TEXAS JOURNAL
ON CIVIL LIBERTIES & CIVIL RIGHTS

VOL. 16 NO. 1 | FALL 2010 | PAGES 1 TO 128

ARTICLES

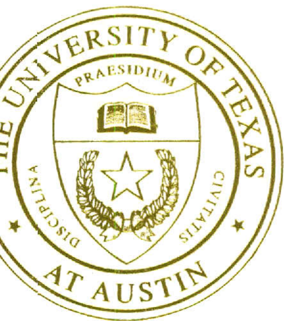
A New Look at Section 504 and the ADA in Special Education Cases
Mark C. Weber

Congress Needs to Repair the Court's Damage to § 1983
Ivan E. Bodensteiner

NOTES

Race and Civil Asset Forfeiture: A Disparate Impact Hypothesis
Mary E. H. Murphy

Arab Americans, Affirmative Action, and a Quest for Racial Identity
Christine Tamer



A Journal Publication of The University of Texas School of Law and the Individual Rights and Responsibilities Section of the State Bar of Texas

TEXAS JOURNAL ON CIVIL LIBERTIES & CIVIL RIGHTS SPONSORSHIP

The TEXAS JOURNAL ON CIVIL LIBERTIES & CIVIL RIGHTS offers varying sponsorship levels:

Platinum Sponsor:	**$3000 +**
Gold Sponsor:	**$1000 +**
Silver Sponsor:	**$500 +**
Bronze Sponsor:	**any donation up to $500**

In appreciation of your donation, you will receive the following recognition:

- Name printed in volume 16.2 of the TEXAS JOURNAL ON CIVIL LIBERTIES & CIVIL RIGHTS with sponsorship level (Platinum, Gold, Silver, or Bronze) identified and listed on our website.
- A copy of the fall and spring editions of volume 16 of the TEXAS JOURNAL ON CIVIL LIBERTIES & CIVIL RIGHTS for Silver Level sponsors and above.

MAKE CHECKS PAYABLE TO
Texas Journal on Civil Liberties & Civil Rights
MAIL DONATIONS TO
Texas Journal on Civil Liberties & Civil Rights
727 East Dean Keeton St., Austin, TX 78705
OR DONATE ONLINE AT
www.txjclcr.org

SPECIAL THANKS TO OUR SILVER SPONSOR:

KAITLIN T. FARRELL

TEXAS JOURNAL ON CIVIL LIBERTIES & CIVIL RIGHTS
LETTER FROM THE EDITORS

Dear Reader,

Thank you for your patronage. This academic year marks the sixteenth year of the Texas Journal on Civil Liberties & Civil Rights, formerly the Texas Forum on Civil Liberties & Civil Rights. The Journal was formed in 1992 by a group of law students wishing to facilitate a scholarly discussion on the state of civil rights in America by publishing cutting edge articles at the intersection of law, politics, and society written by judges, lawyers, professors and fellow students.

The Journal is published twice a year with support from the Individual Rights and Responsibilities Section of the State Bar of Texas and private donors. The Journal is run by law students and is overseen by a Board of Advisors.

In addition to publishing biannually, the Journal hosts an annual symposium featuring civil rights scholars from around the nation. The topic for 2011 will be "Civil Rights and the Border." The Journal also hosts speeches, brown bag events, and other events to expose students to this important area of law.

In this Volume we are pleased to publish one article from the Jacobus tenBroek Disability Law Symposium, which took place on April 15–16, 2010. The Jacobus tenBroek Disability Law Symposium is hosted by the National Federation for the Blind. We are proud to have a continuing relationship with such a progressive organization.

Our second article suggests legislative action to provide Section 1983 plaintiffs with expanded remedies. Our first student note discusses racial disparities in the implementation of civil asset forfeiture laws. Our second student note recommends developing an Arab American option in racial categories in the U.S. Census.

Over the past two years, the Journal has developed a web based component to its exploration of civil rights law with the TJCLCR Blog, available at http://tjclcr.blogspot.com/. Please also visit our website at http://www.utexas.edu/law/journals/tjclcr/.

We appreciate your continued support.

Sincerely,
Devon Helfmeyer and Mary Murphy
Editors-in-Chief

TEXAS JOURNAL ON CIVIL LIBERTIES & CIVIL RIGHTS

Advisory Board

Shelia E. Cheaney	Will Harrell
Michael Diehl	William Kilarglin
Suzanne Donovan	Glen Maxey
Fred Fuchs	F. Scott McCown
Julius G. Getman	Edward F. Sherman
Anthony P. Griffin	Jim Todd
James C. Harrington	Craig Washington

Subscription Information: The TEXAS JOURNAL ON CIVIL LIBERTIES & CIVIL RIGHTS (ISSN 1930-2045) is published twice a year.

The annual subscription price is $40.00 domestic / $50.00 foreign. Austin residents add 8.25% sales tax, and other Texas residents add 7.25% sales tax. Send subscriptions to: School of Law Publications, The University of Texas at Austin, P.O. Box 8670, Austin, Texas 78713-8670.

A subscription is provided to members of the Individual Rights and Responsibilities Section of the State Bar of Texas as part of the benefits they receive from their annual Section dues. To become a member of the IRR Section, call (800) 204-2222 or write to the State Bar of Texas, P.O. Box 12487, Austin, Texas 78711.

POSTMASTER: Send address changes to School of Law Publications, Inc., The University of Texas at Austin, P.O. Box 8670, Austin, Texas 78713-8670.

Manuscript Submissions: The Editorial Board and The University of Texas are not in any way responsible for the views expressed by the contributors. We welcome the unsolicited submission of articles from scholars, practitioners, businesspeople, government officials, judges, and students on topics relating to recent developments in civil liberties and civil rights law.

All submissions are reviewed throughout the year on a rolling basis. The Selection Committee seeks to provide authors with timely responses; however, the Committee will sometimes hold articles for consideration in a future publication unless the Journal is notified of a withdrawal. Please send submissions, accompanied by a curriculum vitae and a cover letter, to the Journal via ExpressO or by e-mail to tjclcr@law.utexas.edu.

Manuscripts must conform with the most recent version of The Bluebook: A Uniform System of Citation, published by the Harvard Law Review Association. As is the standard practice of publications in the United States, the Journal will hold copyrights to the publication.

Except as otherwise noted, the Journal is pleased to grant permission for copies of articles, notes, and book reviews for classroom use, provided that: (1) a proper notice of copyright is affixed to each copy; (2) the author and source are identified (please cite the Journal as TEX. J. C.L. & C.R.); (3) copies are distributed at or below cost; and (4) the Journal is notified of the use.

THE UNIVERSITY OF TEXAS SCHOOL OF LAW

ADMINISTRATIVE OFFICERS

Lawrence G. Sager, B.A., LL.B.; *Dean, John Jeffers Research Chair in Law, Alice Jane Drysdale Sheffield Regents Chair.*
Mechele Dickerson, B.A., J.D.; *Associate Dean for Academic Affairs, Arthur L. Moller Chair in Bankruptcy Law and Practice.*
Alexandra W. Albright, B.A., J.D.; *Associate Dean for Administrative Services, Senior Lecturer.*
Eden E. Harrington, B.A., J.D.; *Assist. Dean for Clinical Ed. & Public Serv., Dir. of William Wayne Justice Ctr. for Public Interest Law.*
Kimberly L. Biar, B.B.A.; *Assistant Dean for Financial Affairs, Certified Public Accountant.*
Carla Cooper, B.A., M.A., Ph.D.; *Assistant Dean for Alumni Relations and Development.*
Michael J. Esposito, B.A., J.D., M.B.A.; *Assistant Dean for Continuing Legal Education.*
Kirston Fortune, B.F.A.; *Assistant Dean for Communications.*
Michael Harvey; *Assistant Dean for Technology.*
Monica K. Ingram, B.A., J.D.; *Assistant Dean for Admissions and Financial Aid.*
David A. Montoya, B.A., J.D.; *Assistant Dean for Career Services.*
Leslie Oster, A.B., J.D.; *Assistant Dean for Strategic Planning, Senior Lecturer.*
Reymundo Ramos, B.A.; *Assistant Dean for Student Affairs.*

FACULTY EMERITI

Hans W. Baade, A.B., J.D., LL.B., LL.M.; *Hugh Lamar Stone Chair Emeritus in Civil Law.*
Richard V. Barndt, B.S.L., LL.B.; *Professor Emeritus.*
William W. Gibson, Jr., B.A., LL.B.; *Sylvan Lang Professor Emeritus in Law of Trusts.*
Robert W. Hamilton, A.B., J.D.; *Minerva House Drysdale Regents Chair Emeritus.*
Douglas Laycock, B.A., J.D.; *Alice McKean Young Regents Chair Emeritus.*
J. L. Lebowitz, A.B., J.D., LL.M.; *Joseph C. Hutcheson Professor Emeritus.*
John T. Ratliff, Jr., B.A., LL.B.; *Ben Gardner Sewell Professor Emeritus in Civil Trial Advocacy.*
John F. Sutton, Jr., J.D.; *A.W. Walker Centennial Chair Emeritus.*
James M. Treece, B.A., J.D., M.A.; *Charles I. Francis Professor Emeritus in Law.*
Russell J. Weintraub, B.A., J.D.; *Ben H. & Kitty King Powell Chair Emeritus in Business and Commercial Law.*

PROFESSORS

Jeffrey B. Abramson, B.A., J.D., Ph.D.; *Professor of Law and Government.*
David E. Adelman, B.A., Ph.D., J.D.; *Harry Reasoner Regents Chair in Law.*
David A. Anderson, A.B., J.D.; *Fred and Emily Marshall Wulff Centennial Chair in Law.*
Mark L. Ascher, B.A., M.A., J.D., LL.M.; *Joseph D. Jamail Centennial Chair in Law.*
Ronen Avraham, M.B.A., LL.B., LL.M., S.J.D.; *Thomas Shelton Maxey Professor in Law.*
Lynn A. Baker, B.A., B.A., J.D.; *Frederick M. Baron Chair in Law, Co-Director of Center on Lawyers, Civil Justice, and the Media.*
Mitchell N. Berman, A.B., M.A., J.D.; *Richard Dale Endowed Chair in Law.*
Barbara A. Bintliff, M.A., J.D.; *Joseph C. Hutcheson Professor in Law.*
Lynn E. Blais, A.B., J.D.; *Leroy G. Denman, Jr. Regents Professor in Real Property Law.*
Robert G. Bone, B.A., J.D.; *G. Rollie White Teaching Excellence Chair in Law.*
Oren Bracha, LL.B., S.J.D.; *Howrey LLP and Arnold, White, & Durkee Centennial Professor.*
Norma V. Cantu, B.A., J.D.; *Professor of Law and Education.*
Loftus C. Carson, II, B.S., M. Pub. Aff., M.B.A., J.D.; *Ronald D. Krist Professor.*
Robert M. Chesney, B.S., J.D.; *Charles I. Francis Professor in Law.*
Michael J. Churgin, A.B., J.D.; *Raybourne Thompson Centennial Professor.*
Jane M. Cohen, B.A., J.D.; *Edward Clark Centennial Professor.*
Frank B. Cross, B.A., J.D.; *Herbert D. Kelleher Centennial Professor of Business Law.*
William H. Cunningham, B.A., M.B.A., Ph.D.; *James L. Bayless Chair for Free Enterprise.*
Jens C. Dammann, J.D., LL.M., Dr. Jur., J.S.D.; *William Stamps Farish Professor in Law.*
John Deigh, B.A., M.A., Ph.D.; *Professor of Law and Philosophy.*
George E. Dix, B.A., J.D.; *George R. Killam, Jr. Chair of Criminal Law.*
John S. Dzienkowski, B.B.A., J.D.; *Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process.*
Karen L. Engle, B.A., J.D.; *Cecil D. Redford Prof. in Law, Director of Bernard & Audre Rapoport Center for Human Rights & Justice.*
Kenneth Flamm, Ph.D.; *Professor.*
William E. Forbath, A.B., B.A., Ph.D., J.D.; *Lloyd M. Bentsen Chair in Law.*
Julius G. Getman, B.A., LL.B., LL.M.; *Earl E. Sheffield Regents Chair.*
John M. Golden, A.B., J.D., Ph.D.; *Loomer Family Professor in Law.*
Steven Goode, B.A., J.D.; *W. James Kronzer Chair in Trial and Appellate Advocacy, University Distinguished Teaching Professor.*
Lino A. Graglia, B.A., LL.B.; *A. Dalton Cross Professor.*
Charles G. Groat, B.A., M.S., Ph.D.; *Professor.*
Patricia I. Hansen, A.B., M.P.A., J.D.; *J. Waddy Bullion Professor.*
Henry T. Hu, B.S., M.A., J.D.; *Allan Shivers Chair in the Law of Banking and Finance.*
Bobby R. Inman, B.A.; *Lyndon B. Johnson Centennial Chair in National Policy.*
Derek P. Jinks, B.A., M.A., J.D.; *The Marrs McLean Professor in Law.*
Stanley M. Johanson, B.S., LL.B., LL.M.; *James A. Elkins Centennial Chair in Law, University Distinguished Teaching Professor.*
Calvin H. Johnson, B.A., J.D.; *Andrews & Kurth Centennial Professor.*
Emily E. Kadens, B.A., M.A., Dipl., M.A., Ph.D., J.D.; *Baker and Botts Professor in Law.*
Susan R. Klein, B.A., J.D.; *Alice McKean Young Regents Chair in Law.*
Sanford V. Levinson, A.B., Ph.D., J.D.; *W. St. John Garwood & W. St. John Garwood, Jr. Centennial Chair in Law, Professor of Gov't.*
Stefanie A. Lindquist, B.A., J.D., Ph.D.; *A.W. Walker Centennial Chair in Law.*
Vijay Mahajan, M.S.Ch.E., Ph.D.; *John P. Harbin Centennial Chair in Business.*

BASIL S. MARKESINIS, LL.B., LL.D., DCL, Ph.D.; *Jamail Regents Chair.*
INGA MARKOVITS, LL.M.; *"The Friends of Joe Jamail" Regents Chair.*
RICHARD S. MARKOVITS, B.A., LL.B., Ph.D.; *John B. Connally Chair.*
ALOYSIUS P. MARTINICH, B.A., M.A., Ph.D.; *Professor.*
THOMAS O. MCGARITY, B.A., J.D.; *Joe R. and Teresa Lozano Long Endowed Chair in Administrative Law.*
STEVEN A. MOORE, B.A., Ph.D.; *Bartlett Cocke Regents Professor in Architecture.*
LINDA S. MULLENIX, B.A., M. Phil., J.D., Ph.D.; *Morris & Rita Atlas Chair in Advocacy.*
STEVEN P. NICHOLS, B.S.M.E., M.S.M.E., J.D., Ph.D.; *Clint W. Murchison, Sr. Fellow of Free Enterprise.*
ROBERT J. PERONI, B.S.C., J.D., LL.M.; *The Fondren Foundation Centennial Chair for Faculty Excellence.*
H. W. PERRY, JR., B.A., M.A., Ph.D.; *Associate Professor of Law and Government.*
LUCAS A. POWE, JR., B.A., J.D.; *Anne Green Regents Chair in Law, Professor of Government.*
WILLIAM C. POWERS, JR., B.A., J.D.; *President, The University of Texas at Austin, Hines H. Baker and Thelma Kelley Baker Chair, University Distinguished Teaching Professor.*
DAVID M. RABBAN, B.A., J.D.; *Dahr Jamail, Randall Hage Jamail, & Robert Lee Jamail Reg. Chair, Univ. Distinguished Teaching Prof..*
ALAN S. RAU, B.A., LL.B.; *Mark G. and Judy G. Yudof Chair in Law.*
DAVID W. ROBERTSON, B.A., LL.B., LL.M., J.S.D.; *W. Page Keeton Chair in Tort Law, University Distinguished Teaching Professor.*
JOHN A. ROBERTSON, A.B., J.D.; *Vinson & Elkins Chair.*
DANIEL B. RODRIGUEZ, B.A., J.D.; *Minerva House Drysdale Regents Chair in Law.*
WILLIAM M. SAGE, A.B., M.D., J.D.; *Vice Provost for Health Affairs, James R. Dougherty Chair for Faculty Excellence.*
JOHN J. SAMPSON, B.B.A., LL.B.; *William Benjamin Wynne Professor.*
CHARLES M. SILVER, B.A., M.A., J.D.; *Roy W. and Eugenia C. MacDonald Endowed Chair in Civil Procedure, Professor in Government, Co-Director of Center on Lawyers, Civil Justice, and the Media.*
ERNEST E. SMITH, B.A., LL.B.; *Rex G. Baker Centennial Chair in Natural Resources Law.*
TARA A. SMITH, Ph.D.; *Professor.*
LEWIS J. SPELLMAN, B.B.A., M.B.A., M.A., Ph.D.; *Professor.*
JAMES C. SPINDLER, B.A., J.D.; *The Sylvan Lang Professor.*
MATTHEW L. SPITZER, B.A., Ph.D., J.D.; *Hayden W. Head Regents Chair for Faculty Excellence.*
JANE STAPLETON, B.S., Ph.D., LL.B., D. Phil.; *Ernest E. Smith Professor.*
JORDAN M. STEIKER, B.A., J.D.; *Judge Robert M. Parker Endowed Chair in Law.*
PAUL J. STEKLER, Ph.D.; *Professor.*
SHIRLEY E. THOMPSON, A.B., A.M., Ph.D.; *Professor.*
GERALD TORRES, A.B., J.D., LL.M.; *Bryant Smith Chair in Law.*
GREGORY J. VINCENT, B.A., J.D., Ed.D.; *Professor.*
WENDY E. WAGNER, B.A., M.E.S., J.D.; *Joe A. Worsham Centennial Professor.*
LOUISE WEINBERG, A.B., J.D., LL.M.; *William B. Bates Chair for the Administration of Justice.*
OLIN G. WELLBORN, A.B., J.D.; *William C. Liedtke, Sr. Professor.*
JAY L. WESTBROOK, B.A., J.D.; *Benno C. Schmidt Chair of Business Law.*
ABRAHAM L. WICKELGREN, A.B., Ph.D., J.D.; *Bernard J. Ward Professor in Law.*
ZIPPORAH B. WISEMAN, B.A., M.A., LL.B.; *Thos. H. Law Centennial Professor in Law.*
PATRICK WOOLLEY, A.B., J.D.; *Beck, Redden & Secrest Professor in Law.*

ASSISTANT PROFESSORS

MARILYN ARMOUR, B.A., M.S.W., Ph.D.
HUGH L. BRADY, B.A., J.D.
DANIEL M. BRINKS, A.B., J.D., Ph.D.
JUSTIN DRIVER, B.A., M.A., M.A., J.D.
ZACHARY S. ELKINS, B.A., M.A., Ph.D.
JOSEPH R. FISHKIN, B.A., M.Phil., D.Phil., J.D.
CARY C. FRANKLIN, B.A., M.S.T., D.Phil., J.D.
MIRA GANOR, B.A., M.B.A., LL.B., LL.M., J.S.D.
JENNIFER E. LAURIN, B.A., J.D.
ANGELA K. LITTWIN, B.A., J.D.
MARY ROSE, A.B., M.A., Ph.D.
SEAN H. WILLIAMS, B.A., J.D.

SENIOR LECTURERS, WRITING LECTURERS, AND CLINICAL PROFESSORS

WILLIAM P. ALLISON, B.A., J.D.; *Clinical Prof., Dir. of Criminal Defense Clinic, Co-Dir. of Actual Innocence Clinic.*
MARJORIE I. BACHMAN, B.S., J.D.; *Clinical Instruct., Staff Attorney.*
PHILIP C. BOBBITT, A.B., J.D., Ph.D.; *Distinguished Sr. Lecturer.*
KAMELA S. BRIDGES, B.A., B.J., J.D.; *Lecturer.*
CYNTHIA L. BRYANT, B.A., J.D.; *Clinical Professor, Director of Mediation Clinic.*
PAUL J. BURKA, B.A., LL.B.; *Senior Lecturer.*
MARY R. CROUTER, A.B., J.D.; *Lecturer, Assistant Director of William Wayne Justice Center for Public Interest Law.*
TIFFANY J. DOWLING, B.A., J.D.; *Clinical Instructor, Staff Attorney.*
LORI K. DUKE, B.A., J.D.; *Clinical Professor.*
ARIEL E. DULITZKY, J.D., LL.M.; *Clinical Professor.*
ELANA S. EINHORN, B.A., J.D.; *Lecturer.*
TINA V. FERNANDEZ, A.B., J.D.; *Lecturer.*
ELIZABETH FRUMKIN, B.A., M.A., J.D.; *Lecturer.*
DENISE L. GILMAN, B.A., J.D.; *Clinical Prof., Dir. Immigr. Clinic.*
BARBARA HINES, B.A., J.D.; *Clinical Prof., Dir. Immigr. Clinic.*
KRISTINE A. HUSKEY, B.A., J.D.; *Dir. Ntl. Sec. & Hum. Rts. Clinic.*
HARRISON KELLER, B.A., M.A., Ph.D.; *Vice Provost for Higher Education Policy, Senior Lecturer.*
JEANA A. LUNGWITZ, B.A., J.D.; *Clinical Professor, Director of Domestic Violence Clinic.*
TRACY W. MCCORMACK, B.A., J.D.; *Lect.; Dir. Trial Advoc. Prg..*
ROBIN B. MEYER, B.A., M.A., J.D.; *Lecturer.*
JANE A. O'CONNELL, B.A., M.S., J.D.; *Lecturer, Associate Director for Patron Services, Instruction, and Research.*
RANJANA NATARAJAN, B.A., J.D.; *Clinical Professor, Director of National Security Clinic.*
ROBERT C. OWEN, A.B., M.A., J.D.; *Clinical Professor.*
SEAN J. PETRIE, B.A., J.D.; *Lecturer.*
WAYNE SCHIESS, B.A., J.D.; *Sr. Lecturer, Dir. of Legal Writing.*
STACY ROGERS SHARP, B.S., J.D.; *Lecturer.*
PAMELA J. SIGMAN, B.A., J.D.; *Lect., Dir. Juvenile Justice Clinic.*
DAVID S. SOKOLOW, B.A., M.A., J.D., M.B.A.; *Distinguished Senior Lecturer, Director of Student Life.*
LESLIE L. STRAUCH, B.A., J.D.; *Clinical Prof. Child. Rights Clinic.*
GRETCHEN S. SWEEN, B.A., M.A., Ph.D., J.D.; *Lecturer.*
MELINDA E. TAYLOR, B.A., J.D.; *Sr. Lect., Dir. Envtl. Law Clinic.*
HEATHER K. WAY, B.A., B.J., J.D.; *Lecturer, Director of Community Development Clinic.*
ELIZABETH M. YOUNGDALE, B.A., M.L.I.S., J.D.; *Lecturer.*

ADJUNCT PROFESSORS AND OTHER LECTURERS

ROBERT J. ADAMS, JR., B.S., M.B.A., Ph.D.
WILLIAM R. ALLENSWORTH, B.A., J.D.
WILLIAM G. BARBER, B.S.Ch.E., J.D.
SHARON C. BAXTER, B.S., J.D.
WILLIAM H. BEARDALL, JR., B.A., J.D.
JERRY A. BELL, B.A., J.D.
ALLISON H. BENESCH, B.A., M.S.W., J.D.
CRAIG R. BENNETT, B.S., J.D.
JAMES B. BENNETT, B.B.A., J.D.
MELISSA J. BERNSTEIN, B.A., M.L.S., J.D.
ROBERT S. BICKERSTAFF, B.A., J.D.
MURFF F. BLEDSOE, B.A., J.D.
WILLIAM P. BOWERS, B.B.A., J.D., LL.M.
STACY L. BRAININ, B.A., J.D.
ANTHONY W. BROWN, B.A., J.D.
JAMES E. BROWN, LL.B.
TOMMY L. BROYLES, B.A., J.D.
W. A. BURTON, JR., B.A., M.A., LL.B.
JOHN C. BUTLER, B.B.A., Ph.D.
BENEDICTE CALLAN, B.A., Ph.D.
AGNES E. CASAS, B.A., J.D.
RUBEN V. CASTANEDA, B.A., J.D.
EDWARD A. CAVAZOS, B.A., J.D.
DAN J. CHRISTENSEN, B.B.A., J.D.
JEFF CIVINS, A.B., M.S., J.D.
JUDGE LEIF M. CLARK, B.A., M.Div., J.D.
GARY COBB, B.A., J.D.
ELIZABETH COHEN, B.A., M.S.W., J.D.
LYNN R. COLEMAN, B.A., LL.B.
JAMES W. COLLINS, B.S., J.D.
PATRICIA J. CUMMINGS, B.A., J.D.
DICK DEGUERIN, B.A., LL.B.
MICHELE Y. DEITCH, B.A., M.S., J.D.
ADAM R. DELL, B.A., J.D.
RICHARD D. DEUTSCH, B.A., J.D.
CASEY D. DUNCAN, B.A., M.L.I.S., J.D.
PHILIP DURST, B.A., M.A., J.D., Ph.D.
JAY D. ELLWANGER, B.A., J.D.
KAITLIN T. FARRELL, B.A., J.D.
ARLEY D. FINLEY, B.A., M.B.A., J.D.
JOHN C. FLEMING, B.A., J.D.
MARIA FRANKLIN, B.A., M.A., Ph.D.
DAVID C. FREDERICK, B.A., Ph.D., J.D.
GREGORY D. FREED, B.A., J.D.
FRED J. FUCHS, B.A., J.D.
MICHAEL GAGARIN, Ph.D.
GERALD J. GALOW, B.A., J.D.
JAMES B. GAMBRELL, B.S.M.E., M.A., LL.B.
FRANCIS J. GAVIN, B.A., M.S.T., M.A., Ph.D.
CHARLES E. GHOLZ, B.S., Ph.D.
MICHAEL J. GOLDEN, A.B., J.D.
JULIE E. GRANTHAM, B.A., J.D.
SHERRI R. GREENBERG, B.A., M.Sc.
ROBERT L. GROVE, B.S., J.D.
DAVID HALPERN, B.A., J.D.
ELIZABETH HALUSKA-RAUSCH, B.A., M.A., M.S., Ph.D.
JETT L. HANNA, B.B.A., J.D.
KELLY L. HARAGAN, B.A., J.D.
CLINT A. HARBOUR, B.A., J.D., LL.M.
ROBERT L. HARGETT, B.B.A., J.D.
JAMES C. HARRINGTON, B.A., M.A., J.D.
CHRISTOPHER S. HARRISON, Ph.D., J.D.
JOHN R. HAYS, JR., B.A., J.D.
P. MICHAEL HEBERT, A.B., J.D.
STEVEN L. HIGHLANDER, B.A., Ph.D., J.D.
SUSAN J. HIGHTOWER, B.A., M.A., J.D.
WILLIAM M. HINES, III, B.B.A., J.D.
JAMES C. HO, B.A., J.D.
KENNETH E. HOUP, JR., J.D.
RANDY R. HOWRY, B.J., J.D.
MONTY G. HUMBLE, B.A., J.D.
DIRK M. JORDAN, B.A., J.D.
SEAN D. JORDAN, B.A., J.D.
PATRICK O. KEEL, B.A., J.D.
DOUGLAS L. KEENE, Ph.D.
CHARI L. KELLY, B.A., J.D.
ROBERT N. KEPPLE, B.A., J.D.
MARK L. KINCAID, B.B.A., J.D.
AMI L. LARSON, B.A., J.D.
KEVIN R. LASHUS, B.A., J.D.
JODI R. LAZAR, B.A., J.D.
KEVIN L. LEAHY, B.A., J.D.
MAURIE A. LEVIN, B.A., J.D.
JAMES LLOYD-LOFTIS, B.B.A., J.D.
ANDREW F. MACRAE, B.J., J.D.
JIM MARCUS, B.A., J.D.
PETER D. MARKETOS, B.A., J.D.
HARRY S. MARTIN, A.B., M.L.S., J.D.
FRANCES L. MARTINEZ, B.A., J.D.
LAURA A. MARTINEZ, B.A., J.D.
RAY MARTINEZ, III, B.A., J.D.
LISA M. MCCLAIN, B.A., J.D., LL.M.
STEPHANIE G. MCFARLAND, B.A., J.D.
BARRY F. MCNEIL, B.A., J.D.
ANGELA T. MELINARAAB, B.F.A., J.D.
JO A. MERICA, B.A., J.D.
RANELLE M. MERONEY, B.A., J.D.
ELIZABETH N. MILLER, B.A., J.D.
DARYL L. MOORE, B.A., M.L.A., J.D.
EDWIN G. MORRIS, B.S., J.D.
MANUEL H. NEWBURGER, B.A., J.D.
DAVID G. NIX, B.S.E., LL.M., J.D.
PATRICK L. O'DANIEL, B.B.A., J.D.
M. A. PAYAN, B.A., J.D.
MARK L. PERLMUTTER, B.S., J.D.
LOUIS T. PIRKEY, B.S.Ch.E., J.D.
JUDGE ROBERT L. PITMAN, B.S., J.D.
ELIZA T. PLATTS-MILLS, B.A., J.D.
LAURA L. PRATHER, B.B.A., J.D.
JONATHAN PRATTER, B.A., M.L.S., J.D.
VELVA L. PRICE, B.A., J.D.
BRIAN C. RIDER, B.A., J.D.
GRETCHEN RITTER, B.S., Ph.D.
ROBERT M. ROACH, JR., B.A., J.D.
BRIAN J. ROARK, B.A., J.D.
BETTY E. RODRIGUEZ, B.S.W., J.D.
JAMES D. ROWE, B.A., J.D.
AMANDA M. RUNYON, B.B.A., J.D.
SARA J. RUSHING, B.A., LL.M., J.D.
MATTHEW C. RYAN, B.A., J.D.
KAREN R. SAGE, B.A., J.D.
MARK A. SANTOS, B.A., J.D.
CHRISTOPHE H. SAPSTEAD, B.A., J.D.
SUSAN SCHULTZ, B.S., J.D.
AMY J. SCHUMACHER, B.A., J.D.
MARCUS F. SCHWARTZ, B.B.A., J.D.
SUZANNE SCHWARTZ, B.J., J.D.
RICHARD J. SEGURA, JR., B.A., J.D.
DAVID A. SHEPPARD, B.A., J.D.
JUDGE ERIC M. SHEPPERD, B.A., J.D.
ALISSA R. SHERRY, B.A., M.A., Ph.D.
NADAV SHOKED, LL.B., S.J.D.
RONALD J. SIEVERT, B.A., J.D.
AMBROSIO A. SILVA, B.S., J.D.
BEA A. SMITH, B.A., M.A., J.D.
LYDIA N. SOLIZ, B.B.A., J.D.
KATHERINE J. SOLON, B.A., M.S., J.D.
JUSTICE ROSE B. SPECTOR, B.A., J.D.
DAVID B. SPENCE, B.A., J.D., M.A., Ph.D.
LAURA L. STEIN, B.A., M.A., Ph.D.
JAMES B. STEINBERG, B.A., J.D.
CHARLES H. STILL, B.B.A., J.D.

WILLIAM F. STUTTS, B.A., J.D.
MATTHEW J. SULLIVAN, B.S., J.D.
BRADLEY P. TEMPLE, B.A., J.D.
SHERINE E. THOMAS, B.A., J.D.
TERRY O. TOTTENHAM, B.S., LL.M., J.D.
JEFFREY K. TULIS, B.A., M.A., Ph.D.
ROBERT W. TURNER, B.A., LL.B.
TIMOTHY J. TYLER, B.A., J.D.
SUSAN S. VANCE, B.B.A., J.D.
ERIC M. VANHORN, B.A., J.D.
LANA K. VARNEY, B.J., J.D.
SRIRAM VISHWANATH, B.S., M.S., Ph.D.
DEBORAH M. WAGNER, B.A., M.A., J.D.
CLARK C. WATTS, B.A., M.D., M.A., M.S., J.D.
JANE M. WEBRE, B.A., J.D.
WARE V. WENDELL, A.B., J.D.
DARA J. WHITEHEAD, B.A., M.S.
RANDALL B. WILHITE, B.B.A., J.D.
DAVID G. WILLE, B.S.E.E., M.S.E.E., J.D.
MARK B. WILSON, B.A., M.A., J.D.
JUDGE PAUL L. WOMACK, B.S., J.D.
LUCILLE D. WOOD, B.A., J.D.
LARRY F. YORK, B.B.A., LL.B.
DANIEL J. YOUNG, B.A., J.D.

VISITING PROFESSORS

OWEN L. ANDERSON, B.A., J.D.
ANTONIO H. BENJAMIN, LL.B., LL.M.
AARON-ANDREW P. BRUHL, B.A., M.Phil., J.D.
PETER F. CANE, B.A., LL.B., D.C.L.
VICTOR FERRERES, J.D., LL.M., J.S.D.
FRANCESCO FRANCIONI, J.D., LL.M.
ROBERT M. O'NEIL, A.B., A.M., LL.B., LL.D., LL.D.
GUILLERMO A. PADILLA, J.D., Ph.D.
ADAM H. ROSENZWEIG, B.A.,LL.M., J.D.
KEVIN G. TOH, A.B., M.A., Ph.D., J.D.

TEXAS JOURNAL ON CIVIL LIBERTIES & CIVIL RIGHTS

Volume 16 | Number 1 | Fall 2010

Editorial Board 2010-2011

DEVON M. HELFMEYER
MARY E.H. MURPHY
Editors-in-Chief

KATHERINE L. ROSENBERG
Managing Editor

KELSEY L. DOW
TSE-HAN A. FANG
Articles Editors

KATHRYN L. OLSON
MARK T. TERRELL
Notes Editors

MICHAEL GAREMKO
Submissions Editor

ONYEBUCHIM A. CHINWAH
Technical Editor

KRISTIN P. HOUSH
Symposium Chair

ANDRE J. SMULLEN
Summer Article Editor

Members

MEAGAN T. ARMSTRONG
KIMBERLY ASHWORTH
ALESE BAGDOL
STEPHANIE BOUEY
SUZANNE BRANGAN
KATHERINE A. BROOKER
JORDAN L. BROWN
MARTHA L. BUTTRY
MARGARET CLIFFORD
WILLIAM C. DALTON
JOSHUA DAVIS
TARESSANN DOMINGUEZ
KELLY M. FALLIGANT
CHARLES L. GALINDO JR.
SILVIA G. GARCIA
ALEXANDRIA JOHNSON

SIAN JONES
JOSHUA LIVELY
JERRY LYNN MADDOX
RALPH C. MAYRELL
JOSEPH MOKODEAN
TIMOTHY NEAL
MARISSA NEUMAN
CHRISTINE NISHIMURA
WESLEY NUTE
MICHAEL O'KEEFE COWLES
DOMINIC V. PARIS
SHAUN ROONEY
GERALD SALLIER
SHERIN VARGHESE
DEREK VERHAGEN
DORIS WONG

STEFANIE A. LINDQUIST
Faculty Advisor

PAUL N. GOLDMAN
Business Manager

© Copyright 2010
TEXAS JOURNAL ON CIVIL LIBERTIES & CIVIL RIGHTS

Cite as TEX. J. C.L. & C.R.

TEXAS JOURNAL
ON CIVIL LIBERTIES & CIVIL RIGHTS

Volume 16, Number 1, Fall 2010

ARTICLES

A New Look at Section 504 and the ADA in Special Education Cases

Mark C. Weber 1

Congress Needs to Repair the Court's Damage to § 1983

Ivan E. Bodensteiner 29

NOTES

Race and Civil Asset Forfeiture: A Disparate Impact Hypothesis

Mary Murphy 77

Arab Americans, Affirmative Action, and a Quest for Racial Identity

Christine Tamer 101

Articles

A New Look at Section 504 and the ADA in Special Education Cases

Mark C. Weber*

Abstract

School districts are finding fewer children eligible for services under the Individuals with Disabilities Education Act (IDEA). At the same time Congress has expanded the number of children who are protected by section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act (ADA). These developments present the largely unexplored question of what obligations school districts owe children who have disabilities and are protected under section 504 and the ADA, but who are not eligible for services under IDEA. This article concludes that these children must be provided an education that meets their needs as adequately as the needs of children without disabilities are met in the same school district. This level of services may be higher or lower than the level of services required by IDEA. Other educational obligations apply, as do procedural protections and rights in the student disciplinary process. In general, exhaustion defenses should not apply, and a wide range of remedies should be available.

I. EXPANDED COVERAGE UNDER SECTION 504 AND THE ADA 5

II. ENTITLEMENTS UNDER SECTION 504 AND THE ADA 9
A. The Comparison to IDEA and *Rowley* 9
B. Meeting Educational Needs as Adequately as the Needs of Others Are Met 10
1. Cases Interpreting the Section 504 Regulation 11
2. Implications: A Standard Both Higher and Lower ... 13
3. Practicability 14
4. Regulatory Authority 15
5. Judicial Enforceability. 17
C. Dually Eligible Children and *Rowley* as a Floor or a

Ceiling 18
D. Other Substantive Educational Obligations 20
E. Procedural Protections 21
F. Student Discipline 22

III. EXHAUSTION DEFENSES 24

IV. REMEDIES 25
A. In General 25
B. Attorneys' Fees 26
C. Expert Witness Fees 27

V. CONCLUSION 27

In a 2009 article, I commented that school districts seem increasingly eager to restrict the eligibility of children for services under the Individuals with Disabilities Education Act (IDEA) and that frequently, courts let them do so when parents file challenges.[1] Caselaw indicates this trend has intensified over the past two years.[2] In the article, I advocated reexamining the cases that limit eligibility and adopting an interpretation of IDEA that calls for broader coverage under that statute.[3] Nevertheless, the likelihood remains that eligibility for services under IDEA will continue to be cut back. What happens if that occurs?

A probable result is that parents of children with disabilities will bring more claims[4] for services under section 504 of the Rehabilitation

---

[1] Mark C. Weber, *The IDEA Eligibility Mess*, 57 BUFF. L. REV. 83 (2009).

[2] *See, e.g.*, Anello v. Indian River Sch. Dist., 355 F. App'x 594 (3d Cir. 2009) (upholding summary judgment in favor of school district on claim that child should have been found eligible earlier, noting child's success under section 504 plan); Brado v. Weast, No. CIV. PJM 07-2696, 2010 WL 333760 (D. Md. Jan. 26, 2010) (holding that child with section 504 plan was not eligible under IDEA); A.J. v. Bd. of Educ., E. Islip Union Free Sch. Dist., 679 F. Supp. 2d 299 (E.D.N.Y. 2010) (holding child with Asperger syndrome ineligible on ground that academic performance was satisfactory); Chase v. Mesa County Valley Sch. Dist. No. 51, No. CIV.A. 07-CV-00205RE, 2009 WL 3013752 (D. Colo. Sept. 17, 2009) (holding that child managing average grades was properly terminated from special education); E.M. v. Pajaro Valley Unified Sch. Dist., No. C 06-4694 JF, 2009 WL 2766704 (N.D. Cal. Aug. 27, 2009) (holding child continually at risk of grade retention not eligible on basis of learning disability). Of course, cases continue to run in the other direction too. *E.g.*, Springfield Sch. Comm. v. Doe, 623 F. Supp. 2d 150 (D. Mass. 2009) (holding that school district should have evaluated child with record of truancy); W.H. v. Clovis Unified Sch. Dist., No. CV F 08-0374 LJO DLB, 2009 U.S. Dist. LEXIS 47736 (E.D. Cal. June 8, 2009) (upholding IDEA eligibility under other-health-impaired category).

[3] *See* Weber, *supra* note 1, at 152–59.

[4] Relatively few parents use existing IDEA procedures to challenge the decisions of school districts concerning their children, so one should not expect a litigation explosion in any instance. *See* U.S. GEN. ACCOUNTING OFFICE, SPECIAL EDUCATION: NUMBERS OF FORMAL DISPUTES ARE GENERALLY LOW AND STATES ARE USING MEDIATION AND OTHER STRATEGIES TO RESOLVE CONFLICTS 3 (2003) ("While data are limited and inexact, four national studies indicate that the use of the three formal dispute resolution mechanisms has been generally low relative to the number of children with

Act of 1973[5] and Title II of the Americans with Disabilities Act (ADA).[6] Section 504 forbids disability discrimination by federal grantees, including local school districts; Title II forbids disability discrimination by state and local governments, again including school districts. The regulations promulgated to enforce section 504 require that all children with disabilities, as defined by section 504 and the ADA, be provided with free, appropriate public education as interpreted by those regulations.[7] That entitlement does not hinge on IDEA eligibility.

Section 504 and the ADA have often been viewed as supplemental causes of action in special education cases, used mostly when a student who is eligible for services under IDEA has a plausible claim for damages relief. The general consensus is that the cause of action provided in IDEA does not allow claims for compensatory or punitive damages;[8] although punitive damages are not available under section 504 and Title II, compensatory damages may be.[9] Nevertheless, section 504 and Title II special education cases in which viable compensatory damages claims exist are rare. Courts generally insist that the plaintiff show that the defendant engaged in intentional wrongful conduct, or at least manifested deliberate indifference,[10] and they frequently apply a test of whether the school district engaged in gross misjudgment or bad-faith conduct.[11] Section 504 and the ADA remain underdeveloped as avenues of judicial relief in special education cases that do not assert compensatory damages claims.[12]

---

disabilities. Due process hearings, the most resource-intense dispute mechanism, were the least used nationwide. Using data from the National Association of State Directors of Special Education, we calculated that nationwide, in 2000, about 5 due process hearings were held per 10,000 students with disabilities."); *see also* DICK ZELLER, CENTER FOR APPROPRIATE DISPUTE RESOLUTION IN SPECIAL EDUCATION, FIVE YEAR STATE AND NATIONAL SUMMARIES OF DISPUTE RESOLUTION DATA (2010), http://www.directionservice.org/cadre/pdf/National%20Part%20B%20Dispute%20Resolution%20Data%20Summary%20FFY2003-FFY2007%2015April2010.pdf ("Due process complaint filings have shown a very slight decline on average but with variability from year to year. The reported number of due process hearings fully adjudicated peaked in 2004-05 but has declined sharply over the last four years."). It remains uncertain whether parents whose children are denied IDEA eligibility will assert rights under the other statutes, or whether they will choose to make a stand on the issue of IDEA eligibility, or perhaps do both.

[5] 29 U.S.C.A. § 794 (West 2010).

[6] 42 U.S.C.A. §§ 12131–12150 (West 2010).

[7] 34 C.F.R. § 104.33(a) (2010).

[8] The Supreme Court recognized this fact as early as 1984. Smith v. Robinson, 468 U.S. 992, 1020 n.24 (1984), *superseded by statute in part not relevant*, 20 U.S.C. § 1415(*l*) ("Without expressing an opinion on the matter, we note that courts generally agree that damages are available under § 504, but are available under the EHA only in exceptional circumstances.").

[9] *See* Tennessee v. Lane, 541 U.S. 509 (2004) (upholding Title II damages claim against Eleventh Amendment defense); Barnes v. Gorman, 536 U.S. 181 (2002) (holding that Title II does not permit punitive damages).

[10] *See* Mark C. Weber, *Disability Harassment in the Public Schools*, 43 WM. & MARY L. REV. 1079, 1103–06 (2002).

[11] For an extensive discussion of cases applying this standard, see Drew Millar, Note, *Judicially Reducing the Standard Of Care: An Analysis of the Bad Faith/Gross Misjudgment Standard in Special Education Discrimination*, 96 KY. L.J. 711 (2007-08).

