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Advance

The Journal of the ACS Issue Groups

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Advance

A *dvance*, the Journal of the Issue Groups of the American Constitution Society for Law and Policy (ACS), is published annually by ACS. Our mission is to promote the vitality of the U.S. Constitution and the fundamental values it expresses: individual rights and liberties, genuine equality, access to justice, democracy and the rule of law.

Each issue of *Advance* features a collection of articles that emanate from the work of ACS's Issue Groups. This edition of *Advance* features a selection of Issue Briefs written for ACS in the preceding several months, on topics spanning the breadth of the Issue Groups. ACS Issue Briefs—those included in *Advance* as well as others available at www.acslaw.org—are intended to offer substantive analysis of legal or policy issue in a form that is easily accessible to practitioners, policymakers and the general public. Some Issue Briefs tackle the high-profile issues of the day, while others take a longer view of the law, but all are intended to enliven and enrich debate in their respective areas. ACS encourages its members to make their voices heard, and we invite those interested in writing an Issue Brief to contact ACS.

We hope you find this issue's articles, which span a range of topics, engaging and edifying.

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ACS Issue Groups are comprised of legal practitioners and scholars working together to articulate and publicize compelling progressive ideas. The Groups are led by distinguished co-chairs who are experts in their respective fields. They are open to all ACS members, and new members and new ideas are always welcome.

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The Access to Justice Group addresses barriers to access to our civil justice system, including, among other issues, efforts to strip courts of jurisdiction, raise procedural hurdles, remove classes of cases from federal court, insulate wrongdoers from suit, limit remedies and deprive legal aid services of resources. It focuses attention on ways to ensure that our justice system is truly available to all.

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Judicial Hostility to Litigation and How It Impairs Legal Accountability for Corporations and Other Defendants

Scott A. Moss*

The Supreme Court once saw litigation as an important tool for redressing grievances, deterring wrongdoing, and spurring social reform. In holding that a business must pay the legal fees of workers who proved discrimination claims, the Court noted that “the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law,” so a plaintiff sues “not for himself alone but also as a ‘private attorney general,’ vindicating a policy that Congress considered of the highest priority.”¹ In commercial cases, the Court was just as supportive of challenges to illegality. Rejecting the argument of a price-fixing defendant “that allowing class actions to be brought by retail consumers . . . will add a significant burden to the already crowded dockets of the federal courts,” the Court interpreted an ambiguous statute as allowing such lawsuits, because Congress enacted broad antitrust remedies “precisely for the purpose of encouraging private challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations.”² In short, the Court saw litigation as a positive force that empowered private parties to enforce public priorities.

But almost all the Justices from those decades-old decisions are gone, and now the Court regularly issues rulings based on a more negative view of litigation—a view that stresses litigation’s burdens on defendants rather than its importance to plaintiffs, to society, and to the vindication of policies Congress enacted. Fearing the “high cost of discovery” and the failure of courts “in checking discovery abuse,” the Court in 2007 reversed half-century-old precedent to expand the use of pre-trial, pre-discovery dismissals.³ “[C]oncern[ed] over the imprecise manner in which punitive damages systems are administered,” and that “[p]unitive damages pose an acute danger of arbitrary deprivation,” the Court in the 1990s and 2000s took on a new, aggressive federal role in cutting “excessive” state-court damages awards against businesses found guilty of malfeasances ranging from auto dealer fraud to insurance company fraud to oil company environmental destruction.⁴ And in a 2007 decision that Congress

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¹ *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401–02 (1968).

² *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) (holding that consumers suffering price-fixing could sue under statute allowing suit only for injury to “business or property”).

³ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). See *infra* Part I.A.

⁴ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003) (quoting *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994)). See *infra* Part I.C.

later remedied, the Court imposed a strict statute of limitations on pay discrimination claims, holding that an employer can indefinitely keep paying women less if an employee does not challenge the pay disparity in the first several months, because “it is unjust to fail to put the [employer] on notice to defend within a specified period of time . . . ‘[and defendants’] right to be free of stale claims in time comes to prevail over [plaintiffs’] right to prosecute them.”⁵

Admittedly, the Court is never a monolithic bloc. Even in the heyday of the litigation-promotes-justice era, some Justices complained of plaintiffs “draining judicial resources.”⁶ Conversely, even today, when the Court takes a generally bleaker view of litigation, some Justices still argue that limiting lawsuits challenging statutory violations “obstructs congressional policy.”⁷ But as this Issue Brief notes, the trend toward more hostility and less support for litigation is noticeable, and the Court’s hostility to litigation disproportionately skews outcomes in favor of defendants, most commonly businesses sued by those claiming deprivations of various rights and protections, such as workplace anti-discrimination rights,⁸ consumer rights,⁹ wage rights,¹⁰ and protection against unlawful competition.¹¹

This briefing does not cover all decisions in all areas in which the Court has limited litigation’s ability to hold defendants accountable, such as the substantial caselaw limiting the circumstances in which plaintiffs can seek damages for constitutional violations by governmental entities under 42 U.S.C. § 1983.¹² Nor does it cover all Court decisions ruling for corporations outside the litigation context, such as campaign finance decisions allowing more expansive corporate spending in politics.¹³ Rather, Part I of this Issue Brief discusses in depth four areas—expanding the use of pre-discovery dismissals (Part I(A)), creating inconsistent rules for discrimination plaintiffs (Part I(B)), increasing federal reversals of state-court damages awards (Part I(C)), and allowing businesses to force lawsuits against them into private arbitration rather than public litigation (Part I(D)). These four areas illustrate two broad points. First, the problem with the Court’s jurisprudence is not a generalized “conservative” ideology, because hostility to litigation has trumped other conservative judicial values the same

⁵ *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 630 (2007) (quoting *United States v. Kubrick*, 444 U.S. 111, 117 (1979)). See *infra* Part I.B.

⁶ One classic example is Chief Justice Burger’s “so many Title VII cases” tirade: “Like so many Title VII cases, this case has already gone on for years, draining judicial resources as well as resources of the litigants. Rather than promoting judicial economy, the ‘across-the-board’ class action has promoted multiplication of claims and endless litigation.” *General Telephone Co. v. Falcon*, 457 U.S. 147, 162 (1982) (Burger, C.J., concurring in part and dissenting in part from decision remanding for consideration of class action status).

⁷ *Twombly*, 550 U.S. at 597 (Stevens, J., dissenting).

⁸ *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009); *Ledbetter*, 550 at 618; *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989).

⁹ *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); *State Farm*, 538 U.S. at 408.

¹⁰ *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137 (2002).

¹¹ *Twombly*, 550 U.S. at 544.

¹² Barbara Kritchevsky, *Is There a Cost Defense? Budgetary Constraints in Civil Rights Litigation*, 35 *Rutgers L.J.* 483, 498 (2004) (“Financial concerns . . . play a role in delineating the contours of § 1983 itself. The Supreme Court has established limits on the liability of individual and government actors in response to concerns that subjecting defendants to unlimited financial liability would unduly hamper their ability to function effectively.”).

¹³ See, e.g., *Citizens United v. Federal Election Com’n*, 130 S. Ct. 876 (2010).

Justices have espoused.¹⁴ As detailed below, states’ rights federalism has given way when an anti-states’-rights ruling lets the Court limit litigation; originalism and textualism have given way when the Court reins in litigation on a constitutional theory absent from constitutional text and intent; and deference to the elected legislature gives way when the Court restricts litigation by broadly reinterpreting long-stable rules and statutory text the legislature had left intact. Second, and relatedly, the problem is not a simple left-versus-right issue. With almost all recent Justices holding substantial judicial experience, yet almost no experience with litigation for plaintiffs or with nonprofit law reform organizations, even the Justices commonly identified as the “left” of the Court have joined some of the Court’s most significant anti-litigation opinions, such as the decisions expanding pre-discovery dismissals and reversing punitive damages awards. The current anti-litigation jurisprudence promises to continue, and even strengthen, until the judiciary comes to include a new crop of judges whose views and backgrounds make them less hostile to litigation as a tool of private and public redress.

I. THE MODERN COURT’S JURISPRUDENCE: SACRIFICING OTHER JURISPRUDENTIAL VALUES TO PROTECT DEFENDANTS FROM LAWSUITS, LITIGATION COSTS, AND DAMAGES VERDICTS

A. AUTHORIZING MORE DISMISSALS BEFORE ANY FACT DISCOVERY – AND DOING SO BY CHANGING LONGSTANDING DISMISSAL STANDARDS

The Supreme Court recently declared that more cases should be dismissed before any fact discovery, reversing half-century-old precedent to do so. In *Bell Atlantic Corp. v. Twombly*, the Court dismissed a class action claim that large phone companies colluded to exclude competitors because, in the court’s view, the collusion was insufficiently “plausible.”¹⁵ Pre-discovery dismissal for insufficient plausibility was forbidden by 1957’s *Conley v. Gibson*, under “the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears *beyond doubt* that the plaintiff can prove *no set of facts* in support of his claim.”¹⁶ Under *Conley*, pre-discovery dismissal was proper only in limited circumstances, mainly where the complaint, even if assumed true, fell short on a required element—for example, by alleging an injury that preceded the limitations period¹⁷ or that was insufficiently severe to qualify for statutory coverage.¹⁸ Otherwise, regardless of the judge’s view of the claim’s plausibility, plaintiffs could proceed to discovery. “[D]iscovery . . . is the battleground where civil suits are won and lost”¹⁹ is a quotation from the patent litigation context, but it is just as true in various other fields. “Discovery is the most crucial phase” in employment

¹⁴ Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court’s Jurisprudence*, 84 Tex. L. Rev. 1097, 1108 (2006); see Scott A. Moss, *Reluctant Judicial Factfinding: When Minimalism and Judicial Modesty Go Too Far*, 32 Seattle U. L. Rev. 549, 563–65 (2009); Tracy A. Thomas, *Proportionality and the Supreme Court’s Jurisprudence of Remedies*, 59 Hastings L.J. 73, 87 (2007).

¹⁵ 550 U.S. 544, 557 (2007).

¹⁶ 355 U.S. 41, 46–47 (1957).

¹⁷ See, e.g., *Weeks v. New York State Div. of Parole*, 273 F.3d 76, 84–86 (2d Cir. 2001).

¹⁸ See *id.* at 84–87.

¹⁹ Joseph D. Steinfield & Robert A. Bertsche, *Recent Developments in the Law of Access* – 1998, 540 PLI/Pat. 53, 107 (1998).

litigation,²⁰ for example: “Because employers rarely leave a paper trail—or ‘smoking gun’—attesting to a discriminatory intent, disparate treatment plaintiffs often must build their cases from pieces of circumstantial evidence which cumulatively undercut the credibility of the various explanations offered by the employer.”²¹ In short, pre-discovery dismissals eliminate plaintiffs’ ability to gather evidence supporting their claims, which is a key rationale for the *Conley* rule limiting pre-discovery dismissals.

The *Twombly* rule allowing dismissal of insufficiently “plausible” claims expressly replaced the *Conley* standard (dismissal only if no possible facts could support the plaintiff) with the new standard allowing pre-discovery dismissal whenever a judge does not find the claim plausible enough.²² The *Twombly* Court asserted with little documentation (beyond recitation of others’ opinions) that there exists a systemic “problem of discovery abuse,” that “the threat of discovery expense will push cost-conscious defendants to settle even anemic cases,” and that “[j]udges can do little about impositional discovery” beyond more freely dismissing cases before discovery.²³

Twombly has drawn varied criticism. For one, the assumption that more dismissals are proper to save discovery costs may be factually unfounded and normatively questionable. As a factual matter, district courts have broad discretionary power over “controlling and scheduling of discovery,”²⁴ and some courts already order that discovery occur in stages.²⁵ Many courts issue scheduling orders at early Rule 16 court conferences requiring a certain order of discovery devices;²⁶ other courts begin by allowing partial “sampling” of data to determine the likelihood that comprehensive searching will be worthwhile; and more broadly, courts could postpone especially expensive discovery until the earlier discovery sheds light on whether the case may be meritorious enough to warrant expensive discovery (*e.g.*, whether the early discovery yields some useful evidence or none).²⁷ Thus, the Court was too quick to depict dismissals as the only way to limit discovery costs. Normatively, and perhaps more fundamentally, even if discovery costs can be substantial, Justice Stevens lambasted the Court for giving top priority to protecting wealthy corporations from those costs: “The transparent policy concern that drives the decision is the interest in protecting . . . some of the wealthiest corporations in our economy—from the burdens of pretrial discovery.”²⁸

²⁰ Jon W. Green & Kyle M. Francis, *Age Discrimination in Employment: A Plaintiff’s Perspective*, 522 PLI/Lit. 227, 238 (1995).

²¹ *Hollander v. Am. Cyanamid Co.*, 895 F.2d 80, 85 (2d Cir. 1990) (internal citations omitted); *see also id.* (holding that denial of discovery prevented plaintiff from “assembl[ing] such a quantum of circumstantial evidence” as he needed).

²² *Twombly*, 550 U.S. at 562–63 (“Conley’s ‘no set of facts’ language . . . has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss . . .”).

²³ *Id.* at 559.

²⁴ FED. R. CIV. P. 16(c)(2)(F).

²⁵ *See* Scott A. Moss, *Litigation Discovery Cannot Be Optimal But Could Be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 Duke L. J. 857, 937–38 (2009) (discussing these rules).

²⁶ *See* Fed. R. Civ. P. 16 advisory committee’s note (“[T]he initial disclosures required by Rule 26(a)(1) will ordinarily have been made before entry of the scheduling order, [and] the timing and sequence for disclosure of expert testimony and of the witnesses and exhibits to be used at trial should be tailored to the circumstances of the case and is a matter that should be considered at the initial scheduling conference.”).

²⁷ Moss, *supra* note 25, at 936–43 (2009) (noting ways judges can allow high-cost discovery only when more affordable discovery proves inadequate and when case merits prove sufficient).

²⁸ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 596 (2007) (Stevens, J., dissenting).

Another criticism of *Twombly* is that the majority Justices departed from their usual methods of judicial interpretation to reach their litigation-limiting result. Dismissal standards are set by various Federal Rules of Civil Procedure (mainly Rules 8 and 12) set by a rulemaking committee and reviewed by Congress;²⁹ some dismissal standards also are heightened by statutes such as the Private Securities Litigation Reform Act.³⁰ In adopting a new dismissal standard, the *Twombly* majority displaced the prevailing *Conley* rule that Congress and congressionally authorized rulemakers had left in place for decades, even while (as just noted) the same legislators and rulemakers amended various other procedural rules, including dismissal standards. Abrogating a long-established judicial interpretation of non-constitutional provisions (*i.e.*, statutes or rules) is improper under such circumstances, the *Twombly* majority Justices have explained in other cases. The year after *Twombly*, all Justices in the *Twombly* majority joined a decision reasserting the rule that “*stare decisis* in respect to statutory interpretation has ‘special force,’ for ‘Congress remains free to alter what we have done’[.]” making abrogation of an established interpretation improper where “Congress has long acquiesced in the interpretation we have given.”³¹ And the same year as *Twombly*, Justice Scalia wrote, joined by Chief Justice Roberts and Justice Thomas, that judicial reinterpretation of duly enacted provisions is an illegitimate “system of judicial amendatory veto over texts duly adopted by Congress.”³² *Twombly*’s repudiation of a half-century-old interpretation of federal civil procedure rules violates this principle of preserving rule interpretations in which generations of legislators and rulemakers have acquiesced.

The impact of *Twombly* and *Iqbal* has been substantial in various fields of litigation. Initially, some suggested that *Twombly* might represent a crackdown only on antitrust cases.³³ But in *Ashcroft v. Iqbal*, the Court held that the *Twombly* expansion of pre-discovery dismissal applied to other kinds of lawsuits, including individual rights claims.³⁴ Even before *Iqbal*, courts had applied *Twombly* to dismiss a wide variety of claims, such as breach of contract and securities fraud,³⁵ and one study showed that *Twombly* led courts to dismiss employment discrimination claims at an accelerated rate.³⁶ Some appellate courts have started to rein in excessive district court

²⁹ As to the rulemaking process, see generally Thomas E. Willging, *Past and Potential Uses of Empirical Research in Civil Rulemaking*, 77 Notre Dame L. Rev. 1121 (2002); see, e.g., *Martinez v. Cornell Corrections of Texas*, 229 F.R.D. 215, 218 (D.N.M. 2005) (recounting 2000 amendment narrowing scope of discovery: “Rule 26, which stated a party may obtain discovery on any matter ‘relevant to the subject matter,’ . . . was amended . . . to state that the material must be ‘relevant to the claim or defense of any party[.]’”).

³⁰ 15 U.S.C. § 78u-4(b)(2) (2006) (imposing heightened requirement that complaint can survive dismissal only if it pleads facts giving rise to “strong inference” defendants made misleading statements with intent to deceive).

³¹ *John R. Sand & Gravel Co. v. U.S.*, 552 U.S. 130, 139 (2008).

³² *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81, 117 (2007) (Scalia, J., dissenting, joined by Thomas, J. and Roberts, C.J.); see *Twombly*, 500 U.S. at 595–596 (Stevens, J., dissenting) (criticizing majority in this vein).

³³ See, e.g., *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007), *rev’d*, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. Ill. L. Rev. 1011, 1014 (2009).

³⁴ *Iqbal*, 129 S. Ct. at 1953 (2009).

³⁵ See, e.g., *S. Cherry St. LLC v. Hennessee Group LLC*, 573 F.3d 98 (2d Cir. 2009).

³⁶ See Seiner, *supra* note 33, at 1029.

Twombly/Iqbal dismissals. In one such case, D.C. Circuit Judge Janice Rogers Brown wrote as follows:

[T]he district court interpreted *Twombly* as establishing a new threshold for complaints: enough facts to ‘clarify the grounds’ on which each claim rests and ‘nudge[] their claims across the line from conceivable to plausible.’ Many courts have disagreed about . . . *Twombly*. We conclude that *Twombly* leaves the long-standing fundamentals of notice pleading intact.³⁷

Such plaintiff’s appellate rulings, however, show how aggressively some district courts are using *Twombly* and *Iqbal* to clear their dockets.

In sum, *Twombly* and *Iqbal* have substantially limited plaintiffs’ ability to sue to redress a wide range of illegalities, and they did so by taking two bleak views of litigation: stressing the burdensomeness to defendants of discovery and expressing a lack of faith in district judges’ ability to manage discovery so as to minimize discovery excess.

B. RAISING THE DISCRIMINATION BURDEN OF PROOF FOR ONLY AGE CLAIMS —AND CREATING OTHER INCONSISTENCIES AMONG DIFFERENT KINDS OF DISCRIMINATION CLAIMS

In a ruling that surprised most Court observers, *Gross v. FBL Financial Services*³⁸ required age discrimination plaintiffs to show that age was the but-for cause, not just a “motivating factor,” of the employer’s decision. The latter had been the general rule: an employee proves discrimination by proving discrimination was one of the employer’s motivations.³⁹ Under this “motivating factor” standard, the employer can counter-argue that even though it had discriminatory motivation, it would have taken the same action anyway for nondiscriminatory reasons – but such a defense just limits the employee’s damages, by establishing (for example) that even without the discrimination, the job loss would have occurred anyway.⁴⁰ In contrast, under the *Gross* but-for standard, age discrimination plaintiffs now must prove not only discriminatory motivation, but also that all nondiscriminatory reasons the employer asserts did not play any relevant part in the termination, demotion, etc.

Gross was not just tinkering with burden-of-proof minutiae; lawyers representing employees and employers alike agree that *Gross* is “likely to make it more difficult for plaintiffs to prove age discrimination claims.”⁴¹ *Gross* protects employers from liability when there is both good evidence of age discrimination but also enough plausibility of other nondiscriminatory motivations to complicate a jury finding that discrimination was the sole “but-for” cause.

³⁷ *Aktieselskabet Af 21 November 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 15 (D.C. Cir. 2008).

³⁸ 129 S. Ct. 2343, 2351 (2009).

³⁹ *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101–02 (2003).

⁴⁰ *Id.* at 94–95.

⁴¹ Roy A. Ginsburg & Ambrea Bigley, *Gross v. FBL Financial Services, Inc.: Age Discrimination Cases Are a Different Breed*, Dorsey & Whitney LLP, June 26, 2009, http://www.dorsey.com/age_discrimination_cases_different_breed/ (article by attorneys representing employers as defendants); see also Ellen Simon, *Congress Introduces Age Discrimination Bill To Fix Supreme Court’s Gross Decision*, Today’s Workplace, October 22, 2009, <http://www.todayworkplace.org/2009/10/22/congress-introduces-age-discrimination-bill-to-fix-supreme-courts-gross-decision/> (describing *Gross* as imposing “more difficult standard of proof” on plaintiffs).

Gross reflects three troubling phenomena in the Court's discrimination jurisprudence. First, the Court has used inconsistent statutory interpretation methods, in each case using whatever method reins in litigation. Second, it has created inconsistencies among different types of claims, wreaking havoc upon "dual-claim" plaintiffs alleging discrimination on both age and another ground (e.g., discrimination against older women also involves a sex discrimination ground). Third, the Court's several pro-plaintiff decisions warrant mention but reflect mainly that many lower courts are unusually willing to defy precedent and statutory text to dismiss lawsuits, requiring the Court to rule for plaintiffs just to police rogue lower courts.

1. Inconsistency in Statutory Interpretation: Reining in Litigation By Whatever Interpretive Methods Helps in Each Case

Gross created an unintuitive split: age discrimination claims face a "but-for" burden of proof, not the "motivating factor" standard applicable to race, sex, religion, and disability discrimination claims. This age-versus-other-discrimination difference is not explicable by any differences between the discrimination statutes. In *Price Waterhouse v. Hopkins*, the Court rejected the "but-for" standard for Title VII (the sex, race, and religious discrimination statute), even though the statute then featured the same wording as the age discrimination statute that the Court now says requires the "but-for" standard.⁴²

Gross thus displays inconsistent, arguably results-oriented use of statutory interpretation principles. On the one hand, *Price Waterhouse* rejected the "but-for" standard, and the Court commonly refuses to change its statutory interpretations because "Congress' failure to disturb a consistent judicial interpretation of a statute" is evidence it "at least acquiesces in, and apparently affirms, that [interpretation]"⁴³—a quotation two of the Justices in the *Gross* majority joined. On the other hand, the Court also has held, in an opinion the same two Justices joined, that "Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction."⁴⁴ In the latter case, the Court frankly admitted its inconsistency on this point of statutory interpretation, conceding that "our cases have not been consistent in rejecting arguments such as these."⁴⁵ This admission parallels the classic observation by Karl Llewellyn that canons of statutory construction are indeterminate because there exist varied, inconsistent rules:⁴⁶ "there are two opposing canons on almost every point," Llewellyn documented, so "[p]lainly, to make any canon take hold in a particular instance, the construction contended for must be sold, essentially by means other than the use of the canon."⁴⁷ To be sure, some, such as Cass Sunstein, have argued that "[Llewellyn's] claim of indeterminacy and mutual contradiction was greatly overstated." because "canons of construction continue to be a prominent feature in the federal and state courts."⁴⁸ Sunstein may be correct that stat-

⁴² *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244–45 (1989).

⁴³ *Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 338 (1988) (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 703 (1979)).

⁴⁴ *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) (quoting *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990)).

⁴⁵ *Id.* at 188.

⁴⁶ Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 Vand. L. Rev. 395, 401 (1950).

⁴⁷ *Id.*

⁴⁸ Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 452 (1989).

utory construction canons can be useful, but cases such as *Gross* still show a Court using those canons badly, to reach whatever inconsistent results it thinks best—here, a pro-employer raising of the evidentiary threshold for proving age discrimination.

2. Inconsistency Among Different Discrimination Claims: Creating Confusion and Ignoring Dual-Claim Plaintiffs.

Even if a higher burden on age claims were to be justified, it risks confusion for a type of case the *Gross* Court never considered: “dual-claim” plaintiffs,⁴⁹ such as an employee jointly claiming age and sex discrimination when her employer stereotyped her as an older woman.⁵⁰ In such a case, the jury must decide whether the same evidence met one burden of proof for sex discrimination, and another for age discrimination—a quantum-of-evidence differential that easily could befuddle judges and lawyers, much less lay jurors.

The Court rarely considers the litigation reality that dual-claim plaintiffs are common. For example, several of the same Justices ruled (a) that pay discrimination claims must be filed immediately (*Ledbetter v. Goodyear*⁵¹) but (b) that sex harassment lawsuits must be delayed until employees pursue internal remedies (*Faragher v. Boca Raton*⁵² and *Burlington Industries v. Ellerth*⁵³). Consequently, “a plaintiff claiming that the same sexist supervisor harassed her and paid her less would face competing demands to file promptly and to delay filing.”⁵⁴ In these timing-of-suit decisions, as in *Gross*, the Court seems not even to consider the fact that some plaintiffs, like women in a pervasively sexist workplace, face more than one single, discrete form of discrimination at a time.

3. The Court’s Rulings for Plaintiffs: Illustrations that the Lower Courts Can be Even More Hostile to Litigation.

Any discussion of the Court’s employment caselaw, though, cannot focus on only pro-defense rulings. The Court has ruled for plaintiffs too – but those rulings reflect that many circuit decisions have been so startlingly pro-defense that they require correction from even a generally litigation-hostile Supreme Court.

Since the late 1990s, while issuing pro-defense rulings on harassment (*Faragher*⁵⁵ and *Burlington Industries*⁵⁶), on whistleblowing rights (*Garcetti v. Ceballos*⁵⁷), on deadlines to sue for promotion or pay discrimination (*National Railroad Passenger*

⁴⁹ Scott A. Moss, *Fighting Discrimination While Fighting Litigation: A Tale of Two Supreme Courts*, 76 *Fordham L. Rev.* 981, 985 (2007).

⁵⁰ See, e.g., *Brennan v. Metro. Opera Assoc.*, 192 F.3d 310, 317–18 (2d Cir. 1999) (claim of hostile work environment and discharge based on age, gender, and sexual orientation); *White v. Baxter Healthcare Corp.*, No. 89-C-4468, 1990 WL 114478, at *4 (N.D. Ill. July 31, 1990) (claim of discharge based on being an older African American woman and a Jehovah’s Witness). “[A] fixture of current employment discrimination litigation . . . [is] for opinions to begin with some variation of the following litany: ‘Plaintiff brings this claim under Title VII and the ADEA for race, age, and gender discrimination.’” Minna J. Kotkin, *Diversity and Discrimination: A Look at Complex Bias*, 50 *Wm. & Mary L. Rev.* 1439, 1443 (2009).

⁵¹ *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007).

⁵² *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

⁵³ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

⁵⁴ Moss, *supra* note 49, at 985.

⁵⁵ 524 U.S. 775 (1998).

⁵⁶ 524 U.S. 742 (1998).

⁵⁷ 547 U.S. 410 (2006).

*Corp. v. Morgan*⁵⁸ and *Ledbetter*⁵⁹), and on age discrimination burdens of proof (*Gross*⁶⁰), the Court also has issued four unanimous rulings relaxing employment plaintiffs' pleading and proof burdens. Ruling for plaintiffs, the Court has held that: (a) proving the employer's explanation is pretextual can suffice for a finding of discrimination without direct evidence of discriminatory bias (*Reeves v. Sanderson Plumbing Products, Inc.*⁶¹); (b) circumstantial rather than direct evidence can suffice to prove discrimination a motivating factor (*Desert Palace, Inc. v. Costa*⁶²); (c) arguably ambiguous evidence of bias can suffice to prove discrimination (*Ash v. Tyson Foods, Inc.*⁶³); and (d) a wide range of retaliation, not just ultimate actions like termination or demotion, is unlawful (*Burlington Northern & Santa Fe Railway Co. v. White*⁶⁴).

While this mix of plaintiffs' and defendants' victories shows that the Court does not reflexively rule for one side,⁶⁵ it bears note that the Court's pro-plaintiff rulings are mainly policings of rogue pro-defense circuit decisions. The Court's rulings for plaintiffs in *Reeves*, *Ash*, and *Desert Palace*, for example, were unanimous precisely because there was little to be said for the lower court decisions. For example, the Fifth Circuit in *Reeves* flatly violated Supreme Court precedent when it reversed a plaintiff's victory on the rationale that proof the employer lied about the firing is insufficient to support a discrimination verdict:

[A] plaintiff must prove not only that the employer's stated reason . . . was false, but also that age discrimination "had a determinative influence" Age-related . . . comments which are "vague and remote in time" . . . are insufficient Reeves failed . . . to prove both that this reason is untrue *and* that age is what really triggered Reeves's discharge. . . . Reeves [argues] a reasonable jury could have found that Sanderson's explanation for its employment decision was pretextual. . . . Even so, . . . [w]e must . . . determine whether Reeves presented sufficient evidence that his age motivated Sanderson[]⁶⁶

⁵⁸ Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 107 (2002).

⁵⁹ 550 U.S. 618 (2007).

⁶⁰ 129 S. Ct. 2343 (2009).

⁶¹ 530 U.S. 133 (2000) (rejecting pretext-plus rule of circuits holding that disproving defendant's proffered reason for a firing is insufficient evidence of discrimination).

⁶² 539 U.S. 90 (2003) (reversing circuit holdings that only plaintiffs with "direct" (not circumstantial) evidence can use rule that plaintiffs need prove discrimination only one "motivating factor" of employer's decision).

⁶³ 546 U.S. 454, 456–57 (2006) (holding, contrary to lower court, the following probative of discrimination: (1) calling an African-American "boy," and (2) evidence plaintiff was more qualified than others even where the difference is not "so apparent as virtually to jump off the page and slap you in the face" – several circuits' standard) (quoting *Cooper v. S. Co.*, 390 F.3d 695, 732 (11th Cir. 2004)).

⁶⁴ 126 S. Ct. 2405, 2409–10 (2006) (holding actionable any retaliatory act that would deter a reasonable employee, rejecting holdings that only a materially adverse or "ultimate" employment change is actionable).

⁶⁵ See generally Moss, *supra* note 49 (disagreeing with those who depict the Court as uniformly pro-defense).

⁶⁶ *Reeves v. Sanderson Plumbing Prods.*, 197 F.3d 688, 692–693 (5th Cir. 1999) (internal citation omitted).

This reasoning directly contravened a Supreme Court decision from just six years prior, *St. Mary's Honor Center v. Hicks*.⁶⁷ Unanimously, the *Reeves* Court explained that under *St. Mary's Honor Center*, proving the employer's reason is pretextual can, without more, prove discrimination – so a case cannot be dismissed (as *Reeves's* was) simply for lack of direct evidence of bias:

St. Mary's Honor Center . . . [held] it is permissible for the trier of fact to infer . . . discrimination from the falsity of the employer's explanation. . . . “The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may . . . suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer . . . discrimination.” . . . [T]he Court of Appeals erred in . . . [holding] that a plaintiff must always introduce additional, independent evidence of discrimination.⁶⁸

Even though the Fifth Circuit had gone far enough astray to earn a unanimous reversal, four circuits had applied the same surprisingly erroneous “pretext plus” rule.⁶⁹ Worse, a Second Circuit panel defensively responded to *Reeves* by declaring, “[w]ith all respect the Court was mistaken” in its depiction of the circuit caselaw *Reeves* abrogated⁷⁰—flouting *Reeves* just as the pre-2000 circuit caselaw featured dismissals in defiance of *St. Mary's Honor Center*. The Court's other unanimous pro-plaintiff rulings similarly reflect not that the Court is pro-plaintiff, but that many lower courts are so egregiously anti-plaintiff as to require unanimous reversals. Like the Fifth Circuit's decision in *Reeves*, various appellate decisions so badly strain precedent and statutory text to rule against plaintiffs that the Supreme Court, despite its general hostility to litigation, must police these rogue appellate courts with unanimous reversals. In short, whatever may be said of the Supreme Court's hostility to litigation, the same hostility runs even deeper among a substantial portion of the lower courts.

C. ANNOUNCING A BROAD, LARGELY CORPORATE-ENJOYED RIGHT AGAINST LARGE PUNITIVE DAMAGES AWARDS – AND A BROAD ROLE FOR FEDERAL COURTS TO REVERSE STATE COURT DAMAGES AWARDS.

Generally, state court verdicts are appealable only in state, not federal, court. Yet the same 1990s-2000s Court that has aggressively expanded states' rights, and criticized overly aggressive judicial review, also has increased federal court review of state court damages awards.

Effectively imposing a nationwide state court damages cap, the Court has declared a presumption that punitive damages must be less than ten times, and perhaps no more than four times, compensatory damages—a cap that hampers trial courts' ability to award damages sufficiently large to deter widespread consumer fraud. *BMW of North America, Inc. v. Gore* reversed a \$2 million punitive damages award for fraudu-

⁶⁷ *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

⁶⁸ *Reeves*, 530 U.S. at 147–49 (quoting *St. Mary's Honor Center*, 509 U.S. at 511).

⁶⁹ *Id.* at 140–41 (citing, as the side of the circuit split being abrogated, cases from four circuits: *Fisher v. Vassar Coll.*, 114 F.3d 1332 (2d Cir. 1997) (en banc); *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996); *Theard v. Glaxo, Inc.*, 47 F.3d 676 (4th Cir. 1995); *Woods v. Friction Materials, Inc.*, 30 F.3d 255 (1st Cir. 1994)).

⁷⁰ *James v. New York Racing Ass'n*, 233 F.3d 149, 157 n.3 (2d Cir. 2000).

lently selling repainted cars as mint new cars, finding the punitive award disproportionate to the plaintiff's \$4,000 in compensatory damages.⁷¹ The Court rejected a high punitive-to-compensatory ratio despite the established principles: (a) that punitive damages aim not just to punish wrongdoing, but also "to deter its future occurrence;"⁷² and (b) that a violation consistently repeated, but "hard to detect," warrants a punitive award many times the amount of the damages needed to compensate the one plaintiff who filed suit.⁷³

State Farm Mutual Automobile Insurance Co. v. Campbell then went further, all but imposing a numerical damages cap. State Farm consistently defrauded policyholders to deny coverage, yet the Court reversed a \$145 million punitive award because the plaintiff's compensatory damages were only \$1 million.⁷⁴ The Court denied imposing a "concrete" cap but in effect did so, declaring that "in practice, few awards exceeding a *single-digit ratio* between punitive and compensatory damages," and that "an award of more than *four times* the amount of compensatory damages might be close to the line of constitutional impropriety."⁷⁵ This requirement of a certain ratio between punitive damages and the actual injury compensation directly contravened the Court's declaration, just fifteen years earlier, that "[p]unitive damages are not measured against actual injury, so there is no objective standard that limits their amount."⁷⁶

What flexibility the Court expresses with its four-or-ten-times cap is mainly *tightening* of that cap for especially large damages awards. The Court has suggested that perhaps a greater than ten-to-one ratio might be permissible for a particularly egregious but low-compensatory damages case,⁷⁷ but the one low-compensatory case the Court has decided (*BMW v. Gore*) disallowed a greater ratio. Conversely, *State Farm* described a maximum one-to-one ratio as "perhaps . . . the outermost limit" where compensatory damages are high,⁷⁸ and in *Exxon Shipping v. Baker*, the Exxon Valdez oil spill case, the Court reduced punitive damages to the same amount as compensatory damages (\$500 million) from a trial award of five times greater (\$2.5 billion).⁷⁹

In addition to these reported decisions reversing particular verdicts, the Supreme Court has limited far more state court awards. For example, in deciding *State Farm*, the Court also issued short orders in ten other cases vacating punitive damages awards for reconsideration by the state court.⁸⁰ While a state court could reaffirm its prior award,⁸¹ it often opts for the safer path of "perceiving that it had been overruled by the Supreme Court and . . . fearing that it would be overruled again unless it drastically

⁷¹ 517 U.S. 559, 585–86 (1996).

⁷² See, e.g., *Bankers Life and Cas. Co. v. Crenshaw*, 486 U.S. 71, 87 (1988) (citation omitted).

⁷³ *Gore*, 517 U.S. 559, 582 (1996).

⁷⁴ 538 U.S. 408, 429 (2003).

⁷⁵ *Id.* at 425 (emphases added).

⁷⁶ *Bankers Life and Cas. Co. v. Crenshaw*, 486 U.S. 71, 87 (1988).

⁷⁷ *State Farm*, 538 U.S. at 425.

⁷⁸ *Id.*

⁷⁹ 128 S.Ct. 2605, 2634 (2008). Technically, *Exxon Chipping Co.* was a maritime law rather than Due Process Clause ruling, but as litigation scholar Keith Hylton observed, "the whole discussion was largely unnecessary if the court really wanted to limit its decision to maritime cases. The court's majority appears to be trying to make the case for imposing the one-to-one ratio as a default rule in ordinary civil cases." Associated Press, *Exxon Valdez: An end to long trek through courts*, USA Today, June 25, 2008, available at http://www.usatoday.com/news/washington/2008-06-25-1187291094_x.htm.

⁸⁰ Erwin Chemerinsky & Ned Miltenberg, *The Need to Clarify the Meaning of U.S. Supreme Court Remands: The Lessons of Punitive Damages Cases*, 36 *Ariz. St. L.J.* 513, 513–14 (2004).

⁸¹ *Id.* at 525.

revised its earlier decision” by lowering the punitive award.⁸² Additionally, the Supreme Court’s damages-limiting jurisprudence is by now well known to state court judges and litigators, so it likely influences what awards courts allow in run-of-the-mill trials that never yield appellate decisions.

The Court’s aggressiveness in reversing state-court damages awards under substantive Due Process doctrine is strikingly at odds with two major philosophies espoused by Justices in the Court majorities. First, it conflicts with contemporaneous jurisprudence citing “principles of state sovereignty” as prohibiting federal courts from interfering with states. In a line of cases contemporaneous with this punitive damages caselaw, the Court has held that federal courts cannot hear various kinds of lawsuits against states.⁸³ This holding was discretionary because it was not based on a clear constitutional command: the Eleventh Amendment prohibits only federal lawsuits “against against one . . . State[] by Citizens of *another* State,”⁸⁴ but the Court applies it as prohibiting suits against states by their *own* state citizens, admitting in several decisions that, “[a]lthough today’s cases concern suits brought by citizens against their own States, this Court has long ‘understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.’”⁸⁵ These rulings barring federal courts from hearing cases against states drew three of the same Justices who have supported federal court reversals of state-court damages awards.⁸⁶ These rulings seem inconsistent in their view of the proper federal court role over states, but consistent in their hostility to litigation—both litigation opposed by states (in the sovereign immunity cases) and litigation favored by states (in the punitive damages awards cases).

Second, the constitutional basis for this punitive damages review—substantive Due Process—has an interesting history, as at least one Justice in the *Gore* and *State Farm* majority has rejected the doctrine in virtually all other cases. On and off, the Court long has held that the Due Process clause⁸⁷ protects not only “process” rights to fair hearings,⁸⁸ but also “substantive” rights against laws that infringe protected liberties. For the past several decades, the main such holdings are rejections of statutes excessively restricting private personal matters such as abortion⁸⁹ or homosexual relationships.⁹⁰ Yet the Court’s earliest, and most frequent, uses of substantive due process protected the economic rights of businesses and property owners. *Dred Scott v. Sanford* infamously declared that slaveowners’ property rights trumped the Missouri Compromise’s limits on slavery.⁹¹ *Lochner v. New York* held that a maximum ten-hour bakery workday violated the due process “liberty” of a business to have employ-

⁸² *Id.*

⁸³ *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 91–92 (2000).

⁸⁴ U.S. CONST. amend. XI (emphasis added).

⁸⁵ *Kimel*, 528 U.S. at 72–73 (quoting *Seminole Tribe of Fl v. Florida*, 517 U.S. 44, 54 (1996)).

⁸⁶ Chief Justice Rehnquist, Justice O’Connor, and Justice Kennedy all joined all of the state sovereign immunity decisions and state punitive damages award reversals listed above.

⁸⁷ U.S. CONST. amend. XIV (“. . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .”).

⁸⁸ *See, e.g., Mathews v. Eldridge*, 424 U.S. 319 (1976) (declaring right to hearing on termination of entitlements).

⁸⁹ *See Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

⁹⁰ *See Lawrence v. Texas*, 539 U.S. 558 (2003).

⁹¹ *See Dred Scott v. Sandford*, 60 U.S. 393 (1857).

ees “contract” for long hours;⁹² on identical reasoning, *Adkins v. Children’s Hospital* struck down a minimum wage law.⁹³

The Court, in decisions joined by several Justices of the *Gore* and *State Farm* majorities, has long since rejected economic substantive due process under *Lochner* for having improperly “sought to impose a particular economic philosophy upon the Constitution.”⁹⁴ But the recent Due Process cases reversing punitive damages awards represent a similar economic substantive due process right. After all, litigation and legislation are just two different means to the same end; some corporate misdeeds are penalized by legislation, others by litigation verdicts.⁹⁵ Just as the early 1900s Court struck down legislation-imposed regulation of business practices, the 1990s-2000s Court has struck down litigation-imposed regulation of business practices.

Amidst this controversial history of economic substantive due process, one of the supporters of its application to punitive damages was Chief Justice Rehnquist, who dissented from virtually all other decisions recognizing any substantive Due Process rights, including reproductive rights and gay rights. As Justice Rehnquist stated in *Planned Parenthood v. Casey*, where he called for overturning the *Roe v. Wade* abortion right, partly based on caselaw rejecting gay rights:

“Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge made constitutional law having little or no cognizable roots in the language or design of the Constitution.”⁹⁶

Yet despite decades of opposition to other substantive due process rights, Rehnquist joined the *State Farm* majority’s use of substantive due process to reverse a punitive damages award: “[d]espite the broad discretion that States possess with respect to . . . punitive damages, the Due Process Clause . . . imposes substantive limits on that discretion.”⁹⁷

The dissonance between the Justices’ damages-limiting jurisprudence and their other jurisprudence is striking. The same Justices issuing decisions protecting states from federal court interference to stop litigation, also issue decisions subjecting states to federal court review when necessary to curb litigation awards. And at least one of the Justices who issues decisions rejecting substantive due process doctrine also issues decisions applying substantive due process doctrine to curb litigation awards. In short,

⁹² See *Lochner v. New York*, 198 U.S. 45 (1905).

⁹³ See *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923).

⁹⁴ *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 691 (1999) (opinion by Scalia, J., joined by several Justices from the *Gore* and/or *State Farm* majorities – Chief Justice Rehnquist, Justice O’Connor, and Justice Kennedy).

⁹⁵ See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089, 1122 n.62 (1972) (noting that pollution control “could be administered by decentralized damage assessment as in litigation, or it could be effected by techniques like effluent fees charged to polluters”).

⁹⁶ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 953 (1992) (Rehnquist, J., concurring in part and dissenting in part) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986)).

⁹⁷ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003) (quoting *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433 (2001)). Chief Justice Rehnquist joined both this *State Farm* opinion and the *Cooper Industries* opinion it quoted.

Justices' views on major constitutional issues, such as state sovereignty and substantive due process, give way to the Justices' desire to curb litigation.

D. ALLOWING EMPLOYERS TO MAKE CONSUMERS AND EMPLOYEES WAIVE THEIR RIGHT TO CHALLENGE VIOLATIONS OF FEDERAL LAW IN COURT

Over the past two decades, the Court has held that businesses can require employees not to sue in court for discrimination, harassment, or other workplace violations, but instead to file any such claims only in private arbitration, to be heard by a private arbitration service typically selected by the employer. The Court previously had held in *Alexander v. Gardner-Denver Co.* that a business cannot use an arbitration policy to prevent an employee from filing a discrimination lawsuit in federal court.⁹⁸ Preserving the right to sue in court, rather than just in private arbitration, was important because, the Court explained, “the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices.”⁹⁹ Accordingly, “there can be no prospective waiver of an employee’s rights” to sue rather than arbitrate a statutory discrimination claim, the Court held.¹⁰⁰

Yet in the past two decades, the Court has issued several decisions allowing businesses to compel employees to arbitrate, and never litigate, any workplace rights claims. The Court first so held in *Gilmer v. Interstate/Johnson Lane Corp.*,¹⁰¹ undercutting the prior decades of decisions disallowing employers from making employees give up their right to use public courts to challenge illegalities. In *14 Penn Plaza LLC v. Pyett*,¹⁰² the Court went further, holding that even where the employer’s arbitration “agreement” was with only the union, not with the individual workers themselves, the workers still are precluded from ever filing any claims in court. In *14 Penn Plaza*, a group of employees claiming workplace discrimination had their claims dismissed from court because of the arbitration policy the employer claimed forbade litigation. Accordingly, an employer now can opt out of the public courts either by imposing a policy on employees, such as by inserting it in an “employee handbook,” or by forcing it into a broader deal it strikes with a labor union that may by necessity focus on other negotiation points (wages, benefits, etc.), rather than on lawsuit rights that only some employees will need in the future.

Allowing businesses to opt out of the legal system, by mandating arbitration of all disputes against them, is one of the best illustrations of the Court’s changed view of litigation. The Court once praised plaintiffs who brought employment rights lawsuits as serving the function of a “private attorney general,” vindicating a policy that Congress considered of the highest priority.¹⁰³ But now it says, in approving mandatory arbitration rather than federal litigation of the same types of claims, that “[a]rbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation.”¹⁰⁴ On such arguments, the Court has “pushed the pendulum far beyond a neutral attitude” toward arbitration,

⁹⁸ 415 U.S. 36 (1974).

⁹⁹ *Id.* at 45.

¹⁰⁰ *Id.* at 51.

¹⁰¹ 500 U.S. 20 (1991).

¹⁰² 129 S.Ct. 1456 (2009).

¹⁰³ *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 401–02 (1968).

¹⁰⁴ *14 Penn Plaza LLC*, 129 S. Ct. at 1464 (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001)).

and instead “endorsed a policy that strongly favors private arbitration” over traditional public court litigation.¹⁰⁵

The Court’s approval of business-mandated arbitration has had a substantial impact. As many as 25% of employers may be imposing policies mandating arbitration of all employee claims;¹⁰⁶ mandating arbitration of *consumer* claims may be even more common, covering as much as one-third of all consumer purchases.¹⁰⁷ By forcing claims out of the courts, businesses have successfully opted out of the reams of case-law protecting plaintiffs’ rights to various litigation procedures that arbitration typically disallows, such as the right to question key witnesses at pretrial depositions,¹⁰⁸ common law and constitutional rights to public hearings and court filings,¹⁰⁹ and statutory and constitutional rights to jury trials.¹¹⁰

II. THE ROAD AHEAD: IMPENDING LITIGATION RIGHTS CONTROVERSIES, AND THE FUTURE COMPOSITION OF THE JUDICIARY

More disputes about the proper role of litigation are raging in the lower courts and likely will reach the Supreme Court soon. Without undertaking a comprehensive survey of cases the Court might hear, examples include aberrational circuit decisions suggesting that “maybe neither *Bell Atlantic* nor *Iqbal* governs” in cases lacking especially high risk of burdensome discovery,¹¹¹ the circuit split about whether employment discrimination claims can be class actions,¹¹² and whether a plaintiff’s “unclean hands” preclude a civil racketeering claim.¹¹³ Consequently, we likely will continue to see decisions implicating the Supreme Court’s and lower courts’ desire to protect even the largest corporate defendants from the burden of lawsuits, litigation costs, and damages verdicts. The question is whether and for how long the judiciary will retain its hostility to litigation and pro-defense perspective—and the current composition of the federal judiciary gives little reason to suspect imminent change.

Preliminarily, this briefing takes issue with a broad pattern of jurisprudence not limited to Justices commonly identified as the Court’s “conservatives,” but instead

¹⁰⁵ *Circuit City*, 532 U.S. at 131–32 (Stevens, J., dissenting).

¹⁰⁶ Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 Emp. Rts. & Emp. Pol’y J. 405, 411 (2007).

¹⁰⁷ Linda J. Demaine & Deborah R. Hensler, “Volunteering” to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer’s Experience, 67 Law & Contemp. Probs. 55, 62 (2004).

¹⁰⁸ FED. R. CIV. P. 30(a)(1)-(2) (presumptively allowing each party to depose up to 10 witnesses).

¹⁰⁹ *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 120 (2d Cir. 2006) (noting “the common law right of access” and that “the public and the press have a ‘qualified First Amendment right to attend judicial proceedings and to access certain judicial documents’”) (citation omitted).

¹¹⁰ See, e.g., U.S. Const. amend. VII (protecting jury right for certain common-law claims); 42 U.S.C.A. § 1981a(c) (2006) (providing jury right for Title VII employment discrimination claims).

¹¹¹ See, e.g., *Smith v. Duffey*, No. 08-2804, 2009 U.S. App. LEXIS 17211, at *11–13 (7th Cir. Aug. 3, 2009) (opinion by Posner, J.). *Contra Lormand v. US Unwired, Inc.*, 565 F.3d 228, 258 n.29 (5th Cir. 2009) (holding that the *Twombly* standard “generally applies to all complaints . . . [and] areas of the law”) (collecting cases).

¹¹² *Compare Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998) (disallowing employment discrimination class actions as entailing individualized inquiries precluding a finding of predominance of common issues (Rule 23(b)(3)) or classwide equitable relief (Rule 23(b)(2)), *with Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147 (2d Cir. 2001) (allowing such class actions, rejecting *Allison*).

¹¹³ *Compare Roma Construction Co. v. Russo*, 96 F.3d 566, 571–75 (1st Cir. 1996) (suggesting that unclean hands doctrine is inapplicable to RICO claims), *with Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1366 n. 41 (11th Cir. 2002) (finding unclean hands doctrine applicable to RICO claims).

extending to most of the four-Justice “liberal” wing of the recent Court.¹¹⁴ Justice Souter wrote *Twombly*, and Justices Stevens, so critical of the Court’s other anti-litigation decisions, authored *BMW v. Gore*, joined by Justices Breyer and Souter—and the same three joined the *State Farm v. Campbell* majority. Thus, the debate is not a simple one between the political or jurisprudential “left” and “right.” Rather, the problem is that however varied their ideologies and philosophies, the Justices largely share a negative perception of civil litigation—a shared perspective that may reflect their largely homogenous professional background and experiences.

Admittedly, tracing a Justice’s decisionmaking to his/her professional or personal history is an imprecise art, and some Justices transcend their backgrounds. Chief Justice Earl Warren famously led the Court’s aggressive foray into civil rights after supporting the internment of Japanese-Americans as Attorney General of California.¹¹⁵ But the modern Court that regularly expresses hostility to litigation as a tool of dispute resolution and social reform consists of Justices largely homogeneous in their professional background of civil litigation defense, of policy work rather than litigation, of serving institutional rather than individual clients, and of not working on affirmative public interest civil litigation. The current Justices’ backgrounds, while impressive in many ways, are also surprisingly similar.

- ***Private civil practice mainly representing institutions as defendants.*** Six current Justices had private law practice experience, but all were at a firm representing primarily businesses (Roberts, Scalia, Sotomayor, Kennedy, and Stevens) or at a major corporation as an in-house counsel (Thomas). Justice Ginsburg, former Director of the ACLU Women’s Rights Project, is the only Justice with substantial litigation experience (a) representing plaintiffs or (b) at an issue-oriented nonprofit organization. This background may explain why she is the sole Justice who has dissented from all the litigation-limiting Court decisions detailed above.
- ***Extensive political experience.*** In contrast to their limited-breadth civil litigation experience, six of the current Justices had held high federal political appointments.¹¹⁶ Even those who worked on progressive causes have pursued change through policy, not litigation—a distinction that may explain how a progressive like Justice Breyer can support *Twombly* and all three of the Court’s major decisions limiting punitive damages for proven illegality.
- ***Substantial pre-Court judicial experience.*** All nine current Justices previously were federal appellate court judges, eight of them (all except Thomas) for many years before the Supreme Court—making their practice experience, already of limited breadth, relatively distant.

¹¹⁴ Leigh Anne Williams, *Measuring Internal Influence on the Rehnquist Court: An Analysis of Non-Majority Opinion Joining Behavior*, 68 Ohio St. L.J. 679, 693 (2007) (noting that for over a decade starting in 1994, “Stevens, Ginsburg, Souter and Breyer are considered to be the liberal bloc of Justices”).

¹¹⁵ Lynne N. Henderson, *Legality and Empathy*, 85 Mich. L. Rev. 1574, 1606 (1987).

¹¹⁶ In short: Roberts and Alito held policy-making posts in the Department of Justice; Scalia and Thomas held various high-level Executive branch positions, and Thomas was a Senate staffer as well; Breyer spent many years as a Senate staffer and also had held a policy post in the Department of Justice; a sixth Justice, Stevens, also held political posts but in less depth, serving briefly as a Senate staffer and then for two years on the U.S. Attorney General’s National Committee to Study Antitrust Law.

The lower courts show similar homogeneity, with little change in the professional profile of the judicial nominees of the Clinton administration and the George W. Bush administration. An identical 88% of President Bush's and President Clinton's nominees had private practice experience; while over half of each administration's nominees had been government attorneys (prosecutors or otherwise), only a small percentage were public defenders (5% of Bush and 12% of Clinton nominees), and an even smaller number held elected office (4%, both administrations).¹¹⁷ For all their differences, the past two administrations appointed nominees from similar backgrounds.

The Supreme Court was not always so homogeneous. The presidencies prior to those that appointed the current Court (*i.e.*, prior to President Ford, who appointed Justice Stevens) each added Justices with markedly different backgrounds.

- *A lifelong practitioner.* Justice Powell (a Nixon appointee) had no prior judicial experience, having spent his career as a practicing lawyer prominent enough to be President of the American Bar Association.
- *A union-side labor lawyer.* Justice Goldberg (a Kennedy appointee) represented unions and their member workers in labor disputes.
- *A civil rights lawyer.* Justice Marshall (a Johnson appointee) served a few years as an appellate judge and U.S. Solicitor General, but the vast majority—and most formative—of his professional background was as the NAACP's Chief Counsel and lead attorney on most of its major civil rights cases, including at the Supreme Court, of the 1940s and 1950s.
- *A medical nonprofit lawyer.* Justice Blackmun (a Nixon appointee) for a decade represented the Mayo Clinic, a large entity, but a nonprofit, focused on health issues—a background seen as influencing his surprising authorship of *Roe v Wade* in the early years of his Court tenure when he was still a conservative in many ways.¹¹⁸

More broadly, in the past century, many of the Court's progressive giants came to the job with varied backgrounds; none of the following Justices were appointed primarily because they were accomplished federal appellate judges.

- **Louis Brandeis** was a crusading practicing lawyer, litigating progressive causes such as challenges to railroad mergers and defenses of early wage-and-hour laws, as well as advocating at public hearings for the rights of the poor.
- **William Douglas** was a legal scholar who became a founding member and then Chair of the Securities and Exchange Commission after President Franklin Roosevelt created the agency as a corporate watchdog.
- **Thurgood Marshall** was, as discussed above, arguably the leading civil rights attorney of the Twentieth Century.
- **William Brennan** came closest to the modern mold, but arguably his greatest asset was the political sensibility honed by his range of judicial experience on a New Jersey trial court, and then appellate and Supreme Courts.

¹¹⁷ Scott A. Moss, *The Courts under President Obama*, 86 Denver U. L. Rev. 1 (2009).

¹¹⁸ See, e.g., Joseph F. Kobylka, *Tales from the Blackmun Papers: A Fuller Appreciation of Harry Blackmun's Judicial Legacy*, 70 Mo. L. Rev. 1075, 1087 (2005) (noting that for *Roe*, "Blackmun repaired to the library at the Mayo Clinic to research the medical history of abortion"); Laurence H. Tribe, *Abortion: The Clash of Absolutes* 13 (1990) (suggesting Blackmun's Mayo Clinic work influenced his *Roe* opinion).

To be sure, not all Justices with admirably broad backgrounds became leading lights on the Court. Some of the Court's most poorly regarded Justices had backgrounds similar to the four listed above: Justice Rufus Peckham had almost exactly the same background as William Brennan—private practice, state court trial judge, then state high court judge, just in New York rather than New Jersey; Chief Justice Fred Vinson's impressive political background as elected City Attorney, member of Congress, and Secretary of the Treasury far overshadowed his brief judicial tenure. And the modern practice of appointing mainly able appellate judges has assured a high level of talent unusual in Court history. Harriet Miers in 2005 stood out as insufficiently qualified because it no longer is common for Presidents to appoint cronies to the high court, as it was during (for example) the Truman Administration, which, according to one scholar's ranking, gave us two of the ten worst Justices ever—Vinson and Minton, both political loyalists of President Truman.¹¹⁹ So there is some quality assurance in the Court's current homogeneity.

Yet there is troubling uniformity of perspective on the Court when Justices all arrive from the federal appellate bench and, before the bench, mainly represented corporations or served in policymaking, rather than litigation, posts. That uniformity of perspective risks privileging the portion of the legal profession from which the justices came (*i.e.*, lawyers for corporate clients and for the government), to the disadvantage of those who use the law to serve different interests—such as lawyers challenging malfeasance by the sort of corporations and governmental entities almost all of the current Justices represented as lawyers.

