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NOTE FROM THE PUBLISHER:

This edition has undergone reformatting and editing to adhere to the formatting guidelines of the newly reorganized Juris Mentem Law Review. Upon its initial release, this edition was not formatted for print; thus, non-content-based edits have been made to enhance readability. The unedited version can be accessed on our website.

This edition was written before our editorial review and development process was implemented. This edition should not be cited as independent research, and Juris Mentem does not endorse the factual accuracy of these articles.

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LETTER FROM THE EDITORS:

On behalf of the Editorial Board, we are proud to present the Fall 2022 edition of the Juris Mentem Law Review. We had the pleasure of working with an amazing team of editors and writers who continue to exemplify our mission of providing students with the opportunity to pursue legal scholarship through our publication. We would also like to thank everyone who has helped to expand the journal to what it is today. Creating and maintaining an undergraduate law journal just before the start of a global pandemic has been difficult, but the dedicated efforts of our writers and editorial staff has allowed us to grow as a publication.

A special thanks goes to AU staff and our Editorial Staff who have put countless amounts of time and effort into the publication. It's our pleasure to share with you a collection of reviewed articles that cover a wide range of legal issues and perspectives. Our writers have chosen to focus on not only the many of the large legal questions that will need to be addressed in the coming years but also on issues that are under discussed and garner little attention through traditional media. The diverse collection of pieces this publication presents provides an opportunity for readers to learn about issues in a legal realm they may not have explored before.

We at Juris Mentem hope to continue fostering critical thinking and legal scholarship through this publication and the ones to follow. We are proud to present a publication that not only showcases the legal excellence of our writers but also brings attention to a wide range of diverse legal issues.

Thank you,

Jack Baum & Jon DiPietro
Co-Editors-In-Chief

MASTHEAD:

JURIS MENTEM

Protecting Fashion Under The First

PAULA ARRAIZA
Staff Writer

PROTECTING FASHION UNDER THE FIRST

BY PAULA ARRAIZA

ABSTRACT

In early 2021, clothing and footwear company Vans sued a Brooklyn-based art collective, MSCHF, claiming that the art collective had infringed their trademark on their Old Skool shoe design. MSCHF claims they are allowed to use Vans' design as inspiration as they are offering a social commentary through their design. At the time of publication of this article, this case has yet to be decided, and there is no precedent established when it comes to trademark infringement on clothing articles in relation to the First Amendment. Past case law has discussed different tests and standards used to determine trademark infringement. Based on these past cases, the court should establish a new rule to be used when deciding trademark infringement on clothing articles, stating that they can be exempt from imitation sanctions when they are conveying a specific message, which is a social commentary, and is conveyed clearly. Using this test as well as past case law, there is a significant chance MSCHF has infringed Vans' trademark.

INTRODUCTION

In April of 2022, the clothing company Vans sued the Brooklyn-based conceptual art collective known as MSCHF. This lawsuit entailed the latter infringing on Vans' trademarked Old Skool shoe design. MSCHF has claimed that they are allowed to use the Old Skool design as inspiration as it is protected under the First Amendment. The nature of this case showcases a looming question within trademark law: Under what circumstances should trademark holders be unable to prevent imitation? The law, as will be explained below, makes it clear that trademark holders have the legal capacity to prevent imitation. However, there is a need to determine the circumstances under which trademark holders can prevent imitation, particularly when dealing with clothing and footwear. Based on precedent, in clothing specifically, trademark holders can prevent imitation under certain circumstances. However, imitation cannot be prevented when the product is protected by the First Amendment.

BACKGROUND

In this case, Vans is claiming that MSCHF has infringed their trademark by creating a shoe, in collaboration with the rapper Tyga, that closely resembles their "Old Skool" sneaker design. The company is claiming that the "Wavy Baby offerings purposefully imitate the famous and well-recognized Old Skool trade dress while also incorporating numerous other Vans trademarks and indicia of source."[1] In order to preserve their trademark, counsel for Vans filed a motion for a temporary restraining order and preliminary injunction. In their suit, Vans

[1] TFL, *Vans Is Suing MSCHF over Allegedly Infringing Wavy Baby Sneakers*, The Fashion Law (April 15 2022), https://www.thefashionlaw.com/vans-is-suing-mschf-over-allegedly-infringing-wavy-baby-sneakers/.

argues that the Wavy Baby sneakers are likely to cause confusion between the brands for consumers, which gives them grounds to file for trademark infringement. They also claim MSCHF cannot use a fair use or parody defense. The company stated that "parodic use or artistic alteration of a mark is 'sharply limited' in circumstances where, as here, 'an alleged parody of a competitor's mark [is used] to sell a competing product."[2] Essentially, Vans believes that MSCHF did not release the allegedly infringing shoe as an obvious commentary on Vans, the Old Skool shoe, or some other societal issue, as is typical in a parody case. Based on their statements, Vans believes they are allowed to sue MSCHF for trademark dilution and infringement.

On the other side of the argument, MSCHF is described as an "art collective in the business of critiquing consumer culture, and that given its 'penchant for critiquing consumer culture from within consumer culture,'"[3] they have the legal right to continue production on their Wavy Baby sneakers. The art collective is arguing that, through the Wavy Baby sneakers, they are creating a parody of "sneakerhead" culture and consumer culture in general. Therefore, MSCHF is arguing that the Wavy Baby sneaker is protected by the First Amendment. The collective stated that the "Wavy Baby sneaker is an artwork protected by the First Amendment and no reasonable consumer would be confused into thinking that Wavy Baby was produced or endorsed by Vans,"[4] thereby trying to strike down Vans' claims, lawsuit, and injunction. MSCHF is arguing that the Wavy Baby sneakers are "a warped rendition of Vans, rendering what could previously only be seen digitally into something physical, and critiquing consumer culture and Vans' outsized role in that culture."[5] The art collective states that it has been made clear in

[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*

both their advertising and packaging that Wavy Baby is not a collaboration with Vans and that the sneakers are not and cannot be a substitute for Old Skools. They stated that "courts regularly find no likelihood of confusion with parodic consumer goods, and the more outlandish a parody, the less likely consumers are to think the trademark owner sponsored."[6] The art collective also stated that Vans "will not suffer irreparable harm from the sale of MSCHF's limited-edition artworks,"[7] because the sneakers are too different to be confused with each other, and the product is protected by Free Speech and Fair Use/Parody defenses.

CASE LAW ANALYSIS

The First Amendment provides the right to speech, which has been extended to include the right to freedom of expression. This means that the government cannot prohibit anyone from expressing their opinions and thoughts. With that said, expression and speech are not limited to spoken or written words. Rather, expression can take many different forms, whether it be writing, drawing, painting, performances, movies, designs, etc. The First Amendment and the right to freedom of expression deal with the liberty to be able to criticize something or someone, particularly the government, without repercussions. Based on this, certain criticisms of social norms or ideas are granted protection under the First Amendment. This was the case in *Tinker v. Des Moines,* in which a group of students peacefully protested the Vietnam War by wearing armbands during the school day. In this case, the expression and speech enacted by the students were not explicitly spoken words or writing, but rather the arm band they were wearing in protest. The U.S. Supreme Court ruled that these arm bands were included under the free speech protections in the First Amendment, and therefore the students cannot be prohibited from wearing them. Similarly,

[6] *Id.*
[7] *Id.*

expressive conduct is protected by the First Amendment, allowing certain actions intended to make a statement to be legally permitted . This was the case in both *U.S. v. O'Brien* and *Texas v. Johnson*, in which the court allowed for expressive conduct to be protected. Expressive conduct refers to behavior that delivers a message.[8] In the cases previously mentioned, the behavior in question was burning draft cards and flag desecration, both of which were done as the means to deliver a specific message. Speech and expression have a higher chance of being protected by the First Amendment if the expression is criticizing or making some commentary about or against the government.

In *Rogers v. Grimaldi*, the pair Ginger Rogers and Fred Astaire sued Alberto Grimaldi, MGM/UA Entertainment Co., and PEA Produzioni Europee Associati, S.R.L, who produced and distributed a movie using their name. The court in *Rogers* talks about the Lanham Act, which "creates civil liability for any person who shall affix, apply, or annex, or use in connection with any goods or services . . . a false designation of origin, or any false description or representation . . . and shall cause such goods or services to enter into commerce."[9] Moreover, the Act, which is the primary federal trademark statute today, "prohibits, amongst other things, the use of marks that confuse as to the affiliation, connection, or association with the mark holder or as to the sponsorship or approval of goods or services."[10] Regarding this case, the court stated that "because of First Amendment concerns, the Lanham Act cannot apply to the title of a motion picture where the title is "within the realm of artistic expression,"

[8] Katrina Hotch, *Expressive Conduct*, The First Amendment Encyclopedia (2009), https://www.mtsu.edu/first-amendment/article/952/expressive-conduct.
[9] Rogers v. Grimaldi, 875 F.2d 994 (2d Cir. 1998)
[10] Ivan Blomqvist, *The Rogers Test: Free Speech v. Trademark Protection*, Moeller, https://moellerip.com/the-rogers-test-free-speech-v-trademark-protection/.

and is not "primarily intended to serve a commercial purpose"[11] Therefore, titles that are intended to be profitable in some capacity can be the basis for a trademark lawsuit. The court found that the title does not violate the Lanham Act, stating that works of artistic expression deserve protection and that since "they are also sold in the commercial marketplace like other more utilitarian products," they make "the danger of consumer deception a legitimate concern that warrants some government regulation."[12] However, the court recognized the right for authors to protect titles of their creative work against infringement, using the First Amendment as the basis for this conclusion. The court in *Rogers* created a test in order to determine if an artistic work is protected under Free Speech from the Lanham Act. This two-pronged test consists of determining the artistic relevance to the underlying work. It also determines if the title is explicitly misleading when related to the source of the work's content.[13] Not only has this test been used to determine whether titles are protected under the First Amendment, it has been extended to discussions surrounding artistic creation.

In *Harley-Davidson, Inc. v. Grottanelli*, Harley-Davidson sued Grottanelli, a different motorcycle company, for using the phrases "Bar and Shield' and "Hog."[14] The court found that Grottanelli had infringed Harley-Davidson's copyright when using their Bar and Shield trademarks, but not when using their Hog trademark. The court stated that "hog" is a generic term and that "even the presumption of validity arising from federal registration… cannot protect a mark that is shown on strong evidence to be generic as to the relevant category of products prior to the proprietor's trademark use and registration."[15] This means that even if a

[11] 875 F.2d 994
[12] *Id.*
[13] Blomqvist, *supra* note 9.
[14] Harley-Davidson, Inc. v. Grottanelli, 91 F. Supp. 2d 544 (W.D.N.Y. 2000).
[15] 91 F. Supp. 2d 544

trademark is registered, it won't be protected if it is considered to be commonly used when discussing the pertaining product category. Moreover, the court discussed the test for unfair competition under the Lanham Act. This test states that the plaintiff must show an association of origin by the consumer between both products or marks and a "likelihood of consumer confusion when the mark is applied to the defendant's goods."[16]

VIP Products LLC v. Jack Daniel's Properties, Inc also deals with trademark infringement. VIP Products was selling dog toys that resembled a bottle of Jack Daniel's Old No. 7 Black Label Tennessee Whiskey with dog-related alterations.[17] The court ruled that the Bad Spaniels dog toy was an expressive work and was therefore protected by the First Amendment. Their reasoning for this was that "VIP's purported goal in creating Silly Squeakers was to reflect on the humanization of the dog in our lives, and to comment on corporations that take themselves very seriously."[18] Since VIP Products was making some sort of social commentary, the court decided to allow them First Amendment protections. Moreover, when discussing trademark infringement specifically, the court found that the Jack Daniel's design was non-functional and distinctive, but that VIP's was not. For a product's trade dress or design to be awarded trademark protection, it needs to be both non-functional and distinctive. Although, for a claim to be considered infringement, it must pass the likelihood-of-confusion test. However, the court stated that this test "fails to account for the full weight of the public's interest in free expression"[19] and therefore decided to determine whether the work was expressive, which is done by determining "whether

[16] *Id.*
[17] VIP Products LLC v. Jack Daniel's Properties, Inc., 953 F. 3d 1170 (9th Cir. 2020).
[18] *Id.*
[19] *Id.*

the work is communicating ideas or expressing points of view."[20] In this case, the idea being communicated was that businesses don't always need to be taken seriously. Beyond that, the court stated that "although the Bad Spaniels toy resembles JDPI's trade dress and bottle design, there are significant differences between them, most notably the image of a spaniel and the phrases on the Bad Spaniels label."[21] As a result, VIP's dog toy was considered a fair use of Jack Daniel's trademark.

Lastly, in *Gordon v. Drape Creative, Inc.*, Christopher Gordon sued Drape Creative and Papyrus-Recycled Greetings for designing and producing greeting cards with variations of several phrases he had trademarked. According to the Lanham Act, a trademark owner can sue for trademark infringement or dilution against anyone who "uses in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive."[22] The court used the Rogers test to determine whether Drape Creative had infringed Gordon's trademarks, stating that the test "requires the defendant to make a threshold legal showing that its allegedly infringing use is part of an expressive work protected by the First Amendment." Although the Rogers test was originally used for a title, the court began applying it to a different type of trademark, thereby opening the door for future cases to do the same. They found that greeting cards demonstrate an intent to convey a particular message, which would be understood by those who viewed it. With that established, the court ruled that "a jury could determine that this

[20] *Id.*
[21] *Id.*
[22] Gordon v. Drape Creative, Inc., 909 F. 3d 257

use of Gordon's mark was explicitly misleading as to the source or content of the cards."[23]

CONCLUSION

Based on the above-explained court cases, it is clear that trademark holders have legal grounds to prevent imitation under certain circumstances. However, no trademark case of this sort has dealt with fashion or clothing articles, spotlighting a gap in the law when it comes to regulating imitations amongst these types of products. The decisions in the cases mentioned here demonstrate that trademark holders cannot prevent imitation when it is protected by the First Amendment. However, this does not mean that all clothing items will be protected by it, as illustrated in *Gordon.* The rule for clothing articles should be that they can be exempt from imitation sanctions when they are conveying a specific message, meaning that they are expressive. This message needs to be a social commentary, similar to *VIP Holdings*. This means that writing on a shirt, for example, would not necessarily be protected unless it offers some sort of commentary. It also needs to be easily understood by those who view it, meaning that the message conveyed needs to be clear.

The test could be as follows:

1. Is the purpose of the clothing article to convey a specific message?
2. Is the message conveying some social commentary?
3. Is the message clearly understood?

If all three prongs are satisfied, then the item would be protected as expressive speech under the First Amendment, and therefore not vulnerable to trademark litigation.

[23] *Id.*

Applying this approach to the case at hand, MSCHF's design satisfies some, but not all, of the prongs in the aforementioned test. According to what MSCHF has stated previously, their design's purpose is to convey a specific message, which is the critique of consumer culture and *Vans'* role in said culture. The message is supposed to convey some social commentary, as it is a criticism of consumer culture and those who partake in it. However, this message is likely not clearly understood by the general public. This means that MSCHF's design only satisfies two out of three prongs. Therefore, under this proposed method, the design is not expressive speech under the First Amendment, which means that MSCHF has violated Vans' trademark.

JURIS MENTEM

AB 3070: California's Attempt to Eliminate Discriminatory Peremptory Challenges

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AB 3070: CALIFORNIA'S ATTEMPT TO ELIMINATE DISCRIMINATORY PEREMPTORY CHALLENGES

BY ROBERT CADENASSO

INTRODUCTION

The jury trial is a sacred right - held long before the creation of the United States - and one that may very well outlive it. It is the sacred belief that one deserves to be judged by a collective group, their fate not resting in the hands of a single individual. There is a beauty to a system that vests within each citizen the sacred obligation to deliberate as to the guilt of their peers. Strangers come together in a sometimes intense discussion and seek to render a fair and impartial verdict. Those strangers are entrusted with accurately and fairly analyzing all the evidence presented to them and deciding, beyond a reasonable doubt, whether that evidence indicates the guilt of their peers.

Part of the beauty of the jury is its reliance on such strangers. It is regular citizens, not a governing body, that decide the verdict. The government must prove to the citizens that their peer is guilty and therefore must be removed from the greater community. The government may not remove a person from society before first going before this panel that is to be

representative of the community. The jury is a line of defense against government corruption and injustice.

Though the jury system has evolved and changed over time, its core principles of it remain steadfast: citizenship, democracy, and justice. The jury has always been chiefly composed of citizens, or in a broader sense, members of the society within which the judgment occurs. The practice of sitting on a jury, hearing the evidence, and then weighing it on the scales of justice is one of the most important duties any citizen can perform. It is an experience that provides each citizen the opportunity to participate in the maintenance and continuation of justice.

The jury is also a microcosm of democracy: each juror has a vote on whether to be guilty or not guilty. Each juror, with their voice, understanding of the evidence, and perspective, collectively deliberates, discusses, and finally decides on the verdict. It is this democratic process that leads to the jury being one of the most effective means of achieving justice, in whatever form it manifests itself in. Past these ideals, however, is the realities of the system. The truth is that in pursuit of justice, access to the jury box has always been the greatest obstacle to realizing that ideal. In the US, individual states have passed legislation seeking to remedy such issues, specifically passing laws eliminating jury discrimination.

California passed one of its own, Assembly Bill 3070, which focuses on the role of peremptory challenges in jury discrimination. AB 3070's goal is to root out bias that may predispose the juror to one side's favor before hearing any of the facts of the case. Prospective jurors may be struck through two methods: challenges for cause and peremptory challenges. A challenge for cause is "a request to disqualify a potential juror for specific reasons. Typical reasons include an acquaintanceship with either of the parties, prior knowledge that would prevent

impartial evaluation of the evidence presented in court, bias, obvious prejudice, or an inability to serve (such as being seriously mentally ill). The judge determines whether the person shall be dismissed."[24] First, the judge will ask questions like if the prospective juror knows anyone involved in the case – accused, either attorney, the judge, a witness, etc.– and will dismiss prospective jurors whose answers would inhibit their ability to be impartial in the case. After the judge's questioning, both parties may ask the prospective jurors questions and move to strike for cause, subject to the judge's approval. The second method, which occurs after prospective jurors have survived strikes for cause, and the method which is the subject of AB 3070, is the exercise of a peremptory challenge. The importance of the peremptory challenge is that it is "one exercised without a reason stated, without inquiry, and without being subject to the court's control."[25] The attorney exercising this does not need to give a reason, save for a *Baton-Wheeler* challenge. AB 3070 changes the process by which an attorney raises a *Batson-Wheeler* claim against the use of a peremptory challenge. Under the law, parties can object to the use of the peremptory challenge, forcing the challenging attorney to give a neutral and impartial reason for exercising the peremptory challenge, which is the same procedure as a *Batson-Wheeler* challenge. However, the law details multiple reasons that the Court must consider presumptively invalid due to the reasons being historically disproportionately used against people of color to keep them out of the jury box. This is the first difference between this law and the *Batson-Wheeler* procedure, which allowed for any race-neutral reason. Finally, the law provides remedies and rights if the objection is sustained. First, it gives the accused the right to request a mistrial or for jury selection to start completely over again. In both of these, the judge must comply with these

[24] Challenge for Cause, Legal Learning Institute, https://www.law.cornell.edu/wex/challenge_for_cause.
[25] *Swain v. Alabama* 380 US 202 (1965)

requests. It also provides the judge with limited discretionary power, like being able to seat the juror or give the objecting attorney additional peremptory challenges. This law aims to eliminate discrimination within the jury selection process, looking to finally eliminate a grave injustice that has consistently occurred since the very inception of the US. However, before truly understanding the implications of such a bill, it is important to contextualize it within the history of the jury system, which is just as much the history of exclusion as it is one of justice.

HISTORY OF THE JURY

In the 4th Century, Athens had a robust legal system, complete with judges and courts known as the dicastery.[26] The dikasts sat in judgment and the requirements for service were exceptionally similar to that of US jurors. Dikasts had to be citizens of Athens and at least thirty years old.[27] This is very similar to the US, where a juror must be a citizen and at least eighteen years old. In civil cases, the dicastery would be composed of 201 men, with that odd number being in case of a tie. In criminal cases, the dicastery could be any of 501, 1,001, and 1,501 and when the trial was of exceptional importance, the dicastery would be 6,001, the entire jury pool.[28] To render a guilty verdict required a majority. Verdicts were final; there was no appeal process. The accused would usually speak for themselves, however, they did have the right to an advocate if they so wished. In this system, the dicastery decided both matters of law and fact. In the US today, the jury only decides facts as presented to them. This is one of the earliest justice systems that gave power directly to the people to sit in judgment of their peers and would go on to influence many justice systems including that of the US justice system.

[26] Encyclopedia Britannica, *Dicastery*, https://www.britannica.com/topic/dicastery.
[27] *Id.*
[28] *Id.*

Similar to the dicastery, Germanic tribes, though with kings and their councils, had what was deemed an assembly. Where the Athenians had citizenship and age requirements, the assembly was composed of all free men of the tribe, then subsequently separated into different clans.[29] The assembly had the power to declare war, choose kings, and decide if a person could be allowed into the tribe.[30] Most importantly, it sat in judgment of those who committed crimes against the tribe.[31] The assembly had the power vested in them to decide if a person should be outlawed due to the crime they committed. They decided on punishment, just like how US juries sometimes provide sentencing recommendations along with their guilty verdicts. Notably, the assembly only convened on crimes against the entire tribe, like treason. Once sentenced, anyone could kill the person convicted.[32] Whereas the Athenian court heard cases regarding all crimes, the assembly did not hear crimes against individuals, viewing it as a matter that was the business of the victim or their family.

Around this time, the Franks developed the fehmic court system where judges, called the Freischafen, served in a juror-like manner.[33] The fehmic system's goal was to encourage the strength of the institution by giving it traditions, from those traditions the court gained power and legitimacy within the community. The entire proceedings were secret and the jury

[29] Encyclopedia Britannica, *Germanic Law*, https://www.britannica.com/topic/Germanic-law/Tribal-Germanic-institutions.

[30] *Id.*

[31] *Id.*

[32] Encyclopedia Britannica, *Germanic Law*, https://www.britannica.com/topic/Germanic-law/Tribal-Germanic-institutions.

[33] Encyclopedia Britannica, *Fehmic Court*, https://www.britannica.com/topic/fehmic-court.

under this system was responsible not only for sitting in judgment but also acting as the prosecution.[34] There was no separation of the positions, leading it to be a very inquisitorial system. Additionally, the accused received no representation. The Freischafen had a president called the Freigrafe, which is similar to the US's jury foreperson.[35] The court would meet in a local, centralized area near where the crime occurred. This is similar to how US citizens are called for jury duty within the jurisdiction they live in and people accused of crimes stand trial in the jurisdiction under which the alleged crime occurred. The traditions and proceedings of the fehmic system further developed the jury into a more uniform system, the secret nature of which is reflected in jury deliberations in US trials.

As the jury developed across Eastern Europe, William the Conqueror brought the system to England in 1066 during what is known as the Normandy Conquest.[36] Under his rule, the English judicial system underwent important and substantive changes. First, he separated religion from the court, making them secular and also spurning the creation of canonical law.[37] The jury also experienced a change under his rule. Not only did the jury become more common, but also juries now delivered verdicts under oath.[38] It would not be until the reign of Henry II, over a hundred years later, that the jury started to develop as a right in certain cases. King Henry II brought greater uniformity to England's judicial system, allowing for the accused to request a jury trial. Before this, there were courts of equity, which sought

[34] *Id.*
[35] *Id.*
[36] Encyclopedia Britannica, *The Normans (1066-1154)*, https://www.britannica.com/place/United-Kingdom/The-Normans-1066-1154.
[37] *Id.*
[38] *Id.*

nonlegal remedies for crimes.[39] Henry II replaced these courts with courts of petty assize, where bench and jury trials were common and which heard cases on behalf of the king.[40] Though King Henry mostly introduced this system to erode the power of the local aristocracy by depriving them of judicial power, its impact led to the formulation of the jury system.

In 1199, King John became King of England, including large swaths of western France and Normandy. A few short years later in 1204, the King of France not only invaded and captured Normandy, but also the part of France King John ruled.[41] Seeking to recapture that land, King John raised taxes to acquire an army. This massive increase in taxes angered the barons, who rebelled. This civil war ended in 1215 with the signing of the Magna Carta.[42] Though only briefly applicable (Pope Innocent III would nullify it just three months later), its impact would greatly influence future documents, and how people view the role of governance and the rights of the people. One of those rights included one of the earliest frameworks for the jury trial. The Magna Carta states that "No free man shall be seized, imprisoned, dispossessed, outlawed, exiled or ruined in any way, nor in any way proceeded against, except by the lawful judgment of his peers and the law of the land."[43] This simple clause would provide the framework for how future leaders, both in England and America, understand the role of the government and the people within the jury system. This clause not only puts a check on the king's power, vesting the power of judgment not in the hands of the king, but rather in the hands of the accused's peers.

[39] Encyclopedia Britannica, *Equity Summary*, https://www.britannica.com/summary/equity#:~:text=Courts%20of%20equity%20.

[40] Encyclopedia Britannica, *Assize*, https://www.britannica.com/topic/assize.

[41] Encyclopedia Britannica, *Magna Carta*, https://www.britannica.com/topic/Magna-Carta.

[42] Id.

[43] Magna Carta, §39 (1215)

This right would not only be expanded over time but would also influence the US Constitution and the greater American jury system that has survived to today.

While these institutions, with varying degrees of formality, formulated the basis for the actual jury system, one of the greatest influences upon the structure of the US government and Constitution comes from Enlightenment philosophers like John Locke, Jean-Jacques Rousseau, and Montesquieu. In 1689, John Locke published his *Two Treatises of Government*, where he outlined the role of government, the social contract, and the rule of law. Locke claimed that governments derive their legitimacy from the consent of the governed and that they are formed by people of shared values coming together to create a governing body that will make decisions based on their behalf and is trusted with protecting the people's rights and property.[44] He also details how laws must be applied equally to all people and that the will of the majority is only inhibited by natural law.[45] These ideas would greatly influence the abstract ideas of the jury system, though not necessarily the procedural aspect, like the idea that laws must be applied equally and fairly. Additionally, his emphasis on individual rights, famously life, liberty, and property, serve as one of the first examples of inalienable natural rights, which would go on to influence the Bill of Rights in the US Constitution and the very amendments that grant the right to a fair jury trial.

Along similar lines, Jean-Jacques Rousseau wrote extensively about governments, specifically how people must give up a piece of their individualism in exchange for joining societies and governments. However, he states that by joining, people gain

[44] Encyclopedia Britannica, *John Locke*, https://www.britannica.com/biography/John-Locke.
[45] *Id.*

rights.[46] This notion is very present in the US as the right to a trial, the right for it to be public, the right to an advocate at the trial, and having the right to be judged by one's peers all represent forms of rights people gain through the government. Furthermore, when one joins a society, some of their freedom is deprived by laws. They may not murder or steal; however, in return, they are granted rights if they are accused of breaking such laws. They give up certain freedoms, but in return, they are granted rights like the right to a fair jury trial if accused of a crime. The works of Locke and Rousseau and their commentary on the rights of people led to this emphasis in the US on individual rights and liberties, including both the right to a fair jury trial and also the right to civic participation and jury service.

Lastly, Montesquieu, a French philosopher, introduced the idea of separation of power, arguing in favor of dividing government into three branches - the executive, legislative, and judicial.[47] In his 1748 work, *Spirit of Laws*, Montesquieu states that "...there is no liberty if the judiciary power is not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression."[48] This separation of powers inherently acts as a check on governmental power and control. The US's independent judiciary includes judges who are not legislators or oppressors. They are judges of the law and the law alone. By restricting the powers of the government through the different branches, the rights of the people are protected against the tyranny of complete and absolute power. Achieving a truly

[46] Encyclopedia Britannica, *Jean-Jacques Rousseau*, https://www.britannica.com/biography/Jean-Jacques-Rousseau.
[47] Encyclopedia Britannica, *Montesquieu*, https://www.britannica.com/biography/Montesquieu.
[48] Montesquieu, *Spirit of Laws*, (1748).

independent judiciary where the government does not have unilateral power allows for greater power and protections for those accused of a crime, like the protection of a jury trial. Altogether, Locke, Rousseau, and Montesquieu's works culminate in a foundation of ideals, from which not only derives the Bill of Rights.

DEVELOPMENT OF THE US JURY SYSTEM

In 1777, the US adopted the Articles of Confederation as their governing charter which consisted of a unicameral legislature, no executive or judicial branches, and granted states wide discretionary powers over the economy, courts, and militias.[49] Judicial administration was left up to individual states as there was no greater uniform judicial body. This, along with other issues, led to the Founding Fathers coming together for the Constitutional Convention in 1787. This meeting birthed a document now deemed the "Supreme Law of the Land": The US Constitution, with three branches of government - the executive, legislature, and judicial.[50] Alexander Hamilton, in supporting the ratification of the Constitution, wrote in Federalist 78 that "the complete independence of the courts of justice is particularly essential in a limited constitution."[51] After ratification, amendments were added, with the first ten being called the Bill of Rights. The 6th Amendment, ratified in 1791, states that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."[52] This amendment enshrined the right to a trial by jury to all Americans

[49] Encyclopedia Britannica, *Articles of Confederation* https://www.britannica.com/topic/Articles-of-Confederation.
[50] Encyclopedia Britannica, *Constitutional Convention*, https://www.britannica.com/event/Constitutional-Convention.
[51] The Federalist No. 78, (Alexander Hamilton)
[52] US Const. Amend. VI

under federal prosecution. In addition, the seventh Amendment enshrines the right to a trial by jury for civil trials too, stating that "in Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, then according to the rules of the common law."[53] Though only applicable at the federal level at this time, these amendments broadly outlined the rights of the accused, along with the fourth and fifth amendments, and brought much-needed uniformity to the legal process, specifically enshrining the right to a fair jury trial into the Constitution. The right to a jury is the cornerstone of a fair trial.

When the accused's liberty is at stake, the Constitution ultimately vests the power within the people to condemn, not a police officer, a prosecutor, or even a judge (unless the accused decides to have a bench trial, but the right to choose a bench or jury trial lies in the hands of the accused). Thomas Jefferson understood the importance of the jury trial, writing that "the trial by jury…I consider that as the only anchor, ever yet imagined by man, by which a government can be held to the principles of its constitution."[54] Even when it is a civil trial, there is a belief that those who sit in final judgment should be one's peers. A jury is twelve regular people, with regular jobs, regular problems, and a certain commonality. It is not twelve people specially selected who simply do this as a full-time job. This is not to say that a jury is a monolithic group, it certainly is not. The accused do not simply have the right to a trial by jury, but a jury of their peers. This serves as a safeguard against the government. It is citizens, not government officials or a government body, that ultimately

[53] US Const. Amend. VII

[54] A letter from Thomas Jefferson to Thomas Paine, (July 11, 1789) (on file with National Archives), https://founders.archives.gov/documents/Jefferson/01-15-02-0259.

render a verdict. It protects people from government corruption because it is regular people who have the power to deliver a verdict. It is a jury of peers and that, to a measured degree, must mean people that share some qualities or characteristics, no matter how basic or seemingly innocuous those qualities are. Within the greater context of history and culture, those qualities are not innocuous. The accused's peer requires a measure of understanding. For example, race, though objectively an innocuous identifier, has a drastic impact on a prospective juror's culture and identity. It is the accused right to have that reflected within a jury that must sit in judgment of them. The jury system does not simply safeguard against government corruption, but also provides an opportunity for regular citizens to participate in the governance of justice.

At this time the only people sitting on juries were white men, with women, enslaved people, and free Black people being excluded. However, the jury became more inclusive after the Civil War. In the aftermath of the Civil War, the US was fractured, with the wounds of the war still painfully fresh. The most significant impact of the Civil War was the end of slavery when the US ratified the thirteenth Amendment, which outlawed slavery and involuntary servitude, except as a punishment for a crime.[55] This action led to a dialogue about the rights and citizenship status of the newly freed people. In response to not only the thirteenth Amendment but also the environment the amendment spurned, many southern states, formerly Confederate ones, introduced restrictive laws known as 'Black Codes' that discriminated against newly freed Black people. Texas passed such codes in 1866, in which everyone, save for white men, was barred from jury duty. The code read "that nothing herein shall be so construed as to…permit any other than white men to serve on juries, hold office, vote at any election,

[55] US Const. Amend. XIII

State, county, or municipal."[56] Only allowing one group to serve on juries represents the restrictions and some of the most blatant forms of discrimination within the *voir dire* process. Even though Black people were freed, they did not have equal opportunities within the jury system. In the eyes of the law, they did not have access to the full rights and privileges of citizenship; they were simply free from bondage. This is not even to mention how this law also discriminated against women and other people of color. This perpetuated racial and gender discrimination within the criminal justice system for decades, specifically within the jury selection process. Where the thirteenth Amendment granted freedom, these codes restricted them. These codes relegated everyone, save for white men, to a status of second-class citizenship and deprived them of participation within the judicial system. People were free, but not equal.

To partially remedy this situation, the US ratified the Fourteenth Amendment in 1868, which has become one of the most important amendments in US legal history and has been relied upon in many landmark Supreme Court decisions. The fourteenth Amendment states that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside; no State shall make or enforce any law which shall abridge the Privileges and Immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[57] The citizenship clause, at least on paper, provides citizenship to all freed slaves. This was an important and necessary step in providing equal citizenship and protection. However, the subsequent clauses would prove to be far more beneficial in terms of expanding rights. The Privileges and Immunities clause

[56] TX Civ Proc. CXXVIII §2 (1866)(Repealed 1868)
[57] US Const. Amend XIV §1

outlined two major developments. First, it applied to the states as well as the federal government. Second, it stated that not only are Black people citizens, but they are to be equal citizens. This clause did not stop Black Codes or Jim Crow laws, but it laid the legal foundation for challenges against discriminatory laws that infringed on their rights as citizens. Furthermore, the Due Process clause applied the Bill of Rights, and due process, to the states, expanding the right to a trial by jury. Though virtually all states had that right in some form, the application provided much-needed protection against laws that may attempt to restrict that right based on race. Ever since the Supreme Court adopted the legal doctrine of selective incorporation. That practice is where the Court applies certain clauses of certain amendments to the States.[58] In doing so, not every amendment within the Bill of Rights is incorporated into the States; some are partially incorporated, and others are fully incorporated. Even with this incomplete incorporation, the Due Process clause has expanded jury service and the rights of the accused in general. Finally, the Equal Protections clause, which was relied on heavily in deciding *Batson v. Kentucky*, states that people could not be legally discriminated against based on their race.[59] The legal protections and rights found within the fifth and sixth Amendments could not be restricted based on race. Furthermore, the fourteenth Amendment states that "the Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."[60] Even with such a powerful clause granting Congress broad powers to enforce equality, discrimination persisted at the federal, state, and local levels. Even in the face of such persistence, the fourteenth Amendment laid the legal foundation for future legislation that worked to eliminate discriminatory legislatures and policies.

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[58] Legal Information Institute, *Selective Incorporation*, https://www.law.cornell.edu/wex/incorporation_doctrine.

[59] *Batson v. Kentucky* 476 U.S. 79 (1986)

[60] US Const. Amend. XIV §5

The last of the Reconstruction Amendments, the fifteenth Amendment, was ratified in 1869. It stated 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."[61] This amendment, coupled with the thirteenth and fourteenth, brought equal citizenship rights to Black men, at least in an abstract sense. These three Amendments represent the foundation for equal rights and protections in the US, including due process and voting. However, the manner in which the courts interpreted these amendments in the short term gutted their power, restricting Congress' ability to enact necessary legislation and allowing discriminatory practices like Black Codes to persist that kept Black people outside the jury box.

The most important, and consequential of the Court restricting these amendments was *Slaughterhouse v. Louisiana*.[62] Though the case centered around a Louisiana law that gave a single company the exclusive rights to operate a slaughterhouse in New Orleans, the impact of the Supreme Court decision had massive ramifications for protections against discrimination. In the case, the law in question detailed that Crescent City Live-stock Landing and Slaughter-House Company would be allowed to run a slaughterhouse in New Orleans and that all other slaughterhouses must close. A group of local butchers sued, arguing that the law violated the fourteenth amendment Privileges and Immunities, Equal Protection, and Due Process Clauses.[63] In the 5-4 decision by Justice Samuel Miller, the Supreme Court rejected the butchers' argument, stating that the fourteenth amendment solely works towards full equality for formerly enslaved people.[64] In addition, Justice Miller, relying on

[61] US Const. Amend. XV
[62] *Slaughterhouse v. Louisiana* 83 U.S. 36 (1873)
[63] *Id.*
[64] *Id.*

historical precedent from Great Britain's Parliament, wrote that the Privileges and Immunities clause only applied to the federal government and not the states. He reasoned that the fourteenth Amendment dealt with US citizens, not citizens of individual states.[65] This narrow reading would have broad implications for protections against jury discrimination. With this decision, Justice Miller completely dismantled any legal recourse based upon the fourteenth amendment against state discrimination. This decision loosened the oversight powers of the federal government on state actions. Those seeking equal access to the jury at the state level, and accused people seeking fair juries, would not be able to rely upon the true power of the fourteenth amendment until decades later. By then, countless people were convicted by juries selected in a discriminatory manner.

In 1870, Charles Sumner (R-MA) introduced the Civil Rights Act, which broadly outlawed jury discrimination. Though introduced in 1870, it was not passed until 1875 after Sumner's death. The act states that " no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as a grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars."[66] This Act criminalized jury discrimination, the first instance of such on the federal level. This act provides the legal recourse against states that *Slaughterhouse* deprived them of.[67] This was a landmark piece of legislation in working to eliminate racial discrimination within the criminal justice system.

[65] *Id.*
[66] Civil Rights Act §4 (1875)
[67] *Slaughterhouse v. Louisiana*, 83 U.S. 36 (1873)

Despite the Civil Rights Act, states still found other methods of discrimination to deprive Black people of equality under the law. For example, in 1874, Taylor Strauder, a Black man, stood trial for murder in Ohio County, West Virginia. Before the trial, Strauder filed a petition asking for his trial to be moved to federal court due to a West Virginia law that only allowed white people to serve on juries. He argued that this distinction did not provide him equal protection of the law. The court denied his petition and he was convicted by an all-white jury. Before the Supreme Court, this case was coupled with two companion cases: *Virginia v. Rives* and *Ex Parte Virginia*.[68] [69] Decided in 1880, Justice William Strong, writing for the majority, stated that "[w]hat is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States."[70] Justice Strong clearly acknowledges the importance and power of the fourteenth amendment. This decision enshrines into common law the unequivocal idea that Black people must enjoy the same standard under State laws as white people. Justice Strong continues by stating that "the words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to [Black people],—the right to exemption from unfriendly legislation against them distinctly as [Black people],—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race."[71] This decision in striking down the law opens the door for increased civic engagement amongst Black men who were previously barred from serving on juries. The laws surrounding jury service must be equal, which was a

[68] *Virginia v. Rives*, 100 U.S. 313 (1880)
[69] *Ex parte Virginia*, 100 U.S. 339 (1880)
[70] *Strauder v. West Virginia*, 100 US 303 (1880)
[71] *Id.*

substantive judicial decision that expanded access to the jury box and affirmed the recently passed Civil Rights Act of 1875. Justice Strong acknowledged that denying a prospective juror the right to civic engagement, and by extension, the right to serve on juries, creates a classification under that of a full citizen - it would make Black people second-class citizens. Furthermore, Justice Strong's decision extends legal protections not simply over the actions of the legislature, but also extends protections against discrimination within the judicial process, barring total exclusion from it. Between the Civil Rights Act of 1875 and *Strauder v. West Virginia*, in a few short years, both Congress and the Supreme Court had affirmed protections against jury discrimination.[72] Unfortunately, jury discrimination would outlive the Civil Rights Act of 1875 Act as the Supreme Court ruled it was unconstitutional in a group of cases collectively known as the *Civil Rights Cases* in 1883.[73]

As quickly as the Supreme Court struck down one prejudiced law, another form of discrimination would surface, maintaining discrimination within the jury box. Though it could not totally bar the participation of Black men in juries, Louisiana drafted and finalized a new constitution in 1898 with provisions allowing for non-unanimous jury verdicts. The constitution stated that "cases in which the punishment is necessarily at hard labor, by a jury; of twelve, nine of whom concurring may render a verdict."[74] Louisiana's allowance of non-unanimous convictions served to dilute the voices of Black people serving on juries. The practice essentially allowed Louisiana to place Black people on the jury to provide the facade of equality, but in actuality rely on 9 white jurors to vote to convict. The voices and opinions of the Black jurors were completely drowned out. Countless people were

[72] *Strauder v. West Virginia* 100 US 303 (1880)
[73] *The Civil Rights Cases* 109 US 3 (1883)
[74] LA Const. §116 (1898) (Repealed by Constitutional Amendment Act No. 722, 2018)

convicted under this method, with it predominantly affecting Black defendants. This limited participation was clear and solely performative. The article's purpose was to explicitly uphold white supremacy in a legally justifiable manner, according to Thomas Semmes, the constitutional convention's judiciary committee. Semmes stated that the purpose of the article was "to establish the supremacy of the white race in this State to the extent to which it could be legally and constitutionally done."[75] Even with that blatantly racist intent, Louisiana did not ban non-unanimous jury verdicts until the passage of an amendment in 2018.[76] Up until that point, every constitution Louisiana adopted had that provision, which meant that the dilution of Black jurors was omnipresent in their judicial process.

JURY EXCLUSION AND EXPANSION IN THE 20TH AND 21ST CENTURIES

The history of jury exclusion is incomplete without addressing the exclusion of prospective jurors based on their gender, an issue that AB 3070 also works to eliminate. Gender discrimination, like racial discrimination, has been addressed by Congress with varying degrees of success. Congress passed the Civil Rights Act of 1957, which allowed women to serve on juries in federal court, even in states that still banned women from serving on juries in state courts.[77] The Act reads, "Qualifications of Federal jurors 'Any citizen of the United States who has attained the age of twenty-one years and who has resided for a period of one year within the judicial district, is competent to serve as a grand or

[75] Thomas Semmes, Found in *Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana* (pg. 375), https://books.google.com/books?id=2u8aAAAAYAAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false.

[76] LA Act No. 755 (2018)

[77] Civil Rights Act, (1957)

petit juror."[78] Symbolically, this act gave universal access to the jury box at the federal level for the first time, as it states that any citizen, as long as they satisfy the age and residency requirements, may be eligible to serve on juries regardless of gender. Women now had access to the jury pool within the federal court. This landmark legislation was a great step towards introducing women into the jury pool; however, it has been a continuing fight to truly eliminate gender discrimination within the actual jury selection process. This act did not impact state courts, where many maintained gender-discriminatory practices and continued to bar women from serving on juries on the basis of their gender for years after this act was passed. The continued discrimination on the grounds of both race and gender would continue, even as legislation sought to catch up.

In one of the most influential cases regarding discrimination in jury selection, Robert Swain was convicted of rape and sentenced to death in Alabama in 1964. In his trial, the prosecutor exercised their peremptory challenges on six Black jurors. Swain motioned to dismiss the trial based on the dismissal of those jurors, yet the motion was denied. In an attempt to prove discrimination, Swain introduced statistics regarding the racial demographics of Talladega County, Alabama. According to the data, 26% of people eligible for jury service were Black, yet jury panels have only been composed of about 10% to 15% on average.[79] In addition, a Black person had not served on a petit jury within the county since around 1950.[80] This data was introduced in an unsuccessful effort to prove discrimination. In a 6-3 decision, Justice Byron White wrote that "…a defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him, nor on the venire

[78] Civil Rights Act of 1957 V.152
[79] *Swain v. Alabama* 380 US 202 (1965)
[80] *Id.*

or jury roll from which petit jurors are drawn."[81] Justice White's decision nuances the idea of what exactly constitutes jury discrimination and the definition of peers. A peer does not necessarily mean that the jury shares the exact same identifiers as the accused. Justice White continues by stating that "We cannot say that purposeful discrimination based on race alone is satisfactorily proved by showing that an identifiable group in a community is underrepresented by as much as 10%."[82] This standard represents a legal barrier to showing systematic exclusion as Justice White does not account for whether the jury pool was drawn in a manner that would systematically produce mostly white juries. To address this point, Justice White only states that "…an imperfect system is not equivalent to purposeful discrimination based on race."[83] The method for picking a jury pool should be reflective of the community, if not precisely, then as precisely as possible. That is not to say the jurors who show up will be representative, but the selection method should be equal and free of discrimination.

