonstrations, and even restricting the size or placement of signs on government property. Kevin Francis O'Neill, *Time, Place and Manner Restrictions*, FIRST AMEND. ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/article/1023/time-place-and-manner-restrictions; *see, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781 (1989).

[59] Cox v. New Hampshire, 312 U.S. 569, 576 (1941).

[60] *Id.* at 574.

[61] *Id.* at 577.

[62] Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640 (1981).

[63] *Id.* at 645.

[64] *Id.* at 649–50.

[65] Meaning, the option for government response that would restrict the constitutional rights the least.

[66] Ward v. Rock Against Racism, 491 U.S. 781 (1989).

[67] *Id.* at 787.

[68] *Id.* at 781.

[69] *Id.* at 782–83.

interest," the regulation is a valid time, place, and manner restriction.[70] The government's regulation need not be the least-speech-restrictive.[71]

But again, the restrictions must be content neutral. Even when an ordinance limiting speech is on its face neutral, cases have found government action unconstitutional if, as applied, an ordinance led to an unequal freedom of expression.[72] In *Police Department of the City of Chicago v. Mosely*, the Court unanimously held that carving out exemptions for a picketing prohibition was unconstitutional because it violated the equal protection clause.[73] Chicago's ordinance prohibited picketing within 150 feet of a school during school hours, *except* for peaceful labor picketing.[74] Mosely, who had been picketing near a high school protesting "black discrimination," challenged the city's ordinance on First Amendment and equal protection grounds.[75] The Court agreed with Mosely, ruling the regulation exemption limited other speech based on its content.[76]

Furthermore, protesting rights are not checked at the door[77] simply because there is a "desire to avoid the discomfort and unpleasantness that accompany an unpopular viewpoint."[78] Governments cannot "seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views."[79] As the Court has expressed, in public debate, insulting and even outrageous speech *must* be tolerated, in order to provide adequate breathing space to the freedoms protected by the First Amendment.[80] "Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'"[81]

Arguably, this principle can go as far as protecting protesters who cause emotional harm to listeners. In *Snyder v. Phelps*, the Court held that the First Amendment shielded protesters who picketed signs—such as "Thank God for dead soldiers"—outside a deceased Marine's funeral.[82] Even though some of the signs appeared to target only the deceased's family, the "overall thrust and dominant theme" of the speech related to broader public issues making it public speech protected under the First

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[70] *Id.* at 800.

[71] *Id.* at 797; *see also* Williams-Yulee v. Florida Bar, 575 U.S. 433 (2015).

[72] Police Department of the City of Chicago v. Mosely, 408 U.S. 92, 100 (1972.)

[73] *Id.* at 94–95.

[74] *Id.* at 94.

[75] *Id.* at 93.

[76] *Id.* at 98.

[77] *See* Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.")

[78] *Id.* at 509 (1969)

[79] Cohen v. California, 403 U.S. 15, 26 (1971)

[80] Snyder v. Phelps, 562 U.S. 443, 458 (2011) (citing Boos v. Barry, 485 U.S. 312, 322 (1988)) ("Such a risk is unacceptable; 'in public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment.")

[81] Matal v. Tam, 582 U.S. 218, 246 (2017), citing United States v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).

[82] Snyder v. Phelps, 562 U.S. 443, 458 (2011).

Amendment.[83] Furthermore, while speech may have been upsetting, the Court was unable to find any evidence that it interfered with the funeral.[84] Thus, even offensive, hurtful speech is protected under the First Amendment.[85]

In sum, protests are largely protected, even if they are controversial. While some limitations exist, government restrictions cannot be used to censor certain messages or make First Amendment rights a freedom for a particular demographic or socioeconomic status.

C. Overwhelmingly Peaceful Protests

When discussing restricting protests, a common argument is that non-peaceful protests are not protected. Protests that cease to be peaceful fall outside the bounds of constitutional protection. In those instances, courts have reaffirmed those protests are illegal because they fall out of permissible First Amendment protections and could be subject to government action that restrict speech such as arresting people at those protests. Still, those instances remain the exception, not the rule.[86]

Traditionally, protest movements avoided liability if the demonstrations were largely peaceful, even if some acts and threats of violence occurred. In *NAACP v. Claiborne Hardware*, the NAACP launched a boycott to promote equality and racial justice by nonviolent picketing, but some acts and threats of violence also occurred.[87] Merchants sued the NAACP for damages to their businesses as a result of the boycott, particularly after some unintended violence occurred.[88] The Court held that the NAACP was not liable for the damages on the grounds that when acts of violence are committed in conjunction with lawful expression, regulations can impose damages *only* upon those who are guilty of the wrongful conduct.[89]

This principle, however, may be on its way out. In *Doe v. Mckesson*, the Fifth Circuit recently held that a protest leader can be sued, and therefore be found liable, for violence caused by other people at the protest.[90] "Mckesson directed the protest at all times, and when demonstrators looted a grocery store for water bottles to throw at the assembled police officers, he did nothing to try to discourage this."[91] Therefore, the Fifth Circuit held that McKesson "knew, or should have known, that violence would likely ensue," meaning Mckesson could be sued

[83] *Id.* at 454.
[84] *Id.* at 460.
[85] *Id.* at 461.
[86] *See infra* note 96.
[87] NAACP v. Claiborne Hardware Co., 458 U.S. 886, 904–06 (1982).
[88] *Id.* at 930 (noting that while some isolated incidents of violence occurred, the record does not support that any NAACP member "had actual or apparent authority to commit acts of violence or to threaten violent conduct.").
[89] *Id.* at 924–25.
[90] Doe v. Mckesson, 71 F.4th 278 (5th Cir. 2023).
[91] *Id.* at 281–82.

for the actions of an unidentified protester who struck and injured a police officer.[92]

While media coverage tends to amplify more violent protests and the damage they cause,[93] most protests remain peaceful. For example, in a study researching the Black Lives Matter Movement, the Armed Conflict Location & Event Data Project found the protests "remained overwhelmingly non-violent."[94] "Approximately 94% of all pro-BLM demonstrations have been peaceful."[95] Of the 6% that involved reports of violence, it "is not clear who instigated the violent or destructive activity."[96] While some of those violent instances involved the demonstrators, other events were a result of escalation from aggressive government action and violent intervention from counter-protesters.[97] Other research has reached similar conclusions, finding the overwhelming majority of protests are non-violent.[98]

This is not to discount the effect that non-peaceful protests have had on society. While the overall ethos of the Civil Rights Movement was peaceful protesting, the catalyst of tangible change was arguably the violence that brought it worldwide attention such as the riots that occurred after the assassination of Dr. King.[99] Because non-peaceful protests often make headlines, they are better able to reach wider audiences that can influence policy and effect change. Even though the immediate public reaction to non-peaceful protests may be negative,[100] studies demonstrate

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[92] *Id.* at 281.

[93] *E.g.*, *Capital Insurrection Updates*, NPR, https://www.npr.org/sections/insurrection-at-the-capitol; Anjuli Sastry Krbechek & Karen Grigsby Bates, *When LA Erupted in Anger: A Look Back at the Rodney King Riots*, NPR (Apr. 26, 2017), https://www.npr.org/2017/04/26/524744989/when-la-erupted-in-anger-a-look-back-at-the-rodney-king-riots.

[94] *A Year of Racial Justice Protests: Key Trends in Demonstrations Supporting the BLM Movement*, THE ARMED CONFLICT LOCATION & EVENT DATA PROJECT 1 (May 2023), https://acleddata.com/acleddatanew/wp-content/uploads/2021/05/ACLED_Report_A-Year-of-Racial-Justice-Protests_May2021.pdf [hereinafter ACLED Report].

[95] *Id.*

[96] *Id.*

[97] *Id.* at 6.

[98] *See id; Global Protest Tracker*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Aug. 2, 2023), https://carnegieendowment.org/publications/interactive/protest-tracker; Catherine Caruso & Count Love, *Count Love Project Reveals Protest Patterns*, THE BRINK (Nov. 15, 2017), https://www.bu.edu/articles/2017/counting-american-protests/.

[99] Emily Arntsen, *Are Peaceful Protests More Effective than Violent Ones?*, NORTHEASTERN GLOB. NEWS (June 10, 2020), https://news.northeastern.edu/2020/06/10/are-peaceful-protests-more-effective-than-violent-ones/.

[100] Melissa De Witte, *Violence by Protesters Can Lead the Public to Support them Less, Stanford Sociologist Says*, STANFORD NEWS (Oct. 12, 2018), https://news.stanford.edu/2018/10/12/how-violent-protest-can-backfire/.

public attitudes to even violent protests look better in hindsight,[101] resulting in a net positive effect.[102]

D. Recent Legislation Attempting to Curtail Lawful Protests by Raising Costs

Recent legislation attempts to expand regulation of otherwise lawful, peaceful activity. These regulations dissuade protesters by making protest rights expensive to express.

"Individuals and groups involved in organizing, participating in, and supporting protest actions, including some of the racial justice and police brutality demonstrations, are subject to a range of civil costs and liabilities."[103] These costs—increasing fines and penalties, expanding definitions of what is considered a "riot," and expanding liability for protesters while decreasing liability for harm against protesters—largely fly under the radar.[104] Administratively, permit fees, policing fees, cleanup costs, and liability insurance requirements can easily amount to "[several] thousands of dollars even for mid-size events."[105]

Some bills create large penalties for protest-related offenses. For instance, a 2020 law enacted in Tennessee makes obstructing a sidewalk or street—where most protests occur—an offense punishable by a year in jail.[106] Others, criminalize attributes that would make a protest difficult to express. For instance, under a new Louisiana law, demonstrators who trespass near a pipeline construction site could face five years in prison.[107] This law came into effect a mere months after a lawsuit was filed to block Louisiana's Bayou Bridge Pipeline.[108] Thus, this law would make it

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[101] *Going Too Far: The American Public's Attitudes Toward Protest Movements*, ROPER CTR. (Oct. 22, 2014), https://ropercenter.cornell.edu/going-too-far-american-publics-attitudes-toward-protest-movements (noting complicated feelings toward protests. For instance, polls suggest that Americans are skeptical about protests, but are also quite supportive of protests overseas. Furthermore, Americans viewed previously unpopular protest movements more favorably as time passed.).

[102] *See* Soumyajit Mazumder, *The Persistent Effect of U.S. Civil Rights Protests on Political Attitudes*, 62 AM. J. OF POL. SCI. 922, 925 (Oct. 2018) (suggesting that violent protests may catalyze institutional change even where they have a negative impact on public opinion); *but see* Bret Simpson et al., *Does Violent Protest Backfire? Testing a Theory of Public Reactions to Activist Violence*, 4 SOCIUS 1, 12 (2018) (suggesting that violence at protests by white nationalist protesters has a negligible effect on public opinion because the public already views them as violent, while violence by antiracist *counter-protesters* against white nationalists has a negative effect on public opinion).

[103] Timothy Zick, *The Costs of Dissent: Protest and Civil Liabilities*, 89 GEO. WASH. L. REV. 233, 235–36 (2021).

[104] *See* ACLED Report, *supra* note 96 at 18.

[105] Zick, *supra* note 105 at 236.

[106] H.B. 8005, 111th Gen. Assemb., 2d Extraordinary Sess. (Tenn. 2020).

[107] H.B. 727, 2018 Leg., Reg. Sess. (La. 2018) (amending the criminal law relating to offenses against critical infrastructure to explicitly include "pipelines").

[108] Mark Schleifstein, *Environmental Groups sue Corps to Block Bayou Bridge Pipeline Permit*, NOLA.COM (Jan. 11, 2018), https://www.nola.com/news/environment/environmental-groups-sue-corps-to-block-bayou-bridge-pipeline-permit/article_dbb295f4-afdb-5390-9097-cb627ca3fca3.html. Mere months later the law went into effect. La. Stat. Ann. § 14:61.1.

impossible to legally engage in First Amendment expression if the protest concerns pipelines.[109]

Legislatures have also expanded definitions of what constitutes a "riot" to capture peaceful protesters who do not engage in violence themselves but are simply perceived to "threaten" violence.[110] For instance, under Florida law, no actual property destruction needs to occur for those in a crowd to be guilty of "rioting."[111] Simply, the "imminent danger" of damage is sufficient, giving broad discretion to police and prosecutors to determine what that means.[112] In Ohio, legislators attempted to further expand the definition of a riot to include "recklessly caus[ing] inconvenience [or] annoyance," not one that ends in violence.[113] While this bill did not ultimately pass, similar bills have also been introduced,[114] indicating that legislators are entertaining greater hostility[115] towards protesters.

Other novel claims are currently making their way through the courts that, if accepted, would further curb protest rights. For example, the organizers of the "Unite the Right" protests in Charlottesville, Virginia are being sued under a "conspiracy to protest" theory. Under this theory, it would be an actionable civil wrong for anyone to organize a lawful protest at which violent activity later occurred.[116] Many bills are attempting to use this theory, expanding liability for groups and organizers who may not have even attended the protest in question.[117] This includes in the bail context. For example, Georgia's Senate passed a bill outlawing bail funds for protest groups.[118] This bill would require any charitable individual or group to register as, and meet the requirements of, a bail bond company.[119] Not only does law enforcement have the ability to deny who registers as a bondsman, but the bill also would limit the number of people an individual or group could bail out every year.[120] While the bill has not yet become law,

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[109] Perhaps unsurprisingly, this law was a subject of a lawsuit arguing it is an unconstitutional restriction of First Amendment rights. *See* White Hat v. Landry, No. 6:20-CV-00983, 2023 WL 3854717 at *6 (W.D. La. June 5, 2023).

[110] *E.g.*, C.S./H.B. 1, 2021 Leg. (Fla. 2021).

[111] *Id.*

[112] *Id.*

[113] H.B. 784, 133rd Gen. Assemb., Reg. Sess. (Ohio 2020). This would necessarily include most protests that divert traffic routes, increase noise levels, and dominate news stories.

[114] S.B. 33, 133rd Gen. Assemb., Reg. Sess. (Ohio 2021) (increasing and enhancing penalties for criminal violations commonly connected to protesting).

[115] Some reports indicate that these laws would encourage people to attend protests armed to harm protesters. *See* H.B. 784, *supra* note 115 (allowing people "escaping a riot" to use force, including deadly force).

[116] *See* Sines v. Kessler, 324 F. Supp. 3d 765, 773 (W.D. Va. 2018).

[117] *See U.S. Protest Law Tracker*, INT'L CTR. FOR NOT-FOR-PROFIT L., https://www.icnl.org/usprotestlawtracker/.

[118] S.B. 63, 2023 Leg., Reg. Sess. (Ga. 2024).

[119] *Id.*

[120] *Id.*

similar arrests have already occurred in Georgia after activists bailed out protesters.[121]

To be clear, while this article discusses the consequences connected with cash bail, damage awards resulting from civil causes of actions also represent a particularly concerning threat to protests.[122] In addition to incurring liability under a variety of torts claims including nuisance, trespass, defamation, and interference with business relations, organizers can also be held liable for harms simply because a particular action is "foreseeable."[123] Similar to the tactic in *Mckesson*,[124] this "negligent protest" theory would make protest organizers liable for *all* foreseeable damages that occurred during the protest, including those caused by unplanned or unintended actions as well as unlawful acts of counter-protesters and agitators not associated with the organizer's protest.[125]

The consequences of protesting may extend beyond the act of protesting itself. School children may face discipline for off-campus protest activities,[126] and university students may face disciplinary measures, including expulsion, for engaging in "disruptive" protests on or off campus.[127] Public employees may face termination or other adverse consequences for participating in public protests and other protest activities.[128]

Furthermore, these bills have also created protections for individuals who harm protesters. In 2020 alone, there were over one hundred instances of protesters being hit by vehicles.[129] These laws, however, shield those the drivers from civil liability if the protester was seen to "unlawfully" block a road during a protest, so long as the driver was exercising "due care."[130]

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[121] Kate Brumback, *Bond Granted for 3 Activists Whose Fund Bailed Out People Protesting Atlanta 'Cop City' Project*, AP NEWS (June 2, 2023), https://apnews.com/article/police-training-center-arrests-cop-city-1468a138ed4b17ed394e4b1e4fe202fe ("Stop Cop City" activists were arrested on charges of "charities fraud and money laundering" for leading the bail fund).

[122] *See generally* Zick, *supra* note 105 (outlining the chilling effects on speech associated with civil penalties and fines incurred by protesters).

[123] For an in-depth discussion, *see* Zick *supra* note 105; *see also* Doe v. Mckesson, 71 F.4th 278 (5th Cir. 2023).

[124] *See* Doe v. Mckesson, 71 F.4th 278, 284 (5th Cir. 2023) (concluding that the First Amendment does not prohibit holding protesters liable for organizing protests in a manner that makes violent police response "reasonably foreseeable").

[125] Zick, *supra* note 105 at 237–38.

[126] Morse v. Frederick, 551 U.S. 393 (2007).

[127] Gregory P. Magarian, *When Audiences Object: Free Speech and Campus Speaker Protests*, 90 U. COLO. L. REV. 551 (2019).

[128] *See* Anne Barnard, *Teachers in New York City Barred from Attending Climate Protest*, N.Y. TIMES (Sept. 19, 2019), https://www.nytimes.com/2019/09/19/nyregion/youth-climate-strike-nyc.html.

[129] Grace Hauck, *Cars have hit Demonstrators 104 times Since George Floyd Protests Began*, USA TODAY (July 9, 2020), https://www.usatoday.com/story/news/nation/2020/07/08/vehicle-ramming-attacks-66-us-since-may-27/5397700002/.

[130] *E.g.*, S.F. 342, 89th Gen. Assemb. (Iowa 2021); *see also Anti-Protest Laws in the United States*, FIRST AMEND. WATCH, https://firstamendmentwatch.org/deep-dive/states-rush-to-pass-anti-protestor-laws/.

Scholars have noted that, on their own, increasing "costs and liabilities on First Amendment protest rights" amount to a chilling effect on those rights.[131] "Even if protesters plan to engage in only lawful conduct, they may still fear being caught up in legal action that can be costly to defend against and which could result in uncertain legal outcomes."[132] expanding this body of research, the following sections demonstrate bail is an additional, significant consequence for lawful protesting, serving as yet another disincentive to lawful protesting.[133]

II. PART II – CASH BAIL'S DISPARATE IMPACT ON MARGINALIZED COMMUNITIES

Generally, cash bail—also known as bond—is the process in which arrested people must pay a certain monetary amount in exchange for pretrial release. Unfortunately, while a large percentage of arrested people go through this process, the impact of the cash bail system is not felt evenly and disparately affects poorer communities and people of color. For those unable to pay bail, they must remain in jail until their trial, enduring consequences associated with their employment, housing, and even parental rights. Because these consequences can dramatically alter a person's life, bail is responsible for eliciting guilty pleas from those who otherwise would not plead. Unfortunately, despite calls for reform, bail continues to dominate pretrial systems.

A. What is Cash Bail and How Does it Work?

Cash bail is a collateral guarantee that a defendant will return for their future hearings and trial.[134] The defendant pays a sum of money to be released from jail that is to be returned after they make all necessary court appearances. Otherwise, the government will keep their bail amount *and* incarcerate defendants pretrial.[135] In theory, this process should be quick, taking about twenty-four to forty-eight hours between arrest to potential release on bail.[136]

1. How and Why is Bail Set?

Bail is set for two reasons: (1) the court is concerned the defendant poses a significant risk to the community; or (2) the court is concerned that the defendant will not appear for their trial. Therefore, the primary concerns when setting bail are whether the bail amount will ensure public

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[131] Zick, *supra* note 105 at 240.

[132] Nick Robinson & Elly Page, *Protecting Dissent: The Freedom of Peaceful Assembly, Civil Disobedience, and Partial First Amendment Protections*, 107 CORNELL L. REV. 229, 252 (2022).

[133] Sample footnote text

[134] *See, e.g.*, Adureh Onyekwere, *How Cash Bail Works*, BRENNAN CTR. FOR JUST. (Feb. 24, 2021), https://www.brennancenter.org/our-work/research-reports/how-cash-bail-works.

[135] *Id.*

[136] *See, e.g.*, N.J. Rev. Stat. § 2C:25-26 (2023) ("Bail shall be set as soon as is feasible, but in all cases within 24 hours of arrest."); Walker v. City of Calhoun, 901 F.3d 1245, 1252–53, 1262, 1266 n.12 (11th Cir. 2018) (discussing a standing order that guarantees bail would be set within forty-eight hours); *see also Protesters: Know Your Rights*, ACLU, https://www.acluohio.org/en/protesters-know-your-rights#KeepInMind ("The whole process, from arrest to release on bail, should take about 24–36 hours.").

safety and is reasonably calculated to ensure the defendant's appearance at trial.[137]

Allegedly, these justifications relate to two main benefits. First, pretrial detention reduces the likelihood that defendants will fail to make court appearances, thereby preventing wasted judicial resources.[138] Additionally, pretrial detention reduces the likelihood of new criminal legal system involvement, "prevent[ing] detained individuals from participating in crime while they are detained."[139] Accordingly, pretrial detention can act as a preventative measure for high-risk defendants, particularly in terms of flight and recidivism.[140]

Cash-bail-setting practices are not a uniform practice. The amount that a person must pay depends on their situation, but "the bail setting process can often be hard to comprehend."[141] Technically, judges have broad discretion to raise, lower, deny, or even waive bail.[142] Accordingly, that discretion will look at the severity of the crime,[143] whether the defendant has employment or personal connections in the area,[144] criminal history and past court appearances,[145] and the perceived impact the defendant has on public safety.[146]

Conveniently, however, bail is sometimes set using "bail schedules." These schedules impose a standard bail amount that correlates to a particular offense. For example, Ohio's Warren County follows a "uniform bond schedule," delineating the particular fine that the court imposes for particular crimes.[147] Under this schedule, an M-1 misdemeanor carries with it a $12,500 bond.[148] Importantly, while this schedule follows some of the underlying considerations such as more serious crimes receive higher bail amounts, the schedule does not mention the factors to be considered in

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[137] John-Michael Seibler, *As Bail Reform Progresses, Yes, Bail is Constitutional*, FEDERALIST SOC'Y (Nov. 22, 2017), https://fedsoc.org/commentary/fedsoc-blog/as-bail-reform-progresses-yes-bail-is-constitutional.

[138] Sandra Susan Smith, *Pretrial Detention, Pretrial Release, & Public Safety*, ARNOLD VENTURES (July 2022), at 4.

[139] *Id.*

[140] *Id.* at 5.

[141] *E.g.*, *How Judges Calculate and Set Bail*, ALL CITY BAIL BONDS, https://www.allcitybailbonds.com/2017/12/judges-calculate-set-bail/.

[142] Nicholas P. Johnson, *Cash Rules Everything Around the Money Bail System: The Effect of Cash-only Bail on Indigent Defendants in America's Money Bail System*, 36 BUFF. PUB. INT. L.J. 29, 31 (2019).

[143] Minor crimes usually have lower bail amounts compared to severe crimes. *Id.* at 51.

[144] *Id.* at 52–53.

[145] Judges will often raise the amount for those who have prior convictions or missed appearances *Id.*

[146] If the court believes the defendant poses a risk to public safety, they are likely to increase or deny bail. *Id.* at 48.

[147] *Warren County Court Bond Schedule*, WARREN COUNTY COURT (April 4, 2023), https://www.co.warren.oh.us/countycourt/forms/BondSchedule.pdf.

[148] *Id.*

setting bail, nor that there is the discretion to raise, lower, or waive the bail amount listed on the schedule.[149]

In practice, judges use both bail schedules and their own discretion in setting bail. The bail schedules would allow defendants to post bail with the police before they go for their first court appearance with the judge.[150] Then, at the hearing, the judge has the discretion to alter the amount, considering the facts to raise, lower, deny, or waive bail.[151] Thus, the "bail schedule pertains to release of alleged offenders prior to First Appearance, when a judge . . . may increase or decrease/eliminate the amount of bail."[152]

Modern technology, however, can significantly influence on the way bail is set.[153] In some areas of the country, a computer program can quickly determine what an "appropriate" bail amount for a defendant would be, incorporating the defendant's criminal history, age, type or crime, and assessment of a flight risk.[154] Unfortunately, research finds these algorithms may have racist implications of their own.[155]

Thus, bail amounts can vary from jurisdiction to jurisdiction, meaning there is no true uniform bail practice. In fact, an individual's ability to pay their bail amount can mean the difference between getting arrested in a particular county or being assigned to a particular judge.[156] A 2018 report on the bail-setting practices in New York City demonstrated this predicament.[157] Analyzing felony arraignments in 2017 handled by the Legal Aid Society in Kings, New York, Bronx, Queens, and Richmond Counties, the report described the frequency in which each judge either imposed bail, held without bail, or released without bail.[158] The results demonstrated that each county, as well as each judge in each jurisdiction, imposed bail at a different rate, even for the same crime.[159] When bail was imposed, the amount also differed.[160] Finally, the report demonstrated that

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[149] *See id.*

[150] *Bail Schedules*, JUSTIA, https://www.justia.com/criminal/bail-bonds/bail-schedules/.

[151] *Id.*

[152] *See, e.g.*, *Bail Schedule – Flager, Putnam, Nt. Johns & Volusia Counties*, SEVENTH JUDICIAL CIR. OF FLORIDA, https://circuit7.org/Administrative%20Orders/criminal/Bail_Schedule.pdf.

[153] *See generally* Ric Simmons, *Big Data Machine Judges, and the Legitimacy of the Criminal Justice System*, 52 U.C. DAVIS L. REV 1067 (2018) (discussing the increasing use of predictive algorithms to assist in bail hearings); Samuel R. Wiseman, *Pretrial Detention and the Right to be Monitored*, 123 YALE L.J. 1344 (2014) (suggesting electronic monitoring as an alternative to pretrial detention and the bail system).

[154] Simmons, *supra* note 154 at 1074.

[155] *See* Ember McCoy, *The Risks of Pretrial Risk Assessment Tools: Policy Considerations for Michigan*, FORD SCH. OF PUB. POL'Y (May 2023) (finding "substantial evidence that pretrial risk assessment tools replicate the racial and socioeconomic disparities that bail reform seeks to address.").

[156] Anna Maria Barry-Jester, *You've Been Arrested. Will You Get Bail? Can You Pay It? It May All Depend on Your Judge*, FIVETHIRTYEIGHT (June 19, 2018), https://fivethirtyeight.com/features/youve-been-arrested-will-you-get-bail-can-you-pay-it-it-may-all-depend-on-your-judge/.

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] *Id.*

New York City is not unique, illustrating similar results from judges in Buffalo, New York, hinting that the same results could be found around the country.[161] While judicial discretion is sometimes necessary, the expansive nature of discretion when setting bail leads to an inequitable practice in what should be a uniform system

2. Bail for Arrested Protesters

Arrested protesters are not exempt from this system—they are also subject to bail as a condition of pretrial release. Protests are uniquely fraught with wrongful arrests and dropped charges, but arrests of protesters largely continue undeterred.

While there are many reasons as to why a protester may be arrested, certain charges appear more commonly than others: unlawful assembly, trespassing, obstruction of pedestrian or vehicular traffic, and charges related to rioting.[162] Largely, protesters do not face felony charges.[163] Those that do, however, involve protests around race and police brutality.[164] While prosecutors often drop or reduce those felony charges,[165] protesters were still arrested for serious charges that have excessive bail amounts.[166]

Research shows that protesters of color can expect increased police interactions including being arrested at disparate rates. In a study discussing the demographics of New York City arrestees during the 2020 George Floyd protests, Black protesters were arrested at a staggeringly "lopsided" rate.[167] Analyzing demographic data from arrested protesters found "about half of the arrestees were identified as white and the other half as Black."[168] Considering that the 2020 George Floyd protests were racially diverse, and accounting for the fact that "Black people do not compose even close to half of the U.S. population," there is a "lopsided racial

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[161] *Id.*

[162] *See, e.g.*, Meryl Kornfield et al., *Swept up by Police*, WASH. POST (Oct. 23, 2020), https://www.washingtonpost.com/graphics/2020/investigations/george-floyd-protesters-arrests/ (reviewing data of over 2,600 people detained in fifteen cities, most of whom were arrested for unlawful conduct such as a curfew violation or resisting police orders).

[163] *See id.* ("The Post's analysis found the overwhelming majority arrested in those 15 cities—2,059 of the 2,652—were accused of nonviolent misdemeanors, most on charges of violating curfew or emergency orders.").

[164] *See Protesting While Black*, *supra* note 14 at 163 (finding protests involving primarily Black people are more likely to be policed); *see also* Jacey Fortin & Allyson Waller, *87 Face Felony Charges After Protesting Breonna Taylor's Death*, N.Y. TIMES (July 17, 2020), https://www.nytimes.com/2020/07/15/us/protesters-arrested-breonna-taylor-kentucky.html.

[165] *E.g.*, Akela Lacy, *Protesters in Multiple States are Facing Felony Charges, Including Terrorism*, THE INTERCEPT (Aug. 27, 2020), https://theintercept.com/2020/08/27/black-lives-matter-protesters-terrorism-felony-charges/. Three days after police arrested eighty-seven activists protesting the death of Breonna Taylor, the district attorney dropped the felony charges, leaving open the possibility of bringing misdemeanor charges in the future.

[166] *See, e.g.*, Natasha Lennard, *How the Government is Turning Protesters into Felons*, ESQUIRE (Apr. 12, 2017), https://www.esquire.com/news-politics/a54391/how-the-government-is-turning-protesters-into-felons/.

[167] Karen J. Pita Loor, *An Argument Against Unbounded Arrest Power: The Expressive Fourth Amendment and Protesting While Black*, 120 MICH. L. REV. 1581, 1606 (June 2022).

[168] *Id.*

breakdown of arrests."[169] Combined with studies that find disparate treatment in policing in general, the study suggest that "protest policing––like traditional policing—disparately harms Black people and that such harms result in Black individuals enjoying an unequal (in)ability to express and practice dissent."[170]

Regrettably, these results mirror studies analyzing protests from earlier decades. In a study analyzing protests from 1960 to 1990, "a greater proportion of African American protest events were met with police presence than were white events."[171] Some years included large disparities. For example, in 1967, "70 percent of African American events had police present at them, while only 42 percent of white events did."[172] Perhaps unsurprisingly, the study also showed that police were more likely to arrest, use force or violence, and make arrest using force or violence against protesters of color, even after "control[ing] for measures of behavioral threat."[173] The researchers' statistical analyses concluded that race did, in fact, affect the probability of various policing strategies being employed above and beyond the threats posed by protester behavior.[174]

Furthermore, even if the charges are eventually dropped, [175] protesters who have bail set against them must still pay that amount to obtain pretrial release. After their arrest, the bail amount will depend on the county's bail practice, the county's bail schedule, the judge assigned to the case, or any combination of the three.[176] Therefore, with protesters of color arrested at higher rates than white protesters,[177] and bail generally imposed on arrested persons, this means cash bail has a larger impact on people of color.[178]

B. Consequences of Inability to Pay Bail Pretrial Detentions

Not everyone who protests can be expected to face the many consequences associated with getting arrested at a protest. Admittedly, for

[169] *Id.*

[170] *Id.* at 1613.

[171] *Protesting While Black*, *supra* note 14 at 162.

[172] *Id.*

[173] *Id.* at 163.

[174] *Id.* at 168.

[175] *See* Tom Perkins, *Most Charges Against George Floyd Protesters Dropped, Analysis Shows*, THE GUARDIAN (Apr. 17, 2021), https://www.theguardian.com/us-news/2021/apr/17/george-floyd-protesters-charges-citations-analysis.

[176] *See infra* Section II(A)(i).

[177] *See Protesting While Black*, *supra* note 14 at 167–68. While the authors also note that this disparity has not been entirely consistent over time, the data does support the phenomena "that once police arrive at an event with African Americans present, they are more likely to make arrests, to use force/violence, and to use force/violence in conjunction with arrests than they are to do nothing, although only the last of these outcomes is significantly more likely."

[178] Libby Doyle & Colette Marcellin, *How Bail Reform Can Protect Protestors and Address System Injustices*, URBAN INST. (June 17, 2020), https://www.urban.org/urban-wire/how-bail-reform-can-protect-protestors-and-address-system-injustices (discussing how bail is "systematically set higher" for people of color over white people with similar charges and criminal histories).

some protesters, the point of their protest is to get arrested;[179] but, for the majority of protesters, this is not the intended goal. While Dr. King and other prominent civil rights leaders were arrested multiple times at various protests, they had access to a support network most people do not.[180] Famously, when Dr. King was arrested in Birmingham, Alabama for protesting in violation of an injunction (eventually leading to the famous Letter from Birmingham Jail) a millionaire, A.G. Gaston, posted his bail.[181]

Arrested protesters face the same challenge to post bail amounts as other pretrial detainees. As the U.S. Commission on Civil Rights reported, "[m]ore than 60% of inmates are detained prior to trial due to an inability to afford posting bail."[182] In other words, most people incarcerated pretrial, including those for protest-related offenses, remain behind bars before their trial simply because they are poor. Admittedly, protest-related arrests are different because the large proportion of those arrests never get arraigned or were dismissed, so pretrial detention is often shorter in duration.[183]

While a few days in jail may not initially seem as a large consequence, pretrial detention "carries enormous consequences for the individual charged and has serious downstream effects throughout the entire justice system."[184] "Data shows that pretrial detention can result in numerous irreparable harms and consequences such as a higher likelihood of being convicted, losing one's job, housing, and parental rights, harsher sentences, higher likelihood of pleading guilty, and increased recidivism."[185] Even if the defendant is ultimately found not guilty or have their charges are dropped, their pretrial detention can damage a person's reputation and relationships in the community.[186] Mugshots, for instance, can permanently harm an individual's image and reputation, even if the person was never charged with a crime.[187]

Pretrial detention also impacts the mental, emotional, and physical health of those incarcerated. Scholarship indicates that pretrial detention is especially harmful, with individuals held in pretrial detention showing higher levels of anxiety, depression, and other mental conditions than even

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[179] *See, e.g.*, *Feb. 6, 1961: "Jail, No Bail" in Rock Hill, South Carolina Sit-Ins*, ZINN EDUC. PROJ., https://www.zinnedproject.org/news/tdih/jail-no-bail/ (discussing how some members of the Student Non-Violent Coordinating Committee used the "Jail, No Bail" tactic to protest segregation).

[180] *See* Clint Smith, *Martin Luther King Jr. Was Bailed Out by a Millionaire*, THE ATLANTIC (Feb. 2018), https://www.theatlantic.com/magazine/archive/2018/02/clint-smith-freedom-aint-free/552506/.

[181] *Id.*

[182] U.S. COMM'N ON C.R., THE CIVIL RIGHTS IMPLICATIONS OF CASH BAIL, at ii (January 2022) [hereinafter USCCR Report].

[183] Loor, *supra* note 168 at 1616.

[184] *The Hidden Costs of Pretrial Detention Revisited*, ARNOLD VENTURES (March 21, 2022), https://craftmediabucket.s3.amazonaws.com/uploads/HiddenCosts.pdf.

[185] USCCR Report, *supra* note 183 at 45.

[186] *Id.*

[187] *Id.* at 46–47.

those held in state prisons.[188] People detained pretrial are six times more likely to die by suicide than people who have been convicted and sentenced.[189] Additionally, because pretrial detention has become the norm, jails are "overcrowded, unhygienic, chaotic, and violent environments."[190] One in thirty people in jail report experiencing sexual assault while incarcerated.[191] Furthermore, pretrial incarceration also disrupts ongoing health coverage and threatens individuals' continuity of care, exacerbating existing health issues.[192] More, pretrial detainees—who have not been convicted—are at higher risks of contracting diseases such as COVID-19, HIV/AIDS, and hepatitis C because they are subjected to this jailhouse environment.[193] Specifically, in 2020 and 2021, when COVID-19 rates were high, people in jails were at a higher risk of transmission than the general public, placing them at a higher risk of negative consequences associated with getting the coronavirus.[194]

Rikers Island may perhaps demonstrate the epitome of the deep-rooted problems troubling pretrial detention. As others have noted, the facilities "have rotting floorboards, malfunctioning heating and cooling systems, sewage backups, leaking roofs, broken showers, and flooded bathrooms," creating a dangerous and inhospitable environment.[195] People incarcerated typically have no privacy and little space to receive social services.[196] Furthermore, people held there "endure physical and mental abuse, a rampant culture of violence, and overly punitive conditions," including correctional officers' use of excessive force on people detained. [197] Here—what others have called "hellhole" and "torture island"—these poor

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[188] Elisa L. Toman, Joshua C. Cochran & John K. Cochran, *Jailhouse Blues? The Adverse Effects of Pretrial Detention for Prison Social Order*, 45 CRIM. JUST. & BEHAVIOR 316, 319 (2018).

[189] Samuel Johnson, Tanisha Pruitt & Piet van Lier, *Bail Reform will Make Ohioans Healthier*, POL'Y MATTERS OHIO (Nov. 2021), https://www.policymattersohio.org/files/research/bailreformfinal.pdf.

[190] David Berry, *The Socioeconomic Impact of Pretrial Detention*, OPEN SOC'Y FOUNDATIONS (2011), at 20. https://www.justiceinitiative.org/uploads/84baf76d-0764-42db-9ddd-0106dbc5c400/socioeconomic-impact-pretrial-detention-02012011.pdf.

[191] *Facts on Money Bail*, C.R. CORPS, https://civilrightscorps.org/wp-content/uploads/2021/10/9i2UrGPoQJeM6uCmG5VZ.pdf.

[192] Natasha Camhi, Dan Mistak & Vikki Wachino, *Medicaid's Evolving Role in Advancing the Health of People Involved in the Justice System*, The COMMONWEALTH FUND (Nov. 18, 2020), https://www.commonwealthfund.org/publications/issue-briefs/2020/nov/medicaid-role-health-people-involved-justice-system. (outlining how policies excluding inmates from Medicaid coverage disrupt care for system-impacted persons); *see also* Kam-Suen et al, *Effects of Continuity of Care on Health Outcomes Among Patients with Diabetes Mellitus and/or Hypertension: A Systematic Review*, 22 BMC FAMILY PRACTICE 145, 155 (2021) (finding "strong associations between high continuity of care and reduced healthcare utilization, mortality rate and complication risk" for patients).

[193] Camhi, Mistak & Wachino, *supra* note 193.

[194] Abigail I. Leibowitz et al., *Association Between Prison Crowding and COVID-19 Incidence Rates in Massachusetts Prisons, April 2020–January 2021*, 181 JAMA INTERNAL MEDICINE 1315, 1320 (2021) (finding both increased transmission and increased mortality rates of COVID-19 among carceral populations).

[195] Michael Jacobson et al., *Beyond the Island: Changing the Culture of New York City Jails*, 45 FORDHAM URB. L.J. 373, 380 (2018).

[196] *Id.* at 381.

[197] *Id.*

conditions have been attributed to an unprecedented number of pretrial detainee deaths.

Further, even when a person can post bail, that burden of doing so is often spread among the larger community network, disrupting economic stability for everyone involved.[198] If a person is unable to post bail, any possibility to pay that amount would then fall on family members, friends, and the individual's community to pool together enough money for pretrial release.[199] This often results in family members also being punished for pretrial incarceration, often themselves enduring long-term costs from trying to release their family member pretrial.[200] This could endanger communities even more, as research shows that economic instability is known to increase the risk of crime and violence.[201]

"A pretrial stretch in jail can unravel the lives of vulnerable defendants in significant ways."[202] The long-term damage that bail inflicts is immense and extends well beyond incarceration.[203] People miss out on personal and work obligations, lose weeks, if not months or years, of income, and are subjected to physical, mental, and emotional abuse during their incarceration.[204] For many who cannot afford their bail, this can also jeopardize housing and separate families.[205] If the person unable to post bail is a caretaker, this leaves someone without a caretaker.[206] If the person unable to post bail has immigration concerns, pretrial detention would place them, and possibly their family, at greater risk of related consequences such as deportation.[207] If the person unable to post bail has custody concerns, pretrial detention would place them at a greater risk of losing familial relationships.

Faced with the prospect of going to jail because they are unable to afford bail, many defendants accept plea deals, leaving a conviction on their record. Across the criminal legal system, bail "acts as a tool of compulsion, forcing people who would not otherwise plead guilty to do so."[208] A 2012 report, based on a decade's worth of criminal statistics, demonstrated how

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[198] Allie Preston, *5 Ways Cash Bail Systems Undermine Community Safety*, CTR. FOR AM. PROGRESS (Nov. 3, 2022), https://www.americanprogress.org/article/5-ways-cash-bail-systems-undermine-community-safety/.

[199] *Id.*

[200] *See, e.g.*, Alex Jornya et al., *Crimsumerism: Combating Consumer Abuses in the Criminal Legal System*, 54 HARV. CIVIL RTS.-CIVIL LIBERTIES L. REV. 107, 108, 125, 151 (2019).

[201] Hannah Love, *Want to Reduce Violence? Invest in Place*, BROOKINGS INST. (Nov. 16, 2021), https://www.brookings.edu/articles/want-to-reduce-violence-invest-in-place/.

[202] Nick Pinto, *The Bail Trap*, N.Y. TIMES (Aug. 16, 2015), https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html.

[203] USCCR Report, *supra* note 183 at 39–40, 46–47, 50, 59.

[204] *Id.* at 46–48.

[205] *Id.* at 46.

[206] *Id.* at 53, 72.

[207] Amairini Sanchez et al., *Punishing Immigrants: The Consequences of Monetary Sanctions in the Crimmigration System*, 8 RSF: THE RUSSELL SAGE FOUND. J. OF THE SOC. SCI. 76, 90–91 (Jan. 2022).

[208] Pinto, *supra* note 203.

bail is used to leverage pleas.[209] In nonfelony cases in which people were not detained pretrial—either because they didn't get bail set or were able to pay it—only half were eventually convicted.[210] On the other hand, when defendants were incarcerated throughout pretrial, conviction rates jumped to 92 percent.[211] For felony cases, even when controlling for all other factors, pretrial detention was the single greatest predictor of conviction, suggesting "that detention itself creates enough pressure to increase guilty pleas" that places a conviction on the defendant's record.[212]

In turn, prosecutors offer defendants plea deals to spend a fraction of the time in jail and "be done with it."[213] For example, at arraignment for a possession of controlled substances case, the prosecutor may offer a plea for thirty days in jail in exchange for a guilty plea.[214] While these plea deals may provide short-term relief, the long-term consequences a person faces if they plead guilty are often not immediately clear. In many cases, there is no telling how long someone might be incarcerated pretrial, as they may remain in jail for years awaiting their trial.[215] Therefore, despite the litany of negative consequences associated with a guilty plea on someone's record, thirty days is much less time than the amount they could spend if they went all the way to trial. This means although they would have a conviction on their record, the plea deal makes it appear that in just a short time they could go back to work, go back to their families, and generally get back to their lives.

This makes people from a lower socioeconomic status stuck between a rock and a hard place. Even if they want to maintain their innocence, some cannot afford the process of proving their innocence. Even when a person claims that they are freely and voluntarily pleading guilty, that is not always the case. "They're making a decision coerced by money. . . . [I]f they had money, they wouldn't be pleading."[216] Unfortunately, when they get out after accepting the plea deal, "they come back to a world that's more difficult than the already difficult situation that they were in before."[217]

The fact that the majority of cases result in plea bargaining[218] could suggest that its use is to ensure expediency of the criminal legal system. Proponents of plea-bargaining claim that it saves the criminal system time

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[209] Mary T. Phillips, A DECADE OF BAIL RESEARCH IN NEW YORK CITY, NEW YORK CITY CRIM. JUST. AGENCY (Aug. 2012), at 21, 112, 115–16, https://www.prisonpolicy.org/scans/DecadeBailResearch12.pdf.

[210] *Id.* at 116.

[211] *Id.*

[212] *Id.* at 116–17.

[213] *See* Pinto, *supra* note 203.

[214] This is the plea deal Tyron Tomlin received. *See id.*

[215] *See, e.g.*, Jennifer Gonnerman, *A Boy Was Accused of Taking a Backpack. The Courts Took the Next Three Years of His Life,* NEW YORKER Sept. 29, 2014), https://www.newyorker.com/magazine/2014/10/06/before-thelaw.

[216] Pinto, *supra* note 203.

[217] *See id.*

[218] Lindsey Devers, *Plea and Charge Bargaining*, BUREAU OF JUST. ASSISTANCE (Jan. 24, 2011).

and expense associated with the lengthy trial process.[219] If people did not accept pleas, the criminal courts would be overwhelmed.[220] Without bail's ability to elicit quick guilty pleas, courts would be under immense strain to fulfill all the procedural rights afforded to defendants. Thus, by encouraging the most vulnerable to plead guilty, bail keeps judges' dockets smaller and the courts operating. A quicker system, however, does not make it a fair system.

C. Disparate Impact of Cash Bail

Regrettably, the inconsistencies with how bail is applied are not simply a matter of certain judges being harsher when setting bail than others. Rather, reports consistently indicate the cash bail system is fraught with inequities, disparately impacting poorer communities and people of color.[221]

Rather than use cash bail, "[m]ost other common law countries criminalize the practice of requiring money in exchange for pretrial liberty."[222] In fact, the United States is *one of only two* nations in the world that use a cash bail system.[223] Specifically, the for-profit commercial bail bond industry collects billions of dollars in profit every year, meaning there are strong incentives to keep this system to protect their bottom line.[224] Even though calls for reform have consistently been brought to governments for decades, the U.S. cash bail system has persisted.

Currently, cash bail is the most common form of pretrial release.[225] At any one time, over 400,000 people in the U.S. are detained pretrial, impacting over a million people every year.[226] Of the sixty percent detained pretrial, over thirty were in jail simply because they are unable to post

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[219] *How Courts Work*, AM. BAR ASS'N (Nov. 28, 2021), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/pleabargaining/.

[220] *But see* Ralph Adam Fine, *Plea Bargaining: An Unnecessary Evil*, 70 MARQ. L. REV. 615, 616 (1987) (claiming that the overburdening argument is a myth). Additionally, Fine argues that the reliance on plea bargaining weakens the ways in which we use criminal law to protect society by failing to reach penological justifications such as deterrence, isolation, and rehabilitation.

[221] Mass Incarceration Report, *supra* note 9; USCCR Report, *supra* note 183 at 33–45; *see generally* Connor Concannon and Chongmin Na, *Examining Racial and Ethnic Disparity in Prosecutor's Bail Requests and Downstream Decision-making*, RACE SOC PROBL. (2023).

[222] *Smart Justice – Ending Cash Bail*, ACLU, https://www.aclupa.org/en/smart-justice-ending-cash-bail [hereinafter Smart Justice].

[223] *See* Alireza Nourani-Dargiri, *Guilty? Or Just Poor? Potential International Human Rights Violations in the U.S. Bail System*, 54 CASE W. RSRV. J. INT'L L. 509, 520 (2022); *Smart Justice supra* note 223.

[224] Allie Preston & Rachael Eisenberg, *Profit Over People: The Commercial Bail Industry Fueling America's Cash Bail Systems*, CTR. FOR AM. PROGRESS (July 6, 2022), https://www.americanprogress.org/article/profit-over-people/.

[225] Allie Preston & Rachael Eisenberg, *Profit Over People: Primer on U.S. Cash Bail Systems*, CTR. FOR AM. PROGRESS (July 6, 2022), https://www.americanprogress.org/article/profit-over-people-primer-on-u-s-cash-bail-systems/ ("Commercial bail is the most common form of pretrial release, accounting for 49 percent of all felony pretrial releases and nearly 80 percent of releases with monetary conditions in 2009, the last time these data were collected at the federal level.").

[226] Mass Incarceration Report, *supra* note 9.

their bail amount[227]—the median of which is $10,000 for felonies.[228] In 2019, an estimated $15 billion in bail bonds were written, the overwhelming majority of which were written by a commercial bondsman.[229] While the exact profit is difficult to calculate, reports estimate these companies collect as much as $2.4 billion in profit each year.[230] These profit interests are likely the driving force in maintaining this system as the most common form of pretrial release.

This unfair mechanism has also increased rates of incarceration. Interestingly, the U.S. government is aware that the cash bail system overly punishes the poor. In 2022, the U.S. Commission on Civil Rights released a report on the U.S. cash bail system, revealing that between 1970 and 2015, there was a "433% increase in the number of individuals who have been detained pretrial."[231] The report highlighted that most pretrial detainees are in jail because they are too poor to post bail, highlighted the negative consequences that occur as a result of pretrial detention,[232] and validated research concluding that the cash bail system is the leading cause of the mass incarceration crisis in the United States.[233]

The U.S. Commission on Civil Rights's report also revealed stark racial and gender disparities in the cash bail system. Specifically, these reports found "Black and Latinx individuals have higher rates of pretrial detention, are more likely to have financial conditions imposed and set at higher amounts, and lower rates of being released on recognizance bonds or other nonfinancial conditions compared to white defendants."[234] While the report notes that jurisdictions handle bail differently, it acknowledges that "[d]ecades of research regarding pretrial release and bail decisions have shown that people of color are treated more harshly during the pretrial release decision-making process,"[235] including bail.[236]

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[227] USCCR Report, *supra* note 183 at 45.

[228] *Pretrial Detention*, PRISON POL'Y INITIATIVE at 50, https://www.prisonpolicy.org/research/pretrial_detention/. National data only exists for felony defendants. While it is true that protesters are not often charged with felonies, and misdemeanor bail is much less than for felonies, individuals have still demonstrated an inability to pay. For instance, previous research from New York City found that even when bail was set at or below $500, the majority of pretrial detainees could not pay it. Phillips, *supra* note 210 at 50 (noting that with the exception of Staten Island, the majority of defendants could not make bail at or below $500).

[229] Allie Preston, *Fact Sheet: Profit Over People: Inside the Commercial Bail Bond Industry Fueling America's Cash Bail Systems*, CTR. FOR AM. PROGRESS (JULY 6, 2022), https://www.americanprogress.org/article/fact-sheet-profit-over-people/.

[230] *Id.*

[231] USCCR Report, *supra* note 183 at ii.

[232] *Id.*

[233] *E.g.*, Mass Incarceration Report, *supra* note 9; *Cash Bail*, ACLU, https://www.aclupa.org/en/issues/criminal-justice-reform/cash-bail ; Allie Preston & Rachael Eisenberg, *Cash Bail Reform is Not a Threat to Public Safety*, CTR. FOR AM. PROGRESS (Sept. 19, 2022), https://www.americanprogress.org/article/cash-bail-reform-is-not-a-threat-to-public-safety/; Udi Ofer, *We Can't End Mass Incarceration Without Ending Money Bail*, ACLU (Dec. 11, 2017), https://www.aclu.org/news/smart-justice/we-cant-end-mass-incarceration-without-ending-money-bail.

[234] USCCR Report, *supra* note 183 at 33.

[235] *Id.* at 35.

[236] *Id.*

D. The Need for Bail Reform

The impact of bail does not occur in a vacuum and is not an academic exercise—it has greatly affected many people. Spending time in jail awaiting your trial is not simply an unfortunate, administrative occurrence—it has a life-altering, often ruining, impact.[237] Fortunately, bail reform has received necessary national attention in the recent years, recognizing the need to address the unfair system currently put in place.

At any time, several thousand people are wrongfully imprisoned simply because they cannot pay their bail fee and wanted to maintain their innocence, not wishing to accept a plea deals to be convicted for a crime that they did not commit. The disparities are worth repeating. Reports show that "there was a 433 percent increase in the number of individuals who have been detained pre-trial between 1970 and 2015, with pretrial detainees representing a larger proportion of the total incarcerated population in that same amount of time."[238] For more than sixty percent of pretrial detainees, approximately half a million people, they are in jail awaiting trial simply because they cannot afford bail.[239] Further, studies show that the average yearly income for people who cannot afford bail is $16,000 for men and $11,000 for women.[240] For context, the 2023 poverty line is $14,580 for an individual.[241] To compound more injustice, this population is overwhelmingly Black.[242]

While there are justifications for bail, including efficiency rationalizations to ensure defendants appear for trial[243] as well as trying to protect the public, the benefits of the system are greatly outweighed by these costs. While this bail system could create quicker processes, it is plagued with inequities and can induce guilty pleas for innocent defendants. Accordingly, courts can find its use to be unconstitutional, due to equal protections concerns because of bail's disparate impact on poorer people and communities of color. For instance, in post-conviction precedent, courts have held that confinement based on wealth is unconstitutional.[244] It would not be a far stretch to expand this ruling to apply to pretrial

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[237] *E.g.*, Gonnerman, *supra* note 216.

[238] USCCR Report, *supra* note 183 at ii.

[239] *Id*.

[240] *Id*. at 74.

[241] *2023 Poverty Guidelines: 48 Contiguous States (All States Except Alaska and Hawaii)*, DEP'T HEALTH & HUMAN SERVS. (2023), https://aspe.hhs.gov/sites/default/files/documents/1c92a9207f3ed5915ca020d58fe77696/detailed-guidelines-2023.pdf. This assumes, however, that the individual does not have dependents and lives alone.

[242] USCCR Report, *supra* note 183 at ii.

[243] As mentioned later, data does not demonstrate that bail creates an additional incentive to show up for trial. *Supervised Release Quarterly Scorecard*, N.Y.C. CRIM. JUST. (March 2019), https://criminaljustice.cityofnewyork.us/wp-content/uploads/2019/06/Scorecard-Jan-to-Mar-2019-TJ06072019-2-pgs.pdf; Onyekwere, *supra* note 135.

[244] Cassidy Heiserman, *Punishing Indigency: Why Cash Bail is Unconstitutional Under the Equal Protection Clause*, DREXEL L. REV. (2020), https://drexel.edu/law/lawreview/blog/overview/2020/September/cash-bail/.

confinement. Additionally, lawsuits have had some measured success in challenging cash bail practices, finding those systems unconstitutional.[245]

Socially, the bail system's benefits are also outweighed by its costs. While proponents in favor of the cash bail system argue that this process benefits society and keeps communities safe,[246] research has indicated the exact opposite. Research has associated cash bail with a six to nine percent increase in recidivism,[247] meaning pretrial incarceration *increases*, rather than decreases, crime.[248] After only 23 hours in pretrial incarceration, any additional time in detention has been "associated with a consistent and statistically significant increase in the likelihood of rearrest."[249] As homelessness is inextricably linked to arrest rates, cash bail also perpetuates cycles of homelessness and later incarceration.[250] For the individual, studies have found that one year of incarceration can result in "an irreparable lifetime wage depression of nine percent," because cash bail disrupts their current employment and creates barriers for future employment.[251]

Economically, the system's costs are also outweighed by its benefit. While a justification for bail is to avoid wasting judicial resources, the system creates more financial burdens than it saves. Rather, bail is part of an incredibly expensive system of pretrial detention, which studies estimate costs the United States at least $13.6 billion each year.[252]

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[245] ODonnell v. Harris County, 251 F.Supp. 3d 1052 (S.D. Tex. 2017); *see also Excessive Bail*, JUSTIA, https://law.justia.com/constitution/us/amendment-08/01-excessive-bail.html.

[246] *See, e.g.*, Dermot Shea, *New York's New Bail Laws Harm Public Safety*, N.Y. TIMES (Jan. 23, 2020), https://www.nytimes.com/2020/01/23/opinion/shea-nypd-bail-reform.html.

[247] Arpit Gupta, Christopher Hansman & Ethan Frenchman, *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 J. LEGAL STUD. 471 (2016); *see also* Don Stemen, *The Prison Paradox: More Incarceration Will Not Make Us Safer*, CRIMI. JUST. & CRIMINOLOGY: FAC. PUBL'NS & OTHER WORKS 2 (Jul. 2017). ("At the individual level, there is also some evidence that incarceration itself is criminogenic, meaning that spending time in jail or prison actually increases a person's risk of engaging in crime in the future. This may be because people learn criminal habits or develop criminal networks while incarcerated, but it may also be because of the collateral consequences that derive from even short periods of incarceration, such as loss of employment, loss of stable housing, or disruption of family ties.").

[248] Allie Preston & Rachael Eisenberg, *Don't Blame Bail Reform for Gun Violence*, CTR. FOR AM. PROGRESS (June 23, 2022), https://www.americanprogress.org/article/dont-blame-bail-reform-for-gun-violence/.

[249] Christopher Lowenkamp, *The Hidden Costs of Pretrial Detention Revisited*, ARNOLD VENTURES (March 21, 2022).

[250] Madeline Bailey, Erica Crew & Madz Reeve, *No Access to Justice: Breaking the Cycle of Homelessness and Jail*, VERA INST. 7–8 (Aug. 2020), https://www.vera.org/downloads/publications/no-access-to-justice.pdf.

[251] Alan Butkovitz, *Economic Impacts of Cash Bail on the City of Philadelphia*, CITY OF PHILADELPHIA PENNSYLVANIA OFFICE OF THE CONTROLLER 7 (Oct. 2017), https://www.prisonpolicy.org/scans/philadelphiacontroller/cashbail.pdf.

[252] Bernadette Rabuy, *Pretrial Detention Costs $13,6 Billion Each Year*, PRISON POL'Y INITIATIVE (Feb. 7, 2017), https://www.prisonpolicy.org/blog/2017/02/07/pretrial_cost/. Some reports have found this number to be even higher, finding the actual cost being close to $22 billion. *Pretrial Detention*, MACARTHUR JUST. CTR., https://www.macarthurjustice.org/issue/ending-the-punishment-of-poverty/pretrial-detention/.

Bail reform can bring meaningful change in these areas. Evidence continues to demonstrate that bail reform policies are not linked to rising crime rates.[253] Instead, studies show that "reducing pretrial detention and eliminating money considerations from decisions about detention have had minimal negative effects on public safety."[254] For example, a 2016 initiative in New York City called the Supervised Release Program demonstrated that releasing defendants pretrial, without imposing bail, "delivered an 88 percent court appearance outcome, comparable to results of a defendant being released on their own recognizance or bail."[255]

Recent changes across the country demonstrate that the country is willing to shift away from a cash bail system.[256] While each state has a varying degree of willingness to reform the bail system, these changes indicate an increasing recognition that cash bail unfairly infringes on constitutional rights. Among these infringements, as the next section will elaborate, should also be regarding how bail exacerbates existing disincentives to express protest rights.

III. PART III – CASH BAIL AND GOVERNMENT ACTION TO CRIMINALIZE OTHERWISE LAWFUL PROTESTS

Cash bail exacerbates the consequences of existing government action that seeks to criminalize otherwise lawful conduct. Protesting is protected, but protesting on "controversial" issues, like racial justice, often receives disparate treatment, involving higher risks of arrest or other interactions with police.[257] Cash bail increases the cost of that arrest, and, in turn, acts as a disincentive to engage in otherwise protected activity.

A. Government's Unconstitutional, Disparate Use of Less Than Lethal Force to Quell Protests

Outside of the recent spate of legislation curtailing the right to protest, governments have increasingly used less than lethal force[258] to quell protests.[259] While these government actions resulted in settlements

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[253] Preston & Eisenberg, *supra* note 235.

[254] Don Stemen & Davis Olson, *Is Bail Reform Causing an Increase in Crime?*, HARRY FRANK GUGGENHEIM FOUND. 20 (Jan. 2023), https://www.hfg.org/wp-content/uploads/2023/01/Bail-Reform-and-Crime.pdf.

[255] *Supervised Release Quarterly Scorecard*, NYC CRIM. JUST. (March 2019), https://criminaljustice.cityofnewyork.us/wp-content/uploads/2019/06/Scorecard-Jan-to-Mar-2019-TJ06072019-2-pgs.pdf; Adureh Onyekwere, *How Cash Bail Works*, BRENNAN CTR. FOR JUST. (Feb. 24, 2021), https://www.brennancenter.org/our-work/research-reports/how-cash-bail-works.

[256] *See* Sandra Susan Smith, *The Current State of Bail Reform in the United States: Results of a Landscape Analysis of Bail Reforms Across All 50 States*, HARV. KENNEDY SCH. 2, 19, 28–30 (Dec. 2021), https://www.hks.harvard.edu/publications/current-state-bail-reform-united-states-results-landscape-analysis-bail-reforms-across; Bill Raftery, *Bail Reform in 2023? 2022 Effects in 3 States May Impact the Courts*, NCSC (Jan. 4, 2023), https://www.ncsc.org/information-and-resources/trending-topics/trending-topics-landing-pg/bail-reform-in-2023-2022-efforts-in-3-states-may-impact-the-courts.

[257] Protesting While Black, *supra* note 14 at 153, 162.

[258] Less than lethal force is forced intended to incapacitate, but not kill. This includes use of batons, chemical sprays, and conducted energy devices. *See The Use-of-Force Continuum*, NAT'L INST. OF JUST. (Aug. 3, 2009), https://nij.ojp.gov/topics/articles/use-force-continuum.

[259] *See* ACLED Report, *supra* note 96 at 6–7.

and dropped charges due to courts holding the state's actions as unconstitutional, they have largely gone on undeterred and only addressed after the fact.

The actions of the Seattle Police Department against Black Lives Matter protesters in 2020 are an illustrative example. The Seattle Police Department used pepper spray, tear gas, batons, rubber bullets, blast balls, and flash-bang grenades against protesters during four separate protests.[260] While a court issued an injunction to prohibit the use of those weapons outside of imminent danger, the Seattle Police Department still indiscriminately used chemical irritants and projectiles against protesters.[261] In other words, clear direction by a court to not do unconstitutional acts was not enough to prevent them from happening. Governments may still act in a way to curtail protests, without many serious repercussions. This may be because governments often do not distinguish between lawful activity and unlawful activity when policing protests. Unfortunately, prior studies show that the frequency of government action is based on the protest's message or race, some calling this a "Protesting While Black" phenomenon.[262] Like other cities across the country, Seattle over-policed and over-arrested Black protesters, but later dropped the vast majority of charges.[263]

More recently, studies have also found that police respond differently when the protest is perceived to be "left-wing." A 2020 study analyzed arrests at 64 demonstrations in the United States in 2017 and 2018, categorizing "left-wing" protests—those favoring gun control, immigration, and civil rights—and "right-wing" protests—those favoring anti-abortion measures, Confederate statutes, white supremacy, and President Trump.[264] The study found that left-wing protesters were arrested ten times the amount as right-wing protesters.[265] "Because police repress on the basis of their understanding of threat, it means that left-

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[260] Complaint at 4, Black Lives Matter v. Seattle Police Department, 2020 WL 3064492 (W.D. Wash. Dec. 7, 2020) (No. 20-cv-0087-RAJ).

[261] Black Lives Matter Seattle-King Cnty. v. City of Seattle, Seattle Police Dep't, 516 F. Supp. 3d 1202, 1205 (W.D. Wash. 2021).

[262] Protesting While Black, *supra* note 14 at 153.

[263] Michael Balsamo et al., *AP Finds Most Arrested in Protests Aren't Leftist Radicals*, SEATTLE TIMES (Oct. 20, 2022), https://www.seattletimes.com/nation-world/nation/protest-arrests-show-regular-americans-not-urban-antifa/ ("Of more than 300 arrested [in Seattle], there are about 286 defendants, others had charges dropped. Some . . . local prosecutors declined to bring some protest-related charges."). While approximately thirteen percent of the U.S. population is Black, this report indicated that "[a]t least a third" of the arrests were Black and did not make any exceptions for particular cities. This is consistent with other data that demonstrated an over-policing of people of color during protests. *See, e.g.*, Melissa Chan, *These Black Lives Matter Protesters Had no Idea How One Arrest Could Alter Their Lives*, TIME (Aug. 19, 2020), https://time.com/5880229/arrests-black-lives-matter-protests-impact/ ("[W]hen it came to arrests, the faces were less diverse. While there is no racial breakdown of protest arrests nationwide, some analyses of city and county arrest records the first weekend after Floyd's death show that many who were jailed were Black. Of the 2,172 people the Chicago police department arrested from May 29 to May 31, more than 70% were Black and 10% were white, according to an analysis of police department records by the Chicago Reader. In Atlanta, 48 of the 82 people processed through the Fulton County jail that same weekend were Black, Georgia Public Broadcasting found.").

[264] Lesley Wood, *Policing Counter-Protest*, 14 SOCIO. COMPASS 1 (2020).

