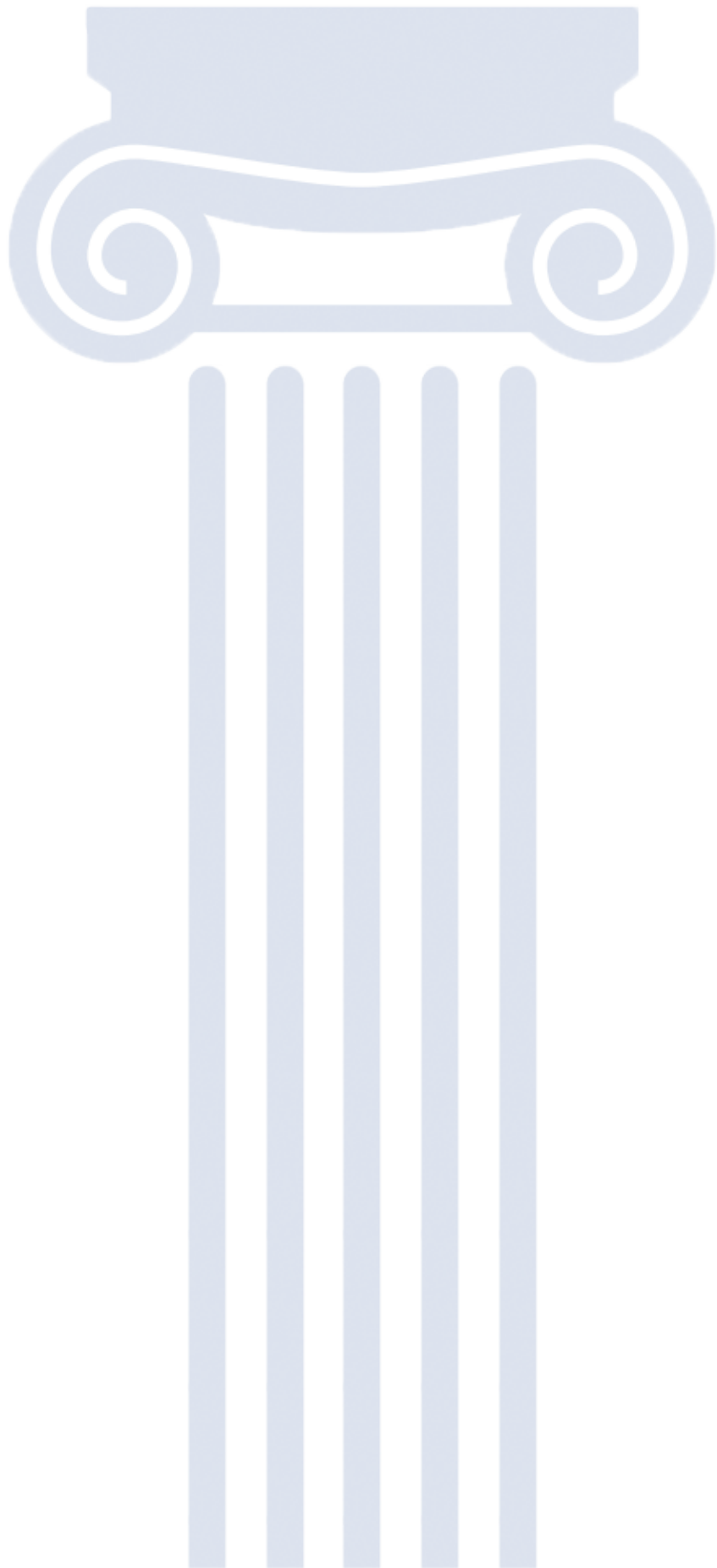


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Letter from the Editor-in-Chief

Dear Readers,

Welcome to the eleventh print edition of the *Claremont Journal of Law and Public Policy (CJLPP)*, Vol. 6. No. 1! We are excited to enter our sixth year of publication. This edition features a number of timely and compelling pieces, ranging in topic from U.S. voting rights litigation doctrine to the effects of the end of China's One-Child policy. We are also proud to present two exclusive interview articles, where you will read about defense attorney Christopher Darden's thoughts on criminal justice issues since his co-prosecution in the infamous O.J. Simpson case, and Lindsay Toczylowski's experiences in a career dedicated to advocating for immigrants' access to fair trial and due process. To read our weekly digital content, as well as submissions from across the U.S. and overseas, visit our website at www.5clpp.com.

These print and online publications would not exist without the dedication of our vast, multi-faceted team, who worked throughout the spring and summer to produce high quality content. A huge thank-you goes out to our many gifted writers; managing editor Isaac Cui; print edition editors Arthur Chang, Nashi Gunasekara, Audrey Jang, Lea Kayali, Frankie Konner, Desiree Santos, and Emily Zheng; digital content editors Allie Carter and John Nikolaou; interview editor Matilda Msall; webmaster Wentao Guo; and design editor Grace Richey.

This semester, we have already co-hosted two engaging events for students and faculty of the Consortium. In early September, we partnered with Pomona EcoReps to present "The Politics of Sustainability," a panel of five students with specialized knowledge and experience in environmental law and policy. In mid-October, we brought four distinguished Claremont Colleges alumni to CMC's Athenaeum for a presentation titled "The Supreme Court: What's Next in the Legal World?", in which the speakers shared knowledge from their respective legal careers. In the next few months, we plan to continue our semesterly Office Hours Speaker Series, in which professors discuss their law or policy backgrounds, research they have done, and advice they have for students interested in their fields. We also look forward to our biannual Writers' Panel, where a handful of our writers will present their research and arguments. Thank-you to our business directors, Ali Kapadia and Ande Troutman, who organize many of these popular events and play a crucial role in the smooth running of the Journal.

I would like to thank our faculty advisor, Prof. Ken Miller, for providing us guidance and mentorship. We are also indebted to the Salvatori Center, the Atheneum, and the 5C politics, legal studies, and public policy departments, for their continued support, in addition to all of our readers, partners, and alumni. If you enjoy reading the Journal and are interested in submitting your own work for potential publication, we encourage you to visit the "Submissions" page on our website for details. If you feel that you could be a valuable addition to our team, we invite you to visit our "Hiring" page for potential openings. For any further inquiries, please email us at info.5clpp@gmail.com.

As *CJLPP* extends another year from its original founding leadership, we are thrilled to see that, over the semesters, we have become far more than just a 5C club. Our readership reaches around the globe, and continues to grow each year. (In our founding year, our website generated about 3,000 views; in the first 9 months of 2018 alone, we have attracted over 26,000.) But more importantly, our team embodies a long-standing community of students and, now, alumni who are interested in law and policy because they truly care about how the fields impact us, our communities, and the world. I have witnessed firsthand that our members are local activists, researchers, debaters, and advocates. True to our mission statement, *CJLPP* fosters a network of people who want to engage in the critical issues of our time. I hope this engagement inspires you as it does me.

Happy reading!

Greer Levin
Editor-in-Chief

About

The Claremont Journal of Law and Public Policy is an undergraduate journal published by students of the Claremont Colleges. Student writers and editorial staff work together to produce substantive legal and policy analysis that is accessible to audiences at the five colleges and beyond. The *CJLPP* is also proud to spearhead the Intercollegiate Law Journal project. Together, we intend to build a community of students passionately engaged in learning and debate about the critical issues of our time!

Submissions

We are looking for papers ranging from 4 to 8 single-spaced pages in length. Our journal is especially receptive to research papers, senior theses, and independent studies or final papers written for classes. Papers need not be on American law or public policy. Students in any field of study are encouraged to submit their work, so long as their piece relates to the law or public policy.

Please submit your work (Word documents only) and direct questions or concerns by email to info.5clpp@gmail.com. We use *Bluebook* citations. Include your email address on the cover page.

Selected pieces will be published in the print edition of the *Claremont Journal of Law and Public Policy*. Other pieces may be selected for online publication only. Due to the volume of submissions that we receive, we will only get in touch with writers whose work has been selected for publication.

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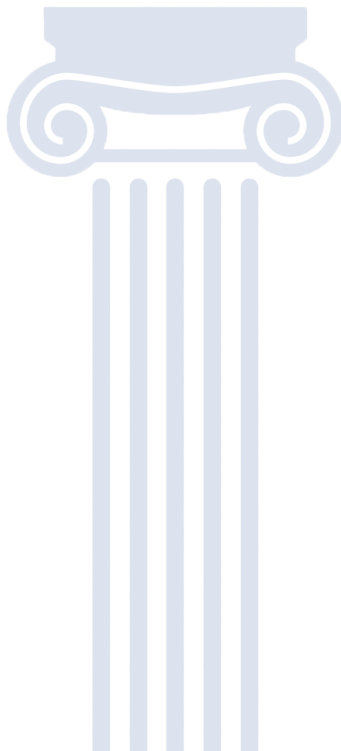
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In This Issue

Understanding Public Policy’s Impact on Generosity Clare Burgess (CMC ‘20)	6
The Danger of Discretion: <i>Implicit Sanctioning of Discrimination in Surveillance Courts</i> Lea Kayali (PO ‘19)	10
Decentralization of UNCLOS in the South China Sea William Shi (CMC ‘20)	15
Sovereignty vs. Self-Determination: <i>A Catalan Balancing Act</i> Milo Kremer (PO ‘20)	21
Against <i>Shelby County</i> and the Equal Sovereignty Principle Isaac Cui (PO ‘20)	24
The End of the One-Child Policy and Beyond: <i>The Future of China’s Population Policies</i> Alec Lei (PO ‘21)	33
Due Process Violations and the Breakdown of the U.S. Immigration Policy: <i>Interview with Lindsay Toczyłowski, Immigrant Defenders Law Center Executive Director</i> Ande Troutman (CMC ‘19)	37
From “The Trial of the Century” to Advocating Against Violence: <i>Interview with Christopher Darden</i> Michaela Shelton (PO ‘21) and Madison Yardumian (SC ‘21)	40



Understanding Public Policy's Impact on Generosity

Clare Burgess (CMC '20)
Staff Writer

Introduction

In 1894, nonprofit organizations received a tax exemption for the first time through the Tariff Act of 1894.¹ Since then, tax-exempt organizations have grown exponentially; since 1985, public charities have more than doubled their total revenue and their net income.² This is not to say that American nonprofit policy is necessarily the most effective form of governing nonprofit organizations. Although the United States is often ranked one of the highest in terms of philanthropy³ and claims three of the top five richest nonprofit organizations,⁴ many countries, such as the United Kingdom, refuse to imitate the United States' nonprofit policy. People, specifically in the U.K., opposed to imitating American nonprofit policy claim that the United States' policy disproportionately benefits the wealthy.⁵ Some opponents do not want to disproportionately encourage religious and education-based nonprofits over other causes.⁶ Still others believe that the U.K.'s existing welfare state accomplishes its goal and does not need policies to further encourage giving.⁷ Is the difference between U.S. and U.K. public policy enough to explain the discrepancies in their charitable giving? Or is there a reason beyond policy that promotes charity?

Overview of American Nonprofit Policy

In the United States, 501(c)(3) groups are tax-exempt nonprofit organizations. In order to qualify for this status, the organization must be organized and operated exclusively for a charitable purpose, which includes but is not limited to:

- Religion;
- Education;

- Science;
- Literature;
- Testing for public safety;
- Fostering national or international amateur sports competition; or
- Preventing cruelty to children or animals.⁸

501(c)(3) groups include universities, certain hospitals, churches, museums, private foundations, etc. However, it is up to the discretion of the Internal Revenue Service (IRS) to determine whether an organization which has filed for 501(c)(3) status actually falls within these categories. The IRS's definition of "charitable" has often come under scrutiny⁹ due to its vague and ever-expanding meaning. In addition to claiming tax exemption, these organizations are also eligible to receive tax deductible contributions from donors. There are over 1.5 million nonprofit organizations registered with the IRS as of 2015; however, there are an estimated 2.2 million nonprofit organizations in total. Congregations and organizations that earn less than \$5,000 annually are not required to register with the IRS.

The United States is often considered to have the most developed policy regarding nonprofits compared to other countries.¹⁰ The United States has clearly defined limits and regulations of nonprofit organizations that most countries do not yet have. For example, nonprofit organizations are somewhat restrained from engaging in legislation, and they cannot advocate for specific candidates at all.¹¹ Additionally, the Supreme Court, in *Bob Jones University v. United States*,¹² held that universities registered as nonprofit corporations cannot discriminate based on race, regardless of religious belief.¹³ Most countries allow nonprofit corporations to remain autonomous; however, this autonomy leads to a more blurred line of what is acceptable.

1 Paul Arnsberger et al., *A History of the Tax-Exempt Sector: An SOI Perspective*, 27 SOI Bulletin 105, 106 (2008), <https://www.irs.gov/pub/irs-soi/tehistory.pdf>.

2 *Id.* at 128.

3 CHARITIES AID FOUND., GROSS DOMESTIC PHILANTHROPY: AN INTERNATIONAL ANALYSIS OF GDP, TAX AND GIVING 7 (Jan. 2016), <https://www.cafonline.org/docs/default-source/about-us-policy-and-campaigns/gross-domestic-philanthropy-feb-2016.pdf>.

4 Sijuola Olanubi, *Top 5 Richest Nonprofit Organizations in the World*, THARAWAT MAG. (Nov. 17, 2016), <https://www.tharawat-magazine.com/facts/top-5-richest-nonprofit-organizations/#gs.mw8Fmvg>.

5 Mitch Nauffts, *[Infographic] Charitable Giving in the U.S. vs the U.K.*, PHILANTHROPY NEWS DIGEST (Apr. 5, 2014), <http://pndblog.typepad.com/pndblog/2014/04/infographic-charitable-giving-in-the-us-vs-the-uk.html>.

6 *Id.*

7 *Id.*

8 *Exempt Purposes – Internal Revenue Code Section 501(c)(3)*, INTERNAL REVENUE SERV. (last updated Jun. 22, 2018), <https://www.irs.gov/charities-non-profits/charitable-organizations/exempt-purposes-internal-revenue-code-section-501c3> (last visited Aug. 23, 2018).

9 MARION R. FREMONT-SMITH, URBAN INST. CTR., THE LEGAL MEANING OF CHARITY 3 (Apr. 2013), <https://www.urban.org/sites/default/files/the-legal-meaning-of-charity.pdf>.

10 LESTER M. SALAMON & HELMUT K. ANHEIER, DEFINING THE NON-PROFIT SECTOR: A CROSS-NATIONAL ANALYSIS 15 (1999).

11 Frederick J. Herzog, *Benefits and Limitations of the Popular Nonprofits*, NONPROFIT RESOURCE CTR. (Sept. 13, 2016), <https://www.thenonprofitresourcecenter.com/benefits-limitations-popular-nonprofits/>.

12 461 U.S. 574 (1983).

13 *Bob Jones University v. United States*, GEORGETOWN UNIVERSITY BERKELEY CTR. FOR RELIGION, PEACE & WORLD AFFAIRS, <https://berkeleycenter.georgetown.edu/cases/bob-jones-university-v-united-states> (last visited Aug. 23, 2018).

It is because of the limitations imposed on nonprofits that the U.S. is considered to be a leader of nonprofit policy.

Overview of United Kingdom Nonprofit Policy

Overall, the United States and the United Kingdom share many policies regarding the nonprofit sector. They have nearly identical definitions of a “charitable organization,” and they have similar legal forms that a nonprofit organization may take. Additionally, nonprofit organizations in the U.S. and the U.K. are treated similarly with regards to taxation.

It is important to note that the United Kingdom as a whole does not have specific laws regarding these institutions because each country within the United Kingdom varies. There are three legal systems that govern within the U.K.: one governing Scotland, one governing England and Wales, and the last governing Northern Ireland.¹⁴ These differences lead many organizations to cross between private, public, and voluntary sectors.¹⁵ There are no clear legal boundaries of “voluntary” institutions within the U.K., nor do the countries within the U.K. share ideas on what type of organizations should be included within the voluntary sector. Without a clear definition of the voluntary sector, it is difficult to be precise and consider all relevant organizations.

Major Differences

The largest difference between the British and American systems is the United States’ charitable deduction policy. In the United States, an individual’s donation to a charity is subtracted from his or her income before taxation. Therefore, the tax levied is lower than it would be without a donation. The United Kingdom has several ways of donating. The most radically different from the United States’ system is the United Kingdom’s “Gift Aid” policy. If a donor donates to a qualified charity through Gift Aid, the charity receives an extra twenty-five pence for every pound donated (in effect, an extra twenty-five percent of the donation).¹⁶ In other words, charities reclaim the tax on a donation, effectively increasing the size of the initial donation. Additionally, if the donor is taxed at a higher rate than the base tax of twenty percent (any individual who earns over £32,000 a year is taxed at a higher rate), he or she can reclaim the difference between his or her tax bracket and the base tax. For example, if an individual earns £150,000 a year, they are taxed at forty to forty-five percent. So, if they donate a certain amount to charity, they can reclaim twenty to twenty-five percent of the donation. However, individuals are taxed on their gross income before donating to charity. Because the taxable income is higher than it would be in the United States, the tax itself is higher than it would be in the United States. Regardless, the difference in savings is not influential enough to explain the United States’ title as “the world’s most generous nation.”¹⁷

14 SALAMON & ANHEIER, *supra* note 10, at 16.

15 *Id.* at 17.

16 *Tax Relief When You Donate to a Charity*, GOV’T OF THE UNITED KINGDOM, <http://www.gov.uk/donating-to-charity/gift-aid> (last visited Aug. 23, 2018).

17 Loulla Mae Eleftheriou-Smith, *America, New Zealand, and Canada Top*

Interestingly, as tax rates increase, so do donations.¹⁸ At nearly all levels of income, Americans are taxed more than Britons.¹⁹ However, the difference is so marginal that it cannot explain the United States’ success of encouraging the creation and growth of nonprofit organizations.

Another main difference between the United States and the United Kingdom is Americans’ attitudes toward government aid. In the United Kingdom, it is not contentious whether the government will fund or subsidize operations that benefit the welfare of its citizens. However, in the United States, reliance on public funding has been controversial for decades. Regardless of controversy, the historical nature of public subsidies for nonprofits is important to note because it has set a precedent for these nonprofits. Nonprofits have learned to take tax breaks and government grants into consideration when writing their budgets. The new tax bill passed in January of 2018 has made all nonprofit organizations nervous. While the initial tax plan proposed by President Trump was much harsher toward nonprofit organizations, it was rewritten. However, the fight for funding has been arduous recently. This creates further tension between the public and the nonprofit sector. The U.K. government, on the other hand, does not even discuss stripping or reducing their financial support for nonprofits.

Impacts on Philanthropy

According to the Charities Aid Foundation, the United States is considered the most generous nation in the world because individuals give 1.44 percent of the nation’s GDP to charities. The second highest nation, New Zealand, comes in at below 0.80 percent.²⁰ However, the United States does not even rank in the top ten when based on the percentage of the population that donates money.²¹ Generosity is more than just money; the United States ranked number seven according to percentage of the population that volunteers.²² Regardless, the United States is consistently ranked highly and is recognized as the country that donates the most to charity.

Does taxation really impact philanthropy?

Although the United States began excluding donations from taxation as an incentive to give to charity, it is widely regarded as a relatively insignificant reason for donors. In fact, donors regard tax deductions as the eleventh most important reason for giving.²³ However, when threatened to take away the char-

List of World’s Most Generous Nations, INDEPENDENT (Feb. 2, 2016), <http://www.independent.co.uk/news/world/americas/america-new-zealand-and-canada-top-list-of-world-s-most-generous-nations-a6849221.html>.

18 Nauffts, *supra* note 5.

19 Patrick Collinson, *Tax on Test: Do Britons Pay More than Most?*, GUARDIAN (May 27, 2017), <https://www.theguardian.com/money/2017/may/27/tax-britons-pay-europe-australia-us>.

20 Eleftheriou-Smith, *supra* note 17.

21 CHARITIES AID FOUND., CAF WORLD GIVING INDEX 2017, at 21 tabl. 5 (Sept. 2017), https://www.cafonline.org/docs/default-source/about-us-publications/cafworldgivingindex2017_2167a_web_210917.pdf?sfvrsn=ed1dac40_10.

22 *Id.* at 25 tabl. 7.

23 Andrew Blackman, *The Surprising Relationship Between Taxes and*

itable tax deduction, many donors said their contributions would decrease or disappear altogether.²⁴ Additionally, a fifty percent increase in the total price of a donation, the amount of the donation minus the charitable tax deduction, decreased donations by 125 percent.²⁵ Furthermore, Martin Feldstein, a Harvard professor of economics, estimates that an elimination of tax deductions altogether would lead to a forty to sixty-five percent decrease in donations to hospitals and educational causes.²⁶ So, while many people do not consider the charitable tax deduction to be the driving factor behind philanthropy, the deduction certainly promotes giving to some extent.

So, what actually aids philanthropic levels?

Since taxation does not adequately explain differences in philanthropic rates, it is necessary to consider the differences in other aspects of American and British societies. Although the United Kingdom continues to have an established church,²⁷ America is still considered more religious. In 2017, about 76.5 percent of Americans identified as religious.²⁸ In the United Kingdom, however, more than half of the population claims to not have a religion.²⁹ In Arthur C. Brooks' book *Who Really Cares*, he finds that religious people are more likely to donate to charity than secular people regardless of political ideology. According to his research, religious conservatives are ninety-one percent likely to give. Religious liberals are ninety percent likely to give to charity. Meanwhile, secular conservatives are only sixty-one percent likely to donate and secular liberals stand at seventy-two percent. An identical trend shows for rates of voluntarism as well.³⁰ However, he also notices that those who favor income redistribution are significantly less likely to behave charitably than those who do not.

Another significant factor behind charitable contributions besides religion is wealth. It makes sense that wealthier families and individuals are more likely to give, and give a higher percentage of income compared to those in lower income brack-

Charitable Giving, WALL ST. J. (Dec. 12, 2015), <https://www.wsj.com/articles/the-surprising-relationship-between-taxes-and-charitable-giving-1450062191>.

24 *Id.*

25 Rob Reich, *Would Americans Make Charitable Donations Without Tax Incentives?*, 3 STAN. SOC. INNOVATION REV. 32, 32 (Winter 2005), https://ssir.org/articles/entry/would_americans_make_charitable_donations_without_tax_incentives.

26 *Id.*

27 ANTHONY BRADNEY, RELIGION AND THE SECULAR STATE IN THE UNITED KINGDOM, *IN* RELIGION AND THE SECULAR STATE: NATIONAL REPORTS 737, 739 (2014), <https://www.iclrs.org/content/blurbs/files/United%20Kingdom.1.pdf> ("Two churches within the United Kingdom are generally thought to be established churches, the Church of Scotland in Scotland and the Church of England in England.")

28 *Religious Landscape Survey*, PEW RESEARCH CTR., <http://www.pewforum.org/religious-landscape-study/> (last visited Aug. 23, 2018).

29 Harriet Sherwood, *More Than Half UK Population Has No Religion*, FINDS SURVEY, GUARDIAN (Sept. 4, 2017), <https://www.theguardian.com/world/2017/sep/04/half-uk-population-has-no-religion-british-social-attitudes-survey>.

30 ARTHUR C. BROOKS, WHO REALLY CARES: THE SURPRISING TRUTH ABOUT COMPASSIONATE CONSERVATISM 38-39 (2007).

ets. A ten percent increase in income is associated with about a seven percent increase in charitable giving.³¹ The median income of U.K. residents in Fiscal Year Ending 2017 is £27,200 or about \$37,900.³² The median income of U.S. residents is \$59,039.³³ The near \$22,000 difference in median income is more significant than any slight tax differences.

What is going to change?

