HUMAN RIGHTS AND WRONGS:
The Dark Canon of the United States Supreme Court in Environmental Law

Oliver A. Houck

Abstract

This is the second in a series of critiques of the Supreme Court's jurisprudence on environmental law. The first series described three cases notable for their manipulation of facts and law and ill-concealed bias against environmental plaintiffs. One crippled the National Environmental Policy Act, the second crippled citizen standing to sue, and the third pivoted to undermine the safety of nuclear power plants.[1]

The instant trio of cases add yet another troubling element to the canon. What distinguishes them, beyond the usual sleight-of-hand, is their failure to demonstrate the slightest understanding or concern for the plight of some of the most disadvantaged people on the planet. All of them brown.

The first case discussed, *Northwest Indian Cemetery*, denied First Amendment protection from the destruction of an entire Native American culture. The second case, *Sandoval*, effectively destroyed Title VI of the Federal Civil Rights Act. The third case, *Kiobel*, slipped the bounds of decency altogether by declaring corporations immune from actions under the Alien Tort Claims Act, expressly designed to provide damages for acts viewed by the entire world as beyond the pale.

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1. * *See* Oliver A. Houck, *Arbitrary and Capricious: The Dark Canon of the United States Supreme Court in Environmental Law*, 33 Georgetown Envt'l L.J. 51 (2020).

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A. *Prologue*

> "*What was wrapped in the GO road was probably the final phase of cultural and spiritual homicide — and it was being perpetrated by the federal government.*"
>
> Chris Peters, Plaintiff in *Northwest Indian Cemetery* and President and CEO of the Seventh Generation Fund for Indigenous Peoples[2]

In the early 1970's, the U.S. Forest Service began construction of a 49-mile road through the Six Rivers National Forest in Northern California. Its stated purpose was to connect two small California towns that would be difficult to find on a map. A more compelling one soon followed. The Service was also

2. Anne Maher, *Saga of the G-O Road, 30 Years Later*, the Northcoast Environmental Center (June 1, 2018), https://www.yournec.org/GO-Road-30yr-anniv [https://perma.cc/84J2-HZ47]; *Our Leadership*, Seventh Generation Fund for Indigenous Peoples, https://7genfund.org/who-we-are/our-leadership [https://perma.cc/6HJB-S7BZ] (background of Chris Peters).

preparing a timber plan, served by the road, to harvest 733 million board feet of Douglas Fir trees over the next 80 years.

Road building proceeded to both sides of the Forest's Blue Creek unit without interruption. Only a six-mile segment called Chimney Rock remained. For the Yurok, Karok, and Tomsola tribes, the values of this area were extraordinary and almost incomprehensible to the Western mind. Their religion was practiced at a particular place, in a particular way, in complete silence, which served the tribes that used it. It would save the world. The inability of the United States Supreme Court to grasp this concept and accommodate it led to one of the most racially insensitive opinions that it has ever rendered: *Lyng v. Northwest Indian Cemetery Protective Association*.[3]

B. *The Supreme Court and Native Americans*

> "*There is nothing in the whole compass of our law so anomalous, so hard to bring within any precise definition, or any logical and scientific arrangement of principles, as the relation in which the Indians stand toward this government and those of the States*"
>
> Hugh Swinton Legare, U.S. Attorney General under President John Tyler (1842).[4]

Going back centuries, the United States Supreme Court has never had an easy time relating to, and accommodating, Native Americans. These difficulties and their accompanying misunderstandings would hang over the High Court's opinion in *Northwest Indian Cemetery Protective Association* like a fog.

It began at an early age, close to the foundation of the Court itself. In *Johnson v. M'Intosh* (1823),[5] the courts were faced with two title-holders to the same property — one issued by the state of Georgia and the other by the Cherokee Nation. Chief Justice Marshall, perhaps the greatest Justice of them all, was faced with a Hobson's choice. The nation had developed on the basis of state property deeds, and it was too late to un-ring that bell. On the other hand, Marshall found it a nasty business and made these sentiments plain. Listen to him speak:

> On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim ascendency. The potentates of the old world found no difficulty in convincing themselves that they made ample

3. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

4. William W. Quinn, Jr, *Federal Acknowledgement of American Indian Tribes: The Historical Development of a Legal Concept*, 34 The Am. J. of Legal Hist. 331, 331 (1990).

5. Johnson v. M'Intosh, 21 U.S. 543 (1823).

> compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence.[6]

As if this were not enough, he continued:

> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear [it was now too late to go back to the beginning]. However this restriction may be opposed to a natural right, and to the usages of civilized nations, yet, if be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, *perhaps,* be supported by reason and certainly cannot be rejected by Courts of justice.[7]

The language drips with sarcasm. The Chief Justice evidently hated what he was doing, and soon found a way to ameliorate it. From 1817 to 1827, the Cherokee successfully resisted in ceding their home place in Georgia, creating a constitution, a two-house legislature, their own written language, published their own newspaper, and adopted Christianity.[8] There was only one problem, and it would prove to be fatal. They were not white. The 1890 Indian Removal Bill, backed by President Andrew Jackson, was the first step for taking the Cherokee land.[9] In response, they went to court, and in *Worcester v. Georgia* (1832),[10] Chief Justice Marshall asserted their right to possession of their homeland against which the laws of Georgia had no force or effect.[11] Outraged by this decision, President Andrew Jackson famously declared, "Justice John Marshall has made his opinion; now let him enforce it."[12] Marshall could not, which led ultimately to expulsion of the Cherokee on a "trail of tears" to a landscape like the moon: Oklahoma.[13]

Beyond the raw possession of land, the psychological divide that overcast *Northwest Indian Cemetery* was best described by Chief Seattle of the Duwamish Nation on the northern Pacific Coast. The arrival of American gunboats and marines made something of a farce of the subsequent negotiations, at the end of which Chief Seattle rose to deliver one of the most oft-quoted orations in American history. He began:

> Our great father in Washington . . . sends word by his son, who no doubt is a great chief among his people, that if we do as he desires, he will protect us.

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6. *Id.* at 572–73.
7. *Id.* at 591–92.
8. *Indian Removal*, Teach US History, http://www.teachushistory.org/indian-removal# [https://perma.cc/WP9S-YJVG].
9. Indian Removal Act, ch. 148, 4 Stat. 411 (1830).
10. Worcester v. Georgia, 31 U.S. 515 (1832).
11. *Worcester*, 31 U.S. 515.
12. Jeffrey Rosen, *Supreme Court History: The First Hundred Years*, Thirteen: The Supreme Court, https://www.thirteen.org/wnet/supremecourt/antebellum/history2.html [https://perma.cc/2YK8–93PE].
13. *The Trail of Tears*, History (July 7, 2020), https://www.history.com/topics/native-american-history/trail-of-tears [https://perma.cc/P29X-XBJ3].

> There is little in common between us. The ashes of our ancestors are sacred and their final resting place is hallowed ground, while you wander away from the tombs of your fathers seemingly without regret. Your dead cease to love you and the homes of their nativity as soon as they pass the portals of the tomb. They wander off among the stars, are soon forgotten and never return.
>
> Every hillside, every valley, every plain and grove has been hallowed by some fond memory or some sad experience of my tribe. Even the rocks that seem to lie dumb as they swelter in the sun along the silent seashores in solemn grandeur thrill with memories of past events connected with the fate of my people, and the very dust under your feet responds more lovingly to our footsteps than yours, because it is the ashes of our ancestors, and our bare feet are conscious to the sympathetic touch, for the soil is rich with the life of our kindred.[14]

Whatever one thinks of this speech, it is hard not to be moved. It is worth asking whether his perspective was that of a barbarian or whether he was expressing a rather elemental truth to which other religions claim to aspire. As beautiful as the Chief's words were, however, the Duwamish had to accede to the Americans' demands and retreat to a small reservation, as had all tribes, eventually, with astonishingly bad outcomes.

The abuse and naked invasion of tribal reservations is, in itself, a dark but well-known part of history. Books such as *Bury My Heart at Wounded Knee*,[15] *Comanche Moon*,[16] and *Chief Joseph and the Flight of the Nez Perce*[17] capture only a part of the agony these tribes endured. They would face a yet more systematic agony from a government initiative to destroy their reservation in order to prepare the tribes for white civilization. The Dawes Act of 1877 was a disaster for Native Americans.[18] It permitted tribal members on reservations to, in effect, privatize what had been community property and sell an allotted parcel for profit. Inevitably, and as intended by the legislature, the ready money overrode the sense of community and the results were staggering.[19] Within a few years, two-thirds of reservation lands owned by the tribes had been sold into white hands.[20] The preparation for white civilization, however, failed utterly and results could be seen on reservations across the country.

The Dawes Act and its outcome turned out to be a tar-baby for both Congress and the courts. After floundering for decades, Congress passed

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14. Henry A. Smith, Seattle Sunday Star, Oct. 29, 1887.

15. Dee Brown, Bury My Heart At Wounded Knee: An Indian History of the American West (1970).

16. Larry McMurtry, Comanche Moon (1997).

17. Kent Nerburn, Chief Joseph and the Flight of the Nez Perce: The Untold Story of an American Tragedy (2005).

18. Dawes Act of 1887, Pub. L. 49–105, 24 Stat. 388 (1887).

19. D.S. Otis, The Dawes Act and the Allotment of Indian Lands 18–19 (Francis Paul Prucha ed., 1973).

20. *Id.*

legislation to consolidate fractured reservations in 1983,[21] but in *Hodel v. Irving* (1987), the Supreme Court found its failure to compensate small interests to be a taking.[22] In *Cobell v. Salazar* (1996), members of the Blackfeet Nation sued the Interior department for its failure to account for income the government had received from tribal lands.[23] The case ultimately settled in 2009 for over three billion dollars, nearly two billion of which went to the repurchase of lands sold under the Dawes Act and returned to tribal ownership.[24] At the end of the day, these tribal property claims were protected, although a century late.

The assault on Native American religious practices, though less well-known, was yet more forthright: they were criminalized. As a Native American history organization reports: "For the past five centuries American Indians have had their religions suppressed (sometimes brutally and violently) and denied".[25] The Bill of Rights protecting religious freedoms did not apply to them "based on the notion that they were not citizens."[26] A series of increasingly severe laws in the 1800's led to the Religious Crimes Code of 1883, which banned all Native ceremonies, including the Sun Dance, Ghost dance, potlaches and the practices of medicine persons".[27] Federal agents were authorized to use force and imprisonment to stop religious practices, including the take-over of recalcitrant tribes . . . leading inter alia to the infamous massacre of a Sioux Nation band at Wounded Knee.[28] The Code was not repealed until 1970.

The Court had dealt with the reservation issues, albeit belatedly. Now, nearly a century later and with the bad odor of federal criminalization still in the in the air, the question was how the High Court would treat trial religious freedom claims. Its answer would unfold in the case to follow, *Lyng v. Northwest Indian Cemetery Protective Association.*[29]

C. *Northwest Indian Cemetery Protective Association*

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

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21. Indian Land Consolidation Act, Pub. L. No. 97–459, 96 Stat. 2515 (1983) (codified at 25 U.S.C. §§ 2201–2221).

22. Hodel v. Irving, 481 U.S. 704 (1987).

23. Cobell v. Salazar, 573 F.3d 808 (D.C. Cir. 2009).

24. *Attorney General Holder, Secretary Salazar Announce Settlement of Cobell Lawsuit on Indian Trust Management*, Indian Tr. Settlement, (Dec. 8, 2009) indiantrust.com/prdoj.html [https://perma.cc/E4A7UFGV].

25. Native American Roots Diary, "Outlawing American Indian Religions", Feb. 28, 2010, http://mnativeamericanroots.net/dikary/380.

26. *Id.*

27. "Religious Crimes Code of 1883 bans Native dances, ceremonies", https://nativephilanthropy.candid.org/event/religious-crimes-code-of-1883-bans-native-dances ceremonies/#content.

28. *Id.*

29. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

First Amendment, Constitution of the United States[30]

The sad fact of this case is that it did not have to be. Facing considerable controversy over the Six Rivers Forest road, the Forest Service District had commissioned a consultant to examine impacts and alternatives to its completion. After two years of study the Theodatorus Report found the impacts to be terminal for the Native American cultures, and the only suitable alternative to be abandoning the road. Upon its receipt, the District Ranger did both.[31] The problem came with the Regional Forester, who overruled his District manager and green-lighted the project.

One cannot be certain of the reason for this abrupt about-face but it likely related to politics. No facts had changed save a new Assistant Secretary of Agriculture, John Crowell, who had supervisory jurisdiction over the Forest Service and a long and checkered record with it. As General Counsel to timber giant Burlington Northern, Crowell was found to have been "personally" involved" with his company's unlawful price-fixing in Alaska.[32] As Assistant Secretary, he had led efforts to thwart such conservation measures as "limits on clearcuts" and the "use of buffer zones" along streams.[33] Crowell would have been of no mind to accept the cancelation of an 80-year, multimillion-dollar timber harvest in the Six Rivers National Forest, or the road that fed it. At this point the Regional Forester could do Crowell's bidding or look for a new assignment.

There was no option left for the affected tribes but to litigate.

As this case wound its way to the Supreme Court, both federal courts below had ruled that the Forest Service's actions imposed an unconstitutional burden on the religious practices of the Yurok, Karok, and Tolowa Indian Nations. The District Court began by noting that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection,"[34] citing *Thomas v. Review Board* (1981).[35] It continued by finding that government had imposed a serious burden on religious practice in this case, and that "only those interests of the highest order" could uphold the federal decision, citing *Wisconsin v. Yoder* (1972).[36] Applying this

30. U.S. Const. amend. I.

31. *Lyng*, 485 U.S. at 442.

32. *National Environmental Scorecard: Nomination of John Crowell to be Assistant Secretary of Agriculture*, League of Conservation Voters, https://scorecard.lcv.org/roll-call-vote/1981–120-nomination-john-crowell-be-assistant-secretary-agriculture [https://perma.cc/M6T8–5A2W].

33. *Id.*

34. Nw. Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586, 591 (N.D. Cal. 1983).

35. Thomas v. Review Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 714 (1981).

36. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

test, of the High Court's own creation, it found the government interests in the G-O Road and timber harvesting to be insufficient.[37] Injunction issued.

A majority of the Appellate Court affirmed the findings from the courts below that the "government ha[d] fallen short of demonstrating the compelling interest required to justify its proposed interference with the Indian plaintiffs' free exercise rights.[38] What would matter to the Supreme Court, however, was the dissenting opinion that—as counter-factual as this was—was certain that the adverse effects on the tribes could be "eliminated by less drastic measures than a ban on building the road," and that the other actual or suggested adverse effects did not pose a serious threat to the tribal religion.[39] This dissent gave a foothold for Justice O'Connor in the Supreme Court opinion that followed.

The constitutional question in *Northwest Indian Cemeteries* was whether an all-but-useless road and a mammoth timber harvest in the affected area prohibited the free exercise of a religion practiced by these three Indian Nations. Perhaps because it seemed obvious in this case that the road and the clearcutting would prevent the free exercise of their religion—indeed, it would obliterate their religion—Justice O'Connor began on another tack. She found another Supreme Court opinion, *Bowen v Roy*,[40] which denied a free exercise claim, to be on all fours with the one before her.

This was hardly so. *Bowen* involved two parents seeking a social security number that would enable their access to federal welfare programs.[41] They believed that such a number would "rob the spirit" of their daughter and prevent her from acquiring more spiritual power.[42] O'Connor found the similarity of *Bowen* to the case at hand dispositive.[43] The correlation was strained. Depriving a single person from welfare benefits was a far cry from depriving an entire people of their religion. Nonetheless, the Justice stuck with Bowen and went on to apply it.

The "incidental effects" of government programs, the Justice found, "may make it "more difficult'" to practice certain religions, but those programs with "no tendency to coerce individuals in acting contrary to their religious beliefs" did not violate the Free Exercise Clause.[44] Perhaps she misunderstood the facts, but the road and the timbering were not just making religious practice "more difficult"; they were making it impossible. Nor was anyone in this case "coercing" anyone to "act contrary to their beliefs"; the government programs were preventing the tribe from acting on their *own* beliefs. Apparently, the

37. *Nw. Indian Cemetery Protective Ass'n*, 565 F. Supp. at 597–98.

38. Nw. Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688, 698 (9th Cir. 1986), *rev'd sub nom.*, Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

39. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 445 (1988).

40. Bowen v. Roy, 476 U.S. 693, 712 (1986).

41. *Id.* at 693.

42. *Id.*

43. *See Lyng*, 485 U.S. at 449.

44. *Id.* at 450–51.

Justice believed that depriving was not "prohibiting", which makes little sense in the real world where depriving is a *means* of prohibiting. In O'Connor's view, apparently, a Free Exercise prohibition required specific intent, which was not mentioned in the Free Exercise Clause at all.

The Justice then invoked a parade of horribles. "[G]overnment simply could not operate," O'Connor wrote, were it "required to satisfy every citizen's religious needs and desires."[45] She meant "no disrespect for these practices," she continued, when noting that this could "easily require *de facto* beneficial ownership of some rather spacious tracts of public property."[46] Unfortunately for the well-being of her statement, she was distorting the facts badly. The Native Americans here were seeking to maintain an infrequent use of a tiny fraction of forest property that would also be open to hunting, fishing, recreation, and similar activities—the major public uses of all national forest lands.[47] This was hardly "de facto ownership".