III. CONCLUSION

Hostility to litigation is an overriding theme in the modern Supreme Court's jurisprudence. Though the Court often is described as "conservative," that label is too blunt, because hostility to litigation trumps other conservative values, such as federalism, judicial restraint, and originalism. On the other side of the ideological divide, a number of the notionally progressive Justices came to the Court with little or no background in affirmative civil litigation—all but Justice Ginsburg—and, perhaps for that reason, have proven willing to join various of the modern court's decisions that have aggressively curtailed litigation. This acquiescence has had very real consequences for workers, consumers, and other individuals trying to use litigation to protect their rights against, and to police, powerful institutions such as employers, businesses, and government entities. With the Supreme Court's most strongly anti-litigation Justices unlikely to be replaced anytime soon, the Court may remain hostile to litigation for the foreseeable future. That fact, along with the even deeper hostility to litigation the lower federal courts exhibit, makes lower court judicial nominations an especially important battleground for the forces most committed to reining in litigation further and, on the other side, the forces most committed to preserving litigation as a tool for redressing grievances, deterring wrongdoing, and spurring social reform.

¹¹⁹ BERNARD SCHWARTZ, *A BOOK OF LEGAL LISTS: THE BEST AND WORST IN AMERICAN LAW* 28–43 (1999).

Mandatory Health Insurance: Is It Constitutional?

Simon Lazarus*

Recently, some opponents of comprehensive health insurance reform have introduced a new contention—namely, that a cornerstone of the reform bills pending before Congress, a requirement that most individuals purchase and maintain health insurance coverage, is unconstitutional. This issue paper addresses this claim. The paper reviews the relevant features of the legislation, Congress’ rationale and record supporting the requirement (generally called the “individual mandate”), relevant constitutional provisions and judicial precedents, and reform opponents’ arguments challenging the lawfulness of the mandate. The paper concludes that the mandate is lawful and clearly so—pursuant either to Congress’ authority to “regulate commerce among the several states,” or to its authority to “lay and collect taxes to provide for the General Welfare.”¹ With respect to Congress’ interstate commerce authority, the goals that drive this legislation—including achieving universal coverage, eliminating adverse selection, eliminating pre-existing conditions as a prerequisite for coverage, facilitating broad-scale pooling of individuals not covered by group health plans, and radically reducing costly emergency room visits by uninsured individuals—are eminently lawful objects for the exercise of that power. In the context of current health insurance market circumstances and the framework of the legislation, the use of an individual mandate, structured as it is to ensure affordability for all who are subject to it, is likewise an eminently rational and well-supported (“necessary and proper” in the words of Article I, §8) means for achieving these goals. The same goals and choice of means fit the mandate snugly within precedents broadly defining Congress’ authority to tax and spend.

Opponents’ arguments to the contrary express philosophical objections to the concept of mandatory health insurance in principle, without regard to the practical issues the Supreme Court has always used to evaluate laws challenged as outside Congress’ interstate commerce authority: the practical impact of the mandate on commerce or the public welfare or the welfare of affected individuals, or the rationality of Congress’ judgments about its impact on statutory goals. No doubt, in some quarters, opponents’ libertarian views are deeply felt. But they have no basis in law, neither in the grants of authority to Congress in Article I nor in limitations on that authority in the Bill of Rights, nor in the case law interpreting these provisions. Opponents’ real grievance is with the law in its current state. Their hope is that a majority of the Supreme Court will seize on a challenge to mandatory health insurance as an occasion to make major changes in current law. But their arguments appear un-

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¹ Both these grants of authority are prescribed in Article I, §8 of the Constitution.

likely to gain traction with the current Supreme Court, and, indeed, represent approaches and theories that have been repudiated by justices across the Court's ideological spectrum.

I. THE "MANDATE" PROVISIONS OF THE HEALTH CARE REFORM LEGISLATION

The individual mandate requires all otherwise uninsured Americans to purchase health insurance, if it is affordable and they do not fall within one of the other mandate exceptions. For the 58% of Americans currently covered by employer, professional, or union-sponsored group health plans, meeting this requirement will involve no change in their current status or arrangements, as long as they do not lose their jobs or find new work not covered by a group plan. Likewise, the 32% of Americans covered by Medicare, Medicaid, or other governmental insurance programs will likewise meet their obligation to acquire health insurance that meets the statutory criteria for adequate coverage.² For individuals not covered by any of the above sources, the legislation establishes a new market for policies for individuals (in the House bill, for employees of small business as well), offered through and regulated by (in the House bill) a national exchange, and in the Senate bill, state-based exchanges. The legislation requires that all such policies be provided without regard to pre-existing conditions, guaranteeing renewability of coverage, prohibiting discrimination based on age and other inappropriate factors, and otherwise eliminating or reducing barriers that have heretofore put quality health insurance beyond the reach of many people not covered by group health plans. In addition, the legislation provides for subsidies designed to make mandatory coverage affordable to all eligible persons.

The Senate bill, H.R. 3590, expressly requires U.S. citizens and legal residents to have "qualifying" health coverage—characterized as an "individual responsibility requirement"—beginning in 2014. Those without coverage pay a tax penalty of \$750 per year up to a maximum of three times that amount (\$2,250) per family. The penalty will be phased-in from 2014 to 2016. Alternatively, if it results in a higher amount, noncompliant individuals must pay .5 percent of household income for 2014, 1 percent for 2015, and 2 percent for 2015 and for later years. The obligation is capped in any event by the cost of the national average premium for a bronze level qualified plan for the relevant family size. Exemptions will be granted for financial hardship, religious objections, American Indians, those without coverage for less than three months, undocumented immigrants, incarcerated individuals, if the lowest cost available plan option exceeds 8% of an individual's income, and if the individual's income is below the Commerce Department's poverty level. The Senate bill expressly provides that failure to pay the penalty cannot result in criminal liability.³

The House bill, H.R. 3962, does not contain an express mandate to carry health insurance. Instead, the House bill casts its "mandate" (technically, not a mandate) as an amendment to the Internal Revenue Code levying a "tax on individuals without acceptable health care coverage."⁴ Functionally and conceptually, the mandate provisions in the two bills are not materially distinguishable.

² Data on health care coverage are drawn from the *AARP Bulletin* for December 2009, at pages 13-14, which cites as its sources the U.S. Census, U.S. Centers for Medicare and Medicaid Services (CMS), the Commonwealth Fund, the Kaiser Family Foundation, and an article, "In Search of health Care Reform," *Washington Post*, June 9, 2009.

³ H.R. 3590, 111th Cong. §§ 5000A(c)-(e) (2009) (as amended by Manager's Amendment).

⁴ H.R. 3962, 111th Cong. Title V, § 501 (2009).

II. MANDATORY INSURANCE AS AN EXERCISE OF CONGRESS' COMMERCE CLAUSE AUTHORITY IS WELL SUPPORTED BY ITS RATIONALE, AND BY ITS RECORD AND PERTINENT RESEARCH, ANALYSIS, AND EXPERIENCE WITH UNIVERSAL HEALTH REFORM PLANS IN THE UNITED STATES AND ABROAD.

The Senate bill contains findings setting out its rationale for inclusion of the individual mandate.⁵ The Senate findings start by specifying Congress' reliance on its commerce clause authority, and reiterating well-established parameters for the exercise of that authority: the mandate, the findings state, is "commercial and economic in nature" and "substantially affects commerce." Hence, the mandate is *not* "non-economic" in the sense that laws with "non-economic" purposes or subject-matters were singled out by recent Supreme Court decisions for comparatively strict judicial scrutiny from a "federalism" or "states' rights" perspective.⁶ In other words, the mandate falls in a class of types of commerce clause-based laws on which Congress retains broad latitude, as discussed below, to craft "rational" means to achieve constitutionally "legitimate" ends.

The Findings section then proceeds to explain the basis for these foundational assertions. Paragraph (2)(A) notes that the requirement "regulates" (the Commerce Clause term) commercial-economic "activity," i.e.: "economic and financial decisions about how and when health care is paid for, and when health insurance is purchased."

Paragraph (2)(B) sketches the case that "health insurance and health care services are a significant part of the national economy," citing various statistical bases for this conclusion, such as that national health spending is already 17.6 percent of the economy and projected to nearly double by 2019.

Paragraphs (2)(C)—(2)(J) identify particular goals of the legislation and state how and why the individual mandate is an effective or essential means of achieving each goal: increasing the "number and share of Americans who are insured," thus promoting the statutory goal of universal coverage; expanding financial security for vulnerable families; broadening the pool of insured individuals to minimize adverse selection; supporting coverage without regard to pre-existing conditions; reducing administrative costs; and lowering insurance premiums.

Paragraph (2)(D) states that the mandate "achieves near-universal coverage *by building upon and strengthening the private employer-based health insurance system*" (emphasis added). This is an especially significant point. As noted below, opponents challenging the validity of the mandate concede that Congress could lawfully establish a government-funded and managed (single-payer) health insurance system with universal mandatory individual contributions, using its powers to tax and spend under Article I, §8 of the Constitution (of course, Medicare is precisely such a program). But Congress has chosen not to totally displace the existing mixed public-private system. To attain universal coverage while retaining this mixed system, Congress must mandate that individual contributions purchase private sector coverage, rather than (as taxes) pay for governmental insurance.

Other paragraphs in the Findings tightly link the mandate to the achievement of specific statutory goals. Paragraph 2(A), for example, specifies that without the mandate, "some individuals would make an economic and financial decision to forego

⁵ H.R. 3590, 111th Cong. § 1501(a) (2009).

⁶ The two cases are *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), discussed immediately below.

health insurance coverage and attempt to self-insure, which increases risk to households and medical providers.” Paragraph 2(F) puts the cost of providing uncompensated care to the uninsured at \$43,000,000,000, which raises family premiums by \$1,000 per year. Paragraph 2(G) notes that 62% of all personal bankruptcies are caused by medical expenses, and states that the requirement, by increasing health insurance coverage, will strengthen financial security for families. Paragraph 2(I) explains why and how the mandate will minimize “adverse selection” and “broaden the risk pool” to “lower health insurance premiums.”

In short, the Senate bill findings state that the subject-matter of the mandate—decisions about how and at what point to pay for health insurance and/or health care—is in and substantially affects interstate commerce, and explain why the mandate is an essential means to achieving statutory goals within Congress’ authority to regulate interstate commerce. As noted above, the House bill contains no findings, and formally achieves the common goal of universal coverage purely by way of a tax incentive. But the Senate’s Commerce Clause rationale encompasses and applies with equal force to the functionally equivalent provisions of the House bill.

III. RELEVANT CONSTITUTIONAL PROVISIONS AND SUPREME COURT PRECEDENTS CONFIRM THE SENATE’S COMMERCE CLAUSE-BASED JUSTIFICATION FOR THE INDIVIDUAL MANDATE.

A. THE INDIVIDUAL MANDATE REGULATES ACTIVITY THAT IS “IN” INTERSTATE COMMERCE AND CONSTITUTES A “NECESSARY AND PROPER” MEANS OF ATTAINING LAWFUL STATUTORY GOALS.

As the Senate Findings note, the Supreme Court decades ago, in 1944, held that the business of insurance fell within Congress’ regulatory authority under the Commerce Clause.⁷ The Court emphasized, in terms pertinent here, that its central responsibility “is to make certain that the power to govern intercourse among the states remains where the Constitution placed it... in the Congress, available to be exercised for the national welfare as Congress shall deem necessary.”⁸ More specifically, the Court observed:

Perhaps no modern commercial enterprise directly affects so many persons in all walks of life as does the insurance business. Insurance touches the home, the family, and the occupation or the business of almost every person in the United States.⁹

The *Southeastern Underwriters* Court’s description of the factual case for federal regulation of insurance current in 1940 could hardly be more consonant with Congress’ identical case for expanding federal regulation of health insurance in 2009. That Court’s exposition of Commerce Clause legal doctrine has been repeated many times, both before and after the *Southeastern Underwriters* decision.¹⁰

⁷ *United States v. Southeastern Underwriters Ass’n*, 322 U.S. 533 (1944).

⁸ *Id.* at 533.

⁹ *Id.* at 540.

¹⁰ See e.g., *United States v. Darby*, 312 U.S. 100, 118-119 (1941); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937); *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 276-280 (1981); *Gonzales v. Raich*, 545 U.S. 1 (2005).

To challenge the precedential definitiveness of these cases, opponents cite two decisions issued near the end of the previous decade, in which, for the first and only times since the New Deal era, a majority of the Court invalidated federal statutory provisions as exceeding Congress' Commerce Clause authority. These 5-4 decisions, *United States v. Lopez*¹¹ and *United States v. Morrison*,¹² in no way undercut the force of *Southeastern Underwriters* and the many other precedents dating back to Chief Justice Marshall's original broad demarcation of Congress' Commerce Clause authority, which recognized the clause as "the Framers' response to the central problem giving rise to the Constitution itself: the absence of any federal commerce power under the Articles of Confederation."¹³ *Lopez* and *Morrison* reiterated and reaffirmed the established categorization of objects fit for federal legislation implementing the Commerce Clause:

- (1) the "channels of interstate commerce;"
- (2) the "instrumentalities of interstate commerce, and *persons or things in interstate commerce*;" and
- (3) "activities that 'substantially affect' interstate commerce."¹⁴

Both *Lopez* (federal criminal prohibition on guns within 1000 yards of a school) and *Morrison* (federal criminal prohibition on gender-motivated violence) involved statutes addressed to activities that the Court majority characterized as "non-economic" or "non-commercial" in nature; these cases stand for the proposition that Congress may not regulate individual instances of such "non-economic" activities—and only such activities—merely on the unsubstantiated assertion that, if repeated many times over, they could substantially affect interstate commerce.¹⁵ More recently, in *Gonzales v. Raich*, (prosecution under the Controlled Substances Act of individuals for growing marijuana for home medicinal use is valid under the Commerce Clause), the Court clarified that, in situations where intrastate activities are connected to and/or affect interstate commercial or economic markets, Congress retains all its broad regulatory authority conferred by earlier Commerce Clause decisions.¹⁶

¹¹ 514 U.S. 549 (1995).

¹² 529 U.S. 598 (2000).

¹³ *Raich*, 545 U.S. at 16. Chief Justice Marshall firmly established the breadth of Congress' authority under the Commerce Clause in such decisions as *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (Commerce Clause authorizes establishment of a National Bank), and *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (Ferry monopoly under state law preempted by Congress exercising Commerce Clause powers).

¹⁴ *Lopez*, 514 U.S. at 558-59; *Morrison*, 529 U.S. at 608-09 (emphasis added).

¹⁵ *Lopez*, 514 U.S. at 561-67; *Morrison*, 529 U.S. at 615-17. In *Lopez* Chief Justice Rehnquist's opinion for the Court explained that the law at issue "is a criminal statute that by its terms has nothing to do with commerce" or any sort of economic enterprise, however broadly one might define those terms. [It] is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce."

¹⁶ *Raich*, 545 U.S. at 23 ("Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class") (citing *Perez v. United States*, 402 U.S. 146, 154 (1971)). Importantly, Chief Justice Rehnquist's *Lopez* opinion emphasized, 514 U.S. at 564, that the statute at issue had no "jurisdictional element" requiring a connection between individual acts to be prosecuted and interstate commerce; Congress immediately re-enacted the provision after adding a requirement that weapons that form the basis of prosecution must be shown

But, however broad Congress' authority to regulate intrastate non-commercial or non-economic activities may or may not be, the answer to that question could not impugn a federal law prescribing mandatory health insurance. In line with the Senate Findings, health insurance, including whether and on what terms individuals acquire and maintain health insurance, comprises "persons or things *in* interstate commerce." Obviously, individual decisions with respect to health insurance "substantially affect" interstate commerce. Even apart from their effects, as Justice Scalia, concurring in *Gonzales v. Raich*, explained, the appropriateness of such items for regulation under the Commerce Clause, is "*self-evident, since they are the ingredients of interstate commerce itself.*"¹⁷

If health insurance is itself an "ingredient" of interstate commerce and "self-evidently" within Congress' Commerce Clause authority, the statutory goals for broadening, making more efficient and less costly, and otherwise improving health insurance coverage, specified in the Senate Findings, fit equally within that authority. Further, the individual mandate requirement easily qualifies as a "necessary and proper" means of achieving those goals, under the standard first articulated by Chief Justice Marshall and adhered to since:

"Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."¹⁸

Many independent experts, studies, and analyses concur in Congress' judgment that health reform with universal coverage must include a responsibility requirement; without it, not enough individuals will participate in a voluntary system, adverse selection will continue, the government will continue to overpay for care for the uninsured, and overall health reform will be unsustainable.¹⁹ Experience in other countries with universal coverage programs confirms these analyses.²⁰ The only large-scale American effort to implement such a requirement has been in Massachusetts and the

to have traveled in interstate commerce. The new law was promptly upheld by the Eighth Circuit, and the Supreme Court declined to grant certiorari. *U.S. v. Danks* 221 F.3d 1037, *cert denied*, *Danks v. U.S.* 528 U.S. 1091. Furthermore, the *Lopez* opinion stressed that, in contrast to the Senate health reform bill, Congress had inserted no findings in the statute linking school violence to goals within the purview of Congress' Commerce Clause writ. *Lopez*, 514 U.S. at 564.

¹⁷ *Raich*, 545 U.S. at 34 (emphasis added).

¹⁸ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

¹⁹ The Senate Finance Committee Report accompanying the precursor of H.R. 3590 succinctly states: "To ensure the insurance market reforms function properly, the [bill] would create a personal responsibility requirement for health care coverage[.]" S. Rep. No. 111-89 (2009), *available at* <http://finance.senate.gov/press/Bpress/2009press/prb102109a.pdf>; The academic consensus is summarized in Linda J. Blumberg and John Holahan, Urban Institute, Do Individual Mandates Matter? (2008), *available at* http://www.urban.org/uploadedpdf/411603_individual_mandates.pdf.

²⁰ As pithily explained by Washington Post health policy expert Ezra Klein: "Pick your favorite system. Socialized medicine in Britain. Single-payer in Canada. Multi-payer with a government floor in France. Private plans with heavy public regulation in Sweden, Germany and elsewhere. None of these plans are 'voluntary.' In some, there's an individual mandate forcing you to pay premiums to insurance companies. In some, there's a system of taxation forcing you to pay premiums to the government. In all of them, at least so far as I know, participation is required except in very limited and uncommon circumstances. And there's a reason for that: No universal system can work without it." Ezra Klein, *The Importance of the Individual Mandate*, Washington Post, December 16, 2009, *available at* http://voices.washingtonpost.com/ezra-klein/2009/12/draft_1.html.

experience there supports these points.²¹ Furthermore, Massachusetts has recently published data on its well-regarded reform efforts which indicate that not only is the requirement crucial, but 25% fewer people were subject to its penalty in 2008 than in 2007, and the amount who ultimately did not obtain insurance, despite its affordability, represented only 1.3% of all taxpayers.²² The Findings specifically note that the requirement in Massachusetts built upon, strengthened, and expanded the existing private employer-based health insurance system.²³

Given Congress' well-supported judgment that mandatory health insurance is essential for making effective the scheme for health care reform established by the bill, there can be no serious question that the individual mandate is "plainly adapted" to the ends promoted by the legislation. All the post-New Deal cases cited by opponents in which the Supreme Court has resolved contested exercises of Congress' Commerce Clause authority have involved matters on the periphery of that authority—intrastate activities, non-economic activities, or other activities alleged not to have a "substantial effect" on interstate commerce, such as those at issue in *Lopez* and *Morrison*. But this is not such a situation. Health insurance is "in" interstate commerce, nowhere near its periphery. But even if (contrary to established law and plain fact) that were not the case, the individual mandate would nevertheless be well within Congress' authority. As Justice Scalia observed in his 2005 concurring opinion in *Gonzales v. Raich*, "Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those interstate activities that do not themselves substantially affect interstate commerce."²⁴ In elaborating this critical dimension of Congress' expansive necessary and proper authority, Justice Scalia referenced (*Id.* at 36) Chief Justice Rehnquist's opinion for the Court in *Lopez*:

Though the conduct in *Lopez* was not economic, the Court nevertheless recognized that it could be regulated as "an essential part of a larger regulation of economic activity, in which the regulatory scheme would be undercut unless the intrastate activity were regulated."²⁵

Of course, to pass constitutional muster in the courts, Congress need not conclusively prove that it has selected a perfect option, or the best option; it need demonstrate only that it has a "rational basis" for the manner in which it designs means to attain lawful statutory goals.²⁶ In the health care reform legislation, Congress has plainly more than

²¹ Editorial, *Mass. Bashers Take Note: Health Reform is Working*, Boston Globe, Aug. 5, 2009, available at http://www.boston.com/bostonglobe/editorial_opinion/editorials/articles/2009/08/05/mass_bashers_take_note_health_reform_is_working/; Sharon K. Long and Paul B. Masi, *Access and Affordability: An Update on Health Reform in Massachusetts, Fall 2008*, Health Affairs, May 28, 2009, available at <http://content.healthaffairs.org/cgi/reprint/28/4/w578?ijkey=kq.AYAeHKJBb6&keytype=ref&siteid=healthaff>.

²² Massachusetts Department of Revenue, Individual Mandate 2008 Preliminary Data Analysis (2009), available at http://www.mass.gov/?pageID=dormodulechunk&L=1&L0=Home&sid=Ador&b=terminalcontent&f=dor_news_pressreleases_2009_Insur_mandate_08_draftpenguidelines_2010&ccsid=Ador.

²³ H.R. 3590, 111th Cong. § 1501(a)(2)(D) (2009).

²⁴ *Gonzalez v. Raich*, 545 U.S. 1, 35 (2005).

²⁵ *Raich*, 545 U.S. at 36 (quoting *Lopez*, 514 U.S. at 561).

²⁶ *Raich*, 545 U.S. at 22 (citing numerous other Supreme Court precedents) (opinion of the Court by Justice Stevens).

met that standard, in determining that its “regulatory scheme would be undercut” unless the individual mandate is included.

B. OPPONENTS’ LABELING OF DECISIONS NOT TO PURCHASE INSURANCE AS “INACTIVITY” DOES NOT DEFEAT CONGRESS’ COMMERCE CLAUSE AUTHORITY TO REQUIRE HEALTH INSURANCE.

Opponents are aware that, as the Federalist Society’s issue paper on the subject acknowledges, “An ‘individual mandate’ to buy health insurance has been a component of most health care reform plans proposed over the years, starting with President Bill Clinton’s 1993 health care reform proposal.”²⁷ Indeed, during that lengthy period of spirited legal and policy disputes about health care reform, the suggestion that the principal template for reform might be *unconstitutional* was never heard, until months into the congressional consideration of the current legislation in 2009. In claiming to have found a constitutional flaw in the logically tight and empirically well-supported link between the individual mandate and lawful goals of a lawful program, opponents’ arguments boil down to a single assertion: that a decision not to purchase or maintain health insurance, which the mandate prohibits, is “inactivity,” not activity at all, and hence not an activity in or affecting interstate commerce.

By its own plain terms, the individual mandate provision regulates no action. To the contrary, it purports to “regulate” inactivity by converting the inactivity of not buying insurance into commercial activity. Proponents of the individual mandate are contending that, under its power to “regulate commerce . . . among the several states,” Congress may reach the doing of nothing at all!²⁸

This “inactivity” claim is empty verbal gimmickry. Individuals who go without health insurance—if health insurance is available to them and affordable, a contingency that the legislation goes to great lengths to eliminate—are not “doing nothing.” They are deciding to put off paying for health insurance and for health care—because they believe that they won’t need it until some future date, or because they recognize that, one way or the other, through hospital emergency room care or other means, necessary care will be available if serious illness or an accident strikes. Professor Jack Balkin has characterized such acts as decisions to self-insure.²⁹ As the Senate Findings state, reflecting widespread, well-documented expert analysis as well as experience with existing universal health programs, universal health coverage requires universal buy-in. In effect, Congress has determined that decisions to forego coverage by indi-

²⁷ Peter Urbanowicz and Dennis G. Smith, *Constitutional Implications of an “Individual Mandate” in Health Care Reform*, Federalist Society, July 10, 2009, available at http://www.fed-soc.org/doclib/20090710_Individual_Mandates.pdf.

²⁸ Randy Barnett, Nathaniel Stewart, and Todd Gaziano, *Why the Personal Mandate to Buy Health Insurance is Unprecedented and Unconstitutional*, The Heritage Foundation, December 9, 2009, at 1, available at http://s3.amazonaws.com/thf_media/2009/pdf/lm_0049.pdf. To the same effect, see Ken Klukowski, *Mandate Insurance is Unconstitutional*, Politico (October 20, 2009), available at <http://www.politico.com/news/stories/1009/28463.html>; David B. Rivkin, Jr. and Lee A. Casey, *Mandatory Insurance is Unconstitutional*, Wall Street Journal, September 18, 2009, available at <http://online.wsj.com/article/SB10001424052970204518504574416623109362480.html>.

²⁹ Professor Balkin’s observation appears in a debate with Messrs. Rivkin and Casey, *A Healthy Debate: The Constitutionality of an Individual Mandate*, 148 U.Pa. L. Rev. PENnumbra 93, 117 (2009), available at <http://www.pennumbra.com/debates/pdfs/HealthyDebate.pdf>.

viduals, most or all of whom will eventually need health care, game the system in such individuals' own perceived short-term interests, narrowly defined. But in the long-run, they make the system more expensive and less effective for themselves as well as the rest of society, and they make the overall statutory program unworkable. The rationality of Congress' judgment on this basic point—if anything, stronger and more direct than regulatory approaches upheld in leading Commerce Clause cases perceived to be close, such as *Gonzales v. Raich*, *Wickard v. Filburn*³⁰, and *Heart of Atlanta Motel, Inc. v. United States*³¹-- cannot be finessed with a misleading label.

In effect, opponents acknowledge that no persuasive argument can be found to rebut Congress' case for the validity of its mandatory insurance provisions. The authors of the Federalist Society paper noted above never actually assert that the mandate is unconstitutional. After setting out—without ever actually endorsing—the various arguments against mandate provisions in the pending House and Senate bills, Messrs. Urbanowicz and Smith merely conclude that:

Reliance on the Commerce Clause to justify the constitutionality of an individual mandate *might be susceptible to an “as applied challenge* from individuals who (1) never access the health care system or (2) are able to pay for their health care without using insurance, because the government could not claim an impact on interstate commerce of providers and insurers as a result of uncompensated care.”³²

Apart from the implicit concession that, on its face the mandate is constitutional under the Commerce Clause, and their identifying only two—very narrow—classes of plaintiffs for “as applied” challenges, they are willing to suggest only that the mandate “might be susceptible” to such claims.³³ Opponents' real grievance is with the state of the law itself, what CATO Institute legal expert Michael Cannon characterizes as “the Supreme Court's tortured interpretation of the Commerce Clause,” which, he and CATO Board Chair Robert A. Levy grimly acknowledge, permits “[e]ven non-

³⁰ 317 U.S. 111 (1942) (Congress authorized to enforce acreage limits to crops grown exclusively for home consumption).

³¹ 379 U.S. 241, 258 (1964) (Upholding prohibition in the Civil Rights Act of 1964 barring hotels and restaurants from refusing to serve customers on grounds of race). Professor Erwin Chemerinsky has noted that this ruling underscores the lack of support in relevant case-law for the activity/non-activity distinction proposed by opponents and on which their entire Commerce Clause case rests. Chemerinsky, *Health Care Reform is Constitutional*, Politico, October 23, 2009, available at <http://www.politico.com/news/stories/1009/28620.html>.

³² Urbanowicz and Smith, *supra* n. 27, at 4 (emphasis added).

³³ The authors' caution is quite understandable, given that no individual could demonstrate that they will “never” access the health care system. Nor could it be demonstrated that uncompensated care has no effect on the overall health insurance system; the latter argument would appear indistinguishable from the arguments rejected by the Court in *Raich* and *Wickard*. In contrast to the suggestion of Federalist Society authors. Urbanowicz and Smith, the Heritage Foundation authors assert that the challenge to the mandate that they contemplate would be a facial, rather than an as-applied claim, and would be *more* likely to succeed for that reason. Barnett, Stewart, and Gaziano, *supra* n. 28, at 11. They note that the Supreme Court has *never* upheld an as-applied Commerce Clause attack on a federal law, most recently rejecting such a challenge in 2005 in *Raich*. *Id.* at 9.

commercial activities within a state [to] be restricted if they threaten to undercut federal regulation of interstate markets.”³⁴

IV. THE PROVISIONS OF THE HOUSE AND SENATE BILLS CREATING INCENTIVES TO CARRY ADEQUATE HEALTH INSURANCE ARE LAWFUL EXERCISES OF CONGRESS’ BROAD POWER TO COLLECT REVENUE AND SPEND FOR THE GENERAL WELFARE.

In addition to contending that the individual mandate exceeds Congress’ authority to regulate interstate commerce, opponents also claim that the penalties prescribed for violating the insurance requirement, in both the House and Senate bills, exceed Congress’ constitutional taxing authority. This claim does not merit extensive analysis, because there is simply no colorable basis for it.

As noted above, the House bill structures the individual mandate entirely as a tax. Section 501 adds a section (§59B) to the Internal Revenue Code that imposes a tax on individuals who fail to carry specified health insurance coverage of 2.5% of their adjusted gross income above the filing threshold, capped at the national average current annual cost of health insurance premiums for basic individual plans.³⁵ The Senate bill, also as noted above, sets forth an affirmative mandate, termed the “individual responsibility requirement,” and prescribes penalties for noncompliance; the penalties are to be included with the individual’s annual tax return—hence, added to his or her tax for the year. This penalty is capped (at very low levels): \$95 for 2014; \$495 for 2015; \$750 for 2016, adjusted thereafter with a cost-of-living adjustment. Alternatively, an individual who fails to purchase insurance must pay .5 percent of household income for 2014, 1 percent for 2015, and 2 percent thereafter, capped by the cost of the national average premium for a bronze level qualified plan for the relevant family size, if this results in a higher amount.³⁶ In effect, these provisions constitute analogues to the pay-or-play mandates imposed by both the House and Senate bills on employers—which opponents have not challenged on constitutional grounds. It is, frankly, difficult to apprehend how these individual requirements, and the larger packages of incentives and benefits of which it is a part, differs in kind from these and from many existing provisions of the Internal Revenue Code, or why they are incompatible with the long-established judicial precedents that Congress has relied upon in fashioning the nation’s tax system.

On their face, these mandated payments are straightforward taxes on income. Contrary to what some opponents have suggested, the fact that they have a regulatory purpose is irrelevant for constitutional purposes. At least since 1937, it has been clear that “[A] tax is not any the less a tax because it has a regulatory effect, and . . . an act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax . . . tends to restrict or suppress the thing taxed.”³⁷ In the same vein: “It is beyond serious question that a tax does not cease to be valid merely

³⁴ Michael F. Cannon, *The Reid Individual Mandate: An Affront to the Constitution*, Cato@Liberty December 12, 2009, available at <http://www.cato-at-liberty.org/2009/12/11/the-reid-individual-mandate-an-affront-to-the-constitution/>; Michael F. Cannon and Robert A. Levy, *Bill Reforms Constitution: Congress is Asserting a New, Unauthorized Power to Force Us to Buy Health Insurance*, Philadelphia Inquirer, December 11, 2009, available at <http://www.philly.com/inquirer/opinion/79034917.html>. Likewise, Rivkin and Casey concede the same point, *supra* n. 29, at 112.

³⁵ H.R. 3962, 111th Cong. §501(a) (2009).

³⁶ H.R. 3590, 111th Cong., § 5000A(c) (2009) (as amended by the Manager’s Amendment).

³⁷ *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937).

because it regulates, discourages, or even definitely deters the activities taxes.”³⁸ As noted above, the mandatory insurance requirements in these bills are well within Congress’ regulatory authority under the Commerce Clause. But even if that were not true, Congress is empowered to enact them pursuant to its taxing and spending powers. Since 1936, it has been established that Congress may exercise its powers to collect revenue and spend for the General Welfare to achieve goals that are not covered by the other powers enumerated in Article I.³⁹ Congress may—though, as noted above, it is not required to—accomplish such results by conditioning the grant of federal funds on compliance with specified requirements.⁴⁰ Indeed, the mandate provisions utilize this approach with respect to those individuals who qualify for subsidies in order to afford mandated insurance payments. Finally, opponents suggest that the taxes associated with the mandate constitute a “direct” tax which, as they interpret the taxation provisions of Article I and the Sixteenth Amendment, must be “apportioned among the states” strictly in accordance with their respective populations. Not since the nineteenth century has the Supreme Court so narrowly or legalistically limited Congress’ taxing authority; Professor Timothy Jost considers it “inconceivable” that the Court would reverse that course over the health care individual mandate. The Court, he explains, has treated only capitation and property taxes as “direct taxes,” and the mandate tax provisions fall within neither category. Instead, they tax “the refusal to purchase insurance, recognizing that individuals who go without insurance impose a burden on society when the uninsured individual ends up receiving “uncompensated care” or being cared for at public expense.”⁴¹

The above constitutional principles have long undergirded Congress’ broad powers to tax and spend for the General Welfare, have been reaffirmed by the courts frequently, and relied upon by Congress pervasively. They are more than adequate to support the taxing and spending provisions that relate to the mandatory insurance requirement in the current health reform bills. As the Congressional Research Service noted earlier this year, “[H]ealth insurance mandate proposals [along the lines of those in the legislation] could rely on Congress’s spending and taxing authority.”⁴² The program created by the legislation leaves no room for doubt about the applicability of this conclusion. As Professor Jack Balkin recently stated in his debate with opponents David Rivkin and Lee Casey:

The individual mandate is part of a comprehensive health care reform proposal that includes employer mandates for coverage, offers numerous tax credits and tax deductions to small businesses and individuals to allow them to purchase health insurance, expands Medicaid to include more Americans who cannot afford insurance, and reforms insurance practices such as denials of insur-

³⁸ *United States v. Sanchez*, 340 U.S. 42, 44 (1950).

³⁹ *United States v. Butler*, 297 U.S. 1, 67 (1936). *United States v. Butler*, decided even before the Court altered its perspective on other constitutional issues to accommodate the New Deal, famously resolved the then-century and a half old debate between Alexander Hamilton and James Madison in favor of Hamilton’s view that the scope of the tax-and-spend power was not limited by the other, specifically enumerated Article I powers. *Helvering v. Davis*, 301 U.S. 619, 640 (1937).

⁴⁰ *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (opinion for the Court by Rehnquist, C.J.).

⁴¹ Timothy Jost, *Is it a Tax? Is it Constitutional?* O’Neill Institute Legal Solutions for Health Reform Blog, available at <http://oneillhealthreform.wordpress.com/2009/10/08/is-it-a-tax-is-it-constitutional/>.

⁴² Congressional Research Service, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis 2* (July 24, 2009).

ance for preexisting conditions. Each of these reforms costs the government money either in extra expenditures or in foregone tax revenues. [Taxing] uninsured persons helps recoup some of these costs and raises revenues for the government to pay for its new programs.⁴³

In sum, the similar incentive and contribution provisions structuring the individual mandate in both bills more than satisfies the bedrock threshold, that the authority to determine whether particular objectives or means for achieving them serve the General Welfare, as specified in Article I of the Constitution, “belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power [or] not an exercise of judgment.”⁴⁴

V. NO PROVISION IN THE BILL OF RIGHTS PREVENTS CONGRESS FROM EXERCISING ITS COMMERCE REGULATORY AND TAX-AND-SPEND AUTHORITY TO PRESCRIBE MANDATORY HEALTH INSURANCE.

In truth, what drives opponents’ strained attempts to shrink Congress’ Commerce and taxing powers is a libertarian hostility in principle to forcing health insurance on individuals who would prefer to go without it—regardless of the effect such decisions have on the health sector of the national economy or on Congress’ design for regulating that sector. The question arises, is there a constitutional provision that could form the basis for trumping Congress’ regulatory and tax authority? Were there a provision in the Bill of Rights—or elsewhere in the Constitution—that provides a colorable basis for asserting this libertarian interest, opponents would surely invoke it. But they do not, because there is no such provision.

Since 1937 the Supreme Court has never invalidated a federal economic regulation as an unconstitutional deprivation of “liberty” under the Fifth Amendment.⁴⁵ While the Court has held that forcing individuals to accept unwanted medical care can constitute such a “substantive due process violation,”⁴⁶ the individual mandate in the health care reform legislation does not require anyone to accept treatment, only to pay for insurance that would entitle them to treatment if and when they need it and choose it. To uphold such a requirement, unless a right that has been defined as “fundamental” is at stake, Congress need only demonstrate that the challenged requirement is “rational.” The current health care reform mandate amply meets that standard, as noted above.⁴⁷ As noted above, the opponents’ briefs against the mandate avoid making a substantive due process challenge.

Messrs. Urbanowicz and Smith, authors of the Federalist Society issue paper, do suggest that an as-applied challenge “can be expected” on the ground that, “based on

⁴³ Balkin, Rivkin and Casey, *supra* note 29, at 103.

⁴⁴ *Helvering*, 301 U.S. at 640.

⁴⁵ Mark A. Hall, Georgetown University O’Neill Institute for National and Global Health Law, Project on Legal Solutions in Health Reform, *The Constitutionality of Mandates to Purchase Health Insurance*, at 11, available at http://www.law.georgetown.edu/oneillinstitute/projects/reform/Papers/Individual_Mandates.pdf.

⁴⁶ *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990).

⁴⁷ *Williamson v. Lee Optical Co.*, 377 U.S. 473, 487-88 (1964) (“It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it”), discussed in Hall, *supra* n. 45, at 11.

individual circumstances,” the requirement to purchase health insurance violates the Fifth Amendment ban on “takings” of private property for a non-public purpose and/or without just compensation.⁴⁸ They express no opinion on the likely disposition of such a challenge. And with good reason. As Professor Hall has noted, the courts have shied away from accepting Takings claims involving government-induced losses of money, except when private money is seized from a discrete and separate account. “Imposing a financial obligation that can be paid out of any source of funds,” he observes, “is indistinguishable from simple taxation, or ordinary regulation. . . .”⁴⁹

In a 1998 decision, five justices—four using a Takings rationale and one (Justice Kennedy) using a substantive due process rationale—struck down a federal law requiring companies formerly in the coal business to fund health insurance for former employees. At first glance, this decision might give some comfort to the notion that a Fifth Amendment taking-based argument could be mounted against the individual mandate. However, in the 1998 case, both opinions supporting its 5-4 result emphasized that they were willing to find constitutional fault only because the law in question shifted costs to a small and discrete set of entities, and, especially, because it did so retroactively so as to defeat justifiable “investment-backed expectations.” Justice O’Connor’s plurality opinion noted that “in the course of regulating commercial and other human affairs, Congress routinely creates burdens for some that directly benefit others.” The Court nevertheless invalidated this particular instance as an uncompensated taking, only because it “imposed severe retroactive liability on a limited class of parties . . . disproportionate to the parties’ experience.”⁵⁰ The statute in the *Apfel* case imposed liability on a company for a business in which it had engaged a quarter century earlier. In contrast, the health reform mandate imposes “costs” (if, indeed, they are net costs or “without compensation” at all, since mandatory payments are exchanged for valuable health insurance) on millions of presently uninsured individuals, many of whom would voluntarily have purchased insurance already, had it been available and affordable. Moreover, the obligation is strictly prospective. In short, opponents can point to no constitutional provision to trump Congress’ straight-forward, black-letter argument—the mandate is a rational means of promoting indisputably “legitimate” statutory goals appropriate for Congress’ broad powers to regulate commerce and tax and spend for the general welfare.

VI. CONCLUSION: MANDATORY INSURANCE IS NEITHER BURDENSOME NOR UNPRECEDENTED.

A major reason why all opponents’ legal arguments fall short is that they share a common factual foundation, which itself is a fallacy. Their root assumption, or assertion, is that requiring Americans to carry health insurance is both extraordinarily

⁴⁸ Urbanowicz and Smith, *supra* n. 27, at 4.

⁴⁹ Mark A. Hall, “Taking” Legal and Economic Liberties, Seriously? O’Neill Institute Legal Issues in Health Reform Blog, available at <http://oneillhealthreform.wordpress.com/2009/10/14/%e2%80%9ctakin g%e2%80%9d-legal-and-economic-liberties-seriously/>.

⁵⁰ *Eastern Enterprises v. Apfel*, 524 U.S. 498, 526-29 (plurality opinion of Justice O’Connor), 538, 548-50 (opinion of Justice Kennedy, concurring in the judgment and dissenting in part).

novel—“unprecedented”—and extraordinarily burdensome. But this endlessly repeated assertion is specious, for several reasons:

- To begin with, experience demonstrates that mandatory health insurance is neither unprecedented nor burdensome. Hundreds of millions of millions of individuals live under a variety of mandatory health insurance regimes, with very high rates of compliance and no record of discontent with the requirement, in other advanced economies and, indeed, as noted above, in Massachusetts.
- As noted above, the overwhelming majority of Americans already carry health insurance that satisfies the terms of the mandate, so they will not be affected by the mandate at all. Of the approximately 46 million Americans who currently lack health insurance, the majority are in this state only because it is unavailable or unaffordable, and they of course, will welcome the opportunity presented by the legislation to gain coverage.
- For those currently uninsured Americans who would prefer to forego the cost of coverage, even with whatever level of subsidy they will be in a position to claim, the mandate is no more a burden than the requirement to pay Social Security and Medicare taxes—indeed, it is less, since the coverage they receive in return is available immediately, not when they reach eligibility in their 60s.
- By conceding that social and health insurance taxes are constitutionally valid restrictions on individual liberty, while condemning functionally equivalent contributions to private insurers, opponents effectively contend that a single-payer, government-run program like Medicare is the *only* type of universal health insurance system Congress may establish. The Constitution surely does not impose such an arbitrary strait-jacket on Congress.
- The great majority of Americans live in jurisdictions that require the purchase of automobile insurance. Health care reform opponents claim that these state mandatory auto insurance regimes are not “precedents” for federal mandatory health insurance, for a variety of essentially legalistic reasons. For example, they assert that auto insurance is a voluntary payment in exchange for a “privilege,” permission to drive on public roads. But for most people, driving is an economic necessity. In terms of its actual impact on people, mandatory auto insurance is a common-sense indicator of whether the public would find novel or inherently burdensome a mandate to purchase health insurance from the private insurance industry.
- If, as opponents claim, the burden of mandatory health contributions was—*in principle*—oppressive and unfair, Medicare, and for that matter Social Security taxes would raise constitutional questions no less than if these landmark statutory programs were cast as regulations of interstate commerce. In fact, of course, since 1937, such questions have never been raised either in the courts or in Congress. The reason is simple: *most people regard these mandatory contributions—in light of what they expect to receive in exchange—as a bargain not a burden.*

Beyond *Citizens United v. FEC*: Re-Examining Corporate Rights

Jeffrey D. Clements*

One of the highlights of the Supreme Court's 2009-2010 term will be the decision in *Citizens United v. FEC*, a campaign finance law case in which the Court is considering overruling *Austin v. Michigan Chamber of Commerce*¹ and *McConnell v. FEC*.² *Austin* upheld the constitutionality of state regulation of corporate political expenditures, and the relevant part of *McConnell* affirmed the constitutionality of federal restrictions on corporate campaign expenditures. Whether or not the Supreme Court's decision in *Citizens United* explicitly addresses "corporate rights" under the Constitution, a holding that overrules *Austin* and *McConnell* would rest on the remarkable—and erroneous—assumption that the Constitution provides corporations with First Amendment and Fourteenth Amendment rights equivalent to those of people for purposes of political expenditures.

While a surprising re-argument order at the end of the Court's 2008-2009 term and an abbreviated briefing and argument schedule may have suggested that the public might overlook the case, that is not what happened. Instead, the threatened extension of corporate rights in *Citizens United* has created increasing public alarm. Debate about whether corporations as corporations are even capable of having constitutional rights entered the mainstream media. Just a few examples include the *New York Times* quoting Thomas Jefferson's desire to "crush" corporations that "dare to challenge" self-government of the people;³ The Bill Moyers Journal on PBS hosting a face-off of Floyd Abrams and Trevor Potter, former counsel to Senator John McCain's presidential campaign;⁴ the *National Journal* describing the "pitched battle" of amicus briefs in the case;⁵ and even Stephen Colbert on the Colbert Report weighing in with a satire of the Court's concern for the newest "oppressed minority," corporations.⁶

Likewise, senators from across the political spectrum have sounded warnings to the Court, with Senator Russ Feingold (D-WI) pointedly stating on the Senate floor that to overrule *Austin* and *McConnell*, "the Court would have to ignore several time-honored principles that have served for the past two centuries to preserve the public's

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¹ *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

² *McConnell v. FEC*, 540 U.S. 93 (2003).

³ Editorial, *A Threat to Fair Elections*, *New York Times*, Sept. 8, 2009, at A24.

⁴ Bill Moyers Journal, Floyd Abrams and Trevor Potter, Sept. 4, 2009, <http://www.pbs.org/moyers/journal/09042009/profile.html>.

⁵ Eliza Newlin Carney, *Citizens United Sparks Pitched Battle*, *National Journal*, Aug. 31, 2009.

⁶ Colbert Nation, Sept. 15 2009, available at <http://www.colbertnation.com/the-colbert-report-vid-eos/249055/sepember-15-2009/the-word---let-freedom-ka-ching>.

respect for and acceptance of its decisions.”⁷ Senator McCain (R-AZ) took to the floor to directly challenge Justice Scalia by name, inveighing against “activist judges, regardless of whether it is liberal or conservative activism,” and warning “the voices of millions and millions of Americans . . . could be drowned out by large corporations if the decades-old restrictions on corporate electioneering are rescinded.”⁸

Whether Chief Justice Roberts and Justice Alito join Justices Kennedy, Scalia, and Thomas in their stated intention to overrule *Austin* and *McConnell* remains to be seen. What is clear, though, is that the Court’s decision to examine whether corporations have First and Fourteenth Amendment rights to free speech and political activity has renewed a debate about the place of corporations in our constitutional jurisprudence that has simmered for more than a century.

This Issue Brief seeks to show that if the Court deems Congress and the states to be powerless to restrict corporate political expenditures, the piecemeal and unwarranted fabrication of a corporate rights doctrine that has gathered pace over the past three decades will have reached an extreme conclusion. Such a conclusion by the Court would not only be wildly out of touch with the realities of corporate power in contemporary American life, but would disregard the Court’s proper separation over 200 years of the constitutional rights of people from those claimed by corporations.

I. CORPORATE RIGHTS ARE NOT FOUND IN THE CONSTITUTION

A. BACKGROUND OF *CITIZENS UNITED V. FEC*

Citizens United is a nonprofit corporation created under the laws of Virginia. During the 2008 presidential primary race, Citizens United produced and sought to distribute *Hillary: The Movie*, which portrayed Senator Hillary Clinton as unfit for office and encouraged voters to vote against her. If *Hillary: The Movie* was an “electioneering communication” against a candidate for election within 60 days of an election, corporate funding of the effort would be prohibited by the Bipartisan Campaign Reform Act of 2002 (known as BCRA or McCain-Feingold). Given the nature of the movie, such a conclusion was likely, and Citizens United sought an injunction to prevent the Federal Elections Commission (FEC) from enforcing BCRA, arguing that corporate spending restrictions violated the First Amendment.

A three-judge panel of the United States District Court for the District of Columbia denied Citizens United’s motion and entered summary judgment for the FEC. Citizens United appealed directly to the Supreme Court, which is the procedure specified under BCRA for constitutional challenges to the law, and the Court first heard argument in March 2009. By the end of the Court’s term in June, the Court declined to issue a decision and instead ordered re-argument in September, following briefing of the specific question of whether the Court should overrule *Austin* and *McConnell*.

In *Austin*, the Michigan Chamber of Commerce, a non-profit corporation created pursuant to Michigan statute that represents the interests of thousands of business corporations, challenged a Michigan law that prohibited corporations from using corporate treasury funds for expenditures in support of or in opposition to state election candidates. The Supreme Court rejected the Chamber of Commerce’s argument

⁷ Sen. Russ Feingold, Statement on Citizens United v. FEC, Oct. 21, 2009, *available at* <http://feingold.senate.gov/record.cfm?id=319214>.

⁸ Sen. John McCain, Statement on the U.S. Supreme Court case Citizens United v. FEC (Oct. 21, 2009), *available at* http://mccain.senate.gov/public/index.cfm?FuseAction=PressOffice.FloorStatements&ContentRecord_id=791f053f-f04d-13af-f29d-ce7e5c124af1&Region_id=&Issue_id=

that the law violated its First and Fourteenth Amendment rights. Instead, the Court concluded that the state's regulation of corporate political contributions was justified by the statutory nature of the corporate form itself:

State law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets—that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments. These state-created advantages not only allow corporations to play a dominant role in the Nation's economy, but also permit them to use 'resources amassed in the economic marketplace' to obtain 'an unfair advantage in the political marketplace.'⁹

The *Austin* Court found “the unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures.”¹⁰ Even as applied to a “non-profit ideological corporation like a chamber of commerce,” states could regulate corporate political expenditures because the aim of the regulation was not accumulated wealth or a large volume of expenditures *per se*. Rather, the regulation targeted the use in elective politics of a particular legal structure created by statute for certain purposes.¹¹

In *McConnell*, the Court considered the constitutionality of various components of BCRA, which amended the Federal Election Campaign Act and continued federal restrictions on corporate political expenditures that Congress first enacted in 1907. *McConnell* specifically upheld Section 203 of BCRA, which prohibited certain expenditures by corporations and unions for “electioneering communications.”¹² As in *Austin*, the *McConnell* Court recognized “the legislative judgment that the special characteristics of the corporate structure require particularly careful regulation” and that legislation may aim at “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.”¹³

B. THE COURT'S HISTORY OF REJECTING CORPORATE RIGHTS

While Justice Scalia has argued that corporations are akin to associations of people,¹⁴ this view is most certainly incorrect. “Those who feel that the essence of the corporation rests in the contract among its members rather than in the government

⁹ *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 658- 59 (1990) (quoting *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 257 (1986)).

¹⁰ *Austin*, 494 U.S. at 660.

¹¹ *Id.* at 661 (“some closely held corporations, just as some publicly held ones, may not have accumulated significant amounts of wealth, they receive from the State the special benefits conferred by the corporate structure and present the potential for distorting the political process”). The Court distinguished *Massachusetts Citizens for Life*, 479 U.S. 238, as involving a narrowly focused organization “formed for the express purpose of promoting political ideas, and cannot engage in business activities;” which did not have “shareholders or other persons affiliated so as to have a claim on its assets or earnings;” and was “independent from the influence of business corporations.” 494 U.S. at 663-64.

¹² *McConnell v. FEC*, 540 U.S. 93, 203-04 (2003).

¹³ *Id.* at 205 (citations omitted).

¹⁴ *Id.* at 256 (Scalia, J., dissenting).

decree . . . fail to distinguish, as the eighteenth century did, between the corporation and the voluntary association.”¹⁵

That distinction remains valid in the 21st century. A corporation is a government-created structure for doing business, and is available only by statute.¹⁶ The structure has state-created advantages (shareholder limited liability, for instance) and disadvantages (taxation of corporate profits and shareholder dividends, for instance) as compared to other structures. Non-profit corporations have other statutory advantages (such as the ability to raise tax deductible money) and disadvantages (such as various compliance requirements and restrictions on political activity).

The corporate legal form remains today not simply an association of people but a pure creation of statute that, unlike associations of people, may or may not be permitted by law. Indeed, a corporation is not fundamentally different now than in 1819 when Chief Justice Marshall writing for the Court explained that a corporation, as a “mere creature of law . . . possesses only those properties which the charter confers upon it. . . .”¹⁷ Corporations remain creatures of statute, subject to various government compliance requirements.¹⁸

Lawmakers have come to deem a corporation to be a legal “person” for limited purposes, such as transacting business, suing and being sued, and other acts. The policy choice of using a “person” metaphor to address corporate law issues is just that: a policy choice resting on perceived advantages of convenience and economic gains. The Constitution, however, does not enshrine particular policy choices. For most of our history, with exceptions to be discussed below, the Court has been careful to distinguish between real people and our constitutional rights on one hand, and, on the other hand, the fiction of a corporate “person” that legislatures and common law courts may use for economic and other policy reasons in non-constitutional matters.

If we are to take seriously the notion that the words and context of the Constitution, the intent of the Framers of the Constitution, and the practices of the American people are central to constitutional jurisprudence, it is hard to make a case that corporations may assert on behalf of the corporation the protections of the Bill of Rights to invalidate democratic enactments. Indeed, the evidence is to the contrary. During the colonial period, only “a handful of native business corporations carried on business,” and only 20 business corporations were formed by 1787, when the American people convened the Constitutional Convention.¹⁹ Legislatures soon created more corpora-

¹⁵ Oscar Handlin & Mary Flug Handlin, *Commonwealth: A Study of the Role of Government in the American Economy, Massachusetts, 1774-1861*, 92 & n.18 (New York Univ. Press 1974).

¹⁶ HARRY G. HENN & JOHN R. ALEXANDER, *LAW OF CORPORATIONS*, WEST HORNBOOK SERIES, 14-35 (3d ed. 1981).

¹⁷ *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 636 (1819).

¹⁸ *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89-91 (1987) (“state regulation of corporate governance is regulation of entities whose very existence and attributes are a product of state law.”).

¹⁹ Henn & Alexander, *supra* note 16, at 24 & n.2, (citing Edwin Merrick Dodd, *American Business Corporations Until 1860* (1954), Joseph Davis, *Essays in the Earlier History of American Corporations* (Harvard Univ. Press 1917), Simeon Eban Baldwin, *American Business Corporations Before 1789*, 1 Annual Rep’t of Am. Historical Ass’n, 253-274 (1902)). See also Handlin & Handlin, *supra* note 15, at 99, 162.

tions but chartered these only for specific *public* purposes, often with limited time periods.²⁰ Restrictions on corporate purposes were the norm.²¹

In fact, it is difficult to imagine that the Founders' generation believed the Constitution barred legislation to prevent corporate expenditures to influence politics. James Wilson—signer of the Declaration of Independence, member of the Continental Congress, a drafter of the Constitution, and one of the nation's first six Supreme Court justices—expressed a prevailing view at the time that corporations were to be limited and constrained:

A corporation is described to be a person in a political capacity created by the law. . . . It must be admitted, however, that, in too many instances, those bodies politick have, in their progress, counteracted the design of their original formation. . . . This is not mentioned with a view to insinuate, that such establishments ought to be prevented or destroyed: I mean only to intimate, that they should be erected with caution, and inspected with care.²²

James Madison viewed corporations as “a necessary evil” subject to “proper limitations and guards.”²³ Thomas Jefferson hoped to “crush in its birth the aristocracy of our moneyed corporations, which dare already to challenge our government to a trial of strength and bid defiance to the laws of our country.”²⁴

“[T]hroughout the greater part of our history,” the American people, state and federal governments, and the Supreme Court knew that corporations remained subject to democratic control.²⁵ President Andrew Jackson warned of partisan activity by the second Bank of the United States corporation: “[T]he question is distinctly presented whether the people of the United States are to govern through representatives chosen by their unbiased suffrages or whether the money and power of a great corporation are to be secretly exerted to influence their judgment and control their decisions.”²⁶ President Martin Van Buren spoke “of the dangers to which the free and unbiased exercise of political opinion . . . would be exposed by any further increase of the already overgrown influence of corporate authorities.”²⁷

These warnings continued as corporations became dominant in our economy. “Corporations, which should be the carefully restrained creatures of the law and the

²⁰ Handlin & Handlin, *supra* note 15, at 106-33; *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 548-60 (1933) (Brandeis, J., dissenting). Justice Brandeis's dissenting opinion comprehensively documents the development of the corporation in America. See *Liggett*, 288 U.S. at 548-67.

²¹ *Liggett*, 288 U.S. at 549; *Head & Amory v. Providence Ins. Co.*, 6 U.S. 127, 166-67 (1804) (“corporation can only act in the manner prescribed by law”).

²² COLLECTED WORKS OF JAMES WILSON, Vol. 2. Ch. X, Of Corporations, (ed. Kermit L. Hall & Mark David Hall) <http://oll.libertyfund.org/title/2074/166648/2957866>, (last visited July 22, 2009).

²³ WRITINGS OF JAMES MADISON, VOL. 9 (Gaillard Hunt ed., G.P. Putnam's Sons, 1900), To J.K. Paulding, <http://oll.libertyfund.org/title/1940/119324> (last visited July 22, 2009).