Although the United States is globally recognized for its generosity, the newly passed tax plan³⁴ can change that. The new tax bill will significantly affect the deductibility of charitable contributions. The maximum amount of money needed to receive a standard deduction is doubled; therefore, while some thirty to thirty-five percent of Americans currently itemize their tax returns to benefit from charitable deductions, only around five to ten percent of the American population will be able to do so with the new law.³⁵ Researchers estimate that this could reduce charitable donations by up to twenty billion dollars.³⁶ While this is the worst-case scenario, it is certain that this change will affect marginal charitable giving. That is, people who only give due to the charitable deduction incentive would no longer give because they are unlikely to qualify for a charitable deduction under the new plan.

Another significant change to the U.S. tax system is the change in estate tax. Before the passage of this bill, one in five hundred estates were large enough to tax. The bill has reduced this number. The estate tax often encourages wealthy people to donate to charity in lieu of paying this tax, so this change is expected to decrease bequests significantly.³⁷

While the United States faces uncertainty regarding its non-profit sector due to its new tax law, the United Kingdom faces political, economic, and social uncertainty due to the looming Brexit decision. While the EU does not provide a specific tax break for charities within their member states, the EU would be less inclined to donate to U.K. charities because they are no longer benefitting European people as a whole. United Kingdom-based charities currently receive millions of pounds from the European Union (in 2015, charities received at least £258.4 million/\$363.8 million).³⁸ The government's solution to this potential lack of funding is still unclear, but it is possible that this funding will be cut off entirely.

31 *Id.*

32 Dominic Webber & Lee Mallett, *Statistical Bulletin: Nowcasting Household Income in the UK: Financial Year Ending 2017*, U.K. OFFICE FOR NAT'L STATISTICS (July 28, 2017), <https://www.ons.gov.uk/peoplepopulationandcommunity/personalandhouseholdfinances/incomeandwealth/bulletins/nowcastinghouseholdincomeintheuk/financialyearending2017>.

33 *Id.*

34 Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017).

35 Chris Gates, *Nonprofits Are the Unintended Victims of the New Tax Bill*, HILL (Dec. 29, 2017), <http://thehill.com/opinion/finance/366773-nonprofits-are-the-unintended-victims-of-new-tax-bill>.

36 *Id.*

37 *Id.*

38 Daniel Ferrell-Schweppenstedde, *UK Charities Face Brexit Funding Cliff Edge of more than £250m*, DIRECTORY OF SOCIAL CHANGE (Nov. 21, 2017), <https://www.dsc.org.uk/content/uk-charities-brexit-funding-cliff-edge-250m/>.

Conclusion

It is obvious that American public policy seems to promote charitable giving to a larger extent than the United Kingdom's. However, it seems to be more than just public policy that shapes America's generous nature. Alexis de Tocqueville wrote that:

Americans of all ages, conditions, and all dispositions constantly unite together. . . . Finally, if they wish to highlight a truth or develop an opinion by the encouragement of a great example, they form an association. Where you would see in France the government and in England a noble lord at the head of a great new initiative, in the United States you can count on finding an association.³⁹

Tocqueville recognized the American initiative to solve problems and help others through "associations" instead of entirely through government aid. However, with the nonprofit sector expanding globally and employing more and more people, it is crucial that American public policy continue to benefit this often-unnoticed sector.

³⁹ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 596 (Isaac Kramnick ed., Gerald Bevan trans., 2003).

The Danger of Discretion

Implicit Sanctioning of Discrimination in Surveillance Courts

Lea Kayali (PO '19)
Print Edition Editor

In a national controversy over the independent investigation into Russian interference in the 2016 elections, Republican congressmembers, in coordination with the Trump Administration, released a memo explicating the alleged activities of the intelligence community. In the ensuing weeks, the so-called Nunes Memo garnered widespread national attention. The document, written by Representative Devin Nunes (R-CA), Chairman of the House Permanent Select Committee on Intelligence, detailed FBI and DOJ surveillance of Trump's inner circle.¹ A series of laws packaged as the Foreign Intelligence Surveillance Act (FISA) was the central piece of the national conversation that ensued over the surveillance of Trump's aides.²

Loosely defined, FISA governs the intelligence community's ability to collect data through surveillance. FISA has existed for over four decades, and it plays a key role in emboldening intelligence agencies under the framework of national security.³ Often critiqued or defended, but less often understood,⁴ I contend that the problematic implications of FISA must be discussed with a broader context in mind: that which considers the powers that our national security policies provide to law enforcement, and how these powers are used. I further claim that FISA allows for discriminatory targeting of surveillance.

In this paper, I examine FISA and the powers it grants to the intelligence community. First, I argue that FISA's procedures are so broadly defined that they do not properly regulate law

enforcement officers. I next take an analytical lens to the courts which oversee FISA proceedings and note that these courts rarely act as a barrier to data collection. Considering FISA's flaws in intent and delivery, I argue that the decisions that the intelligence community makes to selectively apply surveillance is a form of discretionary enforcement—disproportionately implementing a law that is all-encompassing.

I then compare national security agents' discretionary practices under FISA with criminal law enforcement by local police. In particular, I look at two components: the habit of courts to sanction discretionary enforcement (such as in *McCleskey v. Kemp*), and the discriminatory practices of police and agencies during the so-called War on Drugs and in the ongoing War on Terror. An important parallel between these two forms of selective prosecution (national security surveillance and criminal arrests) is a pervasive habit of blatant discrimination. In the War on Drugs, officers chose to criminalize black communities rather than equally applying narcotics crack-downs. In the War on Terror, the intelligence community targeted Muslims, Middle Eastern, and South Asian persons at a rate that was disproportionate to any actual threat that members of those communities pose.

I argue here that FISA must be reformed for, as it stands, it emboldens security agents with broad and unspecified powers. History in criminal law shows us that these powers inherently lend themselves to discriminatory practices. To be clear, this is not an offensive against *all* surveillance in the interest of national security. Rather, it is a call for accountability and fact-based, proportional security policy.

The Foreign Intelligence Surveillance Act (FISA)

FISA emerged in the wake of Democratic concerns for how President Nixon was using surveillance capabilities against U.S. citizens. Congress created the Act to establish oversight over foreign intelligence inquiries in an effort to balance concerns for civil liberties with necessary security policy. The Act also created an entity for granting warrants for the collection of subjects' data: the FISA Court. FISA's procedures were intended to guide surveillance agencies in best practices for the collection and treatment of data.⁵ The creation of FISA im-

1 Full Text: *Nunes Memo on FBI Surveillance*, POLITICO (Feb. 2, 2018, 12:22 PM), www.politico.com/story/2018/02/02/full-text-nunes-memo-fbi-transcript-385057 (hereinafter Nunes Memo).

2 See, e.g., Eric Felton, *Release of FISA Applications Shines Light on Dueling Nunes and Schiff Memos*, WEEKLY STANDARD (July 23, 2018, 6:45 PM), <https://www.weeklystandard.com/eric-felton/release-of-fisa-applications-shines-light-on-dueling-nunes-and-schiff-memos>.

3 The vast collection that the intelligence community was conducting was famously explicated in the Edward Snowden leaks of NSA files in the summer of 2013. See, e.g., Paul Szoldra, *This Is Everything Edward Snowden Revealed in One Year of Unprecedented Top-Secret Leaks*, BUSINESS INSIDER (Sept. 16, 2016, 8:00 AM), <https://www.businessinsider.com/snowden-leaks-timeline-2016-9>.

4 See, e.g., Richard Fontaine, *Commentary: Why the FISA Act Isn't the Privacy-Stealing Monster Some Think It Is*, FORTUNE (Jan. 23, 2018), <http://fortune.com/2018/01/23/section-702-fisa-terrorism/>.

5 *Foreign Intelligence Surveillance Act of 1978*, 50 U.S.C. §§ 1801-1871

proved the process of expansive government collection of data by regulating it at all. However, this does not mean that FISA protects citizens' data in a comprehensive way, and in fact large portions of FISA grant security agencies wide discretion over data extraction. For example, Section 702, an oft-cited portion of the Act,⁶ specifically *expands* agencies' jurisdiction over certain forms of communication, including emails, messages, and phone calls of foreign targets—which may include the communications of American nationals.⁷ These sections that codify mass surveillance are what cause pundits to claim that, from its inception to its implementation, FISA was turned on its proverbial head.⁸

Importantly, FISA limited surveillance to targeting foreign powers or non-U.S. persons acting on behalf of foreign powers.⁹ However, this broad definition allowed agents to sweep up U.S. nationals' communications along the way. Though only foreign nationals could be targets of surveillance campaigns, U.S. persons could still be surveyed. While FISA proponents argue that those sweeps are "incidental,"¹⁰ opponents counter that FISA is used to capture dragnet data of U.S. citizens in communication with foreigners or U.S. citizens communicating through international avenues. These loopholes encapsulate a vast number of domestic communications, including messages between American citizens and those of citizens communicating with foreign residents. As David Medine—then chair of the Privacy and Civil Liberties Oversight Board¹¹—noted in his congressional testimony in 2016: "[T]he database of domestic information is vast, and could include individuals' family photographs, love letters, personal financial matters, discussions of physical and mental health, and political and religious exchanges."¹² The broad powers given to surveillance agencies—the FBI, NSA, etc.—are enough to raise qualms in

even the slightest civil libertarian.¹³ The coordinated collection of billions of pieces of data build metadata profiles of a subject which create a more complete and intimate picture of the subject's entire life experience. The aggregate of this surveillance data gives agents access not only to the subject's communications, but to her interests, relationships, and ambitions. This data has the power to affect law enforcement and prosecution handily. As former NSA director Michael Hayden said rather bluntly: "[W]e kill people based on metadata."¹⁴ Many scholars and advocacy groups have concerns that these policies violate a constitutional right to privacy, a concern well founded in the wake of Edward Snowden's whistleblowing¹⁵ and growing awareness of the U.S. government's surveillance capabilities.

In this paper, I hone in on one of the many problematic aspects of FISA: its broadness. Because it grants national security agencies such robust powers of surveillance in attempt to enforce equally vague missions¹⁶ (the mandate to protect against terrorism¹⁷), agents must use discretion in enforcement. Our intelligence community simply does not have the capacity to review every communication swept up under FISA, nor every communication with foreign interests. Plainly, agencies conducting mass surveillance must make decisions about how to enforce vague counter-terrorism doctrines. Such targeting is subject to implicit bias, as I will discuss further.

FISA Warrant Courts: Foreign Intelligence Surveillance Courts

Proponents of FISA, in response to my argument so far, would point to the codified warrant process that the Act establishes.¹⁸ FISA requires officers to earn a court's approval to surveil Americans, and so the Foreign Intelligence Surveillance Court (FISC) was established with the goal of ensuring due process in

(2018) (hereinafter FISA).

6 See, e.g., *Warrantless Surveillance Under Section 702 of FISA*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/issues/national-security/privacy-and-surveillance/warrantless-surveillance-under-section-702-fisa> (last visited Aug. 27, 2018).

Supra Note 1et al.rveillance."eillance, ued that their civil liberties are left with few options. e cases, we should expect th

7 U.S. HOUSE OF REPRESENTATIVES PERMANENT SELECT COMM. ON INTELLIGENCE, FISA SECTION 702, intelligence.house.gov/fisa-702/ (last visited Aug. 4, 2018).

8 Ewin Macaskill & Gabriel Dance, *NSA Files Decoded*, GUARDIAN (Nov. 1, 2013), <https://www.theguardian.com/world/interactive/2013/nov/01/snowden-nsa-files-surveillance-revelations-decoded#section/1>.

9 FISA SECTION 702, *supra* note 7.

10 Asha Rangappa, *It Ain't Easy Getting a FISA Warrant: I Was an FBI Agent and Should Know*, JUST SECURITY (Mar. 6, 2017), www.justsecurity.org/38422/aint-easy-fisa-warrant-fbi-agent/.

11 PCL0B is an independent agency whose mission is "to ensure that the federal government's efforts to prevent terrorism are balanced with the need to protect privacy and civil liberties." U.S. PRIVACY AND CIVIL LIBERTIES BD., HISTORY AND MISSION, <https://www.pcl0b.gov/about/> (last visited Sept. 19, 2018).

12 *Oversight and Reauthorization of the FISA Amendments Act: The Balance Between National Security, Privacy and Civil Liberties: Hearing Before the S. Comm. On the Judiciary*, 114th Cong. (2016) (prepared statement of David Medine, Privacy and Civil Liberties Oversight Board Chairman), www.pcl0b.gov/newsroom/2016/05/10/chairman-david-medine-testimony-before-the-senate-judiciary-hearing.html.

13 Civil liberties groups such as the ACLU and the Arab American Institute have launched educational campaigns about the implications of FISA and government surveillance. See, e.g., ARAB AM. INST., SURVEILLANCE, <http://www.aaiusa.org/surveillance> (last visited Aug. 4, 2018)). Ad-hoc organizations have even been created around this issue, such as Stop Watching Us. SWU was created in the wake of the Snowden release to organize a march on Washington to demand federal accountability to the privacy concerns of citizens. The rally occurred in 2013, and four years later, in December of 2017, the Act was again renewed. See STOP WATCHING US, WHO WE ARE, <https://rally.stopwatching.us/> (last visited Aug. 27, 2018)).

14 SYMPOSIUM: THE END OF PRIVACY: RE-EVALUATING THE NSA, JOHNS HOPKINS UNIV. (2014), <https://www.youtube.com/watch?v=kV2HD-M86XgI>.

15 Macaskill & Dance, *supra* note 8.

16 Both the FBI and NSA were established by the executive branch, not through a congressional statute. Their missions themselves are vague, and the executive definition of terrorism has long since been critiqued as remarkably open ended. See generally BRUCE HOFFMAN, INSIDE TERRORISM (1998). As such, the American people rely on laws such as FISA to regulate these agencies in pursuing such broad aims. When the regulatory laws (e.g., FISA and the USA PATRIOT Act) are themselves vague and all-encompassing, it makes the danger of discretionary enforcement far more probable.

17 FED. BUREAU OF INVESTIGATION, TERRORISM <https://www.fbi.gov/investigate/terrorism> (last visited Sept. 19, 2018).

18 Rangappa, *supra* note 10.

surveillance initiatives.¹⁹ However, agencies can move forward with their surveillance for up to a year without a warrant,²⁰ and warrants are granted on one of the lowest burden of proof in our legal system.

The surveillance agent simply needs to show that their target *could* be an “agent of a foreign power . . . knowingly engag[ing] . . . in clandestine intelligence activities.”²¹ In other words, if there is probable cause that the target is an agent of a foreign power, though *not necessarily engaging in illegal activities*, the warrant is granted. Here it is important to note that subjects communicating with the foreign power may also be surveilled as a result of their relationship with the target, regardless of whether or not they are themselves a foreign power. The language of FISA only specifies that warrant seekers prove that “the target of the electronic surveillance is a foreign power or an agent of a foreign power.”²²

The Foreign Intelligence Surveillance Court is veiled from public understanding, as all of their proceedings are classified, so what we know about this system is limited.²³ The Court is presided over by eleven federal judges appointed by the Chief Justice of the U.S. Supreme Court. The FISC has jurisdiction over all surveillance procedures enumerated in FISA. This includes sweeps of electronic communications as well as physical searches.²⁴

FBI and NSA agents point out that warrant seekers must pass through a layer of preclearance before even knocking on the courthouse doors,²⁵ but this preclearance only requires that a hypothetical threat exists that the suspect may be related to or implicated in.²⁶ Because the burden of proof placed on the warrant seeker in these cases is extremely low, it is easy to obtain a favorable ruling, as evidenced by the rate at which the court actually grants warrant requests. In the years 2013 to 2017, 7,698 requests have been made to the court; thirty-nine have been rejected. This places the warrant approval rate at 99.5 percent – a comically high number to be considered evidence of review.²⁷ Agencies attempt to dispel concerns for this procedure by claiming that warrants are only granted under specific circumstances.²⁸ Unfortunately, the statistics suggest otherwise.

19 FOREIGN INTELLIGENCE SURVEILLANCE COURT, ABOUT THE FOREIGN INTELLIGENCE SURVEILLANCE COURT, www.fisc.uscourts.gov/about-foreign-intelligence-surveillance-court (last visited August 4, 2018).

20 50 U.S.C. § 1802 (“[T]he President, through the Attorney General, may authorize electronic surveillance without a court order under this title to acquire foreign intelligence information for periods of up to one year.”); see also FISA SECTION 702, *supra* note 7.

21 50 U.S.C. § 1802.

22 *Id.* § 1804.

23 *What’s Wrong with Section 702*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/issues/national-security/privacy-and-surveillance/warrant-less-surveillance-under-section-702-fisa> (last visited Aug. 27, 2018).

24 *Id.*

25 Rangappa, *supra* note 10.

26 *Id.*

27 ELECTRONIC PRIVACY INFO. CTR., FOREIGN INTELLIGENCE SURVEILLANCE ACT COURT ORDERS 1979-2016, epic.org/privacy/surveillance/fisa/stats/default.html (last visited Sept. 19, 2018).

28 Rangappa, *supra* note 10.

Parallels between Criminal Law and Surveillance Law

By allowing nearly every surveillance request to proceed, the nebulous FISC gives law enforcement agents full discretion, which might not be a good thing. The discretion I discuss here refers to the decision of whom to surveil in the first place—in other words, who is inherently suspected before necessarily having committed a crime. Law enforcement discretion means that these tough decisions regarding what kinds of people to search are made by individual officers and departments—not prescribed by the law itself. When agencies are considering millions of potential targets and billions of electronic communications, this discretion is naturally used in a sort of crude vetting process. Discrimination appears to become a tool in this practice.

The statistics of surveilled subjects are classified, and data is limited when it comes to national security enforcement writ large. Still, I argue that discretion in counterterrorism intelligence (as regulated by FISA) results in discriminatory surveillance. A parallel case makes this clear. During the War on Drugs, vague mandates to crack down on drug users²⁹ provided ample room for selective enforcement on American streets. As acclaimed legal scholar Michelle Alexander notes,³⁰ officers disproportionately applied this enforcement to black inner city communities.³¹ I suggest two linkages between contemporary counter-terrorism efforts and tough on crime practices: first, that courts have sanctioned this enforcer’s discretion (damning it to continue), and that this discretion has implications of discrimination due to pre-existing societal biases.

A. Discretionary Rulings

Since the dawn of the War on Drugs, legislators and judges gave extraordinary discretion to law enforcement—especially in drug crackdowns.³² With this power, law enforcers often exhibited patterns of discriminatory arrests, harassment, and detainments, targeting black low-income communities far more than white middle-class ones, though drug use in both communities was comparable.³³ Victims of selective enforcement of criminal policy took their cases up under the Fourteenth Amendment, arguing that discrimination led to their incarceration. The result of the Supreme Court’s failure to sympathize with these claims ultimately supported police’s broad powers

29 The Drug Enforcement Administration (DEA) was created by President Nixon in 1973 as a key first step in the War on Drugs. I argue that, as with the FBI and NSA, the DEA’s mission is vague and its efforts to coordinate local law enforcement. Also, like the case in the War on Terror, the DEA did not (and does not) take explicit and sufficient measures to prevent discrimination in selective enforcement procedures. See, e.g., DRUG ENFORCEMENT ADMIN., MISSION, <https://www.dea.gov/mission> (last visited Aug. 27, 2018).

30 MICHELLE ALEXANDER, *THE NEW JIM CROW* (2012).

31 *Id.* at 50.

32 *Id.* at 52-55.

33 As a report from Drug Policy Alliance, an advocacy coalition group, points out: “Today, Latino and especially black communities are still subject to wildly disproportionate drug enforcement and sentencing practices.” DRUG POLICY ALLIANCE, *A BRIEF HISTORY OF THE DRUG WAR*, <http://www.drugpolicy.org/issues/brief-history-drug-war> (last visited Aug. 27, 2018).

and discriminatory practices, similar to FISC's granting of warrants to surveillance agents.

One such case in the criminal context was *McCleskey v. Kemp*, where a black defendant proved that he was statistically more likely to receive a death sentence than a white man who committed the same crime.³⁴ The issue in *McCleskey* boiled down to the application of law enforcement and sentencing discretion. However, instead of applying the Equal Protection Clause to the case, this discriminatory policy was exacerbated by the Supreme Court decision, where they decided that clear evidence of "discriminatory intent"³⁵ was needed to prove a Fourteenth Amendment violation. In other words, an abundance of evidence suggesting that race based discrimination had indeed occurred was not enough to rule the law unconstitutional: explicit racial reasoning (intent) was required. Though the case was about sentencing rather than arrests and detainments, the *McCleskey* precedent effectively sanctioned law enforcers' unchecked power to use their discretion in implementing sweeping policy.³⁶

I argue that, by granting 99.5 percent of warrants in domestic intelligence cases³⁷, FISC procedures parallel the decision the Supreme Court made in criminal law. By allowing intelligence agents essentially unhindered access to their targets' data, the Foreign Intelligence Surveillance Court is, as a matter of fact, sanctioning those targets. This becomes problematic when we consider the realities of discrimination that exist in the surveillance community.

B. Discriminatory Results

Implicit racial and ethnic bias is a given in our society. A vast body of research published in the last decade has exposed the drastically disproportionate incarceration of people of color in the wake of the aforementioned discretionary powers of law enforcement.³⁸ In the case of crime crack-downs, implicit biases led officers to the assumption that black and Latinx people were more likely to be involved in criminal behavior; scholars point to increased policing in urban neighborhoods as the results of this faulty assumption.³⁹ Though in many cases these biases are blatantly untrue,⁴⁰ law enforcement disproportionately targeted (and continues to target) communities of color.⁴¹ It is clear that the implementation of criminal law allows discretion to become discrimination, even though court action does not promote regulation of officers to curtail prejudice.

With this in mind, I return to the issue of FISA. The details of surveillance warrant grants are classified, and as mentioned, hard data on the demographics of those surveilled is limited.

34 *McCleskey v. Kemp*, 481 U.S. 279 (1987).

35 *Id.* at 289.

36 ALEXANDER, *supra* note 30, at 99-139.

37 ELECTRONIC PRIVACY INFO. CTR., *supra* note 27.

38 See, e.g., Kristin Weir, *Policing in Black and White*, 47 AM. PSYCHOL. ASS'N 36 (2016), Cody T. Ross, *A Multi-Level Bayesian Analysis of Racial Bias in Police Shootings at the County-Level in the United States, 2011-2014*, 10 PLOS ONE 1 (2015).

39 Weir, *supra* note 38.

40 ALEXANDER, *supra* note 30, at 120.

41 *Id.* at 103-05.

However, as I will explore, reports by political advocacy and research groups such as the Council on American-Islamic Relations (CAIR)⁴² and the Arab American Institute⁴³ imply that the troubling trend in criminal law enforcement also arises in domestic surveillance practices.

In counter-terrorism policy, the unspoken targets of surveillance are brown people and Muslims.⁴⁴ Prejudice against Middle-Eastern Americans has skyrocketed since the tragedy of September 11, 2001 and the Iraq War, and sentiments against Islam is at an all-time high (Pew Research Center reports that 2016 saw the highest rates of assaults against Muslims in the twenty-first century). The implicit bias present in counterterrorism agents (who are inherently products of this societal trend) parallels that of officers prejudiced against black inner-city communities in the criminal context.⁴⁵ It is worth noting that the vast majority of incidents of mass violence in America are not committed by Muslims,⁴⁶ and, post-September 11, the most deadly attacks have all been committed by non-Muslims.⁴⁷

As CAIR points out, the targeting of Muslims in surveillance operations is common place.⁴⁸ In just a few days before elections in 2016, over one hundred Muslim-Americans in Texas contacted CAIR about having been visited by the FBI in response to data extraditions.⁴⁹ Discriminatory enforcement is further evidenced by the fact that the FBI has poured billions of dollars into sting operations⁵⁰ involving thousands of personnel hired to infiltrate Muslim communities.⁵¹ The FBI in particular is infamous for its targeting of U.S. Muslims, a clear indication that FISA does not curtail implicit biases and rather

42 COUNCIL ON AM. ISLAMIC RELATIONS, PROTECTING YOU FROM ILLEGAL SURVEILLANCE [HTTPS://WWW.CAIR.COM/PROTECTING YOU FROM ILLEGAL SURVEILLANCE](https://www.cair.com/protecting-you-from-illegal-surveillance) (last visited Aug. 27, 2018).

