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TABLE OF CONTENTS

SYMPOSIUM INTRODUCTION <i>Dean Gary Bledsoe</i>	551
REDEFINING BEST INTEREST OF THE CHILD: THE CRUSHING IMPACT OF CHILD SUPPORT DEBTS ON LOW-INCOME FAMILIES IN THE MINORITY COMMUNITIES <i>Rachael T. Aminu</i>	561
UNDAUNTED: WILLIAM A. PRICE, TEXAS' FIRST BLACK JUDGE AND THE PATH TO A CIVIL RIGHTS MILESTONE <i>John G. Browning and Chief Justice Carolyn Wright</i>	583
BEFORE THE NEW CIVIL RIGHTS: UNDERSTANDING THE OLD CIVIL RIGHTS <i>Paul Finkelman, Ph.D.</i>	597
REGULATORY IMPEDIMENTS DISPROPORTIONATELY AFFECT VOTING RIGHTS IN COMMUNITIES OF COLOR IN TEXAS, MISSISSIPPI, AND LOUISIANA <i>Dr. Reginal D. Harris and Brian M. King</i>	611
THE EQUAL PROTECTION CLAUSE PROHIBITS A PUBLIC SCHOOL FROM STIGMATIZING A STUDENT WITH A DILUTED FAKE EDUCATION THAT FAILS TO TEACH LITERACY <i>L. Darnell Weeden</i>	647
THE CONSTITUTIONAL CRISIS OF GOVERNMENT OFFICIALS IGNORING FACTS IN POLICY CREATION <i>Cortlan J. Wickliff, Ph.D., J.D.</i>	667



SYMPOSIUM INTRODUCTION

DEAN GARY BLEDSOE

“In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society. I do not believe that the 14th Amendment requires us to accept that fate.”¹

The incomparable Justice Thurgood Marshall, for whom this great Law School was named, foretold the Nation’s future if it failed to recognize the need to include people of color in the mainstream. Justice Marshall stood up for many different groups of Americans while he served on the U.S. Supreme Court, not exclusively African-Americans. He stood up for the rights of Latinos, gay and lesbian communities, and many others, including the poor.²

This Symposium emanated from our Law Review, after consultation with its Faculty Advisor, Associate Dean L. Darnell Weeden, where the theme of the Renewed Civil Rights Movement was generated. It should be noted, reflecting on history and the Symposium, that as this year marks the 400th year that Africans were brought as slaves to North America; the timing and theme are certainly appropriate.

For a country that prides itself on democratic principles, as symbolized by the Statute of Liberty, inequities and injustices continue to occur at unacceptable levels. There indeed is a need for new civil rights conversations and action. In the vein of where we go from here, as pondered by Dr. Martin Luther King prior to his untimely death, the topics in the Symposium and the Symposium Editorial address some of the key issues regarding many of today’s civil rights issues and challenges.³ These include: problems with police, public education, the criminal justice system, employment, housing, access to capital, and public accommodations existed from slavery until the present—in different forms.⁴ For example, we know *Brown v. Bd. of Educ.*⁵

1. *Bakke v. University of California*, 438 U.S. 265, 396 (1978) (Marshall, J., concurring).

2. *See e.g.*, *Bowers v. Hardwick*, 478 U.S. 186, 199-200 (1986); *United States v. Kras*, 409 U.S. 434, 454-57 (1973).

3. *See* MARTIN LUTHER KING JR. ET AL., *WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY?* (Beacon Press 2010).

4. *See e.g.*, DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (Icon 2012).

5. *See e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

helped change America, but many may not know that there were cases that pioneered discrimination against California Latinos prior to *Brown*.⁶

Other groups such as Latinos, women, and Asians also suffered discrimination, as well as religious minorities. Despite domestic conflicts, our Nation continues to seek what is possible in terms of integrating all of us with our differences so that we might move forward as a family. Challenges to these efforts, however, persist, so thoughtful works like those in this Law Review edition will help us continue seeking equitable solutions for poverty, prejudice and polarization.

In viewing the articles that are presented for publication in the Law Review, we must keep in mind that our friends may not be who or what we expect. Conversely, this too is true of our enemies. Supreme Court Justice Hugo Black, who became a stalwart for Civil Rights and Civil Liberties, was a former member of the KKK. And let us remember that many of Marshall's greatest legal victories came in the 1930's, 1940's and 1950's—during the Jim Crow epoch.

Professor Larry Gibson, author of *Young Thurgood: The Making of a Supreme Court Justice*, noted that “even in areas with a deep Southern culture, he could still convince judges, prosecutors, and juries to do the right thing.”⁷ Gibson noted that Marshall went out of his way to understand the available points of view on a subject and discussed issues with foes so he could understand their positions. And though he was clearly gifted, Marshall sought advice from other lawyers and judges in communities where cases were to be heard.⁸ We must see the articles in this context and understand that each piece has potential value in achieving the type of justice that Marshall was seeking.

When we talk about “The New Civil Rights,” it is necessary to remind younger generations that they are standing on the shoulders of elder civil rights leaders, who, as U.S. Congressman John Lewis often notes, “gave a little blood on that bridge” in Selma as they peacefully protested for the right to vote. Notably, the Voting Rights Act is the subject of one of the articles in this symposium edition.

President Paul Finkleman of Gratz University in Pennsylvania headlined our conference. When we spoke about the Symposium and its title,

6. See *Mendez v. Westminster*, 161 F.2d 774, 779 (9th Cir. 1947).

7. LARRY GIBSON, *YOUNG THURGOOD: THE MAKING OF A SUPREME COURT JUSTICE* 228 (Prometheus Books 2012).

8. *Id.* at 331.

he noted that it was the death of Justice Marshall that marked the end, at least symbolically, of the Old Civil Rights period.

Undertaking civil rights issues and challenges can be a very lonely and dangerous enterprise. For example, on trips to investigate and handle legal cases, Justice Marshall sat in segregated seating on buses he took to small towns in the South and Oklahoma.⁹ After winning the last of a series of cases in Columbia, Tennessee in 1947, Marshall was threatened with hanging by certain members of Law Enforcement and citizens of the community. He was actually in custody and driven down to where the local white community was known to conduct hangings.

Before Johnnie Cochran passed, we spoke and he told me when his co-counsel tried the case involving Geronimo Pratt (former Black Panther Party Member). Cochran's co-counsel was a government informant who provided their team's next day strategy each night to his government handlers. And many today find themselves in similar circumstances.

Chief Justice Carol Wright of the Fifth Court of Appeals in Dallas and Dallas Attorney, John G. Browning have provided great insight into the path of those who venture to make a difference in their article, "And Still He Rose: William A. Price, Texas First Black Judge and the Path to a New Civil Rights Milestone." They discuss the career of W.A. Price, the first African-American Attorney in Texas, who became a lawyer on October 11, 1873 in Matagorda County, Texas. This is particularly noteworthy if we understand the issues of the time.

At a time when African-Americans were aligned with the Republican Party and the South was Democratic, African-American lives were continually at risk, and many were simply murdered for desiring to participate in politics during this period.¹⁰ After a great resurgence of racist violence following President Abraham Lincoln's death (during the presidency of Andrew Johnson), it was General Grant and then President Grant who took strong, affirmative action between 1868 and 1876. Grant ensured that African-Americans could survive the onslaught of voter intimidation and racial terrorism that targeted them. Grant and Philip Sheridan, his general overseeing Texas, concluded that the most hostile state to Black freedmen was Texas. We should note, too, that Texans were still

9. *See generally*, JAMES RAWN, JR.: ROOTS AND BRANCH: CHARLES HAMILTON HOUSTON, THURGOOD MARSHALL, AND THE STRUGGLE TO END SEGREGATION (Bloomsbury 2013).

10. *See e.g.*, RON CHERNOW, GRANT (Thorndike Press, a part of Gale, a Cengage Company 2018).

fighting for the Confederacy in June of 1865, two months after Lee surrendered his army to Grant at the Appomattox Courthouse.

Price was a Justice of the Peace in Matagorda County before becoming a lawyer and was subsequently elected to serve as a County Attorney in Fort Bend County. News accounts talked about how he was well-regarded by Blacks and Whites. He assumed office in April 1876, but was forced out of office in February 1877. His forced departure from office came months after the Hayes-Tilden Compromise ceded authority in the South back to those who had championed the Confederate Cause.¹¹ One can only imagine the circumstances that he must have endured as the only African-American lawyer in the state during that time period. Even so, accounts suggest he was professionally successful.

After he left Texas, for reasons that were unclear, he ended up in Kansas and handled an important case that was an important legal value supporting *Brown v. Bd. of Educ.* Chief Justice Wright and Attorney Browning make it clear that Price continued to thrive as a lawyer despite the consequences that laid before him. Price took cases for African-Americans during a time of outright hostility against them. To put this in context, we should note how Justice Marshall's mentor, Charles Hamilton Houston, experienced such bias in 1936, when arguing Missouri *ex rel Gaines* before the United States Supreme Court. Justice McReynolds turned to face the back wall and refused to face Houston while he argued before the high Court.¹² This was sixty-four years after Price first became a lawyer.

A clear connection to today's political discourse is seen in "The Constitutional Crisis of Government Officials Ignoring Facts in Policy Creation," an article by Dr. Cortlan J. Wickliff, Associate Provost at Rice University. We have a major public discussion in America and the world about whether objective facts can be labeled as fake news to justify supporting policies that run contrary to science and objective facts. Wickliff, without going right or left, intelligently discusses this very important issue and the many anticipated. The discussion focuses on the intersection of politics, science, philosophy, religion, ethics, and law.

As we move more and more into a polarized society, Wickliff cautions us about founding policies on false information and its social harm. For example, our nation's crack cocaine policy was based on inaccuracies and

11. BLACKMON, *supra* note 3 (discussing the infamous meeting that took place in Ohio).

12. RAWN, *supra* note 8.

misinformation about crack cocaine. I would think we should take note of such admonitions when we are making important public policy, such as that involving integration or immigration.

One of Justice Marshall's former law clerks, Professor Deborah L. Rhode of Stanford University School of Law, described the judicial philosophy of Justice Marshall: "You do what you think is right and let the law catch up."¹³

Dean Weeden's article, "The Equal Protection Clause Prohibits a Public School from Stigmatizing a Student with a Diluted Fake Education that Fails to Teach Literacy," arguably is written along those lines. Interestingly, instead of putting the focus on what is equal or even making race an express issue in his suggested litigation theory, Weeden emphasizes the gross inadequacy found in many school funding systems that leads to education illiteracy. Dean Weeden also invokes the stigma prohibition from *Brown* (shown in part by the dolls) to suggest that, as a matter of precedent, there is a Constitutional duty for governmental entities to provide stigma-free education. He argues that the disparities are just so large and vast that the stigmas clearly exist.

Dean Weeden constructs his theory in a way that requires the courts to apply the rational basis test to evaluate the challenges—which one would think might automatically lead to upholding the challenged laws. He, however, contends such stigmatizing policies that lead to the likely incarceration of victimized children cannot be sustained, even under the rational basis test. Dean Weeden suggests this approach could similarly be used to challenge existing plans that are insupportable because of the severe educational deficits permitted. He seeks to give more meaning to the stigma discussed in *Brown* and lays out an argument that seems legally sound but which has a much broader political appeal. It is clearly understood that Dean Weeden suggests this as a viable alternative legal strategy that has a greater chance of succeeding than traditional approaches.

Dean Weeden's arguments are both equally conservative and liberal and designed to avoid making race the paramount issue. I could see either President Barack Obama or U.S. Senator Mitt Romney making an argument similar to Dean Weeden's core argument—the school-to-prison pipeline is unconstitutionally sustained and expanded by the gross underfunding of

13. Rhode, Deborah L., *The Tribute to Justice Thurgood Marshall: Letting the Law Catch Up*, 44 STAN. L. REV. 1259 (1992).

public education. This argument is logical, and the examples of the extreme underfunding that he provides in his article are gut-wrenching.

Some historians and authors have noted that government underfunding of the public education system may have some of its roots in racial bias.¹⁴ Dean Weeden is showing a connection between traditionally divergent groups in an attempt to counteract the problem that Wright and other authors noted. Sometimes, such as when the Top 10 percent proposed changes are before the Texas Legislature, surprising allies emerge such as LULAC, rural Republicans and the NAACP. Those groups also have fought to oppose publicly financed school vouchers for private schools.

Redefining Best Interest of the Child by Attorney Rachael T. Aminu, Esq., provides another thoughtful public policy discussion. It arguably illustrates the need for truthful and accurate information in our public discourse such as what Wickliff suggested. The author illustrates how an apparently well-intended system is actually defeating or hindering the achievement of the very purposes it was designed to address. The children who are intended to be the beneficiaries of the program are indeed harmed by it.

The article shows how a blind child support system that is mostly applied to minority men and poor people leads to increasing indebtedness to the State of Texas. This suggests there may be facts that are not part of the decision-making process that ought to be part of the discussion. The horrific situation of low-paid individuals required to make payments that put them into such untenable living conditions ultimately injures the child—the best interest of the child presumption. Many parents who cannot pay because of limited income are even sent to jail and the child once again loses. The paper has interesting suggestions on how a well-informed and intelligent society might handle the competing issues of ensuring that a child has income from the non-custodial parent, while recognizing that the best interest of the child frequently includes the need not just for income from the non-custodial parent, but his (or her) presence with a positive parental attitude.

Although this goal is often impossible because of legal burdens imposed by the system, some might find a great deal of wisdom and common sense in this approach and hope that lawmakers recognize the good derived is clearly attainable. This is an important civil rights issue because one can only

14. LAWRENCE WRIGHT, *GOD SAVES 181* (RANDOM HOUSE U.S. 2019).

imagine how the lives of so many young people might be positively changed if the suggestions from this piece were adopted by policy or law.

Our final piece for publication is a thought-provoking piece involving voting rights: “Regulatory Impediments Disproportionately Affect Voting Rights in Communities of Color” by Dr. Reginald Harris and Attorney Brian M. King. I recently spoke with Larry A. Gibson, professor and author, and he stated that Justice Marshall believed that his greatest NAACP legal victory was perhaps not *Brown* but may actually have been *Smith v. Allwright*, which opened up the voting system in Texas and subsequently the Nation—or at least the second most important after *Brown*.

When Texas and the Nation continue to increase their populations of people of color, the concerns about who can vote and the weight of one’s vote loom larger and larger. We must ask ourselves why.

Attorney King and Dr. Harris effectively lay out some of the history with voting problems then address various ways the negative impacts are manifesting themselves today. Attorney King and Dr. Harris discuss the importance of the 14th and 15th Amendments and the Voting Rights Act, but also lay out how they and various experts around the country have concluded we are moving backwards from 1965—rather than forward. They talk about issues with language minorities, felony disenfranchisement, and the now-common voter identification requirements around the nation that are being used to change the very nature of our electorate. Instead of real outreach, some have taken the position that marginalizing minority votes is justifiable because they mostly vote for others. Ironically, I made a final argument in a redistricting case that supports the types of public policy suggested by Attorney King and Dr. Harris. I argued to the judges how it was in the interest minority communities and the state if the various parties competed for their vote and if neither was hostile.

Too frequently, great works of academics do not make it to the mainstream. Great works are seen by other learned individuals, but the social good they could bring is limited by the lack of exposure of their work. For this reason, the Thurgood Marshall School of Law family is attempting to integrate the broader community with academia in this Symposium, so that we might all benefit from better public discussion, and ultimately, more enlightened and improved public policy.

One important issue not yet decided upon by the U.S. Supreme Court is whether you can join different groups together for the purpose of creating a required District under section 2 of the Voting Rights Act. Because of

housing patterns and citizenship issues, the *Gingles* standard discussed by Attorney King and Dr. Harris may not be available in many well-populated areas around the country. In the Fifth Circuit Court of Appeals, there is case law that makes this possible. The political value to such cooperation was incalculable and was discussed by our luncheon panel that included two experts of note — George Korbel, an attorney and walking encyclopedia of voting rights, and Luis Vera, who has led LULAC’s state litigation to many historical victories. I have thought about this for many years, and, in particular, since the time I became aware of the work done by Professor Bill Piatt, the former Dean of St. Mary’s Law School entitled “Black and Brown in America: The Case for Cooperation (Critical America).”¹⁵

Thurgood Marshall changed the definition of justice. Justice once was defined in large part as the lynching of a Black person by a white mob for questionable reasons, or minorities being denied privileges accorded to others. Clearly, we can see that one person’s justice may be another person’s injustice. For example, when John Shillady, a white man who headed the National NAACP, came to Texas and was nearly beaten to death in downtown Austin, the Texas Governor responded to a media question about whether the perpetrator would ever be brought to justice. The Governor responded that, to his knowledge, there was only one offender [Shillady] and, to his knowledge, he had already been punished or gotten what he deserved [the beating].¹⁶

Justices, judges, police and prosecutors have so much authority. Who they are, their sensibilities, compassion, lack of compassion or other disposition can have a lot to do with whether justice is dispensed and what justice looks like. Hence, the law officer who shot Michael Brown in Ferguson, Missouri saw this as justice, while others saw it as an injustice.

Marshall’s recognition of the importance of the courts and legal system led him to always be respectful of judges even if they were racist, and he took pains to never argue a fact or law for which he could not show proof. Judges knew of his great credibility. He even took extraordinary actions as a young lawyer, such as explaining to judges and the public why he and the NAACP did not take certain cases.¹⁷

15. See generally, BILL PRATT, BLACK AND BROWN IN AMERICA: THE CASE FOR COOPERATION (CRITICAL AMERICA) (N.Y. UNIV. PRESS 1997).

16. See Barnes, Michael, *A Closer Look at a 1919 racial incident turns up the unexpected*, Austin American-Statesman (posted Apr. 19, 2017, updated Sep. 25, 2018).

17. See GIBSON, *supra* note 6 at ch. 10.

That approach comes to mind in light of the large number of African-American females recently elected to judgeships in Harris County. Some looked at it as suspect, questioning the future of the court system in Harris County. But their presence is generating positive results because they bring their experiences, excellence and training to the bench. Many of us saw this group of judges already take positive steps towards broad and equitable justice regarding the county's bail bond policies.

Just as America continues to perfect itself, so too, does our justice system as it matures and reflects the broader population. This is the core of why we are hosting this Symposium that includes a discussion about justice and fairness that features distinguished judges and a district attorney on two panels: one to discuss justice in the civil courts and the other to discuss justice and fairness in the criminal courts. Presenting at the conference were Judge Rabeea Sultan-Collier, Judge Dedra Davis, Judge Angela Graves Harrington, Judge Ursula A. Hall and Judge Toria J. Finch. We are very thankful for their incredible insights into the system and how justice or injustice may appear in innumerable ways throughout this process.

In keeping with the spirit and legacy of Justice Thurgood Marshall, it is appropriate that our legal community continue to examine and study today's important civil rights issues.



REDEFINING BEST INTEREST OF THE CHILD

THE CRUSHING IMPACT OF CHILD SUPPORT DEBTS ON LOW-INCOME FAMILIES IN THE MINORITY COMMUNITIES

RACHAEL T. AMINU

This article reviews the impact and negative effect of the child support law and guidelines in accordance with the Texas Family Code on the low-income families, especially African American men, and the direct link between low college completion rate and the high incarceration of African Americans for child support debts.

“As of April 2017, 5.5 million delinquent noncustodial parents, or debtors, owed over \$114 billion in past-due child support.”¹ Over 88% of these debts are owed by low-income and under-educated men minority communities.² Child support arrears represent the amount of child support that was due to the custodial family but remains unpaid, which is either owed to the custodial family or the government.³ Any child support owed while the family received Temporary Assistance for Needy Families, commonly called TANF benefits, is owed to the government.⁴

Aggressive enforcement of Child Support Decree for low-income parents who are receiving TANF primarily benefits the state because the state bills and collects accrued interests. In a documentary called “Where’s Daddy?” the issues affecting a faulty child support system were addressed, showing how this broken system is devastating to minorities.⁵ If truly the court’s standard of law is “the best interest of the child,” how do children benefit from absent fathers imprisoned for non-payment of child support?

A study by the Urban Institute based in Chicago found that 70% of the total child support debt owed in Illinois and across the United States is owed

1. Dennis Putze, *Who Owes the Child Support Debt?*, OFFICE FOR ADMINISTRATION OF CHILDREN & FAMILIES: OFFICE OF CHILD SUPPORT ENFORCEMENT (Sept. 15, 2017), <https://www.acf.hhs.gov/css/ocsedatablog/2017/09/who-owes-the-child-support-debt>.

2. Timothy Grall, *Custodial Mothers and Fathers and Their Child Support: 2013*, U.S. CENSUS BUREAU (Jan. 2016), <https://www.census.gov/content/dam/Census/library/publications/2016/demo/P60-255.pdf>.

3. See Distribution of Collected Support 42 U.S.C.A. § 657 (a)(1)-(2) (2009).

4. *Id.* at 1.

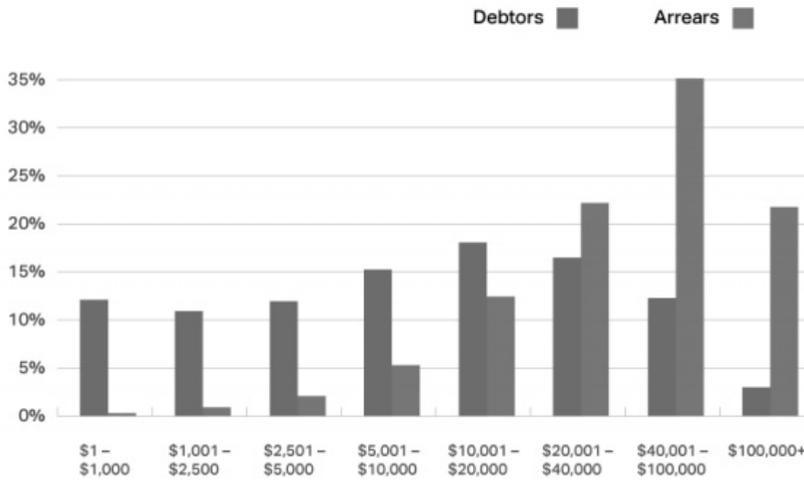
5. Rel Dowdell, “*Where’s Daddy*” (2018), a documentary feature film offering perspectives on the child support system and its effect on black families.

by parents who have no reported income or make less than \$10,000 per year.⁶ In South Carolina, child support obligors imprisoned for civil contempt comprise approximately thirteen to sixteen percent of the jail population.⁷ Vicki Turetsky, the former commissioner of the federal Office of Child Support Enforcement rightfully stated, “[j]ail is appropriate for someone who is actively hiding assets, not appropriate for someone who couldn’t pay the order in the first place.” The purpose of this paper is to focus and scrutinize the *best interest of the child* standard as enforced by the Texas enforcement agency, its devastating effect on non-custodial parents which are mostly fathers in minority communities, and propose more efficient alternatives that ultimately benefit the children without losing the financial incentives the government seek.

There are five major issues that shall be addressed in review of the causal link between the disintegration of African-American family ties and the incarceration of minority men due to child support debts in accordance with the Texas Family Code. They are: (1) the wage gap which shows that majority of African-American men earn significantly less than their White and Asian counterpart; (2) African-Americans have lower college completion rate than their White counterpart and are thus less employable; (3) child support guideline and the Texas Family Code imputes a minimum wage at full-time employment on non-custodial parents regardless of their employment status and continues to accrue interests at 6%; (4) child support offices often times fail to report change in employment and no employment; (5) and the emotional and mental effect of the absenteeism of father on their children. All these factors show that minority fathers are more likely to be incarcerated for non-payment of child support and continue in a cycle of poverty than their white and Asian counterparts.

6. Elaine Sorensen, Liliana Sousa, and Simon Schaner, *Assessing Child Support Arrears in Nine Large States and the Nation*, Urban Institute (July 11, 2017); this publication was prepared for the Department of Health and Human Services, office of the assistant secretary for planning and evaluation and the office of human services policy.

7. Tonya L. Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families*, 15 J. GENDER RACE & JUST. 617 (2012).



Who Owes the Child Support Debt – Data Collected by OCSE File (2017)⁸

The graph shows more than 50% of debtors owe less than \$10,000 in past-due child support and represent less than 10% of the total arrearage.⁹ Approximately 15% of debtors owe between \$10,000 and \$40,000 in past-due child support but account for over 55% of the total debt. Debtors with arrearages between \$40,000 and \$100,000 account for 35% of the total debt and comprise of 12% of the population while debtors with arrearages over \$100,000 account for 22% of the total debt but only 3% of the population.

THE WAGE GAP

Which group constitutes the majority of child support debtors? What factors contribute to the wage gap and low economic level of minority communities, especially African-Americans?

The staggering number of prime-age black men who are not employed —35% compared in 2014 with 17% of whites (see chart 1), and much of this

8. *Id.* at 1.

9. *Id.* at 1.

difference is due to mass incarceration.¹⁰ Nearly 8% of prime-age black men did not work because they were institutionalized—the vast majority in prison—compared with 1.5% of whites.¹¹

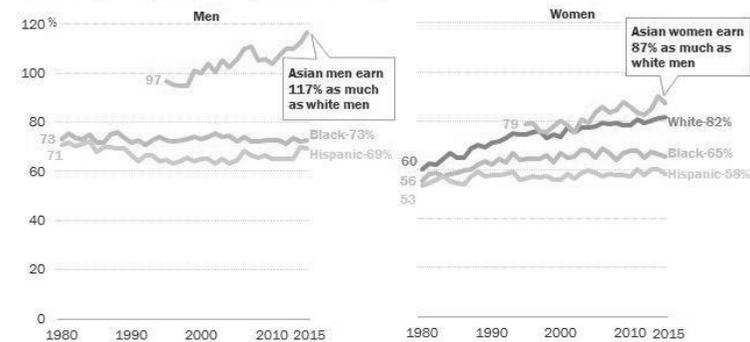
The sharp increase in incarceration rates in the U.S. is also responsible for the vast majority of observed changes in institutionalization rates for white and black men.¹²

Racial, gender wage gaps persist in U.S. despite some progress

BY EILEEN PATTEN

White men out-earn black and Hispanic men and all groups of women

Median hourly earnings as a percent of white men's earnings



Note: Estimates are for all civilian, non-institutionalized, full- or part-time workers ages 16 and older with positive earnings. Self-employed workers are excluded. Hispanics are of any race. Whites, blacks and Asians include only non-Hispanics. Asians include Native Hawaiian and Pacific Islanders.

Source: Pew Research Center tabulations of Current Population Survey data.

PEW RESEARCH CENTER

Pew Research Center (2015).¹³

10. *The Wage Gap Between White and Black Men Is Growing Wider*, THE ECONOMIST (July 7, 2018), <https://www.economist.com/united-states/2018/07/07/the-wage-gap-between-white-and-black-men-is-growing-wider>.

11. *Id.* at 2.

12. Patrick Bayer & Kerwin Kofi Charles, *Divergent Paths: A New Perspective on Earnings Differences Between Black and White Men Since 1940* (Becker Friedman Inst. for Econ. At the Univ. of Chi., Working Paper No. 2018-45, 2018).

13. Eileen Patten, *Racial, gender wage gaps persist in U.S. despite some progress*, PEW RESEARCH CENTER (July 1, 2016), <http://www.pewresearch.org/fact-tank/2016/07/01/racial-gender-wage-gaps-persist-in-u-s-despite-some-progress/>.

The race and wage gap persist in United States despite some progress made in the ethnic groups.¹⁴ America remains two societies – one black and one white – as measured by key demographic indicators of social and economic well-being.¹⁵

There is a direct correlation between child support debt and low-income families.

EDUCATION – GRADUATION RATE

Also known as the Endangered Group, African American males have often been categorized as an at-risk population in the area of education.¹⁶ It is noticeable based on statistics of education, incarceration, unemployment, and the mental and physical health of African Americans that this group of minorities is struggling in the American society.¹⁷ According to the National Center for Education Statistics, 76% of Blacks in the U.S. graduated with a regular high school diploma within four years of starting 9th grade in 2015-2016 school year – a record high since the rate was first measured in 2010-2011.¹⁸ The rates for Black students ranged from 57 percent in Nevada to 88 percent in West Virginia.¹⁹ Texas and West Virginia were the only two states in which the Adjusted Cohort Graduation Rate (ACGR) for Black students was higher than the overall national ACGR. The ACGR is the percentage of

14. Jessica Semega, Kayla Fontenot, & Melissa Kolla, *Income and Poverty in the United States: 2016*, UNITED STATES CENUS BUREAU (Sept. 12, 2017), <https://www.census.gov/library/publications/2017/demo/p60-259.html>.

15. *On Views of Race and Inequality Blacks and Whites are Worlds Apart*, PEW RESEARCH CENTER: SOCIAL & DEMOGRAPHIC TRENDS (June 27, 2016), <http://www.pewsocialtrends.org/2016/06/27/1-demographic-trends-and-economic-well-being>.

16. James Moore III and Jerlando F.L. Jackson, *African American Males in Education: Endangered or Ignored?*, TEACHER'S COLLEGE RECORD 108, 201-205 (2006).

17. K. Hoffman, C. Llagas, & T. D. Snyder, *Status and Trends in the Education of Blacks*. Washington, DC: U.S Department of Education, National Center for Educational Statistics, (2003).

18. Dona Tofig, *Public High School Graduation Rates Reaches New High, but Gaps Persist*, INSTITUTE OF EDUCATION SCIENCES (Oct. 17, 2016), https://ies.ed.gov/whatsnew/pressreleases/10_17_2016.asp. See also *Digest of Education Statistics: 2017*, INSTITUTE OF EDUCATION SCIENCES (Jan. 2018), <https://nces.ed.gov/programs/digest/d17/index.asp>.

19. Bill Gates, *Help Wanted: 11 Million College Grads*, GATESNOTES (June 3, 2015), <https://www.gatesnotes.com/Education/11-Million-College-Grads>.

the students in this cohort who graduate within four years.²⁰ In comparison, White graduation rate was 88 percent (88%), Hispanic at 79 percent (79%), and Asian/Pacific Islander students had the highest ACGR at 91 percent (91%).²¹

Bill Gates, a college dropout himself addressed the issue of college dropout:

“Based on the latest college completion trends, only about half of all those students (54.8 percent) will leave college with a diploma. The rest — most of them low-income, first-generation, and minority students — will not finish a degree. They’ll drop out. This is tragic,” he says. “Not just for the students and their families, but for our nation. Without more graduates, our country will face a shortage of skilled workers and fewer low-income families will get the opportunity to lift themselves out of poverty,” Gates stated.²²

A new study by Georgetown University’s Center on Education and the Workforce revealed that by 2025, two thirds of all jobs in the U.S. will require education beyond high school – including two-year and four-year college degrees as well as postsecondary certificates. At the current rate the US is producing college graduates; however, the country is expected to face a shortfall of 11 million skilled workers to fill those roles over the next 10 years,

The National Clearinghouse Research Center published their Signature Report which investigated the six-year completion outcomes of the students who started their graduate or postsecondary education in Fall 2011. Although graduation rate has increased by 1.9 percentage points for the first time since the Great Recession, when examined by race and ethnicity, Asian and white students had much higher completion rates (68.9 percent and 66.1 percent, respectively) than Hispanic and Black students (48.6 percent and 39.5 percent, respectively).²³ Black students represent the only group that is more

20. Joel McFarland, What is the difference between the ACGR and the AFGR? National Center for Education Statistics, Institute of Education Sciences (November 29, 2017).

21. *Id.*

22. Bill Gates, *Putting Students First*, GATESNOTES, <https://www.gatesnotes.com/Education/11-Million-College-Grads>.

23. Doug Shapiro and et al, *Completing College: A National View of Student Completion Rates – Fall 2011 Cohort*, NATIONAL STUDENT CLEARINGHOUSE RESEARCH CENTER (December 2017), (*citing the Executive Summary: the Signature Report investigation of the six-year completion outcomes of the students who began their postsecondary education in fall 2011. The overall national six-year completion rate for the fall 2011 cohort was 56.9 percent, an increase of 2.1 percentage points from the fall 2010 cohort. This higher completion rate*

likely to stop out or discontinue enrollment than to complete a credential within six years (total completion rate of 39.5 percent, compared to the no longer enrolled rate of 42.8 percent).²⁴ Among students who started in four-year public institutions, Black students had the lowest six-year completion rate (46.0 percent) and the completion rate of Hispanic students was almost 10 percentage points higher (55.7 percent) while over two-thirds of white students (71.7 percent) and three-quarters of Asian students (75.8 percent) completed a degree within the same period.²⁵

One of the most noted trends and problematic situations is the link between low graduation rate and unemployment rate. Black students who comprise of the group with the lowest completion rate of post-secondary education also has the highest unemployment rate.²⁶

CSD in Perspective (True Story, Real Case)

Jason is a non-custodial parent of two minor boys by two different mothers. Although he is in a wonderful relationship with his current wife for almost a decade, he remains under penalty by the State of Texas for his past failed relationships. The children and responsibility of fatherhood are not mistakes, but his attempt at new beginning is a failure and is indirectly punished.

Jason currently pays 35% of his income (approximately \$2750) to the Office of Attorney General (OAG) for the State of Texas; in fact, this percentage is taken out automatically from his paycheck each pay period (i.e. \$962.50). Additionally, Jason pays his employer or health and dental insurance because the children are covered under his employee benefits. Jason's currently family includes three children from his wife's previous marriage. Unfortunately for Jason, the state of Texas does not recognize the responsibilities of fatherhood (as a step-parent) and the financial responsibility of caring for five children in total.

After working for his employer for almost two decades, Jason was terminated from his job. Since both the mothers of his two now teen boys are still on welfare assistance, Jason's child support obligations remained. He went to the child support office for assistance on modifying his obligation;

represents about 48,000 more graduates than the fall 2010 cohort, even with a slightly smaller cohort size).

24. *Id.*

25. *Id.*

26. *Id.*

however, due to unknown circumstances, including the disappearance of the mothers, the paperwork was incomplete.

For the next 13 months, Jason, an educated yet unassuming minority accrued arrears in child support payments (also commonly known as child support) and additional debt for medical reimbursement given that the children are required to get Medicaid. He had not seen his children for over 18 months. The last time he heard from one of them, he had a job and his own car purchased with his own money.

Despite his many attempts to get the assistance he needed, the court clerks, child support office staffs, and Attorney Generals could not assist him with filing the correct paperwork because they CANNOT provide legal advice – understandably so. Providing legal advice to residents would open a floodgate of lawsuits against the State and its agencies for ineffective assistance and malpractice.

Within 13 months, Jason owed a debt of \$12,896 with 6% interest accruing each month. In the interim, Jason's vehicle registration had expired and could not be renewed due to a lien from the OAG. His driver license was on the verge of suspension and a warrant for incarceration was ready to be issued if he fails to appear for his "Order to Show Cause" hearing.

Jason was ready to give up and lose hope. "They might as well throw me in jail, you know?" Jason was under obligation to support five children and two adults, including him and his wife.

Jason is a minority – an African American male with responsibilities: wife, children, parents, and his communities. Jason's goal after unemployment was to build his own business and assist in expanding his wife's business. However, the child support obligations crushed his hope and dreams. On the date of his hearing, as he watched the court coordinator call the names of debtors who could lose their freedom that very moment, his wife's heart fell to floor. Jason was nervous yet ready to face the consequences – The consequences of what? Lack of employment, lack of knowledge of the child support system and what he was required to do, or steps to take to improve his own quality of life.

Thankfully, Jason was not incarcerated that day. He had an attorney.

He still remembers the Attorney General asking the men called to the stand that day – "Do you have a job?" "Do you have any properties you can sell: TV...furniture...phone?"

"No," some replied. Others said "Yes."

Jason realized that the child support division is exactly what it calls itself: an enforcement agency. No feelings or emotions – simply neutral

business organization established to provide services in child support as an agent of the state.

Jason was able to go home with his wife and hold his children.

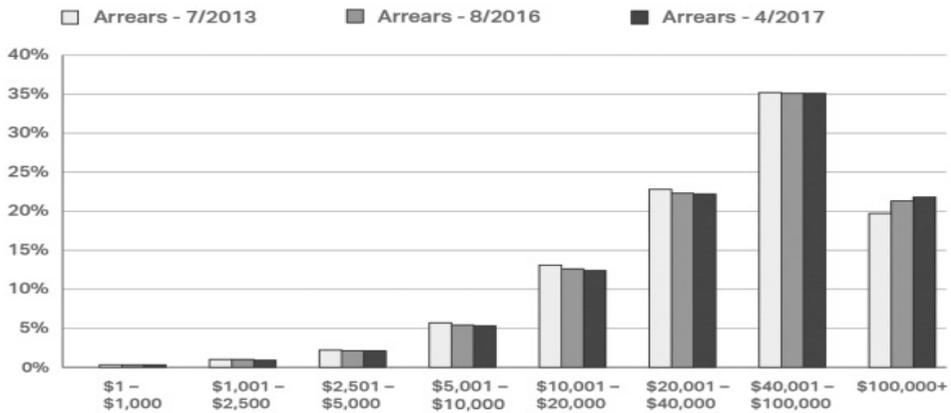
He reminisced back to the moment he sat in the courtroom, waiting for his name to be called and his Miranda rights to be read. There were approximately 15 people whose names were called. 12 were minorities – 8 African Americans and four Hispanics; three of these non-custodial parents were Caucasian. Only one was a woman.