²⁴ University of Virginia, Favorite Jefferson Quotes, Thomas Jefferson Digital Archive, To George Logan, <http://etext.virginia.edu/jefferson/quotations/jeff5.htm> (last visited July 22 2009).

²⁵ *Liggett*, 288 U.S. at 548 (Brandeis, J., dissenting).

²⁶ Andrew Jackson, 1833 Annual Message to Cong. (Dec. 3, 1833) (transcript available at the University of Virginia, Miller Center of Public Affairs, <http://millercenter.org/scripps/archive/speeches/detail/3640>).

²⁷ Martin Van Buren, 1837 Annual Message to Cong. (Dec. 5, 1837) (transcript available at the University of Virginia, Miller Center of Public Affairs, <http://millercenter.org/scripps/archive/speeches/detail/3589>).

servants of the people, are fast becoming the people's masters," wrote President Grover Cleveland.²⁸ Theodore Roosevelt sought to end "a riot of individualistic materialism" and remediate the "total absence of governmental control [that] led to a portentous growth in the financial and industrial world both of natural individuals and of artificial individuals—that is, corporations."²⁹ He successfully called on Congress to enact federal restrictions on corporate political contributions, stating: "Let individuals contribute as they desire; but let us prohibit in effective fashion all corporations from making contributions for any political purpose, directly or indirectly."³⁰

Since the beginning of the Republic, the Court has affirmed that the elected governments of the nation and of the states may regulate, in an even-handed manner, "the corporate structure" because governments create that structure. *Trustees of Dartmouth College v. Woodward* described the corporate entity as "an artificial being . . . existing only in contemplation of law," and created only for such "objects as the government wishes to promote."³¹ The Court brought this understanding of the corporation to other constitutional provisions, such as diversity jurisdiction under Article III and the Judiciary Acts.³² In the Founders' era and beyond, the Court considered state citizenship of shareholders rather than the corporation itself to determine whether people who formed corporations could enter the federal courts in the corporate name.³³ The Court eventually bowed to expediency and overruled these cases, developing a shortcut strictly limited to diversity jurisdiction.³⁴

In *Bank of Augusta v. Earle*³⁵ and *Paul v. Virginia*,³⁶ the Supreme Court refused to extend "special treatment" for corporations to the protection of citizen rights under the Privileges and Immunities Clause of Article IV. Repeatedly, the Court has held that

²⁸ Grover Cleveland, 1888 Annual Message to Cong. (Dec. 3, 1888) (transcript available at the University of Virginia, Miller Center of Public Affairs, <http://millercenter.org/scripps/archive/speeches/detail/3758>).

²⁹ THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 50 (Scribner & Sons 1929) (1913).

³⁰ Theodore Roosevelt, 1906 Annual Message to Cong. (Dec. 3, 1906) (transcript available at the University of Virginia, Miller Center of Public Affairs, <http://millercenter.org/scripps/archive/speeches/detail/3778>).

³¹ *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 636-37 (1819).

³² Article III provides "The judicial Power shall extend . . . to Controversies . . . between Citizens of different States. . . ." U.S. CONST. art III, § 2.

³³ *Commercial & R.R. Bank of Vicksburg v. Slocomb*, 39 U.S. 60 (1840); *Breithaupt v. Bank of Georgia* 26 U.S. 238 (1828); *Sullivan v. Fulton Steamboat Co.*, 19 U.S. 450 (1821); *Bank of the United States v. Deveaux*, 9 U.S. 61, 86 (1809) (corporation is a "mere legal entity . . . not a citizen"); *Hope Ins. Co. v. Boardman* 9 U.S. 57, 58 (1809).

³⁴ *Carden v. Arkoma Assoc.*, 494 U.S. 185, 197 (1990) ("special treatment for corporations."). A thorough discussion of diversity jurisdiction corporate "citizenship" is beyond the scope of this Issue Brief. In short, *Louisville Railroad Co. v. Letson* decreed that a corporation "is to be deemed" a citizen of the state of its creation. *Louisville R.R. Co. v. Letson*, 43 U.S. 497, 557-58 (1844). Nine years later, the Court followed *Letson* but reiterated that "an artificial entity cannot be a citizen," and "State laws by combining large masses of men under a corporate name, cannot repeal the Constitution." *Marshall v. Baltimore & Ohio R.R. Co.*, 57 U.S. 314, 327 (1853) (quotation and citation omitted). The Court soon began simply to treat "a suit by or against a corporation in its corporate name, as a suit by or against citizens of the State which created the corporate body. . . ." *Ohio & Mississippi R.R. Co. v. Wheeler*, 66 U.S. 286, 296 (1861). The Court confined this doctrine to diversity jurisdiction, and it has never been defended with enthusiasm for its soundness. See *Carden*, 494 U.S. 185; see also Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 Cornell L.Q. 499, 523 (1928).

³⁵ *Bank of Augusta v. Earle*, 38 U.S. 519 (1839).

³⁶ *Paul v. Virginia*, 75 U.S. 168 (1868) (overruled in unrelated part by *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944)).

corporations are not citizens under that clause, or under the Privileges or Immunities Clause of the Fourteenth Amendment.³⁷

As the Industrial Revolution gathered pace, the Court maintained with clarity that “[t]he only rights [a corporation] can claim are the rights which are given to it in that character, and not the rights which belong to its members as citizens of a state. . . .”³⁸ The Court did not examine the Constitution to determine rights “given to it in that character” because the Constitution does not create corporate rights. In upholding corporate contracts outside the place of incorporation, *Bank of Augusta* declined to rest on any constitutional provision, instead applying the law that created the corporation, the law of the state where the corporation wished to enforce a contract, and “comity.”³⁹

While the increasingly dominant role of corporations in the American economy did not go unnoticed by the Court, most Justices did not see any grounds for infusing that development with constitutional significance.⁴⁰ By 1868, corporations had “multiplied to an almost indefinite extent. There is scarcely a business pursued requiring the expenditure of large capital, or the union of large numbers, that is not carried on by corporations. It is not too much to say that the wealth and business of the country are to a great extent controlled by them.”⁴¹ Despite this recognition, the Court denied the claim of corporations to the privileges and immunities of citizenship, as a corporation is “a mere creation of local law.”⁴²

The Supreme Court—with exceptions during the substantive due process era characterized by *Lochner v. New York*⁴³—continued through most of the 20th century to distinguish between the rights of people and corporations. In *Asbury Hospital v. Cass County*, for example, the Court, citing numerous cases and without dissent, rejected a constitutional challenge to a state law requiring corporations holding land suitable for farming to sell the land within ten years.⁴⁴ Five years later, the Court again emphasized the “public attributes” of corporations in turning aside corporate privacy claims:

[C]orporations can claim no equality with individuals in the enjoyment of a right to privacy. They are endowed with public attri-

³⁷ *Paul*, 75 U.S. at 177 (“The term citizens as there used applies only to natural persons, members of the body politic, owing allegiance to the State, not to artificial persons created by the legislature, and possessing only the attributes which the legislature has prescribed.”); *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181, 187 (1888) (“Corporations are not citizens within the meaning of that [privileges and immunities] clause. This was expressly held in *Paul v. Virginia*.”); *Asbury Hosp. v. Cass County*, 326 U.S. 207, 210-11 (1945) (corporation is “neither a citizen of a state nor of the United States within the protection of the privileges and immunities clauses of Article IV, § 2 of the Constitution and the Fourteenth Amendment.”).

³⁸ *Bank of Augusta*, 38 U.S. at 587.

³⁹ *Id.* at 586-90.

⁴⁰ *But see* *McConnell v. FEC*, 540 U.S. 93, 257-58 (2003) (Scalia, J. dissenting). *Compare* *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 548 (1933) (Brandeis, J., dissenting) (“The prevalence of the corporation in America has led men of this generation to act, at times, as if the privilege of doing business in corporate form were inherent in the citizen; and has led them to accept the evils attendant upon the free and unrestricted use of the corporate mechanism as if these evils were the inescapable price of civilized life, and, hence, to be borne with resignation.”)

⁴¹ *Paul*, 75 U.S. at 181-82.

⁴² *Id.* at 181.

⁴³ *Lochner v. New York*, 198 U.S. 45 (1905) (overruled by *Day-Brite Lighting Inc. v. Missouri*, 342 U.S. 421 (1952)).

⁴⁴ *Asbury Hosp. v. Cass County*, 326 U.S. 207 (1945).

butes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities.⁴⁵

The Court has recognized, in a limited fashion, assertions of corporate rights, such as those under the Fourth Amendment.⁴⁶ As the Court has observed, however, a corporation has lesser Fourth Amendment rights because:

Congress may exercise wide investigative power over them, analogous to the visitatorial power of the incorporating state, when their activities take place within or affect interstate commerce. Correspondingly it has been settled that corporations are not entitled to all of the constitutional protections which private individuals have in these and related matters.⁴⁷

Accordingly, “it cannot be disputed that the mere creation of a corporation does not invest it with all the liberties enjoyed by natural persons. . . .”⁴⁸

A decade after the Supreme Court’s controversial, 5-4 invalidation of Massachusetts’s restrictions on corporate expenditures in certain state referenda in *First National Bank of Boston v. Bellotti*,⁴⁹ the Court stepped back from its disregard of the statutory nature of the corporate entity, and rejected a Commerce Clause challenge to an anti-takeover statute.⁵⁰ Quoting *Dartmouth College* and noting Justice Rehnquist’s dissent in *Bellotti*, the Court concluded: “It thus is an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares.”⁵¹ The First Amendment and the Commerce Clause obviously implicate different constitutional interests but the Court’s insight in *CTS Corporation v. Dynamics Corporation of America* is correct. Nothing in the First Amendment requires that states, Congress, and the Court ignore the capacity of the “speaker” when that very capacity exists as a result of government policy.

II. THE ERRONEOUS CORPORATE RIGHTS DOCTRINE: FIRST AMENDMENT CORPORATE “SPEECH” AND FOURTEENTH AMENDMENT “PERSONS”

While *CTS Corporation*, *Austin*, *McConnell*, and other campaign finance cases have suggested that the Supreme Court might remain focused on essential differences between corporations and people for purposes of constitutional rights, as *Bellotti* shows, the Court has hardly been consistent in its reaction to corporate demands upon the Court’s extraordinary power to invalidate democratic enactments. The most

⁴⁵ *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (citations omitted).

⁴⁶ *See GM Leasing Corp. v. United States*, 429 U.S. 338, 353 (1977) (corporations have “some Fourth Amendment rights”); Carl Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 *Hastings L.J.* 577, 664-67 (1990).

⁴⁷ *Oklahoma Press Publ’g Co. v. Walling*, 327 U.S. 186, 204-05 (1946) (footnotes omitted).

⁴⁸ *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 823 (1978) (citing *United States v. White*, 322 U.S. 694, 698-701 (1944)). *See also* *Northwestern Nat. Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1906) (“The liberty referred to in that [Fourteenth] Amendment is the liberty of natural, not artificial, persons.”)

⁴⁹ *Bellotti*, 435 U.S. 765.

⁵⁰ *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987).

⁵¹ *Id.* at 89-91.

notorious examples of the Court's responsiveness to such demands may be the substantive due process era that followed the Court's declaration at the turn of the 20th century that corporations are "persons" under the Fourteenth Amendment's protection of the life, liberty, and property of persons. The path to *Citizens United*, however, follows less from the discredited substantive due process era at the beginning of the 20th century and more from the fabrication beginning in the late 1970s of a corporate rights/commercial speech doctrine under the First Amendment. The next sections of this Issue Brief examine in turn the Court's creation of corporate rights under the First and Fourteenth Amendments.

A. THE FIRST AMENDMENT

The development by a divided Supreme Court of unprecedented First Amendment protections for "commercial speech" and, increasingly, of corporate political participation, are the newest and least supportable ventures toward a corporate rights doctrine unhinged from the meaning and history of the Constitution.⁵² For 200 years, the First Amendment did not require the invalidation of state and federal laws that a majority of the Court deemed too restrictive of corporate marketing strategies, nor did the First Amendment prevent restrictions on corporate expenditures to influence elections. In the mid-1970s, however, the Supreme Court began to develop an unprecedented "commercial speech" doctrine. First, the Court invalidated a state prohibition on abortion advertising in *Bigelow v. Virginia*.⁵³ As a result, the Court decided that "the notion of unprotected 'commercial speech' all but passed from the scene," and invalidated a state law regulating pharmaceutical price advertising.⁵⁴ Justice Rehnquist dissented, stating that "nothing in the United States Constitution . . . requires the Virginia Legislature to hew to the teachings of Adam Smith. . . ."⁵⁵

Until *Bellotti*, the First Amendment had never barred regulation of corporate political activity. Following the decision in *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*, however, corporations began aggressively to push for the creation of corporate rights, consistent with a strategy advocated by Lewis Powell as a private attorney advising the Chamber of Commerce before his appointment to the Court.⁵⁶ In 1978, several large corporations challenged a Massachusetts prohibition on corporate expenditures to influence ballot questions, except questions "materially affecting any of the property, business or assets of the corporation."⁵⁷ Mindful of *Virginia Pharmacy* and of the Court's holding in *Buckley v. Valeo*⁵⁸ that equated spending money in elections with speech, the Massachusetts Supreme Judicial Court nevertheless rejected the challenge, making the uncontroversial observation that "a

⁵² The First Amendment provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

⁵³ *Bigelow v. Virginia*, 421 U.S. 809 (1975).

⁵⁴ *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 759 (1976).

⁵⁵ *Id.* at 784.

⁵⁶ The background of the 1971 Lewis Powell memorandum and the text of the memorandum itself are available at http://www.reclaimdemocracy.org/corporate_accountability/powell_memo_lewis.html.

⁵⁷ *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

⁵⁸ *Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

corporation does not have the same First Amendment rights to free speech as those of a natural person. . . .”⁵⁹

In an opinion authored by the now-Justice Powell, the Court reversed. Citing First Amendment cases that happened to involve parties that were corporations, the Court labeled the Massachusetts arguments “extreme” and “an artificial mode of analysis.”⁶⁰ Justice Rehnquist disagreed with that assessment:

A State grants to a business corporation the blessings of potentially perpetual life and limited liability to enhance its efficiency as an economic entity. It might reasonably be concluded that those properties, so beneficial in the economic sphere, pose special dangers in the political sphere.⁶¹

Justice Rehnquist continued to dissent in subsequent “corporate speech” cases. Nevertheless, the Supreme Court and lower courts, with monotonous regularity, increasing aggressiveness, and an undisguised hostility to legislative and regulatory judgments, used this newly-minted corporate rights doctrine to strike down democratically enacted state and federal laws and regulations. Even a partial list shows the range of regulations falling to the new corporate rights doctrine, from those concerning clean and fair elections; to environmental protection and energy; to tobacco, alcohol, pharmaceuticals, and health care; to consumer protection, lottery, and gambling; to race relations, and much more.⁶²

⁵⁹ *First Nat’l Bank of Boston v. Attorney General*, 359 N.E. 2d 1262, 1270 (1977).

⁶⁰ *Bellotti*, 435 U.S. at 778-79 & n.14.

⁶¹ *Id.* at 825-26.

⁶² See *Bellotti*, 435 U.S. 765; *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) (as applied to issue advocacy advertisements of non-profit corporation, BCRA held to violate First Amendment); *Thompson v. Western States Med. Ctr.*, 535 U.S. 357 (2002) (federal restriction on advertising of compounded drugs invalidated); *Lorillard v. Reilly*, 533 U.S. 525 (2001) (Massachusetts regulations of tobacco advertising targeting children invalidated); *Greater New Orleans Broad. Ass’n, Inc. v. United States*, 527 U.S. 173 (1999) (federal restriction on advertising of gambling and casinos held unconstitutional); *44 LiquorMart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (Rhode Island law restricting alcohol price advertising invalidated); *Robert E. Rubin, Secretary of the Treasury v. Coors Brewing Co.*, 514 U.S. 476 (1995) (federal restriction on advertising alcohol level in beer invalidated); *City of Cincinnati v. Discovery Network Inc.*, 507 U.S. 410 (1993) (municipal application of handbill restriction to ban news racks for advertising circulars on public property held unconstitutional); *Pacific Gas & Elec. Co. v. Pub. Util. Comm’n of California*, 475 U.S. 1 (1986) (invalidating California rule that utility corporation must make bill envelopes, which are property of ratepayers, available for other points of view besides that of the corporation); *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557 (1980) (New York rule restricting advertising that promotes energy consumption invalidated); *Bellsouth Telecomm., Inc. v. Farris*, 542 F.3d 499 (6th Cir. 2008) (Kentucky may prohibit collection of tax on telecommunication corporation from customers may not prohibit corporation’s representation of tax on customers’ bills); *Allstate Ins. Co. v. Abbott*, 495 F.3d 151 (5th Cir. 2007) (Texas law regulating advertising of auto body shops tied to auto insurers invalidated); *This That & the Other Gift & Tobacco, Inc. v. Cobb County, Georgia*, 439 F.3d 1275 (11th Cir. 2006) (Georgia ban on advertisements of sexual devices invalidated); *Passions Video, Inc. v. Nixon*, 458 F.3d 887 (8th Cir. 2006) (Missouri statute restricting advertisements of sexually explicit businesses invalidated); *Bad Frog Brewery v. N.Y. State Liquor Auth.*, 134 F.3d 87, 91 & n.1 (2d Cir. 1998) (New York regulation barring beer bottle label with gesture described by the Court as “acknowledged by Bad Frog to convey, among other things, the message ‘fuck you’” held unconstitutional); *Int’l Dairy Foods Assoc. v. Amestoy*, 92 F.3d 67 (2d Cir. 1996) (Vermont law requiring disclosure on label of dairy products containing milk from cows treated with bovine growth hormones invalidated); *New York State Ass’n of Realtors, Inc. v. Shaffer*, 27 F.3d 834 (2d Cir. 1994) (invalidating New York law authorizing the Secretary of State to declare “non solicitation” zones for real estate brokers); *Sambo’s Rest., Inc. v. City of Ann Arbor*, 663 F.2d 686 (6th Cir. 1981) (First Amendment allows corporation to

Moving well beyond the unsoundness of including “commercial speech” in the First Amendment, the Court’s current venture to the precipice of full corporate First Amendment rights in *Citizens United* disregards a fundamental distinction between a “corporate regulation case” and a “speech case.” State requirements that corporations file annual registration papers and fees, or that public corporations comply with SEC filing and statement requirements, along with many more examples of corporate regulations, do not implicate First Amendment interests. Rather, these regulations reflect what seems obvious: legislatures may apply rules to the use of the corporate form itself where the legislature decides such rules advance the policy goals sought to be achieved by the legislature in permitting the corporate form in the first place.

In *Bellotti*, the Massachusetts legislature determined that corporations would unfairly taint a fair vote in a people’s referendum about whether the state would enact personal, not corporate, income taxes, and thus prohibited the use of corporate treasuries to influence such a referendum. This applied only to corporations as corporations, and it did not apply to any person, whether a shareholder, officer, director, or any other person. In contrast, not one of the First Amendment “speech” cases cited in *Bellotti* involved a regulation directed at problems found by a legislature to arise from the corporate form itself.⁶³ None concerned a law distinguishing between corporations and people. The speech cases cited in *Bellotti* happened to involve corporate parties but they concerned speech restrictions that had nothing to do with whether the speech was promoted by a corporation.⁶⁴

Justice Powell’s majority opinion in *Bellotti* argued that “the inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union or individual.”⁶⁵ Legislative action directed at corporations, however, has nothing to do with the worth of particular speech but rather with a particular statutory capacity through which certain people wish to promote their speech. Where that capacity exists only as a result of government policy, even-handed regulation based on “what” (not “who”) speaks rather than on what the speaker is saying, is appropriate and even commonplace.

For example, municipal corporations—which are “persons” for some purposes—have no First Amendment right to spend municipal funds to support candidates, op-

break agreement with City and use name found to be deeply offensive and carry prejudicial meaning to African Americans); *John Donnelly & Sons v. Campbell*, 639 F.2d 6 (1st Cir. 1980) (invalidating Maine law restricting billboard pollution, even though law allowed (and paid for) commercial signs put up by state of uniform size at exits and visitors centers); *Washington Legal Found. v. Friedman*, 13 F. Supp. 2d 51 (D.D.C. 1998) (invalidating federal law regulating drug manufacturers’ use of journal reprints and drug corporation-sponsored educational seminars to promote off-label uses for prescription drugs); *Equifax Services Inc. v. Cohen*, 420 A. 2d. 189 (Me. 1980) (invalidating portions of Maine credit reporting statute as First Amendment violation). Many more such cases may be found in the state and federal reports.

⁶³ See *Bellotti*, 435 U.S. at 778 & n.14.

⁶⁴ Ironic perhaps is the kindest word to apply to the *Bellotti* Court’s citation of *National Assoc. of Colored People, Inc. v. Button*, 372 U.S. 415 (1963), to support the creation of corporate rights to influence elections. *NAACP* was an extraordinary case inseparable from the Court’s effort to protect not only the civil rights of African Americans but also the very authority of the Court itself. See *NAACP*, 372 U.S. at 436 & n.16 (nearly a decade after *Brown v. Board of Education*, 347 U.S. 483 (1954), and despite the intense school desegregation efforts of the NAACP, “only 1/2 of 1% of Virginia’s Negro public school pupils attend school with whites). In other words, in *NAACP*, the Court sought to protect an oppressed minority and to vindicate the core purpose of the Fourteenth Amendment, not to create First Amendment rights for corporations.

⁶⁵ *Bellotti*, 435 U.S. at 777.

pose perceived enemies, or influence ballot questions.⁶⁶ The Hatch Act restricts the political activity of certain government employees.⁶⁷ Our Armed Forces accept the obligations of political neutrality without complaint.⁶⁸ Corporate capacity, as with other government-created capacities, may carry statutory restrictions on political activity.

Finally, some point out that unlike the Fourteenth Amendment, the First Amendment does not refer to persons but prohibits Congressional infringement of the freedom of speech and of “the press.” While true, that is beside the point. The First Amendment would clearly prevent suppression of “the press,” whether a corporation or not. Regardless of whether the *New York Times*, PBS, and other media are operated by people using the corporate form, the media are “press” under the First Amendment, and are not subject to restriction of expression or press activities.

One must distinguish, however, between even-handed government regulation of the use of the corporate form itself and government restriction of speech or the press. Corporations that meet the constitutional definition of press are not relieved of the duty to comply with laws regulating corporations. It is not an infringement on the freedom of the press to make the New York Times Company, a publicly-listed corporation, file its SEC statements or comply with securities “black-out” rules about public statements. Both legislatures and the Court are perfectly capable of distinguishing between corporate-funded campaign electioneering communications and the content, whether political or not, of the press and media. With the quickly evolving nature of the media, journalism, and news, defining “press” is increasingly complicated, but that does not require legislatures and courts to pretend that all corporations become “press” whenever their executives want to influence the outcome of our elections.

B. THE FOURTEENTH AMENDMENT

No question thought to be settled is as unsettled as the assumption that a corporation can be a person under the Fourteenth Amendment.⁶⁹ Despite frequent mis-citation, even by the Supreme Court on numerous occasions, *Santa Clara County v. Southern Pacific Railroad Co.*⁷⁰ did not decide or even reach that question. Indeed, *Santa Clara* did not decide *any* federal constitutional question. As Justice Harlan’s unanimous opinion for the Court made unmistakably clear, the Court decided the case based on California state law concerning the tax assessment at issue. Despite Justice Field’s eagerness to reach the issue while sitting as a member of the Circuit

⁶⁶ See *Creek v. Village of Westhaven*, 80 F.3d 186, 192-93 (7th Cir. 1996); *Anderson v. City of Boston*, 380 N.E.2d 628 (Mass. 1978).

⁶⁷ 5 U.S.C. §§ 7321-7326; 5 U.S.C. §§ 1501-1508.

⁶⁸ See Dep’t of Defense Directive 1344.10, *Political Activities By Members of the Armed Forces*, Feb. 19, 2008, www.dtic.mil/whs/directives/corres/pdf/134410p.pdf, accessed 2009-7-24.

⁶⁹ Section 1 of the Fourteenth Amendment provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person or life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV. *Citizens United* concerns BCRA, a federal statute. Overruling *Austin*, however, effectively would invalidate laws restricting corporate political expenditures in 24 states, and would raise significant Fourteenth Amendment and federalism issues. *Bellotti*, 435 U.S. at 826 & n.6 (Rehnquist, J., dissenting).

⁷⁰ *Santa Clara County v. Southern Pac. R.R. Co.*, 118 U.S. 394 (1886).

Court that considered the case below, the Supreme Court explicitly and repeatedly declined to decide that Fourteenth Amendment question in *Santa Clara*:

It results that the court below might have given judgment in each case for the defendant upon the ground that the assessment, which was the foundation of the action, included property of material value, which the State Board was without jurisdiction to assess, and the tax levied upon which cannot, from the record, be separated from that imposed upon other property embraced in the same assessment. *As the judgment can be sustained upon this ground it is not necessary to consider any other questions raised by the pleadings and the facts found by the court.*⁷¹

Following *Santa Clara*, in five opinions authored by Justice Field between 1888 and 1892, the Supreme Court simply asserted the proposition, without explanation, that the Fourteenth Amendment applied to corporations. In none of the cases did the Court actually find any Fourteenth Amendment violation, and in each case rejected the claims of the corporations. The *complete* analysis of the Fourteenth Amendment “person” issue from all of these cases combined is as follows:

- “Under the designation of ‘person’ there is no doubt that a private corporation is included. Such corporations are merely associations of individuals united for a special purpose, and permitted to do business under a particular name, and have a succession of members without dissolution. As said by Chief Justice Marshall: ‘The great object of a corporation is to bestow the character and properties of individuality on a collective and changing body of men.’ *Bank v. Billings*, 4 Pet. 514, 562.”⁷²
- “It is conceded that corporations are persons within the meaning of the amendment. *Santa Clara Co. v. Railroad Co.*, 118 U.S. 394, 6 Sup. Ct. Rep. 1132; *Milling Co. v. Pennsylvania*, *ante*, 737.”⁷³
- “It is contended by counsel as the basis of his argument, and we admit the soundness of his position, that corporations are persons within the meaning of the clause in question. It was so held in *Santa Clara Co. v. Railroad Co.*, 118 U.S. 394, 396, 6 S. Sup. Ct. Rep. 1132, and the doctrine was reasserted in *Mining Co. v. Pennsylvania*, 125 U.S. 181, 189, 8 S. Sup. Ct. Rep. 737. We admit also, as contended by him, that corporations can invoke the benefits of provisions of the constitution and laws which guaranty to persons the enjoyment of property, or afford to them the means for its protection, or prohibit legislation injuriously affecting it.”⁷⁴

⁷¹ *Id.* at 416 (emphasis added); *see also id.* at 410 (“These questions belong to a class which this court should not decide, unless their determination is essential to the disposal of the case in which they arise.”).

⁷² *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181, 188-89 (1888) (holding that Pennsylvania law assessing tax on Pennsylvania office of Colorado corporation *did not* violate the Commerce Clause, the Privileges and Immunities Clause, or the Due Process or Equal Protection Clauses of the Fourteenth Amendment).

⁷³ *Missouri Pac. Ry. Co. v. Mackey*, 127 U.S. 205, 209-10 (1888) (holding that Kansas workplace injury liability law *did not* violate the Due Process or Equal Protection Clauses); *see also* companion case, *Minneapolis & St. Louis Ry. Co. v. Herrick*, 127 U.S. 210 (1888) (same result).

⁷⁴ *Minneapolis & St. Louis Ry. Co. v. Beckwith*, 129 U.S. 26, 28 (1889) (holding that Iowa law providing for payment of damages where animals killed by train passing where railroad failed to fence *did not*

- “Private corporations are persons, within the meaning of the amendment. It has been so held in several cases by this court. *Santa Clara Co. v. Railroad Co.*, 118 U.S. 394, 6 Sup. Ct. Rep. 1132; *Mining Co. v. Pennsylvania*, 125 U.S. 181, 189, 8 Sup. Ct. Rep. 737; *Railroad Co. v. Beckwith*, 129 U.S. 26, 9 Sup. Ct. Rep. 207.”⁷⁵

In several cases later involving corporate claims of due process rights, the Court simply stated, again without explanation, that corporations were entitled to make Fourteenth Amendment claims that by the wording of the amendment are reserved to “persons.”⁷⁶ A bold but doubtful constitutional stretch thus passed from hotly contested outside the Supreme Court to “settled” with virtually no explanation.⁷⁷

Not until 1938 would an opinion, albeit a dissenting opinion, thoroughly review the issue. Justice Hugo Black’s dissent in *Connecticut Life Insurance Co. v. Johnson*⁷⁸ might today be considered an “originalist” approach to examining whether, in fact, a corporation is a “person” within the meaning of the Due Process and Equal Protection Clauses.⁷⁹ Justice Black’s dissent carefully reviewed the words, context, and history of the Fourteenth Amendment, and concluded there is no basis to view a corporation as a person entitled to protections of the Due Process and Equal Protection Clauses. Justice Black concluded, “this Court should now overrule previous decisions which interpreted the Fourteenth Amendment to include corporations.”⁸⁰

The notion that the Fourteenth Amendment can be interpreted to include corporations within the Amendment’s references to “persons” does not stand up to examination.⁸¹ Indeed, if the Roberts Court is determined to maintain its activist approach and rejection of *stare decisis*, one is tempted to suggest that the justices would find the

violate the Equal Protection Clause and is a valid exercise of the police power of the state).

⁷⁵ *Charlotte C & A Ry. Co. v. Gibbes*, 142 U.S. 386 (1892) (holding that South Carolina law assessing railroad corporations in order to pay for Railroad Commission *did not* violate the Fourteenth Amendment and was within the state’s regulatory power).

⁷⁶ See *Kentucky Fin. Corp. v. Paramount Auto Exch. Corp.*, 262 U.S. 544 (1923) (Kentucky Finance Corporation “was a ‘person’ within the meaning of both the due process clause and the equal protection clause of the Fourteenth Amendment.”) (Van Devanter, J., for the Court; Brandeis, J., joined by Holmes, J., dissented on grounds that the hearings prior to the judge’s application of a reasonable discovery mechanism satisfied due process); *Gulf C & S.F. Ry. Co. v. Ellis*, 165 U.S. 150 (1897) (“It is well settled that corporations are persons within the provisions of the fourteenth amendment of the constitution of the United States.”); *Covington & Lexington Tpk. Rd. Co. v. Sandford*, 164 U.S. 578 (1896) (“It is now settled that corporations are persons, within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws.”).

⁷⁷ Cf. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 822-23 (1978) (Rehnquist, J., dissenting) (“This Court decided at an early date, with neither argument nor discussion, that a business corporation is a “person” entitled to the protection of the Equal Protection Clause of the Fourteenth Amendment.”)

⁷⁸ *Connecticut Life Ins. Co. v. Johnson*, 303 U.S. 77 (1938).

⁷⁹ Justice Scalia maintains that he and Justice Thomas are “originalists” and that on the Court, “Originalism is in the game, even if it does not always prevail.” To Justice Scalia, originalism focuses on “what the text was thought to mean when the people adopted it” and is hostile to “constitutional evolutionism [that] has, so to speak, metastasized, infecting courts around the world.” ORIGINALISM: A QUARTER CENTURY OF DEBATE 43-45, (Steven G. Calabresi, ed., Foreword by Antonin Scalia, Regnery 2007).

⁸⁰ *Connecticut Life Ins. Co.*, 303 U.S. at 85.

⁸¹ *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 581 (1949) (Douglas, J. dissenting); *Connecticut Life Ins. Co.*, 303 U.S. at 85-86 (Black, J., dissenting) (“Neither the history nor the language of the Fourteenth Amendment justifies the belief that corporations are included within its protections.”); *Slaughter-House Cases*, 83 U.S. 36 (1872); Morton J. Horowitz, *The Transformation of American Law (1870-1960)* (Oxford Univ. Press, Inc. 1992); Mayer, *supra*, note 46.

Fourteenth Amendment “person” issue to offer far more fertile ground for restoration of original constitutional principle than seeking to reverse a long-held and sound constitutional consensus, grounded in history and the words of the document, that Congress and the States may, if they choose to do so, restrict corporate expenditures directed at influencing the outcome of elections.

III. CONCLUSION

As the public alarm about the possibility of overruling *McCormell* and *Austin* and the historical American concern about corporate corruption of the democratic process illustrate, it is unlikely that the American people will accept with equanimity a decision in *Citizens United* that would immunize corporations from democratic control. Over time, a new judicial willingness to examine the fundamental underlying question of the nature of a corporation may yet emerge. In the September 2009 re-argument of *Citizens United*, Justices Stevens, Ginsberg, and Breyer all suggested a questioning of the assumption that a corporation as a corporation has full fundamental rights, and in her first appearance on the Court, Justice Sotomayor stated:

Going back to the question of *stare decisis*, the one thing that is very interesting about this area of law for the last 100 years is the active involvement of both State and Federal legislatures in trying to find that balance between the interest of protecting in their views how the electoral process should proceed and the interests of the First Amendment. And so my question to you is, once we say they can't, except on the basis of a compelling government interest narrowly tailored, are we cutting off or would we be cutting off that future democratic process? *Because what you are suggesting is that the courts who created corporations as persons, gave birth to corporations as persons, and there could be an argument made that that was the Court's error to start with, not Austin or McConnell, but the fact that the Court imbued a creature of State law with human characteristics.*⁸²

Considering that Americans have amended the Constitution repeatedly since the Civil War to expand rather than dilute democratic participation of people in elections, and considering the increasing challenges to concepts of corporate rights, it is likely that no matter how *Citizens United* is decided, many will seek, whether through amendment or judicial correction, to end the misuse of the First Amendment by corporations to evade and invalidate democratically enacted reforms and public welfare measures. By ending corporate misuse of the First Amendment, the First Amendment would be restored to its meaning and intent for two centuries: to ensure that all people have the most robust freedom of conscience, speech, and debate and that a vibrant, diverse press remains free and unfettered, thus strengthening, rather than weakening, democracy.

⁸² Official Transcript, *Citizens United v. FEC* (08-205), Sept. 8, 2009, at 33 (emphasis added).

The ADA Amendments Act: An Overview of Recent Changes to the Americans with Disabilities Act

Emily A. Benfer*

When President George H.W. Bush signed the Americans with Disabilities Act (“ADA”) into law in 1990, he enacted a “historic new civil rights Act . . . the world’s first comprehensive declaration of equality for people with disabilities.”¹ Through a series of decisions, the United States Supreme Court narrowed the ADA’s scope of protection and excluded individuals the Act was originally designed to protect, including people with epilepsy, diabetes and muscular dystrophy. Majority Leader Steny Hoyer, Representative Jim Sensenbrenner, Senator Tom Harkin and Senator Orrin Hatch led a bipartisan effort to reinvigorate the original intent of the ADA through the passage of the ADA Amendments Act of 2008 (“ADAAA”), which went into effect on January 1, 2009.

The ADAAA resulted from seven months of negotiations between representatives of the disability and business communities. Some of the negotiators were involved in the drafting of the original ADA and used their understanding of Congress’s original intent to create a bill that carries “out the ADA’s objectives of providing ‘a clear and comprehensive national mandate for the elimination of discrimination’ and ‘clear, strong, consistent, enforceable standards addressing discrimination’ by reinstating a broad scope of protection to be available under the ADA.”² The ADAAA passed unanimously in both the Senate and House of Representatives, and President George W. Bush signed the act into law on September 25, 2008. For a comprehensive history of the ADA and the ADAAA, please visit www.archiveada.org. The website also includes the text of the law, copies of testimony, interpretive articles and documents, frequently asked questions and answers, policy and advocacy documents, and court cases.

With the passage of the ADAAA, our focus turns to interpretation and exercising rights under the ADA, as amended. This Issue Brief discusses the current status of disability rights under the ADA, as amended, and provides an overview of the ADAAA. Part I provides an overview of the definition of “disability,” which is divided into three prongs. Parts II and III discuss the definition of disability under the first and second prong. Part IV examines the rules of construction applicable to the first and second prong. Lastly, Part V discusses the definition of disability under the third prong.

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¹ President George H.W. Bush, Remarks at the Signing of the Americans with Disabilities Act of 1990 (July 26, 1990), available at <http://www.eeoc.gov/ada/bushspeech.html>.

² ADA Amendments Act (ADAAA), Pub. L. No. 110-325, § 2(b)(1), 122 Stat. 3553 (2008) (to be codified at 42 U.S.C. § 12101).

I. DEFINITION OF “DISABILITY”

One of Congress’s main purposes in enacting the ADAAA was to respond to the Supreme Court’s treatment of the definition of disability, which had the effect of severely reducing coverage for people with impairments intended to receive coverage.³ In the ADAAA, Congress clearly states that the Supreme Court and the Equal Employment Opportunity Commission have imposed too high a level of limitation in their interpretations of disability, specifically the terms “substantially limits” and “major” in life activities. Congress achieved the goal of creating a lower standard by rejecting these past Supreme Court decisions and requiring that the definition of disability be construed broadly.⁴

The ADA contained a three-prong structure for the definition of disability that is retained in the ADAAA:

The term disability means, with respect to an individual:

- (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment (as described in paragraph (3)).⁵

Congress originally adopted this definition of disability from the definition of “handicap” used in the Rehabilitation Act of 1973.⁶ The courts had interpreted the Rehabilitation Act definition broadly to include individuals with a wide range of physical and mental impairments;⁷ under the Rehabilitation Act, a person’s status as disabled was typically “undisputed” and the court turned to the merits of the claim.⁸ Unfortunately, the courts did not treat disability under the ADA similarly. Courts interpreting the ADA engaged in a long, arduous process to determine whether a dis-

³ In the “Sutton trilogy” cases, the Supreme Court held that mitigating measures should be considered in determining whether an individual has a disability under the ADA. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999); *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555 (1999). In *Toyota v. Williams*, the Supreme Court created a demanding standard for the term “substantially limits.” *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002). For a detailed discussion about the effect of these cases and the disability community’s response, see Chai Feldblum, Kevin Barry, Emily A. Benfer, *The ADA Amendments Act of 2008*, 13 *Tex. J. C.L. & C.R.* 187 (2008), available at <http://www.law.georgetown.edu/archiveada/documents/ADAAMendmentsActArticle.pdf>.

⁴ ADAAA § 2(a)(7).

⁵ ADAAA § 3(1) (amending Americans with Disabilities Act (ADA), § 2(a), 42 U.S.C. § 12101 (1990)).

⁶ The Rehabilitation Act definition is now codified at 29 U.S.C. § 705(20) (2007). In 1992, the term “disability” replaced “handicap” in the Rehabilitation Act. See Pub. L. No. 102–569, § 102, 106 Stat. 4344, 4355–56 (1992).

⁷ Georgetown Law Federal Legislation Clinic, *Fact Sheet on People Covered Under Section 504 of the Rehabilitation Act and People Not Covered by the ADA*, available at http://www.law.georgetown.edu/ararchiveada/documents/Appendix_A_000.pdf (last visited on Oct. 22, 2008).

⁸ See *Strathie v. Department of Transportation*, 716 F.2d 227, 230 (3d Cir. 1983) (“It is undisputed that Strathie is a handicapped person.”); *Bentivegna v. United States Department of Labor*, 694 F.2d 619, 621 (9th Cir. 1982) (“It is not disputed that: (1) Bentivegna is a ‘handicapped person’ under the Act.”); *Kampmeier v. Nyquist*, 553 F.2d 296, 299 (2d Cir. 1977) (“The appellees do not deny that Margaret Kampmeier and Steven Genecco are within the applicable definition of a ‘handicapped individual’ in 29 U.S.C. § 706(6).”).

ability covered under the law existed, a process that often intruded upon the personal lives of the individuals seeking protection from discrimination.⁹

Congress indicated its disapproval of past interpretations of disability by stating in the Findings and Purposes of the ADAAA that courts had failed to fulfill Congress's expectation that "disability" would be interpreted consistently with the definition of "handicapped individual" under the Rehabilitation Act.¹⁰ To rectify these past interpretations, Congress redefined the terms in each prong of the definition of disability and also added a rule of construction requiring that the definition of disability be construed in favor of broad coverage of individuals, consistent with the Findings and Purposes section and to the maximum extent permitted by the ADA.¹¹ In this way, Congress clearly stated that the ADAAA "should not be unduly used as a tool for excluding individuals from the ADA's protections."¹² Instead, the analysis of whether an individual meets the definition of disability and establishes a *prima facie* case should be similar to the analysis in cases brought under the Rehabilitation Act and should be inclusive.¹³ Under the ADAAA, thanks to an appropriately generous standard for the determination of disability, "courts [are required] to focus primarily on whether discrimination has occurred or accommodations properly refused."¹⁴

The ADAAA further increases the focus on the prohibition of discrimination by aligning the ADA with other civil rights laws. This was accomplished by eliminating language in the ADA that had prohibited discrimination of an individual "with a disability because of a disability" and replacing it with a simple prohibition on "discrimination on the basis of disability."¹⁵ As the Report from the House Committee on the Judiciary explains, "[t]his change harmonizes the ADA with other civil rights laws by focusing on whether a person who has been discriminated against has proven that the discrimination was based on a personal characteristic (disability), not on whether he or she has proven that the characteristic exists."¹⁶ Based on the broad construction of the Rehabilitation Act and civil rights laws, courts should interpret the ADAAA generously and the focus should shift from whether a person is disabled and onto whether discrimination has occurred.

II. FIRST PRONG OF THE DISABILITY DEFINITION

The first prong of the definition of disability means, with respect to an individual, "a physical or mental impairment that substantially limits one or more major life activities of such individual."¹⁷ The ADAAA maintains the same definition of "physical

⁹ While the ADAAA may not entirely prevent the investigation into the personal lives of people seeking protection from discrimination, it should avoid delving into personal activities because it requires consideration of an impairment's effect on a major bodily function. *See infra* Part II(b).

¹⁰ ADAAA § 2(a)(3).

¹¹ ADAAA § 4(a) (amending ADA § 3(4)(A)).

¹² 154 CONG. REC. S8841 (daily ed. Sept. 16, 2008) (statement of Managers).

¹³ *See Carter v. Tisch*, 822 F.2d 465 (4th Cir. 1987); *Gardner v. Morris*, 752 F.2d 1271 (8th Cir. 1985); *Pushkin v. Regents of University of California*, 658 F.2d 1372 (10th Cir. 1981); *Flowers v. Webb*, 575 F. Supp. 1450 (E.D.N.Y. 1983); *Bey v. Bolger*, 540 F. Supp. 910 (E.D. Pa. 1982); *Schuett Inv. Co. v. Anderson*, 386 N.W.2d 249 (Minn. App. 1986).

¹⁴ 154 CONG. REC. S8843 (daily ed. Sept. 16, 2008) (statement of Managers).

¹⁵ H.R. Rep. No. 110-730, at 16 (2008).

¹⁶ H.R. Rep. No. 110-730, at 21 (2008).

¹⁷ ADAAA § 4(a) (amending ADA § 3(1)(A)).

and mental impairment”¹⁸ as promulgated by the Equal Employment Opportunity Commission (“EEOC”) and included in Department of Justice and Department of Education regulations.¹⁹ “Substantially limits” is not defined with new terms but, as explained below, the ADAAA rejects past interpretations of the term in favor of a more inclusive standard. The definition of “major life activities” is more clearly defined and expanded to include “major bodily functions.” Together, these changes should make it easier for individuals to qualify as having a disability for purposes of the law and to focus the discussion onto whether discrimination occurred.

It is important to note that a key difference between the third prong, and the first and second prongs, is that the third prong of the disability definition only requires that a person be treated adversely because of an impairment and does *not* require that the impairment limit or be perceived to limit a major life activity.²⁰ As a result, the ADAAA “relieves entities . . . from the obligation and responsibility to provide reasonable accommodations and reasonable modifications to an individual who qualifies for coverage . . . solely by being ‘regarded as’ disabled under the third prong.”²¹ This is discussed in greater detail in Part V.

The following three sections explore changes to the terms “substantially limits” and “major life activities” and demonstrate that these changes fulfill congressional intent to protect a wide range of individuals with disabilities from discrimination.

A. SUBSTANTIALLY LIMITS

Congress specifically intended that the scope of coverage under the ADAAA be broad and inclusive. The ADAAA states that the “[t]he definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.”²² In keeping with this mandate of broad coverage, the Act provides that the term “substantially limits” should be given a broad interpretation. The ADAAA also includes detailed Findings and Purposes and requires that the term “substantially limits” shall be interpreted consistently with the Findings and Purposes.²³

The Findings and Purposes of the ADAAA reject past interpretations that narrowed the definition of “substantially limits” and make clear that the Supreme Court

¹⁸ 28 C.F.R. § 36.104 (“The phrase physical or mental impairment means -- (i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following bodily systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; (ii) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities; (iii) The phrase physical or mental impairment includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism;(iv) The phrase physical or mental impairment does not include homosexuality or bisexuality.”)

¹⁹ 154 CONG. REC. S8841 (daily ed. Sept. 16, 2008) (statement of Managers); H.R. Rep. No. 110-730, at 9 (2008).

²⁰ 154 Cong. Rec. S8842 (daily ed. Sept. 16, 2008) (statement of Managers); *see* H.R. Rep. No. 110-730, at 14 (2008); H.R. Rep. No. 110-730, at 18 (2008).

²¹ H.R. Rep. No. 110-730, at 14 (2008).

²² ADAAA § 4(a) (amending ADA § 3(4)(A)).

²³ ADAAA § 4(a) (amending ADA § 3(4)(B)).

in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,²⁴ incorrectly “interpreted the term ‘substantially limits’ to require a greater degree of limitation than was intended by Congress.”²⁵ One of the central Findings and Purposes is that Congress rejects the *Toyota* holding that the terms “substantially” and “major life activities” “need to be interpreted strictly to create a demanding standard for qualifying as disabled.”²⁶ The Act also rejects the *Toyota* standard that to be substantially limited in performing a major life activity, “an individual must have an impairment that prevents or *severely restricts* the individual from doing activities that are of central importance to most people’s daily lives.”²⁷ Instead, the ADAAA conveys Congress’s belief that *Toyota* created an “inappropriately high level of limitation necessary to obtain coverage under the ADA.”

Furthermore, “Congress [found] that the EEOC regulations defining the term ‘substantially limits’ as ‘significantly restricted’ [are] inconsistent with congressional intent, by expressing too high a standard.”²⁸ To guide the courts’ future interpretation of “substantially limits,” Congress directs the EEOC to revise its regulations, including the portion that defines the term “substantially limits” as “significantly restricted,” to be consistent with the Act.²⁹ The negotiators of the ADAAA expect that the EEOC will use the plain meaning of the Act in revising its regulations.³⁰

In other words, the term “substantially limits” is “not meant to be a demanding standard.”³¹ Not only does the ADAAA create a more inclusive standard for the term “substantially limits,” but it also expands the term “major life activities” as well.

B. MAJOR LIFE ACTIVITIES AND MAJOR BODILY FUNCTIONS

When determining whether an individual’s impairment substantially limits him or her in a major life activity, the proper analysis includes consideration of whether the individual’s activities are limited in condition, duration and manner.³² To qualify as a disability, an impairment need only substantially limit one major life activity.³³ On the other hand, multiple impairments that together substantially restrict a major life activity may also constitute a disability.³⁴ Throughout the analysis, the ADAAA sets a “lower standard that provides broad coverage” and provides that “the burden of showing that an impairment limits one’s ability to perform common activities is not onerous.”³⁵

²⁴ *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) (holding that an individual who was terminated because of her carpal tunnel syndrome was not disabled because she was only restricted in a limited class of manual tasks and she was not prevented or severely restricted from performing a variety of tasks central to most people’s daily lives).

²⁵ ADAAA § 2(a)(7).

²⁶ *Toyota*, 534 U.S. at 197 (2002).

²⁷ *Id.* at 198 (emphasis added).

²⁸ ADAAA § 2(a)(8).

²⁹ ADAAA § 2(b)(6).

³⁰ ADAAA § 2(b)(5).

³¹ 154 Cong. Rec. S8841 (daily ed. Sept. 16, 2008) (statement of Managers); *see* 154 Cong. Rec. H8288 (daily ed. Sept. 17, 2008) (statement of Rep. Miller) (“We expect the courts and agencies to apply this less demanding standard when interpreting ‘substantially limits.’”).

³² 154 CONG. REC. S8842 (daily ed. Sept. 16, 2008) (statement of Managers).

³³ ADAAA § 4(a) (amending ADAAA § 3(4)(C)).

³⁴ H.R. Rep. No. 110-730, at 10 (2008).

³⁵ 154 Cong. Rec. S8289 (daily ed. Sept. 17, 2008) (statement of Rep. Nadler); *see* 154 Cong. Rec. S8355 (daily ed. Sept. 11, 2008) (statement of Sen. Kennedy) (“[O]ur Senate bill avoids this problem and provides the broader coverage needed to correct the excessively restrictive and unintended interpretation in the litigation.”).

In the definition of a “major life activity,” the ADAAA now includes “the operation of a major bodily function.”³⁶ The ADAAA defines major bodily functions as “including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”³⁷ A disability can also substantially limit the operation of a major bodily function if the disability causes the operation of the major bodily function to overproduce in some harmful fashion, rather than to under-produce.³⁸

The inclusion of major bodily functions is important for people with impairments previously denied protection under the ADA. Prior to the ADA, many courts held that a substantial limitation in a major bodily function, such as liver function,³⁹ did not qualify as a disability. In its effort to make it easier for individuals to qualify as disabled, the ADAAA clarifies the meaning of “major life activities” and expands the term to include “major bodily functions.”⁴⁰ Now these individuals no longer need to show how their disability limits them in specific activities—the substantial limitation of a major bodily function is enough to qualify them for protection under the ADAAA. Because the major bodily functions analysis makes it simpler for an individual to qualify as disabled, plaintiffs’ lawyers should always consider the client’s limitations in major bodily functions first. This will often be the clearest path to coverage, and in many cases should be the plaintiff’s primary argument for coverage.

As previously mentioned, the ADAAA rejects the *Toyota* holding that: 1) “interpreted [the definition of “disability”] strictly to create a demanding standard for qualifying as disabled”⁴¹ and 2) required an individual to prove that his or her impairment prevents or severely restricts the individual from engaging in “activities that are of central importance to most people’s daily lives” to qualify as disabled.⁴² This holding narrowed the definition of “disability” and excluded individuals whom Congress intended to protect. The ADAAA makes multiple changes to address *Toyota* as it applies to major life activities. First, a “major life activity” no longer has to be “of *central importance* to most people’s daily lives.”⁴³ Second, the ADAAA clarifies that “[a]n impairment that substantially limits *one* major life activity need not limit other major life activities in order to be considered a disability.”⁴⁴ Thus, a person need only show he or she is substantially limited in one major life activity to qualify as disabled. Third, the ADAAA expands the non-exhaustive, illustrative list of major life activities. More specifically, “major life activities, include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working.” Congress provides additional examples of major life activities in its House of Representatives’ Committee on Education and Labor Report: “interacting with others, writing, engaging in sexual activities, drinking, chewing, swallowing,

³⁶ ADAAA § 4(a) (amending ADA § 3(2)(B)).

³⁷ ADAAA § 4(a) (amending ADA § 3(2)(B)).

³⁸ H.R. Rep. No. 110-730, at 11 (2008).

³⁹ See *Furnish v. SVI Sys., Inc.*, 270 F.3d 445, 450 (7th Cir. 2001) (holding that an individual with cirrhosis of the liver caused by Hepatitis B did not substantially limit him in a major life activity because liver function was “not integral to one’s daily existence”).

⁴⁰ 154 CONG. REC. S8350 (daily ed. Sept. 11, 2008) (statement of Sen. Harkin).

⁴¹ *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 197 (2002).

⁴² *Id.* at 198.

⁴³ ADAAA § 4(a) (amending ADA § 3(4)(C)) (emphasis added).

⁴⁴ ADAAA § 4(a) (amending ADA § 3(4)(C)) (emphasis added).

reaching, and applying fine motor coordination.”⁴⁵ Therefore, in its effort to make it easier for individuals to qualify as disabled, the ADAAA clarifies the meaning of “major life activities” and expands the term to include “major bodily functions.”

C. EXAMPLES

The following examples demonstrate how individuals who are substantially limited in the operation of various major bodily functions qualify as disabled under the ADAAA:

- An individual with cerebral palsy is disabled because cerebral palsy substantially limits the neurological function. The individual does not need to show any further limitation under the ADAAA.
- An individual with breast cancer is disabled because in its active state,⁴⁶ her breast cancer substantially limits the normal cell growth function.⁴⁷
- An individual with Hepatitis B is disabled because Hepatitis B substantially limits the digestive and liver functions.”⁴⁸ An individual need only be limited in one major bodily function to qualify as disabled.
- An individual with HIV/AIDS is disabled because the virus substantially limits the immune function.⁴⁹

The following examples demonstrate how an individual would be substantially limited in a major life activity:

- Given the less demanding standard for determining substantial limitations in major life activities, we would expect that a person with carpal tunnel syndrome would be found to have a disability because carpal tunnel syndrome substantially limits the major life activity of performing certain manual tasks.⁵⁰
- Congress has now clarified that the primary factor that has been used to defeat ADA coverage for individuals with learning disabilities—mitigating measures—can no longer be relied on to conclude that such individuals do not have disabilities under the ADA. A learning or intellectual disability ordinarily substantially limits a variety of major life activities, including brain function, reading, learning, concentrating, and writing (a person need only show

⁴⁵ H.R. Rep. No. 110-730, at 11 (2008).

⁴⁶ See *infra* Section IV(b).

⁴⁷ See *Pimental v. Dartmouth-Hitchcock Clinic*, 236 F. Supp. 2d 177 (D.N.H. 2002) (holding that an individual with stage 3 breast cancer was not disabled because her breast cancer did not substantially limit her in a major life activity on a long-term basis).

⁴⁸ See *Furnish v. SVI Sys., Inc.*, 270 F.3d 445, 450 (7th Cir. 2001) (holding that an individual with a cirrhosis of the liver caused by Hepatitis B did not substantially limit him in a major life activity because liver function was “not integral to one’s daily existence”).

⁴⁹ See *U.S. v. Happy Time Day Care Ctr.*, 6 F. Supp. 2d 1073 (W.D. Wis. 1998) (holding that “there is something inherently illogical about inquiring whether” a five-year old’s ability to procreate is substantially limited by his HIV infection); 154 Cong. Rec. H8297 (daily ed. Sept. 17, 2008) (statement of Rep. Baldwin) (“Of significance for people living with HIV, among the listed examples of ‘major life activities’ are ‘functions of the immune system,’ as well as ‘reproductive functions.’”).

⁵⁰ See *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) (holding that an individual with carpal tunnel syndrome who could not perform certain manual tasks was not substantially limited because she was not prevented or severely restricted from engaging in activities that are of central importance to most people’s daily lives).

substantial limitation in one major life activity or major bodily function).⁵¹ Because virtually all individuals with learning disabilities are substantially limited in a major life activity, these individuals will ordinarily be protected under the ADA.

Based on these examples, the ADAAA protects individuals with a wide range of impairments that substantially limit a major life activity or the operation of a major bodily function.

III. SECOND PRONG OF THE DEFINITION OF DISABILITY

The second prong of the definition of disability covers “individual[s] [with] . . . a history of, or [who have] been misclassified as having, a mental or physical impairment that substantially limits” a major life activity.⁵² The ADAAA does not directly alter the second prong, but the changes made to “substantially limits,” “major life activities,” and “major bodily functions” apply to it in the same way they apply to prong one. As before, an individual can qualify as disabled if they have a “record of . . . an impairment” that substantially limits them in a major life activity.⁵³ However, as the second prong brings in the functionality test of prong one by reference, the analysis must now occur under the broadened definitions of “substantially limits,” “major life activities,” and “major bodily functions.”⁵⁴ Similarly, the new rules of construction, codified findings and purposes, and statutory findings and purposes apply to the second prong as well. The only difference between the two determinations is that prong one asks for evidence of a present impairment while prong two asks for a “record” of the impairment. The rest of the analysis is essentially the same.

IV. RULES OF CONSTRUCTION

A. MITIGATING MEASURES

The ADAAA addresses Supreme Court decisions, including *Sutton v. United Air Lines, Inc.*, that required consideration of the ameliorative effects of mitigating measures when determining whether an individual was disabled.⁵⁵ As a result of these court decisions, the ADA no longer protected people who took medication or learned to modify their behavior to lessen the effect of their disability. This situation created a Catch-22: “the more successful a person [was] at coping with a disability, the more likely it [was] the Court [would] find that they [were] no longer disabled and therefore

⁵¹ See H.R. Rep. No. 110-730 pt. 2, at 19. (“The next rule of construction for the definition of disability in section 4 of the Act clarifies that an impairment need only substantially limit one major life activity to be considered a disability under the ADA. This responds to and corrects those court decisions that have required individuals to show that an impairment substantially limits more than one life activity or that, with regard to the major life activity of “performing manual tasks,” have offset substantial limitation in the performance of some tasks with the ability to perform others.”)

