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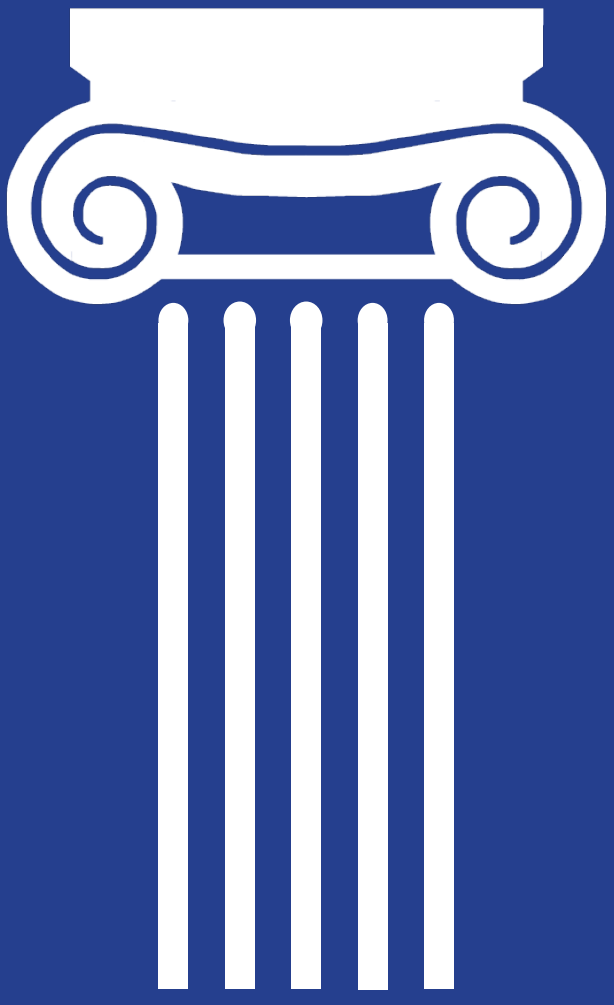

Volume 8 • No. 3

Letter from the Editors

Dear Reader,

Welcome to Volume 8, Number 3 of the *Claremont Journal of Law and Public Policy*. This edition, as you may know, is dedicated to the topic of racial justice. The murders of George Floyd, Breonna Taylor, Tony McDade, Ahmaud Arbery—and countless more—re-focused a necessary light upon the ongoing persecution of Black people in the United States. These events also highlighted the ways in which systems of law and public policy, the systems which this journal seeks to study, have often sanctioned and perpetuated violence against communities of color. In recognition, the pieces of this edition take insightful approaches to explore and disentangle different forms of race and racism in the spheres of law and public policy.

Of course, we are grateful for the contributions of our entire staff, whose persistence throughout this last year has made the work of the Journal and this edition possible. In particular, our Print Edition Editors for this issue included Frankie Konner, Haley Parsley, Katya Pollock, Sean Volke, Calla Li, Ciara Chow, Chris Murdy, and Ethan Widlanski. Our digital content team was led by Chris Tan, Kelsey Braford, and Rya Jetha, and our business operations by Kayla Solomon and Adeena Liang. We also thank our Interview Editor, Lauren Rodriguez; Webmaster, Aden Siebel; and Design Editor, Sofia Muñoz.

We are always impressed by the work of our staff, but this year especially so. It is not an easy feat to find the time to write, edit, design, or plan outside of an already busy academic schedule during the smoothest of semesters, but our members have risen to the challenge in a year plagued by upheaval and uncertainty. With the publication of this last edition, for which our writers and editors have worked long into the summer, we have successfully completed a regular year's worth of activity. And with the election of our new leadership—Calla Li as Editor-in-Chief, Ciara Chow as Chief Operating Officer, and Rya Jetha as Managing Editor—we are certain that the Journal will not only persist, but thrive this coming year.

As with all goodbyes, it is bittersweet indeed to be writing this letter in our final capacity as the outgoing Editor-in-Chief and Managing Editor of the Journal. As we step out of our roles, we want to extend our heartfelt appreciation to all the individuals that we have had the privilege to work with in our last four years with this organization—and especially our recent graduates; your contributions to the Journal while in Claremont were profound, and we wish you abundant success wherever your next venture takes you.

To our fellow Journalers: we have been continually astounded by your wit, intellect, and dedication to studying the issues of law and public policy with such rigor and compassion. Thank you for your work and your friendships—it will never go forgotten.

Yours,
Bryce Wachtell and Daisy Ni
Editor-in-Chief and Managing Editor

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. 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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Note: Due to delays in our publication process caused by the ongoing pandemic, pieces included in this issue were written in the summer of 2021, and therefore reflect the circumstances of those periods.

A Proposal for a Race-Conscious Social Security System

Anika Khemani
Guest Contributer

Though great strides have been made to ease race relations in the United States, racial inequality persists. To alleviate the gap between White and Black Americans, many politicians have advocated for the implementation of race-conscious policies such as baby bonds, affirmative action, and an enhanced Earned Income Tax Credit, which would disproportionately benefit Black individuals.[1] Contemporary philosophers and activists make a strong moral argument for financial reparations to compensate African Americans for slavery and for the hundreds of years of racial discrimination that followed and continues today.[2] Scholars have quantified reparations into a dollar amount, and race-conscious policies are a good way to deliver these reparations. This paper focuses on Social Security, also known as the Old-Age, Survivors, and Disability Insurance Program (OASDI), as an already established and politically popular avenue[3] through which reparations could be distributed to Black Americans.

President Franklin D. Roosevelt enacted the Social Security Act of 1935 to provide a safety net for retired Americans.[4] Every working American would contribute a percentage of their earnings to the system and would receive retirement benefits each month known as their Primary Insurance Amount (PIA).[5] Under the current OASDI program, an individual's PIA is influenced by income, disability, life expectancy, and marriage rates.[6] Though the program is race-neutral as "people in identical economic and family situations are treated identically," Black and White individuals perform differently in the categories that determine their PIA.[7] As a result of systematic differences in performance, White and Black individuals receive different levels of compensation relative to their contributions to the Social Security system, as this paper will later discuss.[8]

Social Security was designed to be a self-sustaining, pay-as-you-go system funded by contributions by the working population.[9] However, as baby boomers (born between 1946 and 1965) begin to retire, the worker-to-retiree ratio is declining steeply and contributions coming into the system will not be sufficient to fund the benefit outlays.[10] The Social Security trust fund is expected to run out by 2037, at which point the system will only be able to pay out seventy-nine percent of promised benefits to beneficiaries.[11] To improve the long-term sustainability of Social Security, policymakers have proposed privatizing the system to include individual accounts, eliminating the financial burden on the government.[12] While a privatized Social Security system would allow individuals to realize higher rates of return by investing their contributions in the private market, it would disproportionately disadvantage African Americans.[13]

In the context of a depleting Social Security fund and the need to compensate African Americans through reparations, this paper will argue against privatization and instead propose a race-conscious Social Security system. Part I will present a moral argument for reparations and Part II will explain how Social Security in its current form pays disproportionately more benefits to African Americans than White individuals. Part III will advise against privatization, and finally, Part VI will suggest a race-conscious alternative to privatization that would explicitly consider race in the PIA benefit calculation while addressing the problem of a depleting trust fund.

I. Moral Argument for Reparations

Today, many activists support the payment of reparations to Black Americans to compensate for the hundreds of years of

1 Isabel V. Sawhill & Richard V. Reeves, *The case for 'race-conscious' policies*, Brookings Inst. (Feb. 4, 2016), https://www.brookings.edu/blog/social-mobility-memos/2016/02/04/the-case-for-race-conscious-policies/ (last visited Mar. 5, 2021).
2 *Id*.
3 Frank Newport, *Social Security and American Public Opinion*, Gallup (June 18, 2019), https://news.gallup.com/opinion/polling-matters/258335/social-security-american-public-opinion.aspx (last visited Mar. 5, 2021).
4 Thomas E. Price, Off. Res., Stat., and Int'l Pol'y, Soc. Sec. Admin., Social Security History, https://www.ssa.gov/history/50ed.html (last visited Mar. 5, 2021).
5 Soc. Sec. Admin., Social Security Benefit Amounts, https://www.ssa.gov/oact/cola/Benefits.html (last visited Mar. 6, 2021).
6 *Id*.
7 Alexa A. Hendley & Natasha F. Bilimoria, *Minorities and Social Security: An Analysis of Racial and Ethnic Differences in the Current Program*, 62 Soc. Sec. Bull. 59 (1999), https://www.ssa.gov/policy/docs/ssb/v62n2/v62n2p59.pdf (last visited Mar. 1, 2021).
8 Kathleen Romig, Ctr. on Budget and Pol'y Priorities, Social Security Lifts More Americans Above Poverty Than Any Other Program (Feb. 20, 2020), https://www.cbpp.org/research/social-security/social-security-lifts-more-americans-above-poverty-than-any-other-program (last visited Feb. 5, 2021).
9 Stephen C. Goss, *The Future Financial Status of the Social Security Program*, 70 Soc. Sec. Bull. 111 (2010), https://www.ssa.gov/policy/docs/ssb/v70n3/v70n3p111.html (last visited Mar. 5, 2021).
10 *Id*.
11 *Id*.
12 Barry P. Bosworth & Gary Burtless, *Privatizing Social Security: The Troubling Trade-Offs*, Brookings Inst. (Mar. 1, 2017), https://www.brookings.edu/research/privatizing-social-security-the-troubling-trade-offs/ (last visited Mar. 5, 2021).
13 William Spriggs & Jason Furman, Ctr. on Budget and Pol'y Priorities, African Americans and Social Security: The Implications of Reform Proposals (Jan. 18, 2006), http://www.cbpp.org/research/african-americans-and-social-security-the-implications-of-reform-proposals (last visited Mar. 1, 2021).

slavery and the legacy of Jim Crow laws that perpetuate racial inequality.[14] Several philosophers have also commented on the moral need for reparations when individuals are prevented from exercising their right of self-preservation or seeking what they value.[15] Social and political philosopher Bernard Boxill, for example, explains reparations as the transferring of money for "backward looking" reasons and for the purposes of acknowledgment of wrongdoing on the part of the transgressor.[16] Boxill argues that when a victim is treated unjustly by a wrongdoer and the wrongdoer is capable of repairing the victim's injury, the wrongdoer owes reparations to the victim.[17] Undoubtedly, Black slaves were morally entitled to the products of their labor, or specifically, the wages which their White slave masters stole.[18] Although White individuals living today did not enslave African Americans, they inherited the stolen wages as descendants of White slave masters.[19] The wealth that slave masters wrongfully inherited from Black slaves did not become concentrated among specific individuals or through individual family lines, but instead was largely passed down to White Americans as a whole.[20] Therefore, according to Boxill's argument, the White community must bear the costs of reparations to the Black community.

Philosopher Jeremy Waldron uses Robert Nozick's extensive work in entitlement theory to reach a similar conclusion about the need to compensate for historical injustices through reparations.[21] Nozick's principle of rectification uses a counterfactual account of what would have happened had the injustice not occurred and requires the redistribution of resources according to this account.[22] Therefore, if we are interested in rectifying the harms of slavery, we must estimate what the world would look like without slavery and try to replicate those conditions. Like Boxill, Waldron explains that the payment of reparations is as symbolic as it is material, as it represents a society's attempt to acknowledge past wrongdoings and respect the dignity of the Black Americans who were enslaved against their will.[23]

Boxill and Waldron are just two of several philosophers who argue for the payment of reparations in cases of historical injustice. Even if the moral argument for reparations is accepted, quantifying the value of reparations African Americans are entitled to and deciding how they should be paid is often a matter of debate. This paper argues that race-conscious reforms to the Social Security system can increase benefits for African Americans, acting as a type of reparation.

II. Social Security and Race

Today, Social Security benefits are calculated by taking an individual's top thirty-five years of indexed wages and computing the average indexed monthly earnings known as the AIME.[24] The AIME is then used to calculate the Primary Insurance Amount (PIA), the dollar value of benefits an individual is entitled to. Even though race is not explicitly considered in the PIA benefit calculation, employment characteristics, lifetime earnings, disability rates, and marital status are.[25] As race influences trends in these measured characteristics, the various aspects of the Social Security system result in a different net benefit for White and Black Americans.

The progressive nature of the Social Security benefit formula benefits African Americans because the AIME only calculates an individual's earnings over thirty-five years rather than a longer forty- or forty-five-year period, which is typically the number of years an individual would spend in the labor force if they worked continuously until retirement. This means that African Americans are not unfairly penalized for spending fewer years in the labor force, as they tend to face higher unemployment rates and longer gaps in employment.[26]

The progressive benefit formula also benefits Black Americans who are disproportionately low earners.[27] Scholars decompose earning differences between Black and White Americans into differences in human capital attainment and employer discrimination.[28] On average, African Americans have fewer years of education than their White counterparts;[29] even when they do have the same education levels, employers prefer to hire the White candidate.[30] In fact, in his study titled *Discrimination in the Credential Society*, Michael Gaddis of the University of Michigan finds that "although a credential from an elite university results in more employer responses for all candidates, Black candidates only do as well as white candidates from less selective universities."[31] Furthermore, Gaddis describes that race results in a "double penalty": when employers do offer jobs to African Americans, they offer lower starting salaries and a title with less prestige.[32] As a result, even when they have the same human capital as White Americans, their earning potential is much lower. In 2017, Black Americans had a median household income of $40,258, while White, non-Hispanic Americans had a median income of $68,145.[33] The progressive

14 *See, e.g.,* Ta-Nehisi Coates, *The Case for Reparations*, The Atlantic (June 2014), https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/ (last visited Feb. 26, 2021).
15 *See, e.g.,* Bernard R. Boxill, *The Morality of Reparation*, 2 Soc. Theory and Practice 113 (1972).
16 *Id*. at 117.
17 *Id*. at 120.
18 *Id.*
19 *Id.*
20 *Id.*
21 Jeremy Waldron, *Superseding Historic Injustice*, 103 Ethics 4 (1992).
22 *Id*. at 7.
23 *Id*.
24 Soc. Sec. Admin., *supra* note 5.
25 *Id*.
26 U.S. Bureau of Lab. Stat., Labor force characteristics by race and ethnicity, 2017, Report 1076 (2018), www.bls.gov/opub/reports/race-and-ethnicity/2017/pdf/home.pdf (last visited Apr. 9, 2019).
27 Hendley & Bilimoria, *supra* note 7.
28 Celeste K. Carruthers & Marianne H. Wanamaker, *Separate and Unequal in the Labor Market: Human Capital and the Jim Crow Wage Gap*, 35 J. of Lab. Econ. 655 (2017).
29 S. Michael Gaddis, *Discrimination in the Credential Society: An Audit Study of Race and College Selectivity in the Labor Market*, 93 Soc. Forces 1451 (2015).
30 *Id.*
31 *Id.*
32 *Id.*
33 U.S. Census Bureau, Current Population Survey, Real Median House-

benefit formula replaces a higher percentage of pre-retirement income for low-wage earners than for high-wage earners, which is therefore advantageous to African Americans who, on average, have lower incomes.[34] Higher unemployment rates and lower average incomes are also correlated with higher disability rates, which means a greater proportion of African Americans are eligible to receive disability benefits (DI) offered to an individual when they are physically unable to work.[35]

On the other hand, White Americans benefit from higher life expectancies and marriage rates in the PIA calculation. An individual becomes eligible to collect benefits when they reach the Normal Retirement Age (NRA) of sixty-seven years.[36] The life expectancy for White Americans is seventy-nine, while only seventy-five for African Americans.[37] African Americans are therefore more likely to pay into the system for their entire working lives but not receive as many years of benefits as White Americans.