[265] *Id.* at 2.

wing protesters, racialized protesters, protesters who are seen as ideological or irrational, are more likely to be arrested and have militarized tactics used against them."[266] Even bail fund organizers have been arrested in an effort to intimidate a left-wing protest movement.[267]

Police are not the only groups who treat protesters of color differently—other government groups must also share the blame.[268] For instance, recent studies compared reports from the Black Lives Matter protests and the January 6 Insurrection to illustrate the disparate treatment.[269] For instance, U.S. Customs and Border Protection's Law Enforcement Safety and Compliance Directorate implemented an "all hands on deck" response to racial justice protests, but only provided support "as needed" in a "standby status" ahead of January 6.[270] Comparably, racial justice protests were 93% peaceful, reporting 155 officers injured over the course of the first week of protests.[271] Compared to the over 1,000 assaults on officers, 250 injured officers and at least seven deaths, one would expect more arrests have been made on January 6.[272] Instead, government action resulted in more than five times as many arrests at the height of the Black Lives Matter protests than on the day of the insurrection.[273] Based on this data, one could conclude that there is a higher likelihood for government intervention simply because you are a person of color and are protesting an issue perceived to be more left-wing.[274] Not everyone can freely express their protest rights.

B. Cash Bail is Another Disincentive to Engage in Lawful Protesting

Responding to protests with criminal prosecution has an explicit purpose: to scare community members into silence, even in the face of grave

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[266] Richard Allen Greene, *Police Respond Differently When It's a Left-Wing Protest, Study Finds,* CNN (Jan. 16, 2021), https://www.cnn.com/2021/01/15/us/protest-disparity-study-trnd (interviewing Lesley Wood about her findings).

[267] *Atlanta City Council Member: Arrests of 'Cop City' Bail Fund Organizers Appear to be 'Intimidation Tactic'*, FOX 5 ATLANTA (June 3, 2023), https://www.fox5atlanta.com/news/cop-city-bail-fund-organizer-arrest-city-councilmember-response (reporting that an Atlanta City Council member called these arrests an intimidation tactic to dissuade people from speaking out about a planned police training center that has been nicknamed "Cop City.").

[268] Ryan J. Reilly, *Jan. 6 Response Would Have Been 'Vastly Different' If Rioters Were Black, House Sergeant at Arms Told Investigators*, NBC NEWS (Dec. 28, 2022), https://www.nbcnews.com/politics/congress/jan-6-response-vastly-different-rioters-black-house-sergeant-arms-told-rcna63457.

[269] Laura Iheanachor, *Docs Show: "All Hands on Deck" for Racial Justice, "No Credible Threats" From Alt-Right Groups on January 6*, CITIZENS FOR RESP. & ETHICS (Jan. 5, 2022), https://www.citizensforethics.org/reports-investigations/crew-investigations/docs-show-all-hands-on-deck-for-racial-justice-no-credible-threats-from-alt-right-groups-on-january-6/.

[270] *Id.*

[271] Lauren White & Sara Wiatrak, *Black Lives Matter Faced an Extreme Police Response. The January 6th Mob Was Met with Something Completely Different*, CITIZENS FOR RESP. & ETHICS (March 28, 2023), https://www.citizensforethics.org/news/analysis/black-lives-matter-faced-an-extreme-police-response-the-january-6th-mob-was-met-with-something-completely-different/.

[272] *See id.*

[273] *Id.*

[274] As of 2024, this premise has also applied to protests calling for a ceasefire in Gaza. *See* James C. Cobb, *A Historian's Case for Protecting Even Offensive Speech on Campus*, TIME (Feb. 8, 2024), https://time.com/6555716/campus-free-speech-codes-history/.

injustice."[275] As more protest activity faces increasing criminalization, the frequency of arrests also increase, charges faced become more severe, and cash bail becomes unavoidable.

Some jurisdictions have been rather clear on their intention to quell only certain kinds of protests. Following the wake of the 2020 George Floyd Protests, Florida Governor Ron DeSantis signed a bill into law that would enforce a zero-tolerance policy for "disorderly" assemblies.[276] Governor DeSantis claimed this law would uphold protected First Amendment and only focus on "violent" protests. The law expanded the definition of what constitutes a "riot" and would detain arrested protesters until their first court appearance.[277] Interestingly, Governor DeSantis maintains that January 6 was not an insurrection, but rather a protest that ended up devolving.[278]

More laws criminalizing otherwise lawful protesting will also increase the use of cash bail on protesters. As previously noted, laws curtailing protest rights are on the rise, often criminalizing otherwise lawful activity using vague and overbroad provisions.[279] For instance, bills in Alabama requires anyone charged with the expanded definition of a "riot" to either be held without bail for up to twenty-four hours[280] or creates

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[275] Tameka Greer, *Tennessee's Attack of First Amendment Right to Protest Turns Attention Away from Real Issues*, COM. APPEAL (Apr. 10, 2023), https://www.commercialappeal.com/story/opinion/contributors/2023/04/10/criminalizing-right-to-protest-deflects-attention-from-the-real-issue/70099339007/

[276] *Governor Ron DeSantis Signs Hallmark Anti-Rioting Legislation Taking Unapologetic Stand for Public Safety*, RON DESANTIS 46TH GOV. OF FLORIDA (April 19, 2021), https://www.flgov.com/2021/04/19/what-they-are-saying-governor-ron-desantis-signs-hallmark-anti-rioting-legislation-taking-unapologetic-stand-for-public-safety/. This statute was eventually blocked by a federal judge. *See A Judge Has Blocked the 'Anti-Riot' Law Passed in Florida After George Floyd Protests*, NPR (Step. 9, 2021), https://www.npr.org/2021/09/09/1035687247/florida-anti-riot-law-ron-desantis-george-floyd-black-lives-matter-protests

[277] *Ron DeSantis Signs Hallmark Anti-Rioting Legislation supra* note 277.

[278] Michelle L. Price, *DeSantis Downplays Jan. 6, Says it Wasn't an Insurrection but a 'Protest' that 'Ended up Devolving'*, AP NEWS (July 21, 2023), https://apnews.com/article/ron-desantis-jan-6-insurrection-cdadb8e378179939549659cc8b23a643.

[279] For a collection of these statutes, *see Analysis of U.S. Anti-Protest Bills*, INT'L CTR. FOR NOT-FOR-PROFIT L. (Feb. 25, 2023), https://www.icnl.org/post/news/analysis-of-anti-protest-bills?location=&status=&issue=12&date=.

[280] H.B. 2, § 13A-11-3.1(d) (Alabama 2022) ("If the defendant is arrested for . . . inciting to riot . . . the defendant shall be in custody until brought before the court within 24 hours for consideration of bail."); S.B. 3 (Alabama 2022) (same).

a rebuttable presumption against granting bail.[281] Similar bills are found in Kentucky,[282] Nebraska,[283] Texas,[284] and Utah.[285]

Furthermore, these new laws give discretion to police and prosecutor to arrest otherwise nonviolent protesters,[286] increasing the probability of arrest. In many arrests, the protester will be issued bail—for an amount that can vary based on the judge—that many struggle to pay. If they cannot pay their bail, even if eventually found innocent, they will have to remain in jail, facing the consequences associated with pretrial detention. In sum, more laws turn into more arrests, those arrests turn into more people getting imposed bail, and more people are detained pretrial because they are unable to post their bail, resulting in more negatively impacted lives because of their pretrial detention. This is a heavy burden.

Even if the frequency of arrests and number of people imposed bail remained the same, these new laws could have a deterrent effect on protesters by elevating charges from misdemeanors to felonies. Broadly, bail amounts for felonies are much higher than for misdemeanors, the median amounting to approximately $10,000.[287] If they cannot pay their—now higher—bail amount, they must be detained pretrial and face the consequences associated with their incarceration, even if their charges are eventually dropped.

For instance, a Florida law makes it a felony to engage in "rioting."[288] That law, however, would encompass peaceful protests as well because no actual property destruction needs to occur, there just needs to be "imminent danger" of damage.[289] Similar laws would increase the number of protesters arrested on felony charges instead of misdemeanors, meaning the bail amount associated will also increase, even if their protest would be considered a "peaceful" protest in a different jurisdiction.

While not expressly done to curtail protests, the indirect consequence of cash bail could have the same effect. Similar to other forms of government action that arguably curtails expressing constitutional

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[281] H.B. 445, § 13-11-4(b) (Alabama 2021) ("Inciting to riot is a Class A misdemeanor. The defendant *shall* serve a minimum term of imprisonment of 30 days without consideration of probation, parole, good time credits, or any other reduction in time.").

[282] S.B. 211, § 3 (Kentucky 2021) (creating mandatory fines of $500–$5,000 for participation in a "riot" and "incitement to riot").

[283] L.B. 111 § 29-901(2)(a)(iv) (Nebraska 2021) (carving out exceptions for a bailable offense when the "defendant is charged for any crime, including violation of a city or village ordinance, arising out of a riot.").

[284] H.B. 2461, § 17.03(b)(1)(L) (Texas 2021) ("Only the court before whom the case is pending may release on personal bond a defendant who . . . was participating in a riot.").

[285] S.B. 138 (Utah 2021) ("This bill . . . provides that a person may be denied bail if charged with rioting.").

[286] *See infra* note 295–97.

[287] USCCR Report, *supra* note 183 at 45.

[288] CS/HB 1 (Fla. 2021) at 15.

[289] *See id.* at 31.

rights—voter ID laws, for instance[290]—cash bail and its attached consequences create enough disincentives to prevent some from exercising their First Amendment rights.

C. Cash Bail Prevents *Free* Exercise of First Amendment Freedoms

Cash bail dissuades people from otherwise expressing their constitutional right to protest out of fear that if they are arrested, they may face serious, long-term consequences. Consider the following calculus. If you are rich and white, the risk of getting arrested and imposed a bail amount you cannot pay is statistically on your side,[291] so you likely are not concerned about negative consequences when you attend a protest. If you are a poor person of color, however, statistics demonstrate that not only are you under a higher chance of an arrest, but you are also at a higher risk to receive a bail amount that you cannot pay.[292] Further, an arrest—even if the charges are later dropped—would have disastrous consequences for both you and your family.[293] Logically, when you compare the two scenarios, protesting loses its appeal for one group, largely due to the risks and potential consequences involved. In turn, this means that marginalized groups will struggle to be able to express their viewpoints, ultimately making this constitutional right reserved for white,[294] wealthy, [295] and often more conservative individuals.

Even though there are these great risks involved, law enforcement has not appreciated the negative impact bail can have on protest rights—they've weaponized it. Reports have shown these government officials have treated arresting protesters as a game, "high-fiving each other" and congratulating each other for the number of arrests made.[296] These tactics,

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[290] *See, e.g.*, Nicole R. Gabriel, *Resurrecting the Nineteenth Amendment: Why Stricter Voter ID Laws Unconstitutionally Discriminate Against Transgender Voters*, 56 IDAHO L. REV. 155, 157 (2021).

[291] *See* Karina Brown, *Black People Nearly Twice as Likely as Whites to Be Arrested at Portland Protests*, COURTHOUSE NEWS SERV. (Aug. 21, 2020), https://www.courthousenews.com/black-people-nearly-twice-as-likely-as-whites-to-be-arrested-at-portland-protests/; Mass Incarceration Report, *supra* note 9; USCCR Report, *supra* note 183.

[292] Protesting While Black, *supra* note 14; *see also* Brown, *supra* note 292, Mass Incarceration Report, *supra* note 9; USCCR Report, *supra* note 183.

[293] Protesting While Black, *supra* note 14; *see also* Brown, *supra* note 292; Mass Incarceration Report, *supra* note 9; USCCR Report, *supra* note 183.

[294] Brown *supra* note 292; *see also* Neil MacFarquhar, *Why Charges Against Protesters Are Being Dismissed by the Thousands*, N.Y. TIMES (Feb. 11, 2021), https://www.nytimes.com/2020/11/19/us/protests-lawsuits-arrests.html; Perkins *supra* note 176; Elise Schmelzer, *Whatever Happened to the Hundreds of People Arrested During Denver's 2020 George Floyd Protests?*, DENVER POST (Dec. 26, 2021), https://www.denverpost.com/2021/12/26/denver-george-floyd-protest-prosecutions/

[295] After being arrested at protests, many have spoken out about how those arrests have drastically altered their lives. *E.g.*, Melissa Chan, *These Black Lives Matter Protesters Had no Idea How One Arrest Could Alter Their Lives*, TIME (Aug. 19, 2020), https://time.com/5880229/arrests-black-lives-matter-protests-impact/. Sometimes, to be "wealthy" is to have the luxury to not face consequences when expressing constitutional rights that could alter your life.

[296] Ali Watkins, *They Were Arrested During the Protests. Here's What Happened Next*, N.Y. TIMES (Aug. 7, 2020), https://www.nytimes.com/2020/08/07/nyregion/ny-protest-arrests.html.

although improper,[297] are largely swept under the rug and treated as normal with little recourse for wrongfully arresting protesters. Cash bail is another weapon in a government's arsenal to circumvent the right to protest.[298]

Bail being used to dissuade people from protesting is nothing new. In fact, bail fund donation patterns may indicate that society understands the dangers bail poses on expressing constitutional rights. During widespread protests, bail funds will often receive sudden influxes in donations, at least in part due to societal recognition that bail can deter people from otherwise protesting.[299] This societal recognition of bail's impact stretches back to the 1960s, even becoming the basis for the "Jail, No Bail" protest. There, activists recognized that it was hard to scrape up bail money to free those arrested in other protests, understanding that this fact can deter protesters or otherwise get people involved with the movement.[300] Therefore, refusing bail became its own protest. By refusing bail after getting arrested, the "Jail, No Bail" movement sought to render the no-money-for-bail barrier for protesting by purposefully refusing bail and serving time to put financial pressure on local authorities to pay the costs of incarcerating them.[301] While this movement is admirable, the goal at most protests is not to be incarcerated.

Additionally, current efforts to reform bail would not effectively protect First Amendment expression, likely because they fail to put bail's impact in this perspective. All fifty states have some flavor of bail reform, "though there is a large variation across jurisdictions as to what constitutes bail reform and how reforms are applied."[302] As one study discussed, bail is

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[297] *See* Edison Lanza, *Protest and Human Rights*, OFFICE OF THE SPECIAL RAPPORTEUR FOR FREEDOM OF EXPRESSION OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 51 (2019), https://www.oas.org/en/iachr/expression/publications/Protesta/ProtestHumanRights.pdf

[298] Commentators and studies have documented prior attempts to unjustly restrict the right to protest. *E.g.*, Zick, *supra* note 105; Jonathan Pedneault, *US States Take Aim at Protesters' Rights*, HUMAN RTS WATCH (Feb. 16, 2021), https://www.hrw.org/news/2021/02/16/us-states-take-aim-protesters-rights; *Protect the Protest*, AMNESTY INT'L, https://www.amnesty.org/en/what-we-do/freedom-of-expression/protest/; Belinda Archibong, *Can Protests Lead to Meaningful Changes in Government Policy, Particularly Around Economic Redistribution?*, BROOKINGS INST. (Apr. 6, 2022), https://www.brookings.edu/articles/can-protests-lead-to-meaningful-changes-in-government-policy-particularly-around-economic-redistribution/.

[299] Jessica Brand & Jessica Pushko, *Bail Reform: Explained,* THE APPEAL (June 14, 2018), https://theappeal.org/bail-reform-explained-4abb73dd2e8a/; Camila Domonoske, *Protest Arrests Led to Surge of Bail Fund Donations: Impact Could be Long Lasting*, NPR (June 23, 2020), https://www.npr.org/2020/06/23/879711694/protest-arrests-led-to-surge-of-bail-fund-donations-impact-could-be-long-lasting; Libby Doyle & Colette Marcellin, *How Bail Reform Can Protect Protestors and Address System Injustices*, URBAN (June 17, 2020), https://www.urban.org/urban-wire/how-bail-reform-can-protect-protestors-and-address-system-injustices.

[300] *Feb. 6, 1961: "Jail, No Bail" in Rock Hill, South Carolina Sit-Ins*, ZINN EDUC. PROJECT, https://www.zinnedproject.org/news/tdih/jail-no-bail/#:~:text=Saying%20%E2%80%9CJail%2C%20No%20Bail%2C,when%20financial%20resources%20were%20limited.

[301] *Id.*

[302] Isabella Jorgensen & Sandra Susan Smith, *The Current Bail Reform in the United States: Results of a Landscape Analysis of Bail Reforms Across All 50 States*, HKS FACULTY RESEARCH WORKING PAPER SERIES 2 (Dec. 2021),

dependent on the local political climate and can be difficult to assess faithful implementation of bail reforms.[303]

Cash bail's benefits are outweighed by the costs it creates, particularly on protest rights. The bail system is not experienced evenly throughout society, disproportionately impacting poorer communities and people of color, deterring participation. If First Amendment expression is to be a "supremely precious" right,[304] meaningful change to bail must occur. Otherwise, bail will deter the central premise of protests: to have marginalized voices heard.

IV. PART IV – ATTAINABLE AVENUES FOR CHANGE

There are many ways that substantial bail reform can occur immediately, including avenues in each branch of government. Every state has attempted to reform bail, but none have done so for the specific purpose of protecting First Amendment expression.[305] Bail costs societies a lot and is not needed to keep communities safe.[306] Therefore, tactical, measured reform can demonstrate the efficacy of a broader overhaul.[307]

Reforming bail to ensure that protesters would not need to pay bail if arrested has been successfully implemented in several jurisdictions.[308] The District of Columbia, for example, took steps to eliminate bail as early as the 1960s[309] without threatening public safety—even during widespread

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https://dash.harvard.edu/bitstream/handle/1/37370366/RWP21-033_Smith.pdf?sequence=3&isAllowed=y.

[303] *Id.* at 8.

[304] NAACP v. Button, 371 U.S. 415, 433 (1963). Other scholars have noted that this "supremely precious" right must holistically include freedom of speech. *See, e.g.*, Alix H. Bruce, *Augmenting our reality: The (Un)official Strategy Guide to Providing First Amendment Protection for Players and Designers of Location-Based Augmented Reality Video Games*, 92 ST. JOHN'S L. REV. 943, 950 (2018) ("The Court has noted that freedom of speech must be protected, not only because it is important in society but also because the right itself would be easy to destroy."). Because protests necessarily include speech, this means that by extension, protests are also a supremely precious right. *See* Alix H. Bruce, *"Enough's Enough": Protest Law and the Tradition of Chilling Indigenous Free Speech*, 8 AM. INDIAN L. J. 53 (discussing the "supremely precious" right of speech in the context of protests).

[305] Jorgensen & Susan Smith, *supra* note 303 (their study did not find that First Amendment concerns motivated bail reforms).

[306] *E.g.*, Allie Preston, *5 Ways Cash Bail Systems Undermine Community Safety*, CTR. FOR AM. PROGRESS (Nov. 3, 2022), https://www.americanprogress.org/article/5-ways-cash-bail-systems-undermine-community-safety.

[307] *E.g.*, Lea Hunter, *What You Need to Know About Ending Cash Bail*, CTR. FOR AM. PROGRESS (March 16, 2020), https://www.americanprogress.org/article/ending-cash-bail/ ("Washington, D.C., was an early pioneer in pretrial reform, taking steps to eliminate the use of cash bail as early as the 1960s. The results have been extraordinary: 94 percent of defendants are released pretrial, and 91 percent of them appear in court for their trial. New Jersey passed a suite of criminal justice reforms in 2016 that essentially eliminated cash bail and created a new pretrial services program. Since implementing these reforms in 2017, New Jersey saw a 20 percent reduction in its jail population. In 2017, 95 percent of defendants were released pretrial and 89 percent of them appeared at their trial date. Harris County, Texas, home to the third-largest jail system in the country, reformed its pretrial system as part of a consent decree to virtually eliminate the use of money bail for misdemeanor charges. Prior to these reforms, 40 percent of people arrested on a misdemeanor charge were detained until their case was adjudicated. Experts estimate that reforms will result in pretrial release for 90 to 95 percent of misdemeanor defendants.")

[308] *Id.*

[309] *Id.*

protests. Instead, when people are arrested at protests, financial resources are no longer a mandate for pretrial release. Rather, those arrested on misdemeanors are presumed releasable, and those arrested on felonies undergo a risk assessment to determine if they should be detained pretrial.[310]

The unique nature of protesting warrants specific focus for bail reform. Even if performed in its purest sense, protesting still runs the risk of unwarranted arrest and subsequent consequences. Therefore, targeted reform to affect bail considerations for the crimes associated with protesting may be more palatable for those concerned with more holistic bail reform, particularly regarding concerns about public safety. Admittedly, there may be some who oppose protesting altogether, but prior research suggests that a majority support most forms of protected protests such as handing out fliers, boycotting, marching, and picketing.[311]

This section proposes some avenues for bail reform, targeting efforts to protect the right to protest. To note, this section is not meant to qualify bail's use in other contexts; rather, by focusing solely on its impact on protest rights, this method could strategically lead to broader reform in the future. Through this limited reform, critics of bail reform would also be able to see that bail is not a necessary for all defendants to keep a community safe.

A. Legislative Means for Reform

While some states have successfully made steps to abolish their bail systems,[312] most states as well as the federal government have been largely unsuccessful. While broad reform has been unsuccessful, voters have signaled considerable support for bail reform such as by electing prosecutors who campaigned on a bail reform platform.[313] Accordingly, a narrower bail reform could be more palatable option to opponents. Incremental reform, starting with reform surrounding protesters, could be the solution. While broad reform may be the ultimate goal, critics would not readily get on board due to public safety concerns. Instead, legislation that focuses solely on waiving bail for arrested protesters could remove bail's disincentives as well as alleviate concerns of critics.

To do so, legislatures can reform their laws to waive bail for the charges commonly associated with protests.[314] Some crimes comprise of the majority of charges when there are protest arrests and largely surround

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[310] For an example of how this can play out, *see* Eliana Block & Evan Koslof, *VERIFY: Will Protesters Arrested in DC Need to Pay Bail?*, WUSA9 (June 4, 2020), https://www.wusa9.com/article/news/verify/verify-cash-bail-dc-george-floyd-protesters/65-a2a8df03-97c2-4c16-a58c-b2e4abc7a59c.

[311] *YouGov Survey: Causes and Protesting*, YOUGOV (2023), https://ygo-assets-websites-editorial-emea.yougov.net/documents/Causes_and_Protesting_poll_results_20231005.pdf.

[312] *See* Raftery, *supra* note 257.

[313] *See* Udi Ofer, *Despite Backlash Voters and Lawmakers Continue to Choose Criminal Justice Reform*, ACLU (Sept. 12, 2022), https://www.aclu.org/news/criminal-law-reform/despite-backlash-voters-and-lawmakers-continue-to-choose-criminal-justice-reform.

[314] *See Analysis of U.S. Anti-Protest Bills*, INT'L CTR. FOR NOT-FOR-PROFIT L. (Feb. 25, 2023), https://www.icnl.org/post/news/analysis-of-anti-protest-bills?location=&status=&issue=12&date=

rioting, traffic interference, or complying with orders.[315] For example, when 61 people were arrested at a protest during the Jayland Walker protests in Akron in 2022, rioting, failure to disperse, disorderly conduct, and misconduct at an emergency comprise 90% of the charges.[316] In many states, these charges are misdemeanors and are viewed as relatively minor offenses.[317]

Waiving bail for the misdemeanors most common to occur at protests would also follow a recent push by legislatures to exclude bail considerations for other minor offenses. For example, a recent Maine bail reform ended cash bail requirements for most minor charges.[318] Specifically, the new law eliminates cash bail for disorderly conduct arrests, a common charge against arrested protesters.[319] Similar to Maine, states could poll the most common, minor charges that occur at protests and eliminate cash bail considerations for those arrests.

Importantly, for states that would elevate the charges to felonies, legislatures should still waive bail for those charges. In some states, traffic interference, rioting, and trespass crimes are elevated to felonies, even if the protests are nonviolent and do not amount to any damage. Legislatures can still anticipate those felony charges and waive bail for those arrested during an otherwise lawful protest. These measured legislative changes would likely be introduced during widespread protests, but should remain implemented even after those movements to demonstrate that bail is not a necessary component to protecting public safety.

Eliminating bail for these minor charges could be an incremental step to demonstrate the efficacy of bail reform. While complete bail reform may be the eventual goal, targeting reform to the specific charges faced in conjunction to a protest could assuage the disincentives bail causes to future protesters.

B. Judicial Means for Reform

Because the courts are largely in charge of imposing bail, they also have the means to alleviate its impact on protest rights. Regardless of legislative action, bail is set at a judge's discretion, meaning that discretion can be used to remove money considerations for every case involving an arrested protester. To be sure, this does not mean that courts should *deny* bail and incarcerate all arrested protesters pretrial; this means *waiving* bail, releasing them without paying any bail fee.

Bail reform in the courts could start in the form of recognition. In other words, court leaders can collect data on how bail is used in their jurisdiction, analyzing its impact on marginalized groups. This is nothing new: several state courts have created task forces to research this topic, discussed disparate impacts, and made recommendations to various

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[315] *See id.*

[316] Livingston, *supra* note 6.

[317] *See Analysis of U.S. Anti-Protest Bills*, *supra* note 315.

[318] An Act to Amend the Bail Code, L.D. 1703 (Me. 2021).

[319] *Id.* at 2 (eliminating cash bail for "Class E" crimes, of which disorderly conduct is one).

branches of government as to how to alleviate those concerns.[320] Some, more outspoken, jurists have taken this a step further to actively call on legislators to reform the state's bail system.[321]

Reform can follow through the court's bail schedules. As mentioned previously, these schedules impose predetermined bail amounts for certain crimes, often leaving little judicial discretion to amend those amounts until the first hearing. These schedules, however, are created by the jurisdiction's courts and are edited regularly, leaving the opportunity to reform the practice to exclude its use on arrested protesters for the commonly charged offenses. In the case that courts do not conform to bail schedules, creating published guidelines restricting bail's use can demonstrate a uniform practice that avoids otherwise setting bail for arrested protesters.

Reform can also take place in the court room, indicated by courts striking down bail systems as unconstitutional. For instance, a justice in New York held that the state's bail system violated a person's due process and equal protection clauses.[322] The arrested person was charged with a misdemeanor, but imposed a $5,000 bail, nearly half his annual income, forcing him to remain in jail for five months until he agreed to a plea deal.[323] In holding his pretrial incarceration violated his due process rights, the justice also noted that over sixty percent "have not been convicted of a crime but are awaiting arraignment or trial."[324]

Because judges are largely at the forefront of setting these bail amounts, their participation is the most crucial to addressing the detrimental effect bail has on constitutional rights. There is little uniformity in how courts and judges impose bail, making pretrial release a luck-of-the-draw for those arrested.[325] Creating a uniform judicial policy[326] to no longer impose bail on the charges attributed to arrested protesters would create the necessary uniformity to alleviating bail's ability to dissuade lawful protests.

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[320] *See, e.g.*, CUYAHOGA COUNTY BAIL TASK FORCE, REPORT AND RECOMMENDATIONS (March 16, 2018).

[321] *See, e.g.*, Jonathan Lippman, *Our Cash Bail System Isn't Working. We can Fix It.*, WASH. POST (Nov. 28, 2017), https://www.washingtonpost.com/opinions/our-cash-bail-system-isnt-working-we-can-fix-it/2017/11/28/3f0dd2ce-cf9f-11e7-a1a3-0d1e45a6de3d_story.html.

[322] People ex rel. Desgranges On Behalf of Kunkeli v. Anderson, 72 N.Y.S.3d 328 (N.Y. Sup. Ct. 2018).

[323] *See* Alan Feuer, *Judge Says New York's Bail Law Treats Poor Unfairly*, N.Y. TIMES (Feb. 11, 2018), https://www.nytimes.com/2018/02/11/nyregion/judge-says-new-yorks-bail-law-treats-poor-unfairly.html.

[324] Kunkeli, 72 N.Y.S.3d at 330.

[325] *See, e.g.*, Anna Maria Barry-Jester, *supra* note 157 (examining the lack of uniformity of bail imposition in New York).

[326] Because the majority of federal courts do not use bonds, these judicial policies would likely need to be introduced at the state-level. This being said, there are arguments for federal change to create uniformity. J.G. Carr, *Bail Bondsmen and the Federal Courts*, 57 FED. PROB. 9 (1993) (advocating for a change in the Federal Bail Reform Act).

C. Executive Means for Reform

The executive branch also has the power to protect protest rights. Executive officials enjoy broad powers to influence how bail is used. For instance, Attorney Generals and District Attorneys have discretion in how prosecutions operate, including bail amounts. Generally, they create the policies that outline how the jurisdiction will prosecute crimes, including considerable discretion in both the charges brought as well as requesting a certain bail amount be set. Some prosecutors have demonstrated this ability, previously instituting policies that they would not seek bail for a particular range of charges.[327] For example, in 2017 the lead prosecutor for Chicago announced that they would no longer seek bail for defendants accused of low-level offenses.[328] This means it is possible for prosecutors to create internal directions that request that bail be waived for anyone arrested at a protest in an effort to encourage First Amendment expression.

Top executive officials can also directly protect protest rights, especially during widespread demonstrations, by enacting bail moratoriums. Similar to executive actions taken place during the COVID-19 pandemic impacting eviction cases,[329] a moratorium can be put in place to prohibit the use of bail against arrested protesters. During the pandemic, the U.S. President placed a moratorium on evictions, recognizing the numerous negative consequences losing housing during that time would have.[330] Not only did evictions drop significantly during the moratorium, but also even after the moratorium was lifted, eviction rates were lower than before the moratorium was put in place.[331] In a similar vein, moratoriums on bail, particular during times of racial justice protests that receive higher rates of arrest, can demonstrate the government's commitment to upholding constitutional rights by recognizing the disincentives bail can have. As an added benefit, even after the bail moratorium is lifted, lessons from the eviction moratorium suggest that bail rates would remain lower than before the moratorium is put in place.

D. Other Means for Reform

While government buy-in is necessary for lasting reform, constituents can help to get the ball rolling. While not a long-term solution, bail funds[332] can alleviate the burden bail can have on arrested protesters

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[327] *E.g.*, Justin Miller, *The New Reformer DAs*, AM. PROSPECT (Jan. 2, 2018), https://prospect.org/health/new-reformer-das/; *see also* Allison Siegler & Kate M. Harris, *How Did the "Worst of the Worst" Become 3 Out of 4?*, N.Y. TIMES (Feb. 24, 2021), https://www.nytimes.com/2021/02/24/opinion/merrick-garland-bail-reform.html.

[328] Steve Schmadeke, *Foxx Agrees to Release of Inmates Unable to Post Bonds of up to $1,000 Cash*, CHI. TRIB. (March 1, 2017), https://www.chicagotribune.com/news/breaking/ct-kim-foxx-bond-reform-met-20170301-story.html.

[329] Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 FR 55292 (Sept. 4, 2020).

[330] *Id*. at 55295–96.

[331] Lindsey Smith, *Effects of the Federal Eviction Moratorium Being Lifted: The Feared Wave of Evictions that Never Hit*, PEPPERDINE SCH. OF L. (2023), https://law.pepperdine.edu/surf-report/posts/effects-of-federal-eviction-moratorium-being-lifted-lindsey-smith.htm.

[332] *E.g.*, CO. FREEDOM FUND, https://www.coloradofreedomfund.org/.

in two ways. First, through educating the general public on the availability of these funds and how they work, bail funds can help reduce bail's deterrence effects on protesting. Additionally, these funds work directly with those who cannot afford their bail amounts, meaning the bail funds are able to influence government officials by recounting specific stories of people impacted by bail.[333] Particularly considering bail system's lack of uniformity, bail funds can provide important information to governments illuminating its inconsistencies and disparate impacts. Rather than criminalize these bail funds as some jurisdictions have sought to do,[334] government should look to collaborate with these organizations.

Litigants can also bring necessary reform. Several organizations have attempted litigation campaigns in an effort to create common law precedent to reform the bail system.[335] While these campaigns may have measured success, the effects are admittedly not as extensive, and wide-reaching as they would need to be to create substantial reform. For instance, the ACLU announced in 2017 its initiative to end cash bail which included targeted litigation,[336] the results have been at best piecemeal rather than the hoped-for overhaul. While the organization is doing important work such as filing class action lawsuits challenging this discriminatory practice, but the states they have brought those lawsuits still use cash bail to this day.[337] Additionally, litigation campaigns can be costly, both in terms of money and time, requiring several years—if not decades—and large financial investments to make the end-goal a reality.[338]

Pressure campaigns on commercial bail companies could also be the means of creating measured reform. Optimistically, past efforts have also had measured success. For example, following a multi-year campaign by the ACLU and Color of Change to pressure private equity firm Endeavour Capital to exit involvement in the bail system, Endeavour divested from

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[333] For an explanation of how storytelling can influence and encourage reform, *see* Ella Saltmarshe, *Using Story to Change Systems*, STAN. SOC. INNOVATION REV. (2018).

[334] Jeff Amy & Kate Brumback, *Atlanta Police Arrest 3 Organizers Behind Bail Fund Supporting Protests Against 'Cop City'*, PBS (May 31, 2023), https://www.pbs.org/newshour/politics/atlanta-police-arrest-3-organizers-behind-bail-fund-supporting-protests-against-cop-city

[335] *See Challenging the Money Bail System*, C.R. CORPS, https://civilrightscorps.org/our-work/.

[336] *See ACLU Announces Nationwide Campaign to Support Movement to End Money Bail*, ACLU (Dec. 11, 2017), https://www.aclu.org/press-releases/aclu-announces-nationwide-campaign-support-movement-end-money-bail.

[337] *ACLU Files Federal Class Action Lawsuit Challenging Discriminatory Cash Bail System that Punishes Poor People in Detroit*, ACLU (April 14, 2019), https://www.aclu.org/press-releases/aclu-files-federal-class-action-lawsuit-challenging-discriminatory-cash-bail-system.

[338] *See* Lawrence M. Friedman, *Claims, Disputes, Conflicts and the Modern Welfare State,* in ACCESS TO JUSTICE AND THE WELFARE STATE 251, 258 (Mauro Cappelletti ed., 1981) ("Litigation had also become terribly expensive. No one decided, deliberately, to raise the price of law. This simply happened or evolved over the years. The reasons hardly matter. Access to the courts for relief against mistakes and injustices of the state became very, very costly. . . . Quality, of course, is always expensive. A well-trained, professional body of judges costs money. . . . The legal profession is now highly professional, as well. . . . Good lawyers have become extremely expensive.").

the largest for-profit bail bond company in the country.[339] These campaigns, while lengthy and limited in effect, can help remove economic reliance on the bail system by damaging bail bond companies' profits.[340]

Finally, while not every state has this method available, ballot initiatives can also be an avenue for change.[341] These initiatives are proposed by constituents by putting the proposals on the ballot for voter considerations.[342] In order to get on the ballot, the ballot initiative needs to collect enough signatures to demonstrate substantial societal attention to the particular issue.[343] The ballot initiative would then need a certain number of votes to pass in order to come into law.[344] While bail reform can occur in this manner, this would require a large, coordinated grassroots movement that requires careful steps to ensure that the initiative can appear on the ballot, and these efforts are limited to states that have these processes in place.

E. Responding to Oppositions to Reform

Even with numerous studies supporting bail reform, that does not mean reform will be met with open arms. Understandably, the prospect of releasing arrested persons brings concerns that public safety will be jeopardized. In the protesting context, there may be concerns about violent protests going on without repercussions, allowing unlawful protesters to further damage and endanger the community. However, not only does data demonstrates the overwhelming majority of protests are peaceful,[345] but also studies consistently demonstrate releasing people pretrial did not negatively impact public safety.[346]

Commonly, critics of bail reform argue that releasing more people pretrial will endanger society by sending "dangerous" people back into the community.[347] While statistics have regularly refuted this fact on a broader scale,[348] this argument has been largely successful in stalling necessary change.

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[339] *ACLU and Color of Change Statement on Endeavour Capital's Divestment from Predatory, For-Profit Bail Industry*, ACLU (Feb. 21, 2020), https://www.aclu.org/press-releases/aclu-and-color-change-statement-endeavour-capitals-divestment-predatory-profit-bail.

[340] *Id.*; Smart Justice *supra* note 223.

[341] *States with Initiative or Referendum*, BALLOTPEDIA, https://ballotpedia.org/States_with_initiative_or_referendum.

[342] *Id.*

[343] *Id.*

[344] *Id.*

[345] *See infra* Section I(C)

[346] Sarah Staudt, *Releasing People Pretrial Doesn't Harm Public Safety*, PRISON POL'Y INITIATIVE (July 6, 2023), https://www.prisonpolicy.org/blog/2023/07/06/bail-reform/; *see also* Benjamin S. Case, *Speaking of Riots: The Complicated Reality of Violence vs. Nonviolence*, POL. VIOLENCE AT A GLANCE (Feb. 8, 2021), https://politicalviolenceataglance.org/2021/02/08/speaking-of-riots-the-complicated-reality-of-violence-vs-nonviolence/.

[347] Dermot Shea, *New York's New Bail Laws Harm Public Safety*, N.Y. TIMES (Jan. 23, 2020), https://www.nytimes.com/2020/01/23/opinion/shea-nypd-bail-reform.html.

[348] *E.g.*, Mass Incarceration Report, *supra* note 9; *Cash Bail*, *supra* note 234; Preston & Eisenberg, *supra* note 234; Ofer, *supra* note 234.

Specifically, critics often point to attention-grabbing reports involving individuals who commit subsequent crimes after their initial arrest because they were not imposed bail. For example, a *New York Post* article documented how New York City's bail reform was not achieving its goal of eliminating bail while keeping communities safe.[349] Particularly, the article points to NYPD data showing the same ten people were arrested nearly a total of 500 times since the bail reform began, as well as data showing an increase in recidivism rates more generally.[350]

While instances like those in the *New York Post* should be addressed, those instances appear to be the exceptions, not the rule. Importantly, recent studies still do not show a clear and obvious pattern in violent crime as a result of bail reform. A 2023 study by the Data Collaborative for Justice examined the impact of New York's bail reform law on recidivism in New York.[351] Contrary to the conclusions by the *New York Post*, the report found "[e]liminating bail for most misdemeanor and nonviolent felony charges reduced recidivism."[352] Even for violent felony offenses, the study found that "reducing the use of bail through measures such as supervised release . . . did not affect recidivism in either direction."[353]

While public safety is a justified concern, data does not support that communities are endangered after eliminating bail for most misdemeanor and nonviolent felony charges. Accordingly, bail reform that focuses on the charges most commonly arising from protests largely focus on misdemeanors and nonviolent felonies.[354] Furthermore, as the data suggests, even for violent crimes, which is often defined to include attributes such as "rioting" that results in property damage,[355] bail is not necessary to protect the public because alternatives such as supervised releases "did not affect recidivism."[356]

Targeting bail reform to waive protest-related, minor charges could be an incremental step to alleviating those concerns. Resistance to bail

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[349] Bernadette Hoga, Tina Moore & Bruce Golding, *10 Career Criminals Racked up Nearly 500 Arrests Since NY Bail Reform Began*, N.Y. POST (Aug. 3, 2022), https://nypost.com/2022/08/03/career-criminals-rack-up-nearly-500-arrests-since-ny-bail-reform-began/.

[350] *Id.*

[351] Summary, René Ropac & Michael Rempel, *Does New York's Bail Reform Law Impact Recidivism? A Quasi-Experimental Test in New York City*, DATA COLLABORATIVE FOR JUST. 4 (March 2023), https://datacollaborativeforjustice.org/wp-content/uploads/2023/04/RecidivismReportSummary.pdf

[352] Main Report, René Ropac & Michael Rempel, *Does New York's Bail Reform Law Impact Recidivism? A Quasi-Experimental Test in New York City*, DATA COLLABORATIVE FOR JUST. 43 (March 2023), https://datacollaborativeforjustice.org/wp-content/uploads/2023/03/RecidivismReport-4.pdf.

[353] *Id.*

[354] *See id.*

[355] *Over 300 People Facing Federal Charges for Crimes Committed During Nationwide Demonstrations*, DEP'T OF JUST. OFF. OF PUB. AFF. (Sept. 24, 2020), https://www.justice.gov/opa/pr/over-300-people-facing-federal-charges-crimes-committed-during-nationwide-demonstrations (listing "inciting a riot" in a group of crimes connected to "[v]iolent opportunists.").

[356] *See* René Ropac & Michael Rempel, *supra* note 353.

reform comes along with the long history of resistance to other criminal justice reforms.[357] These concerns are unlikely to dissipate overnight. Because protesters are often charged with crimes such as blocking traffic or disorderly conduct—not extremely violent crimes such as murder that would be of public concern—this limited reform could demonstrate the efficacy of broader reform. For critics worried that releasing "rioters" would endanger the public because they would go out and cause more riots, judges could always impose conditions, such as supervised release, not related to money to reach similar ends.[358] Finally, a periodic rollout could also demonstrate the reform's efficacy, especially if data is collected to compare recidivism before and after the reform.

CONCLUSION

Protesting is a fundamental right than cannot be reserved only for those who can afford high bail amounts. The impact that protests have on progressing societies cannot be taken lightly. Nearly every significant change in the country has come as a result of some kind of protest. Unsurprisingly, countries around the world, like the United States, wish to promote and protect this right, upholding the right in light of government action that threatens to restrict it.

Cash bail, however, threatens free expression of this constitutional right. Cash bail, the process in which a defendant must pay a monetary amount to be released pretrial, is an unjust system that is treated differently between jurisdictions. Regrettably, research also indicates that cash bail is not felt evenly across demographics, disparately impacting poorer communities and communities of color. This means that the negative consequences involved, including the effect that bail has on eliciting pleas from those who otherwise would not plea, affects these demographics at a disproportionate rate.

Unfortunately, the recent rise in laws criminalizing otherwise lawful protests creates large disincentives for future protesters. In addition to increasingly criminalizing protected activity, laws have also elevated crimes from misdemeanors to felonies. Arrests, and subsequent charges, however, do not occur evenly, as research shows people of color and "left-wing" protesters arrested at significantly higher rates. In turn, the disparate arrest rates and disparate impact of bail exacerbates the existing disincentives of government action on lawful protests.

Fortunately, several avenues exist to alleviate the effect bail has caused on the right to protest. In all three branches of government as well as through grassroots initiatives, the bail system can be reformed to at least waive bail for instances of arrested protesters, alleviating disincentives. Finally, targeting reform to only waive bail for the charges most commonly attributed to arrested protesters will assuage public safety

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[357] *See Backlash on Reform Due to Concerns About Crime*, MARSHALL PROJECT, https://www.themarshallproject.org/records/11987-backlash-on-reform-due-to-concerns-about-crime.

[358] To be clear, this has discriminatory practices in its own right and would be the case for a "lesser evil" because many judges waive money considerations as it relates to supervised release.

concerns, and could demonstrate the efficacy of broader reform. So yes, while these reform recommendations focus on arrested protesters, its impact would be a vital incremental step in reaching comprehensive reform to eliminate the practice altogether.

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ARTICLE

DEFANGING DIVERSITY: *SFFA V. HARVARD* AND ITS IMPLICATIONS FOR THE DIVERSITY RATIONALE IN HIGHER EDUCATION ADMISSIONS

Daniel Kees†

They don't want to realize that there is not one step, morally or actually, between Birmingham and Los Angeles.

- James Baldwin, I Am Not Your Negro (2017)

This article explores the jurisprudential underpinnings of the so-called "diversity rationale" that until recently had been considered a powerful vehicle for fostering racial diversity on elite college campuses. As the national debate around diversity, equity, and inclusion measures—both their legitimacy and practice—will only intensify in the current sociopolitical climate, this writing attempts to provide a chronology of how the nation's High Court has shaped the contours of that discourse, arguing that the Court's juridical trepidation in this area of the law led to an unworkable framework that was doomed from inception. This article further examines the rapidly changing norms of race and identity—including the inherent tensions and complexities that such concepts engender before concluding with a recommendation for how to achieve the supposed aims of the affirmative action regime in American society.

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I. THE DIVERSITY PROBLEM: INTRODUCTION AND BRIEF RECAP OF THE LEGAL PROCEEDINGS

In September 2019, Judge Allison D. Burroughs of the United States District Court for the District of Massachusetts issued a decision in a case that would come to change the face of affirmative action in higher education: *Students for Fair Admissions, Inc. (SFFA) v. President & Fellows of Harvard College (Harvard Corporation)*.[1] SFFA is "a nonprofit membership group" that believes "racial classifications and preferences in college admissions are unfair, unnecessary, and unconstitutional."[2] SFFA contended in its suit that Harvard unfairly discriminated against Asian American applicants in its undergraduate admissions process, violating Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d et seq. ("Title VI"). SFFA considers itself to be advancing the principles of the civil rights movement—namely, that a student's race should not factor into their admissions chances at a competitive university.[3]

The Massachusetts court, in an expansive and footnote-laden opinion, considered the merits of SFFA's and Harvard's arguments and concluded that Harvard—whose review process has been deemed a model for race-conscious admissions[4]—did not discriminate against Asian Americans or violate the U.S. Constitution.[5] SFFA appealed the decision all the way to the U.S. Supreme Court which reached the opposite conclusion, spelling the end of the diversity rationale in higher education admissions and ushering in a post-affirmative action era.[6]

The end of affirmative action followed years of the Supreme Court narrowing the bounds of the so-called "diversity rationale," which is the justification provided for giving additional weight to race in the college admissions process. The Court's failure to fully endorse the social justice orientation of the diversity rationale, or to simply require schools to more explicitly set forth what they value in admissions, resulted in an anemic jurisprudential framework utterly incapable of fulfilling its purpose. Despite this failure, diversity has—and will continue to be—an important

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[1] Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 397 F.Supp.3d 126, 130 (D. Mass. 2019).

[2] Students for Fair Admissions, Inc., *About,* STUDENTS FOR FAIR ADMISSIONS (last visited Mar. 26, 2024), https://studentsforfairadmissions.org/about/ [https://perma.cc/JDH7-9Y28].

[3] Students for Fair Admissions, Inc., *supra* note 2.

[4] Regents of Univ. of California v. Bakke, 438 U.S. 265, 316 (1978) ("The experience of other university admissions programs, which take race into account in achieving the educational diversity valued by the First Amendment, demonstrates that the assignment of a fixed number of places to a minority group is not a necessary means toward that end. An illuminating example is found in the Harvard College program"); Grutter v. Bollinger, 539 U.S. 306, 321 (2003) ("The Court of Appeals also held that the Law School's use of race was narrowly tailored because race was merely a "potential 'plus' factor" and because the Law School's program was "virtually identical" to the Harvard admissions program described approvingly by Justice Powell and appended to his *Bakke* opinion").

[5] Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 397 F.Supp.3d 126, 147 (D. Mass. 2019).

[6] Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181, 231 (2023). The Supreme Court also considered alongside the Harvard case one targeting the University of North Carolina's admissions system.

part of college admissions. The Supreme Court's ruling fell far short of meaningfully curtailing schools' ability to structure admissions in the ways they see fit; rather, schools will simply have to be more innovative about achieving the desired makeup of their classes. The concept enshrined in the diversity rationale, if not the doctrine itself, survives, at least for the moment.

This Article examines the history of the diversity rationale, the factors that eroded its efficacy and legitimacy, and a path forward in a post-*SFFA* world. It also examines the elite college admissions system, an understanding of which is necessary to comprehend why the diversity rationale failed to achieve its potential as a transformative concept in American higher education. The discussion that follows is meant to shed light on a judicial framework that was doomed from inception and to advocate for a more robust framework that can achieve the implicit goals of the diversity rationale. This Article seeks to provide a more nuanced understanding of diversity—in a factual and legal sense—to aid policymakers and laypersons alike in laying the groundwork for a more equitable approach to college admissions and the legal structure under which those decisions are made.

A. Defining Diversity Under SCOTUS: From Then to Now

Note that this Article uses phrases such as "the diversity rationale" or "affirmative action" interchangeably. Though similar, these concepts differ slightly. "Affirmative action" refers to a set of policies that in recent decades have helped underrepresented groups to enter spaces to which they historically had been denied access. Specifically, affirmative action allowed people to hold certain jobs or gain admission to certain educational institutions that had previously excluded them. Affecting large swaths of this country—including Black and Brown people as well as women of all races—affirmative action initiatives helped to foster a workforce that is more representative of the country as a whole. Fostering on-campus "diversity," on the other hand, is the limited ground upon which the Supreme Court in *Bakke* approved race-based tips in higher education admissions. Schools for decades justified the admission of many Black, Indigenous, and people of color ("BIPOC") students on the grounds of building a "diverse" class. In most cases, however, they are two sides of the same coin.

Nailing down exactly what "diversity" means—or what it could mean—for higher education admissions is a challenging endeavor. Although modern conceptions of "diversity" often bring racial diversity to mind, the Supreme Court has always recognized the multifaceted nature of the term. In *Bakke*, where the Court first affirmed the diversity rationale as a compelling state interest, Justice Powell suggested that a plurality of "ethnic, geographic, [and] culturally advantaged or disadvantaged" backgrounds may "enrich the training of [a school's] student body and better equip its graduates to render with understanding their vital service to humanity."[7] Justice Powell wrote that "[t]he diversity that furthers a

[7] Bakke, 438 U.S. at 314 (pertaining to a medical school's admissions program, but the Court noted that there may be "greater force to these views at the undergraduate level

compelling state interest encompasses a far broader array of qualifications and characteristics, of which racial or ethnic origin is but a single though important, element."[8] Powell further noted that the University of California at Davis medical school's "special admissions program, focused solely on ethnic diversity, would hinder, rather than further, attainment of *genuine diversity*" (emphasis added).[9] This "genuine diversity," Justice Powell suggests, comprises more than mere ethnic or racial diversity.

Notably, the Court did not justify diversity's use in higher education admissions on the grounds of being a remedy for past societal harms; instead, it recognized such redress only in limited situations involving specifically identified instances of racial discrimination.[10] The Court noted that remedying the effects of "societal discrimination" was not compelling enough to support the use of the suspect classification of race in admissions.[11] Going further, the Court deemed such discrimination "an amorphous concept of injury that may be ageless in its reach into the past."[12]

The Court again took up the question of diversity in the *SFFA* case. At issue was whether Harvard's use of race in admissions could survive so-called "strict scrutiny," the central test for determining the constitutionality of race-based considerations.[13] Under the Supreme Court's strict scrutiny analysis, Harvard may consider race only if no other workable race-neutral alternative can ensure a sufficiently diverse class.[14] A strict scrutiny inquiry required that Harvard's use of race-based classifications be "narrowly tailored" to further a "compelling interest."[15] The Massachusetts trial court took little issue with the compelling interest prong, simply reiterating Harvard's expressed interest in creating a community that can adequately prepare leaders for the "pluralistic society" and diverse workforce that they will soon join.[16] That court noted that Harvard's goals were similar in their specificity to the goals of the University of Texas at Austin in *Fisher II*, goals that the Supreme Court

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than in a medical school where the training is centered primarily on professional competency."). *Id*. at 313.

[8] *Id*. at 315 (pointing to Harvard College's admission system, the very system that is now under attack, as an example of using race as one of many "plus" factors in admissions—an acceptable use of race-based tips in admissions to produce a diverse entering class.). *Id*. at 316.

[9] *Id*. at 315.

[10] Bakke, 438 U.S. at 307 (finding that in the "line of school desegregation cases, commencing with *Brown*,… the States were required by court order to redress the wrongs worked by *specific* instances of racial discrimination" (emphasis added), as contrasted with the *Bakke* action that concerned the use of race in admissions to remedy the effects of societal discrimination).

[11] *Id*.

[12] *Id*.

[13] Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181, 190 (2023).

[14] Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 397 F.Supp.3d 126, 177 (D. Mass. 2019).

[15] *Id*. at 191.

[16] *Id*. at 192.

found to be "concrete and precise."[17] The Court of Appeals for the First Circuit agreed, finding that Harvard sufficiently demonstrated the "specific goals" it achieves from diversity.[18] Because of the relative silence of the lower courts on the issue of how *Bakke*'s "compelling interest" prong applied to Harvard's admissions scheme, the Supreme Court's *de novo* review had even more room to fashion a new definition of diversity.

In June of 2023, the diversity rationale—and its accompanying universe of legal thought—went out with a whimper, not a bang. In a relatively brief opinion, a 6-2 majority of the Supreme Court found that Harvard's admissions process did not survive strict scrutiny and was violative of the Equal Protection Clause of the Fourteenth Amendment.[19] Specifically, the Court found that Harvard's admissions programs "lack[ed] sufficiently focused and measurable objectives warranting the use of race, unavoidably employ[ed] race in a negative manner, involve[d] racial stereotyping, and lack[ed] meaningful end points."[20]

Most notably, the Court highlighted the imprecision of the racial categories employed by schools like Harvard. Its admissions practices did not distinguish between, for example, South Asians and East Asians. In addition, its consideration of other categories—such as Middle Eastern—might be deemed underinclusive to the extent they do not differentiate between smaller identifiable groups within the broad term "Asian." Moreover, Harvard used categories such as Hispanic, which the Court deemed "arbitrary or undefined."[21] Finding such imprecision inexcusable, the Court cited a "mismatch" between the means Harvard employed to create a diverse class and the goals it sought in so doing, noting the burden this placed on courts in scrutinizing admissions programs like those at issue in this case.[22]

The Supreme Court in the *SFFA* case effectively hobbled the diversity rationale and reduced the extent to which schools can consider race in admissions decisions. American colleges and universities, especially highly selective ones, had relied for decades on the protection courts afforded them to build their incoming classes as they saw fit (e.g., by giving tips to applicants from underrepresented racial groups). With that justification now gone, it remains to be seen what sorts of admissions scheme(s) will take its place.

Ambiguity and imprecision being the main issues that led to the demise of the diversity rationale, the following sections explore the backdrop against which the Supreme Court made its ruling, providing some definitional clarity for the term "diversity" and a survey of the admissions landscape facing colleges in the run-up to *SFFA*. This

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[17] *Id.* at 188.

[18] Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 980 F.3d 157, 187 (1st Cir. 2020).

[19] Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181, 230 (2023).

[20] *Id.*

[21] Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181, 216 (2023).

[22] *Id.* at 217.

background proves essential in contextualizing the highly inequitable admissions landscape and the resulting overreliance on diversity to create incoming classes that roughly mirrored the demographics of broader American society.

II. THE MANY FORMS OF AFFIRMATIVE ACTION: MECHANISMS FOR ACHIEVING NON-RACIAL DIVERSITY IN COLLEGE ADMISSIONS

A. Table Setting: The Meaning and Scope of Affirmative Action in Higher Education

Before proceeding, situating the use of race-based tips in higher education admissions as well as the general debate around such practices will aid in understanding this multifaceted phenomenon. First, it is helpful to know that the type of race-based considerations at issue in the *Harvard* case are ultimately confined to a few highly selective schools. Generally, American colleges and universities do not employ race-based tips of the sort used by elite schools. Some scholars estimate that only about one hundred schools practice race-conscious admissions in the United States, admitting 10,000 to 15,000 Black and Hispanic students who would not otherwise have received an offer of admission.[23] That equates to about one percent of all students in four-year colleges and only about two percent of all Black, Hispanic, and Native American students in four-year colleges.[24]

These statistics beg the question of why the Asian American plaintiffs in the *SFFA* lawsuit did not target recruited athletes, legacies, so-called Dean's or Director's interest list candidates, and children of faculty and staff (collectively, "ALDCs") who, numerically, cost them far more spots than the comparatively few students of color that schools like Harvard admit.[25] Eliminating the handful of "diversity admits" at schools like Harvard will do far less to increase the presence of high-achieving Asian students than would removing the preference for recruited athletes and legacies. For example, a 2016 report showed that completely eliminating Black and Latino applicants from the Harvard admissions pool increased the likelihood of Asian and white students by only one percent.[26] In addition, SFFA expert Peter Arcidiacono published a paper noting that over 40 percent of white Harvard admits are ALDCs and arguing that over three quarters of white ALDCs would have been rejected from Harvard had

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[23] Amy Harmon, *How It Feels to Have Your Life Changed By Affirmative Action*, N.Y TIMES (June 21, 2023), https://www.nytimes.com/2023/06/21/us/affirmative-action-student-experiences.html?searchResultPosition=19 [**https://perma.cc/3GMK-78ZP].**

[24] *Id*.

[25] Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 397 F.Supp.3d 126, 138 (D. Mass. 2019). Especially when one considers the unique and powerful ways in which the Asian- and ALDC-coded variables interact in the economic models at issue in the Harvard case, this omission is notable.

[26] Sherick Hughes et al., *Causation Fallacy 2.0: Revisiting the Myth and Math of Affirmative Action*, 30 POLITICS OF EDUCATION ASSOCIATION SPECIAL ISSUE THEME: EDUCATIONAL POLICY AND THE CULTURAL POLITICS OF RACE 63, 81-82 (2016) (discussing admission rate changes for white and Asian applicants if there were no Black and Latino applicants). *See also Veritas: So You're Applying to College In A Global Pandemic*, VERITAS: ASIAN AMERICANS & AFFIRMATIVE ACTION (Sept. 1, 2020), (revisiting themes of the previous podcast episodes and discussing the current national debate over affirmative action and the rise in anti-Asian sentiments in the wake of the global pandemic).

they been treated as white non-ALDCs.[27] At some level, the more accurate conflict in affirmative action discourse is not between less qualified POC and Asian students, but more precisely, between upwardly mobile Asian kids and rich white kids—an ascendant class bumping up against a mediocre-but-well-resourced social and cultural elite. Ultimately, affirmative action policies generate an outsized level of discourse relative to the share of the American populace actually affected by this narrow policy.

The second point to keep in mind is that this debate on affirmative action, at its height, took place against the backdrop of increased violence against Asian immigrants and Asian Americans in the wake of the global pandemic. This made the conversation an even more highly consequential one, as it took on social, political, economic, and cultural dimensions.[28] Passionate advocates on all sides of the issue brought their own lived experiences into the debate, which only heightened the tenor of these talks. Add in a resurgence in racial consciousness spurred by the murder of George Floyd in May of 2020 and the subsequent summer of #BlackLivesMatter protests against police brutality and systemic racism that captured the world's attention, and you have a fraught discourse that can inflame the passions of all involved.[29] While the import of race-based admissions tips pales in comparison to the import of social movements for racial justice, these issues do conceptually dovetail, however marginally, at least insofar as they are both inextricably intertwined with this country's legacy of chattel slavery, racial apartheid, and the lasting effects of these practices.

The following sections describe two phenomena that massively shape the contours of college admissions in America today. No discussion of affirmative action is complete without giving some attention to these underlying realities that add complexity to an already highly charged discourse around diversity. In the zero-sum game that is college admissions, participants are jockeying for any and every advantage, which makes the following "back doors" to admissions extremely consequential.

1. "Elite" Athletics: The Role of Athletic Recruitment in Admissions

No discussion of diversity and affirmative action is complete without examining the role of sports in admissions. Sports are a major vehicle through which schools recruit students, and examining athletic

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[27] Peter Arcidiacono et. al., *Legacy and Athlete Preferences at Harvard,* 4-5 (Nat'l Bureau of Econ. Rsch., Working Paper No. 26316, 2019).

[28] *See*, for example, Li Zhou, *The Stop Asian Hate movement is at a crossroads*, VOX, (Mar. 15, 2022), https://www.vox.com/22820364/stop-asian-hate-movement-atlanta-shootings [https://perma.cc/LSR7-6C5T] (describing the rise in anti-Asian harassment in 2020 and 2021 and the emergence of the #StopAsianHate movement).

[29] The movement has, for example, spurred discussions around who exactly is "Black" and in what contexts. *See, e.g.,* Cydney Adams, *Not all black people are African American. Here's the difference.*, CBS NEWS (June 18, 2020), https://www.cbsnews.com/news/not-all-black-people-are-african-american-what-is-the-difference/ [https://perma.cc/22ND-RQKU] (noting that "Black Lives Matter protests have opened up conversations about the history of privilege, racism, and the lived experiences and identities of [B]lack people in America").

recruitment provides vital insight into the pre-*SFFA* admissions landscape especially as it relates to the lower courts' findings. The trial court found that "white applicants are significantly more likely to have made strong high school contributions to athletics, and this disparity counteracts the effect that Asian American applicants' relative academic and extracurricular strength would otherwise have on their admission rate."[30] While not necessarily pretextual, Harvard's justification of athlete admits presents a more complicated picture than the lower court suggests. As college admissions becomes ever more competitive, a growing body of research posits that men, particularly white men, enjoy privileges in the admissions process relative to female and minority applicants.[31]

To understand this "quiet"[32] or "regressive"[33] form of affirmative action, one must first consider the demographics of the students who are given such preference in admissions. Elite colleges admit large numbers of students to play sports like field hockey, rowing, sailing, polo, lacrosse, golf, squash, and fencing—sports that are more prevalent in prep schools than low-income public high schools.[34] These higher admittance rates persist even though these "country club" sports are prohibitively expensive and not strong revenue generators for most schools.[35] Even popular sports like basketball and football do not attract high levels of top-tier athletic talent

[30] Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 397 F. Supp. 3d 126, 141 (D. Mass. 2019).

[31] *See generally* Jason England, *The Mess That is Elite College Admissions, Explained by a Former Dean*, VOX (May 8, 2019), https://www.vox.com/the-highlight/2019/5/1/18311548/college-admissions-secrets-myths. [https://perma.cc/785T-ZXKX] (explaining that white men have an advantage in college admissions because of their participation in Division III athletics).

[32] Saahil Desai, *College Sports Are Affirmative Action for Rich White Students*, THE ATLANTIC (Oct. 23, 2018), https://www.theatlantic.com/education/archive/2018/10/college-sports-benefits-white-students/573688/ [https://perma.cc/97F2-3D9H] ("Put another way, college sports at elite schools are a quiet sort of affirmative action for affluent white kids, and play a big role in keeping these institutions so stubbornly white and affluent.").

[33] England, *supra* note 31 ("Division III athletics allowed a regressive system of affirmative action for the demographic that needs it the least: white wealthy males").

[34] *See generally* Desai, *supra* note 32; John R. Thelin, *Admissions, Athletics and the Academic Index*, INSIDE HIGHER ED (April 2, 2019), https://www.insidehighered.com/views/2019/04/03/how-admissions-and-athletics-intertwine-ivy-league-colleges-opinion [https://perma.cc/RVK7-NEXA]; Paul Tough, *What College Admissions Offices Really Want*, N.Y TIMES (Sept. 10, 2019), https://www.nytimes.com/interactive/2019/09/10/magazine/college-admissions-paul-tough.html [https://perma.cc/3KLP-D6B2]; Liam O'Connor, *Ivy League Athletics are the New "Moneyball"*, THE DAILY PRINCETONIAN (Oct. 10, 2019), https://www.dailyprincetonian.com/article/2019/10/ivy-league-athletics-are-the-new-money-ball [https://perma.cc/VTP6-ACRD].

[35] O'Connor, *supra* note 34 (noting that "[a]bout a fifth of the seats in each incoming class go to recruited athletes. Most of them don't play high profile revenue-generating sports like football or basketball. They play the 'country club sports' of polo, sailing, squash, rowing, and fencing, among others."); Desai, *supra* note 32 (noting that "[o]ne in five families of an elite high-school athlete spend $1,000 a month on sports").

at Ivies.[36] Despite this, Harvard has been known to spend more than $1 million per year in recruitment expenses.[37]

There is nothing inherently wrong with a school providing space for these sports or admitting the athletes who play them. What is curious, however, is why schools continue to prop up this "phalanx of lower-profile sports"[38] despite their lack of money-making power. In fact, the NCAA recognized that only twenty-five athletics departments' generated revenues exceeded their expenses in 2018-19.[39] As one former college admissions dean put it, "[y]ou wouldn't want to pay to see the teams play, but these students were admitted as if they were contributing to revenue-producing sports teams at larger universities."[40] It is unclear why schools so fiercely court these athletes in sports that do not make money or even attract fans.[41]

Strong preference for athletes in admissions becomes even less defensible when one considers that athletic recruitment overwhelmingly benefits wealthy white males at the direct expense of applicants outside

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[36] RealGM, *Ivy League Players in The NBA*, REALGM (last visited Mar. 27, 2024), https://basketball.realgm.com/ncaa/conferences/Ivy-League/14/nba-players [https://perma.cc/8VUS-F32P] (listing the "Former Ivy League Players Who Played In The NBA" and noting that there were no such players in recent seasons). Football does not fare much better. *See* Reem Abdalazem, *Which NFL Players Went to Harvard and other Ivy League Schools?*, DIARIO AS (Dec. 11, 2021), https://en.as.com/en/2021/12/10/nfl/1639158921_102106.html#:~:text=As%20of%20January%2C%202021%2C%20there,Yale%2C%20Princeton%2C%20and%20Cornell [https://perma.cc/X4AP-RHJM] (noting that, as of January 2021, "there [were] 13 active Ivy League alumni in the NFL"); Dustin Ghannadi, *Checking in on every Ivy League player currently in the NFL*, THE DAILY PENNSYLVANIAN (Jan. 27, 2021), https://www.thedp.com/article/2021/01/ivy-league-nfl-check-in-penn-quakers-football [https://perma.cc/EHW2-58BW] (confirming only 13 "Ancient Eight" alumni are active on NFL rosters).

