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THOMAS BECKET AFFAIR

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A PRIMER ON THE ORIGINS AND IMPLICATIONS OF THE THOMAS BECKET AFFAIR

*R. Jason Richards**

Chorus: Here let us stand, close by the cathedral. Here let us wait. Are we drawn by danger? Is it the knowledge of safety, that draws our feet towards the cathedral? What danger can be for us, the poor, the poor women of Canterbury? What tribulation with which we are not already familiar? There is no danger for us, and there is no safety in the cathedral. Some presage of an act which our eyes are compelled to witness, has forced our feet towards the cathedral. We are forced to bear witness.¹

I. INTRODUCTION

This article examines the twelfth century controversy between Henry II and Archbishop Thomas Becket. Although the struggle

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¹ Michael Scott Freeley, *Towards the Cathedral: Ancient Sanctuary Represented in the American Context*, 27 SAN DIEGO L. REV. 801, 801 (1990) (quoting T.S. Elliot, *Murder in the Cathedral* 11 (1935)).

between these two individuals occurred during the distant centuries in medieval England, the ramifications of their conflict remains with us today, both spiritually and legally. It is for this reason that we explore this topic again.

II. CANON LAW

Before the Norman Conquest, the Catholic Church's influence was not widespread in England.² As a result, there existed in England a singular tribunal consisting of both the bishop and the Earl whose responsibility it was to determine all controversies of legal significance, both lay and ecclesiastical.³ Accordingly, no distinct separation existed between church courts and secular courts prior to the Conquest.⁴ Not only were the two courts closely linked, but initially, the mood of the ecclesiastical courts and royal courts generally was one of compromise and reconciliation.⁵ Over time, however, the legal disputes between lay and ecclesiastical members of the two competing establishments would become increasingly contentious. This, in turn, led William the Conqueror to carry out the promise he had made prior to his conquest of England – to set up separate ecclesiastical courts in England in exchange for the Pope's blessing of his ideological campaign.⁶ In doing so, he removed suits "which belong to the government of souls" from lay tribunals to ecclesiastical tribunals, thereby permitting the legal separation of the two courts.⁷ It was through this division that William, perhaps unintentionally, set in motion the struggle between church and state courts that would last well beyond his reign.⁸ William's approach disrupted the traditional cooperative atmosphere that had previously existed between bishops and laypeople.⁹ Before William's reign,

² ROSCOE POUND, *THE HISTORY AND SYSTEM OF THE COMMON LAW* 40 (New York: P.F. Collier & Sons, 1939).

³ W.R. Jones, *The Two Laws in England: The Later Middle Ages*, 11 J. CHURCH & ST. 111, 116 (1969)

⁴ Jack Moser, *The Secularization of Equity: Ancient Religious Origins, Feudal Christian Influences, and Medieval Authorization Impacts on the Evolution of Legal Equitable Remedies*, 26 CAPITAL U. L. REV. 483, 515 (1997).

⁵ *Id.*

⁶ *Id.* at 516.

⁷ *Id.* at 517.

⁸ *Id.*

⁹ *Id.* at 519.

ecclesiastical judges could participate in the adjudicatory procedures of state courts, and bring actions of an ecclesiastical nature before the secular courts to be decided according to temporal laws.¹⁰ After the division of power, however, they could do neither of these things.

By necessity, the dispensation of justice would thereafter be determined by two types of courts – ecclesiastical and secular (lay) jurisdictions.¹¹ Not surprisingly, church courts did not implement English customary law in administering justice within their own tribunals; rather, these new ecclesiastical courts applied the medieval canon law of the Catholic Church.¹² Because these canon precedents were strongly based on Roman Law, they were by this time a well-established body of developed law, especially in the areas of crime and criminal procedure.¹³ For this reason, church courts claimed the authority to preside over a wide range of legal issues.

To illustrate, the English church courts dealt not only with crimes and public offenses against morality, but also with secular matters.¹⁴ Ecclesiastical courts claimed broad authority to regulate virtually every aspect of daily life of lay society, both among the clergy and the laity.¹⁵ They believed they were endowed not only with the legal right but also the moral duty to subvert all religious or moral ideas that deviated from traditional orthodox Christian norms.¹⁶ Unorthodox views, they believed, threatened not only the salvation of the individual, but also threatened to infect society in general.¹⁷ As one commentator summarily stated, “[i]t would have

¹⁰ *Id.* at 517.

¹¹ *Id.*

¹² *Id.* At the time of Henry I (1100-1135), England had a strong administrative mechanism for resolving disputes, but the mechanism relied more on Anglo-Saxon law as it had evolved from local custom than from any real common law system. POUND, *supra* note 2, at 41. The body of law known as the common law would not begin to evolve in England until the reign of Henry II (c. 1154). *Id.*

¹³ R.H. Helmholz, *The Early History of the Grand Jury and the Canon Law*, 50 U. CHI. L. REV. 613, 617 (1983).

¹⁴ *Id.*

¹⁵ THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 219 (Rochester, New York: Lawyer’s Co-operative, 1929); JAMES A. BRUNDAGE, *MEDIEVAL CANON LAW* 70 (New York, New York: Longman Group, 1995).

¹⁶ *Id.*

¹⁷ *Id.*

been difficult, indeed almost impossible, for an individual, regardless of social status or occupation, to remain untouched from one year's end to the next by the canonical regulations."¹⁸ It was on this basis that church authorities claimed the right to regulate all commercial and non-commercial activity, matters of a sexual nature, legitimacy issues, labor concerns, testamentary succession, matters relating to the poor and disadvantaged, and the burial of the dead.¹⁹ Throughout this period the church courts endeavored to make their legal system conform as much as possible to the ideal of Christian conduct, and to lessen the gap between law and moral conduct.²⁰

Similarly, ecclesiastical courts claimed the right to prosecute and, if necessary, excommunicate those individuals whose views offended the church's values.²¹ The most frequently tried issues in church courts were those of a criminal nature,²² for church authorities had to try all crimes committed by clerics (or clerks) of whatever description.²³ Thus, anyone who enjoyed the privileges of clerical status - monks, hermits, nuns, and the like - were subject to the jurisdiction of the church.²⁴ It is important to note, however, while the church may have cast a wide net insofar as its claim of authority to resolve legal actions among clergy and laypersons alike, its assertions were at all times subject to the power granted the church courts by the English crown.²⁵ For this reason, conflicts would soon arise between the church and crown with respect to their courts' perceived interests and responsibilities.

First, the needs and demands of an individual claimant would often-times determine, or at least encourage, which court the claimant would petition for relief.²⁶ In other words, whether a claim was

¹⁸ *Id.* at 96.

¹⁹ *Id.* at 71.

²⁰ PLUCKNETT, *supra* note 15, at 218.

²¹ *Id.* Under canon law, "excommunication was the most serious sanction the Church had to wield against those who disobeyed its laws." Richard H. Helmholz, *Excommunication in Twelfth Century England*, 11 J. L. & RELIG. 235, 236 (1994-95).

²² Helmholz, *supra* note 13, at 618.

²³ BRUNDAGE, *supra* note 15, at 71.

²⁴ *Id.*

²⁵ Jones, *supra* note 3, at 114.

²⁶ *Id.* at 115.

brought or heard in courts of church or crown often depended upon the relief sought.²⁷ For instance, canon law favored the flexible disposition of property by testament, while English customary law preferred conveyances in accordance with established rules.²⁸ A by-product of this consumer choice (or “forum shopping” as it is known today) was that each of the courts would feverishly work to safeguard their own jurisdictions from the encroachment by the other, while at the same time seek to draw as many claimants to their own tribunals as possible.²⁹

A second factor contributing to this dissension concerned the uncertainty and ambiguity surrounding particular pleas or else the complex legal issues presented for review in any particular case, which, depending on the how the claim was viewed by any particular court and what method of proof would be used in the case might determine how the issue was decided.³⁰ One source of tension concerned the large number of disputes about land between bishops and laypeople. Again, the question concerned what method of proof would be used to determine the controversy.³¹ While trial by battle was unacceptable to the church, documentary evidence or witness testimony was unacceptable to the king.³² Generally speaking, such disputes were generated by both laymen and clergy, who were attempting to exploit jurisdictional rivalries for personal wealth or advantage.³³ Individual claimants were pleading their case to whatever court could resolve them, regardless of the pretensions of either jurisdiction.³⁴

A third complicating factor was that the crown courts came to resent the sweeping jurisdictional claims of the ecclesiastical courts and, more importantly, claimed the authority to define the boundaries of the church’s jurisdiction – a claim that church authorities strongly

²⁷ *Id.*

²⁸ BRUNDAGE, *supra* note 15, at 97.

²⁹ *Id.*

³⁰ Jones, *supra* note 3, at 115.

³¹ Charles Donahue, Jr., *Biology and the Origins of the English Jury*, 17 LAW & HIST. REV. 591, 593 (1999).

³² *Id.*

³³ *Id.*

³⁴ *Id.*

contested.³⁵ Superior power rested with the crown, which, if necessary, could halt any procedures of the Christian courts which infringed or threatened to infringe upon the authority of the crown, and could similarly punish those ecclesiastical judges who disobeyed the crown's commands.³⁶ It is not difficult to understand that the two legal systems could not co-exist once their shared goals continued to erode and the distrust between the crown and church became more and more apparent.³⁷ The controversy between King Henry II and Archbishop Thomas Becket brings to bear the intensity of this conflict.

III. THE BECKET AFFAIR

In 1154, Henry II's reign as King of England began. Henry, like many rulers before him, believed the Catholic Church in general and the Pope in particular had too much authority in England.³⁸ "Accordingly, Henry sought to assert his own position of power by decreasing the power of the English bishops in whom the Pope's authority was vested."³⁹ In furtherance of this goal, he appointed his friend and colleague, Thomas Becket, Archbishop of Canterbury.⁴⁰ However, Becket's views were not completely aligned with those of Henry.⁴¹ Becket advocated "clerical immunity" – a system in which the church, relying upon the canon law principle that clerks had to be tried in church courts, permitted its holy order to escape the authority of the royal courts in cases of alleged wrongdoing.⁴² The right of the church courts, Becket believed, was central to the authority of the Church, and he insisted on enforcing its prerogatives.⁴³

"Henry, however, believed 'criminous' clerks, like other criminals, should be brought before the King's court."⁴⁴ Henry's

³⁵ Richard H. Helmholz, *Conflicts Between Religious and Secular Law: Common Themes in the English Experience*, 12 CARDOZO L. REV. 707, 709 (1991).

³⁶ Jones, *supra* note 3, at 114.

³⁷ Moser, *supra* note 4, at 517.

³⁸ Peter D. Jason, *The Courts Christian in Medieval England*, 37 CATHOLIC LAW. 339, 342 (1997).

³⁹ *Id.* at 342-43.

⁴⁰ *Id.* at 343.

⁴¹ *Id.*

⁴² Moser, *supra* note 4, at 521.

⁴³ *Id.*

⁴⁴ Jason, *supra* note 38, at 344.

principle concern was that the doctrine of clerical immunity was being abused by many of his ecclesiastical subjects, in the desire to circumvent the authority of the crown's courts and seek relief under the more hospitable ecclesiastical courts.⁴⁵ To be sure, many royal subjects assumed the role of "clerks" as a means of saving themselves from prosecution under the crown.⁴⁶

In response, Henry published the Constitutions of Clarendon in 1164, which was designed to expand the power of the crown at the expense of church courts and to end what he believed to be jurisdictional overreaching by church authorities.⁴⁷ Henry published sixteen Constitutions in all.⁴⁸ Not surprisingly, Henry's actions brought an immediate response from the Pope, who promptly denounced "ten of the Constitutions, four of which concerned the jurisdiction of church courts."⁴⁹ More important for our purposes, however, was the controversy that erupted between Becket and Henry II with respect to the Constitutions.

Becket was concerned that the jurisdictional reforms set up by Henry provided the possibility of double punishment (now known as the concept of "double jeopardy"), as Henry's plan permitted the prosecution of crimes in both the ecclesiastical and King's courts.⁵⁰ Becket, however, believed that when a person may be tried by either court and has been tried by one, it was intolerable that he should be tried again for the same crime.⁵¹ Becket insisted there should be but one trial, and naturally, that any such trial should be before the ecclesiastical courts since clerics were exempt from secular criminal process by virtue of their religious standing.⁵² Becket perceived Henry's authority as an unlawful concentration of power in the crown

⁴⁵ Moser, *supra* note 4, at 520.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Jason, *supra* note 38, at 343.

⁴⁹ *Id.*

⁵⁰ *Id.* at n. 35. More specifically, Henry's Clarendon declaration pronounced, among other things, that "while jurisdiction of the ecclesiastical courts was retained over felonies less than treason committed by ecclesiastical personnel, the punishment itself could be carried out only by the royal courts." Moser, *supra* note 4, at 521.

⁵¹ POUND, *supra* note 2, at 41.

⁵² *Id.*

and as an assault upon the liberty of the Church – a stance that would make him a martyr for his cause.⁵³

Conversely, Henry insisted upon the supremacy of the crown, at least in matters of lay relations.⁵⁴ This matter of jurisdiction was the core of the conflict between these two old friends.⁵⁵ And it was for this right that Becket struggled to preserve the liberty and authority of the church, and it was for this cause that he would ultimately lose his life also, surprisingly enough, at the hands (at least indirectly) of his old friend.⁵⁶ At the height of their controversy, Becket was murdered by four loyal subjects of Henry II who, perhaps mistakenly, perceived Henry's ill-fated remark "Who will free me from this turbulent priest?" as a directive from Henry to kill Becket.⁵⁷ Under the auspices of this royal "mandate," four of Henry's knights took it upon themselves to assassinate Becket on the floor of the Canterbury Cathedral in 1170.⁵⁸

The public outrage surrounding Becket's assassination forced Henry II to repent and submit to the authority of the Pope for his role in Becket's death.⁵⁹ But more than anything else, he did this for the sake of restoring unity in England.⁶⁰ After Becket's death, Henry was forced to limit the state's power over ecclesiastical courts – limits that survive today throughout the West.⁶¹ Indeed, the principle of separation of church and state entered the formal canon law soon after Becket's death, declaring void any statute that contravened ecclesiastical liberty.⁶² These limits were instrumental in creating a

⁵³ Edward McGlynn Gaffnery, Jr., *The Principled Resignation of Thomas More*, 31 LOY. L.A. L. REV. 63, 69-70 (1997).

⁵⁴ *Id.*

⁵⁵ Jason, *supra* note 38, at 343.

⁵⁶ R.H. Helmholtz, *Magna Carta and the Ius Commune*, 66 U. CHI. L. REV. 297, 313 (1999).

⁵⁷ Paul H. Robinson, *Rules of Conduct and Principles of Adjudication*, 57 U. CHI. L. REV. 729, 738 (1990).