The Overdue Burden of the Child Support Guideline

Under the Texas Child Support Guideline, a non-custodial parent is required to pay 17.5% to 20% for each child and up to 40% in child support. In addition, non-custodial is responsible for medical support, approximately \$90 -\$100, and as of September 1, 2018, he or she must pay dental allowance or dental support.

There are several flaws in the Texas Child Support System resulting in division and conflicts in families.

1. The incarceration of non-custodial parents for non-payment of child support.



The graph shows that 22% of the total certified debt is owed by noncustodial parents who owe \$100,000 or more as of April 2017. In our analysis of repeated sampling over the last few years, several trends are

identified.²⁷ The percent of debts between \$40,000 and \$100,000 remains at 35% of total arrears over the years while the percent of debts between \$5,000 to \$4,000 has slightly decreased respectively.²⁸

Roughly 5 million kids have — or have had — at least one incarcerated parent. In the general population, that is 1 in every 14, according to Child Trends, a national nonprofit. The chances are much higher for black children, researchers found: 1 in 9 has had a parent in prison.²⁹ There is a direct link between the absenteeism of minority fathers due to incarceration from child support debts and their low employment and low wages.

Who owes these debts?

The sharp increase in incarceration rates in the U.S. over the second half of our sample is also responsible for the vast majority of observed changes in institutionalization rates for white and black men.³⁰ Incarceration does not resolve the issue of non-payment. Although the original intent is to enforce the court order, the effect is — as the title notes — ‘crushing’. The devastation includes the post-incarceration trauma and the accumulation of debt.

The child support system itself is a corporation that utilizes interests (percentages — as high as 6%) to build its wealth and earn income from individuals who are barely earning enough to maintain their standards of living. According to Texas Family Code (157.261), the State of Texas allows for interest to be charged on missed support payments. Interest accrues on the delinquent child support at the rate of 6% simple interest per year from the date support is delinquent.

Another issue and flaw with the incarceration of non-custodial parents is the stain it leaves on their records. Some non-custodial parents are stuck in these situations that should not be usurped by the governments. The task of

I. 27. *Trends in Child Support Debt Amounts*, OFFICE OF CHILD SUPPORT ENFORCEMENT, AN OFFICE OF THE ADMINISTRATION FOR CHILDREN AND FAMILIES: TRENDS IN CHILD SUPPORT DEBT AMOUNTS (March 15, 2018), <https://www.acf.hhs.gov/css/ocsedatablog/2018/03/trends-in-child-support-debt-amounts>.

28. *Id.* at 7.

29. Daniel Paquette, *One in Nine Black Children Has a Parent Locked up in Prison*, WASHINGTON POST (Oct. 27, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/10/27/one-in-nine-black-children-have-had-a-parent-in-prison/?utm_term=.a5cd35c11aa1; *See also* CHILDTRENDS (Dec. 13, 2018), <https://www.childtrends.org/indicators/racial-and-ethnic-composition-of-the-child-population>.

30. Patrick Bayer & Kerwin Kofi Charles, *Divergent Paths: A New Perspective on Earnings Differences Between Black and White Men Since 1940* (July 2018), <https://bfi.uchicago.edu/Charles-WP-201845>.

the government is to effect laws for the benefits of its residents/citizens. The quality of a state government is not the amount of money accumulated by the state, but it is the quality of the lives of its residents.

Non-custodial parents incarcerated for non-payments are unable to retain employment. As noted above, a large portion of non-custodial parents who are incarcerated are minorities and low-income individuals who cannot afford to maintain quality life with the burdens. Even if they choose to build a business of their own – which takes time and effort – the suggestion and attempt is not commended by the states because they are deemed, at least in the state of Texas – ‘employable’. Without questions, there are non-custodial parents who usurp and manipulate the system to their advantages; likewise, there are custodial parent who solely rely on child support checks when they themselves are employable. Both are ineffective and hurtful.

Employment applications require the disclosure of wage withholdings and garnishment for child support. At times, employers refuse to hire an applicant because of the incarceration on their record. Although they have repaid their debts for contempt of child support order, up to six months, they have accumulated debts to the state which they cannot repay. Thus, on top of the lack to live a quality life because of outstanding child support payments, the misdemeanor remains on their record, likely prevent them from employment, and separate from their children during confinement.

Incarceration is a material and substantial change in circumstances

Under Section 156.401(d) of the Texas Family code:

“The release of a child support obligor from incarceration is a material and substantial change in circumstances for purposes of modifying child support if the obligor’s child support obligation was abated, reduced or suspended during the period of the obligor’s incarceration.”

Please note that a lack of job is not enough to stop child support. Generally, the court presumes both parents have income and resources equal to the 40-hour week at federal minimum wage (Tex. Fam. Code Section 154.068). In other words, the parent is considered ‘employable’ and has a job making minimum wage – even if he or she is unemployed. In the case where a parent is incarcerated for outstanding child support payments, it is deemed a change in circumstance qualifying for modification. However, to obtain modification of an existing child support order, the parent must file the correct request or petition to modify

the existing order. Until the judge signs a new Order, the existing order remains in effect, including its provisions.

Modification which means ‘change’ can be requested. To modify the child support order, there must be a material change in the circumstances of the family (Texas Family Code 156.101). The Code in addressing child support fails to outline the specific circumstances or give examples that can guide the average residents or individuals on the types of circumstances that qualify for modification.

Child Support Order Modification

- (a) Except as provided by Subsection (a-1), (a-2), or (b), the court may modify an order that provides for the support of a child, including an order for health care coverage under Section 154.182 , if:
 - (1) the circumstances of the child or a person affected by the order have materially and substantially changed since the earlier of:
 - (A) the date of the order’s rendition; or
 - (B) the date of the signing of a mediated or collaborative law settlement agreement on which the order is based; or
 - (2) it has been three years since the order was rendered or last modified and the monthly amount of the child support award under the order differs by either 20 percent or \$100 from the amount that would be awarded in accordance with the child support guidelines.

<Text of (a) effective September 1, 2018>

- (a) Except as provided by Subsection (a-1), (a-2), or (b), the court may modify an order that provides for the support of a child, including an order for health care coverage under Section 154.182 or an order for dental care coverage under Section 154.1825 , if:
 - (1) the circumstances of the child or a person affected by the order have materially and substantially changed since the earlier of:
 - (A) the date of the order’s rendition; or
 - (B) the date of the signing of a mediated or collaborative law settlement agreement on which the order is based; or
 - (2) it has been three years since the order was rendered or last modified and the monthly amount of the child support award under the order differs by either 20 percent or \$100 from the amount that would be awarded in accordance with the child support guidelines.
- (a-1) If the parties agree to an order under which the amount of child support differs from the amount that would be awarded in

accordance with the child support guidelines, the court may modify the order only if the circumstances of the child or a person affected by the order have materially and substantially changed since the date of the order's rendition.

<Text of (a-2) effective until September 1, 2018>

- (a-2) A court or administrative order for child support in a Title IV-D case may be modified at any time, and without a showing of material and substantial change in the circumstances of the child or a person affected by the order, to provide for medical support of the child if the order does not provide health care coverage as required under Section 154.182 .

<Text of (a-2) effective September 1, 2018>

- (a-2) A court or administrative order for child support in a Title IV-D case may be modified at any time, and without a showing of material and substantial change in the circumstances of the child or a person affected by the order, to provide for medical support or dental support of the child if the order does not provide health care coverage as required under Section 154.182 or dental care coverage as required under Section 154.1825 .
- (b) A support order may be modified with regard to the amount of support ordered only as to obligations accruing after the earlier of:
- (1) the date of service of citation; or
 - (2) an appearance in the suit to modify.
- (c) An order of joint conservatorship, in and of itself, does not constitute grounds for modifying a support order.
- (d) Release of a child support obligor from incarceration is a material and substantial change in circumstances for purposes of this section if the obligor's child support obligation was abated, reduced, or suspended during the period of the obligor's incarceration.

This means the person who should be receiving child support could ask the court to start or reevaluate child support if the parent who should be paying is no longer incarcerated.

A faster way to assist an incarcerated parent is to hire a private attorney to file a modification of child support order; if you are unable to afford a private attorney, look for Volunteer Lawyer Service in your area and ask for pro-bono attorneys to help with the filings. A custodial parent has standing

to petition the court; he or she may request a modification of child support obligations – though rare. If the non-custodial parent is incarcerated for other reasons apart from child support and the parents are in an amicable relationship, it is not uncommon for the custodial parent to step in the gap and initiate the modification.

A parent may also contact the child support office and ask a caseworker for the necessary legal paperwork for changing their child support obligation. Once released, the staffs at the child support office are neutral parties working for the State of Texas, not the individual parents. Therefore, the advantage to hiring an attorney is having a representative on your side to advocate for a more favorable outcome.

The burden of proof is on the parent seeking modification. He or she must show the court the change in circumstances (i.e. what has changed from the previous time both parties were in court and an order was issued). Please note that modification of conservatorship, i.e. custody is NOT an automatic change in child support order with few exceptions, including termination of parental rights, a requested change, and sole conservatorship.

Moreover, given that support obligation does not change during incarceration, it is important that the incarcerated parent file “Incarcerated Noncustodial Parent Affidavit of Income/Assets” once released in the court where the Child Support Order was issued.

The Child Support Evaders

The Office of the Attorney General’s Child Support Evader Program seeks tips from the public to locate parents who are avoiding their court-ordered obligation to support their children.³¹ The Office of the Attorney General is required by law to publicly identify those parents who are delinquent in the payment of their child support and meet the conditions below:

- Court ordered delinquent child support must be more than \$5,000
- An arrest warrant has been issued
- The Noncustodial parent is avoiding apprehension
- There have not been any regularly made payments in the last six months

31. *Child Support Evaders*, KEN PAXTON OFFICE OF ATTORNEY GENERAL, <https://www.texasattorneygeneral.gov/child-support/child-support-enforcement/child-support-evaders> (last updated Mar. 1, 2019).

- The Noncustodial parent must not be involved in bankruptcy proceedings or receiving TANF benefits.
- A confidentiality waiver must be signed by the Custodial parent, allowing certain case information to be made public
- A photograph must be available³²

This program is similar to Crime-Stoppers. These parents are arrested and incarcerated for child support obligations. If a parent has the ability to pay, that is, the parents earn more than \$15,000 per year and are employable, then there should be a strict enforcement. Jason C. (name was changed to protect his identity) was arrested and jailed because he owed \$5008 for the support of one child. Jason is a male of Latino descent.

Redefine “Best Interest” – the Emotional Health of the Child

The Child’s Development is the Authentic Best Interest

The development of a child is important, and money is not always the solution. The attention and presence of healthy parents can build a child’s confidence and outlook in life – his or her transition into adulthood. Development is not limited to the physical upbringing; it includes the emotional, mental, and social health of a child. It is better to be poor together as a family and healthy in the mind than to have the riches and financial support but miss the social connection and affection of a parent.

The Effect of Non-payment on Custodial Parents

In most households, both parents are unhealthy when child support obligations accrue. The custodial parent is affected because of the weight of parenthood – being present and available to the child at athletic games, social clubs, parent’s meetings, and other school functions. Also, the custodial parent has to carry the financial burden of the child in question and other child(ren) that may be involved, including rent, clothing, food, school fees for extra-curricular activities, etc.

32. *Id.*

The profitability of child support for the State and Its ineffective budget

State child support programs routinely send information about child support cases that owe arrears to the Office of Child Support Enforcement's (OCSE) Federal Offset Program. OCSE uses various enforcement remedies, such as intercepting federal tax refunds, to collect arrears.³³ "Any arrears collected are returned to the state child support program to distribute either to the family or to the government."

The OCSE Federal Offset Debtor File lists the amounts of past-due child support each noncustodial parent debtor owes. As of April 2017, 5.5 million delinquent noncustodial parents, or debtors, owed over \$114 billion in past-due child support. Approximately 20% of the total arrears is owed to the government. The following data is based on a sample of the debtors in the Federal Offset Debtor File as of April 2017."³⁴

PROPOSED SOLUTIONS

Someone from Brooklyn, NY writes:

"How does a mediator make Billions if money is transferred from Non-Custodial to Custodial? I wrote it down and questioned this because if I owe \$1 in Child Support and I give this same \$1 to the Child Support System to transfer to my child's mom how did the Child Support system make a profit off of my \$1? And how is it that not even the President can intervene with this (Separate) Corporation that has nothing to do with the Government?"

There are alternatives that can benefit the parents and lead to unification rather than separation of families.

Removing the enforcement of incarceration on Low-Income Parents

In *TURNER v. ROGERS et al.*³⁵, the Supreme Court of the United States remanded and vacated a case where an indigent was found in civil

33. *Id.* at 2

34. *Id.*

35. *Turner v. Rogers*, 564 U.S. 431, 467 (2011).

27 See *The Wage Gap Between White and Black Men Is Growing Wider*, *supra* note 10.

contempt and ordered to be incarcerated. The Court remanded the case because the trial court did not find that he was able to pay his arrearage. The South Carolina judge found Turner in willful contempt and sentenced him to 12 months in prison without making any finding as to his ability to pay or indicating on the contempt order form whether he was able to make support payments. The Supreme Court ruled:

“Based on the noted gap in the wage and earned income of minorities to their counterparts, the amount of obligation should be based on actual income not imputed income.”

Incarceration for failure to make child support payment should be based on misrepresentation or fraudulence, more specifically where a parent is able to pay but chooses to hide assets or concurrently and intentionally miss payments.

Subsidy of Interest during Incarceration

The state has a budget for a reason – to maintain its administrative function as an enforcement agency. These are dollars provided by tax payers as well as the federal government. The main purpose is to carry out its jobs effectively and function for the well-being of the residents, not to their detriments.

Child support payment is for the advantage and benefit of the child, not the government. The Agency including its Collection Unit serves as its name suggest – a collection institution. Their job is to act as a debt collector and ensure the receipt of owed moneys by any legal means possible. The government profits from the dollars collected, understandably so because the agency after all is a business. The purpose of collecting child support payments and enforcing civil contempt proceedings is “where the underlying support payment is owed to the State, e.g., for reimbursement of welfare funds paid to the custodial parent.”³⁶

The interests added to the principal amount only increases the burden on low-income incarcerated fathers – which based on case study reveals are mostly minority fathers. In the alternative, interest should be subsidized while a non-custodial is incarcerated.

²⁸ CHILD MAINTENANCE OPTIONS, <https://www.cmoptions.org/en/other-arrangements/parent-lives-abroad.asp>, (last updated 2010).

If interest must be charged, then it should be minimal not overburdening. The interest only capitalizes on poor non-custodial parents who cannot afford to pay their child support in the first place.

Best Interest (Refocusing on the Emotional Development of Children) through The Pay Scheme

As noted in the abstract, the focus of this article is not simply on the aggressive efforts resulting in the detainment of many Black and Latino men, but the emotional development of the child. In United Kingdom, a pay scheme was implemented allowing for the reduction of child support debts where paying parent assume the everyday responsibilities and care of the child.³⁷

“If you are involved in Court proceedings to divide assets following a divorce or dissolution of a civil partnership and can agree child maintenance, you can apply to court to have this agreement turned into a consent order. If the non-resident parent fails to pay the maintenance agreed in the consent order, then the Court has powers to enforce the order. 12 months after the consent order has been in place either parent can “opt-out” of the agreement in the consent order and choose to go through the CMS instead. There are also certain limited circumstances when a resident parent can seek orders from the Court under Schedule 1 of the Children Act 1989 (CA) in addition to seeking maintenance through the CMS, or if a CMS assessment is not available. This includes when: the non-resident parent lives abroad, the income of the non-resident parent is greater than the statutory scheme’s upper limit; which is currently £3,000 per week before income tax and national insurance; the application concerns costs for a child’s education or to support a child with a disability; or the resident parent is seeking a sum of money, for example, to provide a home for the child.”³⁸

UK’s paying scheme encourages family-based agreement and incentivizes the paying parent on taking responsibility for the everyday care of the child. This is the intention and the spirit behind Texas Child Support laws – the Best Interest standard is not a vague term; rather, it is defined as

³⁷ Rights of Women, *Children and the law: child maintenance* (Dec. 2014), <https://rightsofwomen.org.uk/get-information/family-law/children-law-child-maintenance/>.

³⁸ *Id.*

UK's pay scheme system provides a child maintenance option which is called joint residency, or increasing the amount of time the paying parent spends providing day-to-day care for the child. Based on the UK's most recent child maintenance scheme, paying parents can reduce their child maintenance up to 50%. The focus of the scheme is increasing the amount of time, hence the reduction in child support obligations.³⁹ As of March 2017, there is a UK backlog of more than £3.8bn in uncollected child maintenance payments, money owed by non-resident parents that has built up over 23 years owed to approximately 1.2 million people.⁴⁰ A spokeswoman for its Department of Work and Pensions said: "We spend £30m a year maintaining the old failing CSA systems where most of the debt relates to children who are now adults, and it would cost the Government a further £1.5bn to attempt to recover it. This situation is unsustainable, and that's why we are consulting on options to address it."⁴¹ The department plans to write off majority of the debt.

Likewise, paying parents can be incentivized to provide for the emotional and physical needs of their children by reducing the child support arrears when they can show their increased involvement and provision.

Accountability

Custodial parents should be required annually to give an account of the bills or expenses paid and spent on the child. This system of accounting is utilized in Probate courts to ensure that the estate of the deceased is not squandered. Each dollar collected is someone else's sweat and hard-earned money; there should be a form of accountability. Many non-custodial parents use their children as pawns, and they have turned childbirth and parenthood into a profitable business. Hence, they are encouraged to have multiple children – and often times by multiple fathers; likewise, some women fall into these traps of men who promise a better future but fail to carry their responsibilities as fathers. In the Probate Court, the dependent administrator

39. TransferWise, *How Can I Reduce the Child Maintenance Amount I'm Paying? Does joint Residency affect Child Maintenance Amount?*, TRANSFERWISE CONTENT TEAM, <https://transferwise.com/gb/blog/uk-child-maintenance-payments>.

40. Nicola Rees, *Verdeshire Derbshire Programme*, BBC (Mar. 20, 2017), <https://www.bbc.com/news/uk-39293209>.

41. Tom Barnes, *Government could write off £2.5bn in child maintenance debts because it fears money may never be recovered*, INDEPENDENT (Jan. 14, 2018), <https://www.independent.co.uk/news/uk/home-news/government-csa-dwp-child-support-money-owed-debt-write-off-wont-pay-parents-a8158806.html>.

is required to submit an inventory of the estate to ensure that there is no usurping and mismanagement of the properties.

This system and solution is also utilized by the Internal Revenue Service for accounting purposes of a taxpayer. A record is important in demanding reimbursement and the involvement of the court in family matters where the properties of another individual is requested to be seized. When a custodial parent or non-paying parent petitions to the court for the enforcement of a mediated settlement agreement on child support or request the enforcement of Child Support Order, there should be a record and proven documentation of child's expenses and inventory of amount spent on the child that should have been covered or paid by the obligor.

In the same manner that child support evaders are reported, non-custodial parents abusing the system should be allowed for reporting. The burden of collecting evidence of every-day living of the child and its expenses is on the custodial parents. Moreover, once a child reaches the age of employment – likely 16 years old, the child herself or himself becomes employable and capable of providing for everyday living expenses. Therefore, the amount in support should reduce.

Modification of Title IV-D of the Social Security Act: A Proposed Holistic Reformation

In order to completely cure an illness, at times, it is best to go directly to the source for prevention rather than merely treat the symptoms. This Article is not intended to lambast the Office of Attorney General, the Child Support Division, its staff, or the state. It is plausible that each agency and department is working to ensure the system remains standing and effective. However, the state can do better. This is not only for Texas, but other states as well.

Title IV-D was enacted to relieving the government of the burden of catering to children living below poverty level, i.e. children on governmental assistance programs with financial support. Public policy is in the interest of present fathers, the ultimate goal is for obligors to contribute their share in caring for the children financially.

IV-D relating to Child Support can be reformed to implement alternatives to incarceration, such as planned labor or community service where obligors can pay their arrears with labor – employment at a state facility or private companies that are willing to accept the labor of low-income obligors and compensate them and the state in exchange. The major

hurdle for most obligors with no or low-income is the lack of employment; at times, their lack of education or job training is a contributing factor.

If the funds that Texas invests into jails or collect from private companies in the operation of larger prisons to accommodate obligors – are distributed to support poor children, then the state will have savings. Also, the mission to support the children and their families is achieved.

This complement system is holistic because it truly satisfies the best interest of the child(ren) by:

- (1) Providing an extra financial cushion and economic support for the child, the subject and targeted person in the Title IV-D of the Social Security Act.
- (2) Maintains obligors' access to their children and opportunities to adhere to their visitation and access Order.
- (3) Ensuring the costly prison and jail system is reserved for other criminal acts, not failure to pay child support obligation.
- (4) Reviewing the income from a two-fold view of BOTH parents' income and employability.
- (5) Assisting low-income families living below poverty level have the financial support needed without mismanaging the distribution of governmental assistance
- (6) Providing employment opportunities through job training and education assistance.

“Outdated gender profile: I want to know who decided that the man is 100 percent financially responsible for bringing a child into this world. Current child support laws are antiquated and outdated.....They were formulated generations ago for the man who walked away from an unemployed wife with small children.....Now for the most part....the females are employed, remarried and the poor father coughs up 25 percent of his salary plus attorneys fees and most times never has visitation [sic] because the courts ignore the rights of a father.”⁴²

The overarching flaw of the current child support system and enforcement is that the focus is on collecting payments – which it does very well – rather than on ensuring that fathers or non-custodial parents in general

42. Shawn Garrison, *Five Ways the Child Support System Fails Families*, DADSDIVORCE, <https://dadsdivorce.com/articles/5-ways-the-child-support-system-fails-families/> (last updated 2018).

are involved in their children's lives. Society labels these parents 'deadbeat' fathers or 'gold-digging' mothers.

The system indirectly rewards mothers who have turned childbirth into a "hustle" or employment – encouraging women who have managed to find loopholes in the system, preying on men and birthing children by different fathers in hope of collecting child support payments on monthly stipend. There is less motivation to find employment to rear these children.

Parenting requires resources, but the involvement of the parents is likewise important. The neglect of one can be devastating and destructive to the other.

In conclusion, there is a direct and indirect negative impact on the current aggressive enforcement of child support Title IV-D law on non-custodial parents. It is a repeated cycle that separate homes and families rather than build and encourage them. The paying parents in low-income communities are largely Hispanic and African-American fathers who lack the education and opportunity to earn actual income. Hence, they are incarcerated while interests continue to accrue on the debts, absent from their child's life and development, and given their inability to pay the debts, the cycles repeat.

Incarceration is justified when applied and enforced against paying parents with arrears who are (1) employed or employable; (2) hiding assets; (3) refuse to comply with court ordered obligations of child support and maintenance. Additional solutions to these issues include a pay system that reduces child support debts based on presence and involvement, a hold on interest during incarceration, and bridging the wage gap by providing programs with employment opportunities, vocational training, and academic improvement.

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UNDAUNTED: WILLIAM A. PRICE, TEXAS' FIRST BLACK JUDGE AND THE PATH TO A CIVIL RIGHTS MILESTONE

JOHN G. BROWNING AND CHIEF JUSTICE CAROLYN WRIGHT*

*History, despite its wrenching pain
Cannot be unlived, but if faced
With courage, need not be lived again*
– Maya Angelou

The history of Texas' earliest African-American lawyers has been, until recent years, among the most neglected chapters in Texas legal history. Lack of available information, the confused or incomplete state of what extant sources remain, and even uncertainty on the part of the few local and national historians to examine this subject² have all been offered as reasons for this dearth of scholarship. But a lack of contributions to our state's rich legal heritage has never been such a justification. Texas' first African-American attorneys spawned a vital legacy that transcends the state's borders, none more so than Texas' very first black lawyer—and first black judge and first black county attorney—William Abram (W.A.) Price.

As this article discusses, W.A. Price's historical significance comes not just from the trail he blazed in becoming the first African-American to practice law in Texas, the first to hold judicial office, or the first to be elected a county or district attorney. Price would eventually cast such a shadow after leaving Texas that one of his singular civil rights victories before the Kansas Supreme Court in 1891 would help lay the foundation for a later school desegregation battle to originate in Kansas and make it all the way to the U.S. Supreme Court—*Brown v. Board of Education* in 1954. Price's path toward the law, public office, and civil rights advocacy was not a direct one, but his work left echoes that are still felt today.

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1. Maya Angelou, *On The Pulse Of The Morning* (1993).
2. See, e.g., DARWIN PAYNE, QUEST FOR JUSTICE: LOUIS A. BEDFORD, JR. AND THE STRUGGLE FOR EQUAL RIGHTS IN TEXAS 9 (2004) (discussing the "uncertain" history of Texas' first black lawyer); J. CLAY SMITH, EMANCIPATION: THE MAKING OF THE BLACK LAWYER 1844–1944 344 (1993).

I. "A MAN OF FINE TALENT"

Relatively little is known about W.A. Price's early years; in fact, one historian writing about Price and one of his later Kansas peers, John Lewis Waller, incorrectly refers to both Price and Waller being "born into slavery."³ In reality, Price was born a free man in 1848, the son of free parents of mixed Native American and African American heritage living near Mobile, Alabama. Price was educated as well and furthered his formal education by attending Wilberforce University in Xenia, Ohio for at least three years. Wilberforce, the nation's oldest private, historically black university, was founded in 1856 as a joint venture between the Methodist Episcopal Church and the African Methodist Episcopal (A.M.E) Church. A destination point on the Underground Railroad, it closed temporarily in 1862 before re-opening on July 10, 1863 under the sole ownership of the A.M.E. Church. Clearly, Price not only received a college education at one of the few institutions open to a person of color at that time, but his learning was likely influenced by the abolitionist learnings at Wilberforce.

Price moved to Texas sometime during Reconstruction, although it is not clear when. His early ambitions did not lead him to the law; based on property records in Matagorda County, he owned a tract of land and likely pursued farming. And he was active in Republican politics, one of the many African-Americans flexing their newfound political muscle in Texas during Reconstruction. As historian C. Vann Woodward noted, "As a voter, the Negro was both hated and cajoled, both intimidated and courted, but he could never be ignored so long as he voted."⁴ Price actively campaigned for the re-election of Congressman (and former Union general) William T. Clark in 1871, giving speeches supporting Clark and writing to local newspapers. Though Clark was unsuccessful, Price proudly referred to himself as "a thorn while I was there" (a hotly-disputed state Republican convention) in one such letter to an editor.⁵

Ironically, Price's decision to explore a career in law may have been spurred by his firsthand experience in seeing the system at work. According to Matagorda County records, in October 1871, Price was indicted for the

3. RANDALL BENNETT WOODS, *A BLACK ODYSSEY: JOHN LEWIS WALLER AND THE PROMISE OF AMERICAN LIFE, 1878-1900* 58 (1981).

4. C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 54 (1966).

5. Richard Nelson, *The Representative*, Vol. 1, No. 14, Ed. 1 (Sept. 2, 1871), <https://texashistory.unt.edu/ark:/67531/metaph203072/?q=The%20Representative%20journal>.

theft of a cast iron wheel (likely part of a cotton planter) valued at twenty-five dollars.⁶ The wheel was the property of Asa W. Thompson, quite possibly a neighbor or business rival of Price's. While an acquittal by an all-white jury was probably more than any African-American defendant could have hoped for, Price apparently made a favorable impression on the jury and on Judge William Burkhart of the 20th Judicial District. The first trial ended with a guilty verdict, but with a verdict of only one dollar. The verdict was set aside as being "unauthorized by law," and a new trial was ordered. At the second trial, on June 12, 1872, the jury once again found against Price, but "assessed the punishment at five minutes in the County jail."⁷ Price appealed this verdict as well, and while on appeal the district attorney voluntarily dismissed the case.⁸

Even while this courtroom drama over an iron wheel was playing out, W.A. Price was becoming more involved in the judicial system—this time as a judge. Although the circumstances of how he attained office are unknown, by at least January 1872, the young man became "Judge Price," serving as Justice of the Peace of Matagorda County's Precinct Number 2. Besides scattered references to "Judge Price" in contemporary local newspapers, legal notices issued by "W.A. Price, J.P. Precinct No. 2" appeared in these papers as well. One such example was the citation appearing in the case of *J.M. Barbour, Guardian v. Wm. A. Gibson*, summoning the defendant Gibson to answer the complaint (a dispute involving the sum of \$98.96) before Justice of the Peace Price "at my office on Caney creek."⁹

Other than such fleeting notices, Price's work as a justice of the peace remains a mystery. He remained active politically (running unsuccessfully for the Texas Legislature against G.M. Bryan), and frequently published letters in local newspapers. The newspapers catering to the black community regarded him highly. Galveston's *The Representative* said, "the Judge is an able and intelligent gentleman," and called him "a fair representative of his race, an active and influential Republican, and by his courtesy commands

6. Matagorda County Civil Minutes, Book C, p. 153, *The State of Texas v. William A. Price*, Cause No. 408 (Oct. 1871 term.).

7. *Id.* at 238–39.

8. *Id.* at 318.

9. *Indianola Weekly Bulletin*, Vol. 5, No. 47, Ed. 1 (Jan. 24, 1872) <https://texashistory.unt.edu/ark:/67531/metapth178919/?q=Indianola%20Weekly%20Bulletin%2C%20Vo.%205%2C%20No.%2047>.

respect from even his opponents.”¹⁰ Evidently, Price’s talents went beyond legal acumen as well. He was credited with being the mastermind behind a canal from Wilson Creek to the Colorado River, which “will take off enough of the water to prevent the overflow, letting in the bay at Palacios.”¹¹ The white-owned *Galveston Daily News* predictably found it “[s]trange to say, that this scheme was gotten up by a colored man, W.A. Price, the colored lawyer of this place.”¹² However, begrudgingly the newspaper gave such credit to Price, it did go on to observe that he was well-regarded by whites and blacks alike, calling him “a man of fine talent” and saying that “the good feeling existing here between the two races is due to his influence; the white people speak very highly of him.”¹³

II. “THE ONLY PRACTICING LAWYER OF HIS RACE IN THIS STATE”

Then, as now, justices of the peace were not required to have any legal education or license. Perhaps it was his experience handling the tasks of Justice of the Peace (“J.P.”) that awakened a desire in Price to become a lawyer, or perhaps it was his earlier sojourn through the justice system as a defendant. It may have been his political ambitions that triggered his decision, or even as simple a reason as a path to financial prosperity for Price and his growing family (Price married his wife Susan, and would later welcome daughter Benita Price and sons William “Willie” A. Price, Jr. and Haywood J. Price). Price may not have even known that in seeking to become a lawyer, he would, in fact, be the first African-American in Texas to do so.

In certain ways, such as his college education at Wilberforce, W.A. Price may have been better prepared for admission to the bar than many white Texas lawyers of his day. For most of the nineteenth century, candidates for admission to the Texas bar usually lacked a formal legal education, having instead “read the law” under the tutelage of one or more older attorneys.¹⁴

10. *The Representative*, Vol. 1, No. 22, Ed. 1 (May 4, 1872) <https://texashistory.unt.edu/ark:/67531/metaph203082/?q=The%20Galveston%20Representative%2C%20>

11. *Galveston Daily News*, Vol. 34, No. 110, Ed. 1 (May 14, 1874) <https://texashistory.unt.edu/ark:/67531/metaph464256/?q=Galveston%20Daily%20News%2C%20May%2014%2C%201874>.

12. *Id.*

13. *Id.*

14. MICHAEL ARIENS, *LONE STAR LAW: A LEGAL HISTORY OF TEXAS* 182 (2011).

Texas did not have a bar exam until 1903.¹⁵ The standards for earning a license to practice law had changed little between Texas' days as a republic in 1839 and the passage of a bar licensing statute in 1891.¹⁶ From 1839 onward, a candidate had to be 21 years old and provide "undoubted testimonials of good reputation for moral character and honest and honorable deportment."¹⁷ The candidate also had to be examined in open court by a committee of lawyers (usually three) appointed by the local district judge; two of these lawyers had to indicate that they were satisfied with the applicant's legal qualifications in order for him to obtain his law license.¹⁸

Upon licensure, the newly-minted attorney was permitted to practice in any trial court in the state (until 1873, a lawyer was only allowed to appear before the Supreme Court, Texas' only appellate court at the time, if he applied directly to it).¹⁹ Being admitted to practice in Texas during the nineteenth century has been described as "extraordinarily easy" despite attempts at rules detailing formal expectations.²⁰ For example, the 1877 rules for district courts spelled out that those seeking admission to practice were required to read a variety of legal treatises, such as those by William Blackstone, James Kent, Simon Greenleaf, and others.²¹ As one historian observed, however, it is highly unlikely that most applicants ever satisfied such reading requirements "not only because of the daunting nature of these works . . . but also because of the relative scarcity of these volumes in frontier Texas."²²

Like so many others before him, Price "read the law" in the offices of a more senior member of the bar—in his case, Judge William H. Burkhart of the 20th Judicial District and the same judge who had presided over Price's 1872 wheel theft trials. Why would Judge Burkhart mentor a young African-American man seeking admission to the bar? Perhaps he saw a spark of promise in the young man who had appeared in his court. Alternatively, perhaps there was a less altruistic reason. After all, Burkhart was a Radical Republican himself, newly-elected to the office during Reconstruction, and a prominent member of the party at the time. Certainly, it would not hurt

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. MICHAEL ARIENS, *LONE STAR LAW: A LEGAL HISTORY OF TEXAS 182-3* (2011).

21. *Id.*

22. *Id.*

Burkhart's standing with the all-important African-American voters to extend a helping hand to a rising star in that community.

Regardless of any ulterior motives, the Matagorda County Civil Minutes reflect a historic moment during the October 11, 1873 term—the formal application of William A. Price for a license to practice law, making him the first African-American in Texas to do so.²³ The Court noted that Price, the petitioner, had made application for a license to practice before “the District and inferior tribunals of this state,” and had produced the required certificate attesting to his residency in the state and county for at least six months, to his age of at least 21 years, and to his being “a man of good moral character.” This certificate was signed by H.P. Love, the “Chief Justice of the County Court of Matagorda.”

Judge Burkhart wasted no time in appointing the required committee of three local attorneys to examine Price on his qualifications, naming local Democrat attorneys W.L. Davidson, D.E.E. Brannan, and James E. Wilson to the task and directing them to “report as soon as practicable.” The committee members apparently did so on the same day, responding that they “report favorably upon said application,” are “satisfied as to the qualifications of said applicant for the purposes of Practicing Law,” and that they “unite in the prayer of said applicant” for a law license. With that, W.A. Price took the historic step of becoming the first African-American admitted to practice in Texas.

Between his admission to practice in October 1873 and his 1875 campaign to become Texas' first African-American county or district attorney, little is known about Price's actual law practice. We do know that he remained active in politics and that he was an important voice among the black Republican voters who were growing increasingly disenchanted with being used by white Republicans as a powerful voting bloc while not reaping the rewards of office themselves. In July 1873, a “colored convention” of black Republicans met in Brenham, Texas. As one Galveston paper described the mood before this convention, “The colored brother is tired of picking bones and munching crusts while the white Radical enjoys the meat and the bread of the loaves and the fishes.”²⁴ At the convention itself, speakers including Price warned against the dangers of “50,000 loyal men” of color being “sold out” by Republican officeholders who “may seek to use our

23. Matagorda County Civil Minutes, Book C, p. 374, Cause #1461, Application of Wm. A. Price for License to Practice Law.

24. GALVESTON DAILY NEWS (Galveston, Tex.) (June 12, 1873).

power for their great greed of gain” and who “for self-interest would barter all the rights we hold most dear.”