43 ARAB AM. INST., *supra* note 13.

44 Note that historically surveillance has also disproportionately targeted black activists, a disturbing practice that may be resurfacing in the era where Executive order's label African American activists as "Black identity extremists." See, e.g., Rashad Robinson, *The Federal Government's Secret War on Black Activists*, AMERICAN PROSPECT (Apr. 4, 2018), <http://prospect.org/article/federal-governments-secret-war-on-black-activists>.

45 Katayoun Kishi, *Assaults Against Muslims Surpass 2001 Level*, PEW RES. CTR. (Nov. 15, 2017), <http://www.pewresearch.org/fact-tank/2017/11/15/assaults-against-muslims-in-u-s-surpass-2001-level/>.

46 Mark Follman, Gavin Aronsen & Deanna Pan, *A Guide to Mass Shootings in America*, MOTHER JONES (June 28, 2018), <https://www.mother-jones.com/politics/2012/07/mass-shootings-map/>.

47 Scott Shane, *Homegrown Extremists Tied to Deadlier Toll Than Jihadists in U.S. Since 9/11*, N.Y. TIMES (June 24, 2015), <https://www.nytimes.com/2015/06/25/us/tally-of-attacks-in-us-challenges-perceptions-of-top-terror-threat.html>.

48 COUNCIL ON AM. ISLAMIC RELATIONS, CAIR RECOMMENDATIONS TO PCLOB ON GOVERNMENT WATCHLISTS, SURVEILLANCE, PROFILING (July 23, 2014), www.cair.com/government-affairs/12574-cair-to-pclob-on-watchlists-surveillance-profiling.html.

49 Mazin Sidahmed, *FBI's Pre-Election Sweep of Muslim Americans Raises Surveillance Fears*, GUARDIAN (Jan. 16, 2017), www.theguardian.com/us-news/2017/jan/16/fbi-muslim-americans-visits-surveillance-cair.

50 See, e.g., Shirin Sinar, *Questioning Law Enforcement: The First Amendment and Counterterrorism Interviews*, 7 BROOKLYN L. REV. 41 (2011).

51 Sidahmed, *supra* note 49.

allows for prejudicial discretion. Put plainly, law enforcement discretion leads to discriminatory enforcement practices in the surveillance community, as it did in the War on Drugs.

Implications of Court-Backed Discretionary Enforcement

In criminal law, after *McCleskey*, it became virtually impossible for black Americans to take their arrests to court on discrimination charges. As Michelle Alexander articulates in her book *The New Jim Crow*, “few challenges to sentencing schemes, patterns, or results have been brought since *McCleskey*, since the exercise is plainly futile.”⁵² The same has happened in surveillance court. The nature of the Foreign Intelligence Surveillance Court makes agency practices even *less* accessible for surveillance targets. The court exists in a sequestered, closed-door system, and information about their proceedings is hard to come by.⁵³ Thus, it is nearly impossible to challenge abuse of discretion. By giving law enforcers (police officers in the case of criminal law and national security agents in the surveillance context) ample room for discretionary enforcement, the courts here are tacitly permitting discriminatory practices. The parallels in surveillance targeting are eerily reminiscent of the disproportionate condemnation of people of color since *McCleskey*. By granting the vast majority of warrants, FISC falls in line with a disturbing trend in our judicial system: non-intervention in cases of law enforcement discrimination.

Conclusion

In this paper I have put forth an argument against judicial complacency in discriminatory enforcement of policies associated with the War on Drugs and War on Terror policies. The Foreign Intelligence Surveillance Act arms the NSA and FBI with vast data collection tools which reach far beyond the scope necessary to conduct efficient counterterrorism efforts. Civil rights organizations’ research into these secret practices shows us that agents apply their powers disproportionately against Middle Eastern, South Asian, and Muslim Americans. The court system meant to curtail such spying on U.S. citizens grants nearly every warrant request, proving that the courts sanction enforcers’ discriminatory, selective prosecution. The parallels with criminal law enforcement here are significant. As I argued above, the War on Drugs follows a remarkably similar factual pattern of enforcers’ discretion and court sanctioning. *McCleskey v. Kemp* endorses police officers as FISC endorses intelligence agents. When selective enforcement and implicit bias so clearly result in discrimination, as they do in these cases, we should expect the judicial system to intervene.

The question of surveillance warrant granting seems central to concerns about how much power our courts grant law enforcement when faced with agencies’ broadly prescribed missions and poor regulation (such as FISA). If the justice system does not demand stronger regulation when faced with the task, Americans concerned for their civil liberties are left with few options.

These concerns were the pinnacle of the memo mentioned at the opening of this paper. Indeed, Representative Nunes plays with transparency concerns in saying:

[D]ue to the sensitive nature of foreign intelligence activity, FISA submissions (including renewals) before the FISC are classified. As such, the public’s confidence in the integrity of the FISA process depends on the court’s ability to hold the government to the highest standard—particularly as it relates to surveillance of American citizens.⁵⁴

Here, Representative Nunes pulls on concerns over our judicial system’s ability—or lack thereof—to protect the rights of American citizens. Though flawed in a number of ways,⁵⁵ the memo’s sentiment about public confidence rings true.

Indeed, Americans should be concerned with surveillance and FISA. Yet ordinary people of Muslim and immigrant backgrounds are the most affected by the systems of surveillance that the memo critiques. Discrimination that plays a significant role in surveillance practices leads to the criminalization of innocent people and disproportionate prosecution of people of color. If we have learned anything from the War on Drugs, we must understand the necessity of transparency in warrant courts and strict regulation of NSA spying. We must critique and understand surveillance policy, for the danger of discretion looms over our communities.

⁵⁴ Nunes Memo, *supra* note 1.

⁵⁵ See, e.g., Zack Beauchamp, *The Democratic Rebuttal to the Nunes Memo Tears It Apart*, Vox (Feb. 24, 2018, 7:16 PM), <https://www.vox.com/world/2018/2/24/17048936/democrat-rebuttal-nunes-schiff-memo>.

⁵² ALEXANDER, *supra* note 30, at 114.

⁵³ ELECTRONIC PRIVACY INFO. CTR, *supra* note 27.

Decentralization of UNCLOS in the South China Sea

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I. Introduction

Ranging from arrests of fishermen to United States-Philippines joint exercises,¹ the tension between China and the Philippines over the South China Sea has existed for decades.² In January 2013, the Philippines initiated compulsory arbitration with China through the International Tribunal for the Law of the Sea (ITLOS) at the Hague.³ This method of dispute settlement, which does not require China's agreement, is authorized under the United Nations Convention on the Law of the Sea (UNCLOS). China responded with an attitude of "non-acceptance and non-participation," indicating that the arbitration involves adjudication on sovereignty and delimitation of maritime areas, which are beyond the scope of UNCLOS.⁴ On July 12, 2016, the dynamite exploded; the Tribunal constituted by UNCLOS under the registry of the Permanent Court of Arbitration (PCA) issued the final award⁵ unanimously in favor of the Philippines. By delegitimizing China's historical rights in the South China Sea and the Nine-Dash Line claim, it determined that the status of disputed features in the South China Sea does not generate 200 nautical miles of exclusive economic zones (EEZ) and condemned the legality of China's activities in the disputed areas.⁶ However, far from complying with the verdict under Article 296 and Article 11 of Annex VII of UNCLOS, China denounced the verdict as "a piece of scrap paper" that was "null and void."⁷

1 See, e.g., *Philippines, U.S. to Determine Fate of Joint Exercises Next Month*, REUTERS (Oct. 26, 2016), <http://www.reuters.com/article/us-philippines-usa-defence-idUSKCN12Q143> (last visited Aug. 3, 2018).

2 E.g., *Scarborough Shoal Standoff: A Timeline*, INQUIRER.NET (May 9, 2012, 10:01 AM), <http://globalnation.inquirer.net/36003/scarborough-shoal-standoff-a-historicalline> (last visited Aug. 3, 2018).

3 Hudson Lockett, *Timeline: South China Sea Dispute*, FINANCIAL TIMES (July 12, 2016), <https://www.ft.com/content/aa32a224-480e-11e6-8d68-72e9211e86ab> (last visited Aug. 3, 2018).

4 MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA, POSITION PAPER OF THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA ON THE MATTER OF JURISDICTION IN THE SOUTH CHINA SEA ARBITRATION INITIATED BY THE REPUBLIC OF THE PHILIPPINES (Dec. 7, 2014), http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml [hereinafter PRC POSITION PAPER].

5 The Tribunal uses "award" when it means "verdict."

6 PERMANENT CT. OF ARBITRATION, PRESS RELEASE: THE SOUTH CHINA SEA ARBITRATION (THE REPUBLIC OF THE PHILIPPINES V. THE PEOPLE'S REPUBLIC OF CHINA") 1-3 (July 12, 2016), <https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Press-Release-No-11-English.pdf> [hereinafter PCA AWARD PRESS RELEASE].

7 Richard Javad Heydarian, *Two Days After: Enforcing The Hague Verdict in the South China Sea*, BROOKINGS INST. (July 25, 2016), <https://www.brookings.edu/opinions/the-day-after-enforcing-the-hague-verdict-in->

The final award did not convince China. International law is known as a measure to settle disputes, but the award seemed to make China more defiant. The reason behind China's non-compliance and aggressiveness is worth exploring. This paper tries to explain China's behavior using theories from international relations and international law. Hans Morgenthau provides a realist account of international law by arguing that its major problem lies in its decentralized nature,⁸ since it has difficulty harnessing universal principles to bind all members of the international community.⁹ Morgenthau's theory provides a fundamental reason for China's non-compliance to the final award: Because of the decentralized nature of UNCLOS, China distrusted the legitimacy of the "final binding" verdict, interpreting UNCLOS differently by stressing the issues of coercion, jurisdiction, and representation. The paper introduces Morgenthau's realist theory on the main problems of international law, delves into a more specific version of this theory in the context of UNCLOS, and shows why the theory can explain China's actions. The paper then strengthens this argument by explaining why China's action would have been mollified if the decentralization of UNCLOS was mitigated.

II. The Main Problems of International Law and UNCLOS

A. Morgenthau's Realist Account of International Law

In *Politics Among Nations: The Struggle for Power and Peace*, Hans Morgenthau regards decentralization as the main drawback of international law. Unlike domestic politics, where centralized agencies have a monopoly of law-making or law-interpreting power, international politics requires that individual states draft laws to which they consent, simply because there is no central authority to draft, implement, or enforce international law.¹⁰ In other words, the legitimacy of international law derives from the consent of individual states and only binds members who are signatories of a particular law.¹¹

Moreover, consent does not make international law effective. To accommodate diverging national interests, drafters of international laws have to make laws imprecise, but the vagueness and ambiguity generate issues of interpretation.¹² Nations can

[the-south-china-sea/](http://www.brookings.edu/opinions/the-day-after-enforcing-the-hague-verdict-in-the-south-china-sea/) (last visited Aug. 3, 2018).

8 HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR PEACE AND POWER* 257 (Kenneth W. Thompson ed. 1993).

9 *Id.*

10 *Id.* at 256.

11 *Id.* at 257.

12 *Id.*

use the imprecision of international law to provide an interpretation to advance their national interests and “shake off the restraining influence upon their foreign policies.”¹³

The decentralized nature also manifests itself in international courts. Except for the International Court of Justice, which is composed of fifteen members who represent “the main forms of civilization and of the principal legal systems of the world,” Morgenthau indicates that many other international courts are mere pretenses of a centralized agency.¹⁴ For instance, the Permanent Court of Arbitration (PCA) has 120 judges appointed by the signatories of either of two Hague Conventions for the Pacific Settlement of International Disputes, established in 1899 and 1907. Because the PCA never collectively decides a case but selects members to constitute an arbitral tribunal, it is more like a panel with representatives of national interests rather than a court, which should decide a case from an impartial and reasonable stance.

B. The Realist Theory in the Context of UNCLOS

Morgenthau’s theory succinctly captures the essence of the drawbacks of international law. To illustrate how his theory can be the key to explaining China’s responses to the verdict of the South China Sea Arbitration, it is necessary to contextualize the realist theory of international law to UNCLOS. Alan Boyle¹⁵ provides a similar and more detailed version of the problems of UNCLOS by elaborating the problems of fragmentation and jurisdiction of disputes settlement because of issues of decentralized nature, substantive consent, and classifications of disputes.

The arbitral tribunal constituted under UNCLOS is an institution similar to the PCA: unlike a court, it is more like a panel. According to Annex VII, Article 3, the arbitral tribunal shall consist of five members; from the list drawn by the Secretary General of the United Nations, each party of a dispute can appoint one member, who can be its national. The two parties shall agree to appoint the other three members, including the President of the tribunal, from the list.¹⁶ If they do not come to agreement, the President of the International Tribunal for the Law of the Sea makes the necessary appointment(s).¹⁷ Therefore, although three members of the tribunal can represent UNCLOS from an impartial standpoint, the other two members may not necessarily act in the same way because they functionally represent the national interests of the two parties at stake. Moreover, if both parties cannot agree on the appointment of the other three judges in the arbitral tribunal, either party may question the legitimacy of the tribunal, which may not represent its interest.

Moreover, international law requires countries to consent to following the law—and, with UNCLOS, consent is more

complicated than just signing the treaty itself. Parties involved in a dispute might both be signatories to UNCLOS, but they do not necessarily agree on specific ways to settle disputes. In other words, being a signatory is only surface-level, rather than substantive, consent. Realizing that a rigid measure may not satisfactorily settle disputes, UNCLOS provides four measures under Part XV, which Boyle names as “the Cafeteria Approach”: (1) the ITLOS, (2) the International Court of Justice, (3) arbitration, and (4) special arbitration.¹⁸ If both parties do not consent to a specific measure, compulsory arbitration becomes the last resort.¹⁹ If one party triggers compulsory arbitration, the dissenting party may point out the coercive nature of the dispute resolution mechanism. Moreover, the dissenting party has the right to opt out of compulsory arbitration for disputes concerning “sea boundary delimitations, or those involving historic bays or titles.”²⁰ If there is already an agreed mechanism to settle the dispute, it can be cited as evidence that the competing party is abusing the compulsory arbitration procedure.²¹ Under this circumstance, the two parties make drastically different claims and have no mutual consent in the method of dispute resolution; thus the verdict by the arbitral tribunal may not be convincing to one party.

Because UNCLOS lacks jurisdiction in many areas, eliminating fragmentation of the jurisdiction becomes a crucial prerequisite of a successful arbitration. UNCLOS has jurisdiction on disputes only related to the freedom of navigation, environmental protection of the high seas, and a country’s entitlement to an exclusive economic zone.²² However, it provides no authority to question a state’s discretionary power over fishing, marine research, and other sovereign rights within its EEZ, disputed sovereignty over land territory, and delimitation of the territorial sea, EEZ, or continental shelf.²³ Therefore, the effectiveness of dispute settlement largely depends on the classification of the dispute. If the tribunal rules that the dispute is outside its jurisdiction, or one party dissents on the classification of the dispute, then significant fragmentation emerges. To have a unified view over the dispute, the two parties either agree on the submission of all the issues in dispute or submit only the high seas issues.²⁴ Both scenarios have problems of agreement, as the high seas issue to one party may be regarded as dispute over sovereignty to the other, making it increasingly hard for both parties to have converging views.²⁵

Though the provisions about classification of disputes seem precise and definite, they do not fully resolve the ambiguity of international law when applied to specific cases. Although the tribunal’s jurisdiction is specified, the disgruntled party may

18 Boyle, *supra* note 15, at 40.

19 *Id.*

20 UNCLOS, *supra* note 16, Part XV, § 3, art. 298, ¶ 1(a)(i), 1833 U.N.T.S. at 515. See also Allen Yu, *Who Is Really Overstepping the Bounds of International Law in the South China Sea*, DIPLOMAT (Nov. 18, 2015), <https://thediplomat.com/2015/11/who-is-overstepping-the-bounds-of-international-law-in-the-south-china-sea/> (last visited Sept. 14, 2018).

21 *Id.*

22 Boyle, *supra* note 15, at 42-46.

23 *Id.*

24 *Id.* at 43.

25 *Id.*

13 *Id.* at 259.

14 *Id.* at 262.

15 See generally Alan E. Boyle, *Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction*, 46 INT’L AND COMP. L.Q. 37, 40 (1997).

16 United Nations Convention on the Law of the Sea Annex VII, art. 3(a)-(d), effective Nov. 16, 1994, 1833 U.N.T.S. 396, 571-72 [hereinafter UNCLOS].

17 *Id.* art. 3(e), 1833 U.N.T.S. at 572.

provide alternative interpretations with different legal evidence to show that the dispute is outside the jurisdiction.²⁶ Moreover, because of the lack of a centralized judicial agency and the non-appealable nature, the disgruntled party can freely question the legitimacy of the final verdict.

All of these are exactly what China did after the tribunal rejected its claim in the South China Sea. Before illustrating reasons that the decentralized nature of the UNCLOS fueled China's vehement responses, it is necessary to discuss the ruling itself and understand why and how China used the weakness of UNCLOS to justify its response.

III. The Facts of the Ruling

The Philippines' position can be summarized as the following: First, China's claim to historic rights in the South China Sea is contrary to UNCLOS, which aims to properly allocate maritime resources and preserve nations' rights of actions in the high seas.²⁷ Second, the status of disputed features in the Spratly Islands does not generate an exclusive economic zone of 200 nautical miles and continental shelf and thus lies in the economic zone of Philippines.²⁸ Third, China aggravated the dispute by unlawfully interfering with the Philippines' freedom of the high seas and rights to resources in the Philippines' EEZ and continental shelf.²⁹ In response, China published its Position Paper on December 7, 2014, arguing that the essence of the arbitration is territorial sovereignty and maritime delimitation, and that the Philippines breached its obligation by unilaterally initiating the arbitration process, rather than bilaterally settling the dispute through the Declaration on the Conduct of Parties in the South China Sea agreed on by China and countries in the Association of Southeast Asian Nations (ASEAN), which includes the Philippines.³⁰ Therefore, China refused to participate in the proceedings because the Tribunal "does not have jurisdiction on this issue."³¹

The Tribunal rejected China's Position Paper, citing Annex VII of UNCLOS, which states that "[a]bsence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings."³² The Tribunal determined that it had jurisdiction over the dispute with a claim well-grounded in facts and law, since the Philippine's position did not concern sovereignty claims to islands in the South China Sea, and the dispute of entitlement did not necessarily involve delimitation in this context.³³ Furthermore, the Tribunal did not consider the Declaration on the Conduct of Parties in the South China Sea an instrument to settle the dispute because it is not legally binding and does not provide the mechanism to settle the dispute.³⁴

26 Yu, *supra* note 20.

27 PCA AWARD PRESS RELEASE, *supra* note 6, at 5.

28 *Id.*

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.* at 6 (quoting UNCLOS, *supra* note 16, Annex VII, art. 9, 1833 U.N.T.S. at 573).

33 *Id.*

34 *Id.* at 7.

Regarding China's claim to historical rights to the waters of the South China Sea and the Nine-Dash Line, the Tribunal ruled that the claim was incompatible with the allocation of rights to resources and maritime zones in the Convention. It stated that, "to the extent China had historic rights to resources in the waters of the South China Sea, such rights were extinguished by the entry into force of the Convention to the extent they were incompatible with the Convention's system of maritime zones."³⁵

Regarding the status of features, the Tribunal referred to Article 13 of the Convention that a rock, or low-tide elevation, and "a naturally formed area of land," which is above water at low tide and submerged at high tide, cannot generate a 12-nautical-mile territorial sea.³⁶ It also cited Article 121 of the Convention by indicating that an island, a naturally formed area that is above water at high tide, can "generate the exclusive economic zone and the continental shelf of an island" applicable to other land territory.³⁷ The Tribunal further interpreted Article 121 and stated that the entitlement also depends on "(a) the objective capacity of a feature, (b) in its natural condition, to sustain either (c) a stable community of people or (d) economic activity that is neither dependent on outside resources nor purely extractive in nature."³⁸ Based on these clauses and interpretation, the Tribunal ruled that China's activities, like island reclamation, changed the feature in the Philippines' EEZ by making rocks appear to be islands.³⁹ If these features were able to generate EEZs or continental shelves, they would overlap with the Philippines' EEZ. Nevertheless, the features claimed by China are either rocks, or they are islands that cannot "sustain a stable community of people or economic activity" in their natural conditions.⁴⁰ Therefore, these features cannot generate territorial sea, EEZ(s), or continental shelves, and thus do not overlap with the Philippines' EEZ.

By demonstrating the nonexistence of the overlap of exclusive economic zones, the Tribunal ruled that China violated the Philippines' freedom in the high seas and illegally interfered with the Philippines' rights in the EEZ.⁴¹ It indicated that it did not rule on the sovereignty of the heavily-contested Scarborough Shoal but pointed out that China aggravated the dispute by "violating its duty to respect the traditional fishing rights of Philippine fishermen by halting access to the Shoal after May 2012."⁴²

By delegitimizing the Nine-Dash Line and extinguishing historic rights, the lawfulness of China's activities in the South China Sea depends on the status of the features under dispute. If these features are capable of generating exclusive economic zones and continental shelves, China could justify its activities as proper uses of sovereign rights, even though the EEZ

35 *Id.* at 9.

36 UNCLOS, *supra* note 16, Part II, § 2, art. 13, ¶ 1, 1833 U.N.T.S. at 403.

37 *Id.* Part VIII, art. 121, ¶ 2, 1833 U.N.T.S. at 442.

38 PCA AWARD PRESS RELEASE, *supra* note 6, at 9.

39 *Id.* at 10.

40 *Id.*

41 *Id.* at 10.

42 *Id.*

of a particular island may overlap with that of Philippines. By determining the status of disputed features as rocks or islands which are not naturally formed, the Tribunal can justify its claim that China violated the freedom of the high seas and interfered in Philippine's EEZ, thus aggravating the tension.

IV. China's Challenge to UNCLOS

China published its statement on the Award of the Arbitral Tribunal in the South China Sea Arbitration by reaffirming its 2014 Position Paper, which insisted that "the essence of the subject-matter of the arbitration is the territorial sovereignty over several maritime features in the South China Sea, which does not concern the interpretation or application of the Convention."⁴³ Meanwhile, China asserted that the Philippines has breached its obligation under international law by disregarding the agreed "bilateral instruments," like the Declaration on the Conduct of Parties in the South China Sea, and "unilaterally initiating the present arbitration."⁴⁴ Therefore, the Tribunal had no jurisdiction in the arbitration, and China's non-participation and non-acceptance are legally justified.

China's responses to the Tribunal suggest that China believed that the Tribunal had no authority in the South China Sea dispute. By blatantly dubbing the final award as "a scrap of paper" and instigating furor among the public with a massive media campaign,⁴⁵ China fully utilized the decentralized nature of UNCLOS. It did so by insisting on the Tribunal's lack of jurisdiction, questioning its authority, and appealing to the coercive nature of compulsory arbitration with different interpretations of UNCLOS.

