CIVIL PROCEDURE — CLASS ACTIONS — SOUTHERN DISTRICT OF NEW YORK CERTIFIES CLASS ACTION AGAINST CITY POLICE FOR SUSPICIONLESS STOPS AND FRISKS OF BLACKS AND LATINOS. — *Floyd v. City of New York*, 82 Fed. R. Serv. 3d (West) 833 (S.D.N.Y. 2012).

For a Court that had been besieged by calls to impeach its Chief Justice for his perceived leniency on crime,[1] the 8–1 decision in *Terry v. Ohio*[2] proved atypical.[3] In his opinion, Chief Justice Warren assented to warrantless police stops and frisks based on no more than reasonable suspicion — an intrusion the former district attorney[4] conceded "must surely be an annoying, frightening, and perhaps humiliating experience."[5] Justice Brennan privately lamented that "[i]t will not take much of this to aggravate the already white heat resentment of ghetto Negroes against the police."[6] Recently, in *Floyd v. City of New York*,[7] the Southern District of New York certified a class in a suit requesting declaratory and injunctive relief against the New York Police Department for allegedly unlawful searches and seizures targeting black and Latino residents.[8] In the Fourth Amendment debate over the proper balance between safety and liberty, advocates have argued that communities — often of color — grappling with inner-city violence are better situated to make that determination than are judges.[9] The examination of adequacy at the class certification stage offers a fresh and compelling avenue for judges to gauge the level of popular support that policing strategies draw in the communities that share in their burdens and benefits. That inquiry would not have mattered in *Floyd*, as informal and early empirical data did not reveal a minority com-

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[1] Carol S. Steiker, *Introduction* to CRIMINAL PROCEDURE STORIES, at vii, x (Carol S. Steiker ed., 2006).

[2] 392 U.S. 1 (1968).

[3] *See* Steiker, *supra* note 1, at x–xi.

[4] *See, e.g.*, John Q. Barrett, *Deciding the Stop and Frisk Cases: A Look Inside the Supreme Court's Conference*, 72 ST. JOHN'S L. REV. 749, 755 n.18 (1998).

[5] *Terry*, 392 U.S. at 25.

[6] Barrett, *supra* note 4, at 826 (quoting Letter from Justice William J. Brennan, Jr., to Chief Justice Earl Warren 2 (Mar. 14, 1968) (on file with the Library of Congress)).

[7] 82 Fed. R. Serv. 3d (West) 833 (S.D.N.Y. 2012).

[8] *Id.* at 836.

[9] *See* Brief Amicus Curiae of the Chicago Neighborhood Organizations in Support of Petitioner at *4, City of Chicago v. Morales, 527 U.S. 41 (1999) (No. 97-1121), 1998 WL 328366; Erika R. George, Recent Development, 30 HARV. C.R.-C.L. L. REV. 577, 594 (1995) ("[P]ublic housing residents should be permitted to exercise and enjoy more substantive freedom; courts must begin to allow them to act in their own interests."); *cf.* Pratt v. Chi. Hous. Auth., 848 F. Supp. 792, 796 (N.D. Ill. 1994) (noting a groundswell of support for warrantless searches in violent neighborhoods); Don Terry, *Chicago Project in Furor About Guns and the Law*, N.Y. TIMES, Apr. 7, 1994, at A12 ("Ms. Bradford, who is 32, supported the [warrantless] sweeps . . . . She said: 'Sometimes you got to sacrifice your rights to save your life.'").

munity willing to shoulder a prodigious stop-and-frisk program, but in constraining judges from even probing the matter, the doctrine itself mistakenly dismisses the opportunity to pay deference to democratic choices.

