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ACKNOWLEDGEMENTS

This past year has been challenging for all of us. We have faced unprecedented times, and despite this, the *Capstone Journal of Law and Public Policy* has persevered. This is all thanks to the dedication of our editors and authors. Throughout this academic year, our editors have continued to hone their legal editing skills. The implementation of those skills brought you the final product that you will read. I am confident that the hard work of both our editors and authors will be evident on the following pages.

In addition to my sincerest gratitude for our editors and authors, I want to specifically thank our wonderful Editor in Chief, Katie Kroft. The LRC could not have asked for a better Editor in Chief. I also want to thank our advisor, Dr. Lawrence Cappello. His constant aid and support enable the LRC to thrive and continue to strive for excellence.

I also want to thank the entirety of The University of Alabama's pre-law community, including the students, advisors, and faculty. Their confidence in the LRC allows us to fulfill our mission of smoothing the transition between undergraduate education and law schools. Finally, thank you to Asia, Sophia, and Spencer, our founders, for your continued support of and belief in the LRC. We are forever indebted to you for the execution of your vision.

The LRC decided to have a theme of Civil Rights for the 2020-2021 academic year, and all eight articles in this volume are representative of our Civil Rights theme. I hope that the articles in this volume will encourage you, the reader, to critically engage with the laws and legal institutions in place in both the state of Alabama and our nation. Perhaps you will be inspired to write an article of your own, and if so, I hope you will consider submitting to the *CJLPP*. Our readers and authors are the key to our success.

Most sincerely,
Mackenzi Barrett
President, Legal Research Club
2020-2021

LETTER FROM THE EDITOR

Dear Reader,

On behalf of the 2020-2021 Editorial Board and the Legal Research Club, I am proud to present the fourth volume of the *Capstone Journal of Law and Public Policy*.

Since the founding of the LRC and the *CJLPP* four years ago, our members and the organizations themselves have grown immensely in their pursuit of innovative legal scholarship. In the midst of our nation's reckoning with the devastating effects of the COVID-19 pandemic and years of racial injustice, it is more important than ever for aspiring students of the law to meaningfully engage with these issues and utilize tools of legal research to envision a brighter, more equitable future. This is why we have chosen the theme "Civil Rights and the Law" for this spring's edition of the journal.

In the following pages, we will explore how race, sexuality, and physical ability have impacted the fulfillment of our most basic civil rights, ranging from concerns of environmental justice to voting rights and citizenship. We hope that this theme will encourage readers to confront the discriminatory practices that have for too long pervaded the American legal system, seeking reforms that will extend our nation's promises of justice and freedom to every citizen. Through this edition, we strive to emulate our founding members' dedication to the rigorous study and questioning of the law, and we express our deepest gratitude to those individuals who first embarked upon this journey four years ago.

In keeping with our focus on "Civil Rights and the Law," I would like to congratulate Anna Kate Manchester as the winner of the LRC's winter writing competition. Her piece, featured first in the

coming pages, presents an astute historical analysis of the legal subjugation of Indigenous Peoples, highlighting the role of the U.S. government in these unjust proceedings. Her thorough examination of the case law and legislation governing this fight for citizenship, as well as her insightful proposals for future reform, make her work an outstanding example of the LRC's mission in undergraduate research. Collaborating with Anna Kate on this project has been an absolute pleasure, and I am sure that this is only the beginning of her remarkable endeavors in law and public policy.

Finally, I would like to thank a long, and hardly comprehensive, list of individuals without whom this publication would not be before you: Mackenzi Barrett, for her steadfast leadership as LRC President, even in the face of unprecedented chaos; Dr. Lawrence Cappello, for his continued guidance as our trusted faculty advisor; our brilliant authors, for their flexibility and creativity throughout the editing process; and most of all, our hardworking and exceedingly talented editorial staff. I am truly lucky to have worked alongside each member of our editorial team, and I cannot express the depth of my gratitude for all of their efforts this year.

Best wishes, and happy reading!

Katie Kroft
Editor in Chief, *Capstone Journal of Law & Public Policy*
2020-2021

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THE CONVENIENCES OF CITIZENSHIP & CIVIL RIGHTS: AN ANALYSIS OF THE LEGAL MANIPULATION OF INDIGENOUS PEOPLES

Anna Kate Manchester[*]

INTRODUCTION

The United States' rich civil rights history paints this country as a land founded in progressivism and opportunism for all people in the modern era; however, it also alludes to a much darker history of white majority rule that, up until the not-so-distant past, legally restricted the liberties and privileges of all racial minorities to quell their influence over American democracy. The historical movement of African Americans toward naturalization and civil liberties is easily one of the most prominent of its kind in the United States, but significantly less attention is afforded to the push for citizenship and civil rights undergone by Indigenous Peoples, as well as the many ties between the two racial groups' movements. Legal cases and legislation relating to the status of native populations in

[*] **Winner of the Legal Research Club's Winter 2021 Writing Competition**

American society over the last two centuries chronicle a concerted effort to minimize the political and social influence held by these groups to protect the primacy of white Americans.

Before an analysis of this twisted legal narrative, the rich and oft-forgotten history of Indigenous Peoples requires some clarification. Over 500 distinct Indigenous tribes are currently recognized by the federal government, each possessing their own language systems, tribal heritage, and cultural institutions. It may be helpful to think of the "Indian" legal category as being akin to the term "European"; both terms were developed by outsiders to succinctly refer to a person coming from just one of an amalgamation of multiple independent and perceptible groups.[1] There is much debate over the various identity labels used to refer to groups indigenous to the North American continent. "Native American" suggests that all indigenous tribes can be categorized under a single cultural identity and falsely implies that the lands that currently constitute the United States were referred to as "America" before the arrival of Europeans; conversely, the term "American Indian" is a misnomer based on Christopher Columbus' faulty geographic knowledge.[2]

Other identity labels like "Indigenous Peoples" and "First Nations People" are becoming increasingly common in current scholarship, as these terms represent the "cultural empowerment and political liberation" of native populations whose identity was constructed by and for their colonial oppressors for centuries on end.[3] In following the trend of modern academia, this paper will employ the term "Indigenous Peoples," except in those cases that

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[1] William Hughes Rollings, *Citizenship and Suffrage: The Native American Struggle for Civil Rights in the American West, 1830-1965*, 5 NEV. L.J. 126, 127-28 (2004).

[2] Michael Yellow Bird, *What We Want to Be Called: Indigenous Peoples Perspectives on Racial and Ethnic Identity Labels*, 23 AM. INDIAN Q. 1, 4 (1999).

[3] *Id.* at 6.

require reference to the specific "Indian" legal category created by the United States government. This designation remains in use as it relates to the provision of aid and assistance to Indigenous tribes by the federal government, which will become relevant with the presentation of policy recommendations later in this article.

With this in mind, it may be easier to understand how the aggregation of a diverse people into a single racial group carries remarkable correlations to the fight for citizenship and civil liberties experienced by descendants of the African continent who were enslaved in the New World. The shared stories of oppression and the modern, though notably less draconian, subjugation of both African Americans and native populations in the United States are too interdependent to be ignored. However, the history of the dual citizenship held by Indigenous Peoples to both the United States and their sovereign tribes creates unique problems of inequity and poverty for those currently living on tribal reservations. This requires contemporary lawmakers to facilitate the transition of decision-making authority to these tribal governments to compensate for centuries of legal oppression and manipulation. Increasing the autonomy of tribal governments within the United States will allow each Indigenous group to dictate its own course of action in bettering the standards of living for its members, thereby taking a sustainable approach to the mitigation of reservation poverty and strengthening the unique cultural identities weakened by forced assimilation at the hands of the federal government.

I. FROM FOREIGN POWER TO DOMESTIC DEPENDENT

The Indigenous Peoples living on the eastern seaboard of North America had been engaged in territorial conflict and negotiations for individual peace treaties since the arrival of Europeans to the New World in the early sixteenth century;

however, formal legal action was not taken against the native populations by the newly established United States government until the passage of the Indian Removal Act under President Andrew Jackson in 1830. Eager to clear the American South of Indigenous tribes occupying valuable lands, Jackson's plan for "Indian removal" required the negotiation of federal treaties with all eastern tribes.[4] These tribes were to be relocated to lands west of the Mississippi River and, to incentivize voluntary removal, many treaties stipulated that Indigenous Peoples who ceded their land would be eligible for American citizenship. Few of these tribes were interested in obtaining citizenship at this time, however, and those who traded their land to become American citizens found little protection from attacks by white settlers and ultimately moved westward to rejoin their tribal kin.[5] Due to the highly underestimated speed of westward expansion, the transport of Indigenous individuals across the Mississippi River in accordance with the Indian Removal Act was seen as a viable solution to the need for profitable land in the South. Though the Act was widely viewed as a success in the eyes of white Americans, certain tribes were able to temporarily withstand removal efforts and draw national attention to their calls for tribal sovereignty.

In the case of *Worcester v. Georgia* in 1832,[6] the Cherokee Nation, whose reservation lay within the state of Georgia, was given exclusive authority over all lands within their territorial bounds; however, the Supreme Court ruling also implied that Cherokee Peoples were citizens of their tribal government, not the United States. President Jackson already disregarded the rights of the Cherokee to remain on their tribal

[4] Indian Removal Act, Pub. L. No. 21-148, § 1 (1830).

[5] *See* ARTHUR H. DEROSIER, JR., THE REMOVAL OF THE CHOCTAW INDIANS (1970); GRANT FOREMAN, INDIAN REMOVAL: THE EMIGRATION OF THE FIVE CIVILIZED TRIBES OF INDIANS (1932).

[6] Worcester v. Georgia, 31 U.S. 515 (1832).

lands, but Indigenous Peoples' assumed ineligibility for American citizenship additionally allowed the federal government to perceive them as a foreign power, making the eventual forced removal of the Cherokee Nation along the Trail of Tears that much easier for an administration seeking only that which benefited its own citizens.

As history progressed, *Worcester v. Georgia* placed inconvenient limitations on the power of the United States to exert influence over tribal governments. The difficulties caused by granting Indigenous tribes a level of sovereignty on par with that of other foreign powers facilitated a retreat from the notion of tribal sovereignty in the 1846 case of *United States v. Rogers*.[7] Following a white-on-white murder on Cherokee lands in Arkansas, involving two men who believed themselves to be under tribal jurisdiction after marrying Cherokee women, Chief Justice Roger Brooke Taney ruled that tribes lacked territorial sovereignty because Indigenous Peoples were conquered by Europeans who were, in turn, defeated by the United States.[8] Indigenous Peoples, therefore, were deemed subject to American laws while remaining ineligible for American citizenship. The Supreme Court failed to address this blatant incongruence with Chief Justice John Marshall's ruling in *Worcester v. Georgia*. Taney's ruling also lacked clarification on the status of those native populations who were living outside of tribal lands. These Indigenous Peoples were counted as whole individuals in their respective states' population counts, commensurate with the Three-Fifths Compromise's exclusion of only those "Indians not taxed," allowing states to benefit off of the native populations who had yet to be removed to western lands.[9] At this point, the naturalization of Indigenous Peoples was only possible through

[7] United States v. Rogers, 45 U.S. 567 (1846).
[8] *Id*. at 572.
[9] U.S. CONST. art. I, § 2, cl. 3.

small-scale treaties, but the federal government's manipulation of these individuals' status was becoming increasingly clear.

The trend of inconsistencies regarding the nuances of non-white citizenship in the United States only expanded as the status of both free and enslaved African Americans became more contentious. Chief Justice Taney once again faced challenges to past rulings in the landmark *Dred Scott v. Sandford*.[10] After hearing the case, Taney ruled that Congress was unable to offer citizenship to freed slaves born in the United States because the ability to naturalize was only available to those not placed under the United States' jurisdiction at birth.[11] This decision was even more problematic when viewed within the current context of tribal naturalization, which allowed for this process to occur on what was essentially a case-by-case basis. The Supreme Court now had to discern between the statuses of different racial minorities present within the United States instead of adhering to a single policy for all non-whites.

However, Justice Taney completely resolved the questionable status of Indian naturalization by disregarding his previous ruling in *United States v. Rogers*, returning to the precedent established under Chief Justice Marshall's decision in *Worcester v. Georgia*. Because Indigenous Peoples were independent when Europeans first arrived in the New World and thus regarded as a foreign power, these tribes were able to naturalize because, unlike African Americans, they were not initially under United States jurisdiction.[12] Naturalization remained relatively uncommon even after this legislative reversal, but the possibility of obtaining citizenship was granted to Indigenous Peoples to momentarily dampen the growing number of domestic and international cries for racial justice in

[10] Dred Scott v. Sandford, 60 U.S. 393 (1857).
[11] *Id.* at 417-18.
[12] *Id.* at 404.

America.

The onset of the Civil War served as a temporary pause in the progression toward widespread naturalization, and while the subsequent Reconstruction Amendments granted African Americans the boost in social status that they had long deserved, policymakers took deliberate action to exclude the Indigenous Peoples population from the benefits that American citizenship would bring. While the Thirteenth Amendment did provide for the dissolution of slavery, it only protected the new freedman's rights to maintain this independent status, promising nothing more.[13] This amendment was soon followed by the Civil Rights Bill of 1866, which granted citizenship to "all persons born in the United States" and, similar to the Three-Fifths Compromise, excluded those "Indians not taxed,"[14] referring to all Indigenous Peoples living on reservations and practicing loyalty to their tribal governments. Congress's unwillingness to grant Indigenous Peoples the rights and responsibilities of American citizenship relegated these groups to an even lower social status, one step behind their African American counterparts and several steps behind white Americans. The vague language surrounding naturalization in the Civil Rights Bill of 1866 served to further prevent the already limited naturalization of Indigenous Peoples and suppressed their ability to climb the social ladder.

The margins of naturalization for racial minorities were revisited in the Fourteenth Amendment, which offered both state and federal citizenship to "all persons born or naturalized in the United States and subject to the jurisdiction thereof."[15] This continued adherence to Chief Justice Marshall's *Worcester v. Georgia* ruling once again rendered Indigenous Peoples living under the jurisdiction of their tribal governments ineligible for

[13] U.S. CONST. amend. XIII, § 1.
[14] Civil Rights Act of 1866, 14 Stat. 27-30, § 1 (1866).
[15] U.S. CONST. amend. XIV, § 1.

naturalization. This decision transitioned native populations from an independent and free people to arguably the most ostracized class in American society and stripping each tribe of its distinct cultural values to create a single "Indian" legal class.[16]

II. CRIES FOR CITIZENSHIP

After the culmination of the Civil War, there was a renewed interest in American expansion into the Western Frontier. This most recent push westward threatened Indigenous tribes in a manner similar to the "Indian Removal" movement of the 1830s in the American South, but, with nowhere else to go, most Indigenous Peoples saw assimilation into white society as their best chance at procuring safety and possible citizenship. The appeal of American citizenship had only increased since the passage of the Fourteenth and Fifteenth Amendments, and a surprising number of white Americans on the East Coast joined the Indigenous Peoples in their fight for naturalization in what many viewed as an attempt to reconcile past wrongdoings.

It was widely understood that assimilation would require the abandonment of reservation landholdings and most tribal customs, but the levels of change required for naturalization were left to the discretion of state courts, most of which remained opposed to this idea well into the twentieth century. In the 1871 case *McKay v. Campbell,* a man possessing "nine-sixteenths Indian blood" was unable to vote in the state of Oregon because of his indigenous heritage. [17] Despite having abandoned his tribe to live among white Americans several years prior, the court ruled that he had been born under tribal jurisdiction and thus did not qualify for citizenship in accordance with the Fourteenth Amendment.[18] Not even a decade later, the state of Oregon once

[16] Worcester v. Georgia, 31 U.S. 515 (1832).
[17] McKay v. Campbell, 16 F. Cas. 161 (D. Or. 1871).
[18] U.S. Const. amend. XIV, § 1 ("All persons born or naturalized in the United

again faced a case centered around the issue of citizenship. In *United States v. Osborn*, Frank Osborn called upon Joe Miller to testify on his behalf after Osborn was charged with illegally selling alcohol to an Indigenous Person.[19] Miller argued that he had lived apart from his tribe for over a decade and, therefore, was no longer part of this native community, meaning that Osborn had not violated any alcohol distribution laws. The court ruled that Indigenous Peoples could not determine their own citizenship status and, though Miller had indeed been leading a fully assimilated life, he still did not qualify for American citizenship.[20]

In the similar but more definitive *Elk v. Wilkins* in 1884, John Elk was unable to vote in Nebraska because, although he had assimilated into white society, only the federal government had the power to determine an Indigenous Person's citizenship status.[21] Justice Horace Gray went one step further than the ruling in *United States v. Osborn* by establishing two methods through which one could become a citizen: birth or naturalization.[22] Elk did not meet either requirement to obtain citizenship because he was born to "an alien, though dependent, power."[23] These cases and several others in the post-Civil War nineteenth century proved that, hard as they might try, Indigenous Peoples were fighting an uphill battle in the quest for

States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.").

[19] United States v. Osborn, 2 F. 58 (D. Or. 1880).

[20] *Id.* at 61 ("But an Indian cannot make himself a citizen of the United states without the consent and co-operation of the government. The fact that he has abandoned his nomadic life or tribal relations, and adopted the habits and manners of civilized people, may be a good reason why he should be made a citizen of the United States, but does not of itself make him one. To be a citizen of the United States is a political privilege, which no one not born to can assume without its consent in some form.").

[21] Elk v. Wilkins, 112 U.S. 94 (1884).

[22] *Id.* at 101.

[23] *Id.* at 102.

citizenship and losing more and more of their indigenous culture in the process.

The notion of tribal sovereignty that allowed the United States to prevent Indigenous Peoples' naturalization was significantly weakened in the case of *United States v. Kagama* in 1886.[24] Following the murder of one tribe member by another on their reservation, the Supreme Court determined that certain criminal occurrences would allow the federal government to intervene in the internal affairs of a tribe, even if the crime never exited the reservation's bounds. This ruling challenged the Fourteenth Amendment's claim that Indigenous Peoples were disentitled to citizenship because of their tribe's total jurisdiction over its people; however, this provision of the Fourteenth Amendment became even more irrelevant with the emergence of the Dawes Act in 1887.

The Dawes Act, also known as the General Allotment Act, destroyed a great deal of tribes' political and economic autonomy by allowing the president to break up their reservations and distribute plots of land to individuals depending on their civil status, whether it be married, single, or orphaned.[25] Conveniently, any surplus land would be sold to whites as a source of profit for the federal government. This offer was made more appealing to Indigenous Peoples with the promise of citizenship granted to those who willingly negotiated to receive their plot of land. These parcels were to be placed in a twenty five-year trust that would protect the new citizens from having to move away from their property, but many argued that Indigenous Peoples lacked the competence necessary to manage their lands wisely. Hence followed the Burke Act, an amendment to the Dawes Act that postponed granting citizenship to Indigenous

[24] United States v. Kagama, 118 U.S. 375 (1886).
[25] Dawes Act, Pub. L. No. 49-105, § 1 (1887).

Peoples until their land trust expired.[26] Ultimately, over half of these individuals received citizenship through the Dawes Act, providing a large portion of the native populace the protections necessary to defend themselves in court and work toward an increased social standing.

With the sharp rise in citizenship among Indigenous Peoples came a burgeoning population of voters looking to exert their newfound influence over the democratic process; however, just like those created to disenfranchise African Americans across the country, voter suppression methods weakened these individuals' voices in state and national elections. The proposed state of Sequoyah was then presented to Congress in 1905 as a potential solution to this problem.[27] The government suggested that, by creating a separate state completely composed of lands promised to Indigenous tribes in the Indian Removal Act of 1830, Indigenous Peoples would be able to hold a democratic majority in the region and more effectively influence elections.[28]

While this idea may fit the modern definition of gerrymandering, the Curtis Act of 1898 was about to take effect, dissolving tribal sovereignty in Oklahoma Territory and thereby erasing the political and cultural agency of these Indigenous Peoples.[29] Without tribal sovereignty, these individuals felt that they should at least achieve relative independence by maintaining a democratic majority of former tribal members with shared interests. A constitutional convention was held in Muskogee, the would-be capital of the state of Sequoyah, and though the convention made their proposal to Congress with all the

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[26] Burke Act, 34 Stat. 182, § 6 (1906).

[27] Richard Mize, *Sequoyah Convention*, THE ENCYCLOPEDIA OF OKLA. HISTORY AND CULTURE, https://www.okhistory.org/publications/enc/entry.php?entry=SE021 (last visited Mar. 10, 2021).

[28] Indian Removal Act, Pub. L. No. 21-148, § 1 (1830).

[29] Curtis Act of 1898, Pub. L. No. 55-517, § 26 (1898).

necessary components for statehood, the motion overwhelmingly failed. This push for Indigenous political influence was admittedly extreme; however, the lacking attention that it received at the national level reflected the government's hesitance toward providing Indigenous Peoples with greater autonomy, especially as African Americans were working toward the same goal and further threatening white majority rule.

Legal battles calling for increased naturalization opportunities carried well into the twentieth century. The onset of World War I sent thousands of Indigenous Peoples, both naturalized and non-citizens, overseas to fight for civil liberties and a democratic process that had not been granted to them on the home front. This hypocrisy of the American social system prompted Congress to provide Indigenous Peoples who had been honorably discharged from the armed forces with American citizenship in 1919. After awarding women the right to vote in 1920 with the passage of the Nineteenth Amendment, Congress found itself on a streak of progressivism.[30] The Indian Citizenship Act was passed in 1924, offering American citizenship to all Indigenous Peoples born in the United States who had not previously been naturalized through the Dawes Act or service in World War I.[31] Not until a century after the forced removal of indigenous tribes from the American South would all of these individuals receive American citizenship, but the desire to freely enjoy these rights and responsibilities while maintaining a sense of cultural agency would begin the next phase of legal clashes for civil rights.

III. THE INDIGENOUS CIVIL RIGHTS MOVEMENT

The awarding of citizenship to all Indigenous Peoples

[30] U.S. CONST. amend. XIX.

[31] Indian Citizenship Act, Pub. L. No. 68-175 (1924); Dawes Act, Pub. L. No. 49-105, § 6 (1887).

through the Indian Citizenship Act was certainly a major milestone for peoples who had inhabited the North American continent for over 30,000 years, but the right to vote would prove more elusive for these native populations.[32] The enactment of poll taxes, as well as literacy and English language tests which specifically targeted groups who had not adequately assimilated into white society, prevented Indigenous Peoples from entering the polls. Even when these individuals were able to cast their ballots, efforts were made to invalidate their votes on the basis of race and social status. In the case of *Opsahl v. Johnson* in 1917, tribal members still residing on a reservation voted in favor of liquor sales in their Minnesota county, but a white resident argued that they had no right to vote.[33] When writing his decision, the judge focused on the level of civilization achieved by the tribe in accordance with the Minnesota state constitution, determining that the Indigenous Peoples' votes would be deemed null and void on account of their lack of perceived civility.

Two Pima tribe members sued their county in Arizona after being barred from voter registration in the 1928 case of *Porter v. Hall*.[34] According to Arizona's constitution, Indigenous Peoples were deemed wards of the state, thus rendering them ineligible to vote in the eyes of the judge. This provision claimed to follow Chief Justice Marshall's holding in *Cherokee v. Georgia*, which granted native populations the unique ward status of those who "look to [the] government for protection, rely upon its kindness and its power; [and] appeal to it for relief to their wants."[35] Nowhere in this holding were Indigenous Peoples referred to as incapable or mentally incompetent; the term *ward* is presumed to have been used by Marshall simply for lack of a

[32] Rollings, *supra* note 1, at 134-35.
[33] Opsahl v. Johnson, 163 N.W. 988 (Minn. 1917).
[34] Porter v. Hall, 271 P. 411 (Ariz. 1928).
[35] Cherokee v. Georgia, 30 U.S. 1 (1831).

better word.[36] Nonetheless, the judge invoked this misunderstood principle in *Porter v. Hall* and, though Indigenous Peoples in Arizona had long since managed their own affairs, their ward status was conveniently employed against them for the benefit of the state's white majority.

Native individuals once again went to war on behalf of the United States in World War II, but the racism underlying the ideology of the Axis Powers shed light on the continued domestic injustices committed against racial minorities.[37] Two decades after the initial *Porter v. Hall* ruling, the state of Arizona once again faced a challenge to the voting rights of Indigenous Peoples. Two Mohave tribe members were denied the ability to register to vote by county recorder Roger Laveen on account of their ward status; this time around, however, the state used this opportunity to overturn *Porter v. Hall*, with the Arizona Supreme Court unable to find a widespread incompetence linked to the Indian racial minority as a whole.[38] Scare tactics continued to be used at polls across the country, but, with North Dakota finally granting Indigenous Peoples the right to vote in 1958, all fifty states began to move toward this standard.

The Voting Rights Act of 1965 was passed to prohibit racial discrimination in the voting process.[39] Though the legislation was largely targeted at African Americans facing physical danger at polls in the South, it eradicated some of the same mechanisms employed across the country to keep Indigenous groups from exercising their right to vote. Geographic areas with histories of racial discrimination, predominantly located in the South, received special attention during these efforts, but this was not entirely beneficial to native

[36] Rollings, *supra* note 1, at 136.
[37] *Id.* at 137.
[38] Harrison v. Laveen, 67 Ariz. 337 (Ariz. 1948).
[39] Voting Rights Act of 1965, Pub. L. No. 89-110, § 2 (1965).

populations that were overwhelmingly concentrated in the western and central regions of the United States. English language tests that had long targeted minority groups at the polls were banned with an amendment to the Voting Rights Act in 1975. An additional extension specifically protected minorities at voting sites, cementing the rights of Indigenous Peoples to participate in American democracy free from harassment or threat.[40]

Heeding precedent established by the African American civil rights movement, the newly launched Indigenous civil rights movement further exposed abuses against these populations, stemming not only from American society and institutions, but also tribal governments. After a series of congressional hearings revealed horrid living conditions on certain reservations, the Indian Civil Rights Act was passed in 1968.[41] Also known as the "Indian Bill of Rights" due to its structural similarities to the original document, this Act offered some of the same protections present in the Constitution's Bill of Rights, walking a very thin line between protecting the rights of Indigenous Peoples who were already American citizens and respecting the sovereignty of tribal governments. The subsequent Indian Self-Determination and Education Assistance Act allowed governmental agencies to make contracts with and provide grants to Indian tribes.[42] Once tribes entered into agreements with different agencies, they had very little say in the types of infrastructure and development projects that would take place within their territorial bounds. The incongruence between the federal government's perception of these tribes' best interests and the individual values and specializations held by each group

[40] Voting Rights Act of 1965, Pub. L. No. 94-73, § 2 (amended 1975).
[41] Civil Rights Act of 1968, Pub. L. No. 90-284, § 202 (1968).
[42] Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-268, § 101 (1975).

prevented federal aid from reaching the reservations most in need. This arguably served as the foundation for the modern failures of the relationship between the United States government and sovereign tribes, thereby contributing to the social inequities suffered by Indigenous Peoples on reservations to this day.

After finally achieving legally protected citizenship and freedoms, the Indigenous civil rights movement shifted its focus toward the preservation of traditional cultural practice in the face of these populations' expected assimilation. These tribes placed heavy importance on maintaining custody of their children so that they might promote the continuation of their millennia-old cultural traditions. The Indian Child Welfare Act requires that Indigenous children be placed with extended family members, other tribal members, or, in extreme cases, non-related Indigenous families in adoption and foster-care situations.[43] Following centuries of religious suppression and plunder, the Religious Freedom Act of 1978 allowed these tribes, among other minority groups, to reclaim sacred objects currently being held in museums, to maintain access to sacred religious sites, and to worship through traditional rituals, most notably the previously illegal Ghost Dance that served as the basis of the many Indigenous belief systems following the Civil War.[44] As difficult as life on the reservations may have been, the successful legislative protection of Indigenous culture in the late twentieth century satisfied a great deal of the Indigenous civil rights movement's foremost aims. However, this still left native populations with the complex task of adapting to life as full-fledged American citizens, seeking to remain loyal both to their rich cultural identities and the United States.

[43] The Indian Child Welfare Act, Pub. L. No. 95-608 (1978).
[44] American Indian Religious Freedom Act, Pub. L. No. 95-341, § 1 (1996).

IV. POLICY RECOMMENDATIONS

With the legal protection of citizenship, civil rights, and cultural institutions obtained by the end of the twentieth century, Indigenous Peoples solidified their space in both American society and history as yet another racially subjugated group who overcame centuries of oppression at the hands of white majority rule. However, the repeated manipulation of Indigenous individuals' social status to best serve white Americans has created a complicated and arguably dysfunctional relationship between the United States and the individual tribal governments who look to American political leadership for assistance. By deliberately strengthening tribal autonomy and transferring political and economic decision-making authority from the Bureau of Indian Affairs to individual tribal administrations, Indigenous Peoples will retain not only a sense of internal agency, but also their unique cultural identities.

The Bureau of Indian Affairs (BIA) is the federal agency under the U.S. Department of the Interior that is responsible for maintaining relations with tribal governments. The BIA aims to "enhance the quality of life" of Indigenous Peoples and their tribes, as well as the nearly 140,000 individuals who identify as Alaska Natives.[45] The BIA brings economic opportunities to individual tribes by managing trust assets, namely reservation lands, on the tribal governments' behalf. The federal government's allocation of social welfare, law enforcement, and disaster relief, all while employing tribal members in the provision of such services, makes aligning with the BIA doubly attractive to these native populations. Though the BIA maintains an exorbitant amount of control over each tribe's development

[45] *Bureau of Indian Affairs (BIA)*, U.S. DEPARTMENT OF THE INTERIOR—INDIAN AFFAIRS (2020), https://www.bia.gov/bia; *Alaska Natives*, MINORITY RIGHTS GROUP INTERNATIONAL (2020), https://minorityrights.org/minorities/alaska-natives/.

prospects, they are responsible for aiding any tribe undergoing economic failure which, to many tribal leaders, is preferable to the alternative of having to pick up the pieces themselves. As secure as the partnership between sovereign tribes and the BIA may be, the current inequities suffered on tribal reservations will only be overcome as each tribe obtains more autonomy; as such, federal policymakers should facilitate the incremental devolution of decision-making authority to tribal governments. By establishing political and economic institutions that are harmonious with their own cultures, Indigenous Peoples will be able to pursue sustainable development projects and elevate their tribal members out of reservation poverty on their own terms.

