

Civil Rights Monitor

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Acknowledgements

Senior Editor: Karen McGill Lawson

Contributing Editors: Tyler Lewis, Jeff Miller, and
Corrine Yu

Contributors: Noah Baron, Sakira Cook, Wade
Henderson, Jim Lardner, Max Marchitello, Christopher
Paredes, and Rob Randhava

Layout & Design: Laura Drachsler

Photo Credits: George Tolbert and Bonita Bing

The Leadership Conference Education Fund Board:
William Robinson, Mary Frances Berry, Deepak
Bhargava, Elizabeth Birch, Michael Calhoun, Stephanie
Jones, Carolyn Osolinik, Marilyn Sneiderman

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Pushing Past 2013 Obstruction into 2014

Wade Henderson Commentary

This year, we had the opportunity to commemorate so many civil and human rights milestones—including the 50th anniversary of the historic March on Washington—which also helped us to focus on the many advances we have yet to make. And with 2013 turning out to be one of the toughest years we’ve faced as a community in a very long time, it was incredibly important and useful to have these vivid reminders of why we do the difficult, often frustrating, work that we do.

To be sure, there were some significant achievements this year. We had important breakthroughs in the area of LGBT rights, with the Supreme Court’s decisions in *Hollingsworth v. Perry* and *United States v. Windsor*, the enactment of marriage equality legislation in Hawaii and Illinois, and the bipartisan passage of the Employment Non-Discrimination Act in the U.S. Senate. The Federal Communications Commission, after more than a decade of inaction, issued an order to reform predatory prison phone rates. Congress finally passed a bill to reauthorize the Violence Against Women Act. And perhaps most notably, the Senate confirmed Tom Perez to head the Department of Labor, Richard Cordray to be the first director of the Consumer Financial Protection Bureau, and President Obama’s five nominees to the National Labor Relations Board.

But this also was the year that the Supreme Court dealt devastating blows to the heart of the Voting Rights Act, with its decision in *Shelby County v. Holder*, and to federal protections from employment discrimination with its decisions in *Vance v. Ball State University* and *University of Texas Southwest Medical Center v. Nassar*. This was the year that we finally got a comprehensive immigration reform bill with a roadmap to citizenship out of the Senate, only to see it stall in the U.S. House of Representatives. And this was the year that “stand-your-ground” laws, Trayvon Martin and George Zimmerman,

and New York City’s “stop-and-frisk” policies put the issue of racial profiling back in the forefront of Americans’ minds.

While the obstruction and paralysis that has largely defined the federal government during the five years since President Obama took office has been unrelenting, there were two important breakthroughs that suggest a path forward next year in Congress.

The first is the Senate rule change to require a majority—instead of 60 votes—to end the filibuster of nominees to the Executive Branch and the federal courts (except the Supreme Court). This has already led to the confirmation of a number of nominees who had faced obstruction, including Patricia Millett and Cornelia “Nina” Pillard to serve on the U.S. Court of Appeals for the D.C. Circuit; Congressman Mel Watt to head the Federal Housing Finance Agency; and Chai Feldblum to serve on the Equal Employment Opportunity Commission.

The second is the December budget deal brokered by Senator Patty Murray and Congressman Paul Ryan, which is designed to avoid another government shut-down and end the budget fights that have contributed to the toxic environment in Washington over the last few years. The deal is imperfect—it fails to extend unemployment benefits to the long-term unemployed and it places new burdens on private pension programs—and we will still have to hold the line on further cuts to safety net programs like the Supplemental Nutrition Assistance Program. But it does suggest that Congress may be as tired as the American people are of endless stalemates.

This is important because we will need that energy to move legislation that already has significant bipartisan support, such as the new Voting Rights Act bill, the legislative response to the *Shelby* decision, championed

by Congressman Jim Sensenbrenner, Congressman John Lewis, and Congressman Bobby Scott, and the Second Chance Reauthorization Act, which has bipartisan support in both houses of Congress. Lawmakers also have an opportunity to enact some meaningful reform to the nation's sentencing laws. In fact, with senators like Patrick Leahy, Mike Lee, Dick Durbin, Sheldon Whitehouse, and Rand Paul leading the effort—coupled with the support of state and local Republican and Democratic officials—the bipartisan energy to pass a criminal justice bill that will reform federal sentencing at the front-end and the back-end is real and significant.

Of course, it's always perilous to be too optimistic about one's chances in Washington. After all, we are still fighting incredible resistance to immigration reform despite making more progress than we have in more than a decade—and we still have to get a bill to the president's desk. But with only three years left in his second term, now is the time to push harder than ever for the change we want to see.

So our challenge in 2014 will be to truly harness this newfound bipartisan support to get these bills through their respective committees and onto the House and Senate floor. We need to use that momentum to push for all the changes that we'd like to see on issues that matter to all Americans, from economic security, health care, and education to voting rights, women's rights, and, perhaps, even jobs. The Executive Branch has a critical role to play, and the president's recent speech on income inequality is an example of the way the bully pulpit can be used to advance the kind of change we seek.

During this year of milestones, we celebrated the courage of those who came before us; we saluted their commitment; and we thanked them for their tireless effort to build the better America—and world—we have inherited. In recent weeks, since his death, many of us have been thinking about Nelson Mandela, his life and his legacy. We know what we must do to preserve what he—and other giants—fought for, even in the face of great challenges.

Together, I believe we can do it.

Wade Henderson is the president and CEO of The Leadership Conference Education Fund and The Leadership Conference on Civil and Human Rights.

Shelby County v. Holder

Noah Baron

On June 25, 2013, the U.S. Supreme Court handed down its decision in *Shelby County v. Holder*, invalidating a key portion of the Voting Rights Act (VRA) of 1965. The VRA, which was most recently reauthorized in 2006, is a landmark law that outlaws discriminatory voting practices that have been responsible for the denial or abridgement of the voting rights of racial, ethnic, and language minorities in the U.S. It has been widely considered the most effective civil rights law in American history.

History

Following the end of Reconstruction in 1877, many southern states passed laws designed to prevent Black people from voting. These tactics took a variety of forms, including literacy tests, poll taxes, and Whites-only primaries. As a federal court struck down one disenfranchisement measure, another would quickly take its place. Over time, Black Americans were able to exert pressure on federal officials and through sit-ins, boycotts, and marches, among numerous other strategies, brought attention to the discrimination they faced. As a result, Congress eventually passed several civil rights bills addressing the right to vote—yet while they had some effect, they failed to fully resolve the problem.

The Voting Rights Act of 1965 was an attempt to fully and fairly address the various tactics used to prevent racial minorities from voting. Included in the VRA was a provision known as the “preclearance provision,” or “Section 5,” which required all voting changes implemented by certain states and local jurisdictions to be pre-approved by the U.S. Department of Justice or the U.S. District Court for the District of Columbia before taking effect. The method of determining which states would be subject to this requirement was included in Section 4(b) and was known as the “coverage formula.” That formula contained two parts: First, whether a given

jurisdiction, as of November 1, 1964, used any “test or device” designed to prevent voting or voter registration; second, whether less than half of eligible voters were registered to vote as of November 1, 1964. That date was changed to November 1, 1968, in the 1982 reauthorization, and then again to November 1, 1972, in the 2006 reauthorization.

Although the Voting Rights Act succeeded in putting an end to the era of Jim Crow voting discrimination, efforts to discriminate against racial minorities have not ceased. Strategies such as racially biased gerrymandering and moving polling places from high-minority populated neighborhoods that disproportionately impact communities of color are commonplace.

The Supreme Court Case

Shelby County, Alabama, has been subject to the preclearance requirement because the entire state of Alabama fell within the parameters of the coverage formula. The county challenged the constitutionality of Section 5 and Section 4(b) in the U.S. District Court for the District of Columbia, which held both sections to be constitutional. When Shelby County appealed, the U.S. Court of Appeals for the D.C. Circuit agreed that both the preclearance requirement and the coverage formula were constitutional, citing to a number of prior Supreme Court decisions that had upheld those sections.

In a 5-4 decision written by Chief Justice John Roberts, the Supreme Court upheld Section 5 but struck down Section 4(b) as unconstitutional. While acknowledging that voting discrimination based on race is still a problem, the majority said that Section 4(b) exceeded Congress’ power to enforce the 14th and 15th Amendments because the formula was based on old data, which the Court said was not rationally related to present-day conditions.

Despite noting that improvements in voter registration and voter access were “in large part *because of* the Voting Rights Act,” the Court still said that the great improvement in voter registration racial parity between 1965 and 2004 invalidates the current formula in Section 4(b). By focusing solely on statistics, however, the Court ignored thousands of deeply disturbing incidents since the 1982 reauthorization, indicating real world instances of discrimination.

Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito joined in the majority opinion. Justice Thomas filed a concurring opinion stating that he would also have found Section 5 to be unconstitutional. Writing in dissent, Justice Ruth Bader Ginsburg supplied a long list of such examples, including cases in which jurisdictions attempted to purge voter rolls of Black voters, suspend or postpone elections in which Black candidates were expected to win, and redraw a district to reduce the strength of Latino voters. Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan joined in the dissenting opinion.

Steps Moving Forward

As a result of the *Shelby* decision, the voting rights of millions of minority voters are in jeopardy. Since the decision, some states previously covered under Section 4(b) have announced their intent to enforce voting laws previously blocked by the Justice Department.

The good news is that members of Congress are committed to passing a legislative fix to the Voting Rights Act that would strengthen and modernize the VRA and pass constitutional muster. The civil and human rights movement is actively supporting these efforts.

Noah Baron is a Summer 2013 Leadership Conference Education Fund legal intern. He is a law student at Georgetown University Law Center.

Arizona v. Inter Tribal Council of Arizona, Inc.

Noah Baron

In 1993, Congress passed the National Voter Registration Act (NVRA)—popularly known as the “motor voter” bill. This legislation was designed to make voter registration easier, especially for groups that have historically suffered from discriminatory and unfair voter registration practices, and therefore increase voter registration and participation in elections. To that end, the legislation allowed individuals to register to vote using a simple, uniform post-card application.

As part of the application, registrants were required to prove their citizenship by affirming, under penalty of perjury, that they were U.S. citizens. However, in 2004, Arizona voters approved a state ballot initiative—Proposition 200—which imposed an additional requirement of specific forms of documentation to prove American citizenship for any person wishing to register to vote. State officials were required to refuse to register anyone who couldn’t provide this documentation.

Civil rights groups including the ACLU, the Mexican American Legal Defense and Educational Fund (MALDEF), and the Lawyers’ Committee for Civil Rights Under Law filed a suit challenging Proposition 200’s documentation requirement, arguing that it is pre-empted by the NVRA’s mandate that states “accept and use” the federal form. The suit was filed on behalf of several individuals and organizations that represent a broad range of Arizona citizens and organizations whose voter registration activity had been improperly curtailed by Proposition 200. The U.S. Department of Justice also brought a lawsuit against the state of Arizona, aiming to have the requirements of Proposition 200 waived as it related to the NVRA, so that the purposes of the NVRA could be better served.

The U.S. Court of Appeals for the Ninth Circuit nullified Proposition 200’s requirement of documentary proof of citizenship and ruled that Arizona officials had to accept

the federal form. The state of Arizona then petitioned the U.S. Supreme Court to take up the case. The Court agreed to hear the case, which was argued on March 18, 2013.

On June 17, 2013, in a majority opinion (7-2) by Justice Antonin Scalia, the Court upheld the lower court’s decision that the federal NVRA preempts Proposition 200’s proof-of-citizenship requirement, citing the power Congress has under the Elections Clause of the U.S. Constitution to regulate the “time, place, and manner” of federal elections. However, the Court did permit Arizona to petition the federal Election Assistance Commission and make its case for why proof of citizenship is necessary and should be included on the federal form.

Chief Justice John Roberts and Justices Anthony Kennedy, Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan all joined the opinion. Justices Clarence Thomas and Samuel Alito filed dissenting opinions.

Noah Baron is a Summer 2013 Leadership Conference Education Fund legal intern. He is a law student at Georgetown University Law Center.

Fisher v. University of Texas at Austin

Christopher Paredes

On June 24, 2013, the U.S. Supreme Court issued its long-awaited decision in the battle over affirmative action and equal opportunity policies in college admissions, *Fisher v. University of Texas at Austin*. Civil and human rights advocates had feared that the Court would issue a broad decision barring the use of the policy by colleges and universities. Instead, Justice Anthony Kennedy, often considered the “swing” vote on the Court, united the Court’s liberal and conservative wings in a narrow 7-1 decision reaffirming that universities may consider racial and ethnic diversity as one factor among many in a carefully crafted admissions policy.

The Court determined, however, that the U.S. Court of Appeals for the Fifth Circuit had not applied the correct standard of review when it affirmed the district court’s ruling in favor of the University of Texas (UT). Consequently, the Court sent the case back to the Fifth Circuit to reconsider the evidence under the “strict scrutiny” standard.

Background

In 2004, UT added race as one component to be considered in applicants’ “Personal Achievement Index” (PAI) score, which is used in conjunction with applicants’ Academic Index score to make admissions decisions. The PAI score is meant to give insight into a student’s background and considers a multitude of factors, such as a student’s leadership and work experience, awards, extracurricular activities, community service, growing up in a single-parent home, speaking a language other than English at home, significant family responsibilities assumed by the applicant, race, and the socioeconomic status of the student’s family.

In addition, Texas state law mandates that the top 10 percent of the graduating class of every high school in the state is automatically granted admission to any of the state’s public colleges, including UT.

Abigail Fisher, a White woman who did not graduate in the top 10 percent of her high school class, applied for admission in UT’s 2008 admissions cycle but was denied. UT received 29,501 applications for that cycle, of which 12,843 were admitted. Fisher sued in the U.S. District Court for the Western District of Texas, alleging that the consideration of race in the application process had violated the Equal Protection Clause. UT maintained that Fisher would not have been admitted regardless of racial considerations. The district court granted summary judgment to UT, which was affirmed by the Fifth Circuit.

A Narrow Decision

The Supreme Court last addressed equal opportunity in its 2003 decision, *Grutter v. Bollinger*, in which it upheld the use of race as one of many “plus factors” in holistic admissions process that evaluated the overall individual contribution of each candidate. The Court affirmed that a diverse student body was “a constitutionally permissible goal for an institution of higher education,” but also mandated that any affirmative action program must pass a “strict scrutiny” standard of review. Under strict scrutiny, educational institutions must show that their application process is “narrowly tailored” to achieving diversity, that there is no race-neutral alternate methodology suited to attaining diversity, and that applicants are not evaluated individually in a way that makes race or ethnicity the defining features of applications.

In *Fisher*, the Court reaffirmed the major principles of *Grutter* but held that the Fifth Circuit had not applied the strict scrutiny test correctly in its decision. Specifically, the Court said that the Fifth Circuit had deferred too much to UT’s good faith in its use of racial categories. Therefore, the Court directed the Fifth Circuit to re-evaluate the case based on whether UT could “prove that its admissions program is narrowly tailored to obtain the

educational benefits of diversity.” On November 13, a three-judge panel of the Fifth Circuit heard arguments in the case. Its decision is still pending.

A Short Reprieve

While Kennedy was able to unite the Court’s conservative bloc in the majority decision, concurrences by individual justices signaled that *Fisher* would not be the last word in the fight over equal opportunity policies.

Justices Antonin Scalia and Clarence Thomas made clear that their votes were based purely on procedural grounds. In his one-paragraph concurrence, Scalia reiterated his position in *Grutter* that state-provided education is not exempt from “government discrimination.” He went on to indicate that he would have voted differently had *Fisher* challenged whether there was a “compelling interest” in diversity served by affirmative action. Thomas mirrored this sentiment in his own lengthy concurrence in which he asserted that he would overrule *Grutter* in its entirety. Thomas not only questioned the “alleged benefits” of diversity in the educational setting, he equated the arguments advanced in favor of affirmative action as “virtually identical” to those made by proponents of segregation.

Justice Ruth Bader Ginsburg, the lone dissenter from the majority decision, argued that the Fifth Circuit’s decision should have been affirmed because of the ample record showing that UT had properly determined that explicit consideration of race was necessary to achieve diversity and that the program had been narrowly tailored. Moreover, Ginsburg voiced strong opposition to the sentiments of Scalia and Thomas, writing that “only an ostrich could regard the supposedly neutral alternatives as race unconscious.”

For the 2013-2014 term, the Court will consider *Schuetz v. Coalition to Defend Affirmative Action*, a case that involves a challenge to Proposal 2, a 2006 Michigan ballot initiative that led to a state constitutional ban on race-conscious college admissions policies, creating a discriminatory system of determining school admission criteria. In 2011, Proposal 2 was declared unconstitutional by the U.S. Court of Appeals for the Sixth Circuit because it places an unfair burden on those seeking to have race considered as one of many factors in university admissions. This means that in Michigan, while donors, athletic officials, religious organizations, and alumni can each advocate that universities include their constituents in admissions decisions, racial and ethnic minorities and those who support greater student body diversity in these areas are effectively banned from doing so.

Schuetz actually comprises two lawsuits that were brought separately and make different arguments. *Schuetz v. Coalition to Defend Affirmative Action* is the name of a case brought by the Coalition to Defend Affirmative Action, Integration, and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN), a civil rights organization that has worked on affirmative action issues since 1995. The Court joined it with *Cantrell v. Granholm*, a separate case brought by the ACLU, NAACP Legal Defense and Educational Fund, Inc., and others on behalf of students, faculty, and prospective applicants to the University of Michigan challenging Proposal 2. The Leadership Conference submitted an amicus brief in *Schuetz* signed by more than 30 national civil and human rights organizations in support of the Sixth Circuit’s decision.