For as critical as Justice White is about the accused not having the right to a directly proportional jury, he does address the exclusion of Black people from jury selection, stating that "...when the prosecutor in a county…is responsible for the removal of [Black people] who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no [Black person] ever serve on petit juries, the Fourteenth Amendment claim takes on added significance."[84] He does address that ultimately the fourteenth amendment provides some basic protections against the total exclusion of Black people on petit juries since 1950; however, he does not go so far as to state that the fourteenth

[81] *Id.*
[82] *Id.*
[83] *Swain v. Alabama* 380 US 202 (1965)
[84] *Id.*

amendment specifically protects against that practice. In fact, Justice White writes that "to subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge."[85] Essentially finding that even though the fourteenth amendment holds increased significance, a singular case where peremptory challenges were exercised does not rise to a violation of the Equal Protection Clause. The impact of this decision is the adoption of the intentional discrimination standard.[86] Such a standard required that evidence of discrimination be more widespread than within a single case. With the bar virtually impossible to meet, no litigant won a *Swain* claim for twenty years.[87] Though the standard did not dissuade discrimination within jury selection, its significance lies within the Supreme Court's finding that the power of the peremptory challenge is limited to some degree.

As the Supreme Court curtailed protections against discrimination within jury selection, congressional action expanded them. The Civil Rights Act of 1957 may have allowed women to serve on juries, but it was the Jury Selection and Service Act of 1968 that made discrimination based on gender and other cognizant groups illegal. Passed towards the end of the Civil Rights Movement, the act stated that "[n]o citizen shall be excluded from service as a grand or petit juror in the district courts of the United States on account of race, color, religion, sex, national origin, or economic status."[88] This act created a substantive legal remedy that people could rely on within the

[85] *Id.*
[86] *Id.*
[87] Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy* (August 2010), https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf.
[88] Jury Selection and Service Act §101.1862 (1968)

legal system. Finally, protections against discrimination were codified into federal law, not simply for race or gender, but for many other classifications under which people may face discrimination. However, this act still only applied to federal courts, leaving states free to their own regulation or lack thereof. In addition to simply outlawing jury discrimination, it also provided a very basic foundation for how a jury pool must be drawn from a fair cross-section of the community. Though very simplistic, this act codified a uniform standard by which jury pools are to be selected, allowing for more diversity and greater representation within the jury pool.[89] Without this substantive criterion that courts must follow, the antidiscrimination clause would be powerless and, frankly, meaningless. It would simply be words on a paper, but including a foundation for how a jury pool must be called, albeit a basic one, marked a sign of progress. This act provided a baseline that future legislation, both by Congress and local state legislatures, could expand on. California's AB 3070 could be considered a beneficiary of this foundation. The importance of this act lies less within its immediate tangible effect and more from how it's a significant step towards ending discrimination. It also represents, quite similarly to AB 3070, a time when the legislature dictated a previous judicial matter. In the face of rampant and incessant injustice like discrimination, the legislature, with respect to the necessity of an independent judiciary, is able to pass a remedy in a more effective and timely manner. Judicial remedies arise after multiple cases and derive from multiple common law rulings, which sometimes occur years or decades apart.

Even with the combination of the Civil Rights Act of 1957 and the Jury Selection and Service Act of 1968, discrimination in jury selection persisted, specifically at the state level. One such example of this continuation occurred in Louisiana, where a man

[89] Jury Selection and Service Act §101.1864 (1968)

named Billy Taylor faced trial for kidnapping. Before his trial started, he motioned the court for a new *voir dire* on the grounds that the Louisiana constitution systematically excluded women from the jury pool. The Court denied his motion and he was convicted. The Louisiana Supreme Court affirmed the decision. The US Supreme Court granted the writ and heard the case. The section in question read that "The Legislature shall provide for the election and of competent and intelligent jurors for the trial of civil criminal cases; provided, however, that no woman shall be for jury service unless she shall have previously filed with the clerk of the District Court a written declaration of her desire to be subject to such service."[90] In Louisiana, women did not have equal access to the jury box. Where men simply were automatically selected once they satisfied the age requirement, women had to actively engage with the government to be in the pool. This extra barrier to civic engagement essentially worked to keep juries all male, a status Taylor alleged violated his sixth amendment rights and his right to a jury of a fair cross-section of the community as outlined by the Jury Selection and Service Act of 1968. In a 7-2 decision, Justice Byron White stated that "...the selection of a petit jury from a representative cross-section of the community is an essential component of the Sixth Amendment right to a jury trial."[91] In affirming the language of the Jury Selection and Service Act, Justice White established that the systematic exclusion of jurors based on gender is an equally unconstitutional act as the exclusion of jurors based on race. This decision makes the denial of women participating in the jury selection process a violation of the sixth amendment, which expands access to the jury box to women regardless of their state laws. Justice White continues by stating that "[i]f the fair cross-section rule is to govern the selection of juries, as we have concluded it must, women cannot be systematically excluded

[90] LA Const. Art. VII, §41 (1921)
[91] *Taylor v. Louisiana* 419 US 522 (1975)

from jury panels from which petit juries are drawn."[92] This decision also serves to help establish that the process by which a fair cross-section of the community is found must be fair. The process cannot exclude women or force them to perform additional services to become eligible. This decision is also important because the Court sided with a man who argued that his rights were infringed due to discrimination against women. The accused does not need to be a member of the same cognizant group for discrimination to violate their rights. The accused, regardless of their gender, is entitled to a fair cross-section of the community, and to discriminate against women would deprive him of that fair cross-section, even if he is not a member of the specific cognizant group being discriminated against. This reasoning can very easily be applied to race as well. This decision represents a wider view of jury discrimination, affirming that not only is racial discrimination unconstitutional, but also gender-based discrimination is. The decision also affirms the idea that the accused must not necessarily be a member of the group that is discriminated against for the discrimination to constitute an infringement on their rights.

In 1978, Amaury Cedeno was killed while attempting to return to his store after withdrawing money from the bank. As he entered the store, he was attacked and killed by a man who subsequently ran out of the store into an awaiting car. At trial, the man was identified as Robert Willis. The driver was identified as James Michael Wheeler; however, only a few fingerprints connected him to the car. During the case against Wheeler, who is a Black man, the prosecutor struck every single Black person from the jury pool through peremptory challenges after some were dismissed for cause. Interestingly, there is no record of precisely how many Black people were struck as the court at the time did not ask for such information. Ultimately, the all-white jury

[92] *Id.*

convicted Wheeler. Though the court did not record information about the identities of the struck jurors, Wheeler's attorney went to great lengths to document their race. After they were struck using peremptory challenges, Wheeler's attorney had the struck jurors sign a document attesting to their race. As he started to realize the systematic exclusion, Wheeler's attorney moved for a mistrial, which was denied. The judge gave the prosecutor an opportunity to explain themselves and assured them they were under no obligation to explain their actions, then denied the motion after the prosecutor declined to respond. More Black jurors were struck, including two that the prosecution did not even question. Again, Wheeler's attorney moved for a mistrial; again it was denied by the judge. The all-white jury convicted Wheeler. In the 5-2 decision, the California Supreme Court sided with Wheeler, with Justice Stanley Mosk writing the majority decision. Justice Mosk states that "It is true that the statute defines such a challenge as one for which "no reason need be given...but it does not follow from that it is an objection for which no reason need exist. On the contrary, in view of the limited number of such challenges allowed by statute... we may confidently disregard the possibility that a party will squander his peremptories by removing jurors, simply because he has the right to do so, for frivolous reasons."[93] Justice Mosk understood the underlying bias within peremptory challenges: they are far too valuable a tool for an attorney to simply use them without reason. Therefore, it is the role and obligation of the court to ensure that the reason is not a discriminatory one. Historically, no reason must be given to the court; however, Justice Mosk understands that this standard requires a certain degree of latitude due to the discriminatory history of its use. He continues by stating that "the use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to...trial by a jury drawn from a representative cross-section of the

[93] *The People v. Wheeler* 22 Cal. 3d 258 (1978)

community…This does not mean that the members of such a group are immune from peremptory challenges: individual members thereof may still be struck on grounds of specific bias."[94] Justice Mosk importantly distinguishes between when a peremptory challenge can and can not be exercised. Membership in a cognizant group does not protect a prospective juror completely from a peremptory challenge; it simply means that the challenge must be centered around the bias of the individual. Obviously, it is very difficult to prove that an attorney used the peremptory challenge in a discriminatory manner.

Justice Mosk continues by outlining the procedure by which a claim can be made against the exercise of a peremptory challenge, stating that "if a party believes his opponent is using his peremptory challenges to strike jurors on the ground of group bias alone, he must raise the point in a timely fashion and make a prima facie case of such discrimination to the satisfaction of the court. First…he should make as complete a record of the circumstances as is feasible. Second, he must establish that the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule…Third, from all the circumstances of the case he must show a strong likelihood that such persons are being challenged because of their group association rather than because of any specific bias."[95] *Prima facie* is the lowest standard of proof and is easy to satisfy; however, that standard is raised by the inherently difficult nature of proving discrimination. Additionally, a *prima facie* case rests on establishing that the person is a member of the cognizant group, which can be difficult due to the fact that the court may not ask a prospective juror for their race or gender. In that case, which is far less prevalent today, the obligation rests with the attorney to meticulously document that evidence in an admissible manner. After these requirements are satisfied, Justice Mosk states that

[94] *Id.*
[95] *Id.*

"the burden shifts to the other party to show if he can that the peremptory challenges in question were not predicated on group bias alone…to sustain his burden of justification, the allegedly offending party must satisfy the court that he exercised such peremptories on grounds that were reasonably relevant to the particular case on trial or its parties or witnesses -- i.e., for reasons of specific bias as defined herein."[96] Justice Mosk's decision lowers the "intentional discrimination" standard in *Swain* to one of a "strong likelihood;" yet, the standard is still too high to effectively prove discrimination.[97] [98] Even if an attorney proves that a group of prospective jurors are of the same cognizant group, this decision makes it virtually impossible to prove systematic exclusion because the attorney exercising the peremptory challenge is simply required to give a reason or reasons that go to the bias of each individual. Having such an attainable threshold to dismiss an objection renders the procedure superfluous. Despite this, the *Wheeler* decision and the test created by Justice Stanley Mosk would greatly influence the Supreme Court's decision in *Batson v. Kentucky*, where the highest court adopted a similar procedure for objections to the exercising of peremptory challenges.[99] [100]

In 1986, James Kirkland Batson was arrested and put on trial for burglary and receipt of stolen goods. After the judge dismissed certain jurors for cause, the prosecutor used peremptory challenges on four Black men, leaving an all-white jury pool. Before the trial started, Batson's attorney filed a motion claiming that the prosecutor's use of the peremptory challenge to obtain the all-white jury violated the sixth amendment and the fourteenth amendment. He sought to have the jury dismissed.

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[96] *The People v. Wheeler* 22 Cal. 3d 258 (1978)
[97] *Swain v. Alabama* 380 US 202 (1965)
[98] *The People v. Wheeler* 22 Cal. 3d 258 (1978)
[99] *The People v. Wheeler* 22 Cal. 3d 258 (1978)
[100] *Batson v. Kentucky* 476 US 79 (1986)

The judge denied the motion without even allowing for a hearing. Subsequently, the all-white jury convicted Batson, a Black man, on all counts. The Kentucky Supreme Court affirmed the decision. The Supreme Court granted Batson's writ of certiorari and heard the case. In the 7-2 decision, Justice Lewis Powell wrote that "the Court decided that the State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded."[101] Justice Powell acknowledged that an all-white jury cannot provide equal protection for a Black defendant as it would for a white defendant. His point is clear: A jury, to a certain degree, must be reflective of the defendant for it to truly be composed of their peers and be considered fair. At the very least, Justice Powell writes that "...the defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria."[102] The jury may not be perfectly representative, but as long as it was picked in a non-discriminatory method, the defendant's rights are respected. There is inherent equality to the notion that a jury must be created in a nondiscriminatory manner; however, every jury selection is uniquely tailored to the facts of the case – grounds that may get a prospective juror dismissed in one case may have no bearing on another case with a different set of facts. Due to this, a non-discriminatory method can not be uniformly applied across every single case; latitude must be given that allows the Court to approach each case based on the facts.

Justice Powell's decision has three major implications. First, it expressly states that it was unconstitutional for a peremptory challenge to be used in a discriminatory manner. Justice Powell states that a "[s]tate's purposeful or deliberate denial to [Black people] on account of race or participation as jurors in the

[101] *Id.*
[102] *Id.*

administration of justice violates the Equal Protection Clause."[103] This decision places a major legal limitation upon an attorney's ability to exercise the peremptory challenge. Peremptory challenges derive their power from the Court not requiring a reason and this decision represents the continued erosion of that power, starting with *Swain*.[104] Justice Powell implicitly states that peremptory challenges, though commonly accepted as a part of the US legal system, are secondary to the accused's constitutionally guaranteed rights. When choosing between the two, the protection of constitutional rights trumps the sanctity of the peremptory challenge. Peremptory challenges may not be exercised in a manner that violates those rights. Second, he states that to prove discrimination, the objecting attorney must establish a "prima facie case of purposeful discrimination."[105] With the adoption of 'purposeful discrimination at the national level, the Supreme Court lowered *Swain's* standard of "intentional discrimination."[106] [107] The 'purposeful discrimination' standard is far more similar to California's Wheeler, with the standard of "significant likelihood."[108] [109] However, even with the lowering of the national standard, Justice Powell's decision maintained the same flaw that *Wheeler's* decision included: allowing for race-neutral, wide-ranging reasons to satisfy the objection.[110] Justice Powell states that the use of a peremptory challenge requires a race-neutral reason for excusing the juror, writing that "once the defendant makes a *prima facie* showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. The prosecutor may not rebut a *prima facie* showing by stating that he challenged the jurors on the

[103] *Batson v. Kentucky* 476 US 79 (1986)
[104] *Swain v. Alabama* 380 US 202 (1965)
[105] *Batson v. Kentucky* 476 US 79 (1986)
[106] *Id.*
[107] *Swain v. Alabama* 380 US 202 (1965)
[108] *Batson v. Kentucky* 476 US 79 (1986)
[109] *The People v. Wheeler* 22 Cal. 3d 258 (1978)
[110] *Id.*

assumption that they would be partial to the defendant because of their shared race or by affirming his good faith in individual selections."[111] This would form the bedrock of a *Batson* challenge for decades. However, the standard set in *Batson* that a "neutral" reason is required to disprove a *Batson* challenge is exceptionally easy to achieve. Simply put, as long as an attorney can provide the Court with a reason that is not blatantly based upon a prospective juror's race, the challenge fails. This standard allows for racism to continue simply disguised as a neutral reason. Note that Justice Powell does not introduce any reasonableness test surrounding the explanation, only that the reason must be separate from race. This fosters an environment where everyone – from the prosecutor to the defense attorney to even the prospective juror themselves – may understand why a Black juror was dismissed, but since the stated reason was "neutral," no remedial actions can be taken. In fact, that occurred in the trial of Gregory McMichael, Travis McMichael, and William Bryan. The trio faced murder charges over the killing of Ahmaud Arbery in 2021. Throughout the selection of the jury, the prosecution continually objected to the defense exercising peremptory challenges against Black jurors.[112] The judge in the case, Judge Timothy Walmsley, plainly acknowledged "intentional discrimination in the panel," yet could not remedy the actions because the defense "have been able to explain to the court why besides race those individuals were struck from the panel."[113] Under the *Batson* standard, the judge could only be an observer to what he understood to be discriminatory.[114] Such a case perfectly encapsulates the failures of *Batson* as a means of truly

[111] *Batson v. Kentucky* 476 US 79 (1986)

[112] Joe Hernandez, *How the jury in the Ahmaud Arbery case ended up nearly all white — and why it matters* (November 5, 2021), https://www.npr.org/2021/11/05/1052435205/ahmaud-arbery-jury.

[113] *Id.*

[114] *Batson v. Kentucky* 476 US 79 (1986)

eliminating discrimination.[115] Racism continued unimpeded as Justice Powell unintentionally provided a flaw that attorneys would exploit for decades. Even though the attorney exercising the peremptory challenge must provide a reason, the burden of proof ultimately is on the objecting attorney to prove discrimination and prove that the neutral reason given is not neutral at all. That is an incredibly high standard for an attorney to achieve over the exclusion of a single juror, but in the pursuit of justice, a single juror can be the difference between a unanimous conviction and an acquittal.

From the combination of both *Batson v. Kentucky* and the *People v. Wheeler*, California created its own three-pronged test called the *Batson-Wheeler* Motion.[116] [117] There are three main steps in proving a *Batson-Wheeler* Motion: the objecting attorney must prove a *prima facie* showing that peremptory challenges were exercised based upon race; then the attorney exercising the peremptory challenge must provide a race-neutral reason for the exercise of the challenge, and finally the Court must decide whether the defense has proven purposeful discrimination.[118] Essentially, the objecting attorney must provide evidence that the peremptory challenge was used in a racially discriminatory way. An example would be the objecting attorney showing that the attorney exercising the peremptory challenge has repeatedly used it against all the prospective Black jurors. That would establish a *prima facie* showing. From that point, the attorney exercising the peremptory challenge would need to provide a race-neutral reason or reasons as to why they wish to dismiss the prospective

[115] *Id.*
[116] *Id.*
[117] *The People v. Wheeler* 22 Cal. 3d 258 (1978)
[118] Memorandum from Nancy E. Orloff, Batson-Wheeler Motions (November 11, 2019), https://www.aclunc.org/sites/default/files/2019.09.11%20Marin%20Batson%20Training%20Materials.pdf.

juror.[119] Finally, the Court must decide if the objecting attorney has proven purposeful discrimination.[120] This procedure is clearly heavily influenced by the State Supreme Court's test created in *Wheeler*; however, there are key aspects that center around the US Supreme Court's *Batson* opinion, including that the burden of proof never shifts from the objecting attorney.[121] [122] They must prove discrimination instead of the attorney exercising the peremptory challenging, proving that the challenge is separate from the prospective juror's race. This practice was the standard in California before the passing of AB 3070, meaning that for over 30 years attorneys had to meet these procedural requirements to prove racial discrimination within jury selection. As evidenced by the passage of AB 3070, California's legislature felt like this procedure was inadequate in effectively eliminating racial discrimination.

Five years after the *Batson* decision, the Supreme Court would address improper peremptory challenges once again in another case from Louisiana, this time focusing on the peremptory challenge within the setting of civil, not criminal, court.[123] Thaddeus Edmonson was a construction worker for the Leesville Concrete Company. One day, Edmonson suffered an injury when a company truck rolled backward and pinned him to some equipment. Due to the injury, Edmonson sued Leesville Concrete Co. for negligence. In the civil trial, the attorneys for Leesville exercised peremptory challenges against two prospective black jurors.[124] After the exercise of these peremptory challenges, Edmonson, who is Black, requested that the opposing attorneys give race-neutral answers as to the peremptory challenges in

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[119] *Id.*
[120] *Id*
[121] *The People v. Wheeler* 22 Cal. 3d 258 (1978)
[122] *Batson v. Kentucky* 476 US 79 (1986)
[123] *Id.*
[124] *Edmonson v. Leesville Concrete Co.* 500 US 614 (1991)

accordance with *Batson*; however, the request was denied by the judge, who ruled that *Batson* only applied to criminal trials.[125] The jury, composed of eleven white jurors and one black juror, found Edmonson. The jury found the total amount of damages to be $90,000; however, Edmonson was only rewarded $18,000 because the jury deemed the rest was due to Edmonson's own negligence.[126] Edmonson appealed and the Court of Appeals for the Fifth Circuit reversed. Eventually, the US Supreme Court heard the case. In a 6-3 decision, the Supreme Court sided with Edmonson, with Justice Anthony Kennedy writing the majority decision. In his decision, Justice Kennedy relied on precedents from *Lugar v. Edmondson* and *Powers v. Ohio* to create a two-pronged test to establish whether *Batson* extended to civil trials.[127] [128] [129] First, the Court must establish that the action or event was conducted within the realm of state or governmental authority, with Justice Kennedy stating that "we asked first whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority…and second, whether the private party charged with the deprivation could be described in all fairness as a state actor…There can be no question that the first part of the Lugar inquiry is satisfied here. By their very nature, peremptory challenges have no significance outside a court of law. Their sole purpose is to permit litigants to assist the government in the selection of an impartial trier of fact."[130] Justice Kennedy identifies peremptory challenges as solely deriving meaning from being within the governmental sphere because they are used within the court of law. Even in civil trials where the government is not necessarily a party to the case, it happens in front of a

[125] *Batson v. Kentucky* 476 US 79 (1986)
[126] *Edmonson v. Leesville Concrete Co.* 500 US 614 (1991)
[127] *Lugar v. Edmondson* 458 U.S. 922 (1982)
[128] *Powers v. Ohio* 499 U.S. 400 (1991)
[129] *Batson v. Kentucky* 476 US 79 (1986)
[130] *Id.*

judge who is a part of the government and requires the same civic participation from the public as a case when the government is a party. Justice Kennedy expounds on this point, stating that "[i]t cannot be disputed that, without the overt, significant participation of the government, the peremptory challenge system, as well as the jury trial system of which it is a part, simply could not exist."[131] Even in civil trials, the government is an active participant, even if that participation is relegated to a judge and a courtroom. There are still multiple government actors within the process, like clerks, courtroom reporters, and bailiffs that cause civil trials to remain within the governmental sphere. This first part of the test is important because it provides a foundation by which the government can intervene within a practice that was previously viewed as private and not under the purview of the government. Under the same *Civil Rights Cases* that stated the government can not regulate private action, Justice Kennedy's first prong eliminates the idea of civil trials being private proceedings separate from the government.[132] The second part of Justice Kennedy's test focuses on the prospective jurors themselves. Justice Kennedy acknowledges that jury discrimination inflicts injury upon the excluded juror, stating that "[t]o permit racial exclusion in this official forum compounds the racial insult inherent in judging a citizen by the color of his or her skin."[133] A juror has the right to protection against discrimination within the jury selection process in a civil trial just as the accused in a criminal trial has a right to a jury composed of a fair cross-section of the community. Allowing discrimination in any form within jury selection denies the prospective juror the right to civic engagement. Though no prospective juror has the right to sit on a petit jury, they do have a right to a fair and equal selection process that does not discriminate against them on the basis of their race or other membership in a cognizant group.

[131] *Id.*
[132] *The Civil Rights Cases* 109 US 3 (1883)
[133] *Edmonson v. Leesville Concrete Co.* 500 US 614 (1991)

Next, Justice Kennedy alludes to the possibility of unconscious bias, stating that "whether the race generality employed by litigants to challenge a prospective juror derives from open hostility or from some hidden and unarticulated fear, neither motive entitles the litigant to cause injury to the excused juror."[134] Prospective jurors can not be struck due to the prejudice of the parties in the case. Within a civil trial, prospective juror retains their rights and protections against discrimination, even if the government is not a party to the case. This two-pronged test extending *Batson* to civil trials created a more equitable civil justice system and fully implemented protections against discrimination in all forms of jury trials within the US.[135]

Even as the Supreme Court expanded protections against racial discrimination in civil trials, fair and equal access to the jury box was still under assault in other areas and forms. In one such case, a man, identified only as J.E.B., was sued by Alabama, itself acting on behalf of a woman who is identified as T.B. Alabama sought paternity and child support from J.E.B., the assumed father of T.B.'s child. In the trial, the state exercised peremptory challenges against nine of ten male prospective jurors. J.E.B. exercised a peremptory challenge against the last prospective male juror. The Court impaneled an all-female jury. J.E.B. objected, stating that the exclusion of male jurors violated the Equal Protections clause of the fourteenth amendment.[136] He went so far as to argue that the reasoning in *Batson's* protection against racial discrimination in jury selection extends to gender discrimination. The Court denied his motion and the all-female jury found him liable for paternity and child support. J.E.B. appealed and, in a 6-3 decision, the Supreme Court found in J.E.B.'s favor and reversed the decision. Justice Harry Blackmun, writing for the majority, stated that "Intentional discrimination

[134] *Id.*
[135] *Batson v. Kentucky* 476 US 79 (1986)
[136] *J.E.B. v. Alabama ex rel T.B.* 511 US 127 (1994)

on the basis of gender by state actors violates the Equal Protection Clause, particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women."[137] This decision's significance lies in the fact that it affirms that protections against gender discrimination are equal for both men and women. It is also important because it works to equalize the jury in the sense that one gender isn't seen as better suited for some crimes and inferior for other situations. There is equality between the genders, and each is equally suited to serve on juries for all crimes or matters. Justice Blackmun continues by stating that "[f]ailing to provide jurors the same protection against gender discrimination as race discrimination could frustrate the purpose of *Batson* itself.[138] Because gender and race are overlapping categories, gender can be used as a pretext for racial discrimination. Allowing parties to remove racial minorities from the jury not because of their race, but because of their gender, contravenes well established equal protection principles and could insulate effectively racial discrimination from judicial scrutiny."[139] This is a highly important revelation. Gender and race are intersectional and if discrimination is allowed on the grounds of one, it effectively renders any protections against the other ineffective. In order to properly defend people from discrimination in jury selection, protections must be extended to any largely shared conditions that could possibly be exploited in an effort to circumvent protections. This decision eliminates the gender loophole and, most importantly, it eliminates the exception in its entirety. This decision, combined with *Taylor v. Louisiana*, means that there are protections against excusing both men and women jurors.[140] By removing gender as an acceptable reason to excuse a juror, this decision slightly narrowed the

[137] *Id.*
[138] Batson v. Kentucky 476 US 79 (1986)
[139] *Id.*
[140] Taylor v. Louisiana 419 US 522 (1975)

race-neutral reasons attorneys could use when faced with a *Batson* claim; however, proving a *Batson* claim would remain a very high burden.

In one of the most obvious examples of a *Batson* claim, Timothy Foster was charged with murder in a Georgia court.[141] During jury selection, there were five prospective black jurors and the prosecutor exercised their peremptory challenges on four of the five. The fifth was ultimately dismissed for cause after realizing a close friend of theirs was related to Foster. His attorney raised a *Batson* claim, which was denied. The all-white jury ultimately convicted Foster and he was sentenced to death. Initially, Foster's appeals failed, until his attorney filed a Georgia Open Records Act and gained access to the file on Foster's 1987 trial, including the prosecutor's notes.[142] The notes included lists of prospective jurors, with the black jurors' names highlighted in green along with other notes like a list of "definite NOs," with six names on - five of which were the names of the five prospective black jurors.[143] On the questionnaire the five prospective Black jurors completed, the response as to their race was circled. This new evidence renewed Foster's *Batson* claim and the Supreme Court granted the writ of certiorari. In the 7-1 decision, the Supreme Court sided with Foster, with Chief Justice John Roberts authoring the majority opinion.[144] However, the importance of the case rests within a question posed by Justice Elena Kagan during oral arguments, who asked "isn't this as clear a Batson violation as a court is ever going to see?".[145] This case, more than any other, with the lists, the prosecutor's notes, and the conflicting reasonings provided by the prosecution for why Black

[141] *Batson v. Kentucky* 476 US 79 (1986)
[142] *Foster v. Chatman* 578 US __ (2016)
[143] *Id.*
[144] *Id.*
[145] Transcript of Oral Argument at 39, *Foster v. Chatman*, 578 US __ (2016) (No. 14-8349)

jurors were struck, all indicate the clear presence of *Batson's* "purposeful discrimination," yet the case had to rise to the Supreme Court for a decision in Foster's favor.[146] No appellate examined the evidence and sided with Foster. The evidence screams discrimination and yet every appellate court seemed to circumvent this smoking gun evidence until the Supreme Court intervened. This case represents the complete breakdown of the *Batson* standard because, as Kagan addresses, it is the most blatantly obvious representation of discrimination.[147] The notes of the prosecution reveal their emphasis on race in their preparation and are the best evidence possible for their state of mind. Unfortunately, though this case was a blueprint for *Batson's* failings, Justice Roberts' opinion was narrowly tailored, granting relief to Foster, but not substantively changing the standard.[148] Foster was the Court's best opportunity to review the failings of *Batson* and provide an updated, modern standard by which to judge discrimination; yet the Court passed, maintaining Batson's standards; the very standards that allowed such a grossly blatant case of discrimination like *Foster* to occur.[149] [150] AB 3070, by changing the standard, aims to rectify this situation by finally eliminating racial discrimination at the trial court level, without overt and excessive reliance on appeals, though maintaining them as a key safeguard.

PEREMPTORY CHALLENGES TODAY

Across the country, Black people are disproportionately struck from the jury through the use of peremptory challenges. In examining 184 cases in the Circuit Court of Appeals, researchers found that almost two-thirds of people removed from jury pools

[146] *Batson v. Kentucky* 476 US 79 (1986)
[147] *Id.*
[148] *Id.*
[149] *Batson v. Kentucky* 476 US 79 (1986)
[150] *Foster v. Chatman* 578 US __ (2016)

are Black, with Latino people being the second largest group.[151] In addition to such exclusions, "several of the cases also had instances where there were multiple racial and ethnic minorities removed from jury pools."[152] California is no exception to this trend. In examining California appeals cases, a study found that "of these 670 cases, 71.6% (480) involved objections to prosecutors' use of peremptory challenges to remove Black jurors. Of the remaining cases, prosecutors removed Latinx jurors in 28.4% (190) of cases, Asian-American jurors in 3.4% (23) of cases, and White jurors in three cases (0.5%)."[153] California is 71.1% white,6.5% Black, and 15.9% Asian, meaning that the use of peremptory challenges by prosecutors is racially distorted and incredibly disproportionate.[154] The study also states that "[i]n the last 30 years, the California Supreme Court has reviewed 142 cases involving Batson claims and found a Batson violation only three times (2.1%)."[155] This data represents two key points: first, peremptory challenges are disproportionately used against Black people, and second, the California Supreme Court's application of the current *Batson* standard is ineffective in curtailing discrimination. AB 3070 rose from this ineffectiveness within the judicial branch to stringent and strict enforcement of antidiscrimination procedures, mostly due to *Batson's* inherent ineffectiveness.[156]

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[151] Shaun L. Gibbidon et al., *Race-Based Peremptory Challenges: An Empirical Analysis of Litigation from the U.S. Court of Appeals, 2002–2006* (January 29, 2008), https://link.springer.com/article/10.1007/s12103-007-9027-6#Tab2.

[152] *Id.*

[153] Elisabeth Semel et al., *Whitewashing The Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors* (June 2020), Berkeley Law Death Penalty Clinic, https://www.law.berkeley.edu/wp-content/uploads/2020/06/Whitewashing-the-Jury-Box.pdf.

[154] US Census Bureau California Quick Facts (July 21, 2021), https://www.census.gov/quickfacts/CA.

[155] *Id.*

[156] *Batson v. Kentucky* 476 U.S. 79 (1986)

AB 3070

In 2020, former California Assemblywoman Shirley Weber (D-79) introduced an assembly bill to amend California's Code of Civil Procedure, titled CA AB 3070. The bill's purpose was to restrict the use of peremptory challenges within jury selection to eliminate discrimination based on what is deemed cognizant groups - sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation. The bill was passed and signed into law, going into effect on January 1, 2022, for criminal trials and will go into effect for civil trials on January 1, 2026.[157] In a larger sense, this bill seeks to end the discrimination that has plagued the criminal justice system for so long and that Supreme Court Justice Thurgood Marshall wrote eloquently and extensively about it in his concurring opinion in *Batson*. Justice Marshall wrote that "this Court explained more than a century ago that " 'in the selection of jurors to pass upon [a defendant's] life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them, because of their color."[158] Decades later, AB 3070 is California's attempt to make the late, great Supreme Court Justice's words ring true.

AB 3070'S STANDARD OF PROOF

The law specifically details how the use of peremptory challenges must change, reasoning that it cannot be used in a discriminatory manner anymore, and states how an attorney may object to the use of peremptory challenges. First, the law states that prospective jurors cannot be discriminated against due to their "race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or the perceived

[157] Cal. Civ. Proc. §231.7

[158] *Batson v. Kentucky* 476 US 79 (1986) (Marshall, J. concurring)

membership of the prospective juror in any of those groups."[159] This is a very all-encompassing and inclusive standard, designed to eliminate all forms of discrimination within the jury selection in a general sense. This section also echoes the language of the Jury Selection and Service Act, which also banned discrimination against many of those groups; however, AB 3070 includes sexual orientation and gender identity while dropping economic status.[160] This goes at the very core of the jury system: the belief that the jury must be fairly composed of one's peers. Justice Marshall stated that "Exclusion of blacks from a jury, solely because of race, can no more be justified by a belief that blacks are less likely than whites to consider fairly or sympathetically the State's case against a black defendant than it can be justified by the notion that blacks lack the "intelligence, experience, or moral integrity," Neal, supra, 103 U.S., at 397, to be entrusted with that role."[161] Discriminating against a cognizant group is a direct indictment of their abilities to be serviceable jurors. Such a notion is not only antiquated but resoundingly false. Membership in a cognizant does not reflect on a juror's ability to deliberate. The inability to serve on a jury must be established on an individual, not collective basis. Justice Blackmun addresses this in *J.E.B.*, where he stated that "gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization."[162] The supremacy of constitutional rights over statistical data is an important distinction. Statistical data, in a limited capacity, is not adequate enough to deprive someone of their rights. That point is magnified when that data is providing a general conclusion about gender or a specific race. Statistical data is not enough to roundly exclude an entire cognizant group. Next, the law details the standard required for sustaining an

[159] Cal. Civ. Proc. §231.7(a) (2022)
[160] Jury Selection and Service Act §101.1862 (1968)
[161] *Batson v. Kentucky* 476 US 79 (1986) (Marshall, J. concurring)
[162] *J.E.B. v. Alabama ex rel T.B.* 511 US 127 (1994)

objection, which is "[i]f the court determines there is a substantial likelihood that an objectively reasonable person would view race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, as a factor in the use of the peremptory challenge, then the objection shall be sustained."[163] Where *Swain's* standard was intentional discrimination, *Batson* lowered it to purposeful discrimination, and now this law lowers the standard to a "substantial likelihood."[164] [165] As the standard continually lowers, the power of the peremptory challenge erodes because the limit that was first set in *Swain* becomes increasingly defined.[166] The law continues by defining what exactly phrases mean within this context and, in doing so, introduces the role of bias. The law states that "[f]or purposes of this section, an objectively reasonable person is aware that unconscious bias, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in the State of California."[167] First, it introduces bias as an element that a trial judge will need to weigh, requiring them to maintain a perspective that exceeds the individual juror and past the facts of the individual case. Similarities can be drawn between this line of reasoning and the initial reasoning within *Swain*'s intentional discrimination standard.[168] The law requires the judge to maintain a perspective greater than the facts of the individual case, similar to how *Swain* required a showing of discrimination that went beyond the excusal of an individual juror within a case.[169] However, the distinction lies in that such evidence was required under intentional discrimination, whereas within this law the evidence is merely a factor considered within

[163] Cal. Civ. Proc. § 231.7(d)(1) (2022)
[164] *Swain v. Alabama* 380 US 202 (1965)
[165] *Batson v. Kentucky* 476 US 79 (1986)
[166] *Swain v. Alabama* 380 US 202 (1965)
[167] Cal. Civ. Proc. § 231.7(2)(A) (2022)
[168] *Swain v. Alabama* 380 US 202 (1965)
[169] *Id.*

the decision.[170] The extent to which courts will interpret unconscious bias remains unclear, as there is the possibility that the Court chooses to narrowly interpret the role of unconscious bias; however, as of now, this law is too new to know how the Courts will interpret it. Additionally, though this clause seemingly requires judges to be historians and exceed their role as neutral arbiters of deciding questions of the law, historical perspective has always been a part of judicial decisions. Every time a judge relies on or references precedent or adheres to *stare decisis*, they are turning towards history to help guide their decision. A judge should be bound by the facts of the case, but should also place those facts within the greater context of legal history and common law. This clause does not change that, rather it simply asks that judges base their decisions and reasoning within that legal history of unfair exclusion, much of which has already been outlined here. Furthermore, the burden of proof necessary to sustain the objection is quite low, as the law states that "[f]or purposes of this section, a "substantial likelihood" means more than a mere possibility but less than a standard of more likely than not."[171] This definition of what substantial likelihood means not only aids the courts in interpreting it, but also reveals just how drastically different this standard is from *Batson* and definitely *Swain*.[172] [173] *Swain*'s intentional discrimination standard was far higher than more likely than not.[174] *Batson*'s purposeful discrimination standard also was higher than more likely than, albeit less so than *Swain*.[175] [176] This substantial likelihood is explicitly under this more likely than not threshold, representing that this law does drastically

[170] *Id.*
[171] Cal. Civ. Proc. § 231.7(2)(B) (2022)
[172] *Batson v. Kentucky* 476 US 79 (1986)
[173] *Swain v. Alabama* 380 US 202 (1965)
[174] *Id.*
[175] *Batson v. Kentucky* 476 US 79 (1986)
[176] *Swain v. Alabama* 380 US 202 (1965)

change the weight of the peremptory challenge. Where the peremptory challenge was once viewed as not needing a reason, this law represents the progression that started with *Swain* where the use of the challenge can come under increased scrutiny.[177] [178] In the face of *Foster*, however, such scrutiny is necessary.[179] *Foster* represents why such a low standard is necessary.[180] The Supreme Court had an opportunity to rectify the ineffectiveness of the *Batson* standard and apply a standard far closer to that of substantial likelihood, yet their subsequent inaction practically forced legislative action at the state level.[181] [182] In his concurring opinion in *Batson*, Justice Thurgood Marshall addresses the question of standard, concluding that "[t]he Court's opinion also ably demonstrates the inadequacy of any burden of proof for racially discriminatory use of peremptories that requires that "justice . . . sit supinely by" and be flouted in case after case before a remedy is available."[183] Justice Marshall acknowledged that one of the most pressing matters within the elimination of racial bias is by what standard of proof should be required. In fact, he argues that any such standard becomes an obstacle to justice. This argument made back in 1986, represents the necessity of attempting the standard of substantial likelihood.[184] If under this standard justice still sits supinely by, then Justice Marshall may well be proven right; however, his reasoning operates within the climate of a purposeful discrimination standard.[185] [186] The substantial likelihood standard may very well effectively eliminate discrimination and be the available remedy Justice Marshall

[177] Cal. Civ. Proc. §226 (b) (1988)
[178] *Swain v. Alabama* 380 US 202 (1965)
[179] *Foster v. Chatman* 578 US __ (2016)
[180] *Id.*
[181] *Batson v. Kentucky* 476 US 79 (1986)
[182] Cal. Civ. Proc. § 231.7(d)(1) (2022)
[183] *Batson v. Kentucky* 476 US 79 (1986) (Marshall, J. concurring)
[184] Cal. Civ. Proc. § 231.7(d)(1) (2022)
[185] *Batson v. Kentucky* 476 US 79 (1986) (Marshall, J. concurring)
[186] *Batson v. Kentucky* 476 US 79 (1986)

refers to.[187] Furthermore, though the legislature somewhat defines the substantial likelihood standard, the law only states that substantial likelihood falls between a range.[188] It will ultimately be the Courts who will interpret what that standard precisely means in terms of the amount of evidence that satisfies the standard. That discretionary power vested within the Courts is where the effectiveness of the substantial likelihood standard will be decided. If the Courts interpret it in a broad and liberal manner, requiring minimal evidence to satisfy the standard, then this standard would be the remedy Justice Marshall sought. However, the Courts may very well interpret the standard conservatively and require greater evidence to satisfy the standard. The law's parameters for the standard force any interpretation down the direction of the former.[189] The substantial likelihood standard marks a drastic acceleration in the erosion of peremptory challenges within the progression that started with *Swain*; however, its effectiveness ultimately lies within how the Courts interpret the weight of the standard.[190]

The law expands what types of bias the court must be cognizant of, stating that "[f]or purposes of this section, "unconscious bias" includes implicit and institutional biases."[191] It is important for judges to base decisions on *stare decisis* and examination of the relevant legal precedent, a fraction of which is outlined here, shows the clear presence of both implicit and institutional bias. With a keen awareness of that presence, it allows the judge to monitor the entire *voir dire* process for bias in a preventative manner. In *Edmonson*, Justice Kennedy stated that "if a litigant believes that the prospective juror harbors the same biases or instincts, the issue can be explored in a rational way that consists

[187] Cal. Civ. Proc. § 231.7(d)(1) (2022)
[188] Cal. Civ. Proc. § 231.7(2)(B) (2022)
[189] Cal. Civ. Proc. § 231.7(2)(B) (2022)
[190] *Swain v. Alabama* 380 US 202 (1965)
[191] Cal. Civ. Proc. § 231.7(2)(C) (2022)

with respect for the dignity of persons, without the use of classifications based on ancestry or skin color."[192] For such a process to be workable and practical, it would require a judge who maintains a perspective centered around bias and that takes great care to ensure that the line of questioning remains solid within an appropriate legal setting. The only way for such an environment to exist within the courtroom is with an awareness of the prevalence of bias. In addition to Justice Kennedy, Justice Marshall addresses the role of bias in his *Batson* concurrence, stating that "it is even possible that an attorney may lie to himself in an effort to convince himself that his motives are legal." *King, supra,* at 502. A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically."[193] This law provides a safeguard against such unconscious bias by putting it at the forefront of any judge's mind when presiding over an objection. As Marshall opines, it is important not to assume or be speculative as to the reasoning and grant the attorney the benefit that the discrimination is subconscious. Within that phrasing, it supersedes the weight that this law places on the attorney, acknowledging that the guilt must be broadly assigned to the institutions within which attorneys must operate. Both AB 3070 and Marshall understand that discrimination within the jury system is not the fault of a single prosecutor or district attorney and neither the law nor Justice Marshall indicts the character or integrity of those who work in district attorney's offices.

Bias is an evil that infects the jury system in multiple manners, which Justice Marshall acknowledges by stating that "A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported. As Justice Rehnquist

[192] *Edmonson v. Leesville Concrete Co.* 500 US 614 (1991)
[193] *Batson v. Kentucky* 476 US 79 (1986) (Marshall, J. concurring)

concedes, prosecutors' peremptories are based on their "seat-of-the-pants instincts" as to how particular jurors will vote. *Post,* at 138; see also The Chief Justice's dissenting opinion, *post,* at 123. Yet "seat-of-the-pants instincts" may often be just another term for racial prejudice."[194] Throughout history, racism has been disguised in differing capacities. Justice Marshall directly addresses this and bestows upon the trial judge the sacred duty to stand guard against these passive forms of racism. This perspective justifies requiring trial judges to maintain an acute awareness of institutional bias. There is also growing evidence that peremptory challenges are not as "seat of the pants" as they are supposed to be. For example, a bench memorandum by the Alameda County, California district attorney's office lists racially neutral reasons and the relevant case law about those reasons.[195] Those reasons may be legitimate; however, having a premade list completely contradicts the thought that this process is "seat of the pants."[196] There is a fine line between simply being adequately prepared for a potential *Batson* challenge and using such a guide as a means of excusing discrimination. Whether this training document is truly used as training or as a means of defeating *Batson's* challenges rests upon how the individual prosecutors within the office choose to use it. However, no matter how a prosecutor chooses to view the document, ultimately the reason a prospective juror is struck should not come from a tailor-made list; it should come from the facts of the case and the juror's answers alone.

In North Carolina, Russell William Tucker appealed his murder conviction on the grounds that prosecutors had peremptorily

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[194] *Id.*

[195] Memorandum from Nancy E. Orloff, Batson-Wheeler Motions (November 11, 2019), https://www.aclunc.org/sites/default/files/2019.09.11%20Marin%20Batson%20Training%20Materials.pdf.

[196] *Batson v. Kentucky* 476 US 79 (1986) (Marshall, J. concurring)

struck prospective Black jurors on the basis of race and relied upon a training worksheet to defeat *Batson* objections.[197] The document in question, titled "Batson Justifications: Articulating Juror Negatives," lists ten justifications like age, appearance, dress, attitude, and body language.[198] This sheet represents that the prosecution's peremptory strikes within the case may have been influenced by this training sheet and not a spur of the moment. That is a troubling and problematic trend as the peremptory challenge must be due to a reason that is naturally uncovered within the *voir dire* process, not one taken off of a list. Finally, Justice Marshall addresses the persistence of bias within the justice system, stating that "even if all parties approach the Court's mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels—a challenge I doubt all of them can meet. It is worth remembering that '114 years after the close of the War Between the States and nearly 100 years after *Strauder,* racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole."[199] Ultimately, the justice system is simply people, with all their flaws and deficiencies. Justice Blackmun echoes this point, stating that "human error is inevitable, and... our criminal justice system is less than perfect."[200] It is when people put those flaws aside, become aware of their biases, and work toward a system that does not let those factors impede justice that the system works. This law is an example of how people within the system must be aware of its deficiencies and consciously work towards a system where these practices and flaws are uprooted or at least a system

[197] *Tucker v. Thomas* 1:07-CV-868 (M.D.N.C. Sep. 11, 2017)

[198] Batson Justifications: Articulating Juror Negatives, Top Gun II - North Carolina Conference of District Attorneys (1994), https://www.aclu.org/sites/default/files/field_document/batson_justifications_da_cheat_sheet.pdf.

