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Congress Blewett by Not Explicitly Making the Fair Sentencing Act of 2010 Retroactive

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COMMENTS

CONGRESS *BLEWETT* BY NOT EXPLICITLY MAKING THE FAIR SENTENCING ACT OF 2010 RETROACTIVE

Andrew Cockroft*

In 2013, the Sixth Circuit Court of Appeals was the first Circuit Court to retroactively apply the Fair Sentencing Act of 2010. The Fair Sentencing Act sought to end the discriminatory effects of the Anti-Drug Abuse Act of 1986 and its treatment of one gram of crack cocaine as the equivalent to one hundred grams of powder cocaine. The Fair Sentencing Act was meant to remedy the injustices brought about by the infamous 100:1 ratio in crack-cocaine and powder cocaine minimum sentencing. Despite this purpose, the Fair Sentencing Act does not contain language that explicitly and unequivocally requires that the new mandatory minimums be applied retroactively. Thus, a narrow reading of the Fair Sentencing Act would mean that individuals sentenced under mandatory minimums that the law acknowledged were, at the very least, perpetuating a racially discriminatory system, would have to serve out those sentences. The Sixth Circuit in Blewett v. United States *held that a reading of the Fair Sentencing Act that did not allow for retroactive application of the more lenient and less dubious mandatory minimums created equal protection concerns that mandated reading the text to allow for retroactive application. Although the original* Blewett *panel decision has been heavily criticized, vacated, and eventually overturned* en banc, *this Comment argues that the original* Blewett *panel was correct in holding that equal protection requires reading the text of the Fair Sentencing Act to allow for retroactive application.*

* J.D., cum laude, Northwestern Pritzker School of Law, 2015; B.A., University of Texas, Austin, 2012. I would like to thank my parents, Randall and Susan Cockroft, for their love and support.

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INTRODUCTION

Congress passed the Fair Sentencing Act of 2010 ("FSA")[1] in an attempt to remedy the discriminatory effects of the Anti-Drug Abuse Act of 1986 ("the Drug Act").[2] The Drug Act included mandatory minimums for the possession of crack cocaine; it "treat[ed] one gram of crack cocaine as equivalent to one hundred grams of powder cocaine for sentencing purposes."[3] The sentencing regime based on the 100:1 ratio led to the mass incarceration of offenders, most of whom were black.[4] The dramatic racial disparity in drug sentencing led to the passage of the FSA.[5]

The FSA lessened the mandatory minimum ratio between crack and powder cocaine from 100:1 to 18:1.[6] However, in passing the FSA, Congress did not include explicit language requiring that the new mandatory

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[1] Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010).

[2] The Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986).

[3] United States v. Blewett, 719 F.3d 482, 484 (6th Cir. 2013). *See also* The Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986).

[4] *See* U.S. Sentencing Comm'n, Special Report to the Congress: Cocaine and Federal Sentencing Policy: Chapter 7D (Feb. 1995); U.S. SENTENCING COMM'N, 2011 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS Table 34 (2011). *See also* Danielle Kurtzleben, *Data Show Racial Disparity in Crack Sentencing,* U.S. NEWS & WORLD REPORT (Aug. 3, 2010, 2:45 PM), http://www.usnews.com/news/articles/2010/08/03/data-show-racial-disparity-in-crack-sentencing, *archived at* http://perma.cc/U472-95CJ.

[5] *See infra* text accompanying notes 192-204 for a discussion of the legislative history behind the passage of the FSA. *See also* Marc Mauer, *Beyond the Fair Sentencing Act,* THE NATION (Dec. 9, 2010), *available at* http://www.thenation.com/article/157009/beyond-fair-sentencing-act, *archived at* http://perma.cc/LL9Y-RBL9.

[6] Fair Sentencing Act, 111 P.L. 220, 124 Stat. 2372, 2373 (2010).

minimums be applied retroactively. That is, the FSA did not include explicit, undeniable language that would allow offenders sentenced under the old sentencing regime of the Drug Act to benefit from the new, fairer mandatory minimums.

In 2013, the original panel in *United States v. Blewett* faced the problem raised by this lack of explicit language.[7] Because the FSA lacked such language, the original *Blewett* panel was left to find ways to make the FSA realize its purpose: reducing the racial disparities in drug sentencing.[8] The panel relied on equal protection jurisprudence as well as the doctrine of constitutional avoidance in holding that the FSA ought to apply retroactively.[9] Although the opinion has been heavily criticized and ultimately overturned after a rehearing *en banc,*[10] this Comment argues that the original *Blewett* panel correctly decided that the FSA ought to apply retroactively.

This Comment will proceed with the following parts. Part I describes the history of crack sentencing, beginning with the passage of the Drug Act in 1986. This part will detail the events leading to the passage of the Drug Act and its effects, ultimately resulting in the passage of the FSA and the original *Blewett* decision. Part I concludes with an overview of the reasoning of the original *Blewett* decision. Part II will analyze the jurisprudence on which the *Blewett* decision relies, including the law surrounding equal protection and the doctrine of constitutional avoidance. Part III will demonstrate how the original *Blewett* panel correctly articulated and used these doctrines to hold that the FSA ought to apply retroactively. This Part also provides an in-depth discussion of the various criticisms of the court's decision. A brief conclusion summarizes the discussion of the preceding parts and discusses the implications of the original *Blewett* decision and its ultimate reversal.

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[7] *Blewett*, 719 F.3d at 482.

[8] *See* Letter from Patrick J. Leahy, Chairman, U.S. Senate Comm. on the Judiciary, to, U.S. Sen., to the Honorable Patti B. Saris, U.S. Sent. Comm. (June 1, 2011) *available at* http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20110602/Durbin_Leahy_Franken_Coons_Comment.pdf, *archived at* http://perma.cc/CC55-6SCD.

[9] *Blewett*, 719 F.3d at 484. *See also infra* text accompanying notes 149-163 for a discussion of the doctrine of constitutional avoidance.

[10] *See* United States v. Blewett*,* 746 F.3d 647, 649 (6th Cir. 2013), *cert. denied,* 134 S. Ct. 1779 (2014) (hereafter described as *"Blewett II.")*.

I. BACKGROUND

Although the federal government's "War on Drugs" began with the Nixon administration,[11] in the 1980s, law enforcement officials increased their effort to stamp out casual drug use. These efforts coincided with the proliferation of a new drug trend in the United States: in the late seventies and early eighties cocaine began growing in popularity.[12] Crack cocaine came to the national spotlight following the death of basketball star Len Bias, who died after reportedly using the drug following his selection by the Boston Celtics in the first round of the 1986 NBA Draft.[13] Congress, amid the hysteria surrounding this new drug, passed the Anti-Drug Abuse Act of 1986 ("the Drug Act"),[14] which created new mandatory minimum sentences for defendants convicted of possessing or using a series of drugs, including crack cocaine.[15] The Drug Act instituted a 100:1 ratio between crack cocaine and powder cocaine, treating one gram of crack cocaine as equivalent to one hundred grams of powder cocaine for sentencing purposes.[16] A first-time possessor of a small amount of crack cocaine would face a mandatory sentence of five years in prison;[17] however, the same person found to be possessing powder cocaine would have to be in possession of one hundred times that amount to warrant the same five-year sentence.[18]

The circumstances surrounding the enactment of those mandatory minimums led to many constitutional challenges to the law. Challengers claimed the law violated the Equal Protection Clause and cited various news articles introduced in the *Congressional Record* that labeled crack dealers as

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[11] *See* President Richard Nixon, Special Message to the Congress on Drug Abuse Prevention and Control (June 17, 1971), *available at* http://www.presidency.ucsb.edu/ws/?pid=3048, *archived at* http://perma.cc/59K8-35U8.

[12] *See* LaJuana Davis, *Rock, Powder, Sentencing—Making Disparate Impact Evidence Relevant in Crack Cocaine Sentencing,* 14 J. GENDER RACE & JUST. 375, 381 (2011) (citing Eva Bertram et al., Drug War Politics: The Price of Denial, 61-62 (1996); Doris Marie Provine, Unequal Under Law: Race in the War on Drugs 76-77 (2007)).

[13] *See id*.; *see also* Julie Stewart, *Well Done Congress, Now Make Fair Sentencing Act Retroactive,* THE HUFFINGTON POST (Aug. 4, 2010, 5:11 PM), http://www.huffingtonpost.com/julie-stewart/well-done-congress-now-ma_b_671008.html. It is worth noting that the reports of Bias' death from the use of crack cocaine have recently come under scrutiny. *See* Michael Weinreb, *The Day Innocence Died,* ESPN THE MAGAZINE, *available at* http://www.espn.com/espn/eticket/story?page=bias.

[14] *See* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986).

[15] *See id.*

[16] *See id.*

[17] *See* 21 U.S.C. § 841(b)(1)(B) (2006).

[18] *Id*.

black youths and gangs,[19] and expressed concern that crack cocaine "would spill out of the ghettos" and find its way into the suburbs.[20] Moreover, challengers argued that the procedural irregularities surrounding the passage of the new mandatory minimums indicated a discriminatory purpose behind the law.[21] For example, Congress held very few hearings on the enhanced penalties and although the penalty ratio was originally set at 50:1 between crack and powder cocaine, the ratio was doubled for arguably no reason.[22] Despite this evidence, these challenges were not successful and the Drug Act was upheld.[23]

Since its enactment, the Anti-Drug Abuse Act has had disastrous consequences on the African-American community. The 100:1 crack cocaine ratio has led to the imprisonment of thousands of offenders, most of whom are black.[24] The statistics are alarming. The U.S. Sentencing Commission projected that approximately 30,000 federal prisoners would be serving crack cocaine sentences by the end of 2011.[25] In 2011, 83% of those prisoners were black.[26] In just one year, 2010, 92.7% of all crack cocaine defendants were non-white, and the majority of them (78.5%) were black.[27] Between 1988 and 1995, federal prosecutors did not bring a single case against a white person "under the crack provision in seventeen states, including major cities such as Boston, Denver, Chicago, Miami, Dallas, and Los Angeles."[28]

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[19] *See* United States v. Clary, 846 F. Supp. 768, 783 n.48 (E.D. Mo. 1994) *rev'd* 34 F.3d 709 (8th Cir. 1994) (citing 132 Cong. Rec. S2495 (daily ed. Mar. 12, 1986) ("[B]ig city ghettos" are "infested with . . . crack houses" and "are centers of the new cocaine trade" in crack); 132 Cong. Rec. S4670 (daily ed. April 22, 1986) ("Most of the dealers, as with past drug trends, are black or Hispanic . . . [w]hites rarely sell the cocaine rocks."); 132 Cong. Rec. S7123 (daily ed. June 9, 1986) (Dealers "organize small cells of pushers, couriers and lookouts from the ghetto's legion of unemployed teenagers.").

