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Articles

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Letter from the Editor

Dear Reader,

On behalf of the executive and editorial boards, I am proud to present the Spring 2017 issue of the Columbia Undergraduate Law Review. This semester, our board had the difficult task of publishing only five articles out of the many high-quality submissions, and we are proud to offer the following.

In her article "Justice Scalia's Jurisprudence in the Guantanamo Cases," Magdalene Beck discusses the originalist opinions of the late Supreme Court Justice, particularly with four cases relating to the Guantanamo Bay Naval Base.

"Pathways for Equitable Education Funding; Assessing the Legacy of San Antonio Independent School District v. Rodriguez in Equal Protection Educational Funding Litigation," by Samuel Klein-Markman, takes up the titular case and its impact on education funding reform.

In "Prison Gerrymandering and the Systematic Dilution of Minority Political Voice," Lindsay Holcomb probes the political disenfranchisement in the United States caused by the practice of prison-based gerrymandering.

Basundhara Mukherjee explores the rehabilitative benefits of religion in prisons and argues for an even more robust protection of religious rights in "Reframing Religion: A Rehabilitative Approach to Religious Rights in Prisons."

Finally, Claron Niu traces the evolution of the Commerce Clause in American legal history in "Threatening Commerce: The Commerce Clause and Federalized Crime," specifically investigating its relation to the case of Jabari R. Dean's online threat to the University of Chicago in 2015.

With each continuing publication, the Columbia Undergraduate Law Review strives to increase intellectual debate and discussion of legal issues, especially among undergraduates. To achieve this goal, we highly recommend visiting our online journal with shorter legal articles on our website – written by current Columbia students on our online staff.

We hope that you enjoy reading both our print and online articles.

Sincerely,
Alicia Schleifman
Editor-in-Chief

MISSION STATEMENT

The goal of the Columbia Undergraduate Law Review is to provide Columbia University, and the public, with an opportunity for the discussion of law-related ideas and the publication of undergraduate legal scholarship. It is our mission to enrich the academic life of our undergraduate community by providing a forum where intellectual debate, augmented by scholarly research, can flourish. To accomplish this, it is essential that we:

i) Provide the necessary resources by which all undergraduate students who are interested in scholarly debate can express their views in an outlet that reaches the Columbia community.

ii) Be an organization that uplifts each of its individual members through communal support. Our editorial process is collaborative and encourages all members to explore the fullest extent of their ideas in writing.

iii) Encourage submissions of articles, research papers, and essays that embrace a wide range of topics and viewpoints related to the field of law. When appropriate, interesting diversions into related fields such as sociology, economics, philosophy, history, and political science will also be considered.

iv) Uphold the spirit of intellectual discourse, scholarly research, and academic integrity in the finest traditions of our alma mater, Columbia University.

SUBMISSIONS

The submissions of articles must adhere to the following guidelines:

i) All work must be original.

ii) We will consider submissions of any length. Quantity is never a substitute for quality.

iii) All work must inclde a title and author biography (including name, college, year of graduation, and major).

iv) We accept articles on a continuing basis.

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Justice Scalia's Jurisprudence in the Guantanamo Cases

Magdalene Beck | University of Virginia

Abstract

In post-9/11 America, how has the United States Supreme Court ruled in national security cases? How frequently do the Justices defer to international legal precedent and invoke foreign legal decisions in cases involving foreign actors or acts committed in foreign territories? Is it possible to reconcile the jurisprudential philosophies of originalism and transnationalism? In my paper, "Justice Scalia's Jurisprudence in the Guantanamo Cases," I seek to answer these and their resultant questions. To explore the modern Supreme Court's jurisprudence in international cases, I focus specifically on the opinions of Antonin Scalia, who serves as a prime example of originalist philosophy and as a counterpoint to the more liberal transnationalist, Stephen Breyer. First, I explore how various scholars have interpreted Scalia's use, abuse, and rejection of foreign and international law precedents. Next, I analyze his dissents in four major cases involving the Guantanamo Bay Naval Base – Rasul v. Bush, Hamdi v. Rumsfeld, Hamdan v. Rumsfeld, and Boumediene v. Bush –specifically focusing on his treatment of foreign and international law. Finally, I evaluate the patterns that emerged in his jurisprudence over the course of these cases. Ultimately, I conclude that (1) Scalia's originalism heavily informed his decisions to invoke or criticize the invocation of foreign and international law in various forms and (2) these cases hinged less on the Court's deference to the world's courts and more on its view of the role of the U.S. government's three branches in crafting and interpreting national security policies in post-9/11 America.

I. Introduction

Few modern Supreme Court Justices' jurisprudences have captured constitutional theorists' interest more than that of the recently deceased Antonin Scalia. Notorious for his originalist idiosyncrasies and the irreverent voice he brought to his writings and speeches, Scalia often produced polarizing Court opinions. Analysts of his jurisprudence often, however, squeeze the Justice into the originalist category without allowing space for nuance in his interpretive approach. For instance, scholars associate his originalism with an unwillingness to cite foreign and international law precedents, yet such a characterization oversimplifies his approach to incorporating the laws and opinions of other countries' courts in his own thinking in cases involving national security or international law. Notably, few scholars have attempted to analyze Scalia's jurisprudence as it was expressed in the Guantanamo cases that entered the Supreme Court's docket in the years after the 9/11 terrorist attacks. As such, this essay will investigate the Justice's dissenting opinions in four major Guantanamo cases to determine whether the current scholarship on his international legal jurisprudence accurately characterizes his application of originalist principles to national security decisions. The essay will begin with an exploration of scholarly interpretations of Scalia's use, abuse, and rejection of foreign and international law precedents. Next, it will present analysis of his dissents in the four Guantanamo cases, specifically focusing on his treatment of foreign and international law. Finally, the essay will describe the patterns that emerged in his jurisprudence over the course of these cases to conclude, ultimately, that (1) Scalia's originalism heavily informed his decisions to invoke or criticize the invocation of foreign and international law in various forms and (2) these cases hinged less on the Court's deference to the world's courts and more on its view of the role of the U.S. government's three branches in crafting and interpreting national security policies in post-9/11

America.

II. Scalia's [Inter?]Nationalist Jurisprudence

A wide array of scholarship has addressed Scalia's originalist jurisprudence as applied in domestic cases. Even so, attempts thus far to characterize his originalist interpretation of matters of foreign and international law often have yielded assessments that are inconclusive at worst and ambiguous at best. Indeed, though Francisco Valdes opines that Scalia used originalism to rebuke the "transnationalist jurisprudence" to which Justices Stephen Breyer and Ruth Bader Ginsburg subscribe[1] in favor of "a legal neo-isolationism"[2] and neocolonial "backlash kulturkampf,"[3] it is not immediately apparent that Scalia's aims were always so purely ideological. At the same time, his approach to foreign precedents certainly was not purely originalist. Overall, his jurisprudence reflects sometimes contradictory rationales for invoking foreign and international law.

A. The Originalist Rejection of Internationalism for Constitutional Interpretation

Harold Hongju Koh claims that Scalia clings largely to "nationalist jurisprudence," which, he writes, "is characterized by commitments to territoriality, extreme deference to national executive power and political institutions, and resistance to comity or international law as meaningful constraints on national prerogatives."[4] Scholars largely agree on one manifestation of Scalia's originalism as applied to this nationalist jurisprudence: his disdain for international legal discourse as a source of constitutional interpretation.[5] In various public appearances since the turn of the century, including a 2004 address to the American Society of International Law (ASIL) conference,[6] a 2005 dialogue with Breyer in a U.S. Association of

Constitutional Law meeting at American University,[7] a 2006 Keynote Address to the American Enterprise Institute,[8] and a 2015 luncheon at the George Mason University School of Law, Scalia solidified his anti-transnationalist position.[9] Scalia questioned deference to foreign law in constitutional interpretation for several reasons.

As a skeptic of interpreting the Constitution using anything besides the text, even the document's own drafting history,[10] Scalia railed against the decision to cite foreign and international law on originalist principles. Moreover, in his 2005 discussion with Breyer, he submitted that even if non-originalists refuse to defer first to the original meaning of the Constitution, they still must look to the "standards of decency of American society."[11] As such, it is irrelevant to cite foreign arguments[12] when Americans "don't have the same moral and legal framework as the rest of the world, and never have."[13] Finally, he thought that transnationalist constitutional interpretation "lends itself to manipulation,"[14] fearing that its champions pick and choose foreign case laws only when they support their own ideological ends.[15] Scalia found such a use of transnationalism by "'Platonic living constitutionalists': scholars and judges who would use comparative legal analysis as a means to import foreign legal norms into the American Constitution,"[16] to be problematic because he thought societal change should come about from democratic discussion, not constitutional interpretation.[17]

Scalia voiced his opposition to transnationalist constitutional interpretation in a variety of cases in the twenty-first century. In 2003, in the majority opinion for *Lawrence v. Texas*, which overturned *Bowers v. Hardwick* by holding unconstitutional the criminalization of homosexual sexual conduct,[18] Justice Kennedy cited the European Court of Human Rights (ECHR) case that "had rejected same-sex sodomy prohibitions as a violation of the European Convention's right to privacy."[19] Scalia, in turn, "bitterly dissented with his second invocation of kulturkampf,"[20] reflecting his disbelief that the majority of Americans agreed with the European acceptance

of homosexuality.[21] He similarly opposed Kennedy's transnationalism in 2004's *Roper v. Simmons*, which struck down the juvenile death penalty in a 5-4 decision.[22] Justice Kennedy cited foreign law in his majority opinion, noting, according to Jeffrey Toobin's summary, "that the United States had only dismal company in countries that had executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China. But since then, even those countries had renounced the practice."[23] In his dissent, Scalia vehemently protested against this invocation of foreign law, claiming: "'To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry.'"[24] Such decisions surely lend credence to Duncan Hollis's hypothesis that Scalia "disfavors the use of international or foreign law whenever it would be rights-enhancing," at least with regard to constitutional rights.[25]

B. Scalia as an Internationalist

Scalia did invoke foreign law in specific circumstances, however, despite Julian Ku's characterization of him as a "judicial sovereigntist" who categorically rejected deference and reference to foreign law.[26] In fact, he himself admitted to citing foreign and international law as frequently as, and perhaps even more frequently than, his Supreme Court colleagues; as Professor O'Brien noted in 2006, Scalia ranked third behind only Kennedy and Breyer in the frequency of citing it in opinions.[27] Significantly, the Justice cited foreign and international law when that law was "old English law,"[28] when the case involved statutory interpretation, and when he could use it to advocate for business.[29]

Consistent with his originalist jurisprudence, Scalia looked to old English laws in his interpretation of the Constitution, arguing that consulting this "foreign law" was appropriate in order to divine the original intent of the document and the rights therein. Deferring

to modern foreign and international law to interpret the Constitution, however, insulted his purported originalist sensibilities.

Furthermore, Scalia had no qualms about invoking foreign precedent to interpret treaties specifically.[30] In fact, as a professor at the University of Virginia School of Law, he taught comparative law and private international law, proving his understanding of the importance of knowledge of other countries' statutory jurisprudence.[31] Scalia proudly deferred to foreign judicial decisions in treaty interpretation more frequently than the other Justices thought necessary.[32] From Scalia's perspective, the Court ought to defer to the judgment of the court of another country that had signed a treaty, provided that foreign court's judgment seemed reasonable.[33] For example, in *Olympic Airways v. Husain*, in which the Court found the airline responsible for the accidental death of Abid Hanson under Warsaw Convention Article 17,[34] his dissent "took the majority to task for failing to give sufficient consideration to foreign court decisions," specifically those of the British and Australian courts, "in interpreting the meaning of the Warsaw Convention."[35] Because the case dealt with interpreting a treaty in which the U.S. had participated, he accepted and encouraged deference to these foreign precedents. Furthermore, the Justice deemed foreign consultation permissible when the Court was "considering other questions, such as the nonconstitutionally mandated rules of habeas corpus."[36]

Finally, Scalia permitted deference to foreign judicial precedent to support businesses, proving that his originalist justification was not always as authentic or unadulterated by other motivations as he liked to argue. For instance, in his dissent in *Hartford Fire Insurance Co. v. California*, he used "canons of statutory interpretation and principles of international comity" to find "that it was unreasonable to apply U.S. antitrust law absent explicit Congressional directives because of the potential disruption to another country's legislative scheme."[37] Similarly, Scalia's aforementioned *Olympic Airways v. Husain* dissent supported the rights of Olympic Airways

through invocation of the Warsaw Convention's "liability regime."[38] In both of these cases, the Justice invoked foreign and international law to protect the interests of businesses.

Considering the inconsistency of Scalia's transnationalist and nationalist statutory and constitutional interpretation, Valdes's argument that Scalia used originalism to promote a neocolonial backlash to a shifting American system of rights seems compelling. Perhaps, as Gerald Neuman agrees, the Justice was ideologically selective in his acceptance or rejection of foreign law citations. After all, according to Neuman, "Ironically, Justice Scalia wrote one of his best-known condemnations of resort to foreign law in *Printz v. United States*…despite an ambiguous historical record that was admittedly 'not conclusive.'"[39] Preliminary assessment of such evidence suggests, at the very least, that Scalia's approach to transnational dialogue was not purely originalist, but also was motivated by his distinction between statutory and constitutional interpretation and by his pro-business motivations.

II. Scalia and the Guantanamo Cases[40]

The events of September 11, 2001, in which Al Qaeda terrorists killed almost 3,000 people in attacks on the World Trade Center and the Pentagon,[41] plunged the United States and, by extension, its Supreme Court, into a new era of national security discourse that necessitated unprecedented jurisprudential thinking. Shortly after the attacks, Congress passed the Authorization for Use of Military Force (AUMF), (Pub.L. 107-40), with the following provision:

> That the President is authorized to use all necessary and appropriate force against those nations, organi zations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent

> any future acts of international terrorism against the United States by such nations, organizations or persons.[42]

It permitted President George W. Bush to launch the "war on terror," deploying thousands of American troops, first into Afghanistan to fight the Taliban government and Al Qaeda forces, and then into Iraq to target these and additional terrorist groups.[43] AUMF would prove to have profound legal consequences, especially for the lives of suspected terrorists who were seized and detained by U.S. government personnel in Afghanistan and Iraq. Such detainees, dubbed "enemy combatants" or "unlawful combatants," lacked Geneva Convention rights, according to Secretary of Defense Donald Rumsfeld.[44] Beginning on January 10, 2002, the U.S. government sent around 600[45] to 800 of these captured suspected enemy combatants from Afghanistan to the Guantanamo Bay Naval Base in Cuba.[46] Shortly thereafter, advocates began to challenge the prisoners' indefinite detainment until the "end" of the war on terror,[47] "petitioning federal courts to issue writs of habeas corpus" with the contention that such detainment was unlawful and unconstitutional.[48] Within this context of national fear about security threats, of expanded executive powers to combat these perceived threats, and of international recognition of the potential unconstitutionality of Guantanamo's treatment of detainees, the Supreme Court had to craft a new jurisprudence of national security. As Justice Breyer wrote in *The Court and the World*, the Guantanamo cases implied to the American public that "Civil liberties would now be understood to have a weight that needed to be balanced against security."[49]

This essay will explore Scalia's dissenting opinions in the four major enemy combatant Guantanamo cases: *Rasul v. Bush*, *Hamdi v. Rumsfeld*, *Hamdan v. Rumsfeld*, and *Boumediene v. Bush*. Given the inherently international nature of these cases—involving both citizens and non-citizens seized for alleged terrorism abroad and thereafter detained abroad—the lack of international and foreign

law citations is striking. Analyzing the content of Scalia's dissents will illuminate whether or not his originalist, nationalist jurisprudence remained consistent over time, and whether or not his relative lack of foreign and international citations may stem from any specific jurisprudential motivations.

A. *Rasul v. Bush* (2004)

In this case, decided on June 28, 2004, the petitioners,[50] two Australians and twelve Kuwaitis who were captured in Afghanistan and detained at Guantanamo,[51] posited that the following conditions violated their Fifth Amendment Due Process rights[52]: they were humanitarian aid workers,[53] not combatants or terrorists, that had been imprisoned mistakenly; they had not been charged with any wrongdoing; they had not been allowed to confer with counsel; and they had not been charged in any court.[54] The Washington, D.C. Circuit Court of Appeals interpreted the suits as habeas petitions and dismissed them, holding that under *Johnson v. Eisentrager*,[55] "aliens detained outside United States sovereign territory may not invoke habeas relief."[56] The Supreme Court overturned this decision, however, finding that "United States courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantanamo Bay."[57] Justice Stevens delivered the majority opinion, joined by Justices O'Connor, Souter, Ginsburg, and Breyer; Justice Kennedy filed a concurring opinion; and Justice Scalia delivered a dissenting opinion joined by Chief Justice Rehnquist and Justice Thomas.[58]

In Scalia's dissent, he rejected the extension of habeas corpus to non-citizens under detention outside U.S. sovereign territory,[59] first distinguishing between statutory and constitutional habeas corpus rights. The petitioners, he contended, were not deferring to a constitutional requirement for jurisdiction, and as such "this case

turns on the words of §2241[60]…the statute could not be clearer that a necessary requirement for issuing the writ is that some federal district court have territorial jurisdiction over the detainee."[61] In fact, the "directly-on-point statutory holding"[62] in *Eisentrager* was that neither the statute nor the Constitution gave federal courts jurisdiction over aliens held outside U.S. sovereign territory.[63] As far as the majority's attempt to prove that *Braden v. United States* "overruled the statutory predicate to *Eisentrager*'s holding" of *Ahrens v. Clark*,[64] Scalia argued that the *Braden* decision had no bearing on *Ahrens*[65] and as such the "petition did not justify application of *Braden*'s limited exception to the *Ahrens* rule"—*Ahrens* still applied and required that the petitioners be within federal court jurisdiction before they could petition for habeas corpus.[66]

Additionally, Scalia criticized the majority's contention that a 1903 lease agreement with Cuba gave the United States "complete jurisdiction and control" over the naval base, since he believed "the lease and treaty do not render Guantanamo Bay the sovereign territory of the United States."[67] This distinction between leasing and occupation of foreign areas and actual sovereignty was crucial, the Justice pointed out, because absent this distinction, "'jurisdiction and control' acquired by lawful force of arms" logically would make "parts of Afghanistan and Iraq…subject to our domestic laws."[68] In all, he determined, the majority failed in proving that the United States could grant federal jurisdiction when Cuba ultimately exercised sovereignty over the naval base.[69]

Crucially, Scalia invoked foreign law with an originalist bent. He attacked the majority's historical justification for extending the habeas writ, English precedents of extending habeas corpus to "exempt jurisdictions" and to "other dominions under the sovereign's control". Scalia contended that the cases cited were "inapposite for two reasons: Guantanamo Bay is not a sovereign dominion, and even if it were, jurisdiction would be limited to subjects."[70] First, Cuba had not granted sovereign authority to the U.S. in any

way that paralleled the old English practice of granting habeas corpus to "exempt jurisdictions," areas in which "the Crown had ceded management of municipal affairs to local authorities" and the courts "had exclusive jurisdiction over private disputes among residents."[71] Additionally, the majority's claim that England had extended the habeas writ to "other dominions under the sovereign's control" was similarly inapplicable to the lease of Guantanamo, since historically these dominions were merely "outside England proper" and, unlike the naval base, still remained "the sovereign territory of the Crown: colonies, acquisitions and conquests, and so on."[72] Second, Scalia spiritedly pointed out, if and when the writ "did extend to exempt jurisdictions, outlying dominions, and the like, that extension applied only to British subjects."[73] Thus, even if he accepted the first failed historical justification of the majority, their justification failed when applied to the alien petitioners.

In an uncharacteristically transnationalist move, Scalia cited a foreign legal precedent that was not simply an old English law that informed the Constitution. In a seeming attempt to emphasize the longevity of the English practice of not issuing the habeas writ to aliens outside sovereign territory, he referenced *In re Ning Yi-Ching*, 56 T. L. R. 3 (Vacation Ct. 1939).[74] Although this citation of the English court decision partially supported his established practice of referencing English law precedents, the case occurred in 1939, meaning it clearly could not have influenced the Framers as they composed the Constitution. As such, his invocation of *In re Ning Yi-Ching*, though atypical for Scalia, did not contradict his preference of old English law precedents and domestic laws only.

Ultimately, Scalia condemned the Court's decision for departing from the "rule of stare decisis in statutory cases" and for bringing "the cumbersome machinery of our domestic courts into military affairs" by extending federal jurisdiction to Guantanamo.[75] Instead of allowing the democratic process to work within a democratic, Congressional revision of the habeas statute, he lamented,

the Court was giving wartime detainees more habeas rights than it granted domestic detainees[76] in a troubling example of "judicial adventurism of the worst sort."[77] Scalia decried what he saw as the Court's decision to frustrate and encumber the efforts of the Executive in a time of war.

