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ARTICLE

UPROOTING AUTHORITARIANISM: DECONSTRUCTING THE STORIES BEHIND NARROW IDENTITIES AND BUILDING A SOCIETY OF BELONGING

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Authoritarianism is on the rise globally, threatening democratic society and ushering in an era of extreme division. Most analyses and proposals for challenging authoritarianism leave intact the underlying foundations that give rise to this social phenomenon because they rely on a decontextualized intergroup dynamic theory. This Article argues that any analysis that neglects the impact of dominance as a legitimizing characteristic of in-group formation and identity construction based on dominant in-group membership will fall short of understanding the surge of authoritarianism. In the West, and the United States in particular, this dominant in-group takes shape around the ideology and social

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force of whiteness. Whiteness, as the bonding element of a dominant identity-based in-group, compels narrow identities and exclusive group membership. It also makes promises of social gain and advantage to those constituted as white, the erosion of which is the source of the authoritarian uprising in the United States. This Article discusses the establishment of the Western meta-narrative, and whiteness's relation to it, and then advances a strategy to replace it with a more inclusive narrative of deep belonging, offering guidance to the social justice movement in its work toward this end.

I. INTRODUCTION: AN AGE OF AUTHORITARIANISM

Now more than ever, it is important to move toward a society of belonging where every life is truly valued, where differences are seen as strengths, and no one is left to suffer outside of the circle of human concern.[1] The world that we instead inhabit is one where nations and people are fearful of difference, increasingly xenophobic, and where lives are valued differently depending on skin color, nationality, ethnicity, and religion. The need for belonging has become all the more urgent in the face of rising ethno-nationalism and authoritarianism around the globe.

In the United States and elsewhere, these phenomena have surged forward at alarming rates. Countries like the United Kingdom, France, and Hungary have elected or flirted with the election of far-right, authoritarian leaders.[2] Across Europe, in Poland and Austria, anti-immigrant nationalist parties are securing blocs of parliamentary power.[3] Demagogic leaders like Rodrigo Duterte in the Philippines and Narendra Modi in India strategically incite social divisions and inflame nationalist sentiment to consolidate and maintain influence and control.[4] Currently, over fifty-three percent of the world lives under authoritarian leadership not including Brazil and the United States.[5] Over one third of nations have walls.[6] The retreat of

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[1] *See* sources cited *infra* note 26, at 32, and accompanying text (discussion on the circle of human concern).

[2] STEPHEN MENENDIAN ET AL., HAAS INST. FOR FAIR & INCLUSIVE SOC'Y, 2017 INCLUSIVENESS INDEX: MEASURING GLOBAL INCLUSION AND MARGINALITY, (Dec. 2017), http://haasinstitute.berkeley.edu/sites/default/files/haasinstitute_2017inclusivenessindex_publish_dec31.pdf [https://perma.cc/R25J-ZWJM].

[3] *Id.*

[4] *Id.*

[5] Garry Kasparov & Thor Halvorssen, Opinion, *Why the Rise of Authoritarianism Is a Global Catastrophe*, WASH. POST (Feb. 13, 2017, 1:32 PM), https://www.washingtonpost.com/news/democracy-post/wp/2017/02/13/why-the-rise-of-authoritarianism-is-a-global-catastrophe/ [https://perma.cc/LG76-PV4M] (reporting that the Human Rights Foundation's research shows that ninety-four countries live under non-democratic regimes, equaling fifty-three percent of the planet's population).

[6] Simon Tomlinson, *World of Walls: How 65 Countries Have Erected Fences on Their Borders—Four Times as Many as When the Berlin Wall was Toppled—As Governments Try to Hold Back the Tide of Migrants*, DAILY MAIL, https://www.dailymail.co.uk/news/article-3205724/How-65-countries-erected-security-walls-borders.html [https://perma.cc/LP9K-SUUC] (Aug. 22, 2015, 3:55 AM).

democratic institutions and norms currently underway is cause for great concern.

In the United States, a rightward surge is underway as the country is in a period of extreme fracturing. To our closest allies and to our neighbors, our divisions appear insuperable. Canadian author Stephen Marche writes in his essay, "America's Next Civil War," that "there is very much a red America and a blue America. They occupy different societies with different values" and because of the instability this deep divide creates, Canada should disentangle its fate with that of the United States.[7]

Much attention and analysis has gone into understanding not only deep division, but the underlying forces animating authoritarianism and what can be done to mitigate its effects. The predominant discourse around this phenomenon, however, has operated in an incomplete fashion. It has opted for an explanation decontextualized of identity construction and intergroup dynamics. The literature undertheorizes the social conditions created when a society's in-group constitutes itself around the idea that it has the right to dominate the rest of the population and the strong desire this creates for individuals to be a part of and build their identities around membership in that group. This claim to the entitlement to dominate varies across contexts and can be built upon race, religion, ethnicity, gender, or other characteristics used to form exclusive group membership. However, in the West, and in the United States in particular, the in-group forms around the aggressive guardianship of whiteness and the presumptions to domination that it claims. Attachment to this group and the tending to identity it performs lie at the heart of authoritarianism in this setting.

Understanding this central aspect will determine the strength of the response to this destructive force and whether or not society can root it out. Namely, attempting to thwart authoritarianism without unseating whiteness may suppress the force of authoritarianism temporarily but will leave the underlying causes at the center of authoritarian surges intact. Accommodating authoritarian sensibilities, as mainstream analyses of authoritarianism call for, demands an unjust exclusion of marginalized identities or suppression of

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[7] Stephen Marche, *America's Next Civil War*, WALRUS, https://thewalrus.ca/americas-next-civil-war/ [https://perma.cc/SP62-GFSY] (June 2, 2020, 3:57 PM).

characteristics that make them different. While it is true that people are innately sensitive to difference and that people who tend toward authoritarian reaction are more likely to perceive difference as threatening, it is also true that much of what people understand as differences are socially constructed. Dominant identities like whiteness are constructed when differences are given social meaning and labeled as inferior. Doing so makes affiliation with people who have these "inferior" qualities particularly abhorrent to people within the dominant identity group who have a heightened sensitivity to difference. Suggesting that people who are "othered" as marginal and inferior either erase their differences through assimilation or have their membership within society restricted and regulated is misguided because it naturalizes the social construction of dominant identities and ignores the often-violent forms the construction process takes.

This Article begins with an outline of the common characterizations of authoritarianism as articulated by two of the leading academics on the phenomenon, behavioral economist and political psychologist Karen Stenner and New York University professor and social psychologist Jonathan Haidt. The pair argues that certain people are naturally predisposed to desire authoritarian control in times of rapid change, as these periods of rapid change increase anxiety among this group. This Article critiques that perspective by offering that although Stenner and Haidt get much correct about the nature of authoritarians, their analysis lacks context on the socially determined interpretation of change. Not all change induces extreme anxiety. Here, we explore why certain populations are interpreted as a negative change that creates backlash and root that exploration in the process of othering, or building an in-group and identity around dominance, superiority, and exclusion. In Part III, we attempt to incorporate this framework into intergroup dynamic theory and explain how the United States' dominant identity of whiteness shapes intergroup relations. In Part IV, we illustrate how the debate over immigration policy is influenced by and filtered through this sense of white entitlement to dominance. Those situated within this paradigm, we show, do not necessarily see it as a force at work. This oversight leads to a misinterpretation of the immigration issue and erroneous policy prescriptions, in our view. Part V explains in greater depth what we mean by "situated within this paradigm." We hold that the Western notion of the self, or the liberal subject, as well as the basic Western social structure is not egalitarian but based on a hierarchical ordering of humanity. Whiteness is defined as

existing at the top of the ordering and constitutes the dominant in-group, the rest of humanity being othered into lower rankings within the stratification. Because the liberal subject and the basic social structure are ideologically interpreted as egalitarian, the othering and stratification is not observed, constituting the paradigmatic blindness. Part VI shows the consequences for society of constituting the self in this hierarchical manner, with a particular focus on globalization, neoliberalism, and polarization. Part VII concludes with offerings on constructing a self that does not need to dominate or be a part of an in-group built around superiority and dominance. We also offer recommendations for all, but particularly for the social justice movement, around the work needed to move society in this direction—toward a just world where all belong.

II. UNDERSTANDING THE NATURE OF AUTHORITARIANISM

Behavioral economist Karen Stenner and social psychologist Jonathan Haidt, preeminent scholars on the topic of authoritarianism, write about the causes, forms, and tendencies of authoritarian uprisings. In their contribution to Cass Sunstein's comprehensive volume on authoritarianism, *Can It Happen Here?*, the pair provides a thorough description of the conditions that lead to authoritarian outbursts and the personality type that desires authoritarian responses, followed by a set of recommendations to quell such uprisings.[8] Their work serves as the basis of this Article's analysis.

Stenner and Haidt argue that authoritarianism does not rise up as anomalous disruptions in an otherwise linear progression toward ultimate enlightenment and liberalism, but that authoritarianism is always there—latent and under the surface ready to be provoked by external factors.[9] When many analysts of moments like the current one are caught off guard and interpret authoritarianism as coming from seemingly nowhere, Stenner and Haidt offer that periods of great intolerance to difference are in fact unsurprising and predictable.[10] Flares of authoritarianism, they assert, are a function of a predisposition to authoritarian leanings interacting with external normative threats to stability. By their estimation, around a third of any population has a personality predisposed

[8] Karen Stenner & Jonathan Haidt, *Authoritarianism Is Not a Momentary Madness, but an Eternal Dynamic Within Liberal Democracies*, *in* CAN IT HAPPEN HERE? 180 (Cass Sunstein ed., 2018).

[9] *Id.*

[10] *Id.*

to resisting complexity, diversity, and difference and desiring of authoritative crackdowns to compel simplicity and sameness when instigated.[11]

Stenner and Haidt also make sure to point out that people with authoritarian tendencies differ in significant ways from Laissez Faire conservatives and status quo conservatives, all of whom tend to get lumped together under the broad umbrella of "right-wing." Laissez Faire conservatives, people generally categorized as classical liberals or libertarians, are of the right of center variety that favor market solutions and detest government attempts at wealth redistribution.[12] Status quo conservatives are "psychologically predisposed to favor stability and resist rapid change and uncertainty."[13] This segment of the right supports the security and dependability of institutions if they maintain an even keel and apply the brakes on sudden sociopolitical reform. Authoritarians, on the other hand, "demand authoritative constraints on the individual in all matters moral, political, and racial, are not generally averse to government intrusions into economic life," and are amenable to "willingly overturning established institutions that their (psychologically) conservative peers would be drawn to defend and preserve."[14]

The latency of authoritarianism is surfaced, Stenner and Haidt argue, when activated by external threats that upset and provoke anxiety. These include a loss of faith in leadership, a splintering of public opinion, or a rupturing of the social fabric and perception of uniformity.[15] Even though certain people are psychologically predisposed to desire heightened authority when aggravated, many people who fall outside of this personality range can still find themselves susceptible to such reactions if the external threat is strong enough. When these anxieties are stimulated, the authoritarian demand is to eradicate diversity or restore the prevailing or pre-existing social order. Authoritarianism urges a "structuring of society and social interactions in ways that enhance sameness and minimize diversity," and call for or participate in "disparaging, suppressing, and punishing difference."[16] These appeals often result in support for "the actual coercion of others (as in driving a black family from the neighborhood)," and "demands for the use

[11] *Id.* at 210.
[12] *Id.* at 181.
[13] *Id.* at 182.
[14] *Id.* at 183.
[15] *Id.* at 186.
[16] *Id.* at 184.

of group authority (i.e. coercion by the state)."[17] The condition in the world today is currently ripe for this latent tendency.

While Stenner and Haidt provide many useful insights for understanding authoritarianism and the dynamics that provoke an uprising, they misunderstand critical aspects of the social fabric and thus arrive at conclusions inadequate toward the effort of constructing a society of true belonging. Stenner and Haidt find from their data analysis that "the notion that populism is mostly fueled by economic distress [is] weak and inconsistent."[18] Instead of focusing on economic anxiety, they suggest, efforts are better aimed toward being more mindful of the concerns of people with authoritarian-leaning personalities. To this end, the authors urge that to minimize authoritarian tendencies in society, we must promote "the abundance of common and unifying rituals, institutions, and processes."[19]

This recommendation by Stenner and Haidt misses how challenging that may be in societies built on an extreme process of othering.[20] In the United States, race has been central to the process of othering and self-making. There is also a central role of gender domination. One may note that the process of othering is not limited to race and gender. Sexual orientation, religion, differently-abled people, and other identities have all been important in the construction of the other and therefore the construction of who is the belonging normative "we." As Stenner and Haidt state, it is important to give attention to the potential for authoritarian tendencies to be activated by normative threat in roughly a third of the population. However, the threat is deeper than they presume and the accommodation of such a tendency much more problematic. By ignoring the centrality of othering to the process of self-making, they overlook how important an association with dominance is to the activation of authoritarian reactions. Their promotion of "common and unifying" practices leaves in place and legitimizes identity groups based in dominance. Instead, a more effective response would be to displace dominance as an organizing force in identity construction. Before addressing these points, however, it is important to thoroughly understand the conditions that produce anxiety and can be used to stoke authoritarians and right-wing identity-based nationalism.

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[17] *Id.*

[18] *Id.* at 207.

[19] *Id.* at 211.

[20] *See infra* note 26 and accompanying text.

A. The Function of Anxiety in the Othering and Belonging Process

Humans' threat perception defines how they experience anxiety, both individually and collectively, in a changing world.[21] While this is consistent with Stenner, Haidt, and others related to authoritarianism and normative threat, there are some important additional insights that are less dependent on the concept of latent authoritarianism. Not all change produces threat, and there are certain types of change that are more important in producing anxiety or threat.[22] The anxiety associated with rapid change might be most acutely experienced by people with authoritarian tendencies, but the general experience of anxiety is more inclusive. Virtually all people will experience anxiety with a heightened degree of change across a number of salient factors. While there are some scholars who are skeptical of the theory of authoritarianism—this Article does not dispute the theory—the psychological underpinnings of anxiety stand on firmer ground.

In regard to anxiety, people have a relationship to the conditions and environment they inhabit or from which they come. People have adapted over a long period of time to the environment around them. But, when the environment changes at a rate faster than the ability to adapt, people experience stress, anxiety, and possibly threat.[23] Yet, the environment is constantly changing, and so are the people in it. This may go largely unnoticed because of the rate of change. On one hand, change is often welcomed and indeed seen as necessary for growth; however, the rate of change and the nature of change matters. While those with authoritarian tendencies may be more challenged by change, all people will find change difficult and even impossible at some rate.[24]

A number of people have begun to focus on the anxiety and stress of rapid change. Thomas Friedman, for instance, describes the current era as one of accelerated change. He focuses on three accelerating areas that are causing anxiety and stress.

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[21] COLLECTIVE PSYCH. PROJECT, A LARGER US (2018), https://www.collectivepsychology.org/wp-content/uploads/2019/05/A-Larger-Us.pdf [https://perma.cc/YN3K-MTJA].

[22] *See, e.g.*, Blake M. Riek et al., *Intergroup Threat and Outgroup Attitudes: A Meta-Analytic Review*, 10 PERSONALITY & SOC. PSYCH. REV. 336 (2006).

[23] *See infra* note 26 and accompanying text.

[24] *Id.*

They are globalization, technology, and climate change.[25] His list, however, leaves out two of the most important factors driving anxiety today—changes in migration patterns and changing demographics. According to authoritarian leaders and their followers, of concern is rarely the hidden pitfalls of technological advancement, or the threat of climate change (even the science behind it being flatly denied). To authoritarians, the gravest threat is always the "other." In Europe, the other is especially organized around anxiety toward Muslims and migrants. This is increasingly true in the United States as well. But, the "other" does not have to be a recent migrant to occupy a central role. The other is defined as outside of who belongs and a threat to the "we."[26] This process is described as othering to reflect the dynamic aspect of the practice. Othering is often critical to defining the "we." The "we" are those that are considered to belong. Re-defining and expanding who is in the "we" is the process of practicing belonging.

Constructing the "we" through belonging is also a dynamic process. Determining who belongs and who does not belong then is a contested process that is not completely stable. Marginality and belongingness not only change from society to society, but context to context. In one context, one racial or religious group might be most marginalized, but in another, a different social group might be. Negative response to or fear of the reality of changing demographics and regional migration is a subset of othering. Rapid change, and particularly change related to people, is likely to play a heightened role in the othering and belonging process. This process is never just about the other but also about the "we" and who belongs.

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[25] Thomas L. Friedman, Opinion, *The End of Europe?*, N.Y. TIMES (Dec. 18, 2018), https://www.nytimes.com/2018/12/18/opinion/europe-france-economy.html.

[26] To clarify terminology, it may be helpful to provide a brief overview of the processes being described. Othering is a set of dynamics, processes, and structures that engender marginality and persistent inequality across any of the full range of human differences based on group identities. It is the action of systematically marginalizing a group of people or constructing an identity for them that labels them a threat too unrecognizable from the ingroup to coexist with. Systematic othering occurs through a process called breaking—which is the construction through stories and practices of the image and perception of the outgroup as a threat and a subordinate. In contrast, the process of belonging—which happens through bridging—is the story-crafting that broadens the ingroup and defines whose full humanity is recognized and who will receive the concern and attention of society. john a. powell & Stephen Menendian, *The Problem of Othering: Towards Inclusiveness and Belonging*, OTHERING & BELONGING, Summer 2016, at 14.

Next, consider changes leading to anxiety, stress, and threat. Rapid change along a salient axis is likely to produce anxiety. This reaction is biological. But how change is perceived and what types of change produce anxiety is largely social.[27] This social process is based on a set of stories that signal to the population that the changes in demographics are either a threat, and must be contained or corrected in some way, or that these changes are good, and will make the population better off in the future. The first set of stories about threat can be categorized as breaking. Breaking is a way of creating social distance. Social distance or the threat of the other does not have to be based on race, language, or religion. The nature of the threat is a part of the story both about the other—the "them"—and how that relates to the "we." It is not just that the other is a threat. This story easily pivots to the goodness and even the purity of the "we." The story of the glorious, pure "we" is bound up with the story of "them."

In the context of change, the story of this narrow exclusive "we" is often tied to an imaginary past. One of the offered solutions to the changing and threatening future is an effort to retreat into the imaginary past when all was good and the "we" was uncontaminated.[28] This story often asserts that there is a natural "we" and a natural other. Neither assertion is true. The conditions that foster a "we" and the story that is the glue can always be contested. One may go back to hunter-gatherers or the family structure to look for a natural "we" with a given categorical boundary, but, even there, one is unlikely to find social groupings that could be described as fixed and natural.

There is a gradient between breaking and bridging. First turning to breaking, if the story of the other is accepted as a mild threat, then one would expect the practice of breaking to also be mild. While if the story that the other is a profound threat is accepted, the subsequent breaking is expected to be extreme. The more extreme the breaking, the greater the chance for a violent response to the other. If one accepts that the other is a fundamental threat to one's existence, then the project of normative practice—the "common and unifying rituals, institutions, and processes"[29]—called for by Stenner and Haidt

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[27] *See* JOHN A. POWELL, RACING TO JUSTICE: TRANSFORMING OUR CONCEPTIONS OF SELF AND OTHER TO BUILD AN INCLUSIVE SOCIETY 51, 229, 241 (2012) [hereinafter POWELL, RACING TO JUSTICE].

[28] ROBERT A. WILLIAMS, JR., SAVAGE ANXIETIES: THE INVENTION OF WESTERN CIVILIZATION 31–48 (2012).

[29] Stenner & Haidt, *supra* note 8, at 211.

becomes deeply problematic. For example, if whiteness is experienced and defined as purity and the domination of Blackness, what then would be the normative practice in response? While not the majority, there is clearly a growing number of people who believe in white, or male, or Christian dominance, not just descriptively, but normatively as well. Stenner and Haidt's call for normative practice is more akin to assimilation—or "same-ing"—a flattening of differences and the continued maintenance of a social boundary in order to achieve agreeable coexistence—than it is to bridging. In the context of dominance and threat, the likely outcome is a deep and persistent breaking with very little opportunity for bridging. While same-ing presents a simpler solution, it is too deferential to a social identity that insists on diminishing others in order to generate a sense of value. Bridging and ultimately creating a society of belonging is a steep challenge, even appearing impractical when social hierarchies are considered to be natural. However, this difficult work offers the highest likelihood of defeating, not just containing authoritarianism.

III. CRITIQUE OF DECONTEXTUALIZED INTERGROUP THEORY: THE INCOMPLETE RESPONSE TO AUTHORITARIANISM

While Stenner and Haidt are correct in their assertion that authoritarian tendencies are provoked by normative threats not related to economic anxiety, their proposed response to authoritarianism is inadequate and based on an incomplete assessment of the issue. They end up aligning their sympathies with the authoritarian-minded because their reasoning lacks context of the social process of othering and is completely blind to the functioning of whiteness throughout the West and in the United States specifically.

In recommending that greater attention be paid to people who resist diversity, the authors quip that "it is perhaps ironic that tolerance of difference is now threatened by liberal democrats' refusal to recognize that many of their fellow citizens are . . . different."[30] Whether intentional or not, this statement is a crafty sleight of hand. What the authors are really pointing out is not that liberal democrats do not recognize that some people are different, but rather that democrats do not agree that society should bend to the will of the intolerant. That the public should not have to acquiesce to people who would rather not have a liberal democracy or who would rather destroy democratic

[30] *Id.* at 210 (ellipses in original).

society than share it with people who are different. As Stenner and Haidt say themselves, "authoritarians may seek massive social change in pursuit of oneness and sameness, willingly overturning established institutions and practices."[31]

Consider this point in the context of Donald Trump's rise to power through the provocation of authoritarian fears and his willingness to use the office of the presidency to pursue the political demands of the authoritarian-minded. Stephen Marche speaks to this point, worrying that democratic institutions—the mechanisms meant to preserve our society—have possibly weakened to the point of being ineffective in holding the United States together. He points to President Trump's "attacks on the FBI, the Department of Justice, and the judicial system" as evidence of the country's veer "toward political collapse."[32]

While Marche sees the attack on institutions by the Trump Administration as an attack on structural norms, Trump is also fighting for a society that values white people above all others. Marche categorizes democracies as "built around institutions that are larger than partisan struggle,"[33] but what if our current division is more than a mere *partisan* struggle? What if it is a struggle for who belongs and whom institutions should serve? Yes, Trump has attacked institutions—but not all of them. Institutions he understands as serving the interests or elevating the status of people of color and other marginalized communities—the Civil Rights Division of the Department of Justice, the Department of Education's Office for Civil Rights, Housing and Urban Development, and federal judges appointed by President Obama—these he has sought to destroy or render ineffective. However, he has strengthened and expanded the institutions where he sees opportunities to harm and oppress communities of color—the Department of Homeland Security and its agencies of Immigration and Customs Enforcement and Customs and Border Protection being a prime example.

Additionally, most arguments in favor of accommodating the preferences of the authoritarian-leaning involve a decontextualization that obscures how embedded into social stability white racial hierarchy is and the degree to which it has shaped norms, values, and traditions. Conservative journalist Conor Friedersdorf, for instance, in his endorsement of Stenner's scholarship, chooses to highlight an experiment by Stenner in

[31] *Id.* at 183.
[32] Marche, *supra* note 7.
[33] *Id.*

which people identified as authoritarian-leaning experienced higher rates of anxiety in interactions with Black surveyors as an example that underscores her point that "difference" rather than racism explains the reaction.[34] This choice of evidence to support this point and his explanation as to why it does is a striking demonstration of this decontextualization at work. Friedersdorf defends her by clarifying that "their intolerance of difference was much broader than racism, encompassing racial and ethnic out-groups, political dissidents, and people they consider moral deviants."[35] He points out that Stenner finds that "intolerance manifests most commonly in demands for broad conformity, typically including . . . 'the regulation of moral behavior, for example, via policies regarding school prayer, abortion, censorship, and homosexuality, and their punitive enforcement.'"[36] For the authoritarian-prone, moral decay and decline evoke intolerance just as much as race.[37]

But, as will be discussed later in greater detail, political scientist Wendy Brown demonstrates that morality often serves the purpose of "challenging social justice with the natural authority of traditional values."[38] This is because harkening to traditional values developed via the exclusion of out-groups can stave off any threat to the status of the dominant in-group. These traditional values safeguard the identity of in-group members as constituted by notions of superiority to subordinated out-groups. Morality and traditional values, this suggests, are not evidence that racism is not a factor. Friedersdorf's argument therefore lacks persuasiveness when he posits that "Trumpist politics [is less so] rooted primarily in racism, or even an ideological belief in white supremacy, rather than an authoritarian 'different-ism,'"[39] because he has not given due consideration to the possibility that 'different' may mean a departure from white racial hierarchy communicated through the language of morality and traditional values.

Stenner and Haidt also call for deeper sympathies for the authoritarian-leaning by pointing out that "democracies will

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[34] Conor Friedersdorf, *What Ails the Right Isn't (Just) Racism*, ATLANTIC (Aug. 9, 2019), https://www.theatlantic.com/ideas/archive/2019/08/what-if-left-was-right-race/595777 [https://perma.cc/LT84-W7BP].

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *See* WENDY BROWN, IN THE RUINS OF NEOLIBERALISM: THE RISE OF ANTI-DEMOCRATIC POLITICS IN THE WEST 37 (2019).

[39] Friedersdorf, *supra* note 34.

persistently harbor a certain proportion of residents (roughly a third) who will always find diversity difficult to tolerate."[40] But, they fail to question why certain traits are considered so different that their presence constitutes an otherness that is difficult to tolerate, and, moreover, who gets to decide which others are worth tolerating. This point, at least, they implicitly understand: white people—who occupy the dominant position in the West—were the only ones included in the data sample they used to analyze authoritarianism.[41]

A. The Role of Whiteness in Intergroup Construction

Questions of social group interactions have long been the terrain of intergroup relation theory, as thinkers within this field have sought to explain the conflicts and difficulties that arise between groups co-existing within a society. An examination of the field's major themes and how they relate to Stenner and Haidt's argument exhibit the absence of context that characterizes their depiction of authoritarian dynamics. Both Stenner and Haidt's analysis and intergroup relation theory as it pertains to the United States context fail to recognize the potency of whiteness to intergroup reactions mediated by race. The central question is: what bonds the white in-group so strongly? What factors interact with the construction of the white "we" and the non-white other? What stories and practices of belonging and breaking occur in this group's construction and maintenance? To be clear, whiteness is not the only dominant identity defended by the process of othering. The privileged and heavily-guarded identities built around patriarchy and heteronormativity exist in the United States, the West broadly, and around the globe. Other countries also grapple with the fracturing caused by nationalism and the exclusion built around their internal dominant groups. In Myanmar, the genocide of the Rohingya people is the virulent outcome of a Buddhist majority's assertion of dominance.[42] In India, Prime Minister Narendra Modi, in demagogic fashion, has stoked the resentment and anxiety of Hindu nationalism against the country's Muslim minority in brutal crackdowns to shore up power and control.[43] Globally, there are numerous examples of dominant groups' angst and insecurities being activated and exploited for political

[40] Stenner & Haidt, *supra* note 8, at 210.

[41] *Id.* at 189–90.

[42] powell & Menendian, *supra* note 26, at 16.

[43] Rana Ayyub, Opinion, *Mobs are Killing Muslims in India. Why Is No One Stopping Them?*, GUARDIAN (July 20, 2018, 7:35 AM), https://www.theguardian.com/commentisfree/2018/jul/20/mobs-killing-muslims-india-narendra-modi-bjp [https://perma.cc/M6BN-ZF4C].

gain, and often resulting in devastating oppression. In the United States context, and in the West generally, whiteness—crosscutting and interacting with patriarchy, heteronormativity, and other forms of super-ordination—is the prominent identity of the dominant in-group and is the locus of the authoritarian crisis at hand.

Social psychologist Marilynn Brewer's contributions to intergroup relation theory includes an exploration of "optimal distinctiveness theory." In her framing, the need for inclusion is central to group attachment. She describes inclusion-needs as being "satisfied by assimilation within the group while differentiation is satisfied by intergroup distinction."[44] But, is mere distinction and assimilation enough to satisfy members of a group, especially when the benefits of being a group member are marginal? What is it about association—principally for low-income white people—that makes attachment to white identity so strong and their commitment to that in-group so deep? Perhaps it is not mere association, but the psychological benefit of regarding oneself as superior through group membership that creates such a vociferously-defended bond.[45] In this reading, whiteness needs a permanently subordinated group to maintain group cohesion.

Marche understands the role of race in driving the divisions he warns of, pointing to growing intolerance of diversity among white Republicans as the source of the seeming irreconcilable chasm that has formed in recent years.[46] A need to protect the status of whiteness, in his view, fuels much of the widespread resentment in the states and is stoking violent reactions. Marche is correct to point to a deep investment in whiteness and a clinging to its promises as the root of the country's crisis and as fueling the rise of violence. To interpret current social tensions as a contentious 'tribalism' is to analyze without context. The current state of affairs is not tribes of the same social status finding it harder to get along. What drives much of the acrimony in the United States is white identity defined in opposition to the groups it excludes and subordinates. What engenders white resentment is a sense that whiteness is losing its currency and luster for those who have depended on the psychological wages of whiteness in lieu of material benefit. As

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[44] Marilynn Brewer, *The Psychology of Prejudice: Ingroup Love or Outgroup Hate?*, 55 J. SOC. ISSUES 429, 429, 434 (1999).

[45] *See* DAVID ROEDIGER, THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS (1991).

[46] Marche, *supra* note 7.

Marche puts it, white resentment and intolerance to diversity derive from "a frustration in the face of minorities making significant gains" and warns "violence protects status in the context of declining influence."[47] Brewer's theorization of in-group and out-group dynamics describes this relationship as "ingroup favoritism and protectivism provid[ing] fertile ground for perceived conflict and antagonism toward outgroups."[48] In this case, the in-group is protecting its status as white and the privileges whiteness confers.

Kimberlé Crenshaw improves upon the analysis of intergroup dynamics by applying a race conscious perspective as she explores why "whites include themselves in the dominant circle—an arena in which most hold not real power but only their privileged racial identity."[49] In the article, *Race, Reform, and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law*, Crenshaw takes on the political right's formal equality argument and the political left's criticism of a rights-based strategy to support her argument that challenges from within the dominant ideological structure can result in Black advancement. Crenshaw critiques the left's (who she categorizes as critical legal studies scholars) use of Antonio Gramsci's concept of hegemony to explain Black people's condition in the United States.[50] Under this framework, Black people, by buying into the legitimacy of American Society, "accept and consent to their own oppression."[51] Crenshaw pushes back against this argument, pointing out that, because of the brutality of racism, it is more accurate to say that Black people have been coerced into an oppressed position and that overlooking civil rights progress reflects an underestimation of the power of Black struggle against an oppressive society.[52]

In both views—the left's argument and Crenshaw's rejoinder—the framework positions white people as the dominant group and Black people as the dominated class. Yet, using hegemony to describe the relationship between groups is

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[47] *Id.*

[48] Brewer, *supra* note 44, at 438.

[49] Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law*, *in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 116 (Kimberlé Crenshaw, Neil Gotanda, Gary Peller, & Kendall Thomas, eds., 1996).

[50] *Id.* at 108 (citing Gramsci's definition of hegemony as "a system of attitudes and beliefs, permeating both popular consciousness and the ideology of elites, [which] reinforces existing social arrangements and convinces the dominated classes that the existing order is inevitable.").

[51] *Id.*

[52] *Id.* at 110.

more apt if it interprets socioeconomically elite and upper-class white people as the dominant group and lower-class white people among the subordinated groups. This reconfiguration places Black people in an even lower position than the previous interpretation. Instead of the dominated group, Black people become a durably positioned outsider, who must remain there to serve as a tool to exert control over lower-class white people and compel them to identify and commit to membership in the "white in-group." But it also better explains group acceptance and consent of its own oppression—it is just that in this case, the group is not Black people but lower-class white people.

It is the establishment of Black people as the durably positioned outsider that encourages poor white people to favor white group membership, even when the pay-off from membership is minimal. It is this shared belief—embedded in the popular consciousness and the ideology of elites[53]—in the inevitability of the predominance of white people in society, or what Herbert Blumer describes as a shared sense of position (explored in greater detail below) that binds white people as a group. [54] The shared sentiment that "blacks were simply inferior to whites and therefore not included in the vision of America as a community of equals."[55] In fact, this "ideology of whiteness"—and the preservation of it—unites people across the political spectrum. When white liberals are criticized for a tepid commitment to racial justice or for being more sympathetic to reconciliation with the political right than to recognizing the full humanity of people of color, it is because of this implicitly shared belief. Whether an explicit racist, an authoritarian, a traditional conservative, or a liberal—an a priori submission to the ideology of whiteness as natural necessitates the subordination and exclusion from the true "we" of Black people.

This forging of a white group consisting of elites and lower class white people who have less to gain from group membership is described by intergroup theorists—University of Cambridge economists Partha Dasgupta and Sanjeev Goyal—as a "group pressure" that is applied toward individual members to assume narrow identities.[56] If there are inter-group conflicts, resources to be protected, or other gains the group stands to make through exclusive membership, then the group will compel

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[53] *Id.*

[54] *See* Herbert Blumer, *Race Prejudice as a Sense of Group Position*, 1 PAC. SOC. REV. 3 (1958).

[55] Crenshaw, *supra* note 49, at 114.

[56] Partha Dasgupta & Sanjeev Goyal, *Narrow Identities*, 175 J. INSTITUTIONAL & THEORETICAL ECON. 395 (2019).

its members to bury and leave latent the "perpetual possibilities" of identity.[57] In this case, white elites interested in power, status, and wealth accumulation compel lower-class white people to suppress potential affiliations along lines of a broader identity or solidarity with people of color. Instead, they are encouraged to embrace white group membership. The "hook" is an artificial sense of superiority in lieu of material benefits. Dasgupta and Goyal explain this as groups attempting to secure advantage by discouraging its members from joining other groups. Groups do this by "implementing narrow rules" for group membership based on characteristics and criteria that group members are unable to control, like "caste, race, and ethnicity."[58] This may be compounded with Brewer's analysis that in-group maintenance produces a sense of superiority within the group and apprehension toward out-groups which "can lead to hostility and conflict between groups."[59] In reference to political groups, political leaders may intentionally instigate fear and hostility to obtain or keep hold of power.[60] Taken together, Dasgupta and Goyal's along with Brewer's analysis describe the Southern strategy that has taken hold of electoral politics in the United States since the 1960s, President Trump's demagoguery, and the general stoking of authoritarian tendencies happening across the globe.

A race conscious reading of group dynamics' interaction with whiteness in the United States also helps make sense of Brewer's theory of "in-group favoritism" existing independently from outgroup hate—or the "dynamic of bonding." Bonding is a facet of social capital theory and is the social practice of focusing on strength of connection within a social group as opposed to between social groups.[61] Brewer states that "outgroups can be viewed with indifference, sympathy, even admiration, as long as intergroup distinctiveness is maintained."[62] This idea evokes images of white people being generally tolerant of the presence of Black people in society but responding with resistance, backlash, and anger at the prospect of having to live in the same neighborhoods or attend the same schools as Black people. Group distinctiveness is important for understanding racial

[57] *Id.* at 23.

[58] *Id.*

[59] Brewer, *supra* note 44, at 437.

[60] *Id.*

[61] Tristan Claridge, *What Is the Difference Between Bonding and Bridging Social Capital?*, SOC. CAP. RSCH. & TRAINING (Jan. 2, 2018), https://www.socialcapitalresearch.com/difference-bonding-bridging-social-capital [https://perma.cc/BRQ2-UB7J].

[62] Brewer, *supra* note 44, at 434.

segregation, but thinking of it in terms of separation for the purpose of mere distinction falls short of fully capturing the forces at work. If Black people share the same resources, have access to the same educational opportunities, and are substantively equal members of society, what makes being white special enough to maintain that psychic sense of superiority?

IV. IMMIGRATION POLICY AND THE CONSTRUCTION OF RACE

Stenner and Haidt explain their point of conciliation in the context of immigration. As stated earlier, one of the clearest distinctions between the "other" and the "we" in both the United States and Europe. Stenner and Haidt believe that an authoritarian's concerns over immigration are not pretext for pragmatic fears such as job insecurity but driven by discomfort and anxieties about "where this country is headed."[63] They legitimize this sentiment, arguing that if citizens are concerned about the rate of immigration, and by extension, the direction of the country, their concerns should be taken at face value and not assumed to be masking racism.[64] However, this argument glosses over the different ways immigrants are perceived—and received—in a decontextualized, almost "formally equal" way, as though all racial conjoiners are erased and all newcomers are imbued with the same "equally other" identity in the eyes of the majority population. If it really is merely the rate of immigration that concerns authoritarians, why do only immigrants from certain regions, who are people of color, evoke enmity and hostile reactions? Why are certain immigrants "othered" and some not? What are the notable "identities" that make someone seem like a disruption to the norm?

What Stenner and Haidt overlook is the historical context of American immigration law. These laws reinforced the notion that the United States is a white, Christian country, that only white people are fit for citizenship, and that an infringement on the whiteness of the nation erodes opportunities understood to be reserved for white people. This erosion results in white people's negative views toward non-white immigration. They see it as a force corrupting the very promises the country is expected to keep. As Ian Haney López demonstrates, "law is one of the most powerful mechanisms by which any society creates, defines, and regulates itself,"[65] and the "stark division" created by

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[63] Stenner & Haidt, *supra* note 8, at 211.

[64] *Id.* at 213.

[65] IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 7 (2 ed. 2006).

immigration law "carried important connotations regarding agency, will, moral authority, intelligence, and belonging. To be unfit for naturalization—that is, to be non-white—implied a certain degeneracy of intellect, morals, self-restraint, and political values; to be suited for citizenship—to be white—suggested moral maturity, self-assurance, personal independence, and political sophistication."[66] Restrictions on immigration throughout the country's history—such as the Naturalization Act of 1790, the Chinese Exclusion Act of 1882, and the restrictive quotas in the Immigration Act of 1924—maintained and fortified the image of the United States as a white country by excluding non-white people. Their exclusion validated by the legitimacy of the law affixed a particular stigma to them. White people, constituted in contrast, thus understood themselves to be the only ones qualified for the benefits and privileges of full membership to the United States body politic. The operation of the law toward this end being largely hidden, these conclusions appear to be natural. Thus, "the notion of a White nation is used to justify arguments for restrictive immigration laws designed to preserve this national identity,"[67] and such concerns can be defended as discomfort with immigration rates and not the byproduct of an institutional effort to construct racial definitions and then limit opportunity on that basis.

The anxiety around immigration has been strengthened by generations of creating, hardening, and instigating a fear of the "other" as a threat to white exceptionalism and purity. *The Atlantic* journalist Adam Serwer chronicles the history and context around the xenophobic up-rise that swept the nation and set the ground for the Immigration Act of 1924.[68] Though humans are innately attuned to differences, and rapid change can lead to anxiety, these broad value systems built on race are artificial. These "categories of difference" had to be socially constructed. A reason to perceive certain groups as a threat had to be created and ingrained into the collective psyche of the population.

Serwer begins by addressing the widespread belief among elites of the late nineteenth and early twentieth century that it was their duty to protect the supremacy of the white race. He

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[66] *Id.* at 11–12.

[67] *Id.* at 13.

[68] Adam Serwer, *White Nationalism's Deep American Roots*, ATLANTIC (Apr. 2019), https://www.theatlantic.com/magazine/archive/2019/04/adam-serwer-madison-grant-white-nationalism/583258 [https://perma.cc/2UBJ-Y8H3].

tells this story through the work and influence—and the milieu in which it existed—of Madison Grant. "The preservation of a pure white race, uncontaminated by foreign blood," Serwer writes, "was in fact sown with striking success in the United States," orchestrated through "a powerful cadre of the American elite, well-connected men who eagerly seized on a false doctrine of 'race suicide' during the immigration scare of the early 20th century. They included wealthy patricians, intellectuals, lawmakers, even several presidents. Perhaps the most important among them was blue blood . . . Madison Grant," and his book *The Passing of the Great Race*.[69] Serwer explains how the concept of race suicide preceded today's use of "white genocide," evoking a deep fear of a loss of status, control, cultural influence, and numerical majority of white people.[70] In explaining the essential role of the aristocratic class in propagating racial fear, he taps into the concept of "hegemony theory," a set of intractable beliefs common in the elite and general population. Serwer identifies this "hegemony theory" as essential to social coercion toward the maintenance of sharp social group boundaries. Serwer unearths the history of elites consuming Grant's ideas with alacrity, including Presidents Theodore Roosevelt, Warren Harding, and Calvin Coolidge. Harding embraced the ideas of a Grant acolyte who issued "warnings about the destruction of white society by invading dusky hordes." Harding would go on to orate that between races exists, "a fundamental, eternal, and inescapable difference," and that "racial amalgamation cannot be." President Coolidge would write that any mixing with "inferior races" would cause a degradation to white people and that the natural laws of racial hierarchy had to dictate immigration law.[71]

These elites sought to create a broadly held conviction amongst white people that their natural superiority and their political, social, and cultural dominance was being threatened. Serwer writes of statistician Francis Walker who bemoaned "racial inferiors," "whose offspring were crowding out the fine 'native' stock of white people."[72] Other elites at the time spoke of "the decay of the American race."[73] Serwer also quotes Grant from *The Passing of the Great Race*: "the cross between a white

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[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] Daniel Okrent, Opinion, *A Century Ago, America Built Another Kind of Wall*, N.Y. TIMES (May 3, 2019), https://www.nytimes.com/2019/05/03/opinion/sunday/anti-immigrant-hatred-1920s.html [https://perma.cc/C5C3-XANF].

man and an Indian is an Indian; the cross between a white man and a Negro is a Negro, the cross between a white man and a Hindu is a Hindu; and the cross between any of the three European races and a Jew is a Jew." Serwer makes clear that during this time of heightened attention to the national ethnic makeup, public intellectuals and thought-leaders were actively working to create a social preoccupation with the artificial notion of "white purity" which had to be defended.[74] By fabricating the concept that a "white race" would erode through contact and contamination by invented "non-white races," these thinkers biologized race in a way that needed staunch protection by any means necessary and by all who had a stake in unadulterated whiteness. Within this notion of "purity" sits an anxiety about biological vulnerability—a fragility that demands zealous attentiveness, which in turn instigates a hysteria among those enlisted to defend it. Grant also wrote about immigrants stealing white America's women on the way to racial extermination for white people.[75] Revealed here is not only the continued social construction of a reason to fear newcomers as different, but a reliance on the device of invoking assumed entitlements to female subordination, dominance, and ownership—another essential aspect of the conceived identity of the Western white male.

A. Patriarchy and the Authoritarian Male Self

Female subordination, as Peter Beinart notes in *The Atlantic*, is a ubiquitous mainstay of consolidating political power and projecting political strength.[76] Beinart writes that "the right-wing autocrats taking power across the world share one big thing, which often goes unrecognized in the U.S.: They all want to subordinate women."[77] What Beinart highlights is a common thread across authoritarians, from Trump to Duterte to Bolsonaro. The only weakness in this theory is that the subjugation of women is even more common than he outlines. As Beinart hints, common among "revolutionaries and counterrevolutionaries" alike,[78] the oppression of women has been characteristic of many besides autocrats. Across a range of regimes and even within certain movements of marginalized

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[74] Serwer, *supra* note 68.

[75] *Id.*

[76] Peter Beinart, *The New Authoritarians Are Waging War on Women*, ATLANTIC (Jan.–Feb. 2019), https://www.theatlantic.com/magazine/archive/2019/01/authoritarian-sexism-trump-duterte/576382 [https://perma.cc/FWZ2-RV4M].

[77] *Id.*

[78] *Id.*

people, a consistent thread has been legitimizing political power, at least partially, through notions of female inferiority and organizing around a patriarchal political structure. This underscores the pervasiveness of constructing the male "self" through the devaluation of women across cultures, and the uniquely potent form of dominance that "othering" takes when it comes to gender.

This is the result of the normalization of female subordination in the service of the accumulation of political power. Beinart quotes political scientist Valerie Hudson who instructs that "for most of human history, leaders and their male subjects forged a social contract: 'Men agreed to be ruled by other men in return for all men ruling over women.' This political hierarchy appeared natural—as natural as adults rearing children—because it mirrored the hierarchy of the home."[79] The normalization of this gender relationship, to the point of it being perceived as the "natural order," causes any departure from it to stir fear and anxiety among the authoritarian-minded as a disruption to stability. This feeling of disorder is then exploited by authoritarian leaders whose "efforts to denigrate and subordinate women cement—for their supporters—the belief that the nation, having been turned upside down, was being turned right-side up."[80]

Beinart's response to the threat of authoritarians exploiting female equality derives from an analysis different from what Stenner and Haidt propose. Beinart recognizes the long-pursued strategy of political opportunists to deepen and instigate fear of gender equality and to present female subordination as a reflection of stability. He thus calls for "normalizing [female] empowerment so autocrats can't turn women leaders and protesters into symbols of political perversity."[81] In Stenner and Haidt's framework that calls for a decontextualized reading of sociopolitical affairs, a move too quickly toward female equality would be understood as faceless change whose rapidity would place an unfair burden on the authoritarian-prone and their anxiety. Calls for tradition and a restoration of norms—strong patriarchal households, women relegated to domestic roles—would be preferable to the hard work of creating new norms and building a society where the full

[79] *Id.*
[80] *Id.*
[81] *Id.*

humanity of women is recognized, as to not perturb those who cannot tolerate change.

B. The Evolving Boundaries of Whiteness

Returning to the discussion of immigration and xenophobia in the early 20th century, what these voices and influences sowed were the conditions to pass an immigration law as restrictive as the 1924 bill. Immense effort went into forming and affirming the notion that the United States was a white country and that "true Americans" should fear non-white people. In the lead up to passage of the bill, "Republicans and Democrats converg[ed] on the idea that America was a white man's country, and must stay that way."[82] Serwer illustrates this sentiment through the voice of Grant who announced, "we have closed the doors just in time to prevent our Nordic population being overrun by the lower races."[83]

The United States constructed its identity as a "white nation," and stoked fear of that purity being threatened. That this construction was an artificial yet intentional design is illustrated by the Supreme Court's effort to establish the boundaries of whiteness. The Court, Serwer notes, had great difficulty as it strained to come up with a consistent definition of whiteness, made even more challenging by its reliance on baseless race pseudo-science.[84] The Court repeatedly changed course as it catered its definition of whiteness to white elites' ideas regarding exclusion from and worthiness of citizenship.[85] Serwer recounts the Supreme Court case of Bhagat Singh Thind, an immigrant from India. His claim of "whiteness" was denied by the court on the basis that—although he was hereditarily Caucasian—he was not "white" by common understandings of the identity.[86] Contrast this ruling with another case where the Court was tasked with deciding who qualified as white. Takao Ozawa, a Japanese man who petitioned to be categorized as white, was denied by the Court because, according to the justices, he could not be technically classified as Caucasian.[87] These two examples demonstrate ever evolving boundaries of "whiteness," which are based on exclusion from that group and on what basis that exclusion would occur. The Court waffled between rejecting science in favor of established notions of white identity on the

[82] Serwer, *supra* note 68.
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] LÓPEZ, *supra* note 65.

one hand and elevating science as the determinant on the other. In its deliberations, the Court exposed the supposedly scientific concept of Caucasian as actually a social invention—referring to it as being "popularly", as opposed to "scientifically," defined.[88]

All of this conformed to popular sentiments and attitudes about who was deserving of "full humanity," and recognition as such, by the United States government. The panic to close the doors to the outside world to define and defend whiteness and the fear that reverberated from this position is what motivates fears about immigration. The anxiety emanates from this logic and the resulting actions. In the era of the Immigration Law of 1924, the United States' idea of the "supreme white race" consisted only of the "Nordic race," the top of the "three tiered" races of white people as the prevailing understanding at that time dictated.[89] Whiteness has since changed, but the disposition toward non-white people and the message communicated regarding them has not.

Stenner and Haidt fail to appreciate the historical basis behind certain groups triggering anxiety amongst the United States' population. They bypass this history in an effort to decontextualize how immigration is perceived, labelling it "change" which inherently causes anxiety in populations. By isolating their stance from history, social forces, and an awareness of identity construction, Stenner and Haidt's interpretation of "anxiety due to immigration" is misleadingly laundered. In their view, this anxiety is cleansed of its reliance on racial hierarchy and white purity; instead being re-presented as nothing more than a psychological inevitability. On this point, it is worth quoting Serwer at length as he dissects this intentional sterilization:

> But to recognize the homegrown historical antecedents of today's rhetoric is to call attention to certain disturbing assumptions that have come to define the current immigration debate in America—in particular, that intrinsic human worth is rooted in national origin, and that a certain ethnic group has a legitimate claim to permanent political hegemony in the United

[88] *Id.* at 5.

[89] Serwer, *supra* note 68. Serwer describes the prevailing thinking during the turn from the 19th to 20th centuries when academics who were considered race experts established hierarchical categories within the white race. They were the "brave, beautiful, blond 'Teutons'" (whom Grant later changed to Nordics), "the stocky 'Alpines' and the swarthy 'Mediterraneans.'"

> States. The most benignly intentioned mainstream-media coverage of demographic change in the U.S. has a tendency to portray as justified the fear and anger of white Americans who believe their political power is threatened by immigration . . . .[90]

Given Serwer's documentation of President Trump and his advisors brandishing the symbols of white nationalism, denouncing Muslim immigration as dangerous, and advocating for "Scandinavian immigrants over those from Latin America or Africa,"[91] Stenner and Haidt failed by not considering the obvious social dynamics at work. Immigration officials have not hidden their racial motivations or intentions, plainly disproving Stenner and Haidt's point that anxiety around immigration is purely driven by the pace of change. "The president's rhetoric about 'shithole countries' and 'invasion' by immigrants," as well as the rise of the "white genocide" term, are directly linked to the fear-based language of "race suicide" that suffused the atmosphere leading to the 1924 immigration bill.[92] These racially motivated factors are important to understanding the present situation. Stenner and Haidt reach the conclusion they do because they analyze from within the United States' dominant narrative. Their perspective proceeds from a position that "erases the extent to which the republic was itself . . . one of settler control over excluded populations," leading them to implicitly endorse this project as a suitable aim.[93] The true impact of othering and white America's preoccupation with maintaining a hierarchy should not be silenced in favor of artificial, sterilized explanations that portray American society as innocent of racial bias and authoritarian impulses as harmless.

This assumption is why anxiety over immigration from Latin America remains high even as undocumented immigration is on the decline and immigration from these regions relative to others around the globe is decreasing.[94] Authoritarian-minded people care less about facts regarding who is coming than about who the perceived threat is. The rate of immigration isn't inducing fear as much as what Justin Gest of George Mason

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[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *See infra* note 118 and accompanying text.

[94] *See* Thomas B. Edsall, Opinion, *Who's Afraid of a White Minority?*, N.Y. TIMES (Aug. 30, 2018), [hereinafter, Edsall, *Who's Afraid?*] https://www.nytimes.com/2018/08/30/opinion/america-white-minority-majority.html [https://perma.cc/RUC8-E545].

University interprets as "a pervasive perception that Latinos, Africans and Asians are simply too different, too far removed from what Sam Huntington called the 'American creed.'"[95] Stenner and Haidt get as far as understanding that authoritarian backlash is in response to a disruption of order. It is what constitutes that "order" that they get wrong. The fear is not a mere loss of stability, but a loss of social status and access contingent on a white identity. It is the attack on the pre-existing social order and the arrangement of social groups that is the threat.

C. Racial Prejudice as Group Positionality

This point is incisively captured by Herbert Blumer's theory of group positionality. Blumer argues that racial prejudice is larger than individual malice or a set of negative feelings toward a different racial group, but rather "exists in a sense of group position."[96] The position of the dominant group in relation to the subordinated group is constructed through collective processes of socialization that solidify the dominant group's self-image of superiority. Racial prejudice is thus a collective activation of that sense of superiority, "a feeling that the subordinate race is intrinsically different and alien, a feeling of proprietary claim to certain areas of privilege and advantage, and a fear and suspicion that the subordinate race harbors designs on the prerogatives of the dominant race."[97] The instigation of prejudice, therefore, "lies in a felt challenge to this sense of group position. The challenge, one must recognize, may come in many different ways. It may be in the form of an affront to feelings of group superiority; it may be in the form of attempts at familiarity or transgressing the boundary line of group exclusiveness; it may be in the form of encroachment at countless points of proprietary claim."[98] The violation to the claim of whiteness—encompassing notions of citizenship, deservingness, and all of its attendant privileges—is the threat behind the reactionary backlash, as opposed to the introduction of instability.

Upon articulation of this theory, Blumer asserts that "the scheme, so popular today, which would trace race prejudice to a

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[95] *Id.* Justin Gest of George Mason University provides this quotation for an article in which Edsall distills the opinions from several scholars on the topic of United States demographic trends, the potential loss of majority status for white people, and the social implications of such a shift.

[96] Blumer, *supra* note 54.

[97] *Id.*

[98] *Id.*

so-called authoritarian personality shows a grievous misunderstanding of the simple essentials of the collective process that leads to a sense of group position."[99] Stenner and Haidt go a step beyond this misunderstanding, and completely excuse authoritarian-leaning personalities of harboring any racial prejudice. This absolution is the product of a social environment where explicit racism is condemned but whiteness must maintain a sense of purity and positional superiority. In order to preserve both, manifestations of racism (especially of the variety that cannot be traced to raw hate or the interpersonal) will not be uprooted but re-inscribed outside of popular definitions of racism. Stenner and Haidt reach the conclusions they do because, being members of the dominant group, they fall under the influence of the "processes of [group] definition." Through the "complex interaction and communication between the members of the dominant group," through the "leaders, prestige bearers, officials, group agents, dominant individuals and ordinary laymen present[ing] to one another characterizations of the subordinate group. Through talks, tales, stories, gossip, anecdotes, messages, pronouncements, news accounts, orations, sermons, preachments, and the like definitions," the white in-group takes form.[100]

To construct white identity, outsiders must be first constituted and then barred from membership, thus creating an image of whiteness as worthy of exaltation and entitlement. Although this process requires the subordination of an "other," it is interpreted as innocuous—its insidiousness is overlooked. This "self-making" is rarely conscious by the members of the group. Through complex interactions, shared stories, common definitions and the like, the in-group agrees no offense has been committed against others; the collective goodness of their group being self-evident. Stenner and Haidt have the sympathies they do because "to the extent they recognize or feel themselves as belonging to that group they will automatically come under the influence of the sense of position held by that group."[101] To Stenner and Haidt, the authoritarian's desire to exclude is, to some degree, sensible. They wouldn't have their own in-group without it. These are the contours and injurious solipsism of whiteness.

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[99] *Id.*
[100] *Id.*
[101] *Id.*

D. The Whiteness Paradigm and its Impact on Immigration Policy

What Stenner and Haidt draw from their examination of immigration is that incorporating the concerns of authoritarians will lead to better immigration policy. They argue:

> there are surely types and degrees of affinity between host and newcomers, rates of entry, and methods of supporting their assimilation and inclusion that facilitate successful integration into the community. Frank consideration of these matters is the key to broad acceptance of immigration policy and vital to the continued health of our liberal democracies.[102]

However, any immigration policy resulting from this decontextualized process will produce outcomes, though considered well-grounded and sound policy, that "just happen" to exclude people from Latin America and the Middle East because they are "harder" to assimilate. In short, their customs are just "too different" from the norm of whiteness.

The solutions engendered by this decontextualized framework are exemplified in journalist David Frum's analysis of US immigration policy. Frum argues that immigration is not going anywhere so it is necessary to understand the pros and cons of it to be able to regulate it appropriately and ensure the "right kind" of immigration occurs. Because he accepts as given many of the assumptions that Stenner and Haidt make, his aversion to large-scale immigration comes from its potential social disruptions, particularly the threat it poses to stable democracy.[103] He comments that the political left was once more closely aligned to what he considers reasonable by quoting Hillary Clinton as saying, "I think Europe needs to get a handle on migration, because that is what lit the flame . . . . [I]t is fair to say Europe has done its part . . . if we don't deal with the migration issue, it will continue to roil the body politic."[104] He reiterates this point by warning that "too much, or the wrong

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[102] Stenner & Haidt, *supra* note 8, at 214.

[103] David Frum, *If Liberals Won't Enforce Borders, Fascists Will*, ATLANTIC (Apr. 2019), https://www.theatlantic.com/magazine/archive/2019/04/david-frum-how-much-immigration-is-too-much/583252 [https://perma.cc/AE2S-BU2Z].

[104] *Id.*

kind [of immigration], and you … possibly upend your democracy."[105]

This stance takes for granted the exclusionary foundation of Western society. A body politic built on excluding, pillaging, and expropriating the globe, then denying access to those confiscated resources and the society enriched and given form by that extraction. What "lit the flame" is an objection to losing the right to exclude, the "roiling" of the body politic stems from the tight regimentation of who constitutes the "we." Clinton's and Frum's positions are that a society of belonging across ethnicities, races, and places of origin is prohibitively costly—or more simply—that they find such a society unimaginable having never questioned the merits of Western world-making. The question is never asked—what mechanisms or processes would cause the "upending of democracy"? Throughout our nation's history, white people have shown a willingness to undermine democracy and reject and dismantle institutions of social stability rather than lose their sense of status atop the racial hierarchy.[106] This reaction playing out, and not immigrants themselves, is what puts democracy at risk.

Frum reveals how firmly he is situated within the ideological framework of Western liberalism[107] when he describes the current global migratory patterns as an "exit from the *less successful* countries of the global South into the *more successful* countries of the global North."[108] Frum has chosen to construct his worldview devoid of historical context, making the inequality between the global South and North appear just a matter of "success." It is merely one set of nations outcompeting

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[105] *Id.*

[106] *See* Nikole Hannah-Jones, *The Resegregation of Jefferson County*, N.Y. TIMES MAG. (Sept. 6, 2017), https://www.nytimes.com/2017/09/06/magazine/the-resegregation-of-jefferson-county.html [https://perma.cc/9XBG-Z6VR] (recounting that in 1956 along with other Southern states, Alabama decided to shut down public schools completely rather than integrate). *See also* IAN HANEY LÓPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS 166–68 (2015) (writing of white people rejecting New Deal and Great Society era policies even as these programs reduced inequality, in part because politicians instigated white resentment about the social gains of people of color); Jonathan M. Metzl, *Dying of Whiteness*, BOS. REV. (June 27, 2019), http://bostonreview.net/race/jonathan-m-metzl-dying-whiteness [https://perma.cc/TV2N-TBXH] (detailing sacrificing health care expansion, in some instances costing them their lives, to preserve the white racial hierarchy).

[107] Western liberalism is defined here as the cognitive erasure of persistent hierarchy in the creation of a liberal subject—that subject then being universalized so everyone appears to be an equal.

[108] Frum, *supra* note 103 (emphasis added).

another in an equal playing field of opportunity—fair and square. Colonialism is completely absent from his analysis, because in order for the Western liberal subject to put together an understanding of the world in which it will exist, the Western world's crimes have to be erased so the subject can understand itself as a pure being ever-marching toward the liberal ideal.[109]

E. Frum's perspective leaves one with an incomplete and distorted view of the world that does not match reality. This foundational misunderstanding leads to proposals that dramatically miss the mark. For instance, Frum advocates that:

> [As] immigration pressures . . . increase, it becomes more imperative than ever to restore the high value of national citizenship, not to denigrate or disparage others but because for

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[109] *See* ROXANNE DUNBAR-ORTIZ, LOADED: A DISARMING HISTORY OF THE SECOND AMENDMENT (2018) (ebook). [Frum's selective sampling of history to construct his worldview is evident in his highlighting of President Theodore Roosevelt as a proponent of equality. He heralds Roosevelt as someone whose "insistence on a singular national identity was founded not on any sense of hereditary supremacy, but on his passionately patriotic egalitarianism." Frum, *supra* note 103. He quotes Roosevelt as saying, "The children and children's children of all of us have to live here in this land together. Our children's children will intermarry, one with another, your children's children, friends, and mine. They will be the citizens of one country." *Id.* Contrast this with Roxanne Dunbar-Ortiz's characterization of Roosevelt, who she describes as:

> an early convert to "Social Darwinism," leading to the racist pseudo-science of eugenics. In his view, all the darker peoples were inferior, particularly Native Americans, who were destined to disappear completely. But he also regarded poor white people as inferior . . . . Furthermore, he theorized that a new race was born with testing of settlers' survival skills in nature, creating a new kind of aristocracy destined to rule the world. The settler "stock" that morphed into that superior species was composed of English, Scots-Irish, French Huguenots, German, and Dutch, all Protestants. . . . Roosevelt argued that the superior European was strengthened by not intermarrying with their defeated enemies, which would cause loss of vigor.

DUNBAR-ORTIZ, *supra* note 109, at 41. It appears that in the quotation Frum cites, Roosevelt was not intending that his vision include everyone. It cannot be pretended that the exclusionary vision of the United States prevalent at the time, embodied in Roosevelt's words, has no effect on how we interpret immigration issues today, whose interests and security is centered, and how we understand and define the "immigration problem" and thus how we shape "solutions." As seen here, Frum's worldview as an outgrowth of a narrow "we" philosophy leads him to attempt to universalize words and sentiments meant only for an exclusive category of people without examining the way that narrow "we" philosophy shaped ways of reasoning, laws, and institutions that are not designed to accommodate everyone.

> many of your fellow citizens—perhaps less affluent, educated, and successful than you—the claim "I am a U.S. citizen" is the only claim they have to any resources or protection.[110]

In this passage, Frum comes upon a central truth, but one that he does not completely grasp. In place of equal access to resources and capital, in place of adequate wages, and in place of health care and other social safety nets, many people in the United States have been granted in-group membership through national identity. Instead of equal access, they have been given an "insignia of belonging" as capital has shifted across borders and as their jobs have been shipped overseas. What is left for them is to fulfill the important social role that keeps the West bound together—what Steve Martinot refers to as the "middle stratum."[111]

Author Rana Dasgupta describes this bolstering of symbolic citizenship as an arbitrary assignment of worthiness to people. This arbitrariness encourages the "productive role" of the "middle stratum"—regenerating the value of in-group membership through their acts of violence and oppression as an expression of ultra-nationalism.[112] Without challenging the underlying foundations of society's current structure, proposals will struggle to devise an egalitarian path forward while stretching to accommodate formations that demand hierarchy.

As reasons to support more restrictive immigration policy, Frum provides a laundry list of issues he believes immigration exacerbates. Among these are American citizens moving between states less frequently than the previous generation due to housing costs, the strain on government finances, Social Security and Medicare, the lowering of scores on national educational assessments, workplace safety and exploitation of workers, the delay in mass incarceration and the opioid epidemic garnering national attention, and the white working-class feeling like strangers in their own country.[113] Frum finds a way to link each of these issues to high rates of immigration.

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[110] Frum, *supra* note 103.

[111] STEVE MARTINOT, THE RULE OF RACIALIZATION: CLASS, IDENTITY, GOVERNANCE 78 (2003).

[112] Rana Dasgupta, *The Demise of the Nation State*, GUARDIAN (Apr. 5, 2018, 1:00 PM), https://www.theguardian.com/news/2018/apr/05/demise-of-the-nation-state-rana-dasgupta [https://perma.cc/FUK9-3UTU].

[113] Frum, *supra* note 103.

Frum does not spend any time interrogating other well documented explanations for these problems. He ignores exclusionary zoning and the rise of institutional investor landlords. He ignores the corporate capture of government which severely limits government revenue, affecting the viability public institutions of resources. He ignores the exclusionary and assimilationist ethos of the United States which influences the way schools view and inadequately accommodate English language learners. He ignores the predominating extractive form of capitalism that encourages worker exploitation and the warehousing of people in penal institutions. He ignores the unsustainability of the implicit arrangement to compensate a certain part of the working-class—the "real American" segment—with honorary but tenuous membership in the dominant in-group, even as that value erodes in the face of capitalism's evermore rapacious demands. His arguments, in this regard, are not so much astute critiques that give reason to oppose immigration as they are reasons to reform American society and institutions. He is not exposing flaws in the way the country handles immigration. He is holding up a mirror—a point he eventually, however reluctantly, comes around to admitting: "it is more true that America's tendency to plutocracy explains immigration policies than that immigration policies explain the tendency to plutocracy."