III. “A COLORED DISTRICT ATTORNEY”

Whether for personal, professional, or political reasons, Price moved from Matagorda County to Fort Bend County by 1875. By December of that year, newspapers in the state were not only taking note of Price and the viability of his candidacy for office but also of the power wielded by African-Americans at the ballot box. The Galveston Daily News bemoaned “the Egyptian darkness of the Eighteenth Judicial District, composed of the counties of Waller, Wharton, East Bend, Brazoria, Matagorda, and Jackson, where the colored race predominate.”²⁵ Noting that it was “impossible to elect a Democrat” in this “tolerably dark district,” the newspaper speculated about who the Radical Republicans would install in office, concluding that “Price (colored), lawyer of Wharton, seems now to be the winning horse, but time brings about many changes, and before the election comes off, we expect of some others in the field.”²⁶

Indeed, Price was elected Fort Bend County Attorney and formally took office April 18, 1876.²⁷ As the Galveston Daily News reported, he was “elected without opposition; the county being so largely Radical, it would have been useless to have made the race.”²⁸ He was the first African-American to hold office as a county attorney or district attorney, and the jarring impression that this might make to casual (white) observers was not lost on the media of the time:

On entering that courtroom, a stranger would, like your correspondent, feel somewhat startled on looking among the attorneys, to see one of them a colored man. Yet such was the case, and he is the newly elected County Attorney, W.A. Price by name.

Predictably given the racism and pseudoscience of the times, the journalist seems to equate Price’s achievement and intelligence with his

25. GALVESTON DAILY NEWS (June 12, 1873), <https://galveston.newspaperarchive.com/galveston-daily-news/1873-06-12/>.

26. *Id.*

27. At the time, many Texas counties used the term “county attorney” and “district attorney” interchangeably to denote that county’s chief elected prosecutorial official.

28. GALVESTON DAILY NEWS (Dec. 22, 1875), <https://texashistory.unt.edu/ark:/67531/metaph464315/?q=Galveston%20Daily%20News%20Dec.%2022%201875>.

lighter-skinned appearance and racially-mixed ancestry. He devotes an inordinate amount of attention to Price's appearance, noting that the new county attorney is "of light or bright copper color; very black, yet almost straight hair and whiskers, and like Galveston's quondam Senator—'Ruby'—has very little African blood in his veins, both his mother and father being half Indian and half bright mulattoes."²⁹ The author goes on to describe Price's personal appearance as resembling "that of an Indian; his features are rather delicate than otherwise; his hands and feet slender and tapering and his conversation indicates that he has not neglected the opportunities afforded him."³⁰ In fact, the bigoted author even contrasts Price with Fort Bend County's newly-elected sheriff, also African-American, who "[u]nlike Price . . . is of the regular cornfield darky appearance," who he snarkily speculates "will find much difficulty in filling the required bond" for his office.³¹

Historic as Price's election was, his tenure was brief and unremarkable. Courtesy of the archives of the Fort Bend County Museum, we have his Oath of Office.³² We also have a handwritten document made by Price in his official capacity, charging four individuals on November 25, 1876, with illegal gambling "contrary to . . . [the]statute" and "against the peace and dignity of the State."³³ However, beyond such evidence that Price diligently carried out the duties of his office, there is a stark indication that less than a year into office he had decided to leave. On February 13, 1877, Price formally resigned the office of county attorney, submitting his formal letter of resignation on the stationery of a local Fort Bend County law firm, Mitchell and Calder.³⁴

What caused Price to resign? The historical record is largely silent, and Price himself left no written explanation. We do know that as Radical Reconstruction ended in the South and federal troops withdrew, that incidents of racial violence and "bulldozing" black farmers off the land they had worked escalated. Even a duly-elected county attorney might have found himself targeted for unwelcome attention. The records of Matagorda County offer some potential clues. They reveal that during the May 3, 1878, judicial

29. *Id.* The Senator referred to by the author is G.T. Ruby of Galveston.

30. *Id.*

31. *Id.*

32. Oath of Office of W.A. Price, Apr. 18, 1876 (courtesy of the Fort Bend County Museum Association, Richmond, TX).

33. W.A. Price Charging Document, County Court December Term, 1876 (courtesy of the Fort Bend County Museum Association, Richmond, TX).

34. W.A. Price Letter of Resignation, Feb. 13, 1877 (courtesy of the Fort Bend County Museum Association, Richmond, TX).

term, Price was named in two indictments brought by the state, one for “swindling” (Cause No. 630) and one for forgery (Cause No. 631). No descriptions of the purported basis for the charges are provided, and indeed both were dismissed by the state in June 1880 “on account of [a] defect in the indictment.” Was there any basis to these actions brought against Price, or were they trumped-up charges brought against a prominent African-American community leader by political opponents? There simply is no way of knowing. We do know that, regardless of the basis for the allegations, W.A. Price seemed to feel that a change in scenery would do him good.

Although he returned to Matagorda by 1878 after leaving office, Price and his family soon moved east to Louisiana, settling in Madison County, Louisiana no later than 1879.³⁵ However, for many African-Americans in east Texas, Louisiana, and Mississippi during this time, the promise of economic opportunity, enfranchisement, and social mobility were proven elusive, and a new “promised land” beckoned: Kansas.

IV. FROM EXODUSTER TO CIVIL RIGHTS CHAMPION

Much has been written about the “Great Exodus” that began in 1879, as over 50,000 African-Americans from the South migrated to Kansas and other Midwestern states.³⁶ Blacks were not just lured by the promise of cheap land in Kansas or the purportedly more tolerant nature of the land of John Brown; they were also fleeing racial violence, poverty, and the erosion of their civil rights and political influence. “Black codes” were passed, for example, and in 1879 the Louisiana Constitutional Convention decided that voting rights were a matter for the state, not the federal government, clearing the way for the disenfranchisement of Louisiana’s African-American population.

Figures like Benjamin “Pap” Singleton and Alfred Fairfax, both former slaves, helped establish all-black communities in Kansas as thousands settled there beginning in 1878. The “Kansas fever” led to the establishment of towns like Nicodemus and Singleton’s Dunlop Colony. Fairfax arrived in Chautauqua County near Peru, Kansas as one of the leaders of a group of

35. U.S. Census records for 1880 list Price and his family as living in Madison County, Louisiana at that time.

36. See, e.g., NELL IRVINE PAINNTER, *EXODUSTERS: BLACK MIGRATION TO KANSAS AFTER RECONSTRUCTION* (1976); QUINTARD TAYLOR, *IN SEARCH OF THE RACIAL FRONTIER: AFRICAN AMERICANS IN THE AMERICAN WEST, 1528–1990* (1998); Morgan Peoples, *Kansas Fever in North Louisiana*, 11 J. LOUISIANA HISTORICAL ASSOC. 121–35 (Spring 1970).

several hundred black families in late 1879 (in 1888, he would become the first black elected to the Kansas state legislature).

The other leader of this “Little Caney Colony” near Peru, Kansas, was none other than W.A. Price, described later by one Methodist publication as “a lawyer of considerable information.” Pointing to the success of the group that Price and Fairfax had brought to that part of Kansas, the Southwestern Christian Advocate observed several years later that in addition to owning and cultivating their land, these “Exodusters” “can have a free ballot, and an honest count, and the public schools are open for their children. They are facing East.”³⁷ Price himself seemed to prosper individually as well from this fresh start. He became one of Kansas’ first African-American lawyers, and in Topeka founded one of the state’s only all-black law firms—partnering with such fellow Kansas legal luminaries as A.M. Thomas (a University of Michigan graduate) and John Lewis Waller.

Price served as president of the Colored Men’s Protective Union, represented Kansas in the National Colored Conference in Pittsburgh, and in 1882 was part of the committee sent to petition Congress to give the Oklahoma Territory to African-American settlers in 1884. Price also co-founded (with G.S. Fox) a newspaper, the *Afro-American Advocate*, “published in the interest of the Negro race of Southern Kansas, and the Freedmen of the five civilized tribes of the Indian Territories.”

Price’s leadership in Kansas’ growing African-American community went beyond politics, public service, and journalism. He put his legal expertise to good use as well. In 1888, he and John L. Waller represented a black man who had been denied service at a local lunch counter, in apparent violation of the Kansas Civil Rights Act. However, the case had to be dismissed when the plaintiff’s chief witness, Will Pickett, was “bought off” and left town just as the trial was about to begin.³⁸

In 1889, Price and Waller represented a light-complexioned black man named Simpson Younger, who had purchased two tickets to the Ninth Street Theater in Kansas City, only to be refused admission when he showed up with a woman much darker than he was. Price was unsuccessful when the trial judge ruled that the denial of access to entertainment facilities resulted only in inconvenience and that the theater proprietors could lawfully exclude any clientele they considered detrimental to their business.³⁹ Price and Waller

37. Southwestern Christian Advocate (New Orleans, LA) (Aug. 30, 1883).

38. Woods, *supra* note 3, at 72–73.

39. *Id.*

also lobbied the Kansas legislature to pass a civil rights bill that would eliminate public school segregation whenever blacks objected to it.

It was this last subject, public school desegregation, that provided Price with an opportunity to make his most lasting impact in the courtroom. While segregation was well-entrenched at this time in states like Texas and Oklahoma, Kansas school policy shifts reflected much more division in the white community. In 1874, the Kansas legislature passed a civil rights law prohibiting state educational institutions from making distinctions based on race, only to reverse itself in 1879 and allow cities of ten thousand or more to establish separate primary schools. In the 1890 decision *Reynolds v. Board of Education of Topeka*, the Kansas Supreme Court held the state's segregation law to be constitutional. So, when Jordan Knox came to Price's law office in 1890 seeking help in compelling the Board of Education in Independence, Kansas to allow his two African-American daughters to attend the school nearest their home, Price had his work cut out for him.

Knox's daughters, Bertha (age 8) and Lilly (age 10), wanted to attend the closer Second Ward School, only 130 yards from their home, instead of the Fourth Ward School further away which all African-American children were required to attend. To add insult to injury, the plaintiffs actually had to pass by the school of their choice en route to the required Fourth Ward School. As the Kansas Supreme Court would later observe, at the time the Knox children were denied admission, neither of the classrooms for their respective grades were filled to capacity. Moreover, no white children living in the Second Ward were required to attend the Fourth Ward school building.

Price took the case and sought mandamus relief to order the Independence School Board to admit the Knox children. He argued that the Legislature had not given the boards of education in cities the size of Independence "the power to establish separate schools for the education of white and colored children, and to exclude from the schools established for white children all colored children, for no other reason than that they are colored children." On January 16, 1891, the Kansas Supreme Court agreed, granting the writ of mandamus and awarding the plaintiffs their costs. As the Supreme Court noted in ruling for Price and his clients

If the board has the power, because of race, to establish separate schools for children of African descent, then the board has the power to establish separate schools for persons of Irish descent or German descent; and if it has the power, because of color, to establish separate schools for black children, then it has the power to establish separate schools for red-headed

children and blondes. We do not think that the board has any such power.⁴⁰

For a span of nearly seventy years, from 1881 to 1949, the Kansas Supreme Court became *the* venue for the constitutional question of public schools and segregation. Many of the decisions did not go in favor of the African-American plaintiffs, while some like 1841's *Graham v. Board of Education of Topeka* did (holding that keeping African-American children in elementary schools longer than whites violated the black children's right to equal educational opportunity). And when NAACP lawyers like Thurgood Marshall argued in *Brown v. Board of Education* in 1954 that Linda Brown and her sister should not have to bypass a closer elementary school reserved for white students only and travel further away to an all-black school because separate educational facilities were inherently unequal, they likely had an earlier pair of sisters like Bertha and Lilly Knox in mind. *Knox* helped lay the foundation for later challenges to school segregation. For W.A. Price, that victory symbolized a journey from a humble justice of the peace office on Caney Creek, Texas to the thriving black community of Little Caney, Kansas.

Price would not live long to bask in this victory. He died at his home on May 6, 1893, at the age of 48, likely due to complications from pulmonary issues. While one obituary tempered its praise of Price as "a thinker and a man of ability" with reference to his race and the observation that "what white blood he had was Spanish,"⁴¹ *The Afro-American Advocate* was predictably more effusive in its description. "In his death the race loses one of her brightest lights, and also an able defender." Calling him a lawyer who "occupied the front ranks in his profession," the *Advocate* described Price as a "forceable speaker" who was "up at all times on all points of law and as a politician," and who "enjoyed a large practice" with a clientele that was largely "outside of his race." And although this notice observed that Price was "the first of his race to be admitted to the bar in this county and in the southern part" of Kansas, it omitted any mention of Price's Texas background and his unique status of being Texas' first African-American lawyer, first African-American judge, and first African-American county or district attorney.

Today, there is no monument or historical plaque to honor W.A. Price's memory, or his significance as Texas' first black lawyer, judge, and county

40. *Knox v. Board of Education of the City of Independence*, 45 Kan. 152 (1891).

41. *THE SEDAN LANCE* (May 10, 1893).

or district attorney. He has suffered the ignominies of being misnamed by historians (as “W.B. Price”) or not named at all. Until recently, the Fort Bend County Historical Commission didn’t even list him in its historical roster of Fort Bend’s elected officials (inexplicably identifying a white lawyer as county attorney in 1876–77 instead). However, Price’s legacy is measured not in monuments or historical records, but in human terms—the countless African-Americans who followed him into the legal profession.

His importance cannot be denied—not only for the trail he blazed for every black lawyer in Texas to follow him, but for the important role he played on the winding path to the civil rights touchstone of the twentieth century, *Brown v. Board of Education*. William Abram Price went from advocating in Texas courtrooms, to shepherding a flock of “Exodusters,” and finally to championing two little girls who wanted to go to the same school as their white peers. At every juncture, and to every challenge and setback, he remained undaunted.



BEFORE THE NEW CIVIL RIGHTS: UNDERSTANDING THE OLD CIVIL RIGHTS

PAUL FINKELMAN¹

“If not now, when?” Rabbi Hillel the Elder

To consider the direction and future of the “new civil rights,” we must first understand the old civil rights, the earlier struggles to define, achieve, and implement civil rights. The struggle for civil rights is far older than many people think. It stems from the first deprivation of civil rights in the American colonies. It begins in the seventeenth century with the creation of racially based slavery in the British mainland colonies – especially Virginia – and continues into our own times. For the last forty years or so the struggle to achieve the “old” civil rights has run in tandem with the new civil rights movement. Americans still struggle to secure and implement some of the gains and accomplishments achieved from the 1940s through the 1990s, even as activists, lawyers, legislators, and scholars have sought to expand the boundaries and meaning of civil rights.

There were essentially three phases to the “old” civil rights. The first was the antebellum struggle to end slavery at the state level, while at the same time trying to secure basic rights at the state level for free African-Americans and simultaneously trying to limit where possible, slavery at the national level. The second phase began with the Civil War and continued through the end of Reconstruction. This phase focused on destroying slavery at the national level while providing federal protections and equal rights for the existing free black population and the newly emancipated slaves – the freedmen and freedwomen – through constitutional changes and federal enforcement legislation. The third phase focused on ending segregation and *de jure* discrimination at the national, state, and local level, through state legislation (especially in the North) and through federal legislation and litigation to secure equality everywhere in the nation. The third phase was supported by civil rights organizations and activism by African Americans and their white allies. This phase began as Reconstruction was ending. It ultimately destroyed legal segregation and *de jure* discrimination, but it took more than a century to achieve this goal.

This long road to racial justice took more than three centuries. It began in 1688, and continues in our own time, as we struggle to implement aspects

1. President and Professor, Gratz College, Melrose Park, Pa. B.A. Syracuse, 1971, Ph.D. University of Chicago, 1976, Fellow in Law and Humanities, Harvard Law School, 1982-83.

of the major civil rights laws passed in the 1960s.² Highpoints of this centuries old struggle for equality include the recognition that Africans were morally equal to Europeans – that they had souls worth saving and families worth preserving; that slavery was morally wrong and unjustifiable; that the ownership of human beings violated the fundamental values of American political culture; that free blacks were entitled to the same fundamental rights as whites (even where whites rejected social interaction); that a democracy could not function without the political participation of all groups; that laws should be impartial; and the equal justice under law was essential. Ultimately, the new civil rights would require an end to segregation, voting discrimination, and legal and political support for racial discrimination. Justice John Marshall Harlan expressed this eloquently in his dissent in *Plessy*:

But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.³

Since the 1970s some scholars and jurists have misused Harlan's statement – willfully pulling it out of context – to denounce or strike down remedial efforts to overcome race discrimination.⁴ Similarly, some supporters of civil rights have attacked Harlan for the same language.⁵ However, partisans on both sides miss the point that Harlan's notion of "color blind" law dovetailed completely with the claims and goals of the plaintiff in *Plessy*, and all other contemporary advocates of racial justice and fairness.

2. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.), Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, the Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 73.

3. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan dissenting).

4. See, e.g., DINESH D'SOUZA, *THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY* (1995); ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* (1992). For critiques of both books see, Paul Finkelman, *The Rise of the New Racism*, 15 YALE L. & POL'Y REV. 245 (1996) and Paul Finkelman, *The Color of Law*, 87 NW U. L. REV. 937 (1993).

5. See, e.g., Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1, 23-36 (1991).

The old civil rights struggled for laws, statutes, and formal, *de jure* equality. The new civil rights seek to go beyond formal legal rights and protections, in part as a response to social, economic, and political conditions, which lead to unequal outcomes, even though these outcomes are achieved through facially neutral, non-discriminatory laws, procedures, and administrative actions. We no longer have laws which mandate different punishments for whites and non-whites. Nevertheless, implementation of laws and administrative discretion in how people are charged for crimes has a consistently deleterious affect on minorities. Similarly, police no longer target blacks, beating them and even torturing them,⁶ but policing and outcomes of police interactions have become increasingly lethal, with African Americans who have committed no offense, or only a minor offense, dying or suffering serious injury at the hands of police. The new civil rights seek to change these behaviors and outcomes. Similarly, our legal culture no longer allows pro forma discrimination in salaries, admission to public schools and institutions of higher education, the allocation of government resources, or access to housing, jobs, or places of public accommodation. Nevertheless, social statistics bear out that many African Americans have significantly fewer life opportunities than others in U.S. society. The new civil rights strive to change these many social outcomes.

The struggles of the old civil rights were far more daunting than the newer goals, but ironically, the path to success seemed more obvious, and clearer. Slavery was the first impediment to achieving civil rights for all. Abolishing it was hard, seemingly impossible at times. But, if it could be abolished, the goal would have been achieved. Similarly, ending segregation in the public schools in the South⁷ seemed like an impossible task. The same difficulty was true for ending segregation in places of public accommodation. But, for either schools or restaurants, the path to success seemed obvious. Laws or court rulings could make such behavior illegal, and enforcement could make it happen. However, for the “new civil rights” movement the goals and changes needed are less clear and less certain. For example, it is easier to create a statutory or regulatory regime or set of rules for ending *de*

6. See *Brown v. Mississippi*, 297 U.S. 278 (1936) and *Screws v. United States*, 325 U.S. 91 (1945) (describing the torture of black prisoners by white police officials).

7. For purposes of this article, I define “the South,” as the fifteen states that had slavery when the Civil War began and the two states created after 1861 (West Virginia and Oklahoma), that still had mandatory segregation of public schools and other facilities, at the time of the decision in *Brown v. Board of Education*, 347 U.S. 483 (1954). For a more elaborate discussion of this, see Paul Finkelman, *Exploring Southern Legal History*, 64 N.C. L. REV. 77-116 (1985).

jure segregation, than to create one that eliminates unnecessary police violence in the line of duty where circumstances are rarely clear.

I: SLAVERY: THE FIRST STRUGGLE OF THE OLD CIVIL RIGHTS

Slavery began to take root in the American colonies in the mid-17th century. Slavery was common all over the New World, as well as parts of Europe. In the 1660s Virginia began to regulate slavery and by the early 1700s the institution was established there and in the other colonies. In 1688 Quakers in Germantown, Pennsylvania issued the first public attack on slavery – the “Germantown Protest” – arguing that slavery violated the “golden rule” of Christianity. The protest further argued that when masters sold selling slaves they became complicit in the crime of adultery, because when slaves were separated from their families by sale they remarried, even though they had never been divorced. The protest explicitly rejected race as an argument for slavery: “tho [sic.] they are black we cannot conceive there is more liberty to have them slaves, as it is to have other white ones.” Furthermore, the protest argued that blacks had “as much right to fight for their freedom, as you have to keep them slaves.”⁸ This document can be seen as the beginning of the civil rights movement in America. It was the articulation of the idea that blacks should have the same rights as whites, and race did not justify slavery, discrimination, or maltreatment.

The Germantown Protest had little effect on law or practice, and when the Revolution began in 1775 slavery was legal in every one of the 13 colonies. The laws of all these jurisdictions considered slaves to be property, and the American Revolutionaries were keenly supportive of private property. Nevertheless, during and immediately after the War, Massachusetts and New Hampshire ended slavery outright, and Pennsylvania, Rhode Island, and Connecticut passed laws to gradually end slavery. Free blacks served in the Revolutionary army and after the war they could vote on the same basis as whites in at least six states. By 1804 New York and New Jersey had taken steps to end slavery while the new states of Vermont and Ohio banned the practice. In the North, the Revolutionary generation accepted the principles of the Declaration of Independence. In the South, thousands of individual masters freed their slaves – most notably

8. *The Germantown Protest Against Slavery, 1688*, reprinted in KERMIT HALL, PAUL FINKELMAN, JAMES W. ELY, JR., *AMERICAN LEGAL HISTORY: CASES AND MATERIALS* 58 (5th ed.) (2017).

George Washington – but from Maryland to Georgia the newly independent states took no steps to end the institution. Throughout the North, as well as in Virginia, Maryland, and Delaware there were Manumission Societies, agitating for an end to slavery and for the protection the rights of free blacks. This “First Emancipation,”⁹ was a hugely successful civil rights movement. When the Constitution was adopted free blacks voted in much of the North as well as in North Carolina, and most northern states had few, if any, legal restrictions on free blacks.

But this new civil rights movement stalled after the War of 1812. In the South, slavery flourished. In 1831 a renewed abolitionist movement emerged, and for the next three decades abolitionists and more moderate opponents of slavery agitated for human freedom. It almost always seemed like a futile effort. The goal was clear: end slavery. Free the slaves. But achieving it was next-to-impossible. In 1790 the census found about four million people in the nation, and nearly 700,000 of them were slaves. By 1830 there were more than two million slaves in the nation, and by 1860 there just under four million. These slaves were worth about \$2 billion in 1860 dollars, which would be at least \$60 billion today. The immense value of these slaves made emancipation an unattainable goal. And the Constitution made it impossible. Slavery, like other forms of property, was largely regulated by the states. The slave states were *never* going to give up their most important social, economic, and political institution. The Constitution requires that three fourths of the states ratify an amendment. In 1860 there were fifteen slave states. To this day, in 2019, with a 50-state union, it would be impossible to end slavery by a constitutional amendment if all fifteen-slave states still existed. It would require 45 free states to pass an amendment over the objections of the fifteen slave states.

Thus, in 1860, on the eve of the election of Abraham Lincoln, the first phase of the old civil rights movement could claim some successes. Slavery was illegal in eighteen states, and all people in them were free, although a small number of very old African-Americans in New Jersey were considered indentured servants. African-Americans had equal suffrage in Maine, New Hampshire, Vermont, Massachusetts and Rhode Island. In New York black voters faced a modest property requirement (which was often ignored) that whites did not face. Blacks could vote in some elections involving school funding in Michigan. Blacks held, or had held, public office in a number of

9. See generally, PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, COMITY AND FEDERALISM (1981); ARTHUR ZILVERSMIT, THE FIRST EMANCIPATION: THE ABOLITION OF SLAVERY IN THE NORTH (1967).

states, including Ohio, where they could not vote. Every free state provided some public education for blacks, sometimes on an integrated basis, sometimes on a segregated basis. With the exception of practicing law (which they did in some states), African-Americans in the free states could enter any profession, purchase any product, and own real estate and other property. They could universally testify in all courts, even against whites, but could not serve on juries in many free states. They faced private discrimination in many places and they faced barriers if they tried to move to Indiana, Illinois, and Oregon. Most states had no laws requiring equal access to restaurants, inns, street cars, or other places of public accommodation.¹⁰

Despite discrimination and prejudice, blacks had steadily moved to the North, where their freedom was secure, and they had many civil rights and greater economic opportunity. Ohio, for example, had 1,899 free blacks in 1810, and 36,673 in 1860. Illinois maintained onerous rules to discourage or even prevent free blacks from moving into the state, but nevertheless its black population had grown from 1,374 in 1820 (right after statehood) to 7,628 in 1860. Almost all of this growth in both states came from the in-migration of free blacks and fugitive slaves.¹¹

On the other hand, in 1860 there were also just under 4,000,000 slaves in the fifteen southern states. There were just over a quarter of a million free blacks in these states. In these states, free blacks had very limited rights. They could not practice many professions, were denied access to schools, and could not own certain kinds of property (and in some states they could not own any property in their own right). They could not vote, serve on juries, or testify against whites, even if they were the victims of crimes or civil wrongs perpetrated by whites. They were restricted on where and when they could travel and with whom they could associate. They were not “second class citizens,” because they were not citizens at all. They had no civil rights.¹²

10. For detailed discussions of black rights in the antebellum North, see Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 RUT. L.J. 415-82 (1986); Paul Finkelman, *Human Liberty, Property in Human Beings, and the Pennsylvania Supreme Court*, 53 DUQ L. REV. 453-482 (2015); Paul Finkelman, *The Strange Career of Race Discrimination in Antebellum Ohio*, 55 CASE WEST. RESERVE UNIV. L. REV. 373-408 (2004); Paul Finkelman, *The Protection of Black Rights in Seward's New York*, 34 CIVIL WAR HISTORY 211-234 (1988); PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, COMITY AND FEDERALISM (1981).

11. Eric Bradford, *Free African American Population in the U.S.: 1790-1860*, NCPEDIA (2008), https://www.ncpedia.org/sites/default/files/census_stats_1790-1860.pdf.

12. For a discussion of the rights of free blacks in Missouri see Paul Finkelman, *Was Dred Scott Correctly Decided? An “Expert Report” For the Defendant*, 12 LEWIS & CLARK L. REV.

At the federal level free blacks had virtually no rights. They could not enlist in the militia or the army (although were allowed to serve in the Navy), they could not sue in federal courts, they were denied passports when travelling outside the nation, and blacks migrating to the United States could not become citizens. Slavery was legal in the District of Columbia and in all the federal territories. The Fugitive Slave Law of 1850 had created the first national law enforcement system, which allowed the government to use the Army and Navy, federal marshals and courts, and call on state militias to hunt down and capture fugitive slaves. This law threatened the freedom of all blacks, even those who were not fugitive slaves, because under the law no alleged fugitive could testify to his or her own freedom, apply for a writ of habeas corpus, or demand a jury trial to determine his or her status. Blacks, whether slave or free, could claim no rights under the Constitution. As Chief Justice Roger B. Taney asserted in *Dred Scott*:

The Question is whether the class of persons [African-Americans] . . . compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word “citizens” in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time [of the adoption of the Constitution] considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

* * *

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.¹³

1219, 1219-1252 (2008). For a comparison of the rights of blacks in the North and the South, and their access to schools, see Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 RUT. L.J. 415, 482 (1986).

13. *Dred Scott v. Sandford*, 60 U.S. 393, 404-05, 407 (1857).

Both before and after *Dred Scott* throughout the North abolitionists and their antislavery neighbors¹⁴ supported racial equality even as they opposed and then dismantled slavery. Before the Civil War they fought for public schooling for blacks, expanding the franchise to blacks, and even allowing interracial marriage. Like the Civil Rights movement of the 20th century, they saw their struggle in legal and institutional terms. In Ohio, for example, in 1849 members of the Free Soil Party put together a coalition that gave control of the legislature to the Democrats (who were traditionally hostile to black rights) in return for legislation that repealed a series of discriminatory laws known as the “black laws,” established public schools for blacks, and a law allowing them to testify in court against whites.¹⁵ In the 1850s Republicans in Wisconsin, New York, and Connecticut pushed for equal suffrage for blacks, while in Massachusetts Abolitionists lobbied the legislature to repeal a ban on interracial marriage.¹⁶

Following the election of Abraham Lincoln in 1860, this first phase came to an unexpected end as the antislavery movement captured the White House and Congress, and eleven slave states seceded from the Union and attempted to form their own nation, with slavery as its “cornerstone.”¹⁷

14. Abolitionists refer to those people who were narrowly focused on ending slavery, some of whom either refused to participate in electoral politics, or only voted for third parties, such as the Liberty Party, committed to a direct political assault on slavery. “Antislavery” refers to Americans and politicians who were opposed to slavery – even hated the institution – but were involved in more traditional politics and were focused on other issues besides slavery. The Republican Party, founded in 1854-55, was antislavery, although many abolitionists ultimately joined the party. The party was dedicated to stopping the spread of slavery, and putting it on the road, as Lincoln put it, “in the course of ultimate extinction.” Abraham Lincoln, *A House Divided, Speech at Springfield, Illinois* (June 16, 1858), reprinted in 2 COLLECTED WORKS, *infra* note 18, at 461. But the party was also focused on issues like tariffs, building a transcontinental railroad, and passing the homestead act. These policies had antislavery implications but were not narrowly focused on slavery.

15. Paul Finkelman, *The Strange Career of Race Discrimination in Antebellum Ohio*, 55 CASE W. RES. UNIV. L. REV. 373, 408 (2004).

16. Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 RUT. L.J. 415, 482 (1986).

17. Alexander Stephens, “Corner Stone” Speech, TEACHING AMERICAN HISTORY (March 21, 1861), <http://teachingamericanhistory.org/library/document/cornerstone-speech/>. See also Paul Finkelman, *States’ Rights, Southern Hypocrisy, and the Coming of the Civil War*, 45 AKRON L. REV. 449, 478 (2012).

II: THE SECOND STRUGGLE OF THE OLD CIVIL RIGHTS: ABOLITION AND LEGAL EQUALITY IN THE CONSTITUTIONAL ORDER

The second phase of the Old Civil Rights began with the election of Abraham Lincoln in 1860 and continued through the end of Reconstruction and into the 1880s. With the election of Lincoln, abolitionists and their less radical antislavery allies, suddenly found that the politics of the nation had been turned upside down. In his first inaugural Lincoln promised not to interfere with slavery in the states where it existed, but made no such promise for the territories, where he fully intended to end slavery. But, the Confederate firing on Fort Sumter on April 12, 1861 mooted these issues. Lincoln publicly did nothing to threaten slavery, but within a few weeks after the war began slaves began to escape to U.S. Army lines, and by mid-summer the administration authorized the Army to emancipate and protect slaves running from Southern masters. Within eighteen months Congress would end slavery in the District of Columbia and the federal territories, authorize the enlistment of black troops and provide for the emancipation of their families, and prohibit the army from returning fugitive slaves, even from loyal masters. Meanwhile, Lincoln drafted and promulgated the preliminary emancipation proclamation. By the end of the war Congress had begun to create meaningful civil rights in the District of Columbia, where it had plenary power. This new civil rights movement included requiring equal punishments of blacks and whites in the District of Columbia, banning segregation on street cars, and providing public schools for blacks.¹⁸

The second civil rights movement achieved remarkable and sudden success from 1861 to 1865 as Congress, President Lincoln, the United States Army, and finally the Thirteenth Amendment ended slavery. The abolitionists won, not because they convinced the South to give up slavery, but because their persistence and agitation ultimately led to the election of a president who believed that “if slavery is not wrong then nothing is wrong.”¹⁹ This in turn led the deep South and then four more slave states to secede and make war on their own country. Southern treason and Northern military

18. Paul Finkelman, *Lincoln, Emancipation and the Limits of Constitutional Change*, 2008 SUP. CT. REV. 349, 349-387 (2009); Paul Finkelman, *The Summer of '62: Congress, Slavery and a Revolution in Federal Law*, in CONGRESS AND THE PEOPLE'S CONTEST: THE CONDUCT OF THE CIVIL WAR 81, 81-112 (Paul Finkelman & Donald R. Kennon eds., 2018).

19. Letter from Abraham Lincoln to Albert G. Hodges, April 4, 1864, 7 COLLECTED WORKS OF ABRAHAM LINCOLN 281 (Roy P. Basler ed., 1953).

success led to the end of slavery, but the struggle was illuminated by the first great civil rights movement – the struggle against slavery.

The cost was immense. Some 650,000 Americans died in the war, including about 68,000 African American soldiers. Hundreds of others had died before the war, in bleeding Kansas, at Harpers Ferry, and in riots over the return of fugitive slaves.

But despite the cost in lives and treasure, and the seemingly impossibility of the task, the goal – the measure of success always seemed clear. The problem was not the goal – ending slavery – but the vehicle for achieving it. No one would have imagined the vehicle would have been the Army, but the result was clear. Once the Republican Party (which now included almost all of the old abolitionists) had the power, it ended slavery.

But the newly powerful civil rights movement did not stop here. The Fourteenth Amendment overturned *Dred Scott*, making all former slaves into citizens, and the Fifteenth prohibited racial discrimination in voting. Today we might argue that both amendments were not quite strong enough – and not specific in their requirements. But for the generation that wrote all three amendments, they seemed to be the right trick. They wanted equality and civil rights for all and the path was to end slavery, make blacks citizens, and guarantee that no state could deny anyone “the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”²⁰ Similarly, no state could deny the vote “on account of race, color, or previous condition of servitude.”²¹ Congress was unable to imagine the subterfuge of future Southern white legislators, as they undermined both Amendments. But Congress was certain at the time it was forever protecting black civil and political rights.²²

Congress did see the need for new legislation. The Civil Rights Acts of 1866 and 1875, as well as various federal enforcement acts, surely provided the legal firepower to secure black freedom and civil rights. And for a while there were successes. Blacks held public office throughout the South and some acquired land. Education in the South was not equal, but it was nevertheless a huge advance over the years of slavery, where education was

20. U.S. CONST. amend. XIV, § 1.

21. U.S. CONST. amend XV, § 1.

22. Paul Finkelman, *John Bingham and the Background to the Fourteenth Amendment*, 36 AKRON L. REV. 671, 692 (2003).

impossible for most slaves and it was often illegal to teach even free blacks to read.

III: THE THIRD PHASE OF THE OLD CIVIL RIGHTS MOVEMENT – ACHIEVING THE PRIZE, ENDING SEGREGATION

But, as we know, southern white racism and the return of white political power, combined with the Supreme Court's failure to understand the constitutional revolution of 1861-1875 ended the advance of the Old Civil Rights. The *Slaughterhouse Cases*²³ eviscerated the Privileges and Immunities Clause of the new 14th Amendment, and more importantly, the decision in *The Civil Rights Cases*²⁴ in 1883 prevented the national government from protecting civil rights and equal accommodations. Significantly, however, in the North the civil rights struggle continued, and the emerging black and white activists understood the goal and remedy: civil rights laws that the Court could not strike down.

In the quarter century after the Supreme Court's disastrous decision in the *Civil Rights Cases*, almost every northern state passed new civil rights laws, protecting at the state level what Congress had tried to protect at the national level.²⁵ This once again showed that civil rights activists had a clear vision of what was needed: laws and enforcement to create equality. These new northern laws were never fully successful. But, they were a critical step toward equality. In the North blacks voted, held office, went to high school and college. Many lived in poverty, and housing discrimination was rampant in some places.²⁶ But at the same time, African Americans moved North because schools were better, there were economic opportunities, and they did not face the growing segregation and lethal violence of the South.

On the other hand, by the end of the 19th century Southern blacks were effectively disfranchised and segregated, all with the blessing of the Supreme

23. *Slaughter-House Cases*, 83 U.S. 36 (1873).

24. *Civil Rights Cases*, 109 U.S. 3 (1883).

25. Paul Finkelman, *The Hidden History of Northern Civil Rights Law and the Villainous Supreme Court, 1875-1915*, 79 U. PITT. L. REV. 357, 410 (2018).

26. Paul Finkelman, *The Promise of Equality and the Limits of Law: From the Civil War to World War II*, in *THE HISTORY OF MICHIGAN LAW* 187, 213 (Paul Finkelman and Martin J. Hershock eds., 2006).

Court.²⁷ Even where Southern whites were willing to integrate and offer blacks equality in private settings, the southern states and the Supreme Court intervened on behalf of segregation and racism.²⁸ Meanwhile, from 1880 until 1920 some 2,000 blacks were lynched throughout the South. Many more were probably murdered by angry white southerners and police officials. Southern law enforcement became a tool of racial oppression, using black convicts as a convenient source of revenue for southern states, by leasing them to private industries or working them (often working them to death) on state prison farms.²⁹ Some blacks still voted until the very end of the century, with North Carolina sending George H. White to the House of Representatives in 1898. When he left in 1901 the age of southern black officeholding was over.³⁰ In 1929 another African-American, Oscar De Priest, would enter Congress, but he came from Chicago.