[37] Delano R. Franklin and Devin B. Srivastava, *The Athlete Advantage*, THE HARVARD CRIMSON (May 28, 2019), https://www.thecrimson.com/article/2019/5/28/athlete-advantage-commencement-2019/ [https://perma.cc/NFE6-8YKY] ("Each year, the University pours more than $1 million into the practice [of recruiting], and hundreds of recruited athletes commit to the College.").

[38] Desai, *supra* note 32.

[39] National Collegiate Athletic Association, *2004-19 NCAA Revenues and Expenses of Division I Intercollegiate Athletics Programs Report*, NCAA (last visited July 10, 2024), https://ncaaorg.s3.amazonaws.com/research/Finances/2020RES_D1-RevExp_Report.pdf [https://perma.cc/4AVX-3CHN].

[40] England, *supra* note 31.

[41] Many justifications are posited, but they fail to adequately explain this recruitment strategy. Some observers claim that these sports programs boost student and alumni morale, which results in more tailgating or bragging rights within an athletic conference and in turn might translate to more donations to the school. England, *supra* note 31. Another justification is that athletes are more likely than their peers to go into lucrative fields like law or business and to donate in the future. *Id.* Some research suggests that male former athletes' donations increase when their college team wins its athletic conference. *See* Jonathan Meer and Harvey S. Rosen, *The Impact of Athletic Performance on Alumni Giving: An Analysis of Micro Data* 1-2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 13937, 2008) (noting the approximate 7% rise in general and athletic program donations from male graduates at an anonymous "selective research university" whose former teams won their athletic championships). There are a variety of justifications for a strong athletic program at selective schools, but the lack of a single prevailing narrative seems odd given the outsized preference for these student athletes.

that demographic.[42] More "average" white female athletes generally are academically qualified enough to be admitted the traditional way, notes former Wesleyan Admissions Dean Jason England.[43] Spots for student-athletes of color were similarly finagled to make room for "underwhelming" white male candidates.[44] In a strategy he calls "cynical," England describes the deferral of Black athletes to the general admissions committee, which often decided to admit them on diversity grounds, which "saved tips in the athletic committee for more underqualified white men, while robbing non-athlete Black students in the regular committee."[45] In this way, white male athletes are deliberately propped up by admissions offices at the direct expense of women and people of color.

SAT scores can provide a "convenient justification" for admitting otherwise unimpressive students who can afford to pay full tuition—a major directive for any admissions office.[46] Another admissions professional laments that colleges routinely admit low-performing high schoolers from expensive prep schools who are at the bottom of their classes academically but who have access to SAT prep courses, tutoring, and other resources that net them a higher-than-average SAT score.[47] With this strategy, admissions committees can then justify rejecting academically successful poor students with lower SATs on the grounds of "college readiness" rather than ability to pay.[48] But SAT scores do not tell the whole story.

Even after admittance, it is not clear that many athletes at elite schools maintain the academic performance that warranted their admittance. Trinity College, a highly selective liberal arts school, provides one example. Unmotivated students with high standardized test scores often did not rise to meet the intellectual rigor of college courses.[49] This lack of performance from supposedly highly qualified students, many of whom are recruited athletes, apparently had a discouraging effect on teacher morale.[50] Furthermore, it casts doubt on what exactly standardized tests are designed to measure and the true meaning of "college readiness."

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[42] National Collegiate Athletic Association, *NCAA Demographics Database,* NCAA (last visited Mar. 27, 2024), http://www.ncaa.org/about/resources/research/ncaa-demographics-database **[https://perma.cc/K7ZB-SY5M]**. For example, during the 2018-2019 school year, 64% of NCAA "student-athletes" were white. Or consider the fact that in 2018, 74% of lacrosse players in the Ivy League were white, and 3% were Black. *Id*.

[43] England, *supra* note 31.

[44] *Id*.

[45] *Id.*

[46] *Id.*

[47] Tough, *supra* note 34.

[48] *Id*.

[49] Tough expounds: "The problem is, rich kids who aren't motivated to work hard and get good grades in high school often aren't college-ready, however inflated their SAT scores may be. At Trinity, this meant there was a growing number of affluent students on campus who couldn't keep up in class and weren't interested in trying." *Id*.

[50] *Id.* (citing Angel Pérez, a former enrollment manager at Trinity College, who noted the "morale effect on our faculty" of students with pumped-up SAT scores who populated classes in which they were disengaged and unmotivated to improve).

Finally, after being admitted, many D-I Ivy League athletes drop their sports.[51] To reiterate: most of these students, whose admissions were justified largely along athletic lines, quit. At Brown University, for example, a 2016 report found that about thirty percent of student-athletes did not play their sport through their senior year.[52] Similarly, Ithaca College, a private liberal arts school in New York, had an athlete retention rate of just forty-six percent for the class of 2014.[53] It is noteworthy that so many athletes—star performers funneled into elite schools on the theory that they bring some benefit to morale, donations, or campus culture—drop the sports they had played, often for the balance of their young lives, not long after arriving to campus. If sports are so integral to life at these elite colleges (and loom so large in their admissions decisions), why do so few admittees stick with them? Why does athletics continue to have an outsize effect on admissions decisions if schools know they will lose these players in a year or so?

The nature of athletics at elite schools is even more perplexing when one considers how heavily the courts weighed athletics as the *SFFA* decision made its way through the judicial branch. For example, in justifying the lower admission rates of Asian students, the trial court noted that white applicants were significantly more likely to have made "strong high school contributions to athletics" and that this counteracts the effect that Asian applicants' grades and extracurriculars would otherwise have on their admission rate.[54] While not necessarily pretextual, Harvard's justification for its preferential treatment of athletes in admissions presents a more complex picture than the lower court suggests.

As discussed above, these sports are prohibitively expensive even at the recruitment stage; they are not particularly popular; their athletes are not star students; they often quit their sport; and schools are losing money on them. Some might argue that Harvard, which has more sports than any school in the NCAA[55], is uniquely able to accommodate this high

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[51] The Next College Student Athlete or "NCSA," a company that "helps thousands of student-athletes and their families take control of their [athletic] recruiting experience," surveyed NCAA sports across Divisions between 2012 and 2017, finding that "over 45% of underclassmen athletes are not listed on their college roster the following year." The Next College Student Athlete, *2019 NSCA State of Recruiting Report*, NSCA (last visited Mar. 27, 2024) https://www.ncsasports.org/state-of-recruiting [https://perma.cc/VX7Z-4ZJS]. *See also* The Next College Student Athlete, *The NSCA Experience*, NSCA (last visited Mar. 27, 2024), https://www.ncsasports.org/who-is-ncsa/what-does-ncsa-do. [https://perma.cc/95YP-NMYQ] (explaining what The NCSA is).

[52] Ben Shumate, *30 percent of athletes quit respective teams*, THE BROWN DAILY HERALD (Apr. 28, 2016), https://www.browndailyherald.com/2016/04/28/30-percent-of-athletes-quit-respective-teams/ [https://perma.cc/HDF2-X34Y]. O'Connor also references a study by William Bowen and Sarah Levin finding that "a lot of athletes drop varsity sports after their underclassmen years." O'Connor, *supra* note 34.

[53] Kristen Gowdy, *Hanging it up: Former Student-Athletes Share their Past Athletic Experiences*, THE ITHACAN, (Apr. 9, 2014), https://theithacan.org/sports/hanging-it-up-former-student-athletes-share-their-past-athletic-experiences/ [https://perma.cc/SEJ4-6W62].

[54] Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 397 F.Supp.3d 126, 164 (D. Mass. 2019).

[55] Harvard College, *Why Harvard: Student Activities,* HARVARD COLLEGE (last visited Mar. 27, 2024) https://college.harvard.edu/admissions/why-harvard/student-

number of athletes of varying academic prowess, athletic ability, and revenue-generating potential due to the school's immense wealth. Even if this theory holds, athletic recruitment remains a high stakes operation at Harvard and elsewhere due to the harsh reality of class size limits.[56] As one observer put it, "every admissions slot dedicated to a talented student athlete could mean one less space for a nonmerit admit, such as an alumni legacy or the child of a generous donor."[57] For these reasons, it is not hard to imagine why even wealthy parents go to such great lengths to produce distinguished athletes—or at least the appearance of such distinction.[58] As the Massachusetts trial court recognized, athletes simply have an edge in admissions, however murky the reasons for that edge may be. The Supreme Court has not yet taken up a challenge to athletic recruitment—indeed, they may never be so inclined—but it is worth noting the massive advantage athletes receive and the corresponding disadvantage non-athletes must overcome in admissions.

2. Early Birds: The Effects of Early Decision and Merit Aid on Admissions

If athletics cannot provide a strong enough justification for the admission of otherwise underwhelming applicants, they have another tool in their admissions arsenal: early decision. Rich (usually white) applicants applying early decision can secure a spot at a prized university before their diverse counterparts have even applied. Early-admission decisions refer to an admissions process, usually occurring months before general admissions, in which students apply to one college and agree to attend that college if admitted. This practice favors wealthier applicants who can often commit to a school without knowing how much financial aid they will receive.[59] Students from low-income backgrounds—many of whom will be BIPOC students—often need to compare tuition costs and aid packages from multiple schools before making a decision. In order to compare, they need multiple admissions offers, which necessitates applying during the

activities#:~:text=Harvard%20is%20home%20to%2042,other%20college%20in%20the%20country [https://perma.cc/WFF5-GSK9].

[56] Thelin, *supra* note 34.

[57] *Id.*

[58] Varsity Blues is perhaps the most high-profile example of parents gaming the system, but it is by no means the only one. Even schools with supposedly merit-based admissions like UCLA or Berkeley are not immune. *See* Scott Jaschik, *University of California Admissions Disgrace*, INSIDE HIGHER ED (Sept. 27, 2020), https://www.insidehighered.com/admissions/article/2020/09/28/university-california-admissions-scandal-worsens [https://perma.cc/72SV-XNJL] (referencing an audit of Berkeley's admissions practices that revealed emails suggesting how or why the university admitted certain students, including: "'Applicant babysat for a colleague of the former director of undergraduate admissions,' … 'Child of a high-level university staff member,' [and] 'Applicant's family promised a large donation'"). Perhaps most insidiously, this preferential treatment can directly harm those it was designed to protect. *Id.* (describing the use by admissions staff of "prospect lists"—lists of students from underprivileged backgrounds who might be strong candidates for admission—to admit students with connections to donors, staff, and faculty over similarly or better-qualified students who were members of the population the list was designed to benefit).

[59] Desai, *supra* note 32 (describing how early admissions and athletic recruitment practices work together to "warp[] the [admissions] process in favor of wealthier kids who can send in early-decision applications to selective schools without fretting about the size of the financial-aid package they'll receive").

regular decision round when they are not bound to accept the first offer of admission.[60] Researchers have consistently found that early admission disproportionately benefits the rich.[61] Colleges also benefit because early admission boosts their yield rate, which is the percentage of admitted applicants who end up enrolling at the school.[62] A school with a higher yield rate can accept fewer students to reach its intended class size, which decreases its acceptance rates and can boost a school's prestige and its place in college rankings.[63] Schools like Trinity and Harvard do not offer athletic scholarships, but recruited athletes can apply early decision.[64] Admissions officers like early admission because, by locking in tuition-paying applicants, it eliminates some of the uncertainty inherent in their jobs, which in significant part depend on bringing in the highest achieving students who can afford tuition.[65] It is therefore no surprise that athletes matriculate at such a high rate at selective schools.

Early decision, whether it serves as a means of securing students passionate about a particular school or merely as a wealth generator, is not inherently suspect. If schools, especially private ones, want to admit students partially—or substantially—based on their ability to pay, that is their prerogative. However, even a wealth-based justification is not wholly convincing, considering that many rich students end up paying far less than sticker price because of merit aid.

A practice that caught on in the 1980s, "merit aid" scholarships became a vehicle to lure wealthy students to enroll in higher education institutions.[66] By the 2000s, merit aid had turned into an "arms race" in

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[60] *Id. See also* Tough, *supra* note 34 (noting that "nonrich students" need to be able to "compare tuition costs and aid packages from multiple colleges before deciding where to enroll"). To again invoke Trinity College, the approximately 300 early admits of a class totaling 589 were "quite a bit wealthier, on average, than the rest of the freshman class, and about half of [them] were athletes." Tough, *supra* note 34. *See also* Kathy Andrews, *Welcoming the Class of 2022,* TRINITY COLLEGE (Aug. 30, 2018), https://www.trincoll.edu/news/welcoming-the-class-of-2022/#:~:text=The%20Class%20of%202022%20at%20a%20Glance%3A&text=Record%2Dsetting%2015%20percent%20first,of%20Columbia%20and%20Puerto%20Rico [https://perma.cc/N73S-ALP6].

[61] *Id.*; *See* Jennifer Giancola and Richard D. Kahlenberg, *True Merit: Ensuring Our Brightest Students Have Access to Our Best Colleges and Universities*, JACK KENT COOKE FOUNDATION (last visited Mar. 27, 2024), https://www.jkcf.org/research/true-merit-ensuring-our-brightest-students-have-access-to-our-best-colleges-and-universities/ [https://perma.cc/228L-93PF] (finding that students who apply early "receive the equivalent of a 100 point bonus on the SAT" [emphasis omitted]).

[62] Maroon Editorial Board, *Early Decision Unfairly Favors Wealthy Applicants*, THE CHICAGO MAROON (Dec. 3, 2018), https://www.chicagomaroon.com/article/2018/12/4/early-decision-unfairly-favors-wealthy-applicants/ [https://perma.cc/7J9N-8TVG] (defining yield rate). *See also* Tough, *supra* note 34 (adding additional support of yield being increased).

[63] Maroon Editorial Board, *supra* note 62.

[64] HARVARD UNIV., *Prospective Student-Athletes*, https://gocrimson.com/sports/2020/5/5/information-recruiting-helpfulinfo.aspx#:~:text=No.,students%20who%20demonstrate%20financial%20need [https://perma.cc/GPT7-HJB2] ("As an Ivy League institution, Harvard does not offer athletic or academic scholarships to students. However, Harvard does provide need-based financial aid to those students who demonstrate financial need.").

[65] Tough, *supra* note 34.

[66] *Id.* (describing Jack Maguire, a former admissions dean at Boston College, who supposedly pioneered in the 1970s the technique of "deploy[ing] financial aid strategically,

which schools were offering increasingly larger merit aid packages to prospective students. Things may now be approaching a "death spiral" in which the vast majority of students are receiving merit aid.[67] In recent years, wealthy admits have been able to demand ever-steeper "tuition discounts," substantially decreasing overall tuition revenue.[68] That is, rich families can more effectively "bargain" over tuition. These families could be lifelong contributors to a school if their child is admitted, but the price of that admittance comes at a cost—or rather, a cost reduction.

The pressure to admit underwhelming rich kids comes not only from their parents but also from data, and enrollment managers, not wanting to lose their jobs, are understandably reluctant to buck the trend.[69] This pressure results in even less aid to low-income students, however "meritorious" they might be.[70] To put this phenomenon into context, American colleges collectively give students with a family income of over $100,000 more institutional aid, on average, than they do to a student with a family income under $20,000.[71] Simply put, colleges work much harder to admit wealthy students than talented ones from low-income backgrounds, despite the fact that the wealthy students may end up giving less money to the school.

Admissions practices related to athletic recruitment, early decision, and merit aid all interact to create an admissions landscape that is less than egalitarian. Certain candidates are privileged due to less "objective" admissions criteria such as perceived athletic ability or the likelihood of future financial contribution to the school. These advantages can be subtle but extremely consequential in such a competitive system. When schools have to choose between well-credentialed but often similarly qualified applicants, something as simple as playing the right sport can be the tiebreaker in admitting one student over another. These "side doors" function as a parallel system of affirmative action, though they engender far less controversy than race-based affirmative action.

III. DEFINING DIVERSITY: AN ANALYTICAL FRAMEWORK

The Supreme Court's diversity jurisprudence in the higher education context centers almost exclusively on race-based tips. One major

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as a way to attract the students he most wanted to admit, whether they genuinely needed financial assistance or not" and explaining the proliferation of this practice among private and some public colleges).

[67] *Id.* (citing the National Center for Education Statistics, which noted that "89 percent of students receive some form of financial aid, meaning that almost no one is paying full price").

[68] *Id.* (referencing Pérez recalling how rich families requesting tuition cuts as a condition of acceptance caused a "financial crisis" at Trinity College).

[69] *Id.* (describing the rise of predictive analytics in admissions and financial aid, how these models point to admitting more wealthy students as the best way to ensure a school's financial survival, and how admissions personnel feel compelled to follow the data).

[70] *Id.*; *See also* Jaschik, *supra* note 58 (referencing a state audit report that describes a situation in which Berkeley admission counselors were overruled in not recommending the admission of both a child of a staff member and child of a donor while a high-achieving third applicant from a low-income background and a "disadvantaged school" was recommended by both readers only to be rejected ultimately).

[71] Tough, *supra* note 34 (citing 2015–16 National Postsecondary Student Aid Study).

challenge facing a race-based diversity regime is the issue of line-drawing. As in any legal framework, courts or juries must decide where to make cut-offs—that is, they must decide who is "diverse" under law. The Supreme Court in *SFFA* showed little interest in this exercise, but one can imagine future challenges to affirmative action policies will highlight line-drawing issues that bear on who gets which benefits. Brazil's college admissions process provides one example of the challenges inherent in this line-drawing approach, as the country's universities have faced backlash regarding their own affirmative action policies in recent years.

A. "Come to Brazil": A Brazilian Case Study and its Lessons for the United States

Brazil provides perhaps the best example of what types of issues arise when a country institutes race-based quotas. Brazil is one of the most ethnically and racially diverse countries in the world, with the largest portion of people with Black ancestry outside of Africa. [72] In this way, it is not unlike the multiracial United States. A self-stylized "racial democracy," Brazil did not introduce significant affirmative action measures in institutions of higher education until the early 2000s.[73] In 2012, Brazil passed the Law of Social Quotas, a sweeping affirmative action policy that required half of incoming students in universities to come from public schools—an effort that effectively sought to increase the enrollment of Black and low income students, who are disproportionately represented in the country's poorly performing public elementary and high schools.[74] The Brazilian government created race-based quotas for Black, Brown, and indigenous applicants to ensure that these students had access to the country's public universities. This process was designed to lead to the "democratization of higher education" and a correction of historical wrongs in Brazil, which has its own fraught history of racial issues.[75]

Almost immediately, however, Black activists started highlighting instances of "race fraud" in which students who were not phenotypically Black were matriculating to Brazilian schools.[76] Activists believed that many white Brazilians took admission spots reserved for applicants who

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[72] Simon Romero, *Brazil Enacts Affirmative Action Law for Universities*, N.Y. TIMES (Aug. 30, 2012), https://www.nytimes.com/2012/08/31/world/americas/brazil-enacts-affirmative-action-law-for-universities.html [https://perma.cc/G7RF-N7Z4].

[73] Cleuci De Oliveira, *Brazil's New Problem With Blackness*, FOREIGN POLICY (Apr. 5, 2016), https://foreignpolicy.com/2017/04/05/brazils-new-problem-with-blackness-affirmative-action/ [https://perma.cc/A9K4-TSMY].

[74] Romero, *supra* note 72.

[75] *Id. See also* De Oliveira, *supra* note 73. For more on Brazil's history of racial strife, *see generally* Vox, *What it means to be Black in Brazil*, YOUTUBE (Sept. 23, 2020), https://youtu.be/jk1eTURC8sA?si=dlQmlXt1q8KY_Mo9 (discussing the complicated history of racial self-identification in Brazil) and Ciara Nugent and Thaís Regina, *How Black Brazilians Are Looking to a Slavery-Era Form of Resistance to Fight Racial Injustice Today*, TIME (Dec. 16, 2020), https://time.com/5915902/brazil-racism-quilombos/ [https://perma.cc/N3QL-MEPU] (describing ongoing inequalities between Black and non-Black Brazilians and the rise of "quilombo" communities of Black Brazilians promoting anti-racism and Black empowerment).

[76] De Oliveira, *supra* note 73. Somewhat ironically, many of these activists were now challenging the implementation of the very race-conscious policies they had fought for decades to enact.

were phenotypically Black, who lived the Black Brazilian experience.[77] A state of "racial vigilance" in 2016 spread across universities.[78] Student activist groups reported and even sued students that they considered not sufficiently Black, which resulted in the temporary or permanent ejection of dozens of students from campuses across Brazil.[79]

The backlash on these campuses, in the public sector, and in the courts led in many instances to the establishment of "race boards" to evaluate which applicants for government jobs or public universities were truly, verifiably Black.[80] These entities screened for what they considered to be African phenotypical characteristics, examining applicants' lip thickness, gum color, nose width, hair texture, skull shape, among others.[81] In response to one school's evaluation committee, students were said to have shaved their heads, worn beanies, gotten tans, and employed face makeup in an effort to appear more "[B]lack."[82] Targeted students, many of whom identified as "pardo" (Brown)—a term signifying a mixed-race person with African ancestry—were kicked out of their educational programs, some suing to reinstate their admission.[83] The *pardo* identity is a complicated one in a country as uniquely diverse as Brazil, where over forty percent of people identify as mixed-race, and around thirty percent of white-identifying Brazilians have Black ancestors.[84] A number of these self-identified *pardo* students had fairly recent African ancestry, such as a Black grandparent, and considered themselves proudly mixed-race—that is, a typical Brazilian—which helps to explain why racial line-drawing can be a quixotic enterprise in Brazil.[85]

Some observers cite the racial evaluation boards as engaging in a "witch hunt," but Brazilian activists view them as a necessary deterrent,

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[77] Lulu Garcia-Navarro, *For Affirmative Action, Brazil Sets Up Controversial Boards to Determine Race*, NPR (Sept. 29, 2016), https://www.npr.org/sections/parallels/2016/09/29/495665329/for-affirmative-action-brazil-sets-up-controversial-boards-to-determine-race [https://perma.cc/6VF9-H9BX].

[78] De Oliveira, *supra* note 73 (describing the work of Colectivo Negrada, Setorial Negro, and other groups in identifying and seeking the removal of non-Black students who gained admittance to schools via Brazil's affirmative action policy).

[79] *Id.*

[80] *Id.*; Garcia-Navarro, *supra* note 77.

[81] De Oliveira, *supra* note 73 (describing a leaked checklist which mentioned several of the characteristics to look for and evaluate applicants on).

[82] *Id.* (presenting Ethnicity Evaluation Committee member Prof. Georgina Lima's comment that "[p]eople would shave their heads, wear beanies, get a tan. Just a series of strategies to turn themselves [B]lack.").

[83] *Id.*, Garcia-Navarro, *supra* note 77 (describing how one self-identified Afro Brazilian decided to sue after his school's race board deemed him not *pardo* and therefore ineligible for his current job).

[84] De Oliveira, *supra* note 73; Garcia-Navarro, *supra* note 77.

[85] De Oliveira, *supra* note 73 (presenting the story of pseudonymous "Fernando" who was kicked out of school but who views himself as pardo, coming from a family that he says struggled with discrimination when his white grandfather married his black grandmother). Garcia-Navarro, *supra* note 77 (presenting Lucas Siqueira, who lost a highly competitive job at Brazil's Ministry of Foreign Affairs after a race committee, spurred to investigate by members of the public who dug into Siqueira's social media accounts, deemed him not Black, despite him having a Black grandfather).

given the country's complicated racial history.[86] Because so much of the country is mixed-race, some believe that skin tone matters more than race in this racial democracy, making the race determinations of committees an all-the-more convoluted—and consequential—exercise.[87] As one ousted university student noted, "[n]one of the race committee [interviewers] were *pardo*. There was no one there that could identify with me."[88] Even though affirmative action policies account for mixed-race individuals, the student felt singled out for being lighter skinned.[89]

A major problem with Brazil's system was that applicants were asked to racially self-identify. That is, they were asked to select their own race, which opened a multitude of responses that overwhelmed a government ill-equipped to evaluate the race of these applicants in a timely and systematic way against the backdrop of growing social anxiety and calls for reform.

From Brazil's experience implementing an affirmative action regime, several lessons can be learned. First, clear guidelines must be in place to ensure that the policy helps the intended population. That is, at some level, there will have to be a discussion of how best to define "Black person" for the purposes of affirmative action in the American context. Second, policies must be enforced in a way that seems more objective—one can hardly imagine a "race panel" deciding if an applicant qualifies for affirmative action in the United States. Therefore, policymakers must find a more objective framework that presents as more legitimate in the eyes of the people. Third, there must be ways of preventing both "racial fraud" and "witch hunts" or other types of activism that is ultimately meant to "expose" persons who are not viewed as sufficiently "Black." If all of the above seems unworkable or even dangerous, that is because this is likely so. As will be discussed below, a purely race-based affirmative action justification is susceptible to numerous challenges that make such a scheme virtually impossible to implement successfully.

B. History Lesson: A Brief Survey of Black Racial and Ethnic Identification

Not unlike Brazil's *pardo*, many terms—e.g., African American; Black; person of color ("POC"); Afro-American; nonwhite; colored; Negro; Brown; minority; "melanated"; and BIPOC—have been created to describe persons of African ancestry living in the United States. These modes of racial self-identification will only continue to proliferate amongst Americans, exacerbating the challenges of defining who is diverse.

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[86] Garcia-Navarro, *supra* note 77 (noting committees are a deterrent); De Oliveira, *supra* note 73 (noting general support for the race commissions among Black Brazilians while others see it as a "witch hunt").

[87] Garcia-Navarro, *supra* note 77. Siqueira describes visiting at least seven dermatologists who used the Fitzpatrick scale, a test measuring skin tones, to prove his Afro-Brazilian identity.

[88] De Oliveira, *supra* note 73.

[89] *Id.*

The newly *en vogue* "people of color" has already encountered difficulties.[90] Professor Efrén Pérez of UCLA describes the label as being created by and for African Americans but a moniker that has "evolved into an identity that politically mobilizes many nonwhites toward common goals."[91] The term has obvious social implications, but it also contains cultural and political dimensions as well.[92]

Further, the histories behind these terms tend to be complex, as their meanings evolve at least as quickly as social mores and political speech. For example, the term "person of color" has historical roots that differ significantly from its modern usage.[93] The word "Negro" was once a near-ubiquitous term.[94] Once-heralded political chimeras like "African

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[90] *See* Benjamin Goggin, *There's a Growing Debate Over Who Qualifies as a 'Person of Color' — Who Is and Isn't Included?*, INSIDER (Dec. 8, 2018), https://www.insider.com/the-internet-is-debating-who-to-call-people-of-color-2018-11[https://perma.cc/G59E-WSLP] (describing the evolution of the term "person of color" from a social justice-oriented phrase to a more widely adopted term and the ensuing debate over whether Asians should be considered people of color, specifically in contrast to Black people, whose experiences and viewpoints many argue are erased by use of the term "people of color") and E. Tammy Kim, *The Perils of "People of Color"*, THE NEW YORKER (July 29, 2020), https://www.newyorker.com/news/annals-of-activism/the-perils-of-people-of-color [https://perma.cc/6ZYG-6LMX] (discussing the origins of the term and the presence of anti-Black racism among "people of color" while simultaneously cautioning against the abandonment of the solidarity inherent in the intersectional phrase).

[91] Efén Pérez,"*'People of Color' are Protesting. Here's What You Need to Know About this New Identity.*", THE WASHINGTON POST, https://www.washingtonpost.com/politics/2020/07/02/people-color-are-protesting-heres-what-you-need-know-about-this-new-identity/ [https://perma.cc/HYE5-E5TA] (researching the history and eventual adoption of the term "people of color" by mainstream newspapers).

[92] *Id.* For example, Pérez found in his research that "[a] stronger level of POC identity is strongly associated with support for BLM among [B]lack, Latino and Asian adults, independent of other influences like personal ideology. This pattern also emerges on other political issues, like support for Deferred Action for Childhood Arrivals (DACA) and curbing police brutality." Pérez also found that support for the term "people of color" tended to narrow when individuals felt their respective racial group's unique needs and challenges were being ignored within the broad "POC" framework.

[93] Kim, *supra* note 90. *Gens de couleur* originally described mixed-race colonial subjects in eighteenth-century France.

[94] W.E.B. Du Bois, *The Name Negro*, TEACHING AMERICAN HISTORY (last visited Mar. 28. 2024), https://teachingamericanhistory.org/library/document/the-name-negro/ [https://perma.cc/S74Q-H62Q]."Negro" was endorsed by Black intellectual titans like author and activist W.E.B. Du Bois, who called it a "fine" word that is as much an accident of history as is the widespread adoption of words like "[w]hite," "German," or "Anglo-Saxon." *Id.* Du Bois believed that the term was as definite "as any name of any great people" and that, practically speaking, Black people needed some way to differentiate themselves and their communal struggles and priorities from that of white people (hence the disutility of a nondescript "American" moniker). Still, "Negro" fell out of widespread use by the 1970s. *See* Ferris State University Jim Crow Museum, *When Did the Word Negro Become Socially Unacceptable?*, JIM CROW MUSEUM OF RACIST MEMORABILIA (Oct. 2010), https://www.ferris.edu/HTMLS/news/jimcrow/question/2010/october.htm [https://perma.cc/7SX6-LMWB] (outlining a controversy around Sen. Harry Reid's use of the word "Negro" and tracing the history of the word in the United States). *See also* Ben L. Martin, *From Negro to Black to African American: The Power of Names and Naming*, 106 POLITICAL SCIENCE QUARTERLY, 83, 107 (1991) (analyzing the historical debates and social movements centered around competing notions of Black racial and ethnic identity). Of course, the term would seem offensive to many Black people today, but social conventions can change quickly. Indeed, the term "Black" was offensive to many African Americans living in the first half of the twentieth century. *Id.* at 8.

American" face questions probing their continued relevance.[95] Today, in the "Black vs. African American" debate, some argue that the default to "African American," often borne out of a desire to appear politically correct or merely polite, obscures differences among persons with African ancestry.[96] Terms of racial self-identification carry no fixed notions of identity, but are rather social and political descriptors that are subject to the myriad forces that cause their use to ebb, evolve, or evaporate altogether.[97]

The politics of the term "Black" are vast and often situation dependent. For example, the NPR podcast "Code Switch" presented the story of Christina Greer. During a pre-orientation event for Black students at Tufts University in the mid-1990s, Greer recalled one session in which students were asked to close their eyes and raise their hands if their parents had told them not to associate with "[B]lack" students upon their arrival to Tufts. What initially seemed an odd question to Greer—in a room full of Black kids—made sense when she opened her eyes and discovered "everyone's hands were raised except for the [six] [B]lack Americans" because the rest of her peers in the room were either Black immigrants or the children of Black immigrants, Greer recalls.[98] Greer goes on to recount other differences between what she terms "JBs" or "just [B]lacks" (i.e., non-immigrant or non-immigrant-descended Black people) and these other students, such as the various affinity groups catering to, for example, students of African or Caribbean origin (in addition to the general Black student union).[99] Of course, Black students in these groups sometimes viewed themselves as one community, but at other times, these separate identities predominated, which is not a phenomenon unique to Tufts or any university for that matter.[100] Such differences, when highlighted, can be a

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[95] *See* Martin, *supra* note 94 at 1 (describing Jesse Jackson's endorsement of the term "African-American" as an ethnic reference to supplant a racial one (i.e., "[B]lack") and the term's eventual adoption in the national press). By the late 1960s, "African American" became popular due to the term's ability to unite Black persons of varying backgrounds by emphasizing their "American-ness" without glossing over a shared African heritage.

[96] Cydney Adams, *Not all Black People are African American. Here's the Difference.*, CBS NEWS (June 18, 2020), https://www.cbsnews.com/news/not-all-black-people-are-african-american-what-is-the-difference/ [https://perma.cc/PRD8-TWVX] (noting that "Black Lives Matter protests have opened up conversations about the history of privilege, racism, and the lived experiences and identities of black people in America."). While "African American" is a nation-specific term usually describing Black persons born in the United States, "Black" could refer to persons of African ancestry born in Africa, the Caribbean, Europe, or elsewhere. *Id.* Of course, for much of this country's history, most "Black" people were enslaved Africans or their descendants, but this changed as immigration from Africa and elsewhere increased in the latter half of the twentieth century. *Id.* These people were more likely to be first- and second-generation immigrants without a direct link to enslaved Americans or their progeny. *Id.*

[97] The issue of self-identification and the associated terminology is not solely a Black one; one need look no further than the perennially controversial term "Latinx." *See, e.g.*, Luis Noe-Bustamante, *About One-in-Four U.S. Hispanics Have Heard of Latinx, but Just 3% Use It*, PEW RSCH. CTR. (Aug. 11, 2020), https://www.pewresearch.org/race-and-ethnicity/2020/08/11/about-one-in-four-u-s-hispanics-have-heard-of-latinx-but-just-3-use-it/ [https://perma.cc/94K8-WXQC].

[98] Code Switch*, Who's 'Black Enough' For Reparations?*, NPR, at 6:32-7:23 (Feb. 3, 2021), https://www.npr.org/2021/01/25/960378979/whos-black-enough-for-reparations [https://perma.cc/C9UQ-99WP].

[99] *Id.* at 4:34-4:54.

[100] *Id.* at 4:54-5:22.

source of tension even within singular racial groups such as Black Americans.

These myriad tensions—the painful history, the competing powers and communities, the ever-changing faces claiming to speak for what ultimately may be a collective of intersecting but differentiated interests—ensure that "Blackness" as a concept is anything but straightforward. Self-identifying can in this way involve innumerable considerations and sometimes imperceptible nuances that are lost even on the individuals themselves as the role of history—both as it happened and as it is retold—can shape our perceptions of our own identity.[101]

Over a decade ago, historian Ira Berlin remarked that "[s]uch discord over the meaning of the African American experience and who is (and isn't) part of it is not new, but of late has grown more intense."[102] It is undeniable that the Black experience, whether that of the descendants of enslaved people or of voluntary immigrants, is at some level a shared one. For example, Africans are more likely than other immigrants to live near African Americans; this proximity results in Black immigrants being deported at higher rates than other immigrants because the Black communities in which they reside are already over-surveilled.[103] Moreover,

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[101] Even major corporate entities have gotten behind this idea of telling a more "complete" story. *See* Cartoon Network, *Tell the Whole Story | The Crystal Gems Say Be Anti-Racist | Cartoon Network*, YOUTUBE (Dec. 3, 2020), https://www.youtube.com/watch?v=7JheC-_8I5A&ab_channel=CartoonNetwork (presenting the story of Lewis Latimer and his role in the creation of the modern lightbulb—all of which is a vehicle for commentary on the erasure of Black narratives from history and the importance of telling a more complete story).

[102] Ira Berlin, *The Changing Definition of African-American: How the great influx of people from Africa and the Caribbean since 1965 is challenging what it means to be African-American*, SMITHSONIAN MAGAZINE, (Feb. 2010), https://www.smithsonianmag.com/history/the-changing-definition-of-african-american-4905887/ [https://perma.cc/SHK6-UHMA] (describing Berlin's appearance on public radio to discuss the Emancipation Proclamation and the concept of "self-emancipation" of enslaved Africans, which has generated controversy among historians).

[103] *See, e.g.*, Ashoka Mukpo, *For Black Immigrants, Police and ICE Are Two Sides of the Same Coin*, ACLU (Sept. 3, 2020), https://www.aclu.org/news/criminal-law-reform/for-black-immigrants-police-and-ice-are-two-sides-of-the-same-coin [https://perma.cc/7NWM-9LYL] (presenting the story of Guinean Amadou Diallo, who was gunned down by NYPD in the Bronx over 20 years ago. Diallo represents one of many Black immigrants whose experiences with law enforcement are colored by their relationship to the Black community in the United States. That is, no matter one's origin, dark skin marks one as "Black" in America, and all associated challenges attach, even if one is not from this country and was not born into the legacy of slavery and segregation. The author, recounting Diallo's story, suggests that the persistent over-policing of Black neighborhoods generally led in part to Diallo's death, noting that modern chants of #BlackLivesMatter should include advocacy for Black immigrant communities. Mukpo also notes that, despite only constituting about 7% of non-citizens, Black immigrants make up over 20% of those in criminal deportation proceedings, another testament to the impact of systemic racism on native Black and Black immigrant communities alike). *See also* Peniel Ibe, *Immigration is a Black Issue*, AM. FRIENDS SERV. COMM. (Feb. 16, 2021), https://www.afsc.org/blogs/news-and-commentary/immigration-black-issue [https://perma.cc/A2YE-FYGG] (noting that, despite making up less than 9% of the undocumented population, Black immigrants make up over 20% of all immigrants facing deportation on criminal grounds or due to criminal offenses) and Shamira Ibrahim, *Ousman Darboe Could Be Deported Any Day. His Story is a Common One for Black Immigrants*, VOX (Feb. 5, 2020), https://www.vox.com/identities/2019/9/30/20875821/black-immigrants-school-prison-

Black immigrants have similar poverty rates to U.S.-born Black persons, with twenty percent of Black immigrants living below the poverty-line compared with twenty-eight percent of U.S.-born Black persons.[104] Also, African immigrants, by virtue of being Black in America, are in some ways more likely to identify with Black American culture. African immigrant children also share the yoke of American racism and continue to be frontline leaders in racial justice movements.[105]

These similarities, these shared experiences, surely unite Black people in undeniably important ways. However, this unity is not absolute, and growing divisions could further complicate what it means to be "Black" and "diverse" in a post-affirmative action world. In light of the below, it is crucial that Black Americans recognize the shared history and challenges of the diaspora, as opponents of affirmative action may try to sew division to weaken political unity among Black persons in an effort to undermine diversity initiatives.

C. State of Play: Modern Fault Lines in Black Self-Identification

Immigration policy and the arrival of more African and West Indian immigrants to the United States has intensified the nationwide discussion of Black identity, and this conversation is already seeping into the affirmative action debate. Diversity advocates must take care not to engage in reductive arguments that pit members of the Black diaspora against one another. The "ADOS" movement, which has gained prominence in recent years, provides an example of potential division. ADOS, which stands for "American Descendants of Slavery," is a group that argues, among other things, that affirmative action policies designed to help Black Americans descended from enslaved people have mostly benefitted other groups, including African and Caribbean immigrants.[106] ADOS believes that descendants of the formerly enslaved should have their own racial category on the census as well as on college applications.[107] Groups like ADOS have seized upon the growing exclusion of "native [B]lacks"[108] at elite colleges as a rallying cry to push their policy preferences.

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deportation-pipeline. [https://perma.cc/S2YW-XDYQ] (describing the "prison-to-deportation pipeline" and its effect on Black immigrant communities).

[104] Monica Anderson, *A Rising Share of the U.S. Black Population Is Foreign Born* 20, PEW RSCH. CTR. (April 9, 2015), https://www.pewresearch.org/social-trends/2015/04/09/chapter-1-statistical-portrait-of-the-u-s-black-immigrant-population/ [https://perma.cc/4NGP-N8ZQ].

[105] For example, Ayọ (formerly, "Opal") Tometi, a founder of the Black Lives Matter Network, is the daughter of Nigerian immigrants. *See* Aly Wane, *A Conversation with Opal Tometi*, PEACE NEWSL. (Syracuse Peace Council, Syracuse, N.Y.) July – Aug. 2015 at 8, https://www.peacecouncil.net/sites/default/files/pnl/pdf/PNL844Jul-Aug15%20small.pdf [https://perma.cc/Q8C8-PNCQ] (stating in interview that Tometi is the daughter of Nigerian immigrants).

[106] Farah Stockman, *"We're Self-Interested": The Growing Identity Debate in Black America*, N.Y. TIMES (last updated Nov. 13, 2019), https://www.nytimes.com/2019/11/08/us/slavery-black-immigrants-ados.html.

[107] *Id.*

[108] This term describes the descendants of people who were enslaved and subjected to forced migration to a foreign land (that would become the United States) by colonizers who themselves deprived the land's actual native inhabitants of its use. It is admittedly a bit of a misnomer, but it seems to be the most commonly used term to distinguish the descendants of slaves in the United States from foreign-born Black people and their progeny.

It is true that African immigrants and the children of African immigrants are disproportionately represented at higher education institutions relative to their percentage of the U.S. population, a reality that is even more pronounced at elite schools.[109] Just as in broader American society, many students of African immigrant origin do not fully or solely identify as African American or Black.[110] As one author noted, "[t]hese new arrivals have shaped their own priorities, values, and identities around their former lives in their native countries; naturally, it is not likely that such uniquely shaped priorities and values of immigrants will translate to the native [B]lack American child who has her own experiences that might even contradict the former."[111] Similarly, many "native" Black people do not necessarily feel that they share a racial or ethnic identity with immigrant-born Black persons or, at least, believe that room for differentiation exists.[112] These sentiments have been well documented at Harvard as well.[113]

A June 2004 *New York Times* article contextualizes the native-immigrant landscape as it existed almost twenty years ago. During a forum at a reunion of Harvard's Black alumni, Professor Henry Louis Gates Jr. and Harvard Law Professor Lani Guinier brought attention to the fact that, out of Harvard's roughly eight percent of Black undergraduates, as many as two-thirds were "West Indian and African immigrants or their children,

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Other terms include "just [B]lack," "regular [B]lack," and "slave [B]lack." *See, e.g.*, Josie F. Abugov, *Are We In The Minority?*, THE HARV. CRIMSON (Oct. 15, 2020), https://www.thecrimson.com/article/2020/10/15/gaasa-scrut/ [https://perma.cc/34MM-UCZE] (listing various monikers Black students at Harvard used to self-identify).

[109] For example, in 2007 researchers at Princeton and University of Pennsylvania published a report stating that, at Ivy League schools, 41 percent of the Black students were of immigrant origin (18 points higher than at similarly selective state schools). Douglas S. Massey, et al., *Black Immigrants and Black Natives Attending Selective Colleges and Universities in the United States*, AM. J. of EDUC., vol. 113, Feb., 2007, at 243, 249, www.jstor.org/stable/10.1086/510167.

[110] *Id.* at 253 (describing a survey of Black students at selective schools and finding that "immigrant- and native-origin [B]lack [students] appear to hold somewhat different ethnic identities, with a larger share of immigrants expressing an identity other than just [B]lack, Negro, or African American").

[111] Maurice R. Dyson, *Racial Free-Riding on the Coattails of a Dream Deferred: Can I Borrow Your*

Social Capital?, 13 Wm. & Mary Bill Rts. J. 967, 994 (2005), https://scholarship.law.wm.edu/wmborj/

vol13/iss3/8.

[112] For example, Black students at Cornell University lobbied for more "underrepresented [B]lack students" whom they defined as Black Americans with several generations in the United States. Stockman, *supra* note 106. These students cited a "lack of investment" from the school in students whose families were affected by slavery in America. Stockman, *supra* note 106.

[113] Abugov, *supra* note 108 (describing the rise of a "Generational African American" or "GAA" identity at Harvard for native Black students and a recognition of the scarcity of such non-immigrant students at the College). Abugov documents the rise of a GAA affinity group and the related warnings from faculty—including Prof. Henry Louis Gates Jr.—that the group could be seen as competing with or antagonistic to the numerous Africa-centered groups on campus. Abugov questions the role affirmative action plays in admitting Black students to campus, and she considers the role of groups such as ADOS in the broader conversation around Black identity.

or to a lesser extent, children of biracial couples."[114] The professors, who were concerned about elite schools overlooking Black students whose families had been in the United States for generations, emphasized that drawing such distinctions was not about excluding immigrants. Rather, they were concerned about how native Black students were disadvantaged by the legacy of Jim Crow laws, segregation, poverty, and inferior schooling.[115] In theory, these are the very students that affirmative action was designed to protect, the *Times* article suggests.[116]

That insinuation, however, is problematic because the Supreme Court in *Bakke* explicitly rejected social justice-oriented rationales for race-based considerations in admissions, opting for the more nebulous concept of "diversity." This option shielded schools from having to engage with how the legacy of slavery impacts the social and economic outcomes that feed into Black Americans' college preparedness. The Court expressed a preference for "diversity" for its own sake over more social justice-oriented justifications such as affirmative-action-as-reparations. Still, that does not eliminate the "moral understanding of the purpose of affirmative action," which is precisely the social justice-rooted belief that affirmative action does—or at least should—remedy past societal discrimination.[117]

The vast overrepresentation of African students in schools compared to native Black Americans complicates the debate about whether affirmative action is serving its intended purpose and its intended population.[118] Some see affirmative action as more of a remedial system designed to correct for the ongoing racial ills of this country, while others view it as a means to correct for past racial injustice.

Some in the latter camp view the overrepresentation of African students as a form of "racial free-riding" that, if left unchecked, will exacerbate inequality, especially for low-income native-born Black students.[119] This Article does not adopt that language, as any discussion of "free-riding" is best employed when discussing its most prevalent form (i.e., legacy admissions) and should not be weaponized by one marginalized ethnic group against another. Still, it is true that the current iteration of affirmative action discourse "focuses on race, which elides an honest discussion about class and ethnicity in the context of [B]lack student admissions."[120] To the extent affirmative action as currently practiced serves as a "clumsy proxy" for fulfilling a "moral" mandate, it should be reformed to clarify and to better reach its intended beneficiaries.[121] This

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[114] Sara Rimer & Karen W. Arenson, *Top Colleges Take More Blacks, but Which Ones?*, N.Y. TIMES (June 24, 2004), https://www.nytimes.com/2004/06/24/us/top-colleges-take-more-blacks-but-which-ones.html.

[115] *Id.*

[116] *Id.*

[117] Dyson, *supra* note 111, at 974.

[118] As one author put it, "[f]or African Americans who find the overrepresentation of their West Indian, African, and biracial counterparts [in college admissions] troubling, the assumption remains that affirmative action should be a means to correct historical injustices against African Americans." *Id.* at 972.

[119] *Id.* at 922.

[120] *Id.* at 971.

[121] *Id.* at 977 (stating that "[w]hile affirmative action, as currently practiced, is a clumsy proxy for fulfilling at least the 'moral' mandate to target its intended beneficiaries,

could be accomplished by schools clarifying how they define and weigh diversity in college applications.

These distinctions become especially salient when considering the prevalence of Black students from economically advantaged[122] backgrounds at elite schools. It is well-documented that "highly selective colleges, epitomized by the Ivy League, have seen [B]lack enrollment stagnate, and increasingly they have admitted the sons and daughters of voluntary [B]lack immigrants to the U.S. rather than descendants of enslaved [B]lac[k] [people] forcibly brought to America's shores."[123] Black immigrants are, on average, more educated than white Americans and native Black Americans, which results in them having a higher proportional representation at selective colleges.[124] In addition, sociological

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the temptation to racialize other minority groups in a vicious fight to the top is all too dangerous if past experience is any indication. Here, too, the remarks of Tucker Carlson come to mind").

[122] The Argument*, Affirmative Action and America's 'Cosmetically Diverse' College Campuses*, N.Y. TIMES, at 11:40 (Feb. 9, 2022), https://www.nytimes.com/2022/02/09/opinion/affirmative-action-the-argument.html (noting that 2/3 or 70% of Black students at elite colleges are from "economically advantaged" backgrounds). Of course, "economically advantaged" in this context does not necessarily mean "rich," especially at a school such as Harvard where the median household income is already significantly higher than the national average. The Upshot, *Economic Diversity and Student Outcomes at Harvard* University, N.Y. TIMES, https://www.nytimes.com/interactive/projects/college-mobility/harvard-university.

[123] Howard Gold, *Opinion: The harsh truth about black enrollment at America's elite colleges*, MARKETWATCH (June 25, 2020, 9:21 AM), https://www.marketwatch.com/story/the-harsh-truth-about-black-enrollment-at-americas-elite-colleges-2020-06-25.

[124] *Immigrant Blacks More Likely to Attend Elite Colleges*, PHYS.ORG (Aug. 11, 2009), https://phys.org/news/2009-08-immigrant-blacks-elite-colleges.html [https://perma.cc/GGG4-YRCZ] ("A larger proportion of immigrant [B]lack high school graduates attend selective colleges and universities than both native [B]lack and white students in America, according to a study by sociologists at Johns Hopkins University and Syracuse University."). *See also* Monica Anderson & Phillip Connor, *Sub-Saharan African Immigrants in the U.S. Are Often More Educated Than Those in Top European Destinations*, PEW RSCH. CTR. (April 24, 2018), https://www.pewresearch.org/global/2018/04/24/sub-saharan-african-immigrants-in-the-u-s-are-often-more-educated-than-those-in-top-european-destinations/ [https://perma.cc/P3UD-Z7K3] ("Immigrants from sub-Saharan Africa ages 25 and older in the U.S. not only stand out from those in Europe, but they are also more likely than the overall U.S.-born population to have at least some college experience (69% vs. 63%)"); *Immigrants from Africa Boast Higher Education Levels Than Overall U.S. Population* 1, NEW AM. ECON. (Jan. 11, 2018), https://www.newamericaneconomy.org/press-release/immigrants-from-africa-boast-higher-education-levels-than-overall-u-s-population/ [https://perma.cc/856L-7BZV] ("These immigrants naturalize at high rates, they attain higher levels of education than the overall U.S. population as a whole, and are more likely to have earned their degree in a Science, Technology, Engineering, and Math, or STEM, field.").

Black immigrants also have higher median incomes than native Black people due to their higher levels of education in their home countries and domestically. Anderson, *supra* note 104. Furthermore, "[i]mmigrant [B]lack and white children are more likely than native [B]lack children to come from two-parent households and to attend private schools, two factors that have been shown to have a positive impact on attending an elite college." PHYS.ORG, *supra* note 124. Indeed, many of the most prominent Black political figures in recent memory—Barack Obama, Kamala Harris, and Colin Powell—are all the children of immigrants. Despite being only about 10% of Black Americans, Black immigrants are well represented in elite educational spaces. *See* Christine Tamir & Monica Anderson, *One-in-Ten Black People Living in the U.S. Are Immigrants* 15, PEW RSCH. CTR. (Jan. 20, 2022), https://www.pewresearch.org/race-ethnicity/2022/01/20/one-in-ten-black-people-living-in-

factors likely contribute to the relative success of African immigrants in the United States and to their disproportionate representation at top schools.[125]

Even when selective colleges do seek out low-income Black students, they tend to pull from a small set of elite private schools.[126] Schools do not seriously recruit Black talent from average or underperforming public high schools that Black students are far likelier to attend.[127]

To be clear, students from immigrant backgrounds have earned their spots. And they surely contribute to diversity of the student bodies at elite schools. Harvard can and should admit African students if they are qualified. Harvard should not, however, pass their presence off as evidence of its implicit commitment to correcting past discrimination because its current admissions practices, in reality, evince no such commitment. The

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the-u-s-are-immigrants/ [https://perma.cc/B7K3-6SXJ]; *see also* PHYS.ORG, *supra* note 124 (noting that "among immigrant [B]lack students, those who either immigrated with their families or are American-born children of immigrants, 9.2 percent were enrolled in elite colleges such as those in the Ivy League, compared with 2.4 percent of other [B]lack students and 7.3 percent of white students"). African immigrants are assumed to enjoy other potential advantages that ease acculturation in American society, such as positive stereotypes of hard-working immigrants and "psychological advantages" such as being from a majority-Black country in which positive role models abound and which, absent a race-based caste system, leads many immigrants and their children to be optimistic about their prospects for success in the United States. Angela Onwuachi-Willig, *The Admission of Legacy Blacks*, 60 Vand. L. Rev. 1141, 1152 (2007) (describing the growing exclusion of native Black students at elite colleges and arguing that admissions offices should give increased weight to Black applicants' "ancestral heritage" to more fully deliver on the promises of the diversity rationale and affirmative action).

[125] Onwuachi-Willig, *supra* note 124, at 1169-1170 (discussing the differing impact of "oppositional culture" on native and immigrant Black people). Onwuachi-Willig discusses additional social factors that might ease the transition of immigrant and mixed-race students to elite environments: "Overall, factors such as living in integrated neighborhoods, attending integrated schools and programs, and having a diverse group of friends in high school may present an advantage for [these students] because they allow for greater familiarity with integrated environments and allow for the opportunity of an easier transition for these students in predominantly white college environments, which studies have repeatedly shown can be alienating for students of color." *Id.* at 1174. Onwuachi-Willig also writes that "to the extent that there are positive stereotypes about [B]lack immigrants and mixed-race people, such perceptions may transform into psychological benefits that enable a certain kind of psychic freedom from the racial stigma and disadvantage that legacy Black people may have a harder time obtaining because of pervasive, negative stereotypes about African-Americans." *Id.* at 1177.

[126] These students have been deemed the "privileged poor" due to the scarcity of low-income students at schools like Phillips Exeter and Harvard Westlake. Admissions officers seem to value students from these schools because they satisfy a diversity quotient without requiring enhanced outreach to schools that are not elite feeder schools. For more, *see generally* ANTHONY A. JACK, THE PRIVILEGED POOR (2019); *see also* Gold, *supra* note 123.

[127] Gold, *supra* note 123. Also consider Lani Guinier's words in *The Boston Globe* almost two decades ago: "Many colleges rely on private networks that disproportionately benefit the children of African and West Indian immigrants who come from majority [B]lack countries and who arrived in the United States after 1965. Affluent, well-educated new immigrants from South America bolster Latino diversity statistics while the children of migrant farm workers are left behind." Lani Guinier, *Our preference for the privileged*, BOS. GLOBE, July 9, 2004, at A13, http://archive.boston.com/news/globe/editorial_opinion/oped/articles/2004/07/09/our_preference_for_the_privileged?pg=full.

import of viewing this debate through the appropriate lens cannot be understated.[128] SFFA and ADOS—groups that effectively pit minorities against one another in a struggle for resources—demonstrate well how these conversations can be weaponized to push for policy preferences that may ultimately have little to do with the purported question before a court (or the court of public opinion) and may in fact do further harm to all marginalized communities. It is therefore paramount that greater ethnic and socioeconomic diversity not come at the expense of groups benefitting from the current system of affirmative action.

Diversity's amorphous character provides universities an admissions criterion as laudable as it is malleable. Even when "diversity" was a viable admissions justification, elite schools were not especially concerned with its proper meaning. For example, in the aforementioned *Times* piece, then-Harvard President Lawrence H. Summers declined to comment on this issue, and Lee C. Bollinger, then-President of Columbia University (the same "Bollinger" defending the University of Michigan's admissions policies in the *Gratz* and *Grutter* cases), said that a Black applicant's ancestry should not matter "for purposes of admissions," arguing that the "differential effect" of whether one "[grew up] [B]lack or white" is the real basis for affirmative action.[129] Their responses—and their lack of attention to potential differences among Black applicants—are not surprising. One former executive at an SAT test development company noted that colleges had "found an easy way out" by admitting high-performing Black students from immigrant families, as higher education institutions were no longer connected to the civil rights movement in the ways they had been previously.[130] Still, universities like Harvard tout their commitments to the ideals of "diversity," "equity," and "inclusion,"[131] words that carry social justice undertones and that suggest a commitment to remedying past harms in pursuit of a more just society. Smiling Black and Brown faces populate any given school's admissions brochure, and one can hardly imagine an alumni donation mailer not featuring a note from an underprivileged ethnic student discussing how a benefactor's generosity has helped finance their education at their dream school.[132] This veneer of a multi-ethnic utopia starkly contrasts with the reality at elite schools.

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[128] "Just as native [B]lack Americans will seek recourse for the preferred status of immigrants, so too will the preferred status of [B]lack [Americans] in admissions become the predicate on which either Latinos or Native Americans will challenge their status. Further, with Asians, Asian Americans, and Caucasian women being among the greatest beneficiaries of affirmative action, it might be reasonable to believe that another inter-group conflict is inevitable. . . A divide-and-conquer strategy cannot be too far away." Dyson, *supra* note 111, at 974.

[129] Dyson, *supra* note 111, at 970.

[130] *Id.* at 989.

[131] *Equity, Diversity, and Inclusion*, HARV. COLL. DEAN of STUDENTS OFF. (last visited Apr. 20, 2024), https://dso.college.harvard.edu/inclusion-belonging-team [https://perma.cc/H9HK-LQZJ].

[132] For more on the deceptive diversity of college brochures, *see* Deena Prichep, *A Campus More Colorful Than Reality: Beware That College Brochure*, NPR (Dec. 29, 2013, 10:31 AM), https://www.npr.org/2013/12/29/257765543/a-campus-more-colorful-than-reality-beware-that-college-brochure [https://perma.cc/LNX8-9UVU] (discussing the "inflated diversity" of certain colleges' marketing materials); Annie Murphy Paul, *When Images of Diversity Don't Match Reality*, HUFFPOST (last updated March 11, 2014), https://www.huffpost.com/entry/when-images-of-diversity-_b_4934767

The diversity rationale was an all-in-one tool at the disposal of admissions offices everywhere. The language of diversity allowed universities to justify virtually any combination of non-white, non-male persons in their classes. Social attitudes regarding who exactly is "diverse" are constantly changing. Therefore, schools could espouse their commitment to attaining diversity in whatever mode it was presently fashioned.

D. Quantification Conundrum: Diversity's Line-Drawing Problem

As in Brazil, racial classifications grow exponentially more complicated with the increasing number of people identifying as mixed-race, biracial, or multiracial. Given the pluralities and subjectivity involved in racial self-identification, the term "diversity" problematizes what would ideally be an objective line drawing exercise for affirmative action purposes. For example, the most recent U.S. census revealed an increase in non-Hispanic Americans who identify as multiracial, surging from six million to 13.5 million, a 127% increase over the last decade.[133] Including multiracial Hispanics, the total number of mixed-race Americans increased by 276%, and the group now represents about ten percent of the population.[134] An uptick in the birth rate of multiracial babies is one obvious explanation. However, changing attitudes toward racial self-identification as well as alterations to the U.S. census itself surely have contributed to this notable increase in people of mixed racial heritage.[135] Improvements in data processing and coding capacity also strengthened the government's ability to capture and adequately report the responses provided by census takers.[136]

This shift is significant in several ways, not least of which being its potential impact on considerations of "diversity" and who fits into that framework. As one sociologist noted, "[t]he off-the-shelf standard American is going to be some kind of blend of Asian, Latino[,] and white. The big

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[https://perma.cc/PU6B-4D38] (presenting the findings of multiple studies highlighting discrepancies between the overrepresentation of students of color in college marketing materials and their actual numbers on campus and noting that the lived experiences of those students often differ from the versions presented in these materials); Nathan Willers, *Marketing Authenticity in Higher Education*, INSIDE HIGHER ED (June 24, 2019), https://www.insidehighered.com/blogs/call-action-marketing-and-communications-higher-education/marketing-authenticity-higher [https://perma.cc/XMA4-MHZ8] (documenting the use of digitally altered images in college admissions materials to promote false notions of campus diversity). Curiously, schools devote comparatively fewer pages to espousing the benefits of legacy admissions, despite the far larger number of legacy students on campus.

[133] *Race and Ethnicity in the United States: 2010 Census and 2020 Census*, UNITED STATES CENSUS BUREAU (Aug. 12, 2021), https://www.census.gov/library/visualizations/interactive/race-and-ethnicity-in-the-united-state-2010-and-2020-census.html [https://perma.cc/V52P-SVQH].

[134] *Id.*

[135] Sabrina Tavernise et al., *Behind the Surprising Jump in Multiracial Americans, Several Theories*, N.Y. TIMES (Aug. 13, 2021), https://www.nytimes.com/2021/08/13/us/census-multiracial-identity.html?smid=tw-nytimes&smtyp=cur (describing this "surprising jump" in multiracial Americans in census data). For example, until the year 2000, the U.S. Census Bureau only permitted one response for race per person, but in the 2020 census, write-in lines were added under the boxes for Black and white, allowing respondents to describe their racial backgrounds in greater detail. United States Census Bureau, *supra* note 133.

[136] *Id.*

question always is, how do Blacks fit in."[137] African Americans are the "one group that was never allowed to cross the line into whiteness," but, in a world that may soon place less social cache on "whiteness," it is less than clear how "blackness" may be defined in any context, let alone the highly consequential context of admissions to elite universities. America's newfound plurality of intersecting racial identities complicates these dynamics, as terms like "diversity" and "white" are sure to take on new meanings as well.

All of this is to say nothing of how race-based admissions tips should work for applicants checking multiple boxes. For example, how should an admissions team score a biracial and self-identified "Black" female applicant who writes about overcoming racial adversity at her elite prep school? How much of a boost does she get? Should she be seen more as a Black student who has overcome obstacles or as a high-performing elite who may not "need" such race-based tips to secure her admission? When one attempts to weigh any of these factors, they introduce subjectivity into an already less-than-straightforward process. This all but ensures that some applicants will feel their rejections from their preferred schools were due to unfair penalizations or for tips given to questionably disadvantaged (and questionably deserving) others, even if those "others" are members of their same group. Such tensions, not unlike those between some "native" Black applicants and the children of immigrants, serve only to weaken support for the use of race in admissions.

If the spirit of the diversity rationale is to persist in some form, it will inevitably encounter problems in quantifying the "Blackness" of multiracial individuals as this demographic group becomes more visible. Even though many schools now include a multiracial option on admissions questionnaires, one can easily imagine frictions emerging when greater numbers of mixed-race individuals, people who see themselves as Black, are admitted on diversity grounds and are therefore, rightly or wrongly, injected into the affirmative action debate. A proliferation of Black identities does not lend itself to straightforward evaluation in the context of the zero-sum admissions game, and any intraracial conflict would only weaken the power of Black people to advocate for themselves as a collective. Indeed, this phenomenon is not unlike the current dynamics that plague African and Black American students on some college campuses.

Racial identities have never been fixed in the United States of America. Issues of line-drawing can be fatal to any affirmative action regime, and racially and ethnically diverse countries like the United States are uniquely susceptible to these challenges. Indeed, *Plessy v. Ferguson*, which in 1896 enshrined America's "separate but equal" racial caste system, concerned a Black man who was a so-called "octaroon."[138] That is, Mr. Plessy was a person with one-eighth of African blood, the equivalent of one great-grandparent, but enough African ancestry to be considered "Black" in 1892 America. Would a person with phenotypically European features that has a Black great-grandparent be considered "Black" today? Would the question even arise—now or then—if not for phenotypical

[137] *Id.*

[138] Plessy v. Ferguson, 163 U.S. 537 (1896).

expression? More interestingly, was the standard even applied consistently in 1892 America? Some research suggests that it was not.

An economics paper by Ricardo Dahis, Emily Nix, and Nancy Qian used U.S. census data to document a phenomenon in which over 300,000 Black males self-identified as—or "passed for"—white between 1880 and 1940 (with thirty percent of them "reverse passing" as Black in the following census).[139] The authors use census data to examine the high rate at which Black males in the U.S. changed their racial self-identification during the height of Jim Crow and anti-miscegenation laws. In addition to their statistical modeling, the authors provide large amounts of anecdotal data suggesting the various reasons that these presumably Caucasian-looking Black men chose to "pass" as white (largely due to a lack of social and economic opportunities for Black men).[140] Facing discrimination in education, housing, and employment, many Black males saw the ability to re-brand themselves as white as a chance at a better life.[141]

In an age where racial categories are more fluid than ever before, one can imagine a scenario where a "borderline" diverse applicant is admitted due to their perceived contributions to campus diversity, only to find that this applicant does not actually share lived experiences with the marginalized group that they claimed in their application. Imagine a wealthy biracial male admit (with minimal Black phenotypical expression) who, upon matriculation to Harvard, does not socialize with other Black students and does not offer a "unique" (i.e., "Black") perspective in class. Does the "diversity" this student brings meaningfully contribute to the growth of his peers? Does it matter that this student chooses not to engage with on-campus Black programming or that he is otherwise socially and economically indistinguishable from his white peers? More consequentially, does it matter that this same applicant highlighted his Blackness to give himself an edge in admissions?