[20] *Id.* at 783–84.

[21] *Id.* at 784–85.

[22] *Id.*

[23] *See, e.g.*, United States v. Clary, 34 F.3d 709, 714 (8th Cir. 1994).

[24] *See* Kurtzleben, *supra* note 4; *see also* United States v. Blewett, 719 F.3d 482, 485 (6th Cir. 2013).

[25] U.S. Sentencing Comm'n, *Analysis of the Impact of Guideline Implementation of the Fair Sentencing Act of 2010 if the Amendment Were Applied Retroactively*, at 11-12 (May 2011).

[26] U.S. Sentencing Comm'n, *Annual Report 2011* at 37.

[27] U.S. SENTENCING COMM'N, 2011 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS Table 34 (2011).

[28] United States v. Blewett, 719 F.3d 482, 487 (6th Cir. 2013) (citing Dan Weikel, *War on Crack Targets Minorities over Whites,* L.A. TIMES, May 21, 1995, http://articles.latimes.com/1995–05–21/news/mn-4468_1_crack–cocaine).

After acknowledging that the 100:1 sentencing ratio was the "primary cause of the growing disparity between sentences for Black and White federal defendants,"[29] the United States Sentencing Commission recommended that Congress reduce the sentencing ratio in 1995[30] and unanimously recommended reducing the ratio in 1997[31] and 2002.[32] Even after adjusting the length of sentences for crack in 2007, Congress made no changes to the 100:1 ratio.[33]

Finally, in 2010, Congress passed the Fair Sentencing Act of 2010 (FSA),[34] scaling back the harsh and racially disparate mandatory sentences for crack offenses.[35] The FSA changed the ratio between crack and powder cocaine from 100:1 to 18:1 in order "to restore fairness to Federal cocaine sentencing."[36] The statute took effect on August 3, 2010.[37]

When it was passed, it was unclear how the FSA would affect individuals sentenced under the old regime.[38] In passing the act, Congress failed to include language that the FSA ought to apply retroactively—that is, there was no explicit language stating that the act's new sentencing standards should apply to individuals convicted or sentenced prior to the enactment of the FSA. In May 2011, the United States Sentencing Commission produced a study which indicated that if the FSA were to apply retroactively, more than 12,000 offenders would be eligible to receive a reduced sentence.[39]

In 2012, in *Dorsey v. United States*, the Supreme Court considered the case of several offenders who were charged with and convicted of crack offenses prior to the enactment of the FSA, but had not been sentenced until

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[29] U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY, Chapter 7D (1995).

[30] *Id.* at Chapter 8.

[31] U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 2 (1997).

[32] U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY, at viii (2002).

[33] *Blewett*, 719 F.3d at 488.

[34] Fair Sentencing Act of 2010, Pub. L. 111-220, 124 Stat. 2372 (2010).

[35] Mauer, *supra* note 5.

[36] Fair Sentencing Act of 2010, 111 Pub.L. 220, 124 Stat. 2372, 2373. (2010).

[37] *Id.*

[38] *See* Mauer, *supra* note 5; *see also* Stewart, *supra* note 13.

[39] Memorandum from Office of Research & Data & Office of Gen. Counsel to Chair Saris, et al., Analysis of the Impact of Guideline Implementation of the Fair Sentencing Act of 2010 if the Amendment Were Applied Retroactively 10 (May 20, 2011) ("These offenders were sentenced between October 1, 1991, and September 30, 2010 (fiscal years 1992 through 2010), and remained incarcerated as of November 1, 2011.").

after the law had passed.[40] After acknowledging that the passage of the FSA was, in part, motivated by public outcry over unjustified race-based differences in sentencing,[41] the Court held in favor of the criminal offenders.[42] The Court held that "Congress intended the Fair Sentencing Act's new, lower mandatory minimums to apply to the post-Act sentencing of pre-Act offenders."[43] However, the Court left open the question of whether the FSA would apply retroactively to *all* pre-Act offenders, regardless of when their sentencing occurred. Even with the holding in *Dorsey,* there are still countless crack offenders in federal prison serving sentences given to them prior to the enactment of the FSA.

Since the passage of the FSA, there have been numerous attempts to force the law to apply fully retroactively. Until the summer of 2013, every circuit court to hear the issue found that the FSA should not apply to these offenders.[44] However, in *United State v. Blewett*, the Sixth Circuit Court of Appeals became the first circuit court to hold that the FSA's new crack to powder cocaine ratio ought to apply fully retroactively.[45] The key difference between the *Blewett* court and every other court to consider the issue is that the *Blewett* court analyzed the issue of retroactivity as a constitutional question, not merely as a question of statutory interpretation.[46]

The court in *Blewett* held that the equal protection principles of the Fifth Amendment required that the FSA apply retroactively.[47] The court acknowledged that when the old 100:1 crack–powder ratio was adopted "it presumably did not violate the Equal Protection Clause because there was no intent or design to discriminate on a racial basis."[48] According to the court,

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[40] Dorsey v. United States, 132 S. Ct. 2321, 2326 (2012).

[41] *Id.* at 2328.

[42] *Id.* at 2335.

[43] *Id.* It is important to note that the court only faced a question of statutory construction, not a constitutional challenge to the FSA.

[44] *See* United States v. Augustine, 712 F.3d 1290, 1293-1295 (9th Cir. 2013) (holding that the FSA does not apply retroactively and agreeing with every other circuit considering this question at the time); *see also* United States v. Kelly, 716 F.3d 180, 181–82 (5th Cir. 2013); United States v. Lucero, 713 F.3d 1024, 1026–27 (10th Cir. 2013); Paul J. Larkin, Jr., *Crack Cocaine, Congressional Inaction, and Equal Protection*, 37 HARV. J. L. & PUB. POL'Y 241, 243 (describing that *Blewett* was the first circuit court decision upholding an equal protection challenge to federal drug sentencing laws).

[45] United States v. Blewett, 719 F.3d 482 (6th Cir. 2013); *see also* Larkin *supra* note 44. at 243.

[46] *Compare id.* at 487 *with Kelly*, 716 F.3d at 181–82; *Lucero*, 713 F.3d at 1026; *Augustine*, 712 F.3d at 1293–95.

[47] *Blewett*, 719 F.3d at 487.

[48] *Id.* at 488.

"[s]ince 1986, however, we have gained knowledge of the old statute's devastating effect on blacks."[49]

The court's equal protection analysis proceeded in three parts. First, judicial action qualifies as state action for the purposes of equal protection.[50] The court is bound by the same constitutional obligations as legislatures or administrative agencies because when the court acts so does the state.[51] The Constitution prohibits giving legal effect to the discriminatory acts of others, even if they are private parties.[52]

Second, if the court gave legal effect to the 100:1 ratio knowing what we know now about its racial implications, such an act would become intentional discrimination for the purpose of equal protection.[53] A "'disparate impact' case now becomes an intentional subjugation or discriminatory purpose case."[54] This is consistent with the Supreme Court's requirement of sufficient intent to find a violation of equal protection.[55] This finding of intent is bolstered by the legislative history of the FSA, because part of the reason for passing the FSA was to remedy the racially discriminatory effects of the 100:1 crack-cocaine ratio.[56]

Essentially, while a statute may not violate equal protection if it only has a discriminatory impact, the FSA is different. The passage of the FSA was a Congressional acknowledgement that the old sentencing regime had a discriminatory impact. If the court were to give legal effect to something that Congress rejected as discriminatory, then the court would impose the discrimination that the FSA sought to avoid.

Third, the court is constrained to "interpret statutes and sentencing guidelines so as to avoid potential conflict with the Constitution."[57] Here, the court reasoned that the interpretation of the statute offered by the Government would result in a violation of equal protection, thus requiring that the court interpret the statute so as to avoid that constitutional violation.[58]

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[49] *Id.*

[50] *Id.* at 490.

[51] *Id.*

[52] *Id.* at 489–90 (citing Shelley v. Kraemer, 334 U.S. 1, 19-20 (1948); Ex Parte Virginia, 100 U.S. 339, 348-49 (1880)).

[53] *See id.* at 489 ("There is no excuse for judges to engage in perpetuating such discrimination or to sanction it by refusing to correct it.").

[54] *See id.* at 488 ("Like slavery and Jim Crow laws, the intentional maintenance of discriminatory sentence is a denial of equal protection.").

[55] *Id.* at 488–89 (citing McCleskey v. Kemp, 481 U.S. 279, 292–298 (1987); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979); Washington v. Davis, 429 U.S. 229 (1976)).

[56] *Id.* at 489.

[57] *Id.* at 487.

[58] *Id.*

Here the court uses the doctrine of constitutional avoidance to interpret the FSA such that the imposition of unconstitutional discrimination can be avoided.[59]

The court's decision has been heavily criticized,[60] most notably by the dissent[61] with which at least one federal district court explicitly agrees,[62] as well as the majority in *Blewett I*.[63] Critics present four main arguments. First, they argue that the original *Blewett* panel would turn every disparate impact case into an intentional discrimination case.[64] According to this argument, the original *Blewett* panel contradicts precedent indicating that a disparate impact alone is insufficient to show a violation of equal protection.

Second, critics argue that applying the FSA retroactively assumes that a party can show a violation of equal protection by Congress's failure to act. This criticism relies on the original *Blewett* panel's discussion of how the FSA remedied the past discrimination resulting from the mandatory minimums of the Drug Act. These critics state that to find a violation of equal protection, the court must either reason that Congress intentionally discriminated in passing the FSA or that Congress's failure to remedy the disparate impact of the Drug Act is constitutionally actionable.[65]

Third, the majority in *Blewett II* argued that there was a simple explanation, one other than discrimination, for Congress's decision to not apply the FSA retroactively: the state's interest in the finality of sentences.[66] According to the majority, it would make little sense for Congress to be "deeply concerned about racial justice when looking at future sentences" and then "suddenly bec[o]me racist when contemplating past

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[59] The *Blewett* court elaborated on the doctrine of constitutional avoidance. *Id.* at 487 ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.") (citations omitted).