F. The Price of the Ticket: The Problem with Same-ing

Stenner and Haidt conclude their analysis by calling for "attending to people's needs for oneness and sameness; for identity, cohesion and belonging," and for an attentiveness to authoritarians' "needs and preferences."[114] But what if those needs and preferences are existential threats to certain groups of people? As Stenner and Haidt pointed out themselves, authoritarian demands will "typically include legal discrimination against minorities, coercion of others," and demands for the use of group authority (i.e. coercion by the state).[115] Further, they concede authoritarians display "a willingness to support extremely illiberal measures (such as the forced expulsion of racial or religious groups)."[116] In the United States context, this means *support* for police brutality and unjustified police killings of Black people, children ripped from families and caged at the Mexican border, and a Muslim ban. Through this conclusion, the authors reveal that the other side

[114] Stenner & Haidt, *supra* note 8, at 215.
[115] *Id.* at 184.
[116] *Id.* at 183.

of their overly-sympathetic disposition toward authoritarians is a dismissive and devaluing stance toward people of color and religious minorities. When Stenner and Haidt call for "belonging," they are actually advocating for "same-ing," a softer othering, yet still an erasure of identity that flattens and destroys everything that makes one appear different (everything deemed unacceptable to the social majority). This "same-ing" is advanced as a prerequisite for acceptance without due consideration for what it is demanding. Proponents carry a false sense of self-congratulatory virtuousness believing they are extending a welcoming embrace, unaware that their acceptance is conditional upon a cleansing of anything that smacks of difference, anything that would make the "other" recognizable as "the other." Same-ing, in other words, is "the price of the ticket."[117]

Stenner and Haidt's use the word "belonging" is misleading. When they conflate "belonging" with oneness and sameness, they are speaking of "belonging" as a condition in which marginalized groups assimilate into the dominant group, or "join the club," no matter the restrictions and demands of conformity that club may place on membership.[118] The authors

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[117] The price of the ticket refers to James Baldwin's sentiment that the cost of admittance into white social circles is to eliminate everything that identifies one as distinguishably non-white. For him, acceptance into white literary spaces meant burying his Blackness and queerness. This price that is demanded—the price of the ticket—is in essence a demand for same-ing, or the compulsion of narrow identity. *See* JAMES BALDWIN, THE PRICE OF THE TICKET: COLLECTED NONFICTION 1948–1985 (1985).

[118] Nikhil Pal Singh, *Universalizing Settler Liberty: An Interview with Aziz Rana*, JACOBIN, (Aug. 4, 2014), https://www.jacobinmag.com/2014/08/the-legacies-of-settler-empire [https://perma.cc/M48M-6QTT]. Also neglected are the unjust foundations of the institutions and structures into which marginalized people are included. This approach of inclusion, as opposed to reckoning and co-creation, has materialized in the folding in of a smattering of people from marginalized identities atop unjust and exploitative systems of human stratification—where equality is defined by a diversity of people operating and benefiting from arrangements that demand and generate value from oppression and subordination. As Aziz Rana puts it, "the country can have a nonwhite person as president, secretary of state, or chairman of the Joint Chiefs of Staff without any expectation that this individual will challenge the basic parameters of economic and racial hierarchy or of American interventionism abroad." *Id.* Because the United States has "never properly confronted the country's colonial infrastructure or its imperial legacies" or has pursued a reconciliatory strategy of inclusion into the existing American project for its marginalized and subordinated populations instead of a "conscious moment of colonial accounting" with them, the nation has been allowed to believe that "the application of US power is fundamentally non-imperial," and that the "projection of American power necessarily means the defense of liberal values," even as it has suppressed democracy and popular sovereignty, imposed

also assert that "in the absence of a common identity rooted in race or ethnicity . . . the things that make 'us' an 'us' —*that make us one and the same* —are common authority (oneness) and shared values (sameness)."[119] They believe that "democracy in general, and tolerance in particular, might actually be better served by an abundance of common and unifying rituals, institutions, and processes,"[120]—in other words, the practice of systematic same-ing through culture-making and institution-building. That might serve the goal of belongingness, but not unless marginalized peoples have a role in the construction of that culture and those institutions. Stenner and Haidt's argument that assimilation is a necessary component of immigration policy betrays their bias. Implicit in their analysis is the fact that the authors cannot imagine the existence of a truly multiracial, multicultural democracy with diverse salient identities. They are challenging the project of pluralism itself.

G. Conservatives and the Pace of (Racial) Change

Conor Friedersdorf provides a clear articulation and defense of Stenner's perspective, mainly in reference to her 2005 book *The Authoritarian Dynamic*.[121] The main points he underscores from Stenner's work are that status quo conservatives, because they have a predilection for defending tradition and order, are perhaps the strongest hope for defending liberal democracy in the face of rising authoritarianism. He makes this case by quoting Stenner's reasons why conservatives are so dependable in trying times. He lifts up her assertion that "it is no secret that liberal democracy is most secure when individual freedom and diversity are pursued in a relatively orderly fashion," and that if conservatives are provided "reassurances regarding established brakes on the pace of change, and the settled rules of the game to which all will adhere," they can be expected to "defend faithfully an established order."[122] But if made to withstand accusations of racism, status quo conservatives can be driven "into unnatural and unnecessary political alliances with the hateful and intolerant."[123]

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economic systems of extraction, and colonially derived hierarchical valuations of people abroad. *Id.*

[119] Stenner & Haidt, *supra* note 8, at 185.

[120] *Id.* at 211.

[121] Conor Friedersdorf, *How Conservatives Can Save America*, ATLANTIC (Feb. 2, 2017), https://www.theatlantic.com/politics/archive/2017/02/how-conservatives-can-save-america/515262 [https://perma.cc/3EGM-AUS7].

[122] *Id.*

[123] *Id.*

However, both Stenner and Friedersdorf miss that in order to divorce notions of "order" and "change" from race, the extent to which society in the United States is predicated on hierarchical stratification must be obscured. Only once the stratification is ignored can immigration from non-white regions of the globe and movements among the marginalized in search of opportunity be described as an aversive rate of change that has nothing to do with race. They call for a reliance on conservatives to "defend faithfully an established order," but what if the established order is unjustifiable and cannot create the conditions for equality for the marginalized and a fully inclusive and broad "we"? Advocating for "diversity [to be] pursued in a relatively orderly fashion,"[124] is the equivalent of telling people of color and other marginalized groups that your freedom must wait. It must conform to a restrained manner that will not upset those who find a world that changes to accommodate your freedom to be distressing. There is a direct relationship between liberty and equality. For the group that has built its identity upon being the top rung of a hierarchy, embedded in their liberty is the right to dominate others, and for those others, equality presents the pathway to liberty. An unencumbered move toward equality then becomes an affront to "liberty" for people whose identity is constituted by whiteness as a super-ordinated position.

What is lacking in this analysis is even a notion of concern for the trauma, hardship, and struggle that people of color and marginalized communities face. Instead, that trauma is dismissed to focus exclusively on how members of the dominant in-group feel about the pace of change—change that is rooting out their "right to dominate." Is it not the height of in-group (white) entitlement to believe that someone else's freedom or full humanity is a pace of change in need of regulation? Such a position recalls the Reverend Dr. Martin Luther King, Jr.'s statement on the white moderate who is "more devoted to order than to justice," and "who paternalistically believes he can set a timetable for another man's freedom."[125] Stenner—and Friedersdorf in his support—has not interrogated sufficiently exactly what her words advocate.

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[124] *Id.*

[125] Letter from Birmingham Jail, Martin Luther King, Jr. (Apr. 16, 1963) (on file with the Columbia Journal of Race and law), http://okra.stanford.edu/transcription/document_images/undecided/630416-019.pdf [https://perma.cc/5EJF-U8K3].

Ibram Kendi grapples with these implications when he asks, "Am I an American?"[126] Kendi, through a tour of history, demonstrates how marginalized groups and Black people in particular have been told to put their freedom on hold out of concern for the white in-group's sense of comfort. He writes of the popular opinion in the antebellum period that "slavery be diminished in a way so gradual as to prepare the whites for the happy and progressive change." He explains how President Grant grew "tired of alienating racist Americans from the Republican Party every time he sent federal troops to defend our right to live, vote, thrive, and hold political office." He reveals that Thomas Jefferson felt that Black people needed not equality but relocation through colonization in order to be civilized.[127]

Kendi's point is not to show how virulently racist the country was in its past, but to illuminate how similar arguments persist today to continue to deny full humanity to people marked as the other. "The moderate strategized then," he writes, "as the moderate still does now, based on what was required to soothe white sensibilities." In the America of slavery, moderates stressed that "immediate emancipation was impractical and impossible in the way that anti-racists are told immediate equality is impractical and impossible today."[128] Kendi communicates how the message from Stenner, Haidt, Friedersdorf and others, who plead to put white comfort ahead of equality for all people, is received by those "othered:" "I can dine on American soil until I demand a role in remaking the menu that is killing me . . . . I hear the moderate message of compliance, of assimilation, of being happy just dining."[129] This is the message broadcasting from those calls to accede to the preferences of the authoritarian-prone, or to create the conditions necessary to allow status quo conservatives to deliver us to a stable order. It is conformity garbed in language that severs its relationship from race and the construction of white identity.

Stenner and Haidt defensively fend off any criticism that considers the context of power and racial dynamics, claiming that "it is implausible to maintain that the host community can successfully integrate any kind of newcomer at any rate whatsoever, and it is unreasonable to assert that any other

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[126] Ibram X. Kendi, *Am I an American?*, ATLANTIC (Jul. 16, 2019), https://www.theatlantic.com/ideas/archive/2019/07/am-i-american/594076 [https://perma.cc/3BQP-XU4U].

[127] *Id.*

[128] *Id.*

[129] *Id.*

suggestion is racist."[130] This position drastically misunderstands the role of whiteness and white racial hierarchy in binding the West, determining identity, and making non-white people seem beyond integration. The authors likely cannot make sense of such a critique in the context of racism narrowly defined as interpersonal racial animus. But, in the context of maintaining white centrality, white normalcy, and the potency of whiteness as a force permeating Western and United States society, criticism of their conclusions becomes resonant. In fact, preservation of white normativity is exactly the work the authors do through their argumentation and outsized sympathies for authoritarianism. What needs to be examined is the Western ideology from which they write, its relationship to white hegemony, and their own role in reifying the epistemologies that continue to mask its foundations.

V. WESTERN IDEOLOGY AND THE FICTION OF WHITENESS

Understanding Stenner and Haidt's conclusions will require an exploration of the construction of Western ideology. In *Sapiens: A Brief History of Humankind*, Yuval Noah Harari argues that the characteristic that sets humans apart from other species is the ability to create collective fictions.[131] During the Cognitive Revolution, when new ways of thinking and communicating rapidly developed, humans adapted a new skill that allowed for mass cooperation: myth-making. While other animals can communicate information about the physical world—a warning of trouble, the location of food—humans can speak about and believe in ideas and concepts that are completely fabricated. The widespread belief in these ideas and the trust that others believe in them, too, allowed humans to form ever larger groups, leading to cities, nations, empires, civilizations, and entire cultures.[132] Through collective stories, people "have been able to change their behavior quickly, transmitting new behaviors to future generations without the need of genetic or environmental change."[133] Human myths propelled the species to its position atop the food chain and to the heights of spectacular achievement.

Among these myths, Harari includes money, religion, ideology, legal systems, corporations, and nations. He makes

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[130] Stenner & Haidt, *supra* note 8, at 214

[131] YUVAL NOAH HARARI, SAPIENS: A BRIEF HISTORY OF HUMANKIND, 32 (2015) (ebook).

[132] *Id.*

[133] *Id.* at 33–34.

certain to point out that these myths are not lies. The nation state, for example, is "an imagined reality . . . that everyone believes in, and as long as this communal belief persists, the imagined reality exerts force in the world."[134] These fictions are the basis for mass social connection and the behaviors, norms, and values that derive from them form culture.[135] Harari calls these grand myths by which humans live, "imagined orders." Once an imagined order is established, great effort must be undertaken to maintain its stability. Through indoctrination, coercion at times, and its appearance in the physical world, the imagined order is embedded into our thinking and incorporated into our lives so deeply that it is assumed to be natural and pre-social.[136] Harari also notes that "an imagined order can be maintained only if large segments of the populations—in particular large segments of the elite and the security forces—truly believe in it,"[137] or in other words, if it takes on a hegemonic nature.[138]

For most people, race is primarily understood narrowly as skin color and not that "laws and customs helped to create 'races' out of a broad range of human traits."[139] Many forget or do not realize that whiteness is just another fiction. It only exists in the collective minds of humans for the purpose of legitimizing the imagined order of Western ideology.

The Western notion of the self is borne out of the Enlightenment tradition by thinkers such as Kant, Descartes, and Locke.[140] These philosophers imagined a self that was one-dimensional and capable of reasoning separate and apart from any social experience—a fixed, unfragmented, and unitary self, excluding any possibility of a self with multiple identities. In fact, this self is not set apart, above, or before social experience, but devised and constructed by societal influence. The self reflects—not determines—social values, preferences, and practices. Indicative of its conception as a construct of European society, despite its claims on universality, this "self" did not intend to include non-white people and their ways of life.[141] As powell notes, "by construing the essence of the human self as individual

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[134] *Id.* at 32.

[135] *Id.* at 37.

[136] *Id.* at 112.

[137] *Id.*

[138] Crenshaw, *supra* note 49.

[139] *Id.* at 113.

[140] john a. powell & Stephen M. Menendian, *Remaking Law: Moving Beyond Enlightenment Jurisprudence*, 54 ST. LOUIS L.J. 1035 (2009).

[141] POWELL, RACING TO JUSTICE, *supra* note 27.

and autonomous, European thinkers deliberately excluded from selfhood members of non-white societies that were organized around non-individualistic norms."[142]

Furthermore, this individualistic self borrows ideas of dominion—an ordained entitlement to rule over the earth and "lesser" forms of life—from the religious traditions of Western society. For instance, "Hobbes's state of nature is a secularized version of Calvin's 'natural man' without God," and "John Locke's theory of individual rights is rooted in a Protestant understanding of man's relationship with God."[143] This "adherence of modernists to Christian beliefs justified the conquest and subjugation of non-Christian (that is, non-white) [peoples]."[144] As DuBois reveals through his study of whiteness, central to white identity is the claim by whiteness to the "title of the universe,"[145] motivated by the belief that the universal self (white male) was created in God's image. As Harari points out, "the idea of equality is inextricably intertwined with the idea of creation. The Americans got the idea of equality from Christianity."[146] Since non-white people were constituted outside of notions of the Western self, equality was reserved for white people, and people of color were part of the lesser world subject to the West's domination.

Because whiteness is constituted in opposition to other explicitly racialized identities—deriving its value, virtuousness, and esteem from standing apart from degradation and debasement—it required anti-Blackness to take form. As Crenshaw states,

> Throughout American history, the subordination of blacks was rationalized by a series of

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[142] *Id.* at 169.

[143] *Id.* at 217.

[144] *Id.* at 169.

[145] Ella Myers, *Beyond the Wages of Whiteness: DuBois and the Irrationality of Anti-Black Racism*, SOC. SCI. RSCH. COUNCIL: ITEMS (Mar. 21, 2017), https://items.ssrc.org/reading-racial-conflict/beyond-the-wages-of-whiteness-du-bois-on-the-irrationality-of-antiblack-racism [https://perma.cc/B3WC-YG2Y]. Myers discusses DuBois's conceptualization of whiteness in *Darkwater* and quotes his pondering of what constitutes whiteness: "I ask soberly: 'But what on earth is whiteness that one should so desire it?' Then always, somehow, someway, I am given to understand that whiteness is the ownership of the earth, forever and ever, Amen!" She then goes on to elucidate DuBois's point even further, stating that "Whiteness entails 'passionate' belief in one's right to everything and anything. The 'title to the universe claimed by White Folk' is an 'extraordinary dictum,' which lies at the heart of white identity."

[146] HARARI, *supra* note 131, at 109.

> stereotypes and beliefs that made their condition appear logical and natural. . . . Today, it is probably not controversial to say that these stereotypes were developed primarily to rationalize the oppression of blacks. What is overlooked, however, is the extent to which these stereotypes serve a hegemonic function by perpetuating a mythology about both blacks and whites even today, reinforcing an illusion of a white community that cuts across ethnic, gender, and class lines. . . . Racism helps to create an illusion of unity through the oppositional force of a symbolic 'other.' The establishment of an Other creates a bond, a burgeoning common identity of all non-stigmatized parties—whose identity and interests are defined in opposition to the other. . . . [A] structure of polarized categories is characteristic of Western thought.[147]

Central to the conceptualization of the Western self was not only the exclusion but the degradation of non-white people. This animating necessity of the white identity fuels beliefs around who belongs and who does not—who *can* belong and who cannot—as long as whiteness and current configurations of the Western self rule the day. Compounding the damage is that, in order to have an appearance of validity, the claim of universality necessitates the cloaking of this exclusion and degradation in today's world. At least in theory, if not in action, racial hierarchy is frowned upon, equality is extended to everyone, and the universal self is meant to apply to all people, not just white men.

A. Objective Reasoning or a Biased Worldview?

The assertion that the ability to reason resides with an a priori self that precedes society is also fundamental to the process of myth making—the insistence "that the order sustaining society is an objective reality created by the great gods or by the laws of nature."[148] As reason was conceived as the ability to know and interpret pre-social and empirical aspects of the world and of being, it serves as the basis on which Enlightenment thinkers believed they discovered and came to realize the essence of the universal unitary self. However, as is evident from Harari's insights, what were thought to be universal conclusions from an a priori ability to reason are

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[147] Crenshaw, *supra* note 49, at 112–13.

[148] HARARI, *supra* note 131, at 113.

actually constructs heavily informed by Christianity and European society. Neglecting this insight, Western thinking claims—as the interaction between reason as a concept and the construction of whiteness is relegated to the background—that all persons through the process of reasoning would naturally reach the same conclusions. This move, by definition, excludes from full personhood anyone with differing conclusions. Understanding this interaction reveals that reason, though thought to be a priori and its conclusions universal, is in reality highly dependent on positionality.

Stenner and Haidt reach their conclusions because they operate within the boundaries of the "whiteness-privileging Western imagined order." They fail to see how significantly white societal primacy influences their thinking. The authors conclude that authoritarian concerns should be attended to. They believe that this conclusion was reached through careful objective "reasoning." They are blind to the fact that their "reasoning" is positional and shaped by their socialization in a society that ignores its own racially exclusive foundation. They see nothing wrong with asserting that the dominant culture has the right to demand assimilation and that authoritarian fears of immigrants are valid. They cannot conceive of how their reasoning is colored by race. This is the same logic that motivates the sentiment that Ashley Jardina of Duke University touches upon in her description that many white people are not motivated by racial animus, but:

> "that the rug is being pulled out from under them—that the benefits they have enjoyed because of their race, their groups' advantages, and their status atop the racial hierarchy are all in jeopardy. . . . [W]hite identity is not synonymous with racial prejudice. White racial solidarity provides a lens through which whites interpret the political and social world that is inward looking. . . . Put bluntly, the politics of white identity is marked by an insidious illusion, one in which whites claim their group experiences discrimination in an effort to reinforce and maintain a system of racial inequality where whites are the dominant group with the lion's share of power and privileges." Because for many whites "identifying with their group and protecting its status hardly seems problematic, especially compared to racism," it's difficult to

> "convince some whites that there's something normatively objectionable about identifying with one's racial group and wanting to protect its interests."[149]

Just as Stenner and Haidt are flabbergasted that anyone could interpret their conclusions as racist, the white identity politics that Jardina describes interprets itself as benign. Perhaps describing these perspectives as racism and bigotry seem too strong. However, it is important to convey the entanglement of safeguarding social benefits for white people with an ideology that declares white people superior to others. This ideology that is a close cousin of racism—and, in fact, relies on racism for its birth as a dominant ideology—is just as harmful to people of color. Stenner, Haidt, and others who are fully enveloped by this imagined order may not like the accusation of racism, but are unwittingly toiling in an ethos that wields the same weapons and inflicts the same injuries.

Also going unnoticed is the act of mythmaking in which Stenner and Haidt are partaking. By defending authoritarian fears, taking the reasoning on which their conclusions are based for granted as natural and universal, and flatly denying that race could ever have had an impact on their thinking (thus rendering its work invisible), the authors are participating in a bit of maintenance work on the imagined order from which they operate.

VI. A SOCIETY AND POLITICAL ECONOMY SHAPED BY AN EXCLUSIONARY "WE"

A. The Social Death

Harari notes that in the many revolutions that changed the course of humanity, there were central transitions in behavior and ways of thinking that powered these new directions. The Scientific Revolution was marked by an admission of ignorance which allowed people to seek new knowledge and solutions to existing problems. This change in thinking led to a belief that the future would be better than the present, paving the way for the concept of credit and the modern

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[149] Thomas B. Edsall, Opinion, *White Identity Politics Aren't Going Anywhere*, N. Y. TIMES (Dec. 20, 2018) [hereinafter Edsall, *White Identity*] (quoting ASHLEY JARDINA, WHITE IDENTITY POLITICS 267–68 (2019)), https://www.nytimes.com/2018/12/20/opinion/trump-race-immigration-democrats.html [https://perma.cc/6XRR-M37P].

economy.[150] The Cognitive Revolution's essential lesson is that humans are capable of creating and believing grand myths that allow for widespread cooperation.[151] While slavery in the United States was not a new innovation—as the practice of enslaving people had been in existence for millennia—nor was it transformative to the point of marking a revolution in human history, it did have an impact on *modern society* (from the era of slavery on through the present) similar to the transition in behaving and thinking that marks epochal revolutions. Slavery showed people of the modern era that their myth-making abilities can be used to conceptually kill others—to exact upon them a social death.[152] This process involves the stripping of full person status and the induction into a subordinated and subservient hierarchy meant to enable a full range of life for those still recognized as whole and respected selves. Once socially dead, these people could be exploited and extracted for all they were worth without harm, consequence, or guilt. It should be noted, as Cedric Robinson and other theorists of the Black Radical Tradition point out, the social death concept takes the perspective of state structures, institutions, and the powerful that are served by them.[153] From the perspective of the people rendered "socially dead," their resistance, especially in a collective form, testifies to their persistent social existence.[154] But in terms of how they are regarded and offered for expropriation by the political economy, their social status was made one of insignificance. Once this discovery was made, it not only justified but completely erased the exploitation, death, and destruction of the industrial revolution, capitalism, and globalization. Saskia Sassen refers to this process as expulsion.[155]

B. Globalization and the Nation-State

This ability to incorporate social death of the victims of existing systems and institutions underpins the neoliberal ideology guiding United States domestic and foreign policy today. The global economic integration promoted and extended across

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[150] *See* HARARI, *supra* note 131, at 212–84 (discussing the consequences of the scientific revolution in chapters 14–16).

[151] HARARI, *supra* note 131, at 20–35.

[152] ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH 35 (1982).

[153] H.L.T. Quan, *It's Hard to Stop Rebels that Time Travel: Democratic Living and the Radical Reimagining of Old Worlds*, *in* FUTURES OF BLACK RADICALISM, 176 (Theresa Johnson Gaye & Alex Lubin eds., 2017) (ebook).

[154] *Id.*

[155] SASKIA SASSEN, EXPULSIONS: BRUTALITY AND COMPLEXITY IN THE GLOBAL ECONOMY 10 (2014).

the planet by the United States has reached its level of domination by exploiting the convenience of socially dead peoples and extracting advantages granted by the lasting impacts of colonialism. As Toni Morrison defines the term in *The Origin of Others*, globalization is "the free movement of capital and the rapid distribution of data and products operating within a politically neutral environment shaped by multinational corporate demands. . . . [B]ut [it is] also the collapse of nation states under the weight of transnational economics, capital, and labor," as well as "the preeminence of Western culture and economy."[156]

This economic structure has achieved the prodigiousness and vast control that it has because it has compelled nations and their mechanisms for governance and restraint to bend to it. Instead of corralling it, national governments have been sufficiently captured to the point of serving it. In this environment, there is nothing protecting people from the abuses and exploitation of the excessive greed of unchecked global capitalism. As Rana Dasgupta puts it, "20th century political structures are drowning in a 21st century ocean of deregulated finance [and] autonomous technology."[157] While "financial elites—and their wealth—increasingly escape national allegiances altogether,"[158] while corporations turn their backs on their "home-nations," refusing to contribute to the social systems of those countries, and while borders essentially become meaningless for the global elite, the dislocated and expelled face continually steeper barriers. They are fleeing poverty, the vicissitudes of climate change, and unrest—much of which has been induced by globalism. Many of these challenges to free movement across borders for people (while capital, technology, and the wealthy move uninhibited) are due to last gasp efforts by formerly effective nations trying to cultivate a sense of power. Dasgupta explains that, "political authority is running on empty, and leaders are unable to deliver meaningful material change. Instead they must arouse and deploy powerful feelings: hatred of foreigners and internal enemies, for instance, or the euphoria of meaningless military exploits."[159] Strong borders play this important role for a decaying national assertiveness, but so too do they serve an essential purpose for the global business elite. Above the advantages restricting the movement of labor creates, strong borders provide a much more subtle, fundamental, and

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[156] TONI MORRISON, THE ORIGIN OF OTHERS 96–97 (2017).

[157] Dasgupta, *supra* note 112.

[158] *Id.*

[159] *Id.*

pernicious necessity toward maintaining stability of the global economic structure. A re-examination of the process of racialization in the United States will help to better understand this point.

C. The Violent Process of White Racialization

In 18th century colonial Virginia, the ruling class needed a mechanism to protect the slave economy. It needed something to prevent African slaves and poor laboring Europeans from rebelling against an unjust economic system. In response to a series of uprisings in the late 1600s, most notably the Bacon Rebellion of 1676, by the early 1700s, that mechanism was advanced in earnest and institutionalized in the form of slave patrols. Scholar activist Steve Martinot states that "the patrols brought white people together from a variety of classes . . . . Their main task was to guard against runaways and autonomous organization among the Black working class (as slaves)."[160] In other words, the slave patrols' main purpose was to foster a sense of unity among white people and deny any semblance of equality to or community with white people for Black people. Through the unifying ritual of conducting these patrols, what Martinot refers to as a "middle stratum" was constructed.[161] It served an intermediary purpose as a source of control, both forfeiting itself to the control of the elites and acting as a control mechanism of the enslaved class. But, it also, as Martinot argues, acted as "social unity reconfiguring a sense of allegiance," becoming "the predominant moment in white self-racialization through the racialization of the Africans."[162] In this telling, as is established above in the re-analysis of the concept of hegemony, white identity itself takes form with the creation of a permanent subordinated "other." Citing Theodore Allen's *Invention of the White Race*, Martinot explains that the creation of race—of an identity based upon race—for the dominant white group required "that the group to be dominated be given undifferentiated status, that is, generalized and inferiorized," and also "that the dominated group is accused of lacking something, which specifies its inferiority,"[163] recalling Blumer's definition of racial prejudice.[164]

The act of policing and patrolling Black people was justified by the instigation of a deep fear associated with

[160] MARTINOT, *supra* note 111.
[161] *Id.*
[162] *Id.* at 70.
[163] *Id.* at 68.
[164] Blumer, *supra* note 54.

Blackness. As Martinot puts it, "the concrete social separation of the English and African bond-laborers depended on the generation of a massive social paranoia."[165] The deep-seated nature of this paranoia was necessary to make it seem to white people that any resistance to oppression on the part of Black people is a threat so severe that it renders any violence inflicted upon Black people not only reasonable, but valiant and commendable. Martinot writes:

> The possibility and appropriateness of rebellion by the oppressed and the rationales (and valorization) of preemptive suppression by the English are the two sides of this question. If one side is the recognition of the reality of uprising against oppression, the other entails imagining a forbidden rebellion against which all countermeasures are appropriate a priori. The notion of paranoia substitutes the demonic for what would have been supported in terms of social justice (or class interests), within an alternate paradigm of solidarity (English). It is from within the convoluted thinking of this structure that race and white supremacy evolve.[166]

In other words, paranoia serves to erase the evil of white violence and in its place imbue it with notions of honor and righteousness, or even an innocuous and unremarkable way of life, while also demanding conformity to a narrow white identity and allegiance. This erasure is what Jardina refers to when she reports that white people do not interpret guarding unearned white advantage as problematic, and it is what activates the racial prejudice—read by white people as anything but prejudice—that Blumer elucidates in his theory of "group positionality."

Present calls for border security closely mirror the rationales and objectives of the colonial Virginia slave patrols. In a period where the wages of whiteness are eroding, to distract from this fact, the strengthening of white identity and the bond of the white group is attempted through the inflammation of border tension. As whiteness as race was constructed through the slave patrols, white identity is being regenerated through fury at the Mexican border and in reactions to Muslim immigrants. Paranoia is being stoked through descriptions of

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[165] MARTINOT, *supra* note 111, at 64.

[166] *Id.* at 65.

migrants as national security threats and through President Trump's national emergency declaration to build a border wall. This paranoia then justifies and triggers intense violence at the border and against immigrants of color, which is read through the lens of whiteness as merely a defense of the national fabric. In reference to the slave patrols, Martinot writes that "terrorism toward Africans and African Americans signified that racism relies on a process of paramilitary activity."[167] The border patrol is the present-day slave patrol: using paramilitary force and executing acts of terror, they reinforce the inferiority and the need to control those deemed as outsiders, inversely fortifying exclusive claims of belonging and the superiority of whiteness. Martinot explains that on the one hand, white "potential violence as a control mechanism engendered an ethos of impunity that expressed itself as terror in the face of their operations. On the other, they appeared to the white population as the institution of peace and social tranquility. Terror and impunity toward Black people constituted the materialization of white solidarity and tranquility, and white consensus in solidarity constituted the product of terror and impunity."[168] While immigrants and other communities of color experience violence and terror as the result of white identity constructing itself, those who believe themselves to be white find in this violence and terror a peace and tranquility—as it, for them, nurtures a sense of self and a welcoming in-group. Furthermore, as Martinot points out, "the violent abuses of slaves that quickly came to characterize the operation of these patrols provided the poor white people with a way of discharging frustration and anger at the elite."[169] As dissatisfaction heightens as the result of present-day economic exploitation, those grievances and resentments are displaced—transferred upon those who have been othered for the purpose of white self-assertion. The danger of acquiescing to authoritarian-minded desires lies in this revelation. It is not simply complexity or disorder that they fear, but a loss of identity (as built around whiteness).

The people whose hysteria is activated by the Trump Administration's border fear-mongering serve as today's middle stratum. They call for strong borders that in reality only serve the interests of multinational economic giants; constructing a whiteness which makes space for those grasping most desperately to white identity to lay down in accordance to their

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[167] *Id.*
[168] *Id.*
[169] *Id.*

own domination. Just as white identity was not of the same importance to the elite as it was for the poorer white laborers who they needed for economic stability, the paranoia around border security is not a cause of concern for the global elite. They need it to the extent that it will activate the populations that they dominate to demand for the elite the key to the elite's own economic advantage. Multinational corporations and the global business elite need the obsolete national governance structures to remain in place to continue to operate above any system of accountability. Toward that end they've enlisted the new patrol class to demand strong borders and national identities.

D. The Western Self and Capitalism

Just as colonial slave patrols bear great resemblance to present border control, so too does the universalized Western self, in its constitution as an implicitly racialized white self, reflect the contours of the neoliberal free-market-regnant economy of globalization. This connection exists because the Western ideology that birthed as well as grew out of the concept of the Western self, underpins the construction of capitalism. As delineated in this Article's discussion of the Western self, this self relies ontologically on innocence and purity (whiteness), universalism, and egalitarianism, even as it depends on hierarchy, dominion, and the erasure of those who don't conform to its image. In order to maintain a veneer of egalitarianism, innocence, and purity, the system must conceal its domination and exploitation. University of California, Los Angeles, economic anthropologist Hannah Appel shows through a study of transnational oil markets that global markets "do not merely deepen racialized and gendered postcolonial disparities; they are constituted by them."[170] In making a case for this argument, she provides an account of how wage schedules are set for oil company laborers by nation of origin. Appel points out that "whereas the value of labor varies radically across the furiously-maintained border of nations, genders, and races, the price of oil is largely stable across space."[171] Multinational oil companies exploit these variations. She details how even when possessing greater skills, workers from the Global South are paid significantly lower wages than workers from the West—generally set by a rating system that decides wages based on

[170] Hannah Appel, *Race Makes Markets: Subcontracting in the Transnational Oil Industry*, SOC. SCI. RSCH. COUNCIL: ITEMS (Dec. 17, 2018), https://items.ssrc.org/race-capitalism/race-makes-markets-subcontracting-in-the-transnational-oil-industry [https://perma.cc/EYS5-6U5B].

[171] *Id.*

nationality.[172] "Firms," she highlights, "have long argued that wage, schedule, and facility segregation is not a question of racism," and can convince themselves that this is true because the "idea of the market absolves the firms and the rating systems from charges of discrimination or racism."[173] This faulty logic on which this structure depends leads to her ultimate point that many markets in the global economy do not just deepen racial and gender inequality, but wouldn't exist without them.

An economic system, borne out of a culture whose guiding ideology will erase the pain and suffering of deemed inferiors to maintain its own self-image of innocence and purity, will do the same. And this is exactly what happened in the onset of globalization. Writer and organizer Nikil Saval argues that even while globalization demanded the erosion of organized labor, wage mismatches between rich and poor countries, and the decimation of social safety nets, "the social cost . . . was consistently underestimated by economists"[174] and that "local adverse effects . . . [such as sweatshop labor and starving farmers] were increasingly obscured by the staggering GDP numbers."[175] In promoting an exportation to the entire planet of neoliberalism, the West made enormous promises of prosperity, "yet this revolutionary transformation has done almost nothing to close the economic gap between the colonized and the colonizing,"[176] because, as Appel demonstrates, many of the markets that generate wealth for the West depend on the racial arbitrage from the vestiges of colonialism. The globe is now dealing with a rejection of this order, even as the West is caught off guard by this backlash.

This disbelief on the West's part stems from the conditions its ideological commitments dictate. Constituted by whiteness—as the West behaviorally interprets itself—the Western world must maintain its material domination even as it denies—for the sake of self-image—its abuses to achieve that status. This mentality obscures the damages it inflicts as it interacts on the world stage, allowing it to achieve a much more benign perception of its impact and a much more optimistic outlook on its promises. As Morrison elucidates, with

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[172] *Id.*

[173] *Id.*

[174] Nikil Saval, *Globalization: The Rise and Fall of an Idea that Swept the World*, GUARDIAN (July 14, 2017, 12:28 AM), https://www.theguardian.com/world/2017/jul/14/globalisation-the-rise-and-fall-of-an-idea-that-swept-the-world [https://perma.cc/Q73M-FSFB].

[175] *Id.*

[176] *Id.*

globalization came "the preeminence of Western culture and economy . . . . Globalization, hailed with the same vigor as was manifest destiny, has reached a level of majesty in our imagination."[177] On the presumption of cultural superiority, the West felt entitled to demand global surrender and assimilation.

To sell globalization, the West pushed a narrative of national self-determination. But following the fall of the Soviet Union, what national self-determination has meant for the United States as the sole world superpower, as Dasgupta illustrates, is international lawlessness.[178] Much of the economic advantage acquired by the United States was accumulated through the disregard of attempts at international governance—the United States expecting this behavior to be reserved for it alone. Even as it acted recklessly on the world stage, the United States—and the West generally—was ideologically restrained from seeing the harm of its actions. Dasgupta states that "for many decades, [the West] was content to see large areas of the world suffer . . . ; it cannot complain that those areas [the rest of the world] now display little loyalty to the nation-state idea."[179] But, the West complains because it is in disbelief. Western ideology—so entangled in whiteness—cannot conceive of its own culpability for destructive action. Such an approach to conduct, unbridled, coupled with the realization that the ideology has the capacity to make people "socially dead" is a dangerous combination. Without a new vision for containing this unbound greed and appetite for abuse and exploitation, the current system will continue to extract more from the masses of ground down people finding themselves ever closer to their breaking point.

E. Understanding Neoliberalism and its Connection to the Western Subject and Authoritarianism

Political scientist Wendy Brown approaches authoritarianism more from an ideological political perspective than a psychological perspective. In her book *In the Ruins of Neoliberalism*, she describes the ways in which the deliberate influences on society that set the conditions for neoliberalism to take root would logically lead to the political expressions of the present. She states that it is necessary to understand "the rise of white nationalist authoritarian political formations . . . as contoured by more than three decades of neoliberal assaults on democracy, equality, and society."[180] Brown explains that the

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[177] MORRISON, *supra* note 156, at 96–97.

[178] Dasgupta, *supra* note 112.

[179] *Id.*

[180] BROWN, *supra* note 38, at 8.

neoliberal project required the decimation of critical institutions of human interconnectedness to make room for the omnipotent rule of the market. This dominance of market rule and market ideology, she illustrates, depends on a very specific and narrow definition of liberty. The individual, as conceived by neoliberals, must be unconstrained from any restrictions of intention or design. The market requires the free maneuvering and interacting of individuals bound only by the norms and common understandings developed through none other than generations of free maneuvering and interacting, and the practices, agreements, and arrangements those actions gave way to.[181] Freedom, then, becomes defined as the ability to do as one pleases within the bounds of, and uninfringed by, anything other than these longstanding practices, agreements, and arrangements. These traditional values become the outer boundary of freedom as individuals forge their paths through the arena of life organized by the invisible hand of the market. This relationship merges traditional values and morals with markets as interconnected forces that provide the platform for organized life.

Anything that would interfere with this construction, therefore, must be arrested, mitigated, and preferably destroyed. Brown demonstrates that for the original neoliberal theorists, this included the social, the political (specifically democracy), and the public.[182] The political, she states, "identifies a theater of deliberations, powers, actions, and values where common existence is thought, shaped, and governed."[183] The people that make up the theater of the political are a community that must decide collectively the norms and rules by which they will live, which means that the political power that this community generates in order to rule itself will have a "distinct rationality" reflective of the comprising members and the unique ethos that they co-create.[184] It follows that this would also require political equality among people in order for them to collectively decide their fate. That facilitating the realization of "a people capable of engaging in modest self-rule" requires that these people be recognized, navigate society, and interact as equals.[185] Democratic rule, in other words, needs a great deal of effort committed to minimizing or eradicating "social or economic inequalities" to prevent the loss of political will to exploitative

[181] *Id.*
[182] *Id.*
[183] *Id.* at 56.
[184] *Id.*
[185] *Id.* at 27.

relationships or the concentration of power—a role Brown, in citing Sheldon Wolin, situates with the state, or the public. True democracy in this sense "requires a robust cultivation of society as the place where we experience a linked fate across our differences and separateness," the definition of belonging.[186]

The progenitors of neoliberal thought believed that life should be organized by the mechanisms of the market. This theory was shaped around enlightenment philosophy's concept of the Western self and enacting this vision, as Brown argues, required the dismantling of the spheres of society, democracy, and political equality. By this what is meant is that the Western self, as has been detailed above, is constructed as a being atop a hierarchy that subordinates the majority of humanity, all other forms of life, and nature to it. Its full personhood is fulfilled by the rest of life's subservience to it. Because Western society is patriarchal and the concept of race serves the purpose of creating the notion of white supremacy, the Western self and the white male are conceptualized without distance between the two constructs. This self being the only one worth theorizing the arena of life for, the institutions designed to support that life accommodate only it as a full person. Everyone else has a stratified order within these institutions to serve this self's interests. The institution of particular concern here is the economy. The functionality of the system depends on inequality. This is why democracy and the social sphere are such a danger to the neoliberal order.

Through this lens, it is apparent that the stratification of humanity serves both the market system and the Western subject's perception of its own identity. This is why liberty as defined by the freedom to dominate and subordinate becomes so essential—and why equality becomes such a threat (for equality vacates the substance of the Western subject's identity). Since the public sphere, the function of the state, and the theater of the political should in theory contribute to realizing and securing political equality for all toward the facilitation of democratic self-rule, these domains must be restrained and undermined to maintain the stage upon which the Western subject expects to carry out its existence and build an understanding of itself.

The social and the political are undermined by three forces as identified by Brown: the denial of society, natural order, and traditional values.[187] She writes that "if there is no such

[186] *Id.*
[187] *Id.*

thing as society, but only individuals and families oriented by markets and morals, then there is no such thing as social power generating hierarchies, exclusion, and violence, let alone subjectivity at the sites of class, gender, or race."[188] Instead, traditional norms and the internal logic of market interactions organize life. Brown contends that for Hayek, freedom arises from "the un-coerced capacity for endeavor and experimentation within codes of conduct generated by tradition and enshrined in just law, markets, and morality."[189] Both traditions and markets, for Hayek, develop organically out of this process of freedom left to be. "Traditions that develop the best possible ways of living together," Brown writes, "emerge not from the sheer authority of the past, but from the experimentation and evolution that freedom permits,"[190] and similarly, "markets and morals, equally important to a thriving civilization, are rooted in a common ontology of spontaneously evolved orders borne by tradition."[191] Markets, morals, traditions, as Hayek understands them, do not emerge from any intentional or deliberate effort or from rational design. They instead are the product of freedom at work. Over time, through the interaction of "free" beings, norms will develop and out of this will emanate the spontaneously organized natural order of the free market. Any laws decided upon and enacted by a democratic society or any attempt to increase fairness by altering the structure of society or redistributing wealth and resources is an unsupportable interference in the market. The market, along with traditional norms, are the only legitimate sources for governing life. Hayek's "conventions and customs of human intercourse," then, must be extended "in order to constitute a crucial bulwark against the wrong-headed designs of social justice . . . and the despotism of an overreaching state that those designs inevitably yield."[192]

This relationship between the Western self and the institution of the market reveals the root of neoliberalism. It seeks most to protect a version of the "self" constructed through the subordination of others and an economic system that depends, for productivity, on the stratification of human value produced by said subordination. Equality not only threatens the Western self but also threatens the structure of the economy. Freedom means the right to constitute oneself in contrast to those one dominates as well as to exploit their stratified value for

[188] *Id.* at 40.
[189] *Id.* at 97.
[190] *Id.* at 99.
[191] *Id.* at 96.
[192] *Id.*

economic gain. As Hannah Appel's analysis makes clear, it is not merely that markets exacerbate racial inequality; markets are made—or come to be—from racial disparity, from race itself more accurately, as it stratifies people's assigned value based on their racialization and creates arbitrage opportunities domestically and globally through the legacies of colonialism. The relationship, therefore, goes beyond Brown's contention that "white and male super-ordination are easily tucked into the neoliberal markets-and-morals project," or that neoliberal theorist James Buchanan was able to "alloy his brand of free enterprise with the project of white supremacism."[193] The connection is so deeply intertwined because white and male super-ordination and the market structure are ontologically based on the same hierarchy of human stratification.

Hayek's perception that "markets and morals . . . are . . . borne by tradition" rings true if one understands tradition as reinforcing both self-making and economic objectives.[194] Traditional norms thus reveal themselves as common practices, agreements, and arrangements forged over time out of and to serve patriarchal white racial hierarchy. As Brown states it, the traditions that neoliberals seek to fortify are constituted by "heteropatriarchal norms and family forms; racial norms and enclaves; property ownership and wealth accumulation, retention, and transmission—in short, all that reproduces and legitimates historical powers and ordinances of class, kinship, race, and gender."[195]

The part that does not hold up to scrutiny is Hayek's claim of spontaneity. The above analysis that identifies Western ideology's egalitarian strain as serving mostly the Western subject's purity-needs and self-image as a fair and self-sufficiently industrious being helps bring clarity to neoliberalism's denial of society and theorization of spontaneity. The social must disappear so that unjust distributions of power go unseen. Equality becomes defined narrowly as only formal equality to mask structural differentiation of human value. Power is understood as coercion to submit to equality demands and liberty as freedom from coercion so as to protect the Western subject's placement at the top of the human hierarchy. This formulation fixes stratified relationality in place as it creates the perception that all people are equally situated in a market system free of exploitation. This is the work that is done by

[193] *Id.* at 13, 62.
[194] *Id.* at 96.
[195] *Id.* at 106.

universalizing the Western self to everyone while neglecting the reality that not everyone fits this mold (because their position is to be in service to it). Neoliberal philosophy calls for this universalism. The existence of stratified levels of human value that the economic system demands and deepens, however, dictate that there can be no universal among the people within the system. The perceived universality therefore has to be imposed, which means that those in subordinated positions have to know and accept their place (and only in doing so are they considered to possess rationality). In this way, the functionality of the economy as theorized by neoliberals requires what Dr. King referred to as a negative peace.[196] Instead of the presence of justice where all people are substantively equal, the stratification on which the market relies necessitates a tensionless acquiescence to subordination.

Spontaneity, however, is doing more work than this. The relationship between these traditions of heteropatriarchal white racial hierarchy and the market reveal that a belief in the spontaneous ordering of the market—by organically originating traditional norms—is a belief that white supremacy is the stable and natural state of the world. That the web of relationships observed in life are not only acceptable but unalterable. That there is nothing to fix—but even if there were, we should not attempt it. The state of human order is a natural order. It is settled. It is thus made clear that the erasure of hierarchy is more than a necessity of an enhanced self-image. It is productive in the sense that it provides structure and generative capacity for the market system. This is why the social cannot exist—so that social hierarchies can be conflated with nature, leaving nothing to correct. Everyone is at once an equal as well as in their place. This is the productive work of the ideology—the cognitive pushing in both directions to make both of these claims true at the same time forces this contradiction into reality as logical consonance. It is generative of the worldview that births the market structure.

This project, though, is clearly one of mystification and de-contextualization. The belief in spontaneity is the result of ahistoricism. To believe that traditional norms arose organically merely from innocuous human interaction is to completely bypass the violent history of conquest, colonialism, racial and gendered oppression, and coercion into positions of subordination

[196] King, *supra* note 125 (referring to a "negative peace which is the absence of tension" in contrast to a "positive peace which is the presence of justice").

and marginalization. Apparently within neoliberal theory, coercion only refers to moving toward equality from the Western subject's perspective—or an infringement of its freedom—and not to the coercion faced by those brutalized into an unjust order in service to the constitution of the Western subject and its life pursuits. This de-contextualization allows for the erasure of social power and dynamics and relationships of exploitation, creating the condition for the forced universalization upon which neoliberalism relies.

Take, for instance, the impact this reasoning has on David Frum's framework to judge the merits of immigration. Frum states that "from an economic point of view, immigration is good because it encourages specialization and thus efficiency."[197] He mentions the lower standard of living many immigrants experience compared to American citizens leading them to also have lower wage expectations. He then walks through a scenario where an American citizen can free up some of her time by hiring an immigrant at a lower rate than what she would've paid an American, allowing her to save money and put that newly freed up time to other productive use.[198] Embedded in this sketch of how the economy works is the uncritical acceptance, as if preordained, of the hierarchical valuation of people that generates what has been termed "efficiency." The same reasoning that allows Frum to argue in a neutral-presenting way about immigration without confronting implicit assumptions about deservingness allows him to see in our economic system an impartial and detached apparatus that guides people to their highest productive placement and resources to their best use. This conceptualization also reveals why Frum sees the disparity between Global South and Global North countries as a matter of degree of success, as opposed to relationships of colonial oppression that opened patterns of relation and causeways that presently generate economic value.

Such reasoning supports "[t]he overwhelming tendency . . . to present immigration as an issue that begins at the national border, with virtually no attention paid to the particular histories, international economic pressures, and specific US foreign policy practices that generate migration patterns in the first place," which are "deeply tied to patterns of colonization and empire that stitch together the Global North and the Global South, as well as to the recent security politics of the [United

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[197] Frum, *supra* note 103.

[198] *Id.*

States] and Europe across the post-colonial world."[199] Here lies the problem with how the immigration debate is framed. Not only is it decontextualized to ignore the history of building fear of "inferior peoples" which is the basis for the anxiety that people experience from immigration patterns, it fails to connect those patterns to colonial oppression and expropriation and the continued reliance on the still extant relational infrastructure colonialism produced. In this way, it also obscures how these two actions are related: the belief that non-Western people are inferior is forced into existence so people would act on that belief, supplying the subordinate relationship needed to extract economic value from them. This value never intended to be shared with the "middle stratum," whose identity as white or European is meant to keep them satisfied. It is this arrangement, and not one of universal egalitarianism, that constitutes the Western liberal project, which means that as these global chains of exploitation deprive more people and more of the globe becomes uninhabitable, it becomes more apparent that this prevailing ideology cannot deliver us to a sustainable future and is incapable of organizing human life much longer. It is better this reality be recognized than to look for ways to preserve this worldview by bending one's analysis to the presumed inevitability of our current path.

A number of these aspects of neoliberalism contribute directly to the rise of authoritarianism. Brown points out that "because the political has been disparaged and attacked, but not extinguished while democracy itself has been thinned and devalued, undemocratic and anti-democratic political powers and energies in neoliberalized orders have swollen in magnitude and intensity."[200] Additionally, since democratic governance should enact the will of the people and respond to social conditions which will disrupt the rule of the market bound only by traditional norms, Milton Friedman "legitimiz[es] political authoritarianism to forge liberalized markets."[201] Friedman calls for a strong central authority to uphold traditional values and fortify the market from intrusion (all of which can involve oppressive crackdowns on the marginalized as well as on dissidents and coercion to confine people to their subordinated position within the order, but of course for Friedman legitimate coercion only flows in one direction).[202] With the political sphere withered, "truth withdrawn from political life is rolled over to

[199] Singh, *supra* note 118.
[200] BROWN, *supra* note 180, at 58.
[201] *Id.* at 66–67.
[202] *Id.*

moral and religious claims rooted in the authority of tradition. The effect is to sever truth from accountability (a recipe for authoritarianism)."[203] All of these conditions—the insistence that the self be constituted through domination and the oppression of women, people of color, and other marginalized populations; the valorization of traditional values that derive from and contribute to the same project; the assault on democracy and the legitimization of authoritarian rule—encourage and instigate the reactionary and authoritarian environment we are living through currently.

Not only does neoliberalism foster authoritarian uprisings, it has come to dominate current thought and reasoning, revealing how even efforts to contain the authoritarian surge replicate its internal logic and therefore work against their own goal. Stenner and Haidt's decontextualized rapidity of change and discomfort with difference mirrors the decontextualized theory of spontaneity of morals and markets, "the order without design," described by Hayek and his fellow neoliberal thinkers.[204] The blindness to the force, oppression, and violence that went into creating the order that produced Western traditions and values is the same type of blindness that allows people like Friedersdorf to speak of "different-ism" divorced from a connection to racism or white supremacy and descriptions from Frum and others that frame the rate of immigration, and not a clinging to status for the dominant in-group, as the problem.

Hayek's "common acceptance" as the "condition for a free society," the negative peace, and the resignation to a subordinated position is taken up by Stenner and Haidt. They call for assimilation, a tempered and slow approach to equality, and an avoidance of significantly altering social arrangements to avoid a disturbance of the prevailing order and to mollify the authoritarian-prone. In Brown's reference to Hayek's advocacy for the "discredit[ing] of social justice talk . . . and the expansion of what Hayek calls the 'personal protected sphere' to extend the purview of traditional morality,"[205] echoes of the same can be heard in Stenner and Haidt's encouragement to move slowly on equality and instead to commit to familiar common rituals and reaffirm traditional values and norms. They advance what is ostensibly a psychological analysis of an observation of human nature but they make the same assumption that Hayek does—

[203] *Id.* at 102.
[204] *Id.* at 34.
[205] *Id.* at 104.

that they are dealing with nature and not social constructs. They are, in effect, operating within and promoting a line of neoliberal reasoning and, in doing so, are advancing the project of neoliberalism and falling into the same trap as its intellectual progenitors of generating the conditions that produce authoritarianism. To state it again, the Western organization of society predicated on the prerogative of whiteness cannot deliver the world into a sustainable, egalitarian future.

F. Dealing with Polarization

Authoritarianism, arising from these forces, imposes a tremendous strain on society, contributing to extreme polarization. The activation of authoritarian tendencies within thirty percent of the population does not fully explain society's current experience of deep division. The question must be asked as to why this segment of the population appears to be, so to speak, punching above its weight, especially if, as Stenner and Haidt put it, there are categorical delineations between authoritarians, status quo conservatives, and laissez-faire conservatives. How is it, given that authoritarians exhibit certain tendencies that should disturb other conservatives, that this faction has coalesced into a firm identity group? Why has the population generally consolidated into distinct and oppositional corners? In other words, what is the nature of our polarization?

Political scientists Jennifer McCoy and Murat Somer comprehensively surveyed a number of countries where similar dynamics are occurring to develop a theory of deep division—what they refer to as "pernicious polarization." This condition is characterized by the "division of the electorate into two hostile camps, where multiple cleavages have collapsed into one dominant cleavage or boundary line between the two camps," whose political identities have become "mutually exclusive and antagonistic" social identities.[206] Entrepreneurial politicians, as the pair labels them, exploit existing socioeconomic divisions to the point that crosscutting identities that may sustain relationships and political interaction across separation dissipate, making way for hardened, adversarial identity groups. These two distinct groups increasingly come to see each other not only in an "us vs. them" manner but in "good vs. evil" terms,

[206] Jennifer McCoy & Murat Somer, *Toward a Theory of Pernicious Polarization and How It Harms Democracies: Comparative Evidence and Possible Remedies*, 681 ANNALS, AM. ACAD. POL. & SOC. SCI. 234, 246 (2019).

interpreting the other side as a credible threat to the nation and its cultural fabric.[207]

Author Jonathan Rauch makes similar claims but adds that emotional attachment drives identity-based polarization. Although ideology plays some role, it turns out that the internal ideologies of each camp demonstrate significant incoherencies.[208] Team affiliation, Rauch concludes, depends on strong emotional identification rather than any set of consistent political ideas. Affective polarization is what we are experiencing—the "subjective feelings [of partisans] towards each other"—and those feelings consist of deep disdain for the other side.[209] Rauch writes that "[i]t's not so much that we like our own party as that we detest the other."[210] He cites University of Memphis's Eric Groenendyk, who finds that a strong dislike of the other party works to rationalize and deepen one's sense of belonging to one's party of choice.[211] This emotionally-motivated connection also facilitates coalescing around diametrically opposed poles. Even if the organizing ideology, rhetoric, and politics are being driven by the bases, out of team-identification, people with more moderate or even contrasting views can end up joining forces with the base in a polarized environment. This explains how authoritarians punch above their weight by forming an allegiance with status quo conservatives, who were offered "something more appealing than any particular list of policies: they [were] offered solidarity against a threat."[212] In this way, status quo conservatives "did not rally to Trump because they embraced his message; they embraced his message in order to rally to Trump. He offered a vivid us-versus-them story that energized one portion of the party, and then, once his followers redefined what "we" (the in-group) believe, the rest of the party preserved its identity by scrambling aboard."[213] This summation contradicts Stenner's contention, communicated via Friedersdorf, that status quo conservatives' bonding with authoritarians constitutes an unnatural union.[214] Accusations of racism may push status quo conservatives in that direction, as the pair argues, but the resulting bond is not unnatural. It has everything to do with psychologically balancing the self-serving perception that society

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[207] *Id.*
[208] Jonathan Rauch, *Rethinking Polarization*, 41 NAT'L AFFS. 86 (2019).
[209] *Id.*
[210] *Id.*
[211] *Id.*
[212] *Id.*
[213] *Id.*
[214] Friedersdorf, *supra* note 121.

is egalitarian with the material need for a hierarchical order. The racism accusation wound's the status quo conservative's self-image—that is, their identity as someone committed to egalitarian principles. The recoil from this injury gives hard lines to the "them," but pushes these conservatives toward an affective connection with people attracted to and moved by racial demagoguery and supportive of racial and gendered oppression, exposing the central confusion of Western subject's identity.

To know how to respond to this deep and identity-based polarization, it must be understood how polarization of such a firmly seated nature arose. Rauch roots polarization in the naturally tribal disposition of humans, stating that our emotionally driven polarization "satisf[ies] a deep atavistic craving to belong to an in-group and to bind ourselves to our group by feeling and displaying animosity toward an out-group."[215] But, the assumption that humans are naturally tribal is strongly contested. For instance, writer Brian Stout posits that analyses of human behavior and theories about how we should design our world uncritically take for granted that humans are inherently primarily driven by competition and marked by tribalism.[216] Stout and Rauch present the same Jonathan Haidt quotation:

> It is difficult for tribalistic humans to run and sustain a modern liberal society founded on compromise, toleration, and impersonal rules and institutions. Pulling it off requires getting a lot of social settings just right. Those settings include formal laws like the Constitution, informal norms like law-abidingness and truthfulness, rules-based institutions like free markets and elections, a system of education that inculcates liberal values, and public mores that honor and defend those values.[217]

But as Rauch takes Haidt's statement at face value, Stout challenges it and asks if humans are indeed naturally tribalistic. Stout's point is that Haidt takes this assumption for granted, and therefore believes that the institutions and practices we develop must at their foundation protect us from our own divisive nature. But Stout points out that perhaps the innateness of our tribalism

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[215] Rauch, *supra* note 208.

[216] Brian Stout, *What If Darwin Was Wrong?*, BUILDING BELONGING, (Feb. 1, 2020) https://citizenstout.substack.com/p/what-if-darwin-was-wrong [https://perma.cc/9QC2-2YX4].

[217] *Id.*; Rauch, *supra* note 208.

is exaggerated and that what we attribute to tribal nature may actually be socialization toward antagonism and contradistinction. In making this point, Stout references journalist Christine Mungai who reminds us that the concept of tribalism is based on a racist stereotype borne out of colonialism and meant to demean those who the colonizers intended to civilize, and that what we often perceive as exemplifying our naturally tribal tendencies such as fierce conflict is likely better described as the manifestation of intense patriarchal socialization.[218]

Tribalism in this sense can be read as a concept developed as the result of a persistent neglect of the extent to which people are hierarchically organized within society. As with the term tribalism itself, social stratification is de-socialized and naturalized. The process of de-socialization demands the shunning of an analysis of whiteness, patriarchy, or any type of super-ordination. When this analysis is removed, and therefore an analysis of power unconsidered, all there is left to observe are equally situated warring factions. Therefore, any challenges to or defenses of whiteness, patriarchy, or other claim to the right of domination are misread and labeled tribalism.

McCoy and Somer perhaps provide a stronger basis upon which to develop an analysis of power. They argue that social cleavages alone cannot explain deep polarization, but rather what they term formative rifts sit at the root of pernicious polarization. They define formative rifts as "long-standing and deep-cutting divisions that either emerged or could not be resolved during the formation of nation-states, or, sometimes during fundamental re-formations of states."[219] In the United States, for McCoy and Somer, this comes down to "the basic question of citizenship and who enjoys the rights espoused by the founding fathers—Thomas Jefferson's 'these truths' of political equality, natural rights, and sovereignty of the people—has been debated since the founding of the republic and its differentiated citizenship for [enslaved Africans], Native Americans, and women."[220] Entrepreneurial polarizing figures also "seek to exploit grievances centered on political, economic, or cultural complaints; to activate latent resentments based on underlying cleavages and formative rifts."[221] These include feelings of being excluded or left behind without political representation, all but

[218] Stout, *supra* note 216.
[219] McCoy & Somer, *supra* note 206, at 237.
[220] *Id.* at 239 (citation omitted).
[221] *Id.* at 240.

forgotten by "unresponsive technocrats or expert governments"; or economic exclusion driven by inequality; or cultural grievances based on disputes around morality or "from a perceived loss or threat of loss of social or economic status by a dominant group in society."[222]

While political actors exploit these grievances and feed polarization by doing so, the grievances themselves are not independent of but related to the aforementioned formative rifts. For instance, the cultural rift centered on morality disputes harkens back to Wendy Brown's analysis on the development of traditional values through world-making around a "self" defined in opposition to subordinated others. Additionally, McCoy and Somer explain their point about economic anxiety through the example of this grievance's attachment to the idea of job-stealing immigrants and declare, "the reaction of white, male, Christian, Trump supporters to the presidency of a biracial man in the United States, and to the growing diversity of the United States (in terms of race, religion, sexual orientation, and gender relations in the workplace) exemplifies a perceived loss of social and economic status."[223] All of these examples of exploitable grievances share at their root that formative question for the United States of who belongs, whose humanity is to be fully recognized, honored, and supported by the institutions and engines of opportunity of the nation. A continual struggle, essentially, with the question at the center of the Civil War conflict: will the nation constitute its definition of the people around an exclusive "we" or by the recognition of everyone's shared humanity?

The perceived loss of status leads to what Brown identifies as a nihilism growing out of an erosion of whiteness—the loss of status that stood in for self-constitution. She refers to Marcuse who saw social and political violence as a result of "individuals getting used to the risk of their own dissolution and disintegration."[224] Brown points out that Marcuse understood this as a reaction to the Cold War nuclear threat and then herself applies this insight to describe the fallout from "world-ending climate change or other existential threats." However, it just as well characterizes how fundamentally entangled whiteness or dominant in-group identification seems with the natural self—so much so that a loss of status feels like existential destruction, unleashing a nihilism and a violence completely fine with tearing

[222] *Id.* at 236–41.
[223] *Id.* at 241.
[224] BROWN, *supra* note 38, at 168.

down a world that moves closer to equality since the end of the world and the end of whiteness is perceived as one and the same.

Revisiting Rauch, he concludes by advocating for bridging, stating that "we need understanding and awareness; then we can build personal and community connections; then we can rebuild social norms and institutions."[225] He is correct in this assessment. The question remains, however, if his path there can be trusted given his power-absent conception of identity politics and tribalism. An analysis of whiteness has to be a part of any serious grappling with understanding and responding to polarization and authoritarianism. The presence of which will engender solutions that recognize whiteness as an impediment to belonging and the fuel re-instigating division, as opposed to solutions that continue to accommodate it.

Rauch raises the factors that he sees as having exacerbated deep polarization. The loss of civic organizations, the erosion of political safeguards "designed to protect the system when the settings go out of alignment," "a social life without supports," and the regarding of institutions as "obstacles to personal fulfillment"—all conditions Brown identifies with the demands neoliberalism makes on society.[226] Although he clearly understands market fundamentalism's contribution to our divided state of affairs, he lumps identity politics in with market fetishism as root causes along with "fears of economic and cultural displacement among whites," and "the decline of traditionally masculine jobs and social roles leaving working-class men feeling emasculated and marginalized."[227] He connects these things without having a critical analysis for how they are connected. There is no attempt to address the fact that the "traditionally masculine" jobs and social roles he writes of are based on white male super-ordination and the exclusion of all who are barred from that category to give shape to white male identity. What he calls identity politics are simply demands to no longer be excluded and subordinated. The shared identity that he claims is eroded by identity politics is less a shared identity than an acceptance of place in a stratified established order. Any enjoinder to again rally around this shared identity is none other than the bidding of white male identity politics. Furthermore, as long as the self is built out of a sense of dominance—accepted in exchange for acquiescence to a callous economic system—this self will feel crushed from both ends as it perceives a loss of status at

[225] Rauch, *supra* note 208.
[226] *Id.*; BROWN, *supra* note 38.
[227] Rauch, *supra* note 208.

calls for equality and as payment in the form of dominant identity becomes less valuable due to the excesses of capitalism becoming more audacious. The likely result being that the self-engages in acts of breaking to reaffirm itself.

An identity that does not assume dominance over anyone is therefore needed. Rauch is right to echo Yuval Levin's call for a stronger "structure of social life; a way to give shape and purpose, concrete meaning and identity, to the things we do together."[228] But instead of building that togetherness through institutions that assume that we are of a rivalrous and tribal nature, we must design institutions that facilitate our cooperative nature and do not take for granted white male primacy in their design.