⁵² S. Rep. No. 101-116, at 22.

⁵³ ADAAA, § (4)(a) (amending ADA § 3(1)(B)).

⁵⁴ *Id.* The structure of the text implies that the functionality test (i.e. the substantially limits a major life activity requirement) applies to both prongs two and three. This is also how the text was traditionally read under the 1973 Rehabilitation Act. Of course, prong three is now explicitly excluded from that test by the language in § (3)(a) of the ADAAA.

⁵⁵ *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) (holding that two women with vision impairments were not disabled because they corrected their vision with glasses or contact lenses).

no longer covered under the ADA.”⁵⁶ The ADAAA remedies this byproduct of *Sutton* and its companion cases by requiring that courts determine whether a person is disabled without reference to the ameliorative effects of mitigating measures.⁵⁷

Under the ADAAA:

[t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the effects of mitigating measures such as: (I) medication, medical supplies, equipment or appliances, low-vision devices, prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies; (II) use of assistive technology; (III) reasonable accommodations or auxiliary aids or services; or (IV) learned behavioral or adaptive neurological modifications.⁵⁸

The House of Representatives included additional examples of mitigating measures in both the Committee on Education and Labor and Committee on the Judiciary Reports. Those reports added “the use of a job coach, personal assistant, service animal, surgical intervention, or compensatory strategy that might mitigate, or even allow an individual to otherwise avoid performing particular life activities.”⁵⁹ The only exception to this rule is that courts are allowed to consider the ameliorative effects of ordinary eyeglasses or contact lenses when determining whether a disability substantially limits a major life activity.⁶⁰

The rule against considering the ameliorative effects of mitigating measures will likely expand the coverage of individuals with learning disabilities. It is now clear that individuals with learning disabilities also qualify as disabled and should be able to secure accommodations in an educational setting⁶¹ or in an employment setting.⁶² “When considering the condition, manner, or duration in which an individual with a specific learning disability performs a major life activity, it is critical to reject the assumption that an individual who has performed well academically cannot be substantially limited in activities such as learning, reading, writing, thinking or speaking.”⁶³ In short, a court must determine whether a learning disability is substantially limiting *without regard* to any mitigating measures, such as learned behavior. As such, a learning disability substantially limits the major bodily function of the brain. (A learning disability also substantially limits the major life activities of reading, learning, con-

⁵⁶ 154 CONG. REC. S8349 (daily ed. Sept. 11, 2008) (statement of Sen. Harkin).

⁵⁷ ADAAA § 2(b)(2).

⁵⁸ ADAAA § 4(a) (amending ADA § 3(4)(E)(i)).

⁵⁹ H.R. Rep. No. 110-730, at 15 (2008); H.R. Rep. No. 110-730, at 20 (2008).

⁶⁰ ADAAA § 4(a) (amending ADA § 3(4)(E)(ii)).

⁶¹ See *Price v. Nat’l Board of Medical Examiners*, 966 F. Supp. 419, 427 (S.D. W. Va. 1997) (holding that an individual with learning disabilities was not disabled because he was able to read and perform at an average level or better compared to most people); 154 Cong. Rec. H8296 (daily ed. Sept. 17, 2008) (statement of Rep. Courtney).

⁶² See *Wong v. Regents of University of California*, 379 F.3d 1097 (9th Cir. 2004) (holding that an individual with a learning disability was not disabled because he was able to read and perform at an average level or better compared to most people).

⁶³ 154 CONG. REC. S8842 (daily ed. Sept. 16, 2008) (statement of Managers); H.R. Rep. No. 110-730, at 10 (2008).

centrating, writing, but a person need only show substantial limitation in one major life activity or major bodily function.) Therefore, because they are substantially limited in a major life activity, individuals with learning disabilities are protected under the ADAAA.

The following examples demonstrate how the “mitigating measures” provision in the ADAAA applies to the analysis of disability:

- An individual with epilepsy should qualify as disabled.⁶⁴ Under the ADAAA, a court must determine whether epilepsy substantially limits a major life activity without regard to the ameliorative effects of medication. When considered without the effects of medication, epilepsy substantially limits the major bodily function of the brain. (Epilepsy also substantially limits the major life activities of walking, standing, communicating, interacting with others, caring for oneself, and breathing, but a person need only show substantial limitation in one major life activity or major bodily function.)
- An individual with diabetes should qualify as disabled.⁶⁵ A court must determine whether diabetes substantially limits a major life activity without regard to mitigating measures, such as insulin, exercise or diet. When considered without the effects of these mitigating measures, a person with diabetes is substantially limited in the endocrine function and is protected under the ADAAA. (Diabetes also substantially limits the major life activities of working, eating, seeing, communicating, and reading, but a person need only show substantial limitation in one major life activity or major bodily function.)
- An individual with post-traumatic stress disorder should qualify as disabled. A court must determine whether post-traumatic stress disorder substantially limits a major life activity without regard to the ameliorative effects of medication or therapy. When considered without the effects of medication or therapy, PTSD substantially limits the brain function. (PTSD also substantially limits the major life activities of concentrating and interacting with others, but a person need only show substantial limitation in one major bodily function or major life activity.)
- An individual with muscular dystrophy should qualify as disabled.⁶⁶ A court must determine whether muscular dystrophy substantially limits a major life activity without regard to the ameliorative effects of behavioral modifications, such as supporting oneself with one arm to perform tasks. When considered without the effects of behavioral modifications, muscular dystrophy substantially limits the neurological function. (Muscular dystrophy also substantially limits the major life activities of lifting, caring for oneself, eating and engaging in sexual activities, but a person need only show substantial limitation in one major bodily function or major life activity.)

⁶⁴ See *Todd v. Academy Corp.*, 57 F. Supp. 2d 448 (S.D. Tex. 1999) (holding that an individual with epilepsy is not disabled because his seizures were generally well controlled by medication).

⁶⁵ See *Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720 (9th Cir. 2002) (holding that an individual with diabetes is not disabled because he was able to mitigate the effects of his diabetes through a regimen of insulin, exercise and diet).

⁶⁶ See *McClure v. General Motors Corp.*, 75 Fed. Appx. 983 (5th Cir. 2003) (holding that an individual with muscular dystrophy was not disabled because he was able to compensate for his condition through the use of behavioral modifications, such as supporting himself with one arm).

Under the ADAAA, courts will no longer consider the ameliorative effects of mitigating measures when determining whether these individuals are disabled. As a result, in all of the circumstances described above, the court should determine that an individual qualifies as disabled based on whether the disability is substantially limiting in its unmitigated state.

B. EPISODIC OR IN REMISSION

Before the ADAAA, many courts held that individuals with epilepsy were not substantially limited because their seizures occurred episodically.⁶⁷ Similarly, many courts discounted the impact of an impairment that was in remission as too short-lived to be substantially limiting.⁶⁸ The ADAAA rejects these holdings and states “[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.”⁶⁹ Furthermore, Congress clarifies in the Senate Statement of Managers that “the rules of construction provide that impairments that are episodic or in remission be assessed in their active state for purposes of determining coverage under the ADA.”⁷⁰

The following are examples of individuals with disabilities who meet the definition of disability when their episodic impairments are considered in their active state:

- An individual with epilepsy should qualify as disabled. “[A]n individual with epilepsy who experiences seizures that result in the short-term loss of control over major life activities, including major bodily functions or other major life activities is disabled under the [Act] even if those seizures occur daily, weekly, monthly, or rarely.”⁷¹ A court must determine whether an individual with epilepsy is disabled without considering that seizures occur episodically and momentarily, lasting five to fifteen seconds.⁷² When considered in its active state (i.e. during a seizure), epilepsy qualifies as a disability and people with epilepsy are protected under the ADAAA.
- An individual with cancer should qualify as disabled.⁷³ A court determining whether an individual with cancer is disabled must consider cancer in its active state, whether or not the individual is in remission. In its active state, cancer substantially limits the normal cell growth function. Thus, an individual with cancer is protected under the ADAAA.
- An individual with depression should qualify as disabled. A court must determine whether an individual with depression is disabled without considering whether his depression is episodic. In its active state, depression substantially limits the brain function. Thus, an individual with depression is protected under the ADAAA.

⁶⁷ See *Todd*, 57 F. Supp. 2d at 453.

⁶⁸ See *Pimental v. Dartmouth-Hitchcock Clinic*, 236 F. Supp. 2d 177, 182-83 (D.N.H. 2002).

⁶⁹ ADAAA § 4(a) (amending ADA § 3(4)(D)).

⁷⁰ 154 CONG. REC. S8842 (daily ed. Sept. 16, 2008) (statement of Managers).

⁷¹ H.R. Rep. No. 110-730, at 19 (2008).

⁷² See *Todd*, 57 F. Supp. 2d at 453 (holding that an individual with epilepsy was not disabled because his seizures occurred episodically and were only momentary, lasting five to fifteen seconds).

⁷³ See *Pimental*, 236 F. Supp. 2d at 183 (holding that an individual with stage 3 breast cancer is not disabled because her breast cancer did not substantially limit her in a major life activity on a long-term basis).

As these examples demonstrate, individuals with impairments that are episodic or in remission qualify as disabled when their impairments are considered in their active state.

V. THIRD PRONG OF THE DISABILITY DEFINITION

The ADAAA redefines the third prong of the definition of disability, or the “regarded as” prong. The original third prong was included in the ADA to “prohibit discrimination founded on [misplaced] concerns or fears.”⁷⁴ However, “[i]n line with the Supreme Court’s restrictive interpretation of the first prong of the definition . . . the Court also . . . restrictively construed prong three, increasing the burden of proof required to establish that one has been regarded as disabled.”⁷⁵ In the *Sutton* decision, the Supreme Court required plaintiffs to show that their employers not only subjectively regarded them as impaired and were substantially limited in a major life activity but also that these same employers subjectively regarded those limitations as disqualifying for a broad range of jobs in the eyes of other employers.⁷⁶

Congress modified the “regarded as” prong in order to counteract the Supreme Court’s narrow interpretation in *Sutton* and to broaden coverage. Specifically, the ADAAA provides that:

An individual meets the requirement of ‘being regarded as having such an impairment’ if the individual establishes that he or she has been subject to an action prohibited under this Act because of an actual or perceived physical impairment whether or not the impairment limits or is perceived to limit a major life activity.⁷⁷

In modifying this standard, Congress reaffirmed that “stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society” continue to negatively affect persons with disabilities and, in many ways, “are just as disabling as the actual impact of an impairment.”⁷⁸

It is also important to note that “[u]nder this bill, the third prong of the disability definition will apply to impairments, not only to disabilities.”⁷⁹ The category of impairments is, of course, much broader than disability and the deliberate use of that term reflects the breadth of coverage Congress intended under the third prong.⁸⁰

The subsections below discuss the ADAAA’s three major changes to the “regarded as” prong. The first, and most important, is the elimination of the functionality test (i.e. a person no longer needs to show substantial limitation in a major life activity under the third prong). Under the ADAAA, an individual only needs to establish that they were subjected to an act prohibited by the ADA due to a perceived or actual impairment regardless of whether they actually have the impairment. The plaintiff is no longer required to show that a covered entity subjectively believes that the plaintiff’s impairment substantially limited him or her in a major life activity, but only that the

⁷⁴ H.R. Rep. No. 110-730 pt.2, at 17.

⁷⁵ *Id.* at 18.

⁷⁶ 527 U.S. 471, 491 (1999).

⁷⁷ S. 3406, 110th Cong. § 4(a)(3)(A).

⁷⁸ H.R. Rep. No. 110-730, at 7 and 13.

⁷⁹ 154 CONG. REC. S8840 (daily ed. Sept. 16, 2008) (statement of Managers).

⁸⁰ *See id.* at S8354 (statement of Sen. Hatch).

covered entity believes the plaintiff has an impairment—or the plaintiff actually does have an impairment. Second, Congress clarified that “reasonable accommodations” or modifications are not required for individuals qualifying solely under the “regarded as” prong. Persons seeking accommodations must now qualify under either prong one or two, a standard that should be easy to meet under the broad definitions in the ADAAA. Finally, Congress also narrowed the scope of coverage slightly by providing an exception for impairments that are “transitory and minor.” Only the most trivial impairments will qualify as an exception to coverage under the third prong as very few impairments are both transitory *and* minor.

This section explores each of these changes in depth by examining the text and legislative history behind each provision. Finally, a list of examples is provided to illustrate what will be covered under the new “regarded as” prong of the ADAAA.

A. THE FUNCTIONALITY TEST

The elimination of the functionality test is the most significant change to the third prong of the definition of disability in the ADAAA. Plaintiffs only need to show that they were discriminated against due to an actual or perceived impairment in order to qualify as disabled. Both the House of Representatives and the Senate support this principle. In the words of the Education and Labor Report:

The Committee therefore restores Congress’ original intent by making clear that an individual meets the requirement of ‘being regarded as having such an impairment’ if the individual shows that an action (e.g., disqualification from a job, program, or service) was taken because of an actual or perceived impairment, whether or not that impairment actually limits or is believed to limit a major life activity.⁸¹

The Senate Statement of Managers adds that “[i]f an individual establishes that he or she was subjected to an action prohibited by the ADA because of an actual or perceived impairment—whether or not that impairment limits or is perceived to limit a major life activity—then the individual will qualify for protection under the Act.”⁸²

Significantly, the new language focuses on discrimination and primarily asks whether the person was subjected to an action prohibited by the ADA. One of the concerns surrounding the ADA jurisprudence was that it failed to adequately examine the question of discrimination. Instead, the decisions revolved solely on whether a person had a disability for purposes of the law. The changes made by the ADAAA to Section 102 of the ADA, pertaining to “discrimination,” reflect this concern.⁸³ The shift in emphasis in the “regarded as” section suggests the same congressional intent. Thus, the primary focus, under the ADAAA, is on whether discrimination took place—not whether a person has a disability.

Under the ADAAA, whether an employer believes the employee is substantially limited in a major life activity no longer matters. When determining the presence of an actual or perceived impairment, an objective, rather than subjective, standard is used. The findings in the ADAAA clearly state that Congress “reject[s] the Supreme

⁸¹ H.R. Rep. No. 110-730, at 13-14.

⁸² 154 CONG. REC. S8346 (daily ed. Sept. 11, 2008) (statement of Managers).

⁸³ H.R. Rep. No. 110-730, at 16.

Court's reasoning in *Sutton v. United Air Lines, Inc.* . . . with regard to coverage under the third prong of the definition of disability and . . . reinstate[s] the reasoning of the Supreme Court in *School Board of Nassau County v. Arline*.⁸⁴ In *Arline*, the Supreme Court held that a teacher with tuberculosis fell under both the "regarded as" and "record of disability" prongs of the Rehabilitation Act. In making the "regarded as" determination, the Court did not dwell on the subjective beliefs of the employer. Rather, the Court only looked at whether the teacher had tuberculosis and was discriminated against because of misperceptions about that illness.⁸⁵ This analysis stands in sharp contrast to the multiple levels of subjective proof required by *Sutton*.

The plain language of the ADAAA clearly indicates that the objective examination in *Arline* is the appropriate standard. In addition to findings that flatly reinstate the reasoning of *Arline*, the case is cited favorably in the Senate Statement of Managers, the Judiciary Report, and the Education and Labor Report.⁸⁶ The drafters of the original ADA "relied extensively on the reasoning of" *Arline* and the ADAAA "restates [Congress's] reliance on the broad views enunciated in that decision."⁸⁷ According to the Senate Statement of Managers, courts should "continue to rely on [*Arline's*] standard."⁸⁸ The objective standard it enunciates, rather than the subjective standard of *Sutton*, should now apply to all cases.

B. REASONABLE ACCOMMODATIONS

The second significant change to the "regarded as" prong is the elimination of accommodations for persons qualifying solely under prong three. Section 6(g) provides that:

[a] covered entity under title I, a public entity under title II, and any person who owns, leases (or leases to), or operates a place of public accommodation under title III, need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets the definition of disability in section 3(1) solely under subparagraph (C) of such section.⁸⁹

The Senate Statement of Managers explains the change this way: "[w]e believe it is an acceptable compromise given our strong expectation that such individuals would now be covered under the first prong of the definition, properly applied."⁹⁰ Essentially, given the addition of "major bodily functions," the expansion of "major life activities," the elimination of "mitigating measures," and the clarification regarding "substantially limits," no impairment that requires an accommodation should fall outside the scope of the first and second prongs. With the expanded first and second prongs, Congress recognized that there is no longer a need for accommodations based solely

⁸⁴ ADAAA § 2(b)(3).

⁸⁵ See *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987).

⁸⁶ See H.R. Rep. No. 110-73 pt. 1, at 12; H.R. Rep. No. 110-73 pt. 2, at 7; 154 Cong. Rec. S8346 (daily ed. Sept. 11, 2008) (statement of Managers).

⁸⁷ 154 CONG. REC. S8346 (daily ed. Sept. 11, 2008) (statement of Managers).

⁸⁸ 154 CONG. REC. S8346 (daily ed. Sept. 11, 2008) (statement of Managers).

⁸⁹ ADAAA § 6(a) (creating new ADA § 501(g)).

⁹⁰ 154 CONG. REC. S8347 (daily ed. Sept. 11, 2008)(statement of Managers).

on the third prong. Every individual who requires an accommodation should now be eligible under the first or second prongs.

While prohibited from seeking accommodations, persons qualifying under the third prong can, of course, still seek all other remedies available under the ADA. Also, nothing in this section prevents a person who qualifies under prong three *and* prong one or two from requesting an accommodation under prongs one and two.

C. TRANSITORY AND MINOR

In addition to the clause removing reasonable accommodations under the third prong, there is a new exception for impairments that are “transitory and minor.” The ADAAA states that:

Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an expected or actual duration of 6 months or less.⁹¹

The Senate Statement of Managers and Education and Labor report describe the exception as applying only to “claims at the lowest end of the spectrum of severe limitations.”⁹² According to the Judiciary Report, “[p]roviding such an exception for claims at the lowest end of the spectrum of severity was deemed necessary under prong three of the definition because individuals seeking coverage under this prong need not meet the functional limitation requirement contained in prongs one and two of the definition . . . absent this exception, the third prong of the definition would have covered . . . common ailments like the cold or flu.”⁹³ It is expected that this exception will be, in the words of the Judiciary Report, “construed narrowly” as it runs counter to the general rule of broad coverage under the ADAAA and few ailments are, in fact, both transitory *and* minor.⁹⁴

Apart from the examples of the cold and flu given in the Judiciary Report (these are also mentioned in the Senate Statement of Managers), other ailments described as both transitory and minor in the debates included: “stomachaches,” “mild seasonal allergies,” “a hangnail,” and “an infected finger.”⁹⁵ Clearly these are all “trivial impairments” and the scope of the exception should be considered in light of them.⁹⁶

Impairments that may have transitory or irregular symptoms but are not minor should still be covered. As such, a person who is treated adversely because he or she has, or is believed to have, an impairment such as colon cancer, epilepsy, bipolar disorder, or HIV/AIDS, could proceed under the “regarded as” prong because these impairments (whether or not the individual actually has them) are not both transitory and minor.⁹⁷

It is also important to note that the “transitory and minor” exception is an objective one, based on the actual nature of the impairment that the person has or is per-

⁹¹ ADAAA § 4(a) (amending ADA § (3)(3)(b)).

⁹² H.R. Rep. No. 110-730 pt. 2, at 18.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ 154 CONG. REC. H6064, H6074 (daily ed. Sept. 17, 2008) (statements of Rep. Nadler and Rep. Smith).

⁹⁶ *Id.* (statement of Rep. Smith).

⁹⁷ H.R. Rep. No. 110-730, at 14; 154 Cong. Rec. S8346 (daily ed. Sept. 11, 2008) (statement of Managers).

ceived to have. The exception does not create the opportunity for a covered entity to defend itself by claiming it believed the plaintiff had a transitory and minor impairment when the impairment in question is not actually transitory and minor. Given that the application of heightened subjective standards to the “regarded as” prong led to the changes in the ADAAA in the first place, it would make little sense for the drafters to reintroduce the problem in a very narrow exception to the general rule of broad coverage.⁹⁸

D. EXAMPLES

The new “regarded as” prong of the ADAAA covers all persons subjected to an act prohibited by the ADA due to a perceived or actual impairment. Under the ADA, prohibited acts include discrimination, denial of equal treatment, and segregation in employment, public services, public transport, or public accommodations.⁹⁹ The following examples illustrate how some persons, among others, would be eligible for protection under this standard:

- A child prevented from enrolling in a daycare facility *because of* his HIV status should qualify for protection under the third prong. Denial of a public service due to an impairment is a prohibited act under the ADA. A plaintiff denied entrance to daycare because of HIV (an impairment that is not transitory and minor) qualifies for protection from discrimination under the new “regarded as” prong.¹⁰⁰
- A person removed from her position as a nurse *because of* her stage three breast cancer should meet the definition of disability under the third prong. Termination is an action prohibited under the Act and stage three breast cancer is an impairment. Thus, the nurse removed from her position should be covered.¹⁰¹
- A person whose job offer is rescinded *because of* his muscular dystrophy is covered under the “regarded as” prong. Denial of employment based upon a perceived or actual impairment is a prohibited act under the ADA. Muscular dystrophy is an impairment that is not transitory and minor. Thus, the individual should qualify as disabled.¹⁰²
- A person terminated *because of* PTSD, depression, or other mental illness should qualify as disabled. Termination based upon a perceived or actual impairment is prohibited under the ADA and mental illnesses, such as PTSD,

⁹⁸ H.R. Rep. No. 110-730, at 13.

⁹⁹ S. Rep. No. 101-116, at 2-3 (areas covered by ADA), 27 (types of discrimination prohibited).

¹⁰⁰ See *U.S. v. Happy Time Day Care Center*, 6 F. Supp. 2d 1073 (W.D. Wisc. 1998) (holding that a child denied access to a daycare center due to their HIV was not regarded as disabled because they could not show that the daycare believed the HIV was substantially limiting).

¹⁰¹ See *Pimental v. Dartmouth-Hitchcock Clinic*, 236 F. Supp. 2d 177 (D.N.H. 2002) (holding that a person removed from her nursing job due to breast cancer was not disabled under the regarded as prong because she could not show that her employer considered her to be substantially limited).

¹⁰² See *McClure v. General Motors Corp.*, 75 Fed. Appx. 983 (5th Cir. 2003) (holding that an individual fired as a result of their muscular dystrophy could not meet the standards of the regarded as prong as they failed to show their employer believed they were substantially limited).

are impairments that are not transitory and minor. Thus, the individual terminated should qualify as disabled.¹⁰³

- A person denied employment in the aviation industry due to unfounded concerns about a severe visual impairment should be eligible under the ADAAA. A severe visual impairment qualifies as a physical or mental impairment that is not transitory and minor. Thus the individual denied employment should qualify as disabled.¹⁰⁴

As these examples indicate, the new “regarded as” prong places a high value on proving causality between the existence of the impairment and the adverse employment action. As in all employment cases, the claimant bears the ultimate burden of proving that a discriminatory act prohibited by the ADA was taken *because of* a perceived or actual impairment. The existence of an actual or perceived impairment that is not transitory and minor should be settled quickly and require minimal evidence from an objective standard.

VI. CONCLUSION

This Issue Brief provides a blueprint for proper application of the ADA as amended and gives a basic overview of the new law and the supporting legislative history. The ADAAA makes significant changes to the definition of “substantially limits,” “major life activities,” and “regarded as.” Congress intends these changes to reflect the “broad and inclusive” intent behind the original ADA.¹⁰⁵ However, these adjustments will never be fulfilled without an adequate focus on proper interpretation of its terms. While the passage of the ADAAA was a victory for people with disabilities, it is extremely important that the ADAAA be implemented consistently with Congress’s intent to allow for individuals with disabilities to fully participate in a society free from discrimination.

¹⁰³See *McMullin v. Ashcroft*, 337 F. Supp. 2d 1281, 1289 (D. Wyo. 2004) (holding that a U.S. Marshall terminated due to depression could not fall under the regarded as prong because he failed to show that his employer subjectively believed he was substantially limited); *Schriner v. Sysco Food Service*, 2005 U.S. Dist. LEXIS 44743 (holding that an employee terminated due to PTSD failed to qualify under the regarded as prong because he could not show that the employer subjectively believed his PTSD was substantially limiting).

¹⁰⁴See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) (holding that two sisters with severe myopia that was correctable with standard aides did not meet the regarded as requirements as they failed to show their employers subjectively believed they were substantially limited in a broad range of pilot jobs).

¹⁰⁵154 CONG. REC. S3845 (daily ed. Sept. 11, 2008) (statement of Managers).

Disorderly (mis)Conduct: The Problem with “Contempt of Cop” Arrests

Christy E. Lopez *

In July 2009, Harvard University professor Henry Louis Gates, Jr., was arrested by Cambridge Police Department Sergeant James Crowley. The Sergeant went to the Professor’s home because a 911 caller had reported a possible burglary in progress. Gates was concerned by Crowley from the outset because Crowley greeted Gates by asking him to step outside. Gates was further nonplussed by Crowley’s continued questioning of him even after seeing Gates’s driver’s license, which showed that he did in fact live in the house.¹ Sergeant Crowley wrote in his arrest report that Professor Gates began to “yell” and that he told Gates that he would speak to him outside, to which Gates responded, “Ya, I’ll speak with your mama outside.”² Professor Gates has stated that when he stepped outside and asked another police officer for the Sergeant’s name, the officer said, “Thank you for accommodating our request. You are under arrest.”³

According to Sergeant Crowley’s police report, Professor Gates was arrested only after being observed “exhibiting loud and tumultuous behavior, in a public place, directed at a uniformed police officer who was present investigating a report of a crime in progress.” The report continued that “[t]hese actions on the behalf of Gates served no legitimate purpose and caused citizens passing by this location to stop and take notice while appearing surprised and alarmed.” Crowley further asserted that Gates had accused Crowley of being a racist; made a telephone call and appeared to be asking for the “chief”; and told Crowley that he “had no idea who [he] was ‘messing’ with.” Sergeant Crowley stated in his report that “[d]ue to the tumultuous manner Gates had exhibited in his residence as well as his continued tumultuous behavior outside the residence, in view of the public, I warned Gates that he was becoming disorderly.” Crowley stated that Gates “continued to yell, which drew the attention of both the police officers and citizens, who appeared surprised and alarmed by Gates’s outburst.” Crowley asserted that he warned Gates again and then arrested him.⁴ Gates was handcuffed, taken to the police station, booked, and held for several hours.⁵

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¹ Dayo Olopade, *Skip Gates Speaks: The Root’s Editor-in-Chief Henry Louis Gates Jr. talks about his arrest and the outrage of racial profiling in America*, The Root, July 21, 2009, <http://www.theroot.com/views/skip-gates-speaks>.

² See Cambridge Police Department, Incident Report #9005127 (2009) available at <http://i.cdn.turner.com/cnn/2009/images/07/23/0498.001.pdf>.

³ Olopade, *supra* note 1.

⁴ See Cambridge Police Department, *supra* note 2.

⁵ Olopade, *supra* note 1.

President Obama famously commented that the police acted “stupidly” in arresting Professor Gates.⁶ The union representing Cambridge police sergeants and lieutenants released a statement in support of Sergeant Crowley, asserting that the Sergeant’s actions were “consistent with his training, with the informed policies and practices of the Department, and with applicable legal standards.”⁷

Sergeant Crowley’s decision to arrest Professor Gates may or may not have been stupid. It may or may not have been consistent with Cambridge Police Department policy. But, if the facts are as Crowley asserted in his arrest report, the arrest was unlawful. Nothing in Sergeant Crowley’s report, or any other evidence, suggests that Professor Gates’s “tumultuous” behavior went beyond words, and there is no evidence that these words, however loud, rude, or obnoxious were so inflammatory as to inflict injury or tend to incite an immediate breach of the peace. Professor Gates’s behavior, as described by Sergeant Crowley, falls squarely in the realm of speech protected by the First Amendment. Not surprisingly, the City of Cambridge and the Cambridge Police Department jointly recommended to the Middlesex County District Attorney that the criminal charges against Professor Gates be dropped, and they were.⁸

Despite its illegality, the arrest of Professor Gates was not unusual. This scenario—an individual being arrested after responding obstreperously to perceived police misconduct—is one that plays out routinely across the United States, albeit without the Ivy League backdrop or culminating in conflict-resolution-through-beer. And while Gates’s arrest may have fostered greater understanding between the Professor and the Sergeant,⁹ it does not appear that this “teachable moment” went much further. Since the arrest in Cambridge nearly a year ago, there have been few examples of progress in how local legislatures write “disorderly conduct” and similar laws; how police policy incorporates these laws; how law enforcement officers are trained to enforce these statutes; or how these types of arrests are tracked or monitored. Not surprisingly, instances of troubling arrests for “disorderly conduct” and similar infractions continue to abound. Given the entrenched and hyperbolic views expressed during the Gates incident, it is perhaps unsurprising that it did not bring about the sea change some had hoped. This missed opportunity is unfortunate. Change in this area is needed and of vital importance.

There is widespread misunderstanding of police authority to arrest individuals who passively or verbally defy them. There is abundant evidence that police overuse disorderly conduct and similar statutes to arrest people who “disrespect” them or express disagreement with their actions. These abusive arrests cause direct and signifi-

⁶ Nicholas Graham, *Obama on Skip Gates Arrest: Police Acted “Stupidly,”* The Huffington Post, July 22, 2009, http://www.huffingtonpost.com/2009/07/22/obama-on-skip-gates-arrest_n_243250.html.

⁷ Jonathan Saltzman & Erica Noonan, *Officer in Gates case says he won’t apologize*, Boston Globe, July 22, 2009.

⁸ David E. Frank, *Making legal sense of the Gates arrest*, The Docket, July 22, 2009, <http://blogs.masslawyersweekly.com/news/2009/07/22/making-legal-sense-of-the-gates-arrest>. It would be easy to dismiss Cambridge’s decision as motivated solely by political expediency, and certainly even meritorious arrests are not always pursued by prosecutors. In this case, however, there is no legitimate dispute that dropping the charges was the only legally sound resolution to the matter. *See Id.*

⁹ Sgt. Crowley and Professor Gates met at the White House “beer summit” and reportedly met again at a bar a few months later. *See, e.g.*, Associated Press, *Cop, scholar to meet again after Obama chat: Two men at the center of race uproar meet at White House for beer*, MSNBC.com, July 31, 2009, http://www.msnbc.msn.com/id/32210408/ns/politics-white_house; Mara Gay, *The Gates-Crowley Beer Summit, Round 2*, The Atlantic Wire, Oct. 29, 2009, <http://www.theatlanticwire.com/opinions/view/opinion/The-Gates-Crowley-Beer-Summit-Round-2-1441>.

cant harm to those arrested and, more generally, undermine the appropriate balance between police authority and individual prerogative to question the exercise of that authority. Moreover, setting aside the question of whether any bias motivated Sergeant Crowley's decision to arrest Professor Gates, these types of arrests appear to impact communities of color disproportionately and exacerbate tensions between these communities and law enforcement. This might just be another sad fact of police-community relations in a country where poverty and its attendant crime are too often correlated with race, except that it is entirely avoidable. There is no need for police to arrest people for "contempt of cop" and there are ways to ensure that they do not.

This Issue Brief first sets out the law governing the enforcement of disorderly conduct and similar statutes. It then explores the widespread and egregious violations of this law in some law enforcement agencies and by some officers. The issue brief argues that the harm caused by improper arrests and threats of arrest for disorderly conduct far outweighs the justification given by some police and pundits for the aggressive (overly-aggressive, some would say) use of these statutes. Finally, the Issue Brief offers a roadmap for legislators, advocates, law enforcement officials, and others seeking to address this problem.

I. THE LAW ON DISORDERLY CONDUCT AND SIMILAR ARRESTS

The First Amendment generally prohibits law enforcement officials from arresting people for how they talk to (or yell at) the police. Even speech that is loud, disrespectful, profane, and insulting is protected in most circumstances. Only words that by their "very utterance inflict injury or tend to incite an immediate breach of the peace" are unprotected.¹⁰ Use of these so called "fighting words" removes First Amendment protection, whether the speech is directed at a police officer or at a civilian. However, "fighting words" are construed more narrowly when the words are directed at police officers.¹¹

Most of us have considerable respect for police officers and appreciate the dangerous and too-often thankless job they undertake every day. Why then would we allow people to say obnoxious and even profane things to police officers? There are several reasons. First, objectionable speech directed towards law enforcement is frequently a critique of police action, however inartfully expressed, and the individual's right to criticize government action is at the very heart of the purpose of the First Amendment's speech protections. As the Supreme Court stated in *City of Houston v. Hill*, perhaps the seminal opinion in this area: "The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state."¹² Secondly, we are less worried about the negative consequences of angry speech in this context because we expect more from police officers than we do from the average citizen: "a properly trained officer may reasonably be expected to 'exercise a higher degree of restraint' than the average citizen, and thus be less likely to respond belligerently to 'fighting words.'"¹³ Speech keeps the wheels of democracy running smoothly, and the right of

¹⁰ *Gooding v. Wilson*, 405 U.S. 518, 522 (1972) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

¹¹ *Lewis v. City of New Orleans*, 415 U.S. 130, 135 (1974) (Powell, J. concurring).

¹² *City of Houston v. Hill*, 482 U.S. 451, 462-63 (1987).

¹³ *Lewis*, 415 U.S. at 135 (quoting *Lewis v. City of New Orleans*, 408 U.S. 913 (1972) (Powell, J., concurring)).

the individual to speak out directly, openly, and immediately against a government actor doing something the speaker thinks is wrong is perhaps the purest—and messiest—form of this democratic axel-grease we allow.

The Supreme Court and numerous lower courts have recognized the potential for abuse by law enforcement if arrests for disorderly and disrespectful speech are allowed. In *Lewis v. City of New Orleans*, Justice Powell noted in a concurrence at least two forms of potential abuse. First, an ordinance prohibiting obscene or opprobrious language directed towards a police officer “confers on police a virtually unrestrained power to arrest and charge persons with a violation.” He recognized that “[m]any arrests are made in ‘one-on-one’ situations where the only witnesses are the arresting officer and the person charged. All that is required for conviction is that the court accept the testimony of the officer that obscene or opprobrious language had been used toward him while in performance of his duties.”¹⁴ In other words, Justice Powell seems to be saying, even if we would rather people express their displeasure with police action with words that are neither obscene nor opprobrious, making it unlawful to do so in effect gives the police the ability to arrest anyone at anytime for a minor infraction with no evidence other than the officer’s word.

Justice Powell noted a second problem with allowing arrests for obnoxious speech towards an officer: in arrests for “common street crimes (i.e., robbery, assault, disorderly conduct, resisting arrest), it is usually unnecessary that the person also be charged with the less serious offense of addressing obscene words to the officer. The present type of ordinance tends to be invoked only where there is no other valid basis for arresting an objectionable or suspicious person. The opportunity for abuse, especially where a statute has received a virtually open-ended interpretation, is self-evident.”¹⁵ The concern Justice Powell expresses here is that especially where an officer cannot show that a person *did* something wrong, the officer might arrest the person for *saying* something wrong, simply because the officer *believes* person did something wrong or is just a bad person. Similarly, overly broad criminal statutes invite “harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure,”¹⁶ and criminal statutes based on the content of the speech facilitate “[t]he eternal temptation . . . to arrest the speaker rather than to correct the conditions about which he complains.”¹⁷

As discussed below, each of these concerns have repeatedly been borne out in police-civilian interactions, resulting in overbroad statutes being invalidated, and arrests being overturned where the arrest appeared predicated on the exercise of protected speech or critique of the exercise of police authority. The colloquial term for abusive arrests under disorderly conduct and similar statutes is “contempt of cop.” The term is a play on the phrase “contempt of court,” in which a person is punished for interfering with a court’s ability to administer justice, usually by refusing to obey a court’s order to do anything from paying a fine to remaining quiet. In contempt of cop arrests, the individual is arrested for showing “contempt” towards a law enforcement officer, either by the way they speak to the officer or by refusing to do what the officer

¹⁴ *Id.*

¹⁵ *Id.* at 136.

¹⁶ *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940)) (invalidating the vagrancy ordinance). *See also* *Coates v. Cincinnati*, 402 U.S. 611, 615-16 (1971) (prohibiting “annoying” conduct is an “obvious invitation to discriminatory enforcement”).

¹⁷ *Younger v. Harris*, 401 U.S. 37, 65 (1971) (Douglas, J., dissenting).

tells them to, or simply because the person is behaving legally but in a way the officer does not like. As the term will be used in this paper, contempt of cop arrests are by definition abusive: they are arrests made with no valid legal reason. When looking at contempt of cop arrests, we may sometimes agree with the officer that the behavior was deplorable, repugnant, and/or immoral, but find that this does not make the behavior an arrestable offense. Other times, we may find that the behavior was justified and even admirable—perhaps where someone speaks out in an attempt to prevent an officer from using too much force against someone else.

Closely related to contempt of cop arrests are arrests that this paper will refer to as “cover” arrests. A cover arrest, as the phrase will be used here, is an arrest meant to help justify or explain an officer’s use of force or other exercise of authority where there may have been no legitimate justification for that exercise of authority. A recent case, discussed below, involving the arrest of a University of Maryland student for assault on an officer and disorderly conduct, appears to be an example of this. In that case, video obtained after the arrest seems to show that there was no disorderly conduct or assault on the officer but that the student was beaten without cause and that the arrest report falsely asserts that the student’s injuries resulted from the student’s assault on officers and their horses. There are a handful of statutes or ordinances that are known for their use as the predicate for contempt of cop or cover arrests. These laws generally prohibit acts such as: disorderly conduct; refusing to obey an officer; obstructing or delaying an officer; resisting arrest; and battery/assault on an officer. Of course, although many arrests made under these statutes may be abusive, there are good reasons for these statutes, provided they are not facially overbroad. This paper is concerned only with the abusive contempt of cop and cover arrests made under these statutes.

II. PREVALENCE OF ABUSIVE ENFORCEMENT OF DISORDERLY CONDUCT-TYPE LAWS

Despite the legal prohibition against arresting persons for criticizing police conduct or behaving rudely towards a police officer, such arrests persist. Lawsuits, investigative reports, anecdotal evidence, and a growing collection of YouTube videos, make clear that there is an overuse of police authority to arrest people for disorderly conduct-type offences, including arrests as retaliation against those who have “disrespected” the police or complained about their actions. Moreover, when disorderly conduct-type statutes are used as the basis for arrest, there is considerable evidence that they are used disproportionately against persons of color, and no benign explanation for this disparate enforcement has been borne out. Abusive enforcement of these laws may be more prevalent in some law enforcement agencies than others, but the extent of the problem or the variance of its occurrence rate among agencies is currently unknown because many abusive arrests go undetected, and because no broad systemic study or comparison of contempt of cop or cover arrests has been conducted. Despite the uncertainty, there is more than enough data to indicate that the problem is significant: the reviews and analyses that have been done show misuse and overuse of disorderly conduct-type laws in jurisdictions large and small across the United States.

In Seattle, Washington, a 2008 investigation by the *Post-Intelligencer* found that prosecutors had dropped nearly half of all cases in which the sole charge was “ob-

structing a public officer.”¹⁸ The news investigation found also that half of all such arrests were of African Americans, even though Seattle is predominately white. This disparate arrest rate had resulted in nearly 2% of Seattle’s black male population being arrested for the sole charge of obstruction, and meant that African-Americans were eight times more likely than whites to be arrested for the sole crime of obstructing.¹⁹ Seattle’s civilian police auditor had warned previously that some officers were “abusing their discretion” when making obstruction arrests. The auditor reported that these scenarios often began with “verbal criticism of the officers, frequently followed by an order to back off or leave the area,” then escalated to an obstruction arrests.²⁰

In 2009, after the *Post-Intelligencer* series, the auditor conducted another review of obstruction arrests. The follow-up report generally found improvement but it also reported patterns in arrests for obstruction that appear problematic and are consistent with problems seen in other jurisdictions. The auditor found that some arrests occurred where “officers were dispatched to a fight or disturbance on a bus, outside a bar or at a mission. These cases often involved a group event and uncertainty about who was a suspect.”²¹ In other words, this seems to say, officers arrested individuals even though they were uncertain whether the person had actually committed a crime. In other instances, officers arrested someone for “obstruction” when the person ran or walked away quickly after being ordered by the officer to stop, even though the officer had no apparent reasonable suspicion that would justify a detention.²²

A newspaper investigation in 2008 found that the San Jose, California, Police Department makes “public intoxication” and “disturbing the peace” arrests at significantly higher rates than any other major California city, and arrests more people for “resisting arrest” when no more serious crime is involved than all but one much larger city in California.²³ The newspaper also reports that 70% of the 206 cases in which resisting arrest or delaying or obstructing an officer was the most serious charge, officers used force.²⁴ This raises the question of whether this charge is being used as a “cover charge” to help officers justify their decisions to use force. Subsequent to these

¹⁸ Stand alone arrests for violations such as “obstruction” and “resisting” are generally of greater concern for the reason Justice Powell stated in his *Lewis* concurrence: “The present type of ordinance tends to be invoked only where there is no other valid basis for arresting an objectionable or suspicious person.” *Lewis*, 415 U.S. at 136. Where obstruction, resisting, or the like is the sole basis of the arrest the question becomes: What was the legal justification for the officer taking the action that led to the alleged obstruction or resisting?

¹⁹ Eric Nalder et al., *Blacks are arrested on ‘contempt of cop’ charge at higher rate*, Seattle Post-Intelligencer, Feb. 28, 2008. This review of six years of data treated an obstructing arrest as “stand-alone,” “if that was the only charge or if all other charges were for closely related offenses, such as resisting arrest.” *Id.*

²⁰ *Id.*

²¹ Office of Professional Accountability, Auditor’s Report on Obstruction Arrests January 2006-July 2008 8 (2008), http://www.seattle.gov/police/OPA/docs/Auditor_Obstruction.pdf.

²² *Id.* at 12-13. The auditor also found that “[r]acial disparity in arrests remains an issue of concern,” but did not conduct any analysis regarding racial disparities in obstruction arrests or make any recommendations because of a broader Seattle project that was reviewing the relationship between Seattle’s police department and communities of color. *Id.* at 3.

²³ Sean Webby, *Policing in San Jose: strict enforcement of ‘conduct crimes’; are Latinos targeted?*, The Mercury News, Apr. 4, 2009 [hereinafter *Policing in San Jose*]; Sean Webby, *Drunkenness arrests in San Jose outpace other California cities*, The Mercury News, Oct. 18, 2008 [hereinafter *Drunkenness arrests in San Jose*] (noting that San Jose’s public intoxication law “requires no sobriety test and leaves officers with wide discretion about when to make an arrest”).

²⁴ Sean Webby, *San Jose police often use force in resisting-arrest cases*, The Mercury News, Oct. 31, 2009.

news reports, community groups in San Jose obtained arrest records for a small portion of public intoxication arrests and assert that in one half of the cases, the arrest reports did not document sufficient probable cause for arrest.²⁵ A federal lawsuit was filed against the police department by three individuals who say they were wrongly arrested for public intoxication. One of the plaintiffs in that suit, a news anchorman, asserts that he was arrested for attempting to record what he believed to be misconduct. Another said he was arrested after he flipped off an officer who threatened him for not walking away quickly enough. Charges against both men were dropped after they took the unusual step of fighting their arrest charges.²⁶

The newspaper investigation also found a troubling ethnic disparity in San Jose arrests. Seventy percent of arrests for disturbing the peace, 57% of arrests for resisting, and 57% of arrests for public intoxication were of Latinos, even though this group comprises only approximately 30% of San Jose residents.²⁷ The Mayor of San Jose asserted that the ethnic disparity in public intoxication arrests was a “socioeconomic” problem that was reflected in other crime statistics.²⁸ This assertion does not sit well with the fact that, in California overall, Latinos make up about 36% of the population and constitute about 37% of those charged for public intoxication, and that in Sacramento and San Diego, two other large California cities with similar Latino populations, Latinos are arrested for public intoxication at rates slightly less than their representation in the municipal population.²⁹ Since these concerns have been made public, arrest rates have dropped in San Jose. Community groups report that they remain concerned that this decrease is only temporary and does not address the underlying causes of the disparity.³⁰ In November 2009, a group of over a dozen community organizations in San Jose requested that the U.S. Department of Justice investigate the Police Department because of these arrest trends.³¹

In 2006, the NAACP and the ACLU jointly filed a class-action lawsuit against the City of Baltimore and the Baltimore Police Department, alleging a widespread practice of illegal arrests for non-criminal conduct. The plaintiffs included a young man “loitering” by tying his shoe in front of a friend’s house; an architect arrested with his friend after showing concern for what appeared to them to be an incident of police brutality; a neurobiologist who was arrested after stopping on a street to watch a woman being handcuffed; two individuals arrested while allegedly legally distributing religious pamphlets; and an individual walking with friends to a basketball game.³² The parties are negotiating an agreement that is expected to require the police department to make systemic changes in how it documents and tracks disorderly conduct-type arrests. The allegations in the lawsuit are consistent with the findings of a 2009 local media review of police department charging documents. This review found that over a several month period in 2009, prosecutors declined to prosecute 21% of arrests

²⁵ Letter from Skyler Porras, ACLU of N. Cal., San Jose Office, et al., to Thomas Perez, Assistant Att’y Gen., Civil Rights Div. (Nov. 4, 2009) [hereinafter ACLU letter].

²⁶ *Drunkenness arrests in San Jose*, *supra* note 23.

²⁷ *Policing in San Jose*, *supra* note 23.

²⁸ *Drunkenness arrests in San Jose*, *supra* note 23.

²⁹ *Id.*

³⁰ ACLU Letter, *supra* note 25.

³¹ *Id.*

³² Press Release, ACLU, New Plaintiffs Join ACLU Illegal Arrests Lawsuit, Call on City Police to Finally End Unconstitutional Practices (Dec. 18, 2007), available at <http://www.aclu.org/free-speech/new-plaintiffs-join-aclu-illegal-arrests-lawsuit-call-city-police-finally-end-unconstitu>.

made—over 6,000—which was a 10% increase over the previous year. In the “dozens” of cases for which records were obtained and reviewed by the news agency, more than 98% of the people arrested but not charged were black.³³

In 2003, the District of Columbia’s Citizen Complaint Review Board,³⁴ which provides independent oversight of the Metropolitan Police Department (MPD), reviewed disorderly conduct arrests by MPD officers. The review was prompted by a discovery by the Board’s Office of Citizen Complaint Review that a high percentage of complaints against the police department involved disorderly conduct arrests, and that in all four of the disorderly conduct complaints that the Board had adjudicated, it had found that the facts did not justify the arrest. According to the report, “[t]he officer either did not understand or ignored the law regarding disorderly conduct in each of these situations, and appeared to be retaliating against the citizen for his behavior during the encounter with the officer.”³⁵ The Board reviewed arrest statistics for the year 2000 and found that MPD had made 10,600 disorderly conduct arrests during that year, accounting for more than one in five arrests that year and by far the largest category of arrests.³⁶ The report documented a series of disorderly conduct arrests that appeared abusive as well as MPD procedures that afforded little review of disorderly conduct arrests. Each of the above reviews was completed in whole or substantial part prior to the Gates incident, demonstrating that the focus on the issue of conduct-related arrests is not simply a reaction to that incident. This is a policing issue about which communities have long been concerned.

Some apparent contempt of cop or cover arrests have been captured on video. These recordings provide an instructive glimpse of the type of behavior associated with such arrests and, by comparison to an officer’s written documentation of the incident, of how facts are sometimes twisted, or even fabricated, to support the arrest and accompanying force.

In March 2010, for example, two college students at the University of Maryland were arrested by Prince George’s County Police for disorderly conduct and assault on an officer following a college basketball game.³⁷ Both students were charged with disorderly conduct and second-degree assault on an officer. The charge of assaulting an officer, a common contempt of cop charge, carries with it the possibility of ten years imprisonment. Charging documents sworn out by a county officer alleged that the two students were “running and screaming” in the street, causing an unruly crowd to form; that the students struck mounted officers and their horses, causing minor injuries; and that the students suffered minor injuries when kicked by the horses.³⁸

³³ Stephen Janis, *Improbable cause: Increase in “no charge arrests raises questions*, Investigative Voice, Oct. 6, 2009, http://www.investigativevoice.com/index.php?option=com_content&view=article&id=1313:improbable-cause-increase-in-qno-chargeq-arrests-raises-questions&catid=25:the-project&Itemid=44.

³⁴ In January 2005, the Citizen Complaint Review Board and the Office of Citizen Complaint Review were renamed the Police Complaints Board and the Office of Police Complaints, respectively.

³⁵ Office of Citizen Complaint Review, *Disorderly Conduct Arrests Made by Metropolitan Police Department Officers, Report and Recommendations 3* (2003), available at http://newsroom.dc.gov/file.aspx/release/7250/disorderly_conduct_policy_recommendation.pdf.

³⁶ *Id.*

³⁷ Darren Botelho, *At least two students plan to fight riot charges*, The Diamondback, Mar. 26, 2010, <http://www.diamondbackonline.com/news/at-least-two-students-plan-to-fight-riot-charges-1.1282395>.

³⁸ Ruben Castaneda, *Beating of University of Maryland student by police probed by county prosecutors*, Wash. Post, Apr. 13, 2010, at A1.

Over a month after the arrest, a video of the incident became public.³⁹ The video appears to contradict the sworn statement in the charging document. It shows one of the students skipping or dancing down the sidewalk and stopping when he reached mounted police. Standing several feet from the horse and appearing to back away as he reaches out towards the horse with empty hands, the student was rushed by three officers who slammed him against a wall. Two of the officers hit him with their batons. After he was on the ground, apparently not moving, the officers continued to strike him with batons at least a dozen times. The student suffered a concussion and other injuries, including a head wound that needed eight staples to close.⁴⁰ The video does not show the other student despite the charging documents' claim that the two students were acting together. The charging documents do not mention the use of force and it appears that officers did not document their use of force in accordance with department policy.

Charges against both students were dropped after the students hired a lawyer and a private investigator found the video recording. The police chief has said that he is "outraged and disappointed" after viewing the video. At the time of this writing, the incident is being investigated both administratively by the department and criminally by county prosecutors and the FBI.⁴¹ The gulf between the officers' statements made in the charging documents filed against these students and the events as depicted on the video raises the question of how many arrests for disorderly conduct, assault on an officer, or similar charges here or elsewhere, might be proven meritless if defendants in other instances had the means to hire a lawyer and a private investigator, and the good fortune of locating a stranger who had videotaped the events.

Another incident captured on video shows an apparent contempt of cop and cover arrest with such clarity that one might mistake it for a police training video.⁴² The video shows a San Francisco Police Department officer about to issue citations to several skateboarders for illegally skateboarding. In response to the officer's question, one skateboarder says he is holding his head in his hands because he is angry. The officer asks why he is angry and the skateboarder responds that it is because the officer is being a "fucking dick." The officer responds by immediately crossing the street and arresting him, saying, "now I'm going to act like a fucking dick. You're under arrest for skateboarding in the City and County of San Francisco." Without first asking the skateboarder to submit to handcuffs, the officer twists the skateboarder's arm behind his back, causing the skateboarder to complain about the pain. Despite the apparent lack of even minor resistance by the skateboarder, the officer then states, "Resist again and I am going to break your arm like a twig and then you can treat me like the asshole you think I am. When I am here to cut you a break you need to keep your mouth shut and you need to listen."

The officer then addresses the skateboarder's friends: "Say goodbye to your friend. He wants to be a jackass so he can go to jail." The officer notes that he'll be taking the skateboard for safekeeping but that the skateboarder will "probably" get it back in

³⁹ Video: Officers strike student after U-Md. basketball game (*The Washington Post* posting Apr. 12, 2010), <http://www.washingtonpost.com/wp-dyn/content/video/2010/04/12/VI2010041202595.html?sid=ST2010041204523>.

⁴⁰ Ruben Castaneda, *FBI probes Pr. George's County police in U-Md. beating*, Wash. Post, Apr. 14, 2010.

⁴¹ *Id.*

⁴² Justin Berton, *S.F. skateboarder vs. SFPD officer*, SFGate, Sept. 30, 2009, http://www.sfgate.com/cgi-bin/blogs/crime/detail?blogid=144&entry_id=48696.

three weeks. After a gap, the video resumes with the officer stating that “now it has to be documented” so all the skateboarders will be cited. When the skateboarders ask why they are being cited, the officer responds, “Thank her!” pointing to an off-screen female voice. The woman says, “I have nothing to do with this. I watched you not perform your job correctly.” The officer repeats, “Thank her!” The woman and another off-screen passerby are heard complaining that the officer kicked the handcuffed skateboarder into the back of the officer’s squad car. The officer responds that he was not kicking the skateboarder and that the skateboarder was refusing to get into the vehicle and that he is going to “book him for [resisting arrest] as well, do you want that?”

The officer cogently explains a widely-held police perspective: the frustration at being seen as the “bad guy” after responding to a citizen complaint about illegal activity and responding to resolve the matter. The passerby responds, “When you kick people, you’re bad guys!” The officer disputes that he kicked the skateboarder, stating that “I put my foot on his hip ‘cause he refused to get in.” “Yeah!” responds the passerby, “that’s what I used to tell my mom too when I kicked my little brother.” This video is somewhat unique in that it captures both a contempt of cop arrest and the issuance of cover citations, and because the officer provides an unusually direct preview of his motivations and how he can be expected to modify the facts to justify the arrest, uses of force, and citations. The officer’s “business as usual” attitude indicates that escalating an incident in response to feeling “disrespected” might not be unusual for this officer or for others officers with whom he has trained and worked.

Nor does it appear unusual for skateboarders to record their interactions with the police. In a video taken in Baltimore’s Inner Harbor, a Baltimore police officer is shown becoming enraged at a 14-year-old skateboarder who calls the officer “dude” and is otherwise arguably disrespectful. The officer puts the boy in a headlock, pushing him to the ground and threatening to “smack” him “upside the head” for the boy’s “attitude.” The officer shouts at the boy: “When I’m talking to you, you shut your mouth and you listen. Obviously your parents don’t put a foot in your butt quite enough, because you don’t understand the meaning of respect.”⁴³ In response to this incident, the police department put a different lieutenant and sergeant in command of the unit patrolling the Inner Harbor and provided “sensitivity training” to the officers in this unit.⁴⁴ The police department also sustained administrative charges against the officer for using excessive force and “discourtesy.”⁴⁵ This disciplinary action failed to impress the skateboarder’s mother who observed, “If I were to go to my job and I were to get upset with someone who called me dude three times and tackled [them], I’d be terminated immediately.”⁴⁶

These videos and others like them provide vivid demonstration that, in contrast to the Supreme Court’s expectation expressed in *Houston v. Hill* that officers would be more likely to show restraint in the face of perceived disrespect, some officers appear to show too little restraint in such circumstances. Some officers respond to perceived disrespect or challenges to their actions with unwarranted intimidation and force, abusing the authority conferred by their badge and acting as if impunity is a compo-

⁴³ Video: Baltimore Police Officer Salvatore Rivieri and skateboarder (YouTube posting Feb. 13, 2008), <http://www.youtube.com/watch?v=OPEeCYPGjm0>.

⁴⁴ Annie Linskey, *Police shift Inner Harbor patrol command*, Balt. Sun, Apr. 23, 2008.

⁴⁵ Peter Hermann, *Skateboard Clip’s Lesson Fuzzy*, Balt. Sun, Sept. 27, 2009.

⁴⁶ *Officer Suspended After Skateboarder Rant*, Good Morning America, Feb. 13, 2008, <http://abc-news.go.com/GMA/story?id=4282823&page=1>.

ment of that authority. While law enforcement officers deserve to be treated with respect, some officers appear not to understand that a lack of respect does not warrant a use of force or an arrest and serves only to decrease respect for the profession.

III. HARM CAUSED BY “CONTEMPT OF COP” AND “COVER” ARRESTS

The discussion above demonstrates that, despite the legal prohibition, the problem of contempt of cop and cover arrests persists. The prevalence of the problem, and the apparent acceptance by many of contempt of cop arrests, as the Gates incident clearly showed, raises the question of whether the harm caused by such arrests is appreciated. For some, the harm caused by these abusive arrests is obvious: lives turned upside down by an arrest or being subjected to unwarranted force and intimidation by a police officer; police exercising a level of control that is at odds with a democratic society. For others, arresting for contempt of cop is appropriate and even necessary if police officers are to retain the level of respect and authority needed to keep order in an increasingly disorderly and disrespectful world. It is worth briefly discussing some of these ideas to explain the extent of the harm caused by contempt of cop and cover arrests and why such arrests are not only unnecessary but also run counter to effective law enforcement.