[60] *See, e.g.*, Larkin, supra note 44; Ed Whelan, *Crackheaded Ruling by the Sixth Circuit*, NATIONAL REVIEW ONLINE (May 17, 2013, 1:57 PM), *available at* http://www.nationalreview.com/bench-memos/348668/crackheaded-ruling-sixth-circuit-ed-whelan, *archived at* http://perma.cc/8FN6-JQK4.

[61] *Blewett*, 719 F.3d at 495–97 (Gilman, J., dissenting).

[62] *See* United States v. Duty, 1:08CR00024-032, 2013 WL 3873076, at *5, n.5 (D. Va. July 25, 2013) ("I agree with the dissent in *Blewett* that the constitutional argument is invalid.").

[63] United States v. Blewett, 746 F.3d 647, 649 (6th Cir. 2013), *cert. denied,* 134 S. Ct. 1779 (2014).

[64] *Blewett*, 719 F.3d at 495–98 (Gilman, J., dissenting).

[65] Larkin, *supra* note 44, at 252–54; Whelan, *supra* note 60.

[66] *Blewett II,* 746 F.3d at 659.

sentences[.]"[67]Because the state has an interest in maintaining the sentences already imposed, Congress chose to have the new minimums be exclusively prospective.[68]

Fourth, critics state that the *Blewett* panel improperly invoked the doctrine of constitutional avoidance, since the sentencing guidelines and the FSA are not subject to two possible interpretations.[69] This argument relies on the Sixth Circuit decision in *United States v. Hammond*, where the court considered whether the FSA, as read, requires retroactive application of the new, lower mandatory minimums.[70] That court held that the best interpretation of the FSA foreclosed retroactive application.[71] As such, critics state that the original *Blewett* panel could not invoke any other interpretation of the FSA other than the one enunciated by the court in *Hammond*.[72]

Following the decision of the original *Blewett* panel, the Sixth Circuit Court of Appeals decided to vacate the decision and scheduled a rehearing for the case *en banc*.[73] In December 2013, the Sixth Circuit overturned the panel decision, applying the same logic as the *Blewett* dissent.[74] Despite the decision, several offenders sentenced under the 100:1 crack–powder ratio have cited the opinion in an attempt to have their sentences reduced, although none have been successful.[75]

While the decision was overturned and heavily criticized, this Comment argues that the original *Blewett* panel correctly decided that the FSA ought to apply retroactively to defendants sentenced under the Anti-Drug Abuse Act of 1986. Congress's decision to change the standards for crack sentencing based on the old sentencing ratio's discriminatory effect on African-Americans presents a unique issue. The original *Blewett* panel's decision—that enforcement of the old sentencing regime violated the Fifth Amendment—was consistent with equal protection jurisprudence. Before analyzing the particular arguments offered by the court, and answering the

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[67] *Id.*

[68] *Id.*

[69] *Blewett*, 719 F.3d at 496–97 (Gilman, J., dissenting).

[70] *Id.* at 496; *see also* United States v. Hammond, 712 F.3d 333, 335 (6th Cir. 2013).

[71] *Hammond*. 712 F.3d at 336.

[72] *Blewett*, 719 F.3d at 496–97 (Gilman, J., dissenting).

[73] *See* Order at 1, United States v. Blewett, No. 12–5226 (6th Cir. July 11, 2013), ECF No. 111; Order at 1, United States v. Blewett, No. 12–5582 (6th Cir. July 11, 2013), ECF No. 104.

[74] *See* United States v. Blewett, 746 F.3d 647, 660 (6th Cir. 2013), *cert. denied,* 134 S. Ct. 1779 (2014).

[75] *See, e.g.*, United States v. Swangin, 726 F.3d 205, 207 n.2 (D.C. Cir. 2013); United States v. Bell, 731 F.3d 552, 554 (6th Cir. 2013); United States v. Drewery, 531 Fed. App'x 675, 682–83 (6th Cir. 2013); United States v. Reeves, 717 F.3d 647, 650–51 (8th Cir. 2013).

decision's critics, it is necessary to analyze the jurisprudence on which the decision relies.

II. THE CONSTITUTIONAL JURISPRUDENCE ON WHICH THE *BLEWETT* PANEL RELIES

In order to successfully claim that his or her right to equal protection has been violated, a party must demonstrate that a state actor has intentionally discriminated against them.[76] A showing of intentional discrimination does not necessarily mean that the discrimination is evident from the face of the law itself.[77] Instead, a party may show intentional discrimination through the grouping of a variety of factors including the procedure preceding the passage of the law, the law's discriminatory effect, the legislative intent, and the statements of the legislators themselves.[78]

It is often the case that a party may not argue that the law in question ought to be invalidated. Instead, the party may simply show that the law is subject to at least two interpretations, one of which avoids an interpretation of the statute that introduces questions of the statute's constitutionality. In certain cases, the court, based on the doctrine of constitutional avoidance,[79] may choose the construction of the statute that avoids such questions.

A. EQUAL PROTECTION AND STATE ACTION

Although the Fifth Amendment does not contain an Equal Protection Clause, the Supreme Court has held that the federal government is subject to the same equal protection restrictions under the Amendment as state governments are under the Fourteenth Amendment.[80] The Equal Protection Clause *only* applies to state action, not private action. The Equal Protection Clause voids all state action of every kind that denies any of its citizens the equal protection of the laws.[81] Executive and legislative acts by the state or federal government clearly fall within the meaning of state action.[82]

In *Shelley v. Kraemer,* the Supreme Court considered whether action on the part of the judiciary in enforcing racially discriminatory agreements constitutes state action within the meaning of the Equal Protection Clause,

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[76] *See* Civil Rights Cases, 109 U.S. 3, 11, 17 (1883).

[77] Washington v. Davis, 426 U.S. 229, 241 (1976).

[78] *Id.* at 241–44.

[79] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2594 (2012).

[80] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224 (1995); Bolling v. Sharpe, 347 U.S. 497, 500 (1954).

[81] *See* Civil Rights Cases, 109 U.S. at 11 (1883).

[82] *See id.*at 17.

when the action taken by the court is the enforcement of a racially discriminatory covenant.[83] The Court concluded that if the agreements were purely voluntary and lacked the involvement of the judiciary, then a restrictive covenant standing alone could not be regarded as a violation of the Fourteenth Amendment.[84] The Court, however, stressed that the judicial enforcement of the covenants brought them into the realm of state action.[85]

The Court held that the action of state courts and of judicial officers in their official capacities constitutes state action.[86] According to the Court, acts of the judiciary have been held to be acts of the state since "the earliest cases involving the construction of the terms of the Fourteenth Amendment."[87] In supporting that judicial action constitutes state action within the meaning of the Fourteenth Amendment, the Court cited numerous examples of the different types of state action the judiciary can take. First, the judiciary enforces the laws of the state and therefore its acts constitute state action.[88] Second, the Supreme Court has found violations of the Fourteenth Amendment when the judiciary of a state applies common-law policies.[89] Third, the Supreme Court ruled that the judiciary acts in enforcing common-law crimes.[90]

In applying these principles, the Court found that the enforcement of racially restrictive covenants constituted state action "in the full and complete sense of the phrase."[91] But for the intervention of state courts, supported by the full panoply of state power, the covenants would have no legal effect.[92] Thus, since the effect of the state action in question was to deny rights subject

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[83] Shelley v. Kraemer, 334 U.S. 1, 4 (1948).

[84] *Id.* at 13.

[85] *Id.* at 14.

[86] *Id.*

[87] *Id.* (citing Commonwealth of Va. v. Rives, 100 U.S. 313, 318 (1880) ("It is doubtless true that a State may act through different agencies,—either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another.")).

[88] *Id.* at 15 (citing Twining v. New Jersey, 211 U.S. 78, 90– 91 (1908) ("The judicial act of the highest court of the State, in authoritatively construing and enforcing its laws, is the act of the state.")).

[89] *Id.* at 17 (citing American Fed'n of Labor v. Swing, 312 U.S. 321 (1941)).

[90] *Id.* at 17–18 (citing Bridges v. California, 314 U.S. 252 (1941); Cantwell v. Connecticut, 310 U.S. 296 (1940)).

[91] *Id.* at 19.

[92] *Id*.

to equal protection, it was the "obligation of this Court to enforce the constitutional commands."[93]

The Court in *Shelley* makes clear that acts of the judiciary constitute state action. Moreover, the *Shelley* court clarifies that the judiciary acts as the state within the meaning of the Fourteenth Amendment when it construes and enforces the laws of the legislature.[94] Since judicial acts constitute state action within the meaning of the Fourteenth Amendment, even when a court serves as an interpreter of the law, the original *Blewett* panel correctly understood its constitutional obligations in deciding the retroactivity of the Fair Sentencing Act of 2010 if reinforcing the mandatory minimums of the Drug Act after the passage of the Fair Sentencing Act of 2010 would have violated the Equal Protection Clause.

B. EQUAL PROTECTION AND THE REQUIREMENT OF INTENT

To show a violation of the equal protection principles of the Fifth Amendment, a party must show that the state intentionally discriminated against an individual within a protected group;[95] however, the Supreme Court has held that a law or another official act cannot be unconstitutional solely because it has a racially disproportionate impact.[96] To find that a law violates the equal protection principles of the Fifth Amendment, a court must find that the law or the official act had a discriminatory purpose.[97] However, the discriminatory purpose does not need to be express on the face of the statute or within the official act.[98] An inference of racial classification can be shown in the absence of an outright, facially racial classification.[99] An intentionally discriminatory purpose may often be "inferred from the totality of the relevant facts," including, in some cases, whether the law "bears more heavily on one race than another."[100]

In *Village of Arlington Heights v. Metropolitan Housing Corporation*, the Court identified three general factors to consider when analyzing whether an official act or a statute was motivated by discriminatory intent in the

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[93] *Id.* at 20.