Practices such as deep canvassing can help toward this end. Researchers have found that this technique—engaging in a two-way discussion guided by non-judgmental listening and surfacing common humanity can facilitate belonging and a reduction in prejudice and that the effect lies in the mutual exchange of narratives about receiving compassion from others.[229] Deep canvassing, in other words, provides experimental evidence supporting a real-world positive impact of bridging and the fostering of belonging. The primary political scientists studying deep canvassing hypothesize that "it works because it's not threatening. People are resistant to changing their mind during an argument, the hypothesis goes, because it threatens their self-image,"[230] exemplifying on an interpersonal level the work that self-image does on the scale of the collective Western identity and revealing the best way to approach this entry point for bridging given its central function. The researchers also conclude that their findings "tell you something about just how willing most Americans are to have an open conversation with a stranger about . . . ostensibly divisive issues," which serves as "a reminder that our political opponents aren't always as rigid or ideologically severe as they appear in our minds."[231] It is a reminder that there is good reason for optimism that Dasgupta and Goyal's "perpetual possibilities" can rise above the collapsing of our identities that polarization induces; that we should not give up on fostering together new identities that have no need for dominance; and that instead of tribalism

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[228] *Id.*

[229] Brian Resnick, *How to Talk Someone Out of Bigotry,* VOX, (Jan. 29, 2020, 9:40 AM) https://www.vox.com/2020/1/29/21065620/broockman-kalla-deep-canvassing.

[230] *Id.*

[231] *Id.*

being our nature, perhaps our nature is "our capacity to learn and improve" and "expand our concept of what it means to be human."[232]

VII. WHERE DO WE GO FROM HERE?

A. A New Imagined Order

For these reasons, it is necessary for any proposed solutions to today's social issues to incorporate all people fully into the circle of human concern. To paraphrase Martin Luther King, Jr. in his speech, "Where Do We Go from Here?" a person who will lie will steal, and a person who will steal will kill. In order to change, one must be born again. One's structures must change. The same is true for the United States. A nation that will enslave will commodify people, a nation that commodifies people will exploit the poor generally, and it will pillage the resources of other nations and protect those foreign investments with military might. The nation itself must radically transform.[233]

In a sense, the American Civil War was a fight over whether to maintain a segment of the population in a state of social death or to realize Lincoln's call in the Gettysburg Address for a new birth of freedom.[234] Marche sees the United States as barreling dangerously toward another civil war,[235] but United States history can be thought of as a constant and repeated re-engagement with this "formative rift"—that it is okay to render some people socially dead and marginalized, confined to a stratified order, or that the circle of human concern should include all. As Dr. King argues, a system corrupted at its core cannot be reformed into a just version of itself—it must be reborn. A rebirth of freedom is required to achieve a society of belonging, hand in hand with the construction of a government responsible for the larger good and a renewed commitment to all people and not just profits or market efficiencies or commercialism. A government responsive to the people and one that recognizes everyone's humanity must be forged, and the social justice movement must lead the charge. For people

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[232] Stout, *supra* note 216.

[233] Martin Luther King, Jr., Where Do We Go from Here?, Address to the Southern Christina Leadership Eleventh Annual Conference (Aug. 16, 1967) (transcript available at https://kinginstitute.stanford.edu/king-papers/documents/where-do-we-go-here-address-delivered-eleventh-annual-sclc-convention [https://perma.cc/X98P-G4F7].

[234] Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863) (transcript available at https://rmc.library.cornell.edu/gettysburg/good_cause/transcript.htm) [https://perma.cc/6QTA-6EUJ].

[235] Marche, *supra* note 7.

engaged in social justice work, this translates into a need to create a new imagined order, a realization of the multiplicity and interconnectedness of the self and all systems, and the understanding that this work cannot move forward without love and engagement.

As Harari illustrates through his imagined order argument, society is based on a network of fictions that exert real power in the material world. Therefore, it is up to society to decide what type of force it wants to wield upon the physical world and physical beings. A society of belonging is possible, but it will require new stories for people to believe in. In Harari's words, "in order to change an existing imagined order, we must first believe in an alternative imagined order."[236]

B. The Multiple Self, Spirituality, and a Society of Belonging

A new imagined order will require a transformation of the self and an unseating of whiteness, as it is deeply intertwined in Western ideology and is an animating force for Western society and Western political legitimacy. Clearly, exposing whiteness as a fiction will require the presentation of a new identity built upon love, connection, multiplicity, and belonging. A self-capable of embracing full and substantive equality for all and holding all life and nature within its circle of concern must be the project we pursue for ourselves and must be the basis from which we build.

From intersectional feminism developed by women of color to W.E.B. DuBois's double consciousness theory, many people of color have expressed that the unitary, single-identity self never fully described or accurately represented their perception of self.[237] For many, trying to fit into the Western conception of the self-caused great dissonance, frustration, and lack of completeness. Although "there is no dissonance between societal definitions of humanity and whites' personal experiences of humanity,"[238] as the Western self was constructed in the image of whiteness and maleness, this feeling of completeness as a unitary being is still just an illusion and an invention supported by social underpinnings. In order for the Western self to make a convincing claim to universality, the centrality of whiteness and maleness to its construction must be rendered invisible. However, as Black feminist theory's concept of intersectionality makes clear, the self is always marked by race and gender. Therefore, the white male is "no more a unitary, cohesive

[236] HARARI, *supra* note 131, at 118.
[237] POWELL, RACING TO JUSTICE, *supra* note 27, at 169–77.
[238] *Id.* at 170.

individual than is the Black female," or any other constituted being having a number of potent and conflicting components of identity.[239]

Despite the fact that for the white male, experience and the Western understanding of the self-share the strongest overlap, dissonance and disappointment stemming from the fissure between the expectation as a fully constituted Western self and what is actually experienced manifest in other ways. Revisiting Jardina's findings, "whites feel, to some extent, that the rug is being pulled out from under them—that the benefits they have enjoyed because of their race, their groups' advantages, and their status atop the racial hierarchy are all in jeopardy."[240] When the conception of self to which one adheres confirms that one is the ultimate being deserving of society's rewards, a sense of failure and resentment toward others emerges when one sees others advancing relative to one's position. This sense of suffering feels like existential suffering because white people are so convinced that whiteness is the constructive tissue of the self and not a social construct that ruptures them from a multitudinous identity connected to others who have been established as estranged subordinates.

To give in to demands fueled by this sentiment, as Stenner and Haidt propose, would be to bend to an artificial and false sense of self that must exclude non-white people to feel whole. Instead, it is necessary to take note of John Rawls's insight that "individual wants and desires are themselves a product of situatedness and background institutions."[241] Harari makes a similar point, stating that "every person is born into a pre-existing imagined order, and his or her desires are shaped from birth by its dominant myths. . . . Even what people take to be their most personal desires are usually programmed by the imagined order."[242] The desire to suppress diversity or to limit immigration are not products solely of an aversion to complexity and rapid change—especially when crackdowns on immigration are so selectively activated—but a function of the angst and anger of white identity not living up to its promises and expectations. Stenner and Haidt do not understand this because they operate in a framework that they believe to be universal, objective, and impartial, but it is in actuality a framework

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[239] *Id.* at 187.

[240] Edsall, *White Identity*, *supra* note 149 (quoting JARDINA, *supra* note 149, at 267).

[241] POWELL, RACING TO JUSTICE, *supra* note 27, at 199.

[242] HARARI, *supra* note 131, at 114–15.

conceived for the purpose of creating and justifying white racial hierarchy. This also speaks to why they are more sympathetic to the pleas of authoritarians than to the societal inclusion of people of color. The pleas, in part, make sense to them because their identities are cut from the same cloth. To revisit Crenshaw's insight, hegemony refers to "a system of attitudes and beliefs, permeating both popular consciousness and the ideology of elites."[243] Stenner and Haidt's proposal to engage with and listen to people who have authoritarian leanings—a group potentially as large as a third of the population—is correct, but not in the way that they suggest. The answer is not to acquiesce to their demands for less diversity and suppression of minority communities or to advance a same-ing approach to resolve the conundrum of otherness. The answer is to develop a new meta-narrative that creates fertile grounds to grow a culture of belonging and to turn to spirituality for assistance in that process.

C. Spirituality and Engagement

There are vast and relevant lessons to be learned from spirituality with regard to repairing the damage of whiteness. It severs the intrinsic connections between all people and a whiteness-based identity creates suffering. Spirituality is the journey toward a deep connection with other people, forms of life, and the planet as humans contend with the fact of loneliness (a life divorced from meaningful connection) and death—what can be referred to as existential suffering. Because the Western self is so intertwined with whiteness, many white people assume that whiteness is essential to, or is, the organic self. Therefore, any effort to expose whiteness or any erosion of the 'wages of whiteness,'[244] or the benefits that being white are supposed to bestow, feels like existential suffering. An end to whiteness feels like death. This suffering of course is not based on actual grappling with mortality, but rather a false sense of existential suffering based on a fictional identity. This physically real pain, borne of an artificial distinction, is the root of authoritarian anger.

Doctor and professor Jonathan Metzl discusses this in an article adapted from his book, *Dying of Whiteness*, as he profiles a white man of middle age who is dying of preventable diseases in a state that does not have the Affordable Care Act Medicaid expansion—the rejection of which he supported. Metzl asks the

[243] Crenshaw, *supra* note 49.

[244] ROEDIGER, *supra* note 45, at xx.

man if he regrets, now that he is dying, opposing the health care expansion. His answer is still an unequivocal "no," described by Metzl as "a literal willingness to die for his place in this hierarchy, rather than participate in a system that might put him on the same plane as immigrants or racial minorities."[245]

This man's position, for Metzl, is representative of a whole subgroup of white people whose value fully depends on their symbolic membership to the white in-group. This is why the potential for "outsiders" to benefit from the privileges attached to citizenship and gains by people of color induce such anxiety. With nothing to differentiate the standing of those long depicted as "others" from the elevated status white in-group membership is supposed to bestow, the resulting "insecurities can lead them to act in ways that seem at odds with their own longevity."[246] Metzl writes that these harms result from a politics of resentment that "gain traction by playing to anxieties about white victimhood in relation to imagined threats."[247]

The people suffering from these self-inflicted wounds are the people Stenner and Haidt argue we should give more attention to. Yet, when it comes to their anxieties that are being exploited, why is their answer to accommodate these anxieties, which can be reduced and alleviated, as opposed to combating and lessening them with practices of deeper belonging? Emphasizing common rituals and clinging to traditions will not only leave these anxieties latent but firmly in place and further entrenched, making them all the more explosive the next time they are unearthed by the next round of social change. It is tempting to acquiesce and feel sympathetic to this anger, especially when the universality of the Western self is taken for granted, but creating a true society of belonging requires the dislocation of whiteness from its central position and its replacement by an acceptance of the multiple self.

True belonging requires understanding the ways in which whiteness operates in Western society—that its bonding force is an adhesive for the white in-group, upon a narrow white racial identity. Both Brewer's and Dasgupta and Goyal's works contain the seeds for achieving a society of belonging. Their arguments rest on the concept of the "multiple self." Brewer advances this notion by citing Gordon Allport's concept of concentric loyalties where "loyalties to more inclusive collectives

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[245] Metzl, *supra* note 106.

[246] *Id.*

[247] *Id.*

(e.g. nations, humankind) are compatible with loyalties to subgroups (e.g. family, profession, religion)."[248] This is Dasgupta and Goyal's "perpetual possibilities" argument that "individuals prefer to have rich (multiple) identities in excess of what groups desire."[249] The powerful group members that stand to gain from narrow inter-conflicting groups will incite and encourage fear of the other, unleashing authoritarian tendencies and promoting division and tension. As Dasgupta and Goyal propose, group members have a deep desire to realize their multiple identities. Overcoming the rise of authoritarianism needs to involve working against the group desire to maintain narrow identities and helping people to understand, explore, and live through their latent multiple selves. Stenner and Haidt explain how authoritarian tendencies are latent within a population—but, as Dasgupta and Goyal point out, so is the potential for "perpetual possibilities." This tendency for connection and broad self-definition must be fostered and advanced, instead of the tendency to retreat, close off, and exclude.

D. Unearthing the Multiple Self

The first step is to recognize that part of what it means to be a "multitudinous self" is that the "other" is inseparable from the "self"—that within everyone considered the "we" exists everyone considered the "them." As an alternative to acquiescing to authoritarian demands, Roberto Unger's concept of engagement offers a more constructive pathway forward. Unger explains that "through engagement, we experience both mutual need and mutual fear of the other. . . . The other is thus necessary both for the constitution of our being and for the realization of self-expression and growth. . . . Because we need the other and are threatened by the other, there is an interplay of love and hate."[250] This offering is useful in a number of ways. Firstly, it is based off an understanding of the self in contrast to the Western unitary self. It understands being as numerous and multiple—proposing that within everyone is everyone else. This framework provides a comfortable landing spot for those most threatened by the disappearance of a unitary identity based on whiteness—a reminder that their prior identity was an artificial one and a reconnection to the latent but inherent desire to leave behind a narrow identity for one of endless potential.

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[248] Brewer, *supra* note 44, at 434 (citing GORDON W. ALLPORT, THE NATURE OF PREJUDICE (1954)).

[249] Dasgupta & Goyal, *supra* note 56, at 414.

[250] *See* POWELL, RACING TO JUSTICE, *supra* note 27, at 203 (citing ROBERTO MANGABIERA UNGER, PASSION: AN ESSAY ON PERSONALITY (1984)).

Secondly, the contending with the fear of the other even as we engage with the other is the foundation of belonging and describes the dynamic process of bridging. An alternative response to anxiety produced by the changing "we" is to embrace through stories and practice an inviting and empathic space. The other is not the infinite other. Bridging rejects the categorical other but does not require that the other and the self become the same—only that the self recognize the other within it. Bridging calls for the construction of spaces and stories for a large, inclusive "we." The acceptance and inclusion of an other, despite their differences, is what constitutes authentic belonging. When one engages in deep bridging over time, there is a shift. The emphasis is no longer just to empathize with the other, but to begin the project of building a new and larger "we"—where the "other" stops being the other. This is the process of real belonging. When this is institutionalized in policies, laws, and culture, then it becomes a belongingness paradigm. This may seem like inclusion or even assimilation. In fact, it is neither and differs from Stenner and Haidt's proposal of accepting immigrants and racial minorities only on the basis that they assimilate, renounce their cultural customs, and flatten their differences in the name of oneness.

Assimilation, especially in one direction, is an erasure. Some of the pundits who opine about white anxiety suggest that we comfort white people by reminding them that they have a good chance of remaining both the demographic majority and the power majority long into the future and that there is a place in such an arrangement for non-white people.[251] There are a number of problems with this proposal for accommodation. It is too willing to make peace with white anxiety by conceding to white dominance. It operates from a false binary of either white dominance or non-white dominance. This is still a form of breaking. The calls for assimilation made by Stenner, Haidt, and other proponents of the same view are akin to the categorical dismissals of identity politics that many on the left have adopted, most recently in the aftermath of the 2016 presidential election. Such views understand identity politics as distracting from central issues that affect everyone, like economic inequality, health care, or climate change. This type of narrow politics, it is argued, is merely the special interests of marginalized groups and are the source of anxiety and resentment that forgotten, everyday and working-class people experience.

[251] Edsall, *Who's Afraid?*, *supra* note 94.

However, behind "everyday" and "working-class" is an assumed whiteness. And since white identity is also believed to be universal, there is a presumption that everyone is situated identically to a set of core issues. Neglected is the fact that marginalized people care about these issues too, but until they are recognized as full members of society, any universal proposals will inadequately address their relationship to these issues. What does a universal approach to economic inequality mean for people who continue to be harmed by structural race and gender discrimination? How can education policy that neglects the specific redistributional needs of communities of color be universally beneficial? If transgender people cannot receive the medical care they need and face persistent misperceptions and prejudice, how would a universal approach to health care solve these issues? What promises do universal climate change strategies hold for people of color when high emission power plants continue to be zoned into their neighborhoods? What does it mean to base policy decisions on an assumption that everyone has the same understanding of 'public safety' in a nation where law enforcement has always been used as a method of social control of Black people?

There is greater concern for losing people to demagogic appeals who would otherwise support a progressive platform than for understanding why their support for progressive policies is dependent on the exclusion of marginalized people. A strong willingness exists to move toward accommodating this constituency instead of grappling with the reasons a message of othering is having such a powerful impact. This is not a departure from identity politics but a pivot to exclusively embrace white identity. A move in this direction under the paradigm of universalism is a form of breaking—the same-ing that compels erasure of difference. It leaves intact whiteness's claims to universalism and the expectation that full societal membership and social gains are its exclusive domain. This breaking needs to be abandoned for the deeper challenge of bridging. The deep bridging described in this Article calls for another approach. The solution to othering is not same-ing or assimilation, but belonging. Belonging moves beyond assimilation and superficial inclusion. It acknowledges that all are co-creating the conditions, institutions, and story that all will inhabit.

Unger concedes that the other's presence can generate discomfort but argues that it is only through engagement that

one can possibly come to know one's full self.[252] This process can help in overcoming authoritarian tendencies to fear and reject the other. The process will not be easy, but it is more promising for a multicultural and multiracial society than giving in to authoritarian fears. For, "the greater our sense of interconnectedness, the greater the scope of our empathy and compassion for those who are suffering."[253] Despite having differences, belonging allows for deep empathy, investment in, and concern for all.

From advancements in psychology and neuroscience, we also know that "a lack of connection with others not only scars our emotions but also restructures and distorts the brain."[254] As Stenner and Haidt tell us that authoritarianism is "substantially heritable and mostly determined by a lack of openness to experience,"[255] it stands to reason that engagement can help start to bring down that alarmingly high percentage—a third of the population—that has authoritarian tendencies instead of conceding defeat to this statistic as a fixed number.

The love that spirituality breeds requires an engagement with the multiple self—a resistance to shortsighted and selfish interests to constrain life to narrow identities. Again turning to Unger, "we must reject those institutions and structures that limit and frustrate our multiple evolving ways of embracing love, hope, and charity in our routine human relations."[256] The hegemony of whiteness is deeply entrenched, to the point that it operates invisibly. Crenshaw explains that hegemony "convinces the dominated classes that the existing order is inevitable."[257] However, "accepting the falseness of what is deemed natural and necessary in our existing context is only the beginning of opening our imaginations to possibilities that can better reflect our own contingencies."[258] The hegemony of whiteness is not inevitable, and existing behind it is true love and a path to a society of belonging.

E. Working Toward a Just World for All

As the Western unitary self has been demonstrated to be fallacious and a central component of an exclusionary imagined order, the social justice movement must embrace the multiplicity

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[252] POWELL, RACING TO JUSTICE, *supra* note 27.
[253] *Id.* at 221.
[254] *Id.* at 209.
[255] Stenner & Haidt, *supra* note 8, at 183.
[256] POWELL, RACING TO JUSTICE, *supra* note 27, at 208.
[257] Crenshaw, *supra* note 49, at 108.
[258] POWELL, RACING TO JUSTICE, *supra* note 27, at 208.

of the self as a composite of the "we" and the other. By extension, the same recognition must be applied to the interconnectedness of all life and all systems. In this same mode of thinking and practice, not only must the work of the social justice movement itself be integrated and the connection of all life understood, there also needs to be a recognition that the breaking and othering occurring in the United States is not an isolated phenomenon but connected to the same process of breaking and othering happening around the globe. This knowledge of multiplicity is inherent to critical race theory, as the field is not monolithic, but a hetero-doctrinal undertaking in understanding and addressing social issues. This approach can be instructive for the work social justice takes on and the way in which that work is conducted.

In order to advance a new meta-narrative of belonging, the work needs to reflect the goal. The social justice movement, and race scholars in particular, need to engage with the world in the same interconnected manner in which it understands the world. That means working with policymakers and those involved in implementation. That means teaming with activists. That means inter-institutional and multi-sector work. And most importantly, that means engaging with the communities that are the subject of this work—the most marginalized and vulnerable of society. As Fanon demonstrates in *The Wretched of the Earth*, the greatest knowledge lies with the most oppressed peoples. Academia does not offer superior knowledge; it provides the skills to uplift the voices with whom knowledge already resides.[259] The social justice movement is at the service of those in need.

Approaching the work in this way can serve as a reminder that the issues facing marginalized communities are structural and interconnected, even if experienced personally. Transgender rights scholars Rickke Mananzala and Dean Spade write on the transgender movement and how it can be informed by Black liberation and Black feminist thought. They cite as a powerful example the Black Panthers' survival programs. These programs were essentially service delivery programs, but it was connected to the Panthers' message of societal transformation. Mananzala and Spade argue that there is a severance between personal roadblocks and structural barriers because in the nonprofit sector, service delivery has been siloed from social

[259] FRANTZ FANON, THE WRETCHED OF THE EARTH (Richard Philcox trans., 2004).

transformation work.[260] The social justice movement must be thoughtful in the same way by connecting its work to people's everyday struggles and linking those struggles to systemic injustices. This connection can only be achieved through direct engagement with these communities.

There must also be a recognition that social justice work is global and that the struggles for liberation and belonging are connected and transcend borders. The inadequacy of the nation-state system to rein in the abuses of global neoliberalism demonstrates the necessity for a new system of organization and a new effort to co-create institutions that serve all people. The current structure of strong national borders—and even the conception of the nation-state based on the Westphalian model—is fraying and in need of reconsideration. Restricting citizenship and free movement tends to make acceptance into a nation's dominant in-group more valuable and more strongly desired. In the United States, for instance, another effect of the Trump Administration's strict immigration policy for people migrating from non-white countries, is to make whiteness—to the extent that it is equated with citizenship—all the more coveted. As Dasgupta states, "citizenship is itself the primordial kind of injustice in the world. It functions as an extreme form of inherited property."[261]

Hard and fixed borders also deepen and perpetuate the inequality resulting from the racial arbitrage that a significant amount of the global economy needs for its existence. The solutions on the table to address the consequences of the current economic order and lack of oversight are insufficient and misguided. The neoliberal answer is to bolster the nation-state organization within the current global economy while also allowing multi-national corporations to supersede national borders. This result occurred in part because of Western ideology's inability to see its own flaws and its undimmed belief in the universality of the nation-state. Just like the desire in constructing a "we" to return to some imaginary ideal past, the "nostalgia for that golden age of the nation-state continues to distort Western political debate to this day."[262] The West is mistaken about an inherent goodness of the nation-state structure because it was devised to serve the West's interest and promote the existing advantages in place as a result of

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[260] Rickke Mananzala & Dean Spade, *The Non-Profit Industrial Complex and Trans Resistance*, 5 SEXUALITY RSCH. & SOC. POL'Y 53 (2008).

[261] Dasgupta, *supra* note 112.

[262] *Id.*

colonization. Universalism sullied the West's judgment in assuming that the benefits the West stood to receive would be enjoyed globally—never mind the fact that many of the nations the West arrogantly and carelessly cobbled together cut across and inflicted divisions created or exacerbated by their colonial histories.

The neofascist solution is to withdraw from the global order—to turn inward and reclaim a powerful nation-state for a narrow group of a pure and true people. This is clearly extreme breaking, motivated by ideas of an essentialized dominant in-group identity around which nations are currently constructed and can lead to nothing but deeper violence and fracturing of humanity.

It is undeniable that the nation-state system is being challenged by the realities of the current global political economy. Yet, this issue is not being sufficiently grappled with to produce a workable solution. This dilemma must be taken head-on and driven by a desire to achieve full human recognition for all, a respect for the planet and all forms of life, and with a goal of an all-encompassing belonging and circle of concern.

A remaining question, then, might be how to bridge with people who are grounded in a claim of superiority, the right to dominate and a striving for purity, and whether this bridging is necessary. Given this atmosphere, those engaged in the work of social justice must work harder to do the work of bridging, of embracing and celebrating differences, and of pulling everyone into the circle of human concern. As Frederick Douglass points out, "power concedes nothing without a demand." Change will require struggle, but this struggle gives meaning and enriches humanity. The answer is to not start by building bridges with those folks but to still avoid breaking. Begin with shorter bridges and as this practice becomes more routine, start to bridge across larger divides. It is also important to be mindful of wellbeing as the process to engage in the practice of bridging begins. Healing is an important part of the bridging process as a recognition of one's own identity and the identities of others constituted at a distance from oneself will inevitably cause initial tension. But, as these small bridges grow into larger efforts to bridge, this process in itself is a form of healing. As strong human connections are made with people who were previously distant, those connections restore a previously missing need and fill a chasm that was disruptive to the self. Having that connection that bridging brings elevates the shared humanity of all and contributes to healing.

Bridging across large divides is also necessary to help create a place and a resonant identity in the new imagined order for those whose former identities relied so heavily on the need for an "other." The stories that are told about who constitutes the "we" don't only create a sense of a "we" but also create a sense of self. Psychologists assert that there is no stable sense of self until the development of a self-story. It matters little that these stories are not always accurate and oftentimes are myths. The purpose of this effort is not to build the truth, but to build a self and a people. One might notice that the claim of purity is not only false, it is also anxiety-producing. Anything that is pure is always under the threat of contamination and being destroyed. The anxiety has been shaped into an existential, ontological threat that has the sense of religion gone bad. The purity central to whiteness has contributed to the anxiety surrounding whiteness's eroding social currency. Realizing that purity is a hollow device meant to create an artificial sense of worth and its replacement with the authentic meaningfulness constructed through engagement and a broad encompassing "we" must be integral to the advancement of any new narrative.

We should be clear: we are not suggesting that there is not deep anxiety for conservative white males, nor are we suggesting their anxiety be ignored. Any path forward must include this group, but we should be equally clear that inclusive fairness and belonging cannot be built upon continued domination either by whiteness or by neoliberalism. As Brown states, "th[is] politics of [resentment] emerges from the historically dominant as they feel that dominance ebbing."[263] Whiteness and patriarchy provided the basis for dominance. But, it is also true that these forces serve as the basis for this group's dominance as well as domination, "as whiteness, especially, but also masculinity provides limited protection against the displacements and losses that forty years of neoliberalism have yielded for the working and middle classes."[264] In the building of a broad and inclusive "we," this group cannot be excluded. There must be space even for the formerly dominant, as there needs to be recognition that the construction of in-group hierarchical identity involved their subjugation as well—as long as it is unequivocally clear that the broad and welcoming space created for this purpose and the co-constitution of a new "we" cannot in any way rely upon a need to dominate.

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[263] BROWN, *supra* note 38, at 175.

[264] *Id.*

As the targets of oppression and the process of othering, there is an urgent role for people of color and other marginalized groups in overcoming the current social structure and advancing a new meta-narrative. People of color, women, the LGBTQ+ community, and the differently abled, along with their allies in the social justice movement, are not simply joining something that is already there—this group is contributing to a new future. The price of the ticket is not erasure but compassionate engagement and practice. People of different identities will not necessarily become the same, but the sameness and differences existing between different identities will be held together by belongingness and caring. The goal then is not to displace white people or any other dominant group experiencing rapid change with a new dominant group. The goal is to displace dominance. In its absence, social boundaries become more porous and identities become more multiple and fluid.

The stories and practices of a new narrative must have space for many "we's" and aspire toward no categorical other. The new stories must be an array of everyone's stories. These stories cannot just appeal to the head but must also engage the heart. One challenge is to put these stories into practice. This Article is a call for such practice recognizing that the grammar, institutions, and stories can borrow from the past but must be open to a new future where all belong.

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ARTICLE

RACIAL DISCRIMINATION IN NATIONALITY LAWS: A DOCTRINAL BLIND SPOT OF INTERNATIONAL LAW?

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Statelessness has historically been overlooked by the international community, but it is now a significant focus of the work of academics, advocates, and international institutions. The United Nations High Commissioner for Refugees' campaign to end statelessness by 2024 is now past its half-way point. Yet, while it is understood that statelessness is often the result of systemic racial discrimination, the relationship between statelessness, nationality laws, and international norms of racial non-discrimination has received very little scholarly attention.

This Article addresses the lacuna in existing legal scholarship, and indeed in jurisprudential analysis, of racial discrimination in nationality matters, by undertaking the first in-depth examination of the history, interpretation, and application of Article 1(3) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), and its consistency with the jus cogens *prohibition on racial discrimination. While focused explicitly on a particular treaty provision, this analysis raises*

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larger and vital questions about race, nationality, and statelessness—matters that are historically pertinent and have profound ongoing relevance.

The Article provides a principled, doctrinal interpretive framework within which to "read down" the problematic Article 1(3) so that the ICERD may be invoked to combat racially discriminatory nationality laws. The clarification and articulation of legal norms around Article 1(3), and a justification for its narrow interpretation, add to the existing legal tools for combatting discriminatory citizenship deprivation and denial and narrowing the boundaries of state discretion.

I. INTRODUCTION

Historically and rhetorically, it is understood that statelessness is often the result of systemic racial discrimination,[1] and that when such discrimination entails the denial or deprivation of nationality, it can operate as the first step in larger programs of persecution.[2] Yet, the relationship between statelessness, nationality laws, and international norms of racial non-discrimination has received little scholarly attention,[3] notwithstanding that it is estimated that seventy-five percent of the 10–15 million stateless persons globally belong to a minority group.[4] Given that the prohibition on racial discrimination is broadly considered a *jus cogens* norm of

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[1] The classic example is the denationalization of German Jews by the Nazi regime. *See infra* note 2. *See also* KRISTY A. BELTON, STATELESSNESS IN THE CARIBBEAN: THE PARADOX OF BELONGING IN A POSTNATIONAL WORLD 27–28 (2017); Amal de Chickera & Joanna Whiteman, *Addressing Statelessness Through the Rights to Equality and Non-Discrimination*, *in* SOLVING STATELESSNESS 99 (Laura van Waas & Melanie J. Khanna eds., 2017).

[2] PATRICK THORNBERRY, THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION: A COMMENTARY 341 (2016) ("Morsink contextualizes the drafting of the right in the UDHR [Universal Declaration of Human Rights] as part of the reaction to Nazi policy that stripped Jews of their citizenship, citing Conot for the claim that deprivation of citizenship was more important in sealing their fate than the Nuremberg Laws." (citing ROBERT E. CONOT, JUSTICE IN NUREMBERG (1983))); *Id.* at 341 n.245 ("[T]o be without a nationality or not to be a citizen of any country at all is to stand naked in the world of international affairs. It is to be alone as a person, without protection against the aggression of states . . . . As . . . Nazi practices show, the right to a nationality is not the luxury some people think it is.").

[3] Indeed, this is true of nationality, citizenship, and race discrimination more broadly. For example, the American Journal of International Law has published a total of three articles on nationality and citizenship. *See* Peter J. Spiro, *A New International Law of Citizenship*, 105 AM. J. INT'L L. 694 (2011); Sean D. Murphy, *U.S. Interpretation of Continuous Nationality Rule*, 96 AM. J. INT'L L. 706 (2002); Marian Nash, *Loss of Nationality: Expatriating Statute and Administrative Standard of Evidence*, 87 AM. J. INT'L L. 598 (1993). It has published one article on ICERD. *See* Theodor Meron, *The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination*, 79 AM. J. INT'L L. 283 (1985).

[4] U.N. HIGH COMM'R FOR REFUGEES, THIS IS OUR HOME: STATELESS MINORITIES AND THEIR SEARCH FOR CITIZENSHIP 1 (Nov. 2017). The report notes that:

> This percentage is based on statistics for stateless populations included in UNHCR's 2016 Global Trends Report that are known to belong to an ethnic, religious or linguistic minority. It does not account for minority groups that compose a proportion of a known stateless population in a country, but do not form the majority of that population. The percentage also does not include the many stateless minority groups for which UNHCR does not have adequate statistical data.

international law, meaning it is "a norm from which no derogation is permitted,"[5] how is it that national legal systems continue to permit race-based discrimination—in form or effect—in matters of nationality? And more poignantly, why is the international community apparently reticent to unequivocally critique racialized nationality laws, particularly when their application has produced large numbers of stateless persons? For instance, while the severe persecution and forcible deportation of Rohingya people from Myanmar in 2014 and 2017 has recently been widely condemned by the international community,[6] very little attention was directed at first instance to the racially discriminatory denationalization of Rohingya people that is a root cause of the predicament.[7] This "racial aphasia," that is, a "collective inability to speak about race" [8] in the context of nationality (at least until it reaches a point of crisis), may reflect a perennial tension between nationality as it pertains to individual rights (for example, the right to a nationality and the right not to be deprived of it arbitrarily) and nationality as it is reserved to the domain of states.[9] Despite the "astounding shift in international law from protecting the sovereignty of racism at the beginning of the twentieth century to openly combatting it by the beginning of the new millennium,"[10] the sovereign fortress of nationality laws still seems somewhat impervious to direct attack, even where such laws contravene anti-racial discrimination norms.

This tension is reflected in the very text of the International Convention on the Elimination of All Forms of

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[5] Spiro, *supra* note 3, at 716 n.144.

[6] *See, e.g.*, S.C. Pres. Statement 2017/22 (Nov. 6, 2017); Human Rights Council Res. 37/32, U.N. Doc. A/HRC/RES/37/32 (Mar. 23, 2018); Hum. Rts Council, Rep. of the Working Group on the Universal Periodic Review of Its Twenty-Third Session, U.N. Doc. A/HRC/31/13 (Dec. 23, 2015); G.A. Res. 70/233, Situation of Human Rights in Myanmar (Mar. 4, 2016).

[7] Early international reports concerning the denationalization of Rohingya people made few references to racial discrimination. *See, e.g.*, Hum. Rts. Council, Rep. of Working Group on the Universal Periodic Review of Its Tenth Session U.N. Doc. A/HRC/17/9 (Mar. 24, 2011). *See also* G.A. Res. 66/230, Situation of Human Rights in Myanmar (Dec. 24, 2011); G.A. Res. 65/241, Situation of Human Rights in Myanmar (Dec. 24, 2010).

[8] Debra Thompson, *Through, Against and Beyond the Racial State: The Transnational Stratum of Race*, 26 CAMBRIDGE REV. INT'L AFF. 133, 134–35 (2013). We are grateful to E. Tendayi Achiume for alerting us to this reference.

[9] For a discussion on the tension between human rights and state sovereignty, see SUZANNE EGAN, THE HUMAN RIGHTS TREATY SYSTEM: LAW AND PROCEDURE (2011).

[10] Thompson, *supra* note 8, at 133.

Racial Discrimination (ICERD).[11] Although ICERD generally provides strong protections against racial discrimination,[12] including in relation to "the right to nationality" in Article 5,[13] Articles 1(2) and 1(3) introduce limitation provisions. Article 1(2) provides that the Convention does not apply to distinctions between nationals and non-nationals, while Article 1(3) provides that "[n]othing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality."[14] On its face, Article 1(3) might suggest that state laws and practices that target more than one nationality would not be in breach of the Convention, whether "nationality" means national or ethnic origin, or enjoyment of citizenship of a particular state. According to this interpretation, a country that has racialized citizenship laws could claim that its laws and practices affect multiple "nationalities" and therefore do not violate the Convention. Relatedly, where a state has denationalized certain ethnic groups, it might claim that the denationalized individuals are not citizens and invoke Article 1(2). Like Article 1(2), Article 1(3) on its face severely limits the "universalist ambition"[15] of the Convention.

The international community's historic reluctance to properly limit Article 1(3)'s scope in a robust and principled manner may mean that Article 1(3), or its animating assumptions, continues to exert an influence on the evolution of nationality laws and practices. So long as the notion persists that matters of nationality exist within the *domaine réservé* of states, largely untrammeled by norms of non-discrimination, states will

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[11] International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, T.I.A.S. No. 94-1120, 660 U.N.T.S. 195 [hereinafter ICERD].

[12] *Id.* art. 1(1) ("In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.").

[13] *Id.* art. 5 ("In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights . . . Other civil rights, in particular . . . The right to nationality . . . .")

[14] *Id.* art. 1(3).

[15] THORNBERRY, *supra* note 2, at 140.

be able to rely on sovereignty-based claims in devising and operating their nationality laws.

To be sure, in recent years—often informed by General Recommendations issued by the Committee on the Elimination of Racial Discrimination (Committee)—numerous scholars have advanced narrowly construed interpretations of Article 1(3). However, these have often been put forward without robust justification. To a certain degree, the discourse around Article 1(3) appears to be self-referential, with scholars referring both to each other and to the same Committee General Recommendation Thirty (examined further below) as if caught in an echo chamber. The dearth of sustained scholarly attention around Article 1(3) makes it difficult to convincingly mount the argument that states are constrained with respect to discriminatory nationality laws.

At the same time, scholars point to racial non-discrimination as a *jus cogens* of international law in building the case that states are constrained in matters of nationality, but often without critical reflection. As John Tobin writes, "[a]ll too often . . . [the] process of defining the content of a human right is accompanied by scant, if any, explanation of the methodology used to generate the interpretation offered." [16] The same, according to Tobin, may be said of some of the work of treaty bodies. [17] New grounds are needed upon which to advance a narrow reading of Article 1(3), as well as a more developed understanding of the intersection between the prohibition of racial discrimination and the interpretive principles around *jus cogens* in the context of nationality.

This Article addresses the lacuna in existing legal scholarship, and indeed in jurisprudential analysis, of racial discrimination in nationality matters, by undertaking the first in-depth examination of the history, interpretation, and application of Article 1(3) of ICERD and its consistency with the *jus cogens* prohibition on racial discrimination. In doing so, this Article offers a nuanced reading of Article 1(3), and suggests that the peremptory norm of racial non-discrimination provides a robust justification for a narrowly circumscribed construal of Article 1(3). While focused explicitly on a particular treaty provision, this analysis raises larger and vital questions about race, nationality, and statelessness—matters that are historically pertinent and have profound ongoing relevance. This

[16] John Tobin, *Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation*, 23 HARV. HUM. RTS. J. 1, 1 (2010).

[17] *See id.* at 2.

Article puts forward the thesis that to the extent that matters of nationality are still considered a balancing act between individual rights and the prerogative of states, the interpretive *jus cogens* principle, as it relates to norms of racial non-discrimination, tips the balance in favor of equality and non-discrimination.

This Article is organized as follows. Part II considers the significance of racial discrimination in the context of nationality regulation, noting historical and contemporary manifestations of racialized citizenship. In Part III, the Article briefly canvasses the intersection between nationality matters within the reserved jurisdiction of states and the evolution of human rights law, examining the ways in which international law has narrowed states' prerogative in this domain. Part IV turns to a detailed examination of Article 1(3), considering first its drafting history, and then the Committee's treatment of the Article, and in particular General Recommendation Thirty. This section examines all individual and inter-state communications that have touched on nationality and provides an overview of relevant concluding observations over a period of thirty years. This Part concludes that the Committee has, to date, failed to articulate a clear and persuasive position that satisfactorily reconciles Articles 1(3) and 5(d)(iii). In Part V, the Article develops the argument that the *jus cogens* norm of prohibited racial discrimination can operate as an interpretative principle in the context of racialized nationality laws and practices. Part V examines the content of the norm and demonstrates that deprivation of nationality can be considered a form of systemic racial discrimination. Finally, Part VI considers the effects or consequences of racial non-discrimination as a *jus cogens* norm, and develops an interpretation of Article 1(3) in light of the *jus cogens* status of racial non-discrimination as a strong interpretive principle.

II. RACIAL DISCRIMINATION AND NATIONALITY LAWS

Human rights inhere in a person by virtue of his or her humanity; indeed, international human rights instruments do not generally condition enjoyment of rights on citizenship. Yet, in practice it remains the case that citizenship often operates as a prerequisite for access to basic human rights,[18] famously

[18] *See, e.g.*, David Owen, *Citizenship and Human Rights*, *in* THE OXFORD HANDBOOK ON CITIZENSHIP 247, 250 (Ayelet Sachar et al. eds., 2017).

described by German political theorist Hannah Arendt as "the right to have rights."[19] As numerous scholars have noted, while statelessness[20] itself is a serious human rights violation, the condition of statelessness can also leave people vulnerable to other profound human rights violations.[21]

Notwithstanding this and despite a renewed focus on statelessness as a pressing and pervasive global human rights issue,[22] the international community continues to struggle to articulate statelessness as a problem significantly animated by racial and ethnic discrimination.[23] In its 2017 #IBELONG Campaign report, which focused on discrimination against minority groups, the United Nations High Commissioner for Refugees (UNHCR) pointed out that discrimination lies at the heart of most cases of statelessness; it is both a cause and consequence of statelessness.[24] As another scholar writes, "most stateless populations lack legal nationality because they are part of a marginalised group that faces systematic discrimination and oppression from the start."[25] Yet, racial discrimination has not

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[19] HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 296 (1968).

[20] *See* Convention Relating to the Status of Stateless Persons art. 1, Sept. 28, 1954, 360 U.N.T.S. 117 [hereinafter 1954 Statelessness Convention] (defining the term "stateless person" as a person "who is not considered as a national by any State under the operation of its law").

[21] *See* INST. FOR STATELESSNESS & INCLUSION, THE WORLD'S STATELESS 29 (2014) (arguing that statelessness is a gateway to further human rights abuses). *See also* LINDSEY N. KINGSTON, FULLY HUMAN: PERSONHOOD, CITIZENSHIP, AND RIGHTS (2019) [hereinafter KINGSTON, FULLY HUMAN] (arguing that statelessness is an example of how basic human rights are threatened whenever a person's relationship to the state is weakened or destroyed).

[22] *See generally* Michelle Foster & Hélène Lambert, *Statelessness as a Human Rights Issue: A Concept Whose Time Has Come*, 28 INT'L J. REFUGEE L. 564 (2016) (analyzing the developments in international campaigns to address statelessness).

[23] Other relevant causes of statelessness include gender discrimination, state succession, gaps in nationality laws, conflicting nationality laws, migration, and administrative barriers to birth registration. *See* Michelle Foster et al., *Part One: The Protection of Stateless Persons in Australian Law—The Rationale for a Statelessness Determination Procedure*, 40 MELBOURNE L. REV. 401, 408–09 (2017).

[24] de Chickera & Whiteman, *supra* note 1, at 103.

[25] *See* Lindsey N. Kingston, *Worthy of Rights: Statelessness as a Cause and Symptom of Marginalisation*, *in* UNDERSTANDING STATELESSNESS 17 (Tendayi Bloom et al. eds., 2017) [hereinafter Kingston, *Worthy of Rights*]. *See also* Lindsey N. Kingston & Saheli Datta, *Strengthening the Norms of Global Responsibility: Structural Violence in Relation to Internal Displacement and Statelessness*, 4 GLOB. RESP. TO PROTECT 475 (2012) (emphasizing the political vulnerability of stateless people).

been a significant focus of the UNHCR #IBELONG campaign, which aims to end statelessness by 2024, nor of the work of the wide array of international actors engaged in the campaign. Gender discrimination and childhood statelessness have been (appropriately) explicitly identified as core, "urgent" issues in resolving statelessness,[26] with dedicated campaigns and much attention from relevant international actors, including treaty bodies. Racial discrimination, however, has not been identified in the same manner despite its undeniably pivotal role in the creation of statelessness in the modern era.[27] Comprehensive work has been undertaken in relation to gender discrimination in nationality laws, which has produced widely accessible information about the number and identity of countries that retain such discrimination.[28] By contrast, no such analysis has

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[26] *See* U.N. High Comm'r for Refugees et al., Urgent Action Needed to Reform Gender Discriminatory Nationality Laws Causing Childhood Statelessness (Aug. 22, 2019), https://www.unhcr.org/en-au/news/press/2019/8/5d5e63d9456/urgent-action-needed-reform-gender-discriminatory-nationality-laws-causing.html [https://perma.cc/C4UT-S9RY].

[27] Rohingya people represent one of the largest known stateless populations, underlining the relevance of discrimination based on ethnicity and race to statelessness today. There is no question that race discrimination underpins their predicament. Indeed, the International Court of Justice (ICJ) issued interim measures in January 2020 in relation to Gambia's case against Myanmar which claims that Myanmar has violated the Genocide Convention. *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Order, 2020 I.C.J. 178 (Jan. 23). Article I of the Genocide Convention, provides that all States parties undertake "to prevent and to punish" the crime of genocide. *Id.* ¶ 49. Article II provides that genocide means a list of relevant acts "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group." *Id.* The ICJ held:

> Bearing in mind Myanmar's duty to comply with its obligations under the Genocide Convention, the Court considers that, with regard to the situation described above, Myanmar must, in accordance with its obligations under the Convention, in relation to the members of the Rohingya group in its territory, take all measures within its power to prevent the commission of all acts within the scope of Article II of the Convention, in particular: (a) killing members of the group; (b) causing serious bodily or mental harm to the members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; and (d) imposing measures intended to prevent births within the group.

Id. ¶ 79. *See also*, Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

[28] *See, e.g.*, U.N. HIGH COMM'R FOR REFUGEES, BACKGROUND NOTE ON GENDER EQUALITY, NATIONALITY LAWS AND STATELESSNESS 2019 (Mar. 8, 2019), https://www.refworld.org/docid/5c8120847.html (demonstrating that

been undertaken regarding the prevalence of direct or indirect racial discrimination in nationality laws, nor is there an equivalent list of countries that maintain explicitly or indirectly racially discriminatory nationality laws. This may well explain why, of the 252 pledges made by states at the UNHCR High-Level Segment on Statelessness in October 2019, only Uganda's pledge related to racial discrimination.[29] This lack of focus on racial discrimination is perhaps unsurprising when considering that, as E. Tendayi Achiume convincingly argues, "racial equality is marginal to the global human rights agenda."[30] As she notes, despite wide ratification of ICERD, having now reached 182 states parties,[31] "racial equality has seemingly drifted to the margins" of the human rights agenda,[32] including in our view the campaign to eradicate statelessness.

If racial discrimination is both a cause and consequence of statelessness,[33] nationality laws and practices of certain countries can both enshrine and enable such discrimination. This insidious cycle[34] of "racialized citizenship"[35] can be seen in many instances of mass denial or deprivation of citizenship, even as the

significant steps have been taken to address gender discriminatory nationality laws in the international community) [https://perma.cc/2TBV-BWT8].

[29] U.N. High Comm'r for Refugees, Results of the High-Level Segment on Statelessness, (Oct. 2019), https://www.unhcr.org/ibelong/results-of-the-high-level-segment-on-statelessness [https://perma.cc/8QXS-FWVE].

[30] E. Tendayi Achiume, *Putting Racial Equality onto the Global Human Rights Agenda*, 28 SUR INT'L J. ON HUM. RTS. 141, 142 (2018) [hereinafter Achiume, *Racial Equality*].

[31] U.N. Treaty Collection, International Convention on the Elimination of All Forms of Racial Discrimination, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&clang=_en [https://perma.cc/G5AJ-7DF9] (last visited Nov. 22, 2020).

[32] Achiume, *Racial Equality*, *supra* note 30, at 144.

[33] *See, e.g.*, U.N. OFF. HIGH COMM'R, FORUM ON MINORITY ISSUES ELEVENTH SESSION, STATELESSNESS: A MINORITY ISSUE, CONCEPT NOTE 3 (Nov. 29–30, 2018), https://www.ohchr.org/Documents/HRBodies/HRCouncil/MinorityIssues/Session11/ConceptNote.pdf [https://perma.cc/6R3Y-3AA9]

[34] Kingston, *Worthy of Rights*, *supra* note 25. *See also* de Chickera & Whiteman, *supra* note 1, at 105 ("[I]n addition to continuing to face discrimination on the basis of pre-existing characteristics, a person's status as stateless often becomes a basis for further discrimination."). *See* KINGSTON, FULLY HUMAN, *supra* note 21, at 57–78; Brad Blitz & Maureen Lynch, *Statelessness and the Deprivation of Nationality*, *in* STATELESSNESS AND CITIZENSHIP: A COMPARATIVE STUDY ON THE BENEFITS OF NATIONALITY 1 (Brad K. Blitz & Maureen Lynch eds., 2011).

[35] David Scott FitzGerald, *The History of Racialized Citizenship*, *in* THE OXFORD HANDBOOK OF CITIZENSHIP 129, 130 (Ayelet Sachar et al. eds., 2017).

precise mechanisms of the discrimination may vary from case to case. Racialized citizenship often intersects with gender and religious discrimination.[36] It can manifest both directly and indirectly, and across distinct "moments" of the citizenship cycle, from acquisition, to naturalization, to deprivation of citizenship.[37] Across all of these moments or sites of racialized citizenship, writes David Scott FitzGerald, "racialization may consist of negative discrimination against a particular group and/or a positive preference that favors a particular group."[38] The first moment presents differently depending on whether a state adopts *jus soli* (right of soil, or birthright citizenship) as its guiding principle, or *jus sanguinis* (the principle of citizenship by descent).[39] At the second stage, naturalization or conferral of citizenship can be restricted, or denied, for certain groups.

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[36] *See generally* Special Rapporteur on Contemp. Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Report, U.N. Doc. A/HRC/38/52 (Apr. 25, 2018) [hereinafter Special Rapporteur Report on Contemporary Forms of Racism]. *See also* E. Tendayi Achiume, *Governing Xenophobia*, 51 VAND. J. TRANSNAT'L L. 333, 353–55 (2018) [hereinafter Achiume, *Governing Xenophobia*]. Achiume notes that "the absence of religion from Article 1's otherwise broad definition of racial discrimination" undermines "ICERD's capacity comprehensively to address the contemporary problem of xenophobia." *Id.* However, she also notes that the Committee has found that Article 1 may apply to cases involving religious discrimination in some cases. *Id. See, e.g.*, Comm. on Elimination Racial Discrimination, General Recommendation Thirty-Two, on the Meaning and Scope of Special Measures in the International Convention on the Elimination of Racial Discrimination, ¶ 7, U.N. Doc. CERD/C/GC/32 (Sept. 24, 2009) [hereinafter General Recommendation Thirty-Two]; Radha Govil & Alice Edwards, *Women, Nationality and Statelessness*, *in* NATIONALITY AND STATELESSNESS UNDER INTERNATIONAL LAW 169 (Alice Edwards & Laura van Waas eds., 2014); Comm. on Elimination Racial Discrimination, Rep. on the Fifty-Sixth Session (Mar. 6–24, 2000) Fifty-Seventh Session (Jul. 31–Aug. 25, 2000), U.N. Doc. A/55/18, at 152 (Aug. 25 2000); Comm. on Elimination Discrimination Against Women, General Recommendation No. Thirty-Two on the Gender-Related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women, U.N. Doc. CEDAW/C/GC/32 (Nov. 14, 2014).

[37] *See* FitzGerald, *supra* note 35.

[38] *Id.*

[39] *Id.* at 131. For an interesting discussion of *jus sanguinis* as being "historically tainted because it is rooted in practices and conceptions that rely on ethno-nationalist ideas about political membership," see Costica Dumbrava, *Bloodlines and Belonging: Time to Abandon* Ius Sanguinis*?*, *in* DEBATING TRANSFORMATIONS OF NATIONAL CITIZENSHIP 73, 73 (Rainer Bauböck ed., 2018). *But see* Rainer Bauböck, Ius Filiationis*: A Defence of Citizenship by Descent*, *in* DEBATING TRANSFORMATIONS OF NATIONAL CITIZENSHIP, *supra*, at 83 (noting that the following contributions to this collection challenge Dumbrava's view on this question).

Denationalization or deprivation of citizenship marks the third potential site for racialized citizenship.[40]

While some historical cases of racialized citizenship laws are well known, examined, and long since rejected,[41] many contemporary manifestations are under-examined. UNHCR opines that at least twenty states have nationality laws that permit denial or deprivation of nationality on discriminatory grounds including race,[42] yet no comprehensive analysis of direct and indirect racial discrimination in nationality laws has been undertaken, and hence the true scope of the problem is unknown.

The most observable cases of racialized citizenship (often leading to statelessness) are those resulting from manifestly discriminatory nationality laws. Rohingya people, considered among the world's most persecuted ethnic minority groups,[43] have been rendered stateless en masse by Myanmar.[44] The plight of Rohingya people is in large measure reflected in and perpetuated by the passing of Myanmar's discriminatory 1982 Citizenship Law[45] and longstanding discriminatory

[40] FitzGerald, *supra* note 35, at 131–32.

[41] *See generally* IAN HANEY LÓPEZ, *Racial Restrictions in the Law of Citizenship*, *in* WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 27 (1996) (regarding the United States); JAMES JUPP, FROM WHITE AUSTRALIA TO WOOMERA: THE STORY OF AUSTRALIAN IMMIGRATION (2002) (regarding Australian racialized citizenship laws).

[42] U.N. HIGH COMM'R FOR REFUGEES, GLOBAL ACTION PLAN TO END STATELESSNESS: 2014–2024, 16 (2017), https://www.unhcr.org/54621bf49.html [https://perma.cc/AE2S-SZ32]. *See also* de Chickera & Whiteman, *supra* note 1, at 101–03.

[43] Shatti Hoque, *Myanmar's Democratic Transition: Opportunity for Transitional Justice to Address the Persecution of the Rohingya*, 32 EMORY INT'L L. REV. 551 (2018) (citing *The Rohingyas: The Most Persecuted People on Earth?*, ECONOMIST (June 13, 2015), https://www.economist.com/asia/2015/06/13/the-most-persecuted-people-on-earth) [https://perma.cc/T2VK-L8SF]. *See also* Katie Young, *Who Are the Rohingya and What Is Happening in Myanmar?*, AMNESTY INT'L (Sept. 26, 2017), https://www.amnesty.org.au/who-are-the-rohingya-refugees [https://perma.cc/3SZA-N97R].

[44] *See generally* AMNESTY INT'L, MYANMAR: AMNESTY INTERNATIONAL ANNUAL REPORT 2016 (2017), https://www.amnesty.org/download/Documents/ASA1657612017ENGLISH.pdf [https://perma.cc/3BFU-PETX] (describing several instances of discrimination and persecution).

[45] Nyi Nyi Kyaw, *Unpacking the Presumed Statelessness of Rohingyas*, 15 J. IMMIGR. & REFUGEE STUD. 269, 272 (2017) ("The main academic and policy argument in the past decades is that the Rohingya are not recognized as citizens of Myanmar because of the discriminatory 1982 law.") (citations omitted).

implementation practices.[46] The Citizenship Law and its implementation are "at the heart of a discriminatory system" which left not only Rohingya people but also other non-Rohingya Muslim minorities without citizenship.[47]

Another blatantly discriminatory instance of mass denationalization involves Dominicans of Haitian descent in the Dominican Republic. In 2010, a new Dominican constitution inscribed the already precarious citizenship status of Haitian Dominicans by providing that the children of persons "in transit or residing illegally in the Dominican territory"[48] were not considered citizens of the Dominican Republic.[49] Prior to 2010, the 1929 Constitution of the Dominican Republic operated under the principle of *jus soli*, thus recognizing as Dominican most persons born within the territory of the country.[50] In Pierre v. No. Judgment 473/2012, the Dominican Constitutional Court ruled that children of "irregular migrants" were not considered

[46] *Id.* at 282 ("[T]he 1982 law—however discriminatory its textual provisions are according to international human rights standards—should not be regarded as the *sole* cause of the Rohingya problem.").

[47] IRISH CTR. FOR HUM. RTS., CRIMES AGAINST HUMANITY IN WESTERN BURMA: THE SITUATION OF THE ROHINGYA, 10 (2010); U.N. HIGH COMM'R FOR REFUGEES, STATELESSNESS AND THE ROHINGYA CRISIS 2 (Nov. 2017), https://www.refworld.org/docid/5a05b4664.html [https://perma.cc/C976-M7WT]. The authors note that approximately one million, largely Rohingya people, within the Rakhine State are stateless "due to the restrictive provisions and application of the Myanmar citizenship law which primarily confers citizenship on the basis of race." *See also* Hum. Rts. Council, Rep. of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, ¶¶ 458–748 U.N. Doc. A/HRC/39/CRP.2 (2018) (finding that based on its overall assessment of the situation in Myanmar since 2011, and particularly in Rakhine State, the extreme levels of violence perpetrated against Rohingya people in 2016 and 2017 resulted from the "systemic oppression and persecution of the Rohingya," including the denial of their legal status, identity, and citizenship, and followed the instigation of hatred against Rohingya people on *ethnic, racial, or religious grounds*).

[48] CONSTITUCIÓN DE LA POLÍTICA DE LA REPÚBLICA DOMINICANA [CONSTITUTION] Jan. 26, 2010, art. 18(3) (Dom. Rep.).

[49] Ernesto Sagas & Ediberto Roman, *Who Belongs: Citizenship and Statelessness in the Dominican Republic*, 9 GEO. J. L. & MOD. CRITICAL RACE PERSP. 35, 35 (2017).

[50] Nicia C. Mejia, *Dominican Apartheid: Inside the Flawed Migration System of the Dominican Republic*, 18 HARV. LATINO L. REV. 201, 202–03 (2015) (noting an exception to the principle of *jus soli* for those born to foreign diplomats or foreigners who were "in transit"). *See also* Richard T. Middleton, *The Operation of the Principle of* Jus Soli *and its Effect on Immigrant Inclusion into a National Identity: A Constitutional Analysis of the United States and the Dominican Republic*, 13 RUTGERS RACE & L. REV. 69, 70 (2011).

Dominican, thereby excluding them from citizenship.[51] In effect, the decision meant that the Constitution (and its interpretation) shifted from operating under a *jus soli* principle—redefining Dominican citizenship to exclude and render stateless thousands of Haitian Dominicans.[52] As has been noted, "[t]he current legal conceptions of Dominican citizenship reflect widespread cultural practices and historical trends, in which Haitians have historically been portrayed as racialized 'others.'"[53]

More recently, the 2019 update of the National Register of Citizens in Assam, India, has been described as "possibly the largest exercise in creating conditions of statelessness" [54] in history.[55] The most recent draft list excluded 1.9 million people, disproportionately impacting Bengali-speaking Muslims (with other religious and ethnic minorities caught in the intersectional xenophobic expulsion). [56] The subsequent enactment of the Citizenship Amendment Act by the Indian Parliament has been widely condemned as embodying direct discrimination against

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[51] Pierre v. No. Judgment 473/2012, TC/0168/13 1, 98 (Dom. Rep. Trib. Const. 2013). *See also* U.N. High Comm'r for Refugees, Submission by the U.N. High Comm'r for Refugees for the Office of the High Comm'r for Hum. Rts.' Compilation Rep., Universal Periodic Rev.: Haiti, at 2 (Mar. 2016) (estimating that 133,000 Dominicans of Haitian descent were rendered stateless by the decision of the constitutional court).

[52] *See* Jonathan M. Katz, *What Happened When a Nation Erased Birthright Citizenship*, ATLANTIC (Nov. 12, 2018), https://www.theatlantic.com/ideas/archive/2018/11/dominican-republic-erased-birthright-citizenship/575527/ [https://perma.cc/6CHR-TBDK]; Alan Yuhas, *Dominicans of Haitian Descent Turned into 'Ghost Citizens', says Amnesty*, GUARDIAN (Nov. 19, 2015), https://www.theguardian.com/world/2015/nov/19/dominican-republic-violated-human-rights-haitians-citizens [https://perma.cc/S9AG-Z5E9].

[53] Sagas & Roman, *supra* note 49, at 37. *See, e.g.*, Mejia, *supra* note 50; BELTON, *supra* note 1.

[54] Priya Pillai, *Of Statelessness, Detention Camps and Deportations: India and the "National Register of Citizens" in Assam*, OPINIO JURIS (Jul. 12, 2019), https://opiniojuris.org/2019/07/12/of-statelessness-detention-camps-and-deportations-india-and-the-national-register-of-citizens-in-assam [https://perma.cc/7GSW-9SSV].

[55] *See also* Rohini Mohan, *Inside India's Sham Trials That Could Strip Millions of Citizenship*, VICE NEWS (Jul. 29, 2019), https://news.vice.com/en_us/article/3k33qy/worse-than-a-death-sentence-inside-indias-sham-trials-that-could-strip-millions-of-citizenship [https://perma.cc/4DE7-4H8S].

[56] *See generally* Anushka Sharma, *Contextualizing Statelessness in the Indian Legal Framework: Illegal Immigration in Assam*, 8 CHRIST U. L.J. 25 (2019) (arguing that current legal frameworks are not equipped to address statelessness); Amit Ranjan, *National Register of Citizen Update: History and its Impact*, ASIAN ETHNICITY, June 28, 2019, at 1.

Muslims, further underlining the discrimination at the heart of the contemporary citizenship crisis in India.[57]

Additionally, many African Commonwealth countries which, having broadly inherited *jus soli* systems of citizenship, almost universally replaced birthright citizenship with laws based on citizenship by descent following independence, often "implicitly or explicitly intended to exclude potential citizens of non-African descent,"[58] and often on a racially or ethnically discriminatory basis.[59] The legacy of colonization and decolonization can bring about entrenched cases of racialized statelessness, as can other forms of state succession.[60] As addressed further below, it is important to note that such cases can be characterized by direct or indirect forms of racial discrimination,[61] and can occur in the absence of discriminatory intent.[62]

III. NATIONALITY MATTERS: BETWEEN STATE SOVEREIGNTY AND HUMAN RIGHTS

Under traditional notions of state sovereignty, decisions relating to the conferral, withdrawal, and regulation of nationality are, in principle, not a matter for international law.[63]

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[57] *See* Farrah Ahmed, *Arbitrariness, Subordination and Unequal Citizenship*, 4 INDIAN L. REV. 121 (2020). *See also* Abhinav Chandrachud, *Secularism and the Citizenship Amendment Act*, 4 INDIAN L. REV. 138 (2020); Monika Verma, *Citizenship (Amendment) Act, 2019: The Pernicious Outcomes of the Altering Equation of Citizenship in India*, CONFLICT, JUST., DECOLONIZATION: CRITICAL STUD. INTER-ASIAN SOC'Y (June 24, 2020), https://www.researchgate.net/publication/342436363_Citizenship_Amendment_Act_2019_The_Pernicious_Outcomes_of_the_Altering_Equation_of_Citizenship_in_India [https://perma.cc/ZA43-JQ5A]; Atul Alexander, *Evaluating the Citizenship Amendment Act, 2019 in India: Perspectives from International Refugee Law,* INT'L L. UNDER CONSTR. (Feb. 27, 2020), https://grojil.org/2020/02/27/evaluating-the-citizenship-amendment-act-2019-in-india-perspectives-from-international-refugee-law/ [https://perma.cc/C3RF-7JKN].

[58] BRONWEN MANBY, CITIZENSHIP IN AFRICA 76 (2018).

[59] *See e.g.*, THE PUBLIC ORDER ACT [CONSTITUTION] Dec. 31, 1965, (Sierra Leone); CONSTITUTION OF THE REPUBLIC OF UGANDA [CONSTITUTION] Oct. 8, 1995, (Uganda). *See generally* MANBY, *supra* note 58, at 193–99.

[60] de Chickera & Whiteman, *supra* note 1, at 101.

[61] ICERD, *supra* note 11, art 1(1) (requiring states to eliminate discrimination in purpose or effect, as well as discrimination that occurs in the absence of discriminatory intent). *See, e.g.*, THORNBERRY, *supra* note 2, at 114.

[62] Special Rapporteur Report on Contemporary Forms of Racism, *supra* note 36, ¶ 18.

[63] Manley O. Hudson (Special Rapporteur of the International Law Commission) *Rep. on Nationality, Including Statelessness*, at 7, U.N. Doc. A/CN.4/50 (1952) ("In principle, questions of nationality fall within the domestic

Rather, nationality is a matter "for each state to decide"[64] within the "reserved domain"[65] of states. The 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws (1930 Hague Convention) did not create an individual right to nationality; states alone grant and withdraw nationality. [66] Article 1 provides that it is "for each State to determine under its own law who are its nationals."[67] According to Article 2, "[a]ny question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State."[68] However, Article 1 also provides that "[t]his law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality."[69]

Accordingly, even within the traditional framework, the exclusive right of states in nationality matters has long been understood as dependent on (and tempered by) the development of international relations. In 1923, in the Nationality Decrees in

jurisdiction of each State."). *See also* Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4, at 24 (February 7) [hereinafter Tunis and Morocco Nationality Decrees] ("The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question: it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of this Court, in principle within this reserved domain."). *See also* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 384 (6th ed. 2018).

[64] Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (ser. A) No. 4, ¶ 32 (Jan. 19, 1984). *Accord* Spiro, *supra* note 3, at 714 (commenting that even through most of the late twentieth century, "the conventional wisdom among legal scholars held nationality practice to be largely unconstrained by international law." (citing GEORG SCHWARTZBERGER, A MANUAL OF INTERNATIONAL LAW 141 (5th ed. 1967) ("[I]n principle, international law leaves each territorial sovereign to decide which of his inhabitants he wishes to grant nationality."))); PAUL WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 65 (2nd ed. 1979) ("The right of a State to determine who are, and who are not, its nationals is an essential element of its sovereignty."); Otto Kimminich, *The Conventions for the Prevention of Double Citizenship and Their Meaning for Germany and Europe in an Era of Migration*, 38 GERMAN Y.B. INT'L L. 224, 224 (1995) (affirming the Hague Convention's provision that "[i]t is for each State to determine under its own law who are its nationals") (citation omitted).

