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Articles

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The Evolution and Entanglement of the Establishment Clause

Alden Kelly

Although religious values and institutions play a key role in American daily life, the separation of church and state is also a staple value in the United States's collective conscience. The first American colonies were quick to establish an official religion, yet throughout the evolution and founding of the United States, the need for this separation became increasingly clear.[1] The founders recognized the two-sided nature of religion in the public sphere, with its uplifting and unifying structure as well as its extreme divisiveness and tendency to incite conflict.[2]

The Establishment Clause, as a function of the First Amendment, works with the Free Exercise Clause to ensure religious freedom within the United States.[3] Thomas Jefferson, in particular, was a man of religious conviction who believed the federal government of the new United States should have no business interfering with his personal beliefs and relationship with God. Jefferson's staunch principles are exhibited in a letter written to the Danbury Baptists in 1802, in which Jefferson mentions a "wall of separation between church and state."[4] The Supreme Court borrowed this phrase in their ruling on the Establishment Clause of the U.S. Constitution 145 years later in the *Everson v. Board of Education.*[5] The Court utilized this wall metaphor regarding the application of government funding to school transportation, stating that as long as

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[1] John R. Vile, *Established Churches in Early America*, The First Amendment Encyclopedia (Dec. 21, 2020), https://mtsu.edu/first-amendment/article/801/established-churches-in-early-america.

[2] Tom Rosentiel, *Religion and Secularism: The American Experience*, Pew Research Center (Dec. 3, 2007), https://www.pewresearch.org/2007/12/03/religion-and-secularism-the-american-experience/.

[3] U. S. Const. amend. I.

[4] Letter from Thomas Jefferson to Danbury Baptist Association (Jan. 1, 1802) (on file with the Library of Congress).

[5] *See* 330 U.S. 1, 16 (1947).

funding for parochial schools stops at the walls of the school, the Establishment Clause is not violated.[6] Since the incorporation of the Establishment Clause in *Everson*, the Supreme Court's interpretation of the clause has changed drastically from a strict separationist view to the current view of the Court, which allows for religion to be intertwined with the government in a much wider set of situations.

Professor Michael McConnell details that

> [b]efore Independence, the Church of England was formally established by law in the five southern colonies (Maryland through Georgia). It also held that status, without explicit legislative authorization, in four counties of metropolitan New York. In Massachusetts, Connecticut, New Hampshire, and Vermont, localized establishments were formed, where the majority within each town could select the minister and hence the religious denomination.[7]

Though state-established religion was commonplace in American life, the Court in *Everson* disregarded this historical practice when they incorporated the Establishment Clause against the states.[8] The argument over state-sponsored religion was an important aspect of the founding, but, as McConnell remarks, "[t]he Justices never analyzed any of the books, essays, sermons, speeches, or judicial opinions setting forth the philosophical and political arguments in favor of an establishment of religion, and relied on only one, perhaps unrepresentative, example from among the hundreds of arguments made against the establishment."[9] This example was the rejection of Patrick Henry's Assessment Bill in Virginia of 1785 and the adoption of Thomas Jefferson's Bill for Establishing Religious Liberty.[10] *Everson* was the first case of many Establishment Clause cases to come before the Supreme Court, and the historical rationale, or lack thereof, that the Court used demonstrates how difficult it found

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[6] *Id.*
[7] Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part 1: Establishment of Religion,* 44 Wm. & Mary L. Rev. 2105, 2110 (2003).
[8] *See generally Everson*, 330 U.S. at 1.
[9] McConnell, *supra* note 7 at 2108.
[10] *Id.*

interpreting these questions to be, especially depending on the political and religious climates of the time.

Shortly after *Everson*, many Establishment Clause cases came before the Supreme Court, the first being *McCollum v. Board of Education*.[11] *McCollum* tested the principle of "released time" in Illinois, where public schools had been authorized to bring in religious teachers for optional religious instruction during the school day.[12] Vashti McCollum, an atheist, sued, complaining that her son was being ostracized for choosing to not attend the religious instruction.[13] The Court decided *McCollum* along the same lines as *Everson,* holding that the program violated the Establishment Clause because of the use of taxpayer-supported buildings and materials to teach children religion within public school walls.[14] This case was the second instance in which the Court utilized a strict separationist approach.

As Professor Erwin Chemerinsky describes in a *Northwestern University Law Review* article, "the strict separationist approach to the Establishment Clause holds that, to the greatest extent possible, government and religion should be separated. Government should be, as much as possible, secular; religion should be entirely in the private realm of society."[15] A similar case, *Zorach v. Clauson,* tested the same principle, except religious instruction was held outside of the physical public school building.[16] Adhering to the principle of a strict wall between church and state, the Court found that the released time program in *Zorach* did not violate the Establishment Clause, as the religious instruction took place outside school walls.[17] The Court's rulings on the Establishment Clause and its connection with public schools remained consistent up until 1971, as justices held a strict separationist view that religion must stop at the school door.

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[11] 333 U.S. 203 (1948).
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] Erwin Chemerinsky, *A Fixture on a Changing Court: Justice Stevens and the Establishment Clause*, 106 Nw. U. L. Rev. 587, 589 (2015).
[16] 343 U.S. 306 (1952).
[17] *Id.*

The next shift in the Supreme Court's interpretation of the Establishment Clause came in *Lemon v. Kurtzman.*[18] In deciding the case, the Court announced what is now referred to as the *Lemon* test.[19] Chief Justice Warren Burger described the three-pronged test in his majority opinion stating, "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[20] The Court ruled that the Pennsylvania and Rhode Island laws did not violate the first prong of the test, as the funding towards the non-public schools was completely for secular educational purposes only.[21] The justices did not rule on the second prong of the test. However, the majority ruled that the statutes created an excessive entanglement between government and religion.[22] In order to maintain a separation of church and state with the non-public schools and taxpayer funding, the government would have to become overly involved in the teachings of religious schools, thus risking a violation of religious freedom within those schools. The Court recognized that the government's financial involvement in the operations and teachings of private schools would create too close of a relationship between these entities that are intended to be separate by the Establishment Clause. The *Lemon* test was utilized by the Court in various other situations and cases, such as *Stone v. Graham*[23] and *Widmar v. Vincent*.[24] The test is still relevant to some members of the modern Court, although other methods of ruling on the Establishment Clause have become increasingly valuable in determining the balance of religion in the public sphere.

Chief Justice Burger abandoned the *Lemon* test in his majority opinion in *Marsh v. Chambers*,[25] marking the next shift in how the

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[18] 403 U.S. 602 (1971).
[19] *Id.*
[20] *Id.* at 613.
[21] *Id.*
[22] *Id.*
[23] 449 U.S. 39 (1980).
[24] 454 U.S. 263 (1981).
[25] 463 U.S. 783 (1983).

Supreme Court has interpreted the Establishment Clause. Ernest Chambers, a member of the Nebraska state legislature, challenged the practice of chaplaincy in legislative meetings in federal court.[26] Before legislative sessions, a prayer was offered to lawmakers by a chaplain paid for by the state. If Burger were to have used the *Lemon* test in his ruling on *Marsh,* it is quite possible that the outcome of the case would have been very different. However, Burger structured the Court's argument on the foundations of historical custom, noting that because the tradition of chaplaincy in legislative sessions could be traced back throughout the history of the founding, it had become "part of the fabric of society," and did not constitute a violation of the Establishment Clause.[27] After relying solely on historical practices in deciding *Marsh,* the Court reverted back to other legal principles and the *Lemon* test in deciding a violation of the Establishment Clause. There was no clear test or answer for justices in applying precedent to cases. In *Edwards v. Aguillard*,[28] the Court struck down a Louisiana law prohibiting the teaching of evolution in public school classrooms if those classes did not also incorporate "creation science" to the curriculum. The Court utilized the *Lemon* test this time, ruling that the Louisiana law failed all three prongs of the test.[29] If the Court were to have followed precedent from *Marsh*, it is possible the Court would have ruled in favor of the Louisiana law due to the "historical background" of the teaching of creation science, particularly in deeply religious areas of the southern United States.[30]

In an article published by the Indonesian Journal of International and Comparative Law, Professor Kent Sparks states, "Justices have employed two additional Establishment Clause tests that supplement, and arguably supplant, the *Lemon* test: the endorsement test announced by Justice O'Connor's concurrence in *Lynch v. Donnelly* and the coercion test announced by Justice

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[26] *See generally id.*
[27] *Id.* at 792.
[28] 482 U.S. 578, 581 (1987).
[29] Kent Sparks, *The New Establishment Clause: The Risks of Elevating Historical Practices Above Legal Principles* 2 Indonesian J. of Int. & Comp. L. 369 (2015).
[30] *Marsh*, 463 U.S. at 793.

Kennedy's partial dissent in *County of Allegheny v. American Civil Liberties Union*."[31] Heading into the modern era of Supreme Court Establishment Clause jurisprudence, there is still a level of inconsistency as to what legal principles are applicable in the many different cases brought before the court. In *Lynch*, the Court was presented with a unique question dealing with a large Christmas display featuring religious symbols in the shopping district of Pawtucket, Rhode Island.[32] Concurring with the majority opinion, Justice Sandra Day O'Connor wrote, "[the] more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."[33] O'Connor's opinion in *Lynch* began to shape the Court's new endorsement test for Establishment Clause cases. The Court found that the religious symbols were viewed in the context of the holiday season and the history behind the holiday, and were therefore not intended to advance the beliefs of any particular sect.[34] It was decided that the display did not threaten the relationship between government and religion, and using O'Connor's logic, did not constitute an endorsement of religion by the state. Several years later, a very similar case, *County of Allegheny v. ACLU*[35] was brought to the Supreme Court. The case involved overtly religious symbols within government property—a nativity scene in a courthouse and a large menorah outside a city-operated building. The Court held the nativity scene to be in violation of the Establishment Clause, as the phrases printed on the display and the display's placement in the county courthouse overtly endorsed Christianity.[36] Justice Kennedy, in a partial concurrence, noted "[the] government may not coerce anyone to support or

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[31] Sparks, *supra* note 29 at 377.
[32] *See* Lynch v. Donnelly, 465 U.S. 668 (1984).
[33] *Id.* at 668 (O'Connor, J., concurring).
[34] *See generally id.*
[35] 492 U.S. 573 (1989).
[36] *See id.*

participate in any religion or its exercise."[37] Justice Kennedy fleshed out what is now referred to as the "coercion test" in the case of *Lee v. Weisman*.[38] *Lee* invalidated the practice of religious benediction and invocation by clergy members in public school gatherings. Kennedy wrote, "even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma."[39] Kennedy recognized the psychological influences placed upon students in particular and noted that this pressure was unquestionably equivalent to coercion to participate in religious activity. Professor Chemerinsky summarizes this new era of Establishment Clause jurisprudence in the *Northwestern University Law Review*, writing,

> Although the strict separationist approach was the dominant view on the Court for several decades, those appointed after Justice Stevens rarely held this view. Some, like Justices Sandra Day O'Connor and Stephen Breyer, believe that the government violates the Establishment Clause only if it symbolically endorses religion or a particular religion. Others, like Justices Antonin Scalia, Anthony Kennedy, and Clarence Thomas, believe that little violates the Establishment Clause: the government acts unconstitutionally only if it literally establishes a church or coerces religious participation.[40]

In the 21st century, American life has become increasingly secular. However, with the additions of Scalia, Kennedy, Thomas, and others, the Supreme Court made significant room for the intertwining of government and religion.

In *Santa Fe Independent School District v. Doe*,[41] strict interpretationist logic reminiscent of *Everson* was used in the modern Court's ruling. Ruling 6–3, the Court struck down Santa Fe ISD's

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[37] *Id*. at 660 (Kennedy, J., concurring in part).
[38] 505 U.S. 577 (1992).
[39] *County of Allegheny*, 492 U.S. at 587.
[40] Chemerinsky, *supra* note 15 at 587.
[41] 530 U.S. 290 (2000).

policy allowing student-led prayer at football games.[42] The majority concluded that prayer on government-sponsored property at a school-sponsored event, even if initiated by students, shows an endorsement of religion.[43] In this situation, prayer constituted public speech, unlike previous cases where prayer had been characterized as private speech such as in *Widmar*. Dissenting from the majority, Chief Justice Rehnquist, Justice Scalia, and Justice Thomas argued that the Court has bristled with hostility to all things religious in public life, a nod toward their narrow interpretation of the Establishment Clause.[44] This belief was further reflected when the conservative majority on the bench upheld a school voucher program in Ohio that provided children and families the opportunity to attend parochial schools instead of the failing public school system. Writing for the majority opinion in *Zelman v. Simmons-Harris*, Rehnquist stated that

> the Ohio program is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of true private choice.[45]

Two of the phrases Rehnquist uses—"neutral with respect to religion" and "true private choice"—are essential to the Court's new framework of Establishment Clause rulings. However, comparing the rulings of the conservative majority in *Doe* and *Zelman* present an odd contradiction in the justices' ideas of a "true private choice." Unless Kennedy's ideas of coercion and the reality of psychological pressures placed upon students are disregarded, it is puzzling how Scalia, Thomas, and Rehnquist viewed school-endorsed prayer as a private choice, or neutral in any capacity.

The Court answered questions dealing with the Establishment Clause and symbolic speech several times throughout the late 1990s

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[42] *Id.*
[43] *Id*.
[44] *Widmar*, 454 U.S. at 267.
[45] 536 U.S. 639, 663 (2002).

and early 2000s. In 1995, the Court upheld private religious speech by the Ku Klux Klan in the state house plaza in Columbus, Ohio.[46] The Court defined the plaza as a public forum, where any group or individual can express their personal views without government regulation.[47] Erwin Chemerinsky described the case, *Capitol Square Review and Advisory Board v. Pinette*, as

> illustrative because it reveals the divisions on the Court regarding the Establishment Clause. Justice Scalia and the plurality do not see a constitutional problem with religious symbols on government property, so they saw the exclusion of the cross as a content-based restriction of speech. Justice O'Connor focused on whether the religious symbol was a government endorsement of religion. Justice Stevens saw all religious symbols on government property as an affront to the Establishment Clause and used his dissent in *Pinette* to reject the Court's movement towards a symbolic endorsement test.[48]

Several years later, the Court was brought a similar question in the case of *Van Orden v. Perry*.[49] Thomas Van Orden sued the State of Texas, arguing that the placement of a monument displaying the Ten Commandments on the grounds of the Texas state capitol violated the Establishment Clause.[50] To determine this question of symbolic speech, the Court reverted to the previous precedent of historical importance and tradition. As previously ruled in *Marsh*, the Court recognized the Ten Commandments as a staple of American government and history, and therefore, "simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause."[51]

These aforementioned cases demonstrate the lack of formal, applicable principles within the questions on the Establishment Clause. From the *Lemon* test, to historical tradition, endorsement and coercion,

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[46] Capitol Square Review & Advisory Board v. Pinette, 515 U.S. 753 (1995).
[47] *Id.*
[48] Chemerinsky, *supra* note 15 at 594.
[49] 545 U.S. 677 (2005).
[50] *Id.*
[51] *Id.* at 690.

the reasoning applied to each case prompted the use of a different test or principle. The extremely complicated background of the applicability of these tests lead to the Court granting certiorari in the case of *Town of Greece v. Galloway*.[52] This case was similar to *Marsh* in that it dealt with a prayer held in a small town board meeting. The Court diverged from previously cited principles in this decision, in a similar manner to how Burger diverged from his own *Lemon* test. The Court held that anytime that a relevant religious historical practice exists, the Establishment Clause is not transgressed based solely on the existence of that traditional practice.[53] Indeed, the Court went so far as to expressly make all other principle-based inquiries irrelevant when the case involves a religious historical practices—an unprecedented mandate that fundamentally changes Establishment Clause jurisprudence moving forward.[54]

The new additions to the conservative majority, Justices Gorsuch and Kavanaugh, have reflected the justices they replaced, Scalia and Kennedy, in their rulings on Establishment Clause questions. Cementing a Catholic majority in the Court, the rulings these conservative justices grew up with from the Warren and Burger Courts are reflected in their inclination to allow religion in the public sphere. In *American Legion v. American Humanist Association*,[55] Gorsuch strictly ruled in a Scalia-like fashion, finding that individuals do not have the standing to challenge religious symbols on government-operated property. Kavanaugh took the position many conservative justices had pushed before him, rejecting the *Lemon* test entirely.

On Liberty, one of the most important philosophical works by John Stuart Mill, discusses the practical application of the First Amendment and states

> We have a right, also, in various ways, to act upon our unfavourable opinion of any one, not to the oppression of his individuality, but in the exercise of ours. We are

[52] 572 U.S. 565 (2014).
[53] *Id.* at 572–3.
[54] Sparks, *supra* note 29 at 371.
[55] 588 U.S. ___ (2019).

> not bound, for example, to seek his society; we have a right to avoid it (though not to parade the avoidance), for we have a right to choose the society most acceptable to us.[56]

Since the pilgrims stepped foot on American soil, people have migrated to the United States so they may establish and exercise their religion of choice without fear of persecution. The freedom that Americans hold to associate themselves within the religious community of their choosing is a value held with the highest importance to the Founders, as it was included in the very first amendment to their United States Constitution. While the applied principles used by the Supreme Court have evolved in a more unique way than traditional precedent, the wall of separation between church and state, as characterized by Thomas Jefferson, remains deeply ingrained within the fabric of a free American society.

[56] John Stuart Mill, On Liberty 71 (1859).

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The Gambia v. Myanmar: Genocide of the Rohingya?

Vibhu Pahuja & Sahaj Mathur[1]

Abstract

Myanmar has been the subject of immense international scrutiny in recent decades for its treatment of its Rohingya Muslim population. This discourse has culminated in the case before the International Court of Justice between the Gambia and Myanmar to evaluate whether it has committed genocide against its Rohingya population. The paper explores Myanmar's responsibility for its actions against its Rohingya population and analyses the development of genocide law to evaluate the situation in the Rakhine State. It explores issues relating to the jurisdiction of claims of genocide through which Myanmar could be held accountable for. It further assesses the problems of proving the commission of genocide in Myanmar, the high threshold for proving the commission of genocide, and the problems of relying on U.N. Fact-Finding Mission Reports as conclusive evidence. Unlike others, the paper argues that the International Court of Justice is unlikely to find Myanmar guilty of genocide. In light of this negative verdict, the paper analyses how international law and politics could nevertheless help resolve the situation in the Rakhine State.

I. Introduction

The prohibition on the commission of genocide is a *jus cogens* norm under international law.[2] *Jus cogens* norms refer to principles of international law that are so fundamental that they bind all states, not

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[1] The authors would like to thank Prabal De for helping the authors with resources and for inspiring the paper. The authors would also like to thank Ritwik P. Srivastava (Student, National Law Institute University Bhopal) and Atul Alexander (Assistant Professor of Law, West Bengal National University of Juridical Sciences) for their comments.

[2] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. and Montenegro), Judgment, 2007 I.C.J. Rep. 43 (Feb. 26) [hereinafter *Bosnia-Serbia Genocide Judgment*].

allowing for any derogations from the peremptory norm.[3] Assessing the situation of the Rohingya in Myanmar, scholars, human rights activists, and other international organizations consistently maintain that Myanmar's actions amount to genocide.[4] In light of these conclusions, the Gambia lodged an application against Myanmar in the International Court of Justice (I.C.J.) under Article 36 of the I.C.J. statute, alleging that the atrocities by Myanmar against the Rohingya in the Rakhine State violate the Convention on the Prevention and Punishment of the Crime of Genocide.[5]

The paper argues that the I.C.J. is unlikely to find Myanmar guilty of committing the crime of genocide. To coherently assess this claim, the paper is divided into seven sections. Section II provides a comprehensive conceptual analysis of the law of genocide under international law, emphasizing aspects that are of relevance to the Gambia's assertions. Section III provides an overview of the case before the International Court of Justice and the current situation of the Rohingya Community in Myanmar. Section IV analyzes the international law framework under which claims of genocide are assessed, particularly relating to the extent of the Court's jurisdiction and standard of proof that arises in the case against Myanmar. Section V analyzes the threshold required for proving the commission of

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[3] Kamrul Hussein, *The Concept of Jus Cogens and the Obligation Under The U.N. Charter*, 3 Santa Clara J. Int'l L. 72 (2005).

[4] Katie Young, *Who are the Rohingya and What is Happening in Myanmar?*, Amnesty International (Sept. 26, 2017), https://www.amnesty.org.au/who-are-the-rohingya-refugees; Office of the United Nations High Commissioner for Human Rights (OHCHR), Independent International Fact-Finding Mission on Myanmar Sess. 39 (2018); Beth Van Schaack, *Determining the Commission of Genocide in Myanmar*, 17 JICJ 285, 292-293 (2019); Organisation of Islamic Cooperation, *O.I.C. Welcomes first hearing of Legal Case on accountability for crimes against Rohingya*, Organisation of Islamic Cooperation (Nov. 24, 2019), https://www.oic-oci.org/topic/?t_id=22925&t_ref=13830&lan=en; Steven Kiersons, *Burma: State Appartus at the Center of Recent Violence and Persecution*, The Sentinel Project (Dec. 22, 2014), https://thesentinelproject.org/2014/12/22/burma-state-appara.tus-at-the-center-of-rec ent-violence-and-persecution/; Azeeb Ibrahim, The Rohingyas: Inside Myanmar's Genocide 13-4 (Hurst ed., 2018), 2016.

[5] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.) Order, 2020 I.C.J. Rep. 178 (Jan. 23).

genocide and explores whether Myanmar has committed genocide under international law. Section VI explores the provisional measures issued by the International Court of Justice to analyze the situation of the Rohingya Community in the interim of the proceedings. Section VII explores the implications of the case on international law and policy and analyses the future of the Rohingya in the aftermath of the case. Section VIII provides concluding remarks to the paper.

II. Genocide in International Law

The term "genocide" colloquially refers to the mass extermination of a particular group based on ethnicity and to dissolve the group both socially[6] and culturally.[7] The initial definition was coined in 1933 by Raphael Lemkin who labeled the term "genocide" and had an unprecedented contribution to the development of the law of genocide. Lemkin derived his definition of genocide by studying the systematic range of attacks conducted by Ottoman Turks on Armenians; these actions not only comprised a systematic killing of the Armenians but also death walks, sexual enslavement and forcible conversion of children to be raised as Muslims.[8] In 1933, Lemkin subsequently tried to include Acts of Barbarity and Acts of Vandalism as crimes. However, his plea was unsuccessful.[9] In 1940, Lemkin established a formal and precise definition of genocide, which stated:

> genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, to annihilate the groups themselves.[10]

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[6] Kai Ambos and Otto Triffterer, Commentary of the Rome Statute of the International Criminal Court 34 (Beck/Hart, 2nd ed. 2008) 2001.

[7] Draft Convention on the Crime of Genocide, June 26, 1947, U.N. Doc. E/447, 6.

[8] Ben Kiernan, Blood and Soil: A World History of Genocide and Extermination from Sparta to Darfur, 395– 416 (Yale University Press, 2007) (2007).

[9] Ana Vrdoljak, *Human Rights and Genocide: The Work of Lauterpacht and Lemkin in Modern International Law*, 20 EJIL 1163, 1176 (2010).

[10] Raphael Lemkin, Axis Rule in Europe: Laws of Occupation, Analysis of Government – Proposals for Redress 79 (Columbia Law Press, 1944) 1944.

In 1948, the United Nations (U.N.) adopted a definition of genocide under The Convention on Punishment and Prohibition of Genocide.[11] The Genocide Convention is the primary legal instrument that governs genocide under international law and is supplemented by the Rome Statute of the International Criminal Court under which prosecutions take place.[12] The Convention entered into force in 1951 and established the principle that genocide, whether committed in war or peace, amounts to a heinous crime under international law.[13] The Genocide Convention defines genocide as

> any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.[14]

The Genocide Convention outlines the punishment for genocide, establishing that a trial relating to genocide should be held by a competent tribunal of the state in the territory where the act was committed or by an international penal tribunal with respect to those contracting parties which shall have accepted its jurisdiction.[15] Furthermore, the doctrine of universal jurisdiction can also apply to cases of genocide, as they comprise of the gravest crimes against humanity.[16] The doctrine outlines how, under international law, a state

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[11] The Convention on the Prevention and Punishment of the Crime of Genocide, art. 2, Dec. 9, 1948, 15 U.S.T. 1555, 78 U.N.T.S. 277 [hereinafter *Genocide Convention*].
[12] Rome Statute of the International Criminal Court, art. 7 §1, July 17, 1998, 2187 U.N.T.S. 3.
[13] William Schabas, Genocide in International Law: The Crime of Crimes 14 (Cambridge University Press, 2nd ed. 2009) 2000.
[14] Genocide Convention, *supra* note 11.
[15] *Id.* at 2.
[16] Kenneth C. Randall, Universal *Jurisdiction under International Law*, 66 Tex. L.R. 788; International Law Association Committee on International Human Rights Law

can bring criminal proceedings for certain crimes, irrespective of the crime's location, perpetrator's nationality, or victim's identity.[17] Universal jurisdiction, therefore, enables the trial of international crimes committed by anybody, committed anywhere in the world.[18] Under international law, consequences for a state that commits genocide comprise of two primary facets. Firstly, the Genocide Convention itself provides for the accountability of individual perpetrators for violation of the Genocide Convention.[19] Secondly, customary international law provides the source of state responsibility for violation of the Genocide Convention.[20]

Individual criminal responsibility can be assessed through international criminal tribunals established for the particular alleged case of genocide as has been the case with the International Criminal Tribunal for Rwanda (I.C.T.R.) and International Criminal Tribunal for Yugoslavia (I.C.T.Y.), which were established by the U.N. Security Council to prosecute perpetrators of the genocide in Rwanda[21] and Yugoslavia,[22] respectively. Individuals can be tried for crimes of genocide under the International Criminal Court (I.C.C.), which was established in 2002 by the Rome Statute. Under Article 5(1) of the Rome Statute, the I.C.C. exercises the jurisdiction to hold individual trials relating to the commission of genocide.[23] For example, Omar Al Bashir, the President of Sudan, was charged by the court for commission of genocidal incidents. His case is to be followed by pre-trial and trial[24] as per the general rules of the court.

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and Practice, Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences, para. 1, U.N. Doc. A/73/10, 2000.

[17] *Id.*

[18] Mary Robinson, The Princeton Principles on Universal Jurisdiction 16 (Princeton University Press, 2001) 2001.

[19] Genocide Convention, *supra* note 11 at 2.

[20] Ian Brownlie, System of the Law of Nations: State Responsibility 132 (Oxford University Press, Part I, 1983).

[21] S.C. Res. 808, para. 1 (Feb 22, 1993).

[22] S.C. Res. 827, para. 2 (May 25, 1993).

[23] Rome Statute of the International Criminal Court, art. 5 §1, July 17, 1998, 2187 U.N.T.S. 3.

[24] The Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Warrant of Arrest, ¶ 215 (Int'l Crim. Trib. July 14, 2008).

The question of state responsibility for genocide arises when the crime, if committed by an individual perpetrator or a group, can be attributed to the state under the Genocide Convention and norms of the customary international law. Claims arising out of state responsibility for genocide can be heard by the I.C.J., which would then assess a state's accountability for the commission of genocide.[25] For example, in the Bosnian Genocide case, the court held the state of Serbia and Montenegro liable for being complicit in the genocide during the Bosnian conflict.[26]

The following section critically analyses the I.C.J. case concerning the alleged genocide against the Rohingya by drawing upon the aforementioned principles of genocide under international law.

III. The International Court of Justice Proceedings

It is widely believed that the Rohingya community has been subjected to decades of targeted violence, statelessness, and systematic discrimination in Myanmar by the Tatmadaw.[27] Estimates believe that nearly 900,000 Rohingya have fled to Bangladesh due to this fear of persecution.[28] The status of the Rohingya community in the Myanmar has been a source of immense international attention, with many human rights organizations pointing towards the possibility of a commission of genocide.[29]

In 2018, the Independent International Fact-Finding Mission in Myanmar issued a report in which it concluded:

> the Rohingya in Myanmar have been subjected to acts which are capable of affecting their right of existence as a protected group under the Genocide Convention, such as mass killings, widespread rape and other forms of

[25] Genocide Convention, *supra* note 11 at 2.
[26] Bosnia-Serbia Genocide Judgment, *supra* note 2.
[27] OHCHR, *supra* note 4.
[28] Karishma Singh, *Factbox: Humanitarian crisis in Bangladesh as nearly 90,000 Rohingya flee Myanmar*. Reuters (Sept. 4, 2017), https://www.reuters.com/article/us-myanmar-rohingya-aid-factbox/factbox-humanitarian-crisis-in-bangladesh-as-nearly-90000-rohingya-flee-myanmar-idUSKCN1BF13P.
[29] Young, *supra* note 4.

> sexual violence, as well as beatings, the destruction of villages and homes, denial of access to food, shelter and other essentials of life."[30] The report further concluded that "the State of Myanmar breached its obligation not to commit genocide.[31]

The report referenced campaigns of violence used by security forces in Myanmar, known as "Clearance Operations," as well as the decades of discrimination and persecution faced by the Rohingya community, including the denial of basic citizenship rights.[32] The United Nations Human Rights Council, referencing this report in 2019 concluded that "the Rohingya people remain at serious risk of genocide under the terms of the Genocide Convention."[33] Myanmar maintains that it has not committed genocide. However, it admitted to the possibility of the commission of war crimes.[34] It further argues that domestic justice mechanisms in Myanmar are sufficient to address the situation.[35]

Myanmar has been brought to the I.C.J. by the Gambia[36] due to the decision of Islamic Cooperation's Ad Hoc Ministerial Committee on the Rohingya Genocide, to which the Gambia is a member.[37] The committee adopted a resolution to demand accountability for the crimes committed against the Rohingya by Myanmar and prevent future occurrences of such crimes.[38] In this backdrop, the Gambia took action by bringing a case against the state of Myanmar in the I.C.J., under accusations of violation of the Genocide Convention. The Gambia alleges that Myanmar violated the Genocide Convention by committing, failing to prevent, failing to punish genocide, and failing to pass domestic legislation to enact the provisions of the Genocide Convention. The case marks the first time that a claim is brought to the

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[30] OHCHR, *supra* note 3.
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] Gambia-Myanmar Genocide 2021 Order, *supra* note 4.
[35] *Id.*
[36] *Id.*
[37] Organisation of Islamic Cooperation, *supra* note 3.
[38] Organisation of Islamic Cooperation, Report Of The Contact Group On Rohingya Muslims Of Myanmar Held On The Sidelines Of The Annual Coordination Meeting, Doc. OIC/ACM/CG-ROHINGYA/REPORT, ¶ 7, (Sept. 25, 2018).

I.C.J. by a party not directly affected by the alleged crimes under the ambit of Genocide Convention.

On January 23, 2020, the I.C.J. unanimously ordered that Myanmar must protect the Rohingya Community in Myanmar by accepting the Gambia's request for certain provisional measures.[39] Aiming to protect the Rohingya, the court further required Myanmar to report on its progress relating to the protection of the Rohingya.[40] The case is significant as it marks the first time Myanmar has been *prima facie* held accountable for its actions against the Rohingya by an international court. The following section explores the crucial issues of jurisdiction and evidence that arise in cases of genocide.

IV. An Analysis of the Jurisdiction and Threshold of Proof of Claims for Genocide

This section seeks to analyze the procedural issues of the cases of genocide. The section will be divided into two parts, (a) Preliminary Matters: Jurisdiction and Standing, and (b) Evidentiary Matters: Standard of Proof.

(a) Preliminary Matters: Jurisdiction and Standing

As discussed in Section II, claims of genocide under international law may fall under the jurisdiction of the I.C.C, the I.C.J., or a specialised tribunal established for the particular case.

Under Article IX of the Genocide Convention, the I.C.J. is the mechanism through which disputes relating to the responsibility of states under the Genocide Convention can be assessed. The I.C.J. can only try cases between states that have accepted its jurisdiction as provided by the following statute:

> (1) they have made a declaration under Article 36 of the I.C.J.'s statute granting the court compulsory jurisdiction over disputes under international law; (2) where a particular treaty provides the I.C.J. as its dispute resolution mechanism, such as under the

[39] Gambia-Myanmar Genocide 2021 Order, *supra* note 5 at 25.
[40] *Id.*

> Genocide Convention,[41] or (3) by entering into a special agreement to submit the dispute to the Court.

Myanmar has not made the required declaration under Article 36(2)(1) to accept the court's compulsory jurisdiction. Further, there does not exist a special agreement between Myanmar and the Gambia, under Article 36(2)(3) of the I.C.J. statute to submit the dispute before the I.C.J. Thus, the jurisdiction falls to the Geneva Convention itself. The case marks the first time where a state without any direct connection to the alleged atrocities brings a claim of genocide against another state under the genocide convention.

