Center for Individual Rights: 35th Anniversary Retrospective

Table of Contents

BY SUMMIT SARKAR

Abstract

CIR was established in 1989 with a simple principle in mind: the nation's Founders developed a capable, balanced system of government where individual rights were inviolable: freedom of speech and religion, and eventually equal protection under the law. But these sacrosanct rights were routinely flouted, most notably on college campuses across the nation. Something needed to be done.

CIR represented both students and professors, ensuring that prejudiced administrators could not discriminate against student organizations and punish faculty for expressing their beliefs on campuses–historically bastions of debate and discussion. This culminated in *Rosenberger v. University of Virginia* (1995), remaining a bedrock of First Amendment jurisprudence even today.

CIR then became the preeminent public interest law firm in the country in challenging affirmative action policies, making national headlines in *Hopwood v. Texas* (1995), the first successful legal challenge to affirmative action in eighteen years. In *Grutter v. Bollinger* (2003), CIR's sympathetic plaintiffs and principled viewpoints resonated with Americans, from *CNN Crossfire* to *The Oprah Winfrey Show*, eventually reaching the Supreme Court. Despite a defeat in *Grutter*, CIR's legal arguments were ultimately vindicated twenty years later in *SFFA v. Harvard* (2023). In the meantime, CIR threw its legal weight behind various state referendums codifying equality in the admissions process, ensuring that popular democracy prevailed, most recently in the Supreme Court victory *Schuette v. BAMN* (2014).

Between *Rosenberger* and *Grutter*, CIR was successful in *U.S. v. Morrison* (2000), limiting Congress's blatant misuse of the Commerce Clause for only the second time in sixty years. *Morrison* was CIR's greatest federalism case to date, a high-water mark due to subsequent backsliding in *Gonzales v. Raich* (2005).

CIR's recent victories have shared thematic similarities with its earlier cases. In *Davis v. Guam* (2019), CIR enabled some two-thirds of registered Guam voters to participate in a plebiscite determining their territory's future relationship with the United States, which had been functionally restricted to racially Chamorro citizens only. And in *Ultima v. USDA* (2020), CIR was successful in enjoining one of the nation's largest racially discriminatory programs for federal contracting. Finally, in *Friedrichs v. CTA* (2016), CIR built the foundations of the legal analysis used in the landmark *Janus v. AFSCME* (2017), preventing unions from collecting compelled dues from non-members, returning millions of dollars to workers' pockets and upholding their First Amendment rights.

Rosenberger v. *UVA* (1995)

As hard as it may be to believe, American universities were *even less* amenable to upholding freedom of expression and religion thirty-five years ago than they are today. Only through skillful litigation in federal courts could public interest law firms like CIR establish nationwide protection of inviolable Constitutional rights.

Ronald Rosenberger was a student at the University of Virginia when he applied for school funding for his student religious magazine, *Wide Awake*. At the time, UVA policy allowed for registered student organizations to use school funding but denied the same for student activities deemed religious.

Wide Awake went to press with non-school funding and was forced to shut down after only four publications. In July 1991, Rosenberger and his fellow founders, Robert Prince and Gregory Mourad filed suit in federal court. Eventually, the circuit court found that there *was* viewpoint discrimination, yet "for the University to subsidize its publication would…send an unmistakably clear signal that the University of Virginia supports Christian values and wishes to promote the wide promulgation of such values." CIR appealed once again, and the Supreme Court granted cert.

During the oral arguments at the Supreme Court, there were many references to a case decided just two years prior, *Lamb's Chapel v. Center Moriches Union Free School District* (1993). In *Lamb's Chapel*, the unanimous court decided that preventing a church from using school facilities outside school hours when other organizations were allowed amounted to viewpoint discrimination.

Both *Lamb's Chapel* and *Rosenberger* entailed a careful study of forum doctrine, which categorized locations into four groups: traditional public, designated public, limited, and nonpublic forums. In both cases, the contested space was a limited forum, where governments could discriminate against *types* of speech (e.g., school-related or not), but they could not exclude a religious group from the forum simply because their viewpoint was different.