The transition of political agency from the BIA to individual tribal governments is crucial to the reclamation of the myriad of pre-Columbian Indigenous cultural identities. However, care must be taken to ensure that Indigenous Peoples are protected from corruption, especially when one considers how centuries of outside control stripped tribal leaders of the ability to manage their own internal affairs. Political scientists have suggested several governmental models to be adopted by Indigenous Peoples, but, because of the great tribal diversity that exists within the United States, there is no standardized solution to be applied to all tribes alike. Disbanding partnerships with the BIA would also allow individual tribal governments to exert economic agency in a sustainable and self-directed manner, though this transition may have a steep learning curve for those tribal governments that have little practice managing profitable affairs. With the immense developmental progress needed to elevate tribal members to standards of living on par with those of American citizens not living on reservation lands, tribal governments must achieve full decision-making authority over internal matters.

Although assuming the responsibility of development

management may appear daunting to tribal governments, breaking away from a partnership with the BIA would exempt Indigenous tribes from both state and federal taxes and certain other economic regulations, granting them the opportunity to institute their own internal taxation measures.[46] Development management does entail a certain level of risk to prepare for unforeseen economic and social crises, but breaking free of business restrictions imposed by the federal government would allow Indigenous tribes to employ and strengthen their economic agency.

By devolving power from the BIA, tribal groups would be able to pursue economic ventures that best suit their values, thus demonstrating the benefits of tribal autonomy. For example, the communal ownership of private corporations would best function for a tribe that is rich in capital and values the collective good; conversely, reservations that experience intertribal divisions would perhaps benefit more from an economic system based on the provision of subsidies from the tribal government to small businesses based on profitable specializations. Methods of economic organization that are culturally consistent with valued societal beliefs will increase the likelihood of tribal members being able to lift themselves out of impoverished states, no matter the structural specifics. However, it is necessary that tribes first achieve political autonomy from the BIA so that they possess institutions with the power necessary to protect businesses and encourage investment.

It is incumbent on federal policymakers to grant Indigenous Peoples the decision-making authority necessary to elevate themselves out of pervasive reservation poverty; tribal leaders would be able to organize their political and economic

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[46] Stephen Cornell & Joseph P. Kalt, *Pathways from Poverty: Economic Development and Institution-Building on American Indian Reservations*, 14 AM. INDIAN CULTURE & RESEARCH JL. 89, 115 (1990).

institutions around their own cultural values, thereby promoting long-term development solutions. Indigenous cultures have long been ignored in the policymaking process due to the Eurocentric belief that the adoption of Western practices serves as the only operable path to development. Not only is this blatantly prejudiced, but it also grossly oversimplifies the immense diversity of culture present within differing native populations.[47] The gradual provision of institutional autonomy will provide Indigenous tribes with feasible pathways to alleviate the effects of poverty on tribal reservations and reaffirm the cultural values that were diminished by the incursion of European settlers.

CONCLUSION

A brief glimpse into the legislative history of native populations' affairs highlights that, though there are similarities between the modern sufferings of Indigenous Peoples and African Americans, there is not a uniform policy solution for bettering the conditions of racial minorities in the United States. Furthermore, the immense diversity across Indigenous cultures necessitates the gradual devolution of decision-making power from the federal government to individual tribal governments. This would additionally allow tribes to tailor development projects to their own cultural values, thereby increasing the likelihood of enacting sustainable solutions to reservation poverty. By expanding the autonomy of Indigenous tribes and allowing them to pursue a more culturally specific form of self-governance, federal policymakers might begin to make amends for centuries of physical and legal oppression, correcting mainstream American society's current oversimplification of Indigenous cultures. These efforts are essential in reviving the

[47] *Frequently Asked Questions – What is a federally recognized tribe?*, U.S. DEPARTMENT OF THE INTERIOR (2020), https://www.bia.gov/frequently-asked-questions.

diverse and superabundant cultures of a people forced to engage in a centuries-long fight for civil rights and liberties.

FOREVER SILENCED: AN ANALYSIS OF THE RACIAL INEQUITIES OF FELON DISENFRANCHISEMENT

Shanique Strickland

INTRODUCTION

In tune with the unprecedented events of the previous year, marred by civil unrest and a devastating pandemic, the 2020 Presidential Election was surrounded by discord and debate concerning issues of racial injustice and healthcare. Many viewed this election as a way to invoke change across the nation and make the United States feel truly united once again. Unfortunately, not all citizens participated: some by choice, but others by nature of unfortunate circumstance. Felons across the U.S. face denial of their fundamental civil rights on a daily basis at the hands of their state governments. From housing and health disparities to the silencing of their voices, felons' post-prison life is not the experience of a "first-class" American citizen. Even after completing the process that is supposed to rehabilitate them, felons are still deemed second-class citizens.

While imprisoned, felons are still counted in the census, but they are not allowed to vote in local, state, or federal

elections.[1] Upon re-entering society, felons must find and hold jobs, acquire housing, and pay taxes as would any other citizen, while still being denied the right to vote. Essentially, felons in certain states face "taxation without representation," a phrase all too familiar to any student of American history. If this grievance was enough to encourage our founding fathers to start a revolution and cut ties with the British government, surely it is enough to evoke progressive change in the American justice system today.

Within this article, I will identify the states in which felons are denied the right to vote and explain the historical underpinnings that have made the disenfranchisement of felons possible, with a specific focus on Florida's passage of Amendment 4 and the lawsuit that followed. While only Vermont and Maine allow felons to vote while incarcerated, most other states reinstate their rights once they have been released or have completed parole and probation.[2] There are only eleven states that permanently disenfranchise felons or make it virtually impossible for them to regain their rights through various processes and fee requirements.[3] These felon disenfranchisement laws—most notably Florida's Amendment 4—demonstrate an undeniable link between Jim Crow era voter suppression and today's disproportionate limitation of the voting rights of Black American communities at the hands of the criminal justice system.

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[1] Newsy, *The Case for Letting Convicted Felons Vote*, YOUTUBE (Apr. 28, 2016), https://www.youtube.com/watch?v=qjrpIi4zVec&t=10s.
[2] Chris Uggen et. al, *Estimates of People Denied Voting Rights Due to a Felony Conviction*, THE SENTENCING PROJECT (Oct. 30, 2020), https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/.
[3] *Id.*

I. THE IMPLICATIONS OF VOTING RIGHTS DISPARITIES IN AMERICA

Voting is a fundamental American right. The ability to participate in governmental decision-making is essential to the assurances of life, liberty, and the pursuit of happiness prescribed by the Declaration of Independence.[4] When this document was drafted, however, racial and ethnic minorities were not deemed worthy of having these inherent rights to liberty. Since the nation's founding, the government's denial of rights and dehumanization of mass groups of Americans has foreshadowed the continual struggle for equality that minority communities would endure for centuries to come. As stated by Brandi Blessett, associate professor and MPA Director at the University of Cincinnati, "For racial and ethnic minorities, voting is equated with citizenship and decision-making power," and even today, American citizens, especially those of color, are being denied the right to vote by state laws based solely upon their criminal records.[5]

Why does this power to choose matter, and how is voting connected? The answer to this question is quite simple: in a democratic society, the voice of the people can only be heard at the governmental level if citizens have the ability to cast votes. Although constituents have the option of calling or writing their representatives at the local, state, and federal levels, they must first reach a general consensus on who should be their representatives through the electoral process. Votes are voices; and by electing representatives who understand the perspectives of citizens, those citizens have the reassurance that their pursuit of life, liberty, and happiness will be protected.

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[4] *Declaration of Independence*, U.S. NATIONAL ARCHIVES (July 4, 1776), https://www.archives.gov/founding-docs/declaration-transcript.

[5] Brandi Blessett, *Disenfranchisement: Historical Underpinnings and Contemporary Manifestations*, 73 PUB. ADMIN. QUARTERLY 3, 6-7 (2015).

Race relations in America are intimately entwined with this discussion. Even before the United States cut ties with the British government, the colonies were racially divided. The enslavement of African people in the U.S. colonies had officially been taking place since the year 1619, but historians believe that slaves had been present in the colonies since the 1500s.[6] In the centuries that followed, many scholars argue that the oppression of minority communities by the majority—supported by the government—did not end, but evolved. In American society, there is a "common discourse used to deny suffrage rights to Blacks" and other minorities, following from a long history of dehumanization through slave labor and genocide.[7] In the fight for citizenship, Black Americans faced Supreme Court decisions that continuously relegated them to mere chattel, shown when the 1857 ruling in *Dred Scott v. Sandford* declared that, "since [Scott's] ancestors were of pure African blood...[he was] denied the right...to sue in a court of the United States."[8] *Dred Scott v. Sandford* solidified the enslavement of Black Americans and proved that these individuals could not seek solace from the government. This case contributed to the rising racial tensions culminating in the Civil War, leading to the end of slavery and the beginning of the Reconstruction Era.

It was not until the passage of the Reconstruction Amendments that Black Americans were given the rights already possessed by white men, with the Thirteenth, Fourteenth, and Fifteenth Amendments all being passed within a five-year time span. First, the Thirteenth Amendment abolished slavery in

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[6] Crystal Ponti, *America's History of Slavery Began Long Before Jamestown*, HISTORY.COM (Aug. 14, 2019), https://www.history.com/news/american-slavery-before-jamestown-1619#:~:text=The%20arrival%20of%20the%20first).

[7] Blessett, *supra* note 5, at 2.

[8] Scott v. Sandford, 60 U.S. 393, 400 (1857).

1865.[9] Two years later, through the passage of the Fourteenth Amendment, former enslaved persons were granted the status of U.S. citizens and guaranteed "equal protection under the law" for anyone born on U.S. soil.[10] Lastly, ratified on February 3, 1870, the Fifteenth Amendment gave Black American males a voice, as women of all races were still banned from voting, by granting them suffrage rights.[11]

During the Reconstruction Era, under the protection of federal troops and agencies dispatched to former Confederate states, Black men and women were finally allowed some degree of autonomy, obtaining jobs and purchasing land in spite of the oppression and violence that they still faced from white supremacists. Demonstrating this progress, in the year 1870, Hiram Rhodes Revels was elected to be the first Black man in the U.S. Senate, and in the decade following his election, fifteen more Black men were elected to seats in Congress.[12] However, a shift soon occurred. Following the election of 1876, discrepancies were found in the election results of Florida, Louisiana, and South Carolina, which were still under the leadership of Reconstruction-era Republican governments.[13] To resolve the matter, senators from the Democratic and Republican parties met in secret to develop the Compromise of 1877, in which Southern Democrats called for all federal troops to be removed from Southern states.[14] Only upon the fulfillment of this stipulation would Democrats allow Republican candidate

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[9] U.S. CONST. amend. XIII.
[10] U.S. CONST. amend. XIV.
[11] U.S. CONST. amend. XV.
[12] Becky Little, *The First Black Man Elected to Congress was Nearly Blocked from Taking His Seat*, HISTORY.COM (Aug. 10, 2018), https://www.history.com/news/first-black-congressman-hiram-revels.
[13] *Compromise of 1877*, HISTORY.COM (Nov. 27, 2019), https://www.history.com/topics/us-presidents/compromise-of-1877.
[14] *Id.*

Rutherford B. Hayes to take office,[15] so as is often the case, the protection of minority communities was sacrificed for political gain of the white majority.

Following this withdrawal of federal troops, the violence and dehumanization inflicted upon Black Americans by white supremacists only intensified. Although white supremacists did not have the ability to strike the Reconstruction Amendments from the Constitution, they did everything they could to undermine them, especially the Fifteenth Amendment establishing the enfranchisement of Black men. This period following Reconstruction is known today as the Jim Crow era, beginning upon the finalization of the Compromise of 1877 and ending after the passage of the Civil Rights Act of 1965.

During this time, Black Codes and Jim Crow laws were enacted to stifle the vote of Black Americans, inhibit their ability to obtain adequate housing, restrict their employment options, and repeatedly dehumanize them through segregation, lynching, and other grotesque acts. To accomplish this disenfranchisement of Black men, state and local lawmakers in Southern states subjected these individuals to "poll taxes, intimidation, illiteracy tests, and many [other]" measures which proved to be effective in diminishing the Black American vote, essentially silencing the minority once again.[16] The addition of pre-voting requirements was not the only fruitful method in diminishing the voices of Black Americans; a loophole in Section Two of the Fourteenth Amendment additionally allowed for citizens to be denied the right to vote based on "participation in rebellion, or other crime."[17] Unfortunately, it is all too easy to pass new laws that disproportionately affect certain groups of people, resulting in the

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[15] *Id.*

[16] Mario L. Small and Devah Pager, *Sociological Perspectives on Racial Discrimination*, 34 J. OF ECON. PERSPECTIVES 49, (2020).

[17] U.S. CONST. amend. XIV. § 2.

over-criminalization of certain acts and the uneven enforcement of these laws under the ruse of discretion. Although not blatantly, the same principles that guided the legislation of the Jim Crow era still rest, rule, and abide among the American people today.

Currently, an estimated 5.17 million people in America are stripped of their voting rights due to a felony conviction, meaning that one in forty-four members of the voting age population are unable to exercise this right.[18] On the other hand, one in sixteen African Americans of voting age are disenfranchised, a rate 3.7 times higher than that of non-African Americans.[19] Even with this unjust discrepancy, an even larger differential exists in the states in which these practices are most widespread. Based on these numbers, a clear pattern presents itself between states with the highest rates of disenfranchisement and those that had the most extensive Jim Crow presence prior to the Civil Rights movement.

This is demonstrated in the eleven states that continue to disenfranchise felons after they have completed their sentence in prison, on probation, and on parole. Those states are Alabama, Arizona, Delaware, Florida, Iowa, Kentucky, Mississippi, Nebraska, Tennessee, Virginia, and Wyoming, many of which had some of the highest rates of lynching between the years 1877 and 1950.[20] In fact, the disenfranchisement rate in 2020 ranged from zero percent in Maine and Vermont to more than 8 percent in Alabama, Mississippi, and Tennessee, and between 1877 and 1950, lynchings were numbered at one in both Maine and Vermont, and 361, 654, and 233 respectively in the southern

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[18] Uggen, *supra* note 2.

[19] *Id.*

[20] *Restoration of Voting Rights for Felons*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Jan. 8, 2021), https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx; *Lynching in America: Confronting the Legacy of Racial Terror*, EQUAL JUSTICE INITIATIVE (2017), https://eji.org/wp-content/uploads/2020/09/lynching-in-america-3d-ed-091620.pdf.

states previously mentioned.[21] These figures reveal strong correlations between the past and the present, hinting at the unequal enforcement of the laws in many of these states. Therefore, states need to create new legislation that contains equitable measures to afford Black Americans–-especially Black men—equal treatment.

II. LEGISLATION USED TO DISENFRANCHISE FELONS

Many state laws disenfranchise the felon population in a constitutionally suspect manner. Under the principles of federalism, states in America have the discretion to "disenfranchise felons and impose conditions on their re-enfranchisement. But the conditions must pass constitutional scrutiny,"[22] and this article seeks to prove that many do not. Across the United States, states impose disenfranchisement laws to varying degrees. Maine and Vermont prove to be the most lenient states concerning voting rights, as they allow prisoners, including felons, to vote while incarcerated. Because prisoners are counted in the census for redistricting purposes and the allocation of representatives, it is only fair that these individuals are able to vote in these elections. This practice is reminiscent of the Three-Fifths Compromise, which allowed slaves' bodies to be counted, although fractionally, in the census to secure Southern states more representatives than their white populations would normally allow.[23] While the Three-Fifths Compromise was rendered obsolete by the passage of the Fifteenth Amendment, felon disenfranchisement laws continue to perpetuate its legacy, given that most of those affected are Black Americans. Most

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[21] Uggen, *supra* note 2; EQUAL JUSTICE INITIATIVE, *supra* note 20.

[22] Jones v. DeSantis, 462 F. Supp. 3d 1196, 1203 (N.D. Fla. 2020).

[23] Steven Philbrick, *Understanding the three-fifths compromise*, CONST. ACCOUNTABILITY CTR. (Sept. 16, 2018), https://www.theusconstitution.org/news/understanding-the-three-fifths-compromise/.

arguments surrounding felon disenfranchisement involve their inability to vote once they have been released from prison, but the inability to vote while incarcerated deserves to be recognized as unconstitutional as well.

Unfortunately, the constitutionality of legislation regarding felon disenfranchisement becomes increasingly questionable as one delves deeper into the extent to which felons have been stripped of their voices. Currently, there are seventeen states that automatically re-enfranchise felons once they have been released from prison, four which allow felons to vote after completion of prison and parole, and sixteen that add the completion of probation to the requirements that felons must achieve before regaining the right to vote.[24] The most severe of all are the eleven states that do not allow felons to vote at all after prison, parole, probation, and post-sentence have been completed. In these states, felons face stringent regulations when applying for the restoration of their civil rights, and many of these laws make this process virtually impossible.[25] One of the most notable examples of these practices is Florida's recent passage of Amendment 4.

III. Florida as a Model of Disenfranchisement Practices

In 2018, Florida voters overwhelmingly supported the passage of Amendment 4, electing to re-enfranchise all felons, with the exception of sex offenders and murderers, who had completed their sentences.[26] Dangling hope before felons yet still snatching it away, Florida's legislative body later added a new stipulation that significantly weakened this measure: only upon the payment of all court fines, costs, fees, and restitution would

[24] Uggen, *supra* note 2.
[25] *Id.*
[26] *Id.*

Florida's felons be eligible to vote, prolonging the disenfranchisement of nearly one million otherwise eligible citizens.[27] Thus, the only thing standing between felons and their voting rights is money, looking eerily similar to the poll taxes imposed during the Jim Crow era.

To further clarify the lack of constitutionality of requiring American citizens—which felons are—to pay these fees, the terms used to masquerade these poll taxes must first be clearly defined. According to the District Court's ruling in the 2020 case of *Jones v. DeSantis*, mandating the payment of legal financial obligations is unconstitutional, specifying these fines to be amounts of money "imposed in a minority of cases…[and] determined by the court, subject to a maximum set by statute."[28] One example of these restrictive fees and costs was "a flat $225 assessment in every felony case, $200 of which was used to fund the clerk's office and $25 of which was remitted to the Florida Department of Revenue for deposit in the state's general revenue fund."[29] Lastly, Judge Hinkle defined restitution, or financial obligations to the victims of the felon's crimes, as any amount of money "payable to a victim in the amount of loss as determined by the court."[30] Although none of these forms of payment are labeled as such, they are analogous to taxes.[31]

Not only is the very existence of these taxes unconstitutional, but the ways in which they are assigned also prove to be inconsistent and arbitrary. Oftentimes, when applying for re-enfranchisement, formerly incarcerated individuals are informed of new fines in addition to those originally specified at the culmination of their judgments. In fact, the stories of both Mr.

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[27] *Jones v. DeSantis*, 462 F. Supp. at 1203.
[28] *Id.* at 1206.
[29] *Id.* at 1206-07.
[30] *Id.* at 1207.
[31] Fritz Neumark, *Taxation*, BRITANNICA.COM (2020), https://www.britannica.com/topic/taxation.

Wrench and Ms. Riddle in the case of *Jones v. DeSantis* clearly demonstrate this inequity. In December of 2018, Mr. Wrench was convicted of two felonies in two separate cases.[32] The criminal judgments in his case from 2008 do not show any financial obligations, but a civil judgment entered in 2009 lists an amount of $1,874 under the category of "financial obligations" with no further explanation.[33] Three years after his original judgment, another amount was added to his second case, listed once again under the title of "financial obligations."[34] Even worse, Mr. Wrench was not made aware of these financial obligations until he applied for the restoration of his civil rights. While Mr. Wrench's case bears witness to the arbitrary nature of these fees, Ms. Riddle's case evidences the disorganized nature of Florida's bureaucracy and its inconsistencies in documentation:

> Ms. Riddle was convicted of felonies between 1975 and 1988 in two different counties. She asked the Clerks of Court for copies of the records of the convictions, but she was told the Clerks were unable to find them. Ms. Riddle apparently owes roughly $1,800 in connection with later convictions, but the Clerk's records do not match those maintained by the Florida Department of Law Enforcement.[35]

Considering that Mr. Wrench and Ms. Riddle are just two of nearly one million felons disenfranchised due to these prohibitive legal financial obligations, the inability of Florida's governmental agencies to maintain clear documentation of these fees is deplorable.

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[32] *Id.* at 1209-10.
[33] *Jones v. DeSantis*, 462 F. Supp. at 1203.
[34] *Id.*
[35] *Id.* at 1209.

Given the discretionary nature of these financial obligations, these muddled proceedings call the biases of the assigning government agencies into question.[36] In the expert report of University of Florida Professor Daniel Smith during these proceedings, he notes that "only 13.5% of black individuals, compared to 23.6% of white individuals" who were assigned legal financial obligations were estimated to be able to pay them back.[37] Furthermore, Black Americans within the felon population were also more likely to be charged a higher fine than that of their white counterparts.[38] The Florida justice system cannot control felons' ability to pay their financial legal obligations; however, by overwhelmingly assigning these steep fees to economically vulnerable communities, these agencies are disproportionately impacting those in minority groups.[39]

Florida's unjust system is but a model of the inequities persisting in the eleven states that make it nearly impossible for felons to regain their right to vote. It could be argued that states are within their rights to deny those who have committed a crime participation in local elections, but it is not within their constitutional rights to withhold equal protection to all citizens.[40] By subjecting Black Americans to higher financial penalties than their white counterparts, the Florida judicial system is denying its citizens their basic rights under the Fourteenth Amendment. Unfortunately, these racial disparities are highly reflective of the practices of the Jim Crow era, suggesting that the system has not truly changed—it merely wears a mask well.

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[36] *See* Marc Meredith & Michael Morse, *Discretionary Disenfranchisement: The Case of Legal Financial Obligations*, 46 J. LEGAL STUD. 309 (2017).
[37] Expert Report of Daniel A. Smith at 33, Jones v. DeSantis, 462 F. Supp. 3d 1196, 1203 (N.D. Fla. 2020) (No. 4:19cv300-RH/MJF).
[38] *Id.*
[39] *See* Meredith, *supra* note 36.
[40] U.S. CONST. amend. X; U.S. CONST. amend. XIV.

CONCLUSION

Within America, the chokehold of oppression is still tight around the necks of those who have already paid their debt to society. Black Americans especially have endured dehumanization and disrespect at the hands of a government all too content to leave things as they are. The legal system and legislation today that disenfranchise Black Americans at a disproportionate rate are not new; they are, indeed, the byproducts of legislation passed following the Civil War and the Reconstruction era, created with the express intent of covertly oppressing the Black community through written law. Although the legislation was passed without directly mentioning race, the enforcement of these provisions was often discretionary, and in turn racist, causing a disproportionate number of Black people to be prosecuted and punished. It is time for a change, and while Florida was close with the passage of Amendment 4, the added stipulation concerning legal financial obligations undermined this piece of legislation's potential for good. As states continue to move forward, they should take heed of the recent events in the Florida judicial system surrounding Amendment 4. The racial inequities within the Florida governmental hierarchy have come under close scrutiny by many advocates for change. However, instead of being reactive, it is time for states to take action and provide equal protection under the law to every U.S. citizen, no matter the mistakes they may have made in the past.

THE EXECUTION OF CHARLES RHINES: AN ANALYSIS OF QUEER RHETORIC, JURY BIASES, & CAPITAL PUNISHMENT IN AMERICA

Crystal Stone and Anna Kutbay

INTRODUCTION

In September of 2017, the United Nations Human Rights Council put forth a resolution condemning the death penalty. The resolution targeted nations who still engaged in "discriminatory use of the death penalty," specifically "discriminatory use based on gender or sexual orientation."[1] Unsurprisingly, this resolution passed by a vote of 27-13, but among the countries that rejected

[1] Human Rights Council Res. 36/17 (Sept. 29, 2017).

this agreement was the United States.[2] The U.S. has a troubling history of biased capital punishment and discriminatory courtroom activity. This twisted history is exemplified and diabolically reinforced in the case of Charles Rhines. After burglarizing a South Dakota donut shop in 1992, Charles Rhines stabbed and killed the first man that tried to stop him, facing lethal injection as his punishment on November 4th, 2019. Nearly three decades later, one troubling aspect of Rhines' sentencing remains unclear: what caused jurors to sentence Rhines to death, rather than life in prison? Once the trial had concluded, reflections from members of the jury and records from Rhines' lawyers revealed that he was likely sentenced to death due to his identity as a gay man.[3] Direct quotations from the jurors included statements questioning whether or not a lifetime in prison full of men would be a punishment for Rhines.[4] Rhines' sexuality catalyzed his death penalty sentence and should therefore be evaluated from a civil rights perspective.

A capital punishment sentence for anything other than the basis of one's crimes creates a flood of implications and serves as an alarming precedent for marginalized groups. Worse, it reminds the LGBTQ+ community that crimes can be regarded as much more deadly and targeted due to their identities, and sentencing can be influenced by the personal beliefs and biases of jurors, lawyers, and judges. Additionally, this case questions the validity of enforcing the death penalty in the first place, considering the criminal justice system's potential to convict and execute the innocent.[5] In spite of the death penalty abolitionist viewpoint

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[2] *Id.* at 4.

[3] Rhines v. Young, AM. C. L. UNION, https://www.aclu.org/cases/rhines-v-young (last visited Feb 7, 2021).

[4] Brief for the United States as Amicus Curiae at 8, *Rhines v. Young*, 899 U.S. 482 (2018) No. 18-8029.

[5] Jessica Dwyer-Moss, *Flawed Forensics and the Death Penalty: Junk Science and Potentially Wrongful Executions*, 11 SEATTLE J. FOR SOC. JUS. 757, 757-

established by past justices, the current era of Supreme Court conservatism forecasts a bleak future for anti-death penalty advocates and civil rights leaders.[6] Rhines' case forces us to investigate the link between rhetoric and the courtroom and pushes legal scholarship to identify this arena as a rhetorical space. More specifically, we put forth the need for further research on how the lack of understanding of rhetoric, in this case, queer rhetoric, can lead to unjust sentences, targeted prosecutions, and improper executions, as in Rhines' case. We also assert that the death penalty's inability to operate without bias perfectly illustrates the case against this draconic form of punishment, sparking a movement toward the total abolition of these policies. Rhines' state-sanctioned death might have been avoided had queer rhetoric been analyzed in legal practices.

This analytical review differs from contents in typical legal scholarship intentionally; the lacking study of queer rhetoric and the law creates a gap that penalizes those overlooked by the system. Therefore, by intertwining queer rhetoric with the legal landscape, this piece seeks to shed light on the discriminatory practices pervading the courtroom. We begin our discussion with a literature review of rhetorical analysis in the courtroom, followed by a brief overview of past LGBTQ+ cases and the precedents that they established. Next, we examine the facts of Rhines' case, analyzing how queer rhetoric could have changed the outcome. Finally, we propose future directions to promote LGBTQ+ rights as true civil rights.

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58 (2012).

[6] Victoria Ashley, *Death Penalty Redux: Justice Sandra Day O'Connor's Role on the Rehnquist Court and the Future of the Death Penalty in America*, 54 BAYLOR L. REV. 407, 407-08 (2002).

I. RHETORIC AND THE LAW

A. Putting the Legal Space in a Rhetorical Framework

The field of law has a long and complicated history with rhetorical studies. Definitionally, the "expansiveness of rhetoric" and rhetorical research encompasses any and every artifact deemed "rhetoric," which can be anything viewed as representing an argument, point of view, experience, or belief.[7] Rhetoric and law mutually benefited each other in their early lives, continuously building upon their theories together during the Graeco-Roman era.[8] However, the Middle Ages marked the fall out of this budding relationship, and only recently have the two fields regained working in tandem. This deterioration of the relationship between rhetoric and law has decimated numerous aspects of legal studies.

Rhetorical and legal scholar Malthom Anapol describes four specific reasons why the combination of rhetoric and communication is important for lawyers, judges, and legal professionals to study. The fourth, and perhaps most important, explains that lawyers, attorneys, and judges "must [be able to] deal with and understand people."[9] Furthermore, without rhetoric and communication studies as a part of legal scholarship, "attorneys fail to consider a key factor in the classic model of communication."[10] Specifically, there is a lack of understanding of "the [jurors] and their psychological evaluation of the case" when considering juror interactions and how it will affect their verdicts.[11] Rhetorical theories and methods provide these

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[7] Raymie McKerrow, *"Research in Rhetoric" Revisited*, 101 Q. J. OF SPEECH 151, 155 (2015).
[8] Anapol Malthom, *Rhetoric and Law: An Overview*, 18 TODAY'S SPEECH 12, 14 (1970).
[9] *Id.* at 18.
[10] Mark deTurck, *Musical Chairs in the Jury Box*, *in* FORENSIC COMM. APP. OF COMM. RES. TO COURTROOM LITIG. 9, 9-32 (2012).
[11] *Id.*

professionals with the information necessary to advocate for every type of client and present or argue the information to any jury or judge. Anapol's analysis warrants a closer look into communication and rhetorical methods that aids in the understanding of the case of Charles Rhines.

In addition, Sonja Foss' theory of ideological criticism can be used to uncover the ideology behind jury members' decision to sentence Rhines to death. Foss explains that an ideology consists of the central and consistent makeup of a group of individuals' beliefs on a subject.[12] In each piece of rhetoric, in this case jury transcripts, notes, and interviews, there is a "dominant ideology" embedded in the artifact.[13] For example, jurors must have a consistent understanding and belief towards the individual's case that they are studying in order to come to a definite conclusion, or a dominant ideology, on the defendant's case. Therefore, jurors develop a common belief surrounding the case in which they are involved: they discuss, analyze, and arrive at a sole group opinion around one idea. This step is prominent in nearly all cases with a jury. However, problems arise when jurors use *preexisting* ideologies to influence their opinions on the case instead of a homogeneous ideology. Although doing so is frowned upon during trial, many jury members bring their own preconceived ideas with them into the courtroom, complicating the central ideology of the jury as a whole.

Jury biases in decision-making become more apparent within a rhetorical framework. Using rhetoric to understand discrimination is critical to the discussion of capital punishment's unjust practices, considering that juries play a pivotal role in this process. Several components contribute to jury decisions in a

[12] SONJA K. FOSS, 5 RHETORICAL CRITICISM: EXPLORATION AND PRACTICE 237 (2018).
[13] *Id.* at 239.

trial.[14] One study that interviewed jury members after these proceedings found that many members had their own personal opinions on a case set in stone after the first few moments of a trial, and some only needed jury deliberations to make those beliefs feel more concrete.[15] This same study also discovered that defendants themselves usually play a negative role in jury viewpoints.[16] This is apparent to the point that, "after the jurors see the defendant for the first time, the defendant must begin fighting to prove his/her innocence."[17] Incorporating rhetorical and communicative research into jury practices and courtroom processes could help combat the notion, found in this study and others, that a defendant is almost always guilty. This is very different from the societal colloquialism "innocent until proven guilty," providing further evidence of the importance of new rhetorical analysis. Constructing a more fair and accurate trial is plausible when defendants, jury members, and attorneys become more accustomed to basic communication and rhetorical skills. Moreover, understanding the assumptions that jurors make in trials lends some insight into what the jury may have been thinking in Rhines' case and what could have been done differently in a rhetorical sense.