[199] *Id.*

[200] *Callins v. Collins* 510 U.S. 1141 (1994) (Blackmun, J. dissenting)

that provides safeguards for when those flaws manifest. Ultimately, the justice system should employ both. All of this being said, and for all the objections there are to this law and its language, not a single reasonable objection can be that AB 3070 was not created for the altruistic pursuit of equal justice for all.

AB 3070'S PROCEDURE

Along with the implementation of the substantial likelihood standard, the law details the procedure by which an objection is handled. When an attorney objects, the attorney using their peremptory challenge must provide a neutral reason for excusing the juror. The law states that "upon objection to the exercise of a peremptory challenge pursuant to this section, the party exercising the peremptory challenge shall state the reasons the peremptory challenge has been exercised."[201] This is consistent with the *Batson-Wheeler* challenge procedure; however, the reason that must be stated will be held to a lower standard, meaning that under AB 3070, any reason given must be far more substantive than under the *Batson-Wheeler* challenge. The attorney must come up with a reason unrelated to any of the cognizant groups and must have greater proof that it is unrelated than previously under the *Batson-Wheeler* challenge. In addition, the law gives the court and the objecting attorney the ability to provide evidence to prove discrimination. The law states that "[w]hether the counsel or counsel's office exercising the challenge has used peremptory challenges disproportionately against a given race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, in the present case or in past cases, including whether the counsel or counsel's office who made the challenge has a history of prior violations under Batson v. Kentucky (1986) 476 U.S. 79, People v. Wheeler (1978) 22 Cal.3d

[201] Cal Civ. Proc. § 231.7(c) (2022)

258, Section 231.5, or this section."[202] The introduction of outside data into the courtroom creates two issues: first, the Court would need to establish the validity of the data, and second, any data about jurors specifically must prove the juror's membership in the cognizant group. For example, in *Swain*, attorneys provided empirical evidence in an attempt to prove discrimination by comparing the demographics of the greater population with the demographics of the jury.[203] The employment of data in this subjective manner may foster debate over the exact percentile number accepted by the Court. In addition, any data introduced would need to accurately and credibly establish the prospective juror's membership in the relevant cognizant group. In *Wheeler*, the attorney had the struck jurors sign a document attesting to their race and therefore their membership in a cognizant group.[204] There is the possibility that having a decentralized method of tracking the prospective jurors' characteristics, meaning one that is reliant upon the individual attorney, increases the chances of discrepancies and honest mistakes. It also may lead to cases where the credibility of the data collection is called into question. This clause should only be implemented when a more uniform, credible system can be created because, before that point, specific data would be incredibly difficult to find. Furthermore, if an attorney is seeking to introduce data that goes to the wider use of peremptory challenges outside of their case, case records would need to be poured over to find where peremptory challenges were used. Then the prospective juror who was struck (whose identity may or may not be discoverable) would need to be tracked down and would need to sign an affidavit attesting to their inclusion in whichever cognizant group the attorney argues is being discriminated against. Even if such a feat is accomplished by an attorney, no judge would be able to verify if their data is true and accurate. Lastly, the attorney attempting to use their peremptory

[202] Cal. Civ. Proc. § 231.7(d)(3)(G) (2022)
[203] *Swain v. Alabama* 380 US 202 (1965)
[204] *The People v. Wheeler* 22 Cal. 3d 258 (1978)

challenge would have no way to confront such data, which would surely be the most damning evidence against them. Due to this, the manner and type of data introduced would need to be of a narrow focus, centered around credible *Batson-Wheeler* challenges. The introduction of evidence within the trial in an effort to prove discrimination must be strictly regulated to ensure the credibility and fairness of the data.

The law limits the race-neutral reasoning attorneys may use when their peremptory challenges are objected to, which represents a break from the broad acceptance under *Batson*. The law states that "a peremptory challenge for any of the following reasons is presumed to be invalid unless the party exercising the peremptory challenge can show by clear and convincing evidence that an objectively reasonable person would view the rationale as unrelated to a prospective juror's…perceived membership in any of those groups, and that the reasons articulated bear on the prospective juror's ability to be fair and impartial in the case."[205] This is a powerful and substantive safeguard against discrimination. It also marks a change from the *Batson-Wheeler* procedure, as instead of simply needing to provide a race-neutral reason, attorneys will now need to prove that their reasoning is separate from the prospective juror's membership in a cognizant group. Instead of the objecting attorney needing to prove discrimination, the attorney exercising the peremptory challenge must prove that it is not discriminatory. In addition, the reasons must be centered around their direct ability to deliberate in the case. This too implicitly restricts reasons, as previously peremptory challenges could be exercised for any reason. The law represents a distinction between itself and the relevant common law. Where *Batson*, *Wheeler*, and *Taylor* all dealt directly with immutable characteristics like race or gender, this law seeks to extrapolate

[205] Cal Civ. Proc. § 231.7(e) (2022)

out further reasons that are historically used to disguise racism.[206] [207] [208] The inclusion of reasons being presumptively invalid solves a problem that Thurgood Marshall addressed in his *Batson* concurrence, stating that "when a defendant can establish a prima facie case, trial courts face the difficult burden of assessing prosecutors' motives. See *King v. County of Nassau,* 581 F.Supp. 493, 501-502 (EDNY 1984). Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill-equipped to second-guess those reasons."[209] A trial judge, who by principle should not assume or speculate the grounds a prosecutor gives to excuse a juror outside of those on record, has their hands tied by "facially neutral reasons," even if they reasonably assume discrimination occurs. *Batson* creates a flaw that attorneys can easily exploit. This law seeks to close that flaw and, hopefully, forces attorneys to use more concrete reasons as to why they exercised their peremptory challenge. The law details multiple reasonings that attorneys can not give for cause for the use of a peremptory challenge, finding each reason to be historically associated with the exclusion of prospective jurors of a cognizant group. These reasons fall on a spectrum ranging from understandable to judicially questionable. Many of the reasons should be invalid, like a prospective juror's neighborhood, whether they have a child outside of marriage, or what clothes they wear. Before this law, there were no remedies for when attorneys provided race-neutral answers that were anything but neutral. The only relief came when white jurors who gave similar answers were not struck. In *Foster*, a white juror claimed to live about half a mile away from the scene of the crime and a Black juror claimed to live about twenty miles away.[210] The Black juror was peremptorily struck. By raising the standard, this

[206] *Batson v. Kentucky* 476 US 79 (1986)
[207] *The People v. Wheeler* 22 Cal. 3d 258 (1978)
[208] *Taylor v. Louisiana* 419 US 522 (1975)
[209] *Batson v. Kentucky* 476 US 79 (1986) (Marshall, J. concurring)
[210] *Foster v. Chatman* 578 US __ (2016)

law rectifies the flaw identified by Justice Marshall in *Batson*, where he writes that "[i]f such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on nonracial grounds, then the protection erected by the Court today may be illusory."[211] Yet, the protection erected by the Court that day was illusory in the exact way that Justice Marshall warned about - its standard was too low and too easy to meet with little or no evidence. The truth is that *Batson* has been largely ineffective in curtailing racial discrimination within jury selection and has simply forced racism to become more entrenched and subtle than before it. This law seeks to change that by striving for more concrete, truly neutral answers as to exactly why a prospective juror has been excused.

As some clauses outlined by AB 3070 are understandable and provide a solid foundation against discrimination, there are multiple that are more ambiguous. Under some circumstances, the clauses protect against discrimination, and in others, they protect a biased and prejudiced juror from a justified peremptory challenge. The effectiveness and righteousness of these reasons are not universal and rather are dependent on the individual facts of the case. First, "expressing a distrust of or having a negative experience with law enforcement or the criminal legal system" may not be used as a reason to peremptorily strike a prospective juror.[212] In a study of 480 California Court of Appeals cases, the Berkeley Law Death Penalty Clinic found that prosecutors cited this reason "in 34.8% (167 cases) of the 480 cases in which defense counsel challenged prosecutors' strikes of Black jurors."[213] In

[211] *Batson v. Kentucky* 476 US 79 (1986) (Marshall, J. concurring)
[212] Cal. Civ. Proc., § 231.7(e)(1) (2022)
[213] Elisabeth Semel et al., Whitewashiing The Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors (June 2020), Berkeley Law Death Penalty Clinic, https://www.law.berkeley.edu/wp-content/uploads/2020/06/Whitewashing-the-Jury-Box.pdf.

addition, the same study found that "[i]n 21.7% (104) of these cases, prosecutors struck Black people because the juror had a negative experience with police or the criminal legal system, although the juror may not have expressed a general distrust of law enforcement or the system."[214] The effectiveness of this reason lies within the extent to which the prospective juror admits to distrusting law enforcement. There is a difference between a prospective juror who does not completely trust law enforcement and one that completely disregards the word of a police officer who may testify. It is very difficult, short of the prospective juror admitting their biases inhibit their ability to be fair and impartial, for an attorney to use a peremptory challenge on the prospective juror. If the prospective juror is not forthcoming, an attorney may not be able to prove the peremptory challenge is separate from their membership in a cognizant group. If a prospective juror is simply skeptical of law enforcement or the criminal justice system, then the reason should be considered invalid; however, if a prospective juror has a more drastic opinion of law enforcement and admits to holding such an opinion, then a peremptory challenge should be justified. Furthermore, the weight of the reason fluctuates as the facts of the individual case fluctuate. For example, this clause is potentially prejudiced when the defendant is a police officer. If a prospective juror admits they do not trust law enforcement, then they are saying that they are already prejudiced against the defendant by the nature of their occupation. In that sense, this clause violates the sixth amendment. In contrast, in a case where law enforcement only has a tangential role, this reason becomes less relevant. Due to this wide spectrum, the constant must be the judge weighing the evidence and the reason and rendering a judicially sound ruling; however, this clause, as written, appears to be absolute and unwavering, impervious to the case-by-case basis that is a cornerstone of the legal system. Every case has different facts and

[214] *Id.*

factors and the rules governing jury selection must be flexible enough to cover all different types of cases while also not being too rigid to inhibit the ability to have a fair trial. The Courts have the power to grant such powers through a fluid interpretation of the clause.

Furthermore, the law states that"expressing a belief that law enforcement officers engage in racial profiling or that criminal laws have been enforced in a discriminatory manner" is also a presumptively invalid reason."[215] The Berkeley Law study found that "prosecutors struck Black jurors for expressing a distrust of law enforcement or the criminal legal system or a belief that law enforcement or the criminal legal system is racial- or class-biased. This occurred in 34.8% (167 cases) of the 480 cases in which defense counsel challenged prosecutors' strikes of Black jurors" and in 26.8% of cases where Latinx jurors were struck by the prosecution.[216] Similar to the first reason, the assessment of this reason is case specific. There are situations where a prospective juror should be protected from a peremptory challenge; however, there are other times when a prospective juror has such a drastic opinion that they could not possibly be fair and impartial. They may not admit that bias in court. In those cases, peremptory challenges would be appropriate, but under AB 3070 they may not be permitted. The judges, who are in the courtroom and keenly observing the process, are the only neutral arbiters that could render judicially fair rulings on whether the peremptory challenge is appropriate, yet again this rigid reason constricts the abilities of judges to make case-specific rulings. This law is highly reliant on a prospective juror's truthfulness and the abilities of

[215] Cal. Civ. Proc., § 231.7(e)(2) (2022)

[216] Elisabeth Semel et al., Whitewashiing The Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors (June 2020), Berkeley Law Death Penalty Clinic, https://www.law.berkeley.edu/wp-content/uploads/2020/06/Whitewashing-the-Jury-Box.pdf.

attorneys to uncover bias. Judges must base decisions on a case-by-case basis and there are cases where this law, instead of solely protecting against discrimination, allows for biased and partial jurors to be protected against peremptory challenges. Due to these reasons, the judge is the greatest safeguard against discrimination if the law would give them the necessary discretionary power and freedom to do so. Rounding out this gray area, the law states that "having a close relationship with people who have been stopped, arrested, or convicted of a crime" is also considered presumptively invalid."[217] This clause has a direct correlation to race because "African Americans are more likely to be stopped, arrested, and convicted of a crime than any other racial or ethnic group. Prosecutors offered this reason for striking Black jurors in 33.3% (160) of the 480 cases in which defense counsel challenged prosecutors' strikes of Black jurors."[218] That same reason was used against Latinx jurors in 33.7 % (64) of cases."[219] In other words, this reason is directly reflective of greater institutional racism invading the courtroom. However, having a close relationship with someone arrested or convicted of a crime would prejudice any prospective juror to some degree, especially if they believe in the innocence of that person. There are many factors, not simply in the case being tried but also in the facts of the stop, arrest, or conviction. If a prospective juror has a close relationship with a person that was convicted of the same crime or similar crimes as the accused is being charged with, a peremptory challenge should be justified. If the prospective juror knew a person who was convicted of a petty misdemeanor and the prospective juror believed they were guilty,

[217] Cal. Civ. Proc., § 231.7(e)(3) (2022)

[218] Elisabeth Semel et al., Whitewashiing The Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors (June 2020), Berkeley Law Death Penalty Clinic, https://www.law.berkeley.edu/wp-content/uploads/2020/06/Whitewashing-the-Jury-Box.pdf.

[219] *Id.*

then a peremptory challenge may be discriminatory. It is difficult, but important, for the attorneys to be provided with all the facts and information about these past experiences so that not only the attorneys themselves but also the judge, can make the most informed decisions and rulings. Ultimately, it must be the judge that decides this reason; however, this reason has two requisite parts. First, the court will need to decide what constitutes a close relationship. The most practical and workable definition may be whether the individual prospective juror perceives the relationship to be close. Second, the judge will need to rule whether that close relationship interferes with a prospective juror's ability to be fair and impartial. There is a duality to each of these clauses and it is the judge, through their observations, understanding of the facts, and experience, that must make the distinction between when these clauses work to eliminate discrimination and when the facts of the case warrant the use of peremptory challenges.

In addition to the clauses that are case-dependent, AB 3070 includes three conditions that would inhibit an attorney's ability to achieve a fair and impartial jury, unless the judge is granted great discretionary authority in deciding the justifications for the peremptory challenge. Juries protect against the deprivation of liberty and property and jurors must carry that obligation responsibly. At the most basic level, jurors should be attentive, should understand basic legal concepts, and maintain a certain level of respect for the court. However, AB 3070 undercuts these fundamental ideas to the degree that it provides protections that extend to detrimental conditions. These protections include "the prospective juror was inattentive, or staring or failing to make eye contact."[220] Demeanor is one of the most common reasons given for striking a juror, as the Berkeley Law study found that "prosecutors relied on demeanor as a reason for their peremptory

[220] Cal. Civ. Proc., § 231.7(g)(1)(A) (2022)

challenges in over 40% of the cases. 156 demeanor-based explanations were used to exclude jurors who exhibited a poor attitude, were sleeping, appeared confused, or failed to make eye contact with the prosecutor" and that "[o]f the 480 cases in which prosecutors struck Black jurors, they offered a demeanor-based reason in 37.5% (180 cases) of these cases."[221] In addition, the study also found that "prosecutors most often, in 41.1% (78) of these 190 cases, offered demeanor-based reasons for striking Latinx jurors."[222] At the most basic level, the foundation of a fair trial is an attentive jury. Without such protection, the mere presence of a jury means nothing in the pursuit of justice and safeguarding against tyranny. A willingly ignorant juror is just as great an actor for the miscarriage of justice as a juror seated due to the improper removal of another. When the accused's liberty is at stake, the highest of standards must be applied to all aspects of the trial, and the allowance of a juror who may be unable, for any reason, to not stay attentive compromises the integrity of the jury. Furthermore, another condition that is protected is if "the prospective juror exhibited either a lack of rapport or problematic attitude, body language, or demeanor."[223] Attorneys must be confident in the neutrality of the jury before they begin their case. If a juror shows a blatantly problematic attitude towards an attorney, it is well within that attorney's right to use a peremptory challenge. That attitude may develop due to the questions asked during jury selection. In that case, as long as the judge finds that the questions the attorney asked were reasonable and not seemingly in an attempt to bait a prospective juror into exhibiting a problematic attitude, then a peremptory challenge is

[221] Elisabeth Semel et al., Whitewashiing The Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors (June 2020), Berkeley Law Death Penalty Clinic, https://www.law.berkeley.edu/wp-content/uploads/2020/06/Whitewashing-the-Jury-Box.pdf.

[222] *Id.*

[223] Cal. Civ. Proc., § 231.7(g)(1)(B) (2022)

appropriate. It is the right of the accused, and the accused alone, to a fair and impartial jury. If their attorney alienates a prospective juror during jury selection, it is the right of the accused to some legal recourse to dismiss that prospective juror. However, all these qualities are highly subjective and it is within that subjectiveness that the evil of discrimination pervades. In addition, it is very difficult to quantify for the record what uncommunicative means or appears like, or what body language justifies the use of a peremptory challenge. Luckily, AB 3070 requires that the challenging attorney explain why they gave the reason, for example, demeanor. They would need to explain for the record why the prospective juror's demeanor not only is relevant to the case but also why it warrants a peremptory challenge. Lastly, the law provides a safeguard surrounding the answers a prospective juror gives, stating, "the prospective juror provided unintelligent or confused answers."[224] The issue, which is very similar to the issues of the previous two clauses, is the highly subjective nature of what constitutes an unintelligent answer. It does not specify at what point a prospective juror's confusion rises to the level of excusable. Even with these safeguards, it would be difficult for the record to accurately reflect the conditions of the court and prospective juror for any future appellate review. All these factors and shortcomings require the judge to be able to accurately read and observe the situation. Then, the judge would need to rule on the peremptory challenge. They are the ones in the courtroom observing and understanding the culmination of many factors that the present system does not provide an appellate court. Justice Thurgood Marshall addresses these issues in his concurring opinion in *Batson*, which reads "How is the court to treat a prosecutor's statement that he struck a juror because the juror had a son about the same age as defendant, see *People v. Hall*, 35 Cal.3d 161, 197 Cal.Rptr. 71, 672 P.2d 854 (1983), or seemed "uncommunicative," *King, supra,* at

[224] Cal. Civ. Proc., § 231.7(g)(1)(C) (2022)

498, or "never cracked a smile" and, therefore "did not possess the sensitivities necessary to realistically look at the issues and decide the facts in this case," *Hall, supra,* at 165, 197 Cal.Rptr. at 73, 672 P.2d, at 856?".[225] It must be the trial judge who, in their best judgment, summatively decides based on the facts of the case and the court proceedings. They are the ones in the courtroom, so they are the ones that are entrusted to decide questions about the law that arise during the trial. Naturally, their opinions can be appealed. Even for reasons considered presumptively invalid, the power should ultimately lie with the trial judge if the reason is sufficiently distant from the prospective juror's membership in a cognizant class. As to the intelligence clause directly, Justice Marshall addresses this very notion, writing that the "exclusion of blacks from a jury, solely because of race, can no more be justified by a belief that blacks are less likely than whites to consider fairly or sympathetically the State's case against a black defendant than it can be justified by the notion that blacks lack the "intelligence, experience, or moral integrity," *Neal, supra,* 103 U.S., at 397, to be entrusted with that role."[226] As stated previously, sometimes racism is disguised within words or phrases that on their surface level give the appearance of reasonableness. When understood deeper, it is revealed that these reasons are simply contemporary terms or implications for racism. They must be eliminated from the criminal justice system. When taken to the extreme, however, this excuse transforms into a vital safeguard against an unfair jury. Each prospective juror must be able to show cognitive awareness to understand the trial and any legal questions that subsequently arise. Although, such a screening comes dangerously close to the literacy tests that withheld the vital right to vote. A prospective juror's lack of understanding or inability to understand compromises the fairness of the trial. This is why the trial judge is so vitally important. Only they would be able to accurately assess whether a prospective juror's perceived

[225] Batson v. Kentucky 476 US 79 (1986) (Marshall, J. concurring)
[226] *Id.*

intelligence would compromise the integrity of the jury and even then the decision can be subject to review. These clauses are centered on the core functions and basic requirements of juries to ensure a fair and impartial trial. The only way these clauses solely protect against discrimination and not compromise the integrity of the jury is through the trial judge's ability and freedom to weigh whether the prospective juror is capable of serving or if a peremptory challenge is appropriate.

AB 3070's REMEDIES

After an objection, the law next details the procedure for successful objections and the remedial powers of the Court. It outlines five substantive remedies after a successful objection. First, the law states that the judge can "quash the jury venire and start jury selection anew. This remedy shall be provided if requested by the objecting party."[227] In sustaining the objection, the judge relinquishes discretionary power. Abstractly, there is nothing inherently wrong with starting jury selection over again, but practically, this remedy could easily be exploited to prolong the trial and could put an undue burden upon the jurors. Due to these reasons, it should be the judge with the requisite discretion to decide if an entirely new jury selection is necessary. They are the ones who would fully be able to understand the scope and potential impact of the improper dismissal of a prospective juror within the specific case. It is also the judge who must ensure that the right to a fair jury trial is respected and upheld. However, in criminal trials, such an obligation is one-sided. It is the accused who has the right to a fair jury trial, not the prosecution. This remedy is not applicable if the objection is against the defense. Applying this remedy against the accused in a criminal trial would deprive the accused of their jury. The prosecution does not have the right to a fair jury trial, yet may hypothetically request a

[227] Cal. Civ. Proc., § 231.7(h)(1)

new jury under this clause. Furthermore, the law states what the procedure is for an impaneled jury, stating that "[i]f the motion is granted after the jury has been impaneled, declare a mistrial and select a new jury if requested by the defendant."[228] This clause is understandable due to the practical nature of a trial. If discrimination is discovered after the entire jury has been impaneled and the trial has started, the only just remedy is declaring a mistrial. The accused has the right to a fair jury trial and it is impossible to simply replace one prospective juror after a trial has started and evidence has potentially been introduced. In this scenario, it is practical to leave the decision to the accused because it is their trial. It should be their right to decide if they think the jury is still impartial and fair or if they want a new jury. Again, such a clause within the context of a criminal case would not be a sufficient or a constitutional remedy, which is why this clause, in contrast to the clause above, names that it is the accused who has the right to request this, not necessarily the objecting party. The law continues by outlining the three most practical and effective actions the judge can take to remedy any discriminatory practices. First, the law states that the judge may "[s]eat the challenged juror."[229] Giving the judge the option to seat the prospective juror allows for the most practical and efficient remedy; however, this remedy is only viable if the attorney trying to use a peremptory challenge is given a platform to excuse the prospective juror for cause or finds some other grounds to strike them on. The law gives the judge the platform and power to seat the juror, making this one of the best potential remedies. Such a remedy does not require any appellate intervention or a costly and time-consuming new jury selection process. Moreover, the law states that the judge may "provide the objecting party additional challenges."[230] This remedy places a great deal of discretionary power on the judge, as it should. This allows the

[228] Cal. Civ. Proc., § 231.7(h) (2)
[229] Cal. Civ. Proc., § 231.7(h) (3)
[230] Cal. Civ. Proc., § 231.7(h) (4)

judge to give a proportional response tailored to the necessities of the specific case in front of them. Only the judge presiding over the case and understanding all the individual facts and factors can render a fair and impartial decision on not only the exact number of challenges to give, but which of the five remedies to apply. Finally, the law opens up for the last remedy, placing it entirely in the hands of the judge, stating judges could "provide another remedy as the court deems appropriate."[231] Though this clause provides the judge with wide discretionary powers, it is too vague. A key aspect of justice and a key goal of this law is that judges are restricted to a narrow, decisive role. There are very few discretionary grounds, yet a balance must be struck between giving no discretion to a judge and giving them complete unilateral discretion. With such a vague remedy, it becomes harder to apply a uniform and consistent standard of justice. Furthermore, the first four remedies with their more defined procedure should be exhausted before this one. After those have been considered, if the judge feels they are not applicable in the specific case, then they should be given the discretion to provide a case-specific remedy. However, such an action should only be taken with the rights of the accused, specifically their rights to a fair jury trial, being at the forefront of the judge's mind. AB 3070's remedies, which greatly expand the rights of the accused at the expense of judicial discretion, are vital safeguards against jury discrimination at the trial level, yet would be more effective in achieving a just and fair outcome if the judges presiding over the cases have greater discretion on which remedies are implemented and to what extent.

After the trial court, AB 3070 includes a safeguard against denied objections: appellate review. The law requires that appellate courts apply a *de novo* standard. It also restricts, rightfully so, the review to reasons given on record and forces the appellate courts

[231] Cal. Civ. Proc., § 231.7(h) (5)

to not speculate as to the reasons the peremptory challenge was exercised or why it was not exercised against a similar prospective juror.[232] Such a standard is required even if a comparative analysis argument was presented in court.[233] Due to the appellate court's reliance on the record for judicial decisions that may surround ambiguous reasons like body language or attitude, it is the obligation of the trial judges to do two important functions. First, the judge must require detailed responses to certain reasons. The reason recorded can not simply be a prospective juror's demeanor; the judge must ask the attorney precisely about their demeanor and the attorney must articulate their justification in a juror-specific manner. The record must reflect such precisions to allow the appellate courts to render a judicially sound judgment in the absence of being in the courtroom and being able to make observations with their own senses. Appellate review provides a safeguard that should allow for greater judicial discretion at the trial level. Due to the tedious nature of the appellate process, the most efficient and practical remedy for jury discrimination is at the trial court level; however, if a judge with wide discretionary powers mistakenly rules and deprives the accused of their right to a fair jury trial, then ultimately there is appellate protection. Though ideally this would provide a substantive safeguard, the nature of the appellate process dilutes its strength. A study found that "the California Supreme Court has consistently approved speculation by trial and appellate courts about reasons the prosecution could have (but did not) offer for its strikes in order to uphold the denial of a Batson objection."[234] Such a finding represents how the review process is flawed. Approving

[232] Cal. Civ. Proc., § 231.7(j)

[233] *Id.*

[234] Elisabeth Semel et al., *Whitewashing The Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors* (June 2020), Berkeley Law Death Penalty Clinic, https://www.law.berkeley.edu/wp-content/uploads/2020/06/Whitewashing-the-Jury-Box.pdf.

speculatory reasons for the dismissal of a prospective juror not only undermines the record but also distorts the conditions under which the peremptory challenge was used. Therefore, simply having appellate *de novo* review does not protect against judges allowing for speculation. Any review process must be limited to the record and the findings of the lower court, not new reasons given at the appellate level.

RECOMMENDATIONS

The question of who is permitted to serve on a jury is one that predates the US justice system, yet it is one that AB 3070 seeks to answer, not by defining who is allowed to serve, but rather by eliminating discrimination within the process. This noble pursuit has seen many suggestions, recommendations, and proposed remedies not only fail to stop discrimination but also force the pervasive evil to adapt and become more difficult to discern. Justice Thurgood Marshall addresses the question of remedy in his *Batson* concurrence, stating that "[s]ome authors have suggested that the courts should ban prosecutors' peremptories entirely, but should zealously guard the defendant's peremptory as "essential to the fairness of trial by jury," Lewis *v. United States,* 146 U.S. 370, 376, 13 S.Ct. 136, 138, 36 L.Ed. 1011 (1892), and "one of the most important of the rights secured to the accused."[235] This remedy would still guard the accused's right to a fair jury trial by retaining peremptory challenges. In California criminal trials, the prosecution and defense have an equal number of peremptory challenges. Death or life in prison are two possible punishments where both the defense and the State have twenty peremptory challenges. In cases where the punishment is less, each side is given ten.[236] To arbitrarily ban the use of peremptory challenges by the State would indeed decrease discrimination; however, studies have shown that the defense has also exercised their

[235] *Batson v. Kentucky* 476 US 79 (1986) (Marshall, J. concurring)
[236] Cal. Civ. Proc., §231(a) (2016)

peremptory challenges in a racially disproportionate manner. A study conducted in Mississippi focusing on data from 2,542 prospective jurors found that prospective white jurors were 4.21 times more likely to be peremptorily struck by the defense attorney as compared with prospective Black jurors.[237] That same study found prospective Black jurors were 4.51 times as likely to be peremptorily struck by the prosecutor than prospective white jurors.[238] Though such statistics of defense peremptory challenges do not constitute discrimination, it does show that the remedy for jury discrimination must also be applicable to the defense because the improper exclusion of a juror, by either attorney, infringes on the right of the prospective juror. Justice Marshall also dissuaded such a remedy, writing that "[o]ur criminal justice system "requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state, the scales are to be evenly held." *Hayes v. Missouri,* 120 U.S. 68, 70, 7 S.Ct. 350, 353, 30 L.Ed. 578 (1887). We can maintain that balance, not by permitting both prosecutor and defendant to engage in racial discrimination in jury selection, but by banning the use of peremptory challenges by prosecutors and by allowing the States to eliminate the defendant's peremptories as well."[239] Justice Marshall advocates for the complete elimination of the peremptory challenge; however, such a measure would lay a considerable burden on the defense's ability to achieve a fair jury trial in their own right. It would leave the accused at the mercy of the laws surrounding challenges for cause and would deny them legal recourse against jurors whose bias may not rise to the level of being dismissed for cause, but may nonetheless violate the integrity and fairness of the jury. Justice Marshall justifies his stance by examining the

[237] Whitney DeCamp and Elise DeCamp, *It's Still about Race: Peremptory Challenge Use on Black Prospective Jurors* (September 6, 2019), https://doi.org/10.1177/0022427819873934.

[238] *Id.*

[239] *Batson v. Kentucky* 476 US 79 (1986) (Marshall, J. concurring)

weight of peremptory challenges against the backdrop of constitutional rights, finding that " the right of peremptory challenge is not of constitutional magnitude, and may be withheld altogether without impairing the constitutional guarantee of an impartial jury and fair trial...If the prosecutor's peremptory challenge could be eliminated only at the cost of eliminating the defendant's challenge as well, I do not think that would be too great a price to pay."[240] The central issue surrounding peremptory challenges is their role in ensuring a fair and impartial jury trial, but also their role in subverting that goal. This dichotomy, as both a vital tool for defending the rights of the accused and simultaneously a potential tool for improper exclusion, is why finding a practical and effective remedy is elusive and has been for decades. If the remedy was obvious, it would have been implemented already, but the closest policy to a substantive remedy is laws like AB 3070. Even with such legislation, there is the possibility that discrimination will persist, as it does nationwide today.

AB 3070, for all its flaws, does provide important core tenets that must be preserved within the greater pursuit of eliminating discrimination within the jury process. However, the effectiveness of this law will ultimately be in the hands of the trial judges who are weighing the totality of the circumstances and rendering judicially sound rulings. As California Supreme Court Justice Stanley Mosk stated in his *Wheeler* decision, trial judges "are in a good position to make such determinations, however, on the basis of their knowledge of local conditions and of local prosecutors' ...They are also well situated to bring to bear on this question their powers of observation, their understanding of trial techniques, and their broad judicial experience. We are confident of their ability to distinguish a true case of group discrimination

[240] *Id.*

by peremptory challenges from a spurious claim interposed simply for purposes of harassment or delay."[241]

JUDICIAL DISCRETION AND APPELLATE REVIEW

Judges have the discretion to interpret AB 3070 broadly, not only so that it can be widely applicable, but also so that they can maintain the ability to rule on cases on an individual basis. These clauses cannot be strictly interpreted because there are times and circumstances when exercising a peremptory challenge truly is separate from a prospective juror's membership in a cognizant group. Luckily, the interpretation of the law is completely a judicial matter, meaning it will be judges who will have the opportunity to decide how and when each clause is applicable. From the cases that arise from specific clauses of AB 3070, the judiciary will be able to develop tests and loosely define terms like what demeanor or inattentiveness must be present for a peremptory challenge to be justifiable. AB 3070 forces the courts to confront these issues. Through this confrontation, much of the vagueness surrounding the law will be more clearly defined through common law, which in turn provides greater instructions and clarity to judges looking to accurately apply the law and accurately weigh the facts.

However, where the discretion of the judges must increase in terms of being able to rule effectively, the role of the judge must also decrease within the questioning portion of the jury selection process. A study found that "subjects changed their answers almost twice as much when questioned by a judge as they did when interviewed by an attorney. Essentially subjects were considerably more candid in disclosing their attitudes and beliefs about a large number of potentially important topics during an

[241] *The People v. Wheeler* 22 Cal. 3d 258

attorney-conducted voir dire. Importantly, in none of the cases were judges more effective than attorneys."[242] The study suggests that judge-dominated *voir dire* is less effective at revealing the biases and honest opinions of prospective jurors. The increased candidness of the prospective jurors through attorney-dominated *voir dire* means that their beliefs on topics pertinent to the case would be more articulated, which may translate into more strikes for cause. Any questioning of the prospective jurors should be done by the attorneys, with both being given a chance to question them. This includes questions that would lead to strikes for cause, though the judge would still ultimately rule on any strikes for cause. Taking the obligations of questioning out of the judge's hands, allows them to completely focus on the demeanors, attitudes, and attentiveness of the prospective jurors in case a challenge is brought on those grounds. Before this can be implemented, however, both attorneys would need to go through anti-bias training, along with the judge, that solely focuses on implicit and institutional biases within the jury selection process. This can take the form of once-a-year training that all district attorney offices and public defender offices must do, with a brief reminder presentation administered by the judge to the attorneys right before the jury selection process begins. Obviously, any such presentation would be done in the absence of the jury pool. Furthermore, the judiciary should create a sanctioned training document that can be used by both district attorneys and public defenders to educate new attorneys about objections to peremptory challenges and the subsequent procedure. The offices would be required to rely solely on this resource and would not be allowed to create their own. If a district attorney's office chooses to create additional resources for training, the resources are subject to be admissible as evidence of discrimination at the appellate stage. The document created by the judiciary would be inadmissible to prove discrimination.

[242] Susan Jones, *Judge- Verses Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor*, (1987),

Once an objection arises to a peremptory challenge, the judge should limit the number of reasons that can be given as justification to a maximum of three. In oral arguments for *Foster*, Justice Kennedy asked the question, "if the prosecutor argues a laundry list of reasons for striking the black juror and some of those are reasonable and some are implausible, how should the Court approach the Batson analysis?".[243] [244] Limiting the reasons given, though not down to a single reason, protects against such long lists and limits the possibility that any of the reasons are implausible as supposedly the limitation would force the attorney to solely provide the reasons they feel are grounded in the best evidence. Limiting the number of reasons given essentially eliminates the possibility of superfluous reasons being added. After those reasons are stated, if the judge does not find them sufficient, then the attorney should have the opportunity to further question the juror. However, any subsequent reasons given should meet increased scrutiny from the judge.

Once the objection is sustained, the judge must have greater discretion into which remedy is appropriate because not every remedy is always applicable. The judge must render a decision that not only remedies the misconduct but also protects the right of the defendant to a fair and impartial jury trial. Though this is not an issue in civil trials, in criminal trials the defendant has the unilateral right to a fair jury trial. The prosecution has no such right. Furthermore, certain remedies would unfairly punish the defendant for the actions of their attorney. If the defense is found to have improperly removed certain jurors based on their membership in a cognizant group, that gives the defendant just as much grounds to motion for ineffective assistance of counsel as it would be for the prosecution to move for a whole new jury

[243] *Foster v. Chatman* 578 US __ (2016)
[244] Transcript of Oral Argument at 24, *Foster v. Chatman*, 578 US __ (2016) (No. 14-8349)

selection. Misconduct by the defense attorney in regard to jury selection is just as much an infringement upon a defendant's constitutional rights as if the misconduct was done by the prosecutor. A judge must be conscious of these factors when dealing with misconduct by the defense. The judge must also understand that remedies provided to the prosecution in the face of defense misconduct must be limited in scope. The prosecution should not have the right to request a whole new jury selection. Additionally, the prosecution should not be granted the right to more peremptory challenges simply because that would tip the scales of an impartial jury too far in their favor and, again, the prosecution does not have the right to an impartial jury. The best practical remedy for defense misconduct should be to sit the challenged juror; however, the defense should first be given a limited chance to question the prospective juror in case there are other grounds that would warrant a peremptory challenge.

Though a remedy at the trial level would be the most efficient and practical, an appellate review is a necessary safeguard. However, it is ineffective if such appeals are curtailed due to procedural mistakes. The remedy, as the Equal Justice Initiative states that "to protect the credibility and integrity of criminal trials, claims of illegal racial discrimination in the selection of juries should be reviewed by courts on the merits and exempted from procedural bars or technical defaults that shield and insulate from remedy racially biased conduct."[245] The goal of this review process would be to ensure that discrimination is not present within jury selection. Though adherence to procedure is a bedrock of the review process, the elimination of discrimination and the preservation of constitutional rights supersedes that importance. This policy would not disregard procedure or faults

[245] Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy* (August 2010), https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf.

entirely, it simply finds that such requirements should not impede a just remedial outcome. The drawback is that attorneys and judges alike would still need to strive to satisfy procedure and avoid procedural issues, this policy would protect accidental or inadvertent mistakes that are superfluous. However, even with this standard, data suggests that if *Batson* relief is not given at the trial level, it is very difficult to have it overturned at the appellate levels. A Berkeley Law study found that "in our examination of California state cases between 1993 and 2019, which were later reviewed by the Ninth Circuit Court of Appeals in habeas corpus proceedings, the Ninth Circuit granted Batson relief 15% of the time—almost six times more often than the California Courts of Appeal and over seven times more frequently than the California Supreme Court."[246] It is this disparity that leads to the importance of the trial judge and the drawback of heavily relying upon appellate review, even at the *de novo* standard. This disparity is due to appellate courts largely deferring to the initial decision of the trial court, which Justice Powell addressed in his *Batson* decision, stating that "[s]ince the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference."[247] Such a standard, even when applying *de novo* review, dilutes the power of the appellate process. Though the trial judge is best suited to rule on objections against peremptory challenges, it is vitally important that if such objections are denied that the appellate court examines that decision with heightened scrutiny. It should not simply defer to a decision; rather it must decide if it concurs. Yet appellate judges, as the evidence suggests, strictly adhere to deference. Such

[246] Elisabeth Semel et al., *Whitewashing The Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors* (June 2020), Berkeley Law Death Penalty Clinic, https://www.law.berkeley.edu/wp-content/uploads/2020/06/Whitewashing-the-Jury-Box.pdf.

[247] *Batson v. Kentucky* 476 US 79 (1986)

adherence, though necessary in certain settings and cases, may also serve to defer to injustice. That is why any potential remedy can not rely on an appellate review. In *Foster's* oral arguments, Justice Kagan blatantly asked "isn't this as clear a Batson violation as a court is ever going to see?".[248] Though it appeared to be clear to her, the fact of the matter is that the case still required the Supreme Court to hear the case and render a decision. No appellate court seemed to agree that it was a clear *Batson* violation. Appellate review is only reliable in the most extreme of circumstances, like *Foster*.[249] Outside of that, the best remedies lie within the discretion of the trial judge.

CHANGING *VOIR DIRE* PROCEDURE

For as important as the judge is and how important it is that they have the requisite discretionary power to minimize discrimination in the jury selection process, the late Justice Sandra Day O'Connor said it best when she wrote that the fact that "..the Constitution does not give…judges the reach to wipe all marks of racism from every courtroom in the land is frustrating, to be sure."[250] Due to that legal limitation and the practical limitation that judges are just as much burdened with implicit biases as attorneys, the elimination of discrimination can not simply revolve around the role or power of the judge. It must involve concrete changes to the procedure of jury selection as a whole. AB 3070 does change the procedure for objections to peremptory challenges, but there are other methods that, when applied, curtail the rampancy of implicit bias within the procedure. First, before jury selection even starts, the judge must administer a presentation to the jury pool about implicit and institutional biases, specifically within jury selection and

[248] Transcript of Oral Argument at 39, *Foster v. Chatman*, 578 US __ (2016) (No. 14-8349)

[249] *Foster v. Chatman* 578 US __ (2016)

[250] *Georgia v. McCollum* 505 U.S. 42 (1992) (O'Connor, J. dissenting)

deliberation. The focus is on making them aware of their biases and explaining the importance of acknowledging them as an essential component of achieving a fair and impartial jury. After such a presentation, the prospective jurors should be required to fill out a detailed questionnaire with questions directly correlating to portions of AB 3070's clauses. For example, there should be extensive questions about someone's views of the police or law enforcement. The reason for such a questionnaire is that it provides both the Court and the attorneys with greater and more precise details on what the prospective juror believes. It allows the attorneys to ask them more specific questions in the *voir dire* process because they have more information about what exactly their beliefs are. Greater information means greater transparency and the greater the transparency, the easier it is to root out biased and prejudiced jurors. Importantly, answers given on the questionnaire cannot be grounds for a peremptory strike alone; the attorney will still need to question the prospective juror before moving to strike them.

PUBLIC TRANSPARENCY

To achieve this transparency, county clerks will be tasked with the creation and maintenance of a database that tracks the use of peremptory challenges in their respective jurisdictions by district attorneys and public defenders. The database would separate between the local district attorney's office and the local public defender's office, keeping statistics on both. This database will be open to the public and accessible to the legislature. The information must be easily accessible without necessitating the completion of a Freedom of Information Act request or any undue burden. The database will consist of a prospective juror's membership in the cognizant group; however, it will not include any personal information for privacy concerns. In circumstances where the case record may be sealed, the facts of the case and precise circumstances will remain sealed, it will only provide the

necessary information about the individual juror. This data may be entered into evidence at trial within the jurisdiction it was collected to show discrimination on a wider basis. Importantly, the database will also include the reason given by the prosecution or defense to dismiss the juror, if a *Batson-Wheeler* claim (Or an AB 3070 objection) was exercised, and the success rate of those challenges. The database, though not substantively fixing the issue of discrimination, forces California to shine a spotlight on its use. The greater the transparency this database provides, the more accountability there is for those exercising peremptory challenges. It forces attorneys to check their bias at the bar, both conscious and institutional. The knowledge of transparency alone is a powerful mitigating factor that would passively decrease discrimination. This transparency not only allows for tailored remedies within the local county but also provides the state legislature with data that can be studied from all across California, meaning that any future laws surrounding peremptory challenges can have the foundation of statistics this database would provide. Such a record also allows California to measure the effectiveness of specific remedies and track trends over time. The database alone does not directly stop discrimination, but it does serve as a deterrence and as a foundation of data on which to base remedies.

Not only will such a database increase public transparency, but it will also provide the judiciary with reliable and credible statistical information that attorneys can enter as evidence. The practice of introducing statistics to prove jury discrimination is common, however, obtaining that data can be tedious. In *Wheeler*, attorneys had to individually track down jurors and have them sign a document attesting to their race.[251] That method leads to many different methods of proving membership in a cognizant group, instead of one uniform place where that information has

[251] *The People v. Wheeler* 22 Cal. 3d 258

already been collected. In addition, once data is collected, there is the possibility that its credibility is questioned. In *Duren v. Missouri*, attorneys for Billy Duren relied on statistics proving gender discrimination in how women were not proportionally summoned to jury service.[252] In rejecting his appeal, the Missouri Supreme Court questioned the validity of his statistics. Attorneys in *Taylor v. Louisiana* introduced similar statistical evidence to prove gender discrimination.[253] Additionally, in *Swain*, attorneys relied upon statistical evidence, comparing the proportion of Black people in the general population with the proportion who sat on juries.[254] This database would ensure that the data introduced is not only uniform but credible. The use of statistics, though not immediate indicators of discrimination, allows judges to render more informed decisions. This database would provide that solid foundation. In addition, in both *Swain* and *Duren*, the respective attorneys relied on data from the general population. In those instances, the judicial branch should defer to the latest governmental population report.[255] [256]

GREATER ACCOUNTABILITY

For decades legal scholars have discussed, debated, and published about how to root out all forms of discrimination in jury selection. Most of the recommendations, specifically those outlined here, have focused on the justice system and court procedure. However, there is another aspect of jury discrimination that is not as commonly addressed. Currently, there is no substantive system in place to reliably hold individual attorneys or offices accountable for possibly discriminatory practices. Fortunately, the Equal Justice Initiative addressed this

[252] *Duren v. Missouri* 439 US 357 (1979)
[253] *Taylor v. Louisiana* 419 US 522 (1975)
[254] *Swain v. Alabama* 380 US 202 (1965)
[255] *Swain v. Alabama* 380 US 202 (1965)
[256] *Duren v. Missouri* 439 US 357 (1979)

issue head-on in a 2010 report, which states that "prosecutors who are found to have engaged in racially biased jury selection should be held accountable and should be disqualified from participation in the retrial of any person wrongly convicted as a result of discriminatory jury selection. Prosecutors who repeatedly exclude people of color from jury service should be subject to fines, penalties, suspension, and other consequences to deter this practice."[257] Though the report focuses on prosecutors, the idea is easily applicable to public defenders too, and it introduces a necessary component of any remedy: to discriminate is to not only deprive the accused of their right to a fair and impartial jury trial but also infringes upon the right of a prospective juror to civic participation. Such deprivations should lead to some deterrent, both office-wide if it appears to be policy or individualized if it is the same prosecutor repeatedly. In addition, once a pattern of discrimination is proven in a case, it becomes impossible for the accused to have a fair trial with the same prosecutor. It immediately taints the jury selection after a credible claim of discrimination has been made in that specific case. The creation and maintenance of a database like the one outlined would make identifying patterns with individual attorneys glaringly obvious. By having the data on their exact numerical actions, holding them accountable becomes easier.