A. THE HARM TO THOSE ARRESTED

There is sometimes a misimpression that, for the individual arrested, an arrest for disorderly conduct, resisting arrest, or similar infraction will mean nothing more than a night in jail and maybe one more line on the criminal record of someone who already has a lengthy criminal record. While this may be true in some instances, it often is not, and in any event does not negate the harm done by an illegal arrest. Abusive contempt of cop and cover arrests is a policing issue that can have a long-term negative impact on large swaths of some communities, including a significant number of people who are not criminals or dangerous to the community.⁴⁷

As noted in one federal suit on behalf of a man who was falsely arrested by police, the “unseen injury” of a false arrest, even where little jail time results, is that a “promising young man must from now on answer ‘yes’ whenever a potential employer inquires whether he has ever been arrested.”⁴⁸ Moreover, even one night in jail is a significant harm, and for many persons arrested on abusive contempt of cop and cover charges, there is the potential for a more extensive sentence. Particularly where there is no video to exonerate the individual or the individual has neither the resources nor reputation to put on an effective defense, the wrongly arrested individual may plead to or be convicted by a jury on the false charges that lead to considerable time in jail or prison. In addition to the immediate harm of incarceration itself, an arrest record or conviction can have significant deleterious effects on one’s future ability to get or

⁴⁷ This author is aware of no analysis or data collection that would establish, on any systematic, broad-based level, the rate of various outcomes for persons arrested for contempt of cop violations, or the criminal backgrounds, if any, of those individuals. Data related to the rate of non-prosecution for arrests under laws known to be used for contempt of cop arrests, as well as anecdotal evidence, does provide evidence that these types of arrests cause more than de minimis harm. This is one of many areas of policing in which additional study would assist public-policy decision making.

⁴⁸ Eric Nalder, *Seattle to pay for unlawful arrest, excessive force*, Seattle Post-Intelligencer, May 20, 2008; see also Eric Nalder, *Dubious bust leaves “unseen injury” for life: Even when charges are dropped, arrest record is still there*, Seattle Post-Intelligencer, Feb. 27, 2008.

keep a job,⁴⁹ go to school,⁵⁰ get credit, or rent an apartment, not to mention the impact on one's reputation. The indications that improper contempt of cop arrests disproportionately impact communities of color means that these communities, portions of which already have higher rates of unemployment, homelessness, and incarceration, may have these ills disproportionately exacerbated by this type of misconduct.

B. UNDERMINING A CRITICAL CHECK ON THE EXERCISE OF POLICE POWER

The ability to oppose or challenge police action is not only, as Justice Brennan stated,⁵¹ a principal characteristic distinguishing a free nation from a police state; it is one of the central benefits of living in a free nation. In a city, county, state, or country where people are unable or afraid to challenge a governmental exercise of its authority to use force, put someone behind bars, or impact a person's ability to make a living, find a home, or become educated, an important check on government behavior is lost. Without this check, a tendency for government actors to abuse their authority may develop and a greater number of people will be wrongfully arrested. There is little doubt that contempt of cop and cover arrests can serve to chill civilian attempts to complain about or challenge police behavior, and evidence that they are often intended to do just that. Examples of abusive arrests and uses of force specifically against those who question or attempt to document police behavior abound. Many of the arrests discussed above are such examples. And there are many more. In a review by a New Mexico newspaper of arrests by Albuquerque police officers for "refusing to obey," the Albuquerque Journal found that arrests for this violation included a man who would not let officers, who did not have a warrant, into his home, along with a TV cameraman who was covering a police standoff.⁵² In Severn, Maryland, a man was threatened with arrest until he deleted every photograph he had taken of an accident scene and then left the scene as ordered by police.⁵³ In Pittsburgh, a man was charged with violating the Pennsylvania Wiretap Act and "possession of an instrument of crime" (his cell phone) after he used his cell phone to record the arrest of a friend.⁵⁴

Complaints from family members that they are arrested when they complain about an abusive arrest or the force used against a relative are common. In Baltimore, Maryland, a seven-year-old boy was arrested for sitting on a dirt bike, allegedly as retaliation for a police misconduct complaint filed by his mother.⁵⁵ In Seattle, the ci-

⁴⁹ *Policing in San Jose*, *supra* note 23 (reporting that a woman lost her job as a result of her conviction for obstructing and resisting during a protest).

⁵⁰ Sean Webby, *San Jose: DA won't charge cops in videotaped beating*, The Mercury News, Mar. 3, 2010 (reporting student's relief when resisting arrest and brandishing a deadly weapon charges dropped, allowing him to continue studying in U.S.).

⁵¹ *Hill*, 482 U.S. at 463.

⁵² T.J. Wilham, *N.M. cops can't arrest for "refusing to obey,"* Albuquerque Journal, Nov. 25, 2008.

⁵³ Marc Shapiro, *Severn man says police forced him to delete photos*, Maryland Gazette, Nov. 4, 2009.

⁵⁴ Press Release, ACLU, ACLU Files Suit on Behalf of Pittsburgh Man Arrested for Taping Police (Aug. 13, 2009), available at <http://www.aclupa.org/pressroom/aclufilessuitonbehalfofpit.htm>. In March 2010, the judge granted in part the defendant's Motion to Dismiss. See *Matheny v. County of Allegheny*, No. 2:09-cv-01070-CB, 2010 WL 1007859 (W.D. Pa. Mar. 16, 2010).

⁵⁵ A police detective testified that his supervisor told him that if the boy's mother carried through on her threat to complain about the detective's earlier decision to confiscate the dirt bike, the supervisor would order the detective to lock up the boy. Justin Fenton, *Officers who arrested 7-year-old say they followed procedures: Defendants in family's lawsuit deny retaliating against mother*, Balt. Sun, Jan. 14, 2010.

vilian police auditor found that nearly a third of the obstruction arrests reviewed involved the “interference” by an individual with the arrest or investigation of someone else, what the report calls the “bystander problem.” The report notes that, “[t]he bystander arrested for obstruction is often a friend or relative who wants to take control of a suspect or prevent his being taken into custody.” In some cases, the individual simply “refuses to leave the area.”⁵⁶ As these and other arrests show, while contempt of cop and cover arrests may sometimes simply be an officer’s response to perceived disrespect, they are sometimes meant to discourage observing, documenting, or challenging officer conduct.

C. DAMAGE TO THE POLICE-COMMUNITY RELATIONSHIPS NECESSARY FOR EFFECTIVE CRIME FIGHTING

Police departments need community support to effectively deter crime. Community members who trust the police are more likely to report corner drug dealing, the sighting of a dangerous suspect, and even knowledge about a crime being planned. When a community sees police officers abuse their authority—and experiences or observes the direct harm of that abuse—that trust is undermined and the relationship between police and the communities they work for suffers. As one neighbor said during a meeting with police leadership that followed the apparently abusive arrest of a community leader, “When you arrest a person standing on his stoop for no reason, it’s hard to rebuild that relationship.” Community members distributed t-shirts at this meeting that said, “21223, I live here, respect me.”⁵⁷ These sentiments are not uncommon among law abiding citizens—especially those living in areas beset with crime.

Perhaps unfairly but understandably, even law enforcement officers who have never made a contempt of cop or cover arrest are painted with the same brush by community members who were subjected to, witnessed, or even merely heard of abusive police actions, simply because the officer wears the same badge and uniform as those officers who have abused their authority. The level of mistrust, stereotyping, and anger—on both sides—increases, making it more difficult for police officers to safely and effectively protect communities. If, as it appears, contempt of cop and cover arrests occur more frequently in communities of color, this poisoning in the police-community relationship is occurring in the communities that are often most in need of effective policing. Contempt of cop and cover arrests thus have a far-reaching impact, throughout these communities and beyond.

D. THE DRAIN ON RESOURCES

Contempt of cop and cover arrests are costly. They needlessly consume resources that could be used by the police department in more productive and constructive ways, or by the state or local governmental jurisdiction that often ends up paying the price of an officer’s misconduct when a lawsuit is filed. Resources are diverted from other law enforcement functions to process the arrests of hundreds, sometimes thousands, of individuals, only to have the charges dropped. In some jurisdictions, the sheer number of disorderly conduct and similar arrests that are not prosecuted sug-

⁵⁶ Office of Professional Accountability, *supra* note 21, at 12.

⁵⁷ Stephen Janis, *We Can’t Take This Anymore: In meeting with top police brass, community demands change*, Investigative Voice, Dec. 17, 2009, http://www.investigativevoice.com/index.php?option=com_content&view=article&id=1926:we-cant-take-this-anymoreq-community-seeks-change-in-meeting-with-top-police-brass&catid=25:the-project&Itemid=44.

gests that if abusive arrests were reduced, cost savings and more efficient policing would result. In Washington, D.C., for example, the Metropolitan Police Department made 10,600 disorderly conduct arrests in one year, accounting for more than one in five arrests.⁵⁸ As discussed above, a review by the city's Citizen Complaint Review Board indicated what appeared to be a pattern of abuse in some of these arrests. In Baltimore, Maryland, in 2008, there were 9,983 arrests that did not lead to charges after prosecutors declined to prosecute the cases.⁵⁹ Many of these arrests were for violations such as loitering, trespassing, and drinking a beer—arrests that a federal lawsuit alleges show a pattern of abuse.⁶⁰

Abusive arrests sometimes result in civil suits or even criminal prosecutions that can absorb an extraordinary amount of time and money to defend and settle. In March 2010, the Prince George's County police settled for \$125,000 a lawsuit by a man who was falsely charged with two counts of assault, including a punch with a closed fist into the stomach of one officer. The officers' in-car camera showed that the man never hit the police and was in fact hit several times in the head by an officer with the officer's baton.⁶¹ In Seattle, a federal civil jury found police liable for \$268,000 in damages, as well as attorneys' fees, for falsely arresting and using force against a man charged with obstruction and resisting arrest, despite no serious injuries to the man.⁶² In 2009, Pittsburgh paid \$50,000 to settle a claim by a man who was issued a citation for giving the finger to a police officer.⁶³ These are just a few of the examples among dozens that can be gleaned from recent media reports.

IV. REDUCING OR ELIMINATING CONTEMPT OF COP AND COVER ARRESTS

If we agree that contempt of cop and cover arrests are a destructive and costly harm, the question then is whether we can do anything to reduce or eliminate such arrests. The answer is yes, but fixing this problem is not simple: it requires a concerted and multi-faceted effort. Fortunately, this effort is consistent with overarching law enforcement objectives and community concerns.

A. MODIFY LAW AND POLICY WHERE NECESSARY

Generally, abusive contempt of cop and cover arrests occur despite police policies and local and state laws and ordinances that appropriately disallow such arrests. In some instances though, local law may need to be brought up to date or modified to ensure it facilitates adherence to the Constitution; or police policy may need to be modified so that it comports with law. In Washington, D.C., there is currently a city-wide task force on disorderly conduct that is considering how to revise the city's nearly century-old laws related to breach of peace. This task force includes representatives

⁵⁸ Office of Citizen Complaint Review, *supra* note 35.

⁵⁹ Janis, *supra* note 33.

⁶⁰ Press Release, *supra* note 32. Through July 2009, the rate was even higher, with 6,313 people arrested and released without charge. Janis, *supra* note 33.

⁶¹ Ruben Castaneda, *Prince George's to pay man who accused police of assault*, Wash. Post, Mar. 12, 2010.

⁶² Nalder, *supra* note 48.

⁶³ Torsten Ove, *City to pay \$50,000 for citation issued over obscene gesture*, Pittsburgh Post-Gazette, Nov. 25, 2009. See *Bird Flipping IS Constitutionally Protected Speech*, N. Country Gazette, Mar. 6, 2010 (discussing other cases in which police agencies have paid substantial sums in payouts or defending arrests for conduct that was later deemed protected speech).

from the Metropolitan Police Department (MPD) and the Office of the Attorney General, as well as from the Office of Police Complaints and other agencies, working together to ensure that local laws do not encourage contempt of cop arrests.⁶⁴ MPD has already issued a directive incorporating changes recommended by CCRB into its internal procedure for disorderly conduct arrests.⁶⁵ In other instances, where officers have misinterpreted surveillance or privacy laws, state or local legislatures may need to clarify statutes to ensure they are not used as the basis for arresting people for legitimately exercising their First Amendment rights, or for audio or video recording public police conduct.⁶⁶

At times, internal police policy may need similar clarification. In Albuquerque, after a news investigation found that of 517 arrests for “refusing to obey” made by the Albuquerque Police Department in 2007, 70% were thrown out, the chief issued a revised policy that prohibits officers from arresting someone for “refusing to obey” unless the individual is being arrested for another crime or is physically keeping the officer from carrying out his or her duties.⁶⁷ In Seattle, the police department’s legal advisor issued a bulletin, “Tips for Avoiding Civil Liability.” Among the tips: “Don’t arrest for ‘contempt of cop.’ Officers must be thick skinned and not unduly influenced by the attitudes of persons they contact. Flunking the ‘attitude test’ is not a bookable offense.” Additionally, the tips suggest: “Avoid charging for ‘obstructing’ and ‘resisting arrest.’ Experience has shown that a substantial number of these two charges in combination result in the dismissal of criminal charges and subsequent filing of civil complaints.” The tips further recommend: “Don’t be intimidated by complaint [sic] of others, including off-duty employers, into making an arrest. Arrest officers must make the arrest decision and are responsible for the arrest decision they make.”⁶⁸

B. CHANGE POLICE CULTURE

If abusive arrests are occurring routinely in a law enforcement agency, or if contempt of cop or cover arrests are not viewed as abusive by the rank and file, stopping such arrests will require more than a reiteration of policy. It will require a change in the agency’s culture. Changing police culture is sometimes viewed as an amorphous and elusive goal. While changing police culture can be quite difficult in some agencies, there are a number of concrete measures that can change culture and help an agency reduce contempt of cop and cover arrests.

1. Leadership

The most important factor in creating a culture that does not tolerate contempt of cop or cover arrests is leadership. The leader of the agency, usually the chief, commissioner, or sheriff, creates and enforces the expectation that abusive arrests will not

⁶⁴ Telephone Interview with Ivelisse Cruz, Deputy Director, Office of Police Complaints (Jan. 5, 2010); Office of Citizen Complaint Review, *supra* note 35 (discussing age and need for reform of the City’s disturbances of the public peace related codes and statutes).

⁶⁵ Office of Police Complaints 2006 Ann. Rep. 39. The CCRB report recommended that MPD revise its arrest procedure to ensure that individuals arrested for disorderly conduct better understand the potential consequences of arrest and that this understanding is better documented. Office of Citizen Complaint Review, *supra* note 35, at 20.

⁶⁶ See, e.g., Alexandra Andrews, *In Mass., Recording an Arrest May Get You Arrested*, Pro Publica, Jan. 12, 2010, <http://www.propublica.org/article/in-mass.-recording-an-arrest-may-get-you-arrested-112>.

⁶⁷ Wilham, *supra* note 52. The new policy also prohibits arrests for verbal challenges unless they constitute threatening “fighting words.” *Id.*

⁶⁸ Leo Port, *Tips for Avoiding Civil Liability Lawsuits*, Seattle Post-Intelligencer, Feb. 27, 2008.

occur. Leadership sends this message in a variety of ways, and a memo on the chief's letterhead is never sufficient. Perhaps the most important facet of this leadership is whether leadership models the right behavior. Whether the chief follows the rule of law (and agency policy) in running the department will be watched closely. Who the chief hires and promotes are other critical signals of the type of behavior that is sought after and rewarded. A formal policy sternly warning against improper obstruction or disorderly conduct arrests will have little impact if officers see those who routinely violate the policy being promoted and given choice assignments.

2. Training

We know that one of the keys to ensuring that officers properly exercise their authority is educating them about why this is important, and helping them develop the necessary skill sets to do their jobs lawfully and effectively. In the aftermath of the Gates incident, there were widely divergent responses from law enforcement officers regarding both the Gates arrest specifically and disorderly conduct arrests more generally.⁶⁹ Some officers clearly understood when to show restraint when faced with disrespect and taunts: according to one retired New York City police officer "What's the reason for staying, if the anger's directed at me? If it's directed at a third party, a storekeeper, I stay." The officer went on to tell the reporter that if the officer himself is the provocation, the officer should leave.⁷⁰ Another officer, who said he was trained not to lose his temper or risk his job by reacting to name calling, was able to quote for the reporter exactly when the line is crossed and an arrest is warranted.⁷¹ A mounted police officer with the Los Angeles Police Department said that taking verbal abuse is part of the job and that "if you don't have a tough skin, then you shouldn't be a cop."⁷²

Interestingly, most of the officers who advocated a more aggressive approach to verbally abusive individuals, including a quicker resort to arrest, often expressed their concern in terms of safety, sometimes coupled with a healthy ego. Michael J. Palladine, president of the Detectives Endowment Association in New York told the New York Times: "We pay these officers to risk their lives every day. We're taught that officers should have a thicker skin and be a little immune to some comments. But not to the point where you are abused in public. You don't get paid to be publicly abused. There are laws that protect against that."⁷³ Another New York officer said that if a crowd is gathering an officer cannot "back down" or it might come back to haunt another officer later.⁷⁴ A police officer from Denver was quoted as saying, "We're not going to take abuse. We have to remain in control. We're running the show."⁷⁵

These sentiments, which are consistent with others expressed after the Gates incident, suggest that ending a culture of contempt of cop arrests requires that training for officers take a two-pronged approach. First, training should include a component

⁶⁹ See, e.g., Michael Wilson & Solomon Moore, *As Officers Face Heated Words, Their Tactics Vary*, N.Y. Times, Jul. 25, 2009; Bonnie Rochman, *The Gates Case: When Disorderly Conduct Is a Cop's Judgment Call*, Time, Jul. 25, 2009.

⁷⁰ See Wilson, *supra* note 69; see also In re: W.H.L., 743 A.2d 1226, 1226 (D.C. 2000) (distinguishing between conduct directed at the police and conduct directed towards the police); Office of Citizen Complaint Review, *supra* note 35, at 5.

⁷¹ See, e.g., Wilson, *supra* note 69.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

that educates officers that, despite what they may have been told or come to believe, such arrests are neither legal nor conducive to effective crime control, officer safety, or respect for the profession. Officers need to be taught that, contrary to the belief of some, the law says that your job *does* require that you take verbal abuse sometimes and that, for the most part, people can legally document what you do when interacting with the public. Secondly, and perhaps even more importantly, training must also ensure that officers are taught the specific tactics and skills for properly responding to obstreperous individuals. Officers need to be taught how to protect their own safety and the safety of their fellow officers, as well as how to convey the authority they need to effectively do their jobs, in the face of a rude or irate individual. Officers need to be taught what they should do to de-escalate a situation in which the officer has initially overreacted out of anger or fear, and how to prevent it from recurring. Some officers have never learned how to effectively and legally control these situations, but others have and are very good at it. A department should identify *these* officers and incorporate them into their training program.

3. Supervision, Data Collection, Tracking, and Response

Law enforcement agencies have a number of other tools at their disposal that can help create a culture where contempt of cop and cover arrests are rare. As with all officer conduct, first level supervisors (usually sergeants) play a critical role in preventing abusive arrests. Arrest reports and use of force reports usually require approval from a supervisor. Supervisors thus have the ability in most circumstances to ask questions and fill in gaps to ensure that the arrest and force were proper, and to immediately address situations where it appears that the police conduct was improper. Supervisors with the right values, skills, and knowledge of their officers can also help their agencies identify early on officers who resort to contempt of cop and cover arrests, provide them with remedial training, and pair them with officers who know how to better handle such situations.

In some agencies, especially large ones, tracking disorderly conduct, resisting, and similar arrests through an early warning system, and regularly evaluating and responding to this data, can help supervisors better do their jobs and assist commanders in knowing which supervisors have a better handle on this issue. The value of tracking these types of arrests is increasingly being recognized.⁷⁶ Many federal settlement agreements requiring reforms in police departments alleged to have a pattern or practice of misconduct have required the agency to more closely supervise, track, and respond to the types of arrests most likely to be misused.⁷⁷

⁷⁶ See, e.g., Webby, *supra* note 24. The article notes that many departments now closely monitor resisting arrest cases and quotes Gerald Chaleff, police administrator for the Los Angeles Police Department: "I think such reviews are a best practice now." *Id.*

⁷⁷ See, e.g., Consent Decree at 6-12, *United States v. City of Los Angeles et al.*, No. 00-11769 (C.D. Cal. Jul. 7, 2009) ("Supervisors shall evaluate each incident in which a person is charged with interfering with a police officer (California Penal Code § 148), resisting arrest, or assault on an officer to determine whether it raises any issue or concern regarding training, policy, or tactics"); Memorandum of Agreement (MOU) Between the U.S. Dep't of Justice and Prince George's County Md. et al., 18 (Jan. 22, 2004), *available at* http://www.justice.gov/crt/split/documents/pgpd/pg_memo_agree.pdf (requiring that an Early Identification System established pursuant to the MOU track "all instances in which force is used and a subject is charged with 'resisting arrest,' 'assault on a police officer,' 'disorderly conduct,' or 'obstruction of justice'"); Negotiated Settlement Agreement at 16, *Delphine Allen, et al. v. City of Oakland, et al.*, No. 00-4599 (N.D. Cal. Jan. 22, 2003) (requiring that supervisors respond to the scene of arrest for arrests pursuant to California Penal Code §§ 69 (resisting/deterring an officer), 148 (interfering with a police officer), and 243(b)(c) (battery on a police officer)), and at 30 (requiring that early warning system estab-

4. Documenting Officer Interactions

Documenting officer interactions with civilians can be an extraordinarily effective tool for stopping abusive arrests. In-car video systems, audio recorders carried in the pockets of officers and their supervisors, and civilians recording interactions on cell phones or camcorders are different ways of helping a police agency, and, where appropriate, the public, determine what actually happened. These tools can also help teach officers and civilians how to act—and not to act. While the law is still catching up to the benefits of this emerging technology, law enforcement is beginning to move beyond its initial opposition to in-car video systems and similar documentation efforts as they realize that, in most instances, such documentation vindicates the officer. At the same time, as discussed, audio and video recording of an incident sometimes is the only way to reveal that the officer's description of events, sometimes supported by other officers' statements and written up in a sworn document, is not accurate. This assists the law enforcement agency, and other community stakeholders, in determining the extent and nature of the problem—a necessary precursor to effectively addressing the issue.

The Seattle Police Department legal advisor has told officers to assume they are being recorded at all times.⁷⁸ This admonition, if taken to heart, might have an impact: in at least one agency of which this author is aware, a department placed in-car cameras in the vehicles of officers who had received a disproportionate number of complaints over a several-month-long period. During the time the officers were in cars with cameras, they received no complaints.

5. Accountability

If, despite the message from leadership, good training, and appropriate supervision, an officer nonetheless arrests someone for contempt of cop or to cover an inappropriate use of force, the officer should be held accountable. Police leaders need to insist on accountability and make it happen even where—perhaps especially where—a portion of the community and most of the agency's officers see nothing wrong with the conduct of the officer. Appropriate and effective accountability may require that an officer be retrained, it may require a period of suspension, or, depending upon the circumstances, it may even require demotion or termination.

Unless accountability is a clear and consistent component of an agency's culture, adherence to the agency's rules and values will not happen. Holding an officer accountable, particularly in circumstances like those that usually surround contempt of cop and cover arrests, is also a critical component of building successful police-community relationships, and can help rebuild those relationships after a particularly high-profile or egregious abusive arrest. Individuals should not be required to hope that a prosecutor drops a case after they have spent a night in jail, spend money to defend themselves, or bring suit against the police department, just to ensure that their constitutional rights are protected.

lished pursuant to the Settlement Agreement track and require intervention for any officer who has exceeded a certain number of these arrests during a specified time period); Consent Judgment Use of Force and Arrest and Witness Detention at 24, *United States v. City of Detroit, et al.*, No. 03-72558 (E.D. Mich. Jun. 12, 2003) (requiring that a risk management database created under the agreement track “all instances in which force is used and a subject is charged with ‘resisting arrest,’ ‘assault on a police officer,’ ‘disorderly conduct,’ or ‘interfering with a city employee’”).

⁷⁸ Office of Professional Accountability, *supra* note 21, at 12-13.

6. *Accepting and Investigating Misconduct Complaints*

One of the hallmarks of a police agency with a culture problem is that a lot of misconduct does not get reported or investigated. A lack of reporting may be caused by an agency culture that sets up road blocks to making complaints: offering complaint brochures and forms only in one language; requiring that complaints be made in person or lodged with a supervisor (or sometimes with the officer against whom you are complaining); or requiring that complaints be notarized or made by the person who suffered the misconduct (who may be in jail because of the misconduct), rather than by a third party. Misconduct may not get reported because community members believe it would be fruitless to do so—more likely leading to future retaliation from the police rather than in a fair and full investigation of the officer's conduct. The nature of contempt of cop and cover arrests means that complaints are sometimes the only way an agency will know if one of its officers is making abusive arrests. Improving the complaint process to make it easier and less intimidating, and ensuring that complaints, once lodged, are fully and fairly investigated, allows a police department to better protect the rights of those it serves and helps it detect and respond to problems *before* they become pervasive.

7. *Outside Intervention*

Where an agency is unable or unwilling to make the changes necessary to stop abusive contempt of cop and cover arrests, outside intervention may be necessary. Where it is part of their purview, elected political leaders may need to replace department leadership. Private plaintiffs or government enforcement agencies at the state or federal level may need to bring suit to effect the necessary change. As noted above, many settlement agreements requiring reforms to police practice include requirements meant to prevent contempt of cop and cover up arrests.

C. CHANGE COMMUNITY CULTURE

As the response to the Gates episode demonstrated, a lack of understanding regarding the limits of police authority and the rights of individuals to protest their treatment by police is hardly limited to some members of the law enforcement community. In fact, in many respects the aftermath of the Gates incident showed that some segments of the broader community have a more expansive view of what the police should be allowed to do than many officers do. Even where there was agreement that Sergeant Crowley's treatment of Professor Gates was unnecessary or flat out wrong, there was often the sense among some that Gates deserved to be arrested nonetheless because he was "stupid" enough to protest that treatment.⁷⁹

Community members might look the other way or respond half-heartedly to abusive arrests because they are as frustrated and fed up with public disorder as are the police, and they see contempt of cop arrests as a sort of unfortunate but unavoidable side effect of a police department that is working aggressively to keep the corners clear and the streets safe. We may even encourage abusive arrests by misinterpreting "community policing" as something that requires police officers to overstep their

⁷⁹ For a relatively mild and non-profane version of this argument, see, e.g., Lars Hindsley, *Obama Stupid. Officer Stupid. Gates Stupid.*, Newsvine, Jul. 23, 2009, http://larshindsley.newsvine.com/_news/2009/07/23/3054714-obama-stupid-officer-stupid-gates-stupid ("[Gates] could just provide the officer I.D. and the incident is avoided, but he invites trouble by getting his tail in the air too by saying, 'this is what happens to a black man in America' and 'you don't know who you're messing with'. [sic] Again, stupid. ANYONE of any color that says that to a police officer is making a stupid mistake.").

bounds and stop crimes before they happen. Taken one step too far, this means apprehending people before they've done anything illegal. "Proactive" policing is great, as long as it is not *too* proactive.⁸⁰

To effectively address this issue, we must educate our own communities about the harms of contempt of cop and cover arrests: the impact on the livelihoods and health of those arrested; the distrust such arrests engender among those most necessary to help the police fight crime; the undermining of democratic values and the proper balance of police power and individual autonomy, as well as what that means in concrete terms. We must make sure we are not demanding that police impose their own personal sense of order and morality on a situation and then castigating them when they do. We need to recognize the value of individuals who are willing to object to mistreatment of themselves or others by the police rather than dismiss them as foolish. It is unrealistic and unfair to expect that police culture will stop tolerating contempt of cop and cover arrests unless the broader community is willing to make clear its objection to such arrests as well. Indeed, many police departments are ahead of many segments of the community in recognizing the harm and ineffectiveness of contempt of cop and cover arrests.

V. CONCLUSION

Inappropriate contempt of cop and cover arrests, and the too-often unnecessary uses of force that accompany these arrests, are a widespread problem. These abusive arrests cause direct harm to those arrested, violate the constitutional rights at the core of our democracy, alienate large segments of our people, and make policing less effective. A meaningful response to this problem requires a number of different approaches, all implemented in concert and to a greater or lesser degree, depending on the breadth and the depth of the problem and the nature of the law enforcement agency in which it is occurring. Changes to policy, and sometimes laws, will be required. Closer supervision, data collection and analysis, and sensible training will also be necessary, as will accountability for officers who make these arrests—and the supervisors who approve them. Where the problem is widespread within an agency, or appears to be a *de facto* part of agency practice, outside intervention may be required to help the agency make the necessary changes to its culture. Those of us outside the field of law enforcement have a critical role to play: speaking out about misconduct when we see it; teaching others to recognize the many harms of misconduct; and demanding changes in agencies that are not effectively preventing or responding to contempt of cop or cover arrests.

⁸⁰ See, e.g., Office of Professional Accountability, *supra* note 21, at 8 ("There may be a significant increase in obstruction situations where the officers are 'proactive,' as opposed to responsive to 911 calls.").

The Crisis in Fourth Amendment Jurisprudence

Jay Stanley*

As the rolling revolution in information technology continues to reshape American life, we need robust rules of the road more than ever to protect the privacy that Americans have always taken for granted. Unfortunately, when it comes to the constitutional amendment that most directly protects our privacy, the Fourth Amendment, federal jurisprudence has gone badly off track. The result is that we are unprepared for an onslaught of new technologies that will leave our privacy more vulnerable than ever in the years ahead.

We are rapidly moving into a new world dominated by biometrics, location tracking, social networks, pervasive surveillance cameras, data mining, cloud computing, ambient intelligence and the “Internet of things,” and a trend away from individual, case-by-case surveillance and toward wholesale, automated mass surveillance. The Fourth Amendment as currently interpreted was created largely in the 1970s by men born between 1898 and 1924. It is an edifice that is now, and will increasingly be, put under enormous stress, yet it is not structurally sound.

In part, the problem is simply the fact that the law moves slowly, while technology does not. Given the reality of abrupt, almost discontinuous technological change, our incremental, evolutionary system of jurisprudence sometimes seems simply overwhelmed. In the time it takes a case to go from initial complaint to Supreme Court ruling, entire sectors of the tech industry can rise and fall. In addition, even given the slow rate at which the gears of justice grind, our courts are particularly slow in adapting our traditions to new technologies. It took almost 40 years for the Supreme Court to recognize that the Constitution should apply to the wiretapping of telephone conversations.¹

But the problem is also that our jurisprudence has gone badly off track and is in need of reform. Most commentators identify two principal problems with the Fourth Amendment as it has been interpreted by the Supreme Court: (1) the “third party doctrine,” under which information shared with any third party loses all Fourth Amendment protection; and (2) the emergence of a circular standard of “reasonable expectation of privacy.”

In some areas, such as communications, Congress has done more than the courts to protect privacy, and some commentators make persuasive arguments that we should invest our hopes in Congress rather than the courts.² Of course, advocates should

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¹ In 1967, the Supreme Court finally recognized the right to privacy in telephone conversations in *Katz v. United States*, 389 U.S. 347 (1967), reversing the 1928 decision in *Olmstead v. United States*, 277 U.S. 438 (1928).

² See Jeffrey Rosen, *The Naked Crowd: Reclaiming Security and Freedom in an Anxious Age* 143-157, 203-216 (2004).

push forward on *all* fronts in attempting to defend our privacy. But ultimately, constitutional protection is needed. Like free speech, privacy needs constitutional protection because it is susceptible to “tyranny of the majority”—for example when a security panic leads to calls for suspect minority groups to be stripped of their privacy, or for other unreasonable privacy-invasive security measures. There is also a problem of collective action in privacy: for the individual, it may actually seem rational to rely on the “protection of the herd” because the chances of any one person becoming a subject of abuses by law enforcement or the national security state are usually small, especially for a person not part of a targeted minority or political group. But once such powers can be wielded at will by the authorities, there will be (1) no telling where it will stop, and (2) the inevitable creation of an atmosphere of pervasive insecurity that will affect everyone and chill the community as a whole.

In addition, of course, privacy must be protected constitutionally because the Constitution says it must. But the broken state of our jurisprudence is a serious problem, and poses a substantial risk that advancing technology will leave privacy law in a dysfunctional state and the Fourth Amendment an empty shell. In Section I of this Issue Brief, I examine how our current privacy jurisprudence is broken, and how advancing technology in particular is bringing things to a crisis point by highlighting gaps in the current law and sharpening contradictions in the status quo.

Fortunately, there are reasons to be optimistic about the possibility of reinvigorating the Fourth Amendment, as I discuss in Section II. Those reasons include: (1) the awakening of First Amendment rights in the first half of the 20th century, which serves as a reminder that, when necessary, our judiciary is capable of giving substance and definition to previously weak and vague rights; (2) a line of vigorous dissents in the cases establishing our current jurisprudence, which show that the doctrines were far from self-evident, and provide raw material for judicial reevaluation; (3) the potential for common ground among liberal and conservative jurists, who have both been critical of various aspects of privacy law; and (4) alternative paths taken on privacy by state courts, which both reflect the weakness of current doctrine and lay the groundwork for its repair.

I. WHAT IS WRONG WITH FOURTH AMENDMENT JURISPRUDENCE

A. THE THIRD PARTY DOCTRINE

According to the Supreme Court’s third party doctrine, personal information, once exposed to any third party, loses all Fourth Amendment protection. Some information exposed to third parties is protected by various statutes, but those can be inconsistent and outdated. The Electronic Communications Privacy Act (ECPA), for example, is notably out of date, leaving privacy protection of technology, as the Ninth Circuit put it, “a confusing and uncertain area of the law.”³ Some privacy interests that are currently unprotected under the Fourth Amendment also receive protection under the First Amendment—but that protection is far from comprehensive.⁴

³ *Konop v. Hawaiian Airlines*, 302 F.3d 868, 874 (9th Cir. 2002).

⁴ *See, e.g., Doe v. Ashcroft*, 334 F. Supp. 2d 471 (S.D.N.Y. 2004) (ruling that National Security Letters violate the First Amendment right to anonymity and association); *In re Grand Jury Subpoena to Kramerbooks & Afterwords Inc.*, 26 Med. L. Rptr. 1599 (D.D.C. 1998) (ruling that government must demonstrate compelling need for grand jury subpoena of book purchase information); *NAACP v. Alabama*, 357 U.S. 449 (1958) (striking down subpoena for membership records as chilling right to association).

The origins of the doctrine extend back to 1967 in the pro-privacy case *Katz v. United States*.⁵ *Katz* overturned a 1928 precedent and found that a suspect making a telephone call from a phone booth did, in fact, enjoy Fourth Amendment protection against wiretapping. This decision was the culmination of a jurisprudential disentanglement of Fourth Amendment privacy from the law of trespass, property rights, and literal-minded hairsplitting over “constitutionally protected area”—modes of thinking that the telephone had long since rendered obsolete. The Court declared in *Katz* that “the Fourth Amendment protects people, not places.”⁶

But the Court also noted that, “[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”⁷ Thus, if the defendant had not spoken inside a closed phone booth but had spoken loudly where he could be heard by anyone passing by, he could not expect privacy. This commonsense observation, however, was soon pushed in directions that would drastically undercut privacy.

In 1971, the Court ruled in *United States v. White* that the Fourth Amendment offered no protection for conversations recorded by someone wearing a wire, even in one’s own home.⁸ The Court reasoned that whenever we communicate with another person, we assume the risk that he or she will remember and repeat what we say, and that actual recording of a conversation does not significantly change that reality.⁹ Then, in a 1976, the Court in *United States v. Miller* extended that logic from conversations to information shared with one’s bank.¹⁰ The Court held that records of the defendant’s financial transactions, which the bank was required by law to maintain, were not his “private papers,”¹¹ and since he had shared them with his bank, he had lost Fourth Amendment protection.

The Court soon extended the same logic to the numbers dialed to and from a telephone, known as a pen register and trap and trace data, in *Smith v. Maryland*.¹² The Court ruled that:

When he used his phone, petitioner voluntarily conveyed numerical information to the telephone company and “exposed” that information to its equipment in the ordinary course of business. In so doing, petitioner assumed the risk that the company would reveal to police the numbers he dialed.¹³

The result of these and other cases is that the current jurisprudence is very inconsistent: courts have found that we retain Fourth Amendment protection in the contents of our telephone calls and sealed postal letters, but not in other information that has been exposed to middlemen, from medical and financial data to our reading habits, whether online or in our local library.¹⁴ Even the status of e-mail remains uncer-

⁵ See *Katz*, 389 U.S. at 347.

⁶ *Id.* at 351.

⁷ *Id.*

⁸ *United States v. White*, 401 U.S. 745 (1971).

⁹ *Id.* at 751-54.

¹⁰ *United States v. Miller*, 425 U.S. 435, 443 (1976).

¹¹ *Id.* at 440-43.

¹² 442 U.S. 735 (1979).

¹³ *Id.* at 744.

¹⁴ Again, privacy in these areas is sometimes and inconsistently protected by federal statutes such as the Health Insurance Portability and Accountability Act (HIPAA) and state library confidentiality and fi-

tain.¹⁵ And even for letters and telephone calls, the current Fourth Amendment protects only their contents—the outside of envelopes and the numbers that we dial and that dial us are not protected, because it has been deemed to have been exposed to a third party.¹⁶ The Court has created a distinction, not found in the Constitution, between “addressing” or “transactional” data, and content data, with the former receiving no constitutional protection.

While we may not mind *some* people having access to certain information about us, it is a big step to then conclude that we do not mind or cannot prevent the *government* from having access to that information. As Professor Daniel Solove has pointed out, this approach “assumes that the government stands in the same shoes as everybody else, which is clearly not the case.”¹⁷ In that sense, it resembles the formalism of the *Lochner* era, which was built around the fiction that a manual laborer and Standard Oil were two equal legal persons “free” to enter into any contract with each other.

B. REASONABLE EXPECTATIONS

The second principal shortcoming with the Fourth Amendment as it has been interpreted in current law is the doctrine that privacy is only protected where a person has “a reasonable expectation of privacy.” Once again, this harmful doctrine emerged out of the pro-privacy decision in *Katz* extending Fourth Amendment protection to telephone conversations. In a concurring opinion, Justice Harlan wrote that Fourth Amendment coverage required “first, that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”¹⁸ This two-part test was taken up in other cases and hardened into the “reasonable expectation” doctrine.

As a result of this approach, the Fourth Amendment as it is currently interpreted provides no protection against a wide array of intrusive searches. The Court has found no “reasonable expectation of privacy” against aerial video surveillance, for example, even when sunbathing in one’s own back yard and surrounded by a tall fence,¹⁹ or against searches of one’s household garbage once it is left out on the curb.²⁰ Or against a wide range of surveillance that takes place in public, even if it is intrusive in ways that, as a factual matter, violate the expectations of most Americans, such as the tracking of a vehicle via an electronic device.²¹

1. *The Circularity of “Expectations”*

The primary, widely recognized problem with this standard is its circularity: people get only the privacy that they expect to get. Under this standard, even the most reprehensible invasions of privacy might lose constitutional protection if a realistic person is forced to conclude that their privacy will in fact be invaded—much as a realistic person might sadly conclude that, no matter how wrong it is, a diamond ring dropped on a busy sidewalk will not long remain.

nancial privacy laws.

¹⁵ See *Warshak v. United States*, 532 F.3d 521 (6th Cir. 2008) (en banc decision vacating panel’s finding of Fourth Amendment protection for e-mail as unripe).

¹⁶ *Smith v. Maryland*, 442 U.S. 735 (1979).

¹⁷ Daniel J. Solove, *The Digital Person: Technology and Privacy in the Digital Age* 215 (2004).

¹⁸ *Katz v. United States*, 389 U.S. 347, 361 (1967).

¹⁹ *California v. Ciraolo*, 476 U.S. 207 (1986).

²⁰ *California v. Greenwood*, 486 U.S. 35 (1988).

²¹ See *United States v. Knotts*, 460 U.S. 276, 281-82 (1983).

In theory, it means the FBI could take out Super Bowl ads announcing deployment of its latest high-tech surveillance technique, and destroy any reasonable expectation that one might have in that area. Or as Professor Laurence Tribe put it, “if you put billboards up saying, ‘Big Brother is listening wherever you are,’ there goes your expectation of privacy.”²² The effect is to create what one commentator has called a “one-way ratchet against Fourth Amendment protection.”²³

The circularity of the “reasonable expectation” language may not have been a problem if the Court had simply adopted the word “desire” or “intention,” instead of “expectation,” when enunciating this test—and to have done so would have barely altered Harlan’s original point, which was simply that people who publicly flaunt something obviously cannot be extended protection for their privacy.²⁴

The word “expectation” is circular because it bases law and practice on the subject’s understanding of law and practice. If we simply substituted “desire for” or “intention to preserve” privacy for “expectation of,” the circularity would be eliminated. Under Harlan’s test, privacy would then be honored when (1) individuals act as if privacy was desired, and (2) that desire is seen as reasonable by the community.

2. Unrealistic “Expectations”

Another significant problem with both the “reasonable expectation” criterion and the third party doctrine is that they are legal fictions that are very fictional indeed. In reality, rightly or (more often) wrongly, most people do in fact have a belief—an *expectation*—that information they share with many third parties—their bank, their doctor, their Internet service provider—will be kept private.²⁵

The current “reasonable expectation” doctrine could only make sense in an era of relatively gradual change in privacy-invading technologies. In an era of gradual change, the circular nature of the doctrine would be much less of a problem, because “expectations” in such contexts could refer to deeply rooted cultural understandings of the boundaries between the public and the private. This would be a reasonable criterion for the Court to lean upon, since privacy is in some (but not all) respects, a culturally relative value. But when changes are as rapid as they are today, that reflexivity becomes intolerable and unworkable. In that context, the “expectation” language makes our rights dependent on up-to-the-minute reevaluations of reality at a time when perpetual technological change leaves us in an extremely fluid, practically revolutionary situation, and when we need stability of expectations regarding our privacy more than ever.

²² Laurence H. Tribe, Freedom of Speech and Press in the 21st Century: New Technology Meets Old Constitutionalism, Remarks at the Progress & Freedom Foundation’s Aspen Summit (Aug. 21, 2007), available at <http://www.pff.org/issues-pubs/pops/pop14.19tribetranscript.pdf>.

²³ Jim Harper, *Reforming Fourth Amendment Privacy Doctrine*, 57 Am. U.L. Rev. 1381, 1389 (2008).

²⁴ After describing his two-part test, Harlan gave several examples showing that this is what he had in mind:

Thus, a man’s home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the “plain view” of outsiders are not “protected,” because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.

Katz v. United States, 389 U.S. 347 (1967).

²⁵ Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at ‘Understandings Recognized and Permitted by Society,’* 42 Duke L.J. 727 (1993); Christopher Slobogin, *Privacy at Risk* 33-35, 110-113, 183-186 (2007).

C. THE TECHNOLOGY REVOLUTION EXACERBATES THE PROBLEM

The Fourth Amendment protects “the right of the people to be secure in their persons, houses, papers, and effects” except when the government obtains a warrant based on probable cause.²⁶ Our privacy interest in our papers and effects has not diminished, but today we store these things in different forms and in different places than the Founders did. The “papers and effects” of someone like, say, Thomas Jefferson—his correspondence, financial and medical records, and so forth—were likely to be stored in his library. In fact, not just his records but most of his actual financial and medical life itself took place within the boundaries of Monticello. Today, our lives have moved outward: our records are just as likely to be stored on the servers of international corporations as in our home. Our medical care is mostly performed in doctor’s offices and hospitals outside the home, our money is held by banks and brokerages—and of course, our verbal conversations are no longer necessarily confined within the walls where they take place, while our written correspondence is often transported and stored electronically by numerous third-party middlemen. Yet we have just as much need for fundamental privacy protections as did Jefferson and his contemporaries.

From the standpoint of an individual seeking privacy in today’s high-tech world, it is highly arbitrary that postal letters handed over to a third party and electrical fluctuations transmitted over wires owned and controlled by a third party (*i.e.*, telephone calls) are protected by the Fourth Amendment, but telephone digits that similarly pulse through telecom wires are not. It would be absurd for e-mail not to be protected, yet all e-mail is exposed to third parties as it passes through the network of servers that make up the Internet, and when it arrives it is stored by the recipient’s Internet service provider. When it comes to the computers that we carry with us (*i.e.*, mobile phones), our voice conversations are protected, but that is an increasingly small portion of what we use our phones for. Web surfing, chat, music downloading, and GPS location sensing make up the rest—and as with e-mail, the courts are having a hard time providing clear protection for these activities because of the Supreme Court’s broken doctrine.

The status quo will become only more dysfunctional as the information revolution unfolds. To take just one example, industry and government are currently working on implementing a concept called “the smart grid,” which involves putting computer intelligence into the electricity system—both into the utilities’ distribution systems, and into customers’ appliances within the home.²⁷ This promises many advantages in terms of energy efficiency and the environment. By pricing electricity differently at different times, for example, it could smooth out demand cycles and reduce the need for utilities to invest in the generation capacity required to handle occasional spikes in demand. Appliances would communicate with each other and with the grid in order to shift electricity use to cheaper times, and to provide feedback to homeowners about their electricity use.

²⁶ U.S. Const. amend. IV.

²⁷ For more on the privacy implications of the Smart Grid, *see, e.g.*, Electronic Privacy Information Center et al., Comments of the Electronic Privacy Information Center to the National Institute of Standards and Technology (Dec. 1, 2009), *available at* http://epic.org/privacy/smartgrid/EPIC_Smart_Grid-Cybersecurity_12-01-09.2.pdf; Future of Privacy Forum et al., SmartPrivacy for the Smart Grid: Embedding Privacy into the Design of Electricity Conservation (Nov. 2009); *available at* <http://www.futureofprivacy.org/wp-content/uploads/2009/11/smartprivacy-for-the-smart-grid.pdf>.

The result, however, could be that relatively detailed information about activities inside the home will be transmitted to utilities, third-party service providers, or others. And under the third party doctrine, that information flowing out from the home could be found to lose constitutional protection. Not only information about “at what hour each night the lady of the house takes her daily sauna and bath” (which the Supreme Court has used as an example of protected information²⁸) but far more besides, would become available. Unfortunately, anyone who wants to retain constitutional protection for the privacy of activities in their home would be well advised to steer clear of many smart grid applications until the current doctrine is fixed.

1. *Our Papers, Ourselves*

The increasing embrace of “cloud computing” may, as much as any trend, intensify the arbitrary effects of current jurisprudence. Cloud computing is the trend toward creating and storing data (such as calendars, address books, photos, and documents) not on individuals’ private computers, but on third-party servers that provide convenient access from a browser anywhere on the Internet. To the modern computer user, the difference between a letter created and stored on his or her hard drive, and a letter stored or composed on a Google server, is nearly invisible. But the third party doctrine makes the difference highly relevant, and ultimately, threatens to make the Fourth Amendment a hollow shell.²⁹

Although our documents may be stored on distant servers, they can be as personal as ever, and perhaps even more so. Technology affects not just how we externally handle our “papers and effects”—it also affects the very way that we think and communicate. People today are discovering that a telephone conversation between two people sitting at their respective computers can be a different kind of conversation, as both parties seamlessly integrate on-the-fly Internet searches into the discussion. And our computers are increasingly becoming an integral part of how we think. From ancient times through the Renaissance, memory was the single most highly valued mental skill.³⁰ Today, however, when we all have access to libraries full of books and computers that can store and retrieve more raw data than our minds will ever match, that faculty has been devalued and is derided as “mere memorization.” With the de-emphasis of memorization skills, our minds have evolved to function around the written word—and as computers have made manipulation of words more fluid than ever, many people today find they have trouble arranging their thoughts without laying them out on a word processor. In effect, for many people, the computer has become an extension of their mind.

Ironically, in the past this continuity of private writings and private thoughts was better recognized in the law than it is today. Until relatively recently, private papers were regarded as immune to seizure. For centuries, English law did not permit the government to access private papers in civil or criminal cases, even with a valid warrant.³¹ Behind this rule was a belief that using a person’s papers as evidence against

²⁸ *Kyllo v. United States*, 533 U.S. 27, 38 (2001).

²⁹ See ACLU of Northern California, *Cloud Computing: Storm Warning for Privacy?* (Jan. 2010); available at <http://www.dotrights.org/sites/default/files/Cloud%20Computing%20Issue%20Paper.pdf>.

³⁰ See F.A. Yates, *The Art of Memory* (1966); Mary Carruthers, *The Book of Memory: A Study of Memory in Medieval Culture* (1990).

³¹ See Jeffrey Rosen, *The Unwanted Gaze: The Destruction of Privacy in America* 26-53 (2000). My account of the law in this area comes from Rosen, as well as Eric Schnapper, *Unreasonable Searches and Seizures of Private Papers*, 71 Va. L. Rev. 869 (1985), upon which Rosen also relies.

him was akin to forcing him to testify against himself. As an anonymous 1763 pamphlet on this issue put it:

A man's WRITINGS lying in his closet, NOT PUBLISHED, are no more than his thoughts, hardly brought forth even in his own account, and, to all the rest of the world, the same as if they yet remained in embryo in his breast.³²

This seizure of private papers was at the center of heated public controversy over several high-profile (and ultimately successful) lawsuits against the English government.³³ Among those galvanized by the issue were the American colonists, who later wrote protections against both unreasonable searches and seizures and self-incrimination into the Constitution.³⁴ A century later, in 1886, the protection for private papers was upheld by the Supreme Court in *Boyd v. United States*.³⁵ The Court cited the English precedent, said that it was the Founders' undoubted intention to incorporate it into the Constitution, and ruled that subpoenaing a person's private papers violated not only the Fourth Amendment but also the Fifth. "The seizure of a man's private books and papers to be used in evidence against him" is not "substantially different from compelling him to be a witness against himself," the Court found.³⁶

The *Boyd* case actually had to do not with revealing personal letters or a diary, but with business records. In this, the Court unfortunately overreached, and its precedent was eroded as regulation of business expanded in the 20th century. And in doing so the courts never drew a line between business records and personal records to preserve privacy protection for the latter. Although the Supreme Court has never explicitly repudiated the distinction, in relatively recent times the right to the privacy of personal records through subpoena has effectively been destroyed. In 1994, for example, Senator Bob Packwood lost an effort to fight a subpoena of his diaries, which were subsequently made public and mockingly and humiliatingly excerpted in the *Washington Post*,³⁷ and Monica Lewinsky's drafts of unsent love letters to President Clinton were acquired by Independent Counsel Kenneth Starr and published.³⁸

As Americans make use of all the advantages of new technologies and increasingly commit not only their communications, purchases, and research to electronic media, but often their very thoughts, they should not have to worry that changes in the mere technology used for the fundamental activities of life will leave them without privacy for their thoughts, communications, papers, and effects.

2. Wholesale Surveillance

Current jurisprudence has another disturbing implication. *White*, *Miller*, and *Smith* all contributed to a significant decline in protection for privacy in America during the 1970s. But in one respect their impact was limited: all involved what has been called "retail," or individually targeted surveillance, as opposed to the "wholesale" kind of mass monitoring that is increasingly becoming possible. The ruling in *White*,

³² Rosen, *supra* note 31, at 29.

³³ *Id.* at 27-31.

³⁴ *Id.* at 27.

³⁵ 116 U.S. 661 (1886).

³⁶ *Id.* at 633.

³⁷ Rosen, *supra* note 31, at 31-33.

³⁸ *Id.* at 26.

for example, addresses cases where people are recruited to betray others by wearing a wire. Human beings are expensive and time-consuming, and arranging to place them in such situations is a complex, labor-intensive, and often dangerous matter. *Miller* and *Smith* similarly involved attempts by the police to obtain information about specific individuals that they already had in their sights.

But the *White* Court's blithe equivalence of electronic and non-electronic eavesdropping, the *Miller* Court's placement of personal financial records outside Fourth Amendment protection, and the content/non-content distinction invented by the *Smith* Court, have paved the way for large-scale privacy invasions that were not technologically possible when those opinions were written.

For example, the Bank Secrecy Act³⁹ and the Patriot Act,⁴⁰ combined with modern electronic communications and the third party doctrine, have permitted the emergence of a system in which the Treasury Department's Financial Crimes Enforcement Network (FinCEN) routinely gathers a vast amount of information about financial transactions. The information it collects includes any transactions over \$3,000 involving cash, checks, or commercial paper,⁴¹ a broadly defined set of other "suspicious" transactions,⁴² all cash transactions of \$10,000 or more not just by banks but by anyone engaged in any "trade or business,"⁴³ and all international wire transfers of \$3,000 or more.⁴⁴ FinCEN then sifts through that information (*i.e.*, data mines it) in an effort to spot wrongdoing.⁴⁵

Similar mass data mining is now taking place with regard to Americans' international telephone and email communications. This was done first under the National Security Agency's (NSA) illegal warrantless wiretapping program, and now under cover of the Foreign Intelligence Surveillance Act (FISA) Amendments Act of 2008,⁴⁶ which effectively approved of such activity by allowing extremely broad searches with no requirement of specificity, no limits on the storage and use of collected information, and little judicial oversight.

All of this is a violation of the time-honored principle in the Anglo-American legal tradition that the government does not watch everyone in an attempt to spot illegal activity, but must have particularized suspicion before it begins looking over people's shoulders. Unless the Constitution is there to protect us, it is to be expected that this kind of routine wholesale surveillance will expand into ever more areas.

In short, today's technology revolution is creating a crisis in Fourth Amendment law. There is no functionalist magic to guarantee that the legal system will adapt, and that we will not simply find ourselves with a greatly diminished right of privacy. However, there are reasons to believe that reform is possible, and Section II of this Issue Brief will look at those reasons.

³⁹ 31 C.F.R. § 103.

⁴⁰ Pub. L. No. 107-56, 115 Stat. 272 (2001).

⁴¹ 31 C.F.R. § 103.29.

⁴² 31 C.F.R. § 103.15-103.21.

⁴³ 31 C.F.R. § 103.30.

⁴⁴ 31 C.F.R. § 103.33.

⁴⁵ "Through robust data mining capabilities, FinCEN can analyze SAR filings for a particular financial institution, type of activity, or geographic area." *Suspicious Activity Reports: Not Just for Law Enforcement*, The SAR Activity Rev., May 2007, at 41; available at <http://www.fincen.gov/sarreviewissue11.pdf>.

⁴⁶ Pub. L. No. 110-261, 122 Stat. 2436 (2008).

II. POTENTIAL SOURCES OF REFORM

A. THE EMERGENCE OF FREE SPEECH

The kind of broad repair of Fourth Amendment jurisprudence that we so badly need today actually took place in First Amendment law early in the 20th century. Before World War I, free speech was generally recognized as an American value, but when that all-American value came into conflict with other all-American values (such as “support your country in a time of war”) or with viewpoints that struck a community as “simply beyond the pale,” it lost out. Free expression was broadly exercised in America through such traditions as a boisterous and partisan press, loud criticisms of political figures, and postal subsidies for periodicals of all persuasions. But radicals, labor organizers, and purveyors of material that was deemed socially “harmful,” such as anything that ran afoul of Victorian moral sensibilities (including for example any information whatsoever about birth control) received virtually no protection in the courts.⁴⁷

In fact, there was widespread hostility to free speech claims in the courts—especially in the Supreme Court, which rarely generated even a dissenting opinion in such cases.⁴⁸ In 1907, for example, the Court found in *Patterson v. Colorado* that while the First Amendment prohibited the prior restraint of speech, the punishment of speech that “may be deemed contrary to the public welfare” was perfectly constitutional.⁴⁹ Freedom of Speech was an ethos—but an ethos was all that it was. In this it was in much the same position as privacy today.

However, in the following decades, First Amendment jurisprudence underwent a startling transformation. During the war, anti-war sentiment was vigorously repressed, including through the Espionage Act of 1917 and the Sedition Act of 1918. Americans were thrown in jail for such activities as writing letters to the editor protesting U.S. participation in the war. Enforcement of these laws was highly selective, targeted almost exclusively against socialists and radicals but not other opponents of the war.⁵⁰

In three separate cases decided in March 1919, the Supreme Court repeatedly rejected First Amendment defenses by socialists convicted of speaking out against the war.⁵¹ Justice Oliver Wendell Holmes wrote all three decisions, and Justice Louis Brandeis joined the unanimous opinions. But just eight months later, both justices seemed to have a change of heart and dissented in another free speech case, *Abrams v. United States*.⁵² From this start, Supreme Court protection of free expression flowered. Justices Holmes and Brandeis remained primarily as dissenters on free speech throughout the 1920s, but increasingly their position won out. In 1925 the Court applied the First Amendment to the states via the Fourteenth Amendment,⁵³ in 1927 it

⁴⁷ Paul Starr, *The Creation of the Media: Political Origins of Modern Communications* 267-94 (2004); David M. Rabban, *Free Speech in Its Forgotten Years, 1870-1920* (1997); Samuel Walker, *In Defense of American Liberties: A History of the ACLU* 11-26 (1990).