[94] *Id.* at 15 (citing Twining v. New Jersey, 211 U.S. 78, 90–91 (1908) ("The judicial act of the highest court of the State, in authoritatively construing and enforcing its laws, is the act of the state.")).

[95] Washington v. Davis, 426 U.S. 229, 239 (1976).

[96] *Id.*

[97] *Id*. (citing Bolling v. Sharpe, 347 U.S. 497 (1954)).

[98] *Id.* at 241.

[99] *Id.*; Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886).

[100] *Davis*, 426 U.S. at 242.

absence of an outright statutory classification.[101] There, the Court's analysis "suggest[s] that certain inferences could be drawn based on our knowledge and expectations of the operations of legislatures."[102] These factors provide courts the ability to infer a decisionmaker's subjective, discriminatory intent by "relying on the historical and social context of the decision."[103]

First, a showing of a clear pattern, "unexplainable on grounds other than race," of a disparity between one class and another can evidence a discriminatory purpose.[104] The Court, however, stressed that "such cases are rare."[105] In the past, the Supreme Court has found intentional state action only when the disparate impact on a protected class is quite stark.

As an example, the Court in *Village of Arlington Heights* cites *Yick Wo v. Hopkins*.[106] *Yick Wo* involved a state administrative agency's decision to bar virtually all persons of Chinese descent from receiving the proper paperwork to continue operating their laundry businesses.[107] Of the 200 persons of Chinese descent that applied for the proper permit, none were granted a permit to operate.[108] "Absent a pattern as stark" as the one established in *Yick Wo*, disparate impact alone usually cannot establish discriminatory intent.[109]

Second, the procedural background of the legislative or administrative decision, including the sequence of events leading up to the decision, may also be used to show the purpose of the decisionmaker.[110] Those sorts of events include "departures from the normal procedural sequence" which may show that "improper purposes are playing a role."[111] If factors usually considered to be important by the decisionmaker strongly favor a conclusion contrary to the one reached, such departures could show that a decision was motivated by an intent to discriminate.[112]

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[101] 429 U.S. 252, 266 (1977) ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.").

[102] Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 305 (1997).

[103] Sheila Foster, *Intent and Incoherence*, 72 TUL. L. REV. 1065, 1077 (1998).

[104] *Id.* (citations omitted).

[105] *Arlington Heights*, 429 U.S. at 266.

[106] *Id.;* Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[107] *Yick Wo*, 118 U.S. at 374.

[108] *Id.* at 359.

[109] *Arlington Heights*, 429 U.S. at 266.

[110] *Id.* at 267.

[111] *Id.*

[112] *Id.*

Third, the legislative or administrative history, including statements made by decisionmakers, may be "highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports."[113] In discussing every other factor, the Court merely speaks of each factor's "relevan[ce]."[114] However, the Court finds that the legislative history to not just be relevant, but potentially "highly relevant."[115] Statements of legislators, whether they directly or indirectly acknowledge the purpose of the law or decision, take on a great importance.[116]

If, upon applying these factors to a statute or an official act, a court finds that the act in question was motivated by a discriminatory purpose, then "judicial deference is no longer justified."[117] The discriminatory purpose behind an official act does not need to be the primary or but-for cause of a decision.[118] Rather, the Equal Protection Clause is violated when discrimination was "a motivating factor in the decision."[119] The Court emphasized that parties are not required to show that a decision was based solely on a discriminatory purpose or "even that a particular [discriminatory] purpose was the 'dominant' or 'primary' one," since rarely do legislatures or administrative bodies make decisions "motivated solely by a single concern."[120] The Court's deference to the legislature and administrative agencies is based on the notion that these political branches "are properly concerned with balancing *numerous* competing considerations" which causes courts to refrain from reviewing the merits of the political branches' decisions, "absent a showing of arbitrariness or irrationality."[121] Requiring a showing of but-for causation would be an unreasonable burden on any complaining party. Legislatures and administrative agencies make decisions based on a variety of factors, making it difficult to assess which factors, in fact, caused these decisions to be made. Thus, these factors are not meant to divine the *only* purpose of a given decision; instead, the factors are only

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[113] *Id.* at 268.

[114] *See id.* at 266–67.

[115] *Id.* at 268.

[116] *See generally* Ugo Colella, *Trust the Tale, Not the Author: Judicial Review of Legislative Motivation and the Problem of Proving A Racially Discriminatory Purpose Under the California Constitution*, 69 TEMP. L. REV. 1081 (1996) (analyzing the application of *Arlington Heights* in subsequent cases).

[117] *Arlington Heights*, 429 U.S. at 266.

[118] *Id.* at 265.

[119] *Id.* at 265–66.

[120] *Id.* at 265.

[121] *Id.* (emphasis added).

meant to show whether an impermissible discriminatory purpose was one of many considerations that went into a decision.

In the year following the decision in *Village of Arlington Heights*, the Supreme Court faced another case addressing the definition of "intent" for the purposes of equal protection. In *Personnel Administrator of Massachusetts v. Feeney*, the female plaintiff argued that the Massachusetts veterans' preference statute discriminated against her because of her sex.[122] There, the plaintiff argued that "intent" for the purposes of equal protection ought to mean the same as "intent" within the context of criminal and civil law.[123] In criminal and civil law, one "intends the natural and foreseeable consequences of his voluntary actions."[124] In arguing that the legislature knew that veterans were overwhelmingly male, the plaintiff argued that the law was purposely discriminatory since a decision to prefer veterans was, in its consequences, a decision to prefer men over women.[125] As the lower court asked, "[w]here a law's consequences are *that* inevitable, can they meaningfully be described as unintended?"[126]

The Court, however, dismissed this argument. Discriminatory purpose implies "more than intent as volition or intent as awareness of consequences."[127] Intent, for the purposes of equal protection, requires that the decisionmaker "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[128] Thus, discriminatory intent cannot be shown simply by demonstrating that a discriminatory consequence was the inevitable result of the decision or that the result was foreseeable.

Feeney does not demonstrate a departure from the factors set forth in *Village of Arlington Heights*. Rather, the decision reaffirms that discriminatory effects are not in themselves evidence of discriminatory intent unless the effect is so great that discrimination is the only logical explanation.[129] The *Feeney* decision merely dictates that awareness of inevitable or foreseeable effects is not a stand-in for an outright discriminatory classification.[130] However, *Feeney* does not mean that evidence of discriminatory effects is irrelevant to an equal protection inquiry.

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[122] 442 U.S. 256, 259 (1979).
[123] *Id.* at 278.
[124] *Id.*
[125] *Id.* at 275.
[126] Feeney v. Massachusetts, 451 F. Supp. 143, 151 (Mass. 1978).
[127] *Feeney*, 442 U.S. at 279.
[128] *Id.*
[129] *Id.*
[130] *Id.*

"If the impact of [a] statute could not be plausibly explained on a neutral ground, impact itself would signal that the real classification made by the law was in fact not neutral."[131]

Nearly a decade later, the Supreme Court again faced the issue of the relevance of discriminatory effect to determining discriminatory intent. In *McCleskey v. Kemp*, the Court considered a challenge to a Georgia man's capital sentence.[132] Particularly, the Court addressed "whether a complex statistical study that indicates a risk that racial considerations enter into capital sentencing determinations" is sufficient to prove that the petitioner's capital sentence violates the Equal Protection Clause.[133] In that case, the petitioner offered a study of over 2,000 murder cases that occurred in Georgia during the 1970s.[134] The study, described by some scholars as "the most complex and thorough study of its kind, in terms of the size of the sample and the number of variables considered,"[135] showed that "the death penalty was assessed in 22% of the cases involving black defendants and white victims; 8% of the cases involving white defendants and white victims; 1% of the cases involving black defendants and black victims; and 3% of the cases involving white defendants and black victims."[136]

Ultimately, the study concludes that "black defendants were 1.1 times as likely to receive a death sentence as other defendants."[137] The study "indicates that black defendants . . . who kill white victims have the greatest likelihood of receiving the death penalty."[138]

In disregarding the statistical analysis offered by the petitioner, the Court emphasized that, regardless of what the statistics showed, the petitioner had to prove that the "decisionmakers in *his* case acted with discriminatory purpose."[139] The Court offered three arguments for why the petitioner could not satisfy the burden of showing that his jury acted with discriminatory purpose using the statistics.

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[131] *Id.* at 275.

[132] McCleskey v. Kemp, 481 U.S. 279, 282–83 (1987).

[133] *Id.* at 282–83.

[134] *Id.* at 286 (citing Baldus, et al., Pulaski, & Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983)).

[135] Steven F. Shatz, Terry Dalton, *Challenging the Death Penalty with Statistics:* Furman*,* McCleskey*, and A Single County Case Study*, 34 CARDOZO L. REV. 1227, 1236 (2013).

[136] *McCleskey*, 481 U.S. at 286 (citations omitted).

[137] *Id.* at 287 (citations omitted).

[138] *Id.*

[139] *Id.* at 292.

First, the Court stressed, "each particular decision to impose the death penalty is made by a petit jury selected from a properly constituted venire."[140] Since "[e]ach jury is unique in its composition . . . the application of an inference drawn from the general statistics to a specific decision in a trial and sentencing" is not appropriate.[141]

Second, in other contexts where statistics are permitted to prove discrimination, "the decision-maker ha[d] an opportunity to explain the statistical disparity."[142] According to the Court, "public policy . . . dictate[s] that jurors 'cannot be called . . . to testify to the motives and influences that led to their verdict.'"[143] Moreover, given their wide discretion, it would be improper to require prosecutors "to defend their decisions to seek death penalties, 'often years after they were made.'"[144]

Third, "[b]ecause discretion is essential to the criminal justice process," the Court "demand[s] exceptionally clear proof before infer[ring] that the discretion has been abused."[145] Given that each decision among each jury is, by its very nature, unique, the disparities demonstrated by petitioner's study were deemed "insufficient to support an inference . . . of . . . discriminatory purpose" in McCleskey's case.[146]

Essential to each of the Court's arguments is the nature and role of the decisionmaker. Unlike legislative bodies or courts, jurors and prosecutors are in a unique position where public policy dictates that the motivations of their decisions remain theirs and theirs alone. McCleskey's challenge did not fail because a study cannot be evidence of discriminatory intent, nor did it fail because a demonstration of discriminatory effect is irrelevant to show discriminatory intent. "Despite the majority's broad language, the brief holding of the Court was much narrower:" his challenge failed because juries and prosecutors make decisions that are tailored to the specific facts at hand, which the law affords great discretion. [147]

It is only because McCleskey could not offer a study to show that *his* jury was motivated by a discriminatory purpose that he did not prevail.[148]

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[140] *Id.* at 294.