The election of Oscar De Priest reflected the movement out of the South into Northern cities. Slowly blacks returned to Congress and national politics. De Priest was followed by a series of black Chicagoans in the 1930s and 1940s and was then joined by Adam Clayton Powell from New York City in 1945, and then members from Philadelphia, Detroit, and Los Angeles. They reflected the growing civil rights movement in the North, which fought for equality in schools, housing, employment, and politics.³¹ The focus of civil rights, from North to South, from 1900 until the 1960s was on ending segregation at the national level and the state level, and putting more blacks in positions of political power, increasing black opportunity in education, and ending segregation at the federal level. Black voters helped elect Franklin Roosevelt who appointed blacks to new positions, including William H. Hastie, the first black federal judge. Black voters in the North

27. *Plessy v. Ferguson*, 163 U.S. 537 (1896); For a fine narrative history of the rise of segregation, see RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1974).

28. *Berea Coll. v. Kentucky*, 211 U.S. 45, 45 (1908).

29. DAVID M. OSHINSKY, *WORSE THAN SLAVERY: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE* (1996); DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2008); ALEX LICHTENSTEIN, *TWICE THE WORK OF FREE LABOR: THE POLITICAL ECONOMY OF CONVICT LABOR IN THE NEW SOUTH* (1996).

30. BENJAMIN R. JUSTESEN, *GEORGE HENRY WHITE: AN EVEN CHANCE IN THE RACE OF LIFE* (2001); ERIC ANDERSON, *RACE AND POLITICS IN NORTH CAROLINA, 1872-1901: THE BLACK SECOND* (1981).

31. Paul Finkelman, *The Necessity of the Voting Rights Act of 1965 and the Difficulty of Overcoming Almost a Century of Voting Discrimination*, 76 L.S.U. L. REV. 181, 223 (2015).

overwhelmingly supported Harry S. Truman in 1948, in part for his Executive Order 9981, which integrated the Armed Forces that summer.

Importantly this phase of the Old Civil Rights was still about legal equality. The case that broke the back of segregation in southern higher education, *Sweatt v. Painter*,³² led to the creation of Texas Southern Law School, but it also showed the futility of southern states trying to maintain segregated higher education.³³ Four years later the Supreme Court declared that segregation in any public school – at any level – was unconstitutional. A decade later the Civil Rights Act of 1964 and the Voting Rights Act of 1965,³⁴ finally put an end to *de jure* segregation. These laws came through political action, marches, demonstrations, and the blood and lives of black and white civil rights demonstrators. The costs were high. But the goals were clear: to end discrimination in law, policy, education, and every other aspect of American society. The struggle was long and enormously costly in money, life, and flesh and blood.

But always, the goals were clear. Civil Rights demonstrators could keep their “eyes on the prize” because the prize was so visible. When the “colored only” and “white only” signs disappeared in the South, when blacks from the former Confederate states entered Congress, when blacks served in the president’s cabinet and on the federal courts, people knew the prize was won. Thurgood Marshall was under no illusion that we had reached a racial nirvana in 1954, when he won the *Brown* case, or in 1967 when he was confirmed as the nation’s first black Supreme Court justice. But he also knew that the Old Civil Rights movement had accomplished a great deal – more than anyone could have imagined in the 18th or 19th centuries or really until after World War II in the 20th Century. The election of Barack Obama in 2008 simply confirmed that despite continuing discrimination and racism, and despite the disproportionate number of blacks living in poverty or incarcerated in jails and prisons, the Old Civil Rights movement had accomplished many of its goals.

32. *Sweatt v. Painter*, 339 U.S. 629 (1950).

33. Paul Finkelman, *Breaking the Back of Segregation: Why Sweatt Matters*, 36 T. MARSHALL L. REV. 1, 37 (2010).

34. Paul Finkelman, *The Necessity of the Voting Rights Act of 1965 and the Difficulty of Overcoming Almost a Century of Voting Discrimination*, 76 L.S.U. L. REV. 181, 223 (2015).

IV: TOWARDS A NEW CIVIL RIGHTS

The new civil rights movement lacks a clear prize. There are no “whites only” signs to come down. No schools are formally and legally segregated. People of all races, all across America, attend school together, play together, work together, and eat at restaurants together. Baseball honored Jackie Robinson by retiring the number 42 for all teams, but no one can imagine (and some cannot even remember) a sporting event where blacks and whites (and people of all races) cannot compete and be teammates. But the persistence of race remains. From the colonial period to the Civil War, free blacks in the South could be stopped by any white and forced to prove their free status. Color was a marker of criminality. From the end of the Civil War until at least World War I, Southern blacks were routinely murdered by white terrorists and the police forces regularly arrested blacks for trivial crimes just to turn them into convict labor. Blackness was associated with inherent criminality, and “walking while black” could lead to incarceration or worse.

Today white terrorism is mostly (but not completely) a thing of the past, and police rarely just arbitrarily kill people. But the Black Lives Matter movement reminds us that police or vigilante violence has not gone away. And “driving while black” is universally understood, at least in minority communities. The struggle to stop these denials of civil rights will be less lethal than in the past. There will be no beatings on the Edmund Pettus Bridge and southern police departments will not unleash snarling dogs or use fire hoses on protestors. But, success will be more complicated.

As we move to a new civil rights agenda we can draw strength from those who struggled for decades to end slavery or fight *de jure* segregation. We can also draw on their legal strategies and persistence. Furthermore, it is important to understand the gains the American people have made in ending discrimination through laws and court decisions, even as we recognize the prize has not yet been fully achieved.

REGULATORY IMPEDIMENTS DISPROPORTIONATELY AFFECT VOTING RIGHTS IN COMMUNITIES OF COLOR IN TEXAS, MISSISSIPPI, AND LOUISIANA

DR. REGINAL D. HARRIS* AND BRIAN M. KING**

INTRODUCTION

Unlike Estonia,¹ who does not give voting rights to Russian minorities in their country, the United States of America endorses the principle of “one person – one vote.”² Most recently, the Supreme Court held that “when drawing legislative districts, state legislatures may use the total population of areas within the state, rather than being restricted to using the voting-eligible populations.”³ The one person – one vote rule, with rare exceptions, applies

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1. *Right to Vote*, VALIMISED, <https://www.valimised.ee/en/right-vote> (last visited Jan. 2, 2019) (“The Constitution of the Republic of Estonia invests the supreme power of state in the people, who exercise it through citizens with the right to vote at the Riigikogu elections and referendums. An Estonian citizen has the right to vote at all elections as well as referendums. A citizen of a non-EU Member State or a stateless person residing in Estonia may vote at the local government council elections if he/she resides in Estonia on the basis of a long-term residence permit or the right of permanent residence. He/she cannot stand as candidate to the council.”).

2. *Reynolds v. Sims*, 377 U.S. 533 (1964) (the court held that states need to redistrict in order to have state legislative districts with roughly equal populations; the equal protection clause requires substantially equal legislative representation for all citizens in a State regardless of where they reside); see *One-Person, One-Vote Rule*, CORNELL LAW LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/one-person_one-vote_rule (last visited 2018).

3. *Evenwel v. Abbott*, 136 S. Ct. 1120, 1149 (2016).

to all federal, state, and local elections. Chief Justice Earl Warren, who was notable for his courage and flexibility in carving new paths of justice for all citizens, emphasized that there must be equality in the distribution of the right to vote. Sadly, this courage and flexibility seems to have been exchanged for unscrupulous dealings as it relates to equal voting rights by many of our elected officials.

On October 3, 2018, Congress transferred *The Voting Rights Act* (“VRA”) from 42 U.S.C. § 1973 to 52 USC § 10301 that reads, “No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.”⁴ In addition, this federal law made it a “violation . . . based on the totality of circumstances,” if the “nomination or election in the State or political subdivision are not equally open to participation by members of a class of [protected] citizens . . . [with] less opportunity than other[s] to participate in the political process.”⁵

The Fifteenth Amendment was ratified on February 3, 1870, thus granting Black men the right to vote. Unfortunately, it would be nearly 100 years later before this constitutional right would be fully realized by Black men. The intent and promise of the Fifteenth Amendment was that the “right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state because of race, color, or previous condition of servitude.”⁶ Back in the nineteenth century, Southern states (and some other states) effectively disenfranchise Blacks by circumventing laws that stifled Blacks ability to be recognized as full citizens. Regrettably, the government tactics of charging poll taxes, requiring literacy tests, and engaging in other barriers, while characteristically different, continue to blur the lines of constitutionality against Blacks in America.

On August 6, 1965, President Lyndon Johnson signed into law *The Voters Rights Act of 1965*.⁷ This act outlawed the discriminatory voting practices adopted in many southern states after the Civil War. President Johnson’s overt actions showed African Americans that he took seriously the legal barriers that outright prevented African Americans from exercising

4. Voting Rights Act, 42 U.S.C. § 1973 (1965) (current version at 52 U.S.C. § 10301 (2012)).

5. 52 U.S.C. § 10301 (2018).

6. U.S. CONST. amend. XV, § 1.

7. 42 U.S.C. § 1971 (1965) (current version at 52 U.S.C. § 10101, Pub. L. No. 115-281 (2018)).

their right to vote.⁸ Although this civil rights legislation was one of the most far-reaching of its time, the fulfillment of the spirit and letter of the law continues to be evaded after fifty-three years. This article shines a bright light on the types of barriers, civil law suits, and violations that have been and continue to be caused by government actors.

Despite the passage and enactment of the *Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006*, (“**VRARAA**”)⁹ communities of color continue to experience violations of their right to vote due to government entities implementing barriers to voters’ registration and the casting of meaningful ballots. By the end of this article, readers will see concrete evidence of how governments, at all levels, continue to infringe upon the rights of communities of color. Many of the methods employed by these government actors are more often than not in contravention with the spirit and letter of the Fifteenth Amendment, VRA, and the VRARAA. Some of these methods, at the time of this article, are being litigated in state and federal courts by advocacy organization. The goal of alleviating the limiting nature of the registration of minority voters, the hindrance to minority voters’ turnout, the elimination of minority representation, and the dilution of minority voting strength seems to be unchecked by Congress and state legislatures which could lead to the extinction of voting rights for minorities.

This article evaluates the impact that government-imposed regulations continue to have on communities of color. Due to the number of states who suffer from these issues, this publication neither provides the space necessary nor the time to fully elucidate every instance. However, this article necessarily refines its focus to certain pervasive impediments of voting rights in Texas, Mississippi, and Louisiana – states within the jurisdiction of the United States Court of Appeals for the Fifth Circuit (“**Fifth Circuit**”).

The article summarizes recent news stories; national, state, and local regulations; and case precedents that currently serve or have served a pivotal role in impeding communities of color from fully exercising their rights under the *Fifteenth Amendment* of the United States Constitution.¹⁰ This article demonstrates that there continues to be pervasive inequality in our

8. 52 U.S.C. § 10101 (1967).

9. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (109 Pub. L. No. 109-246, 120 Stat. 577) (“To amend the Voting Rights Act of 1965. The purpose of this Act is to ensure that the right of all citizens to vote, including the right to register to vote and cast meaningful votes, is preserved and protected as guaranteed by the Constitution.”).

10. U.S. CONST. amend. XV, § 1.

national, state, and local laws which violate the expressed intent of voting rights for communities of color. Fortunately, the First Amendment and its protections of the Freedom of the Press has provided the authors with ample media stories, accounts of equal justice organizations, and firsthand accounts of citizens by shining a light on minority voting rights.

THE VOTING RIGHTS ACT OF 1965

It is vital to begin this analysis by reminding readers why the VRA¹¹ was passed in 1965 “to prevent state and local governments from passing laws or formulating policies that infringed upon racial minority American citizens equal right to vote.”¹² Somewhat of a paradox is that the United States touts itself as the “leading democracy of the world,”¹³ yet, the realities of politicians pounding their chests about fairness and accessibility to voting seem to be evading Black Americans, Hispanic Americans, and Latino Americans (more so than other ethnicities) at a pace surpassing some less developed democratic countries. The VRA, perhaps as conceived by its framers, was supposed to be some sort of cornerstone legislation that cured the ills of Jim Crow laws by ensuring that ALL “citizens, regardless of their race,” had equal opportunity to “have a say and participate in our great democracy.”¹⁴

The construction and application of the VRA in Section 1973 delineates that there can be “[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in 42 U.S.C.A. § 1973b(f)(2).”¹⁵ When Congress originally enacted the VRA, the intent was to “effectuate the guarantee provided by the 15th Amendment” that “the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”¹⁶ Under the original version of the Act,

11. *The Voting Rights Act*, BRENNAN CENTER, <https://www.brennancenter.org/issues/the-voting-rights-act> (last visited Aug. 2, 2018).

12. *Id.*

13. *Id.*

14. *Id.*

15. 51 A.L.R. Fed. 2d 447.

16. 51 A.L.R. Fed. 2d 447 (quoting Am. Jur. 2d, Elections § 38).

“No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.”¹⁷ This provision barred “any practice or procedure” of “social and historical conditions,” that impaired the ability of a “protected class to elect its candidates of choice on an equal basis with other voters.”¹⁸

When Section 2 of the VRA was amended, it “encompasse[d] vote dilution claims in connection with the gerrymandering of election districts.¹⁹ In other words, “voting dilution” was accomplished by “drawing district lines either to disperse the votes of one faction so that they cannot influence the outcome of elections or to concentrate those votes in as few districts as possible, thus wasting their strength.”²⁰ Through the process of redistricting, vote dilution takes place where voters are shifted within those boundaries so that qualified electors are grouped differently than before with the result of neutralizing the vote of one qualified elector with votes of other qualified electors.”²¹

In 1986, the Supreme Court created its first test to the VRA in *Thornburg v. Gingles*, where in 1982, a legislative redistricting plan in North Carolina was enacted and the “Black [registered voters] challenged seven districts, one single-member and six multimember districts, alleging that the redistricting scheme impaired their ability to elect representatives of their choice.”²² Black voters, led by Plaintiff Ralph Gingles brought suit against Lacy H. Thornburg, Attorney General of North Carolina, to contest a redistricting plan for the state’s Senate and House of Representatives that was

17. 42 U.S.C. § 1973b(f)(2).

18. 51 A.L.R. Fed. 2d 447 (quoting Am. Jur. 2d, Elections § 38).

19. Gerrymandering, BLACK’S LAW DICTIONARY (8th ed. 2004). “The practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition’s voting strength. When Massachusetts Governor Elbridge Gerry ran for reelection in 1812, members of his political party, the Anti-Federalists, altered the state’s voting districts to benefit the party. One newly created district resembled a salamander, inspiring a critic to coin the word “gerrymander” by combining the Governor’s name, “Gerry,” with the ending of “salamander.”

20. Am. Jur. 2d, Elections § 38.

21. Am. Jur. 2d, Elections § 38.

22. *Thornburg v. Gingles*, 478 U.S. 30 (1986). “On appeal, the United States Supreme Court held that, with one exception, the redistricting plan violated § 2 by impairing the opportunity of [B]lack voters to participate in the political process and to elect representatives of their choice. The legal concept of racially polarized voting, as it related to claims of vote dilution, referred only to the existence of a correlation between the race of voters and the selection of certain candidates.”

passed by the North Carolina General Assembly.²³ They filed suit in a District Court claiming that this violated Section 2 of the Voting Rights Act of 1965 and the Fourteenth and Fifteenth Amendments.²⁴ The Court found that “five of the six contested districts discriminated against [B]lack voters by diluting the power of their collective vote” and that Black voters “did not need prove causation or intent in order to prove a prima facie case of racial bloc voting.”²⁵ Further, the Court held, that “the district court did clearly err in ignoring the significance of the sustained success that [B]lack voters had experienced in one district.”²⁶

The Court identified three necessary preconditions for a claim of vote dilution of the voting rights under (then) 42 U.S.C. § 1973, that is known as the *Gingles* test.²⁷ This *Gingles* test required that in addition to “[p]laintiffs [demonstrating] that, under the totality of the circumstances, the devices result in unequal access to the electoral process,” they must be able to demonstrate:

(1) [T]hat it is sufficiently large and geographically compact to constitute a majority in the district; (2) [T]hat it is politically cohesive; and (3) [T]hat the white majority votes sufficiently as a bloc to enable it usually to defeat the minority’s preferred candidate.”²⁸ If Plaintiffs failed to “prove all three of [the] preconditions,” a § 2 claim would be defeated.”²⁹

23. *Thornburg v. Gingles*, <https://www.oyez.org/cases/1985/83-1968> (last visited Jan. 1, 2019).

24. *Id.*

25. *Gingles*, 478 U.S. at 62 (1986).

26. *Gingles*, 478 U.S. at 77 (1986).

27. *See generally*, Am. Jur. 2d, Elections § 44; S. Rep. 97-417, 1982 U.S.C.C.A.N. 177.

28. *Gingles*, 478 U.S. at 46, 50 (1986). (“Further, the Court also required that, in order to assess “the totality of circumstances” as required by the Act, courts “determine, based upon a searching practical evaluation of the past and present reality whether the political process is equally open to minority voters. This determination is peculiarly dependent upon the facts of each case and requires an intensely local appraisal of the design and impact of the contested electoral mechanisms.”).

29. *Id.* at 50 (1986); Am. Jur. 2d, Elections § 142. “While there is no specific, additional proof other than the three *Gingles* factors that is needed for the plaintiff in a vote-dilution districting case to prevail, courts often call attention to the factors listed in the Senate Report – relevant totality of the circumstances inquiry include the following: (1) the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process; (2) the extent to which voting in the elections of the state or political subdivision is racially polarized; (3) the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti single-shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group; (4) whether members of the minority group have been denied

In a 1991 Texas case, the Supreme Court held that “prohibition of § 2 of the [VRA] against vote dilution applies to the election of trial judges.³⁰ In that case, “organizations representing Mexican-American and African-American residents challenged the at-large, district-wide method of electing trial court judges in certain Texas counties as violating the VRA because alternative electoral schemes using electoral subdistricts or modified at-large structures could remedy the dilution of minority votes in these elections.”³¹ Here, the Court found no indication that the VRA “specifically exclude[d] judicial elections . . . rather [holding] “the Act covers the election of all those officers, whether executive or judicial, whose responsibilities are exercised independently in an area co-extensive with the districts from which they are elected.”³² Thus, “[c]oncluding that a vote dilution challenge could certainly be brought regarding judicial elections.”³³

Another 1991 case that was dismissed by a Louisiana District Court challenged “Louisiana’s system of electing two of its seven supreme court justices from a multimember district.”³⁴ In this case, Ronald Chisom represented the Black voter Plaintiffs against Charles E. Roemer, the Governor of Louisiana, in the largest of the four parishes making up the multimember district where “more than half of the voters were [B]lack [and] contained about half of the district’s registered voters . . . the other three

access to any candidate-slating process; (5) the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, retirement, and health, which hinder their ability to participate effectively in the political process; (6) whether political campaigns have been characterized by overt or subtle racial appeals; (7) the extent to which members of the minority group have been elected to public office in the jurisdiction; (8) whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority; and (9) whether the policy underlying the state or political subdivision’s use of such voting qualification, prerequisite to voting, or standard practice or procedure is tenuous.”

30. *Houston Lawyers’ Ass’n v. Attorney General of Texas*, 501 U.S. 419 (1991).

31. *Id.* (“[T]he plaintiffs cited one county with a population that was 20% African-American but had elected only three African-Americans out of 59 district judges. The district court granted relief, but the court of appeals reversed, holding that Act’s results test did not apply to judicial elections.”).

32. *Id.* (“If a State chooses to have its trial judges selected by elections rather than appointment, as Texas had since 1861, then those elections must be conducted in compliance with the Voting Rights Act.”).

33. *Id.* (reversing and remanding for further proceedings).

34. *Chisom v. Roemer*, 501 U.S. 380 (1991) (“The Fifth Circuit Court of Appeals reversed the district court’s dismissal and remanded, noting in particular the significance of the fact that no [b]lack person was ever elected to the Louisiana Supreme Court. On remand, the district court found no evidence of a violation of 42 U.S.C. § 1973. The court of appeals again remanded, and the district court again concluded that the evidence did not establish a violation of 42 U.S.C.A. § 1973.”).

parishes were more than three-fourths white.”³⁵ Here, the “plaintiffs alleged that the makeup of the district was such as to impermissibly dilute minority voting strength.”³⁶ The Fifth Circuit ruled that judicial elections were not covered under 42 U.S.C. § 1973 but the Supreme Court disagreed reasoning that “the 1982 amendment, which added § 2(b) . . . clarifying the ‘results’ test, was meant to exclude judicial elections” and that the word “representatives” describes the winners of any representative, popular elections, including those for judges. Thus, holding that the “[r]acially discriminatory results test provisions of § 2” was “applicable to Louisiana Supreme Court elections.”³⁷

In 2000, “[t]he effectiveness of the Voting Rights Act of 1965 [was] significantly weakened by the United States Supreme Court decisions in *Reno v. Bossier Par. Sch. Bd.* and *Georgia v. Ashcroft*.³⁸ In Bossier Parish, “the plaintiffs argued that the Bossier Parish School Board had a racially discriminatory purpose when it refused to create any majority-black districts, even though the black population of that jurisdiction was approximately 20 percent of the total population.”³⁹ In 2003, the VRA was also significantly weakened by *Georgia v. Ashcroft*.⁴⁰ Here, Georgia adopted a new state voter redistricting plan and sought, pursuant to § 5 and 42 U.S.C. § 1973c, to have their plan precleared but the federal court refused and Georgia sought review by the Supreme Court. The Supreme Court held that “[b]ecause the district court was in a better position to re-weigh all the facts in the record in the first

35. *Chisom v. Roemer*, 501 U.S. 380 (1991).

36. *Id.* at 385.

37. *Id.* at 384 (“Nothing in the Voting Rights Act’s legislative history indicated that the term ‘representatives’ applied only to legislative or executive officials, determined the Court. It was difficult to believe that Congress, in an express effort to broaden the protection afforded by the Voting Rights Act, would have withdrawn, without comment, an important category of elections from that protection, the Court reasoned. Rejecting that view and therefore holding that the protection provided by the Voting Rights Act covers judicial as well as legislative elections, the Supreme Court reversed and remanded.”).

38. *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320 (2000) (superseding the holding by statute in *Ala. Legislative Black Caucus v. Alabama*, 989 F. Supp. 2d 1227, 1308 (M.D. Ala. 2013) (“In *Reno v. Bossier Parish*, the Supreme Court ruled that section 5 “does not prohibit preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose,” 528 U.S. at 341, 120 S. Ct. at 878, but Congress overturned that decision and amended section 5 to prohibit any change in voting practice or procedure with a racially discriminatory purpose.”).

39. *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 323-24 (2000).

40. *Georgia v. Ashcroft*, 539 U.S. 461 (2003).

instance in light of the Court's explication of retrogression, the judgment was vacated and remanded for further proceedings consistent with the opinion."⁴¹

These precedents seemed to bolstered Texas's position that its redrawing of districts were within the proviso of the court.⁴² The Court reasoned, "[w]ith respect to both coalition and crossover districts, we require 'more exacting evidence' to prove that minority voters have an ability to elect than we do for majority-minority ability districts."⁴³ In this instant case, the State of Texas "was denied summary judgment on the federal government's claim that the State's redistricting plans violated [Section] 5 of the Voting Rights Act, 42 U.S.C. § 1973c, where the State used an incorrect standard to measure retrogression." "[A] simple voting-age population analysis could not accurately measure minorities' ability to elect [because] the State misjudged which districts offered its minority citizens the ability to elect their preferred candidates in both its benchmark and proposed redistricting plans."⁴⁴

Additionally, *Georgia v. Ashcroft* seemed to be the answer Texas needed to bolster its position that its districts were not racially drawn but rather met the spirit and letter of the Court's holding.⁴⁵ In *Georgia*, Texas asked the Supreme Court to "allow a state to dismantle an ability district as long as it offsets that loss by drawing a new ability district elsewhere."⁴⁶ Here, "Texas's expert submitted two reports to the Court, one at summary

41. *Id.* ("The plan "unpacked" the most heavily concentrated majority-minority districts in the benchmark plan and created a number of new influence districts. As an initial matter, the Supreme Court found that the private intervenors were properly allowed to intervene pursuant to FED. R. CIV. P. 24. The Court held, however, that the district court failed to consider all the relevant factors when it examined whether the plan resulted in a retrogression of black voters' effective exercise of the electoral franchise.").

42. *Texas v. United States*, 887 F. Supp. 2d 133, 151 (2012) ("The Court held that it did not, concluding that the purpose prong extended only to intent to regress, not to all intentional discrimination. Thus, section 5, the Court wrote, would catch only an "incompetent regressor," but offered no recourse against a map drawer who intended to discriminate against minority voters using methods that did not create retrogression.").

43. *Texas v. United States*, 831 F. Supp. 2d 244 (D.D.C. 2011) ("Coalition and crossover districts that continue unchanged into a proposed plan must be counted as well. Our recognition that crossover and coalition districts are ability districts in a benchmark plan is rooted in the fact that there must be discrete data, by way of election returns, to confirm the existence of a voting coalition's electoral power. For example, evidence that a coalition had historical success in electing its candidates of choice would demonstrate that the minority voters in that district had, and would continue to have, an ability to elect their preferred candidates. Proving the existence of a coalition district will require more exacting evidence than would be needed to prove the existence of a majority-minority district as demonstrating past election performance is vital to showing the existence of an actual coalition district.").

44. *Texas v. United States*, 831 F. Supp. 2d 244, 272 (D.D.C. 2011).

45. *Id.*

46. *Id.* at 146.

judgment and another at trial. The expert's first report counted any district in which the number of registered Hispanic voters exceeded 50% or the Black Voting Age Population (BVAP) exceeded 40% as an ability district, without giving attention to actual election performance."⁴⁷ The Court held that "states could draw maps containing a combination of two different types of districts to satisfy Section 5: traditional majority-minority districts, and influence districts, which are not ability districts, but rather those in which minority voters play a 'substantial, if not decisive, role in the electoral process.'"⁴⁸

One hundred forty-nine years after the addition of the Fifteenth Amendment and 54 years of the VRA, the reality is that there continues to be remnants of discrimination against people of color with respect to unfettered voting rights. It is clear to a large segment of minorities that the VRA continues to be watered down, despite the strides of equality these groups have made. The foregoing demonstrates how the VRA has changed over the years through case precedents and federal statutes. Whether these realities are to keep pace with the shifting threat of the majority-minority paradigm of the browning of America or because the powerful want to remain in power, is an argument for the reader. Many jurisdictions throughout the U.S. are in dire straits, as it relates to VRA. Arguably, there is clear and convincing evidence that the original intent, spirit, and letter of the Fifteenth Amendment and VRA have been misconstrued and there is no greater evidence that how the Supreme Court has narrowed the VRA's protections afforded by Section 5, *Shelby County v. Holder*.⁴⁹

SHELBY COUNTY V. HOLDER AND MINORITY VOTING RIGHTS

While there are certainly more impediments that could possibly be discussed in this analysis enacted in Texas, Mississippi, and Louisiana, the forthcoming analysis is some of the most tenuous directly impacting voting rights in communities of color since *Shelby County v. Holder* in 2013.⁵⁰ It should be no surprise to any partially conscious voter that voting is one of the most polarizing issues along racial lines. Even when protected class voters

47. See Texas, 831 F. Supp. 2d at 253.

48. Texas v. United States, 887 F. Supp. 2d 133 (D.D.C. 2012) (quoting *Georgia v. Ashcroft*, 539 U.S. 461, 479-83 (2003) ("The Court concluded that courts "should not focus solely on the comparative ability of a minority group to elect a candidate of its choice," but instead should consider the "totality of the circumstances" regarding minority participation in the electoral process.").

49. 52 U.S.C.S. § 10304 (2018).

50. See generally *Shelby Cty. v. Holder*, 570 U.S. 529 (2013).

are the registered majority in their districts, often times they are unable to elect their preferred representatives because of some voter-impediment or related circumstance that dilutes their opportunity to vote.⁵¹ The constant suppression, dilution, and impediment of minority voting rights are just as evident in the dicta of *Shelby* as they were during the Jim Crow era.

In analyzing legally significant white-bloc voting in a multimember districting case brought under § 2 of the Voting Rights Act, where the protected class constitutes a majority of the population and of registered voters, the third *Gingles* precondition requires an inquiry into the causal relationship between the challenged practice and the lack of electoral success by the protected class voters.⁵²

In September 2011, the U.S. District Court for the District of Columbia upheld the constitutionality of Section 5 of the Voting Rights Act, and in May 2012, the U.S. Court of Appeals for the District of Columbia Circuit agreed with the district court that Section 5 was constitutional but the formula outlined in Section 4(b) was not.⁵³ This landmark case has had “an immediate impact” on voters across the United States. *Shelby County* ushered in unexpected “new voting restrictions” that have quickly become a harsh reality.⁵⁴ The Court concluded that it “believe[d] that the VRA’s success in eliminating the specific devices extant in 1965 means that preclearance is no longer needed.”⁵⁵ On February 27, 2013, ironically during Black History Month, the Supreme Court “invalidated a key Section of the VRA that had required states with a history of discrimination to have new voting laws approved before those laws took effect.”⁵⁶

In a 5-4 decision, the Court held that “Congress could draft another formula (to replace Section 4(b)) that was based on current conditions, and that such a formula was a prerequisite to a determination that exceptional conditions still existed which justified the requirement for preclearance.”⁵⁷ As a practical matter, this means that Section 5 is inoperable until Congress enacts a new coverage formula, which the decision invited Congress to do.⁵⁸

51. See generally *Salas v. Southwest Texas Jr. College Dist.*, 964 F.2d 1542 (5th Cir. 1992).

52. 52 U.S.C. §§ 10301 (2014).

53. *Shelby County v. Holder*, BRENNAN CENTER (Aug. 4, 2018), <https://www.brennancenter.org/legal-work/shelby-county-v-holder>.

54. *Shelby City v. Holder*, 570 U.S. 529, 557 (2013).

55. *Id.* at 592.

56. *Id.*

57. *Id.* at 557.

58. *Shelby County v. Holder*, BRENNAN CENTER (Aug. 4, 2018), <https://www.brennancenter.org/legal-work/shelby-county-v-holder>.

58. *Id.*

There were nine states covered by Section 5 of the VRA at the time of *Shelby County* filed its lawsuit – Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia.⁵⁹ Some counties in California, Florida, New York, North Carolina, and South Dakota were also covered by Section 5.⁶⁰ In Michigan, townships were covered by Section 5.⁶¹

BRENNAN CENTER FINDINGS: 2018 STATE OF VOTING REPORT

The Brennan Center for Justice (“**Brennan Center**”) is recognized as a nonprofit organization under Internal Revenue Code 501(c)3. The Brennan Center is part of New York University School of Law.⁶² It is a nonpartisan law and policy institute that works to reform, revitalize, and defend the nation’s systems of democracy and justice.⁶³ The Brennan Center “is dedicated to protecting the rule of law and the values of Constitutional democracy” by focusing on “voting rights, campaign finance reform, ending mass incarceration, preserving our liberties, and maintaining our national security.”⁶⁴

In its 2018 State of Voting Report, the Brennan Center determined that since *Shelby County* ended preclearance, “states previously covered by the preclearance requirement have engaged in recent, significant efforts to disenfranchise voters.”⁶⁵ Also, the report concluded these states have “purged voters off their rolls at a significantly higher rate than non-covered jurisdictions,” and have enacted “laws and others measures that restrict voting”⁶⁶

In her article, Myrna Pérez, who heads the Brennan Center Voting Rights Program, opined that the Brennan Center and their voting rights allies have taken states to court to prevent discrimination that the law would have stopped.⁶⁷ She wrote, “[t]his case involved two parts of the Voting Rights Act

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Our Mission*, THE BRENNAN CENTER FOR JUSTICE, <https://www.brennancenter.org/about> (last visited on Jan.1, 2019).

64. *Id.*

65. *The Effects of Shelby County v. Holder*, BRENNAN CENTER (Aug. 6, 2018), <https://www.brennancenter.org/analy-sis/effects-shelby-county-v-holder>.

66. *Id.*

67. Myrna Pérez, *Voting Rights Five Years After the Supreme Court’s Shelby County Decision*, BRENNAN CENTER (June 25, 2018), <https://www.brennancenter.org/blog/qa-voting-rights-five-years-after-supreme-courts-shelby-county-decision>.

of 1965, a landmark piece of civil rights legislation designed to prevent any state or local laws and policies that keep people, based on their race, from exercising their right to vote.⁶⁸ Under Section 4(b), the law outlined a “formula that defined which areas of the country were subject to [the] backstop but the Court ruled that “the formula for determining which states need preclearance was too broad” but stopped short of concluding that the “preclearance itself [was] unconstitutional.”⁶⁹ Perez, like many of her allies and minority voters, was disappointed and believed that the Court’s ruling was a “violation of the promise that our country makes, that when you step into the ballot box” we would be “free from racial discrimination.”⁷⁰

Perez wrote that “[o]n the same day as the Supreme Court decision, Texas declared it would be moving forward with a strict photo ID law that had been blocked under Section 5.⁷¹ Soon afterwards, other states (including Mississippi) moved to implement its strict photo ID law that had been passed before the ruling.⁷² It is important to note that the Court, in *Crawford v. Marion County Election Board*, held that voter ID laws were constitutional and “justified by the valid interest in protecting ‘the integrity and reliability of the electoral process.’”⁷³ The Court reasoned that “[b]ecause the cards [were] free, the trouble of going to the Bureau of Motor Vehicles, gathering required documents, and posing for a photograph is not a substantial burden on most voters’ right to vote, and is not a significant increase over the usual burdens of voting.”⁷⁴

Before the Court’s ruling in *Shelby*, preclearance was helpful because “it put the burden of proof on the jurisdiction to show the change in question was not going to make voters worse off” but now voters “have the burden of showing that the change” disenfranchised “or that it has the potential to.”⁷⁵ Perez further explained that in the last five years a number of states have

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 204 (2008) (holding that “[t]he state interests identified as justifications for SEA 483 are both neutral and sufficiently strong to require us to reject petitioners’ facial attack on the statute. The application of the statute to the vast majority of Indiana voters is amply justified by the valid interest in protecting ‘the integrity and reliability of the electoral process.’”).

74. “No photo identification is required in order to register to vote, and the State offers free photo identification to qualified voters able to establish their residence and identity.” *Id.* at 186 (2008); § 9-24-16-10(b) (West Supp. 2007).

75. Myrna Pérez, *Voting Rights Five Years After the Supreme Court’s Shelby County Decision*, BRENNAN CENTER (June 25, 2018), <https://www.brennancenter.org/blog/qa-voting-rights-five-years-after-supreme-courts-shelby-county-decision>.

enacted “more restrictive legislation than they would have if preclearance had been in place.”⁷⁶ Shelby, in essence, has given some lawmakers courage to see how far they can “push the envelope with laws that disenfranchise people,” and this “ugliness” makes racism acceptable in the country – contrary to the intended enactment of the VRA.⁷⁷

Vann Newkirk, in his article, articulates the statistical costs of voter suppression in elections since the ruling in *Shelby County v. Holder*.⁷⁸ He wrote that “data supports the worst-case scenario offered by opponents of restrictive voting laws” because nine percent of both black and Hispanic respondents indicated they were told that they lacked the proper identification to vote in the 2016 election,⁷⁹ compared to only three percent of likely [W]hite voters.⁸⁰ Even worse, ten percent of Blacks and eleven percent of Hispanics reported being incorrectly informed they were not listed on voter rolls compared to only five percent of Whites.⁸¹ Nearly every statistical area survey revealed that Blacks and Hispanics were twice or more likely to experience barriers to voting compared to Whites.⁸²

Newkirk surmised that his statistics suggested that due to the subtle barriers like “voter-ID requirements and automatic voter purges,” people of color were more likely effected by due to the strong racial and ethnic bias of the laws.⁸³ Additional findings included, fifteen percent of Blacks and fourteen percent of Hispanics reported having difficulty finding their polling places on Election Day compared to only five percent of Whites.⁸⁴ National research has consistently reported that “frequent changes to polling-site locations hurt minority voters more.”⁸⁵ Even more startling was that ten percent of Blacks and Hispanics missed the voter registration deadline for the Presidential Election in 2016 compared to just three percent of Whites; and

76. *Id.*

77. *Id.*

78. Vann R. Newkirk, *How Shelby County V. Holder Broke America*, THE ATLANTIC MONTHLY (July 2018), <https://www.theatlantic.com/politics/archive/2018/07/poll-prri-voter-suppression/565355>.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

that Whites were twice as likely than Blacks and Hispanics to be allowed to take off from work to vote.⁸⁶

Newkirk echoed similar sentiments as Perez that restrictive voting laws have long suspected to overwhelmingly impact Blacks and Hispanics than Whites. It is not facially clear whether national or state legislatures intentionally pass voting rights laws that ultimately discriminate against Blacks and Hispanics, but voter-ID laws and other impediments make it less likely these groups will meet the new requirements.⁸⁷ Newkirk's data correlates with other published data that regardless of whether voting rights laws are enacted intentionally to discriminate against people of color, "there is plenty of data detailing just how [these laws have] created Republican advantages.⁸⁸ Newkirk's study revealed many Blacks and Hispanics responding to his survey live in traditionally southern states voting patterns and concerns were likely to be affected by a long history of disenfranchisement, newer voting laws, and barriers.⁸⁹ Sadly, until Congress makes it a priority to look at the VRA and its subsequent amendments now impacted by the Court's holding in *Shelby County*, states will use the for political fodder the gaping loophole that canceled the protections of preclearance once protected by Section 4(b).