[12] The statement in the text should be taken with the caveat that some development of section 504 and the ADA has occurred in an administrative setting, the Office for Civil Rights of the United

Two facts suggest that this underdevelopment will end soon. The first, as noted, is the effort at cutting back on who is protected under IDEA. This will force parents and advocates to look to other legal avenues in asserting the right to have children with disabilities educated properly in the public schools. The second is the recent extension of section 504-Title II coverage to many more children through the redefinition of "individuals with disabilities" in the ADA Amendments Act of 2008.[13] The ADA Amendments Act overturns Supreme Court precedent that had narrowed the coverage of the ADA and section 504. It provides that impairments are to be considered in their unmitigated state and greatly expands the definition of major life activities provided in the statute's coverage provision.[14]

Much commentary[15] concerning section 504 and the ADA in the context of elementary and secondary schooling focuses on damages claims[16] or modification of standards for participation in athletic programs.[17] This article takes the scholarship in a new direction by asking what section 504 and the ADA require of school districts when

States Department of Education, which receives complaints and issues letters of findings.

[13] ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

[14] *See infra* text accompanying notes 18–39 (describing expansion of coverage of ADA in ADA Amendments Act).

[15] Professor Zirkel's work is a notable exception to the generalization in the text. He has written on section 504 and ADA coverage, Perry A. Zirkel, *A Step-by-Step Process § 504/ADA Eligibility Determinations: An Update*, 239 WEST'S EDUC. L. REP. 333 (2009); Perry A. Zirkel, *Conducting Legally Defensible § 504/ADA Eligibility Determinations*, 176 WEST'S EDUC. L. REP. 1 (2003); student discipline issues under section 504 and the ADA, Perry A. Zirkel, *Suspensions and Expulsions Under Section 504: A Comparative Overview*, 226 WEST'S EDUC. L. REP. 9 (2008); Perry A. Zirkel, *Discipline Under Section 504 and the ADA*, 146 WEST'S EDUC. L. REP. 617 (2000)); and other section 504-ADA matters, Perry A. Zirkel, *Initial Implications of the NCLB for Section 504*, 191 WEST'S EDUC. L. REP. 541 (2004); Perry A. Zirkel, *Comparison of IDEA IEP's and Sec. 504 Accommodations Plans*, 191 WEST'S EDUC. L. REP. 563 (2004); Perry A. Zirkel, *Section 504 and the ADA: The Top Ten Recent Concepts/Cases*, 147 WEST'S EDUC. L. REP. 761 (2000); Perry A. Zirkel, *Section 504 and Public School Students: An Empirical Overview*, 120 WEST'S EDUC. L. REP. 369 (1997); Perry A. Zirkel, *The Substantive Standard for FAPE: Does Section 504 Require Less than the IDEA?*, 106 WEST'S EDUC. L. REP. 471 (1996) (hereinafter Zirkel, *Substantive Standard*). Professor Zirkel is also author of a two-volume treatise, PERRY A. ZIRKEL, SECTION 504, THE ADA, AND THE SCHOOLS (2d ed. 2000). Other articles that discuss coverage of section 504 and the ADA in the context of public schooling include Ruth Colker, *The Death of Section 504*, 35 U. MICH. J.L. REFORM 219, 228–33 (2002), and Susan G. Glark, *Making Eligibility Determinations Under Section 504*, 214 WEST'S EDUC. L. REP. 451 (2007).

[16] This includes my own. Weber, *supra* note 10; *see also* Mark C. Weber, *Damages Liability in Special Education Cases*, 21 REV. LITIG. 83 (2002). Other work includes Sarah Poston, *Developments in Federal Disability Discrimination Law: An Emerging Resolution to the Section 504 Damages Issue*, 1992-93 ANN. SURV. AM. L. 419 (1994), and Paul M. Secunda, *At the Crossroads of Title IX and a New "IDEA": Why Bullying Need Not Be "a Normal Part of Growing Up" for Special Education Children*, 12 DUKE J. GENDER L. & POL'Y 1, 31 (2005) (discussing redress for bullying under section 504 and the ADA).

[17] *E.g.*, Tessie E. Rose & Dixie Snow Huefner, *High School Athletic Age-Restriction Rules Continue to Discriminate Against Students with Disabilities*, 196 WEST'S EDUC. L. REP. 385 (2005); Kimberly M. Brown, Comment, *Leveling the Playing Field: A Commentary on the Impact of High School Athletic Eligibility Requirements on Students with Learning Disabilities*, 4 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 255 (2008); Brooke A. Frederickson, *The Age Nineteen Rule and Students with Disabilities: Discrimination Against Disabled Students with Athletic Ability*, 25 T. JEFFERSON L. REV. 635 (2003).

educating children with disabilities who are not eligible under IDEA but who qualify for coverage only under those two statutes. It concludes that an obligation exists to provide appropriate education that meets the needs of those children as adequately as the needs of children without disabilities are met. This obligation may be greater or lesser than the duty under IDEA to provide appropriate education, and will vary from one school district to another. Other obligations apply as well—duties not to segregate, to provide procedural protections, and to afford special rights in the student disciplinary process. In general, exhaustion defenses should not apply to claims to enforce these obligations, and a wide range of remedies should be available. The questions about the scope of section 504 and the ADA's obligations and these proposed answers gain salience from the amendment of section 504 and the ADA to cover more potential claimants, and from the potential decrease in the number of children who are designated as eligible for services under IDEA.

Part I of this article discusses the increase in the numbers of children who are covered by section 504 and the ADA because of the ADA Amendments Act of 2008. Part II goes into the obligations owed those children, discussing in depth the duty to educate them as adequately as others are educated. Part III briefly takes up the exhaustion defense, and Part IV closes the discussion by exploring remedies issues.

I. EXPANDED COVERAGE UNDER SECTION 504 AND THE ADA

Section 504 and the ADA define disability as a physical or mental impairment that substantially limits one or more of the major life activities of an individual, a record of such an impairment, or being regarded as having such an impairment.[18] Although this language sounds broad, the Supreme Court held that it should be read narrowly.[19] The Court ruled that impairments must be evaluated in their mitigated state, that is, after considering any medical intervention or other means—including those of the body's own automatic systems[20]—that the individual uses to reduce the impact of the impairments.[21] It held that the "regarded as" term applies only if an entity subject to the law

[18] 29 U.S.C.A. § 705(9)(B) (West 2010), 34 C.F.R. § 104.3(j) (2010) (section 504); 42 U.S.C.A. § 12102(2) (West 2010) (ADA).

[19] Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 197 (2002), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008) ("[T]hese [definitional] terms need to be interpreted strictly to create a demanding standard for qualifying as disabled . . . .").

[20] An example is the unconscious correction that the brain makes for some of the limits on seeing when a person has unequal vision in the two eyes. Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 565–66 (1999).

[21] Sutton v. United Air Lines, Inc., 527 U.S. 471, 482 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

mistakenly believes that a person has a physical or mental impairment that substantially limits one or more major life activities or mistakenly believes that an actual impairment substantially limits one or more major life activities.[22] The Court held that to be substantially limited in the major life activity of performing manual tasks, an individual must be prevented or severely restricted "from doing activities that are of central importance to most people's daily lives," and that the impairment's impact must be "permanent or long term."[23] Other courts followed the Supreme Court's example and adopted their own restrictive readings of the definitional provisions.[24]

The ADA Amendments Act, passed in 2008 and effective January 1, 2009, explicitly disapproves the two major Supreme Court cases limiting the coverage of the ADA, and by extension, section 504.[25] It provides that the definition of disability "shall be construed in favor of broad coverage of individuals,"[26] and declares that the intent of Congress is "that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations," rather than whether the claimant's impairment meets the definition of a disability.[27] Further, "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active,"[28] and the determination whether an impairment substantially limits a major life activity is to be made "without regard to the ameliorative effects of mitigating measures,"[29] except for ordinary eyeglasses or contact lenses.[30] A nonexclusive list of mitigating measures to be disregarded appears in the statute. Of particular relevance to education disputes are medication, hearing aids, cochlear implants, mobility devices, assistive technology, "reasonable accommodations or auxiliary aids or services," and "learned behavioral or adaptive neurological modifications."[31]

The new statute provides a nonexclusive list of major life activities, similar to that previously found in regulations promulgated under the ADA, but expanded to explicitly include sleeping, reading, concentrating, thinking, and communicating, as well as performing manual tasks, seeing, hearing, eating, walking, speaking, learning, and

---

[22] *Id.* at 489.

[23] *Williams*, 534 U.S. at 198.

[24] *See* Jill C. Anderson, *Just Semantics: The Lost Readings of the Americans with Disabilities Act*, 117 YALE L.J. 992, 994–95 (2008) (collecting sources).

[25] ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(2)-(5), 122 Stat. 3553, 3554 (2008).

[26] *Id.* § 3(4)(A).

[27] *Id.* § 2(b)(5).

[28] *Id.* § 3(4)(D).

[29] *Id.* § 3(4)(E)(i)–(ii).

[30] ADA Amendments Act of 2008 § 3(4)(E)(ii). The exception does not apply to low-vision devices. *Id.* § 3(4)(E)(i)(I).

[31] *Id.* § 3(4)(E)(i)–(ii).

working.[32] The term "major life activities" now also includes operation of major bodily functions, such as "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."[33] A person meets the requirement of being regarded as having an impairment that substantially limits a major life activity if the person establishes that he or she has been subjected to a prohibited action "because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."[34] These definitional provisions apply to section 504 as well as the ADA.[35]

With respect to elementary and secondary students, the expansion of coverage of section 504 and the ADA in the new law is momentous. Through their own extraordinary effort, or through medical and other therapies, or through supplemental devices, aids, or services, children may overcome whatever limits their physical or mental conditions impose on them. These children are now covered by section 504 and the ADA as long as their impairments would substantially limit a major life activity if the impairments were not mitigated.[36] Moreover, the list of what is a major life activity now explicitly includes reading, concentrating, thinking, communicating, and sleeping, as well as hearing, speaking, and learning.[37] The "operation of a major bodily function" provision is especially noteworthy in its coverage of children with serious medical conditions even if the conditions are satisfactorily treated.[38] Were that not enough, the restrictive reading that the Supreme Court imposed on what "substantially limits" means is now a dead letter.[39]

Due to the general underdevelopment of section 504 and the ADA in the context of elementary and secondary education, there has not been the level of judicial controversy over coverage that has taken place in the employment field.[40] If the ADA Amendments Act functions as intended, controversy regarding the coverage of section 504 and the ADA may well not arise because the broad scope of the statutes will be so clearly established. But at the minimum, the new law calls into question the future applicability of what caselaw there is that restricts the eligibility of

---

[32] *Id.* § 3(2)(A).

[33] *Id.* § 3(2)(B).

[34] *Id.* § 3(3)(A). This provision does not apply if the impairment is "transitory and minor"; "[a] transitory impairment is an impairment with an actual or expected duration of 6 months or less." *Id.* § 3(3)(B).

[35] ADA Amendments Act of 2008 § 7.

[36] *Id.* § 4(a).

[37] *Id.*

[38] *Id.*

[39] *Id.* § 2(a)(7), (b)(4)–(5).

[40] *See* Wendy Hensel, *Sharing the Short Bus: Eligibility and Identity Under the IDEA*, 58 HASTINGS L.J. 1147, 1180–87 (2007) (comparing restrictions on coverage of ADA in employment cases to restrictions on eligibility under IDEA, but not drawing similar comparison for coverage under section 504).

elementary and secondary students under section 504 and the ADA. One now-doubtful precedent is *Ellenberg v. New Mexico Military Institute*,[41] the most prominent case relying on a narrow understanding of which students are covered by section 504 and the ADA.

In *Ellenberg*, a student sued the state military academy contending that it violated IDEA, section 504, and the ADA by denying her admission.[42] The Tenth Circuit Court of Appeals affirmed a grant of summary judgment against her on the section 504 and ADA claims, reasoning that she failed to make a prima facie showing that she had a disability within the meaning of those statutes.[43] As characterized by the court, the student's argument was that any child eligible under IDEA is automatically covered by section 504 and the ADA, but the court rejected a proposed interpretation of a section 504 regulation that would have supported that conclusion.[44] Because no other evidence was put forward that the student had an impairment that substantially limited a major life activity, the claims failed.[45]

It may perhaps remain the case that IDEA eligibility does not automatically establish coverage under section 504 and the ADA, but absence of coverage is exceedingly unlikely. In order to be eligible under IDEA, a child must have one or more listed conditions, any of which would qualify as a physical or mental impairment within the meaning of section 504 and the ADA.[46] For all but specific learning disabilities, for which the requirement appears implied, the impairment must adversely affect educational performance, and for all impairments, the condition must cause a need for special education and related services.[47] Conceivably, an adverse effect on educational performance is not necessarily a substantial limit on the major life activity of learning.[48]

---

[41] 572 F.3d 815 (10th Cir. 2009), *cert. denied*, 130 S. Ct. 1016 (2009).

[42] *Id.* at 818.

[43] *Id.* at 819.

[44] *Id.* at 820–21. The student relied on 34 C.F.R. § 104.3(*l*)(2), which defines a "qualified handicapped person" to include "a handicapped person . . . to whom a state is required to provide a free appropriate public education under [IDEA]." The court determined that the regulation had to be read in the context of another regulation, which defines handicapped person as an individual who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. *See* 34 C.F.R. § 104.3(j)(1).

[45] *Ellenberg*, 572 F.3d at 821.

[46] 20 U.S.C.A. § 1401(3)(A)(i) (West 2010) ("mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . . , orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities"). The test for children aged three to nine is less specific. *Id.* § 1401(3)(B)(i).

[47] *Id.* § 1401(3)(A)(ii); 34 C.F.R. § 300.8(c) (2010).

[48] It should be noted, however, that some states have, in their own rules, required that there be a significant adverse effect on the child's educational performance. *See, e.g.*, J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 67 (2d Cir. 2000) (applying Vermont provision requiring functioning significantly below expected age or grade norms). In my view, these restrictions beyond what is in IDEA violate the federal statute. *See* Weber, *supra* note 1, at 118–19. But where a child meets such an enhanced standard, an automatic conclusion of section 504 and ADA coverage appears well justified.

Nonetheless, if the impairment is such that the adverse effect is so significant that it causes the child to need special education and related services, the conclusion is hard to escape that the impairment causes a substantial limit either on learning or on another major life activity such as speaking, reading, thinking, concentrating, or communicating.[49]

II. ENTITLEMENTS UNDER SECTION 504 AND THE ADA

If more children are now covered by ADA and section 504, the question arises as to what duties public school systems owe these children. This discussion entails a comparison to the duties owed children eligible under IDEA, development of the specific obligations imposed by section 504's regulations, exploration of the potential limits on those obligations for children who are also eligible under IDEA, consideration of other educational duties imposed by section 504 and the ADA, and special attention to student discipline issues.

A. The Comparison to IDEA and *Rowley*

In any discussion of the substantive entitlements of children with disabilities to public education, the standard of reference—or elephant in the living room, depending on one's way of thinking—is appropriate education under IDEA. In *Board of Education v. Rowley*, the Supreme Court construed the duty to provide appropriate education to children with disabilities who are eligible under IDEA to mean services sufficient to provide "some educational benefit" to the eligible child.[50] The entitlement is to services that are beneficial,[51] so that access to education is meaningful.[52] Nevertheless, Congress's intent was "more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside."[53]

The Court applied this definition of appropriate education to overturn a ruling that a first-grader who was deaf but had lip-reading

---

[49] For commentary on the ADA Amendments Act not specific to elementary and secondary education, see Stephen F. Befort, *Let's Try This Again: The ADA Amendments Act of 2008 Attempts to Reinvigorate the "Regarded As" Prong of the Statutory Definition of Disability*, UTAH L. REV. (forthcoming 2010); Jeannette Cox, *Crossroads and Signposts: The ADA Amendments Act of 2008*, 85 IND. L.J. 187 (2010); Alex Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U.L. REV. COLLOQUY 217 (2008).

[50] 458 U.S. 176, 200 (1982).

[51] *Id.* at 200–01.

[52] *Id.* at 192. There must be "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Id.* at 203.

[53] *Id.* at 192.

skills and a hearing aid was entitled to a sign-language interpreter even though she was achieving satisfactory grades and progressing from grade to grade without having an interpreter.[54] The Court rejected a standard adopted by the lower courts that she be provided services sufficient to maximize her potential commensurate with the opportunity provided children without disabilities to maximize theirs.[55] The lower courts had adapted that standard from the regulations applicable to elementary and high schools under section 504.[56] The *Rowley* case did not present any claims under section 504 or the section 504 regulations themselves, so there was no occasion to investigate the rights that section 504 (and later the ADA) would confer on a public school student. *Rowley* remains good law with regard to IDEA, though several observers have commented that the lower courts frequently apply a standard for appropriate education that is not as modest as much of the language in *Rowley* suggests.[57] Some judicial and academic sources have also contended that subsequent legislation has effectively raised the *Rowley* standard.[58]

B. Meeting Educational Needs as Adequately as the Needs of Others Are Met

Regulations promulgated under section 504 require a recipient of federal funding that operates a public elementary or secondary education program to provide a free, appropriate public education to each child covered by section 504 in the recipient's jurisdiction.[59] The section 504 regulations define appropriate education as "the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements" of further regulations governing educational setting, evaluation and placement, and procedural safeguards.[60]

It is significant, but essentially noncontroversial, that the section

---

[54] *Id.* at 209–10. The Court said, "We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act," *id.* at 202, but suggested that if a child is advancing from grade to grade in regular education classrooms the standard is likely to be met, *id.* at 203–04.

[55] 458 U.S. 176 at 198.

[56] *See id.* at 186 n.8.

[57] *See, e.g.*, Mark C. Weber, *The Transformation of the Education of the Handicapped Act: A Study in the Interpretation of Radical Statutes*, 24 U.C. DAVIS L. REV. 349 (1990).

[58] *See, e.g.*, N.B. v. Hellgate Elementary Sch. Dist., 541 F.3d 1202, 1213 & n.3 (9th Cir. 2008); Scott F. Johnson, *Reexamining* Rowley*: A New Focus in Special Education Law*, 2003 B.Y.U. EDUC. & L.J. 561 (2003).

[59] 34 C.F.R. § 104.33(a) (2010).

[60] *Id.* § 104.33(b)(1).

504 regulations and the ADA bar unnecessary segregation, unjustified disparate-impact discrimination, refusal to furnish comparable academic and nonacademic facilities and settings, and failure to provide reasonable accommodation.[61] What is controversial is the use of section 504 and the ADA to challenge school district programs that do not meet the needs of individual children with disabilities as adequately as the needs of other children are met. This approach entails applying the standard that the lower courts used in *Rowley*, but which the Supreme Court rejected, and adopting it not as an interpretation of IDEA, but as an application of the section 504 regulation.[62] Resolving this controversy involves examination of section 504 caselaw and its implications, as well as issues of practicability, regulatory authority, and judicial enforceability.

1. Cases Interpreting the Section 504 Regulation

Two notable cases suggest that the section 504 appropriate education regulation should be interpreted and enforced exactly as written. *Mark H. v. Lemahieu* is a damages case in which parents contended that their two daughters, both of whom had autistic conditions, were denied adequate services by the public schools in Hawaii.[63] A hearing officer found that the children were denied appropriate education in violation of IDEA and ordered prospective remedial action.[64] The parents subsequently filed suit for damages asserting, among other claims, that the failure to provide adequate services during the period before remediation constituted a violation of section 504.[65] The district court granted summary judgment for the school system, holding that there is no section 504 cause of action for violation of the right to appropriate education, and that IDEA is the exclusive avenue for claims that fall within its scope.[66]

The Ninth Circuit overturned the decision, ruling that IDEA is not an exclusive remedy[67] and that the appropriate education duty under IDEA is not identical with that under section 504.[68] The court stressed that the section 504 appropriate education standard requires "a comparison between the manner in which the needs of disabled and non-disabled children are met . . . ."[69] Adopting a valid IDEA individualized

---

[61] *See id.* §§ 104.4, 104.34 (listing general prohibitions on discriminatory conduct and governing settings and facilities for elementary and secondary school students, respectively).
[62] *Rowley*, 458 U.S. 176.
[63] 513 F.3d 922 (9th Cir. 2008).
[64] *Id.* at 928.
[65] *Id.* at 930.
[66] *Id.* at 931.
[67] *Id.* at 934–35.
[68] *Mark H.*, 513 F.3d at 933.
[69] *Id.* The court said that the section 504 regulation also entailed a focus on the design of the child's

education program "is sufficient but not necessary to satisfy" section 504's appropriate education requirement,[70] which implies that failure to offer such a valid IDEA program may, but does not necessarily, violate the section 504 duty. Because the parents, like the school system, incorrectly assumed that the standards are identical and that the failure to provide appropriate education under IDEA as identified by the hearing officer necessarily supported the section 504 claim, the case had to be remanded for proceedings on whether the school system violated the section 504 standard.[71]

Lyons v. Smith[72] foreshadowed *Mark H.* In *Lyons*, the federal district court affirmed a hearing officer's decision that a child with attention deficit-hyperactivity disorder did not fit in the IDEA category of "other health impaired."[73] At the same time, it reversed the hearing officer's decision declining to order that the child be given special education pursuant to section 504.[74] The parties, the court noted, agreed that the child was covered by section 504.[75] The court declared that the mere fact of section 504 eligibility "does not necessarily mean that [the child] is entitled to the special education that he seeks."[76] Instead, he was entitled to "an education designed to meet his individual educational needs as adequately as the needs of nonhandicapped persons are met."[77]

Lyons is precisely parallel to the situation that is likely to become common in the wake of IDEA eligibility cutbacks and section 504-ADA coverage expansion: a claim by a non-IDEA eligible child, not necessarily for damages relief, but rather for prospective creation and implementation of a program providing appropriate education under the section 504 standard. *Lyons* cautioned that section 504 does not require anything more than preventing discrimination on the basis of disability,[78] and expressed doubt that the interventions required to serve a child who is not eligible under IDEA in a nondiscriminatory manner would include special education.[79] But it placed its emphasis on the regulation mandating that the needs of the child be met as adequately as the needs

---

educational program, but did not specify how this approach differed from that of IDEA. *Id.*

[70] *Id.*

[71] *Id.* at 939–40. *See generally* Mark H. v. Hamamoto, 620 F.3d 1090 (9th Cir. 2010) (overturning summary judgment entered by district court on remand, upholding claims for (1) failure to provide reasonable accommodation consisting of autism-specific services and (2) failure to meet needs of children with disabilities as adequately as those of others were met, and reassigning the case).

[72] 829 F. Supp. 414, 419 (D.D.C. 1993).

[73] *Id.* at 416.

[74] *Id.* at 419.

[75] *Id.* at 420.

[76] *Id.*

[77] 829 F. Supp. 414 at 420 (citing 34 C.F.R. § 104.33(b)). The court may have believed that this duty is lower than that under IDEA, for it repeatedly used the word "merely" in describing the section 504 entitlement. *See id.* at 419–20, n.9.

[78] *Id.* at 419.

[79] *Id.* at 420 n.11.

of others.[80] In response to a request for interpretation of the duties that public schools owe students covered by section 504 but not IDEA, the Office for Civil Rights of the United States Department of Education stated that the section 504 appropriate education duty does not incorporate any cost or other limit as may be conveyed by a "reasonable accommodation" standard, but instead that precedent imposing such a limit in some education cases applies to post-secondary institutions only.[81] Thus, in the view of the Department of Education, the section 504 appropriate education duty may in fact be more exacting than the *Lyons* court envisioned.

2. *Implications: A Standard Both Higher and Lower*

The upshot of *Mark H.* and *Lyons* is that the section 504 appropriate education standard is enforceable when a case is brought for violation of that statute, but also that the standard it imposes on public schools is different from the IDEA appropriate education standard. Some commentators suggest that it is higher—an entitlement to "services greater than the *Rowley* 'some benefit' standard."[82] Others, quite likely the school districts who resist making children eligible under IDEA but who do not or cannot oppose the children's coverage under section 504, may be banking on the proposition that the standard is lower.[83]

What remains is the possibility that the standard is both, depending on the circumstances. Thus a wealthy school district that does exceedingly well for its students who do not have disabilities, offering them a range of instruction and activities that truly maximizes their educational opportunities,[84] would be held to a high standard for children

---

[80] *Id.* at 420; *see also* Zirkel, *Substantive Standard*, *supra* note 15, at 475–76 (discussing *Lyons*).

[81] Letter to Zirkel, 20 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 134 (1993). The relevant case regarding higher education is *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). Regarding implied limits on reasonable accommodations duties in other contexts, see Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119, 1137-39 (2010) (discussing scope of reasonable accommodation duty and continuing viability of *Davis*).

[82] Kristine L. Lingren, Comment, *The Demise of Reasonable Accommodation Under Section 504: Special Education, the Public Schools, and an Unfunded Mandate*, 1996 WIS. L. REV. 633, 652. I have suggested this position myself, stressing the fact that the *Rowley* court rejected the commensurate opportunity standard embodied in the section 504 regulation, viewing it as imposing excessive duties on schools. Weber, *supra* note 57 at 417–18. Nevertheless, I have acknowledged the possibility that courts could read 34 C.F.R. § 104.33(b) to say that if the IDEA standard has been met for an IDEA-eligible child, then the child is entitled to nothing more under the section 504 regulations. *See* MARK C. WEBER, SPECIAL EDUCATION LAW AND LITIGATION TREATISE § 1.4(2), at 1:10 (3d ed. 2008). *See generally infra* text accompanying notes 113–120 (discussing "floor" and "ceiling" issues for children covered by both IDEA and section 504).

[83] *See* Zirkel, *Substantive Standard*, *supra* note 15, at 476 ("[T]he *Lyons* Section 504 ruling provides the alternative answer that the substantive standard is commensurate opportunity . . . . Only indirectly related to cost, application of this standard will usually yield a lesser result than under the IDEA. . . .").

[84] *See generally* Laurie Reynolds, *Skybox Schools: Public Education as Private Luxury*, 82 WASH.

covered by section 504, a standard well above that of *Rowley*.[85] For school districts that are poor or fail for other reasons to offer a decent level of services to children without disabilities, non-IDEA-eligible children with disabilities in those districts might receive services that are below some of the more generous interpretations of the IDEA standard.[86]

3. Practicability

One may ask whether the "as adequately" standard is workable. Justice Rehnquist's opinion in *Rowley* suggests that such a standard is not. The opinion states:

> The educational opportunities provided by our public school systems undoubtedly differ from student to student, depending upon a myriad of factors that might affect a particular student's ability to assimilate information presented in the classroom. The requirement that States provide "equal" educational opportunities would thus seem to present an entirely unworkable standard requiring impossible measurements and comparisons. Similarly, furnishing handicapped children with only such services as are available to nonhandicapped children would in all probability fall short of the statutory requirement of "free appropriate public education"; to require, on the other hand, the furnishing of every special service necessary to maximize each handicapped child's potential is, we think, further than Congress intended to go.[87]

Meeting the individual educational needs of a student with a disability as adequately as the needs of students without disabilities does require a potentially difficult comparison, but the task is hardly impossible. There are some levels of services for both children with disabilities and children without disabilities that educational observers would consider excellent, good, fair, or poor at serving the respective students' needs. If the children without disabilities receive excellent services in comparison to their peers nationally, then so should the children with disabilities. If services provided to children without

---

U. L.Q. 755 (2004) (describing high levels of educational services in wealthy school districts).

[85] *See* Zirkel, *Substantive Standard*, *supra* note 15, at 476 ("[B]ut in the unusual case of a student eligible solely under Section 504 and enrolled in a district characterized by extremely high academic achievement, the entitlement may be deeper than under the IDEA."). The trend toward resisting IDEA identification and the expansion of the coverage of section 504 may render this case far from unusual in the present day.

[86] *See supra* notes 57–58 and accompanying text (commenting on prevailing interpretations of appropriate education standard that may exceed narrower readings of *Rowley*).

[87] *Rowley*, 458 U.S. at 198–99.

disabilities are good, fair, or poor, the same level of quality would apply for children with disabilities. The section 504 standard does not mean maximizing the opportunities of children with disabilities, but instead simply entails treating all children equitably.[88] Moreover, even if the implementation of the standard is challenging, it remains true that Congress is free to impose such challenges on courts. Legislation and regulation often create legal standards that are hard to apply. This does not authorize the judiciary to ignore them.

4. Regulatory Authority

One writer has questioned whether the standard in the section 504 regulation exceeds regulatory authority as an impermissible interpretation of section 504.[89] The controlling decision on this issue is *Chevron v. Natural Resources Defense Council.*[90] It holds that if a statute speaks directly to "the precise question," a contrary regulation will not be followed,[91] but when there is any ambiguity "with respect to the specific issue," a regulation that is duly promulgated by an agency charged with administration of a statute will prevail as long as it "is based on a permissible construction of the statute."[92] This exceedingly high standard for overturning a regulation governs the Department of Education's section 504 regulation providing that in the context of public elementary and secondary education the law requires appropriate education as defined by the "as adequately" terminology.

The text of section 504 expressly forbids exclusion from participation, denial of benefits, and subjection to discrimination by reason of disability.[93] Those terms, however, are hardly self-defining, and Congress looked to federal administrative agencies, in particular to what was then the Department of Health, Education, and Welfare, to define the terms with regulations.[94] The question under *Chevron* is whether it is permissible to define disability discrimination in the context of public elementary and secondary schooling to include denial of appropriate education, further defined as meeting the needs of children

---

[88] The Court may be criticized for attacking a straw man. *See* Zirkel, *Substantive Standard, supra* note 15, at 474 ("Deftly mischaracterizing the lower courts' standard as 'strict equality of opportunity or services,' the Rehnquist majority criticized it as 'an entirely unworkable standard requiring impossible measurements and comparisons.'").

[89] Ronald D. Wenkart, *Section 504: A Reasonable Accommodation Standard or an Unfunded Mandate for Special Education Services?*, 116 WEST'S EDUC. L. REP. 531, 544 (1997).

[90] 467 U.S. 837 (1984).

[91] *Id.* at 843.

[92] *Id.*

[93] 29 U.S.C.A. § 794.

[94] The regulation in fact was promulgated by the Department of Health, Education, and Welfare before the creation of a separate Department of Education, but it continues to be enforced by the Department of Education.

with disabilities as adequately as the needs of other children are met. Defining discrimination to require a comparable level of excellence or adequacy is within the bounds of reason. Other definitions could be imagined, but it would strain belief to call this one an impermissible construction of the statutory term.[95]

The rule that conditional-spending provisions are to be strictly construed does nothing to undermine the section 504 regulation's validity.[96] The regulation itself makes abundantly clear that the needs of children with disabilities must be met as adequately as those of others. What that means in a given case may need to be hammered out by administrative or judicial decision, but the obligation itself is unambiguous. If it were not, the Office for Civil Rights interpretation that rejects any reasonable-accommodation limits provides clarification and has done so for more than fifteen years.[97] States are thus on notice of what their obligations are when they decide to accept federal education money.[98]

It is also misleading to refer to the regulation as an unfunded mandate.[99] Section 504 is not a mandate at all, but a condition on federal funding. States and localities are in no way obligated to accept federal education money. Section 504 does not have a specific funding stream attached to it, but neither does Title VI of the Civil Rights Act or Title IX of the Education Amendments, both of which may require increased spending by entities that choose to accept federal funds.[100] Any entity that accepts federal money is aware that section 504 needs to be followed and its regulations obeyed if the federal money is accepted. What is more, services for children with disabilities, even those who do not qualify under IDEA, are not unfunded. Local school districts may use

---

[95] *See Lyons*, 829 F. Supp. at 419 & n.8 (upholding regulation); Lingren, *supra* note 82, at 675 n.225 ("Any attempt to declare the current [section 504] FAPE regulatory provision invalid is likely to fail because of the stringency of the [*Chevron*] test . . . ."). That the definition applied in the context of higher education differs, or that the interpretation of free, appropriate education in IDEA differs, does nothing to contradict the proposition that the "appropriate education" and "as adequately" regulations are permissible interpretations of the language of section 504. *Cf.* Wenkart, *supra* note 89, at 544–45 (advancing arguments based on differences in interpretation for post-secondary education and IDEA).

[96] *See* Pennhurst State Sch. v. Halderman, 451 U.S. 1, 17 (1981); Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291 (2006) (applying principle to hold that attorneys' fees provision in IDEA does not encompass expert witness fees).

[97] *See* Letter to Zirkel, 20 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 134 (1993) (discussed *supra* text accompanying note 81).

[98] As the Court noted in *Rosado v. Wyman*, when statutes placing conditions on federal spending are interpreted, enforcement of federal policy is paramount. 397 U.S. 397, 423 (1970) ("When (federal) money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states." (quoting Helvering v. Davis, 301 U.S. 619, 645 (1937))).

[99] *Cf.* Wenkart, *supra* note 89 (using "unfunded mandate" terminology); Lingren, *supra* note 82 (same).

[100] For example, Title VI requires access to education for non-English speakers, *see* Lau v. Nichols, 414 U.S. 563 (1974), and Title IX requires expenditures to make educational opportunities equal for women when existing opportunities are unequal, *see* Cohen v. Brown Univ., 991 F.2d 888, 905 (1st Cir. 1993) (noting costs imposed on university, but affirming preliminary injunction in Title IX case to restore women's gymnastics and volleyball teams to full varsity status).

fifteen percent of their IDEA funding to serve children who do not meet IDEA eligibility standards but who need additional academic or behavioral support to succeed in general education.[101] This would appear to cover children who are eligible under section 504 but not IDEA.[102]

5. *Judicial Enforceability*

Finally, there seems little doubt that the duties imposed by the section 504 regulations on appropriate education can be enforced in court, subject in some cases to an administrative exhaustion requirement.[103] The courts have long recognized an implied private right of action to enforce section 504,[104] following on the acceptance of an implied right of action to enforce the similarly worded Title IX of the Education Amendments of 1972.[105] An objection may be lodged based on *Alexander v. Sandoval*, which ruled that no private right of action existed to enforce regulations promulgated under Title VI of the Civil Rights Act of 1964[106] when the regulations forbade disparate-impact discrimination rather than the intentional discrimination outlawed by Title VI itself.[107] The *Mark H.* court confronted this argument and made three responses: (1) the section 504 education regulation does not prohibit disparate impact or negative outcomes, and the emphasis in the regulation on "design" of programs reinforces that point;[108] (2) the imposition of comparative obligations to meet the needs of some as adequately as the needs of others "clearly represent[s] a prohibition on simple discrimination as long understood";[109] and (3) given the nature of disability discrimination, the ban on discriminatory conduct requires the positive obligation to afford meaningful access.[110] Moreover, whatever the scope of Title VI's statutory ban on discrimination may be, the Supreme Court recognized in *Alexander v. Choate* that section 504 itself—not just its regulations—bars some unintentional discriminatory

---

[101] 20 U.S.C.A. § 1413(f) (West 2010).
[102] *See generally* Mark C. Weber, *Reflections on the New Individuals with Disabilities Education Improvement Act*, 58 FLA. L. REV. 7, 22–23 (2006) (discussing funding provision).
[103] *See infra* text accompanying notes 149–56 (discussing exhaustion).
[104] *See, e.g.*, Nieves-Marquez v. Puerto Rico, 353 F.3d 108, 120–21 (1st Cir. 2003); Witte v. Clark County Sch. Dist., 197 F.3d 1271, 1272 (9th Cir. 1999); *see also* Mark H. v. Lemahieu, 513 F.3d 922, 935 (9th Cir. 2008) ("It has long been established that § 504 contains an implied private right of action for damages to enforce its provisions.").
[105] Cannon v. Univ. of Chi., 441 U.S. 677 (1979).
[106] 20 U.S.C.A. § 1681 (West 2010).
[107] 532 U.S. 275, 285 (2001). The Court did not find the disparate impact regulations invalid, but merely not enforceable through a private right of action. *Id.* at 281.
[108] *Mark H.*, 513 F.3d at 936.
[109] *Id.* at 937.
[110] *Id.* at 937–39.

conduct,[111] and commented specifically that Congress focused on "special educational assistance"[112] in imposing positive obligations on federal grantees to afford meaningful access.[113]

C. Dually Eligible Children and *Rowley* as a Floor or a Ceiling

Can a child who is eligible for services under IDEA and also covered by section 504 claim a higher level of services than that required by *Rowley* by invoking section 504's "as adequately" regulation? The text of the regulation would suggest that the answer is yes, although there are numerous cases saying that when the student loses on an appropriate education claim under IDEA, the court will not look further to determine if section 504 has been satisfied. These cases, however, rarely even acknowledge 34 C.F.R. § 104.33(b)(1)(i), the "as adequately" regulation, much less analyze its meaning.[114]

The holdings could be correct if IDEA were the exclusive remedy in all cases in which the education of children with disabilities is at issue. *Smith v. Robinson* said that IDEA's predecessor statute preempted claims based on section 504,[115] but that case was overruled by the Handicapped Children's Protection Act, which as currently codified provides:

Nothing in this chapter shall be construed to restrict or limit

---

[111] 469 U.S. 287, 295–97 (1985) ("Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference-of benign neglect . . . . In addition, much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent.").

[112] *Id.* at 297 (quoting 118 CONG. REC. 3320, 525–26 (1972) (statement of Sen. Hubert Humphrey)).

[113] *Id.* at 297, 307 & n.29.

[114] *E.g.*, Diaz-Fonseca v. Puerto Rico, 451 F.3d 13, 29 (1st Cir. 2006) (dismissing claims under § 1983, section 504, and Title II in dispute over failure to provide adaptive physical education to child); Burke v. Brookline Sch. Dist., 257 F. App'x 335 (1st Cir. 2007), *aff'g*, No. 06-cv-317-JD, 2007 WL 268947 (D.N.H. Jan. 29, 2007) (dismissing damages claims under IDEA and Family Educational Rights and Privacy Act, claims for retaliation and coercion under ADA and claims based on failure to follow proper procedures under section 504 and 42 U.S.C. § 1983 on ground that claims presented IDEA-based claims in guise of ADA claims), *cert. denied*, 128 S. Ct. 2934 (U.S. June 16, 2008); Seladoki v. Bellaire Local Sch. Dist. Bd. of Educ., No. C2-07-1272, 2009 WL 4884199, at *3 (S.D. Ohio Dec. 14, 2009) (holding that when IDEA claim for denial of appropriate education failed, claim under section 504 and ADA for denial of appropriate education failed as well); Emily Z. v. Mount Lebanon Sch. Dist., No. CIV.A. 06-442, 2007 WL 3174027, at *4 (W.D. Pa. Oct. 29, 2007) (granting summary judgment for school district on section 504 and ADA claims on ground they were derivative of IDEA violation claims). *But see* Edwards v. Fremont Pub. Schs., 21 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 903 (D. Neb. 1994) (finding argument that IDEA is exclusive remedy to be frivolous); Hebert v. Manchester, N.H., Sch. Dist., 833 F. Supp. 80, 81 (D.N.H. 1994) (denying motion to dismiss section 504 claim that overlapped with claim under IDEA).

[115] 468 U.S. 992, 1016–21 (1984). Even the *Smith* Court said, however, "We do not address a situation where [IDEA] is not available or where § 504 guarantees substantive rights greater than those available under [IDEA]." *Id.* at 1021.

> the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under [IDEA] shall be exhausted to the same extent as would be required had the action been brought under this subchapter.[116]

So the mere fact that an IDEA claim fails is not determinative of a section 504 claim if, as indicated above, the laws create different standards and if the section 504 standard may, in some cases, be higher.

The other possible argument for why claims based on the "as adequately" regulation might automatically fail when a child who is eligible under IDEA is provided appropriate education under that statute would be based on 34 C.F.R. § 104.33(b)(2). This provision states that "[i]mplementation of an Individualized Education Program developed in accordance with [IDEA] is one means of meeting the standard established in paragraph (b)(1)(i) of this section."[117] Paragraph (b)(1)(i) is the "as adequately" [118] regulation. The argument would be that for section 504 students also eligible under IDEA and served under an IDEA Individualized Education Program (IEP), the duty is no greater than that imposed by *Rowley*, whereas for other section 504 students, the duty is that of as-adequate meeting of needs, whether that entails a standard higher or lower than *Rowley* in a given instance. Thus the IDEA appropriate education standard is a ceiling if the child is eligible under that statute.

A difficulty with this reading is that it would render the "as adequately" regulation surplusage in the typical situation when a child is eligible under both IDEA and section 504. Another difficulty is that the reading suggests that Congress meant to limit the entitlements of children with disabilities to education when passing IDEA, when precisely the opposite is the case.[119] One can harmonize the two provisions by reading section 104.33(b)(2) to refer simply to the procedures and mechanisms of IDEA. That is, if the child is eligible under IDEA, the as-adequate educational design may be spelled out in an individualized education program written with parental participation and with consideration of all the matters IDEA requires.[120]

Another way to harmonize the provisions is to say that the as-adequate meeting of needs obligation applies to all students eligible

---

[116] 20 U.S.C.A. § 1415(*l*) (West 2010).

[117] 34 C.F.R. § 104.33(b)(2) (2010).

[118] *Id.* § 104.33(b)(1)(i).

[119] *See* 20 U.S.C.A. § 1400(d) (West 2010) (expressing statutory purposes).

[120] These are substantial. *See* 34 C.F.R. §§ 300.320–28 (2010).

under section 504, whether served under IDEA or not. For the IDEA students, the standard is thus as-adequate meeting of needs, with a floor provided by the *Rowley* standard in terribly performing school systems where even students without disabilities are not provided meaningful access to education. Of course, even if the hypothesized interpretation of subsection (b)(2) were correct for children who are eligible under IDEA as well as under section 504, the provision would remain inapplicable for children who are eligible solely under section 504 and the ADA.

D. Other Substantive Educational Obligations

As noted, there are other educational obligations that have been found to inhere in section 504 and the ADA's application to public schooling, though these are generally less controversial and are less the focus of the current inquiry than is the content of the appropriate education obligation. These duties include avoiding the outright[121] or subtle[122] exclusion of children with disabilities from school, providing comparable noneducational benefits such as free meals,[123] providing protection against harassment and abuse on the basis of disability,[124] and avoiding segregation of children with disabilities.[125] The section 504 regulations also explicitly impose duties on public schools with regard to educational settings and evaluation and placement of section 504-covered children.[126]

---

[121] B.T. *ex rel.* Mary T. v. Dep't of Educ., State of Haw., No. CIV 08-00356 DAEB-MK, 2009 WL 1978184 (D. Haw. July 7, 2009) (denying defendant's motion for summary judgment in claim that state rule prohibiting children with disabilities from continuing special education services after reaching age twenty when general education students face no such prohibition violates IDEA and section 504).

[122] Bess v. Kanawha County Bd. of Educ., No. CIV.A. 2:08-CV-01020, 2009 WL 3062974 (S.D. W. Va. Sept. 17, 2009) (upholding section 504 and ADA claims based on school district inducing parent to keep child with disabilities home from school); K.F. v. Francis Howell R-III Sch. Dist., No. 4:07 CV 01691 ERW, 2008 WL 723751 (E.D. Mo. Mar. 17, 2008) (denying motion to dismiss complaint requesting damages and compensatory education in suit brought under section 504 and ADA over practice of school for two years to dismiss student with disabilities three hours earlier than students without disabilities on Wednesday of each week).

[123] C.D. v. N.Y. City Dep't of Educ., No. 05 Civ. 7945 (SHS), 2009 WL 400382 (S.D.N.Y. Feb. 11, 2009) (denying motion to dismiss section 504 and Title II claims of students to entitlement to free meals in out-of-district private schools in which they were placed by public school system, when students would have received free meals had they been in public school; dismissing IDEA claims).

[124] Enright v. Springfield Sch. Dist., No. 04-CV-1653, 2007 WL 4570970 (E.D. Pa. Dec. 27, 2007) (denying renewed motion for directed verdict and new trial in action ending in $400,000 verdict against school district over exposure of seven-year-old child with ADHD and Asperger's syndrome to indecent display and other sexual conduct and language on school bus, upholding claims under IDEA, ADA, and section 504); *see* Weber, *supra* note 10, at 1093–1110 (collecting cases).