[65] Tunis and Morocco Nationality Decrees, *supra* note 63, at 24.

[66] League of Nations, Convention on Certain Questions Relating to the Conflict of Nationality Laws, Apr. 13, 1930, 179 L.N.T.S. 89 [hereinafter 1930 Hague Convention].

[67] *Id.* art. 1.

[68] *Id.* art. 2.

[69] *Id.* art. 1.

Tunis and Morocco Opinion, the Permanent Court of International Justice made the following statement:

> The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain. . . . [I]t may well happen that, in a matter which, like that of nationality, is not, in principle, regulated by international law, the right of a State to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other States. In such case, jurisdiction which, in principle, belongs solely to the State, is limited by rules of international law.[70]

Today, it is well accepted by scholars that international human rights law has evolved to place significant constraints on states' prerogatives in nationality matters, such that traditional notions of sovereignty have been eroded, albeit not eradicated.[71] It is often stated that, in many instances and under certain circumstances, a refusal to grant nationality or a withdrawal of nationality violates norms of international law. Scholars tend to point to a cluster of intersecting areas of international human rights law to establish the claim that the traditional position has been modified in important ways. Interestingly—and perhaps tellingly—a number of scholars have pointed to ICERD [72] (together with other non-discrimination treaties, or treaties containing non-discrimination clauses) to argue that the

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[70] Tunis and Morocco Nationality Decrees, *supra* note 63, at 24. *See also* Nottebohm Case (Liech. v. Guat.), Judgment, 1955 I.C.J. Rep. 4, ¶¶ 20–21 (April 6). *See* Mads Andenas, *Reassertion and Transformation: From Fragmentation to Convergence in International Law*, 46 GEO. J. INT'L L. 685 (2015).

[71] For detailed discussions of the phases and contours of international human rights law that constrain state sovereignty in nationality practice, see Spiro, *supra* note 3.

[72] *See, e.g.*, Alice Edwards, *The Meaning of Nationality in International Law in an Era of Human Rights*, *in* NATIONALITY AND STATELESSNESS UNDER INTERNATIONAL LAW 26 (Alice Edwards & Laura van Waas eds., 2014) [hereinafter Edwards, *The Meaning of Nationality*].

evolution of human rights has encroached on states' prerogatives in nationality matters.[73]

In the context of nationality matters, scholars tend to focus on three interfacing areas of international law where constraints are imposed on state discretion in the context of nationality matters. First, reliance is placed on the prohibition of arbitrary deprivation of nationality as a constraint on state discretion. Arbitrary deprivation of nationality generally refers to withdrawal or denial[74] of nationality where such deprivation does not serve a legitimate purpose, where it does not follow the principle of proportionality, where it is discriminatory, and/or where it is otherwise incompatible with international law.[75] International and regional human rights instruments reinforce this prohibition of arbitrary deprivation of nationality.[76]

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[73] Consider also the relationship of Article 1(3) to similar exclusion/limitation clauses contained in other human rights instruments. *See* G.A. Res. 40/144 (XL), Declaration of Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, art. 2(1) (Dec. 13, 1985):

> Nothing in this Declaration should be interpreted as legitimizing the illegal entry into and presence in a State of any alien, nor shall any provision be interpreted as restricting the right of any State to promulgate laws and regulations concerning the entry of aliens and the terms and conditions of their stay or to establish differences between nationals and aliens. However, such laws and regulations shall not be incompatible with the international legal obligations of that State, including those in the field of human rights.

See also 1954 Statelessness Convention, *supra* note 20, art. 31; Convention on the Reduction of Statelessness art. 1(2)(c), art. 4(2)(c), art. 8(3), Aug. 30, 1961, 989 U.N.T.S. 175 [hereinafter 1961 Statelessness Convention].

[74] MICHELLE FOSTER & HÉLÈNE LAMBERT, INTERNATIONAL REFUGEE LAW AND THE PROTECTION OF STATELESS PERSONS 51–52 (2019). *See also* LAURA VAN WAAS, NATIONALITY MATTERS: STATELESSNESS UNDER INTERNATIONAL LAW 101 (2008).

[75] Edwards, *The Meaning of Nationality*, *supra* note 72, at 26. *See also* Jorunn Brandvoll, *Deprivation of Nationality*, *in* NATIONALITY AND STATELESSNESS UNDER INTERNATIONAL LAW 194 (Alice Edwards & Laura van Waas eds., 2014).

[76] *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 15 (Dec. 10 1948) [hereinafter UDHR] ("No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."); Convention on the Rights of Persons with Disabilities art. 18(1)(a), Dec. 3, 2006, 2515 U.N.T.S. 3 [hereinafter CRPD] (stating that it is upon states parties to ensure "persons with disabilities . . . [h]ave the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability."); Organization of American States, American Convention on Human Rights art. 20, Nov. 22, 1969, O.A.S.T.S No. 36, 1144 U.N.T.S. 123. ("1. Every person has the right to a nationality; 2. Every person has the right to the nationality of the state in whose territory he was born if he does not have the

Second, there is an emerging view that the duty to prevent statelessness is developing as a norm of customary international law and that this duty represents a constraint on state discretion in nationality matters.[77] Reliance is placed on treaty provisions that share an underlying concern to prevent statelessness. Article 13 of the 1930 Hague Convention provides that if a child does not acquire the new nationality of his or her parents in the context of their naturalization, they are to retain their original nationality.[78] Article 9(1) of the 1979 Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) provides that "[states] shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband."[79]

The Convention on the Rights of the Child (CRC) includes under Articles 7 and 8 the right to a nationality and the right to an identity—and specifies that these rights are to be implemented "in particular where the child would otherwise be stateless." [80] Importantly, these provisions in human rights instruments are complemented by the two major conventions on

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right to any other nationality; 3. No one shall be arbitrarily deprived of his nationality or of the right to change it."). *See also* League of Arab States, Arab Charter on Human Rights, Art. 29, May 22, 2004, *reprinted in* 12 INT'L HUM. RTS. REP. 893 (2005) ("Everyone has the right to nationality. No one shall be arbitrarily or unlawfully deprived of his nationality."); The Commonwealth of Independent States, Convention on Human Rights and Fundamental Freedoms art. 24, May 26, 1995, 3 I.H.R.R. 1 (stating both that "[e]veryone shall have the right to citizenship," and that "[n]o one shall be arbitrarily deprived of his citizenship or of the right to change it.").

[77] Edwards, *The Meaning of Nationality*, *supra* note 72, at 28. *See also* Sanoj Rajan, *Ending International Surrogacy-Induced Statelessness: An International Human Rights Law Perspective*, 58 INDIAN J. INT'L L. 128 (2018) (noting that this is especially the case with respect to children).

[78] 1930 Hague Convention, *supra* note 66, art. 13 ("Naturalisation of the parents shall confer on such of their children as, according to its law, are minors the nationality of the State by which the naturalisation is granted. In such case the law of that State may specify the conditions governing the acquisition of its nationality by the minor children as a result of the naturalisation of the parents. In cases where minor children do not acquire the nationality of their parents as the result of the naturalisation of the latter, they shall retain their existing nationality.").

[79] United Nations Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13. *See also* United Nations Convention on the Nationality of Married Women, Feb. 20, 1957, 309 U.N.T.S. 65.

[80] United Nations Convention on the Rights of the Child arts. 7-8, Nov. 20, 1989, 1577 U.N.T.S. 3.

statelessness: the 1954 Convention relating to the Status of Stateless Persons (1954 Statelessness Convention)[81] and the 1961 Convention on the Reduction of Statelessness (1961 Statelessness Convention).[82]

Finally, and related to the prohibition of arbitrary deprivation of nationality, scholars point to the general principle of non-discrimination in nationality laws as a constraint on state discretion. Non-discrimination is underpinned by and fundamental to all major human rights instruments. Article 9 of the 1961 Statelessness Convention prohibits the deprivation of nationality on racial, ethnic, religious, or political grounds. Article 9(2) of CEDAW provides, "States Parties shall grant women equal rights with men to acquire, change or retain their nationality." Article 18(1)(a) of the Convention on the Rights of Persons with Disabilities provides that states parties shall ensure that persons with disabilities "[h]ave the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability."[83] Importantly for the purposes of this paper, scholars point to Article 5(d)(iii) of ICERD, which provides that depriving any person of their nationality on the basis of race, color, or national or ethnic origin is a breach of a state's obligations under the Convention.[84] Often in tandem with this reference, scholars tend to stress the importance of the prohibition on racial discrimination as a *jus cogens* norm of international law.

It is important to recall that these three areas interface and intersect. For example, deprivation of nationality on the basis of race, color, sex, language, etc. has been considered arbitrary and therefore prohibited under international law.[85] Several academics have also argued that deprivation that results in statelessness is inherently arbitrary.[86] Together, the three

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[81] 1954 Statelessness Convention, *supra* note 20.

[82] 1961 Statelessness Convention, *supra* note 73.

[83] CRPD, *supra* note 76, art. 18(1)(a).

[84] Note that "descent"—listed as a prohibited ground of discrimination in Article 1(1)—is missing from Article 5, yet this is unlikely to have any impact given that Article 5 refers to racial discrimination, defined in Article 1 as including discrimination based on descent.

[85] *See e.g.*, Hum. Rts. Council, Draft Resolution of Its Twentieth Session, U.N. Doc. A/HRC/20/L.9, at 2 (June 28, 2012).

[86] *See e.g.*, RUTH DONNER, THE REGULATION OF NATIONALITY IN INTERNATIONAL LAW 245 (2d ed. 1994) (arguing that arbitrary is defined as "a discriminatory measure, directed against a particular section of the population or as resulting in statelessness"); Johannes M. M. Chan, *The Right to a*

intersecting principles, and the contemporary academic discourse around them, go a long way in advancing a "new international law of citizenship."[87] However, there remains a chink in the armor of the new regime related to nationality practice, which, if left unaddressed, threatens to undermine its robustness. Article 1(3) of ICERD, at least on its face, reflects and possibly perpetuates a lingering remnant of state discretion. While ICERD itself is time and again put forward as an example of a constraint on state discretion, most scholars tend to ignore or brush over a tension that exists in the very text of the Convention and that perhaps perpetuates the very problem they seek to resolve.

Coming into force on January 4, 1969, ICERD is broadly considered the core of the international human rights framework for addressing and combating racial discrimination.[88] Article 1(1) defines racial discrimination as:

> [A]ny distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[89]

As explained above, Article 1(2) of the Convention stipulates a limitation on the terms of Article 1(1). It provides that the Convention does not apply to distinctions, exclusions, restrictions, or preferences made between citizens and non-citizens. It has been argued that "while this provision allows States to make some distinctions between citizens and non-citizens," it must be narrowly construed and interpreted in accordance with standards relating to the prohibition of racial discrimination and equality before the law as enshrined in Article 5 of the Convention.[90] A full discussion of Article 1(2) is

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Nationality as a Human Right: The Current Trend Towards Recognition, 12 HUM. RTS. L.J. 1, 3 (1991).

[87] Spiro, *supra* note 3.

[88] Kevin Boyle & Anneliese Baldaccini, *A Critical Evaluation of International Human Rights Approaches to Racism*, *in* DISCRIMINATION AND HUMAN RIGHTS: THE CASE OF RACISM 135 (Sandra Fredman ed., 2001).

[89] ICERD, *supra* note 11, art.1(1).

[90] Special Rapporteur Report on Contemporary Forms of Racism, *supra* note 36, at ¶19 (also noting that "[d]istinctions between citizens and non-citizens cannot be applied in a racially discriminatory manner or as a pretext for racial

beyond the scope of this paper,[91] but 1(2) does help to contextualize Article 1(3) and its place in the drafting history of the Convention. The distinction between citizens and non-citizens also underscores the importance of the right to nationality (as enshrined in Article 5(d)(iii), which applies without distinction to "everyone") and, as shown below, simultaneously highlights the protection gap represented by Article 1(3).

Secondary material on Article 1(3) has mostly either taken as an (unproblematic) given that Article 1(3) limits the applicability of Article 1(1) or produced only thin justifications for interpreting Article 1(3) narrowly, often focusing on the second clause of the Article ("provided that such provisions do not discriminate against any particular nationality") and glossing over the first ("[n]othing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization").[92] Further, few treatments to date have explored the apparent contradiction between Article 5(d)(iii) and Article 1(3). Natan Lerner writes that Articles 1(2) and 1(3) combine to mean that the Convention should not be taken as interfering "in the internal legislation of any State as far as differences in the rights of citizens and non-citizens are concerned, [nor as] pretend[ing] to affect substantive or procedural norms on citizenship and naturalization."[93] Theodor Meron simply states that under Article 1(3) "nationality, citizenship or naturalization provisions of a particular state may not discriminate against any particular nationality."[94] In a reflection on racial discrimination as a major driver of denationalization and restrictive access to citizenship, James A. Goldston asserts that while Article 1(3) of ICERD "grants states discretion in applying race-based distinctions when it comes to citizenship rules," the language of the Article also places limits on this discretion.[95] A recent report of the

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discrimination."). *Accord* DAVID WEISSBRODT, THE HUMAN RIGHTS OF NON-CITIZENS 48 (2011).

[91] For further analysis, see Achiume, *Governing Xenophobia*, *supra* note 36, at 356–58.

[92] ICERD, *supra* note 11, art.1(3).

[93] NATAN LERNER, THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION 35 (1980) [hereinafter LERNER, U.N. CONVENTION].

[94] Meron, *supra* note 3, at 311.

[95] James A. Goldston, *Holes in the Rights Framework: Racial Discrimination, Citizenship, and the Rights of Noncitizens*, 20 ETHICS & INT'L AFF. 321, 333 (2006).

Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance from 2018 highlights this tension in noting that "the regulation of nationality is generally considered to be within the domestic jurisdiction of States," yet "international law provides that the right of States to decide who their nationals are is not absolute."[96]

To be sure, some scholars have acknowledged Article 1(3) as problematic. Peter Spiro observes that while international law has significantly and broadly constrained discriminatory classifications, Article 1(3) "brackets the use of race as a criterion for citizenship."[97] He concludes that "[i]n its original conception . . . the Convention was not intended to constrain criteria for admission from outside the existing community," citing the Convention as an example of international law's historical silence about a citizenship regime that had the clear effect of excluding outsiders on the basis of race.[98] Joanne Mariner makes a similar observation. Writing in 2003, she comments:

> the convention shifts gears with regard to rules regulating citizenship. Despite its broad and

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[96] Special Rapporteur Report on Contemporary Forms of Racism, *supra* note 36, ¶ 23 (citing U.N. Secretary-General, *Human Rights and Arbitrary Deprivation of Nationality*, Hum. Rts. Council, ¶¶ 20, 57, U.N. Doc. A/HRC/13/34 (Dec. 14, 2009)) ("The [International Law] Commission also affirmed that the right of States to decide who their nationals are is not absolute and that, in particular, States must comply with their human rights obligations concerning the granting of nationality."). *Accord* Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (ser. A) No. 4, ¶ 32 (Jan. 19, 1984) (contending that that "the manners in which States regulate matters bearing on nationality cannot today be deemed within their sole jurisdiction; those powers of the State are also circumscribed by their obligations to ensure the full protection of human rights"); Václav Mikulka (Special Rapporteur), *Third Rep. on Nationality in Relation to the Succession of States*, at 20–21, U.N. Doc. A/CN.4/480 (Feb. 27, 1997) (indicating that a State must exercise "its discretionary power within the scope of its territorial or personal competence . . . in a manner consistent with its international obligations in the field of human rights."). *See also id.* at 20 (indicating that "State sovereignty in the determination of its nationals does not mean the absence of all rational constraints. The legislative competence of the State with respect to nationality is not absolute.") (citing HENRI BATIFFOL & PAUL LAGARDE, DROIT INTERNATIONAL PRIVÉ 69–70 (7th ed. 1981)).

[97] Spiro, *supra* note 3, at 716.

[98] *Id.* Note, however, Spiro's treatment of racial discrimination as *jus cogens*: "The prohibition on race discrimination has since arguably evolved into a *jus cogens* norm—that is, a norm from which no derogation is permitted." *Id.* at 716 n.144 (citing Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03*,* Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 101 (Sept. 17, 2003)).

> unqualified language about the necessity of eliminating racial and ethnic discrimination in all of its manifestations, the treaty contains an explicit exception for countries' citizenship and naturalization policies. . . . Practices that would, in short, merit the sternest reproach in nearly every other area of government policy are considered permissible in the area of citizenship.[99]

Mariner made this observation just a year before the Committee formulated its General Recommendation Thirty, which advanced a significantly narrowed interpretation of the Article 1(3) limitation clauses. This Article returns to the Committee's Recommendation below, but for now it is important to stress that generous scholarly and Committee interpretations notwithstanding, it is difficult, and possibly counterproductive, to ignore the fact that on its face, the language of Article 1(3) undermines the reach and application of the Convention. As Egon Schwelb rightly points out, with Article 1(3) left unconstrained, under its terms a provision "depriving of their citizenship the citizens of a State Party who belong to a specific racial or ethnic group would be a legal provision 'concerning nationality' and 'concerning citizenship' and would" therefore be compatible with Article 1(3).[100] Needed is a principled approach for "reading down" Article 1(3), one that heeds closely to the

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[99] Joanne Mariner, *Racism, Citizenship and National Identity*, 46 DEVELOPMENT 64, 64–65 (2003). Mariner notes in a separate essay that "while adamantly prohibiting racial and ethnic discrimination in other areas, international human rights law falters notably with regard to rules regulating citizenship." Joanne Mariner, *Racism Citizenship and National Identity: A Conceptual Challenge for the UN Racial Conference*, FINDLAW (Sept. 3, 2001), https://supreme.findlaw.com/legal-commentary/racism-citizenship-and-national-identity.html [https://perma.cc/YM8W-SQ6J]. Mariner points to ICERD's inclusion of "an explicit exception for countries' citizenship and naturalization policies," noting that this provision specifies "that the convention's protections against discrimination do not generally extend to legal rules on citizenship and naturalization, although they do bar discrimination against particular nationalities." Mariner, *supra*, at 64–65.

[100] Egon Schwelb, *The International Convention on the Elimination of All Forms of Racial Discrimination*, 15 INT'L & COMP. L.Q. 996, 1009 (1966) [hereinafter Schwelb, *Elimination of All Forms of Racial Discrimination*] (although contending that Article 5(d)(iii) "limits the very wide field of application of Article 1(3), such . . . a provision of this kind would ultimately be incompatible with the Convention.").

principles of treaty interpretation as set out in the Vienna Convention on the Law of Treaties (VCLT).[101]

IV. ARTICLE 1(3): HISTORY AND CURRENT APPROACHES

In this Part, the Article addresses the gaps outlined above by undertaking a thorough review of the drafting history of Article 1(3) and an analysis of its interpretation and implementation by the Committee.

Article 31(1) of VCLT sets out the principal scheme of treaty interpretation: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[102] It is worth noting as a general matter that human rights treaties should arguably be interpreted in a manner "favorable to the effective protection of individual rights."[103]

VCLT permits recourse to preparatory materials (*travaux préparatoires)* as supplementary tools when other canons of treaty interpretation deliver ambiguous (or absurd) results. Although the intentionalist approach to treaty interpretation remains highly contested, it is generally agreed that preparatory materials can shed light on the literal and contextual meanings of a provision and that the intention of parties, as distilled from the preparatory materials, serves as "a relevant and underlying consideration"—even if they remain in the background.[104] Given the ambiguity and confusion surrounding Article 1(3), this Part begins by considering its drafting history.

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[101] Vienna Convention of the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

[102] *Id.* art. 31.

[103] Kerstin Mechlem, *Treaty Bodies and the Interpretation of Human Rights*, 42 VAND. J. TRANSNAT'L L. 905, 912 (2009) (citing MATTHEW CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT 3 (1995) ("[T]he terms (of a human rights treaty) are to be interpreted in a manner favourable to the individual and that, in particular, limitations and restrictions on rights are to be read narrowly.")). *See also* Tobin, *supra* note 16, at 50 (noting that international human rights treaties should be interpreted dynamically and in a manner that reflects "factors which are considered essential to ensure a constructive approach to interpretation."); Pushpanathan v. Canada, [1998] S.C.R. 982, ¶ 57 (Can.) ("This overarching and clear human rights object and purpose is the background against which interpretation of individual provisions must take place.").

[104] Tobin, *supra* note 16, at 23.

A. The Drafting History of Article 1(3) of ICERD

As well as disclosing a perennial tension between racial non-discrimination and state discretion in the regulation of nationality (and perhaps, too, a lingering bastion of that discretion), a close reading of the drafting history of Article 1(3) reveals that while the Article 1(3) reflects a concern with state sovereignty, it equally reflects an immediate concern with colonialism (or anti-colonialism). As Patrick Thornberry notes, "[f]or many delegates, colonialism was the great racial evil."[105] Undergirded by similar logic, the twin concerns of anti-colonialism and state sovereignty (what might be described as the unconstrained power to define the boundaries of membership)[106] meant that many states—both developing and developed—could conjoin and concur around the broad language of Article 1(3). As demonstrated above, Article 1(1) defines racial discrimination as:

> any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[107]

As Kevin Boyle and Anneliese Baldaccini write:

> While the words "colour," "descent," and "ethnic origin" did not represent major difficulties, a serious problem arose with regard to the term "national origin" due to it being widely used as relating to nationality or citizenship. To avoid any misinterpretation, paragraphs 2 and 3 were added to Article 1 excluding distinctions between

[105] THORNBERRY, *supra* note 2, at 1. *See also* Rüdiger Wolfrum, *The Committee on the Elimination of Racial Discrimination*, 3 MAX PLANCK Y.B. U.N. L. 489 (1999) (noting that the drafting of the preamble to the Convention reflected a sensitivity to the challenge and practice of colonialism and other issues); David Keane & Annapurna Waughray, *Introduction*, *in* FIFTY YEARS OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION: A LIVING INSTRUMENT 4–5 (David Kaene & Annapurna Waughray eds., 2014).

[106] *See* Spiro, *supra* note 3, at 744.

[107] ICERD, *supra* note 11, art. 1(1).

> citizens and non-citizens from the ambit of the definition.[108]

Initially, the Sub-Commission's draft convention proposed the "interpretive" Article 8 to serve as a counterbalance to the broad protection offered by Article 1(1) and the contested invocation of "national origin."[109] Draft Article 8 reads as follows:

> Nothing in the present Convention may be interpreted as implicitly recognizing or denying political or other rights to non-nationals nor to groups of persons of a common race, colour, ethnic or national origin which exist or may exist as distinct groups within a State Party.[110]

There was general agreement that the article was intended by the Sub-Commission to provide a qualification to Article 1. It was "aimed at precluding certain interpretations of the provisions of the Convention."[111] There was considerable discussion, however, about the scope and intention of some of the wording used in the Sub-Commission's text. A joint amendment to Article 8 proposed by representatives of France, India, and the Philippines read as follows:

> Nothing in this present Convention may be interpreted as affecting in any way the distinction between national and non-nationals of a State, as recognized by international law, in the enjoyment of political or other rights, or as amending provisions governing the exercise of political or other rights by naturalized persons . . . .[112]

After lengthy discussions that revolved largely around the inclusion of the words "national origin" in Article 1(1), Article

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[108] Boyle & Baldaccini, *supra* note 88, at 152 n.79.

[109] U.N. ESCOR, 37th Sess., Supp. 8, at ¶¶ 248, 253, U.N. Doc. E/CN.4/874 (Feb. 17–Mar. 18, 1964).

[110] *Id.* ¶ 242.

[111] *Id.* ¶ 248.

[112] *Id.* ¶ 247. *See also* Comm'n on Hum. Rts. Sub-commission on Prevention of Discrimination & Protection of Minorities, Rep. of the Sixteenth Sess., 41, U.N. Doc. E/CN.4/873 (Feb. 11, 1964). The phrase "as recognized by international law" was later deleted. Earlier drafts focused largely on non-citizens. The first version, submitted by Calvoressi and Capotorti, included the provision that nothing in the Convention "shall be interpreted as implying a grant of equal political rights to nationals of a contracting State or a grant of political rights to a distinct racial ethnic or national group as such." THORNBERRY, *supra* note 2, at 142.

8 was deleted at the 808th meeting.[113] Following deletion of Article 8 from the draft Convention, the representative of France moved at the 809th meeting of the Commission to reconsider Article 1, paragraph 1, with a view to deciding whether the word "national" should be retained.[114] After further discussion and a series of textual proposals, the Commission agreed at its 810th meeting to place the word "national" within square brackets, and to add the following words, also in square brackets, at the end of the paragraph: "In this paragraph the expression 'national origin' does not cover the status of any person as a citizen of a given State."[115] At the conclusion of the Twentieth Session of the Commission on Human Rights, Draft Article 1 read as follows:

> In this Convention the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, [national] or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[116]

The language of Article 1 of the draft Convention arose again at the Twentieth Session of the General Assembly. Article 1(3) was initially conceived as a replacement of Article 8 in light of the decision to retain the reference to national origin in Article 1(1). Although a number of states called for the deletion of all brackets, it was felt that some explanation to eliminate the ambiguity of the word "national" was necessary, specifically following the deletion of Article 8.[117] For example, the representative of France observed that "it was not surprising that the term 'national origin' had given rise to difficulties, since it could be interpreted in two entirely different ways," one sociological and the other legal.[118] Like the original Article 8, the

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[113] LERNER, U.N. CONVENTION, *supra* note 93, at 27.

[114] *Id.*

[115] *Id.*

[116] U.N. ESCOR, 37th Sess., Supp. 8, *supra* note 109, at 111. ("In this paragraph the expression 'national origin' does not cover the status of any person as a citizen of a given State.").

[117] U.N. GAOR, 20th Sess., 1304th mtg. at 83–86, U.N. Doc. A/C.3/SR.1304 (Oct. 14, 1965).

[118] Goolam E. Vahanwati, Presentation Before the U.N. Committee on the Elimination of Racial Discrimination (Feb. 26, 2007), https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/Ind/INT_CERD_STA_Ind_70_11102_E.pdf [https://perma.cc/QWE5-JQRZ].

paired Articles 1(2) and 1(3) were therefore viewed as limiting interpretive clauses on the broad protections conferred by 1(1), and especially in response to the (contested) inclusion of the term "national origin" therein. The discussions around national origin were influenced strongly by concerns and anxieties related to colonialism and the desire of many states to preserve national governance. This concern is evident in comments by the representative of Uganda, who stated, "it was natural that a country which had just become independent should wish to give its own nationals the key posts in the economy hitherto largely held by nationals."[119] It is perhaps worth noting that a similar concern for independence in a post-colonial context can be discerned in the text of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which reads at Article 2(3): "Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals."[120] Here too, Article 2(3) follows a broad non-discrimination clause in Article 2(2), which provides that "[t]he States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[121] Evo Dankwa has pointed out that during the drafting history of ICESCR a number of delegates from developing countries had urged that the approval of Article 2(2) "would be tantamount to perpetuating the dominant position of aliens in the economic field," particularly in light of colonial powers that had deprived the new states "of that opportunity to ensure that meaningful economic rights were exercised by most people in their countries."[122]

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[119] U.N. GAOR, 20th Sess., 1305th mtg. at 89, U.N. Doc. A/C.3/SR.1305 (Oct. 14, 1965).

[120] International Covenant on Economic, Social and Cultural Rights art. 2(3), Dec. 16, 1966, 933 U.N.T.S. 3.

[121] *Id.* art. 2(2).

[122] Evo Dankwa, *Working Paper on Article 2(3) of the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 230, 236 (1987) (citing U.N. GAOR, Draft International Convention on Human Rights, at 235, U.N. Doc. A/5365 (1962) ("The sole aim of the proposals in question was to rectify situations which frequently existed in the developing countries particularly those which recently won their independence. In such countries, the influence of non-nationals on the national economy—a heritage of the colonial era—was often such that nationals were not in a position fully to enjoy the

However, the concerns around the inclusion of the words "national origin" and its relevance to nationality laws in ICERD were also animated, at least in part, by a desire on the part of powerful, developed states to "assure states parties that due respect is given to state sovereignty in areas concerning naturalization."[123] For example, the representative of the United Kingdom stated that the term "national origin" tended to confuse the issue because "such a provision [regarding nationality] would do away with the special facilities given by States to those of their nationals who, having changed their nationality, subsequently wished to recover their original nationality . . . as compared with aliens desiring to acquire that nationality by naturalization."[124] Similarly, the representative of France explained that the inclusion of the words "national origin" might "impair the principle that temporary measures taken by Governments with regards to naturalised persons did not constitute discrimination."[125] The representative of Italy likewise explained that the mention of national origin would "raise difficulties in

economic rights set forth in the draft Covenant.")). *See also* Alice Edwards, *Human Rights, Refugees, and the Right to Enjoy Asylum*, 17 INT'L J. REFUGEE L. 293 (2005) (asserting that the "purpose of Article 2(3) was to end the domination of certain economic groups of non-nationals during colonial times," but that the provision should be narrowly construed).

[123] Drew Mahalic & Joan Gambee Mahalic, *The Limitation Provisions of the International Convention on the Elimination of All Forms of Racial Discrimination*, 9 HUM. RTS. Q. 74, 79, 82 (1987).

[124] Schwelb, *Elimination of All Forms of Racial Discrimination*, *supra* note 100, at 1010, refers to this comment, and others like it, as an attempt at "maintaining disabilities of naturalised persons" and argues that this is the key animating consideration that gave rise to Article 1(3). The representative of the United Kingdom added that since the definition of racial discrimination in paragraph 1 was exceedingly broad, certain legitimate differentiations based on national origin might conceivably be prohibited under the convention if the words were retained. For example, in the United Kingdom, preference was given to married women who had lost their British nationality in assisting them to reacquire that nationality; such preference could not be deemed discrimination. U.N. ESCOR, Summary Record of the 786th Meeting, 20th Sess., at 4, U.N. Doc. E/CN.4/SR.786 (Apr. 21, 1964).

[125] Schwelb, *Elimination of All Forms of Racial Discrimination*, *supra* note 100, at 1010. *See* Comm'n on Hum. Rts., Rep. of the Prevention and Protection of Minorities Subcomm. on Its Fourteenth Session, 42, U.N. Doc. E/CN.4/830 (Feb. 8. 1962). In making this claim, the representative of France pointed to the Report of the 14th session of the Sub-Commission on the Prevention of Discrimination and Protection of Minority Rights to the Commission on Human Rights, in which it was asserted that an insistence upon an over-generous policy of granting full political rights immediately to all naturalized persons might discourage nations from giving nationality to many applicants as the view that all naturalized persons should enjoy the same political rights as any other national was not shared by every State.

connection with enforcement of the right to nationality under article V" as it might present an obstacle to states, such as Italy, "which endeavoured to assist former Italian nationals to reacquire Italian nationality."[126]

In the final analysis, a joint amendment of Ghana, India, Kuwait, Lebanon, Mauritania, Morocco, Nigeria, Poland, and Senegal was proposed and adopted unanimously, almost without comment. The delegate of France said that the text submitted was entirely acceptable to his delegation and to that of the United States. The amendment clarified that the Convention would not apply to non-citizens or affect legislation on nationality, citizenship, or naturalization, provided that there was no discrimination against any particular nationality.[127] The only further mention of Articles 1(2) and 1(3) arose briefly during discussions on Article 5, where the delegate of India stated that "the word 'everyone' in the introductory part of that article might be regarded as including non-citizens as well as citizens," but that in view of Article 1 "the word 'everyone' no longer presented difficulties for his delegation."[128] While many scholars tend to follow Schwelb's view that paragraph 3 of Article 1, as inserted by the Third Committee into the Convention, "appears, to a certain extent at least, to be a saving clause for maintaining disabilities of naturalised persons,"[129] a close reading of the drafting history suggests a more complex view. The twin concerns of state sovereignty and anti-colonialism reinforced each other and were absorbed and reflected into the broad terms of Article 1(3).

Broadly, two key points are discernable from the complex drafting history of Article 1(3). First, the term and notion of "nationality" caused much confusion and anxiety among state representatives, who ultimately did not arrive at a settled definition. The word "nationality" therefore remains ambiguous for the purposes of treaty interpretation, and to a certain extent can and did refer to a person's legal *status* as well as to his or her legal citizenship (as evinced by the concern for protecting the

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[126] U.N. ESCOR, Summary Record of the 786th Meeting, *supra* note 124, at 5.

[127] U.N. HIGH COMM'R FOR HUM. RTS. THE RIGHTS OF NON-CITIZENS 9 (2006), https://www.ohchr.org/Documents/Publications/noncitizensen.pdf [https://perma.cc/A6YV-SMSY].

[128] U.N. GAOR, 20th Sess., 1309th mtg. at 105, U.N. Doc. A/C.3/SR/1309 (Oct. 19, 1965).

[129] Schwelb, *Elimination of All Forms of Racial Discrimination*, *supra* note 100, at 1010.

advantage granted to natural born citizens and the disadvantages of naturalization).[130] Second, and relatedly, while Article 1(3) was viewed as an exception to the broad protections contained in Article 1(1), it was seen by many of the drafters as a limited exception aimed at providing scope for states to favor or give preference to certain groups in response to the context of decolonization.

B. Committee on the Elimination of Racial Discrimination and Article 1(3): Toward a Justification

The Convention's expert monitoring body, the Committee, was established by operation of Article 8 of ICERD.[131] The Committee is comprised of independent experts nominated and elected by states parties to ICERD.[132] States parties to ICERD are obliged to report to the Committee one year after the Convention enters into force and every two years thereafter on the measures they have adopted to give effect to the Convention.[133] The Committee publishes concluding observations on the basis of the information gathered through this reporting. Additionally, the Committee is to report annually to the General Assembly on its activities, and is empowered to make General Recommendations and suggestions on the basis of the information they have gathered from states parties.[134] Furthermore, the Committee is empowered under Article 11 to receive and communicate inter-state complaints regarding the failure to give effect to the Convention by a state party.[135] This mechanism was utilized for the first time in 2018 when three separate complaints were received by the Committee.[136] This is particularly noteworthy since it is the first time that an inter-state complaint mechanism has been invoked under any United

[130] *Id.* at 1010 (noting that including the word "national" lacked the support of several states because, among other reasons, "certain legitimate differentiations based on national origin might conceivably be prohibited under the Convention if the words were retained.").

[131] ICERD, *supra* note 11, art. 8.

[132] *Id.* art. 8(1)–(4).

[133] *Id.* art. 9(1).

[134] *Id.* art. 9(2).

[135] *Id.* art. 11(1).

[136] *See* State of Qatar v. Kingdom of Saudi Arabia, ICERD-ISC-2018/1 (Comm. on Elimination Racial Discrimination 2018); State of Qatar v United Arab Emirates, ICERD-ISC-2018/2 (Comm. on Elimination Racial Discrimination 2018); State of Palestine v State of Israel, ICERD-ISC-2018/3 (Comm. on Elimination Racial Discrimination 2018).

Nations (UN) human rights treaty.[137] While none of these complaints challenge nationality laws, they and the parallel case before the International Court of Justice (ICJ)[138] raise issues about the correct interpretation of Article 1(2) of the ICERD and hence the relationship between discrimination on the grounds of nationality and racial discrimination.[139]

Article 14 (1) provides that a state party may make a declaration allowing for individual and group complaints to be made to the Committee regarding violations of rights under the Convention by the state in question.[140] Of the fifty-seven individual communications brought to the Committee, only three have invoked Article 5(d)(iii), namely, racial discrimination in respect of the right to nationality, and in none of these cases has the claim been made out.[141]

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[137] U.N. High Comm'r for Hum. Rts, Comm. on Elimination Racial Discrimination, *Inter-State Communications*, https://www.ohchr.org/EN/HRBodies/CERD/Pages/InterstateCommunications.aspx [https://perma.cc/N9A2-8F3H] (last visited Sept. 6, 2020). For other such mechanisms, see Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 21, Dec. 10, 1984, T.I.A.S. No. 94-1120.1, 1465 U.N.T.S. 85; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families art. 74, Dec. 18, 1990, 2220 U.N.T.S. 3; International Convention on the Protection of All Persons from Enforced Disappearance art. 32, Dec. 20, 2006, 2716 U.N.T.S. 3; Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, art. 10, Dec. 10, 2008, 2922 U.N.T.S. 29; Optional Protocol to the Convention of the Rights of the Child on a Communication Procedure art. 12, Dec. 19, 2011, 2983 U.N.T.S. Registration No. 27531; International Covenant on Civil and Political Rights arts. 41–43, Dec. 16, 1966, T.I.A.S. No. 92-908, 999 U.N.T.S. 171.

[138] Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Application Instituting Proceedings, ¶¶ 55–56 (June 11, 2018), https://www.icj-cij.org/public/files/case-related/172/172-20180611-APP-01-00-EN.pdf [https://perma.cc/K6M6-3P3G] (conceding that while Article 1(2) affords nations the right to distinguish citizens from non-citizens, it does not allow nations to discriminate against non-nationals by treating one group differently from another).

[139] *See* Comm. on Elimination Racial Discrimination, Jurisdiction of the Inter-State Communication Submitted by Qatar Against the Kingdom of Saudi Arabia, U.N. Doc. CERD/C/99/5 (Aug. 30, 2019).

[140] ICERD, *supra* note 11, art. 14 (Of the 182 states parties to the Convention, fifty-nine have made a declaration under art. 14(1) to recognize the competency of the Committee to hear individual complaints. The Committee only possesses jurisdiction to hear the petitioner's complaint once it has ascertained that they have exhausted all domestic remedies. *Id.* art. 14(7)(a). After hearing the complaint, the Committee is required to communicate any suggestion and recommendation to both the State party and the petitioner. *Id.* art. 14(7)(b)).

[141] *See* Pjetri v. Switzerland, Communication 53/2013, Opinion, Comm. on Elimination Racial Discrimination, ¶ 4.2, U.N. Doc. CERD/C/91/D/53/2013

By contrast, nationality matters have been considered more extensively in the context of the Committee's examination of individual country reports, although in that context the issue is examined relatively infrequently.[142] The Committee was initially reluctant to criticize states' treatment of non-citizens and nationality laws, especially as those laws related to naturalization and the granting of preferential treatment to citizens of favored nations.[143] In more recent years, the Committee's General Recommendations, and especially General Recommendation Thirty, have somewhat narrowed the terms of the Convention so that Article 5 is now seen as limiting the scope of Articles 1(2) and 1(3). Even with this interpretation advanced in its General Recommendations, the Committee has been inconsistent in its willingness to comment directly on racially discriminatory nationality laws. Our survey of the Committee's concluding observations over a thirty-year period reveals that it is, to a certain degree, still reluctant to call attention clearly and unequivocally to discriminatory nationality laws, particularly as they relate to the denial of nationality.

In its General Recommendation Eleven, the Committee made a preliminary and interesting interpretive maneuver with respect to Article 1. Noting that Article 1(2) exempts from Article

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(Jan. 23, 2017) (Petitioner claimed that his application for naturalization was rejected based on his national origin and disability.); A.M.M. v. Switzerland, Communication 50/2012, Opinion, Comm. on Elimination Racial Discrimination, ¶ 3, U.N. Doc. CERD/C/84/D/50/2012 (Mar. 11, 2014) (Petitioner claimed that the State violated his right not to be arbitrarily discriminated against, on account of his race and national origin, in his quest to secure refugee status.); D.R. v. Australia, Communication 42/2008, Opinion, Comm. on Elimination Racial Discrimination, ¶ 7.3, U.N. Doc. CERD/C/75/D/42/2008 (Sep. 15, 2009) (Petitioner claimed that in withdrawing him from Social Security and depriving him of the right to the full benefits of citizenship, the State arbitrarily discriminated against him because of his race and nationality.). This is current up to November 19, 2020.

[142] The Committee has published concluding observations on 161 countries. The analysis for this article has derived from a review of all of the concluding observations available in English up until December 2019.

[143] Mahalic & Mahalic, *supra* note 123, at 79 ("States parties hold, and the Committee has agreed, that a state has the sovereign right to decide who can enter and remain in its territory provided that no element of racial discrimination is involved. Committee members have been hesitant to criticize a state's naturalization laws unless they reveal a flagrant racially discriminatory practice. With one exception, the Committee has discovered no racist provisions on the face of any state party's naturalization laws."); Comm. on Elimination Racial Discrimination, Rep. of Meeting, U.N. Doc. CERD/C/SR.488 (Aug. 11, 1980); Comm. on Elimination Racial Discrimination, Provisional Summary Record of Its Twenty-Eighth Session, 643rd mtg. U.N. Doc. CERD/C/SR.643 (July 22, 1983).

1(1) actions by states parties that differentiate between citizens and non-citizens, the Committee asserted that Article 1(3) provides a qualification to paragraph 2 "by declaring that, among non-citizens, States parties may not discriminate against any particular nationality."[144] Thornberry claims that "the general direction of the CERD approach has been to shrink progressively any lacuna in human rights protection represented by 1(2) and 1(3)." [145] The Committee's General Recommendation Thirty, adopted in 2004, certainly augments the same logic contained in General Recommendation Eleven and widens its guiding principle.[146] Echoing General Recommendation Eleven, Section I of General Recommendation Thirty provides that "Article 1, paragraph 3 declares that, concerning nationality, citizenship or naturalization, the legal provisions of States parties must not discriminate against any particular nationality."[147] Section 4 of General Recommendation Thirty speaks directly to Article 1(3) under the subheading, "Access to citizenship."[148] Paragraph 13 requires states to ensure that "particular groups of non-citizens are not discriminated against with regard to access to citizenship or naturalization, and to pay due attention to possible barriers to naturalization that may exist for long-term or permanent residents." [149] Paragraph 14 "recognize[s] that deprivation of citizenship on the basis of race, colour, descent, or national or ethnic origin is a breach of States parties' obligations to ensure non-discriminatory enjoyment of the right to nationality."[150]

Our survey of concluding observations reveals that, since General Recommendation Thirty, the principles it sets out are frequently relied upon. However, the Committee tends to focus on gender-based discrimination,[151] the risk of statelessness or

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[144] Comm. on Elimination Racial Discrimination, General Recommendation Eleven, on Non-Citizens, ¶ 1, U.N. Doc. A/48/18 (1993).

[145] THORNBERRY, *supra* note 2, at 146.

[146] Comm. on Elimination Racial Discrimination, General Recommendation Thirty, on Discrimination Against Non-Citizens, ¶ 14, U.N. Doc. HRI/GEN/1/Rev.7/Add.1 (May 4, 2005) [hereinafter General Recommendation Thirty] (noting that states parties who fail to grant citizenship on account of race or heritage violate their obligations under the Convention).

[147] *Id.* ¶ 1.

[148] *Id.* at 4.

[149] *Id.* ¶ 13.

[150] *Id.* ¶ 14.

[151] The Committee focused on these issues in relation to fifteen countries. *See, e.g.*, Comm. on Elimination Racial Discrimination, Concluding Observations on Bahamas, U.N. Doc. CERD/C/64/CO/1 (Apr. 28, 2004); Comm. on Elimination of Racial Discrimination, Concluding Observations on Bahrain, U.N. Doc. CERD/C/BHR/CO/7, at 17 (Apr. 14, 2005); Comm. on Elimination

Racial Discrimination, 59th Sess., U.N. Doc. A/56/18, at 288 (2001) (regarding Egypt); Comm. on Elimination Racial Discrimination, Concluding Observations on Estonia, U.N. Doc. CERD/C/304/Add.98 (Apr. 19, 2000) (*but see* Comm. on Elimination Racial Discrimination, Concluding Observations on Estonia, U.N. Doc. CERD/C/EST/CO/7 (Oct. 19 2006) *and* Comm. on Elimination Racial Discrimination, Concluding Observations on Estonia, U.N. Doc. CERD/C/EST/CO/8-9 (Sept. 23, 2010)); Comm. on Elimination Racial Discrimination, Concluding Observations on Kyrgyzstan, U.N. Doc. CERD/C/KGZ/CO/8-10, at 15 (May 30, 2018); Comm. on Elimination Racial Discrimination, Concluding Observations on Lebanon, U.N. Doc. CERD/C/LBN/CO/18-22 (Oct. 5, 2016); Comm. on Elimination Racial Discrimination, Concluding Observations on Madagascar, U.N. Doc. CERD/C/65/CO/4 (Dec. 10, 2004); Comm. on Elimination Racial Discrimination, Concluding Observations on Mauritania, U.N. Doc. CERD/C/65/CO/5, at 18 (Dec. 10, 2004); Comm. on Elimination Racial Discrimination, Concluding Observations on Mauritania, U.N. Doc. CERD/C/MRT/CO/8-14, at 19 (May 30, 2018); Comm. on Elimination Racial Discrimination, Concluding Observations on Morocco, U.N. Doc. CERD/C/MAR/CO/17-18, at 16 (Sept. 13, 2010); Comm. on Elimination Racial Discrimination, Concluding Observations on Nigeria, U.N. Doc. CERD/C/NGA/CO/18, at 21 (Mar. 27, 2007); Comm. on Elimination Racial Discrimination, Concluding Observations on Oman, U.N. Doc. CERD/C/OMN/CO/1 (Oct. 19, 2006), Comm. on Elimination Racial Discrimination, Concluding Observations on Oman, U.N. Doc. CERD/C/OMN/CO/2-5, at 25 (June 6, 2016); Comm. on Elimination Racial Discrimination, Concluding Observations on Qatar, U.N. Doc. CERD/C/QAT/CO/17-21 (Jan. 2, 2019); Comm. on Elimination Racial Discrimination, Concluding Observations on Republic of Korea, U.N. Doc. CERD/C/KOR/CO/17-19 (Jan. 10, 2019); Comm. on Elimination Racial Discrimination, Concluding Observations on Saudi Arabia, U.N. Doc. CERD/C/62/CO/8, at 14 (June 2, 2003); Comm. on Elimination Racial Discrimination, Concluding Observations on Saudi Arabia, U.N. Doc. CERD/C/SAU/CO/4-9 (June 8, 2018); Comm. on Elimination Racial Discrimination, Concluding Observations on Senegal, U.N. Doc. CERD/C/SEN/CO/16-18, at 19 (Oct. 24, 2012).

absence of measures to address the risk of statelessness,[152] and discrimination against non-citizens generally, [153] without

[152] *See, e.g.*, Comm. on Elimination Racial Discrimination, Concluding Observations on Azerbaijan, U.N. Doc. CERD/C/AZE/CO/7-9 (June 10, 2016); Comm. on Elimination Racial Discrimination, Concluding Observation on Cambodia, U.N. Doc. CERD/C/KHM/CO/14-17, at 5–7 (Dec. 12, 2019); Comm. on Elimination Racial Discrimination, Concluding Observations on Cameroon, U.N. Doc. CERD/C/CMR/CO/19-21 (Sept. 26, 2014); Comm. on Elimination Racial Discrimination, Concluding Observations on Czechia, U.N. Doc. CERD/C/CZE/CO/12-13 (Sept. 19, 2019); Comm. on Elimination Racial Discrimination, Concluding Observations on Estonia, U.N. Doc. CERD/C/EST/CO/7, (Oct. 19, 2006); Comm. on Elimination Racial Discrimination, Concluding Observations on Georgia, U.N. Doc. CERD/C/GEO/CO/4-5 (Sept. 20, 2011); Comm. on Elimination Racial Discrimination, Concluding Observations on Georgia, U.N. Doc. CERD/C/GEO/CO/6-8 (June 22, 2016); Comm. on Elimination Racial Discrimination, Concluding Observations on Kazakhstan, U.N. Doc. CERD/C/KAZ/CO/6-7 (Mar. 14, 2014); Comm. on Elimination Racial Discrimination, Concluding Observations on Kyrgyzstan, U.N. Doc. CERD/C/KGZ/CO/8-10 (May 30, 2018); Comm. on Elimination Racial Discrimination, Concluding Observations on Oman, U.N. Doc. CERD/C/OMN/CO/2-5 (June 6, 2016); Comm. on Elimination Racial Discrimination, Concluding Observations on Qatar, U.N. Doc. CERD/C/QAT/CO/17-21, at 27 (Jan. 2, 2019); Comm. on Elimination Racial Discrimination, Concluding Observations on Slovenia, U.N. Doc. CERD/C/SVN/CO/6-7 (Sept. 20, 2010); Comm. on Elimination Racial Discrimination, Concluding Observations on Sudan, U.N. Doc. CERD/C/SDN/CO/12-16, at 19 (June 12, 2015); Comm. on Elimination Racial Discrimination, Concluding Observations on Togo, U.N. Doc. CERD/C/TGO/CO/18-19 (Jan. 18, 2017).

[153] *See, e.g.*, Comm. on Elimination Racial Discrimination, Concluding Observations on Azerbaijan, U.N. Doc CERD/C/AZE/CO/4, at 10 (Apr. 14, 2005); Comm. on Elimination Racial Discrimination, Concluding Observations on Belarus, U.N. Doc. CERD/C/65/CO/2, at 11 (Dec. 10 2004); Comm. on Elimination Racial Discrimination, Concluding Observations on Belarus, U.N. Doc. CERD/C/BLR/CO/20-23 (Dec. 21, 2017); Comm. on Elimination Racial Discrimination, Concluding Observations on Belgium, U.N. Doc. CERD/C/BEL/CO/15 (Apr. 11, 2008); Comm. on Elimination Racial Discrimination, Concluding Observations on Belgium, U.N. Doc. CERD/C/BEL/CO/16-19 (Mar. 14, 2014); Comm. on Elimination Racial Discrimination, Concluding Observations on Botswana, U.N. Doc. CERD/C/BWA/CO/16, at 20 (Apr. 4, 2006); Comm. on Elimination Racial Discrimination, Concluding Observations on Burkina Faso, U.N. Doc. CERD/C/BFA/CO/12-19, at 10 (Sept. 23, 2013); Comm. on Elimination Racial Discrimination, Concluding Observations on Chile, U.N. Doc. CERD/C/CHL/CO/19-21 (Sept. 23, 2013); Comm. on Elimination Racial Discrimination, Concluding Observations on Congo (Democratic Republic of), U.N. Doc. CERD/C/COG/CO/9 (Mar. 23, 2009); Comm. on Elimination Racial Discrimination, Concluding Observations on Cuba, U.N. Doc. CERD/C/CUB/CO/14-18 (Apr. 8, 2011); Comm. on Elimination Racial Discrimination, Concluding Observations on Japan, U.N. Doc. CERD/C/JPN/CO/10-11 (Sept. 26, 2018); Comm. on Elimination Racial Discrimination, Concluding Observations on Kazakhstan, U.N. Doc.

bringing consistent attention to the existence of racially discriminatory nationality laws and practices. To be sure, the Committee has sometimes homed in directly on discriminatory nationality laws, although it is perhaps worth noting that when it does make reference directly to the Convention it tends to cite Article 5 without mention of Article 1(3).[154]

General Recommendation Thirty appears to draw a distinction between *denial* of nationality and *deprivation/withdrawal* of nationality. Specifically, deprivation of nationality on racially discriminatory grounds is described as a *breach*,[155] whereas in relation to denial, states are urged to "ensure" non-discrimination against "particular groups," and "pay due attention to" potential discrimination.[156]

CERD/C/65/CO/3 (Dec. 10, 2004); Comm. on Elimination Racial Discrimination, 62nd Sess., U.N. Doc. A/62/18, at 75 (2007) (regarding Kyrgyzstan); Comm. on Elimination Racial Discrimination, Concluding Observations on Namibia, U.N. Doc. CERD/C/NAM/CO/13-15 (June 10, 2016); Comm. on Elimination Racial Discrimination, Concluding Observations on (North) Macedonia, U.N. Doc. CERD/C/MKD/CO/8-10 (Sept. 21, 2015); Comm. on Elimination Racial Discrimination, Concluding Observations on Peru, U.N. Doc. CERD/C/PER/CO/22-23 (May 23, 2018); Comm. on Elimination Racial Discrimination, Concluding Observations on Poland, U.N. Doc. CERD/C/POL/CO/20-21(Mar. 19, 2014); Comm. on Elimination Racial Discrimination, Concluding Observations on United States of America, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008).

[154] *See, e.g.*, Comm. on Elimination Racial Discrimination, Concluding Observations on Kenya, U.N. Doc. CERD/C/KEN/CO/1-4 (Sept. 14, 2011); Comm. on Elimination Racial Discrimination, Concluding Observations on Maldives, U.N. Doc. CERD/C/MDV/CO/5-12 (Sept. 14, 2011). *But see* Comm. on Elimination Racial Discrimination, Concluding Observations on Côte d'Ivoire, U.N. Doc. CERD/C/62/CO/1 (June 3, 2003); Comm. on Elimination Racial Discrimination, Concluding Observations on Dominican Republic, U.N. Doc. CERD/C/DOM/CO/13-14 (Apr. 19, 2013); Comm. on Elimination Racial Discrimination, Concluding Observations on France, U.N. Doc. CERD/C/FRA/CO/17-19 (Sept. 23, 2010); Comm. on Elimination Racial Discrimination, Concluding Observations on Namibia, U.N. Doc. CERD/C/NAM/CO/13-15 (June 10, 2016).

[155] General Recommendation Thirty, *supra* note 146, ¶ 14.

[156] *Id.* ¶ 13 (This is also replicated in Comm. on Elimination Racial Discrimination, General Recommendation Thirty-Four, on Racial Discrimination against People of African Descent, ¶¶ 47–49, U.N. Doc. CERD/C/GC/34 (Oct. 3, 2011)). *See also* Michiel Hoornick, The Right to Nationality Under the International Convention of All Forms of Racial Discrimination: An Assessment of its Interpretation by the Committee on the Elimination of Racial Discrimination, 27 (Aug. 6, 2018) (L.L.M. Thesis, Tilburg University) (on file with University Library, Tilburg University).

Our analysis of concluding observations revealed that with respect to *denial* of citizenship,[157] the Committee tends to use similar language to that seen in General Recommendation Thirty, including "draws attention to," "is concerned," and "recommends." For example, with respect to reports that government officials in Nepal were seeking to discourage Dalits from applying for citizenship and that other groups had been denied citizenship by descent, the Committee recommended that Nepal ensure that "the laws, regulations and practices contain procedures for issuing citizenship certificates without distinction as to caste." [158] In 2011, the Committee noted that it was "particularly concerned" with the discriminatory provisions in the Maldivian Constitution that "all Maldivians should be Muslim, thus excluding non-Muslims from obtaining citizenship . . . and affecting mainly people of a different national or ethnic origin."[159] Here, the Committee referred only to Article 5.[160] The Committee's concluding observations on Cyprus in 2013 noted with concern that naturalization requests from persons of Southeast Asian origin had been denied, despite meeting requirements for naturalization.[161] The Committee in that case recommended that Cyprus "respect the right to nationality without discrimination." [162] In 2001, prior to its issuance of General Recommendation Thirty, the Committee in its observations on Latvia noted the fact that "only such persons who were citizens of Latvia before 1940 and their descendants have automatically been granted citizenship," while other persons—more than twenty-five percent of the resident population—had to apply for citizenship and were therefore in a disadvantaged position.[163] The Committee also noted the existence of persons

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[157] Our analysis revealed that denial of nationality on the basis of race/ethnic origin was considered in relation to seventeen countries between 1995 and December 2019 (being Bahrain, Cambodia, Croatia, Cyprus, Czech Republic, Estonia, Iraq, Germany, Kenya, Maldives, Nepal, Qatar, Republic of Korea, Switzerland, Syrian Arab Republic, Tajikistan, and Togo).

[158] Comm. on Elimination Racial Discrimination, Concluding Observations on Nepal, ¶ 34, U.N. Doc. CERD/C/NPL/CO/17-23 (May 29, 2018).

[159] Comm. on Elimination Racial Discrimination, Concluding Observations on Maldives, ¶ 10, U.N. Doc. CERD/C/MDV/CO/5-12 (Sept. 14, 2011).

[160] *Id.*

[161] Comm. on Elimination Racial Discrimination, Concluding Observations on Cyprus, ¶ 18, U.N. Doc. CERD/C/CYP/CO/17-22 (Sept. 23, 2013).

[162] *Id.*

[163] Comm. on Elimination Racial Discrimination, Concluding Observations on Latvia, ¶ 12, U.N. Doc. CERD/C/304/Add.79 (Apr. 12, 2001). *See also* Comm. on Elimination Racial Discrimination, Concluding Observations on

who did not qualify for citizenship under the then current Citizenship law and who therefore "may not be protected against racial discrimination in their exercise of rights under Articles 5(d)(i) and (ii) and 5(e) of the Convention."[164]

The Committee has in some instances made more focused recommendations in relation to discriminatory denial of nationality, pointing to particular reform measures that are "urged" or "requested." For example, in relation to Kenya, the Committee recommended in 2011 that Kenya make "necessary amendments to its legislation and administrative procedures in order to implement the new constitutional provisions on citizenship."[165] In relation to Jordan's gendered nationality laws, the Committee recommended in 2012 that the state party "review and amend the Jordanian Nationality Act (Law No. 7 of 1954) in order to ensure that a Jordanian mother married to a non-Jordanian man has the right to confer her nationality to her children equally and without discrimination."[166] And again in 2017, drawing more explicitly on General Recommendation Thirty, the Committee requested that the state party "amend the Jordanian Nationality Act . . . to eliminate provisions that discriminate against non-Arab spouses of Jordanian citizens."[167]

When the Committee utilizes stronger or more forceful language it tends to be in relation to *deprivation or withdrawal* of citizenship.[168] In 2007, for example, the Committee stressed with respect to Turkmenistan that "deprivation of citizenship on the basis of national or ethnic origin *is a breach of the obligation to ensure non-discriminatory enjoyment of the right to nationality*," and "urge[d] the State party to refrain from

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Syria, ¶ 10, U.N. Doc. CERD/C/304/Add.70 (July 7, 1999) ("The Committee is concerned about Syrian-born Kurds, who are considered either as foreigners or as maktoumeen (unregistered) by the Syrian authorities and who face administrative and practical difficulties in acquiring Syrian nationality, although they have no other nationality by birth.").

[164] *See also* Comm. on Elimination Racial Discrimination, Concluding Observations on Iraq, ¶ 17, U.N. Doc. CERD/C/IRQ/CO/15-21 (Sept. 22, 2014) (using slightly stronger language).

[165] Comm. on Elimination Racial Discrimination, Concluding Observations on Kenya, ¶ 21, U.N. Doc. CERD/C/KEN/CO/1-4 (Sept. 14, 2011).

[166] Comm. on Elimination Racial Discrimination, Concluding Observations on Jordan, ¶ 11, U.N. Doc. CERD/C/JOR/CO/13-17 (Apr. 4, 2012).

[167] Comm. on Elimination Racial Discrimination, Concluding Observations on Jordan, ¶ 23, U.N. Doc. CERD/C/JOR/CO/18-20 (Dec. 26, 2017).

[168] *See* Hoornick, *supra* note 156. Our analysis revealed that the Committee discussed deprivation of nationality in relation to ten countries within the period under examination (being Ethiopia, Iraq, Jordan, Kenya, Kyrgyzstan, Oman, Palestine, Qatar, Sudan, and Turkmenistan).

adopting any policy that directly or indirectly leads to such deprivation."[169] This language of breach of obligation is striking, as it is considerably stronger than the weaker language of "concern" more commonly invoked in relation to cases of denial of citizenship. In other cases of deprivation, while the language of breach or violation is not invoked, there is nonetheless a more forceful approach. For example, in 2012 the Committee noted Jordan's "withdrawal of citizenship from persons originating from the West Bank of the Occupied Palestinian Territory," and "urge[d] the State party to discontinue the practice of withdrawing nationality from persons originating from the Occupied Palestinian Territory."[170] It has further called for remedial action following unlawful deprivation in the form of reinstatement of nationality in the context of Jordan[171] and Iraq.[172]

The difficulty with this differential approach in relation to denial of nationality on the one hand and deprivation of nationality on the other is that its rationale is not explained in either General Recommendation Thirty or any of the Committee's concluding observations. Such a neat dichotomy is not evident in the text of the treaty; it is, after all, not clear why a denial of nationality on racial grounds is any less a violation of Article 5(d)(iii)'s right to nationality on non-discriminatory grounds than an active withdrawal of nationality.

In only a few concluding observations has Article 1(3) explicitly been mentioned,[173] although, notably, it does not

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[169] Comm. on Elimination Racial Discrimination, Concluding Observations on Turkmenistan, ¶16, U.N. Doc. CERD/C/TKM/CO/5* (Mar. 27, 2007) (emphasis added). *See also* Comm. on Elimination Racial Discrimination, Concluding Observations on Ethiopia, ¶ 23, U.N. Doc. CERD/C/ETH/CO/15 (June 20, 2007) (noting with concern the situation of children of parents of Eritrean origin, who were deprived of their Ethiopian citizenship in the period 1998–2000); Comm. on Elimination Racial Discrimination, Concluding Observations on Jordan, U.N. Doc. CERD/C/JOR/CO/13-17 (Apr. 4, 2012); Comm. on Elimination Racial Discrimination, Concluding Observations on Jordan, U.N. Doc. CERD/C/JOR/CO/18-20 (Dec. 26, 2017); Comm. on Elimination Racial Discrimination, Concluding Observations on Kenya, U.N. Doc. CERD/C/KEN/CO/1-4 (Sept. 14, 2011).

[170] Comm. on Elimination Racial Discrimination, Concluding Observations on Jordan, ¶ 12, U.N. Doc. CERD/C/JOR/CO/13-17 (Apr. 4, 2012).

[171] *Id.*

[172] Comm. on Elimination Racial Discrimination, Concluding Observations on Iraq, ¶ 17, U.N. Doc. CERD/C/IRQ/CO/15-21 (Sept. 22, 2014).

[173] Our analysis identified that Article 1(3) was mentioned in relation to six countries (being Côte d'Ivoire, Dominican Republic, France, Iraq, Namibia,

generally appear to have been relied upon by states parties as a justification or defense of discriminatory nationality laws. Rather it has been the Committee that has occasionally identified a potential conflict with Article 1(3). Yet, there is no in-depth analysis in these reports of the scope of Article 1(3); rather Article 1(3) is most commonly cited without discussion. For instance, in relation to the discrimination against Dominicans of Haitian origin mentioned above, the Committee observed that the various practices "all lead to a situation of statelessness (art. 1(3) and art. 5 (d) (iii))."[174] However, in two instances, the Committee's relatively more detailed remarks reveal that its focus is indeed on instances where it appears that a state's discriminatory nationality law or implementation thereof singles out a *particular* nationality or ethnic group. For example, in relation to France, the Committee recommended in 2010 that the state "ensure that, in conformity with article 1, paragraph 3, of the Convention, any measures taken in this area should not lead to the stigmatization *of any particular nationality*."[175] In relation to Iraq, the Committee noted that it asked the state party "whether the special provision which referred specifically to Arab citizens of other countries met the requirements of article 1, paragraph 3, of the Convention."[176]

While the Committee's increasing willingness to examine and critique nationality laws that may have a discriminatory object or effect is laudable, it is difficult to discern the interpretive methodology applied by the Committee in arriving at its interpretation of Article 1(3).[177] Of course, as an exception

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and Sierra Leone)—a total of seven reports (twice regarding Sierra Leone). *See* sources cited *infra* notes 174–176.

[174] Comm. on Elimination Racial Discrimination, Concluding Observations on Dominican Republic, ¶ 19, U.N. Doc. CERD/C/DOM/CO/13-14 (Apr. 19, 2013). *See also* Comm. on Elimination Racial Discrimination, Concluding Observations on Cote d'Ivoire, ¶ 11, U.N. Doc. CERD/C/62/CO/1 (June 3, 2003); Comm. on Elimination Racial Discrimination, Concluding Observations on Namibia, ¶ 28, U.N. Doc. CERD/C/NAM/CO/13-15 (June 10, 2016); Comm. on Elimination Racial Discrimination, Rep. on the Work of Its Forty-Sixth Session, ¶ 280, U.N. Doc. A/46/18 (Feb. 27, 1992) (regarding Sierra Leone); Comm. on Elimination Racial Discrimination, Rep. on the Work of Its Fiftieth Session, ¶ 588, U.N. Doc. A/50/18 (Sept. 22, 1995) (regarding Sierra Leone).