In the years after the *Shelby County* decision, a bipartisan group of lawmakers — led by Reps. James Sensenbrenner (R-Wis.), with Sen. Patrick Leahy (D-Vt.) — have introduced multiple bills to strengthen the Voting Rights Act and restore its core protections.⁹⁰ In states previously covered by preclearance, *Shelby County* has chinked the infrastructure the Act put in place to ensure all Americans are able to have their voices heard.⁹¹ The VRA was enacted to marshal in a new era of democracy in the United States but after 54 years, the *Shelby County* ruling has knocked the teeth out of the Fifteenth Amendment that was intended to protect the "promise that no citizen could be denied the right to vote based on race."⁹²

86. Vann R. Newkirk, *How Shelby County V. Holder Broke America*, THE ATLANTIC MONTHLY (July 2018), <https://www.theatlantic.com/politics/archive/2018/07/poll-prri-voter-suppression/565355>.

87. *Id.*

88. *Id.*

89. *Id.*

90. *The Voting Rights Act*, BRENNAN CENTER (Aug. 6, 2018), <https://www.brennancenter.org/issues/the-voting-rights-act>.

91. *The Effects of Shelby County v. Holder*, BRENNAN CENTER FOR JUSTICE (Aug. 6, 2018), <https://www.brennancenter.org/analysis/effects-shelby-county-v-holder>.

92. *Id.*

TEXAS ORDERED TO IMPLEMENT ONLINE VOTER REGISTRATION

In their article, Emma Platoff and Alexa Ura, discuss the mandate for Texas to provide a federal judge with its plan to fix voting rights violation.⁹³ Following a ruling on April 2018 by U.S. District Judge Orlando Garcia, both the state and the Texas Civil Rights Project (“TCRP”) were ordered to submit detailed plans for fixing the violation.⁹⁴ However, state officials seem to be engaging in what their legal adversaries call “bad faith foot-dragging.”⁹⁵

While TCRP has already submitted its plan, the state simply responded by criticizing the group’s proposal as being “overly broad” and “disputed the judge’s ruling.”⁹⁶ Texas was found to be in violation of the federal *Motor Voter Act* (National Voter Registration Act)⁹⁷ because it failed to allow “Texas drivers to register to vote online while they update their license information.”⁹⁸ Under the Act, Congress found that:

- (1) the right of citizens of the United States to vote is a fundamental right;
- (2) it is the duty of the Federal, State, and local governments to promote the exercise of that right; and
- (3) discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities.⁹⁹

The purposes of this Act are:

- (1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office;
- (2) to make it possible for Federal, State, and local governments to implement this Act in a manner that enhances the participation of eligible citizens as voters in elections for Federal office;
- (3) to protect the integrity of the electoral

93. Emma Platoff and Alexa Ura, *Asked To Propose A Fix To Voting Rights Violation, Texas Offers Few Answers*, TEXAS TRIBUNE (May 18, 2018), <https://www.texastribune.org/2018/05/18/texas-voting-rights-violation-few-solutions>.

94. *Id.*

95. *Id.*

96. *Id.*

97. National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77 (1993) (“To establish national voter registration procedures for Federal elections, and for other purposes.”).

98. Platoff & Ura, *supra* note 93.

99. National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77 (1993).

process; and (4) to ensure that accurate and current voter registration rolls are maintained.¹⁰⁰

Advocates for TCRP report that the state's "objections are 'hogwash'¹⁰¹ and that the state holds the position that it has not done anything wrong, contrary to the findings of the court.¹⁰² Texas was unable to appeal the ruling to the Fifth Circuit until Judge Garcia issued final judgment. At the time of the lawsuit, Texas did not allow for any online voter registration.¹⁰³ In the final analysis, Texas provided the court with its proposal – now Texans are able to register to vote online. Because the judge compelled the state to begin allowing Texans to register to vote when conducting driver's license business online, it has provided an easy method to remove a voter registration impediment.¹⁰⁴

It remains to be seen if the state will appeal the final judgment of the court and seek redress by the Fifth Circuit that it believes "'must be narrowly tailored' to the problem at hand and show what other courts have described as 'adequate sensitivity to the principles of federalism.'"¹⁰⁵ Advocates for Texas voters desire the court to order "Texas to allow individuals to register to vote while updating their license information online."¹⁰⁶ As of the writing of this article, Texans are not able to directly register to vote on the Texas Driver's License webpage. However, users are able to click on embedded links at the bottom of the page that will redirect to the voter's registration page and another link that redirects to an Election Identification Certificate.

100. *Id.*

101. Emma Platoff and Alexa Ura, *Asked To Propose A Fix To Voting Rights Violation, Texas Offers Few Answers*, TEXAS TRIBUNE (May 18, 2018), <https://www.texastribune.org/2018/05/18/texas-voting-rights-violation-few-solutions>.

102. *Id.* ("Attorneys for the state argued this week — again — that the state was not violating the law and that the voters who sued them had no standing to do so in the first place. They also objected strenuously to the advocacy group's fix, which proposed giving the state 45 days to begin allowing Texas drivers to register online while updating their license information and forcing Texas to create a "broad-based public education plan" to advertise the new avenue for voter registration.")

103. Alexa Ura and Emma Platoff, *Federal judge: Texas is violating national voter registration law*, TEXAS TRIBUNE, (April 4, 2018), <https://www.texastribune.org/2018/04/03/federal-judge-hands-texas-loss-voter-registration-lawsuit>.

104. *Id.*

105. Platoff & Ura, *supra* note 93.

106. *Id.*

TEXAS COUNTIES HAVE INADEQUATE VOTING MATERIALS IN SPANISH

According to the American Civil Liberties Union (“ACLU”) of Texas, just weeks before the November 6, 2018 election, at least 36 counties across Texas may have been in violation of the VRA for having inadequate voting materials in Spanish.¹⁰⁷ A senior staff attorney for the ACLU warned that “[c]ounties need to ensure that they are providing all citizens with information that will enable them to vote.”¹⁰⁸ The ACLU determined these inadequacies when its attorneys conducted a review of Texas “county election websites.”¹⁰⁹ The ACLU scoured the sites to ensure that “pertinent information was made available in Spanish, including voter identification information, key voting dates, voter registration information, and applications for ballot by mail and absentee voting.”¹¹⁰ What the ACLU discovered was that at least “36 counties had inadequate or inaccessible information in Spanish, had poor or misleading translations, or offered no voting information in Spanish at all.”¹¹¹

The ACLU sent letters that urged the identified counties “to comply with a provision in the law that requires any information about voting or elections to be provided in English and Spanish in counties where more than 10,000 or more than 5% of all voting age citizens are Spanish-speakers with low English proficiency.”¹¹² By holding these county election officials accountable, voting information in Spanish removes barriers to voting in Texas’s “largest number of counties needing foreign language voting materials.”¹¹³ As of the writing of this article, the ACLU reported that many of the counties “agreed to comply” and to provide “Spanish language voting information on their websites.”¹¹⁴

107. Emma Platoff & Alexa Ura, ASKED TO PROPOSE A FIX TO VOTING RIGHTS VIOLATION, TEXAS OFFERS FEW ANSWERS, THE TEXAS TRIBUNE (2018), <https://www.texastribune.org/2018/05/18/texas-voting-rights-violation-few-solutions/>.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

TEXAS VOTER ID LAW AFTER PASSAGE OF *SHELBY COUNTY V. HOLDER*

In July 2011, then-Texas Governor Rick Perry signed Texas Senate Bill 14 (“**SB 14**”) into law that greatly restricted the forms of acceptable IDs voters had to present to cast a ballot.¹¹⁵ As a result of the law, voters were required to present an unexpired photo ID from a list of seven acceptable documents and an estimated 600,000 registered Texas voters did not have an acceptable ID required by the new law.¹¹⁶ Using Section 5 requirements, Texas filed a federal lawsuit seeking preclearance to enforce SB 14.¹¹⁷ Attorneys from the Brennan Center and lawyers representing Texas NAACP and the Mexican American Legislative Counsel opposed the lawsuit.¹¹⁸ *Texas NAACP v. Steen*¹¹⁹ was previously captioned as *Veasey v. Perry*.¹²⁰ In August 2012, the U.S. District Court for the District of Columbia rejected the newly enacted Texas Voting ID law holding that “Texas was unable to prove that

115. The Effects of *Shelby County v. Holder*, IMPROVING JUDICIAL DIVERSITY | BRENNAN CENTER FOR JUSTICE (2018), <https://www.brennancenter.org/analysis/effects-shelby-county-v-holder>.

116. *Id.*

117. *Texas v. Holder*, 888 F. Supp. 2d 113, 114-15 (D.D.C. 2012) (“Pursuant to section 5 of the Voting Rights Act of 1965, Texas seeks a declaratory judgment that Senate Bill 14 (SB 14), a newly-enacted law requiring in-person voters to present a photo ID, ‘neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race[,] color,’ or ‘member[ship] [in] a language minority group.’”).

118. *Id.* (“Preclearance was not warranted of a change in voting procedures in Texas to require a photo identification since many minority voters lacked a photo identification, the burdens associated with obtaining identification would weigh most heavily on racial minorities who were disproportionately likely to live in poverty, and thus the change would likely lead to retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise. Judicial preclearance denied.”)

119. Consolidated with *Veasey v. Abbott*, 830 F.3d 216 (2016). “In this lawsuit, the Court consolidated four actions challenging Texas Senate Bill 14, which was signed into law on May 27, 2011. The Plaintiffs and Intervenors claim that SB 14, which requires voters to display one of a very limited number of qualified photo identifications to vote, creates a substantial burden on the fundamental right to vote, has a discriminatory effect and purpose, and constitutes a poll tax. Defendants contend that SB 14 is an appropriate measure to combat voter fraud, and that it does not burden the right to vote, but rather improves public confidence in elections and, consequently, increases participation.”

120. *Veasey v. Perry*, 135 S. Ct. 9, 9-10 (2014) (recaptioned as *Texas NAACP v. Steen* and states that “[a]pplications to vacate the stay entered by the United States Court of Appeals for the Fifth Circuit on October 14, 2014, presented to Justice Scalia and by him referred to the Court denied. Motion for leave to file response to applications under seal with redacted copies for the public record granted.”) (dissenting Justices Ginsburg, Sotomayor and Kagan). *Texas NAACP v. Steen*, BRENNAN CENTER (Sept. 21, 2018), <https://www.brennancenter.org/legal-work/naacp-v-steen>.

SB 14 law would not discriminate against African-American and Latino voters.”¹²¹

In light of the Supreme Court’s *Shelby County* ruling in 2013, then Texas Attorney General Greg Abbott hastened to effectuate SB 14, stating “[T]he State’s voter ID law will take effect immediately and that [r]edistricting maps passed by the [l]egislature may also take effect without approval from the federal government.”¹²² More lawsuits were filed by the Brennan Center and their voting rights allies on behalf of Texas citizens, in September 2013, on the grounds that SB 14 violated Section 2 of the Voting Rights Act.¹²³ The case filed to impede the enforcement of SB 14 on Section 2 grounds was successful as result of a short-lived Fifth Circuit ruling that was subsequently overturned by *Veasey v. Abbott*.¹²⁴ The Supreme Court concluded that there was no barrier to its review of the discriminatory purpose of the Section 2 claim, but declined to review since the Southern District of Texas Court had yet to enter a final remedial order.”¹²⁵

In June 2017, the Texas Legislature enacted Senate Bill 5 (“**SB 5**”) – a new voter ID law that replaced SB 14.¹²⁶ SB 5 adopted some of the stricter

121. *The Effects of Shelby County v. Holder*, IMPROVING JUDICIAL DIVERSITY | BRENNAN CENTER FOR JUSTICE (2018), <https://www.brennancenter.org/analysis/effects-shelby-county-v-holder> (last visited Feb 22, 2019).

122. *Texas v. Holder*, 888 F. Supp. 2d 113, (D.D.C. 2012). “On appeal from the United States District Court for the District of Columbia. Judgment vacated, and case remanded to the United States District Court for the District of Columbia for further consideration in light of *Shelby County v. Holder*, 570 U.S. 529 (2013).”

123. *The Effects of Shelby County v. Holder*, BRENNAN CTR. FOR JUSTICE (Aug. 6, 2018), <https://www.brennancenter.org/analysis/effects-shelby-county-v-holder>.

124. “The Texas voter ID law violated § 2 of the Voting Rights Act through its discriminatory effects because it imposed significant and disparate burdens on the right to vote, given the stark racial disparity between those with required ID and those without, and it interacted with social and historical conditions to cause inequality in electoral opportunities of African Americans and Hispanic voters, given, among other things, that the voter ID provisions failed to correspond in a meaningful way to the claimed interests; [2]-The court directed the district court to reevaluate the evidence of discriminatory intent; although the district court relied on some infirm evidence, there remained evidence that the cloak of ballot integrity could be hiding a more invidious purpose; [3]-The indirect cost on voters who were born out of state for obtaining ID did not constitute a poll tax. Reversed and remanded in part, affirmed and remanded in part, vacated and rendered in part.” *Veasey v. Abbott*, 830 F.3d 216, 253 (5th Cir. 2016).

125. “The Texas officials who are defendants in this lawsuit have petitioned for certiorari. Their petition asks the Court to review whether the Texas Legislature enacted SB14 with a discriminatory purpose and whether the law results in a denial or abridgment of the right to vote under §2 . . . Petitioners may raise either or both issues again after entry of final judgment. The issues will be better suited for certiorari review at that time.” *Abbott v. Veasey*, 137 S. Ct. 612, 613 (2017).

126. *Texas NAACP v. Steen (consolidated with Veasey v. Abbott)*, BRENNAN CTR. FOR JUSTICE (Sept. 21, 2018), <https://www.brennancenter.org/legal-work/naacp-v-steen>.

provisions of an interim remedial order the District Court put in place to govern the November 2016 election.¹²⁷ SB 5 requires Texas voters to present limited types of photo identification in order to vote, but permits voters who do not possess those types of ID to submit non-photo ID and to sign a declaration indicating why they were unable to obtain the requisite photo ID.¹²⁸ Of course the bill would meet resistance from the Plaintiffs who argued that “SB 5 does not adequately remedy SB 14’s violations” but rather “perpetuates SB 14’s discriminatory defects.”¹²⁹ In July 2017, Plaintiffs asked the Court for “declaratory judgment that SB 14 violate[d] Section 2 of the VRA and 14th and 15th Amendments,” and for a “permanent injunction against both SB 14 and SB 5.”¹³⁰ But the state argued that “SB 5 and the ‘reasonable impediment’ procedure constituted a sufficient remedy,” and asked the Court to issue “a limited remedy ordering the use of a reasonable impediment form until SB 5 took effect in January 2018.”¹³¹

On August 23, 2017, the District Court issued an order striking down both laws and ordered a hearing to determine whether Texas should be required to pre-clear future voting rules changes under the bail-in provisions of Section 3 of the VRA.¹³² Predictively, Texas appealed and on April 27, 2018 the Fifth Circuit ruled in favor of Texas holding the state could “implement SB 5 as an adequate remedy of SB 14.”¹³³ On September 17, 2018, the District Court entered a final judgment, dismissing all subsequent matters of the case consistent with the Fifth Circuit’s April 27th opinion.¹³⁴

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* (“Unusually, each judge on the panel wrote a separate opinion. In the lead opinion, Judge Jones concluded that SB 5 constituted an adequate remedy for SB 14’s violations of Texans’ voting rights.”).

134. *Texas NAACP v. Steen (consolidated with Veasey v. Abbott)*, BRENNAN CTR. FOR JUSTICE (Sept. 21, 2018), <https://www.brennancenter.org/legal-work/naACP-v-steen> (“On June 27, 2018, Texas filed a motion to dismiss private plaintiffs’ claims for a judicial declaration that the voter ID law violated the Constitution and the VRA and for bail-in relief under VRA Section 3. On August 8, 2018 private plaintiffs filed a response, arguing that the Fifth Circuit had ended the case and that there was no further action on the merits for the District Court to take.”).

MISSISSIPPI'S HISTORIC DISENFRANCHISEMENT OF CONVICTED FELONS

One of the greatest impediments to voters of color in Mississippi is the state's unapologetic disenfranchising of voters based on its historical racist roots. In February 2018, Arielle Dreher, reported that the Executive Director of Mississippi's NAACP¹³⁵ called on lawmakers to work to restore voting rights for the more than 218,000 Mississippians who are disenfranchised.¹³⁶ A case and point eloquently discussed in her article, Dreher told the story of Anthony Witherspoon, a Black man convicted of manslaughter in 1992.¹³⁷ His life was turned upside down because antiquated voting laws that denied reinstating voting rights based on the nature of the crime that someone had committed.¹³⁸

"Disenfranchising crimes were initially targeted along racial lines . . . [n]early sixteen percent of the black electorate . . . are disenfranchised. Mississippi's restrictive suffrage laws do not go far enough in providing a meaningful opportunity for enfranchisement."¹³⁹ The list of crimes adopted by Mississippi's Constitution in 1890 were racially designated because "it was thought that [B]lack[s] were more likely than [W]hite[s] to commit these crimes," thus, making it "more difficult for [B]lack[s] to [vote]."¹⁴⁰ "Mississippi [like Texas] is one of [ten] states that permanently revokes voting rights for people convicted of some or all felonies."¹⁴¹ "The 5th U.S. Circuit Court of Appeals rejected a 1998 challenge from a Mississippi inmate

135. Arielle Dreher, *The Racist Roots of Disenfranchising Voters*, JACKSON FREE PRESS (Feb. 28, 2018), <http://www.jacksonfreepress.com/news/2018/feb/28/racist-roots-disenfranchising-voters>.

136. *Id.*

137. *Id.*

138. *Id.*

139. "Just as Jim Crow laws would do well into the 1960s, the point of the disenfranchisement law was to keep black people from voting. The motivation for enacting broad felony disenfranchisement laws in this context was clear: preventing newly enfranchised black citizens from exercising political power." *Id.*

140. *Id.* (Mississippi's state "Supreme Court acknowledged the racist ties to disenfranchisement, while upholding the list as constitutional" in 1896. "Restrained by the federal constitution from discriminating against the negro race . . . offenses [like] [b]urglary, theft, arson, and obtaining money under false pretenses were declared to be disqualifications [from voting], while robbery and murders, and other crimes in which violence was the principal ingredient, were not.").

141. Jerry Mitchell, *Lawsuit: Mississippi Constitution Still Disenfranchising Thousands*, CLARION LEDGER (Mar. 27, 2018), <https://www.clarionledger.com/story/news/2018/03/27/mississippi-still-disenfranchising-thousands/458068002/>.

challenging the constitutionality of the disenfranchisement clause,” although the panel of “judges acknowledged the original provision had racist intent.”¹⁴² In Mississippi and Texas, “a citizen who loses his or her right to vote can only regain that right through a gubernatorial pardon or a bill passed by the Legislature.”¹⁴³

As Witherspoon’s story unfolded, it was evident that he was fortunate that the Mississippi Supreme Court “rejected two lower court rulings that he was guilty of murder and convicted by a jury for manslaughter” that resulted in a 20-year prison sentence.¹⁴⁴ He managed to delay serving his sentence for four years while on an appeals bond, but the Court subsequently ruled that he serve six years in Mississippi state prison.¹⁴⁵ While nearing the end of his prison sentence, Witherspoon researched and discovered that his voting rights were not affected by his manslaughter conviction.¹⁴⁶ Based on a letter Witherspoon sent to the Mississippi Attorney General, he learned that he still had his right to vote.¹⁴⁷ As a result of his understanding of the law and the process, Witherspoon educated others in prison on their rights and continued serving ex-felons after being released from prison.¹⁴⁸

In 2012, the Mississippi Secretary of State published a list of the twenty-two disenfranchising crimes based on the state’s attorney general’s 2009 opinion.¹⁴⁹ Since manslaughter was not a listed felony crime, Witherspoon and others convicted of manslaughter could hold public office but the state

142. *Id.*

143. *Id.*

144. Dreher, *supra* note 135.

145. Dreher, *supra* note 135.

146. Dreher, *supra* note 135 (discovering that manslaughter was not one of the 22 felonies that voided his right to vote)(“[T]here were only 10 felonies that disenfranchised” voting rights following a felony conviction. Witherspoon discovered that rape and aggravated assault were such felonies but not manslaughter.).

147. Dreher, *supra* note 135 (“Witherspoon wrote a letter to the attorney general asking for clarification. The answer was clear: He still had his right to vote. He wrote his circuit clerk and asked for an absentee ballot to be sent to prison. Witherspoon went on to register several other inmates who were eligible to vote as well. Any Mississippian, who is a U.S. citizen and has never been convicted of voter fraud or one of the 22 disenfranchising crimes can register to vote and has the right to vote, including men and women in prison.”).

148. Dreher, *supra* note 135 (“Witherspoon worked with the ACLU of Mississippi and the NAACP to help educate Mississippians about the specific list of disenfranchising crimes. When Witherspoon got out of prison in 2002, voter registration forms still no disclaimers about disenfranchising crimes, so he worked with the ACLU on an education campaign in order to register more formally incarcerated Mississippians to vote.”)

149. Dreher, *supra* note 135 (theft remained on the list as did “receiving stolen property, timber larceny, unlawful taking of motor vehicle, carjacking, felony shoplifting, arson, armed robbery, bigamy, murder and robbery”)

law did not allow expunction of any violent offense.¹⁵⁰ The Mississippi ACLU and NAACP, like similar advocacy groups in Louisiana, continue to strive for federal court rulings that chisel at the armor surrounding the “list of disenfranchising crimes” in order to possibly increase voter turnout.¹⁵¹

As of the writing of this article, Mississippi’s current governor has not pardoned anyone or signed any suffrage bills to restore voting rights, but legislative proponents are undaunted as they seek to reform legislation that could lead to over 200,000 ex-felons regaining their right to vote.¹⁵² The good news is “[t]oday, the disenfranchising crimes are listed on voter-registration forms and online.”¹⁵³

EX-FELONS OF COLOR DISENFRANCHISED IN MISSISSIPPI ELECTIONS

In his article, *Racial Disparity Conspicuous Among Mississippians Banned From Voting*, Alex Rozier tackles Mississippi’s long tainted history of voting disenfranchisement tactics against people of color. African Americans comprise of only thirty-six percent of Mississippi’s voting population, yet, sixty-one percent of this population lost their right to vote.¹⁵⁴ According to Mississippi’s conviction records from 1994 until November 2017, 56,255 Mississippians lost their voting rights because of felony charges. ¹⁵⁵ “Conviction data shows that disqualification laws disproportionately impact black felons,” and “underscore the need” for Mississippi’s Legislature “to closely examine the state’s felon disenfranchisement and the disproportionate effect those laws have on African Americans.”¹⁵⁶

150. Dreher, *supra* note 135 (“In November 1992, the Legislature had added two exceptions to the law that kept anyone convicted of a felony from running for office: manslaughter and tax violations.”).

151. Dreher, *supra* note 135 (“Mississippi has one of the most extreme policies. It’s one of the states that disenfranchises people for life unless there’s intervention either from the governor or from this onerous process where people have to file individual suffrage bills.” It is one of twelve states with disenfranchisement laws that can affect people for life.”)

152. Arielle Dreher, *The Racist Roots of Disenfranchising Voters*, JACKSON FREE PRESS (Feb. 28, 2018), <http://www.jacksonfreepress.com/news/2018/feb/28/racist-roots-disenfranchising-voters/>.

153. *Id.*

154. Alex Rozier, *Racial Disparity Conspicuous Among Mississippians Banned from Voting*, MISSISSIPPI TODAY (Feb. 22, 2018), <https://mississippitoday.org/2018/02/22/racial-disparity-conspicuous-among-mississippians-banned-voting>.

155. *Id.*

156. *Id.*

The laws at the heart of some recent lawsuits, in Mississippi, “can be traced back nearly 130 years.”¹⁵⁷ One defendant, as reported by Rozier, argued that the “framers of the state constitution believed that several crimes were more likely to be committed by African Americans and were therefore were an avenue for disenfranchisement of black voters.”¹⁵⁸ As stated above, the state’s constitution delineate specific disqualifying felonies dating back to their adoption in 1890, which a current lawsuit seeks to remove – “bribery, theft, arson, obtaining money or goods under false pretenses, perjury, forgery and embezzlement,” with murder and rape being added in 1968.¹⁵⁹

A modern reading of the 1896 Mississippi Supreme Court ruling that “the convention discriminated against” the “negro race” when the convention decided the “characteristics and offenses” of the enumerated felonies were more prone to be committed by Mississippi’s “weaker members¹⁶⁰ should give pause since this provision is still the law in Mississippi.” Comparing Mississippi to other states, it is in good company since Mississippi is “one of twelve states that withhold voting rights from a felon after they [have] served their sentence and completed probation.”¹⁶¹

According to a 2009 study commission by Social Science Quarterly, “black voters are twelve percent less likely to cast ballots” compared to “one percent of white voters.¹⁶² Dr. Corey Wiggins, Executive Director of the Mississippi NAACP, stated “[w]hen you start to trace the history of these laws that have been in place and that are disenfranchising the vote, you see this track record of laws that tend to be targeted specifically towards African Americans.”¹⁶³ Furthermore, an alarming issue is that over “200,000 Mississippians are currently disenfranchised” and it is “a hard process to restore those rights.”¹⁶⁴ Rob McDuff, an attorney for the Mississippi Center for Justice, believes Mississippi’s constitutional provisions are “a clear violation of the Equal Protection Clause of the Fourteenth Amendment” and that data “shows the unjust effect of the disqualifying laws.”¹⁶⁵ McDuff believes that the studies “demonstrate that th[e] racist provision from the

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. Alex Rozier, *Racial Disparity Conspicuous Among Mississippians Banned from Voting*, MISSISSIPPI TODAY (Feb. 22, 2018), <https://mississippitoday.org/2018/02/22/racial-disparity-conspicuous-among-mississippians-banned-voting>.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

1890 Constitution continues to have a discriminatory impact” and the federal court should strike it down.¹⁶⁶ If litigation regarding seemingly unconstitutional provisions of the Mississippi Constitutional are successful, voting rights for nearly 53,000 Mississippian can be restored.¹⁶⁷

CASE ANALYSES: EX-FELONS AND VOTING RIGHTS IN MISSISSIPPI

The Supreme Court espouses the importance and fundamental nature of the right to vote.¹⁶⁸ There is “[n]o right more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.”¹⁶⁹ However, the Court has held that “the Constitution affirmatively sanctions the disenfranchisement of felons.”¹⁷⁰

In a 1982 case brought by George Williams, as plaintiff-appellant, against John Taylor, as defendant-appellee, on behalf of himself and others in their capacity as Election Commissioners for Mississippi.¹⁷¹ Here, Williams argued that “retaining his right to vote is constitutionally distinguishable from the right to vote claims of individuals who are not felons.”¹⁷² The court reasoned that “Section 2 of the Fourteenth Amendment allows a state to prohibit a felon from voting, and its classification of felons for voting restrictions must bear only a rational relation to the achieving of a legitimate state interest.”¹⁷³ This analysis was supported by the Supreme Court who “upheld registration procedures fundamentally identical to the Mississippi.”¹⁷⁴ Mississippi law “allows a disenfranchised felon to vote if he obtains a full pardon from the governor as provided.”¹⁷⁵ In these facts, the court found that Williams failed to show he “tried to procure a pardon from the governor or that he would have been rejected had he bothered to apply” or that a pardon was reserved for “only the rich and influential in the state.”¹⁷⁶

166. *Id.*

167. *Id.*

168. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

169. *Id.*

170. *Richardson v. Ramirez*, 418 U.S. 24, 55 (1974).

171. *See generally* *Williams v. Taylor*, 677 F.2d 510 (5th Cir. 1982).

172. *Id.* (quoting *Shepherd v. Trevino*, 575 F.2d 1110, 1112 (5th Cir. 1978), *cert. denied*).

173. *Id.* (quoting *Shepherd*, 575 F.2d at 1115) (“The Supreme Court and this court have upheld the state’s power to classify felons separately with respect to the right to vote, as having an affirmative sanction.”).

174. *Id.* (quoting *Richardson v. Ramirez*, 418 U.S. 24 (1974)).

175. MISS. CONST. art. V, § 124.

176. *Williams*, 677 F. 2d at 517.

Williams lacked standing to assert he had “personally suffered the requisite injury in fact for his federal lawsuit.¹⁷⁷ As a result, the Fifth Circuit “affirmed that part of the summary judgment granted appellee election commissioners” and “reversed the summary judgment granted on appellant’s claim of selective disenfranchisement.”¹⁷⁸

In this case, it appeared that the Fifth Circuit forecasted that but for Williams making an attempt or obtaining a gubernatorial pardon, and then being denied his voting rights, he may have satisfied all three elements of standing. Also, this case showed that the Court’s hand seemed to be tied when it came to overruling more than a century of enforcing Mississippi’s archaic, yet lawful actions. As with most appellate review, the court must first look to the plain meaning of the text before interpreting its legislative intent. This which is what happened in this case. Looking at the “plain text of [Section] 241,” Young and Colley’s “proffered interpretation” was rejected by the Court and the federal district court’s dismissal was affirmed.¹⁷⁹

In *Young v. Hosemann*, a case nearly thirty years later, in 2010, the Fifth Circuit heard a challenge to Section 241, a provision of the Mississippi Constitution. In these facts, Jerry Young and Christy Colley, who were convicted felons, brought an action against Delber Hosemann, in his official capacity as Secretary of State of Mississippi.¹⁸⁰ Young and Colley brought suit contending that Section 241 “grants felons the right to vote in presidential elections” and that by being denied, the state violated the Fourteenth Amendment Equal Protection Clause and the National Voter Registration Act (“NVRA”).¹⁸¹

Looking at Section 241 of the Mississippi Constitution, specifically, “Qualification for Electors,” it reads,

Every inhabitant of this state, except idiots and insane persons, who is a citizen of the United States of America, eighteen (18) years old and upward, who has been a resident of this state for one (1) year, and for one (1) year in the county in which he offers to vote, and for six (6) months in the election precinct or in the incorporated city or town in which he offers

177. *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 501-03, (1975); *Brown v. Sibley*, 650 F.2d 760, 771 (5th Cir. 1981); *Finch v. Mississippi State Medical Association, Inc.*, 585 F.2d 765, 771 (5th Cir. 1978)).

178. “Affirmed the district court’s grant of summary judgment on appellant’s procedural due process claims but remanded for a trial on his contention that the Election Board has selectively enforced § 23-5-35 in violation of his right to equal protection under law.” *Williams v. Taylor*, 677 F.2d 510 (5th Cir. 1982).

179. *Young v. Hosemann*, 598 F.3d 184, 191 (5th Cir. 2010).

180. *Id.*

181. *Id.*

to vote, and who is duly registered as provided in this article, and who has never been convicted of murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy, is declared to be a qualified elector, **except that he shall be qualified to vote for President and Vice President of the United States if he meets the requirements established by Congress** therefore and is otherwise a qualified elector.¹⁸²

The plaintiffs argued that Section 241 explicitly included an exception that allowed “felons to vote in presidential elections” but Mississippi’s “longstanding interpretation to the contrary is that the bar on felon voting applies equally in all elections.”¹⁸³ Both sides disputed the plain meaning of the “presidential election clause,” but the ACLU arguing for the plaintiffs “concede[d] that Mississippi could constitutionally, and consistently with the federal Voting Rights Act, disenfranchise felons from voting.”¹⁸⁴ The ACLU specifically wanted the court to decide “whether the ‘except’ clause did so.”¹⁸⁵ The Fifth Circuit reasoned that the “Mississippi Supreme Court has interpreted the felon bar narrowly, particularly when it has held that the bar does not apply to federal or out-of-state convictions.”¹⁸⁶ In fact, Mississippi Supreme Court “has ruled that Section 241 and the statutes that implement it do not disenfranchise those convicted of felonies under the laws of other states or under federal law.”¹⁸⁷

The plaintiffs believed their argument was compelling based on the provision, “[E]xcept that he shall be qualified to vote for President and Vice President of the United States if he meets the requirements established by Congress.” Under the NVRA, “[a] state is not required to register convicted criminals to vote in an election when those criminals are ineligible to vote “as provided by State law.”¹⁸⁸ The Court concluded that “[i]f Mississippi’s law does not disenfranchise felons, the state may have violated the terms of the NVRA” . . . and that even if the plaintiffs’ claim was “predicated on a dispute of state law” it did “not undermine federal question jurisdiction.”¹⁸⁹ Under the plain meaning of Section 241, the Court found the plaintiffs’

182. MISS. CONST. art. 12, § 241; *Young v. Hosemann*, 598 F.3d 184 (5th Cir. 2010) (emphasis added).

183. *Young v. Hosemann*, 598 F.3d 184, 190 (5th Cir. 2010).

184. *Id.*

185. *Id.*

186. *Id.* at 191.

187. *State ex. rel. Mitchell v. McDonald*, 164 Miss. 405, 420-421 (1933); *Middleton v. Evers*, 515 So. 2d 940, 944 (Miss. 1987).

188. 52 U.S.C.A § 20507(a)(3)(B); *Young v. Hosemann*, 598 F.3d 184, 189 (5th Cir. 2010).

189. *Young v. Hosemann*, 598 F.3d 184, 189 (5th Cir. 2010).

interpretation of the “except clause” unjustified because the text [was] “clear” and that by “[a]ccepting the state’s longstanding, commonsense interpretation . . . avoid[ed] the constitutional issue and demonstrate[d] respect for the state’s interpretation of its own laws.”

In this case, the Fifth Circuit affirmed the lower court¹⁹⁰ as a way to erred on the side of respecting Mississippi Supreme Court’s interpretation of Section 241 on adequate and independent state grounds. This court may have missed an opportunity to reshape Mississippi’s draconian laws regarding voting rights for convicted felons for the greater good. In cases where state constitutions or state laws contradict the Constitution or federal laws, our federal judges should employ commonsense discretion to ensure ex-felons enjoy the precious right to vote in a “a free country.”

LOUISIANA BARRIERS TO VOTING RIGHTS FOR PEOPLE OF COLOR

In June 2018, “A Briefing Paper” by the Louisiana Advisory Committee for the United States Commission on Civil Rights was released.¹⁹¹ Portions of this report revealed challenges and proposed solutions that Louisiana officials may take to remedy a history burdened with voter disenfranchisement, especially for people of color. The committee “sought to examine barriers to voting in the state of Louisiana which may have a discriminatory impact on voters based on race, color, disability status, national origin, and/or the administration of justice.”¹⁹²

During its hearings on November 15, 2017 in Grambling, Louisiana and December 6, 2017 in Baton Rouge, Louisiana, the committee heard testimony for laypersons and experts that were used to produce this document.¹⁹³ The committee specifically addressed “voting rights obstacles” and “voting rights enforcement” following the “2006 reauthorization of the

190. *Id.* at 192.

191. Louisiana Advisory Comm., *Barriers to Voting in Louisiana*, U.S. COMM’N ON CIVIL RIGHTS (June 2018), <https://www.usccr.gov/pubs/2018/08-20-LA-Voting-Barriers.pdf> (“This report documents civil rights concerns raised by panelists with respect to barriers to voting throughout the state of Louisiana and discusses possible strategies for improving voter access in Louisiana.”).

192. *Id.* at 5.

193. *Id.* at 6. “Based on the findings of this report, the Committee offers to the Commission recommendations for addressing this issue of national importance. The Committee recognizes that the Commission has previously issued important studies about voting and civil rights nationwide and hopes that the information presented here aids the Commission in its continued work on this topic.”