A. Issues of Jurisdiction

1. Islands or not Islands

Although the final award stated that it does not rule on sovereignty to land territory, maritime delimitation of the EEZ, or the continental shelf, China claimed that the award nonetheless is about these issues "in essence."⁴⁶ China believes that the issue at stake involves overlapping EEZs and the legitimacy of China's historic claim to the waters in the South China Sea, which are "inextricably linked" with sovereignty and maritime delimitation.⁴⁷

To understand the difference between jurisdiction "on the surface" and that "in essence," it is first necessary to be aware of

one key to the arbitration: the status of maritime features and their ability to generate a two-hundred nautical mile EEZ. According to Article 121 of the UNCLOS, rocks "have no exclusive economic zone or continental shelf "because "they cannot sustain human habitation or economic life of their own."⁴⁸ As a naturally formed area of land, an island above water at high tide can generate the exclusive economic zone and continental shelf "applicable to other land territory."⁴⁹ According to the Tribunal, there is no naturally formed island in the Spratly Islands in the South China Sea that can sustain a human community; the maritime feature in dispute thus cannot generate a two-hundred nautical mile EEZ. Therefore, the issue of overlapping EEZs between China and the Philippines does not exist in the Spratly Islands.⁵⁰

If any maritime feature in the Spratly Island fulfilled the requirement to generate two-hundred nautical mile EEZ, China could claim that it is legally exercising its discretionary power within its EEZ. Therefore, the Philippines must characterize the disputed features as either rocks or unnatural islands produced by China's reclamation.⁵¹ In this way, the Philippines frames the issue as a high seas dispute, falling within the jurisdiction of the Tribunal, and the Tribunal can rule that China is violating other countries' rights on the high seas, like the freedom of navigation. Yet, China could argue that there is a "naturally formed island" that supports a long-term population in the Spratly Islands. Although covering a small area of one-hundred and ten acres, Itu Aba, or Taiping Island, an island under Taiwan's control, does fulfill the requirement to generate an EEZ with its potable water, agriculture, medical emergency room, and a long-term population of one-hundred people.⁵² Although Taiwan controls the island, whether Taiwan is a country or China's province for international law purposes is dubious; therefore, China could theoretically justify its activity as exercising its sovereign rights within its EEZ even without de facto control over Itu Aba.⁵³ By refuting the Tribunal's version of the status of this specific maritime feature, China is arguing that the tribunal in essence is ruling on sovereignty and delimitation of an EEZ by invalidating China's EEZ and the exercise of its sovereign rights.

2. Historic Rights and Sovereignty

Another reason that China found that the Tribunal ruled "in essence" on sovereignty is China's claim to its historic rights

43 PRC Position Paper, *supra* note 4, at II. (4-29).

44 *Id.* at I. ¶ 3.

45 Linh Tong, *The Social Media 'War' Over the South China Sea*, DIPLOMAT (July 16, 2016), <http://thediplomat.com/2016/07/the-social-media-war-over-the-south-china-sea/> (last visited Aug. 3, 2018).

46 MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA, STATEMENT OF THE MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA ON THE AWARD OF 12 JULY 2016 OF THE ARBITRAL TRIBUNAL IN THE SOUTH CHINA SEA ARBITRATION ESTABLISHED AT THE REQUEST OF THE REPUBLIC OF THE PHILIPPINES ¶ 2 (July 12, 2016), http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1379492.shtml [hereinafter PRC STATEMENT RE: PCA AWARD].

47 Joseph Klein, *South China Sea: UN Law of the Sea Arbitration Tribunal Sinks the Rule of Law*, FOREIGN POL'Y J. (Aug. 20, 2016), <https://www.foreignpolicyjournal.com/2016/08/20/south-china-sea-un-law-of-the->

sea-arbitration-tribunal-sinks-the-rule-of-law/ (last visited Aug. 3, 2018).

48 UNCLOS, *supra* note 16, Part VIII, art. 121, ¶ 3, 1833 U.N.T.S. at 442.

49 *Id.* Part VIII, art. 121, ¶ 2, 1833 U.N.T.S. at 442.

50 PCA AWARD PRESS RELEASE, *supra* note 6, at 9-10.

51 Kuan-Hsiung Wang, *The Philippines' Dubious Claims in the South China Sea Arbitration*, DIPLOMAT (Jan. 26, 2016), <http://thediplomat.com/2016/01/the-philippines-dubious-claims-in-south-china-sea-arbitration/>, (last visited Aug. 3, 2018).

52 Steve Mollman, *This Tiny Islet in the South China Sea Is Now Officially A "Rock"—And the Implications Are Global*, QUARTZ (July 25, 2016), <https://qz.com/737219/this-tiny-islet-in-the-south-china-sea-is-now-officially-a-rock-and-the-implications-are-global/> (last visited Aug. 3, 2018).

53 John Ford, *South China Sea: Itu Aba Might Be Key to Philippines v. China*, DIPLOMAT (Apr. 30, 2016), <http://thediplomat.com/2016/04/south-china-sea-itu-aba-might-be-key-to-philippines-v-china/> (last visited Aug. 3, 2018).

over features and resources in nearby water. China argued that “it was the first country to discover, name, develop and manage the South China Sea islands, and was also the first to continuously exercise sovereign jurisdiction over them.”⁵⁴ Chinese legal scholars also cited various records of discovery, occupation, and consolidation of Chinese sovereignty.⁵⁵ In 1946, the government of Republic of China (the current government of Taiwan) recovered the Paracel and Spratly Islands in the South China Sea from Japan and drew an eleven-dash line, which was modified into the nine-dash line after the Communist Party took over.⁵⁶ China also argued that other nations’ acquiescence to Chinese ownership of the islands, including that of the Philippines, had the same effect as recognition because acquiescence is a form of tacit consent.⁵⁷ Therefore, China argued that it is entitled to “sovereign rights and jurisdiction over fishing, navigation and resource development in waters, which “pre-existed the UNCLOS.”⁵⁸

China used its claim to historical rights as another reason to classify the issue as a dispute over sovereignty and to try to unmask the Tribunal’s authority to adjudicate on sovereignty: “to the extent China had any historic rights to resources in the waters of the South China Sea, such rights were extinguished to the extent they were incompatible with the exclusive economic zones provided for in the Convention [UNCLOS].”⁵⁹ The ruling further infuriated China, as China continued to question the Tribunal’s authority to retroactively extinguish historical rights claimed by sovereign nations that preceded UNCLOS. Although the Tribunal stated that it did not rule on sovereignty over land territory, China was not convinced, since historical claim, maritime boundary delimitation, and overlapping exclusive economic zones and continental shelves are “inextricably linked.”⁶⁰

B. China’s Discontent with Compulsory Arbitration

China viewed the Philippines as the violator of international law and deemed its own actions justified. Article 298 of UNCLOS gives states the “opt out right” to not participate in the compulsory arbitration if the dispute relates to “sea boundary delimitation, or those involving historic bays or titles.”⁶¹ Given China’s legal reasons that the arbitration inherently involves jurisdiction over sovereignty and maritime delimitation, China justified its non-participation as the proper exercise of the opt-out right.⁶²

Nevertheless, the Tribunal enraged China by agreeing to adjudicate this issue with only the Philippines’ evidence and by

54 Klein, *supra* note 47.

55 Zhiguo Gao & Bing Bing Jia, *The Nine-Dash Line in the South China Sea: History, Status, and Implications*, 107 AM. J. INT’L L., 98, 102 (2013).

56 *Id.* at 102.

57 *Id.* at 116.

58 *Id.* at 123-24.

59 PCA AWARD PRESS RELEASE, *supra* note 6, at 1.

60 *Id.*

61 UNCLOS, *supra* note 16, Part XV, art. 298, ¶ 1-4, 1833 U.N.T.S. at 515-516.

62 [PRC STATEMENT RE: PCA AWARD](#), *supra* note 46, at ¶ 2 (“As early as in 2006, pursuant to Article 298 of UNCLOS, China excluded from the compulsory dispute settlement procedures of UNCLOS disputes

framing the conflict as a high seas dispute.⁶³ Under this circumstance, China perceives itself as the upholder of UNCLOS by legitimately opting out of the compulsory arbitration and regards the Tribunal as unreasonably punishing it and damaging “international legal order and regional stability.”⁶⁴ Therefore China has refused to accept the verdict, which it viewed as coercive.

V. A Different Strategy: China’s Potential Mollified Responses with Participation

This paper argues that the decentralization of UNCLOS explains China’s defiant behavior to the final verdict. This argument might be questioned, given China’s increasing confrontational attitude and thus the tendency of a revisionist state to alter the regional status quo. This section defends the argument elaborated above by postulating a likely circumstance if China participated in the proceeding and thus mitigated decentralization of UNCLOS. While participation could not guarantee that China would not have critiqued the Tribunal, it may have created a greater possibility for China to show restraint. If China participated in the ruling, it would have much more room to influence the outcome, gain more from the ruling, and become more satisfied.

Participation could have given China a better, if not the most desirable, outcome because it creates room to represent China’s view in the Tribunal and thus influence the proceeding. One way to influence the proceeding is to fully apply the appointment mechanism of members to the tribunal. According to Annex VII, Article 2 and 3 of UNCLOS, each party in the dispute shall appoint one member, “who may be its national,”⁶⁵ and “a list of conciliators shall be drawn up and maintained by the Secretary-General of the United Nations.”⁶⁶ By agreement between the two parties, the other three members “shall be chosen preferably from the list” and shall be “nationals of third States unless the parties otherwise agree.”⁶⁷ If the parties are unable to agree upon “one or more members of the tribunal,”⁶⁸ the President of the International Tribunal for the Law of the Sea “shall make the necessary appointments.”⁶⁹

Because Shuji Yanai, then-President of ITLOS, appointed four of the five members to the Tribunal, China was distrustful. Yanai served as Japan’s Vice Minister for Foreign Affairs from 1997 to 1999 and Ambassador to the United States from 1999

concerning, among others, maritime delimitation, historic bays or titles, military and law enforcement activities.”); *id.* at ¶ 1 (noting that China “neither accepts nor participates” in the arbitration due to jurisdictional concerns).

63 *Id.* at ¶ 1.

64 Michael D. Swaine, *Chinese Views on the South China Sea Arbitration Case between the People’s Republic of China and the Philippines*, HOOVER INST. (Aug. 30, 2016), <https://www.hoover.org/research/chinese-views-south-china-sea-arbitration-case-between-peoples-republic-china-and-philippines>.

65 UNCLOS, *supra* note 16, Annex VII, art. 3(b)-(c), 1833 U.N.T.S. at 571.

66 *Id.* Annex VII, art. 2, ¶ 1, 1833 U.N.T.S. at 571.

67 *Id.* Annex VII, art. 3(d), 1833 U.N.T.S. at 572.

68 *Id.*

69 *Id.* Annex VII, art. 3(e), 1833 U.N.T.S. at 572.

to 2001.⁷⁰ Hence, China believed that Yanai was biased and trying to undermine China's national interest.⁷¹ Although China's claim is hard to verify, China could have avoided Yanai's control over the Tribunal by participating in the arbitration.⁷² China could have nominated at least one member who represented its view, and could have negotiated with the Philippines to nominate the other three members. In this way, it is possible for the Tribunal member or "representative" of China to sway other members' opinions.⁷³ Article 3 also makes many appointment options available by allowing the member to be a Chinese citizen. Judges of ITLOS are very likely choices to constitute a tribunal. In the case of *Philippines v. China*, Judge Jean-Pierre Cot, Judge Rüdiger Wolfrum, and Judge Stanislaw Pawlak from ITLOS were appointed.⁷⁴ Therefore, if China had participated in the arbitration, it could have appointed Zhiguo Gao, who is also a judge of ITLOS,⁷⁵ and who once wrote a paper arguing that China is entitled to historic rights because the "nine-dash line has a foundation in international law" and does not contradict China's obligation but "supplements what is provided for under UNCLOS."⁷⁶ By appointing a legal expert like Gao, China could have gained leverage in the Tribunal.⁷⁷

Even if the most desirable outcome for China is hard to actualize, China could have obtained a better outcome than the resulting award. Because China refused to participate, the Tribunal only took into account its Position Paper, in sharp contrast to the Philippines' deluge of memorials, supplemental documents, and written responses. In a trial, a defendant does not want to be deprived of evidence, views, and laws in favor of his or her side. Likewise, with participation, China could have created more leeway to stir the balance of victory, strived for a more satisfying verdict, and adopted a more moderate peaceful attitude, rather than circulated edicts disgruntled sentiment domestically.

VI. Conclusion

It is perplexing at first glance that international law might not alleviate tension but, rather, inflame it. China furiously ignored the final verdict of *The Republic of the Philippines v. The People's Republic of China* by denouncing it as nothing but "a scrap of paper" and the Tribunal as a partial judicial agency. The prospect of a satisfying resolution remains uncertain.

70 Liu Zhen, *Questions of Neutrality: China Takes Aim at Judges in South China Sea Case*, SOUTH CHINA MORNING POST (July 11, 2016), <http://www.scmp.com/news/china/diplomacy-defence/article/1988119/questions-neutrality-china-takes-aim-judges-south-china> (last visited Aug. 3, 2018).

71 *Id.*

72 Zheng Wang, *What China Can Learn From the South China Sea Case*, WILSON CTR. (July 14, 2016), <https://www.wilsoncenter.org/article/what-china-can-learn-the-south-china-sea-case> (last visited Aug. 26, 2018).

73 *Id.*

74 Julie Makinen, *U.S. Lawyer Who Led Philippines' Case Says Beijing's Boycott Made His Job Harder in South China Sea Arguments*, L.A. TIMES (July 12, 2016), <http://www.latimes.com/world/asia/la-fg-south-china-sea-lawyer-20160712-snap-story.html> (last visited Aug. 3, 2018).

75 INT'L TRIBUNAL FOR THE LAW OF THE SEA, MEMBERS, <https://www.itlos.org/en/the-tribunal/members/> (last visited Aug. 3, 2018).

76 Gao & Jia, *supra* note 55, at 98-99.

77 Wang, *supra* note 72.

Morgenthau's discussion of international law and Alan Boyle's description of issues of fragmentation and jurisdiction capture China's heightened aggressiveness, distrust, and disobedience. Because of the decentralized nature of UNCLOS, China regarded the Tribunal not as a centralized judicial agency but as a biased panel with unjust procedures and without legitimate jurisdiction over the dispute. Because the ruling did not convince China, the decentralized nature led to further fragmentation of UNCLOS. China used the leeway of relevant provisions and flexible interpretations of UNCLOS in ways that would promote its national interest. It classified the dispute as involving sovereignty and maritime delimitation, which are beyond the scope of the Tribunal's jurisdiction. Moreover, China perceived itself as the upholder of international law and the Philippines as the violator, because the latter unilaterally triggered the compulsory arbitration and ignored established channels to settle dispute. Given these views, China naturally felt unjustifiably punished and thus adopted a glaringly outspoken attitude.

Would China have acted differently if the decentralized nature of the institution were mitigated to some extent? The answer is likely to be yes. By participating in the arbitration, China could have had more room to influence the outcome by appointing members who represented its stance to the Tribunal and by submitting much more legal evidence, rather than solely its Position Paper. Given more representation and influence, the Tribunal would have been less likely to rule so overwhelmingly against China. China would not feel unduly punished and thus recognize the ruling of the Tribunal to a certain extent. Under this circumstance, China would act and speak more softly.

Sovereignty vs. Self-Determination

A Catalan Balancing Act

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On October 27, 2017 the regional Parliament of Catalonia declared Catalonia's secession from Spain and its independence as a republic.¹ This declaration followed the independence referendum of October 1, where ninety percent of participants voted to secede from Spain.² A few hours after the declaration, Spanish Prime Minister Mariano Rajoy used his sovereign authority and constitutional privileges to dismiss the Catalan Parliament, call a snap election for the legislature in December, and directly administer the region in the meantime.³ Catalonia remains, indisputably, a mere region of Spain, ultimately subject to Spanish sovereign authority despite its serious claim to independence. Why is this?

While the right to a people's self-determination is consistently reaffirmed by both the United Nations and the European Union, Catalonia's failure to secure its independence on self-determination rationales suggests that there is a hierarchy of international rights that prioritizes sovereignty. This paper will thus begin with a theoretical discussion on sovereignty and self-determination, before moving to an applied analysis of what actually happened following the independence claim to draw conclusions about sovereignty's and self-determination's theoretical standing in the hierarchy of international norms.

How does sovereignty translate from theory to practice? Each September, world leaders gather in New York for the United Nations General Assembly session: heads of state make grand speeches, and news outlets from around the world obsess over each remark, multilateral meeting, and resolution. We are compelled to see this week as capable of changing the state of affairs in whichever country we may call home as our heads of state make promises and solidify commitments on our behalf. Indeed, we are their citizens, the constituents of their jurisdiction. This week, along with the many other international

and regional conventions, organizations, and covenants that demand participation from heads of state, underscores how sovereignty is the foremost political notion in the international arena. In many ways, a head of state is the practical embodiment of the complex legal entity that is a sovereign state, vested with the power to exclusively represent a defined territory and people. After all, are any far-reaching changes—international or domestic—possible without the consent of, and cooperation from, sovereign officials?

All this talk about sovereignty may seem vague and nebulous, but it is in fact grounded in tangible privileges, restrictions, and normative expectations. Sovereignty confers internal (that is, within a state's borders) and external (between and among states) privileges. Ole Holsti, a famed political scientist and professor emeritus at Duke University, suggests that internal sovereignty refers to "a supreme authority within a defined territorial realm";⁴ sovereign institutions have clearly defined jurisdictions. Max Weber, another canonical political scientist, similarly defines internal sovereignty as the fundamental privilege that allows for "the monopoly of the legitimate use of physical force within a given territory."⁵ In both of these cases, territorial authority and control (through legal or coercive means) are highlighted as defining privileges exclusive to sovereignty. From here we can begin to understand that a state is basically a territorial unit over which sovereign authority is the supreme legal agent. In other words, sovereignty is the right that defines a state's legal realm—its territorial jurisdiction—as its exclusive charge, legally independent from any other authority.⁶

This now brings us to the external privileges of sovereignty. A state is "not subject to any external authority" unless its sovereign representatives expressly consent to such an agreement.⁷ This means that sovereignty prohibits a state from projecting authority in territories that are not part of its defined jurisdiction.⁸ But who defines these limits? Though it seems circular in

1 Isa Soares, Vasco Cotovio & Hilary Clarke, *Catalonia Referendum Result Plunges Spain into Political Crisis*, CNN (Oct. 2, 2017, 9:57 AM), <https://www.cnn.com/2017/10/01/europe/catalonia-spain-independence-referendum-result/index.html>.

2 That being said, only forty two percent of the Catalan electorate voted, largely due to the presence of an exceedingly violent Spanish Police force that discouraged turnout. *Id.*

3 Sam Jones, Stephan Burgen & Emma Graham-Harrison, *Madrid Dissolves Catalan Parliament After Secessionist MPs Vote to Create 'Catalan Republic as an Independent and Sovereign State'*, GUARDIAN (Oct. 28, 2017), <https://www.theguardian.com/world/2017/oct/27/spanish-pm-maria-no-rajoy-asks-senate-powers-dismiss-catalonia-president>.

4 KALEVI HOLSTI, TAMING THE SOVEREIGNS: INSTITUTIONAL CHANGE IN INTERNATIONAL POLITICS 113 (2004).

5 Max Weber, *What Is a State?*, in COMPARATIVE POLITICS: NOTES AND READINGS 43-46 (Bernard Brown ed., 8th ed., 1996).

6 Note that a state can enter into treaties, organizations, conventions, etc., that may seem to undermine its sovereignty. However, the very fact that the state has to actively agree to bind itself to these multilateral agreements reaffirms the power of sovereignty.

7 HOLSTI, *supra* note 4, at 113.

8 To be sure, this scaffolding is normative and theoretical, and is consis-

its reasoning, it is the community of states itself which recognizes and upholds sovereignty. For a state to benefit from the exclusive privileges of sovereignty, it must also recognize other states as equally legitimate.⁹ Norms and laws are meaningless unless they are enshrined and reciprocated. The reciprocal nature of sovereignty means that sovereignty is a legal status that can only be validated by other states: “Any polity can claim sovereignty, but . . . the claim establishes no rights in relation to other states. It is other states that validate the claim”¹⁰

We return, here, to Catalonia and its so far unsuccessful claim to independence and, thus, to sovereignty. While Catalonia’s claim certainly carries some degree of internal legitimacy when we look at the referendum, the region lacks the necessary external support. This is a crucial shortcoming because, as noted by Holsti, successful claims to statehood require validation from the community of states. Instead, European states as well as the European Union published nearly identical statements of nonrecognition to the claim and reaffirmation of Spanish sovereignty.¹¹ For example, the German government affirmed that “the sovereignty and territorial integrity of Spain are and remain inviolable”;¹² the United Kingdom “does not and will not recognize the Unilateral Declaration of Independence. . . . We continue to want to see . . . the Spanish constitution respected [] and Spanish unity preserved”^{13,14}; Donald Tusk—president of the European Council, a primary European Union body that steers its political direction—confirmed that “Spain remains our only interlocutor.”¹⁵ Tusk’s statement underscores the statist priority of Europe. This slew of statements in support of Spanish sovereignty and against Catalan secession is entirely necessary. In rejecting the Catalan claim, these leaders are simultaneously enshrining Spanish sovereignty as well as projecting their own. After all, if states were to rally behind the Catalan claim, they would be setting a precedent for any polity to have the ability to easily secede, resulting in severe economic and political ramifications. Furthermore, the European Union’s very establishment and basic functioning is predicated on state sovereignty, as its norms and policies would have no practical currency in member states that do not project supreme legal authority over their entire state’s territory.¹⁶ Simply put, the European Union is able to function because each member state is entirely represented by one agent: its sovereign government. This demonstrates how sovereignty is critical to the broader functioning of international affairs, whereby each government

tently undermined in practice.

⁹ HOLSTI, *supra* note 4, at 114.

¹⁰ *Id.*

¹¹ Saim Seed, *How the World Reacted to Catalan Independence Declaration*, POLITICO (Oct. 27, 2017, 7:59 PM), <https://www.politico.eu/article/how-the-world-reacted-to-catalan-independence-declaration/> (last updated Oct. 28, 2017, 10:05 AM).

¹² *Id.*

¹³ *Id.*

¹⁴ The United Kingdom is, itself, self-conscious of Scottish secession. It therefore has a direct incentive to set a precedent of indissolubility. *See, e.g.*, Kathy Gilsinan, *Scottish Independence: What?*, ATLANTIC (Sept. 16, 2014), <https://www.theatlantic.com/international/archive/2014/09/scottish-independence-what/380196/>.

¹⁵ Seed, *supra* note 11.

¹⁶ Treaty Establishing a Constitution for Europe, art. I-1, § 1, signed Oct. 29, 2004.

legally represents a clearly defined and united territory. The uniform rejection of the Catalan claim also underlines the importance of consensus when confirming or rejecting a polity’s sovereignty.

The discussion up to this point has focused on sovereignty. Sovereignty, as a constitutional institution, serves as the structural skeleton of the state and the international system. But an analysis of the skeleton without considering the complex inner organs—that is, what goes on within the state—misses many important, if complex, empirical phenomena. The most important organ within the state’s skeleton is, of course, the people. That Spain is in the midst of, according to many political commentators, a constitutional crisis points to a serious discordance between the skeleton and its organs.¹⁷ Civil society should not be ignored. Although less than half of the Catalan electorate voted in the referendum, attention must be paid to the fact that ninety percent of voters supported secession. The legitimacy of the referendum result is supported by the steady stream of street protests in Barcelona—one of which attracted the support of around a third of the city’s population—along with powerful statements from regionally based, internationally powerful icons like FC Barcelona that explicitly promise “to support the will of the majority of Catalan people.”^{18,19} Eye-catching referendum results and mass demonstrations coupled with powerful calls to support the will of the majority now raise the question of how the grassroots, deeply personal phenomenon of self-determination relates to the more lofty juridical need for sovereignty.

