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CONTENTS

GINGLES UNRAVELED: HISPANIC VOTING COHESION IN SOUTH FLORIDA

NICHOLAS WARREN**

The Voting Rights Act protects the ability of racial and language minority groups to elect candidates of choice by prohibiting states and localities from diluting those groups' votes when drawing electoral districts. The Fair Districts provisions of the Florida Constitution include a similar ban on vote dilution, plus further protections against diminishing (retrogressing) existing minority voting strength. A key element of proving vote dilution or retrogression is that the minority group votes cohesively. Historically, minority voting cohesion has often been uncontested or easily proven in VRA suits. But in South Florida, Hispanic citizens are voting less cohesively than they used to.

This Article investigates the legal issues that arise when the assumption of cohesion unravels. First, this Article examines to what extent the Hispanic community in South Florida is cohesive. It then proposes several alternative approaches to the vote dilution and retrogression framework to better align doctrine with the real-world conditions of voters and communities.

INTRODUCTION

Section 2 of the Voting Rights Act of 1965 (VRA), as amended, prohibits "a denial or abridgement of the right . . . to vote on account of race or color"[1] or membership in "a language minority group."[2] After voters approved a pair of citizen-initiated amendments in 2010, the Florida Constitution includes a similar ban on legislative and congressional redistricting plans "drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process."[3] Echoing the language of the VRA's now-dormant Section 5,[4] Florida also bars redistricting plans drawn "to diminish [racial or language minorities'] ability to elect representatives of their choice."[5]

** Staff Attorney, ACLU of Florida. I wish to acknowledge the contributions and mentorship of Professor Rick Pildes and Justice Barbara Pariente, as well as the guidance and support of Kira Romero-Craft and Quinn Yeargain.

[1] 52 U.S.C. § 10301(a) ("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 . . . .").

[2] *Id.* ("[O]r in contravention of the guarantees set forth in section 10303(f)(2) of this title . . . ."); 52 U.S.C. § 10303(f)(2) ("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 because he is a member of a language minority group.").

[3] FLA. CONST. art. III, §§ 20(a), 21(a) ("[D]istricts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice . . . .").

[4] *See* Shelby Cnty. v. Holder, 570 U.S. 529, 557 (2013).

[5] FLA. CONST. art. III, §§ 20(a), 21(a); 52 U.S.C. § 10304(b) ("Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, to elect their preferred candidates of choice denies or abridges the right to vote . . . ."). "[T]hese provisions were modeled on and 'embrace[ ] the principles' of key provisions of the federal Voting Rights Act of 1965, section 2 (vote dilution) and section 5 (diminishment, or retrogression)." In re Senate Joint Resol. of Legis. Apportionment 100 (*In re 2022 Apportionment*), No. SC22-131, 2022 WL 619841, at *4 (Fla. Mar. 3, 2022) (quoting In re Senate Joint

Since the landmark U.S. Supreme Court decision *Thornburg v. Gingles*,[6] plaintiffs claiming minority vote dilution under Section 2 must prove, among other things, that the minority group is "politically cohesive" and that the "majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate."[7] A redistricting plan's compliance with Section 5 also depends on the preconditions of minority voting cohesion and white bloc voting.[8] The presence of these two preconditions (collectively, "racially polarized voting") has often been uncontested in VRA suits, or treated as a given by the trial courts hearing the claims.[9] This is partly so

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Resol. of Legis. Apportionment 1176 (*Apportionment I*), 83 So.3d 597, 619 (Fla. 2012)).

[6] 478 U.S. 30 (1986).

[7] *Id*. at 51.

[8] Texas v. United States, 831 F. Supp. 2d 244, 262 (D.D.C. 2011); League of Women Voters of Fla. v. Detzner (*Apportionment VIII*), 179 So. 3d 258, 287 n.11 (Fla. 2015).

[9] *See, e.g.*, De Grandy v. Wetherell (*Wetherell I*), 794 F. Supp. 1076, 1079 (N.D. Fla. 1992) ("The parties agree that racially polarized voting exists throughout Florida to varying degrees."); Alpha Phi Alpha Fraternity Inc. v. Raffensperger, No. 1:21-CV-5337-SCJ, 2022 WL 633312, at *54 (N.D. Ga. Feb. 28, 2022) ("All the parties agree that there is an extremely large degree of racial polarization in Georgia elections."); Singleton v. Merrill, No. 2:21-CV-1291-AMM, 2022 WL 265001, at *66 (N.D. Ala. Jan. 24, 2022) ("[T]here is no serious dispute that Black voters are 'politically cohesive,' nor that the challenged districts' white majority votes 'sufficiently as a bloc to usually defeat [Black voters'] preferred candidate.' " (quoting Cooper v. Harris, 137 S. Ct. 1455, 1470 (2017))), *prob. juris. noted, sub nom.* Merrill v. Milligan, 142 S. Ct. 879 (2022)); Thomas v. Bryant, 366 F. Supp. 3d 786, 805 (S.D. Miss. 2019) ("It also is undisputed that African-American voters in District 22 are politically cohesive."), *aff'd*, 938 F.3d 134 (5th Cir. 2019), and *reh'g granted en banc*, 939 F.3d 629 (5th Cir. 2019), and *vacated as moot en banc sub nom*. Thomas v. Reeves, 961 F.3d 800 (5th Cir. 2020); Ga. State Conf. of NAACP v. Fayette Cnty. Bd. of Comm'rs, 950 F. Supp. 2d 1294, 1312 (N.D. Ga. 2013) ("[I]t is undisputed that Fayette County's African-American population is politically cohesive."); Lopez v. Abbott, 339 F. Supp. 3d 589, 609 (S.D. Tex. 2018) (defendant's expert agreed Hispanics voted cohesively); Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cnty. of Albany, 281 F. Supp. 2d 436, 448 (N.D.N.Y. 2003) ("[N]o one has raised a question in this case concerning the political cohesiveness of the black community in Albany County."); Cano v. Davis, 211 F. Supp. 2d 1208, 1235 (C.D. Cal. 2002) ("There is little dispute that Latinos in SD 27 vote cohesively."); Goosby v. Town Bd. of Hempstead, 956 F. Supp. 326, 334 (E.D.N.Y. 1997) ("There is no dispute that the black voters in the Town are politically cohesive."); Vecinos de Barrio Uno v. City of Holyoke, 960 F. Supp. 515, 518 (D. Mass. 1997)

because the paradigmatic minority group Congress had in mind when drafting the VRA, and which the Supreme Court had in mind when interpreting the law, was African Americans—who still today vote extremely cohesively in most elections in most jurisdictions, just as they did decades ago when *Gingles* was decided and when the VRA was enacted.[10]

In South Florida,[11] one minority group—Hispanics[12]—are voting less cohesively than they used to. What once was a solid Republican bloc comprised mainly of Cuban immigrants has diversified both ethnically and politically.[13] This fact came to the attention of the courts during the last

("The question [of] whether the Hispanic voters in Holyoke are politically cohesive is relatively easy.").

[10] Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L.R. 1833, 1838 (1992) (discussing the goals of the Voting Rights Act and the early history of its enforcement); Peyton McCrary, *Racially Polarized Voting in the South: Quantitative Evidence from the Courtroom*, 14 SOC. SCI. HIST. 507, 508 (1990) (discussing the goals of the Voting Rights Act at increasing Black votership); John M. Powers, *Statistical Evidence of Racially Polarized Voting in the Obama Elections, and Implications for Section 2 of the Voting Rights Act*, 102 GEO. L.J. 881, 901–07 (2014) (discussing high Black voting cohesion); Jeffrey Penney et al., *Race and Gender Affinities in Voting: Experimental Evidence* 4 (Queen's Univ. Econ. Dep't, Working Paper No. 1370, 2016), https://www.econstor.eu/bitstream/10419/149096/1/873819381.pdf (same).

[11] In this paper, "South Florida" refers to Miami-Dade County, unless otherwise noted. Often, social science research analyzing South Florida voting patterns covers additional counties, usually the others that have overlapped with South Florida's three majority-Hispanic congressional districts: Broward, Monroe, Collier, and Hendry.

[12] This paper uses this term to refer to people of Hispanic, Latino, and Spanish origin, because (1) principally, polling has consistently found it to be the preferred term of a plurality of group members, Justin McCarthy & Whitney Dupreé, *No Preferred Racial Term Among Most Black, Hispanic Adults*, GALLUP, Aug. 4, 2021, https://news.gallup.com/poll/353000/no-preferred-racial-term-among-black-hispanic-adults.aspx; Luis Noe-Bustamente, Lauren Mora, & Mark Hugo Lopez, *About One-in-Four U.S. Hispanics Have Heard of Latinx, but Just 3% Use It*, PEW RES. CTR., Aug. 11, 2020, https://pewrsr.ch/2XNrKfR; Jeffrey M. Jones, *U.S. Blacks, Hispanics Have No Preferences on Group Labels*, GALLUP, July 26, 2013, https://news.gallup.com/poll/163706/blacks-hispanics-no-preferences-group-labels.aspx; (2) the class of people the VRA protects is "persons who are [ ] of Spanish heritage," 52 U.S.C. § 10310(c)(3); (3) the State of Florida collects race/ethnicity data from registered voters using the term, Fla. Stat. § 97.052(2)(g); and (4) the Census Bureau similarly collects information including the term.

[13] Matt A. Barreto & Angela Gutierrez, *Taking a Deeper Look at Hispanic Voting Patterns in South Florida*, UCLA LATINO POLICY & POLITICS INITIATIVE (Mar. 3,

redistricting cycle, but its legal implications for the Voting Rights Act remain murky. In a 2015 ruling adopting new congressional districts for the state, the Florida Supreme Court found "a lack of Hispanic voting cohesion" in the region.[14] However, the brevity of the court's analysis and a lack of record evidence invite more inquiry into the matter. Indeed, the parties in that high-profile case took the position that minority voting cohesion was irrelevant to the legal question at issue, and the court's discussion was relegated to a footnote.[15]

This article explores the legal issues that arise when the assumption of cohesion—on which the VRA and *Gingles* rest—unravels. Building upon prior scholarship regarding the goals and theoretical foundations of the VRA, as well as social science research on the electoral and social behavior of South Florida Hispanics, this paper investigates to what extent that unraveling has happened, and the implications. By probing how the history and present conditions of South Florida's Hispanic community intersect with the purposes of the Voting Rights Act, this article seeks to draw attention to weaknesses in the VRA's doctrinal framework. Those weaknesses recommend both statutory and doctrinal changes to better align the law with the VRA's goals.

In particular, Hispanic non-cohesion recommends a shift in how the law defines the protected class. While "Hispanics" as a whole may not vote cohesively, subgroups within that umbrella might—voters of Cuban, Venezuelan, or Puerto Rican heritage, for instance. It is now time to confront what the law means by "the" Hispanic community, by "persons of Spanish heritage," and by "language minorities" more broadly.

This article proceeds as follows: Part I gives a brief history of South Florida's minority communities, including early voting rights litigation. Part II brings the story forward with an examination of present-day conditions in

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2022), https://latino.ucla.edu/research/voting-in-south-florida/, at 1–2; Heike C. Alberts, *The Missing Evidence for Ethnic Solidarity Among Cubans in Miami*, 7 J. IMMIGRANT & REFUGEE STUD. 250, 251 (2009); Pamela S. Karlan, *Our Separatism: Voting Rights as an American Nationalities Policy*, 1 U. CHI. LEGAL F. 83, 100 (1995).

[14] *Apportionment VIII*, 179 So. 3d at 287.

[15] Oral Argument at 9:58, *Apportionment VIII,* 179 So. 3d 258 (No. 14-1905), http://thefloridachannel.org/videos/111015-florida-supreme-court-oral-arguments-the-league-of-women-voters-of-florida-etc-et-al-v-ken-detzner-et-al-sc14-1905/; *Apportionment VIII* at 287, n.11

the Hispanic community. Part III reviews and critiques the redistricting litigation of the 2010 cycle, which provides some of the richest recent research and analysis of Hispanic voting patterns in South Florida. Part IV applies the appropriate cohesion analysis—overlooked or misapplied in recent cases—to the data available. Lastly, Part V explores what non-cohesion means for implementing the VRA and what approaches courts and lawmakers might take in response. In brief, those approaches are (1) staying the course and treating "Hispanic" as the sole category of relevance for voting rights; (2) treating each national-origin subgroup individually, under either the an amended VRA or Florida law; and (3) doing a combination of those two, disaggregating at first but recombining subgroups where voting patterns allow. These alternatives are examined in light of the VRA's role as a "common law statute" and Congress's aim to stamp out discrimination in all its evolving forms.[16]

I. HISTORICAL BACKGROUND

Over the past sixty years, South Florida has undergone dramatic changes in its racial and ethnic makeup. Between 1960 and 1990, the Hispanic population of Dade County skyrocketed from less than 5% of the total, to a majority.[17] Today, the county is 69% Hispanic.[18] Hispanic population growth and immigration are the primary demographic storylines of the largest county

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[16] *See generally* Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PA. L. REV. 376 (2012); S. REP. NO. 89-162, at 18 (1965), *as reprinted in* 1965 U.S.C.C.A.N. 2508, 2543 (invoking the 15th Amendment's prohibition of "sophisticated as well as simple-minded modes of discrimination" to justify the VRA); S. Rep. No. 97-417, at 10, *as reprinted in* 1982 U.S.C.C.A.N. 177, 187 (noting that since the VRA's adoption, discrimination has evolved from "direct, overt impediments to the right to vote to more sophisticated devices . . . .")

[17] Guillermo J. Grenier & Max J. Castro, *Triadic Politics: Ethnicity, Race, and Politics in Miami, 1959–1998*, 68 PAC. HIST. REV. 273, 275 (1999).

[18] *QuickFacts: Miami-Dade County, Florida*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/miamidadecountyflorida/POP060210. Dade County changed its name to Miami-Dade County in 1997. The two names are used here interchangeably. Luisa Yanez, *Miami-Dade Leaders See Magic in New Name*, S. FLA. SUN-SENTINEL, Nov. 15, 1997, https://www.sun-sentinel.com/news/fl-xpm-1997-11-15-9711150484-story.html.

in the nation's third-largest state.[19]

Since the mid-20th century, Cuban immigrants were at the core of that Hispanic population growth. The first wave of Cuban exiles fled Castro's revolution in the late 1950s and early 1960s. Those "golden exiles," as well as the second wave of "freedom flights" in the mid-1960s through the mid-1970s, were largely drawn from Cuba's white, urban middle class.[20] These immigrants faced distinct challenges from other minority groups in the United States, but also enjoyed distinct advantages. Unlike many other immigrants, Cuban exiles were officially welcomed to the United States and had an easy path to citizenship.[21] Importantly, they did not experience political exclusion and historic discrimination to nearly the same degree as other minority groups, such as African Americans and Mexican Americans.[22] The Cuban community quickly became well integrated into the economic and political life of Dade County.[23]

The Miami these immigrants arrived in was not racially monolithic to begin with. Dade County had a substantial Black population, which by the 1960s was strong enough to flex real political power, thanks in part to the Voting Rights Act.[24] In 1968, for example, Dade County elected Florida's first African American legislator since Reconstruction as well as its first Black county commissioner ever.[25]

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[19] *County Population Totals: 2020–2021*, U.S. CENSUS BUREAU, https://www.census.gov/data/tables/time-series/demo/popest/2020s-counties-total.html.

[20] Grenier & Castro, *supra* note 17, at 275, 279; Alberts, *supra* note 13, at 251; Andrew Lynch, *Expression of Cultural Standing in Miami: Cuban Spanish Discourse About Fidel Castro and Cuba*, 7 REVISTA INTERNACIONAL DE LINGÜÍSTICA IBEROAMERICANA 21, 25 (2009).

[21] Lynch, *supra* note 20, at 25.

[22] *See* Samuel Issacharoff, *Groups and the Right to Vote*, 44 EMORY L. J. 869, 873 (1995).

[23] *Id.* at 892, 898–99; Melvyn C. Resnick, *Beyond the Ethnic Community: Spanish Language Roles and Maintenance in Miami*, 69 INT'L J. SOC. LANGUAGE 89, 96 (1988).

[24] OFF. OF CMTY. ADVOC., OFF. OF BLACK AFF., THOMAS D. BOSWELL, PROFILE OF THE BLACK POPULATION IN MIAMI-DADE COUNTY 111 (2007).

[25] Erika L. Wood, FLORIDA: AN OUTLIER IN DENYING VOTING RIGHTS 1, 22 n.46 (2016), https://www.brennancenter.org/our-work/research-reports/florida-outlier-denying-voting-rights (noting that Joe Lang Kershaw was the first Black member of the Florida Legislature since Reconstruction); Meek v. Metro. Dade Cnty., 805 F. Supp.

It would take litigation, however, to ensure Hispanic and Black Miamians could fully participate in the political process. In 1986, several Black and Hispanic voters and politicians brought suit against the Dade County Commission, challenging the board's at-large election system under the amended Section 2.[26] The suit was successful, and transformed the commission from an eight-member body with one minority member (who was not the minority candidate of choice), into a thirteen-member body with six Hispanic, four Black, and three Anglo commissioners.[27] Notably, while the trial court in that case concluded the Hispanic plaintiffs had proven their dilution claim based on the totality of the circumstances, it found that "discrimination . . . does not significantly preclude Hispanics from participating in the electoral process," giving less weight to that factor as compared to others; such as the presence of racially polarized voting, unusually large election districts, economic and educational disparities, and campaign appeals to racial prejudice.[28]

The bi-ethnic coalition that forced changes to local elections pushed for more electoral opportunities in the state's congressional districts too. In *De Grandy v. Wetherell*,[29] a three-judge district court adopted a new redistricting plan that incorporated districts from the Hispanic and Black plaintiffs' proposals. Specifically, the plan drew two new majority-Black districts and one Black influence seat, as well as two new Hispanic supermajority districts.[30] The plan resulted in the election of Florida's first Black members of Congress since Reconstruction, and its second Hispanic member of Congress ever.[31] Notably, the *Wetherell I* court did not engage in a detailed analysis of the plaintiffs' Section 2 claims. It summarily noted a "longstanding general history of official discrimination against minorities," but it found only two facts relating to discrimination against Hispanics

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967, 978 (S.D. Fla. 1992) (explaining that Earl Carroll was the first Black county commissioner).

[26] *Meek*, 805 F. Supp. at 969.

[27] Daryl Harris, *Generating Racial and Ethnic Conflict in Miami: Impact of American Foreign Policy and Domestic Racism*, *in* BLACKS, LATINOS, AND ASIANS IN URBAN AMERICA 79, 89 (James Jennings ed., 1994); *Meek*, 805 F. Supp. at 986.

[28] *Meek*, 805 F. Supp. at 990–93.

[29] (*Wetherell I*), 794 F. Supp 1076 (N.D. Fla. 1992).

[30] *Id.* at 1087.

[31] *See* Adam Clymer, *Democrats Promise Quick Action on a Clinton Plan*, N.Y. TIMES (Nov. 5, 1992), https://nyti.ms/3iSFrBT.

specifically: that Florida had only one Hispanic congressperson, and until recently had no Hispanic state senators.[32] The court did not require statistical evidence of racially polarized voting (RPV) but remarked that the parties agreed RPV existed throughout the state.[33]

By the time of *Wetherell I* and *Meek*, the tripartite division between Hispanics, African Americans, and Anglos defined the political and social life of South Florida.[34] That tripartite structure drew the attention of the U.S. Supreme Court in *Johnson v. De Grandy*,[35] in which the Court upheld the Florida Legislature's 1992 legislative redistricting. Citing the district court's factual findings—which to date provide the most detailed legal analysis of South Florida voting patterns—the Court noted "political cohesion within each of the Hispanic and black populations but none between the two."[36] The district court further noted the Hispanic population's atypical political makeup: "more conservative and much more Republican" than elsewhere in the U.S.[37]

Even in the early 1990s, however, the Hispanic electorate was not monolithic. That fact too did not escape the court's notice.[38] While Dade County's Hispanic electorate was predominantly Republican Cuban American, Nicaraguans, Colombians, Peruvians, Hondurans, Guatemalans, Puerto Ricans, and others from elsewhere in Latin America constituted a solid minority—over two-fifths—of the Hispanic electorate in Dade County at the time.[39] Significantly, the court, and the expert witness on whose testimony it relied, did not assume political cohesion between Cuban and non-Cuban Hispanics. For certain groups, in fact, it noted political dissimilarities. Puerto

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[32] *Wetherell I*, 794 F. Supp. at 1079.

[33] *Id.*

[34] De Grandy v. Wetherell (*Wetherell II*), 815 F. Supp. 1550, 1572 (N.D. Fla. 1992) ("[T]he division of the three major ethnic groups has led to the development of tripartite politics in Miami; that is, ethnic factors between the three communities predominate over all other factors in Dade politics."), *aff'd in part, rev'd in part sub nom.* Johnson v. De Grandy, 512 U.S. 997 (1994).

[35] 512 U.S. 997 (1994).

[36] *Id.* at 1003 (citing *Wetherell II*, 815 F. Supp. at 1569).

[37] *Wetherell II*, 815 F. Supp. at 1570.

[38] *See id*.

[39] According to the 1990 Census, Cubans constituted over 59% of Dade County's Hispanic voters. *See id.*

Rican registrants were majority Democratic, for example, while Hispanic registrants overall were nearly 70% Republican.[40] And while the court ultimately concluded there was sufficient cohesiveness among all Hispanics to satisfy the second *Gingles* prong, it hedged that "there might be differences between the several Hispanic subgroups."[41]

II. THE SOUTH FLORIDA HISPANIC COMMUNITY TODAY

Wetherell II and *Johnson v. De Grandy* were the last judicial rulings on Hispanic voting patterns in South Florida until the extended redistricting litigation following the 2010 Census.[42] Since those cases were decided in the early 1990s, however, the political landscape in South Florida changed dramatically. In 2006, Luis Garcia Jr. became the first Democrat to represent a majority-Hispanic Dade legislative district under the 2002 Republican-drawn maps.[43] In 2012, one of South Florida's three Hispanic congressional districts elected a Democrat for the first time, by an eleven-point margin.[44] In 2016, South Florida's Hispanic Democratic state house delegation grew to

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[40] *See id.* at 1570–71.

[41] *Id.* at 1571.

[42] That being said, in the course of rejecting a Section 2 suit claiming that the post-2000 redistricting diluted the Black vote, a three-judge district court noted that Florida's two Hispanic-majority congressional districts elected Hispanic candidates of choice throughout the 1990s. Martinez v. Bush, 234 F. Supp. 2d 1275, 1300 (S.D. Fla. 2002). The court further found that the three Hispanic-majority districts drawn in the 2002 plan would likely perform for Hispanic candidates of choice. *Id.* at 1301. That was the extent of the court's discussion of Hispanic voting patterns. It is unclear if the court considered evidence of Hispanic voting cohesion or any RPV analysis focusing on Hispanic voters.

[43] ROBERT E. CREW, JR. WITH THE ASSISTANCE OF SLATER BAYLISS, THE 2010 ELECTIONS IN FLORIDA 117 (2013). The Cuban-born Garcia was elected to three terms in total. *Id*.

[44] Cuban American Joe Garcia defeated Cuban American incumbent David Rivera. Patricia Mazzei & Amy Sherman, *In South Florida Congressional Races, David Rivera Loses to Joe Garcia, Allen West Appears to Fall to Patrick Murphy*, MIA. HERALD (Nov. 7, 2012), https://www.miamiherald.com/article1944340.html; Scott Hiaasen & Patricia Mazzei, *Changes in District Helped Lead to Rep. David Rivera's Defeat*, MIA. HERALD (Nov. 7, 2012), https://www.miamiherald.com/article1944366.html; Patricia Mazzei, *Cuba Politics Maze Traps Joe Garcia, Carlos Curbelo*, MIA. HERALD (Oct. 30, 2014), http://www.miamiherald.com/article3470631.html.

three members,[45] while a Cuban American Democratic state representative defeated a three-term incumbent Cuban American Republican state senator, becoming the first Democrat elected from a Hispanic Dade Senate seat in over thirty years.[46] A year later, a Colombian-born candidate became the second.[47] And 2018 saw a pair of Anglo Democrats win high-profile races against Cuban Americans in Hispanic-majority districts: Donna Shalala in the 27th congressional district, and Eileen Higgins in the Little Havana-centered county commission district that Cuban Republicans sued to get thirty years earlier in *Meek*.[48] All these candidates were elected from districts

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[45] *See* Jessica Bakeman, *GOP Incumbents Prevail to Keep Large Majority in Florida House, but Democrats Pick up Seats*, POLITICO (Nov. 8, 2016), https://politi.co/3nALn6h; Mary Ellen Klas, *David Rivera Loses Challenge; Robert Asencio Joins Legislature*, MIA. HERALD (Nov. 22, 2016), https://www.miamiherald.com/article116537413.html.

[46] Mary Ellen Klas et al., *Diaz de la Portilla and Bullard Defeated in State Senate Upsets*, MIA. HERALD (Nov. 8, 2016), http://www.miamiherald.com/article113508138.html; Patricia Mazzei, *Democratic State Senator Plans to Run for Ros-Lehtinen's Seat in Congress*, MIA. HERALD (May 9, 2017), http://www.miamiherald.com/article149408974.html. In 2020, Senator José Javier Rodríguez lost reelection to a Cuban American Republican by 32 votes. Samantha J. Gross, *No-Party Candidate in Miami Election Fraud Case Takes Plea Deal, Apologizes to Voters*, MIAMI HERALD (Aug. 24, 2021), https://www.miamiherald.com/article253696658.html.

[47] Annette Taddeo defeated Cuban American State Representative Jose Felix Diaz in a September 2017 special election. Suzanne Gamboa, *Annette Taddeo Wins Election, First Latina Democrat in Florida State Senate*, NBC NEWS (Sept. 27, 2017), https://nbcnews.to/33NJaN6; Fabiola Santiago, *Legislator Shed Beard and Deleted Inaugural Photo with Trump. Voters Weren't Fooled*, MIAMI HERALD (Sept. 28, 2017), http://www.miamiherald.com/article176007441.html.

[48] Lesley Clark & Rene Rodriguez, *Donna Shalala Defeats Maria Elvira Salazar, Flips Congressional Seat for Democrats*, MIA. HERALD (Nov. 6, 2018), https://www.miamiherald.com/article220785310.html; Douglas Hanks, *Eileen Higgins Wins Miami-Dade Commission Seat in Upset Over Zoraida Barreiro*, MIAMI HERALD (June 20, 2018), https://www.miamiherald.com/article213376864.html. Additionally, Ecuadorian-born Democrat Debbie Mucarsel-Powell defeated Cuban American incumbent Carlos Curbelo in the 26th congressional district; she lost reelection by less than four points. Alex Daugherty & Jimena Tavel, *Democrat Debbie Mucarsel-Powell Defeats Republican Carlos Curbelo*, MIA. HERALD (Nov. 7, 2018), https://www.miamiherald.com/article220860675.html; Alex Daugherty, Carlos Gimenez Defeats Debbie Mucarsel-Powell in Florida's 26th District (Nov. 4, 2020), https://www.miamiherald.com/article246864797.html.

with Hispanic voting-age population and voter registration supermajorities.[49] Underscoring the enduring competitiveness of these Hispanic-majority seats, in 2020 Shalala lost reelection by less than three points while Higgins won by five, both in races against Cuban American Republicans.[50]

South Florida's changing political makeup has not escaped political and social scientists. Between 1970 and 1990, the Cuban share of Dade County's Hispanic population dropped from 91% to 59%, after an influx of new Central and South American immigrants.[51] By 2019, that figure had fallen to 52%.[52] Residents of South and Central American origin now form substantial minorities of Hispanics as a whole, at about 14–18% each.[53] In terms of their social background, the non-Cuban immigrants differ substantially from the Cubans who came before them; Central and South American arrivals tend to be of lower socio-economic backgrounds and more racially diverse, and they have fewer established ties to the United States than the early waves of Cuban

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[49] Florida House of Representatives, *MyDistrictBuilder*, FLA. REDISTRICTING, http://floridaredistricting cloudapp.net/MyDistrictBuilder.aspx; The Florida Senate, *Plan Summary for 2012-CA-2842*, FLA. SENATE, https://www.flsenate.gov/PublishedContent/Session/Redistricting/Plans/2012-CA-2842/2012-CA-2842_map_fl.pdf; The Florida Senate, *Plan Summary for H000H9049*, FLA. SENATE, https://www.flsenate.gov/PublishedContent/Session/Redistricting/Plans/h000h9049/h000h9049_map_fl.pdf; The Florida Senate, *Plan Summary for H000C9047*, FLA. SENATE, https://www.flsenate.gov/PublishedContent/Session/Redistricting/Plans/H000C9047/H000C9047_map_fl.pdf; The Florida Senate, *Plan Summary for FL2002_HOU*, FLA. SENATE, https://flsenate.gov/UserContent/Session/Redistricting/legal/Tab_D2_Benchmark_House_Districts.pdf.

[50] Alex Daugherty, *Maria Elvira Salazar Defeats Donna Shalala in Florida's 27th Congressional District*, MIA. HERALD (Nov. 4, 2020), https://www.miamiherald.com/article246867257.html; Jimena Tavel et al., *Regalado Ahead as Hardemon, Higgins and McGhee Win Miami-Dade Commission Seats*, MIA. HERALD (Nov. 4, 2020), https://www.miamiherald.com/article246780027.html; *2020 General Election*, MIAMI-DADE COUNTY SUPERVISOR OF ELECTIONS, https://enr.electionsfl.org/DAD/2779/Summary/.

[51] Grenier & Castro, *supra* note 17, at 275.

[52] *QuickFacts: Miami-Dade Cnty., Fla.*, *supra* note 18.

[53] *Hisp. or Latino by Specific Origin 2019: Miami-Dade Cnty., Fla.*, U.S. CENSUS BUREAU, https://data.census.gov/cedsci/table?q=b03001&t=Populations%20and%20People&g=0500000US12086&tid=ACSDT1Y2019.B03001.

immigrants.[54] In contrast, the "golden exiles" and "freedom flights" who came shortly after Castro's revolution were predominantly white, urban, and upper- or middle-class.[55]

Separate from the issue of cohesion between different Hispanic groups is the question of cohesion *within* the Cuban population—and that is not a foregone conclusion nowadays, either. Miami's Cuban community shared robust ethnic solidarity following the first and second waves of arrivals, when the bulk of émigrés were highly educated and socioeconomically homogeneous.[56] These exiles and their families viewed themselves as a cohesive ethnic group and mobilized ethnic resources to build economic, social, and political capital in their new home throughout the 1960s and 1970s.[57]

Recent social science and sociological studies, however, have found a decline in solidarity over the past three decades. As later waves of Cuban refugees ("Marielitos" in the 1980s, "Balseros" in 1994, and subsequent arrivals) changed the makeup of the Cuban American population in Dade County, the community fractured.[58] Intra-Cuban ethnic solidarity declined.[59] Having grown up or lived significant portions of their lives under Castro, many among these later waves were more influenced by Communist ideology. They lacked the preexisting family ties of earlier arrivals, had differing attitudes toward work, and shared different expectations of what life

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[54] Grenier & Castro, *supra* note 17, at 275, 284.

[55] *Id.* at 275, 279; Alberts, *supra* note 13, at 251; Jorge Duany, *Cuban Communities in the United States: Migration Waves, Settlement Patterns and Socioeconomic Diversity*, 11 POUVOIRS DANS LA CARAÏBE 69, 76, 78 (1999).

[56] Alejandro Portes, *The Rise of Ethnicity: Determinants of Ethnic Perceptions Among Cuban Exiles in Miami*, 49 AM. SOCIO. REV. 383, 395 (1984); Alejandro Portes, *The Social Origins of the Cuban Enclave Economy of Miami*, 30 SOCIO. PERSP. 340, 368 (1987); Alberts, *supra* note 12, at 251; Duany, *supra* note 55, at 76, 78.

[57] Heike C. Alberts, *Changes in Ethnic Solidarity in Cuban Miami*, 95 GEOGRAPHICAL REV. 231, 236–37 (2005).

[58] Duany, *supra* note 55, at 70, 72.

[59] Alberts, *supra* note 57, at 236; Alberts, *supra* note 13, at 251; Mireya Navarro, *One City, Two Cubas: Miami's Exiles: Side by Side, Yet Worlds Apart*, N.Y. TIMES (Feb. 11, 1999), https://nyti.ms/3ddQxQY. *See also* MARIA CRISTINA GARCIA, HAVANA USA: CUBAN EXILES AND CUBAN AMERICANS IN SOUTH FLORIDA, 1959–1994 (University of California Press ed., 1996).

in the United States would be like.[60] They were also more racially diverse—many were Black or darker-skinned, while earlier waves were mostly white.[61] The majority were working-class and lacked a high school education, and came from more rural areas than the earlier urban emigrés.[62] After the Marielitos, the Cuban American community could no longer be considered unqualifiedly homogenous. Duany describes how "the [Mariel] exodus deepened the rifts between 'old' and 'new' immigrants. Date of departure from Cuba—before or after 1980—became a symbol of one's social status."[63] Alberts goes so far as to say that "[s]ocial, racial, economic, and religious divisions . . . destroy[ed] practically all forms of ethnic solidarity."[64]

Those social divisions translated into political and electoral fragmentation, too. Cuban Americans had long registered and voted overwhelmingly Republican, and the policy preferences of Cuban voters were marked by substantial cohesiveness into the 1990s.[65] But between 2002 and 2013, the percentage of Cubans nationwide who were registered as Republicans dropped from nearly two-thirds to less than half, while Democratic registration increased from 22 to 44%.[66] General election results reflect that registration trend: in six of seven presidential elections between 1980 and 2004, the Republican candidate garnered over 70% of the Cuban vote in South Florida.[67] In 2008, though, that figure had declined to 65%, and by 2012 had dropped below 60% for the first time—maybe even below a majority.[68] Estimates for the most recent presidential elections indicate

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[60] Alberts, *supra* note 57, at 239–40.

[61] *Id.* at 240; Duany, *supra* note 55, at 80.

[62] Duany, *supra* note 55, at 80, 85.

[63] *Id.*

[64] Alberts, *supra* note 57, at 241.

[65] Jens Manuel Krogstad, *After Decades of GOP Support, Cubans Shifting Toward the Democratic Party*, PEW RES. CTR., June 24, 2014, https://pewrsr.ch/33Lcfsg; Kevin A. Hill & Dario Moreno, *Second-Generation Cubans*, 18 HISP. J. BEHAV. SCI. 175, 175 (1996).

[66] Krogstad, *supra* note 66.

[67] Hill & Moreno, *supra* note 66, at 176; Juan O. Tamayo, *Did Obama or Romney Win the Cuban-American Vote?*, MIA. HERALD (Nov. 13, 2012), http://www.miamiherald.com/article1944516.html.

[68] Tamayo, *supra* note 68; Krogstad, *supra* note 66; Dario Moreno & James Wyatt, *Cuban-American Partisanship: A Secular Realignment?*, *in* MINORITY VOTING IN THE UNITED STATES 254, 256–57 (Kyle L. Kreider & Thomas J. Baldino eds. 2015).

improvement for the Republican ticket, with about 54 to 57% of South Florida Cuban voters supporting Trump in 2016, and about 55 to 69% in 2020.[69] The 2018 gubernatorial and U.S. Senate races saw similar splits of about 70–30 or less for the Republican candidates.[70] Recent top-of-ticket elections therefore suggest mixed results with respect to cohesion: some races with rough parity within the 60–40 range and others with robust Republican vote shares north of two-thirds, albeit less than the 75% or greater majorities the G.O.P. could count on a couple of decades ago.[71]

Finally, a recent report by Barreto and Gutierrez took a deeper look at Hispanic cohesion in Dade County in thirteen statewide, congressional, and state legislative races, using precinct-level analysis.[72] The report describes "two distinct Latino electorates:" a "generally cohesive Cuban community [] that supports common candidates of choice," and a "second electorate" of "non-Cuban Latinos" who "demonstrate patterns of majority support for their candidates of choice."[73] Significantly, Barreto and Gutierrez conclude based on this analysis, "grouping all Latino voters as a single cohesive voting block is not supported by the data."[74]

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[69] Jens Manuel Krogstad & Antonio Flores, *Unlike Other Latinos, About Half of Cuban Voters in Florida Backed Trump*, PEW RES. CTR. (Nov. 15, 2016), https://pewrsr.ch/3iNCKlo; Nora Gámez Torres, *'Invisible Campaign' and the Specter of Socialism: Why Cuban Americans Fell Hard for Trump*, MIA. HERALD (Nov. 19, 2020), https://www.miamiherald.com/article247233684.html; *State Results: Florida*, THE AM. ELECTION EVE POLL (Nov. 2020), https://electioneve2020.com/poll/#/en/demographics/latino/fl.

Another analysis estimated that the two-way Democratic share of the *total* vote in predominantly Cuban precincts *nationwide* dropped 13 percentage points from 2016 to 2020. Yair Ghitza & Jonathan Robinson, *What Happened in 2020*, CATALIST, https://catalist.us/wh-national/#pp-toc-608eee40d2225-anchor-0.

[70] STEVEN J. GREEN SCH. OF INT'L & PUB. AFFAIRS, 2018 FIU CUBA POLL: HOW CUBAN AMERICANS IN MIAMI VIEW U.S. POLICIES TOWARD CUBA 24–25 (Jan. 7, 2019), https://cri.fiu.edu/research/cuba-poll/2018-fiu-cuba-poll.pdf; Nora Gámez Torres, *Cuban-American Vote for DeSantis Might Prove Decisive as Race Moves Toward Recount*, MIAMI HERALD (Nov. 10, 2018), https://www.miamiherald.com/article221439990.html.

[71] For example, George W. Bush garnered 75% of Florida's Cuban vote in 2000. Tamayo, *supra* note 63.

[72] Barreto & Gutierrez, *supra* note 13.

[73] *Id.* at 2.

[74] *Id.*

III. LESSONS FROM THE LAST CYCLE

In 2015, the changing social and political makeup of South Florida's Hispanic community became the focus of a voting rights dispute for the first time. In its *Apportionment VIII* ruling adopting congressional districts for the state, the Florida Supreme Court suggested "a lack of Hispanic voting cohesion" in South Florida.[75] This opinion was the final ruling in a suit brought by the Democratic Party and nonprofit groups challenging Florida's 2012 congressional redistricting plan as a violation of the Florida Constitution's prohibition on partisan gerrymandering, and the last in a series of opinions interpreting the new Fair Districts Amendments.[76] With respect to South Florida, the Supreme Court had earlier struck down three majority-Hispanic districts for splitting cities and counties to Republicans' partisan advantage.[77] The court then relinquished the case to the trial court to consider the State's proposed remedial plan and recommend adoption of a final map.[78] During the relinquishment, the trial court recommended that the Supreme Court reject the State's proposed remedial plan and adopt the plaintiffs' map.[79]

The courts were prompted to confront the cohesion question because the State attacked one of the plaintiffs' districts for diminishing Hispanic voting strength, in violation of the Fair District Amendment's Section 5 analog.[80] Before addressing whether the proposed remedial plan was retrogressive, the Supreme Court addressed the threshold question of whether the Hispanic community satisfied the *Gingles* conditions—and concluded that the State had not proven the cohesion prong.[81] Relying on the relatively evenly split registration figures in the district and region, the court concluded that "the

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[75] *Apportionment VIII*, 179 So. 3d 258, 286–87 (Fla. 2015).

[76] *Id.* at 373; Jordan Lewis, Note, *Fair Districts Florida: A Meaningful Redistricting Reform?*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 189, 214 (2015); FLA. CONST. art. III, § 20.

[77] League of Women Voters of Fla. v. Detzner (*Apportionment VII*), 172 So. 3d 363, 409–11 (Fla. 2015).

[78] *Id.* at 371–72; *Apportionment VIII*, 179 So. 3d at 260–62.

[79] *Apportionment VIII*, 179 So. 3d at 261.

[80] *Id.* at 279.

[81] *Id.* at 286–87. Because of the case's procedural posture, the State had the burden of justifying its proposed plan. *Id.* at 261.

evidence . . . suggests a lack of Hispanic voting cohesion."[82]

The Florida Supreme Court stopped short, though, of determining that Hispanics were *not* politically cohesive under *Gingles*. The expert testimony on which the Supreme Court and trial court relied made more explicit conclusions, however. Three reports by two experts in the case shed light on the issue.[83] In his two reports, Stephen Ansolabehere found that "Hispanics vote cohesively in North and Central Florida," but in South Florida, "Hispanics show little or no voting cohesion."[84] When analyzing the three South Florida Hispanic districts, Ansolabehere always characterized them as having a majority Hispanic voting-age population (VAP) or citizen voting-age population (CVAP), but never as districts in which Hispanics have opportunities to elect their preferred candidate.[85] Such careful phrasing implies that because of non-cohesion, there was no Hispanic candidate of choice in these districts, because a minority group can have candidates of

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[82] *Id.* at 286–87. Of Hispanic registered voters in the benchmark district, 38% were Republicans, 30% were Democrats, and 33% were registered with neither party. Within the four counties that comprised the three majority-Hispanic districts (Miami-Dade, Monroe, Collier, Hendry), Hispanic registered voters were more closely divided among Republicans (37%), Democrats (31%), and neither party (33%). *Id.* at 287.

[83] Romo Plaintiffs' Pretrial Disclosures Ex. A (Stephen Ansolabehere, *Expert Report on Congressional Districts in the State of Florida*, Feb. 14, 2013), Romo v. Detzner, No. 2012-CA-412, 2014 WL 3797315 (Fla. 2d Jud. Cir. Ct. July 10, 2014) [hereinafter *Ansolabehere Trial Rep.*]; Romo Plaintiffs' Memorandum in Support of Romo Plaintiffs' Proposed Remedial Plan and in Opposition to Alternative Proposed Remedial Plans Ex. C (Stephen Ansolabehere, *Report on Romo Plaintiffs' Proposed Remedial Plan for the State of Florida*, Sept. 18, 2015), Romo v. Detzner, No. 2012-CA-412 (Fla. 2d Jud. Cir. Ct. Oct. 9, 2015) (relinquishment order) [hereinafter *Ansolabehere Relinq. Rep*.]; *Expert Report of Allan J. Lichtman*, Sept. 18, 2015, *Romo* (Fla. 2d Jud. Cir. Ct. Oct. 9, 2015) [hereinafter *Lichtman Relinq. Rep.*].

The trial court called Lichtman's report "persuasive" but did not comment on either of Ansolabehere's reports. Ansolabehere, but not Lichtman, testified at trial. *Romo*, slip op. at 13–15 (Fla. 2d Jud. Cir. Ct. Oct. 9, 2015).

[84] *Ansolabehere Trial Rep.*, *supra* note 84, at 24, 41. Ansolabehere based his conclusions on exit poll data and ecological regressions from the 2008 presidential and 2010 gubernatorial elections. *Id.* at 39.

[85] *Id.* at 28; *Ansolabehere Relinq. Rep.*, *supra* note 84, at 10. In contrast, Ansolabehere refers to one heavily Puerto Rican—and Democratic—Central Florida district as one "in which Hispanics have the ability to elect their preferred candidates." *Id.* Unfortunately, this nuance in terms was lost on the trial court, which asserted that, based on the expert testimony, the South Florida districts "all function as performing Hispanic districts." *Romo*, slip op. at 15 (Fla. 2d Jud. Cir. Ct. Oct. 9, 2015).

choice only if it is internally politically cohesive.[86]

Unlike Ansolabehere, the plaintiffs' second expert, Allan Lichtman, did not directly make a conclusion about Hispanic voting cohesion. While he analyzed many congressional and legislative races rather than just Ansolabehere's two statewide elections, Lichtman merely summarized the (quite substantial) success of Hispanic *candidates* in those races, rather than determining through regression whether those successful candidates were the Hispanic voters' *candidates of choice*.[87] It was the success of *candidates of a certain race* that inappropriately led him to call all the studied districts "effective performing Hispanic districts."[88]

Notably, the one legislative race for which Lichtman *did* perform a regression analysis actually undermines the argument for cohesion.[89] Lichtman analyzed the one district of all the heavily Hispanic districts he studied which elected an *Anglo* candidate: Republican State Representative Michael Bileca.[90] Lichtman determined that Bileca was in fact the Hispanic candidate of choice in that race, but the numbers do not obviously lead to that conclusion. While Bileca won 77% of the Hispanic vote in the general

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[86] Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the VRA After* Shelby County, 115 COLUM. L. REV. 2143, 2149 (2015); J. Gerald Hebert, *Redistricting in the Post-2000 Era*, 8 GEO. MASON L. REV. 431, 438–39 (2000).

[87] *Lichtman Relinq. Rep.*, *supra* note 84, at 8–10. Lichtman testified to essentially the same analysis in the contemporaneous lawsuit over Florida's state senate districts. The trial court in that case accepted his opinions, and the case was not appealed. League of Women Voters of Fla. v. Detzner, No. 2012-CA-2842, slip op. at 32–37, 67 (Fla. 2d Jud. Cir. Ct. Dec. 30, 2015); John Kennedy, *Florida Senate Won't Appeal New District Boundaries to Supreme Court*, PALM BEACH POST, https://www.palmbeachpost.com/story/news/state/2016/01/20/florida-senate-won-t-appeal/6798413007/ (Jan. 19, 2016).

[88] *Lichtman Relinq. Rep., supra* note 84, at 16–17. *Contra* Thornburg v. Gingles, 478 U.S. 30, 68 (1986) (plurality opinion) ("[I]t is the *status* of the candidate as the *chosen representative of a particular racial group*, not the race of the candidate, that is important.") (emphasis in original).