B. *Hamdi v. Rumsfeld* (2004)

Decided on June 28, 2004, the same day as *Rasul*, this case examined the Fifth Amendment due process rights of U.S. citizen Yaser Esam Hamdi, who grew up in Saudi Arabia and was "seized in Afghanistan as a suspected Taliban fighter,"[78] though he claimed to be a relief worker.[79] Hamdi originally was detained in Afghanistan and then Guantanamo, but he was transferred to a Norfolk, Virginia naval prison[80] and then to a navy brig in Charleston, South Carolina after the discovery of his American citizenship.[81] His father filed a habeas corpus petition on his behalf after multiple months of detainment without access to an attorney.[82] In court, the arguments concerned "the president's authority to detain suspected 'enemy combatants' and to hold them for trials before military commissions rather than before juries in federal courts."[83] These military commissions, which President Bush informally established to try Guantanamo detainees, deprived the detainees of the due process rights granted to criminal defendants in federal courts, including the rights to see evidence used against them and to challenge hearsay statements by witnesses.[84] Justice O'Connor's opinion for the Court, joined by Chief Justice Rehnquist and Justices Kennedy and Breyer, was that although Congress had authorized the detention of such enemy combatants as Hamdi in its AUMF, he had a Due Process right "to contest the factual basis for that detention before a neutral decisionmaker."[85] Justices Souter and Ginsburg disagreed that the AUMF had authorized Hamdi's detention, but they agreed with the conclusion of his Due Process right. Justice Thomas dissented,[86] and

Justice Stevens joined Scalia's dissent in an unlikely pairing of the most conservative and most liberal Justices on the Court.[87] As Peter Irons writes, "Despite their lack of agreement on the authority to detain Hamdi, eight justices[88] rejected the Bush administration's claim that alleged 'enemy combatants' had no access to judicial review of their detention."[89] In all, although the majority thought the President lawfully could detain a U.S. citizen as an enemy combatant,[90] the diversity of opinions served as a rebuke of President Bush's expansion of executive power during this unconventional war, as evinced by Justice O'Connor's now notorious claim: "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[91]

In his dissent, Scalia posited that the AUMF was not an application of the Constitution's Suspension Clause and did not even authorize the indefinite detention of a U.S. citizen[92] "without charge or hearing."[93] The Government could either charge Hamdi with a crime or suspend the writ of habeas corpus;[94] otherwise, he should be released from custody.[95] Delving first into the legislative history of English habeas corpus law and its development as desired by the Founders, Scalia established the origins of the writ, "the only common-law writ to be explicitly mentioned in the Constitution."[96] He then examined how the Framers of the Constitution approached acts of treason, citing England's Statute of Treasons from the year 1350 to argue, in true originalist fashion, how the "The Founders inherited the understanding that a citizen's levying war against the Government was to be punished criminally."[97] Scalia contended, however, that sometimes criminal proceedings for treason are impracticable or impossible to orchestrate, necessitating the English law precedent of suspending the writ of habeas corpus.[98] As such, since the Founding, the Government has been able to resort to this suspension of the writ, but within the constraints of the Suspension Clause in Article I, §9, cl. 2. Scalia wrote: "Although this provision does not state that suspension must be effected by, or authorized by, a legislative act,

it has been so understood, consistent with English practice and the Clause's placement in Article I."[99] Assessing England's 1679 Habeas Corpus Act, coupled with Founders' writings on the Suspension Clause, he concluded that the only two constitutional options for the Government in *Hamdi* were a criminal proceeding for treason and the suspension of the writ.[100]

In advocating for criminal process as the "primary means—and the only means absent congressional action suspending the writ—not only to punish traitors, but to incapacitate them," Scalia made the persuasive argument that "the proposition that the Executive lacks indefinite wartime detention authority over citizens is consistent with the Founders' general mistrust of military power permanently at the Executive's disposal."[101] AUMF did not suspend the writ of habeas corpus—and no Justices contended otherwise—because if doing so were that simple, the Suspension Clause would be "a sham."[102] As such, the plurality's ultimate solution represented what Scalia saw as a quick fix that ignored the underlying constitutional principles of Due Process.

Finally, briefly mentioning (that is, rebuking the invocation of) international law, Scalia wrote that the fact that "captivity may be consistent with the principles of international law does not prove that it also complies with the restrictions that the Constitution places on the American Government's treatment of its own citizens."[103] Overall, the Justice found that the plurality's decision weighing security over liberty did not meet the constitutional requirements of Due Process and did not reflect accurately the constraints of the Suspension Clause.

C. *Hamdan v. Rumsfeld* (2006)

In this landmark case in 2006, the Court delivered a decision that scholar Peter Spiro has deemed "unprecedented…as an example of judicial intervention in national security decision making."[104]

Yemeni national Salim Ahmed Hamdan,[105] a Guantanamo detainee who was charged with conspiracy[106] for serving as Osama bin Laden's driver, challenged[107] the constitutionality of the military commissions that President Bush had established to enable Guantanamo enemy combatants to challenge their detainment.[108] The Bush administration[109] argued that the AUMF "implicitly suspended the writ of habeas corpus"[110] and that the Geneva Conventions did not apply to Guantanamo detainees.[111] In Parts I through IV of the Court's 5-4 opinion against the Government, Justice Stevens concluded the following: the Detainee Treatment Act of 2005 (DTA) did not remove the Court's jurisdiction over Hamdan's habeas petition, the *Councilman* decision[112] did not necessitate Supreme Court abstention in *Hamdan*, Congress had not authorized the military commissions used to try Hamdan, and these military commissions violated the Uniform Code of Military Justice (UCMJ) and the 1949 Geneva Conventions.[113] Scalia dissented, with Justices Thomas and Alito joining in dissent.

Scalia began his critique from an angle of statutory interpretation. The DTA, he insisted, unambiguously stripped all courts, judges, and justices' jurisdiction over habeas writs filed on behalf of alien Guantanamo detainees, and since an "ancient and unbroken line of authority attests that statutes ousting jurisdiction unambiguously apply to cases pending at their effective date," the Court's decision to hear the case was completely inappropriate and incorrect.[114] Furthermore, Scalia pointed out, in keeping with his historical perspective, the Court could not "cite a single case in the history of Anglo-American law (before today) in which a jurisdiction-stripping provision was denied immediate effect in pending cases, absent an explicit statutory reservation."[115] Although the majority opinion did seek a precedent by referencing "the DTA's legislative history as evidence of Congress's intent for the Court to have jurisdiction over cases such as Hamdan's,"[116] Scalia argued that relying on the congressional debates over and drafting history of the DTA allowed

the Court to rely too heavily on the opinions that supported its conclusion while minimizing this conclusion's constitutionally interpretative significance. Demonstrating his originalist preference of the legislative text itself over the history behind it, he wrote,

> As always—but especially in the context of strident, partisan legislative conflict of the sort that characterized enactment of this legislation—the language of the statute that was actually passed by both Houses of Congress and signed by the President is our only authoritative and only reliable guidepost.[117]

Next, Scalia reiterated his *Rasul* opinion that Guantanamo lies beyond the U.S.'s territorial jurisdiction and claimed that Hamdan, as "an enemy alien detained abroad, has no rights under the Suspension Clause."[118] Subsequently, he disagreed with the Court's rejection of the Government's abstention argument, which hinged on the precedent of the *Councilman* case. In *Councilman*, the Court abstained from addressing a military serviceman's claim that he should not be tried in a military courts-martial for the sake of "interbranch comity at the federal level."[119] Scalia conceded that *Councilman* did not offer a perfect jurisprudential equivalent since Hamdan was not a military service member of the U.S., but he argued that it came the closest to *Hamdan* since the military commissions were under the oversight of the D.C. Circuit Court and Court of Military Appeals. As such, the *Councilman* precedent should have moved the Court to abstain from interfering with the military commission.[120] By rejecting the Government's abstention request, the Court was bringing "the Judicial Branch into direct conflict with the Executive in an area where the Executive's competence is maximal and ours is virtually nonexistent"[121] and rejecting what Spiro characterized as the judicial restraint that typically moved the Court to "defer to the government's national-security representations."[122]

Crucially, although Scalia's dissent rested on statutory

grounds (despite the majority's invocation of international law "as it had been incorporated into U.S. law by statute"[123]), his deference to the textual content of the statute itself epitomized his originalist tendencies. According to the Justice, the Court's constitutional consideration of the power of the Executive to establish military commissions was irrelevant to the case. Instead, the language of the ruling statute, the DTA, should have rendered the decision to hear the case unnecessary in the first place.

D. *Boumediene v. Bush* (2008)

After the *Hamdan* decision, Congress enacted the Military Commissions Act of 2006 (MCA), which eliminated "federal courts' jurisdiction to hear habeas applications from detainees who have been designated…enemy combatants" according to procedures established in the DTA,[124] thereby clarifying and confirming the jurisdictional provisions of the DTA called into question in *Hamdan*.[125] Challenges to the MCA poured in, reaching the Supreme Court through the case of Algeria-born Bosnian Lakhdar Boumediene, who, since 2002,[126] had been detained at Guantanamo after being seized in Bosnia under suspicion of planning an attack on a U.S. embassy there.[127] Could alien detainees invoke the Suspension Clause,[128] and did section 7 of the MCA violate this clause by prohibiting federal courts from considering habeas petitions by alien detainees?[129] The Court majority opinion, written by Justice Kennedy and joined by Justices Breyer, Ginsburg, Souter, and Stevens, answered yes to both questions and agreed with the detainees that the test allowing aliens to invoke the Suspension Clause "should depend…on whether the United States exercises de facto control over a territory, regardless of formal sovereignty."[130] The majority decision elicited a vehement dissent from Scalia, in which he claimed that the decision would "almost certainly cause more Americans to be killed."[131]

In a self-conscious departure from his typical dissent structure, Scalia began with a troubling and emphatic warning about the implications of the majority's decision. The Court, he contended, was complicating unnecessarily the military's already difficult assessments of detainees to determine which were deemed enemy combatants and which could be freed in Combatant Status Review Tribunals (CSRTs).[132] By permitting alien detainees to petition for the writ of habeas corpus, the Court raised

> the bar, requiring military officials to appear before civilian courts and defend their decisions under procedural and evidentiary rules that go beyond what Congress has specified… If they impose a higher standard of proof (from foreign battlefields) than the current procedures require, the number of the enemy returned to combat will obviously increase.[133]

And this higher standard of proof would exacerbate the difficulties military tribunals already faced in determining whom qualified as enemy combatants—as Scalia pointed out, at the time of his writing 30 released Guantanamo detainees already had returned to terrorist acts.[134]

But despite Scalia's apocalyptic premonitions, his basic argument closely mimicked that which he had made in *Rasul*: the Suspension Clause did not apply to the petitioners because the habeas writ "does not, and never has, run in favor of aliens abroad,"[135] and as such, MCA was not unconstitutional. Since the Court could not confirm or deny that the "common-law writ would have provided a remedy for these petitioners," its decision sought to circumvent the authority of the Executive and Legislative Branches through what the majority opinion called "fundamental separation-of-powers principles," which supposedly limited the power of the executive to overextend, purposefully, the writ of habeas corpus beyond the U.S.'s sovereign territory.[136] Scalia protested the Court's invocation

of these separation-of-powers principles, finding they disrespected the Legislative Branch's decision to limit civilian courts from determining enemy combatant status:

> The "fundamental separation-of-powers principles" that the Constitution embodies are to be derived not from some judicially imagined matrix, but from the sum total of the individual separation-of-powers provisions that the Constitution sets forth…And if the understood scope of the writ of habeas corpus was "designed to restrain" (as the Court says) the actions of the Executive, the understood limits upon that scope were (as the Court seems not to grasp) just as much "designed to restrain" the incursions of the Third Branch.[137]

The Court, therefore, was extending greatly—and grossly inappropriately, according to Scalia—the Judicial Branch's own power[138] and manipulating "the territorial reach of the writ of habeas corpus through the creation of the majority's functional test."[139]

Scalia's vitriolic dissent rested most steadfastly on his insistence that the *Eisentrager* decision rendered the logic behind *Boumediene* conspicuously incoherent, however. The case "held—held beyond any doubt—that the Constitution does not ensure habeas for aliens held by the United States in areas over which our Government is not sovereign," he wrote, and the Court's citation of the "practical concerns" within *Eisentrager* to create a "functional test" for determining whether federal courts could issue habeas writs to aliens detained beyond U.S. territory was an incorrect reading of the decision.[140] The majority similarly misinterpreted the *Insular Cases* as justification for this reading of the implicit functional test within *Eisentrager*, since these cases "concerned territories…indisputably part of the sovereign territory of the United States."[141] The majority drew a parallel between the circumstances ruling *Boumediene* and

those during WWII (specifically the U.S.'s desire not to occupy Germany for a long period of time) to create a functional test that would allow the Judiciary to monitor the other branches' actions regarding foreign occupation and detention. Scalia found this parallel equally heinous: "Can it possibly be that the Court trusts the political branches more when they are beholden to foreign powers than when they act alone?"[142]

Steadfast originalist that he was, Scalia concluded his dissent by citing the original understanding of the Suspension Clause. Under English common law and specifically the Habeas Corpus Act of 1679, which informed the Constitutional understanding, the writ of habeas corpus never extended to aliens held beyond the Crown's sovereign territory.[143] Furthermore, since the Constitution provides that Congress may suspend the common-law writ only "in Cases of Rebellion or Invasion,"[144] the first of which implies almost exclusively domestic crises, he found it foolhardy to contend, as the majority did, that "the extraterritorial scope of habeas turned on flexible, 'functional' considerations."[145] As such, even without the Eisentrager precedent, Scalia could point solely to the history of the Suspension Clause to disprove the arguments of the majority.[146]

III. Assessing Scalia's Jurisprudence in Light of the Guantanamo Bay Cases

In all, given the conspicuous international character of these cases, it is striking that: (1) the majority opinions made minimal reference to international law in the Guantanamo Cases, except in *Hamdan*,[147] and (2) Scalia's dissents made relatively little reference to international and foreign law even when the majority did invoke it. However, a few jurisprudential trends did emerge from close reading of his dissents.

Scalia embodied an originalist and nationalist appreciation for the explicit text of territorial statutes, eschewing the historical

background of these statutes when possible. Furthermore, the bulk of Scalia's references to international and foreign law were, in keeping with his own claims, to old English common law. And, though constitutional interpretation did not drive his dissents, the Justice paid particular attention to what the text says about the separation of powers, the habeas writ, and the Suspension Clause.

In Scalia's opinions in the Guantanamo cases, he did not reject transnationalist jurisprudence simply for the sake of halting the expansion of individual rights, as scholar Duncan Hollis has argued he did in domestic cases.[148] Indeed, in *Hamdi*, he upheld the rights of an American citizen. Furthermore, contrary to Hollis's argument that Scalia was an inconsistent originalist who hypocritically criticized other justices for invoking international and foreign law to support specific outcomes,[149] Scalia in fact mainly adhered to his originalist roots when deferring to foreign law, at least in the Guantanamo cases. Though it is certainly plausible that the Justice's opinions reflected his conservative ideology and desire to support the Bush administration, he did not rely on transnationalism to do so.

A. Scalia's Originalist Statutory Absolutism

Of the four cases examined, half of Scalia's dissents rested predominantly on statutory interpretations without a reliance on transnationalism. In *Rasul*, he claimed that *Eisentrager* confirmed that Statute 28 U.S. Code §2241, "Power to grant writ," did not extend the privilege of the habeas writ beyond U.S. sovereign territory. Scalia thought that because of this statutory certainty, the other arguments were unnecessary, clumsy examples of blatant judicial activism that would allow detainees to "petition wherever they wish—and, as a result, to forum shop."[150] Similarly, in *Hamdan*, which Spiro writes was ultimately "an exercise in statutory construction,"[151] Scalia both upheld the DTA's unambiguous restriction of the habeas writ to U.S. citizens within U.S. sovereign territory and also criticized the ma-

jority for looking to drafts of the statute in order to interpret it in their favor, claiming that the final language was the only text they have consulted to shape their opinion.[152] Thus, Scalia was able to maintain his nationalist jurisprudential predilection for clearly delineated territoriality through the originalist (i.e. strict) interpretation of federal statutes.

B. Foreign Law References

True to his career-long aversion to the transnationalist invocation of international law, Scalia stuck to citing old English law or nothing in the Guantanamo cases, with one exception: he briefly referenced a 1939 English court case in *Rasul*.[153] Despite this one reference to more modern foreign law, Scalia used old English law as a tool to expand upon his originalist construction of the Constitution and of the habeas writ. In *Rasul* and *Boumediene*, he explained why the English practice of "exempt jurisdictions" with regards to the Crown's sovereign territories did not apply to Cuba.[154] And in both *Hamdi* and *Boumediene*, he specifically cited England's Habeas Corpus Act of 1679 to support his interpretation of the common-law writ of habeas corpus in the Constitution.[155]

The Justice's silence on the majority's use of international and foreign law, especially in *Hamdi*, in which the plurality based its conclusion on "the international law of war,"[156] and *Hamdan*, in which the Court found Bush's military commissions inconsistent with the UCMJ and the Geneva Conventions,[157] is striking. Scalia did, in *Hamdi*, include a brief rebuke of the majority's decision to discuss the international legal principles of captivity.[158] Nevertheless, the striking absence of references to international and foreign law reflects two key facts of the Guantanamo cases: the Court instead emphasized domestic constitutional concerns, and Scalia exercised fundamentally nationalist legal reasoning.

The majority largely avoided mentioning international prec-

edents, choosing instead to focus on the role of the Executive and Legislative Branches and their potential constitutional overstepping. Furthermore, perhaps the Guantanamo decisions "differed from previous cases generating the jurisprudence of deference in U.S. foreign relations law" because, writes Spiro of *Hamdan*, "the Court could rule as it did, confident that the decision would advance, rather than interfere with, U.S. foreign relations by predictably assuaging international opposition to U.S. detention practices."[159] In other words, since the Court was being less deferential because it knew the majority opinions would not upset foreign courts, it felt less compelled to include international legal citations.

Moreover, Scalia likely did not invoke foreign and international law because of his nationalist jurisprudence. Since these cases did not afford the opportunity to support businesses, Scalia had little reason to manipulate international precedent to support ideological aims.[160] Maintaining his strict opposition to transnationalist invocations was straightforward, furthermore, since these cases did not involve the interpretation of treaties. Though the statutory interpretation guiding *Rasul* and *Hamdan* did involve notions of territoriality, the statutes in question were not treaties in which other countries were parties. As such, Scalia likely felt no need to look to other courts in interpreting the statutes.

C. Constitutional Originalism

The final marked trend in Scalia's Guantanamo case dissents was his strict originalist interpretation of the Constitution's Suspension Clause (Article I, §9, cl. 2) and its treatment of the writ of habeas corpus. In *Hamdi* and *Boumediene*, he clarified the original meaning of the Suspension Clause to explain why, respectively, the AUMF did not invoke it and why the MCA did not violate it. Further, as mentioned regarding his invocation of foreign law, in those same two cases he relied on the history of the writ of habeas corpus,

as determined by old English statutes, to inform his constitutional understanding of the writ. Scalia's dissents for *Hamdi* and *Boumediene* reflected his constitutional originalism more than those for *Rasul* and *Hamdan* because both of the former cases invoked questions about suspending the writ of habeas corpus, whereas the latter dealt more with territoriality and U.S. courts' jurisdiction.

IV. Conclusion

Although Scalia characteristically deferred to international and foreign law when interpreting treaties, he did not do so in these cases because the ruling statutes were not treaties. He did, however, demonstrate his originalist adherence to strict textual interpretation, emphasizing the content of the statutes themselves and downplaying their legislative histories. Additionally, supporting established research and the Justice's own claims, Scalia generally referenced only old English law for constitutional and statutory interpretation when he decided to cite foreign precedents at all. Finally, the Guantanamo cases allowed the Justice to apply his originalist jurisprudence to constitutional interpretation proudly and consistently; his construal of the Suspension Clause and the Constitution's treatment of the writ of habeas corpus was steeped in historical reasoning.

The jurisprudential patterns that the Guantanamo cases revealed offer important insights into their historical context. The Court decided the cases beginning in 2004—a few years after the events of 9/11—and this temporal distance likely emboldened the majority to restrict the Executive more than they would have if the cases occurred more recently after the terrorist attacks. Scalia's dissents, therefore, reflect his stronger preference for deferring to the Executive (and, most often, to the democratic process embodied by the Legislative Branch) with regards to national security. Furthermore, the progression of the Court's decisions from *Rasul* to *Boumediene* suggests that the Court grew ever more unwilling to

halt its expansion of rights to aliens detained at Guantanamo. As a result, Scalia's frustration grew with each case as he fought against a growing list of Court precedents that would alter significantly the nation's understanding of Cuban sovereignty over Guantanamo and the habeas writ.

Scalia's jurisprudence was largely inconsistent in the domestic sphere. His opinions were highly nationalistic in cases about individual rights such as homosexual relations and the death penalty, yet he willingly deferred to international law, subscribing to transnationalist rationale when it enabled him to protect businesses. As such, the Justice's treatment of international and foreign laws in domestic cases likely reflected his own ideological motives. Nevertheless, his jurisprudence was much more consistent in the Guantanamo cases, remaining highly originalist and nationalist. Again, it is reasonable to argue that this consistency was a result of his ideology; perhaps adhering to these principles was the best way to support the conservative Bush administration. Or perhaps Scalia's staunch originalism and nationalism in the Guantanamo cases reflected an authentic commitment to his guiding jurisprudential principles. Ultimately, more scholarship is needed to determine whether his jurisprudence in international cases was the result of consistent judicial values or mere partisanship.

[1]Harold Hongju Koh, "International Law as Part of Our Law," The American Journal of International Law 98 (Jan., 2004): 10, https://www.bc.edu/content/dam/files/centers/boisi/pdf/S11/NakazatoReadmore2.pdf.

