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ERIC YOUNG, B.A., M.L.S., J.D.
“No Better Than They Deserve:” *Dred Scott* and Constitutional Democracy  
*Mark Graber* ........................................................................................................................................... 589

*Dred Scott*, Lincoln, and the Constitution: A Reply to Professor Graber  
*John T. Valauri* ........................................................................................................................................ 619

*Dred Scott*: The Decision That Sparked a Civil War  
*Dr. Roberta Alexander* ............................................................................................................................ 643

Interest Convergence and the Education of African-American Boys in Cincinnati: Motivating Suburban Whites to Embrace Interdistrict Education Reform  
*David A. Singleton* .................................................................................................................................... 663

Is Classism the New Racism? Avoiding Strict Scrutiny’s Fatal in Fact Consequences By Diversifying Student Bodies on the Basis of Socioeconomic Status  
*Genevieve Campbell* .................................................................................................................................. 679

*Doe v. Kamehameha Schools*: What is the Proper Standard for Analyzing a § 1981 Claim?  
*Rebecca L. Faust* ...................................................................................................................................... 703

Keeping Your Name and Images Private – How Existing Property Law and Requests for Removal Could Stop Unauthorized Display of Your Identity Online  
*Matthew D. Hemmer* ............................................................................................................................... 723

An Emerging Civil Rights Movement: Immigrant Populations in Need of Equal Protection Under the Fourteenth Amendment  
*Hannah Whitney McMurry Schrock* .......................................................................................................... 749
ERRATA

After Issue 3 of this Volume was published, it was brought to our attention that two appendices for Kentucky Blue Sky Law: A Practitioner’s Guide to Kentucky’s Registrations and Exemptions were not included. Those appendices are included here instead. The materials are Forms U-1 and U-7, and they are referenced at pages 508 and 514, respectively.

Our apologies,

Rebecca L. Cull
Editor in Chief
Northern Kentucky Law Review
2007-2008

Form U-1
Uniform Application to Register Securities

Application to [ ] of the State of [ ]

pursuant to Section [ ] of the [ ]

1. Name and Address of Issuer and principal office in this state:

2. Name, address and telephone number of correspondent to whom notices and communications regarding this application may be sent:

3. Name and address of applicant:

4. Registration or acceptance for filing is sought for the following described securities in the amounts indicated:

<table>
<thead>
<tr>
<th>Descriptions of Securities</th>
<th>Offering Price or Proposed Offering Price</th>
<th>No. of Shares or Units</th>
<th>Amount</th>
<th>No. of Shares or Units</th>
<th>Amount</th>
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Total Offering

Offering in this State

<table>
<thead>
<tr>
<th>Amount</th>
<th>Amount</th>
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<tbody>
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<td></td>
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</table>

Totals: $ [ ] $ [ ]

Indicate the maximum commission to be charged: [ ]%

5. Amount of filing and examination fees which are enclosed: $ [ ] $ [ ]

6. A Registration Statement was filed with the Securities and Exchange Commission on [ ] and [ ] became [ ] will become effective on [ ]

7. (a) List the states in which it is proposed to offer the securities for sale to the public.

[ ]
(b) List the states, if any, in which the securities are eligible for sale to the public.

(c) List the states, if any, which have refused, by order or otherwise, to authorize sale of the securities to the public, or have revoked or suspended the right to sell the securities or in which an application has been withdrawn.

8. Submitted herewith as part of this application are the following documents (documents on file may be incorporated by reference):

(a) One copy of the Registration Statement and two copies of the Prospectus in the latest form on file under the Securities Act of 1933.
(b) Underwriting Agreement, Agreement among Underwriters, and Selected Dealers Agreement.
(c) Indenture.
(d) Issuer's charter or articles of incorporation as amended to date.
(e) Issuer’s by-laws as amended to date.
(f) Signed copy of opinion of counsel filed with Registration Statement pursuant to the Securities Act of 1933.
(g) Specimen (type of security)
(h) Consent to service of process accompanied by appropriate corporate resolution.
(i) If an earning computation or similar requirement is required to be met in this state, attach a separate sheet as an exhibit showing compliance.
(j) One copy of all advertising matter to be used in connection with the offering.
(k) Others (list each):

9. The applicant hereby applies for registration or acceptance for filing of the above described securities under the law cited above and in consideration thereof agrees so long as the registration remains in effect that it will:

(a) Advise the above named state authority of any change prior to registration in this state in any of the information contained herein or in any of the documents submitted with or as part of this application.
(b) File with the above named state authority within two business days after filing with the Securities and Exchange Commission (i) any amendments other than delaying amendments to the federal registration statement, designating the changed, revised, or added material or information by
underlining the same; and (ii) the final prospectus, or any further amendments or supplements thereto.

(c) Notify the above named state authority within two business days (i) upon the receipt of any stop order, denial, order to show cause, suspension or revocation order, injunction or restraining order, or similar order entered or issued by any state or other regulatory authority or by any court, concerning the securities covered by this application or other securities of the issuer currently being offered to the public; and (ii) upon the receipt of any notice of effectiveness of said registration by the Securities and Exchange Commission.

(d) Notify the above named state authority at least two business days prior to the effectiveness of said registration with the Securities and Exchange Commission of (i) any request by the issuer or applicant to any other state or regulatory authority for permission to withdraw any application to any other state or regulatory authority for permission to withdraw any application to register the securities described herein; and (ii) a list of all states in which applications have been filed where the issuer or applicant has received notice from the state authority that the application does not comply with state requirements and cannot or does not intend to comply with such requirements.

(e) Furnish promptly all such additional information and documents in respect to the issuer or the securities covered by this application as may be requested by the above named state authority prior to registration or acceptance for filing.
U-1 Part 2

Date: __________________________

________________________
(Name of Applicant)

BY: __________________________
(Name and Title)

STATE OF ___________________________

COUNTY OF ___________________________

The undersigned, ___________________________,
being first duly sworn, deposes and says:

That he/she has executed the foregoing application for and on behalf of the applicant named therein; that he/she is __________________________ of such applicant and is fully authorized to execute and file such application; that he/she is familiar with such application; and that to the best of his/her knowledge, information and belief the statements made in such application are true and the documents submitted therewith are true copies of the originals thereof.

________________________
(Name of Applicant)

Subscribed and sworn to before me this ________ day of __________

________________________
(Notarial Seal)

________________________
NOTARY PUBLIC

In and for the County of __________________________ State of __________________________

My Commission Expires: __________
FOR AN ACKNOWLEDGEMENT OF THE FILING OF THIS APPLICATION COMPLETE THE FOLLOWING

Name and address of correspondent:

__________

Applicant: ____________________________

Issuer: ____________________________

State of: ____________________________ File Number: ____________________________

Examiner: ____________________________

Telephone: ____________________________
FORM SCOR
DISCLOSURE DOCUMENT

(Exact name of Company as set forth in Articles of Incorporation or Charter)

Type of securities offered:
Maximum number of securities offered:
Minimum number of securities offered:
Price per security: $  
Total proceeds: If maximum sold: $  
If minimum sold: $  
(For use of proceeds and offering expenses, see Question Nos. 9 and 10)

Is a commissioned selling agent selling the securities in this offering?  
☐ Yes  ☐ No  
If yes, what percent is commission of price to public?  %.  

Is there other compensation to selling agent(s)?  
☐ Yes  ☐ No  

Is there a finder's fee or similar payment to any person?  
☐ Yes  ☐ No  
(See Question No. 22)

Is there an escrow of proceeds until minimum is obtained?  
☐ Yes  ☐ No  
(See Question No. 26)

Is this offering limited to members of a special group, such as employees of the Company or individuals?  
☐ Yes  ☐ No  
(See Question No. 25)

Is transfer of the securities restricted?  
☐ Yes  ☐ No  
(See Question No. 25)

In making an investment decision investors must rely on their own examination of the person or entity creating the securities and the terms of the offering, including the merits and risks involved. These securities have not been
recommended by any federal or state securities commission or regulatory authority. Furthermore, the foregoing authorities have not confirmed the accuracy or determined the adequacy of this document. Any representation to the contrary is a criminal offense.

This Company:

☐ Has never conducted operations.
☐ Is in the development stage.
☐ Is currently conducting operations.
☐ Has shown a profit in the last fiscal year.
☐ Other (Specify):
   (Check at least one, as appropriate)

SEE QUESTION NO. 2 FOR THE RISK FACTORS THAT MANAGEMENT BELIEVES PRESENT THE MOST SUBSTANTIAL RISKS TO AN INVESTOR IN THIS OFFERING.

This offering has been registered for offer and sale in the following states:

<table>
<thead>
<tr>
<th>State</th>
<th>State File No.</th>
<th>Effective Date</th>
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## TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>THE COMPANY</td>
<td>xx</td>
</tr>
<tr>
<td>RISK FACTORS</td>
<td>xx</td>
</tr>
<tr>
<td>BUSINESS AND PROPERTIES</td>
<td>xxi</td>
</tr>
<tr>
<td>OFFERING PRICE FACTORS</td>
<td>xxvii</td>
</tr>
<tr>
<td>USE OF PROCEEDS</td>
<td>xxix</td>
</tr>
<tr>
<td>CAPITALIZATION</td>
<td>xxxii</td>
</tr>
<tr>
<td>DESCRIPTION OF SECURITIES</td>
<td>xxxiii</td>
</tr>
<tr>
<td>PLAN OF DISTRIBUTION</td>
<td>xxxvi</td>
</tr>
<tr>
<td>DIVIDENDS, DISTRIBUTION AND REDEMPTIONS</td>
<td>xxxix</td>
</tr>
<tr>
<td>OFFICERS AND KEY PERSONNEL OF THE COMPANY</td>
<td>xxxix</td>
</tr>
<tr>
<td>DIRECTORS OF THE COMPANY</td>
<td>xlii</td>
</tr>
<tr>
<td>PRINCIPAL STOCKHOLDERS</td>
<td>xlv</td>
</tr>
<tr>
<td>MANAGEMENT RELATIONSHIPS, TRANSACTIONS AND REMUNERATION</td>
<td>xlviii</td>
</tr>
</tbody>
</table>
INVESTMENT IN SMALL BUSINESSES INVOLVES A HIGH DEGREE OF RISK, AND INVESTORS SHOULD NOT INVEST ANY FUNDS IN THIS OFFERING UNLESS THEY CAN AFFORD TO LOSE THEIR INVESTMENT IN ITS ENTIRETY.

THIS DISCLOSURE DOCUMENT CONTAINS ALL OF THE REPRESENTATIONS BY THE COMPANY CONCERNING THIS OFFERING, AND NO PERSON SHALL MAKE DIFFERENT OR BROADER STATEMENTS THAN THOSE CONTAINED HEREIN. INVESTORS ARE CAUTIONED NOT TO RELY UPON ANY INFORMATION NOT EXPRESSLY SET FORTH IN THIS DISCLOSURE DOCUMENT.

This Disclosure Document, together with Financial Statements and other Attachments, consists of ______ pages
THE COMPANY

1. Exact corporation name:

State and date of incorporation:

Street address of principal office:

Company Telephone Number: (   )

Fiscal year:

(month) (day)

Person(s) to contact at Company with respect to offering:

Telephone Number (if different from above): (   )

RISK FACTORS

2. List in the order of importance the factors which the Company considers to be the most substantial risks to an investor in this offering in view of all facts and circumstances or which otherwise make the offering one of high risk or speculation (i.e., those factors which constitute the greatest threat that the investment will be lost in whole or in part, or not provide an adequate return).

(1)

(2)

(3)

(4)

(5)

(6)
NOTE: In addition to the above risks, businesses are often subject to risks not foreseen or fully appreciated by management. In reviewing this Disclosure Document potential investors should keep in mind other possible risks that could be important.

BUSINESS AND PROPERTIES

3. With respect to the business of the Company and its properties:

(a) Describe in detail what business the Company does and proposes to do, including what products or goods are or will be produced or services that are or will be rendered.

(b) Describe how these products or services are to be produced or rendered and how and when the Company intends to carry out its activities. If the Company plans to offer a new product(s), state the present stage of development, including whether or not a working prototype(s) is in existence. Indicate if completion of development of the product would require a material amount of the resources of the Company, and the estimated amount. If the Company is or is expected to be dependent upon one or a limited number of suppliers for essential raw materials, energy or other items, describe. Describe any major existing supply contracts.
Describe the industry in which the Company is selling or expects to sell its products or services and, where applicable, any recognized trends within that industry. Describe that part of the industry and the geographic area in which the business competes or will compete. Indicate whether competition is or is expected to be by price, service, or other basis. Indicate (by attached table if appropriate) the current or anticipated prices or price ranges for the Company's products or services, or the formula for determining prices, and how these prices compare with those of competitors' products or services, including a description of any variations in product or service features. Name the principal competitors that the Company has or expects to have in its area of competition. Indicate the relative size and financial and market strengths of the Company's competitors in the area of competition in which the Company is or will be operating. State why the Company believes that it can effectively compete with these and other companies in its area of competition.
Note: Because this Disclosure Document focuses primarily on details concerning the Company rather than the industry in which the Company operates or will operate, potential investors may wish to conduct their own separate investigation of the Company's industry to obtain broader insight in assessing the Company's prospects.

(d) Describe specifically the marketing strategies the Company is employing or will employ in penetrating its market or in developing a new market. Set forth in response to Question No. 4 below the timing and size of the results of this effort which will be necessary in order for the Company to be profitable. Indicate how and by whom its products or services are or will be marketed (such as by advertising, personal contact by sales representatives, etc.), how its marketing structure operates or will operate and the basis of its marketing approach, including any market studies. Name any customers that account for, or based upon existing orders will account for, a major portion (20% or more) of the Company's sales. Describe any major existing sales contracts.

(e) State the backlog of written firm orders for products and/or services as of a recent date (within the last 90 days) and compare it with the backlog of a year ago from that date.

As of: / / $ (a recent date)

As of: / / $ (one year earlier)

Explain the reason for significant variations between the two figures, if any. Indicate what types and amounts of orders are included in the backlog figures. State the size of typical
orders. If the Company's sales are seasonal or cyclical, explain.

(e) State the number of the Company's present employees and the number of employees it anticipates it will have within the next 12 months. Also, indicate the number by type of employee (i.e., clerical, operations, administrative, etc.) the Company will use, whether or not any of them are subject to collective bargaining agreements, and the expiration date(s) of any collective bargaining agreement(s). If the Company's employees are on strike, or have been in the past three years, or are threatening to strike, describe the dispute. Indicate any supplemental benefits or incentive arrangements the Company has or will have with its employees.

(f) Describe generally the principal properties (such as real estate, plant and equipment, patents, etc.) that the Company owns, indicating also what properties it leases and a summary of the terms under those leases, including the amount of payments, expiration dates and the terms of any renewal options. Indicate what properties the Company intends to acquire in the immediate future, the cost of such acquisitions and the sources of financing it expects to use in obtaining these properties, whether by purchase, lease or otherwise.
(g) Indicate the extent to which the Company's operations depend or are expected to depend upon patents, copyrights, trade secrets, know-how or other proprietary information and the steps undertaken to secure and protect this intellectual property, including any use of confidentiality agreements, covenants-not-to-compete and the like.
Summarize the principal terms and expiration dates of any significant license agreements. Indicate the amounts expended by the Company for research and development during the last fiscal year, the amount expected to be spent this year and what percentage of revenues research and development expenditures were for the last fiscal year.

(h) If the Company's business products, or properties are subject to material regulation (including environmental regulation) by federal, state, or local governmental agencies, indicate the nature and extent of regulation and its effects or potential effects upon the Company.

(j) State the names of any subsidiaries of the Company, their business purposes and ownership, and indicate which are included in the Financial Statements attached hereto.

(k) Summarize the development of the Company (including any material mergers or acquisitions) during the past five years, or for whatever lesser period the Company has been in existence. Discuss any pending or anticipated mergers, acquisitions, spin-offs or recapitalizations. If the Company has recently undergone a stock split, stock dividend or recapitalization in anticipation of this offering, describe (and adjust historical per share figures elsewhere in this Disclosure Document accordingly).
4. (a) If the Company was not profitable during its last fiscal year, list below in chronological order the events which in management's opinion must or should occur or the milestones which in management's opinion the Company must or should achieve in order for the Company to become profitable, and indicate the expected manner of occurrence or the expected method by which the Company will achieve the milestones.

<table>
<thead>
<tr>
<th>Event or milestone</th>
<th>Expected manner of occurrence or method of achievement</th>
<th>Date, or number of months after receipt of proceeds, when should be accomplished</th>
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</table>

(b) State the probable consequences to the Company of delays in achieving each of the events or milestones within the above time schedule, and particularly the effect of any delays upon the Company's liquidity in view of the Company's then anticipated level of operating costs. (See Question Nos. 11 and 12)

Note: After reviewing the nature and timing of each event or milestone, potential investors should reflect upon whether achievement of each within the estimated time frame is realistic and should assess the consequences of delays or failure of achievement in making an investment decision.
OFFERING PRICE FACTORS

If the securities offered are common stock, or are exercisable for or convertible into common stock, the following factors may be relevant to the price at which the securities are being offered.

5. What were net, after-tax earnings last year? (If losses, show in parenthesis.)

Total $ Per share based upon number of shares outstanding after this offering if all securities sold: $

6. If the Company had profits, show offering price as a multiple of earnings. Adjust to reflect for any stock splits or recapitalization, and use conversion or exercise price in lieu of offering price, if applicable.

\[
\text{Offering Price Per Share} = \frac{\text{Net After-Tax Earnings Last Year Per Share}}{(\text{price/earnings multiple})}
\]

7. (a) What is the net tangible book value of the Company? (If deficit, show in parenthesis.) For this purpose, net tangible book value means total assets (exclusive of copyrights, patents, goodwill, research and development costs and similar intangible items) minus total liabilities.

$ Per share based upon number of shares outstanding immediately prior to this offering: $

If the net tangible book value per share is substantially less than this offering (or exercise or conversion) price per share, explain the reasons for the variation.

(b) State the dates on which the Company sold or otherwise issued securities during the last 12 months, the amount of such securities sold, the number of persons to whom they were sold, any relationship of such persons to the Company
at the time of sale, the price at which they were sold and, if not sold for cash, a concise description of the consideration. (Exclude bank debt.)

8. (a) What percentage of the outstanding shares of the Company will the investors in this offering have? (Assume exercise of options, warrants or rights and conversion of convertible securities.)

If the maximum is sold: %

If the minimum is sold: %

(b) What value is management attributing to the entire Company by establishing the price per security set forth on the cover page (or exercise or conversion price if common stock is not offered)? (Total outstanding shares after offering times offering price, or exercise or conversion price if common stock is not offered.)

If maximum is sold: $

If minimum is sold: $

(For above purposes, assume convertible securities are converted and outstanding options exercised in determining "shares")

Note: After reviewing the above, potential investors should consider whether or not the offering price (or exercise or conversion price, if applicable) for the securities is appropriate at the present stage of the Company's development.
## USE OF PROCEEDS

9. **If Minimum Sold** & **If Maximum Sold**

<table>
<thead>
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<th>Amount</th>
<th>%</th>
<th>Amount</th>
<th>%</th>
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<tbody>
<tr>
<td><strong>Total Proceeds</strong></td>
<td>$ 100%</td>
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<td>$ 100%</td>
<td></td>
</tr>
<tr>
<td><strong>Less: Offering</strong></td>
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<tr>
<td><strong>Expenses</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Commissions and</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Finders Fees</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Legal &amp; Accounting</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Copying &amp;</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Advertising</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other (Specify):</td>
<td>$</td>
<td></td>
<td>$</td>
<td></td>
</tr>
</tbody>
</table>

**Net Proceeds from Offering**

**Use of Net Proceeds**

$  %

**Total Use of Net Proceeds**

$ 100%  $  %

$ 100%

**Note:** After reviewing the portion of the offering allocated to the payment of offering expenses, and to the immediate payment to management and promoters of any fees, reimbursements, past salaries or similar payments, a potential investor should consider whether the remaining portion of his investment,
which would be that part available for future development of the Company's business and operations, would be adequate.

9. (a) If there are no minimum amount of proceeds that must be raised before the Company may use the proceeds of the offering, describe the order or priority in which the proceeds set forth above in the column "If Maximum Sold" will be used.

10. (a) If material amounts of funds from sources other than this offering are to be used in conjunction with the proceeds from this offering, state the amounts and sources of such other funds, and whether funds are firm or contingent. If contingent, explain.

(b) If any material part of the proceeds is to be used to discharge indebtedness, describe the terms of such indebtedness, including interest rates. If the indebtedness to be discharged was incurred within the current or previous fiscal year, describe the use of the proceeds of such indebtedness.

(c) If any material amount of the proceeds is to be used to acquire assets, other than in the ordinary course of business, briefly describe and state the cost of the assets and other material terms of the acquisitions. If the assets are to be acquired from officers, directors, employees or principal stockholders of the Company or their associates, give the names of the persons from whom the assets are to be acquired and set forth the cost to the Company, the method followed in determining the cost, and any profit to such persons.
(d) If any amount of the proceeds is to be used to reimburse any officer, director, employee or stockholder for services already rendered, assets previously transferred, monies loaned or advanced, or otherwise, explain:

11. Indicate whether the Company is having or anticipates having within the next 12 months any cash flow or liquidity problems and whether or not it is in default or in breach of any note, loan, lease or other indebtedness or financing arrangement requiring the Company to make payments. Indicate if a significant amount of the Company's trade payables have not been paid within the stated trade term. State whether the Company is subject to any unsatisfied judgments, liens or settlement obligations and the amounts thereof. Indicate the Company's plans to resolve any such problems.

12. Indicate whether proceeds from this offering will satisfy the Company's cash requirements for the next 12 months, and whether it will be necessary to raise additional funds. State the source of additional funds, if known.
CAPITALIZATION

13. Indicate the capitalization of the Company as of the most recent practicable date and as adjusted to reflect the sale of the minimum and maximum amount of securities in this offering and the use of the net proceeds therefrom:

<table>
<thead>
<tr>
<th>Amount Outstanding</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Adjusted</td>
<td>As of:</td>
</tr>
<tr>
<td></td>
<td></td>
<td>/ (date)</td>
</tr>
<tr>
<td>Debt:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Short-term debt</td>
<td></td>
<td>$</td>
</tr>
<tr>
<td>(average interest</td>
<td></td>
<td></td>
</tr>
<tr>
<td>rate %)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Long-term debt</td>
<td></td>
<td>$</td>
</tr>
<tr>
<td>(average interest</td>
<td></td>
<td></td>
</tr>
<tr>
<td>rate %)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total Debt</td>
<td></td>
<td>$</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Stockholders equity</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(deficit):</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Preferred stock-par</td>
<td></td>
<td></td>
</tr>
<tr>
<td>value x no. of</td>
<td></td>
<td>$</td>
</tr>
<tr>
<td>outstanding shares</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(By class of</td>
<td></td>
<td></td>
</tr>
<tr>
<td>preferred in order</td>
<td></td>
<td></td>
</tr>
<tr>
<td>of preferences)</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>$</td>
</tr>
<tr>
<td></td>
<td></td>
<td>$</td>
</tr>
<tr>
<td></td>
<td></td>
<td>$</td>
</tr>
<tr>
<td>Common stock-par</td>
<td></td>
<td></td>
</tr>
<tr>
<td>value x no. of</td>
<td></td>
<td></td>
</tr>
<tr>
<td>outstanding shares</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>$</td>
</tr>
<tr>
<td>Additional paid in</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>$</td>
</tr>
</tbody>
</table>
capital $ $ $ 
Retained earnings (deficit) $ $ $ 
Total stockholders equity (deficit) $ $ $ 
Total Capitalization $ $ $ 

Number of preferred shares authorized to be outstanding:

<table>
<thead>
<tr>
<th>Class of Preferred</th>
<th>Number of Shares Authorized</th>
<th>Par Value Per Share</th>
</tr>
</thead>
</table>

Number of common shares authorized: shares. Par value per share, if any: $ 

Number of common shares reserved to meet conversion requirements or for the issuance upon exercise of options, warrants or rights: ____ shares.

**DESCRIPTION OF SECURITIES**

14. The securities being offered hereby are:
   - Common Stock
   - Preferred or Preference Stock
   - Notes or Debentures
   - Units of two or more type of securities composed of:
   - Other:

15. These securities have:
   - Yes No
     - Cumulative voting rights
     - Other special voting rights
Preemptive rights to purchase in new issues of shares
Preference as to dividends or interest
Preference upon liquidation
Other special rights or preferences (specify):

Explain:

16. Are the securities convertible? □ Yes □ No
   If so, state conversion price or formula.
   Date when conversion becomes effective: / /
   Date when conversion expires: / /

17. (a) If securities are notes or other types of debt securities:

   (1) What is the interest rate? %
   If interest rate is variable or multiple rates, describe:

   (2) What is the maturity date? / /
   If serial maturity dates, describe:

   (3) Is there a mandatory sinking fund? □ Yes □ No
   Describe:

   (4) Is there a trust indenture? □ Yes □ No
   Name, address and telephone number of Trustee

   (5) Are the securities callable or subject to redemption? □ Yes □ No
   Describe, including redemption prices:

   (6) Are the securities collateralized by real or personal property? □ Yes □ No
   Describe:

   (7) If these securities are subordinated in right of payment of interest or principal, explain the terms of such subordination.
How much currently outstanding indebtedness of the Company is senior to the securities in right of payment of interest or principal? $.

How much indebtedness shares in right of payment on an equivalent (pari passu) basis? $.

How much indebtedness is junior (subordinated to the securities)? $________.

(b) If notes or other types of debt securities are being offered and the Company had earnings during its last fiscal year, show the ratio of earnings to fixed charges on an actual and pro forma basis for that fiscal year. "Earnings" means pre-tax income from continuing operations plus fixed charges and capitalized interest. "Fixed charges" means interest (including capitalized interest), amortization of debt discount, premium and expense, preferred stock dividend requirements of majority owned subsidiary, and such portion of rental expense as can be demonstrated to be representative of the interest factor in the particular case. The pro forma ratio of earnings to fixed charges should include incremental interest expense as a result of the offering of the notes or other debt securities.

<table>
<thead>
<tr>
<th>Last Fiscal Year</th>
<th>Actual</th>
<th>Pro Forma</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Minimum</td>
<td>Maximum</td>
</tr>
</tbody>
</table>

"Earnings" =
"Fixed Charges"

If no earnings, show
"Fixed Charges" only

**Note:** Care should be exercised in interpreting the significance of the ratio of earnings to fixed charges as a measure of the "coverage" of debt service, as the existence of earnings does not necessarily mean that the Company's liquidity at any given time will permit payment of debt
service requirements to be timely made. See Question Nos. 11 and 12. See also the Financial Statements and especially the Statement of Cash Flows.

18. If securities are Preference or Preferred stock:
   Are unpaid dividends cumulative? [ ] Yes [ ] No
   Are securities callable? [ ] Yes [ ] No

   Explain:

   Note: Attach to this Disclosure Document copies or a summary of the charter, by law or contractual provision or document that gives rise to the rights of holders of Preferred or Preference Stock, notes or other securities being offered.

19. If securities are capital stock of any type, indicate restrictions on dividends under loan or other financing arrangements or otherwise:

20. Current amount of assets available for payment of dividends (if deficit must be first made up, show deficit in parenthesis): $. 

   PLAN OF DISTRIBUTION

21. The selling agents (that is, the persons selling the securities as agent for the Company for a commission or other compensation) in this offering are:

   Name:                           Name:
   Address:                        Address:
   Telephone ( )                  Telephone ( )
22. Describe any compensation to selling agents or finders, including cash, securities, contracts or other consideration, in addition to the cash commission set forth as a percent of the offering price on the cover page of this Disclosure Document. Also indicate whether the Company will indemnify the selling agents or finders against liabilities under the securities laws. ("Finders" are persons who for compensation act as intermediaries in obtaining selling agents or otherwise making introductions in furtherance of this offering.)

23. Describe any material relationships between any of the selling agents or finders and the Company or its management.

Note: After reviewing the amount of compensation to the selling agents or finders for selling the securities, and the nature of any relationship between the selling agents or finders and the Company, a potential investor should assess the extent to which it may be inappropriate to rely upon any recommendation by the selling agents or finders to buy the securities.

24. If this offering is not being made through selling agents, the names of persons at the Company through which this offering is being made:

Name:
Address:

Telephone (  )Name:
Address:
Telephone (  )
22. If this offering is limited to a special group, such as employees of the Company, or is limited to a certain number of individuals (as required to qualify under Subchapter S of the Internal Revenue Code) or is subject to any other limitations, describe the limitations and any restrictions on resale that apply:

Will the certificates bear a legend notifying holders of such restrictions? □ Yes □ No

26. (a) Name, address and telephone number of independent bank or savings and loan association or other similar depository institution acting as escrow agent if the proceeds are escrowed until minimum proceeds are raised:

(b) Date at which funds will be returned by escrow agent if minimum proceeds are not raised:

Will interest on proceeds during escrow period be paid to investors? □ Yes □ No

27. Explain the nature of any resale restrictions on presently outstanding shares, and when those restrictions will terminate, if this can be determined:

Note: Equity investors should be aware that unless the Company is able to complete a further public offering or the Company is able to be sold for cash or merged with a public company that their investment in the Company may be illiquid indefinitely.
DIVIDENDS, DISTRIBUTION AND REDEMPTIONS

28. If the Company has within the last five years paid dividends, made distributions upon its stock or redeemed any securities, explain how much and when:

OFFICERS AND KEY PERSONNEL OF THE COMPANY

29. Chief Executive Officer: Title:

Name: Age:

Office Street Address:

Telephone No.: ( )

Names of employers, titles and dates of positions held during past five years with an indication of job responsibilities:

Education (degrees, schools, and dates):

Also a Director of the Company? [ ] Yes [ ] No

Indicate amount of time to be spent on Company matters if less than full time:

30. Chief Operating Officer: Title:

Name: Age:
Office Street Address:

Telephone No.: ( )

Names of employers, titles and dates of positions held during past five years with an indication of job responsibilities.

Education (degrees, schools, and dates):

Also a Director of the Company? ☐ Yes ☐ No

Indicate amount of time to be spent on Company matters if less than full time:

31. Chief Financial Officer: Title:

Name: Age:

Office Street Address:

Telephone No.: ( )

Names of employers, titles and dates of positions held during past five years with an indication of job responsibilities.

Education (degrees, schools, and dates):

Also a Director of the Company? ☐ Yes ☐ No

Indicate amount of time to be spent on Company matters if less than full time:

32. Other Key Personnel:
(A) Name:    Age:

Title:

Office Street Address:

Telephone No.:    ( )

Names of employers, titles and dates of positions held during past five years with an indication of job responsibilities.

Education (degrees, schools, and dates):

Also a Director of the Company?  Yes  No

Indicate amount of time to be spent on Company matters if less than full time:

(B) Name:    Age:

Title:

Office Street Address:

Telephone No.:    ( )

Names of employers, titles and dates of positions held during past five years with an indication of job responsibilities.

Education (degrees, schools, and dates):

Also a Director of the Company?  Yes  No

Indicate amount of time to be spent on Company matters if less than full time:
DIRECTORS OF THE COMPANY

33. Number of Directors: If Directors are not elected annually, or are elected under a voting trust or other arrangement, explain:

34. Information concerning outside or other Directors (i.e. those not described above):

(A) Name:    Age:

Office Street Address:

Telephone No.: (   )

Names of employers, titles and dates of positions held during past five years with an indication of job responsibilities.

Education (degrees, schools, and dates):

(B) Name:    Age:

Office Street Address:

Telephone No.: (   )

Names of employers, titles and dates of positions held during past five years with an indication of job responsibilities.

Education (degrees, schools, and dates):

(C) Name:    Age:

Office Street Address:

Telephone No.: (   )
Names of employers, titles and dates of positions held during past five years with an indication of job responsibilities.

Education (degrees, schools, and dates):

35.  (a) Have any of the Officers or Directors ever worked for or managed a company (including a separate subsidiary or division of a larger enterprise) in the same business as the Company?  ☐ Yes  ☐ No
Explain:

(b) If any of the Officers, Directors or other key personnel have ever worked for or managed a company in the same business or industry as the Company or in a related business or industry, describe what precautions, if any, (including the obtaining of releases or consents from prior employers) have been taken to preclude claims by prior employer for conversion or theft of trade secrets, know-how or other proprietary information.

(c) If the Company has never conducted operations or is otherwise in the development stage, indicate whether any of the Officers or Directors has ever managed any other company in the start-up or development stage and describe the circumstances, including relevant dates.
(d) If any of the Company's key personnel are not employees but are consultants or other independent contractors, state the details of their engagement by the Company.

(e) If the Company has key man life insurance policies on any of its Officers, Directors or key personnel, explain, including the names of the persons insured, the amount of insurance, whether the insurance proceeds are payable to the Company and whether there are arrangements that require the proceeds to be used to redeem securities or pay benefits to the estate of the insured person or to a surviving spouse.

36. If a petition under the Bankruptcy Act or any State insolvency law was filed by or against the Company or its Officers, Directors or other key personnel, or a receiver, fiscal agent or similar officer was appointed by a court for the business or property of any such persons, or any partnership in which any of such persons was general partner at or within the past five years, or any corporation or business association of which any such person was an executive officer at or within the past five years, set forth below the name of such persons, and the nature and date of such actions.

Note: After reviewing the information concerning the background of the Company's Officers, Directors and other key personnel, potential investors should consider whether or not these persons have adequate background and experience to develop and operate this Company and to make it successful. In this regard, the experience and ability of management are often considered the most significant factors in the success of a business.
PRINCIPAL STOCKHOLDERS

37. Principal owners of the Company (those who beneficially own directly or indirectly 10% or more of the common and preferred stock presently outstanding) starting with the largest common stockholder. Include separately all common stock issuable upon conversion of convertible securities (identifying them by asterisk) and show average price per share as if conversion has occurred. Indicate by footnote if the price paid was for a consideration other than cash and the nature of any such consideration.

Name:

Office Street Address:

Telephone No. ( )

Principal occupation:
### Class of Shares

<table>
<thead>
<tr>
<th>Class of Shares</th>
<th>No. of Shares Held After Offering, if All Securities Sold</th>
<th>% of Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Average Price</td>
<td>No. of Shares Per Share Now % of Total Sold Total</td>
<td></td>
</tr>
</tbody>
</table>

Name:

Office Street Address:

Telephone No. ( )

Principal occupation:

<table>
<thead>
<tr>
<th>Class of Shares</th>
<th>No. of Shares Held After Offering, if All Securities Sold</th>
<th>% of Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Average Price</td>
<td>No. of Shares Per Share Now % of Total Sold Total</td>
<td></td>
</tr>
</tbody>
</table>

Name:

Office Street Address:

Telephone No. ( )
Principal occupation:

<table>
<thead>
<tr>
<th>Class of Shares</th>
<th>Average Price Per Share</th>
<th>No. of Shares Now Held</th>
<th>% of Total Shares Held</th>
<th>No. of shares Held After Offering, if All Securities Sold</th>
<th>% of Total Shares Sold</th>
</tr>
</thead>
</table>

38. Number of shares beneficially owned by Officers and Directors as a group:

Before offering: shares (% of total outstanding)

After offering: a) Assuming minimum securities sold: shares (% of total outstanding)
   b) Assuming maximum securities sold: shares (% of total outstanding)

(Assume all options exercised and all convertible securities converted.)
MANAGEMENT RELATIONSHIPS, TRANSACTIONS AND REMUNERATION

39.  (a) If any of the Officers, Directors, key personnel or principal stockholders are related by blood or marriage, please describe.

(b) If the Company has made loans to or is doing business with any of its Officers, Directors, key personnel or 10% stockholders, or any of their relatives (or any entity controlled directly or indirectly by any of such persons) within the last two years, or proposes to do so within the future, explain. (This includes sales or lease of goods, property or services to or from the Company, employment or stock purchase contracts, etc.) State the principal terms of any significant loans, agreements, leases, financing or other arrangements.

(c) If any of the Company's Officers, Directors, key personnel or 10% stockholders has guaranteed or co-signed any of the Company's bank debt or other obligations, including any indebtedness to be retired from the proceeds of this offering, explain and state the amounts involved.

40.  (a) List all remuneration by the Company to Officers, Directors and key personnel for the last fiscal year:

<table>
<thead>
<tr>
<th></th>
<th>Cash</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chief Executive Officer</td>
<td>$</td>
<td>$</td>
</tr>
<tr>
<td>Chief Operating Officer</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Chief Accounting Officer</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Key Personnel:</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Others:

Total: $ $ $ $ 
Directors as a group (number of persons) $ $ $ $ 

(b) If remuneration is expected to change or has been unpaid in prior years, explain:

(c) If any employment agreements exist or are contemplated, describe:

41. (a) Number of shares subject to issuance under presently outstanding stock purchase agreements, stock options, warrants or rights: shares (% of total shares to be outstanding after the completion of the offering if all securities sold, assuming exercise of options and conversion of convertible securities). Indicate which have been approved by shareholders. State the expiration dates, exercise prices and other basic terms for these securities:

(b) Number of common shares subject to issuance under existing stock purchase or option plans but not yet covered by outstanding purchase agreements, options or warrants: shares.
(b) Describe the extent to which future stock purchase agreements, stock options, warrants or rights must be approved by shareholders.

42. If the business is highly dependent on the services of certain key personnel, describe any arrangements to assure that these persons will remain with the Company and not compete upon any termination:

Note: After reviewing the above, potential investors should consider whether or not the compensation to management and other key personnel directly or indirectly, is reasonable in view of the present stage of the Company's development.

LITIGATION

43. Describe any past, pending or threatened litigation or administrative action which has had or may have a material effect upon the Company's business, financial condition, or operations, including any litigation or action involving the Company's Officers, Directors or other key personnel. State the names of the principal parties, the nature and current status of the matters, and amounts involved. Give an evaluation by management or counsel, to the extent feasible, of the merits of the proceedings or litigation and the potential impact on the Company's business, financial condition, or operations.
FEDERAL TAX ASPECTS

44. If the Company is an S corporation under the Internal Revenue Code of 1986, and it is anticipated that any significant tax benefits will be available to investors in this offering, indicate the nature and amount of such anticipated tax benefits and the material risks of their disallowance. Also, state the name, address and telephone number of any tax advisor that has passed upon these tax benefits. Attach any opinion or any description of the tax consequences of an investment in the securities by the tax advisor.

Name of Tax Advisor:
Address:

Telephone No. (   )

Note: Potential investors are encouraged to have their own personal tax consultant contact the tax advisor to review details of the tax benefits and the extent that the benefits would be available and advantageous to the particular investor.

MISCELLANEOUS FACTORS

44. Describe any other material factors, either adverse or favorable, that will or could affect the Company or its business (for example, discuss any defaults under major contracts, any breach of bylaw provisions, etc.) or which are necessary to make any other information in this Disclosure Document not misleading or incomplete.
FINANCIAL STATEMENTS

46. Attach reviewed or audited financial statements for the last fiscal year and unaudited financial statements for any interim periods thereafter. If since the beginning of the last fiscal year the Company has acquired another business the assets or net income of which were in excess of 20% of those for the Company, show pro forma combined financial statements as if the acquisition had occurred at the beginning of the Company's last fiscal year.

The Company does hereby agree to provide to investors in this offering for five years (or such longer period as required by law) hereafter annual financial reports containing a balance sheet as of the end of the Company's fiscal year and a statement of income for said fiscal year, all prepared in accordance with generally accepted accounting principles and accompanied by an independent accountant's report. If the Company has more than 100 security holders at the end of the fiscal year, the financial statements shall be audited.
MANAGEMENT'S DISCUSSION AND ANALYSIS'S

47. If the Company's financial statements show losses from operations, explain the causes underlying these losses and what steps the Company has taken or is taking to address these causes.

48. Describe any trends in the Company's historical operating results. Indicate any changes now occurring in the underlying economics of the industry or the Company's business which, in the opinion of Management, will have a significant impact (either favorable or adverse) upon the Company's results of operations within the next 12 months, and give a rough estimate of the probable extent of the impact, if possible.

49. If the Company sells a product or products and has had significant sales during its last fiscal year, state the existing gross margin (net sales less cost of such sales as presented in accordance with generally accepted accounting principles) as a percentage of sales for the last fiscal year: %. What is the anticipated gross margin for next year of operations? Approximately %. If this is expected to change, explain. Also, if reasonably current gross margin figures are available for the industry, indicate these figures and the source or sources from which they are obtained.
50. Foreign sales as a percent of total sales for last fiscal year: %. Domestic government sales as a percent of total domestic sales for last fiscal year: %. Explain the nature of these sales, including any anticipated changes:

SIGNATURES

A majority of the Directors and the Chief Executive and Financial Officers of the Company shall sign this Disclosure Document on behalf of the Company and by so doing thereby certify that each has made diligent efforts to verify the material accuracy and completeness of the information herein contained. By signing this Disclosure Document, the Chief Executive and Chief Financial Officers agree to make themselves, the Company's books and records, copies of any contract, lease or other document referred to in the Disclosure Document, or any other material contract or lease (including stock operations and employee benefit plans), except any proprietary or confidential portions hereof, and a set of the exhibits to this Disclosure Document, available to each investor prior to the time of investment, and to respond to questions and otherwise confirm the information contained herein prior to the making of any investment by such investor.

The Chief Financial Officer signing this form is hereby certifying that the financial statements submitted fairly state the Company's financial position and results of operations, or receipts and disbursements, as of the dates and period(s) indicated, all in accordance with generally accepted accounting principles consistently applied (except as stated in the notes thereto) and (with respect to year-end figures) including all adjustments necessary for fair presentation under the circumstances.
Chief Executive Officer:   Directors:

Title:

Chief Financial Officer:

Title:
“NO BETTER THAN THEY DESERVE:” *DRED SCOTT* AND
CONSTITUTIONAL DEMOCRACY

*Mark Graber*

Prominent constitutional designers and theorists reject George Bernard Shaw’s aphorism that “democracy is a system insuring that the people are governed no better than they deserve.” Constitutional democracy, champions from James Madison to James Fleming insist, does promise government better than the people deserve or at least better than the people would obtain in a simple majoritarian democracy. Devotees point to two central characteristics of constitutional government that they maintain improve democratic performance. First, well designed constitutional institutions foster the election of particularly qualified representatives and promote serious deliberation on the public good. “The aim of every political constitution,” Madison wrote, “is . . . first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of society . . . .” Second, well crafted constitutional declarations of fundamental values and constitutional limitations on government power foster the societal commitments to human dignity necessary for privileging decisions based on these communal aspirations for justice. Christopher Eisgruber and Fleming insist that both constitutions and theories of constitutional interpretation be subject to a “no gain, no claim” test. “If the Constitution does not help us secure the political goals we would pursue in the Constitution’s absence,” Eisgruber writes, “then the Constitution’s claim to authority fails.”

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* Professor of Law, University of Maryland, and Professor, Department of Government and Politics, University of Maryland, College Park

2. See The Federalist No. 10 (James Madison).
4. For the differences between constitutional and pure representative or majoritarian democracies, see Walter F. Murphy, James E. Fleming, Sotirios A. Barber & Stephen Macedo, *American Constitution Interpretation* 43-59 (3d ed. 2003).
6. Id.
Dred Scott v. Sandford\textsuperscript{10} challenges this romantic\textsuperscript{11} view of constitutional democracy. The Taney Court\textsuperscript{12} in 1857 apparently missed an unparalleled opportunity to improve antebellum\textsuperscript{13} American politics. Instead of building upon those strands in the American constitutional tradition that celebrated equality and freedom, the judicial majority, when holding that former slaves could not become American citizens\textsuperscript{14} and that human bondage could not be prohibited in American territories,\textsuperscript{15} privileged those aspects of the American constitutional tradition that celebrated racism and slavery. At best, Dred Scott left Americans governed no better than they would have been in the absence of judicial review and constitutional limitations on federal power.\textsuperscript{16} Susan B. Anthony exaggerated only slightly when she described that decision as "but the reflection of the spirit and practice of the American people . . . ."\textsuperscript{17} Certainly the Taney Court in 1857 did not promote justice, human dignity, or any other value commonly associated with the virtues of constitutional democracy.

Constitutional commentators of all interpretive persuasions vigorously condemn Dred Scott,\textsuperscript{18} but that decision is particularly disturbing to those who regard constitutional democracy as a means for improving democratic performance. Institutional critics of the Taney Court ruling maintain that the justices should not have interfered with the political status quo. They excoriate

\begin{itemize}
  \item \textsuperscript{10} Dred Scott v. Sandford, 60 U.S 393 (1856).
  \item \textsuperscript{12} President Andrew Jackson nominated Roger B. Taney as the 5th Chief Justice of the Supreme Court in 1835. He replaced Chief Justice John Marshall who had died after 34½ years of service on the Court. Although he is primarily remembered and criticized for his Dred Scott opinion, Taney is widely considered to have been an excellent Chief Justice who strengthened the Court’s authority of judicial review. In a twist of irony, Taney himself had emancipated his own slaves 30 years before the Dred Scott decision. Henry Abraham, Justices, presidents, and Senators: A History of the U.S. Supreme court Appointments from Washington to Clinton 74-77 (3d ed., 1999).
  \item \textsuperscript{13} “Antebellum” is a Latin word meaning before (ante) the war (bellum). In United States history, Antebellum refers to the period of growing sectionalism leading up to the Civil War, generally held to have begun with the debates leading up to the passage of the Kansas-Nebraska Act of 1854. See Tyler Anbinder, Nativism and Slavery: The Northern Know Nothings and the Politics of the 1850’s, at 18 (1992).
  \item \textsuperscript{14} Dred Scott, 60 U.S. at 407-12.
  \item \textsuperscript{15} Id. at 451-53.
  \item \textsuperscript{16} See Mark A. Graber, Dred Scott and the Problem of Constitutional Evil 30-33 (2006). “Even committed antislavery advocates ruefully admitted that no aspect of Dred Scott was countermajoritarian.” Id. at 33.
  \item \textsuperscript{17} Don E. Fehrenbacher, The Dred Scott Case: Its Significance in American Law and Politics 430 (1978) (quoting Susan B. Anthony, Draft of Speech (1861), in Susan B. Anthony Papers (available in the Manuscript Division, Library of Congress)).
  \item \textsuperscript{18} See Graber, supra note 16, at 15-16, 23-28 (citing such critics of Dred Scott as, among others, David P. Currie, Robert H. Bork, Walter Ehrlich, Cass Sunstein and Robert McCloskey).
\end{itemize}
Dred Scott for making politics worse, not better. Several insist that decision helped cause the Civil War.\footnote{See Lino A. Graglia, “Interpreting” the Constitution: Posner on Bork, 44 Stan. L. Rev. 1019, 1036 (1992); Cass R. Sunstein, Foreword: Leaving Things Undecided, 110 Harv. L. Rev. 4, 49 (1996).} Originalist critics tend to reach a similar conclusion by interpreting the Constitution as vesting Congress with the authority to determine whether slavery could have been permitted in the territories.\footnote{See David P. Currie, The Constitution in the Supreme Court: The First Hundred Years 1789-1888, at 273 (1985); Robert H. Bork, The Tempting of America: The Political Seduction of the Law 31-32 (1990).} Given that Congress during the 1850s had either repealed the Missouri Compromise entirely or repealed that measure for all territories that slaveholders were making any effort to settle,\footnote{See William W. Freehling, 1 The Road to Disunion: Secessionists at Bay 1776-1854, at 553-60 (1990).} the originalist attack on Dred Scott implicitly excoriates that decision for only making politics worse. Proponents of “no gain, no claim” demand more from the Supreme Court and the Constitution. In their view, the justices in 1857 should have strengthened the antislavery and equality strands of American constitutionalism and not merely have deferred to legislative judgments for institutional or constitutional reasons. Chief Justice Roger Taney is “justly condemned,” Milner Ball declares, “for refusing . . . to create with us a future of human flourishing.”\footnote{Milner S. Ball, A Letter to Professor Burt, 42 Wash. & Lee L. Rev. 27, 35 (1985).} Sotirios Barber insists, “asking the Court to overrule Dred Scott can be construed as asking the Court to play its part in achieving a constitutional aspiration to rise above conditions responsible for the initial protection of slavery.”\footnote{Sotirios A. Barber, Whither Moral Realism in Constitutional Theory? A Reply to Professor McConnell, 64 Chi.-Kent L. Rev. 111, 118 (1988); See Christopher L.M. Eisgruber, Justice Story, Slavery, and the Natural Law Foundations of American Constitutionalism, 55 U. Chi. L. Rev. 273, 296 (1988).} Dred Scott, as actually decided, challenges the confidence with which these same constitutional theorists maintain that constitutional democracy and judicial review are practices that improve democratic performance.

Pointing out that Dred Scott could have been a vehicle for improving American democratic performance does not advance the cause of constitutional democracy. Proponents insist that practices associated with constitutionalism have certain characteristics that promote better policymaking. Madison insisted that the large republic would have an inherent tendency to “controll[] the effects of faction.”\footnote{The Federalist No. 10 (James Madison), supra note 5, at 83.} By “augment[ing] cultural checks with institutional limitations,” Walter Murphy agrees, “constitutional democracy offers . . . a much better chance” of protecting basic human rights.\footnote{Walter F. Murphy, Constitutional Democracy: Creating and Maintaining a Just Political Order 109 (2007).} These basic institutions were in place in 1857 when Dred Scott was decided. Governing institutions were staffed...
by the processes James Madison insisted would most likely generate virtuous officeholders who would remain virtuous in office.\textsuperscript{26} Judicial review was established,\textsuperscript{27} and elected officials were promoting the federal judiciary as the forum for determining the constitutional status of slavery. The justices on the Supreme Court, when deciding \textit{Dred Scott}, could refer to the Declaration of Independence, which asserts that “all men are created equal,”\textsuperscript{28} the Preamble to the Constitution, which maintains that the Constitution is a means for securing the “Blessings of Liberty,”\textsuperscript{29} the Northwest Ordinance, which prohibited slavery in the northwest territories,\textsuperscript{30} and other texts that constitutional democrats from Abraham Lincoln to Sotirios Barber insist demonstrate a constitutional commitment to placing slavery on a “course of ultimate extinction.”\textsuperscript{31} Despite the presence of the institutions, practices, and texts central to constitutional democracy, \textit{Dred Scott} happened. Perhaps that decision was an aberration. Even so, proponents who claim constitutional democracy improves democratic performance must demonstrate that \textit{Dred Scott} was such an aberration, that constitutional democracy is likely to produce more good than evil in the long run.

This paper suggests that \textit{Dred Scott} was more a consequence of the constitutional text, institutions, and practices than an historical accident best explained by the perverse idiosyncrasies of a few Supreme Court justices. Part I\textsuperscript{32} details how constitutional constructivists who followed the interpretive strategies championed by constitutional democrats\textsuperscript{33} would almost certainly conclude that Americans in 1857 were constitutionally committed to a “slaveholding republic.”\textsuperscript{34} Such constitutional constructivists would recognize that those execrable constitutional commitments were rooted in, though not compelled by, constitutional commitments made in 1789. Part II\textsuperscript{35} discusses how constitutional institutions in 1857 generated elected officials that lacked the

\textsuperscript{26} See The Federalist No. 57 (James Madison), supra note 5, at 350-51.
\textsuperscript{28} The Declaration of Independence para. 2 (U.S. 1776).
\textsuperscript{29} U.S. Const. pmbl.
\textsuperscript{31} See Abraham Lincoln, Speech at Cincinnati, Ohio (Sept. 17, 1859), in 3 The Collected Works of Abraham Lincoln 1858-1860, at 454-55 (Roy P. Basler ed., 1953); Lincoln, Speech at Leavenworth, Kansas (Dec. 5, 1859), supra, at 502; Lincoln, Address at Cooper Institute, New York City (Feb. 27, 1860), supra, at 542-43; Barber, supra note 23, at 118.
\textsuperscript{32} See infra pp. 594-604.
\textsuperscript{33} See Fleming, supra note 3, at 61-85.
\textsuperscript{34} The expression “slaveholding republic” is taken from Don E. Fehrenbacher, The Slaveholding Republic: An Account of the United States Government’s Relations to Slavery (Ward M. McAfee ed., 2001).
\textsuperscript{35} See infra pp. 604-15.
virtue and motivation necessary to promote emancipation, while practically guaranteeing that most justices on the Supreme Court would be more committed to providing additional constitutional accommodations for slavery than to the ultimate extinction of human bondage and racial equality. In fact, Abraham Lincoln’s election in 1860 was the result of a constitutional malfunction. The constitution functioned as designed in *Dred Scott*. Part III provides some reasons for thinking that constitutional democracy is no more likely to improve democratic performance in 2007 than in 1857. The institutional foundations of *Dred Scott* remain vibrant, and these foundations help explain why judicial review of federal statutes has had no tendency over the past two-hundred years to promote the best in American constitutionalism.

American constitutional politics during the nineteenth century, the following pages suggest, cast doubt on whether the Constitution, constitutionalism and constitutional democracy have the wonderful capacities commonly attributed to them. The Constitution of 1787 did not commit Americans to the ultimate extinction of slavery, the constitutional process for staffing governmental institutions did not yield a class of politicians more prone to act on what was best in the American constitutional tradition, and the Supreme Court was not a forum of principle dedicated to encouraging Americans to realize their best constitutional aspirations. Worse, contemporary constitutional institutions share common features with the antebellum constitutional institutions responsible for *Dred Scott*. As a result, constitutional democracy may be no more likely to improve democratic performance during the twenty-first century than during the first seventy-five years of constitutional existence.