[89] Lichtman also performed a regression analysis for one statewide race, the 2010 U.S. Senate election. In that race, Hispanic Republican Marco Rubio garnered between 71 and 79% of the Hispanic vote in the three Hispanic-majority congressional districts, with the remaining Hispanic vote split between a Black Democrat and an Anglo independent. *Lichtman Relinq. Rep.*, *supra* note 84, at 13–15. That election's peculiar circumstances (one Hispanic Republican versus two left-wing non-Hispanics) caution against using it to draw broad conclusions about Hispanic voting patterns.

[90] *Id.* at 11–12.

election against an Anglo Democrat, he received only 34% of the Hispanic Republican primary vote—hardly the "commanding majority" needed to call him the community's candidate of choice.[91] This is especially so considering that his 34% figure does not take into account the Hispanic voters registered as Democrats or with no party affiliation who could not vote in the closed Republican primary. Moreover, five losing Hispanic candidates in Bileca's Republican primary collectively garnered 65% of the Hispanic vote.[92]

IV. APPLYING THE COHESION STANDARD

The Florida courts' opinions of the last redistricting cycle, the expert reports from those cases, and the Census, voter registration, exit poll, and elections data on which those reports rely cannot substitute for a complete analysis of Hispanic voting patterns. The VRA does not allow statistical shortcuts or permit the use of just a few numbers to demonstrate racially polarized voting.[93] Investigating Hispanic voting cohesion with the rigor that *Gingles* demands would require not just a "quick and dirty" inquiry into party registration breakdowns, but also ecological regression or inference analyses of multiple elections (rather than just a couple legislative and statewide races) to determine how Hispanics are actually voting.[94] It requires going behind the ethnicity of winning candidates, to look at a range of elections in which Hispanics run against Anglos as well as co-ethnics.[95] It requires looking at

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[91] *Id.* at 13; Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 226 (2007) (describing the DOJ's policy dictating that "[u]nless a candidate wins a commanding majority of the minority vote in both the primary and general elections, she cannot be considered the community's candidate of choice"); Stephen Ansolabehere et al., *Race, Region, and Vote Choice in the 2008 Election: Implications for the Future of the Voting Rights Act*, 123 HARV. L. REV. 1385, 1395 n.44 (2010).

[92] *Lichtman Relinq. Rep.*, *supra* note 84, at 13.

[93] *Gingles*, 478 U.S. at 58 ("there is no simple doctrinal test for the existence of legally significant racial bloc voting"); Johnson v. De Grandy, 512 U.S. 997, 1020–21 (1994) ("[n]o single statistic provides courts with a shortcut to determine" vote dilution); Georgia v. Ashcroft, 539 U.S. 461, 479 (2003) ("any assessment . . . depends on an examination of all the relevant circumstances").

[94] Justin Levitt, *Quick and Dirty: The New Misreading of the Voting Rights Act*, 43 FLA. ST. U. L. REV. 573, 587–88 (2016).

[95] Persily, *supra* note 92, at 221–22; Comment, *The Future of Majority-Minority Districts in Light of Declining Racially Polarized Voting*, 116 HARV. L. REV. 2208, 2226 (2003).

the two-step election process, determining how Hispanics vote in primaries as well as general elections.[96] Following the DOJ's former practice in evaluating preclearance submissions, it even requires looking at "soft" factors like the opinions of Hispanic politicians and Hispanic civic groups to see if the community "genuinely" prefers a candidate or just reluctantly supports them.[97]

It is clear that no such searching analysis has been made to date, either in the course of litigation or in the academic literature.[98] It is equally clear that much more research needs to be done. However, we can attempt some preliminary conclusions about Hispanic voting cohesion based on the data and research that *are* available, by applying the correct cohesion standard overlooked by the Florida courts.

First, exit polls, regression data, and precinct analyses from recent presidential elections show mainly low or moderate cohesion. In the three presidential elections between 2008 and 2016, South Florida Hispanics were about evenly split between the Democratic and Republican presidential candidates, with no candidate gaining more than 60% of the vote.[99] Even in the 2016 U.S. Senate election, Marco Rubio—a Cuban American Republican and the incumbent—received less than 55% of the Hispanic vote statewide

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[96] Sam Hirsch, *Unpacking* Page v. Bartels: *A Fresh Redistricting Paradigm Emerges in New Jersey*, 1 ELECTION L.J. 7, 21–22 (2002); Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself: Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1535–36 (2002); Comment, *supra* note 96, at 2219; Persily, *supra* note 92, at 226–27; Section 5 Recommendation Memorandum from Tim Mellett et al., Attorneys and Staff, Voting Section, U.S. Dep't of Justice to Robert S. Berman, Deputy Chief, Voting Section, Dep't of Justice (Dec. 12, 2006) [hereinafter DOJ Memo], available at https://wapo.st/3lLyqVJ.

[97] Persily, *supra* note 92, at 227; DOJ Memo, *supra* note 97, at 29, 33–35, 40, 53.

[98] It is possible the Florida Legislature itself commissioned such analyses for the 2020-cycle redistricting process, but that analysis has not been made publicly available. Andrew Pantazi, *Florida House Approves State District Maps Without Sharing Racial Analyses*, THE TRIBUTARY (Feb. 2, 2022), https://jaxtrib.org/2022/02/02/florida-house-approves-state-district-maps-without-sharing-racial-analyses/.

[99] GIANCARLO SOPO & GUILLERMO GRENIER, ANALYSIS OF THE 2016 CUBAN-AMERICAN VOTE, SCRIBD, 2 (Dec. 18, 2016), https://www.scribd.com/document/334539413/Analysis-of-the-2016-Cuban-American-Vote-by-Giancarlo-Sopo-Guillermo-Grenier-Ph-D; Krogstad & Flores, *supra* note 70; *Exit Polls: Florida President*, CNN (Nov. 9, 2016), https://cnn.it/3lBzVWq; *State Results: Florida*, *supra* note 70.

against an Anglo Democratic opponent.[100] That compares to 2010, when Rubio won about three-quarters of the South Florida Hispanic vote.[101] The 2014 governor's race saw a similarly divided Hispanic electorate statewide, with Democrat Charlie Crist garnering less than 60% of the vote.[102] The 2018 top-of-ticket races showed similar breakdowns within the 60/40 range.[103] In 2020, exit polls painted a picture roughly akin to 2018 and 2016, while other analyses based on results in the most heavily-Hispanic precincts (but not ecological regression or inference analyses) estimated a breakdown closer to two-thirds/one-third for the Republican presidential ticket.[104] By all accounts, the swing toward the G.O.P. was fueled not only by a Cuban reversion, but also by non-Cuban Hispanic voters.[105] It remains to be seen whether that rightward movement will endure in future cycles; if so, to what extent; and whether it would disrupt a conclusion of noncohesion generally—or if it means simply that neither party can count on garnering a solid majority of the South Florida Hispanic voting bloc in any one election.

Considering the known data, few or none of the presidential, gubernatorial, or U.S. Senate races of the last several cycles, then, have seen the level of Hispanic cohesion courts have usually found sufficient to satisfy the second *Gingles* prong. While there is no bright-line cutoff, minority electorates that split 60/40 are generally non-cohesive.[106] At the opposite end, experts have concluded that divides upwards of around 85/15 demonstrate cohesion.[107]

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[100] *Exit Polls: Florida Senate*, CNN (Nov. 9, 2016), https://cnn.it/3nEZXcU.

[101] *Lichtman Relinq. Rep.*, *supra* note 84, at 13–15.

[102] *Governor: Florida*, CNN (Nov. 6, 2014), https://cnn.it/3ltG1Yw.

[103] *Exit Polls: Florida*, CNN (2018), https://cnn.it/2FoJqZy; Green, *supra* note 71, at 24–25.

[104] Carmen Sesin, *Trump Cultivated the Latino Vote in Florida, and It Paid Off*, NBC NEWS (Nov. 4, 2020), https://nbcnews.to/34qOaar; Rodrigo Domínguez-Villegas et al., *Vote Choice of Latino Voters in the 2020 Presidential Election*, UCLA LATINO POLICY & POLITICS INITIATIVE (Jan. 19, 2020), https://latino.ucla.edu/research/latino-voters-in-2020-election/, at 6, 15–16.

[105] Alex Daugherty, David Smiley, Bianca Padró Ocasio & Ben Wieder, *How Non-Cuban Hispanics in Miami Helped Deliver Florida for Donald Trump*, MIA. HERALD (Nov. 6, 2020), https://www.miamiherald.com/article246978452.html.

[106] *See* Elmendorf et al., *Racially Polarized Voting*, 83 U. CHI. L. REV. 587, 627, 681 (2016); Persily, *supra* note 92, at 225; Ansolabehere et al., *supra* note 92, at 1407.

[107] *See* Hirsch, *supra* note 97, at 16–17.

Second, Barreto and Gutierrez's recent research provides the clearest indication yet that, even if South Florida's Cuban voters are cohesive in the elections studied, the Hispanic community overall lacks cohesion.[108] Conducting an ecological analysis of thirteen different elections, they reach the conclusion that there are "two Latino electorates" in the region: a cohesive, mostly Republican, Cuban electorate that makes up about 45% of the region's Hispanic voters, and a non-Cuban electorate representing 55% of Hispanics overall, and that is more likely to support Democrats.[109] Specifically, Barreto and Gutierrez list the two-party vote breakdown in majority-Hispanic precincts across the thirteen elections studied from 2016 to 2020. All fall within the 65/35 range, with eleven races splitting 59/41 or closer.[110] Focusing on the Cuban subset, the study estimates that over 80% of Cuban voters voted cohesively for certain Republican candidates in some of the races studied—exhibiting divergent preferences from the remainder of the Hispanic electorate.[111]

While this recent research is indeed illuminating, the otherwise lack of RPV analysis of legislative and congressional elections, or even South Florida-specific exit poll data for top-of-ticket races, makes it tricky to draw firm conclusions about Hispanic voting behavior further down the ticket. Nonetheless, the data available points to a lack of overall Hispanic cohesion in at least some Hispanic-majority districts, even while Cuban and non-Cuban voters may exhibit divergent political preferences as cohesive subgroups.[112]

V. ALTERNATIVES AND CONSEQUENCES

The possibility of Hispanic non-cohesion raises the question: how should voting rights legislation and jurisprudence respond? This Part discusses three distinct approaches: First, continuing the course: treating "Hispanics" as one irreducible classification, and accepting the attendant consequences should proper analysis reveal electoral disunity. Second, diving deeper than the "Hispanic" category: looking at the voting behavior of its constituent

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[108] Barreto & Gutierrez, *supra* note 13, at 1–2.

[109] *Id.* at 15.

[110] *Id.* at 6.

[111] *Id.* at 10, 14.

[112] *See supra* Part II; *Apportionment VIII*, 179 So. 3d 258, 286–87 (Fla. 2015).

national-origin subgroups. However, whether this approach is appropriate under either the existing Voting Rights Act or Florida's Fair Districts Amendments is no certain proposition, and Congress could—perhaps should—update the statute to adopt this framework. The third approach builds on the second, but adds a wrinkle: where appropriate, combining the subcommunities back together under a coalition theory—also no certain proposition under existing caselaw. I discuss each approach in turn.[113]

A. Hispanics as One Group

If further research confirms a lack of voting cohesion among Hispanics in South Florida, and if the law continues to treat Hispanics together, that would not necessarily mean the end of the road for the Voting Rights Act vis-à-vis South Florida Hispanics. It is true that a non-cohesive Hispanic community would mean vote dilution claims would fail and no changes in

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[113] The Florida House of Representatives suggested a fourth, and radical, potential approach in its recent brief defending its own map in the Florida Supreme Court: dispensing with the cohesion requirement altogether. Brief of Fla. House of Representatives at 27 n.10, *In re 2022 Apportionment*, No. SC22-131, 2022 WL 619841 (Fla. Mar. 3, 2022) (asking the Court to "clarify" *Apportionment VIII*'s footnote 11 and declare that the *Gingles* prerequisites do not govern the non-diminishment standard under Section 5).

The existence of racially polarized voting (the second and third *Gingles* preconditions) is and has been a prerequisite not only for Section 2 liability, but also under Section 5. *See, e.g.*, *Apportionment VIII*, 179 So. 3d at 287 n.11 (citing Texas v. United States, 831 F. Supp. 2d 244, 262–63 (D.D.C. 2011) ("At the outset, a court addressing a proposed voting plan under Section 5 must determine whether there is cohesive voting among minorities and whether minority/White polarization is present.")); Letter from Asst. Atty. Gen. Ralph F. Boyd Jr. to President of the Fla. Senate John M. McKay and Speaker of the Fla. House Tom Feeney (July 1, 2002), at 1, 3 (denying preclearance to 2002 Florida House plan and discussing cohesion among disparate Hispanic populations as grounds for objection).

Indeed, a prohibition on diminishing a minority group's "ability to elect representatives of their choice" presupposes the existence of candidates preferred by a cohesive majority of that group. For the reasons hinted at below, *infra* Part VI, it is the corrosive and invidious nature of racially polarized voting that necessitates the VRA's and Fair Districts Amendments' protections from vote dilution and retrogression in the first place. Without RPV—without minority cohesion—the VRA's theoretical underpinnings unravel.

The Florida Supreme Court declined the House's invitation to revisit *Apportionment VIII*'s discussion of cohesion. *See generally In re 2022 Apportionment*.

district lines could be retrogressive.[114] Even considering racial and ethnic demographics in districting would be constitutionally dubious under prevailing equal protection jurisprudence.[115] Without the justification of VRA compliance, lawmakers engaged in race-conscious redistricting might find their Dade districts vulnerable to challenge, even though Dade's concentrated Hispanic populations would not necessitate contorted district shapes.[116] Florida mapmakers' discretion to draw the lines as they wished would be quite constrained, especially since the state constitution forbids an "it was politics, not race" defense to a racial gerrymandering claim for legislative districts.[117] Politically motivated legislators would find it harder to hide behind VRA justifications to draw districts favoring their party.[118]

But as mentioned above, it may be the case that Hispanic voters are cohesive in certain types of races—local elections, for instance—if not all races. Likewise, it may be the case that Hispanic voters are cohesive in certain neighborhoods—the Republican-heavy Cuban areas around Hialeah and the Tamiami Trail, for instance—if not all areas of South Florida. If so, the VRA's and Florida Constitution's protections against dilution and retrogression remain operative with respect to certain legislative and local districts, but perhaps not for congressional districts or in areas where non-Cuban voters are more prevalent. Assuming that electoral unity in some races implies cohesion in all is the kind of stereotyping the VRA rejects and which

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[114] Persily, *supra* note 92, at 243.

[115] Wis. Legislature v. Wis. Elections Comm'n, No. 21A471, 2022 WL 851720, at *2 (U.S. Mar. 23, 2022) ("[D]istricting maps that sort voters on the basis of race 'are by their very nature odious.' " (quoting Shaw v. Reno, 509 U.S. 630, 643 (1993))); Abbott v. Perez, 138 S. Ct. 2305, 2314 (2018) ("The Equal Protection Clause forbids 'racial gerrymandering,' that is, intentionally assigning citizens to a district on the basis of race without sufficient justification."). *See also* Ala. Legis. Black Caucus v. Alabama, 575 U.S. 254, 262–63 (2015); Miller v. Johnson, 515 U.S. 900, 913, 916 (1995); *Shaw*, 509 U.S. at 649.

[116] Bethune-Hill v. Va. State Bd. of Elections, 137 S. Ct. 788, 799 (2017); *Apportionment I*, 83 So. 3d 597, 645 (Fla. 2012).

[117] *Compare* FLA. CONST. art. III, §§ 20(a), 21(a), *with* Easley v. Cromartie, 532 U.S. 234, 258 (2001).

[118] *See Apportionment I*, 83 So. 3d at 640 (noting that using "minority protection . . . as a pretext for drawing districts with the intent to favor a political party or an incumbent . . . would frustrate rather than further the overall purpose of the Fair Districts Amendment").

the Equal Protection Clause forbids.[119] Mapmakers would have to consider ethnicity for those elections in which it is salient, but disregard it when drawing districts with low Hispanic cohesion. If cohesion varies within the South Florida region, then certain districts may be protected from retrogression, while others may not be.

What would this mean in practice? Judging by recent endogenous election results, this approach could cut the number of Hispanic-majority legislative seats protected from retrogression or dilution from fifteen to six or fewer.[120] Applying the same cursory review to local government—where Republican strength has eroded more slowly—paints a different picture: of the eight predominantly Hispanic Miami-Dade County Commission districts, only two or three might exhibit the noncohesion necessary to lose VRA protection.[121]

B. Subgroups Under the Voting Rights Act

All of this raises a larger issue. Regardless of whether there is cohesion amongst Hispanics as a group in all, some, or no elections, mapmakers and courts ought to reexamine their use of the category "Hispanic" when drawing districts and analyzing VRA claims in South Florida. There are robust cultural, economic, and political differences between the various Hispanic groups in the area.[122] Recognizing those differences accords with anti-discrimination law's goals of combatting stereotypes and rejecting

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[119] Levitt, *supra* note 95, at 577; *Ala. Legis. Black Caucus*, 135 S. Ct. at 1284.

[120] Under the 2010-cycle maps, there are fifteen majority-Hispanic legislative districts in South Florida: SDs 36, 37, 39, and 40; and HDs 103, 105, 110–116, 118, and 119. Of those, only six remain uncompetitive in general elections (with winning margins of ten percentage points or greater): SD 36, and HDs 110, 111, 113, 116, and 119. Given the large Hispanic electorates in all these districts, it is likely that regression analyses will reveal divided Hispanic electorates in the competitive districts. *Election Results*, FLA. DEP'T OF STATE, https://results.elections.my florida.com/; Fla. House of Representatives, *supra* note 49.

[121] Districts 5–8 and 10–13 are majority-Hispanic. Districts 5, 7, and 8 have had recent competitive elections; the others consistently vote overwhelmingly for Hispanic Republicans. MIAMI-DADE CNTY., *Election Results Archive*, https://www8.miamidade.gov/global/elections/election-results-archive.page.

[122] Grenier & Castro, *supra* note 17, at 275, 279; Alberts, *supra* note 13, at 251; *Wetherell II*, 815 F. Supp. 1550, 1570 (N.D. Fla. 1992); *QuickFacts: Miami-Dade Cnty., Fla.*, *supra* note 18.

assumptions about minority groups. Just as we cannot assume difference between groups, we should not assume sameness within groups. Even if Hispanics as a whole do not vote cohesively, subgroups of certain national origin backgrounds may. This approach is practically feasible, as national origin data is collected by both the decennial U.S. Census and the ongoing American Community Survey.

Analyzing subgroup behavior raises some legal questions, however. As an initial matter, by its terms, the text of the Voting Rights Act precludes going beyond the broad umbrella of the "Hispanic" category. The VRA does protect "language minority group[s]," and one could argue that the variations in the Spanish that Cubans, Venezuelans, and other "Hispanic" subgroups speak make each a distinct language minority group.[123] But the VRA specifically defines "language minority group" to mean persons "of Spanish heritage"—rejecting diving deeper than the "Hispanic" umbrella.[124]

Legal efforts to break up the umbrella for other "language minority groups" listed in the statute have failed and are instructive for the Hispanic question. In 1994, a federal district court rejected a Section 2 suit brought by Yupik Alaskans challenging that state's legislative redistricting.[125] The plaintiffs argued the State diluted the Yupik vote in favor of two other Alaskan Native groups, even though the overall number of Native seats was unaffected.[126] The court rejected the Yupik plaintiffs' contention that they deserved independent consideration separate from Alaskan Natives as a whole, notwithstanding the Yupiks' distinct dialect or language:

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[123] 52 U.S.C. § 10303(f)(2); Ana Celia Zentella, *Latin@ Languages and Identities*, *in* LATINOS: REMAKING AMERICA 321, 321 (Marcelo M. Suárez-Orozco & Mariela M. Páez eds., 2008) ("The varieties of Spanish spoken by national-origin groups serve as nationalist flags that symbolize each group's unique identity. . . .").

See also MELVYN C. RESNICK, PHONOLOGICAL VARIANTS AND DIALECT IDENTIFICATION IN LATIN AMERICAN SPANISH (2012); R.W. Thompson, *Spanish as a Pluricentric Language*, *in* PLURICENTRIC LANGUAGES 45 (Michael Clyne, ed., 1992); JOHN M. LIPSKI, LATIN AMERICAN SPANISH (1994); Paola Bentivoglio and Mercedes Sedano, *Morphosyntactic Variation in Spanish-Speaking Latin America*, *in* THE HANDBOOK OF HISPANIC SOCIOLINGUISTICS 168 (Manual Díaz-Campos ed., 2011).

[124] 52 U.S.C. § 10310(c)(3).

[125] Guy v. Hickel, No. A92-494 CIV (JWS), slip op. at 1–2 (D. Alaska Nov. 2, 1994).

[126] *Id.* at 2, 4; Complaint at 5, 8, *Hickel*. *See also Hickel*, slip op. at 1–2 (noting that the other two groups were the Iñupiat and Alaskan Athabaskans).

> If Congress had intended to create numerous subgroups and classes of minorities to correspond to the indeterminate number of languages and dialects spoken in the United States, it could have done so. Instead, the language of the statute is specific: protected classes include "American Indians, Asian Americans, Alaskan Natives or [persons] of Spanish Heritage."[127]

Notably, the U.S. Department of Justice ignored the Yupik argument during Section 5 preclearance proceedings in the same redistricting cycle.[128]

While the Yupik case points against breaking up the statutory "language minority groups," other courts have seen reason to do just that—albeit not squarely within the Section 2 context. After the 1992 Arizona Legislature deadlocked, a federal district court was tasked with redrawing the state's congressional districts.[129] While there was no American Indian VRA claim in the case, the court took care to keep two Indian groups—Hopi and Navajo—in separate districts, "out of respect for . . . the historical tension and present competition between these two tribes."[130] A decade later, the Arizona Independent Redistricting Commission similarly separated the tribes, and state courts looked on that approach favorably in subsequent litigation.[131]

Whether the constituent parts of a protected group can raise VRA claims

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[127] *Id*. at 5 (quoting 52 U.S.C. §§ 10310(c)(3), 10503(e)).

[128] *Id*. at 4 (noting that the DOJ suggested the State add Yupik areas to a plurality-Athabaskan district to bolster its overall Alaskan Native numbers).

[129] Arizonans for Fair Representation v. Symington, 828 F. Supp. 684, 686–87 (D. Ariz. 1992), *aff'd sub nom.* Hispanic Chamber of Commerce v. Arizonans for Fair Representation, 507 U.S. 981 (1993).

[130] *Id*. at 690. The court did so even though it necessitated highly noncompact (and even noncontiguous) districts. *Id*. at 720–21.

[131] Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n, 121 P.3d 843, 849 (Ariz. Ct. App. 2005). The Arizona courts primarily relied on the state constitution's mandate to "respect communities of interest," not the VRA. *Id*. at 871; ARIZ. CONST. art. IV, pt. 2, § 1(14)(D).

on behalf of their subgroup is clearly not a new issue.[132] But the sparse caselaw indicates that this question—how to treat homogenous components of heterogeneous minority groups—remains an "emerging" one, just as Pamela Karlan described over twenty years ago.[133] Nevertheless, given the apparent rigidity of the VRA's "Spanish heritage" definition, it seems unlikely that a subgroup approach is workable. As Congress debates new voting rights legislation, lawmakers should consider how to update the "language minority group" definition to recognize the true diversity of (and distinctive identities within) that term. A reworking of the statute to refine the catchalls "persons who are American Indians, Asian Americans, Alaskan Natives or of Spanish Heritage" to permit claims by members of individual tribes and national origin groups would go a long way toward achieving that goal. Even just adding "ethnicity" as a standalone protected category could be a workable, flexible solution, giving courts leeway to tailor VRA remedies to the social and political realities on the ground.

C. Subgroups Under the Fair Districts Amendments and a Coalitional Approach

In contrast to the Voting Rights Act, Florida's Fair Districts Amendments protect "racial [and] language minorities," without defining those terms.[134] Regardless of whatever amendments Congress makes to the VRA, the Fair Districts text opens a window for a creative Florida court to define either of those terms to include national origin-specific categories. Hampering a flexible interpretation, however, is the Florida Supreme Court's declaration that the VRA guides their interpretation of Fair Districts, as well

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[132] *See Hickel*, slip op. at 1–2. *See also* Wendy K. Tam, *Asians–A Monolithic Voting Bloc?*, 17 POL. BEHAV. 223, 246–47 (1995) (urging a subgroup approach when evaluating voting rights claims of the heterogeneous Asian community in California); Frank J. Macchiarola & Joseph G. Diaz, *The 1990 New York City Districting Commission: Renewed Opportunity for Participating in Local Government or Race-Based Gerrymandering?*, 14 CARDOZO L. REV. 1175, 1211 (1992) (discussing the creation of a heavily Dominican as opposed to more general Hispanic district, and a heavily Caribbean as opposed to Black district, during the 1990 New York City redistricting process).

[133] Karlan, *supra* note 13, at 86–87.

[134] FLA. CONST. art III, §§ 20(a), 21(a).

as Fair Districts' plain text.[135] But facing the realities of collectively diverse, individually unified Hispanic subcommunities, the Florida courts could disregard the VRA, cast aside a constrained definition of "racial and language minorities," and invoke their "independent constitutional obligation to interpret [their] own state constitutional provisions."[136]

Such an approach could better reflect the realities of the people in the world, particularly if combined with a coalitional approach to voting rights claims, as discussed above. Whether through an amended VRA or reinterpreted Fair Districts Amendments, a subgroup framework would provide particularly robust protections if combined with a coalitional approach to voting rights claims. If different subgroups exhibited similar voting behavior, those communities could be assembled together. Component communities that might be too small to constitute a majority in their own single-member district would not necessarily be locked out of a dilution claim. While the U.S. Supreme Court has never endorsed cross-racial or cross-ethnic vote dilution claims, other courts have—including the Eleventh Circuit.[137] And notably, the most recent version of H.R. 4, the John

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[135] *In re 2022 Apportionment*, No. SC22-131, 2022 WL 619841, at *4 ("While they exist independently as Florida law, these provisions were modeled on . . . key provisions of the federal Voting Rights Act of 1965 . . . ."); *Apportionment I*, 83 So. 3d 597, 620 (Fla. 2012) ("[O]ur interpretation of Florida's corresponding provision is guided by prevailing United States Supreme Court precedent."); Advisory Op. to the Gov. re Implementation of Amend. 4, the Voting Rights Restoration Amend., 288 So. 3d 1070, 1078 (Fla. 2020) ("[O]ur opinion is based . . . on the objective meaning of the constitutional text . . . . We therefore adhere to the 'supremacy-of-text principle.' "), *receding from* Williams v. Smith, 360 So. 2d 417, 419 (Fla. 1978) ("In construing the Constitution, we first seek to ascertain the intent of the framers and voters, and to interpret the provision before us in the way that will best fulfill that intent.").

[136] *Apportionment I*, 83 So. 3d at 621.

[137] Bartlett v. Strickland, 556 U.S. 1, 13 (2009); Concerned Citizens of Hardee Cnty. v. Hardee Cnty. Bd. of Comm'rs, 906 F.2d 524, 526 (11th Cir. 1990) ("Two minority groups . . . may be a single section 2 minority if they can establish that they behave in a politically cohesive manner."); LULAC Council No. 4434 v. Clements, 999 F.2d 831, 864 (5th Cir. 1993) (en banc) ("If blacks and Hispanics vote cohesively, they are legally a single minority group."); Badillo v. City of Stockton, 956 F.2d 884, 891 (9th Cir. 1992) ("Plaintiffs must be able to show that minorities have in the past voted cohesively."); Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cnty. of Albany, No. 03-CV-502, 2003 WL 21524820, at *5 (N.D.N.Y. July 7, 2003) ("[B]lacks and Hispanics may be considered as a single minority group under the Voting Rights Act if the coalition meets the three *Gingles* preconditions.").

R. Lewis Voting Rights Advancement Act of 2021, explicitly recognizes claims by "cohesive coalition[s] of members of different racial or language minority groups."[138]

But setting aside, for a moment, the prospect of coalitional claims, South Florida's demographics throw a wrench into the subgroup strategy. All but one national-origin group are too dispersed to form a majority in a legislative or county commission district.[139] Cubans are the only community that could satisfy the first *Gingles* precondition ("sufficiently large and geographically compact to constitute a majority in a single-member district").[140] Even if national-origin subcommunities were grouped into coalitions, the non-Cuban population is so scattered that no combination could form a majority in any type of district. A subgroup approach may be more appropriate than treating all Hispanics as an undifferentiated whole, then, but the practical difference is likely minimal (except, perhaps, for the Cuban American community).

CONCLUSION

The perfunctory nature in which many courts and litigants gloss over minority cohesion in vote dilution cases can obscure its importance to the VRA framework. But racially polarized voting matters because it is itself corrosive to the democratic process. Without RPV, the discriminatory mechanisms by which racial minorities' political opportunities are frustrated could not operate.[141] Indeed, when minority voters can no longer be automatically identified from the candidates and parties they support, the VRA's purpose of remedying the lingering effects of discrimination is no longer salient. If candidate preferences no longer align with race, then at least in the electoral arena, color-blindness wins the day.

Such an outcome doesn't punish minority voters for "unremarkable" voting patterns, nor does it embody a "use it or lose it" attitude about VRA protections. Because at the point when minority-group voting looks roughly

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The 6th Circuit is the only U.S. Court of Appeals to have rejected the coalition theory. Nixon v. Kent Cnty., 76 F.3d 1381, 1393 (6th Cir. 1996) (en banc).

[138] H.R. 4, 117th Cong. § 2(b)(3) (2021) (creating 52 U.S.C. § 10301(b)(4)) (as passed by the House, Aug. 24, 2021).

[139] Fla. House of Representatives, *supra* note 49.

[140] *Id*.; Thornburg v. Gingles, 478 U.S. 30, 50 (1986).

[141] *See* Issacharoff, *supra* note 10, at 1836–37.

like majority-group voting, there's nothing to "lose:" the "operation of those political processes ordinarily to be relied upon to protect minorities" can indeed be relied upon.[142] Especially in light of the Fourteenth Amendment's prohibition on sorting by race, the government shouldn't be making racial classifications without good reason.[143] Compliance with the VRA's results test is a good reason,[144] but only so long as race or ethnicity is clearly salient in shaping the electoral opportunities of historically disadvantaged groups and remedying the effects of past discrimination.

So, answering the question of whether South Florida's Hispanic community votes cohesively has significant implications for how we measure our society's progress on the road toward racial equality. While more research needs to be done, this investigation suggests that for this particular minority group in this particular context, we are one step closer to leaving behind the "politics of second best."[145]

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[142] United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938).

[143] Bethune-Hill v. Va. State Bd. of Elections, 137 S. Ct. 788, 797 (2017) ("The Equal Protection Clause prohibits a State, without sufficient justification, from 'separat[ing] its citizens into different voting districts on the basis of race.' " (quoting Miller v. Johnson, 515 U.S. 900, 911 (1995))).

[144] Abbott v. Perez, 138 S. Ct. 2305, 2315 (2018) ("[W]e have assumed that complying with the VRA is a compelling state interest, and that a State's consideration of race in making a districting decision is narrowly tailored and thus satisfies strict scrutiny if the State has 'good reasons' for believing that its decision is necessary in order to comply with the VRA." (citations omitted)).

[145] Johnson v. De Grandy, 512 U.S. 997, 1020 (1994) (quoting BERNARD GROFMAN ET AL., MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 136 (1992)).

CHALLENGING FAIR HOUSING REVISIONISM

MYRON ORFIELD & WILLIAM STANCIL[**]

INTRODUCTION

The Fair Housing Act[1] was the third great civil rights act of the 1960s, and the most ambitious. While the Civil Rights Act of 1964 sought to end racial discrimination in a variety of contexts,[2] and the Civil Rights Act of 1965 sought to protect the right to vote,[3] the 1968 Fair Housing Act targeted the very physical

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[1] *See* Civil Rights Act of 1968, Pub. L.90-282, 82 Stat. 73, 42 U.S.C. § 3601.

[2] *See* Civil Rights Act of 1964, Pub. L.88-353, 78 Stat. 241, 42 U.S.C. § 2000e.

[3] *See* Voting Rights Act of 1965, Pub. L.89-110, 79 Stat. 437, 52 U.S.C. § 10100.

structure of American society. Then and now, Americans lived in an environment defined by geographic residential segregation.[4] Then and now, nonwhite Americans, and particularly black Americans, were often confined to economically depressed, isolated neighborhoods.[5] This confinement was accomplished through a variety of segregative public and private acts.[6] Its result was the growth of a tiered society, in which some members were forced to live in places absent economic or educational opportunity, where they could be easily targeted by predatory political or economic forces. This was the problem the Fair Housing Act was meant to address, the ultimate goal of its most sweeping provisions, that recipients of federal funds must "affirmatively further Fair Housing," an effort to unite, what the Kerner Commission termed "the two America's" that "were separate and unequal."[7]

Running alongside the well-established judicial interpretation, however, has been an alternative theory of the meaning of the Fair Housing Act. To these fair housing revisionists, the Fair Housing Act was never intended to directly target segregation in cities or require government agencies to affirmatively advance integration in their policies.[8] Instead, they argue, the Act was only ever intended to address individual acts of discrimination, typically taking place during private market sales.[9]

Under the established view, the Fair Housing Act requires the federal government to ensure that local governments receiving federal monies enact policies that affirmatively pursue racial integration. In the revisionist view, this requirement is ahistorical and counterproductive.[10] In the established view, the Fair Housing Act requires that most subsidized housing should be sited in affluent areas with high opportunity in order to reduce residential segregation. In the revisionist view, affordable housing can be sited anywhere, even if doing so mirrors some of the most notoriously segregative policies of past decades.[11] In the established view, the many discriminatory behaviors prohibited by the act include

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[4] *See generally* DOUGLAS MASSEY & NANCY DENTON, AMERICAN APARTHEID; SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993).

[5] *Id.*

[6] *Id.*

[7] *See generally* discussion *infra* Kerner Commission. THE NATIONAL COMMITTEE OF CIVIL DISORDERS, REPORT (1967).

[8] *See* discussion *infra* comparing the position of William Bradford Reynolds, Assistant Attorney for Civil Rights in the Reagan Justice Department, the Trump Administration position on the Affirmatively Furthering Fair Housing Rule, and Edward Goetz, the One Way Street of Interrogation (2018).

[9] *Id.*

[10] *Id.*

[11] *Id.*

disparate impact violations and the "perpetuation of segregation."[12] In the revisionist view, the Fair Housing Act is unconcerned with whether integration is barred, as long as entities in the housing market do not commit discrete acts of discrimination against individual consumers.[13]

The appeal of fair housing revisionism is clear: it effectively guts the Fair Housing Act, transforming it from one of the most significant legislative reforms in American history into a modest anti-discrimination measure. The revisionist Act is not a landmark law intended to advance a particular vision of an integrated society, but a minor, largely redundant law, intended to shield nonwhite Americans and other groups from mistreatment. This shrunken act would have little or nothing to say about how the federal government should guide local governments as they make decisions about land use, affordable housing placement, or white suburban enclaves. To those whose careers are built around local government land use, affordable housing construction, or protecting white suburban enclaves, the revisionist view offers an easy rationale to ignore otherwise-significant fair housing obligations.

Of course, skepticism of fair housing has existed long before the law's passage, beginning with southern segregationists.[14] But since 1968, broader interpretations have mostly prevailed.[15] Every federal court to address the issue has interpreted the law as including a broad integration mandate, relying on several noteworthy pieces of legislative history, as well as the political context in which the law was enacted.[16] The same is true of most scholars, executive branch officials, and even among political conservatives.[17] The first and perhaps the most aggressive defender of the law's broad mandate was none other than Republican George Romney, the first Housing and Urban Development (HUD) secretary to enter office while the Fair Housing Act was in force. Despite serving under Richard Nixon, whose presidential politics were heavily built around the defense

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[12] *Id.*

[13] *Id.*

[14] *See generally* discussion *infra* Section III on the Senate floor debate on the Fair Housing Act of 1968.

[15] *See* discussion *infra* Section II on Obama's disparate impact and affirmatively furthering fair housing rules and its discussion of federal court cases.

[16] *Id.*

[17] While William Bradford Reynolds made statements in the press arguing that the Fair Housing Act did not require integration, he never made this argument formally before the federal courts. Indeed, only the Trump Administration and Professor Goetz have ever formally advanced this argument. Even the student comment often cited by Professor Goetz (written by law student who would go on to work at the Bush Justice Department), does not go as far as Trump and Goetz but merely suggests this as an alternative reading of the law. *See generally* Michael R. Tein, Comment, *Devaluation of Nonwhite Community in Remedies for Subsidized Housing Discrimination*, 140 U. PA. L. REV. 1463 (1992).

of white residential enclaves,[18] Romney understood that the act required him to integrate American communities and pursued that goal throughout his tenure at HUD--often at odds with, or even unbeknownst to, President Nixon. In 2015, Justice Anthony Kennedy, hardly a liberal, offered a strong defense of the law's integrative intent in the case *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*.[19]

But in recent years, the revisionist narrative about the Fair Housing Act has taken on a more alarming character, for several reasons. First, the consistent promotion of these theories by some academics has given them unwarranted credibility in the academy, especially in the public policy field.[20] Of particular note, a widely recognized affordable housing scholar has published a book-length version of the revisionist case, arguing that integration has been unduly prioritized by fair housing advocates.[21] These arguments are beginning to be made by some non-profit low-income housing developers in state and federal courts and more recently quite clearly before the United States Supreme Court.[22] But worse still, during the Trump administration, these revisionist theories have found sudden root in the federal government official position on the meaning of the Fair Housing Act.

Although housing scholarship is often conducted from a left-of-center perspective, and the Trump administration is anything but, a bizarre cross-pollination of ideologies seems to have occurred. In July 2020, Trump's HUD eliminated what is known as the Affirmatively Furthering Fair Housing rule–the

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[18] *See generally* CHARLES LAMB, HOUSING SEGREGATION IN SUBURBAN AMERICA SINCE 1960: PRESIDENTIAL AND JUDICIAL POLITICS (2005).

[19] 135 U.S. 2507 (2015).

[20] As a frequent professional witness and paid policy advisor, Professor Goetz works for defendants in fair housing cases or community development entities that oppose the implementation of integrative remedies. *See* Noel v. City of New York, No. 15-CV-5236-LTS-KHP, 2018 WL 6786238 (S.D.N.Y. Dec. 12, 2018) (supporting a neighborhood residency preference for low-income housing); Henry Horner Mother's Guild v. Chicago Hous. Auth., 824 F. Supp. 808 (N.D. Ill. 1993) (disputing benefits of mixed income housing and relocation of public housing residence).

[21] *See* Goetz, *supra* note 8, at 1.

[22] *See* Reply Brief of Respondents, Frazier Revitalization Inc. in Support of Petition for Writ of Certiorari at 9-11, Texas Dept. of Hous. and Community Affairs v. Inclusive Communities Project, Inc. 135 U.S. 2507 (2015) (No. 13-1371). *See also* Amicus Curiae Brief on Behalf of Local Initiatives Support Corporation, In re Adoption of the 2002 Low Income Hous. Tax Credit Qualified Allocation Plan, (N.J. Super. Ct. App. Div. 2003) (No. A-10-02T2).

centerpiece of the law's integrationist aims.[23] In doing so, it relied heavily on arguments advanced by the law's left-wing critics.[24]

This article shows that the revisionist view of the Fair Housing Act is inconsistent with the legislative language, intent and purpose of the Act, with the administration of the Act starting with its first contemporaneous implementation, with admissions and settlements made by HUD over decades, and the authoritative interpretation by the Supreme Court and all other courts thus far. The remainder of this article addresses these unwelcome developments. Simply put, the revisionist view of the Act does not fit at all with the historical context leading up to its passage. Contrary to the claims of fair housing revisionists, integration was always a core purpose of the Act and well-acknowledged by its proponents and supporters, both in Congress and in the broader civil rights community. Indeed, this focus on real integration is precisely what distinguished the Fair Housing Act from previous efforts to combat housing segregation.

This is not an academic debate, but one of deep importance for American cities. Even if the Trump administration's changes are likely to be overturned in the Biden administration, those changes have re-raised fundamental questions about American civil rights law. The primary question is simple: Are policies that increase racial segregation compatible with the requirements of the Fair Housing Act? And the answer is unequivocal that they are not.

II. FAIR HOUSING REVISIONISM IN THE ACADEMY AND WHITE HOUSE

Although the Fair Housing Act has been law for over half a century, its advocates have spent much of that time trying to defend it. Early resistance to the law, however, typically took the form of non-enforcement and non-compliance.[25] Its bolder provisions were often muddied, stymied with endless court battles, or simply ignored.[26] The law's significance was downplayed for decades.

Despite those struggles, two powerful weapons against racial segregation emerged from the Act. The first was § 3604 (a) of the law, which prohibited a refusal "to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."[27]

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[23] *See* Trump, *supra* note 8, at 1 (discussion of the Trump Administration's position on Obama's Affirmatively Furthering Fair Housing Rule).

[24] *Id.*

[25] *See* Massey and Denton, *supra* note 4, at 1; Florence Wagman Roisman, *Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Laws*, 52 MIAMI L. REV. 1011 (1998)

[26] *Id.*

[27] 42 U.S.C. § 3604(a).

The phrase "otherwise make unavailable" has long been interpreted to create a broad prohibition against discriminatory housing transactions or acts of almost any description.[28] Most importantly, because the passage of the Fair Housing Act was deeply rooted in a larger debate about racial segregation, this "otherwise make unavailable" language has been held to a disparate impact cause of action against policies that reinforce segregation and a "perpetuation of segregation" cause of action, which allows plaintiffs to bring suit against policymakers who enacted certain policies with a segregative effect.[29]

The second was a phrase contained in § 3608 (d) and (e).[30] Both provisions require federal agencies, and the HUD Secretary specifically, "affirmatively to further the purposes of this subchapter."[31] Because the overarching aim of the law was perceived as the formation of a racially integrated society, these provisions effectively created a mandate for federal agencies to *proactively* integrate. In addition, § 3608 (e)(5) requires HUD to specifically "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter."[32] Since most HUD development programs are conducted in collaboration with state and local governments, this provision seems to require HUD to impute its integration mandate on those subordinate jurisdictions.

While both of these legal interpretations were well-established by the 21st century, their particulars (and sometimes, their enforcement) were largely left to the courts. As a result, there was no single clear, standardized set of integration obligations that jurisdictions were expected to follow, frustrating clear implementation of the Act.

Barack Obama sought to change that and restore the Act to its rightful place in the civil rights legal pantheon. In one of his first acts as president, Obama ordered HUD to create an administrative rule that preserved the disparate impact cause of action under the Fair Housing Act.[33] This made clear that the Fair Housing Act reaches further than overt, individual acts of discrimination to include practices that also have a disparate impact on housing availability. It also clarified

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[28] *See* Texas Dep't of Hous. & Cmty. Aff. V. Inclusive Cmty. Project, 576 U.S. 519, 534–35 (2015); Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,461 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100).

[29] *See* Obama's Disparate Impact Rule discussion *infra* Section II; Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 937–38 (2d Cir. 1988)

[30] 42 U.S.C. § 3608(d)–(e) (2007).

[31] *Id.*

[32] *Id.*

[33] *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard Selected provisions and commentary, 78 Fed. Reg. 11,460, 11,461 (February 15, 2013); 24 C.F.R. § 100 (2013).)

beyond doubt that racial integration is a central aim of the Fair Housing Act – in other words, implementing § 3604 (a). He simultaneously directed the drafting of a second fair housing rule, the Affirmatively Furthering Fair Housing rule, which would command recipients of federal funds to use "their massive leverage to create a racially integrated society"–in other words, implementing § 3608.[34] The Obama Justice Department clearly announced the president's position on the integrative purpose of fair housing law:

> The Fair Housing Act's language prohibiting discrimination in housing is "broad and inclusive;" the purpose of its reach is to replace segregated neighborhoods with "truly integrated and balanced living patterns." The intent of the Congress in passing the Fair Housing Act was broad and inclusive, to advance equal opportunity in housing and achieve racial integration for the benefit of all people in the United States.[35]

In 2013, the Obama administration implemented his disparate impact rule, codifying elements of § 3604 (a).[36] That rule defined housing discrimination as a practice that "creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin."[37] The commentary to the rule declared that "the Fair Housing Act's language prohibiting discrimination in housing is broad and inclusive; the purpose of its reach is to replace [segregated neighborhoods] with truly integrated and balanced living patterns."[38] The commentary stated that the intent of the Congress in passing the Fair Housing Act was to advance equal opportunity in housing and achieve racial integration for the benefit of all people in the United States. The commentary continued:

> The legislative history of the act informs HUD's interpretation. The Fair Housing Act was enacted after a report by the National Advisory Commission on Civil Disorders, which Pres. Johnson had convened in response to major riots taking place throughout the country, warned that "[our] nation is moving toward two societies, one black, one white – is separate and unequal." The Act's lead sponsor, Sen. Walter Mondale, explained the Senate debates that the broad purpose of the act was to replace segregated neighborhoods with "truly integrated and

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[34] *See* NAACP Bos. Chapter v. Sec'y of Hous. & Urb. Dev., 817 F.2d 149 (1st Cir. 1987).

[35] H.R. Res. 1095, 110th Cong. 2d Sess. (2008); 154 CONG. REC. H2280-01 (Apr. 15, 2008).

[36] 24 C.F.R. § 100 (2013).

[37] Discriminatory Effect Prohibited, 24 C.F.R. § 100.500 (2013).