Additionally, the current system offers spousal benefits to individuals who have been married for ten years or longer.[38] White Americans are statistically more likely than African Americans to get married at every age and have lower divorce rates.[39] Marriage rates tend to be lower when compared to White individuals because of the high rates of violent deaths and mass incarceration among Black individuals.[40] Furthermore, individuals who experience financial strain and low incomes, who are disproportionately Black, tend to have higher divorce rates because of these stressors.[41] Differences in spousal benefits can also be attributed to differences in the institution of marriage between Black and White communities.[42] In socioeconomically disadvantaged neighborhoods, which are also disproportionately Black, the institution of marriage is weakly supported, which explains lower marriage rates in the first place.[43] Therefore, the trends in marriage rates among Black individuals can be linked to their economic disadvantage, which can be attributed to the legacy of discrimination they have faced. Evidently, Black and White Americans perform differently in the categories considered in the PIA benefit calculation, making it challenging to determine which racial group benefits the most from the Social Security system.

A. Examining the Lifetime Benefit-to-Contribution Ratio

The lifetime benefit-to-contribution, also known as the benefit-to-tax ratio, can help measure the net impact of Social Security by race. The benefit-to-contribution ratio compares the benefits that an individual receives with what an individual has contributed to the Social Security system to determine their rate of return on their payments into the system.[44] This section will reference the Government Accountability Office (GAO) and Social Security Administration (SSA) research studies that have explored differences in the system's net impact on White and Black Americans.

To determine the rate of return on Social Security by race, the GAO considers three factors: (a) lifetime earnings, (b) the incidence of disability, and (c) mortality that impacts the benefits and contributions of an individual.[45] These three factors are important because they hold considerable weight in the PIA calculation. The study found that, in aggregate, Black Americans tend to have higher disability rates and lower lifetimes earnings and therefore receive a greater benefit-to-contribution ratio than White Americans.[46] For example, when the 1931 to 1940 birth cohort retired at the NRA, White Americans had an OASDI lifetime benefit-to-contribution ratio of about 1.1, while African Americans had a ratio of 1.2.[47] The report also studied the relationship between life expectancy and the benefit-to-contribution ratio. In the 1931 to 1940 cohort, African Americans constituted ten percent of the sample but made up more than sixteen percent of the population who died before the age of sixty-two.[48] While White individuals collect on average four more years of Social Security, African Americans still receive a slightly greater benefit-to-tax ratio than White individuals because of lower earnings and a higher incidence of disability.[49]

Similarly, a research study by Dean Leimer of the SSA examined historical redistribution under the OASDI program. The research shows that the ratio of OASDI benefit-to-tax ratio for the 1923 to 1927 birth cohort was 1.595 for White individuals compared to 1.784 for Other Races.[50] When isolating for dis-

hold Income by Race and Hispanic Origin: 1967 TO 2017, at fig. 1 (2018), https://www.census.gov/content/dam/Census/library/visualizations/2018/demo/p60-263/figure1.pdf.

34 Hendley & Bilimoria, *supra* note 7.

35 *Id.*

36 Off. of the Chief Actuary, Soc. Sec. Admin., Normal Retirement Age, http://www.ssa.gov/oact/progdata/nra.html (last visited Mar. 5, 2021).

37 Ctrs. for Disease Control & Prevention, Life Expectancy at Birth, at age 65, and at age 75, by sex, race, and Hispanic origin: United States, selected years 1900–2016, at tbl. 15 (2017), https://www.cdc.gov/nchs/data/hus/2017/015.pdf (last visited Mar. 7, 2021).

38 Benefits.gov, Social Security Disabled Window(er)'s Insurance Benefits, http://www.benefits.gov/benefit/4386 (last visited Mar. 22, 2021).

39 Barbara A. Butrica & Karen E. Smith, *Racial and Ethnic Differences in the Retirement Prospects of Divorced Women in the Baby Boom and Generation X Cohorts*, 72 Soc. Sec. Bull. 23 (2012), http://www.ssa.gov/policy/docs/ssb/v72n1/v72n1p23.html (last visited Mar. 22, 2021).

40 *Id.*

41 Chalandra M. Bryant, *Understanding the intersection of race and marriage: Does one model fit all?*, Am. Psychol. Ass'n (2010), https://www.apa.org/science/about/psa/2010/10/race-marriage (last visited Apr. 2, 2021).

42 R. Kelly Raley, Megan M. Sweeney, & Danielle Wondra, *The Growing Racial and Ethnic Divide in U.S. Marriage Patterns*, 25 Future Child. 89 (2015).

43 *Id.*

44 Spriggs & Furman, *supra* note 13.

45 U.S. Gov't Accountability Off., GAO-03-387, Social Security and Minorities: Earnings, Disability Incidence, and Mortality Are Key Factors That Influence Taxes Paid and Benefits Received 3 (Apr. 23, 2003), https://www.gao.gov/products/gao-03-387 (last visited Apr. 10, 2019).

46 *Id.*

47 *Id.*

48 *Id.*

49 *Id.*

50 Dean R. Leimer, Off. Res., Stat., and Int'l Pol'y, Soc. Sec. Admin., Historical Redistribution Under the Social Security Old-Age and Survivors Insurance and Disability Insurance Programs (2004), http://www.ssa.gov/policy/docs/workingpapers/wp102.html (last visited

ability benefits, the SSA found that the ratio of disability benefits-to-tax for the same cohort was 1.619 for White individuals compared to 2.897 for Other Races.[51] However, it is important to note that the "Other Races" category includes Black, Hispanic, Asian or Pacific Islander, American Indian, and Alaskan Native individuals. On average, African Americans have loweraverage earnings and a higher incidence of disability than Hispanic and Asian populations and similar characteristics to Native Americans.[52] As a result, it is expected that Black Americans have an even higher benefit-to-tax ratio than the values found for "Other Races" in this study.

Social Security can be an avenue to deliver reparations because it meets the necessary condition of being "backward looking." The higher net benefit that African Americans receive from Social Security helps bring them closer to the conditions they would have been in the absence of slavery. In a world without slavery, there would be a smaller gap between White and Black Americans in employment and familial characteristics, which are considered in the PIA benefit calculation. Currently, the benefit structure of Social Security happens to deliver a higher net benefit to African Americans but does not explicitly differentiate beneficiaries by race. Since Black individuals, on average, rely on Social Security more than White individuals, any changes made to the Social Security system would have greater implications on Black Americans than any other racial group.[53] The following two sections argue against privatization of the Social Security system and instead propose race-conscious reforms that would explicitly consider race in the benefit calculation to deliver a higher net benefit to Black beneficiaries, which would act as a form of reparation for past injustices.

III. Argument Against Privatization

As baby boomers begin to retire and the worker-to-retiree ratio declines, scholars anticipate that the Social Security trust fund will run out by 2037.[54] To address the depleting trust fund, politicians have shown strong interest in privatizing Social Security because of its benefits for both workers and the government.[55] A privatized Social Security system would (1) introduce individually owned accounts for each contributor and (2) reduce or eliminate current Social Security benefits.[56] Individuals would be free to invest their contributions in stocks or other private market assets, which could yield a higher rate of return than the current system offers, resulting in higher retirement incomes for workers. It would also alleviate the financial burden on the government to manage the accounts and the trust fund.

While a privatized Social Security system can benefit particular beneficiaries and the government, it would have disproportionate negative implications on the dollar amount of benefits that African Americans receive. First, with private accounts, beneficiaries are exposed to the investment risk of their personal retirement accounts. Though returns in the private market can be higher, there is a greater risk of volatility, and low earners, who are disproportionately Black, are more vulnerable to fluctuations in the stock market. This is because individuals with lower incomes rely on a higher percentage of their Social Security income to fund their retirement, so a downturn in the economy and stock market that undermines the value of private assets can jeopardize their entire savings portfolio.[57] While a larger proportion of African Americans are low earners, many also do not have other sources of retirement income such as private pensions or 401(k)s, and therefore they rely on the certainty of benefits under the current system.[58] More specifically, forty-five percent of Black Americans rely on Social Security for ninety percent or more of their retirement income, compared to twenty-nine percent of White Americans.[59]

In addition to being more vulnerable to macroeconomic conditions that could undermine the value of private market assets, Black Americans are also less likely to yield higher benefits in the private market because of their more conservative investment tendencies.[60] In particular, the SSA found that thirty-six percent of White individuals owned stocks compared to nine percent of African Americans.[61] The mean value of stocks owned by White Americans was $24,944 compared to a mean of $3,387 for Black Americans.[62] The difference in stock ownership at all income quartiles is at least ten percentage points higher for White Americans than African Americans.[63] Black Americans are less likely to invest in all types of private market financial assets, and when they do, they tend to be more risk-averse and invest proportionally less money. A study conducted by Credit Suisse and the Institute on Assets and Social Policy at Brandeis University found that the wealthiest five percent of African Americans invest less in the private market altogether, and, when they choose to invest, they put a greater share of their holdings into low-risk, low-reward options.[64] The study explains that the investment strategy of African Americans is influenced by their "poor experience with banks through the years and their historically fragile financial standing."[65] Stolen wages during slavery, lower wages throughout Jim Crow and still today, and lending discrimination by the country's financial institutions can all be linked to the conservative investing strategy of African Americans.[66] If Black Americans remain conser-

Feb. 5, 2020).
51 *Id.*
52 *Id.*
53 Hendley & Bilimoria, *supra* note 7.
54 Goss, *supra* note 9.
55 Bosworth & Burtless, *supra* note 12.
56 Ferdinand C. Nwafor, *Social Security Privatization and African Americans*, 35 J. Black Stud. 248 (2005).
57 *Id.*
58 Hendley & Bilimoria, *supra* note 7.
59 *Id.*
60 Nwafor, *supra* note 56.
61 Sharmila Choudhury, *Racial and Ethnic Differences in Wealth and Asset Choices*, 64 Soc. Sec. Bull. 1 (2003), https://www.ssa.gov/policy/docs/ssb/v64n4/v64n4p1.html (last visited Apr. 1, 2021).
62 *Id.* at 6.
63 *Id.*
64 Michael A. Fletcher, T*he Big Difference Between How Wealthy African-American and White Investors Treat Their Money*, Wash. Post (Nov. 2019), https://www.washingtonpost.com/news/get-there/wp/2014/11/24/the-big-difference-between-how-wealthy-african-american-and-white-investors-treat-their-money/ (last visited Apr. 1, 2021).
65 *Id.*
66 Crystal Hudson, et al., *Investment Behavior: Factors that Limit African Americans' Investment Behavior*, 9 J. Fin. Therapy 21 (2018), https://new-

vative investors, they will similarly choose low-risk, low-reward options to invest their retirement contributions in a privatized system, which could yield a lower benefit than what they currently receive. Ultimately, in a privatized system, fewer African Americans would reap the benefits of the private market and a greater number would be vulnerable to stock market volatility relative to White Americans.

Additionally, though individual accounts would give American workers the ability to control their savings, many individuals are not equipped to manage and invest their money. To seek a greater return rate than what is offered in the current system, individuals would likely have to pay high management fees on top of hefty administrative costs.[67] For low-income African Americans, in particular, these costs would be significant.[68] Finally, a privatized system with individual accounts would eliminate the progressive nature of the current system.[69] Since African Americans are overrepresented in the categories that benefit from the redistributive nature of Social Security, privatization would exacerbate the already staggering inequality between Black and White Americans.

IV. Alternative to Privatization: A Race-Conscious Social Security System

The following section describes a proposal that would address the depleting Social Security trust fund while also suggesting race-conscious reforms that could deliver reparations to African Americans.

A. Addressing Depleting Trust Fund

In their proposal to reform Social Security and address the depleting trust fund, Peter A. Diamond and Peter R. Orszag argue for the protection of vulnerable beneficiary types including low-income workers, widows and widowers, and disabled individuals who experience the highest poverty rates.[70] They propose gradually cutting benefits and raising taxes for the highest earners while simultaneously increasing benefits for these vulnerable beneficiaries.[71] The increase in contributions would offset the rise in benefit outlays to vulnerable beneficiaries, replenishing the depleting trust fund. In addition to increasing tax rates for the highest earners, Diamond and Orszag also propose raising the maximum taxable earnings base.[72] Under the current system, the wage cap is $142,800 of an individual's earnings, which means any income above this value is not subject to taxes.[73] By increasing the maximum amount of money that can be taxed, contributions into the system would rise to replenish the trust fund.

Diamond and Orszag's proposal has racial implications because the vulnerable beneficiaries that it would benefit, as Section II showed, are disproportionately African American. The individuals who are overrepresented in the highest income brackets and would thus face higher taxes, on the other hand, are disproportionately White. As a result, even though Diamond and Orszag's proposal does not explicitly consider race, it protects and increases benefits for African Americans while cutting benefits for wealthy White Americans who have been shown to have other sources of retirement income.

I agree with Diamond and Orszag's reform proposal to address the depleting trust fund by increasing benefits for vulnerable beneficiaries while cutting benefits and increasing taxes for those in the highest income brackets. Unlike privatization, their proposal ensures that Black Americans, who disproportionately rely on Social Security for a majority of their retirement income,[74] will receive the same or greater benefit than they do currently. In fact, I believe the reform should go further and should explicitly consider race in the PIA benefit calculation.

B. Making the Social Security System Race-Conscious

A race-conscious Social Security system would treat the accomplishments of Black and White Americans differently to account for structural and systematic racism that affects trends in the categories that impact the PIA benefit calculation. Section II revealed that African Americans have lower average incomes, lower life expectancies, and lower marriage rates than White individuals, meaning they miss out on potentially higher Social Security benefits. As such, my race-conscious proposal will include reforms to level the playing field in the three mentioned areas.