In the Supreme Court majority opinion authored by Justice Kennedy, the Student Activities Fund was compared to the physical school facilities in *Lamb's Chapel*, "more in a metaphysical sense than in a spatial or geographic sense." Because the Student Activities Fund did not disburse "public funds to private entities to convey a governmental message" the University had no right to viewpoint-based discrimination.

In the lower courts, UVA argued that mandatory fees for maintaining the Student Activities Fund amounted to levying taxes on the public to establish and support specific religious

sects. The majority opinion rejected this categorization, claiming that the mandatory fees were not for the purpose of raising revenues for the university, but rather "disbursements from the fund go to private contractors for the cost of printing that which is protected under the Speech Clause of the First Amendment."

Following the Supreme Court's decision, the University of Virginia was among many higher education institutions eliminating viewpoint discrimination in their student organization funding. For example, "it took [CIR] little effort to persuade UCLA that it could not exclude a Hindu student association, which had asked for [CIR's] intercession, from *its* student activities fund." A year later, District Judge James H. Michael Jr. awarded $309,518.99 of Virginia state funds to the plaintiffs, including CIR, Covington and Burling, and Mayer, Brown and Platt.

Conservatives applauded the Court's decision, with Jay Sekulow of the American Center for Law and Justice predicting that *Rosenberger* would "propel and energize other religious liberty issues." And it *has* "energized" these issues: in *Pleasant Grove v. Summum* (2009) (another case involving the Establishment Clause), the titular municipality was permitted to erect privately donated monuments involving religious themes to its discretion, rather than be compelled to accept and erect all donations.

After *Rosenberger*, CIR co-founder Michael Greve worried that "the Court's hedges and qualifiers could mean it may decide the next public funding case the other way, especially if that case involves school vouchers." But a mere seven years later, the Supreme Court decided *Zelman v. Simmons-Harris,* "the most important ruling on religion and the schools in the 40 years since the court declared organized prayer in the public schools to be unconstitutional." In developing the five-part "private choice test," Justice Rehnquist's majority opinion noted *Rosenberger*'s role in shaping direct aid programs' constitutionality "significantly over the past two decades."

Twenty-five years after *Rosenberger*, an analogous landmark case was decided in the Supreme Court. In *Espinoza v. Montana Department of Revenue* (2020), a Department rule that excluded religiously affiliated private schools from receiving scholarship dollars earmarked for private schools was deemed unconstitutional. The rule was based on a Blaine amendment in the state constitution, which was initially intended to prevent funding Catholic schools. CIR was pleased when *Rosenberger* was cited in the majority opinion, as Chief Justice Roberts wrote that "the parties do not dispute that the scholarship program is permissible under the Establishment Clause. Nor could they." CIR has narrowed the playing field for those who flaunt the First Amendment, in turn buttressing the inalienable rights of all Americans.

U.S. v. *Morrison* (2000)

Imagine there was an unchecked mechanism in the Constitution through which the federal government could regulate the *production* and *use* of any good and service. For much of the 20th century, such an instrument existed: the wrongful interpretation of the Commerce Clause. What the Founders had created as a check on inter-state economic conflict morphed into something else altogether during the New Deal. Since its inception in 1989, CIR knew it had to tackle this hydra somehow.

In the early 1930s, the Supreme Court consistently ruled against the New Deal's extreme overreach. For instance, the Court distinguished between direct and indirect effects on interstate commerce, holding that *production* was wholly *intra*-state, while commerce was only *inter*-state following the "commencement of [products'] movement from the state." This was common-sense, originalist law. But President Roosevelt wanted otherwise. To force his patently unconstitutional policies through, he threatened to add additional justices to the Court. Not coincidentally, the Court took a 180-degree turn, suddenly abandoning decades of precedent: in the landmark case *Wickard v. Filburn* (1942), the Court established the infamous "aggregate effects" doctrine, providing a *carte blanche* for Congress to regulate virtually everything. Individual liberty was slowly but surely deprioritized, unless ambitious public-interest law firms pushed back.