Voting Rights Act, 194 impact of *Shelby County*,¹⁹⁵ and the proliferation of restrictions on voter access.”¹⁹⁶ To begin, the committee reviewed the law on Louisiana voters being required to wait until they are aggrieved before seeking judicial intervention, which could be a more expensive and less efficient” process that was prompted by Terrebonne Parrish, Louisiana.¹⁹⁷ In those facts, there was an alleged use of at-large voting as a means to maintain a racially segregated Judicial District Court despite the parish electorate being twenty percent Black.¹⁹⁸ No Black candidate had ever been elected in the face of opposition in the district under the at-large system.¹⁹⁹ The District Court held the at-large voting system had discriminatory or dilutive effect, in violation of the VRA.²⁰⁰

As discussed above, “the Fourteenth and Fifteenth Amendments to the Constitution guaranteed citizens the right to vote free of discrimination, but in the context of this report, the committee believed that Louisiana has “a history of efforts to render the[se] guarantee meaningless,” in communities of color.²⁰¹ The committee looked at this disenfranchising history as “relevant to an understanding of the progress of minorities” “under Federal voting laws, and the obstacles which they face in achieving full and free participation in the electoral and political process.”²⁰²

ROLE OF ELECTION SUPERVISORS AT POLLING LOCATIONS IN LOUISIANA

The briefing paper of the committee reported that each Parish Board of Election Supervisor, with the Louisiana Secretary of State’s approval, is authorized to “create election precincts,” “select the polling locations” and

194. Civil Rights Act of 1964, Pub. L. 88–352, 78 Stat. U.S.

195. *See generally* *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013).

196. Brian Walch, *U.S. Commission on Civil Rights Announces Statement on Federal Civil Rights Enforcement and its Reports Planning for Fiscal Years 2018 and 2019*, U.S. COMM’N ON CIVIL RIGHTS, (June 19, 2017), <https://www.usccr.gov/press/2017/06-19-PR.pdf>.

197. *Terrebonne Parish Branch NAACP v. Jindal*, 274 F. Supp. 3d 395 (M. D. La. 2017).

198. *Id.* at 407.

199. *Id.*

200. *Id.*

201. *Supra* note 25; *Barriers to Voting in Louisiana*, LOUISIANA ADVISORY COMMITTEE (June 2018), <https://www.usccr.gov/pubs/2018/08-20-LA-Voting-Barriers.pdf>.

202. Louisiana Advisory Comm., *Barriers to Voting in Louisiana*, U.S. COMM’N ON CIVIL RIGHTS (June 2018). <https://www.usccr.gov/pubs/2018/08-20-LA-Voting-Barriers.pdf>.

“submit suggested locations” for elections.²⁰³ The committee learned from testimony of Political Science Professor, Dr. Joshua Stockley, that Parish Board of Election Supervisors seem to be abusing their authority when it comes to consolidating polling locations. He stated that the supervisors had “eliminated 103 polling places since 2012,” resulting in many voters having to “travel longer distances to the new polling places.”²⁰⁴ Additionally, budget constraints contributed to the closing of polling locations, which created difficulties for “many residents to get to” their polling places in the area.”²⁰⁵ According to a new U.S. 5th Circuit Court of Appeals ruling, the Secretary of State failed to provide appropriate registration forms to people seeking public benefits at certain state agencies.²⁰⁶

As a cure to these impediments of voting rights, the committee suggested that if the Parish Board of Election Supervisors decide to alter “precinct boundaries” or add or merge precincts, they should be announced through the Secretary of State to ensure that all potential voters “are notified by mail and by electronic media.”²⁰⁷ Also, the Louisiana Secretary of State should list the following “easily-accessible information” on its website:

203. Louisiana Advisory Comm., *Barriers to Voting in Louisiana*, U.S. COMM’N ON CIVIL RIGHTS <https://www.usccr.gov/pubs/2018/08-20-LA-Voting-Barriers.pdf> (quoting Kyle Ardoin, testimony, hearing before the Louisiana Advisory Committee, Baton Rouge, LA, Dec. 6, 2017, transcript, pp.177 (hereafter cited as BR Hearing Transcript). “Angie Rogers, the Commissioner of Elections for the state of Louisiana, during her testimony on December 6, 2017, stated “[Louisiana] law requires that every precinct is assigned a polling place.” Currently, however, there are 3,904 precincts and 2,068 polling locations in Louisiana, indicating that on average two precincts are served by one polling location.”)

204. Louisiana Advisory Comm., *Barriers to Voting in Louisiana*, U.S. COMM’N ON CIVIL RIGHTS (June 2018), <https://www.usccr.gov/pubs/2018/08-20-LA-Voting-Barriers.pdf> (quoting Joshua Stockley, testimony before the Louisiana Advisory Committee, hearing, Grambling, LA, November 15, 2017, transcript, p. 1 (hereafter cited as GR Hearing Transcript). “There are about only half as many polling locations than there are election precincts is because the has the authority (with the approval of the Secretary of State) to consolidate polling locations. Merging polling locations implies that a particular polling location serves more than one precinct”).

205. Louisiana Advisory Comm., *Barriers to Voting in Louisiana*, U.S. COMM’N ON CIVIL RIGHTS (June 2018). <https://www.usccr.gov/pubs/2018/08-20-LA-Voting-Barriers.pdf> (quoting Sen. Karen Peterson, Testimony, Hearing before the Louisiana Advisory Committee, Transcript, p. 26. “Senator Karen Peterson, who gave the example of the Pontchartrain Park area of New Orleans, and indicated that “Today, the only polling place for the area’s precincts are (sic) located at Chef Menteur Highway at the Union Baptist Theological Seminary”).

206. *Scott v. Schedler*, 771 F.3d 831, 835 (5th Cir. 2014). See also Marsha Shuler, *5th Circuit Rules in Motor Voter Lawsuit*, The Advocate (Dec. 2, 2014). https://www.theadvocate.com/baton_rouge/news/politics/elections/article_e880d5f6-fb00-5aea-9828-2fc25354959f.html.

207. Louisiana Advisory Comm., *Barriers to Voting in Louisiana*, U.S. COMM’N ON CIVIL RIGHTS (June 2018). <https://www.usccr.gov/pubs/2018/08-20-LA-Voting-Barriers.pdf>.

- (i) the election precincts in each parish, including a map showing the exact boundaries of the precincts,
- (ii) the number of residents by race in each precinct
- (iii) the number of registered voters by race in each precinct, and
- (iv) the location of each polling place pertaining to each precinct.²⁰⁸

VOTER ID LAWS DISPROPORTIONATELY IMPACT VOTERS OF COLOR

Like Texas and Mississippi, Louisiana is one of thirty-four states that require voters to show one of a few statutory allowable identification at the polls.²⁰⁹ Louisiana residents are required to present either “(1) Louisiana driver’s license; (2) Louisiana special identification card (available for free); (3) or other “generally recognized picture identification card that contains the name and signature of the applicant.”²¹⁰ If the voter is unable to do so, the law provides that the voter “shall complete and sign an affidavit . . . [that] include the applicant’s date of birth and mother’s maiden name.²¹¹ The affidavit is the state’s “alternative to a photo identification” that met pre-clearance in 1997, by the Department of Justice.²¹²

In terms of recommendations regarding this issue, the committee recommended “improved poll worker training regarding identification requirements and the affidavit alternative.”²¹³ To protect the integrity of the affidavit process, the committee recommended “the poll books/election rolls include two boxes – ID provided or affidavit offered/signed.”²¹⁴ Another recommendation was that the “Secretary of State increase its community outreach and education regarding voter identification requirements and the

208. *Id.*

209. Wendy Underhill, *Voter Identification Requirements: Voter ID Law*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Jan. 17, 2019), <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx>.

210. La. R.S. § 18:562(A)(2); Louisiana Advisory Comm., *Barriers to Voting in Louisiana*, U.S. COMM’N ON CIVIL RIGHTS (June 2018). <https://www.usccr.gov/pubs/2018/08-20-LA-Voting-Barriers.pdf> (quoting Testimony of Kyle Ardoin, First Assistant to the Secretary of State, Attachment #1 to Dec. 6, 2017 Hearing p3; Information Pamphlet For Election Day Voting, pp30-31; Ardoin Testimony, BR Hearing Transcript, pp 173-174).

211. Louisiana Advisory Comm., *Barriers to Voting in Louisiana*, U.S. COMM’N ON CIVIL RIGHTS (June 2018). <https://www.usccr.gov/pubs/2018/08-20-LA-Voting-Barriers.pdf>.

212. *Id.*

213. *Id.*

214. *Id.*

affidavit alternative.”²¹⁵ Another recommendation was that “the legislature amends the Louisiana Revised Statute, Section 18:566 to permit provisional ballots in all elections and not merely federal elections.”²¹⁶

NEW LEGISLATION MAY HELP FELONS OF COLOR REGAIN VOTING RIGHTS

Recall that Mississippi’s constitution and laws provide limitations on ex-felons regaining their right to vote, if convicted for specified crimes. Similarly, the “Louisiana Constitution of 1973 expressly denies the right to vote to those “under an order of imprisonment for conviction of a felony.”²¹⁷ The “Louisiana Legislature amended the law restricting voting rights to allow those who have not been incarcerated for the previous five years to regain the right to vote regardless of their probation or parole status.”²¹⁸ This law will take effect on March 1, 2019, and it “will allow anyone who has not been incarcerated at any time during the previous five years to submit a form from the Department of Corrections confirming that status to the registrar of voters.”²¹⁹ Once implemented, this new law could very well mean that over 100,000 Louisiana residents may regain their right to vote, with particular benefit to “30-35% of those denied the right to vote who never went to prison at all.”²²⁰

215. *Id.* (“This could be done through increased public service announcements, clear signage at the polls, heightened prominence on the Geaux Vote app, and partnerships with community organizations to increase community awareness.”).

216. *Id.*

217. La. Const. Article I, §10(A) (reading in full: “[e]very citizen of the state, upon reaching eighteen years of age, shall have the right to register and vote, except that this right may be suspended while a person is interdicted and judicially declared mentally incompetent or is under an order of imprisonment for conviction of a felony.”).

218. La. Rev. Stat. Ann. 18:2(8); La. Rev. Stat. Ann. 18:102 (A)(1). “Until 2018, statutory law further stated that ‘Under an order of imprisonment’ means a sentence of confinement, whether or not suspended, whether or not the subject of the order has been placed on probation, with or without supervision, and whether or not the subject of the order has been paroled.”

219. *Barriers to Voting in Louisiana*, *supra* note 213. (“The new law provides limited exceptions, for those convicted of “a felony offense of election fraud or any other election offense,” as well as for those under interdiction for mental incompetence. Those individuals do not regain their right to vote after the conclusion of five years.”)

220. BR Hearing Transcript at 140, Henderson Testimony. (“Norris Henderson, Executive Director of VOTE, testified that 30-35% of those denied the right to vote never went to prison at all, but instead are serving sentences consisting entirely of probation. Because the new law has yet to go into effect, there is no way to anticipate how many people will benefit from these legislative changes.”)

Particularly disheartening about this new legislation is that “approximately 80% of the parolees/probationers currently ineligible to vote are African American, compared with about 32% of the population of the state.”²²¹ Expert testimony explained to the committee that by “[a]llowing more formerly incarcerated individuals to vote at an earlier time [would]facilitate their re-entry into their communities” and that the “success will depend on the ease” of completing the registration process.²²²

“Pretrial detainees are entitled to the presumption of innocence, including the right to vote if they are otherwise eligible.”²²³ It was reported that pretrial detainees were being disenfranchised from the right to vote because the state did not have a viable alternative for these individuals²²⁴ in jail to exercise their constitutional rights and because these individuals are not aware of their right to vote while awaiting trial.²²⁵

To decrease felon disenfranchisement, the committee suggested a litany of recommendations too numerous to enunciate here. However, recommendations that felons’ right to vote “should be restored immediately upon release from incarceration” and that “[o]fficials should ensure that the documentation necessary to allow voter registration of those eligible are readily available.”²²⁶ Also, the “Department of Public Safety and Corrections officials should provide notification and assistance with voter registration.”²²⁷ Another recommendation which would require legislation consisted of any “sentence that does not include incarceration should not result in the loss of voting rights.”²²⁸ Finally, the committee suggested that the legislature pass a law making voting available to all pretrial detainees “in

221. Louisiana Advisory Committee, *Barriers to Voting in Louisiana*, U.S. COMMISSION ON CIVIL RIGHTS (June 2018), <https://www.usccr.gov/pubs/2018/08-20-LA-Voting-Barriers.pdf>. “Dr. Joshua Stockley of the University of Louisiana at Monroe. This disproportionate racial impact can affect communities and the very concept of proportional representation. If many members of a community are unable to vote, they are denied the opportunity to be governed by people who might best serve their interests.”

222. Henderson Testimony, BR Hearing Transcript, p. 148.

223. *Barriers to Voting in Louisiana*, *supra* note 213. (“Pre-trial detainees are those who have been arrested, are awaiting trial (usually in parish jails), and have therefore not been found guilty.”).

224. Henderson Testimony, *supra* note 222 at 139.

225. See also Lanie Lee Cook, “Inmates awaiting trial have right to vote, but few do in Lafayette, other Louisiana parishes, officials say,” ACADIANA ADVOCATE (Nov. 13, 2015), https://www.theadvocate.com/acadiana/news/politics/elections/article_c90053b5-1804-5110-afa7-d76c4a18f702.html (last visited on Apr. 23, 2018).

226. *Barriers to Voting in Louisiana*, *supra* note 213.

227. *Id.*

228. *Id.*

all parish jails” with eligibility in “their home precinct and not at the address of the jail.”

CONCLUSION

The gaveling to open the 2019 legislatures in most states across America and in Washington, D.C. may have ushered in a new crop of progressive legislators who are ready to restore the promise of voting rights for all people. This article has given the reader an unbiased look at just three states whose voter disenfranchisement disproportionately affect communities of color. Unfortunately, there are legislators returning to their respective state houses and in D.C. who may want to keep voting impediments as status quo.

In her article, *A New Congress Could Restore The Promise Of The Voting Rights Act*, Myrna Pérez, wrote that, voter rolls “purges have increased”, “particularly in the handful of states that used to be subject to preclearance,” that was eliminated by the holding in *Shelby County*.²²⁹ The abolishment of Jim Crow laws, literacy tests, poll taxes, gender, and other impediments before the VRA in 1965, was supposed to elevate free and fair elections that were the envy of other countries. However, what we have seen over the last 54 years, is a continual dilution of voting rights to communities of color. Some political talking-heads refer to this phenomenon as a way for the political right to slow the browning of America. Others, see it as an attack on the sheer democracy the Founder Fathers envisioned when it framed the Constitution and enacted the Fifteenth Amendment.

Pérez characterizes it as a “coordinated campaign to weaken the Act’s protections . . . that has imperiled our democracy and jeopardized the right to vote.”²³⁰ It is hoped that this crop of national elected officials, in particular, will see the dilution of voting rights for what it is and “step up, amend the VRA, and restore the landmark law’s promise.”²³¹ Even before *Shelby County v. Holder*, states and local electors were engaging in subversive gerrymandering under the radar that did not rise to the level of disenfranchisement that compelled courts to rule those acts unconstitutional.

229. Myrna Pérez, *A New Congress Could Restore the Promise of the Voting Rights Act*, BRENNAN CENTER (Aug. 6, 2018), <https://www.brennancenter.org/blog/new-congress-could-restore-promise-voting-rights-act> (“[H]ad purge rates continued . . . at the same pace . . . not subject to preclearance . . . two million fewer voters would have been deleted from voter rolls between the elections of 2012 and 2016. [B]etween the federal elections of 2014 and 2016, almost four million more names were purged from the rolls than between 2006 and 2008”).

230. *Id.*

231. *Id.*

As if it were not already difficult for Blacks and other communities of color to vote, the Court which invalidated Section 4(b), requiring preclearance to unfair voting tactics, is now a proponent for keeping the status quo—having a field day, at the expense a half-century of progress.²³²

As discussed above, Texas, Mississippi and Louisiana, among other states, did not waste time implementing voting laws held in waiting before the proverbial ink dried on the Supreme Court’s *Shelby County* decision. “Texas announced the same day as the decision that it was going to implement the country’s strictest photo ID law.”²³³ An unintended consequence of *Shelby County* may be “[v]oter purges — or attempts to clean up voter lists that are too often done recklessly or with bad data — pose a growing threat to the right to vote.²³⁴ Pérez wrote, “[R]e searchers have concluded that the criteria” of voter roll purges are “more likely to tag African-American, Asian-American, and Latino voters for removal than white voters.”²³⁵

The upshot of *Shelby County* is that in the majority opinion, Chief Justice John Roberts reasoned that although Section 4(b) was an unconstitutional and outdate formula analysis, “Congress may draft another formula [for determining preclearance] based on current conditions.”²³⁶ With the current tenor of the Justice Department, it is highly likely that the new Congressional leaders will “devise a new formula and get preclearance back [up] and running.”²³⁷ In fact, as of the writing of this article, members in both the House and Senate have introduced bills attempting to do just that.²³⁸ Unlike the grossly polarizing nature of immigration reform and gun rights; voting rights fixes seem to already have garnered broad bipartisan support. As the country will soon shift into focusing on the 2020 Presidential election, there is no doubt that civil rights advocacy groups and leaders in communities of color will be hawkish in their fight regarding any changes by the government that further dilute, diminish, or destroy the fabric of voting rights.

232. *Id.*

233. *Id.* (“notwithstanding the fact that a federal court and the Department of Justice separately concluded” that Texas’s ID law shouldn’t be approved).

234. *Id.* (“Unlike legislation that’s subject to public debate on the floor of statehouses across the country, purges are often done behind-the-scenes. This makes them more difficult to identify until voters show up at the polls. . . . [A]ll too often jurisdictions are implementing bad purge laws and practices that are threatening the right to vote”).

235. *Id.*

236. *Id.*

237. Myrna Pérez, *A New Congress Could Restore The Promise Of The Voting Rights Act*, THE HILL (Aug. 6, 2018), <https://thehill.com/opinion/civil-rights/400230-a-new-congress-could-restore-the-promise-of-the-voting-rights-act>.

238. *Id.*

THE EQUAL PROTECTION CLAUSE PROHIBITS A PUBLIC SCHOOL FROM STIGMATIZING A STUDENT WITH A DILUTED FAKE EDUCATION THAT FAILS TO TEACH LITERACY

L. DARNELL WEEDEN*

INTRODUCTION

The issue to be addressed is whether a predictable governmental denial of an equal opportunity for literacy to some groups of children in America because of the school district they live in or the school they attend violates the Equal Protection Clause objective of eliminating harmful governmental stigmas that serve as unreasonable obstacles to promoting personal merit.¹ A federal civil-rights lawsuit to secure the right of access to literacy was litigated in Michigan.² The district judge held that, regardless of its magnitude in American society, children do not have a constitutionally protected right to acquire enough skills in a public school to be able to read and write.³ The Michigan plaintiffs, no doubt, support the argument that minorities and other less privileged students in society should have equal access to educational opportunities and resources granted to more affluent students.⁴ Because universal literacy is so beneficial to society and necessary to protect democracy many believe that it should be regarded as a fundamental constitutional right.⁵ Unfortunately, the Supreme Court has held that education is not a fundamental right under the Due Process Clause of the Fourteenth Amendment.⁶ If what the Supreme Court said in 1954 in *Brown v. Board of Education* about education being one of the “most important functions of state and local government”⁷ still holds true in 2019, then a state

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1. *Plyler v. Doe*, 457 U.S. 202, 221-22 (1982).
2. Daniel Ward, *All Children Deserve Access To Literacy*, THE SPECTRUM (Aug. 14, 2018, 6:30 AM), <https://www.thespectrum.com/story/opinion/2018/08/14/opinion-all-children-deserve-access-literacy/982672002/>.
3. *Id.*
4. *Id.*
5. *Id.*
6. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).
7. *Plyler*, 457 U.S. at 222 (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

cannot have a rational or legitimate state interest in providing groups of students an underfunded sham education that predictably fails to teach them how to read and write well enough to escape the harmful stigma and fate of becoming a member of the illiterate class.⁸

Part I of this article contends under the rationale of the *Brown* decision that the equal protection principle prohibits a state from adopting public school funding policies that are very likely to produce a feeling of inferiority in students as to their status in the community. Also, part I simply asserts that denying each student in a public school the right to access functional literacy, promotes the message that the students denied equal access to literacy do not matter as much as other students of similar age and grade because they are inferior and attend schools that are so inferior that they predictably fail to teach functional literacy skills. In part II, the article supports Professor Susan H. Bitensky's excellent constitutional law scholarship advocating constitutional protections for educational literacy because of the strong correlation between a denial of equal access to educational literacy and crime.⁹ "Up to seventy-five percent of imprisoned youths in the United States are functionally illiterate."¹⁰ Because of the extremely high connection between crime and functional illiteracy a state with intentional educational funding or management policy that perpetuates functional illiteracy should fail the Fourteenth Amendment's Equal Protection¹¹ rational basis test because a state cannot establish a required legitimate or rational state interest for such a policy.¹² Part II argues that since the lack of equal access to functional literacy in a public school is highly correlated with stigmatizing school children and making it very likely that children grow up to become prisoners for jails, a school policy tolerating functional illiteracy is not rationally related to a legitimate governmental interest in education.¹³ Part III emphasizes that under the equal protection principle, it is very difficult for a

8. *Id.*

9. Susan H. Bitensky, *Legal Theory: Theoretical Foundations For A Right To Education Under The U.S. Constitution: A Beginning To The End Of The National Education Crisis*, 86 NW. U. L. REV. 550, 559 (1992).

10. *Id.* (citing Patricia Puritz, *Juvenile Justice: Teaching Literacy Through Law-Related Education*, 75 A.B.A. J., June 1989, at 124).

11. U.S. CONST. amend. XIV, § 1 (The Equal Protection Clause stipulates that a state shall not "deny to any person within its jurisdiction the equal protection of the laws.")..

12. *See Papasan v. Allain*, 478 U.S. 265, 289-92 (1986). (In *Papasan* the Court stated that the at a minimum public school educational policy raising issues of equality had to meet the rational basis standard.)

13. Bitensky, *supra* note 9.

state to provide substantial justification for burdening a discrete group of its students with diluted education that leaves them functionally illiterate.

I. UNDER THE RATIONALE OF THE *BROWN* DECISION, THE EQUAL PROTECTION PRINCIPLE PROHIBITS PUBLIC SCHOOL POLICIES LIKELY TO PRODUCE A RISK OF INFERIORITY IN THE MINDS OF STUDENTS

A. Brown and the Opportunity for Equal Access to An Evenhanded Education

Since 1954, the rationale of the *Brown* decision prohibits the government in the field of education from adopting policies that stigmatize children as inferior people because of where they attend school.¹⁴ All 50 states' constitutions guarantee equal access to an education.¹⁵ Under the rationale of *Brown*, all 50 states' constitutions, which guarantee equal access to an education are required to provide a meaningful education that is free of group stigma.¹⁶ Because *Brown* established the right to equal access to an education as a constitutional right, it is appropriate to apply *Brown*'s right to equal access to an education, as a right to equal access to literacy, in order to prohibit a state's denial of equal access from generating a sense of inferiority in the minds of its students.¹⁷ "Every elementary teacher will tell you that the first few years of school are spent learning to read and the rest reading to learn. Without adequate literacy, education collapses."¹⁸ It is my contention, properly understood, that *Brown* has already established equal access to literacy as a civil right through the judicial system. Under the *Brown* rationale the state is not allowed to fund or manage some schools so poorly that its denial of equal access to literary skills to impacted students effectively stigmatized them as functionally illiterate when compared to other public schools in the state.¹⁹ The state must avoid literacy policies that make some of its students feel as though they are inferior illiterate outsiders.²⁰ When the

14. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

15. Ward, *supra* note 2.

16. *Brown v. Bd. Educ.*, 347 U.S. at 494.

17. *Id.*

18. Ward, *supra* note 2.

19. *Brown v. Bd. Educ.*, 347 U.S. at 494.

20. *Id.*

state is allowed to employ funding disparities so substantial that the underfunded schools are unable to teach literacy, the disadvantaged students suffer a stigma that separate them from others of similar age and qualifications. Their lack of literacy “generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”²¹

B. The Contradiction of Rodriguez and Plyler

Forty-six years ago, in the *Rodriguez* suit, Mexican-American parents whose children attended elementary and secondary schools in an urban school district in San Antonio, Texas, challenged the Texas system for a lack of proper financing of their public education.²² Plaintiffs filed a class action suit representing school children in Texas who were either members of minority groups, or who were poor, and live in school districts possessing a low property tax base.²³ The federal district court in *Rodriguez* appropriately recognized that the Texas ad valorem taxation system used to finance its public education was constitutionally defective.²⁴ The Texas taxation system was constitutionally defective according to the district court in *Rodriguez*, because it unreasonably pretended that the value of property inside its many school districts would be adequately able to support comparable expenditures among the state’s school districts.²⁵ Texas finances its education primarily based on local property taxes.²⁶ During the course of litigation the adverse impact of the state of Texas erroneous assumption of relatively equal property value inside a district was demonstrated.²⁷ A survey of 110 school districts throughout Texas showed that the ten districts with a market value of taxable property per pupil greater than \$100,000 utilized an equalized tax rate per \$100 of only thirty-one cents while the poorest four districts containing less than \$10,000 in property per student were burdened with a tax rate of seventy cents per \$100.²⁸ This lack of social justice in

21. *Id.*

22. *San Antonio Independent School District v. Rodriguez*, 411 U.S. at 4-5.

23. *Id.* at 6.

24. *See Rodriguez v. San Antonio Independent School District*, 337 F.Supp. 280, 282 (W.D. Texas 1971) (reversed by *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973)).

25. *Id.* at 281-82.

26. *Id.* at 282.

27. *Id.*

28. *Id.*

taxation contradiction produces the result in which the lower tax rate for the richer school districts produced \$585 per student, while a higher tax rate for the poor school districts produced only \$60 per student.²⁹ “As might be expected, those districts most rich in property also have the highest median family income and the lowest percentage of minority pupils, while the poor property districts are poor in income and predominately minority in composition.”³⁰

The Supreme Court has failed to recognize that the lack of equal access to education funding for all students, regardless of which school district one lives in or attends, increases the risk of placing a lifetime harmful stigma on a student. This harm results from their lack of literacy, which violates the Equal Protection Clause of the Fourteenth Amendment under the rationale in *Plyler v. Doe*.³¹ The lack of equitable funds or resources for many students who attend poorly funded schools has resulted in the creation of a substantial “shadow population” of illiterates throughout the nation.³² This situation involving dysfunctional illiteracy raises the specter of a permanent caste of illiterate citizens who will be denied the benefits that our society makes available to literate citizens and literate residents.³³ The existence of an illiterate underclass should be unacceptable under the equal protection principle in an American nation that seeks self-satisfaction by its faithfulness to the belief of equality under law.³⁴ Equal access to literacy offers the basic tools by which people might live economically productive lives for the benefit of everyone.³⁵ Literacy has a fundamental role in supporting the structure of the American society.³⁶ It is not rational to ignore the sizable social costs incurred nationally, when students attending underfunded or poorly managed schools are routinely denied equal access to tools needed to learn the functional literacy skills our social order requires in order to remain a stable society.³⁷ A foreseeable governmental denial of an opportunity for equal access to literacy directed at any groups of children in America, because of the school district they live in or the school they attend, is an insult to the Equal Protection Clause’s objective of eliminating governmental

29. *Rodriguez*, 337 F.Supp. at 282.

30. *Id.*

31. *Plyler*, 457 U.S. at 218.

32. *Id.*

33. *Id.* at 218-19

34. *Id.* at 219

35. *Id.* at 221

36. *Id.*

37. *Plyler*, 457 U.S. at 221

barriers that unreasonably obstruct equal access to develop one's individual skill. 38 "The inability to read and write will handicap the individual deprived of a basic education each and every day of his life."³⁹ The inability to read and write places an incalculable burden and harmful stigma "on the social economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, mak[ing] it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause."⁴⁰

In *Horne v. Flores*, The Supreme Court missed another opportunity to support equal access to educational literacy.⁴¹ In 1992, a group of students enrolled in the English Language Learner (ELL) program in Nogales, along with their parents (plaintiffs), filed suit in the District Court of Arizona representing every minority 'at risk' and inadequate English proficient child currently or in the future enrolled in the Nogales Unified School District.⁴² "The plaintiffs sought a declaratory judgment holding that the State of Arizona, its Board of Education, and its Superintendent of Public Instruction (defendants) violated the Equal Education Opportunity Act of 1974 (EEOA) by delivering inadequate ELL instruction in Nogales."⁴³ The EEOA obligated Nogales to take necessary and proper steps to remove language barriers that may inhibit equal access to participation in the teaching and learning process for ELL students.⁴⁴ The district court concluded that the defendants violated the EEOA by failing to provide adequate funding for ELL programs and granted a declaratory judgment against Nogales.⁴⁵ In 2000, the District Court applied its declaratory judgment to Nogales, and in 2001, the court expanded its order to operate in the whole state of Arizona. During the next eight years, petitioners repeatedly sought relief from the District Court's orders without success.⁴⁶ The Supreme Court granted certiorari after the Court of Appeals for the Ninth Circuit affirmed the decision of the district court. The Court unfortunately reversed the judgment of the Court of Appeals and remanded the cases.⁴⁷

38. *Id.* at 221-22.

39. *Id.* at 222.

40. *Id.* (citing *Brown v. Bd. Educ.*, 347 U.S. 483 (1954)).

41. *See generally Horne v. Flores*, 557 U.S. 433 (2009).

42. *Id.* 439-40.

43. *Id.* at 440.

44. *Id.* at 439.

45. *Id.*

46. *Id.*

47. *Horne v. Flores*, 557 U.S. at 439.

Although the Court's opinion in *Horne v. Flores* specifically addressed statutory issues presented by EEOA, a more thoughtful Court would have looked directly at the educational forest and not just a few trees, according to a dissenting Justice Breyer.⁴⁸ If the Court had considered the educational forest, it may have realized that Nogales violated the Equal Protection Clause by sending a message to students through its funding policies that they are not entitled to equal access to learning opportunities as inferior school participants because of the language they speak and their national origin.⁴⁹

The Supreme Court must realize that a school district providing targeted students with unequal facilities, unequal textbooks, and unequal teachers because of the lack of the teacher's qualifications, represent a failure to implement a curriculum to provide equal access to acquire literacy skills. This failure makes a mockery of public education when it effectively denies equal access to literacy. The equal protection rights of students who are not taught functional literacy skills are violated because such a state policy makes a mockery out of public education at targeted schools. School policies that make a mockery out of public education fail to provide equal access to literacy skills are prohibited by the *Brown* decision, because such a public school district's educational policy is very likely to generate a feeling of educational inferiority in a student as a result of the targeted school she attends.⁵⁰ In *Horne v. Flores*,⁵¹ the Supreme Court placed a narrow statutory focus on the EEOA's appropriate action requirement and failed to require a particular level of funding when remanding the case, which possibly obstructed the majority from seeing the educational forests⁵² of equal access required under the *Brown* decision.⁵³ If the *Horne v. Flores*⁵⁴ Court had actually considered the educational forest, it would have held that even if the EEOA does not require equal access to education, the *Brown* decision does, in order to avoid treating students as inferior members of society because of the public school they attend.⁵⁵ The *Brown* decision, of course, is best known for mandating the end of state mandated racial segregation in public schools.⁵⁶ However, it is equally important to observe that *Brown's* rationale

48. *Id.* (Breyer, J. dissenting).

49. *See id.*

50. *Brown v. Bd. Educ.*, 347 U.S. at 494.

51. *Contra, Horne v. Flores*, 557 U.S. at 469.

52. *See Horne v. Flores*, 557 U.S. at 475 (Breyer, J. dissenting).

53. *Brown v. Bd. Educ.*, 347 U.S. at 494.

54. *See Horne v. Flores*, 557 U.S. at 475 (Breyer, J. dissenting).

55. *Id.*

56. *Brown v. Bd. Educ.*, 347 U.S. at 494.

for ending racial segregation should also apply to ending literacy segregation because it was premised on the idea that a state may not cause harm to students in public schools by perpetuating a feeling of inferiority in students seeking to obtain equitable literacy.⁵⁷ In my opinion both literacy and racial discrimination in public schools produce the same outcome of promoting an actual sense of inferiority in those students burdened with dysfunctional literacy because of state sponsored discrimination in the illegitimate distribution of education resources.

C. The Snyder case Alleges that A Denial to Equitable Literacy Violates the Equal Protection Clause

In one equal access to literacy case, *Gary B. v. Snyder*, the plaintiffs are current or former students of public schools in Detroit, Michigan.⁵⁸ The plaintiffs in *Snyder* allege that they did not receive, and are not receiving, a minimally adequate education because they were denied equal access to functional literacy.⁵⁹ I have chosen to characterize the Detroit plaintiffs claim as a request for equal access to literacy rather than as an adequacy of literacy claim.⁶⁰ The plaintiffs claim that Michigan violated the Equal Protection Clause because uncertified and presumed inferior teachers were allowed to teach in Detroit's unequally funded schools, whereas other Michigan school districts required their teachers to be certified because the certified teachers were presumed to be superior to non-certified teachers.⁶¹ The equal protection clause was violated in *Snyder* because the Detroit schools were not provided the equal access to literacy given to other schools in Michigan. Under the rational basis test, Detroit public school's hiring of uncertified teachers is not rationally related to a legitimate government interest because such a policy is likely to perpetuate a feeling of inferiority in the minds and souls of students in Detroit as to their status in the Michigan community of schools.⁶²

One could argue that Michigan allowing Detroit to employ uncertified and unqualified teachers to teach the next generation, irrationally undermines a rational public policy interest in producing a literate and educated work

57. *Id.*

58. *Gary B. v. Snyder*, 2018 WL 3609491 (E.D. Mich., July 27, 2018).

59. *Id.* at *1.

60. See, *id.*

61. *Id.* at *9.

62. *Brown v. Bd. Educ.*, 347 U.S. at 494.

force for the city's current and future maintenance and growth.⁶³ *The Snyder* Court's position that the language, "similarly situated" generates comparisons not to the schools in other districts of Michigan under the Equal Protection Clause should be rejected because no Michigan school is an island unto itself.⁶⁴ The "appropriate comparison" is not to the other irrationally funded schools in the same school district, which as a matter of public policy, would erroneously envision that those attending Detroit public schools will only compete for jobs and higher educational opportunities in a very limited Detroit Public School District market.⁶⁵ Under a rational education approach at a bare minimum Detroit public school students should be taught enough equitable literacy skills to be considered competent among their peers of similar age, experience and grade in the Michigan community.⁶⁶ An equitable literacy approach for Detroit that fails to consider other public schools in the state is not rationally related to a legitimate state purpose in assuming that those who attend Detroit public schools will never leave Detroit and dare not to even dream to live in Ann Arbor where the prestigious University of Michigan is located. The issue in *Snyder* is not about either race or wealth as a suspect class, but whether the equal protection principle prohibits the state of Michigan or the Detroit School District from adopting and implementing irrational education policies that are reasonably understood as telling students in a public school that their access to equal literacy does not matter because they are inferior⁶⁷ participants in Michigan's education forest.

D. The Effects of the Denial of Equitable Literacy Expands Beyond the Scope of Public Education

The effects of this unequitable educational stigma will expand beyond public education because it will bleed over into other aspects of the disadvantaged students' lives. This stigmatic harm grows where the conditions of schools and educations differ wildly between the poor schools and the rich schools. In *William Penn Sch. Dist. v. Pa. Dep't of Educ.*, petitioners assert a multitude of inequalities among the school districts under the funding scheme, such as "massive district-by-district funding disparities; low-wealth districts' inability to provide individualized instruction to children who require it;

63. See *Gary B. v. Snyder*, 2018 WL 3609491 (E.D. Mich. 2018).

64. *Contra*, *id.* at 18.