Recall in Section II that the first component of the PIA where African Americans lag behind White Americans is their income, which can be described by differences in human capital attainment and employer discrimination. To account for the racial inequality that occurs as a result of differences in human capital and workforce discrimination, the Social Security benefit formula could scale earnings for Black beneficiaries by a discrimination coefficient that would equal the average percentage wage gap between Black and White individuals with the same credentials. Black recipients would receive benefits according to their scaled earnings but would only contribute according to their actual earnings. Economist Gary Becker first introduced the concept of a discrimination coefficient in his 1957 book *The Economics of Discrimination*.[75] Becker's coefficient quantified racial discrimination so that it could be included in labor economic models to address the fact that Black workers had to accept lower wages even when their productivity matched or surpassed their White counterparts.[76] My proposal would similarly quantify discrimination and use it to scale Social Security benefits by race.

prairiepress.org/cgi/viewcontent.cgi?article=1127&context=jft (last visited Apr. 1, 2021).

67 Nwafor, *supra* note 56.

68 *Id.*

69 *Id.* at 14.

70 Peter A. Diamond & Peter R. Orszag, *Saving Social Security*, 19 J. Econ. Persp. 11 (2005).

71 *Id.* at 13.

72 *Id.* at 15.

73 Soc. Sec. Admin., Contribution and Benefit Base, http://www.ssa.gov/OACT/COLA/cbb.html (last visited Mar. 5, 2021).

74 Hendley & Bilimoria, *supra* note 7.

75 David H. Autor, The Economics of Discrimination – Theory (Nov. 24, 2003) (unpublished lecture note, Massachusetts Institute of Technology), https://economics.mit.edu/files/553.

76 *Id.*

Secondly, recall that African Americans have a lower average life expectancy than White Americans, so many do not reach retirement age to collect benefits despite contributing to the system their entire working lives. To account for differences in life expectancy, the Social Security system should also establish a different retirement age for White and Black Americans so that Black individuals are not punished for the poorer health outcomes they face because of social inequality that prevents them for accessing suitable care.[77] For example, Black Americans could be allowed to start collecting benefits four years earlier, at the age of sixty-three rather than the current NRA of sixty-seven for those born after 1960.[78] Few reform proposals have advocated for a different retirement age based on race because of the desire to remain race-neutral. However, if the Social Security system is made race-conscious then explicitly considering race in this way would be fitting.

Thirdly, Section II described how differences in spousal benefits could be attributed to differences in marriage rates and the perception of the institution of marriage between Black and White communities.[79] In response, the requirements to receive spousal and widower benefits could be lowered for Black Americans to only require five years of marriage instead of ten to be eligible to collect benefits. This would help compensate Black individuals whose spouses die before ten years of marriage due to social disadvantages that cause a low survivorship rate among Black men.

Scaling income by a discrimination coefficient, reducing the NRA, and changing spousal benefit eligibility for African Americans will address the three areas in the Social Security system where they are disadvantaged because of their lower average incomes, life expectancy, and marriage rates. Together, these three reforms constitute the race-conscious elements that I propose should be added to the existing Social Security system along with Diamond and Orszag's reforms.

C. Potential Pushback

While these modifications would mean that African Americans are compensated for the disadvantages they face because of their race, a race-conscious system could face severe public and political backlash. First, it is incredibly challenging to measure the discrimination that individuals face daily. Several non-observable factors beyond educational attainment such as work ethic and interpersonal skills may influence an individual's earnings potential.[80] As a result, quantifying the discrimination coefficient would be a delicate task.

Furthermore, many Americans do not feel responsible for creating the racial inequality established during slavery and do not believe they should carry the burden of rectifying the problem through reparations.[81] In a poll conducted in early 2020, only ten percent of White respondents supported reparations to African Americans, with nearly eighty percent of Republicans in opposition.[82] Only one in three Democrats supported the payments.[83] Also, many individuals believe that offering a greater net benefit to African Americans would create 'reverse discrimination' that would disadvantage White individuals.[84] Opponents could argue that the reforms suggested above would compensate African Americans for their lower life expectancy and lower average earnings but would not compensate White Americans with extra benefits because they, for example, less frequently collect disability benefits.

Lastly, there may also be concerns of how to incorporate other minority groups into the proposed race-conscious policies, while still recognizing the unique and historical oppressions that Black Americans have faced and continue to experience in the United States. Undoubtedly, Hispanic Americans, Asian Americans, and Native Americans have also experienced historical and ongoing discrimination which affect their employment and familial characteristics included in the PIA benefit calculation.

Despite these concerns, the moral argument for the payment of reparations to Black Americans is solid. There is also strong public and political support for the Social Security system, making the suggested reforms both feasible and appropriate.[85] According to the Pew Research Center, seventy-four percent of Americans believe that Social Security benefits should not be reduced.[86] Nearly eight percent also believe that Social Security benefits should be preserved for future generations regardless of tax increases.[87] In fact, the Social Security system is often referred to as the "third rail" of politics because reform proposals generate heated debate among the public and politicians alike.[88] Despite the public's insistence on maintaining the current system, the depleting trust fund means that Social Security must be reformed in one way or another to improve its short-term and long-term sustainability. Diamond and Orszag's reforms, along with my proposed race-conscious elements, will satisfy the public's desire to preserve the Social Security system for future generations while also increasing benefits for some groups. Privatization proposals, on the other hand, would elicit intense public backlash because benefits could be cut for thousands of beneficiaries.

It is important to note that the proposed race-conscious reforms have only been explained for African Americans. Similarly, while dissecting race differences in Social Security benefits, I only compare White and Black individuals. This is because the most significant differences in the Social Security system exist

77 Diamond & Orszag, *supra* note 70.
78 Off. of the Chief Actuary, *supra* note 36.
79 Raley, et al., *supra* note 42.
80 Gaddis, *supra* note 29.
81 Charles Lane, *Would reparations for slavery be constitutional?*, Wash. Post (Aug. 12, 2019), https://www.washingtonpost.com/opinions/would-reparations-for-slavery-be-constitutional/2019/08/12/76677182-ba10-11e9-b3b4-2bb69e8c4e39_story.html (last visited Mar. 6, 2021).
82 Katanga Johnson, *U.S. public more aware of racial inequality but still rejects reparations*, Reuters (June 25, 2020), https://www.reuters.com/article/us-usa-economy-reparations-poll/u-s-public-more-aware-of-racial-inequality-but-still-rejects-reparations-reuters-ipsos-polling-idUSKBN23W1NG (last visited Mar. 22, 2021).
83 *Id.*
84 Lane, *supra* note 81.
85 Newport, *supra* note 3.
86 *Id.*
87 *Id.*
88 *Id.*

between White and Black beneficiaries. The trends are far less clear for Hispanic and Asian American workers. That is not to say that the aproposed race-conscious reforms cannot eventually be expanded to include other minority groups but that we need more research to determine how these racial groups can be helped through the Social Security benefit formula. Additionally, I chose Social Security as an avenue of reparations specifically for African Americans because of their reliance on the system and how proposals for privatization would disproportionately impact them over other racial groups. For this reason, the proposed race-conscious reforms are specifically designed for Black individuals but are not meant to exclude other racial groups.

V. Conclusion

Reforming the Social Security system has been on Congress's political agenda for more than fifteen years.[89] The debate is most contentious among scholars who believe in privatizing part of the system by creating individual accounts and those who aim to preserve the system's collective nature.[90] Diamond and Orszag's proposal to address the depleting trust fund and my proposed race-conscious reforms belong in the latter group of reform strategies. The Social Security system is in need of reform, and my approach will ensure its sustainability while also acting as an avenue for reparations, rectifying this country's wrongs against Black Americans.

89 R. Douglas Arnold, *The Politics of Reforming Social Security*, 113 Pol. Sci. Q. 213 (1998).
90 *Id.*

Race, Constitutionality, and Tribal Sovereignty in *Adoptive Couple v. Baby Girl*

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Custody battles are often heartbreaking affairs, especially for those parents who lose access to their children. But the 2013 Supreme Court case *Adoptive Couple v. Baby Girl*,[1] a dispute between a child's biological father and her prospective adoptive parents, had broader implications than the birth father being denied the right to raise her. According to the South Carolina courts, the Indian Child Welfare Act (ICWA) protected the birth father, a member of the Cherokee Nation, from having his parental rights terminated. However, the Supreme Court interpreted ICWA differently, therefore preventing Baby Girl from being raised in a Native American home and having a connection to her culture. This holding runs counter to ICWA's goal to establish "a Federal policy that, where possible, an Indian child should remain in the Indian community."[2]

This paper's analysis of the case reveals that the plaintiff attorneys and, eventually, the Supreme Court majority, problematically focused on Baby Girl's alleged 1.2 percent Cherokee blood[3] as the basis for ICWA's application, overlooking the predominantly political definition of tribal membership. This flawed racial focus also led the Court to largely ignore Baby Girl's birth father's cultural connections to his tribe, which Baby Girl would have shared had he gained custody. Moreover, this paper contends that the petitioners incorrectly argued that ICWA violates the Equal Protection Clause[4] of the Constitution by mandating special treatment of Native Americans based on race, an argument which the Court failed to conclusively comment on in its holding. Most importantly, the Court disregarded the exact purpose of ICWA in ruling that the biological father, who hadn't previously had custody of Baby Girl, could not invoke ICWA to gain custody.

Sections II and III of this paper provide background on ICWA and *Adoptive Couple v. Baby Girl*. Sections IV, V, and VI delve into the problematic nature of petitioners' and the Court's focus on Baby Girl's racial heritage, the misguided reasoning behind arguments questioning ICWA's constitutionality, and the ways in which the Court's decision ran counter to ICWA's goals. This paper ultimately aims to convey how the decision reflects a misunderstanding of Native culture and of the abusive policies of forced Native assimilation and erasure that ICWA aimed to remedy.

1 Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013) (No. 12–399).
2 Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 37 (1989).
3 Bethany R. Berger, *In the Name of the Child: Race, Gender, and Economics in Adoptive Couple v. Baby Girl*, 67 Fla. L. Rev. 295, 233 (2016).
4 U.S. Const. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

I. ICWA: Background, Goals, and Implementation

Before ICWA became a federal law in 1978, at least thirty-five percent of Native American children[5] were placed in non-Native homes and institutions between 1969 and 1974 by state child welfare and private adoption agencies.[6] The adoption rate for Native children during this time was eight times the rate for non-Natives; moreover, eighty-five percent of these adopted children were placed with non-Native guardians.[7]

A prominent factor in the removal of Native children from their homes and communities was state governments' ignorance of Native tribal relations. In Native communities, children commonly "have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family."[8] However, state child welfare agencies, having no knowledge of this custom, assumed parents who left their children with tribe members outside of the nuclear family to be neglectful, warranting a termination of parental rights.[9]

Congress enacted ICWA to address the widespread and unwarranted transfer of Native children into non-Native communities. In doing so, it recognized the importance of Native children to the long-term existence and prosperity of tribes. By establishing that Native children remain in Native environments where possible, ICWA furthers the broader goal of preventing the weakening of traditional Native systems.[10]

ICWA provides specific instructions for child welfare workers handling the placement of Native children in new homes. After verifying the child's tribal membership or ethnic eligibility for membership, workers must follow the ICWA preference provisions, which specify that the child should, in the following order of preference, be placed with a suitable family member, another family from the tribe, another Native family with foster parent qualifications, or a non-Native family.[11] Workers must also notify the child's parents and tribe of the custody case and make active efforts to involve them in their proceedings.[12]

5 Brief for Respondents at 2, Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013) (No. 12–399).
6 H.R. Rep. No. 101–524, at 10 (1990), *reprinted* in 1990 U.S.C.C.A.N. 1448, 1451.
7 *Id.*
8 *Id.*
9 Brief for Respondents, *supra* note 3.
10 *Id.*
11 25 U.S.C. § 1915 (2012).
12 *About ICWA*, Nat'l Indian Child Welfare Ass'n, https://www.nicwa.org/about-icwa/ (last visited Mar. 29, 2021).

Most relevant to the case discussed in this paper, ICWA prohibits involuntary termination of parental rights to a Native child without "a showing that remedial efforts have been made to prevent the breakup of the Indian family"[13] and "in the absence of a heightened showing that serious harm to the Indian child is likely to result from the parent's continued custody of the child."[14]

II. Summary of Adoptive Couple v. Baby Girl

Adoptive Couple v. Baby Girl concerns a little girl named Veronica (legally known as Baby Girl) whose father, Dusten Brown, agreed to relinquish his parental rights when his relationship with Veronica's mother, Christina Maldonado, ended during her pregnancy.[15] Maldonado placed Veronica with non-Native adoptive parents Melanie Duncan and Matthew Capobianco, who were South Carolina residents, at her birth. Maldonado attempted to verify Brown's membership in the Cherokee Nation during the adoption proceedings, but his name was misspelled and his birth date misrepresented in the request, preventing the Nation from identifying his status.[16] She informed Brown of the pending adoption four months after handing Veronica to the Capobiancos. Brown promptly sought custody, which a South Carolina family court granted and the state's Supreme Court affirmed.[17]

The South Carolina Supreme Court concluded that ICWA applied to the case because of Veronica's Native status, her father's parental determination under ICWA, and the application of three sections of the law: §1912(d) and §1912(f), which barred the termination of his rights as a parent, and §1915(a), which specified ICWA's adoption-placement preferences.[18] The South Carolina courts also determined Brown "'a fit and proper person to have custody of his child' who 'has demonstrated [his] ability to parent effectively' and who possesses 'unwavering love for this child.'"[19]

In July 2013, one and a half years after Veronica was placed in Brown's care, the U.S. Supreme Court held that Brown, as a non-custodial parent, could not invoke ICWA to prevent Veronica's adoption. The 5-4 majority opinion, written by Justice Alito, held that because Brown had never had "legal or physical custody of Baby Girl as of the time of the adoption proceedings,"[20] ICWA's goal of preventing "the breakup of the Indian family"[21] was inapplicable. The Court further held that the placement preferences outlined in §1915(a) were also inapplicable because no other parties formally sought to adopt Veronica. According to the opinion, §1915(a) did not apply to Brown himself because "he did not seek to adopt Baby Girl; instead, he argued that his parental rights should not be terminated in the first place."[22] Brown relinquished Veronica to the Capobiancos that September. [23]

Justices Sotomayor and Scalia dissented. Justice Sotomayor, joined by Justices Ginsburg and Kagan, argued that the majority's reading of ICWA in their opinion was "contrary to both its text and its stated purpose."[24] Her dissent also claimed that the majority's interpretation of the statute would have adverse consequences for all noncustodial Native parents, regardless of their level of involvement in the raising of their child.[25] Justice Scalia's separate dissent contended that the term "continued custody" in §1912(f) of ICWA, which the majority took to apply only to parents who had already had legal or physical custody, could also ostensibly refer to custody in the future.[26]

III. The Flawed Nature of Race-Based Arguments

In its ruling and during oral arguments, the Supreme Court focused on Veronica's racial heritage. Petitioners' and the Court's preoccupation with Veronica's race was not only irrelevant to the details of *Adoptive Couple v. Baby Girl*, but also demonstrated a concerning misunderstanding of what it means to be Native American.