Myanmar contests the I.C.J.'s jurisdiction over the case as the Gambia is not "specially affected" by the alleged crimes. However, it is argued that the Gambia has the standing to bring the case under international law and the I.C.J. has jurisdiction over the dispute. This jurisdiction arises due to the international law principle of *erga omnes*, which refers to obligations owed to the international community as a whole.[42] It is widely established that preventing and punishing genocide is an *erga omnes* obligation.[43] The outlawing of genocide by the Genocide Convention implies that states have an obligation to the international community not to commit genocide, and therefore, any state can enforce the obligation under this principle. By virtue of Article 48 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (A.R.S.I.W.A.) any state, other than an injured state, is entitled to invoke the responsibility of another State for the breach of its international obligations, if the obligation breached is owed to the international community as a whole.[44]

The Genocide Convention further codifies this obligation, which has been ratified by both Gambia and Myanmar.[45] The convention obligates states that have ratified it to punish and prevent

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[41] Genocide Convention, *supra* note 11 at 2.
[42] Barcelona Traction, Light and Power Company Limited (Belg. v. Spain), Judgment, 1964 I.C.J. Rep. 3, 33 (Feb. 5).
[43] Bosnia-Serbia Genocide Judgment, *supra* note 2 at 65.
[44] International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, art. 48, Nov. 20, 2001, G.A. U.N. Doc. A/56/10.
[45] Genocide Convention, *supra* note 11 at 1.

the commission of genocide.[46] Under the Genocide Convention, such obligations are *erga omnes partes* or obligations owed to all the parties to the convention. Therefore, Myanmar owes an obligation to the Gambia not to engage in acts that violate the Genocide Convention that it is a party to. The issue of whether a state can bring a suit without being "specially affected" by the alleged acts has been conclusively settled in the *Belgium v. Senegal* case.[47] The case states, "It follows that any State party to the Convention, and not only a specially affected State, may invoke the responsibility of another State Party to ascertain the alleged failure to comply with its obligations erga omnes partes, and to bring that failure to an end."[48] The principle of *erga omnes partes* is owed to states that are party to the Genocide Convention, including the Gambia. This obligation arises from the common interest of all parties to the Genocide Convention to prevent and punish acts of genocide. The authors of such acts can be made liable by any such party, which need not be specially affected, as also they suffer injury owing to breach of such obligation.[49] Therefore, the I.C.J. has jurisdiction over the case, as Gambia has standing to claim the rights owed to it by Myanmar.

Article IX of the Genocide Convention is the jurisdictional clause of the Convention. It provides that disputes arising out of the "Interpretation, Application or fulfilment" of the Genocide Convention would be submitted before the I.C.J.[50] Issues relating to jurisdiction under the Genocide Convention may arise in cases of reservations to certain provisions of the treaty. The concept of the reservation to treaties in international law is of particular relevance to the issue relating to claims of genocide under international law, as this defense has been claimed by Myanmar to argue that the I.C.J. does not have jurisdiction over the matter. Reservation of states to jurisdictional clauses could deny other states the opportunity to try the alleged states

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[46] *Id.,* at 1; Paola Gaeta, The U.N. Genocide Convention: A Commentary 425-70 (Oxford University Press, 2009) 2009.

[47] Questions relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. Rep. 144, 422 (July 20).

[48] *Id.* at 450.

[49] *Id.*

[50] Genocide Convention, *supra* note 10 at 1.

under the mechanisms provided by such clauses that the alleged state has made a reservation against.[51] It is argued that the I.C.J. exercises jurisdiction over the dispute as Myanmar has not made a reservation to Article IX of the Genocide Convention. Myanmar's reservation is specifically to Article VI of the Convention, which deals with the trial of individuals by a competent state tribunal or by an international penal tribunal in cases of violation of provisions of the treaty,[52] and Article VIII, which relates to the taking of action by U.N. organs for the prevention and against the suppression of genocide by states.[53] The relevance of the reservation must be considered when analysing the jurisdiction of international enforcement mechanisms. In this particular case, neither provision relates to the jurisdiction of the I.C.J. to try the case and would therefore serve as an unsuccessful challenge to the court.

A determination of *prima facie* jurisdiction by the court does not automatically determine whether the I.C.J. would have jurisdiction to hear the case. However, the contestations made by Myanmar to the I.C.J.'s jurisdiction are not likely to succeed. Myanmar further argued that the I.C.J. is not the requisite forum under international law to determine the case, arguing the case of the Rohingya to be an internal matter, subject to domestic remedies. However, unlike the I.C.C., failure to exhaust domestic remedies is not a bar to the I.C.J.'s jurisdiction relating to this case.[54] Therefore, Myanmar's contention is unlikely to be upheld.

Therefore, it is argued that Myanmar's contestations against jurisdiction will not be accepted by the I.C.J., and it will determine that it has jurisdiction to adjudicate the case. The Court is empowered with authority to determine whether genocide has occurred in the particular case, as well as to decide whether the party failed to comply with the obligations prescribed under the genocide convention.[55]

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[51] Vienna Convention on the Law of Treaties, art. 20, May 23, 1969, 1155 U.N.T.S. 331.
[52] Genocide Convention, *supra* note 11 at 2.
[53] *Id*. at 2.
[54] The Panevezys-Saldutiskis Railway Case (Est. v. Lith.), Judgment, 1939 P.C.I.J. Series A/B, ¶ 182, 49 (Feb. 28) (Judge Hudson dissenting).
[55] Bosnia-Serbia Genocide Judgment, supra note 2 at 99.

(b) Evidentiary Matters: Standard of Proof

Myanmar has consistently restricted the entry of the Special Rapporteur for the preparation of Fact Finding Mission reports,[56] making the procurement of direct evidence difficult. The I.C.J. would, therefore, have to rely on evidence of an indirect, circumstantial or secondary nature. As has been remarked in the Corfu Channel case, "a State on whose territory or in whose waters an act contrary to international law has occurred, may be called upon to give an explanation."[57] Therefore, even without direct evidence, the alleged state could still be called before the I.C.J. to justify their acts which allegedly lead to the violation of international law. However, this reasoning raises the question of whether this principle places an obligation upon the alleged state to provide information which would help the Court in determining the merits of the case. As a general principle of law, all parties to the inter-state dispute are obliged to act in good faith and cooperate with the Court to settle the dispute with respect to the procedures and provisions laid down in the statute of the I.C.J.[58] However, this principle does not obligate Myanmar to provide the Court with information in the form of direct evidence of the situation in Myanmar. In pursuance to Article 43(2) of the statute of the I.C.J., parties are only required to submit documents in support of their arguments.[59] Over the years, the I.C.J. has respected the sensitivity of confidential information and state secrets. Therefore, it has not put an obligation upon states to provide such information before the Court. Furthermore, the I.C.J. does not have the authority to procure evidence directly from the alleged state. According to Article 49, the Court may call upon agents to produce any document or explanation even before the hearing begins in the Court and a formal

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[56] Shilla Kim, *Myanmar refuses access to UN Special Rapporteur*, United Nations Human Rights Office of the High Commissioner (Dec. 20, 2017), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22553.

[57] Corfu Channel Case (U.K. v. Alb.), Judgment, 1949 I.C.J. Rep. 4, 18 (Apr. 9) [hereinafter *Corfu Channel*].

[58] Anne Peters, *International Dispute Settlement: A Network of Cooperational Duties*, 14 E.J.I.L. 1, 3 (2003).

[59] Statute of the International Court of Justice, art. 43 § 2, June 26, 1945, U.S.T.S. 993, 33 U.N.T.S. 993.

note would be taken of any refusal.[60] However, the Court has no means to force states to produce ordered documents.[61] Therefore, the I.C.J. cannot compel Myanmar to provide such evidence.[62] In the absence of such direct evidence, the standard of proof for indirect evidence presented by the Gambia will become a crucial issue in the Merits proceedings.

In order to conclusively establish that Myanmar has committed genocide under the Genocide Convention, the Gambia would have to establish that Myanmar committed the following: (i) it committed enumerated acts of violence; (ii) the acts were committed against a protected group; (iii) the acts were committed with the intent to destroy this group in whole or in part.[63] These issues will be analyzed in Section V. Evidentiary concerns are central to these issues as proving the commission of genocide relies extensively on evidence of the *mens rea* and *actus reus* of genocide.

The Gambia's application and the subsequent proceedings indicate their extensive reliance on the United Nations Fact Finding Reports on Myanmar.[64] These reports rely extensively on witness testimony collected from victims in Myanmar.[65] The U.N. Fact Finding reports are not a source of direct evidence, but, in certain cases, the Court has given a liberal recourse to acceptance of evidence by accepting such indirect evidence.[66] The Court undertakes to weigh the evidentiary value of reports prepared by official or independent bodies

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[60] *Id.*

[61] Anreas Zimmermann et al., The Statute of the International Court of Justice: A Commentary, Evidentiary 55 (Oxford University Press, 3rd ed., 2019).

[62] Prosecutor v. Blaškić, Case No. ICTY IT-95-14, Judgment, ¶ 65, 688 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 29, 2007) [hereinafter *Blaškić*].

[63] Genocide Convention, *supra* note 11 at 1; Reservations to Convention on Prevention and Punishment of Crime of Genocide, Advisory Opinion, 1951 I.C.J. Rep. 15, 23 (May 28).

[64] Office of the United Nations High Commissioner for Human Rights (OHCHR), Independent International Fact-Finding Mission on Myanmar Sess. 42 (2019).

[65] Michael A Becker, *The Challenges for the I.C.J. in the Reliance on U.N. Fact-Finding Reports in the Case against Myanmar*, EJIL: Talk! (Dec. 14, 2019), https://www.ejiltalk.org/the-challenges-for-the-icj-in-the-reliance-on-un-fact-finding-reports-in-the-case-against-myanmar/.

[66] Corfu Channel, *supra* note 57 at 17.

in such proceedings.[67] Such reports are sometimes accorded considerable evidentiary weight by the Court. This holding is based on the level of care taken in preparation of the report, its sources and the independence of those responsible for its preparation all lend authority to it. These reports could thereby provide the Court with substantial assistance while assessing the claims presented before it.[68] As outlined in Section III, the U.N. Fact-Finding report concludes that Myanmar conducted acts that amount to genocide against the Rohingya community.[69] Therefore, the weightage that the I.C.J. accords to the fact-finding reports in the Merits stage would be crucial to the outcome of the case. It is important to note that the Court accepted the Fact-Finding reports in its determination of provisional measures. However, the evidentiary burden in provisional measures is that of a *prima facie* showing, which is considerably lower than that in the Merits proceedings.[70] The Court will therefore have to determine the extent of its reliance on these reports in the merits proceedings.

The threshold required for proving the commission of genocide is extremely high, owing to its exceptional gravity as a crime under international law.[71] The I.C.J. has addressed this issue in considerable detail in the Genocide case. The I.C.J., citing the Corfu Channel case, laid down that facts underlying claims against a state involving charges of exceptional gravity (such as the acts listed in Art. III of the Genocide Convention) must "be proved by evidence that is fully conclusive."[72] The authors state that the third-party reports relied on by the Gambia, primarily the U.N. Fact-Finding Mission report, should not be deemed as conclusive proof of the commission of genocide by Myanmar. It is widely accepted that the threshold required for proving genocide is extremely high. Therefore, owing to the multitude of problems plaguing the third-party reports, the independent reports alone cannot constitute conclusive evidence to establish the

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[67] *Id.*
[68] Bosnia-Serbia Genocide Judgment, *supra* note 2 at 137.
[69] OHCHR, *supra* note 64.
[70] Zimmermann et al., *supra* note 61 at 113.
[71] *Id.*; Bosnia-Serbia Genocide Judgment, *supra* note 2.
[72] Corfu Channel, *supra* note 57 at 17.

commission of genocide against the Rohingya Community. The problems with such evidence intensify when dealing with evidence relating to "genocidal intent" which is necessary to prove the commission of genocide by Myanmar. In light of these concerns, the authors argue that the Court is unlikely to conclude that the high threshold required for proving the commission of genocide will be met.

Further issues arise in the use of reports from international organisations, such as the U.N. Fact-Finding reports. The I.C.J. has typically treated such evidence with reluctance and extreme caution, using such evidence to a limited extent.[73] This evidence has often been used to corroborate facts that have already been established.[74] The Court has also not assessed the reliability of reports of international organisations in the context of their probative value in the Genocide case,[75] where the Court merely mentioned these reports in passing.[76] The argument has been further outlined by the Ethiopia Eritrea Claims Commission, which mentions that third-party reports are not based on complete information and instead reflect the agendas and interests of reporters or the source from which empirical data has been derived.[77] The Armed Activities Case further emphasised this point while not considering the factual information that was made available to the Court from the Secretary General's report on M.O.N.U.C., which primarily relied on second-hand reports.[78] Therefore, it remains unlikely that the reports of international organisations that the Gambia extensively relies upon will be used as conclusive proof of a commission of genocide by Myanmar.

Third-party reports cannot exclusively indicate the commission of genocide due to their source and preparation procedure. The I.C.J.

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[73] Zimmermann et al, *supra* note 61 at 113.
[74] *Id.*
[75] Anna Riddell and Brendan Plant, Evidence before the International Court of Justice 249-50 (British Institute of International and Comparative Law ed. 2016).
[76] *Id*. at 185; Bosnia-Serbia Genocide Judgment, *supra* note 2 at 180.
[77] United Nations, *Eritrea-Ethiopia Claims Commission, Partial Award, Civilian Claims - Eritrea's Claims 15, 16, 23, & 27-32*, 26 Reports of International Arbitral Awards 195 (Dec. 17, 2004).
[78] Case Concerning Armed Activities on The Territory of The Congo (D.R.C. v. Uganda), Judgment, 2005 I.C.J. Rep. 168, ¶ 159, 225 (Dec. 19).

laid down the mechanism to determine the weightage accorded to third-party reports in *Serbia v. Bosnia*.[79] The Court held that third-party reports would be scrutinized under two parameters: the evidence's source and the process by which it has been generated.[80]

With regards to the source of such reports, there exists sufficient cause to doubt the reliability and credibility of the evidence. As outlined above, the report of the Fact-Finding Mission primarily consists of witness statements and testimonies. While such reports are admissible,[81] their evidentiary value significantly depends on a case-to-case basis based on the circumstances in which the recordings were made.[82] Firstly, it is argued that evidence based on eyewitness testimony may be unreliable, with the further risk of the report basing its findings on flawed witness accounts.[83] Secondly, the documentary evidence relied on by the report may leave room for interpretation or may have been insufficiently studied.[84] Thirdly, there exist concerns regarding a lack of relevant expertise of the witnesses relating to military operations. This detail would further complicate the task of establishing specific intent to commit genocide given the lack of conclusive evidence. This evidence would provide conclusions merely for the commission of other crimes that do not amount to genocide, owing to the inability to establish genocidal intent.[85] Fourth, the authenticity of media coverage and reports, which the Fact-Finding mission relies on, could further provide issues relating to credibility. The Cumaraswamy Advisory Opinion observed how special rapporteurs, such as the one for the Human Rights Council which authored the report, often derive considerable amounts of data from the media.[86] The I.C.J. demonstrates a strict standard regarding

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[79] Bosnia-Serbia Genocide Judgment, *supra* note 2.
[80] Bosnia-Serbia Genocide Judgment, *supra* note 2 at 135.
[81] Corfu Channel, *supra* note 57 at 4, 32.
[82] Jean Salmon, Dictionary of Public International Law47 (Noisy ed. 2001).
[83] Paul Behrens, *Genocide Denial and the Law: A Critical Appraisal*, 21 Buff. Hum. Rts. L. Rev. 27 (2015).
[84] *Id.*
[85] *Id.*
[86] Difference Relating To Immunity From Legal Process Of A Special Rapporteur Of The Commission On Human Rights, Advisory Opinion, 1999 I.C.J. Rep. 62, ¶ 53, 85(Apr. 29).

admitted data provided by the media. This basis can be illustrated by the Nicaragua case, where such sources were treated with great caution and not considered as evidence capable of proving facts, instead only as corroborative material.[87] Therefore, with regard to the source of the evidence, it is likely that the Court may adopt similar reasoning as the Corfu Channel case, where the Court set aside hearsay on the basis that it fell short of conclusive evidence.[88]

The process by which the reports have been generated are also likely to reduce the value accorded to the report by the I.C.J. Myanmar's challenge of the credibility, impartiality and completeness of the third-party reports would require the Court to scrutinize the methods and processes adopted by the reports in order to determine its weightage. With regard to third-party reports, the I.C.J. has typically afforded higher weightage to findings generated through an adversarial, court-like process, due to their credibility. The Court observed this principle in the Armed Activities case, wherein it gave special attention to evidence obtained through such processes. Although the Court has laid down various factors to assess the credibility of fact-finding reports that do not rely on this process, application of the criteria remains unpredictable. It is therefore unlikely that these reports would be seen as conclusive proof of genocide.

There exist other crucial problems relating to the weightage accorded to such evidence, which present an overlap between the source and process of the evidence. It must be noted that the preparation of the reports would have been significantly hindered by the lack of access to Myanmar, due to Myanmar's refusal to cooperate, which significantly impacts the credibility of the reports.[89] There exists the possibility that findings may be based upon erroneous information that could have been widely disseminated, thus presenting an inaccurate account of the situation in Myanmar.

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[87] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. Rep. 14, ¶ 62, 40 (June 27).

[88] Corfu Channel, *supra* note 57 at 17; Rosenne and Ronen, The Court and the United Nations 558 (MartinusNijhoff Publishers, 2006) 2006.

[89] Kim, *supra* note 56.

Another crucial aspect of evidentiary concerns is the parallel criminal proceedings of the genocide case alongside the I.C.J. proceedings. The investigative powers of the I.C.C. or special tribunals provide crucial evidentiary support to claims within the I.C.J.[90] This aspect differentiates the Myanmar case from previous ones of alleged genocide tried by the I.C.J. In this case, the Court will not be able to draw upon any findings by parallel criminal proceedings either in the I.C.C. or in a specialised tribunal established for Myanmar. The I.C.J. explained its readiness to adopt the factual findings of the I.C.T.Y., classifying them as highly persuasive and further indicating that they would be given due weight in determining the existence of genocidal intent.[91] The lack of such proceedings is likely to impact the case presented by the Gambia. In light of these concerns, the threshold required for proving the commission of genocide is unlikely to be met by the evidence that the Gambia currently relies on.

V. The Commission of Genocide in Myanmar

It is widely established that the standard of proof required in order to prove the responsibility of the commission of genocide is "evidence that is fully conclusive" of the *commission* of genocide and of the *attribution* of such an act to the state concerned. The standard must be beyond reasonable doubt, and such a standard must be "a high level of certainty appropriate to the seriousness of the allegation."[92]

The following section will analyse the elements of the crime of genocide[93] to determine whether the actions of Myanmar amount to genocide under international law.

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[90] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Judgment, 2015 I.C.J. Rep. 3 (Feb. 3) [hereinafter *Croatia-Serbia Genocide Judgment*].
[91] Blaškić, *supra* note 62.
[92] Bosnia-Serbia Genocide Judgment, *supra* note 2 at 76.
[93] Genocide Convention, *supra* note 11 at 1.

(a) Protected Group: Are the Rohingya a Protected Group?

The Genocide Convention defines genocide in terms of violence against national, ethnic, racial or religious groups.[94] In the *travaux préparatoires* of the Genocide Convention, a limited number of groups were covered under the ambit of the crime of genocide.[95] Once a person is born, they are automatically adopted into one of these groups and do not have an easy way out, making that person vulnerable to heinous crimes, such as those of genocide.[96] This method created an objective approach for defining protected groups under the convention. However, over the years, the international community has moved to a subjective approach. Initially, the I.C.T.R. in the case of *The Prosecutor v. Akayesu*[97] objectively defined the four groups, national,[98] ethnical,[99] religious,[100] and racial,[101] within the ambit of commission of genocide. However, it later expressed that "the said concept of national, religious, racial or ethnical groups enjoys no generally or internationally accepted definition, rather each concept must be assessed in the light of a particular political, social, historical and cultural context."[102] The subjective approach ensures that international law prohibiting genocide could afford legal protection even to groups that fall beyond the scope of an objective "protected group" within the convention but only after further scrutiny of the case's factual matrix.

In this context, the status of the Rohingya comes under that of a protected group under the Genocide Convention on a *prima facie* basis. The Rohingya constitute a protected religious group, being a

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[94] *Id.*
[95] U.N. G.A.O.R., 3rd Sess., 179th Plen. Mtg., U.N. Doc. A/760 (Dec. 9, 1948).
[96] *Id.*
[97] Prosecutor v. Akayesu, Case No. ICTR. 96-4-T, Judgment (Int'l Crim. Trib for Rwanda Sept. 2, 1998) [hereinafter *Akayesu*].
[98] *Id.* at 132.
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] Prosecutor v. Kajelijeli, Case No. ICTR-98-44A, Trial Judgment, ¶ 811 (Int'l Crim. Trib for Rwanda Dec. 1, 2003); Prosecutor v. Kamuhanda, Case No. ICTR-95-54A-T, Trial Judgment, ¶ 630, 109 (Int'l Crim. Trib for Rwanda Jan. 22, 2004).

Muslim minority in a predominantly Buddhist society. They could also be conceptualised as an ethnic group,[103] given their distinctive cultural traditions and dialect, and as a racial group, given subjective perceptions among Myanmar society that the Rohingya constitute a different race than the majority population.[104] Therefore, the first element of the crime of genocide under international law is satisfied.

(b) Actus reus: Commission of Prohibited Acts Against the Protected Group

The Genocide Convention lays down the following acts as genocidal acts: killing members of the group;[105] causing serious bodily or mental harm to members of the group;[106] deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;[107] imposing measures intended to prevent births within the group;[108] and forcibly transferring children of the group to another group.[109] The determination of *actus reus* involves two components: firstly, that the acts committed violate the Genocide Convention; and secondly, that the acts can be attributed to the State.

With regard to acts involving the commission of genocide, tribunals have developed the concept of "slow death,"[110] which involves the deliberate infliction of conditions upon a protected group that may not cause the immediate death of members of the group but will eventually lead to that result if maintained over a period of time.[111] When people flee a jurisdiction or the territory of a particular country, they are compelled to do so when the state conducts acts against their

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[103] Van Schaack, *supra* note 4.
[104] Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment, ¶ 70, 33 (Int'l Crim. Trib for Rwanda Dec. 6, 1999) [hereinafter *Rutaganda*]; Claus Kress, *The International Court of Justice and the Elements of the Crime of Genocide*, 18 E.J.I.L. 619, 623 (2007).
[105] Genocide Convention, *supra* note 11 at 2.
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] Rutaganda, *supra* note 104 at 26.
[111] Prosecutor v. Tolimir, Case No. IT-05-88/2-A, Appeals Judgment, ¶ 209, 86 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 8, 2015).

physical and mental interests. This approach has been reaffirmed by the I.C.J. wherein it made clear that ethnic cleansing can constitute genocide if accompanied by the necessary intent.[112] It has been affirmed that rape and other forms of sexual violence account to acts constituting genocide if carried with the necessary intent to commit genocide,[113] as these acts cause serious physical and mental harm.[114]

Myanmar has conducted various activities that can be seen as grave crimes against the Rohingya Community. The state has formulated policies that are oppressive and discriminatory against the Rohingya, as has been dealt with in the section concerning the standard of proof of this case.[115] With the fixation of these policies, the Rohingya community has been intimidated by the government and the Tatmadaw, Myanmar's armed forces.[116] The Tatmadaw also failed to prevent attacks on Rohingya civilians that were conducted by other forces.[117] Furthermore, the Tatmadaw, at times, subjected women and girls to sexual violence, harassment, and rape in public,[118] thereby causing them not only physical harm but mental harm as well. News reports[119] and the reports of the fact-finding mission,[120] coupled with the Myanmar government's admission to the possibility of crimes

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[112] Bosnia-Serbia Genocide Judgment, *supra* note 2 at 83.
[113] Akayesu, *supra* note 97 at 176.
[114] ICJ Global Redress and Accountability Initiative, *Questions and Answers on the Crime of Genocide*, International Commission of Jurists, Aug. 2018 at 36.
[115] Amnesty International, *We Will Destroy Everything: Military Responsibility for Crimes Against Humanity in Rakhine State, Myanmar*, Amnesty International, Jun. 2018 at 13.
[116] Kiersons, *supra* note 4.
[117] Ibrahim, *supra* note 4.
[118] Human Rights Watch, *All of My Body was Pain: Sexual Violence Against Rohingya Women and Girls in Burma*, Human Rights Watch, Nov. 2017 at 4; Human Rights Watch, *Burma: Security Forces Raped Rohingya Women, Girls*, Human Rights Watch (Feb. 6, 2017, 9:00 AM), https://www.hrw.org/news/2017/02/06/burma-security-forces-raped-rohingya-women-girls.
[119] Amnesty International, *supra* note 115.
[120] OHCHR, *supra* note 4.

being committed against the Rohingya by its military, beyond its capacity could prove the *actus reus* element of the crime.[121]

The question of state responsibility for such acts is central to the question of *actus reus.* The A.R.S.I.W.A. codifies customary international law on state responsibility including obligations to prevent and punish genocide.[122] Questions of state responsibility for genocide arise when the acts of an individual that commits an international crime are attributable to the state.[123] These questions are governed by the rules of attribution, which attribute an individuals' act to the state if, *inter alia*, the former is a state organ. In certain cases, modes of attribution can extend beyond state organs under Articles 8 and 11 of the A.R.S.I.W.A.[124] The A.R.S.I.W.A. defines a state organ as "any person or entity which has that status in accordance with the internal law of the state."[125] Armed forces are widely considered a state organ and their acts are attributable to the state.[126] Therefore, alleged actions of the Tatmadaw can be attributable to Myanmar. If individuals of the Tatmadaw are found guilty of committing acts amounting to genocide, Myanmar can be held liable under the principle of state responsibility by the I.C.J. Furthermore, Myanmar itself has the responsibility to prevent genocide, and enact domestic legislation as under The Genocide Convention, for which it can be made liable as a state.[127] Therefore, it is argued that the acts committed against the Rohingya Community are attributable to Myanmar, for which it can be held accountable under the Genocide Convention.

Therefore, the condition of commission of prohibited acts against a protected group would be fulfilled. However, the mere presence of these crimes would not amount to genocide. The genocidal

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[121] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Verbatim Record, 2019 I.C.J. Rep. 178, ¶ 26, 29 (Dec. 11).
[122] U.N. G.A.O.R., 53rd Sess., U.N. Doc. A/56/10 (Dec. 12, 2001).
[123] *Id.* at 2.
[124] *Id.* at 3, 4.
[125] *Id.* at 2.
[126] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 148, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.
[127] The Convention on the Prevention and Punishment of the Crime of Genocide, art. 9, Dec. 9 1948, 15 U.S.T. 1555, 78 U.N.T.S. 277.

intent behind such crimes also needs to be conclusively proven. As argued in Section IV, the I.C.J. is unlikely to find a conclusive determination of genocidal intent behind Myanmar's actions.

(c) Mens Rea: Intention to Commit Genocide

The significant issue in determining the commission of genocide arises in assessing whether a state had genocidal intent when committing prohibited acts against a protected group. The intention to commit genocide refers to a specific intent to destroy a national, ethnical, racial or religious group.[128] This element of genocide distinguishes it from other mass atrocities. In order to prove genocide, acts must be committed with the intent to destroy in whole or in part the targeted group.[129] The definition of "specific intent" was provided in the *Akayesu* case, wherein it was noted that the specific intention, a constitutive element of crime, demands that the perpetrator clearly seeks to produce the act he has been charged with.[130]

International courts and tribunals have established an extremely high threshold of proof, particularly relating to proving the presence of genocidal intent.[131] Even in the abundance of evidence of violence and cruelty against a protected group, courts have generally interpreted intent under the law of genocide in a restrictive and cautious manner. The rationale for such a high standard of proof is that "claims against a state involving charges of exceptional gravity must be proved by evidence that is fully conclusive."[132] Therefore, claims of genocide would always fail when this high threshold is not met. Such threshold is not met when courts have not been able to link the commission of acts to a genocidal intent to commit those acts.

Significant problems arise when assessing whether genocide was committed in Myanmar in the context of this high threshold. As has been laid down in the genocide case,[133] genocidal intent cannot be

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[128] Genocide Convention, *supra* note 11 at 1.
[129] *Id.*
[130] Akayesu, *supra* note 97 at 129.
[131] Bosnia-Serbia Genocide Judgment, *supra* note 2 at 133.
[132] *Id.* at 127.
[133] *Id.* at 121, 126.

established by merely proving that members of a protected group are targeted because of their membership and identity. What is required is proof of a specific intent to destroy that group, which should be significant enough to impact the group as a whole. This principle would require the Gambia to prove that the Rohingya are not merely killed because they belong to the Rohingya community but because Myanmar had a specific intent to destroy the Rohingya Muslim community as a whole.

The question of ethnic cleansing and genocidal intent, especially relating to Myanmar's clearance operations, becomes a central question in this regard. Ethnic cleansing, the forceful displacement of an ethnic group from a particular territory, has caused the Rohingya to flee to Bangladesh. The Court, to this date, has not conclusively addressed the relationship between ethnic cleansing and genocidal intent and whether the ethnic cleaning is conclusive proof of genocidal intent. In *Croatia v Serbia*,[134] the Court found that "acts committed by Serb forces had the effect of making the Croat population flee the territories concerned was not a question of systematically destroying that population, but of forcing it to leave."[135] As per the judgment in the Pre Trial Chamber of the I.C.C. concerning crime against humanity of deportation, by the virtue of huge cross-border flows from Myanmar into Bangladesh in 2017, the Rohingya were intentionally deported to Bangladesh.[136] However, there existed no observation with regards to the physical destruction of the group. Therefore, even in this case, the clearance operations and deportation of the Rohingya may not significantly build a case for proving genocidal intention.

As has been previously stated about lack of direct conclusive evidence relating to the situation, the I.C.J. could infer genocidal intent from particular circumstances only if those circumstances point to the existence of genocidal intent unequivocally. To prove such intent, the

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[134] Croatia-Serbia Genocide Judgment, *supra* note 90.
[135] *Id.* at 126.
[136] Prosecution's Request for a Ruling on Jurisdiction under Article 19 (3) of the Statute, No. ICC-RoC46(3)-01/18-1, Application under Regulation 46 §3, ¶ 42 (Apr. 9, 2018).

Gambia must show that the only possible explanation for those particular circumstances was that Myanmar did those actions with the necessary intent to commit genocide. In essence, this means that genocide must be "the only inference that could reasonably be drawn from the acts in question."[137] There exist significant other possible explanations for the actions committed in Myanmar, which serves as a significant blow to the Gambia's ability to prove that Myanmar had genocidal intent. Myanmar's acts could very clearly be attributed to a protracted problem of ill-treatment of a minority community and systematic discrimination, as opposed to an intention to destroy a community in part or in whole. Furthermore, acts committed against the Rohingya could alternatively be linked merely to excessive use of military force and commission of other human rights violations without genocidal intent. The facts of this case can be compared to the Bosnia-Serbia[138] case, where it was held that acts committed by Serbia were merely war crimes, or crimes against humanity, committed without genocidal intent.[139] As such, Serbia was not charged with the commission of genocide.

In light of these considerations, it is argued that the I.C.J. will not find conclusive evidence of genocidal intent, and therefore Myanmar would not be held liable for the crime of genocide. It is argued, however, that Myanmar would be found guilty of other war crimes.

VI. Provisional Measures and the Immediate Future of Rohingya

The situation of the Rohingya in Myanmar in the interim, during the proceedings of the case, largely depends on Myanmar's compliance with provisional measures imposed by the I.C.J.[140] Provisional measures are the international law equivalent of

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[137] *Id.* at 67.
[138] Bosnia-Serbia Genocide Judgment, *supra* note 2.
[139] *Id.* at 155.
[140] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Provisional Measures, 2020 I.C.J. Rep 178 (Jan. 23) [hereinafter *Gambia-Myanmar Genocide Provisional Measures*].

injunctions or temporary restraining orders, imposed by the I.C.J. against a state. Provisional measures are requested by a state in cases where it is believed that "there is an ongoing legal violation from which it will continue to suffer some harm while the Court considers the underlying claims."[141] In this case, the Gambia feared further harm to the Rohingya could occur while the case was being argued before the I.C.J., and therefore requested certain legally binding measures to be placed on Myanmar.[142] The I.C.J. has established that provisional measures can be granted only upon the fulfilment of the following three conditions, which state that (i) it exercises *prima facie* jurisdiction,[143](ii) the measures are required to preserve the rights of the parties which are the subject of judicial proceedings, from irreparable harm[144] and (iii) there exists urgent necessity to prevent irreparable prejudice to such rights.[145] In the case proceedings, it was established that the Court exercises *prima facie* jurisdiction over the case, as per Article IX of the Genocide convention, with Gambia having a prima facie standing, as established in Section IV. Assessing the preliminary submissions by both parties, the I.C.J. noted that the internal armed conflicts in Myanmar may erupt anytime, and the status of the Rohingya as a vulnerable group threaten the Gambia's rights in this case, while also showing an urgent necessity to prevent the prejudice to these rights. The Court concluded that the circumstances fulfilled the aforementioned conditions.

> The Court, therefore, outlined the following measures
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> i) Myanmar must refrain from acts of genocide against the Rohingya; ii) Myanmar must ensure that the military or other groups or organizations subject to Myanmar's control refrain from acts of genocide or acts related thereto (including conspiring, inciting, or attempting); iii) Myanmar must prevent the destruction

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[141] Bosnia-Serbia Genocide Judgment, *supra* note 2 at 7; Statute of the International Court of Justice, *supra* note 59 at art. 41.

[142] LaGrand (Ger. v. U.S.), Judgment, 2001 I.C.J. 466, ¶ 104, 503 (June 27) [hereinafter *LaGrand Judgment*]; LaGrand (Ger. v. U.S.), 2001 I.C.J. Press Release No. 2001/16 (June 27) [hereinafter *LaGrand Press Release*].

[143] Statute of the International Court of Justice, *supra* note 59 at art. 86.

[144] *Id.* at art. 118.

[145] *Id.* at art. 129.