[38] Trafficante v. Metro Life Ins., 409 U.S. 205, 211 (1972).

> balanced living patterns." Sen. Mondale recognized that segregation was caused not only by "overt racial discrimination" but also by "[o]ld habits" which become quote "frozen rules," and he pointed to one facially neutral practice – is the receipt the "refusal by suburbs and other communities to accept low-income housing." He further explained some of the ways in which federal, state, and local policies had formally operated to require segregation and argued that "Congress should now pass a fair housing act to undo the effects of these past" discriminatory actions…
>
> As discussed in the preambles to both the proposed rule and this final rule, the elimination of segregation is central to why the Fair Housing Act was enacted. HUD therefore declines to remove from the rule's definition of "discriminatory effects" "creating, perpetuating, or increasing segregated housing patterns." The Fair Housing Act was enacted to replace segregated neighborhoods with "truly integrated and balanced living patterns." It was structured to address discriminatory housing practices that affect "the whole community" as well as particular segments of the community, with the goal of advancing equal opportunity in housing and also to "achieve racial integration for the benefit of all people of the United States." Accordingly, the Act prohibits two kinds of unjustified discriminatory effects: (1) harm to a particular group of persons by a disparate impact; and (2) harm to the community generally by creating, increasing, reinforcing, or perpetuating segregated housing patterns. This directly addresses the purposes of the act to replace segregated neighborhoods with "truly integrated and balanced living patterns." For example, the perpetuation of segregation theory of liability has been utilized by private developers and others to challenge practices that frustrated affordable housing development in nearly all white communities and thus it aided attempts to promote integration.[39]

The Obama administration's viewpoint, as expressed in this passage, represented the consensus of the federal courts and the leading fair housing scholars on the meaning and purpose of the Fair Housing Act. Despite that consensus, however, it was necessary for the Obama administration to lay out these concepts clearly and deliberately in a regulation, because over two decades earlier in the Reagan administration, a concerted anti-integration campaign had begun in earnest.[40] That effort was spear-headed by William Bradford Reynolds at the

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[39] 24 C.F.R. § 100 (2013).

[40] *Id.*

Justice Department, and Clarence Thomas as head of the Equal Employment Opportunity Commission. Together, they moved to decimate affirmative action and declare that voluntary integration programs in schools and housing, absent proof of intentional discrimination, were illegal racial balancing that was disallowed by the civil rights act itself.[41]

Reynolds and Thomas declared that neither Title VI nor the Fair Housing Act required integration.[42] Reynold baldly denied the integrationist objectives of the law:

> The Federal fair housing law does not require integration, and the government should not be in the business of trying to bring about integration. Congress intended only to prohibit racial bias renting or selling housing, and as long as people are not denied free housing choice, I don't think any government ought to be about the business to reorder society or neighborhoods to achieve some degree of proportionality.[43]

By 2009, with Thomas then a U.S. Supreme Court justice, and only Justice Kennedy's swing vote upholding the legitimacy of the civil rights movement's long-term goal of ending segregation in schools and housing, Obama knew he had to act quickly to protect the integration imperatives of federal law.

For decades, there had been virtually no effective federal enforcement of the Fair Housing Act, particular against the government's continually segregative placement of affordable housing.[44] When the Obama administration suddenly began more aggressively implementing fair housing law, some constituencies, burdened by the newly enforced rules, resisted.[45] One such group was the affordable housing industry.

The role of affordable housing development in creating segregation has been understood for decades and was a core rationale for the creation of the Fair Housing Act in the first place, as will be explored in greater detail below. However,

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[41] *See generally* Drew S. Days, III, *Turning Back the Clock, The Reagan Administration and Civil Rights*, 19 HARV. C.R.-C.L. L. REV. 309 (1984).

[42] *Id.* While Reynolds made these remarks in newspapers, he never made them through formal arguments as extreme as those from the Trump Administration and Professor Goetz.

[43] Anna Mariano, *Rights Chief Limits Fair Housing Law Questioned*, WASH. POST, July 11, 1984 (quoting William Bradford Reynolds, Assistant Attorney General for Civil Rights during Reagan Administration, 1980-1988.).

[44] *Hearing Before the Commission on Fair Housing and Equal Opportunity*, 110th Cong. (2008) (testimony of Robert Achtenberg, former Assistant Secretary for Fair Housing and Equal Opportunity).

[45] *See* discussion *infra* Section II of Obama's disparate impact and affirmatively furthering fair housing rules.

affordable housing construction, especially when conducted by private developers, often escapes the notice of the public as a civil rights issue. Unlike white, suburban, conservative enclaves, affordable developers do not fit many people's mental image of a civil rights opponent. Affordable developers are usually based in cities; they usually support Democratic or progressive political causes; they house low-income families, who are also often families of color.[46]

But affordable housing development is an industry with a clear interest in maintaining the segregated status quo. This is because it is heavily reliant on government subsidies, and those subsidies are easiest to access if they are allowed to build in low-income areas with limited political resistance, without major changes to their standard operating procedures. As a result, new fair housing rules that require some affordable housing in white or affluent neighborhoods and thus prevent all affordable development to occur in poorer neighborhoods, as well as add new requirements and hurdles for development, are potentially threatening to affordable housing developers who prefer to build in segregated neighborhoods that have less community opposition and more potential funding streams.[47]

In recent years, the figure most aggressively arguing the anti-integration perspective of these developers has been Professor Edward Goetz. Goetz is a long-time scholar of housing and affordable housing at the University of Minnesota and the head of the University's Center for Urban and Regional Affairs. The Center works closely with a number of local community developers in the Twin Cities and receives a substantial amount of funding from those developers and government agencies who have developed housing in a segregated manner and who are often defendants in fair housing cases. Professor Goetz has long been a critic of civil rights programs that would spread affordable housing to more affluent areas, terming this approach "dispersal" and arguing, contrary to the views of most social scientists, that its benefits were limited and that racially segregated communities could thrive.[48] But in recent years, as fair housing enforcement stepped up at the federal level, Professor Goetz increasingly took aim at the *legal* case for integration in the Fair Housing Act.[49]

In 2018, Goetz published a book, *The One-Way Street of Integration*, attacking the notion that integration was intended to be a core legal purpose of the Fair Housing Act.[50] The book makes a series of sweeping claims that attack the

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[46] *See* Myron Orfield, et al, *High Costs and Segregation in Subsidized Housing Policy*, 25 HOUS. POL. DEB. 574 (2015).

[47] *See id.*

[48] Edward Goetz, *Poverty Pimping CDCs: The Search for Dispersal's Next Bogeyman*, 25 HOUS. POL. DEB. 608 (2015). *See* EDWARD GOETZ, THE ONE-WAY STREET OF INTEGRATION (2018).

[49] *See* GOETZ, THE ONE-WAY STREET OF INTEGRATION.

[50] *Id.*

established law and challenge what has become an academic consensus concerning the benefits of racial integration.[51] Goetz's basic argument is that affirmative integration is a *post hoc* addition to fair housing law, never intended by the 1960s authors of the civil rights laws and essentially read into existence by activist courts.[52] Instead, in his view, the purpose of the Fair Housing Act is *anti-discrimination*–in other words, outlawing discrete, individual acts of prejudice but imposing no larger vision of society.[53]

Goetz sustains this argument by examining – at least loosely – the statutory text and the congressional record. With regards to the former, he points out, in an argument remarkably like William Bradford Reynolds, that the word "integration" never appears in the law:

> The text [of the Fair Housing Act] and the congressional records bear out the contention that integration has been read into the acts by the courts. The words integration and segregation for example never appear in Title VIII; nor is there any direct statement of policy or intent stating that Congress intended to achieve racial integration… The language of the act itself is unambiguously focused on eliminating discrimination in the private housing market and prescribing the penalties and procedures adhering to such discrimination. The integration goal is entirely unspecified in the act.[54]

He argues that "[t]here is widespread agreement that the Act "has two overriding objectives: the elimination of discrimination in housing and the achievement of integration."[55] He continues:

> The only goal explicitly identified in the language of the bill is the equal access goal -- that is, the elimination of discrimination. The goal of integration, in contrast, has been read into the act, repeatedly, by the courts. The act never explicitly specifies the

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[51] *Id.*; DOUGLASS MASSEY AND NANCY DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF AN UNDERCLASS (Harv. U. Press. 1998). *See generally,* Raj Chetty, Nathaniel Hendren, LF Latz, *The Effects of Exposure to Better Neighborhoods on Children, New Evidence from the Moving to Opportunity Experiment,* 106 AM. ECON. REV. 855 (Apr. 2016); Raj Chetty, *et. al.*, *Where is the Land of Opportunity? The Geography of Intergeneration Mobility in the United States*, 129 Q. J. OF ECON. 1553, (2014).

[52] *Id.*

[53] *Id.*

[54] EDWARD GOETZ, THE ONE-WAY STREET OF INTEGRATION 98 (2018). While Goetz seems to assert this as a formal legal argument, Reynolds only made such claims in press interviews. None of the briefs submitted by the Reagan Justice Department went as far as Goetz. Indeed, only the Trump administration went this far.

[55] *Id.*

> broader social goals of ending segregation or even of promoting integration.[56]

Goetz also makes broad claims about congressional intent. He asserts that the "record of legislative debate on the bill is not extensive," and that, "[i]n fact, there is little in the congressional debates that can be used in retrospect to divine the intent of Congress."[57]

However, Goetz does identify one statement that he seems to believe acts as something of a smoking gun in favor of his case. He asserts that Walter Mondale – the Fair Housing Act's coauthor, whose quotation about "balanced and integrated living patterns" has been used to sustain the law's integration mandate – actually revealed, in the midst of the congressional debate, that the law was never intended to serve any purpose but antidiscrimination. In Goetz's words:

> … Mondale made additional statements about the bill that seem to contradict the notion that it was about anything other than enhancing choice on the part of disadvantaged populations. In reference to Title VIII, Mondale said, "Obviously [the act] is to be read in context with the entire bill, the objective being to eliminate discrimination in the sale or rental of housing. . . . Without doubt, it means to provide for what is provided in the bill. It means the elimination of discrimination in the sale or rental of housing. That is all it could possibly mean."[58]

Ordinarily, alternative revisionist interpretations of the Fair Housing Act offered by non-lawyers would merit little attention, given the uniformity of legal consensus on the other side of the debate. Unfortunately, recent developments have made it necessary to more directly refute these revisionist analyses of the Fair Housing Act.

It is unsurprising that the Trump administration was opposed to expansive readings of the Fair Housing Act. Trump's HUD Secretary, Ben Carson, had previously denounced the Affirmatively Furthering Fair Housing rule as a form of social engineering,[59] and the administration was not known for its attentive concern to civil rights issues.

Nonetheless, the administration struggled to eliminate Obama's housing rules. This was partly a result of clumsy and incompetent attempts to navigate the

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[56] *Id*. at 92.

[57] *Id*. at 91.

[58] *Id*. at 94.

[59] *Ben Carson's Warped View of Housing*, N.Y. TIMES (Dec. 19, 2016) https://www.nytimes.com/2016/12/19/opinion/ben-carsons-warped-view-of-housing.html.

procedural requirements of federal rulemaking,[60] and partly because, perhaps unexpectedly, many industry and stakeholder groups lobbied in favor of retaining the rules.[61] But the administration did eventually achieve its goal at les It replaced Obama's Disparate Impact rule[62] with a version that would make it far more difficult to prove that a particular act was discriminatory.[63] And in 2020, the Trump administration abruptly eliminated Obama's Affirmatively Furthering Fair Housing rule in its entirety. Trump asserted the Obama rule would "destroy the suburbs."[64]

Whatever its true motives, the rationales adopted by Trump for eliminating this civil rights rule echoed, almost perfectly, some of the arguments advanced by Professor Goetz and other revisionist academics. For instance, Trump's rule documentation mirrors Goetz's claim that the case for an integration mandate relies on selective quotations of the record, and the true intent of the law is, at best, ambiguous:

> The courts making the broadest claims of the AFFH requirement rely on selective quotations from the legislative history. Those decisions rely on legislative history about the FHA aiming to achieve "truly integrated and balanced living patterns" and ending patterns of segregation. The problem is that the same legislative history makes clear that these were long-term goals to be achieved through the narrow means of eliminating overt housing discrimination (e.g., restrictive covenants). As the court in NAACP observed, "the law's supporters saw the ending of discrimination as a means toward truly opening the nation's housing stock to persons of every race and creed." They believed that "[d]iscrimination in the sale and rental of housing has been the root cause of the widespread patterns of de facto segregation."

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[60] Katy O'Donnell, *Court stops launch of HUD rule that makes it harder to prove discrimination*, POLITICO (Oct. 26, 2020), https://www.politico.com/news/2020/10/26/court-stops-hud-rule-discrimination-432592.

[61] *Civil Rights Groups Commend Top Mortgage Lenders for Urging HUD to Reconsider Disparate Impact Rule*, NAT'L FAIR HOUSING ALL., July 15, 2020, https://nationalfairhousing.org/civil-rights-groups-commend-top%E2%80%AFmortgage-lenders-industry-leaders-for-urging-hud-to-reconsider%E2%80%AFdisparate-impact%E2%80%AFrule/

[62] 20 C.F.R. § 100 (Sept. 24, 2020).

[63] *Id.*

[64] Preserving Community and Neighborhood Choice, 85 Fed. Reg. 47,899, 47,902 (August 7, 2020); 24 C.F.R. § 5, 91, 570, 574, 576, 903 (2020); T*rump says low-income housing will 'destroy' the suburbs,* WASH. POST (Aug. 12, 2020, 7:27 PM), https://washingtonpost.com/video/politics/trump-says-low-income-housing-will-destroy-the-suburbs/2020/08/12/c8c1d58d-8c73-4f26-abdd-5819d70857ef_video.html.

> HUD does not subscribe to broader interpretations of AFFH to the extent precedent for them may exist. The case law is clear that "HUD maintains discretion in determining how the agency will fulfill its AFFH obligation." Thus, NAACP and its sister cases were all interpreting an ambiguous phrase that the agency would otherwise have some discretion to define. Indeed, those cases were decided years before HUD had formulated a definition by rule.[65]

Trump's HUD uses this alleged ambiguity to decline to support a broad interpretation of the law. It also twice cites the Mondale quote that ostensibly reveals the antidiscrimination purpose of the law:

> It is imperative to note that the long-standing debate seeking to define "Fair Housing" has spanned the political spectrum. Senator Mondale, the chief sponsor of the Fair Housing Act (FHA), unambiguously acknowledged the limited scope of the concept of fair housing. He "made absolutely clear that Title VIII's policy to `provide . . . for fair housing' means `the elimination of discrimination in the sale or rental of housing. That is all it could possibly mean.' " Senator Mondale thus defined fair housing as simply housing that is free of discrimination. In this definition, housing is "fair" if anyone who can afford it faces no discrimination-based barriers to purchasing it.[66]

Later, the same rulemaking document continues:

> Any broader construction of the AFFH obligation is difficult to square with the sponsor Senator Mondale's unambiguous pronouncement that the FHA's policy to "provide . . . for fair housing" means "the elimination of discrimination in the sale or rental of housing. That is all it could possibly mean."[67]

In short, revisionist arguments about the Fair Housing Act are gaining currency, and as recently 2021, have been used to eliminate fundamental civil rights requirements affecting housing and segregation nationwide.[68] As the Trump administration notes, these ideas now "span the political spectrum."[69] Given the danger that they represent to civil rights, it is imperative they be refuted.

Take, for instance, the quotation in which Mondale seems to refute that the law is intended for any purpose but integration. This quotation becomes much

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[65] Preserving Community and Neighborhood Choice, 85 Fed. Reg. 47,899, 47,902 (August 7, 2020); 24 C.F.R. § 5, 91, 570, 574, 576, 903 (2020).

[66] *Id*. at 47901.

[67] *Id*.

[68] *Id.* at 47908.

[69] *Id.*

more mundane in context. Mondale was not giving a sweeping description of the law's purpose but responding to an overheated concern of a skeptic of the law. Specifically, he was responding to Republican senator George Murphy of California, who had briefly argued in the record that the phrase "provide for fair housing" could potentially obligate the United States to provide housing for its entire population:

> Mr. Murphy: I have one other question with regard to the Dirksen amendment, on my time. I have reference to the last two lines on page 6. Would the Senator from Minnesota do me the great favor of reading the last two lines, where it says provide for fair housing throughout the United States?
>
> Mr. Mondale: The statement to which the Senator from California makes reference reads as follows: It is the policy of the United States to provide for fair housing throughout the United States.
>
> Obviously, this is to be read in context with the entire bill, the objective being to eliminate discrimination in the sale and rental of housing, for the housing described under the circumstances provided by the Dirksen substitute.
>
> Mr. Murphy: There is not the possibility of misconception of what the word provide means?
>
> Mr. Mondale: Not at all
>
> Mr. Murphy: Based on my experience in the short space of three years that I have been here, I would think there would be a great chance that word "provide" could mean almost anything, including "give."
>
> Mr. Mondale: This is a declaration of purpose. The phrase to be construed includes the words "to provide for" I see no possibility of confusion on that point at all.
>
> Mr. Murphy: If the Senator will forgive me, it says "to provide fair housing." Does that mean give the housing, to make it available?
>
> Mr. Mondale: Without doubt, it means to provide for what is provided in the bill. It means elimination of discrimination in the sale and rental of housing. That is all it could possibly mean.[70]

In other words, Mondale was not elucidating the purpose of the law at length. He was batting away a barely-coherent question about the meaning of the term

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[70] 114 CONG. REC. 4971, 4975 (March 4, 1968).

"provide," attempting to reassure another senator that his bill would not smuggle a vast universal public housing requirement into law. This is hardly sufficient evidence to refute the historical and legislative record indicating that integration was a central purpose of the act.

This example reveals a more general difficulty interpreting the legislative history of the Fair Housing Act: during 1960s debates over various fair housing measures, congressional opponents frequently suggested that they would compel large changes to the private housing market, or even its complete elimination. The law's congressional defenders, including Mondale, as well as second co-author Edward Brooke, responded to these complaints by reassuring Congress that they intended no such thing. In a modern context, however, these comments have been occasionally repurposed to argue that Mondale, Brooke, and others were disclaiming any integrative intent at all.

But such a claim is not remotely sustained by the historical or congressional record. It is not just Mondale's famous claim that the Fair Housing Act is intended to create "truly balanced and integrated living patterns" that supports the law's integrative intent. The congressional debate over the Fair Housing Act is unambiguous: the Act's ultimate purpose is integration. The next section explores that debate.

III. INTEGRATION AND THE FAIR HOUSING ACT DEBATE

A. The Struggle to Integrate Federally Subsidized Housing 1949-59

By the time of the Fair Housing Act's passage, there were already a number of anti-discrimination protections on the books in U.S. federal law. However, civil rights advocates understood that greater protections were needed to defeat segregation and produce true integration. One recommendation, offered by advocates, was to incorporate HUD into an integrative program by requiring it to take "affirmative" action to achieve fair housing goals. Although this language was not frequently discussed in the immediate runup to the 1968 law, it was included in earlier iterations of the law and discussed explicitly at that time in Congress.

Even before the Fair Housing Act, there had been numerous federal efforts to eliminate racial discrimination that would affect the sale and rental of housing, either broadly or in a particular activity or market sector. The earliest of these, the Civil Rights Act of 1866, prohibited private housing discrimination.[71] While for many decades the law was assumed to have no effect – the infamous 1883 Civil Rights Cases decided that the Fourteenth Amendment only gave Congress the authority to regulate state or government – by the mid-60s this understanding had

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[71] *See,* 42 U.S.C. § 1982 (2021); *see also* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437 (1968).

shifted. The Civil Rights Act of 1964, and the subsequent Supreme Court decision of *Heart of Atlanta Motel v. United States*, grounded Congress's ability to regulate private discrimination in its Commerce Clause powers.[72] The validity of the 1866 Act was discussed in the debate over the 1968 Act.[73] Indeed, the Supreme Court held that the 1866 Act barred racial housing discrimination shortly after the Fair Housing Act's passage.[74]

In 1944, Gunnar Myrdal's landmark study *the American Dilemma* reported that federal housing policy served to strengthen and widen rather than mitigate residential segregation.[75] The Truman Committee on Civil Rights Report cited FHA officials expressly defending segregation after the Supreme Court decisions in *Shelley v. Kraemer* and *Hurd v. Hodge*.[76] The NAACP supported Bricker-Cain proposed a ban on segregation in the 1949 Housing Act.[77] But it failed. The US Commission on Civil Rights concluded in 1959 that urban renewal was "accentuating or creating clear-cut racial separation."[78]

B. The Organized Push for a Federal Fair Housing Act 1960-66

President Kennedy, seeking black electoral support, promised to desegregate federally supported housing with a stroke of the pen. In November 1962, six years before the Act's passage, President Kennedy issued an executive order to eliminate segregation in federally-supported housing. Kennedy's order declared that

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[72] Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261 (1964). In a separate case in 1966, the Supreme Court also expanded the reach of the Fourteenth Amendment to deprivations of rights conducted by private actors with even minimal state participation. United States v. Guest, 383 U.S. 745 (1966).

[73] *See, e.g.*, *The Fair Housing Act of 1967: Committee on Banking and Currency of the U.S. Senate, Hearings Before the Subcommittee on Housing and Urban Affairs*, 90th Cong., First Session on S. 1358, S. 2114, and S. 2280 at 250 (1967). *See also id*. at 229-31, Testimony of Sol Rabkin.

[74] Jones v. Alfred H. Mayer Company, 392 U.S. 409, 443-44 (1968).

[75] Florence Wagman Roisman, *Affirmatively Furthering Fair Housing in Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation*, 42 Wake For. L. Rev. 333, 337 (2007).

[76] *Id*. at 337–338.

[77] *Id*. at 338-39 (citing Elizabeth Julian & Michael M. Daniel, *Separate and Unequal—The Root and Branch of Public Housing Segregation*, 23 Clearinghouse Rev. 666 (1989); Arnold R. Hirsch, *Searching for a "Sound Negro Policy": A Racial Agenda for the Housing Acts of 1949 and 1954*, 11 Hous. Pol'y Debate 393, 400 (2000) (containing more on HHFA views of Brown v. Board's impact on housing and redevelopment programs); *See also* Jack Greenberg, Crusaders in the Courts, 175, 207 (detailing how the NAACP was challenging segregation in public housing nationally).

[78] *Id*. at 339.

excluding Americans from supported housing because of their race, color, creed, or national origin is "unfair, unjust, and inconsistent with the public policy of the United States as manifested in its Constitution and laws"; and that "such discriminatory policies and practices result in segregated patterns of housing and necessarily produce other forms of discrimination and segregation which deprive many Americans of equal opportunity in the exercise of their unalienable rights to life, liberty, and the pursuit of happiness."[79] The order directed "[a]ll departments and agencies in the executive branch of the Federal Government, insofar as their functions relate to the provision, rehabilitation, or operation of housing and related facilities, to take all action necessary and appropriate to prevent discrimination because of race, color, creed, or national origin" in the "sale, leasing, rental, or disposition of residential property and related facilities."[80]

Implementation of the 1964 Civil Rights Act also created protections against housing discrimination. Title VI of the 1964 Act declares that "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in or denied the benefits of, or be subjected to, discrimination under any program or activity."[81] Rules issued in December of 1964 defined discrimination as "subjecting a person to segregation or separate treatment in any manner related to his receipt of housing, accommodations, facilities, services, financial aid or any benefits under the program or activity."[82] Federal regulation further extended Title VI to housing. 24 CFR § 1.4, implementing Title VI for HUD, prohibited segregated site selection and segregated occupancy.[83]

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[79] Exec. Order 11,063, 3 C.F.R. § 652 (1959-1963); Equal Opportunity in Housing, 27 Fed. Reg. 11,527 (November 24, 1962); 27 Fed. Reg. 11,802 (November 30, 1962). (defining discriminatory practice in the sale, rental or other disposition of the residential property or related facilities or in the use or occupancy thereof of government financed housing).

[80] *Id.*

[81] 42 U.S.C. 2000d et seq.

[82] Effectuation of Title VI of the Civil Rights Act of 1964, 29 Fed. Reg. 16,273, 16,280 (December 4, 1964).

[83] 24 C.F.R. § 1.4 ("(1) A recipient under any program or activity to which this part 1 applies may not, directly or through contractual or other arrangements, on the ground of race, color, or national origin:

(i) Deny a person any housing, accommodations, facilities, services, financial aid, or other benefits provided under the program or activity;

(ii) Provide any housing, accommodations, facilities, services, financial aid, or other benefits to a person which are different, or are provided in a different manner, from those provided to others under the program or activity;

But it was clear that anti-discrimination was insufficient. HUD itself acknowledged as much in its 1965 Low Rent Housing Manual, which sought to restrict local governments to siting affordable housing in areas that would "afford the greatest opportunity for inclusion of eligible applications for all groups." The manual also stated that "[a]ny proposal to locate housing only in areas of minority concentration will be prima facie unacceptable." However, these instructions were directed at local governments, over which HUD exercised limited authority.[84]

Civil rights advocates also knew that federal anti-discrimination efforts preceding 1968 would not be sufficient to create true integration. Martin Luther King, Jr. argued that the federal government had an obligation to engage in activities beyond anti-discrimination rules. He wrote:

> There is hardly any area in which executive leadership is needed more than in housing. Here the Negro confronts the most tragic expression of discrimination; he is consigned to ghettos and overcrowded conditions. And here the North is as guilty as the South…
>
> While most [federal] housing programs have antidiscrimination clauses, they have done little to end segregated housing. It is a known fact that the FHA continues to finance private developers who openly proclaim that none of their homes will be sold to Negroes. The urban renewal program has, in many instances, served to accentuate, even initiate, segregated neighborhoods. (Since a large percentage of the people to be relocated are Negroes, they are more likely to be relocated in segregated areas.)
>
> A president seriously concerned about this problem could direct the housing administrator to require all participants in federal housing programs to agree to a policy of "open occupancy." Such a policy would be enforced by (a) making it mandatory for all violators to be excluded from future participation in federally financed housing programs and (b) by including a provision in each contract giving the government the

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(iii) Subject a person to segregation or separate treatment in any matter related to his receipt of housing, accommodations, facilities, services, financial aid, or other benefits under the program or activity;

(iv) Restrict a person in any way in access to such housing, accommodations, facilities, services, financial aid, or other benefits, or in the enjoyment of any advantage or privilege enjoyed by others in connection with such housing, accommodations, facilities, services, financial aid, or other benefits under the program or activity.").

[84] HUD 1965 low rent housing manual cited in Shannon v. HUD and attached as Plaintiffs exhibit Ramjel v. City of Lansing 417 F.2d 321 (6th Cir 1969).

> right to declare the entire mortgage debt due and payable on breach of the agreement.[85]

King's expansive suggestion that federal officials be directed to proactively promote integration echoes the "affirmatively furthering" provisions of the Fair Housing Act, still several years in the future. But King's ambition did not stop there. He proposed a cabinet-level position to conduct integration work:

> To coordinate the widespread activities on the civil-rights front, the president should appoint a Secretary of Integration. The appointee should be of the highest qualifications, free from partisan political obligations, imbued with the conviction that the government of the most powerful nation on the earth cannot lack the capacity to accomplish the rapid and complete solution to the problem of racial inequality.[86]

On May 17, 1962, King appealed for President Kennedy to issue a second emancipation proclamation, to eliminate all racial segregation in schools and housing. The document released by King declared that "segregation is but a new form of slavery—an enslavement of the human spirit rather than the body."[87] The draft proclamation stated that the President would use the "full powers of his office" to eliminate all forms of "statutory imposed segregation and discrimination from and throughout the respective states of this nation" and that "racial segregation in Federally assisted housing is henceforth prohibited."[88]

King's desire for a more proactive federal role in housing integration was reflected in the preferences of the wider civil rights community. The primary vehicle in which the civil rights community worked to shape a bill to end segregation in housing was the National Committee Against Discrimination in Housing (NCDH). All of the major civil rights organizations were cooperative members. Its legal committee included Robert Carter, general counsel of the NAACP, Jack Greenberg of the NAACP Legal Defense Fund, and many of the nation's most significant civil rights scholars and lawyers. Its reports and congressional testimony lie at the heart of the meaning of the evolving fair housing rules under the 1964 Act and even more importantly of the meaning and structure of the 1968 Fair Housing Act.

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[85] Martin Luther King, *The President has the Power*, THE NATION, Feb 4, 1961, reprinted *in* Essential Writings and Speeches of Martin Luther King (Harper 1986 ed. James M. Washington) at 152-59.

[86] *Id.*

[87] Rev. Dr. Martin Luther King, Jr., Appeal from Dr. Martin Luther King, Jr., President of the Southern Christian Leadership Conference, to President John F. Kennedy: For National Rededication to the Principles of the Emancipation Proclamation and for an Executive Order Prohibiting Segregation in the United States at 5-6 (May 17, 1962).

[88] *Id.*

Over time, spurred by the changing focus of the civil rights movement and ongoing civil disturbances in major cities, the National Committee Against Discrimination in HOUSING NCDA began to demand progress on fair housing. It grew increasingly frustrated with slow efforts of the federal government to desegregate the sites and occupancy of federally supported housing.

Housing was increasingly the focus of other civil rights efforts as well. After the Watts riots, King began his doomed fair housing campaign in Chicago, pushing to end inner-city segregation and integrate America's large metropolitan areas. Almost simultaneously, Dorothy Gautreaux, a civil rights organizer and public housing resident who worked closely with King on his Chicago open housing campaign, sued the city housing authority and HUD[89], arguing that the existing conditions of racial segregation in Chicago public housing violated the U.S. Constitution and 1964 Civil Rights Act. King's Chicago Freedom Movement included efforts to relocate planned HUD low-income housing to less segregated locales, with advocates arguing that such projects would "intensify the ghetto."[90] Negotiating with Mayor Daley, King's representatives demanded an end to the concentration of public housing in poor areas, as well as a guarantee that urban renewal would be conducted in an integrative fashion.[91] When asked if they would withdraw their support of Gautreaux's suit, King refused.

The NCDH worked closely with the King and the Chicago Freedom movement. In April of 1966, the White House asked the NCDH to come up with recommendations for policy to eliminate segregation and redress the federal government's historic role in creating segregation. The bill of particulars that resulted would shape the Fair Housing Act, including § 3608, with its language about "affirmatively furthering." There were 17 recommendations and virtually all of them were incorporated into statute, rules or policy.

In a report "How the Federal Government Builds Ghettos," NCDH centered federal policy decisions in the creation of segregation:

> The Department of Housing and Urban Development, from its central office to its regional and local offices, is replete with officials who are out of sympathy with the nondiscrimination policy and objectives of the Administration, and who are unwilling to implement the responsibilities imposed upon them by Executive Order 11063 and Title VI of the Civil Rights Act of 1964….

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[89] The plaintiffs initially brought two cases, one against the Chicago housing authority another against HUD, which were later consolidated in *Gautreaux v. Chicago Housing Auth*., 503 F.2d 930 (7th Cir. 1974).

[90] ADAM COHEN & ELIZABETH TAYLOR, AMERICAN PHARAOH 396 (2001).

[91] *Id*. at 404.

> The Department of Housing and Urban Development continue to improve the construction of public housing projects on sites and in areas which reinforce and perpetuate segregated living patterns.[92]

The recommendations of King, NCDH, and others had a clear impact on federal policymaking. Civil rights proponents in the federal government began to demonstrate a more robust understanding of the tools available for housing desegregation, particularly those available to HUD, in its capacity as an agency with considerable leverage over state and local governments. A major White House conference on civil rights agreed to a series of proposals to reform civil rights on June 2, 1966. The policies proposed addressed the concerns laid out in the NCDH work. In those proposals, the broad contours of what would eventually become "affirmatively furthering fair housing" are easily seen:

> 1. The administration should adopt a firm and vigorous policy to utilize all the programs and resources of the Department of Housing and Urban Development and other agencies to promote and implement equal opportunity and desegregation. A Presidential directive to all federal agencies to cooperate with the Department of Housing and Urban Development in planning for wider housing opportunities for minority group families, and establishing appropriate criteria for awarding contracts, loans, and grants is strongly urged.
>
> 2. Enforcement under the Executive Order and Title VI of the Civil Rights Act of 1964 must be more affirmative and vigorous. Clear and affirmative guidelines for field offices of the appropriate Federal agencies and frequent checks on their procedures are required if equal housing opportunity is to be a fact. Demonstrations of affirmative action to desegregate should be required by recipients of Federal funds and assistance. Federal assistance within the scope of Title VI should flow only to communities in which freedom of choice to secure a home is written into law.[93]

Policies 1 and 2 capture the heart of the "affirmatively furthering" approach – requiring the utilization of the whole federal toolset, including leverage over subordinate units of government, to pursue housing integration and desegregation. Moreover, far from being the toothless guidelines of the past, these proposals suggest that HUD and other agencies condition federal funding on furtherance of

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[92] NATIONAL COMMITTEE AGAINST DISCRIMINATION IN HOUSING, HOW THE FEDERAL GOVERNMENT BUILDS GHETTOS 6 (1967).

[93] RECOMMENDATIONS OF THE WHITE HOUSE CONFERENCE: TO FULFILL THESE RIGHTS 96 (June 1-2, 1966), http://www2.mnhs.org/library/findaids/00442/pdfa/00442-01894.pdf.

integration goals, which reflects the most aggressive modern-day interpretations of the "affirmatively furthering" requirement.

These recommendations also make clear that policymakers understood the distinction between, on one hand, affirmative integration programs and policies in the federal government, and on the other, anti-discrimination laws. That is because it independently proposes a comprehensive anti-discrimination law in the subsequent recommendation:

> 3. A comprehensive Federal anti-discrimination law as broad as the Constitution permits, covering all housing transactions whether or not Federally assisted --- those parts of the housing industry benefitting from government mortgage. . . The primary enforcement device applicable to Federally assisted housing should be the termination of funds and other benefits now and in the future to the enterprises and units of government found in violation of the law.[94]

C. The Fair Housing Act in Congress, 1966-68

As proposals began to be transformed into legislation, the impact of recommendations such as these was clearly visible. The first several attempts at passing a national fair housing law contained mandates for HUD to affirmatively further fair housing.

The most notable such attempt was the Civil Rights Act of 1966, doomed by Senate filibuster. The 1966 act contained many of the major fair housing provisions that would pass several years later, including the requirement that the secretary of HUD affirmatively further "the purposes of this law."[95] Voluminous congressional debate accompanied the 1966 bill. Congressional debate focused heavily on the constitutionality of the proposal, but also included direct discussion of the "affirmatively furthering" provisions. Of particular note is the May 1966 testimony of Robert Weaver, HUD Secretary at the time (and the department's first black leader). Weaver was interrogated directly about the meaning of the "affirmatively furthering" language. In his response, he describes the fundamental approach to integration that defines the mainstream consensus on the question, and was adopted by HUD in the Obama administration:

> The CHAIRMAN. Section 408 says the Secretary of Housing and Urban Development shall-and you get down to (e) on line 22:

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[94] *Id*.

[95] On May 2, 1966, the first fair housing provisions were introduced as Title IV of an omnibus civil rights bill. Section 409 (e) "declared that that the Secretary of Housing and Urban Development shall administer the programs and activities relating to housing in a manner affirmatively to further the policies of this bill." This language derives directly from the recommendations of the White House conference.

> Administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this title. What would you do if you find violations?
>
> Secretary WEAVER. I think there are several types of violations that would be involved here. In the first place, insofar as the housing activities which are under the Department of Housing and Urban Development, we would immediately issue, of course, the necessary regulations to be consistent with the word, the spirit, and intent of this act. We would also administer the various programs that fell under our jurisdiction in a way to carry out the purposes and the requirements of this act. We would check, not waiting for complaints to come in, but would check in the general operation to be sure that our activities were consistent with the provisions of the section.
>
> The CHAIRMAN. Be more specific; what else would you do?
>
> Secretary WEAVER. In the event there were several- I think this came out in the Attorney General's testimony. If there were several alternative proposals that came in for a given development, as far as housing is concerned, I think the one that would lend to open occupancy patterns of some permanence and the other would perpetuate the existing patterns, we would certainly give preference to the one that would lend itself to open occupancy patterns. …
>
> This is affirmative action. I think it involves, as I said earlier, that we would be sure that our regulations were in conformance with this.[96]

Weaver's approach, of opting for housing policy proposals that produce integration, while disfavoring policies that "perpetuate the existing [segregated] patterns," is a succinct summary of the requirements of the modern Fair Housing Act. Although this principle has been elaborated and formalized in federal rules, the basic requirement to prioritize integration in agency decision making is unmistakable. By contrast, Weaver's answer is incompatible with the idea that the Fair Housing Act is neutral or agnostic on integration.

Other components of the congressional debate around the 1966 law also demonstrate congressional intent to reverse the federal government's historic role as a promoter of segregation, and in its place create agencies that promoted integration. For example, NCDH reports on the federal government's role in creating racial ghettos were submitted into the congressional record by Senator Brooke. The reports' language powerfully condemns the federal government's

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[96] H.R. Rep. No. 1678 at 1367–68, 1385 (1966).

record of ineffective anti-discrimination measures. In one sharp passage, it analogizes the federal government's willingness to use funding as a stick to achieve school integration, with its comparative unwillingness to find similar tools in the realm of housing:

> In recent years the federal obligation to guarantee freedom of housing to all citizens has been twice reaffirmed: first by the 1962 Executive Housing Order and then by Congress in 1964. The Executive Order barring discrimination in all federally-assisted housing was a major breakthrough – the fruits of a 10-year campaign launched and piloted by NCDH.
>
> Two years later Congress passed a Civil Rights bill and included the following stipulation under Title IV: No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any programs or activity receiving Federal financial assistance.
>
> This is the same paragraph the U.S. Office of Education invokes in its affirmative program to desegregate the nation's public schools, especially in the South. Thirty-seven school districts have had Federal funds cut off, and another 185 districts have had funds deferred, because they were violating Title VI. As a result of USOE's relatively firm stand, the proportion of Negro children attending schools with white children in the Deep South jumped this year from 6% to almost 17% -- a small but measurable achievement, especially when one considers that to reach only 6% compliance with the Supreme Court's 1954 desegregation ruling, the South took 12 years!
>
> Nothing remotely resembling this modest success has occurred in housing. Rarely does HUD withhold funds or defer action in the name of desegregation. In fact, if it were not for all the printed guidelines the housing agencies have issued since 1964, one would scarcely know a Civil Rights Act had been passed.[97]

Over and over, NCDH and other advocates emphasize that the fight for fair housing is synonymous with the fight against segregation, and the fight to produce "meaningful integration." On this point the testifiers on the 1966 law were absolutely unambiguous. If anything, they attacked anti-discrimination measures as indicative of the federal government's shaky commitment to the principle of integration:

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[97] NATIONAL COMMITTEE AGAINST DISCRIMINATION IN HOUSING, HOW THE FEDERAL GOVERNMENT BUILDS GHETTOS 23-24 (1967).

> At present, the federal example is murky; it has an Alice-in-Wonderland quality that defies easy summation. On the one hand, the Government is officially committed to fighting segregation on all relevant fronts; on the other, it seems temperamentally committed to doing business as usual – which, given our current social climate, means more segregation. It hires many intergroup relations specialists – HUD has 47 -- but deprives them of the power and prestige to achieve meaningful integration. Similarly, it cranks out hundreds of inter-office memoranda on how best to promote open occupancy, but it fails to develop follow-up procedures tough enough to persuade bureaucrats to take these missives seriously. The federal files are bulging with such memoranda – and our racial ghettos are expanding almost as quickly.
>
> The road to segregation is paved with weak intentions – which is a reasonably accurate description of the Federal establishment today. Its sin is not bigotry (though there are still cases of bald discrimination by Federal officials) but blandness; not a lack of goodwill, but a lack of will.[98]

Similar sentiments were common throughout the congressional discussion of the 1966, 1967, and the 1968 civil rights acts. Testifiers who emphasized racial integration included Attorney General Ramsey Clark, sociologist Kenneth Clark, NAACP head Roy Wilkins, U.S. Commission on Civil Rights head Frankie Freeman, HUD Secretary Robert Weaver, and Algernon Black of the ACLU. Over hundreds of pages of testimony and debate, testifiers repeatedly mentioned the harms of inner-city racial ghettos, the need for proactive federal action to reduce segregation in those places, and the federal government's historic role in producing such segregation, particularly by siting affordable housing within segregated areas. A number of testifiers also expressed support for a policy that would prevent governments from siting affordable housing in segregated neighborhoods, and stated that they believed the proposed law would do so.[99]

Of course, the most important indicator of the integrative purpose of the Fair Housing Act remains the statements of its Senate authors. In addition to Walter Mondale's famous statement that the Act was aimed towards the creation of "truly balanced and integrated living patterns," Senator Edward Brooke, the law's other chief proponent, frequently asserted its integrative purpose. As a member of the Kerner Commission, he cited that report's sweeping conclusion that desegregation

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[98] 114 CONG. REC. 2,281 (1968).

[99] *See* Florence Roisman, *Affirmatively Furthering Fair Housing in Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation*, 42 Wake Forest L. Rev. 333, 360-63, 371-80 (2007).

of urban areas was necessary. Brooke even argued, at one point, that the integrative aim of the law was unmistakably obvious: "Can we state the proposition any more clearly? America's future must lie in the successful integration of all our many minorities, or there will be no future worthy of America."[100]

Both the Trump Administration and Goetz argue that there is little legislative history to inform the meaning of the Fair Housing Act.[101] This claim is obviously false. All told, in 1967, there were 508 pages of Senate testimony about the new fair housing proposal[102], and an additional 361 pages of Senate debate in 1968. [103]

With four cloture votes this constitutes one of the longest and most detailed civil rights debates in the history of Congress. [104] Sixteen senators gave major speeches in favor of the bill in 1968: Mondale, Brooke, Dodd[105], Tydings[106], Javits[107], Percy[108], Hart[109], Proxmire[110], Case[111], Mansfield, Muskie[112], Gruenig[113], Dirksen, Kennedy (MA)[114], and Kennedy (NY)[115]. Each testifier referenced the integrative intent of the bill.

Mondale, Brooke, Case, Proxmire, and Muskie also specifically discussed the bill's goal of eliminating the segregative placement of housing by HUD.

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[100] 114 CONG. REC. 2,525 (1968).

[101] EDWARD GOETZ, THE ONE-WAY STREET OF INTEGRATION 97 (Cornell University Press 2018); Preserving Community and Neighborhood Choice, 85 Fed. Reg. 47,899, 47,901 (August 7, 2020).

[102] *The Fair Housing Act of 1967: Committee on Banking and Currency of the U.S. Senate, Hearings Before the Subcommittee on Housing and Urban Affairs*, 90th Cong. (1967).

[103] 114 CONG. REC. 2270-6002 (1968).

[104] *See* Jean Dubofsky, Fair Housing: A Legislative History, 8 Washburn L.J. 149 (1969)

[105] 114 CONG. REC. 2,528-29 (1968).

[106] *Id.* at 2,529-30.

[107] 114 CONG. REC. 2,703-05 (1968).

[108] 114 CONG. REC. 2,538-41 (1968).

[109] 114 CONG. REC. 2,706-08 (1968).

[110] 114 CONG. REC. 2,984-86 (1968).

[111] 114 CONG. REC. 3,122-23 (1968).

[112] 114 CONG. REC. 3,253 (1968).

[113] 114 CONG. REC. 3,341-42 (1968).

[114] 114 CONG. REC. 2,544 (1968).

[115] 114 CONG. REC. 2,709 (1968).

Mondale asserted the government housing policies promoted segregation and must stop.[116]

> "Negroes who live in slum ghettoes, however, have been unable to move to suburban communities and other exclusively white areas… An important factor contributing to exclusion of Negroes from such areas, moreover, has been the policies and practices of agencies of government at all levels.[117] …. The record of the US government in this period is one, at best, of covert collaborator in policies which established the present outrageous and heartbreaking racial living patterns which lie at the core of the tragedy of the American city and the alienation of good people from good people because of the utter irrelevancy of color.[118]

Brooke introduced the entire NCDH report which blames segregated government action as a cause of segregation and made clear that the fair housing bill was designed to stop HUD and other government agencies from building housing in a segregated pattern. Brooke went on:

> "… American cities and suburbs suffer from galloping segregation…" and, "that the prime carrier of galloping segregation has been the Federal Government. First it built the ghettos; then it locked the gates; now it appears to be fumbling for the key. Nearly everything the Government touches turns to segregation, and the Government touches nearly everything. The billions of dollars it spends on housing… are dollars that buy ghettos."[119]
>
> …What adds to the murk is officialdom's apparent belief in its own sincerity. Today's Federal housing official commonly inveighs against the evils of ghetto life even as he pushes buttons that ratify their triumph -- even as he ok's public housing sites in the heart of Negro slums, releases planning and urban renewal funds to cities dead-set against integration, and approves the financing of suburban subdivisions from which Negroes will be barred."[120]

"The federal mandate to stop segregation is perfectly clear." Brooke continued and because the government's segregated housing policy was continuing under constitutional prohibitions, and under Title VI of the 1964 Civil Act, which both require the proof of intent, the Fair Housing Act was necessary to go further to stop further government segregation.

Senator Case discussed his ongoing battle with HUD in New Jersey to stop building housing in a segregated manner. Case declared; "to our shame the Federal

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[116] 114 CONG. REC. 2,270–79 (1968).

[117] *Id*. at 2,277.

[118] *Id*. at 2,278.

[119] *Id*. at 2280-81.

[120] *Id*. at 2281.