[141] *Id.*

[142] *Id.* at 296.

[143] *Id.* (quoting Chicago, B. & Q. R. Co. v. Babcock, 204 U.S. 585, 593 (1907) (alteration in original)).

[144] *McCleskey*, 481 U.S. at 296 (citation omitted).

[145] *Id.* at 297.

[146] *Id.*

[147] Steven F. Shatz, Terry Dalton, *Challenging the Death Penalty with Statistics: Furman, McCleskey, and A Single County Case Study*, 34 CARDOZO L. REV. 1227, 1238 (2013).

[148] *Id.* at 294 ("Each jury is unique in its composition, and the Constitution requires that

McCleskey, then, at most stands for the proposition that when the decisionmaker is given nearly total discretion, general statistics may not by themselves sufficiently prove that said decisionmaker acted with discriminatory intent.

C. THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE

When faced with a statute subject to two possible interpretations, one of which has constitutional implications, the court considering the statute should adopt the interpretation that avoids those constitutional issues.[149] This is one of the many features of the doctrine of constitutional avoidance. Courts can similarly avoid constitutional issues in how they choose which legal issues to consider in deciding a case. [150] However, the cases with which this Comment is concerned present situations where a text is susceptible to multiple meanings, one of which compels consideration of constitutional issues.

The text of a statute can sometimes have more than one possible meaning.[151] It has been long settled that "if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so."[152] Courts must choose the interpretation of an act that "save[s] the act."[153]

Constitutional avoidance can be thought of as a "substantive cannon of interpretation."[154] Rather than strictly being a cannon of textual interpretation, the constitutional avoidance cannon "typically focus[es] on the underlying values the cannon serves."[155] The cannon functions as a means of giving statutes their intended meanings; allowing "courts to refrain from striking down statutes full stop, functioning as 'a means of giving effect to congressional intent, not of subverting it.'"[156] Within the doctrine, the court

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its decision rest on consideration of innumerable factors that vary according to the characteristics of the individual defendant and the facts of the particular capital offense."). *See also* John D. Bessler, *Tinkering Around the Edges: The Supreme Court's Death Penalty Jurisprudence*, 49 AM. CRIM. L. REV. 1913, 1916-17 (2012).

[149] Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2593 (2012).

[150] *See* Richard L. Hasen*, Constitutional Avoidance and Anti-Avoidance by the Roberts Court,* 2009 SUP. CT. REV. 181, 203 (2009).

[151] *Id.* ("To take a familiar example, a law that reads 'no vehicles in the park' might, or might not, ban bicycles in the park.").

[152] *Id.*

[153] Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J., concurring).

[154] Gilbert Lee, *How Many Avoidance Canons Are There After* Clark v. Martinez*?*, 10 U. PA. J. CONST. L. 193, 198 (2007).

[155] *Id.* (citations omitted).

[156] *Id.* at 198-99 (quoting Clark v. Martinez, 543 U.S. 371, 382 (2005)).

assumes that Congress "intends to legislate within constitutional bounds," thus binding the court "interpret the legislature's work in any way that will result in its validation."[157]

There is no requirement that the interpretation that avoids the constitutional violation is the most natural one, "but only whether it is a 'fairly possible' one."[158] Constitutional avoidance "dictates that judges refrain from wielding the power of judicial review if there is a statutory construction available to avoid doing so."[159] In fact, "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."[160] Thus, in considering how to interpret a particular statute, courts are obliged to choose interpretations of the statute that avoid constitutional issues or doubts.

When analyzing whether the original *Blewett* panel correctly invoked this doctrine, there are two questions that must be asked: (1) Is the FSA susceptible to multiple interpretations?[161] and (2) Is there a "fairly possible"[162] interpretation that avoids "grave and doubtful constitutional questions?"[163]

III. APPLYING THE JURISPRUDENCE TO THE *BLEWETT* DECISION

The original *Blewett* panel held that the application of the mandatory minimums imposed by the Drug Act violated the equal protection principles of the Fifth Amendment.[164] The court, as a state actor, is compelled to avoid the maintenance or legal effectuation of a discriminatory regime. As such, the court may not construct a statute so that it perpetuates such a discriminatory regime. With this position in mind the original *Blewett* panel reasoned that the discriminatory effect of the Drug Act's sentencing regime coupled with the purpose of and statements contemporaneous to the passage of the FSA mandated that the court interpret the FSA so that it would apply retroactively.[165]

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[157] William K. Kelley, *Avoiding Constitutional Questions As A Three-Branch Problem*, 86 CORNELL L. REV. 831, 844 (2001).

[158] *Sebelius*, 132 S. Ct. at 2594 (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)).

[159] *See* Kelley, *supra* note 157, at 845.

[160] Hooper v. California, 155 U.S. 648, 657 (1895).

[161] *Id.* at 384-85.

[162] *Sebelius*, 132 S. Ct. at 2594 (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)).

[163] United States ex rel. Attorney Gen. v. Del. & Hudson Co., 213 U.S. 366, 408 (1909).

[164] United States v. Blewett, 719 F.3d 482, 487 (6th Cir. 2013).

[165] *Id.*

A. OBLIGATIONS OF THE COURT AS A STATE ACTOR

The court in *Blewett* correctly understood its obligation under the equal protection principles of the Fifth Amendment. The judiciary is not protected from constitutional violations merely because it enforces the laws offered by the legislature or even when it gives legal effect to private action.[166] The dissent in *Blewett* does not offer any explicit criticism of the majority's use of *Shelley v. Kraemer*; however, others have argued that the conclusion offered by the Court is illogical.[167]

These critics argue that the logic of the Court would mean that once it becomes known that a law has a racially disparate impact, the maintenance of that law would be transformed into intentional discrimination.[168] According to this argument, such a conclusion is at odds with equal protection jurisprudence that permits racially disparate impacts, but not racially disparate treatment.[169]

However, this argument fails in two respects. First, it assumes that courts following the original *Blewett* panel would treat all disparate impact claims similarly. These critics fail to acknowledge the severity of the impact the Court wishes to avoid, namely, statistics that just barely fail to reach the requirements of showing an automatic inference of racially discriminatory purpose.[170] Second, in *Shelley* the Court acknowledged that the judicial maintenance of a discriminatory regime violated equal protection. In that case, the Court's argument is that the maintenance, the legal empowering, of a discriminatory act constitutes a violation of equal protection.[171] While it is true that in *Shelley* the act that would be given effect was, self-evidently, an act of pure intentional discrimination,[172] that does not change the fact that certain consequences of a judicial decision ought to give rise to equal protection considerations.

It is certainly consistent with modern equal protection jurisprudence that a pattern of discrimination and discriminatory effects, coupled with legislative history and other factors, may give rise to an inference of intentional discrimination, or at least that a continuance of such a regime

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166 Shelley v. Kraemer, 334 U.S. 1, 15–16 (1948).

167 *See supra* note 60.

168 Larkin, *supra* note 44, at 254; Whelan, *supra* note 60.

169 *See, e.g.,* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979).

170 United States v. Blewett, 719 F.3d 482, 487 (6th Cir. 2013) ("These alarming numbers are not unlike the Supreme Court's early cases of facially neutral laws creating an overwhelmingly disparate result.") (citing Yick Wo v. Hopkins, 118 U.S. 356 (1886)).

171 *Shelley*, 334 U.S. at 15–16.

172 *Id.* at 7–8. (The Court invalidated a racial restrictive covenant that, on its face, sought to exclude non-whites from the neighborhood).

could constitute purposeful discrimination.[173] Thus, insofar as these criticisms discredit the role of the judiciary in engaging in intentional discrimination as a state actor, they are not consistent with case law. Courts are barred by the Constitution from giving legal effect to discrimination.[174]

B. THE REQUIREMENT OF INTENT

The original *Blewett* panel correctly demonstrated that the retroactive application of the FSA was mandated by the Drug Act's racially disparate impact coupled with the fact Congress acknowledged and sought to rectify this impact in passing the FSA. The *Blewett* court gave two arguments analyzing why the failure to retroactively apply the FSA would constitute intentional discrimination for the purposes of equal protection. First, the court highlighted the discriminatory effect of the old 100:1 sentencing ratio. More specifically, the court highlighted the astonishing statistics demonstrating how the old sentencing ratio overwhelmingly disadvantaged African-Americans. Of particular import was that under the 100:1 sentencing ratio, 92.7% of the defendants in crack cases were non-white,[175] that in between 1988 and 1995, *no* whites were prosecuted under some of America's biggest cities' crack laws,[176] and that the United States Sentencing Commission routinely, and often unanimously, suggested during the reign of the 100:1 sentencing ratio that Congress change the ratio in order to avoid the "primary cause of the growing disparity between sentences for Black and White federal defendants."[177] According to the court, the continuation of such discriminatory effects would be "intentional subjugation or [a] discriminatory purpose case."[178] Put simply, the panel indicated it would be intentional discrimination for it to force the *Blewett* defendants to continue their pre-FSA sentence with the facts we know now. The court acknowledged that if it "continue[d] now with a construction of the statute that perpetuates the discrimination, there is no longer any defense that the discrimination is unintentional."[179]

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[173] *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–68 (1977).

[174] *See Shelley*, 334 U.S. at 15-16.

[175] *Blewett*, 719 F.3d. at 487 (citing UNITED STATES SENT'G COMM'N, 2011 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.34 (2011)).

[176] *Id.* (citation omitted).

[177] *Id.* at 487–88 (quoting UNITED STATES SENT'G COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY, at Chapter 7D (Feb. 1995)).

[178] *Id.* at 488.

[179] *Id.*

The dissent in *Blewett* argued that the court's holding was barred by the Supreme Court's decisions in *Feeney* and *McCleskey.* As discussed above, both of these cases limit the ways in which a court can consider disparate impact in finding intentional discrimination. However, neither of these cases invalidates the reasons offered by the majority.