[175] Comm. on Elimination Racial Discrimination, Concluding Observations on France, ¶ 11, U.N. Doc. CERD/C/FRA/CO/17-19 (Sept. 23, 2010) (emphasis added).

[176] Comm. on Elimination Racial Discrimination, Rep. on the Work of Its Forty-Second Session, ¶ 303, U.N. Doc. A/42/18 (Aug. 7, 1987) (regarding Iraq).

[177] *But see* THORNBERRY, *supra* note 2, at 158.

to Article 1(1), Article 1(3) should be narrowly construed.[178] But in general, no clear justification has been put by the Committee for essentially having read Article 1(3) out of the Convention in its General Recommendation Thirty, at least in the context of deprivation of nationality. To the contrary, the instances cited above where Article 1(3) has been considered by the Committee suggest an ongoing role for the exception, confusing rather than illuminating the Committee's vision of the relationship between Article 1(3) and Article 5(d)(iii) as articulated in General Recommendation Thirty.

Our comprehensive analysis of the Committee's approach to racial discrimination in nationality laws points to two key ongoing problems. First, the Committee has continued to use relatively soft language in response [179] to states parties' invocation of state sovereignty to justify discriminatory nationality laws. [180] Indeed, in one of the few individual communications directly to challenge the implementation of nationality laws, the state party, Switzerland, relied explicitly on

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[178] Contrary to THORNBERRY, *supra* note 2, it might be argued that the rule of restrictive interpretation ought to apply here, that is, in favor of the freedom of state sovereignty, but as Article 1(3) relates to a State's negative obligation (to refrain from discriminating against a particular nationality), deference to state sovereignty is not necessarily warranted as a matter of interpretation. For discussion of restrictive interpretation, see, for example, H. Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 BRIT. Y.B. INT'L L. 48 (1949); OPPENHEIM'S INTERNATIONAL LAW 1279 (Robert Jennings & Arthur Watts eds., 2008); ULF LINDERFALK, ON THE INTERPRETATION OF TREATIES 280–84 (2007). *See also* BROWNLIE, *supra* note 63, at 635; ARNOLD MCNAIR, THE LAW OF TREATIES 765–66 (1961) (noting that the rule "is believed to be now of declining importance"); Territorial Jurisdiction of the International Commission of the River Oder (U.K. v. Pol.), Judgment, 1929 P.C.I.J. (ser. A) No. 23, at 26 (Sept. 10).

[179] *See* Comm. on Elimination Racial Discrimination, Concluding Observations on Kuwait, ¶ 31, U.N. Doc. CERD/C/KWT/CO/21-24 (Sept. 19, 2017) ("While noting the State party's position regarding the sovereign nature of nationality issues, the Committee remains concerned that the Nationality Act does not allow Kuwaiti women who marry foreigners to pass on their nationality to their children and spouses on an equal footing with Kuwaiti men.").

[180] Comm. on Elimination Racial Discrimination, Concluding Observations on Kuwait: Addendum, ¶ 2, U.N. Doc. CERD/C/KWT/CO/21-24/Add.1. (Nov. 12, 2018) ("It should be emphasized at the outset that the granting of nationality is a sovereign right of the State, and that cases are assessed in the light of the State's fundamental interests."). *See also* Comm. on Elimination Racial Discrimination, Concluding Observations on Dominican Republic, U.N. Doc. CERD/C/DOM/CO/13-14 (Apr. 19, 2013). Estonia has put forward the reservation of "cultural heritage" as a justification for discriminatory nationality laws. Comm. on Elimination Racial Discrimination, Concluding Observations on Estonia, ¶ 15, U.N. Doc. CERD/C/EST/CO/7 (Oct. 19 2006).

Article 1(3) in its argument that the claim was inadmissible.[181] In finding the claim to be admissible (although dismissing it on the merits), the Committee did not take the opportunity to provide a robust explanation of the relationship between Article 1(3) and Article 5(d)(iii), but rather relied once again on General Recommendation Thirty.[182] A strong interpretive framework for explaining its application of General Recommendation Thirty might empower the Committee to respond more forcefully to such invocations. The absence of a principled framework for explaining the limited reach of state sovereignty in matters of nationality simultaneously empowers states to continue relying on such claims, and threatens to weaken state engagement with the process of review. Second, the Committee still does not routinely raise matters of nationality, even in obvious cases of discrimination.[183] Indeed in some instances, other UN treaty bodies have been more active on the topic of racial discrimination in nationality laws than the very treaty body vested with core responsibility in matters of racial discrimination. For example, the Committee did not comment on Liberia's nationality laws in its 2001 review,[184] whereas the Committee on the Rights of the Child commented on Liberia's discriminatory nationality laws in both its 2004 and 2012 Concluding Observations.[185] In 2012, for example, it noted with regret that:

> [D]espite its previous recommendation, the granting of citizenship to children born in the State party remains restricted on the basis of colour or racial origin according to the provisions

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[181] Pjetri v. Switzerland, Communication 53/2013, Opinion, Comm. on Elimination Racial Discrimination, ¶ 4.2, U.N. Doc. CERD/C/91/D/53/2013 (Jan. 23, 2017).

[182] *Id.* ¶ 6.2.

[183] Our analysis reveals that there was no discussion of nationality laws in the reviews of sixty-one countries (being Albania, Argentina, Austria, Bangladesh, Barbados, Belize, Bolivia, Bulgaria, Burundi, Cabo Verde, Canada, Chad, China, Colombia, Djibouti, Ecuador, Fiji, Gabon, Gambia, Ghana, Guatemala, Guinea, Guyana, Haiti, Holy See, Hungary, India, Iran, Ireland, Jamaica, Lao People's Democratic Republic, Lesotho, Liberia, Mali, Malta, Mauritius, Mexico, Mozambique, Nicaragua, Niger, Pakistan, Panama, Papua New Guinea, Paraguay, Philippines, Republic of Moldova, Romania, Saint Vincent and the Grenadines, Seychelles, Slovakia, Solomon Islands, South Africa, Spain, Tonga, Trinidad and Tobago, Turkey, Uganda, Uruguay, Venezuela, Yugoslavia (Former Republic of), and Zambia).

[184] Hoornick, *supra* note 156, at 27.

[185] *See* Comm. on Rts. Child, Concluding Observations on Liberia, ¶ 32, U.N. Doc. CRC/C/15/Add.236 (July 1, 2004); Comm. on Rts. Child, Concluding Observation on Liberia, ¶ 42, U.N. Doc. CRC/C/LBR/CO/2-4 (Dec. 13, 2012).

> contained in article 27 of the Constitution and the Alien and the Nationalization Law, which are contrary to article 2 of the [CRC] Convention.[186]

The following section argues that *jus cogens* and anti-fragmentation (and the interplay between the two) as interpretive principles are appropriate tools to address this interpretive gap and provide the framework needed to more squarely address the fundamental issue of racism in nationality laws.

V. JUS COGENS AS AN INTERPRETIVE PRINCIPLE IN THE CONTEXT OF RACIAL DISCRIMINATION AND NATIONALITY PRACTICE

While the *jus cogens* status of the prohibition on racial discrimination in the context of (or as it extends to matters of) nationality has received considerable support, it is often asserted without critical reflection. Writing in 1978, Paul Weis commented that the prohibition of discriminatory denationalization—particularly acts of collective denationalization—may be regarded as a general principle of international law, and "this certainly applies to discrimination on the basis of race which may be considered as contravening a peremptory norm of international law."[187] Similarly, Laura van Waas writes that the *jus cogens* prohibition "restricts the freedom of states to legislate on nationality matters by demanding that such regulations must not differentiate between individuals on the basis of [race] either in purpose or in effect."[188] According to van Waas, the prohibition covers laws that provide for both "access to, [and] withdrawal of, nationality" through "delineating the scope of" such laws,[189] and adds that the prohibition of racial discrimination "has joined the ranks of *jus cogens*."[190] Spiro likewise contends that "the prohibition on race discrimination has since arguably evolved into *a jus cogens* norm—that is, a norm from which no derogation is permitted,"[191] and James A. Goldston notes that "[t]he prohibition against racial

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[186] Comm. on Rts. Child, Concluding Observation on Liberia, ¶ 41 U.N. Doc. CRC/C/LBR/CO/2-4 (Dec. 13, 2012).

[187] WEIS, *supra* note 64, at 125.

[188] VAN WAAS, *supra* note 74, at 103.

[189] *Id.*

[190] *Id.* at 103, 158 n.39 (citing ICERD, *supra* note 11, art. 5). *See also* General Recommendation Thirty, *supra* note 146.

[191] Spiro, *supra* note 3, at 716 n.144.

discrimination, contained in all major international and regional human rights instruments, is by now a well-settled rule of customary international law that has become a *jus cogens*, or peremptory, norm."[192] While certainly an important contribution to the discourse around the prohibition of racial discrimination in the context of nationality, observations about the *jus cogens* status of racial non-discrimination, in the absence of principled analysis, are limited in their ability to advance the robustness of the legal framework.

A. Impact of Conflict with a *Jus Cogens* Norm

The "starting point for any study of *jus cogens*" is the VCLT.[193] Article 53 of the Convention states:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[194]

Not only is the content of *jus cogens* a fiercely contested issue (which will be revisited in depth below), but the timing of the emergence of a *jus cogens* norm can also be contentious. In order to avoid complicated arguments as to whether a particular *jus cogens* norm had indeed emerged at the time a treaty was concluded, Article 64 of the VCLT provides that "[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates." [195] Accordingly, once a *jus cogens* norm is identified, any existing treaty may be assessed for compliance

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[192] James A. Goldston, *Holes in the Rights Framework: Racial Discrimination, Citizenship, and the Rights of Noncitizens*, 20 ETHICS & INT'L AFF. 321, 328 (2006).

[193] Int'l L. Comm'n, Rep. on the Work of Its Sixty-Sixth Session, Supplement No. 10, U.N. Doc. A/69/10, at 277 (Aug. 8, 2014) *quoted in* Dire Tladi (Special Rapporteur), *Second Report on* Jus Cogens, ¶ 33, U.N. Doc. A/CN.4/706 (Mar. 16, 2017). *See also* Int'l L. Comm'n, *Fragmentation of International Law, Difficulties Arising from the Diversification and Expansion of International Law*, ¶ 375, U.N. Doc. A/CN.4/L.682, (Apr. 13, 2006) [hereinafter Int'l L. Comm'n, *Fragmentation of International Law*].

[194] VCLT, *supra* note 101, art. 53.

[195] *Id.* art. 64.

with the norm, regardless of when precisely the *jus cogens* norm emerged.

However, this raises a challenging issue, namely, the consequences and effects that flow from the presence of conflict with *jus cogens* norms. The characterization of the effects of *jus cogens* has been described as "the greater prize than identifying the norm itself."[196] As Dire Tladi, International Law Commission (Commission) Special Rapporteur on Peremptory Norms of General International Law (*Jus Cogens*), noted in a 2017 report, invalidity of a treaty is often considered "the primary, or even sole, consequence of the *jus cogens* status of a norm."[197] At first glance, Articles 53 and 64 of VCLT present a problem for the validity of ICERD in light of Article 1(3) and its potential inconsistency with the *jus cogens* prohibition against racial discrimination.[198]

However, there is an alternative to invaliding a treaty that conflicts with a *jus cogens* norm. In the 2017 report, Special Rapporteur Tladi explains that the requirement to resort to the "draconian" outcome of treaty invalidity[199] when a conflict with *jus cogens* norms seemingly arises should—and indeed generally *can*—be avoided by reading treaty provisions in light of *jus cogens* norms. Due to the "fundamental principle" that "treaties are binding on the parties and must be performed in good faith,"[200] known as *pacta sunt servanda*, the validity of a treaty, and not its invalidity, should be strived for when determining if

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[196] DANIEL COSTELLOE, LEGAL CONSEQUENCES OF PEREMPTORY NORMS IN INTERNATIONAL LAW 15 (2017), *quoted in* Dire Tladi (Special Rapporteur), *Third Report on Peremptory Norms of General International Law (*Jus Cogens*)*, ¶ 20, U.N. Doc. A/CN.4/714 (Feb. 12, 2018) [hereinafter Special Rapporteur, *Third Report on* Jus Cogens].

[197] Special Rapporteur, *Third Report on* Jus Cogens, *supra* note 196, ¶ 30. *See also* Kyoj Kawasaki, *A Brief Note on the Legal Effects of* Jus Cogens *in International Law*, 34 HITOTSUBASHI J. L. & POL. 27 (2006); HUGH THIRLWAY, THE SOURCES OF INTERNATIONAL LAW (2014).

[198] *See* VCLT, *supra* note 101, art. 44(5) (stating that one key differentiation is that severability of the relevant provision is not possible for cases falling under Article 53). *See generally* Special Rapporteur, *Third Report on* Jus Cogens, *supra* note 196, ¶¶ 30–54.

[199] Special Rapporteur, *Third Report on* Jus Cogens, *supra* note 196, ¶¶ 55–59.

[200] *Documents of the Second Part of the Seventeenth Session and of the Eighteenth Session Including the Reports of the Commission to the General Assembly*, [1966] 2 Y.B. Int'l L. Comm'n 221, U.N. Doc. A/CN.4/SER.A/1966/Add.1.

such a conflict arises.[201] Whether or not a treaty conflicts with a peremptory norm "can only be determined after [establishing] the meaning of the treaty," which, in turn, can only be established through the application of Articles 31 and 32 of VCLT.[202] The Commission envisages that *jus cogens* norms are treated as "strong interpretative principles"[203] to be invoked during the process of interpretation.

As well as calling attention to the requirement that treaties or treaty provisions "be interpreted in good faith," in keeping with the ordinary meaning of the text, and "in their context and in light of the object and purpose of the treaty," a 2006 report by the Commission's Study Group on fragmentation emphasizes Article 31(3)(c)—which is often "taken to express . . . the principle of systemic integration."[204] Article 31(3)(c) provides that the interpreter "shall take into account [a]ny relevant rules of international law applicable in the relations between the parties."[205] According to the Commission's Study Group, treaties must be interpreted against the background of their normative environment and in keeping with these norms.[206] As the Commission's Study Group explained, "[t]his points to the need to carry out interpretation so as to see the rules in view of some comprehensible and coherent objective," and, crucially, to do so in such a way so as to give priority to "concerns that are more important at the cost of less important objectives."[207] These background rules, according to the 2017 report by the Commission's Special Rapporteur Tladi, include *jus cogens* norms.[208] As Cezary Mik explains, "[t]his means that in cases of normative conflicts with peremptory norms that can be resolved through interpretation, one has to rely on such interpretative rules that will support a *jus cogens*-friendly interpretation of

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[201] Special Rapporteur, *Third Report on* Jus Cogens, *supra* note 196, ¶¶ 55–59.

[202] *Id.* ¶ 56.

[203] Int'l L. Comm'n, Rep. on the Work of Its Fifty-Third Session, Supplement No. 10, U.N. Doc. A/56/10, at 85 (2001) [hereinafter Int'l L. Comm'n, Fifty-Third Session].

[204] Int'l L. Comm'n, *Fragmentation of International Law*, *supra* note 193, ¶¶ 412–424 (internal quotations omitted) (internal citations omitted).

[205] Special Rapporteur, *Third Report on* Jus Cogens, *supra* note 196, ¶¶ 55–59 (internal quotations omitted).

[206] Int'l L. Comm'n, *Fragmentation of International Law*, *supra* note 193, ¶ 419.

[207] *Id.*

[208] Special Rapporteur, *Third Report on* Jus Cogens, *supra* note 196, ¶¶ 55–59.

dispositive norms." [209] Likewise, Special Rapporteur Tladi summarizes this section of his 2017 report with the following words: "a provision in a treaty should, as far as possible, be interpreted in a way that renders it consistent with a peremptory norm of general international law (*jus cogens*)."[210]

The question of whether a *jus cogens* norm is to be taken into account in the process of treaty interpretation turns on "the applicability of such a rule in a specific case."[211] This requires a two-fold inquiry. First, what is the content of the *jus cogens* norm (in this case, the norm of racial non-discrimination) and how do matters of nationality fit within this scope? Second, what does this mean for a principled interpretation of Article 1(3)?

B. Content of the *Jus Cogens* Norm of Racial Non-Discrimination

Turning first to the content or identification of the norm itself, while it is the case that the prohibition on racial discrimination is broadly recognized as a *jus cogens* norm of international law,[212] the precise content of racial discrimination is often left unaddressed, with pronouncements to the effect that

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[209] Cezary Mik, Jus Cogens *in Contemporary International Law*, 33 POL. Y.B. INT'L L. 27, 73 (2013).

[210] Special Rapporteur, *Third Report on* Jus Cogens, *supra* note 196, ¶ 67–68 (internal quotations omitted). *See also* Int'l L. Comm'n, Peremptory Norms of General International Law (*Jus Cogens*): Text of the Draft Conclusions and Draft Annex Provisionally Adopted by the Drafting Committee on First Reading, at 5, U.N. Doc. A/CN.4/L.936, (May 29, 2019) (Draft Conclusion 20 adopts a rule to interpret other rules of international law consistently with *jus cogens* norms as far as possible).

[211] Mik, *supra* note 209, at 74.

[212] *See* ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW 10 (2d ed. 2010); ALEXANDER ORAKHELASHVILI, IDENTIFICATION OF PEREMPTORY NORMS IN INTERNATIONAL LAW 54 (2006); Michael Byers, *Conceptualising the Relationship Between* Jus Cogens *and* Erga Omnes *Rules*, 66 NORDIC J. INT'L L. 211, 219 (1997); NATAN LERNER, GROUP RIGHTS AND DISCRIMINATION IN INTERNATIONAL LAW 24 (1991) [hereinafter, LERNER, GROUP RIGHTS AND DISCRIMINATION IN INTERNATIONAL LAW]; Patrick Thornberry, *Confronting Racial Discrimination: A CERD Perspective*, 5 HUM. RTS. L. REV. 239, 240 (2005); THOMAS R. VAN DERVORT, INTERNATIONAL LAW AND ORGANIZATION: AN INTRODUCTION 408 (1998). Int'l L. Comm'n, Fifty-Third Session, *supra* note 203, at 85 (listing the problem of "racial discrimination" as a peremptory norm "clearly accepted and recognized" by international and national tribunals); Int'l Law Comm'n, *Fragmentation of International Law*, *supra* note 193, ¶ 374; Dire Tladi (Special Rapporteur), *Fourth Report on Peremptory Norms of General International Law (*Jus Cogens*)*, ¶¶ 56–61, 91–135, U.N. Doc. A/CN.4/727 (Jan. 31, 2019) [hereinafter Special Rapporteur, *Fourth Report on* Jus Cogens]; Comm. on Elimination Racial Discrimination, Rep. on the Sixtieth Session and Sixty-First Session, Supplement at 107, U.N. Doc. A/57/18 (Nov. 1, 2002).

racial discrimination is a *jus cogens* norm often unaccompanied by any analysis of what that exactly means.[213]

The *Restatement (Third) of the Foreign Relations Law of the United States* defines *jus cogens* norms to include, among others, the prohibitions against genocide; slavery or slave trade; torture or other cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention; systematic racial discrimination; and "a consistent pattern of gross violations of internationally recognized human rights."[214] Scholars tend to cite this influential statement, together with a handful of ICJ and regional decisions, to establish the *jus cogens* status of racial discrimination (or systemic racial discrimination). While majority opinions of the ICJ have dealt only intermittently and sparingly with *jus cogens* norms directly, [215] the majority judgment of the court in the seminal Barcelona Traction[216] case has formed the foundation for many scholars' understanding of *jus cogens* norms.[217] Drawing a distinction between obligations owed by a state vis-a-vis another state and those owed to the international community as a whole and supporting a public order theory of *jus cogens*,[218] the court in Barcelona Traction noted that due to the "importance of the rights involved," obligations owed to the community as a whole are seen to be obligations *erga omnes*, meaning where "all States can be held to have a legal interest in their protection."[219] The court listed among these obligations the protection from and prohibition against racial discrimination. [220] In the ICJ's 1971 advisory

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[213] *See* sources cited *supra* note 212.

[214] Restatement (Third) of the Foreign Relations Law of the United States § 702 (Am. L. Inst. 1987). *See also id.* § 102; Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of* Jus Cogens, 34 YALE J. INT'L L. 331 (2009).

[215] Dire Tladi (Special Rapporteur), *First Report on* Jus Cogens, ¶¶ 44–47, U.N. Doc. A/CN.4/693 (Mar. 8, 2016) (noting that there have been eleven references to *jus cogens* norms in majority judgments by the ICJ, all of which "have assumed (or at least appear to assume) the existence of *jus cogens* as part of modern international law.").

[216] Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Judgment, 1970 I.C.J. 3 (Feb. 5) [hereinafter Barcelona Traction].

[217] *See* THOMAS WEATHERALL, *JUS COGENS*: INTERNATIONAL LAW AND SOCIAL CONTRACT 240 (2015).

[218] Criddle & Fox-Decent, *supra* note 214, at 344.

[219] Barcelona Traction, *supra* note 216, ¶ 33. While obligations *erga omnes* and *jus cogens* are different concepts, Special Rapporteur, *Third Report on* Jus Cogens, *supra* note 196, ¶ 111, contends that the two are interconnected in that "peremptory norms of general international law (*jus cogens*) establish obligations *erga omnes*, the breach of which concerns all States."

[220] Barcelona Traction, *supra* note 216, ¶ 34. *See also id.* at 289, 304 (separate opinion of Ammoun, J.) ("[T]he principle of equality and that of non-

opinion on Namibia, the court additionally noted that "[t]o establish . . . and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter."[221] In a separate opinion, Judge Ammoun reiterated the General Assembly position condemning "policies of apartheid and racial discrimination . . . as constituting a crime against humanity."[222]

A number of domestic and regional courts have upheld the *jus cogens* status of racial non-discrimination. Supporting a notion of *jus cogens* as natural law, the Inter-American Court of Human Rights in their advisory opinion on Judicial Conditions and the Rights of Undocumented Migrants stated:

> [T]his Court considers that the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws.[223]

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discrimination on racial grounds which follow therefrom, both of which principles, like the right of self-determination, are imperative rules of law.") (The court's reference to these norms was made in *obiter*.). *See* Vera Gowland-Debbas, *Judicial Insights into the Fundamental Values and Interests of the International Community*, *in* THE INTERNATIONAL COURT OF JUSTICE: ITS FUTURE ROLE AFTER FIFTY YEARS 327, 333 (A.S. Muller, D. Raič, & J.M. Thuránszky eds., 1997).

[221] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 131 (June 21).

[222] *Id.* at 79, 81 (separate opinion of Ammoun, J.) (citing G.A. Res. 2074 (XX), ¶ 4 (Dec. 17, 1965)). *See also* Educational, Scientific, and Cultural Organization Res. 3/1.1/2, Declaration on Race and Racial Prejudice (Nov. 20, 1978) (declaring that as a most serious violation of the complete self-fulfillment of human being, apartheid "is a crime against humanity." A distinction is made in Article 4(3) between apartheid and "other policies and practices or racial segregation and discrimination" which are not seen to amount to crimes against humanity but "crimes against the conscience and dignity of mankind.").

[223] Judicial Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 101 (Sept. 17, 2003). *See also* MYRES MCDOUGAL, HAROLD D. LASSWELL & LUNG-CHU CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY 3–6 (1980).

The court maintained that "no legal act" that conflicts with the principle of non-discrimination is acceptable,[224] and further characterized the *jus cogens* status of non-discrimination as deriving "directly from the oneness of the human family and . . . linked to the essential dignity of the individual."[225] Importantly, the court affirmed the status of the prohibition on discrimination as *jus cogens* in the Case of Expelled Dominicans and Haitians v. Dominican Republic.[226] Specifically in the context of the right to nationality, the court stated that the prohibition:

> [R]equires States, when regulating the mechanisms for granting nationality, to abstain from establishing discriminatory regulations or regulations that have discriminatory effects on different groups of a population when they exercise their rights.[227]

Numerous preeminent scholars regard the prohibition on racial discrimination as possessing the status of a *jus cogens* norm. As noted above, in most instances the listing of racial discrimination has not been accompanied with any analysis of the content of this prohibition. In the third edition of the influential *Principles of Public International Law*, Ian Brownlie states that the principle of racial non-discrimination is one of the "least controversial" examples of a peremptory norm, together with the prohibition of the use of force, the law of genocide, crimes against humanity, and the rules prohibiting the slave trade and piracy.[228] Similarly, Schwelb notes that "if there is a subject

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[224] Judicial Condition and the Rights of Undocumented Migrants, *supra* note 223, ¶ 101.

[225] *Id.* ¶ 87.

[226] Expelled Dominicans and Haitians v. Dominican Republic, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 282, ¶ 264 (Aug. 28, 2014).

[227] *Id.* Domestic courts have reiterated the status of the prohibition on racial discrimination. *See, e.g.*, R (European Roma Rights Centre) v. Immigration Officer at Prague Airport [2004] UKHL 55, [46] ("State practice virtually universally condemns discrimination on grounds of race. It does so in recognition of the fact that it has become unlawful in international law to discriminate on the grounds of race."). *See also* Comm. of U.S. Citizens in Nicaragua v. Reagan, 859 F.2d 929, 941 (D.C. Cir. 1988) (including racial discrimination as one of the norms to "arguably . . . meet the stringent criteria for *jus cogens*.").

[228] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 510–13 (3d ed. 1980) (noting also that ICERD itself could be added to the existing/suggested body of *jus cogens*). Other examples of *jus cogens* norms include rules prohibiting aggressive war, the law of genocide, trade in slaves,

matter in present-day international law which appears to be a successful candidate for regulation by peremptory norms, it is certainly the prohibition of racial discrimination."[229] Referring to both Schwelb and Brownlie, Warwick McKean reasoned in 1983 that if genocide and slavery, as "extreme forms" of the denial of the principle of equality are considered to possess a *jus cogens* character, then "it is not unreasonable to suppose that other examples of the denial of the principle [of equality] may be contrary to the doctrine" and that non-discrimination "is a strong candidate for inclusion under this heading."[230] Other scholars have framed the *jus cogens* norm as relating to *severe* or *systemic* forms of racial discrimination. Lauri Hannikainen writes that the *jus cogens* prohibition applies to "severe" forms of discrimination, adding that the prohibition may further extend to "substantial" acts of discrimination which affect the non-

piracy, other crimes against humanity, and the principles of self-determination. *Id.* at 417.

[229] Egon Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, 61 AM. J. INT'L L. 946, 956 (1976).

[230] WARWICK MCKEAN, EQUALITY AND DISCRIMINATION UNDER INTERNATIONAL LAW 277–84 (1983). *See also* AUSTIN, *supra* note 212, at 10 ("There is no agreement on the criteria for identifying which principles of general international law have a peremptory character: everything depends on the particular nature of the subject matter. Perhaps the only generally accepted examples of *jus cogens* are the prohibitions on the use of force (as laid down in the UN Charter) and on aggression, genocide, slavery, racial discrimination, torture and crimes against humanity."); LERNER, GROUP RIGHTS AND DISCRIMINATION IN INTERNATIONAL LAW, *supra* note 212, at 24, 71 (noting that racial discrimination at least is already considered a *jus cogens*, namely a peremptory rule of international law from which no derogation is possible, a rule that can only be modified by a new rule of the same status. "However, as stated by the UN Secretary General in a report on the implementation of the program of action for the Second Decade to Combat Racism and Racial Discrimination, the Convention is endowed 'with strong moral force of virtually universality rooted in the overriding principle (*jus cogens*) that racial discrimination must be eliminated everywhere.'"); VAN DERVORT, *supra* note 212, at 408 (stating that the concept of *jus cogens* is still subject to some controversy but would generally include the prohibition of the use or threat of force and aggression and the prevention and repression of genocide, piracy, slave trade, racial discrimination, terrorism or the taking of hostages, and torture, even though the evolving nature of these principles does not allow a conclusive definition); JOHN TOBIN, THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: A COMMENTARY 42 (2019) (citing LOUIS HENKIN, THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 249 (1983)).

derogable rights listed in Article 4 of the ICCPR and Article 27 of the American Convention on Human Rights.[231]

In January 2019, the Commission published the most recent report by Special Rapporteur Tladi on peremptory norms of general international law. While the report includes the prohibition of apartheid and racial discrimination in its illustrative list of *jus cogens* norms,[232] the report stresses that the content of the norm is "a *composite* act" made up of "the prohibition of apartheid with racial discrimination as an integral part of that."[233] It is important to note, however, that almost all of the sources which the report draws upon to establish its definition identify racial discrimination as *a separate and distinct jus cogens* norm, with the prohibition on racial discrimination generally defined in terms of severe or systematic forms of racial discrimination.[234]

As part of his line of reasoning, the Rapporteur refers to the International Convention on the Suppression and Punishment of the Crime of Apartheid (Apartheid Convention)[235] and the definition of apartheid contained therein as a potential indicator of the scope of the content of this peremptory norm.[236] Crucially, Article 2 of the Apartheid Convention provides that the term "the crime of apartheid," includes, inter alia, at Article 2(c):

> [A]ny legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial

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[231] LAURI HANNIKAINEN, PEREMPTORY NORMS (*JUS COGENS*) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS 340–42 (1988).

[232] Special Rapporteur, *Fourth Report on* Jus Cogens, *supra* note 212, ¶ 60.

[233] *Id.* ¶ 91.

[234] *See, e.g.*, JOHN DUGARD, RECOGNITION AND THE UNITED NATIONS 156–58 (1987); Alain Pellet, *Comments in Response to Christine Chinkin and in Defense of* Jus Cogens *as the Best Bastion Against the Excesses of Fragmentation*, 17 FINNISH Y.B. INT'L L. 83, 85 (2006); Barcelona Traction, *supra* note 216.

[235] International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S. 243 [hereinafter Apartheid Convention].

[236] Special Rapporteur, *Fourth Report on* Jus Cogens, *supra* note 212, ¶ 91.

> group or groups basic human rights and freedoms, including the right to work . . . the right to education, the right to leave and to return to their country, *the right to a nationality*, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association.[237]

Under the Apartheid Convention, the key elements required to meet the definition of "the crime of apartheid" in Article 2(c) appear to be that: first, there is a denial of members of a racial group or groups of a basic human right or freedom (including, among others listed, the right to nationality); second, that the denial of rights is undertaken by legislative or other measures; third, that those measures are calculated to prevent the racial group from participation in the political, social, economic, and cultural life of the country, and deliberately create conditions preventing the full development of the group or groups; and fourth, that the acts are inhuman and committed for the purposes of maintaining the dominance of one racial group over another and systematically oppressing the dominated group. [238]

At its most exacting, then, the *jus cogens* norm of non-discrimination prohibits forms of racial discrimination that rise to the level of invidious discrimination, with apartheid positioned as a paradigmatic example. This formulation departs in some measure from the more frequent understanding of racial non-discrimination as a separate *jus cogens* norm, and represents a particularly high bar for establishing peremptoriness. [239] Particularly noteworthy is the requirement for intention to be present. Yet, even under this formulation, many manifestations of denial or deprivation of nationality meet the more exacting

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[237] Apartheid Convention, *supra* note 235, art. 2 (emphasis added).

[238] *See* FitzGerald, *supra* note 35, at 143 (discussing South Africa's racialized system of nationality, which "denationalize[d] the majority black population . . . by assigning their nationality to the fictive new states and stripping them of their South African nationality."). *See also* John Dugard, *South Africa's Independent Homelands: An Exercise in Denationalization,* 10 DENV. J. INT'L L. & POL'Y 11 (1980).

[239] *But see* Int'l L. Comm'n, Provisional Summary Record of the 3472nd Meeting, U.N. Doc. A/CN.4/SR.3427 (July 9, 2019) (noting that following on the debate in the plenary, the Special Rapporteur in his revised proposal included only "the prohibition of apartheid," omitting the words "racial discrimination." The Drafting Committee decided to retain the reference to composite act of the prohibition of racial discrimination and apartheid.).

requirement of systemic racial discrimination and even, arguably, apartheid.[240] To take a paradigmatic example, the Nazi policy of stripping citizenship of Jewish people is accurately characterized as a measure "calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country," and deliberately creating "conditions preventing the full development of such a group or groups."[241]

However, it is our contention that such a high bar is not in fact required. While some historical and contemporary examples of racialized citizenship laws will *satisfy* the definition of apartheid, it is not *necessary* to do so in order to violate the *jus cogens* norm. As explained above, Special Rapporteur Tladi's 2019 report cites a wide range of sources that overwhelmingly favor a broader definition of the *jus cogens* norm, with serious, severe, or systemic racial discrimination widely understood to constitute a violation.[242] There is no reason in principle why intention is required in order for racial discrimination to reach the level of serious, severe, or even systemic.[243] While there is little to no explicit consideration of the role of intent or purpose within academic discussion on this issue—perhaps not surprising given that deep analysis of the content of the norm is often scant—contemporary understandings of the definition of racial discrimination unequivocally support the notion that racial discrimination may be established in the absence of explicit intent or purpose.

As the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance clearly articulates, the prohibition on racial discrimination requires states to combat both intentional discrimination as well as discrimination *in effect*.[244] The language of ICERD Article 1(1) enshrines this principle, stipulating that any distinction, etc. based on a prohibited ground is to be considered racial discrimination when it has "the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and

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[240] Special Rapporteur, *Fourth Report on* Jus Cogens, *supra* note 212, ¶ 91.

[241] Apartheid Convention, *supra* note 235, art. 2.

[242] Special Rapporteur, *Fourth Report on* Jus Cogens, *supra* note 212.

[243] For an excellent discussion of intention in the context of ICERD, see E. Tendayi Achiume, *Beyond Prejudice: Structural Xenophobic Discrimination Against Refugees*, 45 GEO. J. INT'L L. 323, 361–64 (2014).

[244] Special Rapporteur Report on Contemporary Forms of Racism, *supra* note 36, ¶ 18.

fundamental freedoms."[245] Similarly, the Grand Chamber of the European Court of Human Rights has held that "a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory even where it is not specifically aimed at that group and there is no discriminatory intent."[246] In that decision, the Court ruled that Danish Laws on Family Reunification constituted indirect discrimination on the basis of ethnic origin, in violation of Article 14 of the European Convention on Human Rights. Indeed, the notion that direct discrimination may be made out in the absence of intent might even be said to constitute a general principle of law, given the widespread acceptance in domestic jurisdictions of this notion.[247]

In sum, while it is widely accepted that the prohibition on racial discrimination has attained the status of a *jus cogens* norm, little attention has been given to the *scope* of this prohibition. At its most exacting, the prohibition extends only to laws and practices that amount to apartheid. Yet, even on that narrow approach, racial discrimination in nationality laws is capable of violating the norm, as recognized in the very text of the Apartheid Convention.[248] However, such a narrow approach does not have widespread support; rather, both jurisprudence and the views of eminent scholars overwhelmingly support the view that the *jus cogens* norm extends to *severe* or *systemic* forms of racial discrimination, and that such discrimination may manifest in intention *or* effect.

Having considered the scope of the *jus cogens* norm of racial non-discrimination, and how matters of nationality fit within it, the question then becomes one of application. Specifically, how does the *jus cogens* status of systemic racial non-discrimination apply to Article 1(3)? What does this mean for methods of interpreting Article 1(3) and its application to discriminatory cases of nationality regulation?

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[245] ICERD, *supra* note 11, art 1(1).

[246] Biao v. Denmark, App. No. 38590/10, ¶ 91 (May 24, 2016), http://hudoc.echr.coe.int/eng?i=001-141941 [https://perma.cc/BR9T-9HZB] (citing S.A.S. v. France, App. No. 43835/11, (July 1, 2014), https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-145466&filename=001-145466.pdf&TID=uexpxlonsk [https://perma.cc/6GUZ-2FXZ]).

[247] *See, e.g.*, TARUNABH KHAITAN, A THEORY OF DISCRIMINATION LAW (2015).

[248] Apartheid Convention, *supra* note 235, art. 2.

VI. TOWARD A PRINCIPLED INTERPRETATION OF ARTICLE 1(3)

Racially discriminatory nationality laws and practices are often calculated to prevent a group or groups from participation in the political, social, economic, and cultural life of the country. Even when they do not discriminate explicitly and directly, nationality laws can discriminate against certain groups in effect and produce the same exclusionary result. Indeed, the application of racially discriminatory nationality laws to a significant segment of the population of a state is a quintessential example of systemic racial discrimination under the terms of international law. In order for Article 1(3) to conform to the principle of integration, it must be applied consistently with the peremptory prohibition against systemic racial discrimination. Article 1(3) must also, as is widely accepted, be read in light of the broad protection enshrined in Article 5 of ICERD of the right to nationality for everyone (and arguably together with other treaty expressions of the right to a nationality)[249] and the international prohibition against arbitrary deprivation of nationality.[250]

Application of the *jus cogens* norm against systemic racial discrimination to the more prominent and egregious instances of denationalization outlined in Part II is straightforward.[251] In each of those cases, there is a denial of the basic human right to a nationality to members of a racial group or groups, and a convincing argument could be made that the relevant measures leading to this outcome were calculated to prevent the racial group from participation in the political, social, economic, and cultural life of the country. Yet, even where denial or deprivation of nationality does not meet such a high bar, racialized nationality laws may nonetheless violate the *jus cogens* norm given that they will, in many cases, meet the definition of serious or systemic racial discrimination.

However, does this mean that states can no longer maintain any discrimination in the content or application of nationality laws? In this regard, an important question to

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[249] UDHR, *supra* note 76, art. 15.

[250] *Id. See also* CRPD, *supra* note 76, art. 18(1)(a). Article 18(1)(a) provides an explicit prohibition against arbitrary deprivation of nationality. The prohibition has also been acknowledged to constitute a rule of customary international law, and applies whether or not it results in statelessness. Brandvoll, *supra* note 75, at 194.

[251] *See* discussion *supra* Part II.

consider is the distinction between differential treatment and prohibited preferences.[252] In General Recommendation Thirty-Two the Committee noted that differential treatment:

> "[C]onstitute[s] discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim[.]" As a logical corollary of this principle, . . . [General Recommendation Fourteen] (1993) . . . observes that "differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate."[253]

To assist in understanding how this applies in the context of Article 1(3), it is relevant to recall the drafting history and its focus on post-colonial autonomy and the ability to favor particular national groups. Applying this reasoning to a contemporary example, referring to Israel's Law of Return,[254] Dan Ernst characterizes the moral difference between what he refers to as "positive" and "negative" nationality-based discrimination.[255] The former "singles out individuals of a particular ethnic, religious, or racial group for automatic admission because of that group's special entitlement to admission."[256] The latter bars or excludes a group or groups of people because they belong to "an unwanted ethnic, religious, or racial group."[257] While, according to Ernst, international law clearly prohibits negative nationality-based discrimination, it has been argued that there may exist certain limited circumstances under which nationality-based priorities are

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[252] *See* THORNBERRY, *supra* note 2, at 112.

[253] General Recommendation Thirty-Two, *supra* note 36, ¶ 8 (footnote omitted).

[254] Law of Return, 5710–1950, LSI 4 114 (1949–1950) (Isr.); Bill and an Explanatory Note, 5710–1950, HH 48 189 (Isr.). *See also* Ayelet Shachar, *Citizenship and Membership in the Israeli Polity*, *in* FROM MIGRANTS TO CITIZENS: MEMBERSHIP IN A CHANGING WORLD 386–433 (T. Aleinikoff Alexander & Klusmeyer Douglas eds., 2000).

[255] Dan Ernst, *The Meaning and Liberal Justifications of Israel's Law of Return*, 42 ISR. L. REV. 564, 583–85 (2009). In its General Recommendation Thirty-Two, CERD described the term "positive discrimination" as a *contradictio in terminis* which should be avoided in the context of international human rights standards. *See* General Recommendation Thirty-Two, *supra* note 36, ¶ 12.

[256] Ernst, *supra* note 255, at 584.

[257] *Id.*

normatively justified.[258] Seyla Benhabib reasons that giving preference to a certain group *with good reasons* may not be morally forbidden.[259]

> States in which certain ethnic groups reside are likely to plead for special treatment of their ethnic kin; in fact, there are states, such as Israel, which make the right of return a legal privilege for those who can claim Jewish descent. Similarly, Germany has policies which grant special privileges of return to ethnic Germans from the Baltic states, Russia, and other countries of eastern and central Europe (the so-called *Aussiedler* and *Vertriebene*). As long as a state does not deny those of different ethnicity and religion equivalent rights to seek entry and admission into a country . . . these practices need not be discriminatory. It is only because such practices are combined with the goals of preserving ethnic majorities and ethnic purity that they run afoul of and are discriminatory from a human rights perspective.[260]

Ernst goes on to note that Benhabib's reasoning is in keeping with ICERD's use of the term "against" ("that such provisions do not discriminate *against* any particular nationality") in the text of Article 1(3).[261] It may be possible to assert that Benhabib's reasoning is also in keeping with the drafting history of Article 1(3) which, as shown above, was motivated at least in part by concerns of certain developing and newly independent states related to anti-colonialism or self-determination. Finally, Benhabib's emphasis on the requirement of "good reason"[262] is in keeping with the Committee's statement that "differential treatment based on nationality and national or ethnic origin constitutes discrimination if the criteria for such

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[258] *See id. See also* CHAIM GANS, THE LIMITS OF NATIONALISM 124–47 (2003).

[259] *See* Ernst, *supra* note 255, at 589–601.

[260] SEYLA BENHABIB, THE RIGHTS OF OTHERS 138 n.2 (2004). *See also* Ernst, *supra* note 255, at 589–601.

[261] Ernst, *supra* note 255, at 583 (citations omitted). For a discussion on Israel's new Citizenship and Entry into Israel (Temporary Order) Law, 2003, and the 2006 decision of the High Court of Justice upholding the constitutionality of that law, see Yoav Peled, *Citizenship Betrayed: Israel's Emerging Immigration and Citizenship Regime*, 8 THEORETICAL INQUIRIES L. 603 (2007).

[262] BENHABIB, *supra* note 260, at 132.

differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim."[263]

Following the reasoning of the European Court of Human Rights, this may be referred to as *justified* distinctions.[264] In the Belgian Linguistic case, the Court articulates the following two-limbed test for determining the difference between justified and unjustified distinctions:

> [T]he Court, following the principles which may be extracted from the legal practice of a large number of democratic states, holds that the principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies.[265]

The Court goes on to contend, with reference to Article 14 of the European Convention of Human Rights, that the prohibition on discrimination is violated "when it is clearly established that

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[263] Comm. on Elimination Racial Discrimination, Concluding Observations on Denmark, ¶ 19, U.N. Doc. CERD/C/DEN/CO/17 (Oct. 19, 2006). *See* General Recommendation Thirty-Two, *supra* note 36, ¶ 8 ("On the core notion of discrimination, general recommendation No. 30 (2004) of the Committee observed that differential treatment will 'constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.'"). *See also* U.N. GAOR, 48th Sess., Supplement No. 18 at 115, U.N. Doc. A/48/18 (Sept. 15, 1993) (observing that "differential treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are 'legitimate'").

[264] *See* DANIEL MOECKLI ET AL., INTERNATIONAL HUMAN RIGHTS LAW (2010).

[265] *In re* Laws on the Use of Languages in Education in Belgium v. Belgium, App. No. 1474/62, at 31 (Feb. 9, 1967), http://hudoc.echr.coe.int/eng?i=001-57524 [https://perma.cc/5GHE-3ZRY] [hereinafter Belgian Linguistic Case]. *See also* Comm. on Elimination Racial Discrimination, Concluding Observations on Australia, ¶ 24, U.N. Doc. CERD/C/AUS/CO/14 (Apr. 15, 2005) (recommending that Australia "review its policies, taking into consideration the fact that, under the Convention, differential treatment based on citizenship or immigration status would constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of that aim.").

there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised."[266] Similarly, in the Biao v. Denmark decision, the Grand Chamber stated that, while not all differential treatment amounts to discrimination:

> A difference in treatment is discriminatory if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.[267]

Such matters must be examined closely and the wider context appreciated. As Benhabib notes, positive discrimination in nationality laws is problematic when combined with the goals of preserving ethnic majorities and ethnic purity.[268] In our view, a contemporary example is the current citizenship crisis in India, which arguably "broadly aim[s] to convert India into a 'Hindu Rashtra' or a homeland for Hindus."[269]

Applying this analysis to the context of racial discrimination in nationality laws, and against the background of the peremptory prohibition of systemic racial discrimination, the effect of Articles 1(1) and 1(3) of ICERD is that state regulation of nationality must not discriminate, whether directly or indirectly, on the basis of race, color, descent, or national or ethnic origin in the attribution, regulation or deprivation of citizenship, except in narrowly circumscribed situations where differential *access* to citizenship is applied pursuant to a legitimate aim, and is proportional to the achievement of this aim. This limited exception is logically applicable only in relation to acquisition of or access to citizenship and not deprivation.

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[266] Belgian Linguistic Case, *supra* note 265, at 31.

[267] Biao v. Denmark, App. No. 38590/10, ¶ 90 (May 24, 2016), http://hudoc.echr.coe.int/eng?i=001-141941 [https://perma.cc/BR9T-9HZB]. *See also* Comm. on Elimination Racial Discrimination, Concluding Observations on Denmark, *supra* note 263.

[268] BENHABIB, *supra* note 260, at 138 n.2

[269] ASIAN L. CTR., MELBOURNE L. SCH., CONSTITUTIONALISM AND CIVIL LIBERTIES: A BRIEFING NOTE ON RECENT DEVELOPMENTS IN INDIA (2020) (citing Edward Anderson & Christophe Jaffrelot, *Hindu Nationalism and the 'Saffronisation of the Public Sphere': An Interview with Christophe Jaffrelot*, 26 CONTEMP. S. ASIA 468, 468–82 (2018)), https://law.unimelb.edu.au/__data/assets/pdf_file/0003/3441054/Statelessness-in-India-Briefing-Note.pdf [https://perma.cc/K5QD-B22Q]. *See also* Christophe Jaffrelot, *The Fate of Secularism in India*, *in* THE BJP IN POWER: INDIAN DEMOCRACY AND RELIGIOUS NATIONALISM 51 (Milan Vaishnav ed., 2019); BENHABIB, *supra* note 260.

While this suggests that there may be greater state discretion in relation to denial of nationality, there is no clear dichotomy between cases of denial and cases of deprivation as may be suggested in the approach of the Committee at times. The limited exception means that in most cases the same analysis applies to racially discriminatory nationality laws whether the measure in question relates to access to or deprivation of citizenship.

With regard to the burden of proof, the Court in Biao v. Denmark reiterated the well-established proposition that once differential treatment has been demonstrated, the burden of showing that it was justified is upon the state. While the Court in that case applied its longstanding notion that there might exist a margin of appreciation for a State to assess the need for differential treatment, nonetheless "very weighty reasons"[270] would be required in order to justify differential treatment on the basis of nationality. In our view it is clear that no such margin exists in the *systemic* denial or deprivation of nationality made—whether exclusively or in part—on the grounds of race, descent, or ethnic or national origin, given the *jus cogens* stature of this principle.

VII. CONCLUSION

Writing in 2006, just a year after General Recommendation Thirty was published, James A. Goldston noted that the General Recommendation "offers a useful legal platform for advocacy, litigation and monitoring efforts,"[271] yet it is clear that such promise has not been realized. This Article has proffered a principled justification for Article 1(3)'s narrow interpretation with the aim of sharpening the Committee's persuasiveness. More broadly, to the extent that matters of nationality are still considered a balancing act between individual rights and the prerogative of states in this domain, the interpretive *jus cogens* principle as it relates to norms of racial non-discrimination and the clarification of the content and contours of the peremptory norm helps to tip the balance in favor of individual rights and forecloses the possibility of excluding the

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[270] *Biao*, App. No. 38590/10, ¶ 93 (citing Gaygusuz v. Austria, App. No. 17371/90 (May 23, 1996), http://hudoc.echr.coe.int/eng?i=001-58060); Poirrez v. France, App. No. 40892/98 (Sept. 30, 2003), http://hudoc.echr.coe.int/eng?i=001-61317; Andrejeva v. Latvia, App. No. 55707/00 (Feb. 18, 2009), http://hudoc.echr.coe.int/eng?i=001-91388; Ponomaryovi v. Bulgaria, App. No. 5335/05 (Nov. 28, 2011), http://hudoc.echr.coe.int/eng?i=001-105295).

[271] James A. Goldston, *Holes in the Rights Framework: Racial Discrimination, Citizenship, and the Rights of Noncitizens*, 20 ETHICS & INT'L AFF. 321, 346 (2006).

right to nationality from the interpretive fold of racial discrimination as a *jus cogens* norm.

This Article has provided a principled, doctrinal interpretive framework within which to "read down" the problematic Article 1(3) so that the international community no longer brushes over the provision, but rather utilizes it to help combat racially discriminatory nationality laws. The clarification and articulation of legal norms around Article 1(3) and a justification for its narrow interpretation adds to the existing legal tools for combatting discriminatory citizenship deprivation and denial, and narrowing the boundaries of state discretion.

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NOTE

ADOPTING THE CUMULATIVE HARM FRAMEWORK TO ADDRESS SECOND-GENERATION DISCRIMINATION

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Analytical frameworks of constitutional review vary. One framework is the "cumulative harm framework." This method examines the entirety of harm experienced by an individual to determine whether the harms rise to the level of a constitutional violation. For example, in the context of one's right to a fair trial, a reviewing court will aggregate the harm from each error committed at trial. Here, a reviewing court may find that the total harm resulting from the accumulation of all errors may have deprived the defendant's right to a fair trial—even if each error in isolation would not.

Another analytical framework is the "sequential approach." This framework reviews each harm experienced by the individual in isolation to determine whether each harm independently violated an individual's rights. For example, if the sequential approach was applied to the scenario above, a reviewing court would examine an error at trial and assess whether that specific error deprived the defendant's right to a fair trial. If this specific harm is insufficient for a

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constitutional violation, a reviewing court would then examine the subsequent error at trial and conduct the same analysis. Under the sequential approach, even if the trial was saturated with minor errors—each of which were insufficiently egregious to result in an unfair trial—a defendant would not be entitled to a new trial. A reviewing court's analytical framework, therefore, can alter the outcome of a case.

This Note analyzes different applications of the cumulative harm framework and the sequential approach. It then evaluates the advantages and disadvantages of the cumulative harm framework. This Note concludes by arguing for broader adoption of the cumulative harm framework, particularly as an effective tool in addressing second-generation discrimination faced by minorities and people of color.

I. INTRODUCTION

Many constitutional claims are analyzed as discrete, isolated occurrences. Examining a woman's right to receive an abortion is an instructive vehicle to demonstrate the power of different analytical frameworks.[1] Imagine a pregnant person[2] has chosen to exercise their "fundamental right to abortion."[3] Imagine that the government has passed four laws that impede on this person's ability to exercise this right. One law requires, after the initial visit to the doctor, that this person wait an additional twenty-four hours to consider the "nature of the procedure," the health risks, and the probable age of the "unborn child."[4] This first law also requires this person to produce a written statement that they have taken these factors into consideration.[5] If this person is married, the second law is triggered. The second law requires the person to produce a signed statement from their spouse that they are about to undergo an abortion.[6] A third law requires physicians who perform abortions to have "admitting privileges" at a local hospital, and this hospital has the discretion whether to grant the physician this privilege.[7] A fourth law mandates that private insurance can only be used for an abortion when the person's life would be threatened if the pregnancy is carried to term.[8] Each law, in some

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[1] Roe v. Wade, 410 U.S. 113, 153 (1973) ("Th[e] right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

[2] Of course, reproductive rights belong to women, non-binary and intersex individuals, transgender men, and anyone with a uterus. This Note alternates between the terms "woman" and "pregnant person" to respect many individuals who do not identify as woman and have potential to become pregnant. *See* Joella Jones, Note, *The Failure to Protect Pregnant Pretrial Detainees: The Possibility of Constitutional Relief in the Second Circuit Under a Fourteenth Amendment Analysis*, 10 COLUM. J. RACE & L. 139, 141 n.1 (2020); *see also* Jessica Clarke, *Pregnant People?*, 119 COLUM. L. REV. F. 173, 177 (2019). Further, when referencing a "pregnant person," this Note employs the singular "they" to honor those who do not identify with the gender binary.

[3] Harris v. McRae, 448 U.S. 297, 313 (1980).

[4] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 881 (1992).

[5] *Id.*

[6] *Id.* at 887.

[7] *See An Overview of Abortion Law*, GUTTMACHER INST., www.guttmacher.org/state-policy/explore/overview-abortion-laws [https://perma.cc/R3HB-79WH] (Sept. 1, 2020). *See, e.g.*, June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103 (2020) (describing active admitting privileges to mean that a doctor must be a member in good standing of the hospital's medical staff with the ability to admit a patient and to provide diagnostic and surgical services to such patient) (citations omitted).

[8] *Russo*, 410 S. Ct. at 2103.

way, imposes a different burden upon this person in obtaining an abortion.

This pregnant person now challenges these laws, arguing that they collectively present an "undue burden."[9] In this scenario, this person has not experienced a direct ban—a first-generation barrier—on their reproductive rights.[10] Rather, this person faces second-generation barriers in attempting to exercise their rights—barriers which are more concealed, complex, and, arguably, more dangerous than their explicit predecessors.[11]

A reviewing court, in considering the constitutionality of these regulations, will begin by analyzing whether the first law presents an undue burden, and then conduct the same analysis on the second, third, and fourth law.[12] Under this method of constitutional review, the *overall* harm experienced by this person is not considered.[13] Rather, the harm from each law is isolated and then analyzed.[14] Commentators have called this analytical method the "sequential approach."[15]

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[9] *Casey*, 505 U.S. at 874.

[10] *See, e.g.*, Shelby Cnty., Ala. v. Holder, 570 U.S. 529 (2013) (Ginsburg, J., dissenting) (discussing first-generation discrimination as explicit denial of rights).

[11] *See, e.g.*, Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 476 (2001) ("[N]ormative theories [of second-generation discrimination] are plural, subtle, and, not surprisingly, more complex. One such theory would apply to decisions or conditions that violate a norm of functional, as opposed to formal, equality of treatment. This theory defines discrimination to include differences in treatment based on group membership, whether consciously motivated or not, that produce unequal outcome.").

[12] *See Casey*, 505 U.S. at 879. ("We now consider the separate statutory sections at issue."). The first two laws are not a hypothetical, but are the laws challenged in *Planned Parenthood of Southeastern Pennsylvania v. Casey*. In this case, the Supreme Court upheld the statute requiring a 24-hour waiting period. *Id.* at 887. The Supreme Court invalidated the statute requiring a married woman to obtain informed consent from her spouse. *Id.* at 898.

[13] *See id.*

[14] *See* Kate L. Fetrow, *Taking Abortion Rights Seriously: Toward a Holistic Undue Burden Jurisprudence*, 70 STAN. L. REV. 319, 328 (2018) ("Indeed, both the parties and the Court [in *Casey*] considered the admitting privileges requirement and the surgical center requirement separately-not looking at whether the two challenged laws together might impose a greater burden on women than either of the two acting alone."). *See also*, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2310 (2016) (evaluating two different requirements of a statute, but only focusing on the "relevant statute here"); *see also*, Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 879 (1992) ("We now consider the separate statutory sections at issue.").

[15] *See Casey*, 505 U.S. at 879 (1992) ("We now consider the separate statutory sections at issue."); Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311, 314 (2012) (defining the "sequential

A different analytical method would not analyze each harm in isolation. Rather, what I call the "cumulative harm framework" reviews the *entirety* of this person's harm—the impact from the four laws above—to determine whether this pregnant person has experienced an "undue burden" in attempting to receive an abortion.[16] Stated differently, the four laws would be analyzed for their cumulative impact under this methodology.[17] Under the hypothetical above, perhaps the mandatory twenty-four-hour waiting period is insufficient to trigger a constitutional violation. But, maybe the twenty-four-hour waiting period *combined* with the spousal consent requirement, the admitting privileges requirement, and the limitations on private health insurance, presents an undue burden.

This Note explores these two analytical frameworks of judicial review. Part II discusses different substantive areas of law in which a reviewing court adopts the cumulative harm framework. Part III explores the different substantive areas of law in which a reviewing court adopts the sequential approach. Part IV evaluates the cumulative harm framework. This section begins by arguing that the framework more appropriately assesses constitutional harms from the perspective of the right-holder and that courts have the institutional capacity to adopt the framework more broadly. It asserts this framework is

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approach" of Fourth Amendment analysis as taking "snapshot of each discrete step and assess[ing] whether that discrete step at that discrete time constitutes a search").

[16] Commentators have described this analytical framework as "aggregate harm." Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. REV. 1309, 1316 (2017). Others have called it the "cumulative harm model." Scott Rempell, *Defining Persecution*, 2013 UTAH L. REV. 283, 288. I use the term "cumulative harm framework" because it suggests that there are multiple frameworks of constitutional review and that this analytical framework is not limited to one substantive area of law. I also use this term because "aggregate harm" is sometimes used to describe the collective harm experienced by groups of people. *See*, *e.g.*, Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1667 (2001) (discussing how vote dilution cases are understood as "aggregate rights" and a group's deprivation of the right to meaningfully participate in the voting process as an "aggregate harm"). In contrast, the cumulative harm framework focuses on the total harm experienced by an individual.

[17] *See* Abrams & Garrett, *supra* note 16, at 1318 ("Under *Strickland*, courts ask not whether each individual act or decision by a defendant's counsel was deficient, but instead whether all of the lawyer's errors, taken together, amounted to a constitutionally deficient performance."). *See also*, Strickland v. Washington, 466 U.S. 668, 695 (1984) ("In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury.").

necessary to addressing second-generation discrimination experienced by Black people,[18] Latinxs,[19] and other minorities and communities of color. Part IV also critiques the framework. It argues that the cumulative harm framework is difficult to administer because there is no clear limit on which facts should be cumulated. It also argues that the framework permits unrestrained judicial review. Further, it argues that the cumulative harm framework may not be suited for evaluating prospective harm and facial challenges of law. This Note concludes by arguing for broader adoption of the cumulative harm framework because of its ability to prevent second-generation discrimination.

II. THE JUDICIARY'S CURRENT ADOPTION AND LIMITATION OF THE CUMULATIVE HARM FRAMEWORK

This section provides an overview of the judiciary's adoption of the cumulative harm framework. It examines six different substantive areas to explain different applications of the cumulative harm framework.

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[18] I use the terms "Black" and "African American" interchangeably by adhering to Professor Kimberlé Crenshaw's formulation of these terms:

> When using 'Black,' I shall use an upper-case 'B' to reflect my view that Blacks, like *A*sians, *L*atinos, and other 'minorities,' constitute a specific cultural group and, as such, require denotation as a proper noun. . . . 'Black' should not be regarded 'as merely a color of skin pigmentation, but as a heritage, an experience, a cultural and personal identity, the meaning of which becomes specifically stigmatic and/or glorious and/or ordinary under specific social conditions.'

Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988) (quoting Catherine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS: J. WOMEN CULTURE & SOC'Y 515, 516 (1982)).

[19] I use the term "Latinx" to reject the gender binary that is inherent linguistically in "Latino/as." *See, e.g.*, Luz E. Herrera & Pilar Margarita Hernández Escontrías, *The Network for Justice: Pursuing A Latinx Civil Rights Agenda*, 21 HARV. LATINX L. REV. 165, 165 n.1 (2018) (using the term "Latinx" throughout the article as a gender-neutral replacement for Latino/as and Latin@s). I also use this term to reject "Hispanic" because it exclusively honors those of Spanish origin. Jyoti Nanda, *The Construction and Criminalization of Disability in School Incarceration*, 9 COLUM. J. RACE & L. 265, 265 n.2 (2019).

A. The Fourteenth Amendment's Guarantee of a Fair Trial

A defendant enjoys the right to a fair trial.[20] In *Taylor v. Kentucky*, the Supreme Court adopted the cumulative harm framework as the test to determine whether a defendant had been deprived of their right to a fair trial.[21] Commentators[22] and courts[23] have called this test the *cumulative error doctrine*. As the Eleventh Circuit described, the cumulative error doctrine "provides that an aggregation of non-reversible errors (i.e., plain errors failing to necessitate reversal and harmless errors) can yield a denial of the constitutional right to a fair trial, which calls for reversal."[24] Such errors are analyzed for their cumulative effect because, as the Tenth Circuit held, "[t]he cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error."[25]

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[20] Estelle v. Williams, 425 U.S. 501, 503 (2006) ("The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment."); U.S. CONST. amend. XIV, § 1.

[21] Taylor v. Kentucky, 436 U.S. 478, 487 n.15 (1978). ("Because of our conclusion that the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness in the absence of an instruction as to the presumption of innocence, we do not reach petitioner's further claim that the refusal to instruct that an indictment is not evidence independently constituted reversible error.").

[22] Ruth A. Moyer, *To Err is Human; To Cumulate, Judicious: The Need for U.S. Supreme Court Guidance on Whether Federal Habeas Courts Reviewing State Convictions May Cumulatively Assess Strickland Errors*, 61 DRAKE L. REV. 447, 450 (2013) ("[T]he cumulative-error doctrine instructs that 'an aggregation of non-reversible errors [such as harmless errors] can yield a denial of the constitutional right to a fair trial, which calls for reversal.'") (quoting United States v. Munoz, 150 F.3d 401, 418 (5th Cir. 1998)). *See also*, Abrams & Garrett, *supra* note 16, at 1317.

[23] United States. v. Azmat, 805 F.3d 1018, 1045 (11th Cir. 2015) ("Under the cumulative-error doctrine, we will reverse a conviction if the cumulative effect of the errors is prejudicial, even if the prejudice caused by each individual error was harmless."). *See also*, *Munoz*, 150 F.3d at 418 ("[T]he cumulative error doctrine . . . provides that an aggregation of non-reversible errors (i.e., plain errors failing to necessitate reversal and harmless errors)"); United States v. Sepulveda, 15 F.3d 1161, 1196 (1st Cir. 1993) ("Of necessity, claims under the cumulative error doctrine are *sui generis*. A reviewing tribunal must consider each such claim against the background of the case as a whole, paying particular weight to factors such as the nature and number of the errors committed; their interrelationship, if any, and combined effect; how the district court dealt with the errors as they arose (including the efficacy—or lack of efficacy—of any remedial efforts); and the strength of the government's case.").

[24] *Munoz*, 150 F.3d at 418.

[25] United States v. Rivera, 900 F.2d 1462, 1469 (10th Cir. 1990). *See also*, Chambers v. Mississippi, 410 U.S. 284, 290 n.3 (1973) ("Petitioner's contention . . . is that he was denied 'fundamental fairness guaranteed by the Fourteenth Amendment' as a result of several evidentiary rulings. His claim, the

In *Taylor*, the Supreme Court aggregated the harm resulting from four actions independently caused by two actors.[26] The first two harms were caused by the trial judge's rejection of the defense's following two requests: An instruction to the jury that law presumes a defendant to be innocent of a crime[27] and that the defendant's indictment should not be considered as evidence to determine the defendant's guilt.[28] The Supreme Court also aggregated the harms caused by the prosecution after the trial judge had rejected the defendant's request. During closing argument, the prosecution stated "*like every other defendant* who's ever been tried who's in the penitentiary or in the reformatory today, has this presumption of innocence until proven guilty beyond a reasonable doubt";[29] and that "[o]ne of the first things *defendants do after they rip someone off*, they get rid of the evidence as fast and as quickly as they can."[30]

The *Taylor* Court found that the four harms alone were "not necessarily improper, but the combination" resulted in an unfair trial.[31] Even though errors resulted from different actors, the Supreme Court permitted the aggregation of harm caused by the trial judge's refusal to grant specified jury instructions paired with the prosecution's statements.[32] Thus, the analytical method adopted by the Supreme Court for determining whether a defendant experienced a fair trial is the cumulative harm framework.