[2]Francisco Valdes, "What's the Fuss? Constitutionalism, Internationalism, and Original Method," Florida International University Law Review 3 (Fall 2007): 11, http://ecollections.law.fiu.edu/lawreview/vol3/iss1/5/.

[3]Valdes, "What's the Fuss?" 19.

[4]Koh, "International Law," 9.

[5]Norman Dorsen, "The relevance of foreign legal materials in U.S. constitutional cases: A conversation between Justice Antonin Scalia and Justice Stephen Breyer," International Journal of Constitutional Law 3 (2005): 521, http://icon.oxfordjournals.org/content/3/4/519.full.pdf+html; Melissa A. Waters, "Justice Scalia on the Use of Foreign Law in Constitutional Interpretation: Unidirectional Monologue or Co-Constitutive Dialogue," Tulsa Journal of Comparative and International Law 12 (2004): 152.; Julian Ku, "RIP Justice Antonin Scalia: The Misunderstood Internationalist," Opinio Juris, February 14, 2016.

[6]Duncan Hollis, "When Does Justice Scalia Love International and Foreign Laws?" Opinio Juris, November 7th, 2007.; Waters, "Unidirectional Monologue," 152.

[7]Dorsen, "Relevance of foreign legal materials," 519-520.

[8]"When Does Justice Scalia Love International and Foreign Laws?"

[9]Jimmy Hoover, "Scalia Sears Supreme Court For Foreign Law References," Law 360.

[10]Ku, "RIP Justice Antonin Scalia."

[11]Dorsen, "Relevance of foreign legal materials," 526.

[12]Ibid, 529.

[13]Ibid, 521.

[14]Ibid, 531.

[15]Ibid, 521.

[16]Waters, "Unidirectional Monologue," 155.

[17]Dorsen, "Relevance of foreign legal materials," 536.

[18]Chicago-Kent College of Law at Illinois Tech, "Lawrence v. Texas," Oyez, https://www.oyez.org/cases/2002/02-102.

Koh, "International Law," 7.

[19]Valdes, "What's the Fuss?" 20.

[20]Jeffrey Toobin, The Nine: Inside the Secret World of the Supreme Court (New York: First Anchor Books, 2008), 224.

[21]Toobin, The Nine, 229.

[22]Ibid.

[23]Ibid, 230.

[24]"When Does Justice Scalia Love International and Foreign Laws?"

[25]Ku, "RIP Justice Antonin Scalia."

[26]David M. O'Brien, "More Smoke Than Fire: The Rehnquist Court's Use of Comparative Judicial Opinions and Law in the Construction of Constitutional Rights," The Journal of Law & Politics 22 (Spring 2006): 110.

[27]Dorsen, "Relevance of foreign legal materials," 525.

[28]"When Does Justice Scalia Love International and Foreign Laws?"

[29]Ku, "RIP Justice Antonin Scalia."

[30]Ibid.

[31]Waters, "Unidirectional Monologue," 151.

[32]Ibid, 155.

[33]Chicago-Kent College of Law at Illinois Tech, "Olympic Airways v. Husain," Oyez.

[34]Waters, "Unidirectional Monologue," 153-154.

[35]Eugene Volokh, "Foreign Law in American Courts," Oklahoma Law Review 66 (Winter 2014): 227, http://www2.law.ucla.edu/volokh/foreignlaw.pdf.

[36]Amar Naik, "A Quick Take on Justice Scalia's Legacy on Antitrust Law," Antitrust Law Blog, February 24, 2016.

[37]"When Does Justice Scalia Love International and Foreign Laws?"

[38]Gerald L. Neuman, "International Law As a Resource in Constitutional Interpretation," Harvard Journal of Law & Public Policy 30: 181-182, http://www.law.harvard.edu/students/orgs/jlpp/Vol30_No1_Neumanonline.pdf.

[39]For the sake of consistency with Court opinions, I have removed the accent that typically appears in the Spanish spelling of Guantánamo.

[40]Peter Irons, A People's History of the Supreme Court: The Men and Women Whose Cases and Decisions Have Shaped Our Constitution (Penguin Books, 2006), 519.

[41]"S.J.Res. 23 — 107th Congress: Authorization for Use of Military Force," www.GovTrack.us, December 1, 2016, https://www.govtrack.us/congress/bills/107/sjres23.

[42]Stephen Breyer, The Court and the World: American Law and the New Global Realities (New York: Alfred A. Knopf, 2015), 67.

[43]Toobin, The Nine, 267.

[44]Ibid.

[45]Breyer, The Court and the World, 67.

[46]Toobin, The Nine, 268.

[47]Breyer, The Court and the World, 67.

[48]Ibid, 66-67.

[49]Joseph Margulies of the Center for Constitutional Rights (CCR) represented the petitioners (Toobin 267-268).

[50]Rasul v. Bush, 542 U.S. 466 (2004).

[51]Solicitor General Ted Olson represented Bush (Toobin 269).

[52]Breyer, The Court and the World, 68.

[53]Rasul.

[54]In this case, the Court said a District Court could not grant a writ of habeas corpus to German citizens captured in China by U.S. troops and imprisoned in Germany.

[55]Ibid.

[56]Ibid.

[57]Ibid.

[58]Sameh Mobarek, "Rasul v. Bush: A Courageous Decision but a Missed Opportunity," Loyola University Chicago International Law Review 3 (Fall/Winter 2005): 68, http://lawecommons.luc.edu/cgi/viewcontent.cgi?article=1103&context=lucilr.

[59]Statute 28 U.S. Code §2241

[60]Rasul (Scalia, J., dissenting).

[61]Ibid.

[62]Mobarek, "A Courageous Decision," 69.
[63]Rasul.
[64]"Rasul v. Bush, 124 S. CT. 2686 (2004)," Washington and Lee Journal of Civil Rights and Social Justice 11 (2005): 246, http://scholarlycommons.law.wlu.edu/crsj/vol11/iss1/12/.
[65]Mobarek, "A Courageous Decision," 69.
[66]Rasul (Scalia, J., dissenting).
[67]Ibid.
[68]Washington and Lee Journal, 246-247.
[69]Rasul (Scalia, J., dissenting).
[70]Ibid.
[71]Ibid.
[72]Ibid.
[73]Ibid.
[74]Ibid.
[75]Ibid.
[76]Ibid.
[77]Irons, 520.
[78]Breyer, The Court and the World, 69.
[79]Hamdi v. Rumsfeld, 542 U.S. 507 (2004).
[80]Irons, 520.
[81]Ibid.
[82]Ibid, 522.
[83]Ibid.
[84]Hamdi (majority opinion).
[85]Hamdi.
[86]Irons, 522.
[87]All but Justice Thomas
[88]Ibid, 523.
[89]Breyer, The Court and the World, 71.
[90]Hamdi (majority opinion).
[91]Ibid (Scalia, J., dissenting).
[92]Ibid.

[93]James B. Anderson, "Hamdi v. Rumsfeld: Judicious Balancing at the Intersection of the Executive's Power to Detain and the Citizen-Detainee's Right to Due Process," Journal of Criminal Law and Criminology 95 (Spring 2005): 701, http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7193&context=jclc.

[94]Irons, 523.

[95]Hamdi (Scalia, J., dissenting).

[96]Ibid.

[97]Ibid.

[98]Ibid.

[99]Ibid.

[100]Ibid.

[101]Ibid.

[102]Ibid.

[103]Peter J. Spiro, "Hamdan v. Rumsfeld. 126 S.Ct. 2749," The American Journal of International Law 100 (Oct., 2006): 892, https://www.jstor.org/stable/4126323?seq=1#page_scan_tab_contents.

[104]Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

[105]Breyer, The Court and the World, 73.

[106]Georgetown professor Neal Katyal and military lawyers Will Gunn and Charles Swift represented Hamdan (Toobin 372).

[107]Toobin, The Nine, 372.

[108]Solicitor General Paul Clement represented the Government.

[109]Ibid.

[110]Ibid, 373.

[111]In Stevens's opinion, he wrote that the Court concluded, in Schlesinger v. Councilman, that "as a matter of comity, federal courts should normally abstain from intervening in pending courts-martial against service member" (Hamdan v. Rumsfeld).

[112]Hamdan.

[113]Ibid (Scalia, J., dissenting).

[114]Ibid.

[115]Sean Mulryne, "A Tripartite Battle Royal: Hamdan v. Rumsfeld and the Assertion of Separation-of-Powers Principles," Seton Hall Law Review 38 (2008): 292, http://heinonline.org/HOL/Page?handle=hein.journals/shlr38&div=2&g_sent=1&collection=journals.

[116]Hamdan (Scalia, J., dissenting).

[117]Ibid.

[118]Ibid.

[119]Ibid.

[120]Ibid.

[121]Spiro, "Hamdan," 893.

[122]Ibid.

[123]Chicago-Kent College of Law at Illinois Tech, "Boumediene v. Bush," Oyez, https://www.oyez.org/cases/2007/06-1195.

[124]Robert M. Chesney, "Boumediene V. Bush," The American Journal of International Law 102 (Oct., 2008): 849.

[125]Toobin, The Nine, 403.

[126]"Boumediene v. Bush," Oyez.

[127]Chesney, "Boumediene," 849.

[128]"Boumediene v. Bush," Oyez.

[129]Chesney, "Boumediene," 849.

[130]Boumediene v. Bush, 553 U.S. 723 (2008) (Scalia, J., dissenting).

[131]David L. Sloss, "Rasul v. Bush. 124 S.Ct. 2686," The American Journal of International Law 98 (Oct., 2004): 792.

[132]Boumediene (Scalia, J., dissenting).

[133]Ibid.

[134]Ibid.

[135]Ibid (majority opinion).

[136]Ibid (Scalia, J., dissenting).

[137]"Boumediene v. Bush: The Supreme Court's War on Precedent Damages the War on Terror," Creighton Law Review 42 (April 2009): 465.

[138]Ibid.
[139]Boumediene (majority opinion).
[140]Ibid (Scalia, J., dissenting).
[141]Ibid.
[142]Ibid.
[143]U.S. Const. art. I, § 9, cl. 2.
[144]Boumediene (Scalia, J., dissenting).
[145]Ibid.
[146]In which the Court invoked the UCMJ and the Geneva Conventions
[147]See page 4.
[148]Hollis.
[149]Rasul (Scalia, J., dissenting).
[150]Spiro, "Hamdan," 893.
[151]See page 15.
[152]See page 10.
[153]See page 10.
[154]See pages 13 and 19.
[155]Jenny S. Martinez, "Hamdi V. Rumsfeld. 124 S.Ct. 2633," The American Journal of International Law 98 (Oct., 2004): 786.
[156]See page 14.
[157]See page 13.
[158]Spiro, "Hamdan," 894.
[159, 160]Hollis argues that Scalia is inconsistent in his transnationalism, citing foreign and international law when it allows the Court to support businesses and rebuking its invocation when it allows the Court to expand domestic rights. See pages 4-6 for more discussion.

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Pathways for Equitable Education Funding: Assessing the Legacy of San Antonio Independent School District v. Rodriguez in Equal Protection Educational Funding Litigation

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Abstract

This article explores the legacy of *San Antonio Independent School District v. Rodriguez* and its impact on education funding reform. Firstly, it traces how the decision in *Rodriguez* narrowed the scope of the *Brown v. Board of Education* decision by severely restricting the possibilities for a court-recognized right to education or court recognition of unconstitutional wealth discrimination. Secondly, this article aims to trace the available arguments and constitutional precedents for a federal case that could require more school funding equity. Various Supreme Court cases post-*Rodriguez* as well as a series of state-level cases point to two remaining pathways toward a federal requirement of more education funding equity. These are the adequacy argument, which asserts that the Constitution requires access to some minimal amount of education for citizens to be able to perform their civic rights and duties, and the equity argument, which supports the idea that the Constitution requires an equitable model of education funding in which schools have equal access to equal funds. This article argues that compared to the equity argument, the funding adequacy argument is more politically and constitutionally viable, and more likely to sufficiently address equity issues that have been closed off by *Rodriguez* and subsequent cases.

I. Introduction

In 2006, New York's Campaign for Fiscal Equity won a landmark case in the state's Court of Appeals.[1] The court ruled that New York must provide all students with at least a "sound basic education," and provide a system to evaluate education funding based on financial need of local areas in order to reach the state's required minimum education level.[2] Since the *Campaign for Fiscal Equity v. State of New York*[3] case, the success of this decision and the continued difficulty effectuating the court's mandate has been central to political discourse surrounding Governor Cuomo's administration. The terms of this education funding debate, and others like it that have taken place across the county, have been dictated by the *San Antonio Independent School District v. Rodriguez*[4] decision and its powerful legacy.

The Supreme Court's decision in *San Antonio Independent School District v. Rodriguez*[5] has had broad implications on education policy, wealth discrimination claims, and Equal Protection litigation in general. The decision came toward the beginning of a new Supreme Court alignment in the wake of the previous Warren Court's broad understanding of constitutional rights and protected classes under the Equal Protection clause. Under Chief Justice Earl Warren, the series of cases following *Brown v. Board of Education of Topeka*[6] articulated a radical understanding of education's importance to society and the broad implications for equality of education beyond solely righting past de jure segregation. *Rodriguez* severely limited this scope of Brown's promise, spoiling any hopes for judicial recognition of either a constitutional right to education or protections against wealth discrimination. It also signaled the Court's pivot away from the possibility of understanding affirmative rights where past wrongs have not been written in law.[7] *Rodriguez* made it clear that the court intended to interpret the broad statements of the Warren Court on racial and financial inequality as a process of

narrowly undoing clear instances of state sponsored discrimination, rather than recognizing any affirmative right to equality. Desegregation cases themselves would soon be explicitly narrowed to require proof of a discriminatory intent (as opposed to solely discriminatory results) for a law that, like the one in *Rodriguez*, does not explicitly classify by race. This would restrict integration efforts to areas with defined culpability for previous discrimination. Given its lasting effect on education policy and the Supreme Court's understanding of discrimination, Hillary Clinton called *Rodriguez* the "worst case decided during Justice Rehnquist's tenure on the Court" until 2000 (presumably *Bush v. Gore*[8]).

Central to the *Rodriguez* decision itself was the two-tiered system of judicial scrutiny of Equal Protection cases. This system, developed over the course of previous Supreme Court cases, requires that a law in question either classifies people by a court-acknowledged "suspect class" or infringes on a constitutional right in order for The Supreme Court to apply strict scrutiny in their assessment of the law's constitutionality. When exercising strict scrutiny, Justices evaluate whether a law is "tailored… with precision" to serve "compelling state interest."[9] If neither a suspect class nor a constitutional right is involved, the court solely employs the extremely flexible rational basis review, evaluating whether a law "rationally furthers some legitimate, articulated state purpose."[10] This two-tiered system was accepted as a useful structure for deliberating Equal Protection cases, but at the time there was still ambiguity as to what extent there could be any spectrum of constitutional interpretations between applications of strict scrutiny and applications of rational basis review.

Justice Powell, writing for the court in *Rodriguez*,[11] ruled that Texas' educational funding system, which was partially based on local property taxes, was constitutional. The court found that there was no suspect class involved in the wealth discrimination issues that arose from funding schools through local property taxes

and declined to find that education is a constitutional right. Consequently, *Rodriguez* severely limited the possibilities for school funding reform at the federal level.[12]

In the aftermath of *Rodriguez*, education finance reformers, like those working for the Campaign for Fiscal Equity in New York, were forced to seek justice elsewhere, notably in state courts. Using state constitutional language, which often provided a more concrete right to education, advocates for equitable education finance reform found two possible avenues to successfully challenge state education funding. One of these, educational adequacy, acknowledges a right to at least a minimal amount of education and hopes to enforce a state-wide effort to meet that minimum for every school. The other, educational equity, essentially makes the same argument that the parents in property-poor Edgewood, Texas made, which is that the Equal Protection clause, or its equivalent at the state level, ensures some kind of equal opportunity to education.

While *Rodriguez* severely restricted possibilities of Equal Protection challenges involving wealth as a "suspect class" or education as a constitutional right, it did leave the possibility of some minimal right to education unresolved. *Rodriguez* and the Court's history afterwards hint at other avenues that could trigger a closer judicial scrutiny, and therefore a likely court victory for education finance reform. Looking at *Rodriguez*, its aftermath, and critiques of the case, the constitutional channels left available to equitable education funding reform suggest that educational adequacy is the more effective path to a successful federal claim. The adequacy argument has an advantage over the equity argument because of its greater political viability of sustained success and its use of the Equal Protection clause to remedy educational equity issues that have been closed off to the equity argument.

II. Pre-*Rodriguez*: Related Equal Protection Claims

Rodriguez occurred at a critical point in Supreme Court history and Equal Protection jurisprudence. Argued during the first year of Nixon Court appointees William Rehnquist and Lewis Powell, it marked a considerable shift from the expansive interpretation of Equal Protection and constitutional rights that came before. In order to understand the limits imposed by *Rodriguez* on the possibility of a successful federal education funding equity case, one must first understand the previously available pathways toward a successful case: wealth classification, education as a constitutional right, and an intermediate level of judicial scrutiny.

The language of various decisions during the Warren Court, in the years prior to *Rodriguez*, strongly suggest that the category of a suspect class could have broadened to include wealth discrimination. In *Griffin v. Illinois*,[13] decided in 1956, the Court considered whether the imposition of a fee to obtain a transcript of criminal court proceedings infringed on Equal Protection and Due Process rights by precluding indigent citizens from a meaningful appeal. In its decision, the Supreme Court made it clear that evidence of wealth discrimination, rather than any right to appeal a conviction, guided its decision to declare Illinois' policy unconstitutional.[14] Asserting that "in criminal trials a State can no more discriminate on account of poverty than on account of religion, race, and color," the decision in *Griffin*[15] asserted that while "a state is not required by the Federal Constitution to provide...a right to appellate review at all…that is not to say that a State that does grant appellate review can do so in a way that discriminates...on account of poverty."[16] While the decision cited both Due Process and Equal Protection rights, it is clear that, according to the Court, Illinois' classification based on wealth required a more close judicial review than a hypothetical case that would solely have to do with availability of appellate review or that did not classify based on poverty level.

The language of *Harper v. Virginia Board of Elections*[17] and *McDonald v. Board of Election Commissioners of Chicago*[18] continued to compare wealth discrimination to more accepted suspect classifications such as race or religion. These comparisons suggested that wealth discrimination might have soon joined that category of suspect class to which race and religion belonged. In the *Harper*[19] decision, where The Court investigated the legality of a Virginia poll tax, The Court claimed that "lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored" and that "The degree of the discrimination is irrelevant." The *McDonald*[20] decision explained that because wealth classification was not a factor in a voting rights claim, close scrutiny need not be applied. In making this argument, the Court explained that wealth classifications, like those based on race, "would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny."[21] Thus, in order to avoid applying strict scrutiny and almost obligatorily finding Texas' policy unconstitutional, the Court would have to differentiate the wealth classification system in *Rodriguez* from those within these precedents and, in the process, severely limit the scope of the "lines drawn on the basis of wealth" that could be considered suspect.

In addition to the Court's previous statements on wealth classification, the *Rodriguez* decision would also have to acknowledge and redefine *Brown v. Board of Education*'s powerful statement on the importance of education. Education reformers hoping for a Court acknowledged constitutional right to education could understand the *Brown v. Board* Court's claim that public education is "the most important function of state and local governments" as suggesting that education was a right.[22] Earl Warren, writing for the Court, defined the importance of public education in terms of both personal success (necessary for a child to "reasonably be expected to succeed in life") and civic duty (education is "required in the performance of our most basic public responsibilities").[23] Regarding

education as a state function that is both important to a successful society and necessary for the performance of the essential functions of citizens, the Court would only need to take a small step to explicitly state that education's necessary function in training citizens to exercise other rights established it as a constitutionally protected right. Warren states that public education "where the state has undertaken to provide it, is a right which must be made available to all on equal terms."[24] While this can be (and has been) seen as a retreat from a commitment to a right to education, it also is a warning to future cases that education disparities should raise Equal Protection concerns, whether or not the disparities are based on race.

Though the Court had previously recognized the two-tier system as a foundation for defining judicial scrutiny, there was considerable ambiguity as to whether there was any middle ground between strict scrutiny and rational basis. The *Rodriguez*[25] decision cites numerous examples of strict scrutiny requiring a sufficiently "tailored policy" to narrowly serve a "compelling state interest." However, at the time that the *Rodriguez* case was decided, there was still some debate surrounding intermediate scrutiny and the issue of whether or not scrutiny, in actuality, operates on more of a spectrum than legal scholars had previously considered. Justice Marshall, in his dissent in *Dandridge v. Williams*[26] advocated that the level of judicial scrutiny be calibrated by "the character of the classification, the relative importance to the class discriminated against of the governmental benefits that they do not receive, and the asserted state interest in support of the classification." Justice Powell showed some implicit support for this "sliding scale" method in the opinion for *Aetna v. Weber Casualty and Surety* when he defined a level of scrutiny somewhat above the usual rational basis test for a case that did not require strict scrutiny.[27] In fact, application of scrutiny was ambiguous enough at the time of *Rodriguez* that Justice Powell considered an intermediate level of scrutiny when writing the Court's *Rodriguez* decision, before ultimately employing a rigid adherence

to the two-tier system of judicial scrutiny.[28]

III. The Decision: Limiting Education Funding Equity Possibilities

Rodriguez dramatically limited the possibility of establishing constitutional support for education funding equity by leaving little room for the differences in fundraising abilities through property tax to create a "suspect class," and imposing a rigid interpretation of the two-tiered approach to strict scrutiny. While the Court rejected the opportunity to declare education a constitutional right, it did leave an open question as to whether or not some adequate level of education might be considered a right.