⁴⁸ Rabban, *supra* note 47, at 131; Starr, *supra* note 47, at 268.

⁴⁹ *Patterson v. Colorado*, 205 U.S. 454, 462 (1907).

⁵⁰ Starr, *supra* note 47, at 277-278. Selective enforcement was not an accidental, additional problem to the repression of speech, of course—it is virtually inevitable when certain people are allowed to decide which speech is acceptable and which is not.

⁵¹ *Schenck v. United States*, 249 U.S. 47 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919).

⁵² 250 U.S. 616 (1919).

⁵³ *Gitlow v. New York*, 268 U.S. 652 (1925).

ruled in favor of a radical for the first time in a free speech case,⁵⁴ and in 1931 the Court first invalidated a state law as a violation of the First Amendment.⁵⁵ In subsequent decades, the Court fully embraced the robust reading of the First Amendment that holds sway today, and eventually the United States came to offer what may well be the broadest protections for free speech in the world.

Of course, legal shifts do not take place in a historical vacuum. Justices Holmes and Brandeis's particular shift on free speech is often attributed to the influence of widely read articles by Harvard law professor Zechariah Chafee.⁵⁶ But the justices, as well as Professor Chafee, were also part of a broader community of statist and pro-war Progressives disillusioned by the domestic abuses of World War I and newly appreciative of individual rights. As affluent elites, they had been insulated from restrictions on free speech, which they had previously associated heavily with pro-business laissez-faire forces, and what that could mean. In 1919 in particular, when Justices Holmes and Brandeis made their switch, Progressives were horrified by the Red Scare, dismayed by intense labor violence and repression, and newly disgusted by the war as a result of the Versailles Treaty.⁵⁷ Such dismay sparked among other things the formation in 1920 of the ACLU, which went on to push for broader free speech rights, in court and out.⁵⁸

Adding to the trend was a simultaneous growth in cultural liberalization and cosmopolitanism that made Victorian censorship of sexual material via state and federal Comstock laws increasingly seem provincial and narrow-minded.⁵⁹ And even more fundamental was the fact that the United States was turning from a set of largely isolated "island communities" into more of a single, larger community, confronting many Americans with questions of diversity they had not before faced.⁶⁰

But World War I brought these trends to a head and functioned as the "generative crisis" of free speech.⁶¹ It intensified the contradiction between the latent and diffuse American cultural respect for diversity of opinion on the one hand, and on the other, the willingness to tolerate legal suppression of opinions that lay outside certain boundaries. The extreme pressures of war and the "extreme" reactions provoked by that war pushed the judiciary and society to resolve that contradiction in favor of expression.

With free speech, historical circumstances brought latent contradictions within American life to a boiling point, leading to a revolution in First Amendment law. Today we may well be facing a similar generative crisis in Fourth Amendment law—one sharpened not by war but by technology. We have on the one hand a set of less-than-robust Fourth Amendment doctrines that originated largely in the post-Warren, Nixonian context of the 1970s, when questions of crime and disorder loomed large politically (and were a major factor in the disintegration of the New Deal political coalition that had ruled America since 1932). On the other hand, we have an ongoing technological

⁵⁴ *Stromberg v. California*, 283 U.S. 359 (1931).

⁵⁵ *Near v. Minnesota*, 283 U.S. 697 (1931).

⁵⁶ Rabban, *supra* note 47, at 342; Walker, *supra* note 47, at 27.

⁵⁷ Starr, *supra* note 47, at 284-85.

⁵⁸ *Id.* at 281, 285.

⁵⁹ Rabban, *supra* note 47, at 351-352; Walker, *supra* note 47, at 30-45; Starr, *supra* note 47, at 268-274.

⁶⁰ Walker, *supra* note 47, at 29.

⁶¹ Starr, *supra* note 47, at 274.

revolution that is exposing the weakness of those legal doctrines and bringing them into growing conflict with Americans' sense of what is and should be private.

B. PRIVACY DISSENTS

There is a rich body of intellectual work that has been highly critical of the Supreme Court's Fourth Amendment law and that might provide raw material for a way out of the current quagmire in this area. In addition to work by a variety of legal scholars,⁶² there is a line of vigorous dissents to the big post-Warren Court privacy cases that established the current broken doctrines. Unlike free speech, where decisions against expression were long unanimous, in the privacy area there have been strong dissenters all along, including especially Justices William J. Brennan, John Marshall Harlan, and Thurgood Marshall. These dissenters spurned the Court's third party doctrine and in some cases its emphasis on or application of the "reasonable expectation" criterion. Instead, they emphasized the need for protection of the substance of privacy and the practical loss of privacy entailed by these decisions. They also pointed out the involuntary nature of the disclosures at issue in these cases, such as the necessity in modern life of dialing phone numbers and maintaining bank accounts. These dissents demonstrate that the law as it has developed was far from self-evident, and provide raw material for the creation of new lines of jurisprudence.

We might look to Justice Harlan's dissent in *United States v. White*, the 1971 case about the use of an informant wearing a wire. Justice Harlan rejected the "expectations approach of *Katz*" and pointed the way toward a broader, more substantive, and non-circular standard for privacy.⁶³ "We should not, as judges, merely recite the expectations and risks without examining the desirability of saddling them upon society," he wrote, arguing that the question before the Court must "be answered by assessing the nature of a particular practice and the likely extent of its impact on the individual's sense of security balanced against the utility of the conduct as a technique of law enforcement."⁶⁴ He then evaluated the actual substantive effect of wearing a wire upon Americans' privacy:

The impact of the practice of third-party bugging, must, I think, be considered such as to undermine that confidence and sense of security in dealing with one another that is characteristic of individual relationships between citizens in a free society Words would be measured a good deal more carefully and communication inhibited if one suspected his conversations were being transmitted and transcribed. Were third-party bugging a prevalent practice, it might well smother that spontaneity—reflected in frivolous, impetuous, sacrilegious, and defiant discourse that liberates daily life.⁶⁵

Similarly, in a dissent in *Smith*, Justice Marshall argued that constitutional protections should not depend on a person's subjective privacy expectations, but "on the

⁶² For critiques of Fourth Amendment jurisprudence, see, e.g., Slobogin, *supra* note 25; Solove, *supra* note 17; Orin S. Kerr, *Digital Evidence and the New Criminal Procedure*, 105 Colum. L. Rev. 279, 293-96 (2005); Rosen, *supra* note 31; Harper, *supra* note 23; Wayne R. LaFare, *Search and Seizure: A Treatise on the Fourth Amendment* (1978).

⁶³ *United States v. White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting).

⁶⁴ *Id.*

⁶⁵ *Id.* at 787; Jeffrey Rosen points to this dissent in *The Naked Crowd*, *supra* note 2, at 204-206.

risks he should be forced to assume in a free and open society.”⁶⁶ Justice Marshall also thought that the underlying statute in that case, the Bank Secrecy Act, which imposed recordkeeping requirements on banks, represented an unconstitutional warrantless seizure of customers’ financial records.⁶⁷

In *Miller*, Justice Brennan cited the full substantive privacy interest that individuals hold in their bank records, and their lack of choice or control over them:

[I]t is impossible to participate in the economic life of contemporary society without maintaining a bank account. In the course of such dealings, a depositor reveals many aspects of his personal affairs, opinions, habits and associations. Indeed, the totality of bank records provides a virtual current biography.⁶⁸

Justice Brennan compared the invasion of bank privacy in the *Miller* case to the intrusion into an individual’s privacy that results from “violent searches and invasions” of a person’s dwelling, adding that high-tech privacy violations could be “equally devastating”:

Development of photocopying machines, electronic computers and other sophisticated instruments have accelerated the ability of government to intrude into areas which a person normally chooses to exclude from prying eyes and inquisitive minds. Consequently, judicial interpretations of the reach of the constitutional protection of individual privacy must keep pace with the perils created by these new devices.⁶⁹

The original pro-privacy decision in *Katz* also contains raw material for new directions in Fourth Amendment jurisprudence. Brushing aside government arguments that the defendant had no privacy because his telephone booth was made of glass, and that therefore he was in public and had no privacy, the Court wrote:

But what [Katz] sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.⁷⁰

The Court thus recognized, first, that it matters when particular communications facilities come to play a “vital role” in private communication—an observation that should be extended today to all manner of electronic communication. Second, the court recognized that being “in public” is not a binary state—that is, one can be exposed to the public in some respects but not in others. This is another increasingly

⁶⁶ *Smith*, 442 U.S. at 750 (Marshall, J., dissenting); see also *Rosen*, *supra* note 31, at 64.

⁶⁷ *California Bankers Ass’n v. Shultz*, 416 U.S. 21 (1974) (Marshall, J., dissenting).

⁶⁸ *United States v. Miller*, 425 U.S. 435, 451 (1976) (Brennan, J., dissenting) (quoting *Burrows v. Superior Court of San Bernardino County*, 529 P.2d 590, 596 (Cal. 1974)).

⁶⁹ *Id.* (quoting *Burrows*, 529 P.2d at 593-596).

⁷⁰ *Katz v. United States*, 389 U.S. 347, 352 (1967).

important observation as all manner of novel technological invasions of privacy—from pervasive video surveillance to thermal imagers to remote pulse-measurement devices to tracking devices—are justified through the too-simple observation that “when you’re in public you have no expectation of privacy.”

A footnote in the majority opinion in *Smith* could also serve as fuel for future courts wishing to redirect Fourth Amendment law. “Situations can be imagined,” the majority wrote, in which reasonable expectations would be “inadequate” as a constitutional measure.⁷¹ Such situations might include a refugee from a totalitarian nation who expects no rights, or if “the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry.”⁷²

In such circumstances, where an individual’s subjective expectations had been “conditioned” by influences alien to well recognized Fourth Amendment freedoms, those subjective expectations obviously could play no meaningful role in ascertaining what the scope of Fourth Amendment protection was. In determining whether a “legitimate expectation of privacy” existed in such cases, a normative inquiry would be proper.⁷³

If the Supreme Court were to recognize the technological revolution as one such factor that makes its doctrine “inadequate,” that would go a long way toward improving our privacy jurisprudence.

C. CONSERVATIVES

It has not only been liberal justices who have been critical of current privacy doctrine. Justice Antonin Scalia authored a majority opinion in the 2001 case *Kyllo v. United States* striking down the use of thermal imagers by the police to identify an in-home marijuana-growing operation via the heat given off by lamps the defendant had installed for his plants.

In *Kyllo*, Justice Scalia acknowledged the problem with the reasonable expectation doctrine, observing that “the *Katz* test—whether the individual has an expectation of privacy that society is prepared to recognize as reasonable—has often been criticized as circular, and hence subjective and unpredictable.”⁷⁴ Justice Scalia preferred to ground his judgment in the intent of the Founders, and on that basis found that the use of the scanners was a search. Only that position, he said, “assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.”⁷⁵

That criteria, read broadly, not only dissolves the circularity of “reasonable expectations,” but also should dispose of the third party doctrine, which due to changes in technology, as we have seen, most definitely does not “assure preservation that degree of privacy” enjoyed by the Founders.

Justice Scalia’s decision is not unlimited in scope—he relied heavily on the “Fourth Amendment sanctity of the home” and it is unclear how far beyond that time-honored

⁷¹ *Smith*, 442 U.S. at 741 n.5.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

⁷⁵ *Id.*

boundary he would push his analysis.⁷⁶ His opinion also includes a potentially ominous disclaimer about the ruling applying only to those technologies “not in general public use.”⁷⁷

But there are other examples of conservative justices supporting privacy. For example, in a concurring opinion on a 2000 case, Justice Clarence Thomas (joined by Scalia), held out the possibility of once again making personal papers immune from seizure as they were once understood to be. Justices Thomas and Scalia suggested their willingness “in a future case” to broaden the Fifth Amendment based on an originalist reading of the meaning of the term “witness,” as in the Fifth Amendment’s prohibition on forcing a person “to be a witness against himself.”⁷⁸ Justice Thomas argued that according to “the meaning of the term at the time of the founding,” the word referred not just to evidence of a “testimonial character,” as current Supreme Court doctrine has it, but any evidence, including personal papers and effects.⁷⁹

Although an originalist approach might work pretty well at protecting our privacy in the midst of the technology revolution, we need not embrace Justices Scalia and Thomas’s originalist theories of jurisprudence to rescue the Fourth Amendment. It would be enough for the Court to make a broad judgment over which privacy desires our society does, as a matter of fact, regard as reasonable according to the contemporary standards of our culture, in the broadest sense, including our oldest traditions.

But there is potential common ground between originalists and broader judicial visions that look to the substantive privacy needs of fulfilled citizens in a democratic society. Conservatives may want to focus on “that degree of privacy against government that existed when the Fourth Amendment was adopted,” while liberals may want to more openly acknowledge the Court’s need to impose substantive privacy out of an evaluation of the deep-rooted privacy sensibilities of contemporary society. Happily for privacy, the Founders clearly valued substantive privacy protection, so a substantive approach and an originalist approach have the potential, at least, to dovetail with each other on privacy, and hermeneutical warfare over these approaches can take place on other battlefields.

The unity of the two approaches—substantive and originalist—can be seen in Justice Brandeis’s famous dissent to *Olmstead v. United States*, the 1928 decision finding that telephone calls did not enjoy Fourth Amendment protection (later overturned by *Katz*).⁸⁰ When the Constitution was written, the violation of individuals’ privacy and right against self-incrimination “had been necessarily simple,” Brandeis observed.⁸¹ But, “subtler and more far-reaching means of invading privacy have become available to the Government. Discovery and invention have made it possible for the Government . . . to obtain disclosure in court of what is whispered in the closet.”⁸²

⁷⁶ The Court also found that warrantless GPS tracking of a car is impermissible when the vehicle is brought into a private residence. *United States v. Karo*, 468 U.S. 705 (1984).

⁷⁷ *Kyllo*, 533 U.S. at 40. It is already possible to find a fully functional \$50 infrared night-vision scope on the shelves of the toy department at Target.

⁷⁸ U.S. Const. amend. V.

⁷⁹ *United States v. Hubbell*, 530 U.S. 27, 50 (2000) (Thomas, J., concurring).

⁸⁰ See generally *Olmstead v. United States*, 277 U.S. 438 (1928).

⁸¹ *Id.* at 473 (Brandeis, J., dissenting).

⁸² *Id.*

Brandeis protested against “an unduly literal” interpretation of the Fourth Amendment, writing that:

The protection guaranteed by the Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings, and of his intellect They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone.⁸³

Ultimately we need Fourth Amendment doctrines that are built around phrases such as “the privacy and dignity befitting a free people,” “the space to explore and create one’s identity,” and the “universal need for a refuge from the glare of the community.” We need jurisprudence that reads “papers and effects” broadly to include the modern-day equivalent—electronic files in all their forms—and provides protection for them. A richer privacy jurisprudence might incorporate the European notion of “proportionality,”⁸⁴ the importance of individuals’ actual desires for privacy, and the principle that where people have no choice but to give up information, privacy should receive heightened protection. And most of all, we need jurisprudence that preserves the substance of privacy, not just its form, through rapid changes in technology.

D. PRIVACY IN THE STATES

Another possible source for alternatives to current Fourth Amendment jurisprudence comes from the states. Indeed, Justice Brennan argued in an influential 1977 law review article that, in light of the direction the Supreme Court was taking on privacy, Americans should look to the states as a beacon of protection in a “new federalism.” He also criticized state jurists who interpret their state constitutions in “lockstep” with the federal judiciary.⁸⁵

An ACLU review of state constitutions and jurisprudence on the third party doctrine makes clear that a significant number have departed from the Supreme Court in areas where the federal jurisprudence is problematic. Some have done so because their courts have found that their state constitutions do not permit it, but others with language very close to the federal constitution have also taken a different interpretive path, whether on the third party doctrine, the reasonable expectation standard, or on various technologically enhanced searches.

California is an example of a state that has much stronger privacy laws than the federal government. While the state constitution contains language almost identical to the Fourth Amendment, the state has decisively rejected the third party doctrine. In a case similar to—but preceding—the *Miller* ruling on protection for bank records, California’s high court rejected the government’s arguments for warrantless access

⁸³ *Id.* at 478.

⁸⁴ Christopher Slobogin argues for the centrality of a principle of “proportionality” in privacy jurisprudence in *Privacy at Risk*, *supra* note 25.

⁸⁵ William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 *Harv. L. Rev.* 489, 491 (1977). See also Stephen E. Henderson, *Learning From All Fifty States: How To Apply the Fourth Amendment And its State Analogs To Protect Third Party Information From Unreasonable Search*, 55 *Cath. U.L. Rev.* 373 (2006); Elbert Lin, *Prioritizing Privacy: A Constitutional Response to the Internet*, 17 *Berkeley Tech. L.J.* 1085, 1129-53 (2002).

based on the lack of voluntariness in customers' furnishing of financial details to the bank, as well as the revealing nature of the information.⁸⁶

Brennan later cited this case extensively in his own dissent in *Miller*, saying that the decision "strikingly illustrates the emerging trend among high state courts of relying upon state constitutional protections of Individual liberties—protections pervading counterpart provisions of the United States Constitution, but increasingly being ignored by decisions of this Court."⁸⁷

Other states also offer a variety of alternative approaches. Examples include:

- Washington state, where the law centers around a substantive inquiry into whether a search is an intrusion into one's "private affairs," defined as "those privacy interests which citizens of this state have held, and should be entitled to hold."⁸⁸
- New Jersey, which relies on a modified version of the "reasonable expectation" test that requires only that there *can be* a reasonable expectation under the circumstances. It has also stated that "disclosure to a third-party provider, as an essential step to obtaining service altogether, does not upend the privacy interest at stake."⁸⁹
- Pennsylvania, which has rejected the third party doctrine, finding that "so long as a person seeks to preserve his effects as private, even if they are accessible to . . . others, they are constitutionally protected."⁹⁰
- Hawaii, where courts have adopted the "reasonable expectation" standard but have interpreted it to require "that governmental intrusions into the personal privacy of citizens of this State be no greater in intensity than absolutely necessary."⁹¹
- Indiana, where courts look at whether a particular search is reasonable "under the totality of the circumstances," without examining the subjective expectations of the person targeted by the search.⁹²

Overall, the ACLU review of state laws found that 11 states have, to a greater or lesser extent, explicitly rejected federal third party doctrine,⁹³ while nine more have indicated in some fashion that they could reject it in the future.⁹⁴ An additional 12 states diverge from federal third party doctrine in other, minor ways,⁹⁵ while 18 states follow federal doctrine "in lockstep."

⁸⁶ See generally *Burrows v. Superior Court of San Bernardino County*, 529 P.2d 590 (Cal. 1974).

⁸⁷ *United States v. Miller*, 425 U.S. 435, 454 (1976) (Brennan, J., dissenting).

⁸⁸ *State v. Myrick*, 688 P.2d 151, 154 (Wash. 1984).

⁸⁹ *State v. Reid*, 945 A.2d 26, 33 (N.J. Super. Ct. App. Div. 2008); see also *State v. Hemplele*, 576 A.2d 793 (N.J. 1990).

⁹⁰ *Commonwealth v. DeJohn*, 403 A.2d 1283, 1289 (Pa. 1979), *cert. denied*, 444 U.S. 1032 (1980) (quoting *Commonwealth v. Platou*, 312 A.2d 29, 34 (Pa. 1973), *cert. denied*, 417 U.S. 976 (1974)).

⁹¹ *State v. Kaluna*, 520 P.2d 51, 58-59 (Haw. 1974).

⁹² *Moran v. State*, 644 N.E.2d 536, 539 (Ind. 1994).

⁹³ The states that have rejected federal third party doctrine are, in rough descending order of the strength of their protection, California, Washington, New Jersey, Montana, Colorado, Illinois, Pennsylvania, Hawaii, Florida, Idaho, and Utah.

⁹⁴ The states that have indicated an openness to doing so are Alaska, Massachusetts, Minnesota, New Hampshire, Oregon, Indiana, Vermont, Arkansas, and South Dakota.

⁹⁵ Those states are Arizona, Connecticut, Delaware, Louisiana, Michigan, Nevada, New Mexico, New York, Ohio, Texas, Tennessee, and Wyoming.

The situation in the states is significant for several reasons. First, state law today serves as a source of alternative legal thinking on privacy. Prior to the 20th century expansion in First Amendment rights, the states played just that kind of role. While the Supreme Court was extremely hostile to free speech claims before World War I, historians point out that the legal and cultural groundwork for the subsequent revival of the First Amendment could be found in the states, where a significant number of court decisions rejected the Supreme Court's approach and kept the possibility of genuine free speech rights alive within the American legal "conceptual universe."⁹⁶

Over time, the spread of alternative interpretations of privacy rights within the states could gain influence at the national level, as has happened before on other issues including the exclusionary rule and the death penalty, where state law has influenced interpretations of "evolving standards of decency" under the Eighth Amendment.⁹⁷

Second, divergent state interpretations on privacy are also a symptom of unease with the current state of the law, and to some extent they highlight the arbitrariness and indeterminateness of privacy law as it now stands. They are also, not incidentally, a source of privacy protection for a large number of people. As the majority noted in *Katz*, "the protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States."⁹⁸

The problem, of course, is that unlike state protections against theft and murder, state and federal privacy laws collectively do not yet provide individuals anything resembling reliable certainty that they will be protected, especially with today's rapidly evolving technology.

III. CONCLUSION: TOWARD A NEW FOURTH AMENDMENT

Our legal system moves slowly via common law evolution. A problem with evolutionary change, however, is that it can get stuck in what evolutionary theorists term a "local peak" in the fitness landscape—a suboptimal state that requires a large, discontinuous shove in order to come into better alignment with current conditions.⁹⁹ The Fourth Amendment, as it is now interpreted, is highly inadequate to protect the substantive privacy rights that Americans have always enjoyed. Unlike so many other rights, privacy in America today is actually in many respects far weaker than in the past.

It could be argued that our society has simply evolved toward requiring less privacy than individuals expected in the 18th century. It could be that all the liberationist social trends and movements in the years between have rendered a broad range of human activity simply less scandalous than it was in more straight-laced times.

Even so, privacy will never stop being a vital human right. If, as it often seems, our culture is evolving in a more open and freewheeling direction, where people feel more at liberty to disclose more things about themselves, that is all to the good. But it is important that such disclosures be voluntary, and under the individual's control, and that the framework of our fundamental rights remains sound. There is still a broad

⁹⁶ Rabban, *supra* note 47, at 131-132.

⁹⁷ Stephen E. Henderson, *Learning From All Fifty States: How To Apply the Fourth Amendment And its State Analogs To Protect Third Party Information From Unreasonable Search*, 55 *Cath. U.L. Rev.* 373 (2006); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Atkins v. Virginia*, 536 U.S. 304, 314-317 (2002).

⁹⁸ *Katz v. United States*, 389 U.S. 347, 350 (1967) (quotations omitted).

⁹⁹ See, e.g., Stuart Kauffman, *At Home in the Universe: The Search for the Laws of Self-Organization and Complexity* 149-90 (1995).

range of personal preference in our society when it comes to privacy intuitions and desires, and individuals still need the right to have those preferences respected as much as possible. Privacy does not mean keeping secrets. Rather, it means having the power to keep them if you wish, and especially not to be forcibly stripped of them by the government or others. While it is a sign of progress that people have less to fear from what might once have been ruinous disclosures, human beings will always need space to think and to converse privately, to experiment, to create and define themselves, and to exercise control over their reputations and “presentation of self” to various audiences.

With today’s accelerating technological revolution, however, the inadequacies of our Fourth Amendment law are facing a crisis point. The history of the First Amendment suggests that reform is possible when it comes to privacy, and there are several places to which we can look as sources for change: a vigorous line of Supreme Court dissents to key Fourth Amendment cases and state constitutional jurisprudence, which suggest alternative shapes for the law. And the originalist approach that Justice Scalia and others have taken to privacy suggests the basis for the kinds of Supreme Court coalitions necessary to change the direction of federal jurisprudence. We must work to make this happen, lest America become a meaner, less forgiving, less just, and less free place.

Birthright Citizenship: A Constitutional Guarantee

Elizabeth Wydra*

Since its ratification in 1868, the Fourteenth Amendment has guaranteed that “All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” Just a decade before this language was added to our Constitution, the Supreme Court held in *Dred Scott* that persons of African descent could not be citizens under the Constitution. Our nation fought a war at least in part to repudiate the terrible error of *Dred Scott* and to secure, in the Constitution, citizenship for all persons born on U.S. soil, regardless of race, color, or ancestry.

Against the backdrop of prejudice against newly freed slaves and various immigrant communities such as the Chinese and Gypsies, the Reconstruction Framers recognized that the promise of equality and liberty in the original Constitution needed to be permanently established for people of all colors; accordingly, the Reconstruction Framers chose to constitutionalize the conditions sufficient for automatic citizenship. Fixing the conditions of birthright citizenship in the Constitution—rather than leaving them up to constant revision or debate—befits the inherent dignity of citizenship, which should not be granted according to the politics or prejudices of the day.

Despite the clear intent of the Reconstruction Framers to grant U.S. citizenship based on the objective measure of U.S. birth rather than subjective political or public opinion, opponents of birthright citizenship continue to fight this constitutional guarantee. After the election of President Barack Obama, lawsuits were filed challenging his citizenship, including an action challenging President Obama’s citizenship at birth because, even though he was born in the United States to a U.S. citizen mother, his father was a citizen of Kenya. In Congress, bills have been introduced each year for more than a decade to end automatic citizenship for persons born on U.S. soil to parents who are in the country illegally.¹ In California, signatures are being gathered for a proposition that would create a sub-class of U.S.-born citizens by issuing different birth certificates to children born in the United States to undocumented immigrant parents.² Academics and national politicians have added to the movement’s momentum: in recent years, a small handful of academics have joined the debate and called into question birthright citizenship,³ and, in the 2008 presidential campaign, several Republican candidates expressed their skepticism that the Constitution guarantees

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¹ E.g., H.R. 6789, 110th Cong. (2008); H. R. Res. 46, 110th Cong. (2007); H.R. 1940, 110th Cong. (2007); H.R. 4192, 110th Cong. (2007); H.R. 3700, 109th Cong. (2005); H.R. 3938, 109th Cong. (2005); H.R. 698, 109th Cong. (2005); H.R. 7, 105th Cong. (1997); H.R. 346, 105th Cong. (1997); H.R. 1363, 104th Cong. (1995).

² The proposed initiative is entitled the California Taxpayer Protection Act of 2010. Its text is available at http://ag.ca.gov/cms_attachments/initiatives/pdfs/i801_initiative_09-0004.pdf.

³ E.g., Peter Schuck & Rogers Smith, *Citizenship Without Consent: Illegal Aliens in the American Polity* (1985); Charles Wood, *Losing Control of America’s Future*, 22 *Harv. J.L. & Pub. Pol’y* 465 (1999).

birthright citizenship.⁴ Though the most prominent proponents of ending birthright citizenship have been conservative, the effort has at times been bipartisan: Democratic Senator—and now Majority Leader—Harry Reid introduced legislation that would deny birthright citizenship to children of mothers who are not U.S. citizens or lawful permanent residents.⁵

Putting aside whether ending birthright citizenship is a good idea as a policy matter—and scholars, notably Margaret Stock,⁶ make compelling arguments that ending birthright citizenship would have disastrous practical consequences—the threshold question is whether Congress may properly consider ending automatic citizenship for persons born in and subject to the jurisdiction of the United States at all. (Proponents of ending birthright citizenship themselves seem to be unsure whether they need to amend the Constitution to achieve their goal, or may simply legislate around it—the sponsors of legislation to end automatic citizenship alternate between proposing amendments to the Constitution and simply proposing legislation that denies citizenship to children born in the United States to undocumented parents.)

A close study of the text of the Citizenship Clause and Reconstruction history demonstrates that the Citizenship Clause provides birthright citizenship to all those born on U.S. soil, regardless of the immigration status of their parents. Perhaps more importantly, the principles motivating the Framers of the Reconstruction Amendments, of which the Citizenship Clause is a part, suggest that we amend the Constitution to reject automatic citizenship at the peril of our core constitutional values. To revoke birthright citizenship based on the status and national origin of a child's ancestors goes against the purpose of the Citizenship Clause and the text and context of the Fourteenth Amendment.

I. THE TEXT OF THE FOURTEENTH AMENDMENT

The Reconstruction Framers' intent to grant citizenship to all those born on U.S. soil, regardless of race, origin, or status, was turned into the powerfully plain language of Section 1 of the Fourteenth Amendment: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."

The text of the ratified Citizenship Clause embodies the *jus soli* rule of citizenship, under which citizenship is acquired by right of the soil (contrasted with *jus sanguinis*, according to which citizenship is granted according to bloodline). Birthright citizenship is a form of "ascriptive" citizenship because one's political membership turns on

⁴ Joanna Klonsky, *The Candidates on Immigration*, Newsweek, Jan. 3, 2008 (noting that Republican presidential candidates Ron Paul, and Tom Tancredo support ending birthright citizenship); Jim Stratton, *Thompson Angers State Hispanics*, Orlando Sentinel, Sept. 29, 2007 (reporting that Fred Thompson publicly expressed support for rethinking birthright citizenship); Romney Eyeing End to Birthright Citizenship, July 22, 2007, <http://blogs.abcnews.com/politicalradar/2007/07/romney-still-lo.html> (explaining that Mitt Romney was looking into whether birthright citizenship could be ended legislatively or by constitutional amendment); Stephen Dinan, *Huckabee Retreats on Birthright Citizenship*, Wash. Times, Jan. 9, 2008 (noting that Mike Huckabee has at times expressed support for ending birthright citizenship).

⁵ S. 1351, 103d Cong., (1993); see James C. Ho, *Defining "American": Birthright Citizenship and the Original Understanding of the 14th Amendment*, 9 Green Bag 2d 367, 367-68 (2006) (discussing federal hearings and legislative proposals).

⁶ Margaret Stock, *Birthright Citizenship—The Policy Arguments*, 33 Admin. & Reg. L. News 7 (2007) (arguing that, even if the Fourteenth Amendment could be interpreted to allow a change from birthright citizenship, "such a change would be ill-advised from a policy perspective," and there is no evidence that changing the rule would reduce illegal immigration).

an objective circumstance—place of birth. The text of the Fourteenth Amendment is not the only place in the Constitution that reflects the notion that citizenship can accrue from the circumstances of one’s birth: Article II of the Constitution, provides that any “natural born citizen” who meets age and residency requirements is eligible to become President. Just as the Citizenship Clause sets forth birth on U.S. soil as the condition for citizenship—not race or bloodline—Article II specifies that the relevant qualification for the presidency of the United States is birth-conferred citizenship, not any particular ancestry.

This understanding of the Constitution’s treatment of citizenship has held for more than a century. Case law just after ratification of the Fourteenth Amendment interpreted the Citizenship Clause to confer automatic citizenship on persons born in the United States regardless of their parents’ immigration status. In the 1886 case of *Look Tin Sing*, the court held that a child of Chinese parents—who still retained their status as Chinese citizens, despite their presence in the United States—was a U.S. citizen under the Citizenship Clause because he was born on U.S. soil. As the court stated plainly, “It is enough that he was born here, whatever was the status of his parents.”⁷

Similarly, the U.S. Supreme Court has consistently read the Citizenship Clause to grant citizenship automatically to almost everyone born on U.S. soil.⁸ In the 1898 case of *United States v. Wong Kim Ark*, the Supreme Court carefully examined the history of citizenship generally and with respect to the Citizenship Clause. Based on this history and the text of the Fourteenth Amendment, the Court held that persons born within the United States, whose parents reside in the United States but remain citizens of a foreign country, are automatically U.S. citizens.⁹ The only exception to birthright citizenship recognized by the Court derives from the phrase “subject to the jurisdiction thereof,” which the Court reads to refer to the legal authority or control of the United States—a reading that excludes from automatic citizenship the children of foreign diplomats or hostile invaders, who are not subject to U.S. legal authority due to their diplomatic and combatant immunity.¹⁰

Under the Supreme Court’s longstanding reading, the “subject to the jurisdiction” language carves out from birthright citizenship only children of diplomats who are immune from prosecution under U.S. laws. Unquestionably, if undocumented aliens or their children commit a crime in the United States, they can be and are punished under U.S. law: they are subject to the jurisdiction of the United States.

This understanding of the Fourteenth Amendment has shaped our nation’s practices regarding citizenship for many decades, and guarantees that citizenship is based on an objective circumstance rather than on membership in any ethnic group or race. This reading of the text comports with the plain language of the Citizenship Clause and squares with the Clause’s legislative history.

II. THE HISTORY OF THE CITIZENSHIP CLAUSE

The current debate over the meaning of the Citizenship Clause also stands in stark contrast to the legislative debates occurring at the time Congress approved it: perhaps the most remarkable feature of the legislative history of the Citizenship Clause is that both its proponents and opponents *agreed* that it recognizes and protects birthright

⁷ In re *Look Tin Sing*, 21 F. 905, 910 (C.C.D. Cal. 1884).

⁸ *E.g.*, *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

⁹ *Id.* at 655-93.

¹⁰ *Id.* at 655-58.

citizenship for the children of aliens born on U.S. soil. The Reconstruction Congress did not debate the meaning of the Clause, but rather whether, based on their shared understanding of its meaning, the Clause embodied sound public policy by protecting birthright citizenship. For the most part, congressional opponents of birthright citizenship argued vigorously against it because, in their view, it would grant citizenship to persons of a certain race, ethnicity, or status that these opponents deemed unworthy of citizenship. Fortunately, these views did not carry the day. Instead, Congress approved a constitutional amendment that used an objective measure—birth on U.S. soil—to automatically grant citizenship to all those who satisfied this condition.

A. ORIGINS: THE CIVIL RIGHTS ACT OF 1866

The Reconstruction Framers' views of what granting citizenship to all children born "subject to the jurisdiction" of the United States would entail can be discerned not only from the debates over the Fourteenth Amendment, but also from the debates that same year over the Civil Rights Act, which included a nearly identical citizenship provision.¹¹ These debates establish two points fatal to the claims against birthright citizenship: first, that the drafters of the Reconstruction Amendments understood citizenship to be conferred automatically by birth, and second, that any child born on U.S. soil was a citizen, regardless of whether his or her parents were aliens, citizens, or slaves brought illegally into the country.

The intent to include children of aliens within birthright citizenship is clear from the floor debates of 1866. Members of Congress specifically debated the impact automatic citizenship would have on various immigrant groups that had recently migrated to the United States in significant numbers, notably the Chinese population in California and the West, and the Gypsy or Roma communities in eastern states such as Pennsylvania. Much of the nineteenth century hostility toward Chinese and Gypsy immigrants is similar to the resentment and distrust leveled at immigrants today from Latin American countries: concern that immigrants would take away good jobs from U.S. citizens (while exhibiting a willingness to allow immigrants to take jobs perceived as undesirable);¹² fear of waves of immigrants "invading" or overtaking existing

¹¹ The citizenship language of the 1866 Civil Rights Act provided: "All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States." 14 Stat. 27 (1866).

¹² Thomas Wuil Joo, *New "Conspiracy Theory" of the Fourteenth Amendment: Nineteenth Century Chinese Civil Rights Cases and the Development of Substantive Due Process Jurisprudence*, 29 U.S.F. L. Rev. 353, 358 (1995) (citations omitted):

Anti-Chinese sentiment was largely economically motivated; this is reflected in the Exclusion Acts, which were directed specifically at Chinese laborers. In the mid-1800s, Chinese laborers and gold prospectors entered a California economy where Native Americans and African-Americans were already seen as threats to free white labor. . . . Chinese entrepreneurs in the American West had experienced great early success in the cigarmaking and shoemaking industries, but the downturn in the Western economy in the 1870s, combined with anti-Chinese agitation from white competitors, drove the Chinese out of these businesses. The laundry business remained open to the Chinese because the whites considered it "menial and undesirable".

American communities;¹³ and distrust of different cultures and languages.¹⁴ These fears were expressed by some members of the Reconstruction Congress but were not allowed to influence the requirements for citizenship.

For example, early in the debates, an opponent to birthright citizenship—Senator Edgar Cowan, often cited by modern opponents of birthright citizenship—objected to the citizenship provision by asking whether “it will not have the effect of naturalizing the children of the Chinese and Gypsies born in this country.”¹⁵ Senator Trumbull stated that it would, “undoubtedly.”¹⁶ As Trumbull stated clearly in the face of Cowan’s xenophobic remarks, “the child of an Asiatic is just as much a citizen as the child of a European.”¹⁷ Echoing Trumbull’s definitive statement, Senator Morrill asked the Congress, “As a matter of law, does anybody deny here or anywhere that the native born is a citizen, and a citizen by birth alone?”¹⁸ Morrill cited “the grand principle both of nature and nations, both of law and politics, that the native born is a citizen, and a citizen by virtue of his birth alone.”¹⁹ To erase any doubt, he went on to state that “birth by its inherent energy and force gives citizenship.”²⁰

President Johnson clearly shared this view of what Congress was attempting to achieve in the citizenship language of the Civil Rights Act—which was why he vetoed it. In his message informing Congress of his veto of the original civil rights bill, Johnson noted that the provision of the bill that “all persons born in the United States, and not subject to any foreign power...are declared to be citizens of the United States” “comprehends the Chinese of the Pacific States” and “the people called Gypsies, as well as the entire race designated as blacks, people of color, negroes, mulattoes, and persons of African blood.”²¹ President Johnson understood the bill to provide that “[e]very individual of those races, born in the United States, is by the bill made a citizen of the United States.”²²

B. ENACTMENT: THE FOURTEENTH AMENDMENT

The Reconstruction Framers were undeterred by President Johnson’s opposition. Not only did they re-enact the Civil Rights Act over the President’s veto, but just two months after Johnson specifically vetoed the Act’s citizenship provision, Congress ensured the permanence of birthright citizenship by incorporating it into the Fourteenth

¹³ See, e.g., Cong. Globe, 39th Cong., 1st Sess. 497 (1866) (statement of Sen. Van Winkle) (stating that the citizenship language is “one of the gravest subjects submitted to the people of the United States, and it involves not only the negro race, but other inferior races that are now setting on our Pacific coast, and perhaps involves a future immigration to this country of which we have no conception.”). See generally Walter Otto Weyrauch & Maureen Bell, *Autonomous Lawmaking: The Case of the “Gypsies,”* 103 *Yale L.J.* 323, 342 n.60 (1993) (noting that the United States adopted immigration policies in the 1880s to restrict the entrance of Gypsies).

¹⁴ See, e.g., Cong. Globe, 39th Cong., 1st Sess. 499 (1866) (statement of Sen. Cowan) (arguing that, if the door to citizenship be opened to the “barbarian races of Asia and or of Africa. . . there is an end to republican government”).

¹⁵ Cong. Globe, 39th Cong., 1st Sess. 498 (1866).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Cong. Globe, 39th Cong., 1st Sess. 570 (1866).

¹⁹ *Id.*

²⁰ *Id.* Senator Trumbull made similar statements, explaining that “birth entitles a person to citizenship, that every free-born person in this land, is, by virtue of being born here, a citizen of the United States.” Cong. Globe, 39th Cong., 1st Sess. 600 (1866).

²¹ Cong. Globe, 39th Cong., 1st Sess. 1679 (1866).

²² *Id.*

Amendment. On May 29, 1866, during Congress's debates over the Fourteenth Amendment, Senator Jacob Howard of Michigan proposed adding language that would ultimately be ratified as the Citizenship Clause. He explained that his proposed addition would declare "that every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States."²³

Both opponents and supporters of the amendment shared the view that this language automatically granted citizenship to all persons born in the United States (except children of foreign ministers and invading armies).²⁴ In fact, opponents of the Fourteenth Amendment's Citizenship Clause objected to it precisely because they understood it to constitutionally protect birthright citizenship for children of aliens born on U.S. soil. For example, Senator Cowan expressed concern that the proposal would expand the number Chinese in California and Gypsies in his home state of Pennsylvania by granting birthright citizenship to their children, even (as he put it) the children of those who owe no allegiance to the United States and routinely commit "trespass" within the United States.²⁵

Supporters of Howard's proposal did not respond by taking issue with Cowan's understanding, but instead by agreeing with it and defending it as a matter of sound policy. Senator John Conness of California declared:

The proposition before us . . . relates simply in that respect to the children begotten of Chinese parents in California, and it is proposed to declare that they shall be citizens. . . . I am in favor of doing so. . . We are entirely ready to accept the provision proposed in this constitutional amendment, that the children born here of Mongolian parents shall be declared by the Constitution of the United States to be entitled to civil rights and to equal protection before the law with others.²⁶

The legislative history of the Citizenship Clause demonstrates that the drafters of the Clause—and their political opponents—knew that the provision would grant automatic citizenship to persons born on U.S. soil regardless of their parents' race, national origin, or status. Whether the members of the Reconstruction Congress understood the Citizenship Clause to be a welcomed turn toward equality—and voted for

²³ Cong. Globe, 39th Cong., 1st Sess. 2545 (1866).

²⁴ In addition, while the view was not held unanimously, the prevailing sentiment was that the Citizenship Clause did not apply to American Indians. In 1870, a Senate Judiciary Committee report on the impact of the Fourteenth Amendment on Indian tribes concluded that Indians who retained tribal status were not subject to U.S. jurisdiction within the meaning of the Amendment's citizenship provisions. S. Rep. No. 41-268 (1870). In 1884, the Supreme Court held that persons born into Indian tribes were not citizens by birth under the Fourteenth Amendment because, while the tribes were "within the territorial limits of the United States," they were "distinct political communities." *Elk v. Wilkins*, 112 U.S. 94, 99 (1884). Justice Harlan dissented, arguing that the majority's result was not what the Fourteenth Amendment had intended. *Id.* at 122 (Harlan, J., dissenting). The debate was resolved in the early 1900s, however, when, as the federal government dissolved the legal authority and independence of the Native American tribes, Congress extended citizenship to Indians. See Sarah H. Cleveland, Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs, 81 *Tex. L. Rev.* 1, 64 (2002).

²⁵ Cong. Globe, 39th Cong., 1st Sess. 2890-91 (1866).

²⁶ Cong. Globe, 39th Cong., 1st Sess. 2891 (1866). See generally Ho, *supra* note 5, at 368-69 (discussing the Cowan-Conness exchange).

it—or a worrisome invitation to foreign migrants—and voted against it—both sides agreed on the enacted Clause’s meaning.

III. THE PRINCIPLES OF THE FOURTEENTH AMENDMENT

While the text and history and of the Citizenship Clause demonstrate the intent and effectuation of the Reconstruction Framers’ desire to enshrine automatic birthright citizenship in the Constitution, the principles behind Reconstruction may be even more relevant to the current challenge to birthright citizenship.

Given the intensity of our national debate over immigration, it comes as little surprise that the special targets of the attacks on birthright citizenship are children of undocumented immigrants. Some observers contend that birthright citizenship provides a strong incentive to those outside our borders to enter the country illegally in order to give birth on U.S. soil and thereby secure automatic citizenship for their child. These undocumented aliens, the argument continues, often hope the United States will grant citizenship to them as well for the sake of the children. They argue that the Congress should pass legislation that prospectively denies citizenship to children of undocumented aliens.

At the time the Fourteenth Amendment was drafted, opinions on race and ethnicity were passionately held and forcefully debated. The *Dred Scott* decision—which was specifically overruled through the Citizenship Clause—demonstrates why the Reconstruction Framers drafted the Clause to place the class of persons eligible for citizenship beyond debate. Dissenting from the majority’s opinion that, under its view of the Constitution, “citizenship at that time was perfectly understood to be confined to the white race,”²⁷ Justice Curtis noted the potential dangers if Congress were empowered to enact at will “what free persons, born within the several States, shall or shall not be citizens of the United States.”²⁸ Curtis noted that if the Constitution did not fix limitations of discretion, Congress could “select classes of persons within the several States” who could alone be entitled to the privileges of citizenship, and, in so doing, turn the democratic republic into an oligarchy.²⁹

Even on the floor of the U.S. Senate, xenophobic and racist sentiments were freely expressed and some senators sought to have these beliefs reflected in the citizenship laws. The Framers of the Fourteenth amendment wisely rejected these attempts, and created a Constitution that gave citizenship automatically to anyone, of any color or status, born within the United States. The provision of citizenship by birthright was constitutionalized to place the question of who should be a citizen beyond the mere consent of politicians and the sentiments of the day, and logically so.³⁰ After cataloguing the discriminatory enactments of the slaveholding states, it would have made no sense for the Reconstruction Framers to have made the citizenship of freed slaves open to easy revocation if these states regained legislative power.³¹ Indeed, Senator Hotchkiss specifically raised this fear with respect to the Fourteenth Amendment,

²⁷ 60 U.S. (19 How.) 393, 419 (1856).

²⁸ *Id.* at 577-78.

²⁹ *Id.*

³⁰ See 1 Joseph Story, Commentaries on the Constitution of the United States 653 (Thomas M. Cooley ed., 4th ed. 1873) (noting that the Fourteenth Amendment constitutionalized the conditions sufficient for citizenship because “the rights of a class of persons still suffering under a ban of prejudice could never be deemed entirely secure when at any moment it was within the power of an unfriendly majority in Congress to take them away by repealing the act which conferred them”).

³¹ See Cong. Globe, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Trumbull).

which was originally drafted simply to allow Congress to enforce the protections of the Constitution rather than to enumerate the specific rights and guarantees it eventually embodied. He noted the possibility that “rebel states” could gain power in the Congress and strip away the rights envisioned by the Reconstruction Framers, unless these rights were “secured by a constitutional amendment that legislation cannot override.”³² The wisdom of the Reconstruction Framers in placing the conditions of citizenship above majority action was confirmed when exclusionary immigration laws were passed just after the Fourteenth Amendment was ratified. Had the racial animus of the Chinese Exclusion Laws, passed in the 1880s,³³ been incorporated into the text of the Citizenship Clause, the amendment would be a source of shame rather than an emblem of equality.

The current, inflammatory invocation of “anchor babies” by opponents to birthright citizenship further confirms the good judgment of the Framers of the Fourteenth Amendment in placing the question of citizenship beyond “consent” of the political majority at any given point in time. Indeed, claims of which immigrants were “worthier” of citizenship than others were present at the time the Citizenship Clause was enacted. In his veto message, President Johnson objected to the discrimination made between “worthy” foreigners, who must go through certain naturalization procedures because of their “foreign birth,” and conferring citizenship on “all persons of African descent, born within the extended limits of the United States” who Johnson did not feel were as prepared for the duties of a citizen.³⁴ The drafters of the Fourteenth Amendment rejected such distinctions, and instead provided us with a Constitution that guarantees equality and grants citizenship to all persons born in the United States, regardless of color, creed, or origin. The text of the Citizenship Clause grants automatic citizenship to all persons born on U.S. soil so that minority groups do not need to win a popular vote to enjoy the privileges and immunities of U.S. citizenship—they simply have to be born here.

IV. DEBUNKING MODERN ARGUMENTS AGAINST BIRTHRIGHT CITIZENSHIP

Despite the strength of the argument—rooted in text, history, and long-standing Supreme Court precedent—that birthright citizenship applies to U.S.-born children regardless of the parents’ immigration status, there is a growing audience for an argument that Congress may deny birthright citizenship to the children of undocumented aliens through legislation. Over the years, several bills and ballot initiatives have been proposed to accomplish exactly that.³⁵ Douglas Kmiec, a professor at Pepperdine University School of Law, and then an informal advisor to Governor Mitt Romney,

³² Cong. Globe, 39th Cong., 1st Sess. 1095 (1866).

³³ The first Chinese Exclusion Act, which, as the name suggests, singled out immigrants of Chinese origin, was passed in 1873. The anti-immigrant sentiment against the Chinese in the late nineteenth century is similar to the arguments made today against Latin American immigrants, both in terms of fears that the immigrant group would overtake the existing majority and perceived threats to labor (except for unwanted, menial jobs). See Charles J. McClain, Jr., *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-1870*, 72 Cal. L. Rev. 529, 535 (1984) (illustrating that as more Chinese arrived in the United States, resentment against them began to build).

³⁴ Cong. Globe, 39th Cong., 1st Sess. 1679 (1866).

³⁵ *E.g.*, James C. Ho, *Birthright Citizenship, the Fourteenth Amendment, and the Texas Legislature*, 12 Tex. Rev. L. & Pol. 161, 161 n.1 (2007) (citing examples).

reportedly concluded that there is a “better than plausible argument” that Congress may legislatively eliminate or adjust the practice of birthright citizenship.³⁶

A. THE “ALLEGIANCE” RED HERRING

The arguments for congressional authority to limit birthright citizenship are all reliant upon an expansive interpretation of the term “subject to the jurisdiction” of the United States. For example, some opponents of birthright citizenship dispute that the Citizenship Clause embodies the *jus soli* definition of citizenship and instead argue that it confers citizenship only to children of those who give their complete allegiance to the United States. Under this view, because citizens of foreign countries still owe “allegiance” to a foreign sovereign, children born on U.S. soil to non-U.S. citizen parents do not owe complete allegiance to the United States. This argument is misleading and based on flawed premises. To be sure, the congressional debates over the Citizenship Clause include occasional references to “allegiance,” which some commentators use to argue that the Citizenship Clause protects only the children of those who owe complete and exclusive allegiance to the United States. But, even if “allegiance” were the defining characteristic of birthright citizenship, the Reconstruction Framers understood allegiance to spring from the place of one’s birth, not the citizenship status of one’s parents. The 1866 debates show that allegiance is not inconsistent with birthright citizenship, because a person “owes allegiance to the country of his birth, and that country owes him protection.”³⁷ Similarly, one of the opinions from the *Dred Scott* decision, which was the backdrop against which the Citizenship Clause was drafted, acknowledged that “allegiance and citizenship spring from the place of birth.”³⁸

This understanding of allegiance deriving from one’s place of birth underscores the Reconstruction Framers focus on the *child* born within the United States, not the status of his parents. The text of the Citizenship Clause thus refers to “[a]ll persons born ... within the United States” and not *all persons born of parents born* within the United States. The Reconstruction Framers expressly recognized this distinction: Senator Trumbull remarked that “the infant child of a foreigner born in this land is a citizen of the United States long before his father.”³⁹ Some even acknowledged that birthright citizenship could encourage immigration, noting that the civil rights bill was “not made for any class or creed, or race or color, but in the great future that awaits us will, if it become a law, protect every citizen, including the millions of people of foreign birth who will flock to our shores to become citizens and to find here a land of liberty and law.”⁴⁰

Case law from the period confirms this view. The case of *Lynch v. Clarke*, cited in the 1866 debates,⁴¹ stated that “children born here are citizens without any regard to

³⁶ Teddy Davis, Romney Weathers “Illegal Worker” Allegations, ABC News, Feb. 13, 2007, available at <http://abcnews.go.com/Politics/Story?id=2873594&page=1>.

³⁷ Cong. Globe, 39th Cong., 1st Sess. 570 (1866).

³⁸ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 586 (1856) (Curtis, J., dissenting) (explaining his belief that, because the Constitution did not provide the federal government with the power to determine which native-born inhabitants were citizens, this power was retained by the States, which could enact their own citizenship rules with regard to persons born on that State’s soil).

³⁹ Cong. Globe, 39th Cong., 1st Sess. 1757 (1866).

⁴⁰ Cong. Globe, 39th Cong., 1st Sess. 1833 (1866).

⁴¹ Cong. Globe, 39th Cong., 1st Sess. 1832 (1866).

the political condition or allegiance of their parents.”⁴² The court held that “every person born within the dominions and allegiance of the United States, *whatever were the situation of his parents*, is a natural born citizen.”⁴³ Ten years after the *Lynch* case, the then-Secretary of State Marcy wrote in a letter opinion that “every person born in the United States must be considered a citizen of the United States, notwithstanding one or both of his parents may have been alien at the time of his birth.”⁴⁴ Thus, even if the relevant measure of citizenship were “allegiance” rather than birth within the territory of the United States, birthright citizenship would still be the constitutional rule.

B. EXCEPTING FOREIGN DIPLOMATS IS NOT THE SAME AS EXCEPTING ALL FOREIGNERS

Opponents of birthright citizenship also cite a statement by Senator Howard, who introduced the language of the Citizenship Clause, that the amendment would “not, of course, include persons born in the United States who are foreigners, aliens, who belong to the families of ambassadors or foreign ministers accredited to the Government of the United States, but will include every other class of persons.”⁴⁵ But if Howard was intending to list several categories of excluded persons (*e.g.*, foreigners, aliens or families of diplomats) he could have said so. The language he used strongly suggests he was describing a single excluded class, limited to families of diplomats.

This interpretation of the Reconstruction Framers’ views on the classes of persons excluded from birthright citizenship is clarified by a statement made just six days prior to Senator Howard’s introduction of the Citizenship Clause. In an exchange on the Senate floor, Senator Wade acknowledged a colleague’s suggestion that some persons born on U.S. soil might not be automatically granted citizenship, stating “I know that is so in one instance, in the case of the children of foreign ministers who reside ‘near’ the United States, in the diplomatic language.”⁴⁶ He went on to explain that children of foreign ministers were exempt not because of an “allegiance” or consent reason, but because there is a legal fiction that they do not actually reside on U.S. soil: “By a fiction of law such persons are not supposed to be residing here, and under that fiction of law their children would not be citizens of the United States.”⁴⁷

In light of the legislative history described above, it is highly unlikely that Senator Howard’s comment regarding foreign diplomats means what opponents to birthright citizenship claim. A single comment plucked out of context should not be used to sweep aside the overwhelming text, history, and principles that point to the opposite conclusion.

C. THE MISGUIDED “CONSENT” THEORY

Finally, in a modification of the “allegiance” argument, some opponents of birthright citizenship contend that the phrase “subject to the jurisdiction thereof” was originally understood, and is best read, as incorporating into the Fourteenth Amendment a theory of citizenship based on mutual consent, which would exclude

⁴² 1 Sand. Ch. 583 (N.Y. Ch. 1844).

⁴³ *Id.* at 663 (emphasis added).

⁴⁴ Letter from March 1854.

⁴⁵ Cong. Globe, 39th Cong., 1st Sess. 2545 (1866).

⁴⁶ Cong. Globe, 39th Cong., 1st Sess. 2769 (1866).

⁴⁷ *Id.*

children of parents present in the United States illegally (because the United States has not “consented” to their presence). Not only does this consent theory require an impossibly distorted reading of the text of the Citizenship Clause, it is directly contrary to the principles of the Fourteenth Amendment. “Subject to the jurisdiction of” the United States is not the same as “subject to the consent of” the United States Congress. Rather than implying governmental consent, the term “jurisdiction” generally refers to legal authority or control, and the phrase “subject to the jurisdiction thereof” most naturally refers to anyone within the territory of a sovereign and obliged to obey that authority.⁴⁸

If the Reconstruction Framers truly intended to allow Congress to grant or withdraw its consent to citizenship for certain children born on U.S. soil, the actual wording of the Fourteenth Amendment was an exceedingly odd way of rendering it. If those who drafted and ratified the amendment wanted to leave the matter within the control and consent of the national legislature, as opponents of birthright citizenship contend, it would have been far more sensible to draft and ratify an amendment that expressly authorized Congress to establish citizenship requirements for those born on U.S. soil, rather than expressly conferring citizenship on all persons born in the United States and subject to the jurisdiction thereof. Or, if the Citizenship Clause was intended to confer citizenship according to the citizenship status or “allegiance” of a child’s parents, the Reconstruction Framers could have focused on conditions to be met by the parents, instead of specifying conditions sufficient for a child to automatically be granted citizenship. But the drafters of the Citizenship Clause were not poor wordsmiths and they chose to do none of those things. Instead, they devised a rule that is elegantly simple and intentionally fixed.