⁵⁸ Marvin Zalman, et al., *Michigan's Assisted Suicide Three Ring Circus – An Intersection of Law and Politics*, 23 OHIO N.U. L. REV. 863, 901 n. 178 (1997).

⁵⁹ Jason, *supra* note 38, at 343.

⁶⁰ Abbe Smith & William Montrose, *The Calling of Criminal Matters*, 50 MERCER L. REV. 443, 515 n. 491 (1991).

⁶¹ Jason, *supra* note 38, at 344.

⁶² Helmholtz, *supra* note 56, at 313.

balance between the state and the individual by curtailing the absolute power of the state to regulate all matters.

Upon reflection, Henry's actions can be explained as a campaign to displace the power of the Church in the temporal and spiritual affairs of England and to establish one rule of law in all of England.⁶³ Becket, on the other hand, "attempted to establish that human law was in the shadow of divine law, appealing to a law greater than the law articulated by Henry II."⁶⁴ Despite the unfortunate circumstances surrounding the Becket affair, it is fair to say that the struggle contributed greatly to the development of a body of law that remains with us to this day.

Through his efforts to limit the ecclesiastical jurisdiction and his powerful royal in the administration of justice, Henry II developed a body of law suited for the needs of England at the time, and it is through the rise of the system of courts laid down in the century to follow Henry II that served as the foundation of the common law.⁶⁵ Similarly, it was Thomas Becket's adherence to the equitable principles of canon law that was primarily responsible for bringing about the adoption of the concept of double jeopardy in the common law.

IV. CONCLUSION

As we have seen, the jurisdictional struggle between the courts in twelfth century England generally, and the rivalry between Henry II and Becket specifically, reflected the political controversy and power struggles of the era. The secularization of equity was an arduous and deadly process. On a larger scale, however, the Becket affair provides the bedrock upon which our common law and modern notions of legal equity rest. And while contemporary courts may have obviated the need for ecclesiastical courts inasmuch as modern judges now resort to the use of equitable remedies as a means of achieving a just and fair result in our courts, the origins of such equitable relief properly lie in medieval England.

⁶³ Moser, *supra* note 4, at 522.

⁶⁴ Smith & Montrose, *supra* note 60, at 515 n. 491.

⁶⁵ POUND, *supra* note 2, at 42.

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WRIT OF HABEAS CORPUS: NO TRUE PRIVILEGE FOR GUANTANAMO DETAINEES

Rebecca Lee *

“To bereave a man of life . . . or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government.”¹

The writ of habeas corpus² affords people, seized by the government, the opportunity to seek review of the validity of their

* J.D. 2013, Lincoln Memorial University-Duncan School of Law; Assistant Public Defender, 4th Judicial District of Tennessee.

¹ *Boumediene v. Bush*, 553 U.S. 723, 744 (2008) (quoting THE FEDERALIST NO. 84 (Alexander Hamilton)).

² Translated from Latin as “you have the body.”

detention before the court.³ The writ protects individual liberties by ensuring against the arbitrary use of government power to detain individuals, by allowing prisoners to question their detention before a judge and by creating a check and balance on the branches of government.⁴ The writ, incorporated as a fundamental principle under the United States Constitution, provides that the privilege may only be suspended “in Cases of Rebellion or Invasion [as] the public Safety may require it.”⁵ In fact, in 1868, Chief Justice Salton Chase identified the right to habeas corpus as the “the most important human right in the Constitution,” and the “best and only sufficient defense of personal freedom.”⁶ The scope of this article will be limited to the use of the writ and its suspension in cases of national security.

Part I of this article will address the historical underpinnings of the writ of habeas corpus, including the writ’s incorporation into the United States Constitution from its British origin. Part II of this article will discuss America’s development of the writ during the Civil War and post-Civil War eras, which resulted in the Ku Klux Klan Act. Part III reviews the modern usage of the writ of habeas corpus, including the suspension of the writ following the attack on Pearl Harbor. Part IV of this article focuses on how the protections of habeas corpus have further been diluted by the “War on Terror”⁷ and by the recent rulings affecting prisoners at Guantanamo Bay. Finally, Part V analyzes the District of Columbia courts’ decisions under the standard established by the United States Supreme Court ruling in *Boumediene v. Bush*.⁸

³ Jonathan Hafetz, *A Different View of the Law: Habeas Corpus During the Lincoln and Bush Presidencies*, 12 CHAP. L. REV. 439, 439-40 (2009).

⁴ *Id.* at 440.

⁵ U.S. CONST. art. I, § 9, cl. 2.

⁶ Wayne A. Logan, *Federal Habeas in the Information Age*, 85 MINN. L. REV. 147, 147 (2000) (quoting *Ex parte Yenger*, 75 U.S. (8 Wall.) 85, 95 (1868).).

⁷ President George W. Bush, Remarks by the President upon Arrival to the South Lawn of the Whitehouse (Sept. 16, 2011), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010916-2.html>. President George W. Bush coined this phrase following the attack on Sept. 11, 2001 when he was urging patience: “This crusade - this war on terrorism - is going to take a while.”

⁸ *Boumediene*, 553 U.S. at 744.

PART I. HABEAS CORPUS: A HISTORICAL PERSPECTIVE

Originating in medieval England, the writ of habeas corpus did not independently provide a court with jurisdiction over an individual.⁹ Instead, the writ provided a procedural mechanism, by which the courts employed, to produce a person in front of the court who was needed to sufficiently adjudicate a dispute where the court already had jurisdiction over the matter.¹⁰ Thus, a court, acting *sua sponte*, could utilize the writ to exercise its judicial functions.¹¹ One form of the writ evolved into a mechanism which allowed a prisoner to obtain a court order requiring officers to bring him in court for the purpose of ascertaining the cause for his detention.¹²

This form of habeas eventually developed into the habeas corpus ad subjiciendum,¹³ commonly referred to as the “Great Writ,”¹⁴ and its primary use enabled the courts to limit the power of the Crown.¹⁵ During the reign of Charles I, King Charles imprisoned individuals without explaining the reason for their detention.¹⁶ The writ established a procedural mechanism for a prisoner to petition a court to claim unlawful detention.¹⁷ Upon a *prima facie* case of unlawful detention, the court would issue the writ which required prison officials to produce the prisoner to determine if legal cause for detention existed.¹⁸ Sir Edward Coke, among others, argued that the Magna Carta insisted that the writ of habeas corpus allowed the court to enforce the legal limitations on royal commands, claiming that a

⁹ LARRY W. YACKLE, *FEDERAL COURTS: HABEAS CORPUS 2* (2d ed. 2010).

¹⁰ *Id.* at 2-3 (noting that the writ was historically used “to produce a person to be prosecuted, to give evidence, or to be tried in a court of proper jurisdiction[;] . . . to produce a person charged with the process of execution[;] . . . to move a cause involving a person to Westminster[; and] . . . to produce the body of a person in court”).

¹¹ Brian Farrell, *From Westminster to the World: The Right to Habeas Corpus in International Constitutional Law*, 17 MICH. ST. J. INT’L L. 551, 553 (2009).

¹² *Id.*

¹³ YACKLE, *supra* note 9, at 3.

¹⁴ 39 AM. JUR. 2d *Habeas Corpus* § 2.

¹⁵ YACKLE, *supra* note 9, at 4.

¹⁶ *Id.* at 4-7.

¹⁷ *Id.* at 5.

¹⁸ *Id.*

free man should not be imprisoned without good cause.¹⁹ Thereafter, in 1641, Parliament enacted the Star Chamber Act which explicitly authorized courts to demand adequate reasons for a prisoner's detention even when the King had ordered imprisonment.²⁰ This Act allowed a prisoner to petition the court, and if the court did not issue the writ, the prisoner was not precluded from filing another petition in an alternate court.²¹

However, abusive tactics continued, and prisoners were often transferred from jail to jail to avoid service on the correct jailer or sent overseas to evade the protection of the writ.²² In response, Parliament enacted the Habeas Corpus Act in 1679, which codified the petition process and prohibited unauthorized movement of prisoners.²³ Under the Act, Parliament retained the power to suspend the writ for certain types of cases, for limited geographical areas, and for defined periods of time.²⁴ Although the Act only applied to situations where individuals were imprisoned by governmental officials, the common law writ continued to serve as a method to challenge judicially imposed custody.²⁵ The court's application of the common law writ remains uncertain; some authorities suggest that courts would, at times, investigate the basis for the detention while other accounts indicate that courts restricted its analysis to whether the court ordering the detention had proper jurisdiction over the matter.²⁶ However, history suggests that a court "declaring that a prisoner was detained under legal process issued by a court of proper jurisdiction was dispositive," and the court refrained from review on the merits.²⁷

As England expanded its territory through colonization, the recognition of the writ of habeas corpus spread with the geographic

¹⁹ *Id.* at 6; but see Ryan Firestone, *The Boumediene Illusion: The Unsettled Role of Habeas Corpus Abroad in the War on Terror*, 84 TEMP. L. REV. 555, 563 (2012) (stating that some academics suggest that the Magna Carta did not provide a basis for the writ).

²⁰ Firestone, *supra* note 19, at 563.

²¹ YACKLE, *supra* note 9, at 9.

²² Farrell, *supra* note 11, at 555-56.

²³ *Id.* at 556.

²⁴ YACKLE, *supra* note 9, at 11.

²⁵ *Id.* at 9-10.

²⁶ *Id.* at 10.

²⁷ *Id.*

borders of the country.²⁸ In all thirteen American colonies, the courts recognized the common law writ of habeas corpus prior to the American Revolution.²⁹ Furthermore, five states felt that protection under habeas corpus was so important that they incorporated its protections in their constitutions.³⁰ The Massachusetts' constitutional provision served as a model for the first draft of the United States Constitution, guaranteeing:

The privilege and benefit of the writ of habeas corpus shall be enjoyed in this commonwealth in the most free, easy, cheap, expeditious and ample manner; and shall not be suspended by the legislature, except upon the most urgent and pressing occasions, and for a limited time not exceeding twelve months.³¹

Although a provision recognizing habeas corpus became part of the final draft of the United States Constitution, its language, as ratified, and its placement within Article I have caused academic and judicial debate because the Framers did not place the provision under the powers of the Judiciary.³² Within Article I of the United States Constitution, which grants powers to Congress, the Suspension Clause dictates that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion [as] the public Safety may require it.”³³ Thus, the clause grants a negative power to Congress, allowing it to suspend the use of the writ in certain situations rather than expressly providing for habeas corpus as a constitutional right.³⁴

²⁸ Farrell, *supra* note 11, at 557.

²⁹ Martin H. Redish & Colleen McNamara, *Habeas Corpus, Due Process and the Suspension Clause: A Study in the Foundations of American Constitutionalism*, 96 VA. L. REV. 1361, 1369 (2010).

³⁰ *Id.*

³¹ *Id.* at 1370 (quoting MASS. CONST. pt. 2, ch. VI, art. VII).

³² See Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600, 607-08 (2009).

³³ U.S. CONST. art. I, § 9, cl. 2.

³⁴ *Id.*; *INS v. St. Cyr*, 533 U.S. 289, 337 (2001) (Scalia, J., dissenting) (“A straightforward reading of this text discloses that it does not guarantee any

By enacting the Judiciary Act of 1789, Congress expressly granted inferior federal courts the power to issue writs of habeas corpus.³⁵ Since this time, Congress has only exercised its Article I, Section 9 power to suspend the writ of habeas corpus on four occasions.³⁶

Although Congress has the power to suspend the writ of habeas corpus, the writ provides a detainee the ability to collaterally attack the lawfulness of his attainment, and it establishes an important balance between the branches of government.³⁷ “It ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the ‘delicate balance of governance’ that is itself the surest safeguard of liberty.”³⁸ Although the writ clearly provides a check on the power of the president and the executive branch, more recent Supreme Court decisions have also invalidated congressional legislation, amounting to unconstitutional suspension of the writ because the legislation fails to act as a formal suspension.³⁹

content to (or even the existence of) the writ of habeas corpus, but merely provides that the writ shall not (except in case of rebellion or invasion) be suspended.”).

³⁵ *Id.* at 592 (referencing the Judiciary Act of 1789, ch. 20, 1 Stat. 73); see *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 94 (1807) (quoting Chief Justice Marshall, who declared that the Court did not have the jurisdiction to consider a petition for habeas corpus absent a directive from Congress, as provided in the Judiciary Act of 1789).

³⁶ Aaron L. Jackson, *Habeas Corpus in the Global War on Terror: An American Drama*, 65 A.F. L. REV. 263, 265-66 (2010) (explaining Congress has authorized the suspension of the writ of habeas on four occurrences: (1) as a response to President Lincoln’s unilateral suspension of the writ during the Civil war; (2) through passing the Klu Klux Klan Act at the request of President Grant; (3) during the 1902 rebellion in the Philippines; and (4) in 1941 after the Japanese attack of Pearl Harbor).

³⁷ See *Boumediene*, 553 U.S. at 742-43.

³⁸ *Id.* at 745 (quoting Hamdi, *infra* note 93, at 536).

³⁹ See *Boumediene*, 553 U.S. at 771.

PART II. LINCOLN & THE WRIT OF HABEAS CORPUS

Although the Constitution delegates Congress the right to suspend the writ, President Abraham Lincoln unilaterally authorized his army general to suspend the writ, if necessary, in April of 1861; his decision was prompted by the imminent fear that Confederate soldiers would capture Washington, D.C.⁴⁰ Under presidential orders, military officials arrested and detained individuals on mere suspicion without providing reason for their detention.⁴¹ Since Congress was not in session at the time, Lincoln asserted that the arrest and detention of Confederate soldiers were necessary to protect and preserve the Nation.⁴² Criticism erupted and Lincoln responded at a special session of Congress convened by Lincoln, stating:

It was decided that we have a case of rebellion, and that the public safety does require the qualified suspension of the privilege of the writ which was authorized to be made. Now it is insisted that Congress, and not the Executive, is vested with this power. But the Constitution itself, is silent as to which, or who, is to exercise the power; and as the provision was plainly made for a dangerous emergency, it cannot be believed the framers of the instrument intended, that in every case, the danger should run its course, until Congress could be called together; the very assembling of which might be prevented, as was intended in this case, by the rebellion.⁴³

Although Congress did not specifically concede that the Executive Branch had the power to suspend the writ under the United States Constitution, Congress ratified the President's actions after two years of debate by enacting the Habeas Corpus Act in 1863, which allowed

⁴⁰ E.g., Hafetz, *supra* note 3, at 444.

⁴¹ Tyler, *supra* note 32, at 638.

⁴² See Hafetz, *supra* note 3, at 444-45.