First, the *Feeney* decision does not make disparate impact issues disappear. In fact, the Court in *Feeney* acknowledges that when an otherwise neutral statute has a discriminatory impact that is unexplainable, then such effect may give rise to the inference of intentional discrimination.[180] The *Feeney* decision only holds that awareness of possible disparate impact does not, on its own, demonstrate intentional discrimination for the purposes of equal protection.[181] The majority in *Blewett,* however, offers more than just an awareness of the discriminatory consequences;[182] it chronicles nearly two decades of unexplainable discriminatory effects.[183]

Nor does *McCleskey* invalidate the original *Blewett* majority's finding of intentional discrimination. The Supreme Court's decision to refuse the data offered in *McCleskey* was not evidence of an aversion to statistics. Rather, the Court was concerned that general statistics offer little insight into particular decisions made by juries and prosecutors.[184] Of particular concern for the Court was that the statistics offered by *McCleskey* did not show that *his* jury or *his* prosecutor acted with discriminatory intent.[185] However, the *Blewett* court correctly argued that crack sentencing is different from the individual and particular considerations given in death penalty sentencing. In crack sentencing, "the defendant's independent characteristics do not factor into the equation, and the decisionmaker's choice is a discretionless mandatory minimum."[186] In crack sentencing, the charge will be "based on an objectively verifiable quantity of crack, and the court will impose a sentence no lower than that mandated by Congress."[187] Therefore, unlike the decisions in *McCleskey,* where discretion was the central feature of the

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[180] Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 275 (1979).

[181] *Id.* at 279.

[182] The court does, however, show that over the course of several years Congress refused the advice of the United States Sentencing Commission to reduce the 100:1 sentencing ratio because of its unnecessary, discriminatory effect. *Blewett*, 719 F.3d at 487–88.

[183] *See id*.

[184] McCleskey v. Kemp, 481 U.S. 279, 293–96 (1987).

[185] *Id.* at 297.

[186] *Blewett*, 719 F.3d at 489.

[187] *Id.* (citing David A. Sklansky, *Cocaine, Race, and Equal Protection,* 47 STAN. L. REV. 1283, 1316-18 (1995)).

sentence, the types of decisions in crack sentencing are so mechanical that sentencing is merely the direct application of the law.

It is true that the court must show more than disparate impact to give rise to the inference that intentional discrimination is at work.[188] This is especially true since no other circuit court has ever held that the old 100:1 sentencing regime violated equal protection despite its discriminatory effect.[189]

The original *Blewett* panel, however, does offer more. What makes the *Blewett* decision different from previous decisions permitting the 100:1 sentencing ratio is that none of those prior cases addressed the equal protection issue following the passage of the FSA. The legislative history of the FSA, along with statements made by the FSA's proponents, evidence Congress's determination that the 100:1 ratio constituted impermissible discrimination.

It is without question what the purpose of the FSA was. The FSA was an attempt to remedy the race-based disparity created by the old sentencing ratio. Given that the main criticism offered against the majority in *Blewett* is that it relies on a finding of disparate impact, it is important to chronicle all of the statements made by the law's proponents as well as other influential lawmakers along with the purpose of the FSA itself.

The FSA was adopted "because the public had come to understand sentences embodying the 100:1 ratio as reflecting unjustified race-based differences."[190] In fact, the preamble to the law signifies itself as "[a]n Act to restore fairness to Federal cocaine sentencing."[191] The Chairman of the Senate Judiciary Committee, Senator Patrick Leahy, when reflecting on the purpose of the FSA, stated that the former 100:1 ratio is "one of the most notorious symbols of racial discrimination in the modern criminal justice system."[192]

Congress acknowledged that the basis of the old sentencing regime was either misplaced or simply incorrect. Senator Dick Durbin, one of the FSA's sponsors, quoted Vice President Joe Biden as saying that "[e]ach of the myths upon which we based the disparity has since been dispelled or altered."[193] Representative Robert C. Scott, then-Chairman of the House Judiciary

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[188] Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

[189] *See, e.g.*, United States v. Clary, 34 F.3d 709 (8th Cir. 1994). *See also* LaJuana Davis, *Rock, Powder, Sentencing—Making Disparate Impact Evidence Relevant in Crack Cocaine Sentencing,* 14 J. GENDER RACE & JUST. 375, 397 (2011).

[190] Dorsey v. United States, 132 S. Ct. 2321, 2328 (2012).

[191] Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010).

[192] 156 Cong. Rec. S1683 (daily ed. Mar. 17, 2010).

[193] 155 Cong. Rec. S10491 (daily ed. Oct. 15, 2009).

Subcommittee on Crime, Terrorism and Homeland Security, stated that "[w]e are not blaming anybody for what happened in 1986, but we have had years of experience and have determined that there is no justification for the 100-to-1 ratio."[194] There was even acknowledgement of just how arbitrary the 100:1 sentencing ratio was. Representative Daniel E. Lungren recalled that "[Congress] initially came out of committee with a 20-to-1 ratio. By the time we finished on the floor, it was 100-to-1. *We didn't really have an evidentiary basis for it,* but that's what we did, thinking we were doing the right thing at the time."[195]

Finally, Congress acknowledged, with very precise language, how the old sentencing regime ran contrary to the equal protection principles of the Constitution. Senator Patrick Leahy argued that "[t]he racial imbalance that has resulted from the cocaine sentencing disparity disparages the Constitution's promise of equal treatment for all Americans."[196] The House Majority Whip at the time, Representative James E. Clyburn, stated that

> [t]he current drug sentencing policy is the single greatest cause of the record levels of incarceration in our country. One in every thirty-one Americans is in prison or on parole or on probation, including one in eleven African-Americans. This is unjust and runs contrary to our fundamental principle of equal protection under the law.[197]

Representative Steny Hoyer put it simply: "The 100-to-1 disparity is counterproductive and unjust."[198]

There was even acknowledgement that the FSA would repeal the existing, unjust 100:1 ratio. Senator Richard Durbin argued that

> [t]his is the first time the Senate Judiciary Committee has ever reported a bill to reduce the crack-powder disparity, and if this bill is enacted into law, it will be the first time since 1970-40 years ago that Congress has *repealed a mandatory minimum sentence.* Every day that passes without taking action to solve this problem is another day that people are being sentenced under a law that virtually everyone agrees is unjust. If this bill is enacted into law, it will *immediately* ensure that every year, thousands of people are treated more fairly in our criminal justice system.[199]

In fact, in a letter written to the Honorable Patti B. Saris of the United State Sentencing Commission, Senators Patrick Leahy, Richard Durbin, Al Franken and Christopher Coons asked the Commission to apply the FSA retroactively.[200] In that letter, the Senators argued that to disallow retroactive

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[194] 156 Cong. Rec. H6202 (daily ed. July 28, 2010).

[195] *Id.* (emphasis added).

[196] 156 Cong. Rec. S1682 (daily ed. Mar. 17, 2010).

[197] 156 Cong. Rec. H6198 (daily ed. July 28, 2010).

[198] 156 Cong. Rec. H6203 (daily ed. July 28, 2010).

[199] 156 Cong. Rec. S1681 (daily ed. Mar. 17, 2010) (emphasis added).

[200] *See* Letter from Patrick Leahy, U.S. Sen., Richard Durbin, U.S. Sen., Al Franken, U.S.

application of the FSA would "be entirely inconsistent with the primary purposes of the 2011 Amendment and the Fair Sentencing Act: *reducing racial disparities in drug sentencing,* increasing trust in the justice system and focusing limited resources on serious offenders."[201] They directed that the Commission apply the FSA retroactively to "ensure that individuals in our federal prisons are not serving disproportionate and racially disparate sentences because of the date of their sentencing."[202]

Amid these statements professing the purpose of the FSA, acknowledging the arbitrariness of the old sentencing regime, and plainly stating that the old sentencing regime undermined equal protection, Congress passed the FSA. The opinion of the original *Blewett* panel, then, offered more than the disparate impact of the old sentencing regime as evidence of the "grave and doubtful constitutional questions."[203] The court offered the extensive legislative history, the most important factor when accounting for discriminatory purpose in a legislative body.[204]

In response, critics have offered three reasons for why the legislative intent behind the FSA is insufficient to show an equal protection problem with enforcing the old sentencing regime. First, they argue that if the 100:1 sentencing ratio is discriminatory, then why not the amended 18:1 sentencing ratio to make it 1:1?[205] This argument assumes that the original *Blewett* panel did not offer "a constitutionally relevant distinction between the old ratio and the new ratio" that was sufficient to justify an equal protection claim.[206] However, the majority did provide such a distinction. The majority's reliance on the legislative history of the FSA demonstrates, in great detail, how the 100:1 ratio was "the single greatest cause of the record levels of incarceration in our country."[207] Every single time the majority offered arguments of Congresspersons, each argument contained either implicit or explicit comparisons between the new and old sentencing ratio. Moreover, given just how disparate the impact of the 100:1 sentencing ratio was, it stands to reason

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Sen., and Christopher Coons, U.S. Sen., to the Honorable Patti B. Saris, U.S. Sent. Comm. (June 1, 2011) *available at* http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20110602/Durbin_Leahy_Franken_Coons_Comment.pdf.

[201] *Id.* (emphasis added).

[202] *Id.*

[203] United States ex rel. Attorney Gen. v. Del. & Hudson Co., 213 U.S. 366, 408 (1909).

[204] Vill. of Arlington Heights v. Metro. Hous. Corp., 429 U.S. 252, 265–68 (1977) (noting that legislative history is "highly relevant" where every other factor is only considered "relevant").

[205] United States v. Blewett, 719 F.3d 482, 496 (6th Cir. 2013) (Gilman, J., dissenting).

[206] *Id.*

[207] 156 Cong. Rec. H6198 (daily ed. July 28, 2010).

that reducing the effect of that impact by more than 80% would do more than enough to demonstrate how the new ratio avoids violating equal protection.

What's more, even if it were true that the 18:1 sentencing ratio was also discriminatory, it is unclear why that fact would lead one to conclude that the clearly more discriminatory 100:1 ratio should still be applied. What is relevant is that Congress acknowledged the folly of the 100:1 ratio when it implemented the new 18:1 ratio. The fact that this explicit comparison exists in the congressional record is sufficient acknowledgment that the old minimums were discriminatory and that new minimums were less discriminatory and less onerous.