New York police stopped the city's residents and visitors — "restraining their freedom, even if only briefly" — over 2.8 million times from 2004 to 2009.[10] Over fifty percent of those stops involved black suspects, thirty percent involved Latino suspects, and ten percent involved white suspects.[11] The stop-and-frisk program first came under fire in the progenitor class action suit *Daniels v. City of New York*,[12] resolved in 2003 by a settlement requiring that the city curb the racially disparate application of the practice, in part by implementing an official policy on racial profiling, revising forms to encourage more accurate documentation, and launching regular audits.[13] The *Floyd* plaintiffs filed the instant suit in 2008, arguing that after the *Daniels* settlement expired, the city had failed to reform the challenged policy meaningfully.[14] Four black men alleged that they were improperly stopped by New York City police at least once each between 2004 and 2009, invoking the Fourth and Fourteenth Amendments' respective inconsonance with suspicionless stops and racial discrimination.[15]

On May 16, 2012, Judge Scheindlin certified the class in *Floyd*, supplying legal recourse to the hundreds of thousands of New Yorkers who "will never bring suit to vindicate their rights."[16] Ruling that the plaintiffs stand fit to represent the aggrieved class — all civilians at the wrong end of at least 170,000 stops that the court deemed facially unlawful,[17] and a subclass of black and Latino suspects together bearing eighty percent of the stops[18] — the court found certification proper

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[10] *Floyd*, 82 Fed. R. Serv. 3d (West) at 834.

[11] *Id.* at 834–35.

[12] 198 F.R.D. 409 (S.D.N.Y. 2001).

[13] *Floyd*, 82 Fed. R. Serv. 3d (West) at 836.

[14] *Id.* In November 2011, Judge Scheindlin refused in part to grant the defendants' motion for summary judgment, Floyd v. City of New York, 813 F. Supp. 2d 457, 459 (S.D.N.Y. 2011), and in April and August of 2012, she authored rulings allowing but narrowly circumscribing the introduction of expert testimony. Floyd v. City of New York, No. 08 Civ. 1034(SAS), 2012 WL 1344514 (S.D.N.Y. Apr. 16, 2012); Floyd v. City of New York, No. 08 Civ. 1034(SAS), 2012 WL 3561594 (S.D.N.Y. Aug. 17, 2012).

[15] *Floyd*, 82 Fed. R. Serv. 3d (West) at 835, 850.

[16] *Id.* at 862.

[17] *Id.* at 846–47. The figure represents the six percent of stops in which the documented reason does not rise to the level of reasonable suspicion, including stops rationalized by the suspect's mere "furtive movement." *Id.* at 847.

[18] *See id.* at 834, 836.

in light of the Rule 23 requirements of numerosity, commonality, typicality, and adequacy.[19]

Judge Scheindlin held that the class size, far surpassing the Second Circuit's presumptive threshold of forty members, comported with the demand of numerosity.[20] With regard to commonality, she offered an account of a stop-and-frisk program "enormous" in scope, department-wide, managed at the highest levels, and accelerated in its rate of practice.[21] Citing evidence of increasingly demanding performance standards, Judge Scheindlin found top-down directives to boost stops and frisks sufficiently centralized to have subjected the class to a common source of injury.[22] She rejected the city's appeal to *Wal-Mart Stores, Inc. v. Dukes*,[23] in which women alleging sex discrimination failed to prove commonality because of the high level of discretion the Arkansas-based chain afforded its supervisors in managing pay and promotion.[24] Officer discretion notwithstanding, the stop-and-frisk ethos is hierarchical, unified, and systemic, Judge Scheindlin argued, making it sufficiently distinguishable from the Wal-Mart policy.[25]

In finding the legal claims pursued by the *Floyd* representatives typical of their class counterparts, the court held that unique defenses arising out of qualified immunity and the plaintiffs' failure to identify the offending officer in some cases did not make the representatives atypical.[26] The court also found the four lead plaintiffs adequate despite the lack of a Latino representative among them.[27] The court therefore deemed all prerequisites for class certification met.[28]

Having settled the legal question, the court went on to address a "disturbing statement" in the city's closing argument, which expressed

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[19] *See id.* at 836–37; FED. R. CIV. P. 23(a). That the speculative class arguably lacked ascertainability, which courts sometimes impose as a fifth requirement, posed no challenge. As this suit was a Rule 23(b)(2) class action — seeking equitable relief, not money — there was no need to notify class members. *Floyd*, 82 Fed. R. Serv. 3d (West) at 852–54. The court also disposed of a challenge to the plaintiffs' standing, unconvinced by the defendants' argument that, since lead plaintiffs Lalit Clarkson and Deon Dennis were stopped only once each and Dennis and David Floyd no longer resided in the state, the plaintiffs had failed to show a likelihood of future injury. *Id.* at 849–51.