⁴³ Frank J. Williams, *Abraham Lincoln and Civil Liberties-Then and Now: Old Wine in New Bottles*, 3 ALB. GOV'T L. REV. 533, 540 (2010).

the President to suspend habeas corpus for a limited amount of time when public safety required.⁴⁴

Shortly after the enactment of the Habeas Corpus Act, the Supreme Court, in *Ex Parte Milligan*,⁴⁵ described the functioning of the Suspension Clause. The Court explained that the privilege of the writ existed separately from the writ itself, noting that “[t]he suspension of the privilege of the writ of habeas corpus does not suspend the writ itself. Instead, the writ issues as a matter of course, and on the return made to it, the court decides whether the party applying is denied the right of proceeding any further with it.”⁴⁶ Thus, a court was still able to issue the writ, and, upon review, the court had the ability to ascertain whether individual petitioning the writ was part of the class of the individuals for which the writ was suspended.⁴⁷

KU KLUX KLAN

For the second time in the nation’s history, Congress authorized the President to suspend the writ of habeas corpus shortly after the conclusion of the Civil War as the Ku Klux Klan engaged in domestic terrorist activities.⁴⁸ The Ku Klux Klan committed violent murders, attacks, and rapes, reaching epic proportions, yet resulting in few prosecutions from local authorities.⁴⁹ In fact, the Klan’s prevalence within communities threatened the very existence of local government, controlling law enforcement and terrorizing any individual willing to testify in court against its members.⁵⁰ In the wake of this emergency, Congress supported President Grant’s insistence to institute military law, allowing the detention of suspected Ku Klux Klan members in an effort to destroy the secrecy among its members and prevent witness intimidation by enacting the Ku Klux Klan Act of 1871.⁵¹ Furthermore, the Act allowed the President to suspend the writ for the purposes of defeating the

⁴⁴ Hafetz, *supra* note 3, at 445.

⁴⁵ *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

⁴⁶ *Id.* at 130-32.

⁴⁷ *See id.*

⁴⁸ Tyler, *supra* note 32, at 656.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 656-57.

rebellion and to preserve public safety through preventative detention.⁵²

The Act, however, expressly limited the power of the Executive Branch.⁵³ Prior to suspending the writ in any given area, the President was required to order the insurgents to disperse.⁵⁴ In addition, the President only had the authority to suspend the writ until Congress's next legislation session.⁵⁵ The Act also required the release of a prisoner if he or she was not indicted by the next seated grand jury.⁵⁶ This legislation, however, spurred extensive debate.⁵⁷

Opponents of suspension asserted that Congress vested the President with broad discretion to impact individual liberties.⁵⁸ In contrast, supporters suggested that suspension of the writ was essential to restoring order in the affected communities, thereby ensuring its citizens political and civil rights.⁵⁹ A consensus emerged, with both sides purporting that the suspension of the writ was an extraordinary measure.⁶⁰ Retrospectively, however, Congress, concluded that this preventive suspension of the writ was necessary, finding "[t]he results of suspending the writ of habeas corpus . . . show that where the membership, mysteries, and power of the organization have been kept concealed this is the most and perhaps only effective remedy for its suppression."⁶¹

A Mississippi newspaper reporter, William McCardle, filed an appeal to the Supreme Court after being arrested for the content of his articles and tried before a military tribunal.⁶² Following oral arguments, Congress repealed section 3 of the Habeas Corpus Act of 1867, which effectively stripped the Supreme Court from jurisdiction to review the final judgments of habeas corpus petitions heard in

⁵² *Id.*

⁵³ *Id.* at 657.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 658.

⁵⁸ *Id.*

⁵⁹ *Id.* at 658-59.

⁶⁰ *Id.* at 659.

⁶¹ *Id.* at 661-62 (quoting S. Rep. No. 42-41, pt. 1, at 99 (1872)).

⁶² *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 508 (1868).

lower courts based upon Congress's power under the Constitution's Exceptions Clause.⁶³ The Supreme Court acknowledged that Congress had acted within the scope of its power and dismissed the case for want of jurisdiction.⁶⁴

In contrast, in *Ex Parte Yerger*,⁶⁵ the Supreme Court held that it had jurisdiction to issue the writ of habeas corpus to an individual asserting his unlawful imprisonment.⁶⁶ The Court effectively distinguished this case from *Ex Parte Milligan* by ruling that the repeal applied only to writs brought before the Court under the Habeas Corpus Act.⁶⁷ Yet, unlike Milligan, Yerger had petitioned the Court for a common law writ of habeas corpus.⁶⁸ Thus, it seems that the Supreme Court recognized that Congress could strip its jurisdiction for specific categories of cases; however, Congress's use of the Exceptions Clause did not result in a broad interpretation of Congress's actions, but would be limited in scope.⁶⁹

PART III. USAGES OF THE WRIT IN THE 20TH CENTURY

WORLD WAR II

As global advances were made in modern warfare, the Hawaiian Government recognized a real and imminent threat of war in the Pacific.⁷⁰ In response Hawaii's legislature enacted the Hawaii Defense Act⁷¹ on October 3, 1941, which delegated broad powers to

⁶³ *Id.*

⁶⁴ *Id.* at 510-11.

⁶⁵ *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1868).

⁶⁶ *Id.* at 88.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *See Ex parte McCardle*, 74 U.S. (7 Wall.) at 511-12 ("The act conferring the jurisdiction having been repealed, the jurisdiction ceased; and the court had thereafter no authority to pronounce any opinion or render any judgment in this cause. No court can do any act in any case, without jurisdiction of the subject-matter. It can make no difference at what point, in the progress of a cause, the jurisdiction ceases. After it has ceased, no judicial act can be performed.").

⁷⁰ J. Garner Anthony, *Hawaiian Martial Law in the Supreme Court*, 57 YALE L.J. 27, 28 (1947).

⁷¹ 1941 Haw. Sess. Laws 1-25.

the executive branch in case of emergency, granting the governor power over citizens and property, while only providing minimal safeguards to individual rights.⁷² After the devastating attack on Pearl Harbor on occurring December 7, 1941, Governor Joseph Poindexter responded by invoking the power granted under the Hawaii Defense Act, proclaiming martial law, establishing himself as the military governor of Hawaii, publishing ordinances aimed at governing the conduct of the Territory's citizens, and creating military tribunals to punish ordinance offenders.⁷³ Moreover, the governor suspended the privilege writ of habeas corpus by relying on the Hawaiian Organic Act⁷⁴ which dictated:

The governor shall be responsible for the faithful execution of the laws of the United States and the Territory of Hawaii . . . and he may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the writ of habeas corpus or place the Territory, or any part thereof, under martial law until communication can be had with the president and his decision thereon made known.⁷⁵

The governor complied with the Hawaiian Organic Act by notifying President Roosevelt that he had suspended the privilege of the writ, but failed to communicate the extent of the power he had assumed.⁷⁶ Without the benefit of this critical detail, the President supported the Hawaiian governor's actions.⁷⁷ Therefore, based upon the President's uninformed approval, the Hawaiian military overtook courtrooms and issued orders without regard to territorial, federal, or constitutional protections, including censorship of the press.⁷⁸ The military rule created extreme oppression over the rights of the Hawaiian citizens as later noted by the Supreme Court:

⁷² Antony, *supra* note 70, at 28-29.

⁷³ *Id.* at 29.

⁷⁴ 48 U.S.C. § 532 (1940).

⁷⁵ Antony, *supra* note 70, at 29.

⁷⁶ *Id.* at 30.

⁷⁷ *Id.*

⁷⁸ *Id.* at 31.

[T]he military authorities took over the government of Hawaii. They could and did, by simply promulgating orders, govern the day to day activities of civilians who lived, worked, or were merely passing through there. The military tribunals interpreted the very orders promulgated by the military authorities and proceeded to punish violators.⁷⁹

PART IV: USAGES OF THE WRIT IN THE 21ST CENTURY

“THE WAR ON TERROR”

The devastating events of September 11, 2001, ignited fear and insecurity in the hearts of Americans. During President George W. Bush’s address to the nation following the attacks he stated, “All of this was brought upon us in a single day, and night fell on a different world, a world where freedom itself is under attack.”⁸⁰ A new sense of nationalism immediately emerged as citizens united to honor the victims.⁸¹ In addition, this event provoked the United States to develop new security initiatives for the protection of its citizens and to enact legislation aimed at prosecuting individuals involved in terrorist activity and preventing further attacks on American soil, including the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (“USA PATRIOT Act”)⁸² and the Authorization for Use of Military Force (“AUMF”), which allowed the President to “use all necessary and appropriate force” against those aiding terrorists.⁸³ The United States military led invasions, killing and detaining individuals allegedly involved with the al Qaeda organization.⁸⁴ As a result,

⁷⁹ *Id.* (quoting *Duncan v. Kahanamoku*, 327 U.S. 304, 309 (1946)).

⁸⁰ President George W. Bush, Address to Joint Session of Congress (Sept. 20, 2001), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html>.

⁸¹ COLLEEN E. HARDY, *THE DETENTION OF UNLAWFUL ENEMY COMBATANTS DURING THE WAR ON TERROR*, 5 (2009).

⁸² *Id.* at 2-3.

⁸³ Tor Ekeland, *Suspending Habeas Corpus: Article i, Section 9, Clause 2, of the United States Constitution and the War on Terror*, 74 *FORDHAM L. REV.* 1475, 1503 (2005) (quoting Pub. L. No. 107-40, 115 Stat. 224 (2001)).

⁸⁴ *Id.*

numerous detainees around the globe petitioned federal courts, claiming illegal detention and illegal suspension of the writ.⁸⁵

As United States military forces captured enemy combatants abroad, the Bush Administration deliberately selected Guantanamo as the location to imprison its detainees.⁸⁶ Guantanamo is a territory currently leased and entirely controlled by the United States; however, it falls under the Republic of Cuba's ultimate sovereignty.⁸⁷ Therefore, the Bush Administration determined that the prisoners held there would not be entitled to the Constitution's protections, including the writ of habeas corpus.⁸⁸ Thus, the United States could theoretically hold the detainees indefinitely without violating the Constitutional mandate of formal suspension of the writ⁸⁹ due to the United States Supreme Court holding in *Johnson v. Eisentrager*, which denied habeas rights to a prisoner who:

(a) [wa]s an enemy alien; (b) ha[d] never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.⁹⁰

Thus, the ruling allowed government officials to manipulate a prisoner's location to purposefully evade the protection of the writ---the very evil that the writ was intended to guard against.⁹¹

As the "War on Terror" escalated, petitions for the writ of habeas corpus flooded the courts, and the Supreme Court granted certiorari to several "War on Terror" detainees. In these opinions, the Court clarified the constitutional protection of the writ and

⁸⁵ *Id.*

⁸⁶ Hafetz, *supra* note 3, at 441.

⁸⁷ HARDY, *supra* note 81, at 152.

⁸⁸ Hafetz, *supra* note 3, at 441.

⁸⁹ *Id.* at 442.

⁹⁰ *Johnson v. Eisentrager*, 339 U.S. 763, 777 (1950).

⁹¹ Hafetz, *supra* note 3, at 444.

established jurisdictional requirements when “enemy combatants” asserted that they possessed a right to petition the court for habeas corpus. On June 28, 2004, the United States Supreme Court decided three such opinions: *Rumsfeld v. Padilla*,⁹² *Hamdi v. Rumsfeld*,⁹³ and *Rasul v. Bush*.⁹⁴

In *Rumsfeld v. Padilla*, federal agents apprehended Padilla, a United States citizen, while disembarking a plane at Chicago O’Hare International Airport.⁹⁵ Ultimately, the Department of Defense detained Padilla at the Consolidated Navy Brig in Charleston, South Carolina and designated Padilla as an “enemy combatant.”⁹⁶ Padilla filed a petition for habeas corpus under 28 U.S.C. § 2241 in the Southern District of New York⁹⁷ where he had been in criminal custody prior to his detention in South Carolina.⁹⁸ Although not reviewing the merits of Padilla’s petition, the United States Supreme Court granted certiorari to determine the proper respondent for the petition and whether the Southern District of New York had jurisdiction over this respondent.⁹⁹ The Court held that “the proper respondent is the warden of the facility where the prisoner is being held, not the Attorney General or some other remote supervisory official.”¹⁰⁰ Since Commander Marr was the equivalent of a warden at the naval brig, the Court determined that Marr, instead of Secretary Rumsfeld was the proper respondent.¹⁰¹ Furthermore, the Court found that “the general rule for core habeas petitions challenging present physical confinement, jurisdiction lies in only one district—the district of confinement.”¹⁰² Thus, the South Carolina District Court was the only court with jurisdiction over the petition.¹⁰³ The

⁹² Padilla, 542 U.S. 426 (2004).

⁹³ Hamdi, 542 U.S. 507 (2004).

⁹⁴ Rasul, 542 U.S. 466 (2004).

⁹⁵ Padilla, 542 U.S. at 430.

⁹⁶ *Id.* at 431-32.

⁹⁷ *Id.* at 432.

⁹⁸ *Id.* at 430-31.

⁹⁹ *Id.* at 434.

¹⁰⁰ *Id.* at 435.

¹⁰¹ *Id.* at 436.

¹⁰² *Id.* at 443.

¹⁰³ *Id.* at 451.

Court remanded the case with an order of dismissal without prejudice.¹⁰⁴

In *Hamdi v. Rumsfeld*, the Northern Alliance seized a United States citizen living in Afghanistan and turned him over to the United States military.¹⁰⁵ Interrogated and detained in Afghanistan, Hamdi was later transferred to Guantanamo and, eventually, to the naval brig located Charleston, South Carolina.¹⁰⁶ The Government labeled Hamdi as an “enemy combatant” and claimed that this status alone justified indefinite detention without formal charges or proceedings.¹⁰⁷ Although the Court noted that formal suspension of the writ had not occurred,¹⁰⁸ it recognized that Congress had enacted the AUMF after 9/11, which “authorize[d] the President to use ‘all necessary and appropriate force’ against ‘nations, organizations, or persons’ associated with the . . . terrorist attacks.”¹⁰⁹ In holding that Hamdi must be notified of the factual basis for his classification as an “enemy combatant”¹¹⁰ and allowed to dispute his status before a neutral decision-maker in a timely and meaningful manner, the Court stated that the proceeding “may be tailored to alleviate [its] uncommon potential to burden the Executive at a time of ongoing military conflict.”¹¹¹ The Court suggested that the hearing could include the introduction of hearsay and a burden-shifting scheme that would allow the Government a rebuttable presumption as to the credibility of its evidence, requiring the petitioner to rebut the presumption with more “persuasive evidence.”¹¹² Moreover, the Court stated that those deemed to be “enemy combatants” could be detained throughout the duration of the hostilities with the Taliban, which could potentially result in indefinite confinement.¹¹³ Therefore, the Court ruled that the government’s standard of “some evidence”

¹⁰⁴ *Id.*

¹⁰⁵ *Hamdi*, 542 U.S. at 510.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 525.

¹⁰⁹ *Id.* at 518.