These jury decision-making processes become even more complicated and perhaps trivial when looking at research that points to how jury members might use stereotypes or biases to impact their decisions.[18] Going into a trial, each individual jury

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[14] Pettus Ann, *The Verdict Is in: A Study of Jury Decision Making Factors, Moment of Personal Decision, and Jury Deliberations—from the Jurors' Point of View*, 38 COMM. Q. 83, 92 (1990).
[15] *Id.*
[16] *Id.* at 93.
[17] *Id.*
[18] Sarah Stawiski et. al, *The Roles of Shared Stereotypes and Shared Processing Goals on Mock Jury Decision Making*, 34 BASIC AND APPLIED SOC. PSYCHOL. 88 (2012).

member comes equipped with their own personal beliefs, stereotypes, and implicit biases. In group settings, such as jury deliberations, these stereotypes can potentially permeate the group's shared beliefs. Using mock juries, one study found evidence that "[a] defendant was more likely to be convicted if he was known to be gay."[19] The study further asserts that we should not "be naive about the influence of stereotypes and prejudice in our courtrooms."[20] Evaluating the ways in which ideology, stereotypes, and other personal beliefs negatively influence a jury's decision confirms that homophobic ideology may play a role in some cases, highlighted even more apparently in situations like Rhines'. By utilizing research on homophobic ideology and queer rhetoric, Foss' method of ideological criticism will allow this analysis to dive deeper into the meanings and motives behind jury statements before and after Rhines' sentencing. As a result, conclusions can be drawn as to how his jury's ideology functioned during the trial.

B. Queer Rhetoric and the Courtroom

Understanding LGBTQ+-specific rhetoric is helpful in discovering the potential harms that may result from excluding queer rhetorical thought from the courtroom, a crucial element in Rhines' case. In this research, it is also important to clarify terms central to understanding LGBTQ+ rhetoric. LGBTQ+ refers to lesbian, gay, bisexual, transgender, queer, and other individuals who are part of this community that are not cisgender and/or straight identifying. Furthermore, *cisgender* refers to those who identify with their gender that was originally assigned to them at birth, and *straight* or *heterosexual* refer to those who are solely attracted to the opposite sex. *Queer* is a term recently reclaimed by many members of the LGBTQ+ community to serve as an

[19] *Id.* at 96.
[20] *Id.*

umbrella term of resistance. Finally, *heteronormativity* describes the ways in which heterosexuality has become the default or normal sexuality in our society.

For our purposes, LGBTQ+ or queer rhetoric includes rhetorical and communicative practices that are inclusive of LGBTQ+ people and their identities and combat stereotypes or misinformation about these individuals. This rhetoric could also include perspectives on the law or trials from LGBTQ+ people. More specifically, queer rhetoric involves paying special attention to "the nuanced complexity of power relations within broad categories of queerness and normativity."[21] In Rhines' case, these power structures concern his identity as a gay man in the 1990s and the implications that this had on a jury of cisgender, heterosexual individuals. Therefore, it is also important to discuss the very stereotypes, misinformation, and power dynamics with which queer rhetoric must grapple within the jury. Most homophobic rhetoric may not be explicit, but rather is subconscious in one's actions, thoughts, and decisions, leading to "blatant discrimination" against LGBTQ+ people in the courtroom.[22] Coons and Espinoza created the term *aversive heterosexism* to explain this very concept, as they researched the ways a defendant's sexuality, especially when coupled with another "negative" attribute, may cause the jury to be biased in their decisions toward the defendant.[23] This research is further supported by the conclusion that the mere knowledge of a defendant or victim's sexual orientation can negatively impact the jury's decision.[24]

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[21] Jean Bessette, *Queer Rhetoric in Situ*, 35 RHETORIC REV. 148, 149 (2016).
[22] Jennifer V. Coons & Russ K. E. Espinoza, *An examination of aversive heterosexism in the courtroom: Effects of defendants' sexual orientation and attractiveness, and juror gender on legal decision making.*, 5 PSYCHOLOGY OF SEXUAL ORIENTATION AND GENDER DIVERSITY 36, 37 (2018).
[23] *Id.* at 42.
[24] Jennifer M. Hill, *The Effects of Sexual Orientation in the Courtroom: A*

Homophobic misconceptions and stereotypes were especially prevalent during the 1990s at the height of the AIDS epidemic, right around the time of Rhines' trial. At this time, LGBTQ+ people were the main victims of the deadly AIDS epidemic, and many political leaders, including President Reagan, refused to acknowledge this issue until it was well underway.[25] This epidemic not only illustrated the American public's animosity towards queerness, but heightened it. Homophobic communication was, and in some ways still is, a common part of communication among heteronormative individuals. These individuals utilize negative slurs such as "fag" or "gay" in order to show that they are not, in any way, associated with queer culture or people.[26] Society no longer engages in just homophobia, but also "sexual prejudice": they fear LGBTQ+ people and despise them for their identities.[27] Moreover, the general heteronormative public did not have nearly enough education regarding LGBTQ+ people, their lives, or their behaviors. This created the perfect storm for misconceptions about these individuals to flourish, eventually finding their way inside the courtroom. Unfortunately, both legal and rhetorical studies fall short in adequately producing queer thought and rhetoric as a means to subvert the heteronormativity that oppresses it. Analyzing, critiquing, and publicizing cases like Rhines' can help scholars of all fields "queer the state" and bring justice to queer people.[28]

Double Standard, 39 J. OF HOMOSEXUALITY 93, 102 (2000).

[25] Joseph B. Castro, *How AIDS Remained an Unspoken—But Deadly—Epidemic for Years*, HISTORY (2020), https://www.history.com/news/aids-epidemic-ronald-reagan.

[26] Jeffrey Hall & Betty LaFrance, *"That's Gay": Sexual Prejudice, Gender Identity, Norms, and Homophobic Communication*, 60 COMM. Q. 35, 51 (2012).

[27] *Id.* at 36.

[28] Lisa Duggan, *Queering the State*, SOCIAL TEXT 1, 3 (1994).

C. A Brief Overview of LGBTQ+ Cases

Being open about one's queer identity was not entirely legal until 2003, when the landmark case *Lawrence v. Texas* (2003) struck down the Texas "Homosexual Conduct" law banning same-sex intercourse.[29] Even then, however, the decision was based upon a violation of the Due Process Clause of the Fourteenth Amendment, rather than a violation of the Equal Protection Clause.[30] This dismissal of an Equal Protection argument and ruling, like many other LGBTQ+ cases, is what Dr. Catharine MacKennon calls the "road not taken," in which the Court failed to ensure that LGBTQ+ individuals were granted equal protection from biases inside and outside of the courtroom.[31] The *Lawrence* case is not an anomaly—it is the norm. For Charles Rhines and countless others, sexuality is a debilitating weapon used to strip them of any chance at justice.

Legal strategies like the Queer-Trans Panic Defense utilize the phrase "Gay Panic Disorder" to absolve those accused of killing LGBTQ+ individuals of their crimes.[32] *The Journal of Interpersonal Violence* describes Gay Panic as "a heterosexual man violently responding to unwanted sexual advances from a gay man."[33] In court, attackers can claim that they were in a momentary state of panic or experienced a manic episode at the time of the attack. Defendants like James T. Fisher were sabotaged by their own anti-gay attorneys in capital murder

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[29] Lawrence v. Texas, 539 U.S. 558 (2003).
[30] *Id.*
[31] Catharine A. MacKinnon, *The Road Not Taken: Sex Equality in Lawrence v. Texas*, 65 OHIO ST. L.J. 1081, 1084 (2004).
[32] Alexandra Holden, *The Gay/Trans Panic Defense: What It is, and How to End It*, A.B.A., (April 1, 2020) https://www.americanbar.org/groups/crsj/publications/member-features/gay-trans-panic-defense/.
[33] Robert J. Cramer et al., *The Gay Panic Defense: Legal Defense Strategy or Reinforcement of Homophobia in Court?*, 35 J. INTERPERSONAL VIOLENCE 4239 (2020).

cases, with his attorney waiving his closing statement.[34] Homophobic prosecutors in Diane Whipple's murder case attempted to sway the jury against giving her murderers a guilty verdict, citing an attempt to "'curry favor' with the gay community."[35] Alabama's very own Chief Justice evaded charges of a breach of ethics, despite his repeated anti-gay rhetoric and use of the Bible to oppose queerness.[36] While progress, like that seen in the landmark *Bostock v. Clayton County* (2020), has nevertheless prevailed, it has been overwhelmingly overshadowed by anti-gay rulings and practices.[37] Failing to recognize the anti-LGBTQ+ rhetoric that has become commonplace in legal studies only guarantees the existence of future unjustices.

In *Peña-Rodriguez v. Colorado* (2017), the Supreme Court concluded that a jury's statements containing racial animus prompted an inexcusable sabotage of Sixth Amendment freedoms: the Court held that an override of Rule 606(b) was justified.[38] This rule bars the inquiry into juror deliberations on the basis of trial validity and protects members of the jury from testifying about discussions that took place during court proceedings.[39] However, during *Peña-Rodriguez,* the Court felt the need to "recognize exceptions 'in the gravest and most important cases.'"[40] The Court has clear and established precedent condemning unlawful and unconstitutional discrimination within its walls, yet this precedent has failed to

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[34] Michael B. Shortnacy, *Homophobia In the Halls of Justice: Sexual Orientation Bias and Its Implications within the Legal System*, 11 AM. U. J. GENDER SOC. POL'Y & L. 9, 9 (2002).
[35] *Id.* at 10.
[36] *Id.* at 11.
[37] Bostock v. Clayton County, No. 17 Civ. 1618 (U.S. June 15, 2020).
[38] Pena-Rodriguez v. Colorado, 137 S. Ct. 855 (2017).
[39] *Rule 606 - Juror's Competency as a Witness*, FED. RULES OF EVIDENCE, https://www.rulesofevidence.org/article-vi/rule-606/.
[40] *Pena-Rodriguez*, 137 S. Ct. at 8.

adequately protect LGBTQ+ individuals from biased juries, prejudiced court practices, and inequitable rulings. As a result, it becomes imperative to study, practice, and solidify queer rhetoric into our court systems. Debriefing Charles Rhines' case is one way to do this; understanding how his case could have been alternatively decided demonstrates how future cases can be held to the same robust standards.

II. *RHINES V. YOUNG*

A. Facts

The facts of Charles Rhines' case are relatively straightforward. In 1992, Rhines entered the Dig 'Em Donuts shop in Rapid City, South Dakota. He had been recently fired from the shop, but still had a key to get into the building. As he was attempting to rob the store, employee Donnivan Schaeffer attempted to stop him. Rhines then stabbed Schaeffer and ran with the money he had collected.[41] Rhines later faced a sentencing trial, where he was found guilty and sentenced to death. While this seems routine on the surface, lawyers in 2016 reopened his case after discovering a note that the jury had sent to the judge on Rhines' case, asking the following questions, among others: "would Rhines have a cellmate? Would he be allowed to 'create a group of followers or admirers?' Would he be allowed to 'have conjugal visits?'"[42] Additionally, interviews with jury members revealed that during their second phase discussions, conversation about Rhines' sexual identity involved

[41] Arielle Zionts, *Rhines Scheduled to be Executed Monday*, RAPID CITY J., (November 2, 2019) https://rapidcityjournal.com/news/local/crime-and-courts/rhines-scheduled-to-be-executed-monday/article_fa3e2d1a-1dc1-57aa-b0f7-44b66249a79a.html.

[42] Jordan Smith, *Jurors Thought a Gay Man Would Enjoy Prison. They Sent Him to Death Row Instead. Will the Supreme Court Intervene?* THE INTERCEPT, (June 13, 2018), https://theintercept.com/2018/06/13/supreme-court-anti-lgbt-jury-bias-charles-rhines/.

concerns and disgust towards homosexuality. During the second stage of their decision-making, witnesses were called to testify on Rhines' sexuality to prove that he was gay. One woman that testified against Rhines explained that her husband had had relations with the defendant. Another man admitted to having a sexual relationship with Rhines. Rhines' sisters also testified explaining that their brother struggled with his sexuality.[43] Moreover, some believed that sending a gay man to prison would be sending him "where he wants to go," even explicitly admitting, "we also knew that [Mr. Rhines] was a homosexual and thought that he shouldn't be able to spend his life with men in prison."[44] After hearing of this jury behavior, groups like GLAAD, Lambda Legal, the ACLU, and other social justice organizations filed an amicus curiae brief on behalf of Rhines for his third Writ of Habeus Corpus, with one Lambda Legal attorney describing it as, "one of the most extreme forms anti-LGBT bias can take."[45]

B. Issue and Prior Rulings

In its simplest form, the issue in Rhines' case was whether or not the jury's deliberation and clear anti-gay sentiments deemed his original sentencing trial flawed, warranting a retrial. The amicus curiae brief submitted on Rhines' behalf cites the ruling in *Peña-Rodriguez v. Colorado* (2017) as justification.[46] In *Peña-Rodriguez,* jurors disclosed that

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[43] Writ of Certiorari for Petitioner at 4, Rhines v. Young, 899 F.3d 482 (8th Cir. 2018) (No. 18-8029).
[44] *Id.*
[45] *Id.* at 4; *Civil Rights Organizations Urge Eighth Circuit to Accept Appeal of Man Who May Have Been Sentenced to Death Because He is Gay,* GLAD (2018), https://www.glad.org/post/civil-rights-organizations-urge-eighth-circuit-to-accept-appeal-of-man-who-may-have-been-sentenced-to-death-because-he-is-gay/.
[46] GLAD, *supra* note 45.

racial animosity played a role in their decision-making, specifically about the Mexican identity of the petitioner.[47] The brief also used the Supreme Court case *Buck v. Davis* (2017), in which Buck, a Black man, was sentenced to death following an intense courtroom debate about whether or not his race heightened his "future dangerousness."[48] The District Court tried to make the conclusion that any mention of Buck's race was minimal at best. But in the opinion authored by Chief Justice Roberts, the Supreme Court argued:

> But when a jury hears expert testimony that expressly makes a defendant's race directly pertinent on the question of life or death, the impact of that evidence cannot be measured simply by how much air time it received at trial or how many pages it occupies in the record.[49]

The mention of Rhines' sexuality might have seemed insignificant, but its very presence and introduction via the judge and prosecutorial team created an undeniable effect on the jury.

C. Analysis of Rhines v. Young

Given the facts of Rhines' case, coupled with prior rulings on similar discrimination in the courtroom, we believe that Rhines' application for appeal to the Supreme Court should have been accepted on the grounds of blatant jury bias. Returning to Foss' ideological criticism method and the previous research on queer rhetoric, the jury demonstrated a clear, dominant ideology among themselves that was riddled with homophobic

[47] *Id.* at 29.
[48] Buck v. Davis, 580 U.S. 5 (2017).
[49] *Id.* at 19.

innuendos, stigmas, and stereotypes.[50] Believing that Rhines would enjoy prison simply because he would be with other men, or assuming that he may have relationships in prison, reinforces archaic notions of queerness. The jury spent a session questioning witnesses to confirm that Rhines was a gay man; that alone could prove their "sexual prejudice" towards him. Even though all jury members disclosed prior to the proceedings that they did not have an anti-gay bias, research indicates that *aversive heterosexism* often allows jurors to act on their subtle, subconscious anti-gay biases.[51]

The Supreme Court denied his application for stay of execution of sentence of death and his petition for a writ of certiorari on November 4th, 2019, leading to his subsequent execution.[52] Not only does Rhines' case set a harrowing precedent for future LGBTQ+ bias in the courtroom, but it undoubtedly proves that anti-gay rhetoric is still not being taken into account, even in the most of dire life-or-death situations.

III. POLICY IMPLICATIONS AND FUTURE DIRECTIONS

Charles Rhines' case, along with the countless others that follow similar patterns of civil rights infractions, underscore the need for legal and political changes in our nation's courtrooms and criminal justice system.

A. Reevaluating Capital Punishments' Validity and Legality in America

Gregg v. Georgia (1976) ruled that the death penalty did not violate the Eighth or Fourteenth Amendments. Further, the Court's opinion explained that the imposition of the death

[50] FOSS, *supra* note 12.

[51] Coons & Espinoza, *supra* note 22, at 37.

[52] Denial of Certiorari for Petitioner, Rhines v. Young, 899 F.3d 482 (8th Cir. 2018) (No. 19-6477).

penalty must be in conjunction with adequate and uniform standards, must not be delivered arbitrarily, and must be made in reliance on accurate information about the defendant.[53] However, legally irrelevant factors such as race, identity, and quality of counsel disproportionately determine who is sentenced to death, not to mention the major differences between states' statutes and norms surrounding capital punishment. This is likely due to the fact that, despite efforts to keep jurors with biases out of capital cases and allot defendants a jury of their peers, this is not always feasible for many marginalized groups. White jurors have been found to be more in favor of death penalty decisions than any other group, especially when the defendant is a Black American.[54]

The death penalty was legalized in accordance with relying on sanctioned standards, yet the U.S. has drifted from these guidelines, as seen in Rhines' case. Alongside these findings, many legal scholars argue that the death penalty violates the fundamental right to life, creating the possibility of Supreme Court overhaul and eradication.[55] General support for the death penalty has declined in recent years, shedding light on the favorability of abolition.[56] Not only has this draconic punishment declined in popularity, but research concludes that the states currently without a death penalty statute, opting instead for sentences like life without parole, show lower homicide rates than the national average.[57] While abolishing capital punishment

[53] Gregg v. Georgia, 428 U.S. 153 (1976).

[54] Mona Lynch & Craig Haney, *Death Qualification in Black and White: Racialized Decision Making and Death-Qualified Juries*, 40 LAW & POL'Y 148, 152 (2018).

[55] Kevin M. Barry, *The Death Penalty and the Fundamental Right to Life*, 60 B. C. L. REV. 1545, 1546 (2019).

[56] Andy Hoover & Ken Cunningham, *Framing, Persuasion, Messaging, and Messengers: How the Death Penalty Abolition Movement Succeeded in New Jersey*, 38 HUMANITY & SOC'Y 443, 445 (2014).

[57] Raymond Bonner & Ford Fessenden, *States with No Death Penalty Share*

would not be an instantaneous process, the aforementioned research demonstrates that it would be the most favorable and logical solution. Many states have already begun to move away from the death penalty with a moratorium strategy; this involves stopping all executions for a period of time without an immediate outright ban. Researchers indicate that once this hold is put in place, it becomes difficult to reinstate a regular pattern of executions as the criminal justice system adapts to its new carceral system.[58] Other arguments for life without parole or restorative justice approaches alleviate the need for the death penalty and pave the way for fewer executions, a step in the right direction for many marginalized groups who too often fall victim to the flaws in the criminal justice system.

B. Implementing a Rhetorical Framework in Legal Landscapes

Rhines' case provides substantial evidence for reframing legal studies and practices within a rhetorical lens. Using rhetorical studies in practice would allow lawyers, legal analysts, and judges alike to understand the ways in which laws, the interpretation of said laws, stereotypes, jury deliberations, and general courtroom practices may adversely affect certain citizens while simultaneously protecting others. Studying rhetorical spaces, like the courtroom, heightens understanding of the potential of these practices to dehumanize defendants and "restrict [the] emotion and empathy" of jurors.[59] Paying closer attention to rhetorical scholarship would invite legal

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Lower Homicide Rates, DEATH PENALTY INFO. CENTER, https://deathpenaltyinfo.org/stories/states-with-no-death-penalty-share-lower-homicide-rates#.

[58] Hoover & Cunningham, *supra* note 56, at 446.

[59] Robin Conley, *Living with the Decision that Someone Will Die: Linguistic Distance and Empathy In Jurors' Death Penalty Decisions*, 42 LANGUAGE IN SOC'Y 503, 505 (2013).

professionals to find creative ways to work with every client, expanding their worldview away from solely citizens that look like them. Perhaps if those dealing with, reading, and analyzing Rhines' case had thoroughly studied and considered applicable rhetorical methods or theories, his case would have had a different outcome. Overhauling our criminal justice system with a robust form of rhetorical checks and balances would restore techniques that were once at the foundation of the law in order to ensure that punishment is not unjustly imposed upon those with different identities.

CONCLUSION

When *Obergefell v. Hodges* granted the right to same-sex marriage in 2015, it was a tremendous victory for LGBTQ+ people nationwide.[60] The Court decided that the fundamental right to marry was outlined in the Fourteenth Amendment's Due Process Clause.[61] Interestingly, scholars have argued that *Obergefell* could play a possible role in the case against death penalty statutes, with one arguing:

> "But *Obergefell's* implications for the death penalty are real; if the Fourteenth Amendment reaches the most intimate associations of our lives, it ought to reach our lives as well."[62]

Not only is the idea of *Obergefell* being used to invalidate the death penalty intriguing, but it is also an ironic and long-awaited step towards justice for the LGBTQ+ people that the death penalty has unequivocally harmed. Rhines' case was not the first to face homophobia in the courtroom head-on, yet it still shines a light on the idea that the courtroom must be considered a rhetorical space with rhetorical consequences. Legal studies need

[60] Obergefell v. Hodges, 135 S. Ct. 2584 (2015).
[61] U.S. CONST. amend. XIV, § 1.
[62] Barry, *supra* note 55, at 1548-49.

to move towards intertwining rhetorical practices within the walls of our justice system yet again. Only then can we hope that *Rhines v. Young* becomes an archaic precedent rather than an American norm.

ENVIRONMENTAL INJUSTICE IN ALABAMA: UNDERSTANDING THE IMPACT OF A POSITIVIST POLICY MODEL ON COMMUNITIES OF COLOR

Tejas Dinesh

INTRODUCTION

Plumes of white smoke billow from the ABC-Drummond coke plant on the edge of North Birmingham in July 2018. David Roberson, former vice president of the Drummond Company, has just been convicted of bribing Alabama House Representative Oliver Robinson to block the addition of sites in North Birmingham to the Environmental Protection Agency's (EPA) National Priority List, a position that would qualify the area for additional resources under the federal Superfund program.[1] More than a thousand hazardous sites are on this list, constituting one

[1] Kent Faulk, *Two Balch & Bingham Lawyers and One Drummond Executive Indicted In Bribery of State Legislator*, AL.COM (Jan. 13, 2019), https://www.al.com/news/birmingham/2017/09/two_balch_bingham_lawyers_and.html#incart_big-photo.

of the most environmentally contaminated areas in the country—and more than half of the community's residents are Black.[2]

In 1983, the General Accountability Office (GAO) published a report examining the racial and socioeconomic statuses of the communities surrounding hazardous waste sites.[3] GAO prepared the report in the aftermath of protests by community members in Warren County, North Carolina, who claimed that the state's decision to shift contaminated roadside soil to a landfill in one of the state's only predominantly Black counties was discriminatory. The report found that of the four major hazardous landfills in the Southeast region of the United States, three were located in communities whose populations were primarily Black American, and over a quarter of those communities' residents lived below the poverty line.[4] Four years later, the United Church of Christ Commission for Racial Justice (1987) published a seminal report corroborating the GAO's findings, additionally concluding that a community's racial makeup is the best predictor of its proximity to hazardous waste sites.[5] Moreover, the commission discovered that the proportion of racial minorities in communities with hazardous landfills was two to three times higher than the nation's average demographic ratio.[6]

The commission's findings contributed to the birth of the environmental justice movement, a cause concerned with the

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[2] Shauntice Allen, *The Search for Environmental Justice: The Story of North Birmingham*, 16 INT'L J. ENV'T RSCH. & PUB. HEALTH 2117 (2019).
[3] U.S. GOV'T ACCOUNTABILITY OFF., GAO-83-168, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES (1983).
[4] *Id.*
[5] UNITED CHURCH OF CHRIST COMMISSION FOR RACIAL JUSTICE, TOXIC WASTE AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CONDITIONS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (1987).
[6] *Id.*

equitable distribution of environmental burdens and benefits. In 1994, President Clinton signed Executive Order 12898, one of the earliest attempts by the federal government to incorporate environmental justice concerns into national policy decisions.[7] Unfortunately, Clinton's order "lacked requirements that EJ play a determining factor in siting, rulemaking, and permitting decisions [meaning that] to date, not every federal agency has fulfilled the Order's EJ mandates."[8] In fact, for more than forty years, Alabama's poor and minority populations have borne the brunt of adverse health outcomes related to hazardous-waste landfill siting.[9] In response, environmental justice advocacy groups have emerged throughout the state, calling for greater fairness and transparency in the siting and remediation of toxic waste sites. Among these groups are the Mobile Environmental Justice Action Coalition, the Greater Birmingham Alliance to Stop Pollution (GASP), and Africatown's Clean Healthy Educated Safe & Sustainable (CHESS).[10]

Currently, the Alabama Department of Environmental Management (ADEM) is responsible for the enforcement of environmental regulations within the state. The department has repeatedly drawn fire from environmental justice organizations for their lacking response to and engagement with communities

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[7] Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 7629 (Feb. 16, 1994).

[8] Albert Huang, *The 20th Anniversary of President Clinton's Executive Order 12898 on Environmental Justice*, NAT'L RES. DEF. COUNCIL (Feb. 10, 2014), https://www.nrdc.org/experts/albert-huang/20th-anniversary-president-clintons-executive-order-12898-environmental-justice.

[9] Oliver Milman, *Environmental Racism Case: EPA Rejects Alabama Town's Claim Over Toxic Landfill*, THE GUARDIAN (Mar. 6, 2018), https://www.theguardian.com/us-news/2018/mar/06/environmental-racism-alabama-landfill-civil-rights.

[10] *Other Environmental Organizations*, MOBILE BAYKEEPER, https://www.mobilebaykeeper.org/environmental-links (last visited Aug. 8, 2020).

victimized by environmental racism.[11] While this paper will primarily focus on instances of environmental racism in Anniston, Emelle, and Uniontown, there are many other cases cited by environmental advocates in which ADEM and/or local authorities have failed to appropriately respond to toxic releases of industrial waste.

This article will employ a case study approach to argue that regulatory authorities' current methods of environmental decision-making are insufficient in addressing environmental injustice and allaying the concerns of communities of color. I will rely on archived documents from public hearings, comment periods, and investigations conducted by the EPA and ADEM to demonstrate this deficiency, while including research papers and news articles to provide context for the larger environmental justice issues occurring in each Alabamian community described. Furthermore, this paper will demonstrate that the aforementioned issue occurs because of authorities' dependence on a positivist, quantitative methodology, which alienates communities of color by dismissing their lived experience. The argument presented here questions the mantle of authority lent to positivist methods during policymaking; ultimately, I will draw on environmental justice literature to point to measures that democratize environmental decision-making and improve relationships between communities of color and regulatory authorities.

I. THE POSITIVIST FRAMEWORK

The clash between environmental justice advocates and regulatory authorities can be partially explained by the command-and-control model of policy implementation that both state and federal agencies follow. This process begins by establishing a limit on tolerable pollution and passing regulations

[11] Milman, *supra* note 9.

to prevent violations of this standard.[12] Accordingly, the command-and-control model relies extensively on empirical models of risk; remediation processes are therefore driven by the reduction of whatever pollutant surpasses regulatory limits.[13] Environmental justice advocates have often criticized the command-and-control model's associated focus on risk because it rarely takes into account the "synergistic effects of hundreds of pollutants listed in the Toxic Release Inventory that are released into the air by dozens of plants throughout the county," as well as the unique health conditions of poor communities of color.[14] This explains why ADEM "is limited in its analysis to technical comments concerning environmental matters," even if such analysis directly conflicts with lived experience.[15]

Regulatory agencies' emphasis on technical criteria is rooted in a phenomenon described by Liévanos as "state resonance," which has led policymakers to utilize a decision-making framework that understands legitimacy and credibility as a function of a positivistic regulatory science.[16] The assumption is that this "sound science" is impartial, and therefore, the most effective tool in determining an appropriate course of action.[17] However, as Liévanos points out:

> Recent research suggest [sic] the sphere of regulatory

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[12] Denise Strong & Kathy Allen Hobbs, *Administrative Responses To Environmental Racism*, 25 INT'L J. PUB. ADMIN. 391, 404-05 (2007).
[13] *Id.*
[14] Mark Moberg, *Co-Opting Justice: Transformation of a Multiracial Environmental Coalition in Southern Alabama,* 60 HUMAN ORG. 166, 169 (2001).
[15] Letter from Phillip D. Davis, Chief of Solid Waste Branch, Ala. Dep't of Envt'l Mgmt., to Public Commenters (Sept. 27, 2011) (on file with Ala. Dep't of Envt'l Mgmt.).
[16] Raoul S. Liévanos, *Certainty, Fairness, and Balance: State Resonance and Environmental Justice Policy Implementation,* 27 SOCIO. F. 481, 483 (2012).
[17] *Id.* at 486.

> science, particularly as practiced by environmental protection agencies, has become susceptible to manipulation by countermovement conservatives, industry lobbyists, and legislative initiatives that use a discourse of "sound science" in public policy making. This discourse uses contrary evidence to mainstream scientific findings to obscure an industry's role in harming human and/or environmental health and thus de-legitimizes regulatory restrictions on the industry.[18]

The idealization of science in policymaking is further questioned by scholars in the field of science studies, who argue that science's "methodological preferences" and "experimental conventions" are socially constructed and thus derived from the very sociocultural and historical contexts from which many proponents and practitioners of sound science claim to detach themselves.[19] In other words, the authority of science is constructed, and like any construction, it is assigned legitimacy from an external source. However, as Caudill puts it, "expertise does not require graduate degrees."[20] Unfortunately, locals' expertise regarding their own communities is rarely utilized by regulatory authorities when making environmental decisions because of an inability to effectively access the conventions and vernacular deemed legitimate by policymakers—one commenter repeatedly asked ADEM to provide more "plain English explanations."[21]

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[18] *Id.*

[19] David S. Caudill, *Twenty-Five Years of Opposing Trends: The Demystification of Science in Law, and the Waning Relativism in the Sociology of Science*, *in* THE THIRD WAVE IN SCI. AND TECH. STUD. (2019).

[20] *Id.*

[21] ALA. DEP'T OF ENV'T MGMT., PUBLIC HEARING ON APPLICATION FOR RENEWAL OF OPERATING PERMIT: CHEMICAL WASTE MANAGEMENT (Jan. 11, 2018).

As a result, communities of color often see comment periods and other inclusionary procedures as merely performative. As one commenter stated, "We're not stupid. We know that this plant is going to be permitted. ADEM [will] take down everything we've said and go ahead anyway and issue [their] permit."[22] Ultimately, a command-and-control model of environmental policymaking treats science as an objectivist method and fails to fully recognize the impact of socially constructed concepts such as race and place, as well as the complicated and intersecting historical forces from which these factors are derived. As such, administrators and scientists concerned with generalized rules and the achievement of certain regulatory limits have no way to address the systemic inequities present in the communities they work to assist, because race and other localized social factors are unaccounted for in a positivist policy model. The detriments of relying on this decision-making structure are further evidenced by the blatant environmental justice violations found in the following three case studies.