Government has helped build these ghettos…[121] the ghetto system, nurtured both directly and indirectly by Federal power has created racial alienation and tensions so explosive that the crisis in our cities now borders on catastrophe."[122]

Senator Proxmire spoke at length on how a wider dispersion of HUD housing was a goal of the bill and discussed his own problems with getting affordable housing into Milwaukee's white suburbs. Proxmire forcefully condemned HUD's policy of concentrating low-income housing in segregated neighborhoods, calling it a policy "aimed at bribing a generation of Negro militants into docility." [123] He went on: "The benefits of an open housing policy are numerous. For example, it is doubtful that Negro education can ever be brought on a par with white education when Negroes are concentrated in all black central city schools. Thus, continued residential segregation will perpetuate the transmission of frustration and despair from one generation to the next."[124] Proxmire argued that open housing will bring the poor close to jobs in the suburbs and reduce unrest and declared that in was unjust and un-American to lock the poor into a ghetto. In the long run, Proxmire concluded "America must move toward dissolving the ghetto simply because no other solution will work." [125]

Senator Muskie then took the floor to clarify the aim of the bill was integration and not to create a "golden ghetto."[126] He declared:

> … We must not deceive ourselves that a completely revitalized model city area, or "golden ghetto" as it has been called, is the final solution to the plight of the Negro. For no matter how livable a neighborhood is, and no matter what social and educational resources it provides, it will be of no help to the resident whose job has moved elsewhere. It will provide no satisfaction to the Negro who is forced to remain because he cannot find other suitable housing due to his color.[127]

In other words, the vast body of testimony and policy development in the lead-up to the Fair Housing Act made clear that the overarching purpose of the law under consideration was perceived from the very start as a vehicle for integration. Its objective was not to merely eliminate private-market housing discrimination, but to produce true integration in American communities. Moreover, it made clear

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[121] 114 CONG. REC. 3119, 3122 (Feb. 15, 1968).

[122] *Id.* (citing NATIONAL COMMITTEE AGAINST DISCRIMINATION IN HOUSING, HOW THE FEDERAL GOVERNMENT BUILDS GHETTOS 3 (1967)).

[123] 114 CONG. REC. 2984, 2985 (Feb. 14, 1968).

[124] *Id.*

[125] *Id.*

[126] 114 CONG. REC. 3235, 3253 (daily ed. Feb. 16, 1968) (statement of Sen. Edmund Muskie).

[127] *Id.*

that one of the key perceived shortcomings of existing policy, in the eyes of the bill's supporters, was the long-running tendency of federal agencies to produce greater segregation – a tendency they wanted to invert.

The emphasis of Fair Housing Act supporters on the role of federal agencies also raises a key distinction that fair housing revisionists have missed: the final law's differing approach to private and public actors. In the 1960s, fearmongering over fair housing focused heavily on the idea that integration would compel involuntary sales or rentals of private property – a critique that seems intended to avoid directly targeting the notion of racial integration, and instead rendering the debate over fair housing into a debate about personal liberty and the freedom to dispose of one's own property.[128] In short, congressional critics were not whipping up fears of integrative HUD policies or of efforts by state and local government to promote integration – they were trying to conjure up images of onerous *private* mandates. [129] In turn, it was these fears that the law's authors sought to allay. Indeed, while there is extensive discussion of the law's integrative intent, there is little discussion of what precise policies it would require HUD to "affirmatively" enact – perhaps not surprisingly, given their incentives to portray the legislation as both important and modest.

Nonetheless, as the above testimony shows, the law's drafters were clearly aware of the public-private distinction, and clearly aware of the legacy of public agencies in creating housing segregation.

The Fair Housing Act's anti-discrimination measures are heavily focused on the private market and apply to all entities engaged in housing activity. By contrast, the Act's "affirmatively furthering" provisions, the only component of the Act that requires proactive integration of housing, is focused on government policies and government decision-making.[130] This structure logically follows the dual concerns of the law's drafters and original proponents, who worried both about private-market discrimination *and* the public legacy of segregative building and policymaking.

None other than Walter Mondale himself called attention to this error in the revisionist scholarship in a 2018 New York Times editorial published on the Fair Housing Act's 50th anniversary. He directly addressed the revisionist point of view:

> The act has survived long enough to witness a curious debate over its intent. Some scholars have suggested that its functions

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[128] *See* Remarks of Strom Thurmond CR 2717-2718, Senator Stennis at 3345-48.

[129] *Id.*

[130] 42 U.S.C. § 3608(d). All executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of this subchapter.

> can be divided into "anti-discrimination" and "integration," with the two goals working at cross purposes. At times, critics suggest the law's integration aims should be sidelined in favor of colorblind enforcement measures that stamp out racial discrimination but do not serve the larger purpose of defeating systemic segregation.
>
> To the law's drafters, these ideas were not in conflict. The law was informed by the history of segregation, in which individual discrimination was a manifestation of a wider societal rift.
>
> Though the overarching aim of the law was to create integrated communities, Congress could not simply direct the whole of America to start integrating. Instead, like all laws, the Fair Housing Act tried to accomplish its goal through a variety of more-detailed provisions, each of which, its authors felt, would facilitate integration.
>
> In private housing markets, where Congress's authority is indirect, the law does what it can: forbids discrimination and segregation. Prohibitions include discrimination in the sale or rental of housing, racially targeted advertising for housing and discriminatory real estate transactions.
>
> But the act also sought more-direct remedies to the problem of segregation. Congress has nearly unlimited authority to issue commands to the federal bureaucracy. The Fair Housing Act utilizes this power by requiring all executive departments and agencies to administer programs relating to housing in a manner that "affirmatively" furthers fair housing.[131]

The debate described above happened almost entirely prior to the sequence of events that would ultimately propel the passage of the Fair Housing Act – the release of the Kerner Commission report and the assassination of Dr. King. King's death and the Kerner report both added even greater urgency to the goal of integration, as opposed to nondiscrimination. The Kerner report had identified segregation as the specific cause of urban unrest in America, famously warning of the growth "two societies, one black, one white – separate and unequal."[132] The focus of the report was not at all on individual acts of discrimination, but on the deleterious effects of the urban confinement of black Americans. Its proposals

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[131] Walter Mondale, *The Civil Rights Law We Ignored*, N.Y. TIMES (April 10, 2018). For a more detailed statement of Mondale on this subject, *see generally*, Walter Mondale, *Afterword* to The Fight for Fair Housing: Causes, Consequences, and Future Implications of the 1968 Federal Fair Housing Act, at 291 (George D. Squires ed., 2017).

[132] U.S. NAT'L ADVISORY COMM'N ON CIV. DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1968).

dealt with eliminating racial concentrations and improving conditions within cities. A Fair Housing Act that was neutral on integration would not address the Kerner concerns in the least degree. It made clear that enrichment strategies were not enough and could not by themselves address the harms of segregation.

Similarly, King's final major civil rights campaign had been his fight for Chicago residential integration – an effort that ended in stalemate.[133] This too would be unaddressed by a bill that was merely anti-discriminatory in nature. When King's death produced another wave of urban unrest – the exact violence that the Kerner report had suggested could be prevented with a program of integration – there can be little question about what, exactly, Congress saw as the purpose of its law.

The importance of the Kerner Commission cannot be overstated. In support of the Fair Housing Act, Mondale placed the Kerner Commission report and its recommendation into the Congressional Record on March 1, 1968.[134] He declared that the Fair Housing Act was directly responding to its recommendations as did Senator Brooke who served with Roy Wilkins on the commission.[135]

Kerner concluded that the nation is moving toward two societies, one white and one black, separate and unequal. If that movement is not arrested, it will bring death to the most hopeful of all mankind's attempts at political organizations. [136] The alternative to separation is unity – the extension of the promise of American life to all Americans irrespective of race.[137]

Kerner asserted that any approach of ghetto enrichment that did not involve a major push toward racial residential integration would be a failure. "It would be another way," it declared "of choosing a permanently divided country. … In a country where the economy, and particularly the resources of employment, are predominantly white, a policy of separation can only relegate the Negro to a permanently inferior status.[138]

The major goal was the creation of a true union—a single society and a single American identity. "Toward that goal [of a single society], we propose... opening up opportunities to those who are restricted by racial segregation and discrimination and eliminating all barriers to their choice of… housing.[139]

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[133] *See* Adam Cohen, Elizabeth Taylor American Pharoah: Mayor Richard J. Daley, His Battle for Chicago and the Nation (2001).

[134] 114 CONG. REC. 4831, 4834 (daily ed. March 1, 1968) (statement of Sen. Walter Mondale).

[135] *Id*. at 4833-4841.

[136] *See* U.S. NAT'L ADVISORY COMM'N ON CIV. DISORDERS, *supra* note 132.

[137] *See* 114 CONG. REC., *supra* note 134, at 4,841.

[138] *Id*. at 4,839.

[139] *Id*. at 4,840.

To accomplish this Kerner asserted that HUD must "reorient federal housing program to place more low and moderate income housing outside of ghetto areas"[140] and "must be given a new thrust aimed at overcoming the prevailing patterns of racial segregation."[141] If this is not done, the Report declared these programs will continue to concentrate the most impoverished and dependent segments of the population into the central city ghettoes where there is already a critical gap between the needs of the population and the public resources to deal with them.[142]

Virtually all the congressional debate on the bill before and after the report's release directly responded to the goals of the report.

Shortly after its enactment, the sweeping intent of the Fair Housing law was confirmed by the Supreme Court which had revived the latent power of the Civil Rights Act of 1866. In *Jones v. Alfred Mayer*, the Court considered the question of whether the 1866 Civil Rights Act – which, plaintiffs and the U.S. Justice Department asserted, barred housing discrimination – was good law. [143] The Court's opinion begins by distinguishing the anti-discrimination rules of the 1866 Act from the recently enacted Fair Housing Act which the court found to be far broader and more inclusive than preexisting civil rights laws which barred individual level housing discrimination.[144] A few years later the Court would define this "broad and inclusive language" by quoting Senator Mondale as "[designed] to replace the ghettos [with] truly integrated and balanced living patterns."[145]

In other words, the Court recognized what the congressional record makes clear: the drafters of the Fair Housing Act knew that a mere ban on racial discrimination in housing was not sufficient to eliminate segregation and constructed a statute that extended far beyond such a ban in order to create a racially integrated society.

CONCLUSION

Today there is evidence that the revisionist view of the Fair Housing Act is once again on the retreat, at least at the highest levels of the executive branch. On January 26, 2021 – less than a week after taking office – President Biden released a presidential memorandum on housing discrimination. The document,

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[140] *Id*. at 4,841.

[141] *Id*.

[142] *Id*.

[143] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413-15 (1968) (internal citations omitted).

[144] *Id.*

[145] Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 209–11 (1972).

entitled "Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies," is unambiguous about the role of public agencies in producing segregation. It states bluntly:

> Throughout much of the 20th century, the Federal Government systematically supported discrimination and exclusion in housing and mortgage lending. While many of the Federal Government's housing policies and programs expanded homeownership across the country, many knowingly excluded Black people and other persons of color, and promoted and reinforced housing segregation. Federal policies contributed to mortgage redlining and lending discrimination against persons of color. [146]

Biden's memorandum directly refutes the revisionist view that the Fair Housing Act is primarily or entirely focused on anti-discrimination. Instead, it cites the act's § 3608 provisions on "affirmatively furthering" fair housing.[147] These provisions, according to Biden, are "not only a mandate to refrain from discrimination but a mandate to take actions that undo historic patterns of segregation and other types of discrimination and that afford access to long-denied opportunities."[148] Biden also ordered his HUD secretary to revisit the Trump administration's changes to the Disparate Impact rule, and elimination of the Affirmatively Furthering rule.[149] For a time, the pendulum seems to be swinging back in favor of civil rights and integration. On June 10, 2021, the Biden administration put in place an interim rule to restore and perhaps even improve on Obama's pro-integrative rule. The interim rule fully conformed with the establish precedent discussed above.[150]

Despite this, there remains a risk of allowing revisionist narratives to go unchecked. It was not inevitable that Joe Biden won the presidency, and had the United States been relegated to four more years of his predecessor, it can only be imagined what damage might have been done to fair housing law. There are also threats, even now. The U.S. Supreme Court, currently very conservative, is unlikely to be a friend of the Fair Housing Act or civil rights law for many years to come. False, misleading, artificial, or revisionist narratives are a useful weapon

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[146] Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies, 86 Fed. Reg. 7,487, 7,487 (Jan. 26, 2021).

[147] *Id.* at 7,488.

[148] *Id*.

[149] *Id.*; *see also* Tracy Jan, Trump gutted Obama-eras housing discrimination rules, Biden's bringing them back, WASH. POST (Apr. 13, 2021), https://www.washingtonpost.com/us-policy/2021/04/13/hud-biden-fair-housing-rules/.

[150] *See* Restoring Affirmatively Furthering Fair Housing Definitions and Certification, 86 Fed. Reg. 30,779 (June 10, 2021).

in the hands of courts, which could be used to cause great injury to hard-fought civil rights victories. Integration is the most progressive, most transformative, most controversial objective of the Fair Housing Act. Precisely for that reason, there will likely be many future attempts to sideline or detach it from the law altogether. America should never forget that its last great civil rights law was built to confront segregation, the deepest and most totalistic form of racial discrimination that persists today.

FREE EXERCISE IN THE MIRROR

SHERRY COLB**

Recent U.S. Supreme Court cases present an opportunity to apply a new form of analysis to discrimination claims. In 2018's Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission and 2021's Fulton v. City of Philadelphia, there is a party complaining about discrimination on each side of the dispute. In both cases, one side (respondent) claims that the other (petitioner) is discriminating based on sexual orientation, while the other side (petitioner) claims that subjecting petitioner to the law prohibiting sexual orientation discrimination itself discriminates based on religion. With discrimination claims coming from both directions, this article performs what it calls "mirror-image analysis" to better understand how the Court thinks about the issues it faces in Free Exercise cases. Mirror-image analysis takes a definition that the Court applies to one side of the dispute, whether it is the definition of discrimination or of coercion, and then considers what the other side's claim would look like if it deployed a similarly capacious definition of the term. The article uses hypothetical cases, some quite provocative, to help clarify the nature of the Court's approach to Free Exercise. It concludes that because the religions at issue in both Masterpiece Cakeshop and Fulton were mainstream Christian faiths, it takes a mirror to appreciate how extreme the Court's analysis of religious freedom has become.

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INTRODUCTION

In the last several years, the U.S. Supreme Court decided two important religion cases which happen to be unusual in one significant respect. Each case involved petitioners and respondents that appeared to be mirror images of each other. Each side claimed it was the authentic victim of discrimination. The mirror image structure allows us to evaluate the symmetry or lack thereof in the Justices' analysis of the issues going in both directions. In performing this evaluation, we will see that the Court exhibited a profound empathy for the religious petitioners in each case, Masterpiece Cakeshop ("MC," referring to both the baker and the corporate entity) and Catholic Social Services ("CSS"), respectively. The selective empathy surfaced when the Court deployed an extremely broad definition of "discrimination" for religious petitioners while, in the very same disputes, applied a far stingier and narrower definition of "discrimination" for the governmental entities enforcing the laws prohibiting sexual orientation discrimination on behalf of LGBTQ+ persons, whose own rights and interests the Court downplayed.

In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,[1] a majority of the Justices failed to reach the merits of the principal First Amendment issues presented[2] but revealed quite a bit (about, among other things, their heightened sensitivity to a moral critique of bigotry in the name of religion) in what they ultimately did say. In the second, *Fulton v. City of Philadelphia*,[3] the Justices reached a conclusion on the merits that drew criticism from progressives.[4] In both cases, religious petitioners argued that government actors had engaged in discrimination against petitioners' respective religions.[5] And both sets of traditional religious petitioners won their cases.[6]

Most of the critical commentary on the two decisions and related "shadow docket" Free Exercise cases during the COVID-19 pandemic points out the flawed nature of how the Court applied the landmark 1990 precedent of *Employment Division v. Smith*.[7] Although the Justices said that *Smith*

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[1] 138 S. Ct. 1719, 1723-24 (2018). I do not mean to suggest that *Masterpiece Cakeshop* was the only important religion case on the Court's docket in the October 2017 Term. The Court, for example, rejected a religious discrimination claim in Trump v. Hawaii, 138 S. Ct. 2392, 2393 (2018).

[2] These were the questions presented: "Whether applying Colorado's public accommodations law to compel Phillips to create expression that violates his sincerely held religious beliefs about marriage violates the Free Speech or Free Exercise Clauses of the First Amendment." Petition for a Writ of Certiorari at i, *Masterpiece Cakeshop*, 138 S. Ct. (No. 16-111).

[3] 141 S. Ct. 1868 (2021).

[4] *See, e.g.*, Andrew R. Lewis, *The Supreme Court Handed Conservatives a Narrow Religious Freedom Victory in* Fulton v. City of Philadelphia, WASH. POST (June 18, 2021), https://www.washingtonpost.com/politics/2021/06/18/supreme-court-handed-conservatives-narrow-religious-freedom-victory-fulton-v-city-philadelphia/ (warning that the decision could create "a license to discriminate against LGBTQ people").

[5] Brief for Petitioners at 42, *Masterpiece Cakeshop*, 138 S. Ct. (No. 16-111) (claiming that the Colorado Civil Rights Commission was targeting "a specific religious belief 'for discriminatory treatment'" (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 538 (1993)); Petition for a Writ of Certiorari at 18, *Fulton*, 141 S. Ct. (No. 19-123) ("Philadelphia's actions [against Catholic Social Services] were baseless, discriminatory, and entirely unnecessary.").

[6] *Masterpiece Cakeshop*, 138 S. Ct. at 1740; *Fulton*, 141 S. Ct. at 1882.

[7] 494 U.S. 872 (1990). For a background in the Court's shifting Free Exercise jurisprudence and an argument about the dangers in reinterpreting *Smith*, see James M. Oleske, Jr., *Free Exercise (Dis)Honesty*, 2019 WIS. L. REV. 689, 739 (arguing that the Court's Free Exercise decisions over the last sixty years have tended to defy precedent by

governs,[8] meaning that the Free Exercise Clause requires general applicability, neutrality, and non-discrimination, critics argue that the Court in fact applied a label of "discrimination" to facially neutral government activity that at most incidentally burdened religious practice.[9] One critique asserts that the Court covertly reverted to the regime of *Sherbert v. Verner*,[10] which *Smith* overruled.[11] Another account contends that the Court engaged in an enterprise of protecting "Christian privilege," by analogy to "white privilege," wherein the Court recognized the loss of unfairly appropriated special entitlements as a cognizable harm against Christians.[12] Still others propose that the Court granted "most favored nation" status to religion, thereby departing—perhaps rightly, perhaps wrongly—from the more formal

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disingenuously interpreting it, and warning against continuing this pattern in reinterpreting *Smith*). The "shadow docket" refers to cases the Court decides without plenary consideration. *See* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & Liberty 1, 3 (2015). For examples of Free Exercise cases on the Court's shadow docket during the pandemic, see *infra* note 39.

[8] A majority of Justices in *Fulton* actually criticized *Smith*, but they nonetheless applied it because they could not agree on a workable alternative. *Fulton*, 141 S. Ct. at 1882–83 (Barrett, J., concurring) (noting that "[t]here would be a number of issues to work through if *Smith* were overruled").

[9] *See*, *e.g.*, Dahlia Lithwick, *The Supreme Court Moves the Shadow Docket Out Into the Light*, SLATE (June 21, 2021) (statement of Professor Erwin Chemerinsky), https://slate.com/news-and-politics/2021/06/fulton-v-philadelphia-supreme-court-religious-freedom-discrimination.html ("The court's saying the very possibility of exceptions is what makes this religious discrimination. And that to me is a very troubling holding.").

[10] 374 U.S. 398, 403, 406 (1963).

[11] Emp. Div. v. Smith 494 U.S. 872, 885 (1990) ("We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the [*Sherbert*] test inapplicable to such challenges."). *See, e.g.*, Michael Peabody, *High Court Hands Catholic Social Services Narrowly Drafted Victory*, RELIGIOUS LIBERTY.TV (June 18, 2021), https://religiousliberty.tv/high-court-hands-catholic-social-services-narrowly-drafted-victory.html. Much of the criticism stems from the COVID-19 cases (including primarily or exclusively cases on the shadow docket). *See, e.g.*, Jim Oleske, Fulton *Quiets* Tandon*'s Thunder: A Free Exercise Puzzle*, SCOTUSBLOG (June 18, 2021, 4:20 PM), https://www.scotusblog.com/2021/06/fulton-quiets-tandons-thunder-a-free-exercise-puzzle/.

[12] Caroline Mala Corbin, *Justice Scalia, the Establishment Clause, and Christian Privilege*, 15 FIRST AMEND. L. REV. 185, 209 (2017); Caroline Mala Corbin, *Should We Placate White Christian Fragility?*, BALKINIZATION (July 17, 2020), https://balkin.blogspot.com/2020/07/should-we-placate-white-christian.html.

conception of neutrality associated with *Smith*.[13] And some observers maintain that the Court applied a disparate impact theory of discrimination of the sort that the Justices sanctioned in *Griggs v. Duke Power Co.* and that Congress approved in the 1991 Civil Rights Act.[14]

In this article, I aim to do something different. I take seriously the Court's claim that it was protecting religion against discrimination and doing so under the rubric of *Smith*, which, even on its face, forbids religious discrimination. I accordingly refrain from suggesting that the Court was covertly (or overtly) returning us to the world of *Sherbert* or to some more or less malign version of that regime. Taking the Justices at their word, I analyze the Court's approach to the opposing parties in each of the two cases and assess that approach for symmetry. The two cases offer excellent vehicles for assessing symmetry because in each of the disputes, one side (petitioners) argued the government discriminated against it based on religion by prohibiting it from discriminating against a same-sex couple based on sexual orientation. Because we have claims of discrimination on both sides of the two disputes, one forming the predicate for the other, we can ask the following question: What would the dispute look like if the Supreme Court took the approach that it used to evaluate respondents' conduct and applied it to petitioners' conduct? In other words, I will take seriously the Court's template for discrimination based on religion and apply it to the behavior of the putative

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[13] *See* Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2612 (2020) (Kavanaugh, J., dissenting) (quoting Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 49–50) (claiming that even under *Smith*, whenever government favors some activities over others, "it must place religious organizations in the favored or exempt category" absent a "sufficient justification"). For a sympathetic explication of this approach in theory if not as practiced by the Supreme Court, see Nelson Tebbe, *The Principle and Politics of Equal Value*, 121 COLUM. L. REV., 2397 (2021). *See also* Douglas Laycock, *The Broader Implications of* Masterpiece Cakeshop, 2019 BYU L. REV. 167, 177 (arguing that under the Court's reasoning in *Smith*, religion should enjoy something akin to "most-favored nation status" (quoting Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 49–51)).

[14] 401 U.S. 424, 431 (1971); Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 3(3), 105 Stat. 1071, 1071; *see also* James M. Dise, *Religious Exemptions to Neutral Laws of General Applicability and the Theory of Disparate Impact Discrimination*, 6 COLUM. J. RACE & L. 115, 118–19 (2016) (characterizing religious exemptions as implicitly protecting against disparate impact); David Cole, *A New Assault on Marriage Equality*, N.Y. REV. BOOKS (Dec. 3, 2020), https://www.nybooks.com/articles/2020/12/03/new-assault-marriage-equality/?lp_txn_id=1262059 (describing the petitioner's appeal in *Fulton* as a request to extend religious protections to include disparate impact).

victims of that discrimination. I shall refer to this approach, investigating whether we have symmetry between how the Court looked at each of two symmetrical discrimination claims in one case, as "mirror-image analysis."

One might object that while the same-sex couples claimed that Masterpiece Cakeshop and Catholic Social Services were discriminating against them,[15] Masterpiece Cakeshop and Catholic Social Services did not claim that same-sex couples discriminated against the two businesses. The claim was instead that the *government*, by applying the anti-discrimination laws to petitioners without allowing a religious exemption, discriminated against them.[16] Accordingly, the government was unwilling to tolerate discrimination by petitioners against same-sex couples, and petitioners said this government position discriminated against religious people. And, the objector might add, isn't governmental discrimination in violation of the Constitution more invidious (and, in a sense, "more unlawful") than private discrimination in violation of a statute?

Neither objection is persuasive. As to the first, when Masterpiece Cakeshop and Catholic Social Services complained that the government was discriminating against them, the government stood in the place of actual or potential same-sex couples whose demands for equal treatment (backed up by the law) struck MC and CSS as discriminatory because of its impact on religious people. In other words, same-sex couples, through the government that represented their legal rights, complained that MC and CSS were discriminating based on sexual orientation, and MC and CSS complained in turn that enforcing such anti-discrimination principles on behalf of same sex couples itself discriminated against MC and CSS on the basis of religion.

As to the second objection, sometimes the Constitution requires more of government actors than statutes require of private actors, but other times the opposite is true. The Equal Protection Clause, under *Washington v. Davis*,[17] prohibits only intentional discrimination by the government, while Title VII of the Civil Rights Act of 1964 protects private employees against not only disparate treatment but also conduct with an unintentional disparate impact.[18] We can therefore evaluate how the Supreme Court treats discrimination

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[15] *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1725 (2018); *Fulton v. City of Phil.*, 141 S. Ct. 1868, 1875 (2021).

[16] *Supra* note 5.

[17] 426 U.S. 229, 238–39 (1976).

[18] Title VII, Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000-e2 (as amended in 1991 by Pub. L. No. 102-166, 105 Stat. 1071).

claims generally, whether those claims arise under the Constitution or under a statute, and assess how faithfully the Court applies its own approach to discrimination from one party to a case to another, without worrying about the above objections to such analysis.

Victims can also be perpetrators. A baker can discriminate against same sex couples looking to buy a wedding cake even as the government allegedly discriminates against the religious baker by punishing him for discriminating against same sex couples. What can make such contests coherent and logical is that "discrimination" means more or less the same thing going each way. If Jacob can be said to have committed an assault against Blythe while Blythe is said to have committed an assault against Jacob, then we would want the word "assault" to carry the same meaning for both confrontations, unless we have a good reason to say that an assault means something different in each context.

In analyzing *Masterpiece Cakeshop* and *Fulton*, I will examine ways in which the meaning of "discrimination" differed when the actions were those of the government on behalf of same-sex couples and against religion, versus those of petitioners against same-sex couples. I will describe what the two cases would look like were the Free Exercise definition of religious discrimination to apply to sexual orientation discrimination. Finally, I will provide a better understanding of the Court's analysis purportedly applying *Smith* and thus identifying religious discrimination under the circumstances that presented themselves to the Court in the two cases, taking account of how petitioners would fare under the analysis they successfully urged on the Court. I will offer the hypothesis that the Court so strongly identified with the religious petitioners in these cases that it failed to recognize bigotry against sexual minorities, mistaking it for benign religious observance. By surfacing such bigotry using the Court's own tools for uncovering religious prejudice, my method hoists the Court by its own petard.

Part I begins by describing the conflict that reached the Supreme Court in *Masterpiece Cakeshop*. After briefly touching on the theory of discrimination that animated the petitioner's claim, I turn to the basis on which the Court disposed of the case. I then use mirror-image analysis to determine what the Court would have done if it had applied its definition of discriminatory animus to the actions of petitioner, Masterpiece Cakeshop. The Court's understanding of animus appeared to rest on the harshness of the Colorado Civil Rights Commission's critique of Masterpiece Cakeshop's refusal to bake a wedding cake for a same-sex couple. The contrast between

this definition of animus—as applied to the Commission—and the definition of discrimination that the Court applied to Masterpiece Cakeshop is arresting. It suggests that the Court was—perhaps unintentionally—manifesting the sort of bigotry that it believed it was neutrally observing.

Part II addresses *Fulton*, describing the more developed sort of narrative that would likely have faced the Court in *Masterpiece Cakeshop* if it had reached the merits of the primary claims there. I apply mirror-image analysis to *Fulton* to assess the crossclaim of discrimination that Philadelphia would have been able to make on behalf of same-sex couples seeking to become foster parents if the Court's version of anti-queer discrimination were as robust as its understanding of anti-religion discrimination. Using analogies from different areas of the law, this section provides a clear picture of the fun-house mirror that same-sex couples face in attempting to avoid religious people's discrimination against the couples based on sexual orientation.

Part III describes the most robust test of religious coercion that would have applied under the regime that governed Free Exercise claims prior to *Smith*. I once again use mirror-image analysis here, this time to highlight the unrecognizably enhanced view of anti-religious coercion that the Court took in reaching the results that it did in *Fulton*. I offer hypothetical examples of similarly enhanced Free Exercise claims that a disempowered person, adhering to a nontraditional religion, could make if the Court applied a uniform definition of anti-religious coercion. A Conclusion follows, reflecting on the lessons of mirror-image analysis.

I. *MASTERPIECE CAKESHOP* AND DISCRIMINATION ASYMMETRY

A. The Masterpiece Claim

In *Masterpiece Cakeshop*, a gay couple planning their nuptials entered a bakery and asked to purchase a wedding cake.[19] The individual petitioner (and corporate owner of the bakery) told the couple that because they were having a same-sex wedding, it would violate MC's Christian obligations to provide the cake they wanted.[20] He would happily sell them

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[19] 138 S. Ct. 1719, 1723 (2018).

[20] *Id.* As a reminder, for simplicity I refer to either the individual or the bakery or both by the term MC. Context provides a clear picture of that entity to which MC refers at any time.

rolls or other baked goods, but a wedding cake was out of the question.[21] The couple brought a lawsuit claiming discrimination on the basis of sexual orientation in violation of state law.[22] If the couple were straight—if one of the two people was a woman instead of a man—MC would have served them. MC defended itself by invoking its religious observance, contending that by obligating MC to sell a wedding cake to a same-sex couple, a transgression of MC's religion, the Colorado Civil Rights Commission ("the Commission") violated the First Amendment Free Exercise Clause, which prohibits official discrimination based on religion.[23]

In addition to its religion claim, MC presented a free speech claim, arguing that it should not have to communicate a message with which it disagrees (that the marriage of two men warrants celebration) by creating a same sex wedding cake.[24] How best to answer this free speech question depends on facts that never became entirely clear in the record. Did the couple in question want a special cake indicating that two men were marrying? If so, then MC's free speech claim might be substantial. To see why, consider a scene from *Borat Subsequent Moviefilm*, in which Sacha Baron Cohen as Borat asks a baker to decorate a cake with the slogan "Jews will not replace us."[25] A law that required the baker to accede to such a request would at least *implicate* the baker's free speech right not to speak. Likewise, so might a cake decorated with written or artistic representations of a same-sex couple marrying *implicate* this right.

However, the *Masterpiece Cakeshop* record does not clearly show that the couple sought a bespoke cake. MC apparently refused the couple a cake before knowing what sort of cake—pre-made generic wedding cake or

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[21] *Id.* at 1724.

[22] *Id.* at 1723. Unlike other provisions of federal antidiscrimination law, the public accommodations provision, Title II, does not bar sex discrimination. 42 U.S.C. § 2000a (a) (forbidding "discrimination . . . on the ground of race, color, religion, or national origin" in public accommodations). If the federal public accommodations statute did cover sex discrimination, it would, *ipso facto*, also cover sexual orientation discrimination. *See generally* Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (construing Title VII's prohibition on sex-based discrimination in employment as extending to discrimination based on sexual orientation and gender identity).

[23] Brief for Petitioners, *supra* note 6, at 16.

[24] *Id.* at 17.

[25] BORAT SUBSEQUENT MOVIEFILM (Four by Two Films 2020).

custom—they wanted.[26] As far as MC knew, all that the couple (and the government enforcing the law against discrimination) wanted was for MC to sell the two men a generic wedding cake on the same terms as it would sell one to any other marrying couple.

The religious claim is different, however. MC said it is Christian and its religion opposes same-sex marriage.[27] To compel MC to sell a wedding cake to two men getting married would, according to MC, require MC to violate its religious commitments. I shall say more about MC's Free Exercise argument when I take up the *Fulton* case, but for now, note that the Court did not reach this question because it found in favor of MC's religious discrimination claim on other grounds.[28]

The Colorado Civil Rights Commission ruled in favor of the same-sex couple over MC in its original claim.[29] In separate comments that the Commission did not disclaim, one commissioner stated:

> Freedom of religion and religion has [sic] been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.[30]

The Colorado state courts affirmed the Commission's decision.[31] Then the U.S. Supreme Court ruled that the Commission had exhibited anti-religious animus, evidenced chiefly in the above quote, and that MC would prevail over the marrying same-sex couple for that reason.[32] The Commission could, presumably, revisit the issue and decide it without evident animus, and the Supreme Court might then be willing to evaluate the Commission's new opinion under the Free Exercise Clause.[33]

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[26] Brief of the Colorado Civil Rights Commission in Opposition at 9, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111).

[27] *Masterpiece Cakeshop*, 138 S. Ct. at 1724.

[28] *Id.* at 1732.

[29] *Id.* at 1723.

[30] *Id.* at 1729 (quoting Transcript of Colorado Civil Rights Commission Meeting, July 25, 2014, 11–12).

[31] *Id.* at 1723.

[32] *Id.* at 1732.

[33] *Id.*

B. The Court's Reaction to a Triggering Analogy

Why did the Court believe that the Commission harbored animus against religion? The content of the statement itself appears to be that *the fact that you are religious and act out of religious motives does not exempt your conduct from criticism and condemnation and further, historically, we have seen people invoke religion when carrying out atrocities*. That statement is surely true, so the objection cannot be that the Commission defamed religion. What might have especially bothered the Court, though, was likely the invocation of slavery and the Holocaust.

When someone offers these atrocities as examples of what people can do in the name of religion, they perhaps betray a negative view of religion. Say, for example, someone asks an observant Catholic why she has ash on her forehead, and she says it is because she is Catholic and observes Ash Wednesday. Imagine that her friend follows up by saying, "you know that a lot of Catholic priests molested children and then were just moved to other congregations to continue their abuse, so you don't want to be doing something just because religious Catholics do it!" The Catholic might feel justifiably offended at that statement, even though it asserts facts. Putting ash on one's forehead is unobjectionable, so there is no need to reference Catholic priests who have done horrible things or to invoke a specific and scandalous example.

Refusing to sell a same-sex couple a wedding cake, however, is different from placing ash on one's forehead for the holiday. The former is hurtful and exclusionary. It is probably for this reason that a commissioner saw fit to bring up admittedly far more serious historical atrocities; refusing to engage in commerce with a same-sex couple might have looked like it stemmed from similarly antiquated and invidious bigotry that would have given rise to the larger past injustices. From the point of view of the Supreme Court, however, it appeared that MC had done nothing wrong or nothing especially hurtful—in refusing to serve the same-sex couple—so long as the refusal was the product of religious faith, particularly given that same sex couples could easily find other bakers willing to serve them. From the Court's perspective, a comparison to atrocities could not have come from a genuine grievance, so it must therefore have reflected animus against religion.

The Court was coming from a standpoint of tolerance for what MC did, just as any sensible person would feel tolerance for the ash on the Catholic woman's forehead. No need, under these circumstances, to invoke historical atrocities or misconduct. The Court thus might have viewed the putative

perpetrator of sexual-orientation-based discrimination as engaged in relatively anodyne conduct that should not have triggered any reference to atrocities in the name of religion. Viewing things in this way, it would be natural to conclude that the commissioner and therefore the Commission, which failed to take issue with the bigoted statement, were in fact discriminating against MC by speaking of atrocities justified in the name of religion.[34]

For the Court to have viewed the commissioner's words as comparable to the above example required the Court to regard what MC did to the same-sex couple with empathy. Why? Because unlike wearing ash on one's forehead, a place of public accommodation refusing to serve a couple because the couple consists of two men or two women is illegal. The illegality under state law of this private discrimination stems from the fact that many people, apparently including Colorado lawmakers, believe it is morally wrong. It is wrong for the same reason that race discrimination is wrong. It denies people full participation in the marketplace on account of an invidious classification. Such discrimination does not merely deny a person the opportunity to buy a product, a denial for which some other willing vendor might be able to compensate. It stigmatizes a person and makes him or her feel like an outsider, an exile, a pariah. It also reinforces existing oppressive power relationships at odds with American ideals of freedom and fairness. One of the key attributes that recommends a capitalist "free market" over its alternatives is that any willing customer can walk into any place of business and expect to be served, regardless of race, sex, sexual orientation, religion, or other characteristic.[35]

Freedom from the stigma of discrimination within the market, however, did not, in the Court's estimation, seem to register as a significant enough liberty interest to merit the caustic reply that the commission issued (with the Commission's tacit approval) in response to the denial of that freedom.[36] The

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[34] For an interesting contrast, see Trump v. Hawaii, 138 S. Ct. 2392, 2417–23 (2018) (holding that, despite the history of blatant and explicit anti-Muslim animus behind the Trump travel ban against the entry of travelers and refugees from designated countries into the United States, the cosmetic changes to the ban sufficed to validate it as something other than the discriminatory measure that it plainly was).

[35] *See* STEVEN PINKER, THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED, 64, 76–77 (2012) (asserting that "a free market puts a premium on empathy" and that "[i]f you're trading favors or surplus with someone, your trading partner suddenly becomes more valuable to you alive than dead.").

[36] *See Masterpiece Cakeshop*, 138 S. Ct. at 1732.

caustic reply therefore struck the Court as itself discriminatory, much as it would have been discriminatory to mention atrocities by pedophiles and their protectors in response to a Catholic having some ash on their forehead. The Court's empathy for MC was part of its approach to determining whether MC was doing something wrong by refusing to sell a wedding cake to a same-sex couple. In thinking about that question, the Justices in the majority in *Masterpiece Cakeshop* seemed to betray *f* B. the view that if it was wrong to refuse to sell a wedding cake to a same-sex couple, it was not *all that wrong*.[37] It was not wrong enough to justify a response invoking prior religious atrocities. Nothing like slavery or the Holocaust.

C. Masterpiece Cakeshop *in the Mirror*

Now let us apply mirror-image analysis. Imagine the Court taking a similarly empathic stance toward the same-sex couple that came into MC's bakery for a wedding cake. The two men, maybe filled with excitement about this next chapter in their lives, walk into the bakery. The shopkeeper welcomes them and smiles. The two men know that not that long ago, the law not only prevented them from marrying but authorized the police to arrest them for their choice of partner, while police allowed themselves to do a whole lot more.[38] It feels good to be recognized as equal members of society. The shopkeeper asks how he can help them. They grin and say they will be wed and will need a cake for the occasion. They pay him a compliment, saying they have heard that his cakes are beautiful and delectable.

MC is no longer smiling. He tells the men that he would be happy to sell them a loaf of bread or rolls. But he cannot make them a wedding cake. "Why not?" They ask. "We are willing to pay whatever it costs. We can afford it." "I am sorry," he says, "but it violates my religion to sell you a wedding cake." One of the two men becomes visibly upset and says that the baker takes money from people for wedding cakes all day. Why can't he just do the same for them? He does not even know them, after all. They are good people. Seeing that the shopkeeper has made up his mind and will not budge, the other of the two men says, "get ready for a lawsuit, pal. It is illegal to

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[37] *See id.*

[38] Victoria A. Brownworth, *Police violence is LGBTQ history, past and present*, PHILA. GAY NEWS (Apr. 14, 2021), https://epgn.com/2021/04/14/police-violence-is-lgbtq-history-past-and-present/.

discriminate against us." "I am not discriminating," he assures them. "I am just being a Christian."

Mirror-image analysis asks that we take the same friendly approach to the same-sex couple that the Court took to the baker. Doing so, we note how very insulting and unkind it was to refuse service to the couple. We feel for the men, just as the Court felt for the baker. It would be humiliating for anyone to hear that a store open to the public would not serve them because of their sexual orientation (or because of what amounts to the same thing, their wish to marry someone of the same sex). A refusal to serve customers based on sexual orientation also reinvigorates a properly receding oppressive social structure that long denied LGBTQ+ citizens full access to, and participation in, society.

Empathizing with the couple, we would ask whether the baker sincerely believed that his religion prohibited him from selling a wedding cake to the men. As a particular sort of Christian, he might believe himself to be prohibited from having sex with a man, and he probably could not officiate at a same-sex wedding because that would make him a quasi-partner in the union. But was it truly the case that he could not sell a wedding cake to a same-sex couple? We can suppose he believed in this interpretation, but lending our generosity to the couple, as the Court did to the baker, we might wish to consider whether MC treated some similarly situated sinners differently, which seems likely (as discussed below), just as the commissioner might have spoken less harshly of nonreligious actors who violated antidiscrimination law. Indeed, one way to determine whether a party is engaged in illicit discrimination is to examine how broadly that party applies its own stated criterion in comparable situations.[39] Let us accordingly consider who else should have been unable to shop at the bakery.

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[39] *See, e.g.*, Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 73 (2020) (Kavanaugh, J., concurring) (enjoining enforcement of occupancy limits in places of worship because "New York's restrictions on houses of worship not only are severe, but also are discriminatory. . . . In a red zone, for example, a church or synagogue must adhere to a 10-person attendance cap, while a grocery store, pet store, or big-box store down the street does not face the same restriction."); S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 717 (2021) (Statement of Gorsuch, J.) (supporting the Court's injunction against enforcement of a prohibition on indoor worship services because "California has openly imposed more stringent regulations on religious institutions than on many businesses."); Gateway City Church v. Newsom, No. 20A138, slip op. at 1 (Feb. 26, 2021) (similarly granting injunctive relief against Covid regulations to religious institutions because the

As a matter of Christian doctrine, as generally understood, people must believe in God and must also believe that Jesus died for their sins. A failure to believe is a sin.[40] What if a straight couple walked into MC, and they were wearing matching T-shirts featuring the Flying Spaghetti Monster? They would thereby have designated themselves as atheists. It is sinful not to believe in God and Jesus. Would the Christian baker sell the couple a wedding cake? Absent evidence to the contrary, the answer is almost certainly yes, notwithstanding religious objections to nonbelief.[41]

Next, imagine that a mixed-religion, straight couple came in. The man was Christian and the woman was Jewish. They each wore jewelry indicating their respective faiths. Christian sects assert a variety of views on interfaith marriages, but let us suppose that this baker belongs to one that deems such marriages sinful. Would he sell the couple a cake? Again, absent evidence to the contrary, almost certainly yes.[42] Third, imagine that a man and a woman

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Court's decision in *S. Bay United Pentecostal Church* "clearly dictated" the outcome); Tandon v. Newsom, No. 20A151, slip op. at 3 (Apr. 9, 2021) (per curium) (likewise granting injunctive relief against enforcement of a ban on at-home worship because "California treats some comparable secular activities more favorably than at-home religious exercise."). Notwithstanding the Court's analysis, however, the difference between the stores that were allowed to remain open while churches were ordered to close ought to have been obvious to the Court, given the fact that sitting in church involves prolonged exposure to large numbers of people who are talking and singing, all of which dramatically raises the risk of droplet transmission, while a visit to a market or "bus station[] and airport[], . . . laundromat[] and bank[], . . . hardware store[] and liquor shop[]," *Roman Catholic Diocese*, 141 S. Ct. at 69 (Gorsuch, J., concurring), involves relatively brief exposure and relatively little talking, no singing, and therefore a far more limited risk of droplet transmission. In other words, what the Court described as like cases, discriminatorily treated differently, were quite plainly unlike cases, properly treated differently. *Id.* at 65. These shadow docket decisions demonstrate that the Court is sometimes very sensitive to the mere possibility of anti-religious discrimination, even as it is at other times (in the case of the same-sex couples in *Masterpiece Cakeshop* and *Fulton* as well as the Muslims in *Trump v. Hawaii*) oblivious or indifferent to real and palpable discrimination.

[40] *John* 16:9 (New King James), https://biblehub.com/john/16-9.htm ("[O]f sin, because they do not believe in Me."); CATECHISM OF THE CATHOLIC CHURCH, pt. 3, § 1, ch. 1, art. 8(II) (1851), https://www.vatican.va/archive/ENG0015/__P6A.HTM (listing "unbelief" as one of the "many forms" of sin).

[41] Brief Amici Curiae of Lambda Legal Defense and Education Fund, Inc., One Colorado, and One Colorado Educational Fund in Support of Appellees at 4, Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111) (describing the baker's "routine willingness to serve those of faiths different from his, as well as atheists and interfaith couples").

[42] *Id.*

came into the bakery and the woman was visibly pregnant, wearing a T-shirt that says "a choice, not a child"—referring to abortion—on it. Most religious Christians believe that abortion is tantamount to murder. Could our baker, consistent with his beliefs, nonetheless sell a wedding cake to these customers? Once again, we can assume, absent contrary evidence, that the answer is yes, even assuming the baker personally holds the anti-abortion views of his church.[43] Why? Because common experience tells those of us who have frequented the businesses of devout Christians that Christian salespeople generally do not require their customers to conform their conduct to the salesperson's religion. Out of all the sinful people that might walk into the bakery seeking to buy a wedding cake, then, so far as we know, MC refuses wedding cakes only to people from the LGBTQ+ community.[44]

Recall the Court's reaction to the commissioner having mentioned the Holocaust and slavery to make a point about how people sometimes invoke religion to justify evil acts. The Court plainly believed that to compare the actions of MC in refusing to provide a same-sex couple with a wedding cake to such atrocities was grossly disproportionate, so much so that it evidenced animus against religion. A similarly empathic stance toward the same-sex couple that visited the bakery would give rise to a corresponding sense that refusing to sell the two men a wedding cake was insulting and disproportionate relative to the fact that a couple planning to marry within their sex had walked into a Christian's bakery. We can tell that refusing to sell them a wedding cake goes too far because opposite-sex couples with sinful lifestyles walk into the bakery all the time and find a baker who is happy to sell them a wedding cake.