It was at this point in the opinion that O'Connor picked up on the bizarre notion of the Ninth Circuit dissent below, below; that the road-cum-timbering would have negligible impacts, and that opposition to it was overblown,[48] neither of which was in the record, and all of which was contradicted by the Theodoratus Report. She went on to praise the "ameliorative measures" proposed by the Service to reduce the road's impact,[49] which included moving it one-half mile away from the sacred site. It requires little expertise to know that the protection a buffer this small would provide from the sound of logging trucks grinding up and down the mountain was illusory.

Justice O'Connor concluded her opinion by admonishing that "nothing in [it] should be read to encourage governmental insensitivity to the religious needs of any citizen."[50] How could one *not* read it this way? "Except for abandoning its road entirely," she continued, "thereby leaving the two existing segments of road to dead-end in the middle of a National Forest, it [was] difficult to see how the government could have been more solicitous."[51] The statement is astonishing. It was the Service's decision and no one else's to build to both ends of the sacred zone, and then assume that its completion would be a fait accompli. Why should that fact be the tribes' problem? As for the decision itself, everything from the Theodoratus Report to two federal courts below and to the dissenting opinion of three colleagues called for abandoning the road, which had lost its principal *raison d'etre* (80 years of logging) years

45. *Id.*at 452.
46. *Id.* at 453.
47. Mary Wagner, *National Outdoor Recreation Conference*, U.S. Dep't Of Agric.: Forest Serv. (May 20, 2013), https://www.fs.usda.gov/speeches/outdoor-recreation-national-forest-system [https://perma.cc/W2GL-UVY8].
48. *See Lyng*, 485 U.S. at 453–54.
49. *Id.* at 454.
50. *Id.*
51. *Id.* at 454.

before the case reached the High Court. It would have been ridiculously easy to be "more solicitous". For whatever reason Justice O'Connor refused to do so.

Justice Brennan joined by Justices Marshall and Blackmun saw this issue plain.[52] Their opinion began with a more fulsome and Native American-centric description of the Uurok, Karok and Tolowa religion that signaled that they had read not only the words of the Report but had understood them:

> "[I]t sacrifices a religion as old as the nation itself, along with the spiritual well-being of its 5,000 adherents, so that the Forest Service can build a six-mile segment of road that two lower courts found had only the most marginal and speculative utility, both to the Government and to the private lumber interests that might conceivably use it."[53]

In any balancing analysis, it was a loser.

The Free Exercise Clause, the dissenters continued, required just such a balancing analysis.[54] The plaintiffs in such a case should be required to show a substantial threat to their religion (which here, was crystal clear).[55] At this point the burden should shift to the Government to come forward with a compelling state interest sufficient to justify" the burden it was imposing.[56] Stepping away from the opinion for a moment, this two-step process was and is standard-operating procedure for determining the constitutionality of many First Amendment restraints, from pamphleteering at airports to picketing abortion clinics. Why the majority did not apply it in this case was not explained, but it was apparently diverted by an unnecessarily narrow reading of the word "prohibit."

Violations of the Free Exercise Clause, the dissent concluded, did not require an intent to prohibit, nor logically could it. De facto prohibitions are just as fatal to those whose religious practices are restricted, to say nothing of destroyed.[57] By way of support, Webster's Ninth New Collegiate Dictionary of the English Language provided two accepted definitions of the word "prohibit," one of which was "to prevent [someone] from doing something."[58] Prevention of course does not require intent at all.

One emerges from the majority opinion in this case with the feeling that Justice O'Connor did not feel comfortable with it. Such phrases as: "However much we wish it were otherwise", "nothing in our opinion should be read to encourage governmental insensitivity to the religious needs of any citizen", and "it is difficult to see how the Government could have been more solicitous"

52. *Id.* at 458 (Brennan, J, dissenting).
53. *Id.* at 476.
54. *Id* at 474 ("It is frequently the case in constitutional litigation, however, that courts are called upon to balance interests that are not readily translated into rough equivalents").
55. *Id* at 475.
56. *Id.*
57. *Id.* at ("The harm to the practitioners is the same regardless of the manner in which the government restrains their religious expression").
58. *Id.* at 477 n. 4.

seem intended to fend off a conclusion that her opinion was brutal. In truth, it was quite brutal indeed.

The question remaining is: Why?

D. *Reflections on NWIC*

> "[T]he use of the foundational concepts of American Indian law exceptionalism found in the Marshall Trilogy is predictive of outcome. . . . Justice O'Connor's opinions are lacking in this foundation and, therefore, are particularly lacking in support for tribal sovereignty. In this, as a native Westerner, she may have missed an opportunity to elaborate a system of sovereignty, one favoring the tribes as sovereigns by right of their historical role outside the federal government".
>
> Professor Richard L. Barnes, "A Woman of the West, but not the Tribes".[59]

As seen earlier in this essay, in the context of American history *Northwest Indian Cemetery* was not an unusual opinion. It was simply another aftershock of a collision between two cultures that barely understood each other. The Native Americans spoke a different language—dozens of them—that sounded like grunts to the western ear. They held property in common and shared its use—including personal property, including even wives to accommodate a visitor—and grew their crops in communal gardens that mixed species together so that something edible was always in season.[60] They did not fence them in as the English did, which led the English to believe that they weren't really gardening at all.[61]

Worst of all, they worshiped strange gods, not the western one who was visited once a week inside stone churches and smote his enemies with a "terrible swift sword", but deities found in nature, wolves, bears, waterfalls, or in the case of the Yurok, Karok and Tolowa on the top of a mountain . . . and in utter silence. Authors of the Theodatorus Report researched this religion deeply, steeped themselves in the culture, and recommend accordingly. Justice O'Connor could read the Report's words, even quote them, but she was evidently unable to internalize them. When she said that "it was difficult to see how the government could be more solicitous", she was absolutely correct. It *was* difficult for her to see because she came from a different world, and in this she was not alone.[62]

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59. Richard L. Barnes, "A Woman of the West, But Not of the Tribes: Justice Sandra Day O'Connor and the State-Tribal Relationship", 56 Loyola L.Rev. 39 (2012) at 111.

60. *See* Charles C. Mann, 1493 (2011) 45–48.

61. See G. North "Medieval Economics in Puritan New England", 5 journal of Christian Reconstruction 155–56 (quoting Massachusetts Bay Colony Governor John Winthrop, "The savage people ruleth over many lands without title or property for they encloseno ground, neither have they cattle to maintain it". Ergo, Native lands were open for the taking.)

62. Several scholars of Native American culture have written of the incapacity of White Americans to understand tribal perspectives and religious practices. *See* Steven N Moore, "Can We Not Understand That? Toward a Just and Equitable Accommodation of Indigenous Religious Practices on Public Lands," Michael McNally, "Why Not Religious

One explanation for O'Connor's opinion has been offered by her official biographer, Evan Thomas. His book, FIRST: SANDRA DAY O'CONNOR,[63] covers every Supreme Court opinion authored by her but one: *Northwest Indian Cemeteries*. Asked by the author of this article why this should be, he explained that the opinion was not "major".[64] Asked whether it would have been "major" to the affected tribes who litigated it, won twice below, and then lost in the High Court he said that he had not talked with her about this case (nor had she mentioned it, apparently).[65] He explained that Justice O'Connor considered herself a mediating force on the Court,[66] and evidently believed that the Forest Service had compromised greatly by widening the distance between the road and Chimney Rock to half a mile. Abandoning the road did not come up on her screen. Indeed, in the case itself she saw the claims for silence as a kind of blackmail, a land grab by the tribes.[67] With all due respect for Mr. Thomas, this was hardly a compromise.

Northwest Indian Cemeteries was not the Justice's first rodeo with Native American issues. As Professor Barnes' article quoted above explains, in his review of no fewer than eight O'Connor opinions involving tribal sovereignty, seven were decided against the tribes.[68] Addressing her opinion in *Northwest Indian Cemeteries*, he observes that her stated "empathy with American Indian belief systems" was "at odds with her silence on deference for native self government", nor did she address the historic "trustee-fiduciary" relationship between tribes and the United States government which would prevent approval of this particular road.[69] "Something else", he concluded, "was at work".[70]

In a remarkably similar case involving Native American use of peyote in religious practices, O'Connor wrote a concurring opinion stating:

> "There is no dispute that Oregon's criminal prohibition of peyote places a severe burden on the ability of respondents to freely exercise their religion. Peyote is a sacrament of the Native American Church and is regarded as vital to respondents' ability to practice their religion. . . . [B]ut I believe that

Freedom?," and Dana Lloyd, "A Hollow Freedom: On Lyng v. Northwest Indian Cemetery Protective Association," in Symposium Essays, American Indian Religious Freedoms (2019), httsp://politicaltheology.com/symposium/American-indian.religious freedom.

63. Evan Thomas, First: Sandra Day O'Connor (2019).

64. Author telephone interview with Evan Thomas, 2020.

65. *Id.*

66. *Id.* Justice O'Connor was indeed a "mediating force" on several occasions, including environmental law. She authored opinions in favor of endangered owls, Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 708 (O'Connor J. concurring, 1995); pacific salmon, PUD No. 1 of Jefferson County v Wash. Dept. of Ecology 511 U.S. 700 (majority opinion); and a national forest stream, Cal. Coastal Comm'n v Granite Rock Co. (480 U.S. 572 (l987) (majority opinion). These opinions, however, stand in stark contrast to those issued against Native American interests, by a ratio of 7-to-1.

67. See *Lyng*, *supra* note 48.

68. See Barnes *supra* note 59 at 111.

69. *Id.* at 70.

70. *Id.*

> granting a selective exemption in this case would seriously impair Oregon's compelling interest in prohibiting possession of peyote by its citizens.[71]

There is a marked lack of balance in these decisions. Was the selected use of peyote for religious purposes essential to their practice really a threat to white citizens of Oregon? Did the near-worthless NO-GO road and then-abandoned timber harvest in Northwest Indian Cemeteries really merit the destruction of the Yurok, Karok and Tolowa of Northern California?

Also of note in her opinion was the Justice's use of the same balancing test and burden shift that she had rejected in *Northwest Indian Cemetery* only two years earlier.

> "'Once it has been shown that a government regulation or criminal prohibition burdens the free exercise of religion, we have consistently asked the Government to demonstrate that unbending application of its regulation to the religious objector "is essential to accomplish an overriding governmental interest," or represents "the least restrictive means of achieving some compelling state interest,"[72]

In neither case, *Northwest Indian Cemetery* or *Employment Division*, was Justice O'Connor able to give substantial weight to what the Native Americans needed in order to practice their religion. At the same time, she accepted whatever purpose the government had to offer as an overriding need. As Professor Berenal commented on the short shrift she had given to Native American sovereignty in general, 'something else was at work', and it related to his view of the Justice as a "native Westerner".

The shoe fit. Justice O'Connor was born and raised in Arizona, and came from a family of ranchers whose own history in the Arizona Territory dated back to the 1800's.[73] The war between white settlers and Native Americans along the Mexican border was a thing of legend. Some 310 battles were fought within the state,[74] not counting excursions by Arizona possies into Mexico's Sierra la Esmeralda mountains. Atrocities abounded.[75] Over 4,000 white settlers and Indians were killed in the process, more than twice as many as in Texas, the second highest-ranking state.[76]

The Apache Tribe, skilled in guerilla warfare, resisted white settlers until the 1920's.[77] When their major battles with the U.S. Army ended in 1885,

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71. Employment Division, Oregon Department of Natural Resources v Smith, 494 U.S. 872, 903, 906 (1990) (O'Connor J. concurring).

72. *Id.* at 894–95.

73. *See* First, *supra* note 63, at 4–15 (describing O'Connor's rancher/parents and lifetime love for "the ranch").

74. Gregory Michno, Encyclopedia of Indian Wars, Western Battles and Skirmishes, 1850 – 1890, 353 (2003).

75. *See* "Battle with the Apache, 1872", Eyewitness to History, http://www.eyewitnesstohistory.com/apache.html (describing "atrocities on both sides").

76. *See* Michno, *supra* note 74.

77. *See* Military, "Apache Wars", https://military.wikia.org/wiki/Apache_Wars. (skirmishes continued until 1924 in the U.S., and nine more years in Mexico).

the warriors agreed to be held as prisoners of war for two years and then allowed to return to Arizona.[78] Instead, they were held for 27 years.[79] In the end, of course, the landowners won, but the bitter saga remains family history in Arizona and there is little in it that demonstrates sympathy for Native Americans. The Yurok, Karok and Tolowa were not only strangers to Justice O'Connor in every religious and cultural way imaginable they were also reminiscent of the tribe that was her mortal enemy in family folklore, one that made Arizona hell for over half a century.

It is indisputable that *Northwest Indian Cemetery* had a markedly racist outcome of which Justice O'Connor was at least sufficiently aware to attempt to soften the blow, (e.g. "this opinion should not be interpreted to encourage government insensitivity"). But which she seemed unwilling to correct.

As things turned out it would be up to Congress to make the correction, which it proceeded to do.

E. *Epilogue*

> "The arc of the moral universe is long, but it bends toward justice."
>
> Martin Luther King, Washington National Cathedral, 1968.[80]

Early in his Presidency, Jimmy Carter introduced the American Indian Religious Freedom Act of 1978,[81] declaring:

> "In the past, Government agencies and departments have on occasion denied Native Americans access to particular sites and interfered with religious practices and customs where such use conflicted with the Federal regulations. In many instances, the Federal Officials responsible were unaware of the nature of traditional religious practices, and, consequently, the degree to which their agencies interfered with these practices."[82]

Whether he intended to include federal courts in this sweeping statement is unknown, although in an earlier Part of this article their failure to be aware of and avoid Native American practices was plain.

Unfortunately, the Act he was describing had a fatal flaw: it contained no enforceable mandate, it had no teeth. Ten years later along came

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78. *See* Clare V. McKanna, Court-Martial of Apache Kid: The Renegade of Renegades (2009); *Indian Wars in Arizona Territory*, Arizona Military Museum, (March 30, 2012), https://web.archive.org/web/20120330234011/http:/www.azdema.gov/museum/famousbattles/pdf/Indian Wars in Arizona Territory -context.pdf. *See also Forced Removal of Native Americans*, Equal Justice Initiative, (July 1, 2016) https://eji.org/news/history-racial-injustice-forced-removal-native-americans. The photo attached shows women held in captivity as well.

79. *Id.*

80. Dr Martin Luther King, Jr., Remaining Awake through a Great Revolution:, March 31, 1968, https://www.si.edu/spotlight/mlk?page=4&iframe=true.

81. 42 U.S.C Sec. 1996 (1978).

82. Jimmy Carter, 39th President of the United States, American Indian Religious Freedom Act Statement on signing S.J. Res. 102 Into Law, August 12, 1978.

Northwest Indian Cemeteries mirroring the very attitudes and actions Carter had deplored and, quite unintentionally, it changed the game. Specifically referencing O'Connor's opinion, Congress found its outcome so unpalatable that it passed the American Indian Religious Freedom Act,[83] prohibiting all federal agencies from interfering with the free exercise of tribal religions. This was an effects test, not an intent test, based on standard First Amendment jurisprudence: the seriousness of the infringement and the availability of an alternative to avoid it.

This was of course precisely the approach Brennan's dissent had urged, to no avail. Were one to have applied it to the NO-GO Road and the 80-year timber harvest it would have failed on both counts. The infringement was as serious as one could have imagined short of bombing the tribes out of existence. And of course the alternatives were as easy as giving up on a road to virtually nowhere, and a timber sale that had been pulled from the table for economic reasons years before.

At warp speed for federal legislation, then, *Northwest Indian Cemeteries* was reduced to law school casebooks, and little more. There is no reason other than pedagogy to cite it. Unfortunately, however, the racial overtones that clouded it endure.

II. Sandoval

A. *Prologue*

> *You understand me—yes, it's racism*".
>
> Emelda West, resident, Convent, Louisiana (1996)[84]

Environmental racism rose in America more than a century ago with the advent of industrialization and, more acutely, the petrochemical industry. In the 1990s, it caught up with a small, African American community of Convent, Louisiana hard by the Mississippi River.[85] Some 84 percent of its residents were minorities and 40 percent lived below the poverty line.[86] Nonetheless, Convent had long been a pleasant place to live. People lived simply here, grew their own vegetables, raised chickens, and made do.[87] They enjoyed the clean air, the shade of big trees, and a peace that was disappearing before their eyes.

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83. American Religious Freedom Act of 1994, Pub.Law No. 103–344, Oct. 6, 1994.

84. Oliver A. Houck, *Shintech: Environmental Justice at Ground Zero*, 31 Geo. Envtl. L. Rev. 455, 462 (2019) (describing Ms. West as a "feisty and fiercely religious 74-year old African American mother of seven").

85. *Id.* at 457.

86. *Id.* at 459.

87. *Id.* at 505 (quoting Rose Miller, 80 years old: "We had 11 fruit trees. They all died. The pecan trees died. Vegetables don't grow right any more. Frogs, Butterflies, grasshoppers, birds – we don't see them anymore").

In 1996, the Japanese chemical giant Shin-Etsu proposed to build a $700 million poly-chloride plant in the middle of Convent.[88] Shintech would emit some three million tons of air pollution a year, more than a quarter of that in toxins like dioxin (whose Vietnam War victims were still being identified), ethylene dichloride, and vinyl chloride—all known carcinogens.[89] Unfortunately, the facility was not alone.

Convent rested in a cluster of chemical plants along the River, thirteen of which were within two miles of the community.[90] Even before Shintech, the community was exposed to more pollution than its Parish of St. James, doubled that for the Mississippi corridor as a whole, exceeded that of Louisiana by 129 times, and topped the national average by a stunning 658 times.[91] As one environmental lawyer observed at the time: "A person could spend half a day in Convent and be exposed to almost as much toxic air pollution as the average American breathes in a year". . ."[92]

The difference between Black and White was also clear. Convent residents were breathing 2,277 pounds of pollution per person a year.[93] Americans nationwide, nearly 80 percent white, were breathing 7 pounds a year.[94] The disparate impact on African Americans could not have been more stark. As litigation against Shintech proceeded, the legal question became: did this difference matter?