> and ensure the preservation of any evidence related to allegations of genocide; and iv) Myanmar must submit a report in four months regarding the steps it has taken to implement these measures, and submit a new report every six months thereafter.[146]

It would be overly optimistic to expect Myanmar's compliance with all provisional measures outlined by the Court. The international and domestic media continues to report military strikes against the Rohingya population, even in the aftermath of the order for provisional measures. Although the provisional measures are binding,[147] considerable issues could arise if Myanmar failed to comply with these measures. In most cases, the Court takes note of the non-compliance of the measures while evaluating the merits of the case. Alternatively, Article 94(2) of the UN Charter[148] gives the Security Council powers of enforcing judgments made by the I.C.J. by undertaking measures to them effect. However, provisional measures translate to merely an interim judgement, for which the Security Council's jurisdiction does not flow from Article 94(2) of the charter but from Article 34[149] and Article 35.[150] This issue occurred in the Anglo-Iranian Oil case, the sole instance where recourse was sought from the Security Council to enforce provisional measures.[151]

There exists a strong possibility that even though the final judgement may not label Myanmar guilty of genocide, the situation of the Rohingya could improve considerably by virtue of the existence of I.C.J. proceedings. Myanmar admitted the possibility that their actions may amount to war crimes and crimes against humanity, which, despite not fulfilling the claims brought forth by the Gambia, comprise grave crimes under international law. This admission, coupled with the multitude of evidence publicising the abhorrent situation of the Rohingya in Myanmar, could garner unprecedented political pressure

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[146] Gambia-Myanmar Genocide Provisional Measures, *supra* note 140.
[147] LaGrand Judgment, *supra* note 142 at 104; LaGrand Press Release, *supra* note 142.
[148] U.N. Charter art. 94, para. 2.
[149] *Id.* at art. 34.
[150] *Id.* at art. 35.
[151] Anglo-Iranian Oil Co. Case (United Kingdom v. Iran), Provisional Measures, 1951 I.C.J. Rep. 89, 93 (July 5, 1951).

to hold Myanmar accountable for its crimes. The public nature of such a case could provide significant political capital to states and international organizations to act against Myanmar, further creating a situation where Myanmar would be compelled to provide relief to the Rohingya.

Although the report Myanmar submitted to the Court regarding their compliance with the provisional measures remains confidential, recent developments in Myanmar could serve as a sign of the principle outlined above. The President's office in Myanmar publicly took steps to comply with the I.C.J.'s provisional measures, issuing directives against hate speech activities and incitement, as well as the calling for the preservation of evidence of the atrocities committed against the Rohingya[152] These actions could be attributed to the immense political pressure piled against the state in the aftermath of the proceedings and the order. While it can be argued that Myanmar can do significantly more, the steps that it has taken could significantly provide hope that it may comply with international law in the future.

Despite providing relief to the Rohingya Community through provisional measures to ensure that their situation does not worsen in the interim of the proceedings, it is a widely established principle of law that the order of the provisional measures neither amount to any sort of interim judgement nor bear any prejudice on the decision that would be made on the merits of the case relating to the commission of genocide. The standard of proof required for granting provisional measures is that of a *prima facie* showing, considerably less than what is required in the merits of the case.[153] The I.C.J. adopted a flexible approach to evaluating the plausibility of the claims and the justification of issuance of the provisional measures by relying on the U.N. Fact-Finding mission reports.[154] It is unlikely that these reports would hold the same weightage in the proceedings relating to the

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[152] Khin Latt, *Prevention of incitement to hatred and violence (or) Prevention of proliferation of hate speech*, The Republic of the Union of Myanmar President Office (Apr. 20, 2020), https://www.president-office.gov.mm/en/?q=briefing-room/news/2020/04/21/id-10007.

[153] Gambia-Myanmar Genocide Provisional Measures, *supra* note 140.

[154] *Id.*

merits of the dispute. Theoretically, therefore, the determinations of provisional measures have no bearing on the final outcome of the legal issues linked to these measures. Even in the case involving the Bosnian Genocide,[155] the I.C.J. laid down provisional measures to be followed by Serbia in order to prevent further harm in the interim of the proceedings[156] but later ruled against the finding of genocide.[157] These principles are reflected in the separate opinion of Xue Hanqin, one of the judges in the case.[158] Despite the issuance of provisional measures, it is argued that the determination of genocide may not actualize, due to the high threshold required. With the compliance of the provisional measures at a contentious state, a question remains over the future of Myanmar, which shall be dealt with in the next section of the paper.

VII. The Way Forward

It has been argued that the Gambia will be unable to match the high threshold required for proving Myanmar's culpability in the commission and prevention of genocide. A widely held opinion is that if the I.C.J. rules in favour of Myanmar, international efforts for protecting the Rohingya could be hampered insurmountably. While such an outcome is plausible, this paper argues that even in a scenario where Myanmar is not held guilty for genocide, the proceedings could still make remarkable changes to the life of the Rohingya in Myanmar, as well as to those that have fled Myanmar due to fear of persecution. This section explores the future of the Rohingya in Myanmar and examines what the multiple stakeholders in the crisis could do in the aftermath of the I.C.J. case.

The *de facto* implementation of international law, despite its binding characteristics, is governed in large part by the political considerations of the states in the international community. In the case

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[155] Bosnia-Serbia Genocide Judgment, *supra* note 2.
[156] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. and Montenegro), Provisional Measures, 1993 I.C.J. Rep. 3 (Apr. 8).
[157] Bosnia-Serbia Genocide Judgment, *supra* note 2 at 179.
[158] Gambia-Myanmar Genocide Provisional Measures, *supra* note 140.

of the Rohingya, the Chinese and Russian veto, arising out of their political considerations of all international action against Myanmar, represent the issues arising out of a disjunct between international politics and international law. The two countries used their veto powers to forbid the implementation of a U.N.-mandated resolution against Myanmar, as well as to prevent an I.C.C. investigation into the alleged crimes that have been committed in Myanmar, despite the proceedings that have been undertaken recently.[159] This action has significantly hampered the international response to the crisis in Myanmar. However, it may be reasonable to expect the nature of the international community's political considerations to change over the course of the proceedings. The case has been widely followed by the international community with its incredible presence and coverage by the media as an extremely significant development in global affairs. The order of provisional measures[160] was highly celebrated by the media, human rights organizations, activists and, most importantly, by the general public. Even if the Gambia is unable to prove genocidal intent on the part of Myanmar, the case will bring to light evidence of crimes, possibly war crimes and crimes against humanity, committed by Myanmar. The public nature of the case would, in turn, lead to greater public outcry and international attention, which could in turn compel states to take action against Myanmar. The highly international nature of the proceedings could cause a situation where states that remain silent would be condemned. This trend could further generate domestic and international action against Myanmar to hold them accountable for their actions against the Rohingya, even if they do not strictly come under the purview of the crime of genocide.

States must take action in order to ensure the compliance of international law by states that violate it. The liberalization of Myanmar's economy since the end of military rule presents the possibility of economic pressure to ensure Myanmar's compliance

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[159] Michelle Nichols, *U.N. Security Council mulls Myanmar action; Russia, China boycott talks*, Reuters (Dec. 18, 2018), https://www.reuters.com/article/us-myanmar-rohingya-un/u-n-security-council-mulls-myanmar-action-russia-china-boycott-talks-idUSKBN1OG2CJ.

[160] Gambia-Myanmar Genocide Provisional Measures, *supra* note 140.

with international law. Myanmar currently depends on foreign investment, especially in the fields of transport, oil and gas and communication, major pillars of its economy.[161] Therefore, states, international organizations and multinational companies have an opportunity to put pressure on Myanmar to change its policies as well as its conduct with respect to the Rohingya. This change can be achieved through the attachment of conditions relating to the human rights situation of the Rohingya to aid, as well as to development and reform projects in Myanmar. It further can be coupled with economic sanctions by individual states in the lack of genuine compliance by Myanmar. The economic impacts of such measures could create tremendous pressure on the government of Myanmar while offering a direct incentive to cease the commission of atrocities against the Rohingya and focus on their rehabilitation.

The aftermath of the case, which could result in a paradigm shift in international politics relating to the issue, could reopen the possibility of Security Council-mandated action against Myanmar. The political pressure on China by the international community could create a possibility where the council passed a resolution mandating action against Myanmar. This Security Council resolution could include stringent measures in the form of sanctions on those that appear most responsible for war crimes and crimes against humanity, to an arms embargo. More importantly, the Security Council would be the only international mechanism that could provide reparations and relief to the Rohingya population. International pressure on China and Russia arising out of the proceedings of the case could translate to a resolution in the form of lifting the restrictions on freedoms of the Rohingya. This action could further entail repealing discriminatory laws, providing for a safe and dignified return of the Rohingya back to a safe Myanmar and granting complete citizenship rights to them. It could further include providing restitution, rehabilitation and compensation for the crimes in Myanmar, medical and psychological

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[161] Thiha Ko Ko, *Economy to improve as Myanmar opens up to foreign investment*, Myanmar Times (Sept. 26, 2019), https://www.mmtimes.com/news/economy-improve-myanmar-opens-foreign-investment.html.

care as well as legal and social services, among other measures. Even if the respective procedure fails in the Security Council, other U.N. bodies and international organizations can take actions to increase the political and economic cost of non-compliance by Myanmar. The acknowledgement of the strong possibility of commission of war crimes and crimes against humanity provides the international community with the impetus to impose stringent measures on Myanmar. While also providing Myanmar with the opportunity to cooperate with the international community to remedy the situation which they admit to having created, to a large extent.

The acts of officials in Myanmar against the Rohingya are grave violations of international criminal law. While they may not satisfy the high threshold required for proving the commission of genocide, there exists a strong possibility that war crimes and crimes against humanity are likely to have been committed against the Rohingya. This possible commission of war crimes calls for the individual criminal accountability of officials for their actions. Myanmar has consistently argued that its domestic justice mechanism is capable of addressing the possible commission of genocide. Hereby, it relies on a fundamental principle of international criminal law, one wherein international criminal mechanisms cannot be invoked unless a domestic judicial system is incapable of dealing with the case.[162] However, the lack of transparency and possibility of bias overrides the complementary principle of international criminal law, and therefore mandates international criminal accountability for the crimes committed by Myanmar.[163] It is argued that the international political pressure generated out of the I.C.J. case would provide significant political support to the ongoing investigations against Myanmar.[164] The scope of such an investigation is limited to the deportation of Rohingyas to Bangladesh currently but could possibly be expanded to the scope of the investigation if China forgoes its in the security

[162] Gambia-Myanmar Genocide Provisional Measures, *supra* note 140.
[163] OHCHR, *supra* note 4.
[164] Prosecution's Request for a Ruling on Jurisdiction under Article 19 (3) of the Statute, *supra* note 136.

council.[165] Indeed, China may be under tremendous international pressure when evidence of the grave atrocities committed against the Rohingya comes to light on the international forum.

VIII. Conclusion

The case of the Rohingya community remains a perplexing conundrum. The I.C.J. case to hold Myanmar accountable for its actions against the Rohingya by a country not directly involved in the dispute is a significant development for the international law relating to claims of genocide. The situation of the Rohingya in Myanmar has received considerable criticism from the global community. Despite previously unsuccessful efforts to hold Myanmar accountable for its acts, the Gambia finally initiated a suit against Myanmar for violating its obligations under the Genocide Convention, for which the Court is likely to establish its jurisdiction. However, the I.C.J. is unlikely to find Myanmar guilty of the commission of the act of genocide, due to the insurmountable issues that would be faced by the Gambia in proving genocidal intent. This pessimistic conclusion indicates that the international law of genocide has considerable scope for development to hold Myanmar accountable within the I.C.J. for the atrocities committed against the Rohingya. However, even in light of the negative judgement of the I.C.J., Myanmar is likely to be held accountable for the commission of war crimes and crimes against humanity. This accountability, coupled with international pressure on Myanmar could improve the situation in Myanmar immeasurably.

[165] *Id.*

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Spanish Law and the Government's Decisions Regarding Secession: Triggering a Climate of Ethnic Tension and Violence

Hana Arriaga

I. Introduction

The opportunity for independence in Catalonia and the Basque Country remains bleak. Unless the international community recognizes the legal right to secede or Spain alters its constitutional rules regarding referenda on independence, the formation of new nations for Catalans and Basques is unlikely. The national government maintains the unity of Spain by continuously disregarding Catalan separatists' pleas for independence, grounded on the unfair redistribution of taxes and repression of their language. Newer or future democratic nations ought to pay heed to how ethnic politics unraveled to fuel separatism, so they do not find themselves facing the same fate as Spain. Separatist movements in Catalonia and the Basque Country reflect the national government's consistent aversion toward the demands for independence, justified through the Spanish Constitution, Constitutional Court Judgments, and government administrations. The unwillingness of the Spanish state to alter its constitutional rules or allow political participation continues to generate a climate of ethnic tension and violence.

II. Critical Decisions in Forming Democracy: Drafting the Spanish Constitution of 1978

The Spanish Constitution of 1978 laid a foundation for a future teeming with ethnic tension, which ultimately culminated into violence in Catalonia and the Basque Country. Completely new leadership drafting the constitution would have represented a clean break from General Francisco Franco's dictatorship, but instead, old regime members participated in the drafting process. Strong military presence persisted through "*la Transición"* to democracy, as demonstrated in Article 2, Article 8, and the framework for the constitutional

amendment process.[1] Article 2 begins by recognizing the unity of Spain: "the Constitution is based on the indissoluble unity of the Spanish nation, the common and indivisible country of all Spaniards."[2] However, somewhat paradoxically, the Article also stipulates that the Constitution "recognizes and guarantees the right to autonomy of the nationalities and regions of which it is composed."[3] Article 2 is the most controversial aspect of the Constitution since it fixates on the inseparable identity of Spain while simultaneously granting the existence of autonomous communities. The first point of contention surrounds the phrase "nationalities and regions," which implies that multiple nationalities exist within Spain.[4] This idea received backlash from some former politicians and military leaders, as well as Conservatives who thought it overextended the definition of a nation.[5] From this perspective, Spain would become the only political entity with distinction as a "nation." Nonetheless, the language produced in Article 2 included the "nationalities and regions" phrase but only on the condition that constitutional drafters included the "indissoluble unity of Spain" elsewhere in the document. The remaining Franco regime military leaders pushed to emphasize state solidarity by including the concept that sovereignty resides in the Spanish people. Thus, the central government prioritized the protection of the state at the expense of a more liberal, democratic constitution that would distinctly cater to regional autonomy. Later Constitutional Court Judgments, which have fueled separatist desires for independence, ultimately cite this explicit language regarding Spain's indissolubility.

Article 8, another disputed provision of the Constitution of 1978, calls for "the Armed Forces…to guarantee the sovereignty and independence of Spain" and protect "its territorial integrity and the constitutional order."[6] Two constitutional drafters revealed in a recent

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[1] Bofill H. Lopez, *Hubris, constitutionalism, and "the indissoluble unity of the Spanish nation": The repression of Catalan secessionist referenda in Spanish constitutional law*, 17 Int'l J. of Con. L., 943, 945 (2019).
[2] C.E. art. II.
[3] *Id.*
[4] *Id.*; Lopez, *supra* note 1 at 943.
[5] Lopez, *supra* note 1 at 952.
[6] C.E. art. VIII.

interview that head military leaders at the time were consulted in the decision-making of this article. The outcome reflects the doubt these leaders had for adherence to territorial integrity in a democracy.[7] Thus, the Constitution relies on the military to protect the Spanish state, a stipulation that does not appear in other constitutional law of this era.[8] Article 8 was invoked following the 2017 illegal referendum on independence in Catalonia. Egregious acts of police brutality occured as officers beat Catalans with batons and forced them away from polling stations.[9] Lawmakers in Madrid justified the national police and Armed Forces intervention through the Article's clause to protect Spain's "territorial integrity."[10] However, these violent and blunt acts of voter suppression should not occur in a legitimate and stable democracy such as Spain, which strives to include the voices of all citizens in political processes.

The Spanish Constitution's rigid rules regarding referenda pose a difficult environment for separatist politicians to pass new amendments. An amendment legalizing unilateral independence referenda would involve changing Spain's quasi-federalist system, grounded on centrality with autonomous subnational units, to a completely federal system where "the right to secede is explicitly stated."[11] Under the Constitution, Spanish Parliament has the power to pass amendments for constitutional reform.[12] Parliament can permit a popular referendum only after a supermajority of both houses votes in favor of passing an amendment.[13] Following this approval, a nationwide referendum can only be called if one tenth of Congress or one tenth of the Senate votes in favor of one.[14] Therefore, Catalonia

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[7] Lopez, *supra* note 1.
[8] *Id.*
[9] Yasmeen Serhan, *Catalonia Is Becoming Europe's Problem*, The Atlantic (Nov. 2, 2017), https://www.theatlantic.com/international/archive/2017/11/how-catalonia-became-europes-problem/544622/.
[10] *Id.*
[11] E. D. Faingold, *Language rights in Catalonia and the constitutional right to secede from Spain*, 40 Language Problems and Language Planning 146, 155 (2016).
[12] C.E. art. X.
[13] *Id.*
[14] *Id.*

and the Basque Country face substantial obstruction if their regional parties cannot garner enough support in both houses to prompt change.

III. Catalonia Confronts Spanish Constitutional Supremacy

The 2010 and 2014 Constitutional Court Judgments highlight the bias toward unionism apparent in Article 2[15] and further reinforce constitutional supremacy. The 2010 Judgment resulted from the disputed 2006 Catalan Statute of Autonomy that Partido Popular (PP), the Spanish conservative party, challenged.[16] This statute attempted to redress issue areas in the original 1979 Catalan Statute of Autonomy where Catalonia did not receive enough autonomy.[17] The Court declared 14 articles unconstitutional and changed the interpretation of 27, many of which were related to language rights and Catalonia's cultural recognition as a nation.[18] For instance, Article 6 of the statute declared the "preference" for Catalan in education, the media, and the local government.[19] However, the Court ruled that "preference" implied valuing Catalan over Spanish when both are official languages of Spain, which made it unconstitutional.[20] Additionally, the Statute's preamble referred to Catalonia as a "nation."[21] The Court ruled that based on Article 2, which references the inseparable unity of Spain, only Spain should be explicitly referred to as a nation. This strict interpretation, that "the Constitution only knows of the existence of the Spanish nation," frustrated Catalans.[22] Furthermore, the Court's interpretation failed to address the other component of Article 2, "the right to autonomy of the nationalities and regions" in Spain.[23] This

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[15] *See* T.C., Jul. 9, 2010 (R.J., No. 31) (Spain); T.C., Mar. 25, 2014 (R.J., No. 42) (Spain).
[16] T.C., Jul. 9, 2010 (R.J., No. 31) (Spain).
[17] Statute of Autonomy of Catalonia of 2006 (B.O.E. 2006) (Spain).
[18] Faingold, *supra* note 11 at 151.
[19] C.E. art. VI.
[20] T.C., Jul. 9, 2010 (R.J., No. 31) (Spain).
[21] V. F. Comella, *The Spanish Constitutional Court Confronts Catalonia's Right to Decide (Comment on the Judgment 42/2014) Case Notes*, 10 Eur. Con. L. Rev. 571, 575 (2014).
[22] *Id.*
[23] C.E. art. II.

specific point of contention fueled many protests and unofficial referendums on independence in following years.

The 2014 Constitutional Court Judgment on the 2013 Catalan Declaration of Sovereignty also critically shaped the separatist movement. The Declaration aimed to garner political support for Catalonia as a sovereign nation, but the Court declared the principle of sovereignty unconstitutional.[24] With national sovereignty resting in the Spanish people as a whole, the Court could not legally grant sovereignty to the individual region.[25] And beyond declaring the principle of sovereignty unconstitutional, the Court posed two additional ideas: (1) Catalonia does not have the unilateral right to secede, and (2) Catalonia cannot conduct a unilateral independence referendum.[26]

Constitutional drafters created the language of Article 2 to appease military leaders at the time of transition to democracy. The Spanish Constitutional Court's Judgments—both on the 2006 Catalan Statute of Autonomy and the 2013 Declaration of Sovereignty—justify the Court's decisions, using an Article that was inherently biased toward the military regime under Franco. Article 2, "[an] imposition perpetrated by the remnants of the dictatorship," created a way for the Court to interpret constitutional language to prevent nations within Spain from successfully seceding.[27] This constitutional inflexibility generated a climate with rising ethnic tensions that ultimately culminated into violence.

IV. The Basque Country and the Onset of Socialist Retaliation

In contrast to Catalonia, which faced ethnic tensions triggered by Constitutional Court decisions, the Basque Country's ethnic tensions escalated due to the violent socialist government that held power in 1982. Additionally, the Basque Country's separatist

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[24] X. Arzoz & M. Suksi, *Comparing constitutional adjudication of self-determination claims*, 25 Maastricht J. of Eur. and Compar. L. 452 (2018); T.C., Mar. 25, 2014 (R.J., No. 42) (Spain).
[25] *Id.*
[26] Comella, *supra* note 21 at 581.
[27] Bofill, *supra* note 1 at 953.

movement was more radical as the extreme nationalist group Euskadi Ta Askatasuna (ETA) engaged in bombings, street violence, and murders of politicians to stir tensions and unnerve the Spanish government. In 1959, ETA emerged from dissatisfaction with General Franco's oppression of Basque culture and Euskara, their local language.[28] Feeling that their nation had been systematically oppressed, ETA's radical terror disobeyed the rule of law in their fight to gain independence.

Even though ETA dismantled its armament in 2017, the violence its members have inflicted since 1959 contributed to how the Spanish government has negotiated relations with the region. Over time, the Spanish government in Madrid engaged less in coercive counter-attacks. However, in 1982, instead of resolving the conflict through party leadership during parliamentary negotiations, Prime Minister Felipe Gonzáles believed violence promoted through the government could defeat ETA and protect the unity of Spain.[29] Gonzáles launched a campaign to eradicate ETA leaders, pushing the French government to crackdown on them. His "dirty war" involved secretly funding the Grupos Antiterroristas de Liberación (GAL), an anti-terrorist group that used violence to end radical groups like ETA.[30] Violence toward ETA members and innocent civilians ultimately triggered backlash and fueled separatist sentiments.

V. Encountering Rising Tensions and Violence

Within the two years of the 2014 Court Judgment, the Catalan Parliament discussed holding a unilateral referendum on independence despite the Court having ruled independence referenda illegal. Parliament knew that amending the Constitution was unlikely due to the multi-step process and supermajority needed in both houses, but the nationalist parties concluded that holding the referendum was their

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[28] Euskal Kultur Erakundea Institut Culturel Basque, *Euskara, the Basque Language,* Euskal Kultur Erakundea Institut Culturel Basque (n.d.), https://www.eke.eus/en/kultura/euskara-the-basque-language.

[29] Paddy Woodworth, *Why Do They Kill?: The Basque Conflict in Spain*, 18 World Pol'y J. 6 (2001).

[30] Diego Muro, Ethnicity and Violence: The Case of Radical Basque Nationalism 139 (2013).

best chance to ensure political participation for independence.[31] On October 1, 2017, citizens lined up at the polls and expressed their preferences for independence. Hours into voting, polling stations were taken over by the national police, and citizens were beaten for merely participating in what they considered a democratic process. Invoking Article 8 of the Constitution, the duty of armed forces to defend state territorial sovereignty, the central government ordered the national police to close the polls.[32] However, it did so at the expense of its own citizens. Amnesty International criticized the national government, explaining that officers used "excessive and disproportionate force" that violated human rights.[33] In addition to stopping the referendum, the central government arrested twelve leaders associated with it and convicted nine on accounts of sedition.[34] The UN Office of High Commissioner for Human Rights is currently investigating whether or not the central government is following guidelines for human rights under international law.[35] The state's violence coupled with the imprisonment of Catalan leaders expressing freedom of assembly reflected the state's priority of protecting national unity over individual rights.

While the Court Judgments are largely responsible for triggering the 2017 Catalan referendum on independence, the outcomes of the Spanish government's "dirty war" in the 1980s had lasting impact on how another Basque generation perceived the struggle for independence. During the "dirty war," GAL murdered 27 people near ETA's "sanctuary," nine of whom were completely innocent civilians. Kidnappings and brutal murders of ETA's leaders and members also occurred. An investigation revealed that GAL was

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[31] Comella, *supra* note 21 at 575.
[32] C.E. art. VIII.
[33] Amnesty International, *Catalan referendum: Police must not use excessive or disproportionate force*, Amnesty International (Oct. 2, 2017), https://www.amnesty.org/en/latest/news/2017/10/catalan-referendum-police-must-not-use-excessive-or-disproportionate-force/.
[34] Massimo Frigo, *Spain: Conviction of Catalonian leaders violates human rights – Video*, International Commission of Jurists (Oct. 14, 2019), https://www.icj.org/spain-conviction-of-catalonian-leaders-violates-human-rights/.
[35] Amnesty International, *supra* note 33.

tied to members of Gonzáles's administration.[36] By 1998, GAL leaders and government leaders like the former Minister of the Interior were convicted of crimes related to kidnapping or murder. These discoveries significantly damaged the reputation of the central government. The generation of youth, first to experience democracy in Spain, also experienced this violence and formed serious doubts about the government's legitimacy. These dispositions created a fertile environment through which ETA could recruit more members who saw this new democracy as another means of repressing Basque nationalist sentiment.[37] Another situation of Spanish government brutality against separatists was when the PP imprisoned 500 ETA members and relocated them far from their families. In the 2000s, Amnesty International and UNICEF both reported human rights violations relating to the ETA members' imprisonment.[38] From the founding of democracy in 1978 and onward, the brutality of the Spanish central government against Basque separatists, specifically ETA, only exacerbated political tensions. By reinforcing themes of violence from Franco's regime, the Spanish central government damaged their reputation and pushed moderate separatists to be completely against union.

VI. Conclusion

The history of Constitutional Court Judgments and decision-making of former government administrations elucidates how these past events incited separatist pleas for independence and intensified tensions between autonomous communities and the central government. The 2017 Catalan referendum and subsequent violence from the national police enhanced existing frustration with the central government. Additionally, the use of Article 8, which allowed police intervention, was an unprecedented action that reflected the central government's willingness to prioritize the state over the individual rights of citizens. Meanwhile, the González administration's "dirty war" against ETA generated a climate through which separatists and

[36] Muro, *supra* note 30.
[37] Woodworth, *supra* note 29.
[38] *Id.*

even unionists turned against the new democracy as a result of the violence and secrecy of their actions. This administration's ruthless and covert coordination with GAL seemed to contradict the point of establishing democracy in the first place. The Basque separatists wanted a new regime, free from repression and violence; however, they found themselves with secretiveness and brutality as the government sought to protect the state instead of cooperating with separatists' requests for more autonomy and independence. Although there exist different circumstances in Catalonia and Spain, Court Judgments in the former and government administration decisions in the latter, fueled tensions, and the outcomes in both protected the Spanish nation at the expense of honoring individuals' political preferences.

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The Effects of *Shelby County v. Holder*

Morgan Fields

The right to vote is a central aspect of the United States' democratic system and a basic right of citizenship. Originally, only white, land-owning men over the age of 21 who were not Catholic, Jewish, or Quakers were eligible to vote.[1] While the right to vote was not universal at the country's inception, the addition of the Fifteenth and Nineteenth Amendments to the Constitution extended the right to vote to African American men and women, respectively.[2] However, mere constitutional enfranchisement did not elevate African Americans as equals to white Americans.[3] As early as 1890, several states adopted new constitutions and voting laws designed to obstruct the African American vote.[4] States employed literacy tests, poll taxes, grandfather clauses, and the white primary to make voting difficult or impossible for many African American voters.[5] The Voting Rights Act of 1965 (VRA) recognized and attempted to eliminate voter suppression by preventing states from enacting historically popular

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[1] Geri Zabela Eddins, *Who Gets to Vote?*, The National Children's Book and Literacy Alliance, https://ourwhitehouse.org/who-gets-to-vote/.

[2] Lee Epstein & Thomas G. Walker, Constitutional Law for a Changing America: Rights, Liberties, and Justice 676 (10th ed., 2018).

[3] *See generally*, Jarrold M. Packard, American Nightmare: The History of Jim Crow (1st ed., 2002) (This "separate but equal" doctrine was not, in fact, equal. Jim Crow laws, originating immediately after the end of Reconstruction in 1877, oppressed African Americans for nearly a century by depriving them of equal access to American society. These laws implied African American inferiority to white Americans mainly by enforcing the maintenance of "separate but equal" public facilities.); s*ee* Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) (in which the majority opinion acknowledged the inherent inequality of separate but equal facilities in education and ruled such laws unconstitutional: "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to ever be undone.").

[4] Packard, *supra* note 3.

[5] *See* Glen Krutz, American Government 165 (2d ed., 2019). (describes how the white primary was a method of disenfranchisement employed by the Democratic Party that prevented African Americans from voting for the Democratic Party's candidate in primary elections).

methods of discriminatory voter laws, allowing the federal government to investigate voter discrimination, and requiring federal oversight of elections.[6] Additionally, one provision of Section 5 of the VRA ensured states could not pass discriminatory voting laws that, due to the lengthy litigation process, would effectively disenfranchise many African American voters before finally being declared discriminatory in court.[7]

Prior to the VRA, registration of Black voters was nearly stagnant in many states. Between 1958 and 1964, black voter registration in Alabama rose to 19.4 percent from 14.2 percent.[8] In Louisiana, black voter registration increased to 31.8 percent from 31.7 percent.[9] And in Mississippi, the rate increased to 6.4 percent from 4.4 percent.[10] Within just the first two years of the VRA's passage, registration rates of Black voters in the South rose to over 50 percent of the voting age population.[11]

After decades of tremendous progress,[12] the 2013 Supreme Court decision *Shelby County v. Holder* ushered in a modern resurgence of voter suppression methods.[13] Section 4(b) required states with histories of voter suppression to receive federal approval, or preclearance, before changing their voting laws.[14] The Court referred

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[6] Voting Rights Act of 1965, 52 U.S.C. §§ 10101, 10301-14, 10501-8, 10701-2 (1965). (Section 4(a) states the goal of the act: "To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State") [hereinafter VRA].

[7] VRA § 5.

[8] Epstein & Walker, *supra* note 2 at 678.

[9] *Id.*

[10] *Id.*

[11] *The Voting Rights Act,* Constitutional Rights Foundation, https://www.crf-usa.org/black-history-month/the-voting-rights-act (last visited Dec. 21, 2020).

[12] *See* Vishal Agraharkar, *50 Years Later, Voting Rights Act Under Unprecedented Assault*, Brennan Center for Justice (Aug. 2, 2015) https://www.brennancenter.org/our-work/research-reports/50-years-later-voting-rights-act-under-unprecedented-assault.

[13] Shelby County v. Holder, 570 U.S. 529 (2013).

[14] VRA § 4(b) ("The provisions of subsection (a) shall apply in any State or in any political subdivision

to the methods of voter suppression the VRA sought to prevent as nonexistent and ordered Congress create a new, more applicable formula for preclearance.[15] Attempts to rectify the loss of Section 4(b) and devise a new formula have been made, but partisan division has thus far prevented much progress.[16] Most recently, the Voting Rights Advancement Act of 2019 passed in the House of Representatives in 2019, with only one Republican voting in favor.[17] Senate Majority Leader Mitch McConnell has yet to consider the bill in the Senate, and there is speculation the bill will not pass under his leadership.[18] The Trump Administration also threatened to veto the bill if it managed to

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of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 percentum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 percentum of such persons voted in the presidential election of November 1964").

[15] *See Shelby County v. Holder*, 570 U.S. at 531 ("[T]hings have changed dramatically. Largely because of the VRA, '[v]oter turnout and registration rates' in covered jurisdictions 'now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.' The tests and devices that blocked ballot access have been forbidden nationwide for over 40 years. Yet the Act has not eased [Section] 5's restrictions or narrowed the scope of [Section] 4's coverage formula along the way. Instead those extraordinary and unprecedented features have been reauthorized as if nothing has changed, and they have grown even stronger.") (quoting Northwest Austin Municipal Utility District No. 1 v. Holder, 557 U.S. 193, 2002 (2009)).

[16] For example, the Voting Rights Amendment Act of 2014 (H.R 3899, 113th Cong.) and the Voting Acts Advancement Act of 2015 (H.R. 2867, 114th Cong.) have yet to be heard by the Senate.

[17] Voting Rights Advancement Act of 2019, H.R. 4, 116th Cong. (2019) (established new criteria for preclearance, filling the void created by one of the rulings in *Shelby County v. Holder*: "A state and all of its political subdivisions shall be subject to preclearance of voting practice changes for a 10-year period if (1) 15 or more voting rights violations occurred in the state during the previous 25 years; or (2) 10 or more violations occurred during the previous 25 years, at least one of which was committed by the state itself. A political subdivision as a separate unit shall also be subject to preclearance for a 10-year period if three or more voting rights violations occurred there during the previous 25 years.").

[18] Benjamin Barber, *Will Mitch McConnell continue to block restoration of the Voting Rights Act?*, Facing South (Aug. 5, 2020), https://www.facingsouth.org/2020/08/will-mitch-mcconnell-continue-block-restoration-voting-rights-act.

pass in the Senate.[19] Since the July 2020 death of Representative John Lewis, one of the leaders of the Civil Right Movement, House Democrats have renewed interest in passing a voting rights package in Lewis's honor. It remains unclear whether the House will propose another bill or simply rename the Voting Rights Advancement Act of 2019 in honor of John Lewis.[20]

The invalidation of Section 4(b) and Congress's lack of revision has resulted in sweeping voting law reforms that unnecessarily burden African Americans, Latinos, and Native Americans in states previously subject to Section 4(b). Modern methods of voter suppression, such as strict voter-ID laws, registration policies, and poll closures, now threaten the ability of voters to cast their ballots. Legislation enacted in Texas, Alabama, and Mississippi after the Supreme Court issued *Shelby County v. Holder* will be considered to best examine its effects. These three states were previously subject to federal preclearance, and immediately responded to *Shelby County v. Holder* by changing their voting practices to be more burdensome.

I. A Brief History of Voting Rights in the United States

When the Framers met in Philadelphia in 1787 to discuss what would become the Constitution, several colonies already had progressive election systems by British standards. In Britain, only white males with substantial wealth or property could vote,[21] and the standards of other European democracies served as precedent for state

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[19] Sheryl Gay Stolberg & Emily Cochrane, *House Passes Voting Rights Bill Despite Near Unanimous Republican Opposition,* N.Y. Times (Dec. 6, 2019), https://www.nytimes.com/2019/12/06/us/politics/house-voting-rights.html.