Furthermore, the EJI report states that "the Justice Department and federal prosecutors should enforce 18 U.S.C. § 243, which prohibits racial discrimination in jury selection, by pursuing actions against district attorney's offices with a history of racially

[257] Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy* (August 2010), https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf.

biased selection practices."[258] Having the federal government intervene in local jurisdictions would be a nationwide effort; however, the California attorney general's office could perform a similar function on the state level. The office would monitor the district attorney's offices and the Legislature, with advice and consultation of both the Judiciary and Attorney General should create strict guidelines that explain when a district attorney's office requires intervention and what precisely that intervention would look like. These guidelines would need to be clear and precise as to what behavior would elicit such oversight. The guidelines would also require substantive remedial steps the office would need to take, like additional implicit bias training and additional thresholds to meet when attempting to exercise peremptory challenges. In this process having neutral statistics to reference and use as a foundation for any guidelines is vitally important for uniform enforcement of anti-discrimination policies. These additional requirements would not be punitive, but rather, would be a necessary safeguard against discrimination. These steps would not be an indictment on the character of the individual prosecutors; it would simply be a necessary procedure to protect constitutional rights.

In addition to these measures, the EJI also states that California "should provide remedies to people called for jury service who are illegally excluded on the basis of race, particularly jurors who are wrongly denigrated by state officials. States should implement strategies to disincentivize discriminatory conduct by state prosecutors and judges, who should enforce rather than violate anti-discrimination laws."[259] This echoes the point that discrimination within jury selection also harms the prospective

[258] Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy* (August 2010), https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf.

[259] *Id.*

juror who was improperly dismissed. In *Edmonson*, Justice Kennedy stated that, "race-based exclusion violates the equal protection rights of the challenged jurors."[260] Essentially, this is a rule without a remedy. The EJI seeks to provide a specific remedy for those jurors whose rights are violated. One possible remedy is an injunction against the district attorney's office, something the NAACP attempted in 2019. The NAACP filed a class action lawsuit in 2019 against Mississippi District Attorney Doug Evans alleging he committed racial discrimination in selecting juries.[261] They sought a court injunction that would require ongoing oversight of the office.[262] The Fifth Circuit Court ultimately dismissed the lawsuit, finding that the NAACP did not have the standing to bring it as they have not been discriminated against by Evans.[263] The Court also found it unreasonable to assume they would be discriminated against in the future and that eligibility for jury service is not standing enough to bring the lawsuit.[264] If a prospective juror is dismissed in a discriminatory manner, that infringes on their rights as citizens by the state. California would essentially be depriving them of their right to jury duty without due process. There must be a remedy for such deprivation. Importantly, no one has the right to sit on a specific jury; however, they have the right to a fair and impartial selection process. That is the due process that is necessary to dismiss them.

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[260] *Edmonson v. Leesville Concrete Co.* 500 US 614 (1991)

[261] Parker Yesko, *Doug Evans sued for using race in jury selection* (November 18, 2019), https://www.apmreports.org/story/2019/11/18/doug-evans-sued-for-using-race-in-jury-selection-naacp.

[262] *Id.*

[263] Taylor Vance, *NAACP branch loses lawsuit challenging Doug Evans jury selection process in Mississippi* (June 16, 2022), https://www.djournal.com/news/state-news/naacp-branch-loses-lawsuit-challenging-doug-evans-jury-selection-process-in-mississippi/article_6d5a0a07-9af8-5139-8047-26b0441db411.html.

[264] *Id.*

CONCLUSION

AB 3070 is a valiant effort to finally eliminate discrimination of all forms in jury selection. When the right to a fair and impartial jury selection is achieved, the justice system becomes more just and equitable for all people. Democracy, in order to maintain it, requires constant adjustments and this is another step in that process. This is a grand experiment and it is the obligation of every American citizen not simply to take jury service seriously, but also to work toward a society where everyone has access to the jury box. As long as discrimination persists in any form within the justice system, injustice lives. It lives as a constant threat to the very principles the justice system was founded on: equal justice, rule of law, and the rights of the accused. Discrimination in jury selection erodes these principles until they are almost meaningless. There can be no equal justice if a group of people is systematically excluded from civic engagement. There can be no rule of law if the law is manipulated to oppress. Most importantly, there can be no rights for the accused if the justice system does not have the required foundation to vehemently defend and protect these rights. The importance of jury selection, and criminal proceedings in general, is that it is reflective of the moral stature of the society. The manner in which a person is accused, tried, and convicted matters because it is the only distinction between a system that is punitive and a system of justice. When that selection process is discriminatory, it crosses that line from just to punitive. AB 3070 is another example of attempting to stop such a crossing. However, AB 3070 is not the final solution. Discrimination persists as it always has, but that does not necessarily mean that discrimination will always persist. This is progress, one step in a seemingly endless ladder. Importantly, any and all attempts to eliminate discrimination should never be above scrutiny. Remedies must withstand the impassioned discussion and debate that any legislation or action that subverts the status quo must be held to.

It is through that fire and dialogue that remedies are forged, evolve, and finally become effective tools against the discrimination of today. Not only must AB 3070 not be above criticism, its changes must also not lead to complacency. Discrimination in jury selection has survived the Supreme Court, federal law, and the test of time, and due to such persistence, all people within the justice system and the California Legislature must remain vigilant in examining how discrimination evolves in response to this law. It is only through these necessities – constant dialogue about remedies and steadfast vigilance – that discrimination in jury selection will inevitably and finally be eliminated. Until that day, it is the solemn obligation of all those in the legal profession to be receptive to changing the system so that it works for all people equally. Justice depends on it. Human lives depend on it.

JURIS MENTEM

Long Awaited Changes: The Evolution of Borrower Protections

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LONG-AWAITED CHANGES: THE EVOLUTION OF BORROWER PROTECTIONS

BY EMMA CELAJ

ABSTRACT

The current state of borrower protections has both undergone major reform and is continuously in need of reform. Without necessary changes being made, low income and disadvantaged groups will continue to suffer and a similar crash to 2008 is inevitable. Although much progress has been made since then, there are still barriers to home ownership and predatory practices continue to lurk beneath the surface of the mortgage industry. This article pulls from existing statutes, such as the Dodd-Frank Act, to show improvements since the 2008 recession but also to illuminate ways that additional changes could be made. This paper calls for legislative action in providing stricter guidelines for mortgage lenders, such as in compensation, in order to avoid the temptation to advise borrowers towards unwise products and programs. It also calls for efforts to create federal programs intended to support low-income and disadvantaged borrowers and communities.

INTRODUCTION

Around 65% of the United States population are homeowners, many of which have to go through the often tedious and confusing process of obtaining a mortgage loan. In order to get a mortgage loan, borrowers must obtain pre-approvals, sign numerous sets of disclosures, and, depending on the loan program, take homeowner education classes in which they learn the basic finances of home owning, including making on-time mortgage payments, the benefits of paying down the mortgage, and how to maintain good credit.

These developments in the process are largely new, however, since before the 2008 housing crisis and recession, there were few regulations and processes to protect borrowers. In fact, the 2008 recession was caused, in part, by the predatory lending practices exhibited by lots of banks and mortgage lenders. Some examples of this include lending to those with low credit scores who have showed histories of late payments or defaults, pre-approving for amounts that were out of borrowers realistic affordable range, and recommending loan programs that were intentionally set up for the benefit of the mortgage loan officer and lender and not for the best interest of of the borrower.

The negative consequences of these choices made by lenders resulted in the economic nightmare that was the 2008 recession. Regulations that have since been born of that disaster, one of the most important being the legislation. The Dodd-Frank Act, arguably the single most important piece of legislation to come from the recession, created regulations within the industry and ways to enforce them, such as the Consumer Financial Protection Bureau (CFPB). This legislation has changed the requirements of lending and has made it safer, although harder, for borrowers to obtain mortgages. While the new regulations are indeed better for the economy in preventing another housing crisis and

recession as well as beneficial for borrowers on an individual level in protecting their credit, it's also made it more difficult for people to obtain mortgages easily. This seems to be a necessary evil in protecting borrowers and the economy in the long run.

Ultimately, this paper will analyze the changes made in the home-loan process and how that has or was intended to benefit borrowers and the economy, while also acknowledging that there is still a long way to go in order to make obtaining a mortgage more accessible and equitable, as we continue to see lowered home ownership rates among marginalized communities. It seeks to uncover the how and why we see these lowered rates and what could possibly be done to boost them.

PRE-2008 HOUSING CRISIS AND RECESSION

Before the recession, there were laws in existence that aimed to protect borrowers and make the home loan process more documented and those who work in the industry more accountable. Examples of these laws include the Real Estate Settlement Procedures Act (RESPA) and Truth In Lending Act (TILA). RESPA was signed into law in 1974 and TILA in 1968 as part of the Consumer Credit Protection Act. RESPA, for example, was intended to deal with the effects of Affiliated Business Arrangements, outlawing things such as kickbacks in order to make referrals from realtors more genuine and not self-serving. It ultimately aimed to protect borrowers from predatory referrals that would not benefit them.

As Robert Jaworski notes in his article on the development of RESPA through the years, it is often a long process full of stalemates when changes are to be made to these laws. Specifically he mentions a provision for AfBAs in a 1997 Proposal, saying "As those efforts dragged on throughout 1998,

the 1997 Proposal languished, leaving the law regarding AfBAs virtually unchanged from the 1992 rule."[265] While the 1992 rule was much broader when it came to the question of AfBAs, and therefore arguably safer for borrowers, this nonetheless shows the lengthy and long processes that the laws needed to go through in order to be amended and updated. While one might argue that this is the case for all laws, Jaworski's article shows just how often RESPA needed revision and how there were some instances in which revision was successful and many others, such as this instance, in which it took too long. He doesn't address the ways in which this might have contributed to the recession as the article was published in 1999, but it is now possible to see the ways in which the delays made by Congress members and the inability of HUD (Housing and Urban Development) to enforce these changes had violent financial impacts.

TILA is another law that was enacted before 2008, but did little to mitigate predatory lending practices. It aimed to promote transparency in credit costs and lender fees so that borrowers could compare different lenders and loan options fairly. Despite this intention, there were still many other aspects of the process that were unregulated and made lying, on part of the lender, easy and beneficial for their pockets. If a borrower knows little about the process and what fair fees and credit costs are, there is no real impact of lenders disclosing credit costs because there is not enough information and guidance for borrowers to know what is best for them. So while TILA existed for the benefit of borrowers, its impact was minimal due to confounding factors that might have been included or amended into the act to make it more meaningful and effective.

In the Dodd-Frank Act, there is an effort to amend laws like TILA extensively so that they actually become effective. In

[265] Robert Jaworksi, *RESPA: 1998: The Long and Winding Road*, 54 ABA. 1357, 1359 (1999).

section 1403, another subsection is added to section 129B of TILA saying, "For any residential mortgage loan, no mortgage originator shall receive from any person and no person shall pay to a mortgage originator, directly or indirectly, compensation that varies based on the terms of the loan (other than the amount of the principal)."[266] This is evidence not only of the progress that was made with Dodd-Frank but the proof that the progression was grossly needed and that these laws, like TILA and RESPA, were sorely ineffective. It was proof that change was desperately needed. This added section, one of many, merely suggests that mortgage loan originators are not supposed to make more money for increasing something like the interest rate. It is a provision to protect borrowers from predatory lending, and one that might have been assumed to exist. It did not, however, further showing the danger and inadequacy of the laws that existed prior to the 2008 housing crisis.

The existence of these laws was also largely nullified by the lack of enforcement power. The Dodd-Frank Act, created after the recession in 2010, created the first enforcement of these acts through the CFPB. So while the intention to protect borrowers and create transparency in the housing and lending industry may have been there, it was clearly ineffective, ultimately leading to the 2008 recession.

An important point to note here is that the blame falls entirely on a poorly structured system and even partially on those within the industry. Those with knowledge, access to resources regarding things like laws, programs, and rates, are the ones who have the responsibility to protect their clients and make informed decisions and recommendations regarding their qualifications to obtain a mortgage loan. A popular conservative argument against expanding programs to include marginalized groups who often

[266] Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 2139 (2010)

have higher rates of poor credit, less income, or lower cash values in the bank is to say that the 2008 recession was due to lenders lending to these groups due to pressure from the government.[267]

Michael Comiskey and Pawan Madhogarhia address this argument in their article on reasons behind the 2008 housing crisis. They note how this explanation fails to take into account that if the Community Reinvestment Act of 1977, an act geared towards expanding homeownership in marginalized communities, were to blame, then we would have seen the inflated home prices and defaults only or mainly in America. They also touch on how although people largely blame the Clinton Administration, "Under Bush, however, "the subprime mortgage market experienced explosive growth from 2003 to 2006": the subprime share of the market rose from 8% to 20% and the securitized share from 54% to 75% in those years (Demyanyk and Van Hemert 2008, 31-32)." [268]

Aside from the points that Comisky and Madhogarhia make, the argument blaming policies like CRA also ignores the fact that there was very poor transparency within the industry, predatory practices including, but not limited to, lenders suggesting worse or dangerous programs for borrowers in order to make more money for themselves, and qualifying borrowers for amounts they were unqualified for in order to make more in commission off of a higher purchase price. It is important to remember the roles that individuals played in causing the recession as well as that of the faults of the system as a whole. Blaming policies aiming to expand homeownership among marginalized groups ignores the aspect of improper regulation, which was rampant before the recession.

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[267] Michael Comiskey and Pawan Madhogarhia, *Unraveling the Financial Crisis of 2008*, 42 APSA. 271, 273 (2009)
[268] *Id.*

The Center for Responsible Lending published an issue paper in 2007, right before the crash, outlining concerns with Subprime Lending. An important part to note in the piece is its mention of loss of homeownership for African Americans and Latinos, saying "Both populations also experienced a net loss of homeownership due to these loans"[269]. If the liberal policies were working and were therefore to blame, there likely would not have been the loss in homeownership due to subprime lending that we see. The report calls for action, saying that "states that have passed stronger laws in recent years have reduced targeted practices without reducing access to home loans"[270]. There are ways in which we can expand access to homeownership without discrimination. Regulation is a key factor in achieving this.

POST-2008 HOUSING CRISIS AND RECESSION: WHAT HAS CHANGED?

The 2008 Housing Crisis was brutal on homeowners and the economy alike, and as addressed it was largely the fault of predatory lending practices and unstable subprime loan products and lending system. As a result of this crash, the Dodd-Frank Act was passed in July of 2010 to remedy the system and its effects. The act is broad and encompasses many important parts of the home-loan process, complete with many new regulations that have since attempted to further stabilize the system. Both RESPA and TILA are included, for example, and have been amended through the act to be more efficient and effective, as mentioned previously with section 1403.

Jonathan W. Cannon's article explanation of the TILA-RESPA Integration Disclosures, an update to TILA and RESPA, he

[269] Center for Responsible Lending, *CRL Fact Sheet J&P*, March 2007, https://www.responsiblelending.org/mortgage-lending/research-analysis/Net-Drain-in-Home-Ownership.pdf

[270] *Id.*

explains how the TILA and RESPA mortgage disclosures used to be sent out separately by HUD. After Dodd-Frank, the CFPB was given authority over the disclosures and was to combine them for ease and accessibility for consumers[271]. In section 1032 under Subtitle C in the Dodd-Frank Act, it is required that the disclosures, "uses plain language comprehensible to consumers"[272]. Reforms like these made to existing laws are just some examples of the important changes made when redefining and clarifying expectations in the industry. Even so much as clarifying in law that the language used in disclosures should be clear and comprehensible to borrowers is a clear effort to put the borrowers first. It acknowledges them as a vulnerable group, as we saw in the 2008 crisis, in need of legal protection when it comes to finances.

In Title X of the Dodd-Frank Act, the Consumer Financial Protection Bureau is created. While the act included many other important changes, such as those discussed above, this is perhaps one of the most influential. The CFPB is in charge of enforcing the new regulations outlined in Dodd-Frank; their powers generally described as, "seek[ing] to implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive."[273]. To achieve this, they can file an action in federal district court or initiate adjudication proceedings[274]. Without the CFPB, the new regulations brought

[271] Jonathan W. Cannon, Christine Acree and Brandy Hood, *TILA-RESPA Integrated Disclosures*, 71 THE BUSINESS LAWYER, 639-645 (2016)

[272] Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 2007 (2010)

[273] Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1980 (2010)

[274] *Consumer Financial Protection Bureau Enforcement Actions*, https://www.consumerfinance.gov/enforcement/actions/

up through Dodd-Frank would be potentially meaningless as there would be less accountability in the industry. Mortgage lenders are now more wary of keeping in line with laws and regulations because they know they can be punished, suspended, or imprisoned based on the crime.

One of the most significant cases in which we see this is the Seila Law v. CFPB case. The case exists because the CFPB was investigating Seila Law, a debt-relief assistance firm, and had asked for documentation and compliance with investigation interrogations. When Seila Law refused to comply, the CFPB took them to court. The district court ruled that they should comply and Seila Law appealed, claiming that this was unconstitutional under the basis that the CFPB is run by one director, which violates the separation of powers.

The Supreme Court ultimately decided in Seila Law's favor with a 5-4 vote. This close vote makes clear the gray area which the case was founded on, and perhaps Seila Law's attempt to escape the investigation brought upon them. Justice Kagan makes a point in her dissent about the validity of the argument, saying, "If signing statements and veto threats made independent agencies unconstitutional, quite a few wouldn't pass muster." [275]**.** Although the Supreme Court ultimately decided the case in Seila Law's favor, it illuminates not only the ways in which the CFPB is investigating breaches of Dodd-Frank and consumer protections but also perhaps a reflection of political reactions to the new regulations.

The end goal of all of these regulations is to support and protect both borrowers and the economy. While it seems that the economy and the housing market is in better shape than what it was in 2008 and the years leading up to it, there are still questions

[275] Seila Law LLC v. Consumer Financial Protection Bureau, 591 U.S. 31 (2020)

surrounding what it has done for borrowers, particularly those that suffered most: marginalized groups. Lower income individuals were hit hard by the recession, and many regulations in Dodd-Frank exist to protect them from experiencing the housing crisis again.

Unfortunately, the new regulations make it more difficult for low-income individuals to get approved for mortgage loans. This is because their debt-to-income ratios tend to be too high to get approved due factors like having more student loans or a low credit score. The National Association of Realtors's report on homeownership rates found that, "According to NAR's Profile of Home Buyers and Sellers report, 7% of Black and Hispanic home buyers were denied mortgages, compared with about 4% of White and 3% of Asian applicants. While the main reason the mortgage lender rejected their application is the debt-to-income ratio, Black and Hispanic home buyers reported that they also had a low credit score"[276]. This shows that although there have been good results of the Dodd-Frank Act and new regulations since 2010 in terms of protecting borrowers from predatory lending and the possibility of foreclosing on their homes, it also makes it more difficult for marginalized groups to get approved for mortgages because factors like low-income play a large role in deciding that.

The Dodd-Frank Act was a positive and strong first step in achieving a more stable and equitable system of mortgage lending. Despite that, there needs to be more reforms, regulations, and calls for action when it comes to expanding access for minority and marginalized communities in home ownership. Subprime lending is not the solution, but creating

[276] Lawrence Yun, Jessica Lautz, Nadia Evangelou, Brandi Snowden, Meredith Dunn, *Racial Disparities in the Mortgage Market*, 2022, https://cdn.nar.realtor/sites/default/files/documents/2022-snapshot-of-race-and-home-buying-in-the-us-04-26-2022.pdf

loan programs with the intention of supporting disadvantaged communities will be.

THE NEED FOR SOLUTIONS: NEW EFFORTS AND WHAT CAN BE DONE

The need for thoughtfully structured loan programs intended to help marginalized communities is necessary now more than ever. Since the passage of Dodd-Frank, there has been less of an incentive to keep progressing in the area of making mortgage loans more accessible in a safe way. While Dodd-Frank did have a strong positive impact in making lending practices safer for borrowers, it did not address the need for programs catered to those with lower credit, lower incomes, or less access overall.

This is not to say that there haven't been advancements on a smaller scale. At state levels, there have been programs created for just this reason. An example of this would be two Pennsylvania based loan programs, PHFA and Philly First. These programs exist to support lower income individuals and first time homebuyers. They offer closing cost assistance programs, make home-owner classes mandatory, and offer competitive and lowered rates. This allows lower income individuals to obtain mortgages that are safer and accessible to them as they can choose to finance closing costs into the life of the loan, making it possible to obtain the loan without worries of covering excessive fees. The lowered rates offered make it easier for these individuals to get approved as the monthly mortgage payments would be lower for them through this loan program as compared to a conventional 30-year fix or even an FHA loan.

Programs like these reveal the ways in which it is possible to create opportunities for people with low incomes or low credit scores to safely and reliably obtain a mortgage loan and become homeowners. Ideally, these programs will help marginalized and

minority communities and raise homeownership rates among these communities. If similar programs could be adopted federally or made more available to borrowers through banks, it would have an unprecedented impact on homeownership rates for those that have systematically discriminated against for decades. Ultimately, it is proof that it is possible to balance borrower protections and increase accessibility.

CONCLUSION

Regulations and laws have come a long way since the pre-2008 Housing Crisis. Dodd-Frank is an important vehicle for change, but there is more to be done yet. While we can acknowledge that Dodd-Frank made the lending industry a safer place for consumers, we must still admit that there has not been a significant increase in homeownership among minority communities or those previously discriminated against within the housing industry. In fact, there has been a lowered rate of home ownership for Black and Hispanic families. To create an industry that is truly equitable, there must be reforms in programs to become more accessible and overall systemic changes that must take place. Local and state programs, like PHFA and Philly First Home Loans, are good models for federal housing to follow in order to create more opportunities for all.

JURIS MENTEM

Ranked Choice Voting: Perot, Palin, and Progress

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RANKED CHOICE VOTING: PEROT, PALIN AND PROGRESS

BY NOAH GOCIAL

Ranked Choice Voting is a new and unique way of conducting elections. In the contemporary United States, almost every election is based on a plurality voting system. Such an electoral system is bound under a simple premise: you win the election if you get the most votes.[277] This system has, historically , made elections beholden to either two major parties. The most widely known deviation from this is in 1992, where a third party candidate, Ross Perot, won nearly 20,000,000 votes, though did not get a single electoral vote.[278] Ranked Choice Voting (RCV) takes a different approach to the same premise. Whereas under plurality voting Perot did not win a single vote, he may have, under RCV, had a chance to win the presidency.

RCV works as follows: qualified voters choose their desired candidates on a numerated scale, then cast their vote. If no candidate reaches the 50% threshold, the least chosen candidate gets eliminated. The constituents' who voted for that candidate first get their votes redistributed based on their second and third pick. The cycle repeats itself until a candidate reaches the 50% threshold, and thus wins.

[277] Plurality Voting
[278] 1992 presidential election

Ross Perot statistically stood no chance at the presidency under the current electoral systems, which virtually negates third party candidates from winning. However, it is important to question if ranked choice voting was in place, would more people have voted for him… even to the point of him having a chance at the presidency? If enough people selected Perot as their first choice, knowing that, were he to lose in the first round, he very well might have. A good look into what would've happened took place in the Alaskan 2022 Special Election for the late Don Young's seat.

The Alaskan 2022 Special Election occurred on June 11th and saw a Democratic victory. Mary Peltola, a former Representative from the Alaskan House of Representatives, beat Sarah Palin, the former governor of Alaska, in the contest. Per ranked choice voting, there are multiple rounds in which the candidate that has the least first-choice votes gets eliminated, then their second choice votes go to the respective candidate. Nick Begich III, the grandson of Nick Begich—a former Congressman—was eliminated in the first round of voting. The Republican only received 27.8% of the vote, and thus everyone who voted for him first had their second-vote counted. In doing so, Peltola was able to secure 51.5% of the vote, putting her above the threshold and winning the election.

Palin, as well as other Conservative groups and politicians, argued that this system is inoperable. Senator Tom Cotton of Arkansas, the day Peltola won, tweeted "60% of Alaska voters voted for a Republican, but thanks to a convoluted process and ballot exhaustion—which disenfranchises voters—a Democrat won."[279] Furthermore, Palin herself said the "new crazy, convoluted, confusing" way to elect lawmakers has

[279] @TomCottonAR, Twitter (August 31, 2022),https://twitter.com/TomCottonAR/status/1565139542000246784

"disenfranchised 60% of Alaska voters."[280] This system does not disenfranchise voters. While addressing the equity of ranked choice voting—and how it empowers rather than disenfranchises—it is noteworthy to look at whether or not this voting system is constitutional.

This article will analyze three Supreme Court cases—*Baker v. Carr*, *Reynold v. Sims*, and *Evenwel v. Abbott*—to ask an important question: is ranked choice voting constitutional?

WHAT IT MEANS TO CAST A BALLOT

Baker v. Carr defined what it means for a supreme court question to be 'political,' and how a court should proceed in deciding in such a matter. Citizens of Tennessee, whose state had not been reapportioned for some 70 years, sued the state's attorney general, Joe C. Carr, to end unequal and outdated voting districts. In a 6-2 decision the court ruled that a 'political question,' such as the one presented, could be answered by the Court solely if it had constitutional relevance. Inversely, if the question's jurisdiction was given to the Legislative or Executive branch directly by the Constitution, the Supreme Court would not be able to decide the case.

The U.S. District Court for the Middle District of Tennessee ruled contrary to Carr's eventual outcome:

The defendants, at this time at least, do not deny the discrimination, nor do they question the fact that the state legislature has failed and refused to comply with the mandate of the State Constitution. What they do say is that the question involved is exclusively of a political

[280] Paul Best, *Former Alaska Gov. Sarah Palin knocks ranked-choice voting after election loss,*. Fox News (September 1, 2022),https://www.foxnews.com/politics/former-alaska-gov-sarah-palin-knocks-ranked-choice-voting-election-loss.

nature and does not present a justiciable controversy, with the result that the Court has no power or jurisdiction to intervene to grant any kind of relief.[281]

This is notable for two reasons: (1) the lower court does not take up the issue's contents and (2) the court only claims it lacks power to intervene in any capacity. The claim they make is readily reversed in the higher court, which gives way for the court at-large to make decisions about 'political questions.' Furthermore, the Court makes its decision on the back of Colegrove v. Green,[282] which notes: "the remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress."

The defining of a 'political question' is important as it permits the Supreme Court to not take up a case of this subject matter. For instance, if *Baker* was not decided on, it is possible that the Supreme Court wouldn't take up other cases, such as *Citizens United, Obergefell v. Hodges,* and *FEC v. Cruz*. Furthermore, it is probable that the high court wouldn't have "jurisdiction to intervene to grant any kind of relief," which would render many of their future decisions void.

Reynold v. Sims[283] exemplifies this, where it would not have been able to be decided by the Supreme Court if the institution could not address a political question. This case brought up the question of fair and equal representation in government, and how Alabama has had districts which haven't gained new representatives despite gaining an immense population. One of the plaintiffs used the example of Jefferson County having comparable representation to other counties, while being 41 times the population. The Fourteenth Amendment states that "no less

[281] Baker v. Carr, 369 U.S. 186, (1959).
[282] Colegrove v. Green, 328 U.S. 549 (1946).
[283] Reynold v. Sims, 377 U.S. 533 (1964).

than substantially equal state legislative representation for all citizens," and thus in an 8-1 decision, the high court mandated districts contain representatives on the basis of their individual population. Conclusively, this case creates the definition of "one person one vote," as every person is entitled to the rights of voting for their representatives and being represented.

Without *Sims*, those who seek to have fairly apportioned districts would not be able to. After the 2010 census, Texas voters attempted to sue the state to make redistricting based on the total voter population instead of the total population. Evenwel, a Texas voter, sued—using the 14th Amendment's Equal Protection Clause—to make an argument that "one person one vote" should be interpreted and based on who is eligible to vote, not who could potentially vote. They argued that "one person one vote" is predicated on the idea that only registered voters should be represented, rather than total population.

In a unanimous decision, opinionated by Ruth Bader Ginsburg in 2016, the Court ruled that—based on the 14th Amendment, constitutional history, state practice and the widespread use of deciding House of Representative districts—districts are created and represented by the total population of the region, not only the registered voters. *Evenwel v. Abbott* allows for a conclusive interpretation of how to think about voting: where every citizen is represented. It does not matter who is registered to vote; all citizens deserve to be represented. Assuming the logic permits a broader framework, the type of counting, not the type of election, matters: each person has equal representation as long as each person is able to potentially cast a ballot.

THE DISCUSSED DISCREPANCY

Senator Cotton's claim that RCV disenfranchises voters is a valid concern. Though it has merit, that merit only stretches so far as

ignorance does. By understanding the premise of RCV, its intended goals, and the process by which it is constitutionally permitted, there will be a more comprehensive understanding of the legality of this type of voting. Before the constitutionality is addressed, however, one must look toward *Baker* in order to ask if the Supreme Court has jurisdiction in deciding this issue.

The high court, in determining if RCV is a political question, would deem it such. The Constitution lays out "the Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations,"[284] and thus wish to defer this to individual states to decide for themselves the enactment of RCV. However, the upcoming Supreme Court Case *Moore v. Harper*[285] may change this section to allow complete control of elections to be in the hands of states. Due to this case, on the same note as the continued expansion of the Commerce Clause, one could make the claim that the voting system affects interstate commerce. From this, there are ways to validly present this case to the Supreme Court and have them make a decision on it.

Disenfranchisement refers to "to deprive of a franchise, of a legal right, or of some privilege or immunity especially : to deprive of the right to vote."[286] Whereas Senator Cotton is concerned about people's rights getting stripped through their votes being rendered worthless, there lacks cohesion in his claims. Under *Reynold's* precedent for equal representation, the question that needs to be asked is does RCV limit, impede or restrict equal representation? As discussed earlier, it does not. Every eligible voter is entitled to voting for their list of preferred

[284] US. Const. art 1, § 4, cl. 1.
[285] Moore v. Harper, 21 U.S. 1271 (2022)
[286] *Disenfranchise Definition & Meaning*, Merriam-Webster, https://www.merriam-webster.com/dictionary/disenfranchise.

candidates—which is ranked, and which only one vote will be used or counted. Every time there is a candidate who does not reach the 50% threshold, the candidate with the least amount of votes gets removed, and those who voted for that candidate have their votes automatically register for their second pick. This is a purer form of representation than our current system allows, as it permits every voter to have a voice through their vote. Under *Reynolds*, this enables and ensures equal representation.

The final connection lies in voting districts being made up of only eligible voters, rather than all people. *Evenwel* cemented the idea that everyone is entitled to representation, not just those who are current voters. An argument can be made which poses the notion that under the current system of plurality voting, which emphasizes the two party system and only two major candidates, that those who want to vote for a third party, or a different candidate, are disenfranchised. RCV solves this issue, and reinforces *Evenwel's* precedent of everyone being represented, not just those who vote in the two major parties. Ranked Choice Voting is not disenfranchisement, nor is it unconstitutional. RCV is a step above what *Reynold* and *Evenwel* both set precedents for: furthering equal representation.

JURIS MENTEM

A History of the Expansion of Executive Power and an Argument for the Unitary Executive Theory

JAKE KIRSHEN
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A HISTORY OF THE EXPANSION OF EXECUTIVE POWER AND AN ARGUMENT FOR THE UNITARY EXECUTIVE THEORY

BY JAKE KIRSHEN

INTRODUCTION

Since the founding of The United States of America, the power of the executive branch has gradually grown, rapidly expanding in the 1930s. Often, presidents have used military conflict and emergency circumstances to expand their power. The legal justification for such expansion frequently relies on the first statement of Article II of the U.S. Constitution, which vests executive power in the President. Due to the vagueness of what constitutes "executive power," the boundaries of the President's abilities are continually pushed.[287] A theory pushing the extent of presidential power is the Unitary Executive Theory (UET). The theory holds that the President controls all aspects of the executive branch because the President is the only individual endowed with executive power in the Constitution. The UET, backed by legal research and Supreme Court precedent, provides a strong legal basis for the President's unilateral direction of the Executive branch.

[287] U.S. CONST. art II, § 1.

Understanding the intent, initial structure, and changes over time of the role of the executive and its authority are vital to recognizing how expansive the president's power has become. The Founders of our country did not want a robust executive when crafting our nation's Constitution. They had just gained independence from a tyrannical ruler and did not want to replicate one in their new system. It was believed a powerful executive goes against the republican government the Founders were crafting. However, some believed a powerful executive to be necessary. Alexander Hamilton supported a strong Executive, arguing in Federalist 70 –

Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy.[288]

The view expressed in the paper did not take hold with the American public. Instead, executive power was minimized, powers were separated among the branches of government, and checks and balances were put in place to keep the branches accountable to one another. Notably, Congress must approve all presidential appointments, can overturn a presidential veto, declares war, and controls the funding of executive agencies and departments, including the military.[289] The legislative branch was intended to be the primary manager of the country, with the executive merely being the administrator of the laws and policies set by Congress. Hamilton's vision of the executive would take

[288] The Federalist No. 70 (Alexander Hamilton).
[289] U.S. CONST. art. I, § 7, cl. 3; § 8, cl. 1, 11-16; art II, § 2.

centuries to come to fruition, culminating in the modern American presidency.

EXPANSION OF EXECUTIVE POWER & AUTHORITY

Within the First Congress, there was much debate about whether the Constitution allows for the President to unilaterally remove executive branch officers. Upon the proposal of establishing the departments of Treasury, War, and Foreign Affairs by a member of the House of Representatives, then-Representative James Madison proposed for the Secretaries of those departments to be unilaterally removed by the President.[290] The House of Representatives, while debating these proposals, focused on whether the President had the power under the Constitution to remove officers with the absence of legislation allowing them to do so.[291] Eventually, Congress passed bills establishing the various departments, noting a subordinate officer will take charge when the department head is removed from office by the President or when vacant.[292] This came to be known as the "Decision of 1789." With the passage of the bills, the President gained the ability to remove department officers. As a result, the Executive can better control the operations of the executive branch. The Supreme Court has cited the Decision of 1789 in numerous cases as a reason for Congress to stay out of the removal process, reaffirming executive authority.[293]

The Judiciary Act of 1789 further expanded executive influence. By establishing circuit courts and district courts, the act created

[290] 1 Annals of Cong. 368–69 (1789).
[291] 1 Annals of Cong. 371 (1789).
[292] Act of July. 27, 1789, ch. 4, § 2, 1 Stat. 28, 29; Act of Sept. 2, 1789, ch. 12, § 7, 1 Stat. 65, 67; Act of Aug. 7, 1789, ch. 7, § 2, 1 Stat. 49, 50.
[293] Bowsher v. Synar, 478 U.S. 714, 723 (1986); Myers v. United States, 272 U.S. 52, 146 (1926); Parsons v. United States, 167 U.S. 324, 338–43 (1897).

new federal judge positions to be nominated by the President, therefore expanding their influence on the judiciary. Furthermore, the act set the number of Supreme Court Justices, positions nominated by the president, at six.[294] The act further created the Office of the Attorney General to represent the United States in judicial hearings, the United States Attorney, and the United States Marshal for each judicial district.[295] With the expansion of the Judicial Branch at all levels, and the establishment of offices within the modern-day Department of Justice (although they could not enforce laws until the 1870s), the Office of the President gained more control over how laws of the land are to be interpreted and enforced.

One of the first direct expansions of executive authority caused by Congress came from the Alien and Sedition Acts of 1798. With tensions high between the United States and France and fear of war present, the Federalist Party-controlled Congress passed a series of laws authorizing the president to deport aliens and allowing for their arrest, imprisonment, and deportation during wartime.[296] These were known as the Alien Acts. Passed alongside the Alien Acts was the Sedition Act, making it a crime for an individual to:

…write, print, utter or publish, or shall cause or procure to be written, printed, uttered or published, or shall knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government…[297]

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[294] U.S. CONST. art II, § 2, cl. 2.
[295] Federal Judiciary Act, Stat 28, 36 (1789).
[296] "Naturalization Act of 1798", June 18, 1798; "Alien Act", June 25, 1798; "Alien Enemies Act", July 6, 1798; "Sedition Act", July 14, 1798.
[297] "Sedition Act", § 2, (1798).

The Federalist Party set a dangerous precedent with the passage of the Alien and Sedition Acts. They used their control of Congress to broaden the purview of executive authority in wartime and to silence critics of their government. This would be the first of many instances in which executive power was expanded during wartime or other emergency circumstances. The American Civil War would be the first case where Presidential power was mildly expanded due to military conflict.

At the onset of the Civil War, President Abraham Lincoln ordered his military commanders to suspend habeas corpus from Washington D.C. to Philadelphia. Lincoln feared rioters in Baltimore, Maryland would threaten the rail system to the capital. The suspension was brought before the U.S. Circuit Court of Maryland. The Court deemed the suspension unconstitutional, as Congress is the body that may suspend habeas corpus in cases of rebellion.[298] When Congress convened in a special session later that year, Lincoln defended his unconstitutional actions as necessary measures during the war. The President would go unpunished. Two years later, Congress passed The Habeas Corpus Suspension Act of 1863, which allowed the President to suspend the right of habeas corpus.[299] The act targeted rebels, protesters, and other dissenters to not give rise to Confederate support. With this act, Congress set a precedent of ceding power to the President in times of war.

Myers v. United States (1926) is another instance of the President's authority to remove individuals within the executive branch being reaffirmed. President Woodrow Wilson removed a postmaster without Senate approval, going against the law.[300] When the case was brought before the Supreme Court, Chief

[298] U.S. CONST. art. I, § 9, cl. 2.
[299] Habeas Corpus Suspension Act, 12 Stat. 755 (1863).
[300] The Act of July 12, 1876, 19 Stat. 80, § 6 (1876).

Justice Taft concluded the President may unilaterally remove appointed officers, leaning on the Decision of 1789, as they would be unable to fulfill their constitutional obligations without this right.[301]

The rapid enlargement of the executive branch occurred with the passage of President Franklin Roosevelt's New Deal program. With its enactment, the New Deal established dozens of federal agencies to relieve the economic hardship Americans were facing during the Great Depression. Agencies such as the Federal Housing Authority, Federal Deposit Insurance Corporation, Securities and Exchange Commission, and many more expanded the scope of the federal government, and with it the influence of the presidency.[302] In addition to the newly created agencies, the Roosevelt-led Reorganization Act of 1939 was passed. This allowed the president to hire six staffers to aid in the management of the federal government, created the Executive Office of the President (EOP), and included other legislative provisions. The EOP extended the president's control over the rest of the executive branch.[303] In Reorganization Plan No. 1 of 1939, numerous agencies were consolidated into single entities with respect to their purposes.[304] Thus, agency efforts became streamlined while also providing the president with a more direct way to supervise the policymaking of the agencies.

One of the most recent expansions of executive authority came in the aftermath of the September 11th, 2001 terrorist attacks with the

[301] Myers v. United States, 272 U.S. 52, 135 (1926) ("Otherwise, he [the President] does not discharge his own constitutional duty of seeing that the laws be faithfully executed.").

[302] *New Deal*, Encyclopedia Britannica, https://www.britannica.com/event/New-Deal

[303] Relyea, Harold C. *The Executive Office of the President: An Historical Overview.* 98-606 GOV. Washington, D.C.: Congressional Research Service, November 26, 2008.

[304] Reorganization Plan No. 1 of 1939, 4 FR 2727, 53 Stat. 1423, (1939).

passage of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001. The act aimed to strengthen national security and counterterrorism efforts. This was accomplished in part with the widening of investigatory powers of law enforcement agencies, including the FBI, CIA, NSA, Office of the Attorney General, and more. The Department of Homeland Security was also established with the passage of the act.[305] As a result of the act, executive branch law enforcement and surveillance powers grew greatly, and by extension, the President's influence in matters of national security, counterterrorism, and law enforcement grew as well.

WHY THE UNITARY EXECUTIVE THEORY IS VALID

As head of the executive branch, the President is tasked with executing the laws passed by Congress. Members of the executive branch - its various offices, departments, and subsequent agencies and bureaus - aid the President in doing so. From the Department of State to the Department of Homeland Security, each actor in the executive plays a part in shaping policy which almost always reflects the view of the President. These Departments derive their power from the presidency - they do not possess any power independent from the President, as "[t]he executive Power shall be vested in a President of the United States of America."[306] The Constitution does not vest "some" power into the President and the remaining amount to the Departments. *All* executive power stems from the presidency. Further, the President is the individual that nominates all appointments, which includes hundreds of positions within the various Departments, subject to Senate approval.[307] Any heads of

[305] USA PATRIOT Act, Pub. L. No. 107–56, 115 Stat. 272 (2001).
[306] U.S. CONST. art. II, § 1, cl. 1.
[307] U.S. CONST. art II, § 2, cl. 2.

departments, agencies, or bureaus exercise the President's authority and receive their position because the President allows it. These heads are carrying out the will of the President for as long as the President extends their executive power to that Department, and by extension to the head of the Department. So, how could the President not remove lesser executive officers from their roles? The Supreme Court has recognized the President's ability to do so.

With the decision of *Myers v. United States (1926),* the Supreme Court set a precedent of allowing the President to unilaterally remove appointed officers. Without control over officers who ensure laws are being executed faithfully, the President would be unable to make certain they are fulfilling their constitutional duties. However, the Hughes Court did not see it this way with their decision in *Humphrey's Executor v. United States (1935).* In the case, the Court held President Roosevelt could not dismiss individuals within the Federal Trade Commission (FTC) outside of the reasons listed in the FTC Act. The ruling was different from *Myers* because it was argued the FTC was different, having been established by Congress with a quasi-legislative and judicial purpose.[308] However, it is my belief that this ruling is wrong. Regardless of the quasi-legislative and judicial purposes of the FTC, the Commission is charged with law enforcement power - a power reserved to the President. If the FTC, an agency tasked with law enforcement power, is failing to faithfully enforce the law, the President by extension is not fulfilling their constitutional duty. To ensure the President is following their duties, why should they not have control over individuals who possess law enforcement powers and reflect their will? Almost a century later, the Court would weaken this decision.

[308] Humphrey's Executor v. United States, 295 U.S. 602, 631 (1935).

The case *Seila Law LLC v. Consumer Financial Protection Bureau (2020)* is an example of The Supreme Court acknowledging the Executive Vesting Clause as the sole constitutional clause concentrating power in a single individual.[309] The Consumer Financial Protection Bureau is structured to have a single director, able to be removed only for neglect, malfeasance, or inefficiency. This provision was severed from the Dodd-Frank Act in this case, as it was deemed contradictory to the Constitution's structure and did not fall under the two circumstances in which Congress may restrict the President's power to remove lesser executive officers.[310] The circumstances where Congress may restrict the President's removal power are established in the decisions of *Humphrey's Executor v. United States (1935)* and *Morrison v. Olson (1988).*[311] Writing for the majority in *Seila Law*, Chief Justice Roberts affirms the Court's declination, "to extend Congress's authority to limit the President's removal power to a new situation....the executive power belongs to the President, and that power generally includes the ability to supervise and remove the agents who wield executive power in his stead."[312] By maintaining a more intelligible separation of powers with this opinion, the Court simultaneously recognizes the President's command over lesser executive branch officials.

Law enforcement and supervising executive action also fall under the purview of the President. As the only individual granted executive power, the President is charged with the full powers of law enforcement, with no limits enacted on what is beyond their control. Although there are those that enforce the law and

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[309] U.S. CONST. art. II, § 1, cl. 1.

[310] Seila Law LLC v. Consumer Financial Protection Bureau, 591 U.S. __ (2020) ("...the CFPB's single-Director configuration is incompatible with our constitutional structure.).

[311] Humphrey's Executor v. United States, 295 U.S. 602 (1935). Morrison v. Olson, 497 U.S. 654 (1988).

[312] Seila Law LLC v. Consumer Financial Protection Bureau, 591 U.S. __ (2020).

prosecute on the President's behalf - the Attorney General and other members of the Department of Justice (DOJ) - they are merely extensions of the Executive's will.[313] Thus, they cannot prevent the President from interceding in their matters since they inherently deal with law enforcement. This also means the President has authority over instances where they possess an interest, even investigations into themselves. While one may view this as problematic due to a conflict of interest, the DOJ in 1974 concluded there to be "serious doubt as to the constitutionality" of conflict-of-interest laws since they would prohibit the President from exercising their constitutional duties.[314] Further, the President, "though able to delegate duties to others, cannot delegate ultimate responsibility or the active obligation to supervise that goes with it."[315] The responsibility and power of law enforcement rest with the President, even in matters of interest to them because they are the executive branch.