Were MC to turn away every couple that rejects the beliefs, customs, or marital directives of even mainstream Christianity, he would quickly find himself out of customers. He therefore instead makes the uniquely insulting choice to turn away business from a same-sex couple. That looks like anti-

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[43] *See id.*

[44] Indeed, the only other apparent suit against MC for refusing service to a customer also involved discrimination against the LGBTQ+ community; MC was again a defendant in a suit over its refusal to sell a blue birthday cake with pink frosting to a transgender woman after discovering that she sought to celebrate her transition. Scardina v. Masterpiece Cakeshop, Ltd., No. 2019CV32214, slip op. 1, 5 (Dist. Ct. Denver June 15, 2021). However, it is worth noting that having to bake a special pink and blue cake to specification might be different, for free speech purposes, from having to sell a same-sex couple a generic wedding cake just as the baker would sell an opposite sex couple the same generic wedding cake.

queer animus that tracks societal prejudice rather than simply fidelity to the tenets of Christianity.

One might contend that out of all the sins that engaged couples commit while getting married, the worst of all—from the point of view of some version of Christianity—is homosexuality. If that is so, then the argument that MC should have been excluding other sinners as well if it was excluding same-sex couples for religious reasons might be weaker because MC would no longer be treating like cases differently; it would instead be singling out the most serious transgression for the most severe measure. On the other hand, given the breadth and depth of Christianity, one might have reason for skepticism regarding the sincerity of a claim that the core commitment of Christianity is an opposition to homosexuality and to same-sex marriage.

Had the Supreme Court applied the sort of analysis to MC's behavior that it applied to the conduct of the Commission (and specifically to the words of the commissioner) reviewing MC's behavior, it would have said something like the following: We believe that the Commission is discriminating against religion because one of its commissioners (without contradiction by others) speaks of religion as though it belongs in the same conversation as slavery and the Holocaust, thereby treating unlikes alike, with religion getting the short end of the stick. Analyzing MC's behavior similarly, we observe that MC is refusing to sell wedding cakes to same-sex couples even as it sells wedding cakes to other couples whose planned wedded lifestyles substantially deviate from what MC's faith prescribes. By singling out LGBTQ+ couples for exclusion from its wedding cake business, MC therefore treats like cases differently, a move that signals discrimination in just the way that treating distinct cases alike does. Though the Commission would register as a wrongdoer, so would MC in its discriminatory conduct for which religion here offers only an apparent but not an actual explanation, given its underinclusive application.

Had the Supreme Court ignored the allegedly animus-based thinking of the Commission, we would have a different sort of comparison to draw. Aside from the free speech issue that I regard as potentially difficult, consider what the conflict would look like. On one side would be the same male couple walking into the bakery seeking the opportunity to purchase a wedding cake. On the other side this time would be the application of anti-discrimination law to a religious man who says he cannot sell a wedding cake to the same-sex couple because doing so would violate his religious obligations. For MC to prevail under *Smith*—the standard that the Court said it was applying and

that we will therefore assume that it was applying—we would need to find a way to construe the application of anti-discrimination law *to* MC as discrimination *against* MC based on religion.

II. CATHOLIC SOCIAL SERVICES AND DISCRIMINATION ASYMMETRY

A. The Catholic Social Services Claim

To see how the conflict would work, let us turn to a case in which the Supreme Court addressed what was essentially the same fight as we saw in *Masterpiece Cakeshop* but on the merits. *Fulton* involved the foster care system in Philadelphia. The city contracted with various private foster care agencies to review and certify applicants for fostering children in the system.[45] If you wanted to foster children in Philadelphia, you could go to one of the agencies, and it would review your qualifications and conclude that you either were or were not qualified to be a foster parent.

One of the parties to the dispute was Catholic Social Services ("CSS"), a foster care agency that had a contract with the city.[46] CSS believed, as a matter of religious faith, that marriage was a sacred bond between a man and a woman.[47] CSS accordingly refused to review and certify couples that were unmarried or that consisted of two people of the same sex, even if they were married.[48] The city told CSS that if it did not drop its refusal to certify same-sex married couples, the city would stop referring children to the agency and refuse to enter future foster care contracts with CSS.[49] CSS intended to continue its bar against same-sex couples and brought a lawsuit claiming a violation of its Free Exercise right to practice its religion without suffering discrimination and seeking to enjoin the city from terminating its contract with CSS.[50]

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[45] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1875 (2021) (explaining that the city "enters standard annual contracts with private foster agencies to place . . . children with foster families" and that these foster agencies have "the authority to certify foster families" under the law).

[46] *Id.* at 1874.

[47] *Id.* at 1875.

[48] *Id.*

[49] *Id.* at 1875–76.

[50] *Id.* at 1876.

The U.S. Supreme Court ruled in favor of CSS, holding that, given the city's broad authority to grant exemptions from the prohibition against discrimination, a refusal to grant such an exemption to a religious group failed the "law of general applicability" test of *Smith* and had to meet strict scrutiny, like any discriminatory burden upon religion.[51] Because the City of Philadelphia had the *option* of granting an exemption from the antidiscrimination provision of the contract with CSS but evidently chose not to grant such an exemption to CSS, the Court viewed enforcement of the antidiscrimination provision as falling outside the category of neutral rules that avoid triggering strict scrutiny. In the free speech context, for instance, the Court has gone one step further and subjected a system of granting parade permits—a system that gives the grantor complete discretion to deny permits for whatever reason they like—to strict scrutiny (which the parade granting system would likely fail) under the First Amendment.[52]

B. The Court's Reaction to an Exemption & the Non-Discriminating Alternatives

Let us consider how the Court thought about the facts such that it ultimately concluded that Philadelphia had engaged in anti-religious discrimination. Philadelphia had an ordinance as well as contract provisions in foster-care-agency agreements that prohibited discrimination on the basis of sexual orientation.[53] The city applied the contract provision to CSS by refusing to do business with an entity that discriminated against same-sex couples.[54] The city could have granted (though it did not actually grant any) exemption from the provision, and it is sometimes fair to worry that the discretion to grant permits or exemptions could amount to a cover for discrimination.[55] In the context of an agreement organized around providing

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[51] *Id.* at 1916 (Barrett, J., concurring) (discussing *Smith*'s "law of general applicability" test); *id.* at 1878 (majority opinion) (ruling in favor of CSS because the city's non-discrimination law was not generally applicable).

[52] *Id.* at 1878.

[53] *Id.* at 1875.

[54] *Id.* at 1875–76.

[55] The Court has, in other areas, treated a public official's boundless discretion to decide whether to grant or deny a privilege as tantamount to discrimination in the provision of that privilege. In the context of freedom of speech, for example, the Court has invalidated speech-licensing schemes that afford the licensing official unlimited discretion to decide whether to

foster care for children, however, the Court might have best exercised constitutional avoidance and understood any discretion in applying contractual rules as narrowly dedicated to furthering the interests of the foster children. Given that the city had not yet exempted anyone from the provisions prohibiting discrimination,[56] it would have made sense to conclude that the city would grant an exemption only if the needs of children in foster care militated in favor of such an exemption.

One could imagine, for instance, that a trans foster child might best thrive in the custody of a trans family rather than a cis family. Rejecting the second for the first family would technically violate the provision prohibiting discrimination based on gender identity.[57] Thus, the apparently never-yet-used exemption would perhaps be available for that kind of a case. Understood in this way, the exemption would have nothing to do with accommodating the *agency* or its special needs. The goal would be to meet the needs of the children while generally avoiding discrimination.

Another context in which a related type of child-centered discrimination might be appropriate is in the placement of African American children.[58] Where the law prohibits race discrimination in adoption or foster care placement, we nonetheless see social work agencies preferring African American parents for fostering or adopting African American children.[59] The

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grant or deny a license. *See, e.g.*, Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150–51 (1969) (parade licensing); Schneider v. New Jersey, 308 U.S. 147, 164 (1939) (leafletting licensing). In the area of search and seizure too, the Court has held that when an officer, in the absence of articulable individualized suspicion, singles out an individual motorist on the road to ask for license and registration, the officer conducts an unreasonable seizure in violation of the Fourth Amendment, though officers may lawfully erect a checkpoint and stop every oncoming driver to ask for license and registration. The main difference between the two is that in the first but not the second, the police exercise unbridled discretion. *See* Delaware v. Prouse, 440 U.S. 648, 663 (1979). And in a later case, Michigan v. Sitz, 496 U.S. 444, 454-55 (1990), the Supreme Court, for similar reasons, approved a sobriety checkpoint system in which every driver had to stop. The apparent elimination of discretion removed the possibility of discrimination and thereby changed traffic stops from unlawful to lawful under the Fourth Amendment.

[56] *Fulton*, 141 S. Ct. at 1879.

[57] PHILA. CODE § 9-1106(1) (2013).

[58] Kristie Ann Rooney, *Racial Matching vs. Transracial Adoption: An Overview of the Transracial Adoption Debate*, 53 J. MO. BAR 32, 32 (1997).

[59] *Id.* at 33 ("[C]ourts and adoption agencies often practice a policy of racial matching whereby they strive to place Black children with Black parents and discourage placement

theory for this type of racial preference is that growing up African American in our society is sufficiently distinct from growing up White that an African American child might do better in the home of an African American couple that can teach the child how to manage the particular struggles that face an African American individual in the U.S. today.[60] This practice is not without controversy,[61] but it stems from the view that on occasion, a race-neutral approach to the placement of children could disserve a child's best interests. One might imagine a similar argument for placing hearing-impaired children with a deaf family, and so on.[62] Once again, by contrast to what CSS did—accommodating its *own* spiritual or other needs—the interests of the agency would play no role in justifying an exemption from the rules against discrimination. The exemption would be for the children whose interests the agency is supposed to be serving.

Although the exemption language in Philadelphia's foster care contract was broad and seemingly boundless, it would have been sensible to assume that in carrying out its responsibilities toward the children, the exemption would apply only if the children's wellbeing at least arguably called for such an exemption.

Nonetheless, the Supreme Court saw the exemption provision very differently. To understand the Court's perspective, it is useful to recall a fact that the Court highlighted in its opinion: *other* contracting agencies evaluating foster care applications were willing to review a same-sex couple's qualifications, a willingness that meant that same-sex couples would

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with white parents."); Ezra E. H. Griffith & Rachel L. Bergeron, *Cultural Stereotypes Die Hard: The Case of Transracial Adoption*, 34 J. AM. ACAD. PSYCHIATRY L. 303, 303 (2006) (noting that despite "statutory efforts . . . meant to promote race-neutral approaches to adoption . . . , the cultural preference for race-matching in the construction of families remains powerfully ingrained"); Jessica M. Hadley, Note, *Transracial Adoptions in America: An Analysis of the Role of Racial Identity Among Black Adoptees and the Benefits of Reconceptualizing Success Within Adoptions*, 26 WM. & MARY J. RACE, GENDER & SOC. JUST. 689, 692 (2020) (pointing out that, despite prohibitions against the consideration of race in adoptions, "some states have allowed race to be considered as one factor among many others").

[60] Rooney, *supra* note 59, at 33 (citing NAT'L ASS'N OF BLACK SOC. WORKERS, POSITION STATEMENT ON TRANS-RACIAL ADOPTIONS 2 (1972)).

[61] Griffith & Bergeron, *supra* note 60, at 305 ("Race-matching has been and remains an influential and controversial concept regarding how best to construct adoptive families.").

[62] Barbara White, *When Deaf Parents Adopt Deaf Children: An Investigation of the Concept of Adoptive Parent Entitlement in Deaf Adopted Families*, JADARA, Oct. 2019, at 1.

allegedly lose nothing from CSS's refusal to consider their applications.[63] From the Court's perspective, CSS was doing the best it could, given its religious commitments, and a same-sex couple would have had many other agencies from which to choose.[64] Indeed, no same-sex couple had ever asked CSS to review their application to become foster parents.[65] The Court thus saw same-sex couples as having plenty of options for becoming eligible to foster children, so long as they did not insist on being serviced by the one agency that—due to religious commitments—was unable to offer its services.[66]

Because alternative, non-discriminating, agencies were available, the Court did not see the same-sex couple as suffering any real harm.[67] CSS was able to fulfill its religious requirements, and same-sex couples could become foster parents by undergoing review with a different agency.[68] CSS even offered to help couples find another agency, thus manifesting its lack of animus toward the couple.[69] If CSS was doing everything it could, and if same-sex couples could readily get what they wanted elsewhere, then only an animus towards religion would lead the City of Philadelphia to terminate its contract with CSS.[70] Unlike a same-sex couple seeking to foster a child,

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[63] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1886 (2021) (observing that according to the record, if a same-sex couple were to approach CSS, "CSS would simply refer the couple to another agency that is happy to provide that service—and there are at least 27 such agencies in Philadelphia") (citing App. 171; Petition for a Writ of Certiorari, *supra* note 6, at App. 137a).

[64] *See id.* at 1886, 1930 (Gorsuch, J., concurring) (mentioning that "dozens of other foster agencies stand willing to serve same-sex couples").

[65] *Fulton*, 141 S. Ct. at 1886.

[66] *Id.* (noting that, due to the plethora of other agencies serving same-sex couples in Philadelphia, "not only is there no evidence that CSS's policy has ever interfered in the slightest with the efforts of a same-sex couple to care for a foster child, there is no reason to fear that it would ever have that effect").

[67] *Id.*

[68] *Id.*

[69] *Id.* at 1930 (Gorsuch, J., concurring) ("CSS is committed to help any inquiring same-sex couples find those other agencies").

[70] To be sure, the Court says it is not looking for animus as the test of a Free Exercise violation but is instead faulting Philadelphia for applying a contractual provision that is not generally applicable because the city reserves the right to offer exemptions but did not offer one to CSS for its religiously motivated noncompliance. *See id.* at 1877. Still, the claim that

moreover, CSS would suffer a serious setback from the termination of its contract with the City of Philadelphia.

From the Court's perspective, instead of appreciating and acknowledging how well the Catholic agency had worked things out and instead of accordingly going forward with all contracts intact, the City of Philadelphia sought to punish the religious organization for its actions. Other parties contracting with the city perhaps would not lose their contracts for offering compromises and for trying to make everything go smoothly. Yet, when a religious party was unwilling to stick to the contract when the provision creating a conflict was an anti-discrimination rule that interfered with the party's religious beliefs, the city inflicted a discretionary, severe penalty on the religious party.

The above description of what the City of Philadelphia did is how we might most charitably construe the claim that the city did more than just fail to accommodate religious practice. Such a failure would seem to violate *Sherbert* or Christian privilege or a most-favored-nation approach if we lived in the pre- or post-*Smith* universe. The Court's view instead was that the city, by retaining the authority to offer an exemption while simultaneously refusing to grant such an exemption for religious reasons, effectively discriminated against CSS because of its religion, a claim that falls within the *Smith* standard.

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the Court isn't looking for animus is unpersuasive here. Part of why the Court highlights a failure to grant an exemption to a religious actor is that the failure signals subjective animus on the part of the government. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, for instance, where the Court applied *Smith* to strike down an animal sacrifice ordinance, the existence of exceptions to the putatively neutral legal principle of furthering public health or animal protection goals revealed the animus of the City of Hialeah, Florida, toward practitioners of the Santeria religion. 508 U.S. 520, 542 (1993) ("[T]he pattern we have recited discloses animosity to Santeria adherents . . . . [T]he texts of the ordinance were gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings."). If someone gets—or could get—an exemption from the rule for a non-religious pursuit but the religious party gets no exemption for a religious pursuit, then the government appears to be engaged in purposeful discrimination based on religion. *See also* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493, 500 (1989) (asserting that the Court must "'smoke out' illegitimate uses of race" by subjecting any legislation containing racial classifications to strict scrutiny because "[r]acial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice"); Jed Rubenfeld, *Affirmative Action*, 107 Yale L.J. 427, 436–37 (1997) (describing "[h]eightened scrutiny of a racial classification" as "a test of ulterior state interests," which functions "to smoke out illegitimate purposes" and "permits a court to conclude, in effect, '[i]f the state were really interested in race-neutral purpose x, it would not have done what it did'").

We caught a hint of the Court's perspective on the conflict during oral argument. Justice Kavanaugh said to Neal Katyal, the lawyer representing the City of Philadelphia, that the city "was looking for a fight . . . even though no same-sex couple had gone to CSS," characterizing the city's position as "absolutist and extreme."[71] According to Justice Kavanaugh's line of questioning, making extreme demands of a religious entity that would require the entity to violate its own faith sounds a lot like anti-religious discrimination. Further, people need to be able to work together, as working together is a sign of mutual respect. Here, CSS was prepared to work with any same-sex couple to find an agency better suited to the couple's needs. And any same-sex couple that might have come to CSS for an evaluation should have been willing, in the interests of cooperation and religious tolerance, to go to a different agency to form their family. Thus, the city taking the extreme position that it did, reflected an anti-religious sentiment. A win-win solution was available, and Philadelphia, on behalf of same-sex couples looking to foster children, chose to reject that solution and instead to seek a win-lose proposition, thereby manifesting hostility to religion.[72]

C. Catholic Social Services: Coercion in the Mirror

Now let us conduct mirror-image analysis. What if the Court had applied this sort of reasoning—the reasoning that allowed it to identify anti-religious discrimination by Philadelphia against CSS—in analyzing the same-sex couple's predicament? As in the Masterpiece Cakeshop scenario, we might have a gay couple, this time seeking the opportunity to foster one of the many children living without the support of either parent. Many sincere and kind people become foster parents because they are generous and wish to share their home with a child in need, perhaps in preparation for adopting the same or a different child. They might feel good about what they are doing, especially because their actions will also save a child from the unscrupulous individuals who sometimes become involved in the foster care system.

The hypothetical couple might approach one of the agencies hired by the government to carry out what is essentially a government function: to review

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[71] Oral Argument at 1:16:10—17:24, *Fulton*, 141 S. Ct. 1868 (No. 19-123) (Kavanaugh, J.), https://www.oyez.org/cases/2020/19-123.

[72] *Id.* at 1:15:41–15:54 (Kavanaugh, J.) ("There are strong—very strong feelings on all sides that warrant respect. And it seems like we and governments should be looking, where possible, for win-win answers.").

the couple and determine whether they are qualified to foster a child. The couple would walk in the door and find a receptionist who might look from one to the other and then shake her head, confirming that they are a same-sex couple and explaining that the agency is Catholic but that she could give the couple a list of other agencies that would serve a same-sex couple.

"What's the problem?", one member of the hypothetical couple would ask, while the other remembers how things were not so long ago, when bullying queer people was even more widely accepted and prevalent. This member of the couple feels herself returning to earlier traumas but tries to remain present. Maybe she and her partner are the wrong age? The receptionist confirms their worst fears and says the agency would not evaluate them as foster parents because they are a same-sex couple. The first woman assures the receptionist that the two of them are eager to take good care of a child in need, that they have a peaceful and loving home, a big yard where the child could play, and a marvelous kitchen for baking cookies and cupcakes and preparing healthier snacks as well. And the child would have a dog, a lab-shepherd mix who has qualified as an emotional support animal and is gentle and friendly and playful.

The receptionist begins to look bored. She explains that none of those things matter. What matters is that the couple is made up of two women, and under Catholicism, only people of the opposite sex are supposed to marry and form a sacred union, not two people of the same sex.

The hypothetical receptionist at this point might once again offer to direct the couple to an agency that does not regard same-sex relationships as sinful and disqualifying. The couple leaves, dejected. They had believed things had changed.

The same-sex couple is warm, kind, and everything else a child could want in foster parents and, indeed, in permanent parents. An agency committed fully to the function delegated to it would have moved with alacrity to get the process moving so that a child in need could find comfort, safety, and happiness, perhaps for the first time in her life. And note that just as Philadelphia did not even consider granting CSS an exemption from the anti-discrimination requirement, CSS did not even consider making an exception to its rule against reviewing same-sex couples for people who would have offered a child a wonderful home and everything that a child could wish for.

CSS, moreover, did arguably offer a different exception to its rule rejecting sinful families. The exception would have applied to virtually every

couple that failed to embrace a Catholic lifestyle in some way other than living with an opposite-sex partner, without benefit of marriage, or living with a same-sex partner with or without the benefit of marriage. And what exactly would have violated the agency's Catholic faith about evaluating a same-sex couple? Saying that the couple is qualified under the rules to foster a child? Treating two women as though they could give a child a safe and supportive environment?

Consider a parallel to the Court's focus on what the hypothetical same-sex couple (represented by the City of Philadelphia) could have done instead of insisting on being evaluated by the Catholic Agency. Think instead about CSS's alternative course of action. In place of refusing to evaluate any same-sex couples, CSS could have completed an evaluation and then written on the qualification form that CSS, as a matter of its religion, rejects the practice of same-sex marriage. Then no one would make the mistake of attributing endorsement or even tolerance of different lifestyles to CSS. Picking up on a proposal in the city's brief, Justice Breyer made this suggestion to CSS's attorney during oral argument,[73] but the lawyer rejected the proposed compromise out of hand.[74] And in the majority opinion, the Court said that CSS believed that approving a home for foster children constituted an endorsement of the couple's relationship, a view that the Chief Justice said we must accept even if it is illogical; a view that seemed to manifest the very sort of rigidity and unwillingness to compromise that the Court identified with the City of Philadelphia.[75]

The Court apparently believed as well that a same-sex couple's ability to go to a different agency, and CSS's willingness to assist them in doing so, neutralized any discrimination. But is that a reasonable belief? Would a foster care agency that barred African American couples or mixed-race couples be treating such couples neutrally and equally just so long as the discriminating

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[73] *Id.* at 0:06:48–07:00 (Breyer, J.) (referring to the city's brief and telling CSS's lawyer that CSS could "add something onto any response you make and say that you do not endorse same-sex marriages").

[74] *See id.* at 0:07:24–07:45 (response of Lori. H. Windham) (pointing to the lower court record to assert that from the perspective of CSS, "a home study is essentially a validation of the relationships in the home").

[75] *Fulton*, 141 S. Ct. at 1876 ("CSS believes that certification is tantamount to endorsement. And 'religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.'" (quoting Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707, 714 (1981)).

agency was willing to direct them to an agency that did not discriminate? Does discrimination only "count" when everyone discriminates?

Furthermore, if CSS truly believed that its religion prevented it from evaluating the foster-parent qualifications of people who violate Catholic religious dogma, then why did it single out same-sex couples? After all, most people—and therefore, probably, most people who seek to become foster parents—are not Catholic or at least do not obey the requirements of Catholicism in their homes. Did CSS refuse to evaluate lapsed Catholics, religious Protestants, Jews, Muslims, Hindus, Buddhists, and atheist couples because they do not observe Catholic rules of conduct or believe what Catholics are supposed to believe?

How about mixed Catholic/non-Catholic couples? And couples who slept together before they were married? What of couples that include a woman who made the decision to terminate a pregnancy and stands by that decision? And couples in which the male masturbates from time to time, thereby spilling his seed in violation of Biblical law?[76] How about heterosexual couples that engage in sodomy? And if CSS would not know which couples were sinful because their sins were hidden, then did CSS at least hand people a list and ask that if they answered "yes" to any of the questions ("Does the would-be foster father masturbate? Does the would-be foster mother have in her possession the morning-after pill?")? Do they suggest another agency to evaluate those sinners?

I suspect that CSS did not hand out a list of this kind. Why not? Because somehow, out of all the sins of married potential foster parents in which CSS would allegedly be complicit by evaluating their qualifications to be foster parents, only same-sex marriages made the cut. Applying the most-favored-nation approach symmetrically would thus lead to the conclusion that CSS was not evenhandedly applying its religious tenets but rather disfavoring—discriminating against—same-sex couples, treating them as a "least favored nation."

There exist, it turns out, state laws that function—within this argument about selective (discriminatory) religious practice—as a double-edged sword: they bring into sharp relief the comparative dishonesty of CSS's policy regarding same-sex couples, but they also unveil the shocking

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[76] *Genesis* 38:9–10 (King James), https://www.bible.com/bible/1/GEN.38.9-10.KJV ("And Onan knew that the seed should not be his; and it came to pass, when he went in unto his brother's wife, that he spilled it on the ground, lest that he should give seed to his brother. And the thing which he did displeased the LORD: wherefore he slew him also.").

potential of what the Supreme Court has now blessed for religious people who contract with the government to carry out government functions like the evaluation of would-be foster parents.

As of 2019, eight states had laws in place that allowed contracting agencies to use an expansive list of religious criteria to exclude foster-parent applicants, criteria that were not always Catholic-friendly.[77] In South Carolina, for instance, a private agency screened out Catholics, Muslims, Buddhists, Hindus, atheists, agnostics, and Jews.[78] Not a model of subtlety, the initial screening form asked for "contact information of your pastor" along with the potential parent's "testi[mony] to [her] salvation."[79]

The potential breadth of complicity-based refusals to serve a couple wishing to foster a child thus goes well beyond LGBTQ+ people and reaches even those who practice the same religion that the Court in *Fulton* bent over backwards to accommodate. In one respect, such agencies are therefore even worse than CSS, which only refuses queer couples, because it excludes so many more people. But in another respect, CSS is worse because it treats similarly situated parties—those whose family lives conflict with the dictates of Catholicism—differently, with most sinners arbitrarily spared exclusion.

Treating like cases differently is the definition of discrimination. Selecting in the way that CSS did therefore manifests prejudice against sexual minorities and exposes as false the claim that excluding same-sex couples simply reflects sincere dedication to religious requirements. An empathic stance toward the same-sex couples seeking to foster a child would have, first, identified sexual-orientation-based animus in CSS for its failure to exclude most other married couples who failed to embrace the religious principles of Catholicism, and it would simultaneously have considered the potential breadth of complicity-based arguments for many groups beyond sexual minorities.

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[77] Lydia Currie, *I was barred from becoming a foster parent because I am Jewish*, JEWISH TELEGRAPHIC AGENCY (Feb. 5, 2019, 5:46 PM), https://www.jta.org/2019/02/05/opinion/i-was-barred-from-becoming-a-foster-parent-because-i-am-jewish; *Equality Maps: Religious Exemption Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/religious_exemption_laws (last visited July 24, 2021) (listing states with current religious exemption laws allowing state-licensed agencies to discriminate).

[78] Currie, *supra* note 78.

[79] Brief of ADL (Anti-Defamation League) and Other Organizations as Amici Curiae in Support of Respondents at 7 n.7, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123) (quoting Currie, *supra* note 77).

III. EXTRAVAGANT CLAIMS AND COERCION ASYMMETRY

A. The Scope of the Supreme Court's Free Exercise Perspective

We have, up until now, focused largely on the Supreme Court's discrimination analysis as applied to those enforcing Colorado Civil Rights law and those trying to enforce a contract provision prohibiting sexual orientation discrimination in Philadelphia. We have seen that when we apply the Court's standard for identifying (religious) discrimination by respondents to the parties originally charged with sexual orientation discrimination, the petitioners, we find straightforward discrimination against same-sex couples and a rather weak defense of purely religiously motivated action. It is fair, in addition to noting the drastic under-inclusiveness of MC's refusal to sell wedding cakes to, and CSS's exclusion of, LGBTQ+ couples, to ask how exactly the two entities would have transgressed against their religion by serving same-sex couples in the ways that they refused to do. In answering this question, we might consider what it would mean for the other side of each litigation to make similar demands of the religious parties, the petitioners.

Until recently, Free Exercise claims at their most robust typically identified some way in which a religious person or entity would have to commit a sin if they conformed their conduct to the law or to the requirements of a public workplace or an institutional setting. For example, a religious Jew might complain that Sunday closing laws forced him to choose between violating his Sabbath and being unable to compete with Christian vendors who work six days a week (the Jew would unfortunately lose that case under *Braunfeld v. Brown*[80] and *McGowan v. Maryland*).[81] Or a Muslim employee might want lighter tasks during the period of Ramadan or might want to be allowed to grow a beard despite a rule requiring employees to be clean-shaven. Even Hobby Lobby simply demanded the right not to offer health insurance covering contraceptives prohibited by the proprietors' religion—

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[80] 366 U.S. 599, 606 (1961) (rejecting Jewish merchants' Free Exercise challenge to a statute mandating that stores close on Sundays because the legislation "imposes only an indirect burden on the exercise of religion").

[81] 366 U.S. 420, 459, 452 (1961) (holding that a statute proscribing certain work on Sunday does not violate the Establishment Clause because the state has the power to "set one day apart from all others as a day of rest," and "[i]t would seem unrealistic . . . to require a State to choose a common day of rest other than that which most persons would select of their own accord").

morning-after birth control that they (erroneously) believed functioned as an abortifacient.[82] None of these cases involved the right of a public accommodation to refuse service to people because *those people* did not follow the dictates of the religious person's faith.[83]

To get a sense of what the religious parties' successful Free Exercise claims would look like in the hands of a nontraditional claimant, consider a person who subscribed to ethical veganism as a part of Jainism, a religion that emphasizes "ahimsa" or nonviolence.[84] Say this person, whom we'll call "Veronica," considered homosexual activity innocuous but believed the consumption of animal products like chicken, beef, or cheese to be sinful, harmful, and wrong because it requires the torture and killing of sentient living beings. Assume Veronica worked in a prison and was required to stay in the main building for most of her 12-hour shift. A sensible Free Exercise claim from Veronica might be one in which she asked her government employer to either supply her with vegan food at lunch or allow her to bring

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[82] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 683, 702 (2014) (explaining that Hobby Lobby "believe[d] that life begins at conception and that it would violate their religion to facilitate access to contraceptive drugs or devices that operate after that point," including, as their fellow petitioners specified, "'morning after' pills"); James Trussell, Elizabeth G. Raymond & Kelly Cleland, *Emergency Contraception: A Last Chance to Prevent Unintended Pregnancy* 6 Contempt. Readings L. & Soc Just. 7, 16 (2014) (explaining that studies show that morning-after pills, or emergency contraceptive pills, "are not abortifacient" because they "do not interrupt an established pregnancy").

[83] To be sure, Hobby Lobby was making a similar complicity argument. However, by covering insurance for contraceptives, the employer purchasing the coverage would have a better claim of having had to participate in the sinful activity (using the contraceptives) than an agency that refuses to evaluate non-sex-related attributes of two men or two women for foster parent status has of having had to participate in same-sex sexual relations or marriage. The Court in *Fulton* denies that CSS functions as a public accommodation because it is very selective rather than welcoming all comers. *Fulton*, 141 S. Ct. at 1880 (stating that "foster care agencies do not act as public accommodations in performing certifications" because "[c]ertification is not 'made available to the public' in the usual sense of the words" (quoting Phila., Pa., Code § 9-1102(1)(w) (2016))). However, the Court here describes things at too high a level of generality. The agency is supposed to welcome everyone who shows up for an evaluation. Its selectivity should happen only once the evaluation begins, and some people prove to be more qualified to serve as foster parents than others. It is not a matter of equal outcomes but of equal opportunity.

[84] M. Varn Chandola, *Dissecting American Animal Protection Law: Healing the Wounds with Animal Rights and Eastern Enlightenment*, 8 WIS. ENV'T L.J. 3, 22 n.181 (2002) (quoting Susan L. Goodkin, *The Evolution of Animal Rights*, 18 COLUM. HUM. RTS. L. REV. 259, 283–85 (1987)).

her own outside vegan food into the penitentiary despite, let us say, a general rule against outside food. To refuse Veronica is to compel her to violate her religion or go hungry for her entire shift.

If Veronica were like CSS, however, she might go much further and say that working in a prison and performing services with and for guards and prisoners who would be eating animal products in the building violated her religion. Veronica might explain that she, as a prison employee who sometimes had to take prisoners and guards from place to place on a bus, viewed busing prisoners to a building for a flesh-centered meal, for instance, as an endorsement of their flesh consumption in violation of her religion. She might accordingly demand that the prison serve only vegan food to prisoners.

In truth, any ethical vegan would regard this idea as wonderful, but the question here is whether it would violate the Free Exercise Clause for the government to refuse to accommodate Veronica in this extravagant way, for the prison only to give her a vegan allowance (whether by supplying vegan food to Veronica or by giving her permission to bring in her own vegan food) but for it to continue to serve flesh, eggs, and dairy to prisoners and guards. It would not even occur to any court to regard the latter as a Free Exercise violation, no matter how strongly Veronica might believe she is endorsing carnism[85] by bringing prisoners or guards to a building where they will consume the remains of slaughtered creatures and their reproductive secretions. If Veronica could not handle doing her job in a nonvegan workplace, then she would need to find another job.

In a far less ambitious program, WeWork, a commercial real estate company that designs and builds shared spaces for entrepreneurs and companies, announced in 2018 that it would no longer be serving red meat, pork, or poultry at company functions and would not reimburse employees for spending money on these foods for lunch meetings and the like.[86] Employees were still free to buy their own meat, but WeWork would not be paying for it. Still, the reaction was fast and furious.

In a New York Times article titled "Memo From the Boss: You're a Vegetarian Now," David Gelles referred to WeWork's policy as a vegetarian mandate and claimed in the first line that "WeWork is no longer a safe space

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[85] According to Dr. Melanie Joy, "[c]arnism is the belief system that conditions us to eat certain animals." MELANIE JOY, WHY WE LOVE DOGS, EAT PIGS, AND WEAR COWS: AN INTRODUCTION TO CARNISM 30 (10th Anniversary ed. 2020).

[86] Sara Ashley O'Brien, *WeWork Is Banning Meat*, CNN BUSINESS (July 13, 2018), https://money.cnn.com/2018/07/13/technology/wework-meat-ban/index.html.

for carnivores."[87] The policy did not even involve vegetarianism (fish was permissible), but "carnivores" were very upset because they felt that a third party was interfering with their choices on moral (environmental) grounds.[88] One could only imagine how people would react to the workplace veganism mandate I described above, but the backlash would surely be intense.

For similar reasons, few would tolerate an observant Jew demanding that the Post Office where he worked provide or allow only matzoh and other Kosher-for-Pesach food during the holiday of Passover. To argue that it would violate the Free Exercise Clause for the Post Office to permit bread on the premises or to serve the bread (or foods made from bread) to employees would be frivolous. No one has the right to coerce other people to abide by their religion as a matter of Free Exercise, no matter what they believe.

When a petitioner holds to a nontraditional faith, we see this point immediately. And yet, perhaps because the petitioners in *Masterpiece Cakeshop* and *Fulton* were both Christian, we (or at least our Supreme Court) could easily miss the fact that petitioners were coercing non-Christians to conduct their own lives in a Christian fashion, notwithstanding the Court's insistence that CSS "does not seek to impose [its religious] beliefs on anyone else."[89] If people may not use your government-contracted services unless they conform their conduct to the requirements of your religion, then you are engaged in religious coercion on behalf of the government. Same-sex couples seeking to become foster parents would reasonably view such conduct as coercive, and yet the Supreme Court upheld the evident coercion under the Free Exercise Clause. Seen in this light, *Masterpiece Cakeshop* and *Fulton* vindicated a right of Christians to impose traditional versions of Christianity on potential wedding cake customers (because the holding, if they had reached the merits, was rather clear) and potential foster parents.

Worse, the petitioners were not even neutrally imposing their own religion on the public. Applying the same searching approach to CSS that the Court used in assessing Philadelphia's behavior, we have seen that CSS was in fact engaged in anti-queer discrimination rather than simply in the Free Exercise of religion. CSS selectively applied its "no sinners welcome here" lifestyle restriction by failing to exclude all the other lifestyle and relationship "sinners" that applied to become foster parents.

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[87] David Gelles, *Memo from the Boss: You're a Vegetarian Now*, N.Y. TIMES (July 22, 2018), https://www.nytimes.com/2018/07/20/business/wework-vegetarian.html.

[88] *Id.*

[89] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882 (2021).

On top of its under-inclusiveness problem, CSS's behavior manifested over-inclusiveness by rejecting the same-sex couple outright rather than simply expressing its view of same-sex unions on the qualification form. Its preferred approach visited excessive harshness upon the fostering applicants in that way, just as Justice Kavanaugh stated during the argument (and, one suspects, a majority of the Court thought but did not include in the final opinion) that insisting on CSS's services was unnecessarily demanding and harsh given the option of going to other agencies.[90]

B. Mirror-Image Analysis of the Court's Free Exercise Perspective

What if we again employed the kind of mirror-image analysis that helped us better understand the discrimination claims that each religious party brought to the Supreme Court? That process would have us first assume arguendo that it was sensible to extend First Amendment Free Exercise protection to a religious person's or entity's prerogative to refuse service to people whose lifestyles violated the religion of that person or entity, thereby avoiding the appearance of endorsing the prohibited relationship.

In keeping with mirror-image analysis, we thus consider things from the same-sex couple's perspective in each of the two cases we have studied. What would the same-sex couples have had to want from MC and CSS, respectively, to mirror what the two religious entities successfully demanded of the couples? I would argue the following: If either of the couples was in business—for example, selling health insurance—then the couple would have had to have asked for the baker in MC or for the individuals working at CSS to marry people of the same-sex to qualify for the purchase of health insurance.

The above might sound like hyperbole but consider the following: MC refused to sell a wedding cake to a same-sex couple getting married. MC would sell other baked products to the same-sex couple,[91] but only a marrying heterosexual couple could qualify for the privilege of buying a wedding cake

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[90] *Id.* at 1886 (emphasizing that "there are at least 27 [other] agencies in Philadelphia" that would be "happy to provide . . . service" to queer couples (citing App. 171; Petition for a Writ of Certiorari, *supra* note 6, at App. 137a)).

[91] In refusing to serve them, MC told the couple "I'll make your birthday cakes, shower cakes, sell you cookies and brownies, I just don't make cakes for same sex weddings." Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719, 1724 (2018) (quoting Joint Appendix at 152, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (2018) (No. 16-111)).

from MC. Accordingly, MC's wedding cake policy, by withholding wedding cakes from same-sex couples, pressured gay men and lesbians to marry people of the opposite sex, much in the way that one of the couples selling health insurance in our hypothetical case would be pressuring MC and CSS personnel to marry people of the same sex as a condition of purchasing insurance. No one would honor an entitlement to deny people insurance unless they form a same-sex couple. Yet MC and CSS could, with the Supreme Court's all-but-certain blessing, subject same-sex couples to traditional Christian demands that the couples likely found offensive, sexist, and homophobic, as a constitutionally protected prerequisite to service.

Similarly, CSS would not evaluate a couple for foster-parenting unless the couple consisted of a married man and woman. Single people could apply to be foster parents, to be sure, but then the "single person's" partner would not be the child's foster parent and could not fully perform the functions of an approved foster parent. Moreover, since certification as a foster parent often involves assessment of the entire household and the relationships in it, a person in a queer relationship attempting to circumvent an agency's bar against queer couples by applying to be a single foster parent might not be certified for the same reasons the agency refused to certify queer married couples to begin with.[92]

CSS was thus applying pressure to people in same-sex couples to instead marry people of the opposite sex to qualify for the privileges of foster parents. It would accordingly be parallel for one of the couples to refuse to sell health insurance to opposite-sex couples, creating pressure on straight couples to marry people of the same sex. It might be tough to identify a religion that demanded homosexuality in the way that Catholicism required heterosexuality. But an individual could have personal reasons other than religion for manifesting preferences for some people over others.

An LGBTQ+ group might refuse to sell their highly desirable wooden furniture to traditional couples, requiring that a customer manifest the

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[92] Under New York law, for instance, foster agencies will conduct background checks on all people over 18 years old residing in a foster parent's household when deciding whether to certify the foster parent or renew their certification, N.Y. COMP. CODES R. & REGS. tit. 18, § 443.8(a) (2021). Foster parents must inform agencies of marital status and family composition. *Id.* § 443.3(b)(13). Likewise, in Pennsylvania, agencies also evaluate the entire foster family and consider such factors as "community ties with family" and "[e]xisting family relationships" in certification determinations. 55 PA. CODE § 3700.64(a)(3), (b)(1) (2021). So, if an agency has homophobic biases to begin with, it is unlikely to certify a single person in a queer relationship as a foster parent, even if they do not apply as a couple.

lifestyle of a sexual minority to qualify for service. A straight couple could, of course, take their business elsewhere, to someone who did not condition service on sex-based characteristics. But the fact that not everyone made prejudiced demands would not excuse the prejudice and discrimination of those who did.

This mirror-image analysis offers us a reductio ad absurdum. No same-sex couple would dream of going into court and defending an insistence that would-be customers engage in unconventional sexual relationships as a condition of service. The very idea is ludicrous.

Indeed, no same-sex couple would even want such a thing. Despite defamatory claims to the contrary,[93] same-sex couples typically just ask for the right to have their chosen relationships without outside interference or harassment and have no interest in compelling or even persuading straight people to join the LGBTQ+ community.[94] Yet the extremity of such a hypothetical and utterly counterfactual request—or demand—exposes the extravagance of what MC and CSS were in fact successfully demanding: a Free Exercise right to force same-sex couples to act like religious Catholics (and therefore to marry people of the opposite sex) as a prerequisite to engaging in ordinary commerce at a bakery and to receiving certification as

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[93] Anthony Niedwiecki, *Save Our Children: Overcoming the Narrative that Gays and Lesbians Are Harmful to Children*, 21 Duke J. Gender L. & Pol'y 125, 151 (2013); Timothy J. Dailey, *Homosexuality and Child Sexual Abuse*, THE LANTERN PROJECT, http://lanternproject.org.uk/library/general/articles-and-information-about-sexual-abuse-and-its-impact/homosexuality-and-child-sexual-abuse/ (last visited Jul. 8, 2021) (claiming that homosexuality and pedophilia are connected and that employment protection for gay teachers therefore makes children vulnerable to be "'recruited' into adopting a homosexual identity and lifestyle"); Peter Sprigg, *Homosexuality in Your Child's School*, FAMILY RESEARCH COUNCIL (2006) ("[S]ince directly promoting acceptance of homosexuality or of sexual activity by students would be controversial, pro-homosexual activists routinely deny or downplay those aspects of their agenda.").

[94] *See* Evelyn Schlatter and Robert Steinback, The Southern Poverty Law Center, *10 Anti-Gay Myths Debunked*, THE INTELLIGENCE REPORT (Feb. 2011), https://www.splcenter.org/fighting-hate/intelligence-report/2011/10-anti-gay-myths-debunked (referring to "the alleged plans of gay men and lesbians to 'recruit' in schools" as a "myth" or "fairy tale[]" that merely "provided fodder for the[] crusade" of the anti-gay right); HBO: Last Week Tonight with John Oliver, *Uganda and Pepe Julian Onziema Pt. 1*, YOUTUBE, at 12:20 (June 30, 2014), https://www.youtube.com/watch?v=G2W41pvvZs0 (showing a clip from the Ugandan NBS television show *The Morning Breeze* in which queer activist Pepe Julian Onziema stated, "there is no such thing as recruitment of young people or adults or anything like that.").

qualified foster parents by an agency contracting with the city in which the couple lived.

The closest thing to a Free Exercise right to impose one's religion on another person is what parents may do when they raise children in their chosen faith. Parents can insist that their children behave in the manner dictated by the parents' religion, and parents may also punish children who defy their parents and who refuse to conform their conduct to religious teachings. It is a right of discipline and indoctrination. In *Wisconsin v. Yoder*,[95] the Supreme Court held that Amish parents had a Free Exercise right to take their children out of public school after the eighth grade, reasoning that secondary school offered programs and embraced values that were "in sharp conflict with the fundamental mode of life mandated by the Amish religion."[96]

In a partial concurrence and partial dissent, Justice William O. Douglas pointed out that some Amish children might want to expose themselves to the ideas they would encounter in high school and that denying them that opportunity because of their parents' religion protected parental indoctrination at the expense of children's freedom.[97] Justice Douglas's vision of religious freedom—one that respected a minor's wishes notwithstanding a conflicting parental agenda—remains largely unfulfilled. Increasingly, the Court has given effect to its mirror image, and not just with respect to minors.

Notably, all the parties to the recent Free Exercise cases discussed in this article are adults. On one side, the government looked after the equality rights of adults attempting to purchase a wedding cake from a place of public accommodation and of adults trying to foster children in need without confronting discrimination based on sexual orientation. On the other side, adults asserted a religious right that encompassed discrimination against same-sex couples because the latter adults failed to adhere to the religion of the former adults. However, we might choose to handle parent-child conflicts over religion, we must recognize that no adult in this country rightfully holds an entitlement, in the name of religious freedom, to impose the demands of her faith upon another adult.

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[95] 406 U.S. 205, 235-36 (1972).

[96] *Id.* at 217.

[97] *Id.* at 245–46 (Douglas, J., dissenting in part).

CONCLUSION

The Court's Free Exercise doctrine has always allowed courts to assess the sincerity of a claimant's assertion of religious faith as a reason for their behavior. A religious group called the Neo-American Church that embraced the motto "Victory over Horseshit!" was insincere, in the estimation of a district judge who thought the group a front for people seeking to circumvent the drug laws.[98] MC's and CSS's assertions of faith as the reason for their exclusion of same-sex couples from the opportunity to buy a wedding cake and from evaluation for foster parenthood, respectively, were insincere as well. Their actions were substantially underinclusive relative to the many other people who buy wedding cakes from MC and undergo evaluation by CSS without needing to conform their conduct to MC's and CSS's religious requirements. The exclusion of same-sex couples is also overly harsh relative to the option of indicating "dissent" by, respectively, preparing only standard wedding cakes and specifying non-endorsement on the foster-parent evaluation forms, rather than refusing altogether to provide these services to same-sex couples.