In the petitioners' briefs, the oral arguments, and the majority opinion, the phrase "3/256ths of Cherokee blood" came up repeatedly. The phrase first appeared in a footnote of the petitioners' first brief stating, "[w]e have since reviewed records from Baby Girl's paternal grandparents reflecting that Baby [G]irl is 3/256 Cherokee."[27] Paul Clement, the attorney who served as the guardian ad litem, or the guardian appointed by the court to represent the child's interests, particularly embraced the statistic. After making several assertions along the lines of "Baby Girl's sole link to any tribe is her 3/256ths of Cherokee blood"[28] in his brief, Clement argued before the Supreme Court that Veronica's "whole world" should not have to change simply because "the tribe, based on a racial classification, thinks that somebody" with "1 percent Indian blood is enough to make them [a member]."[29]

Clement's statements are problematic on two counts. First, they emphasize a likely inaccurate statistic.[30] Veronica's proof of descent was derived from the Dawes Rolls, census rolls the U.S. government created between 1899 and 1906 to document tribal populations in preparation for allotment of tribal land. Some Cherokee citizens refused to enroll in the Dawes Rolls altogether in resistance to allotment; meanwhile, those who did enroll were incentivized to deflate their Cherokee blood quantum in order to avoid property restrictions the govern-

13 Adoptive Couple v. Baby Girl, 570 U.S. 637, 641 (2013) (No. 12–399).
14 *Id.*
15 Berger, *supra* note 2, at 296.
16 *Adoptive Couple*, 570 U.S. at 644.
17 *Id* at 645.
18 *Id.*
19 Adoptive Couple v. Baby Girl, 731 S.E.2d 550, 553 (S.C. 2012).
20 Adoptive Couple, 570 U.S. at 650.
21 *Id.* at 637.
22 *Id.* at 639.
23 Berger, *supra* note 2, at 297.
24 *Adoptive Couple*, 570 U.S. at 669 (Sotomayor, J., dissenting).
25 *Id.* at 670.
26 Berger, *supra* note 2, at 313.
27 *Id.* at 326.
28 Reply Brief for Guardian ad Litem at 1, *Adoptive Couple*, 570 U.S. 637 (2013) (No. 12–399).
29 Transcript of Oral Argument at 29, *Adoptive Couple*, 570 U.S. 637 (2013) (No. 12–399).
30 Berger, *supra* note 2, at 327.

ment imposed on the Cherokee. Thus, many Cherokee citizens have more blood heritage than the Dawes Rolls report.[31]

More importantly, Clement's blood quantum argument overlooks the fact that ICWA's definition of an "Indian child" is "predominately political."[32] ICWA defines an "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."[33] Because Veronica was not yet enrolled in a tribe at the time of her adoption, it was part (b) of this definition that led to her classification as an "Indian child" under ICWA; her Cherokee ancestry made her eligible for membership *and* her father was a citizen of the Cherokee Nation. Had her father *not* been a registered member, however, her blood lineage alone would not have allowed her case to fit ICWA's definition. Thus, though ICWA's requirements recognize that biological ties are often "the basis for identification as Indian"[34] since most tribes require Native American ancestry for membership,[35] they nevertheless affirm the political, not racial, nature of tribal membership status by requiring that biological parents be registered members of a tribe. Moreover, even children who have *no* Native American blood heritage can also be considered "Indian children" under ICWA, as long as they are a member of a tribe. The South Dakota Supreme Court set this precedent, holding that a child without Native heritage who had been adopted by a Lakota family and enrolled in their tribe fit ICWA's definition.[36]

Charles Rothfeld, Brown's attorney, emphasized that tribal citizenship is inherently political during the oral arguments, correctly pointing out that Cherokee membership has always required proof of connection to an enrolled lineal ancestor listed on Dawes Rolls.[37] But Chief Justice Roberts's and Justice Alito's questions continued to home in on the 3/256ths statistic. Roberts asked, for example, "I'm just wondering is 3/256ths close — close to zero? [...] is it one drop of blood that triggers all these extraordinary rights?"[38] His question reflected a concern about "who is 'Indian enough' for the ICWA to apply."[39] Justice Alito's follow-up question, "But what if a tribe makes eligibility available for anybody who, as a result of a DNA test, can establish any Indian ancestry, no matter how slight?"[40] demonstrates how "the Justices were not primarily concerned about special rights for Indians, but instead about ensuring that those rights remained limited to a small and racially defined group."[41] The first sentence of the majority opinion implies a similar concern. Justice Alito, who penned the opinion, wrote "This case is about a little girl (Baby Girl) who is classified as an Indian because she is 1.2% (3/256) Cherokee."[42] Later in the opinion, he asserted that "had Baby Girl not been 3/256 Cherokee, Biological Father would have had no right to object to her adoption under South Carolina Law."[43] As Justice Sotomayor pointed out in her dissent, these "analytically unnecessary" references to Veronica's blood quantum problematically "second-guess the membership requirements of federally recognized Indian tribes, which are independent political entities."[44]

The Supreme Court majority's preoccupation with Veronica's blood quantum led the Court to largely overlook her father's political and cultural connections to his tribe. Brown's family owned "Indian trust land in Pryor and Cayuga, Oklahoma"[45] and his father voted in Cherokee elections.[46] Moreover, the South Carolina family court found that his family kept in close contact with extended relatives and had membership in the Wolf Clan.[47] But the petitioners ignored these connections and instead emphasized the supposed advantages living with the Capobiancos would give Veronica. Lisa Blatt, the Capobiancos' attorney, pointed out in her brief the adoptive mother's Ph.D. in developmental psychology and the father's job as a technician with Boeing.[48] "Stretching ICWA to fit" the facts of Veronica's case would come at the cost of "leaving abandoned Indian children to face uncertain and uniquely disadvantaged futures,"[49] Blatt wrote. Her statement reveals the biased assumption that the Capobiancos' White, affluent household would be a better environment in which to raise Veronica than her biological father's home.

The Supreme Court majority alluded to this belief, writing that allowing a Native American father to "play his ICWA trump card at the eleventh hour" would go against the "best interests"[50] of the child. In her dissent, Justice Sotomayor argued that parents who cannot provide their children with "the fullest possible financial and emotional support" are fit guardians nonetheless. According to Sotomayor, the "custodial-parent mold for which the majority would reserve IWCA's substantive protections" is unrealistic and fails to honor ICWA's broad definition of a "parent."[51] In any case, the South Carolina courts'

31 *See id.* at 329 ("Those who did enroll had incentives to misrepresent their blood quantum to avoid the federal property restrictions imposed on those of Cherokee blood. Therefore, many, like Brown, who Maldonado believed to have one-eighth Cherokee descent, report more heritage than can be proven from the Dawes Rolls."). *See also* Dan Littlefield, *Study of Historical Facts Clarifies Freedman Citizenship Issue*, Cherokee Phoenix (Mar. 21, 2007), https://www.cherokeephoenix.org/opinion/study-of-historical-facts-clarifies-freedmen-citizenship-issue/article_c9c2fdce-76bd-5ed8-86d7-81e7b87d4fb1.html (last visited Mar. 29, 2021) ("Knowing that they would likely be labeled incompetent, many Cherokees probably chose voluntarily to lower their blood quantum.").
32 *Id.* at 327.
33 25 U.S.C. § 1903(4) (2012).
34 Kathleena Kruck, *The Indian Child Welfare Act's Waning Power After Adoptive Couple v. Baby Girl*, 109 Nw. U. L. Rev. 445, 457 (2015).
35 *Id.*
36 Berger, *supra* note 2, at 328.
37 *Tribal Registration*, Cherokee Nation, https://www.cherokee.org/all-services/tribal-registration/ (last visited Mar. 29, 2021).
38 Transcript of Oral Argument, *supra* note 27, at 42.
39 Kruck, *supra* note 32.
40 Transcript of Oral Argument, *supra* note 27, at 43.
41 Berger, *supra* note 2, at 330.
42 Adoptive Couple v. Baby Girl, 570 U.S. 637, 641 (2013) (No. 12–399).
43 *Id.*
44 *Adoptive Couple,* 570 U.S. at 690 (Sotomayor, J., dissenting).
45 Berger, *supra* note 2, at 333.
46 *Id.* at 332.
47 *Id.* at 333.
48 Brief for Petitioners at 7, *Adoptive Couple*, 570 U.S. 637 (2013) (No. 12–399).
49 *Id.* at 56.
50 *Adoptive Couple*, 570 U.S. at 656.
51 *Id.* at 689 (Sotomayor, J., dissenting).

findings that Brown provided a "safe, loving and appropriate"[52] home for Veronica, based on testimony from the child welfare specialist who conducted a home study on Brown's family, render any claims or allusions that living with Brown put Veronica at a "disadvantage" inaccurate.[53]

IV. Equal Protection Concerns and their Misguided Reasoning

Beyond questioning the membership criteria of federally recognized Native American tribes, the petitioners argued that interpreting ICWA to give custody to Brown would render ICWA unconstitutional. Clement wrote in his brief, ". . . the federal government does not have any license to treat Native Americans differently from others based solely on biology and race. By (mis)interpreting ICWA to allow unwed Indian fathers—alone among all unwed fathers—to establish paternity based on biology alone, the court below unnecessarily creates grave doubts about ICWA's constitutionality."[54] In other words, according to Clement, applying ICWA protections to Veronica based on her Cherokee racial heritage would constitute a violation of the Equal Protection Clause.

Justice Department lawyers responded to this claim in their brief to the Supreme Court justices, emphasizing that, as I explained above, ICWA is based on "political, not racial, classifications" and that "the definition of 'Indian child' does not comprise all children who are ethnically Indian"[55]; rather, it involves the children who are members of a tribe or the biological child of a parent who is a member. Justice Sotomayor, moreover, rejected the notion that ICWA could violate the Fourteenth Amendment in her dissent, writing that the Supreme Court's precedents "squarely hold that classifications based on Indian tribal membership are not impermissible racial classifications."[56] The majority opinion did not make a standing on ICWA's constitutionality, however. Justice Alito, who penned the opinion, wrote that interpreting ICWA to allow a non-custodial parent to gain custody "at the eleventh hour to override the mother's decision and the child's best interests" would "raise equal protection concerns,"[57] but did not elucidate this claim further.

By failing to conclusively address the petitioners' notions of equal protection violation, the Court missed an opportunity to clarify their error. As Rothfeld wrote in his brief, "in the area of Indian affairs, the Court has consistently acknowledged that special treatment of Indians is justified '[a]s long as the [treatment] can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians.'"[58] Rothfeld took this quote from the 1974 case *Morton v. Mancari*,[59] in which the Supreme Court upheld the constitutionality of a hiring preference for Natives in the Bureau of Indian Affairs (BIA) for two reasons. First, because the BIA held a "unique degree of control"[60] over Native American lives, the employment preference was "rationally related to the goal of increasing tribal self-governance."[61] Second, since the preference only applied to those who were members of federally recognized tribes, the measure was "political, rather than racial in nature."[62]

The Court reaffirmed its *Mancari* decision in the 2000 case *Rice v. Cayetano*.[63] Though its ruling in Rice declared a state law giving Native Hawaiians special voting rights in state elections unconstitutional, which might have raised questions regarding *Mancari's* constitutionality, it still upheld the *Mancari* framework. The Court ruled that its precedent of allowing differential treatment of Native tribes did not apply to the Hawaiian voting law in question—not that the precedent itself was the issue. In fact, Justice Kennedy, who penned the opinion, wrote that "Of course, as we have established in a series of cases, Congress may fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs."[64] Because Congress acknowledged that "the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe"[65] in enacting ICWA, the law clearly falls within "Congress' unique obligation toward the Indians" that the Court recognized in *Mancari*.[66] This explains why all but one lower court has rejected a constitutional challenge to ICWA. The one court in question, a third division California appellate court, found that applying ICWA to "children whose biological parents do not have a significant social, cultural or political relationship with an Indian community" may render it unconstitutional.[67] Brown's clear political, social, and cultural connections to his tribe make this precedent inapplicable to his case.

Nevertheless, petitioners and some scholars have condemned ICWA's supposed racial bias. Christopher Deluzio wrote in the Pace Law Review, for example, that the Court's inclusive stance on ICWA's constitutionality in *Adoptive Couple* "will only perpetuate the divisive nature of laws, like ICWA, that afford Indians disparate treatment based, at least in part, on their racial heritage."[68] According to Deluzio, "the ICWA will persist as an awkward exception to the Court's otherwise steady embrace of colorblindness, in adoption and beyond."[69]

52 Adoptive Couple v. Baby Girl, 731 S.E.2d 550, 553 (S.C. 2012).
53 Berger, *supra* note 2, at 310.
54 Reply Brief for Guardian ad Litem, *supra* note 26, at 41.
55 Andrew Cohen, *Indian Affairs, Adoption, and Race: The Baby Veronica Case Comes to Washington*, The Atlantic (Apr. 12, 2013), https://www.theatlantic.com/national/archive/2013/04/indian-affairs-adoption-and-race-the-baby-veronica-case-comes-to-washington/274758/ (last visited Mar. 29, 2021).
56 *Adoptive Couple*, 570 U.S. at 690 (Sotomayor, J., dissenting).
57 *Adoptive Couple*, 570 U.S. at 656.
58 Brief for Respondents, *supra* note 3, at 23.
59 Morton v. Mancari, 417 U.S. 535 (1974).
60 Berger, *supra* note 2, at 334.
61 *Id.*
62 *Mancari*, 417 U.S. at 553.
63 Rice v. Cayetano, 528 U.S. 495 (2000).
64 *Id.* at 519.
65 25 U.S.C. § 1903(3) (2012).
66 *Mancari*, 417 U.S. at 555.
67 Berger, *supra* note 2, at 336.
68 Christopher Deluzio, *Tribes and Race: The Court's Missed Opportunity in Adoptive Couple v. Baby Girl*, 34 Pace L. Rev. 509, 553 (2014).
69 *Id.*

Not only does Deluzio's focus on racial heritage again convey an ignorance of the political nature of tribal status, but his support of extending the "colorblindness" precedent to include Native Americans undermines the very real obligation the United States government has to all Natives given its long history of abuse, forced assimilation, and erasure. These practices were evident from the first steps by European colonizers onto the American continent, and they continue today. In the post-World War II period, the U.S. government divided and sold millions of acres of tribal land to railroads and Homestead Act land claimants, coerced Native families into sending their children to Native American boarding schools for assimilation purposes, and regulated tribal activity through Courts of Indian Offenses.[70] The Supreme Court acknowledged as much in its *Mancari* decision, citing how the government has historically taken possession of Native lands and left tribes unprotected from infringements on their sovereignty and culture. Thus, according to the majority opinion in *Mancari*, the government necessarily has the obligation to provide tribes with needed protection. Subjecting differential treatment of Native Americans to the strict scrutiny applied to racial classifications would jeopardize the government's "solemn commitment toward the Indians."[71]

V. The Court's Decision Runs Counter to the Goals of ICWA

By homing in on the fact that Brown did not have custody of Veronica at the time of the adoption proceedings, the petitioners and the Court neglected to honor the intended purpose of ICWA. Clement argued in his brief that "The application of ICWA under these circumstances did not prevent the breakup of an Indian family, preserve any existing tribal relationships, promote tribal sovereignty, or serve any other constitutionally permissible purpose."[72] On the contrary, as Rothfeld responded in his brief, "Regardless whether Baby Girl was 'disconnected from the Tribe and her Indian relatives' at the time of birth (GAL Br. 14-15), the issue of her custody concerns tribal sovereignty directly, for her placement will either contribute to or detract from the 'continued existence and integrity of Indian tribes.'"[73] When one recognizes that ICWA's placement preference provisions are based on Native American cultural values, which emphasize the importance of children staying within the tribe,[74] this case's links to tribal sovereignty are even more evident. Congress acknowledged in framing ICWA that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children."[75] Evidently, the law not only concerns individual Native parents and their children, but also the interests of Native American tribes generally.