The first sign of changing times was *U.S. v. Lopez* (1995), where the Court finally restrained Congress' regulation of interstate commerce for the first time in almost 60 years. The Court held that federal crimes could not be created under the Commerce Clause, since states already had jurisdiction. This reasoning would prove crucial in CIR's argument in *U.S. v. Morrison*. But at the time, it was uncertain how pivotal the Court's doctrinal shift in Commerce Clause was. A singular decision could be a rare one-off, an exception rather than the rule. CIR's work in *Morrison* ensured that American liberties were fortified, filling in the gaps that *Lopez* missed.

***

The Violence Against Women Act (VAWA) was at issue in CIR's *U.S. v. Morrison* (2000), where Congress created federal remedies for victims under the Commerce Clause. It was easy to sympathize with: violence against women was heinous, and VAWA should disincentivize such conduct, encouraging women to participate in the economy. But this federal law had no place under the Constitution, no matter how benign it appeared. The general power to police was reserved for the states–federal intrusion here was both duplicative and illegal.

Justice Scalia immediately pointed out the absurdity of VAWA: if the extremely narrow category of gender-based violence could be policed by the Federal government due to its effects on interstate commerce, why stop there? “Certainly murder, rape, robbery affect interstate commerce much more than that.” What would be left of the states’ jurisdiction?

Reaffirming this bright-line was crucial: while, for example, “anti-discrimination laws in the workplace are secure because they are seen as regulations of commercial activity”, regulating general gender-based violence is not licensed to the federal government. As CIR’s General Counsel Michael Rosman put it best: “[violence against women] is not commerce…This is interpersonal violence, the kind of thing the States have always had the exclusive province of regulating since the start of our country.” CIR finally had the luxury of an agreeable court–one that took originalist arguments more seriously.

Gratz/Grutter v. *Bollinger* (2000), *Schuette* v. *BAMN* (2014)

On March 6, 1961, President John F. Kennedy signed Executive Order No. 10925, ensuring that government contractors "take affirmative action." Despite a supposed non-discriminatory animus, affirmative action quickly devolved into group preferences and quotas, culminating in *Regents of the University of California v. Bakke* (1978), where the judgment of the Supreme Court, written by Justice Powell, "upheld the kind of affirmative action plan used by most American colleges and universities, and disallowed only the unusually mechanical."

Bakke left an immense opening for admissions officers to exploit. Racial composition of many universities remained nearly indistinguishable year-on-year, despite the discrepancies in application count and population growth of different racial groups. Quotas persisted in full force in all but name.

In the last decade of the 20th century, CIR played an outsized role in shaping the legal developments to resolve *Bakke*. First, in the Fifth Circuit case *Hopwood v. Texas* (1996), made the first successful challenge to *Bakke*, relieving millions of Americans from discrimination. In the same year, *Coalition for Economic Equity v. Wilson* (1996) upheld California's Proposition 209, prohibiting gender and racial preferences in education, contracting, and employment.

Yet opacity in higher education admissions would continue despite legal victories. As CIR co-founder Michael Greve noted, "instead of discriminating in broad daylight, UT officials will henceforth administer a discretionary process that, lo and behold, produces the same predetermined minority enrollment…UT officials have proudly said so." Neither *Hopwood* nor *Coalition for Economic Equity* found its way to the Supreme Court.

***

A year later, on the opposite end of the country, Jennifer Gratz and Barbara Grutter, applicants denied admission to University of Michigan's undergraduate college and law school, respectively, were plaintiffs in CIR's most ambitious litigation to date, becoming household names seemingly overnight. Camera crews followed Gratz around campus, and when she traveled to Cincinnati for oral arguments at the Sixth Circuit Court of Appeals, "the subject of racial preferences had generated such wide interest that the court required that observers have tickets to attend." As a political stunt, "a ton of kids" from Michigan were bused to Cincinnati by the "human rights group" BAMN, armed with counterfeit tickets. When *Gratz* and *Grutter* reached the Supreme Court for oral arguments, "there were tens of thousands of people. Streets were shut down…You could hear the protests in

the court…the chief justice paused for a second…and acknowledged what was going on outside, because it was so loud."