The parents in property-poor Edgewood claimed that Texas' public education funding system was unconstitutional because it discriminated on the basis of wealth and infringed on a constitutional right to education. They also claimed that there was no rational basis in the way that Texas' funding system contributed to its stated government interest (local control of school policy and funding) because it locked property-poor districts from exerting any meaningful control over local school funding.[29] The Court found that wealth discrimination in the form of property tax did not constitute a suspect class, that education was not a recognized constitutional right, and that, according to the applicable "rational basis" test, Texas' funding scheme was rationally related to local control of public education.[30]

In this way, The Supreme Court in *Rodriguez* restricted the possible scope of any wealth-based suspect classification in order to make an education funding claim exceedingly difficult. First, the decision sought to demonstrate that "the 'poor' cannot be identified or defined in customary equal protection terms."[31] The decision first organized plaintiffs in wealth-based discrimination claims into three categories: those below some threshold of poverty line; those

in property-poor neighborhoods; and those with relatively less than others.[32] The Court dismissed the latter two categories as classes without precedent and without defining characteristics of normal suspect classes "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[33] Instead these classifications were "large, diverse, and amorphous," and only united by happenstance of local taxable wealth.[34] The Court found that the third possible classification, those whose personal wealth fell below a certain line, did not correlate well enough to those residing in property-poor school districts to justify a suspect classification.

While the preceding logic in and of itself may have doomed the opportunities for education equity claims that would have established suspect classification based on wealth, the Court went one step further in limiting wealth-based discrimination claims. The *Rodriguez*[35] decision argued that since all available precedents of wealth discrimination cases amounted to an absolute denial of a government benefit (whereas, in *Rodriguez*, the children in poorer areas of Texas still attended public school), there was no evidence to indicate that "where wealth is involved, the Equal Protection Clause... require[s] absolute equality or precisely equal advantages." Given the fact that nearly all possible education funding equity cases are based on the assertion that there is a profound systemic inequity in the public education system, not that there is an absolute denial, the requirement of "absolute denial of a government benefit" essentially closed off the constitutional claim that public education funded by local property tax is equivalent to wealth-based discrimination.

The *Rodriguez* Court narrowly interpreted the meaning of *Brown v. Board of Education*, declining to acknowledge any constitutional implications in the language of Justice Warren's em-

phasis on the importance of education. Instead, the Court denied a constitutional right to education while leaving open the possibility of a right to some minimal amount of education. The *Rodriguez*[36] decision emphasized that *Brown v. Board*'s strong language about education was "in the context of racial discrimination," implying that the *Brown* Court's ruling served to help the cause of desegregation rather than to have any constitutional significance in themselves. The *Rodriguez*[37] decision warned that the Supreme Court would become a "super-legislature" if it were to acknowledge a constitutional right to education which cannot be found looking for rights "explicitly or implicitly guaranteed by the Constitution." Basing constitutional rights on social importance, the Supreme Court argued, could be a slippery slope that led to recognizing rights to "decent food or shelter."[38] In contending that public education is not related enough to constitutional rights, the Court qualified that "even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise" of any constitutional rights, the *Rodriguez* case did not show evidence that the poor schools were under that minimum education level. However, in safeguarding against the potential argument that education is a necessary background for exercising constitutional rights, the Court created an opening for subsequent education funding cases: the possibility that there is a right to some adequate amount of education for a citizen to be able to exercise their constitutional rights.

At the same time, the *Rodriguez* decision struck a decisive blow to the viable arguments for a constitutional requirement of equity in public education funding. The Court denied the existence of any suspect class based on wealth in the use of local property tax to fund local schools. The Court also denied any constitutional right to education with the small caveat that there may be a right to a minimal amount of education. Justice Powell's strict adherence to the two-tier approach of judicial scrutiny helped to establish it as

common practice, limiting the possibility of wealth classification or education rights triggering some sort of intermediate scrutiny.[39]

The Supreme Court used the framework established in *Rodriguez* to decide other cases that would increase challenges for education funding reform. In *Milliken v. Bradley*,[40] the Court ruled, among other things, on whether or not inter-district busing could be permitted as a remedy to past segregation in Detroit. The decision indicated that while the federal courts had a responsibility to "remedy effects of past segregation," "the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation."[41] The Court recognized a responsibility to undo the effects of past legal discrimination, but claimed that it was not responsible for removing barriers that were not previously created by the state. In addition, the Court claimed that the remedy must be tailored to the area responsible for the discrimination and therefore that inter-district busing was not required. The logic of local control of schools articulated in Rodriguez served as a justification against inter-district busing.[42] As using the Equal Protection clause to equalize de facto inequalities became more difficult, especially with little chance of finding a suspect class, the debate between adequacy and equity arguments would involve which method best addressed removing burdens not explicitly created by the state.

IV. Criticism and Challenges in Later Cases

The framework of Justice Marshall's dissent, coupled with the hindsight of over forty years, reveals that some of the few opportunities left open in *Rodriguez* have grown over time into viable arguments for a possible future case. Justice Marshall's dissent argued that the two-tier system was neither effective in evaluating Equal Protection claims nor an accurate representation of how Justices scrutinized cases in practice. Though the two-tier system

has remained the framework for Equal Protection jurisprudence, there has been extensive use of intermediate degrees of scrutiny especially regarding rights that are not recognized as being protected by the Constitution. Though he argued that education should be considered a fundamental right because of its close "nexus" with constitutional rights, he also methodically examined past cases that gave fundamental status to a non-constitutional right (for example, the right to procreation in *Skinner v. Oklahoma*[43]) or intermediate scrutiny to non-fundamental rights (for instance, the right to equal appellate review in *Griffin v. Illinois*[44]).

Since Marshall's criticism, one case, *Plyler v. Doe* has provided a key precedent to strengthen the case for a constitutional requirement of some sort of equitable education reform. In *Plyler*,[45] the Court determined that the denial of public education to undocumented children was unconstitutional. In doing so, it reaffirmed *Rodriguez* in stating that public education is not a recognized constitutional right but claimed that "neither is it merely some governmental benefit indistinguishable from other forms of social welfare legislation."[46] By explicitly stating that education occupies a space in Equal Protection law separate from other social welfare programs, the Court has disposed of its own "slippery slope" argument in *Rodriguez*.[47] After *Plyler*, education can be accepted as a fundamental right without the danger of other welfare programs becoming fundamental rights as well. The importance of education to civic life, as well as the impact of its absolute denial prompted the Court to require an intermediate scrutiny where the policy must further a "substantial," rather than merely legitimate, government objective.[48] The fact that the absolute loss of education triggered a higher standard of scrutiny than that employed in *Rodriguez*, suggests that there is indeed a minimal amount of public education required by the constitution.

The lasting impact of *Rodriguez* still limits available pathways to a successful case. However, there are some pathways that

are substantial enough to see how a possible success could occur. While the two-tier system of judicial scrutiny is still in place as a standard, we have seen exceptions and contradictions where the Court uses at least intermediate scrutiny if not a wider spectrum. With *Plyler* as a key example, some increased scrutiny for cases regarding the right to education or even a constitutional right guaranteeing some minimal amount of education seems plausible. While finding a suspect classification in public education's reliance on property tax seems unlikely, there is a plausible argument for intermediate scrutiny for this and other wealth classifications as has been established in gender-related cases.

V. Comparing Adequacy and Equity Claims

The argument for educational adequacy makes the best use of available constitutional channels. It provides a framework to address the issues of classification without requiring the unlikely acknowledgement of a new wealth-based suspect class. It only requires a right to a minimal amount of education rather than a right to full educational equity. Most importantly, while there is a case for the equity argument in Justice Marshall's dissent as well as in more recent developments in Equal Protection jurisprudence, it would still most likely require the court to overturn much of the *Rodriguez* ruling. The right to an adequate education is a channel left open by the *Rodriguez* decision itself and further supported in subsequent decisions like *Plyler*. Not only is the adequacy argument both politically and constitutionally more palatable at this moment in time, but it also can be a stronger tool than the equity argument in achieving real educational equity. Since *Rodriguez*, the latter argument must rely on finding new suspect classes and operating within the confines of rectifying previous de jure discrimination. The adequacy argument enables the court to require an extra governmental effort to remove resource disparities not created by the state and to target

unrecognized classes in the effort to ensure that every student can achieve at least the minimum level of education required.

VI. Adequacy and Equity in State Cases

Because the adequacy-equity question arose in various state education funding cases, these cases shed light on the promise and pitfalls of each approach. However, it is important to recognize that at least forty-eight of the fifty state constitutions specifically protect a right to education.[49] Another advantage for education funding reformers on the state-level was the acceptance of "judicial federalism" in the Supreme Court and in state courts. An idea accepted by both liberal and conservative members of the Court, "judicial federalism" encouraged states to employ a broader understanding of constitutional rights than was permitted at the federal level.[50] State courts, according to this practice, were not necessarily bound to the two-tier system of scrutinizing Equal Protection cases, nor to the Supreme Court's understanding of what makes a constitutional right.[51] While these cases contain many relevant arguments and practical lessons that can be used to form a case at the federal level, there is a clear advantage for education reformers built in to state constitutions.

Though there may be a different playing field in state constitutional litigation, state court cases do give us a practical understanding of the results of equity and adequacy-based claims. In the years after *Rodriguez*, forty-two states' supreme courts have ruled on the constitutionality of education funding schemes.[52] In twenty-three states, challenges to state education funding have been successful at least once.[53] While most states have had some combination of adequacy and equity-based court decisions, both Texas and California cases reveal the state-level possibilities and pitfalls for equity based reform. While successful in reducing the education funding gap, the policies of the California and Texas

governments reveal that equity-based reform has difficulty addressing "affirmative funding" (more funding for those who may need it more, as opposed to flat, or equal, funding for all) and can inspire dangerous political backlash. Over ten years after *Rodriguez*, the same poor Texas district that brought the *Rodriguez* case, Edgewood Independent School District, brought a suit to the Texas state courts that was later decided in the state supreme court in 1989 as *Edgewood v. Kirby*. Interpreting a clause of the state constitution that provides for an "efficient system of public free schools," as a statement on financial equity, the Texas supreme court required "substantially equal opportunity to equal funds."[54] The court, by recommending "equal opportunity" to equal funds rather than equal funds themselves, suggested that the legislature adopt a system of "power-equalizing" or "fiscal neutrality," in which school districts who tax themselves at equal rates receive equal education financing. This system is more politically salient than a state-wide fiscal equality, in which every school receives equal funding, avoiding to some extent the argument that equality of funding will dismantle local control. After many years of legislative remedies and court orders, the Texas system is still based on a fiscal neutrality funding scheme. Although it has nearly eliminated the funding gap, there are still dramatic disparities in student success between rich and poor districts.[55] While equality of opportunity for funding in Texas and elsewhere has been shown to improve student results in property-poor areas, the equity-based decisions in Texas are restricted from imposing extra funding to help students most in need of resources.

The school funding cases of both Texas and California illustrate another problem with the equity argument. In *Edgewood* and in California's many iterations of its *Serrano v. Priest* case, fiscal neutrality became central to the state school funding scheme.[56] In both cases, there was significant political backlash to the decisions. In Texas, opponents of the *Edgewood* decisions challenged

what they considered an illegal state-wide tax imposed by the legislature in an effort to comply with the courts. While immediately successful, the opponents were unable to implement the statewide tax successfully in the long term because the Texas legislature found legal workarounds to this extra tax.

In California, voters passed a constitutional amendment initiative, in part as a reaction to redistributive measures required by *Serrano*.[57] Proposition 13, a constitutional amendment which required a maximum of a 1% tax increase per year for education funding at a time of up to 15% yearly inflation, strangled California's access to public school funding.[58] In the following years, California's schools went from some of the top ranked in the country to among those at the bottom.[59]

Kentucky and New Jersey's legal battles for education funding reform demonstrate the framework and relative success of the adequacy-based approach. In 1989, Kentucky initiated what is considered the "third wave" of education funding, essentially the introduction of adequacy as the central argument for education funding reform claims.[60] In this decision, known as *Rose v. Council for Better Education*, the Kentucky state court understood "adequate" education in terms of educational outputs rather than financial inputs. In ruling on what constituted an adequate education, or an education that would enable students to participate in society as able citizens, the court articulated several capacities that students must achieve through a public school education.[61] This focus on educational output rather than input carried through a number of subsequent education cases, notably in the New Jersey case *Abbott v. Burke*.[62]

Abbott v. Burke demonstrates the ability of the adequacy claim to remove burdens that the government did not create by assessing local need in order to reach the state education minimum. *Abbott v. Burke*'s predecessor case on New Jersey education funding, *Robinson v. Cahill*,[63] began as an equity-based

claim that New Jersey's poorest districts were unconstitutionally underfunded compared to the wealthiest districts. Like in Texas, New Jersey legislature created a fiscal neutrality scheme to afford poorer districts a more equal opportunity to raise education funds.[64] However, finding that unconstitutional inequality still existed, the next Abbott decision required that funding for twenty-nine "special needs districts be brought "up to parity" with wealthy suburban districts.[65] Eventually, the court required additional funds for the state's most disadvantaged areas.[66] Failing to meet constitutional requirements multiple times, the legislature eventually adopted a standards-based system, which the court then accepted.[67] The court required that the legislature's standards must be tied to funding that would "assure the level of resources needed to provide a constitutionally sufficient education to children in the special needs districts.[68] To meet this requirement, the legislature weighed districts according to their need, which was based on local student demographics including the number of English language learners and the concentration of students in urban versus rural areas.[69] By requiring an adequate education for all, rather than an equal opportunity to raise funds, New Jersey's courts enabled reformers to specifically target groups that would need more resources in order to reach an adequate level. In New Jersey, adequacy standards were both a political necessity to avoid a court stalemate and a powerful tool for targeting specific disadvantaged groups so that they could receive extra resources.

VII. Evaluating Adequacy and Equity

The adequacy argument, which contends that the Constitution requires universal access to adequate education, is both more politically viable and more capable of improving educational equality in ways that have been blocked off to the equity argument by the *Rodriguez* decision. The political concerns with the equity

argument begin with the *Rodriguez* decision. *Rodriguez* demonstrates (and further promotes) a fear that local control of education could be eroded by the imposition of equality.[70] Justice Powell himself told his clerks that he feared a centralization of public education at the federal level.[71]

While *Rodriguez* reveals a strong sympathy for local control of education and fear of centralization, the *Plyler* decision demonstrates that requiring a minimum education level, a policy that improves education for those in need without comparing relative education quality between districts, is politically viable. As William Koski, an advocate for the equity approach, explains, while there is a fear among privileged sectors of society that education quality will "level-down" to achieve equality, adequacy by definition, "levels up."[72] The trial history of the two approaches is quite revealing; equity-based claims have won about one-third of their cases while adequacy-based claims have won two-thirds of theirs.[73]

In addition to the adequacy approach's greater political viability, at this moment in time it also has a more clear and effective constitutional argument. As has been shown, adequacy claims solely require a logical extension of the even if (some amount of education were a recognized right) phrase in *Rodriguez* and the adoption of intermediate scrutiny in *Plyler* to succeed. Since there was no claim that Edgewood residents received an inadequate education, there is no negative precedent to contend with in *Rodriguez*. On the contrary, an equity-based approach would at the very least need to contradict *Rodriguez* in requiring intermediate scrutiny for a funding system based on local tax.

As demonstrated with the weighted need system in *Abbott*, the adequacy approach can require the government to provide extra resources to underprivileged groups even when those groups are not an accepted suspect class and there has been no overt state discrimination against them. This has been precluded from the equity

approach through a series of cases like *Milliken v. Bradley*, where the court requires that the remedy to discrimination only involves a tailored solution that targets the area or group that committed the discrimination.

Defenders of the equity approach point out aspects of educational funding equity that are out of the scope of any adequacy claim. The most obvious is the contention that while adequacy can be seen as a tool in increasing funding equity, the aim of adequacy is neutral to the aim of equity.[74] In other words, a ruling solely based on an equal right to an adequate education is indifferent to inequalities above the adequate line. Another contention is that education is a "positional good," that its value is inherently tied to one's position on a spectrum of educational ranking.[75] In this case, adequacy does not necessarily help to level the playing field at all if inequalities are reproduced above the adequate education line. These two arguments can be challenged by the facts of contemporary politics. While in theory, adequacy does not address equity issues beyond the adequate line, in practice, the funding for educational adequacy comes from the state as a whole, and therefore does have some intrinsic redistributive qualities. The weighting system based on need, which was developed in the *Abbott*[76] decision, further redistributes public education funds and does so in a way that is outside the scope of a successful constitutional equity claim. The positional good claim is dangerous because it can apply to nearly anything.

Justice Marshall articulates perhaps the most serious concern with the adequacy argument in his *Rodriguez* dissent. He asserts that the Court "has never suggested that, because some adequate level of benefits is provided to all, discrimination in the provision of services is therefore constitutionally excusable."[77] Justice Powell does seem to assume that an adequate education provided to all would fulfill the requirements of the Equal Protection clause when he claims that, even if there were a right to an

adequate education, there is no evidence that any school districts are under the adequate line. This is a dangerous precedent that could have unintended consequences. Are there Equal Protection concerns if one district has an adequate number of polling places and another has far more? We have seen both *Brown v. Board of Education* and *Griffin v. Illinois* emphatically define Equal Protection rights in terms of equity as opposed to adequacy. The *Brown*[78] decision states that, "where the state has undertaken to provide… is a right which must be made available to all on equal terms." In *Griffin*,[79] the Court writes that a state's freedom not to provide appellate review "is not to say that a State that does grant appellate review can do so in a way that discriminates."

It is clear that at this moment the adequacy approach takes better advantage of the constitutional avenues both for a successful Equal Protection education funding claim and to provide extra resources to those most in need. However, this short-term goal may have serious long term repercussions. While the adequacy approach currently has a more viable constitutional argument, it could skew the meaning of Equal Protection from relative equality before the law to a universal minimum set of rights. It is worth considering whether or not the possibilities for short-term success of the adequacy claim and the societal good that it can achieve merit the possible dangerous extensions of that claim into other constitutional areas.

[1]New York Times Editorial Board, "The Central Crisis in New York Education," New York Times, January 4, 2015, https://www.nytimes.com/2015/01/05/opinion/the-central-crisis-in-new-york-education.html?_r=0>.

[2] id.

[3] id.

[4] San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

[5]id.
[6]Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).
[7]Rodriguez, 411 U.S.
[8]Clinton, Hillary Rodham, "Brown at Fifty: Fulfilling the Promise," Yale Law & Policy Review 23 (2005), no. 1: 216.
[9]Rodriguez, 411 U.S.
[10]id. at 17.
[11]id.
[12]id.
[13]Griffin v. Illinois, 351 U.S. 12 (1956).
[14]id.
[15]id.
[16]id. at 13.
[17]Harper v. Virginia Board of Elections, 383 U.S. 663 (1966).
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Prison Gerrymandering and the Systematic Dilution of Minority Political Voice

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Abstract

Although political voice is celebrated as a fundamental mechanism of American democracy, several scholars have recently found that the political voice of low-income minorities is often diminished, or even silenced, compared to the voice of more affluent, white populations. This disparity has meaningful consequences, producing legislation that is not representative of the concerns held by significant segments of the American public. While most analyses of this inequality focus on the effects of political disengagement or the influence of moneyed interest groups, this paper takes a different approach, examining the ways in which political voice has been warped by the practice of "prison-based gerrymandering." Since the 1970s, the interplay between the demographic consequences of mass incarceration and the US Census Bureau's practice of counting incarcerated persons where they are imprisoned, has led to dangerous inaccuracies in the redistricting and apportionment processes, augmenting the political voice of those who live in districts that house prisons, while diminishing the political voice of the low-income, minority districts that most incarcerated persons call home. Ultimately, in order to achieve fair and equal political representation that articulates the full range of American experiences, the US Census Bureau must count prisoners by their legal residences prior to incarceration and states must use more accurate data in the redistricting and apportionment processes.

I. Introduction

From the polis of ancient Athens to the contemporary United States, the most fundamental mechanism of the democratic process remains each citizen's unfettered exercise of political voice. When left unconstrained, the freedom to communicate one's interests to policy-makers not only allows for a broad diversity of needs to be meaningfully addressed, but also enables the public to hold its elected officials accountable. Because democracy—on etymological grounds alone—requires the rule of the people, or the demos, the mechanism of political voice can only be considered truly democratic if it fairly and proportionally represents the wide swath of politically relevant experiences, characteristics, and needs of the entire democratic citizenry.

Although the concept of equal and representative political voice has been celebrated ideologically in the United States since the nation's establishment, the extent to which it is realized in the contemporary US remains heavily contested. Several scholars—most notably, Schlozman, Verba, and Brady in *The Unheavenly Democracy*—have found that in comparison to white, affluent individuals, the political voice of low-income individuals and racial minorities is often unfairly silenced.[1] In a country as racially diverse and economically stratified as the United States, this stark disparity in political voice serves to produce policies that do not fairly represent significant segments of the population.