65. *Contra*, *id.*

66. *Id.*

67. See *Brown v. Bd. Educ.*, 347 U.S. at 494.

shortages of essential learning materials such as computers and text books; persistent and ongoing reductions in teachers and staff, with increases in student-teacher ratios and class size; the elimination of educational programs such as art, music, and foreign languages.”⁶⁸ Many of the schools are in deteriorating conditions, projectors don’t work, and textbooks are so old that they no longer match the State’s curricular requirements.⁶⁹ In one school, “the roof over the auditorium is collapsing, plaster is falling from crumbling walls and ceilings, and some bathrooms are in such disrepair that they cannot be used.”⁷⁰ In contrast, “in the Lower Merion School District, all kindergartners and first-graders have access to iPads, and all high school freshmen are issued laptops to use as their own during their high school years.”⁷¹

The students in the poor school districts do not have equal access to the basic tools to gain the knowledge and literacy that is readily available to their counterparts in other school districts. The court here fails to mention the equal protection stigma regarding literacy, although, attending schools in such poor conditions, undoubtedly, has an adverse effect on the students’ self-worth. The comparison is not hard to make; one school district has enough money to provide access to iPads to their students whereas another school is using outdated textbooks that are no longer relevant to the curriculum.⁷² This gross disparity is enough to “shock the conscience” and force the court to intervene and remedy the situation by implementing equal funding for all the public schools regardless of the district they reside.⁷³ This shock to the conscience is comparable to the Doll Test that was conducted by Mamie and Kenneth Clark, which ultimately helped strike down “separate but equal” in *Brown v. Board of Education*.⁷⁴ The test was simple, African American children were presented with a white doll and a black doll and asked which doll was “good” and which doll was “bad.”⁷⁵ “A majority of African-American children showed a preference for dolls with white skin instead of black ones—a consequence, the Clarks argued, of the malicious

68. *William Penn Sch. Dist. v. Pa. Dep’t of Educ.*, 170 A.3d 414, 428 (Pa. 2017).

69. *Id.* at 430.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Rochin v. California*, 342 U.S. 165 (1952).

74. *How Dolls Helped Win Brown v. Board of Education*, HISTORY.COM, <https://www.history.com/news/brown-v-board-of-education-doll-experiment> (last visited Nov 16, 2018).

75. *Id.*

effects of segregation.”⁷⁶ The results of the experiment were heartbreaking and shocked the conscience with several children participants “cry[ing] and run[ning] out of the room when asked to identify which doll looked like them.”⁷⁷ Similarly, in the *William Penn.* case, there is no doubt that if students are asked which school they would choose to attend, they would choose the school that supplies iPads for the students to use, over the school with the leaky roof and deteriorating condition.⁷⁸ The students attending the unequally funded schools are suffering from the same inferiority that plagued the African American children in the Doll Test. Both racial segregation in schools and targeted unequal funding in schools result in the same outcome of promoting inferiority within the disadvantaged students.

Moreover, the state is treating two sets of students very differently. In effect, the state is communicating that one set of students’ success and growth matters more. This inequality to access to literacy creates a dangerous future by disconnecting the disadvantaged students from effectively participating in society because of their lack of equal access to functional literacy. This unequal access to functional literacy between poor schools and rich schools allows inequality to permeate fundamental elements of life beyond public education. There will, undoubtedly, be an unconscionable class gap between a student provided with an iPad with access to limitless information, and a student who is learning out of outdated textbooks. In the *Plyler* case, the court stated that “the Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation.”⁷⁹ Therefore, this persistent lack of equal access to functional literacy perpetuates an unconscionable class gap amongst peers and their prospective futures, their lives after the public school stage, and violates the equal protection clause because such a policy is so dysfunctional, it is not rational. This unconscionable lack of equal access to functional literacy for all intents and purposes is not rationally legitimate because it perpetuates a separate but unequal caste of poorly educated individuals who are at an increased risk of becoming unemployed.

In due course, no legitimate interest of the government is being served by providing an unequal access to functional literacy to these disadvantaged students that is so inadequate that it is substantially certain to create a badge of inferiority in the hearts and minds of students at a very tender age. The

76. *Id.*

77. *Id.*

78. See *William Penn. Sch. Dist. v. Pa. Dep’t of Educ.*, 170 A.3d at 430.

79. *Plyler v. Doe*, 457 U.S. 202, 213 (1982).

government is stunting the growth of a substantial population of society's future workforce by allowing such discriminatory public-school funding to stand. As things stand now, the lack of literacy that is being provided to these students is nothing more than a façade that falsely portrays that every student is receiving a functionally literate education. However, the façade of equal access to functional literacy where outdated materials are used, and unqualified teachers teach, should not be called an equal opportunity to access literacy. In the *William Penn* case, the school district has essentially set up four deteriorating walls and a leaky roof in the poor areas and is calling it an educational facility without regard to the actual substantive education.⁸⁰ The sham education is the functional equivalent of a "deprivation of education" which violated the equal protection clause in *Plyler*.⁸¹ Finally, the court in *William Penn* recognized that the "petitioners' allegation that the General Assembly imposes a classification where under distribution of state funds results in widespread deprivations in economically disadvantaged districts of the resources necessary to attain a constitutionally adequate education" was colorable and not a political question like the defendants were claiming.⁸² However, the court stated that "it remains for petitioners to substantiate and elucidate the classification at issue and to establish the nature of the right to education."⁸³

Furthermore, the concurring opinion in *William Penn*. by Justice Dougherty states that the unequal funding scheme at issue has constitutional challenges that "entail grave social, economic, and moral implications and consequences."⁸⁴ Justice Dougherty goes on to say that "a proper public education is not a static concept and must change with the evolving world around us...[the] public education system must also evolve to ensure the Commonwealth's citizens are fully capable of competing socially, economically, scientifically, technologically and politically in today's society."⁸⁵ The court correctly ruled that the issue regarding unequal funding in public schools was justiciable.⁸⁶ However, a court that is sincere about stopping an unconscionable lack of equal access to educational equity could remedy the unequal funding scheme by declaring the scheme is

80. *William Penn.*, 170 A.3d at 428.

81. *Plyler*, 457 U.S. at 209.

82. *William Penn.*, 170 A.3d at 464.

83. *Id.*

84. *Id.* at 466.

85. *Id.*

86. *Id.* at 463.

unconscionable because it can only be explained as an irrational prejudice against students who attend those underfunded public schools. From a rational public policy perspective, the lack of access to equal funding is a foreseeable proximate cause or substantial factor in a school's inability to teach a student enough skills to become functionally literate. A rational educational policy under the equal protection concept requires a school funding or management policy that avoids imposing a sense of inferiority on a student because the school she attends is so inferior that the school is known in the community it serves for its failure to provide functional literacy skills to its students.

II. CONSTITUTIONAL PROTECTIONS FOR EDUCATIONAL LITERACY ARE NECESSARY BECAUSE OF THE STRONG CORRELATION BETWEEN A DENIAL OF EDUCATIONAL LITERACY AND CRIME

The fact that the Constitution fails to expressly suggest a right to an education should not end the important continuing debate regarding whether an implied right to educational literacy is entitled to constitutional protections.⁸⁷ The lack of functional literacy is a virtual proxy for giving the majority of illiterates a prison sentence in a jail somewhere in America.⁸⁸ Because of the connection between illiteracy and its dominant role as a pipeline to prison a proper equal protection analysis requires the Court at its first opportunity to establish a helpful right to an equal access to an education.⁸⁹ Grade-school children receiving a public education who are at an identifiable risk of joining the pipeline to prison population should have an equal access right to require the government to equip them with enough objective literacy skills in the education process so as to avoid placing them at a significantly increased risk of becoming a prison inmate by not qualifying for even the most basic requirements in entry level occupations. Students who attend public schools that allow them to become functionally illiterate are not likely to acquire the skills necessary to stay out of prison. The majority of dysfunctional illiterate are not likely to enjoy either the freedom of religion, speech or press from a jail cell.⁹⁰

87. Bitensky, *supra* note 9, at 574.

88. *Id.* at 559.

89. *Id.* at 573.

90. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 36-37 (1973).

The vicious cycle of the school-to-prison pipeline begins with a lack of resources in schools.⁹¹ Schools with dishonorable reputations for serving as school-to-prison-pipeline have extremely inadequate financing, which creates overcrowded classrooms and unqualified teachers.⁹² As a result inadequate financing students are interconnected with what has been appropriately described as “second-rate educational environments.”⁹³ Schools are under a great deal of pressure by the No Child Left Behind Act (NCLB) of 2001,⁹⁴ which expanded federal funding for poor school districts.⁹⁵ The NCLB links standardized test scores to school funding in order to make a teacher and a school responsible.⁹⁶ Grants were awarded solely to those schools with test scores that measured up to a definite minimum.⁹⁷ As a result of the NCLB, “education within classrooms goes from well-rounded, rich foundational material to cold, methodical test preparation. Moreover, to better perform on these standardized tests and acquire better funding, teachers often encourage students who struggle with reading to dropout in order to improve overall test scores.”⁹⁸ The purpose of the NCLB is to help underprivileged school districts, but as implemented by many of those local public school districts, the NCLB has developed into a root cause for the prison to pipeline for these victimized children i.⁹⁹ According to Fatema Ghasletwala, Project Analyst at Mintz, Levin, Cohn, Ferris, Glovsky, and Popeo PC, if the NCLB task force had performed a socio-legal scrutiny of stakeholders and likely outcomes for academically at risks students, this unintended consequence may well have been avoided.¹⁰⁰

The question before the Court is whether a state’s educational funding policy has to be rational under the equal protection of the law concept

91. Fatema Ghasletwala, *Examining the School-to-Prison Pipeline: Sending Students to Prison Instead of School*, 32 J. CIV. RTS. & ECON. DEV. 19, 20 (2018).

92. *Id.*

93. See generally American Civil Liberties Union, *School-to-Prison Pipeline*, ACLU, <https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline?redirect=racial-justice/what-school-prison-pipeline> (last visited Feb. 11, 2019).

94. National Center for Fair & Open Testing, *How Testing Feeds the School-to-Prison Pipeline*, FAIRTEST (Mar. 31, 2010, 2:58 PM), <http://fairtest.org/how-testing-feeds-schooltoprison-pipeline>.

95. *The New Rules*, PBS.ORG: FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/schools/nochild/nclb.html> (last visited Feb. 11, 2019).

96. Ghasletwala, *supra* note 91, at 20.

97. *Id.*

98. *Id.*

99. Fair & Open Testing *supra* note 94.

100. Ghasletwala, *supra* note 91, at 20.

the basic answer is yes. It may not be the province of the Supreme Court “to create substantive constitutional rights in the name of guaranteeing equal protection of the laws.”¹⁰¹ However, the Court has a duty to determine under the equal protection of the law whether a state’s education policy is rationally related to a legitimate state interest. “Whether there is a right to education explicitly or implicitly guaranteed by the Constitution”¹⁰² the government may not implement educational policies that stigmatized children. Education like other services and benefits provided by the State must bear a rational relationship to teaching a student enough reading skills to avoid becoming functionally illiterate, and the unjustifiably heightened risk of joining the inmate population. If it is conceded that an “identifiable quantum level of education is a constitutionally protected prerequisite” to meaningful exercise of free speech or voting, then equitable expenditure must be required to attract qualified teachers.¹⁰³ When an expenditure formula fails to provide enough funds for equitable access to educational literacy, then it necessarily falls short of being rational because such a policy is an irrational, and expensive expansion of the state’s future prison population.

It is my contention that if a state’s financing system generates fundamentally unequal access to educational opportunities to any of its children, then such funding inherently supports a separate but unequal education system which violates the equal protections rights of underserved and underfunded students. Significant and irrational differences in spending levels and school management policies which fail to reasonably provide a child with an equal access to literacy needed to avoid the pipeline to prison, which is an equal protection violation.¹⁰⁴ A student who complains that the state has denied her enough educational literacy skills is in fact complaining that the state has unconstitutionally diluted her right to functional literacy.¹⁰⁵ Educational dilution occurs when equal access to functional literacy is denied to students who are of similar of age and experience, because of prejudice against students who attend school in poorer districts. Irrational prejudice against some students exists in public schools when those student’s schools are allowed to be routinely poorly managed unlike those students attending more affluent schools.

101. *San Antonio*, 411 U.S. at 33.

102. *Id.*

103. *Id.* at 36-37.

104. *See id.*

105. *Id.* at 38.

III. UNDER THE EQUAL PROTECTION PRINCIPLE IT IS DIFFICULT FOR A STATE TO PROVIDE A SUBSTANTIAL JUSTIFICATION FOR BURDENING STUDENTS WITH A DILUTED EDUCATION THAT LEAVE THEM FUNCTIONALLY ILLITERATE

Under the rationale of *Plyer v. Doe*,¹⁰⁶ a school funding policy cannot be rationally related to advancing any legitimate state economic or social goal in educating children when it leaves students functionally illiterate, and in some instances, encourages them to drop out of school. Thus, the Constitution's equal protection principle should hold it invalid. Under *Plyer's* intermediate scrutiny standard,¹⁰⁷ a state system of school financing that permits localities to tax and expend locally while negatively impacting the state's educational gap in functional illiteracy is not rationally related to a state's legitimate interest in advancing equitable access to public education. Such a failure to erase illiteracy in a public school invites havoc on American society because of the dangerous correlation between the lack of functional literacy and existing criminal activity.¹⁰⁸

Domestic security and nonviolence in America's streets are at risk of being lost due to the crisis created by the lack of functional literacy, given the clear and convincing connection between dysfunctional educational illiteracy and increased incidences of crime.¹⁰⁹ Nearly seventy-five percent of incarcerated adolescents in the United States have been labelled as functionally illiterate.¹¹⁰ Specifically, only twenty-five percent of prisoners possess a high school diploma.¹¹¹ Statistics demonstrate that states possessing the greatest proportions of school dropouts also possess the premier per capita prison populations, while in contrast, the states with reduced school dropout rates also have reduced prison populations.¹¹² The connection between dysfunctional illiteracy and the criminal enterprise is

106. 457 U.S. 202, 217-18 (1982).

107. See *id.*

108. Bitensky, *supra* note 9, at 559.

109. *Id.*

110. Patricia Puritz, *Juvenile Justice: Teaching Literacy Through Law-Related Education*, 75 A.B.A. J., 124 (1989).

111. Edward B. Fiske, *Lessons: Can Money Spent on Schools Save Money that Would be Spent on Prisons?*, N.Y. TIMES, Sept. 27, 1989.

112. *Id.*

certainly a significant issue in America, given that one in four households come into contact with crime on an annual basis.¹¹³

It is conceded that some educational opportunities benefit some more than others but an educational funding or spending policy that fails to accomplish functional literacy is not a rational use of a state's resources because giving a substantial number of students a diluted dysfunctional education because of the school they attend fails to advance a substantial government interest. If a state's educational system is beneficial for the majority¹¹⁴ without equitable access to literacy, it flunks the equal protection standard because the state will not be able to demonstrate a substantial justification for allowing its schools to serve as an avoidable pipeline to prison for a substantial minority of its students.¹¹⁵ In the twenty-first century, it should be clear that separate but unequal educational policies that tolerate functional illiteracy among its students are prohibited under the separate but equal doctrine because in the area of public education, *Brown's*¹¹⁶ rejection of state sponsored prejudices is not limited to race but should also be applied to any school funding or management policy that displays hostility to students without a substantial justification.¹¹⁷

A state is not permitted to reduce expenditures for education by arbitrarily excluding selected category of children from its schools.¹¹⁸ A state may not target for a diluted dysfunctional education lacking literacy, groups of students, because the State has a duty to provide all of its students with equitable access access to a school that teaches functional literacy skills.¹¹⁹ The research is clear that many of the public school children disabled by being classified as functionally illiterate, due to a diluted public education will drop out of schools that serve as a pipeline to prison, and suffer an unjustifiably high risk of becoming inmates in a jail in the United States.¹²⁰ It is very hard to comprehend what a State expects to accomplish by supporting policies that perpetuate a subclass of illiterates in the United States, given that such policies expand future expenditures for unemployment, subsidized

113. JACK E. BOWSER, EDUCATING AMERICA: LESSONS LEARNED IN THE NATION'S CORPORATIONS 15-16 (1989).

114. *San Antonio*, 411 U.S. at 39.

115. *See Plyler*, 457 U.S. at 230.

116. 347 U.S. 483.

117. *See Plyler*, 457 U.S. at 230.

118. *See id.* at 229 (citing *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969)).

119. *See id.*

120. Bitensky, *supra* note 9, at 559.

housing, and protection from crime.¹²¹ It is clear that every single benefit that may possibly be accomplished by burdening these children with a diluted functionally illiterate education is absolutely flimsy when one considers the long term price these children, the State, and the Nation has to pay.¹²² It is equally clear not a single child should suffer from state sponsored racial or literacy discrimination.¹²³ It should be very difficult for a state to provide either a rational or substantial justification for burdening a discrete group of its students with a diluted education that leave them functionally illiterate.¹²⁴

Equal access to functional literacy has a necessary role in preserving the very framework of our democratic society.¹²⁵ It is not rational to postpone the substantial social costs suffered by the American people when identifiable groups of schools or students are given functionally illiterate fake educational tools.¹²⁶ Fake literacy tools are so inferior and unequal that they fail to allow students to acquire the values and functional literacy skills needed to sustain our social order and escape the school to prison pipeline.¹²⁷ Because functional literacy skills play a crucial part in supporting America's political and cultural heritage, burdening isolated groups of children in public schools with a separate but equal access to functional literacy skills establishes a violation of one of the major objectives of the Equal Protection Clause: the ending of state sponsored walls of inequality that serve as unreasonable impediments to the achievement of functional literacy rooted in personal ability.¹²⁸

By burdening an identifiable group of underserved children with a lack of equitable access to acquire functional literacy skills, a state builds a wall that unreasonably blocks the avenue by which that group may perhaps foster increased self-esteem while winning over others in their community, including their very literate peers.¹²⁹ Functional literacy skills allow students in public schools to become resourceful and enterprising contributors to society.¹³⁰ Illiteracy is a continuing injury¹³¹ because a lack of competence in

121. *See Plyler*, 457 U.S. at 230.

122. *See id.*

123. *Id.*

124. *See id.*

125. *See id.* at 221.

126. *See Plyler*, 457 U.S. at 221.

127. *See id.*

128. *See id.* at 221-22.

129. *Id.* at 222.

130. *Id.* (citing *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972)).

131. *Id.*

basic reading and writing skills will harm the student who is denied equitable access to functional literacy skills in a public school every single day of her existence.¹³² The enormous social, economic, intellectual, and psychological harm that the denial of equal access to functional literacy causes a student, combined with the separate but equal wall it creates to block personal success, produces outcomes that are virtually impossible to reconcile with the structure of equality personified in the Equal Protection Clause.¹³³ The Court recognized 65 years ago in *Brown*, when it invalidated the separate but equal doctrine, that providing equal access to functional literacy is a very important function of state and local governments.¹³⁴ The flawed separate and unequal access to the development of literacy skills in education produces an unreasonable risk of destabilizing our democratic society.¹³⁵ Functional literacy is required for good citizenship or a public obligation,¹³⁶ and when the state teaches functional literacy, that right to literacy should be made accessible to every student on equitable terms.¹³⁷

CONCLUSION

Professor Derek W. Black has appropriately stated as a general matter, by any reasonable assessment that educational inequalities are currently growing considerably and this trend is likely to continue without appropriate federal judicial intervention.¹³⁸ Equal educational access opportunity is in jeopardy in Detroit if the plaintiffs claim that their school buildings are collapsing and their school curriculum neglect to teach ordinary literacy skills are true.¹³⁹ Federal courts have a duty provide a constitutional check against egregious separate but unequal abuses in educational polices that perpetuate dysfunctional illiteracy under the rationale of *Plyler*,¹⁴⁰ and perpetuate the separate but equal pipeline to prison under the rationale of *Brown*.¹⁴¹ The

132. *Plyer*, 457 U.S. at 222.

133. *See id.*

134. *Id.* (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

135. *Id.* at 223.

136. *Id.*

137. *Plyer*, 457 U.S. at 222 (citing *Brown v. Bd. Educ.*, 347 U.S. at 493).

138. Derek W. Black, *The Constitutional Compromise To Guarantee Education*, 70 STAN. L. REV. 735, 836 (2018).

139. *Id.*

140. *See Plyler*, 457 U.S. at 230.

141. *See Brown*, 347 U.S. 483.

disturbing drift toward tolerating separate but dysfunctional illiteracy in public schools in the absence of a substantial justification by the state is very plausibly independently eligible for federal judicial intervention under both *Plyler*¹⁴² and *Brown*¹⁴³ as violations of the Equal Protection Clause. I believe that it is plausible to declare that those separate but unequal educational policies that tolerate perpetuating functional intergenerational illiteracy¹⁴⁴ among students are prohibited under *Brown*'s rejection of the stigmatizing separate but equal doctrine.¹⁴⁵ In the area of public education *Brown*'s¹⁴⁶ rejection of the separate but equal doctrine is not limited to race, because it should also be applied to any school funding or management policy that perpetuates a subclass of illiterates without a substantial justification.¹⁴⁷

I agree with Professor Black's suggestion that any federal judicial involvement requires a constitutional concept.¹⁴⁸ My article advances the theory that the equal protection of the law concept as stated in the Equal Protection Clause is plausibly construed under the rationale of *Brown*¹⁴⁹ to prohibit public school policies that generate inferiority in students because they received a diluted education and *Plyler*¹⁵⁰ restricts the state from perpetuating a class of illiterates without a substantial justification. The Fourteenth Amendment's Equal Protection Clause¹⁵¹ explicitly guarantees that no state shall deny a person the equal protection of the law. In 2019, under *Brown*,¹⁵² equal protection in public education, at a minimum, should include prohibiting a separate but unequal inferior diluted education that unreasonably perpetuates the social evils of functional illiteracy. This equal protection framing offers a plausible theory for providing limited constitutional protection against the burden of an unequal education that perpetuates functional illiteracy¹⁵³ which perpetuates the pipeline to prison.¹⁵⁴

142. *Plyler*, 457 U.S. at 230.

143. *See Brown*, 347 U.S. 483.

144. *See Plyler*, 457 U.S. at 230.

145. *See Brown*, 347 U.S. 483.

146. *See id.*

147. *See Plyler*, 457 U.S. at 230.

148. Black, *supra* note 138, at 837.

149. *See Brown*, 347 U.S. at 494.

150. *Plyler v. Doe*, 457 U.S. at 230.

151. U.S. CONST. amend. XIV, § 1.

152. *See Brown*, 347 U.S. at 494.

153. *Plyler*, 457 U.S. at 230.

154. Bitensky, *supra* note 10, at 559.

THE CONSTITUTIONAL CRISIS OF GOVERNMENT OFFICIALS IGNORING FACTS IN POLICY CREATION.

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ABSTRACT

The First Amendment guarantees freedom of speech and freedom of religion (i.e. belief) to every American. United States citizens can choose to believe anything or nothing at all; no matter how willfully ignorant and misguided a belief is, the Constitution guarantees us the right to have it. Does the government have that same First Amendment protection as the public? The intent of the First Amendment was to protect the people from a totalitarian government that would limit their access to knowledge and their ability to explore and express opinions/beliefs. However, does the First Amendment protection apply to the government itself? When we delve deeper into the question, we are asking, does a government official lose some of their First Amendment rights by virtue of being a government official. The question seems innocuous on its face, but the constitutional implications are expansive. Do government officials have the right to subjectively believe things that are objectively inaccurate? Are things like bigotry and willful ignorance constitutionally protected rights for government officials? To say no is to deprive them of their First Amendment right, but to say yes might very well deprive citizens of their Fourteenth Amendment right to equal protection under the law. If we decide that willful ignorance in government officials is not constitutionally protected, is it constitutionally prohibited?

This article explores the intersection of First Amendment protection for people who serve in government and their responsibility to maintain the constitutionally protected liberties of the constituents they serve. Ultimately, the conclusion drawn is that government officials do not have the right to impose their personally held beliefs on the public through government action. When government officials willfully ignore established facts in the execution of their duties, they likely violate the constitutional rights of the public and risk implementing and perpetuating unjust law. Therefore, such actions are unlikely to be constitutionally protected and are likely to be constitutionally prohibited.

GOVERNMENT OFFICIALS IGNORING FACTS IN LAWMAKING JEOPARDIZES
THE PROGRESS OF CIVIL LIBERTIES

This article will answer the question of whether government officials are constitutionally protected, allowed or prohibited from acting on their personally held beliefs in the commissions of their duties. Along the way, this article will ask: when a government official's actions are motivated solely by personally held beliefs, does that rise to the level of a religious belief that might be protected under the First Amendment? However, before we address these constitutional issues, we must first examine a more fundamental question of "why is this relevant?" What is the harm of government officials ignoring facts and creating policy based on personally held beliefs?

Government officials willfully ignoring facts in favor of personally held beliefs possess a significant threat to the progression of civil liberties in this country. When laws are based on facts as they are understood at the time, laws can and will change as more information becomes available. However, when empirical data is no longer used as the basis of laws, it becomes more difficult to challenge unjust laws. As such, a government that ignores facts in favor of personal beliefs and biases is a threat to the individual liberties of its people.

History is rife with governments implementing unjust laws. Typically the justifications for those unjust laws are an underlying factually inaccurate assertion. Consider Jewish citizens in Nazi Germany; Jewish people were blamed for hardships caused by heavy sanctions imposed on Germany after World War I and the depression. This factual inaccuracy was used by the government to justify the systematic implementation of increasingly violent, unjust and oppressive laws.¹ Similarly, in the 16th-19th centuries, the prevailing scientific consensus was the inaccurate assertion that African descendants were genetically inferior and subhuman when compared with their European counterparts. These factually inaccurate scientific suppositions were used as a basis for a wide assortment of laws that limited

1. See Andreas Musolff, *What role do metaphors play in racial prejudice? The function of antisemitic imagery in Hitler's Mein Kampf*, 41 *PATTERNS OF PREJUDICE* (2007) (showing Musolff proposing that by utilizing dehumanizing language when referring to Jewish people, it made it easier for citizens and government officials to perpetrate crimes against Jewish people that would otherwise be considered morally reprehensible by the perpetrator). See also Sheri Berman, *Civil Society and the Collapse of the Weimar Republic*, 49 *WORLD POLITICS* (1997).

access to civil liberties and equal protection under the law.² As such, one of the first steps to eliminating inequitable legal regimes was to systematically disprove those inaccurate factual assertions used to justify the creation and perpetuation of unjust laws.

Over the course of the 19th and 20th centuries, African Americans distinguished themselves as scholars, artists, athletes, and war heroes.³ This systematic effort called into questions the long-held assertion that African Americans were subhuman. Without an underlying justification for the differences between people based on the color of their skin, it became increasingly difficult to justify disparate and violent treatment under the law. As such, societal victories were accompanied by legal victories that forced both state and federal legislatures to change laws that discriminated on the basis of race.⁴

Major advancements in laws and policies related to civil liberty regularly follow this same trajectory. The underlying assumptions used to justify a discriminatory or oppressive set of policies is disproved or called into question. Then without this underlying justification, a group is able to successfully challenge the policies in one or more branches of government. We see this process in the progression of several bodies of law including civil rights, women's rights, LGBTQ rights, and even consumer laws. For example, there was a period of time where companies were allowed to excessively limit their liability in consumer products by unilaterally forcing consumers to agree to liability waivers. This was justified by the underlying assertion that consumers who do not want to sign away this liability can negotiate these provisions out of their contract. When it became clear that this underlying assumption was inaccurate, we saw a change in consumer protection laws.⁵ When citizens can challenge inaccurate factual assertions, they have the ability to challenge unjust laws. As such, it can be seen as a

2. See Joyce E. King, *Dysconscious Racism: Ideology, Identity, and the Miseducation of Teachers*, 60 J. NEGRO EDUC., 133, 136-138 (1991). The author postulates that the prevailing belief that Africans were less than human, was a prerequisite to finding a moral justification for the atrocious nature of the Transatlantic Slave Trade.

3. See e.g. F. Michael Higginbotham, *Soldiers for Justice: The Role of the Tuskegee Airmen in the Desegregation of the American Armed Forces*, 8 WM. & MARY BILL RTS. J. 273 (2000); Frederick Douglass, *What to the Slave is the Fourth of July?*, 1 HEATH ANTHOLOGY AM. LITERATURE (1852); See also, Denise C Morgan, *Jack Johnson: Reluctant Hero of the Black Community*, 32 AKRON L. REV. (1999).

4. See Thurgood Marshall, *An Evaluation of Recent Efforts to Achieve Racial Integration in Education through Resort to the Courts*, 21 J. NEGRO EDUC. (1952).

5. See Arthur Allen Leff, *Unconscionability and the Crowd-Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349, 350-351 (1969).

necessary part of democracy for citizens to have the ability to present government officials with overwhelming scientific studies or objective evidence and have that information sway their actions.

Conversely, the advent of tyrannical governance often begins with the dismissal of objective facts. Some of the most brutal dictatorships and violent reigns in recorded history have begun with the suppression of information or a call to ignore objective and observable facts. The dark age of Europe, the Spanish Inquisition, the rise of Nazi Germany, and the Soviet Union are all examples of governments that distance themselves from facts and objective inquiry.

Now we can readily observe chasm between government officials and objective facts and empirical data. Sometimes this breakdown is a simple misunderstanding. In an increasingly technological age, the vast majority of laws are still made by people with little-to-no technical training.⁶ Often, government officials are forced to develop and implement laws in cutting-edge technical industries without a clear understanding of how those industries work. For example, Mark Zuckerberg was asked by congressional members to explain how a website that does not charge money to its users can make money.⁷ The congressional members were considering whether to impose federal regulations on social media websites and did not have a clear understanding of the market for targeted ads for application users, which is the backbone industry potentially being regulated. These kinds of innocuous misunderstandings are generally corrected by providing government officials with additional information.

When additional information is provided and government officials continue to steadfastly adhere to their preconceived beliefs, this disconnection between facts and belief is a more conscious choice. Examples of this phenomenon include government officials that choose to implement policy without performing basic research or soliciting the advice of subject matter experts. This conscious choice can also be accomplished by

6. Manning, J. E., *Membership of the 114th Congress: A Profile*, Washington, DC: Congressional Research Service, (2014) (noting, of the 538 members of congress in 2014, 438 members in the United States House of Representatives and 100 members in the Senate, congress had only: 18 physicians, 3 physicians in the Senate and 15 physicians in the House, 4 nurses, 3 dentists, 3 veterinarians, 3 psychologists, 1 pharmacist, 1 physicist, 1 microbiologist, 1 chemist, all in the House, 1 optometrist in the Senate, and 8 engineers, 1 in the Senate and 7 in the House).

7. See Mark Zuckerberg testifies on Capitol Hill. April 10, 2018, ASSOCIATION V.A.A. (2018), <https://www.youtube.com/watch?v=XmGbf5WMIZ4>.

intentionally selecting questionable sources of data that confirm pre-existing biases. In some cases, government officials may have or be presented with well understood factual information from trusted sources, yet choose to ignore the data altogether. In all these cases, government officials are choosing a personally held belief over facts.

Historically, examples of government officials choosing to hold personal beliefs over facts have been seen in the criminal justice system. For example, during the crack epidemic of the 1980s, there was a prevailing belief that crack/free-base cocaine was more dangerous than powder cocaine. The belief was that crack-cocaine was, both, more likely to cause overdoses to the user and more likely to cause the user to perpetrate violent crimes.⁸ This belief was not substantiated by scientific evidence and based solely on anecdotal experiences.⁹ Additionally, in the 1990s, government officials coined the phrases “Super Predators,” to describe criminals that have an innate inability to be rehabilitated.¹⁰ This conclusion was drawn largely without empirical study or consultation with experts in the field of psychiatry, criminology, or sociology.¹¹

Currently, there is an overwhelming scientific and anecdotal evidence that the climate is changing and being destabilized at an increasingly severe

8. Charles J. Ogletree, *Testimony of Charles Ogletree: Discriminatory Impact of Mandatory Minimum Sentences in the United States*, 18 FED. SENT’G REP. 273, 273-275 (2006) (noting, with a rapid increase in the use of crack over several years from 1984 to 1986, many myths about the properties of ‘crack’ were established in the popular culture. For example, crack was thought to be so much more addictive than powder cocaine that it was ‘instantly’ addicting. It was said to cause especially violent behavior in those who used the drug. It was said to destroy the maternal instinct leading to the abandonment of children. It was said to be a unique danger to developing fetuses and it was said that a generation of “crack babies” would plague the nation’s cities for their lifetimes. Such dramatic claims were widely repeated in the news media. As a result of the enormous fear of crack, many in Congress said that the existing sentences for drug violations were inadequate to deal with the dangers of this new drug. In June 1986, the nation was stunned by the death of University of Maryland basketball star Len Bias, who was African American and died of a drug and alcohol overdose three days after being drafted by the Boston Celtics of the National Basketball Association. Many in the media and public jumped to the conclusion that Bias died of a crack overdose. Significantly motivated by Bias’ death, Congress quickly enacted the 1986 Anti-Drug Abuse Act. In large part this law was passed based on the notion that America’s inner cities were being devastated by the infiltration of crack cocaine. However, it was later revealed, during the trial of the person accused of supplying Bias with drugs, that he actually died of a powder cocaine overdose.¹¹ By the time the truth about Bias’ death was discovered, Congress had already passed the harsh discriminatory crack cocaine law).

9. *See Id.*

10. *See* Linda S Beres & Thomas D Griffith, *Demonizing Youth*, 34 LOY. L. REV. 747, 749 (2000).

11. *See Id.*

rate.¹² In the last five years, there have been numerous record-breaking storms, and natural disasters that are categorized as once-in-a-lifetime occurrences that are happening on a yearly basis.¹³ The vast majority of scientists agree that these climate changes are attributed to man-made pollution in a well-understood phenomenon of ozone layer depletion and accumulation of “greenhouse” gases in the atmosphere.¹⁴ Globally the scientific community has produced several peer-reviewed studies that clearly articulate that the rate of temperature increase, polar ice-cap melting, and rising sea levels are entering a near irreversible phase, and require immediate global action.¹⁵ Even military officials acknowledge that climate change, if not addressed, could become one of the greatest threats to the national security of the United States.

Despite overwhelming scientific consensus, reproducible scientific experiments, and well-documented increases in the severity of extreme weather conditions in the last twenty years, there are still several government officials who refuse to acknowledge well-documented facts about climate change. In the face of overwhelming opposing scientific and anecdotal evidence, numerous politicians still maintain the belief that man-made climate change is impossible. Furthermore, these government officials believe that any observed climate change is a temporary fluctuation that will self-correct over time.

12. See e.g. Intergovernmental Panel on Climate Change, *Climate change 2007: The Physical Science Basis*, 6 AGENDA (2007); D.R. Reidmiller, C.W. Avery, D.R. Easterling, K.E. Kunkel, K.L.M. Lewis, T.K. Maycock, & B.C. Stewart, *Impacts, Risks, and Adaptation in the United States* § II, U.S. GLOB. CHANGE RES. PROGRAM ED., 4TH NAT’L CLIMATE ASSESSMENT, 25-58 (2018).

13. See D.R. Reidmiller, Et Al., *Impacts, Risks, and Adaptation in the United States* § II, U.S. GLOB. CHANGE RES. PROGRAM ED., 4TH NAT’L CLIMATE ASSESSMENT, 25-32, 38-58, 1286-1288 (2018) (In addition to widespread hurricanes and wildfires that the report directly attributes to increases in global temperature, there are also other major issues. The report documents an alarming devastation to marine life including a 50% mortality rate to Hawaiian coral. Also the rising sea levels threatens cities, neighborhoods, and even military installation. The report attributes over \$1 trillion dollars of damage and spending directly to issues relating to climate change).

14. See Intergovernmental Panel on Climate Change, *Climate change 2007: The Physical Science Basis*, 6 AGENDA, 467-469 (2007).

15. See Intergovernmental Panel on Climate Change, *Global warming of 1.5°C: An IPCC Special Report on the Impacts of Global Warming of 1.5°C Above Pre-Industrial Levels & Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, & Efforts to Eradicate Poverty*, WOR’D. MET’L ORG. GEN. SWITZ. (2018), <https://www.ipcc.ch/sr15/>.

These beliefs by themselves present no constitutional question; all United States Citizens are guaranteed the constitutional right to believe anything or nothing. However, government officials possess and utilize the ability to act on these ideas in a way that imposes their beliefs on the country as a whole. Therefore, unsubstantiated beliefs held by government officials typically result in major changes to policies, laws and agency guidelines.

When there was a prevalent belief that crack cocaine posed a significantly higher risk to the public, Congress implemented mandatory minimum sentencing that punished crack cocaine users 100 times more severely than powder cocaine users.¹⁶ The emergence of “super-predators” as an unofficial criminal classification cause harsher sentencing guidelines, including mandatory 25-years-to-life sentences for certain repeat offenders.¹⁷

In the case of climate change, government officials who maintain their disbelief in climate change routinely advocate for and implement policies that are projected to actively promote increased climate change. Donald Trump is outspoken in his belief that climate change does not exist.¹⁸ When he became president of the United States he rolled back Environmental Protection Agency regulations on pollution and withdrew the United States from commitments to clean energy and limiting pollution.¹⁹

16. See Ogletree, FED’L SENT’G REP., 273, 274-275 (2006) (noting, Despite the fact that the myths and misconceptions that underpinned the sentencing disparity between crack and powder cocaine was repeatedly disproven by empirical study, it took over two decades before a meaningful revision of the sentencing guideline was implemented); See also Kyle Graham, *Sorry Seems to be the Hardest Word: The Fair Sentencing Act of 2010, Crack, & Methamphetamine*, 45 U. RICH. L. REV. (2010); Miriam Gohara, *Keep On Keeping On: Maintaining Momentum for Criminal Justice Reform During the Trump Era*, (2018) (In 2010, President Obama signed into a law the Fair Sentencing Act of 2010 which, among other things, reduced the disparity between crack cocaine (“cocaine base”) and powder cocaine from being a 1:100 ratio to a 1:18 ratio. This meant that a defendant would have to be convicted of possessing approximately 28 grams of crack cocaine to get the same sentence as somebody with 500 grams of powder cocaine; whereas, they used to only need to be in possession of 5 grams. In 2017 and 2018, the federal government is considering additional).