The 1989 case *Mississippi Band of Choctaw Indians v. Holyfield*[76] upheld ICWA's promotion of tribal interests in ruling that the biological parents of two Native children could not avoid the application of ICWA to their adoption proceedings by having their children born off of their reservation.[77] Here, the Court reasoned that the "actions of individual members of the tribe" should not interfere with ICWA's prevention of "the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians."[78] The Court should have extended *Holyfield's* protection of tribal welfare to its decision in *Adoptive Couple*.

Perhaps even more problematically, the petitioners and the majority opinion expressed concern that the application of ICWA to *Adoptive Couple* would increase the difficulty of making adoptive placements for Native children—but this is exactly what ICWA aimed to do. During the oral arguments, Blatt warned the justices, "You are relegating adopted parents to go to the back of the bus and wait in line if they can adopt. And you're basically relegating the child, the child to a piece of property with a sign that says, 'Indian, keep off.' 'Do not disturb.' This case is going to affect any interracial adoption of children."[79] As Justice Sotomayor pointed out in her dissent, however, "ICWA does not interfere with the adoption of Indian children except to the extent that it attempts to avert the necessity of adoptive placement and makes adoptions of Indian children by non-Indian families less likely. The majority may consider this scheme unwise. But no principle of construction licenses a court to interpret a statute with a view to averting the very consequences Congress expressly stated it was trying to bring about."[80]

Finally, in denying Brown custody out of the stated fear that any biological Native American father who gave his parental rights could "play his ICWA trump card at the eleventh hour to override the mother's decision and the child's best interests,"[81] the Court made a decision with dramatic implications for "all Indian parents who have never had custody of their children, no matter how fully those parents have embraced the financial and emotional responsibilities of parenting."[82] The elimination of ICWA protections for non-custodial parents because of *Adoptive Couple* makes "judicially-invented exemptions to the ICWA" more likely, as the Justice Department wrote to the justices.[83] This directly "contributes to the problem of diminishing tribal numbers that the ICWA sought to remedy."[84]

VI. Conclusion

There is no evidence that the Capobiancos had any anti-Native American intent when they sought to adopt Veronica; rather, they simply wanted to be parents. But by denying custody to

70 Bethany R. Berger, *Reconciling Equal Protection and Federal Indian Law*, 98 Cal. L. Rev. 1165, 1180 (2010).
71 *Mancari*, 417 U.S. at 552.
72 Reply Brief for Guardian ad Litem, *supra* note 26, at 49.
73 Brief for Respondents, *supra* note 3, at 24.
74 Sosinski, Amy, *What It Means To Be a Parent: A Problematic Outcome in Adoptive Couple v. Baby Girl*, 1 F.: Tenn. Student Legal J. 1, 9 (2014).
75 Adoptive Couple v. Baby Girl, 570 U.S. 637, 670 (2013) (Sotomayor, J., dissenting).
76 Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989).
77 Brief for Respondents, *supra* note 3, at 23.
78 *Holyfield*, 490 U.S. at 49.
79 Transcript of Oral Argument, *supra* note 27, at 62.
80 Brief for Respondents, *supra* note 3, at 22.
81 *Adoptive Couple*, 570 U.S. at 656.
82 *Id.* at 670 (Sotomayor, J., dissenting).
83 Cohen, *supra* note 53.
84 Kruck, *supra* note 32, at 467–468.

Brown, who actively wanted to raise his daughter in a tribal environment in which she participated, for instance, in "Cherokee stomp dances at weekly classes with other children"[85] during the brief period she was placed in his care, the Supreme Court contributed to a documented history of Native assimilation by incorporation of Natives into White households.

Since the Court's 2013 decision, another ICWA-related case, *Brackeen v. Bernhardt*,[86] has emerged in which the states of Texas, Indiana, and Louisiana along with non-Native prospective adoptive parents challenged the law's constitutionality.[87] In 2018, the U.S. District Court for the Northern District of Texas ruled that ICWA indeed violated the Equal Protection Clause, but the Fifth Circuit overturned this opinion a year later.[88] While it remains to be seen whether the Supreme Court will hear the case, the fact that ICWA's constitutionality is still being questioned several years after the *Adoptive Couple* decision conveys a persistent ignorance of both the political definition of membership in a Native American tribe and the U.S. government's established mandate to protect the continued existence and self-governance of tribes. The lingering consequences of the Court's failure to firmly uphold ICWA's necessity and constitutionality in *Adoptive Couple* are evident and concerning.

Overturning ICWA could in fact jeopardize Native American law as a whole. According to Chuck Hoskin Jr., the Principal Chief of the Cherokee Nation, the recognition that tribes are "sovereign, not distinguished as a race but as a special political designation," is a "bedrock of federal Indian law in this country." Viewing ICWA as a violation of equal protection and repealing the act would have "broad implications" not just on ICWA, but on "many laws that relate to housing and healthcare and education and employment."[89] As such, cases like *Adoptive Couple* and *Brackeen v. Bernhardt* constitute not only a challenge to ICWA itself, but a "broad-scale effort to reshape Native governance."[90] Indeed, the executive director of the National Indian Child Welfare Association believes organizations like the Goldwater Institute, which backed the plaintiffs' lawsuit in *Brackeen v. Bernhardt* and "has challenged ICWA a dozen times since 2014," have agendas that include "subverting or dismantling tribal sovereignty."[91] It is therefore imperative to contemplate the impact of ICWA-related court decisions on all Native Americans, not just the parents who seek to retain custody of their children under the act's provisions.

Because of the potentially dramatic implications of ICWA court cases, it is also important to discuss how elected officials and individuals can help prevent cases from reaching courts in the first place. The federal child welfare system, for example, should better incentivize adoption caseworkers to fully ensure that adoptive placements are appropriate (meaning, in the case of Native children, that they meet ICWA's stipulations). In the current system, caseworkers are encouraged to make swift adoptive placements because of an economic incentive for states to increase adoption numbers. While this incentive, introduced in the 1997 Adoption and Safe Families Act (ASFA),[92] aimed to reduce the number of children in foster care each year in favor of permanent placements, it has come at the cost of many inappropriate adoption placements as rushed caseworkers ignore or fail to recognize potential issues with placements.[93] If better incentivized to conduct a more in-depth investigation of Veronica's Cherokee ties, the social workers responsible for her case could have prevented the Capobiancos from gaining custody of her from the outset. Revising the ASFA to reduce or remove adoption bonuses for states might result in fewer Native children being placed in White homes in violation of ICWA.

Additionally, when courts do need to handle ICWA cases, they should interpret the law to protect non-custodial parents from having their rights terminated in order to adhere to ICWA's primary goals: to promote tribal sovereignty and the retention of traditional Native systems by keeping Native children within Native communities. This way, Native parents who have not had custody of their children but desire to raise them lovingly and support them financially will not be denied this opportunity, and tribes will more easily retain the most important factor in their continued resilience—the membership of future generations.

Both individuals and elected officials should urge the U.S. government to take these solutions into consideration. In doing so, they must recognize that the entire framework of Native American autonomy may depend on the status of ICWA. It should also be widely acknowledged that the application of legislation like ICWA that protects federally recognized tribes is not a display of racial bias in violation of the Fourteenth Amendment, but rather a crucial and justified measure to promote tribal sovereignty.

85 Berger, *supra* note 2, at 309.
86 Brackeen v. Bernhardt, 942 F.3d 287 (2019).
87 Nat'l Indian Child Welfare Ass'n, *supra* note 10.
88 Id.
89 Roxanna Asgarian, *How a White Evangelical Family Could Dismantle Adoption Protections for Native Children*, VOX (Feb. 20, 2020), https://www.vox.com/identities/2020/2/20/21131387/indian-child-welfare-act-court-case-foster-care (last visited Mar. 29, 2021).
90 Leah Litman & Matthew L.M. Fletcher, *The Necessity of the Indian Child Welfare Act*, The Atlantic (Jan. 22, 2020), https://www.theatlantic.com/ideas/archive/2020/01/fifth-circuit-icwa/605167/ (last visited Mar. 29, 2021).
91 Asgarian, *supra* note 84.
92 Pub. L. No. 105–89, 111 Stat. 2115 (1997).
93 Dawn Post, *Adoption Bonuses and Broken Adoptions*, A.B.A. (Jan. 1, 2014), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-33/january-2014/adoption-bonuses-and-broken-adoptions/ (last visited Mar. 29, 2021).

The Construction of "Minzu": Han Ethnocentrism and the Oppression of Tibetans

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If someone were to ask a person in China what races make up the country's demographics, they would most likely be greeted with a blank stare. In China, the concept of race does not exist in the way that it does in the West. A common misperception by Westerners is that China is a homogenous country that lacks multiculturalism or diversity. The reality is that China is made up of different ethnic groups that have a variety of languages, cultures, and religions.[1] But instead of creating racial categories for these ethnic groups, the Chinese government resorts to its own complex yet ambiguous categorization of minority groups.[2] For example, the Western term "race" is often equated to the Chinese[3] term *minzu* or *shaoshu minzu*. This equating is inexact because the term *minzu* doesn't have a direct translation, but instead has multiple definitions. More specifically, *minzu* is "used interchangeably to denote both zhonghua *minzu* (Chinese nation) and *shaoshu minzu* (ethnic minorities, national minorities, or minority nationalities)."[4]

The concept of *minzu* was constructed in the twentieth century and promulgated nationwide when the Chinese Communist Party (CCP) launched the State Identification Project of the Ethnic Groups (also known as the Ethnic Classification Project) in 1949 to identify and grant non-Han Chinese ethnic groups official minority status.[5] Throughout this paper, I investigate how the construction of *minzu* promotes Han ethnocentrism in state policies and how those policies contribute to the oppression of certain minority groups. More specifically, I focus on Tibetans—one of China's largest ethnic minority groups—in the Tibetan Autonomous Region (TAR) and Tibetan prefectures, as well as how the state's language policies are erasing the Tibetan language.

In Section I, I discuss how the Ethnic Classification Project resulted in the creation of *minzu*. In Section II, I examine how Han ethnocentrism in linguistic policies contributes to the oppression of Tibetans. In Section III, I examine how the CCP perceives the preservation of the Tibetan language as a threat to national unity. Overall, I argue that the state's construction of *minzu* and the term's goal of national unity encourage Han ethnocentrism and assimilation of non-Han ethnic groups, further escalating the linguistic and cultural erasure of minority groups. I suggest that the Chinese government support the use of minority languages as the language of instruction in *shaoshu minzu* regions rather than passing language policies that promote assimilation.

I. Ethnic Classification Project (ECP)

The construction of *minzu* by the CCP under the Ethnic Classification Project was established to exert control over ethnic minority groups.[6] The Ethnic Classification Project arose in the second half of the twentieth century, soon after the communist regime took over China and "was attempting to consolidate its political control and establish a stable government in the mainland."[7] The project sent ethnologists and linguists around the country to determine China's ethnonational composition so that "these different groups might be integrated into a centralized territorially stable polity."[8] China has had a history of viewing Han identity as modern and civil while depicting non-Han ethnic groups as "barbarians" and "backward."[9] During the project, most of the non-Han ethnic groups were labeled in lower stages of the hierarchy due to a "less advanced mode of production" and a "supposed lower level of civilization."[10] The Ethnic Classification Project identified fifty-six ethnic groups in the Chinese nation, with the Han Chinese as the dominant group.[11]

This project has influenced how the modern Chinese state and the Chinese people have viewed and understood non-Han Chinese identity.[12] Prior to the Ethnic Classification Project, the use of *minzu* by non-Han ethnic groups, and an ethnic group's identification to a specific nationality, was nonexistent.[13] Through the construction of *minzu*, the CCP created the ethnic divide between Han Chinese and non-Han groups.[14] Minorities recognized by the state are granted minority rights and certain benefits.[15] Ethnic groups who are not identified by the state as a part of the fifty-five minority ethnic groups don't

1 *See, e.g.,* Wang Linzhu, *The Identification of Minorities in China*, 16 Asian-Pac. L. Pol'y J. 1 (2015).
2 *Id.* at 12.
3 Throughout this paper, I use the term "Chinese" as a reference to Mandarin.
4 Miaoyan Yang, Learning to be Tibetan: The Construction of Ethnic Identity at Minzu University of China 5 (2017).
5 *Id.* at 8.
6 Linzhu, *supra* note 1, at 14.
7 Thomas Mullaney, Coming to Terms with the Nation: Ethnic Classification in Modern China 17 (2010).
8 *Id.* at 3.
9 Yang, *supra* note 4, at 7.
10 *See, e.g.,* Yitung Chu, *Constructing Minzu: the Representation of Minzu and Zhonghua Minzu in Chinese Elementary Textbooks*, 39 Discourse: Stud. Cultural Pol. Educ. 943 (2017).
11 *Id.* at 942.
12 Mullaney, *supra* note 7, at 5.
13 *See, e.g.,* Xiaowei Zang, Ethnicity in China: A Critical introduction 13 (2015)
14 *Id.*
15 Linzhu, *supra* note 1, at 13.