The exercising of discretionary powers exclusive to the President is generally non-reviewable. The decisions of appointing and removing executive officers, issuing pardons, and choosing whether to bring forth prosecutions are among the discretionary powers of the President.[316] The President, being the final authority on internal matters within the executive branch, cannot have these choices questioned because it must be assumed they

[313] Ponzi v. Fessenden, 258, U.S. 254, 262 (1922).

[314] Letter to Honorable Howard W. Cannon from Acting Attorney General Laurence H.
Silberman, dated September 20, 1974; and Memorandum for Richard T. Burress, Office of the
President, from Laurence H. Silberman, Deputy Attorney General, Re: Conflict of Interest
Problems Arising out of the President's Nomination of Nelson A. Rockefeller to be Vice President
under the Twenty-Fifth Amendment to the Constitution at 2, 5 (Aug. 28, 1974).

[315] Free Enterprise Fund v. Public Co. Acctg. Oversight Bd., 130 S. Ct. 3138, 3154 (2010) (quoting Clinton v. Jones, 520 U.S. 681, 712-713) (1997).

[316] U.S. CONST art II, § 2, cl. 1, 2.

did so lawfully. The ability of lesser officials, who do not possess these powers themselves, to review the decision to search for an unethical basis is oppugnant to the discretion and finality of the decision.[317]

CONCLUSION

With the enlargement of the executive branch over the past two centuries, its importance and impact on the country have grown with it. The Executive's responsibility as Chief Law Enforcer is an important one and is extended to various departments and agencies within the branch. Being that "[t]he executive Power shall be vested in a President…"[318], it would be foolish to assume the President may not on a whim choose to cease extending their power to subordinate members of their branch. This power has become vital with the expansion of the country and the growing influence the United States has over the rest of the world. The UET allows for greater control over governmental operations, leading to better efficiency in executing policy. Moreover, subordinate law enforcement officials may not prevent the President from involving themselves or entirely terminating investigations and prosecutions. Backed by Supreme Court precedent and the Constitution, the UET is a sound rationale for the President's complete control over the executive branch.

[317] Wayte v. United States, 470 U.S. 598, 607- 608 (1985); cf Franklin v. Massachusetts, 505 U.S. at 801.
[318] U.S. CONST art II, § 1, cl. 1.

JURIS MENTEM

Ancient Roman Influence On Early American Justice

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ANCIENT ROMAN INFLUENCE ON EARLY AMERICAN JUSTICE

BY ELLA LANE

ABSTRACT

The founders drew on several different existing legal systems during the creation of the US justice system, primarily England and its system of common law. However, the role of Ancient Rome and its influence on the US justice system is substantial in its contribution to the US Code and court procedures.

OVERVIEW OF ANCIENT ROMAN JUSTICE

The Roman legal tradition went through several transformations throughout the different time periods of the civilization. The Roman Republic saw the beginning of the use of code as the basis for legal consequences. Before the use of codes, patrician leaders used unwritten traditions as the basis for court decisions. The plebeian class insisted upon a written code, resulting in the creation of the Twelve Tables. The Twelve Tables, recorded by ten commissioners, upheld the previous customs of the patricians while also providing recorded law for plebeians for the first time in Roman history. Although the original codes of the Twelve

Tables did not survive to the present, remnants of their assumed content are present in later codes and writings. From these writings, it is assumed they contained information on a variety of topics such as family law, tort law, and legal procedure. The Republic also saw the development of civil law (*jus civile*). Based on both legislation and customs, the *jus civile* governed the actions of Roman citizens. During the 3rd century BCE, the law of nations (*jus gentium*) developed to administer justice to foreigners and non-citizen Roman subjects. *Jus gentium* could not be based on legislation, as this was a privilege afforded only to Roman citizens. *Jus gentium* decisions could be decided based on mercantile law, Roman law that could be applied universally, or magisterial discretion. Another division of law developed during the Republic was the distinction of *jus scriptum* and *jus non scriptum*. *Jus scriptum* consisted of written law, derived from legislation, edicts, or any other written source deemed authoritative. This could include *leges* (laws), or enactments from assemblies of Roman people.[319] Another form of law during this era was the *edicta,* which was a yearly issue of codes created by the office of the praetor. The position of praetor was created in 367 BCE to cope with the increasing volume of legal issues. Magistrates, officials elected by the Roman people, could also issue *edicta*. *Edicta* became more prominent during the later stages of the Republic, and assembly-created leges became less common.[320] *Senatus Consulta*, a third type of law, were resolutions adopted by the Roman Senate. *Senatus Consulta* did not have the full force of law unless adopted by the magistrates' edicts. The *responsa prudentium* was another source of law, derived from written advice from lawyers and jurists.

During the Imperial era, the distinction between *jus civile* and *jus gentium* ceased to exist as citizenship became universal throughout the Empire's territories. The passage of *leges* declined

[319] https://www.britannica.com/topic/Roman-law
[320] https://www.jstor.org/stable/299417#metadata_info_tab_contents

when Caesar Augustus took control from the rest of the triumvirate formed after Julius Caesar's death, and the last *lex* was passed in 96 CE. All the powers previously held by assemblies were transferred to the Roman Senate, which was essentially a vehicle for the emperor's powers. Senatus Consulta became little more than affirmations of the emperor's decrees. The *edicta* remained in place until 131 CE, when Hadrian reviewed and altered all previous *edicta*, and declared the new set of *edicta* unchangeable except by imperial decree. This resulted in the most consequential form of law during the Imperial era being the *constitutiones principum,* or the legislative actions of the emperor. By the end of the Pax Romana, the emperor was the only creator of law in the empire. The *constitutiones principum* could be a variety of issues from the emperor, including decrees, edicts, decisions of the emperor acting as a judge, and even letters or instructions to subordinates. *Responsa prudentium* continued to exist, and Augustus authorized a small number of jurists to write with imperial authority, bolstering the legitimacy of the *responsa prudentium*.

After the fall of the empire in the West, the legal tradition of Rome carried over to Constantinople and the Byzantine Empire. Emperor Justinian took a special interest in the law and issued the creation of the Corpus Juris Civilis. This text is one of the most extensive legal documents ever made and serves as the inspiration for modern civil law systems. It consists of writings on various aspects of Byzantine law and served as a collection of all the fundamental works in jurisprudence.[321]

TRANSFER OF ROMAN IDEALS THROUGH THE MEDIEVAL ERA

[321] https://droitromain.univ-grenoble-alpes.fr/Anglica/codjust_Scott.htm

Roman legal traditions continued to exist throughout the medieval era in Western Europe. Although England eventually developed its own legal system (common law), it adopted many Roman legal practices during the medieval era that were later incorporated into common law. After the fall of the Roman Empire, Anglo-Saxon law overtook that of the Romans despite Britain's past as a Roman colony. However, because Roman legal tradition had persisted in continental Europe, the Norman conquest of England reintroduced Roman legal practices to England. Many of these practices were adopted into what would later become common law. *Tractatus de Legibus et Consuetudinibus Regni Angliae* (A Treatise on the Laws and Customs of the Kingdom of England), was one of the earliest treatises on common law and established very detailed procedures and laws. Considered the predecessor to *De Legibus Consuetudinibus Angliae*, this treatise began to codify English law, but did not go to the same extent as Bracton's work did.[322] Published during the late 12th century, *De Legibus Consuetudinibus Angliae*, written by Henry de Bracton and published in 1235, is regarded as the first attempt to codify the laws of England. Bracton understood the importance of codified law, and mentions the law of Rome in his chronicle of English common law often. [323] Both of these treatises implemented some aspects of Roman law that were already popular with the English, especially the codification of the previous unwritten customs of law. However, Roman tradition was not as firmly established as it was in continental Europe. When English colonists moved to the American colonies centuries later, they brought English common law traditions with them. However, once the American colonies gained independence from England, founders of the new country began looking for ways of differentiating their legal system from that of the British empire.

[322] https://culibraries.creighton.edu/rarebook/commonlawofengland
[323] https://quod.lib.umich.edu/m/moa/AGY1033.0001.001?rgn=main;view=fulltext

FOUNDERS INSPIRATION FROM ROME

When looking for inspiration to base the new United States government on, several of the founders looked to the ancient Roman Republic as an example. The works of Roman statesmen like Cicero and Cato the Younger had been highly influential for American revolutionaries. Cicero was especially significant to founders like John Adams and Thomas Jefferson, who cited his works as a major influence on the Declaration of Independence. [324]

[324] https://allthingsliberty.com/2018/10/romes-heroes-and-americas-founding-fathers/

JURIS MENTEM

Particular Social Group: Defining the Most Ambiguous Term in Refugee Law is the Difference Between Life and Death

JUSTIN MORGAN
Staff Writer

PARTICULAR SOCIAL GROUP: DEFINING THE MOST AMBIGUOUS TERM IN REFUGEE LAW IS THE DIFFERENCE BETWEEN LIFE AND DEATH

BY JUSTIN MORGAN

INTRODUCTION

It is no secret that the immigration system in the United States is complex, multi-faceted, and heavily flawed. At an institutional level, there are currently 600 active federal immigration judges, while there are over 1.6[325] million immigration cases on the docket, leaving millions of prospective immigrants waiting days, months, or even years for their citizenship proceedings. For asylum seekers, or individuals seeking refuge in the United States because they were a victim of persecution in their country of origin, the odds of success are much worse. According to a study

[325] *Immigration Court Backlog Now Growing Faster Than Ever, Burying Judges in an Avalanche of Cases,* TRAC Immigration (Jan. 18, 2022), https://trac.syr.edu/immigration/reports/675/.

by Syracuse University, 64%[326] of asylum claims were rejected in 2021 (18,129 of 28,327 cases). Of the asylum applicants who were rejected, 81% (14,684)[327] were rejected without legal representation, meaning thousands of non-English speakers with no legal experience were left to navigate a complex immigration system in order to escape persecution in their country of origin. In addition, The Poynter Institute found that of the asylum claims that were rejected in 2021, about 16%[328] of them were rejected because the court found that they did not have a "credible fear of being persecuted" by a specific individual or organization in their country of origin. However, many of these cases included statements of direct verbal or electronically delivered threats against the asylum seeker. While the asylum application process is fundamentally unjust for asylum seekers in general, there is a group of refugees which are disproportionately rejected at higher rates than any other group of asylum seekers. According to a 2022 Congressional Report, out of the five grounds that qualify an asylum seeker to gain refugee status, almost 30% (5,000)[329] of the asylum seekers who were rejected claimed that they were persecuted, or had a reasonable fear of being persecuted, on account of being a member of a particular social group (PSG).

Due to the ambiguity of the definition of a PSG, as well as historical disagreements among immigration law authorities, particular social groups are immensely difficult to identify and

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[326] *Asylum Grant Rates Climb Under Bidens,* TRAC Immigration (Nov. 10, 2021),https://trac.syr.edu/immigration/reports/667/.

[327] *Id.*

[328] Madlin Mekelburg, *Are the vast majority of asylum claims without merit?*, Politifact (May 17, 2019), https://www.politifact.com/factchecks/2019/may/17/dan-crenshaw/are-vast-majority-asylum-claims-without-merit/.

[329] https://www.state.gov/report-to-congress-on-proposed-refugee-admissions-for-fiscal-year-2022/#_Toc80119712

maintain a level of specificity that even immigration courts have struggled to define. Therefore, in order to begin reforming the United States' broken asylum system, it is critical to cultivate a specific, identifiable definition of a PSG, and codify how to prove persecution or reasonable fear of persecution based on membership in a particular social group.

To gain refugee status in the United States, an asylum seeker must prove that they have faced persecution or have a legitimate fear of persecution as a result of one's race, religion, gender, nationality, or membership in a particular social group.[330] While the first four categories are easily identifiable, membership in a particular social group is extremely complex and has been the source of fierce legal debate. Breana Carney, an immigration attorney who specializes in asylum law, argues that immigration judges are more likely to grant asylum status if they apply for refugee status based on the first four grounds: race, religion, gender or nationality. Her reasoning is that the "first four grounds are relatively self-explanatory, while PSG is more complex and does not have a definition that is easily applicable on a case by case basis."[331] Additionally, according to former Attorney General Jeff Sessions, PSG is "an ambiguous term that has required repeated construction by the Board of Immigration Appeals (the "Board"), the Attorney General, and the U.S. Courts of Appeals." [332]

In order to define PSG, one must first understand how the United States Code defines a refugee. According to section 101 (A) of the Immigration and Nationality Act (INA), the term "refugee" is defined as "any person who is outside any country of such

[330] Immigration and Nationality Act of 1952, 8 U.S.C. § 1101(a) 42 (1952), 106.

[331] Breanna Cary, *Asylum or Refugee Status: Who Is Eligible?,* Nolo https://www.nolo.com/legal-encyclopedia/asylum-or-refugee-status-who-32298.html.

[332] Matter of L-E-A-, Respondent, II 27 I&N Dec. 581 (A.G. 2019) ,581.

person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, political opinion, or membership in a particular social group."[333] While the INA indicates that persecution or reasonable fear of persecution based on membership in a PSG is one of the grounds for gaining refugee status, it still does not provide a clear definition of a particular social group. What is a PSG? Who qualifies as a member of a PSG? Can the courts prove that a prospective refugee is being persecuted because of their membership in a PSG? How specific can the definition of a PSG be? The Immigration and Nationality Act failed to provide a definition of a PSG, leaving the courts, the attorney general, and most commonly, the Board of Immigration Appeals, to interpret this ambiguous and complex term. Moreover, confusion is not the only consequence of the INA's failure to clearly define a PSG. Each year, thousands of asylum seekers who have been persecuted and/or have a credible fear of being persecuted in the future have attempted to escape gang violence, domestic abuse, or a lack of government protection, only to be denied by a board of twenty-three immigration judges who adjudicate each asylum case based on their own biases and presuppositions regarding the credibility of an asylum seeker's claim.

To be recognized as a member of a particular social group, an asylum seeker must prove that their proposed social group has "particularity" and "social visibility." Particularity with regard to PSG means that the asylum seeker's proposed social group is a socially distinct group, and they face persecution based on membership in that group. Social visibility means that the

[333] Immigration and Nationality Act of 1952, 8 U.S.C. § 1101(a) 42 (1952), 106

community the asylum seeker lives in recognizes that their proposed social group is a distinct social group. Throughout the procedural history of defining a particular social group, these terms have been interpreted in several ways by a multitude of institutions. In each case related to PSG, the Board of Immigration Appeals (BIA), the Department of Justice (DOJ), and the Executive Office for Immigration Review (EOIR) have molded the definition of particularity and social visibility to fit the facts of the case. While this has been helpful in establishing a definition of PSG in extremely specific cases, the general definition of a PSG has been left unclear, allowing thousands of asylum seekers to be unfairly denied refugee status each year. Therefore, it is critical that the INA be rewritten to include a specific definition of PSG, as well as definitions of particularity and social visibility.

THE FIRST DEFINITION OF PARTICULAR SOCIAL GROUP

The first precedential definition of a Particular Social Group was established in *Matter of Acosta* in 1985. In 1976, the respondent of the case, a taxi driver in San Salvador, El Salvador, founded a company called COTAXI. The company was designed to enable its members to use the money that they earned while running their taxi service to pay off the loan that they took out in order to purchase their taxi. Starting in 1978, COTAXI and its drivers began receiving phone calls and notes which requested that they participate in work stoppages. While the requests were anonymous, the respondent and other members of COTAXI believed them to be from anti-government guerrillas[334] who had targeted small businesses in the transportation industry in hopes of damaging El Salvador's economy. In response, COTAXI's board of directors refused to comply with the requests,

[334] Matter of Acosta, 19 I&N Dec. 211, 232 (BIA 1985), 219.

prompting the anonymous callers to make threats of retaliation. Throughout the course of the next several years, the respondent and the rest of the members of COTAXI were threatened about 15 times. In 1979, unidentified attackers began to seize and burn taxis, as well as use them as barricades. Additionally, five COTAXI drivers were killed in their taxis by unknown persons. Three of the drivers who were killed were founders of COTAXI and friends of the respondent. Each of the three founders were killed after receiving an anonymous note threatening their lives. The other two drivers died from the injuries that they sustained from crashing their cabs in order to avoid being shot by three men who identified themselves as guerrillas. The men had jumped into their taxis, demanded possession of their cars, and announced that they were going to kill them.

During January and February of 1981, the respondent received three anonymous notes threatening his life.[335] The first note, which was slipped through the window of his taxi, stated: "Your turn has come, because you are a traitor." The second note, which was placed on the windshield of the respondent's car, was written to "the driver of Taxi No.95," which was the car owned by the respondent, and warned: "you are on the black list."[336] The third note was placed on the respondent's car in front of his house, and threatened: "we are going to execute you as a traitor."[337] In late February of 1981, three unidentified men approached the respondent in his taxi, who subsequently warned him not to call the police, and took his taxi. After being assaulted and receiving the threatening notes, the respondent left El Salvador and entered the United States because he feared that the men would take his life. At the respondent's asylum hearing, he testified that the reasons he did not want to return to El Salvador were: there was little work for taxi drivers because the people

[335] Matter of Acosta, 19 I&N Dec. 211, 232 (BIA 1985), 222.
[336] *Id.*
[337] *Id.*

were too poor to pay for taxis.[338] In response to the respondent's testimony, the Bureau of Human Rights and Humanitarian Affairs in the Department of State submitted a written advisory which stated that the respondent does not appear to qualify for asylum because he failed to show a well-founded fear of persecution in El Salvador on account of membership in a particular social group consisting of taxi drivers in El Salvador who were threatened or attacked by guerillas. Consequently, the court denied his application for a grant of asylum.

After discussing the factual and procedural history of *Matter of Acosta*, the Board of Immigration Appeals (BIA or the Board) explained their reasoning for denying the respondent's grant of asylum by defining the statutory standard for granting asylum. The BIA then compared this standard to the respondent's case, in which he claimed "well-founded fear of persecution based on membership in a PSG."[339] First, the Board defined the terms "fear" and "persecution." According to The Office of the United Nations High Commissioner for Refugees (UNHCR), "fear" should be a refugee's primary motivation for requesting refugee status in the United States.[340] Furthermore, the UNHCR concluded that fear is a genuine apprehension or awareness of danger in another country.[341] After defining "fear" as it relates to a well-founded fear of persecution based on membership in a particular social group, the BIA established the definition of "persecution." According to the Refugee Act of 1980, persecution was constructed to mean "either a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive."[342] The BIA made two clarifying points regarding this definition. First, harm or suffering had to be

[338] Matter of Acosta, 19 I&N Dec. 211, 232 (BIA 1985), 231.
[339] *Id.*
[340] *Id.*
[341] *Id.*
[342] Refugee Act of 1979, S.643 (1980), 6.

inflicted on the individual in order to punish them for possessing a belief or characteristic (that would qualify them to be a member of a PSG) that a persecutor sought to attack.[343] Therefore, physical injury that arises from some form of private civil strife (fights, familial altercations) or anarchy in a country does not constitute persecution because these examples do not include persecution based on a specific belief or characteristic. The second clarifying point is that harm or suffering had to be inflicted either by the government of a country or an organization that the government was unable or unwilling to control.[344] In *Matter of Acosta*, the BIA established that the respondent adequately proved that his primary motivation for seeking asylum is fear of persecution.[345] However, the Board still had to consider whether the respondent demonstrated that his fear was "well-founded" and that he could prove that he was persecuted on account of membership in a particular social group.

To establish the definition of a "well founded" fear of persecution, the BIA utilized the ruling in *Matter of Dunar, supra*. "The requirement that the fear be 'well-founded' rules out an apprehension which is purely subjective…Some sort of showing must be made and this can ordinarily be done only by objective evidence. The claimant's own testimony as to the facts will sometimes be all that is available; but the crucial question is whether the testimony, if accepted as true, makes out a realistic likelihood that he will be persecuted."[346] The Board accepted this "well found fear standard" and stated that a well-founded fear of persecution is understood to mean that an alien must produce objective evidence showing a likelihood or probability of persecution. Therefore, the well-founded fear standard is linked

[343] Matter of Acosta, 19 I&N Dec. 211, 232 (BIA 1985), 227.
[344] Matter of Acosta, 19 I&N Dec. 211, 232 (BIA 1985), 231.
[345] *Id.*
[346] *Id.*

to objective facts, as opposed to purely subjective fear, and to the likelihood of persecution.

After establishing the definition of a "well-founded" fear of persecution, the Board elaborated on their definition by stating that their constructed definition of a well-founded fear reflects two fundamental concepts. First, in order to be "well-founded," an alien's fear of persecution cannot be purely subjective or conjectural–it must have a solid basis in objective facts or events.[347] Second, in order to warrant protection afforded by a gant of refuge, "an alien must show it is likely they will become the victim of persecution."[348] Since the nature of words such as "likelihood" are inexact, the Board explained that in order for an asylum seeker to prove that they have a well-founded fear of persecution, they must establish a particular degree of "probability" as opposed to "possibility." Establishing probability requires: the alien possesses a belief or characteristic a prosecutor seeks to overcome in others by means of punishment of some sort, the persecutor is already aware, or could easily become aware, that an alien possess this belief or characteristic, the persecutor has the capability of punishing the alien, and the persecutor has the inclination to punish the alien.[349] The first of these factors shows that the conduct that the alien fears amounts to "persecution" and that the alien was persecuted because he possessed a characteristic difference from the persecutor that the persecutor deemed offensive and sought to overcome. The second, third, and fourth factors all have similar purpose in defining a "well-founded" fear of persecution. Each of them demonstrate that there is a real chance that the alien will become a victim of persecution, for if the persecutor is not aware or could not easily become aware that an alien possess the characteristic that is the basis for persecution, or if the persecutor lacks the

[347] *Id.*
[348] Matter of Acosta, 19 I&N Dec. 211, 232 (BIA 1985), 235.
[349] *Id.*

capability to carry out persecution, or if the prosecutor has no intention of punishing the alien, then it cannot be reasonably found that the alien is likely to become the persecutor's victim.[350]

While the Board established this thorough definition of a "well-founded" fear of persecution, it also admitted that the facts in asylum cases do not produce clear-cut instances in which such distinctions can be meaningfully made.[351] In *Matter of Acosta*, the respondent claims that he feared persecution at the hands of the guerrillas that attacked him in his taxi. According to the definition of a "well-founded" fear of persecution constructed by the Board of Immigration Appeals, the respondent must demonstrate that his fear is grounded by facts and that persecution by the guerillas is likely to occur if he returned to El Salvador. This means that respondent must demonstrate "that (1) he possess characteristics the guerillas seek to overcome by means of persecution; (2) the guerillas are aware or could easily become aware that he possesses these characteristics; (3) the guerillas have the capability of punishing him; and (4) the guerillas have the inclination to persecute him.[352] Per the findings of the court, the respondent's fear of persecution by the guerillas has no factual basis because the respondent failed to provide evidence that he was persecuted. Additionally, the Board stated that whatever the facts may have been prior to the respondent's departure from El Salvador, those facts have changed significantly since 1981.[353] For example, the respondent admitted that he does not intend to work as a taxi driver upon his return to El Salvador, and the respondent testified that the guerillas' strength had diminished significantly since 1981, rendering them inactive throughout the region. Therefore, the court explained that the respondent did not prove that at the present time, he possessed characteristics

[350] *Id.*
[351] Matter of Acosta, 19 I&N Dec. 211, 232 (BIA 1985), 227.
[352] *Id.*
[353] *Id.*

that the guerillas seek to overcome or that they had the inclination to persecute him. For these reasons, the Board found that the respondent's fear of persecution upon deportation to El Salvador is not "well-founded."

After constructing a definition of a "well-founded" fear of persecution, and applying it to the respondent's case in *Matter of Acosta*, the BIA examined whether the respondent was persecuted based on membership in a particular social group. According to the BIA, the respondent argued that he fears persecution by the guerillas on account of his membership in a particular social group "comprised of COTAXI drivers and persons engaged in the transportation industry of El Salvador."[354] Subsequently, the Board offered a general definition of persecution on account of membership in a PSG: "Persecution seeking to punish either people in a certain relation, or having a certain degree of similarity, to one another or people of like class or kindred interests, such as shared ethnic, cultural, or linguistic origins, family background, or perhaps economic activity."[355] Additionally, similar to persecution based on the other four grounds that qualify an asylum seeker for refugee status (race, religion, nationality, and political opinion), persecution based on membership in a PSG entails persecution based on an immutable characteristic, a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed.[356] After establishing that persecuting someone based on their membership in a PSG is persecution based on an immutable characteristic, the Board constructed a definition of a particular social group that would be utilized in asylum cases for the next four decades and beyond. "Persecution on account of membership in a particular social group means persecution that

[354] *Id.*
[355] Matter of Acosta, 19 I&N Dec. 211, 232 (BIA 1985), 232.
[356] *Id.*

is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic"[357]

The Board went on to explain that the common immutable characteristic may be an innate one such as sex, color, or kinship ties, or it could be a shared past experience such as former military leadership or land ownership. While the particular kind of group characteristic will be determined on a case-by-case basis, it must be one that the members of the group cannot change, or should not be required to change because it is fundamental to their individual identities or consciences. In the respondent's case in *Matter of Acosta*, the facts indicate that the guerillas in El Salvador sought to harm the members of COTAXI, in addition to other members of taxi companies in the city of San Salvador, because they refused to participate in work stoppages. According to the Board, the characteristics that define the group of which the respondent was a member of include being a taxi driver in El Salvador and refusing to participate in guerilla-sponsored work stoppages.[358] The court found that neither of these characteristics were immutable because the members of the group could avoid the threats of the guerrillas either by changing jobs or by cooperating with the work stoppages. Additionally, the BIA stated that while it may be unfortunate that the respondent either would have had to change his means of earning a living or cooperate with the guerillas in order to avoid their threats, the concept of a refugee does not guarantee that an individual will have the right to work in the job of their choice.[359] Therefore, since the respondent's membership in COTAXI and the group of taxi drivers was something that he had the power to change, the respondent did not show that the conduct he feared was "persecution on account of membership in

[357] *Id.*
[358] *Id.*
[359] Matter of Acosta, 19 I&N Dec. 211, 232 (BIA 1985), 235.

a PSG."[360] Based on the facts of *Matter of Acosta*, the Board established that while the respondent's primary motivation for leaving El Salvador and entering the United States was fear of persecution, his fear of persecution was not "well-founded." Additionally, according to the BIA's constructed definition of PSG, the respondent's group comprised of COTAXI drivers and persons engaged in the transportation industry of El Salvador was not found to be a PSG because the group did not share a common immutable characteristic. Therefore, the respondent in *Matter of Acosta* was denied asylum and deported to El Salvador.

While the respondent's asylum application was not granted, *Matter of Acosta* established the definition of several terms in asylum law that are critical to determining whether an asylum seeker is a member of a PSG, and if they have a well-founded fear of persecution on account of membership in that particular social group. Throughout the next four decades, immigration judges, the Board, the Department of Justice, and the Executive Office for Immigration Review would rely on the definitions of "fear," "persecution," a "well-founded" fear of persecution, and persecution based on "membership in a particular social group." "Fear"[361] is a genuine apprehension or awareness of danger in another country. "Persecution" is either a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive.[362] A "well-founded" fear of persecution was constructed to mean that an alien must produce objective evidence showing a likelihood or probability of persecution.[363] Finally, persecution based on membership in a PSG is defined as persecution that is inflicted upon an individual because of their membership in a group of persons, all of whom share a common, immutable characteristic.

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[360] *Id.*
[361] *Id.*
[362] Matter of Acosta, 19 I&N Dec. 211, 232 (BIA 1985), 236.
[363] *Id.*

THE POWER OF THE BOARD OF IMMIGRATION APPEALS

Before analyzing contemporary legal definitions of a PSG, the role that the Board of Immigration Appeals has over the interpretation of "particular social group," and in constructing the definition of a PSG, must be evaluated. In *Rivera-Barrientos v. Holder Jr.* (2012), the circuit judges of the tenth circuit of the U.S. court of appeals asserted that Congress did not define the term "particular social group" in the Immigration and Naturalization Act, so they would "defer to the BIA's interpretation of PSG unless it is unreasonable."[364] While the court has relied on this board of twenty-three appellate immigration judges for decades, the Supreme Court's decision in *INS v. Aguirre-Aguirre* (1999) gave the BIA immense power in deciding contemporary cases related to a particular social group. The respondent in this case was a Guatemalan man named Juan Aguirre who claimed to be strongly opposed to the Guatemalan government. While Aguirre lived in Guatemala, he burned buses, assaulted passengers, and vandalized private property. Shortly after, the respondent fled to the United States, claiming that he feared persecution by the Guatemalan government due to his actions of "political protest."[365]The immigration judge who adjudicated Aguirre's case ruled in favor of asylum, but his decision was overturned by the BIA on the grounds that the respondent committed serious "nonpolitical crimes,"[366] meaning that Aguirre does not qualify for asylum status per the INA. Aguirre appealed the decision and the ninth circuit repealed the BIA's ruling, asserting that the BIA failed to consider whether Aguirre's actions were politically necessary or successful. Subsequently, the Immigration and Naturalization Service (INS) appealed the case to the Supreme Court. In a unanimous opinion, the Court held that when

[364]Rivera-Barrientos v. Holder, Jr., 666 F.3d 641 (2012), 7.
[365] INS v. Aguirre-Aguirre, 526 U.S. 415 (1999), 433.
[366] *Id.*

determining Aguirre's asylum status, the BIA was not required to determine whether the respondent's actions were politically necessary or successful.[367] In a majority opinion, Justice Kennedy stated that when considering an alien's deportability, "the BIA may determine the likelihood of persecution."[368] The Court's decision to grant the BIA discretion in determining whether an asylum seeker faced persecution based on membership in a PSG set the precedent for future PSG cases. In the decades since *INS v. Aguirre-Aguirre*, the BIA and the Attorney General have been the only legal entities that have interpreted and enforced the definition of a particular social group. A board of twenty-three appellate immigration judges and one Attorney General have discretion over whether thousands of asylum seekers can escape persecution in their home countries.

Since each PSG case contains a unique set of facts, different respondents with different identities and from different countries, the BIA and the Attorney General have interpreted the definition of a PSG based on the details of each case. Additionally, the President of the United States typically appoints an Attorney General that aligns with their political beliefs. Therefore, the interpretation of the definition of a PSG has shifted based on the left-leaning or right-leaning biases of the Attorney General. Conservative Attorney Generals, such as Jeff Sessions, tend to interpret "PSG" in a more stringent manner. Liberal Attorney Generals, such as Merrick Garland, are more broad and inclusive in their interpretation of a particular social group. Therefore, since the Attorney General and the BIA have interpreted this already ambiguous term in completely different ways, the courts have never been able to establish a solidified definition of a particular social group. While confusion in the circuit courts regarding the definition of a PSG is a critical issue, the ambiguity of the definition of a particular social group has been detrimental

[367] INS v. Aguirre-Aguirre, 526 U.S. 415 (1999), 434.
[368] INS v. Aguirre-Aguirre, 526 U.S. 415 (1999), 435.

to thousands of families who come to the United States as asylum seekers. Since a clear definition of a particular social group does not exist, the fate of individuals and families who have faced persecution in their home countries lies in the hands of twenty-three immigration judges who were appointed by an Attorney General who himself was appointed to advance a political agenda.

In *Matter of Acosta*, the BIA established that members of a proposed social group must share a common, immutable characteristic in order for their group to be recognized as a particular social group. While this aspect of PSG has been generally accepted throughout the legal history of interpreting what a particular social group is, there are two additional facets of the definition of a PSG that have been subjected to legal debate and differing interpretation for decades: "particularity" and "social visibility." The following research will discuss the contemporary and comprehensive definition of a PSG, and how the BIA has caused further confusion by interpreting these terms in different ways, based on the facts of the cases presented to them.

PARTICULARITY AND SOCIAL VISIBILITY/DISTINCTION

In February of 2014, the BIA elaborated on the definition of membership in a PSG established by *Matter of Acosta* by incorporating the terms "particularity" and "social visibility" as requirements for establishing membership in a particular social group. These requirements were introduced in *Matter of W-G-R-, Respondent* and *Matter of M-E-V-G-, Respondent*. In *Matter of W-G-R-, Respondent*, the respondent was a citizen of El Salvador who was a member of the Mara 18 gang, a local El Salvadorian gang. After being a member for less than a year, the respondent left the gang. Shortly after he left, members of the respondent's

former gang confronted him and attacked him twice. Gang members shot him in the leg during one of the attacks. After being targeted for leaving the gang, he fled to the United States. In his asylum hearing, the respondent argued that he feared persecution on account of his membership in a PSG consisting of "former members of the Mara 18 gang in El Salvador who have renounced their gang membership."[369] In response to the respondent's claim, the immigration judge who presided over the case concluded that the respondent had not established that he was persecuted on account of his membership in a particular social group. Subsequently, the respondent appealed his case to the BIA, the EOIR, and the DOJ.

Before discussing the respondent's case specifically, the BIA, the Executive Office for Immigration Review (EOIR), and the Department of Justice (DOJ), asserted their additions to the definition of PSG. In addition to the fact that any characteristic that defines a PSG must be immutable and characteristic, the group must also possess "particularity" and "social distinction" for it to be recognized as a PSG. The court stated that "particularity refers to whether the group is sufficiently distinct that it would constitute a discrete class of persons."[370] The "social distinction" requirement mandates that "the shared characteristic of the group should generally be recognizable by others in the community."[371] After establishing these definitions, the BIA, EOIR, and DOJ expounded on their definitions of particularity and social distinction. The court stated that the particularity requirement clarified the point that not every immutable characteristic is sufficiently precise to define a particular social group. For example, the characteristics of poverty, homelessness, and youth, are too vague and generalized to set perimeters for a protected group. In addition to this requirement for

[369] Matter of W-G-R-, Respondent, 26 I&N Dec. 208 (BIA 2014), 211.
[370] *Id.*
[371] *Id.*

"particularity," the terms used to describe the group must have commonly accepted definitions in the society of which the group is a part of, and the group must be discrete and have definable boundaries. [372] Therefore, the group cannot be amorphous, overbroad, or subjective. According to the BIA, EOIR, and DOJ, the purpose of "particularity" is to clearly define the distinct identity of a particular social group and determine whether it is discrete or amorphous. Therefore, persecutory conduct aimed at a social group cannot alone define the group, which must exist independently of the persecution.[373]
For a group to be a cognizable PSG, it must have defined boundaries or a limiting characteristic which is separate from being persecuted or having a well-founded fear of persecution.

After elaborating on their definition of "particularity," the BIA, EOIR, and DOJ expounded upon their definition of "social distinction." The court explained that social distinction clarifies the significance of perception or recognition in the concept of the PSG. To be socially distinct, a group does not need to be seen by society; it must instead be perceived as a group by society.[374] While members of the group may be a visibly recognizable particular social group, there are many cases of PSGs that are clearly not ocularly visible. For example, *Matter of Kasinga*[375] determined that young tribal women who are opposed to female genital mutilation constitute a particular social group. Additionally, *Matter of Toboso-Alfonso*[376] held that homosexuals in Cuba were shown to be a particular social group, despite these individuals not publicly recognizing their homosexuality. Therefore, in order to have the "social distinction" necessary to to establish a PSG, there must be evidence showing that the society

[372] *Id.*
[373] Matter of W-G-R-, Respondent, 26 I&N Dec. 208 (BIA 2014), 213.
[374] Matter of W-G-R-, Respondent, 26 I&N Dec. 208 (BIA 2014), 214.
[375] *Id.*
[376] *Id.*

in general perceives, coincides, or recognizes persons sharing a particular characteristic to be a group.[377] While the society in question does not need to be able to easily identify who is a member of the group, it must be commonly recognized that a specific common and immutable characteristic is the one that defines the group in order for it to qualify as a PSG. After defining the requirements for a group to be "socially distinct," the BIA, the EOIR, and the DOJ explained why the court must determine social distinction based on the community's perception of the group, instead of the persecutor's. First, defining a social group's social distinction based on the persecutor's perception is problematic because a persecutor may purposefully identify an incorrect common immutable characteristic in order to stop the court from proving that the PSG was persecuted based on the characteristic that the community perceives the group to have. Second, the persecutors' perception of the group is not itself enough to make a group socially distinct because "a social group cannot be defined exclusively by the fact that its members have been subjected to harm."[378] Therefore, it is critical that the court considers the perspective of the community in which the group is in to determine social distinction.

INTERPRETATIONS OF PARTICULARITY AND SOCIAL VISIBILITY IN CASE LAW

In *Matter of W-G-R-, Respondent*, The Board, the EOIR, and the DOJ agreed with the immigration judge's ruling that the respondent's group comprised of "former members of the Mara 18 gang in El Salvador who have renounced their gang membership" does not constitute a PSG for the purposes of establishing the respondent's eligibility for withholding of

[377] Matter of W-G-R-, Respondent, 26 I&N Dec. 208 (BIA 2014), 216.
[378] *Id.*

removal (deportation).[379] The court argued that the group lacks particularly because it is too diffuse, as well as too broad and subjective. Furthermore, the group could include persons of any age, sex, or background. It is also not limited to those who have had significant involvement with the gang and would consider themselves–and are considered by others–as former gang members. For example, it could include a person who joined the gang many years ago at a young age but disavowed his membership shortly after initiation without having engaged in any criminal or other gang-related activities; it could also include a long-term, hardened gang member with an extensive criminal record who only recently left the gang.[380] In the former category, it is unlikely that the person would consider themself, or be considered by others, as a former gang member. Even if people in the former category might consider themselves "former gang members," this does not mean that they would be perceived as a part of a discrete group within society or be perceived as a discrete group in society because they had renounced their identity as gang members when they were young. After illustrating the definition of social distinction through this hypothetical, the Board, the EOIR, and the DOJ asserted that the "boundaries of a group are not sufficiently definable unless the members of society generally agree on who is included in the group, and evidence that the social group proposed by the guy respondent is recognized within the society is lacking in this case."[381]

Subsequently, the court explained why the respondent's claim in *Matter of W-G-R-, Respondent* did not meet the particularity or social distinction requirement to be recognized as a particular social group. According to the Board, the EOIR, and the DOJ, the boundaries of the group of "former gang members who have

[379] Matter of W-G-R-, Respondent, 26 I&N Dec. 208 (BIA 2014), 223
[380] *Id.*
[381] Matter of W-G-R-, Respondent, 26 I&N Dec. 208 (BIA 2014), 224.

renounced their gang membership" are not adequately defined.[382] Therefore, in order to meet the particularity requirement, the respondent would have to further specify the characteristics of the group that he claims to be a member of. For example, the respondent could have specified that the group could be comprised of "former gang members who have renounced their membership for less than one year and are being targeted as a result of their renouncement." Additionally, the court found that the respondent did not show that his proposed social group met the requirement of social distinction. The court's record revealed that there is little evidence that Salvadoran society considers former gang members who have renounced their gang membership as a distinct social group. While the record contains documentary evidence describing gangs, gang violence, and the treatment of gang members, it contains little documentation discussing the treatment or status of former gang members.[383] The only evidence that the record contains any societal view of former gang members is a report by the Human Rights Clinic, a Human Rights Program at Harvard Law School, stating that there is a societal stigma against former gang members because of their tattoos which makes it difficult for them to find employment.[384] However, the report does not clarify whether such discrimination occurs because of their status as known former gang members or because their tattoos create doubts or confusion about whether they are, in fact, former, rather than active, gang members. For these reasons, the Board, the EOIR, and the DOJ concluded that the respondent did not provide evidence demonstrating that former Mara 18 gang members who have renounced their gang membership are perceived, considered, or recognized in Salvadoran society as a socially distinct group. Additionally, the court found that since the respondent did not show membership in a cognizable social

[382] Matter of W-G-R-, Respondent, 26 I&N Dec. 208 (BIA 2014), 225.
[383] *Id.*
[384] Matter of W-G-R-, Respondent, 26 I&N Dec. 208 (BIA 2014), 227.

group, neither the harm he suffered nor the future harm he fears from gang members or the police on account of his status as a former gang member provides a basis for withholding of removal.[385] Since the respondent in *Matter of W-G-R-, Respondent* could not prove that his proposed social group comprised of former Mara 18 gang members who have renounced their gang membership had particularity or was socially distinct, the court dismissed his appeal.

In *Matter of M-E-V-G-, Respondent,* the BIA, the EOIR, and the DOJ reiterated the definition of PSG established by the decision in *Matter of Acosta* and *Matter of W-G-R-,Respondent*. The respondent in this case was a young man who suffered past persecution and feared further persecution in his native country of Honduras. While he was traveling to Guatemala, members of the Mara Salvatrucha gang beat, kidnapped, and assaulted him and his family. Additionally, the gang members threatened to kill him if he did not join the gang and threatened to shoot at him and throw rocks and spears at him about two to three times per week. The respondent claimed that he was persecuted on account of his membership in a PSG, namely "Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose the gangs."[386] The immigration judge who presided over the respondent's asylum case denied his application for asylum. Subsequently, the Third Circuit granted the respondent's petition for review regarding his membership in a PSG, but the respondent's application was denied again. *Matter of M-E-V-G-, Respondent* follows the respondent's second petition for review, and aims to answer the following question: does the respondent qualify as a refugee as a result of his past mistreatment, and his fear of future persecution, at the hands of gangs in Honduras? Specifically, has the respondent fulfilled the requirements for asylum based on his membership in a PSG?

[385] *Id.*
[386] Matter of W-G-R-, Respondent, 26 I&N Dec. 227 (BIA 201), 232.

To answer this question, The Board, the EOIR, and the DOJ referenced a prior decision made in *Matter of S-E-G-, Respondent*. In this case, the court denied a gang-related asylum claim asserting a proposed social group of "Salvadoran youths who have resisted gang recruitment, or family members of such Salvadoran youth."[387] The court found that the applicant's membership in a PSG was not established because he did not prove that the proposed group met the "particularity" or "social distinction" requirement established in *Matter of W-G-R-, Respondent*, since the group was not recognized in El Salvador as a discrete class of persons. Therefore, the respondent's fear of persecution was not based on his membership in a PSG. His fear was based on his individual response to the gang's efforts to increase its ranks.[388] After making these clarifications regarding the respondent's asylum claim in *Matter of W-G-R-, Respondent*, the BIA, the EOIR, and the DOJ remanded the case to the immigration judge who originally ruled on this case for further proceedings.

In section 4(B) of *Matter of W-G-R-, Respondent*, the court offered their interpretation of "particularity" and "social distinction." First, the BIA explained their interpretation of particularity. "A particular social group must be defined by characteristics that provide a clear benchmark for determining who falls within the group."[389] To illustrate this concept, the court referenced *Matter of A-M-E- & J-G-U-, Respondent* in which a family of wealthy Guatemalans claimed to be members of a PSG on account of facing persecution based on their wealth. In this case, the BIA found that "wealthy Guatemalans" lack particularity because the concept of wealth is too subjective to provide an adequate benchmark for defining a PSG.[390]

[387] Matter of M-E-V-G-, Respondent 26 I&N Dec. 227 (BIA 2014), 230.
[388] Matter of M-E-V-G-, Respondent 26 I&N Dec. 227 (BIA 2014), 231.
[389] *Id.*
[390] Matter of M-E-V-G-, Respondent 26 I&N Dec. 227 (BIA 2014), 233.

Additionally, there are many other wealthy Guatemalan families who are not persecuted, meaning that wealthy Guatemalan families are not targets of persecution based on a particular characteristic. The BIA, EOIR, and the DOJ also explained that a PSG must have discrete and definable boundaries that are specific to the proposed social group in question. Therefore, characteristics such as homelessness, poverty, and youth are too vague and all encompassing to set perimeters for a protected group.

After asserting their interpretation of particularity, the court explained how they define social distinction. Similar to *Matter of Acosta,* the Board's definition of social distinction emphasizes perception and recognition in the concept of PSG. To illustrate this point, the BIA, EOIR, and the DOJ referenced *Matter of H-, Respondent*, in which a former member of a Somali pirating clan faced persecution on account of him leaving the clan. In 1996, the BIA ruled that the respondent's proposed social group (Somali clan members who revoked their clan membership) was a PSG because in Somali society, clan membership is a "highly recognizable" characteristic that is inextricably linked to family ties.[391] Next, the court emphasized that "social distinction" does not entail ocular visibility, meaning that the community of a respondent does not have to visibly recognize that the respondent's proposed social group is a distinct group that has one or more immutable characteristics. To be socially distinct, "a group need not be seen by society; rather, it must be perceived as a group by society."[392] To further this point, the BIA, EOIR, and the DOJ reference *Matter of Toboso-Alfonso*, in which the respondent was persecuted on account of his proposed social group as a Cuban homosexual man.[393] While this immutable characteristic is not ocularly visible, the court found that Cuban

[391] *Id.*
[392] Matter of M-E-V-G-, Respondent 26 I&N Dec. 227 (BIA 2014), 235.
[393] *Id.*

society perceived Cuban homosexual males as a compromised social group due to the cultural conditions of Cuba. With this establishment, members of a PSG may still have protected status as a member of a particular social group, despite efforts to hide their membership in the group to avoid persecution. Therefore, for a respondent's proposed social group to have social distinction, it must be perceived by their society as a compromised group based on a common immutable characteristic.