To the State of Louisiana and the chemical industry, the answer was no because none of it was intentional. No one wanted to discriminate against Black Americans, the industry argued. They just happened to live where the plants wanted to be in order to access the Mississippi. Discrimination, in their view, required a purpose to discriminate, which would of course be terribly hard to prove, and in most cases simply untrue.[95] Chemical plants did not intend to harm the nearby residents; they were simply collateral damage. Without this intent, environmental racism did not exist.

Whether the industry was correct would depend on the meaning of the most important civil rights legislation since the Fourteenth Amendment, the Federal Civil Rights Act of 1964, including Title VI, which prohibited

88. *Id.* at 457–58.

89. *Id.* at 458.

90. *Id.* at 459.

91. *Id.* at 459–60.

92. *Id.* at 460 (quoting Robert R. Kuehn, *Denying Access to Legal Representation: The Attack on the Tulane Environmental Law Clinic*, 4 Wash. U. J.L. & Pol'y 22 (2000)).

93. *Id.* at 460 n.31.

94. *Id.*

95. *See* U.S. Comm'n on Civil Rights, Not In My Backyard: Executive Order 12898 and Title VI as Tools for Achieving Environmental Justice 34 (2003) ("Business representatives and local government officials overwhelmingly object to using disparate impact . . . ."); *see also* Stephen B. Huebner, Ctr. for the Study of Am. Bus., Are Storm Clouds Brewing on the Environmental Justice Horizon? 15 (1998) (criticizing a disparate impact standard for environmental racism, but accepting the phenomenon as proven).

discrimination in "any program receiving federal funding."[96] What this meant in cases like Shintech would be decided not by the Congress but by the courts.

In *Guardians' Association of Contractors* (1983) and *Sandoval v. Alexander* (2001), the Supreme Court seemed blind to the very evil that the federal Civil Rights Act intended to cure.[97] Indeed, the Court had been blind to it throughout a long and dark history that featured some of the most disgraceful decisions it has ever rendered.[98] One century later, in two badly fractured decisions, the Court pulled the rug out from under the Act, reading the purpose requirement into a statute that made no reference to it at all.

Given the opportunity to offset a very dark canon, the Court confirmed it instead.

1. The Federal Civil Rights Act of 1964

It's really the law that created created modern America."

Todd S. Purdum, journalist, Washington, D.C.[99]

The Federal Civil Rights Act of 1964[100] came out of an evil that had haunted America for more than 300 years. By the 1960s the uproar over the plight of Black Americans had reached a fever pitch. Mass demonstrations in the streets violence in the air, finally prompted a reluctant Congress to act.[101] The civil rights movement was led by two individuals whose philosophies could not have been further apart.[102] The Reverend Martin Luther King led the peace faction, with its emphasis on passive resistance.[103] In his redoubtable

96. 42 U.S.C. § 2000d-1 (2012)..This provision applied because the Louisiana Department of Environmental Quality regulatory program that permitted Shintech was receiving significant EPA funding.

97. Guardians Ass'n v. Civil Service Comm'n, 463 U.S. 582 (1983); Alexander v. Sandoval, 532 U.S. 275 (2001) (both cases reaching 5–4 decisions on the basis of multiple opinions).

98. *See* Dred Scott v. Sanford, 60 U.S. 393 (1857) (holding that the Constitution did not include citizenship for African Americans); Plessy v. Ferguson, 163 U.S. 537 (1896) (holding that the Constitution allowed for segregated public facilities so long as they provided "comparable" services).

99. *Fresh Air: The Politics of Passing 1964's Civil Rights Act*, NPR (Feb. 16, 2015), https://www.npr.org/2015/02/16/385756875/the-politics-of-passing-1964s-civil-rights-act [https://perma.cc/EWE8-MAVD].

100. Civil Rights Act of 1964, 78 Stat. 241 (codified at 42 U.S.C. § 1971 et seq. (2006)).

101. *See 1960s*, History, https://www.history.com/topics/1960s [https://perma.cc/P88C-2ZXA] ("The 1960s were one of the most tumultuous and divisive decades in the world, marked by the civil rights movement . . . ."); *see also Civil Rights Act of 1964,* History (Jan. 4, 2010), https://www.history.com/topics/black-history/civil-rights-act [https://perma.cc/NST8-D2MB] (describing, inter alia, violence in U.S. cities and against Freedom Riders, black and white, seeking integration of public facilities).

102. *See generally* Peniel E. Joseph, The Sword and the Shield: The Revolutionary Lives of Malcolm X and Martin Luther King (2020) (describing how Martin Luther King and Malcolm X had similar visions, but differing tactics on how to achieve those visions).

103. *Id.*

"I have a dream!" speech on the National Mall, he predicted the day when "all God's children, black men and white men," would be able to sing the old negro spiritual, "Free at last! Free at last! Thank God Almighty, we are Free at Last."[104] It was a dream of the future. Others, however, wanted freedom now.

Malcolm X was born in poverty and rose to leadership of a different movement by the force of his personality and rhetoric alone.[105] He became a media star, his rallies attracting thousands. His phrases were less soaring but grittier than those of King, one favorite being "Either the Ballot or the Bullet"[106] The combination of King's passivism and Malcolm's fireworks compelled Congress toward seminal and sweeping legislation that dealt with the now, and not the distant future.

The Federal Civil Rights Act was anything but a foregone conclusion. Southern Democrats held the levers of key committees in both houses of Congress, and this was a victory that they had won and hung onto for a century after losing the Civil War in 1865. Civil rights statutes had been proposed for years, and failed.[107] In 1963, in the wake of the lunch counter sit-ins, the Birmingham march and protests in other cities, the initiative was revived by President Kennedy who declared that the country "will not be fully free until all of its citizens are free."[108] Unfortunately, the President had little influence in the South or in Congress, and his chances of success were slim. That November, however, Kennedy was assassinated in Dallas, and everything changed.

President Johnson made passage of civil rights legislation the first priority of his administration. "No memorial oration or eulogy could more eloquently honor President Kennedy's memory," he stated, "than the earliest possible passage of the civil rights bill for which he had fought for so long."[109] At this very time, however, Kennedy's bill was bottled up in the House Rules Committee, chaired by a Democrat and segregationist from Virginia, from which it would never emerge.[110] The House Judiciary Committee petitioned to release the bill,

104. *See Civil Rights Movement*, History (Oct. 27, 2009), https://www.history.com/topics/black-history/civil-rights-movement [https://perma.cc/428K-WDN5] (describing the March on Washington and King's "I Have a Dream" speech).

105. *See* Lawrence A. Mamiya, *Malcolm X: American Muslim Leader*, Britannica, https://www.britannica.com/biography/Malcolm-X [https://perma.cc/Q8UD-3MRG].

106. *See* The Sword, *supra* note 102.

107. *See Civil Rights Act of 1964*, History (last updated Jan. 25, 2021), https://www.history.com/topics/black-history/civil-rights-act [https://perma.cc/87K6-QWYB] (describing previous attempts to pass comprehensive civil rights legislation).

108. *Id.*

109. President Lyndon B. Johnson, Address to a Joint Session of Congress Regarding President John F. Kennedy's Assassination (Nov. 27, 1963). (transcript available in the Center for Legislative Archives).

110. *See* The Civil Rights Act of 1964: The Passage of the Law That Ended Racial Segregation 55, 60 (Robert D. Loevy ed., 1997).

which would then be voted on by the full House membership where the South was outnumbered.[111] Once on the floor, it passed overwhelmingly.

The battle was yet more fierce in the Senate, where for thirteen consecutive weeks, Senator Byrd of West Virginia, a former Ku Klux Klan member, led the longest filibuster in the history of that Chamber.[112] It might have lasted forever, bottled up this time in the Judiciary Committee Chaired by Mississippi Democrat James Eastland.[113] In a maneuver similar to that of the House leadership, however, Senate Majority Leader Mike Mansfield bypassed the Committee and placed the bill on the floor for open debate.[114]

To the South, the threat was existential. Senator Richard Russell of Georgia announced that "[w]e will resist to the bitter end any measure or any movement which would have a tendency to bring about social equality and intermingling and amalgamation of the races in our [Southern] states."[115] South Carolina Senator Strom Thurmond called the bill's provisions "unconstitutional, unnecessary, unwise, and . . . beyond the realm of reason" and "reminiscent of the Reconstruction proposals and actions of the radical Republican Congress."[116] We could be back at Fort Sumpter.[117] The vote in favor of cloture was 71.[118]

The Federal Civil Rights Act that emerged contained more than a dozen titles addressing such specific problem areas as voting, education, and employment. One common denominator of this form of discrimination is that it was intrinsically intentional; no one accidentally barred Black children from attending White schools. All-white schools were the goal. In Title VI, by contrast, the discrimination came as the byproduct of an otherwise lawful act. The chemical

111. *See generally The Civil Rights Act of 1964: The Long Struggle for Freedom*, Libr. of Cong., https://www.loc.gov/exhibits/civil-rights-act/civil-rights-act-of-1964.html [https://perma.cc/N7XH-EYFH] (describing the process by which the House Judiciary Committee pressured the House Rules Committee into releasing the bill).

112. *See* David F. Gomez, *The Federal Civil Rights Act of 1964 Turns 50*, Ariz. Att'y 26 (Dec. 2014).

113. *See James O. Eastland*, https://mississippiencyclopedia.org/entries/james-oliver-eastland [https://perma.cc/T3KG-Q52H].

114. *See Civil Rights Act of 1964*, Senate Hist. Off., https://www.senate.gov/artandhistory/history/civil_rights/strategy.html [https://perma.cc/ZNX2-RGPG].

115. Noah Remnick, *Op-Ed: The Civil Rights Act: What JFK, LBJ, Martin Luther King and Malcolm X had to Say*, L.A. Times (June 25, 2014, 4:55 AM) (quoting Sen. Richard Russell).

116. *1963 Year in Review – Civil Rights Bill*, UPI, https://www.upi.com/Archives/Audio/Events-of-1963/Civil-Rights-Bill [https://perma.cc/FN9C-FZ3E].

117. Indeed, following *Brown v. Board of Education*, a "Southern Manifesto" signed by 82 Representatives and 19 Senators encouraged resistance to the "chaos and confusion" resulting from school desegregation. *See Historical Highlights – The Southern Manifesto of 1956*, U.S. History, Art, & Archives – U.S. House of Reps., https://history.house.gov/Historical-Highlights/1951–2000/The-Southern-Manifesto-of-1956 [https://perma.cc/92UD-8GJ3].

118. *Landmark Legislation: The Civil Rights Act of 1964*, Senate Hist. Off., https://www.senate.gov/artandhistory/history/common/generic/CivilRightsAct1964.html [https://perma.cc/82H2–8GNE].

plants surrounding the residents of Convent, Louisiana did not intend to harm them, but their impacts reached extraordinary levels of risk and harm.

Congress certainly knew this, and while it did not mention intent in Title VI, either way, it seems clear from the legislative history that disparate impacts of this magnitude would suffice. In his statement on the Senate floor, Senator Humphrey, one of the Act's authors and sponsors, quoted with favor the endorsement of President John. F. Kennedy,[119] which stated: "Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, *entrenches*, subsidizes, or *results in* racial discrimination"[120] Attorney General Robert Kennedy, testifying on the Act before the Senate said the same directly to the members. There is no record of objection.

It is worthy of note that the phrases "entrenches and "results in" are not words of acts. They are words of effect, impact, things that the Act also meant to remedy. At this remove the proposition seems obvious. Were it not true, citizen enforcement of Title VI would disappear. This was before the issue reached the Supreme Court, however, whose record on civil rights did not bode well.

B. *The Supreme Court and Race*

> "*An honest, unsentimental look at the legal history of the United States reveals only two periods characterized by sustained, systematic protection of civil rights and civil liberties by the Supreme Court: from about 1937 to 1944, and from about 1961 (or 1954 including* Brown*) to 1973. The rest has been nightmare.*"
>
> Professor David Kairys, Temple Law School[121]

The Federal Civil Rights Act of 1964 ran into a juggernaut. Throughout its history, and with a few notable exceptions, the High Court had acted as an agent of slavery and the vestiges of slavery. According to the Court, Black people were inferior beings, had no inherent rights, and the rights accorded to them by amendments to the Constitution and subsequent legislation were either ignored or finessed to the fullest extent possible. The Court's track record on race began well before the Civil War. An 1825 case called *The Antelope* held that although slavery violated the law of nations and international law, it was legal and constitutional in the United States.[122] The Court

119. Cong. Rec. 6543 (1964) (remarks of Sen. Humphrey).

120. U.S. Dept. of Justice, Civil Rights Div., Title VI Legal Manual § II, at 1 (2021) (statement of President Kennedy).

121. David Kairys, *A Brief History of the Supreme Court and Race*, 79 Temp. L.R. 751, 766–77 (2006) (additionally listing extensive Critical Race Theory literature at 751 n.2). Literature on the Supreme Court and race abounds, some indication perhaps of its notoriety. For more detailed treatments, *see* David Kairys, With Liberty and Justice for Some (1993), and Michael J. Klarman, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality (2004).

122. The Antelope, 23 U.S. 66, 114–17 (1825).

followed with another decision in 1845 approving the Fugitive Slave Act over state safe-harbors for those who had fled captivity.[123] These holdings led to the Court's infamous *Dred Scott* decision of 1857, decreeing that African Americans, whether free or enslaved, were not citizens and had no standing to challenge their incarceration.[124] Lest this statement seem insufficient, the Court went on to say that Congress lacked authority to ban slavery anywhere in the Union.[125]

For the next 50 years, the Court's civil rights jurisprudence would resemble men in black robes trying to stomp out a fire In the *Slaughterhouse Cases* of 1873, the Court held that the Constitution's privileges and immunities clause, a hard-won fruit of the Civil War, did not extend to private property rights.[126] In the *Civil Rights Cases* of 1883, it returned to the Fourteenth Amendment to hold that neither due process nor equal protection applied to private action—only to state actors.[127] Justice Harlan in his lone dissent pointed out that the private enterprises in this case were in fact state actors[128] and, more broadly, that the Fourteenth Amendment should be given "full effect" to achieve its purpose.[129] Instead, the opposite happened.

The next debacle came in the almost equally infamous case of *Plessy v. Ferguson*, affirming Louisiana's Separate Cars Act that required different train cars for African Americans if they were "equal but separate," a concept even facially impossible to achieve.[130] "If one race be inferior to another socially," Chief Justice Story reasoned, "the constitution of the United States cannot place them upon the same plane."[131]

From this decision forward, everything about race went south, quite literally. Louisiana adopted a new constitution about which its convention's presiding officer crowed: "Doesn't it let the white man vote, and doesn't it stop the negro from voting, and isn't that what we came here for?"[132] It was, indeed. With the advent of literacy and poll taxes, Black voters in the state dropped from 130,344 to fewer than 1,300.[133] With segregated education, Black literacy rates plummeted,[134] lynchings and burnings soared,[135] and groups such as the Knights of the White Camellia and the Ku Klux Klan flourished.[136] All of

123. Prigg v. Pennsylvania, 41 U.S. 539 (1842).
124. Dred Scott v. Sandford, 60 U.S. 393 (1857).
125. *Id.* at 395–96.
126. Slaughter-House Cases, 83 U.S. 36 (1872).
127. The Civil Rights Cases, 109 U.S. 3 (1883).
128. *Id.* at 26 (Harlan, J., dissenting).
129. *Id.*
130. Plessy v. Ferguson, 163 U.S. 537, 540 (1896).
131. *Id.* at 552.
132. Keith Weldon Medley, We As Freemen: Plessy v. Ferguson 209 (2003).
133. Light Townsend Cummins et al., Louisiana: A History 266 (5th ed. 2008).
134. *Id.* at 223, 231–2 (literacy).
135. *Id.* at 268–9 (lynchings and burnings).
136. Geroge C. Rable, But There Was No Peace: The Role of Violence in the Politics of Reconstruction, 132 (1984).

this and more would remain set in stone until *Brown v. Board of Education* in 1954.[137] All the more striking, then, that the Chief Justice of a later Court would claim that *Plessy* was correctly decided.

Brown v. Board is instructive not simply for what it said, but for how long it had taken to say it. By the early 1950s, the Court presided over by Chief Justice Vinson was in disarray, just as a bevy of civil rights cases were arriving from half-a-dozen states.[138] When Vinson suddenly died, his colleague Felix Frankfurter made the famous comment that "This is the first solid piece of evidence that I have ever had that there is a God," apparently not out of animosity but because he believed resolving these cases was critical for the future of the country.[139] The Court's ultimate conclusion, that separate but equal was a myth, seems rather obvious today. It was highly and irreducibly unequal.[140]

The *Brown v. Board* decision was the crowning achievement of Thurgood Marshall, who had risked his life and reputation defending wrongly-accused black men in the American South.[141] When Marshall was appointed to the Court (over the opposition of eleven southern senators ostensibly opposed not to his race, but to his "activist" temperament), Marshall sought out Justice Hugo Black to administer his oath of office.[142] As related in a Washington Post article at the time, Black had been an active member of the Alabama Ku Klux Klan, but had voted instead with the all-white Court to strike down school segregation and, by inference, all institutional segregation wherever found.[143]

This, then, would be a dark history with a happy ending had it not been for the Court that followed, starting in 1968 with the appointment of members consistent with President Nixon's "southern strategy"[144] and perpetuated by President Reagan with the appointments of Lewis Powell, William Rehnquist, and Antonin Scalia to the High Court. Under Reagan, wrote former Solicitor General Drew Days, the administration "aimed at turning back the clock on civil rights," and "inadequately enforced and otherwise undermined, if not violated outright, settled law in the field."[145] These men had no loyalty to *Brown*

137. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

138. *See* Richard Brust, *The Court Comes Together*, Am. Bar Ass'n J. 40, (April 2004).