[20] *Floyd*, 82 Fed. R. Serv. 3d (West) at 854.

[21] *Id.* at 839–42; *see id.* at 854–58.

[22] *Id.* at 842–46; *see id.* at 856–58.

[23] 131 S. Ct. 2541 (2011).

[24] *Id.* at 2554–57.

[25] *Floyd*, 82 Fed. R. Serv. 3d (West) at 854–58. Judge Scheindlin noted, for instance, that Commissioner Raymond Kelly had ordered that "'[d]epartment managers *can* and *must* set performance goals,' relating to . . . the stopping and questioning of suspicious individuals." *Id.* at 843 (quoting Operations Order re: Police Officer Performance Objectives at 1, *Floyd,* 82 Fed. R. Serv. 3d (West) (No. 08 Civ. 01034), Doc. No. 167-12) (internal quotation mark omitted).

[26] *Id.* at 859–61.

[27] *Id.* at 861.

[28] *Id.*

doubt that any court injunction could ever truly "guarantee that suspicionless stops would never occur," and that if so utopian an order could be fashioned, the legislature would have done so already.[29] Judge Scheindlin denounced the city's "cavalier attitude" and "troubling apathy" toward the constitutional rights of the public it serves: "[S]uspicionless stops should never occur. . . . [A]n injunction seeking to curb that practice is not a 'judicial intrusion into a social institution' but a vindication of the Constitution . . . ."[30]

Communities in the crossfire have before called this type of judicial oversight paternalism, not protection.[31] Whether political majorities properly disburse the burdens and benefits of policies that implicate the safety-liberty divide — and whether those majorities even fairly represent traditionally disenfranchised groups[32] — is a contested and controversial matter.[33] Admittedly, overwhelming support for a policy that flies in the face of constitutional safeguards cannot trump the rights of discrete minorities.[34] But class action certification and its demand for the alignment of members' interests supply fertile ground for the dissection of public support for policies under the Fourth Amendment microscope.

The adequacy question is a fitting basis for contemplating a group's interest in the realm of search and seizure. Constitutional balancing — though cloaked in the rhetoric of neutrality and objectivity — is a judicially constructed, contested, and eminently partial exercise.[35] That analysis, particularly in the Fourth Amendment context, is a subjective line-drawing endeavor, more so as the Court has moved from employing bright-line rules to more standard-like inquiries such as "reasonableness"[36] and the "special need for flexibility."[37] That shift

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[29] *Id.* at 862; *see id.* at 862–63.

[30] *Id.* at 863.

[31] *See* Roger L. Connor & George Clements, Letter to the Editor, *Listen to the Voice of the Projects*, N.Y. TIMES, Apr. 15, 1994, at A30; *see also* sources cited *supra* note 9.

[32] *Cf.* David Cole, *Foreword: Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059, 1079–81 (1999) (arguing that supposed gains in black political power are overblown).

[33] *See* Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of* Chicago v Morales, 1998 U. CHI. LEGAL F. 197, 209.

[34] *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

[35] *See* Dan M. Kahan, *The Supreme Court, 2010 Term — Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 34–35 (2011).

[36] Charles Hellman, Note, *Secure in Their Houses? Fourth Amendment Rights at Public Housing Projects*, 40 N.Y.L. SCH. L. REV. 189, 204 (1995).