[20] Sarah Ferris & John Bresnahan, *Dems eye voting rights package to honor John Lewis,* Politico (July 20, 2020), https://www.politico.com/news/2020/07/20/democrats-voting-rights-john-lewis-373286.

[21] A survey conducted in 1780 England and Wales found less than three percent of the population comprised the electorate, and many large industrial cities lacked electors in Parliament entirely. *See Getting the Vote*, The National Archives, http://www.nationalarchives.gov.uk/pathways/citizenship/struggle_democracy/getting_vote.htm.

legislatures and state constitutions.[22] The Framers left the determination of voter qualifications to the states not by explicitly defining voter qualifications in the Constitution,[23] but through Article I, Section 4 of the Constitution, which defers to the states the determination of election laws and procedures.[24] Individual state constitutions outlined voter qualifications for each state,[25] initially granting ballot access generally to white males who owned property and paid taxes.[26] Following the Civil War, citizens criticized state voting restrictions, casting them as unacceptably discriminatory and exclusive.[27] The Fifteenth Amendment, which attempted to prevent disenfranchisement based upon race, color, or previous condition of servitude, was ratified as a result.[28]

In response to the Fifteenth Amendment's ratification, many states created obstacles to vote that disproportionately targeted African

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[22] Michael Lind, *European Origins of American Democracy*, The Globalist (June 11, 2003), https://www.theglobalist.com/european-origins-of-american-democracy/

[23] *See e.g.*, Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 Vand. L. Rev. 89, 93 (2014) ("In fact, unlike virtually every state constitution, the U.S. Constitution does not actually confer the right to vote on anyone. 26 Instead, the right to vote stems from the general language of the Fourteenth Amendment's Equal Protection Clause and the negative mandates on who the government may not disenfranchise.").

[24] U.S. Const. art. 1, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of [choosing] Senators.").

[25] Douglas, *supra* note 23 at 101–5 ("In sum, state constitutions go well beyond the U.S. Constitution in discussing the right to vote. In fact, most state constitutions have a separate article specifically dealing with elections and the franchise. Unlike the U.S. Constitution, these state constitutional provisions explicitly grant the right to vote to all citizens who meet simple qualification rules.").

[26] *Voting Rights: A Short History*, Carnegie Corporation of New York (Nov. 18, 2019), https://www.carnegie.org/topics/topic-articles/voting-rights/voting-rights-timeline/.

[27] Epstein & Walker, *supra* note 2.

[28] *See* U.S. Const. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."); U.S. Const. amend. XV, § 2 (gives Congress the power to enforce § 1 with appropriate legislation); s*ee generally* John Mabry Matthews, Legislative and Judicial History of the Fifteenth Amendment (2009) (for further discussion on the origins of the Fifteenth Amendment).

Americans.[29] Literacy and understanding tests often required prospective voters demonstrate the ability to read and understand a passage of text.[30] The passage chosen was at the discretion of the local voter registration officials, who often gave simple passages to white voters whom they wanted to register and difficult passages to African American voters whose registration they wanted to deny.[31] Given the criminalization of teaching enslaved people to read and write in many Southern states, the majority of African Americans were illiterate at the time literacy tests were introduced.[32] When southern states began using literacy tests in 1890 en masse,[33] thirteen years after the end of Reconstruction and twenty years after the ratification of the Fifteenth Amendment, 56.8 percent of African Americans were illiterate.[34] To protect the voting rights of illiterate white Americans (7.7 percent of

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[29] Some scholars also argue that the Fifteenth Amendment was successfully ratified in part by allowing other forms of voter discrimination; Carnegie Corporation of New York, *supra* note 26; s*ee, e.g.*, Alfred Avins, *The Fifteenth Amendment and Literacy Tests: The Original Intent*, 18 Stan. L. Rev 808 (1966).

[30] A Mississippi registration form used from 1955 to 1965 required voting applicants to respond in writing to a series of questions. An excerpt at the beginning of the application mentions aspects of the Mississippi law that require the person registering to complete the application without any aid. *See Literacy Tests*, Sworn Smithsonian National Museum of American History, https://ids.si.edu/ids/deliveryService?id=NMAH-AHB2016q013070.

[31] Krutz, *supra* note 5 at 163.

[32] *Id.*

[33] The first implicit literacy test to be introduced in the South was the "eight-box" ballot by South Carolina in 1882. Voters were required to slip their ballots in boxes specific to the office being elected. Illiterate voters could not assess which box was for which office, and votes put in the wrong ballot box were discarded. *See Techniques of Direct Disenfranchisement, 1880-1965*, University of Michigan, http://www.umich.edu/~lawrace/disenfranchise1.htm?promocode=LIPP101AA?pro mocode; The Supreme Court recognized this history when it ruled that the Fifteenth Amendment was a proper constitutional basis for the VRA, which banned literacy tests. *See* South Carolina v. Katzenbach 383 U.S. 301, 310–11 (1966) ("[B]eginning in 1890, the States of Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia enacted tests still in use which were specifically designed to prevent Negroes from voting. Typically, they made the ability to read and write a registration qualification and also required completion of a registration form. These laws were based on the fact that as of 1890 in each of the named States, more than two-thirds of the adult Negroes were illiterate while less than one-quarter of the adult whites were unable to read or write.") (citations omitted).

[34] *120 Years of Literacy*, National Center for Education Statistics, https://nces.ed.gov/naal/lit_history.asp.

white Americans in 1890[35]), a loophole commonly called the grandfather clause exempted from literacy and understanding tests those who were allowed to vote prior to the Civil War and their descendants.[36]

In addition to literacy and understanding tests, many states employed a poll tax, an annual per-person tax required to register to vote.[37] Voters often paid $1–$2,[38] which equals about $20–$50 as of the publication of this article. Poll taxes were cumulative in many states, meaning the amount required to vote increased year by year. Individuals who were eligible to register but did not vote were still required to pay the poll taxes, which disproportionately affected Black voters, who typically could not afford the taxes[39] due to economic inequality perpetuated by generations of slavery and racist Black Codes and Jim Crow laws targeting employment.[40] A grandfather

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[35] *Id.*

[36] KRUTZ, *supra* note 5 at 163 ("Some states introduced a loophole, known as the grandfather clause, to allow less literate whites to vote. The grandfather clause exempted those who had been allowed to vote in that state prior to the Civil War and their descendants from literacy and understanding tests.").

[37] *Id.* at 164 ("This was an annual per-person tax, typically one or two dollars (on the order of $20 to $50 today), that a person had to pay to register to vote. People who didn't want to vote didn't have to pay, but in several states the poll tax was cumulative, so if you decided to vote you would have to pay not only the tax due for that year but any poll tax from previous years as well. Because former slaves were usually quite poor, they were less likely than white men to be able to pay poll taxes.").

[38] *Id.*

[39] *Id.*

[40] South Carolina Black Codes required African Americans to sign labor contracts with white "masters." These contracts reduced African Americans essentially to slaves; the contracts required them to live on their employer's property, remain quiet and orderly, work from sunrise to sunset, and request permission for visitors. These contracts also defined wages. South Carolina's Black Codes permitted the whipping of minors who signed labor contracts as a form of discipline. Other vagrancy laws permitted the arrest of unemployed African Americans. Upon arrest, African Americans were resigned to hard labor as prisoners. These laws were meant to compel African Americans to sign labor contracts with white employers. *See The Southern Black Codes of 1865-66*, CONSTITUTIONAL RIGHTS FOUNDATION, https://www.crf-usa.org/brown-v-board-50th-anniversary/southern-black-codes.html; Brown v. Bd. of Educ., 347 U.S. 483 (1954) (Jim Crow laws extended to all aspects of life, including employment. African Americans were generally relegated to undervalued or service-oriented jobs, regardless of the quality of their education. Segregation alone implied inferiority, and thus white employers—the majority of

clause developed at the Mississippi Constitutional Convention of 1890 exempted white Americans from poll taxes and literacy tests if their grandfathers could vote prior to the Civil War.[41]

Grandfather clauses were eventually declared unconstitutional in *Guinn v. United States* in 1915.[42] But even for the few African Americans who passed literacy tests and paid poll taxes, the Democratic Party created the so-called white primary, primary elections in which only white Americans could vote, to limit Black Americans' influence in determining who ultimately won elections. In defense of the constitutionality of white primaries, the Democratic Party argued state party organizations were *private* groups not subject to the Fifteenth Amendment's requirement that voting not be denied on the basis of color, race, or previous condition of servitude.[43] Additionally, the Democratic Party claimed white primaries did not abridge the voting rights of African Americans because voting for nominees for the general elections was different from the actual election of those officials.[44] The Supreme Court denounced the white primary as discriminatory on a case by case basis, typically applying the language of the Fourteenth and Fifteenth Amendments. In 1927, the Court invalidated Texas's white primary in *Nixon v. Herndon*,[45]

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employers—saw the education delivered in African American schools as inherently inferior to that of white schools); segregation ultimately amounted to greater African American unemployment and lower wages. *See Segregation*, The African American Policy Forum, https://aapf.org/segregation.

[41] *See* Race and Voting, Constitutional Rights Foundation, https://www.crf-usa.org/brown-v-board-50th-anniversary/race-and-voting.html.

[42] Guinn v. United States, 238 U.S. 347 (1915). *See also id.* at 365 ("[W]e seek in vain for any ground which would sustain any other interpretation but that the [grandfather clause], recurring to the conditions existing before the Fifteenth Amendment was adopted and the continuance of which the Fifteenth Amendment prohibited, proposed by in substance and effect lifting those conditions over to a period of time after the Amendment to make them the basis of the right to suffrage conferred in direct and positive disregard of the Fifteenth Amendment.").

[43] U.S. Const. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged *by the United States or by any State* on account of race, color, or previous condition of servitude") (emphasis added).

[44] Krutz, *supra* note 5 at 165 ("The state party organizations argued that as private groups, rather than part of the state government, they had no obligation to follow the Fifteenth Amendment's requirement not to deny the right to vote on the basis of race.").

[45] Nixon v. Herndon, 273 U.S. 536 (1927).

calling the state law a "direct and obvious infringement" of the Fourteenth Amendment.[46] But the Texas statute was atypical. In most cases, the white primary was a Democratic Party rule, not a state law.[47] In 1944, the Court eventually ruled against a Democratic Party resolution in *Smith v. Allwright,* stating that party elections become subject to Constitutional restraints when the election in question is a primary for a general election.[48]

In response to the rampant use of poll taxes and the increasing momentum of the Civil Rights movement, Congress proposed what became the Twenty-fourth Amendment in 1962. Ratified in 1964, the Twenty-fourth Amendment banned poll taxes in federal elections but made no mention of the same proscription for state elections.[49] As a

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[46] *Id.* at 541 ("[The Fourteenth] Amendment, while it applies to all, was passed, as we know, with a special intent to protect the blacks from discrimination against them. That Amendment 'not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws. ... What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color?' The statute of Texas in the teeth of the prohibitions referred to assumes to forbid negroes to take part in a primary election the importance of which we have indicated, discriminating against them by the distinction of color alone.") (citations omitted).

[47] Michael J. Klarman, *The White Primary Rulings: A Case Study in the Consequences of Supreme Court Decisionmaking*, 29 Fla. St. Univ. L. Rev. 55, 58 (2001).

[48] 321 U.S. at 649, 664–66 ("When primaries become a part of the machinery for choosing officials, state and national, as they have here, the same tests to determine the character of discrimination or abridgement should be applied to the primary as are applied to the general election. If the State requires a certain electoral procedure, prescribes a general election ballot made up of party nominees so chosen and limits the choice of the electorate in general elections for state offices, practically speaking, to those whose names appear on such a ballot, it endorses, adopts and enforces the discrimination against Negroes, practiced by a party entrusted by Texas law with the determination of the qualifications of participants in the primary. This is state action within the meaning of the Fifteenth Amendment.") (citing Guinn v. United States, 238 U.S. 347, 362 (1915)).

[49] U.S Const. amend. XXIV, § 1 ("The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax."); U.S Const. amend. XXIV, § 2 (gives Congress the power to enforce § 1 with appropriate legislation).

result, and in compliance with the Constitution, Southern states continued to employ poll taxes in state elections until 1966 when the Supreme Court declared all poll taxes unconstitutional.[50] African American organizations called upon government officials to pass new civil rights legislation as the Civil Rights Movement, and President Lyndon B. Johnson eventually signed into law the Civil Rights Act of 1964, outlawing segregation and creating the Equal Employment Opportunity Commission.[51] The Civil Rights Act also outlawed government discrimination and unequal application of voting qualifications by race.[52]

African Americans responded to the Civil Rights Act with registration drives. In the summer of 1964, the Student Nonviolent Coordinating Committee (SNCC) launched what they called the Summer Project with the goal of gaining African Americans in Mississippi the right to vote.[53] Mississippi newspapers warned of an invasion, and Mississippi Governor Johnson assured the public that law and order would be maintained.[54] Early on in the "Freedom Summer," local law enforcement coordinated the kidnappings and murders of African American SNCC worker James Chaney and white volunteers Andrew Goodman and Michael Schwerner.[55] In response to

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[50] *See generally*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

[51] Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat 241 (1964) (establishes the Equal Employment Opportunity Commission, which is charged by § 706 to respond to allegations of unlawful employment practices outlined in § 704. Actionable offenses include retaliation for an employee's charge against his employer for unlawful employment practices and discrimination in employment advertisement relating to the race, color, religion, sex, or national origin of the potential employee).

[52] Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat 241, § 101(a)(2)(A) (1964) ("No person acting under color of law shall—in determining whether any individual is qualified under State law or laws to vote in any Federal election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote.").

[53] Rachel S. Ohrenschall, *Freedom Summer campaign for African American voting rights in Mississippi, 1964*, Global Nonviolent Action Database (Mar. 19, 2012), https://nvdatabase.swarthmore.edu/content/freedom-summer-campaign-african-american-voting-rights-mississippi-1964.

[54] *See id.*

[55] *See id*; s*ee also Freedom Summer*, Stanford Martin Luther King, Jr. Research Institute, https://kinginstitute.stanford.edu/encyclopedia/freedom-summer.

the SNCC's campaign, eighty volunteers were beaten, 1,000 were arrested, and 37 churches were bombed or burned down.[56]

Seventeen-thousand African Americans attempted to register in the summer of 1964; only 1,600 of the completed applications were accepted by local registrars.[57] Civil rights activists and leaders responded to the brutality of the Freedom Summer with the famous march from Selma to Montgomery in 1965. The brutal attack on three white marchers by Ku Klux Klan members was televised for all to see, and the death of a white minister garnered greater public sympathy for the plight African Americans faced in exercising their voting rights.[58] But progress in registering African American voters remained slow. There was enough support in Congress for a follow-up bill to the Civil Rights Act that would further enforce the Fifteenth Amendment—the Voting Rights Act of 1965 (VRA).

II. The Voting Rights Act of 1965

The VRA banned prerequisite tests and devices used to discriminate against African American voters and required greater oversight by federal officials of elections in several states with histories of racially discriminatory voting processes.[59] Its enactment resulted in a rapid increase in African American voter registration.[60] The VRA includes nineteen sections, but for the purposes of this

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[56] *Id.*

[57] *See Freedom Summer*, *supra* note 55.

[58] KRUTZ, *supra* note 5 at 168 ("That night, three of the marchers, white ministers from the north, were attacked and beaten with clubs by members of the Ku Klux Klan; one of the victims died from his injuries. Televised images of the brutality against protesters and the death of a minister led to greater public sympathy for the cause. Eventually, a third march was successful in reaching the state capital of Montgomery.").

[59] *See* South Carolina v. Katzenbach*,* 383 U.S. 301 (1966) at 311 (Chief Justice Warren said of the tests, "... the States of Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia enacted tests still in use which were specifically designed to prevent Negroes from voting.").

[60] KRUTZ, *supra* note 5 at 169 ("The Voting Rights Act proved to have much more immediate and dramatic effect than the laws that preceded it; what had been a fairly slow process of improving voter registration and participation was replaced by a rapid increase of black voter registration rates—although white registration rates increased over this period as well.").

paper, in-depth discussion of only Sections 2, 3, 4(a), 4(b), 4(c), and 5 follow.

The demands of the VRA begin with Section 2. Section 2 banned the imposition of voting qualifications and practices designed to deny the right to vote based on race.[61] This section explicitly applies to any state or political subdivision, meaning individual counties are covered under this requirement. Section 3 outlined the process for enforcing the Fifteenth Amendment through the VRA. Whenever the Attorney General discovers or suspects a state or political subdivision's voting practices has failed to fulfil the guarantees of the Fifteenth Amendment, a court may appoint federal examiners as part of an interlocutory order to enforce the guarantees of the Fifteenth Amendment or as part of a final judgment where violations of the Fifteenth Amendment have been found.[62] Federal examiners may not be appointed when the court determines discriminatory voting incidents were minimal and promptly corrected by state or local action, any prolonged effect of an incident has been eliminated, and it is improbable further incidents will occur.[63] Section 3(b) grants courts the power to suspend the use of any voting practice deemed

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[61] VRA § 2 ("No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.").

[62] VRA § 3(a) ("Whenever the Attorney General institutes a proceeding under any statute to enforce the guarantees of the fifteenth amendment in any State or political subdivision the court shall authorize the appointment of Federal examiners by the United States Civil Service Commission in accordance with section 6 to serve for such period of time and for such political subdivisions as the court shall determine is appropriate to enforce the guarantees of the fifteenth amendment (1) as part of any interlocutory order if the court determines that the appointment of such examiners is necessary to enforce such guarantees or (2) as part of any final judgment if the court finds that violations of the fifteenth amendment justifying equitable relief have occurred in such State or subdivision…").

[63] *See id.* ("*Provided*: That the court need not authorize the appointment of examiners if any incidents of denial or abridgement of the right to vote on account of race or color (1) have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.").

discriminatory for a finite time they decide.[64] Section 3(c) presents the opportunity for restitution in areas where the guarantees of the Fifteenth Amendment have been abridged; in addition to whatever relief a court chooses to grant, the court may retain jurisdiction over the area in question.[65] New voting qualifications, prerequisites, standards, or practices may be enforced by the chief legal officer or other appropriate official, provided the practices have been submitted to the Attorney General for review and the court finds the new imposition does not have the purpose or effect of denying the right to vote on account of race.[66] The Attorney General has sixty days from submission to object to the implementation of the new qualification, prerequisite, standard, or practice.[67] Neither the court's finding of discriminatory intent nor the Attorney General's objection prevent

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[64] VRA § 3(b) ("If in a proceeding instituted by the Attorney General under any statute to enforce the guarantees of the fifteenth amendment in any State or political subdivision the court finds that a test or device has been used for the purpose or with the effect of denying or abridging the right of any citizen of the United States to vote on account of race or color, it shall suspend the use of tests and devices in such State or political subdivisions as the court shall determine is appropriate and for such period as it deems necessary.").

[65] VRA §3(c) ("If in any proceeding instituted by the Attorney General under any statute to enforce the guarantees of the fifteenth amendment in any State or political subdivision the court finds that violations of the fifteenth amendment justifying equitable relief have occurred within the territory of such State or political subdivision, the court, in addition to such relief as it may grant, shall retain jurisdiction for such period as it may deem appropriate and during such period no voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced unless and until the court finds that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color…").

[66] *Id.*

[67] *See id.* ("*Provided*: That such qualification, prerequisite, standard, practice, or procedure may be enforced if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the court's finding nor the Attorney General's failure to object shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure.").

future enforcement of the new qualification, prerequisite, standard, or practice.[68]

Section 4 intended to protect citizens from compliance with poll taxes and literacy tests in any state, federal, or local election.[69] Section 4 also issued a formula for determining which states and counties required approval from federal courts before making changes to voting laws.[70] Under Section 4(a), unless the United States District Court for the District of Columbia determined no test or device was used in the territory at issue within five years prior to the proceeding, said territory would be subject to federal preclearance for five years following the proceeding.[71] In other words, use of a prohibited test or device by a county or state warranted supervision of its voting practices from the federal government. Up until *Shelby v. Holder*, Section 4(b) made the provisions of Section 4(a) applicable to any state or county in which the Attorney General determined any discriminatory test or device was used as of November 1964, or in any state for which the Director of the Census found less than 50% of residents eligible to vote were registered as of November 1964 or voted in the 1964 presidential election.[72] Section 4(b) covered nine states fully (Alaska, Virginia, South Carolina, Georgia, Alabama, Mississippi, Louisiana, Texas, and Arizona) and six states partially (Florida, North Carolina, New York, Michigan, South Dakota, and

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[68] *See id.*

[69] VRA § 4(a) ("To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State…").

[70] VRA § 4(b) ("The provisions of subsection (a) shall apply in any State or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964.").

[71] *See id.*

[72] 570 U.S. at 529 (the Court struck down VRA § 4(b)). *See supra* note 70 and accompanying notes. *See also infra* note 69 and accompanying notes.

California).[73] Section 4(c) defined tests as "any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class."[74]

Section 5 prevented the states described in Section 4(b) from passing new voting laws without federal approval. This section required states receive determination in federal court that the new standard, qualification, or procedure would not, intentionally or incidentally, deny the right to vote on account of race.[75] Without a declaration by a federal court that a proposed new standard complied with the Fifteenth Amendment, the standard could not be enforced.

III. *South Carolina v. Katzenbach*

Immediately after its passage, the VRA faced criticism from the states targeted by its preclearance formula. In 1966, South Carolina sued U.S. Attorney General Nicholas Katzenbach to gain review of the constitutionality of the VRA.[76] South Carolina, joined by five other Southern states, argued Sections 4, 5, 6(b), 7, 9, and 13 of the VRA unconstitutionally curtailed the states' rights to determine voter qualifications, a violation of Article I, Section 4[77] and the Tenth Amendment.[78]

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[73] Leah Aden et al., *Democracy Diminished: State and Local Threats to Voting Post*-Shelby County, Alabama v. Holder, The Thurgood Marshall Institute at LDF (2016) at 1.
[74] VRA § 4(c).
[75] *Id*.
[76] 383 U.S. at 301.
[77] U.S. Const. art. 1, § 4 ("The Times, Places, and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the places of [choosing] Senators.").
[78] U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

In an 8–1 decision, the Court ruled the Voting Rights Act constitutional in part on the grounds that previous attempts by Congress to remedy discriminatory voting practices had failed. Chief Justice Warren opined:

> Two points emerge vividly from the voluminous legislative history of the Act contained in the committee hearings and floor debates. First: Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution. Second: Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment.[79]

The Court recognized that states allowed local discrimination or implemented discriminatory measures themselves for decades prior to the VRA.[80] The majority also emphasized that judicial remediation of disenfranchisement after the passage of discriminatory voting laws was incapable of fully re-enfranchising those burdened by the laws.[81] Chief Justice Warren said that Congress "is not circumscribed by any such artificial rules under § 2 of the Fifteenth Amendment"[82] and that

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[79] 383 U.S. at 309.

[80] *Id.* at 310 ("Meanwhile, beginning in 1890, the States of Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia enacted tests still in use which were specifically designed to prevent Negroes from voting.").

[81] *Id.* at 313–14 ("Despite the earnest efforts of the Justice Department and of many federal judges, these new laws have done little to cure the problem of voting discrimination… The previous legislation has proved ineffective for a number of reasons. Voting suits are unusually onerous to prepare, sometimes requiring as many as 6,000 manhours spent combing through registration records in preparation for trial. Litigation has been exceedingly slow, in part because of the ample opportunities for delay afforded voting officials and others involved in the proceedings. Even when favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and Negro registration.").

[82] *Id.* at 327 ("In the oft-repeated words of Chief Justice Marshall, referring to another specific legislative authorization in the Constitution, 'This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent,

the VRA "was clearly a legitimate response to the problem, for which there is ample precedent under other constitutional provisions."[83] Litigation is a lengthy process, and the United States does not typically redo elections. Those affected by discriminatory voting laws lose their voice in elections until the suit is decided, which could take years. For these reasons, the Court considered federal preclearance a necessary aspect of the VRA.[84] Additionally, the Court saw in the history of voting discrimination disputes that Section 1 of the Fifteenth Amendment[85] was always considered self-executing and construed to invalidate apparently or practically discriminatory voting procedures.[86] *Katzenbach* made clear that Section 2 of the Fifteenth Amendment granted Congress the power to enact legislation enforcing Section 1.[87]

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and acknowledges no limitations, other than are prescribed in the constitution.'") (citing Gibbons v. Ogden, 9 Wheat. 1, 196 (1824)).

[83] *Id.* at 328 (citing Katzenbach v. McClung, 379 U.S. 294, 302–04 (1964) (ruling that Congress's Commerce Power included the power to prohibit racial discrimination in restaurants) and United States v. Darby, 312 U.S. 100, 120–21 (1941) (ruling that Congress's Commerce Power included the ability to regulate labor conditions)).

[84] *See id.* ("Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits.").

[85] U.S. Const. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

[86] 383 U.S. at 325 ("[Section 1 of the Fifteenth Amendment] has always been treated as self-executing and has repeatedly been construed, without further legislative specification, to invalidate state voting qualifications or procedures which are discriminatory on their face or in practice.") (citing Neal v. Delaware, 103 U.S. 370 (1881); Guinn v. United States, 238 U.S. 347 (1915); Myers v. Anderson, 238 U.S. 368 (1915); Lane v. Wilson, 307 U.S. 268 (1939); smith v. Allwright, 321 U.S. 649 (1944); schnell v. Davis, 336 U.S. 933 (1949); Terry v. Adams, 345 U.S. 461 (1953); United States v. Thomas, 362 U.S. 58 (1960); Gomillion v. Lightfoot, 364 U.S. 339 (1960); Alabama v. United States, 371 U.S. 37 (1962); Louisiana v. United States, 380 U.S. 145 (1965).).

[87] 383 U.S. at 325 ("South Carolina contends that the cases cited above are precedents only for the authority of the judiciary to strike down state statutes and procedures — that to allow an exercise of this authority by Congress would be to rob the courts of their rightful constitutional role. On the contrary, § 2 of the Fifteenth Amendment expressly declares that 'Congress shall have power to enforce this article by appropriate legislation.'").

IV. *Crawford v. Marion County Election Board*

Voting rights after *Katzenbach* remained safeguarded by the VRA. The enactment of prejudicial methods of disenfranchisement were prevented by the preclearance formula in the states covered by the law. More than forty years later in 2008, after the VRA had been renewed five times,[88] the Supreme Court considered the constitutionality of voter identification laws in *Crawford v. Marion County Election Board*.[89] In 2005, the Indiana legislature enacted SEA 483, a voter ID law which required citizens to present government-issued photo identification at their polling places to be eligible to vote in primaries and general elections.[90] The requirement did not apply to absentee votes by mail, and individuals in state-licensed facilities, like nursing homes, were exempt under the procedure outlined in the Indiana statute.[91] Voters who forgot to bring their IDs received provisional ballots, which would be counted if they presented a government-issued photo ID to a circuit court clerk by noon on the second Monday after the election.[92] Indiana DMV offices offered free identification cards to those without driver's licenses, and a photo ID was not required to register to vote. Indiana was not covered under Section 4(b) of the VRA and thus required no federal preclearance before enacting SEA 483.

Shortly after SEA 483's enactment, individuals, interest groups, the Indiana Democratic Party, and the Marion County Democratic Party challenged the law. They argued in the district court that the law violated the Fourteenth Amendment by substantially burdening the right to vote and arbitrarily disenfranchising those who

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[88] Gary May, Bending Toward Justice: The Voting Rights Act and the Transformation of American Democracy (2013).

[89] Crawford v. Marion County Election Board, 553 U.S. 181 (2008).

[90] Senate Enrolled Act No. 483, Ind. Code § 3-2-5-40.5 (2005).

[91] *Id.* at § 7.2(e) ("A voter who votes in person at a precinct polling place that is located at a state licensed care facility where the voter resides is not required to provide proof of identification before voting in a primary election."); *Id.* at § 8.1.2 ("An absentee voter is not required to provide proof of identification when: (1) mailing, delivering, or transmitting an absentee ballot under section 1 of this chapter; or (2) voting before an absentee board under this chapter.").

[92] Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 786–87 (S. D. Ind. 2006), *aff'd*, 472 F.3d 949 (7th Cir. 2007), *aff'd* 553 U.S. 181 (2008).

could not easily obtain photo identification cards.[93] The State of Indiana claimed it had a compelling interest in protecting the integrity and reliability of the electoral process and preventing voter fraud, submitting evidence of national voter fraud and its impact on public faith in the validity of elections.[94] On appeal from the Seventh Circuit Court of Appeals, the Supreme Court found SEA 483 constitutional in a 6–3 ruling. The Court cited federal statutes which required states review their election procedures and indicated Congress's approval of photo identification as an effective way of establishing a voter's qualification to vote.[95] The Court also noted Indiana's inflated voter rolls, fraudulent voting in the 2003 Democratic primary for mayor of East Chicago, Indiana, and the minimal burden in obtaining a valid form of photo identification to support Indiana's claims that voter fraud is an issue in the state and that SEA 483's voter ID requirement is a justifiable measure.[96]

Importantly, the State of Indiana itself had little experience with voter fraud in its elections.[97] Nationally, voter fraud is extremely rare, with only 52 people convicted of illegal voting since 2005.[98] Indiana continues to have some of the strictest voter identification laws in the country.

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[93] *See id.* at 820 ("Plaintiffs' basic claim in this lawsuit is that the photo identification requirements of SEA 483 violate the First and Fourteenth Amendments to the U.S. Constitution because they place a severe burden on the right to vote.").
[94] *See id.* at 793–94. *See also* 553 U.S. at 191.
[95] *See* 553 U.S. at 192–94.
[96] Because the lawsuit involved a restriction on the right to vote, the Court engaged in a strict scrutiny analysis. *See id.* at 194–97 ("In sum, on the basis of the record that has been made in this litigation, we cannot conclude that the statute imposes 'excessively burdensome requirements' on any class of voters. A facial challenge must fail where the statute has a 'plainly legitimate sweep.' When we consider only the statute's broad application to all Indiana voters we conclude that it 'imposes only a limited burden on voters' rights.' The 'precise interests' advanced by the State are therefore sufficient to defeat petitioners' facial challenge to SEA 483.") (citations omitted); For more on how the Court rules in cases relating to ever-salient interests such as the right to vote, *see* Bush v. Gore, 531 U.S. 98 (2000); s*ee also*, United States v. Carolene Products Co., 304 U.S. 144, 152–3 n. 4 (1938).
[97] *See* 458 F. Supp. 2d at 792–3.
[98] *See id.*

V. *Northwest Austin Municipal Util. Dist. No. One v. Holder*

This 2009 case concerned elections for a small Texas limited government, Northwest Austin Municipal Utility District Number One.[99] Northwest Austin Municipal Utility District Number One had an elected board. Because of the utility district's location in the State of Texas, the board was required to abide by Section 5 of the VRA and seek federal preclearance before changing its election procedures. The district sued U.S. Attorney General Eric Holder, seeking an exemption from Section 5 under a provision of Section 4(a). Section 4(a) released "political subdivisions" from preclearance requirements provided they met certain conditions.[100] Under Section 14(c)(2), "political subdivisions" are "any county or parish, except that where registration

[99] Municipal utility districts (MUDs) are special districts functioning as independent, limited governments which provide an alternate method of obtaining funds for public utility development. MUDs issue bonds to reimburse developers and use taxes paid by individuals within the MUD to repay the debt.

[100] VRA § 4(a) ("To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under subsection (b) or in any political subdivision with respect to which such determinations have been made as a separate unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color: *Provided*, That no such declaratory judgment shall issue with respect to any plaintiff for a period of five years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this Act, determining that denials or abridgments of the right to vote on account of race or color through the use of such tests or devices have occurred anywhere in the territory of such plaintiff. An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for five years after judgment and shall reopen the action upon motion of the Attorney General alleging that a test or device has been used for the purpose or with the effect of denying or abridging the right to vote on account of race or color. If the Attorney General determines that he has no reason to believe that any such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, he shall consent to the entry of such judgment.").

for voting is not conducted under the supervision of a county or parish[. T]he term shall include any other subdivision of a State which conducts registration for voting."[101] A 1980 Supreme Court decision considering a similar question of bailout found political subdivisions within states entirely covered by Section 4(b) ineligible for bailout.[102] A 1982 amendment to the VRA following that decision allowed for political subdivisions to bailout when the states are entirely covered by the VRA.[103]

Based on this amendment, the Supreme Court held the Austin municipal district eligible for bailout, contrary to the ruling by the District Court for the District of Columbia.[104] More importantly, in response to the district's claims of Section 5's unconstitutionality, Chief Justice Roberts recognized the improved conditions resulting from Section 5 but noted the preclearance requirement "authorizes federal intrusion into sensitive areas of state and local policymaking, impos[ing] substantial 'federalism costs.'"[105] The Court ultimately chose not to decide the case on the constitutionality of Section 5 since the case could be resolved on other grounds.[106] But the Court also questioned whether the limitations imposed on states covered by preclearance formula could be justified based on the state of race relations in 2009.[107] Chief Justice Roberts relied on "considerable

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[101] VRA § 14(c)(2).

[102] *See* City of Rome v. United States, 446 U.S. 156 (1980).

[103] Voting Rights Act Amendments of 1982 § 2(b), Pub. L. No. 97-205, 96 Stat. 131 (1982) (codified in 42 U.S.C. §§ 1973 (1982)) .

[104] *See* Northwest Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 209–11 (2009).

[105] *Id.* at 202 (quoting Lopez v. Monterey County, 525 U.S. 266, 282 (1999) (quoting Miller v. Johnson, 515 U.S. 900, 926 (1995))).

[106] *See id.* at 206.