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36. See infra pp. 615-19.
I. PERFECTING THE CONSTITUTION OF THE SLAVEHOLDING REPUBLIC

Proponents of constitutional democracy insist that the Constitution of the United States should be interpreted consistently with “the substantive political theory that best fits and justifies our constitutional document and underlying constitutional order.”38 This method of textual exegesis does not require constitutional decisionmakers to discover a master principle that accounts for all previous constitutional rulings and social practices. Justification may trump fit in particular instances, as long as the substantive political theory accounts for a fair degree of past practice. “No theory can count as an adequate justification of institutional history unless it provides a good fit with that history,” Ronald Dworkin declares, ”but if two or more theories each provide an adequate fit, on that test, then the theory among these that is morally the strongest provides the best justification, even though it exposes more decisions as mistakes than another.”39 As persons and as a society, Americans may not always have the moral fiber or virtue necessary to live up to our highest constitutional aspirations. Our constitutional “aspirations” may conflict with our “immediate wants and aversions.”40 Some compromises of principle may be necessary when drafting a constitution.41 Others may prove necessary when implementing constitutional principles.42 Nevertheless, leading constitutional democrats insist, constitutions establish a hierarchy of values. Constitutional interpretation is the process of identifying the correct ordering of constitutional values and providing guidelines for ensuring that, to the extent politically feasible, constitutional decisions are based on the highest constitutional norms.43 Regarding “constitutional interpretation,” Walter Murphy states:

[I]ts two missions are to transform into a systematic unity the possibly conflicting clauses of the constitutional document(s), as well the prescriptions of the broader constitutional tradition; and, . . . to distill from that unity a mutually consistent set of jurisprudential values and principles, ranked in importance, that fit the developing political system.44

Fleming illustrates how this interpretive process takes place when he seeks to elucidate the central constitutional values that best justify and fit contemporary constitutional practice. He asks readers to “imagine . . . a constitutional archaeologist who digs up . . . bones and shards of a constitutional

41. See id.; see also Fleming, supra note 3, at 219.
44. Id. at 706.
The artifacts uncovered in 2007 include “the liberty of conscience and freedom of thought,” the freedoms of “expressive association and intimate association,” “the right to marry,” “the right to decide whether to bear or begat children,” and “the right to exercise dominion over one’s body.” Fleming then contends that this constitutional archaeologist or, more accurately, anthropologist would attempt to fit those artifacts into a unified whole. “A constitutional archaeologist,” he writes, “would accept these bones as stipulated features (or fixed points) of a skeleton that [he or she has] a responsibility to construct.” In his view, constitutional commitments to “deliberative democracy” and “deliberative autonomy” are the master values that bring coherence to an otherwise disparate set of norms. The constructive archaeologist/anthropologist, Fleming declares, “[w]ould comprehend that all of these bones constitute rights that reserve to persons the power to deliberate about and decide how to live their own lives.” Persons committed to perfecting the American constitutional order, therefore, should be prepared to recognize other rights that foster deliberative democracy and deliberative autonomy. As Fleming concludes, “fidelity to the Constitution requires that we disregard or criticize certain aspects of our history and practices in order to be faithful to the principles embodied in the Constitution.”

Fidelity to the Constitution at the time Dred Scott was decided would likely require a commitment to principles far more venal than deliberative democracy and deliberative autonomy. Archaeologists on a “Constitution of 1857” dig would find numerous relics that could be used to construct a slaveholding republic and a treasure trove of shards that fit a commitment to white supremacy. They would excavate hardly any artifacts indicating an aspiration for a free, multiracial polity. The “Constitution of 1789” dig would yield more ambiguous findings. Nevertheless, only archaeologists strongly predisposed to emancipation and racial equality would construct such a regime out of the materials available when the Constitution was ratified. Persons constructing the antebellum Constitution who did not care whether slavery “was voted down or voted up” would not find themselves constitutionally compelled or even constitutionally tempted to place human bondage “in [the] course of ultimate extinction.”

45. Fleming, supra note 3, at 92.
46. Id.
47. Id. at 93.
48. Id.
49. Id. at 227.
A. Perfecting the Constitution of 1857

Constitutional archaeologists/anthropologists would uncover different bones and shards from those Fleming found when exploring American constitutional commitments at the time *Dred Scott* was decided. If they followed Fleming’s approach to constitutional excavation, their dig site would be the U.S. Reports with an emphasis on more recently decided cases.\(^{52}\) A modicum of spade work would quickly generate several discoveries. The people of that culture believed that states had the power to enslave persons of color who voluntarily entered their jurisdiction, whatever the status of those persons in their previous state of domicile.\(^{53}\) States in that regime had the power to forbid free persons of color from entering their jurisdiction, even when those free persons of color were citizens of other states.\(^{54}\) The right of a slaveholder to recover a fugitive slave in that polity was more important than the right of a free citizen of color to peacefully reside in states where slavery was illegal.\(^{55}\) Congressional power over commerce did not entail congressional power to regulate the domestic slave trade.\(^{56}\) Such constitutional protections for slavery as the Fugitive Slave Clause\(^{57}\) were interpreted generously because they were “so vital to the preservation of the[] domestic interests and institutions,” of the slave states “that it cannot be doubted that it constituted a fundamental article, without the adoption of which the Union could not have been formed.”\(^{58}\) These commitments, the numerous findings would confirm, were endorsed by justices from both major parties and from all sections of the United States.\(^{59}\)

\(^{52}\) See Fleming, supra note 3, at 269 n.17.

\(^{53}\) Strader v. Graham, 51 U.S. 82, 93-94 (1851) (Taney, J.) (“There is nothing in the Constitution of the United States that can in any degree control the law of Kentucky. . .[a]nd the condition of the negroes, therefore, as to freedom or slavery, after their return, depended altogether upon the laws of [Kentucky], and could not be influenced by the laws of Ohio.”).

\(^{54}\) Moore v. Illinois, 55 U.S. 13, 18 (1852) (Grier, J.) (“In the exercise of [its]… police power, a State has a right to make it a penal offence to introduce paupers, criminals, or fugitive slaves, within their borders . . . . Some [] States, coterminous with those who tolerate slavery, have found it necessary to protect themselves against the influx either of liberated or fugitive slaves, and to repel from their soil a population likely to become burdensome and injurious, either as paupers or criminals.”).

\(^{55}\) Prigg v. Pennsylvania, 41 U.S. 539, 612 (1842) (Story, J.) (stating that there is an “unqualified right on the part of the owner of the slave [to capture a fugitive], which no law or regulation can in any way qualify, regulate, control, or restrain”).

\(^{56}\) Smith v. Turner, 48 U.S. 283, 426 (1849) (Catron, J.) (“[W]hen Congress shall legislate . . . to make paupers, vagabonds, suspected persons, and fugitives from justice subjects of admission into the United States, I do not doubt it will be found and declared, should it ever become a matter for judicial decision, that such persons are not within the regulating power which the United States have [sic] over commerce.”).

\(^{57}\) U.S. Const. art. IV, § 2, cl. 3 (“No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.”).

\(^{58}\) Prigg, 41 U.S. at 611.

\(^{59}\) See Fehrenbacher, supra note 34, at 239-40.
Constitutional archaeologists and anthropologists would likely reach several conclusions from these artifacts about the culture’s more general constitutional commitments. The most important is that the legal maxim, “in favorem libertatis,” had little place in American constitutionalism. Lord Mansfield’s famous dictum in *Somerset v. Stewart* was cited in only one Supreme Court opinion, and then as a presumption which in the case before the Court was overcome by the Fugitive Slave Clause. “Lord Mansfield has said some very pretty things (in the Case of Somerset),” Justice Robert Grier declared on circuit, “[b]ut they will perhaps be found . . . to be classed with rhetorical flourishes rather than legal dogmas.” The investigation into American constitutional commitments would further reveal that persons of color did not enjoy the privileges and immunities of most American citizens. Persons who may be barred from all states, may be enslaved at the will of any state, and who may be seized from their state of residence without a right of trial in that state can hardly be deemed equal citizens of that state. Finally, Justice Story’s interpretation of the Fugitive Slave Clause in *Prigg* would likely be regarded as rooted in the more general constitutional principle that all textual protections for slavery should be broadly construed, particularly when the beneficiaries of alternative interpretations were enslaved Africans or free persons of color.

Constitutional archaeologists and anthropologists who expanded their focus beyond Supreme Court opinions would uncover more antislavery materials. They would find judges offering variations on “in favorem libertatis” in lower federal and state courts. They would learn that substantial resistance to the fugitive slave acts took the form of personal liberty laws, state judicial declarations that the national government had no power to pass fugitive slave acts, and private efforts to free accused fugitives that sometimes enjoyed passive

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61. *Somerset v. Stewart*, (1772) 98 Eng. Rep. 499, 510 (K.B.) (“The state of slavery is . . . so odious, that nothing can be suffered to support it, but positive law.”). This case involved Charles Stewart, Esq., who brought with him from Jamaica to England his slave, James Somerset. Upon reaching English soil, Somerset left Stewart and refused to serve him. James Somerset. Upon granting Stewart’s writ of habeas corpus, Lord Mansfield commented that the recapture of Somerset was “[s]o high an act of dominion [that it] must be recognized by the law of the country where it is used.” As such, English law did not support Stewart’s right and Somerset was released. Id.
64. See *Prigg*, 41 U.S. at 608-27.
65. See *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 845-46 (D. Mass. 1821) (No. 15550) (declaring that the slave trade violates the law of nations, Christian principles, and the eternal maxims of social justice); *Hudgins v. Wright*, 11 Va. (1 Hen. & M.) 134 (1806) (declaring that the burden of proving the slavery status of an undocumented person in custody depends on that person’s racial appearance).
official support. 66 Despite frequent pleas from slave state representatives, neither the federal government nor the free states prohibited speech that advocated emancipation. 67 Slaveholding efforts to prevent Congress from debating petitions urging emancipation were abandoned within a decade. 68 Congress outlawed the international slave trade in 1807, as soon as constitutionally permitted. 69 These practices, constructed into a larger whole, suggest a culture ambivalent about slavery, willing to keep open the possibility of an antislavery future.

Persons digging at the “Constitution of 1857” site, however, would discover far more bones and shards evincing a societal commitment to slavery. They would recognize that Congress had consistently permitted slavery in some territories, and excluded it only in territories that slaveholders thought were inhospitable to human bondage. 70 When prominent slaveholders changed their minds about the possibility of introducing slavery into those regions, the prohibition on slavery was removed. The Compromise of 1850 refused to extend the ban on human bondage in territories north of the Missouri Compromise line to lands acquired from Mexico during the Mexican War; in 1854, that prohibition was explicitly repealed for both the Kansas and Nebraska territories. 71 The Attorney General of the United States in 1855 concluded that Congress could not prohibit slavery in American territories, 72 as did the platform of the victorious Democratic Party the next year. 73 American expansionism after 1820 was fueled by a desire for additional land for slaveholders. The United States annexed Texas and fought a war with Mexico largely for the purpose of acquiring southern territories, but President Polk reached compromises with England on American territorial claims in the Pacific Northwest rather than engage in the bellicose activities necessary to acquire free territories. 74 Abolitionists may have been permitted to speak legally, but the federal post-office would not deliver their newspapers in slave states 75 and prominent persons

68. Id. at 175-81.
72. See Eminent Domain of the States – Equality of the States, 7 Op. Att’y Gen. 571, 576 (1855) (stating that Congress may not impose on the municipal power of new states);
73. See Democratic Platform of 1856, 1 National Party Platforms 25 (Donald Bruce Johnson ed., 1956).
74. Fehrenbacher, supra note 34, at 267.
75. Curtis, supra note 67, at 155-58. Despite understanding that he had no legal authority to exclude the delivery of newspapers, Postmaster General Amos Kendall refused to deliver abolitionist literature, stating “[w]e owe an obligation to the laws, but a higher one to the
in free states did not suffer legal consequences when they organized mobs that destroyed abolitionists’ printing presses and murdered antislavery leaders.\textsuperscript{76}

Excavations of antebellum American sites would yield a treasure trove of white supremacist policies, while generating only isolated shards suggesting any national commitment to a multiracial society. Numerous Attorneys General of the United States maintained that free persons of color were not American citizens and Jacksonian presidents consistently denied such persons basic citizenship rights.\textsuperscript{77} An increasing number of free states prohibited free persons of color from residing in their jurisdictions and denied existing residents of color fundamental rights of citizenship.\textsuperscript{78} Congress had recently strengthened the Fugitive Slave Act, barring alleged fugitives from testifying at their rendition hearings and providing financial rewards to magistrates who found that the person of color before them was a fugitive slave.\textsuperscript{79} The federal court system before \textit{Dred Scott} was structured in ways which guaranteed that a majority of the justices on the Supreme Court would hail from slave states.\textsuperscript{80} Congress, aware of this judicial bias, repeatedly passed measures declaring that the Supreme Court was the institution responsible for settling constitutional issues associated with slavery and race in the United States.\textsuperscript{81}

\textit{Dred Scott} from this perspective is the decision that perfected a “herrenvolk” democracy\textsuperscript{82} and slaveholding republic. The tenor of previous judicial rulings and official policies from fugitive slaves to residency requirements consistently limited citizenship to white persons. The Taney Court ruling on this matter merely made explicit what had been implicit in judicial precedent and explicit in executive action. American public policy on slavery, while a bit more ambiguous, had been tilting southward for two generations. “Over the decades,” Don Fehrenbacher details, “the federal government had effectively become a proslavery instrument by means of multiple little decisions and unconscious communities in which we live,” calling it an act of “patriotism to disregard [the laws]” in this case. Id. at 155.

\textsuperscript{76} Id. at 216-40; One such anti-slavery leader was a Presbyterian clergyman named Elijah P. Lovejoy. Originally from Albion, Maine, Lovejoy established himself in St. Louis and began printing an abolitionist newspaper called the Aton Observer. While defending against the destruction of his printing press by an angry mob for the fourth time, Lovejoy was killed. Id. at 219-227.

\textsuperscript{77} Graber, supra note 16, at 28-31.

\textsuperscript{78} Id. at 32.

\textsuperscript{79} Fugitive Slave Act of 1850, ch. 60, § 6, 9 Stat. 462, 463-64 (repealed 1864) (authorizing federal marshals and federal troops to aid in the capture of fugitive slaves).

\textsuperscript{80} Graber, supra note 16, at 147.

\textsuperscript{81} See, e.g., Kansas-Nebraska Act, ch. 59, §§ 9, 27, 10 Stat. 277, 280, 287 (1854); Act of Sept. 9, 1850, ch. 49, § 10, 9 Stat. 446, 450; Act of Sept. 9, 1850, ch. 51, § 9, 9 Stat. 453, 455–56.

\textsuperscript{82} Rogers M. Smith, Civic Ideals: Conflicting Visions of Citizenship in U.S. History 551-50 n.25 (1997) (“[I]t thus seems correct to call the ‘dominant political ideology’ of the Jacksonians a ‘Herrenvolk egalitarianism’ promising equality among whites and the dominance of whites over blacks and Native Americans . . . .”).
The Taney Court decision that slavery could not be prohibited in any territory was hardly compelled by the immediate past judicial and legislative precedents. Nevertheless, given the recent repeal of the Missouri Compromise, that ruling was far more consistent with the constitutional order of 1857 than Republican claims that Congress had the right and duty to prohibit human bondage in all territories.

The speeches Abraham Lincoln made when running for the Senate and White House buttress claims that Americans in the years immediately before Dred Scott were constitutionally committed to a “slaveholding republic.” Lincoln, as is well known, repeatedly insisted that the framers believed slavery had been “placed on a course of ultimate extinction.” When defending that claim, he relied almost exclusively on official actions taken and decisions made during the eighteenth century and, to a lesser extent, the Missouri Compromise. His famous address at Cooper Union, for example, discusses policies adopted in 1784, 1787, 1789, 1798, 1804, and 1819-20. Nowhere in that speech or in any other did Lincoln point to an official action taken or a policy adopted in the next thirty years that evinced a similar constitutional commitment to emancipation. In fact, he largely conceded that Dred Scott perfected the Jacksonian Constitution of 1828-1860. “[T]he Dred Scott decision,” Lincoln observed, “never would have been made in its previous form if that party that made it had not been sustained previously by the elections.”

B. Perfecting the Constitution of 1789

Constitutional archaeologists/anthropologists attempting to construct original constitutional principles are confronted by a remarkable lack of evidence. The Constitution of 1789 neither contains an explicit commitment to emancipation nor an explicit commitment to slavery. Indeed, the constitutional text never explicitly mentions human bondage. The Constitution also contains no explicit law on the specific issues raised by Dred Scott. The Constitution framed in Philadelphia neither includes a clause plainly detailing the qualifications for citizenship nor a clause plainly authorizing Congress to acquire and govern new territory west of the Mississippi River. The framers explicitly vested Congress with the power “[t]o exercise exclusive Legislation in all cases” when governing the District of Columbia.

83. Fehrenbacher, supra note 34, at 291.
84. See supra notes 31, 51.
85. Lincoln, Address at Cooper Institute, New York (Feb. 27, 1860), supra note 31, at 523-30.
86. See id.
88. See U.S. Const.
89. See id.
90. U.S. Const. art. I, § 8, cl. 17.
comparison, merely provides Congress with the “Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” 91  The significance of this different language is obscure. The Due Process Clause of the Fifth Amendment could be interpreted as prohibiting enslavement as a deprivation of liberty 92 or emancipation as a deprivation of property. 93 The Preamble to the Constitution speaks of “establish[ing] Justice” and “secur[ing] the Blessings of Liberty,” but limits these ends “to ourselves and our Posterity.” 94

Abraham Lincoln was correct to note the strong anti-slavery sentiment among the framers. By the late 1780s, most American elites believed that human bondage was wrong and hoped that the practice would eventually be abandoned. George Washington spoke for most slaveholders when he asserted, “there is not a man living who wishes more sincerely than I do, to see a plan adopted for the abolition of [slavery] . . . .” 95 Jefferson insisted that the passage in the Declaration of Independence asserting “all men are created equal” and “are endowed by their Creator with certain inalienable rights” 96 referred to persons of color as well as to his white contemporaries. 97 When the Constitution was ratified, most northern states had either abolished slavery or were considering legislation that would immediately or over time abolish slavery in their jurisdictions. 98 States in the middle and upper south had passed laws facilitating voluntary manumission, a process some thought would eventually lead to broader anti-slavery measures. 99

Still, archaeologists/anthropologists constructing constitutional commitments in 1789 would unearth contrary bones and shards that did not comfortably fit the antislavery hypothesis. Eighteenth century Americans who believed that “all persons are created equal,” archaeologists would learn, did not

91. U.S. Const. art. IV, § 3, cl. 2.
93. Dred Scott, 60 U.S. at 450.
94. U.S. Const. pmbl.
95. Letter from George Washington to Robert Morris (Apr. 12, 1786), reprinted in George Washington: A Collection 319 (W.B. Allen ed., 1988). Washington goes on to say that “there is only one proper and effectual mode by which [the abolition of slavery] can be accomplished, and that is by Legislative authority . . . .” Id.
96. The Declaration of Independence para 2 (U.S. 1776).
97. See Thomas Jefferson, Notes on the State of Virginia, Query XVIII: Manners (1781), reprinted in The Portable Thomas Jefferson 215 (Merrill D. Peterson ed., 1975) (“[C]an the liberties of a nation be thought to secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God?”).
98. See Arthur Zilversmit, The First Emancipation: The Abolition of Slavery in the North (1967) (discussing the progression of abolition throughout the northern states beginning with the Quakers in the 1750’s through the enactment of gradual abolition in New Jersey in 1804).
99. See Peter Kolchin, American Slavery 1619-1867, at 77-78 (1993); Manumission, or the act of freeing slaves, could be accomplished either by an act of law or by private individual. Id. at 77-78, 89-90.
believe that all persons had the right to be equal citizens of the United States. “Nothing is more certainly written in the book of fate,” Jefferson wrote, “than that these people are to be free; nor is it less certain that the two races, equally free, cannot live in the same government.”

James Galloway at the North Carolina ratification asserted that “[i]t is impossible for us to be happy, if, after manumission, they are to stay among us.” Abstract antislavery rhetoric did not pervade the entire Republic in 1789. Slaveholders from Virginia and North Carolina may have conceded that slavery was a moral wrong, but such confessions never issued from Georgia and South Carolina slaveholders. The Pinkneys and Rutledges of the world insisted that slavery was a positive good and that, over time, Americans would become more constitutionally committed to human bondage. Rawlins Lowndes of South Carolina insisted that the slave “trade could be justified on the principles of religion, humanity and justice; for certainly to translate a set of human beings from a bad country to a better, was fulfilling every part of those principles.”

Most important, crucial constitutional institutions were designed for the purpose of empowering Virginia slaveholders, or at least for ensuring that the national government could not interfere with slavery without substantial southern consent. If southwestward population trends continued as the framers expected, southern moderates would control crucial national institutions. Virginians would control the House of Representatives, the framers believed, because a majority of the population would likely hail from the slaveholding states and southern representation would be augmented by the Three-fifths Clause. George Mason and other delegations to the framing convention expected that “the Southern & Western population should predominate . . . in a few years . . . .” The President would most likely be a slaveholder because representation in Congress determined the number of electoral votes cast in presidential elections. Slave state representatives demanded the electoral college

100. Thomas Jefferson, The Autobiography of Thomas Jefferson (1821), reprinted in The Life and Selected Writings of Thomas Jefferson 51 (Adrienne Koch & William Peden eds., 1944); See also Letter from Thomas Jefferson to Jared Sparks Monticello (Feb. 4, 1824), in 12 The Works of Thomas Jefferson 335 (Paul Leicester Ford ed., 1905) (suggesting that in order to “make [ ] some retribution for the long course of injuries we have been committing on their population,” slaves should be “provide[d] an asylum to which we can, by degrees, send the whole of that population from among us, and establish them under our patronage and protection, as a separate, free and independent people, in some country and climate friendly to human life and happiness”).


103. South Carolina House of Representatives, supra note 102, at 167; See Graber, supra note 16, at 110.

104. The material in this paragraph summarizes Graber, supra note 16, at 101-06.

to ensure the “influence in the election on the score of Negroes.” Federal justices would support slaveholding claims because the President elected by slaveholding votes would, with the advice and consent of the more free state dominated Senate, appoint federal justices. Removing the President from the judicial appointment process, Madison asserted, would “throw the appointments entirely into the hands of ye Northern States . . . .”

The most likely conclusion constitutional archaeologist/anthropologists would draw from the artifacts excavated from the “Constitution of 1789” dig site is that the persons responsible for the Constitution left developmental paths open at the time of the ratification; the Constitution of the United States contained no master principle likely to compel or privilege either human bondage or emancipation. Given the structure of constitutional institutions, a good case can be made that the fundamental constitutional commitment was neither proslavery nor antislavery, but that public policy on slavery should enjoy substantial support in both the free and slave states, with particular emphasis on Virginia. Abraham Lincoln’s constitutional vision was consistent with one possible developmental path. Most framers expected that antislavery trends would continue; they believed that Virginians would become even more antislavery over time. The constitutional powers of the national government were sufficiently vague to make plausible constitutional claims that a future coalition of Virginians and representatives from the free states could pass legislation that would place slavery in the United States on “the course of ultimate extinction.”

On the other hand, Roger Taney’s United States was also consistent with a developmental path left open at the time of ratification. South Carolinians thought antislavery trends would crest, that Virginians would continue insisting that Congress not interfere with slavery. Slaveholding Virginians in charge of the national government could easily interpret ambiguous constitutional provisions consistently with their proslavery, white supremacist notions. Which developmental path Americans would take was for the future to determine without substantial aid from framing commitments to either human bondage or freedom. The Constitution would influence the direction of American slavery politics, according to its original design, more by influencing the character of constitutional decisionmakers than by fashioning a more antislavery citizenry or by legally compelling persons to promote emancipation.

II. INSTITUTIONAL PERFORMANCE

Antebellum constitutional institutions did not privilege the more antislavery and egalitarian strands of the American constitutional tradition. Contrary to framing expectations, the rules for staffing the national government did not yield

107. Id. at 81.
distinguished representatives who were more inclined and motivated than average citizens to pursue justice. The commitment to a governing class with distinctive capacities for virtue was largely abandoned shortly after ratification. The constitutional process for electing the members of the national legislature privileged sectional extremists. The primary moderating and organizing forces in politics by the 1840s had become national parties which championed accommodation or silence on slavery issues. The federal judiciary was the one national institution that at the time Dred Scott was decided was functioning consistently with the original expectations of the framers and the constitutional theories championed by constitutional democrats. The justices were fairly learned and distinguished. Judicial review was fairly well established. Federal law, however, structured the federal judicial system in ways that guaranteed that a majority of the justices on the Supreme Court would be citizens from slave states. Those justices, while tending to be more moderate on sectional issues than many slave state representatives in Congress, were far more inclined to identify with the accommodationist and racist strands of American constitutionalism than with the antislavery and egalitarian strands of that political order. Products of a constitutional order that generated a governing class with no commitment to emancipation, offered that governing class no incentives for emancipating slaves, and provided that governing class with no clear law compelling emancipation, the judicial majority in Dred Scott not surprisingly championed the racist values at the heart of the Constitution of 1857.

A. Institutional Malfunctions

The persons responsible for the Constitution insisted that well designed constitutions improved democratic (they would say republican) performance by improving the quality of democratic decision-makers and improving the quality of democratic deliberation. The extended republic, James Madison believed, facilitated both. Federalist 10 maintains that political leaders elected in large election districts are likely to be more virtuous than those elected by smaller
constituencies. Expanded constituencies would “refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.” Extended republics would also prevent factions from forming and combining, thus promoting policy-making aimed at the common good. “Extend the sphere,” Madison famously declared, “and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.” Stephen Elkin relies on similar Publian notions when he insists that well designed constitutions enable elites to take a longer and larger view of their interests. Properly structured institutions, he states, “provide strong and regular incentives for lawmaking to give concrete meaning to the public interest.”

This elitist vision of a constitutional republic was decisively rejected during the years between ratification and Dred Scott. Constitutional forms proved weak reeds for holding back democratic tides. Gordon Wood observes how “a new generation of Democratic Americans was no longer interested in the revolutionaries’ dream of building a classical republic of elitist virtue out of the inherited materials of the Old World.” The democratic wave that the Constitution sought to break swamped institutions designed to be bastions for aristocratic virtues. The Senate was transformed from an American House of Lords into an institution little different from the more plebian House of Representatives. The President was transformed from a figure above the fray to a party leader who claimed to be the best representative of ordinary people. The very word “democracy” was transformed from a term of opprobrium to a popular phrase. Federalists in 1789 took great pains to distinguish their desired

117. See The Federalist No. 10 (James Madison), supra note 5, at 77-84.
118. Id. at 82.
119. Id. at 83.
120. Id.
121. Elkin, supra note 108, at 5.
122. Wood, supra note 109, at 369; See Bruce Ackerman, We the People: Foundations 70 (1991) (“[T]his neat system did not survive the Founding generation.”).
124. See Elaine K. Swift, The Making of an American Senate: Reconstitutive Change in Congress, 1787-1841, at 104 (2002) (stating “[b]etween 1809 and 1829 . . . the Senate cultivated strong bonds with the people and distanced itself from state legislatures,” and through “its new closeness to the people and greater legislative proactivity, it came to be more like the House.”).
125. See Skowronek, supra note 111, at 54 (describing the changing relationship between the President and the rest of the federal government and stating that during this time period “[i]nterparty conflict was the premier organizing principle in governmental operations, and the presidents acted politically as unabashed representatives of their party organization”).
Constitutional republic from a democracy. Jacksonians after 1828 proudly called themselves “Democrats.” The heart of their democratic political vision was a commitment to staff government offices with ordinary people. “We have an abiding confidence in the virtue, intelligence, and full capacity for self-government, of the great mass of our people -- our industrious, honest, manly, intelligent millions of freemen,” the Jacksonian Democratic Review declared. Andrew Jackson maintained that the “duties of all public offices are, or at least admit of being made, so plain and simple that men of intelligence may readily qualify themselves for their performance.”

Constitutional rules for staffing the national legislature privileged sectional extremists rather than virtuous statesmen committed to placing slavery on a course of ultimate extinction. The best strategy for gaining national office in many local single-member districts was a demonstration of one’s firm commitment to securing sectional interests. “[I]t is easy in the North to gain power by denouncing slavery’s existence in the South,” commentators observed, “and as easy in the South to win favor by denouncing its northern opponents.” With the exception of the 1850 national election, southern candidates gained national office by convincing voters they could better protect slavery than their opponents. After the Mexican War, many northern elections became contests over which candidate could better denounce the slave power. These constitutional practices did generate northern representatives who, on average, were probably more antislavery than the average northern voter. The same constitutional practices, however, generated southern representatives who, on average, were more proslavery than the average southern voter. The moderate southerners who might have mitigated proslavery zealotry in their region were practically disenfranchised by constitutional arrangements. More than 40% of constitutional representatives were likely proslavery.

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126. See The federalist No. 10 (James Madison), supra note 5, at 81-84.
127. Morton Horwitz & Orlando do Campo, When and How the Supreme Court Found Democracy – A Computer Study, 4 QLR 1, 26 (1994) (“After Jackson’s electoral victory in 1828, the triumphant Jacksonians began to be informally referred to as Democrats – a change in name that arose mostly . . . to differentiate themselves from the Adams wing of the party” known as the “administrative Republicans.” (citing Frank R. Kent, The Democratic Party: A History 23 (1928)).
130. For an elaboration on the themes of this paragraph, see Graber, supra note 16, at 161-63.
132. Id.; But see Don E. Fehrenbacher, Sectional Crisis and Southern Constitutionalism, at xv (1989) (stating that “the extraordinary amount of scholarly attention” paid to party politics of the 1850s has resulted in an “emphasis on ethnocultural factors and somewhat diminish[ed] the importance of the slavery issue as a primary cause of the political upheaval”).
134. Id.
all slave state voters during the 1856 election supported a candidate committed to a free Kansas, but Millard Fillmore won no electoral votes south of Maryland. As a result of these electoral arrangements, when elected officials sought to appease the south, they typically were forced to appease the most militant proponents of slavery.

National political parties were the primary institutional means for mitigating the constitutional tendencies toward extremism. Scorned by the framers, such institutions began to develop in the Second Congress, in part through the efforts of the formerly anti-party stalwart, James Madison. By the 1840s, national electoral politics was structured by a competition between the Jacksonian Democrats and Whigs. Both coalitions celebrated partisanship, insisting that the framers had opposed sectional parties, but not parties per se. “When men are governed by a common principle,” the Albany Argus asserted,

> [W]hich is fully indulged and equally operative in all parts of the country, the agency of party conduces to the public good. But the political opinions of some men, when actuated by feelings of a sectional character are directly the reverse. What is party in the one case, is faction in the other.\(^\text{139}\)

National parties mitigated constitutional tendencies toward extremism by promoting accommodation on slavery or by refusing to present voters with clear choices on sectional issues. Both Democratic and Whig party leaders believed that “national parties and slavery agitation were mutually exclusive.”\(^\text{140}\) Jacksonians guaranteed that their candidates would be sensitive to slavery issues by requiring a two-thirds vote in their presidential convention.\(^\text{141}\) Whigs nominated either slaveholders or candidates who hailed from the slave states.\(^\text{142}\) Neither the Whig nor Democratic Party platform contained any provision promoting emancipation or racial equality. Both party platforms in 1852 endorsed the Compromise of 1850 and condemned any further agitation of the slavery issue.\(^\text{143}\)

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135. See Holt, supra note 74, at 914-15.
142. Id.
143. Democratic Platform of 1852, supra note 73, at 17; Whig Platform of 1852, supra note 73, at 21; See Graber, supra note 16, at 148.
Constitutional institutions at the time *Dred Scott* was decided were staffed by ordinary citizens, privileged sectional extremists, and facilitated the rise of national parties dedicated to avoiding sectional issues proved poor vehicles for promoting emancipation or racial equality. Congress could rarely act effectively on slavery concerns because southern “fire-eaters” and their doughface supporters had the power to prevent any antislavery measure from becoming law (and antislavery advocates were often able to block legislation deemed too proslavery). Presidents preferred not taking clear stands on slavery because their power depended on accommodating both proslavery and antislavery activists. So constructed, the electoral branches of the national government in 1857 had a far greater capacity to be stalemated on sectional issues than to promote emancipation or any other value associated with constitutional democracy. The best elected officials could do during the late 1840s and early 1850s was to promote the Supreme Court, the one national institution still largely functioning consistently with its original design, as the branch of government responsible for settling the constitutional status of slavery.

### B. The Supreme Court

The federal judiciary was the one national institution that largely resisted the democratizing imperative in antebellum America. The Supreme Court, Wood observes, in the Jacksonian Era became increasingly regarded as “the only governing institution that came close to resembling an umpire, standing above the marketplace of competing interests and rendering impartial and disinterested decisions.” While more radical reformers scorned aristocrats in robes, most Americans by the 1840s celebrated the judicial virtues championed by contemporary constitutional democrats. In the decade before *Dred Scott* was decided, Charles Warren observes, “the Court may be said to have reached its height in the confidence of the people of the country.” William Seward, an antislavery Whig, spoke in 1851 of “the high regard which, in common with the

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147. See Skowronek, supra note 111, at 181-96.
148. See Graber, supra note 146, at 47-51.
149. Wood, supra note 109, at 325.
150. See id. at 323.
151. Id. at 325.
whole American people,” he “entertain[ed]” for Chief Justice Taney “as the head of the Judicial Department.”

Contemporary constitutional scholars believe this praise was well deserved. The federal bench, in their view, was staffed by those jurists most likely to be able to identify and act on cherished American constitutional commitments. Leading justices on the Taney Court had distinguished careers in law and politics before joining the bench. Justices Benjamin Curtis and John Campbell, in particular, were leaders of the northern and southern bar, respectively. The craftsmanship of Taney Court opinions on the contracts and commerce clause is generally praised. Henry Abraham credits that tribunal with solidifying the Court’s “position as the logical, ultimate, and fair-minded arbiter of the Constitution.” Commentators willing to discount maintain that Chief Justice Taney was among the greatest Supreme Court justices in American history.

The majority of justices on the antebellum Supreme Court, as the framers expected, were citizens of slave states. Both long-serving Chief Justices had hailed from the south as did most of the associated justices. Five of the nine members of the Court in 1857 were southerners. The political foundations of this southern majority, however, differed from original expectations. The persons responsible for the Constitution of 1789 assumed that slave states would control the federal judiciary because the electoral college privileged the election of a southern president, that president was responsible for appointing the federal justices, and, as the most populous region in the country, the south would be entitled to at least its fair share of judicial representation. The Court that decided had a southern majority because Jacksonians in the executive and legislative branches of the government passed legislation placing five of the

153. Id.
154. See Abraham, supra note 12, at 77 (stating that “history and most experts have justly accorded [Taney] the mark of judicial greatness”).
155. Taney himself was, among other achievements, the U.S. Attorney General prior to taking a seat on the high Court. Abraham, supra note 12, at 74.
156. Abraham, supra note 12, at 82-84; Justice Campbell had no former judicial experience prior to sitting on the Supreme Court, but his reputation as a leading lawyer in Alabama and six personal appearances in front of the Court’s December 1851 Term prompted his appointment. Warren, supra 152, at 245 (citing Henry G. Connor, John Archibald Campbell (1920)); Justice Curtis was known as a skillful attorney who was once referred to as “the first lawyer of America” by the Massachusetts Law Quarterly. Abraham, supra note 12, at 82 (quoting 1 Massachusetts Law Quarterly 192-94 (1915) (emphasis in original)).
157. Abraham, supra note 12, at 72. See also Robert Saunders, Jr., John Archibald Campbell: Southern Moderate, 1811-1889, at 105-23 (1997) (noting that the Taney Court’s decision in overshadows its voluminous work in the area of contracts and commerce).
158. Abraham, supra note 12, at 76.
159. Other than that, Mrs. Lincoln!
160. Abraham, supra note 12, at 75-76.
161. Fehrenbacher, supra note 132, at 46.
162. See supra pp. 603-04 and notes 104-07.
nine federal circuit court districts entirely within the slave states, and presidents who depended on southern votes ensured that one representative from each federal circuit district sat on the Supreme Court.163

These southern justices, as the framers and constitutional democrats might have hoped, were far more moderate on sectional issues than were their peers. Justice Peter Daniel of Virginia was the only member of the Taney Court who identified with southern “fire-eaters.”164 Justices John Campbell of Alabama and James Wayne of Georgia on circuit vigorously condemned the international slave trade, interpreting the constitution as vesting the federal government with substantial power to prevent that human commerce.165 Campbell vigorously opposed secession.166 He reluctantly resigned his judicial office when Alabama left the Union, but remained in Washington in efforts to reach a last minute compromise.167 Justice John Catron opposed secession and refused to resign his judicial office when Tennessee joined the Confederacy.168 Wayne was the only federal official from the Deep South who remained in office during the Civil War.169

The same constitutional practices that generated southern justices more moderate on slavery issues than slave state elected officials and citizens, however, generated northern justices less antislavery than free state elected officials and citizens. Two-fifths of all voters and a majority of northern voters in 1860 cast their ballot for an antislavery candidate, but evidence suggests that only 1 of the 9 justices on the Supreme Court and 1 of the 4 from the north favored Lincoln. Justice Robert Grier of Pennsylvania and Samuel Nelson of New York were doughfaces who supported southern pretensions on slavery.170 Justice Benjamin Curtis of Massachusetts was a white supremacist, who while

163. Howard Gillman, How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891, 96 Am. Pol. Sci. Rev. 511, 514 (2002) (“[T]o ensure the protection of Southern regional interests . . . the slave states were divided into five circuits, meaning that they would enjoy a majority on the Supreme Court.”).
165. See United States v. Haun, 26 F. Cas. 227 (C.C.S.D. Ala. 1860) (No. 15329) (opinion delivered by then-Circuit Justice Campbell); Charge to Grand Jury, 30 F. Cas. 1026 (C.C.D. Ga. 1859) (No. 18269A) (opinion delivered by then-Circuit Justice Wayne).
166. Saunders, supra note 157, at 138-45 (outlining a series of letters wherein Campbell called for calm among southerners and believed that talk of succession only brought discredit to the South).
167. Id. at 140-51.
believing Congress had the power to ban slavery in the territories,171 favored strict enforcement of the Fugitive Slave Act,172 vigorously opposed black citizenship,173 and would later attack the constitutionality of the Emancipation Proclamation.174 Justice John McLean of Ohio was the only member of the Court which decided *Dred Scott* who had any sympathy with the antislavery movement.175

This judicial tendency toward moderation was a consequence of the interaction between the constitutional rules for staffing the federal judiciary and Jacksonian constitutional politics. The Constitution commands that justices be nominated by the president and confirmed by the Senate.176 Jacksonian presidents during the decades immediately before *Dred Scott* were required to appease both northern and southern constituencies when exercising that executive power. This governing imperative, in practice, favored southern judicial nominees less proslavery than their slave state peers and northern judicial nominees less antislavery than their free state peers. Judicial nominees identified with sectional extremists were unlikely to win confirmation. Both antislavery Senators and proslavery Senators were sufficiently powerful to prevent persons too strongly committed to human bondage or emancipation from taking seats on the Supreme Bench.177 As sectional tensions heightened, judicial nominees became increasingly moderate. The two sectional extremists on the tribunal that decided *Dred Scott*, Justices Daniel and McLean, were nominated and confirmed before the Mexican War.178 The two justices appointed after the Compromise of 1850 were a northern Cotton Whig who had recently denounced opposition to the Fugitive Slave Act179 and a southern conservative who opposed the Mexican War and hoped slavery would die of natural causes.180

The constitutional rules for staffing the Supreme Court explain why the Taney Court majority, when adjudicating *Dred Scott*, did not seek to strengthen the weakening antislavery and egalitarian strands of the American constitutional tradition. Constitutional politics before the Civil War, as constitutional

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176. U.S. Const. art II, § 2, cl. 2.
178. Justice McLean’s tenure on the Court began in 1830 after his appointment by President Jackson. Justice Daniel was confirmed for the Court in 1842, appointed by President Van Buren. Abraham, supra note 161, at 378. For a list of statistical data of the Justices of the Supreme Court, including their years of service, Presidents who appointed them and states from which they hailed. See Abraham, supra note 12, at 377-81.
179. Id. at 82-83 (Justice Benjamin Robbins Curtis).
180. Saunders, supra note 157, at 57, 62-63 (Justice John Archibald Campbell).
democrats maintain, did generate distinguished Supreme Court justices who could decide cases on the basis of enduring constitutional values being given too short a shrift in the electoral process. The value that justices appointed during the 1840s and 1850s were inclined to support was the constitutional commitment to preventing slavery from disrupting the national union.181 Southern justices could interpret constitutional power to prohibit the international slave trade more broadly than many slave state officials because they were not electorally accountable to slaveholding voters. Northern justices could interpret constitutional power over fugitive slaves more broadly and constitutional power over slavery in the territories more narrowly than many free state officials because they were not electorally accountable to antislavery voters. Constitutional democracy in Dred Scott, this evidence suggests, functioned almost according to plan. The problem from the perspective of contemporary constitutional democrats was that the Supreme Court was better structured to secure the clear constitutional commitment to appeasing the moderate south than the more ambiguous constitutional commitment to emancipation and human freedom.

President Buchanan made two judicial nominations after Dred Scott that highlight how the institutions most associated with constitutional democracy were more likely to promote national union than emancipation. Nathan Clifford and Jeremiah Black were the sort of highly respected statespersons and lawyers constitutional democrats believed particularly likely to act on constitutional principle.182 Clifford was “an able lawyer and legal scholar” who had served with distinction in both the executive and legislative branches of the national government.183 Black was one of the best known lawyers in the United States.184 Neither Clifford nor Black, however, had any devotion to emancipation or racial equality. Clifford was on record before his nomination as supporting the Dred Scott decision.185 Black had previously published a broadside defending the most pro-southern interpretation of Dred Scott.186 Had the Civil War not intervened, both would have helped the Taney Court perfect the Constitution of the slaveholding republic.

181. See Graber, supra note 16, at 223 (suggesting that the basis of this constitutional commitment was a relational contract theory, which asserts that the Constitution was essentially a compromise to maintain the political relationship between people who disagreed about slavery and should have been interpreted to best maintain those relationships).
182. Abraham, supra note 12, at 85-86.
183. Id. at 85.
184. Id. at 86; see generally Mary Black Clayton, Reminiscences of Jeremiah Sullivan Black (1887);
C. The Constitutional Contribution to Antislavery

The Constitution of the United States did make one major contribution to the antislavery movement. Article II enabled Abraham Lincoln to gain the presidency with only 40% of the popular vote.\(^\text{187}\) By rewarding candidates with geographically compact supporters, the electoral college fostered the development of sectional parties while reducing the influence of parties and candidates that enjoyed diffuse support throughout the United States.\(^\text{188}\) Whether Republicans or another antislavery party with the same percentage of the ballots cast in 1860 could have gained control of the presidency under any other electoral scheme presently adopted by a democratic country is doubtful. Lincoln could begin the process of putting slavery on the course of ultimate extinction only because the Constitution did not permit the fictitious median voter, who in 1860 probably favored John Bell and Stephen Douglas, to dictate the presidential election. Neither Bell nor Douglas, if elected, would have tinkered substantially with the *Dred Scott* status quo.\(^\text{189}\) The difference between them primarily would be over whether the United States should continue expanding southwards and northwestwards.\(^\text{190}\)

Ironically, the one constitutional practice that before the Civil War privileged emancipation was originally designed to privilege slaveholding and is abhorred by many contemporary constitutional democrats. The persons responsible for the Constitution believed that the electoral college, combined with the Three-fifths Clause, would strongly augment slave state influence on presidential selection.\(^\text{191}\) They also expected that the virtuous members of the electoral college would exercise independent judgment when evaluating presidential candidates.\(^\text{192}\) They never anticipated that Article II would dramatically inflate the strength of sectional candidates at the expense of national moderates. Prominent constitutional thinkers presently regard the electoral college as a constitutional stupidity, a product of unsavory constitutional compromises that malfunctioned a decade after ratification, and a practice inconsistent with the constitutional commitment to majority rule.\(^\text{193}\) Professor Sanford Levinson and others insist that the constitutional rules for electing the president are “an undemocratic and perverse part of the American

\(^{187}\) U.S. Const. art. II, § 1, cl. 2, 3 (electoral college).
\(^{188}\) The themes in this paragraph are more fully developed in Graber, supra note 16, at 161, 165-67.
\(^{189}\) See id. at 240.
\(^{190}\) See id. at 240-41.
\(^{191}\) See supra pp. 602-04 and notes 101-106.
\(^{192}\) See The Federalist No. 68 (Alexander Hamilton), supra note 5, at 412.
system of government that ill serves the United States." One of the worse features of the American constitutional order, these observations suggest, may have helped trigger the first clear expression of a constitutional commitment to racial equality and emancipation.

III. DRED SCOTT AS NORMAL CONSTITUTIONAL POLITICS

Dred Scott was not an aberration. Just as the Constitution of 1789 failed to generate a powerful social commitment to emancipation for more than seventy years, the Constitution of 1868, for another seventy years, failed to generate a powerful social commitment to racial equality. The Fourteenth Amendment declares that “nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws,” but Americans regarded that provision as permitting white supremacy, pervasive Jim Crow, and massive disenfranchisement. The First and Fifth Sections of the Fourteenth Amendment provided weak parchment barriers against lynching. The American commitment to eradicating racism after World War II was as much a consequence of the Cold War as a renewed dedication to constitutional principle, and many commentators believe that this commitment began waning during the late 1960s. Substantial debate exists at present as to whether Supreme Court decisions interpreting the Equal Protection Clause as permitting or forbidding affirmative action programs best promote justice.

The problematic relationship between constitutional aspirations and political practice transcends race. Throughout American history, fundamental

194. Levinson, supra note 193, at 82; Amar, supra note 193, at 15.
198. See Mary L. Dudziak, Cold War Civil Rights: Race and the Image of American Democracy 6-12 (2000) (discussing how the Cold War required the United States to address Civil Rights in order to project a more positive image of democracy to the rest of the world).
200. See, e.g., Grutter v. Bollinger, 539 U.S. 306, 344 (2003) (“[T]he Equal Protection Clause does not prohibit the Law School’s narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.”).
201. See, e.g., Gratz v. Bollinger, 539 U.S. 244, 275 (2003) (“[T]he University’s use of race in its current freshman admissions policy is not narrowly tailored to achieve respondents’ asserted compelling interest in diversity, [therefore] the admissions policy violates the Equal Protection Clause of the Fourteenth Amendment.”).
constitutional values have been ignored as much as they have inspired. Studies proposing interpretive strategies that will make the Constitution “the best it can be” are published on a regular basis, but those same studies typically criticize Supreme Court justices and other governing officials for consistently not acting on what the author regards as the highest constitutional aspirations. Whatever potential these aspirations have for improving the quality of democratic decision-making in the United States, the evidence suggests, has not been realized in practice. Herbert Wechsler’s famous “neutral principles” lecture failed to identify one instance when the Supreme Court correctly declared unconstitutional a major piece of federal or state legislation.

Many constitutional practices that failed to improve the quality of democratic decision-makers and the quality of democratic deliberation before the Civil War remain in place and have no more ameliorative influence on American politics at present. The deferential politics expected to promote republican virtue has not been resurrected. Contemporary candidates for elected office appear on MTV and eschew broccoli in efforts to convince voters that they are average American citizens who share the values of average American citizens. The constitutional rules for citizenship continue to promote extremism, often in defense of values only marginally less heinous than slaveholding. Article I’s requirement that all members of the national legislature be elected by local constituencies explains why southern candidates in the 1850s competed over who was most committed to human bondage and why southern candidates in the 1950s competed over who was most committed to white supremacy. Economic inequality in the United States may be partly a consequence of constitutional processes that enable affluent citizens to gain tax policies opposed by most Americans. Then as now, political parties stand ready to discipline candidates and office holders otherwise inclined toward the independent judgment admired by the framers. “Political party affiliation,” Daryl Levinson observes, “seems to be a much more important variable in predicting the behavior of members of Congress vis-à-vis the President than the fact that these members work in the legislative branch.”

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203. Ronald Dworkin, Law’s Empire 53 (1986) (“[A]ll interpretation strives to make an object the best it can be . . . and that interpretation takes different forms in different contexts only because different enterprises engage different standards of value or success.”).
204. Id. at 271-75.
206. U.S. Const. art I.
207. See Klarman, supra note 196, at 385-442.
is waning is caused by the lack of money, not a renewed appreciation for the best persons holding public office.\textsuperscript{210}

The Supreme Court has historically failed to provide more protection for values associated with constitutional democracy than the national legislature.\textsuperscript{211} A consensus presently exists that \textit{Bolling v. Sharpe}\textsuperscript{212} was the first decision in which the justices protected a fundamental constitutional right being infringed by national majorities.\textsuperscript{213} By comparison, most liberal and conservative scholars now think numerous Supreme Court cases handed down before 1954 striking down federal laws were wrongly decided, that Congress in these instances was more committed to constitutional principle than the Supreme Court. These erroneous decisions include \textit{Hepburn v. Griswold}\textsuperscript{214}, \textit{Pollock v. Farmers' Loan & Trust Co.}\textsuperscript{215}, \textit{the Civil Rights Cases}\textsuperscript{216}, \textit{United States v. E.C. Knight Co.}\textsuperscript{217}, \textit{Adair v. United States}\textsuperscript{218}, \textit{Butler v. United States}\textsuperscript{219}, and \textit{Carter v. Carter Coal Co.}\textsuperscript{220} Even if correct as a matter of technical law, none of these decisions protect rights or practices celebrated by contemporary constitutional democrats. The Supreme Court’s record when declaring state laws unconstitutional is more complicated and controversial. No present consensus exists on whether such decisions as \textit{Mapp v. Ohio}\textsuperscript{221} and \textit{Roe v. Wade}\textsuperscript{222} foster or inhibit protections for

\begin{itemize}
\item \textsuperscript{210} See generally Gary C. Jacobson, \textit{Money in Congressional Elections} (1980).
\item \textsuperscript{211} For a different argument, reaching a similar conclusion, see Rebecca E. Zielow, \textit{Enforcing Equality: Congress, the Constitution, and the Protection of Individual Rights} (2006).
\item \textsuperscript{212} \textit{Bolling v. Sharpe}, 347 U.S. 497, 500 (1954) (holding that Congress could not segregate school children in the District of Columbia because the principles of equal protection are applicable to the federal government through the Fifth Amendment).
\item \textsuperscript{213} See Alfred Hill, \textit{The Political Dimension of Constitutional Adjudication}, 63 S. Cal. L. Rev. 1237, 1277 n.153 (1990). Hill acknowledges that the common perception is that Bolling is the first case of its kind, but suggests that cases were not uncommon in which the Court first declared that the Equal Protection Clause is not applicable in a Fifth Amendment case, and then indicated that the result would have been the same if it were. Id. (citing Detroit Bank v. United States, 317 U.S. 325, 337-38 (1943); Steward Mach. Co. v. Davis, 301 U.S. 548, 584-85 (1937); La Belle Iron Works v. United States, 256 U.S. 377, 392-93 (1921); Currin v. Wallace, 306 U.S. 1, 14 (1939); Brushaber v. Union Pac. R.R., 240 U.S. 1, 25 (1916)).
\item \textsuperscript{214} \textit{Hepburn v. Griswold}, 75 U.S. 603, 625-626 (1870) (holding that Congress had no power to make paper money legal tender).
\item \textsuperscript{215} \textit{Pollock v. Farmers' Loan & Trust Co.}, 158 U.S. 601, 637 (1895) (holding that Congress had no power to pass an income tax).
\item \textsuperscript{216} \textit{Civil Rights Cases}, 109 U.S. 3, 25-26 (1883) (holding that Congress had no power to prohibit places of public accommodation from discriminating on race).
\item \textsuperscript{217} \textit{United States v. E.C. Knight Co.}, 156 U.S. 1, 17 (1895) (holding that Congress had no power to prohibit businesses from monopolizing production).
\item \textsuperscript{218} \textit{Adair v. United States}, 208 U.S. 161, 179-180 (1908) (holding that Congress could not prohibit yellow dog contracts).
\item \textsuperscript{219} \textit{Butler v. United States}, 297 U.S. 1, 74-75 (1936) (holding that Congress could not regulate agriculture).
\item \textsuperscript{220} \textit{Carter v. Carter Coal Co.}, 298 U.S. 238, 303-304 (1936) (holding that Congress could not regulate wages of coal miners).
\item \textsuperscript{221} \textit{Mapp v. Ohio}, 367 U.S. 643, 664-661 (1961) (holding that state courts may not use evidence acquired unconstitutionally in criminal trials).
\end{itemize}
fundamental rights. A consensus is emerging, however, that the justices tend to declare state laws unconstitutional only when that ruling is supported by at least some members of the dominant national coalition. Some research may suggest that the justices will protect rights that many elected officials cannot publicly endorse, though other research suggests that the rights justices are presently protecting are those of the political and financial elite.

Neither perfection nor depravity is the lot of this world. Both the Constitution of the United States and the Supreme Court have facilitated much good. What Dred Scott highlights is how fundamental elements of constitutional democracy are also complicit in much evil. Raising the banner of Brown v. Board of Education of Topeka or, perhaps, Lawrence v. Texas will not redeem constitutional democracy in the absence of more systemic proof that constitutional practices over the long run have more often fostered justice than injustice. Even the worst managed professional sports team, after all, has occasional good seasons, good weeks, and good games.


DRED SCOTT, LINCOLN, AND THE CONSTITUTION:  
A REPLY TO PROFESSOR GRABER  

John T. Valauri∗

I. INTRODUCTION

Dred Scott v. Sandford,¹ the case in which Chief Justice Taney declared that an African-American could not be a citizen of the United States and that Congress could not prohibit slavery in the territories,² is perhaps the most reviled Supreme Court decision in American history,³ both for its judgment and for its reasoning. Yet Professor Mark Graber contends that the result in the case “may have been correct⁴” and he seeks to rehabilitate its legal and constitutional reputation.⁵

Professor Graber’s argument for his revisionist view centers on his approach to the problem of constitutional evil (for none—today, at least—would deny that slavery was a constitutional evil woven into the fabric of the constitution of 1787) and how a divided polity ought to deal with it. Denying that evils like slavery can be interpreted or argued away,⁶ he argues, instead, that the stability of deeply divided societies requires compromise with evil.⁷ Dred Scott, then, is for Graber just this sort of necessary constitutional compromise with evil. In this he opposes contemporary opinion on Dred Scott and the institutional, historical, and aspirational views on which it is based.⁸ This received opinion deplores the

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1. 60 U.S.393 (1856) (hereinafter Dred Scott).
2. I say “declared” rather than “held” because, despite its being designated as such, it is not at all clear that Taney’s opinion in the case is indeed the opinion of the Court because of discrepancies between it and portions of the several concurrences. See DON E. FEHRENBACK, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 2 (1978).
5. He asserts that, “[I]mportant normative, historical, and constitutional reasons exist for rehabilitating the Dred Scott decision.” Id.
6. “Deeply rooted constitutional evils, however, are immune to standard interpretive treatments.” Id. at 2.
7. “Political orders in divided societies survive only when opposing factions compromise when constitutions are created and when they are interpreted. The price of constitutional cooperation and union is a willingness to abide by clear constitutional rules protecting evil that were laid down in the past and a willingness to make additional concessions to evil when resolving constitutional ambiguities and silences in the present.” Id. at 3.
8. The first part of his book is devoted almost entirely to the exposition and critique of these views. See id. at 15-89.
Dred Scott decision and Court and seeks to distinguish them from modern activist cases and Courts.