139. *Id.*

140. *Brown v. Board* was diminished by a later Court in Milliken v. Bradley, 418 U.S. 717 (1974), which, by a 5–4 margin, approved a gerrymandered school district resulting in a markedly unequal racial balance and school funding. "Separate" turned out to be "unequal" after all.

141. *See* Gilbert King, Devil in the Grove (2012).

142. *See* DeNeen L. Brown, *Thurgood Marshall Asked an Ex-Klan Member to Help Him Make Supreme Court History*, Wash. Post (Sept. 1, 2017), https://www.washingtonpost.com/news/retropolis/wp/2017/09/01/thurgood-marshall-asked-an-ex-klan-member-to-help-him-make-supreme-court-history [https://perma.cc/55QS-ERSG].

143. *Id.*

144. *See generally* Angie Maxwell & Todd Shields, The Long Southern Strategy: How Chasing White Voters in the South Changed American Politics (2019).

145. Drew S. Days, *Turning Back the Clock: The Reagan Administration and Civil Rights*, 19 Harv. C.R.-R.C.L. L Rev. 309, 309 (1984).

v. Board—some opposed it openly—and had little intention of fulfilling its promise.

Perhaps the foremost of these Justices was Lewis Powell, who by coincidence was a member of the Richmond District School Board challenged in *Brown v. Board*, and whose law firm defended the discrimination at issue in the case.[146] Throughout his life, Powell made no secret that he thought the case was incorrectly decided.[147] States controlled education—not the federal government—period. Putting Powell's conviction into practice, African American students were not admitted into white schools in Richmond until 1960, four years after *Brown*.[148]

Powell's dim view of black peoples' rights was particularly apparent in three cases on standing to sue against patently discriminatory practices. In *Warth v. Seldin*,[149] writing for a 5–4 majority, he denied standing for a fair housing organization and several low-income residents claiming exclusionary zoning; he found their exclusion was due to market forces instead. In *Simon v. East Kentucky Welfare Rights Organization*,[150] he denied plaintiff's standing to challenge revised tax regulations that allowed hospitals to receive federal funding even if they refused to serve low-income and minority patients. In *Allen v. Wright*,[151] he joined with Justice O'Connor to hold that low-income black families lacked standing to challenge federal tax exemptions for segregated schools; white students, they asserted, would simply be removed to private segregation academies. These holdings didn't just strain credulity; they rose from something deep in Powell's own history that created a dark legacy of their own.

Justice Rehnquist, who would serve on the Court for over 30 years, was no less racist, though less open about it; As witnesses testified before several committees of Congress, in the 1960, '62, and '64 national elections, shortly after passing the bar, Rehnquist helped plan and direct a poll watching campaign focused on black neighborhoods that included photographing voters at the poll stations.[152] When asked what he was doing, Rehnquist said, "I'm taking pictures of everybody," and when asked whether this was harassment, he laughed and said, "there's no film in the camera."[153] As if no film mattered. The same bland evasions would continue to mark his career.

146. *See Lewis F. Powell, Jr*, Oyez, https://www.oyez.org/justices/lewis_f_powell_jr [https://perma.cc/8WB2-EATB].

147. *Id.*

148. *Id.*

149. Warth v. Seldin, 422 U.S. 490, 506 (1975).

150. *See* Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26 (1976).

151. *See* Allen v. Wright, 468 U.S. 737 (1984).

152. *See* Kairys, *A Brief History, supra* note 121, at 760 n.33.

153. Robert Lindsey, *Rehnquist in Arizona: A Militant Conservative in 60's Politics*, N. Y. Times, Aug. 4 1986, at A7; *see also* Mark Nothaft, *Who Is Arizona's Second Most Famous U.S. Supreme Court Justice?*, Ariz. Republic (May 3, 2017, 11:31 AM) https://www.azcentral.com/story/news/local/phoenix-contributor/2017/05/03/arizonas-second-most-famous-us-supreme-court-justice/101051324 [https://perma.cc/94ZB-95A3] (citing additionally

Rehnquist went on to oppose a 1964 ordinance in Phoenix that outlawed the racial segregation of theatres, restaurants, and other public places, said to be for "philosophical" reasons.[154] He also opposed school integration, arguing that "we are no more dedicated to integrated society than we are to a segregated society."[155] He also owned a home with a restrictive covenant barring the sale or ownership of the property "to any person not of the white or Caucasian race."[156] All this was prelude to his most spectacular act of racial prejudice: a memorandum urging Justice Jackson, for whom he was clerking at the time, to resurrect *Plessy v. Ferguson* and side with the segregationists in *Brown v. Board*. Once again, his response was first denial, and then evasion.

Congress was unaware of his memorandum during his 1971 hearing on appointment to the High Court.[157] Uncovered by a Washington Post reporter in 1986, it came front and center at his nomination for Chief Justice.[158] The language of the memo was unambiguous—"I think *Plessy v. Ferguson* was right and should be reaffirmed"[159], leading Rehnquist to attempt yet another dodge. He testified, under oath, that he was asked to write it by Justice Jackson himself.[160] Styled as "A Random Thought on the Segregation Cases,"[161] however, the memorandum obviously was a product of Rehnquist's own effort to lobby Jackson rather than a treatment of law. One doubts that anyone at the time or since believed his story. By this time, Jackson had died, but his long-serving secretary called his testimony "incredible on its face."[162] But it gave his Senate supporters enough cover to confirm.

To the end, the Chief Justice had difficulty in praising, or even mentioning, *Brown v. Board*.[163] He would, however, put on blackface at law gatherings in Virginia[164] and refer to African Americans before the Court in demeaning ways. In one proceeding, he asked a state lawyer whether it would not be

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"Rehnquist's support for Arizona's literacy-testing laws in predominantly Democratic precincts").

154. Lindsey, *supra* note 153.

155. Brad Snyder & John. Q. Barrett, *Rehnquist's Missing Letter: A Former Law Clerk's 1955 Thoughts on Justice Jackson and* Brown, 53 Bos. C. L. Rev. 631, 652 (2012); *see also* Lindsey, *supra* note 153; Nothaft, *supra* note 153.

156. Lindsey, *supra* note 153. Rehnquist's advocacy included his disapproval of *Brown v. Board*. In an address to the Pima Arizona Bar Association, he "railed against the Warren Court and its 'Red Monday' and 'Black Monday' decisions. 'Red Monday' referred to the four cases decided on June 17, 1957, protecting the rights of suspected Communists. 'Black Monday' most likely referred to *Brown*." Snyder & Barrett, *supra* note 155, at 649.

157. Snyder & Barrett, *supra* note 155, at 652.

158. Adam Liptak, *The Memo That Rehnquist Wrote and Had to Disown*, N.Y. Times, Sept. 11, 2005, at C5.

159. *Id.*

160. Snyder & Barrett, *supra* note 155, at 631.

161. *Id.* at 632 n.1.

162. Liptak, *supra* note 158.

163. Snyder & Barrett, *supra* note 155, at 656–57.

164. Thomas, *supra* note 63.

cheaper "from the taxpayer's point of view" to execute a (Black) defendant "rather than confine him to years of psychiatric treatment," to which Justice Marshall interjected, "well, it would be cheaper just to shoot him when you arrested him, wouldn't it"?[165]

On May 17, 2004, the Chief Justice spoke to the American Law Institute on Justice Jackson and the Nuremburg trials.[166] He did not acknowledge that it was the fiftieth anniversary of *Brown v. Board*.[167] Perhaps he truly didn't make the connection. Harvard law professor Mark Tushnet summarized, with some delicacy, this aspect of Rehnquist's career:

> "When you put the memo together with his voting registration challenges and with his opposition to a local anti-discrimination ordinance in Phoenix, you get a picture of somebody for whom issues of racial justice and nondiscrimination were not a high priority."[168]

Unfortunately, Powell and Rehnquist were not unique. No Justice of the Supreme Court was more under the influence of William Rehnquist than Sandra Day O'Connor. They had been an "item" together at the Stanford Law School,[169] and she openly lamented his graduation.[170] She told her biographer after retirement that Rehnquist was "the most intelligent man she ever knew,"[171] and she acted that way. She also owed her appointment to Justice Rehnquist, given that he urged it directly to President Reagan's search team and secured a staunch ally in return.[172]

O'Connor's opinion with the most racial impact was the infamous 5–4 *Bush v. Gore*,[173] which invalidated the votes of over 21,000 Black and Latino voters certain to favor Gore [174] on equal protection grounds so flimsy that the Court insisted they not be taken as precedent..[175] Justice Scalia later called them, more graphically, "a piece of shit."[176] The result was a presidential election-swinging number of minority ballots rejected for reasons later exposed as

165. Thomas, *supra* note 63, at 167.

166. Snyder & Barrett, *supra* note 155, at 656–57.

167. *Id.*

168. Liptak, *supra* note 158.

169. Thomas, *supra* note 63, at 37. In fact, Rehnquist professed his love for her several times, and even proposed marriage. *Id.* at 42.

170. *Id.* at 39.

171. Thomas, *supra* note 63.

172. Thomas, *supra* note 63, at 123–24.

173. Bush v. Gore, 531 U.S. 98 (2000).

174. Kenneth O'reilly, Holy Cow 2000: The Strange Election of George W. Bush (2010) (ebook).

175. *See* Liane Hansen, *Legal Precedent and the Bush-Gore Ruling*, NPR (Aug. 20, 2006, 8:00 AM) https://www.npr.org/templates/story/story.php?storyId=5678490 [https://perma.cc/BT3S-U5NY].

176. David Mark, *Scalia thought Bush v. Gore Legal Rationale Was a 'Piece of Sh-t' But Backed it Anyway*, Wash. Examiner (Mar. 7, 2019, 11:29 AM), https://www.washingtonexaminer.com/scalia-thought-bush-v-gore-legal-rationale-was-a-piece-of-s-t-but-backed-it-anyway [https://perma.cc/5QNG-CREJ].

highly political.[177] Selected to write for the majority by Chief Justice Rehnquist, Justice O'Connor was apparently unable to appreciate the difficulty of minorities in executing a diabolically-complicated ballot. Rehnquist and other concurring colleagues declared that this difficulty was unreasonable.[178]

Although O'Connor weaned herself free from Rehnquist as the years went on, it was not easy. One early case, involving whether the children of undocumented immigrants were entitled to public education, pitted her human instincts against the Chief Justice in a dramatic fashion. At the conference following oral argument, she expressed her anguish over the plight of the Mexican children affected by the decision.[179] Nonetheless, while a five-justice majority ruled for the children, she joined Rehnquist and four colleagues in dissent.[180] In *City of Richmond v. Croson*, Justice O'Connor would author a 5–4 opinion to enjoin the use of racial preference in federal contracting[181] and go on to join other opinions to the same effect.

Toward the end of her service on the Court Justice O'Connor began departing with Rehnquist and Powell on issues of race, particularly those regarding affirmative action in education.[182] In the interim, bad law was made and bad things happened.

Justice Scalia fit in well with those on the Court who saw race discrimination as a thing ot the past, voting in *Shelby v. Holder* that the Voting Rights Act of 1964 was now unconstitutional because the South had "changed dramatically;" indeed, it had become a "perpetuation of racial entitlement."[183] In the *Croson* case just mentioned, Scalia wrote a concurrence warning that "there is no such thing as either a creditor or debtor race" and policies should not be used to "even the score."[184] Concurring in *Schyette v. BAMN*, he castigated prior Court decisions supporting affirmative action in education as a "sorry line of race-based admissions decisions."[185]

This point of view would come to a head during oral argument in a case involving the admission policies of the University of Texas.[186]

"Scalia: There are those who contend that it does not benefit African-Americans to – to get them into the University of Texas where they do not do

177. *Id.*

178. *Bush*, 531 U.S. at 112, 119 (Rehnquist, J., concurring).

179. Thomas, *supra* note 63, at 168.

180. Plyler v. Doe, 457 U.S. 202, 242 (1982) (Burger, J., dissenting).

181. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

182. Thomas, *supra* note 63, at 228–34 (describing agonizing swing vote against Powell opinion).

183. Shelby Cty. v. Holder, 570 U.S. 529, 531 (2013); Transcript of Oral Argument at 46, Shelby Cty. v. Holder, 570 U.S. 529 (2013) (No. 12–96).

184. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part); J.A. Croson Co., 488 U.S. at 528 (Scalia, J., concurring).

185. Schuette v. Coal. to Def. Affirmative Action, Integration and Immigrant Rts. and Fight for Equal. By Any Means Necessary (BAMN), 572 U.S. 291, 317 (2014).

186. Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198 (2016).

well, as opposed to having [a] slower track school where they do well. One of – one of the briefs points out that – that most of the black scientists in this country don't come from schools like the University of Texas.

Garre [representing the University]: So this Court –

Scalia: They come from lesser schools where they do not feel that they're – that they're being pushed ahead in – in classes that are just too fast for them.

Garre: This Court –

Scalia: I'm just not impressed by the fact that – that the University of Texas may have fewer. Maybe it ought to have fewer. And maybe some — you know, when you take more, the number of blacks, really competent blacks admitted to lesser schools, turns out to be less. And – and I – I don't think it – it – it stands to reason that it's a good thing for the University of Texas to admit as many blacks as possible. I just don't think –

Garre: This Court heard and rejected that argument, with respect, Justice Scalia, in the Grutter case, a case that our opponents haven't asked this Court to overrule. If you look at the academic performance of holistic minority admits versus the top 10 percent admits, over time, they – they fare better.

And, frankly, I don't think the solution to problems with student body diversity can be to set up a system in which not only are minorities going to separate schools, they're going to inferior schools. I think what experience shows, at Texas, California and Michigan, is that now is not the time and this is not the case to roll back student body diversity in America."[187]

The Scalia argument, among other things, simply disregarded the facts presented to him. More fatally, it echoed those of the southern plantation owners that Black people were simply not *ready* for emancipation. It echoed *Plessy* in its endorsement of separate but equal as well, and it simply voided *Brown v. Board*'s holding that separate was inherently unequal. Most pertinent to this article, however, is the revelation of yet another Supreme Court Justice ill-disposed to the civil rights of African Americans.

Turning to today's Court, no member has a more checkered past than Samuel Alito on the matter of race. The issue first surfaced during his undergraduate years at Princeton University with an organization called Concerned Alumni of Princeton (CAP), founded in opposition to the admission of women at the all-male school.[188] Soon after it opposed affirmative action measures to increase minority enrollment, in particular Black and Hispanic students, and defended all-white "eating clubs," the bastion of school social life.[189] Although not officially a leader, Alito was a member of CAP and remained

187. Oral Argument at 1:07:14, Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198 (2016) (No. 14–981), https://www.oyez.org/cases/2015/14–981 [https://perma.cc/CZN5-ZHXP].

188. David D. Kirkpatrick, *From Alito's Past, a Window on Conservatives at Princeton*, N.Y. Times (Nov. 27, 2005), https://www.nytimes.com/2005/11/27/politics/politicsspecial1/from-alitos-past-a-window-on-conservatives-at.html?searchResultPosition=1 [https://perma.cc/92RP-WHYJ].

189. *Id.*

one despite the controversy over its program. By contrast, Senators Bill Bradley (Democrat, New Jersey) and William Frist (Republican, Maryland) had belonged to CAP but renounced their memberships because of its increasingly retrograde agenda.[190]

When asked by the Reagan White House to provide evidence of his "philosophical commitment" to administration policies, Alito listed his membership in CAP.[191] During his subsequent confirmation hearings, Ralph G. Neas, president of People for the American Way stated, "The question for senators to consider and to ask is why Samuel Alito would brag about his membership in an organization known for its fervent hostility to the inclusion of women and minorities at Princeton."[192] As one Court scholar observed, "Alito supporters could not make up their minds whether they like him because he does not apply values or because they like the values he applies."[193] Either way, he was nonetheless confirmed.

If Alito was scarred by the scrutiny he received at his confirmation hearing, it certainly did not reorient his views on race. His subsequent opinions demonstrate his personal prejudices more openly and outspokenly than any other member of the Court.[194] He went so far as to openly chastise his Republican colleagues on the bench for finding historic racist motives for laws now before the Court and even finding that race discrimination still exists in America. Writing for a five-four majority in *Abbott v. Perez*,[195] a Texas gerrymandering case that had been remanded earlier only to reappear with the same discrimination, Alito asserted such a strong presumption of white innocence that such challenges are as a practical matter impossible due to the requirement of showing a *purpose* to discriminate.[196] This is the same tack taken in *Guardians* and *Sandoval*, as will be seen. One can always proffer another purpose.

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190. *Id.*; *see also* Jerome Karabel, *Samuel Alito and the Concerned Alumni of Princeton*, Huffington Post (May 25, 2011), https://www.huffpost.com/entry/samuel-alito-and-the-conc_b_13826 [https://perma.cc/8HNB-XYK4] (CAP founder stating that trend toward more women and minorities was "by no means irreversible").

191. Kirkpatrick, *supra* note 188.

192. *Id.* During the hearings, Alito professed a remarkable lapse in memory, recalling only that CAP argued for the return of ROTC to the Princeton campus; his statement "strained credulity" because ROTC had already returned to Princeton several years before CAP was formed. *See* Karabel, *supra* note 190.