[107] *See id.* at 202–06 ("These federalism costs have caused Members of this Court to express serious misgivings about the constitutionality of [Section] 5… Things have changed in the south. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels. These improvements are no doubt due in significant part to the Voting Rights Act itself, and stand as a monument to its success. Past success alone, however, is not adequate justification to retain the preclearance requirements. It may be that these improvements are insufficient and that conditions continue to warrant preclearance under the Act. But the Act imposes current burdens and must be justified by current needs. The Act also differentiates

evidence that [Section 5] fails to account for current political conditions."[108] The Court would apply this standard four years later when considering the constitutionality of Sections 4 and 5 in *Shelby County v. Holder*.

VI. *Shelby County v. Holder*

Despite the Court's early finding of constitutionality of Sections 4 and 5 in *South Carolina v. Katzenbach*,[109] the states covered by the VRA's preclearance formula continued to question the limits of the powers and authority of the VRA and Sections 4 and 5.[110] The final

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between the States, despite our historic tradition that all the States enjoy 'equal sovereignty.'... The evil that [Section] 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance. The statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions.").

[108] *Id.* at 203.

[109] *See supra* note 86 and accompanying text.

[110] *See* Stephan Stohler, Reconstructing Rights: Courts, Parties, and Equality Rights in India, South Africa, and the United States 80-1 (2019) (provided the following list of relevant cases: Katzenbach v. Morgan, 384 U.S. 641 (1966); Allen v. State Bd. of Elections, 393 U.S. 544 (1969); Hadnott v. Amos, 394 U.S. 358 (1969); Gaston County v. United States, 395 U.S. 285 (1969); Perkins v. Matthews, 400 U.S. 379 (1971); Georgia v. United States, 411 U.S. 526 (1973); National Association for the Advancement of Colored People v. New York, 413 U.S. 345 (1973); Connor v. Waller, 421 U.S. 656 (1975); City of Richmond v. United States, 422 U.S. 358 (1975); Beer v. United States, 425 U.S. 130 (1976); United States v. Board of Supervisors of Warren County, Mississippi, 429 U.S. 642 (1977); Morris v. Gressette, 432 U.S. 491 (1977); Briscoe v. Bell, 432 U.S. 404 (1977); United States v. Board of Commissioners of Sheffield, Alabama, 435 U.S. 110 (1978); Berry v. Doles, 438 U.S. 190 (1978); Dougherty County Board of Education v. White, 439 U.S. 32 (1978); City of Rome v. United States, 446 U.S. 156 (1980); McDaniel v. Sanchez, 452 U.S. 130 (1981); Blanding v. DuBose, 454 U.S. 393 (1982); Hathorn v. Lovorn, 457 U.S. 255 (1982); City of Port Arthur v. United States, 459 U.S. 159 (1982); City of Lockhart v. United States, 460 U.S. 125 (1983); McCain v. Lybrand, 465 U.S. 236 (1984); National Association for the Advancement of Colored People v. Hampton County Election Commission, 470 U.S. 166 (1985); Thornburg v. Gingles, 478 U.S. 30 (1986); City of Pleasant Grove v. United States, 479 U.S. 462 (1987); Clark v. Roemer, 500 U.S. 646 (1991); Houston Lawyers' Association v. Attorney General of Texas, 501 U.S. 419 (1991); Chisom v. Roemer, 501 U.S. 380 (1991); Presley v. Etowah County Commission, 502 U.S. 491 (1992); Johnson v. De Grandy, 512 U.S. 997 (1994); Holder v. Hall, 512 U.S. 874 (1994); Morse v. Republican Party of Virginia, 517 U.S. 186 (1996); Lopez v. Monterey County, 519 U.S. 9 (1996); Young v. Fordice, 520 U.S. 273 (1997); Reno v. Bossier Parish School Board, 520 U.S. 471 (1997); Abrams v. Johnson, 521 U.S. 74 (1997); Foreman v.

challenge came in 2013, when Shelby County, Alabama, sued U.S. Attorney General Eric Holder. Shelby County was covered under Section 4(b) of the VRA and thus subject to federal preclearance before introducing voting law changes.[111] Shelby County argued Sections 4 and 5 of the VRA were unconstitutional because Congress had not revised the formula for preclearance since 1965.[112] The original VRA was set to expire after five years, but Congress reauthorized the Act for the third time in 2006 for 25 more years. According to Shelby County, the race relations of 1965 no longer existed when the suit was filed in 2006.[113] Shelby County's argument followed from the Court's ruling in *Northwest Austin*, which developed a standard for determining the constitutionality of a burdensome statute.[114] According to the Court in *Northwest Austin*, a statute which imposes current burdens on state authority and sovereignty must be justified by current needs of the legislature to enforce Constitutional guarantees and be sufficiently related to the targeted problem, especially when the principle of equal sovereignty of

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Dallas County, 521 U.S. 979 (1997); City of Monroe v. United States, 522 U.S. 34 (1997); Lopez v. Monterey County, 525 U.S. 266 (1999); Reno v. Bossier Parish School Board, 528 U.S. 320 (2000); Branch v. Smith, 538 U.S. 254 (2003); Georgia v. Ashcroft, 539 U.S. 461 (2003); League of United Latin American Citizens v. Perry, 548 U.S. 399 (2006); Riley v. Kennedy, 553 U.S. 406 (2008); Bartlett v. Strickland, 556 U.S. 1 (2009); Northwest Austin Municipal Util. Dist. No. One v. Holder, 557 U.S. 193 (2009)).

[111] Shelby County is located in Alabama, a state covered by the preclearance formula in its entirety due to its adherence to the characteristics described in § 4(b).

[112] Brief for Shelby County, p. 15–16 ("Section 5 was enacted for a singular purpose: to combat 'the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees.' In 2006, therefore, Congress needed to similarly document a pattern of rampant discrimination and electoral gamesmanship to meet its requirement under the second step of the Boerne framework. Congress did not fulfill its obligation… To renew Section 5 in 2006, Congress needed to establish that those same 'unique circumstances' still existed in the covered jurisdictions.") (citations omitted).

[113] Brief for Shelby County, p. 18 ("But Congress found that 'many of the first generation barriers to minority voter registration and voter turnout that were in place prior to the VRA have been eliminated' ... [T]he Supreme Court reached the same conclusion.") (citations omitted).

[114] 557 U.S. at 211 ("It may be that these improvements are insufficient and that conditions continue to warrant preclearance under the Act. But the Act imposes current burdens and must be justified by current needs.").

the states, outlined in the Tenth Amendment, is challenged.[115] The Tenth Amendment holds powers not expressly delegated to the federal government or specifically prohibited to the states are reserved to the states,[116] effectively attempting to balance the powers of the federal government with the powers of the state government. The VRA, in many respects, curtails the powers of the states to manage their elections, a power reserved to the states in virtue of being neither prohibited to the states nor expressly delegated to the federal government in the Constitution.

Under the *Northwest Austin* standard, the *Shelby County* Court found Section 4(b) of the Voting Rights Act unconstitutional in its original form. The Court found the preclearance formula unduly burdened and infringed upon the sovereignty of the states under its coverage, citing lesser racial disparity in voter registration in the preclearance states and Census Bureau statistics showing greater African American voter turnout than white voter turnout in five of six states covered by Section 5.[117] Section 4(b) did not suddenly become inherently unconstitutional, nor was the decision in *Katzenbach* overruled by the Court. Rather, the Court found Section 4(b) could no longer overcome the states' Tenth Amendment rights because the specific methods of voter suppression prohibited by the VRA were no longer existent.[118] According to the evidence utilized by the Court

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[115] *Id.*

[116] U.S Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

[117] 570 U.S. at 530 ("By 2009, 'the racial gap in voter registration and turnout [was] lower in the states originally covered in § 5 than it was nationwide'.").

[118] *See id.* at 535 ("There is no denying, however, that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions."). *See also id.* at 551 ("The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s. But such tests have been banned nationwide for over 40 years. And voter registration and turnout numbers in the covered States have risen dramatically in the years since. Racial disparity in those numbers was compelling evidence justifying the preclearance remedy and the coverage formula. There is no longer such a disparity.") (citations omitted).

regarding voter turnout and Attorney General objections, few voting obstacles existed for African Americans.[119]

Importantly, the Court's decision did not invalidate the entire VRA. Though Section 5 was rendered unenforceable, the other sections remained.[120] For Section 4(b) to again be considered constitutional, the Court advised Congress to reevaluate the coverage formula to contemporarily apply.[121] Congress has since failed to create a new constitutional standard.[122]

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[119] *See id.* at 535 ("By 2009, 'the racial gap in voter registration and turnout [was] lower in the States originally covered by §5 than it [was] nationwide.' Since that time, Census Bureau data indicate that African-American voter turnout has come to exceed white voter turnout in five of the six States originally covered by [Section] 5, with a gap in the sixth State of less than one half of one percent.") (citations omitted). *See also id.* at 547–49 ("Congress said the same when it reauthorized the Act in 2006, writing that '[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices.' The House Report elaborated that 'the number of African-Americans who are registered and who turn out to cast ballots has increased significantly over the last 40 years, particularly since 1982,' and noted that '[i]n some circumstances, minorities register to vote and cast ballots at levels that surpass those of white voters.' That Report also explained that there have been 'significant increases in the number of African-Americans serving in elected offices'; more specifically, there has been approximately a 1,000 percent increase since 1965 in the number of African-American elected officials in the six States originally covered by the Voting Rights Act.") (citations omitted). *See also id.* at 548 ("The preclearance statistics are also illuminating. In the first decade after enactment of [Section] 5, the Attorney General objected to 14.2 percent of proposed voting changes. In the last decade before reenactment, the Attorney General objected to a mere 0.16 percent.") (citations omitted).

[120] *See id.* at 557 ("Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in [Section] 2. We issue no holding on [Section] 5 itself, only on the coverage formula.").

[121] *Id.* ("Congress may draft another formula based on current conditions.").

[122] *See* Voting Rights Amendment Act of 2014, H.R 3899, 113th Cong. (2014) (revised the formula to apply only to states with five or more voting rights violations during the past fifteen years. The formula pertains to political subdivisions with three or more voting rights violations in the past fifteen years or one or more violations combined with persistent low minority voter turnout in the past fifteen years. The period during which a federal court would retain jurisdiction is also specified as ten years beginning on January 1 of the year following the determination of a violation. Importantly, the bill defines a violation as a final judgment by any U.S. court determining an abridgement of the right to vote 'on account of race, color, or membership in a language minority group, in violation of the 14th or 15th Amendment, occurred anywhere within the State or subdivision.' The bill also

Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, dissented, citing Department of Justice records used by Congress in reauthorizing the VRA.[123] The records showed the DOJ blocked over 700 proposed voting changes based on a determination of discriminatory purpose or effect. Justice Ginsburg said of Section 4(b), "The surest way to evaluate whether that remedy remains in order is to see if preclearance is still effectively preventing discriminatory changes to voting laws... All told, between 1982 and 2006, DOJ objections blocked over 700 voting changes based on a determination that the changes were discriminatory."[124] Ginsburg also mentioned the tendency of covered states to withdraw or review their proposed changes after being asked for additional information by the DOJ, indicating an awareness possessed by the states of the changes' discriminatory intent.[125] The dissent also noted recent attempts by the covered states to dilute the minority vote or disenfranchise minority voters. One such attempt was by the mayor and the all-white Board of Alderman in Kilmichael, Mississippi, in 2001, who abruptly cancelled the town's election after a number of African American candidates announced they were running for office.[126] The DOJ intervened and required the town to hold its election, resulting in the election of the town's first African American mayor and three African American aldermen.[127] Another attempt was denounced by the Supreme Court in 2006 when Texas attempted to redraw district lines to dilute Latino

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provides three other definitions of a violation. The Committee on the Judiciary referred the bill to the Subcommittee on the Constitution and Civil Justice. No pursuant action regarding the bill has since occurred.); s*ee also* Voting Rights Advancement Act of 2015, H.R. 2867, 114th Cong. (2015) (expands the provisions of Section 2 to include requests for polling places by Native American tribes. The bill also devises a new formula for preclearance based on 15 or more violations in a state in the last 25 years, or 10 or more violations in the last 25 years, one of which being committed by the state itself. This bill has also not yet made it to the Senate.); s*ee supra* note 17 (mention of another attempt to revise the formula which has yet to become law).

[123] *See* 570 U.S. at 570–76 (Ginsburg, J., dissenting).

[124] *Id.* at 570–71 (Ginsburg, J., dissenting).

[125] *See id.* at 571–72 (Ginsburg, J., dissenting).

[126] *See id.* at 573–75 (Ginsburg, J., dissenting).

[127] *See id.* (Ginsburg, J., dissenting).

votes.[128] In 2004, Texas outright intimidated two African Americans who announced their intentions to run for office.[129] In her dissent, Justice Ginsburg challenged the majority's characterization of contemporary race relations in the field of voting rights, stating the majority "makes no genuine attempt to engage with the massive legislative record that Congress assembled. Instead, it relies on increases in voter registration and turnout as if that were the whole story."[130]

VII. The Effects of *Shelby County v. Holder*

The Court's finding of Section 4(b)'s unconstitutionality rendered Section 5 unenforceable; thus, states that had previously faced multiple channels of validation to change voting laws could suddenly draft and pass new voting legislation without approval from a federal court. The discriminatory nature of voting laws can now only be challenged after the legislation is in full effect. Without the protection of Section 4(b), discriminatory voting laws could prevent many from voting in elections for several years until a successful lawsuit proves the changes discriminatory.

Many critics of the decision have argued poll taxes, literacy and understanding tests, and white primaries were replaced by more subtle methods of voter suppression as a result of *Shelby County v. Holder*, including voter ID laws, rigorous registration qualifications, sudden poll closures, and voting system changes.[131] The Brennan Center for Justice called the Court's decision "at odds with recent history."[132] In 2016, the Leadership Conference Education Fund noted how the Court's decision could suppress turnout and ultimately impact

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[128] *See id.* at 575 (Ginsburg, J., dissenting).
[129] *See id.* (Ginsburg, J., dissenting).
[130] *See id.* at 580 (Ginsburg, J., dissenting).
[131] *See* Aden et al., *supra* note 73 at 5–34 (discussing said changes in Alabama, Arizona, Arkansas, Florida, Georgia, Louisiana, Michigan, Mississippi, New York, North Carolina, South Carolina, Texas, and Virginia).
[132] *Section 5 Stands, Now Congress Must Strengthen Voting Rights Act*, Brennan Center for Justice (2013), https://www.brennancenter.org/our-work/analysis-opinion/section-5-stands-now-congress-must-strengthen-voting-rights-act.

the general election.[133] The report, for example, mentioned North Carolina's H.B. 589,[134] a law which disproportionately impacts African Americans, Latinos, students, senior citizens, and low-income voters.[135] The Supreme Court's decision in *Shelby* allowed North Carolina to pass the full bill, which implemented of a strict ID requirement, shortened the early voting period, eliminated same-day voter registration, prohibited the counting out-of-precinct provisional ballots, eliminated a pre-registration program for 16- and 17-year-old students, and making it easier to challenge voters.[136] Another report by the Leadership Conference Education Fund found widespread effort to close polling places in states once covered by Section 4(b).[137] An NALEO Education Fund report noted how voting laws requiring proof of citizenship disproportionately impact Latino voters, who are less likely to possess documentation of citizenship due to the demographic's lower level of income compared to African Americans and white Americans.[138]

The remainder of this paper is a close examination of voter ID laws and other modern methods of voter suppression in Texas, Alabama, and Mississippi. Since the Supreme Court's decision in *Shelby County v. Holder*, these three states have enacted stricter voter

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[133] *See* Dana Paikowsky & Scott Simpson, *Warning Signs: The Potential Impact of* Shelby County v. Holder *on the 2016 General Election*, The Leadership Conference Education Fund (2016), http://civilrightsdocs.info/pdf/reports/2016-Voting-Rights-Report-FOR-WEB.pdf.

[134] Voter Information Verification Act, H.B. 589, 2013 Gen. Assemb., Reg. Sess. (N.C. 2013).

[135] *See* Paikowsky & Simpson, *supra* note 133 at 3–4 ("While proponents of the bill argued that these new restrictions are justified in an effort to combat voter fraud, just before the vote on the bill, the State Board of Elections provided legislators with evidence that in-person voter fraud is not a problem in North Carolina. In fact, according to the Board's data, over the last 10 years, in-person voter impersonation has accounted for fewer than one in 100,000 votes cast.") (citation omitted).

[136] *See id.*

[137] *See generally* Scott Simpson, *The Great Poll Closure*, The Leadership Conference Education Fund (2016), http://civilrightsdocs.info/pdf/reports/2016/poll-closure-report-web.pdf.

[138] *See* Erin Hustings et al., *Latino Voters at Risk: Assessing the Impact of Restrictive Voting Changes In Election 2016*, NALEO Education Fund (2016), https://naleo.org/wp-content/uploads/2019/06/Latino_Voters_at_Risk_7.pdf.

ID laws, created tedious registration procedures, closed multiple polling locations serving minority populations, and changed their voting processes. These states were fully covered by Section 4(b) of the VRA and were subject to federal preclearance before enacting voting law changes prior to *Shelby County*. Each case study will begin with an examination of voter turnout and registration figures reported by each state's Secretary of State. This information is useful in determining the general effects of the *Shelby County* decision on voter registration and turnout. To maintain internal validity in this paper, only similar elections will be compared for each state. It is important to note that the Secretaries of State often do not produce information on the demographics of voters, so it remains difficult to discern whether certain groups are driving changes in registration and turnout figures based on state-issued information. Therefore, this information is supplemented by data gathered by advocacy groups. An examination of the state's voter ID laws follows, after which the reports of advocacy groups and individual voters are considered.

A. Texas

The Texas Secretary of State reports turnout and voter registration figures for every election. In 2012, one year prior to the Court's decision, 74.65% of the voting age population (VAP) was registered to vote.[139] In the 2012 Presidential Election, 58.58% of registered voters, or 43.73% of the total VAP, voted.[140] In the 2016 Presidential Election, a total of 46.45% of the VAP voted in the presidential election.[141] Though the Texas Secretary of State's report indicates increased voter turnout, it is unclear which groups caused the increase without demographic information. A Census Bureau report reveals 70.9% of the African American population of Texas was registered to vote and 61.1% voted in the 2012 election.[142] The report

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[139] *Turnout and Voter Registration Figures (1970-current)*, Texas Secretary of State, https://www.sos.state.tx.us/elections/historical/70-92.shtml.
[140] *Id.*
[141] *Id.*
[142] United States Census Bureau, The Diversifying Electorate—Voting Rates by Race and Hispanic Origin in 2012 (and Other Recent Elections) 7–8 (2013),

also states that 38.8% of Texas's Hispanic population was registered to vote, and 27.7% voted in the 2012 election.[143] According to *The Texas Tribune*, in the 2016 Presidential Election, African American turnout fell from 63.1% to 57.2% and Hispanic turnout increased from 38.8% to 40.5%.[144] White voter turnout, however, increased from the 2012 Presidential Election in the 2016 Presidential Election.[145]

Within two hours of the Supreme Court's decision in *Shelby County v. Holder*, Texas's Attorney General announced the immediate implementation of a voter ID law, Senate Bill 14 (SB 14),[146] which the United States District Court for the Southern District of Texas later declared to be an unconstitutional violation of the 14th and 15th Amendments.[147] Arguing that the law was the strictest of its kind in the country, Judge Gonzalez Ramos wrote, "Comparing the acceptable forms of photo IDs of the strict states, it is clear that SB 14 provides the fewest opportunities to cast a regular ballot."[148] The Fifth Circuit Court of Appeals reversed the circuit court's decision in 2016, upholding the law that continues to require Texas voters to present government-issued photo IDs to cast in-person ballots. Acceptable forms of photo IDs include Texas driver's licenses, personal ID cards issued by the Department of Public Safety (DPS), election ID certificates issued by DPS, military photo ID cards, handgun carrying licenses issued by DPS, photographic United States citizenship

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https://www.census.gov/content/dam/Census/library/publications/2013/demo/p20-568.pdf.

[143] *See id.*

[144] Alexa Ura & Ryan Murphy, *Despite high expectations for 2016, no surge in Texas Hispanic voter turnout,* The Texas Tribune (May 11, 2017), https://www.texastribune.org/2017/05/11/hispanic-turnout-2016-election/.

[145] *See id*.

[146] 2011 Tex. Gen. Laws 619 (codified in scattered sections of Tex Elec. Code Ann.) [hereinafter SB 14].

[147] *See* Veasey v. Perry, 71 F. Supp. 3d 627, 703 (S.D. Tex. 2014) *aff'd in part, vacated in part, and remanded*, Veasey v. Abbott, 796 F.3d 487 (5th Cir. 2015), *reh'g en banc granted,* 815 F.3d 958 (5th Cir. 2016), *rev'd* 830 F.3d 216 (5th Cir. 2016) ("This Court concludes that the evidence in the record demonstrates that proponents of SB 14 within the 82nd Texas Legislature were motivated, at the very least in part, *because of* and not merely *in spite of* the voter ID law's detrimental effects on the African-American and Hispanic electorate. As such, SB 14 violates the VRA as well as the 14th and 15th Amendments to the United States Constitution.").

[148] Veasey v. Perry, 71 F. Supp. 3d 627, 642 (S.D. Tex. 2014).

certificates, and United States passports.[149] Additionally, the identification presented must be current or have expired no more than 4 years prior to the election, with the exception of the citizenship certificate. Those who do not have or cannot obtain an acceptable form of ID but appear on the list of registered voters may present supporting forms of ID[150] and complete a Reasonable Impediment Declaration to cast a provisional ballot.[151] If individuals have an acceptable form of photo ID but did not bring it with them to the polling place, they may vote provisionally. Provisional ballots are counted provided the voter returns to the county voter registrar with an acceptable photo ID within six days of casting the ballot. Otherwise, the provisional ballot is rejected and not counted.[152]

Apart from Texas's voter ID requirements, the Texas Civil Rights Project sued Texas in 2016 over the state's voter registration policies.[153] A complaint filed in the San Antonio Division of the United States District Court for the Western District of Texas by the Texas Civil Rights Project claimed Texas voters were being shut out of the democratic process by Texas's registration practices, which the

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[149] SB 14, *supra* note 146.

[150] For example, valid voter registration certificates, certified birth certificates, current utility bills, bank statements, government checks, paychecks, or other government documents with identifying information.

[151] SB 14, *supra* note 146 (a Reasonable Impediment Declaration is a form completed by a Texas voter who lacks an acceptable form of photo ID and is without the means to obtain one. The voter must select one of the reasons provided on the form: lack of transportation; lack of birth certificate or other documents needed to obtain acceptable form of photo ID; work schedule; lost or stolen identification; disability or illness; family responsibilities; or acceptable form of photo ID applied for but not received. In addition to completing the form, the voter must present to an election official one of the following forms of identification: certified copy of a domestic birth certificate or a document confirming birth admissible in a court of law which establishes the voter's identity; a current utility bill; a bank statement; a government check; a government document that shows the voter's name and address; or a paycheck. As per the form, the reasonableness of the voter's impediment may not be questioned).

[152] *Id.*

[153] *Stringer v. Cascos*, 2016 U.S. Dist. LEXIS 187423; *Stringer v. Pablos,* 274 F. Supp. 3d 588; *Stringer v. Pablos,* 320 F. Supp. 3d 862; *Stringer v. Whitley*, 942 F.3d 715.

Texas Civil Rights Project claimed violated the National Voter Registration Act.[154]

The NVRA requires states to create the opportunity to register to vote when individuals update or renew their licenses with departments of motor vehicles and public assistance agencies.[155] Plaintiffs in the suit claimed they found themselves unregistered when they went to vote after updating their driver's licenses and voter registration records through the Texas DPS website and had to cast provisional ballots, which were ultimately not counted.[156] The complaint brought in the suit was made by a group of four individuals who attempted to update their registrations through the DPS's website. The individuals had moved from other Texas counties and thought they could update their registration at the same time they updated their license addresses. The individuals found they were not registered because they failed to fill out, print, and mail in a physical registration form.[157] U.S. District Judge Orlando Garcia found the state's registration policies non-compliant with the NVRA and ordered the state to implement online voter registration for drivers.[158] Rather than revise the state's policies to allow for online voter registration through the DPS website, the Texas Attorney General's Office disputed the ruling.[159] Eventually the case reached Chief Judge Priscilla R. Owens for the 5th Circuit Court of Appeals, who ultimately ruled in favor of Texas in 2019. Chief Judge Owens found the evidence relied upon by

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[154] National Voter Registration Act of 1993, Pub. L. 103-31, 107 Stat. 77 (1993); In Texas, updating a driver's license through the Department of Public Safety's website prompts a question asking to register to vote or update an address on an existing voter registration. Selecting "yes" to either question does not register the individual; instead, the website links to a voter registration document on the receipt page. The receipt page states the individual must print, fill out, and mail the registration form to the individual's local County Voter Registrar. The Texas Civil Rights Project alleged the registration process violated 52 U.S.C. § 20504(d), which states, "[a]ny change of address form submitted in accordance with State law for purposes of a State motor vehicle driver's license shall serve as notification of change of address for voter registration."

[155] National Voter Registration Act of 1993 § 5(c)(1); s*ee also id.*

[156] *Stringer v. Pablos,* 274 F. Supp. 3d 588.

[157] *Id.*

[158] *Stringer v. Pablos,* 320 F. Supp. 3d 862.

[159] *Stringer v. Whitley*, 942 F.3d 715.

the plaintiffs failed to establish substantial injury.[160] The case was remanded with instructions about dismissing the plaintiffs' claims due to a lack of standing.[161] Chief Judge Owens ruled in this way because the language of the NVRA requires states to offer an *opportunity* to register when individuals attempt to renew their licenses. By giving individuals a link to a registration form, Texas fulfilled their obligation under the NVRA. The registration process in Texas still entails filling out a paper application to be hand-delivered or mailed.[162]

According to a report by The Leadership Conference Education Fund, 750 polling places were closed in the time between *Shelby County* and 2019.[163] Five-hundred and ninety closures took place after the 2014 midterm election.[164] With the exception of Maricopa County in Arizona, six counties in Texas had more poll closures than the rest of the sample.[165] All six counties have significant African American and/or Latino populations.[166] Poll closures in Texas in particular have been justified as part of a move to a "super-precinct" or "vote center" system. This system results in fewer polling places but

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[160] *Stringer v. Whitley*, 942 F.3d 715, 720–1 ("Because injunctive and declaratory relief 'cannot conceivably remedy any past wrong,' plaintiffs seeking injunctive and declaratory relief can satisfy the redressability requirement only by demonstrating a continuing injury or threatened future injury. That continuing or threatened future injury, like all injuries supporting Article III standing, must be an injury in fact. To be an injury in fact, a threatened future injury must be (1) potentially suffered by the plaintiff, not someone else; (2) 'concrete and particularized,' not abstract; and (3) 'actual or imminent,' not 'conjectural' or 'hypothetical.' The purpose of the requirement that the injury be 'imminent' is 'to ensure that the alleged injury is not too speculative for Article III purposes.' For a threatened future injury to satisfy the imminence requirement, there must be at least a 'substantial risk' that the injury will occur."); Because the plaintiffs could not see themselves moving again and needing to use the DPS website to update their information, there was no threat of future injury.

[161] *Id.*

[162] *Texas Voting*, Texas Secretary of State, https://www.sos.state.tx.us/elections/pamphlets/largepamp.shtml (last visited Nov. 28, 2020).

[163] *Democracy Diverted: Poll Closures and the Right to Vote*, The Leadership Conference Education Fund, (Sept. 2019) http://civilrightsdocs.info/pdf/reports/Democracy-Diverted.pdf.

[164] *Id.*

[165] *Id.*

[166] *Id.*

allows voters to cast ballots at any of the remaining voting sites.[167] This is the general justification for the closures, but closures in at least four Texas counties were not followed by a transition to a vote center system.[168]

Fewer polling locations resulted in voters enduring substantial and impractical waiting times to cast their ballots.[169] In the 2020 Democratic Primary, voters in Houston faced wait times of over two hours, with some voters waiting three to four hours to cast their votes. [170] Voters across Houston encountered long lines in 2018, too, which election officials and voters attributed to technical difficulties.[171] Election Judge Poppy Northcutt claimed election workers encountered issues verifying voter registration via iPads.[172] Under the typical procedure, election workers would scan the voter's driver's license using an iPad, bringing the voter's personal information to the screen. But workers reported the wrong individuals' information appearing instead.[173] Northcutt also mentioned many voters arrived with an outdated address and that, "Sometimes they think that updating [an address] is automatic."[174]

Lacy Johnson found casting her ballot impeded by the voting process at the Christ the Servant Lutheran Church polling place in

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[167] *Id.*
[168] *Id.*
[169] Alexa Ura, *Texas voting lines last hours after polls close on Super Tuesday*, The Texas Tribune (Mar. 3, 2020), https://www.texastribune.org/2020/03/03/texas-voting-lines-extend-hours-past-polls-closing-super-tuesday/; Matt Dempsey et al., *Long lines, difficulties, at multiple polling places across Houston,* Chron (Nov. 6, 2018), https://www.chron.com/politics/election/article/Long-lines-and-machines-down-at-multiple-polling-13366520.php; Kristian Hernandez, *Reports of long lines, voting machine issues across Fort Worth area on Super Tuesday,* Fort Worth Star-Telegram (Mar. 3, 2020), https://star-telegram.com/voting-machine-issues-super-tuesday-240811361; Jake Bleiberg et al., *Long lines frustrate Houston voters in black neighborhoods,* Associated Press (Mar. 4, 2020), https://apnews.com/article/071258dd436761a63e378ac10d076328.
[170] Ura, *supra* note 169.
[171] Dempsey et al., *supra* note 169.
[172] *Id.*
[173] *Id.*
[174] *Id.*

Houston, Texas. Johnson gave her driver's license to a worker to be checked in. That worker printed out a barcode which would produce an access code when scanned. That access code would be used to cast a ballot. Johnson's bar code would not scan. The poll worker who printed the first bar code had already moved on to another individual, so the system registered her as having cast her vote. Workers gave her the option of casting a provisional ballot, but Johnson was concerned her vote would not be counted since provisional ballots are not guaranteed to be counted.[175] Johnson was an avid voter and said this was the first time she'd encountered such an issue trying to exercise her right to vote.[176] The election judge at Christ the Servant Lutheran Church, Helen Bledsoe, confirmed workers were having problems confirming voter registration on the iPads.[177] According to Bledsoe, three voters were given provisional ballots due to worker error in printing their codes.[178]

Xenia Kulick encountered similar problems casting her ballot at Notre Dame Catholic Church in Houston, Texas.[179] She arrived at her polling place at 6:45 a.m. where she waited with approximately twenty other voters. When the doors opened, voters waited an additional twenty minutes while workers tried to troubleshoot registration check-in machines. Kulick reported a total of sixty voters waiting in line by the time she cast her vote. By 8 a.m., a total of seventy people were in line to vote. The election judge of Notre Dame Catholic Church claimed the iPads were down for less than ten minutes, but by the time Kulick voted, only one machine was ready to check people in.[180]

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[175] Help America Vote Act of 2002, Pub. L. 107-252, 116 Stat. 1666 (2002) (defines provisional voters as individuals who assert their desire and eligibility to vote but whose names cannot be found on the official list of registered voters. Such individuals are permitted to cast provisional ballots. Provisional ballots may not be counted if the individual is determined to be ineligible under state law to vote. The Act mandates that each state develop a free access system to be used by provisional voters to determine whether their provisional ballots were counted.).
[176] Dempsey et al., *supra* note 169.
[177] *Id.*
[178] *Id.*
[179] *Id.*
[180] *Id.*

David Goldblatt arrived at his polling place, the Holiday Inn near NRG Stadium in Houston, at 6:45 a.m. When he first arrived, none of the machines used to check people in were working. Goldblatt waited 45 minutes to cast his vote. By the time he voted, only two check-in machines were working.[181]

The election judge for Martin Elementary in Houston, Texas, Javier Pagan, reported poll workers encountered "information overload."[182] According to Judge Pagan, an influx of people entering access codes at once caused a significant delay. Voters waited an hour and a half to cast their ballots due to this technical difficulty.[183]

Fort Worth voters encountered long lines at North Hi Mount Elementary School on the morning of the March 3, 2020, primary election[184]. Two voters, Joe Webber and Anthony Mikolajunas, reported long lines, two working machines for voters to cast their ballots, and incompetent poll workers.[185] According to Mikolajunas, officials check a voter's identification, "and then there's a screw-up. Half of the people in front of us, they couldn't work it out. They had changes in addresses. Even though they had voter registration cards, they [workers] wouldn't accept it."[186] The hassles with voters in the front of the line resulted in longer wait times for those behind them. For those whose IDs were no issue, officials printed a code to be taken to another official, who would print another code. Voters then made their way to the next station to redeem that code for another code. After this final code redemption, voters were given a sheet and allowed to cast their ballot.[187] Mikolajunas said voters seemed to encounter issues at every step in the voting process at this particular polling place. Both Webber and Mikolajunas passed the blame onto an excessive use of technology in the voting process.[188]

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[181] *Id.*
[182] *Id.*
[183] *Id.*
[184] Hernandez, *supra* note 169.
[185] *Id.*
[186] *Id.*
[187] *Id.*
[188] *Id.*

Ahmed King spent five hours trying to cast his ballot in the 2020 Texas Democratic Primary in Houston, Texas.[189] Four of the usual polling places in his predominantly African American neighborhood were closed or had ridiculously long lines.[190] Instead of voting at a polling place in his neighborhood, King drove fifteen miles to a predominantly white and Hispanic neighborhood to vote, which he was able to do thanks to the transition to a vote center system in Harris County.[191] King stated he first tried to vote at 1 p.m. and finally cast his ballot at 6:05 p.m.[192] Another African American voter, Hervis Rogers, spent more than six hours waiting in line to vote at Texas Southern University, a historically African American college in Houston.[193] Rogers considered leaving the line but stayed, finally voting at 1:30 a.m.[194] The wait made him late for his overnight job.[195] Professor of political science at Rice University Mark Jones attributed the long lines and waits to the transition to a vote center system and record turnout.[196] Three-hundred and twenty-one thousand Democrats cast votes in Harris County in 2020.[197] Jones claimed it is difficult for election officials to predict who will vote where, and the long waits for African American communities could be attributed to greater support for the Democratic Party in those communities.[198]

Upon initial consideration, long lines seem unrelated to the *Shelby* decision. But long lines may present a considerable deterrent to voting. Consider the fact that election days are not federal holidays and fall on Tuesdays, a day when most working-class individuals have to work.[199] Polling places generally open at 6am and close at 6pm or

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[189] Bleiberg et al., *supra* note 169.
[190] *Id.*
[191] *Id.*
[192] *Id.*
[193] *Id.*
[194] *Id.*
[195] *Id.*
[196] *Id.*
[197] *Id.*
[198] *Id.*
[199] Alex Rowell, *Who Makes Up the Working Class,* Center for American Progress Action Fund (July 6, 2018), https://www.americanprogressaction.org/issues/economy/news/2018/07/06/170670/

7pm. If an individual does not get off work until after his/her polling place closes, the individual will likely attempt to go to the polling place before work. Many working-class individuals cannot afford to miss or be late to work, so a long line may result in those individuals either not getting in line in the first place or leaving the line early. Other responsibilities may also result in a voter having to leave a long line, like needing to pick up children from school or childcare facilities. In Texas, the working class was 12.9% African American and 44.5% Hispanic in 2018.[200] Many of the aforementioned voters in Texas attributed the lengthy lines to the integration of technology into the voting process. The technological errors encountered certainly resulted in longer wait times for voters. Where errors did not occur, the convoluted technological process still resulted in longer voting times. Poll closures result in more people attending fewer polling places, thus increasing the chances of long lines and wait times. Those who are not privileged enough to come at a later time or spend 45 minutes to several hours waiting in line are basically being asked to choose between exercising their right to vote or earning income at their jobs.