Some circuit courts[33] have tailored their implementation of *Taylor*'s cumulative harm framework within a federal review

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substance of which we accept in this opinion, rests on the cumulative effect of those rulings in frustrating his efforts to develop an exculpatory defense. Although he objected to each ruling individually, petitioner's constitutional claim—based as it is on the cumulative impact of the rulings—could not have been raised and ruled upon prior to the conclusion of Chambers' evidentiary presentation.").

[26] *Taylor*, 436 U.S. at 480–81, 486–87.

[27] *Id.* at 480.

[28] *Id.* at 480–81.

[29] *Id.* at 486.

[30] *Id.* at 487.

[31] *Id.*

[32] *Id.* at 487–88 ("The prosecutor's description of those events was not necessarily improper, but the combination of the skeletal instructions, the possible harmful inferences from the references to the indictment, and the repeated suggestions that petitioner's status as a defendant tended to establish his guilt created a genuine danger that the jury would convict petitioner on the basis of those extraneous considerations, rather than on the evidence introduced at trial.").

[33] *See, e.g.*, Derden v. McNeel, 978 F.2d 1453, 1458–59 (5th Cir. 1992) ("First, any cumulative error theory must refer only to *errors* committed in the state trial court. A habeas petitioner may not just complain of unfavorable

of state convictions.[34] The Fifth Circuit, for example, imposed four limitations on the cumulative error-doctrine: (1) the "court should only consider actual 'errors' committed at the trial court"; (2) the "error complained of must not be procedurally barred, and, regardless of procedural bar, the defendant must have objected to the error at trial"; (3) "state law errors are not cognizable, unless they individually amount to a due process violation"; and (4) "the court must review the trial record as a whole and ask 'whether the errors more likely than not caused a suspect verdict.'"[35] The Fifth Circuit also includes actions from the trial judge in the cumulative harm framework "only if the judge so favors the prosecution that he appears to predispose the jury toward a finding of guilt or to take over the prosecutorial role."[36] The Tenth Circuit also limits actions that are eligible to be aggregated to "error[s],"[37] rather than the aggregation of "non-errors."[38] However, the Tenth Circuit goes further and requires a defendant to "demonstrate that the ruling was an error" to subject the error to the cumulative harm calculus.[39]

The Fifth Circuit limits the scope of the cumulative harm framework because of the potential dangers of adopting a vague legal standard.[40] Adopting an unfettered cumulative harm

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rulings or events in the effort to cumulate errors. . . . Second, the error complained of must not have been procedurally barred from habeas corpus review. . . . Third, errors of state law, including evidentiary errors, are not cognizable in habeas corpus as such. . . . [Further] [t]he conduct of a trial judge can violate due process only if the judge so favors the prosecution that he appears to predispose the jury toward a finding of guilt or to take over the prosecutorial role."). *See also*, United States v. Rivera, 900 F.2d 1462, 1470 (10th Cir. 1990) ("Impact alone, not traceable to error, cannot form the basis for reversal. The same principles apply to a cumulative-error analysis, and we therefore hold that a cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors.").

[34] *See* Moyer, *supra* note 22, at 455–58.

[35] Pursell v. Horn, 187 F.Supp.2d 260, 375 (W.D.P.A. 2002) (quoting *Derden*, 978 F.2d at 1457).

[36] *Derden*, 978 F.2d at 1459.

[37] *Rivera*, 900 F.2d at 1470 n.7 (defining "errors" to "refer to any violation of an objective legal rule. . . . [such as] some violation of constitutional, statutory, or common law, or a violation of an administrative regulation or an established rule of court").

[38] *Id.* at 1471. *See also*, United States v. Hopkins, 608 F. App'x 637, 648 (10th Cir. 2015) ("Errors are only those violations 'of an established legal standard defining a particular error,' not just incidents a reviewing court considers troubling.") (quoting *Rivera*, 900 F.2d at 1471).

[39] *Rivera*, 900 F.2d at 1470

[40] *See Derden*, 978 F.2d at 1458. ("[A] free-floating fundamental fairness rule subverts the uniformity of results that is the basic goal of an organized legal system: one defendant may persuade the court that his five non-constitutional errors denied fundamental fairness, while another, less

framework, the Fifth Circuit reasoned, would lead to an "infinitely expandable concept that, allowed to run amok, could easily swallow the jurisprudence construing the specific guarantees of the Bill of Rights and determining minimum standards of procedural due process."[41] The Fifth Circuit limits which actions may be aggregated under the cumulative error doctrine to encourage uniformity in its application.[42] An unrestricted cumulative harm framework, the Fifth Circuit held, results in a "free-floating fundamental fairness rule [which] subverts the uniformity of results that is the basic goal of an organized legal system."[43] The Fifth Circuit continued and explained that "one defendant may persuade the court that his five non-constitutional errors denied fundamental fairness, while another, less imaginative, may be denied relief simply because he cited only four of the same errors out of the record."[44] Although courts have adopted limitations, the cumulative harm framework is the analytical method to determine when a defendant was deprived of their right to a fair trial.[45]

B. Ineffective Assistance of Counsel

The Sixth Amendment grants a criminal defendant the right to reasonably effective assistance of counsel.[46] The Supreme Court, in *Strickland v. Washington*, held that a defendant is deprived of this right when (1) "counsel's representation fell below an objective standard of reasonableness,"[47] and (2) that

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imaginative, may be denied relief simply because he cited only four of the same errors out of the record.").

[41] *Id.* at 1457.

[42] *Id.* at 1458 ("To avert such a conflict . . . we can at least eliminate certain types of complaints that should generally not be considered in cumulative error review. By this process of elimination, minimum standards at least normally applicable to a cumulative error claim of constitutional dimension may be expressed.").

[43] *Id.* at 1458.

[44] *Id.*

[45] Taylor v. Kentucky, 436 U.S. 478, 487 n.15 (1978) ("Because of our conclusion that the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness in the absence of an instruction as to the presumption of innocence, we do not reach petitioner's further claim that the refusal to instruct that an indictment is not evidence independently constituted reversible error.").

[46] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."); McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) ("It has long been recognized that the right to counsel is the right to the effective assistance of counsel."); Strickland v. Washington, 466 U.S. 668, 687 (1984) ("As all the Federal Courts of Appeals have now held, the proper standard for attorney performance is that of reasonably effective assistance.").

[47] *Strickland*, 466 U.S. at 687–88.

such deficient performance "prejudiced the defense."[48] Using this test, the *Strickland* Court specified that a reviewing court "hearing an ineffectiveness claim must consider the *totality* of the evidence before the judge or jury."[49] The errors of counsel, under a *Strickland* analysis, are not analyzed in isolation, but are analyzed for their aggregate effect.[50] Therefore, a court reviewing an ineffective assistance of counsel claim adopts the cumulative harm framework as its analytical methodology.[51]

The cumulative harm framework under *Strickland* is also temporally expansive.[52] Its review includes the various stages of a criminal case, including "the course of investigation[s], plea negotiations, trial, or appeal."[53] For example, the *Strickland* Court held that "[i]f counsel does not conduct a substantial investigation into each of several plausible lines of defense, assistance may nonetheless be effective."[54] The *Strickland* Court also held that, "[f]or purposes of describing counsel's duties, therefore, [the] proceeding need not be distinguished from an ordinary trial."[55]

C. Prosecutorial Misconduct Claims

The cumulative harm framework is the analytical method adopted by courts reviewing a prosecutorial misconduct claim.[56]

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[48] *Id.* at 687.

[49] *Id.* at 695 (emphasis added).

[50] *Id.* ("[T]he question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury.").

[51] *See* Porter v. McCollum, 558 U.S. 30, 41 (2009) ("To assess that probability [of whether the defendant's counsel was ineffective], we consider 'the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding'—and 'reweig[h] it against the evidence in aggravation.'") (quoting Williams v. Taylor, 529 U.S. 362, 397–398 (2000)). *See also* Berghuis v. Thompkins, 560 U.S. 370, 389 (2010) ("In assessing prejudice, courts 'must consider the totality of the evidence before the judge or jury.'") (quoting *Strickland*, 466 U.S. at 695).

[52] *Strickland*, 466 U.S. at 698 ("The facts as described above . . . make clear that the conduct of respondent's counsel at and before respondent's sentencing proceeding cannot be found unreasonable.").

[53] Abrams & Garrett, *supra* note 16, at 1318. *See* Missouri v. Frye, 566 U.S. 134, 140 (2012) ("It is well settled that the right to the effective assistance of counsel applies to certain steps before trial. . . . Critical stages include arraignments, postindictment interrogations, postindictment lineups, and the entry of a guilty plea.").

[54] *Strickland*, 466 U.S. at 681.

[55] *Id.* at 687.

[56] Kyles v. Whitley, 514 U.S. 419, 421 (1995) ("[W]e follow the established rule that the state's obligation under *Brady v. Maryland* . . . to

In *Brady v. Maryland*,[57] the Supreme Court held that it is unconstitutional for the prosecution to suppress evidence favorable to a defendant upon request where the evidence is "material either to guilt or to punishment."[58] Material evidence has included, "for example, statements of witnesses or physical evidence that conflicts with the prosecution's witnesses, and evidence that could allow the defense to impeach a witness' credibility."[59] Under *Brady*, a reviewing court does not ask "whether each piece of evidence suppressed led to an unfair trial."[60] Rather, a *Brady* claim "turns on the cumulative effect of all such evidence suppressed by the government,"[61] because a reviewing court is required to assess the "net effect of the evidence withheld by the State."[62] Thus, a reviewing court adopts the cumulative harm framework when evaluating a *Brady* claim.[63]

D. "Cruel and Unusual" Prison Conditions

In *Rhodes v. Chapman*, the Supreme Court adopted the cumulative harm framework to determine whether the

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disclose evidence favorable to the defense, turns on the cumulative effect of all such evidence suppressed by the government.") (citations omitted). *See also*, Wearry v. Cain, 136 S.Ct. 1002, 1007 (2016) ("[T]he state postconviction court improperly evaluated the materiality of each piece of evidence in isolation rather than cumulatively.").

[57] Brady v. Maryland, 373 U.S. 83 (1963). In this case, the defendant admitted that he was involved in a murder, but denied that he conducted the killing by arguing that his co-defendant committed the killing. The defendant's counsel requested that the prosecution allow him to examine the co-defendant's extrajudicial statements. The prosecution gave the defense counsel some statements, but suppressed one statement of the co-defendant in which the co-defendant admitted the homicide. This particular statement was withheld by the prosecution and was not uncovered by defense counsel until after the defendant had been tried, convicted, and sentenced, and after the defendant's conviction had been affirmed. *See id.* at 84.

[58] *Id.* at 87.

[59] Cadene A. Russell, Comment, *When Justice Is Done: Expanding a Defendant's Right to the Disclosure of Exculpatory Evidence on the 51st Anniversary of* Brady v. Maryland, 58 HOW. L.J. 237, 242–43 (2014) (footnote omitted).

[60] Abrams & Garrett, *supra* note 16, at 1319.

[61] *Kyles*, 514 U.S. at 420.

[62] *Id.*

[63] *See, e.g.*, Turner v. United States, 137 S.Ct. 1885, 1895 (2017) ("We conclude only that in the context of this trial, with respect to these witnesses, the cumulative effect of the withheld evidence is insufficient to 'undermine confidence' in the jury's verdict . . . .") (quoting *Kyles*, 514 U.S. at 434). *See also*, Cone v. Bell, 556 U.S. 449, 476 (2009) ("Although we conclude that the suppressed evidence was not material to Cone's conviction for first-degree murder, the lower courts erred in failing to assess the cumulative effect of the suppressed evidence with respect to Cone's capital sentence.").

government's incarceration practices constituted cruel and unusual punishment.[64] The *Rhodes* Court held that prison "conditions . . . alone or *in combination*, may deprive inmates of the minimal civilized measure of life's necessities."[65] In effect, as noted by Justice Brennan's concurrence in *Rhodes*, the *Rhodes* majority adopted "totality-of-the-circumstances test" by evaluating the cumulative effect of individual conditions of confinement to determine whether such conditions were cruel or unusual.[66] Thus, the accumulation of individual harms could rise to a cognizable constitutional violation, even if the harms resulting from each condition of confinement, in isolation, would not rise to a constitutional violation.[67]

The Supreme Court, in *Wilson v. Seiter*, however, tailored the use of the cumulative harm framework.[68] Pearly L. Wilson and another inmate argued that their overall prison conditions were cruel and unusual.[69] Wilson advanced his claim by aggregating the harm from the following conditions: Wilson was forced sleep in a double bunk with another inmate; Wilson's clothing provided by the prison was inadequate in keeping inmates warm; Wilson's cell insulation was inadequate in keeping cell temperature warm during the winter; the summer temperatures were excessively high, resulting in heat-related rashes for some inmates and created respiratory problems for others; the food services were a threat to the inmate's health because of inadequate sanitation, ventilation, and sewage; and the restrooms were dirty, slippery, and malodorous.[70] Relying on *Rhodes*, Wilson argued that these conditions "in combination" resulted in overall cruel and unusual prison conditions.[71] Wilson further argued that these conditions were dependent upon each

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[64] Rhodes v. Chapman, 452 U.S. 337 (1981); U.S. CONST. amend. VIII, ("Excessive bail shall not be required . . . nor cruel and unusual punishments inflicted.").

[65] *Rhodes*, 452 U.S. at 347 (emphasis added).

[66] *Id.* at 363 (Brennan, J., concurring).

[67] *Id.* at 347. *See also*, Hutto v. Finney, 437 U.S. 678, 687 (1978) ("We find no error in the court's conclusion that, taken as a whole, conditions in the isolation cells continued to violate the prohibition against cruel and unusual punishment.").

[68] Wilson v. Seiter, 501 U.S. 294 (1991).

[69] Brief for Petitioner, Wilson v. Seiter, 501 U.S. 294 (1991) (No. 18-2937), 1990 WL 505735, at *37 n.32 [hereinafter Brief for *Wilson*] ("While the overcrowding might not be unconstitutional in itself, because the effect of overcrowding cannot be separated from the overall conditions of the unit, the trial court on remand should not arbitrarily exclude evidence of the impact of overcrowding on the overall conditions in the dormitory.").

[70] *Id.* at *3.

[71] *Id.* at *36 (quoting *Rhodes*, 452 U.S. at 347).

other, as "the adequacy of the ventilation is directly related to the degree of crowding in the facility. The reasonableness of using two fans to supply ventilation for a dormitory turns on the number of bodies in the dormitory."[72]

The Supreme Court rejected Wilson's claim.[73] The Supreme Court explained that "*[s]ome* conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise."[74] The *Wilson* Court thus clarified that the cumulative harm framework can only be used to combine the effects of facts relating to a single condition of confinement, such as aggregating the effects of "low cell temperature at night combined with a failure to issue blankets" to demonstrate insufficient warmth.[75]

Therefore, under *Wilson*, the Supreme Court does not permit a claim based on what this Note calls *cross-categorical cumulation*.[76] For example, cross-categorical cumulation would attempt to prove that overall conditions of confinement would amount to an Eighth Amendment violation by aggregating the harm from (1) cold nighttime cell conditions, (2) the deprivation of exercise because inmates were confined to their cells for twenty hours per day, and (3) inadequate sustenance because inmates were only provided with one meal a day. In this hypothetical, each fact points to three distinct categories: (1) insufficient heat, (2) lack of exercise, (3) and insufficient food. Each fact does not reinforce either of the three claims—a lack of exercise due to required confinement does not support the proposition that there was insufficient heat, and vice versa.

Wilson attempted to persuade the Supreme Court that cross-categorical cumulation was the appropriate analytical method for his claim by arguing that adequate ventilation depends on the amount of persons within a particular cell.[77] The

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[72] *Id.*

[73] *Wilson*, 501 U.S. at 305 ("Nothing so amorphous as 'overall conditions' can rise to the level of cruel and unusual punishment when so specific deprivation of a single human need exists.")

[74] *Id.* at 304 (quoting *Rhodes*, 452 U.S. at 347).

[75] *Id.*

[76] This Note uses the term "cross-categorical cumulation" to refer to the cumulation of nonmutual enforcing facts or actions.

[77] *See* Brief for *Wilson*, *supra* note 69, at *36–37 ("Certainly the adequacy of the ventilation is directly related to the degree of crowding in the facility. The reasonableness of using two fans to supply ventilation for a dormitory turns on the number of bodies in the dormitory. Minimally adequate

Wilson Court rejected the cross-categorical cumulation claim.[78] The *Wilson* Court reasoned that even if "some prison conditions may interact in this [cumulative] fashion [it] is a far cry from saying that all prison conditions" aggregate together like a "seamless web" to find an Eighth Amendment violation.[79] The *Wilson* Court further explained that there cannot be a finding of "cruel and unusual punishment when no specific deprivation of a single human need exists."[80] Stated differently, in applying the cumulative harm framework, the Seventh Circuit's reasoned, that *Rhodes* does not "allow a number of otherwise unquestionably constitutional conditions to become unconstitutional by their aggregation."[81] Many courts, in determining whether conditions of confinement violate the Eighth Amendment, both employ and restrict the use of the cumulative harm framework.[82]

E. The Cumulative Harm Framework Within Asylum Law

The United States, under the 1951 United Nations Convention Relating to the Status of Refugees,[83] the 1967 United

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ventilation for 143 prisoners is different from the ventilation necessary for the smaller number of prisoners that could be accommodated were the dormitory not double-bunked.").

[78] *See Wilson*, 501 U.S. at 305 ("[O]ur statement in *Rhodes* was not meant to establish the broad proposition that petitioner asserts. *Some* conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise—for example, a low cell temperature at night combined with a failure to issue blankets.") (quoting *Rhodes*, 452 U.S. at 347).

[79] *Id.*

[80] *Id.*

[81] Madyun v. Thompson, 657 F.2d 868, 874 n.10 (7th Cir.1981).

[82] *See, e.g.*, Mammana v. Federal Bureau of Prisons, 934 F.3d 368, 374 (3d Cir. 2019) (aggregating the harm "denied bedding, and exposed to low cell temperatures and constant bright lighting for four days" to find a "denial of 'the minimal civilized measure of life's necessities,' in particular, warmth and sufficient sleep") (quoting *Rhodes*, 452 U.S. at 347); Counts v. Newhart, 951 F.Supp. 579, 582, 586–87 (E.D.V.A. 1996), *aff'd*, 116 F.3d 1473 (4th Cir. 1997) (refusing to accept that overall prison condition were cruel and unusual by aggregating the harm resulting from (1) three inmates sharing and sleeping in a cell designed for two inmates, (2) the messiness resulting from overcrowding, (3) the presence of insects and vermin, arguably caused by the overcrowding, (4) inadequate staff for security, (5) inadequate allocation of recreation time, (6) an inadequate law library and, (7) the inability to properly practice one religion); Tokar v. Armontrout, 97 F.3d 1078, 1082 (8th Cir. 1996) (rejecting an Eighth Amendment claim based on the aggregation broken window and a leaky roof because the plaintiff did not have a window in his cubicle and because the plaintiff was provided blankets).

[83] Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137.

Nations Protocol Relating to Status of Refugees,[84] and the United States Refugee Act of 1980,[85] is obligated to provide relief to persons fleeing from persecution in the form of refugee status or asylum.[86] Although the term "persecution"[87] is not clearly defined by statute, [88] "courts have interpreted the phrase to require a showing of something more than mere discrimination or harassment."[89] When determining whether an asylum applicant has faced persecution, many circuit courts adopt the cumulative

[84] Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

[85] Refugee Act of 1980, Pub. L. No. 96-212 § 201, 94 Stat. 102 (1980).

[86] *See e.g.*, Marisa S. Cianciarulo, *Refugees in Our Midst: Applying International Human Rights Law to the Bullying of LGBTQ Youth in the United States*, 47 COLUM. HUM. RTS. L. REV. 55, 72–78 (2015); Anjum Gupta, *Dead Silent: Heuristics, Silent Motives, and Asylum*, 48 COLUM. HUM. RTS. L. REV. 1, 4–15 (2016); Rachel D. Settlage, *Affirmatively Denied: The Detrimental Effects of a Reduced Grant Rate for Affirmative Asylum Seekers*, 27 B.U. INT'L L.J. 61, 63–65 (2009) (discussing the United States' obligations under international and domestic law to provide asylum for those who have experienced sufficient harm to rise to the level of persecution).

[87] 8 U.S.C. § 1101(a)(42) (defining a "refugee" as any person unable or unwilling to return to their home country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion").

[88] *See* Shai v. Gonzales, 416 F.3d 587, 588 (stating that the court could not find "a case in which the BIA [the Board of Immigration Appeals] has defined 'persecution'"); *see generally*, Rempell, *supra* note 16, at 317–18 ("Persecution is the 'fundamental concept at the core of the refugee definition,' yet its meaning remains largely undefined.") (quoting In re T-Z-, 24 I. & N. Dec. 163, 167 (B.I.A. 2007)).

[89] Gupta, *supra* note 86, at 5–6.

harm framework, [90] including the Second,[91] Third,[92] Seventh,[93] Ninth,[94] and Tenth,[95] Circuit courts.

For example, in *Bejko v. Gonzales*, the Seventh Circuit held that an asylum applicant's harms are "not [viewed] in isolation from the other allegations; it is axiomatic that the evidence of persecution must be considered as a whole, rather than piecemeal."[96] Similarly, the Second Circuit, in *Edimo-Doualla v. Gonzales*, also adopted the cumulative harm framework to evaluate the applicant's claim.[97]

The Second Circuit's approach in this case was temporally expansive.[98] The *Edimo-Doualla* court analyzed the cumulative harm from multiple incidents over the span of ten years—occurring in 1991, 1996, 1997, and 2001.[99] The *Edimo-*

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[90] *See* Rempell, *supra* note 16, at 317 ("[T]he cumulative harm model recognizes as germane to a persecution assessment both the number of incidents an applicant experiences and the severity of each harm. The model's persecution inquiry is grounded in the foundational premise that instances of harm should not be viewed in isolation.").

[91] Poradisova v. Gonzales, 420 F.3d 70, 80 (2d Cir. 2005) ("Taking isolated incidents out of context may be misleading. The cumulative effect of the applicant's experience must be taken into account.") (citations omitted).

[92] Fei Mei Cheng v. Att'y Gen., 623 F.3d 175, 192 (3d Cir. 2010) ("Moreover, in determining whether actual or threatened mistreatment amounts to persecution, '[t]he cumulative effect of the applicant's experience must be taken into account' because '[t]aking isolated incidents out of context may be misleading.'") (quoting Manzur v. U.S. Dep't Homeland Sec.,494 F.3d 281, 290 (2d Cir. 2007)).

[93] Chen v. Holder, 604 F.3d 324, 333–35 (7th Cir. 2010) (reversing a ruling of the Board of Immigration Appeals for failing to analyze the cumulative impact of the multiple hardships faced by the asylum applicant).

[94] Krotova v. Gonzales, 416 F.3d 1080, 1084 (9th Cir. 2005) ("Even when a single incident does not rise to the level of persecution, 'the cumulative effect of several incidents may constitute persecution.'") (quoting Surita v. Immigr. & Naturalization Serv., 95 F.3d 814, 819 (9th Cir. 1996)).

[95] Ritonga v. Holder, 633 F.3d 971, 975 (10th Cir. 2011) (adopting the cumulative harm framework by stating, "[w]e do not look at each incident in isolation, but instead consider them collectively, because the cumulative effects of multiple incidents may constitute persecution").

[96] Bejko v. Gonzales, 468 F.3d 482, 486 (7th Cir. 2006) (quoting Cecai v. Gonzales, 440 F.3d 897, 899 (7th Cir. 2006)).

[97] Edimo-Doualla v. Gonzales, 464 F.3d 276, 283 (2d Cir. 2006) ("Incidents alleged to constitute persecution, however, must be considered cumulatively. . . . A series of incidents of mistreatment may together rise to the level of persecution even if each incident taken alone does not.").

[98] *Id.* ("There was an additional fundamental error in the IJ's analysis. In assessing the question of whether Edimo-Doualla's mistreatment amounted to persecution, the IJ considered the 1991 and 1996 incidents separately from the 1997 and 2000 incidents. Incidents alleged to constitute persecution, however, must be considered cumulatively.").

[99] *Id.* ("[F]our beatings during a 1991 arrest; a two-day arrest in 1996; multiple beatings and other forms of abuse during a three-to-five-day arrest in

Doualla court held that the "incidents alleged to constitute persecution . . . must be considered cumulatively."[100] Thus, the Second Circuit's application of the cumulative harm framework allows for a "series of incidents of mistreatment [to] rise to the level of persecution even if each incident taken alone does not."[101]

III. THE JUDICIARY'S APPLICATIONS OF THE "SEQUENTIAL APPROACH"

This section explores the "sequential approach."[102] This framework analyzes each occurrence of harm experienced by an individual in isolation.[103] Under this approach, unlike the cumulative harm framework, aggregation of harm is not permitted.[104] In certain cases, this framework analyzes statutes in isolation.

A. The "Sequential Approach" of the Fourth Amendment

The Fourth Amendment protects individuals against unreasonable government searches and seizures.[105] In determining whether a "search"[106] has occurred, a claimant must show (1) "that a person [has] exhibited an actual (subjective) expectation of privacy," and (2) "that the expectation [is] one that society is prepared to recognize as 'reasonable.'"[107] Courts[108] and

1997; a brief detention at the airport in 2000 during which he was forced to sign an arrest warrant without being allowed to read it; a break-in in which his property was seized; multiple beatings in 2000 during each of six days that Edimo-Doualla was held at a police station.").

[100] *Id.* at 283.

[101] *Id.*

[102] Kerr, *supra* note 15, at 314. (defining the "sequential approach" of Fourth Amendment analysis as taking "snapshot of each discrete step and assess[ing] whether that discrete step at that discrete time constitutes a search").

[103] *Id.*

[104] *See id.*

[105] U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

[106] *Id.*

[107] Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

[108] *See, e.g.*, *id.* at 360 (Harlan, J., concurring) ("[A] person has a constitutionally protected reasonable expectation of privacy . . . ."). *See also*, United States v. Knotts, 460 U.S. 276, 281 (1983) ("A person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.").

commentators[109] have called this the reasonable expectation of privacy test.

The reasonable expectation of privacy test does not adopt the cumulative harm framework, but rather adopts what commentators have called the "sequential approach."[110] This analytical method isolates each government action and then independently reviews the constitutionality of each discrete act.[111] *Terry v. Ohio* provides an informative example.[112] In this case, a police officer stopped Terry and subsequently patted the outside of his clothing to determine whether Terry had a weapon.[113] In applying the sequential approach, the Supreme Court first analyzed whether the officer's seizing of Terry violated the Fourth Amendment, and then analyzed whether the officer's pat-down was unconstitutional.[114] Because the officer's initial seizing of Terry was lawful, the Supreme Court then reviewed the constitutionality of the officer's patting down the outside of Terry's clothing.[115] The Supreme Court did not evaluate whether Terry had suffered a Fourth Amendment violation by aggregating harm from both the stop and the

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[109] Kerr, *supra* note 15, at 316–17; *see* Stephen P. Jones, *Reasonable Expectations of Privacy: Searches, Seizures, and the Concept of Fourth Amendment Standing*, 27 U. MEM. L. REV. 907, 912–25 (1997) (describing how a court may analyze a "reasonable expectation of privacy" to evaluate Fourth Amendment claims). *See, e.g.*, JOSEPH G. COOK, 1 CONSTITUTIONAL RIGHTS OF THE ACCUSED 3d § 4:2 (2019); Timothy T. Takahashi, *Drones and Privacy*, 14 COLUM. SCI. & TECH. L. REV. 72 (2013).

[110] Kerr, *supra* note 15, at 315 ("Fourth Amendment analysis traditionally has followed what I call the sequential approach: to analyze whether government action constitutes a Fourth Amendment search or seizure, courts take a snapshot of the act and assess it in isolation."). *See, e.g*, United States v. Moses, 540 F.3d 263, 272 (4th Cir. 2008) (examining whether the act of inserting a key into the door was unlawful before analyzing the opening of the door); United States v. Jones, 565 U.S. 400, 410–12 (2012) (holding that placing a Global-Positioning-System device (GPS) on an individual's car "encroached on a protected area," and thereby foregoing an analysis of whether the totality of the data produced by the GPS was unlawful).

[111] *See Moses*, 540 F.3d at 272; *Jones*, 565 U.S. at 410–12.

[112] Terry v. Ohio, 392 U.S. 1 (1968).

[113] *Id.* at 7.

[114] *Id.* at 19 ("In this case there can be no question, then, that Officer McFadden 'seized' petitioner and subjected him to a 'search' when he took hold of him and patted down the outer surfaces of his clothing. We must decide whether at that point it was reasonable for Officer McFadden to have interfered with petitioner's personal security as he did.").

[115] *Id.* at 23 ("The crux of this case, however, is not the propriety of Officer McFadden's taking steps to investigate petitioner's suspicious behavior, but rather, whether there was justification for McFadden's invasion of Terry's personal security by searching him for weapons in the course of that investigation.").

subsequent frisk.[116] Thus, in applying the reasonable expectation of privacy test, a reviewing court takes a snapshot of each government action and evaluates each action isolation.[117] As the First Circuit noted, this "step-by-step analysis is inherent" in the Fourth Amendment and demonstrates the absence of aggregation within the sequential approach. [118]

B. Determining an "Undue Burden": Application of Both the Cumulative Harm Framework and the Sequential Approach

As discussed in the Part I, the government may not create an "undue burden" for a pregnant person seeking an abortion.[119] A single jurisdiction typically has multiple laws which prevent a woman from receiving an abortion, such as gestational limits, state-mandated counseling, mandatory waiting periods, limitations in funding, limitations of private insurance's coverage of abortion, which results in a general reduction of doctors and medical facilities due to increased regulations.[120] Yet, in analyzing the undue burden from these laws, courts use *both* the sequential approach and the cumulative harm framework. A recent abortion case, *Whole Woman's Health v. Hellerstedt*,[121] demonstrates the application of both frameworks.[122]

In *Whole Woman's Health*, the Supreme Court considered the constitutionality of two provisions of a Texas law known as HB 2.[123] In analyzing each statutory provision in isolation—first, the provision regarding admitting privileges, and second, the provision regarding the surgical requirements—the Court applied the sequential approach.[124] The Court, in its application of this approach, did not address the impact of previously passed abortion restrictions, even though they were mentioned.[125]

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[116] *See id.*

[117] *Kerr*, *supra* note 15, at 315.

[118] United States v. Beaudoin, 362 F.3d 60, 70–71 (1st Cir. 2004).

[119] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874 (1992).

[120] *See* GUTTMACHER INST., *supra* note 7.

[121] Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).

[122] *See* Fetrow, *supra* note 14, at 328 ("Indeed, both the parties and the Court [in *Whole Woman's Health*] considered the admitting privileges requirement and the surgical center requirement separately—not looking at whether the two challenged laws *together* might impose a greater burden on women than either of the two acting alone.") (internal citations omitted).

[123] *Whole Woman's Health*, 136 S. Ct. at 2300.

[124] *See id.* at 2310. ("[W]e first consider the admitting-privileges requirement."); *id.* at 2314 ("The second challenged provision of Texas' new law sets forth the surgical-center requirement.").

[125] *Id.* ("Prior to enactment of the new requirement, Texas law required abortion facilities to meet a host of health and safety requirements. Under those

Yet, in limiting the parameters of their analysis, Supreme Court evaluated the *cumulative* harm caused "admitting privileges" by reviewing the *cumulative* harm resulting from this single provision.[126] For example, the Court found that admitting privileges caused the closing of about half of the abortion clinics in the state, from about forty to twenty clinics.[127] These closures resulted in "fewer doctors, longer waiting times, and increased crowding," and also meant that women now had to travel longer distances to find a provider.[128] The Supreme Court specified that while longer distances alone were sometimes insufficient to result in a constitutional violation, these impacts "when taken together" could result in an undue burden.[129] Here, the Supreme Court permitted *some* aggregation of harm, but limited its overall analytical framework to the cumulative effects of a single statutory provision.[130]

The Supreme Court continued its application of the sequential approach by then analyzing the second challenged law—specifically the requirement that abortion facilities meet the standard of "ambulatory surgical centers."[131] This provision required a specific number of staff at a clinic in case of an emergency and included requirements of the physical building, specifically within the surgical suite.[132] The Court found that the surgical requirements would reduce the "number of abortion facilities available to seven or eight facilities."[133] As a result, "the number of abortions that the clinics would have to provide would rise from 14,000 abortions annually to 60,000 to 70,000—an increase by a factor of about five."[134] Thus, although the Supreme Court cumulated the harm resulting from the total impacts resulting each statutory provision, the Supreme Court still

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pre-existing laws, facilities were subject to annual reporting and recordkeeping requirements . . . .").

[126] *See id* at 2313 ("But here, those increases are but one additional burden, which, when taken together with others that the closings brought about, and when viewed in light of the virtual absence of any health benefit, lead us to conclude that the record adequately supports the District Court's 'undue burden' conclusion.") (internal citations omitted).

[127] *Id.* at 2312.

[128] *Id.* at 2313.

[129] *Id.*

[130] *See id.* at 2310–13.

[131] *Id.* at 2314.

[132] *Id.* 2314–15 (For example, HB 2 required "including specific corridor widths," specific "advanced heating, ventilation, and air conditioning system[s]," and a specified "piping system and plumbing requirement").

[133] *Id.* at 2316.

[134] *Id.*

declined to evaluate the *cumulative impact* of the abortion regulations.[135]

C. An Explicit Rejection of the Cumulative Harm Framework

As noted above, a criminal defendant enjoys the right to reasonable effective assistance of counsel.[136] The Supreme Court, in *Strickland v. Washington*, held that a defendant is deprived of this right when (1) "that counsel's representation fell below an objective standard of reasonableness,"[137] and (2) that such deficient performance "prejudiced the defense."[138] Circuit courts disagree on whether the cumulative harm framework can be applied to *Strickland*'s second prong—whether counsel's deficient performance prejudiced the defendant.[139] The First,[140] Second,[141] Third,[142] Fifth,[143] Seventh,[144] and Ninth[145] Circuits

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[135] *See* Fetrow, *supra* note 14, at 328 ("Indeed, both the parties and the Court considered the admitting privileges requirement and the surgical center requirement separately—not looking at whether the two challenged laws *together* might impose a greater burden on women than either of the two acting alone.").

[136] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."); McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) ("It has long been recognized that the right to counsel is the right to the effective assistance of counsel."); Strickland v. Washington, 446 U.S. 668, 687 (1984) ("As all the Federal Courts of Appeals have now held, the proper standard for attorney performance is that of reasonably effective assistance.").

[137] *Strickland*, 446 U.S. at 687–88.

[138] *Id.* at 687.

[139] *See* Moyer, *supra* note 22, at 466–74.

[140] Dugas v. Copland, 428 F.3d 317, 335 (1st Cir. 2005) ("*Strickland* clearly allows the court to consider the cumulative effects of counsel's errors in determining whether a defendant was prejudiced.") (quoting Kubat v. Thieret, 867 F.2d 351, 370 (7th Cir. 1989)).

[141] Lindstadt v. Keane, 239 F.3d 191, 203–04 (2d Cir. 2001) ("Taken together, ineffectiveness permeated all the evidence. . . . We assess the impact of these errors in the *aggregate*.").

[142] *See* Breakiron v. Horn, 642 F.3d 126 (3d Cir. 2011) ("We conclude that [the defendant's] claim[] of ineffective assistance of counsel, whether considered alone or cumulatively, require relief from his robbery conviction.").

[143] Richards v. Quarterman, 566 F.3d 553, 571–72 (5th Cir. 2009) (basing its decision on "review of the record and consider[ation of] the cumulative effect of [counsel's] inadequate performance").

[144] Sussman v. Jenkins, 636 F.3d 329, 360–61 (7th Cir. 2011) ("Here, however, we are not faced with a single error by counsel and, therefore, must consider the cumulative impact of this error when combined with counsel's [other errors]."); Goodman v. Bertrand, 467 F.3d 1022, 1023 (7th Cir. 2006) ("[T]he cumulative effect of counsel's errors constituted ineffective assistance of counsel.").

[145] Ewing v. Williams, 596 F.2d 391, 395–96 (9th Cir. 1979) ("And even where, as here, several specific errors are found, it is the duty of the Court to make a finding as to prejudice, although this finding may either be "cumulative" or focus on one discrete blunder in itself prejudicial.").

adopt the cumulative harm framework in determining whether a defendant was prejudiced by counsel's deficient performance.

In contrast, the Eight Circuit rejects the cumulative harm framework in determining whether a defendant was prejudiced by counsel's ineffectiveness.[146] *Pryor v. Norris* is an instructive case.[147] Pryor alleged that her trial counsel was ineffective for (1) failing to timely object to questions regarding possession of cocaine; (2) failing to request a mistrial immediately following improper testimony from a prosecution witness; (3) opening the door to the prosecutor's prejudicial remarks during summation concerning her potential sentence; and (4) "not challenging the introduction of a transcript, rather than the original tapes," of audio-recorded drug transactions.[148] The *Pryor* court rejected this argument, reasoning that "'cumulative error does not call for habeas relief, as each habeas claim must stand or fall on its own.'"[149] *Pryor* did not further explain its rejection of the cumulative harm framework. However, as reasoned by the Eight Circuit in *Wainwright v. Lockhart*, "[e]rrors that are not unconstitutional individually cannot be added together to create a constitutional violation. Neither [the] cumulative effect of trial errors nor [the] cumulative effect of attorney errors are grounds for habeas relief."[150]

IV. EVALUATING THE CUMULATIVE HARM FRAMEWORK

This section analyzes the advantages and disadvantages of the cumulative harm framework. It argues that the cumulative harm framework more appropriately analyzes harms from the perspective of the right-holder. This perspective is necessary because "[t]he Constitution protects individuals," and rights should be viewed through the lens of the right-holder.[151] This section then argues that the judiciary has the capacity to more broadly adopt the framework because of its similarity between a "totality of the circumstances" analysis.[152] Finally, and most

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[146] Hall v. Luebbers, 296 F.3d 685, 692 (8th Cir. 2002) ("[P]etitioner cannot build a showing of prejudice on a series of errors, none of which would by itself meet the prejudice test.").

[147] Pryor v. Norris, 103 F.3d 710 (8th Cir. 1997).

[148] *Id.* at 711–12.

[149] *Id.* at 714 n.6 (citations omitted) (quoting Girtman v. Lockhart, 942 F.2d 468, 475 (8th Cir. 1991)).

[150] Wainwright v. Lockhart, 80 F.3d 1226, 1233 (8th Cir. 1996).

[151] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 896 (1992).

[152] *See, e.g.*, United States v. Arvizu, 534 U.S. 266, 273 (2002) ("When discussing how reviewing courts should make reasonable-suspicion determinations, we have said repeatedly that they must look at the 'totality of

importantly, this section argues that the cumulative harm framework is a necessary tool to combat second-generation forms of discrimination.

This section also critiques the cumulative harm framework. It argues that the framework is difficult to administer because there is no clear limit on which facts should be cumulated. It also argues that the framework permits unrestrained judicial review. Further, the cumulative harm framework would present issues in facial challenges of law and in evaluating prospective harm. This section concludes by arguing for a greater adoption of the cumulative harm framework.

A. Advantages of the Cumulative Harm Framework

1. The Cumulative Harm Framework Evaluates the Harm from the Perspective of the Right-Holder

The cumulative harm framework more appropriately reflects one's lived experience as compared to the "sequential approach."[153] Take, for example, a pregnant person's right to abort a fetus.[154] A pregnant person does not experience each regulation limiting access to an abortion, such as gestational limits, state-mandated counseling, mandatory waiting periods, limitations in funding, and general reduction of doctors and medical facilities due to increased regulations, in isolation.[155] Rather, in attempt to receive this medical treatment, that person experiences *every* regulation before they can receive an abortion.[156] A law review article provides an instructive hypothetical of one's experience:

> Imagine you are a woman living in Lubbock, Texas (the eleventh most populous city in Texas with around a quarter-of-a-million people)[,] and you want to have an abortion. As a result of Texas'

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the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing. . . . This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the *cumulative* information available to them that 'might well elude an untrained person.'") (emphasis added) (citations omitted) (quoting United States v. Cortez, 449 U.S. 411, 417–18 (1981)).

[153] *See* Fetrow, *supra* note 14, at 332–33.

[154] Roe v. Wade, 410 U.S. 113, 152–53 (1973).

[155] GUTTMACHER INST., *supra* note 7.

[156] *See* Fetrow, *supra* note 14, at 332–33. *See also*, Marlow Svatek, *Seeing the Forest for the Trees: Why Courts Should Consider Cumulative Effects in the Undue Burden Analysis*, 41 N.Y.U. REV. L. & SOC. CHANGE 121, 133–34 (2017).

> TRAP [Targeted Regulation of Abortion Providers] laws, including the admitting-privileges requirement and ambulatory-surgical-center requirement . . . there were only ten abortion providers in Texas as of June 2015, a state that spans over 260,000 square miles. The only cities that had clinics were Austin, San Antonio, Dallas, Fort Worth, Houston, and McAllen, which were all on the other side of the state. Therefore, you would have had to drive four-and-a-half hours to get to the nearest clinic in Fort Worth. Once you got to Fort Worth, you would have had to undergo state-directed counseling and then waited another twenty-four hours before you could actually have the abortion procedure. This means that you would have to either spend at least one night in Fort Worth or make the 600-mile round trip twice.[157]

As demonstrated above, a woman cannot experience specific regulations on abortion in isolation—she experiences the *entirety* of the regulatory regime.[158]

The entirety of a pregnant person's experience, however, is not the perspective adopted by the Supreme Court in evaluating this right.[159] Rather, as noted above, the Supreme Court adopts the sequential approach by evaluating "regulation[s] in isolation and [by asking] whether the specific law imposed health risks on women, not whether women actually experienced an undue burden."[160] Thus, the regulations that have limited abortions clinics to eight cities in the state of Texas, the mandatory waiting period, and other regulations, cannot be

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[157] Svatek, *supra* note 156, at 133–34 (internal citations omitted). As of 2019, there are also abortion providers in El Paso and Waco. *Texas Abortion Clinic Map*, FUND TEX. CHOICE, https://fundtexaschoice.org/index.php/ftc-need-help/texas-abortion-clinic-map (Oct. 2019).

[158] *See id.* ("[F]rom a practical perspective, women who are seeking abortions do not experience individual restrictions in isolation. Rather, they experience the collective pressure of various limitations on their reproductive freedom and autonomy.").

[159] *See* Gonzales v. Carhart, 550 U.S. 124, 161 (2007). *See also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 879–80 (1992) (O'Connor, Kennedy, & Souter, JJ.) (plurality opinion) (medical emergency provision); *id.* at 881–87 (O'Connor, Kennedy, & Souter, JJ.) (plurality opinion) (informed consent); *id.* at 887–98 (O'Connor, Kennedy, & Souter, JJ.) (majority opinion) (spousal notice requirement); *id.* at 899–900 (O'Connor, Kennedy, & Souter, JJ.) (plurality opinion) (parental consent); *id.* at 900–01 (O'Connor, Kennedy, & Souter, JJ.) (plurality opinion) (recordkeeping and reporting requirements).

[160] Fetrow, *supra* note 14, at 326.

challenged together.[161] In contrast, the cumulative harm framework, by evaluating harms from the perspective of the right-holder, analyzes the *total* burden faced by a woman seeking an abortion.[162] Only through the aggregation of harm can a reviewing court realize the true lived experience of plaintiffs.

2. Courts Have the Institutional Capacity for a Broader Adoption of the Cumulative Harm Framework

Reviewing courts are well-equipped to more broadly apply the cumulative harm framework. The "totality of the circumstances" analytical framework, mirrors the logic of the cumulative harm framework.[163] This framework evaluates the "cumulative information available."[164] As noted by the Supreme Court, "[t]he 'totality of the circumstances' requires courts to consider 'the whole picture.' . . . [P]recedents recognize that the whole is often greater than the sum of its parts—especially when the parts are viewed in isolation."[165]

Courts apply the totality of the circumstances analytical framework in a variety of substantive areas, such as determining whether law enforcement has sufficient "reasonable-suspicion" to detain an individual,[166] whether a police officer has used excessive force,[167] whether the Voting Rights Act has been

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[161] FUND TEX. CHOICE, *supra* note 157.

[162] Fetrow, *supra* note 14, at 332–33; Svatek, *supra* note 156, at 133–34.

[163] *See, e.g.*, United States v. Arvizu, 534 U.S. 266, 273 (2002) ("When discussing how reviewing courts should make reasonable-suspicion determinations, we have said repeatedly that they must look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing. . . This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the *cumulative* information available to them that "might well elude an untrained person.") (emphasis added) (citations omitted) (quoting United States v. Cortez, 449 U.S. 411, 417–18 (1981)).

[164] *Id.*

[165] District of Columbia v. Wesby, 138 S. Ct. 577, 588 (2018) (quoting *Cortez*, 449 U.S. at 417).

[166] *Id.*; *see* Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness*, 2004 UTAH L. REV. 977 ("[I]n defining the contours of the right to be free from unreasonable searches and seizures, the specific content and incidents of this right must be shaped by the context in which it is asserted. Accordingly, the Court has often said that it must examine the totality of the circumstances of the case—which is no more precise than the total atmosphere of the case—to assess the reasonableness of a search or a seizure.") (citations omitted).

[167] *See, e.g.*, Cara McClellan, *Dismantling the Trap: Untangling the Chain of Events in Excessive Force Claims*, 8 COLUM. J. RACE & L. 1 (2017) (describing the "totality of the circumstances" as the framework for determining

violated,[168] whether an employee has waived their right to bring a claim under the Civil Rights Act of 1964,[169] and whether a police officer has "probable cause" to perform an arrest.[170] In effect, by analyzing the "totality of the circumstances," a reviewing court adopts a flavor of the cumulative harm framework by assessing the entirety of an individual's harm and recognizing that the "whole is often greater than the sum of its parts—especially when the parts are viewed in isolation."[171]

What differentiates the totality of the circumstances analysis from the cumulative harm framework is that some applications of the totality of the circumstances analysis have constrained judicial discretion by requiring guiding considerations.[172] For example, in determining whether a police officer had used excessive force, a reviewing court must analyze the totality of the circumstances from the perspective of an officer "at the moment force was used."[173] Further, this application of the totality of the circumstances analysis requires a reviewing court to give "allowance [to the] fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."[174] Within this

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whether police officers have used excessive force); Michael Avery, *Unreasonable Seizures of Unreasonable People: Defining the Totality of Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People*, 34 COLUM. HUM. RTS. L. REV. 261, 267–70.

[168] *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30 (1986) (requiring a reviewing court to consider the "totality of the circumstances" whether plaints have experienced "unequal access to the electoral process through § 2 of the Voting Rights Act of 1965, Pub. L. No. 89-110).

[169] Daniel P. O'Gorman, *A State of Disarray: The "Knowing and Voluntary" Standard for Releasing Claims Under Title VII of the Civil Rights Act of 1964*, 8 U. PA. J. LAB. & EMP. L. 73, 75 (2005) (describing how a majority of circuit courts apply the "totality of the circumstances" in determining whether an employee has waived their right to a Title VII of the Civil Rights Act of 1964 claim).

[170] *Wesby*, 138 S.Ct. at 586 ("To determine whether an officer had probable cause for an arrest, we examine the events leading up to the arrest, and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause. . . . depends on the totality of the circumstances.") (citations omitted).

[171] *See id.* at 588 ("The 'totality of the circumstances' requires courts to consider 'the whole picture.'") (quoting United States v. Cortez, 449 U.S. 411, 417 (1981)).

[172] *See* McClellan, *supra* note 167, at 7–9 (describing the guiding considerations that must be used in a totality of the circumstances analysis of whether a police officer used excessive force).

[173] *Id.* at 8.

[174] Graham v. Connor, 490 U.S. 386, 397 (1989). *See also* McClellan, *supra* note 167, at 7–9.

analysis, circuit courts disagree on whether a police officer's preceding events may be included with this "totality of the circumstances" analysis, or whether this analysis is limited to the totality of the circumstances "at the moment" of an officer's use of lethal force.[175]

The cumulative harm framework and the totality of the circumstances analytical framework have many similarities. Both frameworks require courts to "hear evidence of multiple acts because many instances of constitutional harm occur in this manner—the harm comes in the form of 'death by a thousand cuts' rather than a single blow."[176] Both frameworks recognized that the "whole is often greater than the sum of its parts—especially when the parts are viewed in isolation."[177] Although there are minor differences in the two analytical frameworks, courts are well-equipped to aggregate the harm an individual faces.[178] Courts are also well-prepared to aggregate harm and even apply conditional requirements, or give preference to specific considerations to guide judicial discretion.[179]

3. The Cumulative Harm Framework More Effectively Addresses Second-Generation Harms Than the Sequential Approach

First-generation discrimination, such as explicit denial of one's right to vote on account of gender or race,[180] the denial of

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[175] *See* Ryan Hartzell C. Balisacan, *Incorporating Police Provocation into the Fourth Amendment "Reasonableness" Calculus: A Proposed Post-*Mendez *Agenda,* 54 HARV. C.R.-C.L. L. REV. 327, 330–31 (2019) (finding that the First, Third, Seventh, Tenth, and Eleventh Circuit all analyze the entirety of law enforcement actions during an encounter—including antecedent, provocative acts of the police—within a "totality of the circumstances" evaluation, while the Second, Fourth, Fifth, Sixth, and Eighth Circuits only examine the "totality of the circumstances" at the moment of the officer's use of force).

[176] Abrams & Garrett, *supra* note 16, at 1314.

[177] District of Columbia v. Wesby, 138 S. Ct. 577, 588 (2018).

[178] *See id.*; McClellan, *supra* note 167, at 7–9.

[179] *Graham*, 490 U.S. at 396; *see* McClellan, *supra* note 167, at 7–9.

[180] *See* U.S. CONST. amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex."); Harper v. W. Va. State Bd. of Elections, 383 U.S. 663, 670 ("[W]here fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined. . . . For to repeat, wealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned.") (citations omitted). S*ee generally*, Christopher Watts, Note, *Road To The Poll: How the Wisconsin Voter ID Law of 2011 Is Disenfranchising its Poor, Minority, and Elderly Citizens*, 3 COLUM. J. RACE & L. 119, 126–27 (2013) (describing the end of explicit racial discrimination in exercising the right to vote as a result of Twenty-Fourth Amendment, the Civil Rights Act of 1964, and the Voting Rights Act of 1965).

employment on the account of gender,[181] or explicit denial of rights on the account of gender identity,[182] although largely addressed, has not disappeared.[183] For example, members of the United States Women's National Soccer Team, who had recently won the 2019 FIFA World Cup,[184] recently filed a gender discrimination lawsuit alleging that a top-tier, twenty-game winning Women's National Team player "would earn only 38% of the compensation of a similarly situated" Men's National Team player.[185]

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[181] *See, e.g.*, Dothard v. Rawlison, 433 U.S. 321 (1971) (invalidating a law that placed height and weight requirements for correctional counselors disproportionately excluded women).

[182] *See* Sandhya Somashekhar et al., *Trump Administration Rolls Back Protections for Transgender Students*, WASH. POST (Feb. 22, 2017), https://www.washingtonpost.com/local/education/trump-administration-rolls-back-protections-for-transgender-students/2017/02/22/550a83b4-f913-11e6-bf01-d47f8cf9b643_story.html [https://perma.cc/26MD-TDMM] (revoking "federal guidelines specifying that transgender students have the right to use public school restrooms that match their gender identity").

[183] *See, e.g.*, Civil Minutes, Morgan v. U.S. Soccer Fed'n (C.D. Cal. 2019) (No. 2:19-cv-01717-RGK-AGR), 2019 WL 5867441 (finding an injury-in-fact that the Women's National Soccer Team was compensated less on a per-game basis than the Men's National Soccer team, despite the fact that the Women's Team "performance has been superior to that of the" Men's Team); Floyd v. City of New York, 959 F.Supp.2d 540 (S.D.N.Y. 2013) (invalidating the New York City Police Department's stop and frisk policy because it unconstitutionally racially profiled African-Americans and Latinos). *See generally* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 468 (2001) ("First generation discrimination has not disappeared, and indeed has played a significant role in recent litigation against companies such as Texaco and Mitsubishi.").

[184] Andrew Keh, U.*S. Wins World Cup and Becomes a Champion for its Time*, N.Y. TIMES (July 9, 2019), https://www.nytimes.com/2019/07/07/sports/soccer/world-cup-final-uswnt.html.

[185] Complaint ¶ 58, Morgan v. United States Soccer Federation (C.D. Cal. 2019) (No. 2:19-CV-01717), 2019 WL 1199270. *See, e.g.*, Andrew Das, *U.S. Women's Soccer Team Sues U.S. Soccer for Gender Discrimination*, N.Y. TIMES (Mar. 8, 2019), https://www.nytimes.com/2019/03/08/sports/womens-soccer-team-lawsuit-gender-discrimination.html [https://perma.cc/9MDH-RUXP].

Second-generation discrimination,[186] however, is just as pervasive.[187] This type of discrimination is not explicit; it is much more subtle. It is frequently the product of facially neutral laws that disparately impacts disadvantaged groups.[188] For instance, second-generation harms, in the context of voting, are "[e]fforts to reduce the impact of minority votes, in contrast to direct attempts to block access to the ballot."[189] Second-generation harms are "often more sophisticated than the facially discriminatory mechanisms that preceded them."[190] Subtle forms of discrimination include requiring an identification (ID) card at the polls, which often impact minority voters more harshly than

[186] Although first-generation discrimination must be addressed, it is not the focus of this Note. Second-generation discrimination is subtler and is frequently the product of a facially neutral law that disparately impacts minorities. *See* Sturm, *supra* note 183, at 468–69 ("Second generation claims frequently involve patterns of interaction among groups within the workplace that, over time, exclude nondominant groups. This exclusion is difficult to trace directly to intentional, discrete actions of particular actors. For example, a now-common type of harassment claim targets interactions among co-workers who have the power to exclude or marginalize their colleagues, but who may lack the formal power to hire, discipline, or reassign. This form of harassment may consist of undermining women's perceived competence, freezing them out of crucial social interactions, or sanctioning behavior that departs from stereotypes about gender or sexual orientation. It is particularly intractable, because the participants in the conduct may perceive the same conduct quite differently. Moreover, behavior that appears gender neutral, when considered in isolation, may actually produce gender bias when connected to broader exclusionary patterns.")

[187] *See* Sturm, *supra* note 183 (describing second-generation discrimination in employment). *See, e.g.*, Shelby Cnty., Ala. v. Holder, 570 U.S. 529, 566 (2013) (Ginsburg, J., dissenting) (describing Congressional findings that "second generation barriers constructed to prevent minority voters from fully participating in the electoral process continued to exist") (citations omitted); Angelia Dickens, *Revisiting* Brown v. Board of Education*: How Tracking Has Resegregated America's Public Schools*, 29 COLUM. J.L. & SOC. PROBS. 469, 470, 479–82 (1996) (arguing that a race neutral policy of tracking students into specific curriculums based on their academic achievement resulted in racial discrimination); Joseph O. Oluwole & Preston C. Green III, *Riding the* Plessy *Train: Reviving* Brown *for a New Civil Rights Era for Micro-Desegregation*, 36 CHICANA/O-LATINA/O L. REV. 1, 10–12 (2019) (providing empirical data on how Black people, Latinxs, and Native Americans were placed in low-track English and math courses at higher rates than their white peers).

[188] *See* Sturm, *supra* note 183, at 468–69 (describing second-generation discrimination as subtle and part of patterns of interactions that exclude nondominant groups).

[189] *Shelby Cnty.*, 570 U.S. at 563.

[190] Jenigh J. Garrett, *The Continued Need for the Voting Rights Act: Examining Second-Generation Discrimination*, 30 ST. LOUIS U. PUB. L. REV. 77, 80 (2010).

white voters.[191] Specifically, six states have "strict"[192] requirements for voters to present a photo ID, twelve states have "non-strict"[193] photo ID requirements, three states have "strict" non-photo ID requirements, and fourteen states have "non-strict," non-photo ID requirements.[194] The remaining fifteen states, and the District of Columbia, do not require a form of identification to vote.[195]

Other second-generation discrimination includes the total loss of 1,200 polling places in the southern United States since 2013,[196] which has resulted in thousands of voters waiting for six hours to vote;[197] the purging of 16,000,000 voters from voting rosters between 2014 and 2016;[198] the insufficient training of poll workers, resulting in the turning away of eligible voters;[199] the loss of the ability to take time off work to go vote without loss

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[191] *See Voter Identification Requirement: Voter ID Laws*, NAT'L CONF. STATE LEGISLATURES, https://www.ncsl.org/research/elections-and-campaigns/voter-id [https://perma.cc/WX2S-HVZX] (Aug. 25, 2020).

[192] *Id.* (defining "strict" laws as "[v]oters without acceptable identification must vote on a provisional ballot and also take additional steps after Election Day for it to be counted")

[193] *Id.* (defining "non-strict" laws as "[a]t least some voters without acceptable identification have an option to cast a ballot that will be counted without further action on the part of the voter. For instance, a voter may sign an affidavit of identity, or poll workers may be permitted to vouch for the voter. In some of the 'non-strict' states . . . voters who do not show required identification may vote on a provisional ballot").

[194] *Id.*

[195] *Id*; *see also*, Shayanne Gal & Ellen Cranley, *Most States, Including Texas and Florida, Now Require Showing ID to Vote. Here's the Full State-By-State Breakdown*, BUS. INSIDER (Nov. 6, 2018), https://www.businessinsider.com/voter-id-requirements-in-every-state-midterm-elections-2018-11 [https://perma.cc/UN7Q-ZJC7].

[196] Andy Sullivan, *Southern U.S. States Have Closed 1,200 Polling Places in Recent Years: Rights Group*, REUTERS (Sept. 10, 2019), https://www.reuters.com/article/us-usa-election-locations/southern-us-states-have-closed-1200-polling-places-in-recent-years-rights-group-idUSKCN1VV09J [perma.cc/F57K-VW83].

[197] Todd J. Gillman et al., *'No One Should Wait Six Hours to Vote,' But in Texas, Thousands Did on Super Tuesday*, DALL. MORNING NEWS (Mar. 4, 2020), https://www.dallasnews.com/news/politics/2020/03/05/no-one-should-wait-six-hours-to-vote-but-in-texas-thousands-did-on-super-tuesday [https://perma.cc/X5RY-GWKL].

[198] Li Zhou, *Voter Purges Are on the Rise in States with a History of Racial Discrimination*, VOX (Jul. 20, 2018), https://www.vox.com/2018/7/20/17595024/voter-purge-report-supreme-court-voting-rights-act [perma.cc/8X4K-T7L3].

[199] *See* Vann R. Newkirk II, *Voter Suppression is Warping Democracy*, ATLANTIC (July 17, 2018), https://www.theatlantic.com/politics/archive/2018/07/poll-prri-voter-suppression/565355 [https://perma.cc/JZ65-MQ9A].

of pay;[200] and requiring voters to vote on different days for state and federal primaries.[201] These requirements result in more difficulties in registering to vote, or staying registered, as well as other barriers to early voting or absentee voting.[202]

None of these laws explicitly prohibit an individual from exercising their right to vote. The laws, in theory, present an equal barrier to everybody. However, that is far from the truth—these "second generation, indirect structural barrier[s]" to vote have factually resulted in disparate impact for Black and Latinx individuals as well as other people of color.[203] One study found that "[r]elative to entirely-white neighborhoods, residents of entirely-[B]lack neighborhoods waited 29% longer to vote and were 74% more likely to spend more than 30 minutes at their polling place."[204] Another study found that individuals in neighborhoods that consisted of a 75% Latinx population waited, on average, 46% *longer* than individuals voting in neighbors that consisted of a 75% white population.[205] Minorities communities in the 2020 Democratic primary also experienced longer waiting times than their white peers.[206]

Other commentators have discussed how the closing of polling places has occurred in jurisdictions with the largest Black

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[200] Rachel Gillett & Grace Panetta, *In New York, California, Texas, and 27 Other States You Can Take Time Off from Work to Vote—Here's the Full List*, BUS. INSIDER (Nov. 6, 2018), https://www.businessinsider.com/can-i-leave-work-early-to-vote-2016-11 [https://perma.cc/3CMM-GFVC].

[201] Vivian Wang, *Why Deep Blue New York Is 'Voter Suppression Land'*, N.Y. TIMES (Dec. 19, 2018), https://www.nytimes.com/2018/12/19/nyregion/early-voting-reform-laws-ny.html [https://perma.cc/76VW-K64Q].

[202] *See New Voting Restrictions in America*, BRENNAN CTR. FOR JUST. (Nov. 18, 2019), https://www.brennancenter.org/sites/default/files/2019-11/New%20Voting%20Restrictions.pdf [https://perma.cc/3FZ9-J9PK].

[203] Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1093 (1991).

[204] M. Keith Chen et al., *Racial Disparities in Voting Wait Times: Evidence from Smartphone Data* 2 (Nat'l Bureau Econ. Rsch., Working Paper No. 2648, 2019) https://www.nber.org/papers/w26487.pdf [https://perma.cc/MZE4-EN8R].

[205] CHRISTOPHER FAMIGHETTI, BRENNAN CTR. FOR JUST., LONG VOTING LINES: EXPLAINED, 5 (Nov. 4, 2016), https://www.brennancenter.org/sites/default/files/analysis/Long_Voting_Lines_Explained.pdf [https://perma.cc/MJ2N-H46Y].

[206] *See* Nicole Narea, *Black and Latino Voters Were Hit Hardest by Long Lines in the Texas Democratic Primary*, VOX (Mar. 3, 2020), https://www.vox.com/2020/3/3/21164014/long-lines-wait-texas-primary-democratic-harris [https://perma.cc/8WCM-FLMB].

and Latinx population growth.[207] Even the frequency of changing polling locations,[208] the inability to get paid leave for going to vote,[209] and conforming to new voter ID laws[210] all disparately impact racial minorities.[211] Finally, the Government Accountability Office has found that requiring voters to demonstrate an ID disproportionately impacts racial minorities.[212]

Taken in isolation, each restriction to vote may seem reasonable and may serve a legitimate government interest in its application, such as "detecting voter fraud," or "safeguarding voter confidence" in elections.[213] However, as found by Congress[214] and as discussed in judicial opinions,[215] these

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[207] Richard Salame, *Texas Closes Hundreds of Polling Sites, Making It Harder for Minorities to Vote*, GUARDIAN (Mar. 2, 2020), https://www.theguardian.com/us-news/2020/mar/02/texas-polling-sites-closures-voting [https://perma.cc/78RN-BZBL]("The analysis finds that the 50 counties that gained the most Black and Latinx residents between 2012 and 2018 closed 542 polling sites, compared to just 34 closures in the 50 counties that have gained the fewest black and Latinx residents.").

[208] Zachary Roth, *Study: North Carolina Polling Site Changes Hurt Blacks*, NBC NEWS (Nov. 23, 2015), https://www.nbcnews.com/news/nbcblk/study-north-carolina-polling-site-changes-hurt-blacks-n468251 [https://perma.cc/8572-XRSE]("In total, black voters will now have to travel almost 350,000 extra miles to get to their nearest early voting site, compared to 21,000 extra miles for white voters.").

[209] Newkirk, *supra* note 199.

[210] Sari Horwitz, *Getting a Photo ID so You Can Vote Is Easy. Unless You're Poor, Black, Latino or Elderly*, WASH. POST (May 23, 2016), https://www.washingtonpost.com/politics/courts_law/getting-a-photo-id-so-you-can-vote-is-easy-unless-youre-poor-black-latino-or-elderly/2016/05/23 [https://perma.cc/FU92-F4ZY].

[211] *See* Crawford v. Marion Cnty. Election Bd., 472 F.3d 949, 954 (7th Cir. 2007) (Evans, J., dissenting) ("Let's not beat around the bush . . . voter photo ID law[s] [are] a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic."), *aff'd*, 553 U.S. 181 (2008).

[212] REBECCA GAMBLER & NANCY R. KINGSBURY, U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-634, ELECTIONS: ISSUES RELATED TO STATE VOTER IDENTIFICATIONS LAWS (2014) ("In both Kansas and Tennessee[,] we found that turnout was reduced by larger amounts among African-American registrants, as compared with Asian-American, Hispanic, and White registrants.").