[37] *Id.* at 205 (quoting New Jersey v. T.L.O., 469 U.S. 325, 352 (1985) (Blackmun, J., concurring in the judgment)) (internal quotation marks omitted); *see* Donald A. Dripps, *The Fourth Amendment and the Fallacy of Composition: Determinacy Versus Legitimacy in a Regime of Bright-Line Rules*, 74 MISS. L.J. 341, 346 (2004); Ryan A. Ray, *The Warrantless Interception of E-Mail: Fourth Amendment Search or Free Rein for the Police?*, 36 RUTGERS COMPUTER & TECH. L.J. 178, 245 n.359 (2010).

complements communitarian ideals. Community norms are integral to the content of reasonableness,[38] and people in the affected community — on the ground, in the trenches — are in the best position to appraise the flexibility policing strategies require. Given that an actor balances the scales and no authoritative interpretation of the constitutional text exists, the will of the people should command a role in "interpret[ing] the chaos disturbing their lives."[39] Substance and procedure are interwoven at the adequacy stage of class certification, as it necessarily "entail[s] some overlap with the merits of the . . . underlying claim"[40] and is not limited to "merely the pleadings."[41] The considerations undergirding Fourth Amendment analysis necessarily color the procedural questions at play.[42] Beyond the negative freedom *from* government intrusion, the reasonableness of a given police practice should incorporate community members' positive freedom *to* thrive, *to* flourish, *to* exist in a space of baseline security.[43]

Court interventions are at times inconsistent with democratic values.[44] A federal judge in *Pratt v. Chicago Housing Authority*[45] fa-

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[38] *Cf.* Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1174 (1998) ("Where a procedure systematically and meaningfully affects the average member of a community, and that community's political representatives support that procedure, that's strong evidence that the procedure violates no reasonable privacy expectation."); Randolph Stuart Sergent, *The "Hamlet" Fallacy: Computer Networks and the Geographic Roots of Obscenity Regulation*, 23 HASTINGS CONST. L.Q. 671, 716 (1996) ("In formulating the 'community standards test,' the Court noted the connection between 'community standards' and a 'reasonableness' inquiry: A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law." (quoting Hamling v. United States, 418 U.S. 87, 104–05 (1974))); James O. Pearson, Jr., Annotation, *Modern Status of "Locality Rule" in Malpractice Action Against Physician Who Is Not a Specialist*, 99 A.L.R.3d 1133, § 5 (1980) (identifying cases observing that reasonableness in medical malpractice cases is determined by standards of care "in the same neighborhood and in similar communities").

[39] George, *supra* note 9, at 595; *see also* Kahan & Meares, *supra* note 38, at 1176–77.

[40] *Floyd*, 82 Fed. R. Serv. 3d (West) at 837 (quoting Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011)) (internal quotation marks omitted).

[41] *Id.*

[42] In order to certify what she called a "Fourth Amendment class," Judge Scheindlin first had to find "strong evidence" of a constitutional violation. *Id.* at 846.

[43] George, *supra* note 9, at 578; *see also* People *ex rel.* Gallo v. Acuna, 929 P.2d 596, 618 (Cal. 1997) ("To hold that the liberty of the peaceful, industrious residents of Rocksprings must be forfeited to preserve the illusion of freedom for those whose ill conduct is deleterious to the community as a whole is to ignore half the political promise of the Constitution and the whole of its sense. The freedom to leave one's house and move about at will, and to have a measure of personal security is 'implicit in the concept of ordered liberty' enshrined in the history and basic constitutional documents of English-speaking peoples." (citing Wolf v. Colorado, 338 U.S. 25, 27–28 (1949); Palko v. Connecticut, 302 U.S. 319, 325 (1937))).

[44] *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (2d ed. 1986) (arguing that the interbranch tension that arises from the judicial review of democratic acts is at times insupportably countermajoritarian).

[45] 848 F. Supp. 792 (N.D. Ill. 1994).

mously put an end to sweeping, emergency searches of residential buildings as violative of Fourth Amendment rights, despite a torrent of opposition headed by the tenants themselves.[46] Indiscriminate bullets pelted innocent bystanders with such frequency near the Robert Taylor Homes development that tenants contemplated donning bulletproof vests for corner-store trips.[47] The community was at war, and popular sentiment blamed judges for leaving residents defenseless.[48] Advocates have argued that courts ought to "presume that the law does not violate individual rights" when communities "internaliz[e] the burden that a particular law imposes on individual freedom."[49]