Civil and human rights advocates believe that equal opportunity policies, such as affirmative action, remain important in ensuring access to opportunities for all individuals, including disadvantaged and underprivileged students, and for enriching the education of all students in the country. In a society where race still matters, interaction between students of different races and ethnicities is key to ensure exposure to a wide range of different viewpoints, perspectives, and experiences.

Christopher Paredes is The Leadership Conference Education Fund’s Summer 2013 Google Fellow. He graduated from Emory Law School in May 2013.

University of Texas Medical Center v. Nassar and Vance v. Ball State

Christopher Paredes

The extensive coverage of the U.S. Supreme Court's high profile decisions invalidating the Defense of Marriage Act and gutting the preclearance formula of the Voting Rights Act left the Court's decisions in two Title VII employment discrimination cases under the radar for many. However, the Court's decisions in *University of Texas Medical Center v. Nassar* and *Vance v. Ball State* will have farreaching implications for the civil and human rights community. As a result of these decisions, employees nationwide will face a heavier burden than ever in seeking legal remedies for workplace discrimination based on race, color, religion, sex and national origin.

University of Texas Medical Center v. Nassar

Title VII of the Civil Rights Act of 1964 is a federal law that prohibits discrimination in employment on the basis of sex, race, color, national origin, and religion. In the Civil Rights Act of 1991, which addressed prior, troubling Supreme Court interpretations of Title VII, Congress established that employers were liable in employment discrimination cases if the plaintiff could show that "race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." In *Nassar*, the Court elevated the standard of proof for Title VII retaliation claims from the prevailing "motivating factor" standard to the stricter "but-for" causation standard. The more strict "but-for" causation standard requires plaintiffs to prove that the discrimination they suffered was *solely* in retaliation for speaking out about other discrimination occurring in the workplace. The "but-for" causation standard is much harder to prove than the less strict "motivating factor" standard.

In its June 24 majority opinion written by Justice Anthony Kennedy, the Court held that Congress' motivating factor standard applied only to discrimination based on race, color, religion, sex, or national origin, and not retaliation.

The Court reasoned that because Title VII divided status-based discrimination and retaliation into two different provisions, retaliation was not covered because Congress did not expressly include it in the language of the amendment. In issuing its decision, the Court refused to defer to the long-held interpretation of the Equal Employment Opportunity Commission (EEOC). Chief Justice John Roberts and Justices Antonin Scalia, Clarence Thomas, and Samuel Alito joined Kennedy's majority opinion.

In her dissent, Justice Ruth Bader Ginsburg emphasized the need for strong anti-retaliation protections and that a "but-for" causation standard was ill-suited for discrimination cases because it will require juries to determine "what would have happened if the employer's thoughts and other circumstances had been different." As a result of what Ginsburg described as the majority's "zeal to reduce the number of retaliation claims filed against employers," many workers will now face an uphill battle to find restitution in court under a more onerous "but-for" causation standard. Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan joined Ginsburg's dissent.

Vance v. Ball State

In *Vance*, the Court narrowed the definition of "supervisor" for purposes of Title VII liability, which will in turn limit the kinds of employment discrimination cases that can be brought under the law.

Under Title VII, harassment of employees is handled differently depending on whether the harasser is considered a co-worker or a supervisor. In instances where the harassment originates from a supervisor, an employer is automatically liable for any harassment that results in a tangible employment action against the employee. Tangible employment actions are defined as any decisions that result in a significant change in employment status, including hiring, firing, promotion, demotion, transfer, or discipline. Additionally, under *Burlington Industries*

v. Ellerth and *Faragher v. Boca Raton*, even when the harassment does not involve a tangible employment action, employers can still be liable for a supervisor's harassment unless they can assert the "*Faragher Ellerth*" defense that: (a) the employer exercised reasonable care to prevent and correct harassment, and; (b) the employee unreasonably failed to take action to prevent or correct the harassment (such as reporting to human resources or a higher-level supervisor). The basis for this rule is agency law, under which a "master" is responsible for the acts of his "servant."

By contrast, when harassment originates from the victim's co-worker, employers are liable only if they are found to have been negligent—that is, if the employer knew or reasonably should have known about harassment and failed to take reasonable remedial action.

In its decision, the Court chose to narrow the scope of an employer's liability as it considered who was a "supervisor" under Title VII. The majority once again rejected the EEOC's interpretation; instead, the Court reasoned that because the framework established in the *Faragher* and *Ellerth* cases evaluated liability in two steps depending on whether or not the supervisor took a tangible employment action, a supervisor must therefore have the authority to take such tangible employment actions. Alito wrote the opinion for the majority, joined by the same justices as the majority in *Nassar*; while Ginsburg again wrote the dissent for the same minority.

Ginsburg wrote that the majority's ruling "disserves the objective of Title VII to prevent discrimination from infecting the Nation's workplaces" by shielding employers from liability for "sub-level" supervisors who control their subordinates' day-to-day work activities, but are not authorized to take tangible employment actions.

Impact on Victims of Employment Discrimination

The Court's decisions make it significantly harder for victims alleging retaliation or harassment in the workplace to prevail in court.

Plaintiffs in retaliation suits, such as Naiel Nassar, must now show that their employers would not have taken adverse employment actions "but for" a retaliatory reason. Nassar was employed as both a member of the University of Texas faculty and a physician at the hospital. Intending to continue work at the hospital only, Nassar distributed a letter citing harassment from his supervisor, Dr. Levine, as the reason for his resignation from faculty. In response to his letter, Dr. Fitz, Nassar's second-level supervisor, protested Nassar's employment at the hospital on the grounds that Nassar was no longer a faculty member. His offer of employment at the hospital was subsequently withdrawn. Nassar filed suit alleging racial and religious

discrimination and retaliation for his letter complaining about the harassment. While Nassar was victorious at the trial level on both counts, the U.S. Court of Appeals for the Fifth Circuit upheld only the retaliation claim. Following the Supreme Court's decision, he will now have to return to a lower level court and prove that Dr. Fitz would not have objected to his continued employment if not for his desire to retaliate on behalf of Dr. Levine.

Plaintiffs like Maetta Vance, who allege harassment from intermediary supervisors, must now prove their employers were negligent in order to recover, a standard that Ginsburg noted will "scarcely afford the protection the *Faragher* and *Ellerth* framework gave victims." Vance worked for Ball State University (BSU) as a catering assistant where she alleged that her co-worker, a catering specialist for BSU, harassed and discriminated against her on account of race. After BSU was unable to satisfactorily resolve the situation, Vance filed suit arguing that she had been subjected to a racially hostile work environment in violation of Title VII. The lower courts found that Davis was not Vance's supervisor because she did not have the power to hire, fire, demote, promote, transfer, or discipline Vance. As a result of the Supreme Court's ruling, BSU is not liable for any discriminatory actions taken by Davis.

Moving Forward

Both of the Court's decisions have undoubtedly weakened the important Title VII protections afforded to the nation's workers. However, employment discrimination is an area where the greatest strides have often been made by Congress rather than—and often in spite of—the Supreme Court.

Ginsburg has laid the foundation for the civil and human rights coalition. She charged the majority with disregarding the realities of the workplace and narrowing Title VII's protections beyond what Congress had intended. Citing Congress's intervention to correct the Court's interpretations of Title VII in *Ledbetter v. Goodyear Tire & Rubber* as well as the passage of the 1991 Civil Rights Act Amendment following the *Price Waterhouse v. Hopkins* decision, Ginsburg ended both of her dissents with another call to Congress to intervene and overrule the majority. In the case of *Nassar*, there is already a vehicle: the Protecting Older Workers Against Discrimination Act, most recently introduced on July 30, 2013, which would explicitly state that the same standard of proof for proving discrimination under Title VII also applies to retaliation claims and to claims under other antidiscrimination statutes.

Christopher Paredes is the Leadership Conference Education Fund's Summer 2013 Google Fellow. He graduated from Emory Law School in May 2013.

Alleyne v. United States

Christopher Paredes

On June 17, the U.S. Supreme Court issued its decision in *Alleyne v. United States*. The Court found that the Sixth Amendment and the Due Process Clause mean that any fact that increases the mandatory minimum sentence for a crime is an element that needs to be proved beyond a reasonable doubt and therefore must be submitted to the jury.

Background

Allen Ryan Alleyne was convicted by a jury for multiple federal offenses related to a robbery. Alleyne and an accomplice had feigned car trouble to trick a store manager to stop while he made a daily deposit at the bank. Alleyne's accomplice then approached the manager with a gun and demanded the deposits. Federal firearms law states that anyone who "uses or carries a firearm" in relation to a crime of violence is subject to a minimum sentence of five years for the offense, with an elevated minimum penalty of seven years if the firearm is "brandished" and 10 years if the firearm is discharged.