The phenomenon of racial amnesia was not reserved for white-passing Black people. Many of this nation's "white" majority, especially in the Deep South, are less "white" than they allow themselves to believe. This phenomenon was illuminated in a study published in *The American Journal of Human Genetics*, which showed through examination of genetic

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[139] Ricardo Dahis et al., *Choosing Racial Identity in the United States, 1880-1940*, NAT'L. BUREAU of ECON. RSCH., 2-3 (2019), https://www.nber.org/system/files/working_papers/w26465/w26465.pdf. The study focused on Black men in part because of the difficulty of tracking Black women, whose names might change with marriage, from census to census.

[140] Of course, mixed-race people have always existed, but acknowledgement of such a fact was in tension with attitudes of white supremacy and white racial purity of the past several centuries. To admit that mixed-race individuals were anything more than anomalies—despite empirical evidence to the contrary—would have posed an existential threat to the American project of white racial superiority. Ideas like the need for racial segregation would have immediately been called into question. Indeed, the very idea of "whiteness" would have been less absolute than many civic, intellectual, and religious leaders of the day would have preferred. For a helpful primer on this paper, *see* The Weeds, *The Never Ending Election Story*, VOX, at 39:35 (Nov. 2020), https://open.spotify.com/episode/0QluGZdvuc5lFtt2ygnEtC [https://perma.cc/KGA2-QRF5].

[141] Though, of course, this transformation incurred heavy costs in many cases such as abandoning family members who could not or would not assimilate and moving away from one's community. *See generally* Dahis et al., *supra* note 139, at 13.

data that many white Americans have significant and recent Black ancestry.[142] The researchers found that Americans with less than twenty-eight percent of African ancestry—that is, more than twice the amount of Black blood that Plessy had—tended to identify as some type of European American as opposed to African American. Ironically, especially in the South, a large portion of these white people have enough Black ancestry to make them "Black" under the "one drop" rule (an adage that if a person had even "one drop" of Black blood, they were socially and legally considered Black). In an appreciable sense, despite the racial tensions characteristic of the American South, many of its most stridently anti-Black racists are themselves "Black," illustrating the incredibly complex ways in which notions of race inform America's view of its history.[143]

Like its Brazilian counterpart, the U.S. government is ill-equipped for such line-drawing exercises in the complicated area of race. Indeed, one does not want the government to formalize (again) the very types of racial quotients that plagued this country's past. Nor should any government branch have the power to enforce, investigate, and evaluate one's heritage, a practice that is, at best, invasive and, at worst, dehumanizing. The aforementioned Brazilian case study provides ample evidence that such systems are often flawed, and one wonders if a workable scheme even exists. Moreover, it is not clear that granting the government broad investigative authority would not result in further violence upon Black and Brown bodies—an unjustifiable outcome in any context—in pursuit of quantifying something that is not easily quantifiable.[144] Even the Supreme Court has tacitly recognized the difficulty of racial quantification.[145]

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[142] *See generally* Katarzyna Bryc et al., *The Genetic Ancestry of African Americans, Latinos, and European Americans across the United States*, AM. J. HUM. GENETICS (Dec. 18, 2014), https://www.cell.com/fulltext/S0002-9297(14)00476-5. For additional media reporting on the article, *see* Jenée Desmond-Harris, *Here's where 'white' Americans have the highest percentage of African ancestry*, VOX (last updated Feb. 20, 2015, 2:22 PM), https://www.vox.com/2014/12/22/7431391/guess-where-white-americans-have-the-most-african-ancestry [https://perma.cc/Y7PU-S57C]; and Lizzie Wade, *Genetic study reveals surprising ancestry of many Americans*, SCIENCE (Dec. 18, 2014), https://www.science.org/content/article/genetic-study-reveals-surprising-ancestry-many-americans-rev2.

[143] The researchers also found that around 19% of self-identified Black folks had white ancestry linked to a European male, often appearing in the early 1800s. This fact squares with the routine and systematic rape of enslaved women at the hands of white men when slavery was still legal in the States, which produced many mixed-race children who were at once their fathers' illegitimate children and legal livestock. As Harriet Jacobs wrote, "[w]hat tangled skeins are the genealogies of slavery!" HARRIET JACOBS, INCIDENTS IN THE LIFE OF A SLAVE GIRL 70 (2016) (protagonist discussing the complicated feelings engendered by the birth of her daughter due to the difficulties of life as an enslaved woman).

[144] Rani Molla, *Genetic Testing Is an Inexact Science with Real Consequences*, VOX (Dec. 13, 2019), https://www.vox.com/recode/2019/12/13/20978024/genetic-testing-dna-consequences-23andme-ancestry (detailing some of the dangers and potential misuses of imperfect genetic testing procedures).

[145] *See*, *e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 723 (2007) (noting that, in striking down schools' racial balancing schemes, "[e]ven when it comes to race, the plans here employ only a limited notion of diversity, viewing race exclusively in white/nonwhite terms in Seattle and [B]lack/'other' terms in Jefferson County"). The footnote to this section also noted that multi-racial applicants were either rejected or placed into a single racial category: "Upon enrolling their child with the district, parents are required to identify their child as a member of a particular racial group. If a parent identifies more than one race on the form, '[t]he application will not be accepted and,

Finally, the centralized collection of genetic information at a massive scale should caution anyone who sees this approach as viable.[146]

IV. TRAUMA PORN AND INTROSPECTIVE ELITES: LEGAL AND SOCIAL IMPLICATIONS OF THE DIVERSITY RATIONALE

A. The Politics of Trauma: The "Adversity" Narrative

Prior to diversity's downfall, a chorus of voices in academic spaces and elsewhere have cited the discrimination to which the diversity rationale's employment ultimately subjects students of color.[147] Before many of them ever set foot on a university campus, let alone fabled collegiate institutions such as Harvard, Black and Brown students of color must master the art of the college application essay—an exercise that for non-wealthy, non-white students often involves a sort of commodification of one's experiences, packaging them in the tight confines of a 500-ish-word essay meant to show how an applicant has "overcome adversity" or risen above challenging circumstances, as requested by an oft-ambiguous essay prompt. This nearly ubiquitous application requirement, the so-called "adversity narrative," forces students to "reduce their own lives to stories of hardship," as one writer put it.[148] These essays serve the legitimate purpose of helping admissions committees calibrate their admissions criteria to account for opportunities various students have or have not had.[149]

College essay prompts clumsily (or dangerously) cast applicants' identities and backgrounds in the same mold as "talents" or "hobbies." That

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if necessary, the enrollment service person taking the application will indicate one box.'" *Id.* at n.11.

[146] *See*, *e.g.,* Eric Rosenbaum, *5 biggest risks of sharing your DNA with consumer genetic-testing companies*, CNBC (June 16, 2018, 2:18 PM), https://www.cnbc.com/2018/06/16/5-biggest-risks-of-sharing-dna-with-consumer-genetic-testing-companies.html [https://perma.cc/464W-HTEJ] (surveying various risks of sharing genetic information with genetic testing services); and Julian E. Barnes, *U.S. Warns of Efforts by China to Collect Genetic Data*, N.Y. TIMES (Oct. 22, 2021), https://www.nytimes.com/2021/10/22/us/politics/china-genetic-data-collection.html (documenting China's efforts to collect genetic data to build the world's largest bio-database and warning that U.S. agencies should be doing more to secure critical technologies in that space).

[147] *See generally* Casey Quinlan, *5 Things That Make It Hard To Be A Black Student At A Mostly White College*, THINKPROGRESS (Jan. 25, 2016), https://archive.thinkprogress.org/5-things-that-make-it-hard-to-be-a-black-student-at-a-mostly-white-college-33ef44abe034/ [https://perma.cc/UC76-VFUM]; Gabriela Thorne, *For Students of Color, Ivy League Schools Have a Long Way to Go*, THE NATION (Jan. 25, 2018), https://www.thenation.com/article/archive/for-students-of-color-ivy-league-schools-have-a-long-way-to-go/ [https://perma.cc/6ZVL-YY5E].

[148] Rose Courteau, *The Problem With How Higher Education Treats Diversity*, THE ATLANTIC (Oct. 28, 2016), https://www.theatlantic.com/education/archive/2016/10/trading-identity-for-acceptance/505619/ [https://perma.cc/5TFC-F89W].

[149] *Id.* Ironically, *SFFA* may serve only to reinforce these trauma narratives, as minority applicants may no longer tick a racial box on their application, tacitly signaling to an admissions committee the hardships inherent in that classification. Rather, the High Court leaves room for these students to discuss race in other ways, such as through their admissions essays—the weight of which will surely grow in the wake of the decision. Applicants will be incentivized to cram even more parts of their identity into those precious few paragraphs, but, perhaps, their ability to do so is itself a form of meritocracy.

is, applicants are invited to inform admissions committees how their non-white, non-middle-class upbringings are a neat quirk that make them worthy of admission. Because of this mold, white students are more likely to see their ethnic peers as window dressing for their educations, figures to be interacted with in pursuit of personal growth.[150] But such a framing proves dangerous. The trauma essay reduces racial groups to monoliths: a smart-but-fungible Asian or a Black kid from the inner city. Whether the Black kid is actually from the inner city and whether the Asian student enjoys a multifaceted existence prove irrelevant to their peers. Similarly, whether the Black student is even a "diversity admit" (and whether the Asian student is not) prove immaterial once snap judgments are made.

Unfortunately, the reality inside university classrooms differs substantially from what the array of smiling Benetton faces on school websites and brochures would suggest.[151] A great irony—in truth, a great failing—of the U.S. education system is that the very need for a "balanced diet of multiculturalism" consumed by white college students stems from the widespread racial segregation and rapid resegregation of American primary and secondary schools.[152] Students today are less likely to have

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[150] One article, reviewing a book by Natasha Warikoo, recounts an excellent example of a student who, when asked if diversity created issues for their university, discussed the role of athletes on campus. *Id.* The student initially felt athletic recruits had an unfair advantage, but they eventually came to see student-athletes as merely bringing a different type of qualification to the school—a realization that came after going to football games, which the student viewed as a "fun" part of student life. The implication here is that, because the athletes provide entertainment to the broader student populace, they are worthy of admission. The article then invites readers to swap the word "athletes" with "poor" or "minority"—a subtle change that makes clear the danger in this mode of thinking. This view of merit is dangerous because the underlying assumption is that students not fitting the traditional mold (i.e., white and middle-class students with good test scores) must justify their place on campus some other way, lest they be considered free riders undeserving of the benefits of an elite education. In reality, these students in many cases have done more with fewer resources, and they may well be more "deserving" than their more privileged peers who simply used the tools in front of them to reach the same destination. Some would argue that fact alone should warrant greater admission of underserved populations to elite institutions. Regardless, diversity is not a "talent" and should not be considered as such. Such a framing, however well-intentioned, treads precariously close to dehumanizing applicants. Such practices center the growth of white students and reduce others to mere stock characters along the road of that student's enlightenment; rather, these nonwhite students should be at the center of their own stories and viewed as fellow travelers on the road to enlightenment.

[151] *See generally* Prichep, *supra* at 132; Paul, *supra* at 132. If schools invested even half the resources in fostering diversity that they invest in maintaining the *appearance* that they do so, perhaps there would be little need for papers like this one.

[152] Courteau, *supra* note 148. *See also* Keith Meatto, *Still Separate, Still Unequal: Teaching about School Segregation and Educational Inequality*, N.Y. TIMES (May 2, 2019), https://www.nytimes.com/2019/05/02/learning/lesson-plans/still-separate-still-unequal-teaching-about-school-segregation-and-educational-inequality.html; Will Stancil, *School Segregation Is Not a Myth*, THE ATLANTIC (March 14, 2018), https://www.theatlantic.com/education/archive/2018/03/school-segregation-is-not-a-myth/555614/; Gloria J. Browne-Marshall, *Busing Ended 20 Years Ago. Today Our Schools Are Segregated Once Again*, TIME (Sept. 11, 2019, 8:12 AM), https://time.com/5673555/busing-school-segregation/; Erica Frankenberg, *What school segregation looks like in the US today, in 4 charts*, THE CONVERSATION (July 19, 2019, 7:35 AM), https://theconversation.com/what-school-segregation-looks-like-in-the-us-today-in-4-charts-120061.

grown up in socioeconomically or racially diverse neighborhoods, so many middle- and upper-class college freshmen have their first substantive interactions with low-income and non-white persons on a college campus.[153] The onus—at times implicit, at times explicit—is constantly on minority students to be representatives of the racial or affinity groups to which they belong. Voluntarily joining the Black student union is one thing; being asked during or after a class discussion to explain how systemic racism has specifically affected *you* is another matter. The push for this pre-packaged diversity often results in Black students feeling like caricatures, two-dimensional guides whose purpose is to educate their affluent white peers in their journey to enlightenment. It is not hyperbole to say that, in many higher education institutions, white growth comes at the expense of Black pain. Moreover, diverse students are not compensated for this involuntary labor, and they must grapple with these incidents in addition to their other responsibilities as college students. Many Black students struggle to adjust to their new normal, and this difficulty can manifest as lower grades, decreased motivation and extracurricular involvement, and a host of other symptoms.[154] The very experiences and difficulties these students overcame to gain admittance to these institutions all too often serve as a source of cultural vertigo during interactions with more privileged peers.[155] The subject matter of their essays—the stories that have made them the exceptional candidates they are—may prove less intelligible to privileged classmates, resulting in a feeling of whiplash or otherness when these differences surface.[156]

When POC students are reduced to the adversities they have overcome, their humanity is stripped away. The Supreme Court has shown some concern for this stereotyping argument. In discussing "serious problems of justice connected with the idea of preference itself," the majority in *Bakke* noted that "preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth."[157] That is, racial preferences in admissions carry the implication that the beneficiaries of these policies are, on the whole, less

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[153] *See e.g.,* Patrick Sharkey, *Rich Neighborhood, Poor Neighborhood: How Segregation Threatens Social Mobility*, BROOKINGS (Dec. 5, 2013), https://www.brookings.edu/blog/social-mobility-memos/2013/12/05/rich-neighborhood-poor-neighborhood-how-segregation-threatens-social-mobility/ [https://perma.cc/ME6J-KTX9]; Richard Rothstein, *Modern Segregation*, ECON. POL'Y INST. 3 (March 6, 2014), https://www.epi.org/publication/modern-segregation/ [https://perma.cc/QR99-GQFX] (arguing that "the *racial segregation* of schools has been intensifying because the *segregation* of *neighborhoods* has been intensifying").

[154] Thorne, *supra* note 147.

[155] These issues may be exacerbated at institutions like Harvard and at selective liberal arts colleges like Trinity College, where students—especially low-income students of color—may struggle to adjust to the culture of wealth and privilege into which their rich white classmates were born. *See generally* Tough, *supra* note 34.

[156] The fictional Frank Gallagher put it thusly: "I can't think of a better use of tokenism than to promote diversity." *Shameless*, season 8, episode 4 at 14:20 (Showtime Nov. 26, 2017) (story arc involving a Black child serving as a diversity admit in a cosmopolitan, liberal prep school in Chicago).

[157] Bakke at 438 U.S. at 298 (referencing DeFunis v. Odegaard, 416 U.S. 312, 416 U.S. 343 (1974) (Douglas, J., dissenting)).

qualified than those admitted through other means.[158] When admittances of non-white students to elite universities carry the implication of being due in large part to the benevolence of high-minded admissions committees, even the most liberal white students that populate college campuses may find it hard to fight their biases and presuppositions. The ongoing failure to more accurately define and apply the diversity rationale furthers this misunderstanding.

Similarly, the ways in which race and class (the latter not being a legally protected status) interact also illuminates some of the diversity rationale's shortcomings. One need look no further than the lack of socioeconomic diversity at schools like Harvard, a well-documented fact that Harvard itself seems to recognize, to illustrate this point.[159] While Harvard's classes in recent years have become more racially diverse, income diversity has remained elusive.[160] That is, elite schools like Harvard provide an academic playground in which the many-hued children of doctors and lawyers can commingle; the perspective of, say, a teacher's or a plumber's child—of any color—will be in shorter supply. While non-white elites surely still bring a unique perspective to these campuses,[161] it is not hard to imagine the ways in which their viewpoints converge with those of their white peers.[162] Indeed, the most privileged members of any

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[158] *Id.* Furthermore, the Court said that "transitory considerations" of which groups should be given preference were subject to the political process and inconsistent application, foreclosing the idea that race-based preferences in admissions could be used to correct for past societal discrimination.

[159] *See, e.g.,* Marina N. Bolotnikova, *Harvard's Economic Diversity Problem*, HARVARD MAGAZINE (Jan. 19, 2017), https://www.harvardmagazine.com/2017/01/low-income-students-harvard#:~:text=Harvard%20College%20has%20almost%20as,in%20the%20top%2020%20percent [https://perma.cc/8ET6-QZUF] (noting that, in recent years, more than half of Harvard students come from the top 10% of the income distribution in the United States and that Harvard had "almost as many students from the nation's top 0.1 percent highest-income families as from the bottom 20 percent"); The Upshot, *Some Colleges Have More Students From the Top 1 Percent Than the Bottom 60. Find Yours.*, N.Y. TIMES (Jan. 18, 2017) https://www.nytimes.com/interactive/2017/01/18/upshot/some-colleges-have-more-students-from-the-top-1-percent-than-the-bottom-60.html [https://perma.cc/Q45Y-BY89] (visualizing results of 2017 Raj Chetty study on income mobility in American colleges and universities, showing that the median family income of a Harvard student is $168,800 and 67% of students come from the top 20 percent of the income distribution); Max Larkin, *Harvard Has Become More Racially Diverse, But Most Of Its Students Are Still Really Rich*, WBUR NEWS (October 24, 2018), https://www.wbur.org/news/2018/10/24/harvard-diverse-wealth [https://perma.cc/PLX8-49MW] (2018 report on the *SFFA* case and on Harvard's lack of socioeconomic diversity).

[160] Larkin, *supra* note 159 (noting that Harvard's 2018 class was its "most diverse" up to that point but that this description applies to race, not socioeconomic status or class, as Harvard continues to lag behind other schools in diversifying its student body along socioeconomic lines by admitting poorer students).

[161] Though, again, one must consider whether "non-white" includes biracial (in this context, half-Black students with one white parent) who are disproportionately represented at elite schools relative to their percentage of the population.

[162] This is why the disproportionate representation of mixed-race and immigrant students presents a missed opportunity to have a more robust diversity of viewpoints and experiences represented on elite campuses. Native Black students, who are more likely to come from a lower socioeconomic stratum than other types of Black students, provide meaningful diversity in that they can speak to, for example, the interaction of poverty *and* race—a phenomenon that other types of Black students may not have experienced. Without these perspectives, white and other students on elite campuses are receiving a much

group—even a marginalized one—are likely to have at least some commonalities with the elites of the majority group.[163] And does this limited type of diversity feed into the "critical mass" justification of diverse students that the Court blessed in *Grutter*?[164]

At present, colleges cannot say that they are educating a "*representative* group of future leaders" due to the growing exclusion of native Black Americans from their campuses.[165] Professor Gates summarizes: "If [affirmative action is] about getting [B]lack faces at Harvard, then you're doing fine. If it's about making up for 200 to 500 years of slavery in this country and its aftermath, then you're not doing well."[166] He continues: "And if it's about having diversity that includes African-Americans from the South or from inner-city high schools, then you're not doing well, either."[167] Anthony W. Marx, a former president of Amherst College, similarly noted that the exclusion of Black students with predominantly American roots deprives campuses of "voices that are particular to being African-American, with all the historical disadvantages that that entails."[168] The *Times* article closes with a Harvard student recalling that the school discouraged him and his classmates from

narrower view of the lived realities of non-wealthy Black Americans, depriving them of a more multifaceted and pluralistic education that the Court blessed in *Bakke*. As Onwuachi-Willig writes, "insofar as first- and second-generation Blac[k] [students] and mixed-race students tend to be of a more privileged socioeconomic and educational class, the disproportionate percentage of them on elite college campuses may paint a distorted view of [B]lack achievement and advantage to many of the future leaders of the world." Onwuachi-Willig, *supra* note 124, at 1185. Onwuachi-Willig later states that "[w]ithout exposure to the diverse ideas and viewpoints that may stem from legacy Blac[k] [students] in the classroom and beyond, cross-racial and cultural understanding and exchange is diminished on campus, thus lessening the promotion of better learning outcomes." *Id.* at 1213.

[163] Consider the words of J. Harvie Wilkinson III in 1979, describing the challenging integration processes in Virginia and North Carolina in the mid-twentieth century: "The token [B]lack people that whites first encountered would be elite members of the race, carefully selected by white pupil-placement boards from those [B]lac[k] [students] courageous and determined enough to apply to white schools in the first place. Thus, favorable first impressions would be formed; integration would brightly begin." J. HARVIE WILKINSON III, FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978 at 86 (Oxford University Press, 1979). Wilkinson ultimately concluded that this rationale was "insulting," but the description of the Black people leading the charge for school desegregation in the 1950s and 60s hardly differs from the Black people most likely to be found at elite schools today; in fact, many of today's non-immigrant Black elites are the descendants of those "courageous and determined" few who integrated white schools and benefitted from their credentialing.

[164] Grutter, 539 U.S. at 340. The Court in that case found a compelling interest in diversity and in admitting a "critical mass" of diverse students such that these students feel comfortable expressing different viewpoints, debunking stereotypes, and facilitating a robust exchange of ideas. Recall that the court in *Bakke* did not limit diversity to race. Bakke, 438 U.S. at 315 ("Petitioner's special admissions program, focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity" (emphasis in original)).

[165] Onwuachi-Willig, *supra* note 124, at 1214.

[166] Rimer & Arenson, *supra* note 114.

[167] *Id.* Thomas Chatterton Williams, in discussing his evolving opinion of race-based affirmative action, has expressed similar opinions: "I don't know what it means to say that [B]lack people in this country have been enslaved and then suffered through decades of Jim Crow and were redlined out of wealth, but we're going to accept this Nigerian daughter of professionals to Harvard, and that'll check the '[B]lack' box." The Weeds, *On biracial identity (with Thomas Chatterton Williams)*, VOX, at 36:31-36:51 (Oct. 2020), https://open.spotify.com/episode/3ozIwN7jDf4B3ic5hSYrud?si=81ff654d84474f08.

[168] Rimer & Arenson, *supra* note 114.

collecting data on the backgrounds of their Black peers. The reasons for Harvard's alleged interference are not clear.[169]

It is unfair to place students of color, irrespective of background, in situations in which they are expected to represent their group—that is, to perform their race—for the consumption of their white peers. All students should expect to be free to enjoy the benefits of the education they receive; they should not be forced to do the additional unpaid labor of educating their peers on the respective communities to which they belong. If not, schools will be in danger of perpetuating a kind of "enlightened minstrelsy" in which students of color are admitted to elite schools only to perform their trauma under the guise of "class participation" or "dialogue" solely for the edification of white children. Schools valuing diversity must ensure that their students are more than their backgrounds and that all students are able to take advantage of the immense resources that higher education can provide. If not, schools risk perpetuating a perverse reality in which "[i]nstitutions of higher learning favor grievance without the aggrieved; they want to hear the song of the marginalized without doing anything to ensure more of the marginalized ascend to the university's gilded platforms to sing it."[170]

V. A MUTILATED MERITOCRACY: FAILED SOLUTIONS TO THE DIVERSITY RATIONALE'S SHORTCOMINGS

The next two subsections lay out potential "solutions" to the problems posed by the diversity rationale before explaining the underlying phenomena that make those solutions unviable. The following subsections are not intended to survey all possible solutions to issues inherent in the diversity rationale; rather, they highlight frameworks that might, under more ideal circumstances, have provided a path forward.

A. Path A: More Diversity

The first and perhaps most obvious solution to the diversity problem is simply to admit more diverse applicants. Increasing the number of Black and Brown students on campuses would surely not have a chilling effect on the conversations that diversity is designed to foster. If students feel that they have a robust, supportive community, they are more inclined to share their individual experiences with a wider audience, as they feel less like a token or representative of their entire group.

However, if schools are aiming only to maintain the aforementioned "critical mass" of diverse students, they are unlikely to see this approach as viable. That is, they have enough "diversity" and may not be keen on altering the formula. The trial court noted that SFFA's modeling of various

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[169] *Id.* It is also curious, considering the centrality of data analytics to modern admissions programs (and the general push for checking as many diversity boxes as possible in a given class), that schools do not seem to track information such as the ethnic breakdown of their Black students.

[170] Jason England, *Why Was It So Easy for Jessica Krug to Fool Everyone?*, CHRON. HIGHER EDUC. (October 2, 2020), https://www.chronicle.com/article/why-was-it-so-easy-for-jessica-krug-to-fool-everyone?emailConfirmed=true&supportSignUp=true&supportForgotPassword=true&email=daniellkees%40gmail.com&success=true&code=success&bc_nonce=zn65vp98hc9up6dt7qoq2&cid=gen_sign_in.

race-neutral alternatives incurred "significant costs" to Harvard.[171] For example, the modeling suggested that giving less weight to ALDCs and more to students from lower socioeconomic backgrounds might lead to an increased number of incoming Harvard students indicating an interest in fields such as engineering, a change that would alter the composition of the incoming classes and "would pose administrative and staffing challenges."[172] The *SFFA* trial court does not investigate whether Harvard, with its $50-plus billion endowment in fiscal year 2021,[173] could accommodate such changes in pursuit of diversity, but it does conclude that Harvard demonstrated "that there are no workable and available race-neutral alternatives…that would allow it to achieve an adequately diverse student body while still perpetuating its standards for academic and other measures of excellence."[174]

In presenting the findings of several committees that Harvard convened to study race-neutral alternatives in admissions, the appellate court notes that one committee report found "that Harvard already devotes significant resources to recruitment efforts [for racially and socioeconomically diverse applicants] and that expanding them further would not increase diversity. [The report] said that a more racially diverse applicant pool is itself not helpful."[175] Expanding the recruitment pool further would simply add more students unlikely to be admitted, according to the report, and might even discourage younger students from applying in the future.[176] The appellate court seemed to take Harvard's various claims at face value, though there is reason to question whether Harvard's current recruitment efforts actually square with its proffered justifications.

While schools like Harvard constantly tout their efforts to increase recruitment of minority applicants, research suggests these efforts may be cosmetic. In a working paper that uses admissions data made public in the *SFFA* case, three economists—including Peter Arcidiacono, the aforementioned SFFA expert—argue that Harvard recruits students differently depending on their race and in a way that ultimately harms Black applicants.[177] Black students are encouraged to apply to Harvard

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[171] Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 397 F.Supp.3d 126, 182 (D. Mass. 2019).

[172] *Id.*

[173] HARVARD UNIV., https://www.harvard.edu/about/endowment/ [https://perma.cc/TP69-QTCN] (last visited May 16, 2024).

[174] Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 397 F.Supp.3d at 183.

[175] Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 980 F.3d 157, 176 (1st Cir. 2020).

[176] *Id.*

[177] Peter Arcidiacono et al., *Recruit to reject? Harvard and African American applicants*, NAT'L. BUREAU ECON. RSCH. (November 2019), https://www.nber.org/papers/w26456 (relying on Harvard admissions data unsealed in the SFFA case to argue "that Harvard encourages applications from many students who effectively have no chance of being admitted, and that this is particularly true for African Americans"). For additional reporting on this paper, *see* Anemona Hartocollis, *That Recruitment Letter From Harvard Probably Doesn't Mean Much*, N.Y. TIMES (Nov. 29, 2019), https://www.nytimes.com/2019/11/29/us/harvard-admissions-recruit-letter.html (outlining the "recruit-to-deny" strategies used by Harvard and other selective schools to boost the number of diverse applicants, even if such applicants have a virtually nonexistent chance of admission).

despite having lower standardized test scores than their white and Asian peers, according to the report.[178] This discrepancy might prove less problematic if Harvard's efforts resulted in greater numbers of Black students actually enrolling in the fall, but the study's authors found that, despite "soaring" numbers of Black applicants to Harvard in recent years, the share of admitted Black students remained stagnant.[179] The authors speculated that Harvard may have been trying to balance out sharp disparities in admissions rates across racial groups by encouraging more Black students to apply, which would have the effect of "downplay[ing] the magnitude of race-based preferences" and avoiding more lawsuits.[180]

At trial, Harvard acknowledged that the lower score cutoff was instituted to account for economic disadvantage, as Black and Hispanic students had less opportunity to prepare well for standardized tests. What remains unexplained, however, is why, in light of these efforts, the share of Black students at Harvard and its peer schools has stagnated in the past thirty-plus years. According to analysis by the *New York Times*, Black and Hispanic students are less represented today at top colleges than they were over thirty years ago.[181] Schools like Harvard are noted to perform especially poorly in this regard, with the *Times* noting that "Black students [in and around 2017] ma[d]e up nine percent of the freshmen at Ivy League schools but fifteen percent of college-age Americans, roughly the same gap as in 1980."[182] Despite the fact that much of the Supreme Court's most significant affirmative action jurisprudence stems from cases brought against top schools (e.g., University of Michigan, UC Davis, Harvard), these same schools, after vigorously defending the educational benefits of diversity as intrinsic to their mission and to their very existence, do little to actually capitalize on their court wins and fail to meaningfully increase the diversity represented on their campuses.

The Arcidiacono paper's findings bring into question whether Harvard and its peer schools' recruitment practices amount to a "cynical enterprise" in which students are led to believe they are competitive for schools that would never admit them, serving only as admissions cannon fodder to pad the numbers.[183] Despite yearly national headlines portraying underprivileged youth—often Black youth—winning admission to a

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[178] In fact, almost half of the students who qualified for a recruiting letter were members of underrepresented minority groups. Arcidiacono, *supra* note 177.

[179] *Id.*

[180] *Id.*

[181] Jeremy Ashkenas et al., *Even With Affirmative Action, Blacks and Hispanics Are More Underrepresented at Top Colleges Than 35 Years Ago*, N.Y. TIMES (August 24, 2017), https://www.nytimes.com/interactive/2017/08/24/us/affirmative-action.html#:~:text=Even%20after%20decades%20of%20affirmative,is%20virtually%20unchanged%20since%201980 [https://perma.cc/X8VC-D7GQ] (showing in 2017 that, even accounting for the supposed effects of affirmative action policies at the nation's colleges and universities, Black and Hispanic students remain underrepresented relative to their portion of the U.S. college-age population, this underrepresentation being most pronounced at Ivy League and other elite schools).

[182] *Id.* The Times continues: "At all eight schools, white enrollment declined as Asian enrollment increased. In recent years, the growth of Asian enrollment has slowed at some schools, and some Asian-American students say they are being held to a higher standard," linking there to a profile about the *SFFA* case.

[183] Hartocollis, *supra* note 177.

smorgasbord of prestigious schools, these stories are equal parts laudable and curated.[184] The reality is that, as things stand now, the vast majority of Black teenagers applying to these schools will not get in, even to schools that asked them to apply. Of course, this study offers only one view, and more research on this topic is warranted. However, the fact that Harvard, despite its supposedly more aggressive recruitment efforts, chose not to actually *admit* more Black students, while proclaiming that it *wanted* to admit more Black students, raises questions about the school's justifications for its admissions scheme.

B. Path B: Greater Socioeconomic Weighting

Of course, no consideration of solutions to race-based affirmative action is complete without a discussion of socioeconomics.[185] With words such as "class consciousness" re-entering the American zeitgeist, and with the economic forecasts for all but the wealthiest Americans looking ever more grim,[186] the concept of class—a broad term often used in America to encompass socioeconomic, cultural, political, racial, and other affiliations—has reemerged as an uber-salient topic, a lens through which any discussion, even of the most marginalized groups, must be viewed.

A common refrain when listing alternatives to race-based preferences, consideration of an applicant's socioeconomic background makes sense for numerous reasons. For one, socioeconomics strongly correlates to race in this country. If you are Black, you are far likelier to be born into poverty than if you are white.[187] Beyond that, one's financial resources (or lack thereof) can loom large in the creation of one's identity,

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[184] *See*, *e.g.*, Dominique Hobdy, *Black Teen Accepted Into All 8 Ivy League Colleges*, ESSENCE (last updated Oct. 27, 2020), https://www.essence.com/news/black-teen-accepted-all-8-ivy-league-colleges/ [https://perma.cc/CV5C-THCS] (presenting the story of Kwasi Enin, who in 2014 earned admittance to all the Ivies); Abby Jackson, *This girl is the 2nd student in her public high school to get into all 8 Ivy League schools*, BUS. INSIDER (April 5, 2016, 9:13 PM), https://www.businessinsider.com/augusta-uwamanzu-nna-was-accepted-into-all-8-ivy-league-schools-2016-4 [https://perma.cc/W72J-PFUS] (Augusta Uwamanzu-Nna, accepted in 2016); and CNN Newsource, *South Florida teen accepted to all 8 Ivy League schools*, WPTV (last updated June 14, 2022, 12:53 PM), https://www.wptv.com/news/education/south-florida-teen-accepted-to-all-8-ivy-league-schools [https://perma.cc/4W5Y-KWR2] (Ashley Adirika, accepted in 2022). Notably, reporting suggests all of these students appear to be the children of Black immigrants.

[185] For the purposes of this paper, socioeconomic status can be considered synonymous with class- and income-based considerations except where otherwise noted.

[186] *See* Paul Constant, *The American middle class used to signify economic security. That's now quickly becoming a luxury only the wealthiest can afford*, BUS. INSIDER (Dec. 25, 2021, 8:00 AM), https://www.businessinsider.com/american-middle-class-no-longer-signifies-economic-security-2021-12 [https://perma.cc/7G2T-79TP] (describing the unsustainable growing economic inequality of the past several decades and concluding that "[b]y draining the middle class of wealth and consolidating that security to an ever-shrinking group of wealthy elites, America is hobbling its capacity for economic growth").

[187] *See*, *e.g.*, Michael B. Sauter, *Faces of poverty: What racial, social groups are more likely to experience it?*, USA TODAY (last updated October 10, 2018, 9:07 AM), https://www.usatoday.com/story/money/economy/2018/10/10/faces-poverty-social-racial-factors/37977173/ [https://perma.cc/T4M8-Z37K] ("Black Americans are more than twice as likely as whit[e] [Americans] or Asian Americans to live in poverty"); and Diana Elliott, *Two American experiences: The racial divide of poverty*, URB. INST. (July 21, 2016), https://www.urban.org/urban-wire/two-american-experiences-racial-divide-poverty ("...a [B]lack child in 2014 is still three times more likely to be in poverty than a white child.").

not unlike race.[188] Indeed, the desire to raise one's socioeconomic status may be a principal driver for many students in applying to college.

Greater weighting of applicants' socioeconomic background would meaningfully expand the benefits of diversity in higher education. Elites are segregated from the rest of the population by education, occupation, and housing, to name a few factors. The *Bakke* Court seemed to recognize this fact when it listed—along with more traditional metrics such as work experience, leadership potential, or maturity—"the ability to communicate with the poor" as a unique qualification potentially warranting admission to an elite university.[189] To follow the Court's logic here, it is not entirely clear that the wealthy scion of a Black Harvard alumnus would have any more ease than a similarly privileged white student when striking up conversation with the janitor who cleans their dormitory. However, a working-class student of any ethnicity from Pittsburgh might be expected (rightly or wrongly) to converse with a non-elite more easily. Whatever merit may or may not lie in this type of thinking, there is surely value in expanding diversity beyond the confines of race.[190]

After all, low-income students—few in number they may be—have been known to "significantly outperform[]" their wealthier peers on elite campuses.[191] Returning to the Trinity College example, at Trinity, "the six-year graduation rate for Pell-eligible students…was 92 percent, compared with 76 percent for the rest of the student body."[192] In this way, there are contexts in which low-income students—often students of color[193]—outdo their more affluent peers (though this trend does not hold for the majority

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[188] While not an immutable characteristic, the socioeconomic stratum into which one is born is typically "fixed" and beyond a child's control until they enter the workforce and/or begin generating their own income (typically in one's late teens or early twenties). Of course, one's parents can make choices that cause a family to move up or down the rungs of the financial ladder. As income mobility in this country stagnates, however, increased attention should be paid to just how "static" one's socioeconomic status can be.

[189] Bakke, 438 U.S. at 317.

[190] All of this is not to say that privileged non-white students do not encounter difficulties upon arrival to campus; however, due to their backgrounds, they may be more familiar with the pitfalls of navigating elite spaces and therefore better able to protect themselves. An entire paper could be written—and surely has been—outlining the myriad ways in which the lives and outcomes of wealthy whites differ from those of wealthy Black people. *See*, *e.g.,* Raj Chetty et al., *Race and Economic Opportunity in the United States: An Intergenerational Perspective*, EQUAL. OF OPPORTUNITY PROJECT (Mar. 2018), http://www.equality-of-opportunity.org/documents/ (finding that Black men born into the 75 percentile of the income distribution end their lives, on average, 12 percentiles below white men born into similarly wealthy families); and Dylan Matthews, *The massive new study on race and economic mobility in America, explained*, VOX (March 21, 2018, 7:30 AM), https://www.vox.com/policy-and-politics/2018/3/21/17139300/economic-mobility-study-race-black-white-women-men-incarceration-income-chetty-hendren-jones-porter (for general discussion and summary of Chetty's findings). Rather, the purpose of this section is to show the need for expanding the base of permissible admissions tips or preferences to ensure that the diversity achieved on college campuses more fully represents the immense diversity of this country.

[191] Tough, *supra* note 34.

[192] *Id.*

[193] Unless otherwise indicated, the phrase "student(s) of color" in this writing is meant to distinguish Asian American students from other racial and ethnic minorities such as Black and Hispanic students.

of less selective schools).[194] Despite facing a culture of privilege that pervades campuses like Trinity (or, one can imagine, Harvard), these students overcame these challenges to excel in an environment that would justify their presence on the nebulous and potentially duplicitous ground of "diversity."

However, weighting socioeconomic factors more heavily, taken alone, will not solve the diversity problem. SFFA's simulations that eliminated ALDC- and LDC-related tips while increasing tips for economically disadvantaged applicants showed that Harvard could significantly increase socioeconomic diversity and the number of Black and Hispanic students in its classes "only if it abandoned all preferences for [LDCs], and implemented a sizable tip based on economic and geographic indicators of disadvantage."[195] One such simulation produced a class in which forty-nine percent of students were from an economically disadvantaged background—contrasted against the twelve percent of students meeting that criteria in Harvard's 2019 class.[196] However, these simulations also showed a fifty three- to seventy one-point drop in Harvard's average SAT scores and a related drop in the profile ratings across admitted students, outcomes the trial court suggests are untenable.[197]

Harvard's own race-neutral proposals encountered similar obstacles in tweaking socioeconomic factors. One Harvard-commissioned report found that increased outreach to schools or organizations serving applicants of modest means would be insufficient and would result in an "incrementally small" number of admitted students that would otherwise not have applied.[198] Nor would increasing financial aid meaningfully add to diversity, as seventy percent of Black and sixty percent of Hispanic families already qualified for zero parental contribution under Harvard's financial aid program.[199] Moreover, Harvard's previous expansions of financial aid were shown not to significantly increase the number of Black and Hispanic applicants or admits.[200]

Beyond the reasons proffered above, however, there remains an additional roadblock to successful implementation of a class-based affirmative action scheme: rich people know how to hide their money. For example, dozens of parents in a Chicago suburb were found to have transferred legal guardianship of their kids over to friends and relatives, at which point their kids declared financial independence to qualify for a

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[194] *See*, *e.g.*, Michael T. Nietzel, *New Report Shows Large Gaps In College Progress Based On Whether Students Attend High- Or Low-Income High Schools*, FORBES (Oct. 8, 2019, 06:00 AM), https://www.forbes.com/sites/michaeltnietzel/2019/10/08/new-report-shows-large-gaps-in-college-progress-depending-on-whether-students-attend-highor-low-income-high-schools/?sh=722b9acc2c13 [https://perma.cc/RR89-YUBY] (finding that "[o]nce enrolled, 89% of the higher-income high-school graduates continued for a second year of college, compared to 79% of those from low-income high schools.").

[195] Students for Fair Admissions, Inc., 397 F.Supp.3d at 182.

[196] *Id.*

[197] *Id.*

[198] Students for Fair Admissions, Inc., 980 F.3d at 177.

[199] *Id.*

[200] *Id.*

bevy of tuition aid and scholarships.[201] Of course, those wealthy Chicago families—many of whom had kids in expensive prep schools—are arguably the group least in need of additional financial aid, but, like their Varsity Blues counterparts, they are also in the best position to take advantage of loopholes that allow for this sort of duplicitous behavior.[202] It is not even clear why wealthy families need to game the system, as schools roll out the proverbial red carpet to admit their children, showering them with aid that comes at the direct expense of lower-income students. For example, research from the think tank New America shows that over the course of almost two decades, more than half of public universities sampled have doubled their spending on "merit-based" aid, a type of non-need-based financial aid that largely targets wealthier students and their families.[203] These funds often come from the same pot as need-based aid, meaning that increases in so-called "merit" aid proportionately decrease the aid that would go to qualified poorer applicants.[204] This nearly $32 billion in merit-based aid represents about $2 of every $5 going to students that the government would consider non-needy—that is, students able to afford college without financial aid.[205]

C. Blood at the Root: Structural Issues Reducing Diversity's Effectiveness

One major reason the above problems remain so intractable—and the diversity rationale comparatively impotent—is that no institution wants to tackle the root causes of inequality in American society. These inequities directly influence the makeup of any given school's applicant pool and the relative qualifications of that applicant pool. Some students are born with privileges that make higher education a forgone conclusion, regardless of their talent or appetite for learning. Others are born into more challenging circumstances that make the road to higher education a less

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[201] While this reporting was local, the authors suggested that this could be a nationwide practice. Jodi S. Cohen & Melissa Sanchez, *Parents Are Giving Up Custody of Their Kids to Get Need-Based College Financial Aid*, PROPUBLICA (July 29, 2019), https://www.propublica.org/article/university-of-illinois-financial-aid-fafsa-parents-guardianship-children-students# [https://perma.cc/9PEB-5KUP] (reporting on the financial loophole that allowed wealthy suburbanites to secure greater need-based financial aid for their students). For additional reporting on this story, *see* Annie Nova, *Parents Exploit this Legal Loophole to Get Their Kids More Need-Based College Financial Aid*, CNBC (July 30, 2019), https://www.cnbc.com/2019/07/30/parents-exploit-legal-loophole-to-get-their-kids-more-college-aid.html [https://perma.cc/E6QD-DGX4] (supplementing the ProPublica reporting and providing additional commentary on the potential legal ramifications for persons involved in the scheme).

[202] Cohen & Sanchez, *supra* note 201.

[203] Stephen Burd, *Crisis Point: How Enrollment Management and the Merit-Aid Arms Race Are Derailing Public Higher Education*, NEW AMERICA (February 13, 2020), https://www.newamerica.org/education-policy/reports/crisis-point-how-enrollment-management-and-merit-aid-arms-race-are-destroying-public-higher-education/ [https://perma.cc/U4FF-4HC9] (examining the merit aid "arms race" taking place among public universities that are providing so-called merit scholarships to students from the upper rungs of the income distribution in the hopes that those students matriculate, as they ultimately pay more in tuition than less wealthy students). *See also* Martin Kurzweil & Josh Wyner, *Rich Kids Are Eating Up the Financial Aid Pot*, N.Y. TIMES (June 16, 2020), https://www.nytimes.com/2020/06/16/opinion/coronavirus-college-rich-kids.html (referencing the New America study's findings to call for congressional action to enable schools to coordinate on setting merit aid and thus rein in spending).

[204] Kurzweil & Wyner, *supra note* 203.

[205] Burd, *supra* note 203, at 36.

straightforward one. A comprehensive examination of the ways in which various phenomena affect one's college preparedness and competitiveness in the applicant pool is beyond the scope of this Article. That said, it behooves us to better understand some of the problems that hampered the effectiveness of the diversity rationale from the outset.

1. School Segregation

As Justice Breyer noted over a decade ago in *Parents Involved*, "resegregation is on the rise" in America's public schools.[206] In fact, students of color—Black students, in particular—attend schools that are about as segregated as they were in the 1960s and 1970s.[207] In the 2015-2016 school year, more than half of American schoolchildren were in racially concentrated districts, with the nonwhite districts receiving about $2,200 less per student on average than predominantly white districts.[208] One report found that school districts serving mostly students of color received $23 billion less in funding than mostly white school districts with the same number of students in 2016.[209] This funding disparity can manifest in numerous ways from older, out-of-date textbooks to a lack of computer and internet access.[210] This dearth of resources impacts a child's ability progress academically, and it can create large "gaps" in a student's preparation for college and career, gaps that wealthier students will not have. Students in majority minority segregated schools are already operating at a deficit due to other factors outside the classroom, but the lack of access to quality resources at school only serves to push them further behind their well-resourced peers.

Relatedly, Black children are more than twice as likely as white children to attend high-poverty schools (schools in which fifty-one percent or more of students are eligible for free or reduced-price lunch).[211] Sixty percent of Black students attend high-poverty schools with a high share of students of color, compared with less than nine percent of white students.[212] Some attribute this concentration to the Reagan Justice Department's abandonment of busing as a desegregation remedy, which

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[206] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 861 (2007).

[207] Will McGrew, *U.S. School Segregation in the 21st Century: Causes, Consequences, and Solutions*, WASH. CTR. FOR EQUITABLE GROWTH (Oct. 15, 2019), https://equitablegrowth.org/research-paper/u-s-school-segregation-in-the-21st-century/?longform=true [https://perma.cc/5T8K-DC5A].

[208] EDBUILD, *$23 Billion* (February 2019), at 4, https://edbuild.org/content/23-billion - CA.

[209] *Id.* For additional reporting, *see* Sarah Mervosh, *How Much Wealthier Are White School Districts Than Nonwhite Ones? $23 Billion, Report Says*, N.Y. TIMES (Feb. 27, 2019), https://www.nytimes.com/2019/02/27/education/school-districts-funding-white-minorities.html (supplementing the EdBuild reporting and highlighting especially inequitable school districts such as those in New Jersey and Arizona).

[210] Mervosh, *supra* note 209 ("Differences in funding translate to the classroom, where underfunded communities often use older, worn textbooks and have less access to computers, said Francesca López, associate dean of the College of Education at the University of Arizona.").

[211] Emma García, *Schools are Still Segregated, and Black Children are Paying a Price*, ECON. POL'Y INST. (Feb. 12, 2020), at 2, https://www.epi.org/publication/schools-are-still-segregated-and-black-children-are-paying-a-price/.

[212] *Id*. at 3.

led to a confluence of racial and socioeconomic stratification in American cities.[213] Almost twenty-five percent of white students attend schools where most of their classmates are white and not poor—compared to about three percent of Black students.[214] In fact, white students have less exposure to non-white students than any other group of students.[215]

Some estimates indicate that the number of segregated schools has doubled in the past two decades, with the percentage of Black students in segregated schools growing very rapidly from fifty-nine to seventy-one percent.[216] The Northeast has overtaken the South in the proportion of segregated schools, and the phenomenon is no longer confined to southern and urban regions.[217] In addition, school closures are about three times more common for segregated schools.[218] Charter schools further complicate things, as they allow students (and associated per pupil expenditures) to travel to other schools, creating what one author describes as "islands" within larger districts, depriving resource-strapped public schools of even more funds, and potentially contributing to further segregation.[219]

Described by one researcher as a "major and intensifying problem," racial segregation in U.S. schools can only lead to "serious educational, social, and civic problems" that Justice Breyer warned of in *Parents Involved*.[220] The costs of attending a segregated school are many, including "reduced academic achievement, increased exposure to the criminal justice system, and significantly worsened professional and educational outcomes."[221] This Article need not supply an exhaustive treatment of these woes, but it is worth elucidating some of the more subtle costs of segregated schooling that can prove just as devastating as the above. For example, the Department of Justice noted that "schools serving the most [B]lack and Latino students are 1.5 times more likely to employ teachers who are newest to the profession" with these teachers often being "less effective than their more experienced" counterparts.[222] Also, schools serving mostly minority students are less likely to offer Advanced Placement (AP) and gifted courses—with one in five Black students attending a high school that did not offer AP courses in the 2011-2012 school year.[223]

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[213] Frankenberg, *supra* note 152.

[214] García, *supra* note 211, at 3.

[215] Frankenberg, *supra* note 152.

[216] Stancil, *supra* note 152. More recent research supports these figures, as an analysis of National Center for Education Statistics' National Assessment of Educational Progress (NAEP) data from a February 2020 report revealed that seven in ten black children (69.2%) attend majority minority schools. *See* García, *supra* note 211, at 2.

[217] Frankenberg, *supra* note 152.

[218] Stancil, *supra* note 152.

[219] *Id.*

[220] *Id.* (presenting the author's findings on school segregation trends and arguing that racial segregation is on the rise in the United States, despite the work of other scholars who argue that such alarmism is unwarranted because this perceived trend is really just the racial diversification of American schools). *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 862 (2007).

[221] Stancil, *supra* note 152.

[222] U.S. DEPT. OF EDUCATION OFFICE FOR CIVIL RIGHTS, "Dear Colleague Letter: Resource Comparability" (Oct 1, 2014), at 4, http://www2.ed.gov/about/offices/list/ocr/letters/colleague-resourcecomp-201410.pdf.

[223] *Id.* at 3.

Moreover, teachers in high schools serving mostly Black and Hispanic students were paid, on average, $1,913 less than teachers within the same district working at schools with the lowest Black and Hispanic population.[224] Two thousand dollars is no small sum, but when one considers the chronic underpayment of teachers, that number proves dire.[225]

For these and other reasons, it is no wonder that many minority students are unprepared for college—let alone for entry into an elite one. The paucity of resources in many of the nation's public schools all but ensure that far too many students of color—and especially Black students—are utterly ill-equipped to thrive at even moderately selective schools.

2. Housing Segregation

Controlling for factors such as education, income, geography, and marital status, nonwhite households—especially Black ones—are still less likely to own their homes when compared to white households.[226] For example, in 2019, only forty-one percent of Black households owned their own homes, while more than seventy-three percent of white ones did.[227] College-educated Black people are less likely to own their homes in comparison to white Americans who never finished high school.[228] And, Black Americans have about one-tenth the wealth of white Americans.[229]

The above problems were created and exacerbated by numerous policies at all levels of American government such as race-based zoning, red lining, and the systematic exclusion of Black people from federal

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[224] *Id.* at 5.

[225] *See, e.g.,* Thomas C. Frohlich, *Yes, Teachers are Underpaid. Here's How Much High School Teachers are Underpaid in Each State*, USA TODAY (September 29, 2020), https://www.usatoday.com/story/money/2020/09/29/states-with-the-most-underpaid-teachers/42699495/ [https://perma.cc/NW42-9GKC] (noting, for example, that the average public school teacher in the United States made almost $30,000 less than the average occupation requiring a college degree) and Tala Hadavi, *2020 has Shone a Light on the Importance of Good Teachers, but Many are Paid Less than a Living Wage in the U.S.,* CNBC (December 11, 2020), https://www.cnbc.com/2020/12/11/why-teachers-salaries-are-so-low-in-the-us.html [https://perma.cc/NMY8-5UD9] (noting that, in parts of the country, teachers live below the family living wage and up to a quarter of teachers leave the profession each year). For additional reading, *see* Katie Reilly, *Exactly How Teachers Came to Be So Underpaid in America*, TIME (Sept. 18, 2018), https://time.com/longform/teaching-in-america/ [https://perma.cc/H86Z-4HU9] (reporting on the large pay gap between teachers and other similar professions and highlighting legal and policy developments that have contributed to lower teacher pay).

[226] Danyelle Solomon et al., *Systemic Inequality: Displacement, Exclusion, and Segregation*, CENTER FOR AMERICAN PROGRESS (Aug. 7, 2019), at 7, https://www.americanprogress.org/article/systemic-inequality-displacement-exclusion-segregation/ [https://perma.cc/B4CP-SGKN].

[227] Solomon et al., *supra* note 226. *See also* U.S. Census Bureau, *Quarterly Residential Vacancies and Homeownership, First Quarter 2024* (2024), https://www.census.gov/housing/hvs/files/currenthvspress.pdf [https://perma.cc/W699-AW85] (providing updated statistics).

[228] Solomon et al., *supra* note 226, at 8.

[229] Angela Hanks et al., *Systematic Inequality: How America's Structural Racism Helped Create the Black-White Wealth Gap*, CTR. FOR AM. PROGRESS (Feb. 21, 2018), at 2, https://www.americanprogress.org/article/systematic-inequality/ [https://perma.cc/KST8-XRQU].

homeownership programs.[230] Federal home loan programs allowed white families to build and transfer wealth through generations, but they excluded Black applicants, trapping them geographically and financially and eliminating any chance of upward mobility.[231] So-called "blockbusting" and contract buying practices were additional methods that predatory real estate professionals used to legally and systematically strip wealth from Black families.[232] Black people were also denied access to tools such as mortgage refinancing and federal underwriting.[233] Moreover, residential segregation was made worse by other social and political forces, like white flight and gerrymandering.[234]

All of this is to say nothing of the well-documented effects of laws like the Home Owners' Loan Act, National Housing Act, and the Servicemen's Readjustment Act (the "GI Bill") on the Black community.[235] In addition to the decades of wealth-building opportunity these laws ripped away from Black families, the descendants of those same families would be exposed to other predatory practices like those around the subprime loan market of the early 2000s.[236] Moreover, Black people continue to face discrimination in housing, with forty-five percent of African Americans saying they have experienced discrimination when trying to rent or buy a home, compared with only five percent of whites.[237] Another recent study found that homes in Black neighborhoods were undervalued by an average of $48,000 due to racial bias, which translates to $156 billion in losses nationwide.[238]

Policies such as single-family zoning—the intellectual descendant of race-based zoning—continue to perpetuate stark racial segregation across the country. Single-family zoning typically restricts the placing of structures like apartment buildings and multifamily units in certain neighborhoods or districts, meaning that only persons who can afford single-family homes can live in those areas.[239] Because white families had greater access to federal home loan programs and higher incomes, single-family zoning allowed for rapid resegregation of America's towns and

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[230] Solomon et al., *supra* note 226.

[231] *Id.*; *see also*, *Classroom Segregation: History and Current Impact on Student Education*, AMER. UNIV. SCH. OF EDUC. (Aug. 19, 2020), https://soeonline.american.edu/blog/classroom-segregation [https://perma.cc/Y8LV-L8QU].

[232] Solomon et al., *supra* note 226, at 9.

[233] *Id.* at 6.

[234] Stancil, *supra* note 152 (describing attempts by some white neighborhoods and cities to "secede" from larger Black or integrated districts to form all-white districts, moves often aided by state legislators).

[235] Solomon et al., *supra* note 226.

[236] *Id.*

[237] Harvard T.H. Chan Sch. of Pub. Health et. al., *Discrimination in America: Final Summary* (Jan. 2018), at 11, https://cdn1.sph.harvard.edu/wp-content/uploads/sites/94/2018/01/NPR-RWJF-HSPH-Discrimination-Final-Summary.pdf [https://perma.cc/PFQ4-CTUZ].

[238] Andre M. Perry et al., *The Devaluation of Assets in Black Neighborhoods: The Case of Residential Property*, BROOKINGS (Nov. 27, 2018), at 3, https://www.brookings.edu/research/devaluation-of-assets-in-black-neighborhoods/ [https://perma.cc/M5YA-2Q2W].

[239] Solomon et al., *supra* note 226, at 11.

cities.[240] Wealthier areas also had greater tax bases to support public goods, and these areas often appreciated in value—all while areas with higher concentrations of Black people were zoned for commercial and industrial use, further depressing property values (which decimated schools) and reducing access to public goods like transportation, grocery stores, and child care facilities while increasing exposure to environmental hazards like waste facilities that were often built closer to apartments and multifamily complexes.[241] Because of these realities, Black communities tend to be poorer than white ones and continue to struggle against racist policies against their social and economic interests.

All of these harmful policies converge in one particularly insidious way. Most schools are at some level "local" schools because they serve the students of a particular neighborhood, district, or city. While public schools do receive some funds from their respective states, much of their budgets come from local property taxes levied on residents; unsurprisingly, that means that schools in poor areas serving poor students are more likely to be underfunded—that is, poor.[242] Conversely, wealthier zip codes often pay more in property taxes, resulting in better funded schools that can more easily meet the needs of their students. This fact also means, however, that as America becomes more economically stratified, so, too, do its schools. The interplay of race and class outlined above ensures that many poor neighborhoods are, in significant part, "Black" neighborhoods and vice versa. Similarly, low-performing and under-resourced schools are often "Black" schools. America's tiered housing system creates a tiered school system that reinforces a racial caste system.

The confluence of the race- and class-based exclusion undergirding residential segregation is a bipartisan phenomenon.[243] The lack of reparative or redistributive measures on behalf of state or federal governments suggests that there exists little political will to reverse these trends. This inaction is hardly surprising when, as the above illustrates, the vast majority of the segregation in the United States results not from individual actors but from state-sanctioned policies designed to relegate Black people to a second-class status. Still, in light of the Supreme Court's souring on the diversity rationale, a decision that was justified at some level under the idea that America has "progressed" racially, the above begs

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[240] *Id.*

[241] *Id.*

[242] Cory Turner et al., *College Board Drops Its 'Adversity Score' For Each Student After Backlash*, NPR (April 18, 2016), https://www.npr.org/2016/04/18/474256366/why-americas-schools-have-a-money-problem [https://perma.cc/8KFL-T44W] (examining funding disparities across America's schools and noting that many schools face funding issues due to their reliance on local property taxes, which can vary from district to district because of large differences in property values).

[243] *See, e.g.*, *Zoned Out: Examining the Impact of Exclusionary Zoning on People, Resources, and Opportunity Before the Subcomm. On Hous. Cmty. Dev. And Ins. Of the H. Comm. on Fin. Serv.*, 117th Cong. 6-7 (2021) (statement of Richard Kahlenberg, Senior Fellow and Director of K-12 Equity at The Century Foundation), https://democrats-financialservices.house.gov/UploadedFiles/HHRG-117-BA04-Wstate-KahlenbergR-20211015.pdf [https://perma.cc/52K9-V92K] (noting that the most exclusionary zoning policies are not promoted in communities with the highest levels of racial intolerance but that progressive areas tend to enact the most damaging legislation, possibly due more to a disdain for the uneducated than for minorities, specifically).

the question of how Black students could ever be expected to compete when the cards are so heavily stacked against them.

3. Test Preparation

While access to quality, well-funded, and integrated schools and neighborhoods is vital to student outcomes, the importance of test preparation in the college admissions process cannot be understated. Few dispute that test scores remain hugely consequential in admissions. Most colleges require that applicants take the Scholastic Aptitude Test (a set of subject area exams collectively termed the "SATs") and/or the American College Testing (ACT) exam. These tests loom large in one's application process, as they are designed to evaluate college preparedness. Applicants, especially to elite schools, spend months—years, even—preparing to take the standardized tests.[244] This preparation ranges from school-sponsored and independent test prep courses to expensive private tutors.

The tests themselves have been shown to accurately predict how well a student is likely to do in their first year in college but not beyond.[245] Performance on tests like the SAT more closely tracks factors like familial wealth than intellectual ability or even college preparedness. For example, a Wharton study demonstrated that SAT and ACT scores are more strongly correlated with family income than high school rank or GPA.[246] As the report summarized, "[m]easures of student ability typically used for college admissions implicitly reflect differences in family income across students."[247] Similarly, a student with a parent that holds a graduate

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[244] Sam Becker, *During Test-Optional College Admissions, Exam-Prep Companies Still Thrived*, BBC (April 17, 2024), https://www.bbc.com/worklife/article/20240416-test-optional-college-admissions-exam-prep-companies [https://perma.cc/9NM9-MJQB] (describing the booming test preparation industry in the United States and the test preparation measures families took even during "test-optional" admissions cycles at selective universities). These efforts are in addition to more traditional resume-padding activities like volunteering and community engagement, and even these activities advantage the rich, who have social capital that will allow their children to undertake ambitious service projects or obtain impressive fellowships even before college.

[245] *See, e.g.*, FAIRTEST, *SAT I: A Faulty Instrument For Predicting College Success* (Aug. 20, 2007), https://fairtest.org/sat-i-faulty-instrument-predicting-college-success/#:~:text=What%20is%20the%20SAT%20I,for%20placement%20or%20advising%20purposes [https://perma.cc/VUA7-VQVG] ("The SAT I is designed to predict first-year college grades – it is not validated to predict grades beyond the freshman year, graduation rates, pursuit of a graduate degree, or for placement or advising purposes."). *See also* Scott Jaschik, *Faulty Predictions?*, INSIDE HIGHER ED (January 25, 2016), https://www.insidehighered.com/news/2016/01/26/new-research-suggests-sat-under-or-overpredicts-first-year-grades-hundreds-thousands [https://perma.cc/A9GE-6XZF] (citing various failures in the predictive ability of the SATs, especially for distinct groups such as women, Black people, and Latino test takers).

[246] Jason Sockin, *Is Income Implicit in Measures of Student Ability?*, THE WHARTON SCH. OF THE UNIV. OF PA. (Sept. 28, 2021), https://budgetmodel.wharton.upenn.edu/issues/2021/9/28/is-income-implicit-in-measures-of-student-ability#:~:text=SAT%20math%20and%20ACT%20scores,ranging%20from%200.06%20to%200.10 [https://perma.cc/QGD4-DHAB]. This is not a new phenomenon, as reporting from almost a decade ago touts similar findings. *See, e.g.*, Zachary A. Goldfarb, *These Four Charts Show How the SAT Favors Rich, Educated Families*, THE WASHINGTON POST (March 5, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/03/05/these-four-charts-show-how-the-sat-favors-the-rich-educated-families/ [https://perma.cc/6VHR-EVUT].

[247] Sockin, *supra* note 246.

degree scores, on average, 300 points higher on their SATs than a student with a parent that only has a high school diploma.[248] These education- and income-related score gaps seem to be widening.[249] In light of this information, the persistent standardized test score gap between high- and low-income students should come as no surprise. Moreover, those findings help to explain why white Americans, some Asian Americans, and students who took the PSAT (the pre-SAT test) tend to outscore other groups; it is largely a matter of test prep resources and familial wealth.[250]

If extensive test prep is not enough to boost a student's score, wealthy families have other tools in their arsenal: so-called "504 designations" that are typically provided to students with anxiety or ADHD or physical disabilities and allow for accommodations like extra time and private testing spaces.[251] White students receive such designations at a disproportionate rate in New York's high-stakes entrance exam for its most selective public schools.[252] Specifically, white students are twice as likely as Black and Hispanic students and ten times as likely as Asian students to receive a 504 designation, according to research conducted by the *New York Times*.[253] In total, forty-two percent of 504 designations from 2016 to 2018 had gone to white students.[254] Assuming that white people are not predisposed to ADHD or breaking an arm (the types of conditions that might warrant extra time on a test), these numbers are notable.[255]

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[248] Goldfarb, *supra* note 246.

[249] Andre M. Perry, *Students Need More than an SAT Adversity Score, They Need a Boost in Wealth*, BROOKINGS (May 17, 2019), https://www.brookings.edu/blog/the-avenue/2019/05/17/students-need-more-than-an-sat-adversity-score-they-need-a-boost-in-wealth/ [https://perma.cc/2SBH-DKKT].

[250] It is also worth noting that most research and media outlets that report on achievement gaps of this sort do not distinguish within ethnic groups. That is, high test scores may very well be concentrated in wealthier east Asians like Chinese, Japanese, and Korean Americans while groups like Cambodian Americans or Hmong Americans may test less well overall. *See* Jason Ng et al., *Southeast Asian American Achievement Gaps Through Many Factors*, AAPI DATA (Oct. 11, 2017), https://aapidata.com/narrative/blog/se-aa-achievement-gaps/ [https://perma.cc/YT8X-YH6W] (compiling research and data highlighting achievement gaps between certain Southeast Asian groups and other Asians, including wealth and educational attainment).

[251] Abigail Johnson Hess, *Rich Students get Better SAT Scores—Here's Why*, CNBC (Oct. 3, 2019), https://www.cnbc.com/2019/10/03/rich-students-get-better-sat-scores-heres-why.html [https://perma.cc/BX3W-PRA4]. Parents in the Varsity Blues scandal were encouraged to take advantage of such accommodations. That is, they lied about their children having learning disabilities to help secure a spot at their favored colleges.