[125] L.M.P. *ex rel.* E.P. v. Sch. Bd. of Broward County, Fla., 516 F. Supp. 2d 1294 (S.D. Fla. 2007) (denying motion to dismiss claims based on section 504 and state law as well as class claims based on IDEA when parents of triplets alleged that school district automatically denied applied behavioral analysis services to children with autism, segregating them in an insular private school).

[126] 34 C.F.R. §§ 104.34–.35 (2010).

E. Procedural Protections

The section 504 regulations require public elementary and secondary education providers to afford children who need or are believed to need special education due to disability "a system of procedural safeguards that includes notice, an opportunity . . . to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure."[127] These duties, which closely resemble the rights provided children covered by IDEA,[128] have been enforced in court proceedings.[129]

However, one district court case, *Power ex rel. Power v. School Board of Virginia Beach*, ruled that there is no private right of action to enforce the procedural obligations imposed by the section 504 regulations in the context of a dispute over discipline of a child with a disability.[130] The controlling authority on this point, *Alexander v. Sandoval*, may imply that the Supreme Court has a restrictive attitude towards allowing private causes of action to enforce federal regulations that could be thought to exceed the exact contours of statutory terms,[131] even when those statutes carry their own implied causes of action.[132] The *Mark H.* court provided an answer to this concern by saying that although it was not determining whether an objection would lie under *Sandoval* to a claim to enforce the section 504 procedural-protections regulations, the claim could be justified on the ground that failure to afford protections may constitute denial of meaningful access to public education, which is the core focus of section 504 in the context of governmental services.[133]

The *Power* court also ignored the availability of a cause of action under 42 U.S.C. § 1983 to enforce the procedural protections

---

[127] 34 C.F.R. § 104.36 (2010).

[128] *See id.* The regulation further provides that compliance with the procedures under IDEA is a means of complying with the section 504 regulation.

[129] J.P.E.H. *ex rel.* Campbell v. Hooksett Sch. Dist., No. 07-cv-276-SM, 2007 WL 4893334 (D.N.H. Dec. 18, 2007) (report and recommendation of magistrate judge) (permitting service of IDEA claims, section 504 claims, and state law claims arising out of alleged failure to provide appropriate IEP to child, failing to properly implement IEP by providing required information to and contact with parent, failing to provide impartial due process hearing, and failing to provide sufficient notice and hearing or furnish child with advocate before finding child ineligible for continued special education services), *adopted*, Campbell v. Hooksett Sch. Dist., 2008 WL 145099 (D.N.H. Jan. 15, 2008).

[130] 276 F. Supp. 2d 515 (E.D. Va. 2003) (also finding case not ripe given pendency of administrative appeal).

[131] 532 U.S. 275 (2001).

[132] The Court's later recognition of an implied cause of action for retaliation under Title IX of the Education Amendments, 20 U.S.C. § 1681(a), may of course undermine such a fraught interpretation of *Sandoval*. *See* Jackson v. Birmingham, 544 U.S. 167 (2005).

[133] *Mark H.*, 513 F.3d at 937–38 & n.14.

regulation.[134] *Sandoval*, too, did not consider a § 1983 cause of action.[135] If § 1983 is asserted as the cause of action for the violation of the section 504 regulations, the controlling case would not be *Sandoval* but *Gonzaga University v. Doe*,[136] and the controlling question would be whether the regulation confers rights. Procedural rights are rights, so that test should not be difficult to meet. Although the Supreme Court has sometimes found § 1983 causes of action preempted by other statutorily provided causes of action, there is no candidate for that role in this situation, except to the extent that there might be an implied cause of action under section 504 itself. However, the *Power* court denied this, and the Supreme Court recently declared an implied cause of action would be highly unlikely ever to preempt a § 1983 claim.[137]

A procedural protection that appears to be lacking under section 504 and its regulations is any avenue for a school district to appeal to federal court an adverse hearing decision under section 504. The school district is not a person with a disability under section 504 or the ADA, and unlike with IDEA, there is no explicit conferral of any right to sue on the school district. Nor is the school district a person deprived of a federal law right by someone acting under color of law, who can sue under 42 U.S.C. § 1983. Accordingly, one court has ruled that a school district lacks the ability to appeal an unfavorable section 504 administrative hearing decision.[138]

F. Student Discipline

I have speculated that one of the reasons school districts are increasingly reluctant to find children eligible for services under IDEA is the districts' unwillingness to afford the children the protections from ordinary student discipline provided by that statute.[139] However, disciplinary protections for students with disabilities are also provided

---

[134] *See Power*, 276 F. Supp. 2d 515.

[135] *See Sandoval*, 532 U.S. 275.

[136] 536 U.S. 273 (2002) (finding no enforceable personal right under Family Educational Rights and Privacy Act such that violation would be actionable under § 1983).

[137] *See* Fitzgerald v. Barnstable Sch. Comm., 129 S. Ct. 788, 796 (2009) ("This Court has never held that an implied right of action had the effect of precluding suit under § 1983, likely because of the difficulty of discerning congressional intent in such a situation." (citing Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 76 (1992) (Scalia, J., concurring))). Even *Smith v. Robinson* held that statutory preemption did not apply to the plaintiffs' claims of due process violations. 468 U.S. 992, 1014 n.17 (1984) ("[M]aintenance of an independent due process challenge to state procedures would not be inconsistent with [IDEA]'s comprehensive scheme.").

[138] Bd. of Educ. of Howard County v. Smith, No. Civ. RDB 04-4016, 2005 WL 913119, at *3 (D. Md. Apr. 20, 2005) ("[W]hile an individual can assert the original jurisdiction of this Court on a claim under the Rehabilitation Act, the institution alleged to have violated the provisions of Section 504 cannot directly seek to assert an appeal from a decision by a state administrative law judge directly to federal court by asserting original jurisdiction.").

[139] Weber, *supra* note 1, at 154 (referring, *inter alia*, to 20 U.S.C. § 1415(k)).

under section 504, and may in some respects be greater than those under the current codification of IDEA. The grandparent of all special education discipline cases is *S-1 v. Turlington*, which relied on section 504 as well as IDEA in holding that a student with a disability may not be expelled for misconduct that results from the disability itself, and that before any proposed expulsion "a trained and knowledgeable group of persons must determine whether the student's misconduct bears a relationship to his" or her disability.[140] This right to manifestation review—whether the misconduct is a manifestation of the disability—is necessarily entailed by the duty not to discriminate on the ground of disability. As the court said, "How else would a school board know whether it is violating section 504?"[141] The court held that the protections against expulsion applied not just to students categorized as emotionally disturbed,[142] that complete cessation of educational services may never occur even during a valid period of expulsion,[143] that the burden is on the school to make the manifestation determination even if the student does not demand it,[144] and that expulsion is a change of placement invoking the procedural protections of section 504.[145]

The *S-1* case considered only expulsion, but its principles would apply to lesser forms of discipline, such as long-term suspensions or disciplinary removals, that constitute a unilateral change in a child's placement by school authorities. Under the current version of IDEA, some disciplinary removals may take place irrespective of whether the child's behavior was a manifestation of the disability,[146] and the definition of what is a manifestation of the disability is quite limited.[147] Application of *S-1* to non-IDEA eligible children would call into question whether school officials have such broad unilateral authority with regard to children protected by section 504 and the ADA. In this respect, the rights of children who are covered by section 504 but not IDEA may exceed those of IDEA-eligible children.[148]

---

[140] 635 F.2d 342, 350 (5th Cir. 1981). The court's reliance on section 504 was essential to the holding, given that at least some of the plaintiffs in the case were expelled before the effective date of the predecessor of IDEA. *See id.* at 344, 350.

[141] *Id.* at 346.

[142] *Id.* at 346–47.

[143] *Id.* at 348.

[144] *Id.* at 349.

[145] 635 F.2d 342 at 350. The court found that the same obligations applied under the statute that is now IDEA. *Id.*

[146] 20 U.S.C.A. § 1415(k)(1)(G) (West 2010) (allowing removal for up to forty-five days to interim alternative educational setting when child's behavior involves weapons, illegal drugs, or infliction of serious bodily injury at school or school functions).

[147] *Id.* § 1415(k)(1)(E) (stating that manifestation will be found if the conduct in question was caused by or had direct and substantial relation to child's disability, or if conduct was direct result of failure to implement individualized education program). There also are limits in the current law on when children not previously identified as IDEA-eligible will be given disciplinary protections on the ground that they have disabilities. *See id.* § 1415(k)(5). Previous iterations of IDEA were more protective of children on these points. *See* Weber, *supra* note 102, at 34–39.

[148] Other cases upholding rights in the school disciplinary process under section 504 include Dean v.

III. EXHAUSTION DEFENSES

Although there is no general rule requiring exhaustion of claims under section 504 or Title II of the ADA before filing suit,[149] IDEA provides that "before the filing of a civil action under [other federal laws protecting the rights of children with disabilities], seeking relief that is also available under [IDEA], the procedures under [IDEA] shall be exhausted to the same extent as would be required had the action been brought under [IDEA]."[150] In other writing, I have argued that this provision should be interpreted as written, that plaintiffs bringing actions under section 504 and Title II must exhaust IDEA procedures when the plaintiffs seek relief that is also available under IDEA.[151] Many courts, however, have acted as though the language were not "a civil action . . . seeking relief that is also available under [IDEA]"[152] but instead, "not seeking relief that is also available under IDEA, but involving a situation that hypothetically might be addressed in some way under IDEA."[153] The focus here, however, is on cases whose remedy is similar to that available in IDEA cases: orders for ongoing services, compensatory education, tuition reimbursement, and the like, not compensatory damages or other relief generally found to be outside the scope of the IDEA cause of action. If a section 504 or ADA plaintiff seeks this relief and IDEA exhaustion would not be futile, then the case would fall within the IDEA exhaustion requirement as written, and exhaustion should be required.

Where things get somewhat stranger is when courts require exhaustion under IDEA in actions where the defendant school system has determined that the child is not eligible under IDEA and the parents are not contesting that determination. For example, the Eleventh Circuit held that parents of two children being served under section 504 plans but not found eligible under IDEA had to exhaust through the IDEA

Sch. Dist. of City of Niagara Falls, 615 F. Supp. 2d 63 (W.D.N.Y. 2009) (upholding right to notice concerning expulsion under IDEA and section 504), and M.G. v. Crisfield, 547 F. Supp. 2d 399 (D.N.J. 2008) (denying motion to dismiss section 1983 procedural due process claim and section 504 claim based on discrimination against person regarded as having disability in case of third-grader suspended indefinitely for misconduct whose parents alleged that defendants conditioned continued educational services on their consent to accepting placement in special education school for child in another district).

[149] Petersen v. Univ. of Wis. Bd. of Regents, 818 F. Supp. 1276, 1278–79 (W.D. Wis. 1993). Some courts have ruled differently in employment contexts, however. *See, e.g.*, Zimmerman v. Or. Dep't of Justice, 170 F.3d 1169 (9th Cir. 1999) (ruling that Title II does not apply to employment).

[150] 20 U.S.C.A. § 1415(*l*) (West 2010).

[151] *See* Weber, *supra* note 10, at 1137–38.

[152] 20 U.S.C.A. § 1415(*l*).

[153] Weber, *supra* note 10, at 1137 (collecting cases). For an example of a more recent case, see *Kutasi v. Las Virgenes Unified School District*, 494 F.3d 1162 (9th Cir. 2007) (affirming dismissal without prejudice of case that included claim for damages, reasoning that exhaustion applies to section 504 and section 1983 claims if alleged injury can be redressed to any degree by IDEA's administrative procedures).

administrative process their claim that the school failed to implement the section 504 plans and retaliated against them after they hired an attorney.[154] At least one other court has required exhaustion of a section 504 claim even though the school district itself admitted that the child was not eligible for services under IDEA.[155] Although the claimant is in a sense seeking relief that would be available under IDEA in a case involving a child who is eligible under IDEA, to say that the relief is available under IDEA for a child who is concededly not eligible under IDEA has an Alice-in-Wonderland quality. Where both sides agree that the child is not eligible under IDEA, there is no statutory provision requiring exhaustion, and in the absence of a statute requiring it, the general rule is that exhaustion is not required.[156]

IV. REMEDIES

As suggested above, the remedies available under section 504 and the ADA are broader than those under the IDEA cause of action in that they encompass compensatory damages. The focus here, however, is not on damages cases but rather on the case in which the most plausible remedy is an order for future services or other equitable relief such as tuition reimbursement or compensatory education. Hence the relevant discussion includes nondamages remedies in general as well as attorneys' fees and expert witness fees.

A. In General

The range of remedies for denials of appropriate education under section 504 should be no smaller than that applicable to IDEA cases. In *Lyons v. Smith*, for example, the court overturned a decision by a hearing officer that the hearing officer lacked authority to order a placement for a child upon making a finding that the school system failed to meet the requirements of section 504.[157] Courts have frequently approved

---

[154] Babicz v. Sch. Bd., 135 F.3d 1420, 1422 (11th Cir. 1998).

[155] Weber v. Cranston Sch. Comm., 245 F. Supp. 2d 401, 408–11 (D.R.I. 2003). The court may have been requiring exhaustion through a hearing held pursuant to section 504, rather than due process procedure under IDEA.

[156] *See* Patsy v. Bd. of Regents, 457 U.S. 496, 513 (1982) ("[P]olicy considerations alone cannot justify judicially imposed exhaustion unless exhaustion is consistent with congressional intent.").

[157] Lyons v. Smith, 829 F. Supp. 414, 419–20 (D.D.C. 1993) ("[T]he court finds that a hearing officer may order [the public school system] to provide special education to a student designated as 'otherwise qualified handicapped' under § 504, but may only do so under appropriate circumstances. . . . [I]n some situations, a school system may have to provide special education to a handicapped individual in order to meet the educational needs of a handicapped student 'as adequately as the needs' of a nonhandicapped student, as required by § 104.33(b)(1)." (quoting Smith v. Robinson,

requests for ongoing educational services, compensatory education, and tuition reimbursement in section 504 or ADA cases, although in some instances the courts have held that the remedy is supported by IDEA as well.[158]

B. Attorneys' Fees

A consideration that may be holding some lawyers back in pressing section 504-ADA claims in special education cases is uncertainty over attorneys' fee entitlements. Both section 504 and the ADA provide for fees for successful claimants. The ADA specifically allows for fees in administrative proceedings (which, as suggested *supra* Part II(B)(5), may be a necessary step in many section 504-ADA special education cases).[159] The section 504 provision is not so explicit, but impliedly allows fees for necessary administrative proceedings. Section 504's provision states: "In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."[160] This language is drawn from Title VII of the Civil Rights Act of 1964, which has been held to allow attorneys' fees for all administrative proceedings that must be pursued in order to present a claim in court.[161] Although the Civil Rights Attorneys' Fees Act has been held not to permit a separate action for attorneys' fees if the claimant has been successful in his or her claim on the merits in administrative proceedings and nothing remains to litigate in court,[162] the language in that statute differs from that of Title VII and

468 U.S. 992, 1016 (1984))).

[158] J.T. *ex rel.* Harvell v. Mo. State Bd. of Educ., No. 4:08CV1431RWS, 2009 WL 262094, at *7 (E.D. Mo. Feb. 4, 2009) (denying motion to dismiss claim for violation of section 504 and ADA in action over alleged failure to provide appropriate education to child in state school; further holding that permissible relief could include audio-visual monitoring to allow independent parental review of activities and monitoring of child's safety); Neena S. *ex rel.* Robert S. v. Sch. Dist. of Phila., No. CIV.A. 05-5404, 2008 WL 5273546 (E.D. Pa. Dec. 19, 2008) (affirming limited award of compensatory education for long-term failure to provide appropriate special education services, stating that compensatory education would be limited to specific areas where child was denied appropriate education and that hourly amount would correspond to hours of education denied, not whole days; upholding section 504 claim for failure to provide appropriate special education services but denying compensatory damages); Damian J. v. Sch. Dist. of Phila., No. CIV.A. 06-3866, 2008 WL 191176, at *1 (E.D. Pa. Jan. 22, 2008) (awarding compensatory education under IDEA and section 504 on account of emotional support classroom teachers' failure to implement substantial portions of child's individualized education program); Lower Merion Sch. Dist. v. Doe, 931 A.2d 640, 644 (Pa. 2007) (finding private school child not deemed eligible for services under IDEA entitled to occupational therapy services at public school under section 504).

[159] 42 U.S.C.A. § 12205 (West 2010) ("In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs . . .").

[160] 29 U.S.C.A. § 794a(b) (West 2010).

[161] N.Y. Gaslight Club, Inc. v. Carey, 447 U.S. 54, 71 (1980).

[162] N.C. Dep't of Transp. v. Crest St. Cmty. Council, 479 U.S. 6, 13–15 (1986). The fees claim in

section 504. Indeed, in the leading Supreme Court case on the issue, the Court declared: "Since it is clear that Congress intended to authorize fee awards for work done in administrative proceedings, we must conclude that [Title VII]'s authorization of a civil suit in federal court encompasses a suit solely to obtain an award of attorney's fees for legal work done in state and local proceedings."[163]

C. Expert Witness Fees

The ADA fees provision explicitly includes "litigation expenses, and costs,"[164] which would appear to cover the charges that parents frequently need to pay to expert witnesses in disputes over special education programs. Although the Supreme Court has ruled that IDEA's fees provision does not extend to expert witness fees,[165] at least one court has ruled that the section 504 fees provision should be read to cover these charges.[166]

V. CONCLUSION

As more parents turn to section 504 and the ADA in special education cases, courts will need to confront questions of appropriate education, procedural protections, defenses, and remedies under those laws as distinct from IDEA. This article proposes that the courts be guided by a straightforward reading of the statutes and regulations. If courts give the relevant provisions their natural reading, they will provide the protection that Congress intended to give schoolchildren with disabilities when it enacted those laws.

---

that case would also appear not be viable under current law due to *Buckhannon Board and Care Home v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001) (holding that claim resolved without award of judicial relief did not support attorneys' fees award even if it served as catalyst for achievement of litigation's goal).

[163] *N.Y. Gaslight Club*, 447 U.S. at 66. The Court in *Crest Street* noted that this statement was dicta, but further said that *Carey* was distinguishable on the ground that it involved a statute that was worded differently. *See Crest Street*, 479 U.S. at 13–14.

[164] 42 U.S.C.A. § 12205 (West 2010).

[165] Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 297–98 (2006).

[166] L.T. *ex rel.* B.T. v. Mansfield Twp. Sch. Dist., No. CIV.A.04-1381(NLH), 2009 WL 2488181 (D.N.J. Aug. 11, 2009) (disallowing expert witness fees under IDEA but allowing expert witness fees under section 504 claim).

Congress Needs to Repair the Court's Damage to § 1983

Ivan E. Bodensteiner*

Today it is not unusual for a § 1983 plaintiff to establish a violation of the U.S. Constitution and resulting injuries, yet be denied damages because of the Supreme Court's misinterpretation of the 1871 statute. This anomaly is the result of several defenses created by the Court, including absolute and qualified immunity, the rejection of respondeat superior *liability for municipalities, and the expansion of sovereign immunity, based, in part, on a misinterpretation of the Eleventh Amendment. Several other rulings of the Court narrow the circumstances under which private parties are subject to § 1983 liability, refuse to exempt § 1983 actions from the usual preclusion rules, limit the protection of federal statutes that plaintiffs attempt to enforce through § 1983, and eliminate supervisory liability. These restrictions have contributed to the erosion of § 1983 and its effectiveness. In short, civil rights are often illusory.*

Because there is little hope that the Court will become more friendly to civil rights plaintiffs in the near future, this Article proposes that Congress adopt corrective amendments to § 1983, designed to overrule several of the limiting decisions issued by the Court. The corrective amendments proposed will bring the statute closer to the broad congressional goals and purposes of Congress in adopting § 1983. They will also force courts to treat civil rights claims as though they are at least as important as, for example, tort claims against state and local government.

I. INTRODUCTION 30

II. DECISIONS OF THE COURT INTERPRETING § 1983 NARROWLY 32
- A. Immunity of Individual Government Officials 34
  1. Absolute Immunity 34
  2. Qualified Immunity 38
  3. Procedural Aspects of the Immunity Defense 42

---

* Professor of Law, Valparaiso University School of Law. I would like to thank Professors Rosalie Levinson and Seymour Moskowitz for their review of an earlier draft of this Article. I would also like to thank Karen Koelemeyer for her assistance in the preparation of this Article.

B. Governmental Entity Immunity 46
1. Limited Liability of Municipal Entities 46
2. Eleventh Amendment Protection for States and State Agencies 48
C. Supervisory Liability 51
D. "State Action" and Action Under Color of Law 53
E. Limitations on the Amount of Punitive Damages 56
F. Use of § 1983 to Enforce Federal Statutory Rights 58
G. Application of 28 U.S.C. § 1728 to § 1983 Actions 62

III. OTHER DECISIONS AFFECTING § 1983 LITIGATION 63

IV. A PROPOSED AMENDMENT TO § 1983 70

V. CONCLUSION 76

I. INTRODUCTION

Section 1983 reflects the view that civil rights are important and that those rights are enforceable through the courts. Originally passed in 1871, § 1983 currently reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory *or the District of Columbia*, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, <u>except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable</u>. *For the purpose of this section, any act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.*[1]

Although it was passed 140 years ago, § 1983 remains very active,

---

[1] 42 U.S.C. § 1983 (2006). The portion in italics was added by an amendment in 1979, Pub. L. No. 96-170, and the portion underlined was added by an amendment in 1996, Pub. L. No. 104-317, § 309(c).

providing a cause of action for many lawsuits each year.[2] Despite its heavy use, § 1983 has been amended only twice, first in 1979 to subject the District of Columbia to actions brought under § 1983, and second in 1996, to provide judges some protection from injunctive relief after the decision in *Pulliam v. Allen.*[3] The "guts" of this statute can be reduced to a few words: "Every person who, under color of [state law], ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . ."[4] Very simply, the language seems to provide a cause of action for anyone who has been deprived of rights protected by the Federal Constitution and laws, with full relief available. Section 1983 does not create substantive rights; rather, it provides a cause of action to enforce federally-created rights found in the Constitution and statutes. While conduct violating these federally-created rights may also violate state law and trigger state law claims, Congress identified the need for federal law to supplement any protections available under state law.[5]

Despite its seemingly broad language, § 1983 was relatively inactive during its first fifty years, with only twenty-one reported cases decided under the section between 1871 and 1920.[6] This was due, at least in part, to the Court's narrow interpretation of constitutional provisions providing for individual rights. In 1961, the Court clarified that state officials who violated state law, while depriving an individual of rights protected by the Federal Constitution, acted "under color of" state law.[7] The Court in *Monroe* also limited the use of § 1983 by interpreting the term "person" to refer to natural persons only, to the exclusion of municipalities.[8] Nearly twenty years after *Monroe*, § 1983 was given a bit of a boost when, in *Maine v. Thiboutot*, the Court held that "laws" as used in § 1983 embraces a claim that the defendants violated the Social Security Act.[9] As the Warren Court expanded the

---

[2] U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT, CIVIL CASES COMMENCED BY NATURE OF SUIT AND DISTRICT DURING THE TWELVE MONTH PERIOD ENDED DECEMBER 31, 2009 34, *available at www.ca7.uscourts.gov/rpt/2009_report.pdf (2009).*

[3] Pulliam v. Allen, 466 U.S. 522 (1984) (holding that a judicial officer acting in her judicial capacity is not immune from prospective injunctive relief in an action brought pursuant to § 1983).

[4] 42 U.S.C. § 1983 (2006).

[5] Monroe v. Pape, 365 U.S. 167, 183 (1961) (noting the evidence before Congress that showed the unwillingness of many states to enforce their laws, the Court said the "federal remedy is supplementary to the state remedy"). Even where states have enforceable laws and their courts are not hostile, § 1983 is often preferred because a prevailing plaintiff, since 1976, is usually entitled to fees pursuant to 42 U.S.C. § 1988 (2006).

[6] Comment, *The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?*, 26 IND. L.J. 361, 363 (1951).

[7] *Monroe*, 365 U.S. at 238–39.

[8] *Id.* at 191. This portion of the opinion in *Monroe* was overruled seventeen years later in *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

[9] Maine v. Thiboutot, 448 U.S. 1, 6 (1980) (relying on both the "plain language" of § 1983 and earlier cases implicitly recognizing that § 1983 encompasses violations of federal statutes as well as

constitutional protection of individual rights between 1953 and 1969,[10] § 1983 was utilized more frequently. Possibly because of the increased use of § 1983 to enforce these broader constitutional protections, in 1974 the Court provided executive officials with qualified immunity from liability for damages under § 1983.[11] In the same year, in *Edelman v. Jordan*, the Court made it clear that § 1983 does not abrogate the Eleventh Amendment immunity protecting states from liability for damages in federal actions.[12] The Court's assault on § 1983 continues to the present.

Part II of this Article addresses, in greater detail, the Court's decisions significantly restricting the scope of § 1983 and the relief it provides. Part III explores parallel limitations resulting from the Court's interpretation of key constitutional and statutory provisions from 1972 to the present. Part IV discusses possible congressional amendments to § 1983 that would more effectively protect the rights of individuals, both constitutional and statutory.

II. DECISIONS OF THE COURT INTERPRETING § 1983 NARROWLY

Following is a list of the Court's holdings that have significantly limited the effectiveness of § 1983 in serving as the vehicle for private litigation designed to enforce federal constitutional and statutory rights:

(a) providing (i) absolute immunity from liability for state and local governmental officials performing legislative functions;[13] and (ii) absolute immunity from liability for damages for state and local governmental officials performing judicial and quasi-judicial functions, including the prosecutorial function;[14]

(b) providing qualified immunity from liability for damages to state and local governmental officials performing other functions;[15]

(c) excluding *respondeat superior* liability under § 1983 for municipalities whose officials acting under color of law

---

the Constitution).

[10] While the Warren Court is most frequently criticized for its expansion of the rights of the accused in criminal cases, it decided a number of civil cases that expanded constitutional rights. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965); Monroe v. Pape, 365 U.S. 167 (1961); Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[11] Scheuer v. Rhodes, 416 U.S. 232, 247–48 (1974).

[12] Edelman v. Jordan, 415 U.S. 651, 674–77 (1974).

[13] *See infra* Part II.A.1.

[14] *Id.*

[15] *See infra* Part II.A.2.

violate the constitutional or statutory rights of individuals, i.e., the municipality is liable only if the challenged action was taken pursuant to municipal policy;[16]

(d) extending to states and state agencies Eleventh Amendment protection from a judgment for damages that would be satisfied from the state treasury;[17]

(e) limiting or abandoning supervisory liability;[18]

(f) imposing a "plausibility" pleading requirement that subjects more claims to dismissal for failure to state a claim;[19]

(g) making it more difficult to establish that action is taken under "color" of state or local law, specifically where a private party is authorized by law to take the challenged action or granted a license by government knowing it will exercise and use the license in a manner that would not be allowed if the government engaged in the action;[20]

(h) establishing constitutional "guidelines" designed to limit the amount of an award of punitive damages;[21]

(i) limiting the use of § 1983 to enforce federal statutes to circumstances where Congress, in clear and unambiguous terms, creates rights enforceable under § 1983; and[22]

(j) subjecting § 1983 actions to the statutory "full faith and credit"[23] provision and thereby opening the possibility that § 1983 plaintiffs could be bound by, for example, the constitutional rulings of state courts in criminal cases.[24]

These holdings have effectively made constitutional rights "second-class rights" when compared to rights created by the common law.[25] Each of these holdings will be examined below.

---

[16] *See infra* Part II.B.1.
[17] *See infra* Part II.B.2.
[18] *See infra* Part II.C.
[19] *Id.*
[20] *See infra* Part II.D.
[21] *See infra* Part II.E.
[22] *See infra* Part II.F.
[23] 28 U.S.C. § 1738 (2006).
[24] *See infra* Part II.G.
[25] As discussed in Part III, *infra*, the Court's limiting interpretation of § 1983 is only part of the story because the Court has been narrowing the scope of the constitutional provisions that plaintiffs frequently seek to enforce through § 1983, including the First, Fourth, Eighth, and Fourteenth Amendments.

A. Immunity of Individual Government Officials

State and local government officials can be sued for damages in their individual capacity under § 1983.[26] When such officials are sued in their individual capacity, their personal assets are at risk.[27] Thus, such government officials can be held personally liable in damages for actions taken in their official capacity.[28] When state and local government officials are sued in their official capacity for damages, the claim is deemed to be against the governmental entity, not the individual, for the purposes of § 1983.[29] The following two subsections address two types of immunity from damages when state and local government officials are sued in their individual capacity, absolute and qualified. In general, the Supreme Court has assumed that Congress intended to import the common law immunities enjoyed by government officials into § 1983.[30]

1. Absolute Immunity

With the exception of the President, who enjoys absolute immunity from damages for all official acts,[31] absolute immunity is assigned to government officials based on the function performed when engaged in the challenged conduct, rather than their title or position.[32] Government officials performing the legislative function are entitled to absolute immunity, as demonstrated by *Supreme Court of Virginia v. Consumers Union of United States, Inc.*, where the Court held that the Virginia Supreme Court acts in a legislative capacity in promulgating the Virginia Code of Professional Responsibility governing attorneys.[33] Members of a committee of the California legislature were entitled to absolute immunity when sued by an individual challenging the actions of the committee.[34] In holding that the defendants were entitled to absolute legislative immunity, the Court relied in part on the spirit of the speech or debate clause in the U.S. Constitution.[35] This absolute legislative immunity extends to other officials, such as counsel to a congressional

---

[26] Hafer v. Melo, 502 U.S. 21, 30–31 (1991).
[27] *See id.*
[28] *Id.* at 25–29
[29] Brandon v. Holt, 469 U.S. 464, 470–71 (1985).
[30] Scheuer v. Rhodes, 416 U.S. 232, 243–45 (1974) (citing Pierson v. Ray, 386 U.S. 547, 554 (1967)).
[31] Nixon v. Fitzgerald, 457 U.S. 731, 756 (1982). *But see* Clinton v. Jones, 520 U.S. 681, 692–95 (1997) (holding that the President's immunity from suit for damages does not apply to unofficial acts).
[32] Butz v. Economou, 438 U.S. 478, 506 (1978).
[33] Supreme Court of Va. v. Consumers Union of U.S., Inc., 446 U.S. 719, 734 (1980).
[34] Tenney v. Brandhove, 341 U.S. 367, 377–79 (1951).
[35] *Id.* at 372–73 (quoting U.S. CONST. art. I, § 6, cl. 2).

subcommittee, committee staff, and congressional aides, when their challenged conduct is within the sphere of legislative activity.[36] In another case, *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, the Court extended absolute legislative immunity to members of a regional planning agency for actions taken in a legislative capacity.[37]

Relying on these decisions of the Supreme Court, lower federal courts extended this absolute immunity to state and local government officials when actions taken in their legislative capacity are challenged.[38] In *Bogan v. Scott-Harris*, the Supreme Court approved the extension of absolute immunity to local government officials performing a legislative function.[39] The Court held that the mayor and a city councilmember were entitled to absolute immunity for their roles in the enactment of an ordinance that eliminated the job of a city department head who had complained about race discrimination by the city. In determining that these officials enjoyed absolute legislative immunity, the Court noted that individual hiring and firing decisions are different from the elimination of a position.[40] The Supreme Court confirmed the singular impact of the function being informed while engaged in challenged conduct when the Court held that Senator Proxmire did not enjoy absolute legislative immunity when he designated someone as the recipient of his "golden fleece award,"[41] and that Representative Passman was not entitled to absolute legislative immunity in a suit alleging sex discrimination in his decision to discharge a deputy administrative assistant.[42] In contrast to the immunity defense in other situations, absolute legislative immunity not only insulates the official from damages, but also from injunctive and declaratory relief, and attorney fees.[43]

Absolute judicial immunity from damages in § 1983 actions can be traced to *Pierson v. Ray*, in which the Court decided that the § 1983 legislative history gave no indication that Congress intended to abolish the long-established principle of absolute judicial immunity.[44] Eleven

---

[36] Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 507 (1975).

[37] Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency, 440 U.S. 391, 405–06 (1979).

[38] *See, e.g.*, Biblia Abierta v. Banks, 129 F.3d 899, 905–06 (7th Cir. 1997) (extending absolute legislative immunity to city alderman whose actions in introducing and voting for zoning ordinances were challenged); Carlos v. Santos, 123 F.3d 61, 66 (2d Cir. 1997) (holding that decision of a town board to hold a public meeting is protected by absolute legislative immunity, regardless of the motive behind the meeting).

[39] Bogan v. Scott-Harris, 523 U.S. 44 (1998).

[40] *Id.* at 56.

[41] Hutchinson v. Proxmire, 443 U.S. 111, 127–29 (1979).

[42] Davis v. Passman, 442 U.S. 228, 236 n.11, 245–49 (1979).

[43] *See* Consumers Union of U.S., Inc., 446 U.S. at 733-34 (1980).

[44] Pierson v. Ray, 386 U.S. 547 (1967). The long-established principle dates back to *Bradley v. Fisher*, 80 U.S. 335 (1871), which held that it is "a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, [should] be free to act upon his own convictions, without apprehension of personal consequences to himself." *Id.* at 347. In *Bradley*, the Court distinguished judicial actions in "excess of jurisdiction" from a "clear absence of all jurisdiction over the subject-matter," with the latter not protected by

years after the decision in *Pierson v. Ray*, the Court, in *Stump v. Sparkman*, held that an Indiana trial court judge was entitled to absolute immunity from damages in an action challenging his entry of an order approving a "tubal ligation" procedure on a fifteen-year-old female based on an ex parte petition submitted by her mother.[45] According to the Court, Judge Stump had jurisdiction to entertain the petition because the broad jurisdiction granted to circuit courts in Indiana had not been "circumscribed [by statute or case law] to foreclose consideration of a petition for authorization of a minor's sterilization."[46] Judge Stump engaged in a "judicial" act because approval of the petition was "a function normally performed by a judge," and the expectation of the parties was that they were dealing with a judge "in his judicial capacity."[47] The informality of the process was not controlling.

Stump confirms that absolute judicial immunity from damages is extremely broad, and this is further demonstrated by a subsequent case, *Mireles v. Waco*, holding that a trial court judge's actions in ordering police officers "to forcibly and with excessive force seize and bring [an attorney] plaintiff into his courtroom" is protected by absolute judicial immunity even if the judge acted in bad faith or with malice.[48] Judges are entitled to qualified, not absolute, immunity when they make employment decisions related to their staff, as they are not performing a judicial function.[49]

Based on the functional approach approved by the Court in *Butz v. Economou*,[50] absolute judicial immunity is extended to administrative law judges performing adjudicatory functions.[51] The Court has been reluctant to extend absolute judicial immunity to administrative procedures that lack formality and procedural safeguards.[52] Similarly, the Court rejected a claim of absolute judicial immunity for members of a prison disciplinary committee because of the absence of procedural safeguards and the fact that the members of the committee are subordinates of the warden, rather than independent decision makers.[53]

Like absolute legislative immunity, judicial immunity encompasses

---

absolute judicial immunity. *Id.* at 351–52.

[45] Stump v. Sparkman, 435 U.S. 349, 351 (1978).

[46] *Id.* at 358.

[47] *Id.* at 362.

[48] Mireles v. Waco, 502 U.S. 9, 10–11 (1991).

[49] Forrester v. White, 484 U.S. 219, 230 (1988).

[50] Butz v. Economou, 438 U.S. 478, 519 (1978).

[51] *Id.* at 514. Lower courts have extended this absolute immunity to parole board members. *See, e.g.* Wilson v. Kelkhoff, 86 F.3d 1438, 1444 (7th Cir. 1996). *See also* Cleavinger v. Saxner, 474 U.S. 193, 206–07 (1985) (holding that members of a prison Institution Discipline Committee are entitled to qualified, not absolute, immunity); Applewhite v. Briber, 506 F.3d 181, 182 (2d Cir. 2007) (applying absolute immunity applied to a medical review board's decision to revoke a medical license).

[52] *See, e.g.*, *Butz*, 438 U.S. at 512 (1978) (noting that "safeguards built into the judicial process tend to reduce the need for private damage actions as a means of controlling unconstitutional conduct").

[53] Cleavinger v. Saxner, 474 U.S. 193, 204–06 (1985).

those whose assistance is critical to the judicial function. For example, judicial immunity has been extended to law clerks,[54] contractors or employees performing a function critical to the judicial process,[55] and executive officials who obtain or execute judicial orders.[56] However, in *Antoine v. Byers & Anderson, Inc.*, the Court held that a court reporter is not automatically entitled to absolute judicial immunity where she failed to produce a transcript of a criminal trial.[57] Because of their importance to the judicial process, the Court held, in *Briscoe v. LaHue*, that witnesses who testify at trial, including police officers, are entitled to the protection of absolute judicial immunity.[58] However, a complaining witness, including a prosecuting attorney who prepares an affidavit in support of an application for an arrest warrant, is not protected by absolute judicial immunity.[59]

Prosecuting attorneys, when engaged "in initiating... and in presenting the [government's] case," act in a quasi-judicial capacity with broad discretion and are therefore protected by absolute judicial immunity.[60] However, because this absolute immunity extends only to the prosecutorial function, the Court has addressed the extent of this function, as opposed to administrative or police-type functions, in a number of cases. For example, a prosecutor preparing for the initiation of a criminal charge or for trial is acting in her role as an advocate for the government and is entitled to absolute immunity, but when acting as an investigator, searching for evidence that will provide probable cause for an arrest, the prosecutor is acting more like a police officer with only qualified immunity.[61] Further, a prosecutor's public announcement of an indictment containing false statements is not protected by absolute immunity.[62] Similarly, statements of a prosecutor in an affidavit supporting an application for an arrest warrant are not part of the prosecutorial function and, therefore, not protected by absolute prosecutorial immunity.[63] In *Burns v. Reed*, the Court refused to extend prosecutorial immunity to a prosecutor who was giving legal advice to

---

[54] *See, e.g.*, Lundahl v. Zimmer, 296 F.3d 939 (10th Cir. 2002).

[55] *See, e.g.*, Williams v. Consovoy, 453 F.3d 173, 178–79 (3d Cir. 2006) (extending judicial immunity to a private psychologist performing evaluations and making findings pursuant to a contract with an adjudicative parole board, which relies on the expertise in denying parole).

[56] *See, e.g.*, Heartland Acad. Cmty. Church v. Waddle, 427 F.3d 525, 531 (8th Cir. 2005) (recognizing that absolute immunity would apply to a juvenile officer who was enforcing a valid court order, but distinguishing the situation where a juvenile officer's conduct in obtaining a court order, such as providing inaccurate information to obtain an ex parte order, is in question).

[57] Antoine v. Byers & Anderson, Inc., 508 U.S. 429, 433–34 (1993) (noting the absence of absolute immunity for court reporters at common law). *See also* Loubser v. Thacker, 440 F.3d 439, 442 (7th Cir. 2006), *cert. denied*, 548 U.S. 907 (2006) (holding that court reporters who allegedly conspired to defraud a litigant by deliberately altering a transcript do not enjoy absolute judicial immunity).

[58] Briscoe v. LaHue, 460 U.S. 325, 343 (1983).

[59] Kalina v. Fletcher, 522 U.S. 118, 129 (1997).

[60] Imbler v. Pachtman, 424 U.S. 409, 430–31 (1976).

[61] Buckley v. Fitzsimmons, 509 U.S. 259, 274 (1993).

[62] *Id.* at 277–78.

[63] *Kalina*, 522 U.S. at 130–31.

the police.[64] However, the action of the prosecutor in appearing in court and presenting evidence in support of an application for a search warrant is protected by absolute immunity, even if the prosecutor deliberately misled the court.[65]

Another case, *Van de Kamp v. Goldstein*, examined the circumstances under which administrative tasks fall within the scope of absolute prosecutorial immunity.[66] After a successful habeas corpus action resulting in his release from prison, Goldstein brought a § 1983 action alleging that the prosecution's failure to disclose impeachment material in his criminal trial resulted from a failure to properly train and supervise prosecutors, and to establish an information system containing potential impeachment material about informants.[67] The Court rejected an automatic exception from absolute immunity for management tasks, and held that the management tasks at issue in this case concerned how and when to make impeachment information available at trial and, therefore, were "directly connected with [a] prosecutor's basic trial advocacy duties."[68] It was obvious that the Court was reluctant to allow a § 1983 plaintiff to avoid absolute immunity simply by suing supervisors, rather than the actual trial prosecutor, and casting the claim as a failure of training or supervision. Lower federal courts have extended the absolute prosecutorial immunity to other prosecutorial-like functions, including the prosecution of disciplinary proceedings before state licensing boards.[69]

2. *Qualified Immunity*

While the Supreme Court has stated that its "cases make plain that qualified immunity represents the norm" for "executive officials in general,"[70] a more accurate view of qualified immunity is that it is available to any government official whose challenged actions do not fit into any one of the functions to which the Court has assigned the protection of absolute immunity. Because the Court requires a functional approach to absolute immunity,[71] the function of the government official at issue is a more accurate starting point than either the title or location within government. Not surprisingly, government officials prefer

---

[64] 500 U.S. 478, 496 (1991).
[65] *Id.* at 488–96.
[66] 129 S. Ct. 855 (2009).
[67] *Id.* at 858–59
[68] *Id.* at 863.
[69] *See, e.g.*, Disraeli v. Rotunda, 489 F.3d 628, 632–35 (5th Cir. 2007) (entitling director of state securities board to absolute prosecutorial immunity in his role as prosecutor in a proceeding against an investment advisor).
[70] Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982).
[71] *See* Butz v. Economou, 438 U.S. 478, 512 (1978).

absolute immunity, but if they cannot characterize their conduct as one that triggers absolute immunity, they will use qualified immunity as their second-choice defense. In short, qualified immunity is less preferred because it is available only when the right asserted is not "clearly established."[72] When applicable, the qualified immunity defense protects a government official from personal or individual liability for damages. While the Court has justified the creation of qualified immunity as a needed protection for government officials who must exercise discretion, and encourage them to exercise that discretion in a vigorous manner,[73] some lower courts have broadly construed the meaning of "discretionary" in order to expand the availability of qualified immunity.[74] Other courts enforce the distinction between discretionary and ministerial actions, denying qualified immunity when a government official is engaged in a ministerial act.[75]

In addition to the perceived deterrence caused by potential personal liability resulting from a government official's exercise of discretion, the Court has identified what it calls "social costs" resulting from such claims, including the expense of litigation, the distraction of the official's attention and energy away from the duties of office, and a deterrence to qualified individuals from either seeking or accepting public office.[76] All of the concerns identified by the Court are based on assumptions, rather than empirical data.[77]

The Court's current version of the qualified immunity defense does not include the subjective component, malicious intent, identified in *Wood v. Strickland*.[78] In *Harlow v. Fitzgerald*, the Court decided that the inclusion of the subjective element made it too easy for plaintiffs to avoid summary judgment on the qualified immunity defense and,

---

[72] *Id.* at 479.

[73] *See, e.g.*, *id.* at 506; Scheuer v. Rhodes, 416 U.S. 232, 239 (1974).