While the jury indicated on the verdict form that Alleyne had "used or carried" the firearm in relation to the robbery, they did not find that the firearm was "brandished." However, the pre-sentence report recommended a seven-year sentence reflecting the mandatory minimum sentence for brandishing cases.

Alleyne objected, contending that raising the mandatory minimum sentence in the absence of a jury finding that he had brandished the gun would be a violation of his Sixth Amendment right to a jury trial. The district court and court of appeals rejected Alleyne's argument, holding that under *Harris vs. United States*, brandishing was a sentencing factor that could be determined by the judge by preponderance of evidence as it only increased the minimum sentence rather than the maximum.

Higher Burdens for Sentencing

In its 5-4 decision, written by Justice Clarence Thomas and joined by Justices Sonia Sotomayor, Ruth Bader

Ginsburg, Elena Kagan, and Stephen Breyer, the Court found that facts that increase the minimum sentencing penalty constitute elements of the crime. As such, the Sixth Amendment and the Due Process Clause require that such elements must be found beyond a reasonable doubt by a jury. In issuing this ruling in *Alleyne*, the Court overturned its *Harris* decision.

Chief Justice John Roberts, joined by Justices Antonin Scalia and Anthony Kennedy, dissented, arguing that *Harris* had correctly identified a distinction between sentencing elements that elevated a minimum sentence versus those that elevated the maximum sentence. Justice Samuel Alito filed a separate dissent, arguing that the majority decision was a violation of the Court's respect for precedent—*stare decisis*.

Victory for Criminal Justice Reform Advocates

Alleyne means that prosecutors will now need to prove the sentencing elements to juries before pursuing elevated mandatory minimum sentences. The Court's holding extends to all crimes that carry mandatory minimums, not just firearms and robbery cases.

The decision was welcomed as a victory for civil and human rights groups engaged in criminal justice reform, as well as for the criminal defense bar. For years defendants have repeatedly asked the Court to overturn *Harris* and bring consistency to the minimum and maximum sentencing distinction. Marc Mauer, executive director of the Sentencing Project, said that the ruling would likely reduce racial disparities in sentencing. "[T]he Court has taken an important step toward diminishing a primary driver of high prison populations, increasing prison costs, and racial unfairness in the criminal justice system," said Mauer, in a statement after the decision.

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Kiobel v. Royal Dutch Petroleum Co.

Christopher Paredes

On April 17, the U.S. Supreme Court issued its decision in *Kiobel v. Royal Dutch Petroleum Co.* addressing which claims U.S. federal courts have jurisdiction to hear under the Alien Tort Statute (ATS). The ATS permits foreign nationals to sue in federal courts for torts that violate either international law or a treaty that the United States has signed. The ATS has been used to bring cases in U.S. courts for violations of international human rights law overseas. However, in a unanimous decision, the Court held that there is a presumption against extraterritorial application of the law, which precludes ATS jurisdiction for such lawsuits unless they concern U.S. territory.

Background

The *Kiobel* plaintiffs were a group of 12 Nigerian expatriates who had been granted political asylum in the United States. The defendants—Dutch, British, and Nigerian corporations—engaged in oil exploration and production activities in Nigeria resulting in environmental protests by local Nigerians. The plaintiffs alleged that the defendants enlisted the Nigerian government to violently suppress these protests. The Nigerian military and police forces looted and destroyed villages and beat, raped, killed, and arrested residents. The Nigerians further alleged that the defendants had abetted these atrocities by “providing the Nigerian forces with food, transportation, and compensation, as well as by allowing the Nigerian military to use respondents’ property as a staging ground for attacks.”

After relocating to the United States, the plaintiffs filed suit in federal district court against the defendants for their role in aiding the Nigerian government in the commission of international law violations under the Alien Tort Statute. The district court agreed to hear the Nigerians’ claims of crimes against humanity, torture and cruel treatment, arbitrary arrest, and detention.

The U.S. Court of Appeals for the Second Circuit dismissed the case, holding that international law granted jurisdiction only over human beings, not corporations.

The Supreme Court initially decided to hear the case to determine if corporations could be brought to court for violations of international law. After hearing oral arguments, the Court ordered the parties to address the question of whether the ATS permits U.S. federal courts to hear suits about international law violations that occur in foreign territory.

Setting Limits on U.S. Jurisdiction

The *Kiobel* plaintiffs argued that because the ATS itself applies explicitly to claims by aliens and was enacted to enforce international law, it should not be limited in application to U.S. territory. Moreover, the plaintiffs urged that human rights violations such as the ones alleged in this case should permit universal jurisdiction by every nation. The defendants argued that the ATS should be bound by the general principle that U.S. law does not grant extraterritorial reach unless Congress explicitly says so.

In a unanimous decision by Chief Justice John Roberts, the Court sided with the defendants and held that while the ATS permits suits by aliens for violation of international law, it does not grant jurisdiction over conduct outside of U.S. territory. The Court affirmed the Second Circuit’s decision because the defendants’ conduct occurred entirely overseas in Nigerian territory and the plaintiffs’ claims did not sufficiently concern U.S. territory to warrant extraterritorial jurisdiction. Since the case was resolved on the question of extraterritoriality, the Court did not address whether corporations could be brought to trial in the U.S. for violations of international law.

Justice Stephen Breyer, joined by Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan, wrote

a separate opinion concurring in the judgment only. In his concurrence, Breyer declined to adopt the majority's presumption against extraterritorial jurisdiction and argued instead that there should be jurisdiction when "the alleged tort occurs on American soil, the defendant is an American national, or the defendant's conduct substantially and adversely affects an important American national interest." He reasoned that torturers and perpetrators of human rights violations should be "fair game where[ever] they are found" and that "all nations have an equal interest in their apprehension and punishment." However, Breyer declined to extend jurisdiction here because the corporations and their conduct were too far removed from American interests.

Major Impact on Foreign Relations

The decision is a major blow to human rights enforcement. Civil and human rights groups assert that the ATS is necessary for victims of human rights abuses to seek justice. Since the Second Circuit's 1980 decision in *Filartiga v. Pena-Irala*, which held that the ATS granted jurisdiction for a lawsuit brought against a Paraguayan residing in the United States for torture that occurred in Paraguay, victims of human rights violations overseas have relied on the ATS to press claims in U.S. courts.

Businesses, especially those with foreign operations, welcomed the decision, arguing that ATS suits are unpredictable and result in large litigation costs.

The Supreme Court's reluctance to extend extraterritorial jurisdiction is grounded in the far-reaching impact on foreign relations that such a move could have. This view is reflected in the evolving stance of the Obama administration in the case. In its first amicus brief, the government supported the *Kiobel* plaintiffs, arguing that corporations could properly be held liable for international law violations under the ATS. However, after re-briefing, the new government brief aligned with the Court's ultimate decision. The second amicus argued that *Kiobel* and cases like it, where the conduct of a foreign country is implicated, are beyond jurisdiction. Noting that foreign governments are typically immune from suit, the government argued that a judgment against the defendant corporation would "necessarily entail a determination about whether the Nigerian government or its agents have transgressed limits imposed by international law."

Indeed, some countries have opposed, as overreaching, the use of the ATS to try international law cases in U.S. courts. The United Kingdom and the Netherlands filed an amicus brief arguing the ATS creates "special litigation advantages" for plaintiffs and that ATS suits should be limited to parties and events related to the United States. On the other hand, Argentina filed an amicus brief in support of the *Kiobel* plaintiffs, arguing that all

countries in the international community are responsible for human rights, and pointed to the use of the ATS to address human rights violations committed by Argentina's military dictatorship.

Professor Trey Childress from the Pepperdine University School of Law has predicted that "the next round of international human rights cases will be filed under state law in federal court and, in some cases, under state law in state courts." J.D. Bindenagel, a former Foreign Service officer who also served as ambassador and special envoy for Holocaust issues, noted that while the ATS was important for helping secure forums for plaintiffs, the International Criminal Court may eventually be able to take over that role.

Christopher Paredes is The Leadership Conference Education Fund's Summer 2013 Google Fellow. He graduated from Emory Law School in May 2013.

The 37th Annual Hubert H. Humphrey Civil and Human Rights Award Dinner

The 37th annual Hubert H. Humphrey Civil and Human Rights Award Dinner was held on May 2, 2013, at the Hilton Washington in Washington, D.C.

The Hubert H. Humphrey Civil and Human Rights Award is presented to those who best exemplify “selfless and devoted service in the cause of equality.” The award was established by The Leadership Conference on Civil and Human Rights in 1977 to honor Hubert Humphrey and those who emulate his dedication to and passion for civil rights.

Two impressive individuals received the award in 2011: Barbara Arnwine, president and executive director of the Lawyers’ Committee for Civil Rights Under Law, and Martin Eakes, chief executive officer of Self-Help and the Center for Responsible Lending. Civil rights icon Julian Bond and James Perry, executive director of the Greater New Orleans Fair Housing Action Center, respectively, introduced the honorees.