Yet, Graber contends that, “This agreement that Dred Scott was a ‘national calamity’ masks a deeper disagreement over exactly what was wrong with the Supreme Court’s decision in that case. Each school of contemporary constitutional thought claims Dred Scott embarrasses rival theories.”9 But he finds this to be little more than buck passing, asserting that, “Theories of constitutional authority cannot successfully eradicate constitutional evil,”10 especially the “quintessential evil” of slavery.11 In this way, Professor Graber goes beyond the specific academic and historical controversy over the Dred Scott case to enter into the larger contemporary constitutional theory debate. His skepticism with regard to theories of constitutional interpretation leads him to doubt that the Constitution usefully (i.e., in a way that has a significant practical effect on adjudication12) contains substantive principles. His, then, is a proceduralist, political Constitution, in this way not unlike the one John Ely argued for in the 1980’s and which was similarly dismissive of substantive theories of constitutional interpretation.13

The Dred Scott decision has created, it seems, a constitutional Rashomon,14 appearing in different ways to interpreters with differing theories and preconceptions. It may be a constitutional tragedy for them all, but they define tragedy in different ways. It should not be surprising, then, that in the course of his larger exposition, Graber singles out Abraham Lincoln, the hero of standard treatments of Dred Scott, slavery, and the civil war,15 for a revisionist downgrading.16 To answer these charges, in this paper I respond to Graber’s analysis, not only to defend Lincoln, his critique of Dred Scott, and his constitutional aspirationalism, but also to offer them up as an alternative to Graber’s account of the Dred Scott case in particular and of constitutional theory

9. GRABER, supra note 4, at 17 (citation omitted).
10. Id. at 5 (emphasis in original).
11. Id. at 12.
12. In contrast to many contemporary theorists, Graber insists of Dred Scott that, “No prominent approach to the judicial function compels any result in that case.” Id. at 17.
14. Rashomon is an Academy Award winning 1950 film by Japanese director Akira Kurosawa which retells the story of the same murder in the woods from several wildly different, even contradictory, perspectives. RASHOMON (Daiei Motion Picture Co. 1950).
15. “We celebrate Lincoln only by recognizing that in 1861 he chose justice over constitutionality, or at least that he refused to accommodate slavery to the extent necessary to maintain the old constitutional order.” GRABER, supra note 4, at 13-14.
16. Saying, for example, that, “Lincoln abandoned the original constitutional hope that conflicts over slavery would not disrupt the union. His claim that the persons responsible for the Constitution intended to place slavery ‘in the course of ultimate extinction’ was faulty constitutional history.” GRABER, supra note 4, at 13.
and adjudication, more generally. The issues underlying our debate have a significance that goes beyond the limited question of which of us better characterizes and analyzes the Dred Scott decision to encompass larger issues of constitutional interpretation which trouble us today.

Lincoln’s approach to Dred Scott and to the Constitution flowed from his commitment to the Declaration of Independence and its doctrine of unalienable natural rights as the basis for American government. The Constitution in his view, as in the Declaration, was made to “secure these rights.” His complaint with Chief Justice Taney’s Dred Scott opinion was that it denied the promise of the Declaration to all Americans, black as well as white. Neither he nor the founders sought immediate total realization of these rights, which would have, at a minimum, required full abolition of slavery, only “simply to declare the right, so that enforcement of it might follow as fast as circumstances should permit.” He did not counsel resistance to the Dred Scott decision, but rather its overruling.

Lincoln’s was a pragmatic aspirationalism, then, one historically grounded in foundational American principles and proceeding with a view both of those principles and the practical obstacles to and cost of their implementation. Its aspirational component, one based on the promise of equal liberty for all in the Declaration of Independence, means that the Constitution has a substantive purpose motivating its structural and procedural provisions. Its pragmatic component means that it is not tied exclusively to one approach (be it structural, historical, or aspirational) to constitutional decision-making, but rather may

17. For this reason, I will concentrate on Professor Graber’s legal and constitutional argument and exposition to the neglect of his extensive and insightful historical and political discussion.

18. “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.” The Declaration of Independence para. 1 (U.S. 1776).

19. In a fragment on the Constitution and the Union Lincoln famously explained the relation between the “Liberty to all” principle of the Declaration and the Constitution saying, “The assertion of that principle, at that time, was the word, ‘fitly spoken’ which was proved an ‘apple of gold’ to us. The Union, and the Constitution, are the picture of silver, subsequently framed around it. The picture was made, not to conceal, or destroy the apple; but to adorn, and preserve it. The picture was made for the apple—not the apple for the picture.” The Collected Works of Abraham Lincoln 168 (Roy P. Basler ed. 1953) (hereinafter Collected Works) (emphasis in original). The underlying imagery is biblical, “A word fitly spoken is like apples of gold in pictures of silver.” Proverbs 25:11 (King James).

20. In a speech at Springfield, Illinois on June 26, 1857, Lincoln complained that, “Chief Justice Taney, in delivering the opinion of the majority of the Court, insists at great length that negroes were no part of the people who made, or for whom was made, the Declaration of Independence, or the Constitution of the United States.” Collected Works 403.

21. Id. at 406.

22. In a speech at Chicago on July 10, 1858, he said of the decision, “I do not resist it. If I wanted to take Dred Scott from his master, I would be interfering with property.” Id. at 495.

23. See id.
prudentially choose among them as circumstances dictate. His approach steers a middle path between the complicity with evil risked by the compromise counseled by Mark Graber or Stephen Douglas, on the one hand, and the revolutionary idealism of John Brown, who sought to bring about abolition by violent insurrection, on the other hand. It is in defense of this approach to constitutional adjudication and dealing with constitutional evil that I join issue with Graber over *Dred Scott* and the Constitution.

The major portion of this paper will consist of exposition and critique of Professor Graber’s account the *Dred Scott* case and constitutional evil as well as the Lincolnian response. But first, to set the stage and provide some context for these discussions, I will do three things. First, I will introduce the notion of *Dred Scott* as a constitutional tragedy of national proportions and examine some ways in which the tragic dimensions of the case and its aftermath have been analyzed. Second, I will briefly summarize what the *Dred Scott* decision says (focusing mainly on Chief Justice Taney’s “opinion of the Court” and the dissents by Justices Curtis and McLean). Third, I will examine what some contemporary critiques of *Dred Scott* assert and compare that to the views of Graber and Lincoln on the case.

II. PROFESSOR GRABER ON *DRED SCOTT* AND CONSTITUTIONAL EVIL

A. *Dred Scott* as Constitutional Tragedy

Whatever their other differences, none of the writers discussed in this paper denies the horror and tragedy of the Civil War that followed in the wake of the *Dred Scott* decision. What they do dispute is the role of the case in what followed and the nature of constitutional tragedy itself. If the *Dred Scott* decision was a constitutional tragedy, then why and for whom was it a tragedy, and what were its tragic dimensions? Not surprisingly, many writers have attempted to answer this question.24

The scheme I find most apt is the triad of alternative definitions of constitutional tragedy suggested by J.M. Balkin.25 For him, one form of constitutional tragedy happens when, “a favored method of constitutional interpretation produces regrettable results.”26 A second approach finds that constitutional tragedy occurs when “we cannot escape the possibility of constitutional evil” where “the constitution permits or requires serious and

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24. Several of these answers can be found in a recent anthology devoted to the subject. See *Constitutional Stupidities, Constitutional Tragedies* (William N. Eskridge, Jr. & Sanford Levinson eds., 1998).


26. *Id.*
profound injustices, like slavery.”27 The third definition of constitutional tragedy, the one most similar to the classical Greek notion of tragedy, “is what befalls us, as a nation, because of the Constitution we have collectively created for ourselves.”28 This view sees tragedy as the result of a tragic fault (usually hubris) and unfortunate, insufficiently foreseen circumstances which when added to the fault create sad results.

This three part classification of tragedy is most apt for this paper because it rather neatly corresponds to the three views on Dred Scott canvassed in several subsequent sections of this paper. The first is that of several contemporary critics of Dred Scott who see it as a failure, an avoidable failure, of the constitutional interpretive methods and aims employed by the Court (and especially by Chief Justice Taney) in that case. The second is the view taken by Professor Graber who, because he sees constitutional evil as an unavoidable feature of American constitutionalism (if not of human nature itself), recommends compromise with evil as necessary for social and governmental peace and stability and preferable to civil war.

The third which (as Balkin notes) was the view of Lincoln himself.29 It was the result of what the abolitionist William Lloyd Garrison famously called a “Covenant with Death and an Agreement with Hell”30 (meaning the constitution itself). As Balkin notes, we as a nation entered into this agreement “pretending it was not an evil—or if so, an evil that could be managed, assuaged, compromised away—until finally slavery provoked a crisis, leading to the deaths of hundreds of thousands of Americans.”31 Yet at the end, unlike classical tragedy, there was redemption for the nation.32

The three views of constitutional tragedy set forth by Balkin, when applied to the views discussed in this paper, set out a range of possibilities concerning the avoidability or inevitability of constitutional tragedy. For the contemporary critics who see it as an avoidable failure, the sadness at the events that occurred arises mainly from a sense that they were unnecessary and, so, gratuitous harms. For Mark Graber, the tragedy arises for the opposite reason—the constitutional evil faced in Dred Scott was unavoidable, given the existence of slavery in the United States, but many Americans did not sufficiently realize this fact and, so refused to make the constitutional and political compromises with the evil of slavery that were needed to avoid or at least minimize the death and destruction

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27. Id.
28. Id. at 122.
29. See id. at 124-25.
32. As Balkin says, “‘A new birth of freedom’ gradually emerges from this struggle, but at a terrible cost.” Id. at 125.
Lincoln’s view of constitutional tragedy is intermediate between the other two views. Unlike some contemporary commentators, Lincoln did not see the tragedy of the *Dred Scott* decision as a wholly avoidable mistake attributable to faulty constitutional decision-making methods. But neither did he have the fatalism and hopelessness Professor Graber displays in the face of constitutional evil, foreseeing instead redemption in “a new birth of freedom.” And rather than counseling unconditional compromise with evil, he famously stated (correctly, as it turned out) that, “A house divided against itself cannot stand.”

It is worth noting here that only on the third, Lincoln/Balkin view is *Dred Scott* truly a tragic case set in motion by a cruel and unforgiving fate, unsuccessfully struggled against. On the other two views, it was less a true tragedy than simply a mistake. A big mistake, but a mistake nonetheless. On the first view, it was a function of the choice of the wrong constitutional theory, the incorrect application of a constitutional theory, or both. On Professor Graber’s view, the mistake is the failure to compromise sufficiently when politically necessary to avoid the dissolution of the union and civil war.

In their views and accounts of constitutional tragedy, we will see, then, in microcosm their presuppositions and theories of constitutional evil, Supreme Court adjudication, American politics, and historical inevitability taken by these thinkers on *Dred Scott*. The *Dred Scott* case will prove to be a main point of contact and conflict between these views, the “hard case” that tests the fundamentals of these approaches. My purpose in the remainder of this paper will be to examine and evaluate these views, concentrating especially on those of Mark Graber and Abraham Lincoln in order to get to the larger, more general questions of constitutional meaning and dealing with constitutional evil (which bedevil us as Americans to this day), which they raise in a stark form.

**B. What Did Dred Scott Say?**

But before discussing the views of Professor Graber and other commentators on *Dred Scott*, to provide some context, let me next give some essentials of the decision, focusing mainly on the “opinion of the Court” by Chief Justice Taney and, to a lesser extent, on the dissents of Justices Curtis and McLean for the

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33. As he says, “The problem of constitutional evil is about why, how, and whether we form and sustain political communities despite these deep disagreements.” GRABER, supra note 4, at 2.

34. This oft-quoted phrase comes from Lincoln’s Gettysburg Address. 7 COLLECTED WORKS 22, 23.

35. President Abraham Lincoln, “A House Divided”: Speech at Springfield, Illinois (June 16, 1858) in 2 COLLECTED WORKS 461, 461. The phrase, like so many used by Lincoln, is biblical in origin, “And Jesus knew their thoughts, and said unto them a kingdom divided against itself is brought to desolation; and every city or house divided against itself shall not stand.” Matthew 12:25 (King James).

36. For an explanation for the use of scare quotes around the phrase “opinion of the Court,” see supra note 2.
purpose of summarizing what are usually taken to be some of the main issues in
the case, such as whether Dred Scott (or any African-American) could be a
citizen of the United States and whether the Missouri Compromise (which
prohibited slavery in the territories above 36° 30’ North latitude) was
constitutional. Professor Graber has largely the same estimation of what the
main issues in the case are. The citizenship issue was important for both
procedural reasons (because Scott sued in federal court alleging diversity of
citizenship as a jurisdictional basis for his suit) and substantive reasons (Scott
was claiming that his travel to the free territory of Wisconsin and the free state
of Illinois made him a free man).

For Chief Justice Taney, the possibility of United States or state citizenship
for African Americans was the first and prime question in the Dred Scott
case. Now, surprisingly, the Constitution of 1787 did not define United States
citizenship or say who American citizens were. This did not stop Taney from
quickly asserting that, “The words ‘people of the United States’ and ‘citizens’
are synonymous terms, and mean the same thing.” He next denied, however,
that Dred Scott and other African-Americans were included under either term.
He did not reach this conclusion from the plain meaning of the words (since that
would have led towards the opposite conclusion), but rather based it on his
estimation of the intent of the framers of the constitution as to the scope of these
terms. State law was not relevant here for Taney because he distinguished state
citizenship (and the rights and privileges attaching thereto) from national

37. See Dred Scott, 60 U.S. at 403-422.
38. See id. at 432-442.
39. Professor Graber has the same assessment of the conventional view of the issues in the
case, but notes grounds for uncertainty, saying, “The precise holding of Dred Scott is not entirely
clear. All nine Justices wrote opinions, and seven Justices in the majority gave different reasons for
rejecting Scott’s appeal.” GRABER, supra note 4, at 19.
40. For a survey of Dred Scott’s extensive travels relating to his claim, see FEHRENBACKER,
supra note 2, at 239-49.
41. “The question is simply this: Can a negro, whose ancestors were imported into this
country, and sold as slaves, become a member of the political community formed and brought into
existence by the Constitution of the United States, and as such become entitled to all the rights, and
privileges, and immunities, guaranteed by that instrument to the citizen?” Dred Scott, 60 U.S. at
403.
42. This defect was cured after the Civil War by the Fourteenth Amendment, which begins
with these words, “All persons born or naturalized in the United States, and subject to the
jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” U.S.
CONST. amend. XIV, § 1.
43. Dred Scott, 60 U.S. at 404.
44. “The question before us is, whether the class of persons described in the plea in abatement
compose a portion of this people, and are constituent members of this sovereignty? We think they
are not.]” Id.
45. “[T]hey are not included, and were not intended to be included, under the word ‘citizens’
in the Constitution, and can therefore claim none of the rights and privileges which that instrument
provides for and secures to citizens of the United States.” Id.
citizenship (and the rights and privileges attaching thereto). The supremacy of the national naturalization power trumped, he felt, the power of a state to confer rights of citizenship.

Having disposed to his satisfaction of the question of whether Scott or other African-Americans might directly gain United States citizenship directly from the Constitution itself, Taney next turned to the possibility that they might obtain it indirectly as a consequence of state citizenship. The obstacle Taney encounters here is that it is difficult to deny that African-Americans are people and, so, would seem to be included in terms like “men,” “person,” and “people” as these words might appear in important basic documents and statutes, most notably the Declaration of Independence. In fact, Taney cannot avoid the use of these terms himself when referring to African-Americans. He meets this difficulty to his argument by denying that it was not within the intent of the framers of these documents to include African-Americans, free or not, under these terms, tracing this back before the Declaration to English colonial days.

Taney directs special attention to the Declaration of Independence, not only because of its important and foundational role in American history and government, but also because its broad wording (e.g., “all men are created equal”) presents a particular difficulty for the point he is pressing. While granting apparent force of the opposing argument, he again insists that this possibility is excluded by the intent of the framers, saying, after quoting the beginning passages of the Declaration,

The general words quoted above would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration; for if the

46. “In discussing this question, we must not confound the rights of citizenship which a State may confer within its own limits, and the rights of citizenship as a member of the Union.” Id. at 405.

47. “The Constitution has conferred on Congress the right to establish an uniform [sic] rule of naturalization, and this right is evidently exclusive, and has always been held by this court to be so. Consequently, no State, since the adoption of the Constitution, can by naturalizing an alien invest him with the rights and privileges secured to a citizen of a State under the Federal Government[.]” Id.

48. He first says that, “It is true, every person, and every class and description of persons, who were at the time of the adoption of the Constitution recognized as citizens in the several States, became citizens of this new political body[.]” As a result, he then asserts, “It becomes necessary, therefore, to determine who were the citizens of the several states when the Constitution was adopted.” Id. at 406.

49. He says, “In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.” Dred Scott, 60 U.S. at 407.

50. See id. at 407-408.
language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted; and instead of the sympathy of mankind, to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation.\footnote{Id. at 410.}

The purported proof of the intent of the Declaration’s framers by the Chief Justice here is indirect, rather than direct, and relies on the assumption that they would never hypocritically do anything inconsistent with their high principles. In the paragraph after the one quoted above, he says that such an inference would be contrary to the framers’ sense of honor and implies that it would even be an insult to their honor to conclude that they acted in that way.\footnote{Id. at 417.} The wording of this argument and the absence of any direct historical evidence for the point he is pressing may be an indication that Taney realizes that he is on thin ice here. One would think that if the framers in fact thought as Taney says they did, one or more of them would have said so in the manner in which Taney himself does. But the absence of any such quotations speaks to the contrary.

This issue will loom large again when we get to Lincoln’s views on the Declaration. The question then will be, if Taney was wrong about the inclusion of African-Americans in the promises of the Declaration of Independence, why did the framers say one thing, yet do another?

Next, Taney surveys race-based statutes of the states since independence and, employing the same counterfactual means of inferring framers’ intent, concludes, “It is impossible, it would seem, to believe that the great men of the slaveholding States, who took so large a share in framing the Constitution of the United State, and exercised so much influence in procuring its adoption, could have been so forgetful or regardless of their own safety and the safety of those who trusted and confided in them.”\footnote{Id. at 432.}

The other main issue discussed at length in Taney’s \textit{Dred Scott} opinion is the constitutionality of the Missouri Compromise which, “declares that slavery and involuntary servitude, except as punishment for crime, shall forever be prohibited in all that part of territory ceded by France, under the name of Louisiana, which lies north of thirty-six degrees thirty minutes and not included within the limits of Missouri.”\footnote{Id. at 431.} This was an issue because Scott claimed that his stay in the territory of Wisconsin made him free.\footnote{See \textit{Dred Scott}, 60 U.S. at 431.}
Scott’s position was that the enactment of the Missouri Compromise fell within Congress’ power to regulate the territories, which seemed to accord with the plain meaning of the Constitution. But Taney once again relied upon framing history to support a contrary position that, “[T]he power there given, whatever it may be, is confined and intended to be confined, to the territory which at the time belonged to, or was claimed by, the United States, and was within their boundaries as settled by the treaty with Great Britain.” To buttress his argument, he points to the definite article and singular territory in the clause. The force of this point is greatly diminished, however, by the fact, noted by Fehrenbacher, that “when the Constitutional Convention began to consider the subject, there was just one ‘Territory of the United States.’” If the Territory Power doesn’t give Congress authority to regulate the territories according to Taney where does this power come from? Taney says that it derives from the Statehood Clause, the power of “the admission of new States.”

After spending untold pages on citizenship and the Missouri Compromise, Taney spends only a brief time (only a paragraph) on another important issue involving the due process clause of the Fifth Amendment.

Now, as we have already said in an earlier part of this opinion, upon a different point, the right of property in a slave is distinctly and expressly affirmed in the Constitution. The right to traffic in it, like an ordinary article of merchandise or property, was guaranteed to the citizens of the United States, in every state that might desire it, for twenty years. And the government in express terms is pledged to protect it in all future time, if the slave escapes from his owner. This is done in plain words—too plain to be misunderstood. And no word can be found in the Constitution which gives Congress a greater power over slave property, or which entitles property of that kind than less protection than property of any other description. The only power conferred is the power coupled with the duty of guarding and protecting the owner of his rights.

As Fehrenbacher has pointed out, this paragraph consists mainly in bald assertion rather than argument, assertion that is often overstated, if not flatly untrue. He notes, for example, “Since the Constitution uses neither the word

56. “The counsel for the plaintiff has laid much stress upon the article in the Constitution which confers upon Congress the power ‘to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.’” Id. at 432 (quoting U.S. CONST. art. IV, § 3).
57. Id. at 432.
58. “It does not speak of any territory, nor of Territories, but uses language which, according to its legitimate meaning points to a particular thing.” Id. at 436.
59. FEHRENBAKER, supra note 2, at 368.
60. Dred Scott, 60 U.S. at 446 (citing U.S. CONST. art IV, §3).
61. “No person shall…be deprived of life, liberty, or property, without due process of law[.]” U.S. CONST. amend. V.
62. Dred Scott, 60 U.S. at 451-452.
‘slavery’ nor the word ‘property’ in connection with Negroes, the first sentence is manifestly untrue.” 63 The next two sentences overstate the textual constitutional support for the first sentence. 64 And the fifth sentence effectively contradicts the second and third as the fugitive slave and slave trade clauses do, in fact, treat slave property as distinctive. 65

Taney’s introduction into constitutional discourse of substantive due process argument (for the doctrine was then a relative novelty, due process having traditionally been seen as only a procedural protection 66) appears to be little more than a brief afterthought to his decision, taking up only a few sentences in an otherwise lengthy opinion.

The Dred Scott dissents by Justices McLean and Curtis contradict several key claims and arguments made by the Chief Justice in his “opinion of the Court,” especially on the question of African-American citizenship. After first noting, “citizens of the several States were citizens of the United States under the Confederation,” Curtis pointed out that at that time a number of states held all free, native-born persons to be citizens. 67

Justice McLean, for his part, attacked slavery from both natural rights and historical perspectives. He quoted Lord Mansfield, who in Somersett’s Case, had said,

The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from the memory; it is of a nature that nothing can be suffered to support it but positive law. 68

He then cited American precedent to the same effect. 69 McLean later added that, “Lord Mansfield held that a slave brought into England was free.” 70

Where Taney had noted the federal constitutional provision saying that the slave trade could not be banned until 1808 71 as evidence of constitutional

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63. Fehrenbacher, supra note 2, at 380.
64. See id.
65. See id. at 381.
66. As Fehrenbacher notes, “Taney, moreover, said nothing to justify use of the due-process clause as a restraint upon legislative power...in spite of the fact that ‘due process,’ a concept derived from Magna Carta, had traditionally meant a guarantee of proper procedure in law enforcement, thus constituting a restraint primarily upon the executive function.” Id. at 382.
67. At the time of the ratification of the Articles of Confederation, all free native-born inhabitants of the States of New Hampshire, Massachusetts, New York, New Jersey, and North Carolina, though descended from African slaves, were not only citizens of those States, but such of them as had the other necessary qualifications possessed the franchise of electors, on equal terms with other citizens.” Dred Scott 60 U.S. at 572-73.
68. Dred Scott, 60 U.S. at 535 (McLean, J., dissenting) (citation omitted).
69. See id.
70. Id. at 548.
protection of slavery, McLean quoted Madison’s comment on that provision, “Twenty years will produce all the mischief that can be apprehended from the liberty to import slaves; so long a term will be more dishonorable to the American character than to say nothing about it in the Constitution.” And Taney sought to lay the constitutional foundation for the perpetuation and spread of slavery, reminding the Court that,

Many of the States, on the adoption of the Constitution, or shortly afterward, took measures to abolish slavery within their respective jurisdictions; and it is a well-known fact that a belief was cherished by the leading men, South as well as North, that the institution of slavery would gradually decline, until it would become extinct. The increased value of slave labor, in the culture of cotton and sugar, prevented the realization of the expectation. Like all other communities and States, the South were influenced by what they considered to be their own interests."

Lastly, Justice McLean disputed Chief Justice Taney’s assertion that the Northwest Ordinance, which prohibited slavery in the Northwest Territory, went into effect only through the several states acting in unison in the Confederation rather than under the Constitution (Taney did this in order to distinguish the Ordinance from the Missouri Compromise, which set forth a similar prohibition in the northern part of the Louisiana Purchase).

C. The Contemporary Critique of Dred Scott

Professor Graber is, I have said, a constitutional iconoclast. So to better set the context and contrast class for his iconoclasm, I turn next to an examination of the orthodoxy from which he dissents. Its basics are simple and few. As he declares, “Contemporary constitutional theory rests on three premises: Brown v. Board of Education was correct, Lochner v. New York was wrong, and Dred Scott v. Sandford was wrong.” And of the three premises, only the last one is held without exception. He also questions the modern day motivations and interests of contemporary commentators. Professor Graber’s assertions are sweeping and perhaps even damning in their implications, but they are, nevertheless, I believe, largely true. For this reason, I will not be defending these

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71. “The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eighty[.]” U.S. Const. art. I, §9.
72. Dred Scott, 60 U.S. at 536 (McLean, J., dissenting).
73. Id. at 538-39.
74. See id. at 546-47.
75. Graber, supra note 4, at 15 (citations omitted).
76. “A few intrepid souls question whether Brown was correctly decided. Some proponents of law and economics favor reviving the freedom of contract and the Lochner decision. No one wishes to rethink the universal condemnation of Dred Scott.” Id. (citations omitted).
77. He says, “Modern day critics of Dred Scott have presentist concerns.” Id. at 20.
writers from Graber’s barbs, but rather attempting to show how neither is match for Abraham Lincoln’s views on the same issues they treat.

In illustration, let us look first at three contemporary critiques of the Dred Scott decision by prominent legal academic commentators—Robert A. Burt, Christopher L. Eisgruber, and Cass R. Sunstein. That Graber’s basic assertions are true of these writers is apparent even from the titles of the articles that propound them. They are focused on the relation of Dred Scott to contemporary constitutional law. They do display the case preferences he claims. Graber is also correct that the commentators vary on exactly why Dred Scott is wrong. Burt, for example, sees its failing in having an improper conception of the Supreme Court’s institutional role. Eisgruber, in contrast, finds the failing in its brand of originalism (i.e., reliance of its view of the intent of the framers of the Constitution), which he contrasts unfavorably with Lincoln’s “originalism steeped in justice.” And according to Sunstein, the Court, “should try to avoid issues of basic principle and instead attempt to reach incompletely theorized agreements on particular cases” (i.e., proceed on a case by case basis). Although all three writers condemn the Supreme Court’s Dred Scott decision in no uncertain terms, they reach no consensus on why it is wrong—they each find a different basic failing in the case.

Their criticisms of Dred Scott go well beyond the points reflected in the titles of their papers. They reject the decision on many scores. Burt, for example, cites its failure as an effort at dispute resolution. He decries its virulent

80. See supra note 9 and accompanying text.
81. Robert Burt, though citing Taney’s reprehensible racial views, does not find them to be the reason that the decision was wrong. Rather, he says, “The decision was wrong because it followed from an incorrect view of the judicial role in our society, a view that itself is morally untenable.” Burt, supra note 79, at 3.
82. He rails at Taney that, “An originalism more contemptuous of fundamental values is scarcely imaginable.” Eisgruber, supra note 78, at 47.
83. Id. at 61.
84. Sunstein, supra note 78, at 67.
85. The notion of incompletely theorized agreements is one of Professor Sunstein’s important contributions to modern legal and constitutional theory. For an introduction to the concept, see Cass R. Sunstein, Incompletely Theorized Agreements, 108 HARV. L. REV. 1733 (1995). For a further treatment, see Cass R. Sunstein, LEGAL REASONING AND POLITICAL CONFLICT 35-61 (1996).
86. Of course, they may all be right if Dred Scott has all three failings they individually find in the case.
87. “If a proper criterion for evaluating a judicial decision is its success in achieving peaceable resolution of a social dispute, Dred Scott was a palpable failure; indeed, its critics then and now have plausibly claimed that the decision played a significant role in precipitating the Civil War.” Burt, supra note 79, at 1 (citation omitted).
racism,\textsuperscript{88} which also infected its treatment of the Declaration of Independence and the intent of its framers,\textsuperscript{89} attributing this to Taney’s sharing of then current racist views.\textsuperscript{90}

Eisgruber writes in opposition to conservative critics of modern substantive due process cases who, like Robert Bork, say, “Who says Roe must say Lochner and Scott.”\textsuperscript{91} To do this, Eisgruber must differentiate modern substantive due process from Taney’s sort. He does this by branding Taney as an originalist, one whose doctrine is blind to principle\textsuperscript{92} and incapable of growth or improvement.\textsuperscript{93} The fault in \textit{Dred Scott}, on this view, then is not entirely due to originalism nor entirely due to racism, but rather due to originalism in service to racism.

Sunstein’s approach to \textit{Dred Scott} is an application of his theory of incompletely theorized agreements. He writes in opposition to the myth (in his opinion) that, “\textit{Dred Scott} was wrong because the Court abandoned the ‘intentions of the framers’ in favor of its own conception of social policy.”\textsuperscript{94} Instead, he finds the mistake in “the Court’s effort to resolve, once and for all time, an issue that was splitting the nation on political and moral grounds.”\textsuperscript{95} To avoid this error, the Court should have pursued, he thinks, a path of “judicial statesmanship” (i.e., “generally not set forth broad theories of the good and the right…[and] decide cases by reference to modest low-level rationales on which diverse people can agree.”\textsuperscript{96}).

All three of these contemporary evaluations of \textit{Dred Scott}, different as they may be, depart from the foremost traditional criticism of the decision—that it wrongly, as matters of both substantive and procedural law, declared the Missouri Compromise to be unconstitutional, thus removing the barrier to the spread of slavery to the territories (and perhaps to the free states, too).\textsuperscript{97} It may

\begin{itemize}
\item \textsuperscript{88} “Chief Justice Taney’s opinion for the Court recited the most explicit racist dogma that appears anywhere, before or since his opinion, in the pages of the United States Reports.” \textit{Id.}
\item \textsuperscript{89} “As a matter of historic fact, the founders were inconsistent, were aware of their inconsistency and admitted it.” \textit{Id.} at 2 (citations omitted).
\item \textsuperscript{90} “Taney’s account was, however, an accurate depiction of a belief about black status that was widely held and openly avowed among his contemporaries.” \textit{Id.} at 2.
\item \textsuperscript{92} “An originalism more contemptuous of fundamental values is scarcely imaginable.” Eisgruber, supra note 78, at 47.
\item \textsuperscript{93} “[H]e also refused to assume that the Framers wanted their constitutional principles to transcend the shortcomings of their own conduct.” \textit{Id.}
\item \textsuperscript{94} Sunstein, supra note 78, at 66.
\item \textsuperscript{95} \textit{Id.}
\item \textsuperscript{96} \textit{Id.} at 78.
\item \textsuperscript{97} Renowned constitutional historian Edward Corwin wrote almost a century ago that, “For obvious reasons, hostile criticism of the Dred Scott decision has always found its principal target in the Chief Justice’s opinion, and the gravamen of such criticism has always been that the great part of it, particularly the portion dealing with the Missouri Compromise, was \textit{obiter dictum}.” Edward S. Corwin, \textit{The Dred Scott Decision, in the Light of Contemporary Legal Doctrines}, \textit{17 AM. HIST. REV.} 52, 54 (1911). Corwin himself does not, however join in this criticism. \textit{See id.}
well be that all criticisms of *Dred Scott* are presentist in their own way and time, thus creating the *Rashomon*-like quality of the commentary on the case.

**D. Professor Graber on Dred Scott and Constitutional Evil**

Having sketched the background of received opinion on the *Dred Scott* decision, one that is overwhelmingly negative, let us turn now to Professor Graber’s underlying account of constitutional theory, one which, not surprisingly, pursues different, in fact contrary, ends than the theories of the writers just discussed and then to his description and evaluation of the *Dred Scott* decision itself. We will find that he is a contrarian on the larger issue of constitutional decision-making as well as on the more specific question of the proper evaluation of the opinions in the *Dred Scott* case. He differs from those writers he opposes both in the value placed in constitutional/political compromise and stability and also faith (or lack thereof) in the ability of argument based on substantive values to resolve deep constitutional and political disputes.

From Graber’s perspective, the overriding purpose of constitutional decision-making is to settle the disputes which arise from the conflict of political values in the polity, especially those involving constitutional evil. The possibility of principled right answers to deep constitutional disagreements is belied by political value conflicts, rendering the effort to find perfect solutions not merely futile, but actually counterproductive. He clearly feels that constitutional compromise is necessary for the stability and even the survival of politically divided polities (such as the antebellum United States). This is especially true for him in cases of constitutional evils like slavery, where the need for compromise increases along with the magnitude of the evil. This stern advice must be taken, Graber argues, because there is no other way of escaping constitutional evil or resolving it. It is foolish to believe that constitutional evil may be avoided, so, apparently, society must compromise with it.

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98. He says, “Constitutionalism, in this work, mediates the controversies that arise among citizens who hold clashing political aspirations.” *GRABER, supra* note 4, at 2.

99. He holds that, “Deeply rooted constitutional evils, however, are immune to standard interpretive treatments.” *Id.*

100. Graber says, “Obsessive searches for ‘correct’ answers to past and present contested questions of constitutional law are politically futile, even when possible jurisprudentially.” *Id.* at 3.

101. “Political orders in divided societies survive only when opposing factions compromise when constitutions are created and when they are interpreted.” *Id.*

102. “The price of constitutional cooperation and union is a willingness to abide by clear constitutional rules protecting evil that were laid down in the past and a willingness to make additional concessions to evil when resolving constitutional ambiguities and silences in the present.” *Id.*

103. He charges, for example, that *Dred Scott’s* critics, “foster the dangerous illusion that the problems of constitutional evil that have plagued American constitutionalism from its inception could have been avoided had the Supreme Court interpreted the Constitution more justly.” *Id.* at 6.
This course is recommended by Graber not because of its inherent goodness or rightness, but because of the dire consequences he thinks will occur if it is not followed. That they will follow seems unavoidable to Graber not merely because of the sad inevitability of evil, but also because of the ineffectiveness of principled ways of resolving evil proffered by the constitutional theorists discussed above and others like them. He thinks that theories of constitutional interpretation cannot eradicate constitutional evil; he implies that they cannot even mediate it. The only choice, then, is for the society to accommodate practices many members find repugnant.

Now that we have surveyed the constitutional consensus against which Professor Graber is reacting and the general approach to constitutional politics that he takes up, we proceed next to Graber’s take on the Dred Scott decision itself. Here he does not shy away from confronting and contradicting received opinion. He challenges the hallowed view of Lincoln in that opinion by saying, for example, that, “Dred Scott was wrong and Lincoln was right only if John Brown was correct when he insisted that slavery was sufficiently evil to warrant political actions that ‘purge[d] this land in blood.’”

Graber seeks to turn Lincoln from the hero of liberty to the destroyer of union. He finds Taney to be a better constitutional historian than Lincoln because he holds him to be more faithful to the intentions of the framers. To work this makeover, Professor Graber must sever justice from the Constitution and present them as stark alternatives. It is fair to say, then, that Mark Graber is not a peace and justice theorist on this topic, but rather a peace or justice theorist, for he sees justice and stability as incompatible alternatives in a deeply divided society like the antebellum United States. He assumes that justice is not an argument that can move or convince citizens in such a situation, and there is unfortunately much truth in this assertion. But this does not mean that it should not be tried or that it can have no positive effect, even in the long run.

In addition, his argument also assumes and implies that compromise with evil is always the better course because it will always work and lead to stable politics. But this certainly is not true, as the history of the antebellum period demonstrates. The compromises on slavery brought only short term peace and also set the stage for more intractable conflict later. The wishful thinking

104. He asserts that, “Ordinary constitutional politics cannot successfully eradicate constitutional evil.” He also says that, “Theories of constitutional authority cannot successfully eradicate constitutional evil.” GRABER, supra note 4, at 4, 5 (emphasis in original).

105. Id. at 8. The quote from Brown appears in Oates’ biography of Brown. STEPHEN B. OATES, TO PURGE THIS LAND WITH BLOOD: A BIOGRAPHY OF JOHN BROWN 351 (1970).

106. “Lincoln abandoned the original constitutional hope that conflicts over slavery would not disrupt union.” GRABER, supra note 4, at 13.

107. “Taney was more faithful to the original Constitution when he championed policies that could be supported by Jacksonians throughout the nation.” Id.

108. “We celebrate Lincoln only by recognizing that in 1861 he chose justice over constitutionality, or at least that he refused to accommodate slavery to the extent necessary to maintain the old constitutional order.” Id. at 13-14.
“ultimate extinction” views of the framers were obviously not productive of a long term solution to the problem of slavery and their compromises, *Dred Scott* included, were ultimately ineffective and unconvincing. Graber’s assumptions on compromises with evil are likewise open, as we shall see, to arguments that they are ineffective and unconvincing.

The net effect of these arguments is to remove the debate over fundamental values from the Constitution and from constitutional decision-making. On Graber’s view, “The Supreme Court of the 1850s is better described as the forum of compromise (or principled moderation) than the forum of principle.”109 And because it is the forum of compromise and not the forum of principle for Graber, it is neither devoted to one exclusive method of constitutional interpretation nor vulnerable to criticism based upon some favored method of constitutional interpretation.110 So, he seeks to remove the debate over interpretive methodology from the Constitution and from constitutional decision-making as well, it seems. More important to Graber than Taney’s methodological purity or correctness was the fact, as he sees it, that, “Taney’s constitutional claims in *Dred Scott* were well within the mainstream of antebellum constitutional thought.”111 He goes on to praise “the remarkable centrism of the Taney Court.”112 And, on some level at least, it is difficult to argue with this assertion since Taney got six other votes and only two dissents on the Court.113

Given Graber’s disdain for constitutional interpretive methodology and his praise for the Taney Court’s doctrinal/political centrism, it should come as no surprise to the reader that he feels that, “The best candidate for being the forum of compromise in the 1850s produced what may have been the most politically acceptable compromise on slavery.”114 Factually, this assertion prompts several obvious objections. The first is that the *Dred Scott* decision did not convince partisans at both extremes of the slavery question nor did it stop the slide toward civil war. In response to this objection, Graber replies that, “Whether *Dred Scott* was a reasonable compromise must be judged in light of that decision’s impact on those forces previously committed to peaceful union, not on the reactions

110. He says, for example, that, “Many agree that Taney’s historical arguments are flawed. If, as Eisgruber nevertheless claims, originalism done badly discredits originalism, then aspirationalism done badly discredits aspirationalism. The issue in *Dred Scott* seems to be whether Taney was, as aspirationalists claim, a bad historicist or, as historicists claim, a bad aspirationalist. In fact, he was at times both and at other times neither.” GRABER, supra note 4, at 28 (citations omitted).
111. *Id.*
112. *Id.* at 37.
113. Remembering, once again, the difficulty and uncertainty over calling Taney’s *Dred Scott* opinion an opinion of the Court. See *supra* note 2. For two alternative “box scores” of how the *Dred Scott* Justices voted on the issues of the case, see FEHRENBACKER, supra note 2, at 324, 327.
114. GRABER, supra note 4, at 39.
from partisans committed to either secession or a set of policies that risked secession.”

This is a strange defense of *Dred Scott*. One would think that the exact opposite view would make a better test of compromise. Those already “committed to peaceful union” presumably do not need further convincing to seek peace and renounce violent conflict. It is those whose policies risk that violence who need to be argued around. A better test of a compromise would be whether it increased the size of the group willing to reasonably compromise and decreased the size of the group of hotheads who preferred justice to peace.

Graber’s test for the *Dred Scott* “compromise” may be related to the weakness of the arguments that can be made for the case as a union-preserving deal. He follows the articulation of the test with the assertion that, “*Dred Scott* did not immediately weaken the capacity of the Democratic Party to serve as a vehicle for statesmen interested in compromising on the slavery issue.” This is a negative statement made weaker still by the inclusion of the hedge words “immediately” and “capacity.” *Dred Scott* did eventually weaken the role of the Democratic Party as the party of compromise on the slavery issue. Worse yet, the “statesmen” of the party were not necessarily interested in acting on the “capacity” for compromise on slavery in the first place. In fact, they did not compromise on the slavery issue when it came to the “Bloody Kansas” crisis as Graber himself admits.

Despite Professor Graber’s presentation of *Dred Scott* as a constitutional compromise, it is difficult to see how it is, in fact, a compromise. Compromises occur, in large part, because they give competing parties some, but not all, of what they want, often by splitting what is sought in its entirety by both sides (as, for example, the Missouri Compromise divided the territories into free and slave portions on opposite sides of the 36° 30’ line). But *Dred Scott* does nothing of the kind. It opens all the territories (and by implication, all the states) to slavery. The South gets all and the North gets nothing. It is no more a compromise over slavery than *Roe v. Wade* was a compromise over abortion. In fact, so far from being a compromise, it undoes the Missouri Compromise.

Compromises typically arise, when they do, out of give and take negotiation among contending parties to a dispute. Sometimes concessions occur in this process that were not foreseen or intended before negotiation began. But the

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115. *Id.* at 39-40.
116. *Id.* at 40.
117. As Graber notes, “[M]any Republicans living at the time thought that, had Buchanan compromised and allowed a fair election in Kansas on the Lecompton constitution, he and the Taney Court would have destroyed the nascent Republican Party.” *Id.* at 41.
118. 410 U.S. 113 (1973) (holding that state laws criminalizing abortion violated the due process privacy rights of pregnant women). *Roe v. Wade* was not a compromise in the sense that it left it up to the pregnant woman to make her procreative choice.
Dred Scott decision, as a judicial opinion, had none of this give and take because the Court had removed the dispute from the political sphere.\textsuperscript{119}

Compromises require reciprocity, but there is nothing in the South’s attitude at the time, or in Taney’s opinion, or in Graber’s analysis of the compromise with the evil of slavery required in the case that indicates a willingness to compromise on the part of the slave power. When discussing compromise generally, Graber cites the need for mutual concession, but when discussing the Dred Scott case and the evil of slavery in particular, Graber says only that justice must make concessions to evil.\textsuperscript{120} This is not compromise with evil, but rather, surrender to evil. This sort of “compromise” brings neither peace nor justice.

Graber defends Dred Scott from antebellum and contemporary historical critiques by turning the tables and casting doubt upon the ability of these methods to make a decisive difference in the issues before the Court in the case.\textsuperscript{121} He does not deny that Taney made some historical mistakes,\textsuperscript{122} but feels that they do not affect the validity of Taney’s overall argument.\textsuperscript{123} And, besides, the other justices made such mistakes, too.\textsuperscript{124} His position on the historical issues in the case is either that the historical record favored Taney,\textsuperscript{125} reasonable arguments could be made on both sides,\textsuperscript{126} or that the framers had no determinate intent on the matter (not having considered it in the deliberations\textsuperscript{127}).

Note, though, that Professor Graber doesn’t actually say that Dred Scott was rightly decided (only that it “may have been correct”\textsuperscript{128}) or that its argument is correct (only that Taney’s claims “were well within the mainstream of antebellum constitutional thought”\textsuperscript{129}). His reticence may come from the fact that

\begin{itemize}
  \item \textsuperscript{119} As Burt says of the case, “It was an attempt to shut off public conversation which would thereby irrevocably break the bonds of communally acknowledged equal status among disputants—bonds that were already stretched thin by their intensely felt, diametric opposition.” Burt, supra note 79, at 21.
  \item \textsuperscript{120} See, e.g., supra note 7.
  \item \textsuperscript{121} With regard to historicism, for example, he says, “The Supreme Court majority in Dred Scott would not have reached different, more antislavery, conclusions had Taney and his fellow justices faithfully applied historicist methods of constitutional interpretation.” GRABER, supra note 4, at 46.
  \item \textsuperscript{122} He concedes, for example, that “The Curtis dissent demonstrated that some black residents of Northern states were treated as citizens after the Revolution.” Id. at 47.
  \item \textsuperscript{123} “Taney need not have made such a strong historical assertion.” Id. at 48.
  \item \textsuperscript{124} He says, for example, that, “The dissents in Dred Scott made a more fundamental historical error when deriving black citizenship from black voting rights.” Id.
  \item \textsuperscript{125} He says, for example, of Jefferson, that, “The author of the Declaration of Independence firmly believed that both black and white persons were created equal and that members of different races could not inhabit the same civic space.” Id. at 50 (citation omitted).
  \item \textsuperscript{126} See, e.g., supra notes 121-24 and accompanying text.
  \item \textsuperscript{127} He says, for example, with regard to a right to take property into the territories that, “It is impossible to determine whether the persons responsible for the Constitution thought the right not to be divested of property included the right not to be divested of property when moving into the territories.” Id. at 65.
  \item \textsuperscript{128} GRABER, supra note 4, at 1.
  \item \textsuperscript{129} Id. at 28.
\end{itemize}
his defense of the *Dred Scott* opinion is distinctly stronger on historical grounds than it is on aspirational grounds, and the case for rehabilitating *Dred Scott* becomes even weaker when historical and aspirational factors are considered together.

But Professor Graber would disagree. He believes that, “The aspirational critique of *Dred Scott* ignores the references to fundamental constitutional principles in the Taney Court opinions and the powerful racist currents in antebellum constitutionalism.”\(^{130}\) It is interesting that no citations are given, in an otherwise well-footnoted book, in support of this sweeping assertion. I suspect that, if he had given examples of these aspirations and principles, he would have proffered statements that the modern aspirationalists he attacks would consider neither aspirations nor principles, but rather historical/legal factual assertions and/or racist beliefs.

The two values Graber does mention in the paragraph in question are “slavery and white supremacy.”\(^{131}\) These may have been beliefs or values adhered to by “Southern Jacksonian jurists” of that day, but they were not aspirations embodied in or assumed by the Constitution or other founding documents such as the Declaration of Independence. Aspirations are broad, moral societal goals; slavery was a compromise of those American aspirations and not, for most Americans, a shared national aspiration itself. In fact, in places Graber essentially says the same thing himself.\(^{132}\) It may have been true that, “Outside of a few abolitionists, hardly any antebellum Americans thought the Constitution aspired to a multiracial society,”\(^{133}\) however, neither was there real “proslavery aspirationalism” (as Graber calls it).\(^{134}\)

“[A]spirational arguments in societies as deeply racist as the antebellum United States are not vehicles for justice,” is Professor Graber’s pessimistic conclusion here.\(^{135}\) He points to historical illiberal racism in American policy. It is true that there is much evidence of this. Stephen Douglas, for example, spoke for many when he said, “I hold that this government was made on the white basis.”\(^{136}\) And some, like John Petit, called the Declaration of Independence a “self-evident lie.”\(^{137}\)

\(^{130}\) Id. at 76.

\(^{131}\) Id.

\(^{132}\) “Although most framers believed that slavery was wrong and inconsistent with the ideals expressed by the Declaration of Independence, the vast majority of persons responsible for the Constitution did not believe as a matter of political principle or prudence that a multiracial society was desirable.” Id. at 78 (citations omitted).

\(^{133}\) Id. at 80.

\(^{134}\) GRABER, *supra* note 4, at 81.

\(^{135}\) Id. at 78.

\(^{136}\) He said this during the third Lincoln-Douglas debate at Jonesboro on September 15, 1858 (Quoted in 3 COLLECTED WORKS, *supra* note 19, at 112).

\(^{137}\) Petit was quoted by Lincoln in a speech at Chicago on October 27, 1854. 2 COLLECTED WORKS, *supra* note 19, at 283
I agree with Mark Graber that “the vulnerability of aspirational theories to unique proslavery outcomes is complicated.”\textsuperscript{138} But, then, the entire relation of American antebellum aspirations and attitudes towards African-Americans and slavery to constitutional meaning is quite complicated. Statements like Taney’s, which dismiss assertions of inconsistency in the framers’ and slaveholders’ beliefs on these issues as insults to their honor\textsuperscript{139} or, as Graber himself does, as silly,\textsuperscript{140} are of little help because they oversimplify this very complicated issue and lead us to overlook its tragic dimensions - dimensions which are created when people and cultures are tested and torn in precisely these complicated and conflicted ways. But the complicated nature of this relation arises, as Professor Graber himself notes,\textsuperscript{141} from the conflict between the professed (Declaration of Independence-based) ideals of these framers and their racism and refusal to confront the slavery problem. This inconsistency is neither dishonorable nor silly, but rather all too human, putting one in mind of St. Augustine, who famously prayed, “Grant me chastity and continence, but not yet.”\textsuperscript{142}

My argument is that this conflict between ideals and prejudices and practices was human and tragic, rather than merely a silly mistake of judgment. And it is to explore the tragic, conflicted, aspirational core of American constitutionalism, then and now, that we turn to Abraham Lincoln’s beliefs on the \textit{Dred Scott} decision and the Declaration of Independence.

\textit{E. Lincoln On Dred Scott And The Declaration Of Independence}

Abraham Lincoln personified the aspirational values of the Declaration of Independence that Chief Justice Taney confined only to whites in his \textit{Dred Scott} opinion and that Professor Graber tells us the framers could not have actually believed in, given their practices.\textsuperscript{143} In a speech in 1852, Lincoln eulogized a great American, of mainstream political values, who personified this conflict between ideals and behavior that Taney and Graber discount.\textsuperscript{144} That man was Henry Clay, “the Great Compromiser,” who had played important roles in brokering the Missouri Compromise and the Compromise of 1850, both over slavery. Of Clay, Lincoln noted,

\begin{itemize}
  \item \textsuperscript{138} Graber, supra note 4, at 84.
  \item \textsuperscript{139} See supra notes 51 and 52 and accompanying text.
  \item \textsuperscript{140} “The aspirationalist critique of \textit{Dred Scott} is at bottom based on the silly proposition that Southerners fought to the death to preserve what they knew in their hearts was a necessary evil.” Graber, supra note 4, at 83.
  \item \textsuperscript{141} See supra note 132.
  \item \textsuperscript{143} Graber, supra note 4, at 89 (arguing that the framers of the Constitution were not concerned with establishing a solution to slavery, but only the framework under which slavery would be handled in the future).
  \item \textsuperscript{144} Abraham Lincoln, Eulogy to Henry Clay (July 6, 1852), in 2 \textit{Collected Works}, supra note 19, at 121.
\end{itemize}
He ever was, on principle and on feeling, opposed to slavery. The very earliest, and one of the latest public efforts of his life, separated by a period of more than fifty years, were both made in favor of the gradual emancipation of the slaves in Kentucky. He did not perceive, that on a question of human right, the negroes were to be excepted from the human race. And yet Mr. Clay was the owner of slaves. 145

Lincoln went on to contrast Clay’s view of slavery from that of a small number led by John C. Calhoun, who believed that the Declaration of Independence was “the white-man’s charter of freedom.” 146 It was the latter view that he assailed two years later as the new position “that there CAN be MORAL RIGHT in the enslaving of one man by another.” 147 He decried the displacement of the founding view, the one shared by Clay, by this new position. 148 Lincoln contrasted this new, aggressively racist attitude to the founders’ position in this way: “The spirit of seventy-six and the spirit of Nebraska, are utter antagonisms; and the former is being rapidly displaced by the latter.” 149

Taney, Dred Scott, the Declaration of Independence, and the Constitution were all important themes in a crucial speech Lincoln gave in Springfield, Illinois on June 26, 1857, in response to the Supreme Court’s Dred Scott decision which had been rendered several months earlier. 150 Lincoln began by noting that Chief Justice Taney excluded African-Americans from the people referred to in both the Declaration and the Constitution, 151 although they seem to be included within the capacious language of those documents, because Taney inferred the supposed intent of the framers to exclude them from their unequal actions toward African-Americans. 152

Lincoln’s response recognized the clear fact of the unequal status of African-Americans at that time, but denied Taney and Douglas’s inference, saying of the framers of the Declaration that, “I think the authors of that noble instrument intended to include all men, but they did not intend to declare all men equal in

145. Id. at 130.
146. Id.
148. “Thus we see, the plain unmistakable spirit of that age, towards slavery, was hostility to the PRINCIPLE, and toleration, ONLY BY NECESSITY. But now it is to be transformed into a ‘sacred right.’” Id. at 275.
149. Id.
151. “Chief Justice Taney, in delivering the opinion of the majority of the Court, insists at great length that negroes were no part of the people who made, or for whom was made, the Declaration of Independence, or the Constitution of the United States.” Id. at 403.
152. “Chief Justice Taney, in his opinion in the Dred Scott case, admits that the language of the Declaration is broad enough to include the whole human family, but he and Judge Douglas argue that the authors of that instrument did not intend to include negroes, by the fact that they did not at once, actually place them on an equality with the whites.” Id. at 405.
all respects.” Lincoln knew that this was a goal perhaps impossible to fully attain, but that it was also a goal nevertheless worthy of striving for.

Oddly, the strongest argument for this forward-looking reading of the intent of the framers of the Declaration, Lincoln tells us, is that its declaration of human equality served no present purpose in 1776! Correspondingly, perhaps the greatest weakness of Taney’s assertions about the Declaration of Independence is that his argument renders the promises of that document a nullity and casts them away, thus raising the danger of further narrowing of the promise of equality in America.