exist according to the government.[16] This effort by the Chinese government to decide which groups to grant minority status to is an example of the government exerting power and defining who is and is not a part of the Chinese nation. By dividing up the minority population, it can organize the population to fit its interests in territorial integrity and regional stability.[17]

The CCP claims that all of these minority nationalities identified by the party are a part of the People's Republic of China (PRC) and are members of the Chinese nation (i.e., *zhonghua minzu*). The creation of the term *minzu* symbolizes plurality and unity of all ethnic groups in the state, with the Han Chinese as the main force bringing together the unity. By recognizing certain ethnic groups as a part of China, the party hopes to gain the loyalty of these groups and convince ethnic minorities (i.e., *shaoshu minzu*) that they have been historically and culturally attached to the Chinese nation.[18] The party believes that the construction of *minzu* delegitimizes any *shaoshu minzu*'s claims of national independence, thus reinforcing the party's desire to control and stabilize ethnic minority territories.[19]

II. Linguistic Erasure in TAR and the Tibetan Prefectures

Minzu has been used by the CCP to acknowledge China as a multinational state and promote unity to the party. The party argues that all nationalities are *zhonghua minzu* (members of the Chinese nation) and boasts its multiculturalism.[20] Yet this embrace of multiculturalism is performative and is not reflected in ethnic minority regions. Supporters of the state point to the preferential admission to colleges, exemption from the one-child policy, and proportionate political representation that *shaoshu minzu* receive as examples of the state's support for its ethnic minorities.[21] They also claim that in ethnic minority regions like the TAR, the CCP used its resources to improve the economy, build transportation, and expand Chinese schooling.[22]

Because of such economic development in minority regions and preferential policies that benefit minorities, some may believe that minorities are not being oppressed in China. In reality, the social and economic development in ethnic minority regions hides the power imbalance and inequality between the Han and ethnic minorities. The suppression of minority rights by the state is most evidently seen in the language policies within schools in ethnic minority regions. Half of the PRC's languages are currently endangered, and with the passage and enforcement of more Han ethnocentric language policies, the number of endangered languages will only increase.[23]
While at first glance state policies appear to protect the linguistic diversity of ethnic minorities, the reality is that these policies are often contradicted by state actions and local policies that emphasize Han Chinese over Tibetan. For example, the PRC's regional autonomy law states that minority nationalities have the right to "conduct affairs in their own languages and independently develop education for nationalities."[24] Even though the state may recognize or say that it supports the use of an ethnic minority group's language, there is a lack of institutional support compared to *putonghua* (Mandarin), inevitably causing minority languages to be sidelined.[25] In the TAR—where the most common language is Tibetan—the state supports the optional use of Tibetan instead of compulsory use, resulting in the great difficulty "to study from kindergarten to Ph.D. in Tibetan, and then graduate and work in a predominantly Tibetan-language workplace."[26]

China's *neidiban* schooling policy further escalates the erasure of Tibetan. *Neidiban* schooling is a program by the state that sends Tibetan children (as well as other ethnic minority groups), mostly from unprivileged and rural areas, to boarding schools in inland China where Chinese is the main language of instruction after primary school.[27] This program is voluntary; thousands of Tibetan students apply for the program and only around ten percent of applicants are accepted. Since the national university exams do not include scores of the Tibetan subject in the total score for university exams, neidiban students focus on studying Chinese and lose incentives to study Tibetan properly.[28] If Tibetans want to go to the best inland national universities, then speaking Tibetan is not necessary; it could in fact become burdensome, since that time could be spent studying for the national university exams.

As a result, graduates leave with a stronger grasp on Chinese but often leave with poorer Tibetan skills than they entered, with many graduates claiming that the Tibetan study curriculum was insufficient.[29] Graduates of the *neidiban* program are usually sent back to work in the TAR and Tibetan prefectures, often struggling to communicate in Tibetan and unequipped to work many local jobs that require a high proficiency in Tibetan.[30] While *neidiban* schools allow for Tibetans to enhance their proficiency in Chinese, which can open up more job opportunities for them (especially inland), they lose proficiency in their mother tongue and are hence unable to work local jobs in their community.[31]

Overall, China's Han ethnocentric emphasis on language policy perpetuates structural violence against Tibetans and other minority groups. The structural violence perpetrated by China's language policy in the TAR and Tibetan prefectures is a

16 *Id.* at 14.
17 *Id.*
18 Chu, *supra* note 10.
19 *Id.*
20 Catriona Bass, Education in Tibet: Policy and Practice Since 1950 at 9 (1998).
21 Yang, *supra* note 4, at 8.
22 *Id.*
23 *See* Alexander E. Davis et al., *International Relations and the Himalaya: Connecting Ecologies, Cultures and Geopolitics*, 75 Austl. J. Int'l Aff. 15 (2021).
24 Bass, *supra* note 20, at 229.
25 *See, e.g.,* Gerald Roche, *Articulating Language Oppression: Colonialism, Coloniality and the Erasure of Tibet's Minority Languages*, 53 Patterns Prejudice 487 (2019).
26 *Id.*
27 Anwei Feng, Bilingual Education in China: Practices, Policies, and Concepts 50 (2007).
28 *Id.* at 59.
29 *Id.* at 66.
30 *Id.* at 64.
31 *Id.* at 52.

slow violence, which, according to academic Rob Nixon, is "a violence of delayed destruction that is dispersed across time and space, an attritional violence that is typically not viewed as violence at all."[32] This type of violence may not be as explicit or immediate as other forms of violence and is often ignored by the media because of its slow but severe impact. This structural violence disrupts the transmission of the Tibetan language between generations and promotes assimilation by making desired options impractical and undesirable options both convenient and rewarding.[33]

Furthermore, China's bilingual education system prioritizes Chinese as the language of instruction over Tibetan, causing a language shift in younger generations of Tibetans. China's bilingual education (Tibetan and Chinese) is usually available in urbanized areas in the TAR and Tibetan prefectures, but after primary school, there is a stronger shift to Chinese as the language of instruction instead of Tibetan.[34] In addition, in most schools in the TAR, math and science are taught in Chinese.[35] Studies show that learning in one's mother tongue is key to quality learning and causes students to learn better in all subjects.[36] Using Chinese as the language of instruction over Tibetan can thus lower the quality of education Tibetan students receive.[37] Living under Chinese occupation and recognizing the importance of Chinese in relation to economic opportunities has caused many Tibetans to subconsciously prioritize Chinese and view the language as more beneficial and useful than Tibetan.[38]

III. Politicization of the Tibetan Language

The CCP's language policy forwards a goal of assimilation in the disguise of unity in hopes of stabilizing areas with a high ethnic minority population. The party's overall goal of education for minorities is to encourage political allegiance toward China and enhance stability in border areas.[39] Instead of embracing the linguistic diversity in China and implementing policies that protect the language rights of these ethnic groups, the Chinese government has focused on having minorities assimilate to Han Chinese culture in order to create a sense of national unity and stability.

The CCP's emphasis on national unity as a tool for control can be seen in the context of the TAR and Tibetan prefectures. The CCP claims that Tibet was always a part of China, despite claims by Tibetans and historical evidence on Tibetan sovereignty that proves otherwise.[40] In 1950, the People's Liberation Army invaded Tibet, forcing the Tibetan government to sign the Seventeen Point Agreement and cede Tibet's territory to the PRC.[41] While unrest and resistance to Chinese occupation in parts of Tibet continued, it wasn't until March 10, 1959, that large masses of Tibetans from different parts of Tibet came to Lhasa to protest Chinese occupation.[42] When the Dalai Lama, Tibet's spiritual leader, fled Tibet, resistance against the CCP escalated and demands for an independent Tibet became widespread among Tibetans. Due to Tibet's past instability, the CCP has thus resorted to incentivizing obedience to the state. For example, many Tibetan students and their parents believe that *neidiban* schools are a pathway to social mobility and financial stability.[43] Therefore, a chance of admission to *neidiban* schools may incentivize Tibetan families to avoid protesting or challenging the state.[44] By encouraging national unity and assimilation, the party hopes to gain the loyalty of minorities and stabilize ethnic minority regions, like TAR, that are challenging party policy or even Chinese occupation. Under these policies, ethnic and linguistic differences are to be gradually erased in the face of perceived external threats such as separatism.[45]

As a result, the politicization of the Tibetan language can be understood as deriving from the CCP's belief that protecting language rights in Tibet correlates to a lack of loyalty to the state. For instance, in early 2016, Tibetan shopkeeper Tashi Wangchuk from Yushu Prefecture was secretly detained by Chinese police for months and later charged for "inciting separatism" due to his participation in a *New York Times* documentary.[46] In the documentary, he expressed his concern over China's new language policies as well as the erasure of the Tibetan language in schools and the business world by the state.[47] The arrest of Tashi, a man who criticized the state's treatment of the Tibetan language, is an example of how the state views expanding support for ethnic minority languages as tied to the increase in separatist activity. Hence, instead of providing a sufficient amount of institutional support for languages like Tibetan, the Chinese government has chosen to emphasize Han ethnocentric policies that contribute to the language oppression of Tibetans.

Despite the CCP's efforts, new bilingual education policies inside the TAR and Tibetan prefectures have caused concern over cultural preservation and sparked resistance from Tibetan communities. In October 2010, Tibetan language-related protests broke out in Qinghai Province after a ten-year bilingual education policy that would prioritize Chinese as the lan-

32 Rob Nixon, Slow Violence and the Environmentalism of the Poor 2 (2011).
33 Roche, *supra* note 25.
34 Feng, supra note 27, at 52.
35 *Id.*
36 Zehlia Babaci-Wilhite, Language, Development Aid and Human Rights in Education 5 (2015).
37 *See* Zhiyong Zhu, State Schooling and Ethnic Identity: The Politics of a Tibetan Neidi Secondary School in China 5 (2007).
38 Feng, *supra* note 27, at 52.
39 Bass, *supra* note 20, at 10.
40 Sam van Schaik, Tibet: A History 210 (2011).
41 *Id.*
42 *Id.* at 234.
43 Yang, *supra* note 4, at 101.
44 *See, e.g.,* James Leibold, *Interior Ethnic Minority Boarding schools: China's Bold and Unpredictable Educational Experiment*, 43 Asian Stud. Rev. 3 (2018).
45 Francoise Robin, Streets, Slogans and Screens: New Paradigms for the Defence of the Tibetan Language, *in* On the Fringes of the Harmonious Society: Tibetans and Uyghurs in Socialist China 209 (Trine Brox & Ildikó Bellér-Hann eds., 2014).
46 Chris Buckley, *A Tibetan Tried to Save His Language. China Handed Him 5 Years in Prison.*, N.Y. Times (May 22, 2018), https://www.nytimes.com/2018/05/22/world/asia/tibetan-activist-tashi-wangchuk-sentenced.html.
47 *Id.*

guage of instruction over Tibetan was introduced.[48] The policy reduced teaching of Tibetan language and downgraded the Tibetan language "to be treated only as a language class, and with less time accorded to it in the curriculum."[49] This policy and many other bilingual education policies in the past have caused anxiety among the Tibetan community over language preservation. Out of fear of the Tibetan language dying out in future generations, Tibetans have expressed their anxieties through protest and argued that the policy went against language rights that were supposed to be protected in the constitution and other laws. Not only did Tibetan students express concern, but a group of former Tibetan Chinese government officials from Qinghai also sent a petition arguing against the policy to the provincial education department.[50] In response to the protests, the CCP tried to convince the masses that the new language policy would be beneficial to minority nationalities since fluency in the dominant language would be important for an individual's future. It also argued that the policy was beneficial since it would link linguistic unity with national and ethnic unity.[51] As a result of the protests, attempts in 2010 and 2012 to implement Qinghai's bilingual education policy were put on hold.[52]

Despite the CCP's claim that the bilingual policy would be beneficial to students, there was a thirty to thirty-five percent decline in grades of Tibetan students after the policy was implemented.[53] The new bilingual education policy in Qinghai does not help preserve the Tibetan language.[54] These bilingual education policies put not only an academic strain on students, but also a socio-emotional strain. China's bilingual education system has weakened students' fluency in Tibetan, and people who call out the problems with the system become at risk of being labeled as separatists or those trying to harm the state's goal of national unity.[55] The linguistic diversity of *shaoshu minzu* has become mutually exclusive to the *zhonghua minzu* identity. Through these policies, the CCP sends the message that ethnic minority groups must assimilate to be loyal to the party and to reap the economic benefits of being fluent in the dominant language.[56]

IV. Conclusion

The construction of *minzu* and its denotations (*shaoshu minzu* and *zhonghua minzu*) have been used to further perpetuate Han ethnocentrism through a notion of unity, rather than to truly embrace the multinationalism of the state. The party's emphasis on Han ethnocentrism has forced minority groups to assimilate and has escalated the cultural erasure of minority groups. Based on party attitudes toward *shaoshu minzu*, national unity and the cultural preservation of certain ethnic minority groups are at odds under China's current ethnocentric policies. Rather than making Chinese compulsory or prioritizing Chinese over minority languages, the Chinese government should encourage the use of minority languages as the language of instruction in these minority (*shaoshu minzu*) regions. Protests by Tibetans surrounding language rights are still rampant inside the TAR and Tibetan prefectures today. In 2014, protests broke out in Dzorge County after a Chinese official said the Chinese language and Chinese-medium teaching should be the focus for Tibetan students rather than the Tibetan language.[57] In 2016, a group of Tibetans in Qinghai protested "against lack of support for Tibetan-language teaching in their area."[58] Similarly, petitions and letters surrounding Tibetan language rights have been created in 2015, 2016, and 2018 in different counties in Qinghai.[59] A starting point in combatting the assimilation and linguistic erasure promoted by the construction of *minzu* should be through a reclamation of Tibetan as the language of instruction in the TAR and Tibetan prefectures.