Perhaps most importantly, the idea that the conditions of citizenship could be modified by the “consent” of Congress, as advocated by those who believe Congress may legislate away birthright citizenship for children born to undocumented immigrants, would have been anathema to the Reconstruction Framers. The Framers of the Fourteenth Amendment believed that providing citizenship to persons born in the United States without regard to race or color was a long-overdue fulfillment of the promise of inalienable freedom and liberty in the Declaration of Independence. Inalienable rights are not put to a vote, and thus the Fourteenth Amendment “conferred no authority upon congress to restrict the effect of birth, declared by the constitution to constitute a sufficient and complete right to citizenship.”⁴⁹ Rather than leaving it to the “caprice of Congress,” the framers of the Fourteenth Amendment intended to establish “a constitutional right that cannot be wrested from any class of citizens, or from the citizens of any State by mere legislation.”⁵⁰ The history of the Citizenship Clause demonstrates that the Reconstruction Framers constitutionalized the conditions sufficient for citizenship precisely to enshrine automatic citizenship

⁴⁸ E.g., Webster’s Encyclopedic Unabridged Dictionary 1039 (1996) (defining “jurisdiction” as “the right, power, or authority to administer justice by hearing and determining controversies” and, more broadly, as “power; authority; control”). See also *Downes v. Bidwell*, 182 U.S. 244 (1901) (concluding that the phrase “subject to the jurisdiction” embraces U.S. territories); *United States v. Bevens*, 3 Wheat. 336, 386 (1818) (Marshall, C.J.) (“the jurisdiction of a State is coextensive with its territory.”); Alan Tauber, *The Empire Forgotten: The Application of the Bill of Rights to U.S. Territories*, 57 Case Western Res. L. Rev. 147, 160 (2006) (suggesting “subject to the jurisdiction” refers to areas under U.S. military control, particularly in view of the condition of the southern States after the end of the Civil War).

⁴⁹ *United States v. Wong Kim Ark*, 169 U.S. 649, 703 (1898).

⁵⁰ Cong. Globe, 39th Cong., 1st Sess. 1095 (1866).

regardless of whether native-born children were members of a disfavored minority group or a welcomed band of ancestors.

Not only do the arguments against birthright citizenship require utter disregard for the express provisions of the Constitution, they encourage us to abandon the precise reasons behind those enactments. The text, history, and principles of the Citizenship Clause make clear that we should not tinker with the genius of this constitutional design.

Trying Terrorism Suspects in Article III Courts: The Lessons of *United States v. Abu Ali*

Stephen I. Vladeck *

To say that it is difficult to divorce from the politics of the moment the ongoing debate over the suitability of trying terrorism suspects in the Article III courts¹ would be an epic understatement. Recent months have witnessed a renewed barrage of objections to subjecting such extraordinary cases to the ordinary processes of our criminal justice system. These critiques have included claims that such trials: make the city in which they occur a target for future attacks; provide the defendants with a platform from which to spew anti-American propaganda; risk publicly revealing information about counterterrorism sources and methods; prove to be costly both with regard to the security measures they require and the judicial resources they consume; and put pressure on the courts to sanction exceptional departures from procedural or evidentiary norms that will eventually become settled as the rule—what we might characterize as the potential “distortion effects.”²

A number of different institutions and organizations have issued reports providing various quantitative and qualitative assessments of the work of the Article III courts in post-September 11 terrorism cases. Although the reports differ in material ways, they all reflect to some degree a sentiment expressed quite pointedly in the *Terrorist Trial Report Card* prepared by the NYU Center on Law and Security, *i.e.*, that “the overwhelming evidence suggests that the structures and procedures, as well as the substantive precedents, provide a strong and effective system of justice for alleged crimes of terrorism.”³

* Professor of Law, American University Washington College of Law. This Issue Brief is derived from a longer article forthcoming in the *Texas Law Review*. See Stephen I. Vladeck, *Terrorism Trials and the Article III Courts After Abu Ali*, 88 *Tex. L. Rev.* (forthcoming 2010). This Issue Brief was first released by ACS in August 2010.

¹ I use the term “Article III courts” to refer to the federal court system created by Congress pursuant to Article III of the U.S. Constitution, which established the Supreme Court and “such inferior Courts as the Congress may from time to time ordain and establish.” U.S. CONST. art. III, § 1.

² Although these critiques have appeared in any number of places, one of the most concise discussions can be found in Michael B. Mukasey, Op-Ed., *Jose Padilla Makes Bad Law*, *WALL ST. J.*, Aug. 22, 2007, at A15. On the idea of “distortion effects,” see Stephen I. Vladeck, *Foreword: National Security’s Distortion Effects*, 32 *W. NEW ENG. L. REV.* 285 (2010).

³ CTR. ON LAW AND SEC., N.Y.U. SCH. OF LAW, *TERRORIST TRIAL REPORT CARD 5* (2010), available at <http://www.lawandsecurity.org/publications/TTRCFinalJan14.pdf>.

In this Issue Brief, I aim to test that thesis against one of the more significant of the post-September 11 criminal prosecutions to date—the trial of Ahmed Omar Abu Ali.⁴ Abu Ali’s case is thought-provoking on any number of levels, including:

- the strange (and potentially troubling) circumstances in which it began—with Abu Ali filing a habeas petition while he was in Saudi custody, claiming that he was being tortured at the behest of the U.S. government;
- the uniqueness of the charges against him—which included conspiracy to assassinate the President in addition to a host of more conventional post-September 11 terrorism counts;
- the procedural innovations adopted by the district court to allow Saudi intelligence officials to provide remote deposition testimony outside the presence of the defendant;
- the thorny question of whether *Miranda* applied to certain statements that Abu Ali gave while in Saudi custody, albeit with American interrogators in the room—the only substantive issue at trial to divide the three-judge panel of the Fourth Circuit on appeal; and
- the clear violation of the Sixth Amendment’s Confrontation Clause at trial that both the district court and Fourth Circuit held to constitute harmless error.

As I demonstrate, *Abu Ali* is a microcosm both of the unique difficulties these cases present and the ways in which such issues have generally been resolved by federal trial judges exercising creativity and flexibility.

I. THE *ABU ALI* LITIGATION

A. BACKGROUND AND DISTRICT COURT DECISION

Ahmed Omar Abu Ali is a U.S. citizen born in Texas and raised in the Virginia suburbs of Washington, D.C.⁵ In September 2002, at the age of 21, he left home to study at the Islamic University in Medina, Saudi Arabia. Nine months later, he was arrested by officers of the Mabahith—the counterterrorism security forces of the Saudi Ministry of the Interior. The Mabahith came to believe that he was affiliated with the terrorist cell (“al-Faq’asi”) responsible for the May 12, 2003 suicide attacks in Riyadh that had killed 34 people, including nine Americans, and that he was involved in planning for future al-Faq’asi and al Qaeda attacks on U.S. soil.

Abu Ali was initially detained in Medina. The warden of the facility where he was detained “adamantly denied that Mr. Abu Ali was tortured, beaten, deprived of sleep, or questioned in Medina.” Abu Ali, on the other hand, alleged that he was not fed on his first day in custody, and that Saudi officials hit him, slapped him, punched him in the stomach, and pulled his beard, ears, and hair on the night of his arrest. Abu Ali

⁴ See generally *United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 1312 (2009).

⁵ The facts are variously taken from three sources: for the district court’s decision denying Abu Ali’s motion to suppress and motion to dismiss the criminal indictment, see *United States v. Abu Ali*, 395 F. Supp. 2d 338, 343–46 (E.D. Va. 2005); for the Fourth Circuit’s decision affirming Abu Ali’s conviction, see *Abu Ali*, 528 F.3d at 221–26; and for the D.C. district court’s decision denying the government’s motion to dismiss Abu Ali’s habeas petition, see *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 31–36 (D.D.C. 2004). It bears emphasizing that, at least in the last opinion, the facts alleged in Abu Ali’s habeas petition were taken as true in order to resolve the government’s motion to dismiss. See *id.* at 31 n.1.

would further testify that the beatings continued on his second day in custody, but ceased after he agreed to cooperate with the investigation. Contrary to testimony given by Saudi officials, who claimed that he was not interrogated in Medina, Abu Ali maintained that he was interrogated on both the second and third days there.

Several days after his arrest, Abu Ali was transported to a prison in Riyadh, where he made a number of incriminating statements regarding his participation in past and future terrorist plots. His principal interrogators in Riyadh—the Brigadier General and the Captain of the Mabahith who ran the prison—would later stringently deny that they directed, participated in, or were aware of any government official torturing Abu Ali or engaging in any such behavior. Both officials would testify that their interrogations began in the evening and continued into the early morning hours, but insisted that this was customary in Saudi Arabia because of the country’s very hot weather, and not an attempt to deprive Abu Ali of sleep. These officials also testified that Abu Ali was granted breaks, access to food, water, a bathroom, and refreshments during breaks in questioning. Abu Ali himself conceded that “Riyadh wasn’t as bad as Medina,” because he wasn’t beaten and the food was much better, though he described his interrogations as “very intense,” and complained he was placed in solitary confinement and left handcuffed to a chain hanging from the ceiling one night in September 2003, which he assumed was punishment for telling an FBI agent that he was mistreated while in Medina.

On June 15, 2003, at the request of the U.S. government, the Mabahith allowed several officials from the FBI and the Secret Service to observe an interrogation of Abu Ali through a two-way mirror. The American officials observed while Saudi interrogators asked Abu Ali six of the thirteen questions requested by the FBI and Secret Service. Meanwhile, in the United States, the FBI obtained and executed a search warrant at Abu Ali’s home in Virginia on June 16, 2003.

It is undisputed that Abu Ali remained in Saudi custody from the date of his capture—June 8, 2003—until February 21, 2005, and that he was repeatedly interrogated by the Mabahith while in custody, interrogations that included at least some questions provided by the FBI and Secret Service agents who were there to observe. Further, Abu Ali alleged that he was subjected on numerous occasions to torture and other coercive interrogation methods by his Saudi captors, although the bulk of his allegations would eventually be deemed un-credible by the trial judge in his criminal case.

Nevertheless, in July 2004, Abu Ali’s parents filed a habeas petition on his behalf in the D.C. district court. Although Abu Ali was in Saudi custody, his parents claimed, *inter alia*, that the Saudis were detaining Abu Ali entirely at the behest of the U.S. government (and perhaps even to avoid the oversight of the U.S. courts); that U.S. officials were involved in Abu Ali’s interrogation; that the Saudi government would immediately release Abu Ali to American officials upon a formal request from the U.S. government; and that Abu Ali was therefore in the “constructive custody” of the United States sufficient to trigger the power of the U.S. courts. The government, rather than responding to Abu Ali’s claims on the merits, moved to dismiss, arguing that Supreme Court precedent barred the district court from exercising jurisdiction.

In a thorough opinion handed down in December 2004, the district court denied the government’s motion to dismiss, holding that Abu Ali’s allegations, if true, were sufficient to establish jurisdiction. Judge Bates proceeded to “authorize expeditious jurisdictional discovery . . . to further explore [Abu Ali’s] contentions.” Such discovery never took place, though. Instead, six weeks after his ruling, on February 3, 2005, a federal grand jury in Alexandria, Virginia, returned an indictment against Abu Ali.

Shortly thereafter, Abu Ali was surrendered to U.S. authorities (perhaps vindicating one of the central claims of his habeas petition), and flown back to the United States, appearing in court for the first time on February 22, 2005—the day after he returned. Eventually, he was charged with nine distinct offenses, including several material support charges, and charges relating to conspiracies to (1) assassinate President Bush; (2) commit aircraft piracy; and (3) destroy aircraft.

Shortly after the indictment was filed, in March 2005, the government moved under Rule 15 of the Federal Rules of Criminal Procedure for an order allowing it to depose Saudi witnesses—in particular Mabahith officers—in Saudi Arabia. Over Abu Ali's objection, such depositions were taken in July 2005, using procedures that, whatever their merits, were certainly novel. As the Fourth Circuit would later summarize,

As Saudi citizens who reside in Saudi Arabia, the Mabahith officers were beyond the subpoena power of the district court. Given this limitation, the United States government officially inquired into whether the Saudi Arabian government would allow the officers to testify at trial in the United States. The Saudi government denied this request, but permitted the officers to sit for depositions in Riyadh. As represented by counsel for the United States, this was a first in Saudi-American relations: the Saudi government had never before allowed such foreign access to a Mabahith officer.

Given the possibility of taking the deposition in Riyadh, the district court found it impractical for Abu Ali to travel to Saudi Arabia for two reasons. First, it would have been difficult for United States Marshals to maintain custody of Abu Ali while in Saudi Arabia. Second, the fact that Abu Ali committed his offenses in Saudi Arabia might subject him to prosecution overseas, complicating—if not precluding—his return to the United States to face trial.⁶

In light of the practical obstacles, the district court sought to create deposition procedures that would allow the examination of the witnesses but still protect Abu Ali's rights. Thus, “[a]t the court's directive, two defense attorneys, including Abu Ali's lead attorney, attended the depositions in Saudi Arabia, while a third attorney sat with Abu Ali in Virginia. Two attorneys for the government and a translator were also present in the room in Saudi Arabia while the Mabahith officers were being deposed.” Moreover, “A live, two-way video link was used to transmit the proceedings to a courtroom in Alexandria. This permitted Abu Ali and one of his attorneys to see and hear the testimony contemporaneously; it also allowed the Mabahith officers to see and hear Abu Ali as they testified.”

To replicate normal conditions as best as possible, the testimony was transcribed by a court reporter in real time, and separate cameras recorded both the witnesses and Abu Ali, so that the jury could see their reactions. Judge Lee presided from his courtroom in Alexandria, ruling on objections as they arose. Finally, Abu Ali had the ability to communicate with his defense counsel in Saudi Arabia during the frequent breaks in the proceedings via cell phone.

⁶ *Abu Ali*, 528 F.3d at 239 (4th Cir. 2008) (citation omitted).

Abu Ali next moved to suppress the admission of the Mabahith officers' deposition testimony, along with various inculpatory statements he made while in Saudi custody, and for dismissal of the indictment. Among other claims, Abu Ali:

alleges that he was tortured while in Saudi custody and that the statements he allegedly made in detention are, therefore, involuntary and must be suppressed. . . . Mr. Abu Ali [also] contends that the United States and the Saudi Government acted as partners or "joint venturers" in his arrest and lengthy detention in Saudi Arabia.⁷

After taking nearly two weeks of testimony in connection with Abu Ali's motions, the district court issued a painstaking 113-page opinion concluding that "the government has met its burden of proving that Mr. Abu Ali's statements were voluntary, and that the alleged defects in the aforementioned searches and Indictment do not violate Mr. Abu Ali's rights under the Fourth or Sixth Amendments."

With regard to Abu Ali's motion to suppress, the district court first concluded that Abu Ali's statements to the Saudi interrogators were voluntary, and not the result of "gross abuse" or "inherently coercive conditions." Despite recognizing that the voluntariness of the statements must be determined by the "totality of the circumstances," the court's discussion focused specifically on whether or not Abu Ali had been tortured.

The district court rested its holding that the statements were voluntary on the following four findings: (1) the Saudi Lieutenant Colonel, who was the warden at the Medina facility, represented that Abu Ali had not been tortured or questioned in Medina, and his testimony was held to be more credible than Abu Ali's allegations he had been tortured and abused; (2) the testimony of the Saudi Captain and Brigadier General, who both asserted that Abu Ali had not been tortured or abused while in custody at Riyadh, and that Abu Ali did not appear to have been abused at the time they questioned him, was credible as well; (3) the testimony of both Saudi Arabian and American officials regarding Abu Ali's behavior throughout the period from June 11–15, 2003, was credible, and did not coincide with the likely behavior a recently beaten person would exhibit; and (4) the testimony of Saudi and American officials also indicated that Abu Ali was concerned that the United States would find out he was in Saudi custody, and this concern raised serious questions about Abu Ali's claims of torture because "[i]t stretches credibility to think that a United States citizen who had just been beaten and tortured days before by foreign law enforcement officials would not want the United States to know that he was in custody abroad and was being tortured."

The court was also skeptical of Abu Ali's own account of his torture; it remarked that some aspects of his testimony "just do not flow logically," and expressed apprehension over its inability to discern "whether Mr. Abu Ali is sincere or just cunning." A particular point of contention was Abu Ali's inability to describe the object that hit him (even though he was blindfolded and chained to the floor), because, Judge Lee remarked, "it seems . . . that he could, at the very least, provide some basic description of what the item might have been based on how it felt to him." And based on its factual

⁷ *Abu Ali*, 395 F. Supp. 2d at 341.

findings related to the conclusion that Abu Ali's statements were voluntary, the court further concluded that his treatment did not "shock the conscience."

Next, the district court turned to the *Miranda* issue, and whether the involvement of FBI and Secret Service agents in parts of Abu Ali's interrogation rendered it a "joint venture," to which *Miranda* would apply. Based on the hearing testimony, the court concluded that: (1) U.S. law enforcement officials did not act in a "joint venture" with Saudi officials in the arrest, detention, or interrogation of the defendant; and (2) Saudi law enforcement officials did not act as agents of U.S. law enforcement officials, and therefore *Miranda* warnings were not required.

In arriving at this holding, the court did not define its understanding of "active" or "substantial" participation, nor did it draw on comparisons from relevant case law. Instead, Judge Lee concluded that the evidence clearly demonstrated that Saudi government officials arrested Abu Ali based on their own information and interest in interrogating him as a suspected member of a local terrorist cell; that the U.S. government did not learn of the defendant's arrest until after it occurred; and that FBI agents were not present or involved with any of the interrogations prior to June 15, 2003—"when virtually all of the incriminating statements sought to be suppressed were made"—or on July 18 and 24, when the defendant hand-wrote and videotaped his confession.

Although the court acknowledged that FBI and Secret Service agents *were* permitted to observe the June 15 interrogation (in which six out of the thirteen questions the FBI and Secret Service drafted were asked by the Saudi interrogators), it nevertheless concluded that "[t]he FBI and Secret Service were not allowed to determine the content or the form of the questions" asked during the interrogation." And because of its conclusion that the interrogation was not a joint venture, the court similarly concluded that the Fourth Amendment simply did not apply to the search of Abu Ali's dorm room in Medina. As for the search of his parents' home in Falls Church, Judge Lee concluded that the voluntary statements made by Abu Ali in his earlier interrogations provided more than sufficient probable cause.

At roughly the same time, the district court was also considering the government's request pursuant to the Classified Information Procedures Act (CIPA) to introduce classified evidence at trial memorializing the communications between Sultan Jubran and Abu Ali. Because Abu Ali's chosen defense counsel did not possess security clearances (and were therefore not authorized to view classified documents), the district court appointed a CIPA-cleared attorney to assist in Abu Ali's defense. The government first produced copies of the unredacted documents at issue to Abu Ali's CIPA-cleared counsel on October 14, 2005. Three days later, the government provided Abu Ali's uncleared defense counsel with slightly redacted copies of the documents, and informed Abu Ali and his counsel that the government planned to "offer these communications into evidence at trial as proof that the defendant provided material support to al-Qaeda." As the Fourth Circuit would later explain, "the declassified versions provided the dates, the opening salutations, the entire substance of the communications, and the closings, and had only been lightly redacted to omit certain identifying and forensic information."

On October 19, 2005, the government filed an *in camera, ex parte* motion pursuant to section 4 of CIPA, seeking a protective order prohibiting testimony and lines of questioning that would lead to the disclosure of classified information contained in the documents memorializing the communications between Sultan Jubran and Abu Ali. The district court curiously ruled that the government could use the "silent witness"

procedure to disclose classified information contained in these communications to the jury at trial, even though Abu Ali himself would only be able to see the redacted version of the documents. Abu Ali responded by filing a motion arguing that the government must either declassify the documents in their entirety, or that the court must order the government to provide Abu Ali and his uncleared defense counsel the dates and manner in which the communications were obtained by the U.S. government. The purpose of the request was apparently to ascertain whether the government had discovered the existence of the communications prior to Abu Ali's arrest by Saudi officials—which would presumably strengthen Abu Ali's argument that his confessions to Saudi officials resulted from a "joint venture" with American law enforcement officers. The district court, after an *in camera* CIPA hearing, concluded that the communications were discovered independently from the Saudi government's investigation (and were therefore not the product of a joint venture), and held that the redacted version of the documents provided to Abu Ali therefore "me[t] the defense's need for access to the information."

Otherwise, Abu Ali's trial proceeded largely without incident. On November 22, 2005, the jury returned a verdict convicting him on all charges. Judge Lee subsequently sentenced him to 360 months imprisonment, followed by a term of 360 months of supervised release. Abu Ali appealed his conviction and sentence to the Fourth Circuit; the government cross-appealed his sentence.

B. APPELLATE HISTORY

On appeal, Abu Ali reiterated many of the claims he had advanced at trial. As relevant here, he first challenged the admission of his statements to the Saudi interrogators on the ground that they were involuntary and, in any event, were taken in violation of *Miranda*. Second, he argued that the government failed adequately to corroborate his confessions. Third, Abu Ali claimed that the introduction of the Mabahith officials' deposition testimony violated his rights under the Sixth Amendment's Confrontation Clause. Fourth, Abu Ali challenged the government's introduction of classified evidence at trial (to which he was not privy) as a further violation of the Confrontation Clause. In an 80-page, jointly-authored opinion,⁸ Judges Wilkinson, Motz, and Traxler rejected nearly all of Abu Ali's arguments.⁹

First, with regard to the *Miranda* issue, Judges Wilkinson and Traxler read prior precedent as establishing that "mere presence at an interrogation does not constitute the 'active' or substantial' participation necessary for a 'joint venture,' but coordination and direction of an investigation or interrogation does." Based on the findings made by the district court, the majority thereby affirmed Judge Lee's conclusion that Abu Ali's interrogation was not a joint venture, and that the introduction of his statements at trial was therefore not a violation of *Miranda*. As Judges Wilkinson and Traxler explained,

the Saudis were always in control of the investigation. It is clear to us, as it was to the district court, that the Mabahith never acted as a mouthpiece or mere conduit for their American counterparts.

⁸ The only exceptions are footnotes 5 and 6, the former of which spoke for Judges Wilkinson and Traxler on the *Miranda* "joint venture" issue, and the latter of which spoke for Judge Motz. *See id.* at 229–31 nn.5–6.

⁹ Judge Motz filed a separate dissent with regard to the majority's decision to vacate and remand Abu Ali's sentence. *See id.* at 269–82 (Motz, J., dissenting).

Based on these findings, we are convinced, as was the district court, that American law enforcement officials were not trying to ‘evade the strictures of *Miranda*,’ and the June 15 interrogation did not rise to the level of a joint venture.¹⁰

Judge Motz dissented on this point—the only trial-related issue that divided the otherwise unified panel. In her words,

Whatever else “active” or “substantial” participation may mean, when United States law enforcement officials propose the questions propounded by foreign law enforcement officials, and those questions are asked in the presence of, and in consultation with United States law enforcement officials, this must constitute “active” or “substantial” participation. After all, the purpose of an interrogation is to obtain answers to questions about criminal or otherwise dangerous activity. Drafting the questions posed to a suspect thus constitutes the quintessential participation in an interrogation. It differs in kind from observation of an interrogation, or rote translation of an interrogator’s questions and a suspect’s responses. Observers and translators undoubtedly gain important information from a suspect’s answers as well as from his behavior and demeanor, but those who formulate the questions asked during an interrogation actually direct the underlying investigation.¹¹

However, because Judge Motz agreed with Judges Wilkinson and Traxler that any error was harmless beyond a reasonable doubt, the panel unanimously concluded that *Miranda* provided no basis for reversal. Similarly, the panel agreed with the district court that, separate from *Miranda*, Abu Ali had failed to demonstrate that his confessions were involuntary. As such, the district court correctly denied his motion to suppress.

Second, as to the independent corroboration issue, the Fourth Circuit conceded that the government’s other evidence did not independently prove Abu Ali’s guilt. Nonetheless, the court explained that corroborating proof was sufficient so long as it “‘tend[ed] to establish’—not establish—‘the trustworthiness’ of the confession.” The government, according to the Fourth Circuit, “offered significant independent circumstantial evidence tending to establish the trustworthiness of Abu Ali’s confessions.” In support, the court noted that the record included evidence that an al-Qaeda cell member identified Abu Ali as a member of the cell, as well as documents containing two of Abu Ali’s aliases recovered from the al-Qaeda safe house, and caches of weapons, explosives, cell phones, computers, and walkie-talkies found in the al-Qaeda safe house (all of which Abu Ali had described in his confessions). This evidence, as well as evidence gathered from Abu Ali’s dormitory and home in Virginia, were held to corroborate Abu Ali’s statements that he had long wanted to join al-Qaeda, to further its goals, and to provide it with support and assistance. Moreover, according to the panel, “[p]erhaps the strongest independent evidence corroborating Abu Ali’s

¹⁰ *Id.* at 230 n.5 (majority opinion).

¹¹ *Id.* at 231 n.6.

confessions were two coded communications: one from him to Sultan Jubran occurring a day after the arrest of other cell members and the other from Sultan Jubran to him several days later.”

Third, as to whether the ad hoc procedures devised for taking the deposition testimony of the Mabahith officials violated Abu Ali’s Confrontation Clause rights, the Fourth Circuit concluded that the district court’s creative approach adequately protected Abu Ali. Relying on the Supreme Court’s decision in *Maryland v. Craig*,¹² the Court of Appeals concluded that the two conditions articulated in *Craig* for admitting testimony taken in the absence of the defendant—that the testimony in the defendant’s absence be “necessary to further an important public policy,” and that “the reliability of the testimony is otherwise assured”—were both met.

With respect to *Craig*’s first prong, the panel began with the observation that “[t]he prosecution of those bent on inflicting mass civilian casualties or assassinating high public officials is . . . just the kind of important public interest contemplated by the *Craig* decision.” Moreover, “[i]f the government is flatly prohibited from deposing foreign officials anywhere but in the United States, this would jeopardize the government’s ability to prosecute terrorists using the domestic criminal justice system.” Thus, because “requiring face-to-face confrontation here would have precluded the government from relying on the Saudi officers’ important testimony,” the court held that the admission of the Mabahith officials’ deposition testimony satisfied the first prong of *Craig*.

Applying the second part of the *Craig* test, the Court of Appeals noted in detail the myriad steps the district court undertook to attempt to assure the reliability of the Mabahith officials’ testimony:

First, the Saudi witnesses testified under oath. While the oath used in this case, at the suggestion of defense counsel, was apparently an oath used in the Saudi criminal justice system, we cannot conclude, without more, that such an oath failed to serve its intended purpose of encouraging truth through solemnity. The oath used here was similar in most respects to the oath used in American judicial proceedings, and the appellant raised no objection to the oath in his briefs. Second, as discussed earlier, defense counsel was able to cross-examine the Mabahith witnesses extensively. Finally, the defendant, judge, and jury were all able to observe the demeanor of the witnesses. Both the defendant and the judge were able to view the witnesses as they testified via two-way video link, and the jury watched a videotape of the deposition at trial. This videotape presented side-by-side footage of the Mabahith officers testifying and the defendant’s simultaneous reactions to the testimony.¹³

¹² See *Maryland v. Craig*, 497 U.S. 836 (1990).

¹³ *Id.* at 241–42.

Finally, the panel turned to the Confrontation Clause error at trial—the disclosure to the jury via the “silent witness” procedure of classified information (the documents memorializing communications between Sultan Jubran and Abu Ali following the May 2003 Mabahith raids in Medina), while Abu Ali had received only the redacted, unclassified version of the documents. As the court explained:

[F]or reasons that remain somewhat unclear to us, the district court granted the government’s request that the complete, unredacted classified document could be presented to the jury via the “silent witness” procedure. The end result, therefore, was that the jury was privy to the information that was withheld from Abu Ali.¹⁴

Concluding that the “silent witness” procedure is meant to keep classified information from the *public*, but not the defendant, the panel noted that “CIPA does not . . . authorize courts to provide classified documents to the jury when only [extremely redacted] substitutions are provided to the defendant.” Moreover, there was no room to “balance a criminal defendant’s right to see the evidence that will be used to convict him against the government’s interest in protecting that evidence from public disclosure.” Instead, “If the government does not want the defendant to be privy to information that is classified, it may either declassify the document, seek approval of an effective substitute, or forego its use altogether. What the government cannot do is hide the evidence from the defendant, but give it to the jury.”

Nevertheless, the panel concluded that the government’s error (and the concomitant violation of the Confrontation Clause) were harmless. Abu Ali and his uncleared counsel were given copies of the declassified versions of the communications well in advance of trial, and there was no information in the classified versions that, according to the Court of Appeals, they would not have already prepared for in considering the declassified versions. Instead, “the information that had been redacted from the declassified version was largely cumulative to Abu Ali’s own confessions and the evidence discovered during the safe house raids, which were presented to the jury.”

Notwithstanding the numerous significant legal issues implicated by the district court’s and Fourth Circuit’s decisions, Abu Ali’s subsequent petition for a writ of certiorari to the Supreme Court raised only the Confrontation Clause error, and whether such Sixth Amendment violations could *ever* be “harmless.” Without comment or dissent, the Supreme Court denied certiorari on February 23, 2009. On remand to the district court for resentencing, Judge Lee resentenced Abu Ali to life in prison, which Abu Ali has again appealed to the Fourth Circuit. Short of a surprising change of direction from the Court of Appeals on the sentencing issue, however, it is there that his legal proceedings are likely to come to a close.

II. THE THREE HARD QUESTIONS RAISED BY *ABU ALI*

As noted above, although Abu Ali’s trial and appeal raised a number of legal issues, three stand out as particularly interesting and unique: (1) the hybrid and ad hoc procedures that the district court fashioned in order to allow for the deposition testimony of the Mabahith officials; (2) the *Miranda* / “joint venture” question, and the Fourth Circuit’s divided approach to that issue; and (3) the CIPA / Confrontation Clause error, and the question of whether such errors really can be harmless. As the

¹⁴ *Id.* at 254.

following discussion suggests, what these issues have in common is the extent to which their resolution simultaneously demonstrates the flexibility that federal courts can exercise in these cases and the potential dangers lurking in the background for the rights of defendants.

A. HYBRID DEPOSITION PROCEDURES

In its current form, Rule 15 of the Federal Rules of Criminal Procedure requires the presence of a defendant who is “in custody” at any pre-trial deposition, except where the defendant waives his right to be present, or “persists in disruptive conduct justifying exclusion after being warned by the court that disruptive conduct will result in the defendant’s exclusion.” As cases like *Abu Ali* demonstrate, though, it is increasingly likely that circumstances will arise in which it is impossible to simultaneously secure the testimony of individuals outside the United States while guaranteeing the presence of the defendant. Thus, courts have increasingly recognized circumstances—such as those in *Abu Ali*—where depositions taken outside the defendant’s presence do not violate the Confrontation Clause.

Mindful of these concerns, the Advisory Committee on Federal Rules of Criminal Procedure has proposed revisions to Rule 15 that would allow depositions outside the defendant’s presence whenever a trial court finds that:

- (1) the witness’s testimony could provide substantial proof of a material fact in a felony prosecution; (2) there is a substantial likelihood the witness’s attendance at trial cannot be obtained; (3) the defendant cannot be present at the deposition or it would not be possible to securely transport the defendant to the witness’s location for a deposition; and (4) the defendant can meaningfully participate in the deposition through reasonable means.¹⁵

The proposed revision, though, raises both practical and constitutional concerns, as a trio of Latham & Watkins lawyers have demonstrated in an insightful recent article.¹⁶ In particular, the new rule would run roughshod over the requirement articulated in *Craig* that testimony taken outside the defendant’s presence be “necessary to further an important public policy.” Although one may well be convinced by the Fourth Circuit’s analysis in *Abu Ali* that the ability effectively to prosecute crimes related to transnational terrorism *is* an important public policy that would justify the accommodation, it is not at all clear that the same argument would hold for lesser crimes—even if they are felonies, all the new rule would require. Indeed, that concern was at the heart of the en banc Eleventh Circuit’s decision in the *Yates* case,¹⁷ cited and distinguished in *Abu Ali*. As the Latham & Watkins lawyers explain, “Unless limitations are placed on this potentially sweeping category of federal crimes, the concerns articulated by the *Yates* court—a lack of specific factual findings and insufficiently important public policies—will be realized.” Thus, the authors instead cite

¹⁵ CONF. COMM. ON RULES OF PRACTICE & PROCEDURE, JUDICIAL CONFERENCE, SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 20–21 (2009).

¹⁶ See Barry M. Sabin et al., PROPOSED CHANGES TO FEDERAL RULE OF CRIMINAL PROCEDURE 15: LIMITATIONS, TECHNOLOGICAL ADVANCES, AND NATIONAL SECURITY CASES *in* CTR. ON LAW AND SEC., N.Y.U. SCH. OF LAW, TERRORIST TRIAL REPORT CARD, *supra* note 3, at 35.

¹⁷ See *United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006) (en banc).

with approval Judge Lee's painstaking accommodations in *Abu Ali*, noting both the specific findings of an important public policy and the myriad steps Judge Lee took to preserve the reliability of the testimony. Lee's procedures, they note, are a model in both form and substance, since they recognize the need to accommodate the foreign witnesses while adopting innovative protections for the defendant and his counsel.

Equally significant, though, is a separate point made by the Latham & Watkins lawyers in their critique of the proposed revisions to Rule 15: as technology improves, the issues that such remote depositions might raise could largely subside. Thus, as they note with regard to just one example:

telepresence is a relatively new technology capable of full-duplex, high-definition, immersive video conferencing. The premise behind this new generation of video conferencing is that the experience should emulate as much as possible the experience of sitting across a table from the other party, to the point that some telepresence systems forego a mute button. The picture is 1080p full high-definition, there is little or no sound delay, and it includes the capability to show a document directly to the opposing side in realtime. Telepresence further reduces the distinction between virtual and in-person confrontation. Conversely, video testimony may actually improve other senses by, for example, zooming in on the witness's face or amplifying sounds. As telepresence becomes more accessible and the technology continues to improve, the drawbacks of two-way video depositions decrease significantly.¹⁸

This point may seem simplistic, but when tied together with *Abu Ali*, it shows how a combination of judicial creativity and technological advancement can help courts strike the balance between the defendant's right to confront the witnesses against him and the unique logistical impediments that can arise when prosecuting complex transnational terrorism cases. *Abu Ali* may well have struck the appropriate balance, but only because of the case-specific decisions made by the trial court.

B. JOINT VENTURE AND GOVERNMENTAL CUSTODY ISSUES

Perhaps the most controversial aspect of the *Abu Ali* litigation was the "joint venture" issue—whether U.S. officials were sufficiently involved in Abu Ali's interrogations at the hands of the Mabahith such that *Miranda* should have applied. Moreover, and unlike the unique deposition and CIPA issues that had arisen, the question of when *Miranda* kicks in with regard to overseas interrogations of individuals in some form of joint custody is likely to be one that will recur time and again in the ensuing years.

To recap, the Fourth Circuit split on the substance of this issue, although they agreed that any *Miranda* error was harmless. On the merits, Judges Wilkinson and Traxler concluded that the critical fact was that "the Mabahith 'determined what questions would be asked, determined the form of the questions, and set the length of the interrogation.' In fact, the Saudi interrogators refused to ask a majority of the questions submitted by the United States, and asked a number of their own questions during the interrogation." Thus, "we are convinced, as was the district court, that American law enforcement officials were not trying to "evade the strictures of *Miranda*." Judge

¹⁸ See Sabin et al., *supra* note 16, at 38.

Motz, in contrast, believed that the critical fact was that questions presented by U.S. officials were answered by the defendant. Or, as she put it, “when United States law enforcement officers provide the questions to be asked of a suspect by cooperating foreign law enforcement officials, they clearly have engaged in ‘active’ or ‘substantial’ participation such that any resultant interrogation becomes a joint venture.”

It bears emphasizing that the judges were fighting over inches of jurisprudential real estate. But the inches are significant. The question presented in *Abu Ali* was unprecedented; no prior case involved U.S. officials submitting questions specifically to be asked of U.S. citizens by foreign interrogators on foreign soil. And so the answer really reduces to formalism versus functionalism—do the U.S. officials actually have to play a formal role in *running* the interrogation to trigger the “joint venture” doctrine, or is it enough that the interrogation *includes* questions that, but for the U.S. involvement, the foreign interrogators might not have asked.

To their credit, both sides marshaled forceful policy arguments in support of their view. Thus, Judges Wilkinson and Traxler emphasized that:

such a broad per se holding [requiring *Miranda*] could potentially discourage the United States and its allies from cooperating in criminal investigations of an international scope. Both the United States and foreign governments may be hesitant to engage in many forms of interaction if the mere submission of questions by a United States law enforcement officer were to trigger full *Miranda* protections for a suspect in a foreign country’s custody and control. To impose all of the particulars of American criminal process upon foreign law enforcement agents goes too far in the direction of dictation, with all its attendant resentments and hostilities. Such an unwarranted hindrance to international cooperation would be especially troublesome in the global fight against terrorism, of which the present case is clearly a part.¹⁹

Not to be outdone, Judge Motz emphasized how the majority’s view “permits United States law enforcement officers to strip United States citizens abroad of their constitutional rights simply by having foreign law enforcement officers ask the questions. This cannot be the law.”

The answer may well be somewhere in between; a formal rule requiring *Miranda* whenever U.S. officials submit questions to foreign interrogators may well have the chilling effect described by Judges Wilkinson and Traxler, and an equally formal rule *not* requiring *Miranda* unless U.S. officials are actually *running* the interrogation may create the perverse incentives identified by Judge Motz. Instead, the question may well need to turn on the motive of the U.S. officials, notwithstanding the Court’s increasing hostility toward subjective tests in the context of criminal procedure jurisprudence.

But either way, perhaps the larger point to take away is that the *Miranda* issue in *Abu Ali* is not unique to terrorism cases. Although it is probably safe to conjecture that a disproportionately high percentage of cases in which this issue arises will involve terrorism-related charges, the merits of the legal question are in no way tied to any consideration of the underlying offense. Put another way, the rhetoric of Judges Wilkinson and Traxler notwithstanding, foreign interrogations of U.S. citizens raise

¹⁹ United States v. Abu Ali, 528 F.3d 210, 230 n.5 (4th Cir. 2008).

complicated *Miranda* questions whether or not the citizen is suspected of terrorism-related offenses. Thus, and unlike the Rule 15 issue presented in *Abu Ali*, which turned to a large degree on the government's case-specific policy interests, the *Miranda* issue is usefully capable of generalization.

C. THE SILENT WITNESS PROCEDURE

Last, we come to the one error with regard to which everyone is in agreement: the district court's surprising and unjustified use of the "silent witness" procedure at trial, pursuant to which the jury was privy to classified information even though the defendant had access only to the redacted, declassified version. In one sense, the error was usefully small: the portion of the communications to which Abu Ali lacked access did not go to their substance, but rather to Abu Ali's claim that the government had learned of their existence prior to his arrest, which would bolster his "joint venture" argument. Nevertheless, the Fourth Circuit was unequivocal in concluding that the introduction of such evidence was necessarily a violation of Abu Ali's Confrontation Clause rights, albeit one that the other evidence against him rendered harmless.

Unless one is taken by Abu Ali's argument in his petition for certiorari that certain Confrontation Clause claims should not be subject to harmless error analysis (an argument that runs against a substantial body of precedent), the real lesson from this aspect of the *Abu Ali* litigation may just be that mistakes will be made, but the Supreme Court's increasing embrace of harmless error principles heavily mitigates the consequences of those mistakes. Indeed, it was harmless error that created consensus on the *Abu Ali* panel with regard to the *Miranda* issue, and it was harmless error that rendered the Confrontation Clause violation a non-issue. In that regard, it may well be telling that Abu Ali's petition for certiorari did not challenge the Fourth Circuit's conclusion that the Confrontation Clause error *was* harmless; it challenged whether, categorically, it *could* be.

A number of scholars have wondered whether the Supreme Court in recent years has taken harmless error doctrine too far. But leaving that debate for another day, it seems clear that, as with the *Miranda* issue in *Abu Ali*, the harmless error question does not in any meaningful way turn on the centrality of terrorism and national security concerns in the litigation. That would change, of course, if the Confrontation Clause error was *not* harmless, but in a way, this observation proves the point. After all, the flaw in Abu Ali's case was *not* that the law failed to provide adequate means of balancing the government's national security interests with the defendant's right to a fair trial; the flaw was that the trial court, for whatever reason, failed to follow the law.

III. CONCLUSION

In sum, then, *Abu Ali* emerges as an unvarnished example of how the civilian criminal justice system can handle high-profile criminal terrorism cases raising novel logistical challenges. The thoughtful procedure devised by Judge Lee to allow the Mabathith officials to testify while protecting the defendant's Confrontation Clause rights are a model that courts should follow (and *have* followed). More generally, this innovative procedure demonstrates how technology and national security can actually help *cabin* proposed changes to the Federal Rules of Criminal Procedure. After all, if such innovation can exist within the present framework, what need is there for hasty changes to rules that have long served the interests of justice? The principled disagreement over whether Abu Ali's interrogation constituted a "joint venture" raises a fascinating question of constitutional criminal procedure that turns in no meaningful substantive

way on the fact that his was a terrorism trial. And the clear Confrontation Clause violation resulting from the trial court's use of the "silent witness" rule shows both the settling effect of harmless error doctrine and the extent to which the flaws sometimes derive not from the laws, but from the judges who apply them.

None of these points, on their own, does anything to conclusively establish the feasibility of civilian criminal trials for *all* terrorism suspects, including the 9/11 defendants. If *Abu Ali* proves anything, it is that every case raises a unique set of practical, procedural, and substantive challenges. But perhaps it proves a bit more: where unique national security concerns are implicated, *Abu Ali* suggests that courts will attempt to reach accommodations that take into account both the government's interest and the fundamental protections to which defendants are entitled, keeping in mind Justice Frankfurter's age-old admonition that "the safeguards of liberty have frequently been forged in controversies involving not very nice people."²⁰ *Abu Ali* reminds us that sometimes, the law is set up properly to resolve the tension between the government's interests and the defendant's rights, even if reasonable minds could argue (in this area of the law, as in any other) that judges sometimes get it wrong.

Indeed, what *Abu Ali* might drive home most forcefully is just how seriously Article III judges from across the political spectrum take their responsibility in these cases—not just to the litigants, but to their institution and its posterity. I suspect that Judges Wilkinson, Motz, and Traxler meant to pay far more than lip service to this idea in the opening pages of their joint opinion for the Fourth Circuit, where, in one voice, they emphasized that:

Persons of good will may disagree over the precise extent to which the formal criminal justice process must be utilized when those suspected of participation in terrorist cells and networks are involved. There should be no disagreement, however, that the criminal justice system does retain an important place in the ongoing effort to deter and punish terrorist acts without the sacrifice of American constitutional norms and bedrock values. . . . [T]he criminal justice system is not without those attributes of adaptation that will permit it to function in the post-9/11 world. These adaptations, however, need not and must not come at the expense of the requirement that an accused receive a fundamentally fair trial.²¹

²⁰ United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).

²¹ *Abu Ali*, 528 F.3d at 221.

Free Riding on Families: Why the American Workplace Needs to Change and How to Do It

Phoebe Taubman*

When we think about the resources required to power our 21st century, 24/7 economy, we may think of electricity to run our factories and office buildings, fuel to power delivery trucks and airplanes, and technology to speed our communications. We may even think about the human power it takes to produce the goods and services bought and sold each day. But how many of us also remember the often unpaid work of caring for families, upon which we all rely and without which our economy would founder?

Our economy is built on the invisible and free labor of millions who provide essential care to their families, whether it is the education and socialization of the next generation of workers or the comfort and care of the elderly. Unpaid family carework produces extensive benefits for society as a whole. Yet much like the natural resources of the earth, we have long relied on the resource of family care without fully recognizing its value, and we often go so far as to penalize those who provide it.

The vast majority of unpaid caregiving work is done by women, and the cost to them is staggering. In the United States, motherhood is the single biggest risk factor for poverty among women in old age.¹ For every two years a woman is out of the workforce, her earnings fall 11%, and this “mommy penalty” stays with her for the rest of her life.² One study measured the pay gap between prime-age working men and women over a 15-year period and found that the women earned only 38% of what the men did during that time—a 62% wage gap—in large part because of lost wages and pay penalties arising from time taken off for caregiving.³

Our society as a whole also incurs real costs from our failure to value and support the work of caring. Families, not just women, suffer from the motherhood pay gap as they rely on the earnings of mothers who bring home over one third of total family income in married-couple households.⁴ Employers suffer from the loss of highly-qualified women who have left the paying workforce to care for family, only to find it dif-

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¹ ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED* (Henry Holt & Co. 2001).

² Heather Boushey, Senior Economist, Center for Economic and Policy Research, *Perspectives on Work/Family Balance and the Federal Equal Employment Opportunity Laws: Meeting of the EEOC* (Apr. 17, 2007), available at <http://www.eeoc.gov/eeoc/meetings/archive/4-17-07/boushey.html>.

³ *Strengthening the Middle Class: Ensuring Equal Pay for Women: Hearing Before the H. Comm. on Educ. & Labor*, 110th Cong. (2007) (statement of Heather Boushey, Senior Economist, Center for Economic and Policy Research), available at <http://www.cepr.net/index.php/publications/testimony/middle-class-equal-pay/>.

⁴ *Id.*

difficult to return and resume their careers.⁵ As a society, we suffer from the increased health costs associated with work/life conflict. One recent report pointed to a correlation between parental work-family conflict and childhood obesity, and highlighted increased rates of anxiety disorders and substance dependence among parents who reported work/family stress.⁶

For a country whose politicians tout family values, the United States has done little to confront these costs and support the critical work that families provide. Compare our public policies to those of our peers around the world. One hundred and seventy-seven nations guarantee leave with income to women in connection with childbirth.⁷ Seventy-four countries ensure paid paternity leave or the right to paid parental leave for fathers.⁸ The United States guarantees no paid leave for mothers in any segment of the work force—putting it in the company of Liberia, Papua New Guinea, Samoa, Sierra Leone, and Swaziland—and no paid paternity or parental leave for fathers.⁹ Today, 163 countries guarantee a minimum number of paid sick days for short- or long-term illness, with 155 providing a week or more per year.¹⁰ In the United States, we have no guarantee of paid sick days, and even among workers who do have sick leave, only 30% can use that time to care for sick children.¹¹ In 1997, the European Union issued a directive to its member states seeking to eliminate discrimination against part-time workers, the majority of whom are women, and improve the quality of part-time work.¹² In the United States, part-time workers are routinely excluded from labor and employment laws and courts have generally rejected their claims of discrimination based on part-time status.

Our workplace norms and laws were developed over 50 years ago when a different workforce model and a different family model prevailed. In 1960, 70% of families had at least one parent at home full time,¹³ but today 70% of children are growing up in families headed by either a single working parent or two working parents.¹⁴ In 1975, 47% of mothers with children under 18 years of age were in the workforce; today 71% of them are working outside the home.¹⁵ Today, one in five Americans provides care to

⁵ SYLVIA ANN HEWLETT & CAROL BUCK LUCE, *OFF-RAMPS AND ON-RAMPS: KEEPING TALENTED WOMEN ON THE ROAD TO SUCCESS* (Harvard Business School Press 2005).

⁶ Kelleen Kay & David Gray, New American Foundation, *The Stress of Balancing Work and Family: The Impact on Parents and Child Health and the Need for Workplace Flexibility* (Oct. 2007), *available at* http://www.newamerica.net/publications/policy/stress_balancing_work_and_family.

⁷ Jody Heymann & Alison Earle, *Raising the Global Floor: Dismantling the Myth that We Can't Afford Good Working Conditions for Everyone*, Capitol Hill Briefing, Nov. 17, 2009 (on file with author). Additional statistics and information can be found at <http://raisingtheglobalfloor.org/>.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Vicky Lovell, Institute for Women's Policy Research, *No Time to be Sick: Why Everyone Suffers When Workers Don't Have Paid Sick Leave* 9, Table 3 (2004), *available at* <http://www.iwpr.org/pdf/B242.pdf>.

¹² Council Directive 97/81 1998 O.J. (L 14) 9-14, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:014:0009:0014:EN:PDF>.

¹³ Multistate Working Families Consortium, *Family Values at Work: It's About Time* 5 (2008), *available at* <http://www.kidscount.org/news/May2008/PDFs/FV@workSummary1.pdf>.

¹⁴ Heather Boushey, Center for American Progress, *Equal Pay for Breadwinners* 8 (Jan. 2009), *available at* http://www.americanprogress.org/issues/2009/01/gender_economy_report.html.

¹⁵ *Women in the Labor Force: A Databook* (2009 Edition), Table 7: Employment status of women by presence and age of youngest child, March 1975-2008, Bureau of Labor Statistics, *available at* <http://stats.bls.gov/cps/wlftable7.htm>.

another adult, and the number will only grow as baby boomers age.¹⁶ Despite these tectonic shifts in our workforce demographics, and the altered reality for most American families, our laws and policies retain an embedded bias against working families that is harming a majority of workers today and preventing them from realizing their full potential both at work and at home. It is time to adapt our laws to reflect and support the way Americans live and work today.

Each section of this Issue Brief discusses a potential change in law or policy that would recognize families' contributions to our economy and begin to value that work. Some of these ideas are already being considered and/or implemented in a variety of U.S. cities and states, as well as overseas, and all of them should be pursued more broadly at the local, state, and federal level. Such reforms would provide meaningful, immediate support to families who are struggling to provide and care for their loved ones, and would set us on a path toward a more family-friendly workplace culture for the future.

I. PAID FAMILY LEAVE

The Family and Medical Leave Act (FMLA), passed in 1993, is the only federal law designed to address the issue of work/family integration. It guarantees eligible employees up to 12 weeks of job-protected unpaid leave to recover from their own serious illness, to care for and bond with a newborn or newly adopted child, or to care for a relative with a serious illness. As such, it is a major first step in the effort to recognize and support the work of caring for families in public policy. Still, the legislative compromises necessary to pass the bill left gaping holes, through which millions of individuals and families fall. The statute's exclusion of employers with fewer than 50 employees excludes 53% of the private workforce from its protections.¹⁷ Furthermore, because leave guaranteed by the FMLA is unpaid, many workers who are eligible to take time off cannot afford to do so. According to one study, more than three out of four employees did not take FMLA leave because they could not afford it.¹⁸ In addition, the FMLA's requirement that eligible employees work at least 1,250 hours in the year before they take leave excludes a significant share of part-time workers, including many mothers and workers balancing multiple part-time jobs. By some estimates, only 20% of new mothers are covered and eligible for FMLA leave.¹⁹

Although there has been movement in Congress to amend the FMLA to provide paid leave and cover more workers, most of the activity on this front has been at the state level. Multiple states have passed laws to extend the protections of family and medical leave to more employees by lowering the threshold number of employees an employer must have to be covered and reducing the number of hours an employee must work before taking leave.²⁰ In Maine, for example, all private employers with 15 or more employees are covered and employees are eligible for ten weeks of family

¹⁶ National Alliance for Caregiving & AARP, Caregiving in the U.S. iv (2005), available at <http://www.caregiving.org/data/04execsumm.pdf>.

¹⁷ Betty Holcomb, National Partnership for Women and Families, Why Americans Need Family Leave Benefits and How they Can Get Them 1 available at <http://www.nationalpartnership.org/site/DocServer/WhyAmericansNeedFamilyLeaveBenefits.pdf?docID=1058>.

¹⁸ *Id.*

¹⁹ ELIZABETH RUDD, SLOAN WORK AND FAMILY RESEARCH NETWORK, FAMILY LEAVE: A POLICY CONCEPT MADE IN AMERICA (2004).

²⁰ See National Conference of State Legislatures, State Family and Medical Leave Laws that Differ from the Federal FMLA (Sept. 2008).

medical leave every two years if they have worked for the same employer for 12 consecutive months.²¹ The Maine statute also expands on the FMLA by allowing leave for the birth of the employee's domestic partner's child and for care of a domestic partner, sibling, or domestic partner's child with a serious health condition.²² Laws such as Maine's can make a significant impact by guaranteeing more workers, including part-time workers and those working for smaller employers—many of whom are low-wage workers—the protections of the FMLA, including the right to return to the same or similar position after taking leave. This will become even more critical as states pass paid family leave laws, which provide some wage replacement for family caregivers, but generally do not guarantee job protection.

States are also at the forefront of providing paid family leave insurance. Five states and Puerto Rico already have temporary disability insurance (TDI) programs that provide benefits to workers unable to work because of a temporary disability developed off the job. These benefits have been available to pregnant women since the passage of the Pregnancy Discrimination Act, for use during the period of disability relating to pregnancy and childbirth. In 2004 and 2009, respectively, California and New Jersey extended their TDI programs to offer paid leave for workers who need to care for a seriously ill family member or bond with a new child. A similar proposal has been introduced and considered every year since 1999 in New York, which also has a TDI program. In addition, states that do not have established TDI programs are working to provide paid family leave. Washington passed a law in 2006 that will guarantee workers up to five weeks a year of paid leave to care for a newborn or newly adopted child.²³ The law will apply to all employers and all employees who have been employed for at least 680 hours during their qualifying year. The law also provides job protection to employees working for employers with more than 25 employees and who have been employed for at least 12 months, working at least 1,250 hours during the previous year. Unfortunately, without a clear funding route, and in the face of state budget shortfalls, implementation of the Washington program has been delayed until October 2012. Similar challenges may confront other states, such as Oregon and New Hampshire, which are considering paid family leave legislation.²⁴

Some have suggested that the federal government is best positioned to provide paid family leave insurance, advocating for use of the Social Security system to allow workers access to income during time off for caring activities or to recover from their own serious illness.²⁵ But even without passing paid family leave at the federal level, Congress can play a larger role in making paid family leave a reality for many Americans. In May 2009, Representative Lynn Woolsey (D-CA) introduced a bill that would support state efforts to provide partial wage replacement to new parents and other employees who need to care for family members. The Family Income to Respond to Significant Transitions Act would provide monetary grants to states to help them establish, implement, and cover the costs of providing partial or full wage replacement to eligible workers.²⁶ For states that already have a paid family leave program, federal funds could be used to conduct outreach and education, to cover the cost of wage re-

²¹ ME. REV. STAT. ANN. Tit. 26 §§ 843-848.

²² *Id.* at § 843(4).

²³ WASH. REV. STAT. § 49.86.

²⁴ Oregon SB 966 and HB 3160, NH HB 661-FN.

²⁵ HEATHER BOUSHEY, CENTER FOR AMERICAN PROGRESS, HELPING BREADWINNERS WHEN IT CAN'T WAIT: A PROGRESSIVE PROGRAM FOR FAMILY LEAVE INSURANCE (May 2009).

²⁶ H.R. 2339, 111th Cong. (2009).

placement, to cover the cost of administering the program, or to provide incentives to employers that are not covered under the FMLA to provide the benefits and protections of that law. For states that do not yet have a program, funds would be available to help develop and implement a program, to pay for administrative costs, and to cover the costs of providing wage replacement for the first six months of the program.

The United States lags far behind the rest of the world when it comes to providing a financial safety net for families to cover their expenses while caring for their loved ones. Providing paid family leave would not only restore the United States to the ranks of developed nations, but would also go a long way toward valuing the work of American families.

II. PAID SICK DAYS

Although the FMLA guarantees unpaid time off to a segment of the workforce for their own or a family member's serious illness, federal law does not guarantee time off for short-term illness or to accommodate preventative care.²⁷ Once again, this absence of policy puts the United States in the global minority. As of 2009, 163 countries guarantee a minimum number of paid sick days for short- or long-term illness, with 155 providing a week or more per year.²⁸ Among the 15 most competitive economies in the world, the United States is the only one not to require even a single day of sick leave.²⁹ Workers in the United States must rely on employer-provided time off and, as a result, nearly half of private sector workers—47%—do not have a single paid sick day to recover from illness or care for a sick family member.³⁰ Even among workers who do have sick leave, only 30% can use that time to care for a sick child.³¹

Without paid sick time, workers, especially low-wage workers, are faced with an impossible choice—do they send a sick child to school or daycare or do they risk losing a day of pay, or perhaps even worse, to stay home and care for the child? Forcing families to make such decisions harms not just the individuals themselves but has broader implications as well. The lack of paid sick days is a public health problem. More than three in four food service and hotel workers do not have a single paid sick day,³² and workers in childcare centers also overwhelmingly lack paid sick days.³³ With the recent spread of the H1N1 virus, the Centers for Disease Control and Prevention have recommended that workers stay home from work when sick and keep sick children home from school. But without paid sick days, many workers have no choice but to disregard this advice.

In 2006, San Francisco became the first city in the United States to pass a paid sick days law. Workers in the city earn one hour of paid sick time for every 30 hours worked, and can accrue up to 40 hours a year if they work for an employer with fewer

²⁷ Several states have included in their family and medical leave laws provisions to allow leave to accompany a child, spouse, or elderly relative to routine medical, dental, or other professional medical appointments. See Mass. Gen. Laws ch. 149 § 52D; Vt. Stat. Ann. tit. 21 §§ 470-474.

²⁸ Heymann & Earle, *supra* note 7.

²⁹ *Id.*

³⁰ Lovell, *supra* note 11 at 1.

³¹ *Id.* at 9, Table 3.

³² *The Healthy Families Act: Safeguarding Families' Livelihood, Families and Health with Paid Sick Days: Hearing Before the S. Comm. on Health, Educ., Labor & Pensions*, 110th Cong. (2007) (statement of Heidi Hartmann, Institute for Women's Policy Research).