[252] Kevin Quealy & Eliza Shapiro, *Some Students Get Extra Time for New York's Elite High School Entrance Exam. 42% Are White.*, N.Y. TIMES (June 17, 2019), https://www.nytimes.com/interactive/2019/06/17/upshot/nyc-schools-shsat-504.html [https://perma.cc/GA32-CWQ8].

[253] Quealy & Shapiro, *supra* note 252.

[254] Quealy & Shapiro, *supra* note 252.

[255] Eliza Shapiro, *Only 7 Black Students Got Into Stuyvesant, N.Y.'s Most Selective High School, Out of 895 Spots*, N.Y. TIMES (March 18, 2019), https://www.nytimes.com/2019/03/18/nyregion/black-students-nyc-high-schools.html?smid=url-share [https://perma.cc/H9NY-SPSF] (reporting that, in 2019, Black and Hispanic students were just over ten percent of the population of New York City's highly selective eight specialized high schools, despite making up nearly 70 percent of New York City's public school population as a whole). This reporting also highlights the opposition from NYC's Asian community to then-Mayor de Blasio's plan to diversify these specialized high schools via elimination of the entrance exam and other measures.

More crucially, students with these extra-time provisions are about twice as likely to receive offers from specialized high schools.[256] White students are overrepresented in NYC's elite high schools, making up about a quarter of the students despite being only about fifteen percent of the entire public school population.[257] The medical consultations required to get a 504 designation are often pricey, which helps to explain why so many more white students seem to get them.[258] Moreover, many of these students "attend some of [New York's] most prestigious public middle schools," a fact that supports the notion that "income, race, and privilege" can have an impact on testing, especially for high-stakes exams.[259]

Still, that Asian students, despite a tenfold accommodations advantage by white students, are the overwhelming majority at specialized high schools serves only to inflame the growing tension between often low-income communities of Asian immigrants and a well-resourced white bourgeoise. For now, proposals to overhaul the specialized high school admissions system have focused on the underperformance of Black and Hispanic students, with some Asian groups arguing that they should not be penalized in admissions for the low performance of other groups.[260]

Regardless of their utility or predictive power, standardized tests feature prominently in the road to college for most Americans. The fierce competition for spots at the nation's top colleges have led to a testing industrial complex in which well-resourced test takers have nearly insurmountable advantages over their less privileged peers. The increased social capital and access that wealthier Americans enjoy in the education system will always make it such that only the most brilliant people of lesser means can keep up. In this way, President Biden's slip—on the 2020 campaign trail, he stated that "poor kids are just as bright and just as talented as white kids"[261]—may have been Freudian, but it was not without truth.[262] The central idea underlying his remark, that Black and low-

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[256] Quealy & Shapiro, *supra* note 252. Tellingly, 504 extra-time testers outperform median test-takers overall.

[257] Quealy & Shapiro, *supra* note 252.

[258] *Id.* White families are also simply more likely to be aware that such accommodations exist, whereas minority students in low-performing school districts may not have quality test prep resources or personnel like guidance counselors who can make them aware of such tools and guide them in applying for the designation.

[259] *Id.* Not unlike the family wealth-SAT score correlation, it appears that wealth strongly tracks whether one requests and receives a 504 designation. *See id.* (finding that, over a three-year timespan, students in a majority white and middle-class area of New York were almost five times as likely as students in other districts to have a 504 allowance and that, by comparison, a majority Hispanic and low-income area had five or fewer students *in total* to receive such accommodations in the same time frame).

[260] Shapiro, *supra* note 255. Then-mayor Bill de Blasio's proposal to admit the top scorers from every middle school would reduce the presence of Asian students—who now make up around 60% of students at specialized schools—by about half, increasing black enrollment by fivefold. The measure was unsuccessful.

[261] He paused before adding "wealthy kids, [B]lack kids, Asian kids." Matt Stevens, *Joe Biden Says 'Poor Kids' Are Just as Bright as 'White Kids'*, N.Y. TIMES (Aug. 9, 2019), https://www.nytimes.com/2019/08/09/us/politics/joe-biden-poor-kids.html [https://perma.cc/8NVC-JKNW].

[262] Stevens, *supra* note 261. For additional coverage, *see* David Siders, *Biden:'Look, I misspoke' about Poor Kids*, POLITICO (Aug. 10, 2019), https://www.politico.com/story/2019/08/10/biden-poor-kids-bright-white-kids-1456296

income students remain structurally disadvantaged relative to wealthier white students, is entirely correct.

If the occasional gifted, low-income student of color is able to surmount the numerous obstacles before them and gain admittance to a selective school, that would be the exception that proves the rule. Such occurrences are quirks of a skewed system, not evidence of its meritoriousness.

VI. FIXING DIVERSITY: MAKING GOOD ON THE PROMISE OF THE DIVERSITY RATIONALE

Specters of inequality haunt the admissions process from start to finish, creating a nightmarish maze in which some students, armed with the tools of wealth and privilege, clamor to marginally differentiate themselves in just the right way from their competitors, while other students do not even know where to begin and whose chances at elite credentialing will be summarily doomed should they make one wrong move. Still, some proposals hold promise for improving outcomes and fostering genuine diversity in a post-*SFFA* world.

A. At First Glance: Preliminary Proposals

National testing bodies and college admissions offices have attempted various proposals to level the playing field. For example, the College Board, which administers the SAT exam, proposed (then promptly abandoned) a measure known as an "adversity score."[263] This metric, which was to be presented alongside an applicant's subject area scores, was supposed to capture—that is, to rate—a test taker's school and neighborhood environment, which, as detailed above, are strong proxies for wealth and privilege.[264] While meant to capture hardships like crime and poverty that individual applicants might have had to overcome in their college admissions journey, the adversity score brought forth "a storm of criticism from parents and educators" supposedly irate at the idea of quantifying achievement in the face of hardship.[265] The opponents of the adversity score seemed less concerned with finding an alternative way of capturing hardship among applicants, as it appears there were few, if any, serious proposals for replacement schemes.

Some observers have called for investing more federal dollars to narrow gaps in the social and economic resources that Black and white families bring to the college-going process.[266] Earlier and greater focus in

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[https://perma.cc/FX35-4FGP] (Biden stating that he meant to say "wealthy" in place of "white").

[263] Anemona Hartocollis, *SAT 'Adversity Score' Is Abandoned in Wake of Criticism*, N.Y. TIMES (Aug. 27, 2019), https://www.nytimes.com/2019/08/27/us/sat-adversity-score-college-board.html [https://perma.cc/R393-PGFP] (describing how the College Board committed to still providing school admissions counselors and families with the information captured in the score, but claimed that it would no longer be summed up in a single number). *See also* Bobby Allyn, *College Board Drops Its 'Adversity Score' For Each Student After Backlash*, NPR (Aug. 27, 2019), https://www.npr.org/2019/08/27/754799550/college-board-drops-its-adversity-score-for-each-student-after-backlash [https://perma.cc/5AFT-SAZY].

[264] Hartocollis, *supra* note 263.

[265] *Id.*

[266] PHYS.ORG, *supra* note 124 (discussing Black immigrants' higher likelihood of attending elite colleges and universities, citing the work of Pamela Bennett and Amy Lutz).

public schools on college preparation, even as early as middle school, would help to ensure that students are better prepared for the admissions process.[267] This preparation could range from providing greater information about college preparatory coursework to counseling on the numerous college options available to students.[268] Exposure to these preparedness tools is a key advantage that white and Asian students have over Black and Brown students. They are aware of the need to prepare for these tests long before test day arrives.

As anyone who has attended a low-income high school knows, resources are limited for students wishing to apply to colleges. And because guidance counselors are often over-worked and underpaid, getting students into colleges—let alone elite institutions—is often a lower priority than simply getting students to their high school graduation. Because of this lack of attention and resources, even students who are aware of the steps in the college admissions process often must navigate them alone or with little support. Assistance with filling out college applications and financial aid forms is needed to help students, many of whom are overwhelmed by the breadth of information requested on forms like the FAFSA.[269] This type of aid could be outsourced to third parties—for example, young lawyers and members of other elite professions that have learned to successfully navigate the bureaucracy that is college and post-grad admissions—who could help with preparation for college interviews or test prep itself.[270]

Moreover, challenges inherent in the financial aspects of applying to college should not go unaddressed. For example, registration costs for tests like the SAT or ACT can pose significant barriers to poor students, who may be intimidated at the prospect of applying for a fee waiver or worried that such a waiver may somehow negatively impact their admissions prospects. In addition, these registration fees preclude far too many students from re-taking the test to get a higher score, a barrier to entry that wealthy and middle-class students are likely not to face.[271] All students, regardless of family income, should have equal opportunity to test or re-test. Whether the solution is eliminating registration costs altogether (an unlikely occurrence given the profitability of the testing industrial complex) or expanding access to fee waivers, little doubt exists that testing companies can do more to aid low-income and minority students in the process of taking these mandatory entrance exams.

Some proposals focus on what admissions offices can do. For example, one author called for more explicit attention to be given to Black applicants' "ancestral heritage" to distinguish between what they term

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For more on Bennett and Lutz's work, *see* Pamela Bennett & Amy Lutz, *How African American is the Net Black Advantage?: Differences in College Enrollment among Immigrant Blacks, Native Blacks and Whites.*, 82 SOCIO. OF EDUC., no. 1, 70 (2009), https://www.jstor.org/stable/40376038 (examining whether the higher likelihood of Black high school graduates to attend college, net of differences in socioeconomic family background and academic performance, is more attributable to differences in the educational trajectories of native Black people versus those of immigrant Black people).

[267] PHYS.ORG, *supra* note 124.

[268] *Id.*

[269] PHYS.ORG, *supra* note 124.

[270] *Id.*

[271] Hess, *supra* note 251.

"legacy [B]lacks" (i.e., Black people descended from enslaved people in America) and other Black people (specifically, first- and second-generation Black Americans descended from African immigrants and mixed-race individuals) in the affirmative action context.[272] This distinction, they argue, would foster intraracial diversity among Black students, especially on elite campuses, and would satisfy affirmative action's social justice undertones.[273] Such a proposal does not prove compelling to this author, largely because admissions offices are ill-equipped to vet an applicant's ancestral heritage.[274] No matter how meticulously designed a racial classification system might be, any institutionalized attempt to "measure" one's race or to quantify it in anything but the broadest terms opens the door to rampant racial fraud as seen in countries like Brazil.

Furthermore, a racial quantification scheme relies on one very large assumption: that colleges genuinely care about racial diversity. It is ambiguous where exactly these schools' commitments lie in regard to diversity. As described above, despite their constant allusions to deeply held, deeply vague social justice commitments, selective colleges and universities have shown little interest in striving for anything beyond a semblance of diversity. Schools should not be left to their own devices in matters related to quantifying an applicant's race, lest a new admissions system even more contorted than the current one work to exclude an entirely new swath of applicants.

Moreover, even if national testing bodies and college admissions offices reconsider their approach to admissions, it is not clear that these changes would result in more equitable outcomes. Persons with wealth and privilege will always find a way to advantage themselves and their children, even in processes designed to eliminate subjectivity.[275] In general, wealth offers a means of superior preparation and other ways, both large and small, to "skip the line" ahead of potentially more talented individuals.

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[272] Onwuachi-Willig, *supra* note 124, at 1156.

[273] *Id.* at 1209-10. This paper largely eschews Onwuachi-Willig's social justice justifications for affirmative action in college admissions because the Supreme Court already dismissed such considerations in *Bakke* and because such arguments are likely to find little purchase given the current makeup of the Court.

[274] And perhaps, more fundamentally, "who can really say that a biracial student of mixed African-American and white ancestry or a [B]lack second generation, Jamaican-American student is any less '[B]lack' than a monoracial [B]lack student from Mississippi who descends from plantation slaves in the United States?" *Id.* at 1209.

[275] This is not a uniquely American or even Western phenomenon, as many East Asian countries that are known for extremely high-stakes entrance exams have regular scandals around these important tests. *See, e.g.*, Charlie Campbell, *Chinese Students Face Up to 7 Years in Prison for Cheating on College-Entrance Exams*, TIME (June 8, 2016), https://time.com/4360968/china-gaokao-examination-university-entrance-cheating-jail-prison/ [https://perma.cc/3EQJ-G9WA] (describing the lengths taken to reduce widespread cheating on high-stakes Chinese college entrance exams); Ock Hyun-ju, *[Feature] Cho Kuk Scandal Reignites Debate On College Admissions System*, The Korea Herald (Sept. 15, 2019), https://www.koreaherald.com/view.php?ud=20190915000144 [https://perma.cc/32PM-M4NS] (describing public outcry following an admissions scandal implicating a high-profile member of the Korean government and presenting commentary on so-called "loopholes" in Korea's college admissions system that, perhaps inadvertently, have come to advantage wealthy and well-connected people). As these examples show, any system that evaluates credentialing is open to being gamed by those with wealth and influence, persons who can effectively tailor their candidacy to whatever requirements are valued by colleges at the time—and should that fail, can find "back doors" into elite institutions.

No matter the system of credentialing, people of means will always find a way to advantage their own. But our current system that "convert[s] wealth into merit"[276] ensures that only the most egregious of these tactics are considered inappropriate, while expensive SAT tutors and admissions consultants are considered fully above board—despite the fact that the use of such resources is often not publicized. To the extent education has become a "private good" and as long as "good parenting and good citizenship are in conflict" in our hyper-capitalistic and highly credentialed society, parents will continue to scramble to have their students master whatever form these admissions trials take.[277]

Perhaps this hyper-competitive and deeply unequal reality is why all the courts that heard the *SFFA* case largely ignored the roles of wealth-driven test preparation, application assistance, and specialized athletic recruitment in admissions.[278] There is little discussion of, for example, the

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[276] Guinier, *supra* note 127.

[277] Matthew Stewart, *The 9.9 Percent is the New American Aristocracy*, THE ATLANTIC (June 2018), https://www.theatlantic.com/magazine/archive/2018/06/the-birth-of-a-new-american-aristocracy/559130/?fbclid=IwAR3MfywEYyRfcpOWIT9D51s9doJV4m5GrrUNDYlmS7hln6wmJJ4qQbZJSTM. Stewart humorously mused: "So go ahead and replace the SATs with shuffleboard on the high seas, or whatever you want. Who can doubt that we'd master that game, too? How quickly would we convince ourselves of our absolute entitlement to the riches that flow directly and tangibly from our shuffling talent? How soon before we perfected the art of raising shuffleboard wizards?" *Id.*

[278] Indeed, this author was especially surprised to find evasion of these topics by Justice Thomas, a longtime critic of programs such as affirmative action. Justice Thomas has written extensively about the harm racial preferences wreak on unqualified Black students, but he has said virtually nothing about the damage that legacy or athletic preferences can cause. For example, Justice Thomas dissented in *Grutter*, opining about the inability of most Black students to succeed at elite educational institutions: "The Law School tantalizes unprepared students with the promise of a University of Michigan degree and all of the opportunities it offers. These over-matched students take the bait, only to find that they cannot succeed in the cauldron of competition." Grutter, 539 U.S. at 372. Thomas recognized that a "handful" of Black students would still be admitted without race-based preferences. *Id.* at 373. In *Grutter*, Thomas does allude to the questionable efficacy of entrance exams like the LSAT in predicting student performance, but he does not seriously consider why Black students score lower on the LSAT. He does, however, correctly note that such racial performance disparities have not driven elite schools away from the use of standardized tests. Grutter, 539 U.S. at 370.

Echoing the language of *Brown*, Justice Thomas in *Grutter* wrote that affirmative action stamps minority students with a "badge of inferiority" and may cause them to believe they are entitled to race-based preferences. Grutter, 539 U.S. at 373. *See also*, Brown v. Bd. of Educ. of Topeka, Shawnee Cnty., Kan., 347 U.S. 483, 494 (1954) ("Brown I"), *supplemented sub nom.* Brown v. Bd. of Educ. of Topeka, Kan., 349 U.S. 294 (1955) ("Brown II") ("To separate [Black schoolchildren] 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.").

Curiously, though, Justice Thomas does not consider the psychological or sociological effects of practices like legacy admissions on student beneficiaries, arguing that, while problematic, "unseemly" legacy tips do not fall within the ambit of the Equal Protection Clause. Grutter, 539 U.S. at 368. Setting aside the fact that Thomas supplies no reasoning as to why the Equal Protection Clause could not apply to legacy admissions, his brief reference to—then prompt abandonment of—the legacy matter is curious. Should legacies not feel as if their spots are unearned? Should not the Exeter-educated legacy lacrosse player with subpar grades and marginal standardized test scores (despite an abundance of tutors) have reason to question his place at Harvard? The stigma does not seem to attach in Justice Thomas's mind.

role that expensive college admissions consultants play in helping students craft the perfect application packet—and the potential ethical pitfalls of such crafting, as these packets are supposed to represent the students themselves, not the machinations of well-compensated admissions wizards. It begs the question of what role standardized tests and other admissions requirements are really playing. That is, are exams like the SAT really just a way to rubberstamp mediocre middle- and upper-class students who might not fare as well in a more egalitarian and competitive evaluation system?

Whatever form the new *SFFA*-imposed admissions regime ultimately takes will introduce uncertainty into an already fraught process for college applicants and their families, and there is no guarantee that it will be any better, more transparent, or more just. Perhaps it would have been better to leave well enough alone, to let an imperfectly-cast caste system remain in the hopes that a few—and only a few—extraordinary students would be able to successfully navigate the labyrinth of admissions. The current system surely captured at least a few diamonds in the rough, students from disadvantaged backgrounds who beat the odds to matriculate to their Ivy-covered dream schools. Perhaps this system is better than nothing. After all, even a broken clock is right twice a day.

While several of the above proposals are ambitious, none of them tackle the root causes of achievement and outcome gaps—at least not in a sufficiently comprehensive way. Band-aid solutions like an adversity score do not solve the problems ailing society; they attempt to address a problem but not its roots. Rather than "retrofitting test results around inequality" to level the playing field, society should provide "historically disenfranchised people opportunities to build wealth."[279] While such calls ring with the echo of "reparations" and are often met with strong resistance, there are avenues short of giving African Americans (or other disenfranchised groups) money; that is, there are solutions that perhaps will be more palatable to the wider—whiter—American public. Palatable is a relative term, however, as one of the most radical but comprehensive solutions to the wealth gap and other societal ills lies in a maneuver that this country has never managed to pull off in over two-and-a-half centuries: desegregation.

B. The Only Way Out: The Role of Desegregation in Realizing the Goals of Diversity

The Supreme Court's pronouncement in *Brown v. Board of Education* that racial segregation in American schools was unconstitutional was a landmark ruling, the legacy of which remains largely unrealized. Numerous sources have documented the Court's retreat from the goals expressed in *Brown*, and this absence of court-ordered enforcement has led to the resegregation of American schools and neighborhoods and continues to drive a gap—between rich and poor, Black and white, haves and have-nots—that threatens to enshrine a rapidly resolidifying American caste system.[280] With social unrest an ever-

[279] Perry, *supra* note 249.

[280] *See, e.g.*, J. HARVIE WILKINSON III, *FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978* 61 (1979) (noting that "[f]rom 1955 to 1968,

increasing aspect of the national conversation, efforts to desegregate public spaces prove more vital than ever before, as people must come to understand one another—but such understanding cannot happen if people do not live, work, and learn in the same spaces. In this way, making good on the promise of *Brown* is not only morally imperative; it may be essential to the survival of the American experiment.

Policies encouraging affordable housing are one major tool to desegregate communities, as the effects of those efforts will spread to schooling and education.[281] Making housing more accessible to low-income and minority communities will allow groups to move from high-poverty, resource-arid locales to more well-funded, resource-diverse areas that tend to have lower crime rates (which also has an impact on educational attainment).[282] This requires putting an end to exclusionary zoning, which goes hand in hand with making housing more affordable. Effectively shutting out large swaths of Americans from economically prosperous areas perpetuates a socioeconomic and racial apartheid. It also further depresses outcomes across a wide range of areas including income, educational attainment, and life expectancy for those unable to live where they wish. Relatedly, policies should address transportation needs, as low-income persons, especially in urban areas, are more likely to have to rely on public transit due to not having a vehicle (or only having one to share within a single family).[283]

Similarly, having more inclusive school district borders could bring major improvements to public school systems nationwide, as it helps to ensure that resources flow into all schools more equally, instead of having concentrations of highly funded schools in one area and underfunded ones in another.[284] Districts could be redrawn or consolidated to ensure that middle- and upper-class students attend socioeconomically diverse schools, which would result in more money being funneled to these schools. In addition, entities like the Department of Justice should be further empowered to bring litigation against school districts that remain highly segregated.[285] Increased civil rights enforcement will help keep schools on track to meet desegregation goals and ensure that poor and minority students are not shuttled into low-performing schools where they will not receive an adequate education.

Within schools, more must be done to support gifted and talented programs—including expanding access to such programs, which should not necessarily be cabined to the smallest possible percentage of students, as talent exists across multiple vectors, such as math, science, art, and

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the Court abandoned the field of public school desegregation"); McGrew, *supra* note 207 (citing the decline in school segregation from the 1960s through 1980s followed by a stagnation and eventual resegregation of American schools).

[281] McGrew, *supra* note 207.

[282] *See, e.g.*, E. Jason Baron et al., *Public School Funding, School Quality, and Adult Crime* (Nat'l Bureau of Econ. Rsch., Working Paper No. 29855, 2022), https://www.nber.org/papers/w29855 [https://perma.cc/Q9B3-USLT] (finding that increased educational investment in public schools reduces adult crime rates).

[283] AMER. UNIV. SCH. OF EDUC., *supra* note 231.

[284] *Id. See also*, Mervosh, *supra* note 209.

[285] McGrew, *supra* note 207.

music.[286] Adding specialized academic programs targeted toward differently gifted students would also encourage greater enrollment at some schools.[287] In addition, more public funds should be channeled to early childhood education, which is widely recognized as the most critical stage of child development.[288]

The benefits of these investments are many. Less segregated schools tend to produce better outcomes for students of color, especially Black students. For example, one study showed that Black children attending the same schools as white children perform much better on standardized math tests than Black children in segregated schools.[289] Moreover, the gap between Black and white student test scores is wider in high-poverty schools with a high share of students of color.[290] Desegregation also has positive implications for the economic mobility of Black people.[291] And, positive economic outcomes for minority students have been shown not to come at the expense of wealthier (usually whiter) students.[292]

In fact, desegregation fuels economic growth because it boosts capital, innovation, and productivity and also strengthens the social trust and interpersonal relationships necessary for smoothly functioning markets.[293] Segregation "foment[s] social distrust and…deteriorat[es] social capital in communities across the country."[294] This lack of social

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[286] Central to this goal is expanding bilingual (especially Spanish-language) education, via, for example, the so-called 50/50 program model, which helps ensure that gifted students are not left behind merely because they are English language learners. This model also provides immense benefits to the broader school population, as students learn a second language as part of their everyday curriculum. For more, *see* Andrew Warner, *4 Benefits of Dual-Language Immersion Programs*, U.S. NEWS & WORLD REPORT (June 9, 2022), https://www.usnews.com/education/k12/articles/4-benefits-of-dual-language-immersion-programs [https://perma.cc/B4H4-NDUS] (listing several social, cultural, and intellectual benefits of dual-language programs in schools).

[287] AMER. UNIV. SCH. OF EDUC., *supra* note 231.

[288] *Ages and Stages of Development*, CAL. DEP'T OF EDUC., https://www.cde.ca.gov/sp/cd/re/caqdevelopment.asp#:~:text=Recent%20brain%20research%20indicates%20that,warm%2C%20loving%2C%20and%20responsive [https://perma.cc/2HLG-UHQQ] (last visited May 25, 2024). ("Recent brain research indicates that birth to age three are the most important years in a child's development."). Children of color are disproportionately excluded from gifted and talented programs in many schools, and schools must reform the racial bias in identifying gifted students so that intellectually gifted children of color can be nurtured as much as white children. *See also* Danielle Dreilinger, *Why Decades Of Trying To End Racial Segregation In Gifted Education Haven't Worked*, THE HECHINGER REPORT (Oct. 14, 2020), https://hechingerreport.org/gifted-educations-race-problem/#:~:text=Gifted%20education%20has%20racism%20in,more%20likely%20to%20be%20white [https://perma.cc/D9MR-3ANN] (examining the issue of decades-long racial disparities in gifted education); *Teacher's Race Affects Gifted Program Selections*, VANDERBILT UNIV. RSCH. NEWS (Jan. 18, 2016), https://news.vanderbilt.edu/2016/01/18/teachers-race-affects-gifted-program-selections/ [https://perma.cc/EMA3-MYMH] (summarizing research that found that "[a]mong elementary school students with high standardized test scores, [B]lack students are about half as likely as their white peers to be assigned to gifted programs in math and reading").

[289] García, *supra* note 211, at 3-4.

[290] *Id.* at 3.

[291] McGrew, *supra* note 207.

[292] *Id.*

[293] *Id.*

[294] *Id.*

capital contributes to arbitrary discrimination and missed opportunities for economic exchange and innovation across the economy.[295] That is, desegregation promotes economic efficiency.[296]

Social boons, such as increased understanding among racial groups, will surely pay dividends down the line. Gaining exposure to genuine diversity early in one's life sets one up for success because one learns how to coexist with many types of persons and how to navigate a pluralistic world. Moreover, the "badge of inferiority" arguments espoused by the *Brown* court and by Justice Thomas would find less purchase in a world in which white students began to understand that their non-white peers are more than their racial or economic backgrounds. It is hard to argue that a faceless POC "took your spot" at your dream school when you have studied and worked alongside this person—and perhaps been bested by them on occasion—your whole life. Indeed, this is a major benefit of integration; it allows people to see that talent exists everywhere. This understanding could help shape a more truly holistic view of "merit" in this country, perhaps even lowering the tenor of the admissions conversation in the years to come.

This option, which could be stylized as "educational-investment-as-reparations," also avoids the common question of "Reparations for whom?" that plagues these sorts of discussions. Rather than the current debate, which treats a quality education as a private good to be divvied up amongst the disadvantaged who are clamoring like crabs in a bucket, desegregation "spreads the wealth." The benefits of desegregation also accrue more widely than even a strictly socioeconomics-based approach; though both concepts implicate race and class, desegregation actually incorporates socioeconomic realities, making it a broader and potentially more effective framework. Greater investment in America's public schools works to the benefit of students, parents, citizens, and residents everywhere.[297]

Texas's practice of guaranteeing spots for the highest performing students at its public schools—the so-called "Top Ten Percent Plan" (the "Plan")—provides an excellent example of the multi-layered effects of desegregation.[298] Under the Plan, all students in Texas graduating in the top ten percent of their high school classes were guaranteed admission to an in-state public college or university, including the flagships. This school-specific eligibility standard was designed to improve college access for disadvantaged and minority students, who disproportionately attend low-performing public high schools.[299] Because the Plan pulled from all high

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[295] *Id.*

[296] *Id.*

[297] Native Black and immigrant communities alike would reap the benefits of better funded and higher performing schools. Poor and middle-class white Americans will also benefit from increased resources and greater contact with Americans who are different from them.

[298] The Plan was implemented after the decision in *Hopwood v. Texas*, which effectively banned affirmative action in Texas. For more, *see* Hopwood v. State of Tex., 78 F.3d 932 (5th Cir. 1996), *abrogated by* Grutter v. Bollinger, 539 U.S. 306 (2003).

[299] Julie Berry Cullen et al., *Jockeying for Position: Strategic High School Choice Under Texas' Top Ten Percent Plan* (Nat'l Bureau of Econ. Rsch., Working Paper No. 16663, 2011), https://www.nber.org/papers/w16663 [https://perma.cc/66MY-PFHU].

schools, even in the highly segregated Texas public school system, this meant that a certain amount of Black and Brown students were guaranteed spots at some of the state's top universities. The positive effect of the Plan on the economic mobility of these students is not hard to imagine, as admittance to a school like the University of Texas at Austin can provide numerous opportunities for quality instruction and later for professional advancement.

Of course, the Top Ten Percent Plan also saw gamesmanship by well-resourced individuals. Specifically, after the Plan took effect, many wealthier and white students began transferring into lower-performing high schools in order to claim a spot in their new school's top ten percent of students.[300] The tournament aspect of the Plan resulted in an increasing number of students choosing to attend comparatively undesirable neighborhood schools instead of more competitive magnet schools.[301] This outcome somewhat undermined the Plan's goal of promoting racial diversity, but the authors found that this strategic school shifting did, in the short run, slightly reduce ability stratification across high schools.[302]

This ever-so-slight increase in peer quality at lower performing schools provides a glimmer of hope for what a more well-designed desegregation plan could achieve. While architects must be aware of potential gamesmanship, if, on balance, they are able to create a system that incentivizes wealthier, white students to attend the public schools closest to where they actually live, over time, there is little doubt that resources will flow into these schools. If overall school quality improves, even marginally, all students at that school are more likely to be competitive for state schools, regardless of whether they finish in the top ten percent of their class. One can easily imagine a student in, say, the top

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[300] *Id.* at 2.

[301] *Id.* at 3. Among the students with both motive and opportunity to make a strategic high school shift, as many as 25 percent chose to enroll in a different high school to improve their chances of cracking the top ten percent. *Id.* at 3. The study's authors found that "[t]hough minority students have greater strategic opportunities so are more likely to trade down [in school quality], the net effect of strategic behavior is to slightly increase the representation of *white* students in the top ten percent pool" (emphasis added). *Id.* at 23. Furthermore, "[b]oth white and minority students who trade down are relatively likely to displace minority students who otherwise would have placed in the top ten percent of their class." *Id.* at 23. Because peer achievement and minority share of a school are highly negatively correlated, the authors viewed this phenomenon of gamesmanship as "almost an inevitable consequence" of strategizing in light of the Plan. *Id.* at 23. The authors concluded that the overall effect of strategic school choice was to slightly decrease the representation of minority students in the ten percent eligibility pool. *Id.*

[302] *Id.* at 22-23. More recent research suggests that the Top Ten Percent Plan has led to virtually no increase in the number of public schools that feed into UT Austin and Texas A&M, though more work is needed to achieve meaningful and lasting change. However, the study also suggests that additional recruitment efforts, combined with a small amount of scholarship funds, notably increased the likelihood that an underrepresented high school would start sending students to a flagship. Jill Barshay, *Texas 10% Policy Didn't Expand Number of High Schools Feeding Students to Top Universities*, THE HECHINGER REPORT (July 8, 2019), https://hechingerreport.org/texas-top-10-policy-didnt-expand-number-of-high-schools-feeding-students-to-top-universities/ [https://perma.cc/R584-KZAA]. (presenting the work of Kalena Cortes and Daniel Klasik examining the impact of the Top Ten Percent Plan on matriculation of Texas high school students to two of the state's top flagship universities).

thirty-five percent of their class at a mid-performing Texas high school gaining admission to at least one institution in the UT system.

While the effects of the Ten Percent Plan do not present a fairytale ending to the thorny problem of how to equitably achieve diversity, they do show that something short of a panacea can be found, improving outcomes for students of color where such improvements are sorely needed. While not a long-term solution, the Ten Percent Plan shows what arguably the barest form of desegregation—indeed, desegregation was not even the goal of the Plan—can do. Unfortunately, short of radical social and political change, it seems incremental change like that described above is the most feasible way forward. Outright calls for rapid desegregation will face opposition from across the American political spectrum, but a tailored "x-percent plan"[303] may be able to achieve the modest aim of pumping a few more resources into America's neediest schools.

Even if some newer formulation of an x-percent plan somehow found purchase with American courts, however, that may not usher in radical change at elite colleges. It may be that most Black and Brown students remain effectively barred from entry into the nation's "top" schools. It may be that—no matter their qualifications—these students simply do not have what elite schools are looking for in a student population and a potential alumni donor base. Regardless, the above measures could help to close the racial achievement gap nationally and would result in greater numbers of minorities matriculating at flagship state schools that are far better pipelines to the middle class, anyway.[304]

Finally making good on the promise of *Brown*—or really, *Brown II*—will not solve all of America's woes, educational or otherwise, but it will put the country on a clearer path to true equality and opportunity for all its residents. Enshrining harmful policies and later dismantling them "with all deliberate speed" is a talent for which American courts and policymakers have shown exceptional aptitude.[305] The diversity rationale

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[303] For example, California and Florida have adopted similar plans. *See Statewide Guarantee*, UNIV. OF CAL., https://admission.universityofcalifornia.edu/admission-requirements/freshman-requirements/california-residents/statewide-guarantee/ [https://perma.cc/3AS6-K4M4] (last visited May 25, 2024) (outlining the University of California's percentage plan) and the *Talented Twenty Program*, FLA. DEP'T OF EDUC., https://www.fldoe.org/schools/family-community/activities-programs/pre-collegiate/talented-twenty-program/ [https://perma.cc/EH9E-TFPU] (last visited May 25, 2024) (describing Florida's "Talented Twenty" program for students finishing in the top 20% of their high school graduating class).

[304] *See,* e.g., The Upshot*, Some Colleges Have More Students From the Top 1 Percent Than the Bottom 60. Find Yours.*, N.Y. TIMES (Jan. 18, 2017), https://www.nytimes.com/interactive/2017/01/18/upshot/some-colleges-have-more-students-from-the-top-1-percent-than-the-bottom-60.html (describing the research of Raj Chetty on colleges and income mobility). Chetty and his fellow researchers found that so-called "Ivy Plus" schools (the eight Ivy League schools and similarly selective colleges) have the highest success rate, with almost 60% of students from the bottom income quintile reaching the top income quintile. However, certain less selective mid-tier universities have similar success rates with the key distinction that they admit far more low-income students. Schools such as the City University of New York, California State, and University of Texas systems often outperform schools like Harvard or Princeton in catapulting poorer students into the middle class and beyond. *Id.*

[305] Brown v. Bd. of Educ. of Topeka, Kan., 349 U.S. 294, 301(1955).

was, at some level, a break from this age-old practice, and it provided the opportunity for these United States to, in the words of many from the Harvard community, "live its values."[306] That opportunity remains elusive, but it is not beyond reach.

The answer to many of the problems inherent in the affirmative action debate have long rested right under *Brown*'s nose. Desegregation in housing, education, and more generally in American society, promises to bridge the gap that continues to divide this country and that has created and enforced a socioeconomically and racially stratified social order. Genuine diversity, if fostered from the pristine corridors of the Ivy League to the halls of local community colleges, promotes positive educational and economic outcomes for the benefit of all and at a cost to none. If this country can find the political and social will to make good on a promise that is not even a century old, the benefits will surely extend to ourselves and our progeny.

VII. CONCLUSION: A PROMISE UNFULFILLED—FINAL THOUGHTS ON THE DIVERSITY RATIONALE

The *SFFA* decision should be a surprise to few. Courts were always reluctant to tackle diversity in a way that accounted for the realities of our world, and the days of such juridical trepidation were always numbered. Even assuming the legitimacy of all of Harvard's justifications for its consideration of race in admissions, the lack of a clear, singular justification beyond the nebulous concept of "diversity" doomed affirmative action from the start. The throughline here is that a broader conception of diversity was needed at the outset. If the *spirit* of the diversity rationale is to survive, because the legal doctrine is now dead, it must expand beyond its narrow confines. Diversity as a concept must be broadened to account for the pluralities of the modern age, and this liberalizing effort must extend to our notions of community, allowing us to finally desegregate our country.

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[306] Pete Buttigieg (@PeteButtigieg), X (formerly TWITTER) (Oct. 2, 2019, 12:42 PM), https://twitter.com/petebuttigieg/status/1179436467019505664?lang=en [https://perma.cc/8CXD-VFDS] (then-presidential candidate Pete Buttigieg, on the one-year anniversary of the murder of journalist Jamal Khashoggi, noting that the lack of holding his murderers accountable represented a year of missed opportunities for this country to "live our values"); CNN Politics, *Warren: We Must be a Country that Lives Our Values*, https://www.cnn.com/videos/politics/2019/07/31/elizabeth-warren-immigration-cnn-2020-democratic-primary-debate.cnn [https://perma.cc/6CDU-M6HV] (then-presidential candidate Elizabeth Warren criticizing the Trump Administration's border patrol policies and arguing that the United States "must be a country that every day lives our values"); C-SPAN, *User Clip: George W Bush Asks us to Live by Our Values,* https://www.c-span.org/video/?c4872239/user-clip-george-bush-asks-live-values (President George W. Bush, in a speech at a Bush Institute event, noting that to recover America's identity and renew the country, "we only need to remember our values" and stating that "[t]he only way to pass along civic values is to first live up to them"); Barack Obama, President, U.S. of Am., Address at 2013 Presidential Inauguration Ceremony (January 21, 2013), https://obamawhitehouse.archives.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama [https://perma.cc/R7ET-PD4S] (President Barack Obama's 2013 inaugural address in which he says that this "generation's task [is] to make these words, these rights, these values of life and liberty and the pursuit of happiness real for every American").

Though this writing eschews a formal proposal of a so-called "neo-diversity rationale" in which one merely swaps the historically favored category of race for another equally amorphous category, it is clear that affirmative action defenders and sympathetic courts will have to grow ever more exacting in justifying race-based preferences in American life, as potential litigants are sure to look to SFFA's success and refine their assaults on whatever is left of affirmative action in educational settings and corporate America.[307] Harvard and its peers can avoid much of this coming headache by re-framing their stated admissions goals. On one hand, they can do the unglamorous work of truly diversifying their student body, making good on the lofty ideals espoused on their websites and in admissions brochures. On the other hand, a more explicit embrace of ALDCs and the value they bring to campus coffers might sound less lofty and egalitarian, but it may be far more honest and, perhaps, more legally defensible.

Either schools will find a new way to achieve the campus diversity they presumptively value, or they will not. Perhaps, in light of the High Court's decision, schools will simply wash their hands of the matter, saying they have done all they could to advance racial justice, silently grateful that they no longer have to employ such complicated admissions schemes to foster on-campus racial diversity. Perhaps elite colleges and universities will more openly stress the financial incentives that play a much larger role in the process than advertised. Who can say?

The forces that led to the very need for the diversity rationale are not in the rear view. The *SFFA* case is a watershed moment in this country's long, sordid racial history. With each feeble defense of the diversity rationale written over the recent decades, the Supreme Court retreated further into a corner, continually shrinking the role of race-based considerations in higher education admissions. Rather than continue this delicate jurisprudential waltz, the Supreme Court has now stopped the music. But silence brings opportunity. In this stillness, the vacuum wherein the word "diversity" is said in hushed whispers, stakeholders, particularly the students of this country, would be better served by an open conversation about the goals of universities, elite and otherwise, and the processes such institutions use to achieve those goals. A performative and thin endorsement of the value of "diversity" did not accomplish this aim. It never could. So, something more robust—and more honest—is needed.

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[307] *See, e.g.*, Nate Raymond, *Affirmative Action Opponent Drops Case over Law Firm's Diversity Fellowship*, REUTERS (Oct. 11, 2023), https://www.reuters.com/legal/affirmative-action-opponent-drops-case-over-law-firms-diversity-fellowship-2023-10-11/ (describing Ed Blum's dropping cases that he launched after the *SFFA* decision that were targeting U.S. law firms over their diversity programs). It is unclear how long this diversity détente will last.

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ARTICLE

THE TRAGEDY OF FELIX FRANKFURTER:

FROM CIVIL LIBERTIES AND CIVIL RIGHTS ACTIVIST TO REACTIONARY JUSTICE

Paul Finkelman[1]

This article reconsiders the life and record of Supreme Court Justice Felix Frankfurter. Frankfurter was smart, hardworking, and talented, serving as a great activist lawyer and important law professor in his early career. When nominated to the court, there were high hopes he would follow Holmes and Brandeis in leading a progressive Court that would protect civil liberties and minority rights. However, it was not to be. On the Court Frankfurter became increasingly conservative and ultimately reactionary. In his opinions, he upheld persecution and discrimination of religious and racial minorities, occasionally hindered racial justice and civil liberties efforts, and opposed due process in criminal trials and fairness in elections. Arrogant and dismissive, he constantly fought with his brethren, alienating almost all of them. In the end Frankfurter was far too often on the wrong side of history, liberty and the law, and even legal ethics. The tragedy of Frankfurter is that he abandoned the constitutional rights and protections that he supported from his graduation from law school until he donned his robes. He could have been a great justice. Sadly, he was not.

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I. INTRODUCTION

Felix Frankfurter (1882-1965) should have been one of our greatest Supreme Court Justices. He was razor sharp, a prolific scholar and author, hardworking, "with seemingly superhuman energy,"[2] extremely well-read, knowledgeable in many areas outside of the law, and capable of producing elegant prose. Before coming to the Court, he served in the Justice Department and the War Department in the Taft and Wilson administrations, was a Harvard Law School professor, a public interest lawyer at the highest levels of social change, and an advisor to Franklin Delano Roosevelt both before and after his presidential election.[3]

Brad Snyder, a journalist and professor at Georgetown Law School, recently published a massive biography of Frankfurter: *Democratic Justice*.[4] What follows is not a review of that book, although I will cite the book often, rely on some of Snyder's impressive research, and challenge many of his arguments and conclusions. Rather, this article is a review of Frankfurter himself and an evaluation of his place in our legal and constitutional history. I particularly focus on his jurisprudence on race, minority rights, religious freedom, civil liberties, voting rights, progressive reform, social justice, and his shocking response to knowledge of Holocaust. At a moment in time when the ethics of the Supreme Court itself are under intense scrutiny,[5] I will also discuss Frankfurter's questionable behavior and his persistent ethical lapses while on the Court.

Snyder defensively asserts that "the standard story about Frankfurter is that he struggled to fill the seat once held by Holmes. Scholars have portrayed Frankfurter as a judicial failure, a liberal turned conservative justice, and as the Warren Court's principal villain."[6] Snyder asserts that "none of these narratives rings true."[7] He argues that

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[2] WILLIAM M. WIECEK, THE BIRTH OF THE MODERN CONSTITUTION: THE UNITED STATES SUPREME COURT, 1941-1953 (2006) 89. Frankfurter's wife, Marion, once blurted out "Do you know what it is like to be married to a man who is never tired?" JAMES F. SIMON, THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA 50 (1989).

[3] MELVIN I. UROFSKY, FELIX FRANKFURTER: JUDICIAL RESTRAINT AND INDIVIDUAL LIBERTIES 1-44 (1991). After FDR's election Frankfurter "tutored" various members of the administration on civil liberties and the importance of the ACLU. SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU 97 (1990).

[4] BRAD SNYDER, DEMOCRATIC JUSTICE: FELIX FRANKFURTER, THE SUPREME COURT, AND THE MAKING OF THE LIBERAL ESTABLISHMENT 714 (2022) [hereinafter "SNYDER"]. The book is 979 pages long.

[5] *See* Alison Durkee, *Here are All the Supreme Court Controversies That Led to Adopting an Ethics Code*, FORBES (July 29, 2024), https://www.forbes.com/sites/alisondurkee/2024/07/29/supreme-court-ethics-controversies-all-the-scandals-that-led-biden-to-endorse-code-of-conduct/. *See also* Jennifer Ahearn & Michael Milov-Cordoba, *Alito Piles on Reasons for Congress to Act on Supreme Court Ethics*, BRENNAN CTR. FOR JUST. (May 24, 2024), https://www.brennancenter.org/our-work/analysis-opinion/alito-piles-reasons-congress-act-supreme-court-ethics; Devon Ombres, *With Its Release of a New Nonbinding Code of Conduct, the Supreme Court Fails on Ethics Again*, CTR. FOR AM. PROGRESS (Nov. 15, 2023), https://www.americanprogress.org/article/with-its-release-of-a-new-nonbinding-code-of-conduct-the-supreme-court-fails-on-ethics-again/; *and* Michael Waldman, *New Supreme Court Ethics Code is Designed to Fail*, BRENNAN CTR. FOR JUST. (Nov. 14, 2023), https://www.brennancenter.org/our-work/analysis-opinion/new-supreme-court-ethics-code-designed-fail.

[6] SNYDER, *supra* note 4, at 4.

[7] *Id.*

Frankfurter made significant contributions to "twentieth Century America's liberal democracy" because of his deep commitment to "the democratic political process," his commitment to judicial restraint, and his mentoring of "a who's who of American liberals in law and politics."[8]

Frankfurter did indeed make significant contributions to American law and culture as a legal activist working for social and economic reform from the time he left law school until he went on the Court in 1939. He mentored many people who held important positions in American politics and law. But far from being a "Democratic Justice"—the title of Snyder's biography—I argue that Frankfurter was in fact deeply anti-democratic. Far too often he refused to lift his pen to defend the civil rights of minorities, to protect civil liberties, and to support meaningful representation in legislatures. As a Justice he was not in fact supportive of "the democratic political process,"[9] but vigorously opposed the entire idea of legislatures accurately representing people and voters, and complained bitterly when the Supreme Court began to require this.[10] Frankfurter was "important," but importance is not the same thing as being admirable or on the right side of history—indeed, a review of Frankfurter's career reveals his often-repressive jurisprudence, which shows that indeed Frankfurter was "a judicial failure, a liberal turned conservative justice."[11] In his last major opinion, he vigorously opposed the concept of "one person, one vote,"[12] which almost all scholars and political commentators believe is central to any democracy.

Snyder has not convinced me that the "standard story" is wrong. On the contrary, his heavily researched and often elegantly written addition to the rather large literature on Frankfurter,[13] demonstrates that, to a great extent, the "standard story" is quite correct. Although an early advisor and litigator for the American Civil Liberties Union, once on the Court Frankfurter "was a great disappointment to the ACLU," as he became "the leading advocate of judicial restraint,"[14] especially in cases of freedom of religion, civil rights, and fair political representation. An early advisor of the NAACP, on the Court he opposed federal prosecutions of police officers who brutalized or killed Black Americans while they were in custody, and found nothing unconstitutional about state agencies

[8] *Id.* at 4-5, 15, and 7.

[9] *Id.* at 5.

[10] *See* Baker v. Carr, 369 U.S. 186 (1962) (Frankfurter, J. dissenting) at 266-330.

[11] SNYDER, *supra* note 4, at 4.

[12] *Id.* at 266-330.

[13] An incomplete list of the many books on Frankfurter includes UROFSKY, FELIX FRANKFURTER, *supra* note 3. NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES (2010); SIMON, THE ANTAGONISTS, *supra* note 2; LEONARD BAKER, BRANDEIS AND FRANKFURTER: A DUAL BIOGRAPHY (1984); BRUCE ALLEN MURPHY, THE BRANDEIS/FRANKFURTER CONNECTION: THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES (1982); MARK SILVERSTEIN, CONSTITUTIONAL FAITHS: FELIX FRANKFURTER, HUGO BLACK, AND THE PROCESS OF JUDICIAL DECISION MAKING (1984); H.N. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER (1981); MICHAEL E. PARRISH, FELIX FRANKFURTER AND HIS TIMES: THE REFORM YEARS (1982); ROBERT BURT, TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND (1988).

[14] WALKER, IN DEFENSE OF AMERICAN LIBERTIES, *supra* note 3, at 106.

operating segregated restaurants.[15] As Melvin I. Urofsky, our leading historian of the modern Supreme Court, noted some three decades ago: "Instead of being the herald of a new jurisprudential age, Frankfurter fought a valiant but ultimately ineffective rearguard action to divert the Court from what he considered a disastrous path. A quarter century after his death his opinions are all but ignored by both the courts and academia."[16] If one were to update Urofsky's analysis, we would note that six decades "after his death," Frankfurter's opinions are not only ignored, but are mostly forgotten.

Despite Snyder's valiant efforts to rehabilitate him, Frankfurter's two decades on the Court remain largely forgotten in Constitutional law, except when his opinions are remembered to point out some of his outrageous attacks on civil liberties and civil rights, which remain embarrassments in U.S. Reports.[17] As I will argue below, while on the Court, Frankfurter was not heroic, but tragic. He could have been great, but he was not.

This Article analyzes Frankfurter's early career and several of his judicial failings. Part II discusses Frankfurter's life before joining the Supreme Court. Part III looks at his many protégés and how his relationship with them was problematic after he went on the Court. Part IV examines his jurisprudence during World War II, when he increasingly supported repressive laws and became what we might call the "anti-Democratic Justice." This Part also examines his response to the Holocaust. Part V examines his jurisprudence after World War II, when he became increasingly hostile to protecting civil rights and civil liberties. Apart from his frequent (but inconsistent) opposition to blatant segregation involving African Americans, Frankfurter was often a stubborn opponent of civil liberties, civil rights, and human rights. Part VI raises questions about Frankfurter's ethics while on the Court. Part VII considers his

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[15] Screws v. United States, 325 U.S. 91 (1945) (Frankfurter, J., dissenting); Monroe v. Pape, 365 U.S. 167, 202 (1961), (Frankfurter, J., dissenting); Burton v. Wilmington Parking Authority, 365 U.S. 715, 727 (1961), (Frankfurter, J., dissenting).

[16] UROFSKY, FELIX FRANKFURTER *supra* note 3, at xii-xiii.

[17] Most infamously are his opinions in the two flag salute cases: Minersville Board of Education v. Gobitis, 310 U.S. 586 (1940) and West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943) (Frankfurter, J., dissenting), where he argued for the constitutionality of persecuting elementary school children because their religious beliefs forbade them from saluting the flag; his dissent objecting to a federal civil rights prosecution of a White Georgia sheriff who beat a Black man to death while he was handcuffed, Screws v. United States, 325 U.S. 91 (1945) (Frankfurter, J., dissenting), which the Court majority described as "a shocking and revolting episode in law enforcement" Screws at 92; his lone dissent in a grotesque case of police brutality against a Black family on the grounds that the federal government should not abridge the rights of the states to conduct their law enforcement as they saw fit, Monroe v. Pape, 365 U.S. 167, 202 (1961), (Frankfurter, J., dissenting), his one hundred page concurrence supporting laws that fined Orthodox Jewish merchants who sold Kosher food or retail merchandise on Sunday because their religion precluded from doing so on Friday evenings or Saturdays, McGowan v. Maryland, 366 U.S. 420, 459 (1961) (Frankfurter, J. concurring and Appendix I, 543-550; and Appendix II, 551-559); and his stubborn dissent protesting reapportionment of outrageously unequal electoral districts and his weird belief that Democracy does not require one person, one vote, in electing state or federal legislators. Baker v. Carr, 369 U.S. 186 (1962), Frankfurter, J. dissenting at 266-330.

decisions at the end of his Supreme Court career. Part VIII offers some conclusions.

I approach this article with the understanding that "democracy" means equal civil rights, equal justice under the law, equal political rights for all Americans, and a political system that allows all voters equal representation in Congress or state legislatures. In this context, Frankfurter was a failure, as he upheld state laws and federal policies that supported racism and religious bigotry and opposed decisions giving voters fair representation in Congress. In his biography of Frankfurter, Snyder praises this behavior as "judicial restraint," often claiming it was "prescient." But one can only wonder what sort of "Democratic Justice" supports expelling elementary school children for refusing to publicly violate their religion,[18] or the incarceration of 120,000 innocent people in what one Justice (and many commentators and scholars) described as concentration camps solely because of their ethnicity or "race."[19] Frankfurter's version of "judicial restraint" was often judicial abdication, as he vigorously opposed striking down repressive legislation and objected to applying federal civil rights laws to police who brutalized African Americans,[20] while upholding arbitrary and oppressive executive acts. His commitment to "democracy" did not include guaranteeing fair representation of the electorate in legislative districts; as I noted above, his last important act on the Court was to vigorously oppose what we call "one person, one vote."[21] In his early career he supported fair trials for some controversial figures, such as the Italian immigrant anarchists Nicola Sacco and Bartolomeo Vanzetti.[22] But while on the Court his commitment to due process of law and fair criminal trials did not include supporting a right against self-incrimination in state criminal trials[23] or requiring counsel for indigent criminal defendants.[24]

Frankfurter's pre-Court advocacy contrasted sharply with much of his jurisprudence on due process once on the Court. Furthermore, as explored in Parts III and VI, Frankfurter often engaged in questionable judicial ethics. He constantly meddled in politics from the bench and adamantly refused to recuse himself from cases in which he had been involved before they reached the Court.[25] Furthermore, and most striking, Frankfurter's notion of judicial restraint did not extend to his own off-the-Court political activities like lobbying government officials and the President, political meddling, helping the administration draft legislation

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[18] *See infra* Part V., Section A (discussion of Minersville Board of Education v. Gobitis, 310 U.S. 586 (1940) and West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943)).

[19] See *infra* pp. 1131-34 (discussion of the Japanese Internment cases).

[20] Screws v. United States, 325 U.S. 91 (1945) (Frankfurter, J., dissenting); Monroe v. Pape, 365 U.S. 167, 202 (1961), (Frankfurter, J., dissenting).

[21] Baker v. Carr, 369 U.S. 186 (1962).

[22] *See infra* pp. 1098-99.

[23] Adamson v. California, 332 U.S. 46 (1947) (Frankfurter, J. concurring).

[24] Betts v. Brady, 316 U.S. 455 (1942).

[25] *See infra*, text at notes 365-66 (discussing Service v. Dulles, 354 U.S. 363 (1957)). Frankfurter, while on the Court, advised Secretary of State Dean Acheson, before Acheson fired Service from the State Department, without any due process, or evidence of wrongdoing. Service sued to get his position back, and when the case came before the Supreme Court Frankfurter stubbornly refused to recuse himself.

that might later be reviewed by the Court, and sometimes giving legal advice to government officials or private litigants whose cases were likely to reach the Court. Justice Frankfurter even testified as a character witness for Alger Hiss, in a case that seemed likely to later come before him. In other words, he could never "restrain" himself from political activities and other questionable behavior, while always insisting on "judicial restraint" when hearing cases that subverted due process, racial equality, and civil liberties.

II. FROM IMMIGRANT SCHOOL CHILD TO HARVARD PROFESSOR AND PRESIDENTIAL ADVISOR

In 1894, the eleven-year-old Vienna-born Frankfurter passed through Ellis Island, speaking only German.[26] In 1902, at age nineteen, he graduated third in his class from New York's City College with a stunning command of English and a deep respect for Anglo-American history and culture.[27] William M. Wiecek observes, correctly, that he had "a facility with the English language that would have been extraordinary even in a native speaker," although "his prose sometimes tended to preciosity."[28] A year later, he entered Harvard Law School where he would be first in his class for three years in a row.[29] He served on the law review, but not as president, perhaps because he was Jewish,[30] since when "Frankfurter reached the Harvard Law School as a student in 1903 . . . Jewishness had assumed an openly stigmatizing meaning in American life"[31] and gentlemanly antisemitism was common at Harvard well into the 1930s.[32] However, at this time none of the students knew what their class standing was, so being first in his class certainly did not guarantee this leadership role. Moreover, while clearly hardworking and brilliant, Frankfurter could be grating, argumentative, egotistical, and dismissive of people with whom he disagreed.[33] Thus, not being president of the law review was likely a function of both his personality and antisemitism.

Between graduation from law school and the beginning of World War I, he had two short stints in private practice on Wall Street,[34] but

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[26] SNYDER, *supra* note 4, at 9.

[27] FELDMAN, SCORPIONS, *supra* note 13, at 5.

[28] WIECEK, BIRTH OF THE MODERN CONSTITUTION, *supra note* 2, at 89.

[29] UROFSKY, FELIX FRANKFURTER, *supra* note 3, at 2.

[30] Snyder suggests this, SNYDER, *supra* note 4, at 24.

[31] BURT, TWO JEWISH JUSTICES, *supra* note 13, at 38.

[32] SNYDER, *supra* note 4, at 142-45; BURT, TWO JEWISH JUSTICES, *supra* note 13, at 38. The great African American historian John Hope Franklin was shocked in his first year at Harvard's graduate program in history, in 1935-36, when he suggested a fellow graduate student Oscar Handlin, be chosen as the president of the Henry Adams Club, the graduate student history organization. Franklin noted Handlin was a straight A student. One of the other members of the Club, with the support of everyone else in the room, explained to Franklin "that although Oscar did not have some of the more objectionable Jewish traits, he was still a Jew." Franklin, the only Black in the room, was stunned by this open bigotry. JOHN HOPE FRANKLIN, MIRROR TO AMERICA: THE AUTOBIOGRAPHY OF JOHN HOPE FRANKLIN 65 (2005). Handlin would later have a distinguished career as a Harvard Professor and win the Pulitzer Prize in history.

[33] See HIRSCH, ENIGMA OF FRANKFURTER, *supra* note 13, at 177 and passim for descriptions of the many unpleasant aspects of Frankfurter's personality.

[34] In 1905-06 he was briefly at Hornblower, Byrne, Miller & Potter, before going the U.S. attorney's office under Henry L. Stimson, in New York City until 1909, when he followed Stimson into private practice until 1911.

otherwise until he went on the Court, Frankfurter served as a government lawyer, legal activist, public intellectual, scholar, and a key advisor to Franklin D. Roosevelt, before and after he reached the White House.[35] During most of this period, from 1914 to 1939 he was also a professor at Harvard Law School. He was active in the NAACP, a significant player in the American Zionist movement, and an early supporter of the ACLU, serving as the organization's expert on labor injunctions, which were a major tool corporations used to stifle freedom of expression for union organizers.[36] In 1914 he worked closely with Herbert Croly in the founding of *The New Republic*, and while declining to officially be one of the editors, he worked closely with the journal and often wrote for it. He was an engaging conversationalist; famous for mixing great cocktails[37] and acquiring and serving champagne during Prohibition; and fond of good food, good wine, stylish clothing, and other trappings of elegance.[38] And he was quirky. For example, he never learned to drive a car.[39]

From World War I until 1939, when he went on the Court, Frankfurter was extraordinarily influential in shaping public and legal policy, while both in and out of government service. In this period, Frankfurter made his most important contributions to American law and society. The NAACP, ACLU, and *New Republic*, which Frankfurter worked with from the 1910s to the 1930s, are still flourishing more than a century later. His persistent support for progressive legislation and safe and fair working conditions for laborers still influences American law. His successful argument in *Bunting v. Oregon* established the precedent that states could constitutionally pass maximum hours laws.[40] He put the Securities Act of 1933 into its "final form" before FDR sent it to Congress,[41] helped draft the National Labor Relations Act (the Wagner Act),[42] which the Supreme Court would narrowly uphold in *NLRB v. Jones & Laughlin Steel Corp.*[43] His use of data and research to improve law enforcement and criminal justice, which followed the work of his mentor Louis D. Brandeis,[44]

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[35] UROFSKY, FELIX FRANKFURTER, *supra* note 34, at 6-44.

[36] WALKER, IN DEFENSE OF AMERICAN LIBERTIES, *supra* note 3 at 55, 66.

[37] FELDMAN, SCORPIONS, *supra* note 13, at 9.

[38] UROFSKY, FELIX FRANKFURTER, *supra* note 3, at 2; HIRSCH, THE ENIGMA OF FRANKFURTER, *supra* note 13 at xii-xii.

[39] SNYDER, *supra* note 4 at 152, 215, and 637.

[40] 243 U.S. 426 (1917); *see also* SIMON, THE ANTAGONISTS, *supra* note 2, at 44-46; SNYDER, *supra* note 4, at 81-82.

[41] JEAN EDWARD SMITH, FDR 323 (2007). "An act to provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes," Act of May 27, 1933, 48 Stat. 77 (1933).

[42] SNYDER, *supra* note 4, at 253-54; Act of July 6, 1935, 49 Stat. 449 (1935).

[43] 301 U.S. 1 (1937).

[44] See Brandeis's famous brief in Muller v. Oregon, 208 U.S. 412 (1908); MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 212-28 (2009). Along these lines, one of Frankfurter's great contributions while a full-time professor was the massive (more than 750 pages) study written by The Cleveland Foundation and The Survey of Criminal Justice, of which Frankfurter was a co-Director. THE CLEVELAND FOUNDATION, CRIMINAL JUSTICE IN CLEVELAND (1922). One reviewer wrote of this pathbreaking study: "A book like this is the despair of a reviewer. It is so chock full of good material that one cannot even summarize it in a review. The best advice to those interested in the subject, and everyone ought to be, is to get the book and read it . . ." A.M. Kidd, *Book Review*, 11 CALIF. L. REV. 59 (1922). This advice remains true today.

helped revolutionize law and social policy. Frankfurter's legacy of fighting for fair trials for unpopular defendants such as Nicola Sacco and Bartolomeo Vanzetti[45] is an inspiration to many modern lawyers. Indeed, I would argue Frankfurter's most important legacy was as the nation's premier public interest lawyer for a quarter of a century. In this period, Justice Louis D. Brandeis, who was known as "the people's lawyer" before he went on the Bench, called Frankfurter "the most useful lawyer in the United States."[46] If he had never gone to the Court, and continued in these activities, he would be remembered as one of the great figures in American law and worthy of serious scholarly attention.

In these years Frankfurter was able to assiduously ingratiate himself with powerful men who helped his career. After law school, he briefly worked at Hornblower, Byrne, Miller, and Potter, which made him the first Jewish attorney to work at an elite "white shoe" Wall Street firm.[47] The firm hired him because of his stunning record at Harvard and on the strong recommendations from the Harvard faculty.[48] The fact that he had only one offer from a Wall Street firm, after graduating first in his class at Harvard, illustrates the nature of antisemitism at the time. While this may not seem like a civil rights achievement today, it was clearly a breakthrough in 1907, when elite law firms did not hire Jews.[49] Illustrative of the antisemitism and xenophobia of the time, while at Hornblower, Byrne, Miller, and Potter senior partners urged him to change his name,[50] to hide his immigrant, and implicitly his Jewish, roots. Frankfurter rejected this advice.

Not surprisingly, Frankfurter disliked private practice, and happily accepted a 25 per cent pay cut to join the staff of Henry L. Stimson, the new United States Attorney for the Southern District of New York.[51] This was also pathbreaking in an environment where immigrants and Jews were rarely seen. When Theodore Roosevelt did not run for reelection in 1908, Stimpson went back to private practice, and Frankfurter went with him.[52] He was Stimson's campaign manager in his unsuccessful run for governor of New York in 1910 and worked as his assistant when Stimson served as President William Howard Taft's Secretary of War.[53] In 1912, Frankfurter supported Teddy Roosevelt's Bull Moose campaign for president, running

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[45] *See infra* pp. 1098-99.

[46] UROFSKY, FELIX FRANKFURTER, *supra* note 3 at 20.

[47] SIMON, THE ANTAGONISTS, *supra* note 2, at 33-34. At this time there was only one Jewish federal judge, Jacob Treiber, who was also the first Jewish federal judge in U.S. history. He served on the eastern district of Arkansas from 1900 to 1927. https://encyclopediaofarkansas.net/entries/jacob-trieber-26/. It would be another decade before a Jew, Benjamin N. Cardozo, would serve on the New York Court of Appeals.

[48] FELDMAN, SCORPIONS, *supra* note 13, at 7.

[49] *Id.* Frankfurter graduated from the law school the same year Theodore Roosevelt chose Oscar Straus to be Secretary of Commerce, thus becoming the first to Jew ever serve in a United States presidential cabinet. Judah P. Benjamin, a former senator, served in the Confederate cabinet during the Civil War.

[50] UROFSKY, FELIX FRANKFURTER, *supra* note 3, at 2.

[51] *Id.* at 2-3.

[52] SIMON, THE ANTAGONISTS, *supra* note 2, at 35-36.

[53] *Id.* at 36-38. Frankfurter would later play a key role in Stimson being brought back as Secretary of War under Franklin D. Roosevelt. See discussion of this at *infra* note 340 .

against Taft. Despite working against Taft's reelection, Frankfurter retained his position in Taft's War Department.[54] After both Taft and Roosevelt lost, Frankfurter remained in the War Department under Woodrow Wilson until June 1914, when he became the first full-time Jewish faculty member at Harvard Law School.[55] This short history highlights Frankfurter's political adroitness. He was able to stay in the administration while campaigning against the sitting president, and then remained in the next administration, whose election he had also opposed.