Self-determination often conflicts with sovereignty. More straightforward a concept than sovereignty, self-determination simply refers to “the right of nations to freely decide their sovereignty and political status without external compulsion or outside interference.”²⁰ Here, it is crucial to define a nation vis-à-vis a state. A state refers to the sovereign territorial unit that we have already discussed at length, while a nation refers to a people who are united by some common aspect and generally concentrated in a region. Catalonia is thus a nation of sorts without its own state. This may seem problematic because self-determination is consistently pointed to as a fundamental right; the first chapter of the United Nations Charter makes this clear, for example, when it states one of its purposes is “[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.”²¹ Based on

¹⁷ *See, e.g.*, *Spain Faces a Constitutional Crisis over Catalonia*, ECONOMIST (Oct. 19, 2017), <https://www.economist.com/news/europe/21730450-prime-minister-mariano-rajoy-may-have-set-up-parallel-government-stop-secession-spain>.

¹⁸ *Thousands Join Pro-Catalan Independence Rally*, FRANCE24 (Oct. 22, 2017), <http://www.france24.com/en/20171021-hundreds-thousands-catalan-independence-barcelona-rally-demonstrations-spain-puig-demont-raj>.

¹⁹ Andy West, *Catalan Referendum: How FC Barcelona Fond Themselves at Centre of Issue*, BBC (Oct. 1, 2017), <http://www.bbc.com/sport/football/41461197>.

²⁰ Edita Gzoyan & Lilit Banduryan, *Territorial Integrity and Self-Determination: Contradiction or Equality?*, 10 21ST CENTURY 90, 90 (2011).

²¹ United Nations Charter art. 1, ¶ 2.

this, Catalonia's claim should be viewed with credence by the United Nations itself as well as its member states. In practice, though, the United Nations' criticisms of the situation in Spain have focused on condemning Spanish police brutality instead of affirming the Catalan people's right to self-determination.²² Like in the European Union, sovereignty is a constitutional institution—an inherently prioritized principle—in the United Nations, while it seems that self-determination is only applicable depending on the context.

Self-determination, while intuitively necessary and explicitly enshrined in the United Nations Charter, seems to be a vague and conditional right. In terms of affirming the creation of new states, United Nations Resolution 1514 stands out. Passed in 1960 as Africa was decolonized, Resolution 1514 reaffirmed the right to self-determination, condemned "alien" domination, and prohibited violence against dependent peoples seeking to exercise their right to self-determination.²³ (Relevantly, Spain abstained from the vote.²⁴) While arguments could easily be made that Catalonia fits within these criteria, Madrid's relationship to Catalonia is wholly different from, for example, Belgium's to its Congo Free State colony, where Belgium's King Leopold II launched a brutal genocide.²⁵ The contexts necessary for a valid claim to self-determination were evoked by Ban Ki-moon, former Secretary-General of the United Nations, in an interview to Spanish newspapers in 2015: "When one speaks of self-determination, certain areas have been recognized by the United Nations as non-autonomous territories. But Catalonia does not fall into this category."²⁶ Indeed, Catalonia is treated as a semi-autonomous region in Spain with its own regional legislature.²⁷ And, while the police violence seen during the referendum cannot be ignored, it is nowhere near the cruelty seen throughout European colonial systems. It seems that Catalonia's situation is not *severe* enough to be given serious credence by the United Nations, despite what its charter may say.

Overall, sovereignty consistently stands out as the determinant feature of the Catalan crisis. Sovereignty operates in a collective environment and is thus rescinded or conferred in extraordinary circumstances with global ramifications. While Catalonia's claim to independence is not lacking in internal credibility, it falls short in external support. The construction of the international system upon sovereignty means that independence claims need strong multilateral backing along with evidence of heinous oppression and violence. The international

community's rejection of the Catalan claim sends a clear message, despite what the United Nations charter suggests: sovereignty supersedes self-determination. This, of course, is not to say that sovereignty will never be renegotiated—the decolonization cases have already been discussed. Rather, I suggest that sovereignty will only be renegotiated in cases when the maintenance of sovereignty is no longer convenient to the state in question for reasons such as international pressure, humanitarian strife, or consistent conflict. Nations seeking statehood should therefore appeal to these stakes to maximize their chances of sovereign recognition. After all, sovereignty can only be conferred by others.

22 Owen Bowcott & Sam Jones, *Catalan Independence Leaders to Appeal to UN over 'Unlawful Imprisonment'*, *GUARDIAN* (Feb. 1, 2018, 10:44 AM), <http://www.theguardian.com/world/2018/feb/01/catalan-independence-leaders-unlawfully-imprisoned-say-lawyers>.

23 GA Res 1514 (XV), UNGAOR, 15th Sess, Supp No 2, UN Doc A/4494 (1960) 66-67. See also Anthony Whelan, *Self-Determination and Decolonisation: Foundations for the Future*, 3 *IRISH STUD. INT'L AFF.* 25, 32 (1992).

24 Whelan, *supra* note 23, at 32 n.38.

25 See generally Mark Dummett, "King Leopold's Legacy of DR Congo Violence." *BBC* (Feb. 24, 2004), <http://news.bbc.co.uk/2/hi/africa/3516965.stm>.

26 *Catalonia Cannot Claim Right to Self-Determination: UN Chief*, *YAHOO NEWS* (Oct. 31, 2015), <https://uk.news.yahoo.com/catalonia-cannot-claim-self-determination-un-chief-120527738.html>.

27 Spanish Constitution of 1978, Article 143.

Against *Shelby County* and the Equal Sovereignty Principle

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In *Shelby County v. Holder*, the Supreme Court reviewed a crucial aspect of the Voting Rights Act (VRA) and found it to violate the Constitution's equal sovereignty principle.¹ Given how incredibly successful and symbolically important the statute was,² it is not surprising that the decision inspired outrage among activists who thought the outcome was a significant regression in the path towards racial equality.³ What is more surprising, however, was the reaction among academics and practitioners. For example, then-Judge Richard Posner, of the Seventh Circuit Court of Appeals, noted that the equal sovereignty principle was "a principle of constitutional law of which I had never heard—for the excellent reason that . . . there is no such principle."⁴ One professor remarked that scholars attacked the principle "with a surprising degree of unanimity and contempt,"⁵ and that "[t]he legal academy seems to agree . . . that *Shelby County* is 'among the worst decisions in recent times.'"⁶ And yet, others—decidedly in the minority—hailed the decision as a "restoration of constitutional order."⁷ *Shelby County*, even half a decade later, remains a hotly contested decision, and it will be remembered as a defining case of the Roberts Court both because of its subject matter and the momentous principles underpinning the Court's analysis. Evaluating the soundness of that decision, therefore, is critical.

This paper argues that the Court deeply erred in *Shelby County*, both because the equal sovereignty principle is flawed and because that principle should not have compelled the Court to strike down the VRA's coverage formula. In Part I, I provide an introduction to the relevant sections of the VRA and examine

the majority and dissenting opinions in *Shelby County*. Part II argues that the majority's opinion crucially hinges on the equal sovereignty principle, which is why I focus on that principle in this essay. Next, in Part III, I assume the validity of the principle and argue that the Court misapplied it. Part IV contends that the principle itself is flawed because it is unprecedented and unworkable. Part V concludes.

I. Setting the Stage: The Voting Rights Act and *Shelby County*

The Voting Rights Act was passed in 1965 to actualize the Fifteenth Amendment's promise that the "right of citizens of the United States to vote shall not be denied or abridged . . . on the account of race . . ."⁸ The 1965 VRA included a nationwide remedy for voter suppression—Section 2,⁹ a permanent provision that allowed the government and private plaintiffs to bring lawsuits against racially discriminatory voting practices¹⁰—as well as temporary measures, limited in duration and territorial application. One of those provisions was Section 5 preclearance, which prevented covered jurisdictions from changing their electoral procedures absent of clearance from either the U.S. Attorney General or a three-judge district court in D.C.¹¹ The temporary coverage formula, in Section 4(b), brought under preclearance any jurisdiction where less than fifty percent of its eligible voters were registered or voted in the 1964 presidential election and which ever used a "test or device" for voting (e.g., a poll tax or literacy test).¹²

Between 1965 and 2006, Congress reauthorized the VRA's temporary provisions four times. The first two times (the 1970 and 1975 reauthorizations), Congress also updated the Section 4(b) coverage formula. However, in 1982 and 2005, Congress continued to use the same formula it adopted in 1975, which defined coverage based on statistics from the 1972 presidential election. When the VRA was first authorized, its constitutionality was challenged and upheld in *South Carolina v. Katzenbach*.¹³ Each time it was reauthorized, covered jurisdictions again challenged its constitutionality, and each time, the Court upheld the act in its entirety—until *Shelby County*.¹⁴

1 *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). Technically the Court did not get rid of preclearance, but it effectively did so by eliminating the coverage formula.

2 See, e.g., William S. Consovoy & Thomas R. McCarthy, *Shelby County v. Holder: The Restoration of Constitutional Order*, 2012-2013 CATO SUP. CT. REV. 31, 31 (describing the VRA as "the most consequential federal law in our nation's history"); *Shelby County*, 133 S. Ct. at 2626 ("There is no doubt that these improvements are in large part because of the Voting Rights Act. The Act has proved immensely successful at redressing racial discrimination and integrating the voting process."); DEPARTMENT OF JUSTICE CIVIL RIGHTS DIVISION, INTRODUCTION TO FEDERAL VOTING RIGHTS LAWS, <https://www.justice.gov/crt/introduction-federal-voting-rights-laws-1> (last visited Apr. 30, 2018) ("The Voting Rights Act . . . is generally considered the most successful piece of civil rights legislation ever adopted by the United States Congress.")

3 See generally Ari Berman, *GIVE US THE BALLOT* 286-314 (2015) (discussing the reaction to *Shelby County*).

4 Richard A. Posner, *The Voting Rights Act ruling is about the conservative imagination*, SLATE (Jun. 26, 2013, 12:16 AM), <https://tinyurl.com/pe2a6ep>.

5 Jeffrey M. Schmitt, *In Defense of Shelby County's Principle of Equal State Sovereignty*, 68 OKLA. L. REV. 209, 210 (2016).

6 *Id.* at 212.

7 Consovoy & McCarthy, *supra* note 2.

8 U.S. CONST. amend. XV, § 1.

9 52 U.S.C. § 10301 (2014).

10 Jon Greenbaum, Alan Martinson & Sonia Gill, *Shelby County v. Holder: When the Rational Becomes Irrational*, 57 HOW. L.J. 811, 817-18 (2014).

11 52 U.S.C. § 10304 (2014).

12 Greenbaum, Martinson & Gill, *supra* note 10, at 818-19.

13 *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

14 See *Georgia v. United States*, 411 U.S. 526 (1973); *City of Rome v. United*

The majority opinion¹⁵ in *Shelby County* began by noting the federalism principles which formed the basis for the constitutional challenge to the VRA's coverage formula and preclearance provisions.^{16,17} The majority stressed that states "retain broad autonomy in structuring their governments and pursuing legislative objectives."¹⁸ Beyond that, "there is also a 'fundamental principle of equal sovereignty' among the States."¹⁹ The majority opined that the VRA "sharply departs" from those basic principles because the preclearance provisions intrusively suspend changes to state law and apply only to a subset of jurisdictions.²⁰ While acknowledging that *Katzenbach* had upheld the constitutionality of the VRA against a similar challenge in 1965, the Court stated that "[a]t the time, the coverage formula . . . made sense" because the formula made sure that the most stringent remedies were aimed at jurisdictions where discrimination was worst.²¹

In contrast, according to the majority, "things have changed dramatically,"²² and "our Nation has made great strides,"²³ but "[t]hose extraordinary and unprecedented features were authorized—as if nothing had changed."²⁴ The Court opined that federalist interests demand that "a statute's 'current burdens' . . . be justified by 'current needs,' and any 'disparate geographic coverage' . . . be 'sufficiently related' to the problem that it targets."²⁵ And while the 1965 VRA met that burden because states were so easily divided based on the amount of discrimination in voting, "[t]oday the Nation is no longer divided along those lines . . ."²⁶ Citing that racial disparity in voter registration and turnout had drastically decreased since 1965, the Court held that the nation had sufficiently changed such that the coverage formula, which "ke[pt] the focus on decades-old data relevant to decades-old problems," was no longer rational.²⁷

The United States, in defending the constitutionality of the VRA, argued that the formula was reverse-engineered to capture the jurisdictions that Congress wanted to single out.²⁸ By that logic, the actual criteria in the formula—e.g., whether a jurisdiction used tests for voting—was irrelevant to Congress, which targeted specific jurisdictions through its choice of criteria. The Court rejected the argument because the government did not "even attempt to demonstrate the continued relevance of the formula to the problem it targets"—and that failure to establish relevance, alone, "is fatal."²⁹

Next, the majority considered the argument that current data justifies disparate coverage because the jurisdictions covered under Section 4(b) most continued to discriminate on the basis of race in voting. The Chief Justice's opinion held that the "fundamental problem" with that argument is that "Congress did not use the record it compiled to shape a coverage formula grounded in current conditions."³⁰ The record, no matter how thorough, "played no role in shaping the statutory formula,"³¹ because "[i]f Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula."³² The Court concluded that Congress's failure to update the formula left it "with no choice but to declare § 4(b) unconstitutional." However, the Court "issue[d] no holding on § 5 itself";³³ indeed, the Court assured, "Congress may draft another formula based on current conditions," so long as that formula "speaks to current conditions."³⁴

The dissent³⁵ offered a fiery rebuttal to the majority. It began by noting that remedial legislation under the Fifteenth Amendment should warrant "substantial deference,"³⁶ especially since *Katzenbach* had held that Congress only needed a rational means for ensuring Fifteenth Amendment rights are protected.³⁷ Furthermore, Justice Ginsburg argued that the Court should have been especially deferential to Congress since it was reauthorizing a statute; after all, if reauthorization were held to the same standard as authorization, then Congress would be placed in a Catch-22 where a successful statute could never be renewed.³⁸

Next, the dissent argued that the formula was legitimate because of the extensive record that Congress had compiled demonstrating that covered jurisdictions were much more likely to discriminate on the basis of race in voting.³⁹ Finally, the dissent highlighted three perceived problems with the majority's opinion: first, the majority allowed Shelby County to make a facial challenge to the statute (that is, a challenge to the statute itself, rather than just an application of it); second, the majority departed from well-established precedent, such as *Katzenbach*, which limited the equal sovereignty doctrine; and third, the majority showed no deference to Congress's enforcement powers.^{40,41}

II. The Heart of the *Shelby County* Opinion: The Equal Sovereignty Principle

The *Shelby County* opinion contains a few potential justifica-

States, 446 U.S. 156 (1980); *Lopez v. Monterey County*, 525 U.S. 266 (1999).

15 The majority opinion was authored by Chief Justice Roberts, and joined by Justices Scalia, Kennedy, Thomas, and Alito.

16 *Shelby County*, 133 S. Ct. at 2623.

17 *Shelby County* did not bring a challenge to § 2 or any other provision of the VRA.

18 *Shelby County*, 133 S. Ct. at 2623.

19 *Id.* (quoting *Northwest Austin Municipal Utility District No. One v. Holder (NAMUDNO)*, 557 U.S. 193 (2009)).

20 *Id.* at 2624.

21 *Id.* at 2625.

22 *Id.*

23 *Id.* at 2626.

24 *Id.*

25 *Id.* at 2628 (quoting *Northwest Austin Municipal Utility District No. One v. Holder (NAMUDNO)*, 557 U.S. 193, 204 (2009)).

26 *Id.*

27 *Id.* at 2628-29.

28 *Id.* at 2628.

29 *Id.*

30 *Id.* at 2629.

31 *Id.*

32 *Id.* at 2630.

33 *Id.* at 2631.

34 *Id.*

35 The dissent was authored by Justice Ginsburg and joined by Justices Breyer, Sotomayor, and Kagan. *See generally id.*

36 *Id.* at 2636 (Ginsburg, J., dissenting).

37 *Id.* at 2638 (citing *South Carolina v. Katzenbach*, 383 U.S. 301 (1966)).

38 *Id.*

39 *Id.* at 2643.

40 *Id.* at 2644.

41 There was one other opinion in this case: Justice Thomas's concurring opinion. In that opinion, he argued that § 5 should also be unconstitutional because of federalism concerns. *Id.* at 2631-32 (Thomas, J., concurring).

tions for striking down Section 4(b). My goal is to show that the nexus of the opinion rests on the equal sovereignty principle—that is, while other justifications may have played a role, the opinion could not come out the way it did without the equal sovereignty claim. Moreover, I suggest that other arguments made by the dissent which circumvent the principle—namely, the argument that Shelby County should not be allowed to mount a facial challenge to the VRA—are also flawed. This section thus sets up the rest of the paper, which focuses on the validity of the equal sovereignty principle.

A. Equal Sovereignty as the Reason for Striking Down Section 4(b)

There are a few plausible reasons that the Court offered in striking down Section 4(b). For one, the Court highlighted the various federalism⁴² concerns associated with the VRA, stating that the VRA “sharply departs” from principles of dual sovereignty⁴³ because it “suspends ‘all changes to state election law—however innocuous—until they have been precleared’”⁴⁴ One could also interpret the Court’s concern as being primarily temporal; under this logic, it chose to consider “whether that coverage formula is constitutional *in light of current conditions*”⁴⁵ because it was worried that the formula was too dated.⁴⁶ A third possible explanation is that the Court struck down the preclearance formula for violating the equal sovereignty of the states.

The first explanation—that the Court was simply concerned with federal intrusion on state sovereignty—is untenable given the endpoint of the decision. The Court explicitly reserved judgment on Section 5,⁴⁷ which was the source of most of the Court’s federalism concerns.⁴⁸ Indeed, it would be illogical to say that the preclearance formula results in substantial federalism costs because the formula itself does not have any effect on state sovereignty. In the context of *Shelby County*, only preclearance can be described as “stringent” and “potent” in terms of its

42 Of course, an equal sovereignty claim is part and parcel of a federalism concern, as I argue later in the paper. However, for the purposes of delineating between the different justifications for the Court’s holding, I describe the federalism costs as the costs associated with federal encroachment on what the Court views as state sovereign domain. In contrast, I view the equal sovereignty principle arguments as relating to the *relative* amount of sovereignty afforded to different states.

43 Dual sovereignty is the idea that the federal and state governments have mutually exclusive regulatory authority. See, e.g., Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195, 1208–10 (2012) (describing the applicability of dual sovereignty as a descriptive theory); Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503, 541(2007) (describing the “strict-separationist” view of federalism).

44 *Shelby County*, 133 S. Ct. at 2624.

45 *Id.* at 2627 (emphasis added).

46 See also *id.* at 2625 (“Nearly 50 years later [after the passage of the VRA], things have changed dramatically. Shelby County contends that the preclearance requirement, even without regard to its disparate coverage, is now unconstitutional. Its arguments have a good deal of force.”).

47 *Id.* at 2631 (“We issue no holding on § 5 itself, only on the coverage formula.”).

48 See, e.g., *id.* at 2626 (“In 2006, Congress amended § 5 to prohibit laws that could have favored such [minority] groups, but did not do so because of a discriminatory purpose . . . even though we had stated that such broadening of § 5 coverage would exacerbate the substantial federalism costs that the preclearance procedure already exacts, perhaps to the extent of raising concerns about § 5’s constitutionality”) (internal citations and quotation marks omitted).

federalism costs.⁴⁹ Certainly the Court did discuss how the coverage formula induces preclearance—which in turn denigrates state sovereignty—but if the Court’s opinion were primarily based on dual-sovereignty concerns, then it should have ruled Section 5 facially unconstitutional.⁵⁰ That being said, there are reasonable explanations for why the Court may have struck down Section 4(b), and not Section 5, out of political or institutional prerogatives, and not as a product of principle.⁵¹ But such explanations require one to analyze the motivations of the Justices, which, for obvious reasons, is difficult to do precisely and nearly impossible to empirically verify. Instead, I take the decision’s words at face value: The Court explicitly opined that “Congress may draft another formula based on current conditions,”⁵² which implies that its issue was primarily with the coverage formula, not the federalism costs of Section 5.

The second plausible reading of the decision is that the Court was primarily concerned with the statute being outdated.⁵³ There is appeal to this argument—it certainly lines up with the Court’s dicta about “current needs” justifying “current burdens.”⁵⁴ However, the passage of time alone cannot make a statute unconstitutional, nor did the Court cite any case suggesting so. Rather, the passage of time played an auxiliary role in the review of the statute. The passage of time made the statute less likely to pass the current-needs to current-burdens standard, but the test itself must have arisen from an independent constitutional principle.

The other plausible explanation is that the reason for striking down Section 4(b) was the equal sovereignty principle. This is the fairest reading of the opinion because it most logically accords with the ultimate disposition of the case—that Section 4(b) is unconstitutional, but that Section 5 is not necessarily so. Moreover, according to the Court, it is the equal sovereignty principle which is “highly pertinent in assessing . . . disparate treatment of States.”⁵⁵ This interpretation also accords with previous precedent set by the Roberts Court. In *Northwest Austin Municipal Utility District No. One v. Holder (NAMUDNO)*, the Supreme Court, four years before *Shelby County*, heard the same exact challenge to the VRA.⁵⁶ There, the Court used the doctrine of constitutional avoidance and issued a statutory ruling, but, in doing so, however, the Chief Justice wrote the key

49 *Id.* at 2624 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966)).

50 See *id.* at 2632 (Thomas, J., concurring) (arguing that the majority’s opinion would imply that § 5 is unconstitutional).

51 See, e.g., Richard L. Hasen, *Shelby County and the Illusion of Minimalism*, 22 WM. & MARY BILL OF RTS. J. 713, 737 (2014) (arguing that the majority “knew full well it was effectively overturning Section 5 because there will not be political will to come up with a new coverage formula”) [hereinafter Hasen, *Shelby County*]; *id.* at 727 (characterizing the majority as pretending to be minimalist by only striking down the coverage formula and not § 5); Allison Orr Larsen, *Do Laws Have a Constitutional Shelf Life?*, 94 TEX. L. REV. 59, 98 (2015) (arguing that “finding a law to be unconstitutional because it is outdated as a factual matter sounds somehow more objective, more scientific, and less politically motivated than second-guessing a legislative policy choice.”).

52 *Shelby County*, 133 S. Ct. at 2631.

53 See, e.g., Larsen, *supra* note 51, at 110 (“[T]he constitutional violation in *Shelby County* had more to do with the passage of time than with anything else.”).

54 *Shelby County*, 133 S. Ct. at 2628.

55 *Id.* at 2624.

56 *Northwest Austin Municipal Utility District No. One v. Holder (NAMUDNO)*, 557 U.S. 193 (2009).

dictum which would anchor the *Shelby County* decision—that the VRA departed from “the fundamental principle of equal sovereignty.”^{57,58} Therefore, the key justification behind the *Shelby County* holding must be the equal sovereignty principle. In the next section, I argue that the only other pertinent, non-equal sovereignty claim to the *Shelby County* disposition—about whether a facial challenge to the VRA is justified—was decided correctly by the majority.

B. Challenging the Dissent and Justifying a Facial Challenge

The dissent argued that the Court should not have allowed *Shelby County* to make a facial challenge to the formula. The logic of the argument is based in Article III, which constrains courts to only deciding particular “Cases” or “Controversies.”⁵⁹ Accordingly, the Supreme Court has opined that courts “are not roving commissions assigned to pass judgment on the validity of the Nation’s laws”;⁶⁰ instead, they must evaluate only the case at hand. And “as applied to *Shelby County*, the VRA’s preclearance requirement is hardly contestable.”⁶¹ Thus, the logic goes, while there may be some plaintiff for whom preclearance is unconstitutional, there should be no question with *Shelby County*. The dissent thus argued that accepting a facial challenge was in violation of the norm of issuing restrained judgments. In his criticism of *Shelby County*, Professor Rick Hasen, of the University of California, Irvine School of Law, endorsed this argument, characterizing the opinion as “audacious” because it “reject[ed] the Roberts Court’s stated commitment to judicial minimalism in its treatment of facial challenges and severability.”⁶² This argument, if accepted, would have prevented the majority from striking down the formula. As such, it is worth considering seriously.