Prior to the dinner, a who’s who in social justice, including members of the Executive Branch, both houses of Congress, business leaders, educators, civil and human rights leaders, and the next generation of social justice advocates all get the opportunity to attend The Leadership Conference Education Fund Reception. This year’s reception was sponsored by UPS.

The 2014 Hubert H. Humphrey Award Dinner will be held on Thursday, May 15.



Top row, from left to right: Leadership Conference Executive Vice President Nancy Zirkin, Leadership Conference President and CEO Wade Henderson, Leadership Conference Executive Vice President and COO Karen McGill Lawson.

Bottom row, from left to right: Leadership Conference Chair Judith Lichtman, Greater New Orleans Fair Housing Action Center Executive Director James Perry, Lawyers’ Committee for Civil Rights Under Law President and Executive Director Barbara Arnwine, Self-Help and the Center for Responsible Lending CEO Martin Eakes, civil rights icon Julian Bond.



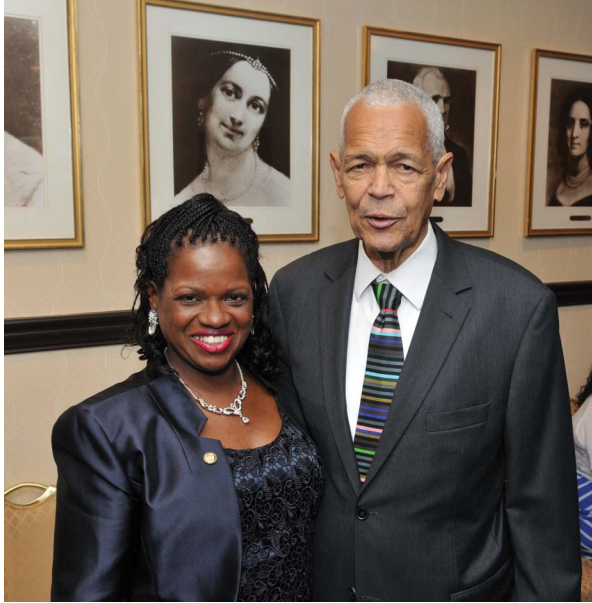
Attendees enjoy the Google-sponsored gelato bar at the reception.



Attendees arriving at the Education Fund reception.



NAACP Legal Defense and Education Fund Counsel to the Director of Litigation Josh Civil, Nueva Vista Group Co-Founder Maria Echeveste, and former NAACP President Ben Jealous pose for a picture during the Education Fund reception.



Humphrey Award honoree Barbara Arnwine poses with civil rights icon Julian Bond backstage.



Leadership Conference President and CEO Wade Henderson and Jasjit Singh, executive director of SALDEF, who did the invocation for the dinner.



Humphrey Award honoree Martin Eakes delivers his acceptance remarks.



Leadership Conference President and CEO Wade Henderson poses with attendees after the dinner.



Humphrey Award Martin Eakes poses with U.S. Secretary of Labor Tom Perez at the Education Fund reception.



Humphrey Award Dinner emcees Maureen Bunyan and Maria Echeveste chat backstage.

Hollingsworth v. Perry and United States v. Windsor

Noah Baron

For decades, marriage equality has been a centerpiece of the “culture wars”—the long-running political debate over contentious social issues. In part because, until recently, supporters of marriage equality were in the clear minority, the issue was used to mobilize and energize social conservatives. As a result, the debate has found its way into state and federal legislatures and executive offices, state-level referenda, and the judiciary. In many cases, conservatives won—and today, 28 states have constitutional bans on same-sex marriage and 18 states and the District of Columbia have marriage equality.

On June 26, 2013, the U.S. Supreme Court ruled on the constitutionality of two anti-marriage equality measures: Proposition 8, a California ballot initiative that amended the state constitution to recognize only marriages between a man and a woman, and the federal Defense of Marriage Act (DOMA), a 1996 law that clarified that the federal government would only recognize marriages between a man and a woman. Although enacted years apart and through different methods, the two measures sought to achieve the same goal: Preventing same-sex couples from marrying.

Background

In 1996, Congress passed DOMA by a wide margin. Among other things, the legislation prohibited the federal government from recognizing same-sex marriages, regardless of whether the couple had a marriage license from their state. Although the law did not prevent states from recognizing same-sex marriages, it did have far-reaching consequences for same-sex couples and LGBT people generally. First, it sent the message to lesbian, gay, and bisexual Americans that their relationships were valued less than those of heterosexual Americans. Second, even after states began to recognize same-sex marriages, the law prevented legally married same-sex couples from receiving numerous benefits from the fed-

eral government, ranging from tax benefits and Social Security to, for those with a spouse in the military, being informed of death.

In 2008—12 years after Congress passed DOMA—a narrow majority of California voters approved Proposition 8, which stripped same-sex couples of the right to marry and overturned a state Supreme Court decision holding that marriage equality was required by the state constitution. Although opponents of marriage equality celebrated that night, their victory spurred advocates for equality under the law into action. In the weeks that followed, thousands of Americans took to the streets to express their opposition to Proposition 8 and similar marriage bans.

The Supreme Court Decisions

A group of same-sex couples filed a lawsuit in federal court challenging the constitutionality of Proposition 8, saying that it was a denial of the equal protection of the laws and of the fundamental right to marry. Initially, the state of California defended the referendum. However, after the district court held that any state-level ban on same-sex marriage was a violation of the 14th Amendment’s requirements of equal protection and due process, the state refused to appeal.

Neither the district court decision nor the state’s decision to stop defending the referendum pleased the proponents of Proposition 8. As a result, they requested to become the primary legal representatives for the referendum to continue the case and the court agreed. After another victory for marriage equality at the appellate level, the U.S. Supreme Court took the case, *Hollingsworth v. Perry*.

On June 26, the Court held, 5-4, that proponents of Proposition 8 lacked the standing to bring the case—meaning that the proponents could not defend the propo-

sition in lieu of the state government. In order to have “standing,” a party must be able to show three things: 1) that it has suffered, or is about to suffer, a specific and material harm; 2) that the legal case is related to that harm; and 3) that winning the case is likely to provide relief to that injury. Although proponents were arguably able to meet the last two requirements, they were unable to meet the first. Writing for the majority, Chief Justice John Roberts said that “[t]heir only interest was to vindicate the constitutional validity of a generally applicable California law. . . [S]uch a ‘generalized grievance’ . . . is insufficient to confer standing.”

Justices Antonin Scalia, Ruth Bader Ginsberg, Stephen Breyer and Elena Kagan joined in the majority opinion. Justices Anthony Kennedy, Clarence Thomas, Samuel Alito, and Sonia Sotomayor dissented.

While the holding was primarily technical, the impact has been real. Because the proponents of Proposition 8 did not have standing to defend the law, they could not have appealed the district court’s decision – which means that the district court’s decision is the final word in that case. As a result, marriage equality is now law in the state of California.

As the Proposition 8 case was working its way to the Supreme Court, a constitutional challenge to DOMA was doing the same. In 2007, Edie Windsor and her partner of 40 years, Thea Spyer, travelled to Canada to marry and then returned to their native New York, which recognized same-sex marriages performed elsewhere. Two years later, Spyer passed away and left her entire estate to Windsor. If they had been a heterosexual couple, Spyer’s estate would not have been subject to any tax. But because Windsor and Spyer were both women, DOMA required the federal government to treat them as having no legal relation; as a result, the Internal Revenue Service forced Windsor to pay \$363,053 in taxes. In court, Windsor argued that Section 3 of DOMA was a violation of the Due Process clause of the Fifth Amendment—and a majority (5-4) of the Supreme Court agreed.

In his majority opinion in *United States v. Windsor*, Justice Anthony Kennedy said:

DOMA’s principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency... By this dynamic DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable

position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects...

Justices Ruth Bader Ginsberg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan joined in the majority decision. Chief Justice John Roberts and Justices Antonin Scalia, Clarence Thomas, and Samuel Alito dissented.

Conclusion

Although both cases were wins for marriage equality, the Court did not give all same-sex couples across the nation a clear victory. Today, same-sex spouses in states that recognize their marriages receive the same benefits under federal law to which their heterosexual counterparts are entitled. But much work remains to be done for the millions of Americans who still live in states where marriage equality is not a reality.

Noah Baron is a Summer 2013 Leadership Conference Education Fund legal intern. He is a law student at Georgetown University Law Center.

Immigration Reform: Is There Still a Road to Citizenship?