If the Supreme Court had applied the definition of discrimination that it utilized for evaluating the respondents in *Masterpiece Cakeshop* and *Fulton* when assessing the religious petitioners in those cases, it would have found their Free Exercise claims meritless. There was a time when observant Catholics in the United States would have been grateful for a Free Exercise jurisprudence that protected their right to practice their religion without government interference. The fact that there are now at least six Catholic Justices[99] on the Court should not shift Free Exercise into a right to engage in the very discrimination and religious coercion that gave rise to the religion clauses in the first place.

With the right lens, we see that both MC and CSS were manifesting anti-queer bias rather than the values of tolerance and good works for which

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[98] *See* United States v. Kuch, 288 F. Supp. 439, 445 (D.D.C. 1968).

[99] Chief Justice Roberts, Justices Thomas, Alito, Sotomayor, (maybe Gorsuch), Kavanaugh, and Barrett are all Catholic. Alyssa Murphy, *6 of the 9 Supreme Court Justices Are Catholic—Here's a Closer Look*, NAT'L CATH. REG. (Oct. 28, 2020), https://www.ncregister.com/blog/supreme-court-catholics; David Crary, Associated Press, *If Barrett Joins, Supreme Court Would Have Six Catholics*, U.S. NEWS (Sept. 26, 2020), https://www.usnews.com/news/politics/articles/2020-09-26/if-barrett-joins-supreme-court-would-have-six-catholics (noting that although Justice Gorsuch is now Protestant, he was raised Catholic).

Christianity is rightly known. We can see this truth most clearly when we take the logic that the Court used to assess the behavior of the respondents in the two cases we have studied and apply the same analysis to the behavior of the petitioners. Rather than offering a mirror image, the two sides of these cases present us with a funhouse mirror, one that distorts reality to such a degree that the Court sincerely perceived discrimination that wasn't there and failed to detect the discrimination that was.

ACCESS TO LITERACY: THE NARROW PATH TOWARDS RECOGNIZING EDUCATION AS A FUNDAMENTAL RIGHT

JULIA BURTON LEOPOLD*

"I, for one, am unsatisfied with the hope of an ultimate 'political' solution sometime in the indefinite future while, in the meantime, countless children unjustifiably receive inferior educations that may affect their hearts and minds in a way unlikely ever to be undone." – Justice Thurgood Marshall[1]

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[1] San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1, 71–72 (1972) (dissent) (quoting Brown v. Bd. of Ed., 349 U.S. 483, 494 (1955)).

INTRODUCTION

Almost 50 years ago, Justice Thurgood Marshall wrote about the irreversible harms that children in underfunded schools face. He wrote these words in his dissent in *San Antonio v. Rodriguez*, where the majority held that education is not a fundamental right protected by the U.S. Constitution.[2] As a result of *Rodriguez*, right-to-education cases brought under the Fourteenth Amendment only need be afforded the lowest level of judicial scrutiny. Today Justice Marshall's dissatisfaction with the hope for a solution in "the indefinite future" still rings true. Students of color, students in poverty, and students in rural areas oftentimes are still condemned to attend schools that lack funding, advanced coursework, highly qualified teachers, and even safe buildings. Because of the holding in *Rodriguez*, federal courts have refused to address the inequality which is still pervasive across American schools.

In more recent years, however, state and lower federal courts have begun to redefine the right to an education in a way that might be constitutionally protected even in a post-*Rodriguez* world. The most recent of these cases, and the inspiration for this comment, is a Sixth Circuit case styled *Gary B. v. Whitmer*.[3] The case was brought by students from Detroit, Michigan, who claimed they had been "deprived of access to literacy" in violation of their rights under the U.S. Constitution.[4] The *Gary B.* Court was asked to determine whether the plaintiffs had a fundamental right to a basic minimum education that provides access to literacy using the substantive due process

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[2] *Id*. at 35.

[3] Gary B. v. Whitmer, 957 F.3d 616, 621 (6th Cir. 2020).

[4] *Id*.

framework of the Fourteenth Amendment.[5] A panel of the Sixth Circuit agreed with the students, holding that the students had been denied access to literacy as a result of their systemically poor education, and thus had been denied a fundamental right to a *minimally adequate* education.[6] That decision was later vacated *en banc*.[7]

The disagreement among the *Gary B.* panel and the Sixth Circuit as a whole exposed a significant legal issue with immense implications for public education in this country. Had the full Sixth Circuit agreed that the *Gary B.* students had a federal right to education, even one that is more narrowly defined than in *Rodriguez*, other plaintiffs could bring similar claims at the federal level, gaining access to broader remedies and providing relief to more students in a timelier manner. Protecting even a more narrowly defined right to an education would likely be a more satisfying solution to Justice Marshall, advocates for education, and most importantly the students demanding an adequate education.

In this comment I argue that the *Gary B.* panel was correct to find that an education so deficient as to deny students access to basic literacy is a violation of those students' substantive due process rights to a *minimally adequate* education. I begin with a brief description of the state of education in the United States today. The education that is available to Black and Brown students, students living in poverty, and students residing in rural areas is inadequate compared to that provided to white students, middle- and upper-class students, and students living in suburban and urban settings. Next, in Part II, I discuss the development of federal jurisprudence concerning the right to an education. To ensure more protection at the federal level, advocates must find a way to narrowly define a right to an education that federal courts consider fundamental under the Fourteenth Amendment's equal protection and substantial due process frameworks. In Part III, I address state right-to-education laws, focusing mostly on North Carolina but also looking at lessons from other states where courts have defined a state right to an education. Although these cases are operating under state constitutional guidance, they provide insight on how a federal right to an education might be narrowly defined. Finally in Part IV, I discuss how a legally adequate education should be defined as a federal right considering the state and

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[5] *Id*. at 642.

[6] *Id*. at 662.

[7] Gary B. v. Whitmer, 958 F.3d 1216 (2020) (en banc).

federal caselaw described in Parts II and III. Education advocates should focus their efforts on funding, physical building conditions, and educational outcomes when narrowing their claims for an adequate education that is constitutionally protected.

I. BRIEF DESCRIPTION OF THE STATE OF EDUCATION

Students in the United States have vastly unequal access to quality public education. Of the approximately 50.7 million students enrolled in public elementary and secondary schools, 52% are not white,[8] 18% are living in poverty,[9] and 21% live in rural locales.[10] Each of these demographic factors affects educational access. And although the demographic statistics that follow do not paint the full picture of these students' lived experiences, nor are they representative of all disadvantaged students, these particular demographics are a helpful starting point in discussing the importance of a federally recognized right to an education.

To begin, it is necessary to start with race because it is along racial lines that young people have been denied education for so long.[11] Despite the groundbreaking holding in *Brown v. Board of Education*[12], which ended *de jure* segregation in American public schools, students today continue to learn in classrooms that are racially segregated. Across the country, many white students learn in environments that are overwhelmingly populated only by other white students.[13] Fifty eight percent of Black students, 60% of Hispanic students, and 39% of American Indian students attend schools in which 75% of the student body is not white.[14] By contrast, just 6% of white students

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[8] Bill Hussar, *The Condition of Education 2020*, U.S. DEP'T OF EDUC.: NAT'L CTR. FOR EDUC. STATS., 32 (May 2020).

[9] *Id*. at 5.

[10] Stephen Provasnik, *Status of Education in Rural America*, U.S. DEP'T OF EDUC.: NAT'L CTR. FOR EDUC. STATS., 8 (July 2007).

[11] While much of what is written about educational inequality focuses on Black children in relation to their white peers, many of the same trends appear for other groups of non-white students. Here, I will focus on Black, Hispanic, and American Indian student groups because they are each heavily represented, and face unique obstacles. When I am discussing these three groups as a whole I will use the term "students of color," otherwise I will reference them individually.

[12] Brown v. Bd. of Ed., 347 U.S. 483 (1954).

[13] *See* Hussar*, supra* note 8, at 33.

[14] *Id.*

attend schools in which 75% of the student body is not white.[15] This statistic illustrates how segregated schools continue to be.[16]

Racial segregation has an impact on students' access to college prep and Advanced Placement classes.[17] White students at demographically white-dominated schools are more likely to have access to a fuller range of course offerings, particularly in the areas of math and science.[18] Approximately one fourth of the schools with the highest percentage of Black and Hispanic students do not offer Algebra II and one third do not offer Chemistry.[19] Additionally, fewer than half of American Indian high school students have access to the full range of math and science courses.[20] The same disparities are evident if measured by educational outcomes. White students were roughly twice as likely as students of color to meet SAT benchmarks as defined by the CollegeBoard.[21]

Race is not the only predictor of educational access in the United States. Students living in poverty and attending high-poverty schools are also frequently represented in cases about equitable access to education and would benefit from a federally recognized right to an education. On one level, that is because race and socioeconomic status often overlap a great deal. Families of color are two to three times as likely as white families to live in poverty.[22] But poverty affects educational access and academic success as well. Only 29% of low-income students take calculus in high school, compared to 42% of higher income students.[23] Less than one third of students receiving SAT fee waivers met both SAT benchmarks according to the CollegeBoard.[24] The number of students who met both SAT benchmarks jumps to nearly 50% for

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[15] *Id.*

[16] *Id.*

[17] *See generally*, U.S. DEP'T OF EDUC., *Office for Civil Rights, Civil Rights Data Collection Data Snapshot: College and Career Readiness* (Mar. 2014).

[18] *Id*.

[19] *Id.* at 1.

[20] *Id*.

[21] COLLEGEBOARD, *SAT Suite of Assessments Annual Report*, 3 (2019).

[22] Hussar, *supra* note 8, at 5.

[23] Paula Olszewski-Kubilius and Susan Corwith, *Poverty, Academic Achievement, and Giftedness: a Literature* Review, 62 GIFTED CHILD Q. 37, 41 (2018).

[24] COLLEGEBOARD, *supra* note 21, at 3.

students who do not use or qualify for a fee waiver.[25] Finally, students in poverty have lower high school graduation rates, lower college attendance rates, and lower college graduation rates.[26]

A third segment of students who would benefit from a federal guarantee of access to quality education are students living in rural communities. Approximately one half of all U.S. school districts are rural and one fifth of students attend rural schools.[27] Poverty in rural communities tends to be deep—meaning that families are living at below half of the federal poverty level.[28] Poverty in rural communities is also persistent, meaning that poverty rates in these areas of the country have been above 20% for the past 30 years.[29] Despite fewer significant differences in overall educational outcomes between cities and rural communities, only 69% of rural schools offer Advanced Placement classes.[30] The percentages are much higher for city (93%) and suburban (96%) schools. Additionally, although rural students are more likely to complete high school than students in urban settings, they are less likely to attend and graduate college.[31] Rural districts also struggle with high teacher turnover rates, high levels of consolidation, strained budgets, and a lack of attention from lawmakers.[32]

Free, high-quality, public education which is accessible to all students lies at the heart of American economic, political, and societal ideals. Public education remains a pathway for a child born into poverty to move themselves and their family into the middle and upper classes. On a broader scale, public education prepares young people to participate in the job market in a wide variety of careers and occupations. Further, public education prepares students to participate in our democratic system by being informed voters, voicing their opinions, and holding elected officials accountable. In *Brown*, the Court wrote that public education "is the very foundation of good citizenship."[33] Finally, a high-quality public education helps build individual

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[25] *Id*.

[26] Caroline Ratcliffe, *Child Poverty and Adult Success*, URB. INST., 3 (Sept. 2015).

[27] Provasnik, *supra* note 10, at 91.

[28] Megan Lavelley, *Out of the Loop*, CTR FOR PUB. EDUC., 4 (Jan 2018).

[29] *Id*.

[30] Provasnik, *supra* note 10, at 91.

[31] Lavelley, *supra* note 28, at 12.

[32] *See generally id*. at 17–26.

[33] Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

students' perceptions of self-worth, personal satisfaction, and motivation for learning.[34]

While students of color, poor, and rural students are by no means the only groups facing disparate outcomes in education, a snapshot of each of these three demographics provides a view of the larger challenges associated with a lack of access to equitable public education today in America.

II. FEDERAL LAW

The U.S. Constitution does not explicitly create, nor has the Supreme Court ever interpreted the Constitution as guaranteeing a fundamental right to an education. Right-to-education cases are almost always brought under the Fourteenth Amendment which includes two relevant clauses: the Equal Protection Clause and the Due Process Clause.[35] Under an equal protection claim, plaintiffs must show that the government treated similarly situated people disparately and that the disparate treatment burdens a fundamental right, targets a suspect class, or has no rational basis.[36] Similarly, under a

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[34] Brief for Appellants at 9, Brown v. Bd. of Educ., 347 U.S. 483 (1954) 1952 WL 47265, *9. Counsel for the Appellants outlined the individual harm by a segregated education system with a laundry list of negative outcomes from such a system that they had proven in prior testimony: "The testimony further developed the fact that the enforcement of segregation under law denies to the Negro status, power and privilege; interferes with his motivation for learning; and instills in him a feeling of inferiority resulting in a personal insecurity, confusion and frustration that condemns him to an ineffective role as a citizen and member of society. Moreover, it was demonstrated that racial segregation is supported by the myth of the Negro's inferiority, and where, as here, the state enforces segregation, the community at large is supported in or converted to the belief that this myth has substance in fact. It was testified that because of the peculiar educational system in Kansas that requires segregation only in the lower grades, there is an additional injury in that segregation occurring at an early age is greater in its impact and more permanent in its effects even though there is a change to integrated schools at the upper levels.".

[35] U.S. Const. amend. XIV. For the purpose of this comment, I will focus on the substantive due process requirement of the Due Process Clause and not procedural due process.

[36] *See* U.S. v. Carolene Products, 304 U.S. 144, 152 n4 (1938); *see also Brown*, 347 U.S. at 495; *see also* San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1, 19 (1972). The focus of this comment is on the fundamental right analysis, but it is of note that federal law also does not currently support equal protection claims brought on the theory that education is less available or robust for students of on account of their socioeconomic status or the relative wealth of their school district. That is because only disparities based on suspect

substantive due process claim, a plaintiff must show that a government action has burdened a right which is fundamental or that the government action has no rational basis.[37] Thus, showing that the right being burdened is fundamental would satisfy claims both under the Equal Protection Clause and the Due Process Clause.

When determining if a right is fundamental, the courts look at both this history of the right and its relationship to enumerated rights. The courts ask if the right is objectively "deeply rooted in this Nation's history and tradition" and if the right is "implicit in the concept of ordered liberty" where "neither liberty not justice would exist" without it.[38] If a plaintiff can show that the government's action burdens a fundamental right, regardless of if the claim is made under the Equal Protection Clause or the Due Process Clause, the court will then apply strict scrutiny rather than the lower standard of rational basis.[39] The government is required to meet a higher level of judicial scrutiny when a plaintiff can show that the right being burdened is fundamental.

Now that I have provided an overview of the analysis required by federal law for questions involving fundamental rights under the Fourteenth Amendment, I will next review how federal courts have analyzed education as a potential fundamental right. I begin with *Brown v. Board of Education*, the transformational civil rights case that required schools across the country to desegregate. After *Brown*, the U.S. Supreme Court seemed to be on its way to recognizing education as a fundamental right guaranteed by the U.S. Constitution. By 1973, however, the Court reversed course in *San Antonio Independent School District v. Rodriguez*. Yet more contemporary cases indicate that there is room for interpretation in the U.S. Constitution, even under *Rodriguez*'s limiting logic. To this end, I explore the recent Sixth Circuit case, *Gary B. v. Whitmer*, which explores the possibility of a minimally adequate education as a fundamental right guaranteed by the Due Process Clause of the Fourteenth Amendment. Finally, I conclude with an overview of other federal cases which attempted to narrowly define an education that would be protected as a fundamental right.

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classifications, such as race, are reviewed by federal courts with strict scrutiny. *Rodriguez*, at 28–29.

[37] *See* Washington v. Glucksberg, 521 U.S. 702, 719–720 (1997); *see* Obergefell v. Hodges, 576 U.S. 644, 675–76 (2015).

[38] *Glucksberg*, 521 U.S. at 720–21; *see also Rodriguez*, 411 U.S. at 33–34.

[39] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 857–58 (Rachel Barkow et al. eds., 6th ed. 2019).

A. Brown *to* Rodriguez*: the Expansion and Foreclosure of a Right*

Although the claims in *Brown v. Board of Education* were made both under the Equal Protection Clause and the Due Process Clause, the decision itself focuses almost entirely on the former.[40] Despite the fact that the Court chose to only decide on the basis of Equal Protection, which would not necessitate holding that education is a fundamental right, the Court wrote the following recognizing the importance of education:

> Today, education is perhaps the *most important function* of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our *democratic society*. It is required in the performance of our most *basic public responsibilities*, even service in the armed forces. It is the v*ery foundation of good citizenship*. Today it is a *principal instrument* in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[41]

Rather than declaring education to be a fundamental right, the equal protection violation found in *Brown* is based on the of fact that school segregation was taking place "solely on the basis of race" – a suspect classification.[42]

Ten years later, the Supreme Court, in *Griffin v. County School Board of Prince Edward County*,[43] continued to refer to education as a right protected by the U.S. Constitution. "The time for mere 'deliberate speed' has run out," Justice Black wrote for a 7-2 Court, "and that phrase can no longer justify denying these . . . school children their *constitutional rights to an education*

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[40] *Brown*, 347 U.S. at 495.

[41] *Id*. at 493 (emphasis added).

[42] *Id.* at 495.

[43] 377 U.S. 218 (1964).

equal to that afforded by the public schools in the other parts of Virginia."[44] *Griffin*, however was decided under the Equal Protection Clause as the state's action had a disparate impact on Black schoolchildren, again a suspect classification, rather than being decided as a denial of a fundamental right.[45]

In *Swann v. Charlotte-Mecklenburg*[46] the Supreme Court again reaffirmed that segregated schools violated the Equal Protection Clause – and added that federal district courts have substantial power to remedy such violations.[47] Although much of the language in *Swann* focused on the violation caused by school segregation, the Court repeatedly used language that references education as a right which is constitutionally protected.[48] In one such example, the Court stated: "[o]nce a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."[49] Again, the Court did not explicitly discuss education as being a fundamental right, however the broader remedy and outcome of this case point to that conclusion. As a result of the *Brown-Swann* line of cases, plaintiffs were more effectively gaining equal access to educational opportunities that had previously been denied on the basis of race.[50]

After decades of decisions pushing towards further access, *San Antonio Independent School District v. Rodriguez* not only reversed this trend, but also purported to make clear that education was not a fundamental right which could also be protected under the Fourteenth Amendment. In *Rodriguez*, the Court was asked to consider the Texas system of financing public education that resulted in a vast funding disparity between school districts.[51] Despite quoting some of the language from *Brown* about the

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[44] *Id.* at 234 (emphasis added).

[45] *Id*. at 229–230.

[46] 402 U.S. 1 (1971).

[47] *Id*. at 15.

[48] *Id*.

[49] *Id*.

[50] This trend even predates *Brown* whereby in *Sweatt v. Painter*, the Court held "[i]n accordance with these cases, petitioner may claim his full constitutional right: legal education equivalent to that offered by the State to students of the other races." 339 U.S. 629, 636 (1950) (referencing Sipuel v. Board of Regents, 332 U.S. 631 (1948); Fisher v. Hurst, 333 U.S. 147 (1948); and State of Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938), three earlier cases regarding equal access to schools for Black students).

[51] San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1972).

importance of education,[52] the *Rodriguez* Court reasoned that fundamental rights are not determined by their importance, but instead by whether they are explicitly or implicitly guaranteed in the Constitution.[53] Thus the Court stated: "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected."[54]

To come to this conclusion, the Court in *Rodriguez* held that even the importance of education in ensuring an informed citizenry did not justify straying from rational basis review.[55] Although the *Rodriguez* Court recognized the importance of effective speech and critical thought to vote, the Court was concerned that guaranteeing such outcomes would amount to government intrusion.[56] Further, the Court deemed unpersuasive the argument about the "nexus" between free speech and education.[57] The Court in *Rodriguez* concluded by holding that, absent a reason to apply strict scrutiny, Texas's school financing plan was only subject to the traditional rational basis review.[58] Thus, the state's burden was only to show that their school financing system was rationally related to a legitimate state interest, and the Court held that the state met this burden.[59]

San Antonio v. Rodriguez marked a turning point in federal litigation efforts to both integrate and to improve the quality of schools. By holding that education is not a fundamental right under the Constitution, the *Rodriguez* Court made it more difficult to make judicial right-to-education claims under both the Equal Protection Clause and the Due Process Clause. This is first because the Court refused to recognize poverty as a suspect class and second, to the heart of this comment, because the Court refused to recognize education as a fundamental right.[60] In the years that followed

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[52] *Id*. at 30.

[53] *Id*. at 33.

[54] *Id*. at 35.

[55] *Id*. at 36–37.

[56] *See id*.

[57] *Id*. at 37.

[58] *Id*. at 40.

[59] *Id.* at 55.

[60] Avidan Y. Cover, *Is "Adequacy" a more "Political Question" than "Equality"?: The Effect of Standards-Based Education on Judicial Standards for Education Finance*, 11 CORNELL J. OF L. AND PUB. POL'Y 403, 409 (2002).

Rodriguez, school desegregation advocates experienced a rollback of the victories won by *Brown* and its progeny.[61]

The *Rodriguez* decision, however, was not unanimous and Justice Marshall's dissent is illustrative of the overall disagreement on the Court.[62] Justice Marshall reasoned that education rises to the level of a fundamental right protected by the U.S. Constitution.[63] Citing other cases in which the Supreme Court expanded the doctrine of fundamental rights, Justice Marshall reasoned that the realm of fundamental rights is not as narrow as the *Rodriguez* majority held.[64] Although Marshall conceded that free public education had never before been required by the Constitution, he maintained that the importance of education and its closeness to other constitutional values should have compelled the Court to "recognize the fundamentality of education."[65] Stated another way, Justice Marshall would require a higher level of scrutiny when access to education is denied, even when the denial is not on the basis of a suspect class. While Justice Marshall's dissent did not win over the majority, it provides a useful framework for advocates who are still seeking to have education recognized as a fundamental constitutional right.

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[61] *Id*. at 408.

[62] The first part of Justice Marshall's dissent focused on the discriminatory impact of the school funding scheme from Texas. Justice Marshall reasoned that the funding disparities led to a decreased educational opportunity for school children of property-poor districts, which he considered a suspect class under the equal protection analysis. *See Rodriguez*, 411 U.S. at 72-97. In the middle part of this argument, Justice Marshall is clear that the question is not whether there is some level of "adequate" education that schools can achieve in order to be exempt from the Equal Protection Clause. Instead, Justice Marshall argues it is the "inequality–not some notion of gross inadequacy–of educational opportunity" that violates the Constitution. *Id*. at 90. Despite Justice Marshall's reasoning and the similarities between poverty and other protected classes, poverty has not been recognized as a suspect classification. *See* Lindsey v. Normet*,* 405 U.S. 56, 74 (1972); *see also* Dandridge v. Williams*,* 397 U.S. 471, 487 (1970).

[63] *Rodriguez*, 411 U.S. at 97.

[64] *See id*. at 98–102. This list of other such rights includes the right to procreation as a result of its necessity to the "survival of the race," the right to vote because it is "preservative of all rights," and the right to appellate review. *Id*.

[65] *Id*. at 116.

B. Gary B.: A Right Redefined and a Question Reconsidered

In early 2020, a Sixth Circuit panel held in *Gary B. v. Whitmer* that the state of Michigan had been so negligent towards the education of Detroit students that they had been deprived their access to literacy.[66] While the panel acknowledged that the plaintiffs did not have a fundamental right to education generally under the majority holding in *Rodriguez*, the Sixth Circuit panel nevertheless determined that the plaintiffs had a fundamental right to a *minimally adequate* education, one that provided access to literacy.[67]

The Sixth Circuit's panel decision was supported by the traditional two-pronged substantive due process framework.[68] First, the Sixth Circuit panel discussed the extensive history that free state-sponsored schools have in the United States.[69] With the exception of the earliest years of the country, public schools have and continue to be "ubiquitous" throughout American history.[70] In addition to the long-standing history that public education has in our country, the panel noted that access to education, and thus access to literacy, has also long been limited in order to subjugate enslaved people and later freed people pushing for equality. [71] The Sixth Circuit panel summarized this history in part by writing: "access to literacy was viewed as a prerequisite to the exercise of political power, with a strong correlation between those who were viewed as equal citizens entitled to self-governance and those who were provided access to education by the state."[72]

Second, the Sixth Circuit panel reasoned that a basic minimum education is "implicit in the concept of ordered liberty."[73] The Sixth Circuit panel distinguished the plaintiffs in *Gary B*. from those in *Rodriguez*, by saying the

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[66] Dana Goldstein, *Detroit Students Have a Constitutional right to Literacy, Court Rules*, N.Y. TIMES (Updated Ap. 28, 2020) https://www.nytimes.com/2020/04/27/us/detroit-literacy-lawsuit-schools.html.

[67] Gary B. v. Whitmer, 957 F.3d 616, 662 (6th Cir. 2020).

[68] *Id*. at 642–44.

[69] *Id*. at 648.

[70] *Id*. at 649. Additionally, the court notes that at the time of the ratification of the Fourteenth Amendment, 36 of the 37 state constitutions imposed a duty on the state to provide a public school education. *Id.* at 649–50.

[71] *See id.* at 650–51.

[72] *Id*. at 651–52.

[73] *Id.* at 652, 655 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

right being asserted in *Gary B*. is "more fundamental."[74] The court stated: "[t]he degree of education they seek through this lawsuit – namely access to basic literacy – is necessary for essentially *any* political participation."[75] Put another way the Sixth Circuit panel held that providing public schools is "the very apex of the function of a state"[76] because it allows citizens to vote, pay taxes, participate in and avoid the legal system, and is necessary for the enjoyment of other fundamental rights.[77] The panel added that education has long been the "great equalizer" allowing children some chance of economic success regardless of their circumstances at birth.[78] "Providing a basic minimum education is necessary to prevent such an arbitrary denial, and so is essential to our concept of ordered liberty."[79]

Important in its holding, the panel in *Gary B*. began to define a minimally basic education. First, the court noted that the fundamental right defined in *Gary B*. was narrow – including only "the education needed to provide access to skills that are essential for the basic exercise of other fundamental rights and liberties."[80] The panel's decision made clear that this was a limited opinion, and that the newly-defined fundamental right does not guarantee "an education at the quality that most have come to expect in today's America."[81] The panel specifically stated it cannot proscribe specific educational outcomes.[82] Instead the court focused on what it calls the "rudimentary educational infrastructure" including, at minimum, facilities, teaching, and educational materials.[83] Finally, the court acknowledged that the precise contours of this inquiry cannot be determined on appeal, but were better left to trial courts.[84] The panel stated that the question was essentially: "whether

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[74] *Id*. Here the court effectively conceded that while it does not have the power to ensure fully advantaged nor the most effective nor intelligent civic participation, that degree of education is beyond the level for which these plaintiffs are asking.

[75] *Id*.

[76] *Id*. at 653 (citing Wisconsin v. Yoder, 406 U.S. 205, 213 (1972)).

[77] *Id*. at 652-53.

[78] *Id*. at 654.

[79] *Id*. at 655.

[80] *Id*. at 659.

[81] *Id*.

[82] *Id*.

[83] *Id*. at 660.

[84] *Id*.

the education the state offers a student – when taken as a whole – can plausibly give [a student] the ability to learn how to read."[85]

The *Gary B.* holding from the Sixth Circuit panel was ultimately vacated by an *en banc* hearing in which no reasoning was given.[86] Thus, federal courts have still not upheld a federal right to a minimally basic education. Despite the reversal of the Sixth Circuit's panel, *Gary B.* made headlines across the country as a potential signal of change in American right-to-education jurisprudence.[87] Some wondered if more federal courts might hear similar cases and make similar rulings.

C. Plyler*,* Papasan*, and* Kadrmas*: the Federal History of a Basic Minimum Education*

Although *Gary B.* received national attention as a potential reversal of previous federal precedent, it relied on prior federal cases which had already chipped away at the armor of *Rodriguez* blocking claims for a federally recognized right to education. The court in *Gary B*. cited a series of cases decided since *Rodriguez* in which the Supreme Court ruled in favor of plaintiff students taking action against schools that had not provided them with a "basic minimum education."[88] These cases were distinguishable from *Rodriguez* because, rather than focusing on a general right to education, they focused on a specific aspect of education such as literacy rights for undocumented students, unequal distribution of school land funds, and charging a bus fee.[89] These three successful federal cases, the Sixth Circuit panel in *Gary B.* reasoned, illustrate that *Rodriguez*'s holding is not so broad as to deny all possibility of a fundamental right to an education, particularly one that is narrowly defined through adequacy or literacy.

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[85] *Id*.

[86] Gary B. v. Whitmer, 958 F.3d 1216 (6th Cir. 2020) (en banc).

[87] Goldstein, *supra* note 66.

[88] *Gary B*., 957 F.3d at 647–48.

[89] *Id*.

1. Plyler *Recognizes Education as More Than "Some Governmental Benefit"*

In *Plyler v. Doe*,[90] the Supreme Court was presented with the question whether, under the Equal Protection Clause of the Fourteenth Amendment, Texas could deny free public education to undocumented school aged children.[91] Despite the fact that the Court neither found immigration status to be a suspect classification nor education to be a fundamental right, the Court held that the Texas legislature's bar on undocumented children from the state's public school was a violation because the state failed to meet even a rational basis of review.[92]

In the discussion regarding education, the Court upheld *Rodriguez*, but argued that education is not "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation."[93] Additionally, the Court cited education's importance from its status as "the most vital civic institution for the preservation of the democratic system of government," to its place in our nation's history, to the modern socioeconomic benefits it provides.[94] The Court took this simple importance argument a step further and argued that the denial of a public education to children is "an affront to one of the goals of the Equal Protection Clause."[95] By depriving children the right of an education, the Court held, the state was effectively denying the children their future livelihoods, ability to live a self-sufficient life, and causing harm to their psychological well-being.[96] The Court ended this argument by quoting a familiar line from *Brown*: "Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."[97]

Although the Court in *Plyler* did not recognize education as a fundamental right, it made clear that education was more important than other benefits provided by the state. The Majority opinion stated it was applying a

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[90] 457 U.S. 202 (1982).

[91] *Id*. at 205.

[92] *See id*. at 230.

[93] *Id.* at 221.

[94] *Id*.

[95] *Id*. at 221–22.

[96] *Id*. at 222.

[97] *Id*. at 223 (internal quotations removed).

rational basis of review, yet still sought a "substantial state interest."[98] While the dissent and all three concurrences made note of this inconsistency, the Majority never clearly stated whether they were using a heightened level of scrutiny.[99] If the Court was applying a heightened level of scrutiny, this would be a major shift from *Rodriguez* where the Court refused to apply any sort of heightened scrutiny. If courts began to apply more than rational basis review for cases concerning education, defendants would have to show more justification for policies that are certain to result in inferior educational opportunities and experiences for groups of students.

2. Papasan *Challenges Rodriguez*

Another challenge to *Rodriguez* is found in *Papasan v. Allain*.[100] When lands formerly owned by the Chickasaw Indian Nation were sold by the state of Mississippi and the funds were improperly distributed to schools across the state rather than those in the area, school officials and schoolchildren filed a complaint against the Governor of Mississippi claiming that such actions constituted several violations of the Constitution including their Equal Protection rights.[101]

The plaintiffs in *Papasan* made two claims. The first was that plaintiffs were denied their fundamental right to a minimally adequate education, which they argued should be examined under strict scrutiny.[102] Although the defendants' motion to dismiss was granted on this claim, the Supreme Court maintained that the question of a right to a minimally adequate education was still left open even after *Rodriguez*.[103]

The next claim the plaintiffs made, and the one the Court substantively ruled on, was that as a result of the distribution of the monies from the sale of the Chickasaw Cession lands, the schools in question faced funding

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[98] *Id*. at 230.

[99] *See generally* Plyler v. Doe, 457 U.S. 202.

[100] 478 U.S. 265 (1986).

[101] *See generally* Papasan, 478 U.S. 265.

[102] *Id*. at 285–86. Because this case was before the Supreme Court on a motion to dismiss, the Court was being asked to determine if there was sufficient factual allegations for the case to move forward. The Court answered this question in the negative because the plaintiffs made legal allegations, which were that funding disparities had deprived them of a minimally adequate education, rather than providing factual allegations, such as being deprived the ability to read or write.

[103] *Id*. at 285.

disparities in violation of the Fourteenth Amendment.[104] While the Court acknowledged that rational basis of review was appropriate, the Supreme Court held that a narrower claim by the plaintiffs, such as the one made by the plaintiffs in *Papasan*, would require a narrower analysis of the state interest.[105] The Supreme Court remanded for such an inquiry to be made. Although the Court in *Papasan* did not apply strict scrutiny, neither did they require the traditionally lax rational basis review for all right-to-education claims.

3. Kadrmas *Adds to the Confusion at the Federal Level*

The third case at the federal level of note is *Kadrmas v. Dickinson Public Schools*,[106] in which the Court held constitutional a district requiring a transportation fee in order for students to ride the bus to school.[107] The Court in *Kadrmas* agreed that heightened scrutiny was applied in *Plyler*, but refused to apply the same standard, despite the similarities between the cases, and provided little reasoning for not doing so.[108] One possible distinction between *Kadrmas* and *Plyler* is that in *Kadrmas* the Court asked whether there is a right *to ride the bus* rather than a right to *education*.[109] This analysis is consistent with the concept that plaintiffs must clearly define the right they are asking the Court to protect. While education generally may not be a fundamental right, the right to a *minimally adequate* education may nonetheless represent an important right triggering some type of heightened scrutiny.

D. Remaining Considerations at the Federal Level

Gary B. and the three cases the panel in *Gary B.* relied on are not the only examples of novel claims being made at the federal level asking the courts to recognize a right to an education. In March of 2018, the U.S. District

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[104] *Id*. at 286.

[105] *See id*. at 288

[106] 487 U.S. 450 (1988).

[107] *Id*. at 454–55.

[108] *Id.* at 459. This is also interesting because the majority opinion in *Plyler* makes no mention of applying heightened scrutiny. This only becomes apparent via the concurring and dissenting opinions. *See generally Plyler v. Doe*, 457 U.S. 202 (1982) (Powell, J., concurring in part and dissenting in part).

[109] *Kadrmas*, 487 U.S. at 459.

Court in Arizona decided a case brought by nine students on the Havasupai Indian Reservation claiming that the Bureau of Indian Education failed to provide them with a general basic education.[110] This case does not provide much in the way of precedent, because federal jurisdiction was gained as a result of federal agency involvement, but this case does show that the federal courts can make determinations about a narrowly defined right to education. In October of 2020, students in Rhode Island filed a claim that both their equal protection and due process rights were violated when the state failed to provide them with "an education that is adequate to prepare them to function productively as civic participants capable of voting, serving on a jury, understanding economic, social, and political systems sufficiently to make informed decisions, and to participate effectively in civic activities."[111] The District Court held there is "no right to civics education in the Constitution"[112] and on appeal the First Circuit upheld the decision.[113] This case from Rhode Island is an example of the way in which a federal right to an education could be more narrowly defined, perhaps as one which includes a basic understanding for students to be able to understand American government and politics. Finally, the COVID-19 pandemic has brought up challenges concerning physical access to education.[114] Again, it is unclear what precedential value these cases could have, but it reinforces the fact that right-to-education cases at the federal level are not entirely foreclosed. Plaintiffs just may need to more narrowly define how their rights have been restricted.

Despite *Gary B*. and other federal cases seeming to signal the possibility of a fundamental right to education, no federal court has upheld such an

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[110] Stephen C. v. Bureau of Indian Educ., No. CV-17-08004-PCT-SPL, 2018 WL 1871457, at 1* (D. Ariz. Mar. 29, 2018).

[111] A.C. v. Raimondo, 494 F. Supp. 3d 170, 175 (D.R.I. 2020). On appeal the First Circuit Court clarified these facts by stating: "Rhode Island does not require any civics courses, although some high schools in more affluent districts offer elective civics courses, nor does the state mandate testing for civics knowledge at the high school level or report student performance in these subjects, unlike reading, math and science. Due to limited time and resources, schools thus focus on these mandatory subjects that are tested statewide." A.C. v. McKee, 2022 WL 10001, *1 (1st Cir. filed Jan. 25, 2021).

[112] *Raimondo*, 494 F. Supp. 3d at 194.

[113] *McKee*, 2022 WL 10001, at *1.

[114] Mark Walsh, *COVID-19 School Reopening Battle Moves to the Courts*, EDUCATIONWEEK (Aug. 22, 2020), https://www.edweek.org/policy-politics/covid-19-school-reopening-battle-moves-to-the-courts/2020/08.

outcome. Thus, *Rodriguez* remains good law at the federal level and a powerful tool for blocking litigation seeking any form of heightened scrutiny in education discrimination cases. Although, *Rodriguez* has effectively blocked such claims at the federal level, in the time since that holding, plaintiffs have found success at the state level which may be instructive for future federal claims.

III. STATE LAW

While the U.S. Constitution does not mandate the creation of a public education system, all 50 states do in their state constitutions.[115] Though this language varies, the most common requirements include being free to the students, common or uniform across the state, and available to all students.[116] A significant number, though not the majority, include some language about the adequacy or level of education that needs to be provided.[117] Arizona details the level of schools to be provided. [118] Florida requires a "high-quality system."[119] Georgia requires "an adequate public education."[120] Illinois requires "[a]n efficient system of high-quality" schools.[121] Montana requires "[a] system of education which will develop the full educational potential of each person."[122] Pennsylvania requires that the school system "serve the needs of the Commonwealth."[123] Finally, Virginia requires that the Commonwealth "ensure that an educational program of high quality is established and continually maintained."[124]

Of course, federal courts are not required to follow state precedent in constitutional fundamental rights cases, but it can still be instructive for federal courts. In fact, throughout history federal courts have looked to earlier

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[115] Emily Parker, *50-State Review: Constitutional Obligations for Public Education*, EDUC. COMM'N OF THE STATES, 1, 1 (Mar. 2016), https://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf.

[116] *See generally id.* at 5–22.

[117] *Id*.

[118] *Id.* at 5.

[119] *Id.* at 8.

[120] *Id.*

[121] *Id.* at 10.

[122] *Id.* at 14.

[123] *Id.* at 18.

[124] *Id.* at 20.

state decisions for guidance particularly when it comes to defending individual liberties.[125] For example, although *Brown v. Board of Education* may be the most well-known school integration case, numerous favorable state courts had already reached similar outcomes by the time of the *Brown* decision.[126] And what's more is the Court in *Brown* actually listened to and relied upon these prior state court holdings in concluding that segregation unconstitutionally harms Black schoolchildren.[127]

There is some debate about what the appropriate relationship between federal and state law should be when deciding federal constitutional questions.[128] Some view federal law as completely separate from state law, while others recognize and even encourage the influence and overlap that the two systems might have on one another.[129] A view that supports such influence is favorable when seeking to protect fundamental rights for several reasons. First, federal courts can benefit from the innovation at the state level.[130] Next, when federal courts follow the lead of state courts, this can lessen the assumption of power by the federal government.[131] Finally, the overlap between state and federal law allows for multiple layers of judicial review, such that if a harmful decision were rendered on one level, the other could still provide protection.[132]

In the remainder of this comment I will analyze what lessons from state law, federal courts could and should look towards in defining a fundamental right to an education. I will start with a case study of North Carolina ending with the state's leading case: *Leandro v. State*.[133] Then, I will examine successful claims in other state courts where plaintiffs argued for a state right

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[125] Goodwin Liu, *State Courts and Constitutional Structure*, 128 YALE L.J. 1304, 1345 (2019).

[126] *Id.* at 1352–55. Additionally, at least twenty-eight state court decisions actually rejected the legality of segregation by the time of the infamous *Plessy v. Ferguson* "separate, but equal" decision. *Id*. at 1350.

[127] *Id.* at 1360.

[128] *See generally*, Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues when Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025 (1985).

[129] *Id.* at 1027–29.

[130] Liu, *supra* note 125. at 1339.

[131] *Id.*

[132] *Id.* at 1338.

[133] 488 S.E.2d 249 (N.C. 1997).

to education. These examples provide guidance for a possible federal right in keeping with the shift in federal right-to-education jurisprudence discussed in the previous section.

A. North Carolina and a "Sound Basic Education"

Two separate clauses in the North Carolina Constitution provide for a state right to equal educational opportunities. The first is found in the Declaration of Rights and states "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right."[134] The second is found in the Article for education and requires that the General Assembly provide a "general and uniform system of free public schools . . . wherein equal opportunities shall be provided for all students."[135] Already the difference between the North Carolina Constitution and the U.S. Constitution, which makes no mention of education whatsoever, is stark.

North Carolina jurisprudence highlights two major lessons for creating a more narrowly defined right to an education. The first lesson is that a requirement for truly uniform or identical educational experiences is neither practical nor desirable. The other lesson concerns the elements courts should use to define what is necessary for a "minimal basic education."

1. "Uniform" Does Not Mean Identical

In the line of cases addressing the first lesson, the North Carolina courts consider what is meant by the constitutional mandate to provide a "general and uniform" school system. The first of these cases is *Britt v. N.C. State Board of Education*.[136] In *Britt*, the plaintiffs argued that the legislature's method of funding schools as well as the establishment of five separate districts in Robeson County created disparities so great that they violated the plaintiffs' right to a uniform educational experience.[137] In response the North Carolina Court of Appeals looked to the history of the Constitutional

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[134] N.C. CONST. art. I, § 15.

[135] N.C. CONST. art. IX, § 2(1).

[136] 357 S.E.2d 432 (N.C. Ct. App. 1987).

[137] *See id.* at 434. A very similar case to this one was decided in the same manner a year after *Leandro* in *Banks v. County of Buncombe*, 494 S.E.2d 791 (N.C. Ct. App. 1998).

mandates and found that "uniform" was only meant to be in regards to "race or other classification."[138] The court held:

> [I]f our Constitution demands that each child receive equality of opportunity in the sense argued by plaintiffs, only absolute equality between all systems across the State will satisfy the constitutional mandate. Any disparity between systems results in opportunities offered some students and denied others. Our Constitution clearly does not contemplate such absolute uniformity across the State.[139]

Not only was the plaintiffs' claim in *Britt* for uniformity denied, the court went a step further and held that such total uniformity was not envisioned by the state constitution.

The second case holding that North Carolina's constitution does not provide for a truly uniform system of education is *Kiddie Korner Day Schools, Inc. v. Charlotte-Mecklenburg Board of Education*[140] local schools were sued for providing extended day care programming at a few of the elementary schools.[141] The North Carolina Court of Appeals cited previous cases that held "uniform" does not relate to individual "schools," but instead the system as a whole in which "every child[] is to have the same advantage, and be subject to the same rules and regulations."[142] The court in *Kiddie Korner* held: "The mandate does not require every school within every county or throughout the State to be identical in all respects. Such a mandate would be impossible to carry out as there are differences within a given school as the caliber of teacher and students differ."[143] Here, the court used

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[138] *Britt*, 357 S.E.2d. at 436.

[139] *Id*.

[140] 285 S.E.2d 110 (N.C. Ct. App. 1981).

[141] *Id*. at 112

[142] *Id*. at 113. *See also* Bd. of Educ. v. Bd. of Comm'rs of Granville Cnty., 93 S.E. 1001, 1002 (N.C. 1917) ("The term "uniform" here clearly does not relate to "schools," requiring that each and every school in the same or other district throughout the State shall be of the same fixed grade, regardless of the age or attainments of the pupils, but the term has reference to and qualifies the word "system" and is sufficiently complied with where, by statute or authorized regulation of the public-school authorities, provision is made for establishment of schools of like kind throughout all sections of the State and available to all of the school population of the territories contributing to their support.").

[143] *Kiddie Korner*, 285 S.E.2d at 113.

this reasoning to uphold the creation of day-care programming, but it could also conceivably be used to justify the offering of career and technical programs, alternate school calendars and schedules, the adoption of different assessment policies and overarching curricular framework. Accordingly, not only is true uniformity to the point of being identical not mandated by the North Carolina constitution, it may not even be a desirable outcome.

2. Minimal Basic Education

In another line of cases addressing the second lesson, and the one that closely mirrors the recent Sixth Circuit decision in *Gary B*., has to do with determining where the line is between an education that is constitutionally sufficient in North Carolina, and one that is constitutionally insufficient. The first of these cases is *Bridges v. Charlotte*,[144] in which the plaintiffs were suing the city of Charlotte for collecting additional taxes to contribute to the State Retirement Fund.[145] Not only did the North Carolina Supreme Court reference multiple times the importance of public education,[146] but it also held that the mandate set forth in the North Carolina Constitution was "not merely the bare necessity of instructional service."[147] Instead, the court held that necessary was relative and must be interpreted "consonant with the reasonable demands of social progress."[148]

Harris v. Board of Commissioners of Washington County,[149] the next case concerning a constitutionally sufficient system of education, allowed the Board of Commissioners of Washington County to increase property taxes in order to supplement the salaries of teachers in the public schools of the county.[150] The North Carolina Supreme Court held that the General Assembly, in establishing a general and uniform system of public schools, was not restricted by other provisions concerning the county commissioner's

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[144] 20 S.E.2d 825 (N.C. 1942).

[145] *Id*. at 828.

[146] *See id*. at 829. ("It is based not only upon the principle of justice to poorly paid State employees, but also upon the philosophy that a measure of freedom from apprehension of old age and disability will add to the immediate efficiency of those engaged in carrying on a work of first importance to society and the State.")

[147] *Id*. at 831.

[148] *Id*.

[149] 163 S.E.2d 387 (N.C. 1968).