¹¹⁰ The Court defined “enemy combatant” as individual who was “‘part of or supporting forces hostile to the United States or coalition partners’ . . . and [who] ‘engaged in an armed conflict against the United States.’” *Id.* at 516.

¹¹¹ *Id.* at 533.

¹¹² *Id.* at 533-34.

¹¹³ *Id.* at 520.

was inadequate under the Constitution's due process standard.¹¹⁴ The Court noted that its holding did not preclude the government from utilizing a military tribunal employing a constitutional process.¹¹⁵

In *Rasul v. Bush*, the United States Supreme Court considered whether the protections of habeas corpus should be extended for two Australian citizens and twelve Kuwaiti citizens who were captured abroad during military actions against al Qaeda and the Taliban.¹¹⁶ Filing in the United States District Court for the District of Columbia, the petitioners challenged their detention, claiming that they were not "enemy combatants" or terrorists and alleging that they were not allowed access to a court or tribunal.¹¹⁷ The district court dismissed all actions for lack of jurisdiction by relying on *Johnson v. Eisentrager* and found that the privilege of the writ did not extend to a territory in which the United States lacked sovereignty.¹¹⁸ The Court recognized that the rule in *Eisentrager* only applied to detainees' constitutional right to habeas corpus review.¹¹⁹ Thereafter, the Court analyzed whether the habeas statute, 28 U.S.C. § 2241, which authorized federal district courts to hear petitions of the writ for any person "in custody in violation of the Constitution or laws or treaties of the United States," and "within their respective jurisdictions,"¹²⁰ provided judicial review to the Guantanamo detainees where the United States did not have ultimate sovereignty.¹²¹ After reviewing the lease with Cuba which stated that the United States has "complete jurisdiction and control" over Guantanamo Bay Naval Base, the Court determined that the statute would provide the district court with jurisdiction over claims of a United States citizen and, since the statute did not state that aliens and citizens would be treated differently, ruled that aliens were entitled to protection of the writ under the statute.¹²² Thus, the

¹¹⁴ *Id.* at 538.

¹¹⁵ *Id.*

¹¹⁶ *Rasul*, 542 U.S. at 470-71.

¹¹⁷ *Id.* at 471-72.

¹¹⁸ *Id.* at 472.

¹¹⁹ *Id.* at 476.

¹²⁰ *Id.* at 473.

¹²¹ *Id.* at 475.

¹²² *Id.* at 480-81.

Court remanded the case to the district court for a decision on its merits.¹²³

In 2006, the Supreme Court, granted certiorari to Hamdan, an alien detainee, imprisoned in Guantanamo Bay.¹²⁴ Shortly after 9/11, a presidential order was issued, governing “Detention, Treatment, and Trial of Certain Non Citizens in the War Against Terrorism” when the “President determines ‘there is reason to believe’ that he or she (1) ‘is or was’ a member of al Qaeda or (2) has engaged or participated in terrorist activities aimed at or harmful to the United States.”¹²⁵ The Government moved to dismiss for lack of jurisdiction based upon the Detainee Treatment Act of 2005, (“DTA”), which removed jurisdiction from any court to consider “an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba.”¹²⁶ Instead, the Act vested the Combatant Status Review Tribunal (“CSRT”) exclusive jurisdiction to establish the classification of the detainees located in Guantanamo and vested the District of Columbia exclusive jurisdiction for final review, albeit with a limited scope, of the CSRT’s determination.¹²⁷ The Court denied the Government’s motion, finding that the jurisdiction stripping statute did not affect pending cases.¹²⁸

Turning to the merits of the case, the Court addressed whether Hamdan’s charge of a conspiracy could be tried by a military commission under the Uniform Code of Military Justice (“UCMJ”) and the Geneva Conventions.¹²⁹ The Court recognized that, historically, military commissions have been convened as “an ‘incident to the conduct of war’ when there is a need ‘to seize and subject to disciplinary measures those enemies who in their attempt

¹²³ *Id.* at 485.

¹²⁴ *Hamdan v. Rumsfeld*, 548 U.S. 557, 566 (2006).

¹²⁵ *Id.* at 568.

¹²⁶ *Id.* at 572-731.

¹²⁷ *Id.* at 570, 573.

¹²⁸ *Id.* at 577.

¹²⁹ *Id.* at 567.

to thwart or impede our military effort have violated the law of war.”¹³⁰ However, the Court determined that the offense of conspiracy did not constitute an offense against the law of war because neither the acts in furtherance of the conspiracy would not be considered a war crime nor did they occur during a time of war.¹³¹ Furthermore, the procedures employed by the military commission did not pass constitutional muster and violated both the UCMJ and the Geneva Conventions.¹³² “Another striking feature of the rules governing Hamdan's commission is that they permit the admission of any evidence that, in the opinion of the presiding officer, ‘would have probative value to a reasonable person,’” including hearsay and evidence obtained through coercion.¹³³ In addition, any appeal panel was required to “disregard any variance” from governing procedures.¹³⁴ The Court concluded that the tribunal must provide the protections guaranteed by courts-martial.¹³⁵ In direct response to this holding, Congress responded by enacting the Military Commissions Act of 2006 (MCA), 10 U.S.C. § 948 et seq. (Supp. 2007), which denied federal courts jurisdiction of habeas corpus actions pending at the time of enactment.¹³⁶

In *Boumediene*, a petition for habeas corpus was granted certiorari, and the Court recognized that the statute had stripped the Court of jurisdiction over the case. However, the Court addressed whether the constitutional privilege of the writ extended to enemy combatant detainees held at Guantanamo Bay.¹³⁷ The Court analyzed the historical basis for the writ of habeas corpus, noting that during

¹³⁰ *Id.* at 596 (quoting *Ex parte Quirin*, 317 U.S. 1, 28-29 (1942)).

¹³¹ *Id.* at 612.

¹³² *Id.* at 567.

¹³³ *Id.* at 614 (quoting Department of Defense, Military Commission Order No. 1, P 6(D)(1) (March 21, 2004)), available at <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf> (2002 version with the same wording).

¹³⁴ *Id.* at 615 (quoting Military Commission Order No. 1, P 6(H)(4)).

¹³⁵ *Id.* at 634.

¹³⁶ See *Boumediene*, 553 U.S. at 735-36.

¹³⁷ *Id.* at 736.

federal Constitution ratifying conventions, the Suspension Clause was “an ‘exception’ to the ‘power given to Congress to regulate courts,’” and the “Clause not only protects against suspensions of the writ but also guarantees an affirmative right to judicial inquiry into the causes of detention.”¹³⁸ In addition, the Court rejected the argument that the protection of the writ only applied in territories where the United States maintained de facto sovereignty and held that the Suspension Clause had full effect in Guantanamo Bay.¹³⁹ Thus, the Court held that the Constitutional privilege of the writ applied to the Guantanamo detainees, which could not be withdrawn without a formal suspension.¹⁴⁰

Thus, the Court analyzed whether Congress could avoid formally suspending the writ by statutorily creating a mechanism that provided an *adequate substitute* for the writ’s protection.¹⁴¹ By enacting the DTA, Congress provided a review of the CSRT’s proceedings limited to assessing whether the CSRT complied with its own procedures.¹⁴² However, the Court found that a substitute habeas proceeding:

must have the means to correct errors that occurred during the CSRT proceedings . . . includ[ing] some authority to assess the sufficiency of the Government’s evidence against the detainee. It also must have the authority to admit and consider relevant exculpatory

¹³⁸ *Id.* at 743-44 (quoting 3 Debates in the Several State Conventions on the Adoption of the Federal Constitution 460-464 (J. Elliot 2d ed. 1876)).

¹³⁹ *Id.* at 770-71 (distinguishing the facts from *Eisentrager*, 339 U.S. 763 (1950), and recognizing the United States de jure sovereignty over Guantanamo Bay).

¹⁴⁰ *Id.* at 732.

¹⁴¹ *Id.* at 733 (“After Hamdi, the Deputy Secretary of Defense established Combatant Status Review Tribunals (CSRTs) to determine whether individuals detained at Guantanamo were ‘enemy combatants,’ as the Department defines that term.”).

¹⁴² *Id.* at 777.

evidence that was not introduced during the earlier proceeding.¹⁴³

Furthermore, a habeas substitute court must be able to order conditional release.¹⁴⁴ Although the Court recognized that the legitimacy of the military objective in detaining threats to our nation in order to avoid the dispersion of classified information, the Court held that the DTA impermissibly diluted the protection of the writ.¹⁴⁵

This opinion ensures that the historical protection of the writ of habeas corpus applies to the detainees at Guantanamo Bay. However, the Supreme Court has not granted certiorari to any habeas corpus petitions since the *Boumediene* decision. Moreover, a study from the Seton Hall Law School suggests that the writ has not been given the Constitutional protections as allocated by the Supreme Court's holdings.¹⁴⁶ In fact, the report notes that since *Boudmediene's* decision, forty-six habeas petitions have been filed, but after the District of Columbia Circuit Court decided *Al-Adahi v. Obama*¹⁴⁷ in 2010, detainees have lost 92% of petitions as a result of judicial deference to the Government's allegations.¹⁴⁸

In *Al-Adahi*, the United States District Court for the District of Columbia granted Al-Adahi's petition for writ of habeas corpus because the court found "'no reliable evidence in the record that [Al-Adahi] was a member of al-Qaida' and ruled that he should be released."¹⁴⁹ The Government appealed, and the District of Columbia Circuit Court first acknowledged that both parties agreed that the

¹⁴³ *Id.* at 786.

¹⁴⁴ *Id.* at 779 (suggesting that "release need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted").

¹⁴⁵ *Id.* at 796.

¹⁴⁶ Mark Denbeaux, et al., Seton Hall Law Ctr. for Policy and Research, No Hearing Habeas: D.C. Circuit Restricts Meaningful Review 11 (May 1, 2012), available at <http://law.shu.edu/ProgramsCenters/PublicIntGovServ/policyresearch/upload/hearing-habeas.pdf>

¹⁴⁷ 613 F.3d 1102 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1001 (2011).

¹⁴⁸ Denbeaux, *supra* note 146, at 1.

¹⁴⁹ 613 F.3d at 1103 (quoting *Al-Adahi v. Obama*, No. 05-280(GK), 2009 WL 2584685 (D.D.C. Aug. 21, 2009)).

preponderance of the evidence standard should be applied.¹⁵⁰ However, the court admonished the district court in failing to apply the “conditional probability analysis,” finding:

Those who do not take into account conditional probability are prone to making mistakes in judging evidence. They may think that if a particular fact does not itself prove the ultimate proposition (e.g., whether the detainee was part of al-Qaida), the fact may be tossed aside and the next fact may be evaluated as if the first did not exist. This is precisely how the district court proceeded in this case: Al Adahi’s ties to bin Laden “cannot prove” he was part of Al Qaida and this evidence therefore “must not distract the Court.” The fact that Al Adahi stayed in an al-Qaida guesthouse “is not in itself sufficient to justify detention. Al Adahi’s attendance at an al-Qaida training camp “is not sufficient to carry the Government’s burden of showing that he was part” of al-Qaida. And so on. The government is right: the district court wrongly “required each piece of the government’s evidence to bear weigh without regard to all (or indeed any) other evidence in the case. This was a fundamental mistake that infected the court’s entire analysis.¹⁵¹

The court proceeded to discuss evidence in the record, which independently may be insufficient to categorize Al-Adahi as an enemy combatant, but when analyzed as a whole met the

¹⁵⁰The court, however, was unconvinced that the Constitution requires a preponderance of the evidence stand, but suggested that the government may only be required to produce “some evidence.” *Id.* at 1104.

¹⁵¹ *Id.* at 1105-06 (internal citations omitted).

preponderance of the evidence standard.¹⁵² Therefore, the court remanded the case with instructions to deny Al-Adahi's petition.¹⁵³

Since the *Al-Adahi* decision, only one petition has been granted, *Latif v. Obama*,¹⁵⁴ but it was subsequently vacated and remanded. Further, the Seton Hall Law School's study suggests that the individual components of evidence that the District of Columbia Circuit Court utilized to justify its reversal in *Al-Adahi*: hostile acts, detainees staying in guesthouses, detainees attendance at a training camp, and a detainees' travel route, have been employed by the district court to systemically deny later habeas court petitions, suggesting that governmental findings are afforded extreme deference.¹⁵⁵

In *Latif*, the district court granted Latif's petition for habeas corpus, and, once again, the government appealed.¹⁵⁶ Although Latif did not deny that he had been interviewed and did not claim that his statements were involuntary, he argued that the governmental record was unreliable because "his interrogators [Text Redacted By the Court] so garbled his words that their summary bears no relation to what he actually said."¹⁵⁷ The district court determined that there was a serious question as to the accuracy of the government's reports.¹⁵⁸ However, the circuit court rejected this finding.¹⁵⁹

¹⁵² *Id.* at 1111 (finding that the record showed that Al Adahi stayed at an al-Qaida guesthouse, attended an al-Qaida training camp, met with bin Laden, wearing a model of Casio watch commonly worn linked to al-Qaida, had inconsistent explanations for his actions, and was captured on a bus carrying wounded Arabs and Pakistanis).

¹⁵³ *Id.*

¹⁵⁴ 677 F.3d 1175 (D.C. Cir. 2012), *cert. denied*, 132 S. Ct. 2741 (2012).

¹⁵⁵ Denbeaux, *supra* note 146, at 6-11.

¹⁵⁶ 677 F.3d at 1176.

¹⁵⁷ *Id.* at 1178.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

The circuit court noted that there is a presumption of authenticity and regularity of governmental reports.¹⁶⁰ The presumption of regularity “presumes the government official accurately identified the source and accurately summarized his statement, but it implies nothing about the truth of the underlying non-government source’s statement.”¹⁶¹ The court concluded that the district court was required to make specific findings as to Latif’s credibility, but rather it had determined that Latif presented a “plausible alternative story.”¹⁶² Therefore, in absence of such a credibility finding, the court vacated the order and remanded the case.¹⁶³

PART V: CONCLUSION

Although the Court determined that the enactment of the DTA constituted an impermissible suspension of the writ because of a lack of formal suspension in *Boumediene*, the Court never stated whether Congress could formally suspend the writ based on the “War on Terror.”¹⁶⁴ Under the Constitution, the writ may only be suspended “in Cases of Rebellion or Invasion [as] the public Safety may require it.”¹⁶⁵ Historically, Congress has only utilized its power to suspend the writ when hostilities occurred on U.S. soil, affecting a limited number of defined individuals or for a limited duration.

Our enemies in the “War on Terror” include individuals affiliated with the underground terrorist organization al Qaeda. Its membership spans across many countries, and its decentralized

¹⁶⁰ *Id.* at 1180.

¹⁶¹ *Id.*

¹⁶² *Id.* at 1190.