II. CASE STUDIES

A. Anniston

Between 1935 and 1997, the Monsanto Company owned and operated an industrial plant that produced polychlorinated biphenyls (PCBs) in Anniston, Alabama. During this time, the plant regularly dumped PCBs, a key ingredient for electric transformers and a known toxicant, into neighboring creeks and waste sites. Two of these dumping grounds were the Snow and Choccolocco Creeks, areas where Black Anniston residents living in the west side of town regularly fished, swam, and baptized their children.[23] It was not until dead, deformed fish

[22] Moberg, *supra* note 14, at 172.

[23] Laura Dillon-Burgess et al., *An African American Community and the PCB Contamination In Anniston, Alabama: An Environmental Justice Case Study,*

were found floating on the surface of the Choccolocco Creek that West Anniston's citizens realized the danger. In 1993, the state's Department of Health issued a fish consumption advisory, but by then, people had been eating PCB-contaminated fish for decades.[24] As a result, Anniston's residents, particularly the Black American population concentrated on the west side, had dangerously high levels of PCBs in their blood and exhibited symptoms including headaches, nosebleeds, cancers, liver damage, and open sores.[25] Moreover, scores of community members in West Anniston had died of mysterious illnesses over the years. Coupled with the legacy of strict Jim Crow housing laws, Black Anniston residents found themselves trapped on poisoned land with nowhere to go. While there is evidence that ADEM knew about the pollution as early as the 1970s and that Monsanto knew as early as the 1930s (neither disclosed it to the community), Monsanto only paid a $700,000 settlement to the tens of thousands of victims and their families in 2003.[26] Unfortunately, West Anniston is still contaminated by PCBs, and despite being added to the Superfund list at the turn of the twenty-first century, EPA cleanup efforts are ongoing.

In 2006, the EPA held a public comment period to record Anniston residents' opinions concerning part of the agency's plan to clean up PCBs and lead in the area.[27] Generally, department policy mandates that the EPA publish a plan, provide the community time to respond to the plan, and then respond to community members' concerns. This particular comment period

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21 RACE, GENDER, AND CLASS J. 334, 336 (2014).

[24] *Id.*

[25] Melanie Barron, *Remediating a Sense of Place: Memory and Environmental Justice in Anniston*, 57 SE. GEOGRAPHER 62, 63 (2017).

[26] Dillon-Burgess et al., *supra* note 23.

[27] U.S. ENV'T PROT. AGENCY, SEC. 122 ADMINISTRATIVE AGREEMENT AND ORDER OF CONSENT FOR REMOVAL ACTION
(2005).

demonstrated a disconnect in the priorities of community members and the EPA with regards to lead contamination:

> Comment: The agreement should provide for long term monitoring and institutional controls, including procedures for enforcing the controls....
>
> Response: After completion of the cleanup called for in the Agreement, all residential soils addressed by the Agreement will contain less than 400ppm in the top 2 feet of soil. Consistent with EPA Region 4's practices and EPA's Superfund Lead Contaminated Residential Sites Handbook, OSWER 9285.7-50, EPA believes this provides adequate protection without the need to implement additional institutional controls.[28]

As Barron later points out, many citizens felt that their concerns were repeatedly dismissed under the "banner of scientific authority," and that they had no say in what parameters were used to determine the safety of their community.[29] This "banner of scientific authority" contributed to the delegitimization of residents' "qualitative concerns about the cleanup in Anniston in favor of a cleanup process that operate[d] according to EPA-defined conventions," thus forgetting the "state neglect for [B]lack life" that initially brought the pollution to Anniston.[30] In other words, a reliance on a technical decision-making framework precluded addressing concerns stemming from the community's lived experience with pollution and racial discrimination.

The comment period also illustrated growing tensions

[28] Barron, *supra* note 25, at 70.
[29] *Id.*
[30] *Id.* at 71.

between community members and those tasked with carrying out the cleanup efforts. Multiple community members asked, "Why is ADEM given any oversight authority when the community does not trust them?"[31] To those whose lives and health were destroyed by PCBs, the thought that the regulatory agency that had neglected to inform its constituents of these dangers would be the same agency in charge of rebuilding their community was incomprehensible. In response, the federal department simply restated its commitment to promoting "strong partnerships with its state counterparts," sweeping decades of neglect under the rug.[32]

B. Emelle

In 1978, Waste Management Inc. bought a permit for a 300-acre landfill site in Emelle, Alabama, located in one of the poorest counties in the state.[33] At the time, the county was heavily populated by Black American descendants of sharecroppers and faced high rates of unemployment and economic depression. As such, the landfill's promise to provide jobs and contribute to the local tax base proved enough for many residents and the local government to put any concerns aside.[34] Additionally, since the company was under no legal obligation to inform the citizens of Emelle about the nature of their landfill, many did not have the chance to mount a real offensive until it was too late. By the mid-1980s, Emelle's landfill had become the biggest hazardous waste site in the country and accepted toxic

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[31] U.S. ENV'T PROT. AGENCY, *supra* note 27.

[32] *Id.*

[33] Oliver Milman, *We're Not A Dump – Poor Alabama Towns Struggle Under The Stench of Toxic Landfills*, THE GUARDIAN (Apr. 15, 2019), https://www.theguardian.com/us-news/2019/apr/15/were-not-a-dump-poor-alabama-towns-struggle-under-the-stench-of-toxic-landfills.

[34] Curt Davidson, *Emelle, Alabama: Home Of The Nation's Largest Hazardous Waste Landfill*, U. OF MICH. (2000), http://umich.edu/~snre492/Jones/emelle.htm.

waste from nearly every other state, including waste from Superfund site cleanups outside of Alabama.[35] During this time, Waste Management Inc. was accused of contaminating the aquifer on top of which it was built, in addition to numerous PCB violations, unsafe working conditions, and improper disposal of DDT wastes from military bases.[36] Eventually, residents formed Alabamians for a Clean Environment (ACE), a grassroots organization whose goal was to shut the landfill down. ACE quickly garnered national attention by partnering with internationally established environmental advocacy groups such as Greenpeace and the Sierra Club; the group organized high-publicity protests, rallies, and a "Toxic Trail of Tears" march across the state.[37]

Unfortunately, as ACE gained national recognition and its members became caught up in broader environmental issues, it became less responsive to local needs.[38] Ultimately, the group was unsuccessful in closing down the landfill, but the national media attention it brought to Emelle prompted the Alabama government to impose punitive fees on every ton of waste brought into the town in 1991.[39] Still, concerns remain about the continued presence of a hazardous waste dump in Emelle. In 2018, ADEM held a public comment period regarding the renewal of the landfill's permit—during this time, Sumter County residents could express any concerns they had.[40]

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[35] *Id.*

[36] *Id.*

[37] Kelly D. Alley, et al., *The Historical Transformation of a Grassroots Environmental Group*, 54 HUMAN ORG. 410, 411 (1995).

[38] *Id.*

[39] Michael L. Nirenberg, *Kaye Kiker Has Been Fighting The Biggest Toxic Waste Dump In The Us For 40 Years*, HUFFINGTON POST (Nov. 8, 2017), https://www.huffpost.com/entry/kaye-kiker-has-been-fighting-the-biggest-toxic-waste_b_5a035ce0e4b0c7511e1b394e.

[40] Letter from Stephen A. Cobb, Chief of Land Div., Ala. Dep't of Envt'l Mgmt., to Comm'r Marcus Campbell (May 4, 2018) (on file with Ala. Dep't

Generally, ADEM publishes a letter responding to these comments, along with a final decision on the issuance or renewal of a permit. ADEM's responses to certain comments during this time demonstrate a fundamental inability to effectively conceptualize and integrate certain kinds of community concerns into their decision making:

> A commenter stated, 'Appendix 1-6: A monetary value cannot be placed on the loss of life, liberty, and pursuit of happiness due [to] the leakage of liquids and gases from this facility. Reducing the waste dump's operating costs is not the consideration, the impact on the environment and the populace is the issue to be considered.'
>
> RESPONSE TO COMMENT: It is unclear to what the commenter is referring. Appendix 1-6 is the facility closure cost estimate which is required by ADEM regulations and is intended to estimate the costs of closure of the facility. ... Nothing about the closure cost estimate reduces or even addresses the operating costs of the facility.[41]

It is important to note ADEM's lack of acknowledgement of the intangible costs of the landfill here. Instead of engaging with the commenter's concern for the "impact on the environment and the populace," ADEM's response focused only on the technical criteria that its rules effectively regulate.[42] The response suggests that ADEM believed the issue at hand was a misunderstanding of its rules' intention rather than the factors ostensibly neglected by these standards. A discrepancy like this

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of Envt'l Mgmt.).
[41] *Id.*
[42] *Id.*

invariably leads to governmental decisions that fail to address the root of community members' concerns due to a kind of epistemological dissonance—that is, a "systems view versus experienced reality."[43] It is equally important to note the comments that ADEM did not engage with in its response letter, in which the department states, "all substantive comments were carefully considered."[44] One of the comments not responded to includes the following:

> MS. MUNOZ: I, along with others in this room, worked for years and years to try to get ADEM to tell us what was going on at that site; and after a while, we came to the point—I came to the point in my life to where I could get out of Sumter County if I needed to. And as a result, I now have a home in north Alabama. ... If I no longer trust you guys or Waste Management, I can leave. But there's so many people that cannot leave this county.[45]

By not responding to comments like these, ADEM effectively categorized them as non-substantive; the department failed to acknowledge the fact that many people in Ms. Munoz's community—the same community that the landfill was sited in—lack the ability to escape this pollution. This immobility is endemic in Sumter County, where seventy-five percent of the population is non-white and the median household income is just $23,000.[46] That this immobility is considered beyond the scope

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[43] Lea Den Broeder et al. *Citizen Science for Public Health*, 33 HEALTH PROMOTION INT'L
505 (2018).
[44] Cobb, *supra* note 40.
[45] ALA. DEP'T OF ENV'T MGMT., *supra* note 21.
[46] *QuickFacts: Perry County, Alabama*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/perrycountyalabama (last visited Aug. 8, 2020).

of the permit and not "substantive" enough to respond to demonstrates the use of an empirical framework that cannot effectively police environmental injustice. The landfill's permit was renewed later that year.

C. Uniontown

In 2008, a dam broke at the Tennessee Valley Authority's Kingston plant, spilling millions of tons of coal ash. In just one year, trains would begin transporting this coal ash 300 miles south to the Arrowhead landfill in Uniontown, a predominantly Black rural community located in the Black Belt region of Alabama.[47] In 2011, ADEM held a public comment period regarding the renewal of Arrowhead landfill's permit. Attendees' concerns about coal ash and ADEM's subsequent responses, or lack thereof, illustrate yet another example of a divergence in priorities. Community members brought up their experiences with headaches, dizziness, breathing problems, nosebleeds, and even cancer following the arrival of the coal ash.[48] In response, ADEM stated:

> [T]he department approved the special waste application for the remediation waste to be disposed ... based on analytical results obtained from the TVA that indicated the waste did not contain hazardous constituents in such concentrations as to classify the waste as hazardous waste.[49]

ADEM never addressed the health issues suffered by commenters and instead only pointed out that the waste in question was technically not hazardous according to "analytical

[47] Milman, *supra* note 9.
[48] ALA. DEP'T OF ENV'T MGMT., *supra* note 21.
[49] Davis, *supra* note 15.

results."[50]

Meanwhile, to the community members who shared anecdotes of coal ash blowing from the landfill onto their property, water, and vehicles, ADEM responded:

> ADEM Administrative Code r.335-13-4-.22(10(a)1. Requires compacted earth ... or approved cover material shall be added ... to control disease vectors, fires, odors, blowing litter and scavenging. Section III.H of the proposed permit renewal addresses the cover requirements at the Arrowhead landfill.[51]

From the regulatory lens utilized by the department, the Arrowhead landfill was technically compliant, even if Uniontown's residents' shared experience demonstrated the insufficiency of this regulation. Perhaps the most damaging result of this lacking oversight is represented by ADEM's response to several comments pointing out that Arrowhead "landfill was placed in a poor African American community and as a result is environmental injustice."[52] ADEM replied:

> the proposed permit complies with all ADEM solid waste regulations ... [T]he Department is limited in its analysis to technical concerns concerning environmental matters …[S]ocioeconomic factors etc. are outside the Department's jurisdiction.[53]

Hence, ADEM's decision-making process has proven itself fundamentally incapable of addressing environmental and

[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*

socioeconomic concerns, even though those factors directly result in a racially disparate distribution of hazardous waste. Despite residents' vocal opposition to it, ADEM renewed Arrowhead landfill's permit in September 2011.[54]

In 2013, the Black Belt Citizens Fighting for Health and Justice, a group comprised of Uniontown citizens, filed a Title VI civil rights complaint with the EPA, claiming that ADEM's decision directly contributed to the disproportionate distribution of adverse outcomes on the town's Black citizens.[55] The outcomes in question included the worsening of citizens' health, the deterioration of property values, and violations of air and water quality regulations. Although ADEM insisted that coal ash is not classified as a toxic substance, the area around the Kingston plant was quickly designated as a Superfund site following the spill.[56] Moreover, multiple citizens in Uniontown have independently had local water tested for arsenic and other toxic substances, finding unsafe levels of these impurities.[57]

Five years after Uniontown's Title VI complaint was filed, the EPA found that there was "insufficient evidence" that ADEM had violated Title VI or the agency's anti-discrimination policies.[58] When making this decision, the EPA primarily checked to see if the landfill in question had violated any air or

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[54] *Id.*

[55] Marianne Engelman-Lado, et al. *Environmental Injustice in Uniontown, Alabama, Decades after the Civil Rights Act of 1964: It's Time For Action*, 44 HUMAN RIGHTS MAG. (Apr. 13, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/vol--44--no-2--housing/environmental-injustice-in-uniontown--alabama--decades-after-the/.

[56] ALA. DEP'T OF ENV'T MGMT., *supra* note 21.

[57] K. Lombardi, *Welcome to Uniontown: Arrowhead Landfill Battle a Modern Civil Rights Struggle*, NBC NEWS (Aug. 15, 2015), https://www.nbcnews.com/news/nbcblk/epa-environmental-injustice-uniontown-n402836.

[58] U.S. ENV'T PROT. AGENCY, LETTER ON CLOSURE OF ADMINISTRATIVE COMPLAINT, EPA FILE NO. 12R-13-R4 (Mar. 1, 2018).

water quality regulations, examining data collected by an air quality monitor located miles from town. Despite residents' complaints of breathing problems, the EPA did not conduct any tests of its own and neglected to investigate Uniontown's complaints of declining property values altogether.[59] Hence, two separate regulatory agencies allowed technical criteria to supersede citizens' experiences and discrimination complaints. In fact, the EPA has only made two formal findings of discrimination in the last three decades, a time period that saw hundreds of Title VI complaints filed with the agency.[60] Eleven of those complaints were filed against ADEM.[61]

IV. COMMON THREADS

An evaluation of these case studies reveals a disturbing trend that has persisted for decades between communities of color and those tasked with ensuring their safety. In every instance described in this paper, regulatory authorities allowed a polluting entity to enter low-income and historically Black communities. These communities usually had little to no indication of the negative environmental and health effects that would follow—in fact, there were instances in which regulatory authorities knew about these effects before the community but waited to disclose these dangers. If residents of a town did organize to formally protest the polluting corporation(s) and regulatory authorities responsible for their decline in health, they were usually unsuccessful due to a policy system prioritizing empirical assessments of health over the more qualitative concerns, such as discrimination, raised by the public during comment periods and hearings. This pattern has destroyed poor communities' faith in the authorities, particularly the Alabama

[59] Engelman-Lado, et al., *supra* note 55.
[60] *Id.*
[61] *Id.*

Department of Environmental Management, which makes it difficult for federal authorities like the EPA to establish positive partnerships with communities of color during remediation efforts. As one community member put it, "our citizens' health is in jeopardy ... ADEM is not acting in the way it was designed to act."[62]

To community advocates, ADEM is more concerned with protecting business than public health, as shown by the fact that the agency's "maximum allowable industrial emission levels are above the limits set by most other states, and industry compliance is frequently unmonitored due to a lack of state enforcement personnel."[63] During one meeting between ADEM and industry representatives in Mobile, a community member caught a state official saying, "ADEM is a kinder and gentler regulatory agency than [federal] EPA. You want to let us fine you rather than let EPA get a hold of you. When there's a problem, we generally try to keep EPA out of it."[64] Unfortunately, the EPA suffers from the same lack of resources and funding as ADEM—as a result, the agency's investigatory and remediating powers are often incredibly restricted.[65] In fact, only 319 of the 1,623 sites involved in the Superfund program have been cleaned up to meet the levels required to be removed from the list in the last forty years.[66] Every year, the amount of money available to the Superfund trust decreases, and clean-up efforts have to be

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[62] ALA. DEP'T OF ENV'T MGMT., *supra* note 21.
[63] Milman, *supra* note 9; Moberg, *supra* note 14.
[64] *Id.*
[65] Steve Cohen, *The Declining Organizational Capacity of U.S. Environmental Agencies*, STATE OF THE PLANET (Feb. 17, 2020), https://blogs.ei.columbia.edu/2020/02/17/declining-organizational-capacity-u-s-environmental-agencies/.
[66] Joaquin Sapien & Richard Mullins, *Superfund Today: Massive undertaking to clean up hazardous waste sites has lost both momentum and funding*, CENTER FOR PUB. INTEGRITY (May 19, 2014), https://publicintegrity.org/environment/superfund-today/.

condensed or delayed. Additionally, the EPA's budget cuts make it more difficult for the agency to diligently investigate the number of Title VI complaints that it receives every year.[67]

V. SOLUTIONS

A. Models for Procedural Inclusion

The growing field of social epidemiology challenges the assumptions on which empirical models of health are built. Practitioners in this field assert that disease is not just "caused by a specific identifiable biological agent," but by a "host of social, economic, and political conditions that…contribute to well-being."[68] In other words, social epidemiology widens the definition of health and becomes more inclusive of determinants such as discrimination. In his book *Street Science*, Jason Corburn presents the titular method of fact finding as a process in which community members are involved in both the "problem framing and subsequent methods of inquiry" upon which policy decisions are based.[69] The book presents a variety of case studies in which "street science" was used to render professional models of risk and exposure to toxic substances more accurately.

One of the cases described by Corburn is set in 1997, when the EPA piloted its cumulative exposure project in the Greenpoint/Williamsburg area, a suburb of New York City known for its rich cultural diversity. The project was meant to combine air toxic modelling with other toxic inputs, created in response to environmental justice advocates' criticisms of previous risk assessments' reliance on a single exposure pathway.[70] These advocates argued that the EPA's focus on

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[67] Cohen, *supra* note 65.

[68] JASON CORBURN, STREET SCIENCE: COMMUNITY KNOWLEDGE AND ENVIRONMENTAL HEALTH JUSTICE 5 (2005).

[69] *Id.*

[70] *Id.*

cancer and single sources of pollution missed the cumulative effect that toxic substances often had on poor and minority communities. Although the EPA initially developed its course of study in the neighborhood without involving the community, they eventually presented their proposed methodology to the G/W neighborhood in a public meeting. Almost immediately, community members pointed out a number of holes in the proposed study. One of these issues was the lacking assessment of potentially toxic exposure posed by eating fish from the East River. The EPA had initially assumed a default urban diet in its study, but for the large immigrant population in the area, fishing was both a side effect of poverty and a cultural tradition. Because the immigrants did not speak English well and were wary of the government, the EPA relied on community partners to gather data on fishing practices. Eventually, this data revealed that pollution in the East River did indeed lead to increased toxicity of the fish, and thus an increased health risk for the community at large.[71]

Another study in West Harlem provides further evidence for the utility of community engagement in professional science. In the 1990s, the organization West Harlem Environmental Action (WEACT) put together a study in conjunction with Columbia University to understand the high rates of childhood asthma in the community.[72] A community risk map was assembled to highlight areas in which young people experienced these symptoms, such as difficulty breathing and irritated throats. The map showed that many neighborhood children spent time in areas close to a bus depot, a sewage plant, and a repair garage. Columbia researchers then trained students working with WEACT to wear personal air monitors and collect samples from

[71] *Id.*

[72] Meredith Minkler et al., *Promoting Environmental Health Policy Through Community Based Participatory Research: A Case Study from Harlem, New York*, J. URBAN HEALTH (Jan. 12, 2006).

the areas they found themselves in throughout the day. The data from the air monitors revealed that areas of concern on the risk map, particularly surrounding the bus depot, corresponded with the areas with the worst air quality. A Columbia researcher remarked on the value of community engagement in the study, saying that "as scientists we make assumptions and don't rethink assumptions to see how they fit in a natural situation. I think community people, because they are looking at it from a fresh perspective, will question the assumptions in a way that actually improves the science. It may tailor things to the situation in a way we would not have thought of."[73] In one instance, community members suggested that air monitors be placed by schools' windows, rather than the buildings' rooftops, in order to collect data that more accurately represented the quality of air children breathed during the day. Ultimately, WEACT's findings prompted the EPA to tighten air quality standards in the city and provided a model for other environmental justice groups tofollow.[74]

B. Practical Application in Alabama

The underpinnings of Corburn's street science model address many Alabamian communities' concerns regarding regulatory agencies and the execution of their duties. As the previous studies demonstrate, when these departments meaningfully engage with community residents during their evaluations, the subsequent co-production of knowledge generates a more inclusive and accurate picture of what is truly occurring. University College London's Extreme Citizen Science research group offers a framework for replicating this co-production.[75] Their plan stresses the importance of partnering

[73] *Id.*
[74] *Id.*
[75] Matthias Stevens, et al. *Taking Participatory Citizen Science to Extremes*,

with intermediaries that have prior relationships with community groups in order to lend outside investigators more credibility within the region.[76] This process is broken down into several phases: first, the outside examiners broadly describe the aims of their work; next, community members collaborate with these agents to design the investigation, including key measurements, environmental parameters, and observations to be collected; and finally, community members are trained to use data collection equipment to help gather the agreed upon information.[77] These participatory methods of data collection have dramatically improved the relationship between regulatory agencies and environmental justice communities and have often yielded critical data that researchers had failed to consider initially.[78] If applied to a community like Uniontown, where citizens use their lived experience to address suspected violations of technical limits, the citizen science framework could yield information that contradicts regulatory agencies' limited data collection methods.

It is also important to expand regulatory agencies' decision-making criteria. As each of the prior case studies demonstrates, the siting of landfills in Alabama has resulted in disproportionate exposure of poor communities of color to pollution. Unfortunately, ADEM is currently unable to consider non-technical criteria such as socioeconomic status and property values when issuing permits, even though these factors are directly tied to environmental justice concerns.[79] Additionally, qualitative concerns, though often directly linked to quantitatively verifiable pollution, are rarely investigated by ADEM.[80] As such, the findings presented in this paper suggest

13 IEEE PERVASIVE COMPUTING 20 (May 20, 2014).

[76] *Id.*

[77] *Id.*

[78] Minkler et al., *supra* note 72.

[79] Davis, *supra* note 14.

[80] Minkler et al., *supra* note 72.

the need for regulatory authorities to expand their positivist policymaking framework to consider non-technical criteria when making decisions—in fact, this was the original intent of Clinton's Executive Order 12898.[81] However, such drastic reforms require major changes in budgetary allocation, and as one study shows, there has been a dramatic decline in the funding and organizational capacity of environmental agencies in the U.S.[82] In order to improve the relationship between communities of color and regulatory agencies, governments must prioritize funding for these agencies and begin to utilize a citizen science methodology that examines non-technical criteria when making environmental decisions.

CONCLUSION

The positivist framework for policymaking, as it is currently employed by environmental regulatory agencies, provides an incomplete picture of the environmental injustices suffered by victimized communities. Every health or environmental risk facing these groups must be justified by a quantitative violation of an existing technical criterion or regulation; otherwise, it is considered to be beyond the jurisdiction of authorities like ADEM and the EPA. The deeper loss of security, as well as what this represents for communities of color, is rarely considered by authorities when making decisions on the issuance of a permit, the validity of a discrimination complaint, or a potential listing on a national priority list. A community's lived experience and history is dismissed in the pursuit of a purely technical evaluation of an environmental policy issue. In order for this to be rectified, regulatory agencies must expand the positivist decision-making framework to include social epidemiological theories that

[81] Huang, *supra* note 8.
[82] Cohen, *supra* note 65.

account for factors like race and historical context in models of health.

However, this paper's findings do not reject the scientific method or those highly skilled individuals who practice it; rather, it calls for a marriage between the positivist and the participatory—both local knowledge and positivist methods have something to contribute and are independently insufficient in resolving environmental problems. As demonstrated by the New York case studies described in this paper, efforts to improve a community without the input of its residents can often lead to results that are methodologically dubious. Whether it is the knowledge of where and when children's asthma symptoms flare up the worst or an understanding of local diets, community members possess intimate knowledge that can overturn or justify the assumptions upon which empirical studies, and the policies they inform, are built. Hence, the fair representation of a community's interests is absolutely predicated on earnest engagement with its people; scholarship and policymaking are improved, rather than discredited by, participatory methods of assessment.

Ultimately, environmental policymaking needs to address and recognize both pollution and its unique impact on various communities. These effects are in many ways a function of the historical and socioeconomic context within which a group is situated. To overlook this is to erase a community of color's identity and perpetuate citizens' dissatisfaction with and mistrust of the regulatory authorities assigned to protect their safety. Context matters. People's stories matter. It is time to equip regulatory authorities with the tools to listen and the jurisdiction to do something about it.[83]

[83] *Id.*

GERRYMANDERING & THE FOR THE PEOPLE ACT

Lucas Brooks

INTRODUCTION

There is clearly no perfect political system, but this article will seek to address one of the largest injustices in the American system: political misrepresentation. Even prior to this country's founding at the end of the eighteenth century, political representation was divided along lines drawn for single-member districts. Such a method, long the norm in our political landscape, has a number of faults, greatest among them being its susceptibility to manipulation and mismanagement. Gerrymandering, one such form of this manipulation, has undermined the ideals of equality and fairness in our country since its inception, preventing certain communities from grasping the full political power owed to them. Thankfully, the sun may finally be setting on this crude desecration of the American political system with

the introduction of the For the People Act of 2019. While by no means a perfect solution, the ideas proposed within this legislation should deal a death blow to gerrymandering at the federal level.

To ensure understanding of how this manipulation of boundaries occurs, I will define and explain gerrymandering and its subtypes. I will also describe the relevant federal court cases that provide many of the current limitations on redistricting for all states. These cases are broken into three different categories of statistics used in the redistricting process: population, race, and partisanship. After laying this groundwork, I will present an overview of the most common methods of state redistricting including each of the different types of commissions. I will then detail both the benefits and drawbacks of the For the People Act for the country as a whole. Finally, I will close with a discussion of the positive impact that this Act will have on the political representation of communities of color.

I. GERRYMANDERING

A. Definition of Gerrymandering

According to the Legal Information Institute at Cornell Law School, gerrymandering occurs "when political or electoral districts are drawn with the purpose of giving one political group an advantage over another."[1] There are many types of gerrymandering, each with its own definition and history of usage. During North Carolina's controversial redistricting process in 2011, the three main types of gerrymandering were defined as cracking, packing, and stacking.[2] These are not the

[1] Craig Newton, *Gerrymander*, WEX LEGAL DICTIONARY, https://www.law.cornell.edu/wex/gerrymander (last visited Feb. 2, 2021).
[2] Joe Schwartz, *Cracked, stacked and packed: Initial redistricting maps met with skepticism and dismay*, INDY WEEK (Jun. 29, 2011), https://indyweek.com/news/northcarolina/cracked-stacked-packed-initial-redistricting-maps-met-skepticism-dismay/.

only types of gerrymandering in use in the United States, but prison and incumbent-protection gerrymandering, which will be outlined later in this section, are better viewed as tools and goals, respectively, rather than individual types.

1. Cracking

Cracking has a long and storied history when it comes to American redistricting; the infamous cartoon from which the term originates features a district meant to divide the support of the Federalist Party, establishing a more favorable electorate for Massachusetts Governor Elbridge Gerry's Democratic-Republican Party.[3] In more modern terms, cracking can be defined as "dispersing a group of voters into several districts to prevent them from reaching a majority."[4]

An example of this devious tactic is documented by *WisContext* in the 2011 redistricting of the Wisconsin state legislature. Districts based in the deeply conservative Milwaukee suburbs crossed county lines and reached far into the city proper. Therefore, the largely progressive urban population was spread across a number of districts dominated by conservative suburbanites.[5]

2. Packing

This second practice of gerrymandering involves "combining as many like-minded voters into one district as possible to prevent them from affecting elections in other districts."[6] While this does, in effect, surrender a district to the

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[3] Erick Trickey, *Where Did the Term "Gerrymander" Come From?*, SMITHSONIAN MAGAZINE (July 20, 2017), https://www.smithsonianmag.com/history/where-did-term-gerrymander-come-180964118/.

[4] Schwartz, *supra* note 2.

[5] Malia Jones, *Packing, Cracking And The Art Of Gerrymandering Around Milwaukee*, WISCONTEXT (June 8, 2018), https://www.wiscontext.org/packing-cracking-and-art-gerrymandering-around-milwaukee.

[6] Schwartz, *supra* note 2.

opposing party, its purpose is to increase the drawing party's chances of winning in the surrounding districts. Packed districts are commonly called "vote sinks" since the majority party sacrifices that district in order to gain others.[7]

One example of this tactic can be found in North Carolina's Twelfth Congressional District, which has been featured in several court cases involving gerrymandering; these include the case *Shaw v. Reno*, which will be covered later in this section. For a time in the 1990s and early 2000s, the Twelfth district stretched across the state, snaking through the Black American majority neighborhoods in Charlotte, Winston-Salem, Greensboro, and Durham.[8] Maps featuring this district have been ordered by the court to be redrawn no less than four times, often due to the unusual shape of the district.[9]

3. Stacking

If cracking and packing represent more traditional gerrymandering techniques, then stacking is the new method quickly coming into vogue. There are fewer examples of this type in practice, largely due to the technological complexity necessary to effectively create a stacked plan. While it is typically easier to create gerrymandered maps that crack and pack partisan groups, there is a danger that such gerrymanders can break due to demographic or political shifts, leading to detrimental outcomes for the drawing party.[10] Stacking, on the other hand, is based upon the knowledge of likely turnout,

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[7] Matthew Yglesias, *It's harder for Democrats to gerrymander effectively*, VOX (Apr. 2, 2018), https://www.vox.com/policy-and-politics/2018/4/2/17173158/democrats-gerrymander-segregation.