Rob Randhava

We Really Mean It This Time: After the 2012 Election

In the midst of one of the most divisive and partisan political atmospheres in our nation's history, the conversation over immigration policy took a rather surprising turn after the 2012 election. For several years, the debate had centered on state laws like Arizona's S.B. 1070, which were meant to create an environment so hostile to immigrants that they would ultimately "self deport," supposedly solving our immigration problems without the need for Congress to act. Even though President Obama had set new records for deportations every year in his first term, Republicans continually demanded he do more to "enforce the law," and blocked legislation like the DREAM Act, which enjoyed widespread bipartisan support. After exit polls showed that 70 percent of Latino voters had helped re-elect President Obama, however, and after realizing the Latino electorate would only continue to get bigger, many Republicans acknowledged that it was time for their party to change its tune.

While Latino voters are certainly not monolithic in their opinions, including on immigration, and while they have a very diverse range of policy goals, leaders in both parties agreed that immigration reform was a good place to start in improving their outreach. As a result, in the opening months of 2013, bipartisan teams in both the House of Representatives and the Senate—each called the "Gang of Eight"—began parallel negotiations on comprehensive immigration reform legislation with a considerable amount of pressure on each team to produce results.

A Breakthrough in the Senate

In April, a bipartisan group of senators introduced S. 744, the Border Security, Economic Opportunity, and Immigration Modernization Act. As one would expect with a bipartisan proposal, S. 744 was a compromise

that included many difficult tradeoffs. It provided a roadmap to citizenship for millions of unauthorized immigrants, but only once border security "triggers" were met and a national worker verification system ("E-Verify") was in place. The bill would reduce backlogs for family visas, but it eliminated several family visa categories altogether. It eliminated the "diversity visa" program that helped many Africans immigrate, and replaced it with a new "points" system to decide who would be eligible. Many human rights advocates praised S. 744's promotion of alternatives to detention and improvements to asylum laws, but they were less enthusiastic about a weak ban on racial profiling. At the same time, labor advocates had mixed reactions to new provisions governing the numbers of temporary foreign workers who could be hired in both low- and high-skilled positions.

For several weeks in May, the Senate Judiciary Committee voted on amendments to S. 744. One important victory for The Leadership Conference on Civil and Human Rights came when the committee added 25,000 visas for workers and their families from African and Caribbean nations to address concerns about the elimination of the diversity visa program. The committee also voted to restrict the use of solitary confinement. On the other hand, it also increased the number of temporary skilled worker visas, raising concerns about how native-born workers would be affected.

For the most part, S. 744 emerged from the Committee relatively intact. It faced a more drastic change, though, on the Senate floor. As a tradeoff for more votes from conservative Republicans, supporters amended the bill to drastically increase border enforcement, even though unlawful border crossings were already at their lowest point in decades. The Leadership Conference and other advocates argued that, in addition to being unnecessary, the amendment would increase profiling and other civil

and human rights violations, but they reluctantly supported the final version of the bill, which passed in late June by a bipartisan vote of 68 to 32.

Progress Stalls in the House

Thanks to its complex procedural rules and its deliberative nature, the Senate has long been viewed as the chamber of Congress in which good ideas, after being passed by the more procedurally streamlined House of Representatives, go to die. In the case of immigration reform, though, this maxim was turned completely on its head. After the relatively smooth process that led to the Senate passage of S. 744, the House leadership quickly put the brakes on reform.

Indeed, by the time S. 744 had reached the Senate floor, there were already signs of trouble. One of the members of the House “Gang of Eight” had already walked away from negotiations. On the day the Senate passed the bill, House Speaker John Boehner, R. Ohio—who had previously voiced support for immigration reform—warned that he would not allow a bill to come up for a vote if it did not have a “majority of the majority,” meaning it needed widespread Republican support. To make matters worse, the House Judiciary Committee in June marked up several extremely conservative bills—essentially several “shots across the bow”—including a drastic enforcement proposal, an agricultural guestworker bill that would badly disfavor farm workers, and an E-Verify measure that lacked the civil rights protections in the Senate version.

Since June, little has changed. Two more Republicans in the House “Gang of Eight” gave up on negotiations in September, leaving Rep. Mario Diaz-Balart, R. Fla., with little authority to reach a deal. House Majority Leader Eric Cantor, R. Va., said he would sponsor a bill similar to the DREAM Act, but he never circulated language. It soon became clear that even the “piecemeal” bills cleared by the Judiciary Committee would be unlikely to move because conservative House members argued that any bill—even ones they liked—would be used as a vehicle for a joint House-Senate conference committee that would result in a comprehensive bill that included a path to citizenship. Obscured by the logjam, however, is the fact that the House could easily pass a bill like S. 744, with support from Democrats and moderate Republicans, if only the House leadership let it come up for a vote.

Grassroots Efforts Continue Undaunted

Congress ended the year without any plan for how it would move forward on the issue of immigration reform. Yet there are still some encouraging signs. House Judiciary Committee Chairman Bob Goodlatte, R. Va., stated that immigration would be a high priority for his

committee in 2014, suggesting that the piecemeal bills he passed last June were not his last word on the matter. House Government Oversight Committee Chairman Darrell Issa, R. Calif., has been negotiating a more limited but workable approach, one that would allow unauthorized immigrants to remain in the country long enough to “get in line” for existing visas. Boehner announced that he had hired a former immigration adviser to Sen. John McCain, R. Ariz.—long an outspoken supporter of immigration reform—suggesting that he plans to continue pressing the issue next year.

The most important recent developments, however, have been originating from beyond Capitol Hill. Grassroots advocates throughout the country have become increasingly frustrated that the House has failed to move forward, and they have been displaying a level of energy and effort that is rarely seen in American politics. For weeks, a group of immigration advocates—including Eliseo Medina of the SEIU—set up a large tent on the National Mall and fasted in protest, drawing widespread attention, including visits from President Obama and House Democratic Leader Nancy Pelosi, D. Calif. In December, more than 1,000 activists—including several Leadership Conference staffers—participated in “sit-ins” in congressional offices where they demanded reform. Given his record deportation numbers, Obama has also been the target of increased grassroots pressure. These kinds of efforts are certain to increase in the coming months.

Whether ramped-up grassroots tactics will ultimately move the House leadership remains very unclear. As we head into an election year, with the prospect of primary challenges hanging over their heads, it is widely understood that House Republicans are unlikely to take up immigration reform in the winter or early spring. Yet filing deadlines for primary elections in most House districts will have passed by the end of April. After those deadlines, more Republicans may feel comfortable supporting a bipartisan immigration bill, leaving a window of opportunity for something to happen in the early summer—if, that is, their party leadership can muster the political will to make good on the intentions it voiced a little over a year ago.

Rob Randhava is senior counsel for The Leadership Conference on Civil and Human Rights and The Leadership Conference Education Fund and specializes in immigration and housing/finance issues.

Judicial and Executive Nominations

Sakira Cook

At the start of the 113th Congress, in the wake of an agreement to reduce the number of hours required for debate on district court nominations, advocates hoped that the U.S. Senate would begin to make some headway in confirming Executive Branch nominees and reducing the backlog of judicial vacancies. However, the pace of confirmations remained very slow. To date, there have been only 44 confirmations to the circuit and district courts, with 53 nominees pending in the Senate, 17 on the floor and 36 in committee.

To increase public awareness of the impact of judicial vacancies on the nation's justice system, and the dire need for the Senate to increase the rate of judicial confirmations, The Leadership Conference on Civil and Human Rights and a number of its partner organizations urged the White House to hold a high-profile meeting on the issue. On June 4, more than 150 prominent lawyers, academics, and other legal experts came to Washington, D.C., to stress the need to fill vacancies on the courts, and in particular, the three remaining vacancies on the U.S. Court of Appeals for the D.C. Circuit. The three seats on the D.C. Circuit had been vacant for many years—including one seat that became vacant when John Roberts was confirmed as Chief Justice in 2005—and became the center of the fight over nominations in 2013. On the first day of the conference, President Obama nominated three individuals ranked “Highly Qualified” by the American Bar Association—Patricia Ann Millett, Cornelia T.L. Pillard, and Judge Robert L. Wilkins—to fill the D.C. Circuit vacancies, and urged the Senate to swiftly confirm all three nominees.

Soon thereafter, the Senate struck a deal on executive nominations, which led to the confirmations of Tom Perez as Secretary of Labor and Richard Cordray to head the Consumer Financial Protection Bureau. Yet, even with this mild progress, the obstruction of quali-

fied Obama judicial nominees by the Senate minority continued. The Senate minority filibustered the D.C. Circuit nominees, arguing that the court's current caseload did not warrant the addition of any new judges. Senator Charles Grassley, R. Iowa, the ranking member on the Senate Judiciary Committee, went so far as to introduce legislation—the Court Efficiency Act of 2013, S. 699—which would eliminate the remaining three vacancies on the D.C. Circuit. In addition, the Senate minority used other tactics to obstruct the process, such as delaying a custom of sending names to the president for judicial vacancies in senators' home states or not returning what's known as the “blue slip,” a way of signaling their support for a nominee, which prevented the Senate Judiciary Committee from considering nominations.