With regard to the *Dred Scott* decision itself, Lincoln did not deny its effect as precedent, let alone urge violent insurrection like John Brown. What he did do was to distinguish between court decisions as precedents and as authorities and deny that doctrine on the issues presented in the case was finally settled by the Court’s *Dred Scott* decision. If even this was more than the South could
bear, then perhaps no compromise on the slavery issue at that time was any longer possible or justifiable.

IV. CONCLUSION

In the end, we are left with Lincoln’s question for Chief Justice Taney and Stephen Douglas (and which I will also address to Professor Graber and other contemporaries), “[A]re you really willing that the Declaration shall be thus frittered away?—thus left no more at most, than an interesting memorial of the dead past? thus shorn of its vitality, and practical value; and left without the germ or even the suggestion of the individual rights of man in it?”\footnote{Id. at 407.}

Professor Graber’s provocative book has raised questions that we as citizens of the United States all ought to consider. It has also elicited this Lincolnian response from me in exposition of a position in defense of constitutional aspirations that ought to have a far larger following than it currently does.\footnote{As one modern writer on the subject notes, “Surprisingly, the natural-rights political philosophy of the Declaration of Independence, the most obvious choice for interpreting the Constitution, is now all but ignored.”} These are not just academic questions involving an old, much reviled Supreme Court case. They are, as Professor Graber has said, questions that have “presentist” aspects involving crucial issues of how we see and ought to see the Constitution itself, what it binds and inspires us to do or not do as a people and how we are to deal with the constitutional evils that have been handed down to us.
DRED SCOTT: THE DECISION THAT SPARKED A CIVIL WAR

Dr. Roberta Alexander*

I. INTRODUCTION

According to legend, President Abraham Lincoln, upon meeting Harriet Beecher Stowe, said: "So you're the little woman who wrote the book that started this great war!" Lincoln could have said much the same thing to Supreme Court Chief Justice Roger B. Taney. As the author of the most controversial decision rendered in Dred Scott v. Sandford, Taney started a firestorm that contributed to Lincoln’s victory in 1860 and the South’s subsequent secession from the Union. Contemporaries recognized the significance of Taney’s decision. The New York Times, in October of 1864, reflecting on the causes of the Civil War, concluded that the Dred Scott decision “contributed more than all other things combined to the election of President Lincoln.” Supreme Court Justice Felix Frankfurter, writing almost one hundred years later argued that not only did Dred Scott “probably” help “to promote the Civil War,” it also “required the Civil War to bury its dicta.”

Numerous historians have reached similar conclusions. Leo Pfeffer succinctly summed up this thesis when he concluded: “If war was not inevitable, the [Dred Scott] decision made it so.” Charles Warren even more boldly asserted that Taney “elected Abraham Lincoln to the Presidency.” Paul Finkelman, a little more conservatively, concluded that although “it would be an exaggeration to say that the Dred Scott decision caused the Civil War[,] . . . it certainly pushed the nation far closer to that war” by playing “a decisive role in the emergence of Abraham Lincoln as

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5. Many other historians have also concluded that the Dred Scott decision was a major, if not the major cause of southern secession. See e.g., ROBERT K. CARR, THE SUPREME COURT AND JUDICIAL REVIEW 208 (1942); see generally, BRUCE CATTON, THE AMERICAN HERITAGE PICTURE HISTORY OF THE CIVIL WAR 40 (Richard M. Ketchum ed., American Heritage Publishing Co., Inc. 1960); HARRY V. JAFFA, A NEW BIRTH OF FREEDOM: ABRAHAM LINCOLN AND THE COMING OF THE CIVIL WAR 324 (Rowman & Littlefield Publishers, Inc., 2000); KENT NEWMYER, THE SUPREME COURT UNDER MARSHALL AND TANEY 139 (AHM Publising Corp., 1968); BERNARD SCHWARTZ, supra note 4 at 125.
the Republican Party’s presidential candidate in 1860 and his election later that year.” Lincoln’s election then “set the stage for secession and civil war.”

The Dred Scott case began April 6, 1846 when Scott filed suit on behalf of himself, his wife, Harriet, and their two daughters, against their owner, Irene Emerson, in Missouri circuit court in St Louis, claiming that their residence on free soil made them free. Dred Scott had been owned originally by Peter Blow. In the early 1830s, Blow sold Scott to Dr. John Emerson, an army surgeon living in St. Louis. As Emerson’s slave, Scott traveled with his master first to the free state of Illinois, where he lived for over two years, and then to Fort Snelling in the Wisconsin territory, where slavery was prohibited by a federal statute known as the Missouri Compromise. There Scott met and married a slave woman, Harriet Robinson. After their marriage, Emerson bought Harriet from her master. The Scotts had two daughters, one of whom was born in territory north of the 36° 30’ line, where slavery was prohibited by the terms of the Missouri Compromise. For a time, Emerson returned to St. Louis, leaving the Scotts on their own at Ft. Snelling. In 1838, Emerson married Irene Sanford. The Scotts returned to Missouri around the same time. After Emerson died in 1843, the Scotts became the property of his wife, Irene, who was given a life estate of all his possessions, with their daughter Henrietta as remainderman. The executor of Emerson’s will was Irene’s brother, John F. A. Sanford of St. Louis. In 1846, having no need for her slaves, Irene hired Dred and Harriet out to Samuel Russell, a cruel master. A few weeks later, the Scotts filed suit for their freedom.

After six years of complicated litigation which included victory for the Scotts in the Missouri trial court, the Missouri Supreme Court, on March 22, 1852, held, by a 2-1 vote, that since the Scotts currently resided in

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9. FEHRENBACHER, supra note 3, at 250.
10. Id. at 239-41.
11. Id.
12. Id. at 243-46.
13. Dred Scott, 60 U.S. at 431.
14. Id.
15. Id. See also FEHRENBACHER, supra note 3, at 243-49.
16. FEHRENBACHER, supra note 3, at 244.
17. Id.
18. Id. at 248.
19. Id.
20. Id. at 249.
21. FEHRENBACHER, supra note 3, at 249. Sanford’s name was misspelled in the reports of the case in the United States Supreme Court. Hence the case is labeled Dred Scott v. Sandford rather than Dred Scott v. Sanford.
Missouri, a slave state, Missouri law prevailed; the Scotts were not free. 22 The Scotts, with a new attorney, then filed a new suit in federal court on November 2, 1853, this time against John Sanford, Irene Emerson’s brother-in-law, who had control of the Scotts. 23 The following year, after the Scotts lost in the United States Circuit Court for the District of Missouri, they appealed to the United States Supreme Court. 24 It took another three years, before the Supreme Court finally issued its ruling. By a 7-2 vote, with each justice writing his own opinion, the Court, Chief Justice Taney writing for the majority, held that (a) Dred Scott and his family were still slaves; (b) no Negro, slave or free, could be a citizen of the United States with a right to sue in federal court; and (c) the Missouri Compromise, prohibiting slavery north of the 36° 30' was unconstitutional. 25 Although there was some initial concern among African Americans and white northerners to that part of the decision denigrating African Americans and proclaiming their ineligibility for United States citizenship, 26 contemporary debated focused on that part of the decision declaring that Congress did not possess the power to prohibit slavery in the territories owned by the United States. 27

This article will not analyze the Dred Scott decision itself. Rather, what it shall focus on is the impact of that decision on the nation. It shall argue that Taney’s decision was, if not the major cause, certainly one of the most significant factors that contributed to Abraham Lincoln’s election as President in 1860. Part II of this Article will describe the controversies over the expansion of slavery into the territories before 1857. Part III will describe the impact of Taney’s decision on events after that time.

II. EARLY DISPUTES OVER SLAVERY IN THE TERRITORIES

Even before the founding of the United States, slavery was a potentially divisive force. In 1787, the Congress of the United States, operating under the nation’s first constitution—the Articles of Confederation—enacted the Northwest Ordinance. 28 It’s main purpose was to provide territorial government

22. Scott v. Emerson, 15 Mo. 576, 582-87 (1852).
23. Dred Scott, 60 U.S. at 393.
24. Id. at 396-97; FEHRENBACKER, supra note 3, at 276-80. During the course of the litigation, Irene, Emerson’s widow, married Calvin C. Chaffee, a prominent Republican Congressman from Massachusetts. John Sanford, confined to an asylum, died May 5, 1857. Three weeks after the decision, Taylor Blow received title to the Scotts via a quitclaim deed from the Chaffees and then manumitted the family. FEHRENBACKER, supra note 3, at 420-21.
25. Dred Scott, 60 U.S. at 406-07 and 452.
26. FEHRENBACKER, supra note 3, at 429-31 and passim.
27. SCHWARTZ, supra note 4, at 116.
28. Northwest Territory Ordinance, Ch. 8, 1 Stat. 50 (1789).
for the Northwest Territory. After first mandating a survey of these western lands, Congress, in this statute, established the means by which new states would be created and then admitted into the Union. But, Congress also added a proviso prohibiting slavery in the territory. At the time, there was little if any debate on this provision. Most legislators believed slavery, at best, a necessary evil. Further, few thought that slavery would be viable north of the Ohio. Common sense prevailed.

The subject of slavery also provoked debate at the Constitutional Convention of 1787, as evidenced by three distinct compromises. These three compromises emerged as: a provision counting each slave as three-fifths of a person for the purpose of representation in the House of Representatives and for taxation; a clause forbidding the enactment of any law prohibiting the importation of slaves from Africa for twenty years; and a section requiring the return of escaped slaves. Operating under its new Constitution, America developed rapidly, with slavery provoking little controversy. That peace, however, was broken in 1819 when Missouri sought admission into the Union as a slave state. Up until that date, an implicit understanding had developed to maintain a balance between free and slave states in the Senate—and the nation. For each new free state Congress admitted into the Union, a new slave state was admitted as well. Missouri’s admission as a slave state would upset that balance. In February of 1819, James Tallmadge, Jr., a representative from New York, proposed an amendment to the enabling legislation being debated that would provide for the gradual emancipation of slaves then in Missouri and prohibit the importation of any additional slaves. The debate that ensued lasted until well into 1820. During that year, both northerners and southerners began to harden their positions. Southerners defended and northerners attacked slavery on political,
economic, social, and religious grounds.\textsuperscript{40} Finally, a compromise was enacted by which Missouri was admitted into the Union as a slave state, Maine entered as a free state (thus maintaining the balance between slave and free states) and slavery would be excluded north of the 36°30' line in the rest of the territory acquired from France in the Louisiana Purchase.\textsuperscript{41}

Although for thirty years no other legislative debates centered on the issue of slavery in the territories, each side was solidifying its position on the subject of slavery and became increasingly suspicious of the motives of the other side. In the North, the abolitionist movement grew as many, although still a distinct minority, called for the immediate end to slavery and condemned slave owners as immoral.\textsuperscript{42} In the South, John C. Calhoun’s proclamation that slavery was a positive good grew to a conviction among most. As sides moved further apart, Congress became a battleground again as radical abolitionists, in 1836, flooded the legislature with antislavery petitions and southerners insisted on a “gag rule” to prevent them from being read on the House floor.\textsuperscript{43}

Thus when David Wilmot, in 1846, introduced a proviso that would prohibit slavery in any territory acquired by the then-raging Mexican War, four years of debate ensued.\textsuperscript{44} Finally, Congress hammered out another compromise—the Compromise of 1850, admitting California as a free state, prohibiting the buying and selling of slaves in the District of Columbia, and organizing the New Mexico and Utah territories on the principle of popular sovereignty, that is the principle of non-intervention, meaning the people in the territories would decide whether to allow slaves or not. Finally, to appease the South, which had gotten little so far, Congress enacted a stronger Fugitive Slave Act which established a federal police force and a federal bureaucracy to capture and return runaway slaves.\textsuperscript{45}

Although many hoped that this compromise would end debates over the status of slavery in the territories, the peace did not last long. In 1854, Stephen A. Douglas, Democratic Senator from Illinois, introduced the Kansas-Nebraska bill.\textsuperscript{46} An ambitious man hoping to become president, Douglas, for a variety of reasons, proposed that the Kansas and Nebraska territories be organized on the principle of popular sovereignty, a concept he had been championing since 1848, believing it would deflect the controversy over legislating on slavery in the territories.\textsuperscript{47} Popular sovereignty meant that Congress would not decide whether

\textsuperscript{41} 3 Stat. 545, 548 (1820).
\textsuperscript{42}  Fehrenbacher, supra note 3, at 188-94.
\textsuperscript{44}  Fehrenbacher, supra note 3, at 133-34.
\textsuperscript{46}  Id. at 133.
\textsuperscript{47}  Id. at 131-35.
the territory would permit slavery; rather, the people living in the territory would decide. 48 The major problem with applying this concept to the Kansas and Nebraska territories was that they lay north of the 36° 30’ line where slavery was prohibited by the Missouri Compromise. Thus Douglas, prompted by some southern senators, amended his original bill to explicitly repeal the Missouri Compromise. 49

Although Douglas managed to get the bill through Congress, it was an expensive victory. As a result, the Whig party collapsed and in its wake the Republican Party was born, a coalition of Free Soilers, antislavery Whigs, and Anti-Nebraska Democrats. 50 A purely sectional party, the Republican platform retained much of the Whig economic program, but focused on the issue of slavery in the territories. When the party ran its first presidential candidate in 1856, the central plank was a call for Congress to prohibit slavery in all the territories. The Constitution, the platform maintained, gave Congress “sovereign powers over the Territories of the United States for their government.” 51 Further, Congress had both the right and the duty “to prohibit in the Territories those twin relics of barbarism—Polygamy and Slavery.” 52

Meanwhile, in Kansas tensions mounted as supporters of slavery and abolitionists fought for control of Kansas. 53 As each side armed, violence ensued, culminating in an attack by seven hundred proslavery men on Lawrence Kansas, the home of the free state government and the revenge attack by John Brown and his followers on five proslavery settlers along Pottawatomie Creek, murdering them in cold blood. 54 “Bloody Kansas” shocked the nation. 55 It was in this tense atmosphere, that the Supreme Court issued its decision on Dred Scott. 56

III. EVENTS FROM DRED SCOTT TO SOUTHERN SECESSION

By the time Chief Justice Taney delivered his opinion in Dred Scott v. Sandford on March 6, 1857, the case had captured national attention. In November 1856, the Democrats prevailed over the Republicans and on March 4, 1857, James Buchanan was inaugurated as president. Knowing that the issue of slavery in the territories was the most divisive of the day and one that could ruin the Democratic party as the majority party, Buchanan, along with most Democrats, hoped the Supreme Court could

48. Id. at 134.
49. Id. at 131-133.
51. FEHRENBACKER, supra note 3, at 202.
52. Id. at 202.
53. Id. at 193-94.
54. Id. at 193.
55. MCPHERSON, supra note 50, at 91-94; FEHRENBACKER, supra note 3, at 188-94.
56. FEHRENBACKER, supra note 3, at 194.
settle the issue once and for all.\textsuperscript{57} Thus in his inaugural address, Buchanan told his audience that the territorial issue was a “judicial question” now pending before the Supreme Court.\textsuperscript{58} And that issue, he assured his listeners, “will, it is understood, be speedily and finally settled.”\textsuperscript{59} Further, Buchanan assured America, he, along with “all good citizens” should “cheerfully submit” to the decision, “whatever this may be.”\textsuperscript{60}

Two days later, when the Court issued its ruling, the justices spoke to a courtroom packed with journalists and spectators. Chief Justice Taney, like Buchanan, hoped his ruling would end the controversy over slavery in the territories. Taney, from Maryland and a former slaveholder,\textsuperscript{61} supported the position of the southern Democrats. Believing the Republican Party and its platform of preventing the spread of slavery into the territories to be dangerous, Taney hoped his decision would not only end debate over slavery but would put the Republican Party on the path to extinction.\textsuperscript{62}

After Taney read his opinion, a task which took some two hours, and after the other justices had their say, the nation responded. Immediately, the decision “became an integral part of the political debate.”\textsuperscript{63} That debate demonstrated that both sides realized that the desire for the Court to end the debate might backfire. Rather than quelling discussion, Taney’s decision, many saw at the time, might speed up disunion by firming resolve in the North and strengthening the Republican party. That, in turn, would push the South closer to a decision to leave the Union.

Northern Democrats were the most hopeful that Taney’s decision had ended debate on the issue of slavery in the territories. They urged “all patriotic men” to “acquiesce” in his decision.\textsuperscript{64} The New York Journal of Commerce, labeling Republicans critical of the decision “disappointed factionists whose vocation it is to foment strife and discord to subserve individual and selfish ends,” predicted that among “the great masses of people” the decision would “be respected and honored.”\textsuperscript{65} The Pittsburg

\textsuperscript{57} SCHWARTZ, supra note 4, at 111.


\textsuperscript{59} Id.

\textsuperscript{60} Id.; James Buchanan, Inaugural Address, in 4 MESSAGES AND PAPERS OF THE PRESIDENTS 2962 (James D. Richardson ed., 1913). Later, Republicans will use this speech as proof that there was a conspiracy between Taney and the Democrats to undermine the Republican Party and to support southern slavery. FEHRENBACKER, supra note 3, at 313.

\textsuperscript{61} HYMAN & WIECEK, supra note 45, at 59-60.

\textsuperscript{62} FINKELMAN, supra note 8, at 44.


\textsuperscript{64} LOUISVILLE DEMOCRAT, March 8, 1857, reprinted in FINKELMAN, supra note 3, at 418.

\textsuperscript{65} NEW YORK JOURNAL OF COMMERCE, March 11, 1857, reprinted in FINKELMAN, supra note 8, at 138.
Post went further, applauding the decision as additional evidence that the Democrat’s popular sovereignty position was not only the correct constitutional position but also the position supported by the people. It pointed out the Republicans had “made the repeal of the Missouri Compromise one of the main issues of the late campaign” and they had lost. Now the Supreme Court “decided that the Compromise act was unconstitutional.” Further, in the Kansas-Nebraska Act, Congress repealed the now discredited Compromise, and, through the elective process, “the people have approved the act.” The Democrats, “in place of a void and unconstitutional enactment” have “established upon a firm basis the broad and salutary principle of popular sovereignty . . . . Local questions are to be settled by the local residents. That is the Democratic doctrine, and it is now approved, affirmed and established beyond recall.”

Southerners also praised the decision, seeing it as a “vindication of their constitutional rights.” Although they cheered the decision, they worried that it would simply strengthen the Republican Party and eventually force them to leave the Union. The Charleston Mercury, which represented the most extreme southern nationalist position, wrote: “In the final conflict between Slavery and Abolitionism, which this very decision will precipitate rather than retard,” the Dred Scott decision may help the South somewhat. But, it warned, “let us not abandon ourselves to the delirium of a premature triumph.” It warned that it is still “a question whether the decision may not add as much to the material strength of the North as it deducts from its moral power.” Like the Kansas-Nebraska act, which the Mercury also considered a victory for the South, Dred Scott, it feared, could engender “so much of resentment and ferocious energy” in the North that the “Black Republican party will go into the canvass of 1860, strengthened rather than discredited.”

Because the central plank of the Republican Party was the prohibition of slavery in the territories, it could not possibly accept the decision without accepting extinction. Thus, they responded with a “roar of anger and defiance.” They labeled the decision “atrocious, “abominable,” and

67. Fehrenbacher, supra note 3, at 3. See also Jaffa, supra note 5, at 175.
68. Finkelman, supra note 8, at 128.
69. Charleston Mercury, April 2, 1857, reprinted in Finkelman, supra note 8, at 131-32.
70. Id.
71. Id.
72. Id.
74. Fehrenbacher, supra note 3, at 2-3.
“wicked.” Indeed, the New York Tribune contended that it deserved “as much moral weight as . . . the judgment of a majority of those congregated in any Washington bar-room.” Taney, Republicans warned, had provided for the nationalization of slavery. Indeed, his decision, the New York Times proclaimed “revolutionizes the Federal Government, and changes entirely the relation which Slavery has hitherto held toward it.”

The only debate among party leaders was how best to oppose Dred Scott. Abraham Lincoln argued that the decision was so defective in its logic, so contrary to precedent, and “so repugnant to a large part of the population” that it was not immediately binding on the other branches of government or on the people. Rather, northerners will unite to reverse it. Of course, the only way to do that would be a Republican victory and new Supreme Court justices. Thus, “the South’s judicial victory was to be challenged at the polls, and southerners had another strong reason to fear a Republican in the White House.” Republican governors and legislatures echoed Lincoln’s sentiments. They also sent messages and passed resolutions denouncing the decision. Some enacted laws declaring free any slave brought into their state. The New York Times, recognizing the upside potential of the decision for the party, predicted that the decision would “produce the most profound impression upon the public judgment” and in the end “will do more to stimulate the growth, to build up the power and consolidate the action” of the Republican Party “than has been done by any other event since the Declaration of Independence.”

Initially, the Dred Scott decision “does not appear to have produced. . . any significant number of new adherents for the Republican party.” Indeed, historian Albert Beveridge notes that among leading Republican politicians and lawyers, especially those in Illinois including those traveling the circuit, few even mentioned the case. But, the Republicans soon developed several strategies which began to win over northern public opinion. First, party leaders warned that the Dred Scott decision could

75. See e.g., NEW YORK TRIBUNE, March 7, 1857, quoted in Fehrenbacher, supra note 3, at 417.
76. NEW YORK TRIBUNE, March 7, 1857, reprinted in Finkelman, supra note 8, at 145; Fehrenbacher, supra note 3, at 3.
77. NEW YORK TIMES, March 9, 1857, reprinted in Finkelman, supra note 8, at 145-46.
78. Fehrenbacher, supra note 3, at 4.
79. Id. at 5.
80. Id.
81. Id. at 4-5.
82. Hyman & Wieck, supra note 45, at 195-96.
83. NEW YORK TIMES, March 9, 1857, reprinted in Finkelman, supra note 8, at 145, 147.
84. Fehrenbacher, supra note 3, at 437.
85. Albert Beveridge, 2 Abraham Lincoln, 1809-1858 at 497-98 (Houghton Mifflin Co. 1928).
nationalize slavery.86 If slaves were not free when voluntarily brought by their masters to free states, how could free states prevent slavery from entering their borders?87 The Chicago Tribune, for example, called the decision a “conspiracy.” Chicago, it warned, “may become a slave market and ... men, women, and children may be sold off the block in our streets, in defiance of our local laws.”88 The Bloomington, Illinois Pantagraph warned that only “one little step remains: to decide all State prohibitions of Slavery to be void; and our enslavement is complete.”89

Second, Republicans argued that Taney’s ruling that Congress had no power to legislate on the issue of slavery in the territories was *obiter dictum*, not binding on the nation.90 They argued that once Taney held that Scott was not a citizen and therefore had no standing to sue in federal court the case was over, anything beyond that was non-binding dicta.91

Third, Republicans challenged the scope of the Court’s power of judicial review. The Court had only invalidated a federal law once before, in *Marbury v. Madison*.92 In that case, the Court simply refused to enforce a provision it declared was contrary to the Constitution.93 Further, the *Marbury* decision invalidated only one section of a statute, and that section dealt with the powers of the Court itself.94 *Dred Scott* was the first time the Supreme Court had invalidated a major piece of legislation. Was that decision binding on the other branches of government? Was the Court the final, authoritative decision maker? This was certainly not settled in the 1850s.95

The Northern sense of a conspiracy by southern slaveholders to spread slavery throughout the country, having become widespread as a result of Taney’s decision, was exacerbated by the struggles in Kansas.96 In February, 1857, the proslavery territorial legislature enacted legislation paving the way for an election for delegates to a constitutional convention.97 Free-state forces, holding a significant majority in the state, determined to boycott the election, fearing that the proslavery legislature

86. FEHRENBACKER, supra note 3, at 451.
88. CHICAGO TRIBUNE, March 12, 14, 16, 1857, quoted in FEHRENBACKER, supra note 3, at 451.
89. PANTAGRAPH (Bloomington, Illinois), March 17, 1857, quoted in FEHRENBACKER, supra note 3, at 693 n. 5.
90. FEHRENBACKER, supra note 3, at 330-34.
91. Id.
92. 1 Cranch 137 (1803).
93. Id.
95. Id.; FEHRENBACKER, supra note 3, at 438-42.
96. McPherson, supra note 50, at 102.
97. Id.
would not hold a fair election. This strategy, a serious miscalculation, resulted in the election of a pro-slavery constitutional convention. That convention, meeting September, 1857 in Lecompton, Kansas, drafted a state constitution which authorized slavery and determined to bypass a popular vote, which the delegates knew would go against them, and send the document straight to Congress.

Stephen Douglas, the northern Democratic spokesman for popular sovereignty based on the principle of nonintervention by Congress in the affairs of a territory, knew he could not support this constitution and win reelection in 1858 as United States senator from Illinois. To support a pro-slavery constitution would reinforce charges by Republicans that the Dred Scott decision would lead to the nationalization of slavery. Douglas had to prove that popular sovereignty, fairly carried out, could stop the spread of slavery in the territories. Meanwhile, President Buchanan, determined to support the Lecompton Constitution, warned that any Democrat who opposed the constitution would be punished by the White House. Despite this warning, Douglas broke with the administration, arguing that the Lecompton constitution made a mockery of popular sovereignty. To Douglas Democrats, the anti-Lecompton position was not so much anti-southern as it was anti-Republican. As one of Douglas’s supporters wrote: “You have occupied the only ground upon which the northern democracy can stand, and if you fail, our party in the free states is destroyed.”

The Republicans, for their part, continued to point out the connection between the Lecompton Constitution and the Dred Scott decision, reiterating their position that both were the result of a conspiracy between the President and the forces seeking the expansion of slavery. Finally, in August, 1858, the citizens of Kansas overwhelming defeated the constitution; Kansas would not be admitted into the Union until after the Civil War began. But, the debate that had occurred over this proposed constitution and Buchanan’s use of patronage against anti-Lecompton Democrats badly fractured the Democratic party and damaged Douglas’ image in the South.
While the question of admitting Kansas as a slave state was pending in Congress, the nation turned its attention to the elections of 1858. In Illinois, Stephen Douglas was running for reelection.\footnote{107} His opponent was Abraham Lincoln.\footnote{108} “It would not be far wrong to say that the meaning of the Dred Scott decision became the heart of the matter in the famous debates of 1858.”\footnote{109} As we shall see, while Dred Scott helped strengthen the Republican party by playing on northern fears of a slaveocracy conspiracy, the ruling helped drive a wedge between northern and southern Democrats that became a chasm. Lincoln, during the Lincoln-Douglas debates, was able to exploit the differences between Douglas’ views on popular sovereignty and the South’s belief that they were guaranteed the right to bring their slaves into the territories so that eventually Douglas became unacceptable as a presidential candidate in the South. This helped pave the way for Lincoln’s victory in 1860 and the South’s subsequent secession.

Douglas, upon his return to Illinois after the Lecompton debates, “found hostility to the administration running high.”\footnote{110} But he returned a hero, having stood up to the President and the forces trying to spread slavery.\footnote{111} Still, he feared the Republicans might carry Illinois. They had won the governorship in 1856,\footnote{112} and increased fears of a conspiracy by southern slaveholders to nationalize slavery based on the Dred Scott decision and the controversy over the Lecompton Constitution seemed to favor the Republicans. Moreover, the Republicans had formally nominated Lincoln as their candidate, an “unprecedented” action for a time when the state legislature, not the people, elected United States senators.\footnote{113} The Republicans had undertaken this bold move to make clear that Douglas would have opposition in his reelection bid.\footnote{114}

Lincoln, immediately upon receiving the Republican Party’s nomination, hit Douglas hard both on his support of the Dred Scott decision and his doctrine of popular sovereignty.\footnote{115} Speaking to the convention on June 16, 1858, Lincoln delivered his famous “House Divided” speech, maintaining that:

“a house divided against itself cannot stand.” I believe this government cannot endure permanently half slave and half free. I do not expect the Union to be dissolved . . . but I do expect it will cease to be divided. . . .

\footnote{107} Fehrenbacher, supra note 3, at 480.\footnote{108} McPherson, supra note 50, at at 105-06.\footnote{109} Fehrenbacher, supra note 3, at 443.\footnote{110} Id. at 482-83.\footnote{111} Id.\footnote{112} Id. at 466.\footnote{113} McPherson, supra note 50, at 105.\footnote{114} Id.\footnote{115} Id. at 105-07.
Either the opponents of slavery will arrest the further spread of it, and place it where the public mind shall rest in the belief that it is in the course of ultimate extinction; or its advocates will push it forward, till it shall become alike lawful in all the States, old as well as new—North as well as South.”

Lincoln then launched into a detailed attack on the Dred Scott decision and Douglas’s doctrine of popular sovereignty, and especially Douglas’s statement that it is up to the people in the territories to decide if they want slavery and he “did not care” which they chose. Lincoln warned:

Put that and that together, and we have another nice little niche, which we may, ere long, see filled with another Supreme Court decision, declaring that the Constitution of the United States does not permit a state to exclude slavery from its limits. And this may especially be expected if the doctrine of “care not whether slavery be voted down or voted up,” shall gain upon the public mind sufficiently to give promise that such a decision can be maintained when made.

Lincoln then concluded by linking the Kansas-Nebraska Act, Douglas’s moral indifference to slavery, and Dred Scott into one large conspiracy in which “Stephan [Douglas] and Franklin [Pierce] and Roger [Taney] and James [Buchanan] all understood one another . . . , and all worked upon a common plan or draft before the first lick was struck.”

Because of his fear that if he didn’t take his case to his constituents and prove the Republicans wrong, the Democrats might not prevail, Douglas reluctantly agreed to a series of seven debates with the obscure Springfield lawyer who was his opponent. And just as Lincoln had devoted more than 80 per cent of his House Divided speech to criticizing Taney’s decision, so, too, did the debates focus on that ruling. When one considers all the important economic and social issues the candidates could have debated, the fact that the debates centered around that Supreme Court case is just one more indication of how it had become THE issue of the day. Indeed, the Dred Scott decision pervaded the debates so thoroughly that in one, “a Douglas supporter shouted from the audience to Lincoln: ‘Give us something besides Dred Scott.’ Quick as a cat,

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117. Id. at 461-67.
118. Id. at 467.
119. Id. at 466.
120. FEHRENBACKER, supra note 3, at 485-86.
121. Id. at 486.
122. Id.
123. Id. at 491.
Lincoln responded: ‘Yes; no doubt you want to hear something that don’t hurt.’” 124

While both candidates tried to portray the other as an extremist—Lincoln accusing Douglas of supporting the southern plot to nationalize slavery and Douglass portraying Lincoln as an abolitionist dedicated to negro equality,125 it was Douglas’ support of Taney’s decision that did him in. The key debate took place at Freeport, Illinois on August 27, 1858. As Don E. Fehrenbacher noted, the “growing northern hostility to the slaveholding South, as distinguished from hostility to southern slavery” was seen by Republicans as the key to their success, “thus constituting the main causal connection between the Dred Scott decision and the coming of the Civil War.”126 And Lincoln’s second question during that debate becomes “one of those decisive moments on which destiny turns.”127

On August 27, after responding to a series of questions Douglas had raised during their first debate, Lincoln asked his opponent four questions.128 The second directly related to the Dred Scott decision and the Republican argument that it was the first step in nationalizing slavery.129 Lincoln inquired: “Can the people of a United States Territory, in any lawful way, against the wish of any citizen of the United States, exclude slavery from its limits prior to the formation of a State Constitution?”130 Douglas answered assuredly that they could.131 Reminding Lincoln that he had consistently spoken on this subject many times before, he reiterated that it did not matter what the Supreme Court had decided or may decide in the future “as to the abstract question whether slavery may or may not go into a territory under the constitution,” because “slavery cannot exist a day or an hour anywhere, unless it is supported by local police regulations” which must be enacted by the territorial legislature.132 Thus, if the people in that territory oppose slavery, they will elect free-soilers who will refuse to enact such a slave code. Slave owners will not risk bringing valuable slave property into a territory that will not protect it.133

124. McPherson, supra note 63, at 92.
126. Fehrenbacher, supra note 3, at 493.
127. Id.
128. Id. at 491-93.
129. Id.
130. Abraham Lincoln, Political Debates Between Lincoln and Douglas, Addressed at the Second Joint Debate at Freeport (August 27, 1858), in 3 COLLECTED WORKS OF ABRAHAM LINCOLN, supra note 67, at 43; Fehrenbacher, supra note 3, at 493-94.
131. Fehrenbacher, supra note 3, at 493-94.
132. Id.
133. 3 COLLECTED WORKS OF ABRAHAM LINCOLN, supra note 67 at 51-52.
The election was tight—Republican candidates getting 125,000 votes to 121,000 for Douglas Democrats. But Douglas supporters won more counties, thus preserving the Democratic majority in the Illinois legislature which proceeded to reelect Douglas by a vote of 54 to 46. But, the damage to Douglas’s prospects for the presidency in 1860 had been done.

Although, as James M. McPherson argues, Douglas had already alienated southerners with his position on the Lecompton Constitution and had already articulated the position he restated at Freeport, the doctrine proclaimed there became a rallying cry for the South. In response, the South upped the ante, so to speak. No longer satisfied with popular sovereignty and the Dred Scott decision, southern Democrats demanded that the party endorse the enactment of a federal slave code to protect slaves in the territories. Senator Albert G. Brown of Mississippi, for example, in February of 1859, warned that if Congress did not enact such a code, he would encourage his state to leave the Union. This dispute, then, led directly to the splitting of the Democratic party in 1860.

The Democrats were deeply divided when they met in Charleston, South Carolina on April 23, 1860 to write a platform and nominate a presidential candidate. What was at issue was the meaning of the Dred Scott decision, “with each side crying ‘Never!’ to the other’s interpretation.”

As constitutional scholar, Michael Les Benedict succinctly concluded: The Dred Scott decision led the Democratic party to divide in 1860.

Northern Democrats remained committed to popular sovereignty, arguing that nothing in Taney’s decision prevented the people of the territory from deciding whether they wished to allow slavery or not. Southern Democrats, on the other hand, were committed to repudiating Douglas’s Freeport Doctrine, insisting that Dred Scott demanded the positive protection of slave property in the territories. They were also committed to blocking the nomination of Douglas or any candidate who would not support a platform that called for the enactment of a federal slave code. The Alabama Democratic party, for example, “instructed its delegates to walk out of the convention if the slave code plank was
defeated.”145 True to their word, southerners at the convention insisted on a slave code plank.146 Northerners responded with a plank endorsing popular sovereignty “with an added provision promising to obey a definitive Supreme Court ruling on the powers of a territorial legislature over slavery.”147 To support the southern plank would be suicide for northern Democrats. The slave code plank would simply play into the hands of the Republicans with their assertion that southerners intended to nationalize slavery. As one Douglas supporter from Illinois explained “We are not in a condition to carry another ounce of Southern weight.”148

The popular sovereignty platform defeated the slave code plank 165 to 138, the North having a majority of the delegates.149 But, immediately after the vote, “in a prearranged move, forty-nine delegates from eight Southern states followed [William L.] Yancey [delegate from South Carolina] out of the convention.”150 Essentially, what these southerners refused to accept was the party platform of 1856. “Such was the revolutionary change of attitude in the Deep South wrought primarily by the Lecompton controversy, the Dred Scott decision, and the Harper’s Ferry raid.”151 Although the remaining delegates tried to continue on with the nomination process, they deadlocked.152 Democratic convention rules, established in 1836, required a two-thirds majority for the presidential nomination.153 After fifty-seven ballots it was clear that neither Douglas nor any other candidate could achieve such a vote.154 The delegates therefore adjourned, planning to meet six weeks later in Baltimore.155 The cooling off period did not help.156 After the convention refused to seat all those who had bolted at Charleston, 110 delegates, “more than a third of the total,” left.157 They proceeded to hold their own convention, enact a slave-code platform, and nominate John C. Breckinridge of Kentucky as their candidate for president.158 Meanwhile, the remaining delegates nominated Douglas on a platform endorsing popular sovereignty.159 Thus,

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145. McPherson, supra note 50, at 117.
146. Id. at 117-18; Benedict, supra note 141, at 175.
147. McPherson, supra note 50, at 118.
148. Fehrenbacher, supra note 3, at 511.
149. McPherson, supra note 50, at 118.
150. McPherson, supra note 50, at 118.
151. Fehrenbacher, supra note 3, at 535.
152. McPherson, supra note 50, at 118.
153. Id.
154. Id.
155. Id.
156. Id.
157. McPherson, supra note 50, at 120.
158. Id.
159. Fehrenbacher, supra note 3, at 537.
the “Douglas and Breckinridge platforms were very nearly identical, except in their interpretations of the Dred Scott decision.”

Meanwhile, the Republicans met in Chicago, nominating, on the fourth ballot, Abraham Lincoln. Before the Lincoln-Douglas debates, Lincoln was little known outside Illinois. But, those debates brought him national recognition and when the leading contenders failed to attract enough votes for nomination, the party turned to the more obscure and more moderate candidate. In its platform, however, the party denounced Dred Scott. In return, southerners threatened to leave the Union if a Republican was elected president.

Despite the fact that the issue of slavery in the territories had ceased to be a real issue, with the future of Kansas as a free state determined and few slaves being taken into other areas, the issue of slavery in the territories as affected by the Dred Scott decision remained the prime topic of debate throughout the presidential campaign and the secession crisis.

It can not be determined with any certainty whether Lincoln would have won election against a united Democratic party. In the election he garnered only 40 per cent of the popular vote, but a majority of the electoral votes. He needed no electoral votes from southern states for victory, so it is quite possible he would have won even if the Democrats had been able to unite. But the southern demand for the positive protection of slavery—that is the demand to have the Dred Scott decision interpreted the way they insisted Taney meant it—probably won more votes for the Republicans in the North by seemingly proving Republican charges that the South was determined to nationalize slavery. Lincoln won 98 percent of the northern electoral vote. Republicans won a half-million more votes in 1860 compared with 1856, “including 300,000 more than the party’s proportionate share of the increase in the voting population.” Further, about 70 percent of that 300,000-vote gain came from five states crucial to Lincoln’s electoral college victory, all of which the Democrats had carried in 1856—New Jersey, Pennsylvania, Indiana, Illinois, and California.

With Lincoln’s victory all but assured, regardless of whether he received any southern votes, southern politicians could see the writing on

160. Id. at 538.
161. Id. at 539-41.
164. Id.
165. See generally Fehrenbacher, supra note 3, at 563.
166. Fehrenbacher, supra note 3, at 563.
167. Id.
168. Id.
Increasingly a minority section, their fate was sealed. Lincoln would appoint territorial governors who opposed slavery, bottling slavery up where it currently existed. With the number of free states expanding and the population in these areas increasing, it would only be a matter of time before the Republicans controlled both houses of Congress. Finally, through appointments, Lincoln and future Republican presidents could shape the Supreme Court in such a way that would continue to undermine the institution of slavery. Thus, true to their word, on December 20, less than a month after Lincoln’s victory, South Carolina seceded from the Union. By February 1, six other states had followed suit.

Still, many fought to save the Union by proposing one last great compromise. And here, again, that compromise would focus on the issue of slavery in the territories. John J. Crittenden of Kentucky, chair of a Senate Committee of Thirteen created to deal with the secession crisis, proposed a set of constitutional amendments, the most important of which would have extended the Missouri Compromise line to the Pacific. But, the Republicans rejected the proposal. They also denounced secession as unconstitutional, as treason which must be stopped. Determined to protect federal property, on April 12, Lincoln sent ships to resupply Fort Sumter in Charleston. The Confederacy, to prevent this, fired on the fort. Lincoln, determined to suppress the rebellion, called forth the militia and the Civil War began.

IV. CONCLUSION

The Dred Scott decision fanned northern fears that the South would be able to nationalize slavery. On the other hand, the Republican attack on the Court’s decision reinforced southerners’ fears that their way of life, centered around slavery, was at risk by an aggressive North that would not even accept a decision by the highest court in the land. Further, Dred Scott aggravated, perhaps even created, an irreparable split in the Democratic party. Douglas clung to his theory of popular sovereignty despite Taney’s ruling that insisted that since Congress could not prohibit

169. *Id.* at 541.
170. *Id.; Benedict, supra* note 141, at 175-76.
171. *Fehrenbacher, supra* note 3, at 541-43.
172. *Id.*
173. *Id.* at 547.
174. *Id.* at 544-46.
175. *Id.*
177. *Id.* at 145.
slavery in a territory, neither could it authorize a territorial legislature to do so. Congress could “confer no power on any local government, established by its authority, to violate the provisions of the Constitution.” With Douglas assuring northerners that slavery would not spread west even with the Dred Scott decision because the territorial legislatures would not enact slave codes, southerners responded by insisting Congress enact a statute positively protecting slavery in the territory. When they made this a *sine qua non* for their acceptance of a party platform and a presidential candidate, the party fractured. With a divided Democracy and a strengthen Republican party, Lincoln won the election. True to their word, seven southern states seceded from the Union rather than live under a government presided over by a Republican president. Still, Lincoln would not change his position. At his First Inaugural Address, he rejected the notion that the nation should blindly follow any decision by the Supreme Court. Rather, he urged that “if the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned the government into the hands of that eminent tribunal.” Thus, as Don Fehrenbacher concludes, Dred Scott “was a conspicuous part of the pattern of events and conditions that caused disruption of the Union.”

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INTEREST CONVERGENCE AND THE EDUCATION OF AFRICAN-
AMERICAN BOYS IN CINCINNATI: MOTIVATING SUBURBAN
WHITES TO EMBRACE INTERDISTRICT EDUCATION REFORM

David A. Singleton*

Education is essential to preparing our youth to be productive members of
our society, with the skills and knowledge necessary to compete in the
modern world. - DeRolph v. State

The Ohio Constitution guarantees a “thorough and efficient system of
common schools”—a quality education—to Ohio’s school children. For most
black boys attending Cincinnati Public Schools (“CPS”), this constitutional
guarantee is an empty promise. According to the Schott Foundation for Public
Education, which works nationally to improve black male high school graduation
rates, only 25% of ninth grade boys attending Cincinnati Public Schools graduate
from high school with their peers. For many of those who do not graduate,
underemployment, prison and unmet potential likely awaits. From the
perspective of many of these boys, school has become the proverbial pipeline to
prison.

Will efforts to improve black boys’ educational achievement in Cincinnati
succeed in the current political climate? Consider the following. Ten years after
the Ohio Supreme Court declared Ohio’s school funding system
unconstitutional, the recalcitrant legislature has yet to remedy the problem, and
the Court has abandoned efforts to force the legislature’s hand. Additionally,
more than fifty years after Brown v. Board of Education ended state-mandated
racial segregation of public schools, racial segregation of schools has intensified
in many communities across the country as a result of white flight from urban

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2. OHIO CONST. art II, § 2.
3. M. HOLZMAN, SCHOTT FOUNDATION FOR PUBLIC EDUCATION, PUBLIC EDUCATION & BLACK
4. JOHANNA WALD & DANIEL F. LOSEN, THE CIVIL RIGHTS PROJECT, DEFINING AND
REDIRECTING A SCHOOL-TO-PRISON PIPELINE 11-12 (2003), available at
5. Id. at 11.
7. See generally DeRolph v. State, 780 N.E.2d 529 (Ohio 2002).
school districts and the Supreme Court’s refusal to extend desegregation remedies across school district lines.\(^9\) The concentration of poor black children in urban school districts dims these students’ prospects for success.

Thus, for black boys trapped in failing schools, Dred Scott’s legacy—blacks “have no rights which the white man is bound to respect”\(^10\)—appears very much alive. Unless and until suburban whites realize that ending this school-to-prison pipeline serves their own self-interest, meaningful education reform in Cincinnati will not occur. This essay will explore the challenges of instituting meaningful reform in Cincinnati.

Part I more fully describes the dimensions of the education crisis facing black boys in Cincinnati, and briefly discusses some potential explanations for their low graduation rates. Part I concludes by arguing that many of these high school dropouts will wind up in prison as a result.

Relying on Professor Derrick Bell’s interest-convergence theory, Part II argues that black boys’ interest in obtaining a quality education will only be accommodated when it converges with the interests of suburban whites.

Part III discusses economic integration—transferring poor students to middle class schools—as a possible way to improve educational achievement for low-income students in Cincinnati, including black males. Part III acknowledges, however, the difficulty of implementing such a remedy in Cincinnati because it would necessarily involve transferring urban school children across district lines into suburban schools.

Part IV suggests possible arguments that can be made to persuade suburban families that their self-interest is served by embracing an interdistrict solution to the education crisis facing black boys in Cincinnati.

I. THE DIMENSIONS OF THE PROBLEM

A. Low high school graduation rates for black boys attending CPS institutions

In 2006, the Schott Foundation for Public Education released a report entitled, “Public Education and Black Male Students: The 2006 State Report Card.”\(^11\) The 2006 State Report Card examined “the gap between the graduation rates of Black and White male students.”\(^12\) The Schott Foundation

focus[ed] on the issue of how well our public schools meet their responsibilities in regard to Black male students because history tells us that this is the group least likely to be the focus of such efforts, the

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\(^10\) Dred Scott v. Sanford, 60 U.S. 393, 407 (1856).


\(^12\) Id. at iii.
In effect, black boys are the proverbial canaries in the mine: for “when it is normal for Black male students to graduate on time and college-ready, it will be normal for all students to do so.”14 Schott calculated graduation rates “as the percentage of the students in ninth grade receiving diplomas with their cohort at the end of the twelfth grade.”15 According to Schott, this calculation “is similar to those used by many researchers, states and districts” and therefore allows “‘apple to apple’ comparisons of varied districts and states.”16

In addition to comparing state graduation rates for black boys, Schott examined graduation rates for the largest school districts nationally, those that enroll 10,000 or more students annually.17 Because Cincinnati Public Schools (“CPS”) enrolls over 35,000 students daily,18 it was one of the fifty-nine school districts whose graduation rates were analyzed by Schott.19

Schott determined CPS’s graduation rate for black boys to be 25 percent, ranking CPS fifty-seventh out of the fifty-nine districts enrolling 10,000 or more students.20 For comparison purposes, CPS’s graduation rate for white boys, as calculated by the Schott Foundation, is 43 percent,21 eighteen points higher than the rate for black boys but still abysmal. To suggest, however, that low graduation rates for boys in CPS is a color blind problem would be misleading. Although whites comprise fifty-three percent of Cincinnati’s population of approximately 320,000 people,22 with blacks representing approximately 43 percent of the city’s population,23 whites constitute 23.3 percent of CPS’s student population,24 compared to blacks who comprise 70.9 percent of the student population.25 Thus it appears, as has happened in many large urban areas

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13. Id.
14. Id.
15. Id. at 1.
16. Id.
19. Id. at 5.
20. Id. (CPS ranked higher than Pinellas County, FL (21% graduation rate) and Indianapolis Public Schools (21% graduation rate)).
21. Id.
23. Id.
25. Id.
around the country, that more affluent whites living in urban communities either send their children to private schools, or flee the city altogether for the suburbs.26

It should be noted at this juncture that CPS reports a much higher graduation rate for black boys than does Schott. According to CPS, the high school graduation rate for black boys attending its schools in 2004 was 64.2 percent;27 the rate for that year as reported by Schott was 25 percent.28 To arrive at its rate, CPS uses an elaborate formula.29 The problem with this formula is that it does not allow for “apples to apples” comparisons with school districts located in other states. According to Michael Holzman, the lead researcher for the Schott 2006 State Report Card, CPS’s graduation rate for black boys ranks near the bottom nationally, regardless of which formula is used: “Using a simple, standard, national measure allows us to find outliers, like Cincinnati, and look more closely. If the whole country used the Ohio formula, Cincinnati would still be last, or nearly so, but with a bigger number.”30

B. Possible causes of the problem

It is beyond the scope of this Essay to analyze comprehensively all of the possible explanations for why black boys graduate from Cincinnati public high schools at such low rates. But before turning to this Essay’s central thesis—that public school education for black boys in Cincinnati will continue to be inferior unless and until whites realize that it is in their self interest for all young people


29. Graduation = # of FY2005 Graduates + 2005 summer graduates (reported in Oct. FY2006) X 100

# of FY2005 Graduates + 2005 summer graduates (reported in Oct. FY2006)
+ # of Graduates in Grades 13
+ # of Grade 9 dropouts in FY2002 - # of Grade 9 Ret. Withdrawals
+ # of Grade 10 dropouts in FY2003 - # of Grade 10 Ret. Withdrawals
+ # of Grade 11 dropouts in FY2004 - # of Grade 11 Ret. Withdrawals
+ # of Grade 12 dropouts in FY2005 - # of Grade 12 Ret. Withdrawals
+ # of Grade 13 dropouts in FY2005

- Students previously reported as dropouts


30. E-mail from Michael Holzman to David A. Singleton (Apr. 5, 2007, 14:01 EST) (on file with author).
in this community to receive a quality education—it is helpful to briefly consider possible explanations for black boys’ low educational achievement in Cincinnati.

1. Is inadequate school funding the culprit?

There are two primary sources of school funding in Ohio: state revenue through the “School Foundation Program,” and local revenue through locally voted property taxes. Contrary to the national trend, Ohio relies more on local revenue than it does state revenue in financing public school education.

In 1997, the Ohio Supreme Court held, in DeRolph I, that Ohio’s system for funding public school education violated the Ohio Constitution, which guarantees a “thorough and efficient system of common schools.” The court observed that Ohio’s school funding formula “has no real relation to what it actually costs to educate a pupil.” This formula, called the “foundation guarantee amount,” is “a budgetary residual, which is determined as a result of working backwards through the state aid formula after the legislature determines the total dollars to be allocated to primary and secondary education in each biennial budget.” In other words, the state’s budget for public schools, grades K-12, is the amount of money left over after other state obligations were fulfilled.

Concluding that “the evidence is overwhelming that many districts are ‘starved for funds,’” and that the State had abdicated its constitutionally-imposed duty to rectify the problem, the court held that a “complete systematic overhaul” of the state’s school funding formula was necessary to render the system constitutional.

Over the ensuing years, the Ohio Supreme Court issued follow-up decisions, DeRolph II and DeRolph IV, holding that Ohio’s school funding system remained unconstitutional. DeRolph IV, however, did not include a remand for further proceedings. In a subsequent case, the Ohio Supreme Court held that the absence of a remand order in DeRolph IV meant that the court had relinquished jurisdiction over the case. Thus, the lengthy DeRolph litigation has come to a

31. DeRolph I, 677 N.E.2d at 737-38. The School Foundation Program is codified at OHIO REV. CODE ANN. §§ 3317.01-3317.51 (West 2007)
32. Id. at 738.
33. Id. at 747 (citing OHIO CONST. art. VI, § 2).
34. Id. at 738.
35. Id. (quoting Statement of Howard B. Fleeter, Assistant Professor, School of Public Policy, Ohio State University).
36. Id.
37. Id. at 745 (quoting Miller v. Korns, 140 N.E. 773, 776 (Ohio 1923)).
38. Id.
39. Id. at 747.
41. DeRolph v. State (DeRolph IV), 780 N.E.2d 529 (Ohio 2002).
42. State ex rel. State v. Lewis, 789 N.E.2d 195, 201-03 (Ohio 2003).
close without achieving the “complete systematic overhaul” the Ohio Supreme Court held was necessary to make the school funding system constitutional.

Although Ohio’s school funding system has been held unconstitutional (and is almost certainly still so), it is far from clear that a lack of funding is behind black boys’ low graduation rates in Cincinnati. Based on data available for the 2004-05 academic year, per pupil spending for students attending CPS institutions was $12,307, compared to $9,330 for the state as a whole. Comparing CPS to higher performing, wealthier school districts is even more interesting. For example, the Mariemont City School District, located right outside of the City of Cincinnati, spends $10,554 per pupil. The median household income in Mariemont was $61,800 in 2005, compared to $29,554 in Cincinnati. Mariemont City School District is 93.7 percent white and 2.8 percent African-American; Cincinnati City School District, by contrast, is 23.3 percent white and 70.9 percent African-American. Although Mariemont spends some $2,000 less per pupil than does CPS, Mariemont schools are much better. During the 2005-2006 academic year, Mariemont City School District met all 25 of the state’s achievement benchmarks. CPS, by contrast, met only 6 of the 25 indicators.

Located in nearby Warren County, Mason City School District is overwhelmingly white—84.1 percent white and 3.5 percent black—and the City of Mason is significantly more affluent than Cincinnati—median household income in Mason was $72,500 in 2005. Mason City School District spends

43. *DeRolph I*, 677 N.E.2d at 747.
50. ODE 2005-06 Report Card for Cincinnati Public Schools, supra note 18, at 3.
52. ODE 2005-06 Report Card for Cincinnati Public Schools, supra note 18, at 1.
$9,611 per pupil, nearly $3,000 less than CPS spends. Despite spending less money per pupil, Mason City School District, like Mariemont City School District, met all 25 of the Ohio Department of Education achievement benchmarks.

These two examples—more affluent, predominately white suburban school districts spending less per pupil and achieving better educational outcomes than poor, predominately black urban districts that spend more per pupil—are not anomalies. But the fact that districts like Mariemont and Mason spend less per pupil than does CPS is not particularly illuminating. Poor students tend to have greater needs educationally and thus require more resources to educate than wealthier students. Once cost-per-pupil figures are adjusted to reflect cost differentials between poor and affluent districts, it is often the case that school districts with the highest concentration of minority students spend the least.

In Cincinnati, more than 64 percent of CPS students fall into the “economically disadvantaged” category, compared to 6.2 percent for Mariemont and 3.7 percent for Mason. Without further analysis of cost differentials—which is beyond the scope of this Essay—the meaning of these expenditure figures is difficult to ascertain.

2. Is the high concentration of economically disadvantaged students in CPS partly to blame for low black male graduation rates?

In recent years, education scholars have argued that socio-economic segregation, not racial segregation, is the primary cause of poor achievement in


56. ODE 2005-06 REPORT CARD FOR MASON SCHOOL DISTRICT, supra note 53, at 1.

57. See James E. Ryan, The Influence of Race in School Finance, 98 MICH. L. REV. 432, 439 (1999) (discussing the “myth” that “predominantly minority districts are generally underfunded as compared to predominantly or exclusively white districts.”).