[74] *See, e.g.*, Hudson v. Hudson, 475 F.3d 741, 744 (6th Cir. 2007) (holding that even though a state statute provides that law enforcement officers "shall arrest" one governed by a protective order if there is reasonable cause to believe the order has been violated, the reasonable cause provision introduces discretion); Gray v. Bostic, 458 F.3d 1295, 1303–04 (11th Cir. 2006) (holding a deputy sheriff serving as a resource officer at an elementary school was exercising discretionary authority when detaining and handcuffing a student); DeArmon v. Burgess, 388 F.3d 609, 612 (8th Cir. 2004) (deciding the so-called ministerial functions exception to the qualified immunity doctrine is narrow and applies only if an officer violated a statute or regulation specifying a precise action that the officer must take and state law creates the cause of action).

[75] *See, e.g.*, Groten v. California, 251 F.3d 844, 851 (9th Cir. 2001) (the refusal by government officials to provide a real estate appraiser with the materials needed to apply for temporary and reciprocal licenses involve ministerial acts not protected by qualified immunity).

[76] Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982).

[77] If a concern about personal liability for damages really deters qualified individuals from seeking or accepting public office, there should be evidence to support the Court's assumption. If states and local governments see this as a concern, they can address it by paying judgments entered against their officials. *See, e.g.*, IND. CODE § 34-13-4-1 (2003) (requiring the governmental entity to pay any judgment, other than for punitive damages, and allowing the entity to pay a judgment for punitive damages if it "is in the best interest of the governmental entity").

[78] 420 U.S. 308, 322 (1975). Government officials will not be protected by qualified immunity if (a) they knew or reasonably should have known that the action taken violated the federal rights of the plaintiff, or (b) they took the action with malicious intent to cause a deprivation of rights. *Id.*

therefore, it was abandoned.[79] After *Harlow*, in *Davis v. Scherer*, the Court made it clear that the qualified immunity defense is the same for state and local government officials as it is for federal government officials.[80] *Davis* also clarified that acting contrary to state law will not affect a state or local government official's qualified immunity defense in a § 1983 action because the focus is on whether the federal right the plaintiff seeks to enforce was clearly established at the time of the challenged action.[81]

Finally, even if the right asserted by the plaintiff was clearly established at the time of the challenged conduct, government officials may still be protected by qualified immunity if they can show extraordinary circumstances.[82] For example, in a case seeking damages from the administrator of a state hospital, the Court indicated such a "professional will not be liable if he was unable to satisfy his normal professional standards because of budgetary constraints; in such a situation, good-faith immunity would bar liability."[83]

In sum, federal, state, and local government officials, who at the time of the challenged conduct were not engaged in a function that triggers absolute immunity, will be entitled to qualified immunity from individual or personal liability for damages unless the plaintiff shows that the asserted right was clearly established at the time of the challenged conduct. Of course, the parties will dispute the meaning of "clearly established." This determination is difficult because whether government officials have violated the Constitution often turns on the specific facts of the situation. For example, while it is clearly established that the Fourth Amendment prohibits unreasonable searches and seizures, whether a particular search or seizure violates the Fourth Amendment will turn on the facts. The Court made this clear in *Anderson v. Creighton*, in which it said:

> [O]ur cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official

---

[79] 457 U.S. 800, 818. *See also* Anderson v. Creighton, 483 U.S. 635, 641 (1987) (confirming that a government official's subjective belief about the legality of her conduct is not a factor); Malley v. Briggs, 475 U.S. 335, 341 (1986) (stating that qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law," i.e., a government official's knowledge that her action is unlawful makes her ineligible for the protection of qualified immunity).

[80] 468 U.S. 183, 194–95 (1984).

[81] *Id.* at 194 n.12.

[82] *Harlow*, 457 U.S. at 818–19 ("[i]f the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained").

[83] Youngberg v. Romeo, 457 U.S. 307, 323 (1982). Courts have considered reliance on the advice of counsel as a factor in determining whether there are extraordinary circumstances. *See, e.g.,* Sueiro Vazquez v. Torregrosa de la Rosa, 494 F.3d 227, 234–36 (1st Cir. 2007); Revis v. Meldrum, 489 F.3d 273, 286–95 (6th Cir. 2007); Cox v. Hainey, 391 F.3d 25, 34–36 (1st Cir. 2004); Dixon v. Wallowa Cnty., 336 F.3d 1013, 1019 (9th Cir. 2003).

would understand that what he is doing violates that right.[84]

This creates a tension with the Court's desire to have the qualified immunity defense determined early in the case, preferably at the summary judgment stage before the government official seeking immunity expends substantial time and resources responding to discovery. If the plaintiff is required to show that the alleged Fourth Amendment right, for example, was clearly established as to her particular situation, discovery may be necessary to establish the contours of the situation. While the Court in *Crawford-El v. Britton* rejected a heightened state of mind requirement or a heightened evidentiary standard where subjective intent is an element of the underlying constitutional claim, it concluded that lower courts should limit and tailor early discovery to issues related to the qualified immunity defense.[85]

The district courts' inclination to rely on holdings in their own circuit to determine whether a right is clearly established is approved by the Supreme Court.[86] It is not uncommon for the circuits to split holdings on a specific aspect of a constitutional right: the Court in *Wilson v. Layne*[87] addressed that situation indicating a right is not clearly established if plaintiffs cannot identify "any cases of controlling authority in their jurisdiction at the time of the incident which clearly established the rule on which they seek to rely" and fail to "identif[y] a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful."[88] A split in the circuits, according to the Court, is normally an indication that the right was not clearly established at the time of the incident.[89]

More recently, however, in *Hope v. Pelzer*, the Court rejected the argument that plaintiffs must point to facts in previous cases that were "materially similar" to their situation in order to avoid the qualified immunity defense.[90] Rather, the Court determined that "officials can still be on notice that their conduct violates established law even in novel factual circumstances."[91] The plaintiff need only show that government officials had a "fair warning" that their conduct violated clearly established law.[92] In *Safford Unified School District No. 1 v. Redding*, the Court applied *Wilson* and *Hope* to find a strip search of a thirteen-year-old student violative of the Fourth Amendment as interpreted in

---

[84] 483 U.S. 635, 640 (1987)

[85] 523 U.S. 574, 598–600 (1998)

[86] *E.g.*, Davis v. Scherer, 468 U.S. 183, 192 (1984); Butz v. Economou, 438 U.S. 478, 488, 506 (1978); Procunier v. Navarette, 434 U.S. 555, 561 (1978) (all approving the practice of following precedent established by lower courts in determining whether a right is clearly established).

[87] 526 U.S. 603 (1999).

[88] *Id.* at 617.

[89] *Id.* at 618.

[90] 536 U.S. 730, 753 (2002)

[91] *Id.* at 741.

[92] *Id.* at 739–40 (noting that violation of a state regulation could be a factor in determining whether the officials had a "fair warning").

New Jersey v. T.L.O..[93] Noting that the lower courts reached "divergent conclusions" regarding the application of the *T.L.O.* standard to school searches, the Court held that the school officials were entitled to qualified immunity because "the cases viewing school strip searches differently from the way we see them are numerous enough, with well-reasoned majority and dissenting opinions, to counsel doubt that we were sufficiently clear in the prior statement of law."[94] However, the Court said it was

> not suggest[ing] that entitlement to qualified immunity is the guaranteed product of disuniform views of the law in the other federal, or state, courts, and the fact that a single judge, or even a group of judges, disagrees about the contours of a right does not automatically render the law unclear if we have been clear.[95]

Since the "clearly established" issue raises a question of law, it is subject to *de novo* review on appeal, and the Court made it easier for defendants to prevail on the qualified immunity defense by holding that appellate courts should consider all relevant precedent, even precedent that was not presented to or considered by the trial court.[96]

The Court's interpretation of "clearly established," along with its recognition of several defendant-friendly procedural rules addressed in the next section, has interfered significantly with the ability of plaintiffs to recover damages in § 1983 actions and frequently leaves them without a remedy, even when they establish a constitutional violation.

3. *Procedural Aspects of the Immunity Defense*

Some of the procedural aspects of the immunity defense were discussed above, in the context of describing the "clearly established" aspect of qualified immunity,[97] such as the absence of a heightened pleading requirement[98] and the limitation on discovery. There are several other procedural rules the Court has deemed applicable to the immunity defense, most of which are designed to enhance its value to government officials. First, in *Gomez v. Toledo*, the Court treated qualified immunity as an affirmative defense that must be pleaded by the

---

[93] 129 S. Ct. 2633, 2643 (2009) (applying the Fourth Amendment as interpreted in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985)).

[94] *Safford*, 129 S. Ct. at 2644.

[95] *Id.*

[96] Elder v. Holloway, 510 U.S. 510, 515–16 (1994).

[97] *See supra* Part II.A.2.

[98] *But see* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)) (holding that a complaint, to survive a motion to dismiss, "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face'").

defendant government official in accordance with the Federal Rules of Civil Procedure.[99] When not pleaded properly, affirmative defenses may be waived; however, courts are fairly lenient in allowing defendants to raise the defense, even if omitted in the initial answer.[100]

Second, the Court determined in *Mitchell v. Forsyth* that qualified immunity "is an *immunity from suit* rather than a mere defense to liability."[101] Consistent with this concept of immunity, the Court, in *Hunter v. Bryant*, also determined that immunity "ordinarily should be decided by the court long before trial,"[102] meaning that defendant government officials are encouraged to raise the immunity defense either in a motion to dismiss or more commonly in a motion for summary judgment.[103]

Consistent with the "immunity from suit" aspect of immunity, in *Mitchell v. Forsyth*, the Court held that a trial court order rejecting the immunity defense is immediately appealable as a "final decision."[104] *Forsyth* invoked the "collateral order rule," pursuant to which a decision is deemed final if it is separate and independent of the merits and effectively unreviewable on appeal if an immediate appeal is not allowed.[105] The fact that an order denying summary judgment is immediately appealable as a collateral order does not mean the defendant must appeal it at that point. Rather, the defendant may choose to wait until there is a truly final decision and then challenge the order denying immunity.[106] When a defendant appeals the order denying immunity immediately, as a collateral order, the trial court is divested of jurisdiction, thus delaying the progress of the suit for months, if not years.[107] If a government official files an immediate appeal based on *Forsyth*, the issues on appeal are limited to those raised by the immunity

---

[99] *Gomez*, 446 U.S. 635, 640–41 (1980). *See* FED. R. CIV. P. 8(c). While not at issue in *Gomez*, there is no reason why the absolute immunity defense should not be treated the same. *See, e.g.*, Tully v. Barada, 599 F.3d 591, 594 (7th Cir. 2010) ("[d]efendants waived their absolute-immunity defense by failing to raise it in the district court.").

[100] *See, e.g.*, Ridpath v. Bd. of Governors Marshall Univ., 447 F.3d 292, 305–06 (4th Cir. 2006); Stephenson v. Doe, 332 F.3d 68, 76 (2d Cir. 2003); Eddy v. V. I. Water & Power Auth., 256 F.3d 204, 207–10 (3d Cir. 2001).

[101] Mitchell v. Forsyth, 472 U.S. 511, 526 (1985), emphasis in original. Similarly, absolute immunity is treated as an immunity from suit. *Id.* at 525.

[102] Hunter v. Bryant, 502 U.S. 224, 228 (1991).

[103] Behrens v. Pelletier, 516 U.S. 299, 307–09 (1996)

[104] 472 U.S. at 512. Normally, 28 U.S.C. § 1291 requires a final decision before there may be an appeal.

[105] *Forsyth*, 472 U.S. at 526. *See also* Johnson v. Fankell, 520 U.S. 911, 916–17 (1977) (holding that the appealability of a state court order denying the immunity defense is dependent on state law).

[106] *See, e.g.*, Robbins v. Wilkie, 433 F.3d 755, 762–63 (10th Cir. 2006); Pearson v. Ramos, 237 F.3d 881, 883 (7th Cir. 2001); Ernst v. Child & Youth Servs. of Chester Cnty, 108 F.3d 486, 492 (3d Cir. 1997). The Court agreed to hear *Ortiz v. Jordan*, 316 F. App'x 449 (6th Cir. 2009), *cert. granted*, 130 S. Ct. 2371 (2010), to address the question whether a party may "appeal an order denying summary judgment after a full trial on the merits if the party chose not to appeal the order before trial."

[107] *See, e.g.*, Stewart v. Donges, 915 F.2d 572, 574–79 (10th Cir. 1990); Apostol v. Gallion, 870 F.2d 1335, 1338 (7th Cir. 1989).

defense.[108] However, the Court did not preclude a narrow exception where a portion of the order that is not immediately appealable is "inextricably intertwined" with the immunity decision, or where review of the portion of the decision that is not immediately appealable is "necessary to ensure meaningful review" of the immunity issue.[109] For example, an order granting partial summary judgment for a plaintiff determining liability on a constitutional claim was considered on appeal of an order denying summary judgment on the qualified immunity defense.[110]

In another defendant-friendly case, *Behrens v. Pelletier*, the Court held that a government official is entitled to an immediate appeal of an order denying the immunity defense, even though that defendant will have to go to trial on other claims, such as an application for prospective equitable relief, if in fact the plaintiff establishes a violation of the federal right.[111] The Court in *Behrens* also held that a government official is not limited to one collateral order appeal based on *Forsyth*.[112] For example, if a defendant raises the immunity defense in a motion to dismiss and immediately appeals unsuccessfully the order denying the motion to dismiss, that defendant could file another collateral order appeal, based on *Forsyth*, after a denial of a motion for summary judgment raising the immunity defense.[113]

Not surprisingly, the decision in *Forsyth* has raised some difficult questions where the denial of summary judgment on the immunity defense is based on unresolved factual disputes. This question arose in *Johnson v. Jones*, and the Court held that an order denying summary judgment on the immunity defense is not immediately appealable when the order addresses only a question of the sufficiency of the evidence.[114] A year later, in *Behrens*, the Court clarified *Johnson*, stating that

> determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified immunity case; if what is at issue in the sufficiency determination is nothing more than whether the evidence could support a finding that particular conduct occurred, the question decided is not truly "separable" from the plaintiff's claim, and hence there is no

[108] Swint v. Chambers Cnty Comm'n, 514 U.S. 35, 50–51 (1995).

[109] *Id.* at 51. *See also* Johnson v. Jones, 515 U.S. 304, 318–19 (1995) (recognizing that the exercise of pendent appellate jurisdiction may sometimes be appropriate).

[110] Mueller v. Auker, 576 F.3d 979, 989–91 (9th Cir. 2009).

[111] 516 U.S. 299, 307, citing Mitchell 472 U.S. 511, 526 (1996). Note that a finding of a violation of a constitutional right, for purposes of equitable relief, is not inconsistent with a determination that a government official is entitled to immunity from individual liability for damages.

[112] *Behrens*, 516 U.S. at 308.

[113] *Id.* at 307–09.

[114] *Johnson*, 515 U.S. at 313.

"final decision" under *Cohen* and *Mitchell*.[115]

However, the Court held that the defendant could immediately appeal seeking review of the legal question—whether, accepting the plaintiff's version of the facts, the conduct violated clearly established law.[116] In short, the decisions in *Johnson* and *Behrens* invite procedural disputes related to the immunity defense that effectively place the case on hold, thus delaying the plaintiff's opportunity to get to the merits and increasing the cost of litigating the case.

Another procedural dispute concerns the order in which the courts should address the issues raised when a government official asserts the qualified immunity defense. In *Saucier v. Katz*, where the plaintiff alleged the use of excessive force by a federal officer in violation of the Fourth Amendment,[117] the Court said that the lower courts, in considering the qualified immunity defense, should first consider the threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?[118] If the answer is no, there is no need for further inquiry relating to the defense and the plaintiff loses on the merits of that claim.[119] However, if the answer is yes, then the court must determine whether "in light of the specific context of the case," the force used violated a clearly established Fourth Amendment protection so that the officer was not entitled to immunity.[120] In addressing this issue, the Court said "[a]n officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense."[121] This approach forced the lower courts to always make a decision on the merits of the constitutional claim. Only if the court ruled in favor of the plaintiff on that question would it be necessary to address the "clearly established" issue.

Eight years later, the Court reexamined this two-step process in *Pearson v. Callahan*,[122] and decided to modify it. The Court recognized the two-step process was beneficial because there are cases in which there would be little if any conservation of judicial resources by beginning and ending with a discussion of the "clearly established" prong.[123] However, after recognizing the benefits, the Court noted that

---

[115] *Behrens*, 516 U.S. at 313.
[116] *Id.*
[117] Saucier v. Katz, 533 U.S. 194, 199 (2001).
[118] *Id.* at 201.
[119] *Id.*
[120] *Id.*
[121] *Id.* at 205.
[122] Pearson v. Callahan, 129 S. Ct. 808 (2009).
[123] *Id.* at 818.

these benefits are frequently offset by other considerations.[124] These include the often unnecessary litigation of constitutional issues that wastes both courts' and parties' resources; the consideration of whether there is a constitutional violation may be short-changed where the court has already determined there was not a violation of clearly established law; and the two-step process departs from the general rule that courts should not decide constitutional questions unless it is necessary.[125] The Court then concluded that the benefits of the two-step process can be retained and the disadvantages avoided by allowing lower court judges "to determine the order of decisionmaking [that] will best facilitate the fair and efficient disposition of each case."[126] In sum, "while the sequence set forth [in *Saucier*] is often appropriate, it should no longer be regarded as mandatory."[127]

B. Governmental Entity Immunity

1. *Limited Liability of Municipal Entities*

It is apparent from the discussion of individual immunities in Part II.A that it is not uncommon for a § 1983 plaintiff to establish a violation of a federal constitutional right but be denied an award of damages from the responsible individual because of absolute and/or qualified immunity. This situation would not be so devastating if the victim of unconstitutional action by a government official could recover from that official's employer, as is frequently the case when a government official engages in tortious conduct. However, while the Court in *Monell v. Department of Social Services*[128] held that a municipality is a "person" within the meaning of § 1983 and could be sued as a defendant in such an action,[129] the Court also held that municipalities could not be liable based on *respondeat superior.*[130] Rather, "[i]t is when execution of government's policy or custom, whether made by its law makers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983."[131]

This means a municipality can be held liable under § 1983 only (i)

---

[124] *Id.*
[125] *Id.* at 818–21.
[126] *Id.* at 821.
[127] *Pearson*, 129 S. Ct. at 818.
[128] 436 U.S. 658, 690 (1978).
[129] *Id.* at 691.
[130] *Id.*
[131] *Id.* at 694

if one or more of its officials acted in accordance with official municipal policy in violating the plaintiff's constitutional rights, (ii) when the official responsible for the violation was one of the municipality's policymakers,[132] or (iii) where a government acts in accordance with municipal custom— demonstrated by repetition of the same challenged misconduct over a period of time,[133] or by a policy or custom of inadequate training, failure to supervise, or inadequate screening of applicants for a position.[134] Establishing municipal liability based on inadequate training, failure to supervise, or inadequate screening of applicants is very difficult.[135]

In *City of Los Angeles v. Heller*,[136] the Court held that a municipality is not liable for damages under § 1983 based on a policy that may cause constitutional deprivations where individual employees, acting pursuant to the deficient policy, inflicted no constitutional harm on the plaintiff.[137] Further, states and state agencies are not liable under § 1983 because the Court, in *Will v. Michigan Department of State Police*, held that neither a state, a state agency, nor a state official acting in his or her official capacity is considered a "person" subject to suit under § 1983.[138] Where a plaintiff is successful in establishing municipal liability under *Monell*, the municipality is not protected by absolute or qualified immunity.[139] However, municipal entities cannot

---

[132] Pembaur v. City of Cincinnati, 475 U.S. 469, 480 (1986); *see also* McMillian v. Monroe Cnty., 520 U.S. 781, 785–86 (1997) (requiring a functional analysis to determine whether the government official had policymaking authority with respect to the specific function at issue in the challenged conduct, i.e., a government official may be a policymaker with respect to some functions, but not others); City of St. Louis v. Praprotnik, 485 U.S. 112, 128–29 (1988) (holding that a policymaker's acquiescence to the actions of a subordinate is not necessarily sufficient to impose liability on the municipality); Bd. of Cnty. Comm'rs v. Brown, 520 U.S. 397, 405 (1997) (holding that in a situation where a municipality does not directly violate nor authorize the deprivation of a plaintiff's rights, the courts must apply "rigorous standards of culpability and causation" in order to "ensure that the municipality is not held liable solely for the actions of its employee").

[133] *See, e.g.*, Baron v. Suffolk Cnty Sheriff's Dep't, 402 F.3d 225, 236–41 (1st Cir. 2005) (requiring a practice or custom so widespread that municipal policymakers had actual or constructive knowledge and took no action to end the practice). *But see* Rhyne v. Henderson Co., 973 F.2d 386, 394, 392 (5th Cir. 1992) (holding that the failure of a municipality to adopt an official policy on a particular subject may not serve as a basis for liability unless the omission "amount[s] to an intentional choice, not merely an unintentional negligent oversight").

[134] *See Brown*, 520 U.S. at 410–11 (holding that inadequate screening of an applicant's background would trigger municipal liability only where inadequate scrutiny of the applicant's background would have led a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of someone's protected constitutional rights); *Canton*, 489 U.S. at 392 (1989) (holding that a constitutional violation arises from inadequate training or supervision only where it constitutes "deliberate indifference" to the rights of the persons with whom the employees come into contact; the deliberate indifference standard is met only where "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need").

[135] *See, e.g.*, *Brown*, 520 U.S. at 405; *Canton*, 489 U.S. at 391–93.

[136] 475 U.S. 796 (1986).

[137] *Id.* at 799.

[138] Will v. Mich. Dep't of State Police, 491 U.S. 58, 64 (1989).

[139] Owen v. City of Independence, 445 U.S. 622, 638 (1980).

be held liable for punitive damages under § 1983.[140]

When you combine the protection of absolute and qualified immunity with the limitations *Monell* imposes upon municipal liability, it is apparent that many victims of unconstitutional action by local governmental officials and employees are without a remedy for damages under § 1983. In Part II.B.ii below, we will see that victims of unconstitutional action by state officials and employees have even less of a chance of recovering damages under § 1983.

2. Eleventh Amendment Protection for States and State Agencies

The Eleventh Amendment to the U.S. Constitution states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.[141]

Passed in response to the Court's decision in *Chisholm v. Georgia*,[142] permitting a suit by citizens of South Carolina against Georgia for the purpose of collecting a debt in a situation where Georgia had not consented to suit, the Eleventh Amendment on its face does not address § 1983 actions brought against a state by a citizen of that state. However, in *Hans v. Louisiana*,[143] the Court held that the Eleventh Amendment bars federal suits against a state by its own citizens, concluding that Article III was intended to permit states to be sued only when they consented and that the Eleventh Amendment more broadly restored the common law notion of sovereignty.[144] The decision in *Hans* leads to the anomalous result that constitutional rights provided by the Fourteenth Amendment, including those incorporated through the Due Process Clause, cannot be enforced in a § 1983 action, even though the primary purpose of § 1983 was to provide a cause of action against the states that were either unable or unwilling to comply with the mandates of the Fourteenth Amendment. The Court has since recognized a few ways to avoid the holding in *Hans*.

---

[140] City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 267–71 (1981).
[141] U.S. CONST. amend. XI.
[142] Chisholm v. Georgia, 2 U.S. 419 (1793).
[143] Hans v. Louisiana, 134 U.S. 1 (1890).
[144] *See also* Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 760 (2002) (holding that the sovereign immunity enjoyed by the states extends beyond the literal text of the Eleventh Amendment and bars federal agency adjudication of a complaint by a private party claiming an arm of the state violated a federal statute).

First, in *Ex parte Young*,[145] the Court held that state officials may be sued in their official capacity for prospective injunctive relief. The government official is deemed to be "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."[146] This results in the legal fiction in which the action of the government official is deemed state action for purposes of the Fourteenth Amendment and under color of law for purposes of § 1983, but it is not deemed to be a state action for purposes of the Eleventh Amendment. *Ex parte Young* remains the law today, although its use has been limited by *Seminole Tribe of Florida v. Florida*,[147] holding that a court should hesitate before applying *Young* "where Congress has prescribed a detailed remedial scheme for the enforcement against a state of a statutorily created right."[148] It was also limited by *Idaho v. Coeur d'Alene Tribe of Idaho*, in which an Indian tribe was not allowed to use the *Ex parte Young* exception because, according to the Court, it raised an issue that is "unusual in that the tribe's suit is the functional equivalent of a quiet title action which implicates special sovereignty interests."[149]

Second, the Court held that states may waive their Eleventh Amendment protection and consent to being sued in federal court; however, such waivers must be explicit.[150] In *Lapides v. Board of Regents of University System of Georgia*, the Court held that, by removing a case from state to federal court, a state waives its Eleventh Amendment protection.[151] Lower courts have held that a state also waives its Eleventh Amendment protection by accepting federal funds pursuant to a statute that provides, in clear and unmistakable terms, that a recipient may be held liable in federal court for violations of, for example, a provision in the statute prohibiting discrimination.[152]

Third, the Court held that Congress may abrogate Eleventh Amendment immunity,[153] but this has been limited to circumstances where Congress passes legislation pursuant to its power under Section 5 of the Fourteenth Amendment.[154] If it intends to abrogate Eleventh

---

[145] *Ex parte* Young, 209 U.S. 123 (1908).
[146] *Id.* at 160.
[147] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 75–76 (1996).
[148] *Id.* at 74.
[149] 521 U.S. 261, 281 (1997).
[150] Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99–100 (1984); Edelman v. Jordan, 415 U.S. 651, 673 (1974). *See also* United States v. Metro. St. Louis Sewer Dist., 578 F.3d 722, 725–27 (8th Cir. 2008); New Hampshire v. Ramsey, 366 F.3d 1, 18 (1st Cir. 2004).
[151] Lapides v. Bd. of Regents of Univ. Sys. of Ga., 535 U.S. 613, 624 (2002).
[152] *See, e.g.*, Haybarger v. Lawrence Cnty. Adult Prob. & Parole, 551 F.3d 193, 197–203 (3d Cir. 2008); Diaz-Fonseca v. Puerto Rico, 451 F.3d 13, 33 (1st Cir. 2006); Constantine v. Rectors & Visitors of George Mason Uni., 411 F.3d 474, 491–506 (4th Cir. 2005).
[153] Fitzpatrick v. Bitzer, 427 U.S. 445, 455–57 (1976) (holding Title VII of the Civil Rights Act of 1964 abrogates states' Eleventh Amendment protection and subjects them to liability for employment discrimination in violation of Title VII).
[154] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 64–65 (1996) (holding that Congress may not

Amendment immunity, Congress must express its intent in clear and unmistakable terms on the face of the statute.[155] While the power to abrogate gives Congress the power to ameliorate some of the consequences of *Hans*, the power has been limited substantially by the Court's narrow interpretation of Section 5 of the Fourteenth Amendment. Following *City of Boerne*, the Court ruled that several civil rights acts passed by Congress, which attempted to abrogate the states' Eleventh Amendment protection, were unconstitutional because they exceeded the Section 5 power of Congress.[156] Also beginning in *City of Boerne v. Flores*, the Court held that the Religious Freedom Restoration Act (RFRA)[157] exceeded the Section 5 power of Congress because it was not "congruent and proportionate" in light of the narrow scope of the Section 1 right.[158] Although the Section 1 right to religious freedom is very limited after *Smith*, requiring only that state and local governments act rationally in passing laws of general applicability that conflict with religious freedom,[159] RFRA required state and local government to satisfy strict scrutiny when passing laws of general applicability that conflict with religious freedom.[160]

Because the Court held in *Edelman v. Jordan* that Congress in passing § 1983 did not abrogate the Eleventh Amendment immunity of states and state agencies,[161] and in *Will v. Michigan Department of State Police* that states and state agencies are not persons subject to suit under § 1983,[162] it is not possible to sue states pursuant to § 1983 for violations of federal constitutional and statutory rights.[163] While state officials are subject to § 1983 actions seeking damages in their individual capacity, they can raise an absolute and/or qualified immunity defense. This means that many violations of federal rights by state government officials will

---

abrogate Eleventh Amendment immunity when it passes legislation pursuant to its Article I power).

[155] *See, e.g.*, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 363 (2001) (finding clear congressional intent to abrogate Title I of the Americans with Disabilities Act but a lack of congruence); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 73–74 (2000) (finding a lack of clear congressional intent in Age Discrimination in Employment Act).

[156] *E.g.*, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (Title I of the Americans with Disabilities Act); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (Age Discrimination in Employment Act); Fla. Prepaid Post Secondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (Patent Remedy Act). *Compare* Tennessee v. Lane, 541 U.S. 509 (2004) (Title II of the Americans with Disabilities Act); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003) (family-care leave provision of the Family and Medical Leave Act).

[157] 42 U.S.C. § 2000bb, *et seq.* (2006).

[158] *City of Boerne*, 521 U.S. at 530–34. The relevant Section 1 right is the Free Exercise Clause of the First Amendment, which is subject to only rational basis review in circumstances where a religious-neutral law of general applicability has an incidental effect on religious freedom, based on the decision in *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

[159] *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

[160] *See* 42 U.S.C. § 2000bb-1 (providing that "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.")

[161] 415 U.S. 651, 673 (1974).

[162] Will v. Mich. Dep't of State Police, 491 U.S. 58, 64–66 (1989).

[163] *Id.* at 64–66.

not be remedied.

C. Supervisory Liability

There are at least three reasons why § 1983 plaintiffs may want to hold supervisors personally liable for the actions of their subordinates: First, the supervisor is more likely to be a policymaker and this could trigger municipal liability based on *Monell*; second, supervisors are more likely to have resources from which plaintiffs could satisfy a judgment; and third, a judgment against a supervisor is more likely to lead to a change in the municipal culture, customs, practices or policies that facilitated the challenged conduct that led to the judgment. The law surrounding supervisory liability in § 1983 actions is unclear, but somewhat analogous to municipal liability after *Monell*.

In a § 1983 action against the mayor, the police commissioner, and others alleging a pervasive pattern of illegal and unconstitutional police mistreatment of racial minorities, the plaintiff sought equitable relief addressing the alleged mistreatment.[164] The trial court found that the evidence did not show a policy on the part of the defendants to violate the legal and constitutional rights of the plaintiff classes, but did find evidence of a tendency to discourage civilian complaints and to minimize the consequences of police misconduct.[165] After noting that individual police officers not named as defendants "were found to have violated the constitutional rights of particular individuals," the Court said "there was no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by [defendants] express or otherwise showing their authorization or approval of such misconduct."[166] The Court overturned the equitable relief.

Later, in *Monell*, the Court said *Rizzo* rejected the argument that § 1983 liability may be premised on "the mere right to control without any control or direction having been exercised and without any failure to supervise."[167] Relying on *Rizzo* and *Monell*, a majority of the circuits have required plaintiffs—who are attempting to hold supervisors liable based on a failure to supervise rather than affirmative misconduct—to show either gross negligence or deliberate indifference, with some

[164] Rizzo v. Goode, 423 U.S. 362, 371 (1976).

[165] Council of Org. on Phila. Police Accountability and Responsibility v. Rizzo, 357 F. Supp. 1289, 1317 (E.D. Pa. 1973).

[166] *Id.* at 371. Justice Blackmun, dissenting, saw it differently and pointed to the district court's finding that it "is the policy of the department to discourage the filing of such complaints, to avoid or minimize the consequences of proven police misconduct, and to resist disclosure of the final disposition of such complaints." *Id.* at 386 (quoting Council of Org. on Phila. Police Accountability and Responsibility v. Rizzo, 357 F. Supp. 1289, 1318 (E.D. Pa. 1973)).

[167] Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978).

circuits requiring "knowledge and acquiescence."[168]

While not in the context of a § 1983 action, in *Ashcroft v. Iqbal*,[169] the Court considered the "supervisory liability" of the former Attorney General, John Ashcroft, and the Director of the Federal Bureau of Investigation, Robert Mueller, in an action by an alleged terrorist claiming that Ashcroft and Mueller "adopted an unconstitutional policy that subjected [him] to harsh conditions of confinement on account of his race, religion, or national origin."[170] After noting that the plaintiff "correctly concedes that Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*,"[171] the Court said "[w]here the claim is invidious discrimination in contravention of the First and Fifth Amendments, our decisions make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose."[172] Imposing a heightened pleading requirement, the Court said the plaintiff would have to "plead sufficient factual matter to show that [defendants] adopted and implemented the detention policies at issue not for a neutral, investigative reason, but for the purpose of discriminating on account of race, religion, or national origin."[173] Rejecting the argument that "a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution," the Court said "[i]n a § 1983 suit or a *Bivens* action—where masters do not answer for the torts of their servants—the term 'supervisory liability' is a misnomer," and each government official "is only liable for his or her own misconduct."[174] The Court went on to hold that the plaintiff's allegations were nothing more than a "formulaic recitation of the elements" of a constitutional discrimination claim that were not entitled to an assumption of truth and did not nudge the claims of invidious discrimination "across the line from conceivable to plausible."[175]

Therefore, based on *Iqbal*, plaintiffs in *Bivens* actions, and presumably in § 1983 actions, must allege plausible facts showing the defendant supervisors were personally involved in the claimed

---

[168] *See, e.g.*, Harper v. Lawrence County, Ala., 584 F.3d 1030, 1039–40 (11th Cir. 2009); Goodman v. Harris County, 571 F.3d 388, 395–96 (5th Cir. 2009); Pineda v. Toomey, 533 F.3d 50, 54 (1st Cir. 2008); Johnson v. Snyder, 444 F.3d 579, 583–84 (7th Cir. 2006).

[169] Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

[170] *Id.* at 1942. Federal officials are not subject to suit based on § 1983 because absent special circumstances they do not act under color of state or local law. However, federal officials may be subject to suit based on an implied right of action to enforce the Constitution. This is often referred to as a "*Bivens* action," based on the decision in *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), holding there is an implied right of action to enforce provisions of the U.S. Constitution against federal officials. *See* Hui v. Castaneda, 130 S. Ct. 1845 (2010).

[171] *Iqbal*, 129 S. Ct. at 1948.

[172] *Id.*

[173] *Id.* at 1948–49.

[174] *Id.* at 1949.

[175] *Id.* at 1951–52.

constitutional violation.[176] Justice Souter's dissent in *Iqbal* indicates that the majority's reasoning eliminates supervisory liability, stating that the "nature of a supervisory liability theory is that the supervisor may be liable, under certain conditions, for the wrongdoing of his subordinates, and it is this very principle that the majority rejects."[177] It remains to be seen whether the dissent is correct.

D. "State Action" and Action Under Color of Law

As a general rule, the individual rights guaranteed by the Fourteenth Amendment, including those incorporated through the Due Process Clause, restrict only government action. Private parties are subject to these constitutional restrictions only when their conduct is fairly attributable to state or local government. While not necessarily identical, the "under color of [state law]" requirement in § 1983 similarly limits § 1983 actions to claims against state and local government officials.[178] In short, the actions of state and local government officials, employees, and agents, taken in their official capacity, generally constitute state action,[179] while the actions of private parties generally do not. There is a relatively narrow band of cases that straddle the line—those where private parties act in conjunction with government officials, perform the work or a function of government, or act with the specific assistance of government—and the Supreme Court has not given clear, principled guidance in determining whether § 1983 and the Constitution

[176] *See, e.g.*, Arar v. Ashcroft, 585 F.3d 559, 569 (2d Cir. 2009); Maldonado v. Fontanes, 568 F.3d 263, 274 n.7 (1st Cir. 2009) (noting that after *Iqbal*, there is doubt as to whether a public official may be held vicariously liable under § 1983 based on a supervisory liability theory). *See also* Symposium: *Pondering* Iqbal, 14 LEWIS & CLARK L. REV. 1 (2010). *But see* Al-Kidd v. Ashcroft, 580 F.3d 949, 974–77 (9th Cir. 2009) (supervisors may be held liable for subordinates' actions that they set in motion or knowingly refuse to terminate, for improper training or supervision, for acquiescing in the constitutional deprivations, or for conduct showing a reckless or callous indifference to others' rights. Allegations that Ashcroft developed and set in motion a policy of using the material witness statute to arrest and preventively detain and interrogate terrorism suspects, absent probable cause that they committed a crime, satisfied this standard).

[177] *Iqbal*, 129 S. Ct. at 1957–58. (Souter, J., dissenting).

[178] *See* Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 935 (1982) (noting that private defendants who meet the state action requirement of the Fourteenth Amendment will be deemed to be acting "under the color of state law" and subject to suit under § 1983). *See also* Brentwood Academy v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 n.2 (2001); Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970).

[179] *See* Monroe v. Pape, 365 U.S. 167, 171–72 (1961) (finding that government officials may act under color of state law even though acting contrary to state law). In other words, § 1983 does not require that a government official be acting pursuant to a state statute; rather, "[m]isuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is taken 'under the color of state law.'" *Id.* at 184 (quoting United States v. Classic, 313 U.S. 299, 326 (1941)). *But see* Polk County v. Dodson, 454 U.S. 312 (1981) (holding that a public defender sued for an alleged violation of constitutional rights in representing a client was not acting under color of law because a public defender exercises professional independence in representing a claim against the state).

are in play.

The easiest case for subjecting a private individual to a § 1983 action arises where the private party and a government official act jointly. This sometimes occurs pursuant to a statutory scheme,[180] and other times results from an agreement or conspiracy between private individuals and government officials.[181] In contrast, private conduct authorized by state law, but not compelled, does not trigger § 1983 liability.[182]

When private parties perform a public function that is exclusively and traditionally assigned to government, they may be subject to § 1983 liability.[183] This doctrine has been substantially narrowed recently, and the Court has refused to subject certain parties to §1983 liability. Examples of this include a provider of utility services,[184] the operator of a nursing home that is funded almost exclusively with government-provided medical assistance,[185] and a provider of education to special needs children pursuant to an agreement with government.[186] These cases become more complicated in circumstances where the government contracts with a private party to perform a governmental function, such as the operation of a jail or prison. The Court, in *West v. Atkins*, held that a private physician who contracted with the state to provide medical services at a state hospital is subject to § 1983 liability, at least in part because the physician was fulfilling the government's statutory or constitutional obligation to provide medical services.[187] However, private parties who contract with government to provide services are not automatically subjected to § 1983 liability.[188]

Government assistance to a private party can take many forms. Financial assistance alone is insufficient to trigger application of either § 1983 or the Fourteenth Amendment. In contrast, a "symbiotic

---

[180] *See, e.g.*, *Lugar*, 457 U.S. 922 at 937 (1982) (pre-judgment attachment pursuant to a statute imposing a duty on the court clerk and the sheriff that is triggered by a private lawsuit); Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 622–28 (1981) (a peremptory challenge scheme pursuant to which a private litigant motivated by race identifies a potential juror who is then excused by the judge).

[181] *See, e.g.*, Tower v. Glover, 467 U.S. 914, 920 (1984) (a public defender, who is normally not subject to § 1983 liability for actions taken in representing a client, is subject to § 1983 liability arising out of a conspiracy between the public defender and state officials); Dennis v. Sparks, 449 U.S. 24, 28–29 (1980) (private individual who bribes a judge is subject to suit under § 1983 even though the judge enjoys absolute immunity); Dombrowski v. Eastland, 387 U.S. 82, 83 (1967) (federal officials, not normally subject to suit under § 1983, may be subjected to § 1983 liability when acting in concert with state officials).

[182] Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 166 (1978).

[183] *See, e.g.*, Marsh v. Alabama, 326 U.S. 501, 506–08 (1946) (private company operating a municipality); Smith v. Allwright, 321 U.S. 649, 662–64 (1944) (a private political club effectively controlling a local election).

[184] Jackson v. Metro. Edison Co., 419 U.S. 345, 353–54 (1974).

[185] Blum v. Yaretsky, 457 U.S. 991, 1011–12 (1982).

[186] Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982).

[187] West v. Atkins, 487 U.S. 42, 54–57 (1988).

[188] *See, e.g.*, Reasonover v. St. Louis County, Mo., 447 F.3d 569, 584–85 (8th Cir. 2006); Leshko v. Servis, 423 F.3d 337, 342 (3d Cir. 2005).

relationship" between government and a private party was sufficient in *Burton v. Wilmington Parking Authority*[189] to support a § 1983 action against the private owner.[190] This case may represent the outer limits of state action, decided at a time when the Court was quite interested in addressing racial discrimination.[191] More recently, in *Brentwood Academy v. Tennessee Secondary School Athletic Association*,[192] the Court held that a "private" statewide voluntary association, consisting of both public and private schools, is subject to the restraints of the Due Process Clause of the Fourteenth Amendment because of the "pervasive entwinement of public institutions and public officials."[193] Several factors were considered in reaching this conclusion, including the dominant role of public schools and their officials in the membership and governance of the association, the assignment of state board of education members to serve *ex officio* on the governing body of the association, and the eligibility of association employees for membership in the state retirement system.[194] This case might be viewed as government delegation of the supervision of public high school athletic activities to a private association.

Another form of government assistance is found in *Shelley v. Kraemer*,[195] a case in which white property owners filed suit in state court to enforce a racially restrictive covenant and block a sale from a white owner to a black buyer. Of course, the action of a state court is government action subject to Fourteenth Amendment and § 1983 restrictions. In *Shelley*, the state court was asked to assist the white property owners in their enforcement of a racially restrictive covenant.[196] *Shelley* is unremarkable in the sense that the judicial branch of government was an instrument of racial discrimination. The Court held "that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand."[197] While *Shelley* would arguably support a finding of state action any time a private party brings a lawsuit with a discriminatory intent, *e.g.*, a private

---

[189] Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (holding that the private operator of a restaurant, who leased space from the government and refused to serve African-American customers, was subject to liability under § 1983).

[190] *Id.* at 725.

[191] The Court pointed to the mutual benefit from the arrangement, *id.* at 724, but the Court has not relied on the "symbiotic relationship" theory since *Burton*.

[192] Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288 (2001).

[193] *Id.* at 298.

[194] *Id.* at 298–303.

[195] 334 U.S. 1 (1948).

[196] For a contrary approach, *see* Evans v. Newton, 382 U.S. 296 (1966), in which the state court accepted the resignation of a city as the trustee of park property designated in a will as available for white people only and appointed new trustees who would carry out the discriminatory purpose of the deceased. The Court found government action because it found that the park was still run as a municipal park, even after the new trustees took control.

[197] *Shelley*, 334 U.S. at 20.

landlord sues to evict a tenant because of her race, it has not been interpreted this broadly.

Government assistance in the form of a state-granted monopoly to operate a public utility,[198] or in the form of a liquor license for a private club which refused to serve a black customer,[199] was deemed insufficient to convert the private party's action into government action. In *Norwood v. Harrison*, the Court held that the action of the executive secretary of the Mississippi State Textbook Purchasing Board in loaning books to students attending private schools that discriminated on the basis of race violates the Fourteenth Amendment.[200] While it was not remarkable to hold that the action of the state official constitutes state action, a more interesting question is whether the Court would have enjoined the private school, which benefitted from the state assistance, from discriminating on the basis of race in admissions.[201]

While the state action doctrine has always been unclear, it is apparent that the Court, with the exception of *Brentwood*, has moved toward a more restrictive interpretation of state action. In other words, the current Court is less willing to subject private parties to the restrictions of the Fourteenth Amendment and § 1983. As the line between the private and government spheres becomes more blurred, and government increasingly utilizes private parties to perform government functions, constitutional protections may shrink.

E. Limitations on the Amount of Punitive Damages

In a series of cases, beginning with *Honda Motor Co., Ltd. v. Oberg*,[202] the Court has invoked due process, both substantive and procedural, as a means of imposing limitations on the amount of punitive damages awarded, usually by a jury. In *Oberg* the Court held that Oregon's constitutional prohibition on judicial review of the amount of punitive damages awarded by a jury "'unless the court can affirmatively

---

[198] Jackson v. Metro. Edison Co., 419 U.S. 345 (1974).

[199] Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

[200] 413 U.S. 455 (1973).