48 Robin, *supra* note 45.
49 Int'l Campaign for Tibet, Preliminary Observations of the International Campaign for Tibet Regarding the People's Republic of China's Report to the Committee on the Rights of the Child (2012), https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/CHN/INT_CRC_NGO_CHN_13778_E.pdf.
50 Lekey Leidecker, Global Nonviolent Action Database, Tibetan Students Campaign to Defend Tibetan Language in Schools (Oct. 14, 2010), https://nvdatabase.swarthmore.edu/content/tibetan-students-campaign-defend-tibetan-language-schools-tibet-and-china-2010.
51 Robin, *supra* note 45, at 215.
52 Sophie Richardson et al., Hum. Rights Watch, China's "Bilingual Education" Policy in Tibet: Tibetan-Medium Schooling Under Threat (2020), https://www.hrw.org/sites/default/files/report_pdf/tibet0320_web_0.pdf.
53 Robin, *supra* note 45, at 216.
54 *Id.* at 213.
55 Feng, *supra* note 27, at 52.
56 Robin, *supra* note 45, at 215.
57 Richardson et al., *supra* note 52.
58 *Id.*
59 *Id.*

Zoning and Land Use Planning — Racial and Health Inequities in Environmental Public Health in New York City

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Primarily driven by an idea that the urban environment could be improved by "technical expertise, scientific knowledge, and rational city planning," zoning emerged as a city policy in the United States in the period of time from the 1890s to 1920s known as the Progressive Era, when widespread social activism and political reforms took place.[1] Zoning reached its zenith in the early twentieth century. On July 25, 1916, New York City passed the nation's first comprehensive zoning ordinance. Since then, this urban planning method has been extensively adopted across the United States to manage land use, urban life, and transportation technology.[2] In 1926, over five hundred U.S. municipalities had adopted similar zoning ordinances.[3] By 1932, there were 766 comprehensive zoning ordinances across the nation.[4]

Commonly used in urban planning as a regulatory measure, zoning entails the division of a community into districts or zones where residential, commercial, or industrial activities are permitted or prohibited.[5] Goals of zoning vary from building height regulation and facilitation of new investment or development in cities, to requiring "private developers to create or fund affordable residential units when they construct new market-rate residential buildings."[6] While zoning may seem to serve a city's welfare and progress as a whole, such city policy often leads to land-use conflicts between the commercial, industrial, and civic sector. The commercial sector's interests are often prioritized, thus providing them an upper hand in decision making. For instance, despite the initial goal of the 1916 New York City Zoning Ordinance to regulate building heights, the passage of the ordinance was primarily driven by the Fifth Avenue Association, a group of investors, retail merchants, property owners, hotel operators, and real estate brokers attempting to "stabilize and reinforce the image of Fifth Avenue between 32nd and 59th streets as a high-class shopping district."[7]

Moreover, the effectiveness, legitimacy, and constitutionality of zoning has been widely questioned since its early days of implementation, as seen in *Lincoln Trust Co. v. Williams Building Corp., Village of Euclid v. Ambler Realty Company*, and *Penn Central Transportation Co. v. City of New York*.[8] For example, Marc A. Weiss, the Chairman and CEO of Global Urban Development, previously criticized that although zoning may have helped to produce a new, distinctive form of architecture in New York City, "it did little to reduce the level of density and overcrowding" and instead led to the disappearance of open spaces on both the ground and the sky.[9] Such debates prevail today, as case studies repeatedly show zoning to be a cause of racial segregation, health inequity, and environmental injustice. Examples of such range from New York City's racialized environmental regulations, asthma politics, and trash politics in the 1900s, to Hoffman et al.'s recent study on the connection between redlining and intra-urban heat inequities and Richardson et al.'s report on redlined neighborhoods demonstrating greater incidence of COVID-19 risk factors[10] — a few of which this paper will discuss. As a result, zoning has become an alluring yet controversial urban development and planning strategy.

This paper analyzes zoning policies in the United States in the early 1900s as racialized processes through the lenses of race, class, and gender. It argues that zoning laid the groundwork for racial and health inequities in the realm of environmental public health, which have, and continue to, put the lives of many of the United States' ethnic minority, working-class, immigrant neighborhoods at risk. Section I examines the history, law, and constitutionality of zoning in the United States through using New York City as a case study. In particular, it does so in the backdrop of *Village of Euclid v. Ambler Realty Company*, given the case's significance in the United States' land use planning history and how it has defined conventional land use zoning, better known as Euclidean zoning, Section II follows to review

1 Fransisco Branco, "Social Reform in the US: Lessons from the Progressive Era." *Soc. Work and the Making of Soc. Policy* 71-88 (Ute Klammer et al., 1st Ed., 2019) https://doi.org/10.2307/j.ctvhktj6v.
2 Julie Sze, Noxious New York: The Racial Politics of Urban Health and Environmental Justice 41 (2006).
3 Jessica Yager & Vicky Chau, *Zoning for Affordability: Using the Case of New York to Explore Whether Zoning Can Be Used to Achieve Income-Diverse Neighborhoods*. Lincoln Inst. of Land Policy 21 (2016).
4 Sze, *supra* note 2.
5 William A. Fischel, Zoning Rules! : The Economics of Land Use Regulation 28 (2015).
6 Yager & Chau, *supra* note 3, at 1.
7 Marc A. Weiss, *Skyscraper Zoning: New York's Pioneering Role*. 58 No. 2 Journal of the Am. Planning Ass'n 201 (1992).
8 Yager & Chau, *supra* note 3, at 21.
9 Weiss, *supra* note 7, at 209.
10 Jason Richardson, Bruce C. Mitchell, Jad Edlebi, Helen C.S. Meier & Emily Lynch, Nat'l Cmty. Reinvestment Coal., The Lasting Impact of Historic "Redlining" on Neighborhood Health: Higher Prevalence of COVID-19 Risk Factors (2020), https://ncrc.org/holc-health/; Jeremy S. Hoffman, Vivek Shandas & Nicholas Pendleton, *The Effects of Historical Housing Policies on Resident Exposure to Intra-Urban Heat: A Study of 108 US Urban Areas*. 11 8, No. 1, 12 Climate (2020). https://doi.org/10.3390/cli8010012; Sze, *supra* note 2, at 42-141.

how current zoning practices epitomize the urgent need for a diversified, community-centric urban planning approach and present solutions on leveraging urban planning toward racial and environmental justice.

I. New York City Case Study

As Joseph Schilling from the Urban Institute and former lawyer Leslie S. Linton from Health Policy Consulting Group discuss in their article, "the protection of public health runs throughout zoning's history and is central to the legal justification for zoning."[11] During the Industrial Revolution, the population and size of many major cities in Europe and the United States surged as people arrived to work in the steel, coal, and manufacturing industries.[12] The U.S. population continued to grow at a rate of 56.7 percent from 1960 to 2000.[13] In the nineteenth century, industrialists often saw smoke, smog and dirt as "an exemplification of productive labor, full employment, and social progress."[14] This notion began to change as a shared connection between urban planning and public health evolved from the nineteenth century sanitary movement to early twentieth century Progressive Era reforms to clean up food, water, and air.[15]

Progressive reformers strategized based upon the miasma theory, which advocates for a relationship between weather, atmosphere, and disease to explain the causation of diseases.[16] The theory was proposed by Edwin Chadwick, who pioneered London's sanitary reforms and advocated for an environmental approach to disease control. Chadwick suggested that economic class and physical living conditions, rather than character or morality, were the sources of disease.[17] This sparked the growing need for regulatory, legal measures to advance public health and welfare. As a result, public health laws and zoning emerged and laid a constitutional foundation for public nuisance jurisprudence, with aims to protect the health, safety, and welfare of the general public using state and local police powers.[18]

Some zoning practices, however, soon diverged away from their initial public health premise and instead, were manipulated to segregate White and non-White communities, as well as to prioritize the health and quality of live of the former. As Richard Rothstein from the Economic Policy Institute wrote in his book *The Color of Law*, the use of "industrial, even toxic waste zoning, to turn African American neighborhoods into slums...became increasingly common as the twentieth century proceeded and manufacturing operations grew in urban areas".[19] "The pattern was confirmed in a 1983 analysis by the U.S. General Accounting Office (GAO)", which concluded that "across the nation, commercial waste treatment facilities or uncontrolled waste dumps were more likely to be found near African American than white residential areas."[20] Studies conducted by the Commission for Racial Justice of the United Churches of Christ and by Greenpeace at about the same time as GAO's report also concluded that "the percentage of minorities living near incinerators was 89 percent higher than the national median".[21]

Although zoning may present itself as a quick and easy explanation to the disproportionate distribution of toxic waste facilities, Julie Sze — professor at University of California, Davis and the founding director of the Environmental Justice Project for Davis' John Muir Institute for the Environment — highlights in the first chapter of her work *Noxious New York* that

> the neutral answer to the question of why noxious facilities are concentrated in areas with high populations of working-class and non-white populations is that zoning allows such uses. However, this answer in isolation ignores the complexity of how health and illness have historically been stratified in New York City by race and class through the spatial organization of the urban environment.[22]

Hence, examining racial and health inequities associated with urban planning through zoning at large without looking into a place's planning history is fundamentally insufficient. To this end, as the first city in the United States to pass a citywide comprehensive zoning ordinance, as well as one of the nation's largest and most racially diverse metropolitan area, New York City presents as a prime location to examine the relationship between urban planning and environmental public health through the lens of race, class, and zoning. To analyze the intertwined history and relationship of racial and health inequities in the urban environment, the following provides a chronology of landmark zoning ordinances and cases that took place in the 1900s.

1916 New York City Zoning Ordinance

The Zoning Ordinance passed in July 1916 categorized zoning districts into three types according to use, height, and area, in which "use" determined whether land was used for residence, business, or unrestricted (mostly industrial) uses.[23] The preamble of the Zoning Resolution states that "this Resolution is adopted in order to promote and protect public health, safety, and general welfare" along with adequate light and air; yet, as aforementioned, a major portion of the Ordinance catered to the real estate market and retail businesses' interests. The Fifth Avenue Association, specifically retail merchants, aimed to control private property and prevent the northward expansion of the garment industry through zoning laws to limit building heights within the district and to reduce the number and size of loft manufacturing buildings.[24] Under the Ordinance, "large

11 Joseph Schilling & Leslie S. Linton, *The Public Health Roots of Zoning: In Search of Active Living's Legal Genealogy*. 28 Am. Journal of Preventive Med. 102 (2005).
12 *Id.*
13 Rutherford H. Platt, Land Use and Society: Geography, Law, and Public Policy 33 (Island Press 3d ed. 1996) (2014).
14 Sze, *supra* note 2, at 27.
15 *Id.* at 31.
16 *Id.* at 30.
17 *Id.*
18 Schilling & Linton, *supra* note 11, at 99.
19 Richard Rothstein, The Color of Law 54 (2017).
20 *Id.*
21 *Id.* at 55.
22 Sze, *supra* note 2, at 28.
23 *Id.* at 41.
24 Weiss, *supra* note 7, at 202.

areas of the Bronx, Brooklyn, and Queens were classified as unrestricted (with less protection than residential areas), including many poor and working-class areas in New York City."[25] The categorization of use districts also resulted in varying protections and regulations across the city, whereby residential areas enjoyed the greatest protection while unrestricted areas were dominated by industrial activities with limited environmental regulation.

Village of Euclid v. Ambler Realty Company (1926)

Zoning was first upheld by the U.S. Supreme Court case Village of Euclid v. Ambler Realty Company in 1926. The Supreme Court approved zoning and the right of local governments to regulate land use within their boundaries, establishing "the constitutionality of zoning through the mechanism of police power."[26] The Ambler Realty Company had originally owned sixty-eight acres of land in the village of Euclid, Ohio; however, the company's building development began to face restrictions as Euclid adopted its first zoning ordinance on November 13, 1922.[27] Euclid's zoning ordinance was largely based on the 1916 New York City Zoning Ordinance and hence takes a similar map-based approach in zoning. As the 1922 Euclid zoning ordinance restricted the types of buildings that Amber Realty could build, the company filed a suit against the village, claiming that the ordinance violated the Fourteenth Amendment's protections of liberty and property.[28]

Ambler Realty first sued Euclid in state court and lost, so they brought the case to the Federal District Court of Northern Ohio, where Judge David Westenhaver ruled for Ambler Realty.[29] Following the federal court's ruling, Euclid appealed to the Supreme Court. Ultimately, in a 6-3 opinion delivered by Justice George Sutherland, the Supreme Court concluded that Ambler Realty's speculative claims on damages caused by Euclid's zoning ordinance were insufficient to invalidate the ordinance itself, or, in other words, the exercise of the village's police power.[30] The Court affirmed that a local government derives its zoning and police power at large through state allocation to municipalities. Zoning ordinances that exclude apartment houses from desirable residential districts were not arbitrary and unreasonable, nor was excluding apartment houses, business houses, retail stores, and shops from residential districts invalid.[31] In addition, the Court established that zoning regulations must find justification in police power "asserted for the public welfare," affirming that the legitimacy of a local government's zoning power should not be determined by "abstract consideration of building or use," but should rather be based on circumstances and locality.[32]

The significance of *Euclid* in the United States' land use planning history can be analyzed through three major outcomes of the case. Firstly, the Supreme Court's landmark decision in the *Euclid* case signalled a formal approval of zoning specifically based on the public health principles of public nuisance law.[33] A public nuisance refers to "one which affects at the same time an entire community or neighborhood, or any considerable number of persons."[34] This includes "water and air pollution, the storage of explosives, and the emission of loud noises and bad odors", and more.[35] Thus, public nuisance law prohibits one from using their property to harm others or the neighborhood, and was used to resolve many disputes and policy conflicts over land use which were deemed harmful to public health or general welfare during the early years of American jurisprudence.[36] Yet, as *Euclid's* ruling upholds the constitutionality of zoning within the legitimate scope of police power, subsequent court decisions on zoning have been refined to "affirm its use to preserve property rights and the residential quality of life," causing zoning to delineate from its public health premise and exclusionary zoning ordinances to prevail in White suburbs across the country.[37]

Secondly, the *Euclid* case provided a new term for map-based, conventional zoning: "Euclidean" zoning. The term references Euclid's zoning map and its outcomes, which categorizes a single land-use type for each piece of land through different colors, shades, and geometry of city streets and linear zone borders.[38] This zoning method soon became a widespread standard for zoning practices across municipalities and was used to ensure that residences predominantly occupied by White communities would be far from industrial areas and any toxic waste facilities.[39] Euclidean zoning, however, has been widely criticized for its exclusionary principles and adverse impacts on public health and the living environment. For instance, Schilling and Linton argue that Euclidean zoning led to reduced pedestrian-friendly development and physical activity, and in turn, growing rates of obesity and chronic diseases.[40] Urban activist Jane Jacobs presents similar criticisms on Euclidean zoning in her influential book *The Death and Life of Great American Cities*, in which she proposes mixed-use districts, as opposed to Euclidean zoning's single-use approach, as one of the key design principles for urban vitality and diversity. Jacobs further emphasizes that "intricate minglings of different uses in cities are not a form of chaos. On the contrary, they represent a complex and highly developed form of order."[41] The urban activist's ideas eventually developed to become one of the core values of placemaking, a modern community-centric urban design approach that seeks to strengthen the connections be-

25 Sze, *supra* note 2, at 41.
26 Sze, *supra* note 2, at 41.
27 Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926)
28 *Id.*
29 *Village of Euclid v. Ambler Realty Co.*, Case Western Reserve University https://case.edu/ech/articles/v/village-euclid-v-ambler-realty-co.
30 *Id.*
31 *Id.*
32 *Id.*
33 Schilling & Linton, *supra* note 11, at 98-99.
34 *Civil Code*, California Legislative Information https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=CIV&division=4.&title=1.&part=3.&chapter=&article= (Jan. 1, 2019)
35 Schilling & Linton, *supra* note 11, at 99.
36 *Id.* at 98-99.
37 *Id.*; Rothstein, *supra* note 19, at 53.
38 Fischel, *supra* note 5, at 67.
39 Benjamin Schneider, *CityLab University: Zoning Codes*, Bloomberg CityLab (Aug. 6, 2019, 5:53 AM), https://www.bloomberg.com/news/articles/2019-08-06/how-to-understand-municipal-zoning-codes
40 Schilling & Linton, *supra* note 10, at 102.
41 Jane Jacobs, The Death and Life of Great American Cities 222 (2011).

tween people and places, of which Section II of this paper will discuss in further detail.