This analysis of American political representation focuses on "prison-based gerrymandering," the practice of counting incarcerated persons in the districts where they are confined for the purpose of electoral redistricting. This paper asserts that this practice distorts the distribution of political voice in the US, creating immense political disadvantages for low-income, minority voters. Furthermore, the US Census Bureau will be only further implicated if it does not change address this methodological issue, which

facilitates the discrimination against the country's racial minorities and subverts the equality in political voice that is necessary for the democracy to function.

The first section of this study explains the function of the decennial census in the redistricting process, while the second section discusses how the demographic effects of mass incarceration have profoundly affected census data within the past three decades. The third section focuses on the ways in which minorities are acutely disadvantaged by the dichotomous relationship between the population movements caused by mass incarceration and the misinformation gathered by the US Census Bureau for the redistricting process. In order to contextualize this racial inequity in the US, the fourth section draws a comparison between prison-based gerrymandering and the three-fifths compromise—which similarly distorted the political activity of racial minorities in the eighteenth and nineteenth centuries. Building off of previous scholarship, which has asserted that prison-based gerrymandering undermines the constitutional principle of "one person, one vote" and the minority protections of the Voting Rights Act of 1965, the fifth and sixth sections of this paper argue that prison-based gerrymandering further distorts the democratic process by diminishing the political voice of low-income, minority communities. Finally, the seventh section of this paper addresses the policy consequences of prison-based gerrymandering and the concluding section offers a look towards the future, examining alternative methods that the US Census Bureau could pursue to remedy the democratic distortions wrought by prison-based gerrymandering.

II. Redistricting and the Census

The democratic system envisions political voice as an equally distributed and representative function that would enable individuals to communicate their interests to locally elected representatives

who could, in turn, articulate these needs in larger government bodies. As Harvey Mansfield wrote in the introduction to *Democracy in America*, "When exercising sovereignty in this way, the people's reason is informed by firsthand knowledge and keen interest; they know how badly a road or a school is needed, and how well its costs can be borne. And because the consequences of choices are readily visible, choosing well seems worth the time and effort; good results evoke personal pride."[2] A fundamental requirement of the democratic process, therefore, is that the citizenry is enabled to articulate its needs to those who represent it and that these political representatives listen to the wishes of the full diversity of opinions of their constituents. As Schlozman, Verba, and Brady explain, "Although they may act as trustees more capable of producing effective and efficient policy for the benefit of the people than the people can produce for themselves, representatives still seem to need to hear the views of the populace if they are to be effective trustees."[3] If a representative hears only the political preferences of a certain segment of those she represents, her advocacy of her constituents' preferences in larger government bodies will artificially over-represent the desires of that minority.

In order to formally establish that effective channels of communication be guaranteed for all citizens, a numerically-based representative system was written into the Article I, Section II of the Constitution apportioning representatives among the states according to their "respective Numbers."[4] Since 1790, the US Government has determined these "respective numbers" using the population statistics collected by the Census Bureau in each Decennial Census. State and local governments use the data from each census to draw election district lines or "redistrict," ostensibly ensuring "equal and proportional" representation by crafting legislative districts with numerically similar populations.

Redistricting affects the results of every electoral process by changing the demographics of the population counted in each dis-

trict. In theory, this process is fair insofar as it affords each legislative district the same amount of political voice, however in practice, the redistricting process is vulnerable to the fallibilities of the US Census—chiefly the way in which the census counts prisoners.

When the census is taken every ten years, the population counts used in the apportionment and redistricting processes are determined according to Public Law 94-171 or the "usual residence rule."[5] The *2010 US Census Booklet*, which lays out the guidelines for the census, explains: "Planners of the first US decennial census in 1790 established the concept of 'usual residence' as the main principle in determining where people were to be counted [...] Usual residence is defined as the place where a person lives and sleeps most of the time. This place is not necessarily the same as the person's voting residence or legal residence."[6] Under the usual residence rule, individuals incarcerated persons in a "correctional residential facility," "detention center," "state prison," "local jail," or "municipal confinement facility" on Census Day are counted as a resident of the legislative district in which they are confined.[7]

For centuries, the impact of counting these populations in what was determined to be their "usual residence" was so small that this practice did not meaningfully affect apportionment in any way. "Prison populations were, at worst, minimal blips in the redistricting data," explains Peter Wagner in his study *Breaking the Census: Redistricting in the Era of Mass Incarceration*.[8] Since the 1990s, however, the major demographic changes caused by mass incarceration have transformed the seemingly innocuous "usual residence rule" into a mechanism by which the distribution of political voice is dangerously and undemocratically distorted.

III. Influence of Mass Incarceration

In 2010, the total incarcerated population in the US counted on Census Day was upwards of 2.3 million individuals, a 700

percent rise from the prison population tallied in 1970.[9] The demographic changes wrought by the incarceration of a population of this size are considerable. Today, the total population of prisoners in the United States is equal to the population of the country's fourth largest city, Houston, Texas. It is also larger than the populations of fifteen individual states as well as the population of the three smallest states combined. While the incarcerated are dispersed throughout the country, if they could form their own state, those imprisoned within the United States would have qualified for five Electoral College votes following the reapportionment scheme dictated by census data from 2000.[10]

Historically, census-taking efforts in light of large demographic shifts have been resisted by politicians cognizant of the ways in which the mere enumeration of bodies can distort political representation. For example, as Kenneth Prewitt explains in *Politics and Science in Census Taking*, reapportionment accorded by the 1920 census was blocked in congress by Southern conservatives who feared that internal migration during the wartime period--in which hundreds of thousands of Americans moved from rural, Southern states to industrial Northern cities--would diminish the political voice of their constituents.

In particular, these congressmen feared that the reapportionment of representatives resulting from such migration might create the false appearance of added support for policies favoring the interests of northern, industrial populations when in fact large subsets of these populations were temporary dwellers who were more ideologically aligned with the South. "An urban America was something new and disturbing, especially to those who held the Jeffersonian belief that independent farmers best protected democracy…Conservatives in Congress blocked reapportionment, complaining...that transient agricultural workers were 'incorrectly' counted in cities rather than on the farms to which they would return in time for spring planting," Prewitt explains.[11] Today, this

situation appears conceptually applicable to that faced by incarcerated populations, who can also be considered a "transient" population. Displaced from densely populated, urban areas to penal facilities in remote, rural communities where they have no personal connections or enduring ties, incarcerated persons perform essentially the reverse migration of southern laborers in the 1920s with equally damaging political effects.

In the same way that a migrant laborer's destination and length of stay might be dictated according to random factors such as weather patterns or job availability, incarcerated individuals are assigned to a facility according to an incredibly variable assortment of considerations that can range from punitive concerns such as flight risk or crime committed; to administrative concerns involving a facility's resources and prisoner capacity; to sentencing discretions based on inmate behavior, dropped charges, or applications for parole. These parallels appear particularly relevant when considering that incarcerated individuals are typically detained for less than three years, meaning that like migrant laborers who returned South during planting season, most incarcerated individuals will return to their native urban, minority communities well before the next census count.[12]

For this reason, counting inmates where they are imprisoned facilitates the distribution of political representatives, government programs, and public benefits to various communities according to incarceration rates instead of a community's actual need. Specifically, when prisoners from urban, minority communities are counted as residents in the rural, white districts in which they are incarcerated, their enumeration allows for more representatives and resources than would otherwise be afforded to the non-incarcerated residents of these prison-holding districts. At the same time, the amount of representatives and resources will be accordingly diminished in the urban, majority-minority communities from which these incarcerated populations came and to which they will likely

return before the next decennial census.

For example, if 3,000 prisoners from New York City are counted as residents of Dannemora, New York because they reside in Dannemora's Clinton Correctional Facility, their enumeration will serve to augment the political power of politicians advocating the interests of Dannemora's rural, conservative population. Meanwhile, representatives in New York City--who advocate for policies far more relevant to inmates' personal concerns, and whose voice is essential to soliciting the public benefits that most ex-offenders will utilize upon their release--experience a proportional dilution in their political power. In this way, though inmates are stripped of the vote during their incarceration, the census creates a mechanism through which incarcerated individuals are still able to be politically active, albeit in a manner to which they do not consent and that is likely antithetical to their interests. The political ramifications of manipulating the political activity of the incarcerated are intensified proportionally as a product of the distance between the incarcerated individual's home and the place in which they are incarcerated. As the incarcerated population in the US continues to rise, the usual residence rule simply is no longer an accurate, fair, or representative tool for the US Census Bureau to use to inform the redistricting process.

IV. Race and Prison-based Gerrymandering

By forcibly relocating millions of people far from their legal residences, the prison boom of the 1980s and 1990s has created the ideal demographic context to foster prison-based gerrymandering, while rendering those communities most vulnerable to incarceration vulnerable to electoral manipulation as well. Despite committing crimes at comparable levels, African Americans and Latinos are incarcerated at dramatically higher rates than their white counterparts. Racial disparities in policing and sen-

tencing have created an American prison population that does not accurately reflect the demographics of the population as a whole. Though African Americans and Latinos amount to just 13 percent and 16 percent of the total populace respectively, these two groups constitute roughly 60 percent of the total US prison population.[13] Furthermore, almost 9 percent of African American men in their twenties or thirties currently reside in correctional facilities, while one in six African American men has been incarcerated in his lifetime.[14] For census taking purposes, such racially stratified patterns of incarceration are significant because they displace large populations of minority constituents from the districts in which they normally reside, thereby creating a dangerously unrepresentative picture of the apportionment needs of distinct electoral districts.

When urban minorities are counted by the decennial census as residing within the legislative districts of their incarceration, the communities from which they hail are denied of their owed political representation during redistricting. This is particularly problematic given that urban minorities tend to live in communities that are firmly delineated along racial and economic lines. As Loic Wacquant and William Julius Wilson explain in their study, *The Cost of Racial and Class Exclusion in the Inner City*, beginning at the end of the Civil Rights Era, the urban black poor have become increasingly concentrated in along spatial lines, shunted into "territorial enclaves" in inner city areas.[15] The authors state that by 1989, "fully 38 percent of all poor blacks in the 10 largest American cities lived in extreme-poverty [census] tracts...and with only 6 percent of poor non-Hispanic whites," symbolizing a "growing social and spatial concentration of poverty."[16] Furthermore, due to the lack of economic opportunity, high rates of unemployment, and low levels of education characteristic of these neighborhoods, these impoverished urban areas are also those with the highest rates of incarceration, where many residents feel compelled to "resort to illegal activities in order to survive."[17] For the past four

decades, such exorbitantly high rates of incarceration along racial, economic, and geographic lines around the country have led to the detention of hundreds of thousands of urban-dwelling blacks and Latinos in penal facilities far from the communities with which they politically and socially identify. While the political voice of urban, minority, and low-income communities is unfairly deflated, the political voice of white, rural communities with often oppositional politically relevant characteristics is inflated, distorting representation particularly at the local level.

V. Similarities to the Three-Fifths Compromise

Given the racial dynamics of mass incarceration as well as the considerable political advantages reaped by those who reside near carceral facilities, prison-based gerrymandering can easily be compared to the three-fifths clause to Article I, Section 2 of the Constitution. Written to settle debates over how and whether slaves should be counted in the allocation of congressional representation, the three-fifths compromise instructed the government to count each slave as only three fifths of a person. The very need for this compromise between Northern and Southern legislators signified a mutual understanding that counting non-voting slave populations for legislative apportionment would be politically advantageous for Southern states. Even counting only three fifths of their slave populations as constituents, slave-holding states and their white citizens reaped significant political benefits when it came to representation and the allocation of federal funds. As John C. Drake explains in *Locked Up and Counted Out: Bringing an End to Prison-based Gerrymandering*, in 1793, had slaves not been counted for reapportionment purposes, Southern states would have had only thirty-three seats in Congress as opposed to the forty-seven they were ultimately granted.[18] The racialized and undemocratic mechanisms by which the three-fifths compromise inflated the political

clout of the slave-holding South are strikingly similar to those that artificially augment the voices of individuals residing near prisons today through prison-based gerrymandering.

The relationship between prison-based gerrymandering and the three-fifths compromise is not entirely analogous insofar as the racial divide between incarcerated and non-incarcerated Americans is not as clear cut as that between slave and slaveholder. Additionally, prisoners are not considered to be without blame for their incarceration, while slaves were not at all responsible for their bondage. Nevertheless, an examination of the similarities between the three-fifths compromise and prison-based gerrymandering serves to clarify the racialized mechanisms through which prison-based gerrymandering undermines fair political representation today.

Though a crucial protection of equal political voice in the US is the "one person, one vote" principle defended by the Equal Protection Clause of the Fourteenth Amendment, the census' flawed method of counting prisoners where they are incarcerated has crafted several legislative districts that subvert this principle through over and underpopulation. Several Supreme Court rulings in the latter half of the 20th century such as *Baker v. Carr* and *Reynolds v. Sims* have established that states must make an "honest and good faith effort to construct districts...as nearly of equal population as is practicable" and that any redistricting plan that deviates by more than 10 percent from the ideal district size "creates a prima facie case of discrimination."[21] Though states have the freedom to use whatever form of census data they deem fit to conduct reapportionment, most states--given the Bureau's historically nonpartisan stance and scientifically well-tested model--choose to refer to the data provided by the US Census Bureau in order to determine their respective ideal number of citizens. From small towns to large counties, legislative lines are drawn according to a formula by which the population counted by the census is divided

by the number of legislators designated by the appropriate constitution, code, or charter.[22]

For this reason, counting incarcerated persons as residents in the legislative districts in which they are confined subverts the one person, one vote ruling by allowing for the creation of legislative districts that should be considered below the designated ideal size for apportionment. Because incarceration does not change an individual's voting address in any of the fifty states, counting incarcerated persons in the legislative district in which they are confined serves to unconstitutionally grant more political voice to those who vote in districts with prisons.[23] When elections occur, fewer individuals are given the same opportunity to elect a representative than neighboring districts, thereby granting certain communities more electoral power than they rightfully should have.

The injustice of this practice can be clearly seen when considering the case of Anamosa, Iowa, where in 2005, because 96 percent of the population of the city's second ward was comprised of incarcerated persons, the ward was able to nominate a candidate for city election using two write-in votes. Though this is an extreme example, the political voice of second ward residents effectively gained 25 times the power held by residents of neighboring wards in the city.[24] If incarcerated persons were not counted in the population of the second ward, the apportionment plan of the city would unequivocally be deemed below the "ideal size" of an electoral district and in violation of the one person, one vote ruling.

Less visible, but equally damaging, is the dilution of political voice that occurred for voters in the legislative districts that those incarcerated in Anamosa consider to be their usual places of residence. Because the population of prisoners regularly living in these districts is not counted by the census, these districts are afforded less representation. These districts would thus be considered over-populated according to redistricting rules even though their actual populations--which would include individuals tem-

porarily incarcerated outside of the community--exceed the ideal size of an electoral district. For example, if the ideal size for each district within a given state is 10,000 people, and a certain district has an actual population of 11,500, but a census-enumerated population of 10,700 because 800 individuals in that community are incarcerated outside of the district, that district would be considered over-populated because its actual population is more than 10% larger than the ideal size of an electoral district. Similarly, if another district in this same state had an actual population of 8,900 but a census-enumerated population of 10,400--because the district contained a correctional facility with 1,500 inmates from outside of the community--that district would be considered underpopulated due to the fact that its actual population is less than 10% of the state's ideal district size. Those who cast ballots in overpopulated districts experience a comparatively diminished ability to express their preferences in a meaningful way, violating Supreme Court precedent established in the Reynolds v. Sims case, which states "Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based on factors such as race and economic status."[25] Thus, prison-based gerrymandering's clear infringement upon the political and civil guarantees established by the Equal Protection Clause violates case precedent over half a century old and disadvantages voters according to distinctions of race and class.

VI. Obstructions of Protections for Minority Voters

Because of the notable social and geographical differences between communities with high rates of incarceration and communities where prisons are located, the dilution of votes caused by prison-based gerrymandering falls along racial lines and protections for minority citizens. Section 2 of the Voting Rights Act of 1965

states: "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."[26] In 1982, this section was amended to include protections against any "voting qualification or prerequisite to voting, or standard, practice, or procedure" that had the effect of "denying or abridging the right of any citizen of the United States to vote on account of race or color."[27] Under this amendment, irrespective of whether or not a minority voter legally retains the right to vote, if her ability to exercise this right is diminished in a way that does not affect white voters, it is considered a violation of her voting rights. Insofar as the right to vote entails not only the physical ability to cast a ballot, but also that ballot's ability to meaningfully choose a representative, an individual's suffrage is subverted when her vote carries less weight than her neighbor's in an election. Thus, Section 2 of the Voting Rights Act is violated when the ballots of minority voters are given less electoral purchase than the ballots of white voters, or when issues affecting minority voters are decided by representatives they did not have fair opportunity to choose.

In the context of prison-based gerrymandering, the discrimination outlined by a section 2 claim is applicable to the experiences of individual minority voters living in legislative districts with high rates of incarceration. In New York State, 90 percent of incarcerated individuals from New York City are confined outside of the city in white, rural areas upstate. Given that two-thirds of the state's total incarcerated population is comprised of individuals from New York City, and almost all of these individuals are minorities who normally reside in one of the state's six majority-minority districts (all of which are located in New York City), when they are counted as residents of majority-white districts, their falsely registered absence from their native districts serves to dilute the voting power of the minority individuals who continue to reside in these districts.[28]

Meanwhile, white voters in districts like New York State's 114th State Assembly district--where 82.6 percent of the African American "constituents" in the district are incarcerated--experience an inflation in the ability of their vote to elect representatives. In this way, the weight of individual ballots cast in the state is transferred from residents of majority-minority, urban districts to predominantly white, rural districts.

After the 2000 Census, the New York State Senate began a process of reapportionment with the intention of creating 62 Senate Districts, each with a population within 10 percent of 306,072 people. It soon became clear that population changes recorded in the Decennial Census would require redistricting in some areas of upstate New York. In particular, the 2000 Census had recorded an influx of 43,740 New York City residents into a small handful of prisons in rural, upstate counties.[29] Within the narrow margin of error afforded by the "one-person, one-vote" ruling, only a few thousand residents were able to protect several Senate districts from being considered "underpopulated" or "overpopulated." Upstate, several new Senate districts were drawn, accounting for the population movements that had occurred due to mass incarceration throughout the 1990s.[30] Nevertheless, because of census counts, which included incarcerated individuals as new residents of these rural communities, several districts were able to shrink both in terms of non-incarcerated population and geographic size and still fall within the ideal size calculated by the Senate reapportionment committee. In this way, the redistricting scheme devised after the census served to politically reward districts with prisons, granting smaller, local, non-incarcerated populations the same representation and political voice as the larger populations of districts without a prison.

The gross violations wrought by this practice are made particularly clear when examining this issue through the rural 59th Senate District, which houses several medium security correctional facilities, and had a population count of 294,256 under the 2000

census. Though this count made the district sufficiently populous to be an individual Senate District, subtracting the district's nearly 9,000 prisoners would have made it drastically "underpopulated" given that the population would have fallen outside of 10 percent of the state's ideal district size of 306,072 people.[31] The 59th district was not an isolated case, however. According to the Prison Policy Initiative, in the redistricting process that followed the 2000 Census, a total of seven districts would have been considered underpopulated if the prison populations housed there had not been counted.[32]

At the same time, the New York City senate districts that legally housed the state's newly counted 43,740 prisoners prior to their incarceration were undercounted and subsequently drawn to be larger than they should have been in order to meet apportionment requirements. Had the incarcerated residents of these districts been counted in their homes on April 1, 2000, the populations of these urban districts would be deemed severely overpopulated according to redistricting rules because their actual populations would have been more than 10% larger than 306,072. Assuming that each district in New York City had an equal number of individuals incarcerated outside of the city, the population of each of the city's Senate Districts would be 1,800 individuals higher than the number counted by the census.[33] In Queens alone, if this minimum estimated number of 1,800 incarcerated residents were to be allotted to each district, seven districts would be considered overpopulated given that Queens's 10th, 11th, 12th, 13th, 14th, 15th, and 16th senate districts had already been counted as possessing more than 318,000 residents and barely within 10% of 306,072.[34]

In the majority-minority 10th Senate District for example, adding 1,800 incarcerated individuals to the population count would make for a total of 320,281 district residents. The gravity of this additional population is made clear when considering that under the 2000 redistricting plan crafted after the census, these individuals were granted the same number of representatives, state-allocated

resources, and political voice as the 285,305 non-incarcerated residents of the majority-white 59th Senate District upstate. In this way, the distinct needs and concerns of the 10th district's much larger number of residents were advocated with the same amount of political clout as the very different needs and concerns of the 59th district's much smaller population. Within the state senate, such disproportional legislative influence serves to create the false appearance of a lessened amount of interest in those policies--such as means-based benefits--that typically appeal to majority-minority, urban, low-income New York districts. Furthermore, because the 10th district has almost 35,000 more residents than the 59th district, the Senator for the 10th district was accountable to a constituency roughly 11% larger than her rural, white counterpart, taking for granted the fact that a vast majority of the 1,800 prisoners counted in the district will be released from confinement and return home before the next census. Given that many districts with particularly high rates of incarceration would likely be depleted of far more than 1,800 residents on census day due to incarceration, the implications of miscounting are particularly consequential, particularly in the manner in which they subvert the political power of minority communities.