The second criticism offered is that the original *Blewett* panel misunderstood how legislative intent is treated within equal protection analysis because it held that Congress acted with discriminatory intent through an act of recklessness or negligence-failing to make the new minimums retroactive.[208] This argument relies on the assumption that the *Blewett* panel considered Congress's failure to pass a law like the FSA for twenty-four years as the equal protection problem in the case; that Congress's failure to act violates the Constitution.

This argument fails on multiple fronts. First, it mischaracterizes the argument of the *Blewett* majority. The original *Blewett* panel does not argue that Congress acted with discriminatory purpose or negligence in 2010. Rather the *Blewett* majority discerned the intent of Congress in passing the FSA, acknowledging that it would bring grave constitutional concerns if Congress simultaneously acknowledged that past sentences under the Drug Act were discriminatory yet it continued to enforce them.[209] Second, as was explained above in Part II, a finding of discriminatory intent requires investigating numerous factors, including the legislative history and the disparate effect, if it reaches sufficient levels, of a particular law or administrative decision.[210] The reason that disparate impact cases have not shown sufficient evidence to give rise to the inference of intent is that there is often nothing more than the discriminatory impact, nothing in the legislative or administrative record detailing how discrimination took place.[211] But what could be more persuasive evidence of impermissible discrimination than Congress acknowledging that it acted wrongly? Its action in 1986 gave rise to, in the words of one of the FSA proponents, "one of the most notorious symbols of racial discrimination in the modern criminal

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[208] Larkin, *supra* note 44, at 258.

[209] *See Blewett*, 719 F.3d at 488.

[210] Vill. of Arlington Heights v. Metro. Hous. Corp., 429 U.S. 252, 266–68 (1977).

[211] *See supra* Part I.B.

justice system."[212] To prove intentional discrimination all that is necessary is to show that discrimination was a motivating factor in the decision by the governmental body.[213] The *Blewett* court did that and more by demonstrating, not just that the old sentencing ratio had a discriminatory impact, but that Congress acknowledged that impact (by stating that it was discriminatory and arbitrary), and that Congress desired that such discrimination be stopped.

Finally, the majority in *Blewett II* argue that the original *Blewett* panel's "theory of discrimination . . . makes little sense" because it assumes that Congress was "deeply concerned about racial justice when looking at future sentences," but "suddenly became racist when contemplating past sentences[.]"[214] Rather than simply stating that the original *Blewett* panel offered an incoherent reading of Congress's intent in passing the FSA, the majority in *Blewett II* attempts to close the loop. According to the *Blewett II* majority, the reason Congress was only concerned about future sentences, as opposed to those sentences already imposed, was that "[t]he government has a powerful interest in avoiding the disruption of final sentences."[215]

However, the *Blewett II* majority places far too much emphasis on the FSA's concern for the finality of sentences. Indeed, the FSA "permits a slew of similarly situated crack offenders to disrupt finality" of their respective sentences.[216] The majority and the Government agreed that those sentenced above the 100:1 ratio-presumably the more serious offender-may disrupt the finality of their sentences in seeking a reduction in line with the minimums set forth in the Drug Act.[217] Yet the majority and the Government would deny such a reduction to an individual sentenced at the 100:1 minimum-presumably a less serious offender.[218]

What's more, the *Blewett II* majority's reliance on the interest In finality begs the question: what is the finality in service of? Surely an interest in finality cannot, with that proclamation alone, avoid the system that "finality" reproduces. Quite the contrary, "[t]here is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose."[219] Indeed, finality is of little importance when it is nothing more than a "euphemism for ossifying an arbitrary and discriminatory classification."[220]

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[212] 156 Cong. Rec. S1683 (daily ed. Mar. 17, 2010) (citation omitted).

[213] *Arlington Heights*, 429 U.S. at 265–66.

[214] United States v. Blewett, 746 F.3d 647, 659 (6th Cir. 2013).

[215] *Id.* (citations omitted).

[216] *Id.* at 674 (Cole, J., dissenting).

[217] *Id.*

[218] *Id.*

[219] *Id.* (quoting Penry v. Lynaugh, 492 U.S. 302, 313-14 (1989)).

[220] Brief of *Amicus Curiae* NAACP Legal Defense and Educational Fund, Inc., in Support

It is difficult to see how "finality can support criminal convictions and overly onerous sentences based upon a premise that Congress has overwhelmingly and demonstrably acknowledged to be false as of the day it was passed."[221] Rather than "finality" answering the concerns offered by the original *Blewett* panel, such a state interest only reinforces the original panel's argument: finality cannot force the Blewetts to serve sentences that Congress acknowledged were unfair and discriminatory.

C. CONSTITUTIONAL AVOIDANCE

The original *Blewett* panel held that the constitutional avoidance doctrine compelled the court to accept an interpretation of the retroactivity of the FSA that avoids violating the equal protection principles inherent in the Fifth Amendment.[222]

In *Blewett*, the Government argued that the FSA ought not be applied retroactively because a mandatory minimum does not fit the language in the applicable statute: "sentencing range that has subsequently been lowered by the Sentencing Commission."[223] The Government argued that the Blewetts' sentences could not be retroactively lowered because they did not fall in the narrow exception provided by the Sentencing Guidelines.[224] Essentially, the Government stated that "a court may consider a defendant for a sentencing reduction only 'in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission."[225] Since the Blewetts had been sentenced based on a statutory minimum, not on a guideline range, and the Sentencing Commission did not lower their guideline range or statutory minimum, the court may not reduce their sentence.[226] Put simply, even though the FSA reduced the statutory minimum for crack offenses, since the

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of Defendants-Appellants, at 18. United States v. Blewett, 719 F.3d 482 (6th Cir. 2013) (No. 12-5226).

[221] *Blewett II* at 684 (Clay, J., dissenting).

[222] United States v. Blewett, 719 F.3d 482, 487 (6th Cir. 2013).

[223] 18 U.S.C. § 3582(c)(2) (West 2012) ("[I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission . . . the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.").

[224] Supplemental Brief for Appellee United States of America, at 6-7. United States v. Blewett, 719 F.3d 482 (6th Cir. 2013) (No. 12-5226).

[225] Brief for Appellee United States of America, at 19, United States v. Blewett, 719 F.3d 482 (6th Cir. 2013) (No. 12-5226) (quoting 18 U.S.C. § 3582(c)(2)).

[226] *Id.* at 19.

Sentencing Commission itself did not lower the sentencing range, the Blewetts cannot have their sentences reduced.

The court held that the Government's interpretation of the FSA ought to be rejected given that it would result in a violation of equal protection as explained above.[227]

First, the *Blewett* court analyzed whether the language and purpose of the FSA would, by itself, justify retroactivity even without considering constitutional issues.[228] The analysis provided by the court gives more than the "fairly possible"[229] reading of the statute required to activate the doctrine of constitutional avoidance.

In the FSA Congress sought to reduce crack sentences by increasing the drug amounts "triggering mandatory minimums for crack offenses from five grams to twenty-eight grams in respect to the five-year minimum."[230]

In the face of the Government's interpretation of the statute, the *Blewett* panel favored the less constitutionally problematic interpretation offered by the Blewetts: that statutory minimums condition and limit the guideline range, so when the statutory minimum is reduced, then the guideline is also reduced.[231] If the sentencing range offered to the defendants is the main issue, then nothing could be more relevant than the mandatory minimums that apply to that defendant.[232] Mandatory minimums and maximums provide the "bookends" for the guideline range.[233] The Sentencing Commission instructs judges to view mandatory minimums within the context of the suggested guideline range, allowing the applicable guideline range to condition minimum sentencing.[234] As an example, "if a defendant's guideline range is fifty to seventy months with a statutory minimum of sixty months," the actual range is "sixty to seventy months."[235] If the statutory minimum changes and takes it out of the offender's guideline range, then the range has been lowered. This contradicts the Government's argument, since the Government treats the

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[227] *Blewett,* 719 F.3d at 490.

[228] *Id.* at 491.

[229] Crowell v. Benson, 285 U.S. 22, 62 (1932).

[230] *Blewett*, 719 F.3d at 491 (quoting Dorsey v. United States, 132 S. Ct. 2321, 2329 (2012)); *see also* Fair Sentencing Act of 2010, Pub. L. No. 111–220, 124 Stat 2372 (2010).

[231] Brief for Appellants Cornelius Demorris Blewett and Jarreous Jamone Blewitt, at 3-5, United States v. Blewett, 719 F.3d 482 (6th Cir. 2013) (No. 12-5226).

[232] *Blewett*, 719 F.3d at 491 ("The mandatory minimums and maximums are an integral part of and gave rise to the sentencing guideline ranges.").

[233] *Id.*

[234] U.S.S.G. § 5G1.1(b) (2013) ("Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence.").

[235] *Blewett*, 719 F.3d at 492.

statutory minimums and the guideline ranges as separate inquiries and not working in tandem. The revised crack guidelines are therefore mandated by the new mandatory minimums. The mandatory minimum for crack cocaine was lowered and, therefore, the Blewetts' guideline range was also lowered.

Moreover, the original *Blewett* panel's rationale can be understood by looking to the Supreme Court's decision in *Dorsey*.[236] In finding that the FSA's 18:1 sentencing ratio ought to apply to those offenders whose offenses predated the act, but whose sentences postdated the act, the Court in *Dorsey* offered a series of considerations finding that the statute pointed "*clearly* in that direction."[237]

First, the Supreme Court noted that applying the old sentencing regime to those offenders whose offenses predated the act, but whose sentences postdated the act, would "create disparities of a kind that Congress enacted the Sentencing Reform Act and the Fair Sentencing Act to prevent."[238] In so finding, the Court considered the sentencing outcomes of two hypothetical individuals with the same number of prior offenses who each engaged in the same criminal conduct involving the same amount of crack.[239] Prior to the enactment, an offender with five grams of crack would be subject to a mandatory five-year minimum sentence, whereas the same offender, sentenced after the enactment of the FSA, would be subject to a guideline range of twenty-one to twenty-seven months.[240]

The *Blewett* panel also recognized that failing to apply the FSA retroactively would lead to the sort of disparate results Congress was intending to avoid. Under the argument offered by the Government, the offenders in *Blewett* would "remain in prison for ten years when under the new guidelines they would be subject to no minimum at all."[241] Even more problematic, under the Government's argument "major drug kingpins" would be given the "greatest benefit of retroactivity because their amended guideline range is above the mandatory minimum"[242] while offenders like the Blewetts would not receive the benefits of the FSA because they were

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[236] Dorsey v. United States, 132 S. Ct. 2321 (2012).