¹⁶³ See *id.* at 1192; Charlie Savage, *Military Identifies Guantanamo Detainee Who Died*, N.Y. TIMES, Sept. 11, 2012, available at <http://www.nytimes.com/2012/09/12/us/politics/detainee-who-died-at-guantanamo-had-release-blocked-by-court.html> (stating that on September 8, 2012, after a decade of detention, Adnan Farhan Abdul Latif was found dead in his cell).

¹⁶⁴ *Boumediene*, 553 U.S. at 732.

¹⁶⁵ U.S. CONST. art. I, § 9, cl. 2.

system makes it difficult to ascertain its members. In comparing this organization to the historical enemies where the writ was suspended, this organization most closely resembles the Klu Klux Klan because the Klan's membership did not encompass an entire region or nation. However, during this period, Congress delicately balanced the nation's need to usurp the power of the Klan to preserve the legitimacy of the justice system against the fundamental principle that the executive branch should not be able to yield the power to arbitrarily imprison individuals by expressly limiting the executive branch's power during the writ's suspension. Congress seemingly recognized that, during periods of rebellion, the executive branch may abuse its power and undermine the constitutional protection of the writ.

Even in *Boumediene*, Justice Kennedy acknowledged that in England during the 1600s:

[T]he writ proved to be an imperfect check. Even when the importance of the writ was well understood in England, habeas relief often was denied by the courts or suspended by Parliament. Denial or suspension occurred in times of political unrest, to the anguish of the imprisoned and the outrage of those in sympathy with them.¹⁶⁶

Furthermore, the Court understood that habeas corpus proceedings are more crucial where detention is ordered by the executive branch rather than a disinterested tribunal.¹⁶⁷

In addition, under the Ku Klux Klan Act, Congress restricted the executive branch's power by limiting the suspension's duration. The "War on Terror," however, is perpetual, and contains no identifiable means to determine its conclusion. In fact, the *Boumediene* Court acknowledged that the "War on Terror" was clearly distinguishable from prior military conflicts which were for limited duration, and that the Court may need to address the outer limits of

¹⁶⁶ *Boumediene*, 553 U.S. at 741.

¹⁶⁷ *Id.* at 783.

the president's war powers "to preserve constitutional values while protecting the Nation from terrorism."¹⁶⁸ Thus, it is unclear whether Congress could currently constitutionally suspend the writ after more than ten years after al Qaeda's invasion based on the constitutional requirement that the writ may only be suspended for the public safety.

Moreover, without a formal suspension, the detainees at Guantanamo Bay are entitled, under the *Boumediene* decision, to the constitutional protections of the writ. The Court declared, "[w]ithin the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person."¹⁶⁹ However, the District of Columbia Circuit Court has impermissibly ignored this critical responsibility, and its decisions threaten individuals misclassified as enemy combatants with indefinite confinement and without effective means to challenge their detention.

A CSRT consists of a hearing and a review of classified and unclassified evidence by a panel of three military judges, and evidence against the detainee is withheld from him, making it seemingly impossible to rebut his involvement in al Qaeda or other terrorist organizations. Furthermore, the detainees do not have access to sources of proof due to both their imprisonment and distance from their homeland.¹⁷⁰ Finally, the rules of evidence and criminal procedure have been relaxed to such an extent that the ownership of personal property similar to property employed in al Qaeda

¹⁶⁸ *Id.* at 797-98.

¹⁶⁹ *Id.* at 797.

¹⁷⁰ At the conclusion of the CRST for Al-Adahi, Al-Adahi requested to see the classified information. The Tribunal President responded: "Classified information cannot be revealed to a Detainee." Thereafter, Al-Adahi asked to look at the Unclassified Evidence. The Tribunal President did not allow this either, and responded by stating that "[b]asically, all of the Unclassified has been shown to you." Summarized Unsworn Detainee Statement at 9, *Al-Adahi v. Obama*, 692 F.Supp.2d 85 (2010) (No. 05-CV-0280 (GK), available at http://s3.amazonaws.com/publica/assets/detention/gitmo/Mohammed_Al_Edah_Government_Allegations.pdf).

bombings can be introduced as evidence of the detainee's affiliation to the organization, even without an admission of ownership by the detainee or a chain of custody establishing ownership.

In *Boumediene*, the Court recognized that the "necessary scope of habeas review in part depends upon the rigor of any earlier proceedings," and, when detention is based upon an executive order rather than a judicial proceeding in front of a disinterested judge, the habeas court must have authority to conduct meaningful review, of both cause for detention and the Executive's power to detain.¹⁷¹ However, the court continually fails to exercise its authority. The District of Columbia Circuit Court has unilaterally instituted a standard of review that is insurmountable for these detainees. Deference is afforded to the Government's findings of fact and documents, whereby the detainee must prove his innocence without adequate means of doing so after only a probable cause hearing which has determined his status as an enemy combatant, even in a time when the needs of war do not mandate such a relaxed standard. This diminishes the underlying purpose of the writ and its collateral function, which provides the habeas court the power to review the sufficiency of the Government's evidence used to detain the individual. The Judiciary must necessarily act as a check on the Executive branch's power, but blanket deference to the Government results in no check at all - when it is the only check that can reverse an arbitrary and indefinite detention.

The problem is further exacerbated because the CSRT and habeas reviews cannot be fully scrutinized by our nation's citizens. American courts have historically existed as open forums, ensuring the integrity of the justice system. In *Globe Newspaper Company v. Superior Court for Norfolk County*,¹⁷² the United States Supreme Court noted:

the right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole. Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with

¹⁷¹ *Boumediene*, 553 U.S. at 781, 783-84.

¹⁷² 457 U.S. 596, 606 (1982).

benefits to both the defendant and to society as a whole. Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process. And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process - - an essential component in our structure of self-government. In sum, the institutional value of the open criminal trial is recognized in both logic and experience.

Although the Court has historically recognized exceptions to open courtroom proceedings where safety and justice demands, these closed proceedings are memorialized in court records and documents available to the public at a later time. In the CSRTs and habeas reviews, concerns for national safety require that they be closed to the public. However, many of the documents available to the public for review are redacted or deemed classified information, preventing any real scrutiny by the public.

Therefore, as the law stands now, the Guantanamo Bay detainees are destined to indefinite detention without any meaningful review. Congress is arguably unable to formally suspend the writ, which could limit the power of the Executive in detaining those classified as enemy combatants. Furthermore, our nation's citizens have no meaningful method to ascertain whether the judicial system is adhering to Constitutional mandates. Meanwhile, the District of Columbia of Circuit Court has given the Executive Branch extreme deference in its findings, eliminating all cognizable rights to the writ under our Constitution.

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DE FACTO SEGREGATION: HOW IT IS AFFECTING AMERICA'S INNER-CITY SCHOOLS

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INTRODUCTION

Many Americans believe our schools are no longer segregated, and legally they are correct. However, although statutory segregation was abolished with the U.S. Supreme Court's holding in the landmark case of *Brown v. Board of Education*,¹ a different type of non-government mandated segregation exists in our school systems today:

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¹ *Brown v. Board of Ed. Of Topeka, Shawnee Cnty, Kan.*, 347 U.S. 483 (1954) ("Brown I").

de facto segregation. De facto segregation may be the result of a combination of events outside the government's control, but that does not extinguish the fact black students and Hispanic students are suffering under the effects of living in a segregated society. Part I of this note will discuss the history of slavery in America and how de jure and de facto segregation were established. Part II will analyze de facto segregation specifically in Knoxville, Tennessee. Part III will focus on the causes of de facto segregation. Part IV will review the different types of remedies that have been attempted to rectify de facto segregation and the obstacles school districts face in trying to implement their remedial plans. Finally, Part V will conclude with a proposal of how school districts can become integrated without using race as a factor. Because America is a melting pot of nationalities and races, children who are educated in schools heavily populated by a single race are at a severe disadvantage once they graduate and enter into the real world, especially children in minority populations. America has come a long way from the days of slavery, but it has yet to reach the point where children are no longer classified by their race but rather by their character and what they can contribute to society.

PART I: A BRIEF HISTORY OF SLAVERY IN AMERICA, HOW DE JURE SEGREGATION WAS ESTABLISHED, AND THE SHIFT TO DE FACTO SEGREGATION

The history of segregation in American school systems began long before it was an independent nation. In order to understand de facto segregation, one must first understand how segregation started in America. In 1619, twenty slaves from Africa were brought to the colony of Jamestown, Virginia.² These twenty people were the first slaves to be brought to America. From 1619 until the Emancipation Proclamation of 1862 issued by President Abraham Lincoln, many white land owners owned slaves and used them to work in their fields and serve them in their homes.³ Slavery was not officially abolished until the Thirteenth Amendment of the Constitution was adopted in 1865.⁴ Furthermore, it was not until the Fourteenth Amendment was adopted in 1868 that former slaves received the

² Slavery in America. <http://www.history.com/topics/slavery> (last visited Oct. 27, 2012).

³ *Id.*

⁴ *Id.*

rights of citizenship and equal protection, and they were not granted the right to vote until the Fifteenth Amendment was adopted in 1870.⁵ The significance of the history of slavery and when it was abolished is that it explains why, until 1954, there were schools for white children and schools for black children. Ideally, it would be nice to say that white slave owners treated their slaves with respect by paying the slaves for their work and educating the slaves and their children and seeing to all the physical and medical needs of all the slaves on their property. However, the exact opposite was the case.

There may be a few slave owners in history who treated their slaves like hired workers and provided care and benefits to them in return for their work; however, the sad truth is most white slave owners treated the African slaves as if they were property and less than human.⁶ Frederick Douglass stated in *My Bondage and My Freedom* that at the time he was writing, killing a slave or any colored person was not a crime in Maryland.⁷ Writing about how slaves were denied the right to be educated, Douglass stated that when his second owner, Master Hugh, learned that his wife was teaching Douglass how read the bible, Hugh forbade her to continue teaching Douglass because it was unlawful saying:

[i]f you teach [Douglass]...how to read the bible, there will be no keeping him...it would forever unfit him for the duties of a slave...and as to himself, learning would do him no good, but probably, a great deal of harm—making him disconsolate and unhappy...if you learn him how to read, he'll want to know how to write; and, this accomplished, he'll be running away with himself. ⁸

White people became accustomed to the idea that a black person could not be educated. As evidence, for over one hundred and fifty years, it had been illegal to educate a slave due to the slave codes in many states. Therefore, it would be decades before former slaves saw the benefits of the abolition of slavery. An example

⁵ *Id.*

⁶ FREDERICK DOUGLASS, *MY BONDAGE AND MY FREEDOM* 43 (1855).

⁷ *Id.* at 98.

⁸ *Id.* at 114

of a slave code which made it illegal to educate slaves or former slaves is Georgia's Slave Code Section 2(11) which stated: If any slave, Negro, or free person of color, or any white person, shall teach any other slave, Negro, or free person of color, to read or write either written or printed characters, the said free person of color or slave shall be punished by fine and whipping, or fine or whipping, and the discretion of the court.⁹

Once slaves were made free citizens, they were still governed by the slave codes, regardless of whether the Supreme Court actually made a declaration that it followed the now illegal slave code in its holdings in cases where one or more former-slaves were involved.¹⁰ As a whole, African-Americans who were former slaves were treated as an inferior race to white Americans. Rather than trying to create an environment where everyone coexisted, white legislatures and city council members developed the habit of distinguishing the difference between white people and black people in all areas of life: separate train cars, separate boarding docks, separate schools, separate churches, even separate parts of the street one could walk. Thus, although former slaves were now free people in society, the influences of the slave codes still dictated the court systems and black people were judged far more severely than white people who were charged with similar crimes.¹¹ When the slaves were granted their freedom, it should have meant that they would be treated with equality and justice for all, instead the pre-emancipation influences were so strong that rather than blending the societies, *de jure* segregation was formed to legally keep the societies separated.

De jure segregation is segregation permitted by law.¹² In many former slave-holding states, laws and statutes were created to restrict, limit, or make it completely impossible for minority citizens to exercise their rights. Laws were made to prevent minorities from loading the train in a certain spot or walk on a certain side of the

⁹ Codification of the Statute Law of Georgia § 2(11) (Hotchkiss comp., Grenville 1848) (1861).

¹⁰ A. Leon Higginbotham, Jr., *"Rather Than the Free": Free Blacks in Colonial and Antebellum Virginia*, 26 HARV. C.R.-C.L. L. REV. 17, 18 (1991).

¹¹ *Id.*

¹² BLACK'S LAW DICTIONARY (9th ed. 2009).

street. The first landmark case to address this concept of legal segregation was *Plessy v. Ferguson*.¹³ In that case, Plessy filed a law suit against a criminal district court judge John H. Ferguson in Louisiana after Plessy was ejected from the train after refusing to remove himself to the train car designated for black passengers.¹⁴ Plessy challenged the constitutionality of a Louisiana law which provided for separate train cars for whites and minorities.¹⁵ Plessy argued that the separation was a violation of the Thirteenth and Fourteenth Amendments of the Constitution.¹⁶ However, the Supreme Court of the United States held that the state law providing for separate cars on a train to separate the races did not violate the Thirteenth Amendment because:

[a] statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—as no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude.¹⁷

As for the Fourteenth Amendment issue, the Court ultimately held that forcing citizens to separate on the basis of color was constitutional so long as the separate accommodations were equal in what they offered to that class of people.¹⁸ In dicta, the Court indicated that segregation is necessary because when one race is inferior to another, it would violate the Fourteenth Amendment to put the two races on the same plane.¹⁹ Essentially, the Court believed that segregation was created in favor of minorities because it would not be fair to combine them with a race that was far more superior.²⁰ As outrageous as the Court holding is in *Plessy*, the “separate but

¹³ 163 U.S. 537 (1896).

¹⁴ *Id.* at 538.

¹⁵ *Id.*

¹⁶ *Id.* at 553.

¹⁷ *Id.*

¹⁸ *Id.* at 548.

¹⁹ *Id.* at 552-53.

²⁰ *Id.* at 552

equal” doctrine was not overturned until 1954.²¹ This doctrine became the driving force for making constitutional all laws that compartmentalized people based on their color and showed great favoritism to white citizens. Most importantly for this paper is how the “separate but equal” doctrine led to the establishment of de jure segregation in American schools.

It was not until 1954 that the Supreme Court of the United States finally overruled the “separate but equal” doctrine stating de jure segregation violated the Fourteenth Amendment.²² In *Brown I*, several class action suits were filed by African-American children who wished to be able to attend school on a non-segregated basis in four different states.²³ Each class of plaintiffs argued that they were denied access to schools attended by white children under state laws which permitted segregation according to race and argued that those laws violated the plaintiffs’ rights to equal protection under the Fourteenth Amendment.²⁴ At the trial court level for three of the four class suits, the trial judge denied the plaintiffs relief on the “separate but equal” doctrine, stating that so long as the races were provided substantially equal facilities, it did not matter that people were being separated by race.²⁵ In Delaware, the judge still adhered to the “separate but equal doctrine” but stated that the black students needed to be admitted into the white-only schools because the schools the black students were attending were far inferior to the white children’s schools.²⁶ The specific issue before the Court was whether segregating children on the sole basis of race deprives children of the minority group of equal educational opportunities even if the facilities are considered “equal.”²⁷ Chief Justice Warren, writing for the majority, held “separate but equal” deprived minority children the right to equal education.²⁸ He further stated that segregating schools made children in the minority races feel inferior to their white counterparts, and that sense of inferiority hindered the black

²¹ *Brown I*, 347 U.S. 483.