Modern-day adequacy doctrine does not afford judges sufficient play in the joints to evaluate community preferences. Courts have left the concept of adequacy nebulous,[50] saying it is to be "judged in light of the seriousness and extent of conflicts" present,[51] and only those conflicts that are deemed "fundamental" may sever a prospective class.[52] As the primary motivation for the adequacy rule is to avoid a preclusive effect that impedes the rights of far-flung members,[53] judges tether their inquiry in part to the existence of a shared legal right.[54] Judge Scheindlin's analysis was correct under that doctrine, as no preemption concern existed.[55] Opponents within the *Floyd* class would not be deprived of any legal claim; they could not sue to *require* that police engage in rampant stops and frisks. But, should the *Floyd* representatives win, class dissenters *will* be injured in being deprived of a perceived public good, an injury the doctrine fails to recognize. Absent class members have a personal stake in a policy that may arguably aid minorities in crime-ridden areas.

Active and concerted opposition in the prospective class has at least once compelled a court to refuse certification.[56] But judges have rarely read such considerations into the doctrine. Members of a putative

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[46] *See id.* at 796 ("Many tenants . . . , apparently convinced by sad experience that the larger community will not provide normal law enforcement services to them, are prepared to forgo their own constitutional rights."); Terry, *supra* note 9.

[47] *See* Terry, *supra* note 9 ("'Without the sweeps,' [a local school principal] said, 'the gangs will start up again.' . . . 'Every parent I talk to wants the sweeps.'").

[48] *See* Connor & Clements, *supra* note 31.

[49] Meares & Kahan, *supra* note 33, at 209.

[50] *See* Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 TEX. L. REV. 1137, 1137–38 (2009).

[51] Blackie v. Barrack, 524 F.2d 891, 910 (9th Cir. 1975).

[52] *In re* Flag Telecom Holdings, Ltd. Sec. Litig., 574 F.3d 29, 35 (2d Cir. 2009).

[53] *See* Smith v. Babcock, 19 F.3d 257, 265 n.13 (6th Cir. 1994).

[54] *See* Arthur v. Starrett City Assocs., 98 F.R.D. 500, 506 (E.D.N.Y. 1983).

[55] *See Floyd*, 82 Fed. R. Serv. 3d (West) at 859.

[56] *See* Hess v. Anderson, Clayton & Co., 20 F.R.D. 466, 473, 484 (S.D. Cal. 1957) (rejecting proposed class action after over 2000 out of 8000 unnamed plaintiffs indicated their opposition to the lawsuit).

class may express apathy, personal satisfaction, or even approval toward the defendant's behavior — none of these conditions have defeated class certification.[57] Courts have nonetheless incorporated proof of community pushback in rejections of class certification as a factor that, while not determinative, weighs against adequacy. The Supreme Court once cited a class-wide vote in opposition to the relief sought by plaintiff representatives as evidence of unbearable class conflict,[58] and a New York district court acknowledged that certification is improper when, among other factors, "most of the putative class members had demonstrable views in opposition to the goals of the litigation."[59] These declarations suggest a limiting principle for community engagement: opposition ought to be clearly documented, and it ought to be widespread, if conflicts of interest are to defeat class certification.

Judge Scheindlin in *Floyd* devoted no discussion to the views or perceptions of a polarized city embroiled in a heated debate.[60] That neglect comported with doctrine, but unfortunately so. Part of the adequacy calculus ought to include the preferences of communities to the extent that they (1) are clearly and legitimately expressed in the political process and (2) arise out of a diffuse, internalized understanding and acceptance of the shared burden brought to bear. That is not to say that "everything produced by the democratic process should automatically escape scrutiny. But minority involvement in the political process should factor into the court's analysis . . . ."[61] This determination no doubt tests the limits of judicial administrability, but it should be a rarely used tool — wielded only when confronted with dominant opposition. Constitutional protections cannot be put to a referendum, but a more cooperative approach between the judiciary and democratic institutions both hems in mob rule and contemplates the general welfare.