193. Kairys, *supra* note 121, at 9–10.

194. *See* Ian Millhiser, *Justice Alito's jurisprudence of white racial innocence*, Vox (Aug. 13, 2020, 9:27 AM), [https://web.archive.org/web/20210408235936/https://www.vox.com/2020/4/23/21228636/alito-racism-ramos-louisiana-unanimous-jury].

195. Abbot v. Perez, 138 S. Ct. 2305 (2018).

196. *See* Richard L. Hasen, *Suppression of Minority Voting Rights is About to Get Way Worse*, Slate (June 25, 2018, 2:20 PM), https://slate.com/news-and-politics/2018/06/the-abbott-v-perez-case-echoes-shelby-county-v-holder-as-a-further-death-blow-for-the-voting-rights-act.html [https://perma.cc/XKU6–6DPR] ("intention" virtually impossible to prove).

Alito's greatest heartache came with Justice Gorsuch's 6–3 opinion in *Ramos v. Louisiana*,[197] invalidating non-unanimous juries in criminal cases. The roots of Louisiana's system, Gorsuch wrote, lay in its racist constitution of 1898 that reduced the chances of African Americans serving on juries and thereby provided more convict labor for white plantations..[198] Alito's 51-page dissent was scathing., writing: "The Court tars Louisiana and Oregon [the only two states remaining with the practice] with the charge of racism."[199] Indeed it did, and the shoe fit quite well.

That this shoe did not fit Alito when the tables were reversed became apparent in yet another opinion, *Ricci v. Destefano*,[200] , a case brought by white firemen to revalidate an examination for promotion that had been discarded due to racial bias. Concurring to make another 5–4 majority, Alito found the invalidation improper because it had been advocated by a black minister.[201] With an African American involved, apparently, the presumption of regularity Alito so firmly stated in *Perez* had disappeared.

Unfortunately for the Supreme Court's jurisprudence on racism, the tendencies revealed at Samuel Alito's confirmation hearing were often realized, and they have made an unfortunate difference.

Clarence Thomas is an enigma of his own, a man who benefitted considerably from affirmative action and opposed it vigorously at every turn.[202] Appointed to Chair the Equal Employment Opportunity Commission (EEOC) in 1982, over the next 8 years it was roundly accused by citizen groups and members of congress of incomplete investigations, lapsed enforcement, faulty reports, a failure to cooperate that led to subpoenas, and assurances that "it would not happen again".[203] At the same time Thomas himself was directing his regional attorneys not to enforce goals and timetables in court settlements (they were "a fundamentally flawed approach"),[204] and case closures plummeted. The reason was simple. In the words of one veteran civil rights attorney, "He refused to recognize the affirmative role of the government in protecting against discrimination".[205] This attitude did not augur well for the Federal Civil Rights Act.

Thomas was appointed to the Supreme Court by President George H. W. Bush, reportedly under "significant political pressure to appoint another

197. Ramos v. Louisiana, 140 S. Ct. 1390 (2020).

198. *Id.* at 1394.

199. *Id.* at 1425 (Alito J., dissenting).

200. Ricci v. DeStefano, 557 U.S. 557 (2009).

201. *Id.* at 596.

202. *See* Clarence Thomas Biography, Biography.com, (last updated Aug. 17, 2020), https://www.biography.com/law-figure/clarence-thomas (regarding admission to Yale Law School, "he also benefitted from the school's affirmative action policy").

203. William M. Welch, "Thomas Presided Over Shift in Policy at EEOC, Records Show", Assoc. Press, July 215, 1991.

204. *Id.*

205. *Id.* (quoting William L. Taylor, a veteran civil rights attorney).

African American" to replace Justice Thurgood Marshall.[206] Although the American Bar Association's evaluation committee had divided on his recommendation,[207] he was set for clear sailing in congress until his confirmation hearing, which featured graphic testimony of sexual abuse by Professor Anita Hill, also an African American, who had worked for him at the Commission.[208] Thomas, in rebuttal, was adamant in denying the charges, explicit as they were, and went on to call the hearings "a high-tech lynching for uppity Blacks who in any way deign to think for themselves".[209] A Black woman had humiliated him.

Thomas was confirmed by the Senate, despite the proffer of several witnesses, corroborating Professor Hill's testimony. One of them wrote to Committee staff that she had worked Thomas at the EEOC for several years and had experienced similar behavior.[210] None were called, but Thomas cannot have come away from this experience with any more empathy for those on the receiving end of civil rights abuses than he had before, a hallmark of his judicial career.

Thomas' objectivity on the bench was further compromised by the political activity of his wife who formed a powerful conservative lobby called Liberty Central, garnering $1.5 million in its first two years.[211] One of Liberty Central's major campaigns was to defeat the Obama Affordable Care Act (ACA) that provided first-ever health-insurance coverage for thousands of Blacks, Hispanics and other minorities.[212] Her activism on the issue was so pronounced that it prompted 70 Democrats to ask Justice Thomas to recuse himself, which he refused to do.[213] When the Court voted to support the ACA, Thomas felt impelled to write his own dissent.[214]

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206. Brian P. Smentkowski, *Clarence Thomas*, Encyclopedia Britannica, https://www.britannica.com/biography/Clarence-Thomas [https://perma.cc/NTZ7–2P3Q] ("the president was under significant political pressure to appoint another African American").

207. Neil A. Lewis, *Bar Association Splits on Fitness of Thomas for the Supreme Court*, N.Y. Times, (Aug. 28, 1991).

208. Sarah Pruitt, *How Anita Hill's Testimony Made America Cringe – and Change*, History.com (Sept. 26, 2018) https://www.history.com/news/anita-hill-conformation-hearings-impact [https://perma.cc D5W9–6AJW] (noting that under incessant requests for details from Senate Republicans, Thomas as accused of talking with Hill about "large-breasted women, a porn star named Long Dong Silver, and pubic hair on a coke can", and was said to have talked to her about sex several times in graphic detail.

209. Biography, *supra* note 202.

210. *See* Michael Matthews, *Anita Hill Testimony: The Witness Not Called*, Nat'l. Pub. Radio (Sept. 23, 2018), https://www.npr.org/2018/09/23/650956623/anita-hill-testimony-the-witness-not-called (quoting former EEOC attorney Sukari Hardnet).

211. Jessica Piper, *Virginia Thomas, wife of Justice Clarence Thomas, extends her conservative reach for 2020*, Ctr. for Responsive Pol. (June 15, 2019, 3:32 PM), https://www.opensecrets.org/news/2019/06/virginia-thomas-extends-her-conservative-reach-for-2020 [https://perma.cc/7JZC-U92F].

212. *Id.*

213. *Id.*

214. *Id.*

Perhaps the most revealing observations on Justice Thomas and issues of race has come from a biography by political theorist Corey Robin called The Enigma of Clarence Thomas.[215] According to Robin, the Justice views white efforts to improve conditions for African Americans as "paternalism" that ends up "perpetuating the injustices."[216] Which statement leaves us exactly where? By way of explanation, Robin continues:

> "It would be too strong to say that he would like to rewrite the Constitution as if it were a Jim Crow Constitution, but he really does believe in his heart of hearts that black people, particularly black men, flourished under the heavy yoke of subjugation that was Jim Crow" . . . that enabled the "strongest wills" to "bash their way through.[217]

Apparently, African Americans did not need protection of law, only the challenge of "bashing their way through." What is clear is that African Americans pleading race discrimination had an African American on the Court who had at least rationalized it away. Yet another signal that the Federal Civil Rights Act would be in trouble when it reached the High Court.

John Roberts continued the Court's sorry legacy on civil rights. He had been Rehnquist's law clerk at the Court, and had followed him at the Department of Justice where he attempted to neuter the impact of the Voting Rights Act of 1965.[218] It was not an encouraging start. One investigative reporter writes: "as a junior Department of Justice official in the early 1980s he ghostwrote op-eds for his superiors denouncing the law."[219] In the law's crosshairs were a series of voter suppression efforts aimed at African Americans that included purging of state voter rolls, limited polling hours, proof of identification requirements, and the loss of 70,000 presidential votes from the largely black city of Detroit, which President Trump won by only 10,000.[220]

Robert's opinion in *Shelby County v. Holder* nullified a provision of the Voting Rights Act that required pre-clearance by the Justice Department before states changed their voting rules.[221] Such rules were no longer needed, he found, and therefore unconstitutional on the same federalism principles that the South had relied on since the Civil War.[222] Now, he declared, the elections in the South were a brand-new ballgame.

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215. *See* Corey Robin, The Enigma of Clarence Thomas (2019).

216. Sean Illing, *The Racial Pessimism of Clarence Thomas*, Vox (Oct. 15, 2019, 8:40 AM), https://www.vox.com/policy-and-politics/2019/10/15/20893737/clarence-thomas-supreme-court-corey-robin [https://perma.cc/8MXW-QZMN].

217. *Id.*

218. Voting Rights Act of 1965, Pub. L. No. 89–110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1).

219. Andrew Cockburn, *Election Bias: The New Playbook for Voter Suppression*, Harper's Magazine, Jan. 2020, at 68, https://harpers.org/archive/2020/01/election-bias-voter-suppression-african-americans-south [https://perma.cc/TM4P-YF6Q].

220. *Id.*

221. Shelby Cty. v. Holder, 570 U.S. 529 (2013).

222. *Id.*

Putting the lie to this statement was Texas Republican Attorney General Greg Abbot, who immediately activated a previously invalid law requiring photo identification at the polls, explaining: "People say, 'So what? Everyone has a driver's license.' Well, ninety-five percent of people do have a license, but five percent don't and that adds up to six hundred thousand Texans."[223] Georgia did him one better, stripping from the voter rolls those who, for whatever reason, had failed to vote in recent elections.[224]

Following Roberts' *Shelby* decision, 1,200 polling stations in the American South were closed outright, primarily in communities of color, and a range of other restrictions such as shorter voting hours disenfranchised minorities at those venues that remained open.[225] There is no reason to believe that Justice Roberts would decide *Shelby* otherwise today. As seen above, he had been opposing the Voting Rights Act since his days at Justice. *Shelby* was the vehicle to realize his goal. As one Court observer has written: "The most powerful enabler of voter suppression in recent years has [been] . . . the conservative majority of the Supreme Court."[226] Led by its Chief Justice.

Justice Roberts did no better on the issue of racial diversity in public secondary schools.[227] In two consolidated cases, writing for a 4–1-4 plurality, he invalidated the efforts of two, democratically elected public school boards to broaden diversity by assigning students to mixed classes. Per the Chief Justice, they were not "narrowly tailored" enough.[228] Unfortunately, he had his facts wrong. The school practice did not involve school admissions, but rather class assignments. This fact notwithstanding, secondary school diversity was hung out to dry.

Justice Roberts' one positive, if reluctant, moment in racial discrimination came with the 2020 census, where the Trump Administration attempted to add a new citizenship question that could deter registration by immigrants.[229] Roberts and his Republican majority were reportedly prepared to accept the Administration's highly-implausible explanation that it would help them with voting rights enforcement.[230] At this point, however, the daughter of the Republican strategist behind the census issue located "several hard drives" of his with a very different explanation: "to give electoral advantage to

223. Cockburn, *supra* note 219, at 69.

224. *Id.* at 70.

225. Andy Sullivan, *Southern U.S. States Have Closed 1, 200 Polling Places in Recent Years: Rights Group*, Reuters (Sept. 9, 2019), https://www.reuters.com/article/us-usa-election-locations/southern-u-s-states-have-closed-1200-polling-places-in-recent-years-rights-group-idUSKCN1VV09J [https://perma.cc/E8T4-GHWN] (citing the Leadership Council on Civil and Human Rights).

226. Cockburn, *supra* note 219, at 68.

227. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

228. *Id.*

229. Dept. of Commerce v. New York, 139 S. Ct. 2551 (2019).

230. Cockburn, *supra* note 219, at 71.

Republicans and Non-Hispanic Whites."[231] When the press became aware of this charade, Roberts' hand was forced, and he capitulated.

This brief history of the Court, then, from Justices Powell and Rehnquist to O'Connor, Scalia, Alito, and Roberts, presents a formidable challenge to racial justice in America, and to the success of the Federal Civil Rights Act of 1964 in particular. All of these Justices save Roberts were involved in the *Guardians* and *Sandoval* saga, to which we now turn. What we now know going in is that these five had demonstrated little regard for civil rights.

C. *Lau and Guardians*

> *Discrimination is barred which has that* effect *even though no purposeful design is present: a recipient "may not . . .* utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination" *or have "the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin".*
>
> Justice William O. Douglas, *Lau v. Nichols*[232]

The legal question before the Supreme Court in *Sandoval* was whether violations of Title VI of the Federal Civil Rights Act required proof of a discriminatory purpose or only a discriminatory effect. When first confronted with this question, the Supreme Court ruled that the act did not require intent to discriminate. In *Lau v. Nichols* (1974), students of Chinese ancestry were severely handicapped by requiring them to participate in English without providing the means for them to do.[233] Justice Douglas, writing for the Court, stated that, whatever the educational program's purpose, its discriminatory impact was dispositive. All of Douglas' fellow justices signed onto his opinion or concurred. One would think, then, that the matter settled. Instead, the wheels came off.

Guardians Association v. Civil Service Commission[234] was an unusually muddled decision. One can piece together only fragments of holding from it where a sufficient number of Justices concurred on one point, but not others. None of them save the dissenters seemed to appreciate that Black lives were at stake and that they were what the Federal Civil Rights Act was all about.

The facts of the case were similar to those in *Lau*. Black and Hispanic police officers had been discriminated against in promotions to a higher grade.[235] The District Court held that an implied right of Action existed under Title VI and that proof of discriminatory effect was sufficient to make a violation.[236] So far, it was *Lau* revisited. On review, however, the Appellate Court

231. *Id.*
232. Lau v. Nichols, 414 U.S. 563, 568 (1974).
233. *Id.*
234. Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983).
235. *Id.* at 585.
236. Sandoval v. Hagan, 7 F. Supp. 2d 1234, 1262 (M.D. Ala. 1988).

disagreed and found proof of discriminatory purpose was required.[237] From here on, the purpose question got messy.

At the Supreme Court level, Justice White, joined by four other Justices, began by finding that the Appellate Court erred: discriminatory purpose was not required.[238] This would have reaffirmed *Lau* again, but he then found an "alternate ground" for affirming the decision below: there was no private right of action that would allow the Black and Hispanic Officers to secure their relief.[239] Explaining that no remedy should "frustrate the purposes" of the Civil Rights Act (although it seems obvious a private right of action would do just the opposite), he concluded that, unless a discriminatory purpose were shown, private relief should be limited to injunctive relief without compensation to the officers for wages lost.[240]

Justices Powell, Rehnquist, and Chief Justice Burger concurred, but on a more grudging basis. They would confirm the Court of Appeals either on the sweeping ground that Title VI did not authorize any form of private enforcement, or that a showing of purposeful discrimination was required for all violations.[241]

Justice O'Connor, concurring, took a yet more grudging tack. Title VI required purposeful discrimination, and federal regulations incorporating an effects standard were perforce invalid.[242] *Lau* should therefore be overruled. So much for *stare decisis*.

Justice Marshall, dissenting, began by revisiting history.[243] Discriminatory effect had been federal policy since the Civil Rights Act was enacted in 1964. The Justice Department wrote implementing regulations based on the effects test that were adopted by every cabinet department and forty federal agencies.[244] As a "contemporaneous construction" of the statute, they deserved "great weight."[245] They had been operating without contest for twenty years.

He also found it significant that the effects test had never been altered by Congress. Indeed, two years after the Act passed, the House of Representatives defeated a proposal to insert an intent requirement.[246] Congress went on to enact yet other anti-discrimination statutes, none of which were based on intent.[247] The High Court was inserting the intent requirement on its own.

Marshall also disagreed with the rejection of compensatory relief. Injunctions did nothing to remedy past harm, nor did they stimulate better

237. Sandoval v. Hagan, 197 F.3d. 484, 505 (11th Cir. 1999).
238. Guardians Ass'n, 463 U.S. at 584 (1983).
239. *Id.* at 593.
240. *Id.* at 595.
241. *Id.* at 610.
242. *Id.* at 612 (O'Connor, J., concurring).
243. *Id.* at 618 (Marshall, J., dissenting).
244. *Id. at* 619.
245. *Id.* at 618, 621.
246. *Id.* at 620.
247. *Id.*

performance by agencies in the future.[248] Nor was it fair. The Black and Hispanic victims in this case and many others would never recover their lost wages.[249]

Justices Stevens, Brennan, and Blackmun also dissented, primarily on the issue of relief. It seemed "most improbable that Congress contemplated so significant and unusual" a prohibition on the recovery of damages, but "thought it unnecessary to tell the Judiciary about the qualification."[250]

At the end of the journey, we have a 5–4 decision with the majority opinions in disarray over what they were holding and why. The upshot was that Title VI required an intent to discriminate for which full relief would be provided, while in cases of effect only the relief was limited to an injunction, although federal regulations could include compensation. A tangled ball, indeed.