These tactics forced Senate Majority Leader Harry Reid, D. Nev., on November 21 to exercise the so-called “nuclear option” and force a vote to change Senate rules to require a simple majority vote to end a filibuster on all Executive Branch and judicial nominations, except those for the U.S. Supreme Court. Subsequently, the Senate was able to confirm Millett and Pillard, Congressman Mel Watt to head the Federal Housing Finance Agency, and Chai Feldblum to serve on the Equal Employment Opportunity Commission. However, much to the dismay of advocates, a deal was made to delay the vote on the third D.C. Circuit nominee, Judge Robert L. Wilkins, until the Senate reconvenes in January 2014.

By the end of 2013, the Senate had confirmed 217 of the president's nominees to the federal courts, considerably fewer than the number the Senate confirmed at this point in the Clinton or George W. Bush presidencies. Of the 108 current or announced vacancies, 61 are vacancies without nominees and 38 of them were designated as “judicial emergencies” in which there are not enough judges to handle the caseload.

Even with the obstruction, Obama has succeeded in bringing unprecedented diversity to the federal courts. Women comprised more than 40 percent of Obama's confirmed judicial nominees, African Americans more than 18 percent, Hispanics nearly 13 percent, and Asian Americans 7.1 percent. In addition, seven openly LGBT individuals were confirmed to the courts.

With the Senate rules change and three years remaining in his second term, the president will have an opportunity to influence the makeup of the courts for decades. But his ability to impact the courts will still depend to a large degree on the willingness of the Senate minority to abandon its obstructionist tactics and return to the tradition of considering judicial nominees on their merits and as part of the Senate's routine business. Civil rights groups are already concerned about the minority's use of technical rules to delay committee hearings or votes. While the new Senate rules have made things a bit easier, if the close of the session is any indication of what is to come, the next session of the 113th Congress may feature a whole new kind of obstruction of nominations.

Sakira Cook is the senior policy associate and researcher for The Leadership Conference Education Fund and The Leadership Conference Civil and Human Rights.

The National Equity and Excellence Commission Tackles Education Reform

Max Marchitello

In 1983, the federal government established a national commission on excellence in education to evaluate the American public education system and determine how well the country prepares all of its children to be ready for college, career, citizenship and a competitive, globalizing economy. The findings were reported in “A Nation at Risk: The Imperative for Educational Reform,” which painted a dire picture and emphasized an urgent need for significant reform and reinvestment in public schools. The commission condemned the American public education system as a potentially fatal, self-inflicted wound:

If an unfriendly power had attempted to impose on America the mediocre educational performance that exists today, we might well have viewed it as an act of war. As it stands, we have allowed this to happen to ourselves ... We have, in effect, been committing an act of unthinking, unilateral educational disarmament.

Thirty years later, in the face of stagnant student achievement, persistent achievement and graduation rate gaps based on race, class, and disability status, and weakening global competitiveness, the federal government has revisited these very same questions through the National Equity and Excellence Commission. The commission was sponsored by Representatives Chaka Fattah, D. Pa., and Mike Honda, D. Calif., and chartered by the U.S. Department of Education in 2011.

The commission was composed of 28 national experts in a variety of fields including education, business, and law. Five CEOs of organizations belonging to The Leadership Conference on Civil and Human Rights served on the commission: Benjamin Jealous of the NAACP, Marc Morial of the National Urban League, Thomas Saenz of the Mexican American Legal Defense and Educational Fund, Dennis Van Roekel of the National Education

Association, and Randi Weingarten of the American Federation of Teachers.

On February 20, 2013, the commission submitted its report, “For Each and Every Child: A Strategy for Education Equity and Excellence,” to U.S. Secretary of Education Arne Duncan. The report covered five key components of a successful system of public education: improving school finance and efficiency; teaching, leading, and learning opportunities; ensuring access to high-quality early childhood education; meeting the needs of students in high-poverty communities; and governance and accountability to improve equity and excellence. To build a healthy 21st century economy and afford every child the right to a high-quality public education, the commission recommended that each state undergo a comprehensive needs assessment to identify gaps in funding and other resources, including access to high-quality, academic early childhood education, effective teachers, and wrap-around services. Once identified, the report recommended that states direct additional resources and supports to those schools and districts most in need to ensure that each and every child attends a safe school, is taught by effective teachers, is held to high standards, and has every opportunity to succeed.

Redesigning and reforming the funding of our nation’s public schools is at the core of the commission’s vision for achieving educational equity. Far too often students are forced to attend substandard schools that lack the resources necessary to provide *all* students with a high-quality education. Due to funding models based largely on local property tax revenues and irrational state funding systems that have little relationship to the actual costs of educating students to the state standards, too many students, particularly students of color and low-income students, drop out of high school or do not graduate fully prepared for college or career.

Restructuring how states fund their public schools is a daunting but necessary endeavor to guarantee each child's fundamental civil and human right to an education, and to sustain the ability of the U.S. to compete in the 21st century labor market. To chronicle the history of state-based efforts to achieve educational equity and chart a path toward realizing those goals, The Leadership Conference Education Fund published a report, "Reversing the Rising Tide of Inequality: Achieving Education Equity for Each and Every Child." The report, released shortly after the commission's report, examines the history of efforts over the last 40 years to achieve adequate and equitably distributed resources for public schools. The report traces school finance cases in five states—California, New Jersey, Texas, Colorado and Kansas—and documents the struggles in each of these states that continue to this day to address resource deprivation and inequity. Importantly, "Reversing the Rising Tide" proposes concrete steps government officials, foundations and advocacy organizations can take to achieve the bold vision for American public education set forth in the commission's report.

Max Marchitello is The Leadership Conference Education Fund's Bill Taylor Education Fellow.

The State of Financial Reform

Jim Lardner

Two broad avenues of policymaking stretch across the roadmap of financial reform. One points to improvements in the quality of the financial products and services on which American families directly depend, such as mortgages, checking accounts, retirement plans, student loans, and credit cards. The other involves efforts to reshape the practices, structure, and incentives of the financial system as a whole. In 2013, there were major developments in both areas.

Consumer Financial Protection

One early priority—and one of the signature accomplishments of the Dodd-Frank Act of 2010, fiercely resisted by Wall Street—was to create a strong Consumer Financial Protection Bureau (CFPB). In July 2013, that success was advanced significantly when the Senate confirmed former Ohio Attorney General Richard Cordray as the CFPB’s director.

For two years, a filibuster-sized bloc of senators had refused to permit a vote on *any* CFPB nominee except as part of a deal to fundamentally weaken the agency. Americans for Financial Reform (AFR) and its members played a central role in fighting to uphold the bureau as an effective regulator and in articulating the case for the leadership and funding arrangements that the CFPB’s critics sought to undo. In the end, the Obama administration and a majority of senators stood firm, and the nomination was approved on July 16, 2013, without concessions.

This was a tremendous victory—and not just because it ensured another five years of effective leadership for the CFPB. The Senate’s action also dissolved the threats that hung over Cordray’s original recess appointment and ended an unprecedented attempt to use the confirmation process to undermine an agency of the federal government and the law that brought it into being.

Even before the Senate acted, the effort invested in the CFPB’s creation by AFR and its members and allies had begun to bear fruit. 2013 was a year in which the bureau took meaningful steps to make the consumer financial marketplace safer by, among other things:

- Returning more than \$700 million to nearly six million consumers cheated by credit card companies;
- Writing new mortgage rules that require lenders to verify a borrower’s ability to repay, while demanding better conduct on the part of loan servicers;
- Making auto lenders accountable for compensation arrangements with a discriminatory impact on racial or ethnic minorities, women, the elderly, or other protected groups;
- Creating a set of “Know Before You Owe” tools to help students understand and compare college costs and financial-aid offers;
- Documenting the danger of unsustainable student debt and its impact on the economic circumstances and prospects of young people and their families, and bringing the full range of student loan servicers under effective supervision for the first time; and
- Setting up a complaint system that has begun to get real results for consumers, while also making markets work better.

The bureau is also stepping up its efforts to end abusive payday loans. In April, it released a study demonstrating that while such loans may be promoted as emergency short-term credit, they are routinely rolled over again and again by borrowers who can’t afford to repay them any other way. Nearly half of all borrowers had more than 10 transactions over the course of the year, while 14 percent had more than 20 transactions. The median loan,

according to the CFPB, was \$180; the median amount of fees paid was \$451.

In a major step forward, the Federal Deposit Insurance Corporation (FDIC) and the Office of the Comptroller of the Currency (OCC) took measures to prevent the banks under their oversight from making payday and other small-dollar loans crafted to trap people in a cycle of triple-digit-interest debt. Unfortunately, the Federal Reserve has not followed suit, allowing two of the big banks it regulates (Regions and Fifth Third) to continue making these loans.

Systemic Risk

AFR and its member organizations have been working to make the system safer and more transparent; to reduce the excessive leverage, size and power of the biggest banks; to end implicit and explicit public subsidies for Wall Street speculation; and, by these and other means, to draw resources away from gambling and arbitrage toward business loans, mortgages, and other useful real-economy activities.