Floyd is likely an imperfect vehicle for communitarian impulses, given evidence that the stop-and-frisk program enjoys scant black

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[57] *See* Cousins v. City Council of Chi., 466 F.2d 830, 845 (7th Cir. 1972) (holding that the fact that many black aldermen had voted for a challenged redistricting ordinance was not sufficient to defeat class certification in a race discrimination challenge to that ordinance); Norwalk CORE v. Norwalk Redev. Agency, 395 F.2d 920, 937 (2d Cir. 1968) (noting that "some members of the class were personally satisfied" with the challenged conduct); Zapata v. IBP, Inc., 167 F.R.D. 147, 161 (D. Kan. 1996); *Arthur*, 98 F.R.D. at 506 (conceding that some class members may view the challenged conduct "with either apathy or approval"); *see also* Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 563 (2d Cir. 1968) ("[T]he representative party cannot be said to have an affirmative duty to demonstrate that the whole or a majority of the class considers his representation adequate. Nor can silence be taken as a sign of disapproval.").

[58] E. Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 405 (1977).

[59] *Arthur*, 98 F.R.D. at 507.

[60] *See* Michael M. Grynbaum & Marjorie Connelly, *Majority in City See Police as Favoring Whites, Poll Finds*, N.Y. TIMES, Aug. 21, 2012, at A1.

[61] Meares & Kahan, *supra* note 33, at 208.

support. Community leaders in the *Pratt* case charged that "[t]he A.C.L.U. never sought the input of the Tenants Council to find out what residents want. Instead, it found four individuals who agreed with it and filed a class action lawsuit."[62] The *Floyd* plaintiffs, too, may have very well been cherry-picked from a solid pool of stop-and-frisk supporters, a possibility that merited attention even if, in hindsight, it seems counterfactual. Although fifty-seven percent of white New Yorkers approved of the stop-and-frisk program as of August 2012, a meager twenty-five percent of black New Yorkers agreed.[63] Stop-and-frisk proponents are certainly still making the argument that these aggressive policing strategies are "a boon to minority neighborhoods,"[64] but when they do, it is not those neighborhoods supplying the voices.

In noting that Latinos targeted on account of race are in a position practically indistinguishable from that of the *Floyd* plaintiffs — and are therefore represented despite the lack of a Latino lead plaintiff[65] — Judge Scheindlin, at the behest of formal doctrine, declined the opportunity to explore the rich interests of multidimensional agents, not the surface assumptions of identity politics. Fifty-three percent of Latinos, in fact, supported the practice in August 2012.[66] The court's silence is unfortunate, particularly in light of the criticism leveled by the defense that the plaintiffs had not found a willing Latino counterpart to join suit.[67]

Class opposition need not drive certification analysis, but it should inform it. Members of the *Terry* Court fretted that its pro-enforcement opinion might render the Court a scapegoat to the potential abuses of officers conjuring up "suspicious circumstances."[68] That narrative accuses the judiciary of failing to stand between an encroaching police force and the people at its mercy. Such hand-wringing does not consider that, in a burgeoning partnership between police and a sometimes-receptive community, the courts might just be standing in the way.

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[62] Connor & Clements, *supra* note 31.

[63] Tina Susman, *Racial Divide over an NYPD Policy*, L.A. TIMES, Aug. 18, 2012, at A10.

[64] Seth Mandel, *Ignoring the* Times*, to Keep NYC Safe*, N.Y. POST (Aug. 22, 2012, 12:09 AM), http://www.nypost.com/f/print/news/opinion/oped columnists/ignoring_the_times_to_keep_nyc_safe_GX8TDUsYKXkvgv4xo3PdNP (citing lower crime rates in minority-heavy communities during the Rudolph Giuliani and Michael Bloomberg administrations); *see also* Susman, *supra* note 63.

[65] *Floyd*, 82 Fed. R. Serv. 3d (West) at 861.

[66] Susman, *supra* note 63.

[67] *Floyd*, 82 Fed. R. Serv. 3d (West) at 859.

[68] Barrett, *supra* note 4, at 826 (quoting Letter from Justice William J. Brennan, Jr., to Chief Justice Earl Warren, *supra* note 6, at 2).