While *Matter of W-G-R-, Respondent* and *Matter of M-E-V-G-, Respondent* established our contemporary understanding of "particularity" and "social visibility," the tenth circuit of The U.S. Court of Appeals provided a concise summary of these terms in *Rivera-Barrientos v. Holder, Jr.* The respondent in this case is a woman from a small town in El Salvador. Within this town, she routinely witnessed acts of violence, intimidation, and other crimes committed by members of the Mara Salvatrucha Street Gang (MS-13). In August of 2005, members of MS-13 approached Rivera Barrientos and asked her to join the gang. She refused, stating, "No, I don't want to have anything to do with gangs. I do not believe in what you do."[394] Subsequently, members of the gang threatened that if Barrientos did not join the gang, they would "make her family pay."[395] Over the next few months, the gang members harassed her and continued to pressure her into joining the gang. In January of 2006, Barrientos encountered 5 gang members while she was walking to a bus station alone. They again demanded that she join their gang, prompting her to state that she disapproved of the gang's activities and would never join it. One of them put a knife to her throat while they forced her into a car, blindfolded her, and drove her to a field. After dragging her out of the car, the gang members asked Rivera Barrientos if she had changed her mind, and she told them she

[394] Rivera-Barrientos v. Holder, Jr., No. 10-9527 (2012), 10.
[395]Rivera-Barrientos v. Holder, Jr., No. 10-9527 (2012), 12.

had not. The gang members then began kissing her. When she struggled to escape, one of them smashed a beer bottle into her face. Then, three of the gang members brutally raped her. Afterwards, they told her that if she talked to the police about what had happened that night, they would kill both her and her mother. Barrientos did not report the rape and physical abuse to authorities because she feared that the gang would follow through with their threats. Additionally, she was not confident that the El Salvadorian police would protect her or take significant action against the gang. For several days after the attack, Rivera Barrientos stayed in her house, hoping to evade her attackers. However, gang members appeared at her house on five occasions, expressing their continued intentions to recruit her into their gang. Rivera Barrientos's mother lied and told them she did not know where Rivera Barrientos was. Two weeks later, Rivera Barrientos's brothers sent her money, and she left El Salvador for Mexico by bus. She was subsequently apprehended by immigration officials while trying to illegally cross the border into the United States.

Upon arrival in the United States, the Department of Homeland Security initiated removal proceedings against Barrientos for being an alien present in the United States without having been admitted or paroled (See 8 U.S.C. § 1182(a)(6)(A)(I)). In response, she filed an application for asylum based on her violent encounters with MS-13 gang members. After Barrientos's hearing with an immigration judge, the judge found that her testimony as to the events that took place in El Salvador were credible. However, the judge denied her application for asylum on the grounds that she failed to establish persecution on account of her membership in a particular social group. On appeal, the Board of Immigration Appeals affirmed this decision, prompting Barrientos to appeal her case to the United States Court of Appeals. After reiterating the definition of a PSG, per *Matter of Acosta*, the circuit judges explained Rivera Barrientos's

contentions based on her proposed membership in a particular social group. According to the court, Barrientos claims that she qualifies as a refugee because the MS-13 gang attacked her on account of her membership in a particular social group composed of "women in El Salvador between the ages of 12 and 25 who resisted gang recruitment."[396] Subsequently, the court acknowledged that the BIA denied these grounds, concluding that this proposed social group is not defined with particularity or social visibility. While applying "particularity" and "social visibility" to Rivera Barrientos's case, the circuit judges provide clear definitions of these terms.

According to *Rivera-Barrientos v. Holder, Jr.,* the premise of particularity is that the proposed social group "has specific and well-defined boundaries that are not subject to dispute or variation."[397] Therefore, if a description of the social group is too vague or relevant terms within the definition of the proposed group are subject to dispute or variation, the applicant has failed to provide an adequate benchmark for determining group membership. For example, if an asylum applicant claims that they were persecuted based on membership in a particular social group consisting of women who wear clothing that expresses explicit content, this would not satisfy the particularity requirement because "explicit" is not a clearly defined term and "women" has no well-defined boundaries. Are women persecuted because they wear shirts that protest government action? Are women targeted by militia groups because they wear the color green? Additionally, in either of these cases, are these women persecuted within the boundaries of Germany, Nicaragua, or another country? Evidently, the essence of the 'particularity' requirement is whether the proposed group can accurately be described in a manner sufficiently distinct that the group would

[396] *Id.*

[397] Rivera-Barrientos v. Holder, Jr., No. 10-9527 (2012), 14.

be recognized, in the society in question, as a discrete class of persons.

After explaining their definition of particularity, the circuit judges offered a clear definition of social visibility. In *Rivera-Barrientos v. Holder, Jr.,* the court established that social visibility requires that "society perceive those with the characteristic in question as members of a social group."[398] Therefore, whether a proposed social group has social visibility must be considered in the context of the country that the respondent was persecuted in. In addition to this foundational definition of social visibility, the circuit judges established two conditions that a proposed social group must meet to demonstrate that it possesses social visibility. First, citizens of the applicant's country must consider the individuals within the proposed group as members of a distinct group who share a common, immutable characteristic. The second is that the applicant's community must be capable of identifying an individual as belonging to the group. Therefore, the applicant's proposed social group must be highly visible and recognizable by the society in which they live.

CURRENT DEFINITION OF A PARTICULAR SOCIAL GROUP

In August of 2014, the BIA, the EOIR, and the DOJ established the first comprehensive definition of a PSG in *Matter of A-R-C-G-et al. Respondents*. The lead respondent of this case is a mother of three minor respondents. All of the respondents are natives and citizens of Guatemala who entered the United States without inspection in December of 2005. The lead respondent was married at age 17 and faced consistent, severe abuse from her husband. This abuse included weekly beatings after the lead respondent had her first child.[399] On one occasion, the

[398] *Id.*

[399] Matter of A-R-C-G-, Respondent 26 I&N Dec. 388 (BIA 2014), 392.

respondent's husband broke her nose. On another occasion, he threw paint thinner on her, burning her breasts. Additionally, the respondent's husband raped her. The respondent attempted to seek help by calling the police. However, the police did not arrest the respondent's husband, claiming that they didn't want to interfere with their marital relationship. One time, the police came to her home after her husband hit her on the head, but he was not arrested. When her husband found out that she had called the police, he threatened to kill her if she called them again. Throughout the relationship, the respondent tried to leave the relationship by staying with her father multiple times, but her husband found her and threatened to kill her if she did not return to him.[400] Once, she went to Guatemala City for three months, but her husband followed her and convinced her to come home by promising that he would discontinue the abuse. When she returned home, the abuse continued, prompting her to leave Guatemala in December of 2005.

The immigration judge that presided over this case found that the respondent "did not demonstrate that she had suffered past persecution or has a well-founded fear of future persecution on account of a particular social group composed of married women in Guatemala who are unable to leave their relationship."[401] The judge referenced the definition of PSG established by *Matter of Acosta* and determined that there was inadequate evidence that the respondent's spouse abused her "in order to overcome" the fact that she was a "married woman in Guatemala who was unable to leave the relationship."[402] Additionally, the judge asserted that the respondent faced criminal acts which were perpetrated arbitrarily and without reason, meaning the respondent did not face persecution. Therefore, the immigration

[400]Matter of A-R-C-G-, Respondent 26 I&N Dec. 388 (BIA 2014), 393.
[401] *Id.*
[402] Matter of A-R-C-G-, Respondent 26 I&N Dec. 388 (BIA 2014), 396.

judge found that the respondent did not demonstrate eligibility for asylum or withholding of removal.

On appeal, the respondent argued that she established eligibility for refugee status as a victim of domestic violence on account of the fact that she was a member of a PSG, comprised of "Guatemalan women who are unable to leave a relationship." In response to this argument, the Department of Homeland Security (DHS) responded that the immigration judge's decision should be upheld on the grounds that domestic violence is a criminal activity, and not persecution based on membership in a particular social group. Subsequently, the BIA, the EOIR, and the DOJ requested briefings from the DHS and *amici curiae* to address whether domestic violence can serve as a basis for an asylum claim in certain instances such as the respondent's in *Matter of A-R-C-G-et al. Respondents.* Following this request, the DHS conceded that the respondent suffered past persecution and that her proposed social group is a valid PSG, but sought remand, arguing that "further factual development of the record and related findings by the immigration judge are necessary on several issues."[403] The respondent opposed this remand, claiming that she has met her burden of proof regarding all aspects of her asylum claim. While the court accepted both parties' position that the respondent faced past persecution and that the respondent's proposed social group is a particular social group, the Board, the EOIR, and the DOJ remanded the record.

Before discussing their analysis on the respondent's case, the court considered whether victims of domestic violence can have established membership in a PSG. The BIA, EOIR, and DOJ reference *Matter of R-A-,* in which the court considered whether the respondent was eligible for asylum on account of her membership in a PSG consisting of "Guatemalan women who

[403] *Id.*

have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination."[404] In this case, the majority opinion explained that the proposed social group was "defined principally, if not exclusively, for purposes of" the asylum case and that it was unclear whether "anyone in Guatemala perceives this group to exist in any form whatsoever," including spousal abuse victims themselves or their male oppressors.[405] The court furthered their reasoning by stating that even if the respondent established that the proffered social group was cognizable through a common, immutable characteristic, she could not prove that her husband harmed her on account of her membership in the group. Therefore, the court made it clear that being a victim of domestic violence alone does not qualify you as a member of a PSG. In order to establish that one has faced persecution or has a well-founded fear of persecution based on membership in a PSG with regard to domestic abuse, they must prove that they were abused because of their membership in a PSG and that the society in which they live recognizes the group's common, immutable characteristic.

In section II(B) of the opinion in *Matter of A-R-C-G-,et al. Respondents*, the DOJ, EOIR, and BIA establish a comprehensive definition of PSG. An applicant seeking asylum based on his or her membership in a PSG must establish that the group is "(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question."[406] In the respondent's case in *Matter of A-R-C-G-,et al. Respondents*, her group consists of members who share the common immutable characteristic of gender. Additionally, the DOJ, EOIR, and BIA claim that the respondent's marital status is an immutable characteristic since

[404] *Id.*

[405] Matter of A-R-C-G-, Respondent 26 I&N Dec. 388 (BIA 2014), 397.

[406] Matter of W-G-R-, Respondent, 26 I&N Dec. 208 (BIA 2014), 220.

the individual is unable to leave her relationship. Within the context of Guatemalan society, a married woman's inability to leave a relationship due to societal expectations of gender roles and subordination, as well as legal restrictions regarding divorce, furthers the claim that a group of Guatemalan women who cannot leave her marriage share an immutable characteristic.[407] The court also indicated that the dissolution of marriage could be contrary to religious or other deeply held moral beliefs, which could also make "unable to leave a marriage" an immutable characteristic in specific societal contexts. With regard to the social distinction of the respondent's PSG in *Matter of A-R-C-G-,et al. Respondents,* the DOJ, EOIR, and BIA explain that it is critical to determine whether Guatemalan society makes meaningful distinctions based on the common immutable characteristic of being a Guatemalan woman in a domestic relationship that she cannot leave. Moreover, they explain that in order to establish that Guatemalan society recognizes this social distinction, there must be evidence that the society in question "recognizes the need to offer protection to victims of domestic violence, including whether the country has criminal laws designed to protect domestic abuse victims and whether those laws are effectively enforced."[408] In support of the argument that the PSG of married Guatemalan women who are unable to leave their abusive relationship has social distinction, the record in *Matter of A-R-C-G-,et al. Respondents* includes evidence that Guatemala has a culture of "machismo and family violence,"[409] furthering the claim that Guatemalan society recognizes that domestic abuse is a significant issue within their country. Additionally, a study by the Canadian Broad Corporation established that while Guatemala has laws in place to prosecute domestic violence crimes, enforcement is mostly ineffective because the National Civilian Police "often fail to respond to

[407] *Id.*
[408] *Id.*
[409] Matter of W-G-R-, Respondent, 26 I&N Dec. 208 (BIA 2014), 222.

requests for assistance related to domestic violence."[410] Therefore, the DOJ, EOIR, and BIA established that the respondent's PSG, married Guatemalan women who are unable to leave their relationship, contains a common immutable characteristic (women who are unable to leave a relationship), particularity (women in Guatemalan society cannot leave abusive domestic relationships because of societal pressure and laws that restrict divorce and separation), and social distinction (reports have recognized that there is a culture of machismo and family violence in Guatemala that perpetuates female subordination). Therefore, the court established that the respondent meets the requirements for being recognized as a member of a cognizable PSG.

Matter of A-R-C-G-, et al. Respondents exemplifies the complexity of PSG and why it has been subjected to decades of legal debate. In order to establish that the respondent was a member of a particular social group, the DOJ, EOIR, and BIA had to prove that being a Guatemalan woman who cannot escape a domestically abusive relationship is an immutable characteristic, that this group has particularity because Guatemalan society has specific barriers that prevent these women from leaving their relationships, and that the group is socially distinct because trusted reports recognize that Guatemalan culture contributes to these womens' persecution in domestic relationships.

THE FAMILY UNIT AS A PARTICULAR SOCIAL GROUP

In *Matter of L-E-A-, Respondent I*, *Matter of L-E-A-, Respondent II*, *Matter of A-B-, Respondent I*, and *Matter of A-B-, Respondent II*, Attorney General Jeff Sessions and Attorney General Merrick Garland applied the definition of a PSG (as established by *Matter*

[410] Matter of W-G-R-, Respondent, 26 I&N Dec. 208 (BIA 2014), 223.

of W-G-R-, *Respondent*, *Matter of M-E-V-G-, Respondent, Matter of A-R-C-G-,et al. Respondents*, and *Matter of Acosta*) to a complex proposed social group that can be interpreted differently on a case-by-case basis: the family unit. Through the contradictions that both attorney generals have regarding the interpretation of a family as a PSG, it is evident that the definition of particularity, social distinction, and a particular social group must be more clearly stated in the INA.

In *Matter of L-E-A-,Respondent I*, the BIA, EOIR, and DOJ utilized the precedential definitions of PSG to determine whether a PSG based on family membership is eligible for asylum status. The respondent in this case was a Mexican man who was the target of a gang. Thirteen Years after the respondent entered the United States illegally in 1998, he returned to his parents' home in Mexico City in May of 2011. Prior to the respondent's arrival, members of La Familia Michoacana, a Mexican criminal cartel, approached the respondent's father and asked him if they could use his store as a distribution center to sell drugs. His father refused. About a week after the respondent returned to Mexico, he was running an errand with his cousin and a nephew when they heard gunshots coming from inside a car. A week later, the respondent was approached by the same car. Its four occupants identified themselves as members of La Familia Michoacana. They asked if he would sell drugs for them at his father's store because they liked the store's location. The respondent declined, and the cartel members indicated that he should reconsider. The week after this incident, the same people who confronted the respondent attempted to grab him and force him into their car, but the respondent was able to escape. This prompted the respondent to leave and successfully cross the border into the United States. Soon after, the respondent left for the border and was ultimately successful in crossing into the United States.

The respondent in *Matter of L-E-A-, Respondent I* claimed that he was targeted by members of La Familia on account of his membership in a PSG composed of his father's family members. Additionally, he asserted that he had a well-founded fear of persecution due to his membership in his father's family. The Immigration judge who presided over the case found that the respondent had a credible fear, but she concluded that La Familia Michoacana was not motivated to harm his father's family based on their membership in his family itself. Instead, the gang members were interested in distributing illegal drugs at the store and increasing their profits. Additionally, the Board explained that the prosecutor's motive was related to ownership of the store. Therefore, even if the current owners of the store sold their store, the gang would still target the new owners of the store.

After discussing the respondent's claim, the BIA, EOIR, and DOJ analyzed the requirements for recognizing a family as a PSG and the connection between a family-based PSG and a persecutor's motive for harming a family-based particular social group. First, the BIA recognized that a family can be a cognizable particular social group if it is based on innate characteristics (including family relationships), are generally easily recognizable, and understood by others to constitute a social group.[4ıı] Therefore, a determination of whether a proposed social group qualifies as a particular social group is a fact-based inquiry made on a case-by-case basis, depending on whether the group is immutable and is recognized as socially distinct in the relevant society. The court explained that since the facts of *Matter of L-E-A-, Respondent I* present a valid particular social group comprised of the respondent's father's immediate family, it is clear that the respondent, a son residing in his father's home, is a member of a PSG. However, the BIA, EOIR, and DOJ explained that the key issue they must consider is whether the harm he experienced or

[4ıı] *Id.*

feared was on account of his membership in that particular social group.[412] "We must separate the assessment whether the applicant has established the existence of one of the enumerated grounds (religion, political opinion, race, ethnicity, and particular social group) from the issue of nexus."[413] In other words, a persecution claim cannot be established if there is no proof that the applicant or other members of the family were targeted because of the family relationship. In the case of the respondent in *Matter of L-E-A-, Respondent I*, the respondent's membership in his father's immediate family cannot play a minor role in his persecution if he were to be recognized as a member of a PSG. The court went on to explain that nexus is not established simply because a particular social group of family members exists and the family members experience harm. Therefore, the fact that a persecutor has threatened an asylum seeker and members of his family does not necessarily mean that the threats were motivated by family ties. After outlining the grounds for establishing nexus between a family-based PSG and persecution or a well-founded fear of persecution based on a PSG, the court stated that according to the immigration judge who adjudicated this case, the cartel attempted to coerce the respondent's father into selling contraband his store. When he refused, the cartel approached the respondent to sell its product because he was in a position to provide access to the store, not because of his family membership. Therefore, the court found that the immigration judge correctly determined that the respondent was targeted only as a means to achieve the cartel's objective to increase its profits by selling drugs in the store owned by his father. The cartel's motive to increase its profits by selling contraband in the store was a more central reason for its actions against the respondent's family than the respondent's membership in his father's immediate family. Moreover, the evidence does not indicate that the persecutors had any animus against the family or the respondent based on their

[412] Matter of W-G-R-, Respondent, 26 I&N Dec. 208 (BIA 2014), 226.
[413] *Id.*

biological ties, historical status, or any other features unique to that family unit. After their analysis on the family unit as a PSG, the BIA, EOIR, and DOJ concluded that the respondent in *Matter of L-E-A-, Respondent I* did not establish that his membership in a PSG composed of his father's family members was one of the central reasons for the events he experienced and the harm that he claims to fear in the future. Therefore, the respondent's appeal from the immigration judge's denial of his application for asylum was dismissed, forcing him to leave the United States.

In *Matter of L-E-A-, Respondent II*, Former Attorney General Sessions argued that the respondent in *Matter of L-E-A-, Respondent I* failed to prove that his proposed social group was the reason for him and his family's persecution. In addition, Attorney General Sessions claimed that the Board was incorrect in recognizing that the respondent is a member of a particular social group composed of the respondent's father's immediate family because his proposed group is not distinct from other persons within the society in some significant way. Therefore, he does not meet the social distinction requirement established in *Matter of W-G-R-, Respondent* and *Matter of M-E-V-G-, Respondent*. Sessions explains that the alien bears the burden of showing that his proposed group meets the criteria for membership in a PSG and "he will not satisfy that burden solely by showing that his social group has been the target of private criminal activity."[414] To further this claim, Sessions references the respondent's case in *Matter of Acosta-,Respondent*[415], the case in which a taxi driver in El Salvador refused to participate in guerilla-sponsored work-stoppages at risk of harm by the MS-13 gang. According to Sessions, despite the respondent's imminent danger, their risk of safety did not create PSG status because the fact that a criminal group targeted him and his fellow taxi drivers

[414] *Id.*

[415] Matter of Acosta, 19 I&N Dec. 211, 234 (BIA 1985), 224.

did not necessarily make that group socially distinct. Furthermore, the Attorney General argued that the taxi drivers were not in a substantially different situation from anyone else who has crossed the MS-13 gang, or was perceived to be a threat to the gang's interests.[416] Subsequently, Sessions reiterated the argument that was made by the Board in *Matter of L-E-A-, Respondent I*. The Board of Immigration Appeals recognized that "a clan or similar group bound together by common ancestry, cultural ties, or language may constitute a particular social group."[417] However, Sessions countered this point by asserting that what qualifies a familial group or clan as a PSG is not the genetic ties among its members, but its ability to be recognized by society as a socially distinct group of people. The attorney general furthered this claim by stating that "the large and prominent kinship and clan groups that have been recognized by the Board as cognizable particular social groups stand on a very different footing from an alien's immediate family, which generally will not be distinct on a societal scale, whether or not it attracts the attention of criminals who seek to exploit that family relationship in the service of their crimes."[418] For example, in *Matter of H-, Respondent*, former members of a Somali pirating clan were recognized as members of a particular social group because pirating clans were socially recognized by Somali society as a group that based membership on one's familial ties. After making this counter argument, Sessions compares the case to the definition of PSG as established by *Matter of W-G-R-, Matter of M-E-V-G Respondent* and *Matter of M-E-V-G-, Respondent* and emphasizes the importance of interpreting social distinction and particularity correctly in this case. He argues that a family group will generally not meet that standard for a PSG, because it will not have the kind of identifying characteristics that render the

[416] Matter of L-E-A-, Respondent, II 27 I&N Dec. 581 (A.G. 2019), 590.
[417] Matter of L-E-A-, Respondent, I 27 I&N Dec. 581 (A.G. 2019), 587.
[418] *Id.*

family socially distinct within the society in question.[419] Sessions furthers this point by explaining the flaws of several cases that utilize the *Matter of M-E-V-G-, Respondent* and *Matter of W-G-R-, Respondent* framework for the definition of PSG. According to the attorney general, *Velasquez v. Sessions, Villalta-Martinez v. Sessions, Torres v. Mukasey, and Rios v. Lynch* all express that an individuals's membership in their nuclear family satisfies the requirement for membership in a PSG. However, these cases do not explicitly evaluate whether that position is consistent with the standard established in *Matter of M-E-V-G-, Respondent*, or *Matter of W-G-R-, Respondent.*[420] Additionally, Sessions argues that the circuit courts based these decisions on a suggestion by the Board that social groups based on family relationships are generally easily recognizable and understood by others to constitute particular social groups. The notion that a family is generally recognizable as a PSG is not rooted in evidence and is not faithful to the text, purpose, and policies underlying the asylum statute.

Additionally, in the case of the respondent in *Matter of L-E-A-, Respondent, I*, the Board did not conduct a fact-based inquiry to determine whether the respondent had satisfied his burden of establishing the existence of a PSG. According to Sessions, respondents must present facts to establish each of the required elements for asylum status, and the asylum officer, immigration judge, or the BIA must determine whether those facts satisfy the required elements. However, the argument that respondents must prove they meet the requirements for asylum status are not rooted in precedent. In *INS v. Cardoza-Fonseca*, the ninth circuit court established that an asylum seeker does not need clear evidence to prove they are facing persecution or fear persecution based on membership in a PSG. The respondent in this case is a thirty-eight-year-old Nicaraguan citizen who entered the United

[419] *Id.*

[420] Matter of L-E-A-, Respondent, I 27 I&N Dec. 581 (A.G. 2019), 588.

States in 1979 as a visitor. After she remained in the United States longer than she was permitted, and failed to take advantage of the Immigration and Naturalization Service's (INS's) voluntary departure, the INS commenced deportation proceedings against her. The respondent claimed that she was eligible for consideration for asylum and contended that the immigration judge and the BIA erred in applying the "more likely than not" standard of proof. Instead, the respondent claimed that they should have applied the "well-founded fear"[421] standard established by the UNHCR. The immigration judge agreed, but interpreted the "well-founded fear" standard to require asylum applicants to present specific facts through objective evidence to prove either past persecution or good reason to fear persecution.[422] After explaining the court's interpretation of the "well-founded fear" standard, the ninth circuit referenced the United Nations High Commissioner for Refugees' Handbook on Procedures and Criteria for Determining Refugee Status to explain the U.N's standard on an applicant's fear of persecution. According to the handbook, "the applicant's fear should be considered well-founded if they can establish, to a reasonable degree, that their continued stay in their country of origin has become intolerable to them for reasons stated in the definition (persecution on account of race, religion, nationality, political opinion, or membership in a PSG), or would for the same reasons be intolerable if they returned there."[423] Subsequently, the ninth circuit asserted that the High Commissioner's analysis of the United Nations' standard is consistent with their conclusions regarding an asylum seeker's fear of persecution. "There is simply no room in the United Nations' definition for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no

[421] INS v. Cardoza-Fonseca, 480 U.S. 421 (1987), 480.
[422] *Id.*
[423] *Id.*

"well-founded fear" of the event happening."[424] Therefore, so long as an objective situation is established by the evidence, the respondent does not have to show that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility. After the ninth circuit discussed why their interpretation of a well-founded fear of persecution aligns with the United Nations' definition, the court explained that an applicant must satisfy two burdens in order to satisfy the requirements for establishing a credible fear of persecution. First, the asylum seeker must prove that they at least have a "well-founded" fear of persecution (see *Matter of Dunar,).* Second, the refugee must show that their life of freedom would be threatened if they were deported.

After the ninth circuit established the requirements for proving a well-founded fear of persecution, the court acknowledged two arguments made by the United States Immigration and Naturalization Service that support the claim the well-founded fear standard allows the same benefits as the clear probability standard for less stringent regulations. First, the INS argues that the structure of the INA and the court's well-founded fear standard is anomalous and affords greater benefits to asylum seekers than necessary because it is a less stringent standard of eligibility than the clear probability standard. However, the court responded by arguing that an alien who satisfies the applicable "well-founded fear" standard does not have a right to remain in the United States. Instead, they are only eligible for asylum and suspension of mandatory deportation.[425] Whether they are granted refugee status or not is based on the discretion of the Attorney General. If an asylum seeker satisfies the clear probability standard, then they are entitled to mandatory suspension of deportation and are eligible for asylum. Therefore, the INS is erroneous in claiming that the court's well-founded

[424] INS v. Cardoza-Fonseca, 480 U.S. 421 (1987), 481.
[425] *Id.*

fear standard grants unnecessarily generous benefits to asylum seekers who satisfy this standard. The INS's second argument in support of the proposition that the "well-founded" fear standard and the "clear probability" standard are equivalent is that the BIA does not clearly define the difference between these two standards. However, the ninth circuit argues that the BIA defined the standards per the language of the United Nations Protocol. According to the United Nations, an alien need not prove that it is more likely than not that he or she will be persecuted in his or her home country in order to meet the "well-founded fear" standard.[426] Additionally, the United Nations defined the "clear probability" standard as determining whether the alien has provided objective evidence that they will be persecuted in their home country if they are deported. Evidently, there is a clear difference between the two standards.

Until the court's ruling in *INS v. Cardoza-Fonseca*, the courts required asylum seekers to show a "clear probability" of persecution in order to obtain refugee status. However, this requirement was not established by legal precedent until The U.S. Supreme Court adjudicated *INS v. Stevic* in 1984. The respondent, a Yugoslavian citizen, entered the United States in 1976 to visit his sister, then a permanent resident alien residing in Chicago. After the respondent overstayed his 6-week period of admission, The Immigration and Naturalization Service instituted deportation proceedings against the respondent. Subsequently, the respondent admitted that he was deportable and agreed to depart voluntarily by February 1977. In January 1977, however, the respondent married a United States citizen who obtained approval of a visa petition on his behalf. Shortly thereafter, the respondent's wife died in an automobile accident. The approval of the respondent's visa petition was automatically revoked, prompting the INS to order the respondent to surrender for

[426] *Id.*

deportation to Yugoslavia.[427] In August of 1977, the respondent sought to reopen the deportation proceedings, seeking an asylum application upon review from the Attorney General.[428] In a supporting affidavit, the respondent stated that he had become active in an anti-Communist organization after his marriage in early 1977, that his father-in-law had been imprisoned in Yugoslavia because of membership in that organization, and that he feared imprisonment upon his return to Yugoslavia. In response to the respondent's claims the Immigration Judge denied the motion without an evidentiary hearing, and the denial was upheld by the Board of Immigration Appeals, which held that the respondent had not met his burden of showing that there was a "clear probability" of persecution. The BIA upheld this decision, stating that "[a] motion to reopen based on a claim of persecution must contain prima facie evidence that there is a clear probability of persecution to be directed at the individual respondent."[429] After reopening his deportation proceedings, and being denied a third time, the respondent turned to the United Nations Human Rights Council's (UNHCR) protocols to argue that he should be held to the "well-founded" fear standard instead of the "clear probability standard." The Respondent claims that in the United States, the difference between clear probability of persecution and well-founded fear of persecution is unclear by the United States Congress. However, the UNHCR clearly established that ever since the United States's accession to the United Nations Protocol in 1968, Congress has failed to adhere to the protocols by not applying the "well-founded" fear standard to asylum cases. In the Supreme Court's examination of the UN Protocol, they explained that Congress's actions "satisfied the requirements established by the UN Protocol"[430] because a "well-founded" fear of persecution still requires objective

[427] INS v. Stevic, 467 U.S. 407 (1984), 467.
[428] INS v. Stevic, 467 U.S. 407 (1984), 468.
[429] *Id*
[430] INS v. Stevic, 467 U.S. 407 (1984), 469.

evidence that the respondent has faced or is likely to face persecution upon arrival to their country of origin. Therefore, the Supreme Court held that the respondent in asylum cases is required to show a "clear probability" of persecution in order for their asylum application to be granted. While the distinction between clear probability and a well-founded fear is established in *INS v. Cardoza-Fonseca*, the court has required asylum seekers to provide objective evidence that they would face a clear probability of persecution or fear of persecution if they were to return to their country of origin.

The Attorney General's decision in *Matter of L-E-A-, Respondent, II* set a clear precedent for PSG cases: not only does the family unit not satisfy the requirements to be recognized as a PSG, but all asylum applicants must provide objective evidence to prove that they were persecuted or have a well-founded fear of persecution based on their membership in a particular social group, despite the precedent established in *INS v. Cardoza-Fonseca*. However, Attorney General Jeff Sessions did not stop there. In *Matter of A-B-, Respondent, I* the Attorney General levied more attacks on the established precedents that provided some semblance of a definition for a "particular social group."

VICTIMS OF DOMESTIC VIOLENCE AS A PARTICULAR SOCIAL GROUP

MATTER OF A-B-, RESPONDENT I

Matter of A-B-, Respondent I, directly contradicted years of legal precedent regarding particular social groups. The respondent in this case was a woman who is a native and citizen of El Salvador, who entered the United States illegally and was apprehended by U.S. Customs and Border Protection agents in July of 2014. The respondent claimed that she was eligible for asylum because she was persecuted on account of her membership in a particular

social group. In her asylum proceedings, the respondent asserted her ex-husband, with who she shared three children, repeatedly abused her physically, emotionally, and sexually during and after their marriage. Therefore, the respondent claimed that she was a member of a PSG composed of "El Salvadoran women who are unable to leave their domestic relationships where they have children in common with their partners."[431] In response to her claim, the immigration judge ordered the respondent to be deported to El Salvador, listing four independent reasons for this decision. First, the judge argued that the respondent's testimony was not credible because she offered no evidence to prove that she faced persecution from her husband in El Salvador. Second, he asserted that the group that the respondent claimed membership in was not a "particular social group" per the INA (despite the fact that the INA provides no definition of PSG). The third reason for the respondent's removal was that even if her proposed social group was recognized as a PSG, the respondent still failed to establish that her membership in a particular social group was a central reason for her persecution. Finally, the immigration judge claimed that the respondent failed to show that the El Salvadoran government was unable or unwilling to help her. Subsequent to this decision, the respondent appealed her case to the Board of Immigration Appeals.

In December of 2016, the BIA reversed and remanded the decision with an order to grant the respondent asylum. With regard to the court's claim that the respondent's testimony was not credible, the BIA found that the judge's ruling was clearly erroneous, since the respondent provided a sworn affidavit to verify the details of her situation. Additionally, The Board explained that the respondent's case is substantially similar to *Matter of A-R-C-G-, Respondent*. In this case, the BIA established that "married women in Guatemala who are unable to leave their

[431] Matter of A-B-,Respondent I, 27 I&N Dec. 316 (A.G. 2018), 321.

relationship"[432] satisfies the requirements for recognition as a PSG. Therefore, The Board found that the respondent's status as an "El Salvadoran woman who is unable to leave her domestic relationship where she has children in common with her partner" supports her claim that she is a member of a particular social group. In addition, the BIA explained that the respondent's ex-husband persecuted her because of this status. Moreover, the Board held that the immigration judge erred in finding that the respondent could leave her relationship with her husband because she clearly expressed a well-founded fear of persecution if she were to leave the relationship. Additionally, the fact that the respondent and her ex-husband have shared children furthers the claim that she could not leave her relationship, since leaving the relationship could mean leaving her children in an abusive household. Finally, the Board determined that the El Salvadoran government was unwilling and unable to protect the respondent due to the inaction of El Salvadoran law enforcement officers upon receiving requests for help from the respondent.

Until Jeff Sessions was appointed as Attorney General of the United States, it was clearly established that victims of domestic violence who lived in countries that possessed a culture of "machismo" and masculine domestic abuse qualified as members of a particular social group. However, shortly after his appointment as Attorney General, Jeff Sessions utilized his discretionary power to completely undermine the established precedent regarding domestic violence victims as members of PSGs. In *Erazo v. Sessions* and *Cardona v. Sessions*, the Attorney General argued that the respondents in these cases did not qualify as members of a particular social group because they successfully escaped their domestic abusers (*See Fuentes-Erazo v. Sessions*[433] *and Cardona v. Sessions*[434].) Additionally, in *Marikasi v.*

[432] *Id.*
[433] Fuentes-Erazo v. Sessions 848 F.3d 847 (8th Cir. 2017)
[434] Cardona v. Sessions 848 F.3d 519 (1st Cir. 2017)

Lynch and *Vega-Ayala v. Lynch*, Jeff Sessions asserted that the responents' sworn testimonies of their experiences as domestic abuse victims were not sufficient in proving that the respondents maintained a well-founded fear of persecution because they did not satisfy the "clear probability standard" described in *INS v. Cardoza-Fonseca* (*See Marikasi v. Lynch*[435] *and Vega-Ayala v. Lynch*[436]). According to Jeff Sessions, these cases established that domestic violence victims are not entitled to asylum based on membership in a particular social group.

With this newfound rhetoric regarding victims of domestic violence, the Attorney General challenged the Board's decision that the respondent in *Matter of A-B-, Respondent I* satisfied the requirements to be recognized as a member of a PSG composed of El Salvadoran women who are unable to leave their domestic relationships where they have children in common with their partners. In his rebuttal of the BIA's decision, Sessions cited *Cardona v. Sessions*, which denied the respondent's asylum application on the grounds that the alien had not established that her alleged domestic abuse was on account of her membership in a PSG. Instead, the Attorney General claimed that her husband's domestic abuse was an example of private violence. Therefore, the respondent's situation does not constitute evidence of persecution based on her membership in a PSG comprised of victims of domestic violence. To illustrate this claim with an example, Sessions referred to a concurring opinion in *Matter of M-E-V-G-, Respondent*, in which the immigration judge explained that victims of gang violence in countries that contain a significant amount of gang violence are not necessarily persecuted because they are a member of a particular group. These victims experienced a private wrong in a setting in which gang violence is prevalent within the community that the

[435] Marikasi v. Lynch, No. 16-3281 (6th Cir. 2016)
[436] Vega-Ayala v. Lynch, No. 15-2114 (1st Cir. 2016)

respondent is residing in. Similarly, Sessions argued that victims of domestic violence are not persecuted based on their membership in a PSG. Rather, they are victims of a private wrong in a country where domestic abuse is a common instance. After defending his claim that domestic violence victims cannot prove that they have been persecuted or have a well-founded fear of persecution unless they have demonstrated a "clear probability" that they have been abused due to their membership in a particular social group, Attorney General Jeff Sessions ordered the respondent in *Matter of A-B-, Respondent I* to be removed from the United States on the grounds that she did not prove that she was persecuted on account of her membership in a PSG.

MATTER OF A-B-, RESPONDENT II

In the years following the Attorney General's decision in *Matter of A-B-, Respondent I*, the Board of Immigration Appeals recognized that victims of domestic violence could not qualify as members of a particular social group unless they could prove that there was a clear probability that the respondent faced persecution or a well-founded fear of persecution on account of their membership in a PSG. However, in June of 2021, Attorney General Merrick Garland, under the administration of President Joe Biden, restored the precedent that recognized domestic violence victims as members of a PSG and respected that their sworn testimonies were sufficient in proving that they faced persecution or a well-founded fear of persecution based on their membership in a PSG. In *Matter of A-B-, Respondent II*, Attorney General Garland directed the BIA to refer *Matter of A-B-, Respondent I* to him to review its validity.

In his response to Attorney General Jeff Sessions's decision, Merrick Garland first recognized that the former Attorney General's opinion fosters ambiguity, as it begins with a broad

statement that "victims of private criminal activity will not qualify for asylum except perhaps in "exceptional circumstances."[437] This statement threatens to create confusion and discourage careful case-by-case adjudication of asylum claims because it lumps all asylum seekers into generic groups such as "victims of gang violence" or "victims of domestic violence." This reasoning is problematic because it ignores the social visibility requirement established by *Matter of W-G-R-, Respondent* and *Matter of M-E-V-G-, Respondent*. In other words, women in Guatemala who face domestic violence and cannot escape their husbands suffer persecution because they are a member of that particular social group. This group is socially visible and distinct because Guatemalan society recognizes that a culture of machismo and abusive male domestic partners contributes to women in their country facing domestic abuse. Therefore, the particular social group composed of "women in Guatemala who face domestic violence and cannot escape their husbands" cannot be bundled into a group composed of all domestic violence victims in foreign countries. In *Matter of A-B-, Respondent I*, Attorney General Jeff Sessions bundled the PSG composed of El Salvadoran women who experience domestic abuse and share children with their partner into a group of all domestic violence victims, despite the fact that El Salvadoran society contains a culture of machismo which has infamously encouraged male dominance in the household. Consequently, Attorney General Merrick Garland clarified that the respondent's proposed social group in *Matter of A-B-, Respondent I* qualified as a cognizable PSG.

In addition, Garland asserted that the former Attorney General spawned confusion in the courts regarding the standard of fear that the courts use to determine whether an asylum applicant has proven a well-founded fear of persecution. Evidently, the courts

[437] Matter of A-B-, Respondent I 28 I&N Dec. 307 (A.G. 2021), 323.

have disagreed about whether *Matter of A-B-, Respondent I* changed the standard from a "well-founded" fear of persecution to a "clear probability" of fear of persecution. Additionally, if Attorney General Jeff Sessions intended to make this change, he did not explain his reasoning for why the change was made. However, in *Matter of A-B-, Respondent II*, Attorney General Merrick Garland clarified that as established by *INS v. Cardoza-Fonseca*, asylum claims related to membership in a particular social group should be adjudicated based on the "well-founded" fear standard, which states that "so long as an objective situation is established by the evidence, the respondent does not have to show that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility."[438]

For these reasons, Attorney General Merrick Garland concluded that the decision in *Matter of A-B-, Respondent I* should be vacated in its entirety. Additionally, the Attorney General stated that immigration judges and the Board of Immigration Appeals should no longer follow the precedent established in *Matter of A-B-, Respondent I* when adjudicating pending or future cases.[439] Instead, The Board and immigration judges should follow pre-*Matter of A-B-, Respondent I* precedent, including *Matter of A-R-C-G-,et al. Respondents*, *Matter of W-G-R-, Respondent*, *Matter of M-E-V-G-, Respondent*, and *INS v. Cardoza-Fonseca*.

DEFINITIONS

Since "particular social group" and its components are not defined in the INA, it is critical to establish specific definitions for key terms that are used with regard to defining a PSG. First, a particular social group can be defined by the following: a group that is "(1) composed of members who share at least one common

[438] Supra, INS v. Cardoza-Fonseca, 480 U.S. 421 (1987), 480.
[439] Matter of A-B-, Respondent I 28 I&N Dec. 307 (A.G. 2021), 309.

immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question." After establishing this comprehensive definition of PSG, the INA must define the specific terms that make up a particular social group. According to *Matter of Acosta*, an immutable characteristic is a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed. For example, Guatemalan women who suffer domestic abuse and cannot escape their relationships share a common immutable characteristic because it is beyond the power of each Guatemalan woman to escape persecution. Additionally, *Matter of Acosta* explains that an immutable characteristic can be innate, such as sex, color, kinship ties, or a shared past experience such as former military leadership or land ownership. To define "particularity" and "social distinction," the INA should refer to the precedent established in *Matter of W-G-R-, Respondent* and *Matter of M-E-V-G-, Respondent*.

According to *Matter of W-G-R-, Respondent*, "particularity" refers to whether the group is sufficiently distinct enough that it would constitute a discrete class of persons. This term ensures that not every immutable characteristic can be sufficiently precise to define a PSG. For example, if a respondent claims that they were persecuted based on their membership in a particular social group composed of people who are living in extreme poverty, this characteristic would not qualify that individual to be a member of a PSG because it is not a distinct class of persons, as there are members of impoverished groups throughout the world. However, the INA should specify that if an asylum applicant defines their proposed social group with a "broad" term such as age or social class, their proposed social group could qualify as a PSG if it is socially visible to the community in which it exists. For example, the United Nations Humans Rights Protocol recognizes that in El Salvador, male members of the nine to twenty-five age cohort are recognized by El Salvadoran society as

a group who is targeted by gang recruitment and violence based on their membership in that age cohort. While age itself is a broad group, a proposed social group based on a specific age cohort can be recognized as a PSG with particularity because it is recognized by the society that it resides in.

Matter of M-E-V-G-, Respondent defines social visibility as the shared characteristic of the group being generally recognizable by others in the community. Additionally, the society of which the group is a part of should have commonly accepted definitions or ideas of the terms that are used to describe the group. In *Matter of A-R-C-G-,et al. Respondents*, the court held that the respondent sufficiently demonstrated social distinction because Guatemalan society recognizes that women who cannot escape their domestic relationships are persecuted due to a culture of "machismo" and male dominance in the household.

Another component of the definition of a particular social group is the well-founded fear standard. In order for an asylum seeker to be granted asylum in the United States, they must demonstrate that they have been persecuted, or have a well-founded fear of persecution on account of membership in a PSG. While immigration courts have accepted sworn affidavits and testimonies as proof that asylum applicants have been persecuted, the definition of a well-founded fear of persecution has been disputed throughout the legal history of PSGs. However, in *Matter of Matter of A-B-, Respondent II*, Attorney General Merrick Garland established that in cases related to particular social groups, immigration judges should adjudicate these cases based on the well-founded fear standard established by *INS v. Cardoza-Fonseca*. According to the BIA's ruling, in order for an asylum applicant to satisfy the well-founded fear standard, they do not have to show that their situation will most likely result in persecution, so long as an objective situation is established by their sworn testimony, statements, and contributing evidence.

Instead, the respondent is required to demonstrate that they have a reasonable fear of persecution if they were to return to their home country. For an asylum seeker to be recognized as having a reasonable fear of persecution, they must satisfy two burdens. First, their testimony must prove that their situation has caused or puts them at risk of harm. Second, the refugee must show that their freedom would be threatened if they were deported. If the respondent satisfies these burdens through their sworn testimony, they have demonstrated a well-founded fear of persecution on account of membership in a PSG.

CONCLUSION

According to section 101(42) of the Immigration and Nationality Act of 1952: the term "refugee" means any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, political opinion, or membership in a particular social group. Including this definition of a refugee, the term "particular social group" is used three more times throughout the entire 501 page piece of legislation. In the other two instances in which the INA uses the term "particular social group," the authors reiterate the aforementioned definition of a refugee.

The immense ambiguity of a particular social group can be traced back to the INA's failure to provide a specific definition of this term and its relation to asylum applicants. Unfortunately, this confusion has led to more severe consequences than fierce legal debate in the immigration courts. For decades, thousands of asylum applicants who made claims based on their membership

in a particular social group were at the mercy of a Board of Immigration Appeals and the Attorney General of the United States. Both of which were appointed in order to advance a political agenda and adjudicate immigration cases based on their personal biases. While Merrick Garland's decision in *Matter of A-B-, Respondent II* established that immigration judges should adjudicate asylum claims based on the definitions of PSG, and its components that have been established by legal precedent, this could be immediately reversed by the next Attorney General, or any Attorney General that follows.