At Harvard Law School, Frankfurter taught, wrote, and actively participated in progressive causes. Working with Herbert Croly and Walter Lippman, he was a co-founder of *The New Republic*.[56] While declining to be officially on the masthead, "he in essence became a fourth editor, writing numerous pieces and often sitting in on editorial meetings."[57] He published unsigned pieces, often praising his hero, Justice Oliver Wendell Holmes Jr., and supporting the Supreme Court nomination of his mentor, Louis D. Brandeis.[58] Frankfurter would follow this pattern throughout his life—quietly, secretly, or anonymously advocating on public issues while keeping his name out of the limelight. Some of this was clearly strategic, such as his admonition during the Brandeis confirmation fight "that no Jews should make the slightest peep about a race issue," by which he meant Brandeis's Judaism.[59] But Frankfurter's penchant for secrecy went beyond strategy. He seemed to relish being behind the scenes, pulling strings, maneuvering, and constantly pushing his friends and favorite former students into government positions. Frankfurter then relied on these protégés for information about pending policies and inside information. Even after going on the Court, he used them to advise and lobby administration officials and the President for his favorite causes.[60] As I discuss below, most legal scholars and political commentators think it is inappropriate for a sitting Justice to be actively involved in political machinations and talking constantly with people in the executive branch, including the President himself. Frankfurter, however, never paused for a moment to consider the ethics of his behavior. It is worth noting, however, that he never sought to line his own pockets or accept valuable presents and vacations while on the bench.

Before the United States entered World War I, Frankfurter joined the U.S. Army reserves as a major in the Judge Advocate General's (JAG)

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[54] SIMON, THE ANTAGONISTS, 40.

[55] FELDMAN, SCORPIONS, *supra* note 13, at 11. Many scholars (such as Feldman) assert, incorrectly, that Frankfurter was "the first Jewish professor at Harvard Law School." Id. In fact, Louis Brandeis taught evidence at Harvard in 1881, with an offer directly from Harvard's president, Charles W. Eliot. The following year, Dean Christopher Columbus Langdell, at the urging of the law faculty, offered Brandeis a full-time position as an assistant professor, but Brandeis declined because he preferred practice. MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 79, 80-81 (2009).

[56] UROFSKY, FELIX FRANKFURTER, *supra* note 3, at 8; SIMON, THE ANTAGONISTS, *supra* note 2, at 114.

[57] UROFSKY, FELIX FRANKFURTER, *supra* note 3, at 8; SIMON, THE ANTAGONISTS, *supra* note 2, at 114.

[58] UROFSKY, FELIX FRANKFURTER, *supra* note 3, at 8; SNYDER, *supra* note 4, at 72.

[59] SNYDER, *supra* note 4, at 72.

[60] *Id.* at 219-30.

Corps.[61] When the United States entered the war in 1917, Frankfurter returned to Washington as a special assistant to Secretary of War Newton Baker.[62] This was one of his finest hours.[63] As the Army's Judge Advocate General, he supervised court-martials, trying to ensure fairness and due process.[64] As the head of the War Labor Policies Board, he established fair wages, decent working conditions (including an eight-hour day), and limited the use of child labor in defense industries.[65] With an uncanny ability to befriend important (or soon-to-be important) people, Frankfurter became reacquainted with Franklin Roosevelt, the Assistant Secretary of the Navy, who he had met a decade before when he worked on Wall Street. They developed a relationship which would eventually lead to Frankfurter's Supreme Court seat.[66]

In 1918, Frankfurter went to Europe in an ultimately failed attempt to negotiate a separate peace with the Ottoman Empire.[67] While there, he also worked unsuccessfully to establish a Jewish state in Palestine.[68] After the War, he attended the Paris Peace Conference at the request of the World Zionist leader Chaim Weizmann and met with Saudi Arabia's Prince Faisal and Col. T.E. Lawrence (a.k.a. Lawrence of Arabia).[69] Frankfurter believed he had secured a peaceful future for Jews and Arabs in Palestine, but of course he was either overly optimistic or naïve.[70] He conferred with Brandeis, who met with him in Paris before the Justice went on to Palestine and Egypt.[71] Meanwhile, Frankfurter visited impoverished Jewish communities in Poland where he was appalled at the "systematic, pervasive anti-Semitism."[72] Frankfurter never expressed interest in his Jewish heritage and abandoned religious practice very early in life, but at this time he was sensitive to the oppression of Jews in eastern Europe and in the 1930s would express concerns for the safety of Jews in Nazi Germany.[73] As a Justice he was sometimes hostile to Jewish religious

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[61] SNYDER, *supra* note 4, at 84-85, says this took place in 1916.

[62] *Id.*

[63] UROFSKY, FELIX FRANKFURTER, *supra* note 3, at 10-16.

[64] SNYDER, *supra* note 4, at 84-85, 84-104.

[65] *Id.* at 84-93.

[66] SNYDER, *supra* note 4, at 98-100. They were in "periodic contact" in the early 1920s, when FDR was struck down with polio, but after FDR became governor of New York in 1928 he increasingly sought Frankfurter's advice. UROFSKY, FELIX FRANKFURTER, *supra* note 3, at 35-37.

[67] SNYDER, *supra* note 4, at 104-05.

[68] UROFSKY, FELIX FRANKFURTER, *supra* note 3 at 16-19.

[69] *Id.*; SIMON, THE ANTAGONISTS, *supra* note 2, at 21-23. Prince Faisal (also spelled Feisal) was born in Mecca in 1885 and was King Faisal I of Iraq from 1921 until his death in 1933. *Faisal I: King of Iraq*, BRITTANICA, https://www.britannica.com/biography/Faisal-I (Last accessed Mar. 9, 2024).

[70] *Faisal I: King of Iraq*, BRITTANICA, https://www.britannica.com/biography/Faisal-I (Last accessed Mar. 9, 2024). Faisal sent Frankfurter a letter asserting that Zionist aspirations were "moderate and proper," and promised "we will wish the Jews a most hearty welcome home," that is to Palestine. SIMON, THE ANTAGONISTS, *supra* note 2, at 23. But in the end, nothing positive came of this meeting or the exchange of letters between the future Supreme Court justice and the future King of Iraq.

[71] On Brandeis in Palestine, *see* PHILLIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 240-47; 277-80 (1984).

[72] SNYDER, *supra* note 4, at 115.

[73] BURT, TWO JEWISH JUSTICES, *supra* note 13, at 38-39; FELDMAN, SCORPIONS, *supra* note 13, at 6. In planning for his death, Frankfurter insisted that no Rabbi be at a service for him, but did ask that a former student, Lewis Henkin, who was a practicing

liberty (such as in the Sunday closing cases).[74] However, he worked closely with Brandeis on the Zionist cause from World War I until his mentor died in 1941. After the United Nations voted to partition Palestine, Frankfurter quietly lobbied for U.S. recognition of the new nation of Israel.[75]

During the War, Frankfurter also mediated labor strikes and investigated the barbaric treatment of more than 1,100 peaceful striking miners in Bisbee, Arizona.[76] The local sheriff, with some 2,000 deputies, rounded up the majority of the strikers and shipped them in boxcars to Columbus, New Mexico, on the Mexican border. The law enforcement officials denied the workers food, water, and shelter for two days.[77] Most of the strikers were immigrants—Mexicans, Slavs, and Finns were the largest groups—but American-born citizens constituted more than 15 per cent of those deported. At the time anti-immigrant sentiment was a particular kind of racism.[78] Frankfurter's report castigated the sheriff and other officials, asserting that their behavior was "wholly illegal and without authority in law, state or federal."[79] In this period he also investigated the murder conviction and death sentence of labor activist Tom Mooney for a bombing in San Francisco. Frankfurter helped expose that the conviction was based on perjured testimony.[80] Because of Frankfurter's work, President Wilson persuaded California's governor to commute Mooney's sentence to life in prison.[81] In 1935, the Supreme Court declined to hear Mooney's appeal because he had failed to exhaust all his

Orthodox Jew, say something. He explained, that Henkin was "my only close personal friend who is also a practicing, orthodox Jew. He knows Hebrew perfectly and will know exactly what to say. I came into this world a Jew and although I did not live my life entirely as a Jew, I think it is fitting that I should leave as a Jew." UROFSKY, FELIX FRANKFURTER, *supra* note 3 at 174. Like much of his life, even in death Frankfurter was disingenuous and somewhat hypocritical. His opinion in West Virginia Board of Education v. Barnette, his refusal to even discuss the Holocaust with FDR, and his opinion in the Sunday closing cases illustrates that he was often hostile to civil liberties and civil rights of Jews. It was not that he "did not live" his life as a Jew, but he often acted on the Court in ways that were hostile to Jews.

[74] *See* discussion of these cases, *infra* at note 71.

[75] SNYDER, *supra* note 4, at 105-116; 506-07.

[76] For a long discussion of these events, *see* PARRISH, FELIX FRANKFURTER AND HIS TIMES, *supra* note 3, at 87-101. Also, UROFSKY, FELIX FRANKFURTER, *supra* note 3, at 10-14.

[77] PARRISH, FELIX FRANKFURTER, *supra* note 13, at 90.

[78] *Id.* While the majority of the strikers were probably from Europe, Id. at 90 there was some fear that the strike was tied the revolutionary activities of Francisco "Pancho" Villa in Mexico. Michael Daly Hawkins, *The Bisbee Deportation: There Will be Ore*, 31 W. LEGAL HIST. 91 (2020-21). A list of 900 deportees shows that Mexicans may have been the largest single group of deportees, followed by U.S. citizens, but the combined total of Finns and people from what later became Yugoslavia exceed either U.S.-born citizens or Mexicans. *Deportees*, BISBEE DEPORTATION OF 1917, https://wayback.archive-it.org/8851/20171217204532/http://www.library.arizona.edu/exhibits/bisbee/deportees/index.html (last visited Feb. 21, 2024). About 15 per cent of those deported were American-born citizens, whose ancestry, based on their last names, appears to be from the British Isles and northern Europe.

[79] SNYDER, *supra* note 4, at 91.

[80] UROFSKY, FELIX FRANKFURTER, *supra* note 3, at 11-12.

[81] SNYDER, *supra* note 4, at 95.

state remedies.[82] In 1939 Governor Culbert Olson, a liberal Democrat, would pardon Mooney.[83]

Frankfurter's powerful report on the mistreatment of the Bisbee strikers and the perjury in the Mooney case had its costs. The aging Theodore Roosevelt, once a friend and ally who Frankfurter had actively campaigned for, publicly called him a Bolshevik for his defense of Mooney and because Frankfurter exposed that "the chief instigator of the [Bisbee] deportation was Arizona mine operator John C. Greenway," who had been one of Teddy's Rough Riders in Cuba[84] and "whose wife, Isabella Selmes, had long been a close friend of the Roosevelt family."[85] Roosevelt considered the strikers threats to the war effort, even though more than a third of them, including many non-citizen immigrants, were registered for the draft and ready to serve their country.[86] But Teddy Roosevelt's personal connections to Greenway and his wife were more important to the former president than Frankfurter's longtime support for him or the fact the strikers posed no threat to the nation or the war effort. By this time Teddy Roosevelt "was a sad, jingoistic reactionary, a far cry from the inspiring" Progressive of 1912.[87] This surely helps explain Roosevelt's "vicious attacks" on Frankfurter's patriotism and calling him a Bolshevik.[88]

The important unanswered question, at least in Snyder's comprehensive biography, is why Frankfurter still had "faith in him," and "believed the country needed Roosevelt's leadership."[89] What led Frankfurter to crave the affirmation of Roosevelt, after the ex-president so viciously defamed him, striking at his immigrant (and by implication Jewish) heritage and calling him a Bolshevik? What was it about Frankfurter's personality, or insecurity, that led to this behavior, and how did it affect his later career on the Court?

Starting with Frankfurter's investigation of the Bisbee deportations and the Mooney case, conservatives, including the now-reactionary Theodore Roosevelt, began to think of Frankfurter as the most dangerous man in America.[90] It is easy to see why conservatives, supporters of segregation, nativists, and opponents of legal protections for workers, feared him.

In 1920, Frankfurter helped found the ACLU and served on its board. He devoted enormous energy, albeit unsuccessfully, to save the lives of the Italian immigrant anarchists Nicola Sacco and Bartolomeo Vanzetti, who had been convicted in an outrageously unfair trial for a murder that neither of them (or perhaps only one of them) likely committed.[91] His strong

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[82] Mooney v. Holohan, 294 U.S. 103 (1935).

[83] *Mooney Pardoned; To Dedicate Life to the "Common Good;" Absolved of Guilt*, NEW YORK TIMES, January 8, 1939, cited in FELDMAN, SCORPIONS, *supra* note 13, at 438 n.23.

[84] SNYDER, *supra* note 4, at 94.

[85] UROFSKY, FELIX FRANKFURTER, *supra* note 3, at 12.

[86] *Id.* at 94.

[87] SNYDER, *supra* note 4, at 104.

[88] *Id.*

[89] *Id.*

[90] Snyder's chapter 9 is titled "A Dangerous Man." SNYDER, *supra* note 4, at 117.

[91] FELDMAN, SCORPIONS, *supra* note 13, at 15-27.

commitment to fair trials and due process for labor activists and radicals, and his denunciation of the Palmer raids and the Red Scare after World War I, gave Frankfurter an unjustified reputation as a radical and a communist.[92] He was neither, and was as anti-communist as anyone could be. His support for McCarthy-era suppression of freedom of speech would later underscore his deep hostility to Communism.[93] However, in some McCarthy-era cases he supported civil liberties involving alleged communists.[94]

Despite his personal hostility to most of the goals of radicals, before he went on the Court, Frankfurter sometimes worked to insure they received fair trials. On the Supreme Court, he would courageously support a full review of the espionage convictions of Ethel and Julius Rosenberg, not because he sympathized with their politics, but because their trials were unfair,[95] just as he had worked to overturn the outrageously unfair convictions of Sacco and Vanzetti, whose anarchist politics he deplored. These failed attempts to save the lives of "radicals" illustrate Frankfurter's willingness to take unpopular positions as an activist lawyer and later, in some cases, as a Justice. But they also may reflect a desire to be associated with famous cases and well-known defendants. He showed little concern with denying run-of-the-mill defendants protection from self-incrimination or trying them without providing them with counsel.[96]

Before going on the Court, Frankfurter's scholarship and advocacy for labor causes, improved race relations, and other pressing social issues made him a leading figure and advocate among progressives. He worked with the NAACP on civil rights, argued Supreme Court cases to support minimum wages and maximum hours, and helped draft the Norris-La Guardia Act, which was the first federal law to successfully protect organized labor.[97] Frankfurter's impact on social policy from World War I to the 1930s illustrates his importance. As I noted above, Justice Louis Brandeis, who mentored Frankfurter, called him "the most useful lawyer in the United States."[98]

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[92] SIMON, THE ANTAGONISTS, *supra* note 2, at 50-59. While defending radicals, he clearly was not sympathetic to most of their larger political goals. While never a fan of corporate wealth, he was hardly a socialist. *Id*. at 14-15.

[93] *See, e.g.,* Feiner v. New York, 340 U.S. 315 (1951); Dennis v. United States, 341 U.S. 494 (1951); Ullman v. United States, 350 U.S. 422 (1956); Barenblatt v. United States, 360 U.S. 109 (1959); Konigsberg v. State of California, 353 U.S. 252 (1957) (Frankfurter, J. dissenting); *and* Konigsberg v. State of California, 366 U.S. 36 (1961) (evidencing his votes upholding the suppression of communists and other radicals).

[94] *See* Alder v. Board of Education of the City of New York, 342 U.S. 45 (1952); Sacher v. United States, 343 U.S. 1 (1952); Rosenberg v. United States, 346 U.S. 273 (1953); Peters v. Hobby, 349 U.S. 341 (1955); Pennsylvania v. Nelson, 350 U.S. 497 (1956); Slochower v. Board of Higher Education of the City of New York, 350 U.S. 551 (1956); Sweezy v. New Hampshire, 350 U.S. 234 (1957); Yates v. United States, 3454 U.S. 298 (1957); *and* Kent v. Dulles, 357 U.S. 116 (1958) (evidencing his support of civil liberties and due process for some alleged Communists).

[95] Rosenberg v. United States, 346 U.S. 273 (1953), (Frankfurter, J., dissenting).

[96] *See infra* at notes 451-52 (discussing Adamson v. California) *and infra* at note 204 (discussing Betts v. Brady).

[97] An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes, act of March 23, 1932, Chapter 90, 72nd CONG., 47 Stat. 70.

[98] UROFSKY, FELIX FRANKFURTER, *supra* note 3, at 20.

At the same time, Frankfurter increasingly showed a conservative—often reactionary—streak, opposing Supreme Court decisions protecting individual liberty and religious freedom. He privately denounced the Court's decision in *Meyer v. Nebraska*, overturning the conviction of Robert T. Meyer for teaching the German language in a private Lutheran school in violation of a Nebraska statute which prohibited teaching children any modern foreign language before the ninth grade.[99] At the time, many Lutherans used the German language Bible translated by Martin Luther.[100] In his biography of Frankfurter, Brad Snyder praises Frankfurter's opposition to overturning Nebraska's repressive law for supporting "a prescient theory of limited judicial review."[101] It is not at all clear why Frankfurter was "prescient" in opposing decisions to strike down truly repressive legislation aimed at minorities and immigrants. More prescient was Brandeis, who joined the majority in *Meyer*, and a month later explained to Frankfurter that "fundamental rights" such as "education," or "choice of profession" should "not be impaired or withdrawn except as judged by [the] 'clear and present danger' test."[102] It is hard to imagine how teaching children to read the Bible in the language of their choice threated society in any way, much less created a "clear and present danger." Unfortunately, this was a moment when Frankfurter failed to learn anything from his mentor.

The law used to convict Meyer was a classic form of racial,[103] ethnic, and religious hatred and discrimination against German immigrants and German Americans, who during and after World War I were demonized as "Huns" and barbarians.[104] As one professor at the University of Nebraska explained, in language similar to the way many Southerners described Black people and many Americans had described Native Americans, "The Prussian" is "a moral imbecile, an arrested development, a savage in

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[99] SNYDER, *supra* note 4, at 138-39. Meyer v. Nebraska, 262 U.S. 390, 391 (1923). The law did allow teaching children Biblical Hebrew, Biblical Greek, and Latin, which of course supported the religious liberty of Jews, Roman Catholics, Orthodox Catholics, and some Protestants, but emphatically *not* German Lutherans.

[100] *Paul Finkelman, German Victims and American Oppressors: The Cultural Background and Legacy of* Meyer v. Nebraska*, in* LAW AND THE GREAT PLAINS 33, at 44, (ed. John R. Wunder) (1996).

[101] SNYDER, *supra* note 4, at 139.

[102] Brandeis to Frankfurter, quoted in ROBERT C. POST, THE TAFT COURT: MAKING LAW FOR A DIVIDED NATION, 1921-1930 (2024), 828-29.

[103] It is worth noting that in this period ethnicity and religion were often combined with concepts of "race." For example, THE DICTIONARY OF RACES OR PEOPLES. REPORTS OF THE IMMIGRATION COMMISSION. Senate Document No. 662. 61st Cong. 3rd. Session. (1911), refers to people of European ancestry as being of different "races" such as "[t]he principal race or people of England," (54), "[t]he principal race or people of France," (61), "[t]hat section of the French race or people which lives in Canada," (63), "[t]he race or people whose mother tongue is German," (64), "[h]he modern Greek race," (68), "the Gypsy belongs to the Aryan race," (71), "[t]he race or people that originally spoke the Hebrew language" (73) noting that "the Hebrew is a mixed race, like all our immigrant races or peoples, although to a less degree than most" (73), [t]he principal race or people of Ireland: the race which originally spoke Irish," (79), "[t]he race or people of Italy," noting that the "bureau of Immigration divides this are into two groups, North Italian and South Italian," (81). Thus, people talked about the "German race" in WWI and when discussing immigration, there were references to such groups as the Irish, Italian, or Jewish race. For example, *see*, NOEL IGNATIEV, HOW THE IRISH BECAME WHITE (2009).

[104] Finkelman, *German Victims, supra note 100, at 43.*

civilization's garb, and even the garb he has stolen. Like the savage he is boastful and cunning. Among the nations he is precisely what the type of moral imbecile but intellectually educated criminal is among individuals."[105] More succinctly, Professor Vernon Kellogg, an evolutionary biologist and zoologist at Stanford University, and the first permanent secretary of the National Research Council in Washington, D.C. declared that all Germans were "unclean."[106] Several other states passed similar laws at this time.[107] The Court ruled seven to two that the Nebraska statute violated the due process clause of the Fourteenth Amendment.[108] Frankfurter's mentor Justice Brandeis was in the majority, but his hero Holmes was not.[109] Frankfurter privately denounced the Nebraska law as "uncivilized,"[110] and apparently liked the outcome,[111] but at the same time strenuously objected to the Court overturning the law.[112] In a preview of his anti-libertarian opinions on the Court, he said he would have voted with Holmes, arguing that the Supreme Court should not overturn state laws, no matter how much they repressed religious freedom, freedom of speech, or the right of parents to educate their children.[113] Brad Snyder argues that Frankfurter was "opposed to invoking the Due Process Clause [of the Fourteenth Amendment] no matter how horrible or objectionable the law."[114] But surely such a cramped view of liberty was neither "prescient" nor admirable.

This position was anachronistic, oppressive, bigoted, and destructive of civil liberties. Brandeis in *Meyer* and both Holmes and Brandeis in a number of other cases,[115] and Brandeis alone after Holmes left the bench,[116] embraced using the Fourteenth Amendment to strike down repressive state legislation, support freedom of speech, and reverse unfair criminal verdicts that denied people due process of law. Frankfurter's view of the role of the court and his rigid deference to state legislation meant that, in Frankfurter's view, it was constitutionally permissible, in the name of "democracy," for the majority of the population to persecute a minority, as in the case of German Lutherans in Nebraska.

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[105] *Id.* at 38.

[106] *Id.* During the War one German immigrant, Robert Prager, was lynched and many were tarred and feathered and physically attacked. Id. at 34-39; See also PAUL MURPHY, WORLD WAR I AND THE ORIGINS OF CIVIL LIBERTIES IN THE UNITED STATES (1979) 119-24 and 128-32 for a list of vigilante attacks on German immigrants during the war, when Germans were considered to be a "dangerous race."

[107] For a full history of these laws and the surrounding litigation, *see* WILLIAM G. ROSS, FORGING NEW FREEDOMS: NATIVISM, EDUCATION, AND THE CONSTITUTION, 1917-1927 (1994).

[108] Meyer v. Nebraska, 262 U.S. 390, 391 (1923).

[109] *Id.*

[110] SNYDER, *supra* note 4, at 138-39.

[111] WALKER, IN DEFENSE OF AMERICAN LIBERTIES, *supra* note 3 at 81.

[112] SNYDER, *supra* note 4 at 138-39.

[113] *Id.*

[114] *Id.* at 139.

[115] *E.g.,* Pierce v. Society of Sisters, 268 U.S. 510 (1925); Gitlow v. New York, 268 U.S. 652, 672 (1925) (Holmes and Brandies, JJ. dissenting); Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis and Holmes, JJ. concurring); Stromberg v. California, 283 U.S. 359 (1931); Near v. Minnesota, 283 U.S. 697 (1931).

[116] Nixon v. Condon, 286 U.S. 73 (1932); Powell v. Alabama, 287 U.S. 45 (1932); Patterson v. Alabama, 294 U.S. 600 (1935); Herndon v. Georgia, 295 U.S. 441 (1935); Herndon v. Lowry, 301 U.S. 247 (1937)

The only explanation, which is indeed grim, is that Frankfurter stood for the "tyranny of the majority" over the fundamental rights of discreet minorities and believed that such tyranny was good for the nation and the Constitution. It is quite frankly bizarre that any modern scholar would praise Frankfurter's support of this sort of religious persecution or defend his rigid constitutional theory that led him to this position.

Two years after *Meyer*, in an unsigned *New Republic* essay, Frankfurter denounced the Court's unanimous decision in *Pierce v. Society of Sisters*,[117] striking down Oregon's Ku Klux Klan-inspired law prohibiting any parochial schools or private schools from operating in the state.[118] As in Meyer's case, Frankfurter was intellectually inflexible and out-of-touch with reality, unlike his hero Holmes and his mentor Brandeis, both of whom voted to strike down the Oregon law. The Oregon law was certainly the result of a "democratic" process. Oregon's overwhelmingly white Protestant majority supported a referendum to implement the law, which was aimed at Catholics and immigrants.[119]

Claiming he did not like the law, and even admitting that the results in *Meyer* and *Pierce* were "just cause for rejoicing,"[120] Frankfurter argued that it was anti-democratic for the Court to strike down state laws because it interfered with the will of the elected legislature.[121] Frankfurter further claimed that it was dangerous to rely on the Court to protect liberty because the same doctrines that preserved liberty in *Meyer* and *Pierce* would "be used as a sword against what Frankfurter viewed as economically progressive legislation."[122] He believed that whatever might have been gained by both decisions was not worth the cost to his peculiar notion of "democracy."[123] But this begs the question why Frankfurter believed that the Constitution did not in fact protect minorities from the bigotry of the majority. Here and throughout his career, we see Frankfurter's stubborn inability to distinguish between laws that

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[117] Pierce v. Society of Sisters, 268 U.S. 510 (1925). SNYDER, *supra* note 4, at 157-58. *See also* ROSS, FORGING NEW FREEDOMS, *supra* note 107.

[118] In the 1920s a reinvigorated Ku Klux Klan, often called the "second Klan," emerged in the North (and the South) focusing mostly on opposition to Catholics, Jews, and immigration from anywhere except the British Isles and northern Europe, and hatred for Blacks. The KKK was heavily involved in the election of Governor Walter Pierce of Oregon, who supported the KKK's slogan of "100 percent Americanism." PAULA ABRAMS, CROSS PURPOSES: PIERCE V. SOCIETY OF SISTERS AND THE STRUGGLE OVER COMPULSORY PUBLIC EDUCATION (2009). David A. Horowitz, *Social Morality and Personal Revitalization: Oregon's Ku Klux Klan in the 1920's*, 90 OR. HIST. Q. 365 (1989); Paul M. Holsinger, *The Oregon School Bill Controversy, 1922-1925*, 37 PAC. HIST. R. 327-340 (1968); NANCY MACLEAN, BEHIND THE MASK OF CHIVALRY: THE MAKING OF THE SECOND KU KLUX KLAN (1995); LINDA GORDON, THE SECOND COMING OF THE KKK (2017); KENNETH T. JACKSON, THE KU KLUX KLAN IN THE CITY, 1915-1930 (1992). DAVID A. HOROWITZ, INSIDE THE KLAVERN: THE SECRET HISTORY OF A KU KLUX KLAN OF THE 1920'S (1999) and Robert R. McCoy, *The Paradox of Oregon's Progressive Politics: The Political Career of Walter Marcus Pierce*, 110 OR. HIST. Q. 390 (2009) argue that Pierce was in fact a member of the Klan.

[119] In 1930 Oregon had 938,597 White residents and 15,189 non-white residents. Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for the United States, Regions, Divisions, and States* Table 52-Oregon (U.S. Census Bureau, Working Paper No. 56)

[120] POST, THE TAFT COURT, *supra* note 102, at 860 n.107.

[121] ROSS, FORGING NEW FREEDOMS, *supra* note 107, at 195.

[122] *Id.* at 196.

[123] SNYDER, *supra* note 4, at 157.

oppressed minorities by denying "liberty" and economic regulations, which applied to everyone.

Frankfurter also seemed oblivious to the reality that if the Court would not protect fundamental liberties, as it did in *Meyer* and *Pierce*, there was no hope that such liberties could be vindicated. Frankfurter's belief in "democracy" was surely misplaced, especially in this period. The repressive laws at issue in Nebraska and Oregon had been properly passed by democratically elected legislators and signed by democratically elected governors. Frankfurter's commitment to "democracy" and his opposition to judicially protected liberties rings hollow in the face of democratically adopted laws that targeted minorities for their religion, ethnicity, or race.

Frankfurter does not seem to have understood the problem of the "tyranny of the majority"—the problem that without constitutional limitations, the majority of the population can easily run roughshod over minorities. These issues were not new. In the nineteenth century both Alexis de Tocqueville[124] and the great English philosopher of freedom of expression, John Stuart Mill, had eloquently described the problem.[125] But Frankfurter need not have used a French scholar or an English philosopher to understand this. He could have cited James Madison's arguments that in a republic, threats to liberty would emanate from the popularly elected legislature, where a determined majority would simply ignore the civil liberties of the minority.[126] Or he could have learned from Madison's Federalist 10 that threats to liberty came when "a number of citizens, whether amounting to a majority or minority of the whole" were "united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens."[127] Most importantly, he might easily have turned to Thomas Jefferson's brilliant single-sentence explanation of the need to support the will of the majority (the essence of democracy) while protecting the basic liberties of the minority: "All, too, will bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable; that the minority possess their equal rights, which equal law must protect, and to violate would be oppression."[128]

Throughout his career, in private conversation, essays, and on the Court, Frankfurter would wring his hands about unjust and uncivilized laws—but then proceed to explain why the Court should refrain from stopping such oppression.[129] Similarly, while he claimed to oppose the

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[124] 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (1835) and 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (1840).

[125] JOHN STUART MILL, ON LIBERTY (1859).

[126] "Madison in the Virginia Ratification Convention," reprinted in 11 THE PAPERS OF JAMES MADISON 130 (ed. Robert Rutland) (1977). See also Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301-47.

[127] Federalist No. 10, 10 PAPERS OF JAMES MADISON 264, 269.

[128] Thomas Jefferson, *First Inaugural Address*, March 4, 1801, available at https://founders.archives.gov/documents/Jefferson/01-33-02-0116-0004 (last visited Mar. 17, 2024).

[129] For an example of this while on the Court, see Frankfurter's majority opinion in Minersville Board of Education v. Gobitis, 310 U.S. 586 (1940) (supporting the expulsion of students who refused to salute the flag because it violated their religious beliefs, and upholding legal sanctions against their parents); his angry dissent in West Virginia Board

death penalty, he provided the fifth vote that led to the electrocution of Willie Francis in Louisiana.[130] He felt compelled to write a concurrence to explain his vote, as he did so often. Frankfurter later told Learned Hand that he found the Francis execution "barbaric," but insisted that due process did not require a different decision. Francis, a Black teenager, was convicted by an all-white jury of murdering a white businessman when he was sixteen. His court appointed lawyers called no witnesses, offered no evidence, made no motions, and did not challenge a confession by Francis that many commentators believed was coerced. Evidence in the case was mishandled. The police who arrested Francis claimed he had the victim's wallet at the time, but the prosecution never produced the wallet, which apparently disappeared (assuming it ever existed). At age seventeen Louisiana sent Francis to the electric chair, but the execution malfunctioned. When Louisiana moved to send him to the electric chair a second time, his new attorney argued executing him a second time constituted double jeopardy and cruel and usual punishment.[131] Four justices agreed with the argument, but Frankfurter, the former ACLU attorney, provided the fifth vote for execution.

In claiming the execution was barbaric, Frankfurter could once again privately protest the horrendous outcome of this case, proving (at least to himself) that he was really in favor of justice, while voting for a barbaric outcome, even though four other justices thought due process should lead to a different result. For Frankfurter, fidelity to an outdated, rigid, and anachronistic legal theory mattered far more than a Black life in segregated Louisiana. But, as if to salve his conscience, Frankfurter urged the governor of the rigidly segregated former Confederate state to commute Francis's sentence.[132] That Frankfurter believed this tactic would have worked suggested he was either unrealistically naïve or cynical. That he thought it was even appropriate for a sitting Justice to lobby a state governor illustrates Frankfurter's lack of judicial ethics as well as his absurd hubris. This improbable result did not happen, and Francis was executed. Put another way, when in the position to prevent a grotesque miscarriage of justice, Frankfurter voted with the majority to uphold the injustice and the execution. With the power of his vote, in a 5-4 decision, Frankfurter refused to act to save Francis's life. But he was able to salve

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of Education v. Barnette, 319 U.S. 624, 646 (1943) (Frankfurter, J. dissenting) (protesting a reversal of his position in Gobitis and arguing for the constitutionality of new laws directly aimed at Jehovah's witnesses); and his massive concurrence in McGowan v. Maryland, 366 U.S. 420, 459 (1961) (Frankfurter, J. concurring and appendix I, 543-550; and Appendix II, 551-559) (justifying laws discriminating against religious Jews in a variety of ways). Similarly, while he claimed to oppose the death penalty, he provided the fifth vote that led to the electrocution of Willie Francis, in Louisiana. Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947). *See also* UROFSKY, FELIX FRANKFURTER, *supra* note 3 at 154-55. Frankfurter insisted that due process did not require a different decision. For Frankfurter, fidelity to an outdated, ridged, and anachronistic legal theory mattered far more than Black lives in segregated Louisiana.

[130] Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947). For details of the case see the dissent in this case by Justice Burton, 329 U.S. 459, 480. See also UROFSKY, FELIX FRANKFURTER, *supra* note 3, at 154-55.

[131] For a full history of the case, see ARTHUR S. MILLER and JEFFREY BOWMAN, DEATH BY INSTALLMENTS: THE ORDEAL OF WILLIE FRANCIS (1988).

[132] SNYDER, *supra* note 4, at 468-87.

his conscience by an improper appeal to a governor who could, and did, ignore him.

In his biography of Frankfurter, Snyder explains the Francis case as an example of Frankfurter's "lifelong reluctance to invoke the Fourteenth Amendment's Due Process Clause to interfere with state political process."[133] But in fact, despite Snyder's lame defense of Frankfurter, this was not about the "political process" in Louisiana. It was about the judicial process. Indeed, by writing to the governor of Louisiana Frankfurter was interfering (arguably improperly) in the political process.

Furthermore, by failing to use the Fourteenth Amendment in this case, Frankfurter demonstrated that as both a scholar and a Justice, he apparently missed the history of the Fourteenth Amendment, adopted after the Civil War to prevent the states from denying due process and equal protection of the laws to all people in America, and to reverse the holding in *Dred Scott v. Sandford* that African Americans could *never* be citizens of the United States and under the Constitution they "had no rights which the white man was bound to respect."[134] Although almost no Frankfurter scholars discuss it,[135] it is worth remembering that before he went on the Court, Frankfurter had written admiringly of Chief Justice Roger B. Taney,[136] praising his jurisprudence while failing to seriously examine *Dred Scott*[137] and his many other proslavery and racist decisions.[138] Snyder notes that William Coleman, who was Frankfurter's clerk and the first Black clerk in the court's history, argued with the Justice about his praise of Taney,[139] but Snyder never considers whether Frankfurter's refusal to see the Fourteenth Amendment as a vehicle for the protection of racial, religious, and political minorities was in part a function of his unabashed admiration for the person generally considered to be the worst and most racist Justice in our history. Frankfurter, who had once been a "liberal" and a civil libertarian, consistently supported allowing state governments, and the Federal government in the Japanese Internment cases, to oppress religious, racial, and ethnic minorities. Snyder asserts that "Frankfurter understood the need to protect free speech, fair criminal trials, and racial and religious minorities."[140] But, as in *Meyer* and *Pierce*, even before he was on the Court, and in many cases when he was on the Court, the evidence actually demonstrates the opposite.[141] With the exception of his support for Black civil rights (and even here he is inconsistent), Frankfurter's record on these issues is, quite frankly, appalling. His reaction to *Meyer* and *Pierce*, while he was teaching at Harvard, was simply an appetizer to his often-repressive jurisprudence

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[133] *Id.* at 486.

[134] Dred Scott v. Sandford, 60 (19 How.) U.S. 393, 407 (1857).

[135] None of the Frankfurter biographies I have cited here do, for example.

[136] Felix Frankfurter, "Taney and the Commerce Clause," 49 HAR. L. REV. 1286 (1936).

[137] Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

[138] PAUL FINKELMAN, SUPREME INJUSTICE: SLAVERY IN THE NATION'S HIGHEST COURT (2018) and Paul Finkelman, *"Hooted Down the Page of History": Reconsidering the Greatness of Chief Justice Taney*, 1994 J. SUP. CT. HIST. 83-102 (1995).

[139] SNYDER, *supra* note 4, at 523.

[140] *Id.* at 139.

[141] *Id.* at 157-58.

while on the Court. These cases demonstrate Frankfurter's support of religious persecution, antisemitic laws, federal discrimination based on race, discriminatory and murderous police practices, state sponsored segregation, denial of fair trials for indigent defendants, and state voting laws that denied equal representation to a majority of the population.[142] Ironically, when he was on the Court, those who valued fundamental liberties might have agreed with the inter-war conservatives who asserted that Frankfurter was a "dangerous man,"[143] but of course for very different reasons. The thousands of Jehovah's Witnesses booted out of public schools after Frankfurter's *Gobitis* opinion[144] or the 120,000 Japanese Americans sent to concentration camps, with Frankfurter's support,[145] surely knew how dangerous he actually was.

III. FRANKFURTER'S PROTÉGÉS AND THE PROBLEM OF JUDICIAL ETHICS

After Franklin D. Roosevelt's presidential nomination and his election, Frankfurter became a key insider, advising FDR, helping draft legislation, and writing (sometimes anonymously) essays to support the New Deal.[146] However, as Melvin Urofsky notes, it is "manifestly false" that "Frankfurter's ideas governed early New Deal policy," in part because shortly after FDR's inauguration Frankfurter went to Oxford University for a year.[147] While he was at Oxford, Frankfurter continued to give the president advice by mail.[148] When he returned from England he was a key advisor to FDR, who used him as a sounding board.

In this period Frankfurter backed all of FDR's policies, including the court packing plan, which in some ways made sense, but was also somewhat ill-conceived and poorly rolled out to the American people.[149] Before leaving for Oxford he had declined FDR's offer to make him solicitor general of the United States, even though the President said it would be a stepping stone to the Supreme Court.[150] Frankfurter believed that he could better serve his friend "Frank," as he called him when they were alone, in a less conspicuous and unofficial role as an "outsider-insider."[151] FDR was surprised by this rejection, and called Frankfurter "an independent pig," and then explained "that's one reason I like you."[152] Even while he was at Oxford, Frankfurter continued give the president advice.[153]

As an unofficial presidential advisor and a self-appointed lobbyist and talent scout, Frankfurter helped place at least sixty of his students and

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[142] See *infra,* Parts III, V, and VII.

[143] This is the title of Snyder's Chapter 9, describing conservative reactions to Frankfurter's legal activism from World War I until the 1930s. SNYDER, *supra* note 4 at 117.

[144] For a discussion of *Gobitis*, see *infra* at Part V., Section A .

[145] Korematsu v. United States, 323 U.S.214, 224 (1944) (Frankfurter, J., concurring).

[146] SNYDER, *supra* note 4, at 282-309; UROFSKY, FELIX FRANKFURTER, *supra* note 3, at 35-6.

[147] UROFSKY, FELIX FRANKFURTER, *supra* note 3, at 36-7.

[148] *Id.* at 37.

[149] *Id.* at 40-44.

[150] *Id.* at 36; SNYDER, *supra* note 4, at 215-18.

[151] UROFSKY, FELIX FRANKFURTER, *supra* note 3, at 36.

[152] *Id.*

[153] *Id.* at 37.

friends, sometimes known as the "Happy Hotdogs"—a play on Frankfurter's first and last name—in one New Deal agency after another.[154] The list of Frankfurter's protégés in the administration is "staggering."[155] *Fortune* magazine called him "the most famous legal employment service in America."[156] With direct access to the President, and connections to many others in the administration, a word from Frankfurter easily led to a job offer. Snyder asserts that Frankfurter's "eye for talent was second to none,"[157] although as I suggest below, some of his choices proved very problematic. Most of those he helped place in the federal government had been on the *Harvard Law Review*, clerked for Justices Holmes or Brandeis or federal judges Julian Mack and Learned Hand, and entered private practice until Frankfurter recruited them for government service.[158] Some ended up at the highest levels of American politics, such as the future Secretary of State Dean Acheson. Frankfurter recommended Archibald MacLeish (the lawyer-poet) to be the Librarian of Congress (1939-44). Later, as Assistant Secretary of State, MacLeish helped create the precursor of the Central Intelligence Agency. Nathan Margold, William Hastie, and Charles E. Wyzanski, Jr. served in numerous positions before becoming federal judges.

Frankfurter's former students, protégés, and friends served in sub-cabinet positions (or their equivalent) at the Departments of State, Justice, Interior, Labor, and Commerce.[159] Frankfurter protégés Benjamin V. Cohen, Thomas Corcoran, and Joseph L. Rauh, Jr. were part of FDR's "brain trust." The chairs of both the Tennessee Valley Authority (David Lilienthal) and the Securities and Exchange Commission (James M. Landis) had been Frankfurter's students. A number of these young lawyers, including Cohen, Wyzanski, Rauh, Lilienthal, and Margold, were Jewish, which infuriated isolationists, assorted anti-Semites, and some conservatives. In an age when major law firms usually hired White Protestants who were born in the United States, the federal government, with an endorsement from Frankfurter, offered more equal opportunities. With Frankfurter's help, his former student William Hastie would become the first African American federal judge.[160]

Along with his former students, many of Frankfurter's law clerks would help shape American politics and law. His clerk William T. Coleman was the first African American to hold that position.[161] Coleman's co-clerk that year, Elliot Richardson, later served with great integrity as Attorney General during Watergate, playing a key role in saving the nation by standing up to Richard Nixon's attempt to corrupt our legal system for

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[154] *Id.* at 36. SNYDER, *supra* note 4, at 219-230, Chapter 15, titled "Happy Hot Dogs."

[155] UROFSKY, FELIX FRANKFURTER, *supra* note 3, at 37.

[156] *Id.*

[157] *Id.* at 229, 224.

[158] Those listed in this paragraph and the following two paragraphs are discussed in UROFSKY, FELIX FRANKFURTER, *supra* note 3, at 36-40 and in SNYDER, *supra* note 4, at 219-230.

[159] UROFSKY, FELIX FRANKFURTER, *supra* note 3, at 37.

[160] SNYDER, *supra* note 4, at 151.

[161] *Id.* at 523. Later, as Secretary of Transportation, he was the second Black man to serve in a presidential cabinet.

political gain. These students and clerks are key to the subtitle of Snyder's biography, "Making the Liberal Establishment."[162]

When he went on the Court, Frankfurter gave his former Harvard colleague Al Sacks "carte blanche power to select his clerks,"[163] but he rejected Sacks's selection of Ruth Bader Ginsburg.[164] Frankfurter claimed this was because *he* had recently had a heart attack and did not want to burden Mrs. Ginsburg, as he referred to her.[165] He could have a Black clerk, but not a female clerk. Frankfurter, perhaps unsurprisingly, wrote for the Court upholding a Michigan law that denied a woman the right to work in a bar, unless it was owned by her father or her husband.[166]

Some of Frankfurter's protégés were problematic and serve as a caution for understanding the Justice's judgment and ethics. A few of Frankfurter's went to federal prison, including Alger Hiss for perjury, Edward Prichard for election fraud, and James M. Landis for tax evasion. His relationship with his former students after he went on the bench is also problematic. Frankfurter's former student John McCloy, as Assistant Secretary of War, was the leading policy maker in planning and implementing the internment of Japanese Americans.[167] He deflected discussion on civil liberties to avoid a disagreement with Attorney General Francis Biddle, who objected to denying civil liberties to American citizens.[168] But when a Justice Department lawyer questioned the constitutionality of incarcerating U.S. citizens who had never been charge with a crime, much less convicted of one, McCloy declared, "The Constitution is just a scrap of paper to me."[169] We can only wonder what Professor Frankfurter taught him about the Constitution. Interior Secretary Harold Ickes wrote in his diary that many people thought McCloy was "more or less inclined to be a Fascist."[170] Apparently, Frankfurter's "eye for talent" did not catch that flaw. When the Court heard the Japanese Internment cases, *Hirabayashi v. United States*[171] and

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[162] *Id.* (giving the full title of the book, which ends with "The Making of the Liberal Establishment.").

[163] *Id.* at 663.

[164] *Id.*

[165] *Id.*

[166] Goesaert v. Cleary, 335 U.S 464 (1948). In a rare criticism of Frankfurter, Snyder rightly finds his opinion "indefensible," noting that it would not "be the last time that Frankfurter's gender bias resulted in a serious error in professional judgment." SNYDER, *supra* note 4, at 522.

[167] ROGER DANIELS, THE DECISION TO RELOCATE THE JAPANESE AMERICANS 35 (1975).

[168] CLIFF SLOAN, THE COURT AT WAR: FDR, HIS JUSTICES, AND THE WORLD THEY MADE (2023) 178.

[169] DANIELS, DECISION TO RELOCATE, *supra* note 167, at 35; *see also* ROGER DANIELS, CONCENTRATION CAMPS USA: JAPANESE AMERICANS AND WORLD WAR II 55-56 (1971). McCloy would later admit his errors but at the same time "tried to justify them in a calmer time when hindsight ought to have conferred on [him] greater wisdom." WIECEK, BIRTH OF THE MODERN CONSTITUTION, *supra* note 2, at 339.

[170] Robert Sherrill, *The Real McCloy: THE CHAIRMAN: JOHN J. McCLOY; The Making of the American Establishment*, LA TIMES (April 19, 1992), https://www.latimes.com/archives/la-xpm-1992-04-19-bk-588-story.html. Ickes, a member of the ACLU, is described as the ACLU's staunchest friend" in FDR's administration. WALKER, IN DEFENSE OF AMERICAN LIBERTIES, *supra* note 3, at 97.

[171] Hirabayashi v. United States, 320 U.S. 81 (1943).

Korematsu v. *United States*,[172] McCloy was heavily involved in suppressing a memo from a "Naval Intelligence official" showing that it "was entirely feasible to separate the loyal from the disloyal" in the Japanese American community and "that wholesale restrictions against those of Japanese descent were neither appropriate nor justified."[173] McCloy also helped suppress a report from the senior army commander in California, Lt. General John L. DeWitt, that the push for the internment was mostly about racial hatred of the Japanese.[174]

In 1981, McCloy would admit before the Commission on Wartime Relocation and Internment of Civilians that the Internment had not been about military necessity or fear of sabotage by Japanese Americans, but was the result of the "surprise attack" that started the War and was implemented "in the way of retribution for the attack that was made on Pearl Harbor."[175] In other words, McCloy admitted that in implementing and defending the internment he misled the Court and the nation in order to incarcerate in concentration camps some 120,000 American citizens and their elderly immigrant relatives as an act of revenge for something done by people from another county. He sought revenge against these completely innocent Americans because of their race and shared ethnicity with the people from another country who had attacked the United States. As one scholar recently noted, the dishonesty of Frankfurter's protégé, who the Justice was quietly advising, led to a "historic and shameful failure by the best and brightest of the American legal establishment," which included McCloy who "orchestrated the withholding [from the Court] of critical information known the government."[176]

When Jewish Americans pleaded with McCloy to authorize the bombing of the gas chambers or crematoria at Auschwitz, or the railroads leading to the death camp, to slow down the mass murder of Jews, he categorically refused to consider it, dishonestly asserting that United States bombers could not reach that location, when in fact they could.[177] He furthermore, absurdly, argued "that bombing Auschwitz would inflict worse punishment on the Jews interned there, Jews *whom he knew*, were destined for the gas chambers."[178] As United States High Commissioner in Germany from 1949 to 1952, McCloy pardoned scores of war criminals (including some mass murderers), restored property to German

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[172] Korematsu v. United States, 323 U.S.214, 224 (1944) (Frankfurter, J., concurring).

[173] SLOAN, COURT AT WAR, *supra* note 168, at 194, 197-98.

[174] *Id.* at 301-03.

[175] McCloy quoted in PETER IRONS, JUSTICE AT WAR 353 (1983).

[176] SLOAN, COURT AT WAR *supra* note 168, at 301-03.

[177] On the ability to reach Auschwitz, *see*, *OPERATION FRANTIC: Shuttle Raids to the Soviet Union*, NAT. MUSEUM OF THE U.S. AIR FORCE, https://www.nationalmuseum.af.mil/Visit/Museum-Exhibits/Fact-Sheets/Display/Article/1519682/operation-frantic-shuttle-raids-to-the-soviet-union/; *and Auschwitz, Bombing of*, SHOAH RESOURCE CENTER, https://www.yadvashem.org/odot_pdf/Microsoft%20Word%20-%205786.pdf (last visited Sept. 22, 2024). *See also* RICHARD BREITMAN AND ALLAN J. LICHTMAN, FDR AND THE JEWS (2013) 282-86.

[178] DEBORAH E. LIPSTADT, BEYOND BELIEF: THE AMERICAN PRESS AND THE COMING OF THE HOLOCAUST, 1933-1945 71-72 (1986).

industrialists who had enriched themselves by using slave labor during the war, and allowed ex-Nazis into the new government.[179]

By 1950, under McCloy's administration, more than 80 per cent of the judges in Bavaria were ex-Nazis. Roger Baldwin, the leading figure in the American Civil Liberties Union complained, after a fact-finding mission to Germany that "The wrong men are at the top of the government," and "former Nazis hold too many posts." Other observers reached the same conclusion.[180] In addition to placing ex-Nazis in post-war government positions, McCloy pardoned, granted clemency, or commuted sentences for 64 of 74 Nazi war criminals. Those pardoned or had their sentences commuted included mass murderers, doctors who performed inhumane experiments on concentration camp and death camp inmates, and industrialists who used slave labor, with many of their workers dying from starvation or punishment. He commuted the sentences of ten of the fifteen war criminals sentenced to death for mass murder, enslavement, and similar crimes.[181] While McCloy was considering the fate of these war criminals, some of the murderers, doctors, and industrialists who used slave labor were appealing their sentences to the U.S. Supreme Court. While the cases were pending Justice Frankfurter and McCloy corresponded, even though McCloy was in effect a party to the case.[182] Oddly, the former law professor saw nothing unethical about what amounted to ex parte communications with parties to cases that were on appeal to his court.

Frankfurter's relationship with McCloy during the War and while McCloy was the High Commissioner of Germany raises an important question about his role on the Court and his ethics as a justice. During the War, Frankfurter lived around the corner from McCloy. The two met for evening walks and had numerous phone conversations, where they discussed "departmental matters."[183] Through these conversations Frankfurter, while on the Court, was involved in helping the administration draft legislation connected to the war, policies on the conduct of the war, and international negotiations.[184]

Historians of the internment have documented that Frankfurter "informally advised 'Jack' McCloy about restrictions on aliens."[185] This of course would include the internment of tens of thousands of Japanese immigrants living in the United States who were unable to naturalize because federal law prohibited the naturalization of anyone from East Asia.[186] Was Frankfurter's unwavering support for the internment of

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[179] KAI BIRD, THE CHAIRMAN: JOHN J. MCCLOY, THE MAKING OF THE AMERICAN ESTABLISHMENT 359-88 (1992).

[180] R.W. KOSTAL, LAYING DOWN THE LAW: THE AMERICAN LEGAL REVOLUTIONS IN OCCUPIED GERMANY AND JAPAN 286-301 (2019).

[181] BIRD, THE CHAIRMAN, *supra* note 179, at 364; *see* 359-88 (describing crimes of these Nazis).

[182] *Id.* at 373-74.

[183] MURPHY, THE BRANDEIS/FRANKFURTER CONNECTION, *supra* note 13, at 204, 219. SLOAN, COURT AT WAR, *supra* note 168, at 177.

[184] MURPHY, BRANDEIS/FRANKFURTER CONNECTION, 219-20, 285, 291.

[185] DANIELS, CONCENTRATION CAMPS USA, *supra* note 169, at 135.

[186] Gabriel Jack Chin and Paul Finkelman, *The "Free White Persons" Clause of the Naturalization Act of 1790 as Super-Statute*, 65 WILLIAM & MARY L. REV. 1047 (2024).

Japanese Americans, including his concurrence in *Korematsu* v. *United States*, influenced by the fact that his protégé was the architect? We do not know exactly what advice Frankfurter gave McCloy while planning the internment, but it is reasonable to think that Frankfurter talked about the internment with McCloy and also with FDR. We know Frankfurter "maintained regular contact while McCloy was actively involved in defending the legality of the internment."[187] Frankfurter had been advising McCloy on these issues and while he was on the Court, the Justice was heavily involved in administrative policymaking and working with his many contacts, and former students in the administration.[188] Was Frankfurter's *Korematsu* concurrence, upholding the internment,[189] a function of an unethical relationship with the McCloy? Should the Justice have recused himself in *Korematsu*?[190]

IV. THE NEW JUSTICE TRAPPED IN A TIME WARP

In 1939, Frankfurter joined the Supreme Court. Some conservatives opposed his nomination, as Teddy Roosevelt's ancient and absurd claim that he was a "Bolshevik" resurfaced.[191] Unlike other nominees at the time, the Senate committee insisted that he appear in person to answer questions.[192] "Frankfurter faced opposition from 'a strange assortment of crackpot crusaders, Fascists, professional Jew-haters, and others.'"[193] In the end, the Senate unanimously confirmed him by a voice vote.[194] Thus began his long tenure on the Court. But as noted in the previous discussion of the Japanese Internment, which I will return to later in this article, on the Court he did not cease advising the President and other administration officials. Indeed, Frankfurter continued to meet with the President and had back-door access to the White House, where he frequently visited.[195]

When he went to the Court, Progressives had high hopes for him. The *Nation* asserted that "[n]o other appointee . . . has gone to the court so fully prepared for its great tasks."[196] In 1930, in a speech at Yale, "Frankfurter posited a living Constitution, which 'within its own ample and flexible resources permits adequate response to changing social and

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[187] ERIC K. YAMAMOTO, MARGARET CHON, CAROL L. IZUMI, JERRY KANG, FRAK WU, RACE RIGHTS AND REPARATION: LAW AND THE JAPANESE INTERMENT (2001) 162.

[188] SNYDER, *supra* note 4, at 353, 710, and 506-09; UROFKSY, FELIX FRANKFURTER, *supra* note 3, at 37.

[189] Korematsu v. U.S., 323 U.S. 214, 224 (1944), Frankfurter, J., concurring. Snyder does not appear to have consulted Record Group 107 in the National Archives, where the correspondence with McCloy is documented.

[190] One of the most "scathing law review critiques" of *Korematsu*, WIECEK, BIRTH OF THE MODERN CONSTITUTION *supra* note 2, at 346, was by the niece of Louis Brandeis. Nanette Dembitz, *Racial Discrimination and Military Judgment: The Supreme Court's Korematsu and Endo Decisions*, 46 COLUM, L. REV. 175 (1945).

[191] SNYDER, *supra* note 4, at 104.

[192] MARK TUSHNET, THE HUGHES COURT: FROM PROGRESSIVISM TO PLURALISM, 1930-1941 320 (2021).

[193] Id.

[194] SNYDER, *supra* note 4, at 328.

[195] *Id.* at 353.

[196] MARK TUSHNET, HUGHES COURT, *supra* note 192, at 320.

economic needs.'"[197] But on the Court he either abandoned or forgot these insights.

On the Court Frankfurter was sometimes brilliant, but he was also stubborn and egocentric. In the end he would be intellectually and jurisprudentially trapped in the early twentieth century, while the American century passed him by. In the laudatory conclusion of his biography, Snyder praises Frankfurter for following the constitutional theories of Harvard professor James Bradley Thayer, who died in 1902.[198] It is as though Frankfurter never had a new constitutional thought of his own after he left law school. There was no intellectual or jurisprudential growth even as the United States and the world changed in the six decades between Frankfurter entering law school and stepping down from the Supreme Court. As a law student and young lawyer, Frankfurter watched the Supreme Court eviscerate some progressive state legislation, most famously illustrated by striking down New York's limitation on working hours for bakers in *Lochner* v. *New York*.[199] He became convinced that the Supreme Court should rarely, if ever, override state legislation, should never do so through the Due Process Clause of the Fourteenth Amendment, and should never override federal laws "unless they were unconstitutional beyond a reasonable doubt."[200] "As one critical commentator put it," for Frankfurter "'all things should be stretched almost to the breaking point in order to hold any act of a state constitutional.'"[201] Once Frankfurter's mind was made up, he never looked back.

Frankfurter never reconsidered his own constitutional theories, which were undisturbed by the great events of the age in which he lived. In the international arena, Frankfurter's constitutional theories were unaffected by World War I, the rise of communism and fascism in Europe, World War II, the Holocaust, the Atomic Age, the Korean War, and the Cold War. Domestically he was unaffected by women's suffrage, the rise of organized crime during prohibition, the repression of free speech during World War I, the red scare of 1919, the wave of white attacks on Black communities after World War I, the Great Depression, the New Deal, the emergence of the labor movement and powerful unions, the persistence of lynchings and racially motivated murders throughout the country, the lynching of Leo Frank, the great migration of African Americans to the North, the rise of the second Ku Klux Klan, the religiously and racially motivated immigration restrictions of 1921 and 1924, McCarthyism, and the civil rights movement. He never paused to consider whether any of these events called for a reevaluation of how a judge might approach the Constitution, the Bill of Rights, the Civil War Amendments, and other constitutional and historical developments.

While other Justices were legally realistic in changing times, even though they were not "legal realists," Frankfurter was locked in the past,

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[197] WIECEK, BIRTH OF THE MODERN CONSTITUTION, *supra* note 2, at 88,

[198] SNYDER, *supra* note 4, at 710. UROFSKY, FELIX FRANKFURTER, *supra* note 3, at 30-31.

[199] Lochner v. New York, 198 U.S. 45 (1905).

[200] SNYDER, *supra* note 4, at 710.

[201] TUSHNET, THE HUGHES COURT, *supra* note 192, at 1114; Tushnet quoting Fred L. Howard, *Freedom of Speech and Labor Controversies*, 8 MO. L. REV. 25, at 43 (1943).

almost always looking backwards. He was convinced that laws passed by legislatures and executive branch policies should almost never be overturned, even when they were oppressive, religiously intolerant, or racist.[202] He regretted police brutality and unfair trials but did not think existing federal laws should be used to prosecute police who brutalized or murdered Blacks or that the Constitution allowed the Court to overturn unfair trials. He probably thought all defendants needed lawyers to have a fair chance at a trial, but he "vehemently disagreed" [203] with the idea that the right to counsel in the Sixth Amendment could be incorporated to the states.[204] In conference he argued that doing so "would uproot all the structure of the states."[205] Fidelity to states' rights was far more important to Frankfurter than fair trials for indigent defendants, and if Black people like Willie Francis were executed after a patently unfair trial, Frankfurter was willing to accept such "costs" to preserve his legal theories. Frankfurter's opposition to the Court providing meaningful protections against bigoted legislatures' racially motivated police violence, or segregated juries, may have been unshakable because he believed in "democracy."[206] However, it is hard to understand how he did not see the way democracy and the tyranny of the majority were used to attack minorities, including African Americans, German Americans in Nebraska, Japanese Americans and Japanese immigrants during World War II, or Jehovah's Witnesses. His rigid opposition to using existing federal civil rights laws and the Civil War Amendments to the Constitution cannot be reasonably based on his alleged "Democratic" principles. Certainly, he knew that throughout the South, and much of the North, Blacks were segregated, subject to police brutality, local vigilantism, and faced massive educational and economic discrimination. Especially in the South, where most Black people lived and were universally disfranchised, democracy was a hollow concept.

Thus, in one case after another Frankfurter voted to uphold bigotry, intolerance, unfair trials, repression, racism, and some of the most outrageous governmental behavior in American history, because these policies had been created by an elected legislature, were implemented by an elected governor or President, or were consistent with his support for states' rights.[207] Although he voted against segregated schools,[208] he supported allowing a segregated restaurant which received a subsidy from the city to operate in a publicly owned building.[209] Always claiming to be progressive on race and civil liberties, he supported laws that incarcerated Japanese Americans (the majority of whom were American citizens born in the United States) in concentration camps, solely on the basis of their

[202] *See* discussion *infra* Parts V and VII.

[203] WIECEK, BIRTH OF THE MODERN CONSTITUTION, *supra* note 2, at 494.

[204] Betts v. Brady, 316 U.S. 455 (1942).

[205] WIECEK, BIRTH OF THE MODERN CONSTITUTION, *supra* note 2, at 494.

[206] Hence the title of Snyder's book.

[207] *See* discussion *infra* Parts V. and VII.

[208] Brown v. Board of Education, 347 US 483 (1954).

[209] Burton v. Wilmington Parking Authority, 365 U.S. 715, 727 (1961), (Frankfurter, J., dissenting).

race,[210] expelling elementary school children for refusing to violate their religious beliefs by bowing down to an idol,[211] denying observant Jews (as well as Seventh-Day Adventists and other Christian Sabbatarians) the right to have a six-day work week because their faith precluded them from working on their sabbath (Saturday) and states prosecuted them for working on the traditional Christian sabbath,[212] and upholding outrageously malapportioned legislative districts on the absurd ground that the self-serving legislators who had created or perpetuated these districts should be expected to fix the problem.[213]

Frankfurter was clearly a gentle soul and never personally favored police brutality. While on the Court he almost always upheld federal laws. But oddly, when it came to police brutality against African Americans, Frankfurter was unwilling to enforce federal laws. In *Screws v. United States* he opposed applying federal civil rights laws against policemen who brutalized and beat to death an African American prisoner.[214] The majority opinion in *Screws* began with a stark description of the case:

> This case involves a shocking and revolting episode in law enforcement. Petitioner Screws was sheriff of Baker County, Georgia. He enlisted the assistance of petitioner Jones, a policeman, and petitioner Kelley, a special deputy, in arresting Robert Hall. . . . The arrest was made late at night at Hall's home on a warrant charging Hall with theft of a tire. Hall, a young negro about thirty years of age, was handcuffed and taken by car to the court-house. As Hall alighted from the car at the court-house square, the three petitioners began beating him with their fists and with a solid-bar blackjack about eight inches long and weighing two pounds. They claimed Hall had reached for a gun and had used insulting language as he alighted from the car. But after Hall, still handcuffed, had been knocked to the ground they continued to beat him from fifteen to thirty minutes until he was unconscious. Hall was then dragged feet first through the court-house yard into the jail and thrown upon the floor dying. An ambulance was called and Hall was removed to a hospital where he died within the hour and without regaining consciousness. There was evidence that Screws held a grudge against Hall and had threatened to "get" him.[215]

In dissent, Frankfurter argued that Sheriff Claude Screws might be "guilty of manslaughter, if not of murder, under Georgia law," for beating Hall to

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[210] Korematsu v. United States, 323 U.S.214, 224 (1944) (Frankfurter, J., concurring).

[211] Minersville Board of Education v. Gobitis, 310 U.S. 586 (1940); West Virginia Board of Education v. Barnette, 319 U.S. 624, 646 (1943) (Frankfurter, J. dissenting).

[212] McGowan v. Maryland, 366 U.S. 420, 459 (1961) (Frankfurter, J. concurring).

[213] Baker v. Carr, 369 U.S. 186, 266 (1962) (Frankfurter, J., dissenting).

[214] Screws v. United States, 325 U.S. 91 (1945) (Frankfurter, J., dissenting). For another example of Frankfurter's utter insensitivity to protecting Black people from outrageous police brutality, see the discussion of his lone dissent in Monroe v. Pape, 365 U.S. 167, 202 (1961).

[215] *Screws*, at 92-93. No gun was ever found in Hall's possession.

death, but he refused to connect the murderous police officials to the utter lack of democracy for African Americans in Georgia. Thus, Frankfurter refused to support a federal prosecution under Reconstruction-era civil rights laws. Rather, Frankfurter believed the case should be left to "vindication by Georgia law,"[216] utterly ignoring the reality that in 1945, in a state that was thoroughly segregated and virtually all African Americans were disfranchised, no White police officer was going to be charged for murdering a Black man.[217] His dissent in *Screws* suggest that while Frankfurter, who once worked with the NAACP to support civil rights, might have thought Black lives mattered, they did not matter very much.