[201] *But see* Reitman v. Mulkey, 387 U.S. 369 (1967) (affirming the holding of the California Supreme Court that a constitutional amendment (Proposition 14) designed to overturn state laws that prohibited race discrimination in selling or leasing real property constitutes an express state authorization of private race discrimination in violation of the Fourteenth Amendment).

[202] 512 U.S. 415 (1994). In an earlier case, *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 21–24 (1991), the Court rejected a due process challenge to the "common-law method for assessing punitive damages," but indicated that unlimited jury or judicial discretion in fixing such damages could "cross the line into the area of constitutional impropriety." *See also* TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 462–63 (1993) (rejecting a due process challenge to an award of $10 million in punitive damages, where the jury awarded $19,000 in compensatory damages, because TXO acted in bad faith, its conduct was part of a broader pattern of fraud and deceit, and it was a wealthy defendant).

say there is no evidence to support the verdict,' violates the Due Process Clause of the Fourteenth Amendment."[203] A few years later, in *BMW of North America, Inc. v. Gore*,[204] the Court imposed another due process restriction on punitive damages, holding that (i) lawful conduct of the automobile manufacturer outside the state of Alabama could not be considered by an Alabama court in determining the appropriate amount of punitive damages in a fraud action,[205] and (ii) an award of $2 million in punitive damages was grossly excessive in light of three facts that serve as guideposts in determining the reasonableness of punitive damages awards—the degree of reprehensibility of the defendant's conduct, the disparity between the punitive damages awarded and the actual harm to the plaintiff, and the comparison with civil and criminal penalties that could be imposed for comparable misconduct.[206]

The *Gore* guideposts were applied in *State Farm Mutual Automobile Insurance Co. v. Campbell*, a case in which the jury awarded $1 million in compensatory damages and $145 million in punitive damages. [207] The judgment of the Utah court was reversed because of the reliance on State Farm's out-of-state conduct, much of which was lawful where it occurred, that had no nexus to the specific injury suffered by the plaintiff and was not similar to that which harmed the plaintiffs.[208] There is a presumption against an award that has such a high ratio—145:1 in this case—between punitive and compensatory damages,[209] and the most relevant civil sanction under Utah law is limited to a $10,000 fine.[210]

Subsequently, in *Philip Morris USA v. Williams*, the Court clarified *Campbell*, holding that harm to other victims is relevant on the reprehensibility issue, but due process precludes a state from using "a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent" because such use would deprive the defendant of the opportunity to present every available defense, and it would add a "near standardless dimension to the punitive damages equation."[211] In determining whether a punitive damages award is unconstitutionally excessive, appellate courts should consider a *de novo* standard because a jury's award of punitive damages does not constitute a finding of fact that is entitled to deference on appeal.[212]

While the due process restrictions on punitive damages awards

---

[203] *Oberg*, 512 U.S. at 415.

[204] 517 U.S. 559 (1996).

[205] *Id.* at 572–73.

[206] *Id.* at 575–85. The Alabama Circuit Court entered judgment by the jury awarding the plaintiff $4,000 in compensatory damages and $4,000,000 in punitive damages.

[207] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003).

[208] *Id.* at 419–24.

[209] *Id.* at 426.

[210] *Id.* at 428.

[211] Philip Morris USA v. Williams, 549 U.S. 346, 353–54 (2007).

[212] Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 443 (2001).

were imposed by the Court in the context of tort claims decided in state courts, the principles established in those cases are argued in § 1983 cases as well.[213] Because the source of the restrictions on punitive damages is the Due Process Clause of the Fourteenth Amendment, the restrictions are largely immune from corrective action by Congress. However, Section 5 of the Fourteenth Amendment gives Congress the power to "enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct."[214] Because compensatory damage awards may be small in cases establishing a violation of federal rights, application of two of the *Gore* guideposts—the ratio between compensatory and punitive damages and the comparison to civil and criminal penalties[215]—interferes with the goal of preventing and deterring unconstitutional conduct. Therefore, Congress has the power based on Section 5 to legislate more broadly than the Court's interpretation of Section 1.[216]

In addition, Congress could correct the Court's decision in *City of Newport v. Fact Concerts, Inc.*,[217] which held that punitive damages are not generally available against municipalities in a § 1983 action.

F. Use of § 1983 to Enforce Federal Statutory Rights

With the decision in *Maine v. Thiboutot*,[218] it seemed well settled that § 1983 provided a cause of action to enforce federal statutes. Because "Congress attached no modifiers to the phrase ['and laws'], the

---

[213] *See, e.g.*, Gibson v. Moskowitz, 523 F.3d 657, 664–65 (6th Cir. 2008) (an award of $3 million in punitive damages, in a case in which the jury awarded $1.5 million in compensatory damages, against a prison psychiatrist who was deliberately indifferent in ignoring the medical needs of the deceased, held to be not excessive); Alexander v. City of Milwaukee, 474 F.3d 437, 454 (7th Cir. 2007) (suggesting that a higher ratio between punitive and compensatory damages may be tolerated in cases where the compensatory damages awarded are relatively low).

[214] Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721, 727-28 (2003)

[215] BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 559 (1996). *See* City of Boerne v. Flores, 521 U.S. 507, 519–20 (1997) (holding that Congress has the power under § 5 of the Fourteenth Amendment to adopt "measures that remedy or prevent unconstitutional actions" so long as there is "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end"). *See also* Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721, 727–28 (2003).

[216] *See Boerne*, 521 U.S. at 519–20 (holding that Congress has the power under § 5 of the Fourteenth Amendment to adopt "measures that remedy or prevent unconstitutional actions" so long as there is "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end".); *See also Hibbs*, 538 U.S. at 727–28 (affirming the congressional power to remedy and deter violations of rights under the Fourteenth Amendment); Bd. of Trs., Univ. of Ala. v. Garrett, 531 U.S. 356, 365 (2001) ("Congress' power 'to enforce' [§ 1 of] the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.").

[217] City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981).

[218] 448 U.S. 1, 9 (1980) (holding that a person deprived of constitutional rights under color of state law may be awarded attorney fees).

plain language of the statute undoubtedly embraces respondents' claim that petitioners violated the Social Security Act."[219] The Court also confirmed that attorney fees are available, pursuant to 42 U.S.C. § 1988, in a § 1983 action seeking to enforce statutory rights.[220]

This seemingly straightforward approach to § 1983 quickly became clouded. In *Middlesex County Sewage Authority v. National Sea Clammers Association*,[221] the Court concluded *sua sponte* that Congress did not intend to allow an implied private right of action to enforce either the Federal Water Pollution Control Act or the Marine Protection, Research, and Sanctuaries Act and *sua sponte* addressed the possibility of enforcing these statutes through § 1983. While recognizing that such a claim "arguably falls within the scope of *Maine v. Thiboutot*," the Court said it has "recognized two exceptions to the application of § 1983 to statutory violations"—where Congress "foreclosed private enforcement of that statute in the enactment itself," and where "the statute at issue . . . was [not] the kind that created enforceable 'rights' under § 1983."[222] Relying on the first exception, the Court concluded that, because the two statutes at issue in *Middlesex County* "provide quite comprehensive enforcement mechanisms," Congress not only "intended to foreclose implied private actions but also that it intended to supplant any remedy that otherwise would be available under § 1983."[223]

A few years later, in *Wright v. City of Roanoke Redevelopment and Housing Authority*, the Court referred to *Thiboutot*, *Pennhurst*, and *National Sea Clammers Association* and said that "[u]nder these cases, if there is a state deprivation of a 'right' secured by a federal statute, § 1983 provides a remedial cause of action unless the state actor demonstrates by express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement."[224] By placing the burden on the defendant,[225] the Court adopted an approach that is favorable to § 1983 plaintiffs.

Shortly after holding in *Wilder* that "reasonable and adequate" provided an enforceable standard,[226] the Court in *Suter v. Artist M.* concluded that the "reasonable efforts" provision in the Adoption

---

[219] *Id.* at 4.
[220] *Id.* at 9–10.
[221] 453 U.S. 1 (1981).
[222] *Id.* at 19 (discussing Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 28 (1981)).
[223] *Id.* at 20–21.
[224] Wright v. City of Roanoke Redevelopment & Hous. Auth., 479 U.S. 418, 423 (1987) (concluding that tenants residing in low-income housing projects could sue under § 1983 to enforce the Brooke Amendment to the Housing Act, as well as HUD regulations including utilities as part of the rent ceiling). *But see* Alexander v. Sandoval, 532 U.S. 275 (2001) (holding that a private cause of action cannot be implied directly under a federal regulation, but not determining whether § 1983 can be utilized to enforce a federal regulation).
[225] This was confirmed in *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 520–21 (1990), which held that the Medicaid Act created a right enforceable by health care providers to reasonable and adequate rates of reimbursement.
[226] *Id.* at 512.

Assistance and Child Welfare Act was too vague and amorphous to create rights enforceable under § 1983.[227] The result in *Suter* seems inconsistent with that in *Wilder*. Nevertheless, in *Livadas v. Bradshaw*, the Court unanimously sustained the right of a discharged employee to sue the state labor commissioner for violating her National Labor Relations Act right to bargain collectively, reasoning that

> § 1983 remains a generally and presumptively available remedy for claimed violations of federal law . . . [w]e have no difficulty concluding . . . that the NLRA protects interests of employees and employers against abridgement by a State, as well as by private actors; that the obligations it imposes on government actors are not so 'vague and amorphous' as to exceed judicial competence to decide; and that Congress had not meant to foreclose relief under § 1983.[228]

The Court's most recent decisions show that it has backed away from a plaintiff-friendly approach to the use of § 1983 to enforce federal statutes. The plaintiffs in *Blessing v. Freestone* brought a § 1983 action seeking to enforce Title IV-D of the Social Security Act, alleging that the state agency failed to take adequate steps to obtain child support payments for them. The Court ruled that Title IV-D did not give the parents an enforceable right to better performance by the state agency. In reaching this conclusion, the Court said it was necessary to examine three factors: (i) whether the plaintiff is the intended beneficiary of the statute, (ii) whether the interests asserted are so vague and amorphous as to be beyond the competence of the judiciary to enforce, and (iii) whether the statute imposes binding obligations on the state.[229] The Court rejected the plaintiffs' claim, stating that the plaintiffs must identify with particularity the right they want enforced. The Court noted that a statutory requirement that the state operate its child support program in "substantial compliance" with the statute is not intended to benefit individual children and parents, but rather to establish a "yardstick" to measure a state's performance.[230]

Later, in *Gonzaga University v. Doe*, the Court said "*Blessing* emphasizes that it is only violations of *rights*, not *laws*, which give rise to § 1983 actions."[231] *Gonzaga* presented the question of "whether a student may sue a private university for damages under [§ 1983] to enforce provisions of the Family Educational Rights and Privacy Act . . . which prohibit the federal funding of educational institutions that have a policy or practice of releasing education records to unauthorized

---

[227] Suter v. Artist M., 503 U.S. 347, 367 (1992).
[228] Livadas v. Bradshaw, 512 U.S. 107, 133 (1994)
[229] Blessing v. Freestone, 520 U.S. 329, 340–42 (1997).
[230] *Id.* at 342–46.
[231] Gonzaga Univ. v. Doe, 536 U.S. 273, 283 (2002).

persons."[232] After examining its prior cases, the Court abandoned the plaintiff-friendly approach that appeared in at least some of the earlier cases. First, the Court rejected lower court decisions interpreting *Blessing* as allowing individuals who fell within a general zone of interest that a federal statute was intended to protect to enforce the statute under § 1983. The Court confirmed that prior cases do not "permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983."[233] In short, "it is *rights*, not the broader or vaguer 'benefits' or 'interests,' that may be enforced under [§ 1983]," and thus the Court rejected "the notion that our implied right of action cases are separate and distinct from our § 1983 cases."[234]

While recognizing that the question of whether a federal statute can be enforced through § 1983 is different than whether a private right of action can be implied from a federal statute, the Court said the "inquiries overlap in one meaningful respect—in either case we must first determine whether Congress *intended to create a federal right.*"[235] Therefore, "the initial inquiry—determining whether a statute confers any right at all—is no different from the initial inquiry in an implied right of action case, the express purpose of which is to determine whether or not a statute 'confer[s] rights on a particular class of persons . . . .'"[236] This means, according to the Court, that "where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under § 1983 or under an implied right of action."[237] It is not clear whether the limitations imposed by the Court in *Gonzaga University* apply only to Spending Clause legislation.[238]

This area has become much more complicated than necessary. The structure of § 1983 suggests that the approach should be the same whether the plaintiff seeks to enforce a federal constitutional right or a federal statutory right. In either case, the inquiry should be twofold—whether the plaintiff satisfies the elements of § 1983, and, if so, whether the plaintiff can establish a violation of the Constitution or the statute at issue. In *Gonzaga University*, the Court says "[i]n sum, if Congress wishes to create new rights enforceable under § 1983, it must do so in

---

[232] *Id.* at 276.
[233] *Id.* at 283.
[234] *Id.*
[235] *Id.* at 274.
[236] *Gonzaga*, 536 U.S. at 274 (2002) (quoting California v. Sierra Club, 451 U.S. 287, 294 (1981)).
[237] *Id.* at 286.
[238] Some language in *Gonzaga* suggests the Court may have relied on the fact that Spending Clause legislation was at issue. *See, e.g., id.* at 280–81 ("[S]ince *Pennhurst*, only twice have we found spending legislation to give rise to enforceable rights," and "[o]ur more recent decisions, however, have rejected attempts to infer enforceable rights from Spending Clause statutes."). *But see* McCready v. White, 417 F.3d 700, 703 (7th Cir. 2005), (holding that "[a]ny possibility that *Gonzaga* is limited to statutes that rest on the spending power (as the law in *Gonzaga* did) has been dispelled by *Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005), which treats *Gonzaga* as establishing the effect of § 1983 itself.")

clear and unambiguous terms—no less and no more than what is required for Congress to create new rights enforceable under an implied private right of action."[239] There is nothing in the language of § 1983 that justifies a "clear and unambiguous terms"[240] requirement. If the plaintiff meets the elements of § 1983, why not simply ask whether the defendant's challenged conduct violates the federal statute relied upon by the plaintiff?

A related but different question is whether a statute, such as Title IX of the Education Amendments,[241] precludes a § 1983 action alleging sex discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. In *Fitzgerald v. Barnstable School Committee*, the Court concluded that Title IX did not preclude an equal protection claim under § 1983 because Congress did not intend the statutory remedial scheme to be the exclusive avenue of relief.[242] Earlier, in *Cannon v. University of Chicago*, the Court held that victims of sex discrimination by educational institutions had an implied right of action under the antidiscrimination provision of Title IX.[243]

G. Application of 28 U.S.C. § 1728 to § 1983 Actions

By statute, federal courts are required to give state judicial proceedings the same preclusive effect those proceedings are given under the preclusion law of the issuing state.[244] This arrangement means, for example, that a defendant in a state court criminal proceeding who loses a motion to suppress evidence alleging a violation of the Fourth Amendment may be barred from pursuing the Fourth Amendment claim in a civil action in federal court.[245] It also means that a discharged school official who prevailed on a breach of contract claim in state court may be precluded from pursuing a First Amendment claim in federal court, even though the First Amendment claim was not raised in state court.[246] In *Allen* the Court concluded that there is "no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he

---

[239] *Gonzaga*, 536 U.S. at 290.
[240] *Id.*
[241] 20 U.S.C. § 1681 (2006).
[242] Fitzgerald v. Barnstable Sch. Comm., 129 S. Ct. 788, 797 (2009).
[243] Cannon v. Univ. of Chicago, 441 U.S. 677 (1979).
[244] 28 U.S.C. § 1738 (2006).
[245] *See* Allen v. McCurry, 449 U.S. 90, 94–100 (1980). *Contra* Haring v. Prosise, 462 U.S. 306 (1983) (where a plaintiff brings a § 1983 action in federal court alleging a search violated the Fourth Amendment, after a state court conviction based on a plea of guilty, he is not precluded under either Virginia law or federal common law from pursuing the Fourth Amendment claim).
[246] *See* Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 80–85 (1984).

would rather not have been engaged at all."[247] In short, the Court held that § 1983 does not create an exception to § 1728.

Similarly, in *University of Tennessee v. Elliott*, the Court held that Congress, in adopting § 1983, "did not intend to create an exception to general rules of preclusion...."[248] As a result, state preclusion law governs the preclusive effect to be given to factual findings by a state administrative agency acting in a judicial capacity, as long as there was a full and fair opportunity to litigate the issue(s).[249]

As a result of these decisions, a § 1983 plaintiff may not only be deprived of a federal forum for resolution of her § 1983 claims, she may also lose her right to trial by jury—administrative agencies generally do not provide jury trials, and motions raising constitutional claims in state criminal proceedings are usually decided by the judge, not the jury. This is true even though the accused in a state criminal proceeding has no choice but to raise the constitutional argument in, for example, a motion to suppress evidence because the stakes are so high.[250]

III. OTHER DECISIONS AFFECTING § 1983 LITIGATION

As demonstrated in the prior section, the effectiveness of § 1983 as a vehicle for enforcing civil rights has been undermined over the past thirty-five to forty years. However, the decisions interpreting § 1983 do not portray a full picture of the civil rights landscape, in part because § 1983 plaintiffs have to look elsewhere for substantive rights and in part because § 1983 cases are governed by the same procedural rules as other civil litigation. The limited goal of this section is to demonstrate that the barriers facing plaintiffs seeking to protect their individual and civil rights are not limited to the Court's interpretation of § 1983.

Given the power assumed by the Court in *Marbury v. Madison* as the final voice on the meaning of the U.S. Constitution, the damage it can inflict upon civil rights litigants is most durable when the Court is interpreting the U.S. Constitution.[251] While Congress can never overturn a Supreme Court decision, a decision interpreting a federal statute can be

---

[247] *Allen*, 449 U.S. at 104. *See also* Kremer v. Chem. Constr. Corp., 456 U.S. 461, 476 (1982) (concluding "that neither the statutory language nor the congressional debates suffice to repeal § 1738's long-standing directive to federal courts").

[248] 478 U.S. 788, 797 (1986).

[249] *Id.* at 789.

[250] The same is true of the federal court plaintiff in *San Remo Hotel v. County of San Francisco*, 545 U.S. 323, 337–47 (2005), who was required by an earlier Supreme Court decision, *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), to pursue an inverse condemnation action in state court before pursuing a Fifth Amendment takings claim in federal court. State preclusion law applied because the California courts "interpreted the relevant substantive state takings law coextensively with federal law." *San Remo Hotel*, 545 U.S. at 335. Therefore, the federal claims constituted the same claims already resolved in state court.

[251] 1 Cranch 137 (1803).

rendered meaningless by simply amending the statute. Congress has done this several times in the past twenty-five years.[252] While a decision of the Supreme Court interpreting the U.S. Constitution could be rendered meaningless by constitutional amendment, this rarely happens.

Congress does have the power under Section 5 of the Fourteenth Amendment "to enforce, by appropriate legislation, the provisions of this article."[253] But the Court interprets Section 5 and determines what constitutes "appropriate legislation," and the power of Congress has been limited substantially since 1997, beginning with the decision in *City of Boerne v. Flores*.[254] Today congressional power to compensate for a "bad" decision of the Court is substantially less than in the past. For example, Congress compensated for the decision in *Lassiter v. North Hampton County Board of Elections* (upholding a North Carolina statute conditioning voting eligibility on a person's ability to read and write) by amending the Voting Rights Act to prohibit at least some literacy tests.[255] In *Katzenbach v. Morgan*, the Court held that the amendment to the Voting Rights Act was a valid exercise of congressional power under Section 5 of the Fourteenth Amendment, despite the fact that it effectively overturned the result in an earlier decision.[256]

The scope of the protection provided by the Equal Protection and Due Process Clauses of Section 1 of the Fourteenth Amendment has declined substantially over the past thirty-five years. As Section 1 rights contract, the range of "appropriate legislation" under Section 5 narrows. The Supreme Court controls the scope of Section 5 of the Fourteenth Amendment through its interpretation of Section 1. Probably, the equal protection decisions of the Supreme Court that are most harmful to a progressive understanding of civil rights are those addressing invidious race discrimination.

The Supreme Court decided that the Equal Protection Clause reaches only intentional discrimination,[257] thereby insulating practices and policies with a disproportionate impact, unless purposefully discriminatory, from an equal protection challenge. As a result of the Court's interpretation, the Equal Protection Clause does not address all racial inequality. For example, segregated schools are consistent with the Court's interpretation of the Equal Protection Clause, unless challengers can show that the segregation results from purposeful government action.[258] According to the Court, formal or legal equality, not actual

---

[252] *See, e.g.*, Lily Ledbetter Fair Pay Act, Pub. L. No. 111-2, 123 Stat. 6 (2009); ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3557 (2008); Civil Rights Restoration Act of 1988, Pub. L. No. 100-259, 102 Stat. 31 (1998); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991); Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978).

[253] U.S. CONST. amend. XIV, § 5.

[254] 521 U.S. 507 (1997).

[255] 360 U.S. 45 (1959); 42 U.S.C. § 1971 (2006).

[256] 384 U.S. 641 (1966).

[257] Washington v. Davis, 426 U.S. 229 (1976).

[258] *See, e.g.*, Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976) (holding that where a

equality, is all that the Equal Protection Clause requires.

In contrast, because of the Court's insistence on utilizing strict scrutiny when addressing benign race-conscious actions,[259] most governmental attempts to promote racial equality through benign race-conscious actions are invalidated by the Equal Protection Clause.[260] A notable exception is the decision in *Grutter v. Bollinger*, upholding the University of Michigan Law School admissions policy aimed at achieving student body diversity.[261] The Equal Protection Clause, which was designed to promote racial equality, now stands in the way of governmental efforts to promote such equality.

The Court's interpretation of the Due Process Clause provides another example of how the scope of the protection afforded by Section 1 of the Fourteenth Amendment has narrowed. In order to prevail in a procedural due process claim, the plaintiff must show a "protected" liberty or property interest and, if successful, must show a defect in the process utilized by the government. Either prong can result in the defeat of a procedural due process claim, with the scope of "protected" interests seemingly declining.[262] Assuming there is a protected property or liberty interest, the Court determines what process is due by balancing three factors: (i) the private interest affected by the government action; (ii) the risk of an erroneous deprivation of this interest through the procedures utilized and the probable value, if any, of additional or different procedural safeguards; and (iii) the government interest.[263]

Pre-deprivation process is most beneficial to the person who is being deprived of a liberty or property interest by government. However, in *Parratt v. Taylor*, the Court held that the availability of a post-deprivation tort remedy under state law may be sufficient to satisfy due process where the deprivation of an inmate's property was the result of negligent, random and unauthorized action.[264] The protection

---

federal court order resulted in desegregation of a school system that had been segregated by law, and then began to resegregate due to residential shifts, it was not appropriate for the lower court to require that attendance boundaries be redrawn annually).

[259] *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

[260] *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007); Gratz v. Bollinger, 539 U.S. 244 (2003); *Adarand*, 515 U.S. at 239 (remanded for application of strict scrutiny); *Croson*, 488 U.S. at 511; Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

[261] 539 U.S. 306 (2003).

[262] *Compare* Goldberg v. Kelly, 397 U.S. 254 (1970) (holding that a recipient of public assistance has a protected property interest in continued receipt of the assistance) *with* Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005) (finding that an individual who obtained a restraining order based on state law does not have a constitutionally protected property interest in police enforcement of the restraining order).

[263] Mathews v. Eldridge, 424 U.S. 319 (1976).

[264] Parratt v. Taylor, 451 U.S. 527 (1981). *See also* Zinermon v. Burch, 494 U.S. 113 (1990) (narrowing the meaning of "random and unauthorized" to exclude governmental action where a state delegates to high-ranking officials the power and authority to carry out the alleged deprivation and the duty to initiate the procedural safeguards provided by state law); Hudson v. Palmer, 468 U.S. 517 (1984) (extending *Parratt* to an intentional deprivation of property that could not be anticipated).

afforded by procedural due process is less than it was in 1970 when the Court decided *Goldberg v. Kelly*,[265] and it is influenced significantly by state law because the Court often looks to state law to determine whether there is a protected property or liberty interest. The availability of state remedies, even though not comparable to § 1983 remedies, may preclude a procedural due process claim.

While reasonable minds may differ on the scope and meaning of procedural due process, it is viewed as a legitimate concept because of the language of the Fourteenth Amendment: "nor shall any State deprive any person of life, liberty, or property, without due process of law."[266] In contrast, use of the Due Process Clause to protect substantive rights is questioned and its history checkered. From 1905[267] through 1936, the Due Process Clause was used frequently to strike down socio-economic legislation based on freedom of contract, a right inherent in liberty as used in the Fourteenth Amendment. This changed, beginning with the decision in *West Coast Hotel Co. v. Parrish*, when the Court abandoned the expansive notion of liberty and began giving substantial deference to legislative bodies, requiring only that they act rationally.[268] This remains the standard applied to substantive due process challenges to socio-economic legislation, with the possible exception of the punitive damages cases.[269]

Two cases decided during the *Lochner* era, *Meyer v. Nebraska*[270] and *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*,[271] were used as the foundation for the protection of individual rights, through substantive due process, even after *Lochner* was effectively abandoned by the Supreme Court. Building on *Meyer* and *Pierce*, substantive due process jurisprudence developed as a means of protecting "fundamental rights," such as personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education, and eventually abortion with the decision in *Roe v. Wade*.[272]

Because of the absence of a textual basis in the Constitution for substantive due process, Justices who disagree with the concept sought to

---

[265] 397 U.S. 254 (1970).
[266] U.S. CONST. amend. XIV, § 1.
[267] Lochner v. New York, 198 U.S. 45 (1905).
[268] 300 U.S. 379 (1937).
[269] *See supra* Part II.E.
[270] Meyer v. Nebraska, 262 U.S. 390 (1923) (holding, as a matter of substantive due process, that "liberty" encompasses the right of an individual to "establish a home and bring up children").
[271] Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510 (1925) (holding that an Oregon statute, which required parents to educate their children between the ages of eight and sixteen in a public school, "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children").
[272] Roe v. Wade, 410 U.S. 113 (1973). *See also* Griswold v. Connecticut, 381 U.S. 479 (1965) (finding that a law making the use of contraceptives illegal intruded on married couples' right to privacy); Washington v. Glucksberg, 521 U.S. 702 (1997) (refusing to recognize a fundamental right to assistance in committing suicide).

limit the reach of substantive due process by limiting the rights that would be classified as fundamental. They sought to do so by limiting fundamental rights to those anchored in history and tradition at a very specific level.[273] This narrow concept of substantive due process was rejected by five Justices in *Planned Parenthood v. Casey*, who stated the "inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule."[274] However, in affirming the "essential holdings" of *Roe v. Wade*, the Court abandoned the "fundamental right" and "strict scrutiny" language of *Roe v. Wade* and spoke of a liberty interest that could not be unduly burdened by government.[275]

Today, what is protected by substantive due process is likely to be referred to as a protected liberty interest, rather than a fundamental right, with the level of scrutiny ranging from heightened rational basis[276] to a balancing approach.[277] Even after *Casey*, the Court in *Washington v. Glucksberg* upheld a Washington statutory ban on physician-assisted suicide against a facial substantive due process challenge and noted that the "established method of substantive-due-process analysis has primary features"—it specially protects fundamental rights and liberties deeply rooted in the nation's history and tradition, and there must be a careful description of the asserted fundamental liberty interest.[278]

Despite the "primary features" described in *Glucksberg*, the Court has used a variety of approaches to substantive due process claims. For example, in *County of Sacramento v. Lewis*,[279] the Court recognized that substantive due process may be utilized in a § 1983 action for damages alleging an abuse of executive power. However, in order to avoid substantial overlap between such a claim and state tort law, the Court held that only an abuse of power that "shocks the conscience" will be actionable.[280] The Court rejected "deliberate indifference to constitutional rights" as the standard in *Lewis* because the case involved a high-speed chase by police officers, resulting in the death of a passenger on the fleeing motorcycle, and the Court was concerned that in

---

[273] *See, e.g.*, Michael H. v. Gerald D, 491 U.S. 110, 127 n.6 (1989) (plurality opinion of Justice Scalia, joined by Chief Justice Rehnquist).
[274] Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833, 849 (1982)
[275] *Id.* at 877.
[276] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003) (holding the Texas statutory ban on same-sex sodomy violates the Due Process Clause).
[277] *See, e.g.*, Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990) (recognizing the right of a competent person to refuse unwanted medical treatment, while upholding Missouri's clear and convincing evidence standard for determining the wishes of the individual).
[278] 521 U.S. 702, 703 (1997)
[279] 523 U.S. 833 (1998).
[280] *Id.* at 846.

such a situation there is no opportunity for actual deliberation.[281]

In another case, *DeShaney v. Winnebago County Department of Social Services*, the Court held that government's "failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause."[282] Because government had not created the danger to the child, or rendered the child more vulnerable to abuse by his father, the Court refused to find liability absent a "custodial relationship" or a government-created danger.[283] Substantive due process claims arise in a wide variety of circumstances. For our purposes, it is sufficient to say that the current Court does not favor such claims, and that it is certainly not willing to expand the protection provided by substantive due process.[284]

While the Court was interpreting § 1983 narrowly and imposing a number of substantial barriers to plaintiffs seeking relief under that statute, it was also interpreting other civil rights provisions narrowly. On several occasions, Congress has reacted to a Supreme Court decision interpreting a civil rights statute narrowly by amending the statute to specifically overturn the result reached by the Court.[285] For example, the Pregnancy Discrimination Act[286] was passed in 1978, shortly after the decision in *General Electric Co. v. Gilbert*,[287] which held that discrimination based on pregnancy was not sex discrimination within the meaning of Title VII. In *Grove City College v. Bell*,[288] the Court narrowly interpreted Title IX,[289] which bans sex discrimination by educational institutions receiving federal financial assistance, to cover discrimination only in the program that actually receives the financial assistance, rather than the entire educational institution. This narrow interpretation was specifically rejected in 1988, when Congress passed the Civil Rights Restoration Act[290] for the purpose of correcting the *Grove City* decision.

Congress passed the Civil Rights Act of 1991[291] to address several decisions narrowly interpreting § 1981[292] and Title VII of the Civil

---

[281] *Id.* at 851.

[282] 489 U.S. 189, 197 (1989) (finding no due process violation when county welfare workers failed to protect a young child from his abusive father even though the welfare department had intervened on numerous occasions and the caseworkers were fully aware of the danger).

[283] *Id.* at 189–90.

[284] Rosalie Berger Levinson, *Reining in Abuses of Executive Power Through Substantive Due Process*, 60 FLA. L. REV. 519, 523–25 (2008).

[285] *See supra* note 252 and accompanying text.

[286] 42 U.S.C. § 2000e-2(k) (2006).

[287] Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976).

[288] Grove City Coll. v. Bell, 465 U.S. 555 (1984).

[289] 20 U.S.C. §§ 1681–1688 (2006).

[290] Civil Rights Restoration Act of 1988, Pub. L. No. 100-259, 102 Stat. 31 (codified as amended at 42 U.S.C. § 2000d-4a (1988)).

[291] Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

[292] 42 U.S.C. § 1981 (2006).

Rights Act of 1964.[293] One of those decisions was *Patterson v. McClean Credit Union*,[294] interpreting § 1981, which prohibits race discrimination in contracting, to exclude "postformation conduct,"[295] thereby rejecting racial harassment, failure to promote, and discharge claims brought by an African-American woman. The 1991 Act specifically defined the term "make and enforce contracts" to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."[296] This Act also overturned portions of the decision in *Ward's Cove Packing Co. v. Atonio*,[297] narrowing the scope of disparate impact claims brought under Title VII of the Civil Rights Act of 1964.[298]

The ADA Amendments Act of 2008,[299] which became effective in January 2009, overturned the results in several Supreme Court decisions narrowly interpreting the Americans with Disabilities Act.[300] Most recently, the Lilly Ledbetter Fair Pay Act of 2009[301] was passed to correct the result in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*.[302] The Act provides that the time limit for filing pay discrimination claims under Title VII begins to run each time an employee receives a paycheck that manifests discrimination, rather than when the employer makes a discriminatory pay decision. In each of these corrective Acts, Congress explicitly noted its disagreement with the Court's statutory interpretation.[303]

For purposes of this article an attempt to analyze and provide potential responses to all Supreme Court decisions adversely affecting civil rights litigation is unnecessary. One possible solution to this problem would be to amend federal statutes that provide substantive rights. This could alter the Court's narrow interpretation of those statutes. However, the feasibility of such amendments depends on the political climate. A more drastic solution would be to amend the Constitution, but the amendment process provided in Article V[304] of the Constitution was designed to set a high bar, and the current political climate is not conducive to expanding civil rights through constitutional amendments. Another way to fix the Court's previous narrow

---

[293] 42 U.S.C. §§ 2000e–2000e-17 (2006).

[294] Patterson v. McClean Credit Union, 491 U.S. 164, 164 (1989).

[295] *Patterson*, 491 U.S. at 165.

[296] 42 U.S.C. § 1981(b).

[297] Ward's Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

[298] 42 U.S.C. § 2000e–e-17 (2006).

[299] ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3557 (2008).

[300] *See, e.g.*, Toyota Motor Mfg., Inc. v. Williams, 534 U.S. 184 (2002); Albertsons, Inc. v. Kirkingburg, 527 U.S. 555 (1999); Murphy v. United Parcel Serv., 527 U.S. 516 (1999); Sutton v. United Airlines, Inc., 527 U.S. 471 (1999).

[301] 42 U.S.C. § 2000e-5(e)(3) (2006).

[302] Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162 (2007).

[303] *E.g.*, H.R. 2764, 110th Cong. (2008), Consolidated Appropriations Act, Pub. L. No. 110-325, 122 Stat. 3557 (2008).

[304] U.S. CONST. art. V.

interpretations is through the Court itself. This, however, is also unlikely due to the current make-up of the Court and the vacancies that seem likely in the near future. A third option is to substitute statutory rights for the narrowly interpreted provisions of the Constitution, as attempted with the Religious Freedom Restoration Act,[305] which followed the Court's strict interpretation of the Free Exercise Clause in *Department of Human Resources of Oregon v. Smith.*[306] This option failed because the Court narrowly interpreted Section 5 of the Fourteenth Amendment, the legislative power utilized by Congress in passing the Religious Freedom Restoration Act.[307]

Nevertheless, there may be circumstances where Congress has the power to substitute a statutory right for a narrowly-interpreted constitutional provision through Section 5 of the Fourteenth Amendment, the Commerce Clause[308] or the Spending Clause,[309] combined with the Necessary and Proper Clause.[310] That, however, is for another article. The limited scope of Part IV is to suggest an amendment to § 1983 that would address some of the problems identified in Part II, above.

IV. A PROPOSED AMENDMENT TO § 1983

In Part II, I identified seven major areas—individual immunity, governmental entity immunity, supervisory liability, color of law, limitations on punitive damages, enforcement of statutory rights, and preclusion—in which the Court's interpretation of § 1983 has significantly narrowed a plaintiff's chances of recovery. Most of these limiting decisions, I contend, are not supported by either the language of § 1983 or public policy considerations.[311] Therefore, it is time for

---

[305] 42 U.S.C. § 2000bb, *et seq.* (2006).

[306] Employment Div., Dep't. of Human Res. of Ore. v. Smith, 494 U.S. 872 (1990).

[307] *See* City of Boerne v. Flowers, 521 U.S. 507 (1997).

[308] U.S. CONST. art. I, § 8, cl. 3.

[309] U.S. CONST. art. I, § 8, cl. 1.

[310] U.S. CONST. art. I, § 8, cl. 18. Justice Scalia, in his concurring opinion in *Gonzales v. Raich*, 545 U.S. 1, 34–42 (2005), argues in favor of utilizing the Necessary and Proper Clause to supplement the Commerce Clause where, for example, "regulation of an intrastate activity may be essential to a comprehensive regulation of interstate commerce even though the intrastate activity does not itself 'substantially affect' interstate commerce," or regulation of "noneconomic local activity" is "a necessary part of a more general regulation of interstate commerce." *Id.* at 37 (Scalia, J., concurring). In *Katzenbach v. Morgan*, 384 U.S. 641, 650 (1966), the Court compared Section 5 of the Fourteenth Amendment to the Necessary and Proper Clause, stating "[b]y including Section 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause." Later, in Oregon v. Mitchell, 400 U.S. 112 (1970), Justice Douglas wrote that "[c]ongressional power under Section 5 of the Fourteenth Amendment is . . . buttressed by congressional power under the Necessary and Proper Clause." *Id.* at 149 n.13 (Douglas, J., concurring in part and dissenting in part).

[311] Of course, the Court is not supposed to rewrite a statute simply because Congress has not acted in accordance with the Court's view of what is good public policy.

Congress to repair at least some of the damage the Court has inflicted on § 1983 and those who are entitled to rely upon it for relief from violations of their civil rights. Following is a proposed amended version of the statute:

42 U.S.C. § 1983.

(a) Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

(b) For the purpose of this section:

(1) Any act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(2) "[U]nder color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia" includes the conduct of private individuals and entities that is (a) taken pursuant to an agreement with state or local government, (b) authorized by state or local government, (c) taken on behalf of, or at least in part for the benefit of, state or local government, (d) taken jointly with state or local government employees, agents or officials, (e) taken with the assistance of state or local government, or (f) taken in the performance of a public function that is traditionally an important function of state or local government.[312]

(3) When a person alleges a deprivation of "rights, privileges, or immunities secured by [section 1 of

---

[312] This subsection adopts an expansive view of "under color of law," consistent with *Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001), *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), *Terry v. Adams*, 345 U.S. 461 (1953), *Shelley v. Kraemer*, 334 U.S. 1 (1948), and *Marsh v. Alabama*, 326 U.S. 501 (1946). While this does not change the Court's decisions interpreting "state action" for Fourteenth Amendment purposes, it expands the reach of § 1983 for plaintiffs seeking to enforce (a) provisions of the Constitution that do not require state action, like the Thirteenth Amendment, and (b) federal statutes that provide substantive rights against private parties.

the Fourteenth Amendment to] the Constitution," conduct of private individuals and entities constitutes "state action" when it satisfies subsection (b)(2) and when its prohibition is necessary to remedy and deter violation of rights guaranteed by section 1.[313]

(4) The term "person," insofar as it describes those who "shall be liable to the party injured," includes individuals, states and state agencies, municipalities and local governmental agencies, and private entities that fall within subsection (b)(2).[314]

(5) Entities, both governmental and private, are subject to *respondeat superior* liability, *i.e.*, they are subject to liability for deprivations of protected rights caused by their agents and employees while acting within the scope of their agency or employment.[315]

(6) A supervisor "subjects, or causes to be subjected" another person "to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" where the supervisor was personally involved in the deprivation and where the supervisor either knew or should have known of the deprivation, but took no preventive or corrective action.[316]

---

[313] While Section 5 of the Fourteenth Amendment does not give Congress the power to enlarge substantially the substance of § 1 as defined by the Court, "Congress' power 'to enforce' [Section 1] of the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." Bd. of Trs., Univ. of Ala. v. Garrett, 531 U.S. 356, 365 (2001). This subsection prohibits "a somewhat broader swath of conduct" than Section 1 because it expands a bit the concept of "state action," when necessary "to remedy and to deter violation of rights guaranteed [by Section 1]." A challenge to conduct that falls within this "broader swath of conduct" is based on subsection (b)(3), not Section 1 of the Fourteenth Amendment, because Congress may not enlarge § Section rights beyond the Court's interpretation. This means that subsection (b)(3) provides a substantive right, not just a cause of action to enforce rights found elsewhere, i.e., there is a statutory right to challenge some private conduct that does not constitute "state action" under the Fourteenth Amendment. *See* Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 617 (1979) ("Unlike the 1866 and 1870 Acts, [Section] 1 of the Civil Rights Act of 1871 did not provide for any substantive rights—equal or otherwise. As introduced and enacted, it served only to ensure that an individual had a cause of action for violations of the Constitution . . . .").

[314] This subsection confirms the holding in *Monell v. Department of Social Services*, 436 U.S. 658 (1978), that a municipality is a "person," but overrules the holding in *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989), that neither a state nor a state agency is a "person" subject to suit under § 1983.

[315] This subsection invalidates the holding in *Monell v. Department of Social Services*, 436 U.S. 658 (1978), that a municipality cannot be held liable based on *respondeat superior*.

[316] This subsection invalidates the holding in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), that supervisory liability is a misnomer because a supervisor "is only liable for his or her own misconduct." *Id.* at 1949.

(c) The qualified immunity defense, recognized by the U.S. Supreme Court in several cases, is abolished and any "person," as defined above in subsection (b)(4), found to have violated the federal constitutional or statutory rights of another person in an action based on this section is liable for equitable relief and damages, including punitive damages.[317]

(d) The absolute immunity defense, recognized by the U.S. Supreme Court in several cases, is abolished and any "person," as defined above in subsection (b)(4), found to have violated the federal constitutional or statutory rights of another person in an action based on this section is liable for equitable relief and damages, including punitive damages, *except* state and municipal judges are immune from an award of damages against them in their individual capacity, based on action taken in their judicial capacity, that (i) is subject to review by a state appellate court, (ii) is entitled to preclusive effect under state preclusion law, (iii) provided a full and fair opportunity to litigate, as required by the Due Process Clause of the Fourteenth Amendment, and (iv) is the result of an adversarial proceeding.[318]

(e) Any "person," as defined above in subsection (b)(3), is subject to suit, brought pursuant to this section, in federal court and any protection provided by the Eleventh Amendment to the U.S. Constitution is abrogated.[319]

(f) Where the plaintiff satisfies the elements of this section, it creates a private right of action to enforce federal statutory rights without any showing that Congress, in clear and unambiguous terms, expressed its intent to create new

---

[317] This subsection eliminates both qualified immunity as a defense to claims for damages against governmental officials, agents and employees in their individual capacity, and governmental immunity from punitive damages. While *respondeat superior* liability, provided in subsection (b)(5), reduces the evils of qualified immunity, it needs to be eliminated because it is confusing and substantially increases the costs, including the unnecessary use of judicial resources, of litigation.

[318] This subsection eliminates absolute immunity as a defense to claims for damages against governmental officials, agents and employees in their individual capacity when performing certain functions, such as legislative, judicial and prosecutorial functions. However, it retains a more limited form of immunity for state and municipal court judges, acting in their judicial capacity under certain conditions. The conditions would lead to a different result in some cases decided by the Supreme Court, including *Mireles v. Waco*, 502 U.S. 9 (1991) (holding judge judicially immune from lawsuit regarding his order requesting and authorizing court officers to use excessive force against an attorney in bringing him into court), and *Stump v. Sparkman*, 435 U.S. 349 (1978) (holding judge immune from lawsuit regarding his order approving a "tubal ligation" procedure on a fifteen-year-old female based on an *ex parte* petition). Non-judicial officials performing a judicial function, as in *Butz v. Economou*, 438 U.S. 478 (1978), would no longer enjoy absolute immunity.