VII. Policy Consequences

The fact that urban, majority-minority districts tend to vote in a united manner has been demonstrated in several studies of voter preferences undertaken in recent decades. Since the 1960s, many factors, including housing discrimination, forced segregation, factory booms, economic collapses, and familial ties, have crafted contemporary American cities and legislative districts that are heavily divided along racial and economic lines.[35] Poor communities have distinct needs, which they experience far more acutely than even slightly less impoverished areas. For example, most of the residents

of these areas are on welfare, receive public assistance, are unemployed, do not own cars, and have not received a college education.[36] All of these attributes--in addition to race--serve as relevant factors, which shape their political attitudes and policy preferences. As Wilson explains, the processes of "meaning-making and decision-making" within such communities can be understood clearly by examining the interplay between "national views on and beliefs on race" and the "shared outlooks, modes of behavior, traditions, belief systems, worldviews, values…that emerge…in settings created by discrimination and segregation, and that reflect collective experiences within those settings."[37] The unified preferences that emerge from the particular psychogeography of low-income, urban, minority communities powerfully shapes means by which the citizens of those communities operate politically, streamlining their shared experiences into a cohesive political voice.

Because minority, low-income, urban communities vote in a united manner, and political issues such as welfare and criminal justice often fall along racial lines, the dilution of minority votes due to prison-based gerrymandering impacts the development of policy in a way that systematically contradicts the interests of legislative districts with high rates of incarceration. With less political clout and numerically diminished representation of their experiences, the unique interests of citizens from undercounted minority districts are often insufficiently communicated in policy-making bodies, thereby diminishing the political voice owed to these citizens by an equally representative democratic system.

Ultimately, these racially and geographically delineated disparities in political voice incentivize political leaders in the rural, white districts in which prisoners are housed to advocate "tough on crime" policies and to promote redistricting schemes that perpetuate prison-based gerrymandering. Particularly in highly competitive districts, state legislators will pursue legislation that is more likely to yield electoral victories for themselves and fellow members of

their parties.[38] If such legislators are aware of the electoral benefits yielded by retaining large prison populations in their districts, it would appear politically advantageous for those representing rural prison districts to advocate policies that perpetuate mass incarceration.

In New York State, for example, four of the seven Republican senators representing districts that would be considered overpopulated if the incarcerated population was subtracted from the 2000 Census count, sat on the state's Codes Committee where they adamantly supported the harshly punitive Rockefeller drug laws. As Wagner explains, "The inflated populations of these senators' districts gave them little incentive to consider or pursue policies that might reduce the numbers of people sent to prison or the length of time they spent there."[39] Two of these senators counted 17% of the state's incarcerated population as their constituents.[40] If a policymaker knowingly subverts the interests of the incarcerated individuals that she represents by crafting policies that obfuscate their personal experiences and repudiate their unique needs, it is absurd to say that she speaks for these individuals in any sort of fairly democratic way. Instead, she capitalizes on their captive constituency for the political gain of the free individuals that she represents, advocating for policies that serve to advantage only those whose voice is relevant in local elections

Furthermore, the redistricting opportunities created by decennial censuses that capture the population fluxes caused by mass incarceration enable rural legislators to draw increasingly small districts around prisons within their jurisdictions. Across the country, but particularly in California, Illinois, and New York, Republican legislators have worked to craft numerically diminished districts in areas where they have higher chances of electability, thereby increasing the political voice of their non-incarcerated constituents.[41] As Wagner explains, "in an incumbent's ideal world, the district would be drawn around the incumbent's home and a huge prison,

resulting in a guaranteed election because there would not be an opponent eligible to run. Every prisoner counted at the prison therefore increases not just the clout of the actual residents, but makes reelection more likely for the incumbent."[42] Because the advantages accrued by retaining control of a district padded with prisoners also include the allocation of additional federal benefits for each resident as well as less constituents for the politician to attend to, it is no wonder that these incumbents defend their district lines with such fervor during redistricting sessions.

Given the specific demographics and geographic areas that benefit from the political effects of prison-based gerrymandering as well as heavily racialized nature of mass incarceration, prison-based gerrymandering is undoubtedly a partisan issue. As Paul Frymer asserts in Uneasy Alliances, African American voters--particularly low-income, urban, African American voters--are considered to be "captured " constituents by the Democratic Party. They overwhelmingly vote for the Democratic Party, they are ideologically left of center on a number of divisive social and economic issues, and in a heavily divided two-party system, they find themselves in an electoral position in which one party makes "little or no effort to appeal to its interests or attract its votes" (Frymer, 8). Thus, when the political voice of inner-city legislative districts with high rates of incarceration and high concentrations of African American voters is systematically diminished, the Republican Party benefits, while the Democratic Party is disadvantaged.

VIII. Conclusion

Further inaction on prison-based gerrymandering, particularly on the state and local level, would be a direct affront to both constitutional principles as well as the citizenship of the thousands of individuals whose political lives are unfairly disadvantaged by this malpractice. Even still, the Supreme Court has never addressed

the issue or considered specifically the ways in which the US Census Bureau's "usual residence rule" violates the "one person, one vote" principle or the Voting Rights Act of 1965. For this reason, those voices calling for reform have mostly come from advocacy and research organizations, demanding that states amend their methods of counting prisoners in the census in order to grant a more fair apportionment of political voice within their state.

The two most commonly suggested solutions are reallocating prisoners to their home during the census process or excluding prisoners from census counts entirely. Nevertheless, for the purposes of remedying the distortion of political power in each state, only one of these options is truly just in a way that is cognizant of minority rights. While excluding prisoners from the census count would correct the vote dilution suffered by those legislative districts without prisons that neighbor districts with large incarcerated populations, it would not address the inequities faced by those living in districts with high rates of incarceration. Instead, these individuals would still suffer the same political ramifications, described above, that are wrought by an unfair undercounting of the true population of their district. Furthermore, excluding the incarcerated population from census counts entirely would take an injurious toll on the provision of certain need-based government programs--such as Temporary Assistance for Needy Families, the Public Housing Capital Fund, Medicaid, and Unemployment Insurance--that rely on census data to allocate funds.[44] Insofar as most incarcerated individuals will return home in less than three years, where they will rely on such federally funded programs their exclusion in census data would misrepresent the amount of aid truly needed by the communities in which they reside. Lastly, removing prisoners from the census count would undermine their status as citizens of the United States, dangerously denying the civil existence of hundreds of thousands of particularly low-income, minority individuals. As Ho explains, "When some groups of individuals no longer count as 'persons,' it

becomes easier in some sense to treat them as though they have no rights that society is bound to respect."[45] For this reason, it is only fair that the immediate solution to prison-based gerrymandering be a reallocation of prisoners to their home addresses during census counts. This process is by no means infallible given that it would miscount those individuals who will never return to their former communities either out of personal choice upon release or because of the length of their sentence. Nevertheless, this number is small enough (just under 50,000 individuals are serving life without parole) that until some more nuanced mechanism of enumeration can be attained, counting residents in their chosen residence prior to incarceration is a far more accurate means of census-taking than the current practice.[46] For this reason it is politically, economically, and socially a far more justifiable remedy than exclusion from the census.

Above all, despite the emphasis placed by scholars, legislators, and advocates alike on critiquing the flaws of archaic census rules, undemocratic redistricting techniques, and Supreme Court inaction, the real culprit of prison-based gerrymandering is the mass incarceration of hundreds of thousands of Americans every year. Since the 1970s, racially biased policing and sentencing practices, and "tough on crime" policies have ravaged the black and Latino populations of inner-city legislative districts around the nation, forcibly displacing hundreds of thousands of individuals to rural prison districts within their own states. However, until mass incarceration is finally put to an end in the US, this effort to ensure that those who live next to large prisons are not given a disproportionately large voice in the political process is a definitive gain in the service of the equal political voice that a well-functioning democracy requires.

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Reframing Religion: A Rehabilitative Approach to Religious Rights in Prisons

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Abstract

For years, scholars and political theorists alike have grappled with the age-old debate of civic rights within the American prison system. Currently, incarceration in the United States strips prisoners of several "civic rights" that non-incarcerated citizens enjoy. Yet, both the Supreme Court and the Judicial Branch have upheld a robust protection of religious free exercise in prisons through the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), which guarantees the strict scrutiny standard for prisoners' religious rights. However, the Supreme Court, in its case law citing RLUIPA, has still deferred to the prison institution to limit free exercise rights in the name of prison efficiency or safety. Such deference poses an inherent risk to a consistent maintenance of prisoners' religious free exercise rights.

This paper serves to explore the rehabilitative benefits of religion in prisons and, consequently, argue for an even more robust protection of rights that defers to religion rather than prison administrators. The paper begins this exploration by outlining the evolution of case law in regards to religious free exercise throughout the history of American prisons. Moreover, using empirical and theoretical arguments, it outlines the rehabilitative benefits of religion in the prison for both the prisoner and the prison institution, demonstrates the logistics of applying this principle to policies, and addresses potential challenges. Overall, this paper seeks to engage the debate about improving criminal justice through a pragmatic method that may better serve prisoners and prisons.

I. Introduction

With the largest prison population in the world, the United States has faced a myriad of legal and ethical questions concerning its criminal justice policies. Political theorists and prison reformers often focus on the need for retention of civic rights for prisoners. Yet in spite of the relatively limited rights of prisoners there is a unique jurisprudence in the United States regarding religious exercise rights in prisons. While prisoners lose many of their civic rights upon entering the prison system, the Supreme Court's jurisprudence on religious rights for prisoners affords them broader protections in regards to religion than they would receive outside the prison walls. This expanded protection for religious free exercise stems from the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), which applies the strict scrutiny test to free exercise of religion in prisons.[1] Under this standard, prison rules that limit religious exercise can only be upheld if the prison has a compelling interest and the rule is narrowly tailored, meaning that it is the least restrictive way to achieve the compelling interest. In affording greater protection to religious rights, RLUIPA provides an interesting contradiction to both the theoretical and physical limitations of the prison institution.

But there is an inherent risk of this type of standard, in that it can strike down religious rights in the name of prison efficiency or administration without considering the ramifications of doing so. Even contemporary court cases that are decided under RLUIPA, such as *Holt v. Hobbs*, acknowledge that the prison has a right to question the sincerity of a religious belief, thus giving them some discretion over religious matters. In *Holt*, decided in 2015, the Court ruled that a policy in an Arkansas prison that limited a prisoner's right to grow a half-inch beard for religious purposes violated RLUIPA. The Court noted that the policy was neither a compelling interest nor narrowly tailored, since the prison had allowed beards in other instances, such as for health purposes. But

the Court reiterated that the prison still retains the ability to question the sincerity of a religious belief if suspect, and, moreover, "be entitled to withdraw an accommodation if the claimant abuses the exemption in a manner that undermines the prison's compelling interests" even when the belief is sincere.[2] This is a problematic caveat of the expansions afforded by RLUIPA. It advocates for the prison administration to have discretion over religious matters, in spite of the expansion of religious rights. What happens in the case when the religious belief is sincere but uncommon? Or when the prison's "compelling interest" can actually be accommodated, albeit with high monetary and administrative costs? Moreover, this jurisprudence – although beneficial for free exercise – fails to consider the notion that religion can, in fact, be beneficial to both the prison's interests and prisoners themselves when considered for its rehabilitative aspects.

This paper argues that it is necessary to reconfigure the approach to religion in the prison through a rehabilitative framework. The rehabilitative perspective of religion views it for its inherent benefits to the individual as well as to its surroundings, from lowering recidivism to reducing violence in the prisons. As the Supreme Court noted in its decision in *O'Lone v. Estate of Shabazz*, one of the key penological objectives of the prison is rehabilitation, and religion contributes immensely to this goal.[3] By extension of this, religion should be expanded more concretely within the prison in order to reap its full benefits, thus requiring the prison to be flexible with its own administration and logistics, except in the circumstances in which a religious right curbs the fundamental rights of other prisoners, either due to the presence of a physical harm or oppression of rights. In conclusion, an expansion of religious rights within the prison can facilitate the institution's goals while having wide-ranging and long-lasting benefits for the individual, the prison, and society. Moreover, this theory would be consistent with the Establishment Clause since it provides a secular purpose for

religious accommodations in prison.

This analysis answers key questions regarding the role of religion as a rehabilitative element of prisons, particularly focusing on the state's role and the Establishment Clause, the necessity for prison security and efficiency, and instances of prison radicalization. While the first part of this paper will center in on the doctrinal elements of religion as rehabilitative, the second will delve further into applying this concept to the Court's current jurisprudence and into the theoretical and ideal prison system in which this method would be most effective.

II. Evolution of Religious Jurisprudence

The impact of religious institutions on incarcerated individuals extends back centuries. During the rule of Constantine in the Roman Empire, the Christian Church often gave asylum to prisoners awaiting capital punishment. At the time, this policy was not widely condoned, yet the Church continued to provide such assistance. In the medieval times, the Christian Church had developed punishment techniques that other states later used, such as the monastic cell, which held guilty offenders.[4] In 1703, Pope Clement XI built the Michel Prison in the Vatican, which served as a correctional facility for youth offenders and emphasized silence, work, and prayer. This model of prison influenced European and American prisons up until the 18th century.

Upon the founding of the American Constitution, however, this intertwining of religious institutions and punishment began to violate the Establishment Clause of the First Amendment – in that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" – which was instituted to prevent the state-led religious persecution from which the Founding Fathers were escaping in England.[5] Under the Establishment Clause, in particular, the state would not be able to

endorse religion in any sense, especially not within institutions of punishment.

But even today, religion still does have some role in the prison system. Data-wise, little is known about the religious breakdown of inmates in U.S. prisons, especially with around 85% under state jurisdiction. A Pew Forum survey of prison chaplains indicated that on average, chaplains noted that Christians make up two-thirds of the inmate population, Muslims less than 10%, and other non-Christian groups considerably smaller, but this data is in no way representative of the entire prison system since it represents the views of selected chaplains unrepresentative of the entire prison population.[6] While federal agencies often require data reporting from prisons, religion is not one of the categories included. Nonetheless, there is sufficient evidence that religion is both commonplace and controversial in prisons, particularly when considering the litigation surrounding religious rights.

Even the evolution of Supreme Court jurisprudence on prisoners' rights has demonstrated the salience of religion in prisons. Today, the Court has come a long way since early cases about prisoners' rights. In the 1866 case of *Prevear v. Massachusetts,* the Court ruled that prisoners had no constitutional rights, including Eighth Amendment rights, and advocated for a federal "hands-off" policy over state prisons.[7] In the subsequent century, the Court began to uphold prisoners' rights, particularly in regards to free exercise of religion. In *Cooper v. Pate*, decided in 1964, the Court ruled that state inmates have standing to sue in federal court regarding the legality of their sentence and the conditions of their imprisonment.[8] Years later, in the 1972 case *Cruz v. Beto*, the Court upheld a Buddhist prisoner's free exercise right after a Texas prison discriminated against his request to use a chapel, a right enjoyed by other prisoners of more common faiths.[9]

Prior to RLUIPA, the Court's first formal guideline for religion in the prison rooted from a balancing test that determined

whether to protect the rights of prisoners. In *Turner v. Safley*, the Court considered the constitutionality of prison policies that limited correspondence between two inmates, as well as the right to marry within the prison.[10] The Court ultimately ruled that the validity of limiting the rights of prisoners depends on a balancing test that considers the security and rehabilitative goals of the prison with the constitutional rights of inmates. This test considers factors like the connection between a legitimate correctional interest and the regulation in question, alternative methods of exercising these rights, and the extent to which inmates' rights affect others in the facility. But it largely places the prison's goals at the center, at the expense of rights of prisoners. In *O'Lone v. Estate of Shabazz*, decided in 1987, the Court applied this balancing test to uphold a New Jersey institution's policy about prison work that would not allow two Muslim men to attend Jumu'ah, the Muslim religious service held on Fridays. According to the court's opinion, the prison was justified in its policy since accommodating the prisoners would have imposed security risks and administrative burdens.[11]

In 2000, the Religious Land Use and Institutionalized Persons Act introduced the current jurisprudence of religion in prisons. The Act reads:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—(A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest.

The Act set up the highest standard of scrutiny for religious rights in prison, thus expanding them immensely.[12] Under the strict scru-

tiny test, the prison must hold the burden of proving that a policy that limits religious rights is both a compelling interest and narrowly tailored. Since 2000, RLUIPA has been the jurisprudence for several court cases, two of them being the most relevant to religion in prisons. The first, *Cutter v. Wilkinson*, which was decided in 2005, focused on RLUIPA's constitutionality, especially in consideration of the Establishment Clause.[13] The Court ruled, "We do not read RLUIPA to elevate accommodation of religious observances over an institution's need to maintain order and safety. Our decisions indicate that an accommodation must be measured so that it does not override other significant interests."

This aspect of the Court's opinion is significant because it highlights the second of two key issues with RLUIPA. In considering *Holt v. Hobbs*, I mentioned the first issue: the maintenance of the prison's discretionary powers over religious claims in the name of security and administrative burdens. The second is that this jurisprudence implicitly pits religious free exercise against compelling prison interests, without considering the ability for them to work in tandem. Therefore, religion is now framed not only as a necessary freedom for prisoners, but also as an obstruction of prison objectives. The remainder of this paper will advocate for why the benefits of religion should take precedent over many common prison objectives because of religions' inherent and long-lasting effects on the prisoner, prison, and society. We begin with the questions: What does it mean for religion to be rehabilitative, and where does this theory fit into the current jurisprudence? The next two sections will discuss this.

III. Doctrine of Religion as Rehabilitative

The first purpose of reframing the view of religion is to emphasize the need to protect it in the first place. Of course, RLUIPA does just this, but I argue that there needs to be a greater emphasis

on the secular elements and benefits of religion that ultimately contribute to the prison's goals. In the American prison system, prisoners lose a large part of their civic and constitutional rights. Such a move is, without a doubt, both controversial and problematic. It strips prisoners of their civic rights guaranteed by the Constitution; nowhere does the document say that imprisonment warrants a "civic death," meaning an end to the civic rights inherent to citizenship in a democracy. In this case in particular, religion is a fundamental part of the human experience. While many do not practice religions, there are many who do find that religion is inherent to their lives. To limit the practice of religion in any manner – especially in the interest of prison efficiency or agency – violates the fundamental rights of prisoners. Moreover, to permit the practice of some religious exercises while limiting others negatively affects the entire religious experience.

The rehabilitative perspective of religion acknowledges the centrality of it to many individuals, as well as the benefits reaped from it. It advocates for an expanded role of religion in the prison system while simultaneously limiting the prison administration's discretionary powers. While issues like prison security are certainly considered, this view takes an expansive approach that advocates for more flexibility in regards to prison administration and agency and more concreteness in terms of protecting religious rights.

This view starts with the premise that rehabilitation is both a necessary and stated prison objective. Rehabilitation in punishment focuses on practices that help offenders with reentry to society, whether in terms of therapy or education. While the criminal justice system in the United States is far more punitive than it is rehabilitative, the Court has formally acknowledged rehabilitation as a "penological objective" of prisoners in cases like *Turner and O'Lone*.[14]

There are three primary ways in which religion can be rehabilitative for both the individual prison and the prison institution. The first centers on the community aspect of religion. In the dissent

for *O'Lone*, Justice William Brennan wrote, "Incarceration by its nature denies a prisoner participation in the larger human community. To deny the opportunity to affirm membership in a spiritual community, however, may extinguish an inmate's last source of hope for dignity and redemption."[15] Being religious is not solely about holding certain beliefs; rather, it is about an entire experience and a spiritual community. Limiting this right takes the prisoner away from this community and exceeds what a punishment should entail. Prisoners are already limited in their rights and in their physical environment, but to take away a fundamental aspect of their humanness constitutes a cruel and unusual punishment, which the Eighth Amendment protects against.

This leads to the second rehabilitative aspect of religion: a feeling of self-awareness and reflection. The notion of religion itself is introspective, in that it requires individuals to come to terms with their spiritual beliefs and a larger spiritual being, regardless of the religion. Religions often institute guidelines for living, and those who are spiritual can self-reflect through these value systems. In Hinduism, for instance, believers follow ten disciplines, some of which include ahimsa (non-violence), satya (truth), and tapas (austerity). In Islam, five pillars guide believers: shahada (faith), salat (daily prayers), sawm (fasting during Ramadan), zakat (religious tax), and hajj (pilgrimage). In many ways, religion serves as a key avenue for morality in the lives of many individuals. By allowing religious practices extensively within the prison, the institution can facilitate one key form of self-reflection, ultimately guiding the individual to be more aware of their punishment and reflect upon their crime. The adherence to religion and its accompanying moral values creates a pathway to atonement for one's crime. While religion is certainly not the only path to morality and atonement, the existence of value systems like those in Hinduism and Islam allow followers to seek these two ultimate goals. In contrast to current prison "rehabilitative" measures – like prison work – that seek to help prisoners

self-reflect on their crimes, religion offers a pre-determined path to morality. The benefits of this would extend to the prisoner's post-incarceration life and aid with reentry into society. If a prisoner has spent their time in prison using religion as a way to connect spiritually with a wider community and self-reflect through guided moral values, then they will likely emerge from incarceration in a better state. In essence, this is the idea of rehabilitation, but few consider how religion – something that so widely exists – can be an immediate method by which this goal can be realized.