The pair of cases was centered around the Fourteenth Amendment's Equal Protection Clause. To what extent was diversity a compelling state interest? Was a given university's implementation of affirmative action *solely reliant* on redressing specific past discrimination borne by the university? Would the *Hopwood* model be the rule of the land, or would Justice Powell's opinion be irrefutably enshrined?

On June 23, 2003, the Supreme Court handed down the two decisions. In *Gratz*, the fixed numerical points awarded to applicants solely due to race was too banal for the Court to stomach, and the policy failed the "narrowly tailored" requirement. Nonetheless, the landmark decision in *Grutter* was a resounding blow to those who had dreamed of a fair admissions policy.

The Hopwood majority opinion was prescient when it observed that "no other Justice joined in…discussing the diversity rationale. In *Bakke,* the word 'diversity' is mentioned nowhere except in Justice Powell's single-Justice opinion." With *Grutter*, however, Justice Powell's lonesome 35-year-old opinion was brought to the front and center: "The Court endorses Justice Powell's view that student body diversity is a compelling state interest that can justify using race in university admissions."

Rather than deflate proponents of fair admissions policy, *Gratz* and *Grutter* instead reinvigorated grassroots efforts at the state level to stamp out discriminatory affirmative action policy. Jennifer Gratz, far from disillusioned, saw opportunity in Michigan's citizen initiatives. Quitting her job in California and moving back home, she spent the better part of three years devotedly championing what would become the Michigan Civil Rights Initiative, approved by voters by a 58% to 42% margin on November 7, 2006.

***

Unfortunately, this remarkable feat of democracy lacked a tidy conclusion. Rather, the day after the Initiative succeeded in poll booths across the state of Michigan, the pro-affirmative action organization BAMN filed suit in federal trial court (E.D. Michigan) alleging violation of the Fourteenth Amendment. BAMN was on the cusp of securing a delay to the amendment after a favorable District Court order, but CIR swooped in, filing an emergency appeal to the Sixth Circuit, forcing Michigan to implement the amendment immediately. CIR's rationale was simple: while the Supreme Court *permitted* race preferences as the central holding in *Grutter*, it was well within the confines of federalism for individual states to eliminate such preferences through the democratic process.

But the bitter dispute continued in state courts as well, when the University of Michigan simply refused to put the amendment into force, arguing that the amendment was unclear in what it prohibited and permitted. For all intents and purposes, the hard-fought victory was nullified. That is, until CIR filed a class action lawsuit in the Circuit Court for Washtenaw County, MI, on behalf of Eric Russell, a Michigan resident who had applied to the University of Michigan law school, who sought to have his application considered without regard to his race. Before long, the University of Michigan accepted that their arguments were untenable and agreed to change its policies to conform to the amendment.

But BAMN re-emerged once again in 2008, this time successfully appealing a District Court defeat (where the Court held that the Amendment did not violate the constitution), where the Sixth Circuit held that the amendment *did* violate the Constitution by altering the political process in a manner that disadvantages minorities–the "political process doctrine." The *en banc* Sixth Circuit then re-affirmed the doctrine and holding.

After the case made its way to the Supreme Court, Justice Kennedy, writing for the plurality of the Supreme Court, upheld the amendment, preserving the democratic process and states' rights. He described the Sixth Circuit's conclusion as "mistaken," for it misapplied the holding in *Washington v. Seattle School District No. 1* (1982), a reading with "no principled limitation."

Jennifer Gratz and Barbara Grutter finally had some closure, nearly two decades since they were denied admission at the University of Michigan. The state provided its citizens with what it had denied the pair–equal standards of admission. *Schuette v. BAMN* was cited a decade later in the landmark *SFFA v. Harvard*, overturning *Grutter* and echoing CIR's prescient arguments, nearly thirty years in the making.