58. Id. at 435; see also Ryan, supra note 26, at 284 (“[S]tudents from impoverished backgrounds have greater needs and thus cost more to educate.”).


60. ODE 2005-2006 REPORT CARD FOR CINCINNATI PUBLIC SCHOOLS, supra note 18, at 3. The Ohio Department of Education characterizes a student as economically disadvantaged if (a) the student’s family income is at or below 185% of the federal poverty level or (b) the student or student’s guardian is a known recipient of public assistance. Ohio Dep’t of Educ., Terms Used on the Local Report Card, http://www.ode.state.oh.us/GD/Templates/Pages/ODE/ODEDetail.aspx?page=3&TopicRelationID=1266&ContentID=11352&Content=15440 (last visited July 30, 2007). This same definition applies to the report cards for Mariemont School District, supra note 49, and Mason School District, supra note 53.

61. ODE 2005-06 REPORT CARD FOR MARIEMONT SCHOOL DISTRICT REPORT CARD, supra note 49, at 3.

62. ODE 2005-06 REPORT CARD FOR MASON SCHOOL DISTRICT, supra note 53, at 3.
One of the leading scholars in this area, Richard D. Kahlenberg, theorizes that the “single most powerful predictor of a good education” is “the presence of a core of middle-class families.”

It is these families, Kahlenberg argues, “who will insist upon, and get, a quality school for their children,” which will benefit all students attending the school. In addition, both expectations and the curriculum quality tend to be much lower in poor schools than they are in more affluent ones. Moreover, affluent schools have “high-achieving peers, whose knowledge is shared informally with classmates all day long.”

As Kahlenberg notes, “[s]tudy after study has found that low-income students do better, and middle-class achievement does not suffer, in economically integrated majority middle-class schools.” By contrast, where poor students make up 50 percent or more of a school’s population, educational achievement markedly declines.

As discussed above, more than 64 percent of CPS students are “economically disadvantaged” compared to 35 percent statewide. This disparity is even greater when compared to nearby suburban districts like Mariemont (6.2 percent) and Madeira (3.7 percent). The concentration of low-income students in CPS, and the relative paucity of middle class and more affluent students within the district, very likely affects the performance of low-income black boys attending these schools.

C. The Link Between Educational Failure and Prison

High school dropouts are much more likely to commit crime than high school graduates. Demographic information obtained from the Ohio prison system underscores this point. In 2002, nearly 80 percent of prisoners entering the Ohio prison system lacked a verified high school diploma or General


64. Id. at 1.

65. Id. at 1-2.

66. Id.

67. Id.

68. Id.


70. See supra note 60 and accompanying text.


Education Diploma (GED). 73  Sadly, the average Ohio prisoner reads at the 7th grade level. 74  Moreover, blacks are disproportionately incarcerated in Ohio. Although blacks comprise 11.5 percent of Ohio’s population,75 they represent more than 47.5 percent of the state’s prison population.76

One does not need a PhD to understand the dynamics at play. As the Ohio Supreme Court noted, “[e]ducation is essential to preparing our youth to be productive members of our society, with the skills and knowledge necessary to compete in the modern world.”77 Without it, the prospects of obtaining legitimate paid employment are dim. Without employment, involvement with the criminal justice system is almost inevitable. This vicious cycle—educational failure, diminished job prospects, commission of crimes, incarceration—hits black men hardest.

Part II of this essay argues that the key to turning around this problem in Cincinnati is persuading suburban whites that it is in their best interest to improve educational outcomes for black males enrolled in Cincinnati Public Schools.

II. PROFESSOR BELL’S INTEREST CONVERGENCE THEORY

In his influential article, Brown v. Board of Education and the Interest-Convergence Dilemma,78 Professor Derrick A. Bell, Jr., theorizes that “[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.”79 Thus, “[r]acial remedies may . . . be the outward manifestations of unspoken and perhaps subconscious judicial conclusions that the remedies, if granted, will secure, advance, or at least not harm societal interests deemed important by middle and upper class whites.”80

Applying this “interest-convergence” theory to Brown, Bell posits that the decision “cannot be understood without some consideration of the decision’s value to whites in policymaking positions able to see the economic and political

74. Id.
77. DeRolph I, 677 N.E.2d at 736.
79. Id. at 523.
80. Id.
advances at home and abroad” from desegregation.81 Bell argues that Brown (1) helped improve America’s credibility during its struggle with Communist countries during the Cold War; (2) provided “needed reassurance to American blacks” who might fall prey to communism; and (3) removed a barrier to further industrialization in the south—all interests deemed of value to whites.82

The convergence of interests that led to Brown diverged by the time the Court decided Milliken v. Bradley, which struck down an inter-district school busing remedy.83 According to Bell, the interests of whites, who had fled Detroit for the suburbs, in maintaining existing school policies (which did not provide for inter-district busing), was deemed more important than the right of black students in Detroit to attend desegregated schools.84

Applying Bell’s interest-convergence theory to Ohio’s school finance reform controversy, Professor Bryan Adamson argues that legislative reform in the area of school finance will only occur if, among other things: (1) local control and decision making are preserved (i.e., no interdistrict solutions); (2) wealth is not redistributed from affluent to poor districts; (3) performance-based accountability measures are imposed to ensure fiscal responsibility; and (4) benefits “to poor, not just urban poor, and to rural and middle class” (i.e., whites) are emphasized.85 Essentially Adamson argues that school finance reform can occur so long as no sacrifices are required of wealthy (and predominantly white) suburban school districts.

But what about improving educational outcomes for black males in Cincinnati Public Schools? Can an effective remedy be implemented without requiring anything of suburban school districts? Perhaps.86 But Part III argues that implementation of an interdistrict solution—specifically, socioeconomic, rather than racial, integration—could significantly improve educational outcomes for black males and other low-income students attending Cincinnati Public Schools. Part IV will offer suggestions for how to persuade middle class and affluent suburban families that socioeconomic integration of their school districts is in their interest, too.

81. Id. at 524.
82. Id. at 524-25.
84. Id. at 526.
86. Whether intradistrict transfers of wealth could work is beyond the scope of this essay. Under such a scheme, schools with more challenging—and costlier to educate—enrollments would be allocated more money per pupil than schools within the district that have less challenging students.
III. ECONOMIC INTEGRATION—AN INTERDISTRICT REMEDY FOR FAILING CINCINNATI SCHOOLS?

Since 2000, a growing number of school districts across the country have created economically diverse school districts. These districts have done so in light of research demonstrating that low-income students who are educated in an economically diverse environment succeed academically whereas students who attend high poverty districts do much worse. The economic integration plan adopted by Wake County School District, which includes Raleigh, NC, has been touted as a national model.

In January 2000, the Wake County School District approved a plan prohibiting schools from enrolling more than 40 percent of students defined as poor—i.e., eligible for free or reduced price lunch—and from having more than 25 percent of its students performing below grade level. In order for Wake County’s plan to work, some students travel to schools located far from their homes. Suburban students are lured to city schools by special magnet programs.

In 1995, only 40 percent of black students in the third through eighth grades scored at grade level on standardized tests. A decade later, 80 percent of black students scored at grade level. Moreover, middle-class achievement did not suffer and appears to have improved. In explaining the reasons for the dramatic turnaround, Richard Kahlenberg states: “They [low-income students] are surrounded by parents who are more likely to be active in the school. And, they are taught by teachers who more likely are highly qualified than the teachers in low-income schools.”

Focusing on economic, rather than racial, integration is beneficial for an additional reason: it avoids race-based policies that are likely to be declared unconstitutional by the courts. In a pair of cases that will be decided this term,

88. Id. at 4-5.
89. Id. at 2.
90. Alan Finder, As Test Scores Jump, Raleigh Credits Integration by Income, N.Y. TIMES, Sept. 25, 2005, ¶ 1, at 24.
91. Id.
92. Id.
93. Id.
94. Id. (fully 91% of all students in grades three through eight scored at grade level in 2005, up from 79% in 1995).
95. Id.
the Supreme Court appears poised to declare unconstitutional Seattle,
Washington and Louisville, Kentucky's voluntary desegregation plans, which
use race as a factor in determining the schools children can attend. If the
Court holds, as expected, that race can no longer be used by school districts
voluntarily seeking to desegregate, advocates for minority students trapped in
segregated schools will need a different approach. Economic integration plans,
like the one adopted by Wake County School District, provided a promising
alternative.

But could such a plan work in the Cincinnati metropolitan area? In Wake
County, the school district is countywide, which simplifies combining students
from the city and the suburbs. School districts located in Hamilton County,
Ohio, by contrast, are not countywide. Because Cincinnati Public Schools has a
high concentration of economically disadvantaged students (64 percent),
economic integration would necessarily involve the transfer of low-income
students across district lines. Trying to implement such a plan would
undoubtedly provoke an intense battle between suburban (white, affluent) and
urban (black, low-income) interests. Citing the importance of “local control,”
suburban white districts would likely argue that they should not shoulder the
responsibility of raising achievement scores for Cincinnati Public Schools
students.

Could suburban school districts in Greater Cincinnati be convinced to
embrace interdistrict economic integration? Part IV will discuss possible ways
to do so.

IV. DOES INTERDISTRICT ECONOMIC INTEGRATION SERVE THE INTERESTS OF
SUBURBAN CINCINNATI SCHOOL DISTRICTS?

As Professor Bell argues, blacks' interest in achieving racial equality will
not be accommodated unless it converges with the interests of whites.
Therefore, given the highly charged politics surrounding interdistrict
desegregation remedies, economic integration of Greater Cincinnati schools will
not occur unless white, suburban school districts are persuaded that such
integration serves their interests. This part will examine three potential reasons
why interdistrict economic integration would benefit white suburban families.
A. Crime Reduction

People who live in the Cincinnati metropolitan area can scarcely pick up the morning newspaper without reading about crime rates spiraling out of control.\textsuperscript{102} To Cincinnati Mayor Mark Mallory, crime fighting is among the city’s top priorities: “The bottom line is we have to do all we can to fight crime. People in this city are not comfortable with the amount of crime we have. I’m not comfortable with the amount of crime we have.”\textsuperscript{103} The Mayor’s statement followed September 2006 news reports that Cincinnati ranked in the top 20 nationally in homicides per capita.\textsuperscript{104} If emphasized, could the link between black males’ low graduation rates and increasing crime rates persuade white suburbanites to tolerate, if not embrace, interdistrict economic integration?

While the connection between crime and lack of education could persuade some suburban families that addressing low graduation rates in Cincinnati serves their self-interest, the danger is that emphasizing high crime in Cincinnati could reinforce the very dynamic that has so crippled urban school districts across the country: white flight. Indeed, census data released in 2006 indicates that Cincinnati lost 6.8 percent of its population between 2000 to 2005; out of 255 cities nationally with populations exceeding 100,000, only Detroit matched Cincinnati’s loss of population in percentage terms during that same period.\textsuperscript{105} Emphasizing this link also reinforces the stereotype of young black men as dangerous individuals who commit crime, the kind of people suburban families have fled Cincinnati to get away from.

B. Soaring Incarceration Costs

The cost of incarcerating a person in the state prison system for one year is $25,334.65.\textsuperscript{106} The cost of incarcerating a person in the Hamilton County Justice


\textsuperscript{103} Dan Klepal, \textit{Crime outbreak covers Cincinnati}, The Cincinnati Enquirer, Metro, Pg. 1B (Sept. 24, 2006).

\textsuperscript{104} Id. (REPORTING THAT “CINCINNATI HAS THE 15TH HIGHEST HOMICIDE RATE PER CAPITA AND THE 34TH MOST INCIDENTS OF VIOLENT CRIME ON A LIST OF THE 254 LARGEST CITIES”).


\textsuperscript{106} Ohio Department of Rehabilitation and Correction, \textit{Pieces of the Puzzle: FY 2006 Annual Report} 26 (2006), \textit{available at}
Center, located in Cincinnati, Ohio is $57.37 per prisoner per day for a yearly total of $20,940.05.\textsuperscript{107} By contrast, the yearly tuition cost for an in-state student to attend the University of Cincinnati’s undergraduate program is $9,399.\textsuperscript{108} Recall also that CPS spends just over $12,000 per pupil annually. What becomes apparent from these figures is that we spend far more to incarcerate than to educate our young people. With the state’s prison population approaching 50,000\textsuperscript{109} and growing, the high cost of incarceration will likely continue to increase.

These soaring costs might persuade some suburban residents, particularly fiscal conservatives, to embrace education reform—including interdistrict remedies—that reduce these costs over the long run. But rising prison costs do not impact ordinary citizens in a direct way. Something more persuasive is needed.

C. Strengthening the Local Economy

Perhaps a more powerful reason for suburban school districts to accept interdistrict economic integration is that such integration, and the increase in educational achievement that will result, is necessary to ensure a robust local economy.

People tend to settle in communities where property taxes are reasonable and job opportunities are abundant. Communities that meet these criteria develop around public school systems with high graduation rates. Families gravitate toward successful public school systems in which to enroll their children, and businesses also seek out communities boasting thriving public school systems because qualified entry-level employees are readily available. As the Buckeye Institute for Public Policy Solutions has repeatedly enunciated, the economic vitality of Cincinnati and other major cities is hindered by the underachievement of its public schools.\textsuperscript{110} Because over 70 percent of the United States work force has not earned college degree, local high graduates are the employee base for the

\begin{footnotesize}
\textsuperscript{107} Memorandum from Patrick Thompson, County Administrator, Hamilton County Administrator’s Office to the Board of Commissioners, Hamilton County 2 (Mar. 15, 2007), available at http://www.hamiltoncountyohio.gov/administrator/bsi/jail/OpCost031607.pdf.
\end{footnotesize}
local economy.\textsuperscript{111} Communities with low high school graduation rates are therefore less attractive to businesses considering relocation.\textsuperscript{112}

If suburban parents want a robust economy for their children, then it is important that public school education improve across the board for students in the region.

\textbf{V. CONCLUSION}

In 1962 President Kennedy told the nation:

\begin{quote}
We choose to go to the moon. We choose to go to the moon in this decade and do the other things, not because they are easy, but because they are hard, because that goal will serve to organize and measure the best of our energies and skills, because that challenge is one that we are willing to accept, one we are unwilling to postpone, and one which we intend to win, and the others, too.\textsuperscript{113}
\end{quote}

On July 20, 1969, Kennedy’s vision came to fruition.\textsuperscript{114} At a cost of more than $100 billion, the United States beat the Soviet Union in the race to the moon.\textsuperscript{115}

If we can find the political will to spend the vast sums of money required to land on the moon, then certainly we must find a way to ensure that low-income students across the United States, including black boys in Cincinnati, receive the education to which they are entitled. Making sure that all of our children—whether they are black, white, poor or affluent—is certainly in everyone’s interest.


\textsuperscript{112} \textit{Id.}


IS CLASSISM THE NEW RACISM? AVOIDING STRICT SCRUTINY’S FATAL IN FACT CONSEQUENCES BY DIVERSIFYING STUDENT BODIES ON THE BASIS OF SOCIOECONOMIC STATUS

Genevieve Campbell*

I. INTRODUCTION

Yet another racial classification, this time in the context of race conscious student assignment plans in K-12 public education, has made its way to the Supreme Court by way of challenge under the 14th Amendment’s Equal Protection Clause.¹ Because of the current temperament of the Court, the classification will most likely fail, as many similar classifications have before it, on constitutional grounds.² Such a holding would be problematic; the importance of diversity in student bodies and threats impending re-segregation of public schools in larger urban districts have not diminished³ since the infamous holding of Brown v. Board of Education declaring segregated schools unconstitutional.⁴ So where does strict scrutiny leave public schools committed to maintaining a diverse student body, and the myriad benefits resulting from such atmospheres? They must turn to race neutral admission programs that incidentally also have the benefit of increasing the level of diversity within student bodies.⁵ Given the Court’s inherent suspicion of racial classifications, public schools have begun giving preference on the basis of the socioeconomic status of their students, rather than their students’ races, in their admissions approaches.⁶ In their implementations, these “economic affirmative action” plans demonstrated the incidental benefit of not only increasing diversity among students as far as socioeconomic economic status is concerned, but have also had the incidentally beneficial effect of diversifying on the basis of race because of

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². Id.
³. See RICHARD KAHLER, ALL TOGETHER NOW (2001).
⁶. Id.
the correlation between race and poverty that exists in America. This article discusses this correlation and how economic affirmative action plans may be a means for school districts to avoid having their programs held unconstitutional under a court’s strict scrutiny analysis that accompanies any racial classification by a government actor. This article also analyzes how these socioeconomic plans would fair under both rational basis review by a court and under the Washington v. Davis standard for a facially neutral law with a disparate impact on a certain race. This article argues that rational basis review should apply to such programs, and that even under Washington v. Davis review these admissions programs should survive an Equal Protection challenge.

II. BACKGROUND LAW

The Equal Protection Clause of the Fourteenth Amendment mandates that no state “den[y] to any person within its jurisdiction the equal protection of the laws.” The Supreme Court began strict scrutinization of racial classifications subject to equal protection review in Korematsu v. United States, and has continuously maintained this level of review under a broad variety of circumstances in subsequent cases. The Supreme Court recently reaffirmed strict scrutiny review of racial classifications in higher education admissions programs in Grutter and Gratz. Although cases involving race conscious student assignment plans in the K-12 context are distinguishable in many respects from decisions like Grutter and Gratz, focusing on admission policies at the undergraduate and graduate levels, given the inherent suspicion of racial categories, the District Court in the Western District of Kentucky chose to apply

7. Kahlenberg, supra note 4, at 45 (noting that, “socioeconomic integration is uniquely positioned to promote unity because if it capable of achieving a good measure of racial integration without the balkanizing effect that the use of race itself can entail. In recent years, race-conscious policies have sometimes promoted an insidious racialism on both the left and the right.”).


11. See McFarland, 330 F. Supp. 2d at 848 (“[N]o Justice appears to have suggested that a lesser degree of scrutiny was appropriate in either [case].”).
the same level of strict scrutiny to McFarland.\textsuperscript{12} Strict scrutiny demands that government classifications based on race further a compelling government interest and that these classifications be narrowly tailored to meet that compelling interest.\textsuperscript{13} The Court has stated that “[a]bsent searching judicial inquiry into the justification for such race-based measures,” it has “no way of determining what classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.”\textsuperscript{14} Strict scrutiny is a powerful tool the Court utilizes to “smoke out” illegitimate uses of race by assuring that the legislative body using racial classifications, is pursuing a goal important enough to warrant the differentiation.\textsuperscript{15} The Court has held that universities and graduate schools can articulate a compelling interest in obtaining “the educational benefits of a diverse student body.”\textsuperscript{16}

In McFarland, the Jefferson County Public School Board stated interests overlapping those of the University of Michigan Law School at the individual student level, but the Board also articulated broader community concerns necessarily implicated in the K-12 context.\textsuperscript{17} The unique concerns arising in the K-12 context should be noted because under the Equal Protection review, “[n]ot every decision influenced by race is equally objectionable,” and strict scrutiny provides courts with a roadmap for careful examination of “the importance and sincerity of the reasons advanced by the governmental decision-maker for the use of race in a particular context.”\textsuperscript{18} While all governmental uses of race are subject to strict scrutiny review, this standard does not chill its use in all situations.\textsuperscript{19} In Adarand, the court stated that, “[w]hen race-based action is necessary to further a compelling interest; such action is within constitutional constraints if it satisfies the “narrow tailoring” test this Court has set out in previous cases.”\textsuperscript{20} Any interest asserted is examined in light of the unique context giving rise to it, and whether an asserted interest is actually compelling enough to satisfy strict scrutiny’s second prong is revealed by assessing the objective validity of the goal.\textsuperscript{21}

Americans have traditionally viewed educating their children as a matter of both personal and local concern.\textsuperscript{22} The role and importance of local elected
school boards in creating educational policy has also been endorsed by the Court. 23  Deference to the school board is an important facet in determining whether diversity is a compelling interest in student assignment plans such as those in Jefferson County Public Schools. 24  Also, in determining whether diversity is a compelling interest, the Court must necessarily examine “whether the Board’s motives are sincere, and not aimed at some improper or illegitimate purpose, or are merely for the purpose of racial balancing.” 25  Even if the Board alleges a compelling purpose, it must pass the second element of strict scrutiny in that the plan must be specifically and narrowly tailored to accomplish the purpose of maintaining a diverse student body. 26  To fit within the confines of narrow tailoring, the Board’s use of race in its assignment plans must “fit” this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.” 27  Courts have been unable to reach a unanimous decision as to discerning narrow tailoring in racial classifications in the school context. 28  In Grutter, the Supreme Court designated four factors as determinative in its analysis of whether the University of Michigan’s admissions policy was narrowly tailored. 29  The Court calibrated its inquiry to fit the unique issues raised by using race to achieve student body diversity in public higher education. 30  The first factor examined by the Court was whether Michigan’s policy constituted a quota. 31  Quotas are

23. See Freeman v. Pitts, 503 U.S. 467, 489-90 (1992) (“As we have long observed, ‘local autonomy of school districts is a vital national tradition.’ Returning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system. When the school district and all state entities participating with it in operating the schools make decisions in the absence of judicial supervision, they can be held accountable to the citizenry, to the political process, and to the courts in the ordinary course.”). See, e.g., Board of Educ. v. Dowell, 498 U.S. 237, 248 (1991) (“Local control over the education of children allows citizens to participate in decision-making, and allows innovation so that school programs can fit local needs.”); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 481 (1982) (“[N]o single tradition in public education is more deeply rooted than local control over the operation of schools . . . ”) (quoting Milliken v. Bradley, 418 U.S. 717, 741-42 (1974); Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 410 (1977) (“O]ur cases have . . . firmly recognized that local autonomy of school districts is a vital national tradition.”); Milliken, 418 U.S. at 741-2 (No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.”); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 49-51 (1973) (“[L]ocal control of schools offers the opportunity . . . for participation in the decision making process that determines how those local tax dollars will be spent . . . Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence.”)


25. Id. at 854.


28. Id.


30. Id. at 333-34.

31. Id. at 334.
unconstitutional because they “insulate each category of applicants with certain desired qualifications from competition with all other applicants.”32 An admissions program that is not characterized as a quota is flexible by considering all important elements of diversity, paying particular attention to the qualifications of each applicant, and placing each applicant on equal footing with one another when considering applications for admissions, although it is not necessary to give each application the same weight.33 The second inquiry by the Court was whether each applicant was afforded individualized review.34 Thirdly, the Court examined whether the particular assignment plan “unduly harm[ed] members of any racial group.”35 The fourth and final inquiry examined whether the particular actor gave “serious, good faith consideration of workable race-neutral alternatives” in achieving its goal.36 Socioeconomic classifications, unlike racial classifications, are not inherently suspect and therefore do not trigger strict scrutiny under a court’s review.37 Economic classifications are subject to a less strict standard of review known as rational basis review.38 Under this standard of review, the policy-maker need only articulate a policy rationally related to a legitimate state interest, and the Court confers substantial deference to the policy-maker.39 Other courts, applying an even less strict standard, have stated that a statute or policy will be found unconstitutional only if it is “arbitrary.”40 Unlike race conscious student assignment plans, a student assignment plan taking socioeconomic factors into consideration instead of race would be subject to a lower level of review unless the Court were to determine that the actual purpose of the plan

32. Id. (quoting Regents of the Univ. of California v. Bakke, 438 U.S. 265, 315 (1978)).
33. Id. at 334.
34. Id. at 336.
35. Grutter, 539 U.S. at 341.
36. Id. at 339 (Justice O’Connor states, “Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.”).
38. Dandridge, 397 U.S. at 485.
40. See, e.g., United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 177-79 (1980) (“The only remaining question is whether Congress achieved its purpose in a patently arbitrary or irrational way . . . Where, as here, there are plausible reasons for Congress’ action, our inquiry is at an end.”); McGowan v. Maryland, 366 U.S. 420, 425 (1961) (“The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State’s objective.”); Lindley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911) (noting that a law will be stricken only if it is “purely arbitrary.”).
was discriminatory in nature.\textsuperscript{41} In \textit{Washington v. Davis}, the Court held that facially neutral policies with disparate impacts on racial minorities require rational basis review.\textsuperscript{42} However, where discriminatory intent is evident in a facially neutral policy, the Court applies strict scrutiny analysis as discussed above.\textsuperscript{43}

III. FACTUAL BACKGROUND

\textbf{A. Jefferson County’s Commitment to Diversity}

The Jefferson County Public School system in Louisville, Kentucky has made its way to the Supreme Court because of its commitment to the process of integration.\textsuperscript{44} Jefferson County Public Schools’ race conscious student assignment plan, promulgated in an attempt to diversify its student body, has been challenged by a group of parents of white children who were denied assignment to their first school choice in the district.\textsuperscript{45} The County has nineteen traditional schools with reputations for good discipline, structured teaching, and parental involvement spanning kindergarten through twelfth grade.\textsuperscript{46} Another particularly desirable attribute of these traditional schools is that once a child is assigned, he or she can stay within the traditional school until twelfth grade without having to apply for assignment to that particular school again, and without having to worry about being reassigned to a less desirable school.\textsuperscript{47}

These traditional schools are so popular that the school system does not have enough room to accommodate all students that want to attend, and students are therefore assigned to schools by lottery.\textsuperscript{48} In 2000, the county employed a voluntary “managed-choice” program covering the entire school district.

\begin{footnotesize}
\begin{enumerate}
\item Washington v. Davis, 426 U.S. 229, 245 (1976) (holding that facially neutral laws with disparate impacts will be strictly construed if a challenger is able to prove that a state actor had an invidious discriminatory purpose).
\item \textit{Id.} at 242. \textit{See also} Personnel Adm’r. v. Fenney, 442 U.S. 256, 280 (1979) (holding that hiring preference for veterans does not violate Equal Protection of 14th Amendment even though it disproportionately and inherently impacts women, because there was no evidence of a discriminatory intent); Village of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 270 (1977) (holding that government’s refusal to re-zone parcel of land to permit construction of low-income housing did not violate Equal Protection Clause because plaintiffs failed to show an invidious discriminatory intent).
\item Davis, 426 U.S. at 242.
\item McFarland, 330 F. Supp. 2d at 837-39.
\item Jost, \textit{supra} note 44, at 347; \textit{see} McFarland, 330 F. Supp. 2d at 846 (“These schools emphasize basic skills in a highly structured environment, discipline and dress codes, learning with daily follow-up assignments, and concepts of courtesy, patriotism, morality and respect for others.”).
\item McFarland, 330 F. Supp. 2d at 846.
\item Jost, \textit{supra} note 44, at 347.
\end{enumerate}
\end{footnotesize}
replacing a court-ordered desegregation plan. The school employed this “managed-choice” plan in an effort to prevent any school in its district from having fewer than 15 percent or more than 50 percent black students throughout the entire school population. These racial guidelines apply to the entire school system. In the traditional schools, to keep these racial ratios, the school system maintained a separate list of black students. The County’s plan consists of separating and randomly sorting applicants into four lists at each grade level: “Black Male, Black Female, White Male and White Female.” The principal has discretion to draw candidates from different lists to stay within the racial guidelines proscribed by the plan for the entire school population, with the guidelines applying to the school as a whole, and not just per grade. Jefferson County’s plan was working prior to the challenge by McFarland and the three other families in federal court. The County was one of the first school systems to begin integrating after the Court handed down its decision in Brown v. Board of Education, and yet still remains in “stark contrast to the ethnic and racial patterns in most other school districts” nationwide.

B. The Resegregation of America’s Public Schools

The Supreme Court declared “‘separate but equal’ has no place in the public education context” and that racially segregated schools violated the Equal Protection guarantees in the Constitution’s Fourteenth Amendment. Brown’s fiftieth anniversary accompanied by challenges to race conscious student assignment plans, such as the one employed by Jefferson County, have generated a great deal of discussion regarding whether the Court’s ruling has fulfilled its original promise of giving all students the benefits stemming from an

49. Id.
50. Id.
52. Jost, supra note 44, at 347.
54. Id. (Depending on how many seats are available for new applicants, a principal randomly takes a certain number of applicants from each list, starting at the top of the list, and notifies the parents of the child’s acceptance. If the parent fails to enroll his or her child, the principal moves sequentially down the list, the choice of which list to use being left to the principal’s discretion. The Office of Demographics has the final say on the principal’s selection so that the school is within its racial guidelines).
55. Jost, supra note 44, at 347.
56. Id.
57. Brown v. Bd. Of Educ., 347 U.S. at 495; see generally NAACP LEGAL DEFENSE FUND ET AL., LOOKING TO THE FUTURE: VOLUNTARY K-12 SCHOOL INTEGRATION (2005) (This is a publication put out by the NAACP Legal Defense Fund, the Civil Rights Project at Harvard University and the Center for the Study of Race and Law at the University of Virginia School of Law for the purpose of educating parents, educators and others on the importance of a diversity in the K-12 context. It also gives a brief history of Brown and its progeny and discusses means of maintaining diversity in public schools in light of these various decisions.).
education in a racially integrated school.\textsuperscript{58} Since the Court’s holding in \textit{Brown},
the national student public school population has shifted from an overwhelmingly white population to one where minority students comprise of over 40 percent of all U.S. public school students.\textsuperscript{59} One result of growing student diversity in public schools is that substantial shares of students now attend multiracial schools.\textsuperscript{60} Today it appears as though desegregation of these public schools is creating an atmosphere where segregation is becoming as much of a reality as it was in 1954.\textsuperscript{61} Despite the fact that minority students comprise over 40 percent of all U.S. public school students,\textsuperscript{62} only 14 percent of white students attend multiracial schools.\textsuperscript{63} On average, white students attend schools in which only one in five students are of another race, minimizing opportunities for non-white students to attend school with white students.\textsuperscript{64} African American and Hispanic students are also isolated from students of other races, attending schools where two-thirds of the students are also African American and Hispanic.\textsuperscript{65} School district re-segregation is a trend that has been seen in the majority of large school districts since the mid-1980s.\textsuperscript{66} One reason cited for this occurrence is that public school districts in America’s largest cities contain few white students.\textsuperscript{67} “While the twenty-six largest city districts enroll over one-fifth of all black and Latino students, less than one in forty white students attend these urban schools.”\textsuperscript{68} Without white students, desegregation plans are impossible to realize.

In the suburban setting, minorities are generally exposed to more white students than those students in central city districts, but substantial variation exists within the largest urban districts.\textsuperscript{69} Generally in districts with more than 60,000 students, African American and Hispanic students will attend predominately white schools; however, these African American and Hispanic students are more segregated from white students today than in the mid-1980s.\textsuperscript{70} Extreme racial changes have left some suburban districts predominantly

\begin{itemize}
\item \textsuperscript{58.} \textit{McFarland}, 330 F. Supp. 2d at 836.
\item \textsuperscript{59.} \textit{NAACP LEGAL DEFENSE FUND, ET AL., LOOKING TO THE FUTURE: VOLUNTARY K-12 SCHOOL INTEGRATION, 9} (2005).
\item \textsuperscript{60.} \textit{Id.} at 10. (This study defines “multiracial” schools as a school in which at least three races (African-American, Latino, Asian specifically) represent 10 percent or more of the total student population).
\item \textsuperscript{61.} \textit{See generally Id.}
\item \textsuperscript{62.} \textit{Id.} at 9.
\item \textsuperscript{63.} \textit{Id.} at 10.
\item \textsuperscript{64.} \textit{Id.} at 10-11.
\item \textsuperscript{65.} \textit{NAACP LEGAL DEFENSE FUND ET AL., LOOKING TO THE FUTURE: VOLUNTARY K-12 SCHOOL INTEGRATION, 11} (2005).
\item \textsuperscript{66.} \textit{Id.} at 10 (This study uses the term “re-segregation” to describe the steady trend of schools that are becoming “racially identifiable”).
\item \textsuperscript{67.} \textit{Id.} at 11.
\item \textsuperscript{68.} \textit{Id.} at 12.
\item \textsuperscript{69.} \textit{Id.} at 12-13.
\item \textsuperscript{70.} \textit{Id.} at 13.
\end{itemize}
minority, similar to the urban statistics presented above. \textsuperscript{71} Districts with both central city and at least some section of the suburbs within one school district have traditionally experienced high degrees of racial integration. \textsuperscript{72} Additionally, many of these districts contain a majority of the metropolitan area students, and have consequently steadily grown while maintaining a mixture of racial groups within the district. \textsuperscript{73}

\textbf{C. The Correlation Between Race and Class}

The correlation between segregation by race and segregation by poverty in American public school systems is also alarming. “Racial segregation is inextricably linked to segregation by poverty, and the racial differences in students’ exposure to poverty are striking.”\textsuperscript{74} On a national level, about half of all African American and Hispanic students attend schools where three-quarters or more of the students are poor, while only 5 percent of white students attend such schools.\textsuperscript{75} In schools with populations of poor students constituting 90 to 100 percent of the population, 80 percent of the students are African American and Hispanic.\textsuperscript{76} Statistically, these figures speak to the fact that African American and Hispanic students are more than three times as likely as whites to be in high poverty schools and twelve times more likely to be in schools where almost the entire population is poor, whereas over half of all white students attend schools in which 25 percent or fewer students are poor.\textsuperscript{77}

Scholars and the courts seem to agree on the fact that maintaining a diverse population benefits students in the K-12 context. It was first reported twelve years after the \textit{Brown} decision that a student’s achievement is more closely related to the characteristics of other students in the school than any other school characteristic.\textsuperscript{78} The harms of being educated in a segregated school include the fact that segregated minorities tend to be educated in schools of concentrated poverty and that these poverty-stricken schools have weak academic offerings,
less resources, and less experienced teachers with higher turnover rates.\textsuperscript{79} Studies have shown that teachers are highly influential on students’ achievement, and so these trends have more negative consequences for students in minority schools.\textsuperscript{80} Students in minority schools have also demonstrated weaker academic preparation, higher dropout rates, and fewer post-secondary opportunities such as job offers or college admissions due in part to the poor reputations of these poverty stricken schools.\textsuperscript{81} A 2003 study demonstrated that in all of the twenty-four largest urban districts except two, one out of every three ninth graders does not graduate four years later.\textsuperscript{82} This same study also found that in seven of these districts, more students do not graduate than those who do get their diplomas in four years.\textsuperscript{83} Studies have also shown that all students subject to segregation in their secondary schools suffer from a lack of exposure to and comfort with students of other races.\textsuperscript{84} Benefits of integrated classrooms have been shown to consist of, but are not limited to, deeper ways of thinking for students of all races, higher educational and occupational aspirations in students of all races, and positive interactions with students of other races and ethnicities.\textsuperscript{85} Research also demonstrates that black and Latino students perform better in integrated schools than predominantly minority schools.\textsuperscript{86} The heightened aspirations of these students attending desegregated schools translates into higher expectations for students within these schools.\textsuperscript{87} Students attending integrated schools will reap the benefits of the integrated networks of these schools, which are unavailable to students attending segregated minority schools.\textsuperscript{88} The Supreme Court has upheld these benefits of integration in the context of diversity in higher education.\textsuperscript{89}

\textsuperscript{79} Id. at 16.
\textsuperscript{80} Id.
\textsuperscript{81} Id.
\textsuperscript{82} Id. at 16 (See Table 3: Graduation Rate for the 24 Largest Central City Districts, 2002-2003).
\textsuperscript{83} NAACP LEGAL DEFENSE FUND ET AL., LOOKING TO THE FUTURE: VOLUNTARY K-12 SCHOOL INTEGRATION, 16 (2005).
\textsuperscript{84} Id.
\textsuperscript{85} Id. at 17.
\textsuperscript{86} Id. at 18 (noting that one reason for minority students’ higher rate of achievement in integrated schools is that these schools “tend to be schools with middle class students and decades worth of research has shown that student achievement is higher . . . when students are in classes where the students’ average socio-economic status is higher”).
\textsuperscript{87} Id.
\textsuperscript{88} Id. (This article defines networks as informal connections that exist between people for a variety of reasons such as “where they live, what school they attend(ed), where they attend religious services, involvement in a particular organization, etc. These networks, according to research, have been shown to be very important in several aspects of affecting one’s life chances.” Such uses of networks include finding jobs, admission to colleges, housing and knowledge of goods schools. One of the long-term benefits of desegregation has been access to these networks by minority students, offering them an ability to overcome such things as segregated housing, education and job opportunities).
\textsuperscript{89} See Grutter, 539 U.S. 306.
However, as Jefferson County’s experience thus far in the new Court has shown, upholding these benefits in the context of K-12 public education appears to have a dim outlook. Even Justice Kennedy, who many predicted would be the only possible avenue of salvaging the school’s race conscious assignment plan with a swing vote in their favor, expressed dismay over the school’s voluntary use of race in its assignment plans. Thus, it appears that once again, strict scrutiny will strike down a plan of integration. This would have negative consequences for not only Jefferson County Public Schools, but also for the numerous schools around the country with similar programs and for those schools in large urban districts quickly moving towards resegregation.

D. The Importance of Education and the Utilization of Developmental and Admissions Plans in Public Schools

What can school districts do, then, to avoid race consciousness and vicariously, strict scrutiny in their admissions plans? Many public schools around the country are experimenting with various race neutral alternatives to admissions plans. There are currently two avenues a school may choose with respect to admissions plans it can employ – developmental approaches and admissions approaches. Both types of programs attempt to reduce the achievement gap that exists among students in public high schools in America.

The importance of education for every child was recognized by President Bush when he proposed the No Child Left Behind Act, which eventually became law. The achievement gap is measured by several indicators according to the National Assessment of Educational Progress (NAEP), which reports that on average African American and Hispanic students in the twelfth grade score four years behind white twelfth graders in both reading and mathematics. According to the NAEP, 41 percent of white fourth graders are proficient or above in reading while only 15 percent of their Hispanic peers and 12 percent of

90. Trotter, supra note 2.
91. Id.
93. Id.
94. Id. (note that the achievement gap is a term used to describe the disparity in wealth that exists between students who attend school districts with higher rates of students who have greater academic achievements, enabling them to attend college and to therefore network themselves into positions where they obtain careers enabling them to live at the middle class level; as compared to students in schools where the majority of the student population consists of minority students where high school graduation rates and college matriculation rates are lower thus contributing to lower socioeconomic status).
their African American peers read at that level. As for the achievement gap in
the context of low income students, it is measured by examining the gap between
the academic performance of students eligible for the free and reduced-price
lunch program as compared to the more affluent students who are not eligible for
the program. These comparisons demonstrate that 41 percent of non-eligible
fourth grade children are proficient in, or above average in reading, while only
14 percent of their low income peers read at that same level. In mathematics
courses, 33 percent of economically advantaged fourth graders in public schools
are proficient or above average, while only 9 percent of low-income students
consistently perform at that level. The No Child Left Behind Act is an attempt
to close that achievement gap by ensuring that all students receive a quality
education necessary for success in college and beyond. The Act proposes to
achieve this goal by implementing programs focusing on elements that school
districts across the nation must address in achievement gaps at elementary
schools. School districts have taken it upon themselves to reduce the
achievement gap by diversifying their student bodies through the developmental
and admissions approaches discussed above.

Developmental approaches are “designed to diversify student enrollments by
enriching the pipeline of applicants equipped to meet entry requirements and to
achieve academic success,” by enriching the skills, resources and abilities of
students who might not otherwise apply to and succeed in college. Methods of
“enriching the pipeline” focus on filling the pipeline into certain institutions with
students who are prepared to succeed post K-12 by employing such mechanisms
as accounting systems, higher teacher education, science-based reading
practices, curriculum enrichment, targeted financial aid and partnerships
between universities and low-performing schools, partnerships between the
College Board and educational institutions, and consequences for schools that
fail to educate disadvantaged students.

These developmental approaches reflect the ideas codified into law by the
Elementary and Secondary Education Act, which was reauthorized by the No
Child Left Behind Act of 2001, with the prospect of meeting two goals. First,
the program focused on building skills in students who would otherwise not be
considered competitive in the admissions process, and providing support

97. Id.
98. Id.
99. Id.
100. Id.
101. Id.
102. U.S. Dep’t. of Educ., Office for Civil Rights, Achieving Diversity: Race-Neutral
103. Id.
104. Id.
105. Id.
throughout the postsecondary educational experience. Second, admissions policies that focused on diversity in student enrollments were developed. Race neutral admissions procedures, such as socioeconomic preference plans, focus exclusively on the process for admitting students into educational institutions. The goals of these programs reflect the goals enumerated in the Elementary and Secondary Education Act as reauthorized by the No Child Left Behind Act.

E. Race Neutral, Socioeconomic Admissions Plans

One type of race neutral admission policy that would seemingly have a rather great impact on race is a socioeconomic preference plan. Statistics show that public schools with high concentrations of African American and Hispanic students are more than three times as likely to be high poverty schools and twelve times more likely to be schools where almost the entire population is poor; over half of all white students attend schools in which 25 percent or fewer students are poor. Despite race not being a factor, these socioeconomic preference plans would ultimately impact race because minority students may benefit under these plans, given that racial and ethnic groups are disproportionately disadvantaged per socioeconomic factors. At a 2003, “Back-to-School Address,” Rod Paige, former Secretary of Education stated:

We are facing an unrecognized educational crisis in this country. Our wide and sometimes growing achievement gap confirms that there is a two-tiered educational system. For the lucky few, their education is the best in the world; virtually ensuring those students have wonderful opportunities for further education, economic security, professional rewards and personal freedom. For others, there is an underperforming system. Students come to school, but find little education. The vast majority of students left behind are disadvantaged or low-income. Effectively, the education circumstances for these students are not unlike that of a de facto system of apartheid.

Currently, 35 percent of African American female-headed households and 34 percent of Hispanic female-headed household live below the poverty line, compared to only 17 percent of non-Hispanic whites in female-headed households.

106. Id.
107. Id.
109. Id.
111. Id.
households. Also, 6 percent of married African American couple households and 14 percent of married Hispanic couple households live below the poverty line, compared to only 3 percent of non-Hispanic white married households.

Socioeconomic preference plans attempt to diversify the range of students who are admitted into their educational institutions on the basis of socioeconomic status. Just as racial diversity is considered an important factor by most educational scholars, over two-thirds of postsecondary institutions surveyed in 2004, by the National Association for College Admissions Counseling viewed diversity in socioeconomic status as an important goal. It has been proven that at the K-12 level student achievement is affected by the social composition of a school, even after taking into account a student’s own academic and social background. A 2001 study conducted in Montgomery County, Maryland, reported test scores and economic statuses of over 50,000 students; it demonstrated that poverty is the most influential factor in predicting a student’s academic performance and that individual student performance hinges on the overall level of poverty in the school attended by each student. Statistics from similar studies conducted by the Department of Education revealed that in 2000 the average twelfth grade, low-income student read at the same level as an average eighth-grade, middle-class student; 25 percent of the students in the lowest-income quintile drop out of high school compared with 2 percent of students in the highest quintile. Recently, school districts have adopted socioeconomic school assignment plans that seek a reduction in concentrations of poverty. Research has found that better student performance, which stems from a racially diverse student body, is also rooted in having a core middle-class student population.

A leading expert on the issue of socioeconomic diversity in schools, Richard Kahlenberg, advocates that the use of socioeconomic factors provides students an equal chance to attend middle-class schools and that all students benefit from this experience. Because “a majority of students set the tone that academic achievement is to be valued and that aspirations should be set high, students learn from one another’s differences, misbehavior is kept under control and does not become contagious, and teachers are not overwhelmed by large numbers of

113. U.S. Dep’t. of Educ., Office for Civil Rights, supra note 6, at Figure 3 (citing Bureau of the Census, U.S. Department of Census, Poverty in the United States (2000)).
114. Id.
115. Id.
116. Id.
117. Id.
118. Id.
120. Id.
121. Id.
122. Id.
high-need students.\textsuperscript{123} Advocates like Kahlenberg push for admissions preferences based on socioeconomic status because the gaps existing in the educational system between students from low-income families and students from middle and high income families are widening, compared to those that exist between students of different racial groups.\textsuperscript{124} These experts contend that even with race-based preferences in place at many selective colleges, low-income students are all but nonexistent.\textsuperscript{125} One study reviewing America’s 146 most selective colleges revealed that economically disadvantaged students are 25 times less likely to be found on selective college campuses than economically advantaged students; only 3 percent of students matriculate from the bottom socioeconomic quartile and only 10 percent matriculate from the bottom half, while 74 percent come from the top economic quartile.\textsuperscript{126}

Several educational institutions at the college level have also shown that diversity in socioeconomic status among student bodies is beneficial by establishing preferences in their admissions processes based on a student’s economic criterion in an approach known as “economic affirmative action.”\textsuperscript{127} Under economic affirmative action, university admission committees show preference to students who have performed well despite having faced various social and economic obstacles, similar to the practice of showing minorities preference in racial affirmative action.\textsuperscript{128} Advocates of socioeconomic preference programs, such as Kahlenberg, claim that a student from a single-parent family living in a neighborhood with high concentrations of poverty with a B+ average and a score of 1100 on the SAT is likely to be more resourceful and capable than a student from a wealthy suburban home who had access to expensive after-school tutoring programs and achieved an A- average and a higher SAT score.\textsuperscript{129} This fact is contributed to the skills that the impoverished student achieved in overcoming adversity, such as living in a poverty-stricken neighborhood and school district and making it through high school.\textsuperscript{130} Socioeconomic preference programs also exist around the nation in the K-12

\textsuperscript{123} Id.
\textsuperscript{124} Id.
\textsuperscript{126} Id.; See also KAHLENBERG, supra note 4 (Kahlenberg argues, and most scholars agree that college is a necessity to overcome the negative effects of poverty. Kahlenberg contends that, outside the context of dead end jobs, employers are less likely to hire an individual without a college degree because high schools have experienced lower standards in achievement and therefore a high school diploma is less meaningful than it once was. He also states that high school drop outs are ten times more likely to live in poverty than college graduates).
\textsuperscript{128} Id.
\textsuperscript{129} Id.
\textsuperscript{130} Id.
context. To name a few examples, in Wake County, North Carolina, the public school system incorporates socioeconomic status as an assignment factor for its magnet schools; the La Crosse, Wisconsin school districts changed school district boundaries using socioeconomic factors; the San Francisco, California public school system assigns students in part based on socioeconomic status; in Charlotte-Mecklenburg, North Carolina, the public school system which offers some choice to parents, gives choice preference to students of low socioeconomic status; the Brandywine, Delaware public school system keeps all schools between 16 percent and 47 percent low socioeconomic status; in Cambridge, Massachusetts, public school students are apportioned according to the number of students requiring free lunches throughout the schools. Studies conducted by the United States Department of Education have found that socioeconomic disadvantage typically encompasses the following factors: parents’ education, family income, parents’ occupation(s), family’s net worth, family structure, school quality and neighborhood quality. One must necessarily ask, if socioeconomic preference student assignment plans impact the number of minority students that will be admitted to public schools, what level of review would the Court apply in reviewing these programs, if challenged?

IV. RATIONAL BASIS REVIEW

As mentioned above, socioeconomic classifications do not carry the taint of inherent suspicion under the Court’s view, as race-based classifications do. Rather, given socioeconomic classifications, the Court defers to the government or institution using the classification, and the institution need only give the Court a rational basis for the socioeconomic classification. Justice Powell, writing for the majority, held that wealth discrimination in the school financing context does not invoke strict scrutiny, but rather, rational basis review. Since socioeconomic preference plans discriminate on the basis of wealth, rather than race, a challenge by parents whose children are denied access to the school of their choice, as in the case of the McFarlands, should enable a school board to

131. Id.
132. Id.
134. Kahlengberg, supra note 4, at 34 (Kahlenberg states, “Race and class are not identical – sometimes racial integration does not involve socioeconomic integration – but an obvious overlap exists, and evidence from racial desegregation studies provides some indirect confirmation of studies involving economic school integration). 
If challenged under the Equal Protection Clause and held to the minimum standard of review, the school board would only have to elicit a rational basis for its use of socioeconomic classifications for the program to be held constitutional. If challenged under the Equal Protection Clause and held to the minimum standard of review, the school board would only have to elicit a rational basis for its use of socioeconomic classifications for the program to be held constitutional.139 Scholars, such as Kahlenberg, agree that benefits exist in diversifying student bodies on the basis of socioeconomic status so that all students attend school from kindergarten through twelfth grade with a core of middle-class students because the achievement gap between students of lower socioeconomic and students of higher socioeconomic status may be diminished.141 The school board could argue that rational basis is met because, “separate is inherently unequal, not because something magic happens to minority students when they sit next to whites, but because minority schools are so often isolated high-poverty schools that almost always have low levels of academic competition, performance, and preparation for college or jobs.”142 Integrating on the basis of socioeconomic status is a method by which the school board can utilize to dispel these problems.143 Under this rationale, the school board may be able to overcome the scrutiny of even a conservative Court by using socioeconomic classification and existing precedent, which demands that rational basis is the appropriate level of review.144 This type of program may be the resolution to a conundrum that the Court has struggled with since Brown – the need for and benefits of a racially diverse student body juxtaposed against the inherent suspicion of categories based on race and strict scrutiny review that accompanies such classifications when they are challenged. In Grutter, Justice O’Connor even stated that one method of judging whether racial classifications are narrowly tailored is whether the state entity using such classifications has examined other, race neutral means of achieving its goal of diversity.146 Economic affirmative action is defined as a race neutral alternative

140. City of New Orleans, 427 U.S. at 303.
141. Kahlenberg, supra note 4, at 25-26 (noting that disadvantaged students are found to learn more when they attended school with middle-class students and middle class students do not experience any deleterious effects by attending school with economically disadvantaged students).
143. Id.
144. See San Antonio Indep. Sch. Dist., 411 U.S. at 29 (holding wealth discrimination in school financing context does not invoke strict scrutiny); James v. Valtierra, 402 U.S. 137, 140-43 (1971) (holding state constitutional provision requiring popular referendums to approve low rent housing projects does not violate the Equal Protection Clause); Dandridge, 397 U.S. at 485 (holding rational basis as applicable standard to economic and social welfare classifications).
145. See generally McFarland, 330 F. Supp. 2d 834 (discussing difficulty of maintaining racial diversity through racial classifications in a school context and application of strict scrutiny review by the courts).
146. Grutter, 539 U.S. at 339.
to diversifying student bodies on the basis of race. Given the fact that these socioeconomic programs incidentally benefit a greater number of minority students, there is concern that the Court may gloss over rational basis review and instead opt for the Washington v. Davis line of review implicated whenever a facially neutral law or program disparately impacts a certain race. The Supreme Court has held time and time again that strict scrutiny analysis will be applied to any blatant government race-based classification. Washington v. Davis clarifies the notion that even if a law appears racially neutral, if it disparately impacts one race and if an invidious intent to discriminate on the basis of race is found to have occurred by a government actor, the law or program will then be subject to strict scrutiny. Stated more simply, a statute or program involving a government actor that is otherwise neutral on its face cannot be applied in a manner that invidiously discriminates on the basis of race.

V. FACIALLY NEUTRAL LAWS WITH DISPARATE IMPACTS

In his opinion in Washington v. Davis, Justice White, wrote for the majority and stated that, “The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race.” He made sure to clarify that statement through a disclaimer stating that past precedent handed down by the Court by no means reflects the principal that any law or official act, regardless of whether it reflects a racially discriminatory purpose, becomes unconstitutional because of its racially disproportionate impact. Essentially, Justice White’s conclusion was that if a supposedly racially discriminatory official act was held to have an invidious quality, the act itself must be traceable to a discriminatory purpose. Justice White quoted the Keyes Court in stating that the difference between the law simply having a disparate impact on one race and one that intentionally discriminates, therefore calling for strict scrutiny, is that a purpose or intent to

148. Id.
150. See, e.g., Adarand Constructors, 515 U.S. at 227 (holding that, “[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.”).
154. Id.
155. Id. at 240. See also Akins v. Texas, 325 U.S. 398, 403-404 (1945) (holding that, “A purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurymen of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination.”).
discriminate is present in the latter.\textsuperscript{156} If the disparate impact on middle and upper class white students is shown to have the ultimate purpose of discriminating against them, the school boards would be back to square one as far as diversifying their student populations are concerned, because strict scrutiny would inevitably quash all efforts at integration.\textsuperscript{157} Students challenging these socioeconomic preference plans on Equal Protection grounds would attempt to prove that any school using such an admissions plan implemented the plan with an intent to discriminate on the basis of race.\textsuperscript{158} The majority in \textit{Washington v. Davis} held that:

\begin{quote}
[\textit{A}n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact . . . may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds.]
\end{quote}

Given the fact that many socioeconomic preference plans were instituted because of orders from various courts to stop using race-based classifications,\textsuperscript{160} the outlook for these programs against an Equal Protection Clause challenge appears grim.\textsuperscript{161} However, studies are consistently showing that diversification of student bodies on the basis of socioeconomic status is as beneficial, if not more so, as diversity along racial lines.\textsuperscript{162} Kahlenberg argues that, “the separation of poor and middle-class children is the fountainhead of a host of related inequalities of educational opportunity.”\textsuperscript{163} He lists ten ways in which socioeconomic segregation negatively impacts the education of students stuck in a track of poverty, such as the fact that good schools (as in schools whose student populations are not comprised by a majority of low-income students) have “motivated peers who value achievement and encourage it among classmates.”\textsuperscript{164} While “[p]eers in low-income schools are less academically

\begin{itemize}
\item \textsuperscript{156} \textit{Washington}, 426 U.S. at 240 (citing Keyes v. Sch. Dist. No. 1, Denver, 413 U.S. 189 (1973) (holding that differentiating factor between de jure and de facto segregation is the “\textit{purpose or intent} to segregate.”)).
\item \textsuperscript{157} \textit{Id}. at 240.
\item \textsuperscript{158} \textit{Id}.
\item \textsuperscript{159} \textit{Id}. at 242.
\item \textsuperscript{161} Trotter, \textit{supra} note 2 (noting Justice Kennedy’s dismay over using the color of a child’s skin as part of an admissions program to a public elementary school).
\item \textsuperscript{162} KAHLENBERG, supra note 4, at 43 (stating, “Apart from achievement effects, socioeconomic integration, and the racial integration it entails, is likely to produce a more cohesive and humane society, one in which people are less likely to view one another as ‘others’ – with the added benefit of taking the direct focus off race per se”).
\item \textsuperscript{163} Kahlenberg, \textit{supra} note 142, at 2.
\item \textsuperscript{164} \textit{Id}. 
\end{itemize}
engaged, less likely to do homework, more likely to watch TV, more likely to cut class and less likely to graduate, all of which have been found to influence the behavior of classmates."\textsuperscript{165}

Kahlenberg also notes that good schools have “high-achieving peers, whose knowledge is shared informally with classmates all day long” while “[i]n low-income schools, peers come to schools with about half the vocabulary of middle-class children, so any child is less likely to expand his or her vocabulary through informal interaction. . . Good schools have well-connected classmates who will help provide access to jobs down the line”\textsuperscript{166} The lack of access to the informal connections that enable middle-class children to find good paying jobs after graduation, proliferates the cyclical effect of being born into poverty, being educated in poverty and subsequently living in poverty for the rest of their lives where eventually their children will face the same or similar challenges.\textsuperscript{167} Therefore, evidence exists that integrating on the basis of socioeconomic status, rather than race, is incredibly beneficial to students, especially in the K-12 context.\textsuperscript{168} The fact that these students will be vicariously integrated on the basis of race is simply an incidental benefit.\textsuperscript{169}

The majority opinion of \textit{Washington v. Davis} also indicates that these socioeconomic preference plans, if challenged under this line of cases, would prevail.\textsuperscript{170} In his discussion of proving up discriminatory purpose in a facially neutral law, Justice White writes a rather lengthy explication of the \textit{Palmer v. Thompson} case stating that “the operative effect of the law, rather than its discriminatory purpose is the paramount factor” in deciding whether a discriminatory purpose has been proven to trigger strict scrutiny review.\textsuperscript{171} In Palmer, the city of Jacksonville, Mississippi, closed five public swimming pools that it deemed could not be economically operated if integrated, following a court decree that demanded desegregate all of its public swimming pools.\textsuperscript{172} Plaintiffs, African Americans, challenged the closings on Equal Protection grounds and the District Court held that the closures were necessary to maintain peace and order.\textsuperscript{173}

Justice Black held for the majority that the city of Jacksonville had not closed the pools to the public in an effort to discriminate against African
Americans and that it had no invidious racial motivations but rather was actually applying the law equally to both its white and African American citizens. The opinion cautioned courts from grounding decisions as to whether or not the official actor had a discriminatory purpose on legislative purpose or motivation and supported the notion that the “operative effect of the law rather than its purpose is the paramount factor.” Justice Blackmun’s reasoning in Palmer could be equally applicable in the context of socioeconomic preference plans. Like the city of Jacksonville in Palmer, the school board would apply the preference plan to both African American children and white children equally. Socioeconomic preference plans do not even take race into account in their applicability. What they do take into account is the prospective student’s socioeconomic status, or the socioeconomic status of the student’s family.