I argue that *Shelby County* was entitled to a facial challenge. The problem with the dissenters’ argument is that the challenge at hand was not to Section 5; *Shelby County*’s (successful) challenge was to Section 4(b). To evaluate the validity of a facial attack, the Supreme Court’s precedent instructs courts to determine whether there is any constitutional way to apply the challenged practice.⁶³ If we take for the sake of argument that the formula is irrational under the equal sovereignty principle, then there is no constitutional way to apply that formula.⁶⁴ As

a corollary, *any* covered jurisdiction would have standing to challenge the formula.

Justice Ginsburg suggested that the VRA’s severability clause should caution against allowing a facial challenge.⁶⁵ The severability clause, in whole, states that:

If any provision of [this Act] or the application thereof to any person or circumstance is held invalid, the remainder of [the Act] and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby.⁶⁶

Then, by citing to the Supreme Court’s previous holding in *NFIB v. Sebelius*, where the Court cited the Affordable Care Act (ACA)’s severability clause in striking down the ACA’s threat of withdrawing Medicaid funding while still upholding the rest of the Act,⁶⁷ Justice Ginsburg argued that the Court should have been similarly restrained by blocking a facial challenge to the VRA’s coverage formula.

Two circumstances distinguish the Court’s holding in *NFIB* from its decision in *Shelby County*. First, with the ACA, the Court was able to sever a provision as a whole—the threat of withdrawing Medicaid funding⁶⁸—without having to otherwise alter the statute. Second, severing the threat was sufficient to remedy the constitutional violation in its entirety: The whole logic of the Spending Clause argument in *NFIB* was that the threat of withdrawing Medicaid funding was coercive to states in a way which offended the Constitution.⁶⁹ With the VRA, neither was true. First, the Section 4(b) coverage formula did not single out jurisdictions; rather, it captured any jurisdiction which had a voting test and less than fifty percent voter registration or turnout in 1972.⁷⁰ Severing a single plaintiff would thus be textually impossible. And second, severing an individual plaintiff would not be sufficient to resolve the constitutional issue of discriminating among states irrationally, per the equal sovereignty principle. Of course, as Dean Heather Gerken of Yale Law School has cautioned, “the key to drawing distinctions is not to argue they exist, but to explain why they matter.”⁷¹ Here, the differences do matter. Because it is impossible to textually sever an individual plaintiff from the Section 4(b) preclearance formula, the severability clause does nothing to protect the formula—at best, the Court could sever specific criterion in the formula (e.g., it could state that the metric of 50% voter registration or turnout in 1972 is unconstitution-

57 See *Shelby County*, 133 S. Ct. at 2622, 2623, 2624, 2630, 2631, and 2648 (citing *NAMUDNO*, 557 U.S. at 203).

58 Rick Hasen has dubbed this the Chief Justice’s “long game” of strategically inducing constitutional change. See Richard L. Hasen, *The Chief Justice’s Long Game*, N.Y. TIMES (Jun. 25, 2013), <https://www.nytimes.com/2013/06/26/opinion/the-chief-justices-long-game.html>.

59 U.S. CONST. art. III, § 2.

60 *Broadrick v. Oklahoma*, 413 U.S. 601, 610-11 (1973) (cited in *Shelby County*, 133 S. Ct. at 2645 (Ginsburg, J., dissenting)).

61 *Shelby County*, 133 S. Ct. at 2645 (Ginsburg, J., dissenting).

62 Hasen, *Shelby County*, *supra* note 51, at 714.

63 See *Shelby County*, 133 S. Ct. at 2645 (Ginsburg, J., dissenting) (“‘A facial challenge to the legislative Act,’ the Court has other times said, ‘is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.’”) (quoting *United States v. Salerno*, 481 U.S. 739 (1987)).

64 Of course, if one were to conclude that the formula is *not* irrational under the equal sovereignty principle (or that the equal sovereignty principle is not legitimate, as I argue in Part IV), then facial challenge or not the case would be dismissed on the merits. In other words, if I am correct, then Justice Ginsburg’s argument is not sufficient to shield § 4(b) from the overarching constitutional challenge by itself; either the constitutional challenge must lack merit on its

own, or the challenge is correct and justifies the facial attack on the preclearance formula.

65 *Shelby County*, 133 S. Ct. at 2648 (Ginsburg, J., dissenting) (“The VRA’s exceptionally broad severability provision makes it particularly inappropriate for the Court to allow *Shelby County* to mount a facial challenge to §§ 4(b) and 5 of the VRA . . .”).

66 *Id.* (Ginsburg, J., dissenting) (quoting 42 U.S.C. § 1973p).

67 See generally *Nat’l Fed’n of Indep. Bus. v. Sebelius (NFIB)*, 132 S. Ct. 2566 (2012).

68 See 42 U.S.C. § 1396(c) (2010).

69 See, e.g., *NFIB*, 132 S. Ct. at 2604 (Roberts, C.J., joined by Kagan and Breyer, JJ.) (“In this case, the financial ‘inducement’ Congress has chosen is much more than ‘relatively mild encouragement’—it is a gun to the head.”), and *id.* at 2666 (Scalia, Kennedy, Thomas, and Kennedy, JJ., dissenting) (“The Medicaid Expansion . . . exceeds Congress’ spending power and cannot be implemented.”).

70 *Shelby County*, 133 S. Ct. at 2620.

71 Heather K. Gerken, *Slipping the Bonds of Federalism*, 128 HARV. L. REV. 85, 108 (2014).

al). Likewise, because the constitutional violation derives from the disparate treatment of different states' sovereignty, carving out exemptions for certain jurisdictions, as Justice Ginsburg suggested, would be insufficient to resolve the constitutional violation.⁷²

In short, I have argued that the decision hinges fundamentally on the equal sovereignty principle. The procedural arguments offered by the dissent against deciding a facial challenge are unpersuasive, and so too are interpretations of the opinion that predicate the constitutional violation primarily on other principles (e.g., federalism or the passage of time). In the next two sections, I argue that the Court was nevertheless wrong in *Shelby County*.

III. Evaluating Section 4(b) Against the Equal Sovereignty Principle

This section assumes, for the sake of argument, that the Court's equal sovereignty principle is a legitimate constitutional imperative. Though I also argue that the principle itself is flawed,⁷³ my point here is to show that *even if* the principle were correct, the Court came to the wrong conclusion. I note, first, that the Court had before it two separate tests for evaluating the VRA's constitutionality—a congruence and proportionality test and a rational basis test—and that the Court did not clearly explain which test should control in the review of the VRA. However, the best reading of the opinion implies that the Court attempted to adopt a rational basis test. Based on that, I argue that the Court erred in its analysis.

A. Standards of Review

One of the key questions that scholars expected the *Shelby County* Court to decide was the standard of review for analyzing the constitutionality of Sections 4(b) and 5. In *South Carolina v. Katzenbach*, the Court had held that exercises of Congress's enforcement powers under the Fifteenth Amendment⁷⁴ were subject only to rational basis review—that is, the Court would uphold the act if Congress had a rational justification for the means it employed.⁷⁵ However, in *City of Boerne v. Flores*,⁷⁶ the Court opined that Congress, when authorizing remedies pursuant to the Fourteenth and Fifteenth Amendments, must employ means that are “congruen[t] and proportional[]”⁷⁷ to the harm. It was therefore unclear which standard—a rational basis test or a congruency and proportionality test—should control in reviewing the VRA.⁷⁸

72 The fact that the formula is challenged, and not the preclearance provision, matters in my reading. If *Shelby County* were to challenge the burdens of preclearance on purely federalism grounds, then the Court should be much more willing to reject the facial challenge in favor of an as-applied challenge because the Court would be able to enjoin specific requirements that states need to go through under preclearance by evaluating whether the specific scrutiny applied to the jurisdiction is justified.

73 See *infra*, Section IV.

74 U.S. CONST. amend. XV, § 2 (“The Congress shall have the power to enforce this article by appropriate legislation.”).

75 *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966) (“As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.”).

76 521 U.S. 507 (1997).

77 *Id.* at 520.

78 See generally Hasen, *Shelby County*, *supra* note 50, at 715-17 (describing

While the *Shelby County* Court did not explain which test it applied, it almost certainly did not apply *Boerne's* congruence and proportionality test. That test, when applied to the VRA, would have required a thorough review of the evidentiary record that Congress amassed in its reauthorization debates.⁷⁹ Given that the Court simply did not do any of that factual analysis, it is implausible to suggest that the Court performed a congruence and proportionality analysis.⁸⁰ In the alternative, the Court could have employed a rational basis test, which would accord with much of the dictum in the decision. For example, the Court found the coverage formula to be unconstitutional because “[i]t would be *irrational* for Congress to distinguish between States in such a fundamental way based on 40-year-old data And it would have been *irrational* to base coverage on the use of voting tests 40 years ago, when such tests have been illegal since that time.”⁸¹ Assuming this to be the case, I argue the Court erred.

B. The Rationality of Section 4(b)

Under rational basis review, it is difficult to justify the Court's ultimate conclusion. A rational basis test is highly deferential to the government⁸²—so much so that “the justification for the statute need not be the one that actually motivated the legislature.”⁸³ The legislative choice can be based on rational speculation—even without data.⁸⁴ That standard makes it extremely easy to justify the preclearance formula. First, Congress's record included fifteen thousand pages worth of evidence showing continual and gross violations of minority citizens' Fourteenth and Fifteenth Amendment rights.⁸⁵ Congress's record even showed that “there were *more* DOJ objections between 1982 and 2004 (626) than there were between 1965 and the 1982 reauthorization (490).”⁸⁶ Furthermore, Congress looked to a comprehensive study which evaluated all Section 2 litigation between 1982 and 2004. Because Section 2 has nationwide coverage, one would expect the success of Section 2 litigation to be roughly indicative of the frequency of Fourteenth and Fifteenth Amendment violations. That study showed that the covered jurisdictions under Section 4(b), which accounted for less than twenty five percent of the country's total population, were responsible for fifty six percent of the successful Section 2 litigation in the time period.⁸⁷ In addition, the study showed that there was greater racial polarization in voting in the cov-

uncertainty in which standard of review to apply).

79 Greenbaum, Martinson & Gill, *supra* note 10, at 830.

80 *Id.*

81 *Shelby County v. Holder*, 133 S. Ct. 2612, 2630-31 (2013) (emphasis added). See also *id.* at 2651 (Ginsburg, J., dissenting) (“The Court holds § 4(b) invalid on the ground that it is ‘irrational’ to base coverage on the use of voting tests 40 years ago, when such tests have been illegal since that time.”) (emphasis added).

82 See, e.g., Greenbaum, Martinson & Gill, *supra* note 10, at 831 (“Rational basis review of a statute by a Court is usually highly deferential to the governing body that enacted the statute.”). See also Hasen, *Shelby County*, *supra* note 50, at 729 (“A lower rationality affords Congress much more leeway under the VRA, leeway which supports the constitutionality of the preclearance standard and justifies other parts of the VRA . . .”).

83 Greenbaum, Martinson & Gill, *supra* note 10, at 831-32 (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314-15 (1993)) (internal quotation marks omitted).

84 *Id.*

85 *Shelby County*, 133 S. Ct. at 2636 (Ginsburg, J., dissenting).

86 *Id.* at 2639.

87 *Id.* at 2643.

ered jurisdictions which, while not dispositive of discrimination, increases the propensity for discrimination in voting.⁸⁸ Thus, Congress clearly had a rational justification for disparate coverage.

More importantly, the rational basis test does not instruct courts to inquire into Congress's actual motives for adopting a statutory scheme.⁸⁹ Rather, the Court's precedents urge courts only to look for a rational justification, even if it is not the one that Congress chose. When the majority disregarded the extensive record that Congress had in front of it based on the idea that the record "played no role in shaping the statutory formula,"⁹⁰ the Court drastically erred. As one set of legal scholars put it, the Court's analysis was "diametrically opposed to basic canons underlying rational basis review . . ."⁹¹

IV. Against Equal Sovereignty

This section engages most fundamentally with the Court's doctrine in *Shelby County*. After first defining more precisely what the equal sovereignty principle might mean, I argue that the principle is deeply flawed because it is unprecedented and unworkable.

A. Defining Equal Sovereignty

The *Shelby County* opinion uses the term "equal sovereignty" seven times, each time in reference to the *NAMUDNO* case, but never defines it beyond stating that it is "a fundamental principle . . ."⁹² Incredibly, *NAMUDNO* is equally indeterminate about the meaning of the equal sovereignty doctrine as *Shelby County*; that case devoted a single paragraph to the principle, suggesting that Section 5 is unconstitutional because it "differentiates between the States, despite our historic tradition that all the States enjoy 'equal sovereignty.'"⁹³ Because neither of these decisions put forth a working definition of the principle, I turn to two professors who have defended the principle. Professor Jeffrey Schmitt, of the University of Dayton, has summed up the equal sovereignty principle as the guarantee that "when Congress limits the sovereign power of some of the states in ways that do not apply to others, it has good reason to do so."⁹⁴ Professor Thomas Colby, of George Washington University, similarly characterizes it as the principle that "[n]o state, new or old, can have more or less sovereignty than the other states."⁹⁵ Given these working definitions, I argue that this principle is unprecedented and unworkable.

B. Precedent

1. Evidence from *NAMUDNO* and *Shelby County*
Between *NAMUDNO* and *Shelby County*, the Court⁹⁶ cited only a few cases to justify the equal sovereignty principle: *United States*

v. Louisiana,⁹⁷ *Lessee of Pollard v. Hagan*,⁹⁸ *Texas v. White*,⁹⁹ and *Coyle v. Smith*.¹⁰⁰ (Of course, *Shelby County* cited *NAMUDNO*.) This section examines each case and argues that none justifies the equal sovereignty principle's application in *Shelby County*.

In *Louisiana*, there was a dispute between the United States and states bordering the Gulf of Mexico about where state sovereignty extends into the ocean and where federal sovereignty begins. The Court there opined that the original states "owned the lands beneath navigable inland waters within their territorial boundaries, and that each subsequently admitted State acquired similar rights as an inseparable attribute of the equal sovereignty guaranteed to it upon admission."¹⁰¹ This language was subsequently cited by the *Shelby County* Court.¹⁰²

In *Pollard*, there was a land dispute arising from a condition on Alabama's admission to the Union which required Alabama to "for ever [sic] disclaim all right or title to . . . unappropriated lands lying within the state," to be reserved to the United States.¹⁰³ The Court found that Alabama was admitted "on an equal footing with the original states" and that therefore Alabama "succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession . . ."¹⁰⁴ The *Pollard* Court opined that the United States did not have any title to land in Alabama based on the language of the agreement, but that even if the agreement would allow such title, "such stipulation would have been void and inoperative; because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain . . . except in the cases in which it is expressly granted."¹⁰⁵

In *Texas v. White*, the dispute was about the validity of bond transactions. Texas bought bonds from the United States in 1850 and, when Confederates took over the legislature, sold many of those bonds back to the United States. Texas sought to return those bonds to the state on grounds that the bond sales were unlawful.¹⁰⁶ The Court concluded in favor of Texas,¹⁰⁷ opining that, because "[t]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States,"¹⁰⁸ Texas' admission to the Union "was final." Texas had therefore never left, and its bond sales were illegitimate as such.¹⁰⁹

Finally, *Coyle v. Smith* had to do with the Enabling Act of 1906 which admitted Oklahoma to the Union but required that its capital be at Guthrie. The state legislature decided to locate the capital at Oklahoma City, and the question was whether the

97 *United States v. Louisiana*, 363 U.S. 1 (1960).

98 *Lessee of Pollard v. Hagan*, 3 How. 212 (1845).

99 *Texas v. White*, 7 Wall. 700 (1869).

100 *Coyle v. Smith*, 221 U.S. 559 (1911).

101 *Louisiana*, 363 U.S. at 16.

102 *Shelby County v. Holder*, 133 S. Ct. 2612, 2623 (2013).

103 *Pollard*, 3 How. at 220-21.

104 *Id.* at 223.

105 *Id.* (referring to U.S. CONST. art. I, § 8, cl. 16, which allows the United States to have exclusive jurisdiction of land only in its capital and over purchased land with the consent of the state where the land is "for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings[.]")

106 *Texas v. White*, 7 Wall. 700, 717-18 (1869).

107 *Id.* at 736.

108 *Id.* at 725.

109 *Id.* at 726.

88 *Id.* (Ginsburg, J., dissenting).

89 See *supra* note 83 and accompanying text.

90 *Shelby County*, 133 S. Ct. at 2629.

91 Greenbaum, Martinson & Gill, *supra* note 10, at 838.

92 *Shelby County*, 133 S. Ct. at 2624.

93 *NAMUDNO*, 129 S. Ct. at 2512.

94 Schmitt, *supra* note 5, at 213.

95 Thomas B. Colby, *In Defense of the Equal Sovereignty Principle*, 65 DUKE L. J. 1087, 1108 (2016).

96 See *Shelby County*, 133 S. Ct. at 2623, and *NAMUDNO*, 129 S. Ct. at 2512.

federal mandate was constitutional.¹¹⁰ The Court noted that the power to locate a state's capital is an "essentially and peculiarly state power []" and declared that the question of this case was simply whether "a State [can] be placed upon a plane of inequality with its sister States in the Union if the Congress chooses to impose conditions which so operate, at the time of its admission[.]"¹¹¹ The Court noted that the United States "is a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself."¹¹² This is the language that the *Shelby County* Court quoted.¹¹³

None of these cases leads to *Shelby County*'s application of the equal sovereignty doctrine, however. The *Louisiana* case's principle was, by its own words, limited to protecting equal sovereignty "guaranteed to [each state] upon admission."¹¹⁴ Moreover, the case was about interpreting the language of the Submerged Lands Act—not about constitutional doctrine—which means it is certainly not dispositive. The *Pollard* case similarly stated that Alabama must be admitted "into the union on an equal footing with the original states, the constitution, laws, and compact, to the contrary."¹¹⁵ Additionally, *Pollard* had much more to do with the sphere of sovereignty that states retain, independent of the equality of their sovereignty; for example, the Court there rejected the United States' position because "[t]o give the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty, and deprive the states of the power to exercise a numerous and important class of police powers."¹¹⁶ In other words, the Court did not say that a denial of equal sovereignty, in itself, is sufficient to reject a federal exercise of power—rather, it said that a denial of sovereignty which is beyond the United States' delegated authority, in addition to the denial of equal sovereignty, is unconstitutional. The *Texas v. White* case said nothing to support the claim of equal sovereignty that the *Shelby County* and *NAMUDNO* Courts cited; indeed, scholars have remarked on the oddities of citing *Texas* as the Court did.¹¹⁷ Finally, the *Coyle* Court's dictum that was cited by the *Shelby County* case was taken out of context. Immediately after noting that states must be "equal in power, dignity and authority,"¹¹⁸ the Court stated: "To maintain otherwise would be to say that the Union, through the power of Congress to admit new States, might come to be a union of States unequal in power, as including States . . . whose powers had been further restricted by an act of Congress accepted as a condition of admission."¹¹⁹ The Court thought that ruling in favor of the admissions condition would allow the powers of Congress, "in respect to new states," to be "enlarged

or restricted by the conditions imposed upon new States by its own legislation admitting them into the Union"¹²⁰ Thus, the *Coyle* Court also limited its holding to the admission of states. Furthermore, most of the dictum from these cases is about the rightful *limits* on the federal government, such as with concerns for Congress's ability to seize unenumerated powers, rather than about equal sovereignty between the states.¹²¹

The essence of this argument was noted by the dissent, which pointed out that *Katzenbach* held that the equal sovereignty principle "applies only to the terms upon which the States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared."¹²² The majority opinion's rebuttal to this was that "the dissent analyzes the question presented as if our decision in [*NAMUDNO*] never happened."¹²³ Of course, *NAMUDNO* certainly had language that emphasized the importance of the equal sovereignty principle. But *NAMUDNO* cited the *Katzenbach* holding "in the course of declining to decide whether the VRA was unconstitutional or even what standard of review applied to the question."¹²⁴ In other words, *NAMUDNO*'s dictum would generally not be sufficient to reverse *Katzenbach*'s explicit holding. Yet, this is exactly what the *Shelby County* court did.¹²⁵

Professor Schmitt argues that the majority's reading of *Katzenbach* is "equally plausible" as the dissent's.¹²⁶ He stresses that *Katzenbach* held "that the equal sovereignty principle does not apply to 'remedies for local evils which have subsequently appeared.' Rather than cabin the principle to the admission of new states, this language could simply mean that Congress may violate the equal sovereignty principle when needed to address local problems within particular states."¹²⁷ Schmitt then argues that *Katzenbach*'s discussion of the "exceptional conditions" which "justify legislative measures not otherwise appropriate"¹²⁸ shows that the *Katzenbach* Court was, in essence, applying the equal sovereignty principle.¹²⁹

This is a flawed interpretation of *Katzenbach*. The line explicitly used the term "only" in talking about the equal sovereignty principle's applicability,¹³⁰ which even Schmitt concedes.¹³¹

120 *Id.*

121 This is also the conclusion from Professor Leah Litman, of the University of California, Irvine. See Litman, *supra* note 117, at 1228 ("Analyzing the early equal sovereignty cases thus reveals equal sovereignty for what it was: a series of claims about what powers the Constitution delegates to Congress and what spheres it reserves to the states.")

122 *South Carolina v. Katzenbach*, 383 U.S. 301, 328-29 (1966), cited favorably by *Shelby County*, 133 S. Ct. at 2648-49 (Ginsburg, J., dissenting).

123 *Id.* at 2630 (majority opinion).

124 *Id.* at 2649 (Ginsburg, J., dissenting) (emphasis original).

125 See also *id.* ("In today's decision, the Court ratchets up what was pure dictum in *Northwest Austin*, attributing breadth to the equal sovereignty principle in flat contradiction of *Katzenbach*. The Court does so with nary an explanation of why it finds *Katzenbach* wrong, let alone any discussion of whether *stare decisis* nonetheless counsels adherence to *Katzenbach*'s ruling on the limited 'significance' of the equal sovereignty principle.")

126 Schmitt, *supra* note 5, at 230.

127 *Id.* (emphasis original, footnote omitted).

128 *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966).

129 Schmitt, *supra* note 5, at 230.

130 See *Katzenbach*, 383 U.S. at 328.

131 See Schmitt, *supra* note, at 230 n.125.

110 *Coyle v. Smith*, 221 U.S. 559, 563-64 (1911).

111 *Id.* at 565.

112 *Id.* at 567.

113 *Shelby County v. Holder*, 133 S. Ct. 2612, 2623 (2013).

114 *United States v. Louisiana*, 363 U.S. 1, 16 (1960).

115 *Lessee of Pollard v. Hagan*, 3 How. 212, 228-29 (1845) (emphasis added).

116 *Id.* at 230 (emphasis added).

117 See Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207, 1216 n.42 (2016) (concluding same about *Texas v. White*).

118 *Coyle v. Smith*, 221 U.S. 559, 567 (1911), cited favorably in *Shelby County v. Holder*, 133 S. Ct. 2612, 2623 (2013).

119 *Coyle*, 221 U.S. at 567 (emphasis added).

That alone should be sufficient to reject inferences about other circumstances where the doctrine applies. Moreover, the term “only” would be illogical under Schmitt’s reading because the statement about the scope of the doctrine (“only to the terms upon which the States are admitted to the Union”) refers to a temporal distinction (when “States are admitted”), not a geographic one. This is buttressed by the fact that the remedies which the principle does not protect against are for evils “which have subsequently appeared.”¹³²

The geographic distinction is tenuous at best. The sentence is written in a way to draw a line between two mutually exclusive arenas. If the distinguishing factor were premised on geography, then the two separate locations would have to be mutually exclusive for the sentence to read logically. However, the two clauses discuss problems in “States” and “local evils,”¹³³ which are not mutually exclusive. In contrast, reading *Katzenbach* to imply a temporal distinction—between the time of a state’s admission and after the fact—is more natural and syntactically harmonious. Lastly, if one read “local evils” to be mutually exclusive to problems with states, then *Katzenbach* would imply that localities are not afforded sovereignty protections, which is an open question in elections law because no court has ever interpreted the Constitution to imply that.¹³⁴ On its terms, *Katzenbach* should have ended the equal sovereignty challenge because it explicitly disavowed the application of the principle to the VRA. Professors Schmitt and Colby, however, argue that the logical extension of the principle embodied in the aforementioned cases must be the equal sovereignty principle.