Friedrichs v. *California Teachers Association* (2016)

Before 2018, every public school teacher in California had to pay union dues, regardless of their opinion of the union. In a Supreme Court case dating back to 1977, *Abood v. Detroit Board of Education* deemed "agency fees" constitutional in both the private sector *and* the public sector. The Court held that unions could require all employees, member or non-member, to pay for the union's expenses "germane to collective bargaining," but it could not require employees to pay for other expenses.

But agency fees were not trivial–often upwards of 2 percent of a new teacher's annual salary. And unions often advocated for controversial policy in their collective bargaining, notably for increased State spending and "seniority" protections, while vehemently resisting educational reform. This was best explained in CIR's cert petition to the Supreme Court: "in this era of broken municipal budgets and a national crisis in public education, it is difficult to imagine more politically charged issues than how much money cash-strapped local governments should devote to public employees, or what policies public schools should adopt to best educate children."

Even seemingly unrelated expenditures were included into agency fees: frivolous conferences and publications were anywhere between 71.3 and 100% "chargeable". Outside of "chargeable" fees, the California Teachers Association was a substantial donor to the California Democratic Party, spending nearly $102 million from 2003 to 2012. Less than a thousandth of that money went to the California Republican Party. In essence, all Californian school teachers were compelled to subsidize specific political viewpoints–a clear violation of the First Amendment.

CIR saw an opening and pounced on the opportunity. In recent years, the Supreme Court delivered two rulings weakening *Abood*: *Knox v. Service Employees Intl. Union* (2012) and *Harris v. Quinn* (2014). In the former, the Court ruled that unions must not levy special fees upon non-members on an "opt-out" basis; rather, non-members must "opt-in", expressly consenting. Unions had long maintained convoluted opt-out processes, deterring employees from solely paying the agency fee.

In the latter case, Justice Alito's majority opinion declared *Abood* "questionable" and "erroneous", explaining that "except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." Former CIR President Terry Pell welcomed the *Quinn* ruling, remarking to POLITICO that the decision "is a good sign of things to come." The right case at the right time could finally topple *Abood* entirely, past the restraint in *Knox* and *Harris*.

CIR had such a case in *Friedrichs v. California Teachers Association*, making both a free speech claim and a challenge to union opt-out rules. Because federal trial and appellate courts could not overturn *Abood*, CIR raced through the lower courts without trial and oral arguments, hoping to reach the Supreme Court as quickly as possible. Only there could *Abood* be vanquished.

The oral arguments presented by Michael Carvin, partner at Jones Day and co-counsel in *Friedrichs* went well; in an interview, he explained that "I had an opportunity to make thorough responses, which I think exemplified the point I was trying to make." Everything was poised for a 5-4 decision in CIR's favor along the court's ideological divide. Unfortunately, Justice Scalia unexpectedly passed away a month after the oral arguments and before the published decision. Thus, *Friedrichs* was decided *per curiam* 4-4, affirming the Ninth Circuit's holding without precedent. CIR or another public interest law firm would have to repeat the entire process when Justice Scalia's replacement was on the Supreme Court.

But just as CIR never gave up after its defeat in *Grutter,* CIR simply doubled its efforts after *Friedrichs*. CIR immediately found a new plaintiff in Ryan Yohn, intending to target the opt-out issue from *Friedrichs*. In the meantime, CIR filed a brief in *Janus v. AFSCME*, addressing factual claims that the union defendants would make from experience in *Friedrichs*, since *Janus* moved through lower courts without discovery.

Justice Alito's majority opinion delivered a resounding victory for proponents of individual rights. On top of ending compelled union dues, he also ended the opt-out system, unequivocally explaining that "neither an agency fee nor any other payment to the union may be deducted from a non-member's wages…unless the employee affirmatively consents to pay." Without the compelled subsidy, the nation's largest public sector unions lost up to 98% of their agency fee-payers. Millions of American employees received a greater portion of their paycheck while fortifying their First Amendment protections.