The fact that these plans would also have the effect of benefiting minority children is simply an incidental benefit that results from having high concentrations of minority children who also live in economic situations that are not middle or upper class. Following his discussion of Palmer, in his less than clear discussion of what does constitute discriminatory purpose, Justice White reaffirms that Keyes demonstrated that Palmer did not change the prevailing view that a facially neutral program that nevertheless involves purposeful discrimination subjects that program to strict scrutiny. If subsequent to implementing a socioeconomic preference admission program, a school board publicly admits to doing so as a result of its inability to take race into consideration during admissions, or if a court were to order that particular school board, such as Jefferson County Public Schools, to discontinue its use of race in its assignment plans, Justice White’s majority opinion would most likely hold that program subject to strict scrutiny review because it would be difficult prove any purpose other than a discriminatory one under those circumstances.

Once a challenger to a facially neutral law or program has proven a discriminatory intent on behalf of that actor, the actor has the burden of rebutting the presumption of the discriminatory intent, and thus almost certain unconstitutionality, under strict scrutiny review. If the school board were given a chance to rebut accusations of a discriminatory purpose, the board could

174. Id. at 227.
175. Id. at 225.
177. Id.
179. Id.
180. Id.
182. Washington, 426 U.S. at 243-244.
183. Id.
184. Id. at 241.
most likely prevail against even the conservative Supreme Court it would currently face.\textsuperscript{185} This sort of admissions program seems to be the solution that both sides of the argument are looking for.\textsuperscript{186}

In \textit{McFarland}, the opposition to the race conscious assignment plan argued for race neutrality in the selections/lottery process.\textsuperscript{187} The proponents of the plan argue for increased diversity and avoiding re-segregation of their schools.\textsuperscript{188} Schools in larger urban districts are in even more danger of becoming re-segregated, and with their high levels of lower income students, this plan would benefit them as well as schools such as those in Jefferson County who are committed to providing their students with a racially diverse learning environment and pushing more minority students through the “pipeline” leading to success beyond their elementary and high school educations.\textsuperscript{189} There could be no accusations of quotas in these types of programs because these programs are colorblind.\textsuperscript{190} The Court has continually held that diversity in the school system is a compelling interest.\textsuperscript{191} These race conscious assignment plans typically fail because they are not “narrowly tailored” enough to remove any suspicion that the motive for the classification was based on racial prejudice or stereotype.\textsuperscript{192} If the program does not take race into account, there is no basis or motivation of racial prejudice or stereotype.\textsuperscript{193} Given the fact that the programs are only motivated to benefit students of all races and utilize only economic classifications, they demand to be reviewed under rational basis review.\textsuperscript{194} With socioeconomic preference plans, strict scrutiny would actually be proven to not be “strict in theory, but fatal in fact,”\textsuperscript{195} because it would not even apply at all.\textsuperscript{196}

\textbf{VI. CONCLUSION}

The benefits a student realizes from being educated in a diverse environment have been proven and sustained time and time again.\textsuperscript{197} However, it is becoming apparent that schools and other state institutions simply cannot use racial classifications in their admissions or other programs in order to preserve or

\begin{itemize}
  \item \textsuperscript{185} Trotter, \textit{supra} note 2.
  \item \textsuperscript{186} \textit{Id}.
  \item \textsuperscript{187} \textit{McFarland}, 330 F. Supp. 2d at 837-838.
  \item \textsuperscript{188} \textit{Id}.
  \item \textsuperscript{189} \textit{Id}.
  \item \textsuperscript{191} \textit{Grutter}, 539 U.S. at 328.
  \item \textsuperscript{192} \textit{J.A. Croson Co.}, 488 U.S. at 493.
  \item \textsuperscript{193} \textit{NAACP Legal Defense Fund et al., Looking to the Future: Voluntary K-12 School Integration.} (2005).
  \item \textsuperscript{194} \textit{San Antonio Indep. Sch. Dist.}, 411 U.S. at 29.
  \item \textsuperscript{195} \textit{Adarand Constructors, Inc.}, 515 U.S. at 237 (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring)).
  \item \textsuperscript{196} \textit{San Antonio Indep. Sch. Dist.}, 411 U.S. 1 at 29.
  \item \textsuperscript{197} \textit{See generally Kahlelberg, \textit{supra} note 4}.
\end{itemize}
create these necessary and beneficial diverse environments. Socioeconomic preference admissions plans appear to be a saving grace in a climate where many Justices cringe at the use of race conscious programs by public schools.\textsuperscript{198} Although the Court has not yet held race conscious student assignment plans, such as the one employed by Jefferson County unconstitutional, if its affirmative action cases are any indication of the projected outcome, the outlook for students enjoying and benefiting from diverse populations within their public schools appears grim at best.\textsuperscript{199} Implementing programs, such as economic affirmative action, gives public schools the best of both worlds. They enable schools to maintain or create diverse student bodies,\textsuperscript{200} while simultaneously avoiding strict scrutiny analysis under Equal Protection challenges.\textsuperscript{201} These programs enrich students’ education and also remove the stigma of racial inferiority that race based affirmative action plans have caused in the past.\textsuperscript{202} Economic classifications are proving to be the wave of the future and a means of ridding society of suspicion-ridden racial classifications once and for all.

\begin{itemize}
\item \textsuperscript{198} Trotter, \textit{supra} note 2.
\item \textsuperscript{199} \textit{Id}.
\item \textsuperscript{200} Kahlenberg, \textit{supra} note 4, at 18.
\item \textsuperscript{201} \textit{Id}. at 43 (Kahlenberg states, “Indeed, if the Supreme Court applies its reasoning in affirmative action cases to school desegregation and declares voluntary integration efforts by race unconstitutional, socioeconomic status may become the best means of achieving racial integration.”).
\item \textsuperscript{202} \textit{Id}.
\end{itemize}
DOE V. KAMEHAMEHA SCHOOLS: WHAT IS THE PROPER STANDARD FOR ANALYZING A § 1981 CLAIM?

Rebecca L. Faust*

I. INTRODUCTION

Throughout the history of the civil rights movement in America, landmark school cases have shaped the civil rights debate, and that debate continues in full-force today. At the time of this article, the Supreme Court is deciding two cases regarding voluntary desegregation programs in public schools, and in the 2005 term the Supreme Court decided two cases with respect to racially conscious admissions policies in public universities. The vast majority of cases dealing with race in education have been in the context of public schools. But as government becomes increasingly involved in private schools, it becomes more logical to also consider those schools within the scope of this debate. Furthermore, many of the important policy reasons, which courts cite as motivation to combat racially discriminatory policies in public schools, apply equally to private schools.

There exists a framework for enforcing racially neutral policies in private schools. § 1981 provides a clear starting point for ensuring that students have access to private schools, regardless of their race. There are, however, distinct differences between a cause of action based on the Fourteenth Amendment,

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1. Before the Supreme Court, McFarland ex rel McFarland v. Jefferson County Pub. Schs., 330 F. Supp 2d 834 (W.D. Ky 2004) aff’d, 416 F.3d 513 (6th Cir. 2005), and Parents Involved in Cmty. Schs. v. Seattle Sch. Dist No. 1, 426 F.3d 1162 (9th Cir. 2005), were combined and heard together as Meredith v. Jefferson County. As of the date this article was written, the Court had not issued a decision.


3. See, e.g., Brown v. Bd. of Ed., 347 U.S. 483, 493 (1954) ("[E]ducation is required in the performance of our most basic public responsibilities . . . It is the very foundation of good citizenship. Today it is a principle instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."); Plyler v. Doe, 457 U.S. 202, 221 (1982) ("[E]ducation has a fundamental role in maintaining the fabric of our society."); Parents, 426 F.3d at 1174-75 ("[S]ocial science research clearly and consistently shows that, for both white and minority students, a diverse educational experience results in improvement in race-relations, the reduction of prejudicial attitudes, and the achievement of a more . . . inclusive experience for all citizens.").

4. 42 U.S.C. § 1981(a) (2000). ("All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.").

which ensures equal access to public schools, and a cause of action based on § 1981. Two cases which are currently under consideration by the Supreme Court, Meredith v. Jefferson County Schools and Parents Involved in Schools v. Seattle Schools District Number One, are both brought against public schools arising from voluntary desegregation programs. Both of these claims are premised on the Fourteenth Amendment and Title VI, which provide a cause of action for plaintiffs when the government acts in a racially discriminatory fashion. Claims brought pursuant to the Equal Protection Clause are judged according to a precise and established standard: strict scrutiny. Claims brought pursuant to § 1981, such as claims brought against private schools, are subject to a variety of standards. When a § 1981 claim is combined with a Fourteenth Amendment claim, courts generally only measure the claim against Fourteenth Amendment standards; when a § 1981 claim is brought with a Title VII claim, courts generally only measure the claim against the standards associated with Title VII. In the context of private schools, § 1981 might be the only cause of action available to a plaintiff. The question then arises: when courts analyze § 1981 claims against private schools, which standard should apply?

II. LEGAL BACKGROUND: HISTORY OF § 1981

When the Ninth Circuit addressed the validity of the Kamehameha Schools’ racially conscious admissions policy, it was fully aware that it was addressing an issue of first impression for courts across the country. The narrow issue before the court was whether “a private, nonsectarian, commercially operated school, which receives no federal funds, [can] purposefully exclude a student qualified for admission solely because he is not of pure or part aboriginal blood.” The basis of this action was a §1981 claim brought by an applicant to a Kamehameha School. The school admitted that, if not for his race, it would have likely accepted his application, and he would have been admitted to the school. Doe argued that the schools’ racially conscious admissions policy was in direct violation of § 1981, because it expressly allowed for racial discrimination in making and enforcing contracts. Kamehameha Schools did not deny that it used race as a factor in its admissions process, but instead argued

6. McFarland, 416 F.3d at 513; Parents, 426 F.3d at 1166.
7. Id.
10. See Wilson v. Legal Assistance, 669 F.2d 562, 563 (8th Cir. 1982)
12. Id.
15. Id.
16. Doe, 416 F.3d at 1027.
that the policy comprised “a valid, race-conscious remedial affirmative action plan, and thus serve[d] a legitimate purpose,” placing it outside the reach of § 1981. The outcome of Doe v. Kamehameha is important because it addresses an issue that has plagued § 1981 since its enactment – what is the proper standard for determining the validity of a racially discriminatory practice?

The history of § 1981 sheds some light on the question. § 1981 is a portion of the Enforcement Act of 1870, enacted by Congress after the passage of the Fourteenth Amendment. The Enforcement Act of 1870 was essentially a republication of the Enforcement Act of 1860, meant to update the 1866 Act to reflect the passage of the Fourteenth Amendment. Although the Fourteenth Amendment applies only to state action, legislative history from both the 1866 and 1870 Enforcement Acts has provided evidence that Congress intended to “‘prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein.” Since its enactment, § 1981 has been applied to private contracts ranging from employment contracts to swimming club contracts to educational contracts.

While it has regularly formed the basis, alongside the Fourteenth Amendment, for challenges to the racially conscious admissions policies of public schools and universities, the Supreme Court did not address the applicability of § 1981 to private schools’ admissions polices until 1976, when it decided Runyon v. McCrary. In Runyon, the Court held that private schools did, in fact, fall within the purview of § 1981, and therefore, it was illegal to refuse to offer admission to applicants solely on the basis of their race. In its finding, however, the Court simply stated that the policy at issue violated § 1981

19. Id. at 23.
21. Id. at 387 (quoting Jones v. Alfred H. Mayer Co., 392 U.S. 409, 436 (1968)).
25. Runyon, 427 U.S. 160 (1976). The Supreme Court in Runyon addressed a slightly different situation than the one at hand in Doe v. Kamehameha. The Court considered whether private schools had the right to exclude Negro applicants from admission, solely on the basis of their race. Id. The Court found that the application of § 1981 to private, educational contracts did not interfere with parental rights to make educational choices, and that § 1981 did not interfere with a private school’s ability to teach “whatever values and standards they deem desirable.” Id. at 177. See Mawdsley, supra note 18, at 24.
26. Runyon, 427 U.S. at 172-173. The Court found the schools’ assertion that § 1981 did not reach private schools “wholly inconsistent” with Supreme Court precedent. Id. at 173. The Court further found that the schools’ admissions policies amounted to “a classic violation of § 1981.” Id. at 172. See also Mawdsley, supra note 18, at 23.
– it did not establish the proper test for determining when a private school has
violated § 1981.27

After Ruynon, § 1981 claims have been subjected to a variety of standards in
the employment and education arenas, but courts had yet to address a private
school’s racially conscious admissions policy until Doe v. Kamehameha.28
Therefore, when the parties brought their dispute before the District Court, it
was unclear how the court should measure their claims. Doe argued that the
proper standard was the same standard used to decide claims under the Equal
Protection Clause based on the historical relationship between § 1981 and the
Fourteenth Amendment.29 This standard has become known as the “strict
scrutiny” standard.30 To meet the strict scrutiny standard, a defendant must
demonstrate that its “use of race in its current admissions program employs
‘narrowly tailored measures that further compelling government interests.’”31
The standard advocated by Kamehameha Schools was a Title VII standard,32
which courts have utilized to decide discrimination in the context of private
employment contracts.33 The Title VII standard requires only that a defendant
show a legitimate purpose for its racially conscious practice.34

The most recent additions to the long line of cases on the topic of racial
discrimination in education include Gratz v. Bollinger35 and Grutter v.
Bollinger.36 These cases differ from Doe because they both involved challenges
to the admissions policies of public schools, and because the plaintiffs in those
actions challenged a state activity, their complaints also included claims under
the Fourteenth Amendment’s Equal Protection Clause.37 The Supreme Court
established long ago that the proper standard for analyzing racial classifications
under Equal Protection challenge is a strict scrutiny standard.38 According to
this standard, racial classifications “are constitutional only if they are narrowly
tailored to further compelling governmental interests.”39 Based on this standard,

27. Mawdsley, supra note 18, at 24.
28. Id. at 24–25.
1025 (9th Cir. 2005), rev’d en banc, 470 F.3d 827 (9th Cir. 2006).
31. Id. (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995)).
32. Doe, 295 F. Supp. 2d at 1162.
33. Wilson v. Legal Assistance, 669 F.2d 562, 563 (1982) (“The standards to be applied in
evaluating a claim of racial discrimination in employment [under § 1981] are the same as those
applied in actions brought pursuant to Title VII . . . . ”).
shifting framework has long been accepted as the proper structure for analyzing § 1981 claims, but
it is not clear whether the substantive standards for Title VII should also apply to § 1981 claims.
37. Gratz, 539 U.S. at 250; Grutter, 539 U.S. at 317.
38. See Grutter, 539 U.S. at 326.
39. Id. (citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995)).
an admissions policy which classifies applicants based on race can only be valid if: (1) it fulfills a compelling government interest; (2) it is narrowly tailored to fit this interest; and (3) it is limited in its duration. A compelling government interest does not include “reducing the historic deficit of traditionally disfavored minorities” in certain professions, and it does not include remedying societal discrimination. It is clear from these requirements that an admissions policy with a racial preference will rarely survive a court’s strict scrutiny.

By contrast, in the employment context, a defendant who employs a hiring or promotion policy admitting candidates based on race must only present a legitimate nondiscriminatory reason for its policy, similar to the standard applied in the Title VII claims that usually accompany a § 1981 claim in the employment setting. In United Steelworkers of America, AFL-CIO-CLC v. Weber, the Supreme Court found that the employer had established a legitimate, nondiscriminatory purpose for its affirmative action program. The employer wanted to employ more African American employees at higher levels in its company and created a quota system for its training program to carry out this policy. The Court ruled that the employer’s voluntary affirmative action program was an attempt to eliminate traditional patterns of racial segregation in the workplace and therefore should be upheld under a Title VII standard.

Doe, then, presented an interesting dilemma for the Ninth Circuit and the District Court of Hawaii. It was unclear whether those courts should apply the strict scrutiny standard that the Supreme Court applied in other cases involving educational admissions policies, or whether the courts should apply a Title VII standard, as the Court applied in private employment situations. Ultimately, both the District Court and the Ninth Circuit applied the Title VII standard but came to opposite conclusions.

III. FACTUAL BACKGROUND: HISTORY OF KAMEHAMEHA SCHOOLS

The Kamehameha Schools were founded by a trust created by the last direct descendent of King Kamehameha I, Princess Bernice Pauhi Bishop. In her

40. Id. at 326, 342.
41. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 306-307, 310 (1978) (Powell, J. concurring). In the Bakke decision, none of the six opinions written carried a majority, but Powell’s concurring opinion has proved to be the most influential on the topic. See, e.g., Grutter, 539 U.S. at 338-330; and Gratz, 539 U.S. at 268-270. In Powell’s opinion, the only “compelling government interest” he was willing to recognize was “the attainment of a diverse student body.” Bakke, 438 U.S. at 311.
43. Id.
44. Id. at 197.
45. Id. at 204-208.
46. Doe v. Kamehameha Sch., 416 F.3d 1025, 1030 (9th Cir. 2005).
47. Id. at 1048; Doe v. Kamehameha Sch., 295 F. Supp. 2d 1141, 1172 (D. Hawaii), rev’d, Doe, 416 F.3d at 1025, rev’d en banc, 470 F.3d 827 (9th Cir. 2006).
will, Mrs. Bishop created a trust and directed that her trustees give the income from the trust to the support and education of children needing aid, giving first preference to Hawaiians of pure or part aboriginal blood.\textsuperscript{49} She gave the trustees the power to make such rules and regulations as they saw necessary to achieve her goal.\textsuperscript{50} The will itself does not establish race as a condition of admission to the Kamehameha Schools, but the first set of trustees determined that students of Hawaiian blood should have first right to the schools.\textsuperscript{51} To further this policy, the trustees established a two-step admissions process.\textsuperscript{52} First, applicants must prove that they meet the School’s minimum academic qualifications, and second, applicants are required to complete an “Ethnic Ancestry Survey” to verify whether the student has any aboriginal blood.\textsuperscript{53} Kamehameha then offers admission to all qualified students of native Hawaiian descent.\textsuperscript{54} After those offers of admission have been accepted or rejected, the schools offer the remaining seats to qualified students without aboriginal blood lines.\textsuperscript{55} John Doe, the plaintiff in this action, twice applied for admission to Kamehameha Schools, twice was determined to be a qualified applicant, and twice was rejected when his Ethnic Ancestry Survey showed he was not of native Hawaiian descent.\textsuperscript{56}

IV. THE NINTH CIRCUIT SHOULD HAVE APPLIED A STRICT SCRUTINY STANDARD TO THE ADMISSIONS POLICY.

At all three decisions in this case, the courts decided to apply their own form of a Title VII analysis, but the reasoning behind each decision varies slightly. At the District Court level, the decision to apply a Title VII test hinged on whether the schools were a public or private actor.\textsuperscript{57} A three member panel of the Ninth Circuit took the stance that a Title VII test should be used in this situation because the most recent decisions regarding § 1981 applied a Title VII test in their analysis.\textsuperscript{58} It should be noted that none of the cases discussed by the Court of Appeals addressed the policies of a private school – all dealt with § 1981

\textsuperscript{49} Doe, 295 F. Supp. 2d at 1154.
\textsuperscript{50} Id.
\textsuperscript{51} Doe, 416 F.3d at 1029.
\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} Doe v. Kamehameha Sch., 295 F. Supp. 2d 1141, 1164 (D. Hawaii 2003), rev’d, 416 F.3d at 1025, rev’d en banc, 470 F.3d 827 (9th Cir. 2006). By categorizing the Kamehameha Schools as a wholly private actor, the District Court overlooked the fact that the Bishop Estate, which funds the schools, receives tax exempt status as a charitable trust. As such, the schools do receive funds from the federal government, if only in the form of a reduction in the taxes it would otherwise pay. The Supreme Court has already decided that at the very least, a private school must relinquish its tax exempt status if it chooses to employ a racially conscious admissions policy. Bob Jones University v. United States, 461 U.S. 574, 595-96 (1983).
\textsuperscript{58} Doe, 416 F.3d at 1036.
coupled with Title VII claims in an employment context. When it reheard the case en banc, the Ninth Circuit adopted a further modified version of the Title VII standard. The en banc decision attempted to revise the Title VII standard for analyzing affirmative action but found it necessary to substantially modify each of the three elements of the standard. Instead of attempting to adapt a Title VII standard to fit the needs of a private school, the Ninth Circuit could simply have applied a strict scrutiny standard and recognized the historic plight of Native Hawaiians as a compelling interest.

A. Title VII and § 1981 are distinct statutes and apply in distinct ways.

While both Title VII and § 1981 apply to situations involving racial discrimination, they operate in different ways. Each statute applies to slightly different situations. Title VII only applies to situations arising in an employment context, and § 1981 only applies to intentional discrimination. Furthermore, the legislative history behind § 1981 suggests that its standard should be closer to the strict scrutiny standard that applies to the Fourteenth Amendment or Title VI, as opposed to the more recent and legislatively distinct Title VII standard. Finally, the Doe line of cases has applied the substantive standards of Title VII, when Supreme Court precedent only requires that the burden-shifting framework be used. While the burden shifting framework from Title VII logically transfers to § 1981 claims, the substantive law attached to Title VII does not make the same smooth transition. Because of these differences between § 1981 and Title VII, the Title VII standard is not the proper standard for analyzing a § 1981 claim.


Since the Civil Rights Act of 1991, there has been substantial overlap between the application of Title VII and § 1981 in employment discrimination claims. Prior to the Civil Rights Act of 1991, the Supreme Court interpreted § 1981 as applicable only to situations involving contract formation or cancellation, and even subsequent to its enactment significant differences in the applicability of § 1981 and Title VII persist.

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59. Id. at 1136-37 (citing Patterson v. McLean Credit Union, 491 U.S. 164, 187 (1989); Jurado v. Eleven-Fifty Corp., 813 F.2d 1406, 1412 (9th Cir. 1987); EEOC v. Inland Marine Industries, 729 F.2d 1229, 1233 (9th Cir. 1984)).
60. Doe v. Kamehameha Sch., 470 F.3d 827, 841-43 (9th Cir. 2006) (en banc).
61. Id. at 842.
64. See infra Part IV.A.2.
67. See, e.g., Patterson, 491 U.S. 164.
First, § 1981 applies to a wider variety of situations. Title VII is restricted in its application to employment situations, and further restricted to employment situations involving employers with more than fifteen employees. § 1981, by contrast, applies in any contractual situation. In Tillman v. Wheaton-Haven Recreation Association, the Supreme Court upheld a challenge to a swimming club’s racially discriminatory membership policy on the grounds that it violated the plaintiff’s right under § 1981 to freely enter into contracts without regard to race. As seen in Doe v. Kamehameha Schools, § 1981 also applies in educational disputes. Therefore, even though both Title VII and § 1981 apply to certain employment situations because of the amendment to the Civil Rights Act in 1991, they are still distinct in their applicability. A standard that fairly resolves a wide variety of employment claims might not apply as fairly to claims involving disputes as varied as private club membership or educational admissions.

Second, Title VII and § 1981 are distinguishable on the grounds of who can be found liable for the wrongs committed under each. As a consequence of Title VII’s limitation of liability to employers, unless a plaintiff can establish that the defendant acted either in the role of an employer, or as an agent of an employer, that plaintiff will not be able to hold the defendant liable for any discriminatory practices. By contrast, § 1981 allows a plaintiff to establish individual liability against supervisors or other high-ranking employees who were personally involved in the defendant’s discriminatory conduct. The same standard should not apply to a company’s discriminatory conduct as should apply to an individual’s purposeful conduct.

Similarly, the same standard should not apply to an employer’s unintentional discriminatory conduct as is applied to someone’s intentionally discriminatory conduct. Title VII allows plaintiffs to hold an employer liable for conduct that is not intentionally discriminatory by allowing a cause of action for disparate impact. Thus, Title VII permits liability for unintended consequences. § 1981, on the other hand, only applies to intentional conduct. Applying the same standard both for claims of unintentional discrimination and claims for intentional discrimination is not logical. Because of the very nature of the

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68. 42 U.S.C.S. § 2000e.
69. Id. at (b).
72. Doe v. Kamehameha Sch., 416 F.3d. 1025, 1027 (9th Cir. 2005).
73. 42 U.S.C.S. § 2000e.
74. Whidbee v. Garzarelli Food Specialties, Inc., 223 F.3d. 62, 74-75 (2d Cir. 2000). See also Jones v. Con’t. Corp., 789 F.2d 1225, 1231 (6th Cir. 1986) (“[T]he law is clear that individuals may be held liable under § 1981”); Faraca v. Clements, 506 F.2d 956, 959 (5th Cir. 1975) (holding individual director of facility liable while not holding corporation liable).
75. Gay v. Waiters’ & Dairy Lunchmen’s Union, 694 F.2d 531, 537 (9th Cir. 1982).
76. Id.
claims, an employer should be given a more lenient standard under which he can explain his legitimate, non-discriminatory reasons for the unintended results of his actions, whereas a defendant should be held responsible, with less room for excuse, when his actions prove to be intentionally discriminatory. A strict scrutiny standard for § 1981 claims logically fixes this problem.

Because of the various distinctions between Title VII and § 1981, it is illogical to apply the same substantive standard to claims based on these statutes. Applying a more permissive Title VII standard to § 1981 claims does not effectively punish those who intentionally discriminate against plaintiffs because of their race. By applying a strict scrutiny standard to § 1981 claims, courts will be able to better effectuate the unique purpose of § 1981.

2. § 1981 is legislatively closer to the Equal Protection Clause and Title VI than Title VII.

Even if the text of § 1981 does not shed much light on the standard by which it should be evaluated, the legislative history of the statute provides some insight. As mentioned above, § 1981 was first enacted as a part of the Civil Rights Act of 1866, and was later reenacted as part of the Enforcement Act of 1870 to reflect the passage of the Fourteenth Amendment. Because of the historical relationship between the Fourteenth Amendment and § 1981, the Supreme Court has reasoned that “it would be incongruous to construe the principle object of their successor, § 1981, in a manner markedly different from that of the Amendment itself.”

Both the Fourteenth Amendment and § 1981 can only be violated by purposeful discrimination, unlike Title VII. Similarly, Title VI, which applies a strict scrutiny standard, also applies solely to intentional discrimination. Additionally, Title VI and § 1981 deal only with racial discrimination, unlike

78. See McDonald Douglass Corp. v. Green, 411 U.S. 792, 800-804 (1973) (holding that even if a plaintiff proves a prima facie case of discrimination, the employer can rebut that prima facie case by showing that its actions were motivated by a “legitimate nondiscriminatory reason” for its actions).
80. Id.
82. Id. at 390.
83. Id.
84. 42 U.S.C.S. § 2000d (LEXIS 2000 & Supp. 2006). Title VI states that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” Id.
Title VII, which deals with a wide variety of discriminatory animus. § 1981 is more closely related to the Fourteenth Amendment and Title VI than it is to Title VII because the former three laws apply to a wider variety of claims, while, as stated above, Title VII claims apply only to disputes arising from an employment relationship.

Because of the similarities between § 1981, the Fourteenth Amendment and Title VI, it is logical to apply a similar standard to § 1981 claims. The three laws address the same types of discrimination, they apply to a broad range of potential claims, and they can only be violated by purposeful discrimination. Based on these similarities, courts should apply the strict scrutiny standard utilized by the Fourteenth Amendment and Title VI for § 1981 claims, rather than the permissive Title VII standard.

3. The Title VII burden-shifting framework still applies in a strict scrutiny analysis.

There is, however, substantial case law stating that the Title VII structure should apply to § 1981 claims. The application of a McDonald Douglass burden-shifting scheme of proof, does not imply that the court should also apply Title VII’s substantive standards in weighing a plaintiff’s § 1981 claim.

With respect to a § 1981 claim, the McDonald Douglass burden-shifting scheme could be applied in the context of a strict scrutiny standard. As with any claim involving the burden-shifting scheme, the burden would fall on the plaintiff first. For a § 1981 claim, the plaintiff would first be required to establish that the defendant intentionally discriminated against her on the basis of her race. Then, as described by McDonald Douglass, the burden would shift to the defendant, but with respect to a § 1981 claim, a strict scrutiny standard would restrict the types of evidence which the defendant might use to show that its actions were not discriminatory. Supreme Court precedent has clearly stated

86. Compare 42 U.S.C.S. § 1981 and 42 U.S.C.S. § 2000d, with 42 U.S.C.S. § 2000e. The Supreme Court has noted this difference and has acknowledged that the harms caused by racial discrimination are viewed by the laws and by the courts in a slightly different light than discrimination claims based on gender, age or disability: “the perception of racial classifications as inherently odious stems from a lengthy and tragic history that gender-based classifications do not share.” Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 303 (1978).
89. See Patterson v. McLean Credit Union, 491 U.S. 164, 186 (1989) (stating that the structure for the burden of proof of a Title VII claim should apply to claims of racial discrimination under § 1981). The Court, however, did not state that the substantive law from Title VII should also apply to § 1981 claims, but merely adopted the McDonald Douglass burden shifting scheme or proof. Id. Additionally, the application of the Title VII burden shift was especially logical in Patterson because the plaintiff’s claims arose from an employment dispute. Id. at 169.
90. McDonald Douglass Corp. v. Green, 411 U.S. 792, 802 (1973).
91. Id.
92. Id.
that very few types of evidence or defense theories can rebut a proper showing of intentional discrimination. 93 Namely, the defendant must show that its actions instead promote a compelling interest. 94 If the defendant is able to establish that its actions were in defense of a compelling interest, then the burden shifts back to the plaintiff, as per McDonald Douglass, 95 to show that the defendant’s actions, admirable though they may be, unnecessary trammel the rights of others. 96

Therefore, although the Supreme Court has stated that the Title VII burden shifting framework should apply to § 1981 claims, it has not stated that the substantive standards of Title VII should also apply. 97 The burden-shifting framework adopted from Title VII can be applied to § 1981 in light of a strict scrutiny standard. By applying the Title VII framework, a § 1981 claim can still be subject to a strict scrutiny standard, while allowing the defendant a reasonable chance to defend its actions.

Because of the differences between Title VII and § 1981, it is not logical to apply substantive Title VII standards to § 1981 claims. 98 Based on the greater similarities between the Fourteenth Amendment, Title VI and § 1981, 99 a strict scrutiny standard better fits the goals of the statute. Courts can still comply with Supreme Court precedent requiring them to use the Title VII burden-shifting scheme 100 even if they apply a strict scrutiny standard. Therefore, courts should adopt a strict scrutiny standard for analyzing § 1981 claims.

B. Supreme Court precedent applied strict scrutiny for racial discrimination in education settings in its most recent cases.

Within the last several years, the Supreme Court has heard two landmark cases dealing with racially discriminatory admissions policies: Gratz v. Bollinger, 101 and Grutter v. Bollinger. 102 Both cases were challenges to racially preferential admissions policies at the University of Michigan. 103 The plaintiffs

94. Id. The Supreme Court has approved a limited number of “compelling interests,” including a diverse student body. See Grutter v. Bollinger, 539 U.S. 306, 324 (2003) (referring to the approved “compelling interest” accepted by Justice Powell’s concurring opinion in Bakke). Bakke, 438 U.S. at 311-312.
95. McDonald Douglass, 411 U.S. at 804.
96. Grutter, 539 U.S. at 326, (citing on Bakke, 438 U.S. at 310).
100. See Patterson, 491 U.S. at 186.
103. Gratz, 539 U.S. at 249-250 (challenging the validity of the undergraduate admissions policy); Grutter, 539 U.S. at 311 (challenging the validity of the law school’s admissions policy).
in both of these actions challenged the allegedly discriminatory policies on the basis of § 1981, the Equal Protection clause, and Title VI.  

The admissions policy in question in *Gratz* awarded applicants to the undergraduate program a predetermined number of points based on their standardized test scores, their high school academic performance, their involvement in extracurricular activities, and finally, if applicants were members of a minority race, they automatically received a certain number of points. The plaintiff alleged that the number of points awarded automatically to minority students created a situation where a Caucasian candidate might not be offered admission, while an African American candidate with identical grades and test scores would be offered admission solely because of the additional admissions points earned because of his race. In beginning its analysis, the Court stated that the racial classification was subject to strict scrutiny and that to survive, the defendants had to show that their admissions policy was narrowly tailored and furthered a compelling government interest. The Court found that the admissions policy, while serving a compelling interest, was not narrowly tailored and therefore violated the Equal Protection Clause, Title VI and § 1981.

The admissions policy in *Grutter* differed slightly in that candidates for admission to the law school were judged on a more individual basis. The admissions committee examined the applicants’ LSAT scores, undergraduate GPA and course of study, work history after graduation, personal statement, letters of recommendation submitted on their behalf, and other unique characteristics that would enhance the learning experience of the class as a whole. Within the final category, the law school sought to reach a “critical mass” of minority students within its program; the school did not set aside a specific number of seats each year for minority students, but instead aimed to admit a first year class including between fifteen and twenty percent minority students. Again, the Court began its analysis by noting that the admissions policy was subject to strict scrutiny. In this case, however, the Court found that the admissions policy was narrowly tailored and did not “unduly burden individuals who are not members of the favored racial and ethnic groups.” Based on the finding that the law school’s admissions policy was narrowly

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104. *Gratz*, 539 U.S. at 250; *Grutter*, 539 U.S. at 317. Again, the overlap of these three laws provides further support for the application of a strict scrutiny standard to § 1981 claims.
106. *Id.* at 256-257.
107. *Id.* at 270.
108. *Id.* at 275-276.
110. *Id.* at 338.
111. *Id.* at 334-336.
112. *Id.* at 326.
113. *Id.* at 341 (quoting Metro Broad., Inc. v. FCC, 497 U.S. 547, 630 (1990)).
tailored to fulfill a compelling interest, the Court determined that the policy was valid under the Fourteenth Amendment, Title VI and § 1981.114

The result in Gratz does not add much intrigue to the Ninth Circuit’s decision to apply Title VII in Doe, but the Court’s statement in Grutter certainly does. According to Gratz, if a racially conscious admissions policy fails strict scrutiny, it is not necessary for a court to continue its analysis because the policy violates the Fourteenth Amendment.115 Therefore, in Gratz the Court logically stopped where it found a reason to invalidate the admissions policy.116 It would have been an exercise in futility for the Court to continue its analysis of the other claims because the policy was already void under the Equal Protection clause.

The Grutter decision sheds a significant amount of light on the proper standard for a § 1981 claim. After the Court determined that the law school’s admissions policy did not violate the Equal Protection clause, it dismissed the rest of the plaintiff’s claims as well.117 In its reasoning, the Court relied on General Building Contractors Association Incorporated v. Pennsylvania for the proposition that “the prohibition against discrimination in § 1981 is co-extensive with the Equal Protection Clause.”118

The combination of these two decisions, the most recent decisions by the Supreme Court regarding § 1981’s applicability to education, provides significant insight for the proper standard in § 1981 claims. Based on the fact that the Court’s analysis focused solely on whether the racially conscious policies violated a strict scrutiny standard, it can fairly be assumed that the Court would apply a strict scrutiny standard to future cases involving racially conscious educational programs.

C. Lack of Government Action

The most compelling argument for not applying strict scrutiny to § 1981 claims is that the strict scrutiny standard is traditionally reserved for claims involving government action.119 Both the Fourteenth Amendment and Title VI, which share so many other characteristics with § 1981, are violated only when

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114. Grutter, 539 U.S. at 343.
115. Gratz v. Bollinger, 539 U.S. 244, 275 (2003). In the majority’s final paragraph, Chief Justice Rehnquist simply stated that “the admissions policy violates the Equal Protection Clause of the Fourteenth Amendment.” Id. He went on to state, “[w]e further find that the admissions policy also violates Title VI and 42 U.S.C. § 1981.” Id. at 275-276. A footnote following the decision explains the Court’s reasoning: “purposeful discrimination that violates the Equal Protection Clause of the Fourteenth Amendment will also violate § 1981.” Id. at 275 n.23. From this statement it is not entirely clear that the Court would have applied a separate standard for a § 1981 claim. Indeed, it seems to imply that the Fourteenth Amendment and § 1981 are both subject to strict scrutiny standards.
117. Grutter, 539 U.S. at 343.
governmental bodies, or bodies receiving federal funds, discriminate against persons because of their race. This difference, though, does not suffice to allow a less stringent standard to apply to § 1981 claims, especially with regard to a private school funded by a tax exempt charitable trust.

Runyon v. McCrary was the first case to authoritatively rule that § 1981 applies to both public and private schools, but before this decision was handed down, the Court had decided that § 1981 was applicable to private contracts in general. When the Court decided Johnson v. Railway Express Agency, it noted that § 1981 is based partly on the Fourteenth Amendment but that it differs only to the extent that it applies to both public and private action.

With respect to other statutes, namely Title VII, the Court has clearly stated that the standard applied to a claim should not depend on the identity of the actor involved. When the Court decided Johnson v. Transportation Agency, it explicitly rejected Justice Scalia’s suggestion that a different standard of review should apply to public and private actors within the scope of Title VII. This principle directly applies to the case at hand. The Court has already applied strict scrutiny to § 1981 challenges to other racially conscious admissions plans. Because the Court has determined that a strict scrutiny analysis fulfills the required analysis for § 1981 with respect to public actors, it follows that the same standard should be applied to private actors as well. Because the statute does not distinguish between public and private actors, the standard should also treat both public and private actors similarly.

V. WOULD A STRICT SCRUTINY TEST HAVE CHANGED THE OUTCOME IN DOE?

If the Ninth Circuit or the District Court in Doe had applied a strict scrutiny test to the admissions policy in question, would it still have succeeded? The likely answer is no. The test that the courts chose to apply, the Title VII test, is much more lenient than the strict scrutiny standard, and it is likely that the Kamehameha Schools’ admissions policy would fail under a strict scrutiny analysis as well.

If a racially conscious policy is subject to a strict scrutiny standard, the proponents of that policy can still prove that the policy is valid. If the policy is “narrowly tailored to further a compelling governmental interest” then the policy does not violate prohibitions against racial discrimination. Therefore,
if the Kamehameha policy furthers a compelling interest, and it is narrowly tailored to affect that interest, it might be a valid policy under the strict scrutiny test.

A. Does the policy further a compelling governmental interest?

The Supreme Court has had the opportunity to address, in several cases, which interests the law recognizes are “compelling” in light of racial classifications. Through these discussions, only one compelling interest has been accepted: achieving a diverse student body. In *Bakke*, the school presented four possible interests that its admissions policy fulfilled: “(i) ‘reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession;’ (ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body.” Justice Powell’s plurality opinion rejected all but the final interest, but later opinions have suggested that remediying past discrimination is also a valid justification for racial classification.

Clearly, Kamehameha’s admission’s policy does not promote the achievement of a diverse student body. In fact, the admissions policy operates to create a student body which is entirely homogenous. If there are a sufficient number of Hawaiian students in the qualified applicant pool, the entire admitted class will be composed of students of Hawaiian descent. The purpose of the “diverse student body” exception is to create an academic atmosphere with a free exchange of a variety of viewpoints. Because it creates a student body composed almost entirely of students from one ancestry, it is unlikely that the admissions policy utilized by the Kamehameha Schools fosters the type of free exchange of diverse views in the way the Supreme Court anticipated a racially-conscious admissions policy might. Therefore, because the Kamehameha admissions policy does not serve to create a diverse student body, but actually

130. *Bakke*, 438 U.S. at 306-315. It is possible, however, that in the forthcoming decisions by the Supreme Court, that additional compelling interests will be explicitly accepted by the Court. In *Parents Involved in Cnty Schs. v. Seattle Sch. Dist. No. 1*, the Ninth Circuit described the school’s compelling interests as twofold: “(1) the District seeks the affirmative educational and social benefits that flow from racial diversity; and (2) the District seeks to avoid the harms resulting from racially concentrated or isolated schools.” *Parents*, 426 F.3d at 1174. Therefore, it is possible that after the decision in that case, additional compelling interests could serve as the basis for a racially conscious admissions program.
132. *Id.* at 311-312.
133. *Grutter*, 539 U.S. at 328.
134. Doe v. Kamehameha Sch., 416 F.3d 1025, 1029 (9th Cir. 2005).
135. *Id.*
serves to create a homogenous student body, it does not fall within the exception applied by the Court in either *Bakke*\(^{137}\) or *Grutter*.\(^{138}\)

It is still possible that the Kamehameha Schools’ admissions policy supports a valid compelling interest. If the admissions policy serves as a remedy for past discrimination against the race or ethnicity that it favors, the policy could further a compelling government interest.\(^{139}\) The history of the Native Hawaiian people, their treatment by the United States government, and the lingering results of that treatment could provide a compelling interest in allowing an admissions policy giving preference to Native Hawaiian students.\(^{140}\) In 1893, the Hawaiian monarchy was overthrown and replaced by a provisional government supported by the United States federal government; shortly thereafter, the Hawaiian provisional government sought and was awarded annexation to the United States.\(^{141}\) Since that time, “Congress has made repeated findings in numerous legislative enactments that the Hawaiian Monarchy was unlawfully overthrown with the aid of the United States.”\(^{142}\) When Hawaii was first discovered by James Cook in 1778, experts estimate that the population ranged from 300,000 to 800,000 Native Hawaiians, and shortly after the islands were annexed to the United States, the population of Native Hawaiians had dwindled to between 22,000 and 33,000.\(^{143}\)

Additionally, Western systems of education and labor were imposed upon the Native Hawaiians.\(^{144}\) The educational system created in Hawaii was a dual tracked system giving preference to Caucasian students and giving Hawaiian students training suitable only for vocational and low-paying jobs.\(^{145}\) As a result of this imposed educational system, Native Hawaiians are among the poorest people on the islands.\(^{146}\) Furthermore,

Native Hawaiian students score the lowest among all major ethnic groups on statewide standardized tests; the gap between Native Hawaiian students and their peers increases throughout the grade levels. Nearly 79 percent of Hawaii public schools with a predominantly

\(^{137}\) *Id.*

\(^{138}\) *Grutter*, 539 U.S. at 328.

\(^{139}\) *Id.*

\(^{140}\) Doe v. Kamehameha Sch., 295 F. Supp. 2d 1141, 1147-1154 (D. Haw. 2003), rev’d, 416 F.3d 1025 (9th Cir. 2005), rev’d en banc, 470 F.3d 827 (9th Cir. 2006). The Supreme Court has noted that when considering racially conscious admissions policies, it is vital that the facts of each controversy be decided in the proper context. *Grutter*, 539 U.S. at 327. In this case, the context surrounding the debate necessarily includes the history of the Native Hawaiian people.

\(^{141}\) *Id.*, 295 F. Supp. 2d at 1149.

\(^{142}\) *Id. at 1150*, citing as evidence 20 U.S.C. § 7512 (Native Hawaiian Education Act); 42 U.S.C. § 11701 (Native Hawaiian Health Care Improvements Act); and an Apology Resolution from the United States government to the Native Hawaiian people.

\(^{143}\) *Id. at 1148, 1150.

\(^{144}\) *Id. at 1150.

\(^{145}\) *Id.*

\(^{146}\) *Id.*
Native Hawaiian student body do not satisfy the State’s minimal educational standards, as compared to 17.4 percent of public schools without a predominantly Native Hawaiian student body.147

As described in *Bakke*, a remedial race conscious admissions policy should be based on policy created by the government, not by the institution itself.148 With respect to the Native Hawaiians, there have been several Congressional findings and resolutions recognizing the special relationship between the Native Hawaiians and the United States government because of the government’s past treatment of the native people.149 Based on this past government action, it is possible that the Native Hawaiian people have a compelling government interest in creating an educational system that focuses on remedying the societal problems that have resulted from the failure of Hawaii’s traditional public schools.

As mentioned above, when the Ninth Circuit reheard *Doe* en banc, it essentially crafted a new § 1981 standard out of the Title VII standard for affirmative action claims.150 The court took into consideration the drastic differences between private employers and private schools, stating that, "schools perform a significantly broader function than do employers,"151 and "[w]hile private employers strive primarily to make money, and public employers . . . perform a specific public function, schools pursue a much broader mission: the development of all children to become citizens, leaders, and workers."152 However, instead of applying a separate standard for private schools, the court went on to attempt to adapt the private employer standard to fit what it had just acknowledged was a starkly different situation.153

The newly minted standard created by the Ninth Circuit requires a private school to first “demonstrate that specific, significant imbalances in educational achievement presently affect the target population.”154 Next, a private school must not unnecessarily trammel the rights of the members of the non-preferred group, and finally, the admissions policy “must do no more than is necessary to

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147. *Id.* at 1150-1151.
148. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 309 (1978) (Powell, J., concurring). Justice Powell rejected the medical school’s assertion that it had a compelling interest in remedying past discrimination against “disadvantaged minorities” (to which group the medical school arbitrarily assigned several ethnic minorities) because there were no governmental findings stating that the classified group was in need of remedial efforts. *Id.* Justice Powell, therefore, rejected the medical school’s classification because it was based on the school’s own perceived notion of “disadvantaged minorities,” and not supported by any real governmental interest. *Id.* at 310.
150. *Doe*, 470 F.3d 827, 842 (9th Cir. 2006) (en banc).
151. *Id.* at 841
152. *Id.* at 842.
153. *Id.*
154. *Id.*
remedy the imbalance." Each of these factors, is gauged to consider the actions of the school with respect to the larger community. While the Title VII affirmative action standard announced in Johnson v. Transportation Agency requires that the court consider a racial imbalance within the company, the relative rights of employees within the company and the extent of the impact of the policy within the company, the Ninth Circuit changes this test to consider the effect of the schools’ policy on the community at large, based on the special nature of their schools. The Ninth Circuit found that, in light of the history of the Native Hawaiians and their tendency to underachieve in public schools, there were significant imbalances in education achievement. The Ninth Circuit found that by favoring Hawaiians in its admissions policy, Kamehameha does not prevent non-Hawaiians from succeeding within the larger Hawaiian community, and therefore does not trammel the rights of the non-preferred group.

The Ninth Circuit went out of its way to recognize that the Native Hawaiian people have suffered a tragic history to such an extent that, as a group, they are therefore entitled to certain considerations that other racial groups are not. Without a doubt, the history of the Hawaiian Islands, and even the current socioeconomic situation of Native Hawaiians, entitles this group to certain advantages not afforded others. The Ninth Circuit could have taken these unique circumstances into account without modifying a Title VII test. As the court made sure to emphasize, schools play an integral role in the development of students into productive members of any community, and for that reason, our schools should be held to a higher standard with regard to treating all people equally. By applying a strict scrutiny analysis, the Ninth Circuit would have been able to communicate this message clearly, while still ensuring that the history and current status of the Native Hawaiian people were taken into consideration as a “compelling interest.”

B. Is the policy narrowly tailored to meet this end?

If Kamehameha’s admissions policy does in fact further a compelling government interest, the policy must still prove to be narrowly tailored to fulfill this interest. The Supreme Court has stated that, to be narrowly tailored to fulfill the interest in question, the admissions policy must not “unduly burden

155. Id.
156. Doe, 470 F.3d 827, 842 (9th Cir. 2006) (en banc).
158. Doe, 470 F.3d at 841-842.
159. Id. at 843-844.
160. Id. at 844-845.
161. Id. at 830-831, 833-843.
162. Id. at 841-843.
individuals who are not members of the favored racial and ethnic groups.\textsuperscript{164} The admissions policy in question admits as many qualified Native Hawaiian applicants as possible before filling the remaining seats with students of non-Hawaiian descent.\textsuperscript{165}

This Hawaiians-first policy does seem to “unnecessarily trammel” the rights of non-Hawaiians. While the student body is arguably diverse – over 96 percent of the student body claims 3 or more ethnicities\textsuperscript{166} – the overwhelming majority of seats in the class are essentially reserved for students of Hawaiian descent.\textsuperscript{167} In fact, in the past four decades, the school has admitted only one student without Native Hawaiian ancestry.\textsuperscript{168} It is clear that even though the admissions policy leaves open the possibility that a non-Hawaiian student will be admitted, it is highly unlikely and a rare occurrence when that does occur.\textsuperscript{169} Because the admissions policy of the Kamehameha Schools essentially creates a bar for admission to students of the “non-favored race,” it is not narrowly tailored to fulfill its compelling interest.\textsuperscript{170}

The Ninth Circuit addressed this point in its Title VII analysis of the case when it considered the second and third prongs of its test: whether the admissions policy stinted the rights of the non-preferred population and whether the policy did no more than was necessary.\textsuperscript{171} The court found that the rights of non-Hawaiian students were not harmed by this policy because there was no evidence that they lacked other educational opportunities.\textsuperscript{172} The court was able to frame the exclusion of non-Hawaiians from the Kamehameha Schools this way because of its altered Title VII test.\textsuperscript{173} Ordinarily, the court would consider whether the policy trammeled the rights of the non-preferred groups within the school, business, or other organization.\textsuperscript{174} In this case, non-Hawaiian students are effectively excluded from attending the primary and secondary schools in the

\textsuperscript{166} Id. at 1157.
\textsuperscript{167} Id.
\textsuperscript{168} Brief of Plaintiff-Appellant at 9, Doe v. Kamehameha Sch., 416 F.3d 1025 (9th Cir. 2005) (No. 04-15044). In the 2002-2003 school year, there was one seat remaining after all qualified Native Hawaiian students were admitted, and one non-Hawaiian student was admitted to the class. Id.
\textsuperscript{169} Doe, 295 F. Supp. 2d at 1157. Given the fact that there are over 70,000 school aged children of Native Hawaiian descent in Hawaii and only 4,856 seats in the school, it is unlikely that this trend will change any time soon. Id.
\textsuperscript{171} Doe v. Kamehameha Sch., 470 F.3d 827, 842 (9th Cir. 2006) (en banc).
\textsuperscript{172} Id. at 844-45.
\textsuperscript{173} Id. at 842.
\textsuperscript{174} See e.g., Grutter, 539 U.S. at 341 ( “To be narrowly tailored, a race-conscious admissions program must not ‘unduly burden individuals who are not members of the favored racial and ethnic groups,’” (quoting Metro Broad., Inc v. FCC, 497 U.S. 547, 630 (1990))).
Kamehameha Schools because they lack the preferred racial characteristics. While other educational opportunities around the state surely exist, the availability of other schools cannot be a justification for refusing to admit students to a private school based solely on their race. The Ninth Circuit found that Doe’s rights were not trammelled by the admissions policy because he did not have “an absolute entitlement” to attend a Kamehameha School. Even if Doe did not have an absolute entitlement to attend a Kamehameha School, he did have an entitlement to have his application considered without regard to his racial background. Because the present admissions policy at Kamehameha effectively acts as a barrier, preventing qualified students without Hawaiian heritage from being fairly considered, it does unnecessarily trammel the rights of those non-preferred students.

VI. CONCLUSION

As the Ninth Circuit highlighted, this country has long recognized the need for education for all of its citizens, and we have taken action to ensure that all citizens have access to the best education possible. While the right to public education for everyone, regardless of race, has been secured through safeguards like the Fourteenth Amendment and Title VI, the right to receive a colorblind private education has not been so firmly protected. Even though the Equal Protection Clause and Title VI do not apply in private school situations, by applying the same strict scrutiny standard to § 1981 claims, the courts can take a step toward ensuring that race is considered only when it furthers a compelling interest.