[For the full consideration and rebuttal of counterarguments by Professors Schmitt and Colby, see the full paper online at www.5clpp.com]

C. Workability

Beyond its lack of precedent, I argue that the equal sovereignty principle is fundamentally unworkable as a doctrine. For example, the Supreme Court, in announcing its decision in *Shelby County*, did not establish a standard of review for when the equal sovereignty principle is sufficiently violated that a law becomes unconstitutional.¹³⁵ Moreover, in failing to define what the scope of “equal sovereignty” means, the Court invited extensive challenges to other laws. Justice Ginsburg’s dissent, for example, argued that the principle “is capable of much mischief [because f]ederal statutes that treat States disparately are hardly novelties.”¹³⁶

In their defense of the equal sovereignty principle, both Professors Schmitt and Colby argue that the examples given by Justice Ginsburg are not violations of equal sovereignty. They limit the principle only to when the federal government infringes on

states’ political authority.¹³⁷ Therefore, according to Professor Colby, the principle should not undermine federal laws that are drafted “in general, nongeographic terms, but have a disparate impact on some states.”¹³⁸ Similarly, Professor Schmitt states that the principle does not require “the federal government to *treat* the states equally.”¹³⁹ And, according to Professor Colby, this means that federal spending decisions should not be implicated because “[g]iving money to one state but not another . . . is a form of discrimination, but not one that directly impedes the regulatory authority or sovereign autonomy of the state that got the short end of the stick.”¹⁴⁰

This delineating principle seems robust, but it fails when examining the Court’s doctrine. For example, coercion through the threat of withholding money *has* been understood as impeding on a state’s sovereignty,¹⁴¹ which implies that the principle could open up the floodgates to litigation about disparate spending. Professor Colby acknowledges this possibility in a footnote, but he dismisses it because “no state has ever suggested that such laws violate the equal sovereignty principle.”¹⁴² Professor Colby is currently correct, but the *Shelby County* opinion is young, and judicial precedent often evolves in odd ways that stretch the limits of a once-reasonable principle.¹⁴³ Furthermore, the broader problem with the principle is that federal regulation necessarily displaces state regulation because of the Supremacy Clause. When the federal government regulates something, federal law preempts any state law which contradicts it. And even when statutes are facially neutral, their implementation can displace state law in inequitable manners. For example, when the Endangered Species Act is applied to the Utah Prairie Dog, an endangered species that lives only in Utah,¹⁴⁴ the Act necessarily displaces Utah’s ability to regulate that species—such as in legalizing hunting of the prairie dog. This poses a dilemma for the equal sovereignty principle because the distinguishing principle, according to Professors Schmitt and Colby, was that the principle sanctions disparate *treatment* but not disparate intrusions on *sovereignty*. When disparate treatment is given the power of the Supremacy Clause, it necessarily results in disparate intrusions on sovereignty.

Of course, the natural response to this argument is that *Shelby County* concerned an issue that is at the core of state sovereignty—the administration of self-governance—whereas the ability to legalize hunting of a specific animal is less intrinsic to a state’s rights. This argument is only minimally persuasive because the Court has already gone down this path once before. In *Nation-*

132 *Katzenbach*, 383 U.S. at 329 (emphasis added).

133 *Id.* at 328-29.

134 See Justin Weinstein-Tull, *A Localist Critique of Shelby County v. Holder*, 11 STAN. J. C.R. & C.L. 291, 310 (2015) (noting that the issue of whether localities deserve the protection of state sovereignty in the context of elections has been unresolved directly by the Court).

135 Hasen, *supra* note 51, at 730.

136 *Shelby County v. Holder*, 133 S. Ct. 2612, 2649 (2013) (Ginsburg, J., dissenting).

137 Schmitt, *supra* note 5, at 220.

138 Colby, *supra* note 95, at 1150 (footnote omitted).

139 Schmitt, *supra* note 5, at 220 (emphasis original).

140 Colby, *supra* note 95, at 1152 (footnote omitted).

141 See generally *Nat’l Fed’n of Indep. Bus. v. Sebelius (NFIB)*, 132 S. Ct. 2566 (2012).

142 Colby, *supra* note 95, at 1152 n.293.

143 See, e.g., *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting) (“All who observe the work of courts are familiar with what Judge Cardozo described as ‘the tendency of a principle to expand itself to the limit of its logic.’ . . . [I]f we review and approve, that passing incident becomes the doctrine of the Constitution. There it has generative power of its own, and all that it creates will be in its own image.”) (footnote omitted).

144 *People for the Ethical Treatment of Property Owners v. United States Fish and Wildlife Service*, Nos. 14-4151 & 14-4165, slip op. at 8 (10th Cir. Mar. 29, 2017).

al League of Cities v. Usery,¹⁴⁵ the Court attempted to delineate between areas of regulation that the federal government could not intrude upon from areas where it could based on whether the area included “functions essential to separate and independent existence.”¹⁴⁶ That case was overruled less than ten years later in *Garcia v. San Antonio Metropolitan Transit Authority* because the principle was fundamentally unworkable.¹⁴⁷ The history of the Court’s long struggle with attempting to limit the Commerce Clause¹⁴⁸ is indicative of its inability to draw the line concerning when federal regulation intrudes too much on sovereignty—and that will be the central problem with the equal sovereignty cases as well.

V. Conclusion

Shelby County is a flawed decision because it is premised on a flawed principle. But even if the principle were sound, there is good reason to believe that the outcome was incorrect. Nevertheless, while Section 5 was incredibly effective, it arguably was losing its relevance as major battles now take place in states such as Ohio or Colorado—states that were never covered.¹⁴⁹ Moreover, given the Court’s increasing hostility to race-based social legislation, alternative approaches may be the future for voting rights.¹⁵⁰ Whatever path Congress chooses, however, it must commit to voting rights, for, as President Reagan once said, “the right to vote is the crown jewel of American liberties.”¹⁵¹ We should not allow its luster to be diminished.

145 426 U.S. 833 (1976).

146 *Id.* at 845.

147 469 U.S. 528 (1985).

148 See, e.g., Gerken, *supra* note 71, at 91-92 (Dean Gerken argues that the fundamental problem with the Court’s federalism doctrine is that either it strikes down a law based on some arbitrary or overly-formalistic principle, reminiscent of *Lochner*, or courts do nothing and “end up ignoring what most agree to be true—the federal government isn’t supposed to be able to do anything it wants.” Thus, “therein lies the tragic choice of federalism doctrine: do nothing or do something silly.”).

149 Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 104 (2013).

150 *Id.* at 120-22.

151 Quoted in Greenbaum, Martinson & Gill, *supra* note 10, at 867.

The End of the One-Child Policy and Beyond

The Future of China's Population Policies

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On December 27, 2015, the standing committee of the National People's Congress in China passed a new law abolishing the One-Child Policy. The law took effect on January 1, 2016. Under the new policy, all couples are allowed to have two children. The reversal of the One-Child Policy has been long anticipated and is hardly surprising to observers, given the demographic challenges that China is facing right now as a result of this policy. China is one of the many developing countries that have instituted family planning policies in anticipation of population growth; if the population grows at a rate that exceeds what the national physical and social infrastructures can accommodate, there may be severe repercussions to the national economy and to social stability. However, the scale and stringency of China's One-Child Policy is unparalleled by any other government-initiated population policies. This paper examines the impact of the One-Child Policy on Chinese society and looks into the future of China's demographic challenges along with ways to address them.

I. Context

In 1979, the Chinese government introduced the One-Child Policy to slow China's rapid population growth. At the time, the centrally planned Chinese economy had not yet fully opened up and was experiencing severe shortages of capital, natural resources, and consumer goods.¹ A rapidly expanding population would not only put more pressure on the already strained social infrastructure in China, but might also outstrip its economic development. Although the policy was designated as a "temporary measure," it remained in effect for over thirty years.² Under the One-Child Policy, couples were only allowed to have one child; exceeding that limit could result in a heavy fine and even forced abortion. Mandatory vasectomies and use of inter-uterine devices (IUD) after the birth of a first child had also been practiced in certain regions.³ China's Ministry of Health estimated that, by 2013, 336 million babies had been aborted as a result of the policy, and some thirteen million abortions were taking place in China every year.⁴ The Family

Planning Commission claims that the policy has prevented four hundred million births in China, though this figure has been contested by academics.⁵ However, it should be noted that this policy is not all-encompassing, as it only applies to urban families and the Han ethnic group. Ethnic minorities and some people living in rural areas are entitled to certain exemptions from this policy.⁶

II. Gender and Society

The One-Child Policy has produced mixed consequences for gender equality in China. On one hand, the strong preference for sons in Chinese culture, especially in rural areas, combined with the ability to determine an infant's sex before birth through ultrasound technology, have resulted in the deaths of millions of unborn baby girls in sex-selective abortions.⁷ Despite the Chinese government outlawing sex determination in the late 1980s to stop parents from aborting or abandoning unborn female infants, the practice still goes on due to the deeply seated traditional perception of female inferiority.⁸ The prevalent femicide practices have severely skewed China's gender ratio. According to official 2016 figures from the National Bureau of Statistics, there were 33.59 million more men than women in China.⁹ This has also resulted in an expanding and increasingly frustrated bachelor class who are unable to find spouses.¹⁰ Even

Policy, TELEGRAPH (Mar. 15, 2013), <https://www.telegraph.co.uk/news/worldnews/asia/china/9933468/336-million-abortions-under-Chinas-one-child-policy.html>.

⁵ Wang Feng et al., *Population, Policy, and Politics: How Will History Judge China's One-Child Policy?*, 120-122, 38 POPULATION & DEV. REV. 115 (2013).

⁶ Daniel DeFraia, *China's Legislature Adopts Resolution Easing One-child Policy*, PUB. RADIO INT'L (Dec. 23, 2013), <https://www.pri.org/stories/2013-12-28/chinas-legislature-adopts-resolution-easing-one-child-policy>

⁷ *China Announces End of One Child Policy*, POPULATION RES. INST. (Oct. 29, 2015), <https://www.pop.org/china-announces-end-of-one-child-policy/>.

⁸ Yuan Ren, *Oh China, This Isn't How to Solve Your 'Girl Problem'*, TELEGRAPH (Feb. 27, 2015), <https://www.telegraph.co.uk/women/womens-life/11393782/China-and-gender-abortion-Government-policy-isnt-the-answer.html> (last visited Aug. 25, 2018).

⁹ Didi Kirsten Tatlow, *In China, a Lonely Valentine's Day for Millions of Men*, N.Y. TIMES (Feb. 14, 2017), <https://www.nytimes.com/2017/02/14/world/asia/china-men-marriage-gender-gap.html>.

¹⁰ Rob Budden, *Why Millions of Chinese Men Are Staying Single*, BBC (Feb. 14, 2017), <http://www.bbc.com/capital/story/20170213-why-millions-of->

1 Wang Feng et al., *The End of China's One-Child Policy*, 47 STUD. FAMILY PLANNING 83, 83-84 (2016), <https://www.brookings.edu/wp-content/uploads/2016/07/The-End-of-Chinas-OneChild-Policy.pdf>.

2 *Id.*

3 IMMIGRATION & REFUGEE BD. OF CANADA, ONE-CHILD POLICY UPDATE (Jan. 1, 1995), <http://www.refworld.org/docid/3ae6a81314.html>.

4 Malcolm Moore, *336 Million Abortions under China's One-Child*

though the gender ratio from birth has dropped from a high of 121 boys born for every 100 girls in 2004 to about 113.5 boys in 2015, it is still considerably higher than the world average of 104 boys to 100 girls. This gender imbalance will persist for decades to come.¹¹

On the other hand, the One-Child Policy also considerably elevated the status of women, especially considering the long-standing tradition of patrilineal kinship and the cultural preference for sons over daughters in China. According to a study by Vanessa L. Fong, Professor of Anthropology at Amherst College, singleton daughters in urban Chinese cities have enjoyed more equal opportunities and resources in education, which has helped improve their upward social mobility as they become less dependent on men to make a living.¹² However, the report also notes that despite this positive equalizing effect of the One-Child Policy on the gender gap, such effect is mostly limited to urban cities. In some rural places, low birthrate tends to frustrate women more than it empowers them.¹³

III. Demographic Challenges

An immediate result of the policy is a reduced fertility rate. Since the early 1990s, China's total fertility rate has fallen below the replacement level of 2.1 and has plateaued at around 1.5 to 1.6 births per woman.¹⁴ A direct consequence of the fertility rate decline is a rapidly aging population. According to the Asian Development Bank's projection, almost a quarter of China's population will be over 65 years of age by 2050. That is up from 8.2 percent of the population in 2010.¹⁵ By 2050 China is projected to have one of the oldest populations in the world, and one of the highest age dependency ratios.¹⁶

The One-Child Policy has also reshaped China's family structures. The "4-2-1" family structure (four grandparents, two parents, and one child) has become the norm in Chinese society.¹⁷ This means that each only child is likely to be responsible for as many as six dependents when their parents retire, even without their own children. Despite the high savings rates in China, it seems unlikely that these children will be able to afford such a burden.¹⁸

[chinese-men-are-staying-single](#) (last visited Aug. 25, 2018).

11 *Id.*

12 Vanessa L. Fong, *China's One-Child Policy and the Empowerment of Urban Daughters*, 104 AM. ANTHROPOLOGIST 1098 (2002).

13 *Id.* at 1099

14 FERTILITY RATE, TOTAL (BIRTHS PER WOMAN), WORLD BANK, <https://data.worldbank.org/indicator/SP.DYN.TFRT.IN?locations=CN> (last visited Sept. 15, 2018) (data from 1960-2016, filtered to China).

15 SANG-HYOP LEE, ANDREW MASON & DONG HYUN PARK, ASIAN DEVELOPMENT BANK, AGING, ECONOMIC GROWTH, AND OLD-AGE SECURITY IN ASIA (September 2012), at 28, <https://www.adb.org/sites/default/files/publication/30041/aging-economic-growth-asia.pdf>.

16 Xiao-Tian Feng et al., *China's One-Child Policy and the Changing Family*, 45 J. COMP. FAMILY STUD. 17 (2014).

17 *Id.*

18 *China's Achilles Heel*, ECONOMIST (Apr. 21, 2012), <https://www.economist.com/news/china/21553056-comparison-america-reveals-deep-flaw-chinas-model-growth-chinas-achilles-heel> (last visited Apr. 22, 2018).

Despite the abolition of the policy, its effect on China's fertility rate is not easily reversible. Since the relaxation of the One-Child Policy, China has seen the number of births rise to 18.46 million in 2016—the biggest annual increase since 2000.¹⁹ However, it still fell short of previous expectations of at least twenty million new babies under the two-child policy.²⁰ A survey of ten-thousand respondents from the All-China Women's Federation conducted over the second half of 2016 found that 53.3 percent of couples with one child did not want another, despite their ability to have one. This ratio rose above sixty percent in wealthy areas like Shanghai and Beijing.²¹ Quality and affordability of childcare and education are commonly cited reasons for people's reluctance to have two children.²²

IV. What's Next?

The rapidly aging population will put enormous pressure on China's social infrastructures, in particular pensions and healthcare. Even as early as 2016, the Chinese government already sensed pressure on its nascent state pension program to break even and started formulating a plan to raise the retirement age for the first time since 1978.²³ The shrinking workforce will only make the situation worse as government revenue will be reduced considerably due to the decrease in the number of taxpayers and economic slowdown. There is striking similarity between China's current demographic and economic challenges and those that Japan faced in the 1990s.²⁴ In order to save itself from a similar fate, China needs to make immediate revisions to its current policies and introduce new ones to maintain a sizable labor force and simultaneously care for the graying population.

However, China faces a unique set of challenges. First, despite the fact that China now has the second largest economy in the world, it is still considered to be a poor country when measured by per capita GDP; its per capita GDP in 2016 is fifty-five percent below the world average.²⁵ This is unlike most other countries facing the same problems, as they are typically more developed and already have a solid social welfare system in place. Furthermore, encouraging birth through monetary incentives

19 Laura Zhou, *China's Government Admits Birthrate Too Low After Decades Imposing One-Child Policy*, SOUTH CHINA MORNING POST (Jan. 27, 2017), <https://www.scmp.com/news/china/policies-politics/article/2065676/chinas-government-admits-birthrate-too-low-after> (last visited Aug. 25, 2018).

20 *Id.*

21 Amanda Wu, *Two-Child Policy's Impact on Family Education*, ALL-CHINA WOMEN'S FED. (Jan. 4, 2017), http://www.womenofchina.cn/html/data_speaks/17010579-1.htm.

22 Dan Levin, *Many in China Can Now Have a Second Child, but Say No*, N.Y. TIMES (Feb. 25, 2014), <https://www.nytimes.com/2014/02/26/world/asia/many-couples-in-china-will-pass-on-a-new-chance-for-a-second-child.html> (last visited Aug. 25, 2018).

23 *China Will Set Plan for Raising Retirement Age Next Year*, REUTERS (Feb. 28, 2016), <https://www.reuters.com/article/us-china-labour-retirement/china-will-set-plan-for-raising-retirement-age-next-year-media-idUSKCN0W1077> (last visited Apr. 21, 2018).

24 *China Announces End of One Child Policy*, *supra* note 8.

25 Panos Mourdoukoutas, *China Is Still a 'Poor' Country*, FORBES (Sep. 2, 2017), <https://www.forbes.com/sites/panosmourdoukoutas/2017/09/02/china-is-still-a-poor-country/#72558b6d4eef> (last visited Aug. 25, 2018).

will put even greater pressure on a national budget already strained by the rising cost of subsidizing pension and other social security services.²⁶ Second, the homogeneous nature of Chinese society suggests that solving labor shortage through immigration is challenging. According to estimates from the United Nations, as of July 2017, only 0.07 percent of all people in the China are migrants—including people who were born in Hong Kong and Macau but now live in China.²⁷ This shows that China has one of the smallest shares of migrants of any country in the world, and immigration policies still remain restrictive.²⁸ Third, China lacks effective anti-discriminatory laws which protect women's employment status.²⁹ As a result, women may delay childbearing or choose not to have children for fear of losing their jobs or in order to advance their careers.

A. Further Relaxation of the Population Policy

Although the One-Child Policy has been repealed, China still only allows couples to have two children. Considering the prevailing reluctance of couples to even have a second child, a more drastic policy shift, such as a complete lifting of family planning policies, is inevitable as China's state council recently commissioned a study on the impact of scrapping restrictions on family size.³⁰ Yet there is considerable political inertia working against the abandonment of family planning policies altogether because admitting that the One-Child Policy was a mistake would directly call into question the regime's legitimacy. In order to make the uncomfortable but necessary policy change, the Chinese government must realize that maintaining population growth is a national priority and that overlooking the issue may spell disaster for the country's future.

B. Improving Social Security Services

A report published by the Paulson Institute estimates that by 2050, China will have a 1.6 active workers per retiree, a far cry from the current number of 4.9 per retiree, and China's pension system is ill-prepared for such a challenge.³¹ For one, the pension system is administered by local governments where different regulations and standards hinder labor mobility and result in significant managerial inefficiency.³² Second, the pension scheme is different and separate among govern-

ment employees, urban employees in private sectors, and rural workers. Civil servants receive a guaranteed pension as high as ninety-five percent of their salaries, while employees at private companies only receive around forty percent of their salaries as pension. Furthermore, government employees are exempt from the eight percent mandatory contribution to a retirement fund, which employees at private firms are subject to.³³ This discrepancy means that the thirty million public sector employees contribute no money while receiving pensions up to two or three times the size of their private sector counterparts' pensions.³⁴ This has resulted in huge amount of unfunded pension liability.

Besides the obvious solution of channeling more money into the pension fund, other actions can be taken to mitigate this pension crisis. First, the government can eliminate the provincial differences in pension standards and create a uniform, national pension policy. This may reduce some of the managerial inefficiency and improve geographical labor mobility while also preventing local governments from mismanaging pension funds. Second, there should be further integration between the different pensions schemes for workers in public sectors, private companies, and rural areas. This could be done through terminating the public sector workers' exemption from paying mandatory retirement contributions and standardizing the pension amount payable to retirees across sectors and geographic areas.³⁵ China could also gradually raise the retirement age. The current retirement age in China (sixty for male and between fifty to fifty-five for female) was calculated based on the average life expectancy in the 1970s, which has significantly increased in the last five decades.³⁶ Moreover, the retirement age in China is substantially lower than the effective retirement ages in Japan and South Korea, which face similar demographic challenges.³⁷ Thus, raising the retirement age can be a viable option to slow the shrinkage of the workforce and ease the burden on the pension system.

Ultimately, the sustainability of China's pension system will depend on its ability to keep the economy growing and ensure a more equitable income distribution so that more people pay more tax and pension contributions and fewer receive government assistance. A more viable social security system will alleviate some of the burden of supporting the elderly, potentially making the working age population more willing to have additional children.

C. Making Education More Affordable

33 Dexter Roberts, *Chinese Rage at the Pension System*, BLOOMBERG (Oct. 31, 2013), <https://www.bloomberg.com/news/articles/2013-10-31/chinese-rage-at-the-pension-system>.

34 Yukun Zhu, *Recent Developments in China's Social Security Reforms*, 55 INT'L SOCIAL SEC. REV. 39 (2002).

35 Tao Liu & Li Sun, *Pension Reform in China*, 28 J. AGING & SOCIAL POL'Y 15, 23-24 (2016).

36 Weihua Chen, *Time for a Change to One-Size-Fits-All Retirement Policy*, CHINA DAILY (Mar. 11, 2017), http://www.chinadaily.com.cn/opinion/2017-03/11/content_28517346.htm (last visited Aug. 25, 2018).

37 Mu Guangzong, *Why the Elderly Don't Retire in Japan and South Korea*, GLOBAL TIMES (July 8, 2018), <http://www.globaltimes.cn/content/1109888.shtml> (last visited Aug. 25, 2018).

26 *China's Ageing Population Is Creating A New Debt Crisis For Beijing as Pension Shortfall Widens*, SOUTH CHINA MORNING POST (Feb. 6, 2018), <https://www.scmp.com/news/china/economy/article/2132236/china-ageing-population-creating-new-debt-crisis-beijing-pension> (last visited Aug. 25, 2018).

27 Dan Kopf, *In One Metric of Diversity, China Comes in Dead Last*, QUARTZ (Dec. 27, 2017), <https://qz.com/1163632/china-still-has-the-smallest-share-of-incoming-migrants-in-the-world/> (last visited Apr. 23, 2018).

28 *Id.*

29 Fan Yiyang, *China Lacks Anti-Discrimination Law With Teeth*, SIXTH TONE (Jan. 07, 2017), <http://www.sixthtone.com/news/1772/china-lacks-anti-discrimination-law-with-teeth> (last visited Aug. 25, 2018).

30 *China Considers Ending Birth Limits as Soon as This Year*, BLOOMBERG (May 21, 2018), <https://www.bloomberg.com/news/articles/2018-05-21/china-said-to-consider-ending-birth-limits-as-soon-as-this-year> (last visited Aug. 25, 2018).

31 Shannon Tiezzi, *China's Looming Social Security Crisis*, DIPLOMAT (Nov. 22, 2013), <https://thediplomat.com/2013/11/chinas-looming-social-security-crisis/>.