DynaLantic Corp. v. *Department of Defense* (1997), *Ultima* v. *USDA* (2023)

On July 30, 1953, President Eisenhower signed the Small Business Act into law. This created the Small Business Administration (SBA), a government agency with a seemingly admirable goal: to "aid, counsel, assist and protect, insofar as is possible, the interests of small business concerns." Yet the Administration has been controversial for decades, with a Republican-majority House attempting to eliminate the entire agency in 1996 and the Bush administration attempting to eliminate its loan program, while the Obama administration reversed these efforts, strengthening the SBA through various Congressional Acts and executive orders.

Section 8(a) of the Small Business Act has been subject to constitutional challenge since at least 1971, dating back to *Ray Baillie Trash Hauling, Inc. v. Kleppe*, where the trial court determined that because the primary criterion for Section 8(a) eligibility was "race, color or ethnic origin," yet "[t]here is no evidence that members of the 'minority' groups… have been discriminated against in the formation and operation of small business concerns by reason of race, color or ethnic origin," so "[t]he exclusion of 'whites'…except on a token basis, represents invidious discrimination against them." As a result, this amounted to violation of the plaintiffs' rights to equal protection under the Fifth and Fourteenth Amendments. In addition, the trial court also held that the SBA was statutorily unauthorized and limited to periods of emergency, among other constraints.

The Fifth Circuit reversed the decision, holding that the SBA was endowed with a broad mandate from Congress, and according to administrative law, the SBA "need not 'strike at all evils at the same time.'" The SBA had no obligation to assist every group of people immediately. Finally, the Fifth Circuit found that the plaintiffs lacked standing to constitutionally challenge Section 8(a), as they never applied to participate in the Section 8(a) program, nor did they assert membership in the government-designated groups of social or economic disadvantage; thus, "whatever the outcome of the litigation, the plaintiffs will not be directly affected." Because of how emphatically the opinion was written, any further constitutional challenge to Section 8(a) would be an uphill battle.

***

Over twenty years later, Dynalantic Corporation, a manufacturer providing training equipment to the U.S. military, sought declaratory relief and an injunction against the Department of Defense, with the goal of submitting bids that would otherwise be exclusively reserved for manufacturers participating in the Section 8(a) program. Citing *Ray Bailie* ("The facts in *Ray Baillie* bear a striking resemblance to the facts of this case"), the

District Court of D.C. denied the motion for preliminary injunction, maintaining that Dynalantic "has not demonstrated a strong likelihood of success on the merits," because of a similar standing issue à la *Ray Bailie*, but also since Congress could make findings evidencing discrimination. The Court then dismissed the entire case.

Yet the Court of Appeals handed Dynalantic a lifeline, "grant[ing] Dynalantic's motion to enjoin the [flight simulator] procurement during the pendency of the appeal." Suddenly, however, the Navy cancelled this process, legally implying that Dynalantic's case had become moot, as there was no longer controversy between it and the Department of Defense. After all, the new procurement process for the specific flight simulators would not involve any race-conscious procedure, and thus Dynalantic could equally compete for *that specific* flight simulator: the UH–1N Aircrew Procedures Trainer.

Dynalantic quickly recognized the plight facing contractors (including itself) under this new regime: the Department of Defense, "presumably can evade review by withdrawing particular procurements from the program whenever it is seriously challenged." Then Section 8(a) would persist. Soon thereafter, the D.C. Circuit Court of Appeals finally saw the brilliance of Dynalantic's argument, and why it was substantially different from that of *Ray Bailie*: "Dynalantic's injury is 'the inability to compete on an equal footing in the bidding process, not the loss of a contract.'" Thus, the lack of standing as suggested by the trial court and in the Fifth Circuit's decision in *Ray Bailie* was wrongfully determined. Similarly, the Court rejected the DOD's arguments regarding the impossibility of redressability: if the race-conscious portion of Section 8(a) were removed, then Dynalantic's impediment to fair competition would be largely removed–by definition redress.