²² *Id.*

²³ *Id.* at 489

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 493.

²⁸ *Id.*

children's motivation to learn and slowed their mental development.²⁹ The Court overruled the "separate but equal" doctrine in the school systems and found that the segregated school systems deprived the plaintiffs their Fourteenth Amendment right to equal protection.³⁰

One year later, in *Brown II*, the Court established that school districts had the constitutional duty to desegregate their schools.³¹ Unfortunately, almost sixty years after the Court's holding in *Brown II*, many school districts who had desegregated were once again re-segregated and many never did desegregate.³² The departure from de jure segregation was a slow one and one that was done with great reluctance by many states. It became obvious to state legislatures and court systems that one court holding was not going to be enough to erase centuries of animosity and discrimination.

The harsh reality of school systems today is that the dual system of segregation still exists, but now, it is de facto segregation rather than de jure segregation that separates students. De facto segregation is segregation that occurs without state authority on the basis of socioeconomic factors.³³ There are many theories as to what has caused the de facto segregation phenomenon, most of which will be discussed later in this article when discussing the different measures that have been taken by states and school systems to attempt to remedy de facto segregation. For now, the important thing to understand is that although state constitutions no longer have provisions requiring separate schools for separate races, children, especially African-American children, are still suffering from the harmful effects of segregation.³⁴ De facto segregation is a malady in this country and until we find a cure, children are going to continue to

²⁹ *Id.* at 494.

³⁰ *Id.* at 495.

³¹ *Brown v. Board of Educ.*, 349 U.S. 294, 301 (1955) ["Brown II"].

³² John M. Jackson, *Remedy for Inner City Segregation in Public Schools: The Necessary Inclusion of Suburbia*, 55 OHIO ST. L.J. 415, 416 (1994).

³³ BLACK'S LAW DICTIONARY (9th ed. 2009).

³⁴ See Jonathan Kozol, *Savage Inequalities: Children in America's Schools* 211-249 (1991).

be victims to the psychological ramifications that come with being classified and separated because of the color of their skin.³⁵

PART II: DE FACTO SEGREGATION IN KNOX COUNTY, TENNESSEE

Although there are numerous psychological studies that prove that people are generally drawn to people they have the most in common with, the reality is having a school that is predominantly one race over another forces children in the minority race to withdraw, act out, and fail to reach their full potential.³⁶ This article concentrates on high schools in Knox County, Tennessee to demonstrate the harmful effects of children, especially African-American children, being educated in a school system divided by de facto segregation. There are fourteen high schools in Knox County. Below is a compilation of data retrieved from U.S. News and World Report on the performance levels of the fourteen high schools in Knox County in 2011:

School	% Economically Disadvantaged Students	Proficient in English	Proficient in Algebra
Austin East High/Magnet School	83%	31%	18%
Bearden High School	17%	87%	60%
Carter High School	46%	66%	38%
Central High School	47%	60%	25%
Farragut High School	9%	89%	71%
Fulton High School	69%	48%	23%
Gibbs High School	33%	59%	26%
Halls High School	23%	73%	58%
Hardin Valley High School	15%	81%	56%
Karns High School	33%	66%	32%
Powell High School	30%	69%	37%
Ridgedale Alternative School	80%	N/A	N/A
South Doyle High School	49%	59%	36%
West High School	42%	69%	31%

³⁵ *Id.*

³⁶ Mary N. Parker, et al., *Minority Status Stress: Effect on the Psychological and Academic Functioning of African-American Students*; *Journal of Gender, Culture, and Health* 61, 62 (1999).

School	% College Readiness	% White Students	% Minority Students	Geographical Setting
Austin East High/Magnet School	5.80%	10%	90%	City
Bearden High School	26.30%	85%	15%	City
Carter High School	8.90%	90%	10%	Rural
Central High School	7.90%	72%	28%	City
Farragut High School	38.70%	84%	16%	Suburb
Fulton High School	3.90%	59%	41%	City
Gibbs High School	2.90%	92%	8%	Suburb
Halls High School	13.80%	96%	4%	Suburb
Hardin Valley High School	25.80%	85%	15%	City
Karns High School	18.30%	85%	15%	Rural
Powell High School	9.7%	88%	12%	Suburb
Ridgedale Alternative School	N/A	66%	34%	City
South Doyle High School	5.7%	85%	15%	Suburb
West High School	23.3%	66%	34%	City

*Table Continued*³⁷

Of the fourteen schools listed, only Farragut High School is ranked fifth in the state and is 705th in the nation.³⁸ The only other ranked school on this list is Bearden, which is eleventh in the state and nationally ranked at 1,303rd.³⁹ This chart indicates two things: 1) the poverty rate with correlates high percentages of minorities in schools; and 2) the highest concentration of minority students are in the city limits of Knoxville. Without further looking into the information provided in the chart, it shows Knox County high schools are operating under de facto segregation. These data are not conclusive, and there are many factors that contribute to the success of students in any given school. Nevertheless, the data is clear that students in schools where the number of minority students is greater than the number of white students are at a significant disadvantage (for the most part) than students in the schools where the white student population was higher than the minority population. The

³⁷ U.S. News College Compass Best Colleges 2011.

www.usnews.com/education/best-high-schools/tennessee/districts/knox-county/ (last visited Oct. 27, 2012). *The L&N Stem Academy was not included in the school report; therefore I did not include it in my study.

³⁸ *Id.*

³⁹ *Id.*

only school with an almost-balanced student ratio was Fulton, with one of the lowest college readiness scores. After reading several articles about Fulton's strides to reform its school system to bring that readiness score up, it is clear that those changes will be reflected in years to come.⁴⁰

Based on the information in the graph, the two schools on polar opposites of each other are Farragut and Austin East. Of the sixteen percent of minority students in Farragut, only six percent are black. Seven percent are Asian and three percent are Hispanic. The poverty level in Farragut is the lowest of all the fourteen high schools in Knox County.⁴¹ Farragut has a history of being known as one the wealthiest parts of Knox County. On the other hand, Austin East has a long history of being a predominantly black school located in Knoxville's inner city. Austin East has a bad reputation of violence and drugs and is more noted for its need for police escorts at its home football games than for its academic achievements.⁴² Looking at the scores and percentages in the chart, it can be determined that students at Austin East are receiving an inferior education than the students in Farragut: an example of de facto segregation at play.⁴³

The numbers do not lie. The Knox County School District is one with a dual system. Although there are small percentages of minority students in other schools, the highest concentration of black students can be found in Fulton High School and Austin East High School, the district's city schools. These schools have the lowest test scores in the district. The scores are not the result of a high concentration of slow-minded students who struggle to mentally grasp educational concepts. Instead, these scores arguably are the result of students having to learn in an environment where they are told that because they are minorities and attend a nearly all-minority

⁴⁰ See, e.g., Lydia X. McCoy, *Making the Grade: Knox Schools Innovate, Score Well on State Report Card*, KNOXVILLE NEWS SENTINEL, Dec. 2, 2011, available at <http://www.knoxnews.com/news/2011/dec/02/making-the-grade-knox-schools-innovate-score-on/>.

⁴¹ U.S. News College Compass Best Colleges 2011, *supra* note 34.

⁴² Megan Boehnke & Lydia X. McCoy, *Gun Violence, Close Calls at Knox-area Schools*, KNOXVILLE NEWS SENTINEL, Dec. 21, 2012, available at <http://www.knoxnews.com/news/2012/dec/21/east-tennessee-school-violence-and-close-calls/>.

⁴³ U.S. News College Compass Best Colleges 2011, *supra* note 34.

school, they will not be allowed the educational opportunities that students in majority-white schools have.⁴⁴ De facto segregation is detrimental to America's students. The question becomes: how is de facto segregation eliminated without violating the Constitution?

PART III: CONTRIBUTIONS TO THE EXISTENCE OF DE FACTO SEGREGATION

So, what caused this de facto segregation or re-segregation to occur? There are many theories as to what caused this phenomenon of highly concentrated students of one race in schools, but they all lead back to what is commonly known as "white flight."⁴⁵ With white flight, white citizens left the cities they once populated and moved out to the suburbs in large concentrations while black citizens stayed in the cities.⁴⁶ When new schools were built, they were placed in heavily populated neighborhoods of one race or another, which helped to keep the suburban children and urban children separated.⁴⁷ Naturally, the poorer districts are found in urban communities because of the lack of public transportation between the suburbs and the city, the higher cost for housing and taxes in the suburbs, and the government's placement of federal housing projects in the cities rather than the surrounding suburban districts.⁴⁸ Thus, the inner-city schools have a much higher population of students below the poverty line than those in most suburban communities.⁴⁹ As seen in the chart in Part II of this article, often times where there is a high concentration of poverty, there is also a high concentration of minorities.⁵⁰ Because it is reportedly known that poverty affects overall student achievement, the high concentration of poverty juxtaposed with a high concentration of minorities creates an environment that restricts students' learning achievements and feeds into the thought process

⁴⁴ See e.g., Lucis Miron, *Education, Inner-City Schools*, Encyclopedia of Social Problems, 284-285 (2008).

⁴⁵ See e.g., Jan Blakeslee, *"White Flight" to the Suburbs: A Demographic Approach*, Institute for Research on Poverty (1978).

⁴⁶ *Id.*

⁴⁷ ABIGAIL M. THERNSTROM & STEPHAN THERNSTROM, *BEYOND THE COLOR LINE: NEW PERSPECTIVES ON RACE AND ETHNICITY IN AMERICA* 252 (2002).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ U.S. News College Compass Best Colleges 2011, *supra* note 31.

that inner-city schools are far more inferior to those located in the suburbs.⁵¹

PART IV: REMEDIES FOR DE FACTO SEGREGATION

A. TYPES OF REMEDIES, THEIR EFFECTIVENESS, AND THE UNITED STATES SUPREME COURT'S RESPONSES

Americans may not have the constitutional right to an education, but they do have the constitutional right to an equal education.⁵² *Brown I* and *Brown II* should have been the cases to dissolve all segregation problems in schools. They represent the pivotal point in America's history where the highest court in the country declared that to be racially divided in our school systems was unconstitutional. It gave hope to those who had once believed that there was no hope.⁵³ It sent a message to the world that America was a progressive and moving nation.⁵⁴ However, although the Supreme Court declared dual school systems unconstitutional and mandated that all segregated systems integrate, both cases had one major flaw: they failed to mention how the schools needed to desegregate and left it up to the District Courts to determine the appropriate remedies. As Chief Justice Burger explained it in *Swann v. Charlotte-Mecklenburg Board of Education*:

This Court, in *Brown I*, appropriately dealt with the large constitutional principles; other federal courts had to grapple with the flinty, intractable realities of day-to-day implementation of those constitutional commands. Their efforts, of necessity, embraced a process of 'trial and error,' and our effort to formulate guidelines must take into account their experience.⁵⁵

⁵¹ Misty Lacour & Laura D. Tissington, *The Effects of Poverty on Academic Achievement*, Educational Research and Reviews, Academic Journals, 522 (2011).

⁵² *Id.*

⁵³ Mary L. Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy*, Princeton U. P. (2000).

⁵⁴ *Id.*

⁵⁵ 402 U.S. 1, 6 (1971).

Because the Court failed to provide a remedy in *Brown I* and *Brown II* for school systems and states to follow, states and school boards alike spent the next sixty years trying to find the perfect remedy to resolve the segregation issues that was not racially discriminatory or harmful to any students involved.⁵⁶ Most of the remedies have failed when they were challenged at the federal court level.⁵⁷ Many parents believed the school systems were not doing enough.⁵⁸ Others believed the school systems were becoming too intrusive in their children's lives.⁵⁹ It rapidly became clear that merely declaring something that had been practiced for centuries unconstitutional was not going to be enough.⁶⁰

Today, school districts must show the correlation between the legitimate interest and the means for achieving said interest.⁶¹ The test to determine the constitutionality of desegregation plans is one of strict scrutiny, which requires that the state or school district show that their system has been narrowly tailored to achieve a compelling government interest.⁶² Thus, a heavy burden is placed on a school district to establish it does have a compelling government interest in desegregation plans and that the method in which it used is narrowly tailored to achieve that purpose. This is important to understanding how proposed desegregation methods have been accepted or denied by the Courts and how the strict standard has contributed to the racial imbalance in schools today.

1. BUSING AND RESTRUCTURING SCHOOL ZONES

Once *Brown I* and *Brown II* were decided, they did not change the fact most schools in states operating under dual systems were still racially divided.⁶³ The question became how to make the students

⁵⁶ See Jonathan Fischbach, et. al., *Race at the Pivot Point: The Future of Race-Based Policies to Remedy De Jure Segregation After Parents Involved in Community Schools*, 43 HARV. C.R.-C.L.L. REV. 491 (2008).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 702 (2007).

⁶² *Id.*

⁶³ *Armor*, *supra* note 36.

integrate so that it was obvious the state and school board were taking steps to desegregate the system. The most popular method of desegregation was the busing method.⁶⁴

Under the busing method, which involved the restructuring of school zones in an effort to achieve racial balance in that district's schools, public transportation was provided to bus students to the school they had been assigned to in an effort to achieve racial balance.⁶⁵ The school district to make history under this method was the Charlotte-Mecklenburg school district in North Carolina, a state that formerly had a statutory dual segregated school system.⁶⁶ Out of its 84,000 pupils, 21,000 of the 24,000 black children in its district attended schools within the city of Charlotte; 14,000 of those students attended 21 schools which were either all-black or more than 99% all-black.⁶⁷ The school board was ordered by the District Court to come up with a plan based on geographic zoning with a free-transfer provision to make the Charlotte-Mecklenburg school district racially balanced.⁶⁸

Two plans were proposed: the Board Plan and the Finger Plan.⁶⁹ Both plans had a similar proposal for high school students but varied for the junior high and elementary school students.⁷⁰ The common denominator in both plans was to eliminate several all-black schools and relocate those students to other schools in the district in order to make the minority ratio in each school reflect the minority ratio in the school district as a whole.⁷¹ The Finger Plan was adopted, but it had one major flaw: only white students in the fifth and sixth grades were bused to schools in the inner city.⁷² From kindergarten to fourth grade and from seventh grade to twelfth grade, black students

⁶⁴ David J. Armor, *The Evidence on Busing*, PUBLIC INTEREST 28 (1972).