Thirdly, the *Euclid* case justified the use of zoning codes and in turn foreshadowed the prevalence of Euclidean and exclusionary zoning in city planning since its ruling. The Federal District Court of Northern Ohio ruled for Ambler Realty, in which Judge David Westenhaver wrote that "the blighting of property values and the congestion of population, whenever…certain foreign races invade a residential section…was so well-known as to be within judicial cognizance," and that "the result to be accomplished [by Euclid's law] is to classify the population and segregate them according to their income or situation in life."[42] The Supreme Court reversed the lower court's ruling in a 6-3 decision, in which Supreme Court Justice Sutherland explained that "very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district" and that under such circumstances, apartment houses "come very near to being nuisances."[43] The use of "mere parasite" and "nuisances" in Justice Sutherland's statement denounced the racial motivations behind Euclidean zoning, of which was briefly mentioned in Justice Westenhaver's opinion. However, one should also note that although Justice Westenhaver ruled for Ambler Realty and was seemingly aware of the racial inequities associated with the village's zoning ordinance, his use of the verb "invade" in describing the assimilation of "foreign races" in the neighborhood may still be perceived as disturbing and prejudiced for many. Both justices' use of derogatory words depicted the hostile and discriminatory attitude of city planners toward people of color, as well as certain policymakers and elected officials' ignorance of the welfare of low-income, minority communities; hence, the ruling of the *Euclid* case instilled the nation's already existing caste system of racial inequality and segregation.[44]

1961 Revision of the New York City Zoning Ordinance

The New York City Zoning Ordinance was revised in 1961 to adapt to the city's growing population and changing urban landscape. In the report and blueprint of the 1961 resolution, *Plan for Rezoning the City of New York*, consultants Harrison, Ballard, and Allen provided four reasons for the need to update the 1916 ordinance: inadequacy, inflexibility, irrelevance, and confusion. Specifically, Harrison, Ballard, and Allen stated that existing regulations "fail to provide the protection which the greatest city in the world deserves" and that land was "not effectively reserved for the vital needs of industry and commerce."[45] On a similar note, in 1938, the Mayor's Committee on City Planning stated that "half of the inhabitants of the City lived in non-residential districts; and at present over half of the area of the Commercial Districts is actually used for residence."[46] Therefore, the report demonstrated a strong preference for maintaining industrial growth areas and assumed residential districts to be the only ideal area for people to live in.

Instead of dividing the City into residence, business, and unrestricted districts, the 1961 New York City Zoning Ordinance changed the three categories to residential, commercial, and manufacturing. In addition, the resolution reduced the allowable population density from fifty-five million in the 1916 ordinance to twelve million and "replaced the setback requirements with restrictions based on floor area ratios."[47] However, despite such changes, the new ordinance failed to improve the poor living environments of low-income and racial minority populations, who have always been overrepresented in areas designated by city agencies as non-residential districts.[48] The revised ordinance continued to distribute and concentrate manufacturing and industrial activities in neighborhoods with fewer financial and social resources to organize politically, especially those of low-income, working class, and people of color. Louis Winnick, a former Ford Foundation economist, addressed the impacts of the 1961 ordinance on New York City in his publication on the history of Sunset Park in 1990, which examines how zoning has accelerated housing decline and abandonment in the City's neighborhoods. Precisely, Winnick's statistics show that "over 2,000 residences, containing an estimated 10,000 people," were placed into nonconforming status and areas that receive no regulations under the revised zoning ordinance.[49]

A. Systemic Racism and Environmental Health Inequities

Zoning in New York City did not only lead to racial inequities, but also caused detrimental impacts on the health of ethnic minority, working-class, and immigrant communities with relation to their surrounding built environment. As Rothstein discussed in *The Color of Law*, zoning had two faces. "One face, developed in part to evade a prohibition on racially explicit zoning" with the attempt to keep African Americans and lower-income families out of expensive White neighborhoods; and the other "to protect White neighborhoods from deterioration by ensuring that few industrial or environmentally unsafe businesses could locate in them."[50]

In the case of New York City, there were three major environmental health inequities that alluded to Rothstein's statement: racialized environmental regulation, asthma politics, and trash politics. The 1916 Zoning Ordinance had a disproportionate effect on racial minorities in New York City. The displacement of the garment industry, for example, forced minority workers, predominantly Asian American, Puerto Rican, and African American women to relocate to environmentally unsafe work environments like sweatshops. These locations tend to have poor environmental regulations; as a result, workers had to face an increased exposure to fibre particles, dyes, formaldehydes, and arsenic, and in turn, high rates of respiratory ill-

42 Fischel, *supra* note 5, at 76; Sze, *supra* note 2, at 42; cf. E. F. Murphy, Euclid and the Environment, *Zoning and the American Dream: Promises Still to Keep* 154–86 (C. Haar, and J. Kayden ed. 1989).
43 Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926); Rothstein, *supra* note 19, at 52-53.
44 Schilling & Linton, supra note 10, at 100.
45 Harrison, Ballard & Allen, Plan for Rezoning the City of New York 4 (1950).
46 *Id.*
47 Weiss, *supra* note 7, at 209.
48 Sze, *supra* note 2, at 45.
49 Louis Winnick, New People in Old Neighborhoods: The Role of Immigrants in Rejuvinating New York's Communities 91 (1990).
50 Rothstein, *supra* note 19, at 56-57.

nesses.[51] By the late 1990s, studies from various organizations, including the United Church of Christ and the Environmental Protection Agency, had repeatedly proven race to be associated with the location of commercial hazardous waste facilities and penalties for environmental pollution.[52] Specifically, Lavelle and Coyle's article in *The National Law Journal* reported that penalties at sites having the greatest White population were five hundred percent higher than penalties of sites with the greatest minority population.[53] For one, this stark contrast highlights how regulatory agencies prioritized concerns of White communities over that of non-Whites; in addition, it showcases how segregated land use planning leads to the creation of exclusive White neighborhoods and urban low-income, minority slums.

Aside from disproportionate environmental regulations across zoned areas, researchers also connected racial zoning to the growing childhood asthma rates in New York City during the 1980s and 1990s. Childhood asthma arose as a prevalent public health issue in poorer populations and urban areas, and has affected low-income minority youth with a racial disparity that has grown steadily since 1980.[54] According to the Centers for Disease Control, asthma attack rates are thirty-two percent higher in African Americans than in White Americans, and Black children are four times more likely to die from asthma than White children. Asthma also carries burdens of gender stigmas, as it was often depicted as a female health problem and mothers were often criticized for being overprotective of their children.[55] Such stigmatization of asthma politics disregards the fact that under the City's zoning ordinances, most low-income, minority communities had limited housing choices and were forced into living in districts categorized as unrestricted or industrial, where there are high risks of air pollution, fragile health status, and minimal public health protections.

Racial and health inequities of asthma also tie in closely with New York City's trash politics. The City relied on a truck-based garbage export system and particulate air pollution from diesel fuel for trucks led to high rates of asthma.[56] In particular, a study conducted by the Centers for Disease Control in 2000 showed that thirty percent of the students at a local South Bronx elementary school suffered from asthma.[57] The City also had poor regulatory enforcement over operations at waste transfer stations. Waste transfer stations were clustered in neighborhoods including Williamsburg, Sunset Park, and South Bronx, with over half of the fifty-four private waste transfer stations located in South Bronx and Williamsburg.[58] It is important to note that these areas were already subject to limited protections and regulations under the effects of zoning ordinances. Thus, top down, racial zoning demonstrates city planners' decision to avoid the deterioration of White neighborhoods at the expense of places where low-income and minority populations reside.

II. Moving Forward: Community-Centric Urban Planning for Racial and Environmental Justice

Zoning policies may not be inherently discriminatory, but they do mirror, magnify, and at times exacerbate social stratification based on race and class, resulting in racial and health inequities in the urban landscape. City planning has the potential of shaping our built environments into welcoming, clean, and healthy spaces, but could also easily misshape our built environments into hostile and segregated lands when race and class are considered as key measures in public policy making.

Fortunately, the shared experiences of environmental racism and public health inequities in New York City have given rise to numerous community-based environmental justice campaigns. The Young Lords Garbage Offensive of 1969 was an instance when a group of young, low-income Puerto Rican piled up and burned garbage in East Harlem as a means to protest the lack of garbage collection services in the neighborhood.[59] A number of other environmental justice movements also took place in recent years. A multi-racial/ethnic organizing campaign consisting of Asian immigrants and Latino communities was organized in Sunset Park to combat a proposed sludge treatment plant in the early 1990s. This coalition was unique as it shed light on how diverse communities could mobilize around common concerns for health and the environment. In this case, the Chinese and Latino communities have been suffering from elevated asthma rates due to excessive pollution from the immense traffic on the nearby Gowanus Expressway.[60]

Later in 1991, community activists across neighborhoods networked and formed the New York City Environmental Justice Alliance, which aims to empower communities of color and to advocate for improved environmental conditions. The Alliance places people of color in leadership roles, focuses on solution-building processes, and has become a pioneer in environmental monitoring projects that use mapping tools and geographic information systems. An outcome of this is the Waterfront Justice Project Interactive Map, a research and advocacy campaign that seeks to "reduce potential toxic exposures and public health risks associated with climate change and storm surge in the City's industrial waterfront."[61]

It is important, however, to note that community activism is not sufficient to revamp the existing rigid structure of city planning, or to eradicate the nation's history of systemic racism

51 Julie Sze, *Asian American Activism for Environmental Justice.* 16 No. 2 Peace Review (2004).
52 Rothstein, *supra* note 19, at 56; United Church of Christ, Toxic Wastes and Race in the United States. A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites (1987) https://www.nrc.gov/docs/ML1310/ML13109A339.pdf.
53 Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law*, 15 The Nat'l L.J. 2 (1992) https://www.ejnet.org/ej/nlj.pdf.
54 Sze, *supra* note 2, at 92; cf. Centers for Disease Control. Measuring Childhood Asthma Prevalence Before and After the 1997 Redesign of the National Health Interview Survey—United States. Morbidity and Mortality Weekly Report 908–11. (49 NO. 40 2000).
55 Sze, *supra* note 2, at 95.
56 *Id.* at 110.
57 *Id.*
58 *Id.* at 113-14.
59 Sze, *supra* note 2, at 50.
60 Sze, *supra* note 2, at 88.
61 New York City Env't Justice All., Waterfront Justice Project Interactive Map https://www.nyc-eja.org/waterfront-map/.

that still exists today. Inclusion of low-income and minority communities in the process of planning and budget making is crucial, and is the sole way to ensure that all stakeholders of a neighborhood, district or city are represented, with their needs and concerns being heard, reflected, and acted upon. To this end, placemaking — a community-centric urban planning approach that emphasizes on people, place, and connection — serves as a viable solution. Early concepts of placemaking were first introduced by urbanists William H. Whyte and Jane Jacobs in the 1960s but did not become consolidated till the 1990s, when the Project for Public Spaces — an organization that promotes placemaking initiatives around the world — began using the term.[62] Today, placemaking has become a community-centric design process that emphasizes on the "needs, aspirations, desires, and visions" of individuals and drives community participation. This urban design approach continues to "inspire people to collectively reimagine and reinvent public spaces as the heart of every community" and advocate shared-use spaces as opposed to single-use ones as seen in Euclidean zoning.[63]

Moreover, while city and state governments across the nation should reassess the extent of judicial deference that may be granted to zoning power, the government should also increase the utility, accessibility, and transparency of spatial data for environmental monitoring through scientific research, or even community resilience projects like the Waterfront Justice Project Interactive Map. Well-informed planning and policy decisions should be supported by extensive data; for instance, the National Longitudinal Land Use Survey maps and analyzes the relationship between land use practices and socio-economic conditions, such as housing supply and affordability as well as racial and economic segregation.[64] Furthermore, the use of artificial intelligence and geographic information systems should extend toward research in mitigating climate change and injustice, along with building climate resilience. Hoffman et al.'s recent study examines the connection between redlining and heat disparities through looking into the distribution of tree cover areas versus paved surfaces in historically redlined areas across the United States, and concluded that "cities experiencing the greatest exposure to present and potentially future extreme heat are living in neighborhoods with the least social and ecosystem services historically."[65]

New York City's racial and health inequities, along with its environmental justice campaigns and the City's urban planning history, reflect the complex, inextricable relationship between race, urban planning, and environmental public health. This case study also reminds us that race and history play a central role in community consciousness of land use and development, and that the negative impacts of zoning endure across generations. Discourses in zoning and city planning must not stop at the planning stage; what is put within each district and neighborhood are equally as important as the uses designed for each public or private space, whether that be the landscape, transportation, or infrastructure. While zoning may still be seen as a controversial or segregatory planning method, the transition toward a community-centric urban design and planning process shall mark the nation's step toward reintegrating its segregated population and eventually eradicating the flaws of existing racial zoning practices. As we move on, through integration and diversification, we may perhaps be able to envision a future where our built environments are more just, healthy, and equitable for all.

62 Susanna Moreira, *What is Placemaking?* (Tarsila Duduch trans.) ArchDaily (May 27, 2021), https://www.archdaily.com/961333/what-is-placemaking.
63 Project for Public Spaces, *Placemaking* https://assets-global.website-files.com/5810e16fbe876cec6bcbd86e/5a6a1c930a6e6500019faf5d_Oct-2016-placemaking-booklet.pdf.
64 Urban Inst., National Longitudinal Land Use Survey (NLLUS) https://www.nyc-eja.org/waterfront-map/. https://datacatalog.urban.org/dataset/national-longitudinal-land-use-survey-nllus.
65 Hoffman et al., *supra* note 10, at 11.

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