It is worth noting that these cases perforce involved racial minorities, and the majority included several members whose negative proclivities toward minority rights are described in the preceding Part of this article. They simply did not see these rights or relate them to the question at hand. This phenomenon would become yet more pronounced in the 5–4 case that followed, *Sandoval.*

D. *Sandoval*

> "*Ms. Sandoval cleans homes early in the morning, five days per week. She then returns home to clean up and change before going to work at the restaurant and store that she and her husband own.* . . . For the past year or so*, Ms. Sandoval has either driven illegally to her jobs, or has waited for her friends and husband to provide her with transportation. Prior to either driving illegally or waiting until relatives or friends could provide transportation, however, Ms. Sandoval would spend hours each day walking to and from work and other locations, whatever the weather.*"
>
> U.S. District Court, Sandoval v. Hagan, 1998[251]

Martha Sandoval needed to take a driver's exam. For the reasons found by the District Court, it was urgent. She wanted to be able to take it in Spanish because her skills in English were poor. Until recently, she could have done so. Like 48 other states, Alabama had administered its license exam in at least fourteen foreign languages.[252] In 1990, however, the Alabama legislature amended the state Constitution to declare English to be the state's "official language."[253] This language provision was interpreted by the State Attorney General to require "English only" exams for reasons of "safety and integrity,"[254] although there was no evidence that there had been issues of either in

248. *Id.* at 625–26.
249. *Id.* at 627.
250. *Id.* at 635–36 (Stevens, J., dissenting).
251. Sandoval v. Hagan, 7 F. Supp. 2d 1234, 1293 (M.D. Ala. 1988).
252. *Id.* at 1242.
253. *Id.* at 1243.
254. *Id.*

the past.[255] High-ranking officials of the Attorney General's office disagreed with the Attorney General's stance. One of them called it "dumb."[256] In consequence, Martha Sandoval filed suit claiming the English-only requirement constituted race-based discrimination. The question was: did it violate Title VI of the Civil Rights Act.

Both courts below concluded that it did. The Alabama Department of Transportation did not intend to discriminate against Martha Sandoval, but its requirement had a patently discriminatory effect. The District Court found actions with this effect violated the U.S. Department of Justice regulations cited earlier in this article.[257] It found considerable support for the proposition that violations of these regulations could be pursued by private parties on the basis of these regulations, citing more than a dozen federal district and appellate court decisions from other states.[258] Precedent was very much on Martha Sandoval's side.

The District Court then turned to the Eleventh's Circuit's test permitting private rights of action, based on the seminal Supreme Court case of *Cort v. Ash,*[259] that propounded four questions:[260]: (1) whether the plaintiff was a member of a class for whose "special benefit" the statute was enacted; (2) whether there was any indication of "legislative intent," explicit or implicit, to create such a remedy or deny one; (3) whether it is consistent with the "underlying purposes" of the legislative scheme to imply one; and (4 whether the cause of action was one "traditionally relegated to state law."

Applying this test, the first prong was a laydown: The Civil Rights Act was enacted in order to benefit minorities exactly like Martha Sandoval.[261] The second prong leaned in her favor due to the remarks of Senator Humphrey and others. The third prong also leaned he way because private enforcement would provide additional disincentives for discrimination, and the last was immaterial to the case. The score seemed to be 3–0, and so it was.

Delving into legislative intent, the district court found convincing evidence in statements of legislators, the testimony of witnesses, an opinion of the Office of Management and "every licensed attorney would be empowered to file suit to enforce the 'effects test' regulations of agencies.[262] Indeed, the Solicitor General of the United States submitted an *amicus* brief supporting this view as well.[263] Martha Sandoval won, which was a victory for "some

255. *Id.*
256. *Id.* at 1243–44.
257. *Id.* at 1298.
258. *Id.* at 1255.
259. Cort v. Ash, 422 U.S. 66 (1925).
260. *Sandoval*, 7 F. Supp. 2d at 1256.
261. *Id.* at 1257.
262. *Id.* at 1258–59.
263. *Id.* at 1258.

13,000 adult Alabama residents" as well who would have also had difficulty passing an English-only exam.

The Eleventh Circuit affirmed the District Court's rulings on fact and law largely by repeating them.[264] It then fended off an Eleventh Amendment defense claiming sovereign immunity, a slender reed perhaps indicating that Alabama may have been feeling somewhat desperate at this point.[265] For a host of cited reasons, this defense failed. The upshot of these cases below and many others like them was a solid body of precedent in favor of private enforcement of the Department of Justice effects-based regulations from other federal appellate and district courts. This, then, was the lay of the land when the plight of Martha Sandoval reached the Supreme Court.

As it turned out, five Justices of the Court knew better than over a dozen other judges in the federal judiciary below. Of course, this is why we have a Supreme Court, but it takes some hubris to gainsay every other judge who has decided the issue and the four dissenting Justices as well. Justice Scalia, never short on hubris, was up to the task.

He opened by positing two givens, the first of which was that private parties could sue to enforce Title VI, which was largely removed by the condition: *if* the discrimination was intentional.[266] The statement was both gratuitous and irrelevant. Intent was not an issue the Alabama Motor Vehicle decision, no more than it had been in Shintech and other Title VI challenges. The second "given" was that, while Department of Justice regulations may validly prescribe the "effects" test, they could not empower private parties to enforce them, citing Justice O'Connor's concurring opinion in *Guardians* (the most grudging concurrence of them all), and no others.[267] Catch-22.

Having cherry-picked from *Guardians*, the Justice went on to address the Eleventh Circuit's application of *Cort v. Ash* by omitting the first and most relevant prong: whether Sandoval was part of a class intended to be protected by the Act. She obviously was, which may be why Scalia ducked it. He then moved to prong three, which he phrased as whether private actions were "necessary to effectuate" the congressional purpose, a semantic twist from whether they "conflicted" with it, but as the District Court had found, and virtually anyone reading the Federal Civil Rights Act would conclude, not only would private recoveries not conflict with the statute they would reinforce it significantly where government resources were thin.

At the end of the day, rather than standing at 3–0 in her favor under the applicable Supreme Court test in *Cort v Ash*, Martha Sandoval stood at 0–2 for no reasons that stood the light of day.

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264. Sandoval v. Hagan, 197 F.3d. 484, 484 (11th Cir. 1999).
265. *Id.* at 492–94.
266. Alexander v. Sandoval, 532 U.S. 275, 275 (2001).
267. *Id.* at 286 n.6.

Justice Stevens, writing for three additional dissenting Justices,[268] discussed in detail, opinions from every U.S. Court of Appeals that "either explicitly or implicitly" upheld private rights to enforce the Department of Justice disparate-impact regulations.[269] To this, Scalia had no answer. Indeed, he never mentioned this precedent, although it had been cited by both courts below. He had something more important instead: the votes of four other Justices, three of whom had made their views on race quite plain.

In his majority opinion, Scalia never alluded to the plight of Martha Sandoval. In fact, he never even mentioned her name.

E. *Epilogue*

> "*They says if you was white, should be all right*
> *If you was brown, stick around*
> *But as you's black, m-mm brother, git back git back git back.*"
>
> Song, "Black, Brown and White", Big Bill Broonzy[270]

With *Guardians* and *Sandoval*, the Supreme Court gutted the Federal Civil Rights Act of 1964, the most important civil rights legislation in American history. Following these decisions, environmental justice communities were reduced to a single option. They could not sue for damages under Title VI unless they could prove intent, which in most cases is Mission Impossible. The Department of Justice "effects test" was out of reach. Instead, they would have to approach the federal Environmental Protection Agency, hat in hand, and petition it to act.[271]

As noted at the outset, the Agency rarely does.[272] Minorities across America, and the law Congress had enacted to protect them, suffered a nasty blow.

III. Kiobel v. Royal Dutch Petroleum

A. *Prologue*

World history is replete with accounts of powerful countries invading and abusing indigenous peoples for all manner of reasons, some of them pure

268. *Id.* at 293 (Stevens, J., dissenting) (joined by Souter, Ginsburg, and Breyer).

269. *Id.* at 295.

270. Big Bill Broonzy, Black, Brown and White (Warner Chappell Music, Inc. 1951).

271. See Californians for Renewable Energy v EPA, 2018 WL 15686211 (N.D. Cal. 2018) (compelling EPA to address a backlog of 217 civil rights petitions going back 17 years).

272. See Julie Eilperin, et al., *Trump Administration Plans to Minimize Civil Rights Effects in EPA and Other Agencies*, Wash. Post (May 29, 2017), https://www.washingtonpost.com/politics/trump-administration-plans-to-minimize-civil-rights-efforts-in-agencies/2017/05/29/922fc1b2–39a7–11e7-a058-ddbb23c75d82_story.html; Phil McKenna, *Chief Environmental Justice Official Resigns with Plea to Protect Vulnerable Communities*, Inside Climate News (Mar. 9, 2017), https://insideclimatenews.org/news/09032017/epa-environmental-justice-mustafa-ali-flint-water-crisis-dakota-access-pipeline-trump-scott-pruitt.

conquest. The history of America is not much different and the history of Latin America infamously so. After World War II, however, another phenomenon arrived on stage. These same activities were now being undertaken by multi-national corporations in close concert with the regimes of newly formed nations. They arose largely from exploitation of the environment, and their abuses often reached extraordinary levels, including torture and slavery that were condemned unanimously by all nations of the world. What followed was a depressingly similar story of conduct leading to litigation under the one statute designed to address it: the Alien Tort Claims Act of 1787 (ATCA). It reads in full:

> "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[273]

The Act would lie dormant for close to 200 years. Then, suddenly, it exploded.

B. *The Corporations: Who are Today's Pirates?*

1. UNOCAL (1973)

This case rose in Burma, where the French oil company Total was licensed by the military government to exploit gas reserves and transport them to Thailand via a pipeline through the largely unpenetrated interior of the country.[274] The American corporation UNOCAL bought a large piece of the endeavor. A company memorandum documented an understanding that four Burmese military battalions would protect the pipeline itself and company survey teams.[275] There was convincing evidence to show that UNOCAL actually hired the Burmese military for this purpose, and confirmed by another memorandum of the corporation's on-site representative.[276] No one bothered to inform the villagers living in the way, who would be impressed into service to build the pipeline itself.

What happened next was forced labor, slavery, torture, rape, and murder.[277] One plaintiff testified that her husband was shot attempting to escape the project, and in retaliation she and her babies were "thrown into a fire."[278]

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273. The Alien Tort Claims Act of 1789, 28 U.S.C. § 1350 (the Act was prompted by the failure of the Articles of Confederation to provide "adequate remedies for foreign citizens", and was a priority of the members of the Constitutional Convention in Philadelphia in 1787. *See* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1396 (2018)).

274. *See* Doe I v. Unocal Corp., 395 F 3d 932 (9th Cir. 2002). For an excellent documentary on the events that followed, *see Blood and Oil in Burma*, American RadioWorks – NPR (Mar. 2000) http://americanradioworks.publicradio.org/features/burma [https://perma.cc/A7Z7-HHXY].

275. Unocal Corp., 395 F. 3d at 938.

276. *Id.*

277. *Id.* at 939.

278. *Id.* at 940.

The baby died. Others reported that villagers unwilling or too weak to work were summarily executed.[279] Yet more commonly, the women were raped, often at knifepoint.[280] UNOCAL's knowledge of these actions was fully documented.[281] Its local representative warned headquarters in writing that their military partners were committing "egregious human rights violations,"[282] a fact confirmed by the UN General Assembly, and by a former US military attaché at the Embassy in Rangoon.[283]

The victims, grouped under the pseudonym "John Doe," filed suit under the ATA, which would become a new field of law.[284]

2. Rio Tinto (1969)

A second case rose on the island of Bougainville near Papua New Guinea (PNG), Indonesia. A consortium of British and Australian companies, formed as "Rio Tinto," sought to mine copper and gold that would inter alia support its activities across the globe, including major projects in Rhodesia (now Zimbabwe) which was fighting to retain apartheid at the time.[285] Once in operation, the mine would be responsible for nearly one-quarter of Rio Tinto's revenues worldwide.[286] In return for providing military support, the PNG government would receive 19 percent of the profits.[287]

The Panga mine, located in virgin jungle was nearly a half-mile deep and over five miles across.[288] The ore was "extremely low grade," which required turning out a "tremendous volume."[289] Every day, more than 300,000 tons of ore and rock were flushed from the pit into the Jaba River and thence to the Empress Augusta Bay, a major fishery for the native people.[290] The impacts were extreme. River valleys were wasted, entire forests were destroyed, and the PNG environmental minister himself described the pollution of the Jaba as "dreadful and unbelievable."[291] Every natural thing the Pangan people depended on was gone.

Inevitably, the people of Bougainville rose up against the mine. They formed the Bougainville Revolutionary Army, sabotaged mining equipment,

279. *Id.*
280. *Id.*
281. *Id.* at 939–43.
282. *Id.* at 942.
283. *Id.* at 941 n.9.
284. *See* John Doe I v. Unocal Corp., 963 F. Supp. 880, 890 (C.D. Cal. 1997).
285. Sarei v. Rio Tinto Plc., 221 F. Supp. 2d 1116 (C.D. Cal. 2002). The facts that follow are taken largely from a 90-page opinion in the ensuing case.
286. *Id.* at 1123.
287. *Id.* at 1121.
288. *Id.* at 1123 (citing a report by the explorer Jean Jacques Cousteau).
289. *Id.*
290. *Id.* at 1122–23.
291. *Id.* at 1123–24.

and called for secession.[292] Rio Tinto, in turn, threatened to close the mine unless the military quelled the uprising which it then assisted by supplying helicopters, other vehicles, and money.[293] So armed, the PNG military mounted an attack called "the St. Valentine's Day massacre" in which many civilians, including a United Church pastor were killed.[294] It did not stop here. Rio Tinto imposed a blockade of the island in order to, in the words of one official, "starve the bastards out some more [so] they [would] come around."[295] Australian pilots and helicopters attacked Bougainville villages directly with "mortar bombs, guns, grenades, and ammunition."[296]

One of the few reporters to witness these events wrote: "When we visit, almost everyone has a horror story to remember . . . a wife dying in an unattended jungle birth, a child hit by a dum-dum bullet, a daughter raped and then mutilated by the PNGDF. Yet no one is especially willing to tell these stories."[297]

Some did, however. Alexis Hollyweek Salei lived in Bougainville and developed a lung disease from toxins emitted from the mine.[298] He was placed in house arrest, a gun was put to his head in front of his wife and daughter, and he was ordered to leave the island.[299] Gregory Kopa was "paramount chief" of the Moroni village, formerly located at the mine site.[300] He too had found his lands unusable, its sacred sites destroyed, and like his neighbors, he had to leave it behind.[301] Most of his community was either dead by this time or gone.

Salei, Kopa, and others, too, would bring suit under the ATA.

3. Freeport-McMoRan (1969)

An American corporation this time, the former oil company Freeport-McMoRan, struck gold and other minerals on a mountain in Iryan Jaya, part of the Indonesian archipelago.[302] The Grasburg mine that followed, at more than 20 square miles, decapitated the mountain and sent more than 100 million tons of crushed rock, laced with toxins, into the Akjwa River below. The crushed rock turned the water into a milky paste, killing all aquatic life and destroying forest cover thousands of yards from its banks.[303] It also smothered the indigenous Amungme people, who had lived along it and from it for time beyond

292. *Id.* at 1125.
293. *Id.* at 1125–26.
294. *Id.* at 1126.
295. *Id.*
296. *Id.* at 1127.
297. *Id.* at 1126–27.
298. *Id.* at 1128.
299. *Id.*
300. *Id.*
301. *Id.*
302. Beanal v. Freeport-McMoRan, Inc., 969 F. Supp. 362 (E.D. La. 1997).
303. Danny Kennedy et al., Project Underground, Risky Business: The Grasberg Gold Mine, 15–18 (1998) (identifying volume, toxic loadings, and impacts on the Ajkwa River).

time, and for whom the mountain and the river formed part of their creation story and religion.[304] One photograph taken when, at last, Freeport allowed a few American reporters onto the island, shows a brown boy with his head out of the river, caked with white mud.[305]

Indigenous resistance was inevitable, as was the response of Freeport and the Indonesian government, which was a "major shareholder" in the project.[306] A 1995 report of the Australian Council for Overseas Aid described a "six month reign of terror" around the mine site.[307] Freeport security was "engaged in acts of intimidation" and "extracted forced confessions" against the Amungme.[308] The company "shot three civilians, disappeared five Dani villagers, and tortured thirteen people."[309] These were not mere allegations made in a lawsuit complaint, they were made after investigation by a fully independent body. For its part, the Indonesian military was converting the mine area into the "most militarized area of all Indonesia."[310] As an eleven-year expatriate worker stated:

> "This place is a war zone. Used to be whenever [there was a fight with local people] we would drop over some village in a helicopter gunship and wipe it out with napalm. The soldiers would shoot tribals for sport and get pictures of themselves resting with a foot on the chest or the head of the kill, like trophy hunters."[311]

The torture was appalling, widespread, and vile. According to a legal complaint later filed, it included: beatings at Freeport security stations and inside Freeport containers with fists, rifle butts and stones, starvation, standing with weights on the subject's heads, shackling of the hands and legs, forcing victims to stand in water three feet high that reeked with human feces, and detaining indigenous people with their eyes taped shut, thumbs tied, and subject to repeated beatings by Freeport security personnel..[312] These actions came in addition to atrocities committed by the Indonesian military. They were on Freeport's tab alone, which worked hard to suppress public knowledge of what was transpiring.[313]

Throughout, however, Freeport was not alone. It had cultivated a close relationship with the Indonesian military dictator General Suharto.[314]

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304. *Id.* at 10.

305. Robert Bryce, *Spinning Gold*, Mother Jones, Sept./Oct. 1996, at 67, https://www.motherjones.com/politics/1996/09/spinning-gold [https://perma.cc/3QRS-RKCH].

306. *Beanal*, 969 F. Supp. at 378–79.