B. Alabama

Alabama followed Texas in implementing a photo ID law in 2014.[201] The state's photo ID law was originally created in 2011; since the state was required to receive federal preclearance, the state delayed implementation of the law until the *Shelby* decision. Immediately after the Supreme Court announced its decision, Alabama announced the photo ID law would be enforced in the 2014 election cycle. Opponents of the law claimed the state's waiting to enforce the law until after the Court's decision indicated Alabama knew the law would not pass preclearance and would likely be determined discriminatory.[202] Alabama's voter ID law restricts in-person and absentee voting to

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makes-working-class/ ("Working-class" is defined as members of the labor force with less than a four-year college degree.).

[200] *Id.*

[201] Aden et al., *supra* note 73.

[202] *Id.*

individuals possessing one of seven forms of acceptable photo ID.[203] Individuals who do not possess any of the approved forms of photo ID can obtain a free Alabama photo voter ID card at several locations throughout the state.[204] Individuals can obtain free ID cards at the Secretary of State's Office in Montgomery, Alabama, or at a Board of Registrar office located in every county.[205]

Obviously, individuals must be able to visit these offices during their hours of operation. Government offices generally have limited hours and are closed on weekends, so individuals who work during the week or whose schedules conflict with their county Board of Registrar office hours are required to miss work or request time off. An individual who lives in Montgomery, Alabama may have an easier time visiting the Secretary of State's Office, but those who live in other towns would have to also account for the commute to and from Montgomery. This is a significant impediment for minority voters who represent a significant portion of the working class in Alabama. According to an article published by the Center for American Progress Action, 28.7 percent of the working class in Alabama were African American and 4.6 percent were Hispanic in 2016.[206]

An individual lacking a form of acceptable ID or a free Alabama photo voter ID card cannot cast a regular ballot unless two

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[203] Acceptable forms of photo ID for Alabama are: valid Alabama driver's license which has not yet expired or has been expired for less than 60 days; Alabama law enforcement agency digital driver's license; valid Alabama non-driver's ID which has not yet expired or has been expired for less than 60 days; Alabama law enforcement agency digital non-driver ID; valid Alabama photo voter ID card; valid state-issued ID (e.g. valid Alabama Department of Corrections release temporary ID with photo, valid Alabama movement/booking sheet from prison/jail system with photo, or valid pistol permit with photo); valid federal-issued ID; valid U.S. passport; valid employee ID from the federal government, state of Alabama, county, municipality, board, or other Alabama state entity; valid student or employee ID from a public or private Alabama college or university; valid student or employee ID issued by a state institution of higher learning in any other state; valid military ID; and a valid tribal ID. VALID ID AT THE POLLS, ALABAMA SECRETARY OF STATE, https://www.sos.alabama.gov/alabama-votes/photo-voter-id/valid-ids.

[204] MOBILE ID LOCATIONS, ALABAMA SECRETARY OF STATE, https://www.sos.alabama.gov/alabama-votes/photo-voter-id/mobile-id-locations?_ga=2.72853264.2024160753.1607044067-2105212680.1597005344.

[205] *Id.*

[206] Rowell, *supra* note 199.

election officials at the polling place can "positively identify" the individual.[207] Alabama Code does not define what constitutes a positive identification. Therefore, what constitutes a positive identification is left to the discretion of election officials. The positive identification provision may pose problems for minority voters who face racist or otherwise discriminatory election officials. Election official biases concerning what an eligible voter looks like or should be could result in non-identifications of individuals who the election official could reasonably identify based on the individual's presence within the community. Election officials may also be more willing to vouch for voters whom they know personally. Election officials are more likely to know individuals who are similar to them in terms of race and socioeconomic class. An African American voter who goes to a polling place in a predominantly white community where he does not reside, like Ahmed King in Houston, Texas, is unlikely to meet election officials who recognize him and will vouch for his identity. Racist election officials may also recognize an African American voter and intentionally reject the voter.

If election officials cannot vouch for individuals' identities, they must cast a provisional ballot that may be counted only if they present a valid form of photo ID to the board of registrars by 5 p.m. on the Friday following election.[208] Alabama closed 31 driver's license offices in Alabama's Black Belt, making obtaining a valid form of photo ID increasingly difficult for the African American community in that area of Alabama.[209] The Alabama Law Enforcement Agency and census data reveal that of the eleven counties in Alabama with a majority or near majority African American population, eight experienced license office closures.[210] After advocates voiced opposition to the closures due to the probably negative impact on African American voters, Alabama opted to keep the offices open with

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[207] Ala. Code § 17-9-30 (2013).
[208] *Id.*; Ala. Code § 17-10-2 (2019); Aden et al., *supra* note 73.
[209] Aden et al., *supra* note 73.
[210] Barriers to Voting in Alabama, Alabama Advisory Committee to the United States Commission on Civil Rights (Feb. 2020) https://www.usccr.gov/files/2020-07-02-Barriers-to-Voting-in-Alabama.pdf.

limited hours in some of the affected counties.[211] One license office was left open in Wilcox County, which is 72.5 percent African American.[212] The community is also poor with a median family income of little over $22,000.[213] The Alabama Advisory Committee to the United States Commission on Civil Rights attempted to learn the single office's hours of operation over the course of a year.[214] All attempts were futile - the location has no website offering any information, no one ever answered the phone regardless of when the Chair of the Committee called, and the answering machine had no pre recorded message offering the location's hours of operation.[215] Clearly this "compromise" still presents a significant obstacle to obtaining a valid form of identification for African Americans in Alabama.

Figures for voter turnout as reported by the Alabama Secretary of State reveal a 73.2% voter turnout for the 2012 Presidential election.[216] This figure dropped for the Presidential election in 2016 to 66.8%.[217] The Alabama Secretary of State neglects to define the demographics of voters, and information delineating turnout by race in Alabama for the presidential elections in 2012 and 2016 as reported by other sources could not be found.

Alabama, together with Kansas and Georgia, also requested the federal Election Assistance Commission modify the federal election registration form to require some form of proof of citizenship.[218] The NVRA requires states to accept federal voter registration forms without proof of citizenship.[219] Per the NVRA, voters must attest to their citizenship and provide signatures under penalty of perjury.[220]

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[211] *Id.*
[212] *Id.*
[213] *Id.*
[214] *Id.*
[215] *Id.*
[216] Primary/Primary Run-off/General Election Statistics, State of Alabama (June 25, 2018), https://www.sos.alabama.gov/sites/default/files/voter-pdfs/turnout.pdf?_ga=2.574353 6.2024160753.1607044067-2105212680.1597005344.
[217] *Id.*
[218] Aden et al., *supra* note 73.
[219] National Voter Registration Act of 1993 § 5(c).
[220] *Id.*

According to a ruling issued by the U.S. Court of Appeals for the District of Columbia in 2016, Alabama, Kansas, and Georgia election officials illegally changed proof-of-citizenship requirements.[221] The court found Newby, the Director of the Election Assistance Commission who unilaterally approved the changes, did not have the authority to do so. More importantly, the court found the League of Women Voters showed irreparable harm to the objective of the League, which is to register voters.[222] Irreparable harm is harm which is great, actual, imminent, and if it should occur, beyond remediation.[223] Prior to the appellate court's decision, Kansas was the only state of the three enforcing the proof of citizenship requirement.[224] The objective of registering voters was significantly impaired for the Kansas League by the proof of citizenship requirement.[225] Specifically, the Kansas League found potential voters often did not have proof of citizenship with them, the Kansas League lacked the equipment to copy the documents when potential voters did have the documentation, and "some potential voters balked at the idea of allowing the League's volunteers to copy their sensitive citizenship documents."[226] The appellate court opinion stated, "A declaration of a former Kansas League president recounts that registration numbers in Kansas fell by more than 85% in three counties, nearly 70% in another, and two other counties suspended all registration efforts."[227] The court found that based on the experiences of the Kansas League, "it seems almost certain that similar obstacles to registration will spring up in Alabama and Georgia when those States decide to enforce their laws."[228] The three states were ordered by the court to remove state-specific instructions directing applicants to provide proof of citizenship.[229] The court noted the ruling does not prevent the states from making similar

[221] League of Women Voters of the United States v. Newby, 838 F.3d 1 (D.C. Cir. 2016).
[222] *Id.*
[223] Chaplaincy of Full Gospel Churches v. England, 454 F.3d at 297 (2006).
[224] 838 F.3d 1.
[225] *Id.*
[226] *Id.*
[227] *Id.*
[228] *Id.*
[229] *Id.*

requests to require documentation of proof of citizenship to register to vote in the future.[230] Should the Election Assistance Commission refuse to respond to similar requests by altering the federal election registration form to require proof of citizenship, Alabama and other states may seek to establish in court that proof of citizenship requirements are necessary to safeguard the election process and prevent non-citizens from voting.[231]

Polling place closures have also occurred in Alabama. A 2019 study conducted by the Leadership Conference Education Fund revealed 72 polling place closures since the *Shelby* decision.[232] Marshall County, which has a population that is 13 percent Latino, has closed ten polling places since 2012.[233] Mobile County also closed 10 polling sites, most of which were closed after the *Shelby* decision.[234] Mobile County is 35 percent African American.[235] Etowah County closed nine polling places after *Shelby.*[236] Etowah County is 5 percent African American.[237] The Voting Rights Institute sent a letter to the Civil Rights Division of the U.S. Department of Justice asking the DOJ to investigate polling place closures in Daphne, Alabama.[238] According to the letter, an African American leader and voter in Daphne named Willie Williams contacted the Voting Rights Institute alleging the city had discriminatorily reduced the number of polling places from five to two locations.[239] Daphne voters can vote at the Civic Center and Daphne High School.[240] The closures leave no

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[230] *Id.*
[231] Registering to vote in Alabama can currently be done online via the Secretary of State website.
[232] The Leadership Conference Education Fund, *supra* note 163.
[233] *Id.*
[234] *Id.*
[235] *Id.*
[236] *Id.*
[237] *Id.*
[238] Letter from J. Gerald Hebert, Executive Director & Director of Litigation, and Harry Baumgarten, Attorney to Mr. T. Christian Herren, Jr., Chief of the Voting Section of the Civil Rights Division of the U.S. Department of Justice (Apr. 13, 2016), https://campaignlegal.org/sites/default/files/Letter%20of%204.13.16%20to%20DOJ.pdf (on file with the Voting Rights Institute).
[239] *Id.*
[240] *Id.*

polling places in Districts 1, 2, and 3.[241] Voters in District 1, a district with a sizeable African American population, must travel over 2.5 miles away from their original polling place to vote due to the closures.[242]

Alabama voters reported several issues casting their ballots in the 2018 midterm elections.[243] These issues perpetuated wait times for voters and further contributed to long lines. Ballots provided to voters at Midfield Park & Recreation Center in Midfield were too wide to fit into voting machines, according to two voters and four campaign workers.[244] To remedy this issue, poll workers cut individual ballots, leading to long lines that two campaign workers believe resulted in some individuals not voting.[245]

In Birmingham, multiple voters reported being told to change their clothes in order to vote at Mountain Brook Community Church by employees of the church.[246] Mary Powers wore a shirt in support of the U.S. House District 48 Democratic nominee, and she claimed she was instructed by a church employee to zip her jacket so the shirt was not visible in order to vote.[247] Powers declined and voted anyway. Powers told Advance Local, "It concerns me that other people don't know the rules and they don't necessarily understand that they have the right to wear whatever they want to the polls."[248] The church's administrator denied the veracity of these claims and said church employees were not in the portion of the church being used as a polling place in November 2018.[249]

Being instructed to remove or cover up clothing in support of a specific party candidate or not vote could be considered voter

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[241] *Id.*
[242] *Id.*
[243] Connor Sheets, *Voters report dozens of voting irregularities at polling stations across Alabama,* Advance Local (Nov. 6, 2018), https://www.al.com/news/2018/11/voters-report-dozens-of-voting-irregularities-at-polling-stations-across-alabama.html.
[244] *Id.*
[245] *Id.*
[246] *Id.*
[247] *Id.*
[248] *Id.*
[249] *Id.*

intimidation or an unnecessary prerequisite to voting, especially since Alabama election code does not include a prohibition against the wearing of campaign shirts to the polling booth. The Pew Research Center mapped out affiliation by race in Alabama 2014.[250] Eighty percent of African Americans in the study's sample affiliated with the Democratic Party.[251] The race of Mary Powers is unclear, but her clear support for a Democratic candidate may have made her a target for the church employee. Voters who are not aware of their right to wear clothing in support of any candidate may leave the polling place to change and come back to long lines thus further discouraging the voter from casting a ballot, or not come back at all. The Court's decision in *Shelby* emboldened those who would seek to prevent those likely to vote for certain candidates from voting.

As previously stated, long lines can disincentivize voters who are on a schedule or subject to time constraints. Changes which result in long lines, like poll closures and voting procedure changes, were subject to federal review before implementation prior to the *Shelby* decision. Since the Court's decision, Alabama is free to enact voting procedures that consequently discourage voters from voting by increasing the length of time it takes to vote. Voters in Alabama faced long lines similar to voters in Texas. A University of Alabama journalism professor, Meredith Cummings, reported long lines at Bobby Miller Activity Center, a Tuscaloosa County polling station, on Twitter.[252] Cummings posted a photo of what she described as 230 voters waiting in six lines to get their ballots.[253] A reporter for the Montgomery Advertiser, Andrew Yawn, also took to Twitter to illustrate long lines at Huntingdon College, in Montgomery.[254] Yawn's tweet includes a photo of a long hallway with a line of people

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[250] *Party affiliation among adults in Alabama by race/ethnicity*, Pew Research Center (2014), https://www.pewforum.org/religious-landscape-study/compare/party-affiliation/by/racial-and-ethnic-composition/among/state/alabama/.

[251] *Id.*

[252] Sheets, *supra* note 243.

[253] Meredith Cummings (@MereCummings), Twitter (Nov. 6, 2018, 1:35 PM), https://twitter.com/MereCummings/status/1059891962109673472.

[254] Andrew Yawn (@yawn_meister), Twitter (Nov. 6, 2018, 7:52 AM), https://twitter.com/yawn_meister/status/1059805687268757505

wrapping around the corner.[255] What is shown in the photo is apparently only one third of those in line.[256]

But the issues did not stop there. Election workers placed the wrong ballots in poll machines at Southlawn Elementary and Wares Ferry Elementary School in Montgomery during the 2018 midterms.[257] Ballots meant for the Southlawn Elementary location were placed in the poll machines at Wares Ferry Elementary School and vice versa.[258] Election workers had to fix this issue between the locations, which are 16 miles from one another, causing a 45-minute delay opening both polling locations.[259] A circuit judge later ordered the two locations to remain open an additional hour to account for this delay.[260] The delay further perpetuated long lines and wait times for voters.

At the Trenholm State Community College polling location in Montgomery, voters who were at the incorrect location to cast their ballot were encouraged to cast provisional ballots rather than redirected to their correct polling location.[261] The poll worker expressed she was trained to offer provisional ballots in response to this rather than turn voters away.[262] This location ran out of provisional ballots by 2:30 p.m.[263] The poll worker could have misunderstood the instructions for when to give a voter a provisional ballot, but it is also possible the poll worker understood the instructions perfectly. The officials who trained her may have purposely misled the poll worker so as to warrant provisional ballots being given for the wrong reasons, thus leading to a shortage for those voters who actually should have used them. The poll worker's error also increased the probability that several ballots were not counted considering an individual must vote at

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[255] *Id.*
[256] *Id.*
[257] Andrew J. Yawn, *Election Day 2018: Voting problems aplenty in Montgomery County*, Montgomery Advisor (Nov. 7, 2020), https://www.montgomeryadvertiser.com/story/news/politics/2018/11/07/election-day-2018-voting-problems-midterms-montgomery-alabama/1920873002/
[258] *Id.*
[259] *Id.*
[260] *Id.*
[261] *Id.*
[262] *Id.*
[263] *Id.*

the location where they are registered in Alabama.[264] Prior to the *Shelby* decision, any and every aspect of election procedure was under the watchful eye of the federal government. If the poll worker understood the instructions perfectly, the instructions were changed to allow for such an interpretation. Such a change would not have been allowed prior to the Court's decision.

Signs at polling locations across Montgomery County claimed that cellphones were not allowed in the polling place.[265] Voters attempting to use their devices to access voter guides and research candidates at three polling stations reported being told to turn their devices off or put them away.[266] A poll worker called the Montgomery County Sheriff's Office after Wade Preston told the poll worker he could use his phone to research candidates per the information on Alabama's Secretary of State website.[267] Preston was not arrested, and a judge responded to the reports by contacting chief inspectors and informing them phones are permitted provided their cameras are not engaged.[268] The judge's response had little effect; voters reported the signs remained and poll workers continued to enforce the cellphone ban.[269] Cellphone bans were also reported in Lee, Bibb, and Mobile counties.

Cellphone bans initially seem logical—election officials want to ensure voters are not photographing their ballots. But the primary use of cellphones at the ballot box is to inform the voter what he is voting for according to Wade Preston.[270] Implementing a cellphone ban at a polling site even though the state of Alabama allows for the use of cellphones effectively prevents voters from informing themselves of the contents of the ballot. This could prevent a voter from voting for any unknown candidate listed for an office; instead, the voter may select someone whose name he recognizes, like an incumbent, even if the incumbent's policies and values counter those of the voter.

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[264] *Id.*
[265] *Id.*
[266] *Id.*
[267] *Id.*
[268] *Id.*
[269] *Id.*
[270] *Id.*

Cellphone bans could also result in fewer people voting on an elected office or proposed measure simply because they lack the ability to check the purpose of the office, the proposals of the candidates, or the text of the proposed measure. Individuals may say voters ought to inform themselves before entering the polling location, but informing oneself of the details of every aspect of a ballot is time consuming and unrealistic. Like Wade Preston said, "There's always some random down-ballot candidate or amendment." Voters cannot be expected to know the entire contents of a ballot.

C. Mississippi

Voter turnout for the State of Mississippi is not available on the Mississippi Secretary of State's website. The Jackson Free Press reported voter turnout dropped by almost 75,000 people between the 2012 and 2016 Presidential elections, a six percent decrease.[271] Neither source reported turnout specific to race.

Mississippi is no different from Texas and Alabama in its issuance of photo ID requirements following *Shelby*. Mississippi's Secretary of State implemented a voter ID law for the 2014 primaries immediately after the ruling.[272] Individuals receive provisional ballots in Mississippi if: their names do not appear on the pollbook; they have moved without notifying the circuit clerk, municipal clerk, or election commission; their name was erroneously purged from the voter roll;

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[271] Tim Summers Jr., *Mississippi Voter Turnout Down Over Last Presidential Election,* Jackson Free Press (Nov. 22, 2016), https://www.jacksonfreepress.com/news/2016/nov/22/mississippi-voter-turnout-down-over-last-president/ (Mississippi Secretary of State Delbert Hosemann reported 2012 figures as "about 1,285,000." In 2016, 1,209,357 of the 1,480,191 eligible voters in Mississippi voted).

[272] Miss. Code Ann. § 23-15-563 (2020); County Election Handbook, State of Mississippi Secretary of State 33 (Oct. 2020), https://www.sos.ms.gov/content/documents/elections/County%20Elections%20Handbook_Final.pdf (voter information guide published by the Mississippi Secretary of State lists acceptable photo IDs as: a driver's license; a government issued photo ID card; a U.S. passport; a government employee photo identification card; a firearms license; a student photo ID issued by an accredited Mississippi university or college; a U.S. military photo ID; a tribal photo ID; a Mississippi voter identification card; and any other photo ID issued by any branch, department, agency, or entity of the U.S. government or any state government.).

they were illegally denied registration; or they are a first-time, unverified mail-in voter without a valid form of photo ID.[273] Mississippi poll workers are encouraged to redirect voters whose polling places have changed to their new polling places rather than offer those voters a provisional ballot.[274] Provisional ballots are not guaranteed to be counted; individuals voting with provisional ballots due to a lack of photo ID must present a valid form of photo ID in the circuit clerk's office within five days after the election for the provisional ballot to count.[275] If an individual does not bring a valid photo ID within the five days, the provisional ballot is not counted. This requirement is likely to negatively affect minority and low-income voters. According to a research memo published by Project Vote in 2015, 13 percent of African Americans and 10 percent of Hispanics lack photo IDs compared to 5 percent of white Americans.[276] Twelve percent of individuals who make less than $25,000 per year lack photo ID.[277]

Government officials closed multiple polling places in Mississippi. The Leadership Conference Fund found that of the 59 Mississippi counties surveyed, 34% closed polling places since *Shelby*.[278] Lauderdale County, the population of which is 43.4 percent African American,[279] closed 14 percent of their polling locations after *Shelby*.[280] After the 2013 election of the city's first African American mayor, the majority-white county election commission removed polling places from the city's black churches despite objections from the mayor and a pastor of one of the churches.[281] Closures in communities with

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[273] State of Mississippi Secretary of State, *supra* note 272 and accompanying notes.
[274] *Id.*
[275] *Id.*
[276] Vanessa M. Perz, Ph.D., Americans with Photo ID: A Breakdown of Demographic Characteristics, Project Vote (Feb. 2015), http://www.projectvote.org/wp-content/uploads/2015/06/AMERICANS-WITH-PHOTO-ID-Research-Memo-February-2015.pdf.
[277] *Id.*
[278] Simpson, *supra* note 137.
[279] *Lauderdale County, MS*, Data USA, https://datausa.io/profile/geo/lauderdale-county-ms (last visited Dec. 5, 2020)
[280] Simpson, *supra* note 137.
[281] *Id.*

significant minority communities would have required federal preclearance prior to the *Shelby* decision. Without preclearance to prevent the closures or at least investigate whether the closures would significantly hinder the voting ability of the African American community in Lauderdale County, officials are free to implement any changes to the election process. Since *Shelby*, the African American community in Lauderdale County will have to take the closures to court. Litigation procedure could take several years, and during that time the voting ability of the community will continue to be hindered until the judge determines whether the closures have discriminatory intent.

Mississippi voters in Jackson experienced long lines and wait times in the 2018 midterm U.S. Senate run-off election between Mike Espy and Cindy Hyde-Smith.[282] On the final day of in-person absentee voting, the line to vote extended from the basement of the circuit clerk's office outside to the sidewalks.[283] One voter, Rukia Lumumba, said she saw many voters leave the line after waiting for hours to unsuccessfully cast their votes because they needed to go to work or tend to their children.[284] Lumumba said many voters remained in line despite the wait and attributed voters staying to racist remarks made by Senator Cindy Hyde-Smith, who was up for reelection against Mike Espy.[285] Given Mississippi's history of public hangings as an official method of capital punishment, many in Mississippi were motivated to vote by her comment and refusal to apologize.[286] As is made clear by Lumumba's observation, long lines can result in fewer votes being

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[282] Ko Bragg, *Long Lines for Absentee Voting Point to Engagement, Room for Improvement,* Jackson Free Press (Nov. 25, 2018), https://www.jacksonfreepress.com/news/2018/nov/26/long-lines-absentee-voting-point-engagement-room-i/.

[283] *Id.*

[284] *Id.*

[285] Adam Ganucheau & Larrison Campbell, *Cindy Hyde-Smith blasted for 'public hanging' comments; she calls criticism 'ridiculous'*, Mississippi Today (Nov. 11, 2018), https://mississippitoday.org/2018/11/11/cindy-hyde-smith-blasted-for-public-hanging-comments-she-calls-criticism-ridiculous/ (On November 2, 2018, a video revealed Senator Hyde-Smith stating she would attend a public hanging if invited by a Hyde-Smith supporter.).

[286] Bragg, *supra* note 282.

cast. Individuals most likely to leave the line are those with other pressing responsibilities, like low income individuals. Low income individuals are more likely to need to leave the line to go to work or tend to children since most low income individuals likely cannot afford childcare. The City of Jackson is located in Hinds County, which is majority African American.[287] The most common community living in poverty in Hinds County is African American.[288] Long lines and wait times in the City of Jackson and Hinds County in general are likely to deter African Americans voters more than voters belonging to other ethnic communities. Prior to *Shelby,* preclearance effectively deduced the probability of these issues occurring before they occurred.

Malfunctioning equipment also led to impediments in the voting process in Mississippi. These malfunctions served to exacerbate wait times for voters. Election officials at the Villa Maria polling place in Ocean Springs reported computers containing voter rolls were improperly archived, resulting in some voters being told they had already voted and turned away during the 2018 general election.[289] Election Commissioner Danny Glascox reported this issue, and it was quickly resolved.[290] It is unclear whether the voters who were turned away prior to the issue being resolved were able to vote. In 2019, other technical difficulties affected voters' abilities to cast votes in the general election in Jackson[291]. Fondren Presbyterian poll workers wrote each voter's driver's license information manually due to malfunctioning scanners, which led to longer wait times and lines.[292] Poll workers at Fellowship Baptist Church in Madison County encountered a similar problem. One machine's scanner failed to scan

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[287] DATA USA, *supra* note 279.
[288] *Id.*
[289] Lindsay Knowles, *Long lines across South MS as voters show up at the polls,* WLOX (Nov. 6, 2018), https://www.wlox.com/2018/11/06/long-lines-voters-harrison-county-polls-open/.
[290] *Id.*
[291] Scott Simmons, *Some problems at polls reported during Mississippi general election,* WAPT (Nov. 5, 2019), https://www.wapt.com/article/some-problems-at-polls-reported-during-mississippi-general-election/29702437.
[292] *Id.*

IDs after the first voter.[293] The scanner was replaced by the county technician and worked for a short time before failing again.[294]

Lumumba noted how Mississippi does not allow early voting and the mail-in process can be cumbersome—the paperwork must be notarized and stamped.[295] Voters also cannot register to vote online in Mississippi.[296] To register to vote in Mississippi, citizens must print out a New Voter Registration form, which must be postmarked or hand-delivered to their county clerk's office.[297] The form must be delivered at least 30 days before an election.[298]

The Mississippi registration process can be especially cumbersome for working class voters or low income voters for a few reasons. Completing the application requires usage of a printer, which is something many working class or low income voters may not have in their homes. If they do have a printer, they have to also purchase ink which can be expensive depending on the ink the printer requires. Eligible voters lacking the needed equipment and without the funds to purchase it for their homes will have to visit a public library or printing facility that allows visitors to use their printing services for a small fee. Unless the potential voter has the time to deliver the application, the individual must also pay the postage costs of mailing the application to the county clerk's office. Registering to vote in Mississippi can be a considerable expense for working class and low income voters. Despite making up less of the state population than white Americans,[299] African Americans make up the largest ethnic group living impoverished in Mississippi.[300] Therefore, the registration process is an additional disincentivization for the African American community of Mississippi more than other ethnic communities in the state.

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[293] *Id.*
[294] *Id.*
[295] Miss. Code Title 23. Elections § 23-15-39 (2019).
[296] *Id.*; Miss. Code Title 23. Elections § 23-15-47 (2019).
[297] Miss. Code Title 23. Elections § 23-15-47 (2019).
[298] *Id.*
[299] DATA USA, *supra* note 279.
[300] *Id.*

VIII. Discussion

Data and reports from Secretaries of State and news sources regarding voter turnout in Texas, Alabama, and Mississippi reveal mixed effects in the aftermath of the *Shelby* decision.[301] The reports issued by the Texas Secretary of State and Alabama Secretary of State fail to address the demographic composition of voters in comparison to the demographic composition of each state, effectively preventing turnout data for African Americans and other minority groups from being analyzed. This implies the states do not want the turnout of those demographics analyzed. The Mississippi's Secretary of State website also lacks any similar report, but figures derived from statements made by the former Mississippi Secretary of State indicate decreased voter turnout overall since *Shelby*.

In 2012, reports from the Texas Secretary of State revealed that 43.73% of eligible Texans voted in the 2012 Presidential Election. In the 2016 presidential election, 46.45% of eligible voters participated. The slight increase in voter turnout may be due to a slight increase in impassioned voters.[302] Donald Trump campaigned using a platform that may have encouraged greater voter turnout by both Democrats and Republicans in Texas.[303] Jeffrey S. Passel and D'vera Cohn opined Trump's strong anti-immigration platform may have enticed many Texan voters to vote, given undocumented immigrants comprise 5.7% of Texas's population.[304] An article by Brian F. Schaffner, Matthew MacWilliams, and Tatishe Nteta opined, "Trump's rhetoric frequently violated norms that were supposed to inhibit politicians from making

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[301] *See* Ura & Murphy, *supra* note 144; *see* Summers, *supra* note 171; *see* State of Alabama, *supra* note 216.

[302] Jeffrey S. Passel & D'Vera Cohn, *U.S. Unauthorized Immigrant Total Dips to Lowest Level in a Decade*, Pew Research Center (Nov. 27, 2018), https://www.pewresearch.org/hispanic/2018/11/27/u-s-unauthorized-immigrant-total-dips-to-lowest-level-in-a-decade/.

[303] Brian F. Schaffner et al., *Understanding White Polarization in the 2016 Vote for President:The Sobering Role of Racism and Sexism*, 133 The Journal of Public and International Affairs 9, 13 (2018).

[304] *U.S. unauthorized immigrant population estimates by state,* Pew Research Center (2016), https://www.pewresearch.org/hispanic/interactives/u-s-unauthorized-immigrants-by-state/.

explicitly racist appeals."[305] Schaffner, MacWilliams, and Nteta's article appeals to a series of studies which acknowledged white Americans now consider themselves an embattled racial group.[306] This could be particularly true for the uneducated white citizens[307] of the states once covered by Section 4(b). White citizens of Texas likely felt emboldened by Trump's outright racist and sexist behavior, now feeling confident in their preexisting bigoted views.

While Trump's campaign likely engaged the racist and sexist vote, his rhetoric alone cannot account for the implementation of disenfranchising methods like voter ID laws and poll closures prior to the 2016 presidential election. The voting trend in the 2016 election, however, offers some insight into the racist attitudes of Texans, the majority of whom supported Trump in 2016.[308] As previously stated, Trump's campaign gave racists across the United States the confidence to make their racist hostility known. For example, in 2019, 51 race-based hate crime murders were committed in the United States, the most recorded since 1991.[309] The majority of these murders involved African American victims.[310] According to the Southern Poverty Law Center, anti-Hispanic hate crimes increased in the United States for the fourth year in a row to 527, a 9 percent increase since 2010.[311] The Southern Poverty Law Center estimates the figures are actually greater since law enforcement agencies tend to underreport

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[305] Schaffner et al., *supra* note 303.
[306] *Id.*
[307] *Id.* at 13 ("Importantly, education has been found to be related to views on race; whites with less education generally are less tolerant of other racial/ethnicgroups and tend to exhibit more conservative racial attitudes than those with more education. Thus, if Trump's racial rhetoric was effective, it was most likely to win him votes among less educated whites.").
[308] *Texas 2016 Presidential and State Election Results,* NPR (2016), https://www.npr.org/2016/11/08/501067319/texas-2016-presidential-and-state-election-results.
[309] *FBI Reports an Increase in Hate Crimes in 2019: Hate-Based Murders More than Doubled,* Southern Poverty Law Center (Nov. 3, 2020), https://www.splcenter.org/news/2020/11/16/fbi-reports-increase-hate-crimes-2019-hate-based-murders-more-doubled.
[310] *Id.*
[311] *Id.*

hate-crime incidents.[312] In the summer of 2020, a 17-year-old African American boy was found hanged from a tree at an elementary school playground in Spring, Texas, and a Latino man was found hanging in Houston.[313] Donald Trump's election and campaign definitely sparked an outpouring of racist hostility, but the hostility existed prior to his presidential run. The *Shelby* decision endorsed the false illusion that racism in the United States in the form of disenfranchisement was part of a bygone era of hatred. It is clear that hatred was only bubbling beneath the surface, and once the regulations in place to prevent that hatred from infiltrating the election system were no more, officials saw the opportunity to make voting less convenient and effectively disenfranchise the African American and Hispanic community in Texas.