[319] This subsection abrogates the Eleventh Amendment protection, provided to states and state agencies, from an award of damages in an action in federal court. Congress has the power to abrogate the states' Eleventh Amendment immunity "through a valid exercise of its [Section 5] power..." when it makes "its intention to abrogate unmistakably clear in the language of the statute." Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721, 727, 721 (2003).

rights enforceable under this section, unless the statute the plaintiff seeks to enforce contains its own comprehensive enforcement mechanism that is inconsistent with a private right of action under this section.[320]

(g) Where necessary to prevent or deter unconstitutional conduct, an award of punitive damages is not limited by the amount of compensatory damages awarded or available civil and criminal penalties for comparable misconduct.[321]

(h) The statutory full faith and credit provision of 28 U.S.C. § 1738 does not apply to actions under this section where (i) the prior state "judicial proceedings" were in the context of a criminal prosecution, (ii) the federal claim was not actually litigated and decided in the prior state "judicial proceedings," or (iii) the prior state "judicial proceedings" were required to make the federal claim(s) ripe; administrative proceedings shall not be given preclusive effect in actions under this section.[322]

(i) The legal sufficiency of a complaint alleging a violation of § 1983, when one or more defendants seeks dismissal for failure to state a claim, will be determined under the standard established in *Conley v. Gibson*, 355 U.S. 41 (1957), accepting all allegations in the complaint as true, dismissal is proper only if there is no set of facts on which the plaintiff(s) would be entitled to relief against the defendant(s).[323]

These proposed amendments demonstrate a true commitment to protection of civil rights, unlike the Court's derogation of civil rights. A primary purpose of the Fourteenth Amendment, and § 1983, was to protect civil rights by imposing restrictions on the states. Counterintuitively, while states are generally subject to tort claims based on state laws, the Court has made it more difficult for civil rights plaintiffs than tort plaintiffs to succeed in obtaining remedies. The point is simply this—a person hit and injured by a government-owned vehicle is more likely to obtain full relief than a victim of excessive force by a police officer. As a result, there is little incentive for state and local government to make compliance with civil rights regulations a priority.

---

[320] This subsection invalidates the results in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), *Blessing v. Freestone*, 520 U.S. 329 (1997), and *Suter v. Artist M.*, 503 U.S. 347 (1992), all of which place restrictions on the use of § 1983 to enforce federal statutory rights.

[321] This subsection eliminates two of the "guideposts" established by the Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574–84 (1996).

[322] This subsection overrules the results in *Allen v. McCurry*, 449 U.S. 90 (1980), *Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984), *San Remo Hotel v. County of San Francisco*, 545 U.S. 323 (2005) and *Tennessee v. Elliott*, 478 U.S. 788 (1986), insofar as they held that § 1983 claims or issues were precluded.

[323] This subsection requires application of the standard adopted in *Conley v. Gibson*, 355 U.S. 41 (1957), rather than the standard adopted in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

Why should defendants who violate civil rights be held liable in damages only if the right at issue was "clearly established" at the time of the challenged conduct? This is not the standard applied in tort law. Why should governmental entities be absolved of liability for the unconstitutional actions of their agents, absent a showing that their agents were acting pursuant to entity policy? This is not the standard applied to entities in tort law, where *respondeat superior* is the norm. Why should supervisors who know, or would know if they cared, of the misconduct of their subordinates not be held responsible for such misconduct? This is a form of negligent supervision that is generally recognized as actionable in tort law. Why should states and state agencies be protected from civil rights liability by the misinterpretation of the Eleventh Amendment in *Hans*[324] and the resulting narrow interpretation of "person" in *Will*?[325]

I fully understand the difficulty of passing legislation that enhances protection for civil rights. Most states and their political subdivisions are already experiencing budget difficulties and the proposed legislation will be viewed as exposing those units of government to greater liability and costs. However, whether or not such legislative reform would result in greater costs to state and local government depends on how those units of government react. The goal is to deter violations of civil rights, not to increase costs. One way to reduce civil rights litigation and reduce the cost of such litigation is to make more serious efforts to prevent violations of civil rights. Ideally such legislation would result in fewer violations, not more and larger judgments. Taxpayers who are upset with judgments that have to be paid by state and local government should elect officials who make avoiding such liability a priority. Do not blame the victims who seek compensation for their injuries; rather, blame the government officials who engage in or tolerate the violations of civil rights.

Most taxpayers who complain about the cost of civil rights liability view the matter very differently when, for example, a family member is the victim of the use of excessive force by a police officer or a family member is fired from a government job because she failed to support the winning candidate for political office. While government units will not be able to prevent all civil rights violations, just as they cannot prevent all negligent conduct by agents and employees, they can contain costs by making prevention a priority.[326]

---

[324] Hans v. Louisiana, 134 U.S. 1, 10–11 (1890) (holding that states are protected from suits by their own citizens by the Eleventh Amendment).

[325] Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989) (holding that neither a state nor a state agency is a "person" subject to suit under § 1983).

[326] Exposure to liability for violations of civil rights, like exposure to tort liability, can be addressed through insurance. Governmental units with more accidents and more violations of civil rights will pay more for insurance, but that too can be addressed through preventive measures.

V. CONCLUSION

In many respects, the Supreme Court's interpretation of § 1983 is inconsistent with the statutory language, the purpose of the statute, and the importance of civil rights. Therefore, Congress should take corrective action, as it has done on several occasions in the past when the Court has misinterpreted civil rights statutes in favor of defendants.

Notes

Race and Civil Asset Forfeiture: A Disparate Impact Hypothesis

Mary Murphy*

I. INTRODUCTION: "HIGHWAY ROBBERY" IN TENAHA, TEXAS 78

II. CIVIL ASSET FORFEITURE LAW 80
   A. Civil Asset Forfeiture Law: History and Today 80
   B. Legal Challenges to Civil Asset Forfeiture 83

III. CRITICISM OF CIVIL ASSET FORFEITURE 86

IV. CIVIL ASSET FORFEITURE AND RACE 89
   A. Race and Law Enforcement Generally 90
      1. Racial Profiling 90
      2. Officer Bias & Training 92
   B. Race and Civil Asset Forfeiture 93
      1. Race and Civil Asset Forfeiture Hypothesis: Cash 94
      2. Race and Civil Asset Forfeiture Hypothesis: Consent to Search 95
      3. Race and Civil Asset Forfeiture Hypothesis: Highway Travel 96
      4. Race and Civil Asset Forfeiture Hypothesis: Limited Legal Agency 96

V. SUGGESTIONS FOR ACTION 97
   A. Legislative Reforms 97
   B. Reforms for the Racial Impact of Civil Asset Forfeiture 98

VI. CONCLUSION 99

* B.A., Georgetown University, 2006; J.D., The University of Texas School of Law, 2011. I would like to thank Professor Jennifer Laurin for her extensive editing and suggestions for this Note and her guidance in the law generally. I would also like to thank Kathryn Olson and all the TJCLCR staff for their patient and diligent work on this Note.

I. INTRODUCTION: "HIGHWAY ROBBERY" IN TENAHA, TEXAS[1]

In 2009, eight plaintiffs brought a civil action lawsuit against the City of Tenaha for violating 42 U.S.C. § 1983 by developing "an illegal 'stop and seize' practice of targeting, stopping, detaining, searching, and often seizing property from, apparently non-white citizens and those traveling with non-white citizens," in or near Tenaha, Texas.[2] The plaintiffs in *Tenaha* all share one common feature—they appeared to be non-white or were traveling with someone who appeared to be non-white when they were stopped on Highway 59.[3] The attorney representing the plaintiffs said that of the forty motorists he contacted in preparing the lawsuit, thirty-nine were Black.[4]

In the complaint, the plaintiffs describe five incidents in which Tenaha police officers illegally stopped, detained, interrogated, and searched drivers.[5] After the police officers asked the plaintiffs if they were carrying cash, the officers threatened to bring money laundering charges against the plaintiffs unless they permitted the officers to seize their property.[6] Two plaintiffs allege that the police officers threatened to take their children and put them in foster care if they did not authorize the seizure.[7]

Civil rights law, through 42 U.S.C. § 1983, provides a cause of action for plaintiffs whose right to equal protection of the law under the Fourteenth Amendment[8] is violated by the state. Few other cases assert a racial component in civil asset forfeiture through a § 1983 claim. For example, in deciding a motion for summary judgment in *Ibarra v. Barrett*, the court denied the equal protection claim of Latino defendants who alleged that the police seized their assets because of their race, but the court did find their Fourth Amendment rights were violated.[9] However, the small number of § 1983 claims for civil asset forfeiture does not necessarily mean that there are therefore no constitutional

---

[1] Howard Witt, *Highway Robbery? Texas Police Seize Black Motorists' Cash, Cars*, CHI. TRIB., Mar. 10, 2009, *available at* http://www.chicagotribune.com/news/nationworld/chi-texas-profiling_wittmar10,0,6051682.story.

[2] Complaint at 1–2, Morrow v. City of Tenaha, No. 2:08cv288 (E.D. Tex. June 30, 2009); *see* Civil Action for Deprivation of Rights, 42 U.S.C. § 1983 (2006).

[3] Complaint, *supra* note 2, at 4.

[4] MARIAN R. WILLIAMS ET AL., INSTITUTE FOR JUSTICE, POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 16 (2010).

[5] Complaint, *supra* note 2, at 2–10.

[6] *Id.*

[7] *Id.* at 10.

[8] U.S. CONST. amend. XIV, § 1.

[9] No. 3:05-0971, 2007 WL 1191003, at *6–12 (M.D. Tenn. Apr. 19, 2007) (finding that the plaintiff could not sufficiently demonstrate the defendants' discriminatory purpose, although there was sufficient evidence to raise a material issue on the discriminatory effect of the defendants' actions).

violations through the practice of civil asset forfeiture.[10] Rather, it may imply that the attorneys representing individuals in forfeiture proceedings do not have the time or expertise to bring a § 1983 claim.[11] The anecdotal evidence from Tenaha is informed by a great deal of literature concerning the importance of race in other areas of law enforcement. At present, there are no statistics on the racial breakdown of civil asset forfeiture stops and proceedings, but this Note presumes that the story from Tenaha is an indicator of a larger problem: civil asset forfeiture laws have a disparate impact on racial minorities.

Civil asset forfeiture is a tool used in preventing drug trafficking, money laundering, and other crimes. With civil asset forfeiture, as long as the officer suspects that the property is being used in the commission of a crime, a law enforcement agency can seize a person's property without arresting or charging that person with a crime.[12] Most state laws on civil asset forfeiture contain provisions that some or all of the proceeds obtained in a forfeiture go directly to the law enforcement agency that seized the property.[13] This creates a concern that the police officers' desire for funds for their department might motivate their civil asset forfeiture enforcement, rather than their duty to prevent crime.[14]

The legal system's check on the potential abuses in civil asset forfeiture has been difficult to enforce. First, an individual whose property is seized typically must appear in court to prove that the seized assets are not contraband.[15] Court appearances can be difficult for property owners who do not actually live in the jurisdiction where the forfeiture action is proceeding. Some of the plaintiffs in the Tenaha lawsuit do not live in Tenaha but instead were driving through on highways when their property was seized.[16] Besides the difficulty of travel, court appearances require a disruption in the lives of the property owners that can be difficult to overcome. The legislature has also had difficulty with successfully enacting civil asset forfeiture reforms.[17] The fact that civil asset forfeiture is indeed civil, and not criminal, also removes certain constitutional protections afforded to criminal

---

[10] E-mail from Chloe Cockburn, Attorney, Racial Justice Program, American Civil Liberties Union to author (May 11, 2010) (on file with the author).

[11] *Id.*

[12] *See infra* Part II.

[13] WILLIAMS, *supra* note 4, at 6.

[14] *See infra* Part III.

[15] Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 47 (1998) (discussing the method for challenging the government's seizure of property); *see also* American Civil Liberties Union, *Easy Money: Civil Asset Forfeiture Abuse by Police,* ACLU BLOG OF RIGHTS (Feb. 3, 2010), http://www.aclu.org/blog/racial-justice/easy-money-civil-asset-forfeiture-abuse-police.

[16] Complaint, *supra* note 2, at 2–3.

[17] *See* S.B. No. 1529, 81st Leg. (2009) *available at* http://www.legis.state.tx.us/tlodocs/81R/billtext/html/SB01529I.htm; Karis Ann-Yu Chi, *Follow the Money: Getting to the Root of the Problem with Civil Asset Forfeiture in California*, 90 CAL L. REV. 1635, 1649–57 (2002); *see also infra* Part V.

defendants.[18] The government's seizure of property is considered "less serious" than the deprivation of an individual's liberty through a criminal trial, so principles such as due process of law and the right to an attorney are not available for civil asset forfeiture.[19]

While a general discussion of potential civil asset forfeiture reform through case law and legislation is important, this Note instead explores the notion that race has a particular impact on law enforcement agencies' incentives when enforcing civil asset forfeiture laws in highway stops. First, Part II discusses the civil asset forfeiture laws in the United States. Then Part III explores some of the present scholarship that critiques civil asset forfeiture laws generally. Part IV explores social science literature regarding racial profiling and explores hypotheses on why civil asset forfeiture might have a disparate impact on racial minorities. Part V presents suggestions for reform of civil asset forfeiture, through legislation, legal challenges, and institutional reform in law enforcement agencies.

II. CIVIL ASSET FORFEITURE LAW

A. Civil Asset Forfeiture Law: History and Today

Civil asset forfeiture has its roots in English common law.[20] In the seventeenth century, statutes provided for the legal fiction of prosecution against property without criminal conviction of the property's owner, as "the property itself, without human intervention, caused the harm or violated the law."[21] In the United States, the expansion of civil asset forfeiture laws began in the 1970s and 1980s with the federal administration's commitment to the "War on Drugs."[22] The theory behind the forfeiture laws was that law enforcement agencies could target the drug trade by removing the capital that funded drug producers and dealers.[23]

In 1970, Congress passed the Comprehensive Drug Prevention and Control Act, which included a civil asset forfeiture provision allowing "the government to seize and forfeit drugs, drug manufacturing and storage equipment, and conveyances used to transport drugs."[24] Since

---

[18] WILLIAMS, *supra* note 4, at 10; Blumenson & Nilsen, *supra* note 15, at 47.

[19] Blumenson & Nilsen, *supra* note 15, at 47.

[20] Donald Boudreaux & A. C. Pritchard, *Civil Forfeiture and the War on Drugs: Lessons from Economics and History*, 33 SAN DIEGO L. REV. 79, 93 (1996).

[21] *Id.*

[22] WILLIAMS, *supra* note 4, at 10–11; *see also* Karis Ann-Yu Chi, Follow the Money: Getting to the Root of the Problem with Civil Asset Forfeiture in California, 90 CAL. L. REV. 1635, 1638–39 (2002) (discussing the history of civil asset forfeiture law in the United States).

[23] Blumenson & Nilsen, *supra* note 15, at 44–45.

[24] *Id.* at 44; *see* Controlled Substances Act, 21 U.S.C. § 881 (2006).

1970, the types of property available for seizure have expanded to include any real property or proceeds of a drug transaction, as well as any property of equal value to assets that are no longer available.[25] As part of the 1980s increased commitment to the War on Drugs, Congress passed the Comprehensive Crime Control Act of 1984.[26] The act included an equitable sharing provision that allows local law enforcement to keep up to eighty percent of the proceeds of forfeited property seized under federal law.[27] Today, the forfeiture section of the Controlled Substance Act states that subjected property includes,

> [a]ll moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance or listed chemical in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter.[28]

States also have their own laws on civil asset forfeiture. The Institute for Justice recently published a report on states' civil asset forfeiture laws, cataloguing not only the types of laws, but also how proceeds are distributed among law enforcement agencies.[29] Only eight states distribute no portion of proceeds from civil asset forfeiture to law enforcement agencies,[30] while twenty-six states send 100% of proceeds to law enforcement agencies.[31] Most states have a lower standard of proof required for forfeiture of assets than is required for a finding of personal guilt for the criminal activity to which the forfeiture is credited.[32] Most states also do not halt forfeiture proceedings against "innocent owners"—property owners who have not been convicted themselves of the crime associated with the forfeiture.[33]

The Institute for Justice report also suggested that states "circumvent" their own civil asset forfeiture laws through equitable sharing provisions from the Department of Justice's Asset Forfeiture Program.[34] Through equitable sharing, if a local law enforcement agency seizes assets in association with a federal crime, the assets go to

---

[25] Blumenson & Nilsen, *supra* note 15, at 44–45.

[26] Pub. L. No. 98-473 (codified as amended at 21 U.S.C. § 881 (2006)).

[27] Kyla Dunn, *Reigning in Forfeiture: Common Sense Reform in the War on Drugs*, FRONTLINE, http://www.pbs.org/wgbh/pages/frontline/shows/drugs/special/forfeiture.html.

[28] 21 U.S.C. § 881(a)(6).

[29] *See* WILLIAMS, *supra* note 4.

[30] *Id.* at 17 (states are Indiana, Maine, Maryland, Missouri, North Carolina, North Dakota, Ohio, and Vermont).

[31] *Id.* (states are Alaska, Alabama, Arkansas, Arizona, Delaware, Georgia, Hawaii, Idaho, Iowa, Kansas, Kentucky, Massachusetts, Michigan, Montana, Nevada, New Jersey, New Mexico, Oklahoma, Pennsylvania, South Dakota, Tennessee, Utah, Virginia, Washington, West Virginia, Wyoming).

[32] *Id.* at 22.

[33] *Id.* at 23.

[34] WILLIAMS, *supra* note 4, at 37.

the federal government; however, up to eighty percent of the proceeds are returned to the local agency.[35] California, Georgia, and Texas were among the many states criticized in the Institute for Justice report, and I will discuss those particular statutes in more detail below.[36]

California's civil asset forfeiture laws require that the state prove by clear and convincing evidence[37] that the property is

> moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, or securities used or intended to be used to facilitate any violation of [California law].[38]

In California, a petition of forfeiture must be filed within one year of the seizure of the property[39] and no underlying criminal conviction is necessary for the forfeiture.[40] Real property cannot be seized without a demonstration of exigent circumstances in a pre-seizure hearing.[41] Innocent property owners may make a claim for the property, which will trigger a forfeiture hearing, decided by a jury within thirty days.[42]

In accordance with California's Health and Safety Code, the state attorney general publishes an annual civil asset forfeiture report which includes statistical data on the number of cases initiated and the value of the assets seized by the county.[43] Sixty-five percent of revenues from assets seized in California go to law enforcement agencies.[44]

Georgia law requires that the state must file a complaint for forfeiture within sixty days of seizing the property,[45] but there is no additional guarantee of notice regarding the forfeiture to the people present at the seizure.[46] The state need only show that there was probable cause to seize the property, in which case no process is required.[47] The burden of proof is on the property owner to show either that the property was never used for an illegal activity at all or that he or she is an innocent owner and committed no crime.[48] One hundred percent of the proceeds from seized property go to law enforcement

---

[35] Blumenson & Nilsen, *supra* note 15, at 51.
[36] WILLIAMS, *supra* note 4, at 49, 54, and 92.
[37] CAL. HEALTH & SAFETY CODE § 11488.4(i)(4) (West 2010).
[38] *Id.* § 11470(f).
[39] *Id.* § 11488.4(a).
[40] *Id.* § 11488.4(i)(4).
[41] *Id.* § 11471(e).
[42] CAL. HEALTH & SAFETY CODE § 11488.5(c)(1)–(2) (West 2010).
[43] *Id.* § 11495; *see e.g.*, CALIFORNIA DEPARTMENT OF JUSTICE, ASSET FORFEITURE: 2008 ANNUAL REPORT *available at* http://www.ag.ca.gov/publications/2008_af/af.pdf.
[44] WILLIAMS, *supra* note 4, at 49.
[45] GA. CODE ANN. § 16-13-49(h)(2) (West 2010).
[46] *See id.* § 16-13-49(i)(1).
[47] *Id.* § 16-13-49(g)(2).
[48] WILLIAMS, *supra* note 4, at 54.

agencies.[49]

Texas civil asset forfeiture laws offer a large amount of discretion to the state.[50] The evidentiary standard for property is a preponderance of the evidence, rather than beyond a reasonable doubt as it is for a person charged with a crime.[51] On average, Texas receives approximately $22 million per year in equitable sharing from the U.S. Department of Justice.[52] Law enforcement agencies report forfeitures valuing, on average, approximately $20 million per year[53] and the state's laws allow agencies to keep up to 90% of proceeds from seized property.[54]

Texas law requires that if property is seized, the forfeiture proceedings must commence within thirty days of the seizure.[55] An attorney for the state files the forfeiture proceedings with the clerk of a district court, including a sworn statement by the law enforcement officer who conducted the seizure.[56] The attorney must give notice to the property owner, and if he or she was not in possession of the property at the time of the forfeiture, the person who was in possession is then made party to the proceeding.[57] The hearing follows the same procedures as civil lawsuits, and the state has the burden of proof by a preponderance of evidence that the property is subject to forfeiture.[58] Like California and Georgia, Texas does not require a criminal conviction for the forfeiture of property.[59]

B. Legal Challenges to Civil Asset Forfeiture

The United States Supreme Court has considered the legality of civil asset forfeiture from the Court's very inception. The Court held that under admiralty law, forfeiture was civil rather than criminal and due process did not require that a jury be present to hear the case.[60] The Court also held that the property owner's innocence was no defense[61] and that the claimant, not the government, bore the burden of proof.[62] These cases were limited to admiralty, customs, and piracy enforcement,

---

[49] *Id.*
[50] *See id.* at 92.
[51] *Id.* at 92.
[52] *Id.*
[53] WILLIAMS, *supra* note 4, at 93.
[54] *Id.* at 92.
[55] TEX. CODE CRIM. PROC. ANN. art. 59.04(a) (West 2009).
[56] *Id.* § 59.04(b).
[57] *Id.* § 59.04(j).
[58] *Id.* § 59.05(a)–(b).
[59] *Id.* § 59.05(d).
[60] United States v. La Vengeance, 3 U.S. 297, 301 (1796).
[61] The Brig Ann, 13 U.S. 289, 290–91 (1815).
[62] The Langdon Cheves, 17 U.S. 103, 104 (1819); Locke v. United States, 11 U.S. 339, 348 (1813).

whereas civil asset forfeiture laws apply to all criminal enforcement.[63] In a challenge to civil asset forfeiture in conjunction with criminal proceedings, the Supreme Court held that in rem forfeitures are not subject to the double jeopardy clause, because they are purely civil and not criminal in nature.[64]

The Court's most recent look at civil asset forfeiture upheld a Michigan state law that gave no protection to innocent owners whose property is used in commission of a crime.[65] The Court in *Bennis v. Michigan* also considered two important constitutional protections, the Takings Clause and the Due Process Clause.[66] The Fifth Amendment, applied to the states through the Fourteenth Amendment, establishes the principle of due process.[67] The Due Process Clause is an essential tenet of the U.S. criminal justice system, which allows criminal defendants the right to trial, the right to be tried by a jury, the right of appeal, and the right to attorneys and also affords property owners the right to due process of law before the government seizes their property, also known as a taking.[68] The Takings Clause of the Fifth Amendment states that "private property [shall not] be taken for public use, without just compensation."[69] Even if the state action that takes private property is legitimate—e.g. the effort to prevent drug trafficking—the property owner still retains rights with regard to that property.[70] The physical taking of real property is considered a per se taking and the property owner is entitled to just compensation, unless the property owner has no right to exclude the state based on some background state law.[71] In *Bennis*, the court held that the owner's intent to use his or her property legally does not negate the government's valid interest in seizing the property if it was used to commit a crime without the owner's knowledge.[72] Therefore, the government has not committed a taking without due process of law since the property was used in the commission of a crime. The Court in *Bennis* also held that the innocent property owner's rights under takings law were not violated through the civil asset forfeiture, stating that the "government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain."[73]

Another method to challenge civil asset forfeiture, and more

---

[63] WILLIAMS, *supra* note 4, at 10.
[64] United States v. Ursery, 518 U.S. 267, 274–80 (1996); *see also* Chi, *supra* note 22.
[65] Bennis v. Michigan, 516 U.S. 442 (1996).
[66] *Id.*
[67] U.S. CONST. amends. V, XIV.
[68] *See* U.S. CONST., amend XIV.
[69] U.S. CONST. amend. V.
[70] *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987); Dolan v. City of Tigard, 512 U.S. 374 (1994).
[71] *Id.*
[72] *See* Bennis v. Michigan, 516 U.S. 442, 446 (1996).
[73] *Id.* at 452.

specifically to address underlying issues of race, is through the Equal Protection Clause of the Fourteenth Amendment. Plaintiffs can seek a remedy for the violations of constitutional law through civil rights claims under 42 U.S.C. § 1983. Under the Fourteenth Amendment of the Constitution, no state shall "deny to any person within its jurisdiction the equal protection of the laws."[74] The Fourteenth Amendment jurisprudence protects individuals who, on the basis of race, are discriminated against by state law or action. When a law, such as civil asset forfeiture, is facially neutral but has a disparate impact on a racial group, the plaintiffs must show that racially discriminatory animus existed behind the state's law or policy.[75] This could be difficult to achieve with civil asset forfeiture because the overzealousness of police officers could be interpreted simply as a policy targeting drug crime, not a policy targeting racial minorities. Although the Court has maintained that racial animus in state action is necessary for a violation of the Equal Protection Clause,[76] Justice Ginsburg's dissent in *Ricci v. DeStefano,* citing *Griggs v. Duke Power,*[77] argues that "[i]n assessing claims of race discrimination, '[c]ontext matters.'"[78] While Ginsburg's dissent gives little concrete hope for an equal protection claim in civil asset forfeiture, it may be a sign of future progression of the law.

Property owners can also challenge the constitutionality of civil asset forfeiture through a selective prosecution claim under the Equal Protection Clause.[79] A claim of selective prosecution would show that police officers have chosen to stop based on race: officers could have found illicit materials on others, but chose not to investigate because they were white.[80] In order for this claim to prevail, a great deal of data would need to be gathered. It would need to make some showing of the percentages of people who were not stopped but could have been.[81] The Court outlined the rule to prove selective prosecution in *United States v. Armstrong*: the prosecutorial policy must have "a discriminatory effect and [be] motivated by a discriminatory purpose."[82]

Civil liberties groups and legislators have bemoaned the federal civil asset forfeiture laws in recent years. In 2000, a bipartisan Congress enacted the Civil Asset Forfeiture Reform Act of 2000.[83] Congressman Henry Hyde, who authored the bill, stated:

---

[74] U.S. CONST. amend. XIV.

[75] Washington v. Davis, 426 U.S. 229, 239 (1976) (holding that a police officer's test did not violate the Equal Protection Clause because it tended to promote whites over Blacks).

[76] *Id.*

[77] 401 U.S. 424 (1971).

[78] 129 S. Ct. 2658 (2009) (Ginsburg, J., dissenting) (quoting Grutter v. Bollinger, 539 U.S. 306, 327 (2003)).

[79] BREST ET. AL., PROCESSES OF CONSTITUTIONAL DECISION MAKING: CASES AND MATERIALS 1065 (5th ed. 2006).

[80] *Id.*

[81] *Id.*

[82] 517 U.S. 456, 457 (1996).

[83] 18 U.S.C. § 981 (2010) (codified as amended).

> Enlisted 25 years ago as a legitimate auxiliary tool in the so-called war on drugs, the legal doctrines of civil asset forfeiture have since been perverted to serve an entirely improper function in our democratic system of government—official confiscation from innocent citizens of their money and property with little or no due process of law or judicial protection.[84]

The Civil Asset Forfeiture Reform Act included a number of amendments, such as placing the burden of proof on the government rather than on the claimant, and providing representation for indigent defendants.[85] The Act, however, did not provide guidance or improvement on how proceeds from civil asset forfeiture would be distributed.[86] Without reforms to the distribution of proceeds, law enforcement agencies will continue to be motivated by money, rather than the enforcement of law, in seizing property.

III. CRITICISM OF CIVIL ASSET FORFEITURE

Civil asset forfeiture is designed to remove the capital involved in money laundering, organized crime, and drug sales from the market.[87] The underlying concept of civil asset forfeiture is that concentrating efforts on stopping drug dealers only stops individuals, who the industry will simply replace with others for the police to investigate and arrest.[88] With civil asset forfeiture, law enforcement can focus their investigations on the capital involved in the drug market rather than on individuals. By not developing cases against individuals, who are guaranteed significant constitutional and evidentiary protections, law enforcement saves valuable resources.[89]

Civil asset forfeiture is also a valuable tool for law enforcement agencies to earn revenue. Especially in an economy with strained public resources, civil asset forfeiture allows law enforcement agencies to directly connect their accomplishments to earnings for their department. This direct incentive can motivate law enforcement agencies that will be able to see the fruits of their labors.

In reporting the Tenaha, Texas lawsuit, the press has referred to the

---

[84] Alan Schlosser, *Asset Seizure Laws: A Civil Liberties Casualty of the War on Drugs*, ACLU OF NORTHERN CALIFORNIA, Oct. 27, 2000, http://www.aclunc.org/news/opinions/asset_seizure_laws_a_civil_liberties_casualty_of_the_war_on_drugs.shtml.

[85] WILLIAMS, *supra* note 4, at 11 & 113 n.12; *see also* 18 U.S.C. § 981 (2010).

[86] *Id.*

[87] *See* Blumenson & Nilsen, *supra* note 15, at 44.

[88] *See id.*

[89] *See id.*

law enforcement agency action as "highway robbery"[90] and a "shake down."[91] Because criminal charges are not required for civil asset forfeiture, the process seems counter to the notion that punishment should be meted out only when the individual has culpability. However, culpability cannot be strictly determined by whether a person is charged with a crime or not. Arrests and convictions require evidence. Thus, there may be a number of false negatives, in which the property is seized but the owner is not charged with a crime, although he or she did indeed commit that crime, because of a lack of evidence or the omission of evidence resulting from conflicts in the judicial process. This Note, however, presumes that there are a number of false positives—people who had not used their seized property in connection with a crime. Even if one does presume that all of the property owners are guilty, the principles of Due Process require a stronger showing of guilt than the standard used against seized property.

The first major criticism of civil asset forfeiture laws is that they "may shift law enforcement objectives to maximizing forfeiture proceeds rather than deterring crime."[92] In federal forfeiture cases, over 80% of the people whose property is seized are not charged with a crime.[93] There is evidence that law enforcement agencies use civil asset forfeiture for the purpose of padding their budgets, rather than strictly enforcing the law.[94] Criminologists report that up to 40% of law enforcement managers agree or strongly agree that civil asset forfeiture is necessary for their agency's budget.[95]

The second major criticism is that the burden of proof for finding that the seized property is subject to forfeiture is too low. Within the framework of drug enforcement, the government is entitled to the money from proceeds of drug trafficking, and can use civil asset forfeiture in order to obtain those proceeds.[96] However, civil asset forfeiture is problematic because the standard of proof required to take the property is lower than the standard of proof required to find the property owner guilty of a crime.[97] This is in conflict with the criminal justice system's value of culpability associated with crime, as it allows punishment of an individual who is not guilty in the legal sense of the word.[98]

The third major criticism of civil asset forfeiture laws is the limited

---

[90] Witt, *supra* note 1.

[91] Gary Tuchman & Katherine Wojtecki, *Texas Police Shake Down Drivers, Lawsuit Claims*, CNN (May 6, 2009), http://www.cnn.com/2009/CRIME/05/05/texas.police.seizures/; WILLIAMS, *supra* note 4, at 16.

[92] Chi, *supra* note 22, at 1635.

[93] *Id.* at 1647 n.99 (citing Barbara Metzler, *State Asset Forfeiture Law Faces Change; Drug Convictions Will Be Needed*, PRESS ENTERPRISE, Nov. 15, 1993, at B3 (citing a 1991 investigation that found "80 percent of those who forfeit property to the government are never charged with a crime")).

[94] WILLIAMS, *supra* note 4, at 17–18; *see also* Boudreaux & Pritchard, *supra* note 20.

[95] WILLIAMS, *supra* note 4, at 17–18.

[96] Boudreaux & Pritchard, *supra* note 20, at 123–24.

[97] *Id.* at 80.

[98] *See* WILLIAMS, *supra* note 4, at 6.

procedural rights of the property owner in these cases.[99] Because the property owner of the seized property is not an official party to the lawsuit, the property owner does not necessarily have the same procedural guarantees, such as the right to an attorney or to a jury trial.[100] Under the Fifth Amendment of the U.S. Constitution, individuals charged with a crime are entitled to certain procedural guarantees, or "due process."[101] The Fifth Amendment also guarantees procedural protections for individuals who are deprived of property whether or not they were charged with a crime.[102] Benefits jurisprudence in administrative law includes a test to balance the government's and the individual's interests in receiving benefits. This test is used when a benefit recipient challenges the administrative procedure used to deny their benefits.[103] The judiciary uses a balancing test to determine whether there has been a violation of the Fifth Amendment. As explained in *Mathews v. Eldridge*, this civil due process balancing test includes three factors:

> (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional procedural safeguards; and (3) the Government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail.[104]

The complication with civil asset forfeiture is that the property is charged with a crime, a consideration missing from the United States Bill of Rights. The legislature and the judiciary, therefore, largely determine entitlement to procedural rights, with discretion left to the judiciary to determine the requirements of due process.[105] Because these procedural rights are not guaranteed, there are few venues of recourse for property owners.[106]

While some states' laws afford more procedural protections to the property owner, the discretion granted to law enforcement and the judiciary can circumvent these procedural protections. In 1994, California passed forfeiture law reforms that made criminal conviction a predicate of the forfeiture determination, raised the burden of proof to beyond a reasonable doubt, placed the burden of proof on the

---

[99] *See* Chi, *supra* note 22, at 1636–37 (noting that limited procedural rights will not curb civil asset forfeitures because of the financial incentives for police officers).

[100] *Id.* (also noting that some states have passed civil asset forfeiture reforms that do guarantee the right to a jury trial and to an attorney).

[101] U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime . . . nor be deprived of life, liberty, or property, without due process of law . . .").

[102] *Id.*

[103] Mathews v. Eldridge, 424 U.S. 319 (1976) (balancing the government and individuals entitlement interests).

[104] *Id. at* 321.

[105] Boudreaux & Pritchard, *supra* note 20, at 118.

[106] *See supra* Part II.

government, and protected innocent owners.[107] However, there are a number of loopholes to avoid the state's restrictions, including equitable sharing with the federal government[108] (so that the local law enforcement can gain proceeds from forfeiture without following state law), and granting sovereignty to municipalities when local law conflicts with the state law.[109]

One final criticism of civil asset forfeiture is the political incentives of cities, municipalities, and states to use civil asset forfeiture. The War on Drugs has been an important political issue for years. A 2009 study found that the more politically conservative a population, the more likely asset forfeiture was utilized.[110] The study pointed to the "longstanding conservative political emphasis on drug crimes and efforts to enhance law enforcement's mandate relating to drug crime offenses."[111] It also noted that conservative politics also value conservation in budgetary spending, creating incentives for law enforcement agencies to gain proceeds outside of budgetary restrictions.[112]

IV. CIVIL ASSET FORFEITURE AND RACE

Presently, no available data addresses the racial breakdown of civil asset forfeiture actions. However, race might play a part in motivations for civil asset forfeiture as indicated by available data on racial profiling, search and seizure stops in highway interdiction, and the general disparate impact on racial minorities as a result of the War on Drugs—why is this? This Part seeks to provide data on the relevance of race in other areas of law enforcement and then posit some hypotheses of why racial minorities are disproportionately affected by civil asset forfeiture. While the financial incentives may be the primary motivating factor for law enforcement agencies in using civil asset forfeiture, law enforcement agencies also have incentives to target racial minorities.

---

[107] Chi, *supra* note 22, at 1655–56; WILLIAMS, *supra* note 4, at 49.

[108] Chi, *supra* note 22, at 1662–64; WILLIAMS, *supra* note 4, at 49.

[109] Chi, *supra* note 22, at 1659.

[110] Ronald Helms & S. E. Costanza, *Race, Politics and Drug Law Enforcement: An Analysis of Civil Asset Forfeiture Patterns Across U.S. Counties*, 19 POLICING & SOC'Y 1, 15 (2009).

[111] *Id.*

[112] *Id.*

A. Race and Law Enforcement Generally

1. Racial Profiling

The use of profiling in criminal investigation is not on its face a racially biased practice. It is foremost an important tool for law enforcement to narrow fields of suspected criminals. Police officers and organizations "use characteristics associated with either a particular crime or group of crimes to develop a profile of someone likely to engage in illicit behavior."[113]

With proper justification, race may be considered a valid option for profiling. The Second Circuit Court of Appeals considered racial profiling in *Brown v. City of Oneonta.*[114] In *Oneonta*, police officers conducted a "roundup" of Black male individuals after an elderly woman claimed that a Black male broke into her home and attacked her, cutting his own hand in the process.[115] The police officers conducted the roundup by requesting a list of, and then questioning, the local university's Black male students.[116] After that produced no results, the police officers conducted a "sweep," which involved stopping non-white individuals on the street and looking for cut marks consistent with the victim's description of her attacker's injury.[117] Although the police officers exclusively used the suspect's race as an excuse to stop a group of individuals, the court held that "absent other evidence of discriminatory racial animus, [the police] could act on the basis of that description without violating the Equal Protection Clause."[118]

Oneonta upheld racial profiling, but only under the circumstances in which a crime had already been committed. Although police have notably used profiling to more efficiently investigate serial killers, police also use profiling to prevent crimes that have yet to occur.[119] For example, the "drug-courier profile" is for "proactive detection of common drug offenses *as yet unknown to the police*."[120] This type of drug enforcement is different from investigations of known drug dealers or users, and starts with a suspicion of a crime based on profiles of behaviors not obviously associated with crime rather than the actual knowledge that a crime has been committed.[121] The use of profiles may encourage officers to rely on instinct or hunches when deciding to

---

[113] DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK 16 (The New Press 2002).
[114] Brown v. City of Oneonta, 221 F.3d 329 (2d Cir. 1999).
[115] *Id.* at 334.
[116] *Id.*
[117] *Id.*
[118] *Id.* at 333–34.
[119] HARRIS, *supra* note 113, at 17–21.
[120] *Id.* at 19 (emphasis in original).
[121] *Id.* at 19–20.

investigate a person or location.[122]

One justification for targeting racial minorities to conduct searches in person[123] or on highways is based on the "hit-rate" theory.[124] The hit-rate theory of racial profiling implies that in fact, racial minorities are more likely as a group to be trafficking drugs, and therefore police officers are authorized to be more suspicious of them.[125] However, some available data on highway stops tend to negate that proposition. Data on suspected drug stops in Maryland from 1995 through 1996 indicated that while Blacks comprised 70% of drivers searched, only 28.4% of Black drivers searched were discovered with narcotics, and 28.8% of white drivers searched were discovered with narcotics.[126] Of the drivers searched, Blacks and whites were equally likely to have narcotics in the car.[127] New Jersey data from 2000 indicated that while Blacks and Latinos comprised 78% of drivers searched, the hit-rate for whites was 25%, 13% for Blacks, and 5% for Latinos.[128]

Highway stops have been an essential part of the federal government's focus on preventing drug trafficking. The Drug Enforcement Agency began Operation Pipeline in 1984.[129] Operation Pipeline is "a nationwide highway interdiction program that focuses on private motor vehicles."[130] Operation Pipeline is credited to a Florida Highway Patrol officer, Bob Vogel, who developed a system of "cumulative similarities" among drug-traffickers, which he used to target highway motor vehicle operators.[131]

Although Officer Vogel's system became a national model, the Eleventh Circuit found that some of the individuals who had been stopped by Officer Vogel were entitled to suppress the narcotics discovered in their car.[132] The court found that the mere fact that the defendants had not made eye contact with the officer's patrol car and were driving on the highway at 3:00 a.m. did not justify the stop made by Officer Vogel.[133] The court stated that though "Trooper Vogel's 'hunch' about the appellants proved correct ... it is not sufficient to justify, *ex*

---

[122] *Id.* at 26–28.

[123] *See* Terry v. Ohio, 392 U.S. 1, 30 (1968) (police officers are permitted to stop and search an individual if the "police officer observes unusual conduct which leads [him or her] reasonably to conclude in light of [his or her] experience that criminal activity may be afoot."); *see also* Stephen Clarke, *Arrested Oversight: A Comparative Analysis and Case Study of How Civilian Oversight of the Police Should Function and How it Fails*, 43 COLUM. J.L. & SOC. PROBS. 1, 29 (2009) (discussing the fact that most complaints made to the New York City Civilian Complaint Review Board involving "stop-and-frisk[s]" are made by young men who are Blacks and Latinos).

[124] HARRIS, *supra* note 113, at 79.

[125] *Id.*

[126] *Id.* at 79–80.

[127] *Id.* at 80.

[128] HARRIS, *supra* note 113, at 80.

[129] U.S. Drug Enforcement Administration, *Operations Pipeline and Convoy*, http://www.justice.gov/dea/programs/pipecon.htm (last visited January 2, 2011).

[130] *Id.*

[131] HARRIS, *supra* note 113, at 21–23.

[132] United States v. Smith, 799 F.2d 704, 707, 712 (11th Cir. 1986).

[133] *Id.*

post facto, a seizure that was not objectively reasonable at its inception."[134] The court used a reasonableness standard in determining whether the officer's stop was pretextual (meaning the officer's evidence for a stop was unrelated to his or her suspicion of criminal activity).[135] Today, the DEA website describes Operation Pipeline as a profiling system looking at a driver's "characteristics, tendencies, and methods" that law enforcement uses to consider whether an individual who is *already stopped for traffic violations* might be a drug trafficker.[136]

Although Officer Vogel did not explicitly say that race was a factor in his system of cumulative similarities, the lesson from his conduct creates a concern that relying on officer discretion can lead to a racially disparate effect. The following subsection seeks to analyze possible effects of officer bias on racial minorities. The American Civil Liberties Union's report on drug enforcement task forces on Texas highways found that there are racial disparities in task forces' traffic interdiction.[137] In 2004, the majority of Texas task forces were more likely to search Blacks and Latinos than whites.[138] By targeting racial minorities for drug crimes, police officers are more likely to conduct an in-person or highway stop. This would make racial minorities more susceptible to civil asset forfeiture for the mere fact that they are more likely to be stopped by police.

2. *Officer Bias & Training*

An explanation beyond the hit-rate theory for the racial disparity in search and seizure rates is officer bias. In searches resulting from highway or traffic stops, whether for probable cause or by consent, the police officer has a great deal of discretion in identifying and interpreting evidence.[139] This discretion may permit the personal biases of the police officer to impact his or her actions in stops and searches. These actions may include not only the initial decision to pull a motorist over, but also the decision to search the vehicle, and the decision to pursue civil asset forfeiture.

An officer's bias might not necessarily be developed from his or

[134] *Id.* at 708.

[135] *Id.* at 709. ("We conclude, however, that in determining when an investigatory stop is unreasonably pretextual, the proper inquiry, again, is not whether the officer *could* validly have made the stop but whether under the same circumstances a reasonable officer *would* have made the stop in the absence of the invalid purpose.")

[136] U.S. Drug Enforcement Administration, *supra* note 129.

[137] AMERICAN CIVIL LIBERTIES UNION, FLAWED ENFORCEMENT: WHY DRUG TASK HIGHWAY INTERDICTION VIOLATES RIGHTS, WASTES TAX DOLLARS, AND FAILS TO LIMIT THE AVAILABILITY OF DRUGS IN TEXAS 14 (May 2004), *available at* http://www.aclu.org/racial-justice/flawed-enforcement-report.