17. See Beres ET AL., *supra* note 12.

18. See Coral Davenport & Kendra Pierre-Louis, *U.S. Climate Report Warns of Damaged Environment and Shrinking Economy*, N.Y. TIMES (2018), <https://www.nytimes.com/2018/11/23/climate/us-climate-report.html>.

19. See Stephanie Ebbs, *Scientists: Time Running Short Before Climate Change Effects are 'Irreversible'* (2018), ABC NEWS, <https://abcnews.go.com/International/united-nations-report-details-looming-climate-crisis/story?id=58354235>. Despite the scientific consensus on climate change, after Donald Trump became president, he pulled the United States out of the Paris Climate Agreement. The Paris Climate Agreement is an accord where the signatory countries pledged to drastically reduce greenhouse gas emissions.

Aren't these just policy decisions that elected officials are given the constitutional right to make? If we don't agree with the decisions then we vote them out of office, right? Characterizing these types of decisions as politics is inaccurate. Political policy decisions are made by using the same set of facts and deciding what to do based on those facts. For example, both pro-big-government and anti-big-government politicians agree that there is a significant wealth gap in the United States, but they disagree on what should be done in the face of that immutable fact. Anti-big-government politicians believe that by allowing unfettered capitalism, the matter will resolve itself; whereas pro-big-government politicians believe that the wage inequity is a market failure that must be solved by the federal government. Neither side disputes the underlying fact; they only disagree about the solution. This is an example of a political disagreement and does not raise a constitutional question.²⁰

Conversely, consider the origin of the universe. There are deist & theist politicians who believe that the universe was created by a deity, and there are atheist politicians who believe that the universe came into being based on scientific mechanisms. This is a different perception of the underlying fact of how the universe came into being, and there is no objective evidence that strongly supports one interpretation over the other. Thus, both sides are essentially expressing a religious belief that is not supported in a compelling way by empirical data. As private citizens, acting on those beliefs are constitutionally protected; however, it would create a constitutional issue if the government officially endorses either position over the other.²¹

These previous examples were fairly obvious because one specifically involved religious beliefs. However, is there a point at which a fanatical

20. See e.g. Philippe Aghion & Patrick Bolton, *A theory of trickle-down Growth and Development*, 64 REV. ECON. STUDIES 151, 151-153 (1997); Elizabeth Martinez & Arnoldo Garcia, *What is Neoliberalism?*, CORPWATCH: HOLDING CORPORATIONS ACCOUNTABLE (Jan. 1, 1997).

21. See e.g. *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 723-724 (M.D. PA 2005); *Epperson v. Ark.*, 393 U.S. 97, 106-110 (1968); *Edwards v. Aguillard*, 482 U.S. 578, 583-585 (1987); *Selman v. Cobb Cty. Sch. Dist.*, 449 F.3d 1320, 1322-1323 (11th Cir. 2006) (noting that teaching a subject matter is not the same thing as officially endorsing a stance. The subject of what can be taught as part of a primary or secondary school curriculum has been the subject of numerous court cases and legislative & school board battles. One of the biggest controversies is whether creationism i.e. theist and deist belief that an intelligent entity is responsible for the origin of the universe can or should be taught as part of science curriculum as a theory associated with the origin of the universe. The current holding of the court is that creationism may be taught in philosophy, religion, history, and other humanities classes, but that it should not be taught in science class).

belief in a supposition crosses the line from being a political ideology and becomes something more akin to a religious belief? Consider climate change; it is an objective and proven fact that climate change is occurring on a global scale. In order for it to be a political policy decision, those who oppose measures to slow and/or reverse climate change would have to agree to that fact. If those government officials who oppose climate change agreed that pollution is leading to the irreversible destabilization of the environment, they would still have the latitude to oppose environmentally friendly policies. For example, it is a constitutionally acceptable policy to say that “we believe other countries will solve climate change and continuing to pollute will give us a competitive advantage in the global market” or that “figuring out how to live in the world post-climate-change is an issue for our children’s and grandchildren’s generations.” Even though those would be questionable political standpoints to make, they are constitutionally acceptable political positions.²²

However, a constitutional question arises when government officials who oppose environmentally friendly regulations don’t make these types of political statements. Opposition to environmental regulations are often basing their opposition on the unsubstantiated belief that climate change is not occurring. Despite the overwhelming facts, studies and consensus that man-made climate change is occurring, these government officials maintain the belief that climate change does not exist.²³ As a private citizen, acting on

22. See Michael Shellenberger & Ted Nordhaus, *The Death of Environmentalism Global Warming Politics in a Post-Environmental World*, 1 GEOPOLITICS, HIST., INT’L REL. (2009) (noting that previously environmental protection, and the lack thereof, was argued on more of a political basis. When the subject matter was broached in the 1990s, it was framed as a political question of whether we should sacrifice jobs or continue to damage the environment. As the cost and consequences of relaxed environmental protection have become increasingly damaging to global economies, the jobs vs. environment debate is becoming less compelling).

23. See e.g. *Global warming of 1.5°C: An IPCC Special Report on the Impacts of Global Warming of 1.5°C Above Pre-Industrial Levels & Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, & Efforts to Eradicate Poverty*, supra note 15; D.R. Reidmiller, C.W. Avery, D.R. Easterling, K.E. Kunkel, K.L.M. Lewis, T.K. Maycock, & B.C. Stewart, *Impacts, Risks, and Adaptation in the United States* § II, U.S. GLOB. CHANGE RES. PROGRAM ED., 4TH NAT’L CLIMATE ASSESSMENT (2018); Stephanie Ebbs, *Scientists: Time Running Short Before Climate Change Effects are 'Irreversible'* ABC NEWS (2018), <https://abcnews.go.com/International/united-nations-report-details-looming-climate-crisis/story?id=58354235>; Matthew C Nisbet, *Communicating Climate Change: Why Frames Matter for Public Engagement*, 51 ENV’T SCI. POL’Y FOR SUSTAINABLE DEV. (2009); Michael Shellenberger & Ted Nordhaus, *The Death of Environmentalism Global Warming Politics in a Post-Environmental World*, 1 GEOPOLITICS, HIST., INT’L REL. (2009).

such a belief is constitutionally protected. However, when government officials form policy based on such a belief, they are, essentially causing the government to adopt a particular type of personally held belief.

The question this article seeks to answer is whether this kind of belief can be deemed to be a religious belief under the First Amendment. If so, is this type of government expression of religious beliefs constitutionally protected, allowed or prohibited?

WILLFULLY IGNORING FACTS IN FAVOR OF PERSONALLY HELD BELIEFS
WOULD LIKELY CONSTITUTE RELIGIOUS BELIEFS THAT ARE PROTECTED
UNDER THE FIRST AMENDMENT.

The first question before us is whether willfully ignoring facts on a particular subject matter can rise to the level of a religious belief. The First Amendment guarantees the right to the free expression of religion under the United States Constitution.²⁴ The question becomes, how does the Constitution define religion?

Neither the Supreme Court nor Congress has clearly articulated a definition of religion as defined under the First Amendment.²⁵ In fact, there is a prevailing belief that attempting to define religion risks oppressing people.²⁶ If at any time in human history we established a definition of what is accepted as a religion, there would have been some faith excluded. If the definition had established the need for one or more deities as a prerequisite for religion, the definition would have excluded non-theist religions like Buddhism, Confucianism, and Hinduism. Even defining religion as a belief in something specific or defined is limiting and would deprive groups like Atheists and Agnostics of the protection to explore their faith or the lack thereof.

Despite this conundrum, the court does try to give some guidance to what constitutes a religion. In order to be a religious belief, the belief must

24. U.S. CONST. amend. I (Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances).

25. See Jesse H. Choper, *Defining Religion in the First Amendment*, 1982 U. ILL. L. REV. 579, 587-91 (1982).

26. See T. Jeremy Gunn, *The Complexity of Religion and the Definition of Religion in International Law*, 16 HARV. HUM. RTS. J. 189, 198 (2003).

be greater than a simple life philosophy or political viewpoint.²⁷ However, there is no consistent guidance to where the line between an opinion and a religious belief lies. The closest that we have come to a definition are court opinions that identify certain types of beliefs as clearly religious and clearly not-religious.

The First Amendment definition of religion certainly encompasses “traditional” theist religious beliefs. The Supreme Court has repeatedly affirmed that theist religions fall within the definition of “religion” as used in the First Amendment.²⁸ As such, beliefs that are grounded within a theist religious system are clearly protected under the First Amendment.

Additionally, the Supreme Court has stated that beliefs that hold a similar weight to a deity in a person’s life can be considered religious. This means that non-theist beliefs that are used to govern an individual’s life and create a higher obligation than human interactions are viewed as a religious belief that is protected under the First Amendment. As such, both non-theist established religions and non-theist strongly held belief systems are covered under the First Amendment.²⁹ This even applies in cases where the belief is not well articulated.³⁰

27. See *Wisconsin v. Yoder*, 406 U.S. 205, 215-216 (1972) (In this case the court stated in the dicta that in order to rise to the level of First Amendment protection and be considered a religious belief, the belief must be more than just a philosophical or personal choice).

28. See e.g. *Davis v. Beason*, 133 U.S. 333, 342 (1890) (In the dicta of this case, the court states that “The term ‘religion’ has reference to one’s views on his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will); See also *Everson v. Board of Ed. of Ewing*, 330 U.S. 1 (1947); *United States v. Seeger*, 380 U.S.163 (1965).

29. See *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) (Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others); See also *United States v. Ballard*, 322 U.S. 78, 86-87 (1944) (Freedom of thought, which includes freedom of religious belief, is basic in a society of free men); *Board of Education v. Barnette*, 319 U.S. 624 (1943) (It embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. . . . But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain. The First Amendment does not select any one group or any one type of religion for preferred treatment).

30. See *United States v. Seeger*, 380 U.S. 163, 165-167 (1965) (Interpreting the term “Supreme Being” to be expansive enough to include a general “belief in and devotion to goodness and virtue for their own sake).

The court has further affirmed that decisions and actions that are not religious on their face can still be protected by the First Amendment if they are grounded in a religious belief. For example, a parent's decision not to educate their child in a public or private school system past the eighth grade is not on its face religious. However, the court struck down laws requiring Amish families to educate their children past the eighth grade on the basis that the law violated their First Amendment protection for freedom of religion.³¹ In this case, the Amish believed that education passed the eighth grade was not necessary for their lifestyle, which was closely tied to their religious beliefs. Additionally, the Amish families in this case believed that further education in the school system would jeopardize their children's chances for salvation. As such, even though this belief was not directly religious, it was sufficiently grounded in their religious beliefs to warrant protection under the First Amendment.

Outside of these clearly defined contexts, the definition of religion does become somewhat amorphous. There is not a consistent test for what is considered a religious belief that enjoys protection under the First Amendment. However, these definitions alone already encompass quite a large amount of activity that may not be considered directly religious. For example, the belief that one race is superior to another race of people would not be traditionally considered a religious belief. However, now and throughout history, there are a significant number of white supremacy groups who ground their beliefs in their chosen religious texts.³² Additionally, assertions about moral imperatives and the capability of humankind can often be grounded in some form of religious belief.

This amorphous definition of religion can and does encompass a lot of beliefs. Is there a viable rationale for asserting that the personal beliefs that cause someone to ignore clear and present facts should be considered religious? Yes, there is. A hallmark of religious beliefs has always been faith and obedience to that faith.³³ In the case that we are describing, the individual

31. See *Wisconsin v. Yoder*, 406 U.S. 205, (1972).

32. See e.g. DAVID M GOLDENBERG, *THE CURSE OF HAM: A CASE OF RABBINIC RACISM?*, *STRUGGLES IN THE PROMISED LAND* (1997); Anton L Allahar, *When Black First Became Worth Less*, 34 *INT'L J. COMP. SOC.* (1993).

33. See *United States v. Seeger*, 380 U.S. 163, 174-177 (1965) (Within that phrase would come all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent. The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition) (Interpreting that this definition of religious

is exhibiting faith in something that exceeds reason and facts. Despite overwhelming facts to the contrary, they are remaining steadfast and obedient to their beliefs.

A prime example of this kind of faith is the people who continue to believe that climate change is not real. All currently available facts indicate that climate change threatens the lives, livelihood, and well-being of the majority of the planet. Unlike people of the past, we are currently witnessing the preamble of the devastation that the destabilized climate will cause. If in the face of repeated category four/five hurricanes, devastating wildfires, sinking cities and once in a millennia storms you can maintain the belief that everything is going to be fine and the world will fix itself, then what is that if not faith?³⁴ And if your faith is so strong that you would oppose metrics to stop that danger, you are clearly being obedient to your faith to a fault.

As such, if a challenge was brought stating that the personal belief causing a government official to ignore overwhelming factual assertions and empirical data was a religious belief, there is enough basis for the court to find that this personally held belief is a religious belief.

THE FIRST AMENDMENT PROTECTS THE RIGHT OF GOVERNMENT OFFICIALS TO MAINTAIN RELIGIOUS BELIEFS.

Do First Amendment protections actually apply to government officials? All citizens of the United States of America are guaranteed the protection of the First Amendment of the Constitution. As such, surely First Amendment protection must also apply to government officials. Just because someone joins the government shouldn't mean that they forfeit constitutional protections. Citizens cannot be deprived of constitutional protections based on choosing a particular occupation, right?

The answer to that question is not as straight forward as one might think. The First Amendment and the Constitution, in general, were designed to protect private citizens from the threat of a totalitarian government. The provisions limit the government's ability to impose totalitarian or unjust regulations on its citizens. However, because of that distinction, it is not clear

training or belief endorsed by the court looks at the weight of a belief as compared to other influences that the person may have e.g. faith in that belief. This case shows a willingness of the court to accept beliefs that are not explicitly part of a religion as religious in nature and deserving of First Amendment protection).

34. See *supra* note 12.

how much of the Constitution actually applies to the government's regulation of itself. In other words, we have to ask to what extent the Constitution that protects citizens from their government also protects the government from itself.

An in-depth analysis of whether the government as an entity enjoys protection under the Constitution and the Bill of Rights is somewhat outside the scope of this discussion. However, it would be impossible for the government as an entity to enjoy all of the same constitutional protections as its citizens. In order to prove that point, we need not look further than the First Amendment. It expressly forbids the federal government from establishing a religion. Additionally, the Fourth Amendment protects people against "unreasonable searches and seizures" by the government.³⁵ If the Fourth Amendment were applied to the government as an entity to the same extent that it is applied to private organizations, it would create an odd paradox. This would suggest that the government might have to go to the court to get permission to view its own documents. As such let us assume that the government as an entity does not enjoy full protection under the First Amendment.

The government is not just an entity, it is also a group of United States citizens. Let us ask the question of whether a citizen forfeits their protection under the First Amendment by joining the federal government. Once a person becomes a member of the federal government they establish a unique relationship with the government. Ultimately, a review of the literature will show that, because of that unique relationship, government officials can be required to forfeit some of the protection that they would normally enjoy under the First Amendment.

The application of the First Amendment to government employees can be limited for compelling government interests. The court has affirmed the right of the government to limit the ability of government officials and employees to participate in certain political activities that would otherwise be protected under the First Amendment. The Hatch Act of 1939 (An Act to Prevent Pernicious Political Activities), expressly limits most federal government employees and officials from participating in partisan political activities.³⁶ The basis of this imposition on First Amendment protection is

35. 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).

36. See Henry Rose, *A Critical Look at the Hatch Act*, 75 HARV. L. REV. 225 (1962).

the concern that politics could make government officials become derelict in their duties.³⁷ Additionally, there was a concern that public officials could use their public position for improper leverage in attaining political favor. This Act has been the subject of multiple legal challenges because of its blatant imposition on protected First Amendment rights.³⁸ Nevertheless, the Supreme Court has affirmed the constitutionality of the Act because of the compelling government interest that forms the basis of the act.³⁹

Another area where government officials can enjoy less protection under the First Amendment, is the area of freedom of speech. As a general matter, the First Amendment protects a private citizen's right to free speech from government interference.⁴⁰ However, when the government is acting as an employer they have a unique relationship with citizens. Generally, citizens working for private companies are "at will" employees that can be fired for any reason, or no reason at all. As such, if an employee says something that an employer does not like, generally, the employer has the right to terminate that employee's employment.

When an employee works for the federal government, the court has given employers some rights to cartel speech that would cause harm or inefficacy in the workplace. The standard for evaluating acceptable limitations to free speech has changed over the years. In the mid-20th century, the prevailing viewpoint of the court could be characterized as a "rights-privilege" distinction. The court found that government employees had the right to freedom of speech and could exercise that right. The employee, however, did not have the right to employment with the government and could lose that employment based on what was said.⁴¹

37. *See Id.*

38. *See e.g.* *Public Workers v. Mitchell*, 330 U.S. 75 (1947); *Broadrick v. Oklahoma*, 409 U.S. 1058 (1972).

39. *See* *USCSC v. National Association of Letter Carriers*, 413 U.S. 548, 555-557 (1973) (the court reversed a decision declaring that the Hatch Act of 1939 was unconstitutional on its face. In this case the court affirmed that the government has a reasonable interest in limiting rights that would otherwise be protected under the First Amendment).

40. *See* Geoffrey R Stone, *Free Speech and National Security*, 84 *IND. LJ* 939, 955-957 (2009) (protection for free speech is not unfettered or absolute. When the government has a compelling reason or there is clear and present danger, the courts have allowed government to place limitations and penalties on certain free speech. For example, the government would have the right to stop a newspaper from publishing troop movements in an active warzone).

41. *See* *McAuliffe v. Mayor of City of New Bedford*, 29 N.E. 517, 520-521 (Mass. 1892). The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are

Currently, it seems that the court has settled on a three-pronged inquiry: (1) is the speech regarding a public issue? (2) Was the speech made in the commission of their duties? And (3) does the harm to the workplace outweigh the employee's compelling interest for free speech? If the speech does not involve a public issue or the speech is directly related to the commission of the employee's duties, the government has wide latitude to regulate the speech. If the speech does concern a public issue and is not related to the duties of their employment, then the court will balance the compelling interests of the government versus the interest of the employee to engage in free speech. Generally, the court will expect that the government officials that seek to limit the free speech, can show some harm to workplace efficacy, harmony, efficiency, or some other specified harm in order to take advantage of this provision.⁴²

From these court cases, we can conclude that the Supreme Court does affirm that government employees do enjoy First Amendment protections. Although the Supreme Court has upheld the government's compelling interest in limiting government officials' unfettered protection under the First Amendment, government officials are not alone in these types of rulings. When the court found a compelling justification for legislation they have upheld the legislation even in the context where it limits a citizen's First Amendment right.

The one area that the court has essentially given absolute First Amendment protection is the freedom to believe in a particular belief. The court has protected the unfettered right of religious freedom. The court has protected the unfettered right of religious freedom and has held that laws cannot interfere with mere beliefs and opinions.⁴³ The court has stated that the Religious Freedom clause of the First Amendment guarantees the absolute right for citizens to believe anything or nothing at all. That absolute right has been extended to government officials as well.

Although the freedom to believe is generally seen as absolute, the freedom to act on those beliefs has consistently been held to have reasonable limitations. The court has established that the government has the right to regulate and deem activities illegal even if doing so may prevent someone

offered him. On the same principle the city may impose any reasonable condition upon holding offices within its control. This condition seems to us reasonable, if that be a question open to revision here.

42. See *e.g.* *Arnett v. Kennedy*, 416 U.S.134 (1974); *Pickering v. Board of Education*, 225 U.S. 1 (1968); *Connick v. Myers*, 461 U.S. 138 (1983).

43. See *Sherbert v. Verner*, 374 U.S. 398 (1963).

from freely expressing their religion; provided that the government was doing so based on a secular and non-religious basis.⁴⁴ Therefore, if we apply this same standard to government officials, we can conclude that they are most likely permitted to believe in the course of their duties, but the Constitution is unlikely to protect them if they act on those beliefs (freedom to act is discussed further in later sections).

It is worth noting that First Amendment protection does not guarantee employment with the government. This is something that will be discussed further in later sections, but the court has found that the government has a compelling reason to terminate the employment of certain employees based on their expression of their First Amendment rights. Simply put, the courts determined that you have the absolute right to say what you want, but not the absolute right to work for the government. This applies primarily to speech, which we have already discussed, but how does that apply to the mere belief?

⁴⁵

Current jurisprudence says that a government official cannot be terminated for merely having a particular belief. However, by expressing those beliefs, the individual may run afoul of the exceptions to First Amendment protections for free speech that we previously discussed. For example, it is unlikely to be constitutionally permissible for a government official to be terminated for believing that a particular nationality or race is inferior to another. However, if that official proclaims that belief publicly, that statement that could disrupt the efficacy of the workplace. As such the court would likely uphold the termination of such employee.⁴⁶

There is also a Fourteenth Amendment concern that is associated with government officials having certain beliefs. The concern is, if you believe

44. See *Davis v. Beason* 133 U.S. 333 (1890) (the court determined that the government had the right to outlaw polygamy even though doing so would prevent the free exercise of certain religious practices for members of religions that practiced polygamy. It is worth noting that the constitutionality of banning polygamy may be challenged as the court moves further from traditionally held views on what are “[C]rimes by the laws of all civilized and Christian countries.”); See also *Romer v. Evans*, 517 U.S. 620, 648 (1996) (Scalia, A., dissenting) (The Constitutions of the States of Arizona, Idaho, New Mexico, Oklahoma, and Utah to this day contain provisions stating that polygamy is ‘forever prohibited.’); See ARIZ. CONST. art. XX, par. 2; IDAHO CONST. art. I, § 4; N. M. CONST. art. XXI, § 1; OKLA. CONST. art. I, § 2; UTAH CONST. art. III, § 1 (polygamists, and those who have a polygamous "orientation," have been "singled out" by these provisions for much more severe treatment than merely denial of favored status; and that treatment can only be changed by achieving amendment of the state constitutions. The Court's disposition today suggests that these provisions are unconstitutional...).

45. See e.g. *Arnett*, 416 U.S. at 135; *Pickering*, 225 U.S. at 5; *Connick*, 461 U.S. at 139.

46. See *McAuliffe*, 29 N.E. at 41.

something completely, can you resist the temptation to act on that belief, even if doing so would violate someone's constitutional right to equal protection under the law? In other words, if you have an innately discriminatory belief that would violate the Fourteenth Amendment if acted upon, can you be preemptively removed from your position? This question is not one that we have a clear answer to, because often these types of biases do not become known until after a government official violates the rights of a citizen. Or at the point that this kind of discriminatory belief comes to light the situation is resolved via political means instead of through the court system. Keep in mind that for elected government officials, the public always retains the right to vote or pressure people out of office for reasons that would constitute constitutional violations if the person was fired for those same reasons. We are going to talk in greater detail about the Fourteenth Amendment as it relates to the beliefs of government officials later in this article.

THE FIRST AMENDMENT LIKELY PROHIBITS GOVERNMENT OFFICIALS FROM ACTING ON THEIR RELIGIOUS BELIEFS WHILE EXECUTING THEIR GOVERNMENT DUTIES.

A government official may be permitted to believe in the course of their duties, but the Constitution is unlikely to protect them if they act on those beliefs. The court has found that laws cannot interfere with mere beliefs and opinions.⁴⁷ The court has found that laws cannot interfere with mere beliefs and opinions, and that the Constitution guarantees the absolute right for all citizens to believe anything or nothing. As such, that right must extend to government officials, and would likely include the beliefs that they hold while executing their duties as government officials.

However, the court has made a distinction between the freedom to believe and the freedom to act.⁴⁸ There cannot be laws that limit your right to believe, but citizens can have their ability to act on those beliefs limited. We see this in cases related to religious beliefs against vaccinations⁴⁹, rituals

47. See *Sherbert*, 374 U.S. at 43.

48. See *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990); See also, *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

49. See *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

involving poisonous snakes⁵⁰ and polygamy⁵¹. Although the individual is permitted to maintain the underlying religious belief, they are not permitted to act on that belief.

As such, a government official is permitted to believe that a required government action is morally wrong because it opposes their personally held beliefs. In such a context, and where reasonably possible, the government official may even be allowed to seek reasonable accommodations so that they are not forced to violate their belief system.⁵² However, the government official is not likely to be protected under the Constitution if they use their position to further their belief.⁵³

Additionally, creating legislation in furtherance of a specific belief would likely limit the free exercise of beliefs of citizens. The court stated that the Free Exercise Clause of the First Amendment prohibits the government from compelling the affirmation of a religious belief.⁵⁴ If the government creates laws and regulations, citizens within the relevant jurisdiction must comply with such laws. If those laws further a particular belief, then the creation of the laws would be compelling citizens to adhere to that belief. Therefore, it violates a citizen's right to freely exercise their beliefs if the government enacts legislation that furthers a particular belief.

Similarly, by endorsing a specific belief, the government would likely run afoul of the Establishment Clause of the Constitution. The court has determined that the First Amendment prohibits the government from establishing or explicitly endorsing a specific belief system.⁵⁵ By passing laws based on a specific belief, an official would be causing the government to specifically endorse a belief. This constitutes another way that using personal beliefs as a basis for establishing law could cause a government official to run afoul of the First Amendment.

50. See *State v. Massey*, 51 S.E.2d 179 (N.C. 1949).

51. See *Cleveland v. United States*, 329 U.S. 14, 17 (1946) (affirming a lower court's conviction of the defendant for transporting women across state lines for the purposes of polygamy).

52. See *Torcaso v. Watkins*, 367 U.S. 488 (1961).

53. See *Miller v. Davis*, 123 F. Supp. 3d 924 (E.D. Ky. 2015) (holding that refusal to issue marriage licenses was not protected under the Constitution where a county clerk refused to issue marriage licenses because doing so would require her to issue marriage licenses to same sex couples).

54. See *Torcaso v. Watkins*, 367 U.S. 488 (1961); See also *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

55. See *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

Therefore, we can conclude that laws based on a government official's personally held beliefs are likely to be considered unconstitutional under a First Amendment analysis.

GOVERNMENT OFFICIALS ACTING ON PERSONALLY HELD BELIEFS TO
CREATE LEGISLATION MAY VIOLATE FOURTEENTH AMENDMENT
PROTECTION

As discussed in the previous section, government officials using their position to create laws and policies that further personally held beliefs would likely violate the Establishment Clause and Free Exercise Clause of the First Amendment. However, the First Amendment is not the only constitutional amendment that such government officials would potentially violate. As previously mentioned, there is a strong likelihood of violating the Fourteenth Amendment. This section is going to focus on why government officials passing laws and creating policy based on personally held beliefs is a violation of the Fourteenth Amendment.

The Fourteenth Amendment protects classes of citizens will be protected from the passage of laws that are unreasonably discriminatory towards a particular class.⁵⁶ The courts have adopted different levels of scrutiny for laws targeting certain protected classes. Generally, the level of scrutiny for most classes or groups of people is a rational basis test. This is the lowest level of review, because the government just need only offer a reasonable justification for enacting the law. An example of this kind of protected class is the limitations placed on registered sex offenders. The legislation directly targets sex offenders and is discriminatory; however, the government has a reasonable public safety concern. For example, the government could reasonably want to limit the contact of known pedophiles with children. As such, most of these types of laws are constitutional.

The next level of scrutiny is the intermediate level of scrutiny which is applied to quasi-suspect classes; these are classes that have some legitimate differences that could be the basis for legitimate legislation, but also these

56. U.S. CONST. amend. XIV, § 1 (All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws).

quasi-suspect classes have been subject to baseless discriminatory legislation.⁵⁷ An example of a type of law that gets this level of scrutiny is laws that discriminate on the basis of gender. The reason why this is subject to an intermediate level of review is that there are actual differences between men and women.⁵⁸ There are reasonable, just and ultimately constitutional laws that can be based on gender when they are grounded in those actual differences. For example, a law requiring TSA to have female agents available to conduct body searches for female subjects is technically discriminatory. If such a law were under strict scrutiny it would likely be ruled as unconstitutional. However, this policy would be acceptable under intermediate scrutiny. Conversely, if the government passed a law saying that women could not be firefighters, then it would likely be ruled unconstitutional under intermediate scrutiny. There is no actual difference between men and women that would prevent a woman from being a firefighter, only unfounded stereotypes.

The greatest level of scrutiny is strict scrutiny. This is the level of scrutiny applied to laws that discriminate on the basis of race and religion. For a discriminatory law to overcome strict scrutiny is an incredibly difficult standard. Under strict scrutiny review, a statute is unconstitutional if it is not “narrowly tailored to serve a compelling government interest.”⁵⁹ Even laws that benefit the discriminated class are often held unconstitutional because they cannot overcome strict scrutiny. For example, a law that prescribes that a government-run university must admit at least x number of people of color would actually be unconstitutional. The government may have a compelling interest in ensuring that people of color have access to higher education. However, this kind of law would not be deemed to be narrowly tailored to serve the compelling government interest.⁶⁰

If a government official passes legislation based on furthering a religious belief that can be characterized as religious, then this would likely be seen as an imposition on the religious freedom of others. Such legislation would have to be evaluated under strict scrutiny. This standard of review evaluates if the promulgation of this legislation is narrowly tailored to serve a compelling government interest. The court would be unlikely to find that

57. See Gayle Lynn Pettinga, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 784-787 (1986).

58. *Id.*

59. See Richard H Fallon Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267 (2006).

60. See Harry Holzer & David Neumark, *Assessing Affirmative Action*, 38 J. ECON. LITERATURE 483 (2000).

furthering a government official's personally held belief in contradiction with established fact is a compelling government interest.

GOVERNMENT OFFICIALS WHO WILLFULLY IGNORE FACTS MAY CREATE LIABILITY UNDER OTHER BODIES OF LAW

If a law or government action is found under the aforementioned constitutional provisions, a claimant has the right to sue for injunctive relief to stop government actions. However, is this the only manner in which a citizen could oppose the improper imposition of personal beliefs on them? Because of sovereign immunity, the citizens have limits on their ability to bring suit against the federal and state government. Put simply, a person can only sue the sovereign of their jurisdiction (i.e. the state and country in which they are located) to the limited extent to which the jurisdiction has stated that you are allowed to sue them.⁶¹

The court has been very reluctant to override or expand sovereign immunity beyond the explicitly outlined exceptions granted by the jurisdiction. The court has generally interpreted the strict language of the exceptions and has not read into them additional expansion. Currently, two prevalent exceptions to sovereign immunity to the United States federal government are the Tucker Act and the Federal Tort Claims Act.⁶²

The Tucker Act allows citizens to sue the federal government for breach of contract when the government has entered into an agreement with the individual. This act is not relevant for our discussion, but worth noting because it is a commonly used waiver to sovereign immunity. The Federal Tort Claims Act waives the federal government's sovereign immunity when it does tortuous actions that it would be liable for if it were a private citizen. In the case of both of these acts, the government waives its sovereign immunity against being sued, but it does not allow for all of the damages for which a private citizen would be liable. For example, the government cannot allow itself to be sued for punitive damages.⁶³

61. See Vicki C Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521 (2003).

62. See e.g. Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1970); Tucker Act, 28 U.S.C. §§ 1346-1491 (1970).

63. See Roger C. Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 MICH. L. REV. 389 (1969).

When looking at the Federal Tort Claims Act waiver to sovereign immunity, the relevant question is whether or not the government's actions would be considered a tort if committed by a private citizen. Any private citizen who knowingly or recklessly causes harm to another citizen is potentially subject to tort liability. In the context where a government official has clear and convincing empirical data to substantiate the outcome of a given action, the government official would have knowledge of the outcome. Even in the context where the outcome is not absolutely certain, this level of understanding of the facts would likely rise to recklessness. As such, if government action harmed a private citizen based on their personal beliefs, ignoring clear empirical data facts, this could open the government to tort liability.⁶⁴

The greatest challenge to this kind of tort liability case would be proving causation and damages. Because of the limitations on punitive and consequential damages, the plaintiff, in this case, would have to prove actual damages to recover money. This fact makes recovery of monetary damages difficult in even the most egregious cases and can make the cost of the lawsuit exceed the possible value of the recovery.⁶⁵

In addition to litigation through the Federal Tort Claims Act, there is another body of law that might trigger government liability for willfully acting in contravention of known facts. Throughout this article, we have examined climate change as an example of government officials acting on their personally held beliefs over examining facts. This example also presents another body of law that could be relevant in cases like this. That is the laws related to unlawful taking and eminent domain. As government action and inaction continues to result in higher sea levels, more and more property is going to be consumed by the ocean. As property owners find their property underneath ocean water, the land will gradually become state and/or national waters. Then what, if any, legal recourse will citizens have to prevent their property from being taken by the government in that context? Additionally, if a private citizen cannot prevent the government from taking ownership of

64. Jack Boger et al., *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Analysis*, 54 N.C.L. REV. 498 (1976); Mark C. Niles, "Nothing But Mischief": *The Federal Tort Claims Act and the Scope of Discretionary Immunity*, 54 ADMIN. L. REV. 1275 (2002).

65. See, e.g., Ray Sanchez, *Flint Water Crisis Lawsuits: 5 Things to Know*, CNN (Mar. 11, 2016, 6:38 PM), <https://www.cnn.com/2016/03/11/us/flint-crisis-lawsuits-five-things/index.html>; See also David C. Bellinger, *Lead Contamination in Flint—An Abject Failure to Protect Public Health*, 374 NEW ENG. J. MED. 1101 (2016).

their underwater property, what if any compensation will they be due?⁶⁶ The body of law involving eminent domain and unlawful taking might provide causes of action under these or similar circumstances.

These additional bodies of law to be considered in this discussion all require the citizens in question to experience a harm. As such, the likelihood of these types of cases making it to and through the court system is much lower. Additionally, we do not have a clear understanding of how these types of litigation will play out in the court system. However, if government officials continue down this pathway of recklessly ignoring facts, we may very well see some of these types of litigation in the future.

CONCLUSION

Strengthening the correlation between empirical study and government action is an area of potential improvement. When government action is based on well-studied facts and not personal bias or beliefs, laws become more just. Although our governments have moved closer towards this ideal over time, there is still a long way to go.

When governments ignore facts in favor of personally held beliefs, it is not only dangerous, the practice likely violates several constitutional provisions. When a belief is held unchanging despite overwhelming facts to the contrary, such beliefs would likely meet the ever-expanding definition of a religious belief. Although willfully ignoring facts may not seem religious on the surface, if challenged, the court could find that such decisions are grounded in religion. As such, policy that is formed based on such strongly held personal beliefs that are not grounded in fact, may very well be seen as policies that further religion.

Government policies or laws that further or endorse one particular religious belief over another are going to be considered a constitutional violation. The government passing religious laws violates the First and Fourteenth Amendment protections of private citizens. The government is both establishing religious beliefs and forcing citizens to abide by and affirm such religious beliefs; this is a per se violation of a citizen's First Amendment

66. See, e.g., Emerson G. Spies & John C McCoid, II, *Recovery of Consequential Damages in Eminent Domain*, 48 VA. L. REV. 437 (1962); Arthur Lenhoff, *Development of the Concept of Eminent Domain*, 42 COLUM. L. REV. 596 (1942); Vicki C Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521 (2003).

protection. Additionally, since the policy would be religious in nature it would likely be discriminatory against citizens based on religion which would likely violate their Fourteenth Amendment rights.

Additionally, this type of government action in opposition to well-established facts opens the government up to torts. If a private citizen knowingly or recklessly acts in a way that harms another citizen, then that creates tort liability. Having clear and convincing facts that a particular government action is going to cause harm to a subset of people falls into the category of knowingly or recklessly committing a tort. While individual government officials cannot be held personally liable for their work for the government, the government as a whole might be subject to liability in these contexts.

Ultimately, when government officials act without regard to facts, they likely generate some form of liability or constitutional crisis. Until one of these cases is put before the Supreme Court we cannot know exactly how the court will rule. However, if government officials continue this disturbing trend of distancing themselves from facts we may see one of these cases soon.