[150] *Id*. at 389.

role in public schools.[151] Instead the court held: "This mandate contemplates a system of public schools sufficient to meet . . . the educational needs of the people of the State."[152]

The final two decisions concerning what is meant by a minimal basic education in North Carolina are procedurally related. In *Leandro v. State*, the plaintiffs included students from across the state in relatively poor school districts claiming that they did not receive an education meeting the minimal standard for a constitutionally adequate education.[153] Citing school facilities, low teacher salary supplements, and college admission as well as end-of-grade test results, plaintiffs alleged that there was a great disparity between the educational opportunities available in their districts and those in more wealthy districts.[154] In *Leandro* the North Carolina Supreme Court held that the state is required to provide equal access to a "sound basic education" for every child.[155] Further, the *Leandro* Court defined a sound basic education as follows:

> . . . [O]ne that will provide the student with at least: (1) sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student's community, state, and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.[156]

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[151] *Id*. at 393.

[152] *Id*.

[153] *Leandro*, 488 S.E.2d 249, 252 (N.C. 1997).

[154] *Id*. *Leandro* also featured plaintiffs from rural districts as well as plaintiff-intervenors from urban districts each of whom made slightly different claims regarding the education being provided in their respective districts. *Id* at 252–53.

[155] *Id*. at 255.

[156] *Id.*

Three years later, when some of the plaintiffs from *Leandro* appeared again in front of the state supreme court, the court was asked in *Hoke County Board of Education v. State*[157] to determine whether the state had actually provided a sound basic education. To reach a conclusion, in *Hoke*, the court evaluated the funding levels as well as the educational outcomes of the plaintiff's schools and held that the plaintiffs had been denied their state constitutional right to a sound basic education as defined in *Leandro*.[158] In so holding, the *Hoke* Court gave a warning similar to Justice Marshall's quoted at the outset of this comment: "The children of North Carolina are our state's most valuable renewable resource. If inordinate numbers of them are wrongfully being denied their constitutional right to the opportunity for a sound basic education, our state courts cannot risk further and continued damage because the perfect civil action has proved elusive."[159] Just as Justice Marshall's warning has proven true, so too has the warning in *Hoke*.

Although the court in *Leandro* defined four broad standards for what is a sufficient education under the North Carolina State Constitution, North Carolina lawmakers were still left to determine exactly what should be done to ensure that all schools meet the *Leandro* standards. In the years that followed *Hoke*, the state's courts have held several hearings and issued reports, orders, and memoranda on the performance of high schools, the status of prekindergarten in North Carolina, and the needs of at-risk students.[160] In 2017, both the student-plaintiffs and the State agreed to use WestEd, an independent education consultant, to study the status of education in North Carolina and make recommendations on the ways the state can ensure a sound basic education for every child.[161] This report published by WestEd at the end of 2019 included eight major recommendations: funding reallocation; a more qualified, well-prepared, and diverse teaching workforce; more qualified and well-prepared principals; increasing access to early childhood education; better support available to high-poverty schools;

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[157] 599 S.E.2d 365 (N.C. 2004).

[158] *Id*. at 391.

[159] *Id*. at 377.

[160] *See* Ann McColl, *Everything You Need to Know About the Leandro Litigation*, EDNC (Feb. 17, 2020) https://www.ednc.org/leandro-litigation/.

[161] Alex Granados, *Court Finds 'Considerable, Systemic Work is Necessary to Deliver' on Leandro*, EDNC (Jan. 21, 2020) https://www.ednc.org/court-finds-considerable-systemic-work-is-necessary-to-deliver-on-leandro/.

a revitalized state assessment and school accountability system; establishment of a regional and statewide support system for school turnaround; and better monitoring of the state's compliance.[162]

In January of 2020, Wake County Superior Court Judge David Lee signed a consent order for the parties to develop a plan to move the state's schools towards meeting the *Leandro* standards based on the WestEd report by 2030.[163] In the consent order Judge Lee reiterated that North Carolina's public education was currently preventing thousands of students, mostly student of color and from economically disadvantaged backgrounds, from being able to participate in the economy and society.[164]

In June of 2021 Judge Lee signed an order to implement a Comprehensive Remedial Plan which had been set forth by the parties.[165] This plan included seven action items that roughly mirror the recommendations of the WestEd report.[166] In addition to the broad recommendations, the Comprehensive Remedial Plan includes discrete, individual, action steps, implementation timelines, responsible parties, and estimated State investment.[167] The court order stated that this plan is "necessary to remedy continuing constitutional violations and to provide the opportunity for a sound basic education to all public school children in North Carolina."[168] The order also stated that if North Carolina fails to implement the actions in the Comprehensive Remedial Plan, the court will enter a judgment granting declaratory relief and other such relief as needed to correct the wrong.[169]

At the time of publication of this comment, the North Carolina General Assembly remained in a standoff with Judge Lee and the plaintiffs on how to

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[162] *See* WESTED, SOUND BASIC EDUCATION FOR ALL: AN ACTION PLAN FOR NORTH CAROLINA, 33 (2019).

[163] Comprehensive Remedial Plan at 2, Hoke Cnty. Bd. of Educ. V. State, 599 S.E.2d 365 (2004) (No. 95-1158).

[164] *Id*.

[165] *See generally,* Order on Comprehensive Remedial Plan, Hoke Cnty Bd. of Educ. v. State, 599 S.E.2d 365 (2004) (95-CVS-1158).

[166] Comprehensive Remedial Plan, *supra* note 163, at 3–4.

[167] *Id*. at 5.

[168] Order on Comprehensive Remedial Plan, 7, Hoke Cnty Bd. of Educ. v. State, 599 S.E.2d 365 (2004) (No. 95-1158).

[169] *Id.* at 6 (citing Leandro v. State, 346 N.C. 336, 357 (1997)). The court also put into place a reporting process so that progress towards benchmarks can be tracked. *Id*. at 7.

proceed. Republican leaders in the General Assembly maintain that appropriations, such as those needed to implement the Comprehensive Remedial Plan, are in the exclusive domain of the legislative branch.[170] Meanwhile, in a November 2021 order, Judge Lee held that the state constitutional mandate to provide a sound basic education includes the necessary funding, as provided by taxation and appropriations.[171] The order stated: "When the General Assembly fulfills its constitutional role through the normal (statutory) budget process, there is no need for judicial intervention to effectuate the constitutional right. As the foregoing findings of fact make plain, however, this Court must fulfill its constitutional duty to effect a remedy at this time."[172] The order required that the state make available $1.7 billion to fund the Comprehensive Remedial Plan.[173]

While the final outcome of the *Leandro* ruling is still not yet totally clear, the case provides an important state analogy to the *Gary B.* case in the Sixth Circuit. First, the claims are similar because the plaintiffs claimed the education they received was inadequate. In each case, the courts stressed the importance of an adequate education in such a way that highlighted its potential fundamental status. Finally, in each case the plaintiffs' success depended clearly and narrowly defining what an adequate education would provide. In *Leandro*, the plaintiff's successfully argued for a four-factor framework – including the ability to function in a rapidly changing society, make informed civic decisions, engage in further education or training, and compete for gainful employment – for how to define a constitutional right to an education. Although state cases are not binding in federal courts, cases such as *Leandro* could be used to inform and guide jurisprudence on defining an adequate education at the federal level.

Leandro is just one example of how claims for an adequate education can be decided at the state level. Below I will more briefly discuss other successful claims concerning a right to education at the state level in order to

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[170] Alex Granados, *Leandro Judge Says He is 'Very Close' to Giving up on Republican Lawmakers*, EdNC (Sept. 8, 2021), https://www.ednc.org/2021-09-08-leandro-judge-says-he-is-very-close-to-giving-up-on-republican-lawmakers/.

[171] Order at 16, Hoke Cnty Bd. of Educ. v. State, 599 S.E.2d 365 (2004) (No. 95-1158).

[172] *Id*.

[173] Alex Granados, *Leandro Judge Orders $1.7 Billion for Plan to Ensure Student Access to a Sound Basic Education*, EDNC (Nov. 2021), https://www.ednc.org/2021-11-10-leandro-judge-orders-1-7-billion-for-plan-to-ensure-student-access-to-a-sound-basic-education/.

better understand if, and how, a similar right could be recognized and defined at the federal level.

B. The Other 49 States and a Minimal, Basic, or Adequate Education

North Carolina is not the only state in which a basic right to an education has been protected. All 50 state constitutions protect such a right and while that fact alone does not require that federal courts find a federal right to an education, these cases can help guide federal courts in determining how to define such a right.[174] In analyzing successful right-to-education claims at the state level, three major trends appear. These cases tend to be based on funding, physical access to school, and learning outcomes of students. In looking for how to narrowly define a federal right to an education, these three areas may provide an answer.

1. Funding Levels

Since *Rodriguez*, many of the state right-to-education cases have centered on the issue of school funding. Around 60 percent of the time, courts have held that the school funding system was a constitutional violation.[175] The first of these cases is *Robinson v. Cahill*[176] where the New Jersey Supreme Court held that the state's school funding and taxation scheme did not and could not satisfy the constitutional obligation of the state.[177] The taxation scheme was similar to that in *Rodriguez* in that it resulted in low-wealth districts having a lower expenditure per student than wealthy districts.[178] Unlike *Rodriguez*, the court in *Robinson* held that the state's funding scheme did result in a state constitutional violation and required that the legislature change the distribution scheme for education funding.[179]

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[174] *See* Liu, *supra* note 125. At 1323.

[175] *Id*.

[176] 303 A.2d 273 (N.J. 1973).

[177] *Id*. at 519.

[178] *Id.* at 481. The difference in *Robinson* was that the statutory scheme also required the state to supplement the budgets of these low-wealth school districts in order to ensure proper funding – the court found that the state funding did "not operate substantially to equalize the sums available per pupil."

[179] *Id*. at 520–21.

Despite this ruling, New Jersey continues to be one of the worst offenders in funding disparities today.[180]

In a more recent case, *Gannon v. State*,[181] the Kansas Supreme Court ordered the state to address significant shortfalls in how its public schools are funded.[182] In Kansas school funding came from both state and local sources with an allocation for additional state monies to go to less wealthy districts.[183] The court held that that the state had failed their constitutional duties in both the areas of adequacy and equity.[184] To come to this conclusion, the court held that the test for adequacy included numerous factors, which were statutorily codified in K.S.A. 2013 Supp. 72-1127, and is met when the education financing system is reasonably calculated to have all Kansas public education student meet or exceed those standards.[185] Likewise, the court set

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[180] *See* Sarah Mervosh, *How Much Wealthier Are White School Districts Than Nonwhite Ones? $23 Billion, Report Says*, N.Y. TIMES (Feb. 27, 2019), https://www.nytimes.com/2019/02/27/education/school-districts-funding-white-minorities.html.

[181] 319 P.3d 1196 (Kan. 2014).

[182] Emily Richmond, *Can a Court Decision Help Close the Achievement Gap?* THE ATLANTIC (Mar. 8, 2017), https://www.theatlantic.com/education/archive/2017/03/can-a-court-decision-help-close-the-achievement-gap/518859/.

[183] *Gannon*, 319 P.3d at 1205.

[184] *See generally id.*

[185] *Id*. at 1237. K.S.A. 2013 Supp. 72-1127 has since been recodified as K.S.A. 72-3218 and the requirements are as follows:

> Subjects and areas of instruction shall be designed by the state board of education to achieve the goal established by the legislature of providing each and every child with at least the following capacities:
>
> (1) Sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization;
>
> (2) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices;
>
> (3) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation;
>
> (4) sufficient self-knowledge and knowledge of his or her mental and physical wellness;
>
> (5) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage;
>
> (6) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and

forth a rule that when the legislative actions exacerbate the wealth-based disparities between districts, the school financing scheme will fall short of the equity standard set by the Kansas Constitution.[186] In addition to having fairly clear tests for adequacy and equity, the Kansas Supreme Court also gave guidance for the state legislature on a timeline to meet these minimum standards for education in the state.[187]

2. Physical Conditions and Access

Another aspect of education that state plaintiffs focus on is the physical conditions of and actual physical access to the school building.[188] Although these claims oftentimes are a result of funding, the following cases will be ones in which the plaintiffs' arguments focus on the physical conditions of the school.[189]

In *Campaign for Fiscal Equity v. State of New York*,[190] plaintiffs brought a claim against the State of New York arguing that "minimally acceptable educational services and facilities [were] not being provided."[191] The New York Court of Appeals defined a sound basic education as one that should "consist of basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury."[192] In this case, the court held that if the physical facilities were inadequate for children to obtain these skills, the State did not

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> (7) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.

K.S.A. 72-3218 (c).

[186] *Gannon*, 319 P.3d at 1238–1239.

[187] *See generally id.* at 1251–52.

[188] One of the first of these cases was Abbott v. Burke, 495 A.2d 376 (N.J. 1985), a case that arose out of *Robinson v. Cahill*, in which school facilities were a central issue in attacking the adequacy of the state's funding scheme. David G. Sciarra, Koren L. Bell, and Susan Kenyon, *Safe and Adequate: Using Litigation to Address Inadequate K-12 School Facilities*, EDUC. L. CTR. (July 2006).

[189] This was a tactic that was used in *Brown* because it was generally less subjective than learning outcomes.

[190] 655 N.E.2d 661 (N.Y. 1995).

[191] *Id*. at 665.

[192] *Id*. at 666.

satisfy its constitutional obligation.[193] The court described what minimally adequate facilities should include: "enough light, space, heat, and air to permit children to learn . . . adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks."[194] Because of the procedural posture in this case, the court did not make a determination as to whether the State met this standard, but upheld that the plaintiffs' claim was sufficient.[195]

The courts in Ohio have also been asked to rule on the adequacy of classroom facilities in *DeRolph v. State*.[196] Here, the Ohio Supreme Court struck down large parts of the Classroom Facilities Act, an Ohio statute addressing the physical school buildings, on the grounds schools were so underfunded, that the law was unconstitutional.[197] Part of the court's reasoning for their holding were the results of a 1990 Ohio Public School Facility Survey which found that over $10 billion was needed for facility repair and construction.[198] The survey's findings were quoted by the court and they included: half of the buildings were 50 years or older, around half of the buildings lacked satisfactory electrical systems; only 17 percent of the heating systems and 31 percent of the roofs were satisfactory, 19 percent of the windows and 25 percent of the plumbing was adequate, only 20 percent of the buildings were handicap accessible, and only 30 percent of the schools had adequate fire alarms.[199] The court also included details about other health concerns such as: a school where 300 students were made sick by carbon monoxide poisoning, almost 70 percent of schools having asbestos that still needed to be removed, students breathing coal dust from the heating system, raw sewage flowing on athletics fields, arsenic in drinking water, and plaster falling from the ceiling so frequently that the principal worried it would hit a student.[200] The court found these conditions across the state to be neither safe

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[193] *Id*.

[194] *Id*.

[195] *Id*. at 666–67.

[196] 677 N.E.2d 733 (Ohio 1997). The Ohio Supreme Court had previously recognized the importance of buildings in an "efficient system of schools." Sciarra, *supra* note 188, at 12 (quoting Miller v. Korns, 140 N.E. 773, 776 (1923)).

[197] *DeRolph*, 677 N.E.2d at 747.

[198] *Id*. at 742.

[199] *Id.*

[200] *See id*. at 743–44.

nor conducive to learning and as such held that the state was failing in its constitutional obligation to provide students with a basic education.[201]

3. Learning Outcomes

The final strategy that plaintiffs in state courts have adopted is to attack the actual learning outcomes of school districts. This line of cases is very similar to the claims being made in *Leandro* and *Gary B.* These cases focus on markers such as curricular standards, test scores, graduation rates, and general self-sufficiency of the students as they move into adulthood. Generally, these claims argue that the schools are so inadequate that students are unable to be productive members of society.

The first of these cases is *Rose v. Council for Better Education*,[202] in which the Kentucky Supreme Court found that education was a fundamental right and that the General Assembly had failed to meet this obligation.[203] The court further stated: "Lest there be any doubt, the result of our decision is that Kentucky's *entire system* of common schools is unconstitutional."[204] Although this claim was made on the basis of education financing, the lower courts and the Kentucky Supreme Court spent a considerable amount of time looking at the outcomes of Kentucky public schools.[205] The court stated:

> The overall effect of appellants' evidence is a virtual concession that Kentucky's system of common schools is underfunded and inadequate; is fraught with inequalities and inequities throughout the 177 local school districts; is ranked nationally in the lower 20–25% in virtually every category that is used to evaluate educational performance; and is not uniform among the districts in educational opportunities.[206]

Additionally, the court noted that although poorer districts fared worse than wealthier districts, even the affluent schools in Kentucky fell below national standards and the levels of achievement of surrounding states.[207]

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[201] *Id.* at 746.

[202] 790 S.W.2d 186 (Ky. 1989).

[203] *Id*. at 206, 209.

[204] *Id*. at 215.

[205] *Id*. at 196–97.

[206] *Id*. at 197.

[207] *Id*. at 213.

Although the court stated that it was up to the general assembly to resolve this issue, the court supplied a seven-part definition of an efficient school system.[208] These seven parts focused on the outcomes of an education such as "sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization," "sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation," and "sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently."[209] Because the court recognized that education was within the authority of the state legislature it did not give any further direction as to how the legislature should work to meet this definition of efficient schools.[210]

A more recent case dealing with a state not meeting its constitutional obligations to provide an adequate education was *Cruz-Guzman v. State*,[211] in which families of Minnesota public schools, particularly those in Minneapolis and Saint Paul, claimed that there was a "high degree of segregation based on race and socioeconomic status" which resulted in "significantly worse academic outcomes" for schools that were predominantly comprised of students of color and students living in poverty.[212] The plaintiffs measured these outcomes with "graduation rates; pass rates for state-mandated Basic Standards Tests; and proficiency rates in math, science, and reading."[213] Here, the Minnesota Supreme Court reasoned that the language of the Education Clause of the Minnesota Constitution could not possibly have been intended to create an inadequate system which would not allow people to fulfill their duties as citizens.[214] Ultimately the court made clear that a determination of adequacy will require looking at outcomes and how well prepared students are.

Although all the above cases are at the state level and interpret state constitutional provisions, not federal law, they highlight some of the

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[208] *Id.* at 211–12. These seven factors are what would later inspire the Kansas Legislature in drafting K.S.A. 2013 Supp. 72-1127, *supra* note 185.

[209] *Id*. at 212. These seven factors are also very similar to the four that were developed in *Leandro*.

[210] *Id*. at 216.

[211] 916 N.W.2d 1, 10–11 (Minn. 2018).

[212] *Id*. at 5.

[213] *Id*.

[214] *Id*. at 12.

strategies that have worked in various states for plaintiffs making right-to-education claims. At other points in history federal courts have looked to how state courts handled questions of school integration, substantive due process, and education funding. Today federal plaintiffs, like those in *Gary B.*, might find it useful to present these trends in state law as guidance and support for the development of federal education law.

CONCLUSION: WHAT IS A LEGALLY ADEQUATE EDUCATION?

As federal courts begin to explore the possibility of recognizing a fundamental right to an education, they will also need to define this right. After *Brown*, it seemed as though education would be broadly protected, but *Rodriguez* made clear that was not the case. *Papasan* later distinguished that despite the bar on a broad federal right to an education, there might still be federal protection for a right to educational that is more narrowly defined.

It is this narrower definition of a right to education that plaintiffs have made successful claims for at the state and federal levels. Based on the lessons from North Carolina jurisprudence, as well as successful claims in other states, one can begin to see trends that might inform how a federally protected right to an education might be defined. By looking at existing case law across the nation, funding is brought up in a vast majority of cases. To be successful, plaintiffs need to argue that the current funding levels are either wholly inadequate or lead to great levels of disparity. The next claim that is frequently brought up is with regards to physical conditions and physical access to schools. Here, a successful argument might be that the physical conditions or access to the school is so bad that it is impossible for the child to receive an education.

The last area of successful claims are those that focus on educational outcomes. These tend to be hard to define, but they are critical to seeing real improvement. The argument here is that the outcomes of a given school, district or even state are simply inadequate. This could be that too few students are graduating, or that when they are graduating, students lack the skills necessary to contribute to society economically or as a citizen. Some of these standards from states even include looking at the student's future psychological well-being or intellectual fulfillment. Courts should look to states like Kentucky and Kansas who have several elements they want their students to be able to achieve. In *Leandro*, the court began do to this, but severely limited itself by only focusing on the child's economic future. Not only should courts broaden their horizons to ensure the education of the

whole child, but they should also allow these standards to be dynamic and adaptable as the world develops. Finally, while federal courts do not need to tell legislatures or school boards exactly how to achieve these ends, the standards should be as specific as possible and give as much guidance as possible.

MASS INCARCERATION, DEPRIVATION OF RIGHTS, AND RACIAL SUBORDINATION: *U.S. V. GARY,* THE AMERICAN GUN CONTROL NARRATIVE, AND UGLY TRUTH BEHIND 18 U.S.C. 922(G)

ANDREW J. ARDEN*

> *"Any unarmed people are slaves or are subject to slavery at any given moment. . . There is a world of difference between thirty million unarmed, submissive Black people and thirty million Black people armed with freedom and defense guns and the strategic methods of liberation."*[1]
> *- Huey P. Newton, Co-Founder and Minister of Defense, Black Panther Party for Self Defense*

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[1] Huey P. Newton, *In Defense of Self-Defense*, BLACK PANTHER, June 20, 1967, at A4.

INTRODUCTION

America's history of white supremacy has influenced every facet of our legal system—gun control legislation is no different. Regulation of the right to bear arms has been highly racialized since the days of chattel slavery, when slaveowners sought to disarm and dominate Black Americans to prevent insurrection.[2] After the ratification of the Thirteenth Amendment, facially racist Black Codes were justified with openly racist rhetoric.[3] Following the passage of the Civil Rights Act of 1866 and the ratification of the Fourteenth Amendment, Black Codes openly denying Black Americans their Second Amendment rights gave way to more facially neutral policies,[4] but the intent to disarm and dominate Black Americans remained the same. In the past half century, the criminalization of gun ownership has disproportionately affected poor and Black Americans. As this paper demonstrates, although the methods of domination and oppression have changed, from chattel slavery to mass incarceration, the effect, oppression and maintenance of white supremacy through disarmament of Black Americans, remains unchanged. In many federal court districts, 18 U.S.C. §

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[2] Stefan B. Tahmassebi, *Gun Control and Racism*, 2 GEO. MASON U. C.R. L.J. 67, 68–70 (1991).

[3] *See generally Black Codes*, HISTORY, https://www.history.com/topics/black-history/black-codes (last visited July 28, 2021).

[4] *See, e.g.*, National Firearms Act, Pub. L. No. 73-474, 48 Stat. 1236 (1934) (codified as amended at 26 U.S.C. § 5849).

922(g) contributes more to the incarceration of disproportionately poor and Black Americans than any other federal statute.[5]

This recent development explores *United States v. Gary*, a recent Fourth Circuit case interpreting § 922(g),[6] and places it squarely in the context of this racialized history. Section 922(g) criminalizes possession or attempt to possess a firearm by a number of classes of individuals, including felons,[7] those addicted to a controlled substance, those convicted of a misdemeanor domestic violence offense, and those with an active domestic violence protective order against them.[8] The vast majority of defendants charged under § 922(g) are charged under § 922(g)(1), for their status as a felon.[9] In *Gary*, the Fourth Circuit Court of Appeals held that when a court fails to confirm that a defendant is aware of their relevant status, that court has committed a structural error that isn't amenable to plain error review, and the case must automatically be remanded.[10] This decision contradicts the nine other circuit courts to address the issue, which have held that a court's failure to confirm a defendant's awareness of their qualifying status is not a structural error.[11] A motion for the court's *en banc* review was denied.[12] In a concurrence with the denial of an *en banc* hearing, Judge Wilkinson suggested that the panel's decision was "so incorrect and on an issue of such importance that I think the Supreme Court should consider it promptly. Any

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[5] *See generally*, U.S. SENT'G COMM'N, QUICK FACTS: FELON IN POSSESSION OF A FIREARM (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY20.pdf.

[6] 954 F.3d 194 (4th Cir. 2020).

[7] This recent development uses the term "felon" to refer to people convicted of a felony. While people-first language is generally preferred, felon is used here because this this term refers to the legal status of these individuals. Individuals convicted of a felony are referenced this way in practice and statute, and the thesis of this recent development highlights how § 922(g)(1) reduces people convicted of a felony to their status.

[8] 18 U.S.C. § 922(g)(1)-(9).

[9] *See* U.S.SENT'G COMM'N, *supra* note 5.

[10] 954 F.3d at 198.

[11] *See* United States v. Burghardt, 939 F.3d 397, 403–05 (1st Cir. 2019); United States v. Balde, 943 F.3d 73, 97 (2d Cir. 2019); United States v. Denson, 774 F. App'x 184, 185 (5th Cir. 2019); United States v. Hobbs, 953 F.3d 853, 857–58 (6th Cir. 2020); United States v. Williams, 946 F.3d 968, 973–75 (7th Cir. 2020); United States v. Hollingshed, 940 F.3d 410, 415–16 (8th Cir. 2019); United States v. Fisher, 796 F. App'x 504, 510–11 (10th Cir. 2019); United States v. McLellan, 958 F.3d 1110, 1118–20 (11th Cir. 2020).

[12] United States v. Gary, 963 F.3d 420, 421 (4th Cir. 2020) (Wilkinson, J., concurring).

en banc proceedings would only be a detour."[13] A petition was filed with the Supreme Court, which heard the case in April, 2021, consolidated in *Greer v. United States*.[14] The Supreme Court ultimately sided almost unanimously with Wilkinson – save for a partial concurrence and partial dissent by Justice Sotomayor – overturning the Fourth Circuit panel decision.

This recent development argues that the Fourth Circuit panel was right in determining that failure to confirm relevant status is a structural error, particularly given the racialized context of § 922(g) and the racialized history of U.S. gun control legislation generally. Part I of the piece provides background by exploring the racialized history of gun control legislation in America, as well as the racialized narrative that has repeatedly been used to justify gun control legislation. Part II discusses how modern gun control legislation, particularly 922(g)(1), contributes to the mass incarceration of Black and indigent defendants. Part III then examines the Fourth Circuit's holding in *Gary* and the circuit split that case created on structural error in § 922(g) cases. Part IV next considers *Gary* in light of a history of racially motivated gun control legislation to demonstrate why the Fourth Circuit panel was correct in identifying Gary's guilty plea as a structural error. It posits that, more broadly, the Supreme Court's denial of plain error review in cases where a defendant does not know about their § 922(g) status will disproportionately harm Black and indigent defendants. A failure to recognize this error as a structural one only compounds the disproportionate impact of § 922(g) on Black and indigent defendants' Second Amendment rights.

I. THE RACIALIZED HISTORY OF GUN CONTROL LEGISLATION

Gun control in the United States has long been a tool of racial oppression. Throughout American history, firearm legislation has been used to disarm and criminalize Black and Hispanic Americans for the purpose of repressing social movements, forcing economic subserviency, and reinforcing White supremacy.[15] Acknowledgement of this context is

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[13] *Id.*

[14] 141 S. Ct. 2090 (2021).

[15] Tahmassebi, *supra* note 2, at 68–69.

paramount to understanding the implications of § 922(g) and *U.S. v. Gary* for the criminal justice system's disproportionately poor defendants of color.[16]

Throughout our country's history, gun control legislation has served as much as an experiment in racial control as it has served to protect Americans. The development of chattel slavery in the American colonies was accompanied by the enactment of laws restricting the right to bear arms on the basis of race.[17] In 1640, Virginia passed the first of these restrictive laws, which excluded Black people from the classes of people permitted to own a firearm.[18] Fear of slave uprisings in the later Seventeenth and early Eighteenth Centuries prompted further legislation restricting Black firearm ownership, including a 1712 law from South Carolina titled "An Act for the Better Ordering and Governing of Negroes and Slaves,"[19] and Virginia's "An Act for Preventing Negroes Insurrections," both of which instituted complete, race-based bans on firearm ownership by enslaved and freed Black Americans.[20]

Racial control through gun legislation continued even after the formal abolition of slavery following the American Civil War. Southern states adopted "Black Codes," or sets of regulations that denied newly freed Black citizens many of the rights that white citizens were constitutionally guaranteed.[21] These Black Codes frequently forbade freed Black Americans from bearing arms, rendering these newly-freed men and women defenseless against a litany of racially motivated assaults.[22] The overwhelming majority of these Black Codes remained in place until the passage of the Civil Rights Act in 1866.[23]

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[16] This essay does not attempt to argue the public safety merits of some forms of gun control legislation. Rather, it focuses on the implications when some forms of gun control are racially motivated in their creation or administration.

[17] Tahmassebi, *supra* note 8, at 69.

[18] *Id.*

[19] 7 Stat. 346 (S.C. 1690), *reprinted in* 1 THE STATUTES AT LARGE OF SOUTH CAROLINA 346 (D.J. McCord ed., 1840).

[20] 2 STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS FROM VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 481 (W.W. Henning ed., 1823).

[21] *See generally Black Codes*, *supra* note 3.

[22] Tahmassebi, *supra* note 2, at 71.

[23] 78 U.S.C. § 241.

The Civil Rights Act, and the Fourteenth Amendment to the U.S. Constitution which gave Congress the power to pass it, required States to pass laws that were racially neutral—at least on their face.[24] Lawmakers had little difficulty pivoting to facially neutral laws intended to disarm Blacks. Some states such as Tennessee and Arkansas responded by banning cheap handguns, the only firearms that newly freed Black people could usually afford, through "Saturday Night Special" laws which criminalized distribution of small, low quality, and easily concealable handguns.[25] Other states, including Alabama, Texas, and Virginia, chose instead to price Blacks and poor whites out of gun ownership through the imposition of exorbitant business and transaction taxes on handguns.[26] In 1902 South Carolina banned all pistol sales except to sheriffs and their special deputies, a group which often included numerous members of the Ku Klux Klan.[27] In 1911, New York, fueled by racial stereotypes about Black Americans and immigrants, and in an effort to disarm union organizers, enacted the Sullivan Law, which made handgun ownership illegal for anyone without a police-issued permit.[28] These permits were then systematically denied to the very groups the Sullivan Law intended to disarm.[29] Similar police permit systems followed in Arkansas, Hawaii, Michigan, Missouri, New Jersey, North Carolina, and Oregon.[30] As a result of these restrictive gun policies, Black Americans were left without firearm protection as violent white supremacists, including members of the Klan, once again became a major force of racialized violence,

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[24] *Id.*

[25] Tahmassebi, *supra* note 2 at 73. *See generally* STEVE EKWALL, THE RACIST ORIGINS OF US GUN CONTROL: LAWS DESIGNED TO DISARM SLAVES, FREEDMEN, AND AFRICAN-AMERICANS, https://www.sedgwickcounty.org/media/29093/the-racist-origins-of-us-gun-control.pdf (providing a timeline of racially disparate gun control legislation in America from 1640–1995).

[26] Tahmassebi, *supra* note 2, at 74–75.

[27] *See id.* at 76; Timothy Winkle, *When Watchmen Were Klansmen*, NAT'L MUSEUM AM. HIST., BEHRING CTR. (Apr. 28, 2020), https://americanhistory.si.edu/blog/watchmen; *see also, e.g.*, *Klan Chief Is Deputy Sheriff*, N.Y. TIMES (Sept. 28, 1968).

[28] Tahmassebi, *supra* note 2, at 77.

[29] *Id.* at 77–79.

[30] *Id.*

perpetrating beatings, lynchings, and murders against unarmed Black Americans throughout the early twentieth century.[31]

Racialized gun control laws were also enacted at the federal level. Lawmakers passed the first federal gun control legislation of the twentieth century, the National Firearms Act (NFA), in 1934.[32] The law was supported by the NRA and imposed steep tax and registration requirements on so-called "gangster" guns, machine guns, and sawed-off shotguns.[33] These restrictions disproportionately disarmed Black Americans and other poor minorities, who were largely priced out of the firearms market en masse.[34] A larger and more racially-motivated step in federal gun control legislation came thirty years later, with the Gun Control Act of 1968.[35] Here, history is unequivocal: the Gun Control Act was a racially motivated reaction to the violence of the Civil Rights Movement and the growing agency of Black Americans that was afforded in part by their utilization of firearms.[36] Robert Sherrill, former correspondent for The Nation and gun control advocate, argued in his book *The Saturday Night Special* that "The Gun Control Act of 1968 was passed not to control guns but to control blacks, and inasmuch as a majority of Congress did not want to do the former but were ashamed to show that their goal was the latter."[37]

The racist intent of the Gun Control Act is illustrated by lawmakers' reactions to the Black Panther Party. In the face of police violence against Black Americans, the Black Panther Party had begun openly carrying

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[31] *Id.* at 78; *see also* David Schenk, *Freedmen with Firearms: White Terrorism and Black Disarmament During Reconstruction*, 4 GETTYSBURG COLL. J. CIV. WAR ERA 9 (2014) (detailing the history of Black disarmament in the reconstruction and post reconstruction south and KKK targeting of unarmed Blacks).

[32] National Firearms Act, Pub. L. No. 73-474, 48 Stat. 1236 (1934) (codified as amended at 26 U.S.C. § 5849).

[33] Adam Winkler, *The Secret History of Guns,* ATLANTIC (Sept. 2011), https://www.theatlantic.com/magazine/archive/2011/09/the-secret-history-of-guns/308608/.

[34] J. Baxter Stegall, *The Curse of Ham: Disarmament Through Discrimination - the Necessity of Applying Strict Scrutiny to Second Amendment Issues in Order To Prevent Racial Discrimination by States and Localities Through Gun Control Laws*, 11 LIB. U. L. REV. 272, 299–300 (2016).

[35] Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended at 18 U.S.C. §§ 921-31).

[36] Winkler, *supra* note 31.

[37] ROBERT SHERILL, THE SATURDAY NIGHT SPECIAL 280 (1973).

handguns and assault rifles by 1967.[38] Members of the party engaged in "copwatching," openly carrying at protests and in the streets to police the police and protect Black Americans from police violence.[39] On May 2, 1967, 30 fully-armed Black Panthers demonstrated at the California State Capitol in protest of government infringement on their right to bear arms – particularly Republican Assemblyman Don Mulford's bill to repeal open carry in California.[40] This demonstration further stoked white establishment fear of Black armament, and the aforementioned bill was quickly passed, with the Mulford Act being signed into law by then-California Governor Ronald Reagan on July 28, 1967.[41] Federally, the attitude of the white establishment mirrored that of California, as the Mulford Act was closely followed nationally by the passage of the Gun Control Act of 1968, with support of unlikely allies such as the NRA.[42] The Gun Control Act imposed a number of restrictions on the sale and transfer of firearms, including restricting the importation of cheap military surplus weapons popular with the Black Panther Party and the Black community.[43] The law also prohibited certain people from owning guns, including people who had been convicted of a felony.[44] That section of the law is now codified at 18 U.S.C. § 922(g).

Racially motivated gun control did not end with the Gun Control Act of 1968. As part of a national movement towards "tough on crime" policy, the Chicago Housing Authority (CHA) and the Chicago Police Department enacted and enforced Operation Clean Sweep, an official policy which applied to all housing units owned and operated by the CHA, in 1988.[45] The program confiscated firearms from public housing tenants through

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[38] *See* Winkler, *supra* note 33.

[39] *See* John Metta, *Racism and the Black Hole of Gun Control in the US*, AL JAZEERA (Nov. 23, 2019), https://www.aljazeera.com/features/2019/11/23/racism-and-the-black-hole-of-gun-control-in-the-us.

[40] Thad Morgan, *The NRA Supported Gun Control When Black Panthers Had Weapons*, HISTORY (Aug. 30, 2018), https://www.history.com/news/black-panthers-gun-control-nra-support-mulford-act.

[41] *Id.*

[42] Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended at 18 U.S.C. §§ 921-31); *see* Morgan, *supra* note 40.

[43] *See* Winkler, *supra* note 33.

[44] 18 U.S.C. § 922.

[45] Ekwall, *supra* note 25, at 11.

warrantless searches.[46] The constitutionality of operation clean sweep was repeatedly challenged, and eventually in 1994 it was struck down for violating of the Fourth Amendment by a federal District Court for the Northern District of Illinois, Eastern Division.[47] Then-President Clinton responded by ordering his attorney general to help Chicago develop an alternative search policy, adding "[w]e must not allow criminals to find shelter in the public housing community they terrorize,"[48] scapegoating and villainizing Black felons in the process of justifying sweep policies. In a similar case, in 1990, the U.S. District Court for the Eastern District of Virginia upheld a ban imposed by the Richmond Housing Authority on the possession of all firearms, whether operable or not, in public housing projects.[49] The Clinton Administration tried and failed to enact a similar ban in federal public housing in 1994.[50]

As this history demonstrates, America's long experiment with gun control legislation is the product of, and reinforces, a pervasive and racist narrative and political order. This narrative takes the shape of a dichotomy familiar in politics—that of the protective, heroic white homeowner who owns a firearm to hunt or protect his family, and the Black criminal "thug" who the white firearm owner needs protection from. This narrative has been constructed and deployed throughout American history to justify gun control policy that disarms and criminalizes Black Americans while affirming the right of white people to arm themselves at home, in public, and even in political spaces.[51] "Throughout the history of this country, the rhetoric of gun

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[46] *Id.*

[47] Pratt v. Chi. Hous. Auth., 848 F. Supp. 792, 796–97 (N.D. Ill. 1994).

[48] William J. Clinton, *Statement on the District Court Decision on Chicago's "Operation Clean Sweep"*, AM. PRESIDENCY PROJECT (Apr. 7, 1994), https://www.presidency.ucsb.edu/documents/statement-the-district-court-decision-chicagos-operation-clean-sweep. Though many felons are barred from public housing, some felons can qualify for § 8 HUD public housing programs, depending on how their state administers these programs and the specific felony of which they were convicted.

[49] Ekwall, *supra* note 25, at 12. *See* Richmond Tenants Org. v. Richmond Dev. & Hous. Auth., No. C.A. 3:90CV00576 (E.D.Va. Dec. 3, 1990).

[50] *Id.*

[51] *See, e.g., Coronavirus: Armed protesters enter Michigan statehouse*, BBC (May 1, 2020), https://www.bbc.com/news/world-us-canada-52496514; Abigail Censky, *Heavily Armed Protesters Gather Again At Michigan Capitol To Decry Stay-At-Home Order*, NPR (May 14, 2020), https://www.npr.org/2020/05/14/855918852/heavily-armed-protesters-

rights has been selectively manipulated and utilized to inflame white racial anxiety, and to frame Blackness as an inherent threat."[52] From Slave Codes motivated by the fear of insurrection, to the war on drugs and "law and order" rhetoric of the 1970s and 1980s,[53] racial subordination has remained a carefully (and not so carefully) couched motivator of American gun control legislation. In the past fifty years, such legislation has contributed extensively to the mass incarceration of Black and poor Americans.

II. THE IMPACT OF §922(G) AND OTHER MODERN GUN CONTROL STATUTES ON MASS INCARCERATION OF BLACK AND INDIGENT DEFENDANTS

Gun control discourse in America is not only racist; it also continues to center criminalization as a solution to gun violence. Section 922(g) is among the laws that criminalizes firearm possession, and, as a result, has contributed significantly to the mass incarceration of Black and poor Americans. In 2019, 76,538 cases charging unlawful possession of a firearm by a felon were reported to the U.S. Sentencing Commission.[54] Of these, 7,647 involved convictions under § 922(g), accounting for over 85% of federal firearm-related convictions.[55] Nearly 98% of the people convicted were men, and over 55% were Black.[56] In the Middle District of North Carolina, § 922(g) cases accounted for over one third of total criminal convictions in 2019.[57] Over 97% of the people convicted of federal felonies for unlawful firearm possession were given active prison sentences averaging 64 months.[58] Of those sentenced to prison, 15.6% were convicted of violating

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gather-again-at-michigans-capitol-denouncing-home-order; Associated Press, White bystanders armed with rifles watch Floyd protesters march in Indiana, POLITICO (June 5, 2020), https://www.politico.com/news/2020/06/05/george-floyd-protests-armed-white-bystanders-indiana-303143.

[52] Ines Santos, *Do Black Americans Have the Right To Bear Arms?*, ACLU (July 16, 2021), https://www.aclu.org/news/civil-liberties/do-black-people-have-the-right-to-bear-arms/.

[53] MICHELLE ALEXANDER, MASS INCARCERATION IN THE AGE OF COLORBLINDNESS, 45–58 (2012) (discussing President Nixon's use of "law and order" rhetoric to villainize Black Americans).

[54] U.S.SENT'G COMM'N, *supra* note 5.

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

one or more statutes that carry a mandatory minimum sentence.[59] The draconian mandatory minimums for firearm-related offenses arise from 18 U.S.C. § 924(c), which establishes a series of mandatory minimum sentences ranging from five years to life for people who possess, brandish, or use a firearm during a crime involving drugs or violence—even if the gun was legally acquired or sitting at home unloaded during the commission of the offense.[60]

As with the war on drugs and other "tough on crime" policies, the war on guns has created a number of negative outcomes for communities which further increase incarceration including aggressive policing on city streets, like "stop-and-frisk" policies.[61] Police stop-and-frisk policies are often criticized for targeting people of color for drug possession and open warrants en masse.[62] While these criticisms are correct, stop-and-frisk has also been successfully weaponized to target and incarcerate gun owners of color.[63]

The impact of gun legislation on prison populations has been astounding. A 2014 report from the Bureau of Justice Statistics estimates that fifty-one thousand people were locked up in state custody for public-order offenses involving a weapon—"carrying, exhibiting, firing, possessing, or selling a weapon."[64] That's nearly four percent of the total prison population in the states.[65] In the federal system, 30,500 people were incarcerated on weapons offenses as of the end of September 2014, or 15.8 percent of the total federal prison population.[66] These numbers likely underrepresent the true incarcerated population that has been convicted of firearm offenses or had their sentences increased by a firearm charge, because the Bureau of Justice Statistics only classifies offenders by their most serious offense.[67] Nearly a quarter of the 94,678 federal prisoners classified as drug offenders in 2012

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[59] *Id.*

[60] 18 U.S.C. § 924(c).

[61] Daniel Denvir, *A Better Gun Control*, JACOBIN (Sept. 5, 2016), https://www.jacobinmag.com/2016/09/gun-control-mass-incarceration-drug-war-nra-shooters.

[62] *Id.*

[63] Terry v. Ohio, 392 U.S. 1, 12 (1968).

[64] E. ANN CARSON, PH.D., U.S. DEPT. OF JUST., PRISONERS IN 2014, 16 (2015), https://www.bjs.gov/content/pub/pdf/p14.pdf.

[65] *Id.*

[66] *Id.* at 30.

[67] *Id.*

(sentenced since 1998) received a sentence involving weapons.[68] Roughly three quarters of federal drug offenders are also Black or Hispanic.[69]

III. U.S. V. GARY AND THE CIRCUIT SPLIT ON STRUCTURAL ERROR

A. U.S. v. Gary

The case of Michael Andrew Gary is just one example of how formerly incarcerated people of color become reinvolved in the criminal justice system as a result of § 922(g).[70] Gary was arrested on January 17, 2017, in Columbia, South Carolina, following a traffic stop for driving on a suspended license.[71] Gary's cousin, Denzel Dixon, was a passenger in the vehicle.[72] Officers searched Gary's vehicle and recovered a loaded firearm and a small plastic bag containing nine grams of marijuana.[73] Gary admitted to possessing both the gun and marijuana and was charged with the misdemeanor for violating South Carolina's open carry ban.[74]

Five months later, on June 16, 2017, Gary and Dixon were again approached by police while parked in a motel parking lot.[75] The officers reportedly smelled marijuana and decided to approach the vehicle.[76] When the officers confronted Gary and Dixon, they found Dixon holding a joint.[77] Gary and Dixon consented to a search of their persons, in which officers found large amounts of cash on both men and a digital scale in Dixon's

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[68] SAM TAXY, JULIE SAMUELS & WILLIAM ADAMS, U.S. DEPT. OF JUST., DRUG OFFENDERS IN FEDERAL PRISON: ESTIMATES OF CHARACTERISTICS 1 (2015), https://www.bjs.gov/content/pub/pdf/dofp12.pdf.

[69] *Id.* at 3.

[70] United States v. Gary, 954 F.3d 194, 198 (4th Cir. 2020).

[71] *Id.*

[72] *Id.*

[73] *Id.* at 199.

[74] *See* S.C. CODE ANN. § 16-23-30(C) (2008). In their panel opinion, the Fourth Circuit mistakenly characterized this as a "charge[ ] under state law with possession of a firearm by a convicted felon." Gary's brief to the Supreme Court confirms that he was first charged under § 16-23-30. *See* Brief in Opposition at 1 n.1, United States v. Gary, 954 F.3d 194 (4th Cir. 2020) (No. 20-444).

[75] *Gary*, 954 F.3d at 198.

[76] *Id.*

[77] *Id.* at 199.

pocket.[78] Gary and Dixon then consented to a vehicle search, where the officers found a stolen firearm, ammunition, "large amounts" of marijuana in the trunk, and baggies inside a backpack.[79] Gary claimed possession of the firearm and said that he regularly carried a firearm for protection.[80] Dixon admitted to possession of the marijuana.[81] Gary was arrested and charged under state law with possession of a stolen handgun.[82] At the time of the arrest, Gary had a prior felony conviction for which he had not been pardoned.[83]

Soon, federal authorities got involved. A federal grand jury in the District of South Carolina indicted Gary on two counts—one for his conduct on January 17, 2017 and one for his conduct on June 16, 2017—of possessing a firearm as a felon in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).[84] The state charges were subsequently dropped, and Gary plead guilty to the two federal charges without a plea agreement.[85] During his plea colloquy, as required by law,[86] the government recited facts related to each of his firearm possession charges.[87] The court also informed Gary of the elements the government would be required to prove if he went to trial:[88] (1) that Gary had "been convicted of a crime punishable by imprisonment for a term exceeding one year;" (2) that he "possessed a firearm;" (3) that the firearm "travelled in interstate or foreign commerce;" and (4) that Gary possessed the firearm "knowingly; that is that he knew the item was a firearm and his possession of it was both voluntary and intentional."[89] Gary was not however informed of an additional element of his offense—that "he knew he had the relevant status

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[78] *Id*.