[138] *Id.*

[139] *See* Robin S. Engel & Richard Johnson, *Toward a Better Understanding of Racial and Ethnic Disparities in Search and Seizure Rates*, 34 J. CRIM. JUST. 605, 608 (2006).

her own perceptions of racial minorities. Highway interdiction training, an important aspect of the War on Drugs and Operation Pipeline, describes particular vehicle and occupant characteristics that, supposedly, are more likely to indicate drug couriers.[140] This training provides clues for officers once they have pulled a vehicle over. The officer should look for everything from the odor of marijuana to inconsistencies in the motorists' or occupants' jewelry and socioeconomic status.[141] Nonverbal clues by motorists such as nervous behavior, gang symbols in dress, bloodshot eyes, and possession of walkie-talkies all indicate the suspect is a likely drug courier.[142]

Social science research has shown that these clues, while facially neutral, contain racial bias. Marketing research shows that non-criminal Black motorists often use the clothing, jewelry, and vehicles that are described as suspect in highway interdiction training as suspect.[143] Social psychology studies also show that non-Black police officers are more likely to describe nonverbal communications by Black motorists as "suspicious."[144] A variety of social psychology studies have found that Blacks are more likely than whites to use less eye contact and more smiles, pitch variations, pauses, laughs, and body movements, all synonymous with the highway interdiction training's description of "lying."[145]

B. Race and Civil Asset Forfeiture

Racial profiling may be particularly problematic in civil asset forfeiture for a number of reasons. Some of the more general criticisms of civil asset forfeiture are that it gives the government too much power over an individual's private property and limits an individual's ability to contest the seizure. There are a number of specific factors that not only indicate why racial minorities might be targeted in civil asset forfeiture, but also why they may be less likely to successfully contest forfeiture after the property has been seized.

A 2009 study examined four hypotheses of civil asset forfeiture utilization.[146] The study found that in areas of large Black populations, the amount of forfeiture dollars gathered by law enforcement agencies per drug arrest is smaller than in areas of fewer minority residents.[147] The study pointed to theories that law enforcement agencies use a "more

---

[140] *Id.* at 609–11.
[141] *Id.* at 610.
[142] *Id.*
[143] *See id.* at 612–13.
[144] Engel & Johnson, *supra* note 139, at 611.
[145] *Id.* at 611–12.
[146] Helms & Costanza, *supra* note 110.
[147] *Id.* at 13.

formal and punitive approach in communities with larger [B]lack populations" than an "alternative mechanism" such as civil asset forfeiture.[148]

The 2009 study also looked to the correlation between areas of greater income disparity without specific consideration of race and the use of asset forfeiture in drug arrests.[149] The research indicated that the greater the income disparity in an area, the more likely the law enforcement agencies would use civil asset forfeiture.[150] The authors propose that given that social control by law enforcement agencies is more difficult in areas of "expanded inequality," law enforcement agencies may be more likely to use alternative methods such as civil asset forfeiture to enforce law and order.[151] This allows law enforcement agencies to use civil asset forfeiture "to retain the threat of formal trial while imposing a basic fine for the activity."[152] This method, while within the legal right of the police officer, is coercive. Officers are able to make a threat to obtain the assets civilly, even though the criminal burden of proof would be much harder to meet.

1. Race and Civil Asset Forfeiture Hypothesis: Cash

Police officers might target racial minorities because they are more likely to carry cash due to a lack of access to national banks. Racism in banking is a well-documented occurrence in American society.[153] Large national banks have historically been reluctant to open branches in minority neighborhoods, and have been known to offer unsatisfactory loans to racial minorities.[154] A report on banking in African- and Asian-American communities in Los Angeles noted that "[r]elatively fewer formal bank branches operate in disproportionately African-American and lower-income communities. In these communities, check-cashing stores, pawnshops, and loan brokers provide transaction and credit services supplied elsewhere by banks."[155]

This could explain why racial minorities are more likely to carry large amounts of cash while traveling for innocent reasons. Because there are fewer banks in Black neighborhoods, Blacks are more likely to

---

[148] *Id.*

[149] *Id.* at 13–14.

[150] *Id.*

[151] Helms & Costanza, *supra* note 110, at 14.

[152] *Id.*

[153] *See generally* Anthony D. Taibi, *Banking, Finance, and Community Economic Empowerment: Structural Economic Theory, Procedural Civil Rights, and Substantive Racial Justice*, 107 HARV. L. REV. 1463 (1994) (discussing the Equal Credit Opportunity Act).

[154] *See generally* Gary Dymski & Lisa Mohanty, *Credit and Banking Structure: Asian and African-American Experience in Los Angeles*, 89 AMER. ECON. REV. 362 (1999) (discussing the banking and lending structures in African- and Asian-American communities in Los Angeles).

[155] *Id.* at 363.

use cash systems or lending to make purchases. Given that money laundering and the illegal drug trade are cash industries, it is reasonable that police officers might conclude that an individual carrying a large amount of cash might be using it for that purpose. This conclusion, however, disproportionately impacts racial minorities, who are more likely than whites to be carrying large amounts of cash.

2. Race and Civil Asset Forfeiture Hypothesis: Consent to Search

In the *Tenaha* complaint and in most civil asset forfeiture cases, the property owners have consented to a search of their vehicle or person.[156] Although the Supreme Court has upheld the legality of consent searches,[157] some states have banned the use of such searches on highways because of the problem of racial profiling.[158] In 2010, Colorado introduced a law that will create a *Miranda*-like requirement that police officers inform motorists of their Fourth Amendment right not to be searched during a highway stop.[159]

However, the concern remains that despite consent, even after specific instructions as to their Fourth Amendment rights, some people may not fully contemplate the meaning of their rights due to extenuating circumstances. This notion is explored within the standard used to determine whether or not consent was obtained for a search: "if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[160] This reasonable person standard does not account for racial disparity because it presumes that there is one type of person who has the same experiences and expectations from encounters with the police.[161] In fact, racial minorities are more likely to be suspicious of the police, and therefore likely to feel threatened by the police.[162] Thus, racial minorities may consent to searches because they feel threatened, not because they truly are comfortable with the police officer's search.

---

[156] E-mail from Chloe Cockburn, *supra* note 10; AMERICAN CIVIL LIBERTIES UNION, *supra* note 137, at 14.

[157] *See* United States v. Drayton, 536 U.S. 194 (2002).

[158] *The Fourth Amendment and Antidilution: Confronting the Overlooked Function of the Consent Search Doctrine*, 119 HARV. L. REV. 2187–88 (2006) (discussing the political problems with consent searches).

[159] Joseph Boven, *Consent-to-Search Bill Takes Aim at Racial Profiling*, COLO. INDEP., Feb. 24, 2010, *available at* http://coloradoindependent.com/47988/consent-to-search-bill-takes-aim-at-racial-profiling; *see also* H.B. 10-1201, 67 Leg. 2d Sess. (Colo. 2010) *available at* http://www.leg.state.co.us/clics/clics2010a/csl.nsf/fsbillcont/34BDAFC4BDBE212B872576A8002BC0D3?Open&file=1201_01.pdf; *see generally* Miranda v. Arizona, 384 U.S. 436 (1966).

[160] INS v. Delgado 466 U.S. 210, 215 (1984) (quoting United States v. Mendenhall 446 U.S. 544, 554 (1980)).

[161] Robert V. Ward, *Consenting to Search and Seizure in Poor and Minority Neighborhoods: No Place for a "Reasonable Person"*, 36 HOW. L.J. 239, 241 (1993).

[162] *Id.*

3. Race and Civil Asset Forfeiture Hypothesis: Highway Travel

Highway interdiction training also teaches police officers that motorists driving from Florida, Texas, New Mexico, and Arizona to a northern urban area are more likely to be drug couriers, as those are the states through which the majority of illegal drugs are brought into the United States.[163] This policy could disproportionately affect Blacks, as approximately 85% live in either a southern state or a more urban area in the north,[164] making them more likely to be traveling to or from these locations.

The southern states do not have an efficient or expansive train system, and air travel is expensive. Thus, all southerners might be more likely to travel on highways rather than by other methods of transportation. It is unlikely that there are more racial minorities on the road than whites based on the demographic breakdown of the nation as a whole, but racial minorities may be more likely to travel on highways than by other means of transportation.

4. Race and Civil Asset Forfeiture Hypothesis: Limited Legal Agency

Racial minorities may have more difficulty effectively petitioning for their property after it has been seized by highway police officers because they may be less likely than whites to have access to defense attorneys. Access to experts, those who have "specialized knowledge not commonly available," such as lawyers, are a valuable social resource.[165] Experts can connect "individuals to valuable knowledge, elucidating information that would otherwise be incomprehensible or inaccessible for laypersons, and providing specialized services."[166] A 2004 study found that whites are more likely than racial minorities to have expert contacts.[167] Even controlling for network size, since whites tend to have larger networks than racial minorities, whites were 37% more likely to have an expert contact.[168] Surprisingly, while whites' access to experts has remained stable over the past twenty years, racial minorities' probability in access to experts has decreased from 24% to 16%.[169]

---

[163] Engel & Johnson, *supra* note 139, at 613.
[164] *Id.*
[165] Erin York Cornwell & Benjamin Cornwell, *Access to Expertise as a form of Social Capital: An Examination of Race- and Class-based Disparities in Network Ties to Experts*, 51 SOC. PERSP. 853, 856 (2008).
[166] *Id.*
[167] *Id.* at 864.
[168] *Id.*
[169] *Id.* 867

Because racial minorities may be more likely to not have access to civil asset forfeiture lawyers or legal advice than whites, they may not be able to effectively petition the government once their property has been seized.

V. SUGGESTIONS FOR ACTION

This Part looks to protect the innocent motorists whose assets are seized or forfeited without sufficient evidence. Although the exact number of false positives in civil asset forfeiture cannot be determined, the following suggestions look at targeting civil asset forfeiture laws based on principles of justice. Any false positive, in which an innocent person's assets are seized, is detrimental to society, and many would prefer to see criminals go free than to see innocent people burdened by law enforcement action. The implications of race in civil asset forfeiture make these false positives particularly troublesome. The Fourteenth Amendment guarantees equal protection under the law,[170] and any law that has a disparate impact on racial minorities should be carefully considered.

A. Legislative Reforms

The first, and rather unlikely, suggestion proposes to remove the economic incentives for drug-traffickers by legalizing drugs. Civil asset forfeiture, as it is known today, can be an abuse of discretion by police officers, motivated by greed and racial bias rather than zeal for the enforcement of drug laws.[171] Scholars have criticized the War on Drugs as an inefficient use of law enforcement resources.[172] Drug offenses can be viewed as a victimless crime, and civil liberty scholarship suggests that a person might have the right to use and even abuse drugs so long as that does not affect others.[173] The criminalization of drug use creates a black market that results in a number of other crimes, including murder, assault, and robbery. Ending the War on Drugs could free up resources to target the real criminals who kill and abuse others in order to profit from the black market. While drug smuggling would surely continue, and drug couriers would continue to use our nation's highways, perhaps the number of drug couriers would significantly decrease, as economic incentives to participate in the black market would be diminished.

Legislatures could target the culpability problem in civil asset

[170] U.S. CONST. amend XIV, § 1.
[171] *See supra* Part III.
[172] *See generally*, Boudreaux & Pritchard, *supra* note 20.
[173] *Id.* at 90.

forfeiture by requiring criminal convictions of the property owner or possessor before forfeiture. Only Nebraska and Wisconsin require the burden of proof to be beyond a reasonable doubt.[174] In North Carolina, civil asset forfeiture essentially does not exist—all asset forfeitures are criminal proceedings.[175] On the other hand, seizing property prevents future crimes by removing the property from the market. There is no reason, however, not to require proof beyond a reasonable doubt that the property was indeed being used for a crime. This can be accomplished with a criminal conviction.

Texas, for example, has recently tried and failed to enact legislative changes to civil asset forfeiture. In the 2009 legislative session, State Senator John Whitmire, Chair of the Criminal Justice Committee, suggested amendments to Chapter 59 of the Texas Code of Criminal Procedure.[176] Senator Whitmire's proposal included an "Audits and Investigation" section, which would allow the state auditor to investigate any law enforcement agency in connection with a seizure.[177] The auditor would look into how the proceeds from the seized property were being spent in the law enforcement agency.[178] Senator Whitmire's bill also included definitions of how the money could be spent, and specifically prohibited law enforcement agencies from using the money to lobby the judiciary.[179]

Federal lawmakers could defer to state laws on civil asset forfeiture by removing the equitable sharing provisions from the Controlled Substances Act.[180] By removing the equitable sharing provisions, the federal government would make local law enforcement agencies accountable only under state laws on civil asset forfeiture. This would allow states that have already restricted civil asset forfeiture to actually protect citizens within their borders.

B. Reforms for the Racial Impact of Civil Asset Forfeiture

While the suggestions for legislative action may be the final tool for radical change in civil asset forfeiture laws, there are a number of minor suggestions that could protect innocent motorists. First, to combat officer bias in highway and *Terry* stops, officers should undergo more training to become familiar with the likelihood that behavior by racial minorities would seem "suspicious" to them. Not all police officers are

---

174 WILLIAMS, *supra* note 4, at 22.

175 *Id.*

176 TEX. CODE CRIM. PROC. ANN. art. 59 (West 2001).

177 S.B. 1529, 81st Leg. (Tex. 2009), *available at* http://www.legis.state.tx.us/tlodocs/81R/billtext/html/SB01529I.htm.

178 *Id.*

179 *Id.*

180 21 U.S.C. § 881 (2006).

biased, and not all suspects are racial minorities, but officer training could perhaps bridge the culture gap between some officers and some citizens in order to better protect the rights of these citizens.

Furthermore, law enforcement agencies should collect data on the race of individuals subject to civil asset forfeiture. Although many law enforcement agencies do not collect data on race in law enforcement proceedings, some do.[181] The data could inform the public on the relevance of race in civil asset forfeiture, and perhaps create another avenue of reform for this highly criticized practice. The data collection could also make law enforcement officers themselves more aware of the characteristics of the motorists that they pull over. This awareness might improve their cognizance of race while enforcing the law.

This information could also help groups like the property owners in Tenaha. With the ability to recognize and analyze any particular patterns in police action, they could better demonstrate a legal harm by the behavior of the police officers.

Finally, public interest and legal groups could work with civil asset forfeiture attorneys to conduct a broader investigation of the types of clients subject to civil asset forfeiture. With an information exchange between attorneys, they may be able to notice patterns, and then might be able to seek the advice of civil rights attorneys should a § 1983 claim appear appropriate. There are a number of public interest groups already dedicated to ending civil asset forfeiture, but perhaps with the outrage at the racial component, true change can be accomplished.

VI. CONCLUSION

Because civil asset forfeiture laws often include provisions where proceeds go to police officers, they pose a unique and disingenuous incentive for police officers in carrying out forfeiture actions. This incentive might play out along racial lines due to more than just simple discrimination against minorities; racial minorities as a group might have characteristics that make them more likely to be subjected to civil asset forfeiture proceedings. In order to investigate the racial distinctions in civil asset forfeiture proceedings, police departments should keep data on forfeitures by the property owner's race. Through § 1983, property owners could seek a remedy for the violation of their constitutional right of equal protection under the law because of the disparate impact of civil asset forfeiture laws on racial minorities. To prevail in disparate impact claim, a plaintiff need not necessarily show that a facially neutral policy (that has an adverse affect on a particular racial group) have any

[181] *See* Clarke, *supra* note 123 (New York City Police Department); J. Mitchell Pickerill, Clayton Mosher & Travis Pratt, *Search and Seizure, Racial Profiling, and Traffic Stops: A Disparate Impact Framework*, 31 LAW & POL'Y 1 (2009) (Washington state law enforcement).

discriminatory intent behind it.[182] This jurisprudence and the constitutional requirement that laws should affect all citizens equally, regardless of race, indicates that race matters. Race matters because of the potential for police officers to make assumptions about an individual. Although, the assumptions may be false, they make police officers more suspicious and therefore more likely to investigate racial minorities because of their race. This harms racial minorities by making them disproportionately susceptible to police action and therefore more likely to have their property confiscated and their liberty disrupted through civil asset forfeiture proceedings.

---

[182] *See* Washington v. Davis, 426 U.S. 229, 239 (1976).

Arab Americans, Affirmative Action, and a Quest for Racial Identity

Christine Tamer*

I. INTRODUCTION 101

II. THE WORST OF BOTH WORLDS 103
   A. Post 9-11 Racism, Hate, and Discrimination 105
   B. Discrimination, Racism, and Overt Acts of Hate on Campus 106

III. OFFICIALLY WHITE; REALISTICALLY BLACK 108
   A. Check it Right, You Ain't White! 112
   B. The Mark of Blackness 114

IV. RACE-BASED AFFIRMATIVE ACTION AND WHY ARAB AMERICANS SHOULD BE INCLUDED 117
   A. Arab American Students on Campus 121
   B. The Campus Quad and Beyond 125
   C. Getting Outside the Box 126

V. CONCLUSION 127

I. INTRODUCTION

> "If I see someone come in and he's got a diaper on his head and a fan belt around that diaper on his head, that guy needs to be pulled over and checked." – U.S. Congressman John Cooksey of Louisiana, September 17, 2001[1]

---

* J.D. Candidate, 2011, The University of Texas School of Law; B.A. Baylor University, 2008. I would like to thank Professor Justin Driver for his guidance and counsel in the preparation of this Note. I would also like to express my gratitude to the editors and staff of the Texas Journal on CIVIL LIBERTIES & CIVIL RIGHTS and my husband, Jonathan Bassham, for his inspiration and support. This Note is dedicated to my grandfather, Roger Tamer.

[1] Steve Ritea, *Republicans Say Cooksey Used Poor Choice of Words*, TIMES-PICAYUNE (New Orleans), Sept. 21, 2001, at 3.

Sand nigger, camel jockey, towel head. Disloyal, threatening, foreign. Billionaires, bombers, belly dancers. Fundamentalist, extremist, militant. Dune coon, raghead, Mohammedan. Dirty, derelict, vermin. *Terrorist.*

Historically Arab Americans[2] have been negatively stereotyped in a variety of ways. Today, Arab Americans have essentially been "raced as terrorists."[3] The classification of Arab Americans as officially "white" in the census, while society perceives Arab Americans as socially "black," is problematic. It denies a group that is historically and presently suffering discrimination the benefits and protections of minority status, as well as the benefit of official recognition as a way of conferring identity. The main argument of this Note is that undergraduate colleges and universities should recognize Arab Americans as a minority for purposes of their race-based affirmative action programs since Arab Americans contribute to the diversity rationale as set forth by the Supreme Court. The purpose of this Note is not to analyze the pros and cons of affirmative action or the diversity rationale, but rather to argue that as long as such affirmative action programs exist, Arab Americans should be recognized as contributing to a race-based diversity rationale.

This Note first briefly outlines the recent history of discrimination, racism, bias, and stereotypes against Arab Americans, with a focus on discrimination and racism in the context of colleges and universities. Next, this Note describes how society perceives Arab Americans and why classifying Arab Americans as white in the census is both arbitrary and harmful. Then, this Note argues that Arab Americans have essentially been given the "mark of blackness," rather than a so-called "white privilege" in today's society. The Note goes on to discuss the diversity rationale for affirmative action as articulated in *Grutter v. Bollinger*, and to describe how enrolling a critical mass of Arab American students can contribute to diversity. Finally, this Note calls on colleges and universities to recognize Arab American students by giving them their own race "box" on college applications for purposes of their affirmative action programs, even if the census still officially classifies Arab Americans as white.[4]

---

[2] Throughout this Note I will refer to "Arab American" as a distinct racial group of people. I realize that grouping people of Middle Eastern descent under the title of "Arab" is problematic in itself, and I merely use this label for the sake of simplicity. Additionally, I recognize that there are Arab people who have immigrated to this country or who are here on visas and thus using the term "American" is in many ways under-inclusive. However, the main focus of this Note is on people of Arab descent who are living in America.

[3] Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the "Racing" of Arab-Americans as "Terrorists,"* 8 ASIAN L.J. 1, 12 (2001) (internal quotations omitted).

[4] Recognition of Arab Americans, as distinct from the white majority, is important for reasons beyond affirmative action, diversity, and identity. For instance, currently Arab Americans are the subject of heightened racial profiling. Because Arab Americans are classified as white the extent of such profiling has gone uncounted since, as put by Roughy Shalabai, president of the Arab American Bar Association, "[y]ou can't tell whether Arab-Americans are being profiled if we're counted with

II. THE WORST OF BOTH WORLDS

> "Arab spokesmen similarly argue that the Arab world is being branded anti-American because of the extremism of a few. But that's nonsense. In that world, hatred of the U.S. and anti-social international behavior are nearly universal." – Zev Chafets, "Arab Americans Have to Choose," September 16, 2001[5]

Although the Supreme Court has rejected the use of affirmative action as a way of remedying societal discrimination,[6] it is still important to recognize that Arab Americans' experience in the United States falls within the social justice rationale. Nevertheless, remedying societal and racial discrimination against minorities, including Arab Americans, greatly motivates support for affirmative action.[7] For instance, Justice O'Connor's majority opinion in *Grutter v. Bollinger* was arguably influenced by a social justice rationale in imposing a potential twenty-five-year limit on affirmative action, as "time limits are normally associated with affirmative action programs designed to remedy past discrimination, not those aimed at ensuring a diverse student body"[8] since the "benefits of diversity are forever."[9] Certain scholars have also noted that after the 1989 Supreme Court case *City of Richmond v. J.A. Croson Co.*,[10] "the need to justify the inclusion of particular groups in

---

whites." *See* JOHN TEHRANIAN, WHITEWASHED: AMERICA'S INVISIBLE MIDDLE EASTERN MINORITY 167 (2009) (discussing an Illinois law that requires police officers to identify the race of individuals they stop and how a majority of police officers initially checked the "Asian/Pacific Islander" box when stopping Arab Americans before being instructed that Arab Americans should be classified as white).

[5] Zev Chafets, *Arab Americans Have to Choose*, N.Y. DAILY NEWS, Sept. 16, 2001, *available at* http://www.nydailynews.com/archives/opinions/2001/09/16/2001-09-16_arab_american_have_to_choose.html.

[6] *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 306 (1978) (rejecting the affirmative action rationales of "reducing the historic deficit of traditionally disfavored minorities," "countering the effects of societal discrimination," and increasing professional services to disadvantaged communities).

[7] Angela Onwuachi-Willig, *The Admission of Legacy Blacks*, 60 VAND. L. REV. 1141, 1149, n.28 (2007); Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939, 946–47 (1997) ("A judge will be more likely to read precedent as permitting a broader range of action if the judge is personally convinced there are good reasons to do so, even if those good reasons are reasons (like societal discrimination) that must go unstated. Thus, a justice faced with the question whether diversity as a justification for affirmative action survives strict scrutiny might well be influenced by her (unstated) views about why diversity cannot be achieved without affirmative action – which might well turn on the effects of societal discrimination.").

[8] Kevin R. Johnson, *The Last Twenty-Five Years of Affirmative Action?*, 21 CONST. COMMENT. 171, 184 (2004).

[9] Onwuachi-Willig, *supra* note 7, at 1149 n.28.

[10] 488 U.S. 469 (1989). In this case, the the City of Richmond's affirmative action plan, which required prime contractors on city-funded construction to award 30 percent of their subcontracts to minority business enterprises; the Court invalidated the plan because there was insufficient evidence of past discrimination. *Id.* at 477–78, 498. The City of Richmond provided evidence that minority

affirmative action programs became constitutionally mandated."[11]

While racism against other minorities is arguably declining, at least in respect to overt forms of racism,[12] racism against Arab Americans remains at a comparatively high level.[13] A university's use of voluntary race-conscious admissions policies remains an important opportunity for those seeking to mitigate vestiges of past wrongs and ameliorate the effects of ongoing discrimination. The Supreme Court stated in *Shaw v. Reno*[14] that our Constitution encourages us to weld together various racial and ethnic communities, and to avoid the racial balkanization that has plagued other nations.[15] In *Grutter v. Bollinger*,[16] the University of Michigan's race-based admissions program emphasized "racial and ethnic diversity with special reference to the inclusion of students from groups that have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers,"[17] while also seeking "a mix of students with varying backgrounds and experiences who will respect and learn from each other."[18] Thus, it is important that universities first recognize that Arab Americans are a group that has been historically, and is currently, discriminated against.[19]

---

businesses received less than one percent of prime contracts and that minority contractors had minimal participation in state contractor associations. *Id.* at 499. However, the Court found this evidence, as well as a congressional determination that discrimination depressed construction, insufficient to support a plan that used race classification. *Id.* at 499–500.

[11] George LaNoue & John Sullivan, *Deconstructing Affirmative Action Categories*, *in* COLOR LINES: AFFIRMATIVE ACTION, IMMIGRATION, AND CIVIL RIGHTS OPTIONS FOR AMERICA 75 (John Skrentny ed., 2001) (citing *City of Richmond*, 488 U.S. at 506) (pointing to Justice O'Connor's argument that "[t]here is absolutely no evidence of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the city's construction industry").

[12] *See, e.g.*, United States v. Clary, 846 F. Supp. 768, 779 (E.D. Mo. 1994) ("[I]ntentional discrimination is unlikely today . . . most Americans have grown beyond the evils of overt racial malice . . . ."); Antony Page & Michael J. Patts, *Poll Workers, Election Administration, and the Problem of Implicit Bias*, 15 MICH. J. RACE & L. 1, 22–23 (2009) (noting that "[r]acism has drastically changed in the United States—moving from a regime where explicit prejudice was the order of the day to one where publicly expressing racist views can make one a social pariah" and that "overt racism has declined"); Janet Ward Schofield & Leslie R.M. Hausmann, *The Conundrum of School Desegregation: Positive Student Outcomes and Waning Support*, 66 U. PITT. L. REV. 83, 94 (2004) ("There has undoubtedly been a true decline in traditional racism.").

[13] *See infra* notes 19–43 and accompanying text.

[14] 509 U.S. 630 (1993).

[15] *Id.* at 648–49 (citing Wright v. Rockefeller, 376 U.S. 52, 66–67 (Douglas, J., dissenting)).

[16] 539 U.S. 306 (2003).

[17] *Id.* at 316.

[18] *Id.* at 314.

[19] The systematic racism engaged in by the government and society against Arab Americans after 9/11 was extensive. Numerous reports, articles, and cases demonstrate the extent of the hate crimes and discrimination suffered by Arab Americans. However, for purposes of this Note, the main focus will be on racist incidents and discriminatory attitudes that have and still do exist on college campuses.

A. Post 9/11 Racism, Hate, and Discrimination

> "[T]he only answer is ethnic profiling. Every Middle-[E]astern-looking truck driver should be pulled over and questioned wherever he may be in the United States." – Mona Charen, Jewish World Review, Oct. 17, 2001[20]

While extreme racism against Arab Americans existed long before September 11, 2001,[21] the events of that day provided legitimacy to anti-Arab racists and caused a major upsurge in hate crimes and illegal discrimination against Arab Americans.[22] During the first nine weeks following the 9/11 terrorist attacks, the American-Arab Anti-Discrimination Committee (ADC) confirmed more than 700 violent incidents toward Arab Americans (or those seeming to resemble the physical appearance of an Arab American).[23] Over 1000 incidents of hate crimes against Arab and Muslim Americans were reported by February 2002.[24] Arab Americans also faced an immense increase in discrimination in the workplace as employers became reluctant to hire them and more eager to dismiss them or treat them with hostility at work.[25] Between September 2001 and September 2002, the ADC received more than 800 complaints of employment discrimination against Arab Americans—a 400 percent increase above previous annual rates of employment discrimination against Arab Americans in the past decade.[26] Furthermore, after 9/11, sixty percent of Americans (compared

---

[20] Mona Charen, *Two Fears*, JEWISH WORLD REVIEW, Oct. 17, 2001, http://www.jewishworldreview.com/cols/charen101701.asp.

[21] Racism against Arab Americans is not simply a post-9/11 phenomenon. There were numerous instances of racial violence against Arab Americans after the TWA terrorist hijacking in 1985 and after the first Gulf War. Nabeel Abraham, *Anti-Arab Racism and Violence in the United States*, *in* THE DEVELOPMENT OF ARAB-AMERICAN IDENTITY 155, 161 (Ernest McCarus ed., 1994). For instance, a 1991 ABC News poll during the first Gulf War found that 59 percent of Americans associated Arabs with terrorism. TEHRANIAN, *supra* note 4, at 122. Similarly, after the Oklahoma City Bombing of the Murrah Federal Building, the government received more than 200 reports of threats, harassment, and assault against Arab Americans and Muslims. The predisposition of American society in associating "terrorist" with Arab Americans prevailed even in the face of the reality that a white Caucasian was the one responsible for the attack. Jason A. Abel, *Americans Under Attack: The Need for Federal Hate Crime Legislation in Light of Post-September 11 Attacks on Arab Americans and Muslims*, 12 ASIAN L.J. 41, 48 (2005).

[22] *See* STEVEN SALAITA, ANTI-ARAB RACISM IN THE USA: WHERE IT COMES FROM AND WHAT IT MEANS FOR POLITICS TODAY 105 (2006) (arguing 9/11 allowed large numbers of Americans who previously disliked Arabs to express that dislike throughout the events of everyday life without fear of retribution or negative reaction); AM.-ARAB ANTI-DISCRIMINATION COMMITTEE, *Report on Hate Crime and Discrimination Against Arab Americans: The Post-September 11 Backlash* 19 (Hussein Ibish ed., 2003), *available at* http://www.adc.org/PDF/hcr02.pdf [hereinafter ADC 2003 Report] (noting that while Arab Americans have long faced problems with racism, the problem absorbed a widespread intensity post-9/11).

[23] ADC 2003 Report, *supra* note 22, at 20.

[24] Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1575 n.1 (2002).

[25] ADC 2003 Report, supra note 22, at 20.

[26] *Id.*

to eighty-one percent of Americans who opposed racial profiling in 1999)[27] said racial profiling was acceptable, especially if directed at Arabs.[28] Another Gallup poll of Americans showed that one in three favored internment of people of Arab descent, similar to that of the Japanese in World War II.[29] Surprisingly, according to a 2002 Gallup Poll, African Americans, who currently battle racial profiling themselves, were the number one supporters of racial profiling against Arab Americans, seventy-one percent approving of such measures.[30] Today, there should be no hesitation for universities to begin to see Arab Americans as a group that has been "historically discriminated against," especially because the bulk of the "historical" discrimination has been throughout the past decade.

B. Discrimination, Racism, and Overt Acts of Hate on Campus

> "Arabs do nothing on impulse . . . Muslims, who have no allegiance to any country. Their only allegiance is to Islam. This is what they have been taught since birth. It is all they know. Muslims have no borders." – David Horowitz, frontpagemagazine.com, March 7, 2005[31]

In the wake of September 11th, Arab Americans on university campuses experienced an immense number of hate crimes and discrimination. At the University of Arizona, a freshman's head was bashed into a brick wall after leaving class.[32] At Pierce College, two

---

[27] Frank Newport, *Racial Profiling is Seen as Widespread, Particularly Among Young Black Men*, GALLUP NEWS SERVICE, Dec. 9, 1999, *available at* http://www.gallup.com/poll/3421/Racial-Profiling-Seen-Widespread-Particularly-Among-Young-Black-Men.aspx.

[28] David A. Harris, *Racial Profiling Revisited: "Just Common Sense" in the Fight Against Terror?*, 17-SUM CRIM. JUST. 36, 37 (2002).

[29] Jeffrey M. Jones, The Impact of the Attacks on America, GALLUP NEWS SERVICE, Sept. 25, 2001, *available at* http://www.gallup.com/poll/4894/Impact-Attacks-America.aspx. See also Volpp, supra note 24, at 1576–77 ("There is now public consensus that racial profiling is a good thing, and in fact necessary for survival").

[30] Robert A. Levy, *Blacks for Profiling*, NATIONAL REVIEW, Feb. 6, 2002, *available at* http://old.nationalreview.com/comment/comment-levy020602.shtml.

[31] AM.-ARAB ANTI-DISCRIMINATION COMMITTEE, REPORT ON HATE CRIMES AND DISCRIMINATION AGAINST ARAB AMERICANS: 2003-2007 88 (Hussein Ibish ed., 2008) *available at* http://www.ibishblog.com/sites/default/files/hcr07.pdf [hereinafter ADC 2008 REPORT] (alteration in original).

[32] ADC 2003 REPORT, *supra* note 22, at 107. These are just a few of the many reported incidents of hate crimes and discrimination against Arab Americans at colleges after 9/11. In addition, Arab American children were readily discriminated against and the victim of hate crimes in their secondary schools. For instance, an Arab American high school student was harassed during a football game by an opposing team member threatening, "You f****** Arab terrorist, you bombed us Americans and now I am going to kill you." Although the referee witnessed the incident, he refused to take any action. *Id.* at 109.

students wrote "die" across a Persian Club sign.[33] At the University of California, San Diego, a hijab was torn off a Muslim student's head.[34] At Arizona State University, an Arab American student was hit with eggs.[35] At the University of California, Berkeley, Arab American students received telephone death threats and hate mail.[36] At the University of Texas, a professor of Middle Eastern language and culture was spat on.[37] At the University of North Carolina, a Lebanese student was beaten by two college-aged men who yelled, "Go home terrorist."[38] At Wayne State University, vandals broke windows of the Muslim Students Association.[39] At the University of Nebraska, an Arab American employee received an email stating, "You must be put to death. I will go out of my way to kill every man, woman, and child that is even part of your people. You must be treated like the savage you are."[40]

While such incidents have decreased and such problems have become better contained, a "lingering distrust and underlying enmity remain in many places."[41] A later report published by the ADC in 2008 found that universities are still the scene of physical assaults, threats, and individual bias against Arab Americans.[42] For instance, in May 2005, "an Arab American student at Tufts University alleged that he was attacked and beaten unconscious" by a group outside a fraternity house who called him a terrorist and "Saddam supporter."[43] In March 2003, "an Arab American medical student reported that he was nicknamed Osama bin Laden by employees at the medical college."[44] In May 2004, a mural built by the Society of Arab Students at the University of California, Irvine was the target of arson.[45] Today, racist and other discriminatory incidents against Arab American students continue to occur at colleges and universities across the country. As recently as March 9, 2010, campus police at Brandeis University investigated whether vandalism against the Muslim Student Association should be characterized as a hate crime.[46]

Unlike many other races that have seen increasing progress

---

[33] *Id.*
[34] *Id.*
[35] *Id.* at 107.
[36] *Id.*
[37] ADC 2003 REPORT, *supra* note 22, at 108.
[38] *Id.* at 110.
[39] *Id.* at 108.
[40] *Id.* at 108–09.
[41] *Id.* at 107.
[42] ADC 2008 REPORT, *supra* note 31, at 63.
[43] *Id.* at 69.
[44] *Id.* at 65.
[45] *Id.* at 67.
[46] *Vandalism Reported at College Muslim Office*, WCVB-TV Boston, Mar. 9, 2010, http://www.thebostonchannel.com/news/22793330/detail.html.

throughout the years, Arab Americans suffer increasing rates of discrimination and racism. Critics of affirmative action who argue that racism is on the decline or that diversity does not work, are hard pressed to argue that racism is a thing of the past in the context of Arab American students.

III. OFFICIALLY WHITE, REALISTICALLY BLACK

> "Arabs aren't really human and most Americans would just like to drop a nuclear bomb on them—any of them" – Michael Savage, radio talk show host, September, 2008[47]

The official government categorization of Arab Americans as white or Caucasian denies Arab Americans, a group still suffering from discrimination, the protection of minority status. Arab American's legal classification as white essentially ignores the present extreme discrimination and racist attitudes toward Arab Americans in the United States. Given this context of racism, bias, and bigotry, the population at large sees Arab Americans as part of the "other" rather than as part of the white majority.[48] Achieving census recognition of Arab Americans' classification as distinct from white is an important step in securing minority protections for Arab Americans as a group. There are numerous benefits that flow from such official recognition, including acknowledgment by colleges and universities that the increased presence of Arab Americans in undergraduate schools would contribute to the diversity rationale for affirmative action.

Racial classification of Arab Americans as white is arbitrary. In *St. Francis College v. Al-Khazraji*,[49] the Supreme Court determined that Arab Americans were Caucasian, but nevertheless held that an Arab American can bring a discrimination claim under 42 U.S.C. § 1981.[50] In *Al-Khazraji*, an Iraqi professor claimed he was denied tenure because of his "Arabian race," even though he was officially classified as a Caucasian.[51] Since Al-Khazraji's claim was brought under 42 U.S.C. § 1981, a nineteenth century anti-discrimination provision that addresses only racial discrimination, the question before the Court was whether Arab American was a protected racial category.[52]

---

[47] ADC 2008 REPORT, *supra* note 31, at 90.

[48] *See* Therese Saliba, *Resisting Invisibility: Arab Americans in Academia and Activism*, *in* ARABS IN AMERICA: BUILDING A NEW FUTURE 309 (Michael W. Suleiman ed., 1999).

[49] 481 U.S. 604 (1987).

[50] *Id.* at 613–14.

[51] *Id.* at 606–07.

[52] *Id.* at 607.

While the Court held that all ethnic and religious groups are protected against discrimination under federal law, the interesting part of the Court's opinion was its attempt to define race.[53] The Court recognized that racial categories changed over time and that "[i]t was not until the 20th century that dictionaries began referring to the Caucasian, Mongolian, and Negro races . . . ."[54] Justice White pointed out that that although some people believed that Caucasoid, Monogoloid, and Negroid were the three major races, many biologists and anthropologists criticized such racial classifications as "arbitrary and of little use in understanding the variability of human beings" and "some, but not all, scientists . . . conclude[d] that racial classifications are, for the most part, sociopolitical, rather than biological, in nature."[55] Although the Court acknowledged the difficult and often "arbitrary" result of racial classifications, the Court did not recognize Arab Americans as distinct from their arbitrary classification as Caucasian.[56] In a post-9/11 world, where discrimination and racism against Arab Americans is more prevalent than ever, such "arbitrary" classification of Arab Americans is especially problematic.

Today, the question of what is "white" remains open to interpretation. But according to the Census, it is clear that Arab Americans are officially classified as white.[57] The Office of Management and Budget (OMB) defines "white" for purposes of the census as "[a] person having origins in any of the original peoples of Europe, North Africa, or the Middle East."[58] However, what is strange about this classification is that the OMB, which promulgates the survey questions that make up the Census, specifically acknowledges that their data on race and ethnicity are not "anthropologically or scientifically based" but are based on social policy. Therefore, it instructs Census takers to choose a category based on the "individual's recognition in his community."[59] This practice leaves Arab Americans perplexed. If the

---

[53] *Id.* at 610–13.

[54] *Al-Khazraji*, 481 U.S. at 611.

[55] *Id.* at 610, n.4.

[56] What seems clear is that not even the Supreme Court can articulate precisely what makes someone white. For instance, in 1922, the Supreme Court hinted that there was a role for science in racial assignments in regard to who was white. *See* United States v. Ozawa, 260 U.S. 178, 196–98 (1922) (denying citizenship to a Japanese applicant because he was not Caucasian when at the time naturalization rights were limited to whites and persons of African nativity). But in 1923, the Court revised the definition of white person "to be interpreted in accordance with the understandings of the common man." United States v. Thind, 261 U.S. 204, 214 (1923) (revising the definition of "White person" to mean whatever is understood by the "common man" and excluding a man of Asian Indian origin from eligibility for citizenship).

[57] OFFICE OF MGMT. & BUDGET, STATISTICAL DIRECTIVE NO. 15: RACE AND ETHNIC STANDARDS FOR FEDERAL STATISTICS AND ADMINISTRATIVE REPORTING, (May 12, 1977) [hereinafter OMB DIRECTIVE NO. 15].

[58] *Id.*

[59] *See* OMB, Recommendations from the Interagency Committee for the Review of the Racial and Ethnic Standards to the Office of Management and Budget Concerning Changes to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 36874-01 (July 9, 1997). *See*

community does not perceive Arab Americans as white, then shouldn't Arab Americans check some other box? Or should they disregard this belief and check the white box because they have "white" origins? [60]

The Census is described as "one of the grand prizes in the politics of identity."[61] Therefore, the best way for Arab Americans to secure recognition and protection is through official acknowledgment in the Census. Numerous federal agencies, state governments, and local governments use Census data to determine important issues such as education grants, affirmative action programs, low-income housing tax credits, voting rights, employment rights, legislative redistricting, food stamps, and veteran benefits.[62] Since the 1960s, lawmakers have used Census data on race and ethnicity in creating civil rights legislation.[63] Abed Ayoub, legal advisor for the ADC, is one of many Arab Americans expressing concern over being counted as white in the 2010 Census.[64] One reason for his concern is that hate crimes against Arab Americans have dramatically increased since 9/11, but the FBI does not keep statistics on these hate crimes because the Census does not recognize Arab Americans as a racial group.[65]

However, it is what the Census does on an "unofficial" level that makes it so important that Arab Americans secure minority recognition.[66] The Census asks respondents to indicate the race in which they believe they belong. Today, self-classification is largely understood "as a matter of individual psychology, of an individual's highly subjective feelings of attachment to some group, its culture or language, or perhaps its historical experience."[67] The ability of a certain group to self-classify in the Census is limited by the specified categories supplied by the government. The Census derives its racial categories from OMB Statistical Directive No. 15, which David Hollinger famously called "the single event most responsible for the lines" that configure our

---

also Lisa K. Pomeroy, *Restructuring Statistical Policy Directive No. 15: Controversy over Race Categorization and the 2000 Census*, 32 U. TOL. L. REV. 67, 72 (2000).

[60] *See infra* part II.A.

[61] Naomi Mezey, *Erasure and Recognition: The Census, Race and the National Imagination*, 97 NW. U. L. REV. 1701, 1748 (2003).

[62] *Id.* at 1745.

[63] Shalini R. Deo, *Where Have All the Lovings Gone?: The Continued Relevance of the Movement For a Multiracial Category and Racial Classification After Parents Involved in Community Schools v. Seattle District No. 1*, 11 J. GENDER RACE & JUST. 409, 419 (2008) (noting that "[d]ata were needed to monitor . . . population groups that historically had experienced discrimination and differential treatment because of their race or ethnicity").

[64] Michel Martin, *Arab-American Activist Upset About Census Snub*, NPR, Jan. 4, 2010, *available at* http://www.npr.org/templates/story/story.php?storyId=122217013.

[65] *Id.*

[66] Although the OMB claims that the listed racial categories did not relate to minority group status and did not contribute to the determination of eligibility for federal programs, "the fact is that civil rights laws explicitly link census data with political access for minorities." Mezey, *supra* note 61, at 1746.

[67] PETER SKERRY, COUNTING ON THE CENSUS? RACE, GROUP IDENTITY AND THE EVASION OF POLITICS 43 (2000).

understanding of race.[68] Directive 15 was propagated in 1977 and laid out four races and two ethnicities to be used in all federal statistics.[69] In 1997, the racial categories were slightly amended to include five race categories: American Indian or Alaska Native; Asian; Black or African American; Native Hawaiian or Other Pacific Islander; and White, with two choices for ethnicity "Hispanic or Latino" and "Not Hispanic or Latino."[70] In the 2010 Census, the following racial categories are listed: White; Black, African American, or Negro; American Indian or Alaska Native; Asian Indian; Chinese; Filipino; Other Asian; Japanese; Korean; Vietnamese; Native Hawaiian; Guamanian or Charmorro; Samoan; Other Pacific Islander; or "Some other race."[71] Arab Americans are still expected to check the "white" box.

Whether or not Arab Americans are more discriminated against than other racial categories that received a check box on the Census form is irrelevant. The point is that the Census is one of the main ways that certain race-based group protections and entitlements are distributed, and it is an essential means of conferring identity. Therefore, it is especially important that Arab Americans secure recognition. The Census plays a dual role of "recognizing identity and also of conferring it."[72] "[C]ensus classifications have contributed to our understanding of race, to the grammar and logic of identity discourse, and to a particular way of imagining the nation."[73] Thus, while the Census classifies and tracks individuals according to race, it simultaneously creates race.[74]

It should be noted that some Arab Americans argue that now is not the time to seek official Census recognition.[75] Samia El-Badry, a noted demographer of Arab American descent who previously advocated for a separate Arab racial classification, has temporarily paused his efforts.[76] El-Badry argues that "[g]iven the present stance on terrorism, the war to eliminate a president of an Arab nation and the uneducated fear of the Muslim religion, this is not a time for us to have an Arab American

---

[68] DAVID A. HOLLINGER, POSTETHNIC AMERICA: BEYOND MULTICULTURALISM 33 (2000).