Frankfurter's hero, Justice Oliver Wendell Holmes, Jr., famously dissented in *Lochner* and other economic due process cases in the early part of the twentieth century, objecting to the use of the due process clause of the Fourteenth Amendment to strike down state economic regulation. But, by the mid-1920s, Holmes had embraced the idea that the Fourteenth Amendment should be used to strike down bigoted and repressive state legislation aimed as suppressing minorities or freedom of speech. Frankfurter's mentor, Justice Louis D. Brandeis, joined Holmes in creating this jurisprudence. Thus, Holmes and Brandeis joined the majority in striking down the Ku Klux Klan-inspired Oregon law which prohibited parochial and other private schooling in the state.[218] Frankfurter vigorously denounced that outcome but did it anonymously,[219] perhaps because he did not want to publicly disagree with Holmes and Brandeis. Similarly, while Holmes and Brandeis supported a repressive federal law that denied free speech to opponents of World War I in *Schenck v. United States*,[220] they soon changed their jurisprudence toward both federal and state laws that suppressed freedom of expression, even though they never formally recanted the earlier opinions.[221]

Frankfurter was not a failure as a justice because he wrote opinions which in retrospect were wrong. *All* justices have done that. No justice is perfect. Frankfurter's ultimate failure as a Justice was rooted in his inability (or unwillingness) to admit he had *ever* made a mistake. That failure is compounded because he never understood that his opposition to striking down economic regulations—like wage and hour laws or bans on child labor—which affected all citizens equally, did not translate to legislative acts that singled out disfavored minorities for bigoted and

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[216] *Screws*, at 138. Frankfurter rejected that Screws could be prosecuted under a federal law, the Civil Rights Act of 1866, despite the clear language of the statute: "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects . . . any inhabitant of any State . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States . . . ." *Screws*, at 139.

[217] The details of the beating of Hall are found here. https://go.gale.com/ps/i.do?id=GALE%7CA689949004&sid=googleScholar&v=2.1&it=r&linkaccess=abs&issn=21587345&p=AONE&sw=w&userGroupName=anon%7Ebcd5f7aa&aty=open-web-entry (last visited 3/34/24). The killing of Hall took place in 1943, but the case did not reach the court until 1945.

[218] See text *supra*, at notes 117-23.

[219] SNYDER, *supra* note 4, at 157-58.

[220] Schenck v. United States, 249 U.S. 47 (1919).

[221] Abrams v. United States, 250 U.S. 616, 624 (Holmes, J. dissenting); Gitlow v. New York, 268 U.S. 652, 672 (1925) (Holmes and Brandies, JJ. dissenting); and Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis and Holmes, JJ. concurring).

repressive treatment. Unlike Holmes (his hero) and Justice Louis D. Brandeis (his mentor), Frankfurter never understood that the Court had an obligation to protect civil liberties, civil rights, due process, and fair political representation from oppressive legislatures and executive officials.

Snyder asserts that Frankfurter's "philosophy of judicial restraint" came from "reading" the "opinions" of Holmes and Brandeis.[222] But this is simply not correct. Had Frankfurter read their opinions in every free speech case after the spring of 1919, noticed Brandeis's vote in *Meyer* v. *Nebraska*, or recognized the support of both Justices for the unanimous decision in *Pierce* or their dissents in cases denying naturalization to pacifists,[223] he would have learned from them that judicial restraint has no place when the government tramples on the civil liberties of individuals or the police brutalize people under the color of law, especially because of their race or religion, but also because of their political views.[224] As he showed in his support for the incarceration of innocent Japanese Americans merely because of their race,[225] Frankfurter never understood or accepted that the Bill of Rights (and the three Civil War amendments) were designed to limit legislatures, governors, and even presidents, from trampling on fundamental rights.

The contrast with Justice Robert Jackson on this issue is striking. Jackson was hardly a liberal activist. In some ways, he was jurisprudentially quite conservative. But Jackson understood, and eloquently set out, the obligation of Justices to protect the fundamental liberties of all Americans. In the second Flag Salute case, *West Virginia Board of Education* v. *Barnette*, he wrote: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."[226] Frankfurter vigorously and angrily dissented from Jackson's brilliant language and analysis supporting free speech and civil liberties.

In defending Frankfurter's *Barnette* dissent, Snyder asserts that "It was not hard for Frankfurter to believe that the political process, led to more liberal outcomes—especially with Roosevelt in the White House for the past eleven years."[227] The analysis based on the "liberal outcomes" of FDR's presidency is actually inconsistent with the history of the period.

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[222] SNYDER, *supra* note 4, at 353-54.

[223] United States v. Schwimmer, 279 U.S. 644 (1929), (Holmes, J. dissenting, with Brandeis joining the dissent) See the discussion of Girouard v. United States, 328 U.S. 61 (1946), *infra* at notes 303-05. In that case Frankfurter joined two other dissenters, arguing that a pacifist should not be allowed to become a naturalized citizen. In the wake of World War II, and the Holocaust, Frankfurter was unwilling to grant religious liberty to an alien who otherwise was entitled to naturalize.

[224] *See, e.g.*, Frankfurter upholding the conviction of a college student for a public speech denouncing racial discrimination in Feiner v. New York, 340 U.S. 315 (1951).

[225] Korematsu v. United States, 322 U.S. 214, 224-225 (1944), (Frankfurter, J. concurring).

[226] 319 U.S. at 638. See *infra*, Part V., Section A.

[227] SNYDER, *supra* note 4, at 429.

The laws oppressing Jehovah's Witnesses had been passed in the late 1930s and 1940s, during the Roosevelt administration. The New Deal did not offer any protection for the Witnesses, and Frankfurter clearly knew that. Indeed, the "political process" during this period led to one state after another passing laws to harass Witnesses and these were followed by local prosecutions. This state legislative and judicial oppression only increased after Frankfurter's opinion in *Gobitis*, as numerous states passed new and increasingly repressive laws, while mobs attacked Witnesses, often aided by local law enforcement.[228] Witnesses were beaten, kidnapped, mobbed, and arbitrarily arrested, while in some places terrorists and vigilantes burned down their churches. Some were tarred and feathered, in Arkansas some were shot, and in Nebraska one man was castrated.[229] It was this wave of terror and repression that in part led the Court to overturn *Gobitis*. The six justices in the majority in *Barnette* knew this, but if we are to believe Snyder, Frankfurter was unaware of these pogroms and repressive laws in his own country. A far more plausible explanation is that Frankfurter really did not care much what happened to the Witnesses and did not really believe in civil liberties for minorities, especially religious minorities. Or, alternatively, that having written an opinion in favor of repression he stubbornly refused to reconsider his views.

Unlike Chief Justice John Marshall, Frankfurter never understood that while the Constitution set out a basic plan for government, it was not frozen in time. In his greatest opinion, Marshall reminded Americans "we must never forget that it is a *constitution* we are expounding"[230] and that the Constitution was "intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs."[231] The Civil War amendments were adopted to end slavery, make African Americans and other non-Whites equal citizens, and apply most of the Bill of Rights to the states to protect the liberties of all Americans from state legislatures and executives that trampled on the rights of minorities.[232] Frankfurter far too often forgot or ignored these aspects of constitutional law. Most importantly, trapped in the intellectual world of 1905, he was unable to adapt his own constitutional theories and jurisprudence to "the various *crises* of human affairs"[233] in a different age. Because of this, he was a failed justice.

V. THE NEW JUSTICE AND WORLD WAR II

In his first few years on the Court, Frankfurter emerged as an opponent of civil liberties and due process, especially for minorities. At the same time, he began a pattern of behavior that violated the traditional

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[228] Paul Finkelman, *The Flag Salute Cases*, in 2 HISTORIC U.S. COURT CASES 947, 951 (ed. John W. Johnson) (2nd ed. 2001).

[229] *Id.* at 950-51.

[230] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

[231] *Id.* at 415.

[232] In the debates over the citizenship clause of the Fourteenth some members of Congress wanted to limit birthright citizenship to African Americans and exclude Chinese. The Congress emphatically rejected this idea. Paul Finkelman, *Original Intent and the Fourteenth Amendment: Into the Black Hole of Constitutional Law*, 89 CHI-KENT L. REV. 1019, 1024-29 (2014). *See also* Paul Finkelman, *John Bingham and the Background to the Fourteenth Amendment,* 36 AKRON L. REV. 671 (2003).

[233] McCulloch v. Maryland at 415.

notion that Justices should not advise the executive branch and that Justices should stay out of politics. He was furious that Justice William O. Douglas was considering leaving Court for electoral politics. Ranting at this violation of his notion of judicial ethics, Frankfurter told Justice Frank Murphy, "When a priest enters a monastery, he must leave-or ought to leave-all sorts of worldly desires behind him. And this Court has no excuse for being unless it's a monastery."[234] But at the very time he wrote this, Frankfurter was constantly meddling in politics. With back door access to the White House, Frankfurter secretly left his "monastery" on a regular basis to consult with the president, cabinet members, and other administration officials.

Frankfurter also regularly violated his "monastic" vows in his jurisprudence. As William M. Wiecek aptly observed, while Frankfurter "consistently promoted judicial restraint" in civil liberties cases,[235] Frankfurter in fact "had difficulty disciplining himself" on the Court in his opinions. He ignored the American Bar Association's Canons of Judicial Ethics (1924) "which called on judges . . . to exercise 'self-restraint'" when writing opinions.[236] Indeed, Frankfurter could not restrain himself on the bench or exercise the discipline to refrain from political activity and egregious violations of the separation of powers.

This departure from judicial restraint is illustrated by two sets of cases involving Jehovah's Witnesses (partially discussed above), two cases involving the internment of Japanese Americans, and is further exemplified by Justice Frankfurter's response to the Holocaust. While constantly meeting with President Roosevelt and members of the administration during his time on the bench, a clear violation of judicial ethics, he adamantly refused to discuss the Holocaust with the President. Ironically, given his meddling in politics when he had no business doing so because the issues might come before the Court, he uncharacteristically kept his mouth shut on the one issue of pressing urgency—the Holocaust—where speaking out, or quietly lobbying President Roosevelt, Secretary of War Stimson, or Assistant Secretary of War McCloy would not have impinged on judicial ethics because it was highly unlikely to have impacted American law.[237]

A. The Flag Salute Cases

In 1940, Frankfurter wrote the majority opinion in *Minersville Board of Education v. Gobitis*,[238] upholding the expulsion of two children from an elementary school who refused to salute the flag. As Jehovah's Witnesses, the children believed this act of reverence towards a piece of

[234] Frankfurter Diaries quoted in Melvin I. Urofsky, *Conflict Among the Brethren: Felix Frankfurter, William O. Douglas, and the Clash of Personalities and Philosophies on the United States Supreme Court*, 1988 DUKE L.J. 71, at 101-02 (1988).

[235] WIECEK, THE BIRTH OF THE MODERN CONSTITUTION *supra* note 2, at 413.

[236] *Id.* at 89-90.

[237] One might argue that at the end of the war, in the light of the Nuremberg trials, a case might have reached the Court, but certainly in 1942 or 1943, when Frankfurter refused to discuss the issue with FDR, this would have seemed extraordinarily unlikely.

[238] Minersville Board of Education v. Gobitis, 310 U.S. 586 (1940).

cloth violated the Biblical injunction against idol worship. The Gobitas[239] children were polite and respectful to the flag ceremony but would not participate in it.

The case was fraught with local politics and religious bigotry. The Jehovah's Witnesses faith was notoriously anti-Catholic (believing the Pope was the anti-Christ) while the school officials, and eighty percent of the town, were Roman Catholics. This led to the school district's aggressive response to the request that the children not be forced to say the pledge.[240] The lower federal court ordered the readmission of the children. Judge Albert Maris, a Quaker with a personal understanding of religious persecution, noted that the school superintendent's behavior was "a means for the persecution of children for conscience's sake" and had little to do with the educational needs of the school. Maris noted "[o]ur country's safety surely does not depend upon the totalitarian idea of forcing all citizens to render lip service in a manner that conflicts with their sincere religious convictions."[241] He found this "doctrine . . . utterly alien to the genius and spirit of our nation and destructive of that personal liberty of which our flag itself is the symbol."[242] The Third Circuit Court of Appeals unanimously upheld his decision, noting that a compelled flag salute was "an affront to the principles for which the flag stands."[243] Both decisions reflected the view of the *New York Herald Tribune* that "[t]o compel school children to salute the flag is a step in the 'Heil Hitler' direction."[244]

This was the perfect case for the relatively new Justice to make his mark as the former ACLU advisor and litigator who would protect civil liberties and minorities on the Court. Frankfurter now had an opportunity to strengthen his pre-Court progressive stances that led Brandeis to call him the nation's "Most Useful Lawyer." [245] But this did not happen. With the Nazis gobbling up Europe, arresting and persecuting Jehovah's Witness, Roma, Jews, and others, Frankfurter shocked his friends with an over-the-top repressive decision condoning the religious bigotry of the small-minded, small-town school officials in Minersville. As one scholar has noted, "Frankfurter's opinion would be best remembered not for his clearly articulated position on the law so much as for the fact that Frankfurter, a founder of the ACLU, would reject one of the most dramatic civil liberties

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[239] The last name was actually Gobitas, but a court clerk misspelled it, and the spelling error remains in the case caption.

[240] Douglas Laycock notes that the Witnesses "own doctrines were intolerant, especially of Catholics." Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409, 419 (1986); Finkelman, *Flag Salute Cases*, *supra* note 228, at 947, 951. For a useful study of these cases, *see* IAN ROSENBERG, THE FIGHT FOR FREE SPEECH: TEN CASES THAT DEFINE OUR FIRST AMENDMENT FREEDOMS 26-54 (2021); DAVID MANWARING, RENDER UNTO CAESAR: THE FLAG SALUTE CONTROVERSY (1962); PETER IRONS, THE COURAGE OF THEIR CONVICTIONS (1988); and LEONARD A. STEVENS, SALUTE! THE CASE OF THE BIBLE VS. THE FLAG (1973).

[241] Gobitis v. Minersville School District, 24 F. Supp. 271, 274 (E.D. Pa. 1938).

[242] *Id.*

[243] Minersville Board of Education v. Gobitis, 108 F.2d 683, 691 (3d Cir. 1940).

[244] SNYDER, *supra* note 4, at 352.

[245] UROFSKY, FELIX FRANKFURTER, *supra* note 3, at 20.

claims of the modern Court era. His opinion would also prove his undoing as leader of the Roosevelt appointees."[246]

As his own European Jewish relatives were being arrested and persecuted for their faith,[247] Frankfurter vigorously supported the power of the school district's expulsion of the Gobitas children. Although the United States was not yet involved in the War in Europe,[248] Frankfurter argued national unity was "the basis of national security" and that the "flag is the symbol of our national unity." Therefore, he concluded that it was permissible to compel all children to participate in patriotic exercises in public schools.[249] With embarrassing rhetorical overkill, he compared forcing a ten-year-old to salute the flag to Lincoln authorizing the military to arrest pro-Confederate terrorists who were trying to destroy railroad tracks and bridges to isolate Washington D.C. from the rest of the nation decision at the beginning of the Civil War.[250] It is hard to imagine that Frankfurter truly believed that a couple of elementary school children refusing to salute the flag were the equivalent of armed pro-Confederate saboteurs trying to blow up bridges or destroy railroad tracks. But it is equally hard to understand why he used this analogy.

In his biography Snyder defends Frankfurter's opinion on a variety of grounds, including Frankfurter's "opposition to American neutrality and isolationism," "Hitler's threat to exterminate Europe's Jews," and Frankfurter's "preoccupation with his wartime policymaking and recruitment efforts on behalf of the Roosevelt administration."[251] However, this analysis is seriously flawed.

We can only wonder why Frankfurter believed that persecuting elementary school children because they were members of a small and powerless religious minority was an answer to "isolationism." On the contrary, the school districts and state legislatures, supported by Frankfurter's opinion, were playing directly into the hands of the bigots, isolationists, and xenophobes. Frankfurter's opinion simply encouraged the isolationists by justifying their bigotry, as his opinions "unleashed a new wave of violence against the Witnesses."[252]

Snyder's defense of Frankfurter is also inconsistent with the actual history of the time. In the spring of 1940, Hitler was persecuting Jews but had not yet initiated a program of genocide to "exterminate Europe's Jews."[253] Moreover, as will be described below,[254] when Frankfurter was

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[246] SIMON, THE ANTAGONISTS, *supra* note 2, at 114.

[247] The Nazis jailed Frankfurter's beloved eighty-two-year-old uncle in Vienna.

[248] The nation was officially neutral at this time, and while many people assumed war was on the horizon, the nation had taken no steps in that direction at the time the Court decided *Gobitis* in June 1940.

[249] *Gobitis*, 310 U.S. at 595, 596. It is worth noting that Hitler, Mussolini, Franco, Tojo, or Stalin would have completely agreed with this position.

[250] *Id.* at 596. On Lincoln's suspension of Habeas Corpus, see MARK E. NEELY, JR., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES (1991). *See also* Paul Finkelman, *Civil Liberties and the Civil War: The Great Emancipator as Civil Libertarian*, 91 MICH. L. REV. 1353 (1993).

[251] SNYDER, *supra* note 4, at 353.

[252] WALKER, IN DEFENSE OF AMERICAN LIBERTIES, *supra* note 3, at 109.

[253] SNYDER, *supra* note 4, at 353.

[254] *Infra* at pp. 1134-36.

confronted with evidence of the Holocaust and the Nazi death camps, he categorically refused to believe the eyewitness who reported to him and refused to discuss the ongoing Holocaust with Roosevelt, even though he had direct and private access to the President.[255] Furthermore, it is absurd to argue that persecuting religious minorities in the United States was a response to Nazi persecution of Jews *and* Jehovah's Witnesses in Germany. It is worth remembering that the Nazis had rounded up Jehovah's Witnesses in Germany before they rounded up German Jews.

Finally, there is the explanation (or arguably the excuse) that Frankfurter was "preoccupied with his wartime policy making and recruitment efforts on behalf of the Roosevelt administration."[256] At the time Frankfurter wrote his *Gobitis* opinion, the United States was not at war and in fact had taken very few steps towards going to war. For example, Congress would not enact the first peacetime draft until September 1940, and Lend-Lease, which was a major step towards the war, would not begin until March 1941. Put simply, in June 1940 the United States had no "war-time" policy, so it is impossible to explain Frankfurter's opinion in *Gobitis* with such an argument.

Even more problematic is the justification (or excuse) for Frankfurter's repressive opinion because he was busy with "wartime" policy and staffing the administration. As a justice Frankfurter had absolutely no business staffing the administration or making military policy. Certainly, Frankfurter was not out of ethical bounds in recommending his former students for jobs. But giving advice to the President and other administration officials on legislation and policy matters, as Frankfurter was secretly doing, was unprofessional, violated traditional norms of judicial ethics, and undermined the whole notion of separation of powers. Certainly, this unethical behavior cannot be used to justify Frankfurter's authoritarian opinion. If Frankfurter truly believed he should be involved in making policy, then he should have left the Court, as other justices have done, and joined the administration.[257]

But assuming someone actually believes a Supreme Court Justice should be involved in executive branch staffing, drafting legislation, and making policy during "wartime," (even when the United States was not actually at war), it is hard to fathom how the desire of the Gobitas children

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[255] *See* discussion *infra* Part V, Section C.

[256] SNYDER, *supra* note 4, at 353.

[257] Frankfurter's judicial colleague James F. Byrnes served on the Court from July 1941 until October 1942, when he became the Director of the Office of Economic Stabilization and then left that post to become Director of the Office of War Mobilization until 1945, when became Secretary of State. This was the model Frankfurter should have followed if he wanted to be involved in policy making. There are other examples of this. Justice John Rutledge resigned from the Court in 1791 to become Chief Justice of South Carolina; Chief Justice John Jay resigned from the Court in 1795 to become governor of New York; David Davis left the Court in 1877 when he was elected to the United States Senate; Charles Evans Hughes resigned from the Court in 1916 to run for President and then returned to private practice until 1930 when he went back to the Court as Chief Justice; Frankfurter's successor on the Court, Justice Arthur Goldberg, resigned from the Court in 1966 to become the U.S. Ambassador to the United Nations. John A. Campbell left the Court in 1861 to join the Confederacy as Assistant Secretary of War, and thus to make war on his own country.

to remain silent and not raise their hands in supplication of the flag threatened that policy.

Frankfurter personally thought that the law was "foolish,"[258] but this only undermines his opinion. If he thought the law was foolish, and could accomplish little, why did he offer his over-the-top comparison of the flag salute to the crisis of the Union in 1861? If Frankfurter knew that this foolish law could not accomplish its goal, what exactly justified the religious intolerance of the state and the Court?

From his narrow analysis of constitutional law, Frankfurter believed courts should rarely if ever overturn state laws, however "foolish" they might be. He simply did not believe the Court should overrule state legislation that interfered with "liberty." Here, Frankfurter was intellectually frozen by *Lochner v. New York*[259] and similar cases in which a much earlier Court, with a thoroughly reactionary majority, had overturned Progressive Era economic legislation on the grounds that it interfered with liberty of contract. However, by 1940, the Court had emphatically rejected such jurisprudence as it applied to economic regulations[260] while selectively incorporating some of the Bill of Rights to the states to protect fundamental liberties.[261] Thus, Frankfurter certainly knew that the Court would no longer use (or misuse) substantive due process, the Fourteenth Amendment, and the Bill of Rights, or apply its earlier, and by 1940 outdated, distinction between manufacturing and commerce,[262] to strike down progressive economic regulations. Frankfurter's fears of this, in 1940, were quite frankly, absurd. Frankfurter was either incapable of seeing, or unwilling to see, the difference between protecting minorities from oppressive majorities and striking down economic regulations that helped the majority of people, which the Court had struck down decades earlier[263] but had been upholding since the late 1930s.[264] After Frankfurter became a Justice, the Court

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[258] SNYDER, *supra* note 4, at 358.

[259] 198 U.S. 45 (1905).

[260] This jurisprudential change began with Nebbia v. New York, 291 U.S. 502 (1934) and was solidified by West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). *See generally*, BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998) and Barry Cushman, *Teaching the Lochner Era*, 62 St. Louis U.L.J. 537 (2018). For an intriguing defense of *Lochner*, although not one I agree with, see DAVID BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS (2011).

[261] *See* Gitlow v. New York, 268 U.S. 652 (1925); Stromberg v. California, 283 U.S. 359 (1931); Near v. Minnesota, 283 U.S. 697 (1931); Powell v. Alabama, 287 U.S. 45 (1932); Patterson v. Alabama, 294 U.S. 600 (1935); Herndon v. Georgia, 295 U.S. 441 (1935); Herndon v. Lowry, 301 U.S. 247 (1937); Cantwell v. Connecticut, 310 U.S. 296 (1940).

[262] For earlier examples of this, *see* E.C. Knight v. United States, 166 U.S. 1 (1895) and Hammer v. Dagenhart, 247 U.S. 251 (1918).

[263] *See* Lochner v. New York, 198 U.S. 45 (1905); Adair v. United States, 208 U.S. 161 (1908); Loewe v. Lawlor (the Danbury Hatters' Case), 208 U.S. 274 (1908); Coppage v. Kansas, 236 U.S. 1 (1915); Adams v. Tanner, 244 U.S. 590 (1917); Hitchmand Coal & Coke Co. v. Mitchell, 245 U.S. 229 (1917); Hammer v. Dagenhart, 247 U.S. 251 (1918); Truax v. Corrigan, 257 U.S. 312 (1921): Adkins v. Children's Hospital, 261 U.S. 525 (1923); Ribnik v. McBride, 277 U.S. 350 (1928); New State Ice Co. v. Liebman, 285 U.S. 262 (1932).

[264] The most important cases in this area were: Home Building & Loan Assn v. Blaisdell, 290 U.S. 398 (1934); Nebbia v. New York, 291 U.S. 502 (1934); The Gold Clause Cases [Norman v. Baltimore & Ohio Railroad, 290 U.S. 240 (1935); Nortz v. United States, 294 .S. 317 (1935); Perr v. United States, 294 U.S. 330 (1935)]; Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936); National Labor Relations Board v. Jones & Laughlin

continued to uphold federal and state economic regulations, with the new Justice in the majority.[265] By 1940, when he wrote his opinion in *Gobitis*, Frankfurter knew that the *Lochner* era, of the court overturning state and federal economic regulations, was effectively dead. Thus, his rigid refusal to protect basic liberties out of fear that the case could be used to strike down economic regulations simply makes no sense.

Most importantly, in *Gobitis*, Frankfurter ignored the economic regulation case of *United States v. Carolene Products Co.*,[266] where Justice Harlan Fiske Stone articulated that the Court should give wide discretion to economic regulations "affecting ordinary commercial transactions," reviewing them under a "rational basis" test,[267] while arguing in his famous Footnote 4 that the Court should not give a "presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth."[268] This analysis would easily have led Frankfurter to support the two lower federal courts in striking down the Pennsylvania law persecuting Jehovah's Witness children. Surely the razor-sharp Frankfurter was smart enough to see the differences and understand the distinction. But, as Mark Tushnet has observed, because Frankfurter had "articulated the position that courts should not displace legislative judgments about economic regulation by invoking vague constitutional terms like 'due process,' how could he support displacing legislative by invoking other seemingly equally vague constitutional terms like 'equal protection' and even 'freedom of speech'?"[269] The answer, of course, is that he could have supported liberty by relying on Justice Stone's brilliant doctrine set out in *Carolene Products*. Significantly, Stone dissented from Frankfurter's opinion in *Gobitis*.

Alternatively, Frankfurter's support for liberty was never what he claimed it to be. Perhaps in *Gobitis*, he was deceiving himself and his readers. The record in the District Court overwhelmingly demonstrated

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Steel Corporation, 301 U.S. 1 (1937); NLRB v. Friedman-Harry Marks Clothing Co., 301 U.S. 58 (1937); Senn v. Tile Layers Protective Union, 301 U.S. 468 (1937); Steward Machine Co. v. Davis, 301 U.S. 548 (1937); Electric Bond & Share Co. v. Securities and Exchange Commission, 303 U.S. 419 (1938). After Frankfurter became a justice, the Court continued to support economic regulations. See Currin v. Wallace, 306 U.S. 1 (1939); Graves v. New York ex rel. O'Keefe, 306 U.S. 466 (1939); Mulford v. Smith, 307 38 (1939. Frankfurter would also have been familiar with a number of cases from before World War I through the Hoover administration that had upheld state and federal economic regulations, including Muller v. Oregon, 208 U.S. 412 (1908), which Frankfurter's mentor Louis Brandeis has argued and won, Hipolite Egg Co. v. United States, 220 U,.S. 41 (1911); Standard Oil Co. v. United States, 221 U.S. 1 (1911); Sturgis & Burns Mfg. Co. v. Beauchamp, 231 U.S. 320 (1913), Shreveport Rate Cases, 234 U.S. 342 (1914); and Bunting v. Oregon, 243 U.S. 426 (1917), which Frankfurter litigated and won. Other cases upholding economic regulations before FDR's election included: Coronado Coal Co. v. United Mine Workers, 268 U.S. 295 (1925); Village of Euclid v. Ambler Realty Co, 272 U.S. 365 (1926); United States v. Swift & Co., 286 U.S. 106 (1932).

[265] Currin v. Wallace, 306 U.S. 1 (1939); Graves v. New York ex rel. O'Keefe, 306 U.S. 466 (1939); Mulford v. Smith, 307 38 (1939.

[266] 304 U.S. 144 (1938).

[267] *Id.* at 152.

[268] *Id.*

[269] TUSHNET, HUGHES COURT, *supra* note 192, at 551.

that the flag salute regulation was not a neutral law, with a legitimate purpose, and it was not enforced neutrally. Here, Frankfurter might have turned to the case of *Yick Wo* v. *Hopkins*,[270] an early Fourteenth Amendment case, where the Court struck down a law that pretended to be a fire regulation but was only used to persecute Chinese immigrants and their American-born children.

Frankfurter's solution for the Gobitas family was to send their children to private schools, rather than to reign in the oppressive nature of the local school board.[271] As noted earlier, in 1925 Frankfurter had vigorously denounced the Court's decision in *Pierce v. Society of Sisters*, which struck down a state law prohibiting private schools. Had some state decided to prohibit private or parochial schools, in part to create the very "national unity" that Frankfurter was demanding or passed legislation requiring that private schools require flag ceremonies (just as Nebraska had prohibited private schools from teaching German), he likely would have supported these new school laws. Thus, Frankfurter, who never agreed with the decisions in *Meyer* and *Pierce*, was in the position of urging private schools for Jehovah's Witnesses, and in effect inviting states to ban them, as Oregon had.[272] Finally, there is the financial issue. As he later would in the Sunday Closing Cases and cases upholding tax laws on religious books designed to harass Witnesses,[273] Frankfurter seemed to think it was permissible for the government to make religiously observant people "pay" for their faith by forcing them to choose between religious obligation and being able to support themselves.

Legal scholars and public intellectuals roundly condemned the *Gobitis* decision. Although Jehovah's Witnesses were notoriously anti-Catholic, law reviews at major Catholic law schools condemned the decision.[274] Frankfurter's opinion became an open invitation for bigots across the country to pass laws directly aimed at the Jehovah's Witnesses. Thus, the "Democratic Justice's" *Gobitis* opinion led to a spate of new state laws to punish children who would not "bow down" to the flag.

In 1941, West Virginia adopted a law requiring flag salutes in all public schools.[275] The law contained a clause declaring that refusal to salute the flag for religious reasons would "be regarded as an act of insubordination"[276] and lead to the children being expelled from school and declared truants. This would subject their parents to thirty days in jail and a fine of $50, which was equivalent to a month's salary at the prevailing federal minimum wage.[277] The West Virginia law reflected the language of Frankfurter's *Gobitis* opinion. Within a few years, more than 2,000 children were expelled from schools across the country, with their parents

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[270] 118 U.S. 356 (1886).

[271] SNYDER, *supra* note 4, at 356.

[272] *See* discussion *supra* Part V, Section A.

[273] Follett v. Town of McCormick, 321 U.S. 573 (1944). *See also* discussion of "Sunday closing" cases *infra* 80-82.

[274] Finkelman, *Flag Salute Cases*, *supra* note 228, at 947, 951.

[275] *Id.* at 951.

[276] *Id.* at 952.

[277] Barnette at 629.

subject to fines and jail sentences.[278] In addition to new repressive laws, Frankfurter's opinion also unleashed massive persecution and violence against Jehovah's witnesses, as across the nation Witnesses were terrorized by vigilantes and local police.[279]

Frankfurter certainly did not intend these outcomes, nor did he approve of them. However, he was surely politically savvy enough to have foreseen that such laws and violent attacks might follow from his opinion forcing Jehovah's Witnesses to comply with authoritarian and repressive community standards of patriotism and religious belief.

The flag salute cases are a clear example supporting "[t]he standard story about Frankfurter . . . that he struggled to fill the seat once held by Holmes" and that he ultimately failed in that struggle.[280] *Gobitis*, and his dissent in *Barnette* three years later, call into question the claim that Frankfurter's "philosophy of judicial restraint" came from "reading . . . Holmes's and Brandeis's opinions."[281] In 1919 backlash against Holmes's opinion in *Schenck v. United States*[282] led both Holmes and Brandeis to quickly distance themselves from the test in *Schenck*. And while Frankfurter almost worshipped both justices, he failed to learn from them that when justices make a mistake, they should not double down on their error, but should find a way, as Holmes and Brandeis did in subsequent free speech cases, to move in a different direction.[283]

Law professors, liberal activists, journalists, and others denounced Frankfurter's opinion. Only Justice Harlan Fiske Stone dissented in *Gobitis*. But, shortly after *Gobitis,* three of the Justices in Frankfurter's majority—Black, Douglas, and Murphy—realized how oppressive this decision was. In 1943*,* the Court reconsidered the flag salute issue in *West Virginia Board of Education v. Barnette*.[284]

This was Frankfurter's golden opportunity to redeem himself, concede he was wrong in *Gobitis*, and make his mark as a great Justice. Had he done so he might have become the intellectual and moral leader of the Court, as he always believed he should be. In this context he might have learned from Holmes and Brandeis, who supported free speech in *Abrams* by distinguishing it from the oppressive opinion in *Schenck*. Frankfurter was smart enough to change his jurisprudence, distinguish the cases, and move the Court to support liberty, without having to admit he was wrong in *Gobitis*.

But Frankfurter did not do this, instead, he doubled down on his support for religious persecution in an angry dissent. Frankfurter responded with fury at the rejection of his *Gobitis* opinion and his

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[278] Finkelman, *Flag Salute Cases*, *supra* note 228 at 950-51.

[279] *Id.*

[280] SNYDER, *supra* note 4, at 4.

[281] *Id.* at 353-54.

[282] 249 U.S. 47 (1919). On the immediate scholarly pushback from these opinions, see ZECHARIAH CHAFEE, JR. FREEDOM OF SPEECH (1920). *See also* MURPHY, WORLD WAR I, *supra* note 106.

[283] Abrams v. United States, 250 U.S. 616, 624 (Holmes, J. dissenting); Gitlow v. New York, 268 U.S. 652, 672 (1925) (Holmes and Brandies, JJ. Dissenting); and Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis and Holmes, JJ. Concurring).

[284] West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943).

unrestrained support for expelling children and fining and jailing their parents because their faith precluded them from saluting the flag. Without any sense of irony, as the Nazi extermination of the Jews was in progress, he raged on, using his Jewish heritage to justify persecuting Jehovah's Witnesses. To "his colleagues' horror, the opinion began with an excursus into Frankfurter's own identity as a Jew."[285] He wrote: "One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution."[286] He then justified expelling children and incarcerating their parents for their religious beliefs, showing that in fact he was utterly "insensible to the freedoms guaranteed by our Constitution."[287] As one scholar correctly notes, his *Barnette* dissent was "the most agonized and agonizing opinion recorded anywhere in the U.S. reports."[288]

Snyder praises Frankfurter's support of judicial restraint in *Barnette,* endorsing the Justice's view that the Courts should not interfere with democratically adopted legislation, even when it targets a minority group or young children. Ignoring the massive and growing attacks on Jehovah's Witnesses, Snyder explains that Frankfurter's opinion "cannot be divorced from his obsession with the war [World War II] to save civilization."[289] This may in fact have been what motivated Frankfurter, but it does not really explain exactly how emulating "the 'Heil Hitler' direction," as the *Herald Tribune* put it, and vigorously supporting religious persecution of minorities would "save civilization." To be blunt, Snyder defends a bigoted, oppressive, and utterly uncivilized opinion by absurdly claiming it was necessary to "save" civilization.

While Frankfurter was almost always a cheerleader for Roosevelt, his *Barnette* opinion ran totally contrary to FDR's enunciation of the "Four Freedoms" in his annual message to Congress (today called the State of the Union Address) on January 6, 1941. In that speech he asserted:

> [T]here is nothing mysterious about the foundations of a healthy and strong democracy. The basic things expected by our people of their political and economic systems are simple. They are: Equality of opportunity for youth and for others. Jobs for those who can work. Security for those who need it. The ending of special privilege for the few. The preservation of civil liberties for all.[290]

Frankfurter apparently failed to understand that if he was truly worried about saving "civilization," he should have supported FDR's notion that civil liberties even applied to Jehovah's Witnesses. Roosevelt ended the speech with what is perhaps his most enduring legacy to American liberty:

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[285] FELDMAN, SCORPIONS, *supra* note 13, at 229.

[286] Barnette at 646 (Frankfurter, J. dissenting).

[287] *Id.*

[288] FELDMAN, SCORPIONS, *supra* note 13, at 229.

[289] SNYDER, *supra* note 4, at 419.

[290] Franklin Delano Roosevelt, *Annual Message (Four Freedoms) to Congress*, NAT. ARCHIVES (Jan. 6, 1941), https://www.archives.gov/milestone-documents/president-franklin-roosevelts-annual-message-to-congress.

> In the future days, which we seek to make secure, we look forward to a world founded upon four essential human freedoms. The first is freedom of speech and expression—everywhere in the world. The second is freedom of every person to worship God in his own way—everywhere in the world. The third is freedom from want—which, translated into world terms, means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants—everywhere in the world. The fourth is freedom from fear—which, translated into world terms, means a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbor—anywhere in the world.[291]

Frankfurter was ready to deny all these freedoms to Jehovah's Witness, who were living in fear from the repercussions of his *Gobitis* opinion, which denied them freedom of speech and religion, and severely threatened them economically, by allowing for severe fines because of their faith. Frankfurter's "solution" to the Flag Salute was to make Jehovah's Witnesses send their children to private schools, which would have been a severe economic hardship, or an impossibility because in much of the nation there were either no private schools, or the only private schools were Catholic.

Frankfurter ignored all these goals of the President and the nation, and weirdly, his most recent biographer does as well. Thus, Frankfurter's opinion ran completely counter to the war against Nazism and FDR's truly prescient notion, in his Four Freedoms declaration, that the War was in part about religious liberty. You do not support that liberty, or any liberty, by persecuting religious minorities. This is something Felix Frankfurter never understood or believed in.

Snyder effusively praises the *Gobitis* opinion for what he calls Frankfurter's "stirring conclusion about unchecked judicial power,"[292] quoting Frankfurter's assertion that "[o]f course patriotism can not be enforced by the flag salute. But neither can the liberal spirit be enforced by judicial invalidation of illiberal legislation."[293] Here, Frankfurter admitted that the law was not only unnecessary to promote the patriotism he wanted, but that it would not accomplish that goal. Thus, Frankfurter was ready to expel young children from school, while fining and jailing their parents, for a meaningless law because he was blindly wedded to an abstract theory of constitutional interpretation that led to such outrageous results. Had he reread Stone's Footnote 4 in *Carolene Products*, Frankfurter would have been able to support his theory of constitutional interpretation while also supporting fundamental civil liberties. But this did not happen. As Melvin Urofsky explained, "That Frankfurter showed

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[291] *Id.*

[292] SNYDER, *supra* note 4, at 427.

[293] *Id.* (quoting Frankfurter, 319 U.S. at 670).

consistency is admirable; that he showed absolutely no sensitivity to the need to protect unpopular speech is deplorable."[294]

In his majority opinion in *Barnette*, Justice Robert Jackson responded to the portion of Frankfurter's *Gobitis* opinion that compared expelling children from school to Lincoln's suspension of Habeas Corpus to arrest terrorists and saboteurs during the Civil War:

> It may be doubted whether Mr. Lincoln would have thought that the strength of the government to maintain itself would be impressively vindicated by our confirming power of the State to expel a handful of children from school. Such oversimplification, so handy in political debate, often lacks the precision necessary to postulates of judicial reasoning. If validly applied to this problem, the utterance cited would resolve every issue of power in favor of those in authority and would require us to override every liberty thought to weaken or delay execution of their policies.[295]

In overturning the West Virginia law, the Court was not trying to "enforce" a liberal spirit, as Frankfurter disingenuously claimed in his dissent, but instead trying to prevent local majorities from using their political power to oppress minorities. Despite Snyder's claims that Frankfurter was "prescient" in his opinions, it was Jackson who was prescient. In the years following *Barnette*, persecution of Jehovah's Witnesses abated, in part because the Court was no longer willing to tolerate it. Within less than a decade, such persecution had completely disappeared. The lesson here is that a pro-liberty decision, such as *Barnette*, can change minds and teach citizens and legislatures the value of supporting liberty.

Snyder argues that the "lasting import" of Frankfurter's support of religious persecution was "his deep skepticism about judicial power"[296] and "his boundless democratic faith."[297] But once again, this misses the point that the attacks on Jehovah's Witnesses were hugely popular, supported by democratically elected legislatures, and in many cases aggressively enforced by democratically elected school boards. This history suggests that Frankfurter's "democratic faith" was not justified when voters and legislators used their power to oppress the powerless.[298] Nor does it explain why Frankfurter thought, in the middle of the Holocaust, that it was legitimate for him to use his Jewish heritage (which he usually ignored and rejected) to claim moral superiority in supporting religious persecution. In the end, it was the logic of Justice Jackson, not Frankfurter's "democratic faith" in repressive state legislatures, which ended the reign of terror against Jehovah's Witnesses.

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[294] UROFSKY, FELIX FRANKFURTER, *supra* note 3, at 58.

[295] Barnette, at 636.

[296] SNYDER, *supra* note 4, at 425.

[297] *Id.* at 429.

[298] Under the theories of both Snyder and Frankfurter, all statutory segregation in the American South was fully justified, because it was passed by democratically elected legislatures, which determined Blacks should not eat in the same restaurants as Whites, sit next to them in movie theaters, stay in the same hotels with them, or marry them.

Justice Jackson's final point in *Barnette* was infinitely more stirring than Frankfurter's. It is one of the most eloquent statements on liberty in American constitutional law, which is quoted and taught far more than anything Frankfurter ever said while on the Court: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."[299] Two years later, Justice Jackson would take this philosophy, that persecution of people for their religion was unacceptable, to Europe as the chief American prosecutor at the Nuremberg War Crimes Trials.

Some people criticized Jackson for not resigning when he accepted the role as the Nuremberg prosecutor, but the difference between Jackson and Frankfurter is that Jackson openly acted at Nuremberg and his work on the war crimes trials did not appear to be something that would ever come before the Court. This contrasts with Frankfurter's role in FDR's administration after he went on the Bench, which was concealed, never open, and clearly involved many issues which could (and some did) come before the Court. Furthermore, Jackson's role was a one-time extraordinary moment, while Frankfurter's secret role as an advisor and policy maker was on-going.

Apparently conceding, *sub silentio,* that Frankfurter's Flag Salute opinions were repressive, Snyder claims that after *Barnette*, Frankfurter "began to adapt judicial restraint to protect minority rights."[300] This leads to the question of "why" Frankfurter needed to change his jurisprudence, unless he realized he wrong. And *if* he was wrong, why did Snyder so effusively praise these two "repressive" Flag Salute opinions and argue that Frankfurter's legal theory was prescient and correct?

Finally, in looking at his jurisprudence after *Barnette,* it is not at all clear that he really *did* change his views on liberty and rights. Both before and after *Barnette*, Frankfurter often supported laws aimed directly

[299] Barnette, at 642.
[300] SNYDER, *supra* note 4, at 429.

at Jehovah's Witnesses for no other reason than their faith.[301] Frankfurter was equally hostile to the claims of other religious minorities.[302]

Three years after *Barnette*, in 1946, Frankfurter continued his jurisprudence of religious intolerance in his dissent in *Girouard v. United States*.[303] James Girouard, a Canadian seeking naturalization, had complied with every aspect of the oath for citizenship except one. As a Seventh Day Adventist he was a pacifist and refused to agree that he would take up arms in defense of the nation.[304] In the wake of World War II, a majority of the Court approved his right to naturalize, thereby overturning earlier precedents that denied naturalization to pacifists.[305] Both Holmes and Brandeis had dissented in those earlier cases, arguing for a more flexible approach to naturalization, that protected religious freedom. Had Frankfurter actually been influenced by Holmes and Brandeis, he would have cited their dissents in the earlier naturalization cases and quoted them to support religious liberty, thereby vindicating his hero and his mentor. Instead, he dissented in *Girouard*, arguing against citizenship for anyone who would not join the military. As he had in the Flag Salute Cases, he once again supported religious discrimination.

Many scholars argue that the Flag Salute Cases were the undoing of Frankfurter. He never recovered from the scholarly opposition to his opinions, and he increasingly fought with his colleagues after these cases. Frankfurter "took the reversal of his *Gobitis* opinion as a professional and personal calamity."[306] As Urofsky noted, Frankfurter "personalized every battle, so that within five years he had divided his colleagues into 'we' and 'they'—allies and enemies"—and "the Court and its members suffered for more than two decades from the personal animosities generated by this prima donna of the law."[307]

Unfortunately, the rest of the nation had to suffer the increasingly anti-libertarian and sometimes racist opinions of Frankfurter. This began

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[301] For example, see his votes and opinions in these cases which Snyder ignored where Frankfurter voted against the liberties of Jehovah's Witnesses, often writing a separate concurrence to support prosecutions of Witnesses, or writing dissents when the majority of the Court supported civil liberties and religious freedom: Jones v. Opelika, 316 U.S. 548 (1942) (before *Barnette)*), Murdock v. Pennsylvania, 319 U.S. 105 (1943) and Martin v. City of Struthers, 319 U.S. 141 (1943) (in the same term as *Barnette*), and after *Barnette*, Follett v. Town of McCormick, 321 U.S. 573 (1944), Saia v. New York, 334, 562 U.S. 558 (1948) (Frankfurter, J. dissenting), Kovacs v,. Cooper, 336 U.S. 77, 89 (1949) (Frankfurter, J., concurring), Poulos v, New Hampshire, 345 U.S. 395, 415 (1953) (Frankfurter J., concurring). Frankfurter joined a unanimous court in Largent v. Texas, 318 U.S. 416 (1943), ruling on free speech grounds that the city of Paris, Texas could not require that Jehovah's witnesses to obtain a permit to solicit orders for religious books, and joined a dissent in Prince v. Massachusetts, 321 U.S. 158 (1944). He also did not support the persecution of Jehovah's Witnesses is Marsh v. Alabama, 326 U.S. 501 (1946) (Frankfurter, J., concurring). For a list of many of these cases, see Laycock, *A Survey of Religious Liberty*, *supra* note 240, at 419-20.

[302] *See* discussion *infra* Part VII, Section A.

[303] Girouard v. United States, 328 U.S. 61 (1946).

[304] *Id.*

[305] United States v. Schwimmer, 279 U.S. 644 (1929); *and* United States v. Macintosh, 283 U.S. 605 (1931).

[306] FELDMAN, SCORPIONS, *supra* note 13, at 229.

[307] UROFSKY, FELIX FRANKFURTER, *supra* note 3, at 63; *see also* HIRSCH, ENIGMA OF FRANKFURTER, *supra* note 13, at 176.

a year after *Barnette*, when Frankfurter went out of his way, with a separate concurrence, to voice his approval for sending 120,000 Japanese Americans, about two-thirds of whom were American-born citizens, to concentration camps, encased in barbed wire and guarded by armed soldiers, solely because of their ethnicity.

B. The Japanese Internment

The Japanese Internment cases illustrate that Frankfurter did not change his views on liberty and government oppression after *Barnette*. Instead, he never blinked at sending Japanese Americans to concentration camps—a term used to describe them by many people at the time including one member of the Court[308]—simply because of their race,[309] without any trial or evidence that they had committed any crimes or were even likely to do so.[310] In the 1920s Frankfurter had devoted years and enormous energy to reverse the convictions of Sacco and Vanzetti because their trials were unfair and they were in part being persecuted for their ethnicity and immigrant status. But in 1943 and 1944 he saw no legal problems with incarcerating American citizens and their immigrant parents (who were never allowed to naturalize because of their race) in concentration camps without any trials at all because of their ethnicity.

A week after striking down the West Virginia Flag Salute law, a unanimous Court approved curfews for Japanese Americans, in *Hirabayashi v. United States*.[311] However, three concurring justices—Justices Douglas, Murphy, and Rutledge—expressed deep skepticism about the inherent racism of the policy, under which, as Justice Murphy put it, "70,000 American citizens have been placed under a special ban and deprived of their liberty because of their particular racial identity."[312] Murphy noted that the policy "bears a melancholy resemblance to the treatment accorded to members of the Jewish race in Germany and in other parts of Europe," and that it went "to the very brink of constitutional power."[313] Murphy, who had joined the Court a year after Frankfurter, actually wrote his opinion as a dissent, but "under pressure from his colleagues, particularly Felix Frankfurter," Murphy turned his opinion—which reads like a dissent—into a concurrence.[314] As the leading historian

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[308] It is important to understand that "concentration camps" were used by the Nazis for political prisoners and unwanted people—like Jews, Jehovah's Witnesses, and Roma—well before the Nazis created extermination camps like Auschwitz and Treblinka. In his dissent in Korematsu, Justice Roberts asserted this was a "case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. He noted the "so-called Relocation Centers," was in fact "a euphemism for concentration camps." Korematsu v. United States, 323 U.S.214, 226, 230 (Roberts J. dissenting) (1944).

[309] Korematsu v. United States, 323 U.S.214 (1944).

[310] Of course, being "disloyal" should not itself have mattered, as long as people did not actually break a law by acting in ways that harmed the nation.

[311] Hirabayashi v. United States, 320 U.S. 81 (1943).

[312] 320 U.S. at 111, Murphy, J. concurring. Murphy's figure did not include the 50,000 or so Japanese immigrants in the United States, who were prohibited from becoming naturalized citizens. Ozawa v. United States, 260 U.S. 178 (1922) and Chin and Finkelman, *The "Free White Persons" Clause*, *supra* note 186.

[313] 320 U.S. at 111, Murphy, J. concurring.

[314] DANIELS, CONCENTRATION CAMPS USA, *supra* note 169, at 135. .

of the internment noted, "Had Murphy's opinion been submitted as a dissent, it would have focused a little more public light on the sweeping nature of the *Hirabayashi* decision."[315] Significantly, Frankfurter's former student, John McCloy suppressed evidence from an internal War Department report, that would have undermined the government's argument for the necessity of the curfew and the subsequent internment.[316] Had McCloy not suppressed this information it is entirely likely that the decision would not have been unanimous, and might even had led to a different outcome.

While he often wrote separate concurrences, in *Hirabayashi* Frankfurter was silent. The decision was unanimous, so a dissent by Murphy, Douglas, or even Frankfurter would not have changed the outcome. But had Frankfurter dissented, or joined Murphy's hostile concurrence, others might have joined him. Just as Stone's dissent in *Gobitis* proved prophetic, Frankfurter raising the problem of this blatant racial and ethnic discrimination might have had a real impact. While not writing an opinion in *Hirabayashi*, Frankfurter pressured Chief Justice Harlan Fiske Stone to resist a suggestion by Justice Douglas that would have left "open the possibility of individual Japanese being able to prove their loyalty."[317] Frankfurter's clerk, Philip Elman, believed the Justice was so adamant about supporting the government in this case because of "Jack McCloy, a close friend who owed his job to Frankfurter."[318] As a recent history of the wartime Court noted, "Nobody in the senior ranks at the War Department had been more responsible for FDR's Executive Order 9066 [allowing for the internment], and for the military's curfew, expulsion, and detention orders, than John J. McCloy." [319]

A year later in *Korematsu* v. *United States*,[320] three justices—Owen Roberts, Frank Murphy, and Robert Jackson (who had written the stirring majority opinion in *Barnette*)— refused to condone the actual incarceration of Japanese Americans solely based on their race, without any evidence of disloyalty or acts against the interest of the United States. Fred Korematsu had tried to enlist when the War began, but he failed his physical. He then took a welding course to work in a defense plant. He did not report to an assembly center, as a prelude to being deported to a camp. In his dissent, Justice Roberts correctly asserted that this was a "case of . . . imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry. . . ."[321] Justice Jackson also wrote an eloquent opinion denouncing the internment.

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[315] ROGER DANIELS, THE JAPANESE AMERICAN CASES: THE RULE OF LAW IN TIME OF WAR 60 (2013). There is also evidence that Justice William O. Douglas was planning to dissent, but Frankfurter talked him out of it. ERIC K. YAMAMOTO, MARGARET CHON, CAROL L. IZUMI, JERRY KANG, FRAK WU, RACE RIGHTS AND REPARATION: LAW AND THE JAPANESE INTERMENT 124-25 (2001).

[316] WIECEK, BIRTH OF THE MODERN CONSTITUTION, *supra* note 2, at 350.

[317] *Id.* at 351.

[318] Elman quoted in SLOAN, COURT AT WAR, *supra* note 168, at 205.

[319] *Id.*

[320] 321 U.S. 214 (1944).

[321] *Id.* at 226 (Roberts, J. dissenting).

Rather than "adapt[ing] judicial restraint to protect minority rights" as Snyder claims Frankfurter did after *Barnette*,[322] in *Korematsu* Frankfurter concurred in using race and ethnicity to send United States citizens and lawful immigrants—to concentration camps.[323] In *Barnette*, Frankfurter had used his Jewish heritage to justify expelling students from schools and jailing their parents over a flag salute. With his European relatives being sent to concentration camps and extermination camps, he remained oddly silent on the issue of sending Americans to concentration camps because of their race. Here was a moment for Frankfurter to speak up in favor of justice. He did not. Instead, he ignored the lack of due process in the internment and felt obligated to write a separate concurrence to support sending American citizens to concentration camps, guarded by armed soldiers authorized to shoot anyone attempting to leave the camp without permission. In his opinion, Frankfurter claimed that it was not his responsibility to consider this mass incarceration and washed his hands of the whole issue, asserting this was the "business of Congress and the Executive," and "not ours."[324] One can only wonder why Frankfurter thought it was not the business of courts to ensure that people are not rounded up and locked up without due process, a liberty which the Constitution guarantees to all people.

Justice Owen Roberts had the correct answer to Frankfurter's claim. This was a "case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States" and there was no reason to "labor the conclusion that Constitutional rights have been violated."[325] Justice Murphy simply noted that the internment went "over 'the very brink of constitutional power' and falls into the ugly abyss of racism," which was impermissible under the Constitution.[326]

When working to secure due process for labor radicals during World War I, Frankfurter "refused to sacrifice civil liberties and fair criminal trials in the name of patriotism."[327] But in the Flag Salute and Internment cases, this is exactly what Frankfurter did, arguing that expelling elementary school children over their religious beliefs was necessary for instilling patriotism and later concurring in sending law-abiding American citizens to concentration camps because of their ethnicity. His positions in these and other cases illustrate why most "scholars have" correctly

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[322] SNYDER, *supra* note 4, at 429.

[323] Fred Korematsu was convicted of violating the evacuation orders that led to internment, but the judge suspended his sentence giving him "five years of probation." DANIELS, JAPANESE AMERICAN CASES, *supra* note 315, at 36. There was some question whether he could appeal this conviction since he was not incarcerated. Both Korematsu and the U.S. government believed the case was reviewable, as did eight justices. Frankfurter argued from "the bench that it might not be" reviewable. Id at 55. If Frankfurter had had his way, Korematsu would have been unable to challenge the legality of the internment and to vindicate himself.

[324] 323 U.S. 225 (Frankfurter, J., concurring).

[325] 323 U.S. 226 (Roberts, J., dissenting).

[326] 323 U.S. 233 (Murphy, J., dissenting).

[327] SNYDER, *supra* note 4, at 94.

"portrayed Frankfurter as a judicial failure, a liberal turned conservative justice."[328]

C. Frankfurter and the Holocaust

In the midst of his support for the internment, Frankfurter refused to use his political connections and backdoor access to the White House[329] to influence something that would not likely come before the Court: American policy towards the Holocaust. As one scholar has noted, "Supreme Court Justice Felix Frankfurter had regular access to Roosevelt during the war, and he exercised a quiet but powerful influence in many sectors of the administration. Although he used his contacts to press numerous policies and plans, rescue [of Jews in Europe] was not among them."[330]

The same year that Frankfurter dissented in *Barnette* and silently joined the majority in *Hirabayashi*, he met with Jan Karski, a Catholic member of the Polish resistance. Karski briefed Frankfurter on the Warsaw Ghetto and the system of concentration camps and sub-camps (including one he had infiltrated), which then sent Jews on to the Belzec death camp, where they were systematically murdered.[331] Karski spelled out, in precise detail, the ongoing extermination of Europe's Jews. He asked Frankfurter to convey this information to President Roosevelt. Before joining the Court, Frankfurter advocated removing barriers to Jewish immigration to the United States.[332] In 1940, he contacted everyone he could to successfully obtain the release of his eighty-two-year-old uncle, Salomon Frankfurter, who the Nazis had jailed.[333] By 1943, there was substantial evidence of the ongoing Holocaust from British officials and the Polish government in exile. Frankfurter knew about this. Karski enhanced this knowledge with his first-person account of the horrors. Jan Ciechanowski, the Polish ambassador to the United States, was present at this meeting.

But Frankfurter simply rejected Karski's evidence, saying, "I do not believe you." When Ambassador Ciechanowski challenged his response, Frankfurter denied that he thought Karski was lying. Ever the law professor, he parsed his words, asserting: "I did not say he is lying; I said I don't believe him. These are different things. My mind and my heart are made in such a way that I cannot accept it."[334] He declared, "I know humanity, I know man, no, no, it is impossible."[335] Snyder simply notes "[t]he justice did not want to believe that the Nazis were capable of

[328] *Id.* at 4.

[329] SNYDER, *supra* note 4, at 457, 474, and 610 (discussing Frankfurter's "back door" access to the White House).

[330] DAVID S. WYMAN, THE ABANDONMENT OF THE JEWS: AMERICA AND THE HOLOCAUST, 1941-1945 (1984) 316.

[331] SNYDER, *supra* note 4, at 416-17.

[332] *Id.* at 226-29.

[333] *Id.* at 295-96, 417.

[334] *Id.* at 411-12.

[335] ANNETTE BECKER, MESSENGERS OF DISASTER: RAPHAEL LEMKIN, JAN KARSKI, AND TWENTIETH CENTURY GENOCIDES (2021) 4.

slaughtering Jews like cattle,"[336] even though, as Snyder points out, he had ample evidence to know this is exactly what was happening.

Frankfurter's response contrasts with Snyder's claim that his *Gobitis* opinion was based on "Hitler's threat to exterminate Europe's Jews"[337] and Snyder's claim that his *Barnette* opinion was a function of his "obsession with the war [World War II] to save civilization."[338] Given the opportunity to possibly save at least a small portion of civilization by speaking to the President, Frankfurter simply denied the existence of what he knew was happening.[339]

Frankfurter never took Karski's information to Roosevelt. He refused to sit down with his old friend Frank in the White House to discuss the ongoing extermination of the Jews. If the persecution of Jews motivated Frankfurter's repressive opinion in *Gobitis,* as Snyder claims, then we might wonder why he wasn't similarly motivated to discuss the issue with Roosevelt.

What might the United States have done if Frankfurter had convinced FDR to act, or had used his connections in the administration to lobby for actions that could have saved lives? The possibilities are tantalizing. Frankfurter's former student, Assistant Secretary of War John McCloy, who he had been in contact with throughout the War, was in a position to do something about this. American bombers, flying from airbases in the Soviet Union, might easily have bombed the gas chambers and crematoria at Auschwitz and the other death camps and the railroad tracks leading to them. This would have slowed down the Holocaust and forced Germany to repair its death camp operations. As noted earlier, when Jewish Americans pleaded with McCloy to authorize such bombings, he categorically refused to consider it, dishonestly claiming American bombers could not reach Auschwitz. If Frankfurter had met with FDR on this, would his former student, McCloy, have changed his mind? Similarly, in 1940 Frankfurter had been instrumental in getting FDR to appoint the Justice's old boss Henry L. Stimson to be Secretary of War.[340] Surely, Frankfurter could have gone directly to him—McCloy's boss—to discuss bombing Auschwitz or in some other way helping to stop the Holocaust. The United States might also have used neutral powers to help rescue some Jews. Obviously, the most effective way to finally stop the Nazi genocide was to win the war, but categorically denying evidence of the Final Solution was hardly useful. The most recent scholarship on this issue notes that "[n]either in Frankfurter's published memoir nor in his handwritten notes is there any mention of his meeting with Karski," even though he had known of the "gassings" of Jews by the Nazis since late 1942.[341] Frankfurter refused to believe the Holocaust was happening, and thus did

[336] SNYDER, *supra* note 4, at 417.

[337] *Id.* at 353.

[338] *Id.* at 419.

[339] In early 1933 Frankfurter was aware of the increasing danger for Jews in Germany and had access to meaningful information about what was happening there. But Frankfurter declined to discuss the rising antisemitism and threats to Jews with FDR. SNYDER, *supra* note 4, at 227-29.

[340] SMITH, FDR, *supra* note 41, at 450.

[341] BECKER, MESSENGERS OF DISASTER *supra* note 335, at 12-13.

not bother to discuss it with the President, Secretary of War Stimson, the assistant secretary, McCloy, bother to record it in his many notes, or recall in his memoir how he learned about it from an eyewitness. When confronted with the catastrophe of the Holocaust, Frankfurter did nothing.

These three examinations of Frankfurter during the War illustrate his stubbornness in the face of facts on the ground, such as the persecution of Jehovah's Witnesses, Japanese Americans, and European Jews. They underscore the correctness of the general scholarly consensus that Frankfurter was a failure as a Judge and that once he went on the bench, he lost his commitment to life, liberty, and justice.

VI. THE "DEMOCRATIC JUSTICE," HIS BRETHREN, AND THE PROBLEM OF ETHICS

Frankfurter served on the Supreme Court from 1939 to 1962. While Frankfurter is most famous for this high office, Frankfurter's service on the Court was the least successful part of his life. He initially served on a Court with a moderate to liberal majority, with most of his colleagues nominated or elevated, like Chief Justice Stone, by FDR or his hand-picked successor, Harry Truman. In the 1950s, they were joined by Eisenhower's greatest federal appointments, Chief Justice Earl Warren and Associate Justice William J. Brennan. Even some of the more conservative members of the Court, like Justices Robert Jackson, Tom Clark, and Potter Stewart, were sensitive to individual rights. This was a Court that seemed "made" for Frankfurter, populated by smart, hardworking civil libertarians and progressives. As the famous "Professor" on the Court, he had a grand opportunity to be a progressive leader. Indeed, he could have been the leader of a Court, at least from 1939 to 1954, that might have been called "The Frankfurter Court," the way William J. Brennan became the leader of the Court under Chief Justice William Rehnquist.[342] But unlike Brennan, Frankfurter was often in petty conflicts with one after another of his fellow Justices. Throughout his years on the Court, he was arrogant, stubborn, often non-collegial, and sometimes simply nasty. He tried to dominate every discussion while often lecturing his brethren. He had "boundless self-confidence" but also boundless "self-esteem."[343] Indeed, "his conduct on the Court, his self-defeating and isolating relations with his brethren," in the end "obstructed" his jurisprudential goals.[344] He bragged about his intelligence, telling Justice Stanley Reed that his years as a professor made him a better judge than Chief Justice Charles Evans Hughes.[345] As one scholar noted, "Such cocksure chutzpah served him badly in the collegial relationships of the Court."[346] Furthermore, Frankfurter did not understand Brennan's notion of the "the Rule of Five,"[347] that a Justice must find four more votes to shape an opinion.

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[342] *See* Mark Tushnet, *Themes in Warren Court Biographies*, 70 N.Y.U. L. REV. 748 (1995).

[343] WIECEK, BIRTH OF THE MODERN CONSTITUTION, *supra* note 2, at 89.

[344] BURT, TWO JEWISH JUSTICES, *supra* note 3, at 53.

[345] WIECEK, BIRTH OF THE MODERN CONSTITUTION, *supra* note 2, at 89.

[346] *Id.*

[347] *Id.* at 763.

He could clearly mentor and act as a guiding professor to young men (but not young women, like Ruth Bader Ginsburg), and he could ingratiate himself with more powerful men, such as Henry Stimson, Oliver Wendell Holmes, Jr., Louis D. Brandeis, Teddy Roosevelt, and Franklin D. Roosevelt. But, Frankfurter was never able to collaborate with most of his colleagues. That Frankfurter wrote more dissents than majority opinions and felt the necessity of persistently concurring, often to disagree with his colleagues even if he accepted the outcome of a case, illustrates his failure to build coalitions and majorities to achieve his jurisprudential goals. Frankfurter's heroes, Holmes and Brandeis, often dissented on a reactionary Court led by the "Four Horsemen of the Apocalypse"—Justices Pierce Butler, James Clark McReynolds, George Sutherland, and Willis Van Devanter—who were bolstered by the deeply conservative Chief Justice William Howard Taft. But Frankfurter dissented from liberal outcomes that many assumed he would have supported. This underscores that this liberal activist of the 1920s and 1930s morphed into a conservative and even a reactionary.

Often noted for his gregarious charm, Frankfurter privately wrote snide comments about his fellow Justices, calling them by snarky nicknames while denigrating their intelligence and honesty, especially if they did not vote as he did. As one perceptive biographer noted, "Frankfurter would mentally divide his colleagues into three categories—adversaries, allies, and potential allies. He would react to adversaries as he had throughout his life—with heated anger and frustration, with attacks on their integrity and motives, with a search for vindication."[348] During World War II, in private memos, he called those who disagreed with him "the Axis"—as though Justices Hugo Black, William O. Douglas, and Frank Murphy were Nazis—and he absurdly accused Justice Douglas of anti-Semitism, merely because Frankfurter hated him.[349] In the 1950s he would add Chief Justice Earl Warren and Justice William J. Brennan to his list of enemies,[350] comparing "the civil libertarian bloc of Warren, Black, Douglas, and Brennan to the conservative Four Horsemen of the 1920s."[351] The comparison truly boggles the mind. The justice who had begun his legal and academic career crusading for civil liberties, due process, and protection of minorities—who seemed to be destined to become an icon of American liberty—ended his years on the Court as an intractable opponent

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[348] HIRSCH, ENIGMA OF FRANKFURTER, *supra* note 13, at 177. Frankfurter's former clerk noted that the Justice referred to his colleges and others in private conversation and notes with various nicknames, some of which belittled them as though they were country bumpkins from rural places or make fun of their core beliefs, such as Justice Frank Murphy's Catholicism: "Douglas was Yak or Yakima, because he came from Yakima, Washington. Hugo Black was Lafayette, his middle name. Stone was Vermont. Hughes was Whiskers. Minton was Shay. Stanley Reed was the Chamer, which means fool, or dolt, or mule in Hebrew; now that might be very difficult for somebody to decipher. The others wouldn't have been. Murphy was the Saint. Roberts was the Squire. He was the country Squire. Jackson was Jamestown, the town in upstate New York that Jackson came from. Francis Biddle, the Attorney General, was Frawn-cis." Philip Elman, *Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 HARV. L. REV. 817, 844 (1987). This interview was conducted by Norman Silber.