Therefore, it is critical that the *INA* includes the following sentiments under section 101(42):

A particular social group is recognized as a group that is composed of members who share at least one common immutable characteristic, defined with particularity, and socially distinct within the society in question. (1) An immutable characteristic is defined as a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed. (2) Particularity refers to whether the group is sufficiently distinct that it would constitute a discrete class of persons. (3) Social visibility is recognized as the shared characteristic of the group being generally recognizable by others in the community. With regard to a well-founded fear of persecution, an asylum applicant must satisfy the "well-founded" fear standard in order to demonstrate that they have a well-founded fear of persecution on account of membership in a particular social group. In order for an asylum applicant to satisfy the well-founded fear standard, they do not have to show that their situation will most likely result in persecution, so long as an objective situation is established by their sworn testimony, statements, and contributing evidence. Instead, the respondent is required to demonstrate that they have a *reasonable* fear of

persecution if they were to return to their home country. For an asylum seeker to be recognized as having a reasonable fear of persecution, they must satisfy two burdens. First, their testimony must prove that their situation has caused or puts them at risk of harm. Second, the refugee must show that their freedom would be threatened if they were deported.

However, even if "PSGs" and their components are defined in the INA, one question remains: how will immigration courts verify that extremely specific cases of particular social groups have particularity and social visibility within the cultural context of certain countries? In order to verify that an asylum applicant's proposed social group is particular and socially distinct, the Department of Justice should conduct an independent fact-finding mission for each PSG. For example, in order to figure out whether women in Guatemala who face domestic abuse and cannot escape their relationships have particularity and are socially visible to Guatemalan society, the DOJ should solicit private researchers in Guatemala to investigate the asylum seeker's claim. While this would prolong immigration proceedings initially, it would strengthen the DOJ's database regarding specific PSG claims, which would allow immigration judges to make swifter and better-reasoned decisions as the United States collects more examples of PSGs and compares them to the definitions established in the revised INA.

Establishing a codified definition of "particular social groups" is not only critical to the efficiency of the U.S. legal system and immigration system, but it is also a key step in ensuring that thousands of asylum seekers receive a fair trial as they attempt to escape persecution. For almost fifty years, the United States has placed the lives of refugees in the hands of politically biased officials who adjudicate asylum claims with the intention of advancing a political agenda. It is time that we allow the law to decide whether a respondent has faced persecution, or a

well-founded fear of persecution, on account of membership in a particular social group.

JURIS MENTEM

Mansfield v. Williamson County, Texas: The Newest Evolution in the Rights of the Accused

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MANSFIELD v. WILLIAMSON COUNTY, TEXAS: THE NEWEST EVOLUTION IN THE RIGHTS OF THE ACCUSED

BY BEN PARSONS

INTRODUCTION

Upon signing the Declaration of Independence, John Hancock remarked in reference to his unnecessarily large signature, "There, [Great Britain] can read my name without spectacles, he may double his reward, and I put his at defiance".[440] By the very act of signing his signature to the Declaration, Hancock and America's other forefathers were engaging in treason. If the revolution failed, these men would have surely been executed.

Perhaps it is for this reason that in creating our constitution, the rights of those accused of crimes were very clearly stated. As time has progressed, these rights have evolved. Today in the United States, those accused of a crime are promised, with few exceptions, to be told of the crime they are arrested for, to have a

[440] Jessie Katz, *John Hancock and His Signature* (Sept. 12 2019), https://prologue.blogs.archives.gov/2019/09/2/john-hancock-and-his-signature/.

fair trial with a jury, to not be retried if found innocent, and to receive a sentence free of cruel or unusual punishment if they are found guilty.[441] Outside of these constitutional parameters, other rights exist, including the right to be made aware of one's rights at arrest,[442] the right to obtain a lawyer even if unable to pay,[443] and the right to be made aware of exculpatory evidence during a trial.[444]

Today, a new question sits before the court in the case of *Mansfield v. Williamson County, Texas*. Do those accused of a crime have the right to be made aware of exculpatory evidence before a trial? Does the right conferred in *Brady v. Maryland* apply to pretrial negotiations? Within our criminal justice system, only about 2% of criminal defendants actually see their cases go to trial; 90% agree to a plea deal.[445] No clear statistics exist regarding the number of innocent people who end up agreeing to plea deals, but empirical data suggests that this is sometimes the case.[446] *Mansfield* has the potential to single-handedly change our criminal justice system more than any case in the last 80 years – and it is, in fact, time for that change.

THE RIGHTS OF THE ACCUSED:

[441] U.S. Const. amend. 4, 5, 6, 7, 8, 9.

[442] Miranda v. Arizona, 384 US 436 (1966).

[443] Gideon v. Wainwright, 372 US 335 (1963).

[444] Brady v. Maryland, 373 US 83 (1963).

[445] John Gramlich, *Only 2% of federal criminal defendants go to trial, and most who do are found guilty* (Jun. 11 2019), https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendant
s-go-to-trial-and-most-who-do-are-found-guilty/.

[446] Report by the National Association of Criminal Defense Lawyers, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* (2018) (available at
https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf).

A LEGAL HISTORY

To fully understand the modern state of our nation's criminal justice system, it's important to consider the formulation of the rights of the accused. American constitutional law is derived, in part, from the traditions of English common law.[447] Many of the customs and procedures now required by the Constitution first existed in England and British North America. For example, the Magna Carta prohibits arbitrary arrests, assures defendants the right to trial by a jury of peers, and promotes the general equality of the rule of law.[448] Derived from these ideas and other influential liberal thinkers of the day, the U.S.' Founding Fathers enumerated five key protections for those accused of a crime. These are the 4th Amendment's protection from unreasonable search or seizure,[449] the 5th Amendment's guarantee against self-incrimination,[450] the 6th and 7th Amendments' promise of a speedy trial by jury,[451] and the 8th Amendment's prohibition on cruel or unusual punishment.[452]

Following the Civil War, the Union stipulated that, in order for former Confederate states to be readmitted for representation, each state would need to ratify several amendments, including that of 14th Amendment. While these amendments outlawed slavery, discrimination, and enshrined the right to vote for men, the 14th Amendment, included new protection for those accused of a crime titled the due process clause.[453] This clause stipulated that, in addition to the federal government, no state, regardless of

[447] Kristopher A. Nelson, *Colonial Law in Early America* (Oct. 2011), https://inpropriapersona.com/articles/colonial-law-in-early-america/.
[448] G.R.C. Davis, *English Translation of Magna Carta* (Jul. 28, 2011), https://www.bl.uk/magna-carta/articles/magna-carta-english-translation.
[449] U.S. Const. amend. 4.
[450] U.S. Const. amend. 5.
[451] U.S. Const. amend. 7.
[452] U.S. Const. amend. 8.
[453] U.S. Const. amend. 14.

the identities of the accused, shall "deprive any person of life, liberty, or property, without due process of law".[454] Collectively, these six amendments create a strong basis for the defendant's rights.

Since then, a number of court cases have expanded the rights of those accused. In the 1963 case *Gideon v. Wainwright,* the Supreme Court found that in all criminal cases, defendants had a right to a court-appointed attorney.[455] In 1966, the Court found in *Miranda v. Arizona* that the 5th Amendment protection against self-incrimination applied to police interrogation and that the accused were required to be made aware of their rights upon arrest. Only once the accused knowingly and intelligently waived their right could evidence gathered from interrogation prior to legal counsel's presence be used.[456]

Another significant increase in the rights of the accused is identified in the 1963 case *Brady v. Maryland*. In this case, two Maryland men, John Brady and Charles Boblit, were found guilty of the first-degree murder of William Brooks. Brady, who received the death penalty, confessed to the preceding robbery but said that he did not actually commit the murder.[457] Brady's attorney had asked for all relevant statements made by Charles Boblit, but only received some of these statements. After conviction, Brady's attorney was made aware of a confession made by Boblit that said that only Boblit, without help from Brady, actually committed the murder.[458] Brady appealed, with the case making it to the Supreme Court. The Court, noting the intentional refusal to show Brady's attorney the evidence proving his innocence, stated that this was a violation of Brady's due

[454] U.S. Const. amend. 14.
[455] Gideon v. Wainwright, 372 US 335 (1963).
[456] Miranda v. Arizona, 384 US 436 (1966).
[457] Brady v. Maryland, 373 US 83 (1963).
[458] Brady v. Maryland, 373 US 83 (1963).

process rights afforded to him by the 14th Amendment.[459] The case created a new standard for criminal trials, known as the *Brady* disclosure, in which prosecutors were required to reveal exculpatory evidence (evidence that proves innocence) when "the evidence is material either to guilt or to punishment."[460] This disclosure is not currently all-encompassing, however. Two cases before the Fifth Circuit, *Alvarez v. City of Brownsville* and *US v. Conroy*, found that the *Brady* disclosure only applied during the trial, not in pre-trial negotiations. This precedent has not yet been considered by the Supreme Court.

Finally, relevant to these cases is the 1977 case of *Monell v. Department of Social Services of the City of New York*. The case, though not directly a criminal justice issue, outlines the framework for a civil suit against the government for the deprivation of rights. While the federal government can be sued because of the actions of individual agents acting for it, local governments cannot. In order for a local government to be found culpable, a policy or custom must be the "moving force" behind the deprivation of rights.[461] The burden of proof is relatively high, where the "connection must be more than a mere 'but for' coupling between cause and
Effect."[462] This standard has been used by defendants over the years to hold governments culpable and receive compensation for deprivation of rights claims.

THE CASE OF TROY MANSFIELD

In 1992, Troy Mansfield of Williamson County, Texas, was accused of sexually assaulting a minor. Mansfield, a local father, church-goer, and upstanding member of the community, claimed

[459] Brady v. Maryland, 373 US 83 (1963).
[460] Brady v. Maryland, 373 US 83 (1963).
[461] Monell v. Department of Soc. Svcs., 436 U.S. 658 (1978).
[462] Monell v. Department of Soc. Svcs., 436 U.S. 658 (1978).

that no such assault occurred.[463] The Williamson County prosecutor's office, ignoring the claims of innocence, arrested and charged Mansfield. The office, at the time of his arrest, had a 98% conviction rate of cases that made it to trial. Mansfield and his attorney were well aware of these statistics, yet Mansfield refused multiple plea deals offered to him. Eventually, as a young man without a reliable source of income, Mansfield rationalized that he "didn't have a chance" going up against Williamson County, and agreed to a plea deal. Mansfield pled guilty on August 13, 1992 to three counts of sexual misconduct of a child. The deal placed Mansfield on probation for ten years and required him to register as a sex offender.[464]

For twenty years Mansfield supported his family with an income below the federal poverty line, was kicked out of his church, could not attend any of his children's school-run events, and was an outcast in his community. In 2016, Mansfield acquired a new attorney after hearing of the exoneration of Michael Morton, another man convicted in Williamson County under District Attorney Ken Anderson.[465] Morton was falsely incarcerated for 25 years for the murder of his wife. After suing for the release of a sealed file,[466] it was revealed that prosecutors had exculpatory evidence revealing that Morton did not commit the murder. This

[463] *Attorneys for wrongfully convicted man file petition with Supreme Court to allow lawsuit against Williamson County* (Aug 31. 2022), https://www.kvue.com/article/news/local/lawsuit-supreme-court-williamson-county-wrongfully-convicted-man/269-5c9fa109-f553-43b1-870c-07d49a8535 2c.

[464] Mansfield v. Williamson County, Texas, 30 F.4th 276 (5th Cir. 2022).

[465] *Attorneys for wrongfully convicted man file petition with Supreme Court to allow lawsuit against Williamson County* (Aug 31. 2022), https://www.kvue.com/article/news/local/lawsuit-supreme-court-williamson-county-wrongfully-convicted-man/269-5c9fa109-f553-43b1-870c-07d49a8535 2c.

[466] Morton v. State of Texas, 460 S.W.2d 917 (1970).

constituted a violation of disclosure requirements established in *Brady v. Maryland*, and Morton was released.

Mansfield followed suit, obtaining a sealed document that provided exculpatory evidence. The victim of the assault had told prosecutors that "she does not remember what happened" and "told me nothing happened, then says little boy might have done it ([Mansfield]'s son)."[467] This revelation was used in Mansfield's appeal, and in 2016, Mansfield's conviction was vacated, with the court finding "the prosecutors violated his due process rights by lying to avoid disclosing exculpatory evidence".

Upon his charges being vacated, Mansfield sued Williamson County in federal court, arguing that his due process rights were violated. He alleged that, under *Brady v. Maryland*, prosecutors had violated his due process rights by failing to disclose exculpatory information. Lawsuits against municipal and county governments are possible under *Monell v. Department of Social Services of the City of New York* and require that, in order for a county to be held liable, a linkage must be clear between the county policy and the violation of rights.[468] Mansfield argued that the Williamson County Prosecutor's Office policy of closing files and sealing them enabled the violation of his *Brady* disclosure rights.

The case first appeared in the United States District Court for the Western District of Texas, but after the case was dismissed, Mansfield appealed to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit affirmed the decision of the lower court. They argued in their reasoning that under both *Monell* and *Brady*, Mansfield's suit was not strong enough. The court argues that, under *Monell*, plaintiffs need to establish that the county action was the "moving force" behind the violation of their rights

[467] Mansfield v. Williamson County, Texas, 30 F.4th 276 (5th Cir. 2022).
[468] Monell v. Department of Soc. Svcs., 436 U.S. 658 (1978).

and that the policy was made with "deliberate indifference" to possible consequences.[469] They note that a high burden of proof is necessary and that Mansfield's case does not meet this burden. They argue he does not provide a "pattern of injuries" and only sights the *Brady* violation committed by Anderson and another county prosecutor in the *Morton* case.[470] They say that while the closed-file policy might allow for prosecutors to lie or withhold information, it is not necessarily the "moving force".[471]

Turning to the issue of *Brady*, the court argues that *Brady* disclosure requirements do not apply to pre-trial negotiations. They sight the recent decisions of *Alvarez v. City of Brownsville*[472] and *US v. Conroy* that determined as such.[473] On August 26, 2022, Mansfield appealed the decision of the Fifth Circuit to the Supreme Court, filing a petition for a writ of certiorari.[474] The Supreme Court has not yet answered this petition.

PROCEDURAL CONFUSION: THE FIFTH CIRCUIT'S *MONELL* STANDARD

While the Fifth Circuit's decision seems to firmly suggest that the arguments Mansfield raises are settled law and that his case presents no new legal questions, this couldn't be further from the truth. In the question of Mansfield's *Monell* claim, the Fifth Circuit offers little explanation other than a decisive "no" on Mansfield's ability to bring the § 1983 claim for deprivation of rights. The Court is correct in noting that the rigorous standard of *Monell* requires more "than a mere 'but for' coupling between

[469] Monell v. Department of Soc. Svcs., 436 U.S. 658 (1978).
[470] Mansfield v. Williamson County, Texas, 30 F.4th 276 (5th Cir. 2022).
[471] Mansfield v. Williamson County, Texas, 30 F.4th 276 (5th Cir. 2022).
[472] Alvarez v. City of Brownsville, No. 16-40772 (5th Cir. 2018).
[473] US v. Conroy 589 F.2d 1258 (5th Cir. 1979).
[474] Mansfield v. Williamson County, Texas, 30 F.4th 276 (5th Cir. 2022), cert. pending.

cause and effect."[475] Where this Court fails, however, is in the claim that this is the only evidence Mansfield uses to establish the county policy as responsible for his deprivation of rights. Mansfield argues that the county's closed-file policy enabled the prosecutor's office to lie and withhold exculpatory evidence. He cites the prosecutor's past misconduct in the *Morton* case to establish a pattern of injury, and even presents evidence suggesting that the prosecutor's office pressured its staff to obtain convictions.[476] The Fifth Circuit rejects these claims, saying that, while certainly problematic, this evidence doesn't establish that the policy was a "moving force" behind the lies of the prosecutor's office. They say "a system that fails to prevent lying is not necessarily one that causes lying".[477]

This interpretation, however, is far too strict, making it unworkable in today's legal system. Under a *Monell* standard envisioned by the Fifth Circuit, repeated offenses of the same nature do not constitute a "pattern of injury", and only when a municipality has a stated policy that effectively requires the deprivation of rights would a *Monell* claim be justified. In this world, George Wallace could stand in front of every single schoolhouse in Alabama and deny entry to African American children, as long as it was not the official policy of the state or municipality. This potentially dangerous standard the Fifth Circuit has put forth requires Supreme Court intervention.

And, beyond these issues, this standard simply is inconsistent with precedent. Eight years following *Monell*, the Supreme Court recognized how the standard set forth in *Monell* might be interpreted too strictly and clarified the standard to make it more workable. The court found in *Pembaur v. City of Cincinnati* that municipal liability may be imposed by the actions of a single

[475] Mansfield v. Williamson County, Texas, 30 F.4th 276 (5th Cir. 2022).
[476] Mansfield v. Williamson County, Texas, 30 F.4th 276 (5th Cir. 2022).
[477] Mansfield v. Williamson County, Texas, 30 F.4th 276 (5th Cir. 2022).

individual, not just the official or unofficial policy of a municipality.[478] Further, they note "If the decision to adopt a particular course of action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly".[479] This means that, in the case of Mansfield, since the county prosecutor created the policy and directed the action of closing files, offering a plea deal, lying to Mansfield's attorney, and withholding exculpatory evidence, the municipality is - at the very least - plausibly responsible for the action. Under such conditions, the Fifth Circuit has the obligation to allow the suit to advance to consider the question of if a *Brady* violation occurred, and cannot strike it down for mere procedural reasons. The Fifth Circuit erred in this regard, and the Supreme Court, in the interest of maintaining precedent, should grant certiorari to correct this issue.

AN UNSAFE LEAP: APPLYING AND EXPANDING *BRADY*

Although the Fifth Circuit erred in their interpretation of *Monell*, even if the court had affirmed Mansfield had a § 1983 claim, such claim would have been made irrelevant by their subsequent adjudication that Mansfield experienced no deprivation of his *Brady* rights because he never went to trial. When *Brady* was written, the court only explicitly stipulated that a *Brady* disclosure was required *during a trial* if exculpatory evidence "material either to guilt or to punishment" existed.[480]

[478] Pembaur v. City of Cincinnati, 475 US 469 (1986).
[479] Pembaur v. City of Cincinnati, 475 US 469 (1986).
[480] Brady v. Maryland, 373 US 83 (1963).

This narrow requirement was affirmed by the Fifth Circuit in the cases of both *Alvarez v. Brownsville*[481] and *US v. Conroy*[482] to imply such disclosures are only required during trial. In both of these cases, the court argues that, because *Brady* so strictly stipulates that this right occurs during a trial (not before or after), and because a separate case, *US v. Ruiz*, does not require the government to provide defendants with impeaching evidence of witnesses during plea negotiations,[483] *Brady* rights don't extend to pre-trial negotiations. While the Supreme Court has never directly answered the question of whether defendants have the right to exculpatory evidence during plea negotiations, the Fifth Circuit assumes in *Alvarez* that the logic of *Ruiz* applies.[484] However, this assumption is a wide leap. Plea deals, by their very nature, concern the issue of both guilt and punishment. By agreeing to a plea, defendants are both admitting to guilt and agreeing to a severity of punishment - exactly what the Court finds pertinent when requiring *Brady* disclosures. Rather than following precedent, the Fifth Circuit in *Alvarez*, *US v. Conroy*, and *Mansfield* seem to completely ignore it in favor of an evidence-lacking assumption.

And, perhaps the most egregious argument the Fifth Circuit makes regarding Mansfield's claim of *Brady* violations, is that the Court has no power to overturn the rulings of *Alvarez* and *US v. Conroy* even if they wanted to. The court states that "the Fifth Circuit abide[s] by controlling precedent not overruled by the Supreme Court or an en banc sitting of this Court."[485] While this is in line with the concept of stare decisis, it makes it seem as if the Court has no authority to overrule itself, or that it never has. Both the Supreme Court as well as the lower Circuit Courts have

[481] Alvarez v. City of Brownsville, No. 16-40772 (5th Cir. 2018).
[482] US v. Conroy 589 F.2d 1258 (5th Cir. 1979).
[483] US v. Ruiz 536 US 622 (2002).
[484] Alvarez v. City of Brownsville, No. 16-40772 (5th Cir. 2018).
[485] Mansfield v. Williamson County, Texas, 30 F.4th 276 (5th Cir. 2022).

overturned their own rulings on a number of occasions, particularly on cases regarding the rights of the accused (*Gideon v. Wainwright* overturned court precedent from *Betts v. Brady*, for example).[486] To act as if the Court is bound to obey its former iterations entirely is a serious error in the Fifth Circuit's arguments and makes for one of the many reasons why the Supreme Court must correct their ruling.

A MORAL IMPERATIVE: CORRECTING THE FIFTH CIRCUIT'S FAULTS

The arguments of the Fifth Circuit are wrong both in their interpretation of *Monell* and in their application of *Alvarez* and *Brady*. On this basis alone, the Supreme Court should grant certiorari to amend the errors of the lower courts. But, perhaps the most convincing argument that must be considered regarding Mansfield's case, is that allowing the executive branch to knowingly incarcerate an innocent defendant is morally reprehensible, and goes against both the values our criminal justice system was founded upon and the intent our Founding Fathers had in their creation of our criminal justice system.

The United States is exceptional for many reasons, but the most significant reason for this excellence is our focus on human rights. This is not to say that the country hasn't experienced grave injustices or that it has been perfect regarding human rights: it hasn't. Court decisions like *Plessy vs. Ferguson*,[487] *Korematsu v US*,[488] and *Buck v. Bell*[489] all are objectively horrible. But in the modern era, the nation has genuinely tried to advocate for human rights both here and abroad. Consider NATO's requirement that member states include a functioning democratic

[486] Gideon v. Wainwright, 372 US 335 (1963).
[487] Plessy v. Ferguson, 163 US 537 (1896).
[488] Korematsu v. US, 323 US 214 (1944).
[489] Buck v. Bell, 274 US 200 (1927).

political system, the fair treatment of minority populations, and a commitment to democratic civil-military relations and institutions,[490] or the US's involvement in the United Nations Human Rights Commission.[491] Our official policy has been to help promote human rights and defend them domestically and internationally, even if we haven't always followed through on these promises.

This is what has led, in conjunction with strict requirements imposed by the Constitution, the US criminal justice system to operate with a presumption of innocence (this is even officially enshrined in law by *Coffin v. US*).[492] There is a strong sentiment among the American public that it is better to err on the side of caution when incarcerating people. In our view, it is better to allow a few guilty individuals to avoid incarceration than to incarcerate a single innocent person. The Fifth Circuit's logic in the case of Mansfield completely defies this notion. The Fifth Circuit is willing to allow the government to incarcerate an innocent man when explicit knowledge of his innocence existed. If this doesn't constitute a deprivation of "life" or "liberty" as stated in the Fifth and Fourteenth Amendments, then it is time to consider the idea that these protections simply no longer matter in US law.

CONCLUSION

In introducing the Bill of Rights to the First US Congress, James Madison spoke of the Fifth Amendment stating "[these

[490] *NATO Enlargement & Open Door* (Jul. 2016), https://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2016_07/20160627_1607-factsheet-enlargement-eng.pdf.

[491] *United States elected to U.N. Human Rights Council* (Oct. 27, 2021), https://ge.usembassy.gov/united-states-elected-to-u-n-human-rights-council/#:~:text=The%20United%20States%20was%20elected,47%20nations%20composing%20the%20council.

[492] Coffin v. US, 156 U.S. 432 (1895).

rights]cannot be considered as a natural right…but is as essential to secure the liberty of the people as any one of the pre-existent rights of nature".[493] Today, the Fifth Circuit continues to prevent the full realization of this right by refusing to acknowledge that Mr. Mansfield suffered a deprivation of rights by prosecutors not revealing exculpatory evidence in pretrial negotiations. Their poor legal reasoning and overall ignorance toward the moral foundations of our criminal justice system must be corrected. The Supreme Court must grant certiorari to Mr. Mansfield's case and correct the wrongs of the lower courts, thus clarifying *Monell* and expanding *Brady v. Maryland* to apply to pretrial negotiations.

[493] Bruce Frohnen, *James Madison, Speech Introducing Proposed Constitutional Amendments (1789)* (2002),https://oll.libertyfund.org/page/1789-madison-speech-introducing-proposed-amendments-to-the-constitution.

JURIS MENTEM

Ogletree v. Cleveland State University: Technology, Privacy, and a Student's Fourth Amendment Rights

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OGLETREE V. CLEVELAND STATE UNIVERSITY: TECHNOLOGY, PRIVACY, AND A STUDENT'S FOURTH AMENDMENT RIGHTS

BY WHITNEY POWERS

ABSTRACT

This paper details the legal theories and concepts present within the decision of Ogletree v. Cleveland State University, including the notion of privacy, data collection, and the expansion of the Fourth Amendment. Since this topic is evolving in light of new technological developments, it is important to reflect on these decisions and evaluate them to determine their potential impact on students, as well as the legislative system and society as a whole.

INTRODUCTION

During the COVID-19 pandemic, schools and universities across the country adapted their class and exam modalities to fit a remote learning environment. One practice required students to conduct a video scan of their rooms to ensure academic integrity. This was the case for Aaron Ogletree, who was required to conduct a video scan prior to taking an exam. The initial scan, as well as the monitoring during the exam, are conducted by a third party, specifically, Respondus and Honorlock. Ogletree at first

refused to conduct the scan, citing that he had sensitive documents in his workspace. Noting that his professor originally, however, had a sentence on his syllabus stating that the room scan would be required, Ogletree complied with the video scan. That room scan was stored utilizing the university's third-party vendor. The scan of Ogletree's bedroom, although lasting less than a minute, was enough for the Northern District of Ohio to rule in favor of Ogletree when brought to court, stating that the public university had violated Ogletree's Fourth Amendment right against unreasonable searches (*Ogletree v. Cleveland State University*, 2 (Dis. Ct. 2022)).

REDEFINING *KATZ V. UNITED STATES*: A STUDENT'S RIGHT TO PRIVACY IN THE AGE OF TECHNOLOGICAL DEVELOPMENTS

In the landmark case *Katz v. United States*, the Federal Bureau of Investigation (FBI), without a warrant, utilized a recording device to collect an oral recording that incriminated the plaintiff. In this case, the Supreme Court held that a search under the Fourth Amendment need not result in acquiring physical items, but extends to non-physical means, such as oral recordings (*Katz v. United States*, 389 U.S. 347 (1967)); therefore, the FBI would have needed to obtain a warrant prior to conducting the recording. In *Ogletree,* this definition of a search is expanded to include video recordings. As technology continues to develop and allow for more intrusion into the private lives of Americans, it is necessary for the interpretation in *Katz* to expand as well.

While *Katz* establishes that the Fourth Amendment protects people, not places, the court in *Ogletree* still had to determine whether or not the video scan fit the definition of a search to begin with. *Katz* also establishes the reasonable expectation of privacy standard, stating that if an individual has a reasonable

expectation of privacy, a warrant must be obtained prior to the search being conducted.

As cited in *Ogletree*, the Court held in *Kyllo v. United States* that the use of thermal technology to determine who was inside the residence did constitute as a search, as that information would have been impossible to obtain otherwise without physical intrusion (*Kyllo v. United States*, 533 U.S. 27, 33 (2001)). Similarly, the court found that the contents of Ogletree's bedroom would not have been obtained otherwise without university personnel physically examining the room.

The technology utilized during the search in *Kyllo* is significant, as the Court deemed that because the infrared technology was not in use by the general public, it mandated that the actions taken and the information gathered from the infrared scan be categorized as a search. Instead, the court in this case pointed to an accompanying holding in *Kyllo.* The Court additionally held that a subjective expectation of privacy must be established, and that society also recognizes the expectation as reasonable (*Kyllo v. United States*, 533 U.S. 27, 33 (2001)).

Similarly, in *Ogletree,* the university defended its actions by asserting that the technology used to conduct the video scan is widely in use, and because of that, the video scan is not defined as a search. They also attempted to establish that Ogletree did not have a subjective expectation of privacy. The court sided against them, maintaining that although many students have undergone these scans and have not objected to them, it does not prevent others from doing so. The court also held that the home, specifically Ogletree's bedroom, would be deemed as a reasonable expectation of privacy by society (*Ogletree v. Cleveland State University*, 2 (Dis. Ct. 2022)).

Even the court acknowledges that society does not always agree on what it deems is a reasonable or subjective expectation of privacy. This disagreement has the possibility of changing the legal system's interpretation of what constitutes as private enough to be protected under the Fourth Amendment. This change in what society deems as private, in tandem with the development of newer, faster, and more invasive technologies that society is becoming accustomed to indicates that the definitions of searches, privacy, and the Fourth Amendment must evolve with them.

THE THIRD-PARTY DOCTRINE: THE MEANS AND SUBSTANCE OF DATA COLLECTION

While there are a number of legal issues that *Ogletree* presents, the court does not fully address the data collection by a third-party vendor. In *Ogletree,* the video scan of the student's room was collected and stored by the third-party vendor that conducted the scan. *United States v. Miller* established the third-party doctrine which states that any information turned over to a third party is not a reasonable expectation of privacy, and as such, no warrant is needed for government authorities to obtain the information (*United States v. Miller,* 425 U.S. 441 (1976)). As information collected and stored by third parties becomes more sensitive and indicative of how someone lives their life, the third-party doctrine will also need to continually be addressed.

In 2017, the third-party doctrine was refined in *Carpenter v. United States,* when the Court ruled that government authorities will generally need a warrant to obtain cell-site location information (*Carpenter v. United States* 585 U.S. 12 (2018)). In this case, a person's cell-site location data can reveal very specific information and details about their life, which the Court takes into consideration and differentiates *Carpenter* from *Miller*.

Cell-site location data can pinpoint where a person lives, where they work, their running path, and every other aspect of their lives including how long they spend in each location. Similarly, a video scan of somebody's bedroom, especially when they may have sensitive information, can also reveal very specific details of a person's life.

Because of the rejection of the third-party doctrine application in *Carpenter*, if the university or another government authority had sought to retrieve the information contained in the video scan in the case of potential cheating or another criminal activity, the courts may have required the university or government authority to seek out a warrant prior to retrieving the information from the video scan. In *Ogletree,* the court also recognized that there are other methods of data collection beyond a video scan that third parties such as Respondus, Blackboard, and Honorlock can conduct. Blackboard can track a student's IP address, while Respondus and Honorlock utilize artificial intelligence to flag any suspicious activity. These heightened levels of intrusion can present issues if and when government authorities attempt to collect sensitive information in criminal proceedings.

THE FUTURE OF THE FOURTH AMENDMENT: AN EVOLVING INTERPRETATION IN THE COURTS AND CONGRESS

In his dissenting opinion in *Carpenter*, Justice Neil Gorsuch comments on how the decision, in his view, moves further from the original meaning of the Fourth Amendment. He asserts that the reasonable expectation test established in *Katz* is vague, and lends itself to an inconsistent application when used in other cases. He also states that the third-party doctrine attempts to put forth a universal concept; however, it is no longer universal following the ruling in *Carpenter* (*Carpenter v. United States* 585 U.S. 12 (2018) (Gorsuch, J., dissenting)).

Differing opinions, such as Justice Gorsuch's in *Carpenter*, may have the ability to impact the Fourth Amendment in the long-term, especially with a Supreme Court where an originalist lens is in the majority. The degree to which it may affect how the Fourth Amendment is interpreted and applied is uncertain, however, as it is becoming increasingly more difficult to maintain a narrow interpretation as the technology that can be used to conduct unreasonable searches evolves.

Justice Gorsuch also calls on Congress to pass legislation to assist in mitigating the vague nature of the Court rulings. The most notable codification of the Fourth Amendment is the Stored Communications Act, which establishes that information collected by third parties may be obtained through a court order rather than requiring a warrant (18 U.S. Code § 2703(d)). A court order only mandates that the government authority establishes "reasonable grounds" that the information they are attempting to obtain will aid in an ongoing investigation (*Carpenter v. United States* 585 U.S. 18 (2018)).

In a similar manner, legislation could be passed to better define what a reasonable expectation of privacy looks like as well as a better definition of what data is to be protected from a simple court order. Instances such as room scans prior before taking an exam could also be protected and restricted by codifying this ruling in *Ogletree*.

THE FUTURE OF THE FOURTH AMENDMENT: THE NECESSITY FOR A BROADER APPLICATION IN EDUCATION

In *Ogletree*, the court acknowledged that the room scan only lasted less than a minute, but that it still constituted a search and is required to adhere to the Fourth Amendment. *Ogletree* is one of

many examples of searches that have only been possible with the development of new technology. Put within the broader context of the COVID-19 pandemic, when most activities including school and work were conducted entirely through virtual platforms, the collection of data and searches conducted on students by the university increased exponentially.

While students have largely been returning to in-person classrooms, there were still plenty of students in the same position as Ogletree whose weakened immune systems necessitated that they remain in a virtual learning environment, as well as many who choose to remain virtual without these obstacles. The court recognizes that even though they are enrolled in an educational institution, they are still entitled to their constitutional rights in their own homes. In the instance of *Ogletree,* the plaintiff asserts that while the university does have a compelling interest in academic integrity, there are many other options available to the university that are far less intrusive.

CONCLUSION

While students and universities alike navigate a post-pandemic learning environment, the way that the Fourth Amendment is interpreted and applied will need to develop with those changes. There are benefits to both a virtual and physical learning environment that will require universities to adapt and find less restrictive ways to pursue academic integrity when students are learning from their homes.

As *Ogletree* was only decided a few months ago, it is possible that the university will appeal and the facts will be weighed again. This ruling is another example of the difficulties of maintaining constitutional rights for students while also considering the university's interest in maintaining academic integrity and a fair learning environment for all students. This ruling also allowed the court to consider the use of technology by government

entities and whether or not their use constitutes a search that needs Fourth Amendment protection. When pushed further, the retrieval of the data stored by the third-party vendor would also allow the court to consider the third-party doctrine following the landmark ruling in *Carpenter*.

Should this case go further in the court system, the impact of *Ogletree v. Cleveland State University* is significant and will make a difference in the lives of students in an increasingly virtual world, as well as the universities that are tasked with their education.

JURIS MENTEM

Reimagining Human Trafficking Law: How Can We Use Legislation to Comprehensively Aid Survivors?

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REIMAGINING HUMAN TRAFFICKING LAW: HOW CAN WE USE LEGISLATION TO COMPREHENSIVELY AID SURVIVORS?

BY JULIA SQUITTERI

ABSTRACT

This article will first look at the era of moral panic, racism, and ignorance associated with the Mann Act of 1910 and, nearly a century later in 2000, the Trafficking Victims Protection Act (TVPA). The racist underpinnings and seriously inaccurate assumptions of victims continue to have deleterious impacts on the ability of these two laws to aid survivors. An analysis of historical context paints a grim picture of preventative efficacy in human trafficking laws: the provisions and enforcement are both extremely lacking in the realm of prevention. The reality of these laws for survivors is often dim; human trafficking survivors are often locked out of crucial services, risk criminalization for prostitution, and may even face deportation.

INTRODUCTION

The reality for human trafficking survivors in the United States entails a system where survivors are rarely identified or rescued, not believed if they rescue themselves, are ineligible for the most basic of services, relatively rarely have their cases prosecuted, and rarely see justice for what has happened to them. In short, the current human trafficking laws fail to protect survivors. In response, this article seeks to understand how the United States can reimagine human trafficking laws to mitigate trafficking, protect survivors, and improve pathways to justice for survivors. Enforcement is a major issue with the TVPA, but beyond the enforcement of a policy well-rounded on paper, vulnerable populations need preventative action, such as anti-poverty legislation, to be at the forefront of anti-trafficking approaches.

MORAL PANIC AND PERFECT VICTIMS: UNDERSTANDING THE HISTORY OF U.S. HUMAN TRAFFICKING LAW

THE MANN ACT OF 1910: RED LIGHT DISTRICTS AND INTERRACIAL MARRIAGE

The turn of the 20th century ushered in an era of moral panic ranging from prohibition movements to widespread outrage in response to "red-light districts" to government efforts to end polygamy to racist attacks against an increase in interracial relationships. It is indeed this era of which the Mann Act of 1910 must be characterized as an effect; it remains a highly controversial law with highly controversial origins. The Mann Act was a product of the emphasis on social purity during the Progressive Era— a period of progressive reform and economic expansion from 1900 to 1929.[494] This era of legislating morality

[494] *Progressive Era to New Era, 1900-1929* (n.d.), https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/progressive-era-to-new-era-1900-1929/overview/

gave rise to a myth that would continue to persist far beyond the early 20th century and would go on to influence the social imperative for the TVPA (Trafficking Victims Protection Act) in 2000: the myth of the white slave.

Masked as concern for "white slavery"—an archetype commonly applied in cases of white female prostitutes—reformers during this era were more concerned with the adoption of their societal beliefs than with the situations of prostitutes.[495] The Mann Act was primarily aimed at punishing the traffickers of nonconsensual prostitutes, but in the legislative process, legislators did not consider the statistics on forced prostitution—which led to the dangerous belief that many white prostitutes were "enslaved."[496] The Mann Act emerged from a decade-long push internationally and domestically to mitigate the prostitution of the "white slave," an idea that was disconnected from reality.[497]

The Mann Act of 1910, also known as the White Slave Traffic Act, bans transportation across state lines of "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose."[498] The Commerce Clause was integral to carrying out the enforcement of the Mann Act, which focused not only on sex trafficking but on immigrant prostitution and immorality.[499] Congress had no power to regulate sexual

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[495] James Adams, *Alien Animals and American Angels: The Commodification and Commercialization of the Progressive-Era White Slave*, 28 Villanova Concept Journals 1, 2 (2004).

[496] Michael Conant, *Federalism, the Mann Act, and Imperative to Decriminalize Prostitution,* 2 Cornell Journal of Law and Public Policy 99, 109 (1996).

[497] Kelli Ann McCoy, Dissertation, *Claiming Victims: The Mann Act, Gender, and Class in the American West, 1910-1930s,* UC San Diego Electronic Theses and Dissertations 12010).

[498] *Mann Act,* (July2020), https://www.law.cornell.edu/wex/mann_act#:~:text=The%20Mann%20Act%20

[499] *Id.*

relationships and thus invoked its' control over interstate commerce as legal justification for the Mann Act.[500] Just three years before the Mann Act was signed into law, Congress created a commission to address the issue of immorality stemming from immigration, wherein they alleged that immigrant men lured white American women—the "perfect" victims—into prostitution under the belief that no American woman would willingly enter prostitution.[501] These allegations gave way to fertile soil for the Mann Act—a law that, from its very inception, was designed to "save" white women from men of color, forcing them into prostitution or other "immoral" acts. These ideas were seriously inaccurate; the majority of defendants in Mann Act cases were American-born, white men—not immigrant men.[502] The perceptions of needing to "save" women only served to victimize them, as the Mann Act (prior to its amendment in 1986) reaffirmed the victimized idea that only women could be victims of sex trafficking or other "immoral" activities and legally established women as a form of property.[503]

Caminetti v. United States, decided by the Supreme Court in 1917, permitted prosecutions in cases where the transportation of women across state lines was for noncommercial purposes[504] and even more deleteriously, "illicit fornication," consensual or not, was considered an "immoral purpose."[505] This ruling, in particular, led to the use of the Mann Act as a prosecutorial tool against sexual relationships which defied the status quo, such as interracial relationships,[506] and the policing of shifting gender

[500] McCoy, *supra* note 4, at 3.
[501] s*upra* note 5.
[502] McCoy, *supra* note 4, at xii.
[503] McCoy, *supra* note 4, at 4.
[504] *Caminetti v. United States*, (n.d.), https://casetext.com/case/drew-caminetti-v-united-states-no-139-maury-diggs-v-united-states-no-163-hays-v-united-states-no-464-464/case-summaries
[505] *supra* note 5.
[506] *supra* note 5.

roles by the FBI—especially under the direction of J. Edgar Hoover.[507] *Caminetti v. United States* consisted of a case in which two men had brought their girlfriends on a weekend getaway across state lines and opened the floodgates for the distortion of the Mann Act for use scarcely related to prosecuting sex traffickers including, but not limited to, wives using the law against women who ran off (crossing state lines) with their husbands.[508]

United States v. Hattaway confirmed that interstate travel was necessary to give courts federal jurisdiction over interstate trafficking cases—even in cases in which defendants claimed ignorance of crossing state lines—and remains in effect today.[509] *Hays v. United States* held that a customer of a prostitute is guilty under the Mann Act if they bought an interstate travel train ticket for the prostitute with the intention of engaging in sexual intercourse.[510] Especially notable in the judicial interpretations of the Mann Act is *United States v. Holte,* a case in which the Supreme Court ruled that prostitutes can be held liable for attempting to violate the Mann Act. Based on the ruling in *United States v. Holte,* it is likely that Congress did not consider the fact that some of the supposed victims, consenting prostitutes, may be charged as felons under the Mann Act.[511]

Congress later amended the Mann Act with the Child Sexual Abuse and Pornography Act of 1986. First, the 1986 amendment made the Mann Act gender-neutral, where it had previously

[507] Ronald D. Hunter, *The Mann Act and the making of the FBI,* 41 Criminal Justice Review, 117 (2016) (book review)
[508] *Congress passes Mann Act, aimed at curbing sex trafficking*, (1910), https://www.history.com/this-day-in-history/congress-passes-mann-act
[509] Allison Gross, *The Mann Act and Crossing State Lines: Maybe You Should Have Known*, 37 Cardozo Law Review 2239, 2243 (2016).
[510] Conant, *supra* note 3, at 110.
[511] Conant, *supra* note 3, at 110.

applied to just women and girls.[512] Second, the "immoral purposes" provision was revised to only include transportation for prostitution or other illegal sexual activities.[513] To violate the Mann Act, there must now be evidence of intent to cross state lines and engage in criminal activity.[514] Noncommercial sex cannot be included under the Mann Act given the 1986 amendment; to do so would be an overreach of Congress' constitutional powers.[515]

The Mann Act, an ambitious wielding of the Commerce Clause's powers by Congress, was, in effect, a law that capitalized on xenophobia, gave way to extensive policing of sexual relationships, relegated sexual consent to the backburner in prosecution, punished prostitution, and victimized actual sex trafficking survivors into a position which was manipulated and stretched out of realistic proportion to fit the ideals of American society in the throes of a moral panic.

MORALITY POLITICS IN THE 1990s AND EARLY 2000s: THE RETURN OF THE "WHITE SLAVE"

It was nearly a century later that the Trafficking Victims Protection Act of 2000 (TVPA) was passed and signed into law by President Clinton. The TVPA's stated goals were to "punish traffickers, to support countries in preventing trafficking, and to provide restorative services to victims of trafficking...[although] there remains a disconnect between the three goals."[516] Despite

[512] Gross, *supra* note 16, at 2260.
[513] Gross, *supra* note 16, at 2260.
[514] Conant, *supra* note 3, at 117.
[515] Conant, *supra* note 3, at 117.
[516] Jennifer Sheldon-Sherman, *The Missing "P": Prosecution, Prevention, Protection, and Partnership in the Trafficking Victims Protection Act*, 117 Penn State Law Review 443, 445 (2012).

nearly ninety years between the inception of the TVPA and the Mann Act, the TVPA's historical context draws stark parallels with [insert bill name here]. At a time thick with morality politics, the idea of forced prostitution—the "undeniable" evil— led to increased outrage and publicity of human trafficking, particularly sex trafficking.[517] The Western world grappled with imagery of "innocent, young girl[s] dragged ... against [their] will to distant lands to satisfy the insatiable sexual cravings of wanton men"—ideas once again governed by xenophobia and racism.[518] A rise in immigration, the AIDS pandemic, the feminist movement, and increased attention to child sex trafficking led to the return of "white slave" myths, bringing human trafficking to the forefront of moral reckoning in politics at the start of the 21st century.[519]

The TVPA's original author, Congressman Christopher Smith, a Republican from New Jersey, supported women's rights, humane immigration policy, and racial equality less than 30% of the time—three factors that are significant in their relationship to human trafficking.[520] When considering the fact that human trafficking is an issue that disproportionately impacts immigrants, women, and people of color, Rep. Smith's voting record does not suggest an anti-human trafficking stance, despite authoring one of the most important human trafficking laws in the U.S. to date. This political conflict of interest is worth noting, given the problematic context behind the TVPA's human trafficking definition.