Voter turnout for the 2012 presidential election in Alabama 73.2 percent.[314] In the 2016 presidential election, this figure dropped to 66.8 percent,[315] a 6.4 percent decrease. The decrease in voter turnout since the *Shelby* decision is easily attributed to the state's voter ID law [316] and poll closures. After the *Shelby* decision, poll closures occurred in predominantly or significantly African American counties.[317] The state also implemented a voter ID law and then proceeded to close license branches[318] in predominantly African American communities, thus making obtaining an acceptable form of photo ID and voting harder for minorities. Prior to *Shelby,* poll closures and a voter ID law would have required federal preclearance. It is likely the poll closures in particular would not have occurred had the state been subject to preclearance. Alabama also joined other states in an attempt to require

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[312] *Id.*
[313] *Fear Grows of Modern-Day Lynchings as Five People of Color Are Found Hanged*, Democracy Now (June 18, 2020), https://www.democracynow.org/2020/6/18/headlines/fear_grows_of_modern_day_lynchings_as_six_people_of_color_are_found_hanged.
[314] *See* State of Alabama, *supra* note 216.
[315] *Id.*
[316] *See* Alabama Secretary of State, *supra* note 204.
[317] *Id.*
[318] *Id.*

proof of citizenship for federal voter registration forms.[319] Obtaining proof of citizenship can be especially hard and expensive for low income and minority voters.[320] Requiring proof of citizenship to register also prevents registration drives from registering voters considering many voters do not have proof of citizenship documents on hand.[321]

According to the Mississippi Secretary of State, 75,000 fewer people voted in 2016 compared to 2012, a six percent decrease.[322] Mississippi's decrease in turnout can also be attributed to the imposition of a voter ID law[323] and poll closures.[324] Mississippi also makes it more difficult to register by requiring applications be printed and mailed or hand delivered, which hinders the ability of low income and minority eligible voters to register.[325]

In general, the data offered by the states' Secretaries of State fails to deliver the full picture of voter turnout. It is also important to note the three states immediately implemented changes to their voting processes after the *Shelby County* decision removed federal preclearance.[326] Despite the state-reported data, voters in the three states reported greater obstacles to voting than existed prior to the *Shelby* decision. Several predominantly or significantly African

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[319] *See* Alabama Advisory Committee to the United States Commission on Civil Rights, *supra* note 210.

[320] Terry Ao Minnis & Niyati Shah, *Voter Registration in Today's Democracy: Barriers and Opportunities,* American Bar Association (Feb. 9, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-rights/-use-it-or-lose-it---the-problem-of-purges-from-the-registration/.

[321] 838 F.3d 1.

[322] *See* Yawn, *supra* note 257.

[323] *Id.*

[324] *See* State of Mississippi Secretary of State, *supra* note 272 and accompanying notes.

[325] *See* Simmons, *supra* note 291.

[326] Recall that prior to *Shelby*, the states of Mississippi, Alabama, and Texas were required to have any proposed changes to election code and procedure reviewed by a federal court to determine whether the proposals had discriminatory intent. Now, due to the Court's invalidation of the preclearance formula, which determined which states were subject to federal review of potential election procedure revisions, it is unclear which states must request federal preclearance before implementing election procedure changes. Now, the states which were once subject to preclearance are free to revise their election law without the revision first being declared non-discriminatory.

American counties in each state experienced poll closures after the *Shelby* decision. All three states enacted fairly strict photo ID laws that are more likely to negatively impact low income and minority voters since *Shelby,* and voters in all three states reported experiencing long lines and wait times to vote which significantly hinder the voting ability of low income and minority voters as explained in previous sections. Prior to *Shelby,* all of the changes made in these states would have required federal preclearance. Federal preclearance likely would have foreseen the issues voters are currently experiencing and prevented the implementation of the policies causing these issues.

IX. Conclusion

Since the Supreme Court's ruling in *Shelby County*, several states covered under Section 4(b)'s preclearance formula are free to revise laws that previously would have required federal preclearance. The removal of the preclearance section has shifted the burden of proving voting laws' discriminatory effects to the voters. Previously, states had to prove in court . Now, voters can object only after the laws take effect.

Several states previously covered by Section 4(b) have enacted strict voter ID laws[327] that work to disenfranchise voters.[328] Alabama unsuccessfully petitioned the Election Assistance Commission to require proof of citizenship to register to vote on federal forms, contrary to federal voting qualification requirements outlined in the NVRA,[329] and Mississippi's and Texas's registration policies effectively disenfranchise would-be voters by requiring they register in-person or by mail. Texas, Alabama, and Mississippi have also closed polling locations, resulting in outrageously long lines that disincentivize particularly African American and Latino voters.[330]

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[327] *See* Ura & Murphy, *supra* note 144; *see* Bleiberg et al., *supra* note 169; *see* Yawn, *supra* note 257.

[328] *Fact Sheet on Voter ID Laws,* ACLU (2017), https://www.aclu.org/other/oppose-voter-id-legislation-fact-sheet (last visited Dec. 6, 2020)

[329] *See* Alabama Advisory Committee to the United States Commission on Civil Rights, *supra* note 210; State of Alabama, *supra* note 216.

[330] *See* Aden et al., *supra* note 73.

Long lines were further exacerbated by malfunctioning election machines and equipment, long voting processes, and mistakes by poll workers. In general, voting in these states is burdensome and inconvenient, especially for minorities. As a result, fewer minority voters vote.

Concern is especially warranted when the inconvenience falls mostly on historically disenfranchised and marginalized groups. Inconvenient registration procedures, poll closures in communities significantly populated by minorities, and voter ID laws in Texas, Alabama, and Mississippi mostly affect African Americans and Hispanics. The loss of Section 4(b) empowers states to make the voting process burdensome and disincentivize voting across multiple groups.

Congress could remedy these issues by revising the preclearance formula as suggested by the Supreme Court. They have yet to do so.[331] Without a revised preclearance formula, citizens will continue to lose their voice and receive half-hearted recompense—they cannot regain the vote they lost—and states may continue to enact legislation that makes the voting process more burdensome for all Americans.

Modernizing the formula would make Section 4(b) constitutional pending further review by the Supreme Court and thus revitalize the VRA. A modern formula should acknowledge modern voter suppression tactics, including poll closures in communities with significant minority populations, voter ID requirements, and costly and inconvenient registration policies, as equally dangerous to the voting process as historic methods. The revision may not solve every problem faced by voters, but it may prevent future legislation with the express purpose of disenfranchising certain voices.

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[331] *See supra* note 122 and accompanying notes.

SB 943: The Value of Value Transparency

Baylee Wang

A basic right of a democracy is the right to access public information.[1] It is imperative that citizens have knowledge of how they are being governed and how their government uses their tax dollars. Open government is the general process that allows citizens the right to access the proceedings of the government in order to ensure accountability. This process dates back to the Enlightenment Era of the 1700s, the early stages of what would become American democracy.[2] The term "open government" is expected to "bring a broad variety of benefits such as efficiency, a reduction in corruption and increased government legitimacy."[3] Yet, the government—and specifically the Texas state government[4]—continually finds ways to take advantage of

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[1] *See, e.g.*, G.A. Res. 217 (XIX) A, Universal Declaration of Human Rights (Dec. 10, 1948) (The United Nations, when discussing the right to freedom of opinion and expression, included the freedom "to seek, receive and impart information and ideas through any media and regardless of frontiers."). *See also* Org. of Am. States [OAS] G.A. Res. 1932, *Access to Public Information: Strengthening Democracy*, OAS Doc. (XXXIII-O/03) (2003).

[2] *See* Albert J. Meijer, *Government Transparency in Historical Perspective: From the Ancient Regime to Open Data in The Netherlands*, 38 Int'l J. of Pub. Admin. 189, 193 (2015) ("The Enlightenment had resulted in a new form of government, in a constitution and also in transparency of meetings, decisions, and information.") (citation omitted). *See also id.* ("For transparency in The Netherlands, it was important that the meetings of Parliament were public and could be attended by all citizens. In addition, decisions of Parliament were to be made public so that all citizens could know what had been decided by their representatives, and these transparency ideals of Enlightenment became, for the first time, to be enacted in the form of a legal obligation for government.").

[3] Albert J. Meijer et al., *Open Government: Connecting Vision and Voice*, 78 Int'l Rev. Admin. Sci. 10, 11 (2012). *See also id.* ("Citizens need information to *see* what is going on inside government and participation to *voice* their opinions about this.") (emphasis in original).

[4] *See* Tex. Gov't Code §§ 552.001(a) ("Under the fundamental philosophy of the American constitutional form of representative government that adheres to the principle that government is the servant and not the master of the people, it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees.").

loopholes around the statutory right to freedom of information,[5] especially in relation to contracts between governments and businesses.

The Texas Public Information Act (TPIA) is an open government law intended to increase transparency in Texas' government, but it contains 60 exemptions.[6] As a consequence of such exemptions, controversies have arisen regarding the release of public information about contracts between the government and third-party businesses—or, more importantly, how taxpayer money is spent. If the Texas government strictly follows the current state transparency law enacted to fix monetary corruption and economic illegitimacy, contract-heavy areas of the state's budget may shrink as a result of more public exposure. In theory, public exposure forces potential corruption into the public eye. However, past corruption involving unfair and monopolistic business deals between the government and big corporations, such as Boeing Co., suggest the future addition of more exemptions to the TPIA or a total refusal to adhere to the law.

In 2015, Boeing Co. sued Texas Attorney General Ken Paxton, alleging that, since it was the largest aerospace company in the world and competed for military contracts, public disclosure of corporate information, such as government contracts, could economically harm the company.[7] The lawsuit resulted in a ruling that any contract or information between the government and a third-party business could be deemed as exempted by the TPIA's competitive advantage

[5] All fifty states in the United States have public record laws, and the federal government enacted the Freedom of Information Act over fifty years ago.
[6] *See generally* Tex. Gov't Code §§ 552.101–160 (2020).
[7] *See* Boeing Co. v. Paxton, 466 S.W.3d 831, 835 (Tex. 2015) ("[Boeing] argues that the information it redacted from the lease contains financial or commercial information that would, if disclosed, put Boeing at a competitive disadvantage when bidding on future large government contracts.").

exemption.[8] In *Boeing v. Paxton*,[9] the Supreme Court of Texas concluded "that a private party may assert the exception to protect its competitively sensitive information."[10] Justice John Phillip Devine claimed that the release of contractual information could risk a competitive advantage for competing businesses or harm the government's bargaining power.[11] Ultimately, by giving the government the power to deny the release of information regarding how taxpayer money is spent when that money went toward a contract with a private business, *Boeing* decreased government transparency.

Boeing centered around contract bids with competing businesses and the government, yet it opened doors for much more collusion between the two. Joe Larsen, an open government attorney for the Freedom of Information Foundation of Texas, said in an interview with the *Texas Tribune* that *Boeing* "lowered the threshold for what can be secret, while affirming that private entities—when the government informs them about someone's request for their information—could invoke the protection when doing government business in Texas."[12] The Texas government used the *Boeing* ruling as a tool to hide more information to the public,[13] paving the path for potential future corruption.

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[8] Texas Government Code § 552.104(a) ("Information is excepted from the requirements of Section 552.021 if a governmental body demonstrates that release of the information would harm its interests by providing an advantage to a competitor or bidder in a particular ongoing competitive situation . . . "). *See infra* notes 21 and 22. *See also* Genuine Parts Co. v. Paxton, NO. 03-19-00441-CV, 4 (Tex. App. Jul. 10, 2020) ("The Texas Supreme Court has held that the test under section 552.104(a) is whether disclosure of the information would provide a competitor or bidder with an advantage, albeit not necessarily a decisive one.") (citing *Boeing*, 466 S.W.3d 841 (Tex. 2015)).

[9] 466 S.W.3d 831 (Tex. 2015).

[10] *Id.* at 833.

[11] *Id.* ("Concluding further that the information withheld will benefit the private party's competitors and thus 'give advantage to a competitor' of the private party asserting the exception, we reverse the court of appeals' judgment and render judgment for the private party.") (quoting Tex. Gov't Code §§ 522.104).

[12] Jim Malewitz, *Texas High Court Carves "Monstrous Loophole" for Government Secrets*, The Texas Tribune (Aug 5, 2016), https://www.texastribune.org/2016/08/05/lawmakers-eye-monstrous-loophole-keeps-contract-de/.

[13] *See infra* Table 1 and accompanying discussion.

Four years later, after thousands were denied information under the *Boeing* ruling,[14] Senator Kirk Watson and Representative Giovanni Capriglione worked with the Freedom of Information Foundation of Texas to pass Senate Bill 943 (SB 943).[15] District 98 Representative Capriloine argued that "every single private organization can essentially shut down any information they gave a government entity in perpetuity."[16] SB 943 addressed the loophole created by *Boeing* and removed parts of the exemption surrounding contracts or spending with a third-party business.[17] This bill expanded disclosure requirements related to government contracts with private third parties and enacted record-keeping requirements on certain entities who have such information about these contracts.[18] Along with revising the exception based on competitive advantage and trade secrets, the bill also expanded the definition of a governmental body to include other agencies, such as local departments.[19] SB 943 went into effect on January 1, 2020, with the intention of making the government's expenses more transparent.[20]

Boeing granted private entities the ability to claim the exemption of competitive advantage, which previously only applied to government entities.[21] Furthermore, *Boeing* concluded that the

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[14] *See* Christopher Collins, *Ready, Set, File: Transparency Bills Passed by Legislature Could Open the Door to Once-Public Records*, The Texas Observer (May 28, 2019), www.texasobserver.org/ready-set-file-transparency-bills-passed-by-legislature-could-open-the-door-to-once-public-records/ ("The carve-out has been used by private companies and the government itself thousands of times to hide how taxpayer money has been spent. . .").

[15] S.B. 943, 86th Leg., Reg. Sess. (Tex. 2019).

[16] Malewitz, *supra* note 12.

[17] Tex. S.B. 943.

[18] *See id*.

[19] *See id.*

[20] *See* Collins, *supra* note 14 ("'The Legislature is finally in a position to restore the public's right to know. If Texans are to hold their public officials accountable, access to public information is essential,' Watson said in a statement. Capriglione, the Republican who sponsored Watson's bills in the House, called their passage 'a strong statement for transparency.'").

[21] *See* Boeing Co. v. Paxton, 466 S.W.3d 831, 839 ("Accordingly, we hold that section 522.104's exception applies to both the government and private parties and may be invoked by either to protect the privacy and property interests of a private party in accordance with its terms."). This extension to private parties has been

exemption can apply even after the competitive bidding process—in which the government encourages companies to present the best proposal for a specific project and then compete for the selected bid as is required by law—has begun and the contract has been awarded.[22] As a result, *Boeing* allowed potential corruption to be considered "trade secrets," thereby entitling private entities to receive any amount of public funding negotiated. To fix the damage of *Boeing*, SB 943 made the following contract details public information:

> (a) vouchers or contracts relating to public funds by governmental agencies;
> (b) bid documents relating to contracts with governmental bodies;
> (c) all communications between a third party and the government during the process of creating a contract;
> (d) documents showing evidence that a government evaluated solicitation responses; and,
> (e) details such as prices, items, services, deadlines, parties, and dates.[23]

Exemptions related to the government's claims of competitive advantage, trade secrets, proprietary information, and information kept private by economic development agencies for "public growth" still stand under SB 943.

Even though SB 943 officially went into effect, there are concerns that the bill will not make a meaningful difference. Advocates for government transparency have speculated that the

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followed up with leniency in the determination of whether a competitive advantage applies. *See* Genuine Parts Co. v. Paxton, NO. 03-19-00441-CV, 4 (Tex. App. Jul. 10, 2020).

[22] *See id.* at 840–41 ("Although the Attorney General urges that 552.104 only applies to 'ongoing competitive bidding,' nothing in the exception's text says as much. While disclosing bids after a contract award may rarely give competitors any advantage, the federal cases indicate that the aerospace industry is different because the disclosure of current contract prices gives competitors a distinct advantage by telling them precisely how to undercut the current contractor when contracts are re-bid.") (citing Canadian Comm., Corp. v. Dept. of Air Force, 514 F.3d 37, 42 (D.C. Cir. 2008)).

[23] *See* S.B. 943, 86th Leg., Reg. Sess. (Tex. 2019).

government will continue to find loopholes around the bill.[24] While these advocates are apprehensive about the future of contract transparency, those who have opposed SB 943 claim contract transparency unduly burdens corporations.[25] According to the House Research Organization bill analysis, opponents argued that the bill will "impose recordkeeping requirements on entities that contracted with governmental bodies that could prove burdensome for smaller contractors."[26] In other words, SB 943 faces challenges from both sides: not going far enough to protect against loopholes and burdening third parties.

The potential for a more transparent system is analyzed in this paper by comparing past data of contract-heavy areas in the Texas budget before and after *Boeing* and by looking at the general trends of Attorney General rulings and reports after SB 943 took effect.

As exemptions in the TPIA increase, so do requests for information. Below, Table 1 shows that the number of ruling letters denying the public access to requested information has increased by an average of around 1,000 denials every year since 2011.[27] By 2017, 1,815 denial letters were issued under the *Boeing* ruling of 2015.[28] From 2015 to 2019, *Boeing* was cited in more than 2,700 denial letters from the Attorney General.[29] These consistent, large amounts of

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[24] The potential for misuse by the government is apparent simply in the continued existence of the related exemptions. *See* State Affairs Comm., House Research Organization Bill Analysis, S.B. 943, 86th Leg., Reg. Sess., at 8 (Tex. 2019) ("The bill would return certain exceptions under the Public Information Act back to their longstanding interpretation while providing a new exception to disclosure for truly proprietary information.").

[25] *Id.*

[26] *Id.*

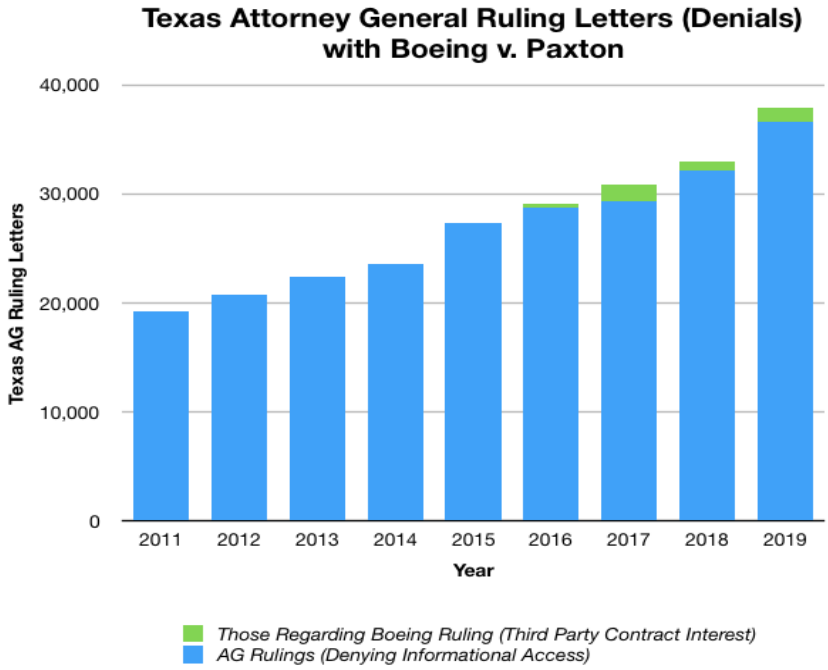
[27] Office of the Texas Attorney General (February 2020). Retrieved from a Texas Public Information Act records request.

[28] *Id.*

[29] *See* Laura Prather, *Finding Out How Tax Dollars Are Spent: New Law in Effect January 1, 2020*, Haynes and Boone, LLP (Jan. 3, 2020), www.haynesboone.com/Alerts/finding-out-how-tax-dollars-are-spent-new-law-in-effect-january-1-2020 ("Since it was handed down in 2015, *Boeing* has been cited in more than 2,700 Attorney General opinions foreclosing access to information under the TPIA. Many of those rulings involved TPIA requests for information regarding final contracts, effectively foreclosing access to even the most basic information about government contracting and expenditures.").

denials deteriorate and ultimately destroy the public's trust in the government to conduct respectable business ventures.

TABLE 1



There were cases in 2020 concerning the Attorney General's Office's continued denial of information referencing *Boeing*, despite it being overruled by SB 943. The Attorney General's Office attempted to deny Dr. Nathan Jensen, a professor at the University of Texas at Austin, his request for information about opportunity zones. The ruling letter cited *Boeing*, even though it was issued on February 26, 2020, almost two months after *Boeing* had been overruled.[30] Similarly, a request for information regarding an agreement for naming rights between the University of Houston and the contractors of its sports facilities was met with opposition citing *Boeing*. The Attorney General's Office withheld the information under *Boeing* nearly three months after the decision had been overruled.[31] Both cases are

[30] Interview with Dr. Nathan Jensen, University of Texas at Austin Professor of Government (Mar. 2020).
[31] *Id.*

currently being examined for possible grounds to appeal, and the new AG rulings on the denial of information are still pending.

Texas law's present lack of requirements for responding to records requests is a problematic source of transparency issues with third-party contracts. Government agencies have ten days to respond to a public records request, yet there is no penalty imposed on the agency for not responding in the appropriate time period. Many local governments and corporations also refuse to move public records to an entirely online database, despite Representative Giovanni Capriglione and Senator Jane Nelson recently passing transparency measures requiring certain government contracts to be published online.[32] Some local governments, such as Denton County and El Paso County, do not accept records requests by email, instead requiring the requester to set up an online portal. Transparency and uniformity with how local governmental bodies respond to records requests would not only increase accountability in government, but also create ease for government employees. Government employees should have an organized computer-based system that could be accessed remotely during state emergencies requiring employees to work from home.

Total spending on contracts naturally increases each year, but dramatic shifts appear when taking a closer look at the top contract-heavy subcategories of Texas' yearly spending in relation to the life of the *Boeing* ruling. These areas include technological services, highway construction, professional services, and rentals and leases.[33] The largest increase in spending for these categories from year to year was between 2015 and 2016, the year *Boeing* first took effect. Highway construction spending increased by $1 billion, or 19%, in 2016 compared to the roughly 11% average yearly increase illustrated in Table 2.[34]

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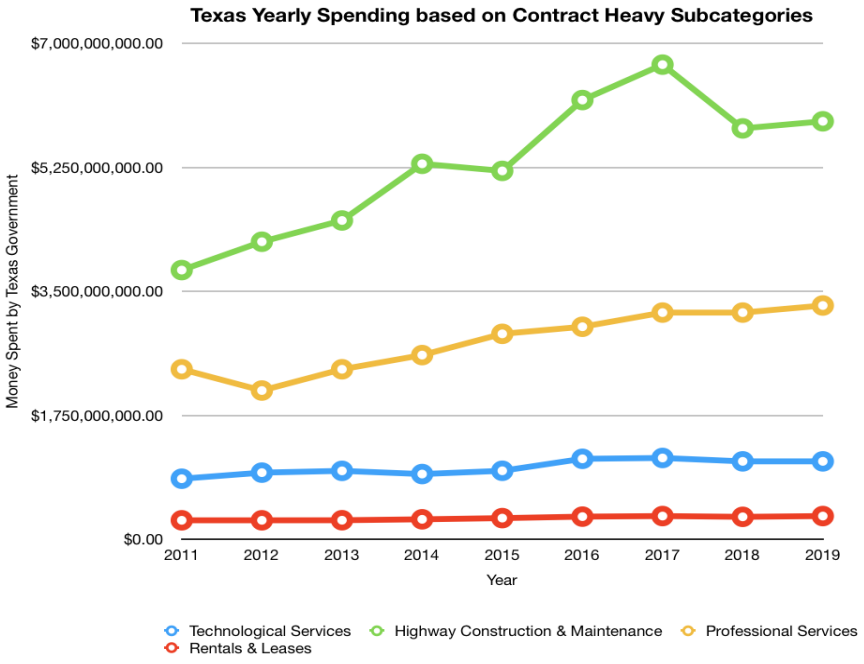
[32] S.B. 65, 86th Leg., Reg. Sess. (Tex. 2019).

[33] *See* Andrea Ball, *Big Contracts, Big Data, Big Dollars and a Big Mess*, Austin American-Statesman (Sept. 25, 2018), www.statesman.com/news/20180611/big-contracts-big-data-big-dollars-and-a-big-mess.

[34] Glen Hegar, *Open Data Center — Contracts*, Texas Comptroller of Public Accounts comptroller.texas.gov/transparency/open-data/contracts.php.

TABLE 2



Two out of the three witnesses against the passage of SB 943 represented the Heavy Highway Branch of the Association of General Contractors of Texas, while the other represented Zachry Corporation, a global contractor specializing in transportation and construction.[35] The years 2016 and 2017 brought the highest total spending in contract-heavy subcategories for the past decade with $10.6 billion and $11 billion, respectively.[36] Combining these three witnesses with the recent spending trends on highway construction raises valid questions regarding why these construction agencies are against transparency in their work.

Since SB 943's passage, some decisions made in light of *Boeing* have been overturned, exposing the government's past abuses of taxpayer money. The City of McAllen, Texas, hired singer-songwriter Enrique Iglesias to perform for one hour. The

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[35] *See* State Affairs Comm., House Research Organization Bill Analysis, S.B. 943, 86th Leg., Reg. Sess., at 1 (Tex. 2019).

[36] Glen Hegar, *Open Data Center — Contracts*, Texas Comptroller of Public Accounts comptroller.texas.gov/transparency/open-data/contracts.php.

government spent around $500,000 of taxpayer money on Iglesias alone, hiding that information for four years under claims of exempt information.[37] Similarly, until exposed by SB 943 in February 2020, the Teacher's Retirement System of Texas (TRS) withheld information on how taxpayer money would be spent on the lease of its new office at Indeed Tower in Downtown Austin. The amount was revealed to be a minimum of $326,000 per month, and TRS ultimately decided to stay at its office after the public criticized the budget.[38] If not for SB 943, TRS might be spending $3.9 million each year on its office. TRS refused to release the information for seven months, claiming the information was exempt from disclosure—a claim initially supported by Attorney General Paxton. It took the force of SB 943 as well as a resubmitted request from the *Austin American-Statesman* for TRS to even reveal the base rent.[39] Other high-profile cases have yet to be reopened under SB 943, including the City of Houston's refusal to release the number of driver permits issued to Uber;[40] Kemp County keeping its school district's food service prices secret;[41] and the City of Denton hiding the contract details for a power plant estimated to cost

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[37] *See* Emma Platoff, *An Open-Government Mystery Solved: McAllen Paid Enrique Iglesias $485,000 for 2015 Performance*, The Texas Tribune (Jan. 8, 2020), www.texastribune.org/2020/01/07/McAllen-Enrique-Iglesias-paradge-open-records/ ("For years, reporters and others had requested that McAllen disclose how much it paid Iglesias for the performance, and the city had refused, citing exceptions in the Texas Public Information Act. The city had reportedly lost money on the deal — but taxpayers were never given the numbers.").

[38] The amount revealed even resulted in heavy public criticism from state lawmakers, helping cancel the deal. *See* Bob Sechler, *Lawmakers Skewer TRS over Indeed Tower Lease Plan*, Austin American-Statesman (Feb. 25, 2020), www.statesman.com/business/20200225/lawmakers-skewer-trs-over-indeed-tower-lease-plan ("'I just think it gets down to arrogance, a lack of oversight — and I'll be honest, I think somebody's head ought to roll,' state Sen. John Whitmire, D-Houston, said . . . Amid a barrage of criticism in the wake of the partial disclosure, however, the retirement system's board voted last week to scrap plans to move the investment division into Indeed Tower and instead to keep it at the existing Congress Avenue location.").

[39] *See id.* ("The agency still has not revealed its full cost for the lease and is seeking a new ruling from Paxton's office on whether it must also release those details.").

[40] *See* Malewitz, *supra* note 12.

[41] *See id.*

$265 million—what would be the largest expenditure in the city's history.[42]

Previously reopened cases show improvement to government transparency, but even as cases begin to reopen, one cannot assume the government will abandon attempting to find loopholes. While those who worked very closely with the drafting of SB 943 note its potential, they also speak with caution. Kelsey Erickson, a representative from Senator Watson's office, discussed her time working on SB 943 and the potential consequences of the bill. The bill demanded multiple draft revisions and took two legislative sessions to successfully pass. Erickson explained that it "took a mix of creativity and compromise" to pass because "the government likes to recruit businesses, and transparency is seen as a threat."[43] Yet, seeing transparency as a threat seems to conflict with the Texas government's claims that their closed-door business deals are in the public interest. Erickson also noted that everyone wants to see how their taxpayer money is being spent and "a single standard [of transparency] is tricky for general government to follow."[44] SB 943 was a bipartisan bill, with no political biases and a purpose of increasing government accountability. The right to be informed is not a political issue, but one of strength in democracy and accredited service for the public. Erickson sees potential problems with SB 943 arising from the TPIA's lack of transparency;[45] namely, a future conflict may occur if the government deems itself a "competitive business" in competition with other states. Erickson's insight prefaces a battle Texas citizens may have to wage to maintain their rights as the government continues to protect its secrets.

With SB 943, journalists have the opportunity to gather more information and report about potential collusion in the government sector with third-party businesses. Media sources were often denied

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[42] *See* Peggy Heinkel-Wolfe, *Details of Power Plant Deal Hush-Hush*, Dallas Morn. News, Jan. 17, 2017, at 1B, *available at* https://www.pressreader.com/usa/the-dallas-morning-news/20170117/281917362778920.

[43] Interview with Kelsey Erickson, representative for the office of Sen. Kirk Watson (March 19, 2020).

[44] *Id.*

[45] *Id.*

information related to third-party contracts and had few avenues to inform the public on government actions. The *Austin American-Statesman* demanded answers about the actions of public institutions, such as how much taxpayer money was spent on rapper Ludacris performing at the University of Texas' spring football game in 2019.[46] UT also refused to release information regarding the contract for their athletic sponsorship deal with Corona Extra.[47] As a public institution, the school must comply with federal and state laws for these requests. These are only two instances of the many denied requests the *Statesman* has encountered.

In 2013, San Antonio investigative journalist Jaie Alivia reported on tax rebates and incentive deals with the city and business expansion, which was very contract-heavy. He discovered that only one-third of businesses with government contracts fulfilled their side of the bargain, causing the city to lose massive amounts of money. Alivia attempted to reopen his story in 2018 after *Boeing*, but was denied the necessary contract information. Though SB 943 had the potential of cleaning up the mess *Boeing* created in third-party contract transparency, Alivia has not noticed any change after SB 943 went into effect. Alivia argues that government agencies throughout the state, such as in Bexar County, continue to follow old policies because they are unsure of how the Attorney General will decide. Alivia pushes for definite verbiage in these bills to close loopholes and manipulation by officials because being denied transparency blocks journalists from being able to hold government agencies and officials who run these agencies accountable.[48]

The Attorney General's handling of SB 943 demonstrates an inconsistent stance from the agency on third-party contract transparency. In 2015, the Attorney General did not permit BASF, a chemical manufacturer, to keep its contract information about a $2.4

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[46] *See* Asher Price, *Backed by New State Law, Statesman Seeks to Expose Government Spending*, AUSTIN AMERICAN-STATESMAN, (Jan. 3, 2020), www.statesman.com/news/20200103/backed-by-new-state-law-statesman-seeks-to-expose-government-spending.

[47] *See id.*

[48] Interview with Jaie Alivia, San Antonio investigative journalist (Oct. 23, 2020).

million grant secret.[49] In 2016, Chesapeake Energy failed to prove that it would face substantial harm to its competitive position if the Fort Worth Independent School District released the contract with Chesapeake.[50] Two years later, the City of Austin refused to release names of its city manager finalists, citing the *Boeing* ruling. Austin officials claimed they would be at a competitive disadvantage with other cities looking for city managers, despite no other major cities in Texas searching at the time.[51] Again, the agency ruled that the *Boeing* decision did not allow the requested information to be withheld.[52] Clearly, corporations seeking advantages play a significant role—not only the government—in the lack of transparency and corruption. Corruption has the greatest potential to occur where the money is, as demonstrated by agreements between businesses and the government.

Many corporations claim they want to protect the state's economy and promote fair competition. However, a study regarding competitive advantage suggests transparency must play a role in the business's success.[53] Businesses that engage in corrupt deals with the government will abuse their control if the principle of transparent democracy is taken away. Some may have high hopes about SB 943,

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[49] It's not clear if the forced disclosure in the case of BASF was even in effort of transparency. *See* Malewitz, *supra* note 12 ("Bill Cobb, a former deputy in the attorney general's office, said BASF may have failed on a technicality, since it did not submit a sworn statement detailing how the release would damage the company . . . ").

[50] *See* Open Records Letter Ruling No. 7931, at 2 (2016) ("Upon review, we find Chesapeake has failed to demonstrate release of the information at issue would give advantage to a competitor or bidder. Accordingly, the district may not withhold any of the submitted information under section 552.104 of the Government Code.").

[51] *See* Elizabeth Findell & Philip Jankowski, *Statesman Sues City of Austin over City Manager Secrecy*, Austin American-Statesman (Sept. 22, 2018), www.statesman.com/NEWS/20171101/Statesman-sues-city-of-Austin-over-city-manager-secrecy.

[52] *See* Open Records Letter Ruling No. 740, at 3 (2018) ("Accordingly, the city may not withhold any of the information at issue under section 552.104.").