[349] Indeed, as I will discuss below, Douglas was far more sensitive to the liberty issues of Jews than Frankfurter.

[350] HIRSCH, ENIGMA OF FRANKFURTER, *supra* note 13, at 180.

[351] SNYDER, *supra* note 4, at 649.

of jurists like Brennan, Warren, Douglas, and Black, who are remembered as icons of liberty, civil rights, and equal justice for all.

Justice Frankfurter was far too often on the wrong side of history, the wrong side of the law, and the wrong side of liberty. Justices make mistakes, but the great ones will admit them, either explicitly—as Black, Murphy, and Douglas did in *Barnette* after having been in the majority in *Gobitis*—or by silently changing their jurisprudence, as Holmes and Brandeis did when they reversed their anti-free speech positions starting with *Abrams*.[352] Holmes and Brandeis never explicitly recanted their position in *Schenck*, but starting in the Fall of 1919, they consistently supported free speech while eviscerating the idea that peaceful opposition to government policies should be punished.[353] They managed to distinguish every subsequent free speech case from *Schenck*. Frankfurter, on the other hand, seems to have never changed his mind. As I mentioned earlier, most of the people who mattered to Frankfurter roundly condemned his *Gobitis* opinion. Three years later, when given the opportunity to back away from his repressive *Gobitis* opinion, Frankfurter doubled down to support expelling children from schools. The contrast with Holmes and Brandeis after *Schenck*, when they reversed course, is striking.

In addition to his inability to get along with his colleagues and his stubborn refusal to ever admit a mistake while on the Court, Frankfurter violated numerous ethical rules and practices without batting an eye while condemning other justices for less egregious behavior. As already noted, while on the Court, Frankfurter remained one of FDR's closest advisors. With "back door" access to the President, entering the White House without any record of his comings and goings, he discussed "wartime policy making and recruitment efforts on behalf of the Roosevelt administration."[354] Indeed, Frankfurter seemed to think he was still working for the President while on the Court. His law clerk, Philip Elman, recalled that when the Court heard *Hirabayashi* Frankfurter "saw himself as a member of the President's war team."[355] The distinguished constitutional historian

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[352] *See* Holmes's opinions in Schenck v. United States, 249 U.S. 47 (1919): Frohwerk v. United States, 249 U.S. 204 (1919); and Debs v. United States, 249 U.S. 211 (1919). On the immediate scholarly pushback from these opinions, *see* ZECHARIAH CHAFEE, JR. FREEDOM OF SPEECH (1920).

[353] Abrams v. United States, 250 U.S. 616 (Holmes, J. dissenting); Gitlow v. New York, 268 U.S. 652 (1925) Holmes, J. dissenting; and Whitney v. California, 274 U.S. 357 (1927) (Brandeis, J. concurring). While technically concurring in Whitney because of the procedural posture of the case, Brandeis's eloquent defense of free speech is a stirring dissent in opposition to the majority's anti-free speech position. For background to these cases, *see* RICHARD POLENBERG, FIGHTING FAITHS: THE ABRAMS CASE, THE SUPREME COURT, AND FREE SPEECH (1987) and MURPHY, WORLD WAR I, *supra* note 106.

[354] SNYDER, *supra* note 4, at 353. He also stayed with FDR at Hyde Park. *Id.* at 240-41.

[355] Elman quoted in SLOAN, COURT AT WAR, *supra* note 168, at 205. In his oral history Elman recalls that in the wake of Pearl Harbor Frankfurter told Elman, who was then his clerk, that he (Frankfurter) "was going to have to devote his full energies to helping in the war effort, to helping FDR. That would be his overwhelming priority, to which everything had to yield." NORMAN I. SILBER, WITH ALL DELIBERATE SPEED: THE LIFE OF PHILIP ELMAN, AN ORAL HISTORY MEMOIR 83 (2004). This attitude seems to have led to his unrestrained support of the internment and for suppressing Jehovah's Witnesses, since Frankfurter articulated that denying them religious liberty was central to creating the patriotism necessary to win the war.

William M. Wiecek notes that Frankfurter "was not the first Supreme Court Justice to advise presidents on affairs of state. But few have done so as extensively as he, and his consultative activities often posed ethical questions that would have troubled someone with a lesser capacity for self-exoneration."[356] Additionally, it seems likely he also discussed other policies including the constitutionality of planned legislation. Indeed, given Frankfurter's personality, it is inconceivable that he did not discuss these issues with the President. While on the Bench, he remained in constant contact with many of his former students working in the government, advising them on legislation, policymaking, and the law. We know he talked to John McCloy when he was planning the Japanese Internment, but it seems likely that he also talked to the President. This in part may explain Frankfurter's unconscionable support for sending innocent people to concentration camps purely because of their race. In *Korematsu*, Frankfurter specifically concurred in what Justice Murphy called a policy that goes "over 'the very brink of constitutional power' and falls into the ugly abyss of racism."[357]

On his many unrecorded visits to the White House, Frankfurter ignored separation of powers, giving FDR legal and/or political advice and then ruling on these issues from the Bench. Since 1793, when John Jay refused to give President George Washington an advisory opinion on pending legislation,[358] the Court has insisted that its members cannot give advice to the executive branch or Congress. Similarly, Justices should never discuss cases with parties that might someday come before the Court. They are not lawyers who give advice, and they must stay away from such activity. Frankfurter ignored these rules throughout his time on the Court.

In addition to the President, Frankfurter gave others legal advice which was ethically and legally problematic. Frankfurter advised and coached his former student Alger Hiss and his lawyers when it seemed clear that Hiss's legal problems surrounding his communist past would lead him to a federal court and possibly an appeal to the Supreme Court.[359] Frankfurter's ethically questionable behavior did not come to light at the time only because Hiss never appealed to the Court. During the Hiss controversy, Frankfurter used a third party to try to pressure the great journalist Edward R. Murrow to stop reporting on Hiss and "keep his mouth shut."[360] Frankfurter publicly defended Hiss's honesty and character. But significantly more than a decade earlier "Frankfurter began to overlook Hiss's small deceptions."[361] This tells us a lot about Frankfurter, and to be blunt, it is not pretty.

The Hiss case again raises the issue of Frankfurter's "eye for talent" that Snyder incessantly praises.[362] Mentors can easily misjudge the skills

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[356] WIECEK, BIRTH OF THE MODERN CONSTITUTION, *supra* note 2, at 91.

[357] 323 U.S. 233 (Murphy, J., dissenting).

[358] John Jay to George Washington, August 8, 1793, available at: https://press-pubs.uchicago.edu/founders/documents/a3_2_1s34.html.

[359] SNYDER, *supra* note 4, at 528.

[360] *Id.* at 534.

[361] *Id.* at 526.

[362] *Id.* at 229, 224.

or abilities of their students. But we must wonder why Frankfurter pushed Hiss forward when, as Snyder demonstrates, he had reason to doubt Hiss's honesty, because of his "deceptions." There are also profoundly serious ethical questions when a Supreme Court Justice tries to prevent a reporter from covering a story. Snyder notes that the Hiss case "tested" Frankfurter's loyalty to someone he called "one of the very best men we have in many a day." But his support for Hiss also tested his judicial ethics, and here he clearly failed the test. Frankfurter's loyalty to his student was honorable, but giving Hiss legal advice was surely questionable and his attempt to intimidate a reporter certainly crossed an ethical line. Frankfurter was a character witness for Hiss in his perjury trial. There, Frankfurter asserted Hiss's "reputation" for "loyalty and veracity" was "excellent."[363]

But if Frankfurter had long before this known of "Hiss's small deceptions,"[364] his testimony under oath, vouching for Hiss's character and honesty, might have constituted perjury. The era of McCarthyism and the Red Scare of the early 1950s was a horrible period in United States history. Many people were heroic, and others were not. These were tough times. As a sitting Justice, Frankfurter should have declined to testify at Hiss's trial, explaining that as a sitting Justice it would be inappropriate for him to testify. That he did not decline to testify says something about his loyalty to a student, but it also says much about his arrogance and his lack of judicial ethics. That he was less than honest in his testimony, vouching for Hiss's integrity when he knew Hiss was dishonest, tells us much about Frankfurter's character.

The Hiss case underscores the limits of Frankfurter's "eye for talent," as well as his judicial ethics. Perhaps the problem is that "talent" in Frankfurter's eye did not include "character" or "honesty." That conclusion may help us understand Frankfurter's slippery notions of judicial ethics.

The ethics issue becomes clearer in the case of John S. Service, a career state department officer whom Senator Joseph McCarthy wrongly accused of disloyalty and being a communist sympathizer.[365] Under strong political pressure, Secretary of State Dean Acheson, Frankfurter's protégé and former student, fired Service without any due process or evidence of wrongdoing. Frankfurter privately discussed the firing with Acheson before it happened. Eventually, the case came to the Supreme Court.[366] By this time Acheson was no longer Secretary of State. The other Justices were aware of Frankfurter's earlier discussions with Acheson and their close friendship. Justice William O. Douglas urged Frankfurter to recuse himself because of the clear impropriety of his *ex parte* conversations with Acheson. This was not an attempt to change the outcome of the case. Ultimately the Court unanimously supported Service, who was reinstated in the State

[363] *Id.* at 532.

[364] *Id.* at 526.

[365] Unfortunately, Snyder provides none of the background to this case. *See* LYNNE JOINER, HONORABLE SURVIVOR: MAO'S CHINA, MCCARTHY'S AMERICA, AND THE PERSECUTION OF JOHN S. SERVICE (2009); *see also* RONALD RADOSH AND HARVEY KLEHR, THE AMERASIA SPY CASE: PRELUDE TO MCCARTHYISM (1996).

[366] Service v. Dulles, 354 U.S. 363 (1957).

Department. The recusal issue was simply a matter of basic judicial ethics and Douglas's view was that the Justice should avoid an appearance of impropriety. It is a view that every jurist should take very seriously.

Frankfurter stubbornly refused to recuse himself. The ethical issue here is not even close. A judge cannot give advice to a party and then later adjudicate the case. Snyder dismisses this clear—even outrageous—breach of judicial ethics by simply claiming "Frankfurter's friendship with Acheson did not stop him from voting against the State Department."[367] Such an answer would doubtless lead to a failing grade in a legal ethics course.

Snyder implies that Frankfurter's vote for Service is a rebuke of Acheson, but that may not be the case. For all we know, Frankfurter urged Acheson to protect his political career by firing Service, assuring him that the Supreme Court would "make it right" in the end, as in fact the Court did. The issue here is not "all's well that ends well," but rather Frankfurter's clear violation of judicial ethics, his obvious "appearance of impropriety," and his stubborn refusal to recuse himself in a case where his vote truly did not even matter. The case underscores Frankfurter's inability to exercise enough restraint to not meddle in politics or legal cases while on the bench and his refusal to recuse himself when he did.

The Service case also illustrates Frankfurter's own set of double standards. Chief Justice Fred Vinson almost certainly, and improperly, discussed the steel seizure case with President Truman.[368] These conversations certainly violated the concept of separation of powers. Frankfurter was furious when he learned this, as he ranted to Justice Jackson about Vinson's breach of ethics. The two cases underscore Frankfurter's double standards for judicial behavior. When Frankfurter discussed a case with a party, as in the Service case, he would not even consider recusing himself. Similarly, Frankfurter not only voted on the internment cases but wrote a concurring opinion in Korematsu, after discussing the internment with McCloy and probably Roosevelt. In addition to Acheson, Frankfurter met with lower-level executive branch officers to lobby for particular policies or to weigh in on them. In other words, while furious at Vinson, Frankfurter did the same thing more often than Vinson.[369]

A final example of the nature of Frankfurter's lack of ethical boundaries concerns *Brown v. Board of Education*. In the period leading up to the oral argument in the fall of 1953, Frankfurter had numerous private conversations with his former law clerk, Philip Elman. At the time Elman was writing an amicus brief for the United States government in support of desegregation. Frankfurter told Elman his fears about not getting a strong majority to strike down segregated schools, and Elman incorporated into his brief some of Frankfurter's suggestions on how to persuade other justices to join the majority opinion.[370] Frankfurter later said that Elman

[367] SNYDER, *supra* note 4, at 628.

[368] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); SNYDER, *supra* note 4, at 557-58, 569.

[369] SNYDER, *supra* note 4, at 557-58, 569.

[370] *Id.* at 573; SILBER, WITH ALL DELIBERATE SPEED, *supra* note 355, at 219-27.

was the "real strategist of the litigation" who "proposed what the Supreme Court finally decreed, namely that the Court should not become a school board for the whole country."[371]

Elman later admitted that these "ongoing private conversations with the Justice" and his sharing of parts of the brief, were problematic, but argued that the case "transcended ordinary notions about propriety in litigation."[372] We can easily imagine why a young justice department lawyer deeply committed to fighting segregation, relished the chance to develop his strategy with the help of a sitting justice, who would soon hear the case. Elman was no doubt delighted that Justice Frankfurter gave him "confidential information about his [Frankfurter's] and his colleagues' views on the case, Brown v. Board of Education, information that inspired Mr. Elman to write a crucial argument into the Justice Department's brief."[373] Thus, Elman recalled he and the justice "fully discussed" the case and that in *Brown* "'I knew everything, or at least he gave me the impression that I knew everything, that was going on at the Court. He told me about what was said in conference and who said it.'" [374]

While understanding why Elman had these improper conversations, we cannot understand why Frankfurter, or any justice, would secretly help one side of a case in ways that were utterly improper. The ethical issues here are not even close. A sitting jurist has absolutely no business revealing the private discussions of a judicial conference. This also violates well established judicial and legal ethics when a judge in a case has *ex parte* discussions with an attorney about the brief the attorney is writing.[375]

VII. THE ANTI-DEMOCRATIC JUSTICE: FROM WORLD WAR II TO THE COLD WAR

After World War II Frankfurter continued to have a mixed (at best) record on civil liberties and civil rights. Snyder argues that Frankfurter's commitment to "democracy" and civil liberties guided his jurisprudence. However, in addition to the flag salute and internment cases, a number of Frankfurter's opinions illustrate the problematic nature of this claim. These include cases involving: a) laws requiring that Orthodox Jews close their businesses on Sundays; b) flagrant examples of segregation and racism in which Frankfurter defended the racial status quo; and c) the gross malapportionment of state legislative districts, which made a mockery of "democratic" representation. In many of these cases Frankfurter supported existing laws and government policies that were

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[371] SILBER, WITH ALL DELIBERATE SPEED, *supra* note 355, at 223-24. We might argue that this outcome undermined integration and led to years of delay as southern states used this tepid approach to integration to prevent it.

[372] SILBER, WITH ALL DELIBERATE SPEED, *supra* note 355, at 223.

[373] Stuart Taylor, Jr., *Key 1954 Bias Case: A Drama Backstage*, NEW YORK TIMES (Mar. 22, 1987), https://www.nytimes.com/1987/03/22/us/key-1954-bias-case-a-drama-backstage.html?unlocked_article_code=1.JE4.8Vnx.XYZ62iXsSNAq&smid=url-share.

[374] *Id.*

[375] It is worth noting that when the story of these events became public, it was reported on the front page of the New York Times. *Id.*

fundamentally undemocratic. In these cases, he often supported states' rights over civil rights, civil liberties, and political fairness.

A. The Sunday Closing Cases

In 1961 the Court heard four cases dealing with Sunday closing laws.[376] Here Frankfurter wrote one of the longest opinions of his career—eighty-four pages plus two appendices covering another sixteen pages.[377] Frankfurter's opinion illustrates just how reactionary he had become and how insensitive he was to the liberties of minorities. His opinion in these cases undermines Snyder's claim that, after *Barnette*, Frankfurter "began to adapt judicial restraint to protect minority rights."[378] On the contrary, in the Sunday Closing Cases, which Snyder's biography does not even mention much less discuss, Frankfurter spent enormous energy to justify laws that blatantly discriminated against a small minority of Americans—Orthodox Jews, Seventh-day Adventists, and members of a few other Sabbatarian Christian denominations.[379]

The cases challenged Maryland, Pennsylvania, and Massachusetts laws requiring most, but not all,[380] businesses to remain closed on Sundays. Massachusetts, for example, allowed Sunday sales of wholesale chickens or cooked chickens in a restaurant, but not chickens sold by a Kosher butcher. It was legal to sell live bait to anglers and wholesale fish to restaurants and grocery stores, but not gefilte fish.[381] One provision of the Massachusetts law provided exemptions for some businesses operated by anyone *except* Christian Sabbatarians and observant Jews. The law stated that it did not apply to "the retail sale [on Sundays] of tobacco in any of its forms by licensed innholders, common victuallers, druggists and newsdealers whose stores are open for the sale of newspapers every day in the week."[382] In other words, a mainstream Christian or an atheist who sold newspapers and tobacco Monday through Saturday was permitted to make the same sales on Sunday. But a Seventh-day Adventist or an observant Jew, who sold the same products on Monday through Friday, but for religious reasons was closed on Saturday, was prohibited from selling

[376] Braunfeld v. Brown, 366 U.S. 398 (1961); McGowan v. Maryland, 366 U.S. 420 (1961) Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961); Gallagher v. Crown Kosher Supermarket of Massachusetts, 366 U.S. 617 (1961).

[377] McGowan v. Maryland, 366 U.S. 420, 459 (1961) (Frankfurter, J. concurring and appendix I, 543-550; and Appendix II, 551-559).

[378] SNYDER, *supra* note 4, at 429.

[379] In Girouard v. United States, 328 U.S. 61 (1946), Frankfurter had also demonstrated his willingness to persecute Seventh Day Adventists.

[380] Maryland allowed the sale of, among other things, confectioneries, tobacco products, newspapers, periodicals, boating accessories, flowers, and souvenirs. McGowan at 420; Massachusetts allowed, among other things, professional and amateur sporting events (both outdoors and indoors) and the operation of businesses engaged in golf; tennis; the showing of "motion pictures;" the sale of "live bait for noncommercial fishing;" renting horses, carriages, boats, and bicycles; "the printing, sale and delivery of newspapers;" the wholesale sale of fresh fish and dressed poultry; the making of cheese and butter; the transportation of livestock to fairs and sporting events; "bowling and games of amusement where prizes are awarded;" amusement parks; beach resorts; digging for clams; the sale of art at exhibitions; "conducting of private trade expositions;" and the sale of alcoholic beverages, as long as they were not taken off the premises. Gallagher at 619-22.

[381] McGowan at 420; Gallagher at 619-22.

[382] Braunfeld at 636.

anything on Sunday. To add insult to this injury, the law specified that these prohibitions applied to the "Lord's Day," which of course was not the "Lord" for Jews or the "Lord's Day" for Jews or Christian Sabbatarians.[383]

Two of the Sunday Closing cases, *Braunfeld v. Brown*[384] and *Gallagher v. Crown Kosher Supermarket*,[385] involved Orthodox Jews, whose beliefs required them to be closed on Saturday. Thus, they opened on Sundays, so, like other businesses, they could operate six days a week. The Court upheld all of these laws and the convictions of the offending business owners.[386] Frankfurter wrote his own massive one-hundred-page concurrence supporting all of these Sunday closing laws. Douglas, Brennan, and Stewart dissented in the two cases involving observant Jews. Braunfeld, who operated a small clothing store, asserted that he would "be unable to continue in his [retail] business if he may not stay open on Sunday."[387] Presumably, Frankfurter did not care if Braunfeld suffered for his faith, or maybe he believed Braunfeld should have just taken on a non-Jewish employee to run the business on Saturday. As in the Flag Salute cases, Frankfurter was perfectly willing to allow the states to impose an economic cost for people of faith, giving Jehovah's Witnesses the choice of violating their religion or paying for private schools, and forcing observant Jews to choose between their faith and their livelihood.

Crown Kosher was even more problematic. The market sold Kosher food. Most of its customers were observant Jews. Under Jewish law, the store would not have been Kosher if it had opened on Saturday, whether operated by a Jew or a non-Jew. Furthermore, the observant Jewish customers could not have shopped on Saturday. However, if the store were not open on Sundays, observant customers who worked a traditional five-day-a-week job would have had difficulty buying food.[388]

Justice William J. Brennan, a Roman Catholic, dissented, noting that the "effect" of such laws "is that no one may at once and the same time be an Orthodox Jew and compete effectively with his Sunday-observing fellow tradesmen." Brennan argued that "this state-imposed burden on Orthodox Judaism" was unconstitutional.[389] He noted that the law had "exactly the same economic effect as a tax levied upon the sale of religious

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[383] *Id.*

[384] Braunfeld v. Brown, 366 U.S. 398 (1961).

[385] Gallagher v. Crown Kosher Supermarket of Massachusetts, 366 U.S. 617 (1961).

[386] Douglas Laycock suggests that "The Court up-held Sunday closing laws on the ground that they functioned more as a restraint of trade than as an establishment of religion." Douglas Laycock, *The Many Meanings of Separation*, 70 U. CHI. L. REV. 1667, 1696 (2003).

[387] Braunfeld, 366 U.S. at 599.

[388] Arguably, someone should have made a Free Exercise claim in *Crown Kosher* on behalf of the observant Jews who were deprived of their one non-working day to buy groceries. This claim might have noted that people who did not keep Kosher had many opportunities to buy food of various kinds in Massachusetts on a Sunday, but observant Jews could not. Such a claim might not have been successful, but it should have been made. Or, Frankfurter might have made such an argument if he had been inclined to protect the rights of Jews or other religious minorities, but there is nothing in his jurisprudence that suggests he had any such inclinations.

[389] Braunfeld v. Brown, 366 U.S. 398, 613 (1961) (Brennan, J. dissenting).

literature," which the Court had struck down.[390] Two Protestant Justices, Potter Stewart and William O. Douglas (whom Frankfurter called an anti-Semite), also defended the rights of Jews.

Frankfurter was over-the-top in supporting this discrimination against Jews with a massive eighty-four-page concurrence in *McGowan v. Maryland*, followed by a seven-page appendix listing all colonial and post-Revolutionary War Sunday laws (when most colonies and many of the new states had official churches) and a second nine-page appendix of all current statutes on this issue. He provided these lists to defend his support for a law titled "Observance of the Lord's Day," making the traditional Christian sabbath an "official" state holiday, while irreparably harming observant Jews and Christian Sabbatarians.[391] Clearly Frankfurter felt compelled to justify to himself, and to the world, why he continued to support laws which discriminated against religious minorities.[392]

Frankfurter's narrow notion of "democracy," that almost anything a state legislature passed was constitutional, left no space to protect minorities, except in some (but not all) cases involving discrimination against African Americans. He saw no constitutional problem with Massachusetts requiring that all business owners close (except those that were exempt, such as bait stores, bakeries, and some stores that sold tobacco) in "Observance of the Lord's Day." He cited colonial and early American statutes to support his claim. It was as though, in Frankfurter's mind, nothing in Constitutional law, except equal protection for African Americans, had changed since 1787 or 1791. As with Jehovah's Witnesses or Japanese Americans, Frankfurter had no interest in protecting fundamental liberties of minorities.

Frankfurter was too ill to hear the last few cases of 1962, including the school prayer case, *Engle* v. *Vitale*.[393] Without any evidence or even a footnote, Brad Snyder asserts that "given his votes in favor of separation of church and state," Frankfurter would have voted to strike down school prayer.[394] Perhaps this is true, since he had favored separation of church and state in cases involving religious instruction in public schools or the state spending money on school buses to help parochial schools.[395] But he

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[390] *Id.*, citing Follett v. Town of McCormick, 321 U.S. 573 (1944). In passing, it is worth nothing that *Follett* involved a tax directed at Jehovah's Witnesses who went door-to-door seeking converts. The Court struck down the tax, but Frankfurter dissented, refusing to consider that the law was a form of religious persecution. *Follett* at 579. At least Frankfurter was consistent in his support for the persecution of religious minorities by local governments.

[391] McGowan v. Maryland, 366 U.S. 420, 459 (1961) (Frankfurter, J. concurring in appendix I, 543-550; and Appendix II, 551-559).

[392] Curiously, Robert Burt's book on the intersection between Frankfurter's career and his Jewish background does not mention the Sunday closing cases. Nor does Snyder mention them in his book. Burt notes that Frankfurter grew up as an observant Jew but abandoned all religious practice when he was a junior in college. BURT, TWO JEWISH JUSTICES, *supra* note 13, at 38-39. It seems likely that Frankfurter felt compelled to show how "neutral" he was to issues involving Jews (or to distance himself from his upbringing) with his opinion in these cases.

[393] 370 U.S. 421 (1962).

[394] SNYDER, *supra* note 4, at 699.

[395] McCollum v. Board of Education, 333 U.S. 203 (1948). Everson v. Board of Education of Ewing Township, 330 U.S. 1 (1947); Zorach v. Clauson, 343 U.S. 306 (1952).

might also have supported school prayer, just as he supported Sunday closing laws, which directly merged church and state by making the traditional Christian sabbath an official state holiday, and furthermore punished anyone who did not observe that religious holiday according to the dictates of the state. Similarly, in his opinions upholding laws requiring children to violate their own faith to salute the flag he argued that the state could require children to openly violate their religion and punish children and their parents if they refused. He might have written a long appendix, as in the Sunday closing cases, pointing out that colonial-era and nineteenth-century schools had prayers and Protestant Bible readings. He might also have asserted that amid the Cold War, children should be forced to pray for the country, just as he believed they should be forced to salute the flag during World War II. Modern scholars might *want* to think Frankfurter would have voted to strike down school prayer, but we cannot know, and the evidence is at best murky. In the context of the flag salute and Sunday closing cases (which Snyder never discussed), it is likely that Frankfurter would have supported an official prayer, just as he supported the Christian sabbath or Lord's Day.

B. Racial Justice, Segregation, Civil Rights, and Policing

Frankfurter's record on racial equality was sometimes progressive and smart, and sometimes not. He played an important role, but not the key role, in obtaining a unanimous decision in *Brown v. Board of Education*.[396] The key player was Chief Justice Earl Warren, whom Frankfurter disliked, in part because he wanted to be Chief Justice.[397] Frankfurter's landmark 1960 opinion in *Gomillion v. Lightfoot*[398] struck down new boundaries for the city of Tuskegee, Alabama that were explicitly created to exclude almost every African American from the city to prevent them from voting in municipal elections. However, this was his only important majority opinion in a civil rights case in his entire career.

Frankfurter's relationship to race and civil rights was mixed. Sometime after 1929, he began to serve as an advisor to the NAACP at the personal request of the organization's general secretary, Walter White.[399] He served as an advisor but never took any compensation. When he went on the Court, he terminated this relationship, as he did others, including his membership in the American Bar Association and the Harvard Club.[400] As noted above, in the early 1940s he asserted that "when a priest enters a monastery, he must leave—or ought to leave—all sorts of worldly desires behind him. And this Court has no excuse for being unless it's a monastery."[401] But, while terminating his formal relationships with institutions and organizations, Frankfurter did not terminate his far more

[396] 347 US 483 (1954).

[397] *See generally*, RICHARD KLUGER, SIMPLE JUSTICE (rev. ed., 2004) (1975).

[398] 364 U.S. 339 (1960).

[399] WALKER, IN DEFENSE OF AMERICAN LIBERTIES, *supra* note 3, at 90. KLUGER, SIMPLE JUSTICE, *supra* note 390, at 133.

[400] *Justice Describes Former N.A.A.C.P. Tie,* N.Y. TIMES, September 30, 1958. https://www.nytimes.com/1958/09/30/archives/justice-describes-former-naacp-tie.html

[401] Frankfurter Diaries quoted in Melvin I. Urofsky, *Conflict Among the Brethren*, *supra* note 234, at 101-02.

ethically problematic informal political relationships with presidents, cabinet members, or major players in federal agencies.

In his early years at Harvard Law School, Frankfurter mentored Charles Hamilton Houston while he took his LL.B.[402] and then was his advisor when Houston continued on for his S.J.D. Frankfurter later mentored William Henry Hastie, Houston's cousin, who also did an S.J.D. under Frankfurter and would eventually become the first Black federal judge in the United States. Houston and Hastie were also the first Blacks to serve as editors on the Harvard Law Review.[403]

Frankfurter also connected his former law student Nathan R. Margold to Houston, and working together they developed a long-range strategy to challenge school segregation.[404] Frankfurter's work with Houston may have been his greatest contribution to Civil Rights because his former student went on to be the Vice Dean at Howard Law School, the mentor of Thurgood Marshall and other important civil rights attorneys, and the first director of the NAACP Legal Defense Fund (LDF), which would eventually win *Brown* and almost all of the other major civil rights cases.[405] Although he never litigated civil rights cases, in the 1920s and 1930s Frankfurter mentored the first generation of twentieth century Black civil rights lawyers, while giving excellent advice to the NAACP.

This record should have led Frankfurter to be the Court's greatest advocate of racial equality since John Marshall Harlan, who sat from 1877 to 1911. In his first decade and a half on the Court, Frankfurter joined majority opinions (but never wrote any) generally supporting civil rights; chipping away at segregation in transportation, higher education, voting, and housing; and protecting the due process rights of African Americans, usually from southern injustice. Often these cases were unanimous. From the early 1940s to the mid-1950s, Frankfurter was generally, but not always,[406] supportive of claims that challenged segregation and racism. However, as noted above, he dissented in decisions supporting civil rights in cases involving police brutality and provided the fifth vote to impose the death penalty in the Willie Francis case.

Frankfurter supported civil rights in cases involving Black litigants who had been denied fair trials,[407] striking down a restrictive covenant that barred the sale of land to an African American,[408] and overturning convictions where African Americans or Mexican Americans were excluded

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[402] What today would be called a J.D.

[403] RICHARD KLUGER, SIMPLE JUSTICE, *supra* note 390, at 116-17, 133-37, 156-58.

[404] *Id.*

[405] ON HOUSTON, *SEE* GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS (1983).

[406] For example, in Feiner v. New York, 340 U.S. 315 (1951), he joined the majority in upholding the conviction of a white college student for a public speech attaching racism.

[407] Chambers v. Florida, 309 U.S. 227 (1940) (overturning a racially charged conviction where there had been coerced confessions).

[408] Hansberry v. Lee, 331 U.S. 32 (1940). This case is usually taught as a civil procedure case, but the facts and substance were about race. Frankfurter was also part of a unanimous Court in Shelly v. Kraemer, 334 U.S. 1 (1948) and Hurd v. Hodge, 334 U.S. 24, 36 (1948) (Frankfurter, J., concurring), which struck down restrictive covenants in housing under state law and in the District of Columbia.

from jury service.[409] Frankfurter supported using the Interstate Commerce Act to prohibit segregation on interstate trains and protecting African Americans who refused to be segregated on trains.[410] He agreed that all voters, including African Americans, had a constitutional right to vote in primaries for congressional seats[411] and voted to overturn a Texas law denying Black Americans the right to vote in the Democratic primary.[412] He also supported integrating state graduate and professional schools as part of a unanimous Court.[413]

Most importantly, he was part of the unanimous court in *Brown v. Board of Education*,[414] *Brown*'s companion case *Bolling v. Sharpe*,[415] and a less well-known case that ordered the city of Louisville, Kentucky to integrate its public golf course.[416] He joined the unanimous per curiam opinion upholding a lower court ruling that segregation on buses in Montgomery, Alabama (and by extension everywhere else in the South) was unconstitutional, which overturned the precedent in *Plessy v. Ferguson*.[417] He was also part of the unanimous court preventing the state of Alabama from prohibiting the NAACP from operating in that segregated state.[418] During this period, he also supported decisions dismantling California's long history of discriminating against Japanese immigrants and their children in land ownership or obtaining various commercial licenses.[419]

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[409] Smith v. Texas, 311 U.S. 128 (1940); Hernandez v. Texas, 347 U.S. 475 (1954). In another case, Frankfurter joined Douglas and Black in dissenting when the Supreme Court denied death row inmates a rehearing in federal court, despite claims of racial discrimination in jury pools and another claim that the conviction was based entirely on race discrimination. Brown v. Allen, 344 U.S. 443 (1953) (Frankfurter, J. dissenting).

[410] Mitchell v. United States, 313 U.S. 80 (1941) and Morgan v. Virginia, 328 U.S. 373 (1946). In Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28 (1948), Frankfurter joined a seven-vote majority to uphold a state law prohibiting segregation, rejecting an argument by Bob-Lo that under various nineteenth century cases, the state could not regulate its boats because they carried passengers from Michigan to Canada. He also supported integration on railroads in Henderson v. United States, 339 U.S. 816 (1950).

[411] United States v. Classic, 313 U.S. 299 (1941). *Classic* challenged Louisiana's non-racial restrictions on voting in primary elections at a time when Louisiana also barred Blacks from voting in primary or general elections. Although *Classic* did not challenge these racial restrictions, it was the key to striking down such racially discriminatory laws. Significantly, the Louisiana policy that *Classic* did address was based on state laws, and under Frankfurter's later jurisprudence of almost always deferring to state legislatures, he should have opposed this outcome. Instead, he voted with the *Classic* majority in what was a four to three decision.

[412] Smith v. Allwright, 321 U.S. 649 (1944). *See also* Terry v. Adams, 345 U.S. 461 (1953) (Frankfurter, J., concurring).

[413] Sipuel v. Oklahoma State Board of Regents, 332 U.S. 631 (1948); Sweat v. Painter, 339 U.S. 629 (1950); McLaurin v, Oklahoma State Regents for Higher Education, 339 U.S. 637 (1950).

[414] 347 U.S. 483 (1954). He was also past of the unanimous majority in Brown II, 349 U.S. 294 (1955).

[415] 347 U.S. 497 (1954).

[416] Muir v. Louisville, Park Theatrical Association, 347 U.S. 971 (1954).

[417] Gayle v. Browder, 352 U.S. 903 (1956); Plessy v. Ferguson, 163 U.S. 537 (1896),

[418] NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958). He took a similar position for a unanimous court in Bates v. City of Little Rock, 361 U.S. 516 (1960).

[419] Oyama v. California, 332 U.S. 633 (1948); Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948).

After more than a decade of taking on segregation, in 1958 the Court was able to reiterate that "separate but equal" had no place in American life. The case, *Cooper v. Aaron*,[420] involved attempts by officials in Arkansas to circumvent a federal court order to integrate Little Rock's Central High School. This was the first time since *Brown v. Board of Education* that the Court had an opportunity to speak about segregation in public schools. By this time, there were three new members of the Court, and within the Court there was a strong sense that the country, once again, should see the unanimity that the Court had in *Brown*. Tactically, the Court decided on a per curiam opinion, which would not have a single author. The Court heard the case in late August 1958 as part of a special term—the first in five years—so that the school officials would be on notice to allow the Black students to enter Central High when the new school year began in September.

Although he supported an end to segregated schools in *Brown,* in the Little Rock case Frankfurter urged Chief Justice Warren to delay ordering that the school desegregate to placate what Frankfurter considered to be southern moderates. Frankfurter had no actual evidence that such moderates were active in Arkansas, or anywhere else in the former Confederate states.[421] The lawyer for the Board asked for a two-and-a-half-year delay,[422] which was hardly "moderate." The day after the argument, "the Court announced a short, unsigned decision drafted by Frankfurter and Harlan" upholding the lower court and ordering the school to desegregate.[423] Justice Brennan then circulated drafts of an opinion which could be the basis of the unanimous per curiam opinion. Frankfurter read the draft and commented on it.

Brennan also proposed, based on a suggestion from Frankfurter, that all nine justices sign the per curiam opinion. After reading Brennan's final draft, Frankfurter wrote him a note saying, "you have made me content," indicating he would sign the opinion.[424] This would be the first time in Supreme Court history that all Justices would sign a per curiam

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[420] 358 U.S. 1 (1958).

[421] The only exception to this were in some private, mostly Catholic, schools that accepted integration. *See* Library of Congress, *School Segregation and Integration Project*, https://www.loc.gov/collections/civil-rights-history-project/articles-and-essays/school-segregation-and-integration/#:~:text=He%20explains%20how%20the%20Catholic,excommunication%20and%20we%20have%20integration (noting that "Lawrence Guyot, who later became a leader in the Student Nonviolent Coordinating Committee, grew up in Pass Christian . . . [and] explains how the Catholic schools were desegregated there: 'The Catholic Church in 1957 or '58 made a decision that they were going to desegregate the schools. They did it this way. The announcement was we have two programs. We have excommunication and we have integration. Make your choice by Friday. Now there was violence going on in Louisiana. . . . I learned firsthand that institutions can really have an impact on social policy.'"). *See also* MARK NEWMAN, DESEGREGATING DIXIE: THE CATHOLIC CHURCH IN THE SOUTH AND DESEGREGATION, 1945-1992 (2018) 138-168; *and* Daniel Hutchinson, *Catholics and Jim Crow: Recent Scholarship on Southern Catholicism During the Civil Right Movement* 12 J. OF SOUTHERN RELIGION (2010), https://jsr.fsu.edu/Volume12/Catholics%20and%20Jim%20Crow%20Review%20Essay.html.

[422] SNYDER, *supra* note 4, at 651-52. For much of Snyder's discussion of the background to this case, *see id.* at 635-65.

[423] *Id.* at 652.

[424] *Id.* at 653.

opinion, and it would signal to the nation that the Court was still unanimously in favor of school desegregation. It seemed like all the justices were on board. But then Frankfurter announced that while he would sign the per curiam opinion, he was also going to write a concurrence. All eight of the other justices were furious. Harlan and Black, who by this time were his closest colleagues on the Court, tried to talk him out of it. But Frankfurter was adamant, only agreeing to publish his concurrence a week after the opinion was announced.[425]

Frankfurter's action in *Cooper v. Aaron* and his insistence on writing a concurrence after everyone was on board, including Frankfurter himself, illustrates his failure as a Justice. Snyder explains Frankfurter's behavior by saying he was "a bad politician."[426] But this is quite wrong. Frankfurter's whole career demonstrates the opposite. This includes his ability to stay in the Taft administration even as he opposed Taft's reelection and then serve in the Wilson administration, after opposing his election. One of his political skills was his ability to make friends with the right people, like Henry Stimson and Frank Roosevelt, and to serve as an advisor to FDR, even after he was on the Court and was presumably "above" politics. Frankfurter's ability to place his students and friends in places of power is another example of his extraordinary political skills. The issue in *Aaron v. Cooper* was not that Frankfurter was a "bad politician," but that after he went on the bench, he became increasingly egotistical, self-centered, judgmental, and intellectually rigid. His "fault" was that he could only get along with people he could dominate, unless they were clearly more powerful than he was, like Holmes, Brandeis, Stimson, or Roosevelt. As one scholar notes, the "entire episode of Frankfurter's separate opinion in *Cooper v. Aaron* suggests not so much his passion for standing alone on the Court as his compulsion to drive his brethren away."[427] In his diary Frankfurter reported on conversations he had with other justices, showing that the interactions with them were "suffused with hectoring, condescending self-righteousness."[428]

In fact, Frankfurter was an excellent politician, but he was a terrible colleague, who could not compromise or collaborate with eight other men who were his equals in power. Furthermore, Frankfurter could never accept that most of his fellow "brethren" were as smart or talented as he was, and thus he was disdainful of almost all of them. His claim, only a few years after he came on the Court that he was a better jurist than Chief Justice Charles Evans Hughes, underscores his arrogance and his "chutzpah."[429] His last-minute refusal to support a fully unanimous opinion in *Cooper v. Aaron* shows that his ego, rather than successfully dismantling segregation, was what mattered most to him. Fortunately, this act of self-centered indulgence did not derail the power of the unanimous per curiam

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[425] *Id.* Cooper v. Aaron, 358 U.S. 1, 20 (1958) (Frankfurter, J. concurring).

[426] SNYDER, *supra* note 4, at 648. At the same time, Snyder also asserts Chief Justice Warren was "a good politician but a bad constitutional lawyer." Because Frankfurter did not like Warren, it seems that Snyder feels compelled to attack him.

[427] BURT, TWO JEWISH JUSTICES, *supra* note 13, at 52.

[428] *Id.*

[429] WIECEK, BIRTH OF THE MODERN CONSTITUTION, *supra* note 2, at 89.

decision. Justice Brennan, who wrote the opinion, did not need to enhance his ego by claiming it as his own.

After *Cooper v. Aaron*, Frankfurter joined a unanimous Court protecting the Arkansas NAACP from state suppression,[430] and concurred in a unanimous decision supporting the voting rights of Black Americans in Georgia.[431] In *Gomillion v. Lightfoot*, he wrote his only significant majority opinion supporting civil rights.[432] It was an important case. Tuskegee, Alabama, had redrawn its boundaries to exclude almost every African American in the city. In *Colegrove v. Green*,[433] in 1946, Frankfurter had written for a six to three majority, that the Court had no power to overrule a state reapportionment or lack of a reapportionment. In that case Illinois had not had any reapportionment in its Congressional districts for forty-five years. At the time of the case, congressional districts in the state ranged from 914,000 residents to just 112,116.[434] Frankfurter considered this a "political" question, not a legal one. Frankfurter believed that the state legislatures should deal with these issues. He asserted that a decision that would make representation fair and meaningful was "hostile to a democratic system" because it would "involve the judiciary in the politics of the people."[435] This was typical of Frankfurter's refusal, or inability, to look at the reality of politics: no legislature was likely to voluntarily reapportion itself, since sitting members might lose their seats. But Frankfurter did not think there was anything undemocratic about an eight-to-one disparity in population in the size of electoral districts.[436] Frankfurter took the same position in *Baker v. Carr*[437] two years after *Gomillion*. However, in *Gomillion*, Frankfurter departed from *Colegrove* and agreed that the city of Tuskegee had violated the Fifteenth Amendment because the city had redrawn its boundaries to disenfranchise almost every Black voter it could reach. This was a powerful argument for racial equality and is probably Frankfurter's most lasting contribution to constitutional doctrine. It is often seen as his greatest opinion.

Gomillion would also be his last vote for civil rights and against racism. Well before the *Brown* decision (as well as after it), Frankfurter had opposed racial equality or tried to limit decisions that attacked racism. While he clearly despised segregation, in some civil rights cases he worked hard to soften the language of the Court, to "soft-pedal" an "uncompromising condemnation of racism."[438] In *Burton v. Wilmington*

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[430] Bates v. City of Little Rock, 361 U.S. 516 (1960).

[431] United States v. Raines, 362 U.S. 17 (1960).

[432] 364 U.S. 339 (1960).

[433] 328 U.S. 549 (1946).

[434] Colegrove v. Green, 328 U.S. 549 (1946), Black, J., dissenting at 566. *See also* WALKER, IN DEFENSE OF AMERICAN LIBERTIES, *supra* note 3, at 255-56.

[435] Colegrove v. Green, 328 U.S. 549 (1946).

[436] In dissent Justice Black also noted that the state legislature had not been reapportioned since 1901. Id. at 567. Illustrative of this discrepancy, in 1900 Chicago had a population of 1,698,575 but by 1940 the city had 3,396,808 residents. In a city that had doubled in size no legislative districts had been reapportioned in forty-five years. https://physics.bu.edu/~redner/projects/population/cities/chicago.html

[437] 369 U.S. 186 (1962).

[438] WIECEK, BIRTH OF THE MODERN CONSTITUTION, *supra* note 2,at 670, in Bob Lo-Lo Excursion Co. v. Michigan, 333 U.S. 28 (1948). Similarly, in Sipuel v. Board of Regents of Oklahoma, 332 U.S. 631 (1948), "he strove unsuccessfully to get [Chief Justice Fred] Vinson

Parking Authority, in a dissent, argued for the right of a state to maintain a segregated restaurant on state owned property, and to use taxpayer dollars to subsidize the racist policies of the restaurant.[439]

A month after *Gomillion*, in *Shelton* v. *Tucker*,[440] Frankfurter wrote a dissent in a case involving Black teachers, the NAACP, and Arkansas. At issue was a state law requiring that all teachers in public institutions—from elementary schools to state universities—report if they were members of any organizations or had contributed money to them. The law further required that they list any such organizations to which they belonged in the five years before the law was passed. Because this was not a criminal statute, it could not technically be called an "ex post facto" law, but clearly it was designed to not only intimidate teachers but also set them up to be fired for exercising their right to freedom of association before the law was passed. The purported goal of the law was to prevent communists from teaching in the state, but in reality, the law aimed to expose anyone who was a member of the NAACP or other civil rights organizations. This law was not a holdover from the McCarthy period. It had been passed at the "Second Extraordinary Session of the Arkansas General Assembly of 1958"[441]—a session called to pass laws to prevent the integration of Little Rock's Central High School. The goal of the law was to intimidate Black state employees from joining civil rights organizations, particularly the NAACP, which had led the fight to desegregate Arkansas's schools. In addition, the law violated the First Amendment rights of citizens to join legal organizations without intimidation.

Frankfurter, as he so often did, expressed his personal distaste for the law, even as he supported it. His opinion made almost no mention of Little Rock, race, or segregation and instead focused on trusting the state to act in an unbiased way. This was of course patently absurd. In the wake of *Cooper v. Aaron*, the state had closed the Little Rock schools rather than integrate them, and like all former Confederate states, Arkansas was thoroughly segregated and had a long record of violence and intimidation against Blacks.[442] As he so often did, Frankfurter simply ignored reality. Here Frankfurter was willing to throw many Black teachers to the tender mercies of an avowedly racist and segregationist governor (Orville Faubus), state legislature, local school boards, local prosecutors, and state judges.

A year later, Frankfurter was the lone dissenter in *Monroe* v. *Pape*, which involved Chicago police officers who invaded the home of a Black family without a warrant, forced the entire family to stand naked in front of the officers while they searched the house, and then arrested the

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to eliminate language from the per curiam opinion that might 'serv[e] as a target for contention,'" WIECEK, BIRTH OF THE MODERN CONSTITUTION, *supra* note 2, at 669-70. In another case involving race, Omaya v. California, 332 U.S. 633 (1948), Frankfurter attacked Justice Murphy's concurring opinion in his diary, calling it "a long-winded soap-boxy attack against racism." WIECEK, BIRTH OF THE MODERN CONSTITUTION, *supra* note 2, at 664.

[439] 365 U.S. 715, 727 (1961), (Frankfurter, J., dissenting).

[440] 364 U.S. 479 (1960)

[441] *Id.* at 480. Snyder ignores this case.

[442] For example, *see* Moore v. Dempsey, 261 U.S. 86 (1923) in which the Supreme Court overturned death sentences and long prison sentences for Blacks in Arkansas, who had defended themselves from white mobs, and were convicted at a trial surrounded by a mob.

homeowner and held him incommunicado for ten hours, before releasing him without any charges.[443] Eight justices believed the officers were liable under Section 1983 of the United States Code, which was based on Reconstruction-era laws designed to protect African Americans from state-sponsored violence. Frankfurter, while always claiming to abhor racial discrimination, was the only dissenter. He wrote a fifty-three-page memorandum arguing that the police could not be tried under the federal Ku Klux Klan Act of 1871, which was the origin of Section 1983, but were instead only subject to state prosecutions.[444] This dissent ignored the utter implausibility of Illinois prosecuting the police officers for their behavior. Frankfurter usually supported federal laws, but he would not do so to allow the prosecution of police for illegal and racially motivated violence against Blacks. In trying to convince his colleagues to reverse the convictions of the police, he argued that the history of the Ku Klux Klan Act had not been briefed,[445] and therefore the police should win. Reflecting his life-long support for states' rights, and his passive support for segregation in many cases, Frankfurter simply refused to see the necessity of the federal government prosecuting rogue or racist policemen, since the states would not do it. It was not that Frankfurter thought Black lives did not matter, but he thought states' rights mattered more. His lone dissent in *Monroe v. Pape* was consistent with his positions in other cases.

Burton v. Wilmington Parking Authority, the last civil rights case Frankfurter heard,[446] involved a segregated restaurant in Wilmington, Delaware, operating in a publicly owned building. Although seen as an "upper South" state, Delaware had a long history of segregation and racism.[447] Indeed, Delaware was one of only two states (the other was Kentucky) that refused to end slavery after the Civil War, doing so only when forced to by the Thirteenth Amendment. The majority of the *Burton* Court found that the restaurant constituted unconstitutional state action because the municipal agency not only owned the building where the segregated restaurant was located but was also involved in a number of aspects of its operation, including providing taxpayer support to help the restaurant stay in business.

The Court correctly concluded that the state's action violated the Equal Protection Clause of the Fourteenth Amendment. Frankfurter dissented, once again putting on his hat as an advocate of states' rights in the face of blatant segregation. In Frankfurter's world, states could not segregate Blacks in schools, but the states could subsidize restaurants that refused to serve them. Joining Frankfurter were two recent conservative Eisenhower appointees, John Marshall Harlan, II and Charles Evans Whittaker. Once again, we see the early supporter of the NAACP as "a

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[443] Monroe v. Pape, 365 U.S. 167, 202 (1961) (Frankfurter, J., dissenting).

[444] SNYDER, *supra* note 4, at 676.

[445] *Id.*

[446] Burton v. Wilmington Parking Authority, 365 U.S. 715, 727 (1961), (Frankfurter, J., dissenting).

[447] *See, e.g.,* Neal v. Delaware, 103 U.S. 370 (1881), where the Supreme Court reversed the conviction of Black man because, more than a decade after the ratification of the Fourteenth Amendment Delaware refused to allow any Blacks to serve on juries. See also Benno C. Schmidt, Jr., *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of Strauder v. West Virginia*, 61 TEX. L. REV. 1401 (1983).

liberal turned conservative justice."[448] Frankfurter's dissents in these cases and others, on a Court that was dismantling segregation, illustrate that whatever he was before 1939, from the beginning of his Court years he was conservative and sometimes reactionary.

These last three dissents against equal justice and in favor of racism, near the end of Frankfurter's judicial career, were not unique. While he often supported racial equality, as already noted, he was inconsistent and at times oblivious to the reality of racial discrimination. As his painful concurrence in *Cooper v. Aaron* demonstrates, he could not even be trusted to support an outcome when he said he would. Thus, while usually supporting integration, Frankfurter was also inconsistent in many cases involving racism in American life. He dissented in *Screws* v. *United States*, where the Court upheld the power of the United States to prosecute a Georgia sheriff who beat a handcuffed Black man so badly that he soon died. The Court described this as "a shocking and revolting episode in law enforcement," but Frankfurter objected to using a Reconstruction-era statute to protect the civil rights of African Americans in the South, arguing that the statute was unconstitutionally vague.[449] In part, this decision reflected Frankfurter's unwillingness to interfere with oppressive police tactics, often used against Blacks. This case was similar to the position he later took in *Monroe v. Pape*,[450] as the lone dissenter in an equally shocking case, although one that did not lead to a death.

In *Adamson v. California*[451] Frankfurter wrote a concurrence as part of a five-vote majority with the most conservative members of the Court, refusing to extend a right against self-incrimination in a criminal case involving a Black defendant.[452] While a due process case, rather than a civil rights case, *Adamson* reflected the reality that Black defendants (like Adamson) were more likely to be convicted that Whites. In *Perez v. Brownell*, Frankfurter wrote the majority opinion for a five-to-four Court, upholding the Eisenhower administration's claim that someone born in Texas, who was mostly raised in Mexico, had lost his citizenship when he voted in one Mexican election and failed to register for the draft during World War II.[453] Here Frankfurter, took a very hard line in a citizenship case involving a racial minority, just as he had against a member of a religious minority in *Girouard v. United States*.[454]

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[448] SNYDER, *supra* note 4, at 4. This is another case Snyder ignored.

[449] 325 U.S. 91 (1945).

[450] Monroe v. Pape, 365 U.S. 167 (1961).

[451] Adamson v. California, 332 U.S. 46 (1947).

[452] *Id.*

[453] 356 U.S. 44 (1958).

[454] 328 U.S. 61 (1946). He took an equally hard line in his dissent in Trop v. Dulles, 356 U.S. 86 (1956), where the majority prohibited the U.S. government from taking American citizenship away from a soldier who had briefly deserted (for less than twenty-four hours) and then willingly returned to his military post. The Court held that it was "cruel and unusual punishment" to make someone "stateless" for this relatively minor offense. Frankfurter had no problem making the former soldier stateless for this minor and short-term infraction. It is again worth noting that Frankfurter almost always sided with the federal government *except* in cases involving civil rights and police brutality, like *Screws* and *Pape*; in those cases, he objected to using federal civil rights laws to vindicate civil rights.

On balance, Frankfurter was often inclined to support civil rights and racial equality but was never on the cutting edge of these issues. That he wrote only one important majority opinion in a civil rights case—in *Gomillion*—speaks loudly about how, on the Bench, he abandoned his early support of the NAACP and became increasingly conservative and disconnected from the reality of American race relations. His opinions and memos in *Screws*, *Pape*, *Shelton*, and the Wilmington restaurant case, his behavior in *Cooper v. Aaron*, and his persistent support for states' rights illustrate why scholars have been correct in portraying "Frankfurter as a judicial failure, a liberal turned conservative justice, and as the Warren Court's principal villain."[455]

C. Reapportionment

In his last case, Frankfurter wrote a long dissent in *Baker v. Carr*,[456] which required that state legislative districts be apportioned on the basis of population—under the theory of "one person, one vote." The case came from Tennessee, which had not reapportioned the state legislature since 1901. As a result, representation was skewed in ways that made a mockery of democracy and should have deeply influenced a "Democratic Justice." For example, Hamilton County (which included the city of Chattanooga) was nineteen times larger than tiny Moore County. But each had the same number of representatives in the state legislature. The same was true in other states as well. In Vermont, one legislative district had only 238 people, while another had about 33,000 people. One state senate district in Los Angeles, California had about six million people in it, while another California state senate district had about 14,000 people.[457]

Frankfurter argued that this was a "political question" and "emphasized that the Court should leave purely political questions to the elected branches and to the people themselves."[458] But Frankfurter ignored the reality that short of judicial intervention (or a civil war), there was no path to democratic change for reapportionment. The Tennessee legislature simply refused to redistrict because that would have pushed many sitting representatives out of the legislature. It would also have shifted political power to the many large cities and their suburbs, and away from the tiny rural counties, where few people lived, but from which a hugely disproportionate number of state legislators were elected.

To put it bluntly, there is no democratic "political" solution to absurdly unfair and unrepresentative apportionment if the political system itself is rigged. This was the case in Tennessee and elsewhere. In a six to two decision, the Court set the stage for massive reapportionment to create legislative districts that are substantially the same size.

Snyder argues that Frankfurter's dissent in *Baker v. Carr* was his "most prophetic," but he never explains why he thinks that, or what the

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[455] SNYDER, *supra* note 4, at 4.

[456] Baker v. Carr, 369 U.S. 186 (1962), Frankfurter, J. dissenting at 266-330.

[457] *Baker v. Carr* in PAUL FINKELMAN AND MELVIN I. UROFSKY, LANDMARK DECISIONS OF THE UNITED STATES SUPREME COURT 327 (2nd ed. 2008).

[458] SNYDER, *supra* note 4, at 710.

"prophecy" of supporting undemocratic representation means in a democracy. It is hard to understand why anyone would want to return to a system where representation is *not* based on population, and where six million residents of Los Angeles would have the same number of votes in the state senate as 14,000 rural Californians. Redistricting has become highly politicized. But that is hardly new. It has been around since 1812, when Governor Elbridge Gerry of Massachusetts invented the Gerrymander.[459]

Political fights over redistricting should be attractive to anyone interested in "democracy," because these fights illustrate democratic politics at its best, provided there is a level playing field to begin with. *Baker* v. *Carr* created level playing fields across the country. The many political arguments over gerrymandering illustrate Frankfurter's notion of letting the democratic process play out. Since *Baker v. Carr*, the political process in the states has determined the shape of electoral districts, with the Courts only making sure they are not unconstitutionally based on race, as Frankfurter seemed to believe in *Gomillion*, and that they are as identical in size as possible. This is what a democratic justice, with faith in state legislatures, should have demanded.

Frankfurter "insisted that the best way to protect people's rights was through the democratic political process."[460] But Frankfurter opposed the requirement of one person, one vote, which is the essence of democracy. And this is precisely what we have today, with reapportionment being very much part of the political process. But before *Baker*, it was not "democratic." There could be no "democratic political process" when the process was rigged by legislative districts that effectively disenfranchised the majority of the people in many states. Frankfurter's opposition to reapportionment suggests that he did not really believe in a "democratic political process," but like the conservative he had become, he favored the status quo of a rigged system.

VIII. CONCLUSION

In his biography Snyder's argues that Frankfurter "treasured free speech."[461] But, but as William M. Wiecek's comprehensive history of the Stone and Vinson Courts shows, Frankfurter "consistently proposed judicial self-restraint, in civil liberties as well as economic issues."[462] He may have "treasured" free speech, but he often opposed it in his opinions. Frankfurter's record on free speech is enormously problematic, as illustrated by one of the last McCarthy-era cases. California deemed Raphael Konigsberg "morally unfit" to be a lawyer because he refused to answer questions about previous Communist Party membership.[463] The Court reversed the case, holding that his refusal was not evidence of bad character. As a co-founder of the ACLU, Frankfurter should have

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[459] Paul Finkelman, *Who Counted, Who Voted, and Who Could They Vote For*, 58 ST. LOUIS UNIV. L. J. 1071, 1073-74 (2014) (Describing the origin of the Gerrymander and .showing a picture of the original political cartoon attacking it).

[460] SNYDER, *supra* note 4, at 710.

[461] *Id.*

[462] WIECEK, BIRTH OF THE MODERN CONSTITUTION *supra* note 2, at 413.

[463] Konigsberg v. State of California, 353 U.S. 252 (1957).

supported this position because one of the major tenets of civil liberties is that private political views should not be a bar to entering a profession. Forgetting his civil liberties background—or simply abandoning it—Frankfurter dissented, joined by Clark and Harlan.[464] Snyder explains Frankfurter dissented because he wanted to remand the case "to clarify the California court's decision."[465] Once again, Frankfurter was more concerned about states' rights than he was about free speech.

Four years later, when the case came back to the Court, Frankfurter was part of a five-justice majority, along with Clark, Harlan, and two other Eisenhower appointees, that upheld a second California decision denying Konigsberg admission to the bar because he would not cooperate with the investigation of his political views.[466] Here, Frankfurter provided the deciding vote in *support* of the idea that the state had a right to question someone's private political views before allowing the person to practice law. Unfairly attacked by Teddy Roosevelt as a Bolshevik, Frankfurter was now firmly in the camp of Cold War red-baiters.

Snyder defends Frankfurter's repressive decisions by claiming that, although he "treasured free speech and religious freedom" he "feared that overprotecting the First Amendment undermined the government's ability to meet people's basic needs."[467] But it is not clear why expelling children from school for not saluting the flag, denying observant Jews and Christian Sabbatarians the right to make a living *and* practice their religion, firing Arkansas teachers for being members of the NAACP, or denying Konigsberg the right to practice law because he might have once been a communist, were necessary to "meeting the people's basic needs." If Frankfurter had been a maker of "the Liberal Establishment," he would have consistently supported freedom of speech and protected minorities, such as Jehovah's Witnesses, Japanese Americans, religious Jews, and Blacks seeking to enter a restaurant in Delaware, from oppression. He did not. If he had been the "Democratic Justice," he would have worked to make sure that the political process gave the people a meaningful vote. But he did not.

When he joined the Court, Frankfurter began to oppose civil liberties for religious minorities and to oppose federal prosecutions of police who abused Black people. Shortly after Frankfurter went on the Court, Roger Baldwin, the Founder of the ACLU, chatted with the new Justice while both were summering on Martha's Vineyard. Baldwin told the Justice, he hoped Frankfurter was "still carrying on his traditions."[468] The man who had defended Sacco and Vanzetti, helped the N.A.A.C.P develop a plan for fighting segregation,[469] fought for the rights of workers, and denounced the persecution of labor organizers immediately responded that

[464] *Id.* at 274 (Frankfurter, J., dissenting).

[465] SNYDER, *supra* note 4, at 627.

[466] Konigsberg v. State of California, 366 U.S. 36 (1961). Unfortunately, Snyder did not discuss this case.

[467] *Id.*

[468] WALKER, IN DEFENSE OF AMERICAN LIBERTIES, *supra* note 3, at 106.

[469] *Id.* at 90. KLUGER, SIMPLE JUSTICE, *supra* note 390, at 133.

as a Justice he had "different responsibilities on the Court. I am not an advocate."[470]

It is hard to imagine other justices, who had been committed to protecting constitutional rights before going on the Court, categorially arguing that in their previous positions they were effectively hired guns, advocating for a client, rather than trying to protect the constitutional rights of all Americans. Chief Justice John Marshall continued to support a strong national government after he left politics to serve on the Court. Justice John McLean did not abandon his lifelong opposition to slavery when he went on the Court, as his important dissents in *Prigg* v. *Pennsylvania*[471] and *Dred Scott v. Sandford*[472] demonstrate. Chief Justice Salmon P. Chase did not forget his career as an anti-slavery lawyer, senator, and governor or abandon his lifelong commitment to racial equality, just because he went on the Court. The first Justice John Marshall Harlan came to the Court with a strong belief in legal equality for former slaves and their descendants,[473] and continued to express that on the Court. Louis Brandeis remained the "people's lawyer," supporting constitutional liberty and social justice from the Bench. As a district attorney and then an attorney general in California, Earl Warren advocated criminal justice reform and brought that understanding of what the Constitution commanded while on the Court.[474] Thurgood Marshall did not forget his lifelong commitment to civil rights, when he put on robes. Nor did Ruth Bader Ginsburg forget about gender equality when she went to the Court.[475] None of these justices *always* supported outcomes they might have argued for before going on the Court, but they consistently supported the constitutional protections for justice that they had believed in before going to the Court. Other Justices, including Oliver Wendell Holmes, Jr., Charles Evans Hughes, Hugo Black, and Harry Blackmun, grew on the Court, increasingly supporting substantive justice, due process, civil liberties, and civil rights.

The tragedy of Frankfurter is that he abandoned the constitutional rights and protections that he supported from his graduation from law school until he donned his robes. When Roger Baldwin asked him if he still supported civil liberties, Frankfurter replied that as a Justice "I am not an advocate."[476] But his response to Baldwin was intellectually dishonest. He in fact had increasingly become an advocate for states' rights, the status quo, and an aggressive nationalism that persecuted minorities. On the

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[470] WALKER, IN DEFENSE OF AMERICAN LIBERTIES, *supra* note 3, at 106.

[471] 41 U.S. (16. Pet.) 539 (McLean, J., dissenting) at 658. On the proslavery nature of *Prigg*, *see* Paul Finkelman, *Story Telling on the Supreme Court:* Prigg v. Pennsylvania *and Justice Joseph Story's Judicial Nationalism*, 1994 SUPREME COURT REV. 247. *See also* FINKELMAN, SUPREME INJUSTICE, *supra* note 138. .

[472] 60 U.S. (19 How.) 393 (1857) (McLean, J. dissenting) at 539.

[473] Unfortunately, he was less protective of the rights of Chinese immigrants and their American-born children. *See* Gabriel "Jack" Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151 (1996).

[474] His opinion in Miranda v. Arizona 384 U.S. 486 (1966), reflected his own policies against third degree interrogations in California.

[475] Significantly, while Frankfurter gave his former colleague Al Sacks "carte blanche power to select his clerks," he rejected Sacks's strong recommendation of Ruth Bader Ginsburg, referring to her as "Mrs. Ginsburg." SNYDER *supra* note 4, at 663.

[476] WALKER, IN DEFENSE OF AMERICAN LIBERTIES, *supra* note 3, at 106.

Court he had become an advocate in opposition to civil liberties, civil rights, the free exercise of religion, due process or law, and democracy.