307. Kennedy, *supra* note 303, at 3.

308. *Id.*

309. *Id.*

310. *Id.* at 3.

311. *Id.*

312. *Beanal*, 969 F. Supp. at 369.

313. Bryce, *supra* note 305, at 67–69 (describing denial of entry to the island and taking of a reporter's camera).

314. Nithin Coca, *Indonesia's Neverending Freeport-McMoRan Saga*, The Diplomat

It claimed not to have "participated in Indonesian military operations," but admitted to providing transportation, food, staging areas, and salaries for the troops.[315] It was even building a Navy unit base on the coast.[316] They were working hand and glove. There was no way to avoid them.

Finally, Thomas Beanal, the leader of the Amungme Tribal Council, would file suit under the ATA after years of futile complaints.[317]

4. Royal Dutch Shell (1958)

Ken Saro Wiwa was a Nigerian author, leader of the Ogoni people, and a man of peace. During his protests against the actions of Royal Dutch Shell and associated companies in the Niger Delta, he would be awarded the prestigious Goldman Environmental Prize and the Right Livelihood Award for exemplary courage in striving non-violently for civil, economic, and environmental justice,[318] for which he would be arrested, tortured, and hanged.

Wiva's move to activism was prompted by the destruction of Ogoniland by Shell oil wells, pipelines, flares, and water pollution that destroyed the environment on which the Ogoni depended.[319] As early as 1970, an Ogoni chief protested, stating:

> Our rivers, rivulets and creeks are all covered by crude oil. We no longer breathe then natural oxygen, rather we inhale lethal and deadly gasses. Our water can no longer be drunk unless one wants to test the effect of crude oil on the human body. We no longer use vegetables, they are all polluted.[320]

Twenty years later, the situation was yet worse. According to the Nigerian National Petroleum Corporation, approximately 2,300 cubic meters of oil are spilled annually, but conservative estimates place the real figure at up to ten times higher..[321] A United Nations Environmental Programme assess-

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(July 20, 2017), July 2017, https://thediplomat.com/2017/07/indonesias-neverending-freeport-mcmoran-saga [https://perma.cc/EN34–6WF3].

315. Kennedy, *supra* note 303, at 6.

316. *Id.*

317. *See Beanal*, 969 F. Supp. 2d 362.

318. *Ken Saro-Wiwa*, The Goldman Envtl. Prize, https://www.goldmanprize.org/recipient/ken-saro-wiwa [https://perma.cc/T5RJ-2PGZ].

319. Rob Nixon, *Pipe Dreams: Ken Saro-Wiwa, Environmental Justice, and Micro-Minority Rights*, Black Renaissance 1:1 (1996), https://online.fliphtml5.com/ulyd/wscx [https://perma.cc/3PMQ-YBQ2].

320. *About MOSOP*, Movement for the Survival of the Ogoni People (MOSOP), https://web.archive.org/web/20201031073325/http://mosop.org.ng/en/about-mosop (Feb. 27, 2019) [https://perma.cc/3BPF-QV3V]. For a compelling video on Ogoniland and the impacts of the Shell oil development see *Ogoni People vs. Shell*, ArcGIS StoryMaps, https://www.arcgis.com/apps/Cascade/index.html?appid=a43f979996aa4da3bac7cae270a995e0 [https://perma.cc/RCX8-LXNE].

321. Bronwen Manby, *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities*, Human Rights Watch 54–55 (January 1999), https://www.hrw.org/reports/1999/nigeria/nigeria0199.pdf [https://perma.cc/L3CP-SHJN].

ment of over 200 locations in Ogoniland found the soils no longer viable for agriculture and the groundwater contaminated with petroleum residues and benzene, a carcinogen, at nearly 100 levels above World Health Organization Guidelines.[322] Wiwa could take it no longer.

He began by forming the Movement for the Survival of the Ogoni People (MOSOP) and drafted a Bill of Rights demanding increased autonomy for the region, a fair share of the proceeds, and remediation of the pollution.[323] MOSOP mobilized a public demonstration on "Ogoni Day" that drew 300,000 protesters, the largest such gathering in the history of the country.[324]

The reaction was swift. In February 1993, Shell officials met in the Netherlands and England to "formulate a strategy" assisted by Nigerian government forces.[325] The Nigerian government, ruled at the time by a military dictator, willingly agreed, in turn for Shell's provision of "salary, equipment, food and ammunition."[326] It then unleashed an offensive to "sanitize" Ogoniland and when its success was apparently too slow, an internal memorandum reported: "Shell operations still impossible unless ruthless military operations are undertaken."[327] To justify this degree of violence, another memo stated: "Wasting operations during MOSOP and other gatherings making constant military presence justifiable."[328] Exactly what "wasting operations" it referred to is not clear, but the gatherings mentioned were awarded internationally for being non-violent—not "wasting at all."

Meanwhile, the "ruthless" part went forward with vigor. As described later by a US federal court judge, from May to August 1994, the ISTF (Internal Security Task Force) engaged in numerous nighttime raids on Ogoni towns and villages. During these raids, "the ISTF 'broke into homes, shooting or beating anyone in their path, including the elderly, women and children, raping, forcing villages to pay 'settlement' fees, bribes and ransoms to secure their release, forcing villagers to leave and abandon their homes, and burning, looting and destroying property,' and killed at least fifty Ogoni residents."[329]

322. *UNEP Ogoniland Oil Assessment Reveals Extent of Contamination and Threats to Human Health*, U.N. Env't Programme (Aug. 7, 2017), https://www.unep.org/news-and-stories/story/unep-ogoniland-oil-assessment-reveals-extent-environmental-contamination-and [https://perma.cc/5EK5–2HAE].

323. Ogoni Bill of Rights, The Movement for the Survival of the Ogoni People (1990), http://bebor.org/wp-content/uploads/2012/09/Ogoni-Bill-of-Rights.pdf [https://perma.cc/XA6N-VJGE].

324. *See On Ogoni Day, UNPO Strongly Condemns Nigerian Government's Non-Commitment to Niger Delta Clean Up,* Unrepresented Nations & Peoples Organization *(Jan. 4, 2018)*, https://unpo.org/article/20540 [https://perma.cc/4A36-GDRA].

325. Kiobel v. Royal Dutch Petroleum Co., 621 F. 3d. 111, 189 (2d Cir. 2010).

326. *Id.*

327. *Id.* at 189–90.

328. Andrew Rowell & Stephen Kretzmann, All for Shell: The Ogoni Struggle – A Project Underground Report (1997), http://www.ratical.org/corporations/OgoniStruggleTL.html [https://perma.cc/P3GH-BDB4].

329. *Kiobel*, 621 F.3d at 190.

Following demonstrations against a new Shell pipeline, the Nigerian Mobile Police Force (known locally as "Kill-and-Go") retaliated with a raid resulting in the destruction of 40 houses and the displacement of 350 people.[330]

Thumbing its nose at increasing international concern, the government then arrested Wiwa and other Ogoni leaders They were held without charges for months.[331] Ogoni protestors of the incarceration were subjected to "floggings, beatings and other torture."[332] Those defense attorneys willing to serve received actual or threatened beatings" as well.[333] Shell supplied food for the guards. Later evidence showed that a Nigerian general, implicated in many of the crimes against the Ogoni, was in the pay of Shell at the time and driven around in a Shell vehicle.[334] In the end, on murder charges that later evidence suggested were false,[335] the "Ogoni 9" were put to death.

Nigerian activists took advantage of an international outcry against these assassinations by calling on western nations to boycott the oil supporting the Nigerian military dictatorship. Although supported by the United Nations and the United Kingdom, the United States ultimately refused through a press statement, perhaps because American companies were buying around 40 percent of Nigerian's crude oil.[336]

Wiwa's survivors filed suit under the ATA in New York City on charges including torture and crimes against humanity.[337] On the eve of trial, Shell settled for $15.5 million, declaring that it was not an admission of responsibility but a "humanitarian gesture."[338] Ken Saro Wiwa would have wanted more. At the end of his trial, condemned to death, he stated:

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330. Rowell & Kretzmann, *supra* note 328.

331. Amnesty International, *Health Concern/Legal Concern* (July 20, 1993), https://www.amnesty.org/en/library/info/AFR44/007/1993/en [https://perma.cc/GSV5-F97V].

332. *Kiobel*, 621 F.3d at 190.

333. *Id.*

334. Andy Rowell & Eveline Lubbers, *Ken Saro-Wiwa Was Framed, Secret Evidence Shows*, Independent (Dec. 5, 2010), https://www.independent.co.uk/news/world/africa/ken-saro-wiwa-was-framed-secret-evidence-shows-2151577.html [https://perma.cc/373A-EBDG].

335. *Id.*

336. *Id. See also* Paul Lewis, *U.S. Seeks Tougher Sanctions to Press Nigeria for Democracy*, N.Y. Times (Mar. 18, 1996), https://www.nytimes.com/1996/03/12/world/us-seeking-tougher-sanctions-to-press-nigeria-for-democracy.html [https://perma.cc/E4JR-2C89] (stating that ninety-eight percent of Nigeria's foreign exchange came from the sale of its oil, and that 40 percent of the sales were to U.S. companies. Perhaps for this reason the U.S. backed away from sanctions. *See Speaking Softly to Nigeria*, Opinion, N.Y. Times (Sept. 17, 1996), https://www.nytimes.com/1996/09/17/opinion/speaking-softly-to-nigeria.html [https://perma.cc/R8BW-HWL5]).

337. *See* Press Release, Center for Constitutional Rights, Wiwa et al. v. Royal Dutch Petroleum et al., (Nov. 8, 1996), https://ccrjustice.org/home/what-we-do/our-cases/wiwa-et-al-v-royal-dutch-petroleum-et-al [https://perma.cc/6L98-T5G9].

338. Jad Mouawad, *Shell to Pay $15.5 Million to Settle Nigerian Case*, N.Y. Times (June 8, 2009), https://www.nytimes.com/2009/06/09/business/global/09shell.html [https://perma.cc/574N-QDT7].

> I repeat that we all stand before history. I and my colleagues are not the only ones on trial. Shell is here on trial and it is as well that it is represented by counsel said to be holding a watching brief. The Company has, indeed, ducked this particular trial, but its day will surely come and the lessons learnt here may prove useful to it for there is no doubt in my mind that the ecological war that the Company has waged in the Delta will be called to question sooner than later, and the crimes of that war be duly punished. [339]

For that day to arrive, however, would require another plaintiff, the wife of Dr. Barimen Kiobel, who was also one of the Ogoni 9, to be hanged that same day on the same bogus charges. Her case would make its way all the way to the Supreme Court of the United States.[340] Whether Wiwa's sought-after justice was provided there remained to be seen. Meanwhile, the federal courts would decide two ATA cases that would set the stage.

5. Filártiga and Sosa: The Courts Step In

> *"Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence."*[341]

Dr. Joel Filártiga was a physician and a long-standing opponent of the Paraguayan strongman Alfredo Stroessner, a military colonel who had ruled the country for several decades.[342] In 1976, Filártiga's son was kidnapped and tortured to death by Américo Norberto Peña-Irala, the Inspector General of the Police in the capital city of Asuncion.[343] Dark as this story is, it has far darker origins.

Filártiga was but a speck on the windshield of Operation Condor, a US backed military campaign of political repression and state terror involving the right-wing dictatorships of the Southern Cone of South America.[344] These had arisen through violence and *coups d'etats* across the region including:

Paraguay: General Stroessner (1954);[345]

Brazil: a military junta following the overthrow of President Joao Goulart (1964);[346]

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339. *Trial Speech of Ken Saro-Wiwa*, Wikisource (1995), https://en.wikisource.org/wiki/Trial_Speech_of_Ken_Saro-Wiwa [https://perma.cc/J64G-Y63G].

340. *See* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013).

341. Filártiga v. Peña-Irala, 630 F. 2d 876, 890 (2d Cir. 1980).

342. *Id.* at 878.

343. *Id.*

344. J. Patrice McSherry, *Chapter 5: "Industrial repression" and Operation Condor in Latin America*, *in* State Violence and Genocide in Latin America: The Cold War Years 107 (Marcia Esparza, Henry R. Huttenbach & Daniel Feierstein eds., 2010); *see also* J. Patrice McSherry, Predatory States: Operation Condor and Covert War in Latin America (2005).

345. *See Filártiga*, 630 F. 2d at 878.

346. Pascale Bonnefoy M., *Brasil examina su pasado represivo en la Operación Cóndor*, El Mostrador (Sept. 29, 2007), https://web.archive.org/web/20070930020821/http://www1.

Bolivia: General Hugo Banzer (1971);[347]

Uruguay: a military overthrow seating dictator Juan Maria Bordaberry (1973);[348]

Peru: General Francisco Morales Bermudas (1975);[349]

Chile: General Augusto Pinochet (1973) (including the assassination of democratically elected President Salvador Allende explained as a "suicide" and the "possible" murder of Nobel Peace Prize poet Pablo Neruda);[350]

Argentina: a military junta in Argentina led by General Jorge Videla (1976) (its specialty, throwing labor leaders, writers, teachers and other "dissidents" out of helicopters and into the sea, followed by the adoption of their children by military families and other elites).[351]

A government archive of Operation Condor victims lists 50,000 citizens killed outright, 30,000 "disappeared" (a new term at the time), and 400,000 imprisoned.[352] Other estimates are higher. Defended as an "anti-communist" initiative, which for the United States may have been at least in part true, historians and journalists have described it as a widespread war of terror by dictators securing their hold on power.[353] The dictators were not alone. The United States CIA was deeply involved in the creation of Operation Condor and the operations of each regime.[354] Along with the U.S. military, it provided

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elmostrador.cl/modulos/noticias/constructor/noticia_impresion.asp?id_noticia=3317 [https://perma.cc/4T7Y-HV28].

347. *Italia confirma cadena perpetua para Morales Bermudez por plan Condor*, El Comercio, July 8, 2019.

348. José Miguel Busquets & Andrea Delbono, *La dictadura cívico-militar en Uruguay (1973–1985): aproximación a su periodización y caracterización a la luz de algunas teorizaciones sobre el autoritarismo*, 41 Revista de la Facultad de Derecho 76 (Sept. 2016).

349. *Francisco Morales Bermúdez*, Encyclopedia Britannica (Sept. 30, 2020), https://www.britannica.com/biography/Francisco-Morales-Bermudez [https://perma.cc/3HMC-CV94].

350. *Chilean President Salvador Allende Dies in Coup*, History (Sept. 9, 2020), https://www.history.com/this-day-in-history/allende-dies-in-coup (the US CIA was deeply involved in the coup and hoped for a swift overthrow of Allende) [https://perma.cc/BY8V-6GDC]; *Chile Admits Pablo Neruda Might Have Been Murdered By the Pinochet Regime*, Guardian (Nov. 5, 2015), https://www.theguardian.com/books/2015/nov/06/chile-admits-pablo-neruda-might-have-been-murdered-by-pinochet-regime [https://perma.cc/VK7D-R7UA].

351. Calvin Sims, *Argentine Tells of Dumping 'Dirty War' Captives into Sea*, N.Y. Times, Mar. 13, 1995, at A1; Tone Sutterud, *I'm a Child of Argentina's 'Disappeared,'* Guardian (Dec. 27, 2014, 2:00 PM), https://www.theguardian.com/lifeandstyle/2014/dec/27/child-argentinas-disappeared-new-family-identity [https://perma.cc/D5AG-JL9R].

352. *This Day in Geographic History, December 22, 1992: Archives of Terror Discovered*, Nat'l Geographic (Dec. 17, 2013); Stella Calloni, *Los Archivos del Horror del Operativo Cóndor* (Aug. 8, 1998), http://www.derechos.org/nizkor/doc/condor/calloni.html [https://perma.cc/564C-BRZR].

353. McSherry, *Industrial repression, supra* note 344, at 107–109.

354. *Id.* at 107, 114–15, 118–19.

intelligence, technical support, planning, financing, coordinating, and training (on U.S. soil), including the use of torture.[355]

Operation Condor also featured assassinations of key political figures,[356] including the former Chilean Ambassador to the United States (car-bombed in downtown Washington, D.C.),[357] and the torture of others in which General Stroessner was apparently a specialist. US Army Colonel Robert Thierry was sent to build a detention center that became a well-known torture center.[358] Stroessner's secret police bathed their captives in tubs of human excrement.[359] He insisted that tapes of the detainees screaming with pain be displayed to their family members.[360]

Dr. Filártiga was simply one of more than half a million victims. He was the only one, however, to strike back with a claim under the ATA.[361]

The federal district court in New York dismissed his case, holding that the Act did not apply to nationals of the acting state.[362] The Second Circuit of Appeals held otherwise, and would become the first appellate court to consider what the ATA meant, what the Law of Nations meant, and whether torture itself was included at all.

The Second Circuit began by accepting that torture had taken place.[363] It was all over the body of the victim, Filártiga's son, which was discovered by his sister who described the bruised and bleeding body of her brother in detail, and later proffered autopsy reports and photographs confirming it.[364] As she fled, "horrified," from the house, Peña had followed her shouting, "Here you

355. McSherry, Predatory States, *supra* note 344, at 71–72.

356. *Operation Condor on Trial: Legal Proceedings on Latin American Rendition and Assassination Program Open in Buenos Aires*, The Nat'l Security Archive (Mar. 8, 2013), https://nsarchive2.gwu.edu/NSAEBB/NSAEBB416 [https://perma.cc/24GD-CMYZ].