As it relates to the outcome of Doe v. Kamehameha Schools, the § 1981 claim in question should have been analyzed under a strict scrutiny standard, instead of the Ninth Circuit’s modified Title VII analysis. Under a strict scrutiny standard, while it is likely that the Schools were acting to further a compelling interest, namely remedying past discrimination, the admissions policy was such that it unnecessarily limited the right of non-Hawaiian students to attend the state’s best school. Doe provides a compelling example of why racially conscious admissions policies at private schools should be examined under a strict scrutiny standard.

175. Brief of Plaintiff-Appellant at 9, Doe v. Kamehameha Sch., 416 F.3d 1025 (9th Cir. 2005) (No. 04-15044). In the 2002-2003 school year, there was one seat remaining after all qualified Native Hawaiian students were admitted, and one non-Hawaiian student was admitted to the class. Id. The fact that there are over 70,000 school aged children of Native Hawaiian descent in Hawaii and only 4,856 seats in the school, it is unlikely that this trend will change any time soon. Doe v. Kamehameha Sch., 295 F. Supp. 2d 1141, 1157 (D. Hawaii 2003).

176. Doe, 470 F.3d at 845.

177. Id. at 842-843.

KEEPING YOUR NAME AND IMAGES PRIVATE – HOW EXISTING PROPERTY LAW AND REQUESTS FOR REMOVAL COULD STOP UNAUTHORIZED DISPLAY OF YOUR IDENTITY ONLINE

Matthew D. Hemmer*

I. INTRODUCTION

The modern internet provides users with numerous ways to submit their own content, interact with others, and reach vast audiences without the entry costs that previously limited the scale of low cost communication mediums. Many of these online services that present user submitted materials receive their content anonymously or with little verifiable identification to link the information to its creator. When used responsibly, these services allow users to interact and learn about the world on an unprecedented scale. But what options does an individual have when unflattering or private images appear on one of these websites without consent and without any identification of its source?

Cecilia Barnes found herself the target of systematic harassment perpetrated over Yahoo!, Inc.’s personal advertisement networks.1 Nude photos were submitted by an anonymous user presumed to be a former boyfriend.2 These photos included Ms. Barnes’ name and became part of the content offered by Yahoo!’s services to its 165 million registered users and 345 million unique visitors who use the company’s services each month.3 After sending numerous letters to Yahoo! without reply, Barnes presented her story over a local news program; a Yahoo! representative then contacted her and assured her that actions would be taken.4 When nothing was done to restrict access to the pictures, Barnes filed an action against Yahoo! but was rebutted by statutory immunity and a summary judgment ruling that favored Yahoo!.5

The Communications Decency Act6 grants broad immunity to internet service providers from tort actions in response to content submitted by third parties. Such immunity is not granted in all actions. If plaintiffs base their claims on intellectual property rights and request removal of the content, actions similar to Ms. Barnes’ may survive summary judgment and receive remedies.

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2. Id.
3. Id.
4. Id.
5. Id at *4.
6. See discussion infra Background Part C.
I. BACKGROUND

A. The Law Protecting Reputation

The written and spoken word can have a dramatic effect on people. Early defamation law addressed the risk of violence that could result from insults. Modern defamation law developed on the premise that every person has an interest in protecting his or her own reputation and avoiding undue distrust or ridicule in future dealings with others. Though reputation is not constitutionally protected, it has been considered similarly significant. To have an actionable claim for defamation, the plaintiff must prove that a defamatory statement has been published in non-privileged communications.

To be published in this sense only requires that one person, in addition to the plaintiff, receive the communication through the defendant’s negligent or intentional actions. There are a number of classifications that encompass both the creator of the defamation and those who repeat and disseminate it. If the speaker is the creator of the information, he will be deemed the publisher and will be held accountable for all proximate harm caused by the defamatory statement, including those resulting from the statement being repeated. Under common law, anyone who republishes a defamatory statement with knowledge or imputed knowledge of its character will be liable as well. “Publishers” disseminate the statement and have a degree of editorial control over the content. Because publishers are considered to actively distribute the materials, they are held to have a level of control over the content and are also treated as publishers of the defamatory statement. “Distributors” transmit, provide, deliver or forward information in a more passive role without exercising editorial control.

8. Bello v. Random House Inc., 422 S.W.2d 339 (Mo. 1967) (holding that any living person has a recognized interest in his or her own reputation but no action for defamation against the dead or on behalf of others).
9. “The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being – a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.” Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).
11. RESTATEMENT (SECOND) OF TORTS § 577 (1977) [hereinafter RESTATEMENT].
15. Id.
control over the material.\textsuperscript{16} Because there is not discretionary or editorial control over the material, only actual knowledge or notice will incur liability.\textsuperscript{17} Lastly, although nonfeasance was generally not considered adequate grounds for defamation liability in some earlier cases, modern courts also consider this passive behavior actionable if the defendant has a duty to prevent or stop publication.\textsuperscript{18}

Both oral and written factual assertions may constitute defamation. When defamatory statements are written on paper or electronically broadcasted, as is the case with websites and internet newsgroups, the defamation has a more permanent character\textsuperscript{19} and is termed “libel.” Statements are defamatory when they negatively impact someone’s reputation\textsuperscript{20} or discourage the community from dealing or associating with the individual.\textsuperscript{21} Additionally, the statement must either assert untrue facts or implicitly allege false, undisclosed facts; and bare opinion that damages reputation will not suffice.\textsuperscript{22}

Under common law, statements were presumed to be false once found to be defamatory.\textsuperscript{23} However, the Supreme Court addressed this presumption in \textit{New York Times Co. v. Sullivan}, and found it to violate the right to freedom of speech\textsuperscript{24} conferred by the First Amendment.\textsuperscript{25} However, the Court in \textit{Sullivan} only addressed the presumption of falsity with respect to plaintiffs who were

\begin{itemize}
\item\textsuperscript{17} \textit{Id.} Compare with Dobbs § 402 (stating at least one English source suggests characterizing distributors as publishers absent an affirmative showing that they neither had actual knowledge nor should have known of the defamatory content of the material) (citing Vizetelly v. Mudie’s Select Library, Ltd. (1900) 2 Q.B. 170). Dan B. Dobbs, \textit{The Law of Torts} § 402 (2000).
\item\textsuperscript{18} Scott v. Hull, 259 N.E.2d 160, 162 (Ohio Ct. App. 1970) (no liability where notice had been given and demand to remove the material had been made), \textit{overruled by} Dillon v. Waller, No. 95APE05-622, 1995 WL 765224 at *1 (Ohio Ct. App. Dec. 26, 1995).
\item\textsuperscript{19} Hibdon v. Grabowski, 195 S.W.3d 48 (Tenn. Ct. App. 2005); see also Restatement § 568A (classifying defamatory radio and television broadcasts as libel regardless of whether they are read from a manuscript).
\item\textsuperscript{20} The Supreme Court has determined that a private person’s reputation may be presumed to have been damaged when alleged defamation concerns matters not in the public eye. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985). \textit{Dun & Bradstreet, Inc.} distinguished the situation of private individuals’ non-public matters, from people or topics in the public eye. \textit{Id.} The First Amendment would preclude any presumption of damages to reputation in the latter two scenarios unless either some fault and actual damages, or knowledge of falsity or recklessness as to the truth of the statements can be established. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). See Spence v. Funk, 396 A.2d 967 (Del. 1978). \textit{But see} Tuite v. Corbitt, 830 N.E.2d 779 (Ill. App. Ct. 2005) (Illinois deviates from the Restatements by classifying defamation based on subject matter and only presuming damage to reputation when the topic falls within the \textit{per se} classification.).
\item\textsuperscript{21} Restatement § 559.
\item\textsuperscript{22} Restatement § 566.
\item\textsuperscript{23} Bird v. Hudson, 18 S.E. 209 (N.C. 1893).
\item\textsuperscript{24} New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (requiring either knowledge of falsity or reckless behavior as to the truth).
\item\textsuperscript{25} U.S. CONST. amend. I states, “Congress shall make no law… abridging the freedom of speech....”
\end{itemize}
public figures. It was uncertain whether the same standard would apply to private individuals claiming defamation on an issue that was not of public concern. States have continued to presume falsity. Whether presumed to be false or not, proof of the truthfulness of statements is a defense to defamatory statements concerning intimate details of a person’s private life. While attempts have been made to allow recovery for maliciously made, but true, defamatory statements, the attempts have been found unconstitutional, in violation of the First Amendment.

B. Protecting Privacy

The right to privacy recognizes that personal details, identity or likeness must be protected above the level of mere accuracy required by defamation. Privacy had indirectly been recognized in many topics of tort law such as trespass to land and battery, but an 1890, article by Louis D. Brandeis and Samuel D. Warren significantly contributed to the development of a theory of recovery based on violations of the right of privacy. While courts initially only protected an individual from commercial use of his or her likeness, modern privacy law departs from defamation and prior rulings by recognizing as actionable many statements and expressions that injure emotions or property rights. Specifically, a violation of the right of privacy may be actionable when there is an unreasonable intrusion on seclusion, an appropriation of someone’s name or likeness, unreasonable publicity is given to someone’s private matters, or publicity is used to place someone in a false light.

To bring a claim in response to an unreasonable intrusion on seclusion or solitude, the intrusion must be highly offensive to a reasonable person.

27. See Kennedy v. Sheriff of East Baton Rouge, 935 So. 2d 669 (La. 2006) (presuming falsity of defamatory statements but allowing an affirmative showing by the defendant to the contrary).
32. De May v. Roberts, 9 N.W. 146 (Mich. 1881) (uninformed consent to touching could not be valid because of the plaintiff’s right to privacy during childbirth).
33. BRANDEIS & WARREN, supra note 30.
36. RESTATEMENT § 652A.
37. RESTATEMENT § 652B.
intrusion addresses policy closely linked to trespass in many situations, the tort has evolved to encompass eavesdropping and persistent unwanted telephone calls. No publicity or publication is needed to assert an unreasonable intrusion, and these acts alone will not constitute an intrusion. However liability will be placed on third parties when they have facilitated or assisted in the intrusion. Once it is established that an intentional intrusion was highly offensive to a reasonable person, and that the plaintiff had a reasonable expectation of privacy or seclusion, recovery is possible. This interest protects the dignity of the plaintiff to be free from unreasonable, wrongful intrusions or acts of another.

A second category of actions based on the right of privacy allows recovery for unreasonable publicity given to an individual’s private life when the publicized material is highly offensive to a reasonable person and is not a legitimate public concern. Although truth is a defense to claims for defamation, the veracity of the material is not an issue in this tort and will not be a defense. In contrast, because the focus is on whether the matter should have been publicized, if the content can be proven newsworthy then no claim can

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38. Pearson v. Dodd, 410 F.2d 701 (D.C. 1969) (noting that invasion of privacy should neither depend on whether the intrusion was physical nor whether it would constitute a trespass under property law).
39. RESTATEMENT § 652B, cmt. B.
40. See discussion infra note 42.
41. “The tort of intrusion on the plaintiffs’ solitude or seclusion does not require publicity and communication to third persons. . . .” Hamberger v. Eastman, 206 A.2d 239, 242 (N.H. 1965). However, it is not sufficient that another party intruded upon the plaintiff and conveyed the content to the defendant, who in turn utilized the information. Karch v. BayBank FSB, 794 A.2d 763, 774 (N.H. 2002). While this may give rise to a claim under a different theory of the right to privacy that requires publicizing, there was not an actionable intrusion. Id.
42. While publishing or utilizing the information garnered from an intrusion will not constitute a second intrusion, if a third party provides the means or opportunity for the intrusion, that person could be held liable. Vescovo v. New Way Enter., Ltd., 130 Cal. Rptr. 86 (Cal. Ct. App. 1976) (An advertisement included derogatory information and information on how to contact the plaintiff. Numerous unwanted contacts and intrusions resulted. The court noted that the advertisement was intentionally designed to create the type of harassment that occurred.)
43. RESTATEMENT § 652B.
45. Publicity should be distinguished from the defamation requirement of publication. Publicity requires the communication to a number of people while publication can be satisfied by informing only a single person. See Santiesteban v. Goodyear Tire & Rubber Co., 306 F.2d 9, 11 (5th Cir. 1962) (“P)ublicity in the sense of communication to the public in general or to a large number of persons as distinguished from one individual or a few.”).
46. RESTATEMENT § 652D.
be made when it is discussed or broadcasted.49 Because publicizing private life imposes liability for expressing true statements, direct conflicts with the First Amendment have resulted. Maintaining a claim based on publicizing private information is tentative at best.50 Because of the difficulties in allowing relief for communication of true facts, many courts have merged publication of private facts with other theories for relief and focus on the collateral acts performed in conjunction with the speech itself. Some courts have stated that only materials and information that were wrongfully obtained may be actionable, thereby dispensing with the constitutional limitations.51 Other courts have found that the emotional harm caused is best compensated with traditional emotional distress recovery and have thus required the intention to humiliate or emotionally disturb the plaintiff as an element.52

False light portrayal actions are based on violations of the right to privacy but closely resemble defamation actions.53 To successfully pursue this claim, the plaintiff must establish that the defendant publicized54 information that portrayed the plaintiff in a false light, which is highly offensive to a reasonable person, and that the defendant either knew the information was false or acted in reckless disregard of its truth.55 The tort is not limited by the defamation requirement that harm be done to reputation and could be used to recover for a wider range of harms.56 This does not widely translate from theory into practice; in many situations the tort is not differentiated from defamation.57 Just as the Supreme Court has imposed limitations on presumptions of falsity and damage in cases of

49. The Supreme Court elected not to determine whether any action for accurate publication of private matters could be enforced by the courts. Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975). Instead, they held that any attempt to base a publication of private facts claim on materials that were held in public records violated the First and Fourteenth Amendments. Id.
53. See generally RESTATEMENT § 652E, cmt. B.
54. See supra note 45.
55. RESTATEMENT § 652E.
defamation, so too have the presumptions of falsity of the statements and damage to the plaintiff been limited in false light cases by constitutional freedoms.58

Finally, a violation of the right of privacy may be based on the unauthorized appropriation of the likeness, name, or identity of another; even if the presentation of the identity is accurate.59 While appropriation in this sense now includes both commercial and personal uses,60 it was first applied to businesses or advertising that used the plaintiff’s identity.61 Unique among the protections offered within the umbrella of the right to privacy, the interest protected could either be characterized as a property right62 or a basic human dignity associated with self identity.63 If characterized as the former, recovery is based on the pecuniary value of the plaintiff’s identity,64 while recovery on the latter would require a conscious use of the plaintiff’s identity.65 Thus when the claim is characterized as a property right, the concern is measurement of the damages done to ownership such as loss in value; whereas when viewed as a dignity tort, the court’s emphasis is placed on wrongful acts or intentions of the appropriating party.

When viewed as a property right, the tort is referred to as the right of publicity, and due to the emphasis on a marketable value of the personality, it was often pursued only by the famous.66 However, it is not limited in this fashion, and any person who can assert that his likeness had a commercial value may act on appropriation of his ownership of property rights in his own identity.67 Further, viewing privacy and rights to one’s own marketability in this way permits licensing and assignment of the likeness for commercial uses.68 To act on this property right, the likeness must therefore have an actual value to the owner or others.69 Currently, a number of states have adopted a property

58. See supra note 49.
59. RESTATEMENT § 652C.
60. Burns v. Stevens, 210 N.W. 482 (Mich. 1926) (A woman publicly claimed to be the wife of the plaintiff and claimed his last name, when in fact she was not married but had cohabitated with him for a prior period. Somewhat ironically, there had previously been marriage proposals that were denied.).
61. The first statute on the topic addressed unauthorized use of an individual’s likeness for commercial or advertising purposes. N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 2006).
62. It seems that the Restatement would recognize emotional side effects of appropriation but would base the right in property law. RESTATEMENT § 252C cmt. A. The text notes that assignment and exclusion are similarly permissible. Id. See also Cox v. Hatch, 761 P.2d 556 (Utah 1988) (not permitting recovery for appropriation when plaintiff did not assert that his identity had a marketable worth after it was used in a campaign photograph).
63. Joe Dickerson & Assoc., LLC v. Dittmar, 34 P.3d 995 (Colo. 2001) (declining to require a showing of the worth of the appropriated identity when there has been emotional suffering).
64. See supra note 42.
67. See RESTATEMENT OF UNFAIR COMPETITION § 49, cmt. B.
69. Blair v. Nevada Landing P’ship., 859 N.E.2d 1188 (Ill. App. Ct. 2006) (providing an overview of the right of publicity as it is commonly regarded and giving a brief overview of the
oriented approach to protecting rights of likeness and personality through statute or judicial decisions. Although attempts were made to bring a large variety of subject matters beyond likeness, image, or name within the scope of publicity rights, federal copyright laws seem to preempt many of these topics. However, publicity actions premised on the use of an individual’s likeness or image are not similarly preempted. In general, claims for violations of the right of publicity require the plaintiff to assert that there has been an appropriation of his likeness, without consent or authority, and such use either is for the commercial benefit of the appropriating party or is the cause of actual damage to the personality’s marketable value. Damages for these claims may include

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71. See Cabaniss v. Hipsley, 151 S.E.2d 496 (Ga. Ct. App. 1966) (Georgia courts distinguish appropriation of likeness from other actions based on the right to privacy because of its property law basis and requirements of special damages) and Canessa v. J.I. Kislak, Inc., 235 A.2d 62, 76 (N.J. Super. Ct. Law Div. 1967) (New Jersey court found appropriation of likeness to be premised on property rights in personality, applied the statute of limitations for property actions, and measured damages in terms of the reduction in value of the plaintiff’s likeness). See also Joe Dickerson & Assoc., LLC, 34 P.3d 995 (Colorado has yet to determine whether or not to allow a claim based on commercial damages to a plaintiff who asserts a pecuniary value in his own personality, but does permit a dignity-based approach).

72. CAL. CIV. CODE § 3344, overruled by Laws v. Sony Music Entmt.’l., Inc., 448 F.3d 1134 (9th Cir. 2006) (analyzing the express preemption provision with respect to federal copyrights, 17 U.S.C.A. § 301, and finding that the materials in question were of a medium entirely defined and covered within the Copyright Act, therefore holding that state misappropriation of voice claims could not survive against federal regulation of the rights concerning the song in question because state law cannot protect or regulate the same rights and activities as federal copyright laws). See also Baltimore Orioles, Inc. v. Major League Baseball Players Ass’n, 805 F.2d 663 (7th Cir. 1986).

73. Downing v. Abercrombie & Fitch, 265 F.3d 994, 1004 (9th Cir. 2001) (finding that the California right of publicity statute is not preempted by claims based on unauthorized use of name or likeness).

punitive damages in addition to the election of actual damages, together with profits derived from the unauthorized use, or a statutory award.  

C. Creation of the Communications Decency Act

The combined law of defamation and the right of privacy provides relief to many individuals that have suffered an injury as a result of publications regarding their private life and personal information. These bodies of law have been applied successfully to new technologies such as television and radio. In the 1990’s, courts were faced with defamatory statements made over the Internet. Initially, the same process of application of existing legal theories to new technologies was conducted with respect to statements published on the Internet by way of a third party. The business or entity that disseminated the information over the Internet was classified according to knowledge or control over the material that was promulgated.

In *Stratton Oakmont, Inc. v. Prodigy Services Co.*, the traditional analysis was applied to defamatory statements that were published on an Internet bulletin-board system that allowed users to contribute messages that could in turn be read by other users. The court noted that Prodigy had publicly compared itself to a traditional newspaper, specifically mentioning the control a newspaper has over the content it publishes. Additionally, Prodigy employed software screens that would prevent the publishing of certain words and human agents who were responsible for removing offensive material. Prodigy had a prior policy of reviewing messages prior to posting, but such policy was abandoned without public notice when the number of subscribers increased to a point that made pre-screening burdensome. Due to this level of control over the content presented via its network, Prodigy was found to be a publisher of the defamatory statement. As *Stratton* suggests, some undesirable material had begun proliferating over the new medium, and as Internet service providers attempted

75. See 765 ILL. COMP. STAT. ANN. 1075/40 (West 2000 & Supp. 2005) (stating that plaintiffs may elect to receive a $1,000 statutory award, actual damages, or profits derived from the unauthorized use; and additionally, punitive damages are available for cases of willful disregard or reckless violations).
77. See supra note 19.
79. Id.
80. Id.
82. Id. at *2.
83. Id.
84. Id. at *3.
85. Id. at *7.
to regulate what flowed through their networks, they incurred liability for engaging in editorial functions.86

In 1996, President Bill Clinton signed the Communications Decency Act (“CDA”) to address this issue.87 First, § 230(c)(1) states, “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”88 This section was drafted with the intention of invalidating Stratton.89 Second, § 230(c)(2) specifically addresses traditional editorial functions and self-censorship and expressly prevents liability based on those discretionary activities.86 As a whole, the statute envisioned internet self-regulation that grew increasing successful as the technologies improved.91 Further, the burden of complete and successful censorship of the internet may be beyond the available resources or limits of technology.92 Since its inception, application of § 230(c)(1) has resulted in judicial interpretations that grant broader immunity to an increasingly large number of actions and entities. Increased immunity has been based on judicial interpretation of “interactive computer service,” “information,” “information content provider,” and “publisher or speaker.”93

D. Expansion of the Communications Decency Act

An interactive computer service is defined in the statute as, “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.”94 Initially, the CDA was only applied to internet service providers (“ISP’s”), companies that provide access to the information on the internet such as Prodigy did in Stratton.95 ISP’s were later found to be a subset of the larger class of interactive computer services, which include the companies that provide computer access and those that provide services such as websites.96 Thus, what could have initially been

86. Id.
90. “No provider or user of an interactive computer service shall be held liable on account of . . . any action . . . to restrict access to or availability of material that the provider or user considers . . . objectionable. . . .” 47 U.S.C.A. § 230(c)(2).
93. See discussion infra Part D.
95. Stratton Oakmont, Inc. v. Prodigy Serv. Co., 1995 WL 323710 at *2 (N.Y. Sup. Ct. May 24, 1995). Prodigy provided both the connection to the internet and maintained the bulletin board system where the defamatory statement was posted. Id.
interpreted merely to govern the roads leading to the internet, was found to encompass the various shops and locations of interests along those roads.

Information is not defined in the statute. Courts have interpreted information to include not only language or speech that could convey facts, but also malicious computer signals designed to disrupt proper computer operation. The Third Circuit would classify all data sent over the internet as information, regardless of whether it conveyed any facts or communicated a message.

The CDA describes an information content provider as any “person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer services.” The classification hinges on the degree of influence during creation held by the party. However, when the ISP’s merely present categories for information to be placed in by the user, or prompt the user to enter information independently, the information content provider classification does not apply.

Information content provider status is not placed on an ISP that contracts with an individual to provide content, even though such services are rendered for compensation and in an arrangement providing for a degree of traditional editorial control.

Finally, the scope of actions for which ISP’s are granted immunity by barring liability based on the company’s role as publisher or speaker has been quite expansive. With a narrow reading, the statute only intends to invalidate Stratton, which in turn only examined publisher liability in a defamation action. Under this interpretation the CDA would not bar actions based on holding the internet service provider liable as a distributor. However, subsequent decisions interpret the statute to grant immunity to defamation actions premised on the ISP’s role as either a publisher or distributor.

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98. Green v. America Online, 318 F.3d 465, 471 (3d Cir. 2003) (signals sent to plaintiff’s computer that forced disconnection from internet services were found to be information within the scope of the CDA).
99. Id.
102. Carafano v. Metrosplash.com, Inc. 339 F.3d 1119 (9th Cir. 2003) (internet dating site that allowed users to create an online profile by selecting options from a list and then entering text in separate areas was not an information content provider).
104. See generally Jae Hong Lee, Batzel v. Smith & Barrett v. Rosenthal: Defamation Liability For Third-Party Content On The Internet, 19 BERKELEY TECH. L.J. 469 (2004) (establishes a background for a narrow interpretation of the actions granted immunity as a publisher or speaker and notes that if Congress had intended to include distributor liability they would have expressly provided for it).
105. “If computer service providers were subject to distributor liability, they would face potential liability each time they receive notice of a potentially defamatory statement....” Zeran v. America Online, Inc., 129 F.3d 327, 333 (4th Cir. 1997) (noting that the policy of the CDA is to
internet service provider is immune for materials published from information content providers even after receiving actual notice of their content.106

The concept of absolute immunity for any content received in this fashion has been extended to grant immunity from other causes of action that incorporate the third party information into the claim.107 The CDA, as commonly interpreted by courts today, would immunize computer service providers from most claims that are dependant on the substance of a statement from an information content provider, regardless of any knowledge of the character of the information.108 Claims premised on an individual’s right to privacy or negligence have received that same fate: relief is denied on the basis of immunity granted to the web and internet-based companies that facilitate the violations just as it was when damage was done to reputation by way of defamation.109 Plaintiffs in these actions may find themselves in a situation where the individual who originally supplied the material cannot be identified,110 the internet disseminator cannot be sued, and there is no right to demand that the materials be taken down or to rely on assurances that they will be taken down.111 Anyone who may find their image encourage the dissemination of information without constant fear of liability, which could encourage restraint on internet development).

106. Id.

107. See Noah v. AOL Time Warner, Inc., 261 F. Supp. 2d 532 (E.D. Va. 2003) (Plaintiff claimed that internet chatroom was a place of public accommodation. Further, because of harassment premised on his religion he claimed a civil rights action based on the defendant’s failure to prevent discrimination based on religion. The court noted that the claim was still based on content provided by a third party and differed little from other claims premised on theories of defamation. However, the court also noted that the chatroom was not a place of public accommodation.). See also Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC, No. CV 03-09386PA(RZX), 2004 WL 3799488 at *1 (C.D. Cal. Sept. 30, 2004) (Action based on Fair Housing Act which made it unlawful to publish or cause to be published any notice or advertisement for the sale or rental of a dwelling that indicates any preference based on race, color, religion, sex, handicap or discrimination. The defendant maintained a website that allowed users to post information to form roommate arrangements. The users were prompted to indicate discriminatory preferences. The court noted that the defendant was a computer service provider and entitled to immunity under the CDA for content submitted by third parties).

108. But see Anthony v. Yahoo!, Inc., 421 F. Supp. 2d 1257, 1263 (N.D. Cal. 2006). “Admittedly, third party created these profiles. Nevertheless, the CDA only entitles Yahoo! not to be ‘the publisher or speaker’ of the profiles. It does not absolve Yahoo! from liability for any accompanying misrepresentations. Because Anthony posits that Yahoo!’s manner of presenting the profiles--not the underlying profiles themselves--constitute fraud, the CDA does not apply.” Id.

109. Parker v. Google, Inc., 422 F. Supp. 2d 492 (E.D. Pa. 2006) (noting that the CDA prevents liability from being imposed by state tort actions that are inconsistent with the immunity granted to ISP’s, specifically, from liability stemming from the tortious acts of third parties disseminated or assisted by the internet entity.; and also noting that this includes negligence, defamation, and invasion of privacy).

110. See Zeran, 958 F.Supp. at 1125 (content was created by anonymous third parties). See also Larry E. Ribstein, From Bricks to Pajamas: The Law and Economics of Amateur Journalism, 48 WM. & MARY L. REV. 185, Part II D (2006) (noting that internet speakers who post anonymously can even avoid reputation damage typically incurred by improper public speaking).

disseminated over an internet information source cannot use rights of privacy, defamation, or negligence to support a demand for removal, or as a basis of reliance on assurances from the internet publisher that the image will be removed.

II. ANALYSIS

A. Actions Based On Property Rights

Not all state actions against ISP’s are preempted; those not in conflict are left intact.\(^{112}\) The CDA expressly states that it does not grant immunity from claims involving violations of intellectual property rights and intends to leave the law in this area unabridged.\(^{113}\) Specifically, the CDA states, “Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.”\(^{114}\) This limitation has ensured that ISP’s facilitating and participating in the contravention of intellectual property will not escape the courts’ reach and has been noted to indicate a grant of immunity only from tort-type actions.\(^{115}\) Demands made to a website to remove an individual’s image will have support if they are based on intellectual property law left unharmed by the CDA.

No legislative history was provided to indicate Congress’ intention for including this statement.\(^{116}\) Courts have subsequently interpreted it to indicate a Congressional intent not to apply the CDA to claims involving redress for damage to a wide variety of intellectual property rights and have further declined to impose a temporal limitation with respect to rights recognized after creation of the CDA.\(^{117}\)

The court in \textit{Gucci America, Inc. v. Hall & Associates} addressed the scope of intellectual property rights that were actionable without triggering immunity under the CDA.\(^{118}\) Gucci asserted that their trademark was violated by a website hosted\(^{119}\) by the defendant, an ISP.\(^{120}\) After twice notifying the ISP, Gucci

\(^{112}\) Zeran, 958 F. Supp. at 1131.
\(^{113}\) 47 U.S.C. § 230(e)(2).
\(^{114}\) Id.
\(^{117}\) Gucci America, 135 F. Supp. 2d at 414.
\(^{118}\) Id. at 409.
\(^{119}\) Id. at 411 n. 4. (noting that domain hosts rent storage space on computer hardware to a web page or file transfer site, with high-speed network connections, and provide access to the information for other internet users), \textit{citing} Columbia Ins. Co. v. Seescandy.Com, 185 F.R.D. 573,
brought an action claiming direct and contributory trademark infringement under the Lanham Act and demanding damages and an injunction. The ISP moved for summary judgment, claiming that the CDA conferred immunity from suits in response to the activities of third parties. The court noted that the complaint indicated that the ISP was not the “information content provider.” Further, Gucci conceded ISP status. Thus, the question of immunity did not hinge on whether the CDA applied. Gucci, relying on § 230(e)(2) of the CDA, asserted that immunity was not conferred in actions concerning intellectual property rights.

The Court proceeded in analyzing § 230(e)(2) and first referred to the plain language of the statute. The Court noted, under existing intellectual property law, the type of third party liability for trademark infringement proffered by Gucci was permitted. Thus, to decline to allow such liability for contributory infringement in the current situation would “limit” the law governing the property rights. The ISP attempted to rebut this argument by offering an interpretation where Congress only intended to leave the intellectual property law as it existed in 1996 intact. The court rejected any such temporal limitations and found that nothing in the language of the statute gave any indication that such an interpretation was proper. Further, the ISP urged the Court to read the statutory language, “or expand,” following the prohibition on any limitation of intellectual property rights, to support a temporal limitation. However, the Court stated that this language was included to prevent an interpretation that the CDA independently created any property rights.

The ISP attempted to argue that the language of the statute was ambiguous; the court rejected this argument and further stated that the outcome would not change regardless.

578 n.1 (N.D. Cal.1999) (thus, the defendant provided access to the information created by others and stored on rented space).

120. Id. at 410.
123. Id. at 411.
124. Id. at 412.
125. Id.
128. Id.
129. Id. at 413.
130. Id.
131. Id. at 414.
132. Id.
135. Id.
136. Id. at 414 n.11.
intention of the drafters. The caption "No effect on intellectual property law" was found to support the conclusion that the drafters intended an expansive reading of the phrase.

Finally, the ISP pointed to case law, citing a wide variety of actions that were granted immunity under the CDA, specifically actions claiming negligent failure to remove defamatory materials. However, while other cases have allowed immunity to third party claims premised on other tort-type rights, this claim is premised on intellectual property rights and such rights are not to be limited by the CDA. Thus, the court reached the conclusion that demands for removal premised under recognized intellectual property law, not premised on tort-type theories, are outside the reach of CDA immunity.

B. Classification of Rights of Publicity Under The Communications Decency Act

Just as the trademark action in Gucci was found within the scope of intellectual property law left unaffected by the CDA, immunity should not be granted in publicity action cases. Demands for removal of materials that violate these property rights should be given the same weight as those related to trademark infringement. A number of states have provided statutory rights of publicity that are expressly defined as property interests. These property rights are in stark contrast to the more dignity-oriented privacy rights actions. They have been subject to the statute of limitations for property actions, have been found to exist beyond the life of the original holder, and are transferable. While there is little dispute that rights of publicity are properly classified as intellectual property rights recognized by state law, not all courts have concluded that they are included within the category of law that was intended to remain unmodified by the CDA. Currently, a limited number of

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137. Id.
139. Gucci, 135 F. Supp. 2d at 414 n.11.
140. See supra note 97.
141. Gucci, 135 F. Supp. 2d at 415, citing Zeran v. America Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997) (“the plain language of Section 230 ‘creates a federal immunity to any cause of action that would make services providers liable for information originating with a third-party user of the service.’” (emphasis in original)).
142. Id.
143. Id. at 415 n. 13, citing Blumenthal v. Drudge, 992 F. Supp. 44 (D.D.C. 1998). The Court notes a number of other cases where liability was expanded, but all involved tort-type rights premised on human reputation, emotions, or dignity. Id., also citing Ben Ezra, Weinstein & Co. v. America Online, Inc., 206 F.3d 980 (10th Cir. 2000); Doe v. America Online, Inc., 783 So. 2d 1010 (Fla. 2001).
144. Id. at 422.
145. See supra notes 70 and 71.
147. See supra notes 70 and 71.
148. Almeida v. Amazon.com, Inc., 456 F.3d 1316 (11th Cir. 2006) (The Eleventh Circuit has expressed concern as to whether or not Florida’s rights of publicity statute would permit
federal courts have categorized publicity rights within the exempt intellectual property category and denied immunity to defendants.\footnote{149} Of the others, none have expressly denied the characterization;\footnote{150} they have yet to determine whether such immunity would be appropriate.

In \textit{Perfect 10, Inc. v. CCBill, LLC}, the court found that property rights of publicity are within the bounds of intellectual property law actions that would remain unmodified and refused to award immunity in a summary judgment made by the defendant.\footnote{151} While the Ninth Circuit had previously addressed a claim asserting rights to publicity and had dismissed it, the dismissal was premised on a failure to assert the state law claim without discussing whether immunity was awarded by the CDA.\footnote{152} Perfect 10, the plaintiff, agreed that the qualifications were met for CDA application but argued that violations of publicity rights are intellectual property actions, and are not modified by the CDA.\footnote{153} The defendants argued that such suits are more akin to violations of tort-type rights and that the California state law\footnote{154} should be preempted.\footnote{155} In rejecting the defendants’ arguments, the court first noted that the California Supreme Court held that publicity rights are a form of intellectual property.\footnote{156} Second, the court noted secondary authority and cases within the Ninth Circuit that have all held the right to be one of intellectual property.\footnote{157}

Just as attacks on trademark rights are allowed remedies,\footnote{158} property interests in publicity should not be denied adequate justice under the blanket immunity conferred by the CDA. Neither property interests are related to reputation or emotions in the way that dignity-based tort actions are; both seek to protect

\footnote{149. Perfect 10, Inc. v. CCBill, LLC, 340 F. Supp. 2d 1077, 1109 (C.D.Cal. 2004) (9th Circuit); Faegre & Benson, LLP v. Purdy, 447 F. Supp. 2d 1008, 1119 (D. Minn. 2006) (District Court in the Eighth Circuit permitted commercial appropriations claim. However, later in the opinion the court notes that a second claim based on defamation is not barred by the CDA because the defendant took part in creating the defamatory statements).}

\footnote{150. Almeida, 456 F.3d at 1316. The issue was presented before the Eleventh Circuit, but the case was decided on other grounds. \textit{Id.}}

\footnote{151. Perfect 10, 340 F. Supp. 2d at 1111.}

\footnote{152. \textit{Id. at 1109, citing Carafano v. Metrosplash.Com, Inc., 339 F.3d 1119, 1125 (9th Cir. 2003).}}

\footnote{153. \textit{Id. at 1107.}}

\footnote{154. \textit{See supra} notes 70 and 71.}

\footnote{155. \textit{Perfect 10}, 340 F. Supp. 2d at 1107.}

\footnote{156. \textit{Id. at 1109, citing Comedy III Productions, Inc. v. Gary Saderup, Inc., 21 P.3d 797, 804 (Cal. 2001).}}

\footnote{157. \textit{Id., citing} J. Thomas McCarthy, \textit{McCarthy on Trademarks and Unfair Competition}, 28.3 (4th ed. 2003) (“The right of publicity is property, and is properly categorized as a form of intellectual property.”); ETW Corp. v. Jireh Pub., Inc., 332 F.3d 915, 928 (6th Cir. 2003) (“The right of publicity is an intellectual property right of recent origin which has been defined as the inherent right of every human being to control the commercial use of his or her identity.”); \textit{and Carafano}, 339 F.3d at 1125).}

something of economic value formed and fostered by its creator, from others who would profit from the work of the right-holder. The requirement that an individual establish actual damage to his own persona is comparable to the “likelihood of confusion” test administered in trademark cases: the similarities between the marks must cause consumer confusion as to the origin of goods. Just as consumers may be confused by the feelings and dependability associated with a well-known mark, so too may they be misled by the inaccurate commercial use of a personality. A person’s identity is quite unique, and the premise of the property rights conferred may be viewed in terms of the ability to influence or reach the public. Finally, publicity is a widely recognized intellectual action. After rejecting temporal limitations on the scope of intellectual property law left intact by the CDA, as was the process in Gucci, inclusion of publicity rights seems natural. The characterization of publicity actions as intellectual property violations exempted under the CDA is proper and should preclude immunity in other jurisdictions.

C. Commercial Benefits Derived From Non-Famous Personas In E-Commerce

The individual whose likeness has been broadcasted over the internet must still assert a commercial use that has resulted in either an actual reduction in the value of personality or a commercial gain by the appropriating party. Demands for the removal of the unauthorized use of a likeness by an ISP not acting as an information content provider will not be judicially enforceable when the use is noncommercial or the persona has no marketable value. In the traditional valuation paradigm, there are few ways, other than fame, to assert this element, even though the value shown need not be time-tested or great. Even
if a person’s commercial value has not been previously utilized or identified, there still may be a market value to the identity. 168 Every person has a right to capitalize on any opportunities for gain held within his or her own identity and reap the benefits from it him or herself. 169 Since the growth of digital distribution mediums such as the internet, traditional methods of appraising personalities have become obsolete. As a result of the changing climate of today’s media, a much broader class of people may assert their own rights to publicity.

A website’s use of likeness or identity was found to have a commercial purpose when those images were used to encourage the purchase of subscriptions, merchandise, or other offerings for sale on the site. 170 Marketing efforts separate from the website itself should not be the focus when determining commercial use of identity in online settings. A commercial purpose has not been interpreted by courts to require a separate product that is promoted. 171 Websites do not solely rely on sales to prosper, as is the case with many brick and mortar stores. Income may be generated on the internet by renting advertising space to companies who wish to reach a large audience or specific demographic group. 172 Web sites may attract commercial sponsors once it can be shown that an adequate number of users view the web page, thus ensuring that the promotional message and advertising dollars will not be wasted on a small amount of traffic. 173 Because content is added to generate traffic, the materials added to this end are used with a commercial purpose. 174

Shifting commercial purpose analysis of website activities away from separate marketing activities is consistent with other applications of the right of publicity. The mere presence of advertisements is not sufficient to give communications a commercial purpose; 175 but when publicity rights are used to increase circulation of a periodical, the court has found a commercial purpose in the appropriation. 176 The appropriation may be mistaken so long as the use itself

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172. Carpenter, supra note 162 at 44.
173. Id.
174. Id. at 48.
176. Thompson v. Close-up, Inc., 277 A.D. 848 (N.Y.A.D. 1950) (“[T]herefore, as the decision by Special Term states, plaintiff’s photograph may be found to have been published (although,
has a commercial purpose.\footnote{Bosley v. Wildwett.com, 310 F. Supp. 2d 914, 927 (N.D. Ohio 2004), citing New York Times Co. v. Sullivan, 376 U.S. 254, 274 (1964). The determination of commercial purpose does not require any malice on the part of the appropriating party, and recovery is possible even when misappropriate is by mistake but the use is commercial. \cite{177}} Appropriations aimed at increasing the number of readers or subscribers to a magazine should not be differentiated from those aimed at increasing the number of web-users who read the same material from an online periodical or website. Similar reasoning has previously been applied to find commercial uses in trademark cases involving internet based infringement.\footnote{Perfect 10 v. Google, Inc., 416 F. Supp. 2d 828, 846 (C.D. Cal. 2006). “Google unquestionably derives significant commercial benefit from Google Image Search in the form of increased user traffic--and, in turn, increased advertising revenue. The more people who view its pages and rely on its search capabilities, the more influence Google wields in the search engine market and (more broadly) in the web portal market.” \cite{178} (the court further noting that internet commercial uses may be more incidental and less traditional).} A much broader class of people now hold value in their personas. The advent of the internet, reality television, and non-traditional market dynamics has dramatically altered the landscape of identity valuation.\footnote{Carpenter, supra note 162 at 17 (Although not presented in relation to the CDA, the article outlines the market forces and technological changes that have given rise to a commercial value to non-famous people.).} Specifically, the value of content is no longer tied to production and development costs, and there is an ever-growing market for content related to non-celebrities.\footnote{Id. at 43, citing Fred H. Cate, PRIVACY IN THE INFORMATION AGE at 14–15 (1997).} When these factors are considered in light of how income is generated by web pages, traditional concepts of fame lose relevance when determining which identities have publicity rights attached.\footnote{Ribstein, supra note 110, citing Eugene Volokh, Cheap Speech and What It Will Do, 104 YALE L.J. 1805, 1806-1833 (1995).}

The value of material is no longer directly tied to production costs because the internet does not require a great cost of entry or upkeep, a large technical or support staff, or extensive expertise.\footnote{Id. at 43.} Most people with a computer and a basic understanding of the internet can broadcast their ideas via a web page. A low cost computer program may be used to assist less skilled users.\footnote{Ribstein, supra note 110, citing Eugene Volokh, Cheap Speech and What It Will Do, 104 YALE L.J. 1805, 1806-1833 (1995).} Standing as a testament to the ease of such methods, one survey estimates that over 35.5 million blogs, web page forums on the internet maintained by an individual, currently exist, with the total number doubling approximately every 6 months.\footnote{Id.} These easily created services may then reach a large audience without much expense. The traditional costs of advertisement and public relations have been
replaced by automated search engines. These services can be further utilized through the effective use of “meta-tags” to draw additional contact with the public without incurring costs of traditional publicity activities. Ongoing efforts are not necessary. These actions will continue to provide an audience into the future because they do not suffer from the same limited lifespan as television, radio or print advertisements.

Current hardware no longer presents space constraints. The audience with a demand for images or other content regarding non-celebrities may be satisfied in a profitable manner. While much of the material would not be provided in a paper or conventional medium, where content must compete for limited space, the virtually unlimited space wielded by most web pages makes such decisions unnecessary. When combined with a new public desire for “reality entertainment” and public presentation of private individuals, there is a viable market for such content. The reality entertainment trend has increased the size of this consumer group, while technology has made services that cater to smaller and smaller niches capable of generating profits. These markets can be sought in conjunction with more mainstream offerings for little added expense, enticed by specialty content presented on a grand scale at minimal costs, or by creating a forum for users and other third parties to submit their own information.

Traditional notions that pre-existing fame is what creates market value for details regarding a person’s life and candid images of them, must be discarded. Because advertisements are based on the traffic generated by the amount of personal content, each persona has a commercial value. Though the personas involved may carry a lower market value, publicity actions may still result in statutory damages when profits derived from use or loss in market value cannot be shown with specificity.

185. Carpenter, supra note 162 at 43. A search engine is a service that allows users to look for information on the internet by searching web pages for relevant information; such services are low cost and quick. Id.
186. Id., (citing Suddenly Everyone Can Be A Publisher Watch Out!, INTERACTIVE PR & MARKETING NEWS, April 30, 1999 at 9 (meta-tags are “key words specifically included on the source page of your HTML document that allow search engines to respond to user queries”)).
187. Id. at 43.
188. Id. at 48.
189. Id. (noting that tailoring a website to the reader’s attention is more of a concern than any physical or technological space limitations).
190. Id. (noting that the trend was initially started by MTV’s “The Real World,” a program which depicts a number of strangers living together in an apartment).
191. Even if the likeness only has a slight commercial value the individual has a right to exploit it, and statutory damages may be elected along with the possibility of other damages. See supra note 53.
D. Photos That May Support the Publicity Action

A photographer has an intellectual property right in the pictures taken with his creative ability. Likewise, the purchaser of the photographer’s prints may rest assured that property law protects his right to possession. But what interests are held by the non-famous subject of the photograph? J. Thomas McCarthy describes the right to publicity to permit control over commercial use of one’s identity and prevent unauthorized use that would damage that commercial value. The right to publicity is an intellectual property right, and as such offers protections to the intangible creations of their makers. Non-famous individuals create a persona and likeness through the course of life; their biology and psychology form a unique combination that cannot be reproduced. A viable market exists for content concerning this unique personality, and related images. But the intellectual property right in question does not extend to creative expressions separate and apart from this identity. The right of publicity grants an individual the option to capitalize on the value held in the identity he or she possesses, should that person choose to enter the market as an entrepreneur or license the use of such content to another party. The right only concerns the commercial value of the unique persona and the associated likeness, and certain practical and constitutional constraints will define its scope.

Not every image or photograph that a person believes may include his or her likeness will allow that individual to assert a violation of rights to publicity. Must the individual be the focus of a photo to assert publicity rights? Commonly, publicity actions involving the non-famous have concerned crowd shots or group photos; this case law exhibits the bounds of photos that are actionable by private persons. Group and mob photographs have the potential to give way to countless claims based on violations of rights of publicity held by the numerous people depicted in the background. From this practical concern, liability has been limited to those personas which are identifiable; no additional evidence may establish that an incomplete or unclear image is the plaintiff.

194. G.W.K. v. Dunlop Rubber Co., 42 T.L.R. 376 (1926) (property law protects right to possession, even if displacement is only temporary).
196. See supra note 157.
197. See supra Analysis Section C.
199. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 573 (1977) (“[T]he State’s interest is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation.”).
The commercial value of a unique persona or likeness cannot be utilized when the unique qualities cannot be readily observed or distinguished from others.\textsuperscript{202} Those who wish to use photographs can limit their liability by cropping the photograph or rendering unnecessary individuals unrecognizable.\textsuperscript{203} But those persons who are identifiable contribute to the total effect of the photograph, and the value added by their publicity rights should not be denied because of the quantity of people contributing to the same.\textsuperscript{204} J. Thomas McCarthy, explaining the requirement within the context of crowd shots, stated:

> If a professional photographer feels that the absence of releases or licenses from recognizable persons in the crowd makes a photo unsaleable for commercial advertising purposes, the common practice is to retouch the photo so as to make the faces unrecognizable. If the faces in the background are indeed not critical to draw attention to the advertisement, this is a simple and common alternative. However, if the advertiser or advertising agency objects, and feels that the faces are important, then this alone reveals that the identity or facial expression of those persons has publicity value.\textsuperscript{205}

### E. Friction With the First Amendment

Irrespective of identifiability, certain images will not be subject to publicity actions due to conflicts with the freedom of speech and the press conferred by the First Amendment.\textsuperscript{206} But the First Amendment does not stand as an absolute bar to any law restricting speech or the press.\textsuperscript{207} Compared to state law forwarding reputations and privacy, the interest states have in protecting the “proprietary interests” of their citizens through publicity rights, which could be diminished with unrestrained communication, allows for more substantial limitation of expression.\textsuperscript{208} To find whether the proprietary rights in personality warrant restriction of speech, the state’s interests in protecting those rights are weighed against the First Amendment rights implicated by the offending communications.\textsuperscript{209}

\begin{itemize}
  \item [202.] \textit{Id.}
  \item [204.] \textit{Cohen}, 100 A.D.2d at 183 (“In view of the legislative purpose to prevent commercial exploitation of a person’s name, portrait or picture, this objective would be thwarted were publishers to be absolved solely by reason of the large volume of published advertisements.”).
  \item [205.] McCarthy, \textit{supra} note 203 at § 4.66.
  \item [206.] \textit{See generally} McCarthy, \textit{supra} note 157 at § 28.41.
  \item [207.] Bosley v. Wildwett.com, 310 F. Supp. 2d 914, 925 (N.D.Ohio 2004), (\textit{citing} Beauharnais v. People of State of Ill., 343 U.S. 250, 275 (1952) (Black, J., dissenting) (for the contrary opinion that was never adopted by the court)).
  \item [209.] \textit{Id.}
\end{itemize}
Less constitutional protection is given to “commercial speech.” Commercial speech has been described as “related solely to the economic interests of the speaker and its audience.” Though not completely synonymous with the “commercial purpose” language in publicity statutes, both will likely be implicated in situations where a speaker makes expressions primarily for the purposes of commercial gain. Whether classified as commercial speech or as purely communicative, some constitutional protection is given, but both are ultimately susceptible to publicity actions.

If the subject of the image is newsworthy, or a public figure, the communication is more heavily weighted because of the undeniable public interest in the free dissemination of news, factual, educational, and historical information. Even unknown people could fit this classification when images capture them in the midst of matters of public concern. Alternatively, no such significance is given to communications of affairs of non-famous persons that are not of a public concern.

Due to slight weight given to commercial speech, and those communications that do not convey matters of public concern, publicity actions in private personas are not likely to offend the freedom of speech. The state interest in preserving the public’s ability to capitalize on their own publicity rights outweighs these slight First Amendment concerns.

F. Enforcing Requests For Removal

By definition, an ISP that does not act as an information content provider, is not taking the pictures in question. These materials are likely either created without the knowledge of the subject, or solely for personal use. Publicity

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212. See supra note 165.
213. See McCarthy, supra note 203 at § 28.41.
actions are not only possible against this first photographer, but against all parties that subsequently benefit from use of the subject’s likeness without their consent.\footnote{219} This consent may be limited, and permitting a single commercial use would not then allow later or different commercial uses.\footnote{220} Even when the photo is first used in a newsworthy way, protected by the First Amendment, subsequent commercial uses by the same or other parties will constitute appropriation.\footnote{221} Also, perhaps most importantly, when photos are permitted solely for personal or private uses, their subsequent commercial uses may be considered appropriation of publicity rights.\footnote{222}

When development costs associated in the creation of content are reduced by hosting or publishing materials submitted by third-parties, use of the material remains commercial: increasing available content increases traffic and sponsorship opportunities.\footnote{223} Images that were taken for personal use, or with limited consent not including commercial uses, can later give rise to infringement of publicity rights when used by third party ISPs. However, unbridled actions asserting violations of the rights of publicity may chill internet speech, or require unmanageable monitoring of every third party contributor to a website.\footnote{224} Because of the sheer volume of content on websites and the virtually unlimited storage space of modern computers, it is possible that websites could be caught unaware that they are generating traffic through the unauthorized commercial use of another’s persona, despite some level of vigilance.

These considerations are properly addressed in the similar situation of trademark violations transmitted by an ISP not acting as an information content provider. Contributory trademark infringement cases arise in the same setting and have been successfully addressed without hampering the growth of the internet. Specifically, § 43(a) of the Lanham Act\footnote{225} would impose liability for violations of the trademark rights when a person or entity “continues to supply a product knowing that the recipient is using the product to engage in trademark infringement.”\footnote{226} When applied in the digital context, the party may control the instrumentalities used to violate the property rights, as opposed to supplying a

\begin{enumerate}
\item See Grant v. Esquire, Inc., 367 F. Supp. 876 (S.D.N.Y. 1973); see also Young v. Greneker Studios, 175 Misc. 1027 (N.Y.Sup. 1941).
\item See Manger v. Kree Inst. of Electrolysis, Inc. 233 F.2d 5 (N.Y.App. 1956) (consent to have picture printed in a newspaper concerning a real estate company’s efforts to help the subject find a home for his large family was exceeded by later commercial uses).
\item Lane v. MRA Holdings, 242 F. Supp. 2d 1205 (M.D.Fla. 2002) (While consent may be limited in this fashion, no reasonable jury could conclude that the plaintiff had made effective restrictions on consent. Plaintiff was videotaped by Girls Gone Wild shortly after her friend stated that two years prior she had been photographed under similar conditions during Marti Gras celebrations, and the photos were later published in a men’s magazine).
\item See supra note 183.
\item Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 264 (9th Cir. 1996).
\end{enumerate}
physical product. This knowledge may be either actual or constructive. When a party controls the website used to violate property rights, no liability is imposed for trademark violations made by third party content providers prior to receiving notice. After receiving notice or a request that the items be removed from the holder of the property right, the party controlling the website may remove the content and likely avoid liability. However if the content is not removed, the acquiescing party is accountable for contributory trademark infringement.

With respect to intellectual property rights of trademark submitted by third party information content providers and disseminated on an ISP’s services, once the ISP receives a demand to remove the content, it is obligated to do so. Intellectual property rights regarding publicity or an individual’s likeness should confer the same or similar abilities to demand removal of content. This does not conflict with the fears of unlimited liability or an unduly burdensome monitoring obligation because no action must be taken until notice has been provided. It should be noted that by accepting third party information content, often at little or no cost, ISP’s are dramatically increasing their own content and potential advertising revenue at a minimal cost to themselves. A matching cost associated with responding to publicity violations in addition to trademark claims would not be inequitable when balancing the competing interests of our property rights versus freedom of speech. This conclusion is reasonable under the circumstances.

This system resembles distributor-based theories of imposing liability because no liability is imposed prior to knowledge of the character of the information. The disseminating entity does not actually take part in the development of the information and may not actively police what is published. Prior to the enactment of the CDA, courts classified ISP’s as distributors, but

227. Lockheed Martin Corp. v. Network Solutions, Inc., 194 F.3d 980, 984 (9th Cir. 1999) (the conclusion was reached after examining the application of trademark principles to fact patterns involving a party who rented space in flea markets where the product paradigm did not neatly fit), citing Hard Rock Café Licensing Corp. v. Concession Servs., Inc., 955 F.2d 1143 (7th Cir. 1992); and Fonovisa, Inc., 76 F.3d at 259.

228. Inwood Lab., Inc. v. Ives Lab., Inc., 456 U.S. 844, 854 (1982) (“Thus, if a manufacturer or distributor intentionally induces another to infringe a trademark, or if it continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement, the manufacturer or distributor is contributorily responsible for any harm done as a result of the deceit.”) (O’Connor, J).