⁶⁵ 402 U.S. at 8.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 8-9.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 10.

were bused to predominantly white schools in the suburbs of the Charlotte-Mecklenburg school district.⁷³

Unfortunately, when the constitutionality of the busing and rezoning system was challenged before the United States Supreme Court, the majority of the Court upheld the busing and rezoning method as a necessary means to cure the problem of segregation in the school system.⁷⁴ It appears that the Burger Court chose to believe that busing white students in the fifth and sixth grade along with establishing a unitary athletic department was enough to prove that the school board's system was constitutionally sound.⁷⁵ The Court found that the nature of the violation determines the scope of the remedy; thus, because the school board system was taking strides to make itself racially balanced, striking down the system would not be an effective remedy when the school board was trying to uphold its constitutional duty.⁷⁶

The rezoning and busing system was further challenged in *Milliken v. Bradley*.⁷⁷ In this case, parents of children in the Detroit city school system challenged the constitutionality of a Michigan statute known as Act 48 of the 1970 Legislature, which would interfere with a voluntary partial segregation plan for high schools in Detroit which was racially imbalanced.⁷⁸ The Supreme Court in this case read *Swann* to say that desegregation does not require racial balance in schools.⁷⁹ The problem at issue in this case was that the schools in the city of Detroit were 85%-100% predominantly black schools that operated under the dual school system, whereas the surrounding 53 school districts had made changes to operate under a unitary school system.⁸⁰

The District Court sought to remedy the racial imbalance in Detroit by forcing a busing and rezoning plan on the surrounding

⁷³ *Id.*

⁷⁴ *Id.* at 33.

⁷⁵ *See Id.*

⁷⁶ *Id.* at 16.

⁷⁷ 418 U.S. 717, 722 (1974).

⁷⁸ *Id.*

⁷⁹ *Id.* at 740-41.

⁸⁰ *Id.* at 722.

school districts in order to make Detroit's city school system balanced.⁸¹ The Burger Court declared that when one district is in violation of the Constitution in operating under a dual system, the surrounding districts should not be punished as a result.⁸² Essentially, the Court placed limitations on the rezoning and busing practice approved in *Swann*.⁸³ As Justice Marshall stated in his dissenting opinion, the Court held that if the state failed to prove the surrounding districts played a part in the segregation of a single district, said districts would not be forced to rezone to accommodate or fix the segregation problem of another district.⁸⁴ He believed that the majority opinion would stunt segregation challenges because it would not allow for addressing the discrepancies between one school district and the surrounding school districts.⁸⁵

After *Milliken*, it appeared the rezoning and busing remedies within school districts were remedial methods approved by the Supreme Court, but over time, it would become evident those programs only further supported segregation and fueled the fire to rapid de facto segregation in our country.⁸⁶ In 1997, the decision in *Swann* was challenged when a district judge declared that the school system had achieved unitary status and the busing system was no longer necessary to achieve racial balance.⁸⁷ As a result, the school system implemented a racial-neutral choice plan where students were allowed to pick the school of their choice.⁸⁸ Today, the Charlotte-Mecklenburg school district is just as racially divided as it was before *Swann* was decided.⁸⁹

As for the Detroit city schools, the holding in *Milliken* allowed for further white flight to take place and according to the most recent reported data, 90% of the students in Detroit Public Schools are black or Hispanic while the schools in the surrounding

⁸¹ *Id.* at 752.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 808 (Marshall, J., dissenting).

⁸⁵ *Id.*

⁸⁶ Claire Apaliski & Laura Simmons, *Mapping de facto segregation in Charlotte-Mecklenburg Schools*, UNC Charlotte Urban Institute (2010).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

suburb districts are predominantly white.⁹⁰ Thus, it would appear the busing system and school zoning were effective methods in integrating schools. However, as will be discussed below, the Supreme Court later held that using race for the basis of determining where a student attends school also violates the Equal Protection Clause of the Fourteenth Amendment.⁹¹

2. FREEDOM OF CHOICE

Originally after the decisions in *Brown I* and *Brown II*, school districts adopted a method known as freedom of choice.⁹² Under the freedom of choice approach, students were allowed to choose which school they wanted to attend.⁹³ This was an attempt made by school boards to achieve racially balanced schools without using race as a factor.⁹⁴

This system was challenged in the case of *Green v. County School Board of New Kent County, Virginia*. In this case, Virginia had once conducted its schools under statutory segregation, but after the Supreme Court's ruling in *Brown II*, Virginia enacted first what was known as the Pupil Placement Act in 1964.⁹⁵ Under Pupil Placement, students were automatically reassigned to the school previously attended unless they applied to attend another school.⁹⁶ The problem with Pupil Placement was that no minority applied for admission to the white school under the statute and no white child had applied to the minority school. Before any action could be taken to strike down the Pupil Placement Act, the New Kent school board adopted a "freedom of choice" plan to desegregate schools.⁹⁷ Under the freedom of choice plan, students not entering in first and eighth grade could choose between the previously all-white school or the previously all-black school and any student who did not choose a school would be

⁹⁰ Gary Orfield, John Kucsera & Genevieve Siegel-Hawley, *E Pluribus...Separation: Deepening Double Segregation for More Students*, The Civil Rights Project at the UCLA 44 (2008).

⁹¹ See 402 U.S. at 8.

⁹² 391 U.S. 430, 432 (1968).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 433.

⁹⁷ *Id.*

placed in the school he or she previously attended.⁹⁸ This plan seemed great to the school board because it placed the responsibility of integration on the students. However, the problem with the freedom of choice method in this school district was that after three years of its implementation, no white child had chosen to attend the formerly all-black school and although 15% of the black children enrolled into the formerly white-only school, 85% of the black children still attended the all-black school.⁹⁹ Thus, the schools system remained segregated.¹⁰⁰

The problem with the freedom of choice method is that when children have the freedom to choose, they will choose the most familiar option. Without further action from the school board, the negative stigma the all-black school originally carried will remain, regardless of whether students are suddenly able to pick the school they want to attend.¹⁰¹ The school district must take an additional step to show that both schools provide an equal education regardless of whatever prior negative label that school once held. The Supreme Court found in *Green* that New Kent's freedom of choice plan was an insufficient step to an integrated school system.¹⁰² However insufficient New Kent's freedom of choice plan was, the Court did not go as far as to declare "freedom of choice" programs unconstitutional.

The most well-known freedom of choice plan enacted by the federal government is found in the No Child Left Behind Act, enacted in 2001, which contains a provision allowing for minority students in predominantly black schools to transfer to predominantly white schools in an attempt to remedy de facto segregation.¹⁰³ Many school districts have decided to forgo this remedial procedure, and as a result de facto segregation is becoming more of a reality as students in predominantly white schools choose to stay in their schools while

⁹⁸ *Id.*

⁹⁹ *Id.* at 441.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ 20 U.S.C. § 6316(b)(1)(E)(i).

students in predominantly black or Hispanic schools are forced to remain where they are in the inner city.¹⁰⁴

3. RACIALLY-BASED SCHOOL ASSIGNMENT PLANS

Until 2007, the Supreme Court of the United States upheld any desegregation plans that used race as a basis of assigning students to schools so long as the school boards could establish that it was necessary in eliminating its former dual school system.¹⁰⁵ In addition, schools had to show there were other factors or actions taken by the school district, which made it so that race was not the only factor in the school desegregation plan.¹⁰⁶ Racially based school assignment plans involved a school district looking at the number of students in each school within the district and reassigning the children to different schools in order to achieve racial balance.¹⁰⁷ This practice was challenged by parents of students in Seattle School District No. 1. Under the program established in Seattle School District No. 1, a student reassignment plan was created in which certain slots in oversubscribed schools were allocated based on racial classification.¹⁰⁸ The parents argued the race-based assignment plan violated their children's Fourteenth Amendment right to equal protection.¹⁰⁹ Chief Justice Roberts, writing the majority opinion concerning the race classification, stated that:

[b]ecause 'racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification,' governmental distributions of burdens or benefits based on individual racial classifications are reviewed under strict scrutiny. Thus, the school districts must demonstrate that their use of such classifications is

¹⁰⁴ See Debroah Meier et al., *Many Children Left Behind: How the No Child Left Behind Act is Damaging Our Children and Our Schools 6-15* (2004).

¹⁰⁵ See generally *Seattle Dist. No. 1*, 551 U.S. 701.

¹⁰⁶ See 402 U.S. at 8.

¹⁰⁷ *Id.*

¹⁰⁸ *Seattle Dist. No. 1*, 551 U.S. at 701.

¹⁰⁹ *Id.*

“narrowly tailored” to achieve a “compelling” government interest.¹¹⁰

Following the strict scrutiny test, Chief Justice Roberts found that Seattle School District No. 1 failed to meet the standard due to the fact Seattle schools were never segregated by law; thus the compelling interest to remedy past intentional segregation did not exist.¹¹¹ The Court also found the school district was not governed by *Grutter v. Bolinger* because the positions allocated in the oversubscribed schools were purely based on race.¹¹² In order for *Grutter* to apply, the spectrum needed to be broader so race and ethnicity were mere factors rather than the entire basis for the desegregation policy.¹¹³ The Court further stated if a school’s desegregation decree has been dissolved, a racially based system of assigning students to schools after the dissolution of the decree is unconstitutionally discriminatory absent some showing by the school district or the state that there was a separate compelling interest for using race as a factor in assigning students to a school.¹¹⁴

The impact of the Court’s holding in *Seattle School District No. 1* was devastating for school districts across the country.¹¹⁵ The strict scrutiny test now applied to public schools has debilitated many programs that were meant to help achieve racial balance in schools.¹¹⁶ There are two types of schools in this country: the schools that were never segregated and the schools that once practiced segregation but have since been dissolved of their desegregation decrees.¹¹⁷ As a result, *Seattle School District No. 1* has declared unconstitutional race-based assignments in school districts that had been in place to maintain racial balance, which means these schools must find another way to stop the rapidly growing trend of de facto segregation.¹¹⁸ In

¹¹⁰ *Id.* at 702.

¹¹¹ *Id.*

¹¹² *Id.* at 703.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ See Craig R. Heeren, “Together at the Table of Brotherhood” *Voluntary Student Assignment Plants and the Supreme Court*, 24 HARV. BLACKLETTER L.J. 133 (2008).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Seattle Dist. No. 1*, 551 U.S. at 703.

going back to the chart in Section II, if the problem is that 90% of a school district's minority population attends one school while 90% of its white population attends another school, how does that school district blend the schools so that 50% of each group of people attends both schools without using race as a factor? My answer to that question will be discussed in the Part V of this article.

4. "COLORBLINDNESS"

"Colorblindness" is a theory introduced by "integrationalists" who believe that in order to overcome racism, America must first be a racially-neutral society.¹¹⁹ At this time, colorblindness is only a school of thought that many people would like to see implemented in an effort to achieve a culturally balanced society.¹²⁰ Although the methods of integration discussed below have not been implemented in schools at this time, and thus have not been addressed by the Courts, I found it important to include in this section of the article to show the potential remedies and the potential problems the methods of colorblind integration face. Integrationalists' cure for discrimination is "equal treatment according to neutral norms."¹²¹ There are three forms of integration under the "colorblind" theory: amalgamation, accommodationalism, and assimilationism.¹²²

Amalgamation, or cultural pluralism, permits diverse cultures the right to keep their individual characteristics while allowing them to have equal access to resources in society.¹²³ This system relies on each member in American society acting racially neutral in identifying other members in society as is described below:

Amalgamation thus embraces the belief that each member of American society can determine the extent that another member's race will factor into their

¹¹⁹ Alicia L. Mioli, *Sheff v. O'Neill: The Consequence of Educational Table-Scraps for Poor Urban Minority Schools*, 27 *FORDHAM URB. L.J.* 1903, 1916-17 (2000).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

relationships and identifications so long as the second member's "race would not be used . . . to limit [his] opportunities or define [his] identit[y]." Through meshing different cultures together, including African American culture, American society thus reaps the benefits of multiculturalism and those of integration at the same time. Consequently, the amalgamationist could, in theory, preserve African American heritage.¹²⁴

Thus, in my opinion, the problem with amalgamation is it could further preserve the cultural divide between white society and black society, thus keeping us right where we are: never moving forward; always staying the same.

Accommodationism calls for "accepting the value of dominant society and working toward eliminating racial inequalities gradually."¹²⁵ This form of integration trades the more aggressive approach for one that requires conforming to the expectations of the white majority.¹²⁶ Accommodationists in support of this form of integration believe if black people conform to white culture, it will gradually make white people more open to integration.¹²⁷ The problem with this is it conforms to the stereotype that black people are inferior to white people and calls for African Americans to disregard their distinct culture to conform to the culture of the *majority*.¹²⁸

Under assimilationism, no racial culture is different from any other American, thus all races should adopt the cultural norms and values of the "American majority."¹²⁹ Essentially, what assimilationism calls for is not recognizing any culture as distinct or different and recognizing that everyone can compete equally before and after integration.¹³⁰ Although this is great in theory, the problem with assimilationism, in my opinion, is defining just what is

¹²⁴ *Id.* at 1917-18.

¹²⁵ *Id.* at 1918.

¹²⁶ *Id.*

¹²⁷ *Id.* at 1919.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

considered the culture of “American majority” in a nation where the *minorities* in the country are seeing a major increase in population number while the number of white people is shrinking. Which culture is the one we must conform to or is there something in between the two?

It is my theory that the major flaw of these schools of thought regarding integration is they all rely on society to step up and fix the de facto segregation problem by itself. The problem with this is so far, we are not doing a good job on our own. Taking a step back and looking at the layout of schools today, it is hard not to ask the question, “Is this really the government’s fault or is the segregation in our communities caused by something more?”

B. THE MAIN OBSTACLES SCHOOLS FACE TODAY IN RESOLVING THE ISSUE OF DE FACTO SEGREGATION

What are the schools doing differently, if anything at all, that is affecting the learning outcomes of students in inner-city schools where 90% of the student population is black or Hispanic versus the learning outcomes of students in predominantly white suburban schools?

That racial division by itself is no longer the issue. The two main obstacles schools face today in attempting to achieve a successful and balanced learning environment are poverty and lack of parental involvement. The problem with inner-city schools today is where there is a high concentration of minorities; there is also a high concentration of poverty.¹³¹ Studies have shown that racial segregation combined with poverty results in a negative impact on the quality of education.¹³² As a result, low-income minority students in inner-city schools are more often receiving inferior educations than students coming from upper and middle classes attending schools in

¹³¹ NAT’L CENTER FOR ED. STATISTICS, Percentage of high school dropouts among persons 16 through 24 years old (status dropout rate), by income level, and percentage distribution of status dropouts, by labor force status and educational attainment: 1970 through 2010, http://nces.ed.gov/programs/digest/d11/tables/dt11_117.asp, (last visited Oct. 27, 2011).