[69] Statistical Directive No. 15: Race and Ethnic Standards for Federal Statistics and Administrative Reporting, 43 Fed. Reg. 19,269-70 (May 4, 1978). These racial categories included American Indian or Alaskan Native, Asian of Pacific Islander, black and white, and the ethnic categories were Hispanic and "not of" Hispanic origin. *Id.*

[70] Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782-90 (Oct. 30, 1997).

[71] Bureau of the Census, The Questions on the Form, *available at* http://2010.census.gov/2010census/how/interactive-form.php. The Census also has a separate question for whether a person is of Hispanic, Latino, or Spanish origin and differentiates between Mexican/Mexican American and Chicano, Puerto Rican, Cuban, and other. *Id.*

[72] Mezey, *supra* note 61, at 1747.

[73] *Id.* at 1703.

[74] HEATHER M. DALMAGE, TRIPPING THE COLOR LINE: BLACK-WHITE MULTIRACIAL FAMILIES IN A RACIALLY DIVIDED WORLD 143 (2000).

[75] ALLIED MEDIA CORP., THE QUESTION OF RACE & THE U.S. CENSUS (2009), *available at* http://www.allied-media.com/Arab-American/census.html.

[76] *Id.*

category on any government form."[77] El-Badry largely bases his argument on the fact that since "Arab Americans fear being rounded up . . . now is not the time to pursue" the Arab "box."[78] Others have argued that a separate category for Arab Americans is undesirable since it might be used for disciplinary purposes or might exacerbate the exclusion of Arab Americans from the body politic.[79] There are also arguments that, more generally, the modern Census operates as a disciplinary power that is repressive and reinstates racial subordinations.[80]

Such arguments are unavailing. The first step in combating unreasonable fears, protecting Arab Americans, and educating America about Arab Americans is to recognize Arab Americans as a minority group, rather than allowing them to disappear into an over-inclusive definition of white. Official Census classification would reflect how Arab Americans are recognized and understood—both politically and legally—in a racially stratified society.[81] It would also confer identity on a group who feels excluded from society at large.[82] Official Census classification would allocate funds and protections to Arab Americans[83] and create a sense of group membership among a community that needs to be brought together to face the everyday challenges ahead.

A. Check it Right, You Ain't White!

> "We've been complaining about discrimination, we've been complaining about lack of resources, and here this is a chance to tell the whole world we exist." – Rami Nuseir, president of the American Mideast Leadership Network, April 2, 2010.[84]

In 1993, the Arab American Institute and the American-Arab Anti-Discrimination Committee lobbied Congress to remove Arabs from the

---

[77] *Id.*

[78] *Id.*

[79] Mezey, *supra* note 61, at 1766.

[80] *See id.* at 1721–22 (citing 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY 142–43 (Robert Hurley trans., 1978)).

[81] *See* Julissa Reynoso, Note, *Race, Censuses, and Attempts at Racial Democracy*, 39 COLUM. J. TRANSNAT'L L. 533, 533 (2001).

[82] *See* Deo, *supra* note 63, at 418 (describing one use of the census as "recognition and affirmation of one's racial identity"); Mezey, *supra* note 61, at 1701-02 ("In the language of social constructivism, the census helps to construct recognizable identities at a number of different levels: national identity, group identity and individual identity. These identities can be at once mythic and deeply meaningful.").

[83] *See* Deo, *supra* note 63, at 416 ("The demographic statistics promulgated by the census are pervasive; everything from political campaigns to funding apportioning relies upon the data collected.").

[84] Holly Gilbert & Richard Roth, *Arab-American Leaders Push Census Participation*, CNN, Apr. 2, 2010, http://www.cnn.com/2010/US/04/02/arab.american.census/?hpt=Sbin.

white/Caucasian category. They sought to create a racial category for "Middle Eastern" or "Arab" Americans (which would include, among others, peoples of Arab, Iranian, Turkish, and Afghani descent) so that they could be eligible for remedial programs and better protected under anti-discrimination laws.[85] However, OMB rejected the proposal and left Arab Americans without the grand prize in the politics of identity.[86]

With the 2010 Census underway and an expectation that Arab Americans are supposed to check the white box, the Arab Complete Count Committee launched the "Check It Right, You Ain't White" campaign.[87] The goal of the campaign is to push people of Arab origin to check the "other" box on the census, write in their true racial category, and ultimately change how Arab Americans define themselves in the census.[88] A related goal of the campaign is to undermine the fear that many Arab Americans have of being singled out for surveillance or profiling if they fill out the first Census since 9/11.[89]

The 2000 census reported 1.2 million people as having Arab ancestry,[90] but experts believe that the official Arab American population could swell to more than 4 million people if Arab Americans cohesively checked the "some other race" box and wrote in Arab.[91] The Census Bureau has already responded that even if Arab Americans check the "other" box and write in "Arab," it will still count them as racially white.[92] Clearly, the measure of success of this campaign will not be in the form of official recognition of Arab Americans as distinct from white.[93] Nevertheless, success should come in the form of increased and shared awareness that Arab Americans are simply not white. Already, YouTube videos have been posted,[94] radio shows have been produced,

---

85 TEHRANIAN, *supra* note 4, at 168.

86 *See id.* (noting that the OMB rejected the proposal on several grounds including the difficulty in defining the Middle Eastern race). Tehranian also discusses the following arguments proposed in favor of a separate Middle Eastern category: reducing the difficulty in assessing discrimination against Middle Easterners; alleviating confusion when Middle Easterners respond to race questions; aiding in the administration of certain state and local programs; supporting the principle of self-identification; and providing a more complete composite of society. *Id.*

87 Roqaya Ashmawey, *A Write-In Campaign*, NEWSWEEK, Mar. 1, 2010, *available at* http://www.newsweek.com/id/234325.

88 John Blake, *Arab- and Persian- American Campaign: 'Check it right' on Census*, CNN, Apr. 1, 2010, http://www.cnn.com/2010/US/04/01/census.check.it.right.campaign/index.html.

89 *See* Gilbert & Roth, *supra* note 84.

90 *See* U.S. Census Bureau, *The Arab Population: 2000* (2000), *available at* http://www.census.gov/prod/2003pubs/c2kbr-23.pdf.

91 Ashmawev, *supra* note 87.

92 Suzanne Manneh, *Census to Count Arabs as White, Despite Write-in Campaign*, NEW AMERICA MEDIA, Mar. 25, 2010, http://news.newamericamedia.org/news/view_article.html?article_id=87932e5f600086f93be8b029e4 a 6ff40 (quoting Roberto Ramirez, chief of the ethnicity and ancestry branch at the Census Bureau, who has said that "[a]nyone from Europe, North Africa or the Middle East [will be classified] as white" and that no matter how many people write in "Arab," the Census Bureau is required by law to use racial categories determined by the OMB, and those categories do not include Arab).

93 *Id.*

94 John-Thomas Kobos, *Ethnic Group Takes Different Approach to Census*, ABC, March 16, 2010, http://abclocal.go.com/kfsn/story?section=news/local&id=7332372 (describing the new movement

bloggers have spoken, and newspaper articles have been written. The message to be received can be summed up by one unknown Arab American voice—a blogger in cyberspace with a mere 110 followers:

> Because "white" does not only embody a color. What the term "white" means in the United States today is something that transcends any skin color. White means the suburbs and white means affluence and white means picket fences. Some people may argue then, that I do fit into the white category based on my definition of the term. *But* white also means no questions asked ever, no extra security checks at the airport or in that same category, no mispronunciations of my last name or being told it's a "cool" name as a precursor for the question of where I'm from. Being white means being untouchable in this country.[95]

B. The Mark of Blackness

> "I think your motto should be post-9-11, 'raghead talks tough, raghead faces consequences.'" – Ann Coulter, right-wing attorney and author, February 10, 2006[96]

Discrimination and the civil rights movement have historically been synonymous with the struggle of African Americans to attain racial equality with white Americans—the Black/White Binary Paradigm.[97] While some scholars argue that the unique history of African Americans warrants such a paradigm, other scholars argue that the struggles and battles of other ethnic minorities are often overlooked or marginalized because of it.[98] Although the aforementioned argument is beyond the scope of this Note, it is vital to recognize that Arab Americans have essentially been given the "mark of blackness" in today's society,[99] rather than being the beneficiaries of so-called "white privilege."

---

among the Arab American community on YouTube to check the "other" box in the 2010 census).

[95] Jillian C. York, *In Census, Only Some Races Count*, GLOBAL VOICES, March 23, 2010, http://globalvoicesonline.org/2010/03/23/usa-in-census-only-some-races-count/ (quoting Sarah Alaoui, *The Good, The Bad, The Ugly*, July 17, 2009, http://sarahalaoui.blogspot.com/2009/07/all-boxed-in.html).

[96] Howard Kurtz, *Monumental Misfire*, WASH. POST, Feb. 14, 2006, at A3.

[97] Juan Perea, *The Black/White Binary Paradigm of Race: The 'Normal Science' of American Racial Thought*, 85 CAL. L. REV. 1213, 1219 (1997).

[98] *See id.*

[99] *See* Athena D. Mutua, *Shifting Bottoms and Rotating Centers: Reflections on Latcrit III and the Black/White Paradigm*, 53 U. MIAMI L. REV. 1177, 1192–93 (defining "mark of blackness" and arguing that "[b]lack people represent the metaphorical bottom of a colorized racial hierarchy").

White privilege has been defined as the "pervasive, structural, and generally invisible assumption that white people define a norm and Black people are 'other,' dangerous, and inferior."[100] Critical Race Theory argues that race is not biologically determined, but rather a product of social construction.[101] Such a concept of social construction has been described to mean that "[r]ace exists, if ever, in our individual and cultural consciousness," and "[i]f we do not constantly and consciously meditate on it, race cannot exist."[102] In the sense that race is socially constructed, many scholars agree that race is also "fluid"—meaning that it is "subject to redefinition over time by social and political pressure."[103] The complete history of how Arab Americans' race has been constructed is beyond the scope of this Note;[104] however, it is important to recognize that Arab Americans have effectively been "socially constructed as 'Black,' with the negative legal connotations historically attributed to that designation."[105] In fact, in many ways Arab Americans are worse off than African Americans, who are often considered to be the bottom of the racial hierarchy.[106] Like blacks, Arabs are stereotyped as "dangerous, evil, sneaky, primitive, and untrustworthy."[107] But even worse, Arabs are also commonly considered potential or actual terrorists.[108] As Ibrahim Hooper of the Council on American-Islamic Relations noted, "The common stereotypes are that we're all Arabs, we're all violent and we're all conducting a holy war."[109]

In far greater respect than any other minority, Arab Americans are considered "outsiders" to the definition of a United States citizen. In

---

[100] Sylvia A. Law, *White Privilege and Affirmative Action*, 32 AKRON L. REV. 603, 604 (1999).

[101] Deo, *supra* note 63, at 420.

[102] Reginald Leamon Robinson, *The Shifting Race-Consciousness Matrix and the Multiracial Category Movement: A Critical Reply to Professor Hernandez*, 20 B.C. THIRD WORLD L.J. 231, 233 (2000).

[103] Patricia Palacios Paredes, Note, *Latinos and the Census: Responding to the Race Question*, 74 GEO. WASH. L. REV. 146, 150 (2005).

[104] *See* Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 303 (2002) (noting that Professor Nabeel Abraham, a leading commentator on racism against Arabs and Muslims in the United States, has identified three distinct ways in which Arab Americans have been socially constructed "(1) through political violence by extremist groups based on the Arab-Israeli conflict in the Middle East; (2) by xenophobic violence targeting Arabs and Muslims at the local level; and (3) through the hostility arising from international crises affecting the United States and its citizens." *Id.*). *See generally* Saliba, *supra* note 48 (outlining a complete history of how Arab Americans came to be classified as white).

[105] Adrien Katherine Wing, *Civil Rights in the Post 911 World: Critical Race Praxis, Coalition Building, and the War on Terrorism*, 63 LA. L. REV. 717, 718 (2003).

[106] *Id.* at 752.

[107] *Id.* at 723.

[108] *Id.*

[109] Saito, *supra* note 3, at 12 (quoting Twila Decker, *Muslims Fight Unfairness, the American Way*, ST. PETERSBURG TIMES, Oct. 17, 1999). *See also* Abel, *supra* note 21, at 56–61 (equating the hate crimes against Arab Americans and the American people's perception of Arab Americans with the racist philosophy held by slaveholders in America in the 18th and 19th centuries, and noting that the extreme violence against Arab Americans is a product of "deep-rooted racism driving the attackers" that is akin to the type of violence that was an integral part of the institution of slavery).

America, there exists a general failure to identify people who appear Arab or Middle Eastern as constituting part of the "American national identity."[110] After 9/11, African Americans, East Asian Americans, and Hispanics were "deemed safe and not required to prove their allegiance," while Arab Americans were seen as enemies and inherently suspicious.[111] "Americanness" was viewed as excluding anyone who "look[ed] Middle Eastern."[112] Consequently, Arab Americans' "race" has been socially constructed as equivalent to "terrorist" rather than being associated with the positive attributes often coupled with the social construction of whiteness, such as being virtuous, law-abiding, superior, and loyal.[113] Throughout history, whiteness has been associated most often with the positive characteristics of "citizen" while minorities have been associated with "alien."[114] If being considered a citizen is a primary characteristic of "whiteness," Arab Americans have been marked with something far worse than "blackness."

Peggy McIntosh describes white privilege as "an invisible weightless knapsack of special provisions, maps, passports, codebooks, visas, clothes, tools and blank checks," whose effects infiltrate society creating a societal norm for "other" individuals to be judged against.[115] Unlike the "other" people, white people may go an entire day without noticing the importance of race.[116] Unlike the "other" people, white people have the option not to think of themselves in terms of race.[117] Unlike the "other" people, "[t]hose with [white] privilege can afford to look away from mistreatment that does not affect them personally."[118]

Arab Americans are "other" people within this definition. In a manner of speaking, their "invisible weightless knapsack" was taken by airport security years ago. One of the daily benefits of white privilege McIntosh identifies is that white parents "do not have to educate [their] children to be aware of systemic racism for their own daily physical protection."[119] Arab Americans do not have a similar luxury. Arab Americans must educate their children about the dangers of racism against them. What do you tell your twelve-year-old son when he is

---

110 Volpp, *supra* note 24, at 1594–95 ("The 'imagined community' of the American nation, constituted by loyal citizens, is relying on difference from the 'Middle Eastern terrorist' to fuse its identity at a moment of crisis.").

111 *Id.* at 1584.

112 *Id.*

113 *See* IAN F. HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 28 (1996) (noting that whiteness is defined almost exclusively in terms of positive attributes).

114 *See id.*

115 Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, 1990 INDEP. SCHOOL 1 (1990).

116 *See* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 604–05 (1990).

117 *Id.* at 604.

118 Stephanie M. Wildman, *Whiteness: Some Critical Perspectives: The Persistence of White Privilege*, 18 WASH. U. J.L. & POL'Y 245, 247 (2005).

119 McIntosh, *supra* note 115, at 3.

harassed at school and called a "son of Osama"?[120] What do you tell your daughter when her teacher pulls off her hijab and says, "I hope God punishes you. No, I'm sorry, I hope Allah punishes you"?[121]

Another daily benefit of white privilege described by McIntosh is that whites "can travel alone or with [their] spouse without expecting embarrassment or hostility in those who deal with [them]."[122] Unlike white people who have such a "passport" in their invisible knapsack, Arab Americans cannot travel without a fear of encountering hostility. While black people fear "DWB" or "driving while black,"[123] Arab Americans fear FWA or "flying while Arab." The ADC expresses that airline discrimination remains a concern, and that unfounded fears and baseless stereotypes continue to cloud the opinions of airline employees.[124] For example, Adrien Wing, author of *Civil Rights in a Post 911 World* and an African American, recounts that when she traveled with her sons they were often mistaken as Arabs or Muslims and, as a result, to ensure her sons are not racially profiled, she now instructs them to "dress Black."[125]

Another component of white privilege described by McIntosh is that as a white person, she "can criticize our government and talk about how much [she] fear[s] its policies and behavior without being seen as a cultural outsider."[126] Conversely, Arab Americans cannot criticize the government without the fear of being seen as unpatriotic or, worse, not loyal to the United States. The Arab American Institute articulated that the "dangerous intersection of popular stereotypes and official policy is perhaps the greatest concern" facing Arab Americans, particularly when crises occur and their loyalty comes into question.[127]

Essentially, Arab Americans, unlike white people, do not have the choice to ignore race and its effects on their everyday lives. As Richard Ford argues, it is racism, not race, that creates racial categories.[128]

IV. RACE-BASED AFFIRMATIVE ACTION AND WHY ARAB AMERICANS SHOULD BE INCLUDED

This ain't no rag / It's a flag / And we don't wear it

---

[120] ADC 2008 Report, *supra* note 31, at 54.

[121] *Id.* at 53 (describing an incident in New Orleans in February 2004).

[122] McIntosh, *supra* note 115, at 4.

[123] *See* Tracy Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 341–52 (1998).

[124] ADC 2008 REPORT, *supra* note 31, at 10.

[125] Wing, *supra* note 105, at 722–23.

[126] McIntosh, *supra* note 115, at 3.

[127] ARAB AMERICAN INSTITUTE FOUNDATION, NOTES ON ANTI-ARAB RACISM, http://www.aaiusa.org/page/file/a5773324892438c0e7_la7bmvqgt.pdf/NotesonAntiArabRacism.pdf.

[128] Richard T. Ford, *Race as Culture? Why Not?*, 47 UCLA L. REV. 1803, 1805 (2000).

on our heads / It's a symbol of the land where the good

guys live / Are you listening to what I said?

– Charlie Daniels, country music performer, "This Ain't No Rag, It's a Flag," August 2004[129]

Steven Salaita discusses the difficult Arab American student experience in university classrooms by noting that "Arab students [cannot] fully participate in class if they are scared of being branded anti-Semitic or anti-American every time they vocalize their perspectives on the Arab World."[130] As a professor who has interacted with Arab undergraduate and graduate students, Salaita has found that Arab Americans overwhelmingly report feelings of isolation in American universities.[131] This feeling of isolation is caused by "anxi[ety] about the possibility of hearing contemptuous statements about Arabs from other students and professors"; Arab American students report being "afraid to respond to the contemptuous statements because of the fear of harassment, arrest, or deportation."[132] While Salaita takes an extreme view on the effect of neoconservative pressure on universities, he correctly notes a pattern of anti-Arab racism in universities that is "comparable, if not identical" to the racism directed against other recognized minorities.[133] However, while Salaita argues that this racism arises from the "same contexts of misinformation, colonial discourse, and hyperpatriotic chauvinism—all nourished, of course, by the relentless encroachment of neoconservatives and their moralistic supporters on humanities curricula"[134]—it would seem that lack of cross-racial understanding on the part of the student body is more realistically the cause.

In a discussion of affirmative action, it is imperative to recognize that inherent white privilege stands in the background of the remedies "that affirmative action seeks to distribute to racial minorities."[135] A problematic aspect of Arab Americans being legally classified as white while being socially characterized with a "mark of blackness," is that colleges fail to recognize the benefits of applying race-based affirmative action admission policies to Arab Americans. Racial categories on most college admissions forms consist of some variation of the five racial categories that David Hollinger has famously described as the "ethno-

---

[129] Associated Press, *Arab Community Angry at Charlie Daniels, "Rag" Song*, FOX NEWS, Aug. 6, 2004, http://www.foxnews.com/story/0,2933,128119,00.html.

[130] SALAITA, *supra* note 22, at 131.

[131] *Id.* at 120.

[132] *Id.*

[133] *Id.* at 122–23.

[134] *Id.*

[135] Nancy Chung Allred, *Asian Americans and Affirmative Action: From Yellow Peril to Model Minority and Back Again*, 14 ASIAN AM. L.J. 57, 64 (2007).

racial pentagon," which includes African American/Black, Native American/Alaska Native, Asian American, Hispanic/Latino, and White.[136] Beyond the basic ethno-racial pentagon, there are variations among schools' applications. Some schools give students numerous options in checking the box that describes their "race"[137] while other schools provide only the "ethno-racial pentagon" and do not even give students the option of checking the "other" box.[138] The common application form, which is used by more than 150 colleges and universities, first asks if the student is Hispanic or Latino and then asks the student to select one or more of the listed "ethnicities" that describe them.[139]

It is legitimate and desirable for schools to treat race differently and tailor race-conscious admissions to the schools' individual needs.[140] However, when tailoring their race conscious admission policies, schools should seek to realize the benefits of diversity that can be obtained by recognizing the distinct racial classification of Arab Americans. The first step is to include a separate box on the application for Arab American students. American society requires Arab Americans, like other racial groups, to confront certain fundamental issues of race and identity. Such confrontations make race a significant issue for Arab Americans in a way that it is not for the "whites" with whom Arab American students are currently classified.[141] In this section, I will

---

[136] DAVID A. HOLLINGER, POSTETHNIC AMERICA: BEYOND MULTICULTURALISM 23–25 (1995).

[137] *See, e.g.*, UNIVERSITY OF WISCONSIN–MADISON, UNDERGRADUATE ADMISSION APPLICATION 2011–12, *available at* http://www.admissions.wisc.edu/images/UW-Madison_Application.pdf (giving prospective students the option of checking 13 different boxes for race).

[138] *See, e.g.*, UNIVERSITY OF OKLAHOMA, THE UNIVERSITY OF OKLAHOMA APPLICATION FOR ADMISSION, *available at* http://catalog.ou.edu/Applications/Admissions/cubcUSUGNEWFRESHMAN1009.pdf (providing two ethnicity boxes of "Hispanic of Any Race" and "Not Hispanic" and the following race boxes: White, Black or African American, Asian, Native Hawaiian or Other Pacific Islander, or American Indian or Alaskan Native).

[139] THE COMMON APPLICATION, 2010-11 FIRST-YEAR APPLICATION FOR SPRING 2011 OR FALL 2011 ENROLLMENT, *available at* https://www.commonapp.org/CommonApp/DownloadForms.aspx (follow the "Application (student form) Only: PDF" hyperlink) (providing the following ethnicity boxes: American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, and White (including Middle Eastern)). The student is then given a line to describe his background after he checks any of the aforementioned boxes. *Id.*

[140] *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 328 (2003) (deferring "to a university's academic decisions, within constitutionally prescribed limits"); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) ("The freedom of a university to make its own judgments as to education includes the selection of its student body."). However, as a purely administrative matter, schools must report the demographics of the students admitted to the Department of Education and it may be unclear as to how schools should regroup their students to fit in the standard categories provided by the Department of Education, which include White, Black, Hispanic, Asian/Pacific Islander, American Indian/Alaska Native, and Non-residential alien. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS: 2009 Table 285, *available at* http://nces.ed.gov/programs/digest/d09/tables/dt09_285.asp?referrer=report.

[141] *See, e.g.*, Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 862 (1995) ("[P]eople of different races and ethnicities often have different life experiences that affect their relations with members of other groups and influence their views on issues of legal doctrine and policy.").

discuss the diversity rationale for race-based affirmative action as set forth in *Bakke* and *Grutter* and show why it easily applies to Arab Americans. I will then present an argument that, even in absence of official census recognition of Arab Americans as distinct from whites, colleges and universities should provide a separate racial classification option for Arab American students. It should be noted from the outset that it is unclear how many Arab students are currently enrolled in universities and colleges because presently such students are classified as "white." Another benefit to giving Arab Americans a separate box to check is that universities would be able to compile more complete statistics on racial representation.

The Supreme Court first recognized the benefits that flow from racial diversity on college campuses in *Regents of the University of California v. Bakke*,[142] The deeply divided court held that colleges could use race conscious affirmative action programs.[143] While the Court held that universities could not use a quota system that reserved a certain number of places for minority student applicants, the Court said that race and ethnicity could be used as one factor or as a "plus" factor in the individual consideration of applications.[144] Justice Powell's opinion in *Bakke* argued that universities have a compelling interest in "obtaining the educational benefits that flow from an ethnically diverse student body"[145] and in doing so by selecting students who will contribute to a "robust exchange of ideas"[146] and will contribute "experiences, outlooks and ideas that enrich the training of its student body."[147]

Again in 2003, the Supreme Court considered race-based affirmative action in college admissions when it upheld the University of Michigan Law School's affirmative action plan that aimed to achieve diversity by enrolling a "critical mass" of underrepresented minority students.[148] In *Grutter*, the Supreme Court held that achieving a diverse student body in the context of higher education was a compelling government interest that, if narrowly tailored, could withstand strict scrutiny.[149] The Court found that the law school's admission process was narrowly tailored because each student was individually evaluated and race was considered as one factor among many.[150] The Court explained that race may be used in admissions only in a "flexible" and "nonmechanical" way, noting that the Equal Protection Clause requires institutions to make the "individualized assessments necessary to

---

142 438 U.S. 265, 312 (1978).
143 *Id.* at 315–16.
144 *Id.* at 317.
145 *Id.* at 306.
146 *Id.* at 313.
147 *Id.* at 306.
148 Grutter v. Bollinger, 539 U.S. 306, 316 (2003).
149 *Id.* at 334.
150 *Id.* at 337

assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university."[151] Deferring to "[t]he Law School's educational judgment that such diversity is essential to its educational mission,"[152] the Court stated that the university's "good faith" was "presumed" and that "complex educational judgments" as to whether student body diversity was essential to a university's mission lay "primarily with the expertise of the university."[153]

The Court highlighted the various ways that the university and society in general could benefit from achieving a racially diverse student body. First, Justice O'Connor noted that the school's use of race was compelling because diversity benefits the educational process by promoting "cross-racial understanding," which "break[s] down racial stereotypes," and "enables [students] to better understand persons of different races."[154] Second, Justice O'Connor found the school's use of race was compelling because diversity benefits the educational process by promoting "cross-racial understanding," which "break[s] down racial stereotypes" and "enables students to better understand persons of different races."[155] Third, Justice O'Connor found the school's use of race compelling because diversity in universities benefits society by "better prepar[ing] students for an increasingly diverse workforce and society."[156]

A. Arab American Students on Campus

When examining whether and to what extent Arab American students should be the beneficiaries of race-based affirmative action, the Supreme Court requires that the college identify how the students will contribute to diversity. For example, whether Arab American students contribute to the diversity rationale as set forth in *Grutter* and *Bakke* in the same way that other minority students do is an issue to be scrutinized by the Court. Diversity in the classroom is an integral part of promoting cross-racial understanding among students because it allows students of different backgrounds to be exposed to diverse perspectives and viewpoints. The *Grutter* Court noted that these benefits are "important and laudable" and that "classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds."[157]

---

[151] *Id.* at 340.
[152] *Id.* at 328.
[153] *Grutter*, 539 U.S. at 328–29.
[154] *Id.* at 330.
[155] *Id.*
[156] *Id.*
[157] *Id.* (internal quotation marks omitted).

Furthermore, the Court held that a critical mass of underrepresented minorities qualified as a compelling state interest because it leads to a cross-racial understanding that helps erode stereotypes, increase understanding, and heighten tolerance of persons of difference races.[158] The Court accepted that diversity assists in breaking down racial stereotypes by demonstrating that there is not a single, unanimous "'minority viewpoint' but rather a variety of viewpoints among minorities."[159] In this way, racial diversity enhances the understanding and appreciation of the differences of others, which generates educational benefits for all students.

By including Arab Americans in a "critical mass" of underrepresented minority students, undergraduate universities could erode stereotypes and increase cross-racial understanding and tolerance of Arab Americans. Gordon Allport theorizes that "promoting sustained contact between members of different groups is the best way of increasing tolerance and understanding."[160] As previously noted, Arab Americans have been stereotyped and prejudged as a race and labeled as terrorists. Arab Americans are socially constructed as the "enemy," the "fanatical terrorist," and the "crazy Muslim."[161]

A review of U.S. movies evidences the demonization of Arab Americans in the entertainment industry.[162] In reviewing hundreds of movies, Jack Shaheen found that Arabs are commonly portrayed as terrorists, hostile invaders, or "lecherous, oily sheikhs intent on using nuclear weapons."[163] Western movie characters have called Arabs "assholes," "bastards," "camel-dicks," "pigs," "devil-worshippers," "jackals," "rats," "rag-heads," "towel-heads," and "sons-of-she-camels."[164] Negative stereotypes of Arab Americans have also been fostered through the media and popular culture. For instance, in July 2008, Sonny Landham, an actor and Kentucky Libertarian Party Senate

---

[158] *Grutter*, 539 U.S. at 330.

[159] *Id.* at 319–20.

[160] DEREK BOK, OUR UNDERACHIEVING COLLEGES: A CANDID LOOK AT HOW MUCH STUDENTS LEARN AND WHY THEY SHOULD BE LEARNING MORE 207 n.31 (2006).

[161] Rachel Saloom, *I Know You are, But What Am I? Arab-American Experiences Through the Critical Race Theory Lens*, 27 HAMLINE J. PUB. L. & POL'Y 55, 63 (2005), (quoting Joanna Kadi, *Introduction*, *in* FOOD FOR OUR GRANDMOTHERS xiii, xvi (Joanna Kadi ed., 1994)).

[162] JACK G. SHAHEEN, REEL BAD ARABS: HOW HOLLYWOOD VILIFIES A PEOPLE 9 (2001).

[163] *Id.* In 2004, Harris Interactive found that college students ages 18–24 spent nearly $3 billion annually on movies, DVDs, music, and video games. College students spent $474 million on music sales, $658 million on theater tickets, and $341 million on games each year. "At home and in the dorms, [college students are] watching movies,spending $600 million to buy and another $326 million to rent DVD's." Nancy Wong, *College Students Tote $122 Billion in Spending Power Back to Campus This Year*, HARRIS INTERACTIVE, Aug. 18, 2004, http://www.harrisinteractive.com/news/allnewsbydate.asp?NewsID=835.

[164] SHAHEEN, *supra* note 162, at 11. For instance, *The Rules of Engagement*, has been described as "uniformly negative" in its depictions of Arabs. Speaking for the American-Arab Anti-Discrimination Committee, Hussein Ibish said, "It can only be compared to films like the *Birth of a Nation* and *The Eternal Jew* insofar as the principled [sic] purpose seems to be the demonization and vilification of an entire people." Saito, *supra* note 3, at 13.

candidate, called for an "outright bombing [of Arabs] back into the sand."[165] He went on to say that "[t]he Arabs, the camel dung-shoveler, the camel jockeys, whichever you wanna call 'em, are terrorists" during an interview with *The Weekly Filibuster* radio show.[166]

Additionally, Arabs have been negatively portrayed and stereotyped within educational textbooks. A 1980 study by the National Association of Arab-Americans found that textbooks often "discussed Arabs in a negative light"; similarly, in a 1970s textbook study, Arabs were "portrayed as primitive, backward, desert-dwelling, nomadic, war-loving, terroristic, and full of hate."[167] In the 1990s, the Middle East Studies Association conducted a review of eighty social-studies textbooks and found that many textbooks showed an overrepresentation of Arabs as nomads, living in the desert in tents and using camels as their major mode of transportation.[168] The majority of these textbooks have failed to recognize Arabs' contributions to society, science, medicine, and mathematics.[169] The fact that Arabs sustained Ancient Greek and Roman knowledge, translating it and preserving it for the rest of the world, has also gone unmentioned.[170] Unfortunately, these textbooks ingrain a negative view of Arab Americans in students' minds at an early age.

The most problematic aspect of these stereotypes is that they have become socially acceptable and often represent the attitudes of students toward Arab Americans.[171] Isolated incidents do not represent a comprehensive picture of the stereotypes being drawn of Arab American students or the attitudes toward them at universities across the country. However, such incidents are useful in painting a picture of the ongoing battle of Arab American students at universities and the immense need for these universities to recognize Arab Americans when implementing their diversity goals. For example, on April 4, 2006 a student at Baylor University in Waco, Texas was attacked on campus by an assailant who "grabbed her hijab, threw her to the ground, slapped and kicked her several times in the rips [sic], shouting 'Arabian (expletive)' and '(expletive) Muslims.'"[172] The student reported that she had previously

---

[165] Council on American-Islamic Relations Research Center, *The Status of Muslim Civil Rights in the United States, 2009: Seeking Full Inclusion* 21 (2009), http://www.cair.com/Portals/0/pdf/CAIR-2009-Civil-Rights-Report.pdf.

[166] *Id.*

[167] Saloom, *supra* note 161, at 67 (quoting Samir Ahmad Jarrar, *The Treatment of Arabs in U.S. Social Studies Textbooks: Research Findings and Recommendations*, *in* SPLIT VISION: THE PORTRAYAL OF ARABS IN THE AMERICAN MEDIA 381, 388 (Edmund Ghareeb ed., 1983)).

[168] CTR. FOR MIDDLE E. AND N. AFRICAN STUDIES & MIDDLE E. STUDIES ASS'N, EVALUATION OF SECONDARY-LEVEL TEXTBOOKS FOR COVERAGE OF THE MIDDLE EAST AND NORTH AFRICA (Elizabeth Barrow ed., 1994).

[169] GILBERT T. SEWALL, ISLAM AND THE TEXTBOOKS: A REPORT OF THE AMERICAN TEXTBOOK COUNCIL 8–10 (2003), *available at* http://www.eric.ed.gov/PDFS/ED475822.pdf.

[170] *Id.*

[171] *See supra* part I.B. describing racism on campus.

[172] ADC 2008 Report, *supra* note 31, at 70.

suffered harassment on campus because of her dress.[173] After the incident, Al Siddiq, president of the Islamic Center of Waco, said he approached several Baylor officials, including the University's president and provost, with questions concerning the University's response to the incident. Siddiq said he was "eventually directed to Dr. Dub Oliver, the interim vice president of student life" whom he asked, "'Why did (Baylor) not publicize this?' and 'Why did it take so long for (Baylor) to respond?'"[174] According to Siddiq, Oliver "refused to acknowledge the attack as a hate crime."[175]

If Baylor had included Arab Americans in its race-based affirmative action program, a few things might have happened differently. First, and most optimistically, maybe the stereotype that all Arabs (or Muslims) are terrorists would have been eroded and the incident would never have happened. Since Arab Americans are stereotyped as "terrorists," they are often subject to violence and hate that people feel toward actual terrorists. Increased exposure to Arab Americans on university campuses would help overcome the stereotype that commonly associates Arab Americans with terrorists by promoting a cross-racial understanding. Although social psychologists recognize that it is difficult to control stereotypes that are unconscious and automatic, many experts nonetheless conclude that stereotypes are not permanent and can be altered through exposure.[176] Research has shown that mere physical presence of minorities can help lessen bias. For example, in a university setting, studies suggest that the presence of black students seems to motivate white students be more attentive to race issues. One study found that students noticed more prejudice in a film clip when they were told that they were being watched by black students in an adjacent room.[177] Such effect has been explained by the theory of social tuning, which suggests that since people prefer to have positive interactions with others, they are motivated to bring their own attitudes in line with the suspected views of others in order to have positive interactions.[178]

Another aspect of the Baylor incident that should be examined is the University's delayed and inadequate response. Rather than immediately condemning the incident and using it as a learning experience, the University initially worked to bury the incident, waiting five days to send an email informing the student body. As the editorial staff of the Baylor Lariat student newspaper expressed, "The

---

[173] *Id.*

[174] Van Darden, *Man Assaults Muslim Student Outside of Draper*, BAYLOR LARIAT, April 5, 2006, *available at* http://www.baylor.edu/lariat/news.php?action=story&story=40063.

[175] *Id.*

[176] *See, e.g.*, Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY & SOC. PSYCHOL. REV. 242, 242–43 (2002).

[177] Daisuke Akiba & Payneese Miller, *The Expression of Cultural Sensitivity in the Presence of African Americans: An Analysis of Motives*, 35 SMALL GROUP RES. 623, 637 (2004).

[178] Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1950 (2009).

administration should set an example to the student body in the fight to eliminate intolerance by being upfront about acts of hatred occurring at the university . . . . A more timely response would have better conveyed the administration's concern for the well-being of the university's students—Muslim or not."[179] The student body's response was not much better.[180] For instance, less than a month before the incident, the university held a forum on "Dialogue and Differences."[181] In front of a standing-room-only crowd, black students voiced their concerns and sought to educate white students and a fraternity about the offensive nature of the "E-dawg" themed fraternity party where a student used excessive bronzer to make her face appear black.[182] Following the racist attack on campus against Arabs and Muslims, the campus held another forum, "Dialogue and Differences II."[183] Barely anyone showed up.

"Dialogue and Differences II" might have looked more like "Dialogue and Differences I" if the university had striven to enroll a critical mass of Arab American students, like it does black students. If Baylor actively strove to enroll more Arab Americans students, then a group of Arab American students might band together to spread awareness and achieve a promotion of cross-racial understanding much like the black students have been able to accomplish.[184] As long as universities are using race-based affirmative action admission programs to enroll a critical mass of other minority students, Arab Americans should be included because they also contribute to the diversity rationale articulated in *Grutter*.

B. The Campus Quad and Beyond

The Supreme Court in *Grutter* was influenced by the benefits that campus diversity can provide to society as a whole.[185] One of the

---

[179] Editorial Staff, *Assault Case Requires Continued Discussion*, BAYLOR LARIAT, April 11, 2006, http://www.baylor.edu/Lariat/news.php?action=story&story=40147.

[180] It should be said that immediately following the incident a large group of students gathered to hold a candle lighting for the assaulted student.

[181] Sarah Gordon, *Students Tackle Cultural Barriers*, BAYLOR LARIAT, March 9, 2006, *available at* http://www.baylor.edu/Lariat/news.php?action=story&story=39483.

[182] *Id.*

[183] Editorial Staff, *Forum Turnout Lacks Student Dedication*, BAYLOR LARIAT, April 26, 2006, http://www.baylor.edu/Lariat/news.php?action=story&story=40448.

[184] Currently there is no campus organization for Arab American students at Baylor. Baylor multicultural student organizations include associations for Black, Asian, Chinese, Filipino, Hispanic, Indian, Japanese, and Korean students. BAYLOR UNIVERSITY, STUDENT ORGANIZATIONS, http://www.baylor.edu/studentactivities/organizations/index.php?id=74702.

[185] *See* Grutter v. Bollinger, 539 U.S. 306, 330 (2003). The Court referred to the fact that "major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas and viewpoints" and that "numerous studies show that student body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society, and better

benefits of diversity in the classroom is students who graduate as better citizens. As Justice O'Connor wrote, the Supreme Court "ha[s] repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to 'sustaining our political and cultural heritage' with a fundamental role in maintaining the fabric of society."[186] Former Harvard University President Derek Bok argues that a "successful democracy demands tolerance and mutual respect from different groups within its citizenry in order to contain the religious and ethnic tensions that have riven so many countries around the world"[187] and that college students who are educated in racially diverse environments learn to tolerate and respect people who are different from them.[188]

Using diversity to shape students to be tolerant to Arab Americans is essential to creating a society that fosters democratic legitimacy and an America that is "one Nation."[189] If the students graduating from college learn to tolerate and respect people different from them, including Arab Americans, then the number of hate crimes against Arab Americans may fall.[190] Maybe these students will teach their future children that their Arab American peers are not monsters, but friends.[191] In sum, students' cross-racial understanding and tolerance of Arab Americans may transfer to the rest of society.

C. Getting Outside the Box

Colleges and universities should give Arab American students their own box on undergraduate applications. In the eyes of Arabs and others, Arab Americans are increasingly seen as "non-white," making the inclusion of Arab Americans in the "white" box on college applications inappropriate. If race-based affirmative action programs are to "remain flexible enough to ensure that each applicant is evaluated as an individual,"[192] it is problematic to limit Arab applicants to a "white" box

---

prepares them as professionals." *Id.* (internal quotation marks omitted). Justice O'Connor articulated that "[t]hese benefits are not theoretical but real" and pointed to the evidence suggesting that "major American businesses" and the United States military could not function without employees and soldiers trained "through exposure to widely diverse people, cultures, ideas and viewpoints." *Id.*

[186] *Grutter*, 539 U.S. at 331 (quoting Plyer v. Doe, 457 U.S. 202, 221 (1982)).

[187] BOK, *supra* note 155160, at 195. Bok also notes that employers who are conscious of the growing numbers of minorities and immigrants look for college graduates who can work with diverse groups of people. *Id.*

[188] *Id.*

[189] *See id.* at 332.

[190] *See* ADC 2008 Report, *supra* note 31, at 10 (describing the fact that serious hate crimes and threats of violence remain a significant problem for Arab Americans).

[191] *See id.* at 47 (discussing the "[n]ew undercurrents of uncertainty, anger, fear, shame, and anxiety" that Arab American students encounter in primary and secondary schools).

[192] *Grutter*, 539 U.S. at 337.

or a set of categories that such students feel inadequately characterize their identity and undermine their contributions to diversity. Providing Arab American students with their own box would not only assure that these students' contributions to diversity are taken into account in race-based admission processes, but also function to "create a sense of group membership or even community where there had been none before."[193]

Even if the Census continues to count Arab Americans as white, universities should exercise their unique academic autonomy and count Arab Americans in a way that recognizes their social construction as a distinct race. In *Grutter*, the Court made it clear it would defer to a school's determination that the goal of "attaining a diverse student body" was central to its mission,[194] based partly on a need to respect the school's "educational autonomy."[195] Universities' recognition that Arab Americans are not white may bring to light the benefits to diversity that flow from enrolling a critical mass of Arab American students, including a student body and society that learns to respect, understand, and tolerate Arab Americans.

V. CONCLUSION

> "But if we remain true to our commitment to liberty and justice, tolerance and diversity, at the very time those ideals are most tested—we send a powerful message. We show those who committed this evil that they have not won, and they will not win. And we show that we are truly one nation, indivisible, with liberty and justice for all." – President George W. Bush, Speech at the Islamic Center of Washington, D.C., September 17, 2001[196]

Unfortunately, there is no way to eliminate the risk of another terrorist attack. But if another attack does happen, hopefully the response of the American people toward innocent Arab Americans will be

---

193 Sharon M. Lee, *Racial Classifications in the U.S. Census: 1890-1990*, 16 RACIAL & ETHNIC STUD. 75, 84 (1993) (noting the functions of racial classification). For example, a National Academy of Sciences report on federal race classification claims that it was when the Census Bureau used the designation of "Hispanic" in the early 1970s that it became widely used as an identity referent. The report noted that "[t]here is a symbiotic relationship between categories for the tabulation of data and the processes of group consciousness and social recognition, which in turn can be reflected in specific legislation and social policy." Mezey, *supra* note 61, at 1748.

194 *Grutter*, 539 U.S. at 328 ("The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer. The Law School's assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their amici.").

195 *See id.* at 329 ("We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.").

196 ADC 2003 Report, *supra* note 22, at 137.

different. If Arab Americans are recognized as a distinct racial category in the Census, then lawmakers may be able to use Census data to enforce civil rights laws as they apply to innocent Arab Americans. If the stereotype that all Arabs are terrorists is eroded on university campuses through race-based affirmative action, then fewer innocent Arab American students will be assaulted, threatened, and taunted. If students leave college with a cross-racial understanding of Arab Americans, then when those students enter the workforce, they may combat employment discrimination against innocent Arab Americans. Essentially, society may learn to recognize that not all Arab Americans are terrorists. If we want to take affirmative action seriously, it is essential to apply it to a group who is not only suffering present discrimination but is suffering at the hands of a largely misinformed society. If the goal of affirmative action is diversity, critics would be challenged to find a group that is more in need of the very benefits that diversity provides—a promotion of cross-racial understanding and a subversion of the stereotype that equates Arab Americans with terrorists.