32 *Id.*

As previously discussed, couples often cite the high cost of childcare and education to explain their reluctance to have kids.³⁸ Education has traditionally been viewed as the a ladder of social ascendancy in China.³⁹ Although public education is subsidized, many parents are signing their children up for after-school tutoring in order to get ahead in their studies, ace exams, get into prestigious universities, or even study abroad.⁴⁰ Many parents are also paying for their children to learn musical instruments, art, or English.⁴¹ A report published by HSBC found that Chinese parents on average spend \$42,892 on education per child, which takes up a strikingly large portion of their average income.⁴²

As public schools in China fail to provide individualized teaching styles and arts education, parents are forced to pay for additional education. The same HSBC report found that ninety-three percent of Chinese parents are paying or have paid for private tuition for their children.⁴³ Thus, to improve the affordability and quality of education and consequently boost the productivity of the labor force, more funding needs to be channeled into the education sector. Only when education becomes truly affordable will couples be more inclined to have children.

V. Conclusion

As governments across the world have found, it is much easier to encourage couples to have fewer children than to have more. As the devastating effects of the One-Child Policy start to manifest, swift and well-thought-out policy revisions have to be made to mitigate the looming demographic disaster. China could also learn from countries in the Asia Pacific that have shifted from anti- to pro-natal policies, such as South Korea and Singapore.⁴⁴ China's authoritarian regime and the party-state system can be both a curse and a blessing. While a drastic policy shift may call into question the party's legitimacy, the lack of effective political opposition means that China will be able to quickly and effectively initiate reforms and introduce new policies necessary to address the myriad of challenges engendered by the ill-conceived One-Child Policy.

38 See *supra*, note 25 and accompanying text.

39 Liqing Tao, Margaret Berci & Wayne He, *Education as a Social Ladder*, N.Y. TIMES. <https://archive.nytimes.com/www.nytimes.com/ref/college/coll-china-education-004.html> (last visited Sept. 14, 2018).

40 Wang Zhuoqiong, *After-School Tutoring Booms Across China*, CHINA DAILY (Aug. 25, 2017). http://www.chinadaily.com.cn/business/2017-08/25/content_31084033.htm (last visited Aug. 25, 2018).

41 *Parents spend extra to give kids an edge*, CHINA DAILY (Oct. 30, 2017). http://www.chinadaily.com.cn/china/2017-10/30/content_33880964.htm (last visited Aug. 25, 2018).

42 HSBC, THE VALUE OF EDUCATION 9 (2017), <HTTPS://WWW.HSBC.COM/-/MEDIA/HSBC-COM/NEWSROOMASSETS/2017/PDFS/170628-THE-VALUE-OF-EDUCATION-HIGHER-AND-HIGHER-GLOBAL-REPORT.PDF>.

43 *Id.*

44 Stuart Basten & Quanbao Jiang, *China's Family Planning Policies: Recent Reforms and Future Prospects*. 45 STUD. FAMILY PLANNING 493 (2014).

Due Process Violations and the Breakdown of the U.S. Immigration Policy

Interview with Lindsay Toczyłowski, Immigrant Defenders Law Center Executive Director

Conducted and transcribed by Ande Troutman (CMC '19)
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As a founding member and executive director at the Immigrant Defenders Law Center, Lindsay Toczyłowski has dedicated her career to advocating for and protecting immigrants' access to a fair trial and due process. What challenges do immigration attorneys in today's political climate face? How does the "good vs. bad" immigrant narrative affect access to legal representation? Toczyłowski, who is also a member of the Board of Directors for the international refugee rights organization Asylum Access, discusses the ways in which the U.S. legal system systematically and unfairly denies basic legal principles to immigrants facing deportation.

CJLPP: Your work focuses on challenging systematic injustices that occur against immigrants and refugees in the U.S. legal system. How did you develop this expertise, and why do you think it is important in today's legal climate in particular?

Toczyłowski: I became interested in immigration law when I was still in law school at USC [the University of Southern California Law School], doing the immigration clinic there. One of the things that I realized right away, even during that clinic, was that I was doing it because there were not enough lawyers representing immigrants. Many people actually have to go to court without legal representation. And what you see when you go and stand in immigration court is that we have a system in the United States where little kids, adults who have mental health issues, sick people, people who don't speak English—all of those people are expected to walk into court, in downtown LA and defend themselves and their lives against a highly trained government attorney. I started seeing these issues very early on when I was still a law student and decided to make it my career. I eventually founded the Immigrant Defenders Law Center to answer a fundamental issue within our legal system, a fundamental imbalance, and a fundamental violation of due process. If I told you there is a place where, if you visit without the correct paperwork, you could be put in a remote detention center without access to your family or a lawyer, and that you would be expected to defend yourself in another language, most people would never visit that place. But that is something that happens routinely across the United States every day, and so I have made a career of trying to remedy that.

CJLPP: Speaking specifically about due process violations, for the cases that you work on, which part of due process do you find is most often violated?

Toczyłowski: Immigration is extremely complicated. An example of this is a case I recently worked on where we had a client who had just turned 18-years-old, went into a adult detention center, and was deported because he could not figure out how to put together what is called an I-589, otherwise known as an asylum application. Because he was unable to physically figure out how to put it together, the judge ordered him to be deported. This means that even though he has a fear of returning to his home country, our system was set up in a way that did not allow him to present his own defense to deportation. We routinely see people who may be eligible for legal relief to remain in the United States with their families but are unable to do so because they are not entitled to representation. Right now in the United States, under the case of *Gideon v. Wainwright*, you are guaranteed a lawyer if your life or liberty is at risk. So, if they are going to put you in jail for a crime, then you are entitled to a government-funded attorney. However, for asylum seekers and others, the threat of being exiled to a place where you have never been or do not remember, the threat of separation from your family and friends, and of being taken from your home could be even worse than a year in jail.

CJLPP: Can you talk about a specific policy that systematically oppresses refugees? How does this policy accomplish this, and what are some ways to prevent or mitigate this oppression?

Toczyłowski: The biggest one right now is part of the executive orders under Trump. There has been a cessation of refugees entering the United States entirely. So, while the United States used to accept a certain number of refugees to be resettled here, they are no longer accepting any refugees. If those policies continue under this administration and future administrations, the United States will become a place with no refugee population at all. However, there are litigation challenges to the refugee ban and to the Muslim ban. At the crux of the legal argument is that these bans have an animus and racial component. If the reason the Trump administration is moving forward with those executive orders is for discriminatory purposes, then they will not be upheld in the Supreme Court. But, for refugees sitting in refugee camps those changes may come too late.

Another important policy was the Supreme Court decision on

February 27¹ that said the INA [the Immigration and Nationality Act] doesn't require immigrants to have bond proceedings at the six-month mark—meaning that the government can detain people indefinitely. The only way for people to challenge that detention—it is important to note that people in this situation are often in private detention centers without access to their family or a lawyer—is if they have a federal habeas [corpus] petition and ask a federal court to intervene. This brings us back to the beginning of our conversation. How in the world would anyone do that if they did not have a lawyer? There just aren't enough lawyers to file that in every single case. So that Supreme Court decision that came down, and the government's continued position that they can continue to detain people as long as they want while deciding the case, systematically creates a subclass of people in the United States who do not have the same constitutional rights as the rest of us. That is something that our immigrant defenders and others will continue to fight against. This is a really disturbing turn of events—very discouraging—because in the current political climate, we have a president who, in every instance, has promoted detention. So, the idea that he is now going to take this Supreme Court decision and continue to hold people unconstitutionally is discouraging.

CJLPP: How can people without a law degree support immigrants or refugees?

Toczylowski: One of the biggest ways that people can contribute is get involved politically with advocates on these issues. We have a coalition of different participating organizations called ICE [Immigration and Customs Enforcement] Out of LA. There is also the LA Raids Rapid Response Network, which has a component for lawyers to agree to represent people, but it also has a component for people who are interested in organizing around these issues. So, when ICE goes to do a raid on a grocery store in south LA, it is important that community members will show up, and videotape what is happening. You don't have to be a lawyer to do that. That information that you gather and those videos that you take could be used to build a legal case for a Fourth Amendment violation that leads to that person's arrest which could save somebody from deportation.

We are always asking people to become involved with advocacy resources to increase access to justice for immigrants. That can involve following organizations like Immigrant Defenders, National Immigration Law Center, and the California Immigrant Policy Center on Facebook. Then, when they ask people to show up at city council meetings or make a visit to your state assembly member show up. Make sure you are engaged and that you encourage others to show up as well. Sometimes we ask people to tweet and push for specific policies, so there is a lot of ways to get involved in political advocacy. Southern California is a diverse place in terms of elected representatives and Congress, and one of the most important things for immigrant rights is going to be flipping the House [of Representatives] come the midterm elections. Even if your district is solidly Democratic, making phone calls and knocking on doors is important too. That may seem

¹*Jennings v. Rodriguez*, No. 15-1204 (U.S. Feb. 27, 2018), available at https://www.supremecourt.gov/opinions/17pdf/15-1204_29g.pdf

separate from immigrant rights, but the midterm elections are going to be so important for the immigrant rights movement because if Republicans retain the House and the Senate, the policies that are being predicted are dire.

CJLPP: Do you find that policy makers are adaptive in creating policy in response to international emergencies? How do you expect U.S. policy to change in the future in response to more immigration?

Toczylowski: The short answer is no, I don't think that we have been very adaptive to the situation. Right now, we have a huge refugee crisis coming out of Syria and other places, and the United States has shut its doors to refugees. When it comes to asylum seekers who are already across the border, our immigration laws and asylum laws are far less lenient than the rest of the world. We look at cases coming from Central America, and they are usually asylum cases that are based on the fact that people are fleeing gangs, and our government creates policies that are specifically targeted to keep those people from getting asylum. If we wanted to be responsive, we should look at the most severe situations just south of us and ask how the United States can help work with this population, but instead we look for ways to do the exact opposite. Our policies should also look at what role the United States played in creating refugee situations. A lot of the gang issues that are happening in South and Central America right now are a direct result from U.S. deportation policies twenty years ago, where large numbers of gang members were deported from mostly Southern California to El Salvador. That created a transnational gang network, which refugees now are fleeing from.

CJLPP: Going back to what you said about there not being enough immigrant lawyers: how do you combat immigration issues effectively when there is such a lack of resources?

Toczylowski: One thing that we are doing as immigrant rights advocates is trying to educate the community, so that they understand their rights because everybody does have constitutional rights in the United States. We want people to understand their rights, so they can stay out of ICE detention in the first place. This involves making sure people know that they do not need to answer their door if the ICE comes. And, unless there is a judicial warrant for their arrest, they do not even need to open the door. People need to know that they have the right to remain silent; they don't need to incriminate themselves. So, making sure that we can keep people out of the system is the most important. In terms of what we can do when people are already in immigration proceedings or detention, there are a few things we can do. In California we have created campaigns locally for additional funding to hire and train lawyers to do this work. Over the past year, coalitions have gotten the state to put forth 45 million dollars for immigrant defense. We got the city of Los Angeles and the California Community Foundation to put together the LA Justice Fund, which is a ten million dollar fund to provide immigration lawyers. Once the funding is in place, which luckily is starting to happen, the really hard work is getting young lawyers who want to make a career of publicly defending immigrants. So, we are continuing to recruit and hire young lawyers to come do this work.

CJLPP: As of June 2017, according to the UN Refugee Agency, 65.6 million people have been forcibly displaced from their homes. How have crises like the Syrian refugee crisis changed policy towards refugees coming to America?

Toczyłowski: Unfortunately, U.S. refugee policy has been unchanged and remains indifferent to the actual refugee crises around the world. Most Syrian refugees and refugees of any humanitarian or environmental disaster will usually end up in a neighboring country as a refugee. Less than one percent are resettled to Europe or the United States. Amongst this one percent of refugees, the United States would traditionally take a very small portion of them, but given the Trump Administration's executive orders in relation to the Muslim ban and refugees, we are not taking any right now. Because of that, the refugee crises around the world have continued to grow while the United States has essentially closed its borders.

CJLPP: How has your work at the Immigrants Law Defense Center strengthened your skills as a lawyer? What assets has it built on?

Toczyłowski: At the Immigrant Defenders Law Center, we consider ourselves to be rebel lawyers. So, we are using our law degrees to hopefully change the way that immigration court works all together. Founding the organization and having the audacity to think that a bunch of us could just set up shop and start working towards change taught me about the power of boldness. Recognizing that to truly be a rebel lawyer you need to put your own neck on the line in order to get the best result for your client. We have really created a different style of lawyering, which has not been seen in immigration court before. That has changed me as a lawyer because it has given me hope that many other young lawyers will become invested in these issues as well.

CJLPP: What is the greatest challenge you face as an immigration lawyer?

Toczyłowski: The greatest challenge right now is that the Trump Administration and Jeff Sessions are systematically dismantling protections that took dozens of years to put in place. So, a lot of the progress that was made under the Obama Administration and even during the George W. Bush Administration—those protections are being dismantled. Whether that is being done through an executive order or through challenging the Board of Immigration Appeals cases, or through immigration ICE enforcement and policy, or through getting rid of DACA policies.² These are our greatest challenges. Hurdles are being put up all around us. Immigration law is now much more challenging than it was a year ago. Because of that, there is a huge risk of burnout amongst advocates. Sometimes it feels like there is very little progress being made, but then we get those really amazing decisions like what happened in the Supreme Court with DACA this week, where they essentially

told the Trump Administration that they would not hear the case, meaning that, for now, DACA will remain in place. The only thing we can do is keep fighting and hope that during the midterm elections we can wrestle at least one branch of government away from people who are determined on dismantling immigrant rights across the board.

CLJPP: Thank you for your time and expertise.

² Deferred Action for Childhood Arrivals was a program that granted temporary relief from deportation and legal authorization to work/study for undocumented persons who arrived in the United States before a certain age

From “The Trial of the Century” to Advocating Against Violence

Interview with Christopher Darden

Conducted by Michaela Shelton (PO ‘21) and Madison Yardumian (SC ‘21)
Staff Writers

*Christopher Darden has practiced law for over 37 years. He worked for the Los Angeles County District Attorney’s Office where he prosecuted cases regarding gang violence and criminal activity perpetrated by law enforcement officials. Darden rose to particular prominence for his role as co-prosecutor during the O.J. Simpson case, infamously dubbed “The Trial of the Century.” Since the trial, Darden has taught law and written a New York Times bestselling autobiography, *In Contempt*. Today, Darden works as a criminal defense attorney in the LA area. On February 16th, Darden spoke with the CJLPP prior to his Ideas @ Pomona talk titled “Rising Above the Court of Public Opinion.”*

CJLPP: How strongly do you think current events impact the administration of justice?

Darden: Current events impact the criminal justice system significantly. For example, how politicians take incidents involving violence and use them to support certain rules and consequences in the criminal justice system. We have, over the last twenty years, tried to move away from over incarceration and attempted to reduce the severity of sentencing because we realized that these systems disproportionately affect certain communities. We have attempted to move from incarceration to rehabilitation. Now, what we see is a new administration attempting to reverse all this progress. They want to take us back to incarceration, back to the Stone Ages, without any consideration of the larger consequences these policies have. Politicians will use a violent crime committed by an undocumented person as proof of how the law isn’t strict enough and sentences aren’t long enough. They use it as an example for how certain kinds of people—specifically, certain colors of people—should not be allowed in this country. So yes, national events are shaping the criminal justice system and they have a profound effect on the administration of justice.

CJLPP: Retrospectively, the O.J. Simpson decision was seen as retribution for specific acts of violence against African Americans that occurred right before the trial (Rodney King in particular). Do you believe that if the trial were to take place today that the verdict would be different?

Darden: I believe that a jury with the same racial composition in the city of LA would still give the same verdict today. In

1995, three years after the LA Riots, the racial divide in LA was just as apparent as it is today. The issues that confronted the jury in 1995 still exist today: issues with the police department, unjustified officer shootings, and friction between the black community and the LAPD [Los Angeles Police Department]. Just before the Simpson case, I was part of a unit that investigated officer-involved shootings. I was trying to reform the way that the LA County District Attorney’s Office investigated and prosecuted officers for shootings on duty because the prosecution of police officers was very rare and almost never resulted in convictions. We are confronting the same issues today that we were in 1995.

CJLPP: In your book, *In Contempt*, you say that the prosecution of the O.J. trial was destined to fail. In spite of this, you continued to persevere. What is it like to prosecute a trial you suspect you will lose?

Darden: Any good lawyer must evaluate his or her case against the possibility of winning or losing. But, in the end, all one can do is try. No prosecutor should prosecute a case unless he or she believes that an objective group of fact-finders, a jury, looking at the evidence would conclude that the defendant is guilty beyond a reasonable doubt. That is the kind of evaluation we must make as prosecutors. If you believe an objective fact-finder would find guilt beyond a reasonable doubt, you have to proceed. It isn’t right for prosecutors to consider the political consequences of how others outside the court will view a case, or what the political tone of a case might be. If the objective is justice, you have to apply the same standards to every case. When I looked at the case, I understood the political climate. I lived in the black community, I understood how some people viewed the case, and I knew that it was split on racial lines. But my objective, and every prosecutor’s objective, should be justice. So, I was going to make any attempt to achieve justice.

CJLPP: Your book also highlights how often justice is not served for poor victims of gang violence, and how prosecutors perpetuate this by encouraging victims to testify even when it is not in their best interest. How did you learn to cope with this flaw in the justice system?

Darden: I started prosecuting gangs in the 1980s. In the 1980s,

you could just listen to NWA or Ice Cube rapping about AK-47s and car-jackings to know how “popular” these incidents of violence were. We didn’t have the same kinds of laws then as we do now regarding gangs. We especially weren’t prepared for car-jackings—as I recall we had to pass a car-jacking statute. Time and time again I saw situations where average citizens would make a statement to the police that implicated a suspect and were then later required to testify in the criminal trial. What I did not see was a mechanism for the protection of those witnesses. I encountered a situation once where a young woman called the police after a high-level gang member put a gun to her head. He told her that if she informed the police of his actions he was going to kill her. She did tell the police, and he was arrested. They brought the case to me for filing. The police and detectives both stated that if the case went to trial they did not believe the young woman would testify, but felt it was important to send a message to the gang member, to make him understand that we were watching. So, I filed the case, and we served her with a subpoena to testify. Hours later, on the same day, she was approached by gang members and executed in broad daylight. Should we have exposed her to that risk? Nobody thought about that at the time. No one paid enough attention to what the consequences would be. It is one of those experiences that follows me to this day.

CJLPP: This next question goes back to a topic you mentioned earlier about police relations with the black community. What are your views on the outcomes of cases involving excessive police force such as in the cases of Philando Castile, Eric Garner, and Michael Brown?

Darden: When I see these acquittals, I am not surprised. One of the most difficult things to do as a prosecutor is to successfully prosecute a police officer for an on-duty shooting or for using excessive force. The public asks, why is it so difficult? First of all, the prosecution and police department are hand in hand. Most prosecutors consider themselves an extension of the police department and part of law enforcement. So, there is an inherent bias in terms of the agency required to prosecute and investigate the case. Often times prosecutors aren’t looking for a way to file like they would if you or I killed somebody or beat somebody without mercy. Typically, they’re looking for a way not to file, and they give the police officer the benefit of doubt because he is a fellow law enforcement officer. Then the next problem is the code of silence that continues to exist amongst police officers.

CJLPP: Can you define “code of silence”?

Darden: It is an unspoken practice among police officers that if one commits a crime in the presence of the other, the officer will not report that crime. As a result, police officers are free to violate the rights of individuals without any repercussions and without any concern that fellow officers are going to turn them in. Another problem is the jury process. When you pick a jury—for example, let’s say I pick a jury for the Eric Garner murder case—who is going to sit on that jury for a month? College students? They have class. A thirty-year-old black male living in Baltimore? He has a family to support. He has to go to work. Who is going to sit on this jury panel? Retirees and

older people, who tend to be conservative and tend to rely on the police department more than most other groups in society. So their view of a police defendant is somewhat shaded by their own experience and culture. This makes it very difficult. When I see these acquittals, I’m not surprised, but I know that a grave injustice has been done and at some point there is going to be a price to pay. Whether it’s in rioting, whether it’s in vigilantes who take justice into their own hands and ambush police officers, or whether it’s just a large segment of the population lacking confidence in the criminal justice system—there are repercussions. There is a penalty yet to be paid for these kinds of cases.

CJLPP: This next question is on the subject of violence against women. In light of recent events like the #MeToo movement, how important do you believe it is to speak out about violence against women and call out those who have been complicit?

Darden: This is an issue that I have thought a lot about because of the women who have had the courage to step forward and say something. Any unwanted touching or a non-consensual touching, whether it’s sexual in nature or not, is a problem. It’s a crime. It’s a crime that men in power have done to women. Now, I’ve always been an advocate against domestic violence. I never even spank my own kids because domestic violence includes not only relationship violence between men and women, but also child abuse, violence against children, and violence in the household. I think that every man in this country has a responsibility to support those who have been abused and to support those who have the courage to report abuse, because one of the issues inherent in being an abused woman is the inability to report the abuse.

In California, we changed the law to try and help protect women and make it easier to report abuse. We made it easier for police officers to arrest the abuser. When I began as a prosecutor in the early 80s, I can’t tell you how many times there was a domestic violence case on calendar, and a woman would show up in court and say I don’t want to prosecute, and we dismissed it. Our police officers would tell me that they responded to the location, saw it as a family matter and drove off, leaving the victim to be victimized even more. Again, I think we’re at a critical juncture where we need to reevaluate our policies. We need to re-educate the public about domestic abuse, and we need to move again to protect women who are abused and women who have the courage to report it.

CJLPP: What measures would you put in place to change the way the criminal justice system addresses women who are victims of violence?

Darden: In California we are a lot more active about these issues than many other states. First, when police officers respond to a domestic violence situation, if either party has a visible physical injury, the law permits the officer to take the other person to jail, which is something that didn’t happen in 1995 and does not happen in most communities today. Next, the abuse victim is granted a temporary restraining order which precludes the abuser from returning to the home or location while the case is pending. If a conviction occurs, domestic vi-

olence restraining orders are granted to victims for 10 years or more and can even be renewed. Even so, we need to provide more funding and allocate more money to shelters and other ways of moving abuse victims away from their abusers.

In California, the law is quite severe. Prosecutors don't allow abuse victims to come in to court and say "I don't want the case to be prosecuted." It's the State of California that brings these prosecutions. Prosecutors today will fight until the end to try and prosecute those cases. I don't know if they do so everywhere, but I'm rather proud of how domestic violence cases are approached in California.

CJLPP: Finally, *In Contempt* mentions the difficulty you had in adjusting your conception of law from "a series of answers to a series of questions on a series of tests" to "a living breathing system of criminals and victims, actions and reactions." Do you have any advice for future lawyers to help them transition from an academic comprehension of the law to pursuing it as a career?

Darden: I have a nephew who was attending law school in Northern California. After he completed his first year of law school, he spent the summer with me as my clerk. I now practice criminal defense, and he came with me to court every day to see what I do. At the end of the summer, he went back home and dropped out of law school. For him it was one thing to study law in a sterile, academic environment and quite another to practice law in court—to see the victims, to see the failings, to see the suffering. He was forced to realize that although we are taught that the system is designed to seek the truth, the truth does not always seem to be the objective or the result in criminal cases. Being a criminal law attorney is not for everybody. You're not going to get rich doing it—only a handful of people do. If you want to go into law, you have to prepare yourself for the fact that what you learn in law school isn't what happens when you actually practice law. They say our criminal system is the best in the world, but it can be awfully oppressive. If I was about to invest two-hundred and fifty thousand dollars in a legal education, I would spend a few days with an attorney to get a sense of what practicing law is really like because the theory doesn't always match the reality.

CJLPP: Thank you so much for your time and expertise, Mr. Darden.