[8] Max Blau, *Drawing the line on the most gerrymandered district in America*, THE GUARDIAN (Oct. 19, 2016), https://www.theguardian.com/us-news/2016/oct/19/gerrymandering-supreme-court-us-election-north-carolina.

[9] *Id.*

[10] Laughlin McDonald, *Stacking, Cracking and Packing*, AMERICAN CIVIL LIBERTIES UNION, https://www.aclu.org/video/stacking-cracking-and-packing (last visited Feb. 2, 2021).

occurring "when low-income, less educated minorities are grouped together to create a perceived voting majority but are placed in the same district as high-income, more-educated white voters who turn out in greater numbers."[11] The idea is that, excluding wave elections with higher turnout, most stacked districts will ensure a win for the party in power.

4. Other Types of Gerrymandering

Prison gerrymandering is also a common tool used to inflate the populations of the many rural communities that are the temporary homes of America's 2.3 million incarcerated persons.[12] The Legal Defense and Education Fund of the NAACP defines prison gerrymandering as "a practice whereby many states and local governments count incarcerated persons as residents of the areas where they are housed when election district lines are drawn" instead of the last known address of these incarcerated persons.[13] This practice often dilutes the political power of major population centers; for example, a study by Villanova University found that Philadelphia would likely gain an additional minority-majority district if incarcerated persons were counted at their most recent home address prior to being imprisoned.[14]

Incumbent-protection gerrymandering often occurs in situations where the party in power prioritizes the safety of its incumbents over the creation of the maximum number of

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[11] Schwartz, *supra* note 2.

[12] WENDY SAWYER & PETER WAGNER, *Mass Incarceration: The Whole Pie 2020*, PRISON POLICY INITIATIVE (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html.

[13] Zahra Mion, *Case: Prison-Based Gerrymandering Reform*, NAACP LEGAL DEFENSE AND EDUCATION FUND (Feb. 16, 2018), https://www.naacpldf.org/case-issue/prison-based-gerrymandering-reform/.

[14] Brianna Remster & Rory Kramer, *Shifting Power: The Impact of Incarceration on Political Representation*, 15 DU BOIS REVIEW 417, 417-39 (2018).

favorable districts.[15] These situations generally occur when redistricting control is split between both major parties; therefore, they broker a deal to maintain the status quo by drawing districts that do not lump incumbents into the same district and keep a reasonably similar partisan makeup as the previous map. One such example of this is the North Carolina state legislature maps drawn in 2019; unusual to this redistricting, however, was that the deal brokered by the legislators did not include all of their colleagues.[16] Incumbent-protection gerrymandering is no longer the antithesis to competitive districts that it used to be, suggesting that such redistricting is not fully responsible for the rising rate of incumbent reelection.[17]

B. Relevant Federal Case Law

Much like the rest of the country, the Supreme Court had a subpar record on questions of civil rights issues and political representation prior to the 1950s. Before the Warren Court, few courts had adjudicated cases relating to political redistricting.[18] As such, all of the relevant rulings discussed in the next few subsections were issued within the last sixty years. Some of the later verdicts overrule those that came before them, but all are necessary to gain a complete picture of the modern legal

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[15] Lauren Payne-Riley, *A Deeper Look at Gerrymandering*, POLICY MAP (Aug. 1, 2017), https://www.policymap.com/2017/08/a-deeper-look-at-gerrymandering/.

[16] Michael Wines, *In North Carolina, New Political Maps Don't End Old Disputes*, THE NEW YORK TIMES (Sept. 17, 2019), https://www.nytimes.com/2019/09/17/us/north-carolina-gerrymandering.html.

[17] John N. Friedman & Richard T. Holden, *The Rising Incumbent Reelection Rate: What's Gerrymandering Got to Do With It?*, 71 JOURNAL OF POLITICS 593 (2009).

[18] Wendy Underhill, *Redistricting and the Supreme Court: The Most Significant Cases*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Apr. 25, 2019), https://www.ncsl.org/research/redistricting/redistricting-and-the-supreme-court-the-most-significant-cases.aspx.

landscape regarding redistricting, as well as past experimental solutions.

1. Cases Relating to Population

The following two decisions are the foundations upon which all other redistricting cases have been built. *Baker v. Carr* (1962) and *Wesberry v. Sanders* (1964) opened the floodgates for future cases by ruling that both state legislative and congressional redistricting plans, respectively, can be appealed to the federal court system.[19] The decision in *Wesberry* went even further than that in *Baker*, ruling that population equity between congressional districts is both desirable and a primary goal of redistricting.[20] Without these two essential rulings, there would be little in the way of legal recourse against gerrymandering of any kind.

Reynolds v. Sims (1964) has been dubbed a hallmark of America's legal history and the keystone to a more democratic society.[21] It has long been argued that some of the most important politics in this country occur at the state level, what Justice Louis Brandeis labeled as the "laboratories" of democracy.[22] By expanding the ruling of population equity established in *Wesberry* to the state legislative level, the Warren Court helped ensure that America's statehouses resembled their populations. This decision remedied the representational imbalance between urban and rural areas around the country; some states had not redistricted in decades, so a large section of the country was malapportioned.

These three cases were paramount in establishing the "one person, one vote" rule in redistricting practices across the

[19] Baker v. Carr, 369 U.S. 187, 188 (1962).
[20] Wesberry v. Sanders, 376 U.S. 1, 3 (1964).
[21] Andrea Sachs, *The Best Supreme Court Decisions Since 1960*, TIME (Oct. 6, 2015), https://time.com/4055934/best-supreme-court-decisions/.
[22] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932).

nation.[23] *Baker*, *Wesberry*, and *Reynolds* collectively fired the first shot in the judicial war against gerrymandering and for expanding political equality. While all three of these cases are important for the modern system of governance, none challenged the largest representational injustice: race.

2. Cases Relating to Race

Slavery has long been called America's original sin, and the stain that it casts over our society is something that our nation continues to grapple with today.[24] The racial discrimination that persisted in the wake of slavery has endured for a long period of time and still extends into our modern political system. Legislators wishing to minimize the power of Black Americans and other minority voters often employed the tactics mentioned in section A to carve up communities of color. Fortunately, the landmark Voting Rights Act of 1965, in partnership with the Apportionment Cases discussed in section B.1, paved the way for more representative redistricting.[25] Each of the cases discussed later in this section sought to limit the power of the Voting Rights Act, or the powers it granted to the Department of Justice, in some way.

A pair of cases from the 1990s, *Shaw v. Reno* (1993) and *Miller v. Johnson* (1995), imposed greater limitations on states' ability to create minority-majority districts. *Shaw* concerned the redistricting of North Carolina and how the gerrymandering of the Twelfth Congressional district diluted the power of white voters. Using the Equal Protection Clause of the Fourteenth

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[23] Robe Imbriano, *One Person, One Vote*, THE CONSTITUTION PROJECT, https://www.theconstitutionproject.com/portfolio/one-person-one-vote/ (last visited Feb. 2, 2021).

[24] Annette Gordon-Reed, *America's Original Sin*, FOREIGN AFFAIRS (Jan. 2018), https://www.foreignaffairs.com/articles/united-states/2017-12-12/americas-original-sin.

[25] James C. Cobb, *The Voting Rights Act at 50: How It Changed the World*, TIME (Aug. 6, 2015), https://time.com/3985479/voting-rights-act-1965-results/.

Amendment, the Court ruled that using race while redistricting must be done with strict scrutiny.[26] *Miller* went even further on this issue, reinforcing the strict scrutiny standard applied to race when redistricting.[27] In essence, *Shaw* and *Miller* weakened efforts at the state level to expand minority representation, especially concerning dispersed populations.

While the previous two cases diminished states' ability to ensure that minority representation reflected their population share, the preclearance clauses of the Voting Rights Act still guaranteed that districts were being drawn in a mostly equitable manner. Unfortunately, *Shelby County v. Holder* (2013) dealt a grievous blow to federal oversight of state redistricting. By ruling that the preclearance clauses in Section Four of the Voting Rights Act were unconstitutional, the Court severely curbed federal oversight of racially discriminatory gerrymandering.[28] These provisions had previously required jurisdictions with a history of discrimination to gain federal approval for all changes to state election laws, but the Court elected to strike this added check in *Shelby*.[29] The damage inflicted by this decision only exacerbated the injustices resulting from other methods of voter suppression at the state level.[30]

3. Cases Relating to Partisanship

The inherently partisan nature of politics has spread into the supposedly impartial redistricting of legislative seats in this country. As such, many proponents of gerrymandering reform sought remittance in the court system, especially at the federal

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[26] Shaw v. Reno, 509 U.S. 630, 645 (1993).

[27] Miller v. Johnson, 515 U.S. 900, 909 (1995).

[28] Shelby County v. Holder, 570 U.S. 529 (2013).

[29] *Id.*

[30] Matt Vasilogambros, *Polling Places Remain a Target Ahead of November Elections*, THE PEW CHARITABLE TRUSTS (Sept. 4, 2018), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/09/04/polling-places-remain-a-target-ahead-of-november-elections.

level. However, the decisions in the following cases, among others, have slowly chipped away at that vital safeguard of democracy.

For decades prior to the ruling in *Vieth v. Jubelirer* (2004), the federal court system held that a legal standard existed under which it would be relatively easy to determine whether a redistricting plan constituted a partisan gerrymander. At the time of the *Vieth* ruling, a workable standard had yet to be formulated and implemented,[31] but a lack of success is not an acceptable rationalization for surrendering the idea. Furthermore, this decision not only limited the ingenuity of the federal court system—it also heavily restricted the basis under which a claimant could appeal a redistricting plan. The plurality's ruling blocked the Fourteenth Amendment's Equal Protection Clause from use. Justice Anthony Kennedy's concurring opinion established the justiciability of partisan gerrymandering under the First Amendment, just barely keeping the hopes of reformers alive.[32]

These hopes were quickly extinguished by the Supreme Court's majority decision in *Rucho v. Common Cause* (2019), at least at the federal level. By ruling that partisan gerrymandering was a purely political question, the majority placed court-mandated reform outside the purview of the federal appeals system.[33] Such a decision significantly weakened the main avenue of redress that reform advocates had depended upon for decades. Nonetheless, state-level judicial intervention could still seek to address gerrymandering at a federal level; for example, the Pennsylvania Supreme Court recently ruled in favor of a plaintiff seeking to overturn a partisan gerrymander on the state's

[31] Underhill, *supra* note 18.
[32] Vieth v. Jubelirer, 541 U.S. 267, 307 (2004).
[33] Rucho v. Common Cause, 139 S. Ct. 2484, 2487 (2019).

Congressional map.[34] However, the Court's decision in *Rucho* still limited progress at the federal level that could have benefited citizens across the country.[35]

II. ALTERNATIVES TO REDISTRICTING BY STATE LEGISLATURE

A. Implemented Policy Options

Throughout the years, several groups have taken issue with how redistricting occurs, pushing for a variety of reforms in states across the country. Especially within the last decade, several types of reforms have been implemented with varying degrees of success. While no plan has achieved the goal of completely eliminating bias from redistricting, all have increased transparency and decreased the gerrymandering seen in political districts.

1. Advisory Commission

Generally, redistricting processes that make use of an advisory commission allow population experts and members of the general public to submit map proposals to both the commission and the legislature.[36] By allowing for public consultation, the redistricting process gains transparency. In addition, this method typically limits political interference by publishing all received proposals; this way, it becomes much clearer if a partisan proposal was chosen over more impartial alternatives.[37] Unfortunately, most redistricting systems that involve an advisory commission allow the legislature to choose whichever proposal its members would prefer, even if there are

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[34] Charles Thompson, *If it stands, redistricting order means it's back to square one for Pa.'s Congressional map*, PENN LIVE (Jan. 30, 2019), https://www.pennlive.com/politics/2018/01/redistricting_order_means_its.html#incart_river_index_topics.

[35] *Rucho v. Common Cause*, 139 S. Ct. at 2487.

[36] Justin Levitt, *Who draws the lines?*, ALL ABOUT REDISTRICTING, https://redistricting.lls.edu/redistricting-101/who-draws-the-lines/#advisory+commissions (last visited Feb. 2, 2021).

[37] *Id.*

objectively better alternatives offered by the commission. It should also be mentioned that the opportunity to submit a proposal does not guarantee complete public access to the process. The legal right to participate in this type of commission is a far cry from having the technical knowledge and skill to draft a sensible redistricting proposal.

2. Politician Commission

Politician commissions operate differently depending on the state in question.[38] Some states, like Arkansas, redistrict using statewide officeholders as *ex officio* members of the commission.[39] Others, such as the system utilized in New Jersey, have an equal number of members appointed by the two main political parties with an independent as the tiebreaker if necessary.[40] Though preferable to traditional redistricting methods, this system still faces significant drawbacks. Politicians exercise a great degree of control over their own electorate. It is typical of these systems to have few protections against politicians choosing their constituents and not vice versa.[41]

3. Independent Commission

Most reformers view the independent redistricting commission as the gold standard for how this process should be conducted.[42] These commissions seek to limit the direct

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[38] *Id.*

[39] *Id.*

[40] John J. Farmer, Jr., *Congressional Redistricting Under the New Jersey State Constitution*, NEW JERSEY REDISTRICTING COMMISSION, http://www.njredistrictingcommission.org/aboutredistricting.asp (last visited Feb. 2, 2021).

[41] Randy Ludlow, *Check out the mechanics of how Ohio's congressional, legislative redistricting will work*, THE COLUMBUS DISPATCH (Nov. 3, 2020), https://www.dispatch.com/story/news/politics/elections/2020/11/03/ohio-new-congressional-legislative-lines-heres-how-redistricting-works-republicans-democrats-agree/6088922002/.

[42] J. Gerald Hebert, *Independent Redistricting Commissions*, CAMPAIGN LEGAL CENTER, https://campaignlegal.org/democracyu/accountability/independent-

participation of politicians in the redistricting process by appointing regular citizens to these bodies; every state has different regulations about the ties that commissioners can have to the political process, but all exclude current public officials from service.[43] In spite of this system's failure to achieve complete impartiality, redistricting plans drawn by independent commissions tend to be more reflective of a state's population than those plans created by politicians.[44] This type of commission has even survived constitutional challenge in the Supreme Court. *Arizona State Legislature v. Arizona Independent Redistricting Commission* (2015) found that citizen-led independent redistricting commissions were, in fact, constitutional under the Elections Clause.[45]

B. For the People Act of 2021

There have been a great many attempts to curb gerrymandering at the state level. However, little progress has been made on implementing a federal standard for redistricting that still maintains a high bar in the states. The For the People Act of 2019, hereinafter H.R. 1, was introduced by Representative John Sarbanes (D-MD) in order to do just that, along with a litany of other common-sense ethics and transparency reforms.[46] Although the proposed bill passed the

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redistricting-commissions (last visited Feb. 2, 2021).

[43] Levitt, *supra* note 36.

[44] Josh Goodman, *Why Redistricting Commissions Aren't Immune From Politics*, THE PEW CHARITABLE TRUSTS (Jan. 27, 2012), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2012/01/27/why-redistricting-commissions-arent-immune-from-politics.

[45] Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787 (2015).

[46] Wendy R. Weiser et. al, *Congress Must Pass the 'For the People Act,'* BRENNAN CENTER FOR JUSTICE (Jan. 29, 2021), https://www.brennancenter.org/our-work/policy-solutions/congress-must-pass-people-act.

House of Representatives in a party-line vote, 234 in favor and 193 against,[47] the Senate of the 116th Congress never reviewed the bill, and it remained in the Rules and Operations Committee for the rest of the session.[48] Such an abandonment of the legislative process demonstrates the Senate leadership's complacency and inability to prioritize the needs of our democracy. However, with the advent of the 117th Congress and the unified single-party control of both chambers, H.R. 1 was re-introduced along with its companion bill S.R. 1.[49] The House of Representatives once again passed H.R. 1 along a similar party-line vote, once again placing the fate of this bill in the hands of the closely divided Senate.[50] In order to close the widening cracks in our country's political foundation, the current Senate must seriously consider and pursue passage of this legislation.

1. Summary of Relevant Sections

While the full bill contains a number of provisions, covering topics from voting access for people with disabilities to ethics reform for public servants, Subtitle E Sections 2400 to 2435 most directly relate to the restriction of gerrymandering.[51] In short, the passage of this bill would require every state in the nation to use independent commissions for congressional

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[47] "For the People Act of 2019: Roll Vote No. 118." Congressional Record 165:42 (Mar. 8, 2019) p. H2602.

[48] Ella Nilsen, *Senate Democrats unveiled an anti-corruption companion bill. Mitch McConnell is already blocking it.*, VOX (Mar. 27, 2019), https://www.vox.com/2019/3/27/18284171/senate-democrats-anti-corruption-hr1-schumer-mcconnell.

[49] Andrea Germanos, *Reintroduced 'For the People Act' Praised for Its Potential to Bring Sweeping Democracy Reforms*, COMMON DREAMS (Jan. 5, 2021), https://www.commondreams.org/news/2021/01/05/reintroduced-people-act-praised-its-potential-bring-sweeping-democracy-reforms.

[50] Grace Panetta, *The US House passes H.R. 1, a major voting rights and campaign finance reform package*, INSIDER (Mar. 3, 2021), https://www.businessinsider.com/us-house-passes-hr-1-democracy-reform-voting-rights-package-2021-3.

[51] For the People Act of 2021, H.R. 1, 117th Cong. § 2400-2435 (2021).

redistricting. For a plan to be passed by these new commissions, a majority vote from the entire body must be reached, with at least one affirmation from a representative of each of the two major parties and the Independent group.[52] In effect, such a voting method should produce a plan that is nonpartisan and fair to all sides.

As detailed in Section 2413, these commissions would be prohibited from considering partisan factors in the drawing of their maps, except to ensure that a proposed plan does not unduly favor or disfavor any particular party when compared to their statewide influence.[53] In fact, the commissions use standardized redistricting criteria across the nation: preservation of communities of interest, contiguity, equal population, and equal opportunity for minority groups.[54]

If a specific state's independent commission cannot pass a redistricting plan by the method mentioned above within a certain time frame, the responsibility for creating the state's plan would fall to a three-judge panel from a United States District Court.[55] This panel would follow the same redistricting criteria as the commissions and submit to the same public input hearings. Furthermore, the panel in question may entrust the actual design of the map to a court-appointed special master. This is a common practice in redistricting cases where the court orders the map to be redrawn; for example, the Pennsylvania Supreme Court appointed a Stanford University law professor to help redraw their congressional maps in 2018.[56]

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[52] For the People Act of 2021, H.R. 1, 117th Cong. § 2413(d)(4) (2021).
[53] For the People Act of 2021, H.R. 1, 117th Cong. § 2413(a)(2) (2021).
[54] Underhill, *supra* note 18; For the People Act of 2021, H.R. 1, 117th Cong. § 2413(a)(1)(D) (2021).
[55] For the People Act of 2021, H.R. 1, 117th Cong. § 2421(a) (2021).
[56] Christopher Huffaker, *Work begins on new congressional maps as Pa. Supreme Court appoints adviser*, THE PITTSBURGH POST-GAZETTE (Jan. 26, 2018), https://www.post-gazette.com/local/region/2018/01/26/congressional-

2. Negatives of Relevant Sections

No single solution is perfect, especially when applied across several systems at the state level. While there is a great deal to appreciate about the proposals contained in Section 2400 to 2435, these solutions still have flaws. In the interest of fairness to proponents of all other solutions, the shortcomings of H.R. 1's redistricting reforms must be recognized.

The most vocal criticism against H.R. 1's independent redistricting commissions is their failure to meet one of their primary objectives: the total elimination of partisanship from the redistricting process. Interparty conflict still characterized the redistricting processes of Arizona, California, Colorado, and Idaho when these states first implemented their independent commissions.[57] It should be noted that independent redistricting commissions tend to decrease the partisanship of the actual drawing process and that, especially in this day and age, political parties will always find a reason to contest their opponents' perceived victories.

Another oft-repeated complaint concerning independent redistricting commissions is the lacking qualifications of their members. While there are limitations on the participation of lobbyists and politicians on these bodies, the H.R. 1 proposal makes no mention of an experience or knowledge requirement for commission members. With such a wide range of possible members, independent commissioners are almost always reliant on outside legal counsel and consultants to assist in drawing proposals. As demonstrated by the 2011 Arizona redistricting process, hiring outside assistance leaves the commission vulnerable to the very attacks of partisanship that they were

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maps-work-Pennsylvania-Supreme-Court-appoints-special-master-Legislature-caucus/stories/201801260170.

[57] Goodman, *supra* note 44.

invented to avoid.[58] On the other hand, allowing almost any member of the public to join creates a higher level of trust within these processes. Using unaffiliated or nonpartisan experts in a situation as vitally important as political representation should not be looked upon with dismay. Politicians typically seek expert guidance for laws aimed at a specific goal, and the hiring of an educated specialist is no different in this case.

Other criticisms of the independent redistricting proposal tend to focus on the criteria employed when redistricting. For example, many have argued that the commissions proposed by H.R. 1 do not view compactness of districts as a criterion for mapmaking. While compactness has long been used in most states,[59] there is no single legal definition for this term, leading to disagreements over how compact a map should strive to be. Nevertheless, leaving out this traditional criterion has served as one of many factors used by legislators to discredit this bill.[60] However, compactness in redistricting does not always equate to fairness. Past attempts to achieve compactness have sometimes resulted in the packing of voters from several communities of color.[61]

While these issues are certainly valid, the positive attributes of H.R. 1 far outweigh any minute problems with this piece of legislation. Specific sections of the proposed bill may help to reduce political divisions, standardize the redistricting process across the country, and increase transparency and public accountability.

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[58] Matt Vasilogambros, *The Tumultuous Life of an Independent Redistricting Commissioner*, THE PEW CHARITABLE TRUSTS (Nov. 26, 2019), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/11/26/the-tumultuous-life-of-an-independent-redistricting-commissioner.

[59] Levitt, *supra* note 36.

[60] Nilsen, *supra* note 48.

[61] Payne-Riley, *supra* note 15.

3. Positives of Relevant Sections

It has long been theorized that the implementation of independent redistricting commissions that value competitiveness should, in the long run, lead to more moderate representatives.[62] This follows from the idea that more competitive districts require moderate candidates in order to persuade a majority of the electorate. A successful candidate in a competitive district tends to worry less about appealing to the extremes of their party and focuses on appealing to a broader swath of voters with a moderate platform. Such conjecture has been supported by research from the Center for American Progress in their advocacy for redistricting reform, and many Congressional Representatives have also begun to sound the alarm on the lack of a moderate voice in politics.[63] For example, former Representative John Barrow has decried the effects of gerrymandering upon the partisanship of Congress.[64] However, it should also be noted that creating more competitive districts is not a complete solution to decreasing partisanship. Hypercompetitive states like Wisconsin are more politically divided today than they have ever been before,[65] suggesting that, while H.R. 1 will likely increase the competition within political districts, this bill is not the all-encompassing solution that some had imagined.

One major benefit of H.R. 1 is its standardization of the

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[62] Alex Tausanovitch, *Voter-Determined Districts*, CTR. FOR AM. PROGRESS (May 9, 2019), https://www.americanprogress.org/issues/democracy/reports/2019/05/09/468916/voter-determined-districts/.

[63] *Id.*

[64] John Barrow, *Redistricting moderates out of Congress*, THE WASHINGTON POST (May 17, 2012), https://www.washingtonpost.com/opinions/redistricting-moderates-out-of-congress/2012/05/17/gIQA4uu2WU_story.html.

[65] Nora Eckert & Anya van Wagtendonk, *In evenly split Wisconsin, partisan divides may only grow*, WISCONSIN CENTER FOR INVESTIGATIVE JOURNALISM (Jan. 23, 2021), https://www.wisconsinwatch.org/2021/01/in-evenly-split-wisconsin-partisan-divides-may-only-grow/.

national redistricting process. The bill would extend the same legal requirements—involving an independent redistricting commission—to all states that do not already meet the specified criteria.[66] From Maine to New Mexico and Alaska to Florida, every congressional district would be drawn in the same fashion. The lacking oversight that previously surrounded the redistricting process has allowed practices of gerrymandering to persist for far too long. Supported by research conducted at the Brennan Center for Justice, the passage of H.R. 1 provides strict guardrails for the states during redistricting, providing additional protection against abuses of this system.[67] This uniformity would prove beneficial for all American communities.

Finally, the most beneficial effect of this bill would be the increase in overall transparency that it would bring to the redistricting process nationwide. As Justice Brandeis famously declared, "sunlight is said to be the best of disinfectants,"[68] and H.R. 1 would shine a light on an often-murky process. The proposed bill requires that meetings of each state's independent redistricting commission, as well as the selection of maps and committee members, be open to public comment.[69] This increased input will prove extremely beneficial to those tasked with creating the new boundaries,[70] as it would be nearly impossible for the commission to be aware of every political and geographical intricacy in their state. Therefore, drawing upon the collective knowledge of the entire community will provide for more representative maps than could be drawn without public assent.

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[66] For the People Act of 2021, H.R. 1, 117th Cong. § 2401(a) (2021).
[67] Weiser et. al, *supra* note 46.
[68] LOUIS BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT, 92 (1933).
[69] For the People Act of 2021, H.R. 1, 117th Cong. § 2413(b)(1) (2021).
[70] Weiser et. al, *supra* note 46.

III. IMPLICATIONS OF GERRYMANDERING AND H.R. 1 FOR COMMUNITIES OF COLOR

While the passage of H.R. 1 would certainly strengthen the American electoral system, its representational benefits would greatly empower disadvantaged communities of color. For much of American history, gerrymandering has typically worked to hinder minority representation,[71] and this bill would seek to rectify these injustices.

Even after the Supreme Court deemed racial gerrymandering unconstitutional through *Shaw v. Reno*, most political gerrymanders were simply racial gerrymanders under another name. Using Wisconsin as an example, the redistricting system in place all but ensured that the Black and Hispanic communities in this region would not reach a level of representation equal to their percentage of the state's population.[72] Such gerrymandering even occurs in areas where the community of color in question makes up a majority of the population. The Navajo population in San Juan County, Utah, was long packed into a single district until the Navajo Nation sued the county under a claim of racial discrimination. As documented by political data consultant Matthew Isbel, the new districts drawn by the court further empowered the Navajo community, finally granting them autonomy over their own affairs.[73]

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[71] Kim Soffen, *How racial gerrymandering deprives black people of political power*, WASH. POST (June 9, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/06/09/how-a-widespread-practice-to-politically-empower-african-americans-might-actually-harm-them/.

[72] Gwen Moore, *The Burdens of Gerrymandering Are Borne by Communities of Color*, NBC NEWS (Nov. 6, 2017), https://www.nbcnews.com/think/opinion/burdens-gerrymandering-are-borne-communities-color-ncna817446.

[73] Matthew Isbell, *Gerrymandering in San Juan County, Utah and Discrimination Against The Navajo*, MCI MAPS (Feb. 5, 2018),

Unfortunately, this type of political gerrymandering is not limited to one party. The Brennan Center has identified congressional districts drawn by Republicans in Virginia, North Carolina, and Texas and by Democrats in Maryland as disadvantageous to communities of color.[74] Additional research estimates that Southern states could have drawn as many as sixteen additional Black or Latinx majority congressional districts during redistricting within the past decade,[75] demonstrating the amount of political power that gerrymandering has appropriated from communities of color. These examples illustrate the injustices borne by communities of color for much of American history and highlight the ways in which H.R. 1 could rectify these wrongs.

In every corner of the United States, minority groups have been deprived of political power in order to maintain the racial status quo. Too often, these communities are the most vulnerable and marginalized among us. However, through the solutions outlined in H.R. 1, political influence would finally be restored to those whose voices have been silenced for far too long.

CONCLUSION

This article has examined the types of gerrymandering being practiced across the country; the judicial limitations and various state legislative alternatives implemented to combat this injustice; the methods in which the For the People Act would eliminate federal gerrymandering; and the implications of this bill on communities of color. Although H.R. 1 has its critics, its proposed solutions would positively impact American politics on

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http://mcimaps.com/gerrymandering-in-san-juan-county-utah-how-navajo-voters-have-been-discriminated-against/.

[74] Weiser et. al, *supra* note 46.

[75] Stephen Wolf (@PoliticsWolf), TWITTER (Jul. 18, 2020, 13:21), https://twitter.com/PoliticsWolf/status/1284553942907498496.

the whole by increasing transparency and seeking to reduce partisanship in the redistricting process. While progress is often dishearteningly incremental, the passage of H.R. 1 would provide the American people with the largest leap forward since the Voting Rights Act of 1965. The last four years have made the limitations of our political institutions abundantly clear—in order to save our democracy, we must begin to adapt and move these processes forward into the light of the modern day.

THE ADA AT THIRTY: WHERE WE'VE BEEN AND WHERE WE'RE GOING

Andrew Sandlin and Bessie Gaspar

INTRODUCTION

The year 2020 marked the thirtieth anniversary of the signing of a landmark piece of legislation that sought to extend the promises of civil rights to a new population, persons with disabilities. The Americans with Disabilities Act (ADA) was largely modeled after the Civil Rights Act of 1964, granting many of the same rights guaranteed in that Act to people with disabilities. The Civil Rights Act prohibited discrimination in places of public accommodation, such as hotels and restaurants, and the ADA achieved this as well by requiring that these facilities be accessible for those with disabilities. Examples of these regulations are fairly noticeable in day-to-day life: handicapped stalls in restrooms, wheelchair lifts on public school buses, ramps at local county courthouses, and much more.

When debating the ADA, Congress found a plethora of examples of societal discrimination against persons with disabilities, underscoring the effects of a legal framework that systematically excludes persons with disabilities from participation.[1] The ADA sought to change this, and in doing so found that persons with disabilities typically had no form of legal recourse when they are discriminated against in public fora, such as housing and employment. The ADA was enacted in part to give these individuals the legal remedy that they so rightly deserved.

Where the ADA is headed in the future is something worth analyzing as well. New technology, evolving work environments, and other existing laws are significantly impacting the ADA. While the ADA possesses a strong foundational framework for protecting the rights of persons with disabilities, its basic provisions must be bolstered and possibly updated to reflect changes in technology and workplace standards. It is also worth examining the government's past stances on civil rights for persons with disabilities to analyze how far our nation has come in the current moment. As the thirtieth anniversary of the enactment of the ADA was being celebrated, the COVID-19 pandemic completely upended our normal way of life. Business operations became almost entirely virtual for many months, and the challenges stemming from the pandemic disproportionately impacted persons with disabilities. Therefore, now is the perfect time to discuss the future of the ADA and civil rights for those with disabilities in general.