One may argue that this already occurs with the protections RLUIPA offers. For instance, a prison might argue that although a prisoner is limited from going to a Sunday prayer due to their work schedule, this does not violate their rights since the prisoner receives religious accommodations in the context of food. It is not for the prison to justify limiting some religious exercises in exchange for permitting others; if the Court's jurisprudence protects religious rights of prisoners, then nearly all practices should be permitted, save for ones that pose direct harm to others, as will be discussed. Religion is a holistic experience, and each practice makes its own nuanced contribution to the individual. To say that a Muslim inmate receives halal food but cannot go to Jumu'ah prayer would defeat the purpose of the initial accommodation in the first place. The central issue with RLUIPA, as I have mentioned, is that it permits limiting some religious practices in the name of compelling prison interests. But to truly reap the benefits of religion as a rehabilitative practice, prisons must be willing to accommodate widely for religious exercises and expand their allowances.

Moreover, expanding religious rights in prisons and the resulting self-reflective benefits for prisoners has a third key benefit that affects the prison institution: lowered resentment and violence. In the current prison system, the prison institution bears all control over prisoners. It not only limits rights, but also physically limits the prisoner and coerces them through, for instance, measures like the

cramped cell, forced labor, and limited prisoner autonomy. This type of coercive environment undoubtedly creates resentment, which has led to severe violence both among prisoners and against prison officials. The notion that religion can inspire prisoners to take initiative in pursuing their spiritual beliefs can also have a role in limiting their resentment toward the institution and consequent violence. While some may argue that this gives prisoners too much autonomy, when compared to coercive measures imposed by the prison community, it is more likely to facilitate overall rehabilitative goals. As I outlined earlier, if the premise of the prison is to rehabilitate prisoners, then giving them the self-initiative to pursue and practice their beliefs can negate the coercive environment that exists today, providing them with the necessary autonomy to function as independent human beings. With a spiritual community, as Brennan stated, to be part of, the prisoner furthermore has less of a reason to feel alienated, therefore decreasing violent inclinations.

There are two potential challenges to this idea. The first is that violence can occur in spite of a prisoner's religiosity or, rather, because of a prisoner's religiosity. However, because religious exercises that have the potential to impose direct harm or limit the rights of other prisoners are not protected under the doctrine of religion as rehabilitative, it is not the case that this concern would necessitate the elimination of all religious prison programs. Statistical studies have shown that allowing prisoners to participate in a religious program reduced the rates of new crimes post-incarceration by 14 to 40%, while similar secular programs reduced rates only by 5 to 10%.[16] Although correlation is by no means causation, data from such studies reveals that a positive correlation exists between prisoners' ability to partake in religious practices and the diminution of violent inclinations. Moreover, other research shows that religious involvement can "reduce prisoner misconduct" and serve as a "viable correctional intervention."[17]

The second challenge considers other rehabilitative methods

that may be "compelling interest[s]" on behalf of prisons to limit religious rights – for instance, prison work. In *O'Lone*, the prison used work to justify limiting prisoners' rights to attend a religious service, noting that prison work comes with rehabilitative benefits, such as discipline. However, there is a key difference between prison work and religious practice: the former is imposed by the prison while the latter is due to self-initiative. If a prison coerces inmates to work, they may not reap any rehabilitative benefits from the act; rather, the work may seem more punitive to them than rehabilitative. This is because resentment toward the prison institution created by act of forcing labor onto prisoners would negate any of the rehabilitative benefits that prison labor might provide them. Consequently, if prisons were to prioritize religion over initiatives like prison work, they would be able to better leverage these rehabilitative benefits by giving prisoners the agency to self-reflect in their own spiritual ways. This agency would, in turn, positively affect prisoners' reentry into society.

A similar logic exposes flaws of other state-imposed restrictions on prisoners' personal lives. In *Turner*, the prison argued that restricting marriage in the prison served a "rehabilitative goal" in that "woman prisoners needed to concentrate on developing skills of self-reliance."[18] Again, this "goal" is more coercive than rehabilitative, since it forces a policy onto prisoners rather than allowing them to be self-reliant. One might compare this contrast between prison guidelines to one between parenting styles. Whereas one set of parents might impose a set of overly coercive rules on their child that would have little impact on developing that child's independence, another might embrace a more hands-off approach and give their child more opportunities to take initiative. This analogy will serve useful when we consider the role of the state in reframing religion in prisons as rehabilitative, particularly with the existence of the Establishment Clause.

Now that I have outlined the elements of religion as a reha-

bilitative practice, I will discuss the nature of the prison suited to this type of doctrine. There are two visions of prison structures: the first is that of the existing prison – which I call the punitive – and the other is that of the ideal prison – the rehabilitative. As I mentioned earlier, the current prison system in the United States is largely punitive. With long sentences and unjust practices, like solitary confinement and use of violent force by guards, the prison system today focuses more on punishment than rehabilitation. However, the dire conditions of the prison have been at the forefront of national debate for years, and prisoners have taken the lead in revolting against them. In late 2016, more than 20,000 prisoners participated in the largest prison strike in the country to protest forced prison labor. While many advocates of prison labor discuss its "rehabilitative" benefits, prisoners are coerced into the practice by the prison institution.[19] Moreover, although rehabilitation is formally a prison objective – as the Court's opinion in *O'Lone* indicated – many prison officials still believe that punishment is the prison's priority. A 2008 report from The University of California, Berkeley found that a majority of prison officials think punishment is the prison's primary objective, while rehabilitation is a secondary objective.[20] Due to the current focus of prisons on security, efficiency, and concerns over administrative burdens, full rehabilitation would be incompatible with the current prison system. Nonetheless, fitting the rehabilitative doctrine into the current prison system might grant prisoners a tool to cope with dire prison conditions. This coping mechanism would bring about starkly different post-incarceration outcomes for prisoners, since they could use religion as an escape from the burdens of the prison system.

This is not to say that religion could not serve a rehabilitative function today, but rather to acknowledge that if religious programs were introduced into American prisons, tensions might arise between prisons' goals of maintaining order and the rehabilitative benefits of those programs. Additionally, since rehabilitation is

one of many "penological objectives," it may be difficult to realize the full extent of religion's rehabilitative benefits under the current system. Part of the discussion of this doctrine thus focuses on moving the prison toward the idealized form, the rehabilitative form, in which rehabilitation serves as the utmost penological objective. This movement will require flexibility on the part of the prison administration and, as I will discuss, a shift from the status quo.

IV. The Role of the State and the Establishment Clause

Thus far, I have recounted the evolution of the jurisprudence on religious rights in prison and outlined the doctrine of religion as rehabilitative. As I noted, a key element of this doctrine advocates for a greater expansion of religious rights that prioritizes religion over other prison objectives, like efficiency and work. With such an expansion of religion in the prison comes an inherent fear of violating the Establishment Clause. But, as this section will argue, the rehabilitative view of religion has a secular purpose that works in the interest of the prison.

One of the issues central to Establishment Clause jurisprudence has been religious funding in public institutions. More specifically, the past few years have seen extensive litigation around government funding for religious activities in prisons. In 2007, in *United for Separation v. Prison Fellow*, the United States Court of Appeals of the Eighth Circuit struck down a program in Iowa called the InnerChange Freedom Initiative program. The program described itself as "an intensive, voluntary, faith-based program of work and study within a loving community that promotes transformation from the inside out through the miraculous power of God's love." It sought to reduce rates of offense through a rehabilitative program that included religious teachings. At the center of the conflict was the fact that the state of Iowa funded part of the program. While no one was forced to join the program, those who chose to

were forced to take part in several religious classes. The Court ruled that the InnerChange program violated the Establishment Clause under the Lemon test, which will be shortly explained.[21]

The Supreme Court considered the question of the Establishment Clause in relation to RLUIPA years earlier in 2005 in *Cutter v. Wilkinson*. In the case, prisoners in Ohio had claimed that RLUIPA failed to accommodate their exercise of "nonmainstream" religions, and the prison officials argued that the Act improperly advanced religion and violated the Establishment Clause. The Court's opinion, written by Justice Ruth Bader Ginsburg, ruled that RLUIPA is consistent with the Establishment Clause since it "confers no privileged status on any particular religious sect, and singles out no bona fide faith for disadvantageous treatment."[22]

Because the prison is an inherently coercive environment and the doctrine of religion as a rehabilitative measure pushes for greater expansion of religious rights, one could argue that this doctrine would violate the Establishment Clause. The Establishment Clause's formal jurisprudence has used the Lemon test from the 1971 case *Lemon v. Kurtzman*. This three-prong standard notes that for a statute to be consistent with the Establishment Clause, it must have a secular legislative purpose, its principal or primary effect must neither advance nor inhibit religion, and the statute must not foster an excessive government entanglement with religion.[23]

Considering the Lemon test, there are three reasons why I argue that the rehabilitative view of religion is consistent with the Establishment Clause. First, the purpose of this view is to extract the secular benefits, namely the rehabilitative aspects, from religion. As the previous section demonstrated, these rehabilitative elements specifically work toward lessening the amount of violence in the prison and aid prisoners with reentry into society and self-reflection on their crimes. For these reasons, this proposed rehabilitative view of religion in prisons has a "secular legislative purpose." It is not that religion should be expanded in order to expand religiosity or

spirituality, but rather that it should be expanded so that both the prison and the prisoner can reap its secular rehabilitative benefits. For instance, a prisoner participating in a prayer group reaps the benefits of being part of a spiritual community and having an increased level of self-awareness and self-reflection. Religion is merely the avenue for these rehabilitative end results. Because the ultimate benefits have secular elements, they must be protected under the Establishment Clause.

Furthermore, the neutrality of the prison institution for which I argue is consistent with the second element of the Lemon test, which suggests that the state must protect all religions and neither privilege nor disadvantage any, thus neither "advancing" nor "inhibiting" religion. Part of this rehabilitative view of religion advocates for state protection of more religious exercises than currently exist under RLUIPA. This will be discussed in depth in the next section, but cursorily, this type of expansion of rights protections limits the state's discretionary powers over religious practices even further. As cases under RLUIPA have demonstrated, the prison still has a right to make decisions about the validity of a religious exercise, as the Court noted in *Holt*. Under this doctrine, however, the state must expand the allowance of religious exercises even further so as not to risk the advancement or inhibition of any particular religion. For instance, if the prison were to limit a prisoner's attendance to Jumu'ah for work scheduling reasons but allow another prisoner to attend Sunday prayer, this could come across as the advancement of one religion but the limitation of another. Of course, in this case, it may just be that the prison cannot afford to give the prisoner Friday off for purely logistical reasons, but equal protection should not account for prison efficiency. This will be discussed in depth in the following section.

Finally, in response to the third prong of the Lemon test, the nature of the state's role under this doctrine is entirely hands-off. It is not the case that the state is coercing prisoners to be part of re-

ligious programs, as had been true with the InnerChange Freedom Initiative program. Rather, the state has no role except to facilitate an environment where religion can widely exist and where prisoners can reap its rehabilitative benefits. While the prison will not actively endorse religion or coerce prisoners, it will be required to make accommodations to allow for religion. This takes the state out of the equation and gives the benefit of the doubt to the religion, challenging the Court's claim in Holt that the prison can judge the validity of religious claims.

One challenge to this view that we must navigate is what to do with non-religious rehabilitative practices. For instance, what would occur if a prisoner requests discussion groups that are not religiously motivated but would be "rehabilitative"? Or if a prisoner were to request permission to use drugs because it would be rehabilitative? Where is the line between allowing prisoners to reap the benefits of rehabilitation and allowing for some level of order in the prison? The answer here goes to back to the type of prison environment needed for this theory to work. Ideally, a prison should have the single objective of rehabilitating prisoners, and while religion is one avenue of doing so, others should also be permitted. Under this perspective, a prisoner should be permitted to be part of a discussion group if it means helping them rehabilitate. But the prison must take certain steps to ensure the validity of rehabilitation. First, it must make available the resources necessary for rehabilitation. For instance, in the case of a prison discussion about politics, this may include literature on politics or a prison administrator facilitating the conversation. Where the line is drawn – as I will discuss in the next section – is when a practice harms the prison environment directly by limiting the rights of others or by imposing a direct physical threat. Drug usage, for instance, would fall under this exception, since it would harm the physical institution of the prison itself or may cause the prisoner to have violent inhibitions as a side effect of drug usage.

This line of logic is consistent with my justification of religious expansions as compatible with the Establishment Clause. Since this doctrine serves to extract the rehabilitative benefits of religion for a secular purpose, it does not bar against other rehabilitative elements that are non-religious. In fact, the overall purpose of this doctrine is not to say that religion is the only means by which rehabilitation can be achieved. Rather, it advocates for expansion of religious rights as one of many avenues for rehabilitation, focusing specifically on the jurisprudence of RLUIPA. Because RLUIPA is the most expansive enumeration of rights guaranteed for prisoners, it provides a strong foundation for further criminal justice reform. Moreover, because religion is so often fundamental to an individual's life in the same way that a culture or another identity might be, there should be more focus on it than non-religious rehabilitative elements. The very nature of religion as fundamental to a human can make it a more powerful avenue by which to affect change. But while this paper focuses on religion specifically, it is also necessary to go on further to discuss other rights of prisoners within the rehabilitation framework in another context.

This next section will focus on application of this principle, especially looking at where exceptions must warrant limitations on religious rights. While an ideal prison system would not have to be concerned with prison security, it is a legitimate concern in the contemporary American prison and thus will be discussed extensively. The application of this doctrine focuses on the types of religious accommodations that should be widely permitted, as well as those that are not compatible with the prison system. Generally, it will advocate for flexibility with prison administration and agency, which requires significant reform compared to the current system.

V. Laying out the Principle in Reality

Now that the doctrinal elements of viewing religion

through a rehabilitative framework have been laid out, how would this work in practice? As I have mentioned, the key reform that this doctrine brings to the current jurisprudence is an expansion of religious rights so that the benefit of the doubt goes to the religion rather than the prison administration. This requires a shift in prison efficiency and order and flexibility on the institution's part.

Based on this doctrine, religious accommodations should be guaranteed even when the prison is disadvantaged administratively. A Pew Forum survey indicated that the most common religious accommodations requested by prisoners include religious texts, meetings with faith leaders, special religious diet, religious items or clothing, and special hairstyle or grooming. Currently, many of these accommodations are granted but at the will and ease of the prison administration. Of course, the prison must take the burden of explaining their "compelling interest" should they limit a right, but ultimately, the Court has protected the prison's right to have discretion over religious rights when prison security and order are in danger. But many of these accommodations do not pose a danger, yet might still warrant limits under the strict scrutiny standard. For instance, the prison could argue that religious texts would indoctrinate prisoners and cause extremism, thus violating a "compelling prison interest." But I argue that under this doctrine, prisoners should have full access to elements that constitute the religious experience, including access to texts and communal meetings. Without these key elements, the religious experience would be incomplete.

Of course, one might argue that prison order is necessary. Some might also argue that prison labor should be a top-most priority for prisons, since prisoners have wronged society and must pay back through work. As I mentioned previously, the act of imposing labor onto the prisoner neither helps them nor the prison institution; in fact, it fosters resentment and negates any potential rehabilitative benefits that work would otherwise produce. Moreover,

efficiency and administrative burdens are not reason enough to limit fundamental rights. The Constitution protects religious rights, not the prison's ability to control with ease. Rather, administrative burdens can easily be worked around. One only must look at the Court's opinion in *Holt* to grasp this notion. In the case, the prison argued that Holt's beard would be a security threat, in that he could either bring in contraband or change his identity. The Court responded by saying that these two concerns could be mitigated with two fixes, either a search into the beard or a before-and-after photo to prevent identity changes. In this opinion, the Court endorsed the idea that the prison can reform itself if it means protecting a religious right. Similarly, I would argue that in *Shabazz*, the prison could have reorganized the work schedules to allow the two Muslim inmates to attend Jumu'ah. While the prison argued that this would require extra human resources, this is not sufficient enough to strike down a right, especially one that includes allowing a prisoner to attend a fundamental religious service. The argument that prison order and efficiency is important beyond all is intrinsic to the punitive view of prison. With a shift toward rehabilitation, however, this must take second priority to the rights of prisoners that will ultimately rehabilitate them and aid them with reentry into society.

The security element of prisons cannot be ignored in order for this doctrine to be pragmatic. For this reason, it is important to outline where exceptions are warranted to limit religious rights. I argue that religious rights can be limited by the prison when there are two types of third-party harm: the first is a potential direct physical harm to another prisoner or guard, while the second focuses on a direct limitation of another's fundamental right. Starting with the first, the types of practices that would fall under this would include the use of items or practices that could cause physical harm to others.

For instance, the practice of carrying a kirpan – or dagger – in Sikhism would be prohibited under this first prong, since it could directly cause a physical harm onto another individual in the prison. Moreover, the use of drugs or substances for religious ceremonies would not be permitted either, such as the use of peyote. The act of using a drug not only physically harms the prison institution – often because of the presence of a flame or fumes – but also may engender violent inhibitions within prisoners due to their mind or body-altering effects. Similarly, let us say that a prisoner's religion requires cock fighting as a practice. This would be struck down due to its physical incompatibility with the prison institution; not only is there no space for this, but it could also pose a physical threat to other prisoners. In regards to the second prong, the types of practices that would be limited would include those that limit the rights of others. For instance, consider a religion that upholds white supremacy. While the prisoner is free to believe in this religion by virtue of their First Amendment rights, they would be limited in acting upon practices that put forth white supremacist notions. They would not be permitted to put up swastikas around their cell, since this would be a direct limitation of others' rights, particularly those affected by the symbol and its brutal history. The underlying thread of this limitation is equality for all prisoners. Thus, the root of limitations on religious practices within this doctrine is not related to the interest of the prison, but rather to the equality and well-being of other prisoners. Part of the reframing of religion serves to take away from focusing on the needs of the prison and, instead, place the prisoner and their needs at the center, complementing the overall rehabilitative view.

Logistically, the notion of a rehabilitative view of religion is not unprecedented in the American prison system. A study done in 2005 found that 19 states had some form of a residential faith-based program with the goals of ethical decision-making, anger management, victim restitution, and substance abuse. In one

example, the Lawtey Correctional Institution in Florida is in the midst of an experiment in rehabilitation using religion. As the first faith-based prison in the country, it requires prisoners to attend "character-improvement programs" that are based off of a variety of religious teachings.[24] The program is compatible with the Establishment Clause's requirements, since the prisoners have to apply into the program and are not forced to go to services. Inmates participate in prison activities run by representatives from several faiths, and volunteers serve as personal mentors. The program thus far has yielded low recidivism rates, indicating positive effects from the rehabilitative program. But the program – like others in the country – measures success based on recidivism rates. While this is an important form of a measure, it should not be the only one to determine the success of a rehabilitative program. Rather, evaluators of these programs should also look at violence rates within the prison, as well as qualitative data about prisoners' experiences going through this program.

With the doctrine and application outlined, there is one last element that has not been discussed yet. Staunch opponents of such an expansion of religion in the prison will undoubtedly point to prison radicalization as a problem. The notion of radicalization is widespread in society, but very few incidents translate into acts of terrorism. Many of these opponents point specifically to "radical Islam," since Islam is one of the most common religions for prisoners to convert to. But one must look into the conditions of prison that give rise to prison radicalization. An FBI Law Enforcement Bulletin explained the reason for the phenomena as a cause of the prison environment providing a "captive audience of disaffected young men easily influenced by charismatic extremist leaders."[25] With an environment where resentment toward the prison administration and criminal justice system is widely fostered, prisoners need a cause to turn toward, and the prison environment provides an ideal place for so-called "charismatic" leaders to take advan-

tage of this hostility toward the authorities. The problem, therefore, roots from two areas: prison resentment and a lack of proper teaching of religion. As a result, the solution is two-fold. With this doctrine of religion as rehabilitative, the goal is that the prison will start reforming itself to become more of a rehabilitative environment overall, with one objective of decreasing resentment, as I have outlined. While the natural response to prison radicalization might be a limitation on rights, this would only further resentment and increase the likelihood of more radical behaviors. By giving prisoners the autonomy to practice religion and reap its rehabilitative benefits, they will face less coercion from the institution and more reason to better themselves for their lives post-incarceration.

In response to the "radical Islam" counterargument, it is key to note that Islam has been the one religion to play a large part in securing religious rights for prisoners. Muslim populations in the prison have been "at the center of administrative and legal reform movements," filing the most claims under RLUIPA from 2001 to 2006. It was a Muslim inmate who won the ruling in *Cooper v. Pate* that gave prisoners the right to sue in federal court. Moreover, black Muslim prisoners have been the primary actors to have obtained constitutional rights for the incarcerated population. In fact, Islam is the most common religion to convert to among prisoners. But the notion that the omnipresence of this religion engenders radicalization is a biased look into the issue at hand, particularly when considering that the teachings of radical religion within the prison root from powerful inmates aiming to take advantage of others rather than Islam itself.[26]

Moreover, the expansion of rights that this doctrine advocates for would alleviate concerns about lack of education, since the prison should provide prisoners with proper religious texts if requested. Many prisons currently have robust chaplain programs that allow for formal teachings of religions, eliminating the likelihood that "radicals" will wrongly educate the rest of the remaining

population. Thus, as prisons begin to adopt this idea of rehabilitative religion, they should consider looking at chaplain programs as a way by which to implement this. The concern here is, of course, in regards to the Establishment Clause: If prisons implement chaplain programs, would they not be endorsing religion? Moreover, how can a prison account for the multitude of religions among its prisoners? The key here is the hands-off approach. By providing chaplains, the prison is neither coercing prisoners nor endorsing any particular religion. If a prisoner asks for a chaplain of a particular faith, it would be the prison's responsibility to accommodate this prisoner under this doctrine. The goal of this doctrine is to create an environment where religion can be properly practiced so that prisoners can reap the full rehabilitative benefits of it.