357. Ambassador Orlando Letelier and his American colleague Romi Moffit were assassinated by a car bomb in downtown Washington, D.C. Two days earlier U.S. Secretary of State Henry Kissinger had canceled a warning against the international assassination of political opponents of Operation Condor. Pete Yost, *Cable Ties Kissinger to Chile Controversy*, Associated Press (Apr. 10, 2010), http://archive.boston.com/news/nation/washington/articles/2010/04/10/cable_ties_kissinger_to_chile_controversy [https://perma.cc/5XWE-LSVP].

358. Jonas Hogg, *Exiled Professor Advocates Equality, Democracy*, The Collegian (Oct. 11, 2006), https://www.kstatecollegian.com/2006/10/11/exiled-professor-advocates-equality-democracy [https://perma.cc/CTS8-SL5X].

359. *General Alfredo Stroessner*, Telegraph (Aug. 17, 2016, 12:01 AM), https://www.telegraph.co.uk/news/obituaries/1526487/General-Alfredo-Stroessner.html [https://perma.cc/KUT9-B2EN].

360. Simon Sebag Montefiore, History's Monsters: 101 Villains from Vlad the Impaler to Adolf Hitler, 271 (2008).

361. Indeed, given the facts above Filártiga may have had a convincing claim against the United States as well.

362. Filártiga v. Peña-Irala, 577 F. Supp. 860, 861 (E.D.N.Y. 1984) (exculpating nationals of the acting state, a limitation that would emasculate the Act in practice).

363. Filártiga v. Peña-Irala, 630 F. 2d 876 (2d Cir. 1980).

364. *Id.* at 878.

have what you have been looking for for [sic] so long and what you deserve. Now shut up."[365] These facts obviously left their mark on the judicial mind.

The court then turned to the Law of Nations, ruling that torture indeed violated the "general usage and practice of nations."[366] With more particular reference to the ATCA, it went on to conclude that "it is clear that courts must interpret international law not as it was in 1798, but as it has evolved and exists among the nations of the world today."[367] There were "few, if any, issues . . . so united as the limitations on a state's power to torture persons held in its custody,"[368] citing inter alia an amicus brief in support of Filártiga by the US Solicitor General.[369]

This done, the court followed with a final word:

> In the twentieth century the international community has come to realize the common danger posed by flagrant disregard of human rights and particularly the right to be free from torture . . . . Indeed, for purposes of civil liability the torturer has become like the pirate and slave trader before him hostis humani generis, the common enemy of all mankind. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in fulfillment of the ageless dream to free all people from brutal violence.[370]

The opinion was unanimous. There was no appeal. But it remained for the Supreme Court to decide just how far this dream, and this judicial responsibility, would travel.

The case of Jose Franco Sosa arose from a different and seemingly endless conflict: the U.S.-declared War on Drugs that has unfolded in one guise or another for nearly a century, leaving many victims in its wake. In 1985, an undercover agent of the U.S. Drug Enforcement Agency (DEA) was captured on assignment in Mexico by local dealers, taken to a safe house for interrogation, tortured, and subsequently killed.[371] A Mexican physician named Humberto Alvarez-Machain was present, apparently to prolong the agent's life for interrogation.[372] When Mexico refused to extradite Alvarez-Machain to the United States for trial, the DEA sent a team below the border to kidnap the doctor and bring him before a U.S. court.[373] Jose Sosa was a member of that team.

In the ensuing trial, the district court, perhaps offended by the manner in which Alvarez-Machain was seized and brought before him, granted a motion to dismiss the indictment against Alvarez-Machain following the government's

365. *Id.*
366. *Id.* at 880; *see also id.* at 881–85 for supporting sources.
367. *Id.* at 881.
368. *Id.*
369. *Id.* at 884.
370. *Id.* at 890.
371. Sosa v. Alvarez-Machain, 542 U.S. 692, 697 (2004).
372. *Id.*
373. *Id.* at 698.

case.[374] Alvarez subsequently returned home, but came back to sue Sosa and other members of the kidnap team for damages from his detention under two statutes: the Federal Tort Claims Act (FTCA) and the ATA.[375]

The federal district court dismissed the FTCA claim but awarded Sosa $25,000 on the ATA count.[376] Ultimately, the Ninth Circuit Court of Appeals reinstated the FTCA claim and, under the ATA, found the unlawful detention to be a violation of the "law of nations."[377] The Supreme Court addressed both counts, and in so doing set the stage for ATA claims in the future.

Justice Souter began by rejecting the FTCA claim, which, by its own language, applied only to torts committed in this country.[378] Turning to the ATA, he was faced with the argument that because the ATA was only jurisdictional, a further act of Congress was required to define the torts themselves.[379] The Justice found this proposition unpersuasive under these circumstances: "It would have been passing strange for [Senator] Ellsworth [a principal drafter of the ATA] and [the] Congress to vest federal courts expressly with jurisdiction" over law of nations claims, "but to no effect whatever until the Congress should take further action."[380] On the other hand, Souter stressed, this jurisdiction extended exclusively to a "modest number" of well-established law of nations violations[381] which did not involve the creation of new ones such as Alvarez-Machain's "relatively brief detention" per the Ninth Circuit opinion below.[382] Concurring opinions of Justices Scalia[383] and Ginsburg[384] did little more than emphasize this interpretation of the law.

This would have ended the Court's first foray into the ATA on a positive note, but for a footnote that would lead directly to *Kiobel*, *Jesner*, and for all practical purposes, the demise of the ATA itself. With the omission of only two rather inapposite citations, note 20 of the opinion reads in full:

"A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual."[385]

The footnote note was, to say the least, puzzling. With regard to corporations, it was pure dicta because Sosa was suing Alvarez, a private individual. It also ignored the fact that in United States courts, where ATCA claims were tried, corporations had long been treated as individuals for purposes of liability

374. *Id.*
375. *Id.*
376. *Id.* at 699.
377. *Id.*
378. *Id.* at 712.
379. *Id.* at 714.
380. *Id.* at 719.
381. *Id.* at 724.
382. *Id.* at 737.
383. *See id.* at 739 (Scalia, J., concurring).
384. *See id.* at 751 (Ginsburg, J., concurring).
385. *Id.* at 732 n. 20.

and a suite of constitutional rights. Nonetheless, the ambiguity of this note would come back to haunt the Court's next two cases with terribly unfortunate consequences.

6. Kiobel and Jesner: Things Fall Apart

> "This is it — they are going to arrest us all and execute us. All for Shell."
>
> Ken Saro Wiwa, Ogoni leader, ten days before his arrest, and one month before his hanging.[386]

The facts in *Kiobel v. Royal Dutch Petroleum*, including the above-described death of Ken Saro Wiwa, were uncontestably gross.[387] Courts involved in the cases found the treatment of Dr. Barinem Kiobel, Wiwa, and other leaders of the Ogoni tribe in Nigeria to be violations of the Law of Nations, the most "abhorrent" crimes in the world. On the record, it would be impossible to say otherwise.

It does not speak well of American law that the full description of the relevant facts is presented in only one written opinion, a concurrence at the appellate level.[388] The remaining opinions are bloodless. For the majorities in *Kiobel* and in *Jesner* to follow, it became an abstract exercise in international policy that would shield multi-national corporations via a series of rationales each less persuasive than the one before. In a 47-page opinion, Judge Leval of the Second Circuit Court of Appeals called out the show for what it was and what it would unfortunately be again in the Supreme Court to follow.[389]

A two-judge majority of the Second Circuit began its journey by stating that Supreme Court precedent, to wit *Sosa*, required it to look to international law to determine "the scope of liability," and that corporate liability was "not a norm of customary international law."[390] It found support in the fact that (1) war crimes were prosecuted against individuals, not corporations, (2) nothing precluded damage claims against individual officers and employees who committed these allegedly heinous acts instead[391] In short, not only wrong defendant but just-as-good alternative relief.

One could dismantle these arguments after no long reflection, but Judge Leval's concurring opinion (very much a dissent on the corporate issue) did a thorough job.[392] It notes that the majority conflated two very different things from the start: what conduct violated the law of nations, and who would be liable.[393] The majority's reliance on *Sosa* was misplaced because its use of

386. Rowell & Kretzmann, *supra* note 328.

387. *See* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013).

388. *See* Kiobel v. Royal Dutch Petroleum Co., 621 F. 3d 111, 188–191 (2d Cir., 2010) (Leval, J., concurring in the judgment).

389. *See id.* at 149–96

390. *See id.* at 127–31.

391. *See generally id.* at 132–45.

392. *See id.* at 149–96 (Leval, J., concurring).

393. *Id.* at 175.

"international norm" plainly referred to a standard of conduct (prohibited by the law of nations),[394] not to the defendant, nor could it have because the defendant in that case was an individual, not a corporation at all.

Moving down the list of errors, Judge Leval pointed out that although the war crimes trials were directed not at corporations but individuals because they were the defendants in case; tort damage claims were not before them.[395] As for the views of "publicists," only two were cited.; one was from the London School of Economics[396] and both had been paid witnesses of Royal Dutch Shell in an unrelated case[397] The option of suits against "individual officers and employees" was also spoiled by the fact that (1) few of the individuals involved in the actual torture and enslavement, even if identified and available, had sufficient resources for compensation, and that (2) corporate immunity would defeat the very purpose of the law of nations: to punish the worst conduct mankind had ever known.[398]

All of this would come to naught before the Supreme Court in *Kiobel v Royal Dutch Petroleum*, which had accepted *certiorari* expressly on the issue of corporate liability and then found a different reason to affirm. The opinions themselves were a jumble, and one cannot be too certain what in the end was agreed to. Chief Justice Roberts wrote for a five member majority, all appointed by Republican presidents, denying the "extra territorial" application of the ATA.[399] However, Justice Kennedy, one of the five, then concurred by stating that, in cases not covered by other laws or the Court's holding in *Kiobel*, a presumption against extraterritoriality might not apply, while Alito and Thomas simply reiterated that conduct must be "sufficient to violate an international law norm" to be actionable under the ATA.[400] Justices Breyer, Ginsburg, Kagan, and Sotomayor rejected the extra territoriality argument but wound up adopting something like it in the end.[401] The issue of corporate liability, for which certiorari had been granted, never appeared.

Roberts begins the *Kiobel* decision with the presumption against extraterritoriality as a matter of statutory interpretation.[402] He notes the potential for "foreign policy consequences not clearly intended by the political branches," although for this argument to work, one has to assume that the political branches were intending to support the most heinous atrocities in the world.[403]

394. *Id.* Indeed, the majority seemed to conflate *Sosa*'s "modest number" of LOS *violations* with a limited number of *violators*. *Id.* at 125.

395. *Id.* at 153.

396. *Id.* at 143 n.46.

397. *Id.* at 142–45.

398. *Id.* at 149

399. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124 (2013).

400. *Id.* at 125 (Kennedy, J., concurring); *id.* at 125–27.

401. *See id.* at 127–40 (Breyer, J., concurring).

402. *Id.* at 115–16.

403. *Id.* at 116. Of course, at times the "political branches" were doing just this, as seen in *Filártiga.*

He concludes that, even when valid law of nations claims had been established, they must "touch and concern" the United States with "sufficient force" to permit jurisdiction.[404] Here, they did not.

Justices Breyer et al concurred in the result, but stated that the extra-territoriality presumption did not "work well" for the ATA.[405] The statute was inherently extraterritorial, referring explicitly to "aliens, treaties, and the law of nations."[406] Early ATA applications included ambassadors and pirates who were all international players, which left today's judges to answer the question, "Who are today's pirates?"[407] The opinion then offered three more coherent principles for the application of the ATA, a key element of which was whether the conduct "substantially and adversely affects an important American national interest."[408]

Applying this test, however, Breyer waffled. America had a strong national interest, he stated, in not becoming a "safe harbor . . . for a torturer or other common enemy of mankind."[409], which seemed to bode a dissent. But the activity of Shell on American soil, he continued—to wit, a New York office—was insufficient to apply the ATA[410]. This conclusion, like that of the Chief Justice, is rather fact-blind. It takes only a pair of eyes to see that Shell oil exploration platforms and refineries are found on every coast, Shell lobbyists were found in nearly every state legislature, and throughout America Shell gas stations were ubiquitous. This empire was fueled to a significant extent by its oil and gas operations in third-world countries like Nigeria, where Wiwa and Dr Kiobel were tortured and killed. American cars were driving on their blood.

Justice Robert's "touch and concern" test was a red-herring; no such limitation was in the statute. Even were it inserted, however, Shell's activities in America should have passed it with flying colors.

On reflection, one might ask why the Court majority, of pronounced corporate orientation over the past forty years, would have accepted *certiorari* on the corporate immunity issue and then chosen to decide it on a thoroughly different (and highly dubious) basis instead? One answer might be that it might have been difficult to cobble together a consensus of conservative justices on this issue given the thrashing Judge Laval had given it so recently in the case below. It would take another opinion, one that would barely bother to contend with the Leval analysis, to make corporate immunity a reality, and more deeply than *Kiobel*'s wildest dreams.

404. *Id.* at 124–25.
405. *Id.* at 129.
406. *Id.*
407. *Id.* at 131.
408. *Id.* at 133.
409. *Id.*
410. *Id.* at 139–40.

In *Jesner v. Arab Bank*,[411] a foreign bank was using its New York branch to finance attacks by Hamas and other terrorist groups, even paying the families of suicide bombers.[412] The New York branch also allegedly funneled money to "terrorist-affiliated charities" in the Middle East.[413] It seems clear that these American-based activities would satisfy the *Kiobel* sufficient-US-contacts test for application of the ATA. However, the Court had bigger game in mind and one we have seen raised before: the liability of foreign corporations at all.

Writing for the majority, Justice Kennedy started out well, emphasizing that in drafting the Constitution and the ATA shortly thereafter, Congress intended to "ensure adequate remedies for foreign citizens," the *absence* of which was causing "substantial foreign-relations problems."[414] The ATA was designed to *facilitate* foreign diplomacy, not frustrate it. So much for those who feared interference with foreign policy.

Unfortunately, Kennedy's opinion then careened away in the same fashion that the Second Circuit majority in *Kiobel* had, conflating the "norm" of the Law of Nations (well defined to include slavery, torture and genocide) with the "norm" of its application to corporations, to which of course the Act did not speak at all. Nonetheless, Kennedy had found a reason to grant corporate immunity and it would hold. His remaining rationales were an unpersuasive work-around of Judge Leval's analysis, including its in reliance on criminal law precedent and the supposed alternative remedy of suing individuals instead. The first was quite inapposite. The second made no sense at all.

Justices Thomas, Alito, and Thomas concurred, with the addition of several astonishing observations.[415] The first, perhaps reflecting that Justice Kennedy's reasoning was highly suspect, took the position that *Sosa* was not good law and should be overruled, a practice the Roberts Court had launched a decade earlier with *Citizens United*.[416] Apparently unwilling to stop with trashing *Sosa*, they wound up with a broadside against the ATA itself.[417] Its enforcement would violate the separation of powers, particularly where the "political branches may choose to look the other way."[418] The courts, they admonished, should "not ever be in the business of elbowing our way in."[419] This was of course precisely what the ATA on its face, *required* courts to do.

Justices Sotomayer, Ginsberg, Breyer, and Kagan dissented, raising, once again, the conflation issue.[420] The "norm" of conduct, the internationally rec-

411. Jesner v. Arab Bank, PLC., 138 S. Ct. 1386 (2018).
412. *Id.* at 1394.
413. *Id.* at 1395.
414. *Id.* at 1396.
415. *Id.* at 1408 (Thomas, J., concurring); *id.* at 1408–12 (Alito, J., concurring).
416. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).
417. *Jesner*, 138 S. Ct. at 1408.
418. *Id.* at 1419.
419. *Id.*
420. *See id.* at 1419–37 (Sotomayor, J., concurring).

ognized crimes-beyond-the-pale, was all that the ATA addressed. Per *Sosa*, the question of *who* could be sued was a matter of federal common law to be decided under U.S. law via precedent and reason.[421] There was no precedent and no intelligent reason for exculpating corporations for actions that universally shocked the conscience of mankind.

Were it to matter, as one would like to think, the Solicitor General's Office had submitted amicus briefs in both *Jensen* and *Kiobel*, urging the Court to reach exactly the opposite conclusions—a fact not mentioned in either majority opinion.[422] Immunizing corporations not only defeated the purposes of the ATA, but it also allowed corporations "to take advantage of the significant benefits of the corporate form without having to shoulder the attendant, fundamental responsibilities."[423]

Who could disagree?

7. Reflections: Justice is Blind

In retrospect, *Kiobel* and *Jesner* displayed the same Red/Blue divide that has infected the Court for more than three decades. It has been particularly acute over corporate rights, confected in large part by the Court from whole cloth. The so-called Corporate Court is a real phenomenon, and one cannot help but see the same impulses driving its *Kiobel* and *Jesner* decisions. The notion that individuals can be liable under the ATA but not the largest multi-nationals in the world is truly bizarre.

Beneath the majority opinions one also senses a lack of awareness, a failure of what sociologists call "emotional intelligence." ATA cases are by no means the only ones that display this tendency, but the failure to appreciate the brutalization of indigenous peoples and other severely disadvantaged human beings is here at its most distinct: Ken Saro-Wiwa, Dr.Barinem Kiobel, Alexis Hollywood Salei and so many others subjected to forced labor, torture, and removal. They darken the High Court's strange canon on a law that explicitly authorized, and expected, the judiciary to provide relief. In the end, it simply refused to do so.

In this respect the *Kiobel* and *Jesner* opinions mirror those in *Northwest Indian Cemetery* and *Sandoval.* The United State Supreme Court is acutely aware of Red and Blue. It has always had a great deal of difficulty seeing black and brown.

421. *Id.* at 1420.
422. *Id.* at 1431.
423. *Id.* at 1437.