I. AMERICANS WITH DISABILITIES ACT OF 1990

A. Prior Legislation

The Rehabilitation Act of 1973 was the first piece of legislation passed by the U.S. Congress that explicitly discussed

[1] Americans with Disabilities Act, 42 U.S.C. § 12101 (2012).

persons with disabilities.[2] This legislation laid the groundwork for preventing employers from discriminating based on disability. It required federal agencies, departments, and some federal contractors to commit to nondiscrimination and enact affirmative action for hiring practices. Section 504 was perhaps the most groundbreaking provision of the Rehabilitation Act, requiring that any institution receiving federal funds commit to nondiscrimination and provide accommodation for persons with disabilities. These accommodations mandate that the funds-receiving institution ensure that all of the programs they offer are inclusive to persons with disabilities. Section 504 also requires institutions receiving federal funds to make updates and alterations in building construction to ensure accessibility. The Rehabilitation Act served as a precursor to many other pieces of legislation extending civil rights to persons with disabilities, including the ADA. This Act was the foundation from which other laws would flow, and it is still relevant today for over four million federal contractors working in the modern economy.

In 1980, the Civil Rights for Institutionalized Persons Act was enacted.[3] This law protects institutionalized people by giving the Attorney General and the D.O.J. the statutory power to investigate, uncover, and correct patterns or practices that jeopardize the health and safety of persons within these facilities. This law also gives the D.O.J. the ability to initiate a lawsuit against facilities that harm or infringe on the rights of its residents. This Act does not give the D.O.J. authority to investigate one-time instances of abuse, nor does it give the Department the power to represent individuals. This law safeguards vulnerable populations including those in correctional institutions, nursing homes, mental health facilities, and centers

[2] Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq. (1973).

[3] Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 et seq. (1980).

for those with intellectual or physical disabilities. As the landscape of our society shifts, the Civil Rights for Institutionalized Persons Act must not be ignored.

The Fair Housing Act, a widespread civil rights law enacted in 1988, protects persons with disabilities from discrimination in housing.[4] This legislation covers private dwellings as well as those receiving federal funds and prevents discrimination on the basis of: the disability of the tenant, the disability of a person planning to live at the property, or the disability of a person associated with the renter.[5] This Act also requires that landlords allow tenants to make reasonable alterations to the property in order to make it more accessible for the renter. Large apartment and housing complexes were also greatly affected by the Fair Housing Act, which required that common areas in complexes with four or more units be accessible to persons with disabilities. This far-reaching law seeks to provide persons with disabilities an equal opportunity to find affordable and livable housing.

Passed in 1990, the Individuals with Disabilities Education Act (IDEA) is one of the most important pieces of legislation for students with disabilities.[6] IDEA requires that educational institutions initiate a process to identify students among the school population who have disabilities that may impair their learning abilities. This process is often called "child find," encompassing practices intended to student with intellectual and physical disabilities.[7] Once the school determines that a child does in fact have a disability, they must commit to providing personalized education to fit the needs of the child. It is important to note that under IDEA, a diagnosis from a

[4] Fair Housing Amendments Act of 1988, 42 U.S.C. § 3601 et seq. (1988).
[5] *A Guide to Disability Rights Laws*, U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, (2020).
[6] Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq. (1990).
[7] Individuals with Disabilities Education Act, 20 U.S.C. § 1412 et seq. (1990).

physician does not guarantee that the child will receive special educational services; the process of determining this is entirely entrusted to the school and its "child find" procedures. There are thirteen categories covered by IDEA, including but not limited to: autism, deafness or hardness of hearing, visual impairment, and speech and language impairments.

Under IDEA, Congress extended an important right to these students: an education that fits their needs with as few restrictions on their learning experience as possible. In its practical application, IDEA requires schools to develop individualized curriculums based on the student's needs, stemming from the 504 Plans established under Section 504 of the Rehabilitation Act of 1973.[8] IDEA also mandates that these learning objectives be designed with the input of the student's teachers, parents, and the children themselves. If the parent disagrees with the individualized curriculum set out by the school, the Act provides a legal remedy which allows them to appeal it to their state's applicable educational agency and later to federal court. As educational instruction becomes more reliant on technology and online learning, educators must ensure that IDEA is not ignored and that children with learning difficulties are afforded the same access to educational opportunities as other students. IDEA is considered to be the United States' authoritative law on special education: approximately seven million students currently receive specialized instruction through the Act.[9]

B. Congressional Findings and Purpose

The provision of the ADA most pertinent to society's

[8] Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq. (1973).

[9] Andrew Lee, *Individuals with Disabilities Education Act (IDEA): What you need to know*, UNDERSTOOD, https://www.understood.org/en/school-learning/your-childs- rights/basics-about-childs-rights/individuals-with-disabilities-education-act-idea-what-you-need-to-know.

approach to the issue of disability states:

> discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services…[10]

This was the problem that Congress was initially attempting to address through the ADA. Another key finding shows that, despite this continued discrimination against persons with disabilities, these individuals lacked the legal remedies to place them on equal footing with their able-bodied counterparts.[11]

Passage of the ADA was long overdue, as our society has a history of treating persons with disabilities without respect or dignity. During colonial times, families were often seen as the sole bearers of care for those with disabilities.[12] Resources for these caretakers were often sparse and difficult to attain. This disparity continued until the 1820s, when institutionalization first started to gain traction. At this stage, the process of institutionalization was still rather cruel, as it kept persons with disabilities far from the rest of society and isolated them from the outside world. In addition to this seclusion, persons in these institutions were often subjected to neglectful treatment and abuse.[13] This harsh treatment toward individuals with disabilities, continuing well into the twentieth century, served as the impetus

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[10] Americans with Disabilities Act, 42 U.S.C. § 12101 (2012).
[11] *Id.*
[12] *See* Perri Meldon, *Disability History: Early and Shifting Attitudes of Treatment*, NAT'L PARK SERV., https://www.nps.gov/articles/disabilityhistoryearlytreatment.htm (last visited Mar. 21, 2021).
[13] *ADA-Findings, Purpose, and History*, ADA ANNIVERSARY, https://www.adaanniversary.org/findings_purpose#content (last visited Mar. 9, 2021).

to the passage of the ADA.

C. Relevant Case Law

The ADA has been the subject of landmark litigation in the courts since its enactment in 1990, and in response to these rulings, Congress amended the Act in 2008. These amendments sought to instill a broader, more inclusive scope that would allow more individuals to benefit from the law.

Sutton v. United Air Lines, decided by the Court in 1999, dealt with identical twins who suffered from the same visual impairment.[14] The twins had prescription glasses that corrected their vision and could function normally in their daily lives. The two sisters applied to be pilots with United Air Lines but were denied the positions because their vision was not in line with United's standards. The twins brought suit under the ADA, reasoning that their visual impairment substantially affected their major life activities, that they were regarded as having a life impairment, and that United had discriminated against them due to these impairments. The U.S. District Court dismissed the suit for failure to state a justiciable claim. On appeal, the Supreme Court considered two distinct questions: whether corrective measures to mitigate the impairment should be considered under what constitutes a "major life activity," and whether poor vision is an impairment that substantially limited the Suttons' major life activities. The Court upheld the lower court's ruling on both questions, reasoning that the petitioners failed to prove that United regarded the twins as impaired, as required by the Act. Additionally, this ruling established that the determination of who qualifies as disabled should take into account the options available to the person which allow them to mitigate their impairment. The subsequent amendments to the ADA reversed this decision, allowing the ADA to be applied in employment

[14] Sutton v. United Air Lines, 527 U.S. 471 (1999).

discrimination cases even when mitigating factors were present.

Decided in 1999, *Olmstead v. L.C.* involved two women who were being held in isolated confinement in a Georgia mental institution.[15] Both of these women had been medically cleared to be removed from isolation; however, the Georgia Regional Hospital, where the women were being held, kept them in isolation due to financial constraints. The two females sued the Georgia Department of Public Health, alleging that Title II of the ADA required the hospital to move them to the most communally integrated setting possible. At issue was whether these financial constraints could justify the hospital's decision to refuse to comply with Title II of the ADA. In this case, the Court ruled that institutionalized persons who meet criteria to be moved back to less restrictive confinement have been discriminated against based on a disability, an action prohibited by Title II. The Court also concluded that institutionalized individuals who have been medically cleared for release into less restrictive confinement and have expressed an interest in being returned to such settings are required to be returned when resources allow. This case, which was not reversed by the 2008 Amendments, could serve as a metaphor for the evolution of disability rights in the United States. Persons with disabilities were often shunned and kept separate from society.[16] This case gave persons with disabilities the right to be integrated into a communal treatment setting.

U.S. Airways v. Barnett, decided by the Court in 2002, was a case involving the proper application of the business necessity defense, a legal remedy offered to defendants that is written into the ADA.[17] Under the business necessity defense, companies may engage in hiring and firing practices that violate portions of the ADA only if it is essential to the operation of the

[15] Olmstead v. L.C., 527 U.S. 581 (1999).
[16] ADA ANNIVERSARY, *supra* note 13.
[17] U.S. Airways Inc. v. Barnett, 535 U.S. 391 (2002).

defendant business. To assert this affirmative defense, defendants must show that the decision was made in relation to the job and that it was essential for the business to make such a decision.[18] The business necessity defense is often applied when a defendant engages in a practice that is facially neutral yet discriminatory in its results. In *Barnett,* an airline cargo handler was injured while on the job and no longer able to complete the task of his position. Due to his injury, Barnett was transferred to a less physically demanding position in the mailroom. However, due to U.S. Airways' seniority preference system in hiring, Barnett lost his new job in the mailroom. Barnett sued under the ADA, alleging that he had been discriminated against due to his back injury.

The District Court disagreed and granted the airline summary judgment, reasoning that ending the airline's seniority preference system would place undue hardship on both the airline itself as well as the able-bodied employees of the airline. The Ninth Circuit reversed this holding, concluding that when completing the undue hardship determination, the seniority preference system was only one of many factors. When appealed to the Supreme Court, the justices analyzed the issue of whether a company violates the ADA when it grants another employee a position due to seniority rather than the employee who is entitled to reasonable accommodation. In its decision, the Court ruled that U.S. Airways did not violate the ADA when it failed to accommodate Barnett due to the company's seniority preference practice. The Court reasoned that showing that an accommodation would conflict with any long-standing legitimate hiring practice is grounds enough to show that the

[18] *Preventing Discrimination with Business Necessity,* BUSINESS LAWS (Dec. 22, 2019), https://business.laws.com/defenses/businessnecessity#:~:text=Business%20necessit%20is%20an%20employer's,and%20consistent%20with%20business%20necessity.

accommodation is not reasonable.[19]

In the 2002 case *Toyota Manufacturing, Kentucky v. Williams*, Toyota Manufacturing was sued by Williams after she was terminated from her employment at one of Toyota's manufacturing facilities due to poor work attendance.[20] Williams claimed that she had carpal tunnel syndrome, which affected her ability to perform her work. She alleged that the petitioner failed to provide her reasonable accommodation as required by the ADA. The district court rejected Williams' claim, reasoning that her impairment did not substantially limit any major life activity. On appeal, the Sixth Circuit reversed, writing that Williams' impairment affected an entire class of activities that could be described as manual tasks involving the use of Williams' hands and arms. When the case reached the Supreme Court, the question presented was whether the Sixth Circuit had applied the correct standard when making the determination that Williams' impairment affected her ability to complete the tasks. In a unanimous opinion, the Court ruled that the Sixth Circuit had applied the wrong standard, and that Williams had failed to show that the impairments she suffered affected activities that were central to most people's lives. The Court also concluded that for the ADA to apply, the impairment suffered must affect the sufferer long term; in this case, the Court reasoned that the severity and longevity of the symptoms of carpal tunnel syndrome vary greatly and that a diagnosis of carpal tunnel syndrome does not automatically render one disabled for the purposes of the ADA. This case was one of the driving factors in the passage of the 2008 Amendments, which require a broader interpretation of the ADA.

Bates v. United Parcel Service, Inc. was a landmark case

[19] U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002).
[20] Toyota Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002).

in 2007 for persons who are deaf or hard of hearing.[21] U.P.S., the logistics and shipping corporation, adopted U.S. Department of Transportation (DOT) standards for its package car drivers, despite the fact that the standards were enacted for use in vehicles much heavier than those used by U.P.S. A group of U.P.S. employees who did not meet these DOT standards brought suit under the ADA, as well as several other California civil rights laws. The case was appealed to the Ninth Circuit, with the petitioner contending that while U.P.S. may exclude drivers not meeting the DOT standards from driving vehicles governed by the regulation, U.P.S. cannot exclude drivers from operating vehicles outside the weight range mentioned in the DOT regulation. At the trial court level, U.P.S. was held liable for all claims brought by petitioners after their business necessity defense was rejected. On appeal, the Ninth Circuit determined that the lower court had applied the incorrect standard when considering U.P.S.'s claim of business necessity, and the appellate court remanded the case for further consideration.

These rulings contributed to the passage of the ADA Amendments Act of 2008.[22] This legislation intended to broaden the definition of *disability* to include a greater number of individuals and reverse the narrow interpretation of the ADA established in the above cases, particularly *Toyota v. Williams*.[23] Congressional sponsors of the ADA Amendments felt that the definition of *disability* had been severely narrowed by these cases and that the ADA's original legislative intent was being curtailed. Therefore, these amendments not only restored this intent, but expanded the number of individuals protected under

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[21] Bates v. UPS, 511 F.3d 974 (9th Cir. 2007).

[22] ADA Amendments Act of 2008, 110 P.L. 325, 122 Stat. 3553, 2008.

[23] Jacquie Brennan, *The ADA Amendments Act of 2008,* SOUTHWEST ADA CENTER, http://www.southwestada.org/html/publications/ebulletins/legal/2008/oct2008.html.

the ADA. Congress achieved this in several ways:

First, by amending the law to allow for the broadest definition of the term *disability* as possible, it was made clear that Congress intended a less demanding burden from the plaintiff to demonstrate that they were, in fact, disabled.[24]

Secondly, Congress sought to reverse the Court's decision in *Sutton*, thereby allowing adjudicators to consider mitigating circumstances that could allow persons with disabilities to participate in major life activities. This meant that courts could no longer consider assistive technology, medication, or other modification when determining whether a plaintiff qualified as *disabled* under the ADA. Congress prohibited the use of these mitigating circumstances in such judgments with the passage of these amendments.[25]

Third, Congress further defined "major life activities," clarifying the ambiguous interpretation established under the original ADA. The activities outlined in the amendments include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, sleeping, and walking. Major bodily functions were also listed in the legislation.[26]

Finally, Congress decreased the burden imposed upon plaintiffs when attempting to demonstrate standing under the ADA. The original Act contained the phrase "regarded as" in its definition of *disability*, but this phrase was removed in the new amendments, requiring plaintiffs to show only that they were treated in a manner prohibited by the ADA.[27] The passage of these amendments has led to a broader, more inclusive textual

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[24] *Notice Concerning The Americans With Disabilities Act (ADA) Amendments Act of 2008,* US EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www.eeoc.gov/statutes/notice-concerning-americans-disabilities-act-ada-amendments-act-2008.

[25] *Id.*

[26] *Id.*

[27] *Id.*

interpretation of the ADA, allowing more people with disabilities to receive protection under the Act.

II. DISABILITY RIGHTS IN THE COVID-19 ERA

A. Rising Health Disparities Against People with Disabilities

The ongoing coronavirus pandemic has impacted the entire U.S. population and introduced new social norms and challenges that were non-existent prior to 2019. From wearing masks in public to attending virtual classes via Zoom, COVID-19 has drastically changed our quality of living. In the midst of these drastic changes, long-standing systemic health and social inequities in the U.S. healthcare system have only gotten worse. Specifically, the status of disability rights, administered through Crisis Standards of Care (CSC) by medical systems across the nation, have been jeopardized as the novel coronavirus increases the number of shortages and limitations on healthcare resources.[28]

CSC is a "substantial change in usual healthcare operations and the level of care it is possible to deliver, which is made necessary by a pervasive (e.g., pandemic influenza) or catastrophic (e.g., earthquake, hurricane) disaster."[29] Spearheaded by the Institute of Medicine of the National Academies after the H1N1 outbreak in 2009, this provision of medical care has been identified in hospitals in twenty-nine states across the U.S.[30] CSC "provide[s] a framework for the fair allocation of scarce resources," but it "can intensify discriminatory attitudes towards disabled individuals" and further exacerbate the social

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[28] Emily C. Cleveland Manchanda et. al, *Crisis Standards of Care in the USA: A Systematic Review and Implications for Equity Amidst COVID-19,* J. OF RACIAL AND ETHNIC DISPARITIES (2020).

[29] *Crisis Standards of Care: Summary of a Workshop Series*, NATIONAL ACADEMIES PRESS (2010), https://www.ncbi.nlm.nih.gov/books/NBK32749/.

[30] Manchanda et al., *supra* note 28, at 10.

vulnerability of these persons.[31]

However, at the outset of the pandemic in 2020, the detriments of CSC quickly became apparent, as the Office for Civil Rights (OCR) at the United States Department of Health and Human Services (HHS) received numerous administrative complaints (HHS-OCR complaints) from disability advocacy groups concerning violations of federal disability discrimination laws. Complaints concerning illegal disability discrimination in medical care increased as medical systems and professionals failed to "fully appreciate the value and quality of life with a disability."[32]

Disability advocacy organizations in Washington, Alabama, Tennessee, Utah, Oklahoma, Connecticut, North Carolina, Oregon, Nebraska, Arizona, Washington D.C., and Texas filed complaints concerning discriminatory CSC plans, no-visitor policies, and inaccessible testing: all impediments that violate the ADA, Section 504 of the Rehabilitation Act, and Section 1557 of the Affordable Care Act (ACA).[33] Some of these complaints reached early resolution in states like in Alabama, which had triaging guidelines based on a 2010 document called "Criteria for Mechanical Ventilator Triage Following Proclamation of Mass-Casualty Respiratory Emergency" as an annex to its Emergency Operations Plan. According to the OCR:

> The 2010 Criteria allegedly allowed for denying ventila-

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[31] *Id.*; *How COVID-19 Affects People with Disabilities*, AMERICAN PSYCHOLOGICAL ASSOCIATION, https://www.apa.org/topics/covid-19/research-disabilities (last visited Jan. 29, 2021).

[32] Letter from David Carlson et al., Disability Rts. Washington, to Roger Severino, Dir. of Off. for C.R. at U.S. Dep't of Health and Hum. Servs. (Mar. 23, 2020) (on file with author).

[33] *Id.*; *see HHS-OCR Complaints Re COVID-19 Medical Discrimination*, THE ARC (Mar. 23, 2020), https://thearc.org/resource/hhs-ocr-complaint-of-disability-rights-washington-self-advocates-in-leadership-the-arc-of-the-united-states-and-ivanova-smith/.

> tor services to individuals based on the presence of intellectual disabilities, including "profound mental retardation" and "moderate to severe dementia." Because the 2010 Criteria appeared to reference age as a potential category for exclusion, OCR's compliance review encompassed questions of both disability and age discrimination.[34]

In addition to the state of Alabama, the OCR resolved HHS-OCR complaints regarding COVID-19 medical discrimination in states like Connecticut, Tennessee, Utah, Arizona, Massachusetts, and New Jersey; however, not all states ended these efforts with OCR resolution.[35] In the same year that HHS-OCR complaints began, the state of Oregon passed a law that reaffirmed civil rights protections for people with disabilities in medical settings.

According to the Centers for Disease Control and Prevention (CDC), one in four adults residing in the U.S. live with a disability.[36] As the country focuses on the rising health disparities against people with disabilities in this time of crisis, the tragic events of 2020 call for an analysis of Oregon's history of translating the notion of quality-of-life into legislation, eventually leading to the passage of SB1606 in July.

B. Oregon

In 1991, just one year after the enactment of the ADA, the State of Oregon passed a healthcare reform bill mandating that

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[34] *OCR Reaches Early Case Resolution With Alabama After It Removes Discriminatory Ventilator Triaging Guidelines*, U.S. DEPT. OF HEALTH AND HUMAN SERVICES (Apr. 8, 2020), https://www.hhs.gov/about/news/2020/04/08/ocr-reaches-early-case-resolution-alabama-after-it-removes-discriminatory-ventilator-triaging.html.

[35] THE ARC, *supra* note 23, at 11.

[36] *CDC: 1 in 4 US adults live with a disability*, CENTER FOR DISEASE CONTROL, (Aug. 16, 2018), https://www.cdc.gov/media/releases/2018/p0816-disability.html.

the allocation of Medicaid funds be based on quality-of-life measures. Dr. Louis W. Sullivan, Secretary of HHS at that time, refused to authorize federal funding for the new health reform bill because it was "inconsistent with the ADA," and would "systematically undervalue the quality of life of those with disabilities."[37] Furthermore, in a letter to former Governor of Oregon Barbara Roberts, Secretary Sullivan stated that:

> According to the [the Oregon Health Services] Commission Report, the Commissioners ranked all categories and made hand adjustments to the list on the basis of certain community values, including "quality of life" and "ability to function." These two values place importance on "restored" and "independence" and thus expressly value a person without a disability more highly than a person with a disability in the allocation of medical treat- ment. . .[A]ny methodology that would intentionally ration health care resources by associating quality of life considerations with disabilities does not comport with the mandate of the ADA.[38]

Oregon was the first state to establish quality-of-life measures as the basis for resource allocation.[39] However, "eighteen states had proposed preliminary health care reforms modeled after the Oregon plan."[40] What Oregon's efforts demonstrate on the matter of quality-of-life legislation is not only a violation of the

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[37] Tom Mason, *Legislative Commentary: Sullivan Made the Right Choice in Rejecting the Oregon Plan*, HEALTH MATRIX: J. OF LAW-MED. (1992).
[38] Letter from Dr. Louis W. Sullivan, Sec. of Health and Human Services, to Gov. Barbara Roberts (Aug. 3, 1992) (on file with author); *see* Mason, *supra* note 33, at 13.
[39] Philip G. Peters Jr., *Health Care Rationing and Disability Rights*, 70 IND. L.J. 491, 495 (1995).
[40] *Id.*

ADA in its earliest forms, but also the growing issue of healthcare rationing and the failure to value the lives of disabled Americans.

Disability Rights Oregon (DRO), a federally funded legal group that protects the rights of people with disabilities and state officials, investigated claims of disability discrimination in the midst of the pandemic, asserting that people with disabilities had no access to a reliable caregiver. Furthermore, they alleged that medical professionals were rationing equipment, such as ventilators and emergency beds, for able-bodied individuals at the expense of people with a disability. In Pendleton, Oregon, a woman with an intellectual disability signed a Do-Not-Resuscitate (DNR) order despite being:

> alone in the hospital and not understand[ing] what the doctor and medical staff wanted her to agree to. In addition, the hospital staff sent word to the woman's group home: Fill out DNRs in advance for your other residents, in case one of them comes to the hospital.[41]

According to Jake Cornett, executive director of DRO, a person with an intellectual disability was "being inappropriately influenced about life-sustaining treatment. And the physician in that case talked about the 'low quality of life' of a person with a disability."[42]

Cases like that of the woman in Pendleton were only becoming more prevalent before the passage of SB1606 in 2020; furthermore, it was not until December 8, 2020, that the Oregon Health Authority published new crisis care principles to support

[41] Joseph Shapiro, *Oregon Hospitals Didn't Have Shortages. So Why Were Disabled Denied Care?*, NATIONAL PUBLIC RADIO (Dec. 21, 2020), https://www.npr.org/2020/12/21/946292119/oregon-hospitals-didnt-have-shortages-so- why-were-disabled-people-denied-care.
[42] *Id.*

surge planning, specifically highlighting that "any approach to triaging care should not exclude patients" on the basis of an underlying medical condition or disability.[43] The approach that some Oregon hospitals took in rationing resources raised significant legal and moral questions as the coronavirus increased the scarcity of these goods. These disparities were further illustrated by the unusually high number of cases of healthcare rationing to people with disabilities in Oregon.[44]

In July 2020, Oregon passed SB1606, a law barring discrimination against people with disabilities during the pandemic and "requir[ing] hospital[s] to permit presence of support person for person with disability in emergency department and during hospital stay under specified conditions."[45] Before the passage of SB1606, disabled and elderly persons being treated for COVID-19 in Oregon were denied access to a supporting individual for decision-making or communication during their medical treatment, "because hospitals were not allowing any visitors to prevent the spread of COVID-19 and there were no exceptions for any visitors even as a disability accommodation."[46] This left these disabled and elderly individuals in a vulnerable position, denying them an intermediary to negotiate with doctors regarding Do-Not-Resuscitate Orders.

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[43] Shapiro, *supra* note 41, at 14; *New equity-driven crisis care principles to support surge planning*, OREGON HEALTH AUTHORITY (Dec. 8, 2020), https://www.oregon.gov/oha/ERD/Pages/NewEquityDrivenCrisisCarePrinciplesSupportSurgePlanning.aspx.

[44] Shapiro, *supra* note 41, at 14.

[45] S.B. 1601, 2020 Leg., 1st Spec. Sess. (Or. 2020).

[46] *Intersection of Disability and COVID-19*, OR. STATE BAR (Sept. 16, 2020), https://disabilitylaw.osbar.org/2020/09/16/intersection-of-disability-and-covid-19/.

C. Flouting the ADA

In 2020, quality-of-life measures were not the only government actions in conflict with the ADA. Public entities, like cities, have been in the spotlight due to lacking compliance with the ADA's accessibility requirements, further revealing the United States' failure to enforce a life-changing piece of legislation that was passed three decades ago. In *American Council of the Blind of New York, Inc. v. City of New York*, the American Council of the Blind sued the City of New York, alleging that:

> the City has long failed to provide non-visual crossing information at the vast majority of its signalized intersections, i.e., those which provide visual crossing information to sighted pedestrians. Plaintiffs allege that the City's failure to accommodate blind and low-vision pedestrians violates Title II of the ADA, 42 U.S.C. § 12132; section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a) ("Rehabilitation Act"); and the New York City Human Rights Law, N.Y.C. Admin. Code § 8-107(4)(a) ("NYCHRL").[47]

According to the U.S. Census Bureau's 2017 American Community Survey, roughly 205,212 blind or otherwise visually-impaired people live in New York City, and of the 13,000 pedestrian traffic signals that exist in New York City, "just over 2% convey information in a way that is accessible to blind pedestrians."[48] Given this disparity, the City of New York

[47] Am. Council of the Blind of N.Y., Inc. v. City of N.Y., No. 18 Civ. 5792 (S.D.N.Y. Oct. 20, 2020).

[48] Zack Budryk, *Court rules majority of NYC traffic signals violate Americans with Disabilities Act*, THE HILL, (Oct. 20, 2020), https://thehill.com/regulation/court-battles/521900-court-rules-97-percent-of-new-york-city-traffic-signals-violate.

violated Title II of the ADA, which "prohibits discrimination on the basis of disability in places of public accommodation," and Section 504 of the Rehabilitation Act of 1973, which affirms that "[n]o otherwise qualified individual with a disability … shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[49]

Title II of the ADA and Section 504 of the Rehabilitation Act possess significant similarities, considered to be "nearly identical" by the court in *American Council of the Blind of New York, Inc*.[50] In addition to these supporting provisions, the court concluded that the plaintiff's claims under the NYC Human Rights Law (NYCHRL) were "coextensive" with the ADA and the Rehabilitation Act, because in the 2013 New York case *Brooklyn Center for Independence of the Disabled v. Bloomberg*, "NYCHRL has a 'broader notion of which accommodations are reasonable' than the ADA and Rehabilitation Act."[51] In this 2011 case, 900,000 New York residents with disabilities filed a class action lawsuit against New York City, and the court ruled that the City's emergency plans discriminated against people with disabilities and failed to meet their needs in large scale disasters such as Hurricanes Irene (2011) and Sandy (2012).[52] Although this case took place before the pandemic, it raises similar issues regarding the needs of persons with disabilities during natural disasters or crises and aided the plaintiff's current claims against New York City.

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[49] 42 U.S.C. § 12132; *see also* 29 U.S.C. § 794(a).

[50] *Id.*; *see* Disabled in Action v. Bd. Of Elections in N.Y., 752 F. 3d 189, 196 (2d Cir. 2014) (quoting McElwee v. County of Orange, 700 F. 3d 635, 640 (2d. Cir. 2012)).

[51] Brooklyn Ctr. for Indep. of the Disabled v. Bloomberg, 980 F. Supp. 2d 588, 643 (2013).

[52] *Id.*

On October 20, 2020, District Judge Paul A. Engelmayer, a federal judge for the Southern District of New York, ruled that the City of New York flouted the ADA and the Rehabilitation Act by not installing audible devices at crosswalks. Judge Engelmayer based his ruling on the fact that "non-visual crossing information" was absent at more than ninety-five percent of New York City's signalized intersections and that "some, but not all, of the City's projects with respect to traffic signals gave rise to a duty under these statutes to add APS [Accessible Pedestrian Signals]—a duty that the City has largely breached."[53]

Thus, this decision demonstrates the persistence of inequities that disadvantage individuals with disabilities in our modern society. The fact that this decision was handed down nearly thirty years later after Congress enacted the ADA, highlights the inconsistent enforcement of the ADA's accessibility requirements following the legislation's initial passage. New York City's failure to install audible devices at crosswalks is not only a clear example of "an illegal denial of services and benefits by a public entity," but also a disturbing reminder that "[c]ompliance with ADA's accessibility requirements can never be taken for granted."[54] Even after this ruling, the City still has much to do in order to accommodate the needs of its disabled residents.

III. THE FUTURE OF THE ADA

Like any piece of historic legislation in the U.S. legal system, the ADA has and will continue to evolve to meet the ever-changing nature of the nation's economic and political affairs. Since the ADA's enactment in 1990, workplace culture

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[53] *Id.*

[54] Doron Dorfman & Thomas F. Burke, *Thirty Years Later, Still Fighting Over the ADA*, THE REGULATORY REVIEW (Dec. 7, 2020), https://www.theregreview.org/2020/12/07/dorfman-burke-thirty-years-fighting-over-ada/.