[53] *See* Paweł Cegliński, *The Concept Of Competitive Advantages. Logic, Sources And Durability*, 7 J. of Positive Mgmt. 57, 63 (2017) ("[C]ompetitive advantage is a systemic outcome that develops as firms and constituents participate in six processes that entail, not only use and exchange of resources, but also communication about and interpretations of those exchanges.") (citing V. P. Rindova & Ch. J. Fombrun, *Constructing competitive advantage: The role of firm-constituent interactions*, 20 Strategic Mgmt J., 691–710 (1999)).

but there are also many reasons to doubt its effectiveness. Though SB 943 was put forth to eliminate the *Boeing* ruling, the issue is now the government's constant denial of requests from the public. Even if the government always finds loopholes or simply ignores transparency, we should always be ready to fight for our rights. The power of publicity wielded by the media seems to be a more effective tool in dissuading governments from withholding information in third-party contracts, compared to legislation. But business must be conducted in the light of day, where the people can clearly identify where their money is being distributed.

The public's right to know and duty to hold governments accountable is a bipartisan effort. There are no politics involved when it comes to standing for accountability in government; trust does not lean anymore left than it does right. Citizens are entitled to know how their elected officials spend their tax dollars, and SB 943 was passed for transparency in that realm in relation to third-party business spending. SB 943 is just one of the steps to further our accountability in the government, but there is still much more to be done before actual transparency is accomplished. The fight for an open government is crucial to preserve our right to know and our free democracy as entitled to us by the founding principles of our Constitution.

Criminal Contempt, Freedom of Speech, and the Indian Judiciary: Is it a Quagmire?

Aastha Khanna[1]

Article 19(1)(a) of the Constitution of India guarantees the right to freedom of speech and expression to all citizens, including the right to fairly criticize public institutions.[2] These rights have acted as an indispensable bulwark against tyranny and overreaching governmental institutions. Whilst free speech is a basic human right,[3] it has always been the one of the most contested and controversial because it tends to question the public institutions and hold them accountable to the public. Even today, it is disputed as to whether free speech can be reduced to contempt and whether the contemnor should be shut behind the bars. Democracies all over the world have wrestled with this issue for centuries, and India is no exception. Casualties of this struggle in India include Justice Krishna Iyer,[4] eminent legal

[1] The author is thankful to Mr. Swarnendu Chatterjee (Advocate-on-Record, Supreme Court of India and Managing Associate, L&L Partners, New Delhi) for his valuable comments and suggestions and her parents for their encouragement and support throughout the writing of this paper. The author is also grateful to Kirk von Kreisler and other editorial board members of *Texas Undergraduate Law Review* for their diligent work.

[2] Const. of India art. XIX, § (1)(*a*).

[3] G.A. Res. 217 (XIX) A, Universal Declaration of Human Rights (Dec. 10, 1948) ("Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.").

[4] *See* Apoorva Mandhani, *Peculiar case of contempt against Justice V.R. Krishna Iyer: Disposed of by Kerala High Court in 1983 acknowledging the bias [Read the Judgment]*, Live Law (Dec. 16, 2014, 3:54 AM), https://www.livelaw.in/peculiar-case-contempt-justice-v-r-krishna-iyer-disposed-kerala-high-court-1983-acknowledging-bias/.

stalwart Kapil Sibal,[5] Booker Prize winning author Arundhati Roy,[6] comedians,[7] cartoonists,[8] and many more lesser-known offenders.

For ages, proceedings for Contempt of Court, Sedition, and Defamation have been used to silence those who criticize the powerful. Despite these laws being inconsistent with freedom of speech protections in modern democratic societies, they are used time and again as a weapon of great repression. In fact, India saw a large number of arrests and detention of activists under draconian laws especially in the last three years for peacefully protesting and expressing dissent against the legislations passed by the ruling right-wing government.[9] The criminal contempt law is not only a violation of the free speech doctrine but also has many conundrums of its own, taking the shape of judicial barbarism. The non-requirement of *mens rea,*[10] summary trial, and the power of judges to decide in their own case[11] are some impediments that whittle down the principles of natural justice.[12] The rigour of criminal contempt of Court has recently

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[5] *See* case and discussion, *infra*, note 63.

[6] *See* case and discussion, *infra,* note 65.

[7] *See, e.g.*, Debayan Roy, *[BREAKING] Supreme Court decides to proceed with contempt of court case against Kunal Kamra, Rachita Taneja for their Tweets; Issues notice*, Bar and Bench (Dec. 19, 2020, 3:42 AM), https://www.barandbench.com/news/litigation/supreme-court-contempt-of-court-kunal-kamra-rachita-taneja.

[8] *See, e.g.*, *Breaking: Supreme Court Issues Contempt Notice To Rachita Taneja For Caricatures Of 'Sanitary Panels' About Judiciary*, Live Law (Dec. 17, 2020, 11:28 PM), https://www.livelaw.in/top-stories/rachita-taneja-sanitary-panels-contempt-of-court-supreme-court-167385.

[9] *See, e.g.*, *India activist Disha Ravi arrested over farmers' protest 'toolkit*,*'* BBC News (Feb. 14, 2021), https://www.bbc.com/news/world-asia-india-56060232 (detailing the arrest of an activist who disseminated a document about a protest against new agricultural laws). *See also* Nileena M.S., *Amid lockdown, Delhi Police target and arrest anti-CAA protesters from Jamia Nagar*, The Caravan (Apr. 15, 2020), https://caravanmagazine.in/politics/anti-caa-protesters-jamia-arrested (describing the attempts of police to arrest those protesting the Citizenship Amendment Act).

[10] Latin word for ‘guilty mind.’

[11] The Contempt of Courts Act, 1971, § XIV(2) (Act No. 70/1971).

[12] Principles of natural justice are uncodified rules which provide protection against the arbitrariness adopted by any judicial, quasi-judicial, or administrative authority.

come into question with the *suo moto*[13] contempt proceedings initiated by the Supreme Court of India against activist and public interest lawyer Mr. Prashant Bhushan. Contemnors and Courts—with their own perspectives—have struggled with the free speech-contempt dichotomy. Through this case, the Supreme Court of India revisits the question of where to draw the line between free speech and contempt of Court.[14] This article will highlight this dichotomy in light of the recent judgment of the Supreme Court of India *In Re: Prashant Bhushan*.[15]

I. Origin of Law of Contempt

Contempt of court law originated in England, where it sought to protect the judicial powers of the king, and eventually the judges and judiciary who acted in the name of crown. Violation of the orders, directions, or judgments of the Court was considered an aspersion to the crown.[16] With the passage of time, this violation came to be known as contempt of court and was made punishable. The contempt law was further developed to criminalize acts that "scandalize[d] the court," a term first used by Justice Hardwicke in *Roach v. Garvan,*[17] which is now often cited as a *locus classicus*[18] in the contempt law. In *Roach*, Justice Hardwicke sentenced the printer of *St. James's Evening Post* to

[13] Latin phrase meaning 'on their own accord or by its own motion.' When a Court takes *suo moto* or *sua sponte* cognizance of a matter, it takes cognizance on its own without any prior petition or request from the parties involved or any third person.
[14] In Re: Prashant Bhushan, Twitter Communications India Pvt. Ltd., SMC (Crl.) No. 1/2020.
[15] *Id.*
[16] *See* K. Venkataramanan, *The Hindu Explains | What is contempt of court?*, The Hindu (Aug. 2, 2020, 1:24 AM), https://www.thehindu.com/news/national/the-hindu-explains-what-is-contempt-of-court/article32249810.ece ("In England, [contempt of court] is a common law principle that seeks to protect the judicial power of the king, initially exercised by himself, and later by a panel of judges who acted in his name. Violation of the judges' orders was considered an affront to the king himself.").
[17] Roach v. Garvan (1742) 26 Eng. Rep. 683.
[18] Latin for a 'classical case or example.'

prison for publishing an article about witnesses in a *res subjudice*[19] case and held that:

> Nothing is more incumbent upon courts of justice, than to preserve their proceedings from being misrepresented . . . There are three different sorts of contempt. One kind of contempt is scandalizing the court itself. There may be likewise a contempt of this court, in abusing parties who are concerned in causes here. There may be also a contempt of this court, in prejudicing mankind against persons before the cause is heard.[20]

Scandalizing the Court was eventually clarified in *R. v. Gray*[21] after many inconsistent judicial opinions. In this classic English case, the editor of a Birmingham newspaper authored an article describing Justice Darling as "an impudent little man in horse-hair—a microcosm of conceit and empty-headedness."[22] This editor also published disparaging remarks on the judge and his fitness for office. In the opinion, Lord Russell opined that:

> Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court. The law ought not to be astute in such cases to criticise adversely what under such circumstances and with such an object is published; but it is to be remembered that in this matter the liberty of the press is no greater and no less than the liberty of every subject of the Queen . . . [N]obody has suggested, or could suggest, that [this case] falls within the right of public criticism in the sense I have described. It is not criticism, I repeat that it is personal scurrilous abuse of a judge as a judge.[23]

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[19] Latin maxim that means 'under judgment' or 'pending.' It is used for legal proceedings and cases under consideration of the court where no judgment has been made on the issues involved in those cases.

[20] *Roach*, 26 Eng. Rep at 683–84.

[21] R. v. Gray (1900) 2 Q.B. 36.

[22] The offending words were deliberately omitted from the judgment. *Id.* at 37.

[23] *Id.* at 40.

This criminalization of critical speech against the judiciary was used extensively in pre-independent India, particularly in the early High Court and courts of some princely states.[24] The colonial concept of "scandalizing the court" continued to haunt the corridors of Indian courts even after the end of British rule, though. The Constitution of India confers the power to punish contempt to the Supreme Court and High Courts under Article 129[25] and Article 215,[26] respectively. Additionally, contempt of court is one restriction on freedom of speech and expression under Article 19(2) of the Constitution of India.[27]

II. Law of Contempt in India

In India, besides the Constitution, the statutory foundation that underlies and justifies the archaic concept of contempt is The Contempt of Courts Act (hereinafter, 'the Act').[28] The full title of the Act describes it as "[a]n Act to define and limit the power of certain courts in punishing contempt of court and to regulate their procedure in relation thereto."[29] According to the Act, the law of contempt in India consists of criminal contempt (scandalizing or lowering the dignity of the Court or obstructing the administration of justice) and civil contempt (willful disobedience or breach of Court orders, directions, judgment or decree).[30] Whilst civil contempt attracts no grave controversies, criminal contempt has proved potent in silencing

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[24] In pre-independent India, apart from the provinces that were directly governed by the colonial government of British India, there were some princely states governed by native rulers by entering into a treaty or pact with the British government. There were around 584 princely states that were ruled by the native monarchs and were outside the direct control of the Britishers or any imperial authority. *See* Ian Copeland, *Princely States and the Raj*, 39 Economic and Political Weekly 807, 807–9 (2004).

[25] Const. of India art. CXXIX ("The Supreme Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself.").

[26] Const. of India art. CCXV ("Every High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself.").

[27] Const. of India art. XIX, § (2).

[28] The Contempt of Courts Act, 1971 (Act No. 70/1971).

[29] *Id.*

[30] *Id.* § 2(a).

critical speech and dissenting opinions. Under §2(c) of the Act, criminal contempt is defined as:

> [T]he publication (whether by words, spoken or written, or by signs, or by visible representation, or otherwise) of any matter or the doing of any other act whatsoever which:
> (i) scandalises or tends to scandalise, or lowers or tends to lower the authority of, any court; or
> (ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or
> (iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner.[31]

Making any allegation against an individual judge or the judiciary as a whole, attributing ill-motives to judgments and judicial administration, or making any scurrilous or derogatory attack on the conduct of judges and questioning their authority are all considered scandalization of the Court. The premise of this is to maintain the image of the court in the eyes of the public and protect the judiciary from any tendentious attack.

Further, contempt of court can be bifurcated into *in facie contempt*: contempt committed on the face of the Court while the Court is in session, and *ex facie contempt*: contempt committed outside the Court.[32] The Prashant Bhushan dispute arose in the case of constructive contempt of court—or *ex facie* contempt of court. This type of contempt occurs when the courts do not have a first-hand account of the contemnor's conduct, so evidence of the consequences of the contemnor's act on the administration of justice is needed to establish guilt. The punishment prescribed for contempt of court under the Act is simple imprisonment (detention in civil prison in case of civil contempt where the Court thinks that imposition of fine is not sufficient) for a period of up to six months and/or a fine of up to ₹ 2,000.[33] The contemnor may also be discharged by the court or his

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[31] *Id.* § 2(c).
[32] The distinction between the two is implicitly laid down in the Contempt of Courts Act. *See id.*
[33] *Id.* § 12.

punishment may be remitted if he apologizes to the satisfaction of the court.

III. The Prashant Bhushan Chronicle

On the eve of India's 74th Independence Day, the Supreme Court of India delivered a judgment in *In Re Prashant Bhushan*[34] holding lawyer and activist Prashant Bhushan in gross contempt of Court for two tweets. On June 27, 2020, Bhushan tweeted:

> When historians in [sic] future look back at the last 6 years to see how democracy has been destroyed in India even without a formal Emergency [sic], they will particularly mark the role of the Supreme Court in this destruction, [sic] & more particularly the role of the last 4 CJIs [Chief Justice of India].[35]

This tweet was directed toward the government of India and not the judiciary in particular. It was not a direct accusation, but rather an indirect comment on the role of the judiciary without any references to specific justices. Bhushan's tweet can be considered a critical comment and, therefore, cannot be labeled as contempt of court. Especially when the tweets were without malice. As mentioned by Bhushan in his reply affidavit, there were several serious and critical issues striking at the very core of judiciary, including a sexual harassment allegation against an ex-CJI, as well as a press conference with four former Justices warning citizens of danger to a free judiciary, portraying the collapse of sound judicial structure in India.[36] More so, the tweets, which were driven by anguish, were the symbol of dissent and free speech, which cannot be controlled by contempt proceedings simply because people are entitled to speak their mind in a civilized manner.[37] It is commonplace for people to criticize politicians, government, or bureaucrats and, if something similar is said to a court,

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[34] In Re: Prashant Bhushan, Twitter Communications India Pvt. Ltd., SMC (Crl.) No. 1/2020.

[35] The original link has been withheld by Twitter in response to the legal demand. However, the comments tweeted by Prashant Bhushan were mentioned in the judgment verbatim. *See id.*

[36] Affidavit in Reply for Respondent, In Re: Prashant Bhushan, Twitter Communications India Pvt. Ltd., SMC (Crl.) No. 1/2020.

[37] CONST. OF INDIA art. XIX, § (1)(*a*).

the judges should be broad minded enough to take the criticism and mend the judicial structure. The Act nowhere defines the scope of "scandalizing the court," and, therefore, this provision must be used sparingly and only for cases which make it impossible for a court to function. Further, the courts in a democratic setup must always lean in favor of free speech unless it is a calculated attempt to stagnate the delivery of justice.

In his second tweet just two days later, Bhushan bemoaned the state of affairs in India by sharing a picture of the Chief Justice of India riding an expensive Harley-Davidson motorcycle, commenting that the "CJI rides a 50 lakh motorcycle belonging to a [Bharatiya Janata Party] leader at Raj Bhavan, Nagpur, without a mask or helmet, at a time when he keeps the SC in Lockdown mode denying citizens their fundamental right to access Justice!"[38] This tweet also did not make any direct allegation on the CJI, as it was true that physical hearings were at a halt from the lockdown imposed due to COVID-19. While the Supreme Court heard 879 sittings and around 13,000 petitions during the lockdown via virtual hearing, hundreds of thousands of cases concerning the fundamental rights of citizens are currently pending. Thus, it is justified to say that many people were deprived of their fundamental right of access to justice.

This tweet merely states a fact in a civilized manner and, therefore, it should not be interpreted as degrading the image of judiciary or lowering the public confidence in the administration of justice. The term 'degrading the image of judiciary' or 'lowering the confidence in administration of justice' must be given higher latitude. They must be placed to cover those remarks which are allegations that are far away from known facts. The tweet by Bhushan is nothing but a known fact, which becomes even more evident after CJI Sharad Arvind Bobde opined that the COVID-19 pandemic had spurred a different breed of inequality, wherein people without access to technology effectively lost access to justice.[39]

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[38] *Id.*

[39] *For those who have no access to technology, courts simply don't exist during COVID-19: CJI SA Bobde*, Bar and Bench (Nov. 26, 2020, 9:19 AM),

These tweets from Bhushan can be considered avoidable critical remarks, but they neither degrade the public image of the judiciary nor lower public confidence in the administration of justice—simply because they are void of allegations. More so, holding Bhushan in contempt of court is a *prima facie* attack on free speech of a citizen. However, in an 108-page long judgment,[40] the Supreme Court analyzed the contents of his tweets and the grounds of contest by Bhushan *viz*. free speech, truth (as defense), principle of proportionality (tilting balance in favor of rights as against restrictions), and vague and wandering jurisdiction supplied by Bhushan in his reply affidavit.[41] The Court rejected Bhushan's argument that any remark on the conduct of judges in their individual capacities do not affect the administration of justice or lower the court's dignity and declared that the tweets were capable of lowering the dignity of the court, then referred to itself as the "central pillar" of India's democratic regime, an "*epitome of Indian judiciary*," and the "*last hope of a citizen* [when he] fails to get justice anywhere."[42] The Court stated that any "attempt to shake the very foundation of constitutional democracy has to be dealt with an iron hand,"[43] and

> If such an attack is not dealt with, with requisite degree of firmness, it may affect the national honour and prestige in the comity of nations. Fearless and impartial Courts of justice are the bulwark of a healthy democracy and the confidence in them cannot be permitted to be impaired by malicious attacks upon them.[44]

The Court also laid down two attending circumstances, namely, the extent of publication and whether the criticism is made in good faith or not. The Court further opined that Bhushan was a lawyer of 30

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https://www.barandbench.com/news/courts-technology-covid-sa-bobde-constitution-day-speech.

[40] *Prashant Bhushan*, SMC (Crl.) No. 1/2020.

[41] Affidavit in Reply for Respondent, In Re: Prashant Bhushan, Twitter Communications India Pvt. Ltd., SMC (Crl.) No. 1/2020.

[42] *Prashant Bhushan*, SMC (Crl.) No. 1/2020, at para. 72 (emphasis added).

[43] *Id.* at para. 71.

[44] *Id.* at para. 73 (emphasis added).

years standing, thereby expected to act as a responsible officer of the court, but, instead he made scurrilous and malicious allegations against the judiciary and tried to scandalize the court.[45] The court further noted that such criticism of judiciary was not protected under Article 19(1)(a) of the Constitution of India and therefore Bhushan's right to free speech cannot prevail over judicial dignity. Consequently, the court was of the view that these tweets cannot be said to be a fair criticism of the functioning of the judiciary, made bona fide in the public interest.[46]

The Court relied on its ruling in *Re: Vijay Kurle & Ors.*[47] while deciding the question of "consent of Attorney General of India to initiate criminal contempt proceedings," and held that the Court derives its power to initiate action for contempt from Article 129 of the Constitution.[48] Further, it observed that the Supreme Court's power is not limited by the provisions under §15 of the Contempt of Courts Act, 1971.[49] The Court can therefore exercise its power to initiate *suo moto*

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[45] *Id.* at para. 70.

[46] *Id*.

[47] 2020 SCC Online SC 407, SMC (Crl.) No. 2/2019. The Court included an extensive excerpt from the ruling, claiming the cases were "identical submissions." *Prashant Bhushan*, SMC (Crl.) No. 1/2020, at para. 17.

[48] *Prashant Bhushan*, SMC (Crl.) No. 1/2020, at paras. 17–18.

[49] *Id. See also* The Contempt of Courts Act, 1971, § XV (Act No. 70/1971) (Cognizance of criminal contempt in other cases—(*1*) In the case of a criminal contempt, other than a contempt referred to in section 14, the Supreme Court or the High Court may take action on its own motion or on a motion made by—

(*a*) the Advocate-General, or

(*b*) any other person, with the consent in writing to the Advocate-General, or

(*c*) in relation to the High Court for the Union territory of Delhi, such Law Officer as the Central Government may, by notification in the Official Gazette, specify in this behalf, or any other person, with the consent in writing of such Law Officer.

(*2*) In the case of any criminal contempt of a subordinate court, the High Court may take action on a reference made to it by the subordinate court or on a motion made by the Advocate-General or, in relation to a Union territory, by such Law Officer as the Central Government may, by notification in the Official Gazette, specify in this behalf.

(*3*) Every motion or reference made under this section shall specify the contempt of which the person charged is alleged to be guilty.

Explanation.—In this section, the expression "Advocate-General" means—

contempt proceedings without the consent of the Attorney General.[50] However, the Court did not draw the connection between criticism by Prashant Bhushan and the interference of the administration of justice as required by the Act. The Supreme Court did not explain why Bhushan was deemed guilty of contempt of Court or why a token fine of ₹ 1 was imposed. Failing to pay this fine would result in a jail term of three months and debarment from law practice for three years.[51] Former Supreme Court Justice Kurien Joseph suggested that the contemnor in a *suo moto* contempt case should be granted the option to prefer an intra-court appeal.[52] The court initiating the contempt proceedings is not only an aggrieved person but also the prosecutor, the witness, and the judge. This is against the very basic principle of natural justice,[53] i.e., no one can be at once a suitor and a judge. In contempt proceedings, the court whose authority is scandalized is the aggrieved and the witness to such scandalization. By initiating *suo moto* action, the court aims to decide whether the contemnor is guilty of contempt of court. Justice Joseph opined that, just as persons convicted in ordinary criminal matters are granted an appeal to a higher court, a person charged with criminal contempt of court should also be entitled to challenge the judgment through an appeal.[54] He explained that, under §19 of the Act, the contemnor has the opportunity to appeal any order or decision of a High Court passed by

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(*a*) in relation to the Supreme Court, the Attorney-General or the Solicitor-General;

(*b*) in relation to the High Court, the Advocate-General of the State or any of the States for which the High Court has been established;

(*c*) in relation to the Court of a Judicial Commissioner, such Law Officer as the Central Government may, by notification in the Official Gazette, specify in this behalf.

[50] *Prashant Bhushan*, SMC (Crl.) No. 1/2020, at paras. 17–18.

[51] *Id.* at para. 35.

[52] *See Justice (Retd.) Kurien Joseph statement on Prashant Bhushan contempt case*, THE HINDU (Aug. 19, 2020, 2:36 PM), https://www.thehindu.com/news/national/justice-retd-kurian-joseph-statement-on-prashant-bhushan-contempt- case/article32392092.ece.

[53] *See supra* text accompanying note 12.

[54] *See Justice (Retd.) Kurien Joseph statement on Prashant Bhushan contempt case*, *supra* note 52.

a single judge to at least Division Bench.[55] Further, if the contemnor is still aggrieved by the decision passed by the bench of at least two judges, he can prefer an appeal to the Supreme Court. The case of contempt involves substantial questions of law on the interpretation of the Constitution and repercussions on the fundamental rights of the citizens and, therefore, must always be decided by a constitutional bench as given under Article 145(3) of the Constitution of India.[56] Currently, there is no provision of intra-court appeal from the Supreme Court decision, and Prashant Bhushan has filed a review against the contempt verdict, which, according to him, was an attempt to choke dissent.[57]

IV. Conflicts from the Past

Many different interpretations and perspectives of contempt law have been put forth to override free speech. In *E. M. Sankaran Namboodiripad v. T. Narayan Nambiar,*[58] the Court became the interpreter of political ideologies while initiating contempt proceedings against the Chief Minister of Kerala, Namboodiripad, for invoking Marxist ideology in a press conference. Namboodiripad labeled the judiciary an "instrument of oppression" and accused judges of being "guided and dominated by class hatred, class prejudices, [and] instinctively favouring the rich against the poor."[59] The Minister had done nothing more than express the core tenets of Marxism, which is protected under Article 19(1)(a).[60] The Minister did not accuse any individual judges of ill motive or conduct, but the judge ignored this. The judge then 'proved' how Namboodiripad misunderstood the

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[55] *See id.*
[56] Const. of India art. CXLV, § 3.
[57] *See* Legal Correspondent, *Contempt case: Prashant Bhushan pays ₹1 fine, says review petition being filed*, The Hindu (Sep. 14, 2020, 3:34 PM), https://www.thehindu.com/news/national/contempt-case-prashant-bhushan-pays-1-fine-says-review-petition-being-filed/article32598787.ece ("Mr. Bhushan has led a spirited defence in the contempt case. He said truth was his defence. He has, as any other citizen, stood by his right to criticise the judiciary. He said the court was using its contempt to 'choke dissent.'").
[58] (1970) 2 SCC 325.
[59] *Id*. at para. 32.
[60] Const. of India art. XIX, § (1)(*a*).

teachings of Marx, Engels, and Lenin by elaborating the developments of Marxist theory since the eighteenth- and nineteenth-century.[61] Namboodiripad's speech was considered beyond the shield of free speech, as the alleged attack upon judges was deemed capable of weakening the authority of the law and courts.[62] This case established that even general statements against the judiciary without targeting any particular judge or court may be considered a form of scandalising the court.[63]

In the later case of *Hari Singh Nagra v. Kapil Sibal,*[64] the Supreme Court did not find general statements to be in contempt of court. These statements included: "judiciary has failed to eradicate the phenomenon of corruption," "some judges receive monetary benefits for judicial pronouncements, rendering blatantly dishonest judgments," and "some judges have been kow-towing with political personalities and obviously favouring the government . . . thereby losing all sense of objectivity."[65] The Court opined that these statements did not target any specific judge and observed that they were the just concerns of a long-standing senior advocate. The precedent of *Kapil Sibal* was ignored in *Prashant Bhushan* when the facts of both the cases were similar. Long-standing lawyers expressed concerns regarding the working of the judiciary and the justice delivery system. The comments in both the cases point towards the influence of political parties on the judiciary. Moreover, neither of the comments bring the administration of justice to a standstill.

Another scale for measuring contempt is the knowledge of law and legalese. The Supreme Court in *Re: Arundhati Roy*[66] held that 'fair criticism' would not amount to contempt if made "in good faith and in public interest."[67] To determine if the criticism is in good faith or in public interest, the Court would look at: "(i) the person responsible for [the] comments; (ii) his knowledge in the field regarding which the

[61] *Namboodiripad*, 2 SCC at paras. 15–29.
[62] *Id.* at para. 32
[63] *Id.*
[64] (2010) 7 SCC 502.
[65] *Id.* at para. 5.
[66] (2002) 3 SCC 343.
[67] *Id.* at. para. 28.

comments are made; and (iii) the intended purpose sought to be achieved."[68] Although the court convicted respondent Arundhati Roy—an acclaimed author—and sentenced her to prison for one day along with a fine of ₹ 2000, it opined that the knowledge of law would determine whether the criticism was fair or not. However, in *Prashant Bhushan,* the Supreme Court argued that law officers—the persons with knowledge of law and legalese—are expected to maintain the majesty of Courts by not scandalising the Court. This test of legal knowledge is flawed because both lawyers and non-lawyers have equal right to criticize public institutions. The current rules state that one can only question and criticize the courts when they have a proficient understanding of the legal system. With the contradictions posed by these two rulings, it has become difficult to determine as to who has been '*granted*' the right to criticize.

Lastly, in *P.N. Duda v. V. P. Shiv Shankar*,[69] the Supreme Court examined whether a speech delivered by the Minister of Law and Justice at a Bar Council of Hyderabad meeting brought the Court into disrepute. The Minister said that, since the Supreme Court was composed of the "elite class," it has "unconcealed sympathy for the haves," and therefore interpreted Article 31[70] contrary to the spirit and intendment of the Constitution.[71] He went on to highlight how "[a]nti-social elements, such as people who violate foreign exchange and securities regulations, bride burners and whole hordes of reactionaries, have found their haven in the Supreme Court."[72] Although the Court found this remark to be intemperate, it concluded that the speech of the Minister, read in its 'proper perspective,' neither brought the administration of justice into disrepute nor impaired it. The Court held that the minister was simply "making a study of the attitude of [the] Court" and cannot be prosecuted for criminal

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[68] *Id*.
[69] (1988) 3 SCC 167.
[70] Const. of India art. XXXI. This Article guaranteed a fundamental right to property to the citizens of India. However, this fundamental right was repealed by the 44th Constitutional Amendment in 1978 and was placed under the category of constitutional rights under Article 300A.
[71] *Shiv Shankar*, 3 SCC at para. 3.
[72] *Id*. at para. 6.

contempt of Court.[73] In the case of Prashant Bhushan, an important question is whether his tweets were scandalous general statements (*Namboodiripad*) or a mere analysis of the attitude of judiciary (*Shiv Shankar*). The answer lies in that 108-page judgment.[74] Different obiters and ratios[75] in all these cases establish two zones—one for silence and one for speech—based on the qualifications of the critique, and further suggest that the same speech can have different hues depending on its origin.

V. International Stand on "Scandalizing the Court"

England, from where the contempt law originated, abolished the offense of scandalizing the Court under the "Crimes and Courts Act, 2013" after determining that the contempt law had become almost entirely obsolete.[76] The Law Commission also noted that while most of the remarks and comments are 'too silly or innocuous' to be taken cognizance of, others can be covered by other offenses such as civil libel. In 1968, Lord Denning condemned the contempt law while deciding a case in favor of Mr. Quintin Hogg Q.C., who authored an article containing provocative remarks concerning the judiciary.[77] Lord Denning stated:

> Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself.[78]

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[73] *Id*. at para. 28.
[74] In Re: Prashant Bhushan, Twitter Communications India Pvt. Ltd., SMC (Crl.) No. 1/2020.
[75] A legal judgement has two elements—*obiter dicta* and *ratio decidendi*. *Obiter dicta* means the opinions of the judges that are not legally binding, whereas *ratio decidendi* means the binding part of the judgments on which the decision is based and it acts as a precedent for future cases.
[76] *See* Abhinav Chandrachud, Republic of Rhetoric (2017).
[77] R. v. Commissioner of Police, ex. p. Blackburn (No. 2) [1968] 2 Q.B. 150.
[78] *Id.* at 155.

The constitutional law of the United States—another common law country—has spurned "scandalizing the Court" as a form of Contempt of Court. In *Bridges v. California*,[79] Justice Black, writing for the majority, held that "enforced silence, however limited, solely in the name of preserving the dignity of the bench would probably engender resentment, suspicion, and contempt much more than it would enhance respect."[80] Even Justice Frankfurter's dissenting opinion called the doctrine of "scandalizing the Court" an example of "foolishness" that ''has never found lodgement in the U.S."[81] He further agreed that speech and expression cannot be punished when the purpose is simply "to protect the Court as a mystical entity, or the judges as individuals or as anointed priests set apart from the community and spared the criticism to which, in a democracy, other public servants are exposed."[82]

Whilst we are adamant on calling the contempt law a colonial hangover or foolishness, we often forget the progressive stand taken by Justice Beaumont of Bombay High Court in 1938, when, in *Government Pleader v. Tulsidas Jhadav*,[83] he cited judgments rendered in *Gray*,[84] *Aubyn*,[85] and *Ambard*.[86] Beaumont said that "the degree of confidence reposed in the judiciary" would depend "on the character of judicial work," and that "confidence cannot be for long artificially engendered by the simple process of stifling criticism."[87] He found that it had been "laid down many times and by the highest tribunals that Judges are not immune from criticism," and in cases involving scandalizing the Court, the Court was, "in effect both prosecutor and Judge," in which the contemnor was "deprived of the ordinary methods of trial."[88] For these reasons, Beaumont believed that the

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[79] 314 U.S. 252 (1941).
[80] *Id.* at 271-72.
[81] *Id.* at 287 (Frankfurter, J., dissenting)
[82] *Id.* at 292.
[83] (1938) 40 Bom. L.R. 75.
[84] Reg. v. Gray [1900] 2 Q.B. 36
[85] McLeod v. St. Aubyn [1899] A.C. 549
[86] Andre Paul Terence Ambard v. The Attorney General of Trinidad, (1936) 38 Bom. L.R. 681.
[87] *Government Pleader*, 40 Bom. L.R. at para. 1.
[88] *Id.*

power of punishing contemnors for scandalizing the Court was to be used only when attacks were made imputing "base or improper motives" to a judge.[89]

VI. Conclusion

It would be difficult to imagine a State that calls itself the largest democracy in the world and does not enforce the ideal of free speech and expression in the slightest.[90] The Indian Judiciary—the guardian of the Constitution—has upheld the rights of citizens under the rubric of 'free speech and expression' while failing to actually protect these ideas. The contrasting observations by the Courts in contempt cases suggest the staggering elasticity of justice. In other words, the more influential and powerful a person is, the more generous and benign the law and its gatekeepers. The criminal contempt law has a chilling effect on free speech and human rights and stands as a threat to those who dare speak out against the judiciary. India, the largest democratic nation in the world, cannot afford any more casualties stemming from a muddled interpretation of contempt jurisprudence and laws and descend into some legal wasteland. The fleeting opinions and transient 'precedents' have no place in the country guided by the rule of law.

It is disheartening to see that judgments on the government's bestial conduct and actions—crossing constitutional red lines like electoral bonds, abrogation of Article 370 of the Constitution, Citizenship Amendment Act, and EVM Fraud, among other things—are not able to see the light of the day because the Courts are occupied with the veritable reign of contempt. With almost 1.3 billion people and their social media accounts, it seems the taxpayer's monies are all set to take cognizance of the remarks targeting the pride of the courts and judges, with the rulings and judgments on the conduct ultimately being the certificates of Judiciary's good character.

It is time the Supreme Court reflect on the free speech-contempt dichotomy, make an assessment of the contempt law,

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[89] *Id.*

[90] Gautam Bhatia, Offend, Shock, or Disturb (2016).

and settle it once and for all. With hundreds of thousands of vacillating and arbitrary contempt cases and no clear-cut definition of "scandalizing the Court," one cannot help but ponder over the elements of free speech, the meaning of fair criticism, and the hairline difference between contempt and free speech. In the current judicial setup, it has become difficult to decide whether one is in a court of law or a casino—the court of chance and luck.

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