VI. Conclusion

As the Supreme Court grapples with questions of religious rights within the prison, it should consider reframing its framework of religion to one that views it as rehabilitative. As I have outlined through this paper, the rehabilitative benefits of religion are widefold, and both empirical data and logical connections suggest that religion can play a part in improving the prison environment while aiding prisoners with their self-reflection and post-incarceration re-entry processes. While the jurisprudence of religion in prisons through RLUIPA gives it the highest level of scrutiny, I argue that the Court still prioritizes the prison's interests far too much, creating an illusory protection for religious rights. Religion plays a fundamental role in many individuals' lives, and restricting it in the prison in any form – even to the extent RLUIPA does today – can be detrimental to the rehabilitation of prisoners. Rather, through this doctrine, the Court should allow nearly all religious accommodations, even at the expense of the prison's administrative burdens and efficiency. The rehabilitative benefits of religion are far too

powerful to warrant limitations in the name of prison interests. Because of the hands-off approach of the state and years of well-established precedent cases, this doctrine is compatible with the Establishment Clause.

However, religious rights in the prison should be limited when they limit the rights of other prisoners, either due to the potential for physical harm or because of a restriction on their own rights. As I mentioned, examples of this would include the carrying of the kirpan in Sikhism or practices that advance white supremacism. In essence, the underlying basis of this doctrine focuses on the prisoner's needs rather than the prison's order and efficiency. Altogether, this doctrine shifts the idea of punishment away from the status quo of punition toward a system of criminal justice that emphasizes rehabilitation. While changing the prison structure entirely to prioritize rehabilitation over punition is not feasible as a short-term goal, this doctrine allows for a pragmatic step forward in making this shift.

[1]"Title 42— The Public Health And Welfare." DOJ Civil Rights Division. August 6, 2015.

[2]Holt v. Hobbs, 574 U.S. __ (2015)

[3]O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987)

[4]Dammer, Harry. "Religion in Corrections." The Encyclopedia of Crime and Punishment, Vol. 3. University of Scranton, 2002.

[5]U.S. Const. amend. I. clause I.

[6]Liu, Joseph. "Religion in Prisons - A 50-State Survey of Prison Chaplains." Pew Research Center's Religion & Public Life Project. March 22, 2012.

[7]Pervear v. Massachusetts, 72 U.S. (5 Wall.) 475 (1866)

[8]Cooper v. Pate, 378 U.S. 546 (1964)

[9]Cruz v. Beto, 405 U.S. 319 (1972)

[10]Turner v. Safely, 482 U.S. 78 (1987)

[11]O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987)

[12]Religious Land Use and Institutionalized Persons Act. Library of Congress, Congressional Research Service (2000) (enacted).

[13]Cutter v. Wilkinson, 544 U.S. 709 (2005)

[14]Turner v. Safely, 482 U.S. 78 (1987)

[15]O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987)

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[21]Americans United for Separation v. Prison Fellow, 509 F. 3d 406 (2007)

[22]Cutter v. Wilkinson, 544 U.S. 709 (2005)

[23]Lemon v. Kurtzman, 403 U.S. 602 (1971)

[24]Holguin, Jaime. "Rehabilitation Through Religion." CBS News. June 30, 2005.

[25]"Prisoner Radicalization." FBI Law Enforcement Bulletin. October 11, 2010.

[26]SpearIt. "Religion as Rehabilitation? Reflections on Islam in the Correctional Setting." Whittier Law Review, Vol. 34. (2012)

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Threatening Commerce: The Commerce Clause and Federalized Crime

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Abstract

This essay, titled "Threatening Commerce: the Commerce Clause and Federalized Crime," traces the evolution of the Commerce Clause in American legal history. On November 29, 2015, Jabari R. Dean threatened the campus of the University of Chicago by claiming on an online forum that he would massacre 16 white men on the main quadrangle. Later investigation found that Mr. Dean had no intention of carrying out the threat, nor had he any means to do so. However, Mr. Dean was still charged under the commerce clause of the constitution. This essay explains why Jabari R. Dean's online threat found itself under federal jurisdiction, and how the commerce clause has been used for a variety of legal procedures that may, on the surface, seem only tangentially related to the federal power of "regulating interstate commerce."

I. Introduction

On the Sunday of November 29, 2015, all faculty, staff, and students of the University of Chicago received an email declaring a campus lockdown on the following Monday. Someone had threatened on an online forum to conduct a gun massacre, claiming that he would shoot 16 white men on the main campus quadrangle at 10 am. The man who was later found guilty of writing the online threat, Jabari R. Dean of Chicago, was charged by a federal authority of transmitting a threat in interstate commerce.[1] The affidavit that charges Jabari R. Dean draws its authority from Title 18 of U.S. Code § 875, section (c). The law reads "Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both."[2] U.S.C § 875 was passed on June 25, 1948, and relates expressly to interstate commerce. That this particular federal criminal law rests on Congress' power to regulate commerce is a result of the complex, and often contested, history of the commerce clause. This essay explicates what seems like a bizarre feature of American federalism, the use of the Commerce Clause for what appear to be tangentially related matters, and argues that given the unique history of the Clause, use of Section 875 is appropriate.

II. The Commerce Clause: Expansion and Interpretation

The first major interpretation of the commerce clause was in *Gibbons v. Ogden* (1824), which defined commerce as "intercourse between nations, and parts of nations, in all its branches,"[3] and therefore arrogated to the federal government the power to control interstate navigation. Moreover, the power of Congress to regulate this intercourse was "supreme" and if a state law contradicted

Congress, the law would have to yield to Congressional statute. *Gibbons* thus created the stage for future expansion of Congressional power and the commerce clause in both the 19th and 20th centuries, and was used repeatedly as justification for expansion of federal jurisdiction, putting ever more issues under the eyes of Congress. Edward A. Purcell credits the growth of the federal government to the denser and growing web of economic, social and cultural exchange that connected Americans from coast to coast, enabled by industrial and informational technology. He writes, "What in 1789 had been a collection of geographically rooted, locally oriented, and culturally diverse island communities had by 1920 become an increasingly mobile, nationally oriented, and economically and culturally integrated nation."[4]

The growth of the federal government's reach was due to more than economics, however, as concepts such as "state sovereignty", and "states' rights" came to be associated with states' attempts to discriminate against black citizens and enforce segregation.[5] The federal government, in attempting to outlaw discrimination, relied on the Commerce Clause. The Civil Rights Act of 1964 prohibits race-based discrimination in public places like restaurants, entertainment venues, and used the phrase "affects commerce" to tie the legislation back to its enumerated Commerce power.[6] For example, in Title II of the Act, Section 201 (a) grants that "all persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, and privileges, advantages, and accommodations of any place of public accommodation," and part (b) of the same section defines the phrase "public accommodation." The definition states that anywhere is a place of public accommodation "if its operations affect commerce."[7]

Why would Congress not rely on the power enumerated in the Fourteenth Amendment to outlaw discrimination? The Fourteenth Amendment, ratified in 1866, reads expressly that "No State

shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United State; … nor deny to any person within its jurisdiction the equal protection of the laws."[8] Highlighting that Congress would be able to give the amendment power with legislation, the last section of the Fourteenth Amendment, the fifth, reads, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[9]

Yet the scope of the Fourteenth Amendment was narrowed prior to 1948, the year in which the code being investigated in this essay was passed. In the *Slaughterhouse Cases* (1873),[10] Justice Miller found that the right to practice a trade did not fall under the "privileges or immunities" of citizens of the United States. In dicta, Miller distinguishes between holding citizenship of a state, and holding citizenship of the United States; the latter confers far fewer privileges and immunities than those of state citizenship. He writes, "the entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal government."[11] One of the first iterations of the Civil Rights Act, passed in 1875, was also struck down by the court on the grounds that it was not supported by the Fourteenth Amendment.[12] The Civil Rights Act of 1875, similar to its later relative, the Civil Rights Act of 1964, attempted to outlaw the barring of individuals from public places on the basis of race. It reads, "That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns."[13] The Supreme Court found this unacceptable, however, ruling that the Fourteenth Amendment was by nature prohibitive. It allowed Congress to legislate against already existing State laws that abridged the privileges or immunities of United States citizens, but not to enact positive legislation to secure those rights.[14]

With the Fourteenth Amendment eliminated as a source of

jurisdictional power, Congress sought alternate sources on which it could legislate on politically and racially contentious matters. Congress found this alternative source in the Commerce Clause. This is not to assert that Congress started to legislate on federal criminal law because the Fourteenth Amendment was unavailable, as it is likely the Fourteenth Amendment would have been inapplicable to criminal statutes. Rather, Congress was reminded of the ability and willingness of the Supreme Court to strike down statutes that were found to be unsatisfactory uses of constitutional power. Purcell cites a useful figure: from 1789 to 1860, the Supreme Court voided 60 state statutes and 2 federal ones, but in the much shorter period from 1898 to 1937 voided 400 state statutes and 50 federal ones on grounds that they were unconstitutional.[15]

III. Congress Creates the New Category of Federal Crime

From 1800 to 2000, Congress began to increasingly regulate crimes that crossed state borders. In this period, there was a large expansion of the area known as 'federal crime', as opposed to crime that was purely the concern of local authorities. For example, in 1800, there were only 17 crimes listed in the federal category, whereas by 1995, that number had exploded to over 3000.[16] Kathleen Brickey attributes the expansion of federal jurisdiction to technological and economic changes that knit the United States, as a country, ever closer without regard to state borders. The invention of technology such as cars, planes, trains, and railways accelerated the speed of cross-state border movement of people and articles of commerce.[17] A common crime in the early 20th century was trans-state automobile theft. Thieves would often steal cars, in say, Illinois, and then quickly drive across the Wisconsin border, where they would be beyond the reach of Illinois law enforcement. In order to prosecute the thief, Wisconsin authorities would have to

cooperate with those of Illinois to first catch the thief and then extradite him to Illinois, a process fraught with bureaucratic red tape.[18]

Congress' solution to this problem was to pass the Dyer Act (1919), which federalised the crime of stealing automobiles and airplanes. The statute used the phrase "interstate or foreign commerce", thus making it clear that Congress derived the power to legislate on this issue from the Commerce Clause. The act, passed October 29, 1919, reads "Whoever transports in interstate or foreign commerce a vehicle, vessel, or aircraft, knowing the same to have been stolen, shall be fined under this title or imprisoned not more than 10 years, or both."[19] This was the first instance in which federal crime was linked to commerce, and furthermore, the nation's courts were willing to uphold such an expansive definition of commerce.

In *National Labor Relations Board v. Jones & Laughlin*[20] (1937) the court upheld a substantially expanded view of Congress' power under the commerce clause. The case arose as a dispute between the National Labor Relations Board (NLRB), a federal authority created by the National Labor Relations Act of 1935, and the Jones & Laughlin Corporation, a vast steel-manufacturing conglomerate with operations in numerous states, including Illinois, Michigan, New York, and Pennsylvania. The NLRB tried to enforce labor regulations within the corporation, which had intimidated and coerced its employees into declining union membership. Jones & Laughlin sued in court, alleging that the NLRB overstepped the bounds of federal authority and claiming that labor relations were not included in the definition of "interstate commerce." The court instead found that activities that affect, burden, or obstruct commerce were within congressional power. Chief Justice Hughes wrote, "It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power… It is the effect upon commerce, not the source of the injury, which is the criterion."[21]

Congress' power to regulate labor relations thus depended on the effect of these relations upon commerce. Commerce-affecting activities did not need to be purely interstate either. Hughes describes the activities of Jones & Laughlin as a "stream of commerce." This stream of commerce necessarily crosses state lines, but in each state there is a critical juncture, or throat, at which any interruption in the stream of commerce would allow Congressional regulation. Hughes continues, "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."[22] Thus, due to Jones & Laughlin, the Supreme Court reaffirmed Congress' power to regulate purely intrastate activity under the interstate commerce clause, so long as it had a substantial effect on interstate commerce.

IV. How Jabari R. Dean found himself under the Commerce Clause

In the current case, the charged, Jabari R. Dean, was a student at the University of Illinois-Chicago. He posted his online threat on the World Star Hip Hop online forums, a site for general multimedia sharing, discussion of hip hop, culture, current events, and social media. The threat reads:

> This is my only warning. At 10 a.m. on Monday mourning (sic) I am going to the campus quad of the University of Chicago. I will be armed with a M-4 Carbine and 2 Desert Eagles all fully loaded. I will execute approximately (sic) 16 white male students and or staff, which is the same number of time (sic) Mcdonald (sic) was killed. I then will

> die killing any number of white policemen that I can in the process. This is not a joke. I am to do my part to rid the world of the white devils. I expect you to do the same…[23]

The threat thus involves entirely an intrastate activity, of movement from the campus of the University of Illinois-Chicago, in downtown Chicago, to the campus of the University of Chicago, situated 7 miles south. Moreover, the threat is not remotely economic, yet the affidavit still tersely reads, "there is probably cause to believe that … Jabari R. Dean, transmitted in interstate commerce communications containing a threat to injure the person of another, in violation of Title 18, United States Code, Section 875(c)."[24]

This was indeed within the Commerce Clause's power, and courts have concurred, even in the cases where the threat made is one, intrastate, and two, non-economic in nature. For example, in 2008, U.S. v. Li, 537 F. Supp. 2d 431 (N.D. N.Y. 2008), one Xiang Li was charged with a violation of 875(c) after sending threatening emails to faculty members of Morrisville State College, in Morrisville, New York.[25] One of the e-mails sent to the Dean of the College, for example, reads "You will die soon, mother fucker. But you will watch your son die first." The defendant moved to dismiss the indictment, on the grounds that none of these threats were transmitted in interstate commerce, as in our Jabari R. Dean case, where all the threats were made online inside the strict boundaries of a state (New York in this example). In the Morrisville case, the Court held that the defendant did not need to know that his communications would cross state borders, as is necessarily the case with the Internet.

The New York District Court referenced a federal court decision, in this case made by the Fourth Circuit in 1994. *United States v. Darby*[26] insisted that "numerous cases have held that criminal statutes based on the government's interest in regulating interstate commerce do not generally require that an offender have knowledge

of the interstate nexus of his actions." The "interstate" aspect of 875(c), as written by the Court, is thus a useful place for Congress to draw its authority, and does not need to be fulfilled strictly to the letter. The Judge wrote, "the element of interstate commerce is simply a 'jurisdictional peg' on which to hang the federal prosecution."[27] Regarding the Jabari R. Dean case, a teenager in New York State viewed the online posting, and quickly notified Federal Bureau of Investigation (FBI) authorities in New York.[28] Therefore, even though Jabari R. Dean did not intend to transmit interstate threats, the efficacy and speed with which the internet transmitted information over state lines provided the 'interstate' element necessary to charge him under 875(c).

Moreover, threats liable to prosecution under 875(c) do not need to be remotely related to commerce or economic activity, so long as they are transmitted in a commercial manner. For example, in *United States v Kelner* (1976, CA2 NY) 534 F.2nd 1020, the Second District Court dealt with a case of one Russell Kelner threatening one Yasser Arafat with assassination in 1974. The threat was made at a press conference which was then broadcast to televisions nationwide, thus satisfying the "interstate" criterion. Since the televised broadcast necessarily involved a commercial element, the judge determined that "Kelner's choice of a method of transmitting his threat, a telecast reaching three states which is plainly "in commerce," brings him within the literal scope of the statute."[29] Therefore, the original threat of assassination for a non-commercial and non-economic reason was construed to fall under 875(c) by its means of transmission.

The statute also does not require that the threat be directly communicated to the person or persons under threat. The court held that even if the threat never directly made its way to Yasser Arafat, to argue that an indirect means of transmission did not satisfy the "communications" aspect of 875(c) would poke enough holes in

the statute as to render it useless. Kelner wished to dismiss the charge that he had communicated a threat in interstate commerce by arguing that the medium of transmission, a television broadcast, provided the threat to a large and indefinite audience. The court responded that "If appellant's contention were accepted, any would-be threatener could avoid the statute by seeking the widest possible means of disseminating his threat."[30] The court thus construed 875(c) expansively, deciding that it was the medium of threat transmission that was of critical importance, not the commercial or non-commercial content of the threat.

Finally, in order to be charged under 875(c), the statute does not require an ability to carry out said threat. Relying again on *United States v. Kelner*, the Judge poses the question of "whether an unequivocal threat which has not ripened by any overt act into conduct in the nature of an attempt is nevertheless punishable." The text of 875(c) criminalises, under federal authority, the action of transmitting a threat, not the ability to carry out the threat itself.[31] Thus, in Jabari R. Dean's case, after Federal investigators failed to find any arms that could be used to carry out his threatened massacre[32] he was still liable to be indicted under 875(c).

Federal and District Courts interpreted the language of 875(c) in an extremely broad manner, in a way that Kelner alleged had violated his First Amendment rights. The commerce clause was construed so expansively under 875(c) that there was a perceived threat to free speech protected by the First Amendment. The *U.S. v. Kelner* judge responded by devising a "test" to ascertain whether threats made were sufficiently harmful to endanger other compelling state interests. One example of such an interest was the "robust political debate necessary to a democratic society," and whether the threat put this vibrant debate in jeopardy. The test consisted of determining whether the given threat was "unequivocal, unconditional and [had] specific expressions of intention." The Second

District Court found Kelner's words so, citing "We are planning to assassinate Mr. Arafat," as unequivocal and unconditional in nature. The court proved immediacy by citing "We have people who have been trained and who are out now." Jabari R. Dean's threats would have been charged under the same test, given his unequivocal and unconditional statement:"I will execute aproximately (sic) 16 white male students and or staff, which is the same number of time (sic) Mcdonald (sic) was killed." The threat was also immediate: "This is my only warning. At 10 a.m. on Monday mourning (sic) I am going to the campus quad of the University of Chicago… This is not a joke." It does not heed ability to execute threats or intentions to transmit those threats through interstate commerce, and it is qualified against the First Amendment.

V. Conclusion

In conclusion, the power of the Commerce Clause has expanded significantly over the course of the last two centuries, as Congress consistently tested the limits of its jurisdiction. Courts were complicit, repeatedly upholding the wide interpretation of the Commerce Clause. Economic and technological change in the form of railways and trains in the industrial era originally helped to expand the Federal Government's reach, but this process has continued unceasingly in the development of communications technology, like the internet and anonymous online forums, that creates ever more rapid and dense exchange across state borders. The Commerce Clause helped to federalise crime, such that an unwitting undergraduate writing an anonymous threat online, with no intent or means to execute it, can be charged under Congressional authority.

[1] The exact text reads "transmitted in interstate commerce communications containing a threat to injure the person of another."

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[2]"18 USC Ch. 41: EXTORTION AND THREATS." 18 USC Ch. 41: EXTORTION AND THREATS. United States Congress, accessed December 11 2015.

[3]Gibbons v. Ogden, 22. U.S. 2 (1824)

[4]Purcell, 130. Purcell, Edward A. Originalism, Federalism, and the American Constitutional Enterprise: A Historical Inquiry (New Haven: Yale UP, 2007), 130.

[5]Id, 130.

[6]"OurDocuments.gov." Welcome to OurDocuments.gov. 100 Milestone Documents, 2 July 1964. Web. Accessed December 11 2015.

[7]Id.

[8]"Fourteenth Amendment." Library of Congress. United States Congress, 9 July 1868. Web. Accessed December 11 2015.

[9]Ibid.

[10]The Slaughterhouse Cases 83 U.S. 36 (1873), 13.

[11]Id. 13

[12]Civil Rights Cases 109 U.S. 3 (1883), 2.

[13]Id, 2.

[14]Id, 2.

[15]Purcell, Edward A. "4." Originalism, Federalism, and the American Constitutional Enterprise: A Historical Inquiry. New Haven: Yale UP, 2007. 127-74. Print.

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[17]Id, 29.

[18]Id, 29.

[19]"Title 18, U.S. Code 2312." Transactional Records Access Clearinghouse, Syracuse University. Syracuse University, n.d. Accessed Web. 11 Dec. 2015.

[20]National Labor Relations Board v. Jones & Laughlin Steel Corp. 301 U.S. 1 (1937), 2.

[21]Id. 8

[22]Id, 11.

[23]Burke, Sean. "Jabari Dean Criminal Complaint." Scribd. DNAInfo Chicago, 28 November 2015. Accessed 11 December 2015.

[24]Ibid, 4.

[25]United States v. Li, 537 F. Supp.2d 431 (N.D.N.Y. 2008)

[26]United States v. Darby, 37 F.3d 1059, 1067 (4th Circuit, 1994).

[27]Ibid, Section III.

[28]Cohen, Jodi S., Jason Meisner, and Lolly Bowean. "Feds: Man Who Made Threat at U. of C. Had No Weapons to Carry out Killings." Chicago Tribune, December 1, 2015. Accessed December 11, 2015.

[29]United States v. Russell Kelner, 534 F. 2nd, 1020, 23.

[30] Id, 23.

[31]Id, 24.

[32] Cohen, Jodi S., Jason Meisner, and Lolly Bowean. "Feds: Man Who Made Threat at U. of C. Had No Weapons to Carry out Killings." Chicago Tribune, December 1, 2015. Accessed December 11, 2015.

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