[237] *Id.* at 2332 (emphasis added).

[238] *Id.* at 2333.

[239] *Id.*

[240] *Id.*

[241] United States v. Blewett, 719 F.3d 482, 492 (6th Cir. 2013).

[242] *Id.* These hypothetical offenders would not have been sentenced based on the statutory minimum because they possessed greater amounts of crack. Since they were not sentenced based on the statutory minimum of the Drug Act, these offenders would have been sentenced within the Sentencing Guideline ranges, meaning that their guidelines would likely have been "lowered" within the interpretation of the guidelines offered by the government.

charged based on the mandatory minimum.[243] Such a reading of the FSA would hardly eliminate the unfairness Congress attempted to remedy with the passage of the act.[244]

Critics, however, claimed that the original *Blewett* panel either misstated or misused the doctrine of constitutional avoidance. The dissent's primary argument in *Blewett* was that the panel's reading of the FSA and revised Sentencing Guidelines was precluded by the Sixth Circuit's decision in *United States v. Hammond*.[245] In *Hammond,* the court interpreted the FSA to not apply retroactively.[246] Specifically, the court interpreted the phrase "sentencing range"[247] within the Sentencing Guidelines differently than the original *Blewett* panel.[248] The dissent argued that, given this contrary reading by another Sixth Circuit panel, the majority falsely invoked the constitutional avoidance doctrine since there were not two possible interpretations.[249] In essence, the dissent claims that the *Hammond* decision is binding precedent on how the court could interpret the sentencing guidelines. With that binding precedent, there are not two different interpretations to choose from.[250]

While it is true that for the doctrine to be invoked there must be at least two possible interpretations of the statute, one cannot foreclose an interpretation simply because the issue has been decided by another court.[251] The court must only find a "fairly possible" reading that clears constitutional muster, not necessarily the most natural one.[252] A court may decide that a less-than-perfect statute is sufficient in order to avoid a constitutional issue. It is quite possible that the reading offered by the dissent and the *Hammond* court is the most natural reading or even the best reading, but that is not what the case law requires when attempting to avoid a constitutional issue. For example, the Supreme Court in *National Federation of Independent Business v. Sebelius* upheld the individual healthcare mandate under Congress's taxing

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[243] *Id.* at 492.

[244] The preamble of the act is one sentence: "To restore fairness to Federal cocaine sentencing." Fair Sentencing Act of 2010, Pub. L. No. 111–220, 124 Stat 2372 (2010).

[245] *See Blewett*, 719 F.3d at 494–98 (Gilman, J., dissenting) (citing United States v. Hammond, 712 F.3d 333 (6th Cir. 2013)).

[246] United States v. Hammond, 712 F.3d 333 (6th Cir. 2013).

[247] *See* 18 U.S.C. § 3582(c)(2) (2012).

[248] *Hammond*, 712 F.3d at 335.

[249] United States v. Blewett, 719 F.3d 482, 495 (2013) (Gilman, J., dissenting).

[250] *Id.* (citation omitted).

[251] *See* Green Party of Tenn. v. Hargett, 700 F.3d 816, 825 (6th Cir. 2012) ("Federal courts must construe challenged state statutes, whenever possible, so as 'to avoid constitutional difficulty.'") (citation omitted).

[252] Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2594 (2012) (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)).

power.[253] There, Congress labeled the mandate as a "penalty" within the Affordable Care Act. The Court has held in the past that Congress does not have the power to *penalize* through its taxing power.[254] Central to the majority's argument was that the most natural reading, one that merely reads the term as it is, does not bind the Court if such a reading would cause a violation of the Constitution.[255]

Therefore, pointing out that there is a better reading of the statutory provision is not a sufficient criticism of the *Blewett* majority's interpretation. This is especially true since the court in *Hammond* was not faced with a constitutional challenge to the application of the Drug Act's mandatory minimums and the court did not raise the issue themselves. Here, the court did as the cannon of constitutional avoidance instructed. The court gave "effect to congressional intent"[256] by interpreting the FSA so that the discriminatory effects of the Drug Act could be avoided.

CONCLUSION

In April 2014, the Obama Administration took a step in the right direction by announcing new rules to provide clemency for many of the offenders that continued to serve sentences under the old 100:1 minimums.[257] However, even after the enactment of these new rules, thousands of offenders still remain in prison based on the old, pre-FSA sentencing guidelines.[258] Indeed, although President Obama concluded his presidency "having granted clemency to more people convicted of federal crimes than any chief executive in 64 years,"[259] the Trump Administration is likely to take a harder

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[253] Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. at 2594.

[254] Bailey v. Drexel Furniture Co., 259 U.S. 20, 36–37 (1922).

[255] *Sebelius*, 132 S. Ct. at 2594–95.

[256] Clark v. Martinez, 543 U.S. 371, 382 (2005); *see also* Harvey Gee, *Striving for Equal Justice: Applying the Fair Sentencing Act of 2010 Retroactively,* 49 WAKE FOREST L. REV. 207, 227 (2014) ("The history, purpose, and text of the FSA all demonstrate that it was intended to apply to 18 U.S.C. § 3582(c)(2) proceedings commenced after its enactment.").

[257] *See* Josh Gerstein, *Obama Drug Clemency Guidelines Issued,* POLITICO, (April 23, 2014, 9:40 AM), http://www.politico.com/blogs/under-the-radar/2014/04/obama-drug-clemency-guidelines-issued-187266.html, *archived at* http://perma.cc/TT8H-W8VF.

[258] *See* Sari Horwitz, *Justice Department Prepares for Clemency Requests from Thousands of Inmates,* THE WASHINGTON POST (April 21, 2014), http://www.washingtonpost.com/world/national-security/justice-department-prepares-for-clemency-requests-from-thousands-of-inmates/2014/04/21/43237688-c964-11e3-a75e-463587891b57_story.html, *archived at* http://perma.cc/3LWA-YPZT.

[259] *See* John Gramlich & Kristen Bialik, *Obama used clemency power more often than any president since Truman*, PEW RESEARCH CENTER (January 20, 2017), http://www.pewresearch.org/fact-tank/2017/01/20/obama-used-more-clemency-power/.

line on issues of criminal enforcement.[260]

The original *Blewett* panel provided a novel solution to a novel issue. In normal equal protection cases, the state or federal government explicitly discriminates by way of categorizing the individuals against whom an act will apply, or an act is explicitly adopted with discriminatory purpose. The issue considered in *Blewett* concerns a variety of factors that, if taken alone, may not rise to the level of an equal protection violation. Courts have found that Congress did not have the discriminatory intent sufficient to violate equal protection when it passed the Anti-Drug Abuse Act of 1986, despite evidence that discrimination could have been at work. Twenty-four years of the Drug Act's disastrous consequences gave rise to even more challenges on the basis that the Drug Act had a discriminatory effect, but this effect alone did not rise to the level of an equal protection violation. And even when Congress attempted to remedy more than two decades worth of discrimination, it did not do so in a way that, based on text alone, would overturn the sentences of those that Congress otherwise acknowledged were wrongly sentenced. Only when all these factors coalesced could a valid constitutional argument be made.

It should be further noted that the logic of the *Blewett* decision has the potential to broaden the way equal protection is treated. Indeed, even while writing in concurrence with the majority in *Blewett II,* Judge Karen Nelson Moore, explained that "rather than protecting our citizens, the [Drug Act] has led to the mass incarceration of African-American men and has bred distrust of law enforcement in the larger African-American community. It is time that the federal judiciary determines again whether the Constitution abides such actions."[261]

Few people could reasonably argue that the 100:1 sentencing ratio for crack made sense. The effect on the African-American community is not and was not reasonably justified. Despite this clear indication of discrimination, it was never struck down as violating equal protection because there was insufficient evidence of discriminatory intent, largely because the standard for intent creates a high threshold. The United States has a "long history of facially race-neutral laws targeting African-Americans."[262] It is difficult to

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[260] *See* Matt Apuzzo, *After Obama Push for Clemency, Hints of Reversal Likely to Come,* New York Times (Nov. 22, 2016), https://www.nytimes.com/2016/11/22/us/politics/obama-commutations-criminal-justice-trump.html.

[261] United States v. Blewett, 746 F.3d 647, 668 (6th Cir. 2013) (Moore, J., concurring).

[262] Brief of *Amicus Curiae* NAACP Legal Defense and Educational Fund, Inc., in Support of Defendants-Appellants, at 17-18. United States v. Blewett, 719 F.3d 482 (6th Cir. 2013) (No. 12-5226) (citing Douglas A. Blackmon, *Slavery By Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* 53 (2008)).

argue that the Drug Act was not an example of this shameful history. It was not until Congress acknowledged the widely held view that the old sentencing ratio exploited and accelerated the Drug War's effect on the African-American community that the 100:1 ratio could finally be put to rest. It was not until Congress explained why the old ratio was unjustified and discriminatory that a court could constitutionally find it to be in violation of equal protection.

The *Blewett* court correctly identified the issues involved. The FSA is susceptible to multiple, fair interpretations. One of those interpretations, the one adopted by the original panel, avoids constitutional questions posed by applying the mandatory minimums of the Drug Act following the passage of the FSA. If the FSA were to be read in any other way, and the court had to uphold sentences imposed under the old regime, the court would have to give legal effect to discrimination, something that courts are prohibited by the Constitution from doing. The discrimination was not just evidenced by the overwhelming, persuasive statistics of how discriminatory the old crack sentencing ratio was, but also by the statements of Congresspersons when the FSA was enacted. Congress intended to put an end to the effect of the old, arbitrary and discriminatory sentencing ratio. The original *Blewett* panel endeavored to ensure that the statute realized its intended purpose.