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[517] Samantha E. Godbey, Dissertation, *The Policy Dynamics of the Trafficking Victims Protection Act (2000)*,
West Virginia University Graduate Theses, Dissertations, and Problem Reports 1, 6 (2018).
[518] *Id.* at 6.
[519] *Id.* at 7.
[520] *Representative Christopher Smith*, (2019),
http://politicsthatwork.com/voting-record/Christopher-Smith-400380

The TVPA defines trafficking as "sex trafficking in which a commercial sex act is induced by force, fraud, and coercion, or in which the person induced to perform such act has not attained 18 years of age; or … the recruitment, harboring, transportation, provision or obtaining of [a] person for labor or services, through the use of force, fraud or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, and/or slavery."[521] This definition is especially significant in that it separates labor and sex trafficking within its definition of trafficking.[522] Yet this distinction between the two types of recognized human trafficking was the result of a compromise between business group interests, who lobbied against the inclusion of labor trafficking, and antiprostitution groups who hoped to emphasize commercial sex within the law—making this definition the result of catering to interest groups instead of "serving any useful purpose."[523] The passage of the TVPA marked the conflation of so many political agendas that its purpose and potential were overshadowed.[524] That said, the TVPA still marked a significant change in provisional approaches to human trafficking law; it recognizes psychological coercion or other types of non-physical threats as methods of trafficking and criminalizes *attempts* at trafficking.[525] When considering survivors' reality, these provisions are indeed quite important, yet their enforcement remains an issue of weakness for the TVPA.

During the initial years of the TVPA's implementation, the Bush administration focused on its crusade against prostitution, and it was not until the Obama administration that the U.S. began to

[521] Trafficking Victims Protection Act, 22 U.S.C § 7101, (2000).
[522] Godbey, *supra* note 24, at 4.
[523] Miriam Potocky, *The Travesty of Human Trafficking: A Decade of Failed U.S. Policy*, 55 Social Work 73, 373, (2010).
[524] Dina Francesa Haynes, *Good Intentions Are Not Enough: Four Recommendations for Implementing the Trafficking Victims Protection Act*, U. St. Thomas L. J. 77, 78 (2008).
[525] Sheldon-Sherman, *supra* note 23, at 453.

seriously focus on labor trafficking.[526] The use of the TVPA against labor trafficking may yet be its most distinct difference from the Mann Act, which almost exclusively focuses on sex trafficking and forced prostitution.

The TVPA was reauthorized or amended in 2003, 2005, 2008, 2013, 2015, 2017, and 2018. While each amendment has changed the use of the TVPA to increase protection for survivors, prevention remains an elusive goal for the TVPA's enforcement. In understanding the TVPA, it is crucial to recognize that the failure of the TVPA to respond to a widespread epidemic of human trafficking is exceedingly contingent on the enforcement of the law. The TVPA itself *does* have some prevention provisions that recognize sources of vulnerability for victims. These provisions include "economic alternatives, public awareness, and consultation."[527] Many of the suggested initiatives include programs to retain girls in school, promote economic development for women, and increase anti-trafficking education.[528] Yet the 2005 Reauthorization failed to continue to improve preventative provisions and instead focused on protecting survivors after they have already been victimized.[529] The 2008 Reauthorization proposed that minors be given assistance without the requirement to cooperate with law enforcement but fell prey to business interests when it came to labor trafficking, failing to recognize labor trafficking as an issue of "contractual consent."[530]

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[526] Janie Chuang, *Exploitation Creep and the Unmaking of Human Trafficking Law*, 108 The American Journal of International Law 609 (2014).

[527] Takiyah Rayshawn McClain, *An Ounce of Prevention: Improving the Preventative Measures*
of the Trafficking Victims Protection Act, 40 VAND. J. Transnat'l L. 579, 588 (2007).

[528] *Id.* at 588.

[529] *Id.* at 590.

[530] Haynes, *supra* note 31, at 94.

Provisionally, the TVPA does not ignore survivor vulnerabilities that cause trafficking in the first place; it recognizes "economic deprivation" as a primary problem in trafficking, and the TVPRA (2003 amendment) recognizes immigrant vulnerability and allocates shelters for survivors on specific borders.[531] And yet, as this article will explore, the enforcement of these provisions is highly problematic for survivors. The TVPA may sound like a thorough policy on paper—and indeed it is—but these provisions have little value for survivors if their intent is not transferred from paper to actionable enforcement.

THE SURVIVOR'S REALITY

This section will primarily discuss the TVPA's role in the survivor's realities, simply because the Mann Act does not offer services for survivors in the ways that the TVPA was structured to provide. The TVPA does offer some benefits for survivors, including social services, shelter, food, clothing, education, physical and mental health services, job training, and immigration benefits.[532] Some of these services, however, have been carried out through shelters or organizations with religious affiliations which have denied survivors reproductive health care, including, but not limited to, abortion care. A key example of this use of TVPA-related funding was *ACLU of Massachusetts v. Kathleen Sebelius et al.,* a 2012 case in which the American Civil Liberties Union fought HHS's distribution of funds to a Catholic Charity serving human trafficking survivors but denying them critical reproductive care[533]—an issue even more startling considering the fact that many survivors may become pregnant

[531] McClain, supra note 34, at 589.

[532] Sheldon-Sherman, *supra* note 23, at 456.

[533] *Court Prohibits Religious Restrictions on Government-Funded Trafficking Victims' Program*, (2012),
https://www.aclu.org/press-releases/court-prohibits-religious-restrictions-government-funded-trafficking-victims-program

as the result of rape or may carry sexually transmitted diseases.[534] Prosecution is also funded much more than survivor services are; in 2005, seven times as much funding was put towards investigation than the development of services for survivors.[535] In terms of support for immigrants, the TVPA provides immigration visas to those who qualify—but of the 50,000 visas offered since the TVPA took effect, only 6,206 visas had actually been issued to survivors by 2018.[536]

While the TVPA provides services, the services themselves are flawed, underfunded, and inaccessible to those who fall between the cracks of the strict and unforgiving provisions of the TVPA. To receive social services and immigration benefits, the survivor must meet the definition of having experienced "severe trafficking," which is limited to "force, fraud, or coercion."[537] These three things are very hard to prove, the result being that most survivors do not even qualify for benefits in the first place.[538] This provision particularly impacts survivors who willingly entered the sex work industries, only to find themselves in trafficking conditions, who do not meet the definition of "severe trafficking."[539] In this regard, the TVPA stands as a law heralded for its unprecedented ability to end the exploitation of the "white slave" who has been stolen away to be trafficked—a myth that critically misaligns with the reality of human trafficking. The issue of sex trafficking is incontrovertibly entangled with the issue of prostitution. Even for those who do not willingly enter sex work and are trafficked, it is easy for survivors to be labeled illegal immigrants or prostitutes instead of being recognized as

[534] *ACLU of Massachusetts v. Kathleen Sebelius et al.,* (2012), https://www.aclu.org/cases/aclu-massachusetts-v-kathleen-sebelius-et-al
[535] Sheldon-Sherman, *supra* note 23, at 467.
[536] Godbey, *supra* note 24, at 7.
[537] Sheldon-Sherman, *supra* note 23, at 461.
[538] Sheldon-Sherman, *supra* note 23, at 461.
[539] Sheldon-Sherman, *supra* note 23, at 461.

survivors needing critical aid and support within the law.[540] As good as the TVPA may sound on paper, it denies the realities of what survivors experience and face—and this is just withstanding discussion of the sex trafficking industry, not to mention the labor trafficking industry as well, which is already underrepresented in human trafficking law and prosecutions.

Beyond the "severe trafficking" definition in the TVPA, survivors must also contend with the stringent demands to cooperate with federal prosecutors in order to receive services. Survivors must "fully cooperate" in the prosecution of their traffickers[541]—a demand which is unrealistic, insensitive, and unreasonable. The TVPA provisions completely ignore the fact that it is common for survivors to see their traffickers after escaping trafficking conditions, and it is *very* common for survivors to fear retaliation from their traffickers against either themselves or their families.[542] The requirement to cooperate completely with prosecutors also disregards the reality for survivors that testifying against their trafficker also entails severe psychological costs, and in some cases, survivors may be experiencing trauma that makes it difficult for them to recall details and experiences[543] If survivors, particularly those who are immigrants, do not meet the requirements for services, they may be deported—making it a choice for many between re-victimization (with the threat of retaliation) or deportation.

While the TVPA does have strict and demanding requirements for survivors to provide prosecutors with evidence, it also provides survivors with a "private right of action to bring civil

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[540] April Rieger, *Missing the Mark: Why the Trafficking Victims Protection Act Fails to Protect Sex Trafficking Victims in the United States*, 30 Harv. J. L. & Gender 231, 244 (2007).
[541] Godbey, *supra* note 24, at 5.
[542] Sheldon-Sherman, *supra* note 23, at 464.
[543] Sheldon-Sherman, *supra* note 23, at 461.

actions in federal court against traffickers to recover money damages and attorneys' fees."[544] But once again, this article must point to the problem of accessibility; survivors who have escaped trafficking are unlikely to have the resources, support, and understanding of the legal system to begin taking these actions—if survivors are even recognized by authorities in the first place.

The qualifying process under the TVPA described above does not consider the first step in aiding survivors in trafficking: identifying survivors. Local officials are better equipped to recognize human trafficking survivors, but as a federal law, the TVPA allocates more funding for federal officials, meaning localities lack the resources to train those best equipped to recognize trafficking survivors.[545] ICE and the FBI both have trafficking programs intended to recognize trafficking situations, but neither is trained to handle the social needs of survivors.[546] Survivors may also not trust law enforcement under fears of deportation or arrest; as a result, traffickers can exert even more power over the survivor.[547]

In cases in which survivors escape or rescue themselves,[548] Law enforcement may not believe the survivor and often underscore the severity of cases, failing the victims by not giving them the support they need.[549] Law enforcement officers all too often will dismiss the case as too difficult to prosecute and mistakenly deny the survivor aid as a result.[550] But for the survivor to qualify for

[544] Sheldon-Sherman, *supra* note 23, at 457.
[545] Sheldon-Sherman, *supra* note 23, at 459.
[546] David Okech, Whitney Morreau, Kathleen Benson, *Human trafficking: Improving victim identification and service provision*, 50 International Social Work 488, 492 (2011).
[547] Haynes, *supra* note 31, at 91.
[548] Haynes, *supra* note 31, at 82.
[549] Reiger, *supra* note 47, at 246.
[550] Haynes, *supra* note 31, at 82.

services, their willingness to cooperate should be the only determinant of qualifying for aid under the TVPA—*not* whether or not their case is "good enough" to be prosecuted.[551] Additionally, law enforcement officers will often provide letters certifying that the survivor cooperated when immigrant survivors apply for T visas—but these letters *are not required*, contrary to misunderstandings by crucial service officials.[552] Most survivors never receive services because of these issues, increasing their liability for re-trafficking.

This reality for survivors discusses only the process of becoming eligible for critical services, but for those who do qualify and the even fewer who do have prosecutors take up their cases, justice is a rare outcome for survivors. Under modern human trafficking laws in the United States, a survivor is "lucky" if they are some of the relatively few who qualify for shelters, visas, or the bare minimum of support. It is under these conditions that human trafficking law must be understood as a failure—not just in terms of their provisions, but in what those provisions equate to in the lives of human trafficking survivors.

COURTROOM NEGLECT: THE INSTITUTIONAL FAILURE TO AIDS SURVIVORS

The Mann Act imposes a rigorous standard for prosecution, as it requires someone to physically cross state lines.[553] The TVPA, in comparison, only requires actions "in or affecting interstate commerce," so while both laws derive constitutionality from the Commerce Clause, they have very different implications for prosecutors and are interpreted differently—likely by the design of

[551] Haynes, *supra* note 31, at 85.
[552] Haynes, *supra* note 31, at 86.
[553] Gross, *supra* note 16, at 2269.

Congress.[554] That said, the intentions of prosecutorial use for both laws have fallen short of rates significant in the context of human trafficking data.[555]

The reality of federal prosecutions in human trafficking cases is severely lacking. In 2010, a decade after the passage of the TVPA, attorneys declined to prosecute about 60% of trafficking cases, while they only declined about 25% of *all* federal criminal cases.[556] This statistic is just one piece of the widespread failure of federal prosecutors to respond appropriately to the realities of human trafficking. Labor trafficking prosecutions are also challenging because the provisions in the TVPA that define it are hard to prove. To convict under forced labor, prosecutors must prove that labor was obtained through "(1) means of force, threats of force, physical restraint, or threats of physical restraint; (2) serious harm or threats of serious harm; (3) abuse or threatened abuse of the law or legal process; or (4) a scheme, plan, or pattern intended to cause a person to believe they or another would suffer serious harm or physical restraint if they resisted."[557] The reality of this provision in the TVPA is a lack of prosecutions in the labor trafficking realm.

Prosecutors also often look for an "ideal" survivor who has not engaged in activities "tainted by public fears and prejudices," including but not limited to illegal immigrantion and prostitution.[558] The "perfect" survivor with no criminal record is rare within the scope of human trafficking survivors. What human trafficking survivors look like—immigrants, people of color, those with a lack of English proficiency, and those with records of abuse—is ignored by the idealism of what prosecutors

[554] Gross, *supra* note 16, at 2269.
[555] McClain, *supra* note 34, at 591.
[556] Potocky, *supra* note 30, at 374.
[557] Sheldon-Sherman, *supra* note 23, at 453.
[558] Sheldon-Sherman, *supra* note 23, at 458.

are looking for. And although there are high rates of prosecution for sex trafficking, many survivors who are labor trafficked and who have entered the work voluntarily are met with little response from federal prosecutors.[559] Handpicking survivors means that prosecutors are largely failing to act in cases that resemble the overwhelming majority of survivors.

SURVIVOR-BASED SOLUTIONS

PROACTIVE APPROACHES TO HUMAN TRAFFICKING

Reimagining human trafficking law must start at the level of those who are impacted most by the deficiencies in current human trafficking law: the survivors. The TVPA and Mann Act are laws that claim to "protect" survivors; yet the most essential act of protection any trafficking law can do is attempt to mitigate the trafficking of survivors in the first place by using proactive approaches.

To even begin to look at proactive approaches, legislators must first understand what factors make survivors vulnerable to entering trafficking. Poverty is a key piece of the puzzle of survivor vulnerability. Generational poverty, in particular, makes children susceptible to being lured into trafficking through promises of economic opportunity—and few realize the conditions under which they will be exploited.[560] Despite the population density of the area from which the survivor hails, whether it be rural, micropolitan, or metropolitan areas, poverty

[559] Sheldon-Sherman, *supra* note 23, at 458.

[560] Elzbieta Gozdziak, Micah N. Bump, *Victims No Longer: Research on Child Survivors of Trafficking for Sexual and Labor Exploitation in the United States*, Institute for the Study of International Migration 1, 74 (2008).

prevails as a leading vulnerability factor.[561] Prior sexual abuse is also a prominent source of vulnerability for many survivors of human trafficking—and especially sex trafficking.[562] Survivors often have negative family histories, which can include domestic violence, poor support systems, families with drug abuse, child homelessness, and other forms of childhood abuse.[563] And most consequently, given the relationship to the TVPA, immigrant status is one of the most common features of survivors. Immigrants are especially vulnerable to trafficking due to linguistic barriers, child smuggling, bribery of immigration officials, and insufficiently trained border patrols.[564]

Legislation, to be proactive in preventative approaches, must have provisions that target factors including poverty, increase support for minors with negative family histories, improve services for those who have experienced sexual abuse (such as Title IX at the educational level), and create services accessible to immigrants vulnerable to trafficking to transition them into education or the workforce. If human trafficking laws fail to recognize sources of vulnerability, they fail to prevent survivors from being trafficked in the first place.

Yet the TVPA does not completely ignore these vulnerability factors; there are some provisions that attempt to address poverty, gender inequality, and immigrant vulnerability. The issue, then, is not only paltry enforcement but the lack of prioritization for

[561] Hannabeth Franchino-Olsen, Vulnerabilities Relevant for Commercial Sexual Exploitation of Children/Domestic Minor Sex Trafficking: A Systematic Review of Risk Factors, 22 Trauma, Violence, & Abuse 1, 8 (2019).

[562] Heather J. Clawson, Nicole Dutch, Amy Solomon, Lisa Goldblatt Grace, *Human Trafficking Into and Within the United States: A Review of the Literature,* Office of the Assistant Secretary for Planning and Evaluation, 9 (2009).

[563] *Id.* at 9.

[564] Gozdziak, Bump, supra note 67, at 74.

these provisions. When prosecution, which in and of itself is lacking, is funded more than survivor services, the inclusion of "preventative provisions" is seriously undermined. The best thing that human trafficking laws can do for survivors is to prevent, to the best of their ability, trafficking in the first place. The TVPA does not prioritize this and frequently falls back into "protecting" survivors who have already been trafficked. The Mann Act, on the other hand, is not a preventative law—nor does it pretend to be one. It is to these problems that this article must pose the question: can the TVPA or Mann Act ever truly reach the level of proactive approaches that vulnerable populations demand? The unfortunate but likely answer to this question is no; instead, reimagining human trafficking law that prevents trafficking more likely must begin with anti-poverty legislation and increased state laws[565] that can effectively train on-the-ground responders how to recognize situations that may be conducive to trafficking—especially in areas with high immigration levels.

LISTENING TO THE NEEDS OF SURVIVORS

The survivors' reality under the TVPA entails a harsh and unrealistic system in which to even qualify for the most humane of services, the survivor must risk retaliation from their trafficker, re-victimization, or if they do not fully cooperate with the wishes of prosecutors, face deportation or risk of prosecution for prostitution or other criminal offenses. Survivors need a service-oriented system in which (a) local authorities receive comprehensive training to help them identify survivors; (b) immigration benefits are not applied under extreme demands for survivors; (c) survivors receive reproductive care, mental health care, and other healthcare needs unconditionally; (d) survivors have a more confidential, sensitive system by which they can

[565] Haynes, *supra* note 31, at 87.

provide assistance to prosecutors that does not require the re-victimization and fear that the witness stand all too often commands; (e) survivors receive *immediate* assistance and shelter, if needed, no matter their level of cooperation. These reactive approaches could go a long way in imagining a more humane reality for trafficking survivors.

CONCLUSION

The United States tragically fails to meet the needs of survivors, leaving many to risk re-trafficking, severe health problems, critical mental health conditions, homelessness, poverty, or even deportation. These failures can only be understood in the context of the society and culture that drove the current human trafficking laws—idealizing the "perfect white victim," xenophobia, racism, classism, and widespread critical misunderstandings about what human trafficking looks like.

The Mann Act of 1910 has a serious history of persecuting interracial marriages and targeting immigrants, but does not even pretend to be a preventative law. t remains a prosecutorial weapon but has recently been more effective at prosecuting sex trafficking cases (and increasingly online pornography issues) since its 1986 amendment. The TVPA, a massive anti-human trafficking package, has likewise had a positive effect on the state of government responses to human trafficking. But neither law meets the demands of what survivors need. Survivors are not myths of innocence—girls ripped away from home by immigrant men and sex trafficked. The reality of human trafficking is diverse; the faces of survivors are those of runaway children, sexually abused individuals, immigrants, people of color, people lacking English literacy, and often those who are impoverished. The United States has an imperative to seriously begin to reimagine what human trafficking laws look like beyond antiquated, historic laws carrying the stench of xenophobia,

racism, and ignorance. And to reimagine human trafficking laws, legislators must first look to the survivors—no matter who they are—to rebuild a broken system of absent justice for human trafficking survivors.

JURIS MENTEM

The Development of the Major Questions Doctrine and the Uncertain Future of Regulation

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THE DEVELOPMENT OF THE MAJOR QUESTIONS DOCTRINE AND THE UNCERTAIN FUTURE OF REGULATION

BY BRADY TAVERNIER

ABSTRACT

On June 30th, 2022, the Court handed down a 6-3 decision in *West Virginia v. EPA*, explicitly applying the major questions doctrine for the first time. Under the major questions doctrine, federal agencies that seek to decide issues of "vast economic and political significance" cannot take action without "clear congressional authorization." The Court's recent explicit shift from generally according deference to agencies' interpretations of broad statutes to now raising the standard for agencies to claim broad regulatory authority is significant, but has been developing for nearly four decades. Accordingly, this article aims to provide a more cohesive narrative of the development of the major questions doctrine, its application in *West Virginia v. EPA*, and the uncertain direction of regulatory law. More importantly, however, this article seeks to convey that the

doctrine's rise in administrative jurisprudence warrants further study. Lower court decisions since *West Virginia v. EPA* seems to suggest that the major questions doctrine will continue to be applied in order to strike down controversial agency rules. Other lower court decisions, however, seem to suggest that perhaps some judges may opt to distinguish cases in order to argue that the doctrine does not apply. Regardless, it appears like the major questions doctrine will charge on as a key player in administrative jurisprudence and continue to reveal hardening tensions concerning the separation of powers among Congress, the courts, and federal agencies.

INTRODUCTION

In October 2022, The Wisconsin Institute for Law & Liberty asked the U.S. Supreme Court on behalf of the Brown County Taxpayers Association to grant an emergency injunction on President Biden's executive order to cancel some student debt.[566] One of the questions presented asked the Court to consider whether the "major questions doctrine" prevents President Biden from relying on the 2003 Higher Education Relief Opportunities for Students Act[567] to cancel student debt. Under the major questions doctrine, formally articulated only recently by the Court in *West Virginia v. EPA* (2022),[568] federal agencies that seek to decide issues of "vast economic and political significance" cannot

[566] Brown County Taxpayer Association v. Joseph R. Biden., et al., S. Ct. 22A331 (2022).

[567] The Higher Education Relief Opportunities for Students Act, Pub. L. 108-76, 117 Stat. 904 (2003).

[568] West Virginia v. Environmental Protection Agency, 213 L. Ed. 2d 896, 142 S. Ct. 2587 (2022).

take action without "clear congressional authorization." While Justice Barrett, who is responsible for emergency applications from Wisconsin, declined to grant an injunction,[569] the litigants' decision to ask the Court to apply the major questions doctrine is notable. Where does this doctrine come from and how did it develop? Can we expect the major questions doctrine to become dominant in controversial administrative law cases to come? The Court's recent explicit shift from generally according deference to agencies' interpretations of broad statutes to now raising the standard for agencies to claim broad regulatory authority is significant, but has been developing for nearly four decades. Accordingly, this article aims to provide a more cohesive narrative of the development of the major questions doctrine, its application in *West Virginia v. EPA*,[570] and the uncertain direction of regulatory law. More importantly, however, this article seeks to convey that the doctrine's rise in administrative jurisprudence warrants further study.

THE DEVELOPMENT OF THE MAJOR QUESTIONS DOCTRINE (1984-2022)

When designing laws, Congress often delegates policymaking authority (i.e., the ability to issue legally

[569] Zoë Richards and Kelly O'Donnell, *Justice Barrett rejects group's effort to block Biden's student debt relief program from taking effect*, NBC NewsOctober 20, 2022), at https://www.nbcnews.com/politics/supreme-court/justice-barrett-rejects-groups-effort-block-bidens-student-debt-relief-rcna53307.

[570] West Virginia v. Environmental Protection Agency, 213 L. Ed. 2d 896, 142 S. Ct. 2587 (2022).

binding rules) to government agencies.[571] Whether a court accords deference to an agency's interpretation of a congressional statute or finds that an agency has exceeded its regulatory authority carries far-reaching implications in administrative law. The Court's unanimous 1984 decision, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*,[572] established the two-step framework that courts typically use to evaluate whether to defer to an agency's interpretation of a broad statute or to find that the agency has exceeded their regulatory authority:

a. Step one: The court asks if Congress expressed intent in the statute, and if so, whether or not the statute's intent is ambiguous.
    i. If the court answers yes to step one, then the court declares what the statute means and accords no deference to the agency. In other words, the agency has exceeded their regulatory authority.[573]
    ii. If the court answers no to step one, then the court proceeds to step two.
b. Step two: When the statute is ambiguous or silent to the disputed question, the court evaluates whether the agency's interpretation is reasonable in light of the broader context of the statute.[574]
    i. If the court answers yes to step two, then the court accords deference to the agency even if the court believes it is not the best

[571] Heidi Marie Werntz, *Counting on Chevron?*, 38 Energy L.J. 297, 351 (2017).
[572] Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984).
[573] Heidi Marie Werntz, *supra* note 5.
[574] Cass R. Sunstein, *Chevron Step Zero*, 92 Va. L. Rev. 187, 241 (2006).

> interpretation. In other words, the court finds that the agency reasonably acted within the scope of their regulatory authority.[575]

The foundational contours for what is now the major questions doctrine has been traced back to legal scholarship in the 1980's. In the aftermath of *Chevron,* then-First Circuit Judge Stephen Breyer, an administrative law specialist, authored a 1986 law review article credited "as one of the early sources contributing to the development of the current major questions doctrine"[576] In his article, Breyer articulated the tension between expecting federal judges to allow agencies to address complex problems and the need for judicial oversight to ensure that agencies do not exceed their regulatory authority.[577] Breyer argued, "Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration."[578] By suggesting that Congress may have answered "major questions," Breyer unintentionally provided language for the Court to eventually build upon.

Eight years after then-First Circuit Judge Stephen Breyer authored his 1986 law review article, the Court, in *MCI Telecommunications v. AT&T* (1994),[579] evaluated whether to accord deference to the Federal Communications

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[575] *Id.*

[576] Jonas J. Monast, *Major Questions About the Major Questions Doctrine*, 68 Admin. L. Rev. 445, 448 (2016).

[577] Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. . 363, 370 (1986).

[578] *Id.*

[579] MCI Telecomms. Corp. v. AT&T, 512 U.S. 218 (1994).

Commission (FCC)'s rule making tariff filing optional for non-dominant long distance carriers. The FCC argued that the congressional statute broadly permitted them to "modify any requirement" of the tariff requirements.[580] However, the Court drew a distinction between the FCC's authority under the statute to modify the content and other circumstances of the form versus making the tariff filing optional.[581] Ultimately, the Court found that the FCC's actions were not a mere modification; therefore, the agency had exceeded their regulatory authority.[582] While the Court makes no reference to a "major question," the majority reasons that Congress likely would not have used such a subtle word — modify — to justify an industry-wide rate-regulation.[583] In other words, if Congress intended for the FCC to use the statute to justify implementing an industry-wide rate regulation, they would have clearly answered that question when designing the statute.

The Court more clearly articulated the principles of the major questions doctrine in *FDA v. Brown & Williamson Tobacco Corp.* (2000),[584] citing both *MCI*[585] and Breyer's 1986 law review article.[586] The Court held that the Food and Drug administration (FDA) exceeded their regulatory authority by promulgating rules intended to reduce tobacco consumption among minors. The majority reasoned that

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[580] *Id.*
[581] *Id.*; Jonas J. Monast, *Major Questions About the Major Questions Doctrine*, (2016).
[582] *Id.*
[583] *Id.*
[584] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).
[585] MCI Telecomms. Corp. v. AT&T, 512 U.S. 218 (1994).
[586] Stephen Breyer, *Judicial Review of Questions of Law and Policy*, (1986).

Congress could not have reasonably intended to delegate a decision of such economic and political significance to the agency "in so cryptic a fashion."[587] Foundational to the Court's reasoning is that Congress must grant agencies clear authority to promulgate interpretive rules of "economic and political significance" (i.e., what Breyer had called in his 1986 article, *a major question*).[588] Interestingly however, Justice Breyer, now appointed to the Supreme Court, dissented from the case, arguing that such a major political question is appropriately addressed by one of the politically-accountable branches — Congress or the Executive branch — rather than by the Courts.[589] This tension between the separation of powers among Congress, the courts, and federal agencies underpin the debates surrounding the development of the major questions doctrine.

In the development of cases since *Brown & Williamson,*[590] the Court has repeatedly invoked the principles of the major questions doctrine without clearly acknowledging a dispute as "a major questions case." In *Gonzales v. Oregon* (2006),[591] the Court invalidated the U.S. Attorney General's interpretive rule–undermining Oregon's state law legalizing physician-assisted suicide. In finding that the Attorney General had exceeded his regulatory authority, the Court reasoned that the Attorney General's rulemaking power under the Controlled Substance Act (CSA) did not

[587] *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218 (1994).
[588] Stephen Breyer, *Judicial Review of Questions of Law and Policy*, (1986).
[589] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000); Jonas J. Monast, *Major Questions About the Major Questions Doctrine*, (2016).
[590] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).
[591] Gonzales v. Oregon, 546 U.S. 243 (2006).

include the power to declare illegitimate a medical standard for care specifically authorized under state law.[592] The *Gonzales* Court referenced the "earnest and profound debate" regarding physician-assisted suidice, reasoning that Congress would not have so implicitly granted the Attorney General broad authority to promulgate a rule of such "economic and political significance."[593] Once again, instead of characterizing *Gonzales* as a "major questions case," the Court invoked the core principles of the major questions doctrine by characterzing the issue of physician-assisted suicide as economically and politically significant.[594]

Similarly, in *King v. Burwell* (2015),[595] the Court considered whether the Internal Revenue Service (IRS) exceeded their regulatory authority in creating a regulation that extended the tax credits in the Affordable Care Act (ACA) to both state and federally-created exhanges. The Court held that Congress did not explicitly delegate such authority to the IRS, but that the language of the ACA clearly indicated that Congress intended for the tax credits to apply to both exchanges.[596] In other words, while the Court upheld the IRS interpretation, it did so without necessarily "deferring" to the agency. The issue at the heart of this case, according to the majority, raised questions of deep "economic and political significance;" therefore, the Court found deference

[592] *Id.*
[593] Jonas J. Monast, *Major Questions About the Major Questions Doctrine*, (2016).
[594] Gonzales v. Oregon, 546 U.S. 243 (2006).
[595] *King v. Burwell,* 135 S. Ct. 2480, 2488 (2015).
[596] *Id.*; Jonas J. Monast, *Major Questions About the Major Questions Doctrine*, (2016).

was not appropriate.[597] In characterizing the questions raised as economically and politically significantly, the majority strengthened the development of doctrine and set the stage for its eventual explicit embrace by the Court.

Before formally embracing the major questions doctrine, the Court took a step further in developing its contours in *National Federation of Independent Businesses v. Occupational Safety and Health Administration* (2022).[598] In finding that OSHA's vaccine-or-test mandate was not within the agency's scope of statutory authority under the Occupational Safety and Health Act, the Court reasoned that permitting the vaccine-or-test rule "would significantly expand OSHA's regulatory authority without clear congressional authorization."[599] Again, the Court relied on the principles of the major questions doctrine without clearly characterizing the dispute as a "major questions case," stating: "We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance."[600] From *MCI* (1994)[601] and *Brown & Williamson* (2000)[602] to *NFIB v. OSHA* (2022),[603] the Court had laid the groundwork for the major questions doctrine, continually evaluating regulatory authority and

[597] King v. Burwell, 135 S. Ct. 2480, 2488 (2015); Jonas J. Monast, *Major Questions*, (2016).

[598] National Federation of Independent Business v. Department of Labor, Occupational Safety & Health Administration, 211 L. Ed. 2d 448, 142 S. Ct. 661, 668 (2022).

[599] *Id.*

[600] *Id.*

[601] MCI Telecomms. Corp. v. AT&T, 512 U.S. 218 (1994).

[602] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

[603] Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., (2022).

congressional intent. On June 30th, 2022, the Court handed down a 6-3 decision in *West Virginia v. EPA*,[604] explicitly applying the major questions doctrine for the first time.

WEST VIRGINIA V. EPA (2022)

In 2015, under President Obama's administration, the Environmental Protection Agency (EPA) adopted the Clean Power Plan (CPP), which in part, required coal-fired power plants to shift to cleaner fuel sources.[605] In 2019, President Trump's administration repealed the CPP and replaced it with the more modest Affordable Clean Energy rule (ACE), establishing emission guidelines only for existing coal-fired steam plants.[606] The Trump administration's EPA argued that the CPP exceeded the EPA's regulatory authority under the Clean Air Act by including measures that applied industry-wide.[607] The Clean Air Act, the Trump administration's EPA contended, only permits the agency to promulgate measures implemented on the physical premise of an individual power-plant.[608] In January 2021, the U.S. Court of Appeals for the D.C. Circuit vacated the repeal of the CPP, vacated the ACE rule, and sent the issue back to the EPA.[609] The U.S. Supreme Court granted a request to review the D.C. Circuit's ruling and consider whether the Clean Air Act gives clear authorization to the EPA to

[604] W. Virginia v. Env't Prot. Agency, 213 L. Ed. 2d 896, 142 S. Ct. 2587, 2615 (2022).
[605] *Id.*
[606] *Id.*
[607] *Id.*
[608] *Id.*
[609] *Id.*

require coal-fired power plants to shift to cleaner fuel sources.[610]

In an 6-3 ruling dividing the Republican-appointed and Democrat-appointed justices, the Republican-appointed majority held that the EPA exceeded their regulatory authority by requiring coal-fired power plants to shift to cleaner fuel sources.[611] The Court pointed to precedent to articulate that "there are 'extraordinary cases' in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' mean to confer such authority.'"[612] Among the cases the majority cited were *Brown & Williamson,*[613] *Gonzales v. Oregon,*[614] and *NFIB v. OSHA.*[615] If Congress wishes to make such a significant decision concerning system-wide energy use, the majority asserted, they must do so explicitly by providing "clear authorization" to the EPA.[616] Unlike previous cases cited, the Court explicitly clarifies that *West Virginia v. EPA* "is a major questions case."[617] This explicit characterization raises currently unanswered questions about how the Court will evaluate whether or not a future dispute constitutes "a major questions case."

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[610] *Id.*
[611] *Id.*
[612] *Id.*
[613] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).
[614] Gonzales v. Oregon, 546 U.S. 243 (2006).
[615] Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., (2022).
[616] W. Virginia v. Env't Prot. Agency, 213 L. Ed. 2d 896, 142 S. Ct. 2587, 2615 (2022).
[617] *Id.*

Writing for the dissent, Justice Kagan challenged the majority's characterization of the dispute as "a major questions case."[618] Justice Kagan broadly distinguished the dispute from *Brown & Williamson*[619] along with other relevant case law the majority cites, arguing that in those previous cases, the Court struck down agency actions for two reasons: (1), an agency was operating far beyond its traditional lane; and (2), the action, if allowed, would have conflicted with or wreaked havoc on Congress' broader intent.[620] The Clean Power Plan, Justice Kagan asserted, fell within the EPA's traditional wheelhouse perfectly.[621] In designing the Clean Air Act, Congress explicitly entrusted the EPA with addressing the major public policy issue of carbon pollution.[622] Because the EPA's move to require coal-fired power plants to shift to cleaner fuel sources could reasonably be read in the context of the Clean Air Act's "broader statutory scheme,"[623] Justice Kagan argued that the EPA should be accorded deference.

Moreover, Justice Kagan noted that the Court did not rely on any "special clear authorization demand" in *Brown & Williamson*;[624] rather, the Court relied on the "normal principles of statutory interpretation: look at the text, view it in its context, and use what the Court called some 'common sense' about how Congress delegates."[625] Justice

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[618] *Id.*
[619] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).
[620] W. Virginia v. Env't Prot. Agency, 213 L. Ed. 2d 896, 142 S. Ct. 2587, 2615 (2022).
[621] *Id.*
[622] *Id.*
[623] *Id.*
[624] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).
[625] W. Virginia v. Env't Prot. Agency, 213 L. Ed. 2d 896, 142 S. Ct. 2587, 2615 (2022).

Kagan continued that in *Gonzales v. Oregon,*[626] the Court also followed "normal statutory interpretation" in doubting that Congress would have delegated such a significant medical judgment to an executive official who lacks medical expertise.[627] In other words, the *Gonzales* Court had found that the Attorney General was operating outside of his "traditional wheelhouse."[628] Importantly, the dissent repeatedly invokes the broader tension that Justice Breyer noted in his *Brown & Williamson*[629] dissent: a major political question is appropriately addressed by one of the politically-accountable branches rather than by the Courts. Justice Kagan concluded: "The Court appoints itself—instead of Congress or the expert agency—the decision-maker on climate policy. I cannot think of many things more frightening."[630]

From when Justice Breyer wrote his influential law review article in 1986 to the Court's explicit application of the major questions doctrine thirty-six years later, *West Virginia v. EPA*[631] demonstrates the slow, yet significant, evolution of administrative jurisprudence. Both the majority and dissent cited similar relevant case law to support the application or rejection of the major questions doctrine. Moreover, the dissent reinforced the concerns Justice Breyer had in his *Brown & Williamson*[632] dissent concerning the separation of powers. Regardless of whether or not Justice Breyer could

[626] Gonzales v. Oregon, 546 U.S. 243 (2006).
[627] *Id.*
[628] *Id.*
[629] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).
[630] W. Virginia v. Env't Prot. Agency, 213 L. Ed. 2d 896, 142 S. Ct. 2587, 2615 (2022).
[631] *Id.*
[632] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

have expected his law review article to be cited by the majority in *Brown & Williamson*, his article demonstrates the influence that legal scholarship can have on common law.

THE UNCERTAIN FUTURE OF *CHEVRON* AND REGULATORY AUTHORITY

Scholars and commentators disagree on whether or not *West Virginia v. EPA*[633] will be transformative to administrative law; however, there seems to be a general consensus that the future of *Chevron*[634] is uncertain. James Kunhardt and Anne Joseph O'Connell write for the Brookings Institution that while the state of *Chevron*[635] and regulation is currently unknown, "agencies will presumably be more skittish in their actions in the future, avoiding less compelling interpretation of their operating statutes" and "possibly limiting their power."[636] In other words, even though the Court has not overruled *Chevron*[637], its hesitance to apply it and its embrace of the major questions doctrine may have a chilling effect on agency rulemaking. For proponents of reigning in the administrative state, this means that agencies will be encouraged to act within their granted scope of authority. For critics of the major questions doctrine, this means that agencies will be unreasonably held back from tackling emerging and complex problems.

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[633] W. Virginia v. Env't Prot. Agency, 213 L. Ed. 2d 896, 142 S. Ct. 2587, 2615 (2022).
[634] Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984).
[635] *Id.*
[636] James Kunhardt and Anne Joseph O'Connell, *Judicial deference and the future of regulation*, The Brookings Institution. (August 18, 2022), at https://www.brookings.edu/research/judicial-deference-and-the-future-of-regulation/.
[637] *Id.*

Since the Court's ruling in *West Virginia v. EPA,*[638] various lower courts have applied the major questions doctrine in cases challenging agencies' regulatory authority, suggesting that the narrow scope of the decision may have broad implications for other federal agencies. In *Louisiana v. Becerra*[639] the U.S. District Court for Western Louisiana found that the Department of Health and Human Services (HHS) exceeded their regulatory authority in implementing the Head Start mandate.[640] The Head Start mandate required staff, volunteers and others who come in contact with Head Start students to be fully vaccinated for COVID-19.[641] Judge Doughty, a Trump-appointee, cited *West Virginia v. EPA*[642] to justify striking down the Head Start mandate. Judge Doughty acknowledged that the U.S. Supreme Court recently recognized the major questions doctrine.[643] Specifically, Judge Doughty argued that the Head Start mandate involves an agency decision of vast economic and political significance, and Congress has not given clear authorization to the HHS to promulgate the interpretive rule. Accordingly, the Head Start mandate violated the major questions doctrine.[644] Judge Dought's decision could suggest that there are federal judges who may be eager to apply the major questions doctrine in upcoming disputes.

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[638] W. Virginia v. Env't Prot. Agency, 213 L. Ed. 2d 896, 142 S. Ct. 2587, 2615 (2022).
[639] Louisiana v. Becerra, No. 21-30734 (5th Cir. Feb. 14, 2022).
[640] *Id.*
[641] *Id.*
[642] W. Virginia v. Env't Prot. Agency, 213 L. Ed. 2d 896, 142 S. Ct. 2587, 2615 (2022).
[643] Louisiana v. Becerra, No. 21-30734 (5th Cir. Feb. 14, 2022).
[644] *Id.*

By contrast, in *Loper Bright Enterprises, Inc. v. Raimondo*[645] a three-judge panel on the U.S. Court of Appeals for the D.C. Circuit took a different approach when evaluating whether or not to apply the major questions doctrine. In implementing an Omnibus Amendment that established industry-funded monitoring programs in New England fishery management plans, the National Marine Fisheries Service promulgated a rule that required the fishing industry to fund at-sea monitoring programs.[646]A group of commercial herring fishing companies brought suit, contending that the statute does not specify that the industry may be required to bear such costs.[647] Judge Rogers, a Clinton-appointee, found that the Service's interpretation of the Act was reasonable, and therefore owed deference under *Chevron*.[648] Citing *West Virginia v. EPA,*[649] Judge Rogers wrote that the major questions doctrine did not apply; the doctrine applies only in those "'extraordinary cases' in which the 'history and breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority.'"[650] Here, Judge Rogers contended, Congress had delegated broad authority to an agency with expertise.[651] While the major questions doctrine was not applied in this case, Judge Rogers' choice to include the doctrine in her analysis indicates that the

[645] Loper Bright Enterprises, Inc. v. Raimondo, 45 F.4th 359, 367 (D.C. Cir. 2022).
[646] *Id.*
[647] *Id.*
[648] Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984).
[649] W. Virginia v. Env't Prot. Agency, 213 L. Ed. 2d 896, 142 S. Ct. 2587, 2615 (2022).
[650] *Id.*
[651] *Id.*

doctrine may become a dominant player in administrative disputes to come. Moreover, the D.C. Circuit's ruling could suggest that there are federal judges who may avoid applying the doctrine.

The decisions by lower court federal judges to evaluate whether the major questions doctrines applies to emerging cases in disputes like *Becerra*[652] and *Loper*[653] seems to indicate that, like *Chevron's*[654] two-step framework established in 1984, the major questions doctrine may become a foundational doctrine in upcoming litigation. The Wisconsin Institute for Law & Liberty's emergency application asking the Supreme Court to consider whether the major questions doctrine prevents President Biden from relying on the HEROES Act to cancel student debt is a case in point. While Justice Barrett declined to grant an emergency injunction,[655] the litigants' choice to rely on the major questions doctrine in their legal challenge suggests that future sophisticated litigants may intend to rely on the doctrine as a means to challenge controversial agency rulemaking. Justice Barrett declined this application; however, it is currently unknown if the Court will stay out of the issue. For now, it is unclear what direction *Chevron*[656] and the major questions doctrine will take. That being said, as Kundhardt and O'Connell write in their piece for Brookings, this shift is likely to satisfy *Chevron's*[657] critics

[652] Louisiana v. Becerra, No. 21-30734 (5th Cir. Feb. 14, 2022).
[653] Loper Bright Enterprises, Inc. v. Raimondo, 45 F.4th 359, 367 (D.C. Cir. 2022).
[654] Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984).
[655] Zoë Richards and Kelly O'Donnell, *supra* note 4.
[656] *Id.*
[657] *Id.*

while opening up the conversation about the scope of agency authority.[658]

CONCLUSION

Perhaps Justice Breyer did not foresee that his 1986 law review article[659] would eventually be characterized to justify the development of a doctrine that would limit *Chevron*[660] and agency authority. Nor, perhaps, did Justice Breyer foresee that during his last term on the Court, he would be a dissenter in a case[661] that cemented the development of this doctrine. From *MCI* [662] and *Brown & Williamson*[663] to *West Virginia v. EPA*,[664] the major questions doctrine developed from wrestling with broad principles of congressional intent to formally recognizing a dispute as a "major questions case," in which an agency rule lacks "clear congressional authorization" and involves a question of "vast economic and political significance."[665] The particular implications of the doctrine will not be known until the Supreme Court decides more cases interpreting agencies' regulatory authority. Further scholarship could be helpful in identifying and analyzing the rise of the major questions doctrine and the impact it will have on administrative jurisprudence and regulatory authority.

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[658] James Kunhardt and Anne Joseph O'Connell, *supra* note 70.
[659] Stephen Breyer, *Judicial Review of Questions of Law and Policy*, (1986).
[660] *Id.*
[661] W. Virginia v. Env't Prot. Agency, 213 L. Ed. 2d 896, 142 S. Ct. 2587, 2615 (2022).
[662] MCI Telecomms. Corp. v. AT&T, 512 U.S. 218 (1994).
[663] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).
[664] W. Virginia v. Env't Prot. Agency, 213 L. Ed. 2d 896, 142 S. Ct. 2587, 2615 (2022).
[665] *Id.*

Accordingly, this article seeks to provide a cohesive narrative of the development of the major questions doctrine, its application in *West Virginia v. EPA*,[666] and the uncertain future of regulation. More importantly this article seeks to highlight why the uncertain direction of the major questions doctrine warrants further study. Lower court decisions since *West Virginia v. EPA,*[667] like *Louisiana v. Becerra,*[668] seems to suggest that the major questions doctrine will continue to be applied in order to strike down controversial agency rules. Other lower court decisions, like *Loper Bright Enterprises, Inc. v. Raimondo*,[669] seem to suggest that perhaps some judges may opt to distinguish cases in order to argue that the doctrine does not apply. Regardless, it appears like the major questions doctrine will charge on as a key player in administrative jurisprudence and continue to reveal hardening tensions concerning the separation of powers among Congress, the courts, and federal agencies.

[666] *Id.*
[667] *Id.*
[668] Louisiana v. Becerra, No. 21-30734 (5th Cir. Feb. 14, 2022).
[669] Loper Bright Enterprises, Inc. v. Raimondo, 45 F.4th 359, 367 (D.C. Cir. 2022).