[213] Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 191 (2008) (upholding a law requiring voters to present an ID card prior to voting).

[214] Shelby Cnty., Ala. v. Holder, 570 U.S. 529, 592 (2013) (Ginsburg, J., dissenting) ("As the record for the 2006 reauthorization [of The Voting Rights Act] makes abundantly clear, second-generation barriers to minority voting rights have emerged in the covered jurisdictions as attempted *substitutes* for the first-generation barriers that originally triggered preclearance in those jurisdictions.").

[215] *See* Crawford v. Marion Cnty. Election Bd., 472 F.3d 949, 954 (7th Cir. 2007) (Evans, J., dissenting) (2008) ("Let's not beat around the bush. . . voter

restrictions are a continuation of first-generation discrimination—explicit deprivations of a right.

At an abstract level, these second-generation barriers and forms of discrimination result in continually incremental encroachment upon rights. In the context of reproductive rights, barriers to obtain an abortion work together to ultimately deprive a person's of their right to choose.[216] An article by Kate Fetrow provides an illuminating hypothetical explaining the dangers of incremental regulation:

> In Year 0, a state has a regulatory regime under which abortion is regulated no differently than other medical procedures. Under that regime, women in the state face no undue burden. Then in Year 1, the state imposes a new, relatively minor restriction on abortion. Women in the state now face a slight barrier—say a 10% increase in the barriers they face. In Year 2, the state passes another, equally minor restriction—but now women face a barrier 20% greater than they did in Year 0. In Years 3, 4, and 5, the state continues to pass small, incremental regulations. Finally, when the burden increases to 50% relative to Year 0, a clinic or woman objects to the Year 5 regulation, claiming that it imposes an undue burden. Under the undue burden standard as it is currently articulated, the court would ask whether the Year 5 law imposes a burden compared to the previous status quo, comparing the regulation of Year 5 to the status quo of Year 4—not to the neutral state of affairs in Year 0. Because the regulation is incremental, that there

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photo ID law[s] [are] a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic."), *aff'd*, 553 U.S. 181; *Crawford*, 553 U.S. at 221 n.25 (Souter, J., dissenting) ("Studies in other States suggest that the burdens of an ID requirement may also fall disproportionately upon racial minorities."); *Shelby Cnty.*, 570 U.S. at 592 (Ginsburg, J., dissenting) ("As the record for the 2006 reauthorization [of The Voting Rights Act] makes abundantly clear, second-generation barriers to minority voting rights have emerged in the covered jurisdictions as attempted *substitutes* for the first-generation barriers that originally triggered preclearance in those jurisdictions.").

[216] *See* Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart*,* 117 YALE L.J. 1694, 1706 (2008) (describing how the sequential approach in evaluating reproductive rights "uphold[s] incrementalist regulation enacted for fetal-protective purposes and subsequently defended on woman-protective grounds.").

> is some additional burden imposed by the Year 5 regulation is not sufficient to declare the regulation unconstitutional. And even were the plaintiff to challenge the Year 4 regulation, too, it would be analyzed independently of the other restrictions. The court never compares any provision to the neutral Year 0; nor does it consider whether the combination of small restrictions in Years 1 through 5 might, in total, impose enough of a burden that the burden becomes undue even though each restriction, individually, does not. As a result, the state can continue to pass piecemeal restrictions on abortions, creating downward incremental pressure on abortion access, because none of the restrictions, standing alone, imposes an undue burden.[217]

Of course, it is difficult to quantify the exact harm a person may face when seeking an abortion. Regardless of this lack of precision, this hypothetical demonstrates the inability of the sequential approach to address second-generation discrimination.[218]

There are, of course, many policy proposals[219] and legal theories[220] that may increase access to voting using tools outside of the courts that are beyond the scope of this Note. At the judicial level, courts should adopt the cumulative harm framework in

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[217] Fetrow, *supra* note 14, at 330.

[218] *See also* Siegel, *supra* note 216, at 1706.

[219] *See* BRENNAN CTR. FOR JUST., AN ELECTION AGENDA FOR CANDIDATES, ACTIVISTS, AND LEGISLATORS, 6–13 (2018), https://www.brennancenter.org/sites/default/files/2019-08/Report_Democracy%20Agenda%202018.pdf [https://perma.cc/9Q4J-VSV8]; German Lopez, *9 Ways to Make Voting Better*, VOX (Nov. 7, 2016, 8:30 AM), https://www.vox.com/policy-and-politics/2016/11/7/13533990/voting-improvements-election-2016. *See, e.g.*, Danielle Root & Liz Kennedy, *Increasing Vote Participation in America: Policies to Drive Participation and Make Voting More Convenient*, CTR. FOR AM. PROGRESS (July 11, 2018), https://www.americanprogress.org/issues/democracy/reports/2018/07/11/453319/increasing-voter-participation-america [https://perma.cc/P4BG-6AJZ].

[220] *See* Shane Grannum, *A Path Forward for Our Representative Democracy: State Independent Preclearance Commissions and the Future of the Voting Rights Act After* Shelby County v. Holder, 10 GEO. J.L. & MOD. CRITICAL RACE PERSP. 95, 128–39 (2018); *see, e.g.*, Andres A. Gonzalez, *Creating a More Perfect Union: How Congress Can Rebuild the Voting Rights Act*, 27 BERKELEY LA RAZA L.J. 65, 86–91 (2017); Edward K. Olds, *More Than "Rarely Used": A Post-*Shelby *Judicial Standard for Section 3 Preclearance*, 117 COLUM. L. REV. 2185 (2017).

addressing these harms. Due to its ability to examine the totality of the circumstances and aggregate harm from multiple sources, the cumulative harm framework is a more useful analytical tool to address second-generation harms than the sequential approach.[221] The sequential approach, of course, has been an effective analytical framework to promulgate bright-line rules that combat explicit racism.[222] But, newer, subtler forms of second-generation discriminations "constitute barriers to racial justice that are in many ways more difficult to overcome."[223] The sequential approach would analyze the constitutionality of each law that results in the closing polling places, longer waiting times, new voter ID requirements, and the insufficient training of polling workers that turns eligible voters away from voting, in isolation.

The cumulative harm framework, in contrast, asks whether "multiple election [laws] work together to fence out minority voters and effectively eliminate opportunities to cast a ballot."[224] This analytical framework realizes that life is complex and the "panoply of regulations, each apparently defensible when considered alone, may nevertheless have the combined effect of severely restricting" the right to vote.[225] By aggregating harm, this analytical framework assesses the totality of harm, as opposed to allowing continuous incremental burdens placed upon the right to vote.[226]

B. Disadvantages of the Cumulative Harm Framework

This section evaluates the disadvantages of the cumulative harm framework. The section discusses how this

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[221] *See* Julissa Reynoso, *Perspectives on Intersections of Race, Ethnicity, Gender, and Other Grounds: Latinas at the Margins*, 7 HARV. LATINO L. REV. 63, 72 (2004) (describing how "rigid legal prescriptions" of "anti-discriminatory laws" have been effective in fighting first-generation harms, "they have not been as effective in combating more subtle and contemporary forms of discrimination—what is often referred to as 'second-generation discrimination'—including discrimination arising from intersectional oppression); Sturm, *supra* note 183, at 469.

[222] *See* Reynoso, *supra* note 221, at 72.

[223] Pedro A. Noguera, *Educational Rights and Latinos: Tracking as a Form of Second Generation Discrimination*, 8 LA RAZA L.J. 25, 25 (1995).

[224] Hayden Johnson, *Vote Denial and Defense: A Strategic Enforcement Proposal for Section 2 of the Voting Rights Act*, 108 GEO. L.J. 449, 472 (2019).

[225] Clingman v. Beaver, 544 U.S. 581, 607–08 (2005) (O'Connor, J., concurring).

[226] *See* Siegel, *supra* note 216, at 1706 (arguing the sequential approach permits increased "incrementalist regulation" in the context of abortion rights). The same logic, however, can be applied to the voting context. If minor impediments to the right to vote are continually upheld, incrementally harmful impediments to vote will continue.

analytical framework is difficult to administer because the framework does not have clear boundaries in its application. It also discusses how the framework grants judges substantial discretion and the implications of increased judicial discretion. Further, it describes the difficulty in adopting the framework in facial challenges of law and in cases of prospective harm.

1. Difficulty in Administration: Where to Draw the Cumulative Line?

The cumulative harm framework would be difficult to administer.[227] One immediate question is temporal: how far back in time may a reviewing court be permitted in considering an individual's cumulative harm? In some cases, this question is answered by the inherent scope of the constitutional violation. In determining whether one's right to a fair trial was violated, for example, the analysis is limited to the scope of the trial. Similarly, in determining prosecutorial misconduct claims under *Brady*, the inquiry naturally is limited to the scope of the government investigation.

Other constitutional challenges do not have this natural time-frame. Asylum law is particularly instructive. As noted above, a reviewing court is required to assess the cumulative harm of the asylum seeker.[228] But, how expansive is a review court's analysis? In one asylum case, the Second Circuit reviewed harms over the span of twelve years.[229] Another case, also from the Second Circuit, evaluated four discrete harms during a nine-year period.[230] There is no clear answer to whether a reviewing court should, or should not, have an expansive review. However, if courts do create a bright-line rule regarding the temporal scope of this analysis, such rigidity could negatively impact claimants.

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[227] *See* Kerr, *supra* note 15, at 333.

[228] *See, e.g.*, Fei Mei Cheng v. Att'y Gen., 623 F.3d 175, 192 (3d Cir. 2010) ("Moreover, in determining whether actual or threatened mistreatment amounts to persecution, '[t]he cumulative effect of the applicant's experience must be taken into account' because '[t]aking isolated incidents out of context may be misleading.'") (quoting Manzur v. U.S. Dep't Homeland Sec., 494 F.3d 281, 290 (2d Cir.2007)).

[229] *Manzur*, 494 F.3d a 290–91 (2d Cir. 2007) ("The petitioners' claim of past persecution in this case is primarily predicated on the alleged pattern of harms to which the petitioners were subjected over approximately a twelve-year period in Bangladesh.").

[230] Edimo-Doualla v. Gonzales, 464 F.3d 276, 283 (2d Cir. 2006) ("There was an additional fundamental error in the IJ's analysis. In assessing the question of whether Edimo-Doualla's mistreatment amounted to persecution, the IJ considered the 1991 and 1996 incidents separately from the 1997 and 2000 incidents. Incidents alleged to constitute persecution, however, must be considered cumulatively.").

For example, if such a strict timeframe exists, such as five years, it would be unjust to ignore relevant harm a claimant has experienced two days before this five-year cut off. The only solution to this hypothetical is to allow judges to decide these questions on a case-by-case basis.[231]

Another pressing question is how much cumulative harm is sufficient to justify a constitutional violation? *Jones v. United States*[232] illustrates the difficulties of this question. In this case, the government placed a battery-powered GPS device on Jones's car for twenty-eight days[233]. The device tracked the location of Jones's car every seven seconds, resulting in over 2,000 pages of data throughout the four weeks of surveillance.[234] The government obtained a warrant to install the GPS within ten days of the warrant's issuance, but the government installed the GPS on the eleventh day.[235] Regardless, the D.C. Circuit adopted the cumulative harm framework, reasoning that the data resulting from the GPS constituted a search under the Fourth Amendment because the totality of the search revealed "an intimate picture of the subject's life that he expects no one to have—short perhaps of his spouse."[236] Because the Supreme Court's majority held that "attaching the device to [Jones's] Jeep" unlawfully encroached on a protected area, the majority did not reach the question of whether the cumulative harm from the entire data collection constitutes an unlawful search. [237] The concurring opinions, however, followed the approach of the D.C. Circuit by alluding to the cumulative harm framework.[238]

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[231] *See* Abraham D. Sofaer, *Judicial Control of Informal Discretionary Adjudication and Enforcement*, 72 COLUM. L. REV. 1293, 1296 (1972) (explaining how judicial discretion "allows for the operation of expertise and human sensitivity where standards or stringent review might stifle such expression.").

[232] United States v. Jones, 565 U.S. 400 (2012).

[233] *Id.* at 403.

[234] *Id.*; Kerr, *supra* note 15, at 323.

[235] *Jones*, 565 U.S. at 403.

[236] United States v. Maynard, 615 F.3d 544, 563 (D.C. Cir. 2010), *aff'd in part sub nom.* United States v. Jones, 565 U.S. 400 (2012).

[237] *Jones*, 565 U.S. at 410–12 (2012).

[238] *See Jones*, 565 U.S. at 430 (Alito, J., concurring) ("[The] relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable. . . . But the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy."); *See id.* at 416 (Sotomayor, J., concurring) ("I would take these attributes of GPS monitoring into account when considering the existence of a reasonable societal expectation of privacy in the *sum* of one's public movements.") (emphasis added).

Justice Alito's concurrence adopted a version of the cumulative harm framework.[239] In contrast to the majority, Justice Alito frames the question by "asking whether respondent's reasonable expectations of privacy were violated by the long-term monitoring of the movements of the vehicle he drove."[240] Justice Alito reasoned that for most offenses "society's expectation has been that law enforcement . . . would not . . . secretly monitor and catalogue every single movement of an individual's car for a very long period."[241] On the one hand, the aggregate surveillance presents the constitutional violation and outweighs the government interest in investigating typical crimes.[242] On the other hand, prolonged investigation resulting in an accumulation of information may be justified "in the context of investigations involving extraordinary offenses."[243]

Embedded in this analysis is the question of how much surveillance is sufficient to violate the Fourth Amendment. Justice Alito declined to answer this question: "[w]e need not identify with precision the point at which the tracking of this vehicle became a search, for the line was surely crossed before the 4–week mark. Other cases may present more difficult questions."[244] In context, however, should courts be drawing the constitutional line at three days, three weeks, or some other threshold?[245] Even if, *arguendo*, the Supreme Court creates a bright-line rule that a week of GPS surveillance violates the Fourth Amendment, what if law enforcement conducted five days of GPS monitoring, and then re-opens the investigation a year later and conducts five more days of surveillance? The cumulative harm framework does not provide an answer to this difficulty.[246]

The third question relates to *cross-categorical cumulation*.[247] For instance, to continue with the facts presented by *Jones*, suppose a week of GPS surveillance is sufficient for a

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[239] *See id.* at 430 (Alito, J., concurring) (describing the cumulative impact of surveilling the vehicle for a long period and not needing to "identify with precision the point at which the tracking of this vehicle became a search").

[240] *Id.* at 419.

[241] *Id.* at 430.

[242] *Id.*

[243] *Id.* at 431.

[244] *Id.* at 430.

[245] *See* Kerr, *supra* note 15, at 333 (discussing the difficulty of determining the duration of time necessary to create the relevant mosaic).

[246] *See id.* (discussing the various problems posed by delays and differences in the type of information gathered about different suspects).

[247] *See supra* Part II.D (introducing the idea of cross-categorical cumulation).

Fourth Amendment violation. Should a reviewing court be permitted to aggregate the surveillance of a suspect that results from five days of GPS monitoring, three days of public camera surveillance, and ten minutes of audio monitoring from a microphone the size of a ballpoint pen?[248] If so, even though five days of GPS monitoring may be insufficient for a constitutional violation, does the five days of GPS monitoring *combined* with other surveillance become unlawful? What about the cumulation of surveillance of the suspect's movements in the real world through undercover law enforcement combined with publicly available information online—like information held on social media—[249] and a suspects' information owned by third parties—such as internet search history, call information, cell phone location data, text messages, and emails?[250] Even if the Supreme Court creates a bright-line rule to determine how much surveillance is sufficient to constitute a Fourth Amendment violation, a reviewing court would face serious challenges attempting to appropriately cumulate the surveillance from drastically different types of surveillance.

Each of these considerations suggest that the cumulative harm framework is not perfect. Because the variety of questions presented through the framework's application cannot be easily answered, or uniformly applied, the framework would be difficult to administer.[251] The framework presents "so many novel and difficult questions that courts would struggle to provide reasonably coherent answers," that some commentators argue against its adoption.[252]

2. Potential for Unrestrained Judicial Discretion

As discussed above, the cumulative harm framework presents many challenging questions.[253] If adopted, the

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[248] *See* Kerr, *supra* note 15, at 334–35.

[249] Kashmire Hill, *The Secretive Company That Might End Privacy as We Know It*, N.Y. TIMES (Jan. 18, 2020), https://www.nytimes.com/2020/01/18/technology/clearview-privacy-facial-recognition.html [ ].

[250] *See* Josephine Wolff, *Losing Our Fourth Amendment Data Protection*, N.Y. TIMES (Apr. 28, 2019), https://www.nytimes.com/2019/04/28/opinion/fourth-amendment-privacy.html [ ]. *See also*, Jennifer Valentino-DeVries, et al., *Your Apps Know Where You Were Last Night, and They're Not Keeping It Secret*, N.Y. TIMES (Dec. 10, 2018) https://www.nytimes.com/interactive/2018/12/10/business/location-data-privacy-apps.html [ ] (describing the numerous sources of information available to law enforcement in the digital age).

[251] *See* Kerr, *supra* note 15, at 346–47.

[252] *Id.* at 353.

[253] *See id.* at 328–29.

cumulative harm framework would require judges to answer these questions, thereby granting judges wide judicial discretion.[254] If unchecked, "discretion is a dangerous form of power" that could theoretically lead to partiality in administering the law.[255] Scholarship regarding excessive judicial discretion and advocating for its limitation is extensive.[256] In fact, restraining judicial direction is the primary thrust of textualism.[257] This Note attempts to summarize the predominant arguments.

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[254] *See id.* at 346 (describing administrability of a cumulative harm framework as the "legal equivalent of Pandora's Box").

[255] William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 648 (1982).

[256] *See, e.g.*, *id.* at 647–48 (discussing how discretion "is a far from perfect tool"); Anastasoff v. United States, 223 F.3d 898, 901 (8th Cir. 2000) (Judicial discretion "is the function of a judge not to make, but to declare the law, according to the golden mete-wand of the law and not by the crooked cord of discretion.") (quoting MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 44–45 (Univ. Chi. Press 1971)); Victor J. Gold, *Limiting Judicial Discretion to Exclude Prejudicial Evidence*, 18 U.C. DAVIS L. REV. 59, 63 (1984) ("propos[ing] limits on judicial discretion to exclude prejudicial evidence under [Federal] Rule [of Evidence] 403 by suggesting standards for interpretation and application."); Daniel A. Chatham, *Playing with Post-Booker Fire: The Dangers of Increased Judicial Discretion in Federal White Collar Sentencing*, 32 J. CORP. L. 619, 620 (2007) (arguing for the limiting of judicial discretion in sentencing of non-extraordinary white collar crimes); Kenneth Anthony Laretto, *Precedent, Judicial Power, and the Constitutionality of "No-Citation" Rules in the Federal Courts of Appeals*, 54 STAN. L. REV. 1037, 1055 (2002) (arguing for the limitation of judicial discretion in using nonpublished opinions); Linda D. Jellum, *"Which Is to Be Master," the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 847 (2009) (discussing how legislatures have attempted to limit judicial discretion by creating "statutory directives . . . that tell the judiciary how to interpret a statute or statutes"). *But see*, Erwin Chemerinsky, *Seeing the Emperor's Clothes: Recognizing the Reality of Constitutional Decision Making*, 86 B.U. L. REV. 1069, 1069, 1080 (2006) (discussing how "[j]udges always have discretion" and that "judges make law constantly").

[257] Peter J. Smith, *Textualism and Jurisdiction*, 108 COLUM. L. REV. 1883, 1899 (2008) ("Textualism . . . is an approach to statutory interpretation that accords dispositive weight to the meaning of the statutory text. It maintains that in interpreting statutes, courts must seek and abide by the public meaning of the enacted text, understood in context. The approach is thus closely identified with Oliver Wendell Holmes's famous claim that '[w]e do not inquire what the legislature meant; we ask only what the statute means.'") (quoting John F. Manning, Textualism and Legislative Intent, 91 VA. L. REV. 419, 420 (2005)) (quoting Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899)). *See also* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, at 93 (Mar. 8–9, 1995) [hereinafter Scalia, *Common-Law*] https://tannerlectures.utah.edu/_documents/a-to-z/s/scalia97.pdf [perma.cc/XNK2-3TQF] (discussing how discretion allows judges to "pursue

The primary argument is that, armed with unfettered discretion, judges will overstep their institutional role by creating new laws or invalidating democratically promulgated laws, thereby violating the separation of powers doctrine.[258] The Constitution vests powers in the Congress to legislate, the President to execute the laws, and the judiciary to adjudicate.[259] The separation of powers principle provides that, first, these major branches of governments should be kept in some fundamental senses separate;[260] and second, this separateness should allow each branch to guard its own institutional prerogatives and serve as a check to other branches' self-interested behavior.[261] An overstepping of one branch's role upon another's—e.g., if Congress sought to make a final determination of whether its own law was constitutional—would violate this principle. Some, even as early as James Madison, take this argument a step further by positing that a state cannot have the rule of law without separation of powers.[262] Therefore, empowering judges with wide discretion in assessing the aggregate harm faced by individuals through an entire regulatory framework would permit judges to "pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field."[263] Taking this argument to the extreme, some commentators argue that

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their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field").

[258] *See* Kilbourn v. Thompson, 103 U.S. 168, 190–91 (1880) ("[A]ll the powers intrusted [sic] to government . . . are divided into the three grand departments . . . . [T]he functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. . . . [T]he successful working of this system that the persons intrusted [sic] with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others.").

[259] U.S CONST. art. I, § 1 ("All legislative powers herein granted shall be vested in a Congress of the United States . . . ."); U.S CONST. art. II, § 1 ("The executive power shall be vested in a President of the United States of America."); U.S CONST. art. III, § 1 ("The judicial power of the United States, shall be vested in one Supreme Court . . . .").

[260] Thomas O. Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430, 435 (1987).

[261] *Id.* at 450.

[262] *See* THE FEDERALIST NO. 47 (James Madison) (discussing Montesquieu's conception of separation of powers in terms of protection of liberty under law, and in particular of preventing "*the same* monarch or senate" that enacts laws from being able "to *execute* them in a tyrannical manner").

[263] Scalia, *Common-Law*, *supra* note 257, at 93.

excessive judicial discretion threatens the legitimacy of the judiciary.[264]

Another argument is that with increased discretion, the most important factor in determining an outcome of a trial, could be the presiding judge.[265] For instance, in the most abstract sense and without clear guidelines, a judge can consider that the cumulative harm resulting from five laws that prevent a woman from receiving an abortion are not sufficient for a constitutional violation. Another judge, evaluating the same circumstances, can reach the opposite outcome.

The cumulative harm framework also does not provide clear remedies. To continue from the example above, even if two judges agree that the cumulative effect of five laws results in a constitutional deprivation of a right, how would a judge determine which of the five laws to strike down? All of these questions must ultimately be decided, and may be decided differently by the presiding judge of each case.

3. Prospective vs. Retroactive Litigation

Many of the previous examples focused on litigating harm that has already occurred. However, not all cases are retroactive. Facial challenges of statutes focus on prospective harm.[266] These challenges allege that a statute is invalid in *all* of its applications.[267] In these instances, the judicial discretion granted under the cumulative harm framework is exacerbated because the litigation is based on prospective harm.

Cases of prospective harm often result from quick legal response to new laws. And often, these lawsuits are facial challenges. A recent reproductive rights case[268] and a voter ID

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[264] *See* William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 641–49 (1982) (arguing that excessive judicial discretion at remedial stage threatens judicial legitimacy).

[265] *See* Derden v. McNeel, 978 F.2d 1453, 1458 (5th Cir. 1992). ("[A] free-floating fundamental fairness rule subverts the uniformity of results that is the basic goal of an organized legal system: one defendant may persuade the court that his five non-constitutional errors denied fundamental fairness, while another, less imaginative, may be denied relief simply because he cited only four of the same errors out of the record.").

[266] A successful facial challenge means that a statute is unlawful in all of its potential applications. Gillian E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873, 880–81 (2005).

[267] Nihal S. Patel, *Weighty Considerations: Facial Challenges and the Right to Vote*, 104 NW. U. L. REV. 741, 742 (2010).

[268] Complaint, South Wind Women's Center v. Stitt, 808 F. App'x 677 (10th Cir. 2020) [hereinafter Oklahoma Complaint] (No. CIV-20-277-G), 2020

case[269] demonstrate the speed of which litigation arises and variation in evaluating prospective harm.

On March 24, 2020, in response to the COVID-19 global pandemic, the Governor Stitt of Oklahoma issued an executive order postponing all elective surgeries and minor medical procedures.[270] Three days later, on March 27, the governor declared that the order prohibited all abortions which were not a "medical emergency" or "otherwise necessary to prevent serious health risks" to the woman carrying the fetus.[271] Another three days later, on March 30, the South Wind Women's Center and Planned Parenthood filed a lawsuit challenging the government's order.[272]

Although the plaintiffs were abortion providers, much of the litigation focused on the harm caused to patients who wished to seek an abortion.[273] Further, even though the prospective harm in this litigation was prospective, it was predictable.[274] The prospective harm was at its fullest: a total ban on abortion, with the exception of medical emergency. However, in other cases, aggregating prospective harm is more difficult.

Take, for example, *Crawford v. Marion County State Board of Elections*.[275] On April 27, 2005, the Governor of Indiana signed Senate Enrolled Act 483 (SEA 483).[276] The bill required a person to present a photo ID when casting an in-person ballot at both primary and general elections.[277] A voter who is unable to present photo identification may file a provisional ballot that will

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WL 1521890 (showing how a complaint was filed three days after a governor clarified that an executive order banned all non-emergency abortions).

[269] Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008).

[270] OFF. GOVERNOR, J. KEVIN STITT, FOURTH AMENDED EXECUTIVE ORDER 2020-07, (Mar. 24, 2020), https://www.sos.ok.gov/documents/executive/1919.pdf [https://perma.cc/SYQ5-XKRW].

[271] OKLAHOMA GOVERNOR STITT, PRESS RELEASE: GOVERNOR STITT CLARIFIES ELECTIVE SURGERIES AND PROCEDURES SUSPENDED UNDER EXECUTIVE ORDER (Mar. 27, 2020), https://www.governor.ok.gov/articles/press_releases/governor-stitt-clarifies-elective-surgeries [https://perma.cc/29LS-RVSK].

[272] Oklahoma Complaint, *supra* note 268, ¶ 1.

[273] *Id.* ¶¶ 4–5.

[274] *Id.* ¶ 5 ("Plaintiffs *will* be forced to continue turning away patients, resulting in immediate and irreparable harm for which no adequate remedy at law exists.") (emphasis added).

[275] Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008).

[276] Complaint at ¶ 4, Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008) (1:05-cv-0634-SEB-VSS), 2005 WL 3708052 [hereinafter, *Crawford* Complaint].

[277] *Id.*

be counted if they bring their photo ID to the circuit court clerk's office within ten days.[278] The Democratic Party filed their complaint five days later, arguing that "requiring registered and otherwise qualified voters who do not presently possess" photo identification at the time of voting was unlawful.[279] The *Crawford* plaintiffs argued that SEA 438 was especially burdensome to impoverished people, elderly people, people experiencing homelessness, and people of color.[280]

The Supreme Court discussed the difficulty in evaluating prospective harm in the context of a facial challenge. Justice Stevens, writing for the Court's majority, agreed that through the Indiana law, "a somewhat heavier burden may be placed on a limited number of persons."[281] Yet, the Court found that "on the basis of the evidence in the record it [was] not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them."[282] The record did not show "any concrete evidence of the burden imposed on voters who currently lack photo identification," nor were some of the witnesses able to indicate "how difficult it would be for them to obtain" the necessary documentation for a state-issued photo ID card.[283] Some witnesses even testified that they were able to pay for the necessary documents to receive a photo identification card.[284] Overall, the *Crawford* Court concluded that they "do not know the magnitude of the impact SEA 483 will have on indigent voters."[285] The Court was especially reluctant to accept the plaintiff's facial challenge to SEA 483 because plaintiffs bear a heavy burden of persuasion in these types of challenges.[286]

Justice Steven advances a reasonable concern. It is often difficult to quantify the magnitude of harm or estimate the scope of individuals that will be harmed by a potential law.[287] When harm is retroactive, at least judges can point to separate

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[278] Ind. Code Ann. § 3-11.7-5-2.5(b) (West 2006); *Crawford*, 553 U.S. at 186.

[279] *Crawford* Complaint, *supra* note 276, at ¶ 17.

[280] Brief for Petitioners at 39–45, Crawford v. Marion County Election Bd., 553 U.S. 181 (2008) (No. 07-21), 2007 WL 3276506.

[281] *Crawford*, 553 U.S. at 199.

[282] *Id.* at 200.

[283] *Id.* at 201.

[284] *Id.*

[285] *Id.*

[286] *See id.* at 202–03 (deciding that the plaintiff did not show that the "statute imposes 'excessively burdensome requirements' on any class of voters").

[287] *See id.* at 200 (describing the high burden of persuasion imposed by a broad attack on the constitutionality of SEA 483 and questioning the accuracy of the evidence in the record to determine the magnitude of the burden).

occurrences to justify the use of the cumulative harm framework. When harm is prospective, judges cannot. A prediction of prospective harm may be reasonable, yet the calculus of evaluating the cumulative impact of prospective harm grants judges with more discretion. At one extreme, such as a total ban, prospective harm is clear. At the other, judges may not be able to adequately evaluate the type, severity, or expansiveness of potential harm.

C. The Judiciary Should Adopt the Cumulative Harm Framework

The cumulative harm framework has advantages and disadvantages. The judiciary, despite such drawbacks, should adopt the cumulative harm framework more broadly. Courts are well-equipped to implement this framework because the framework is used throughout constitutional law.[288] The cumulative harm framework evaluates potential constitutional violations from the perspective of right-holders.[289] This perspective is reasonable because the "Constitution protects individuals."[290] Without this perspective, and without this framework, the judiciary cannot adequately address continued incremental burdens.[291] The cumulative harm framework also is better equipped to evaluate and address second-generation discrimination than other analytical methods.[292] Because second-generation discrimination and harms are no longer explicit deprivations of rights, courts should expand analysis to cumulative harm experienced by individuals—including harm experienced from a collection of statutes.

Although the framework provides judges with more discretion, discretion is a natural element of the judicial process.[293] Judicial discretion "allows for the operation of expertise and human sensitivity where standards or stringent review might stifle such expression."[294] Limiting a judge's discretion through an adoption of the sequential approach will be under-inclusive because a rigid rule does not have the flexibility

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[288] *See* discussion *supra* Part III and Part IV.A.2.

[289] *See* discussion *supra* Part IV.A.1.

[290] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 896 (1992).

[291] *See* Siegel, *supra* note 216, at 1706 (describing one strategy of the antiabortion movement as emphasizing incremental opposition to Roe and abortion legislation to change public opinion).

[292] *See* discussion *supra* Part IV.A.3.

[293] *See* Erwin Chemerinsky, *supra* note 256, at 1069, 1080 (discussing how "[j]udges always have discretion" and that "judges make law constantly").

[294] Abraham D. Sofaer, *Judicial Control of Informal Discretionary Adjudication and Enforcement*, 72 COLUM. L. REV. 1293, 1296 (1972).

to account for the complexity of life.[295] The more complex cases become, the more "individualized justice [is needed], that is, justice which to the appropriate extent is tailored to the needs of the individual case. Only through discretion can the goal of individualized justice be attained."[296] This flexibility allows the judiciary to respond to novel questions that arise in contemporary society in innovative ways.[297] Thus, "there can be no justice without discretion."[298]

V. CONCLUSION

This Note has shown the power of different analytical methods of constitutional review. The Supreme Court employs the cumulative harm framework in multiple areas of law.[299] In contrast, the Supreme Court also adopts the sequential approach in other areas of law.[300] This Note evaluates the advantages and disadvantages of the cumulative harm framework.[301] By doing so, this Note demonstrates that constitutional questions can turn on the analytical framework adopted by a reviewing court. Because the "Constitution protects individuals . . . from unjustified state interference," the judiciary should more broadly apply the cumulative harm framework.[302] This framework is the best analytical method to combat new forms of discrimination and help the judiciary truly bring equal justice under law.

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[295] *See* David P. Leonard, *Power and Responsibility in Evidence Law*, 63 S. CAL. L. REV. 937, 999–1000 (1990).

[296] KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 19 (1969).

[297] *See* Leonard, *supra* note 295, at 1002. ("[Judicial] [d]iscretion . . . permits innovation and creativity in law. One of the strengths of the common law is that it was composed in large part of broad principles rather than detailed rules, thus facilitating creativity and innovation that help the law to mature in more enlightened ways."). *See also*, Carl E. Schneider, *Discretion, Rules and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2215, 2217 (1991) ("In a modern society, the law regulates the complex behavior of millions of people. To do this efficiently [the judiciary] must use broadly applicable rules. Yet such rules are bound . . . to fail in some cases . . . . Some of these failures can be ameliorated by according discretion to . . . judges.").

[298] Harold E. Pepinsky, *Better Living Through Police Discretion*, 47 LAW & CONTEMP. PROBLEMS 249, 253 (1984).

[299] *See* discussion *supra* Part II.

[300] *See* discussion *supra* Part III.

[301] *See* discussion *supra* Part IV.

[302] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 896 (1992).

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NOTE

ENVIRONMENTAL JUSTICE AND PENNSYLVANIA'S ENVIRONMENTAL RIGHTS AMENDMENT: APPLYING THE DUTY OF IMPARTIALITY TO DISCRIMINATORY SITING

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Since the 1970s, there has been a growing awareness that environmental hazards are disproportionately sited in low-income communities and communities of color. Under the label of the environmental justice movement, community groups have pursued various means to fight against the discriminatory concentration of environmental burdens in their neighborhoods. Yet in its Civil Rights Act and Equal Protection Clause jurisprudence, the Supreme Court has largely shut the door on federal environmental justice litigation by requiring plaintiffs to prove that the government acted with discriminatory intent in its siting and permitting decisions.

This Note argues that Pennsylvania's Environmental Rights Amendment provides an avenue for disparate impact environmental justice litigation at the state level. In its 2013 Robinson Township v. Commonwealth *decision, the Pennsylvania Supreme Court interpreted the state's Environmental Rights Amendment as imposing significant public trust obligations on the state legislature and other governmental*

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actors. While previous scholarship has analyzed Robinson Township*'s impact on environmental constitutionalism generally, this Note focuses on the decision's environmental justice implications. In particular, this Note argues that one public trust duty imposed by the Pennsylvania Supreme Court—the duty of impartiality—should prohibit state actors from continuing to site environmental hazards in communities that already bear disproportionate environmental burdens.*

I. INTRODUCTION

Advocates have long attempted to hold governments accountable for the disproportionate siting of environmental hazards such as landfills and power plants in communities of color and low-income communities. Under the label of the environmental justice movement, community groups have pursued various means to fight against the concentration of environmental burdens in their neighborhoods.[1] While the movement has had a number of legal successes, including President Clinton's signing of Executive Order 12898 ("Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations"),[2] federal litigation strategies focused on combating environmental racism and injustice have largely stalled.[3]

Several doctrinal roadblocks currently stand in the way of federal environmental justice litigation. Under modern Equal Protection Clause jurisprudence, governmental actions with racially disproportionate impacts are unconstitutional only when the government acted with an intent to discriminate.[4] Similarly, Title VI of the Civil Rights Act does not provide a private right of action to combat discrimination unless the plaintiff can prove the governmental agent in question acted with discriminatory intent.[5] It is incredibly hard—if not impossible—for litigants to

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[1] For a timeline of the environmental justice movement, including key milestones, see ROBERT D. BULLARD ET AL., ENVIRONMENTAL JUSTICE MILESTONES AND ACCOMPLISHMENTS: 1964–2014 (2014), https://www.racialequitytools.org/resourcefiles/Enviromental_justice.pdf [https://perma.cc/88DP-AWSW].

[2] EO 12898 directed that "each Federal agency . . . shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States and its territories and possessions, the District of Columbia, the Commonwealth of Puerto Rico, and the Commonwealth of the Mariana Islands." Exec. Order No. 12,898, 59 Fed. Reg. 7,629, 7,629 (Feb. 16, 1994). The order also mandated the creation of an interagency working group on environmental justice. *Id.*

[3] *See* Carlton Waterhouse, *Abandon All Hope Ye That Enter? Equal Protection, Title VI, and the Divine Comedy of Environmental Justice*, 20 FORDHAM ENV'T L. REV. 51, 63–77 (2009).

[4] Washington v. Davis, 426 U.S. 229, 239 (1976).

[5] *See* Alexander v. Choate, 469 U.S. 287, 293 (1985); Alexander v. Sandoval, 532 U.S. 275, 293 (1998). While the Civil Rights Act provides the Environmental Protection Agency (EPA) the power to administratively remedy disparate impact discrimination, the agency has largely failed to exercise that power to protect citizens from environmental injustice. As of 2016, the EPA's Office of Civil Rights had never found a violation of Title VI of the Civil Rights Act and was dismissing nine out of every ten complaints alleging environmental

establish that state actors intended to discriminate when making siting and permitting decisions.[6] As a result, federal challenges to pollution permits and waste facility siting decisions under the Equal Protection Clause and the Civil Rights Act have uniformly failed.[7]

While federal environmental justice litigation remains largely thwarted, legal inroads at the state level can still be made. [8] Optimistically, state-specific environmental justice litigation could serve as a laboratory for nation-wide innovation, and pragmatically, state courts may be the only viable forum left for environmental justice litigation. [9] Building off this state-oriented approach, this Note argues that recent developments under Pennsylvania's Environmental Rights Amendment (Amendment), a 1971 amendment to the Pennsylvania Constitution, present fertile ground for state litigation targeting the continued siting and permitting of environmental burdens in low-income communities and communities of color. Starting with *Robinson Township v. Commonwealth*, the Pennsylvania Supreme Court has held that the Environmental Rights Amendment imposes a "duty of impartiality" on the State, requiring state actors to balance the interests of all residents when making decisions that affect public natural resources such as ambient air and water quality.[10] While the scope of this duty remains undefined, this Note argues that it could serve as the foundation for litigation challenging discriminatory siting and permitting decisions.

Part II of this Note presents background information regarding patterns of environmental injustice in Pennsylvania and the United States, attempts to litigate environmental discrimination under the Equal Protection Clause and Civil

discrimination. Talia Buford & Kristen Lombardi, *Report Slams EPA Civil Rights Compliance*, CTR. FOR PUB. INTEGRITY (Sept. 23, 2016), https://publicintegrity.org/environment/report-slams-epa-civil-rights-compliance/ [https://perma.cc/AB8S-ABQL].

[6] *See* Maria Ramirez Fisher, *On the Road from Environmental Racism to Environmental Justice*, 5 VILL. ENV'T L.J. 449, 469 n.116 (1994) ("Critics attack the imposition of the burden of establishing discriminatory intent on the wrong party; discriminatory intent is easy to hide. Furthermore, since state action is based on multiple motives, the government always can identify a non-discriminatory motive for its action.") (citation omitted).

[7] Waterhouse, *supra* note 3, at 53.

[8] Robert J. Klee, *What's Good for School Finance Should Be Good for Environmental Justice: Addressing Disparate Environmental Impacts Using State Courts and Constitutions*, 30 COLUM. J. ENV'T L. 135, 136 (2005).

[9] *Id.* at 158–60.

[10] Robinson Twp. v. Commonwealth, 83 A.3d 901, 957 (Pa. 2013).

Rights Act, and the early history of Pennsylvania's Environmental Rights Amendment. Part III explores *Robinson Township*'s effect on jurisprudence under the Environmental Rights Amendment, focusing on the "duty of impartiality" as it is framed in the opinion and subsequent case law. Part IV argues that the duty imposes substantive obligations on state actors to cease siting environmental burdens in communities that are already disproportionately affected, as well as procedural obligations to consider the cumulative impact of environmental decision-making on affected communities when making siting and permitting decisions. Then, Part V analyzes whether other state constitutions provide the framework for similar developments.

II. ENVIRONMENTAL JUSTICE IN PENNSYLVANIA AND THE UNITED STATES

Numerous studies show that the distribution of environmental burdens in the United States is concentrated in communities of color and low-income communities. [11] This unfortunate fact is replicated within Pennsylvania.[12] Litigants both in Pennsylvania and around the country have attempted to use the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act to hold government actors accountable for concentration of environmental hazards in their communities, but Supreme Court jurisprudence has effectively foreclosed the potential for such litigation by requiring private litigants to prove discriminatory intent.[13]

Part II.A presents the substantial evidence of environmental inequality throughout the United States and Pennsylvania, and Part II.B summarizes the federal constitutional and statutory challenges to such inequality. Part II.C introduces Pennsylvania's Environmental Rights Amendment, a provision that could serve as the basis for future environmental justice litigation.

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[11] For an extensive review of such studies, see LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE ENVIRONMENTAL JUSTICE MOVEMENT app. at 167–83 (2001).

[12] *See* FOOD & WATER WATCH, PERNICIOUS PLACEMENT OF PENNSYLVANIA POWER PLANTS: NATURAL GAS-FIRED POWER PLANT BOOM REINFORCES ENVIRONMENTAL INJUSTICE (2018), https://www.foodandwaterwatch.org/sites/default/files/rpt_1806_pagasplants_web3.pdf [https://perma.cc/RR74-4NRD].

[13] *See, e.g.*, Washington v. Davis, 426 U.S. 229, 239 (1976); Alexander v. Choate, 469 U.S. 287, 293 (1985); Alexander v. Sandoval, 532 U.S. 275, 293 (2001).

A. The Distribution of Environmental Burdens in the United States and Pennsylvania

The first information about distributional environmental inequities was published in 1971 in an annual report of the White House's Council on Environmental Quality.[14] Roughly a decade later, studies published in the 1980s enhanced the public understanding that environmental burdens were inequitably distributed along race and class lines. In a 1983 study, the U.S. Government Accountability Office found a correlation between the location of hazardous waste landfills and the racial and economic status of the surrounding communities in eight southeastern states.[15] Several years later, the United Church of Christ's Commission for Racial Justice conducted a nationwide study, titled *Toxic Waste and Race in the United States*, that concluded that race was an important variable associated with the siting of commercial hazardous waste facilities. [16] This research set the framework for numerous other studies into the inequitable distribution of environmental hazards.[17]

In their 2001 book *From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement*, Luke W. Cole[18] and Sheila R. Foster[19] surveyed the numerous

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[14] Paul Mohai & Bunyan Bryant, *Race, Poverty & the Distribution of Environmental Hazards: Reviewing the Evidence*, RACE, POVERTY & ENV'T, Fall 1991–Winter 1992, at 24.

[15] U.S. GEN. ACCT. OFF., GAO/RCED-83-168, SITING OF HAZARDOUS WASTES LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES (1983). The study focused on EPA Region 4 (Southeast), *id.*, which includes Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee. *About EPA Region 4 (Southeast)*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/aboutepa/about-epa-region-4-southeast [https://perma.cc/JX7L-FGTU] (last visited Aug. 23, 2020).

[16] UNITED CHURCH CHRIST COMM'N FOR RACIAL JUST., TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES 9 (1987).

[17] *See e.g.*, COLE & FOSTER, *supra* note 11, at app. at 167–83.

[18] Luke Cole was the Co-Founder and Director of the Center on Race, Poverty, and the Environment, a national environmental justice organization that provides legal, organizing, and technical assistance to grassroots groups in low-income communities and communities of color. *Luke's Legacy*, CTR. ON RACE POVERTY & ENV'T, https://crpe-ej.org/donate-main/lukes-legacy/ [https://perma.cc/D3SN-7UQM] (last visited Mar. 22, 2020). He has been widely recognized as an early leader in the environmental justice movement. Dennis Hevesi, *Luke Cole, Court Advocate for Minorities, Dies at 46*, N.Y. TIMES (June 10, 2009), https://www.nytimes.com/2009/06/11/us/11cole.html [https://perma.cc/9AG3-8JCH].

[19] Sheila Foster is a Professor of Law and Public Policy at Georgetown University. She co-edited *The Law of Environmental Justice: Theories and*

studies and articles that analyzed the distribution of environmental hazards such as "garbage dumps, air pollution, lead poisoning, toxic waste production and disposal, pesticide poisoning, noise pollution, occupational hazards, and rat bites."[20] These studies "overwhelming[ly]" concluded that "environmental hazards are inequitably distributed by income or race." [21] Furthermore, studies comparing the distribution of hazards by income and race found that race was the more consistent predictor of exposure to environmental dangers.[22]

Contemporary studies continue to show a substantial correlation between the location of environmental hazards and the predominant race of surrounding communities. [23] A 2018 study by Environmental Protection Agency (EPA) scientists found that "non-Whites and those living in poverty face a disproportionate burden from [particulate matter]-emitting facilities."[24] The study also found that Black people "in particular are likely to live in high-emission areas."[25] The Third Circuit Court of Appeals recently recognized this issue, noting that "recent studies have shown that environmental pollution, including from landfills, has a disparate impact on racial-ethnic minorities and low-income communities."[26] Furthermore, since low-income communities and communities of color are home to a disproportionate number of polluting sites, they are particularly affected by the Trump Administration's weakening of environmental protections.[27]

Procedures to Address Disproportionate Risks with Michael B. Gerrard. *Sheila Foster*, GEO. L. https://www.law.georgetown.edu/faculty/sheila-foster/ [https://perma.cc/M7PF-V8RM] (last visited Mar. 22, 2020).

[20] COLE & FOSTER, *supra* note 11, at 54.

[21] *Id.* at 54–55.

[22] *Id.* at 55.

[23] Ihab Mikati et al., *Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status*, 108 AM. J. PUB. HEALTH 480 (2018).

[24] *Id.*

[25] *Id.*

[26] Baptiste v. Bethlehem Landfill Co., 965 F.3d 214, 226 (3d Cir. 2020) (citing Christopher W. Tessum et al., *Inequity in Consumption of Goods and Services Adds to Racial-Ethnic Disparities in Air Pollution Exposure*, 116 PROC. NAT'L ACAD. SCI. 6001, 6001 (2019); Kathy Seward Northern, *Battery and Beyond: A Tort Law Response to Environmental Racism*, 21 WM. & MARY ENV'T L. & POL'Y REV. 485, 498–505 (1997)).

[27] Rebecca Beitsch, *Critics Warn Trump's Latest Environmental Rollback Could Hit Minorities, Poor Hardest*, HILL (Jan. 12, 2020, 8:00 AM), https://thehill.com/policy/energy-environment/477798-critics-warn-trumps-latest-environmental-rollback-could-hit [https://perma.cc/GJ9C-6Z62].

The concentration of environmental hazards in low-income communities and communities of color, and the cumulative exposure to multiple environmental health stressors, severely impairs public health in those communities.[28] The effects of industrial development accumulate; while one single source of environmental harm may seem insignificant, the addition of many small impacts greatly increases the cause for concern.[29] In the environmental justice context, the cumulative impact of exposure to disproportionate numbers of polluting facilities correlates with asthma hospitalization rates.[30]

In line with the national data, environmental hazards in Pennsylvania are concentrated in low-income Black and Latinx

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[28] *See EJ 2020 Glossary*, U.S. ENV'T PROT. AGENCY, https://epa.gov/environmentaljustice/ej-2020-glossary [https://perma.cc/MJV4-NP2H] (last visited Aug. 24, 2020) ("Overburdened Community—Minority, low-income, tribal, or indigenous populations or geographic locations in the United States that potentially experience disproportionate environmental harms and risks. This disproportionality can be as a result of greater vulnerability to environmental hazards, lack of opportunity for public participation, or other factors. Increased vulnerability may be attributable to an accumulation of negative or lack of positive environmental, health, economic, or social conditions within these populations or places. The term describes situations where multiple factors, including both environmental and socio-economic stressors, may act cumulatively to affect health and the environment and contribute to persistent environmental health disparities."). *See also* Rachel Morello-Frosch et al., *Understanding the Cumulative Impacts of Inequalities in Environmental Health: Implications for Policy*, 30 HEALTH AFFS. 879, 881 (2011) ("Numerous studies have documented the disproportionate location of hazardous waste sites, industrial facilities, sewage treatment plants, and other locally undesirable and potentially polluting land uses in communities of racial or ethnic minorities and in socially disadvantaged neighborhoods. Residents living near such facilities can be exposed to more pollutants than people who live in more affluent neighborhoods located farther from these sources of pollution. The residents of communities near industrial and hazardous waste sites experience an increased risk of adverse perinatal outcomes, respiratory and heart diseases, psychosocial stress, and mental health impacts.").

[29] *See* INDIAN & N. AFFS. CAN., A CITIZEN'S GUIDE TO CUMULATIVE EFFECTS 2 (2007), https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-NWT/STAGING/texte-text/ntr_pubs_CEG_1330635861338_eng.pdf [https://perma.cc/4GM2-ZG8Z]. EPA's Council on Environmental Quality (CEQ) defines cumulative impact as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7 (2020). CEQ further notes that "[c]umulative impacts can result from minor but collectively significant actions taking place over a period of time." *Id.*

[30] *See* Emanuel Alcala et al., *Cumulative Impact of Environmental Pollution and Population Vulnerability on Pediatric Asthma Hospitalizations: A Multilevel Analysis of CalEnviroScreen*, 16 INT'L J. ENV'T RSCH. & PUB. HEALTH 2683 (2019).

communities.[31] In fact, Pennsylvania has the second largest racial "pollution gap" among all of the states.[32] Furthermore, a 2018 study found that Pennsylvania's 136 existing, new, and proposed fuel-fired power plants are disproportionately located near disadvantaged communities, defined as "areas with lower incomes, higher economic stress, lower educational levels and/or communities of color."[33] This distributional inequity manifests in the health of these communities, with Pennsylvania's Black and Latinx populations considerably more likely to experience negative health effects from pollution than its white population.[34] For example, the Pennsylvania Department of Environmental Protection (PADEP or DEP) found that the 2011 asthma hospitalization rate was five times higher for Black residents of Pennsylvania than for white residents.[35]

PADEP has responded to this inequity by creating an Office of Environmental Justice, which serves "as a point of contact for Pennsylvania residents in low income areas and areas with a higher number of minorities," and has a "primary goal" of "increas[ing] communities' environmental awareness and involvement in the DEP permitting process."[36] The Office has publicized a map of Environmental Justice areas in Pennsylvania, defined as "any census tract where 20 percent or more individuals live in poverty, and/or 30 percent or more of the population is minority."[37] The Office's Environmental Justice

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[31] *See* FOOD & WATER WATCH, *supra* note 12.

[32] Sydney Brownstone, *The 10 Most Polluted States for People of Color*, FAST CO. (Apr. 16, 2014), https://www.fastcompany.com/3029160/the-10-most-polluted-states-for-people-of-color [https://perma.cc/4U6F-FV87].

[33] *See* FOOD & WATER WATCH, *supra* note 12, at 2.

[34] *Id.* at 6–7. While not correlated with race, the recent boom in unconventional gas production, referred to as "hydraulic fracturing" or "fracking," has been concentrated in low-income, rural areas, leading to numerous negative health effects and dangers for those communities. *See* FOOD & WATER WATCH, *supra* note 12, at 7; Elena Pacheco, *It's a Fracking Conundrum: Environmental Justice and the Battle to Regulate Hydraulic Fracturing*, 42 ECOLOGY L.Q. 373, 380 (2015).

[35] *Pennsylvania Asthma Surveillance System*, PA. DEP'T HEALTH, https://www.health.pa.gov/topics/programs/Asthma/Pages/Surveillance-Reports.aspx [https://perma.cc/4GEV-CTPT] (last visited Mar. 22, 2020). In its study, PADEP did not attribute the differing asthma hospitalization rate to any particular cause.

[36] *Office of Environmental Justice*, PA. DEP'T ENV'T PROT., https://www.dep.pa.gov/PublicParticipation/OfficeofEnvironmentalJustice/Pages/default.aspx [https://perma.cc/3MPV-TYRT] (last visited Aug. 24, 2020).

[37] *Pa. Environmental Justice Areas*, PA. DEP'T ENV'T PROT. https://www.dep.pa.gov/PublicParticipation/OfficeofEnvironmentalJustice/Pages/PA-Environmental-Justice-Areas.aspx [https://perma.cc/62HG-K8HR] (last visited Aug. 24, 2020).

Advisory Work Group also helped create PADEP's 2004 Enhanced Public Participation Policy, which triggers community outreach, public participation, and public meeting requirements when certain types of permits are proposed in Environmental Justice areas.[38]

The Enhanced Public Participation Policy grew out of a 2001 report from Pennsylvania's then-formed Environmental Justice Work Group, [39] which detailed Pennsylvania's environmental justice history and recommended ways to "level[] the playing field" by devoting attention, energy, and resources to "the environmental health and safety of minority and low-income communities."[40] Along with its suggestion for enhanced public participation in the permitting process, the report recommended that PADEP examine the feasibility of mitigating the cumulative and/or disparate impacts of environmental permitting decisions and determine whether the benefits of the proposed activity outweigh the harm to the community. [41] These mitigation measures have not been implemented in state policy, and Pennsylvania's low-income communities and communities of color continue to be disproportionately affected by the state's permitting of environmental hazards.[42]

Of course, in Pennsylvania and nationally, the correlation between race, socioeconomic status, and the distribution of environmental burdens does not establish causation. The siting of environmental hazards in communities of color can be explained—at least in part—by ostensibly race-neutral siting criteria and market factors including cheap land values and appropriate zoning. [43] Yet, those "race-neutral" siting factors must be contextualized within the country's history of discriminatory land use policies that include explicitly racial

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[38] PA. DEP'T ENV'T PROT. POL'Y OFF., 012-0501-002, ENVIRONMENTAL JUSTICE PUBLIC PARTICIPATION POLICY (Apr. 24, 2004), http://www.depgreenport.state.pa.us/elibrary/GetDocument?docId=7918&DocName=ENVIRONMENTAL%20JUSTICE%20PUBLIC%20PARTICIPATION%20POLICY.PDF [https://perma.cc/R2SJ-5P8V]. This process applies to NPDES (water) Permits, Air Permits, Waste Permits, Mining Permits, Land Application of Biosolids Permits, and CAFO (Concentrated Animal Feeding Operation) Permits. *Id.* at 8.

[39] *Id.* at 3.

[40] ENV'T JUST. WORK GRP, REPORT TO THE PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION 13 (June 2001), http://files.dep.state.pa.us/PublicParticipation/Office%20of%20Environmental%20Advocacy/lib/environadvocate/EJReportFinal.pdf [https://perma.cc/32BM-GU9E]

[41] *Id.* at 16–18.

[42] *See supra* notes 31–35 and accompanying text.

[43] *See* COLE & FOSTER, *supra* note 12, at 70–74.

zoning,[44] racially restrictive covenants,[45] and redlining.[46] These historical practices continue to drive segregation: as examples, Detroit, Chicago, St. Louis, and Philadelphia all extensively utilized racially restrictive covenants, and those cities ranked first, eighth, tenth, and twelfth respectively in African American residential segregation as of 1990.[47] Furthermore, zoning bodies have historically "down-zoned" Black communities to industrial status while zoning similarly situated white neighborhoods as "residential."[48] Down-zoning then creates a cycle where new industrial development lowers land values, thereby attracting more industry, thereby lowering land values further.[49] Put generally, present-day siting criteria overlay a history of land use decision-making that is all but race-neutral, and those criteria continue to concentrate polluting facilities in low-income communities of color.[50] The question then becomes: what role can and should the law play in remedying that inequity?

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[44] *See* Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 744–45 (1993) ("Shortly after the turn of the century, when legally enforced segregation approached its zenith, several southern and border cities enacted strict racial zoning ordinances designating separate residential districts for whites and blacks. Such ordinances were a response to the mass migration of southern rural blacks to the cities and to white residents' fears of racial amalgamation. Baltimore passed the first such ordinance in 1910 and within six years more than a dozen cities followed suit.").

[45] *See id.* at 751. ("The use of racially restrictive covenants mushroomed during the 1930s and 1940s, particularly in the northern, western, and mid-western regions of the country.").

[46] *See id.* at 752 ("The [Federal Housing Administration] also encouraged the use of racial covenants and denied mortgage insurance to entire 'redlined' black and integrated neighborhoods based on the belief that black residents caused a devaluation of property."). Redlining "denotes the practice of denying mortgage financing on property located within certain geographic areas of a city." *Id.* at 752 n.57 (quoting Marcia Duncan et al., *Redlining Practices, Racial Resegregation, and Urban Decay: Neighborhood Housing Services as a Viable Alternative,* 7 URB. L. 510, 513 (1975)).

[47] *See* Dubin, *supra* note 44, at 751 n. 54 (citation omitted).

[48] *See* COLE & FOSTER, *supra* note 12, at 73.

[49] *Id.* at 72.

[50] Other ostensibly race-neutral siting criteria have similar effects. *See id.* at 73–74 ("Proximity to major transportation routes may also skew the siting process toward communities of color, as freeways appear to be disproportionately sited in such communities. Similarly, locational criteria—prohibitions against the siting of waste facilities near neighborhood amenities like hospitals and schools—skew the process toward underdeveloped communities of color, since such communities are less likely to have hospitals and schools. Hence, siting criteria that prohibit the siting of waste facilities close to such facilities perpetuate the historical lack of such amenities in those communities.").

B. Federal Environmental Justice Litigation Under the Equal Protection Clause and Civil Rights Act

In response to the overwhelming concentration of environmental hazards in low-income communities and communities of color outlined above, community groups and public interest legal organizations nationwide have brought numerous suits under the Fourteenth Amendment's Equal Protection Clause and Title VI of the Civil Rights Act of 1964 challenging the practice of discriminatory siting. This litigation has been unsuccessful in holding governmental actors accountable for siting and permitting practices that disproportionately harm Black and Latinx communities, primarily because the Supreme Court has proven reluctant to impose liability on governmental actors without proof that the action arose from an intent to discriminate.[51]

The text of the Fourteenth Amendment, which prohibits states from "deny[ing] to any person within [their] jurisdiction the equal protection of the laws,"[52] would appear to prohibit the enforcement of siting and permitting schemes that sacrifice the health of low-income communities and communities of color for the benefit of wealthier, whiter communities. As such, numerous plaintiffs have brought suits alleging that the siting of landfills in their predominantly Black communities violated their rights under the Equal Protection Clause.[53] Yet, these claims have failed because the plaintiffs could prove only that the landfill siting produced disproportionate racial *impacts*, rather than prove that the government acted with discriminatory intent.[54]

Following the 1976 case *Washington v. Davis*, "a law or other official act . . . is [not] unconstitutional [s]olely because it has a racially disproportionate impact."[55] Furthermore, even when plaintiffs can prove that governmental action was "motivated in part by a racially discriminatory purpose," the government may still escape liability if it can prove that "the same decision would have resulted even had the impermissible

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[51] *See* Washington v. Davis, 426 U.S. 229, 239 (1976) ("[A] law or other official act . . . is [not] unconstitutional Solely [sic] because it has a racially disproportionate impact.").

[52] U.S. CONST. amend. XIV § 1.

[53] *See, e.g.*, R.I.S.E. v. Kay, 977 F.2d 573 (4th Cir. 1992); East-Bibb Twiggs Neighborhood Ass'n v. Macon Bibb Plan. & Zoning Comm'n, 896 F.2d 1264 (11th Cir. 1989).

[54] *R.I.S.E.*, 977 F.2d at 2; *East-Bibb Twiggs Neighborhood Ass'n*, 896 F.2d at 1267.

[55] *Washington*, 426 U.S. at 239.

purpose not been considered."[56] While the Court in *Village of Arlington Heights v. Metropolitan Housing Development Corporation* stated that the discriminatory impact of official action could serve as evidence of discriminatory intent,[57] it has since ignored this aspect of its opinion. [58] As a result, environmental justice plaintiffs must look elsewhere for proof that governmental actors intended to discriminate when siting environmental hazards, but discriminatory intent is easy to hide, and siting decisions are often based on multiple criteria that are facially non-discriminatory.[59]

Similar roadblocks have stalled environmental litigation brought under Title VI of the Civil Rights Act. Title VI is the most far-reaching part of the Civil Rights Act, since it requires compliance by all recipients of federal funds. [60] Section 601 mandates that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." [61] Section 602 authorizes and directs federal agencies, including the EPA, to promulgate anti-discrimination regulations that give force to section 601.[62] As Title VI targets discrimination generally, it has been the statutory basis for significant environmental justice litigation.[63]

This litigation has also proven unsuccessful. As with the Equal Protection Clause, the Supreme Court has held that challengers to government action under section 601 of the Civil

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[56] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270 n.21 (1977).

[57] *Id.* at 266.

[58] Robert Nelson, *To Infer or Not to Infer a Discriminatory Purpose: Rethinking Equal Protection Doctrine*, 61 N.Y.U. L. REV. 334, 341 (1986) (citing Hunter v. Underwood, 471 U.S. 222 (1985); Wayte v. United States, 470 U.S. 598 (1985); Mobile v. Bolden, 446 U.S. 55, 67–68 (1980); Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979)).

[59] *See* Fisher, supra note 6, at 469 n.116 ("Critics attack the imposition of the burden of establishing discriminatory intent on the wrong party; discriminatory intent is easy to hide. Furthermore, since state action is based on multiple motives, the government always can identify a non-discriminatory motive for its action.").

[60] *See* Tony LoPresti, *Realizing the Promise of Environmental Civil Rights: The Renewed Effort to Enforce Title VI of the Civil Rights Act of 1964*, 65 ADMIN. L. REV. 757, 763 (2013).

[61] 42 U.S.C. § 2000d (2018).

[62] 42 U.S.C. § 2000d-1 (2018). *See also* 40 C.F.R. §§ 7.10–7.135 (the EPA's nondiscrimination regulations promulgated pursuant to section 602).

[63] *See, e.g.*, Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925 (3d Cir. 1997), *vacated*, 524 U.S. 974 (1998); S. Camden Citizens Action v. N.J. Dep't Env't Prot., 274 F.3d 771 (3d Cir. 2001).

Rights Act must prove that the government acted with a discriminatory *intent*; proving that a particular government action had a disparate impact on certain groups is insufficient to establish a civil rights violation.[64] For the reasons outlined above, plaintiffs face near-insurmountable burdens in establishing that officials intended to discriminate when making siting decisions. Accordingly, most cases of environmental discrimination cannot be litigated under section 601.

While litigants must prove that violations of section 601 of the Civil Rights Act arose from discriminatory intent in order to obtain restitution, agencies can still prohibit disparate impact discrimination through regulation.[65] As a result, private litigants have attempted to use section 602 regulations to challenge discriminatory siting of environmental hazards, and one such lawsuit—*Chester Residents Concerned for Quality Living v. Seif*—directly challenged siting practices in Pennsylvania.[66]

The town of Chester is located in Delaware County, Pennsylvania. As of 2002, Delaware County, excluding Chester, was 6.2% African American, while Chester itself was 65% African American.[67] Additionally, Chester's median family income was 45% lower than the rest of Delaware County's and its poverty rate was more than three times higher.[68] In an emblematic case of environmental racism, five of the seven commercial waste facilities that PADEP permitted in Delaware County between 1986 and 1996 were located in Chester.[69] Furthermore, the county processed all of its municipal waste and sewage in Chester, and over 60% of the county's waste-processing industries were located in the township.[70]

Chester residents organized to challenge the continued siting of waste facilities in their community. In *Chester Residents*

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[64] *See* Alexander v. Choate, 469 U.S. 287, 293 (1985) ("Title VI [of the Civil Rights Act of 1964] itself directly reached only instances of intentional discrimination.").

[65] *See id.* ("[A]ctions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI."); *but see* Alexander v. Sandoval, 532 U.S. 275, 281–82 (2001) (assuming for the purposes of deciding the case that "regulations promulgated under § 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups" but noting that such regulations are in "considerable tension with the rule of *Bakke* and *Guardians* that § 601 forbids only intentional discrimination").

[66] *Chester Residents Concerned for Quality Living*, 132 F.3d. at 927.

[67] COLE & FOSTER, *supra* note 11, at 34.

[68] *Id.*

[69] *Id.* at 34–35.

[70] *Id.* at 35.