Yet Dynalantic's battle had just begun–it would take another whopping *seventeen* years for a favorable settlement. After being remanded by the Court of Appeals in 1997, it would take ten years for Judge Sullivan (of the District Court of D.C.) to issue an extremely brief opinion denying the motions for both parties, and another five to rule that the Section 8(a) program failed to satisfy strict scrutiny, enjoining the SBA and the DOD from awarding procurements under Section 8(a) without first articulating a strong basis in evidence for doing so. After *another* two years, Judge Sullivan approved the settlement between Dynalantic and the DOD, where the defendants agreed to not to award any prime contracts in DynaLantic's industry under the SBA's Section 8(a) program for the following two years. After *that* period, the DOD would be required to provide notice to the Court if it intended to begin using the Section 8(a) program in DynaLantic's industry *and* convince the Court that it had a strong basis in evidence for reinstating the program. Finally, the DOD was required to pay Dynalantic $1 million dollars for attorney's fees and other litigation expenses.

Any outside observer would not be remiss in concluding that *Dynalantic* lacked a nationwide, landmark outcome. The scope of the settlement was limited to a singular industry, out of many that were included in the Section 8(a) program. While Dynalantic Corporation had at least a few years of fair competition, its overarching goal to prevent Section 8(a) program from harming small business had failed. It would take another decade for this dream to be realized.

***

CIR's second foray into the world of Section 8(a) began on March 4, 2020, when it filed a Complaint representing Celeste Bennett, the owner of Ultima, a small business providing administrative and technical support services to the United States government. In the Complaint, Ultima alleged that the United States Department of Agriculture (USDA) engaged in race discrimination, violating both the Fifth Amendment and 42 U.S.C.A. § 1981 (equal rights under the law).

The two parties' relationship was not always so acrimonious. For more than fifteen years, Ultima had contracted with the USDA, assisting with community outreach, technical and administrative tasks, and data collection, among other duties. This culminated in 2017, when Ultima was awarded four contracts worth $10 million each, with the option of multiple renewals. Ultima had provided exceptional services for almost two decades, and it seemed unlikely that the status quo would change. Yet in 2018, the USDA unexpectedly decided to cancel Ultima's services, electing to replace some of them with companies participating in the Section 8(a) program. As Bennett was ineligible, Ultima now had fewer potential contracts to bid on, and subsequently experienced a decline in revenue.

During discovery, both parties provided expert testimony: the USDA recruited economists Daniel Chow and Dr. Jon Wainwright, finding "statistically significant disparities facing minority-owned business enterprises in the United States." On the other hand, Ultima produced a report from yet another economist, Dr. Jonathan Guryan, who concluded that the USDA's research could not definitively conclude that the aforementioned disparities were the result of discrimination.

Despite the USDA's best efforts, Judge Clifton Corker found that Ultima had standing, relying heavily on *Vitolo v. Guzman*, explaining that "Ultima face[d] a barrier imposed by Defendants—the rebuttable presumption." This presumption was at the heart of the case, where certain minorities were automatically considered "socially disadvantaged", almost guaranteeing their Section 8(a) eligibility. Unlike the general populace, these individuals need not supply the Small Business Administration with a cohesive narrative of "chronic

and substantial disadvantage" that "negatively impacted [their] entry into, or advancement in, the business world."

The very term "rebuttable presumption" was largely ironic–"[t]here's no process for a third party to question someone's social disadvantage." Simply put, for preferred groups, this "presumption" was never "rebutted." Nor did the Small Business Administration add "socially disadvantaged" groups to their whitelist in over twenty years or remove a group for "no longer being adversely affected by the present effects of discrimination."

After the issue of standing was disposed of, two crucial arguments were contested in the parties' respective motions: whether SBA had the statutory authority to impose the rebuttable presumption in the first place, and whether the presumption survived strict scrutiny. Judge Corker denied Ultima's motion regarding the first argument: he concluded that "Congress generally granted Defendant SBA the ability to make 'determinations ... with respect to whether a group [had] been subjected to prejudice or bias'". Unfortunately, there would be no decisive curtailing of an administrative agency's expansive reach–the fight for federalism would continue in other arenas.

But the second argument was a blowout victory for Bennett, CIR, and all Americans opposing racial preferences in government funding. Judge Corker left little room for interpretation with his thorough analysis. The defendants' first red flag was their lack of goals for the 8(a) program. SBA never analyzed whether any given 8(a) beneficiary was adequately represented in its specific industry, nor did it provide any prospective instance where the remedies would no longer be necessary.