¹³² Mioli, *supra* note 104.

the suburbs.¹³³ Inferior education includes less-qualified teachers, insufficient supply of books and access to technology for students, poorly maintained schools, and lack of valuable learning tools such as writing labs and science labs, AP courses, and extracurricular programs such as photography or newspaper staff.¹³⁴ The inevitable result of an inferior education is below-average student achievement, as was seen in the student proficiency scores in Knox County high schools in 2011.¹³⁵

Austin East, an inner-city school, with 90% minority enrollment and 83% of its students being economically disadvantaged is only 31% proficient in English and 18% proficient in Algebra.¹³⁶ On the other hand, Farragut, with 10% minority enrollment and 9% of its students being economically disadvantaged, is 89% proficient in English and 71% proficient in Algebra.¹³⁷ The average proficiency percentages in Knox County high schools is 66% in English and 39% in Algebra, which means Austin East's student achievement is well below the county average in both subjects.¹³⁸

After a visit at both Farragut High School and Austin East High School, I can conclude students at Austin East are receiving a far inferior education to those at Farragut High School.¹³⁹ In Austin East, many of the ceiling tiles in the hallway showed signs of water stains, the lighting was poor, the lockers were older and scratched, and only the basic extracurricular activities are available although student involvement in those programs is significantly less than the number of students enrolled in the school.¹⁴⁰ In Farragut, the lighting was much brighter in the hallways, the lockers had been repainted over summer break, each student had textbooks for every subject, AP and college courses were available to advanced students, and students

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ U.S. News College Compass Best Colleges 2011, *supra* note 31.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ At both schools, I spoke with the administration about government assistance and the turn-over rate of teachers in each school. We also discussed parental involvement and the socioeconomic status of the students. I was given a tour of the facilities and sat in on a few classes.

¹⁴⁰ *Id.*

had access to extracurricular activities beyond the standard band/chorus/sports activities, which included Navy JROTC, German Club, Technology Student Association, Walking Team, Robotics Team, Admiral's Performing Arts Company, DECA, FHS Book Club, FHS ClubKnit, Humanities Academy, and Health Occupation Students of America.¹⁴¹

Normally, schools rely heavily on fundraiser money to pay for updating equipment or expanding on a certain department in the school.¹⁴² Students generally limit selling their fundraiser items to people in their communities, which means students in poverty-stricken inner-city schools will underperform in sales because of the lack of money in the community.¹⁴³ Whereas the schools in the suburbs will typically meet or surpass their fundraiser goal because even if money is tight, members in their community still have enough to give to their school children.¹⁴⁴ As the person I spoke to at Austin East explained, although the school receives Title 1 funds from the government to go towards updating technology, in a community with limited funds, it is almost impossible to have anything beyond what the Title 1 money covers.¹⁴⁵ As a result, students attending schools with high poverty rates are receiving an inferior education because the school cannot afford to provide the additional money needed to fund new programs and update the facilities.¹⁴⁶ Poverty is an obstacle for remedying de facto segregation because students from low-income families will be more dependent on the school system to provide their food and transportation to and from school.¹⁴⁷ This in turn causes a higher financial burden on the school district and subsequently makes schools more reluctant to change the program in any way that would cause them to have to spend more money transporting these children even further to other schools in an effort to achieve racial balance.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Mioli, *supra* note 104.

The second, and probably the most important, obstacle hindering the reversal of de facto segregation is a lack of parental involvement. It is unfair to place the burden of student achievement solely on teachers and the school administration since a good education begins at home.¹⁴⁸ Statistics have shown that students who have at least one parent actively involved in encouraging and promoting their education have a higher success rate in school than those who have little or no parental involvement.¹⁴⁹ Unfortunately, in urban schools, parental involvement is extremely low.¹⁵⁰ The contributing factors to low parental involvement are culture, income, language, and the parents' perceptions of what a student's responsibilities are to school and their families.¹⁵¹ As mentioned above, schools with higher percentages of economically disadvantaged students generally provide an inferior education.¹⁵²

Poverty also affects parental involvement.¹⁵³ Middle class parents generally take proactive roles in their children's education and try to work with the teachers in order to make sure their children perform at their best.¹⁵⁴ Low-income parents often see themselves as separate and outside the school system and leave the responsibility of teaching their children to the educators.¹⁵⁵ Another problem with schools with high poverty rates and minority rates is that parents often do not feel valued by the schools, which means inner-city schools must take greater strides in making parents in that school feel welcome and important because often parents in these schools have experienced exclusion in the community based on their income, ethnicity, or culture.¹⁵⁶

¹⁴⁸ Peter McDermott & Julia Rothenberg, *Why Urban Parents Resist Involvement in their Children's Elementary Education*, The Qualitative Report (2000).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*; Mioli *supra* note 104.

¹⁵² McDermott & Rothenberg, *supra* note 133.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

The greatest hurdle for teachers in inner-city schools in trying to improve parental involvement is communication.¹⁵⁷ Studies show that teachers who can match their communication styles to that of the community in which they teach will be more successful in making parents more eager to participate in their student's education.¹⁵⁸ Also, teachers who educate themselves on their students' cultures and ethnicities will be able to further encourage more parental involvement.¹⁵⁹ Unfortunately, most teachers in inner-city schools do not communicate effectively because they have failed to educate themselves about the cultures and beliefs of their students, which results in the parents feeling as if the school system was created to cater to middle-class white Americans.¹⁶⁰

In an interview with a teacher from a predominantly Hispanic populated middle school in East Tennessee, I was able to learn that often the hardest thing to overcome in getting students motivated to learn was getting parents to believe that education was important for their children.¹⁶¹ The teacher, who has been certified English as a Second Language (ESL) instructor in the state of Tennessee for three years now, stated,

It's really hard to get students motivated to take school seriously when they go home to a culture that says education isn't necessary for success. When I try to schedule meetings with the parents to discuss how their child is failing, I may get lucky and have one parent show up but most of the time they don't show.

Overall, because of the lack of parental support at home, teachers like the one I interviewed are limited in what they can do to encourage student achievement in schools that are predominantly black or Hispanic. This ultimately results in higher levels of teacher turnovers because the teachers feel like it is impossible to mend a broken system

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ The teacher I interviewed wished to remain anonymous in order to be able adequately answer my questions and still protect her students' identities.

that does not want to be fixed and their job security relies on students' performances on the Tennessee Comprehensive Assessment Program Test (TCAP Test).¹⁶² "It's simple," the ESL teacher said,

without the pressure of losing our jobs over our students' performance on the TCAP, I think you'd see more teachers willing to work in inner-city schools. As it stands, we can't afford to stay in schools where there is little parental involvement and little to no resources available for us to provide that *next level* of education.¹⁶³

Contrarily, in Hartford, Connecticut, parents in racially divided city schools have decided to take an active role in their children's education.¹⁶⁴ Rather than asking for integration, they are asking that their children receive the same education as children in the surrounding suburban schools.¹⁶⁵ Most states have websites to promote and encourage parental involvement in their urban school districts and it is clear that more parents are starting to take active roles in their children's education.¹⁶⁶ According to the American Council on Education, "students with involved parents, no matter what their income or background, are more likely to earn higher grades and test scores, attend school regularly, have better social skills, show improved behavior, and adapt well to school and graduate and go on to post-secondary education."¹⁶⁷ If parents do not make education a priority in their children's lives, no remedy in the world will be enough to provide equal education for all.¹⁶⁸

De facto segregation was not merely the result of poor governmental attempts at eliminating formerly segregated school

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Mioli, *supra* note 104.

¹⁶⁵ *Id.*

¹⁶⁶ See e.g., Cypress Fairbanks Independent School District, www.cfishd.net (last visited Sept. 3, 2014); see also www.marylandpublicschools.org (last visited Dec. 12, 2012).

¹⁶⁷ American Council on Education (2007).

¹⁶⁸ Anne Henderson, *A New Generation of Evidence*, Center for Law & Education (1994).

systems.¹⁶⁹ A state can find the most nondiscriminatory method in balancing its schools, but the obstacles of poverty and lack of parental involvement will ultimately reverse any attempts on the state's part to increase student academic achievement if not properly addressed.¹⁷⁰

PART V: HOW TO REMEDY THE ISSUE OF DE FACTO SEGREGATION

By this point, the foundation has been laid as to why de facto segregation is a problem in our school districts today. Although de facto segregation was not statutorily created by the states, it was encouraged by Court holdings and governmental action.¹⁷¹ We drifted away from constitutional segregation to integration but the trend continued re-segregation where the original boundary lines returned and schools are just as racially divided now as they were before *Brown I and II* were ever decided. The problem does not rest on the fact that there are schools with predominantly one race over the other. The problem is, where there is a high concentration of nonwhite students in inner city schools, there is also a high concentration of poverty in those schools.¹⁷² Poverty combined with racial division and lack of parental involvement creates the perfect storm of student failure.¹⁷³ Parents have attempted to challenge the constitutionality of de facto segregation and demand that states take proactive measures in balancing schools racially as was seen in *Seattle Dist. No. 1*, but because the racial divide resulted from demographic shifts allegedly beyond the government's control, systems remain as they are for the time being.¹⁷⁴ So then, what is the solution?

One single act alone will not be enough to create a multiethnic learning environment. Instead, several events must take place in order to encourage re-integration. First, the government should provide a teaching program that will not only forgive a teacher's student loans if he or she will teach in an inner-city school for five years, but also protect any teacher under this program from termination on the sole basis of students' performances on the TCAP

¹⁶⁹ Armor, *supra* note 36.

¹⁷⁰ Henderson, *supra* note 151.

¹⁷¹ See, e.g., 402 U.S. 1 (1971); 391 U.S. 430 (1968).

¹⁷² U.S. News College Compass Best Colleges 2011, *supra* note 31.

¹⁷³ Henderson, *supra* note 163.

¹⁷⁴ Armor, *supra* note 36.

Test (or whatever government standard aptitude test may be in place at that time) during those five years so that all involved can focus more on addressing the special needs of their students rather than teaching to a test.

Second, school boards need to devise a program which assigns students to schools based on income so there is an equal number of each income class in each school within the district. The Supreme Court has held poverty is not a class protected by the strict scrutiny test.¹⁷⁵ Thus, spreading out students in order to achieve economic balance would not be in violation of the Fourteenth Amendment.¹⁷⁶ However, the state's actions cannot interfere with a fundamental right, and it must be able to show the system bears some rational relationship to legitimate state purposes,¹⁷⁷ and rezoning the school districts is a direct relationship to the state's interest in providing equal education to all its students. The rezoning will result in creating a more racially balanced school system because inevitably, when more upper and middle class students are placed in inner-city schools and more low-income students are placed in the suburban schools, the high concentration of low-income minority students in the inner-city schools will be evened out in the process.

To avoid singling out a student based on his or her family's income, the districts in the county will be rezoned so that each school has an equal ratio of suburban and urban students. This will prevent students from being bused from opposite ends of the county in order to achieve economic balance. The government can show it has a compelling state interest in rezoning school districts in order to resolve economic imbalances that drain the state's educational budget. If money is not being significantly concentrated in one school over another because of the heightened need for governmental assistance, more money can be spent on updating the school's resources and creating new teaching positions to meet the needs of the students.

¹⁷⁵ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

Third, to persuade parents in suburban schools to be in favor of the new zoning plan, the former negative stigma from which inner city schools suffer needs to be eliminated. This will most likely be the most difficult task to achieve, but it can be done. If parents are assured their children will have the same access to all the resources they had in their suburban school when they move to the inner city school, they will be much more supportive of the transition. To achieve that goal, all schools need updated facilities and technology, writing labs, science labs, extracurricular activities that challenge students and provide them with outlets to harvest and channel their gifts and talents, and options to take AP and college-level courses. If students are guaranteed to receive a well-rounded liberal arts education, that will prepare them for college in every school, and parents will likely support the rezoning program. Schools will have a fresh start with teachers ready to take on the challenge of teaching a wide array of students, and students will be exposed to the invaluable experience of learning in a multicultural environment.

Fourth, a new program will need to be implemented in each school that will create a forum for parents so they can express concerns within the school without the structured organization that generally comes with the PTO or PTA. In this program, parents meet with their child's teacher in a small-group setting at least once a month, and the teacher will provide the parents with a syllabus of what the students will be learning in the next month and how the parents can help them in those subjects. Meetings will be arranged so ESL teachers can attend all meetings where there are parents who do not speak English or English is their second language so there is always someone at the meetings who can communicate and translate for them.

Next, schools will need to be structured in a way to encourage cultural differences. Teachers and school administrators will be educated in the cultures and beliefs of their students in order to be equipped with knowing the best way to reach the children. This will require a school system where students are taught how to respect themselves as well as others. There will be rules the students must follow to will teach them structure and discipline which they will need in order to succeed in life, but there will also be avenues for the children to express themselves and learn how to use their different cultures to give back to the community in a positive way. One day a

week will be culture day where students will experience a new culture represented by members of their own student body as well as those not represented. The cafeteria will serve food from the culture, and students from that cultural environment will be able to share with their classmates something unique to their culture such as a type of dance or a holiday tradition. This program will give students a sense of pride in their culture while educating other students who may not have been exposed to other cultures before attending that school. Along with culture day, there would be an amended school curriculum that would reflect the multicultural student body. This involves incorporating art, history, and literature from the different cultures into the curriculum.

Finally, each school will need to have a career program where members of the community will come to the schools and educate students about their careers and provide students with hands-on experience in that field. Interested students can sign up for internships in high school where they can shadow someone in the career of their choice in order to gain the experience of being in a working environment and learning what it takes to be able to do what their mentor does. This will provide students with connections to the community they might not have had before and will help them begin deciding on a career path before graduating high school. Along with the internship program there would be technical courses offered at the high school level that will provide students who do not want to go to college with the necessary tools they will need for the trade of their choice. The school will work with the local trade schools to ensure the classes have dual credit, and the students can graduate with the necessary license in whatever field they studied. Establishing this program in schools with the help of members in the community will create an educational environment that is conducive to all learning types so each student, regardless of race or income level, receives a well-rounded education.

Of course, there are many flaws to my proposal, one being the lack of funding. The proposal relies on members of the community reaching out to help schools. It also does not take into account the parents who do not wish to get involved or cannot get involved in their child's education for whatever reason. It also does not take into consideration the increase in cost it will take to bus the children to and from school. However, it is a plan that calls for action and focuses

on wealth distribution rather than race in order to achieve diversity in the classroom.

Success should not be based on the color of a person's skin or the size of his or her parent's bank account. We all should have the ability to achieve whatever goals we set for ourselves. With deep racial divides in our school systems, we are stunting America's ability to move beyond the days after slavery was abolished and before the Supreme Court made segregation unconstitutional. We now have the resources available to heal racial division in our schools. It is time to take action, and ensure a better and stronger future for the next generation of students.