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.* at 198–199.

[85] *Id.* at 199.

[86] *See* FED. R. CRIM. P. 11(b)(3).

[87] *Gary*, 954 F.3d at 199.

[88] *Id.* Explaining the elements of each offense to which the defendant pleads guilty ensures that the plea is "voluntary and intelligent," and so constitutionally valid. *See* Brady v. United States, 397 U.S. 742, 747 (1970).

[89] *Gary*, 954 F.3d at 199.

when he possessed the firearm," in this case, the status of being a convicted felon.[90] Under *Rehaif v. United* States, this lack of information becomes problematic.[91] In *Rehaif*, the Supreme Court held that a defendant must know, at the time that he possessed the firearm, that he had been convicted of a felony in order to violate § 992(g)(1).[92] For Gary, this burden was never met. The district court nevertheless accepted Gary's guilty plea and sentenced him to 84 months in prison for each count, to run concurrently.[93]

Gary then appealed his sentence to the Court of Appeals for the Fourth Circuit.[94] Gary asserted that *Rehaif*, as well as the Fourth Circuit's opinion in *Lockhart*,[95] require his case be vacated because he pled guilty to two violations of 18 U.S.C. § 922(g)(1) without being informed that the offenses require he know his prohibited status at the time he possessed the firearm.[96] The Fourth Circuit did not question whether Gary's rights under *Rehaif* had been violated, but instead defined the question at hand as "whether a standalone *Rehaif* error required automatic vacatur of a defendant's guilty plea, or whether the error should instead be reviewed for prejudice under *United States v. Olano*."[97]

Chief Judge Gregory, writing for the panel, held that "a standalone *Rehaif* error satisfies plain error review because such an error is structural, which per se affects a defendant's substantial rights."[98] The panel thus held that *Gary* should be automatically remanded for structural error. The state petitioned for rehearing *en banc*, which was denied.[99] In his concurrence

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[90] *Id. See generally* Rehaif v. United States., 139 S. Ct. 2191, 2194 (2019).

[91] *Rehaif*, 139 S. Ct. at 2191.

[92] *Gary*, 954 F.3d at 199.

[93] *Id.*

[94] Brief for Appellant, U.S. v. Gary, 954 F.3d 194, 198 (4th Cir. 2020) (No. 18-4578).

[95] United States v. Lockhart, 947 F.3d 187 (4th Cir. 2020). In *Lockhart*, the Fourth Circuit held that the judge's failure to properly advise Lockhart of his sentencing exposure under the Armed Career Criminal Act, 18 U.S.C. § 924(e), along with the *Rehaif* error, "in the aggregate" were sufficient to establish prejudice for purposes of plain error review. *Id.* at 197.

[96] *Gary*, 954 F.3d at 198.

[97] *Id.* at 200; United States v. Olano, 507 U.S. 725 (1993) (holding that when an issue is not preserved for appeal, an appeals court only has authority to correct plain errors affecting substantial rights).

[98] *Gary*, 954 F.3d at 200.

[99] United States v. Gary, 963 F.3d 420 (4th Cir. 2020).

denying the *en banc* hearing, Judge Wilkinson argued that the *Rehaif* error could not have affected Gary's substantial rights because there was "no possibility . . . that Gary would not have pled guilty had he been informed of that which the government could so easily have proven."[100] Similarly, Justice Kavanaugh, writing for the majority in *Greer* (with which *Gary* was consolidated), agreed, adding that mere omission of an element of an offense (the *Rehaif* element here) does not alone render a guilty plea invalid.[101] I disagree.

B. The Substantial Rights Issue

To succeed under plain error review, a defendant must show that: (1) an error occurred; (2) the error was plain; and (3) the error affected his substantial rights.[102] Courts will generally correct such an error only if the error "seriously affects the fairness, integrity or public reputation of judicial proceedings."[103]

Gary argued that the first two prongs of plain error review were established by the decision in *Rehaif* itself—that an error occurred and that it was plain.[104] Gary also argues that the third element, an effect on his substantial rights, is also met, because he could not have knowingly and intelligently plead guilty without notice that the government was required to prove the *Rehaif* element, thus rendering his plea constitutionally invalid.[105]

The first two prongs of plain error review are not contested in *Gary*. The government concedes that the district court did err in failing to inform Gary of the *Rehaif* element.[106] The government contends however, and Judge Wilkinson agrees, that omission of this element from the plea colloquy did not affect Gary's substantial rights, because there is overwhelming evidence that he knew of his felony status prior to possessing the firearms.[107] The government and Wilkinson also defer to the nine other circuits that have considered this question since *Rehaif* was decided, all of which held that there

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[100] *Id.* at 421 (Wilkinson, J., concurring).

[101] United States v. Greer, 141 S. Ct. 2090, 2099-2100 (2021).

[102] United States v. Olano, 507 U.S. 725, 732 (1993).

[103] *Id.*

[104] United States v. Gary, 954 F.3d 194, 200 (4th Cir. 2020).

[105] *Id.*

[106] *Id.* at 201.

[107] United States v. Gary, 963 F.3d 420, 421 (4th Cir. 2020).

is no effect on a defendant's substantial rights where the evidence shows that the defendant knew of their status as a prohibited person at the time of their gun possession.[108] However, Gary's case differs from the prior circuit decisions referred to by the government and Wilkinson in a significant way—those courts did not consider whether the district court's acceptance of a guilty plea without informing the defendant of every element of the offense was a *constitutional error* that rendered his guilty plea invalid.[109] Consequently, those circuit decisions do not directly answer the question posed in *Gary*, whether this error is a *structural error* that affects the substantial rights of the defendant.

In his concurrence denying rehearing *en banc*, Wilkinson nonetheless sided with all nine other Circuits that have weighed in on this issue, refusing to accept *Rehaif* error as a structural one. Gary then petitioned the United States Supreme Court for a writ of certiorari.[110] The writ was granted, and the Supreme Court heard the case, consolidated in *Greer v. United States* on April 20, 2021.[111] Writing for the majority, Justice Kavanaugh held that in felon-in-possession cases under § 922(g)(1), a *Rehaif* error alone is not a basis for plain-error relief.[112] Kavanaugh further held that plain-error relief can only be granted in *Rehaif* error cases when the defendant can demonstrate on appeal that he would have presented evidence at trial that he did not in fact know he was a felon.[113]

IV. GARY'S GUILTY PLEA WAS CONSTITUTIONALLY INVALID, AND THUS AFFECTS HIS SUBSTANTIAL RIGHTS AS A *PER SE* MATTER.

Gary's guilty plea was "constitutionally invalid," because it was accepted without Gary being informed of the *Rehaif* element of the offense, and therefore the plea colloquy could not have been voluntarily and intelligibly entered into by Gary. Because Gary was not informed of the *Rehaif* element at his plea, what he did plead guilty to would not be a crime. The district court's error in accepting his unconstitutional guilty plea is a

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[108] *Id.* at 420.

[109] In none of the aforementioned cases was structural error considered. *See supra* note 5.

[110] United States v. Gary, 141 S.Ct. 974 (2021) (granting petition for writ of certiorari).

[111] United States v. Greer, 141 S.Ct. 2090 (2021).

[112] *Id.* at 2100.

[113] *Id.*

structural one, because it infringed upon his autonomy interest, or his interest in "mak[ing] his own choices about the proper way to protect his own liberty."[114] As a structural error, it affects his substantial rights regardless of the strength of the prosecution's evidence or whether the error affected the ultimate outcome of the proceedings.

Generally, for an error to be considered structural, it must have affected the outcome of district court proceedings.[115] However, the Supreme Court has recognized that where a conviction is based on a constitutionally invalid guilty plea, such as in *Gary*, even overwhelming evidence that the defendant would have pled guilty regardless does not validate the conviction.[116] In *Bousley v. United States*, the Supreme Court held that a guilty plea is constitutionally valid only to the extent it is "voluntary" and "intelligent."[117] A plea does not qualify as intelligent unless a criminal defendant first receives "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process."

It is on this key point that Judge Wilkinson – and subsequently Justice Kavanaugh –misidentify the issue with Gary's conviction. Wilkinson argues that the "*Rehaif* error could thus not have affected his substantial rights because there is no possibility, not to mention a reasonable probability, that Gary would not have pled guilty had he been informed of that which the government could so easily have proven."[118] In *Greer*, Justice Kavanaugh writes similarly that because Gary had been convicted of multiple felonies, to which he admitted at his plea colloquy, there is no reasonable probability that his outcome would be any different had he been informed of the *Rehaif* element.[119] This analysis is at best misplaced, and at worst intentionally misleading. As in *Bousley*, the question in the case of a constitutionally invalid guilty plea is not whether there is a reasonable probability that the defendant would have pled the same if they were informed of the *Rehaif* element; the question is instead whether the defendant's substantial rights

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[114] Weaver v. Massachusetts, 37 S. Ct. 1899, 1907–08 (2017).

[115] United States v. Ramirez-Castillo, 748 F.3d 205, 215 (4th Cir. 2014) (citing United States v. Olano, 507 U.S. 725, 734 (1993)).

[116] United States v. Dominguez Benitez, 542 U.S. 74, 84 n.10 (2004).

[117] 523 U.S. 614 (1998).

[118] United States v. Gary, 963 F.3d 420, 421 (4th Cir. 2020) (Wilkinson, J., concurring).

[119] Greer v. United States, 141 S.Ct. 2090, 2097–98 (2021).

were violated by omission of the *Rehaif* element.[120] Kavanaugh asserts that neither Gary nor Greer's substantial rights were in fact violated, because the omission of an element in a criminal proceeding, including jury instructions and plea colloquies, does not necessarily render a criminal proceeding unfair or unreliable, and is thus not a structural error that must be overturned.[121] In other words, Kavanaugh asserts that when a defendant enters a plea of guilty to an incomplete set of elements that, without the missing element, does not amount to a crime, this is not a structural error. Recall that Courts will generally only correct a structural error when it "seriously affects the fairness, integrity or public reputation of judicial proceedings."[122] Suggesting that this – pleading guilty to an incomplete set of elements that does not constitute a crime – could amount to anything but a lack of fairness and integrity, making a mockery of our judicial system, is an absurd disregard for the Fifth and Sixth Amendment protections normally available to criminal defendants.

A. The constitutional error in Gary is a structural error because it violates Gary's Fifth and Sixth Amendment rights.

Based on the *Rehaif* precedent from the Supreme Court, the Fourth Circuit panel found the district court's error in Gary's case to be structural, or affecting substantial rights regardless of impact on the trial.[123] The panel was correct here. This error is structural because it violated Gary's right to make a fundamental choice regarding his own defense in violation of his Sixth Amendment autonomy interest, and because he was deprived of his autonomy interest under the Fifth Amendment Due Process clause; the consequences of these deprivations in Gary's case are impossible to quantify.

The Sixth Amendment contemplates that "the accused ... is the master of his own defense," and thus certain decisions, including whether to waive the right to a jury trial and to plead guilty, are reserved for the defendant.[124] Gary had a constitutional right to arrive at his own informed decision on whether to exercise his right to go to trial or to submit a plea of guilty. When the district court accepted Gary's guilty plea after misinforming him of the

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[120] *Bousley*, 523 U.S. at 618 (holding that a guilty plea must be "voluntary" and "intelligent" in order to be constitutionally valid).

[121] *Greer*, 141 S.Ct. at 2100.

[122] United States v. Olano, 507 U.S. 725, 732 (1993).

[123] United States v. Gary, 954 F.3d 194, 205 (4th Cir. 2020).

[124] *Id.*

elements that the state needed to prove, the court unduly prejudiced his decision about how best to protect his liberty. Contrary to Judge Wilkinson's concurrence, Gary has no burden to demonstrate prejudice resulting from the error, because harm to a defendant is irrelevant to his or her Sixth Amendment right to make an informed decision.[125] What Gary pled guilty to was an incomplete set of elements which, under *Rehaif*, does not constitute a crime. Because he was misinformed of the elements of the crime he thought he was pleading guilty to, he thus lacked the ability to come to an informed decision when the plea was entered.

Similarly, Gary was denied his Fifth Amendment due process clause rights. When he pled guilty, he waived his right to a trial by jury, his privilege against self-incrimination, and his right to confront his accusers. Informed by the Supreme Court holding in *United States v. Gonzalez-Lopez*, the Fourth Circuit panel finds a structural error where "the precise effect of the violation cannot be ascertained."[126] It is simply not possible to quantify what impact Gary's waiving of constitutional rights based on an unconstitutional plea could have had. There is no way for the court to know how Gary's counsel, but for the error, would have advised him, what evidence may have been presented in his defense, and what choice Gary would have ultimately made about accepting a plea or going to trial if he had been informed of the *Rehaif* element. With no way to gauge the intangible impact of an unconstitutional guilty plea, the panel found there was no way to determine whether the error was harmless or not.[127]

A defendant's status is *the* defining element of a §922(g) offense.[128] Whether or not a defendant knowingly meets the status element of a §922(g) offense is the difference between innocent and incarcerated. Unfortunately for Michael Andrew Gary, the district court failed to inform him of this element, and thus his decision to waive his constitutional rights was based on an error that is uncontestably unconstitutional. Gary's Sixth and Fifth Amendment rights were violated when the district court accepted his constitutionally invalid plea, depriving him of due process and his autonomy

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[125] McKaskle v. Wiggins, 465 U.S. 168, 177 (1984).

[126] *Gary*, 954 F,3d at 206 (quoting *Gonzalez-Lopez*, 548 U.S. 140, 149 (2006)).

[127] *Id.*

[128] Rehaif v. United States, 139 S. Ct. 2191, 2194 (2019).

interest in making an informed and intelligent decision on how best to protect his liberty. The panel was correct in vacating his plea and remanding his trial.

B. Like §922(g) generally, refusing structural error in these cases disproportionately harms Black and indigent defendants

The implications of this structural error issue reach far beyond Michael Gary, compounding the racially disparate impacts of gun control legislation like The Gun Control Act of 1968. As illustrated above, Section 922(g) was passed in order to prevent the armament of Black Americans.[129] The law has been successful in preventing a disproportionate number of Black Americans from owning guns.[130] Holding that the omission of the *Rehaif* element is not a structural error would continue that racialized legacy. Such a holding would offer fewer protections to those being prosecuted under § 922(g) than other defendants in the criminal justice system, who are entitled to know what they're pleading to and cannot be convicted, even by a guilty plea, for an act that does not meet all of the elements of an offense. Because § 922(g) defendants are disproportionally Black and indigent,[131] the defendants who are stripped of this basic right of criminal adjudication in § 922(g) cases will also be disproportionally Black and indigent, further perpetuating race and class disparities within our criminal justice system.

In cases where § 922(g) defendants accept guilty pleas, as Gary did, these disparities are compounded further. An overwhelming 97% of criminal cases are resolved by guilty plea.[132] Of those cases, Black defendants are more likely than white defendants to be offered plea bargains with an active prison sentence and are less likely to be offered a charge reduction.[133] Indigent defendants face additional pressure to accept guilty pleas, as a lack of funding

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[129] *See supra* notes 34–42 and accompanying text.

[130] *See* U.S. SENT'G COMM'N, *supra* note 5.

[131] *See supra* notes 118-126 and accompanying text.

[132] *Report: Guilty Pleas on the Rise, Criminal Trials on the Decline*, INNOCENCE PROJECT, https://innocenceproject.org/guilty-pleas-on-the-rise-criminal-trials-on-the-decline/ (last visited April 10, 2021).

[133] Gene Demby, *Study Reveals Worse Outcomes for Black and Latino Defendants*, NPR (July 17, 2014),

https://www.npr.org/sections/codeswitch/2014/07/17/332075947/study-reveals-worse-outcomes-for-black-and-latino-defendants; Christi Metcalfe & Ted Chiricos, *Race, Plea, and Charge Reduction: An Assessment of Racial Disparities in the Plea Process*, 35:2 JUST. Q. 223, 242 (2018).

and high caseloads often lead public defenders to encourage clients to accept a plea bargain.[134] Additionally, the costs of litigation, as well as time in pretrial detention for those that cannot afford bail, can be coercive in nature,[135] further driving defendants towards guilty pleas. These impacts weigh heavily on Black defendants, who are disproportionately likely to be poor and indigent.[136]

In addition to being more likely to be indigent, Black defendants, particularly young Black men, represent the majority of § 922(g)(1) defendants. As noted above,[137] a 2020 sentencing commission report found that in fiscal year 2019, 98% of the nearly 8,000 defendants convicted of a § 922(g) offense were male, and over 55% were Black.[138] Their average age was 35.[139] Because over 90% of these defendants are pleading guilty and receiving racially disparate sentencing outcomes,[140] *Rehaif* error thus disproportionately impacts poor and Black defendants.

Michael Andrew Gary provides a telling example. Gary is a thirty-year-old, indigent Black male.[141] He was represented in his Fourth Circuit proceedings by a federal public defender.[142] Gary had been previously incarcerated when he was arrested for unlawful possession of a firearm in South Carolina, there had been no violence involved, and he cooperated

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[134] Jeanette Hussemann & Jonah Siegel, *Pleading Guilty: Indigent Defendant Perceptions of the Plea Process*, 13 TENN. J. L. & POL'Y 459, 466 (2019).

[135] Nick Petersen, *Do Detainees Plead Guilty Faster? A Survival Analysis of Pretrial Detention and the Timing of Guilty Pleas*, 31 CRIM. JUST. POL'Y REV. 1015, 1015 (2019) (finding that pretrial detainees plead 2.86 times faster than released defendants).

[136] *See* Rebecca Marcus, *Racism in Our Courts: The Underfunding of Public Defenders and Its Disproportionate Impact upon Racial Minorities*, 22 HASTINGS CON. L.Q. 219, 234-35 (1994).

[137] *See supra* Part II.

[138] *See generally*, U.S. SENT'G COMM'N, QUICK FACTS: FELON IN POSSESSION OF A FIREARM (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY20.pdf.

[139] *Id.*

[140] *See* Demby, *supra* note 128; *see also* Metcalfe & Chiricos, *supra* note 128, at 242 (2018).

[141] *See Kershaw County Man Pleads Guilty to Federal Gun Charges*, U.S. ATT'Y'S OFF. DIST. S.C. (2018), https://www.justice.gov/usao-sc/pr/kershaw-county-man-pleads-guilty-federal-gun-charges.

[142] Gary v. United States, 954 F.3d at 194.

willingly with the arresting officers.[143] He is now incarcerated again for exercising a right to bear arms that is otherwise protected by the United States Constitution for people who have not been convicted of a felony. And that incarceration was based on his plea to behavior that, without the missing *Rehaif* element, is simply not a crime.

CONCLUSION

Few issues in American political discourse are as divisive as gun control. America no doubt has a gun violence problem to reckon with—Americans have more firearms per capita and suffer more deaths from gun violence than any other high income, populous nation.[144] Thirty-nine thousand Americans die every year from gun violence, or an average of 100 per day.[145] Mass shootings have repeatedly shaken and devastated the country; there were over 400 in 2019.[146] Gun violence also disproportionately impacts communities of color. Black men make up 52% of all gun homicide victims in the United States, despite comprising less than 7% of the population.[147]

While these devastating statistics fuel an ongoing debate about imposing stricter gun control policies, lawmakers and gun control advocates must be careful in constructing regulations to ensure that the impact is not racially disparate, further contributing to the disarmament and mass incarceration of Black Americans. It is also critical that gun control advocates recognize the racialized narrative surrounding gun control in America and the racialized history of such statutes as they craft policy that protects Americans from gun violence through non-carceral solutions. Examination of existing gun control statutes, such as § 922(g), and the ways that these laws have been racially motivated is critical to rewriting the American gun control narrative and moving toward effective, common-sense, gun control policy that does not

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[143] *Id* at 198–99.

[144] Erin Grinshteyn & David Hemenway, *Violent Death Rates: The US Compared with Other High-income OECD Countries, 2010*, 129 AM. J. MED. 266, 266–73 (2016).

[145] *Statistics*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, https://giffords.org/lawcenter/gun-violence-statistics/#national-anchor (last visited Apr. 11, 2021).

[146] Jason Silverson, *There Were More Mass Shootings than Days in* 2019, CBS (Jan. 2, 2020), https://www.cbsnews.com/news/mass-shootings-2019-more-than-days-365/.

[147] *Statistics*, *supra* note 145.

inflict further harm on Black Americans. Addressing structural errors when defendants charged with these statutes are deprived of their constitutional rights is a part of rewriting that narrative.

RELIANCE ON A JUDICIAL LIFELINE: *STATE V. ROBINSON* AND NORTH CAROLINA'S PARTISAN BATTLE FOR THE RACIAL JUSTICE ACT

ADREANNA B. SELLERS*

INTRODUCTION

Nearly two and a half centuries after the founding of our republic, sections of the American public are finally beginning to understand, recognize, and address systemic racism and the shameful stain that has marked our nation since its inception. Even after the ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments to the U.S. Constitution—which finally realized a constitutional guarantee of African Americans' most basic civil rights—many states continued to limit the political and social equality of Black Americans through Jim Crow laws passed specifically to re-entrench white supremacy.[1] Many laws disallowed Black individuals' service on juries.[2] Others diminished Black Americans' stake in representative government through voter suppression and racial

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[1] *See, e.g.,* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOR BLINDNESS 29-31 (2010).

[2] *See* RICHARD WORMSER, THE RISE AND FALL OF JIM CROW 70 (2003).

gerrymandering.[3] The presence of racism in our political and legal processes is an enduring issue that our nation is continuously grappling with and working to remedy today.

Systemic racism has been particularly difficult to address in our nation's courts. In an attempt to address this problem in North Carolina's judicial system, the North Carolina General Assembly passed the Racial Justice Act (RJA) in 2009.[4] The RJA created an affirmative defense for individuals sentenced to death which dissolved the death sentence if the defendant could make a showing of racial bias in jury selection practices or in the application of the death penalty at the time of their sentence.[5] If a defendant could show that racial bias impacted their sentencing, they could serve life in prison without the possibility of parole instead of being put to death.[6] The RJA was one of the first of its kind in the country.[7] Today, California is the only other state with a similar law to protect criminal defendants from being put to death when racial bias infected the judicial process.[8]

The RJA was repealed by the newly-elected Republican majority in the North Carolina General Assembly in 2013.[9] This repeal was also expressly retroactive.[10] As a result, criminal defendants who had utilized the RJA to challenge their capital sentences were left in confusion. Marcus Reymond Robinson, a Black man who had been sentenced to death at the age of eighteen, was one of the individuals whose future was jeapordized by the partisan repeal of an Act which was meant to target the effects of discriminatory prosecution in the first place. In 2012, while the RJA was still

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[3] *See* HENRY LOUIS GATES, JR., STONY THE ROAD: RECONSTRUCTION, WHITE SUPREMACY, AND THE RISE OF JIM CROW 44-45 (2019).

[4] North Carolina Racial Justice Act, S.L. 2009-464, 2009 N.C. Sess. Laws 1213.

[5] State v. Robinson, 375 N.C. 173, 187 (2020).

[6] Act of June 19, 2013, S.L. 2013-151, § 5(a), 2013 N.C. Sess. Laws 368, 372.

[7] *See* Floyd B. McKissick Jr., N.C. Supreme Court's review of bias can continue state's progress on race of bias, News and Observer (March 12, 2018), https://www.newsobserver.com/opinion/op-ed/article204345389.html#storylink=cpy; *see also* Joseph Neff and Beth Schwartzapfel, New Hope for People Who Claim Racism Tainted Their Death Sentence, The Marshall Project (June 11, 2020), https://www.themarshallproject.org/2020/06/11/new-hope-for-people-who-claim-racism-tainted-their-death-sentence.

[8] California Racial Justice Act of 2020, ch. 317, sec. 1473 (2020).

[9] S.B. 306, Sess. 2013, (N.C. 2013).

[10] *See id*.

on the books, Robinson had been resentenced to life in prison and removed from death row. It was unclear how the repeal of the RJA would affect his resentencing. Robinson appealed to the North Carolina Supreme Court, arguing that the General Assembly's decision to make repeal of the RJA retroactive to cases already decided under the law violated his right against double jeopardy under the North Carolina Constitution.[11] In an opinion written by former Chief Justice Cheri Beasley, the Court agreed with Robinson, holding that the retroactivity provision of RJA's repeal violated Robinson's rights.[12] Robinson was then removed again from death row.

The decision of the Court is both powerful and damning. Why would the legislature want to make it harder for defendants to prove that there was racial bias in the criminal process that seeks to put them to death? Why, after Black defendants are able to show by a preponderance of the evidence in a court of law that racial bias did in fact impact their capital sentencing, did the legislature think it still appropriate to put these defendants to death?

The state's judiciary has emerged as one of the last safeguards for Black and brown people attempting to escape the often-deadly clenches of racist discrimination within our state's political systems. Our state's legislature, creating policy from an all-White caucus that seems apathetic to the lives of Black and brown North Carolinians,[13] bears down firmly and unfairly on criminal defendants in the state. Even when Black and brown individuals accused of a crime, criminal culpability aside, can prove that racial bias and systemic racist factors impacted their trial or sentencing, North Carolina's Republican General Assembly is intent on ensuring that these individuals are

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[11] *Robinson*, 375 N.C. at 183 (2020).

[12] *Id*. at 192.

[13] The North Carolina General Assembly has been controlled by Republicans since 2010. *Gen. Assembly of N.C.*, BALLOTPEDIA, https://ballotpedia.org/General_Assembly_of_North_Carolina. Every member of the Republican caucus of the General Assembly in 2011, when the General Assembly first attempted to repeal the RJA, was White and the 25 representatives who were Black were also Democrats. *N.C. Gen. Assembly 2011 Senate Demographics,* OFFICE OF THE SENATE PRINCIPAL (Oct. 18, 2012), https://www.ncleg.gov/DocumentSites/SenateDocuments/2011-2012%20Session/2011%20Demographics.pdf; *149th Session 2011-2012 House of Representatives,* OFFICE OF THE HOUSE PRINCIPAL CLERK (Dec. 4, 2012), https://www.ncleg.gov/DocumentSites/HouseDocuments/2011-2012%20Session/2011%20Demographics.pdf; *see also* Gene Nichol, Indecent Assembly, 27 (2020).

put to death by the state.[14] It has taken a decade and a state supreme court that is committed to upholding justice, fairness, and equity to prevent the deaths of Mr. Robinson and many others.

I. RJA HISTORY AND LEGISLATIVE INTENT

In 1986, the U.S. Supreme Court decided *Batson v. Kentucky*, and held that prosecutors or defense attorneys using peremptory challenges to intentionally strike jurors because of their race violate both the Due Process and Equal Protection clauses of the 14th Amendment.[15] Since this decision, criminal defendants have been able to make *Batson* challenges to potentially discriminatory strikes of jurors. At the time of the *State v. Robinson* opinion however, the North Carolina Supreme Court had never applied the *Batson* rule to protect a criminal defendant from the discriminatory use of a peremptory strike by a prosecutor.[16] The Court finally recognized a *Batson* violation for the first time in 2022.[17]

In August of 2009, the North Carolina legislature enacted the Racial Justice Act (RJA) in an attempt to remedy the apparent failings of the North Carolina judiciary to shield criminal defendants from being put to death after a trial that was compromised by intentional racial discrimination.[18] The Act provided that "[n]o person shall be...given a sentence of death...pursuant to any judgment that was sought or obtained on the basis of race."[19]

The RJA provided defendants with several methods of establishing the existence of racial discrimination in their sentencing.[20] Courts could consider both statistical data and sworn testimony as evidence of racial bias in jury selection or in imposing the death penalty.[21] The defendant challenging their sentence bore the burden of proof.[22] The State could also use statistical

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[14] *See* S.B. 306, 151st Gen. Assemb., 2013-2014 Session (N.C. 2013).

[15] Batson v. Kentucky, 476 U.S. 79 (1986).

[16] *Robinson*, 846 S.E.2d at 716.

[17] *See State v. Clegg*, 867 S.E.2d 885 (2022).

[18] *See Robinson*, 846 S.E.2d at 714.

[19] N.C. Gen. Stat. § 15A-2010 (2009) (repealed 2013).

[20] *Id.* § 15A-2011.

[21] *Id.* § 15A-2011(b).

[22] *Id.* § 15A-2011(c).

evidence to rebut the defendant's claim of racial bias.[23] If the defendant proved their case, he or she was then entitlted to a vacatur of their death sentence and then the resentencing of imprisonment for life without the possibility of parole.[24]

When the RJA was originally passed in 2009, the North Carolina legislature explicitly made the law's effects retroactive so that defendants on death row could take advantage of the RJA's new protections.[25] Defendants who had already been sentenced to death before the enactment of the RJA and who wished to challenge their sentence under the RJA had to file a motion for relief in their previously-closed criminal case within a year of the enactment of the RJA.[26]

Dissatisfied with the use of this statutory remedy created by the Democrat-controlled legislature, the North Carolina General Assembly, now controlled by Republicans, sought to make it harder for defendants to obtain relief. The legislature began its attempts to repeal the RJA in 2011.[27] However, the repeal was thwarted by Governor Beverly Perdue's veto.[28]

In 2012, the Republican North Carolina General Assembly tried again to thwart the RJA, this time by amending it.[29] The amendment changed the evidentiary standards by which defendants could prove racial discrimination in their trials.[30] The amendment required defendants to be much more specific in their showing of bias; instead of proving that racial bias existed in jury selection or the use of the death sentence in the entire state, judicial district, or county, the amended RJA required defendants to show that "race was a significant factor in decisions to seek or impose the sentence of death *in the county or prosecutorial district*" where the defendant was charged with a capitol crime or sentenced to death.[31] By requiring evidence of racial bias in a more narrow jurisdiction, defendants could not rely on more general, state-wide evidence of systemtic racism. Additionally, the amended RJA barred

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[23] *Id.* § 15A-2011(c).

[24] *Id.* § 15A-2012(a)(3).

[25] 2009 N.C. Sess. Laws 1215.

[26] *Id*.

[27] *See* S.B. 9, 149th Gen. Assemb., 2011-2012 Session (N.C. 2011) (vetoed).

[28] *Id*.

[29] S.B. 416, Sess. 2011, (N.C. 2011).

[30] *Id.* § 15A-2011(a).

[31] *Id.* § 15A-2011(c) (emphasis added).

defendants from using statistics alone to prove racial bias in capital sentencing.[32] Defendants were further required to state the precise way that racial bias influenced their case or capital sentencing.[33] Taken together, the amendments to the RJA significantly increased defendants' burden of proof, making it far more difficult to prove their case and reverse their capital sentences.

Despite the difficulties imposed by the amended RJA, multiple defendants were nevertheless able to successfully challenge their criminal convictions under it. In reaction, the Republican-controlled General Assembly entirely repealed the RJA in 2013.[34] To more completely cut off relief under the Act, the General Assembly explicitly provided that the law's repeal applied retroactively to "any motion of appropriate relief" that had been filed under the RJA, including cases that had already been decided under the law.[35] Many assumed that the retroactivity provision in the repeal would effectively resentence defendants to death after their lives had been spared by the Act.

II. *STATE V. ROBINSON*

Marcus Reymond Robinson was one of the individuals most affected by the North Carolina legislature's decision to include a retroactivity provision in its repeal of the Racial Justice Act. In 1995, Marcus Robinson had been sentenced to death after a jury found him guilty of first-degree murder in Cumberland County, North Carolina.[36] Once sentenced, Robinson became the youngest person on death row in the state. He immediately began fighting the capital sentence in the courts. On direct appeal, in which Robinson did not raise the issue of racial bias, the North Carolina Supreme Court affirmed his sentence.[37] Over the next decade, Robinson made numerous claims of constitutional error, all of them ultimately unsuccessful in reversing his sentence to death.

Robinson was still living on North Carolina's death row in 2009, when the RJA was passed. In August of 2010, within the RJA's original period for

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[32] *Id.* § 15A-2011(e).

[33] *Id.* § 15A-2011(d).

[34] S.B. 306, § 5(b) (N.C. 2013).

[35] *Id*. § 5(d).

[36] *See* State v. Robinson, 342 N.C. 74 (1995).

[37] *Id*. at 91.

challenging previous capital convictions and fifteen years after his original trial had concluded, Robinson filed a motion for appropriate relief under the RJA. His case was the first RJA suit to be considered on the merits of a racial bias claim.[38] Robinson successfully showed that racial bias had tainted his sentencing. Among the evidence presented was expert testimony from scholars at the Michigan State University College of Law scholars, who provided a thorough report on jury selection in the case.[39] The report demonstrated that, of the 7,400 jurors that the State might have struck in criminal cases across the state, prosecutors struck 56% of Black jurors, but struck jurors of other races at a rate of only 24.8%.[40] Additionally, of 173 capital proceedings conducted during that same period, seventy three proceeded before juries that were either all White or had only one Black juror.[41] Robinson also presented testimony from Bryan Stevenson—the legal director of the Equal Justice Initative and author of *Just Mercy*—as well as other legal scholars who specialize in studying the racial biases of our society and court system.[42] In light of this evidence, the court found that Robinson met his burden by demonstrating that race was a significant factor in North Carolina jury selection at the time of Robinson's capital trial and sentencing.[43] Under the RJA at the time,[44] the court order vacated Robinson's death sentence and re-sentenced him to life in prison without the possibility of parole.[45]

After the amendment, defendants still filed for relief under the Racial Justice Act. Similar to Robinson, Tilmon Golphin, Christina Walters, and Quintel Augustine were each convicted of first-degree murder and sentenced to death.[46] Each of them filed a motion for appropriate relief in August of

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[38] State v. Robinson, No. 91-23143, at 28 (N.C. Super. Ct. Apr. 20, 2012) (order granting motion for appropriate relief).

[39] *Id.* at 44.

[40] *Id*. at 56, 59.

[41] *Id*. at 104.

[42] *See id*. at 8.

[43] *See id*. at 1.

[44] S.B. 416 *supra* note 23.

[45] *Robinson*, 375 N.C. at 167.

[46] State v. Golphin, No. 47314-15 (N.C. Super. Ct. Dec. 13, 2012) (order granting motion for appropriate relief).

2010, challenging their death sentences under the Racial Justice Act.[47] Golphin, Walters, and Augustine were able to meet their burden of proof to show that racial bias influenced jury selection in North Carolina at the time of their trials.[48] Thus, the Court ordered that they were entitled to relief under the Racial Justice Act. Golphin, Walters, and Augustine's death sentences were vacated, and they were each sentenced to life in prison without the possibility of parole.[49]

The amendments to the Racial Justice Act, although severe, did not prevent defendants from being successful in showing that racial bias affected their sentencing and the decision making of the prosecutors in their districts. Following Golphin, Walters, and Augustine's success under the RJA, the Act was repealed in 2013.[50] At a joint hearing, the Cumberland County Superior Court found that Robinson, Golphin, Walters, and Augustine's motions for appropriate relief were retroactively voided by the repeal of the Racial Justice Act.[51] Repeal of the law, in other words, left the RJA proceedings entirely without effect. This placed all of the defendants back on death row, their capital sentences reinstated. Robinson filed a writ of certiorari to the North Carolina Supreme Court claiming the reinstatement of his death sentence under the retroactivity provision of the Racial Justice Act's repeal law violated his right to be protected from double jeopardy under the North Carolina Constitution to be protected from double jeopardy.[52] That claim is the subject of the next section.

III. PROTECTION FROM DOUBLE JEOPARDY

Double jeopardy is one of the most well-known protections in American criminal law. The Double Jeopardy Clause is enshrined in the Fifth Amendment of the United States Constitution and applies to the states through the Fourteenth Amendment. [53] The protection from double jeopardy was included in the Bill of Rights to shield citizens from excessive prosecution or harassment by the government, which has the resources to

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[47] *Id*. at 7-8.

[48] *Id*.

[49] *Id.* at 210.

[50] S.B. 306, § 5(b) (N.C. 2013).

[51] *Robinson*, 375 at 182.

[52] *Id.* at 183.

[53] Benton v. Maryland, 395 U.S. 784, 794 (1969).

doggedly pursue an individual with criminal charges.[54] The clause prohibits any person from being "twice put in jeopardy of life or limb" for the same offense.[55] This prohibition includes retrial for the same offense after the defendant has been acquitted,[56] retrial for the same offense after the defendant has been convicted,[57] and the imposition of multiple punishments for the defendant's same offense unless a legislature specifically authorizes such cumulative punishment.[58]

In North Carolina, the double jeopardy principle is not as expressly stated in the state constitution as it is in our federal constitution. The same double jeopardy protection nevertheless exists within the "Law of the Land" clause of the North Carolina constitution.[59] The "Law of the Land" doctrine holds that "[n]o person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land."[60] Although the federal double jeopardy principle applies here too because it was incorporated to the States by the Fourteenth Amendment, the North Carolina Supreme Court relies upon the North Carolina constitution's double jeopardy principle in this case.

A defendant may raise double jeopardy as a shield only after completing a first jeopardy, meaning their criminal case has culminated in a conviction or an acquittal.[61] If the State fails to prove their burden of guilt and the defendant is adjudged not guilty, the defendant has been acquitted of the charges. Once the defendant's trial results in a conviction or an acquittal, even if the acquittal is erroneous, the principle of double jeopardy protects the defendant from being retried or repunished for the same crime.[62] The same principle holds true in the context of capital sentencing hearings. At sentencing, the State must show that an aggravating circumstance existed in

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[54] *See* Green v. United States, 355 U.S. 184, 187, 78 S.Ct. 122, 2 L.Ed.2d 76 (1957).

[55] U.S. CONST. amend. V.

[56] *See* Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970).

[57] *See* Brown v. Ohio, 432 U.S. 161, 168–169 (1977).

[58] *See* Missouri v. Hunter, 459 U.S. 359, 368-69 (1983).

[59] N.C. CONST. art. I, § 19; *see* State v. Sanderson, 488 S.E.2d 133, 136 (N.C. 1997).

[60] N.C. CONST. art. I, § 19.

[61] *See* State v. Sanderson, 488 S.E.2d 133, 136 (N.C. 1997).

[62] *See* Fong Foo v. United States, 369 U.S. 141, 142 (1962).

the commission of the crime in order to sentence the defendant to death.[63] Under the law of *State v. Sanderson*, North Carolina's double jeopardy protection also applies to capital sentencing proceedings "after there has been a finding that no aggravating circumstance is present."[64] If the State fails to demonstrate an aggravating circumstance at the capital sentencing proceeding, the State cannot secure a death sentence, and the defendant is considered to be acquitted of the death penalty.[65] The state cannot then re-try the defendant for death; the double jeopardy clause protects the defendant's acquittal from the capital sentence, just as it does his conviction of the underlying crime.

IV. APPLYING THE PROTECTIONS TO ROBINSON'S CASE

Robinson's writ to the North Carolina Supreme Court raised this double jeopardy principle as a defense against the legislature's attempt to make a repeal of the RJA retroactive to his case. At the trial court hearing on Robinson's claim, the trial court held that the RJA was not an ex post facto law but did not rule on whether Robinson's double jeopardy protection had been triggered.[66] Robinson appealed that decision to the North Carolina Supreme Court. The Supreme Court ruled that the trial court erred by not considering Robinson's claim that the relief he obtained in his suit brought under the RJA was an acquittal from a death sentence, and so he was protected from reconsideration under the double jeopardy clause.[67] The Court further explained that the Racial Justice Act provided criminal defendants with an affirmative defense against the death penalty and, when used successfully, resulted in an acquittal of the death pentalty.[68] Thus, once Robinson was acquitted of the death pentaly under the RJA, his right to be protected from double jeopardy shielded him from further punishment.[69] The decision effectively reverted Robinson's death sentence back to life in prison without the possibility of parole as provided by the Act.[70]

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[63] *See Sanderson*, 488 S.E.2d at 137.

[64] *Id.* at 138.

[65] *Id*.

[66] State v. Robinson, 846 S.E.2d 711, 719 (2020).

[67] *Id.*

[68] *Id.* at 722.

[69] *Id*. at 719.

[70] *Id.*

The Court's decision was explained in part by reference to federal double jeopardy law. In her majority opinion, Chief Justice Beasley likened Robinson's case to *Burks v. United States*.[71] In *Burks*, the Supreme Court of the United States held that the double jeopardy clause of the Fifth Amendment prevented the federal government from trying the defendant a second time after the trial court determined that the government had failed to rebut Burks's affirmative defense of insanity.[72] Chief Justice Beasley reasoned that the intent of North Carolina's General Assembly in passing the RJA had been to provide defendants with an affirmative defense to a sentence of death. Just as in *Burks*, the State had the opportunity to rebut the affirmative defense.[73] But because Robinson made his showing of racial bias, proving that he was entitled to the affirmative defense, and because the State could not and did not rebut Robinson's showing, the Court held that Robinson's jeopardy had effectively terminated and could not be revisited without violating his constitutional rights.[74] The trial court even highlighted the State's failure to rebut Robinson's extensive showing of racial bias in North Carolina's prosecutorial system.[75] It had simply not followed that observation through to its legal ramifications. Since Robinson's evidentiary proffer was sufficient and the State failed to rebut it, he had been acquitted from the death penalty. Any re-sentencing would then subject Robinson to double jeopardy and violate his constitutional rights.[76]

Chief Justice Beasley's opinion for the Court sharply criticized the law that created the mess. The opinion observed that the General Assembly, through statutory fiat, sought to resentence Robinson and other defendants to death, even after those individuals had demonstrated that racial bias existed in jury selection at the time of their capital sentencing, and despite the State's inability to rebut that showing.[77] The Court's opinion also pointed to the historic rationale of the double jeopardy principle itself, noting "[i]f our constitution does not permit the State to use its power and resources over and over to . . . impose the death penalty, it certainly does not allow the state to

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[71] *Id.* at 722 (referencing Burks v. United States, 437 U.S. 1 (1978)).

[72] Burks v. United States, 437 U.S. 1, 1 (1978).

[73] *Robinson* at 722.

[74] *Id.* at 719.

[75] *Id.* at 718.

[76] *Id.* at 722.

[77] *Id.* at 723.

use that same power and resources to eliminate the remedy after a defendant has successfully proven his entitlement to that relief."[78] This decision reinstates Robinson's life sentence and ensures him of the protection of life and liberty that were violated by the General Assembly's unconstitutional move.[79]

CONCLUSION

Robinson should be lauded for championing age-old constitutional principles that protect criminal defendants' most basic and essential rights. But there is also much more to be desired here. The Racial Justice Act, hailed as a novel, progressive statutory move by North Carolina's legislature, still allowed defendants who can prove that racist discrimination touched their trials to spend their lives in prison without the possibility of parole.

Additionally, the RJA is no longer good law in North Carolina. Consistent with a problematic and troubling historical trend, the North Carolina General Assembly, controlled by an all-White, Republican supermajority, amended and then repealed this imperfect but important statutory remedy for defendants whose criminal trials may have been irredemibly compromised by racist tactics in jury selection and the imposition of capital sentences. As a result, Marcus Robinson had been imprisoned for nearly thirty years. Defendants currently on death row with potentially successful claims of racial discrimination in their trials must now rely on *Batson* challenges, which notably has only ever been successfully used in North Carolina once.[80]

The dearth of opportunities for relief for imprisoned individuals exacerbates the already troubling state of North Carolina's death row. North Carolina has the sixth largest death row in the United States.[81] More than 40% of people living on death row in the United States are Black, and in North Carolina that percentage rises to 53%.[82] In creating the Racial Justice Act, the North Carolina legislature was, in part, recognizing and responding to the

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[78] *Id.*

[79] *Id*.

[80] *Clegg*, *supra* note 17.

[81] *Death Row Prisoners by State: July 1, 2020,* DEATH PENALTY INFO. CTR., Dec. 14, 2020 https://files.deathpenaltyinfo.org/documents/pdf/FactSheet.f1608589384.pdf.

[82] *Id*.

racial inequalities of capital punishment in North Carolina.[83] Once the North Carolina General Assembly did not like the way that individuals were using the remedies that the RJA gave them, they simply eliminated the remedy. The North Carolina Supreme Court had to step in to keep the legislature's actions from infringing upon the rights of Robinson and many other who sought refuge under the Act.

The power and potential of our judicial systems to not only create vast and sweeping societal change but also to uphold life-saving protections is clear. With each passing election cycle, the North Carolina Supreme Court's justices, each of them enacting their own unique and changing judicial philosophy, may shift. The racial disparities that we see in access to justice and to our political systems persist in North Carolina. The first Black woman to serve as Chief Justice of the North Carolina Supreme Court, who wrote this opinion, lost her seat in the 2020 election. Two NC Supreme Court seats are on the ballot in 2022, and they have the potential to completely reverse the partisan and ideological control of the Court for years to come. *Robinson* illustrates the importance of the preservation of individual and civil rights, but it is just as important to preserve the historically-contextualized and socially-conscious rationale that produced *Robinson.* For now, the Court was able to use its power as a shield to successfully twart racist legislative behavior and protect Mr. Robinson's rights. As the Court shifts, its power may be used to impact the future of the death penalty in North Carolina for decades to come.

[83] North Carolina Racial Justice Act, S.L. 2009-464, 2009 N.C. Sess. Laws 1213.