And while the Court did not "doubt the persistence of racial barriers", it determined that the *government* was not a participant in discrimination in the relevant industries. The defendants failed to prove a "legacy of discriminatory policies that would require [an 8(a)] remedy." Nor was the rebuttable presumption "narrowly tailored", being largely inflexible and unlimited in duration. All in all, Judge Corker found that the presumption violated Ultima's Fifth Amendment right to equal protection of the law. SBA was then enjoined from using the presumption in 8(a) programs.

The ramifications of the *Ultima* decision were noticed overnight (on the front page of The Washington Post, for one), but the decision was the product of almost *two decades* of CIR's cumulative efforts in the 8(a) sphere. In peeling the 8(a) onion one layer at a time, CIR was forward-looking and ambitious, restoring Americans' constitutionally protected rights, no matter how protracted the battle or how entrenched the opposition.

Davis v. *Guam* (2019)

CIR has had a rich history of challenging almost every type of racial preference in the educational and political landscapes, from university admissions in *Grutter* to government contract set-asides in *Ultima*. In 2012, CIR took on the U.S. territory of Guam, challenging their racially exclusive plebiscites.

According to the Fifteenth Amendment, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." Remarkably, even in the 21st century, U.S. states and territories have attempted to circumvent the law, restricting certain elections and plebiscites to people of designated racial groups.

Hawaii first began doing so in 1978, restricting the electoral process for trustees of the Office of Hawaiian Affairs via "blood quantum" laws, a methodical calculation of "native-ness" based on percentage of ancestors inhabiting the islands prior to 1778. Such a voting restriction was challenged and struck down in the Supreme Court in 2000 *(Rice v. Cayetano),* criticizing "the demeaning premise that citizens of a particular race are somehow more qualified than others to vote on certain matters."

Within a month of the ruling, Guam established the 2000 Plebiscite Law, subtly modifying their 1997 Plebiscite, "changing" the electorate from "Chamorro people of Guam" (evidently unconstitutional following *Rice*) to "Native Inhabitants of Guam." These "Native Inhabitants" were not explicitly determined via "blood quantum," but rather only included those with ancestors converted into American citizens by the 1950 Organic Act of Guam. Functionally, this excluded those with ancestors who were *already* American citizens, as well as those whose ancestors were not residents of Guam or born there a century prior.

Revealingly, over 99% of those who obtained citizenship through the 1950 Organic Act were racially Chamorro. In the modern day, the 2000 Plebiscite Law excluded two-thirds of Guam's registered voters from a public issue of utmost importance–the future status of the territory. This was the situation from which *Davis v. Guam* emerged.

Guam attempted to defend its position through several arguments: first, that the plebiscite was of minimal significance, and second, that the designation "Native Inhabitants of Guam" was a political classification like those enjoyed by federally recognized Indian tribes (subject to the weaker rational-basis review) as opposed to a racial classification triggering strict scrutiny. In the amicus brief filed by the Department of Justice under the Trump Administration, the first argument was rebutted. Because the Fifteenth Amendment governs "any election in which public issues are decided or public officials selected," the

plebiscite's determination of Guam's future political relationship with the United States fell squarely into that categorization.

Regarding the second argument, Judge Martha Berzon of the Ninth Circuit noted in her decision that the 1950 Organic Act was so closely associated with the express racial classification "Chamorro" that the statutes "can only be sensibly understood as a proxy for that same racial classification." In particular, she compared Guam's indirect racial classifications to a racist 19th century Oklahoma voting eligibility amendment with carveouts for "lineal descendants" of past registered voters–all of them white.

When the Supreme Court denied Guam's cert petition in 2020, CIR's victory stood in full. In a subsequent plebiscite, Guam must allow all its citizens to determine the country's future, not just a select few. Picking and choosing when and where to apply the Constitution is as disingenuous as it is illegal–as long as Guam is a territory of the United States, it must comport with the law of the land.