230. Id. at 853. However, liability might still attach if the website operator intended to cause the infringement or materially contribute to it. Id. However, the Supreme Court has stated that intent may not be imputed to establish secondary liability when it is based on the design of the service or product, and the product also has a significant legitimate, non-infringing use or purpose. Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984).


later decisions rejected distributor based liability for tort-type actions on account of statutory immunity from the CDA.\textsuperscript{233} Because the CDA does not apply to intellectual property actions, no immunity is given and applying a similar standard to property-oriented rights should not be offensive.

While knowledge or intent is generally more often associated with the dignity or privacy oriented appropriation claims,\textsuperscript{234} some publicity statutes presently incorporate a knowledge requirement into the primary action.\textsuperscript{235} Secondary liability for infringement of the rights to publicity could be handled simply and effectively in this setting with a knowledge requirement. Further, the suffering individual would have a low cost alternative prior to resorting to judicial action. Secondary liability based on trademark infringement has been translated into the internet setting without preventing the growth of this new electronic medium; so too should publicity rights and the ability to demand removal of unauthorized use of likeness.

CONCLUSION

The burden faced by many ISP’s can be characterized as responding to people who claim that an image or likeness is displayed without authorization, but have not filed suit. This does not require any increase in preventative monitoring, nor does it require that any existing systems be changed or removed from public use. The internet has dramatically changed the way that people interact with one another, but it has also changed traditional business models. Images and content generate traffic because people are no longer only interested in the lives of celebrities. Because the same process has been applied to trademark actions in the same situation, and the internet has not ceased to grow at an astonishing rate, property law should yield a remedy for those who do not wish to have their likeness broadcasted over such systems.

\textendnote{233}{\textit{Id.}}
\textendnote{234}{See supra Background Part D.}
\textendnote{235}{See supra note 65.}
\textendnote{236}{\textit{See Cal. Civ. Code} § 3344 (“knowingly uses”); \textit{Mass. Gen. L. Ann. ch. 214 § 3A} (“If the defendant shall have knowingly used such person’s name, portrait or picture in such manner as is prohibited or unlawful, the court, in its discretion, may award the plaintiff triple the amount of the damages sustained by him.”).}
AN EMERGING CIVIL RIGHTS MOVEMENT: IMMIGRANT POPULATIONS IN NEED OF EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT

Hannah Whitney McMurry Schrock*

I. INTRODUCTION

Studying abroad in Oaxaca, Mexico, I saw first-hand the extreme poverty that plagues third world countries; and it is intensely magnified in comparison to that of my Appalachian Eastern Kentucky hometown. It is not difficult to understand why one may choose to leave his or her country and loved ones behind, risking death or mutilation for the possibility of a minimum wage, American job. When a person has nothing, he or she also has nothing to lose. American businesses build and grow, and immigrants come into the country, seeking the low paying jobs. A well-known pattern has emerged from these circumstances. Non-immigrant Americans enjoy the enlivened economy and the authentic, ethnic restaurants, that is, until the immigration population increases to a readily recognizable number. It then becomes “news,” when the increased immigrant population may make some Americans feel as if they are becoming a “minority” in their own country. Local officials correlate crime, surging school enrollments, and the drain on social services with the increase in their immigrant population.

This case note joins the current dialogue on immigration reform, approaching the issue from an Equal Protection perspective. Part I familiarizes the reader with the Fourteenth Amendment’s Equal Protection Clause. It lays out a brief overview of the Clause’s development from protecting primarily economic relations, to personal rights, and the levels of scrutiny that have emerged to guide the Supreme Court. Part II shifts to the current national immigration debate and demonstrates how that debate is being played out on a local level, namely Hazeltown, Pennsylvania. In Hazeltown, there is litigation pending that concerns its Illegal Immigration Relief Act. Part III analyzes the constitutionality of such Acts, proposing that irrespective of illegality, aliens are “persons” under the Equal Protection Clause and deserve to be treated justly. The analysis begins with a key Supreme Court case addressing illegal aliens.

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Plyler v. Doe. Next, it examines two fairly recent Supreme Court Cases, Cleburne v. Cleburne Living Center and Romer v. Evans. These cases provide support for the premise that legislation which targets a minority group with the sole intent to harm, is not constitutional. Part IV concludes, but hopefully does not end, this dialogue.

A. Background Law

The Fourteenth Amendment reads in part that “no state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” “Persons” under the Fourteenth Amendment’s Equal Protection component has a significantly distinct use as compared to the use of “citizens” under the Privileges and Immunities Provision. In 1886, such relevance was clarified when the Court held that persons protected under the Fourteenth Amendment included aliens, as well as citizens.

Adopted after the Civil War, the Thirteenth, Fourteenth, and Fifteenth Amendments ensured that freed slaves were treated equally under the law. The Thirteenth Amendment abolished slavery; the Fourteenth Amendment secured equal rights; and the Fifteenth Amendment gave African Americans the right to vote. Yet, in the later half of the 19th century, the Court essentially nullified any protection the Reconstruction amendments may have provided. The Fourteenth Amendment’s Privileges and Immunities Clause was construed as granting only individual protection from state action that infringed upon very narrow “national rights.”

Virtually erasing the Privileges and Immunities Clause from the Fourteenth Amendment, the courts turned to the Fourteenth Amendment’s Substantive Due Process Clause in the early 1900’s to strike down economic regulations that infringed upon a person’s liberty to contract. Around the 1930’s, the era of strong economic rights dimmed, as the Courts illuminated fundamental liberties and the legislature’s role by allowing the branch more deference. As long as the “laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory,” the Court would uphold

5. U.S. Const. amend. xiv.
7. Id.
9. Id.
12. Lochner v. New York, 198 U.S. 45 (1905); see also Savage, supra note 11, at 257.
the legislation. The Court’s refocusing was expounded in the infamous footnote four of *United States v. Carolene Products Company*, and the newly envisioned standard exhibited in *Williamson v. Lee Optical of Oklahoma*.

In footnote four of *Carolene Products*, Justice Stone reserved heightened scrutiny for situations where “legislation appears on its face to be within a specific prohibition of the Constitution[—] legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation. . . [and legislation which seeks to disadvantage] discrete and insular minorities.” In *Lee Optical* the court clarified that economic legislation would be subject to a more relaxed standard and stated,

> It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it. . . The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they are unwise, improvident, or out of harmony with a particular school of thought.

Leaving economic regulation to the Legislative branch, the Court directed its examination towards more personal liberties. The Court expanded on the word “Liberty” under the Fourteenth Amendment’s Substantive Due Process Clause to afford greater protection to individuals’ personal, as opposed to economic, rights. The Court first applied this expanded definition to embrace the fundamental Right to Privacy in its 1965 *Griswold* decision. Justice William O’Douglas, writing for the majority, believed that the right to privacy was of fundamental importance. Examining precedent, he inferred that the Bill of Rights has “penumbras, formed by emanations from those guarantees. Various guarantees create zones of privacy.” Subsequently, the reach of the right to privacy has been extended to marital privacy, familial privacy, sexual privacy, and other autonomous rights such as abortion.

20. *Id.*
22. *Id.* at 495.
Although not explicitly granted by the Constitution, personal privacy has roots in the First, Fourth, and Fifth Amendments, the Penumbras of the Bill of Rights, and the concept of liberty under the Fourteenth Amendment. Precedent led to the conclusion “that only personal rights that are deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty,’ . . . are included in this guarantee of personal privacy.” There may not be a fundamental right to abortion, but the court found that the right to privacy was broad enough to encompass a woman’s decision whether or not to terminate her pregnancy; her right to choose is a fundamental right.

However, the Fourteenth Amendment’s Due Process Clause only protects individuals from state action impeding upon specific fundamental rights that are described as “so rooted in the traditions and conscience of our people as to be ranked as fundamental.” The Equal Protection Clause, by contrast, is general and more suitable for application against state government action that results in the burdening of a class of people. Nonetheless, the Court has applied the Equal Protection component in limited ways. Although protection is afforded to all people, it does not require that all laws treat everyone equally; rather only those who are similarly situated, must be treated similarly. The Court must first determine the purpose of the legislation, which must be constitutional; then the Court will determine whether the line drawn was acceptable, to create a lawful classification. The Fourteenth Amendment only applies to states, but the same restrictions are applied to the Federal government under the Implied Equal Protection guarantee of the Fifth Amendment’s Due Process Clause.

B. Levels of Scrutiny

1. Rational Basis

There are three standards the Court uses to judge the constitutionality of classifications. The lowest level of scrutiny grew from the aforementioned post-1937 Substantive Due Process cases, when more deference was allotted to
economic and social legislation.\textsuperscript{37} Currently, such laws will be presumed constitutional and do not require heightened scrutiny.\textsuperscript{38} The plaintiff must prove that the law is not rationally related to the government’s purpose.\textsuperscript{39} With only one exception, no economic legislation has been struck down under the rational basis scrutiny since 1937.\textsuperscript{40}

\section*{2. Strict Scrutiny}

If a classification is created based around a discrete and insular minority group that has been historically incapable of protecting itself, or if the classification touches upon a fundamental right, the Court will apply a heightened scrutiny.\textsuperscript{41} The Court will not defer to the legislature and will independently determine whether the government has a compelling interest related to the classification, without an alternative means to achieve it.\textsuperscript{42} Traits that the court has labeled as “inherently suspect” are race\textsuperscript{43} and ancestry.\textsuperscript{44} Additionally, state and local governments will be subjected to strict scrutiny for laws that classify based on alienage, favoring citizens over resident aliens, given that the federal government has plenary power to regulate immigration.\textsuperscript{45}

The Court flexed its Fourteenth Amendment power in \textit{Brown v. Board of Education} to overrule segregation that could no longer pass strict scrutiny.\textsuperscript{46} It was a landmark decision for African Americans, as well as a catalyst for women, the disabled, and homosexuals.\textsuperscript{47}

\section*{3. Intermediate Scrutiny}

A landmark decision, \textit{Brown}, was a catalyst for the Civil Rights Movement of the 1960s that erupted in a “new sensitivity to all forms of discrimination.”\textsuperscript{48} Courts were propelled by the movement to protect other minority groups suffering from discrimination in society, such as women, homosexuals, and the disabled.\textsuperscript{49} In 1976, a new standard delineated from the need to protect women from classifications that were not “inherently suspect,” but were quasi-suspect

\begin{flushleft}
\textsuperscript{37} NOWAK \& ROTUNDA, \textit{supra} note 34, at §14.3.  \\
\textsuperscript{38} United States v. Carolene Prods. Co., 304 U.S. 144 (1938).  \\
\textsuperscript{40} Morey v. Doud, 354 U.S. 457 (1957) (invalidating an Illinois statute that exempted only American Express from fees imposed on issuers of money orders).  \\
\textsuperscript{41} \textit{Carolene Prods. Co.}, 304 U.S. at 153 n.4.  \\
\textsuperscript{42} NOWAK \& ROTUNDA, \textit{supra} note 34, at §14.3.  \\
\textsuperscript{43} Loving v. Virginia, 388 U.S. 1 (1967).  \\
\textsuperscript{44} Toyosaburo Korematsu v. United States, 323 U.S. 214, 216 (1944).  \\
\textsuperscript{45} NOWAK \& ROTUNDA, \textit{supra} note 34, at §14.11; Graham v. Richardson, 403 U.S. 365, 376 (1971); \textit{Savage, supra} note 10, at 307.  \\
\textsuperscript{47} \textit{Savage, supra} note 10, at 253.  \\
\textsuperscript{48} \textit{Id.} at 313.  \\
\textsuperscript{49} \textit{Id.} at 253.
\end{flushleft}
within laws that perpetuated stereotypes between men and women.\textsuperscript{50} Justice Brennan argued that gender based discrimination was invidious and should be upheld only when a compelling government interest existed.\textsuperscript{51} However, some members of the Court objected to characterizing gender as a suspect-class.\textsuperscript{52} A compromise was sustained in \textit{Craig v. Boren} that required legislation based on gender to be substantially related to government’s interest in order to be deemed constitutional.\textsuperscript{53}

By the 1980’s the Court was ready to afford some protection to homosexual rights. It did not declare homosexual relations as a fundamental right, but it marked a monumental step away from an earlier decision in \textit{Bowers v. Hardwick}, which upheld a statute criminalizing sodomy.\textsuperscript{54} In 2003, the court overturned that decision when it struck down a Texas statute prohibiting sodomy.\textsuperscript{55} Justice Kennedy’s opinion criticized the \textit{Bowers} Court for relying heavily on history and looked to the current acceptance of the “right of homosexual adults to engage in intimate conduct as an integral part of human freedom in other countries.”\textsuperscript{56}

\section*{II. NEW CIVIL RIGHTS MOVEMENT}

\textbf{A. Introduction}

The long history of slavery and racial discrimination was the driving force behind utilizing the Equal Protection Clause to protect individuals against government action\textsuperscript{57} and to reverse one of the effects of the Court’s most appalling decisions. One hundred and fifty years ago, in \textit{Dred Scott v. Sanford}, the Supreme Court constitutionalized slavery when it decided that a person who descended from African slaves could not be a United States citizen, and thus was not entitled to freedom even though he resided in free territory.\textsuperscript{58}

Today, as new waves of non-citizens are fighting for minimal levels of equal protection under the law as “persons,” one asks, “How far have we come since the \textit{Dred Scott} decision?” Despite judicial holdings that discourage discrimination and embrace the notion of equality and freedom from oppression, fear of groups who are perceived as not easily assimilated into the traditional

\begin{itemize}
\item \textsuperscript{50} NOWAK & ROTUNDA, \textit{supra} note 34, at §14.3.
\item \textsuperscript{51} SAVAGE, \textit{supra} note 10, at 317.
\item \textsuperscript{52} Frontiero v. Richardson, 411 U.S. 677, 691 (1973) (Powell, J., concurring, joined in his concurrence by Burger, C.J. and Blackmun, J.).
\item \textsuperscript{53} \textit{Craig v. Boren}, 429 U.S. 190 (1976).
\item \textsuperscript{54} \textit{Bowers v. Hardwick}, 478 U.S. 186 (1986).
\item \textsuperscript{55} \textit{Lawrence v. Texas}, 539 U.S. 558 (2003).
\item \textsuperscript{56} \textit{Id.} at 576.
\item \textsuperscript{57} REDLICH, \textit{supra} note 8, at 361.
\item \textsuperscript{58} \textit{Dred Scott v. Sandford}, 60 U.S. 393 (1856).
\end{itemize}
Anglo-Saxon ways is deeply embedded in this nation’s history and continues to prevail today.59

The Constitution expressly gives the federal government plenary power to regulate Immigration under the Naturalization Clause.60 In early 2006, the regulations became the subject of extensive Congressional debate aimed at reformations that would effectively stop the entry of illegal aliens in the country.61 The debate has not been confined to the chambers of Congress but rather has infiltrated towns across the country, which have attempted to create their own resolutions to the “problem.”62 Immigration reform has ignited a national debate within the past year and spawned what has been referred to as the “Next Civil Rights Movement.”63 Supporters of stronger sanctions against illegal immigrants are motivated by the belief that these immigrants are draining the country’s resources, taking wages away from Americans, and adding to the crime rate.64 Opponents argue that irrespective of their documentation status, anyone residing on U.S. soil deserves the fundamental rights that are inherent to all Americans, as well as certain other benefits.65

**B. Debate Contextually Situated**

The noticeable influx of Hispanics into the United States has been a catalyst for the current reforms. In October 2006, the United States population reached 300 million.66 Immigrants and their U.S. born offspring accounted for 55 percent of the 100 million increase in population since 1966.67 Of that 55 percent, 29 million were Latino immigrants, while 12 million were Asian/Pacific islander immigrants, 10 million were white immigrants, and 4 million were black immigrants.68 Eleven million were illegal immigrants.69 The Hispanic community has had the largest growth rate as compared to other minority groups since 1966, growing from 8.5 million to 44.7 million.70

60. U.S. CONST. art. I, § 8, cl. 4.
61. *Infra* notes 77,78.
62. Avon park, FL, Palm Bay, FL, Escondidio, CA, Riverside, N.J., Allentown, PA, Davidson/Nashville TN, Valley Park, MO, LaPorte, IN, and Farmer’s Branch, TX have already enacted housing ordinances.
67. *Id.* at 3.
68. *Id.* at 3.
69. *Id.* at 3.
70. *Id.* at 2.
The census contributes the 100 million increase in population to changes in
United States immigration law in years 1965, 1986, and 1990; to steady
improvements in life expectancy; and to decreasing fertility levels. 71  The
Immigration Act of 1965, during the initial civil rights movement, erased many
discriminatory racial exclusions from immigration laws. 72  Employer sanctions
were imposed under the Immigration Reform and Control Act of 1986 (IRCA). 73
The Immigration Reform and Immigrant Responsibility Act of 1996 denied
federal benefits to illegal immigrants, restricted judicial review of the Internal
Naturalization Service (INS) decisions, and allowed state law enforcement
agents to partner with federal. 74  

Yet, legislating policy is useless without enforcing the policy. Pursuant to
the IRCA, the Immigration and Customs Enforcements (ICE), a division of the
Department of Homeland Security (DHS), is responsible for enforcing employer
sanctions. 75  Since 1990, the number of audits performed a year dropped by 77
percent, from 10,000 a year to less than 2,200 in Fiscal Year 2003. 76

The number of warnings and/or minor sanctions declined by 62 percent,
from an estimated 1,300 to less than 500 between 1990 and 2003. 77  Likewise,
fines imposed for more serious violations drastically dropped from an estimated
1,000 in 1991 to 124 in 2003. 78  The decline in employer sanctions enforcement
is attributed in part to the competing INS/ICE missions. Such missions included
Operation Gatekeeper in San Diego in 1994, and the pull of interior enforcement
agents to the borders in 1996. Following the September 11 terrorist attacks, the
INS’s interest was diverted to National Security and to such missions as
Operation Tarmac, focusing on airports, and Operation Glowworm, focusing on
nuclear plants and military bases. Employee sanction enforcements have
declined as to make such deterrents ineffective at prohibiting American
employers from hiring unauthorized immigrants.

C. Recent Debate

In early December 2005, the House of Representatives proposed their
version of legislation that aimed to reduce illegal immigration, Bill HR 4437. It
proposed erecting 698 miles of new, double-layer fencing; doubling the number

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71. Id. at 2.
73. Zolberg, supra note 59 at 370.
76. Id. at 3 (two different databases showed similar trends and changes over time).
77. Id. at 3.
78. Id. at 4.
of Border Patrol to 21,000 agents, as well as making it a felony to aid entry. 79 In early April of 2006, the Senate countered with a friendlier Bill S 2611. It proposed 370 miles of fencing; 500 miles of vehicle barriers; doubling the number of Border Patrols; creating a new, large scale guest worker program; and increasing the number of permanent legal immigration visas. 80

The debates thus far have culminated in the Secure Fence Act of 2006, which was introduced by the House as H.R. 6061 and approved by the Senate on September 29, 2006 by 80 to 19 votes. 81 It was supported by fifty-four Republicans and twenty-six Democrats. The Act authorized 700 miles of new double-fencing, access roads, lighting, video surveillance systems, ground sensors, and additional vehicle barriers to be built. 82 The current 90 miles of fencing will be expanded to divide one-third of the Mexican-American border. 83 The cost will be two to nine billion dollars not including maintenance. 84

D. State Involvement in Immigration

Given the ineffectiveness of previous federal control of immigration, and the recent congressional debates, local governments are taking action to thwart illegal immigration at the state level. Although states have no authority to interfere with the federal government’s plenary power to regulate immigration, states may implement policy that works to further the federal government’s intent. 85 The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 allows for partnerships with U.S. Immigration and Customs Enforcement. 86 It is no surprise that recently the interest in participation has peaked. Two northern Virginia law enforcement agencies have enlisted, as well as seven other agencies including the Arizona Department of Corrections and the Florida Department of Law Enforcement. 87 That number is expected to triple soon. 88

79. To amend the immigration and nationality act to strengthen enforcement of the immigration laws to enhance border security, and for other purposes. H.R. 4437, 109th Cong. (2005).
80. A bill to provide for comprehensive immigration reform and for other purposes. S. 2611, 109th Cong. (2006).
82. Id.
83. Id.
84. However, the reality of the fence is still a debate. Senator John Cornyn, a Texas Republican and key liaison to the White House on immigration, doubts it will become reality for “lack of money and other practical considerations.” See Eunince Moscoso Border Fence Won’t Happen, GOP Lawmaker Says (Fox News Service, television broadcast, Oct. 3, 2006).
86. Candace Rondeaux, Policing Program Worries Latinos, WASH. POST, Oct. 20, 2006, at B01. See also Id.
87. Id.
88. Id.
Local agencies pay for database software and extensive training. The database enables local authorities to determine the immigration status of individuals. The Act claims that the focus will be on illegal immigrants involved in criminal activity and does not authorize wide-ranging immigration sweeps.

But states are doing more than partnering with federal officials. Local governments are proposing and passing legislation to prevent illegal immigrants from taking refuge in their towns in order to fill the gap in federal immigration regulation.

E. Case Study

As legislation attempts to crack down on illegal immigration, civil rights organizations are speaking up on behalf of America’s newest “second class” citizens. Hazleton, Pennsylvania was the first to respond at a local level to this country’s growing debate on immigration reform. Situated 80 miles northwest of Philadelphia-- the city of “Brotherly Love”-- Hazleton is showing anything but brotherly love to their non-white residents. Once a booming coal town, Eastern European immigrants surged into the town to fill the jobs created by the coal industry; the city’s population jumped from 6,935 in 1880, to 11,872 in 1890. Fifty years later, in 1940, Hazleton’s population peaked at 38,009, steadily declining thereafter so that by the year 2000, it had diminished to 23,000.

Yet, the population rose again to 30,000 when a new wave of immigrants arrived from New York and New Jersey, bringing economic growth to the region. Between 50-60 new businesses appeared, and the value of homes soared from 40,000 dollars to 90,000 dollars, according to the Greater Hazleton Chamber of Commerce. In 2005, Mayor Louis J. Barletta recognized that the city’s economy was at its healthiest.

Yet, with an economic boom comes an expansion of social problems most often equated with big city life. Mayor Barletta said, “[W]e are losing the one

89. Id.
90. Id.
91. Id.
92. Supra note 60.
96. Id.
97. Id.
98. Id.
asset that this city has to offer—our quality of life.”  

Harleton’s cost of living rose, schools became overcrowded, and crime appeared to run rampant. Barletta’s perspective on immigration changed on the evening of May 10, 2006, when four Dominican immigrants were arrested in connection with the fatal shooting of a 29-year-old white male. Harleton attributes the rise in social problems to an estimated 30 percent of Harleton’s population—the Latino community.

Barletta is unable to produce evidence to support a cause and effect theory between illegal immigrants and crime; rather, statistics published by the State Police Uniform Crime Reporting System actually show a reduction in the number of total arrests, rapes, robberies, homicides and assaults in Harleton over the last five years.

Nevertheless, Harleton has decided to enter the current battle against immigration at the local level. Harleton’s five-man City Council passed three ordinances on July 13, 2006, which have already begun to force immigrants out of the city. The adoption of these three ordinances has acted as a catalyst, urging other cities to take action as well. At least thirty-two cities, and the number continues to rise, have drafted, considered, or passed similar legislation. Like Harleton, at least two other cities face lawsuits challenging the constitutionality of the housing ordinances.

The first ordinance, entitled in part, “Establishing a Registration Program for Residential Rental Properties” requires that all occupants of rental units obtain an occupancy permit. “Rental Unit” is defined as unit “let for Occupancy and is occupied by one or more tenants.” “Let for Occupancy” is defined as “to permit, provide or offer for consideration, possession or occupancy of a building, dwelling unit, room in unit, premise or structure by a person who is not the legal owner….” “An occupancy permit” is obtained by showing proper identification, which will establish legal citizenship or residency. Failure to comply with the ordinance will lead to a $1,000 fine to be paid by the Owner for each Occupant, and $100 per Occupant per day for each day the Owner allows the occupant to continue living there.

99. Id.
100. Id.
102. Id.
104. Supra note 56.
105. Supra note 56.
106. Riverside, NJ and Valley Park, MO.
108. Id. at § 1(t) (2006).
109. Id. at § 1(k) (2006).
110. Id. at § 1(b)1(g) (2006).
111. Id. at § 10(b) (2006)
The second ordinance, entitled “Illegal Immigration Relief Act,” prevents businesses from employing or harboring illegal aliens.\textsuperscript{112} The third ordinance, entitled “Official Language,” declares English the official language.\textsuperscript{113} It establishes that “no ordinance, decree, program or policy shall require the use of any language other than English for any documents, regulations, orders, transactions, proceedings, meetings, programs or publications.”\textsuperscript{114}

Plaintiffs, representatives of the Hispanic community ranging from children to adults, to documented and undocumented individuals, to organizations, have filed suit in the U.S. District Court for the Middle District of Pennsylvania.\textsuperscript{115} The complaint was filed on August 15, 2006, and the court approved a stipulation whereby Hazelton agreed not to enforce the Ordinances, and Plaintiffs agreed not to seek an injunction.\textsuperscript{116} Hazelton redrafted two of the initial three ordinances to ensure that they would withstand judicial challenges and to become the first municipality to enact a local anti-immigration scheme.\textsuperscript{117} On September 21, 2006, Hazelton enacted revamped Ordinance 2006-18 and Ordinance 2006-19.\textsuperscript{118}

In response, Plaintiffs filed an amended complaint on October 30, 2006, alleging that the new ordinances infringed on the Constitutional rights of all Hazeltonians, not just illegal aliens.\textsuperscript{119} The complaint is grounded in violations of the Supremacy Clause, Due Process Clause, Equal Protection Clause, civil rights under 42 U.S.C. § 1981, the Federal Fair Housing Act under 42 U.S.C. § 3601, and violations of privacy under the U.S. and Pennsylvania Constitutions.\textsuperscript{120}

In the amended complaint, Plaintiffs sought a temporary restraining order to suspend the Illegal Immigration Relief Act and the Registration for Housing Act, which the court granted after a “delicate balancing of all the elements...to minimize the probable harm to legally protected interests between the time of the preliminary injunction to the final hearing on the merits.”\textsuperscript{121}

The court found that irreparable injury was present in the risk of evictions of young children, and loss of business to name a few.\textsuperscript{122} A monetary value would

\begin{itemize}
\item \textsuperscript{112} Hazleton, Pa., Ordinance 2006-18 (2006).
\item \textsuperscript{113} Hazleton, Pa., Ordinance 2006-19 (2006).
\item \textsuperscript{114} Hazleton, Pa., Ordinance 2006-19, § 3(e).
\item \textsuperscript{115} First Amended Complaint, Lozano v. City of Hazleton, No. 3:06cv1586 (M.D. Pa. Oct. 30, 2006).
\item \textsuperscript{116} Id. at 2.
\item \textsuperscript{117} Id. at 2.
\item \textsuperscript{118} Id. at 2.
\item \textsuperscript{119} Id. at 3.
\item \textsuperscript{120} Id.
\item \textsuperscript{121} Memorandum at 3, Lozano v. City of Hazelton, No. 3:06cv1586.
\item \textsuperscript{122} There are a series of factors to consider: (1) whether the movant will be irreparable injured by denial of the relief, and (2) whether granting preliminary relief will result in even greater harm to the nonmoving party, (3) whether granting the preliminary relief will be in the public interest, and (4) whether the movant has shown a reasonable probability of success on the merits. See generally Crissman v. Dover Downs Entertainment Inc., 239 F.3d 357, 364 (3d Cir. 2001).
\item \textsuperscript{122} Memorandum at 4-5, Lozano v. City of Hazelton, No. 3:06cv1586.
\end{itemize}
not be a sufficient alternative to make the plaintiffs whole.\textsuperscript{123} On the other side of the scale, the court found that the potential harm to the city only amounted to assertions that violent crime in Hazleton is a product of illegal immigration and that the city faces higher costs for social services because of the presence of undocumented persons.\textsuperscript{124} Judge Munley noted in his memorandum that it was in the ‘public interest to protect residents’ access to homes, education, jobs, and businesses. . .moreover since the plaintiff makes claims that implicate constitutionally protected rights\textsuperscript{125} The court recognizes that the complaint asserted “[s]erious” claims and, without considering the probable success of each individual claim, concludes that factors weighed in favor of granting the temporary restraining order.\textsuperscript{126} The temporary restraining order was granted on October 31, 2006, and trial has been set for January 31, 2007.\textsuperscript{127}

III. ANALYSIS

A. Plyler

In the midst of the current immigration debate, tensions have formed between state action and the equal protection afforded to “persons” under the Fourteenth Amendment. State regulations of immigration are limited to effectuating Federal intent.\textsuperscript{128} The extent to which States can create classifications based on alienage is stricter than that of the federal government, and a compelling state interest is required.\textsuperscript{129} As if determining whether a state is mirroring federal law closely enough and whether a compelling state interest exists is not difficult enough task, the protection afforded to unlawful aliens is unclear. Can the reach of the Equal Protection Clause embrace non-citizens to shield them from laws such as those passed in Hazelton, Pennsylvania? What rights do illegal immigrants have under the Fourteenth Amendment that courts should protect?

The level of scrutiny utilized by courts in cases involving lineage require elaboration, although briefly mentioned previously. It is possible to classify the Supreme Court’s rulings in regard to lawful aliens into three categories.\textsuperscript{130} Classifications based on alienage only require a rational basis when drawn by the

\textsuperscript{123} Id. at 4.
\textsuperscript{124} Id. at 6.
\textsuperscript{125} Id. at 8.
\textsuperscript{126} Id. at 10.
\textsuperscript{128} DeCana v. Bica, 424 U.S. 351 (1976).
\textsuperscript{129} Mathews v. Diaz, 426 U.S. 67 (1976).
\textsuperscript{130} NOWAK & ROTUNDA, supra note 34, at § 14.2.
Federal government. Denying aliens competitive civil service could not pass rational basis scrutiny and was in violation of the Fifth Amendment’s Equal Protection because it denied them an opportunity to make a livelihood in a major sector of the economy. Administrative efficiency has not been enough to justify the arbitrary classification.

Strict scrutiny is applied when a state or local government classifies on the basis of alienage when distributing economic benefits or limiting the ability to engage in the private sector. The classification must be “necessary to promote a compelling state interest” to be deemed constitutional. Since lawful aliens pay federal and state taxes, it is usually impossible for the state to meet the threshold of a compelling state interest to justify withholding benefits. Most recently, California’s controversial initiative, Proposition 187, sought “to prevent illegal aliens in the United States from receiving benefits or public services in the State of California,” and was challenged in federal court. Provisions that conflicted with federal law were struck down, and only three sections were found enforceable in later proceedings.

Yet, positions that involve the political process need not be as generously ceded by the state to aliens, who are not citizens; to withhold such entitlement is upheld by a rational basis. The rationale is that careers that entail carrying out governmental policy and exercising the right to govern are reserved for citizens. State laws restricting aliens from practicing as attorneys, engineers, civil servants, and notary publics have been struck down; while laws restricting aliens from serving on the police force, and from teaching in public schools have been upheld.

133. Id.
136. NOWAK & ROTUNDA, supra note 34, at § 14.2.
139. Ambach, 441 U.S. at 80 (applying rational basis scrutiny to a New York citizenship requirement for licensed public school teachers); NOWAK & ROTUNDA, supra note 34, at § 14.2.
Obtaining rights has been a gradual process for *lawful* aliens, just as for other minority groups. Yet, eleven million *unlawful* aliens are unsure as to how the Fourteenth Amendment protects them as “persons” within this country. Has the Equal Protection Clause been violated by a city ordinance that refuses to rent property to alien residents who cannot demonstrate that their presence within the United States is lawful, perhaps because in fact it is not? This question begs the Court’s attention now that over 550 immigration-related provisions have been passed by state and local governments.

Piecing together pertinent precedent shows a favorable situation for unlawful aliens. The Equal Protection Clause is one possible means of honing in on the current controversy of where unlawful aliens reside within the spectrum of Constitutional rights. Prior judicial consideration given to the Equal Protection Clause brings light to the rights that should be granted and not denied without justification to “persons.” The judiciary branch has a long history of intolerance for arbitrary discrimination against suspect, quasi-suspect, and other unpopular groups that may very well carry over to the current controversy. Recently this intolerance has surged.

In 1982, the Court extended the Fourteenth Amendment’s Equal Protection to unlawful, resident aliens, arbitrarily denied free public education under local laws, as a means of curtailing the costs imposed on the state budget. The Court first acknowledged that precedent exists in recognizing unlawful aliens as “persons” under the Constitution. The Court proceeded to establish that precedent, which reads the Fourteenth Amendment as a broad application, embodies the true intent of the Congress when drafting the Clause. The majority opinion internalized the findings of the Joint Committee that debated the draft resolution, which would become the Fourteenth Amendment; quoting a member of that committee, Senator Howard:

> The last two clauses of the first section of the amendment disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State. . .[This] does away with the injustice of subjecting one caste of persons to a code not applicable to another...

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147. Savage, supra note 10, at 305.
149. This article will draw a correlation to mentally retarded individuals (see City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985)) and homosexuals (see Romer v. Evans, 517 U.S. 620 (1996)). Footnote 4 of Carolene Products established that the Equal Protection Clause shall protect “discrete and insular groups.” United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4. (1938).
151. Id. at 210, citing Shaughnessy v. Mezei, 345 U.S. 206, 212 (1953), Wong Wing v. United States, 163 U.S. 228, 238 (1896) and Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).
152. Id. at 214.
will... disable... laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to all persons who may happen to be within their jurisdiction. 153

The Court then turned to scrutinize the local law denying undocumented alien children the right to an education. 154 In a narrow 4-3 decision, the majority strayed from the demarcated categories of scrutiny. 155 Justice Burger adamantly rejected the approach and described it as “patching together bits and pieces of what might be termed quasi-suspect-class and quasi-fundamental rights analysis, the Court spins out a theory custom-tailored to the facts of these cases.” 156 The majority refrained from strict scrutiny because first, unlawful aliens are here voluntarily and therefore, if disfavored, then they are disfavored not by “virtue of circumstance beyond their control.” 157 Second, education is not a fundamental right, explicitly or implicitly, established in the Constitution. 158

Yet, illegal children are distinguishable from their illegal parents so as to compel the Court to elicit more than the general scrutiny. 159 The entry of children is not comparably situated to that of an adult; where an unlawful adult alien may be deterred from entry, it does not follow that an unlawful child alien could be deterred. 160 Therefore, the Court is rightly hesitant to hastily penalize children for their presence within the United States. 161

Likewise, education is distinguishable from mere governmental benefits and social welfare. 162 Although not a fundamental right, education is an extremely cherished right in this country, identified as playing a “fundamental role in maintaining the fabric of our society.” 163 The net effect of educated and economically productive individuals flows to society as a whole. 164 As a primary vehicle for transmitting “the values on which our society rests,” 165 common sense would suggest that it is more likely that educated children will be better assimilated into this country, and that educated children will in turn assist assimilating their parents into this country.

The Court appears extremely attentive to the devastating effect that denying education would have on both the children in question, and the nation as a

153. Id. at 215 (citing to Senator Howard, a member of the House of the draft resolution of the Joint Committee of Fifteen on Reconstruction (H.R. 63) that was to become the Fourteenth Amendment. Cong. Globe, 39th Cong., 1st Sess. 1033(1866)).
154. Id. at 216.
155. Plyler, 457 U.S. at 244 (Burger, J., dissenting).
157. Id. at 220.
158. Id. at 216 n.15.
159. Id. at 220.
160. Id. at 220.
161. Id. at 220.
163. Id. at 220.
164. Id.
165. Id. at 221.
whole. For the nation, denying children education denies them the opportunity to contribute to society.\textsuperscript{166} Even the dissent agrees that it would be “folly—and wrong—to tolerate creation of a segment of society made up of illiterate persons.”\textsuperscript{167} In \textit{Plyler}, the Court found that as a result of alleviating the local Texas community from the burden aliens pose, the entire nation would bear the responsibility of the social and economic costs relating to unemployment, welfare, and crime.\textsuperscript{168} For the individual, denying education would have an “inestimatable toll. . .on the social, economic, intellectual and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost. . .of a statute-based denial of basic education.”\textsuperscript{169}

Although the Court decided \textit{Plyler} on an Equal Protection issue, the power, or lack thereof, that states have to classify based on alienage is tied to the federal government’s plenary power over immigration regulation.\textsuperscript{170} Protectionism has never been a highly regarded justification to regulate what states have no right to regulate.\textsuperscript{171} Likewise, state preservation of resources was not enough to justify denying unlawful aliens the right to education, given that the federal government has plenary power to regulate issues involving immigration.\textsuperscript{172} The Court concluded that denying unlawful alien children of public education is not an effective method of dealing with an urgent demographic or economic problem.\textsuperscript{173} It holds true today that the majority of illegal immigrants are motivated by employment opportunities.\textsuperscript{174} In order for states to pass a law discriminating against unlawful aliens, a state must show more than a rational basis. Specifically, they must show a substantial interest.\textsuperscript{175} The Texas law was “insubstantial in light of the costs involved to these children, the State, and the Nation.”\textsuperscript{176}

Thus, under \textit{Plyler} alone a strong argument is found for striking down the Hazelton housing ordinance. Housing has not been declared a fundamental right, but it most certainly would constitute, along the same line as education, more than a \textit{mere benefit}. “The right to establish a home has long been cherished as

\textsuperscript{166} Id. at 223.  
\textsuperscript{167} Id. at 242 (Burger, J., dissenting).  
\textsuperscript{169} Id. at 222.  
\textsuperscript{170} U.S. CONST. art. I, § 8, cl. 4. See also VICTOR ROMERO, ALIENATED CH. 1 (2005) (explaining how the federal government was allocated plenary power over immigration.)  
\textsuperscript{172} Plyler, 457 U.S. at 202.  
\textsuperscript{173} Id. at 228.  
\textsuperscript{174} Id.  
\textsuperscript{175} Graham v. Richardson, 403 U.S. 365 (1971).  
\textsuperscript{176} Plyler, 457 U.S. at 230
one of the fundamental liberties.” 177 According to Justice Blackmun, it is the “extraordinary nature of the interest involved” that made the Texas legislation fail. 178 Housing, arguably, is even more important than the right to education. 179 Justice Powell would most likely agree that shelter is a bare minimum staple that no “person” should be denied, since he advocates that children should not “be left on the streets uneducated.” 180 Certainly, dissenter Justice Burger would agree given his challenge to the majority: “[i]s the Court suggesting that education is more ‘fundamental’ than food, shelter, or medical care?” 181 Furthermore, Congress enacted the Fair Housing Act of 1968, prohibiting discrimination based on race, religion, color, or national origin in an effort to prevent private and public discrimination in the sale and rental of property. 182

Denying housing undoubtedly shares many of the same devastating effects as lack of education. It would only add to the subclass of the homeless and illiterate persons, which in turn would add to the social problems and economic costs imposed on both state and national governments. It would impede upon the important right to an education, as well as the right to obtain a livelihood and to productively contribute to society—all the things which the Plyler court deemed were important enough to compel further inquiry into the government’s purpose. There is no indication that it would even force unlawful aliens to leave the United States, given the circumstances from which they came, and the obstacles that they most likely confronted immigrating to the States in the first place. 183

Instead of fitting Plyler into the mold of orderly delineated levels of scrutiny, it may be more insightful to read the Plyler court as recognizing that when confronted with Equal Protection challenges, the Court’s priority should be to adhere to the clause’s initial intent. Respecting the purpose of the clause may require a more workable approach as introduced in Plyler and expounded upon in Cleburne. 184 Justice Burger’s dissent in Cleburne essentially argued that the majority muddled the Equal Protection Clause, but Justice Stevens’ concurrence suggests something more was at work. 185

178. Plyler, 457 U.S. at 236 (Blackmun, J., concurring).
179. Id. at 234.
180. Id. at 238 (Powell, J., concurring).
181. Id. at 248 (Burger, J., dissenting).
183. See N.C. Aizenman, Young Migrants Risk All to Reach U.S., WASH. POST, Aug. 28, 2006, at A01 (reporting on the growing number of minor immigrants. Louis Santo, 16 years old came to the U.S. by the same higher wages that attract adults and risked murder, rape, robbery, corrupt immigration officers, death by heat exhaustion, etc. Santos was beaten and robbed by uniformed Mexican officials.); see also Lindsay G. McCullough & Alexandra Garcia, Journey to the Border, 2006, http://www.washingtonpost.com/wp-rv/world/interactives/journeyborder/index.html (multimedia production depicting the journey faced by Guatemalan immigrants such as death by drowning, amputations by trains, deportation centers etc).
185. Id. at 459 (Marshall, J., dissenting); Id. at 451 (Stevens, J., concurring).
B. City of Cleburne v. Cleburne Living Center

In *City of Cleburne v. Cleburne Living Center*, the Court united to unanimously strike down the City of Cleburne’s application of a zoning ordinance that denied a special use permit required to construct a home for mentally retarded individuals. The Court refused to identify the mentally ill as a suspect class, and since no fundamental right was involved, the proper standard required that “legislation must be rationally related to a legitimate government purpose.” Yet, the Court did not simply apply a rational basis test. Justice Marshall, who concurred in judgment but dissented in part, referred to the approach as “second-order rational review.” Others have referred to it as “rational basis with teeth.” However labeled, the *Cleburne* Court suggests that one need not be part of a suspect, or even a quasi-suspect, group in order to be protected by the Fourteenth Amendment.

Justice Powell, concurring in *Plyler*, likened unlawful aliens to illegitimate children to support that Court’s conclusion. It is not a far stretch to find support in *Cleburne* with respect to status of mentally retarded: both groups are susceptible to invidious legislation. In the late nineteenth and early twentieth century those suffering from mental retardation were perceived to be a menace to society and held responsible for “‘many, if not all,. . .social problems.’” Justice Marshall equated the subsequent “bigotry” to the “worst excesses of Jim Crow.” Fear induced practices that “nearly extinguished their race.” Furthermore, the mentally retarded were excluded from public schools and deemed “unfit for citizenship.” Justice Marshall urged that, “excluding them where the elderly, the ill, the boarder, and the transient are allowed, are not substantial or important enough to overcome the suspicion that the ordinance rests on impermissible assumption or outmoded and perhaps invidious stereotypes.” The City of Cleburne’s zoning ordinance had no additional

186. *Id.* (majority opinion).
187. *Id.* at 446.
188. Marshall was joined by Brennan and Blackman; their opposition was directed at the Majority’s refusal to identify mentally disabled as a “suspect group.” *Id.* at 460-468, and failure to strike the statute in its entirety, rather than as applied in to this group. *Id.* at 474.
190. American Fed’n. of Gov. Employees, v. United States, 195 F. Supp. 2d 4, 12, citing *Romer v. Evans*, 517 U.S. 620 (1996) and *Cleburne*, 473 U.S. at 432, “Even though the subject classification is usually upheld under the rational basis standard of scrutiny, on occasion this test will result in the invalidation of a law or statute. As such, the rational basis test has some teeth because it leads to the abrogation of a law whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.” *Id.* at 12.
192. *Id.* at 462 n.8 (Marshall, J., dissenting).
193. *Id.*
194. *Id.* at n.11.
195. *Id.*
196. *Id.* at 465.
effect but to “perpetuate the ignorance, irrational fears, and stereotyping that long have plagued [the mentally retarded].” 197

Despite the “lengthy and tragic history”198 suffered by the mentally ill, the Court refused to allocate “suspect” status because (1) although immutably different, the “State’s interest in dealing with and providing for them is…legitimate”; 199 (2) lawmakers have been addressing their unique plight; 200 (3) they are not politically powerless, because they have attracted attention of legislatures; 201 and (4) if mentally retarded individuals are deemed suspect, there would be a windfall effect to deem other disabilities as suspect. 202 The Court has been historically weary about allowing legislation that perpetuates stereotypes from standings, 203 finding that objectives, such as “a bare. . .desire to harm a politically unpopular group,” are not legitimate state interests. 204 For this reason, unlawful aliens should be given the same inquiry as the mentally retarded in Cleburne to guard against legislation whose principal purpose is to enact harm on individuals.

In Cleburne, the state’s purported justification only amounted to “irrational fears,” 205 “unsubstantiated by factors, which are properly cognizable.” 206 Such fears stemmed from nearby elderly residents, potentially harassing students, doubts regarding the legal responsibility for possible actions taken by the mentally retarded, and concerns regarding population density and congestion. 207 The Court restated, “Private biases may be outside the reach of the law, but the law cannot directly or indirectly, give them effect.” 208

The most insightful explanation to the Court’s ruling came from Justice Stevens, who stated that, “cases reflect a continuum of judgmental responses to differing classification. . .[S]ome cases do not fit well into sharply defined classifications.” 209 Inquiry begins with:

199. Id. at 442 (majority opinion).
200. Id. at 443.
201. Id. at 445.
202. Id.
203. For this reason the Court holds gender classifications to an intermediate standard since such classifications are most likely a result of archaic stereotypes, which the court wishes not to perpetuate. See Craig v. Boren, 429 U.S. 190 (1976) (striking down a statute that prohibited the sale of 3.2 percent beer to males under 21, and to females under 18 because the government did not show an important interest substantially related to its goal).
206. Id. at 448.
207. Id. at 448-450.
Certain basic questions: What class is harmed by the legislation, and has it been subjected to a “tradition of disfavor” by our laws? What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment? In most cases the answer to these questions will tell us whether the statute has a “rational basis.” The trend is that racial classifications will normally never pass, economic almost always do, but cases involving alienage (footnote omitted), gender (footnote omitted) or illegitimacy (footnote omitted) are mixed. This is because “the characteristics of these groups are sometimes relevant and sometimes irrelevant to a valid public purpose, or, more specifically, to the purpose that the challenged laws purportedly intended to serve.”

“Rational” to Stevens means a requirement that an impartial lawmaker could logically believe the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class.

Not presumptively irrational, classifications based on mental retardation may be necessary. For example, depending on the mental capacity of an individual, restrictions on the right to drive cars or to operate machinery may be rational. Likewise, laws that restrict political interests are reasonable because they are a privilege of citizenship. Laws that restrict shelter signal the Court to ask, “What is the government’s purpose?” When a city grows can a portion of the population be singled out? The only interest appears to be an “irrational fear” that immigrants bring crime and reduce the quality of life for citizens.

C. Romer v. Evans

The Court bared its teeth again in Romer v. Evans, when Colorado proposed Amendment 2 to the Colorado Constitution with the effect of prohibiting all legislation aimed at protecting homosexual persons from discrimination. For the majority, such treatment and sentiment towards a group evoked the words of Justice Harlan, in his dissent to the majority’s decision in Plessy v. Ferguson that upheld racial segregation and perpetuated racism, “The Constitution neither knows nor tolerates classes.” His words became the spirit within the Equal Protection Clause.

Colorado argued that the amendment merely denied homosexuals special rights. Yet, the Court observed that the amendment revokes protection for no

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211. Id. at 452.
212. Id. at 454.
216. Id. at 623, quoting Plessy v. Ferguson, 163 U.S. 357, 559 (1896) (Harlan, J., dissenting).
217. Id. at 626.
other minority group but homosexuals, and it denied them protection from both the private sector and the government. It was upon homosexuals only that a burden was imposed, disabling them from seeking “safeguards that others enjoy or may seek without constraint.” The Court need not go further than rational scrutiny since neither a suspect group nor a fundamental right was involved. As Cleburne illustrates, the Court did not need to find homosexuals a suspect group or even a quasi-suspect group in order to invoke their Fourteenth Amendment protection because “Amendment 2 fails, indeed defies, even this conventional inquiry.”

It is the relationship between the classification adopted and the purpose that is sought by the legislation that gives “substance to the equal protection clause,” and this is where the Court’s inquiry begins. Rational basis scrutiny does not strip the Court of its ability to investigate, as was illustrated in Cleburne. The Court found that the Amendment was too broad because it acted as a blanket denial of protection, and was too narrow because it targeted one group based on one trait. Laws that disfavor politically unpopular groups by imposing general hardships run afoul of the principle of equal protection. In fact, they raise the “inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.” The alleged justifications the state proposed—to respect citizens, landlords, and employers who have personal or religious objections to homosexuality, and to conserve resources to fight discrimination against other groups— did not satisfy the Court. “[T]o make them unequal to everyone else” was not a proper legitimate end.

As would be expected from a bold judicial move, the dissent was ardent. The majority was accused of “imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected, pronouncing that ‘animosity’ toward homosexuality, is evil.” “[T]oday’s opinion has no foundation in American constitutional law, and barely pretends to.” Justice Scalia’s dissent is reminiscent of Chief Justice Burger’s adamant dissent in Plyler, “the Constitution does not constitute us as ‘Platonic Guardians’ nor does it vest in this Court the authority to strike down laws

218. Id. at 627.
219. Id. at 629.
220. Id. at 631.
222. Id. at 632.
223. Id.
225. Romer, 517 U.S. at 633.
226. Id. at 634.
227. Id.
228. Id. at 635.
229. Id.
231. Id. at 653.
because they do not meet our standard of desirable social policy, ‘wisdom,’ or ‘common sense.’” \(^{232}\)

Yet, in fact such ground-breaking decisions are exactly what American constitutional law emphasizes, and the judicial branch of government is best-suited for the role of neutral mediator to unmask invidious and harmful legislation aimed at discrete and insular persons.\(^{233}\) When legislation mirrors the unsubstantiated fears or personal moral beliefs of society to disfavor persons who are not like them, the Court should use its teeth to break the perpetual chain of stereotypes:

Courts... do not sit or act in a social vacuum... but history makes clear that constitutional principles of liberty, property, and due process, evolve over time... Shifting cultural, political, and social patterns at times come to make past practices upon which American society rests, an inconsistency legally cognizable under the Equal Protection Clause. ... Evolving standards of equality come to be embodied in legislation... Moreover, even judicial action has catalyzed legislative change.\(^{234}\)

Notions of equality and liberty are not permanently fixed in law, but wane and wax according to public sentiment.\(^{235}\) Given the diversity of this nation, public sentiment will never be universal. In times of turmoil, dislikes for “others” will swell, and the courts will hopefully intervene when hate obscures the Constitutional principles that founded this country.\(^{236}\)

When the Court is forced to address ordinances such as those enforced in Hazelton, Pennsylvania, the Court should use its teeth to get to the State’s core purpose, closely scrutinizing the motivation behind the burdens. The Plyler Court supports the notion that the Equal Protection Clause extends to unlawful, alien children when legislation would have a detrimental and irreversible effect on the individual and society.\(^{237}\) Housing should constitute an important right that, if denied, would have detrimental effects on both the individual and nation. The Cleburne Court adds that legislation, which harms persons who have a history of being stigmatized in this nation, and which seeks to further burden that group, is invalid.\(^{238}\) Immigrants are growing ever more stigmatized, and allowing ordinances such as Hazelton’s only perpetuates the illegitimate fears that play off these stereotypes. In Romer the Court again invalidated legislation

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236. A good, but extreme example is found in the Japanese Internment camp cases, where the court upheld abuses of Japanese citizens by deferring to the military. See Hirabayashi v. United States, 320 U.S. 81 (1943); Korematsu v. United States, 323 U.S. 214 (1944); and Ex parte Mitsuye Endo, 323 U.S. 283 (1944).
238. Cleburne, 473 U.S. at 432.
that sought to make persons unequal and unwelcome in the state.\textsuperscript{239} The effect of Hazelton’s ordinance can only lead to an inference that it is meant to vanish an entire population from the community, and it was motivated by fear that immigrants cause crime. If legislation that perpetuates the marginalization of persons within the meaning of the Constitution is not struck for its invidious nature then the door opens to a wide range of abuses.

Even if the states were effectuating federal intent, their reach was too broad. As identified in \textit{Plyler}, immigration is driven by employment and not housing.\textsuperscript{240} Thus, the effect of the ordinance would be devastating to the nation and exemplifies why the Federal government is best suited for implementing regulations on immigration, and not the States; immigration is not a matter for ad hoc State regulation.

\section*{IV. Conclusion}

Regardless of individual beliefs regarding the immigration debate, the Fourteenth Amendment is a common ground. The Equal Protection Clause of the Fourteenth Amendment protects all “persons” within U.S. territory.\textsuperscript{241} Although the Equal Protection Clause does not require that all laws treat all persons equally, it does require that laws are constitutional and that the classification, at the very least, be rationally related to the government’s purpose.\textsuperscript{242} In \textit{Plyler}, the Court extended the Equal Protection Clause to illegal aliens and thus guaranteed them protection against arbitrary and invidious classifications.\textsuperscript{243} More recently, the Court has struck down legislation against minority groups under scrutiny less than strict.\textsuperscript{244} In \textit{Cleburne} the Court found that mentally retarded individuals have suffered from a long history of false stigmatism.\textsuperscript{245} Local legislation, perpetuating those fears, was not a legitimate state interest.\textsuperscript{246} Recognizing legislation as purely fear-based was not an exceptional holding. The Court once again invalidated Colorado legislation that sought to harm the gay and lesbian population in \textit{Romer}.\textsuperscript{247} Laws that disfavor politically unpopular groups by imposing general hardships run afoul to the principle of equal protection.\textsuperscript{248} It is with this notion in mind that laws regarding immigration should be drafted and it is with this idea in mind that laws should be scrutinized. Laws similar to those passed in Hazleton, Pennsylvania, cannot pass

\begin{thebibliography}{9}
\bibitem{RomervEvans} Romer v. Evans, 517 U.S. 620 (1996).
\bibitem{Plyler} \textit{Plyler}, 457 U.S. at 219.
\bibitem{U.S.Const.amend.xiv} U.S. CONST. amend. xiv
\bibitem{NOWAK&ROTUNDA} NOWAK & ROTUNDA, supra note 34, at §14.2.
\bibitem{Plyler1} \textit{Plyler}, 457 U.S. at 202.
\bibitem{Romer} \textit{Romer}, 517 U.S. at 620; City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).
\bibitem{Cleburne} \textit{Cleburne}, 473 U.S. at 462 n.8 (Marshall, J., dissenting).
\bibitem{Romer1} \textit{Romer}, 517 U.S. at 620.
\bibitem{Id} \textit{Id.} at 634.
\end{thebibliography}
even rational basis scrutiny when their sole purpose is to harm politically, socially and economically unpopular groups.