Derivatives have been an important focus. In the run-up to the financial crisis, Wall Street built a colossal house of cards out of these complex instruments, originally developed for the hedging of risk. Dodd-Frank sought to bring transparency and backup-capital rules to the derivatives markets, but the financial industry has fought reform every step of the way. But fortunately, none of the wave of bills designed to block effective regulation has been enacted.

Another important piece of progress involves the Commodity Futures Trading Commission (CFTC), the agency to which Congress handed most of the responsibility for setting up the structure of derivatives oversight. Unlike most of the other financial watchdogs, and despite severe budget constraints, the CFTC managed to finish writing almost all its core rules, which are already starting to take effect. And despite some compromises, the commission is still working (against strong Wall Street opposition) to ensure that regulatory standards apply to trades conducted by overseas affiliates of U.S. banks—trades which could pose a major risk to the U.S. economy.

There were also signs of progress toward stricter leverage requirements. The major regulators united behind a proposal for capital standards that, while still not tough enough, represented a significant improvement over the inadequate levels set by a panel of international bank regulators.

After months of painfully slow work on the Volcker Rule (the piece of Dodd-Frank that bars banks from

proprietary trading), the watchdogs finally finished this important component of the law. A great deal will depend on the effectiveness of implementation. But the rule's completion is good news in itself, and its language appears to reflect a heightened post-“London Whale” attention to the need, as AFR has long argued, to make sure that banks cannot count speculative trades as permissible “hedging”

Unfortunately, many other needed rules were either unfinished or weak, and financial reform advocates have often been forced to defend already-approved reforms rather than pressing for the further changes that will clearly be needed. In all, the watchdogs have missed some 60 percent of their deadlines. The uncompleted assignments include rules to make sure public funds cannot be used to bail out high-risk derivatives operations; to reform the credit rating agencies that stamped their seal of approval on thousands of toxic subprime mortgage securities; and to restrict executive bonuses that reward reckless behavior. (To its credit, the Securities and Exchange Commission did finally act on the law's directive to require all publicly held companies to disclose their ratios of CEO pay to median-employee pay.)

In 2014, financial reform advocates will continue to press for full and effective implementation of the Dodd-Frank reforms, and to create the political space for more ambitious measures. The goal is not simply to avert another catastrophe but to work for a financial system that serves all people fairly, provides capital for useful private and public investment, and moves the country toward a more equitable as well as sustainable prosperity.

Jim Lardner is the communications director for Americans for Financial Reform, a nonpartisan and nonprofit coalition of more than 250 civil rights, consumer, labor, business, investor, faith-based, and civic and community groups. AFR is a project of The Leadership Conference Education Fund.

Ensuring a Lifeline for Those Who Need It Most

Christopher Parades

For nearly 30 years, under the concept of “universal service,” federal communications policy has set funds aside to ensure that all people could connect to the telephone network even if their financial circumstances or remote location might otherwise prevent them from doing so. Lifeline is a Universal Service Fund program that provides subsidized telephone service for low-income households. The program was created by the Federal Communications Commission (FCC) in 1984 under President Ronald Reagan. In 2005, partially in response to the devastation wrought by Hurricane Katrina, the Bush administration expanded the Lifeline program to support wireless telephone service.

Currently the FCC’s Lifeline program is available to individuals who are at, or below, 135 percent of the federal poverty guideline. Subscription to the program is limited to one line per household.

In 2012, about \$2.2 billion, or one-quarter of the \$9 billion spent on universal service, was spent on Lifeline. Of the 440 million lines supported by universal service, 16 million are in the Lifeline program.

While voice phone service is the minimum service necessary for everything from getting a job, caring for one’s family, or calling 9-1-1, many Americans are rapidly moving to broadband Internet for most of their communications needs. As Representative Doris Matsui, D., Calif., has stated, “In today’s global economy, the Internet is as much a lifeline as the telephone once was.” Reps. Matsui, Henry Waxman, D., Calif., and Anna Eshoo, D. Calif., have introduced the Broadband Adoption Act, which would modernize the Lifeline program to help low-income households gain access to broadband Internet service.

Despite its track record in helping to provide affordable phone service, the Lifeline program has been the subject

of several attacks in Congress, including efforts to prohibit Lifeline support for wireless phones, cap the level of support for the program, and eliminate the program entirely.

Civil and human rights advocates oppose these attacks. Nancy Zirkin, executive vice president of The Leadership Conference on Civil and Human Rights, stated:

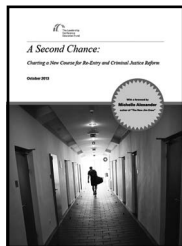
“We must set the record straight about Lifeline; it is a hand up, not a hand out. By harnessing the innovation of the private sector, the Lifeline program has—with minimal investment—been extremely successful at ensuring access to phone service for those who need it most. Lifeline must be protected and strengthened, not subjected to crude prejudices and extreme rhetoric, so it can continue to be the hand up so many Americans need in today’s economy.”

In 2012, the FCC adopted a number of strict reforms, including new eligibility requirements, new disclosure requirements for carriers, and procedures to eliminate duplications. Designed to go to the heart of prior abuses, these important reforms have already resulted in hundreds of millions in savings through the elimination of more than a million duplicative accounts, according to the FCC. The commission recently announced nearly \$44 million in fines against three companies for violating Lifeline rules, bringing the total proposed Lifeline fines to \$90 million in the past three months.

Christopher Paredes is The Leadership Conference Education Fund’s Summer 2013 Google Fellow. He graduated from Emory Law School in May 2013.

Reports

This year, The Leadership Conference Education Fund and The Leadership Conference on Civil and Human Rights released a number of reports that explore important civil rights issues. The full reports can be found here: <http://www.civilrights.org/publications/reports/>.



A Second Chance: Charting a New Course for Re-Entry and Criminal Justice Reform – October 2013

“A Second Chance” examines the impact of four barriers that make re-entry more difficult and recidivism more likely—predatory prison phone rates; inadequate access to education; restrictions on employment; and restrictions on voting. The report discusses the consequences of these practices and makes a series of policy recommendations regarding their reform.



Tribes & Transportation: Policy Challenges and Opportunities – October 2013

The unique transportation context for tribal nations means tribes offer several policy insights to those outside of Indian Country who serve disadvantaged rural and urban communities. “Tribes & Transportation,” co-authored by the National Congress of American Indians, provides an outline of the current data and policy context for tribal transportation; an overview of the tribal employment rights ordinance (with respect to transportation policy); diverse case studies that demonstrate tribal transportation challenges and opportunities; particular insights for rural transportation policy; and proposed recommendations for ongoing work on these important issues.



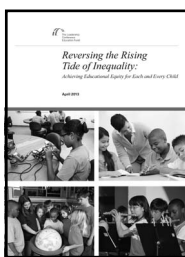
Democracy Imprisoned: A Review of the Prevalence and Impact of Felony Disenfranchisement Laws in the United States – September 2013

“Democracy Imprisoned” documents the impact of felon disenfranchisement laws and how they violate Articles 25 and 26 of the International Covenant on Civil and Political Rights (ICCPR), which the United States ratified in 1992. The report, which was submitted to the U.N. Human Rights Committee, was co-authored with the American Civil Liberties Union, the American Civil Liberties Union of Florida, the Lawyers’ Committee for Civil Rights Under Law, the NAACP, the NAACP Legal Defense and Educational Fund, the Hip Hop Caucus, and the Sentencing Project.



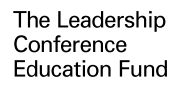
Still Segregated: How Race and Poverty Stymie the Right to Education – September 2013

“Still Segregated: How Race and Poverty Stymie the Right to Education,” a report prepared by The Leadership Conference Education Fund on behalf of The Leadership Conference on Civil and Human Rights, highlights how American educational disparities violate U.S. civil rights and human rights obligations. The report, which was submitted to the U.N. Human Rights Committee, explains how persistent racial and economic segregation and extreme disparities in educational funding are not only immoral, but also violate Articles 2 and 26 of the International Covenant on Civil and Political Rights, to which the United States has been a party since 1992.



Reversing the Rising Tide of Inequality: Achieving Educational Equity for Each and Every Child – April 2013

“Reversing the Rising Tide of Inequality: Achieving Educational Equity for Each and Every Child” aims to bolster the effort to achieve both quality and fairness in the nation’s public education system. This report explains the current available state remedies for inequity; examines the Equity and Excellence Commission’s findings regarding the inequities that exist in U.S. education and its five-part agenda to address them; and concludes with recommendations designed to operationalize that agenda and make equal educational opportunity a reality for each and every child in the United States.

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The Leadership Conference
Education Fund

1629 K Street, NW
10th Floor
Washington, DC
20006

202.466.3434 voice
202.466.3435 fax
www.civilrights.org

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