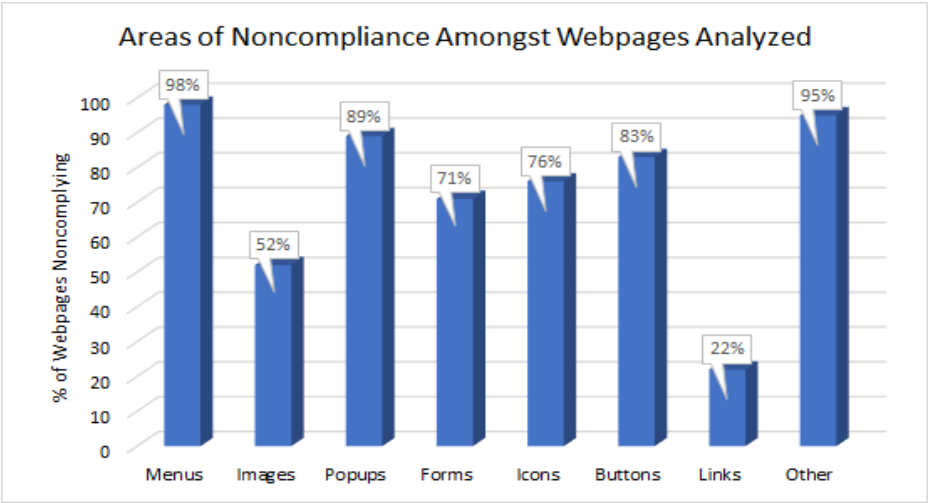
across the country has changed and adapted due to the influx of technological developments: telecommuting has replaced in-office jobs, the personal computer has become a necessity in most American workplaces, and these settings are becoming increasingly diverse with the passage of time. With these changes come new challenges to the law, as well as the need for those enforcing these regulations to recognize and adapt to these shifts.

In 1990, only fifteen percent of American households owned a personal computer; this number had increased to thirty-five percent in 1997.[55] These technological advancements represent a net positive for those wishing to work from home rather than going to the office each day. However, they also pose a challenge to disabled individuals that may lack the proper technological accommodations to work from home. For example, despite the fact that physical locales must be accessible to persons with disabilities, websites are still lacking in their ability to accommodate. People with disabilities rely on the internet to complete the same functions as able-bodied individuals, a practice that has become increasingly necessary due to the ongoing pandemic. Therefore, the question remains as to why so many websites are still so difficult to use for those with visual, hearing, or motor impairments.

A recently conducted study analyzed millions of different websites to assess whether they were compliant with what is known as the Web Content Accessibility Guidelines (WCAG).[56] This study found that ninety-eight percent of the websites analyzed did not comply with these standards.[57] This non-compliance issue has led to a flurry of lawsuits from millions of internet users, with twenty percent of all non-compliance

[55] *Computer ownership up sharply in the 1990s*, US BUREAU OF LABOR STATISTICS (April 15, 1999), https://rb.gy/h2jhjz.
[56] *We Analyzed 10,000,000 Pages and Here's Where Most Fail with ADA and WCAG 2.1 Compliance*, ACCESSIBE (2019), https://rb.gy/t0krfw.
[57] *Id.*

lawsuits originated from these web compliance issues in 2018.[58] The graph below shows the areas in which most websites are noncompliant with the Web Content Accessibility Guidelines. Most of the analyzed websites failed in several of the categories, demonstrating the ways in which our society's technological advancements have failed to account for the needs of users with varying degrees of ability.



This graph uses data from an AccessiBe Study to show areas of noncompliance amongst websites analyzed.[59]

Another sign of the inequities imposed upon persons with disabilities is their ability to find employment. According to the Bureau of Labor Statistics, persons with disabilities have an unemployment rate that is over double that of their able-bodied counterparts.[60] Too often, persons with disabilities are unable to

[58] Hugo Martin, *Lawsuits targeting business websites over ADA violations are on the rise*, LOS ANGELES TIMES (2018), https://www.latimes.com/business/la-fi-hotels-ada-compliance-20181111-story.html.

[59] ACCESSIBE, *supra* note 56, at 17.

[60] *Unemployment rate for people with a disability declines to 7.3 percent in 2019*, U.S. BUREAU OF LABOR STATISTICS (Mar. 2, 2020),

find quality employment that can accommodate their impairment. This problem is only being exacerbated by the ongoing COVID-19 pandemic, as more workplaces shift toward remote or more technologically intensive work. Therefore, now is the perfect time to discuss the possibility of updating the ADA to ensure that technological regulations account for the needs of all individuals.

The WCAG were initially developed to make web content more accessible to persons with disabilities. They cover impairments such as deafness or loss of hearing, blindness, limited movement, and photosensitivity. These guidelines are meant to educate web designers and programmers on how to make their products accessible to those with disabilities by providing practical recommendations on interface set-up. These suggestions additionally include recommendations for text fonts that are easier to read and explanations on the use of pre-recorded audio as an alternative to text, closed captioning on video, or implementing colors in moderate amounts. These guidelines therefore cover a vast range of impairments.

Nearly all of the websites analyzed in the aforementioned study were noncompliant with the WCAG in some form.[61] This large discrepancy between the physical world and the internet requires legislative changes to the ADA. Although WCAG compliance is not legally required, it is often used as a secondary authority by courts.[62] In 2018, over 100 members of Congress

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https://www.bls.gov/opub/ted/2020/unemployment-rate-for-people-with-a-disability-declines-to-7-point-3-percent-in-2019.htm#:~:text=Unemployment%20rate%20for%20people%20with%20a%20disability%20declines%20to%207.3%20percent%20in%202019&text=The%20unemployment%20rate%20for%20people,has%20trended%20down%20since%202011.

[61] ACCESSIBE, *supra* note 56, at 17.

[62] Vikas Khorana, *Why Now Is The Time To Make Your Website ADA-Compliant*, FORBES (2020), https://www.forbes.com/sites/forbestechcouncil/2020/07/14/why-now-is-the-time-to-make-your-website-ada-compliant/?sh=1d7db6d86cef.

signed a letter to the D.O.J. urging the Department to adopt regulations similar to the WCAG.[63] This strong legislative support for web accessibility may soon lead to further action on this pressing issue. The country has already seen a sharp uptick in accessibility lawsuits stemming out of web compliance, and this number is only likely to increase in the future with more employees teleworking and using technology for their careers. Cementing websites' accessibility guidelines into the ADA would result in more inclusive interfaces that allow persons with disabilities to fully enjoy the advantages that the internet has to offer. Congress could achieve this by amending the current ADA to require that the physical locations, organizations, and corporations that are already subject to the ADA's regulations would also be subject to web accessibility guidelines, particularly those outlined in the WCAG. This would likely result in massive changes to the layout of the internet as we know it, but it would be an overall benefit to persons with disabilities. The future of the ADA should focus on adapting technology to remove the barriers that bar persons with disabilities from enjoying the benefits of these advancements.

CONCLUSION

The ADA provides persons with disabilities an equal playing field when it comes to participating in societal activities. Therefore, we need not reinvent the wheel when attempting to protect the legal rights of persons with disabilities—we must simply build upon this existing framework to ensure that no one is left behind by the society's ever-evolving norms and standards.

Recently, we have witnessed many situations in which the ADA should have been used to ensure fair treatment for persons

[63] *Id.*

with disabilities. Issues with discriminatory CSC plans, quality of life measures, and private and governmental non-compliance with the ADA's accessibility requirements require further legal and ethical action, raising one major concern: the devaluation of people with disabilities.[64] In Oregon, people with disabilities were frequently denied healthcare in the midst of a pandemic, with the woman in Pendleton, Oregon, representing a grim reality of the lack of safeguards existing in our healthcare system. The flouting of the ADA in New York City further demonstrates that the enforcement of the laws that govern us are not to be taken for granted. As Justice Neil Gorsuch once stated:

> [a]ll human beings are intrinsically valuable...any line we might draw between human beings for purposes of determining who must live and who may die ultimately seems to devolve into an arbitrary exercise of picking out which particular instrumental capacities one especially likes.[65]

[64] Elizabeth Pendo, *COVID-19 and Disability-Based Discrimination in Health Care,* A.B.A. (May 22, 2020), https://www.americanbar.org/groups/diversity/disabilityrights/resources/covid19-disability-discrimination/.

[65] NEIL M. GORSUCH, THE FUTURE OF ASSISTED SUICIDE AND EUTHANASIA 5, 179 (2006).

THE RESTORATION OF PRECLEARANCE: THE NECESSITY OF FEDERAL AUTHORITY

Ava Fisher

INTRODUCTION

The passage of the Voting Rights Act of 1965 (VRA) marked a significant response to the systematic disenfranchisement of Black Americans in the United States. The VRA emerged after a long litigative struggle in the courts, a strategy that targeted racially discriminatory election laws in specific states or jurisdictions.[1] Though this litigation was ultimately unsuccessful, its purpose soon became obsolete when the VRA began to enforce equality in election practices at the federal level. Following decades of state-adopted discriminatory

[1] Lydia Hardy, *Voter Suppression Post-Shelby: Impacts and Issues of Voter Purge and Voter ID Laws*, 71 MERCER L. REV. 857 (2020).

election laws, this federal power was extremely effective in its aim of at last enfranchising the Black American population.[2]

Despite this success, the Supreme Court weakened key provisions of the VRA in its 2013 decision *Shelby County v. Holder.*[3] This case successfully challenged the constitutionality of the VRA's coverage formula in Section 4(b), which had previously determined the states or jurisdictions that were subject to preclearance by the United States Department of Justice.[4] Chief Justice John Roberts's majority opinion asserted that the coverage formula was outdated.[5] However, contemporary election data contradicts this claim, as states and jurisdictions previously covered under preclearance have dramatically altered their election laws, resulting in decreased Black American political participation.[6] To combat the widespread disenfranchisement of Black Americans, preclearance must be restored in order to assert federal protection of voting rights at the state and local levels.

Preclearance, the required approval by the U.S. Department of Justice for covered states or jurisdictions to change their election practices,[7] is crucial for the enfranchisement of Black Americans. The endeavor to restore preclearance is one that requires many considerations—political, constitutional, and social—and invites debate surrounding fundamentals of governance such as the role of

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[2] BERNARD N. GROFMAN & CHANDLER DAVIDSON, CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 19 (1992).

[3] Shelby County v. Holder, 570 U.S. 529 (2013).

[4] *The Effects of Shelby County v. Holder*, BRENNAN CTR. FOR JUSTICE (Aug. 6, 2018), https://www.brennancenter.org/our-work/policy-solutions/effects-shelby-county-v-holder.

[5] *See Shelby County v. Holder*, 570 U.S. at 529.

[6] *Voting Rates by Race and Hispanic Origin*, U.S. CENSUS BUREAU (May 10, 2017), https://www.census.gov/library/visualizations/2017/comm/voting-rates-race-hispanic.html.

[7] Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437.

federalism in elections, partisanship, and election security. To gain an understanding of the necessity of preclearance, this paper will provide an analysis of the history of the Voting Rights Act of 1965 and the role of preclearance, as well as an empirical assessment of recent election statistics and a theoretical evaluation of various legal perspectives. Such analysis is necessary in light of contemporary election laws that limit voting accessibility, resulting in low Black American voter registration and turnout.[8] In the pursuit of a renewed policy of preclearance, election data contradicts the rationale behind the decision of *Shelby County v. Holder*, refuting the notion that racism within these practices is an antiquated phenomenon.[9] Though the majority opinion of this case was correct in its assertion that the United States has made significant strides toward the pursuit of equality, the continued need for preclearance is still evident.

I. PRIOR TO THE VOTING RIGHTS ACT OF 1965

The ratification of the Reconstruction Amendments represented a major victory for those fighting for greater Black American enfranchisement, written by the Republican-dominated legislature to articulate African American legal equality in the U.S. Constitution.[10] These amendments, passed between 1865 and 1870, "gave Congress explicit power to enforce their provisions with appropriate legislation," a concept that provided the foundation for a justifiable exercise of federal power in the form of the Voting Rights Act of 1965.[11] The most

[8] *See* Hardy, *supra* note 1.
[9] *Id.*
[10] *See* Paul Finkelman, *The Necessity of the Voting Rights Act of 1965 and the Difficulty of Overcoming Almost a Century of Voting Discrimination*, 76 L.A. L. REV. 181, 201 (2015).
[11] *Id.*

significant of these amendments was the Fifteenth Amendment, ratified in 1869, which states that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[12] Though the Fifteenth Amendment nominally granted Black Americans the right to vote, the end of the Reconstruction Era only marked the beginning of decades of disenfranchisement in the Jim Crow South. Restrictive state election laws ensured that few Black Americans were able to vote, utilizing voter suppression methods including white primaries, poll taxes, grandfather clauses, and literacy tests.[13] Prior to the adoption of the VRA, the Black American suffrage movement strategically combatted these policies through litigation, and though this tactic enjoyed considerable success, it was still largely ineffective in protecting racial equality in election practices.[14]

An example of the limits of this approach can be seen in the 1915 case of *Guinn v. United States*, in which the NAACP successfully challenged Oklahoma's grandfather clause, an exemption to the state's poll tax requirement for voters whose fathers or grandfathers had voted.[15] The Court reasoned that, though the law did not explicitly target Black Americans, it "inherently brings" discrimination "into existence" because these individuals' ancestors had been ineligible to vote.[16] However, following this favorable ruling, Oklahoma's legislature immediately exempted white voters from literacy test requirements, thereby achieving the all-white

[12] U.S. CONST. amend. XV, § 1.
[13] Finkelman, *supra* note 10, at 205-06.
[14] Nicholas O. Stephanopoulos, *The South After Shelby County*, 2013 SUP. CT. REV. 55 (2014).
[15] Finkelman, *supra* note 10, at 210-11.
[16] *Id.*

electorate that the state had originally sought.[17] Such failed litigation efforts proved the necessity of federal action to ensure the protection of voting rights on a national scale.

The cause for Black American suffrage enjoyed additional legislative triumphs prior to the adoption of the VRA. The Johnson administration successfully passed the Civil Rights Act of 1964 (CRA), which outlawed discrimination on a national scale and prohibited "de jure segregation" on the basis of race.[18] The CRA, though an admirable aim, did little to create real change for these minority communities. The federal government lacked the power to meaningfully enforce this legislation, making the CRA more of a political statement from the Johnson administration than an attempt at systemic reform.[19] Its role was instead a "setting of the stage for far greater changes in American society."[20] Likewise, the ratification of the Twenty-Fourth Amendment similarly impacted the discourse surrounding voting rights for Black Americans. This amendment eliminated poll taxes "as a requirement for voting in any federal election or any primary election for federal office," representing a major success for Black American suffrage.[21] These national victories indicated a societal shift toward the prioritization of voting rights.

II. THE VOTING RIGHTS ACT OF 1965 & PRECLEARANCE

The enactment of the VRA in 1965 continued the Civil Rights movement's recent work by granting the federal government the ability to actively enforce racial equality in voting. Under the Fifteenth Amendment alone, states often

[17] *Id.*
[18] *Id.* at 185-86.
[19] *Id.*
[20] *Id.* at 186.
[21] *Id.* at 182.

justified discriminatory election practices on the basis that states, being independent actors, were not subject to federal scrutiny.[22] The VRA emboldened this amendment to apply to all states, refuting this misguided contention.[23]

Section 2 of the VRA reiterated the Fifteenth Amendment's assertion of voting rights for all, adding another provision that "forbade states or political subdivisions to apply a voting prerequisite" which would result in the denial of the right to vote on account of race.[24] This crucial new language targeted election laws that were dubbed "race-blind" yet still had a disproportionate impact on Black American communities. While Section 2 remains relevant to contemporary litigation in the absence of the preclearance provision, these tactics are inefficient when compared to previous federal action.[25]

Section 3 of the VRA reinforced federal authority over state election practices by giving courts the ability to "send federal registrars and poll watchers as needed" if a state was employing discriminatory measures.[26] Section 3 effectively abolished state-level violations of the Fourteenth Amendment's Equal Protection Clause.[27] The most crucial provision of Section 3 in the discussion of preclearance is the ability for courts to "retain jurisdiction for a period of time during which any voting change in the locale had to be precleared by the Department of Justice."[28] This power serves as the foundation for the restoration of preclearance today in the absence of Sections 4(b) and 5.

The most significant protections provided under the

[22] *Id.* at 213-14.
[23] Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437.
[24] GROFMAN & DAVIDSON, *supra* note 2, at 17.
[25] Stephanopoulos, *supra* note 14, at 63-6.
[26] GROFMAN & DAVIDSON, *supra* note 2, at 20.
[27] *Id.*
[28] *Id.*

VRA were found in Sections 4 and 5. Section 4 outlined the coverage formula by which states or jurisdictions would be required to submit election changes for preclearance to the Department of Justice. This provision also included a means by which states or jurisdictions could be "bailed out" of preclearance if shown not to discriminate in election administration.[29] The bailout provision, detailed in Section 4(a), may be employed toward a future revised formula that would be able to withstand constitutional scrutiny, as it ensures states or jurisdictions are not targeted unequally.

The original formula applied to states and counties that, as of November 1, 1964, employed any "test or device" in the voting process, including literacy tests, registration prerequisites, and vague assessments of moral character.[30] These tests were primarily utilized in the Jim Crow South, including Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia.[31] In addition to the states employing testing requirements, the coverage formula applied to jurisdictions in which either less than half of eligible voters were registered to vote on November 1, 1964, or less than half of eligible voters voted in the November 1964 election.[32] Although the coverage formula was not strictly limited to Southern states, applying its requirements largely subjected this region to preclearance.[33] Following historical precedent, the repeated renewal of the VRA revealed that these states continued to utilize voter suppression tactics. These regions could have bailed out of preclearance by ceasing these discriminatory practices, but they instead remained subject to coverage until the Court's 2013 decision in

[29] *Id.* at 19.
[30] *Id.* at 18.
[31] *Id.*
[32] *Id.*
[33] *Id.* at 19.

Shelby County v. Holder.[34] While opponents of preclearance may argue that this formula imposes an unfair burden upon covered states, the coverage formula scrutinized all jurisdictions equally. Uncovered jurisdictions were not the subject of some favoritism by the federal government; they simply never employed the tactics that necessitated the formula's very creation.[35]

This historical analysis provides substantial evidence against claims of the coverage formula's obsolescence. As recently as the VRA's renewal in 2006, Congress asserted that the conditions that inspired the coverage formula remained a reality.[36] To address this discriminatory behavior, jurisdictions subject to Section 4(b) coverage were also subject to federal authority prescribed in Section 5. If a covered state sought to change an election law, it was required to submit a proposal to the U.S. Attorney General, who would then review the proposal within sixty days.[37] This process limited discriminatory voter suppression tactics by allowing the federal government to block suspect policies and exert a deterring effect on covered states.[38]

The implementation of Section 5 has produced significant evidence of its success. In the week preceding *Shelby County v. Holder* alone, eighty-six submissions were made to the Department of Justice, demonstrating its continued influence on the enfranchisement of African Americans.[39] Grofman and

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[34] *Id.* at 28.

[35] *Id.* at 19.

[36] Sarah A. Binder, *Reading Congressional Tea Leaves from the 2006 Renewal of the Voting Rights Act*, BROOKINGS INST. (July 1, 2013), https://www.brookings.edu/opinions/reading-congressional-tea-leaves-from-the-2006-renewal-of-the-voting-rights-act/.

[37] GROFMAN & DAVIDSON, *supra* note 2, at 19.

[38] *Id.* at 29.

[39] *Notices of Section 5 Activity Under the Voting Rights Act of 1965, As Amended*, U.S. DEP'T OF JUST. (Aug. 6, 2015), https://www.justice.gov/crt/notices-section-5-activity-under-voting-rights-act-

Davidson revealed that "between 1964 and 1988 the percentage of voting-age [B]lacks registered in the eleven southern states increased from 43.3 percent to approximately 63.7 percent."[40] In addition to higher voter registration rates, Section 5 increased political representation for minorities, demonstrated by the increase in Black elected officials from "fewer than 100 in 1965 in the seven originally targeted states to 3,265 in 1989."[41]

III. *SHELBY COUNTY V. HOLDER*

To justify the restoration of preclearance, one must compare the successes of the past to the modern political climate after the *Shelby* decision. Though the necessity of preclearance was undeniable in 1965, the present attitude toward minority disenfranchisement is largely apathetic. Contemporary lawmakers and politicians maintain that preclearance is archaic, a remnant of a past America in which equality had yet to be achieved.[42] However, these claims may be motivated more by partisan and state interests than concrete fact, evidenced by the political environment that inspired the decision of *Shelby* as well as the present election data.[43]

A. Political Environment

A large portion of the preclearance discussion centers around the idea of state sovereignty. Federal courts, as well as Congress, have historically been hesitant to assert federal influence over election laws, as this power is constitutionally

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1965-amended.

[40] GROFMAN & DAVIDSON, *supra* note 2, at 43.

[41] *Id.*

[42] Jennifer Epstein, *Ariz. sues feds over Voting Rights Act*, POLITICO (Aug. 26, 2011), https://www.politico.com/story/2011/08/ariz-sues-feds-over-voting-rights-act-062120.

[43] Hardy, *supra* note 1.

reserved for the states.[44] However, these governments have too often abused this power at the expense of minority communities.[45] While some advocate for state supremacy based on the notion that local governance is more democratic, such claims undermine the very spirit of democracy. When a state employs discriminatory measures, the federal government must prioritize the preservation of human rights above the discretion of state governments.

Though the federal government has ultimate power over the conduct of elections, as outlined in the Elections Clause, some federal entities have the tendency to favor state sovereignty over federalism.[46] However, forgoing federal power in favor of state interests "inappropriately prioritizes state sovereignty over Congress's authority to act in this area."[47] Federal institutions that adopt a lenient interpretation of the VRA rob the Act of its full strength, resulting in widespread voter suppression tactics.[48] The federal government's inaction on this matter prior to the *Shelby* ruling gave legitimacy to states' resistance of Section 5 of the VRA.

Given this political environment, many voting rights activists and lawmakers feared that the government would do away with preclearance. A year and a half before the *Shelby* decision, Attorney General Eric Holder spoke at the University of Texas about the dangers of voter suppression.[49] Citing recent

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[44] U.S. CONST. art. I, § 4.
[45] Hardy, *supra* note 1.
[46] Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195 (2012).
[47] *Id.*
[48] U.S. CONST. amend. XV, § 2.
[49] *Attorney General Eric Holder Speaks at the Lyndon Baines Johnson Library & Museum,* U.S. DEP'T OF JUST. (Dec. 13, 2011), https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-lyndon-baines-johnson-library-museum.

attempts to alter election laws across the South, such as "new photo identification requirements" and "changes to early voting procedures," Holder advocated for the protection of preclearance as a safeguard of democracy.[50] He countered claims that the country had "moved beyond the challenges of 1965" and that "Section 5 is no longer necessary," imploring the country to recognize the evidence of continued voter suppression.[51]

Despite the warnings of voting rights activists, preclearance came under constitutional scrutiny many times even prior to *Shelby*. To understand the outcome of this decision and how it contradicts other rulings, one must first examine the political atmosphere surrounding the case of *NAMUDNO v. Holder*. The Northwest Austin Municipal Utility District No. 1, or NAMUDNO, challenged the constitutionality of preclearance in 2009, arguing that "Congress did not have the power to enact Section 5."[52] While the Court did not rule on this claim, it did hold that the district could apply for bailout from preclearance as defined by Section 4 of the VRA.[53] This ruling is essential in understanding *Shelby*, as it questions the fundamental role of federal intervention in state election practices.[54] By focusing on the limits of the bailout provision, the Court wasted the opportunity to assert the validity of "legislation that is actually well within congressional authority to implement."[55] This decision furthered the trend of valuing states' rights over federal voting protections, eventually culminating in the Court's invalidation of the most important provisions of the

[50] *Id.*
[51] *Id.*
[52] *NAMUDNO v. Holder*, BRENNAN CENTER FOR JUSTICE (June 22, 2009), https://www.brennancenter.org/our-work/court-cases/namudno-v-holder.
[53] *Id.*
[54] Tolson, *supra* note 46.
[55] *Id.*

VRA.

B. Majority Opinion of the Court

On June 25, 2013, Shelby County, Alabama, challenged the constitutionality of Sections 4 and 5 of the VRA in the U.S. Supreme Court.[56] In lower courts, the plaintiffs' claims were denied, and the courts upheld the constitutionality of these sections.[57] However, in their Supreme Court appeal, the plaintiffs, represented by attorney Bert Weir, maintained the view that the coverage formula for preclearance unjustly targeted specific states and jurisdictions. The Supreme Court affirmed this claim in a 5-4 decision that struck down this crucial protection.[58] While the Court did not declare Section 5's preclearance provision unconstitutional, this portion of the VRA ultimately lost its power in the absence of applicable jurisdictions under the coverage formula. Chief Justice John Roberts delivered the majority opinion of the Court, reasoning that the outdated coverage formula was "based on 40-year-old facts having no logical relation to the present day,"[59] given recent increases in Black American turnout and voter registration rates. The Court based its rationale on the idea that the discriminatory attitudes and actions that inspired the necessity of Section 5 were no longer prevalent, failing to justify the undue burden placed on covered states and jurisdictions.[60]

Sharply contrasting the majority's opinion, Justice Ginsburg articulated the dissenters' view of federal power in regulating state election laws. She argued that Congress' power to enforce the Fourteenth and Fifteenth Amendments also

[56] Shelby County v. Holder, 570 U.S. 529 (2013).
[57] *Id.*
[58] *Id.* at 530.
[59] *Id.* at 554.
[60] *Id.* at 535.

granted them the power to draft legislation such as the VRA to remedy injustices in the states.[61] Justice Ginsberg cited the recent renewal of the VRA in support of her claims, asserting that this judgement by Congress validated the burden placed on states.[62] This dissent remains a valuable piece of evidence in the dialogue surrounding the restoration of preclearance, as Justice Ginsberg's opinion can be used as a persuasive authority to support current litigants' claims.

C. Impact of the Ruling

Shelby has led to the widespread disenfranchisement of Black Americans, as well as rampant changes to election practices in jurisdictions previously covered under preclearance. One example often cited by voting rights activists is a piece of legislation in Texas, a jurisdiction once subject to preclearance, which enacted a strict photo ID law just twenty-four hours after *Shelby.*[63] Considerable research has proven that photo ID laws have a discriminatory effect, evidenced by the fact that at the time of their passage, "25% of Black people and 16% of Latino people lacked government-issued identification, compared with only 8% of White people."[64] Considering this evidence, the aforementioned Texas law was especially strict, requiring voters to present one of "only five accepted forms of ID, all of which were government-issued and required to have a photo of the voter," as opposed to previous requirements that allowed non-photographic forms of identification.[65] These photo ID laws demonstrate the real effects of systemic discrimination and voting accessibility issues. These restrictive regulations are

[61] *Id.* at 556 (Ginsburg, J., dissenting).
[62] *Id.*
[63] BRENNAN CTR. FOR JUSTICE, *supra* note 4.
[64] Hardy, *supra* note 1.
[65] *Id.*

often coupled with mass closures of locations where one may obtain an acceptable form of ID, such as the Department of Motor Vehicles. In Alabama, "thirty-one Department of Motor Vehicles offices were shuttered" in the wake of the *Shelby* ruling, and "all closed facilities were specifically located near predominantly African American communities."[66]

Similar to the discriminatory effects of voter ID laws, voter roll purges also place an undue burden on minority communities. A 2018 report from the Brennan Center for Justice revealed that covered states conducted voter purges at a "significantly higher rate than non-covered jurisdictions."[67] These statistics highlight the real devastation felt in the wake of *Shelby*: between 2012 and 2016, an estimated "2 million fewer voters would have been purged over those four years if jurisdictions previously subject to federal preclearance had purged at the same rate as those jurisdictions not subject to that provision in 2013."[68] Though these purges were originally designed to keep the voter roll up to date, they often result in the removal of active voters from the list as well, directly impacting the voter turnout of ethnic and racial minorities.[69] Many individuals are unaware that they have been removed from the registration list until they have already arrived at the polls to vote, leading many to be turned away without getting to exercise their democratic right. Thus, purged voters must sacrifice hours at work, among other responsibilities, to "go through some

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[66] Paul Davis, *The Root of the Problem: Enforcing the Voting Rights Act in Modern Settings*, 12 L.J. FOR SOC. JUST. 62, 68 (2019) (discussing the aftermath of *Shelby County v. Holder*).

[67] Kevin Morris et al., *Purges: A Growing Threat to the Right to Vote*, BRENNAN CENTER FOR JUSTICE (July 20, 2018), https://www.brennancenter.org/our-work/research-reports/purges-growing-threat-right-vote.

[68] *Id.*

[69] Hardy, *supra* note 1, at 866.

burdensome process of reregistering with the possibility that their vote will not count at all."[70]

The discriminatory impact of these administrative changes has been compounded by rampant voting accessibility restrictions. Since 2010, twenty-five states have passed these additional regulations, including voter ID laws, stricter registration requirements, obstacles to early and absentee voting, and felon disenfranchisement.[71] Many of these voter suppression tactics were utilized for the first time in the 2016 election, thus providing insight into the concrete effects of the elimination of preclearance on voter turnout and registration.[72]

Table 1: Voting Rates of White and Black Populations in 2012 and 2016 Elections*

Race	% Registration in 2012 Election	% Registration in 2016 Election	% Turnout in 2012 Election	% Turnout in 2016 Election
White	71.9	71.7	64.1	65.3
Black	73.1	69.4	66.6	59.6

[70] *Id.* at 867.

[71] *New Voting Restrictions in America*, BRENNAN CTR. FOR JUSTICE (Nov. 19, 2019), https://www.brennancenter.org/our-work/research-reports/new-voting-restrictions-america.

[72] *Id.*

*Source: American Community Survey[73]

As the first general election after the ruling in *Shelby,* voting data from 2016 supplies valuable evidence of the continued relevance of preclearance in a modern context, especially concerning its effects on Black American political participation on a national scale. Table 1 illustrates the impact of these discriminatory practices on both voter registration and participation rates. In the 2012 General Election, African Americans had a higher voter turnout than their white counterparts for the first time in history, as recorded by the U.S. Census Bureau.[74] Despite this record turnout in the 2012 election, Table 1 reveals that African American registration fell by 3.7% between the 2012 and 2016 elections, while white registration decreased by only 0.2% in the same time period.[75] African American voter turnout experienced a similar decrease between this period, falling by 7%, while white voter turnout increased by 1.2%.[76] This discrepancy in political participation between white and Black American voters may be explained by the loss of preclearance, resulting in the passage of state election laws that hindered voting accessibility for minority groups. The voter suppression resulting from these pieces of legislation was far from accidental, demonstrated by North Carolina restrictions that were found to have "pinpoint accuracy in disenfranchising minority voters, which the district court concluded was undeniably [due to] legislative intent."[77] Thus, this data supports the implementation of a revised form of preclearance, applicable to appropriate jurisdictions in the contemporary political landscape.

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[73] U.S. CENSUS BUREAU, *supra* note 6.
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] Hardy, *supra* note 1, at 864.