Concerned for Quality Living v. Seif, Chester Residents Concerned for Quality Living (CRCQL), a local grassroots environmental justice organization, [71] argued that PADEP's issuance of a permit to Soil Remediation Services to operate a waste processing facility in Chester violated section 601 of the Civil Rights Act, the EPA's civil rights regulations promulgated pursuant to section 602, and PADEP's assurance that it would not violate those regulations.[72] The Third Circuit considered the section 602 claim on appeal, and held that Chester residents had a private right of action under regulations passed pursuant to section 602 to sue PADEP for siting practices that had racially disparate impacts. [73] However, that potentially-landmark decision was vacated after PADEP's denial of an operations permit to Soil Reclamation Services rendered the case moot.[74]

Soon after *Chester*, the Supreme Court shut the door on similar litigation, holding that no private right of action existed under Title VI to enforce section 602 regulations.[75] In *Alexander v. Sandoval*, a driver's license applicant claimed that the Department of Justice violated an anti-discrimination regulation promulgated pursuant to section 602 by administering state driver's license examinations only in English, which had the effect of subjecting non-English speakers to discrimination based on their national origin.[76] Justice Scalia wrote for the majority: "Neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under section 602. We therefore hold that no such right of action exists."[77] As a result, one more avenue for environmental justice was closed to potential litigants.

After *Sandoval* prevented litigants from enforcing section 602 regulations directly, environmental justice activists attempted to enforce those regulations through 42 U.S.C. § 1983,

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[71] *Chester Environmental Justice*, EJNET, http://www.ejnet.org/chester/ [https://perma.cc/ML2N-8V7S] (last visited Mar. 23, 2020).

[72] Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925, 927–28 (3d Cir. 1997).

[73] *Id.* at 937.

[74] Seif v. Chester Residents Concerned for Quality Living, 524 U.S. 974 (1998); Rick Kearns, *Chester Lawsuit Declared Moot by U.S. Supreme Court: Environmental Justice Still Doable Through Courts Despite Recent Supreme Court Decision,* EJNET (Oct. 6, 1998), https://www.ejnet.org/chester/moot.html [https://perma.cc/8JPC-6ZNU].

[75] Alexander v. Sandoval, 532 U.S. 275, 293 (2001).

[76] *Id.* at 278–79.

[77] *Id.* at 293.

a provision of the Civil Rights Act of 1871, which provides a remedy for deprivation under color of state law of "any rights . . . secured by the Constitution and laws."[78] In *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, a community organization sued the New Jersey Department of Environmental Protection (NJDEP), claiming that its decision to issue an air pollution permit to a cement processing facility would produce a racially discriminatory impact.[79] Prior to the *Sandoval* decision, the New Jersey District Court held that plaintiffs could sue NJDEP under section 602.[80] Immediately following *Sandoval* and its preclusion of such a section 602 claim, the District Court allowed the plaintiffs to amend their complaint and add a claim to enforce section 602 through § 1983.[81] However, on appeal, the Third Circuit held that disparate impact regulations promulgated pursuant to section 602 cannot create private rights enforceable under § 1983, since only Congress, and not administrative agencies or courts, can create such rights.[82] After much litigation, environmental justice advocates were once again unable to hold governmental actors accountable for siting and permitting decisions that disproportionately harmed low-income communities and communities of color. Federal law in general had failed to provide private causes of action to combat environmental discrimination, rendering state law the only viable avenue for such actions.[83]

C. Pennsylvania's Environmental Rights Amendment

In May 1971, Pennsylvania formally adopted its Environmental Rights Amendment under article 1, section 27 of its constitution.[84] The Environmental Rights Amendment arose from the Pennsylvania Legislature's general effort, beginning in 1965, to reverse the history of widespread environmental destruction in the state.[85] Representative Franklin L. Kury

[78] 42 U.S.C. § 1983 (2018).

[79] S. Camden Citizens Action v. N.J. Dep't Env't Prot., 274 F.3d 771, 775–76 (3d Cir. 2001).

[80] *Id.* at 776.

[81] *Id.*

[82] *Id.* at 790.

[83] Klee, *supra* note 8, at 160.

[84] PA. CONST. art. I, § 27.

[85] *Pennsylvania's Environmental Rights Amendment*, CONSERVATION ADVOC., https://conservationadvocate.org/pennsylvanias-environmental-rights-amendment/ [https://perma.cc/W8JX-8LYT] (last visited Mar. 22, 2020); Robinson Twp. v. Commonwealth, 83 A.3d 901, 976 (Pa. 2013) ("As we have explained, Pennsylvania has a notable history of what appears retrospectively to have been a shortsighted exploitation of its bounteous environment, affecting its minerals, its water, its air, its flora and fauna, and its people. The lessons

drafted the Amendment and introduced the associated House Bill, citing the need for an "over-all governmental framework in which to carry on the fight for conservation . . . that is clearly stated and beyond question . . . [and] will firmly guide the legislature, the executive and the courts alike." [86] As Pennsylvania law requires,[87] the General Assembly approved the Amendment in two successive legislative sessions—first in 1969–70 and then in 1971–72—before a majority of voters approved it in a public referendum on May 18, 1971.[88]

> As enacted, the Amendment reads as follows:
>
> > The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.[89]

At the time of its proposal, commentators hoped that the Amendment would be more than a "statement of policy," and would instead give "citizens a weapon which may be used in the courts, in litigation, to protect and enhance the quality of [their] environment."[90] Representative Kury claimed that he drafted the Amendment to "strengthen substantially the legal weapons available to protect our environment from further destruction."[91]

Despite the legislature's clear intention for the Amendment to serve as a substantive legal tool in the hands of Pennsylvania's citizens, the Pennsylvania judiciary soon undermined the Amendment's force. In *Payne v. Kassab*, responding to an action to enjoin a street-widening project that would result in the taking of part of a river, the Commonwealth

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learned from that history led directly to the Environmental Rights Amendment, a measure which received overwhelming support from legislators and the voters alike.").

[86] John C. Dernbach & Edmund J. Sonnenberg, *A Legislative History of Article I, Section 27 of the Constitution of the Commonwealth of Pennsylvania*, 24 WIDENER L.J. 181, 189–90 (2015).

[87] *See* PA. CONST. art. XI, § 1.

[88] Dernbach & Sonnenberg, *supra* note 86, at 184.

[89] PA. CONST. art. I, § 27.

[90] Robert Broughton, *Analysis of HB 958, the Proposed Pennsylvania Environmental Declaration of Rights*, 41 PA. BAR ASS'N Q. 421 (1969–70), *reprinted in* Dernbach & Sonnenberg, *supra* note 86, at 220.

[91] Dernbach & Sonnenberg, *supra* note 86, at 271.

Court[92] established a three-part test for determining whether a state actor violated its public trust duties under the Environmental Rights Amendment:

> The court's role must be to test the decision under review by a threefold standard: (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources? (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum? (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?[93]

The Court claimed that this test established a "realistic" rather than "legalistic" standard for judicial review,[94] and the *Payne* test quickly replaced the text of the Environmental Rights Amendment as the "all-purpose test for applying article I, section 27 when there is a claim that the Amendment itself has been violated."[95]

On its face, *Payne* established an almost insurmountable bar for challengers to state action. As long as the state actor in question complied with applicable statutes and regulations, the courts would largely defer to the state's decision-making process.[96] Accordingly, during the roughly four decades in which *Payne* was good law, only one of twenty-four court cases decided under the *Payne* test found that the state had violated the

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[92] The Commonwealth Court is one of Pennsylvania's two statewide intermediate appellate courts. It is primarily responsible for matters involving state and local governments and regulatory agencies, and it acts as a trial court in suits filed by or against the Commonwealth. *Learn*, UNIFIED JUD. SYS. PA., http://www.pacourts.us/learn/ [https://perma.cc/V7CM-VHJ5] (Nov. 2016).

[93] Payne v. Kassab, 312 A.2d 86, 94 (Pa. Commw. Ct. 1973), *aff'd*, 323 A.2d 407 (Pa. Commw. Ct. 1974), *aff'd*, 361 A.2d 263 (Pa. 1976).

[94] *Id.*

[95] John C. Dernbach et al., *Recognition of Environmental Rights for Pennsylvania Citizens:* Pennsylvania Environmental Defense Foundation v. Commonwealth of Pennsylvania, 70 RUTGERS U. L. REV. 803, 812–13 (2018) [hereinafter Dernbach et al., *Recognition of Environmental Rights*] (quoting Pa. Env't Def. Found. v. Commonwealth, No. 228 M.D. 2012, 2013 WL 3942086, at *8 (Pa. Commw. Ct. Jan. 22, 2013)).

[96] *See Payne*, 361 A.2d at 273 ("Having determined that Act 120 was complied with, we have no hesitation in deciding that the appellee Commonwealth of Pennsylvania has not failed in its duties as trustee under the constitutional article.").

Environmental Rights Amendment, and only eight of fifty-five cases heard by the Environmental Hearing Board—which hears appeals of PADEP decisions[97]—found the same.[98]

After four decades of undermining the Environmental Rights Amendment under the *Payne* test, the Pennsylvania Supreme Court did a significant about-face in its 2013 plurality opinion in *Robinson Township v. Commonwealth*.[99] In a landmark opinion, the supreme court dismissed *Payne* as incompatible with the Environmental Rights Amendment's text and interpreted the Amendment to provide a number of significant protections to citizens.[100] While the section of the opinion that interprets and applies the Environmental Rights Amendment was joined by a mere plurality of the justices, making it non-precedential, much of that section's content was reiterated in the subsequent majority opinion of *Pennsylvania Environmental Defense Foundation v. Commonwealth* (*PEDF*).[101] The *PEDF* opinion likewise dismissed the *Payne* test and interpreted the text of the Amendment as granting environmental protections that largely overlap with those granted by the plurality in *Robinson Township*.[102] Part III of this Note further discusses the degree to which the *PEDF* decision codified—or failed to codify—key aspects of the *Robinson Township* opinion.

The *Robinson Township* decision overhauled Pennsylvania's jurisprudence under the Environmental Rights Amendment and serves as the current bedrock for environmental

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[97] *Welcome*, PA. ENV'T HEARING BD., http://ehb.courtapps.com/public/index.php [https://perma.cc/BW2R-GRQQ] (last visited Mar. 22, 2020).

[98] John C. Dernbach & Marc Prokopchak, *Recognition of Environmental Rights for Pennsylvania Citizens: A Tribute to Chief Justice Castille*, 53 DUQ. L. REV. 335, 344–48 (2015).

[99] Robinson Twp. v. Commonwealth, 83 A.3d 901, 967 (Pa. 2013). *Robinson Township* again reached the Pennsylvania Supreme Court in 2016, although that opinion does not concern the Environmental Rights Amendment and is therefore not discussed in this Note. Robinson Twp. v. Commonwealth, 147 A.3d 536 (Pa. 2016).

[100] *Id.*

[101] *See* Frederick v. Allegheny Twp. Zoning Hearing Bd., 196 A.3d 677, 713 n.2 (Pa. Commw. Ct. 2018) (Ceisler, J., dissenting) ("Our Court has, in the past, expressed a clear desire to limit the *Robinson Township* plurality's persuasive power as much as possible. . . . However, given the Supreme Court's *PEDF II* opinion, in which the majority liberally quotes and repeatedly cites *Robinson Township*, I believe we must now recognize that authority of former Chief Justice Castille's plurality opinion has been greatly enhanced.") (citation omitted).

[102] Pa. Env't Def. Found. v. Commonwealth, 161 A.3d 911, 916 (Pa. 2017).

constitutionalism in the state.[103] It also presents a new inroad for environmental justice litigation. Part III summarizes this decision and subsequent case-law in this context.

III. *ROBINSON TOWNSHIP* AND THE DUTY OF IMPARTIALITY

The *Robinson Township* court finally established the Environmental Rights Amendment as a legitimate and practical tool for environmental advocates in Pennsylvania. Part III.A provides an overview of the *Robinson Township* opinion and describes its relationship to the Pennsylvania Supreme Court's later *PEDF* decision.[104] Part III.B narrows in on these decisions' still-unsettled environmental justice implications and outlines two alternate understandings of Pennsylvania's obligations under the Environmental Rights Amendment. Under the *Robinson Township* approach, state actors are bound by a substantive duty to avoid environmental decision-making that disproportionately harms certain communities;[105] under the *PEDF* approach, they must merely *consider* those disproportionate impacts in their decision-making process.[106] As Part III.B illustrates, neither of these two understandings has firmly settled in Pennsylvania environmental law, leaving room for environmental justice advocates to shape the law through future litigation.

A. The *Robinson Township* and *PEDF* Decisions

In *Robinson Township*, seven municipalities, an environmental organization, two individuals, and a physician collectively challenged several provisions of Act 13 of 2012, a set of amendments to Pennsylvania's Oil and Gas Act designed to foster unconventional gas production (hydraulic fracturing or fracking).[107] Among a number of other claims, the challengers

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[103] John C. Dernbach et al., Robinson Township v. Commonwealth of Pennsylvania*: Examination and Implications*, 67 RUTGERS U. L. REV. 1169, 1195 (2015) [hereinafter Dernbach et al., *Examination and Implications*] ("The plurality's opinion in *Robinson Township*, however, opens the door to fresh interpretations of constitutionally-embedded environmental rights provisions, especially those found to be 'on par' with other constitutional rights.").

[104] *Pa. Env't Def. Found.*, 161 A.3d at 916.

[105] *See* Robinson Twp. v. Commonwealth, 83 A.3d 901, 980 (Pa. 2013) ("This disparate effect is irreconcilable with the express command that the trustee will manage the corpus of the trust for the benefit of 'all the people.' A trustee must treat all beneficiaries equitably in light of the purposes of the trust.") (quoting PA. CONST. art. I, § 27).

[106] *See Pa. Env't Def. Found.*, 161 A.3d at 933 ("The duty of impartiality requires the trustee to manage the trust so as to give all of the beneficiaries due regard for their respective interests in light of the purposes of the trust.").

[107] Dernbach & Prokopchak, *supra* note 98, at 352.

argued that several of the act's provisions violated the Environmental Rights Amendment.[108] The court ruled unconstitutional sections of the act that asserted that the act preempted and superseded all local regulation of oil and gas operations;[109] that mandated state-wide uniformity among local ordinances to allow for "the reasonable development of oil and gas resources";[110] that required localities to permit industrial uses as a matter of right in every type of pre-existing zoning district;[111] and that mandated the PADEP to waive setback requirements for gas development as long as a permit applicant submitted a plan to protect Commonwealth waters.[112] Of particular relevance in the environmental justice context, the court based its ruling in part on the fact that the blanket provisions of the ordinance ignored the reality that industrial uses would "carry much heavier environmental and habitability burdens [in some communities] than others."[113] The court reasoned that the Commonwealth could not fulfill its mandate to "manage the corpus of the trust for the benefit of 'all the people'" if it could not consider the disparate effects of industrial uses in its siting decisions.[114]

In its ruling, the court dismissed the *Payne* test as incompatible with the text and purpose of the Amendment.[115] The court identified three primary infirmities in the *Payne* test: that it described the Commonwealth's obligations in far narrower terms than the Amendment itself; that it assumed that judicial relief was contingent upon legislative action; and that it minimized the constitutional duties of executive agencies and the judicial branch.[116]

As a result of these infirmities, the *Robinson Township* court turned to the text of the Amendment and identified three clauses therein.[117] The court found that the Amendment's first clause establishes a private right "of citizens to clean air and pure water, and to the preservation of natural, scenic, historic and esthetic values of the environment"; it also "affirms a limitation

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[108] *Robinson Twp.*, 83 A.3d at 913.

[109] 58 PA. CONS. STAT. § 3303 (2012) ("The Commonwealth by this section, preempts and supersedes the local regulation of oil and gas operations regulated by the environmental acts, as provided in this chapter.").

[110] *Id.* § 3304 (b).

[111] *Id.* § 3304 (b)(3).

[112] *Robinson Twp.*, 83 A.3d at 971–1000.

[113] *Id.* at 980.

[114] *Id.*

[115] *Id.* at 967.

[116] *Id.*

[117] *Id.* at 950.

on the state's power to act contrary to this right."[118] The Amendment's second and third clauses establish Pennsylvania's public natural resources as part of a public trust under the common ownership of all people and impose fiduciary duties on the Commonwealth to conserve and maintain those resources.[119]

The court interpreted the scope of "public natural resources" broadly and as encompassing "not only state-owned lands, waterways, and mineral reserves, but also resources that implicate the public interest, such as ambient air, surface and ground water, wild flora, and fauna (including fish) that are outside the scope of purely private property."[120] The court also recognized that, in enacting the Environmental Rights Amendment, the Pennsylvania Legislature intended the definition of "public natural resources" to "change over time to conform, for example, with the development of related legal and societal concerns."[121]

Rather than merely affirming that the state holds public natural resources in trust, the *Robinson Township* court described at length the specific fiduciary duties imposed upon the state.[122] The court held that state actors have duties "both negative (*i.e.*, prohibitory) and affirmative (*i.e.*, implicating enactment of legislation and regulations)" over the public natural resources encompassed by the Amendment.[123] Furthermore, drawing on private trust law, the *Robinson Township* court identified three primary fiduciary duties—prudence, loyalty, and impartiality—under which the Commonwealth is bound in its

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[118] *Id.* at 951.

[119] *Id.* at 954–56. These public trust duties expand upon the traditional American notion of the public trust doctrine, which historically centers on "[t]he principle that navigable waters are preserved for the public use, and that the state is responsible for protecting the public's right to the use." *Public-Trust Doctrine*, BLACK'S LAW DICTIONARY (11th ed. 2019). *See also* Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 459 (1892) ("The soil under navigable waters being held by the people of the state in trust for the common use and as a portion of their inherent sovereignty, any act of legislation concerning their use affects the public welfare.").

[120] *Robinson Twp.*, 83 A.3d at 955. Legislative history also suggests that "public natural resources" has a broad scope, with Representative Kury citing air pollution from vehicles on roads and highways as one of the environmental harms the Amendment was meant to remediate. Dernbach & Sonnenberg, *supra* note 86, at 189.

[121] *Robinson Twp.*, 83 A.3d at 975. The court noted that Act 13 and fracking affect the public natural resources of surface and ground water, ambient air, and aspects of the natural environment in which the public has an interest. *Id.* at 975.

[122] *Id.* at 954–59.

[123] *Id.* at 955–56.

role as trustee of Pennsylvania's public natural resources.[124] The first of these duties requires trustees "to exercise ordinary skill, prudence, and caution in managing the corpus of the trust";[125] the second requires them to "administer [the] trust solely in [the] beneficiary's interest."[126] It is the third of these duties—the duty of impartiality—that directly relates to the equitable distribution of environmental hazards.

In describing the duty of impartiality, the court stated that "dealing impartially with all beneficiaries means that the trustee must treat all equitably in light of the purposes of the trust."[127] Applying this duty, provisions of Act 13 were found unconstitutional when the Legislature's failure "to account for local conditions cause[d] a disparate impact upon beneficiaries of the trust."[128] Furthermore, the court found that the act violated the duty of impartiality because "the Department of Environmental Protection [was] not required, but [was] merely permitted, to account for local concerns in its permit decisions . . . [which] fail[ed] to ensure that any disparate effects [were] attenuated."[129] The court likewise took issue with the fact that the Act "marginalize[d] participation by residents, business owners, and their elected representatives with environmental and habitability concerns."[130] The court enjoined the application and enforcement of the sections of the act that violated these trustee duties.[131]

Because it was a plurality opinion, *Robinson Township* itself is merely persuasive on future courts.[132] However, the Pennsylvania Supreme Court's majority opinion in *PEDF* made much of its analysis in *Robinson Township* binding law.[133] Importantly, that opinion—like *Robinson Township*—relied on private trust law to determine that the state was bound by a duty of impartiality in managing its public trust assets.[134]

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[124] *Id.* at 957.
[125] *Id.*
[126] *Id.*
[127] *Id.* at 959.
[128] *Id.* at 984.
[129] *Id.*
[130] *Id.*
[131] *Id.* at 1000.
[132] Dernbach et al., *Recognition of Environmental Rights*, *supra* note 95, at 813.
[133] *See* Pa. Env't Def. Found. v. Commonwealth, 161 A.3d 911 (Pa. 2017).
[134] *Id.* at 930–33.

In *PEDF*, an environmental organization challenged the Commonwealth's decision to utilize proceeds from oil and gas leases for non-conservation purposes as violating the state's trustee duties.[135] The Pennsylvania Supreme Court held that state entities could use proceeds generated from public trust assets only for conservation and maintenance purposes.[136] In doing so, the court solidified *Robinson Township*'s rejection of the *Payne* test and declared that the text of the Amendment "contains an express statement of the rights of the people and the obligations of the Commonwealth with respect to the conservation and maintenance of our public natural resources."[137] The court also quoted *Robinson Township*'s imposition of the duties of prudence, loyalty, and impartiality, and stated that "[t]he duty of impartiality requires the trustee to manage the trust so as to give all of the beneficiaries due regard for their respective interests in light of the purposes of the trust."[138] The court did not explicate on the duty further, nor reiterate the *Robinson Township* plurality's claim that the duty requires state actors to attenuate disparate impacts arising from their environmental decision-making. As a result, the aspects of the *Robinson Township* opinion that most directly relate to the environmental justice concerns discussed in Part II of this Note remain merely persuasive on Pennsylvania courts. Part III.B discusses the ramifications of this fact and examines the still uncertain role of the duty of impartiality after *PEDF*.

B. Environmental Justice Under the Revamped Environmental Rights Amendment

In its *Robinson Township* opinion, the court never connects its concerns about disparate environmental impacts to racial or socioeconomic discrimination. Yet, the court's central concern—the permitting of industrial uses without regard to the preexisting character of the affected community—parallels environmental justice advocates' concerns about siting additional environmental hazards in communities that already bear disproportionate burdens. As the court recognized, permitting industrial uses in certain communities creates a greater harm than permitting them elsewhere.[139] That is especially true when those communities are already encumbered by other industrial facilities.[140] If the duty of impartiality requires state actors to

[135] *Id.* at 925.
[136] *Id.* at 935.
[137] *Id.* at 916.
[138] *Id.* at 932–33.
[139] Robinson Twp. v. Commonwealth, 83 A.3d 901, 980 (Pa. 2013).
[140] *See supra* notes 28–30 and accompanying text.

consider local factors that cause certain communities to be disproportionately impacted by siting decisions, there is no reason why those factors could not encompass the cumulative environmental risks already facing overburdened communities.

In this regard, *Robinson Township* can be understood to have set the stage for environmental justice litigation challenging the continued siting of environmental hazards in low-income communities and communities of color that already bear a disproportionate number of polluting facilities. Yet following *Robinson Township* and *PEDF*, Pennsylvania courts have not further explicated the state's exact obligations under the duty of impartiality, and the *Robinson Township* and *PEDF* opinions in fact point to different understandings of those obligations. This section accordingly analyzes different ways this duty might be understood under current law, specifically as it relates to the siting and permitting of environmental burdens in overburdened communities.

PEDF, unlike *Robinson Township*, was a binding majority opinion. The *PEDF* court described the duty of impartiality as "requir[ing] the trustee to manage the trust so as to give all of the beneficiaries due regard for their respective interests in light of the purposes of the trust."[141] Taken alone, this paragraph may be read as imposing on the state only procedural requirements to consider the interests of all trust beneficiaries—in this case, the communities affected by environmental decision-making—before making a decision that may or may not align with those interests. Such an understanding would roughly follow the model imposed by statutes such as the National Environmental Policy Act (NEPA), under which the judiciary analyzes whether a federal agency adequately considered and disclosed its impact on the environment as a matter of procedure, rather than considering the substance or merits of an agency action.[142]

In contrast, the plurality opinion in *Robinson Township* points to the duty of impartiality as a substantive duty that requires agencies to avoid environmental decisions that produce disparate impacts on certain communities. As discussed above, the *Robinson Township* court found that the duty of impartiality had been violated when the Legislature's failure "to account for local conditions cause[d] a disparate impact upon beneficiaries of

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[141] *Pa. Env't Def. Found.*, 161 A.3d at 933.

[142] Philip Michael Ferester, *Revitalizing the National Environmental Policy Act: Substantive Law Adaptations from NEPA's Progeny*, 16 HARV. ENV'T L. REV. 207, 208 (1992).

the trust," and when the Legislature "fail[ed] to ensure that any disparate effects [were] attenuated."[143] While the first failure aligns with the sort of procedural considerations that the *PEDF* court would adopt, the second failure suggests that the Legislature would violate its fiduciary duty of impartiality if it produced disparate impacts without attenuating those impacts, thereby imposing a more substantive obligation on the state. This substantive obligation is reflected elsewhere in the opinion, such as in the court's insistence that "the disparate impact on some citizens sanctioned by Section 3304 of Act 13 [is] incompatible with the express command of the Environmental Rights Amendment."[144]

In *Delaware Riverkeeper Network v. Commonwealth*, which was adjudicated after *Robinson Township* and *PEDF*, the Environmental Hearing Board had the opportunity to further examine the relationship between the duty of impartiality and state siting and permitting decisions.[145] In a consolidated appeal, environmental organizations and private residents challenged PADEP's decision to issue and reissue permits for fracking wells.[146] The appellants claimed that the Department "breached its duty of impartiality by treating the Geyer Well Site as if it were no different than any other wellsite, despite the presence of a large, health-sensitive population nearby—children and by approving an unknown amount of further degradation to local air quality in a community that they assert is already suffering from degraded air."[147] In analyzing this claim, the Board repeated *PEDF*'s characterization of the duty of impartiality, noting that it "requires the trustee to manage the trust so as to give all of the beneficiaries due regard for their respective interests in light of the purposes of the trust."[148]

Ultimately, the Board concluded that the Department had not "failed to give due regard to the interests of the various beneficiaries of the public natural resources in the vicinity of the Geyer Well Site."[149] However, its reasoning rested primarily on issues of evidence and failed to reveal much about the Board's understanding of PADEP's obligations under the duty of impartiality. The Board found that the appellant's expert report

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[143] *Robinson Twp.*, 83 A.3d at 984.

[144] *Id.* at 981.

[145] Del. Riverkeeper Network v. Commonwealth, No. 2014-142-B, 2015-157-B, 2018 WL 2294492 (Pa. Env't Hearing Bd. May 11, 2018).

[146] *Id.*

[147] *Id.* at *32 (citations omitted).

[148] *Id.* at *25.

[149] *Id.* at *33.

"was [not] sufficiently related to the particular circumstances at the Geyer Well Site to require the Department to have given it additional consideration beyond the review it conducted and the requirements outlined in the Geyer Well Permits," and decided that the appellants had "not proven that there will be unreasonable degradation of the local air quality as a result of the Department's permitting action."[150] The Board did not specify what the Department's obligations would have been had appellants established that the Greyer Well Site would have unreasonably degraded the local air quality. As a result, the Board's opinion failed to further solidify an understanding of the duty of impartiality in Pennsylvania environmental law.

Following *PEDF*, PADEP has seemed to adopt a procedural understanding of the duty of impartiality. In 2018, PADEP's Policy Office proposed an amendment to its Environmental Justice Public Participation Policy that provides non-binding procedures for community input when a company applies for an environmental permit to operate in an environmental justice community. In its proposed amendment, PADEP suggests that these procedures for community input satisfy the department's obligations to low-income communities and communities of color under the Environmental Rights Amendment.[151]

The proposed Public Participation Policy reflects a procedural understanding of the duty of impartiality, which is satisfied by consideration of a decision's impact on affected communities. However, a deeper analysis of the duty of impartiality in Pennsylvania law reveals that PADEP and the Pennsylvania courts should also adopt the *Robinson Township* decision's substantive requirements. Part IV accordingly argues

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[150] *Id.*

[151] PA. DEP'T ENV'T PROT. POL'Y OFF., 012-0501-002, DRAFT: ENVIRONMENTAL JUSTICE PUBLIC PARTICIPATION POLICY 3 (June 13, 2018), http://files.dep.state.pa.us/PublicParticipation/Office%20of%20Environmental%20Advocacy/EnvAdvocacyPortalFiles/2018/06-10/Draft%20EJ%20Public%20Participation%20Policy.pdf [https://perma.cc/44A9-SEBE] ("The Equal Rights Amendment (ERA) can be used as a tool available to the community to address equal justice in low income and minority communities, and may help the most vulnerable communities while improving a sustainable Pennsylvania."). While the quotation mentions the "Equal Rights Amendment" rather than the "Environmental Rights Amendment," context indicates that PADEP in fact meant the latter. The constitutional provision commonly referred to as Pennsylvania's Equal Rights Amendment does not relate to either environmental justice or low-income and minority communities more generally, but instead mandates that "[e]quality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual." PA. CONST. art. I, § 28.

that the Pennsylvania judiciary should understand the duty of impartiality as prohibiting the additional siting of environmental hazards in communities that already bear disproportionate burdens.

IV. UNDERSTANDING THE DUTY OF IMPARTIALITY IN PENNSYLVANIA LAW

Since *PEDF*, Pennsylvania courts have not defined the exact scope of the duty of impartiality. The *Robinson Township* court's mandate that state actors must "treat all [beneficiaries] equitably in light of the purposes of the trust" does not resolve the issue, as differing conceptions of environmental equity would result in differing state obligations.[152] In light of this uncertainty, future Pennsylvania courts should take seriously the *PEDF* court's statement that "the proper standard of judicial review [for the Environmental Rights Amendment] lies in the text of Article I, Section 27 itself as well as the underlying principles of Pennsylvania trust law in effect at the time of its enactment."[153] Since the text of the Amendment does not detail the state's trustee duties, Pennsylvania trust law provides the basis for my analysis of the state's obligations.[154]

In order to analyze the duty of impartiality in the context of environmental equity, Part IV.A first summarizes how different conceptions of equitable treatment correlate with different siting schemes. Part IV.B next analyzes how the duty of

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[152] Robinson Twp. v. Commonwealth, 83 A.3d 901, 959 (Pa. 2013).

[153] Pa. Env't Def. Found. v. Commonwealth, 161 A.3d 911, 930 (Pa. 2017).

[154] The legislative history associated with the Amendment provides little help in determining what conception of environmental equity the Amendment embodies. Broadly speaking, the legislative history frames the Amendment as a response to the depletion and degradation of humanity's physical environment. *See* Dernbach & Sonnenberg, *supra* note 86, at 188–90. It does not consider the array of distributional concerns broadly encompassed under the term "environmental justice." The closest that the legislative history gets to addressing matters of environmental inequality can be found in broad statements about maintaining the environment for the benefit of *everyone*, rather than a select few. In a Question and Answer accompanying the Amendment's adoption, Representative Kury, the Amendment's Chief Legislative Sponsor, clarified that the Amendment "establishes that the public natural resources of the Commonwealth belong to all the people, including future generations, and that the Commonwealth is to serve as Trustee of our natural resources for future generations." *Id.* at 270. He further stated that "[t]he Resolution would benefit all of the people, and would go a long way toward tempering any individual, company, or governmental body which may have an adverse impact on our natural or historic assets." *Id.* While these statements may emphasize the Amendment's broad applicability, they do not explain how the government should manage its public trust resources nor clarify whether the Amendment could or should serve as a baseline for progressive siting.

impartiality functions in Pennsylvania trust law and argues that it imposes substantive requirements on trustees to avoid actions that would harm one trust beneficiary for the benefit of another, along with procedural requirements to consider the interests of all beneficiaries in the first place. Finally, Part IV.C argues that Pennsylvania courts, in maintaining fidelity to Pennsylvania trust law, should enforce a scheme of substantive environmental equity, in which state actors are prohibited from the continued siting and permitting of environmental hazards in communities that already bear disproportionate environmental burdens.

A. Differing Conceptions of Environmental Equity

As the duty of impartiality requires state actors to "treat all [beneficiaries] equitably in light of the purposes of the trust," [155] future courts deciding the limits of the duty of impartiality must provide a definition for "equitable" treatment. The definition is not self-evident, as New York University Law Professor Vicki Been makes clear in her 1993 article *What's Fairness Got to Do with It? Environmental Justice and the Siting of Locally Undesirable Land Uses*.[156] In her article, Professor Been "explores what various conceptions of equality would look like if translated into concrete siting programs."[157] The article considers the siting of Locally Undesirable Land Uses (LULUs) generally, a category which includes environmental hazards such as waste sites alongside other land uses including homeless shelters and low-income housing. Her study originates from a recognition that "different theories of fairness should lead to radically different siting programs, so that one cannot adequately evaluate a fair siting proposal without first identifying its underlying conception of fairness."[158] As the duty of impartiality centers on treating all beneficiaries equitably, different understandings of equity or fairness should generate different understandings of the obligation of the state and the courts in upholding the duty.

Professor Been begins her study by outlining seven conceptions of fairness and grouping them into three categories: those that focus on the pattern of distribution of LULUs, those that focus on the efficiency of the distribution, and those that

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[155] *Robinson Twp.*, 83 A.3d at 959.

[156] Vicki Been, *What's Fairness Got to Do with It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001 (1993).

[157] *Id.* at 1006.

[158] *Id.* at 1009.

focus on the procedure by which the distribution was effected.[159] The first category includes conceptions of fairness as requiring equal division between the burdens of LULUs, in terms of either pure geographic distribution or compensation for unequal distribution of burdens; as requiring progressive siting of LULUs in advantaged neighborhoods; and as requiring an equal initial split of LULUs and competitive bidding for and against LULUs after the initial split.[160] The second category encompasses a notion of fairness as cost-internalization, in which those that benefit from LULUs internalize the costs through physical distribution or compensation schemes.[161] Finally, the third category encompasses fairness as requiring the treatment of individuals and communities as equals, leading to siting processes that are equally attentive to the interests of all communities regardless of race or class.[162]

This final, procedural conception of fairness drives the "impact statement" approach of environmental justice, in which "agencies must consider the concentration of uses in choosing or approving sites."[163] The impact statement approach underlays President Clinton's Executive Order 12898 ("Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations"), which focuses on "identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of [agency] programs, policies, and activities on minority populations and low-income populations,"[164] without requiring that environmental justice factors "play a determining factor in siting, rulemaking, and permitting decisions."[165]

In contrast, the first category of fairness underpins legislation that requires dispersion and deconcentration of LULUs by prohibiting their siting in communities once those communities reach a certain threshold concentration, along with legislation that requires all communities bear a "fair share" of LULUs.[166] Such legislation imposes substantive obligations on

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[159] *Id.* at 1028.

[160] *Id.* at 1028–55.

[161] *Id.* at 1055–60.

[162] *Id.* at 160–68.

[163] *Id.* at 172.

[164] Exec. Order No. 12,898, 59 Fed. Reg. 7,629, 7,629 (Feb. 16, 1994).

[165] Albert Huang, *The 20th Anniversary of President Clinton's Executive Order 12898 on Environmental Justice*, NAT. RES. DEF. COUNCIL (Feb. 10, 2014), https://www.nrdc.org/experts/albert-huang/20th-anniversary-president-clintons-executive-order-12898-environmental-justice [https://perma.cc/8QEY-M6X2].

[166] Been, *supra* note 156, at 1068–72, 1074–76.

the state, prohibiting siting and permitting decisions when those decisions have discriminatory effects. Of course, in order to fulfill these substantive obligations, the state must first consider the impact of potential decisions on affected groups. In other words, procedural requirements for the identification of disproportionate impacts are necessary preconditions for the implementation of a dispersive or progressive siting scheme. As Part IV.B demonstrates, this mixture of substantive and procedural obligations, rather than the merely procedural requirements of the "impact statement" approach, most readily parallels the obligations imposed on trustees by the duty of impartiality in Pennsylvania trust law.

B. The Duty of Impartiality in Pennsylvania Private Trust Law

A survey of how the duty of impartiality functions in Pennsylvania trust law reveals that it imposes both substantive and procedural obligations on trustees. In surveying Pennsylvania trust law, this section begins by analyzing the five sources cited by the *Robinson Township* and *PEDF* courts, which together provide a substantial but non-exhaustive account of the duty of impartiality at the time of the enactment of the Environmental Rights Amendment. The *Robinson Township* court provided three citations for the duty of impartiality in Pennsylvania trust law: 20 Pa. Cons. Stat. section 7773, Restatement (Second) of Trusts section 232 (Impartiality between Successive Beneficiaries), and the 1980 Pennsylvania Supreme Court opinion from *In re Hamill's Estate*.[167] The *PEDF* court additionally cited Restatement (Second) of Trusts section 183 and the 1979 Pennsylvania Supreme Court opinion in *Estate of Sewell*.[168]

Of these sources, neither 20 Pa. Cons. Stat. section 7773, which implements in Pennsylvania Law section 803 of the Uniform Trust Code, nor the Restatement (Second) of Trusts clarifies the extent to which the duty of impartiality imposes substantive obligations on trustees. However, both *In re Hamill's Estate* and *Estate of Sewell* indicate that the courts understood the duty as imposing substantive obligations,[169] a view which is supported by the more recent Restatement (Third) of Trusts.[170]

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[167] Robinson Twp. v. Commonwealth, 83 A.3d 901, 959 (Pa. 2013).

[168] Pa. Env't Def. Found. v. Commonwealth, 161 A.3d 911, 933 (Pa. 2017).

[169] Estate of Sewell, 409 A.2d 401, 402 (Pa. 1979); *In re* Hamill's Estate, 410 A.2d 770, 773 (Pa. 1980).

[170] RESTATEMENT (THIRD) OF TRUSTS § 79 cmt. c (AM. L. INST. 2007).

> 20 Pa. Cons. Stat. section 7773 reads as follows:
>
> > If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing and distributing the trust property, giving due regard to the beneficiaries' respective interests in light of the purposes of the trust. The duty to act impartially does not mean that the trustee must treat the beneficiaries equally. Rather, the trustee must treat the beneficiaries equitably in light of the purposes of the trust.[171]

Under this statute, the trustee must give "due regard" to the beneficiaries' interests; in other words, the trustee must consider those interests when investing, managing, and distributing the trust property.[172] Beyond that requirement, the trustee must "act impartially" and "treat the beneficiaries equitably."[173] However, as discussed above, demands for "equitable" treatment do not necessarily correlate with demands for substantive equity and could, in theory, be satisfied by mere consideration of the beneficiaries' interests. The Uniform Law Comment associated with the statute does not resolve the ambiguity. It states that, "[i]n fulfilling the duty to act impartially, the trustee should be particularly sensitive to allocation of receipts and disbursements between income and principal and should consider, in an appropriate case, a reallocation of income to the principal account and vice versa, if allowable under local law."[174] While this comment suggests that decisions as to future allocation of trust assets can be based on past inequities, it does not mandate that trustees act in a certain way.

Restatement (Second) of Trusts sections 183 and 232 also fail to provide significant clarity. Section 183 states in part: "When there are two or more beneficiaries of a trust, the trustee is under a duty to deal impartially with them."[175] Section 232 does little more than expand the general rule contained in section 183 to successive beneficiaries, reading: "If a trust is created for beneficiaries in succession, the trustee is under a duty to the successive beneficiaries to act with due regard to their respective interests."[176] Neither of these sections explain what specific actions trustees must take to satisfy their obligations under the

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[171] 20 PA. CONS. STAT. § 7773 (2020).
[172] *Id.*
[173] *Id.*
[174] 20 PA. Stat. and Cons. Stat.§ 7773 uniform law cmt. (West 2020).
[175] RESTATEMENT (SECOND) OF TRUSTS § 183 (AM. L. INST. 1959).
[176] RESTATEMENT (SECOND) OF TRUSTS § 232 (AM. L. INST. 1959).

duty. However, the editors' comments to the sections are of more help; in particular, comments under section 232 clearly indicate that the duty imposes substantive obligations on the trustee.[177]

Comment b of section 232 provides the clearest explication of the substantive obligations imposed under the duty of impartiality. It outlines the trustee's duties to successive beneficiaries, including the duty "not to sacrifice income for the purpose of increasing the value of the principal," and the "duty to a life beneficiary not to purchase or retain unproductive property." [178] While these particular substantive obligations specifically apply in the context of subsequent beneficiaries, case law indicates that substantive obligations also apply in the context of simultaneous beneficiaries.[179]

The private trust law cases that the Pennsylvania Supreme Court cited in *Robinson Township* and *PEDF* both indicate that the duty of impartiality imposes substantive obligations on trustees. In *In re Hamill's Estate*, the court cited section 232 comment b to support the rule that a trustee has an obligation to maintain the trust for the benefit of present and future beneficiaries and should not sacrifice the interest of one for the other.[180] In *Estate of Sewell*, the Pennsylvania Supreme Court found that a trustee violated the duty when the trustee (1) failed to "confirm appellant's status as a beneficiary" and (2) "continu[ed] to make payments of trust income to" a single beneficiary. [181] The duty here is twofold and encompasses obligations both procedural—the duty to consider the status of

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[177] RESTATEMENT (SECOND) OF TRUSTS § 232 cmt. b. (AM. L. INST. 1959).

[178] *Id.* Comments under section 183 indicate that a trustee may be empowered to favor one beneficiary over the other if the trust or will at issue clearly indicates an intent for such favoritism. RESTATEMENT (SECOND) OF TRUSTS § 183 cmt. a (AM. L. INST. 1959) ("By the terms of the trust the trustee may have discretion to favor one beneficiary over another. The court will not control the exercise of such discretion, except to prevent the trustee from abusing it"). In *Estate of Pew*, a private trust case, the Pennsylvania Superior Court analyzed this comment and stated that "[w]hether or not the testator has empowered his trustees here to favor the named income beneficiaries over the charitable remainderman, or vice versa, is a question of intent." 655 A.2d 521, 542 (Pa. Super. Ct. 1994). The Court further clarified that such "intent must be derived from an examination of the entire will, viewed in the light of the circumstances of the testator." *Id.*

[179] *See* Estate of Sewell, 409 A.2d 401, 402 (Pa. 1979) (holding that a trustee whose status is not open to dispute is entitled to trust income along with other trustees).

[180] *In re* Hamill's Estate 410 A.2d 770, 773 (Pa. 1980).

[181] *Estate of Sewell*, 409 A.2d at 402.

all beneficiaries—and substantive—allocating payments in an equitable fashion.

More recently, in *Snyder v. Commonwealth*, the Pennsylvania Supreme Court held:

> [In the case of] a trust with two life beneficiaries, neither of whom's needs were to be considered dominant, the trustee was required to carefully consider how his actions toward one beneficiary would affect the other; and he could not justifiably act to benefit one when to do so would irreparably damage the interest of the other.[182]

In this framing, the question of whether the trustee *intended* to benefit one beneficiary over the other is not determinative; the key issue is whether the trustee did in fact create disparate effects by benefitting one beneficiary while hurting the other. These cases, two of which were cited in the *Robinson Township* and *PEDF* opinions, together indicate that the duty of impartiality is both procedural and substantive.

The Restatement (Third) of Trusts section 79 (Duty of Impartiality; Income Productivity) has upheld that understanding of the duty. A comment under section 79 identifies "'substantive' aspects of impartiality."[183] These substantive aspects require trustees to "avoid injecting their personal favoritism into their decision[-]making and conduct in trust administration and . . . make diligent and good-faith efforts to identify, respect, and balance the various beneficial interests when carrying out the trustees' fiduciary responsibilities in managing, protecting, and distributing the trust estate, and in other administrative functions."[184] This comment clarifies that the trustee must both "identify" and "balance" the beneficiaries' interests: obligations that are procedural and substantive.[185] Furthermore, in requiring trustees to balance the beneficiaries' interests, the Restatement imposes a duty to avoid inequitable trust allocation even when that allocation does not derive from an intentional decision to favor one beneficiary at the expense of another.

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[182] Snyder v. Commonwealth, 598 A.2d 1283, 1287 (Pa. 1991). Other Pennsylvania cases touch on the duty of impartiality without adding substantive analysis. *See, e.g.*, *In re* Neafie's Estate, 191 A. 56 (Pa. 1937); *In re* Tr. Under Agreement of Kaiser, 572 A.2d 734 (Pa. 1990); *In re* Weiss's Estate, 309 A.2d 793 (Pa. 1973); *In re* Longbotham's Estate, 29 A.2d 481 (Pa. 1943).

[183] RESTATEMENT (THIRD) OF TRUSTS § 79 cmt. c (AM. L. INST.. 2007).

[184] *Id.*

[185] *Id.*

This study of Pennsylvania trust law reveals that the duty of impartiality imposes both procedural and substantive requirements on the state. Following the *Robinson Township* and *PEDF* courts' usage of Pennsylvania private trust law as the basis for its understanding of the state's public trust duties,[186] Pennsylvania courts should require the state to not only consider whether siting and permitting decisions would have a disparate impact on certain communities, but also to actually avoid those impacts. As such, the duty of impartiality should allow litigants a cause of action against the sort of disparate impact environmental discrimination litigated under the Civil Rights Act prior to *Sandoval*.

C. Shaping an Environmental Justice Claim Under the Duty of Impartiality

Causes of action under the duty of impartiality could take several forms. Following in the footsteps of the *Robinson Township* and *PEDF* petitioners, litigants may file a Complaint for Declaratory Judgment pursuant to Pennsylvania's Declaratory Judgments Act, seeking the Commonwealth Court to declare Pennsylvania's current permitting scheme unconstitutional. Litigants could alternatively appeal the issuance of specific permits that disproportionately impact overburdened communities. Litigants may also have claims against municipalities or local land use boards that have used their zoning powers to concentrate environmental hazards in communities of color, although such a claim follows less directly from *Robinson Township*'s discussion of disparate impacts arising from the permitting process.

1. Claims Under the Declaratory Judgments Act

Pennsylvania's Declaratory Judgments Act provides that "[c]ourts of record, within their respective jurisdictions, shall have power to declare rights, status, and other legal relations," and that such "declaration[s] may be either affirmative or negative in form and effect . . . [and] shall have the force and effect of a final judgement or decree."[187] The *Robinson Township* petitioners challenged Act 13 under the Declaratory Judgments Act, [188] and the *PEDF* petitioners used this act to seek the Commonwealth Court's declaration as to whether Pennsylvania's

[186] Robinson Twp. v. Commonwealth, 83 A.3d 901, 954–59 (Pa. 2013); Pa. Env't Def. Found. v. Commonwealth, 161 A.3d 911, 930 (Pa. 2017).

[187] 42 PA. CONS. STAT. § 7532 (2020).

[188] *Robinson Twp.*, 83 A.3d at 990.

Fiscal Code and the General Assembly's fiscal appropriations violated the Environmental Rights Amendment.[189]

Litigants could likewise use the Declaratory Judgments Act to seek the court's declaration as to whether the Commonwealth's environmental permitting legislation and PADEP's implementing regulations violate the Environmental Rights Amendment by failing to include a mechanism for preventing the continued siting of environmental hazards in overburdened communities. Of course, the regulatory scheme governing the permitting of environmental hazards differs depending on the facility being permitted—for example, waste facilities as opposed to hydraulic fracturing wells—and litigants would have to separately challenge the permitting of different sorts of environmental hazards. Given the *Robinson Township* and *PEDF* petitioners' success in using the Declaratory Judgments Act to challenge state action under the Environmental Rights Amendment, this procedure stands out as the most feasible method to challenge Pennsylvania's siting scheme.

In a successful Declaratory Judgments Act petition, the court's order would declare the applicable statutes or regulations unconstitutional, and the General Assembly and/or PADEP would then be tasked with remedying that unconstitutionality. In doing so, the federal Environmental Equal Rights Act of 1993 could provide one model for how to incorporate distributive criteria into permitting decisions to remedy any constitutional violation. The Environmental Equal Rights Act was an unsuccessful attempt to amend the Solid Waste Disposal Act to incorporate racial criteria into evaluations of siting approvals.[190] Under the act, affected citizens could have challenged the siting of a waste facility if the proposed location was within two miles of another waste facility, Superfund site, or facility that releases toxic contaminants; the proposed location was within a community with a higher than average percentage of low-income people or people of color; and the proposed facility would have adversely affected the human health, air, soil, or other environmental asset of the community or a portion of the community.[191] The challenge would fail if the defendant could prove that no alternative location existed within the state that posed fewer risks to human health and the environment and that the proposed facility would not release contaminants or was

[189] *Pa. Env't Def. Found.*, 161 A.3d at 925.
[190] H.R. 1924, 103d Cong. (1993).
[191] *Id.*

unlikely to increase the cumulative impact of contaminants on any residents of the community.[192] While these exact protocols are merely one example of standards by which to incorporate environmental equity concerns into permitting decisions, they could serve as a template for legislation and regulation seeking to incorporate the duty of impartiality.

2. PADEP Permit Appeals

In addition to challenging the statutory and regulatory schemes for the permitting of environmental hazards under the Declaratory Judgments Act, affected citizens and community groups can also directly challenge the issuance of environmental permits for facilities to be operated in disproportionately burdened communities. The specific mechanisms for such a challenge would vary based on the type of facility being permitted. For example, 25 Pa. Code section 271.201 provides permit criteria for the approval of municipal waste facilities. That regulation mandates that a "permit application will not be approved unless the applicant affirmatively demonstrates that . . . [t]he requirements of PA. CONST. art. 1, § 27 have been complied with."[193] Community groups could use this regulation to sue PADEP for violating the duty of impartiality by issuing a municipal waste permit in a community that already bears a disproportionate burden. The Municipal Waste Planning, Recycling and Waste Reduction Act requires PADEP to "[a]dminister the municipal waste planning, recycling and waste reduction program pursuant to the provisions of this act and the regulations promulgated pursuant thereto,"[194] and provides that "any aggrieved person may commence a civil action on his own behalf against any person who is alleged to be in violation of this act." [195] The Environmental Hearing Board has original jurisdiction over citizen suit actions brought against PADEP under the aforementioned provision,[196] and the Commonwealth Court in turn has exclusive appellate jurisdiction over any Environmental Hearing Board final order. [197] Litigants could accordingly use 25 Pa. Code section 271.201 to challenge PADEP's failure to comply with the duty of impartiality by permitting a waste facility in an already disproportionately burdened community.

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[192] *Id.*
[193] 25 PA. CODE § 271.201.
[194] 53 PA. CONS. STAT. § 4000.301(a) (2020).
[195] 53 PA. CONS. STAT. § 4000.1711(a) (2020).
[196] 53 PA. CONS. STAT. § 4000.1711(b) (2020).
[197] 42 PA. CONS. STAT. § 763(a)(2) (2020).

Since "the public trust provisions of Section 27 are self-executing,"[198] affected individuals could challenge facilities even if the governing regulations for permitting of those facilities do not explicitly incorporate the Environmental Rights Amendment. Pennsylvania administrative law provides that "[a]ny person aggrieved by an adjudication of a Commonwealth agency who has a direct interest in such adjudication shall have the right to appeal therefrom to the court vested with jurisdiction of such appeals."[199] Parties can use such an appeal to "question[] the validity of the statute" which governed the agency action.[200] As a result, permit appeals could be a forum for challenging permitting schemes that fail to adequately fulfill the Commonwealth's duty of impartiality by attenuating the disparate impacts of permitting decisions.

3. Challenges to Municipalities or Local Agencies

While the most obvious defendant for a duty of impartiality claim would be PADEP or the Commonwealth as a whole, suits could also proceed against local governments and land use agencies that concentrate environmental hazards in overburdened communities via zoning or other land use decisions. The *Robinson Township* court implied that municipalities are bound by the same trust obligations as the state, noting in dicta that "[t]he aggrievement alleged by the political subdivisions is not limited to vindication of individual citizens' rights but extends to allegations that the challenged statute interferes with the subdivisions' constitutional duties respecting the environment and, therefore, its interests and functions as a governing entity."[201] In asserting that subdivisions have constitutional duties to respect the environment, the court opened the door for litigation directly challenging municipalities' abuse of discretion in exercising those duties. [202]

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[198] Pa. Env't Def. Found. v. Commonwealth, 161 A.3d 911, 937 (Pa. 2017).

[199] 2 PA. CONS. STAT. § 702 (2020). A party's interest must also be substantial. *See* MEC Pa. Racing v. Pa. State Horse Racing Comm'n, 827 A.2d 580, 588 (Pa. Commw. Ct. 2003), *as amended* (July 15, 2003). A "direct" interest arises when the adjudication causes harm to the appellant's interest, and a "substantial" interest arises when there is a discernible adverse effect to an interest other than the abstract interest of all citizens in having others comply with the law. *See id.* (citing Pa. Auto. Ass'n v. State Bd. of Vehicle Mfr., Dealers & Salespersons, 550 A.2d 1041, 1043 (Pa. Commw. Ct. 1988); William Penn Parking Garage Inc. v. City of Pittsburgh, 346 A.2d 269 (Pa. 1975)).

[200] 2 PA. CONS. STAT. § 703 (2020).

[201] Robinson Twp. v. Commonwealth, 83 A.3d 901, 920 (Pa. 2013).

[202] Dernbach et al., *Examination and Implications*, *supra* note 103, at 1185.

More recently, the Pennsylvania Commonwealth Court addressed the extent to which the Environmental Rights Amendment binds local governments.[203] The court noted that, "[w]hen a municipality enacts a zoning ordinance, it is bound by the Environmental Rights Amendment and by all the rights protected in Article I of the Pennsylvania Constitution." [204] However, the court also found that *Robinson Township* "did not give municipalities the power to act beyond the bounds of their enabling legislation," meaning that "[m]unicipalities lack the power to replicate the environmental oversight that the General Assembly has conferred upon DEP and other state agencies."[205] Finally, the court noted that, in the context of oil and gas development, "a municipality may use its zoning powers only to regulate *where* mineral extraction takes place . . . [and] does not regulate *how* the gas drilling will be done."[206] While this decision limited municipalities' environmental obligations, it did not rule out potential actions against them for violating the duty of impartiality since environmental justice in this context is precisely a matter of *where* the permitted activity takes place. Accordingly, causes of action can arise at the level of local land use decision-making, rather than being confined to permitting decisions by PADEP and other state-wide actors.

Litigants could use the Declaratory Judgments Act to seek a declaration that the actions of municipalities or local land use agencies violated the duty of impartiality. Alternatively, they could appeal the decision of a local land use agency pursuant to 2 Pa. Cons. Stat. section 752, which provides that "[a]ny person aggrieved by an adjudication of a local agency who has a direct interest in such adjudication shall have the right to appeal therefrom to the court vested with jurisdiction of such appeals." [207] These local actions would allow individuals the opportunity to challenge the zoning decisions that underlay the inequitable permitting of environmental hazards,[208] rather than only challenging the permitting schemes themselves.

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[203] Frederick v. Allegheny Twp. Zoning Hearing Bd., 196 A.3d 677, 695 (Pa. Commw. Ct. 2018), *appeal denied*, 208 A.3d 462 (Pa. 2019).

[204] *Id.*

[205] *Id.* at 697.

[206] *Id.*

[207] 2 PA. CONS. STAT. § 752 (2020).

[208] *See supra* notes 43–50 and accompanying text.

V. THE POSSIBILITY FOR ENVIRONMENTAL JUSTICE LITIGATION UNDER THE DUTY OF IMPARTIALITY IN OTHER STATES

The *PEDF* court found Pennsylvania's obligations under the Environmental Rights Amendment to be relatively unique, claiming that "Pennsylvania deliberately chose a course different from virtually all of its sister states," and arguing that this was a reflection of "the Commonwealth's experience of having the benefit of vast natural resources whose virtually unrestrained exploitation, while initially a boon to investors, industry, and citizens, led to destructive and lasting consequences not only for the environment but also for the citizens' quality of life."[209] Despite these claims, Pennsylvania is not wholly unique in incorporating the public trust doctrine into its constitution. This section accordingly analyzes other states' constitutions to identify where jurisprudential developments similar to those associated with *Robinson Township* may be possible. This survey merely identifies which states are the likeliest candidates for such developments and should not be understood to categorically rule out the possibility of similar developments elsewhere.

Of course, the most direct way for the duty to be incorporated in other states or federally is through direct adoption of new constitutional amendments that codify the government's duty. As a result of *Robinson Township* and the revamped Environmental Rights Amendment jurisprudence, a "Green Amendment Movement" has advocated for "constitutional-level protections for the inalienable right for a healthy environment in every constitution, in every state across the nation, and eventually at the federal level."[210] *Robinson Township* co-plaintiff and Delaware Riverkeeper Maya van Rossum has specifically advocated for the nation-wide adoption of constitutional amendments that would impose duties of impartiality on state actors under the theory that such amendments would serve environmental justice goals by preventing said actors from "target[ing] or sacrific[ing] a single community with repeated environmental harm in order to better protect the environment, health, goals, and rights of another

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[209] Pa. Env't Def. Found. v. Commonwealth, 161 A.3d 911, 918–19 (Pa. 2017).

[210] Natasha Geiling, *The Radical Movement to Make Environmental Protections a Constitutional Right*, THINKPROGRESS (Dec. 22, 2017, 1:18 PM), https://archive.thinkprogress.org/green-amendment-movement-45a19f7c1ce7/ [https://perma.cc/6J8H-AEAF].

community." [211] At the federal level, the adoption of an environmental amendment that directly imposes responsibilities on the federal government has long been a focus of advocates,[212] but the ratification of such an amendment does not seem likely in the near future.

Since the possibility of passing state or federal amendments largely comes down to political will, and the federal judiciary has casted doubt on the existence of a federal public trust doctrine,[213] this Note instead analyzes which states already have the constitutional framework for the judicial application of fiduciary duties including the duty of impartiality. Because the duty arises as a public trust obligation, it could serve to invigorate environmental justice advocacy in states with expansive constitutional public trust doctrines, particularly in those states that foreground the duty of impartiality in their private trust law. If a state has both, then it is a good candidate for the imposition of the duty in the public trust context.

While the constitutions of forty-two states mention the environment or natural resource conservation, [214] only three states—Virginia,[215] Pennsylvania,[216] and Hawaii[217]—explicitly use public trust language in their environmental provisions. And while Virginia's constitution establishes that the Commonwealth has a policy "to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth," the only resources explicitly held in trust are "[t]he natural oyster beds, rocks, and shoals in the waters of the Commonwealth."[218] In contrast to the limited public trust assets defined in Virginia's constitution, Hawaii provides a broad framework for a

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[211] Maya K. van Rossum, *Letter in Support of Maryland House Bill 472*, GREEN AMENDS. FOR GENERATIONS (Feb. 20, 2019), https://forthegenerations.org/wp-content/uploads/2019/02/SD-MD-20190220-Mkvr-Testimony-and-Attachments.pdf [https://perma.cc/WNL5-YS8U].

[212] *See* Lynton K. Caldwell, *The Case for an Amendment to the Constitution of the United States for Protection of the Environment: Affirming Responsibilities Rather Than Declaring Rights May Be the Most Promising Route to the Objective*, 1 DUKE ENV'T L. & POL'Y F. 1 (1991).

[213] *See* Alec L. *ex rel.* Loorz v. McCarthy, 561 F. App'x 7, 8 (D.C. Cir. 2014) (citing PPL Mont., LLC v. Montana, 565 U.S. 576, 603 (2012)).

[214] Klee, *supra* note 8, at 167.

[215] VA. CONST. art. XI, § 3.

[216] PA. CONST. art. I, § 27.

[217] HAW. CONST. art. XI, § 1.

[218] VA. CONST. art. XI, § 3.

constitutional public trust that could incorporate the duty of impartiality as a limit on environmental decision-making.[219]

Like Pennsylvania, Hawaii's Constitution explicitly incorporates the language of environmental rights[220] and the public trust. Its public trust provision reads:

> For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.
>
> All public natural resources are held in trust by the State for the benefit of the people.[221]

By its terms, this provision should establish the same sort of public trust obligation as Pennsylvania's Environmental Rights Amendment. Furthermore, Hawaii's constitutional provisions regarding the environment, like Pennsylvania's Environmental Rights Amendment, are self-executing. [222] As of now, the Hawaiian courts have limited the "public natural resources" governed by encompassed by article 11, section 1 to "natural resources which are or have been in the possession of the State."[223] This differs from the *Robinson Township* court's claim that the state holds in trust all natural resources that implicate the public interest. [224] Even still, the public trust assets encompassed by this provision are far broader than those encompassed by the common law public trust doctrine in most states. [225]

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[219] HAW. CONST. art. XI, § 1.

[220] Article 11, section 9 of Hawaii's constitution, which establishes environmental rights, reads as follows: "Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law." HAW. CONST. art. XI, § 9.

[221] HAW. CONST. art. XI, § 1.

[222] Kent D. Morihara, *Hawai'i Constitution, Article XI, Section 1: The Conservation, Protection, and Use of Natural Resources*, 19 U. HAW. L. REV. 177, 214 (1997).

[223] *Id.* at 198.

[224] Robinson Twp. v. Commonwealth, 83 A.3d 901, 955 (Pa. 2013).

[225] *See* Alexandra B. Klass, *The Public Trust Doctrine in the Shadow of State Environmental Rights Laws: A Case Study*, 45 ENV'T L. 431, 439 (2015)

Hawaii trust law cites the Restatement (Third) of Trusts section 79 when discussing the duty of impartiality.[226] As discussed above, section 79 imposes substantive obligations on trustees.[227] As such, Hawaii is likely the state where the judiciary could most readily establish that fiduciary duties including the duty of impartiality apply in the public trust context, thereby creating a constitutional mandate for equity in environmental decision-making.

Of course, similar developments may prove possible elsewhere. Yet, pending constitutional amendment, more barriers currently exist to applying the duty of impartiality in the public trust context in other states. For one, certain state constitutions such as Montana's impose trust-like obligations on the state and even private parties without explicitly stating that the state holds environmental resources in "trust."[228] As the *Robinson Township* and *PEDF* courts' use of the duty of impartiality arose from an analogy to private trust law, the absence of trust language in constitutions such as Montana's will likely stand in the way of similar jurisprudential developments. Furthermore, for states in which the public trust doctrine remains a matter of common law, public trust assets are generally limited to navigable waters and submerged lands and do not encompass other natural resources, such as the air, which are most frequently impacted by permitting decisions.[229] While some states including New York and New Jersey have somewhat expanded the scope of public trust assets through the common law,[230] they have failed to approach the scope of public trust

("This writing illustrates how litigants have now used the public trust doctrine for over four decades in efforts to protect traditional water-based resources as well as, in some states, public lands, parks, shoreland and beaches, the atmosphere, animals, and plant species. However, it is important to keep in mind that in the majority of states, the public trust doctrine remains limited to navigable waters and submerged lands and has not been extended beyond access to and use of those resources.").

[226] Awakuni v. Awana, 165 P.3d 1027, 1036 (Haw. 2007).

[227] RESTATEMENT (THIRD) OF TRUSTS § 79 cmt. c (AM. L. INST. 2007).

[228] *See* MONT. CONST. art. IX, § 1 ("The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.").

[229] *See* Klass, *supra* note 225, at 439.

[230] *See* Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699, 707–08 (2006) ("In certain states, courts have expanded the doctrine from its historic domain of ensuring public access to navigable waters to protecting use, access to, and preservation of all waters usable for recreational purposes, the dry sand area of beaches for public recreation purposes, parklands, wildlife and wildlife habitat connected to navigable waters, drinking water resources, and inland wetlands. Courts have also used the doctrine to resolve water appropriation issues and

assets contained in Pennsylvania's and Hawaii's constitutions. As a result, the framework does not currently exist in those states for the sort of jurisprudential developments exemplified by *Robinson Township* and *PEDF*. Advocates in those states should therefore continue to push for a constitutional amendment that incorporates the public trust doctrine and requires state actors to manage environmental resources in a sustainable and equitable fashion.

VI. CONCLUSION

While largely untested, Pennsylvania's Environmental Rights Amendment's imposition of the duty of impartiality on state actors should provide a significant tool for litigation targeting environmental racism and discrimination. In light of the recent *Robinson Township* and *PEDF* decisions, Pennsylvania agencies must consider the cumulative impact of previous environmental decision-making when making siting and permitting decisions and cease siting and permitting environmental hazards in communities that already bear a disproportionate burden. Furthermore, as the public trust doctrine and environmental constitutionalism continue to evolve in other states, the duty could help ensure that states are protecting all residents' environments equally. Of course, that result is far from guaranteed, but given the many roadblocks facing federal environmental justice litigation, such a state-oriented approach is one worth pursuing.

have held that even preexisting water rights may be curtailed if necessary to prevent reduction of water in inland streams or lakes that provide aesthetic values or habitats for animal and plant species or other natural resources.").