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PROTECTING THE RIGHTS OF THE MARGINALIZED

> In Republics, the great danger is, that the majority may not sufficiently respect the rights of the Minority.
>
> – *James Madison, 1829*

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Criminal prosecution for the immigration-related infractions of *illegal entry* and *illegal reentry* have escalated dramatically under the Trump Administration, which has made targeting immigrants a top priority. This escalation is happening at a time when the population coming to the U.S. southern border is largely seeking safety from persecution and danger. The United States does not recognize asylum as a defense to illegal entry or illegal reentry, and asylum seekers are not excluded from being charged and criminally prosecuted for these infractions, despite U.S. treaty obligations prohibiting this practice. As a result, people coming to the United States to seek asylum—a legal act—are penalized, detained in federal prisons, and in some cases deported back to the persecution and danger that they fled. In addition, criminal prosecution in the United States for these immigration-related infractions flout due process and fairness, despite longstanding precedent

that noncitizen, criminal defendants are entitled to full constitutional protections, namely those enshrined in the Fourth, Fifth, Sixth. and Fourteenth Amendments. Yet the Trump administration has increasingly violated such protections on a quest to criminally charge all border crossers for immigration infractions, regardless of motive or vulnerability. This Article provides an overview of how the criminal justice system violates the constitutional rights and human rights of asylum seekers and other vulnerable immigrants. This Article argues that America's legacy of providing protection and refuge to the world's most vulnerable is increasingly at risk under the policies and practices of the Trump administration.

Silencing Talk About Race: Why Arizona's Prohibition of Ethnic Studies Violates Equality
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In 2010, Arizona made national headlines when it enacted laws targeting undocumented immigrants, perceived in the state to be primarily Mexican. Arizona experienced population growth that projected it would become a minority majority state within one or two decades. Republican politicians spearheaded a ban on ethnic studies, with its intended target a successful Mexican American studies program at the Tucson Unified School District. The Mexican American studies program was initiated as part of a desegregation decree in ongoing desegregation litigation against the Tucson Unified School District; state superintendents of education in Arizona branded the program "racist" because students were encouraged to think critically about U.S. history and question the role that race plays in the development of U.S. society. This Article examines ethnic studies, their role as a desegregation remedy, and in crafting a more accurate and informed view of history. Ethnic studies are a vibrant and vital educational tool to explore and challenge established historical and cultural orthodoxies that adversely affect formation of individual and group identity, and they encourage and develop critical thinking about race and ethnicity in all student populations. This Article contends that state efforts to prohibit ethnic studies programs are constitutionally infirm and should engage strict scrutiny under the Equal Protection Clause because they classify and prohibit curricular content and offerings on the basis of race or ethnicity, burdening only minority races.

Lighting the Way Towards Liberty: The Right to Abortion After *Obergefell* and *Whole Woman's Health*
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The federal government has failed to fulfill the constitutional guarantee of equal rights for all. While this promise requires affirmative governmental action to ensure the protection of historically subordinated groups, policymakers persist in using the will of the majority to deny the dignity and fundamental rights of groups lacking political defenses. Luckily, recent developments in the doctrine of marriage equality now allow advocates and supportive lawmakers to remedy this injustice by forever removing the fundamental rights of subordinated groups from political debate. Policymakers must address the harm to subordinated groups posed by a tiered system of fundamental rights through constitutional precedent that fully accounts for these considerations. This Article details the expanded vision of liberty espoused by the Supreme Court in *Obergefell v. Hodges*, and applies this analysis to another area in which a historically subordinated group's rights have been systematically curtailed—abortion rights. Following *Obergefell*'s vision of liberty, the government must facilitate the exercise of that fundamental right by ensuring that individuals enrolled in Medicaid receive coverage of abortion.

NOTES

Protecting Our Defenders: The Need to Ensure Due Process for Women in the Military Before Amending the Selective Service Act
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On January 1, 2016, all previously closed frontline military occupations were opened to women for the first time in U.S. history. Shortly thereafter, several military leaders and politicians stated that due to the change in policy, women were then "equal to men" in the military and, therefore, should be required to register for Selective Service—the system that maintains a list of Americans fit for service in the event a military draft is requested by the president. While the recent change extended employment opportunity to women within the military, a number of polices and laws prevent women from achieving equality in various other ways.

Since the change in policy allowing women to serve in all capacities within the military, several cases have been filed in federal courts in an attempt to overturn *Rostker v. Goldberg*, the 1981 case in which the Court held that men and women were not "similarly situated" and therefore it was constitutionally permissible for women to be excluded from the registration requirement for Selective Service. Likely, courts will only revisit the narrow analysis outlined in *Rostker*, namely women's access to frontline positions. This Note urges Congress, for policy and normative reasons, to consider all manners in which women and men are not yet similarly situated when considering a future amendment to the Selective Service Act. In describing a number of policies and structures that deprive rights to women within the military, this Note argues that women should be required to register for the Selective Service only once their due process rights can be guaranteed.

The Fragile Victory for Unaccompanied Children's Due Process Rights After *Flores v. Sessions*
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In 2017, the Ninth Circuit Court of Appeals found that when the federal government detains an unaccompanied child, that child has the right to request legal review of his or her custody before an immigration judge. In *Flores v. Sessions*, the court reaffirmed the right, which had been present in the text of the laws governing the treatment of immigrant youth, but had been ignored by executive branch bodies. In its analysis, the court considered the relationship between a twenty-year-old settlement and two acts of Congress that govern the treatment of immigrant youth. The *Flores* decision affects the lives of an incredibly vulnerable population—children who travel to the United States alone, often to flee gang-related and domestic violence—over half of which qualify for protection deriving from international law. This Note analyzes the significance of the *Flores v. Sessions* decision and the population that it affects. Through the comparison of laws governing children's detention and the due process rights of adults challenging immigration custody decisions, this Note argues that the *Flores* decision represents a temporary victory for unaccompanied children, albeit one that calls for persistence on the part of advocates as the implementation of bond hearings moves forward.

***Johnson v. United States*: The Impact on Texas' Habitual Offender Statute**
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In 2015, the Supreme Court struck down the residual clause of a major federal "habitual offender" statute in *Johnson v. United States*. The Court determined that combining the ambiguously worded "residual clause" with a pure "categorical approach" for interpreting qualifying crimes violated the notice provision of the Due Process Clause. Additionally, the Court identified an inability to create a clear and consistent standard of application for applying the residual clause as a second independent ground for holding the residual clause unconstitutional. Although the Court's holding specifically applied to a federal sentencing enhancement scheme, the holding is undoubtedly applicable to state habitual offender statutes through the Fourteenth Amendment's incorporation of the Fifth Amendment Due Process Clause. This Note applies *Johnson*'s holding to Texas' habitual offender statute. Under the Texas two-strikes or habitual offender statute, criminal offenders can qualify for sentencing enhancement for foreign convictions, or offenses committed outside of Texas, if the conviction "contain[s] elements that are *substantially similar* to the elements of an offense" that would be subject to enhancement in Texas. This Note argues that the foreign jurisdiction clause in Texas fails under both the first and second independent vagueness holdings in *Johnson*. Thus, this Note (1) addresses the constitutional vagueness arguments in the foreign convictions clause of Texas' habitual offender statute; (2) analyzes the propensity for arbitrary judicial application of the law due to a lack of consistent "standards;" and (3) considers cures to the defect and proposes an alternative to the "foreign conviction" clause used in Texas.

Daggers (†) in footnotes indicate unconfirmed sources or unobtainable page numbers.

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