IV. Proposed Methods of Preclearance

A. Current Efforts to Deter Voter Suppression

Efforts to revive an updated form of preclearance draw their strength from the Elections Clause, as described in Article I, Section 4 of the U.S. Constitution. This clause grants Congress to the power to "make or alter" state regulations regarding the "times, Places and Manner of holding elections for Senators and Representatives,"[78] a power affirmed by the Supreme Court in the 2013 case of *Arizona v. Inter Tribal Council of Arizona*.[79] Justice Antonin Scalia delivered the majority opinion in this case, asserting that Arizona's strict proof of citizenship requirement violated the National Voter Registration Act.[80] The Court reasoned that such a violation undermined congressional authority in election matters, thereby contradicting the Elections Clause.[81]

Given this favorable ruling, the Elections Clause may provide the foundation for a new attempt at voting rights advocacy. This provision may even be a stronger mechanism for federal oversight in election administration than the VRA, as it is not subject to the same renewal restrictions and represents a more enduring power of the federal government.[82] These properties also address concerns of Section 5's relevance in the current political climate, granting Congress the power to review state practices in light of modern data on voter suppression.

In the absence of preclearance, voter protection efforts rely heavily on litigation tactics surrounding Section 2 of the

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[78] U.S. Const. art. I, § 4.

[79] Conner Johnston, *Proportional Voting Through the Elections Clause: Protecting Voting Rights Post-Shelby County*, 62 UCLA L. Rev. 236, 239 (2015).

[80] *Id*. at 249.

[81] *Id*.

[82] *See* Johnston, *supra* note 79, at 241.

VRA. Similar to the strategies employed prior to the enactment of the VRA, Section 2 litigation is fairly ineffective in limiting voter suppression when compared to Section 5 at its full strength.[83] Under Section 5 preclearance, covered jurisdictions were required to prove that their proposed election changes would not have a discriminatory effect. However, under Section 2, the burden of proof lies on the plaintiffs challenging an election law.[84] Another key difference between the two sections is that Section 5 preclearance acts as a preventative measure against discriminatory election practices, while Section 2 litigation challenges laws already in place.[85] Laws may be "implemented for one or more election cycles, causing harm to minorities in the meantime,"[86] before they are successfully challenged.

In addition, Section 2 litigation lacks support from the federal government. While matters of preclearance are addressed by the Department of Justice, an existing institution of federal power, Section 2 litigation relies on private parties to serve as plaintiffs.[87] This imposes a significant financial and mental burden upon these individuals, as "Section 2 plaintiffs must go through some or all of a lawsuit's familiar phases--discovery, summary judgment, trial, appeal, etc.--while jurisdictions covered by Section 5 need only submit a standardized set of forms to the DOJ."[88] Due to these high costs on plaintiffs' time and finances, the success rate of Section 2 litigation has "hovered around 40 percent over the last

[83] Stephanopoulos, *supra* note 14, at 63-6.
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.* at 65.

generation."[89] These low statistics are particularly alarming considering litigation's already minimal impact. Given the discrepancies in efficiency and effectiveness between litigation and preclearance, private parties acting as plaintiffs "would have had to have launched double to triple their actual number of Section 2 suits in order to have challenged all of the policies that were blocked by Section 5."[90]

B. Restoring Preclearance in the Current Political Environment

In the fight to restore preclearance, one must consider a variety of methods proposed by legislators and political analysts. A successful solution must be able to withstand constitutional scrutiny, partisan debate, and pursuits of state power. One such method is the justification of preclearance through Section 3 of the VRA. This provision allows jurisdictions to be bailed into preclearance coverage if they are found to violate the Fourteenth or Fifteenth Amendments.[91] This section has gained unprecedented attention by voting rights advocates in the absence of Section 5. Preclearance in Section 3 is favorable in the sense that it is not subject to partisan debate in the same manner as legislative reform. In addition, this provision would be largely exempt from the claim that the coverage formula discriminates against certain states because it only pertains to jurisdictions that have clearly violated these constitutional amendments.[92]

This form of preclearance has shown to be effective thus far, as in the case of Pasadena, Texas, which was bailed into

[89] *Id.* at 58.
[90] *Id.* at 70.
[91] Davis, *supra* note 66, at 62.
[92] *Id.* at 69-72.

preclearance through Section 3 in 2017.[93] After a Fifth Circuit Judge concluded that Pasadena had implemented discriminatory redistricting practices against Latinx voters, the city became the first jurisdiction subject to preclearance since the outcome of *Shelby* four years earlier.[94] However, Section 3 preclearance is limited in scope and largely untested, detracting from its strength as the sole solution to voter suppression issues and making it better suited to serve as a starting point for more comprehensive voting reform. A potential downside of Section 3 preclearance, similar to the failures of Section 2, is that it requires plaintiffs to prove a jurisdiction's violation of the Fourteenth or Fifteenth Amendments; however, plaintiffs must additionally provide evidence of the intentionality of this discrimination under Section 3.[95] These requirements ignore the reality of the political landscape before the passage of the VRA, which proved the weakness of these amendments in addressing voter discrimination at the state level. A revised form of Section 3 preclearance may draw its strength from Section 2 requirements that focus on the ultimate result of election laws as opposed to their intent.[96]

An encouraging prospect in the pursuit to restore preclearance is the recent national support for voting reform. Reacting to current election laws that have resulted in low turnout, in 2018, "over 100 House candidates alone ran on change platforms" dedicated to the protection of a truly democratic election process. [97] In addition to legislative priority, voters displayed a tendency toward reform in the 2018 elections, approving "ballot measures to unrig politics—tackling

[93] *Id.* at 62.
[94] *Id.*
[95] *Id.* at 69.
[96] Stephanopoulos, *supra* note 14, at 63-6.
[97] Wendy R. Weisner et al., *Congress Must Pass the 'For the People Act'*, BRENNAN CTR. FOR JUSTICE (Jan. 29, 2021), https://www.brennancenter.org/our-work/policy-solutions/case-hr-1.

redistricting, voting, and campaign finance—often by large bipartisan majorities, in red, blue, and purple states."[98] Several states have articulated these same values through reforms of automatic voter registration, same day registration, and campaign financing.[99]

A crucial piece of legislation for the cause of preclearance is the revolutionary House bill, H.R. 4: The Voting Rights Advancement Act of 2019, later renamed the John R. Lewis Voting Rights Act of 2020. This Act "passed the House of Representatives on December 6, 2019 by a decisive margin of 228-187" and "established new criteria for determining which states and political subdivisions must obtain preclearance before changes to voting practices in these areas may take effect."[100] The preclearance formula conveyed in H.R. 4 is important due to its reliance on modern election data, given the criticism of the original coverage formula's outdated mechanisms. Under H.R. 4, a state would be subject to preclearance if:

> (1) 15 or more voting rights violations occurred in the state during the previous 25 years; or (2) 10 or more violations occurred during the previous 25 years, at least one of which was committed by the state itself. A political subdivision as a separate unit shall also be subject to preclearance for a 10-year period if three or more voting rights violations occurred there during the

[98] *Id.*
[99] *Id.*
[100] *See John R. Lewis Voting Rights Act of 2020: Action Alert*, NAACP (2020), https://www.naacp.org/wp-content/uploads/2020/07/JOHN-LEWIS-ACTION-UPDATE.pdf; Voting Rights Advancement Act of 2019, H.R. 4, 116th Cong. (2019).

previous 25 years.[101]

In addition to establishing requirements for a state to be subject to preclearance, H.R. 4 specifies what types of data that states under preclearance must submit, including "methods of election, changes to jurisdiction boundaries, redistricting, changes to voting locations and opportunities, and changes to voter registration list maintenance."[102]

As is the trend in matters of election procedures, H.R. 4 has been met with partisan obstacles and concerns over federalism. Moreover, legislators are unlikely to support legislation that would apply to their represented state's government, especially if the revised formula applies to an area not previously covered under preclearance. Though the bill has successfully passed the House of Representatives, it has a mere "3% chance of being enacted" at this time.[103] Many opponents of preclearance view it as an "extraordinary intrusion into state sovereignty since it required covered states to get the approval of the federal government for voting changes made by state and local officials."[104] Those that hold this view draw their claims from rising registration and turnout in the Black American population, reaching the conclusion that the conditions that inspired preclearance have been fully remedied.[105] These arguments have been supported by the fact that "[B]lack registration actually exceeded white registration in the 2004

[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] Hans von Spakovsky, *The Voting Rights Act after the Supreme Court's Decision in Shelby County*, THE HERITAGE FOUNDATION (Aug. 22, 2013), https://www.heritage.org/testimony/the-voting-rights-act-after-the-supreme-courts-decision-shelby-county.
[105] *Id.*

election" in Southern states subject to preclearance.[106] However, such claims ignore the reality behind these statistics. While opponents of preclearance utilize data on higher Black American registration, turnout, and proportional representation to prove its irrelevance in modern times, this conclusion is severely misguided.[107] An assessment of submissions, some rejected, to the Department of Justice suggest that these statistics prove the effectiveness of preclearance instead.[108]

To gain support for the passage of H.R. 4 and any other federal legislation to reinstate preclearance, legislators must be willing to compromise on the scope of a revised coverage formula. While these actions may weaken the original intent of the bill, they may be the only means to restore federalism in election laws. However, any passage of election reform, regardless of strength, may inspire further changes that more broadly addresses systemic issues with these election practices. Such a compromise may be a revised bailout system in which jurisdictions are more easily able to opt out of preclearance if proven to be free from discriminatory election practices. The original bailout system, as described in Section 4 of the VRA, allowed jurisdictions to "request termination of coverage" to address the possibility of a false positive, or a case in which the VRA incorrectly subjected an area to preclearance.[109] This system allowed a jurisdiction to challenge preclearance if they had not used a test or device that discriminated based on race in the previous five years, granting them grounds for litigation similar to a declaratory judgement for preclearance.[110] However,

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[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] Christopher B. Seaman, *An Uncertain Future for Section 5 of the Voting Rights Act: The Need for a Revised Bailout System*, 30 ST. LOUIS U. PUB. L. REV. 9 (2010).
[110] *Id.*

this system has proven to be largely ineffective in removing jurisdictions that did not employ discriminatory election laws. While analysis on bailout estimated that "approximately 25% of covered jurisdictions could bail out in 1984," the reality of bailout cases is far more limited.[111]

This discrepancy may result from flaws within the original bailout system, including these jurisdictions' lacking knowledge regarding the possibility of bailout. This theory is supported by the fact that "all but two jurisdictions that have achieved bailout since 1984 are located in Virginia" which "appears related to the City of Fairfax's successful bailout which eventually led other local governments to follow suit."[112] Secondly, covered jurisdictions largely misperceived the expense required to achieve bailout. While opponents of preclearance view bailout as a lengthy process requiring the hiring of many qualified personnel in support of litigation, the real expense of bailout is less than $5000.[113] In addition, covered jurisdictions were daunted by the "complex, multi-requirement test" to obtain bailout, including measures of Section 2 litigation and whether the jurisdiction had "fully complied with its Section 5 obligations for the past ten years."[114]

To remedy previous flaws within the preclearance system and assure the passage of national reforms such as H.R.4, legislators must employ an automatic bailout for a revised coverage formula. Under automatic bailout, a covered jurisdiction would be removed from preclearance if they:

(1) [had] not received any Section 5 objections from the

[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.*

> Justice Department or been denied preclearance in the district court and (2) [had] not received any adverse final court judgment, consent decree, or other settlement of litigation of vote discrimination claims under Sections 2 or 203 of the Act.[115]

These parameters would apply to the previous twenty-five years, the same period proposed in H.R.4 to subject jurisdictions to preclearance. Automatic bailout may be included as an amendment to the bill to persuade other legislators within the Senate to support its passage. This amendment would encourage states to employ nondiscriminatory practices and address previous concerns of the constitutionality of subjecting irrelevant states to preclearance.

CONCLUSION

In the wake of the 2020 general election, the potential restoration of preclearance has become increasingly relevant. Only the second general election since *Shelby,* the 2020 proceedings exposed persistent flaws in election policy and administration. Recently enacted discriminatory election practices, including closures of polling locations in predominantly Black American communities, signature matching requirements, and strict voter ID laws, have typically been justified by claims of rampant voter fraud and the necessity of election security.[116] However, such claims have been disproven by extensive research on the subject. A report by the Brennan Center for Justice even found that, given the statistical likelihood of voter fraud, "it is more likely that an individual will be struck

[115] *Id.*

[116] Sophie Schuit & Jon C. Rogowski, *Race, Representation, and the Voting Rights Act*, 61 AMERICAN JOURNAL OF POLITICAL SCIENCE 513, 524 (2017).

by lightning than that he will impersonate another voter at the polls."[117] Claims of election fraud instead appear to be a justification for the widespread disenfranchisement of minority voters.

Preclearance must be restored to grant protection of voting rights on a national scale, thereby combatting the effects of this harmful rhetoric. Opponents may view voter suppression as a relic of America's past, one no longer reflective of contemporary progress. However, recent election data and the passage of discriminatory policies in areas formerly subject to Section 5 demonstrate the continued need for preclearance. The restoration of preclearance may drastically improve democratic performance by targeting systemic voter suppression and preventing the implementation of these policies rather than addressing their effects, as is the practice of Section 2 litigation.[118] Such measures would forge an electorate more representative of the nation's population, thereby embodying the spirit of equality and acceptance so central to American values.[119] These measures will increase the ability of Black American communities and other minority voters to make their voices heard through substantive, as well as proportional, representation.[120] Until the country indeed proves its commitment to equality in election practices, preclearance will ensure the protection of the sacred right to vote for all. In the meantime, legislators, voting rights activists, and every American citizen must vigilantly advocate for stronger protections against voter suppression.

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[117] Justin Levitt, *The Truth About Voter Fraud*, BRENNAN CTR. FOR JUSTICE (Nov. 9, 2007), https://www.brennancenter.org/our-work/research-reports/truth-about-voter-fraud.
[118] Schuit & Rogowski, *supra* note 116, at 515.
[119] *Id.* at 514.
[120] *Id.* at 516.

BAKED INTO THE SYSTEM: THE UNCHECKED EXPANSION OF FACIAL RECOGNITION SOFTWARE

Christion Finch

INTRODUCTION

The use of biometrics technology is rapidly increasing in both the public and private sectors, especially through facial recognition software. In broad terms, facial recognition involves matching a person's face with a pre-existing database of images, and its uses include authentication in personal electronic devices, robotics, and most notably, recent implementation by law enforcement agencies across the globe.[1]

While facial recognition can be useful and even convenient in certain situations, it is important that the justice system is still capable of protecting the rights of its citizens against invasions of privacy, particularly in terms of how facial images are collected and processed. There is also the grave concern of racial discrimination within these software systems and the shortcomings of its accuracy in that regard. Current flaws

[1] Thorin Klosowski, *Facial Recognition Is Everywhere. Here's What We Can Do About It*, N.Y. TIMES (July 15, 2020), https://www.nytimes.com/wirecutter/blog/how-facial-recognition-works/.

in the criminal justice system on issues of race and privacy suggest that this powerful technology cannot be fully trusted in the government's hands without imposing heavy limitations on its implementation.[2] These concerns are further emphasized by the increasing use of this software in a number of United States government agencies, including Border Security and the FBI.[3]

While technological advancements like the internet are often perceived as a benefit to society,[4] the unchecked expansion of facial recognition software must be closely monitored to guard against potential violations of privacy. In spite of its positive uses within the criminal justice system, there have also been numerous instances in which this software has been abused, particularly concerning its inaccuracies in identifying those of minority communities.[5] Therefore, by presenting a deeper examination of the uses of this technology, this paper will reveal not only its flaws, but the severe consequences of failing to monitor its growth in our modern society. Greater regulations at the federal and state levels, including legislation to mandate

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[2] *See Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, THE SENTENCING PROJECT (April 19, 2018), www.sentencingproject.org/publications/un-report-on-racial-disparities/; *see also* Rebecca Wexler, *Op-Ed: How data privacy laws could make the criminal justice system even more unfair*, L.A. TIMES (July 31, 2019), https://www.latimes.com/opinion/story/2019-07-30/consumer-data-privacy-laws-crime-defendants-police-instagram.

[3] *See* Kimberly J. Del Greco, *Facial Recognition Technology: Ensuring Transparency in Government Use*, FBI (June 4, 2019), https://www.fbi.gov/news/testimony/facial-recognition-technology-ensuring-transparency-in-government-use; *Facial Recognition: CBP and TSP are Taking Steps to Implement Programs, but CBP Should Address Privacy and System Performance Issues*, U.S. GOV'T ACCOUNTABILITY OFF. (Sept. 2, 2020), https://www.gao.gov/products/gao-20-568.

[4] Kathleen Stansberry et al., *The internet will continue to make life better*, PEW RESEARCH CENTER (Oct. 28, 2019), https://www.pewresearch.org/internet/2019/10/28/4-the-internet-will-continue-to-make-life-better/.

[5] *See* Patrick Grother et al., *Face Recognition Vendor Test (FRVT) Part 3: Demographic Effects*, NAT'L INST. OF STANDARDS AND TECH. (Dec. 19, 2019).

transparent use of this technology and increased judicial oversight, are necessary in order to fully remedy this issue and protect our citizens' civil rights.[6] To illustrate this claim, this piece will break down the historical advancement of facial recognition technology and its usage and propagation in the public and private sectors, including the harms that have resulted. This paper will additionally examine historical and current solutions to the issues created by facial recognition software in an attempt to outline possible methods of mitigation.

I. BACKGROUND

Facial recognition software is a relatively recent development. In 1964 and 1965, Woody Bledsoe began using computers to recognize human faces.[7] Bledsoe's method involved the comparison of key features on the human face to a number of pre-existing images to find a match and determine the identity of the person.[8] Given the lacking sophistication of this technology in the mid-twentieth century, facial recognition software had yet to be tested on a larger scale. However, Bledsoe's first steps in implementing facial recognition techniques catalyzed the technological advancements that can be witnessed in daily life today.

Over time, the use of facial recognition software has become increasingly effective. In 1977, a convicted killer who had escaped prison was found using a system that compared a

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[6] Pam Greenberg, *Facial Recognition Gaining Measured Acceptance*, NCSL (Sept. 18, 2020), https://www.ncsl.org/research/telecommunications-and-information-technology/facial-recognition-gaining-measured-acceptance-magazine2020.aspx.

[7] *History of Face Recognition & Facial Recognition Software*, FACEFIRST, www.facefirst.com/blog/brief-history-of-face-recognition-software/# (last visited Mar. 12, 2021).

[8] JAMES L. WAYMAN, THE HISTORY OF INFORMATION SECURITY: A COMPREHENSIVE HANDBOOK 264-65 (Karl de Leeuw & Jan Bergstra eds., 2007).

picture of his face against a database of drivers' licenses, exemplifying that this technology can be used in a positive manner within the criminal justice system.[9] Facial recognition software's nearly instantaneous identification of potentially dangerous criminals demonstrates a clear benefit in maintaining a safe and civil society.

However, extensive statistical analyses of facial recognition software have also revealed extremely concerning trends of false positives among certain racial and ethnic groups.[10] Extensive facial image databases maintained by U.S. law enforcement agencies such as the Federal Bureau of Investigation were utilized to test whether these systems should be implemented on a wider scale.[11] The resulting study indicated significant inaccuracies in the domestically-created algorithm's false positives, specifically for East African and East Asian persons. These findings stated that, "using the higher quality Application photos, false positive rates are highest in West and East African and East Asian people, and lowest in Eastern European individuals...With domestic law enforcement images, the highest false positives are in American Indians, with elevated rates in African American and Asian populations."[12] Thus, these systems' propensity to falsely identify members of minority communities in criminal investigations severely detracts from their positive uses, endangering these individuals' most basic

[9] Curt Anderson & Suzette LaBoy, *Facial-Recognition Software Nabs Killer Who Escaped from Prison in 1977*, TULSA WORLD (Feb. 20, 2019), tulsaworld.com/news/national/facial-recognition-software-nabs-killer-who-escaped-from-prison-in-1977/article_01b5d039-4f90-5b32-a864-52fa8633be6b.html.

[10] Groether et al., *supra* note 5.

[11] *See* Neema Singh Guliani, *The FBI Has Access to Over 640 Million Photos of Us Through Its Facial Recognition Database,* ACLU (June 7, 2019), https://www.aclu.org/blog/privacy-technology/surveillance-technologies/fbi-has-access-over-640-million-photos-us-through.

[12] Groether et al., *supra* note 5.

civil rights and liberties.

Private sector facial recognition software algorithms also misidentify individuals with darker skin tones at a concerning rate. Amazon conducted a study on its own software, Rekognition, which further demonstrated potential inaccuracies in facial recognition technology.[13] This investigation highlighted the software's difficulty in identifying both women and non-white individuals: women were misclassified as men nineteen percent of the time, and women with darker skin tones were mistaken as men thirty-one percent of the time.[14] Comparatively, the software produced by Microsoft still made this mistake, but only 1.5% of the time.[15] These concerns are exacerbated by the fact that Amazon is currently pushing its Rekognition technology as a tool to be used by the police and federal agencies.[16] While the company claims that it will cease distribution of its software, there are no guarantees that it will halt the software's development.[17] Thus, it can be assumed that a large number of these flaws will remain present within its system. As a result, issues of both privacy and law enforcement are greatly impacted by these findings, calling for greater federal regulation in order to guard against further discrimination.

II. RACE, PRIVACY, & FACIAL RECOGNITION

While law enforcement agencies' use of facial recognition technology is still a relatively new concept, the racial disparities that accompany it are not. Discrimination pervades

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[13] Natasha Singer, *Amazon is Pushing Facial Technology that a Study Says Could be Biased*, N.Y. TIMES (Jan. 24, 2019), https://www.nytimes.com/2019/01/24/technology/amazon-facial-technology-study.html.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *See* Singer, *supra* note 13.

nearly every aspect of the criminal justice system, extending from issues of sentencing to capital punishment.[18] One example of this racially disproportionate impact is the differential in federal sentencing, with the U.S. Sentencing Commission finding that "sentences of Black male offenders were longer than those of White male offenders for all periods studied. Black male offenders' sentences were 19.1% longer than those of White male offenders during the Post-Report period."[19]

These issues are further evidenced by the disproportionate conviction rates of those in African American communities: the Sentencing Project reports that "African Americans are more likely than white Americans to be arrested; once arrested, they are more likely to be convicted; and once convicted, and they are more likely to experience lengthy prison sentences."[20] These findings additionally indicated that "African-American adults are 5.9 times as likely to be incarcerated than whites and Hispanics are 3.1 times as likely," illustrating the discriminatory practices already facing these individuals prior to the introduction of facial recognition technology.[21] Thus, this new software has only worsened the racial disparities existing in our modern legal system.

Furthermore, there are already instances of this bias in practice, demonstrated by the false identification of Robert Williams as a local shoplifter in Detroit, Michigan.[22] Williams, an Black American man, was held for 30 hours and released on a bond of $1,000, all for a crime that he did not commit.[23] This was

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[18] THE SENTENCING PROJECT, *supra* note 2.

[19] U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING (2017).

[20] THE SENTENCING PROJECT, *supra* note 2.

[21] *Id.*

[22] Greenberg, *supra* note 6.

[23] Kashmir Hill, *Wrongfully Accused by an Algorithm*, N.Y. TIMES (June 24, 2020), https://www.nytimes.com/2020/06/24/technology/facial-recognition-arrest.html.

an unnecessarily close call, as this mistake would have entailed a felony larceny charge and its accompanying sentence of up to five years and/or a fine of up to $10,000 if left uncorrected.[24] With Williams' entire future at stake, this incident demonstrates the negative consequences that this software can have on the livelihoods of average American citizens, underscoring the urgency of passing additional legislative reforms to combat this injustice.

These situations exemplify the monumental implications of this technology on issues of race and privacy. An increased rate of false positives against peoples of East African and East Asian descent puts them at a higher risk of harm from private and public sectors.[25] Arrests and convictions based on inaccuracies in facial recognition technology would only exacerbate the disproportionate impact of the criminal justice system on minority communities, as shown by the disparate sentencing rates imposed upon these groups. As this technology approaches mainstream use in both the public and private sectors, the civil rights of historically marginalized peoples could be placed in even greater jeopardy. Therefore, legislative and regulatory efforts to mitigate these harms are necessary in order to avoid further discrimination within the American legal system.

III. LEGISLATIVE & JUDICIAL CHECKS ON PRIVACY

In recent years, a number of larger corporations have decided to distance themselves from facial recognition technology: IBM stepped back following privacy and racial profiling concerns, Amazon pledged a one-year moratorium on selling its technology to police departments, and Microsoft will refuse to sell facial recognition software until Congress passes

[24] Mich. Penal Code § 750.356 (1931).
[25] Groether et al., *supra* note 5.

regulations on its use.[26] In spite of these actions, a large number of other companies are actively moving forward with this technology, regardless of its associated risks.[27] In doing so, they bring the opportunity for racial discrimination into the private sector, threatening these individuals' civil rights and constitutional right to privacy.[28] As such, it is important for Congress to step in with stronger policies to prevent the abuse of these problematic systems.

Passed in 2008, the Biometrics Information Privacy Act (BIPA) was the first major piece of legislation protecting individuals against potential abuses of facial recognition software, shaping the entire future of this technology.[29] While the Act notably states that "the use of biometrics appears to promise streamlined financial transactions and security screenings," it also underscores that "the full ramifications of biometric technology are not fully known."[30] In this regard, BIPA makes plain that facial recognition software is still in its developmental stages and that, in an effort to protect the public, this technology must be regulated to some degree. Further demonstrating the necessity of greater government oversight, provisions of BIPA reveal that "despite limited State law regulating the collection, use, safeguarding, and storage of biometrics, many members of the public are deterred from partaking in biometric identifier-facilitated transactions."[31] The public's hesitance to engage with these practices demonstrates the widespread fear that this

[26] Rebecca Heilweil, *Big tech companies back away from selling facial recognition to police. That's progress*, VOX (June 11, 2020), https://www.vox.com/recode/2020/6/10/21287194/amazon-microsoft-ibm-facial-recognition-moratorium-police.

[27] Greenberg, *supra* note 6.

[28] Heilweil, *supra* note 26.

[29] Biometrics Information Privacy Act, 740 III. Comp. Stat. 14/1 et seq. (2008).

[30] *Id.*

[31] *Id.*

surveillance technology will restrict their privacy and civil rights. Therefore, additional legislative reforms must be implemented to expand upon the protections established under BIPA and guard against racial biases in this technology.

Lower courts have also historically supported increases in the regulation of facial recognition software, exemplified in Circuit Judge Ikuta's opinion in the 2019 case *Patel v. Facebook*.[32] Judge Ikuta specifically states:

> We conclude that the development of a face template using facial-recognition technology without consent (as alleged here) invades an individual's private affairs and concrete interests. Similar conduct is actionable at common law.[33]

The court ruled that Facebook's actions fully violated provisions of BIPA that required corporations to obtain a person's consent before collecting biometric data, such as facial recognition information.[34] This case additionally illustrated the legal consequences that could befall private companies if their technology extended too far into citizens' privacy. Thus, with the passage of BIPA and this decision, both legislative and judicial precedent now exist to protect our nation's people from the misuse of their data through intrusive facial recognition software. These legal provisions serve as an important step in mitigating future invasions of privacy in the private sector, functioning as useful tools to hold these entities accountable for their actions.

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[32] Patel v. Facebook Inc., 932 F.3d 1264 (9th Cir. 2019).
[33] *Id.* at 1275.
[34] *Id.*; *see* Biometrics Information Privacy Act, 740 III. Comp. Stat. 14/1 et seq. (2008).

IV. LEGISLATIVE ACTION TO MITIGATE HARMS

Regarding the public sector and, more specifically, government agencies, there has been some legislative pushback against facial recognition software's unrestrained expansion. The state of Washington has enacted a law mandating that state or local governments which intend to use facial recognition technology must file intent with a legislative authority.[35] Furthermore, the law requires that in investigations employing facial recognition technology, a warrant must be obtained first, and agencies within the state must report on their usage of the technology and ensure that the software is void of algorithmic bias prior to its implementation.[36] In spite of these added regulations, some individuals still objected to the implementation of this technology at all, citing concerns of accuracy, bias, and privacy implications.[37]

This Washington bill has the potential to strengthen protections in the realms of privacy and racial justice, with State Senator Joe Nguyen describing it as a "historic" development in this field.[38] Given these significant improvements on prior legislation, these measures should be considered on a national scale. First, there is now legislative precedent at the state level restricting the use of facial recognition software in law enforcement. This bill could serve as a model for other government entities, encouraging them to strengthen the privacy protections afforded to their citizens and adopt a firmer stance on technological regulation. Second, this law established a system of checks to guard against the hazardous usage of facial recognition

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[35] Wash. Rev. Stat § 6280 (2020).
[36] *Id.*
[37] Greenberg, *supra* note 6, at 8.
[38] Monica Nickelsburg, *Washington state passes landmark facial recognition bill, reining in government use of AI*, GEEKWIRE (Mar. 13, 2020), https://www.geekwire.com/2020/washington-state-passes-landmark-facial-recognition-bill-reining-government-use-ai/.

technology, particularly involving algorithmic biases. This provision sought to eliminate the racial discrimination perpetuated by this software, catching inaccuracies in its programming prior to implementation and thereby reducing the number of false positive identifications in the criminal justice system. Finally, it involves higher authorities within the state's legal system, facilitating greater levels of oversight and accountability in both the public and private sectors.

Though this bill presents a hopeful outlook for the future limitation and regulation of facial recognition technology at the state level, it still fails to resolve the issue on a national scale. While several states have followed Washington's example and passed laws against facial recognition,[39] no federal law exists to mitigate this technology's rapid expansion. This dangerously ambiguous definition of the proper uses of this technology leaves every citizen vulnerable to invasions of their privacy, and it leaves those in minority communities especially vulnerable to false identification in criminal investigations. Therefore, Washington's legislation should be extended to the national level to build upon the foundations established under BIPA.

Making this bill a federal law would help monitor and check the dangerous expansion of facial recognition software. This legislation would seek to hold state law enforcement agencies to a higher standard in the development and implementation of this technology, aiming to decrease the number of false positive identifications disproportionately impacting minority communities. While action at the state level is certainly useful, federal reforms are necessary to effectively mitigate these harms.

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[39] Natalie A. Prescott, *The Anatomy of Biometric Laws: What U.S. Companies Need to Know in 2020*, NAT'L L. REV. (Jan. 15, 2020), https://www.natlawreview.com/article/anatomy-biometric-laws-what-us-companies-need-to-know-2020.

CONCLUSION

The legislative and judicial actions taken by state governments thus far are insufficient in fully alleviating the violations of privacy and civil rights brought about by facial recognition technology. This software continues to have negative effects in both the public and private sectors, demonstrated by the large disparity between false positive identifications among minority and non-minority groups and widespread issues of privacy. Even though the courts have begun to address these harms in cases like *Patel v. Facebook*, this precedent is still not enough to effectively preserve our citizens' rights. Therefore, it is of the utmost importance that the federal government enacts further regulatory legislation, modeled after the bill passed in Washington, to protect not just minority communities, but the public at large.


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