³³ Get the Prescription: Child Care Workers Need Paid Sick Days, Center for Law and Social Policy (July 2006), available at http://www.clasp.org/admin/site/publications_archive/files/0204.pdf.

than ten employees, or up to 72 hours a year if they work for a larger employer. The San Francisco experience has served as a model for what is now a nationwide movement to secure paid sick days at the city and state level. In early 2008, the District of Columbia passed paid sick days legislation and later that fall, voters in Milwaukee, Wisconsin, voted overwhelming to pass a ballot initiative modeled on the San Francisco law. A paid sick days bill was introduced in the New York City council in August 2009, and 13 states are considering bills to guarantee paid sick days in the current legislative session. Congress is also considering The Healthy Families Act, which would create a federal standard for paid sick time and would apply to employers with 15 or more employees.

Paid sick days are an essential protection that all workers need. Everyone gets sick, and everyone needs time off to recover. Although some of us are fortunate enough to work for employers who guarantee time off for sickness, can we say the same for the person next to us on the subway or the waitperson serving us lunch? It serves none of our interests to force workers to make impossible choices between their jobs and their own or their family's well being. Paid sick days are not only crucial to the dignity of all employees but also essential to our collective public health.

III. WORKPLACE FLEXIBILITY

Today's workers juggle childcare, eldercare, and other family responsibilities while also holding down jobs that offer little or no flexibility in work hours. In 2004, just over a quarter of the workforce worked on a flexible schedule,³⁴ even though survey results from the same year showed that nearly 80% of workers would like to have more flexible work options and would use them if there were no negative career consequences.³⁵ Despite ample evidence that flexible work options are good business, many workplaces—especially those employing lower-skilled workers—have not embraced the concept.

To compound the problem, certain laws on the books may actually dissuade employers from adopting flexible work policies or discourage employees from taking advantage of them. For example, the tax laws of New York and New Jersey combine to discourage telecommuting between the two states. Under New Jersey law, if a New York-based employer, who otherwise does not do business in New Jersey, allows a New Jersey-based employee to work from home even one day a month, the employer may create a nexus for triggering corporate taxation and the potential for other liability in New Jersey. This is true despite the fact that New Jersey has separately recognized the benefits of telecommuting by passing a law promising corporate tax credits to companies that provide alternative commuting options to their employees.

In addition, under existing law, New York has aggressively taxed non-resident telecommuters even if some or most of the work they conduct is outside the state. These workers may even be double taxed if their home state also taxes income earned while working at home. The Telecommuter Tax Fairness Act of 2009 has been introduced in Congress to address this problem.³⁶ The bill would prohibit a state from imposing an income tax on the compensation of a nonresident for any period in which the indi-

³⁴ U.S. DEP'T OF LABOR, WORKERS ON FLEXIBLE AND SHIFT SCHEDULES, 2004 SUMMARY (2005).

³⁵ Ellen Galinsky, James T. Bond & E. Jeffrey Hill, Families and Work Institute, *When Work Works: A Status Report on Workplace Flexibility. Who has it? Who wants it? What difference does it make?* 5-6 (2004), available at <http://familiesandwork.org/3w/research/downloads/status.pdf>.

³⁶ Telecommuter Tax Fairness Act of 2009, H.R. 2600, 111th Cong. (2009).

vidual is not physically present in or working in the state or from deeming the individual to be present in or working in the state because he or she is working at home for convenience.

Another barrier to flexible work is the fear of negative consequences for workers who request or adopt flexible work schedules. In a 2002 study by the Families and Work Institute, 78% of employees feared that they would be perceived as less committed to their job if they utilized flexible work arrangements.³⁷ The situation has only grown worse during this recession, as evidenced by calls to the Center for WorkLife Law's hotline suggesting that employers are targeting family caregivers and flexible workers for termination.³⁸ One potential solution, which originated in the United Kingdom, has been gaining some traction on this side of the Atlantic. In 2003, the United Kingdom implemented a "soft touch" law that, as amended, allows employees to request a flexible or alternative work schedule to help them care for children aged 16 and under, disabled children under 18, or certain adults who require care.³⁹ The law requires an employer to meet with his employee to discuss the request and then respond in writing within 14 days of that meeting. Although the employer is not obligated to accept the employee's request, if he refuses, he must identify the business reasons for doing so. Furthermore, employees are protected from discrimination or dismissal based on having made a request for flexibility or exercised their rights under the act. This kind of "right to request" law holds great appeal, especially during tough economic times, because it does not mandate more than a conversation and does not impose significant costs on employers. Still, it could have a major impact on combating the stigma and fear that often prevent even the most progressive workplace policies from being successfully implemented.

One bright spot where states have made strides in facilitating flexibility is around parental involvement in children's education. Studies have shown that children benefit immensely from having their parents engaged with their education, but also that the parents who most need flexibility to help children with school problems are least likely to have access to it.⁴⁰ Thirteen states and the District of Columbia have recognized the importance of this issue and passed laws to guarantee parents time off to attend and participate in their children's educational activities.⁴¹ The laws vary as to eligibility and notice requirements, whether provision of such leave is mandatory, how much time parents can take off, which employees and which school events are covered, and substitution of paid leave for unpaid time off. Some states have used their state family and medical leave laws to cover leave for educational involvement while others have passed separate statutes. These laws should be emulated in other states and public education expanded to make sure that parents know their rights and can exercise them.

³⁷ JAMES T. BOND, ELLEN GALINSKY & DAVID PROTAS, FAMILIES AND WORK INSTITUTE, HIGHLIGHTS OF THE NATIONAL STUDY OF THE CHANGING WORKFORCE (2002).

³⁸ Balancing Work and Family in the Recession: How Employees and Employers are Coping: Hearing Before the Joint Econ. Comm., 111th Cong. (2009) (statement of Cynthia Thomas Calvert, Deputy Director, WorkLife, Hastings College of Law).

³⁹ Department for Business Innovation and Skills, Flexible Working—the law and best practice, <http://www.businesslink.gov.uk/bdotg/action/layer?r.l1=1073858787&topicId=1073931239&r.lc=en&r.l2=1080898061&r.s=tl> (last visited Dec. 8, 2009).

⁴⁰ A Better Balance: The Work and Family Legal Center, Fact Sheet: Educational Leave (2009), available at http://abetterbalance.org/cms/index2.php?option=com_docman&task=doc_view&gid=5&Itemid=99999999.

⁴¹ *Id.*

The strict 9-to-5 workday is no longer necessary or efficient for many employers and their employees. In an age when technology allows people to work remotely and environmental concerns urge us to cut back on excessive travel, the arguments for expanding workplace flexibility are stronger than ever. Improving workplace flexibility, and combating the stigma that often attaches to employees who work flexible hours, is a critical step in the effort to reshape workplace norms to better serve working families.

IV. EMPLOYMENT DISCRIMINATION AGAINST CAREGIVERS

Discrimination against working women has transformed over the past 40 years. Separate job listings for men and women, which were once commonplace, are now a thing of the past. Sexual harassment—a workplace scourge in the 1980s and 90s—has subsided, thanks to strong court rulings and stricter compliance. Still, discrimination persists and now often takes the form of bias against working mothers and other workers with caregiving responsibilities.

Stereotypes about mothers in the workplace are widespread and unabashed. In a recent case, a school psychologist was denied tenure after becoming a mother, despite her history of outstanding performance reviews, by supervisors who said they “did not know how she could perform [her] job with little ones” and thought it was “not possible for [her] to be a good mother and have this job.”⁴² In another case, an executive assistant at a large bank was terminated while on maternity leave and told by her boss, “when you get that baby in your arms, you’re not going to want . . . to come back to work full time . . . when a woman has a baby and she comes back to work, she’s less committed to her job because she doesn’t want to really be here, she wants to be with her baby.”⁴³

Stereotypes about motherhood also extend to pregnant women, or women who may become pregnant and have children. In a 2007 case, the president of a company said to a female employee, who became pregnant and took maternity leave, that he “should no longer allow women to work for him because women who have babies lose too many brain cells to continue to work.”⁴⁴ The prevalence of such bias is evidenced by a steady increase in claims of pregnancy discrimination, particularly as pregnant women are targeted for layoffs during this recession. In 2008 alone, complaints filed with the Equal Employment Opportunity Commission increased by 12.5% over the previous year to a 12-year high of 6,285 claims nationwide.⁴⁵

Although men often benefit slightly at work from their status as fathers,⁴⁶ those who choose to resist the traditional role of breadwinner in favor of playing a more active role in caregiving are also subject to potent discrimination. Studies have shown that fathers who take parental leave are recommended for fewer rewards and considered less committed than women who did so.⁴⁷ And both men and women with elder-

⁴² *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 115 (2d Cir. 2004).

⁴³ *Pizzo v. HSBC USA, Inc.*, No. 04-CV-114A, 2207 WL 2245903, 4 (W.D.N.Y. Aug. 1, 2007).

⁴⁴ *Drebing v. Provo Group, Inc.*, 519 F. Supp. 2d 811, 823 (N.D. Ill. 2007).

⁴⁵ EEOC, *Pregnancy Discrimination Charges*, available at <http://archive.eeoc.gov/stats/pregnanc.html> (last accessed Oct. 19, 2009).

⁴⁶ Shelly J. Correll, Stephen Benard & In Paik, *Getting a Job: Is there a Motherhood Penalty?*, *Am. J. of Sociology* 1297 (2007).

⁴⁷ Joan C. Williams & Stephanie Bornstein, *The Evolution of “FReD”: Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 *Hast. L.J.* 1311, 1331 (2008).

care responsibilities encounter similar pushback from employers when they seek to alter their work schedules or take time off to care for their aging parents.

Over the past decade, a new area of employment law, known as family responsibilities discrimination (FRD), has developed to seek redress for workers treated unfairly at work because of their responsibilities to care for family members. Lawyers around the country have litigated cases under Title VII of the Civil Rights Act of 1964, arguing successfully that stereotyping of working mothers is prohibited gender discrimination under the law, and have used the “relationship or association” clause of the Americans with Disabilities Act to provide protection for caregivers of family members with disabilities. The Pregnancy Discrimination Act and the FMLA are also commonly used to protect caregivers in the workplace. Even the Employee Retirement Income Security Act (ERISA) has been used by caregivers to recoup pension credits denied due to personnel policies that required pregnant women to stop working, to challenge adverse actions based on employer fears of high health insurance premiums associated with sick or disabled relatives, and to seek redress when pregnant employees are fired to prevent them from using maternity leave benefits. As a result, claims of FRD have risen nearly 400% since the mid 1990s⁴⁸ and in 2007, the EEOC weighed in, issuing enforcement guidance about the unlawful disparate treatment of workers with caregiving responsibilities under federal equal employment laws.⁴⁹

Although the existing framework of laws captures a significant portion of cases involving unfair treatment of family caregivers, there are still many cases that fall through the cracks. The statutory cutoffs that limit the number of eligible employees under the FMLA, for example, consequently restrict the reach and protection of the only federal law passed explicitly to address work/family conflict. This will become an even larger issue as more Americans shoulder eldercare responsibilities and have few protections under other laws. And although Title VII can be used to challenge unfair treatment based on gender-role stereotypes about motherhood or fatherhood, it requires evidence that the discrimination is based at least in part on sex. If an employer discriminates against employees based on gender-*neutral* stereotypes about caregivers (*i.e.*, that all caregivers, regardless of their sex, are unreliable workers), he may be outside the reach of the law.⁵⁰

⁴⁸ MARY C. STILL, CENTER FOR WORKLIFE LAW, LITIGATING THE MATERNAL WALL: U.S. LAWSUITS CHARGING DISCRIMINATION AGAINST WORKERS WITH FAMILY RESPONSIBILITIES (2006).

⁴⁹ EEOC, Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities (2007), available at <http://www.eeoc.gov/policy/docs/caregiving.html>. In May 2009, the EEOC supplemented its 2007 guidance by issuing Employer Best Practices for Workers with Caregiving Responsibilities, which go beyond federal non-discrimination requirements, in an attempt to reduce the chance of EEO violations against caregivers and remove barriers to equal employment opportunity. See EEOC, Employer Best Practices for Workers with Caregiving Responsibilities (2009), available at <http://www.eeoc.gov/policy/docs/caregiver-best-practices.html>.

⁵⁰ This exact issue arose in *Chadwick v. Wellpoint, Inc.*, where a claims agent at a health insurance company alleged that she was passed over for promotion after her supervisor found out that she had six-year-old triplets and explained that Chadwick would not be promoted because “you’re going to school, you have the kids and you just have a lot on your plate right now.” *Chadwick v. Wellpoint, Inc.*, 550 F. Supp. 2d 140 (D. Me. 2008), *rev’d*, 561 F.3d 38 (1st Cir. 2009). The district court ruled in favor of the employer; according to the judge, Chadwick had not shown that her employer’s assumption that she would be unable to handle the demands of work and home was based on her sex. *Id.* at 147. The Court of Appeals recently reversed the lower court decision, finding sufficient evidence for a jury to conclude that sex was indeed a motivating factor behind the employer’s failure to promote Chadwick, *see Chadwick v. Wellpoint, Inc.*, 561 F.3d 38 (1st Cir. 2009), but the problem still remains: while stereotypes about female caregivers are prohibited by law, stereotypes about caregivers in general are legally permissible.

As in other areas of work/family policy, states and localities have begun to step up to fill in where federal policy is lacking.⁵¹ The District of Columbia's human rights law prohibits employment discrimination based on family responsibilities, and Alaska law prohibits employment discrimination based on "parenthood."⁵² New York, California, and Maine, among other states, have introduced legislation to include family responsibilities, familial status, or family caregiver status, respectively, to the categories protected from employment discrimination under their state laws.⁵³ Cities and localities have also been active in this area of policy development, and can provide a powerful example for other jurisdictions.⁵⁴ There has been no effort on the federal level to pass legislation explicitly to protect family caregivers from employment discrimination, but this is certainly an area for future advocacy.

Discrimination against employees because of their family responsibilities harms individuals and their families while depriving our society of talented and capable workers. We need targeted legal reform and public education, in addition to litigation, to combat such discrimination and make the workplace a safe place for working mothers and caregivers.

V. WORKPLACE EQUITY

In addition to the family responsibilities discrimination described above, many working mothers confront persistent pay inequities and the problem of the part-time penalty in the workplace. These types of discrimination can be challenging to remedy through litigation because of the limitations of the Equal Pay Act and the reluctance of courts to recognize discrimination claims based on part-time status.

A. THE PAY GAP

Although working women have been steadily chipping away at the pay gap over the last 30 years, as of 2006, women were still only paid 77 cents for every dollar men earned. Over the course of a lifetime, this pay differential costs the average full-time working woman between \$700,000 and \$2 million.⁵⁵ Even as women as a group have narrowed the wage gap, mothers have lagged behind. Studies have found a 7% wage penalty for mothers compared to non-mothers, just one third of which can be explained by differences in experience and seniority.⁵⁶ The remaining part may be due largely to employer discrimination. In one particularly striking study, mothers were offered starting salaries that were 7.4% lower than those offered to otherwise equally qualified childless women, and mothers were rated significantly less promotable and

⁵¹ Federal law does prohibit employment discrimination against federal government employees on the basis of their "status as a parent." Exec. Order No. 13, 152, 50 Fed. Reg. 26, 115 (May 2, 2000).

⁵² D.C. Human Rights Act, D.C. CODE §§ 2-1401.04, 2-1401.02(12), 2-1402.11, 2-1411.02; ALASKA STAT. § 18.80.220.

⁵³ Stephanie Bornstein & Robert J. Rathmell, The Center for WorkLife Law, Caregivers as a Protected Class?: The Growth of State and Local Laws Prohibiting Family Responsibilities Discrimination 5-6 (Dec. 2009), available at <http://www.worklifelaw.org/pubs/LocalFRDLawsReport.pdf>.

⁵⁴ See, e.g., State College, Pennsylvania, Anti-Discrimination Ordinance, available at http://abetterbalance.org/cms/index2.php?option=com_docman&task=doc_view&gid=20&Itemid=999999999. See also New York City, NY, Proposed Intro. No. 565-A, available at <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=451297&GUID=BF186FE1-59F1-4C52-83EB-AF193F92D937&Options=ID|Text|&Search=565-A>.

⁵⁵ National Committee on Pay Equity, *The Wage Gap Over Time: In Real Dollars, Women See a Continuing Gap*, available at <http://pay-equity.org/info-time.html>.

⁵⁶ *Strengthening the Middle Class*, *supra* note 3.

less likely to be recommended for management positions.⁵⁷ This kind of pay and promotional discrimination is seriously hurting family finances as more women take on the role of breadwinner in their households.

Several policy solutions could help to address the motherhood pay gap. First is the Paycheck Fairness Act,⁵⁸ introduced in Congress in 2009, which would update and strengthen the Equal Pay Act of 1964 and, among other things, prohibit employers from punishing employees for sharing salary information with their coworkers. Other solutions include work/life policies, like the ones discussed above, which make the workplace more hospitable to women and mothers so that they can advance in their careers and close the wage gap. For example, research shows that women with access to paid maternity leave are more likely to return to work after they have a child, thus increasing their lifetime employment and earnings.⁵⁹

B. THE PART-TIME PENALTY

Working part-time is one way in which family caregivers balance their work and family responsibilities, but it often comes with a steep price tag. Part-time workers earn on average 20% less per hour than other workers with the same level of education and experience.⁶⁰ They also receive far fewer benefits. According to the Economic Policy Institute (EPI), only 17% of part-time workers receive employer-provided health care coverage in contrast to 69% of full-time workers.⁶¹ Only 21% of part-time workers receive an employer-provided pension plan compared to two-thirds of full-time workers.⁶² Many federal laws explicitly deny or authorize the denial of benefits and protections to part-time employees by excluding them from statutory coverage. The tax code allows employers to exclude from health insurance coverage individuals who work fewer than 35 hours a week. ERISA allows employers to exclude from employer pension plans employees who have worked fewer than 1,000 hours in a year (*i.e.*, less than 20 hours per week). Many states exclude part-time workers from unemployment insurance (UI) by requiring them to be looking for full-time work in order to receive benefits, even though these workers' wages are subject to UI payroll taxes and their earnings prior to layoff meet state eligibility rules.

Quality part-time work is essential to family economic security, especially in this recession as more workers juggle multiple part-time jobs or work part-time involuntarily. Outdated laws and policies that exclude part-time workers put families in jeopardy and do not reflect the reality of today's workforce. This is an area ripe for legal reform, starting with the debate over healthcare reform. We need to analyze our laws and policies through the lens of parity and equitable coverage for part-time workers. For example, many of the paid sick days bills being considered across the country would allow for pro-rata accrual of time off for part-time workers: part-timers would earn one hour of time off for every 30 hours worked, like full-time workers, but would take longer to accumulate the same number of days because they work fewer hours. Part-time workers should be afforded pro-rata pay and benefits as well and states should experiment with incentives to encourage employers to do better by their part-

⁵⁷ Correll, Benard & Paik, *supra* note 46.

⁵⁸ H.R. 12, 111th Cong. (2009).

⁵⁹ Boushey, *supra* note 25, at 19.

⁶⁰ Jeffery Wenger, Economic Policy Institute, The Continuing Problems with Part-Time Jobs, Issue Brief #155, Mar. 31, 2001, available at http://www.epi.org/publications/entry/issuebriefs_ib155/.

⁶¹ *Id.*

⁶² *Id.*

time workers. States could also consider legislation like the E.U. directive, explicitly prohibiting discrimination against part-time workers in pay and benefits because of their status.

Pay penalties and other inequities at work harm working mothers and the families that rely on them for essential income. Combating these persistent injustices will not only advance the cause of women's equality in the workplace, and at home, but will also help to ensure the economic security of their families.

VI. CONCLUSION

American workplace policies and laws are long overdue for a significant restructuring. We have reached a demographic tipping point as more mothers enter the labor force and baby boomers are retiring and requiring more care. We no longer live in a world of breadwinners and homemakers, where employers can expect their employees to be dedicated to one job, week after week, year after year, without interruption. Most families rely on two wage-earners and many others get by on the income of a single parent. All of these earners shoulder the responsibilities of family care in addition to their responsibilities at work and still only have 24 hours each day to handle it all.

The workforce of the 21st century requires an updated, 21st century workplace—one that recognizes and supports families. We have been operating under laws and policies that were created in a very different time, for an entirely different workforce. What we need now is a complete re-imagining of the laws that govern our workplaces and of how they interact with our families. This is a tall order, for sure, but essential. In the mean time, the policy proposals outlined above are manageable and, in many cases, proven measures that would do a great deal to release some of the pressure on working mothers and families. By implementing some of these reforms at the local, state, and federal level, we can begin to make good on the promise of “family values” by finally valuing the unsung and indispensable work of families.

The Employment Non-Discrimination Act: Requiring Fairness for All Employees Regardless of Sexual Orientation or Gender Identity

Maxine Eichner*

Almost half a century ago, Congress passed a sweeping set of workplace protections barring employment discrimination. Through this measure, Title VII of the Civil Rights Act of 1964,¹ Congress announced that employees should be judged solely on the basis of their job performance, rather than on characteristics unrelated to the job at hand. Title VII prohibited discrimination on a number of bases: race, religion, color, national origin and sex.² In the United States of that time, however, issues of sexual orientation and gender identity were not a part of the nation's mainstream political consciousness; Title VII therefore incorporated no explicit protection against discrimination based on lesbian, gay, bisexual, or transgender (LGBT) status.

Since the passage of Title VII, Congress has closed other gaps in protections for U.S. workers. In 1967, it passed the Age Discrimination in Employment Act to protect older employees from discrimination.³ In 1990, it passed the Americans with Disabilities Act, in order to ensure that workers with disabilities were treated fairly.⁴ Congress has not yet, however, filled the gap in protection for LGBT workers. Today, the continued absence of protections against discrimination based on sexual orientation and gender identity imposes a heavy burden on LGBT workers. In a 2007 survey, twenty-eight percent of LGBT adults reported that they had experienced workplace discrimination; twenty-one percent experienced it on a *weekly* basis.⁵ This discrimi-

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¹ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as 42 U.S.C. § 2000).

² *See id.* at 42 U.S.C. § 2000e-2.

³ Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified, as amended, at 29 U.S.C. §§ 621-634 (2010)).

⁴ Pub. L. No. 101-336, Title I, 104 Stat. 327 (1990) (codified, as amended, at 42 U.S.C. §§ 12111-12117 (2010)).

⁵ Press Release Archives, CareerBuilder.com, Twenty-eight Percent of Gay/Lesbian/Transgender Workers Have Experienced Discrimination or Unfair Treatment at Work (June 19, 2007), <http://www.careerbuilder.com/Share/AboutUs/PressReleases.aspx> (follow "2007" hyperlink; then follow title of article hyperlink) (last visited July 21, 2010). As M.V. Lee Badgett, Brad Sears, Holning Lau, and Deborah Ho, the authors of a careful review article of studies concerning the extent of workplace bias note, the rate of discrimination that studies such as this have found varies based on, among other things, the definition of discrimination used, the geographical range of the study, and the method of sampling. In the fifteen surveys conducted between the mid-1990s and 2008 on the issue of employment discrimination based on

nation takes a variety of forms. Employees report being called disparaging names, having anti-gay jokes made to other employees or customers at the employee's expense, being subjected to mock and sometimes real sexual assaults, being refused jobs or promotions, and a retinue of other discriminatory actions.⁶ In one reported case, a gay maintenance worker had his hands and feet bound by his co-workers.⁷ In another, a transgender corrections officer was smashed into a concrete wall.⁸ Further, accounts of LGBT workers who are subjected to harassing comments and unequal working conditions once their status was discovered abound.⁹ Because of the lack of legal protections, many LGBT workers constantly police their own interactions with others in order to avoid disclosing their LGBT status: They pay attention to every statement they make to ensure that they do not disclose their living situation, family status, the identity of their partner, where and with whom they went the night or weekend before, and so on.

Discrimination based on LGBT status not only places a tremendous burden on LGBT workers and subjects them to unequal working conditions, it relegates many to a second-class status financially. Gay men earn anywhere from ten to thirty-two percent less than their heterosexual counterparts, when controlling for education, location, occupation, and experience.¹⁰ These diminished salaries, or, worse, the loss of jobs as a result of discrimination, impede LGBT employees' ability to support themselves and their families. What is more, they create losses throughout the financial system: By one estimate, this discrimination costs \$47 million each year, when unemployment benefits and wasted training expenses are taken into account.¹¹ When the lowered productivity (of both the abusers and the victims) is also taken into consideration, the cost may rise to more than \$1.4 billion in lost output each year.¹²

sexual orientation that were reviewed by the authors, 15% to 43% of LGB respondents reported that they had experienced discrimination in the workplace. M.V. Lee Badgett, Brad Sears, Holning Lau, & Deborah Ho, *Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination 1998-2008*, 84 Chi.-Kent L. Rev. 559, 559, 562, 570 (2009). When transgender persons were surveyed, they reported similar or higher rates of employment discrimination. In the six studies reviewed by the authors that were conducted between 1996 and 2006, 20% to 57% of transgender respondents reported having experienced employment discrimination. *Id.* at 560, 573-75.

⁶ *The Employment Non-Discrimination Act of 2009 ("ENDA"): Hearing on H.R. 3017 Before the H. Comm. on Educ. & Labor*, 111th Cong. (2009) (statement of R. Bradley Sears, The Williams Institute) available at <http://edlabor.house.gov/hearings/2009/09/hr-3017-employment-non-discrim.html> (select "Brad Sears" hyperlink under "Witnesses").

⁷ *Id.*

⁸ *Id.*

⁹ See Deborah J. Vagins, American Civil Liberties Union, *Working in the Shadows: Ending Employment Discrimination for LGBT Americans, 2007*, available at http://www.aclu.org/files/pdfs/lgbt/enda_20070917.pdf (last visited July 21, 2010) (containing LGBT workers' accounts of employment discrimination).

¹⁰ See Badgett, Sears, Lau, & Ho, *supra* note 5, at 560. The findings of a wage penalty against lesbians, however, are less clear. *Id.* Indeed, recent studies suggest that lesbians do not earn less than heterosexual women and may, in fact, earn more. *Id.* at 584-85. As Badgett, Sears, Lau, and Ho note, however, this does not rule out the possibility of wage discrimination against lesbians; instead, the fact that lesbians sometimes make different choices than heterosexual women that would otherwise raise their salaries, since they are less likely to marry men or put their careers on hold to have children, may produce an increase in wages that is offset by a wage penalty. *Id.* at 585-86. The authors also note that "[w]hile less data is available about the incomes of transgender people . . . , a number of surveys have found high unemployment rates and low income levels for transgender people." *Id.* at 562. 587-89.

¹¹ Vagins, *supra* note 9, at 8 (citing Kenneth A. Kovach & Peter E. Millspaugh, *Employment Non Discrimination Act: On the Cutting Edge of Public Policy*, 39 Bus. Horizon 65, 70 (1996)).

¹² *Id.*

Yet when it comes to issues of sexual orientation, the America of today is not the America of 46 years ago, when Title VII was enacted. The United States Supreme Court has since declared that government discrimination motivated by animus against homosexuals is irrational and violates the Constitution.¹³ It has also ruled that the constitutional protection for intimate sexual conduct extends to homosexual conduct.¹⁴ Public sentiment, too, has shifted considerably on these issues: Over half the American population now believes homosexuality is acceptable.¹⁵ When it comes to employment specifically, even more Americans—a full 89 percent—believe that gays and lesbians are entitled to equal workplace protections and opportunities.¹⁶ This is an increase of more than 20 percent since the late 1970s.¹⁷ Furthermore, same-sex couples have become a common feature of American communities. There are approximately 564,743 same-sex couple households in the United States, comprising just under one percent (.9 percent) of all coupled households.¹⁸ Given these changes, the time is ripe to fill the longstanding gap in federal protections against job discrimination based on LGBT status.

Passage of the Employment Non-Discrimination Act, or “ENDA,” which is currently being considered in Congress, would help fill the current void in legal protections.¹⁹ ENDA would ban discrimination based on sexual orientation and gender identity with respect to hiring, firing, and terms of employment. The bill would also protect workers from retaliation. In this way, ENDA is an important step toward ensuring fairness for LGBT workers. The legislation stands for the proposition that like other employees, gay, lesbian, bisexual, and transgender employees should be judged based on their work performance, rather than on their sexual orientation or gender identity.

This Issue Brief considers the role that ENDA could play to ensure fairness for LGBT employees who are the victims of employment discrimination. To do so, the next section discusses the current gap in federal and state legal protections against discrimination based on sexual orientation and gender identity. The second section then considers ENDA, explains its provisions, and assesses its ability to safeguard LGBT workers from bias. ENDA, it concludes, is a modest and pragmatic step toward

¹³ *Romer v. Evans*, 517 U.S. 620, 624 (1996).

¹⁴ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

¹⁵ According to Gallup Poll News Service, 52% of Americans agreed with the statement “homosexuality is an acceptable alternative lifestyle;” whereas, only 38% agreed with the same statement in 1992. Frank Newport, *American Attitudes Toward Homosexuality Continue to Become More Tolerant*, Gallup (2001), www.gallup.com/poll/4432/American-Attitudes-Toward-Homosexuality-Continue-to-Become-More-Tolerant.aspx (last visited July 21, 2010).

¹⁶ Vagins, *supra* note 9, at 9 (citing Press Release, Gallup Poll News Service, Tolerance for Gay Rights at High Water Mark (May 29, 2007), <http://www.gallup.com/poll/27694/tolerance-gay-rights-highwater-mark.aspx> (last visited July 21, 2010)).

¹⁷ Marieka Klawitter & Victor Flatt, *The Effects of State and Local Anti-discrimination Policies on Incomes of Same-Sex Couples*, 17 J. Pol’y Analysis & Mgmt. 658, 660 (1998) (discussing the shift in popular approach to LGBT workers’ rights) (citing David Moore, *Public Polarized on Gay Issue*, Gallup Poll Monthly, No. 331, at 31-34). The year 1977 was the first time that Gallup conducted any polling regarding American attitudes toward gays and workforce opportunities. See Frank Newport, *Homosexuality*, Sept. 11, 2002, <http://www.gallup.com/poll/9916/Homosexuality.aspx>.

¹⁸ U.S. Census Bureau, Families and Living Arrangements, available at <http://www.census.gov/population/www/socdemo/hh-fam.html#acs> (scroll down to “Same-Sex Couples” heading, select “Data from the American Community Survey” heading, then “2008 tables”).

¹⁹ S.1584, 111th Cong. (2009); H.R.3017, 111th Cong. (2009).

ensuring that LGBT employees are judged fairly on the basis of their job performance, without regard to their sexual orientation or gender identity.

I. THE CURRENT VOID IN PROTECTION FOR LGBT EMPLOYEES

Employees discriminated against based on race, religion, color, national origin, and sex have remedies available to them under Title VII and, in many cases, state law. These legal protections are not reliably available to those discriminated against because of their LGBT status.

A. TITLE VII ANTIDISCRIMINATION LAW

Because Title VII does not explicitly bar discrimination based on sexual orientation, gays and lesbians who have brought claims of employment discrimination based on their sexual orientation, and transgender persons who have brought claims based on gender identity, have routinely had their cases dismissed.²⁰ This is the case even though Title VII's prohibition on sex discrimination could be construed to encompass LGBT discrimination. For example, a discrimination claim based on the sexual orientation of a lesbian could be construed as treating a female employee who is sexually attracted to women differently than a male employee who is sexually attracted to women, and as therefore based on sex. Courts, however, have uniformly declined to construe Title VII's ban on sex discrimination to encompass sexual orientation or gender identity on the ground that Congress did not explicitly include LGBT-status in the Act's protected categories.²¹

Despite Title VII's failure directly to bar discrimination based on sexual orientation, Title VII's ban on discrimination because of sex potentially offers LGBT employees some protection insofar as it protects against "sex stereotyping." The 1989 Supreme Court decision of *Price Waterhouse v. Hopkins*,²² provides strong support

²⁰ See, e.g., *Medina v. Income Support Div., New Mexico*, 413 F.3d 1131, 1135 (10th Cir. 2005) ("Title VII's protections, however, do not extend to harassment due to a person's sexuality."); *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 951 (7th Cir. 2002) ("Title VII does not, however, provide for a private right of action based on sexual orientation discrimination."); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 264 (3d Cir. 2001) ("Title VII does not prohibit discrimination based on sexual orientation."); *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000) ("Title VII does not prohibit harassment or discrimination because of sexual orientation."); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999) ("Title VII does not proscribe harassment simply because of sexual orientation."); *Williamson v. A.G. Edwards & Sons*, 876 F.2d 69, 70 (8th Cir. 1989) ("Title VII does not prohibit discrimination against homosexuals."); *Ayala-Sepulveda v. Municipality of San German*, 661 F.Supp.2d 130, 136 (D.P.R. 2009) ("The caselaw from [the Fourth] [C]ircuit has established that, 'Title VII does not proscribe harassment simply because of sexual orientation.'" (quoting *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 751-52 & n.3 (4th Cir. 1996)); *Eitsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221 (10th Cir. 2007) ("[D]iscrimination against a transsexual based on the person's status as a transsexual is not discrimination because of sex under Title VII."); *Ulane v. Eastern*, 742 F.2d 1081, 1085 (7th Cir. 1984) ("[W]hile we recognize distinctions among homosexuals, transvestites, and transsexuals, we believe that the same reasons for holding that the first two groups do not enjoy Title VII coverage apply with equal force to deny protection for transsexuals."); *Michaels v. Akal Security, Inc.*, No. 09-cv-01300-ZLW-CBS, 2010 U.S. Dist. LEXIS 62954, at *7 (D. Colo. June 24, 2010) ("Plaintiff's gender discrimination claims are based entirely on her transgender status. Therefore, Plaintiff is unable to sustain a Title VII claim based upon this status.").

²¹ See, e.g., *Bibby*, 260 F.3d at 265 ("Harassment on the basis of sexual orientation has no place in our society. Congress has not yet seen fit, however, to provide protection against such harassment. Because the evidence produced by [the plaintiff]—and, indeed, his very claim—indicated only that he was being harassed on the basis of his sexual orientation, rather than because of his sex, the District Court properly determined that there was no cause of action under Title VII.").

²² 490 U.S. 228 (1989).

for such an interpretation. In *Price Waterhouse*, the plaintiff, Ann Hopkins, was denied partnership at her accounting firm in part because some members of the firm considered her mannerisms and dress to be too masculine. Ms. Hopkins was advised that for her candidacy for partnership to succeed she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, . . . wear jewelry,” and go to “charm school.”²³ On these facts, the Court ruled that the defendant had violated Title VII, on the ground that Title VII’s prohibition on sex discrimination encompassed a prohibition on evaluating employees for conformity with gender stereotypes:

We are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for “[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”²⁴

Although the sexual orientation of the plaintiff in *Price Waterhouse* was not identified, its prohibition on gender stereotyping would seem to bar a significant portion of discrimination against gay and lesbian employees, protecting against discrimination for being perceived as effeminate in the case of gay men, and as masculine or “butch” in the case of lesbians. Some courts have interpreted *Price Waterhouse* to provide such coverage. For example, in *Prowel v. Wise Business Forms, Inc.*,²⁵ the Third Circuit allowed a claim of sexual stereotyping by a gay man who was harassed on the job and terminated after thirteen years of employment. The *Prowel* plaintiff contended that, among other behaviors, co-workers called him “Princess” and “Rosebud;” derogatorily referred to his manner of sitting, walking, and dressing as effeminate; called him “fag” and “faggot;” and left a tiara on his work station. The Third Circuit ruled that although “the record is replete with evidence of harassment motivated by Prowel’s sexual orientation,” which was not actionable, “[n]evertheless, this does not vitiate the possibility that Prowel was also harassed for his failure to conform to gender stereotypes.”²⁶ The court therefore allowed the plaintiff’s claim of gender stereotyping to go forward.²⁷

²³ *Id.* at 235.

²⁴ *Id.* at 251 (quoting *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707, n.13 (1978)).

²⁵ 579 F.3d 285, 291 (3d Cir. 2009).

²⁶ *Id.* at 292.

²⁷ *Id.*; accord *Lewis v. Heartland Inns of Am.*, 591 F.3d 1033, 1036 (8th Cir. 2010) (plaintiff, described as “having an Ellen DeGeneres kind of look,” presented triable evidence that she was fired from hotel front desk because she did not appear suitably feminine, and therefore should have her day in court under Title VII); *Nichols v. Azteca Rest. Enter.*, 256 F.3d 864, 874 (9th Cir. 2001) (“At its essence, the systematic abuse directed at Sanchez reflected a belief that Sanchez did not act as a man should act,” and was therefore actionable); *Schmedding v. Tnemeco Co.*, 187 F.3d 862 (8th Cir. 1999) (plaintiff had actionable claim of gender stereotyping even though some harassment was directed at his perceived sexual orientation); *O’Donnell v. Pinnacle Corp. Town & Country Homes*, No. 03 C 2815, 2004 U.S. Dist. LEXIS 14623 (N.D. Ill. July 29, 2004) (lesbian who was called “butch” should be allowed to prove the comment demonstrated actionable sex stereotyping); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002) (jury could find plaintiff’s supervisor harassed and terminated lesbian plaintiff because she did not conform to sex stereotypes, based on comments that plaintiff’s shoes were “faggy” because he thought

The possibility that gay and lesbian workers can bring a sex stereotyping claim based on *Price Waterhouse*, though, is far from adequate protection for these workers. First, this leaves these employees unprotected when they are discriminated against based on their sexual orientation alone, without the presence of gender stereotyping. A number of courts have dismissed the claims of gay and lesbian plaintiffs or those perceived to be gay on the ground that the discriminatory actions failed to demonstrate gender stereotyping.²⁸

Furthermore, some courts have rejected Title VII's coverage for gay and lesbian workers even where the facts suggest sex stereotyping. These courts take the position that actions that would constitute actionable sex stereotyping in the case of a straight plaintiff are not actionable in the case of a gay or lesbian plaintiff because Title VII's failure to cover sex orientation trumps an otherwise-valid claim of sex discrimination. The Second Circuit's decision in *Dawson v. Bumble & Bumble*,²⁹ demonstrates this line of analysis. In that case, a hairstylist sued based on her termination, alleging that she was fired because she failed to present a suitably feminine appearance. Though the Second Circuit acknowledged the similarities of the allegations to those made in *Price Waterhouse*, it rejected Title VII's coverage because of one difference: the *Dawson* plaintiff was an out lesbian. In the words of the Second Circuit Court of Appeals:

When utilized by an avowedly homosexual plaintiff, gender stereotyping claims can easily present problems for an adjudicator. This is for the simple reason that "stereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality." Like other courts, we have therefore recognized that a gender stereotyping claim should not be used to "bootstrap protection for sexual orientation into Title VII."³⁰

Likewise, in *Spearman v. Ford Motor Co.*,³¹ the plaintiff, a gay man, argued that he had an actionable Title VII claim based on, among other things, co-workers calling him a "bitch," "selfish bitch," "little bitch," "woman," and the presence of graffiti associating him with a drag queen. Despite the evidence of sex stereotyping, the Seventh Circuit rejected his claim of sex discrimination, on the ground that the plaintiff's "co-workers maligned him because of his apparent homosexuality, and not because of his sex."³² In courts that take this approach, not only are LGBT plaintiffs and LGBT-identified plaintiffs not protected from discrimination based on sexual orienta-

they were for men; "I thought you were the man;" "I thought you wore the pants;" and who "wore the dick in the relationship").

²⁸ See, e.g., *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 264 (3d Cir. 2001) (gay male plaintiff had no claim under Title VII because "he did not claim that he was harassed because he failed to comply with societal stereotypes of how men ought to appear or behave"); *Hamm v. Weyauwega Milk Prods.*, 199 F. Supp. 2d 878, 895 (D.Wis. 2002), *aff'd*, 332 F.3d 1058 (7th Cir. 2003) ("Hamm was harassed not because of any of his characteristics, traits or mannerisms were feminine but because Hamm's coworkers...were hostile to Hamm's perceived homosexuality and were wary of what they perceived to be Hamm's desire of physical intimacy with them.").

²⁹ 398 F.3d 211, 219 (2d Cir. 2005).

³⁰ *Id.* at 218 (quoting *Howell v. North Cent. Coll.*, 320 F. Supp. 2d 717, 723 (N.D. Ill. 2004); *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000)).

³¹ 231 F.3d 1080 (7th Cir. 2000).

³² *Id.* at 1085-86.

tion, they do not even receive the same protection against discrimination based on sex stereotyping that other workers receive.³³

Some courts have been more receptive to finding actionable sex stereotyping in cases of discrimination based on gender identity rather than sexual orientation. These courts recognize that discrimination against an employee because of transgender status inherently involves sex stereotyping, since it is motivated by the divergence between the employee's biological sex and his or her expected gender identity. As the Sixth Circuit stated in *Smith v. City of Salem, Ohio*,³⁴ in allowing such a claim:

After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. It follows that employers who discriminate against men because they do wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex

Sex stereotyping based upon a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label such as "transsexual" is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.³⁵

³³ Courts have refused Title VII's protection not only to LGBT plaintiffs, but those who are identified (whether correctly or incorrectly) as LGBT by the employer or other workers. *See Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757 (6th Cir. 2006); *Taylor v. H.B. Fuller Co.*, No. 06cv854, 2008 U.S. Dist. LEXIS 83420 (S.D. Ohio Oct. 20, 2008); *Valencia v. United States Dep't of Interior*, No. 3:08-cv-069-WKW, 2008 U.S. Dist. LEXIS 114815 (M.D. Ala. Aug. 5, 2008); *Webb v. Int'l Bhd. of Elec. Workers, Local Union*, No. 654, No. 04-3613, 2005 U.S. Dist. LEXIS 21381 (D. Pa. Sept. 23, 2005); *Hamm v. Weyauwega Milk Prods.*, 199 F. Supp. 2d 878 (D. Wis. 2002), *aff'd*, No. 00-C-1283, 2003 U.S. App. LEXIS 11701 (7th Cir. Wis. June 13, 2003).

³⁴ 378 F.3d 566 (6th Cir. 2004).

³⁵ *Id.* at 575 (citations omitted); *see also Kastl v. Maricopa Co. Cmty. Coll. Dist.*, 325 Fed. Appx. 492, 493 (9th Cir. 2009) ("After *Hopkins* . . . , it is unlawful to discriminate against a transgender (or any other) person because he or she does not behave in accordance with an employer's expectations for men or women. . . . Thus, [plaintiff] states a prima facie case of gender discrimination"); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005) (similar to *Smith*); *Glenn v. Brumby*, 2010 U.S. Dist. LEXIS 66207, *35-*36 (N.D. Ga. 2010) ("This Court concurs with the majority of courts that have addressed this issue, finding that discrimination against a transgendered individual because of their failure to conform to gender stereotypes constitutes discrimination on the basis of sex. . . . This conclusion is not at odds with this Court's earlier decision . . . that transsexuals are not a suspect class, and is the result of the logical application of the Supreme Court's reasoning in *Price Waterhouse*." (citations omitted)); *Creed v. Family Express Corp.*, 2009 U.S. Dist. LEXIS 237 (N.D. Ind. 2009) ("Although discrimination because one's behavior doesn't conform to stereotypical ideas of one's gender may amount to actionable discrimination based on sex, harassment based on sexual preference or transgender status does not. To sustain a claim based on sex stereotyping, then, a plaintiff must show that the employer actually relied on his or her gender in making an adverse employment decision. . . .") (citations omitted); *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*, 542 F. Supp. 2d 653, 660-61 (S.D. Tex. 2008) (citations omitted) ("The Court cannot ignore the plain language of Title VII and *Price Waterhouse*, which do not make any distinction between a transgendered litigant who fails to conform to traditional gender stereotypes and an 'effeminate' male or 'macho' female who, while not necessarily believing himself or herself to be of the opposite gender, nonetheless is perceived by others to be in nonconformity with traditional gender stereotypes. There is nothing in existing case law setting a point at which a man becomes too effeminate, or a woman becomes too masculine, to warrant protection under Title VII and *Price Waterhouse*.").

Other courts, however, have rejected claims of discrimination by transgender workers, even where the adverse employment actions were clearly based on gender stereotypes. The District Court for the Eastern District of Louisiana provided a fairly typical example of this position in dismissing a claim by a transgender employee.³⁶ According to the court, cases involving transgender employees are different than other sex stereotyping cases because they involve “not just a matter of an employee of one sex exhibiting characteristics associated with the opposite sex. This is a matter of a person of one sex assuming the role of a person of the opposite sex. . . . While Title VII’s prohibition of discrimination on the basis of sex includes sexual stereotypes, the phrase “sex” has not been interpreted to include sexual identity or gender identity disorders.”³⁷ In this way, these courts deem gender stereotyping of a transgendered person to somehow be more permissible than gender stereotyping of a non-transgendered person.³⁸ Thus, discrimination against a non-transgender woman for behaving in a masculine manner is unlawful because it implicates actionable sex stereotyping. Discrimination against a transgender person who is biologically female but identifies as male for behaving in a masculine manner, however, is lawful even though it also implicates sex stereotyping. In this way, in the Sixth Circuit’s words, “courts superimpose classifications such as ‘transsexual’ on a plaintiff, and then legitimize discrimination based on the plaintiff’s gender non-conformity by formalizing the non-conformity into an ostensibly unprotected classification.”³⁹

B. TITLE VII SEXUAL HARASSMENT LAW

Sexual harassment law under Title VII provides another potential theory of legal redress for LGBT employees. The Supreme Court’s 1998 case of *Oncale v. Sundowner Offshore Services*,⁴⁰ in which the plaintiff sued for sexual harassment based on a series of sex-related, humiliating actions committed by his coworkers, offers some support for such claims.⁴¹ In *Oncale*, the plaintiff, who was working as a roustabout on an eight-man, all-male oil rig in the Gulf of Mexico, endured a series of offensive acts committed by his coworkers, including their calling him derogatory names associated with gay men, sex-related assaults, and threats of rape.⁴² *Oncale*’s action for sexual harassment against his employer was dismissed by the Fifth Circuit on the ground that

The District Court for the District of Columbia also held that transgender status was protected in *Shroer v. Billington*, 424 F. Supp.2d 203 (D.D.C. 2006), although it rejected the plaintiff’s proffered sex stereotyping theory. Instead, the *Shroer* judge stated that discrimination based on gender identity is “literally” discrimination ‘because of . . . sex. . . . That approach strikes me as a straightforward way to deal with the factual complexities that underlie human sexual identity. These complexities stem from real variations in how the different components of biological sexuality -- chromosomal, gonadal, hormonal, and neurological -- interact with each other, and in turn, with social, psychological, and legal conceptions of gender.’ *Id.* at 213.

³⁶ *Oiler v. Winn-Dixie La., Inc.*, No. 00-3114, 2002 U.S. Dist. LEXIS 17417, at *30 (E.D. La. Sept. 16, 2002).

³⁷ *Id.*; see also *Sweet v. Mulberry Lutheran Home*, 2003 U.S. Dist. LEXIS 11373, at *8-*9 (S.D. Ind. 2003) (“Sweet’s intent to change his sex does not support a claim of sex discrimination under Title VII because that intended behavior did not place him within the class of persons protected under Title VII from discrimination based on sex.”).

³⁸ See *Smith v. City of Salem, Ohio*, 378 F.3d at 574.

³⁹ *Smith*, 378 F.3d at 574.

⁴⁰ 523 U.S. 75 (1998).

⁴¹ *Id.* at 79.

⁴² *Id.* at 77.

Title VII did not cover same-sex sexual harassment.⁴³ The high court reversed the dismissal, ruling that “nothing in Title VII necessarily bars a claim of discrimination . . . merely because the plaintiff and defendant are of the same sex.”⁴⁴ Justice Scalia, writing for a unanimous court, stated that the key to the validity of such an action was whether the harassment occurred “because of . . . sex.”⁴⁵ The Court then laid out three “evidentiary routes” by which a plaintiff could establish that same-sex harassment constituted discrimination “because of sex”: (1) where the challenged conduct involved explicit or implicit proposals of sexual activity and the harasser was homosexual; (2) where the harasser is motivated by general hostility to the presence of his or her own sex in the workplace; and (3) where the plaintiff provides “direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.”⁴⁶

Yet while *Oncale* established that courts should not dismiss same-sex harassment cases as a blanket matter, it has provided only sporadic protection for workers harassed because of their LGBT or perceived-LGBT status. This is because although a strong subtext in many same-sex harassment cases, and possibly in the *Oncale* case itself, concerns coworkers responding with animus to the perceived homosexuality of the plaintiff, the Court did not address how such actions should be assessed under the “because of sex” requirement.⁴⁷ Certainly, harassment motivated by anti-LGBT sentiment does not fit squarely into any of the three evidentiary routes explicitly discussed by the Court as satisfying this requirement. Indeed, it is not clear that the facts in *Oncale* would meet any of those routes.⁴⁸ Further, the *Oncale* Court did not make clear the extent to which courts may go beyond these routes in determining sex discrimination.

In the face of this uncertainty, lower courts have come to very different conclusions on whether and when they treat sexual harassment cases motivated by LGBT animus as actionable. The case of *Rene v. MGM Grand Hotel*,⁴⁹ demonstrates the legal uncertainty that surrounds this type of harassment. In it, an openly gay man who worked as a butler at the defendant hotel asserted a Title VII action based on sexual harassment by his male coworkers and supervisor. According to the plaintiff, the harassers’ conduct “included whistling and blowing kisses at Rene, calling him ‘sweetheart’ and ‘muneca’ (Spanish for ‘doll’), telling crude jokes and giving sexually oriented “joke” gifts, and forcing Rene to look at pictures of naked men having sex.”⁵⁰ Plaintiff also testified that he was frequently subjected to offensive physical conduct of a sexual nature, including his coworkers “grabb[ing] him in the crotch and pok[ing] their fingers in his anus through his clothing.”⁵¹ The plaintiff asserted that he believed that the offensive actions were motivated by the fact that he was gay.⁵² The district court dismissed the Title VII action on the ground that “Title VII’s prohibition of ‘sex’ discrimination applies only [to] discrimination on the basis of gender and is not ex-

⁴³ *Id.* (citing *Oncale v. Sundowner Offshore Services*, 83 F.3d 118 (5th Cir. 1996)).

⁴⁴ *Id.* at 79.

⁴⁵ *Oncale*, 523 U.S. at 81.

⁴⁶ *Id.* at 80-81.

⁴⁷ *See id.* at 81.

⁴⁸ *See id.* at 80-81.

⁴⁹ 243 F.3d 1206 (9th Cir. 2001), *rev’d en banc*, 305 F.3d 1061 (9th Cir. 2002).

⁵⁰ 305 F.3d at 1064.

⁵¹ *Id.*

⁵² *Id.*

tended to include discrimination based on sexual preference.”⁵³ On appellate review, a panel of the Ninth Circuit affirmed dismissal of the plaintiff’s claim by a divided vote. According to the panel opinion, the plaintiff’s case failed because it met none of the three evidentiary routes for demonstrating sex discrimination laid out in *Oncale*. “The degrading and humiliating treatment Rene contends that he received from his fellow workers is appalling, and is conduct that is most disturbing to this court. However, this type of discrimination, based on sexual orientation, does not fall within the prohibitions of Title VII.”⁵⁴

An en banc review of the panel’s decision reversed that outcome, although the uncertainty in the legal analysis that applied to same-sex harassment caused considerable disagreement on the rationale for holding the coworkers’ conduct actionable. A plurality opinion written by Judge William Fletcher and joined by four other judges, noted that the Supreme Court, in a past sexual harassment case, had “describ[ed] the kinds of sexual harassment that can create a hostile work environment, . . . [by] explicitly includ[ing] ‘physical conduct of a sexual nature.’”⁵⁵ Judge Fletcher’s opinion continued: “It is . . . clear that the conduct [in this case] was ‘of a sexual nature.’ Rene’s tormentors did not grab his elbow or poke their fingers in his eye. They grabbed his crotch and poked their fingers in his anus.”⁵⁶ The opinion declared that,

Rene’s otherwise viable cause of action [may not properly be] defeated because he believed he was targeted because he is gay. This is not the law. We have surveyed the many cases finding a violation of Title VII based on the offensive touching of the genitalia, buttocks, or breasts of women. In none of those cases has a court denied relief because the victim was, or might have been, a lesbian. The sexual orientation of the victim was simply irrelevant. If sexual orientation is irrelevant for a female victim, we see no reason why it is not also irrelevant for a male victim. . . . The physical attacks to which Rene was subjected, which targeted body parts clearly linked to his sexuality, were “because of . . . sex.” Whatever else those attacks may, or may not, have been “because of” has no legal consequence. So long as the environment itself is hostile to the plaintiff because of [his] sex, why the harassment was perpetrated (sexual interest? misogyny? personal vendetta? misguided humor? boredom?) is beside the point.⁵⁷

A second opinion written by Judge Pregerson, in which two other judges concurred, stated that the plaintiff’s claim was actionable because it presented a viable claim of sex stereotyping harassment under *Price Waterhouse*. According to Judge Pregerson, “The repeated testimony that his co-workers treated Rene, in a variety of ways, “like a woman” constitutes ample evidence of gender stereotyping.”⁵⁸ Four other judges dissented.

⁵³ *Id.*

⁵⁴ *Rene*, 243 F.3d at 1209.

⁵⁵ *Rene*, 305 F.3d at 1065 (quoting *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986)).

⁵⁶ *Id.*

⁵⁷ *Id.* at 1066 (quoting *Doe by Doe v. City of Belleville*, 119 F.3d 563, 578 (7th Cir. 1997)).

⁵⁸ *Id.* at 1068.

A number of other courts, however, have denied similar harassment claims made by LGBT plaintiffs even where the harassment is of a sexual nature, on the ground that the harassers' actions were motivated by anti-homosexual animus, which is unprotected by law. Some of these courts read the evidentiary routes laid out in *Oncale* as the only means by which LGBT plaintiffs can make out a claim for sexual harassment, and then deny coverage because evidence of anti-LGBT sentiments satisfies none of these routes. For example, in *King v. Superior Services*,⁵⁹ the plaintiff, who worked in a truck dispatching office, sued for sexual harassment based on coworkers repeatedly using a derogatory term for "homosexual" to describe him, and their frequent expression to the plaintiff of their professed belief that he wanted to perform oral sex on them.⁶⁰ The Sixth Circuit held that the case had been properly dismissed on summary judgment by the district court. According to the court, the harassing actions were not "based on sex" within the meaning of Title VII's prohibition since none of the three evidentiary routes laid out in *Oncale* had been met by the plaintiff.⁶¹ The Sixth Circuit ruled that harassing actions, whether sexual or not, that were motivated by the harassers' belief in plaintiff's sexual orientation (whether correct or not), were "different from discrimination on the basis of sex," and that even sexually explicit conduct based on such motivations did not constitute actionable sexual harassment.⁶²

⁵⁹ 68 Fed. Appx. 659 (6th Cir. 2003).

⁶⁰ *Id.* at 660.

⁶¹ The Sixth Circuit noted that, first, the speech and conduct were not motivated by (homosexual) sexual desire on the part of the harassers. *Id.* at 663. Second, "King might also prove discrimination on the basis of sex by showing that other male employees were harassed in such sex-specific and derogatory terms by another man as to make it clear that the harasser was motivated by general hostility to the presence of men in the workplace." *Id.* at 664. The court found that King had made no such showing. In this regard, the court ruled that even if there was evidence in the case that the harassers' actions involved sex stereotyping pursuant to *Price Waterhouse*, such remarks would not "prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on [the plaintiff's] gender in making its decision." *Id.* (quoting *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1085 (7th Cir. 2000)). Third, the Sixth Circuit noted that plaintiff did not claim that the harassers at the defendant company treated men comparatively worse than women. *Id.*

⁶² *Id.* at 664 (citing *Spearman*, 231 F.3d at 1085). Similarly, in *Spearman v. Ford Motor Co.*, the Sixth Circuit dismissed a case in which the plaintiff, a gay man, was repeatedly called names by a coworker such as "selfish bitch," "cheap ass bitch," was subjected to graffiti comparing him with male drag queens, and stating that he had AIDS. The Sixth Circuit held that "[w]hile sexually explicit language may constitute evidence of sexual harassment, it is not 'always actionable, regardless of the harasser's sex, sexual orientation, or motivations.'" *Spearman*, 231 F.3d at 1085 (quoting *Oncale v. Sundowner Offshore Services*, 523 U.S. 75, 79 (1998)). Although the Sixth Circuit had deemed sexually explicit language to be sexual harassment on its face in other sexual harassment cases, *see, e.g.*, *Mire v. Tex. Plumbing Supply Co.*, 286 Fed. Appx. 138, 142 (5th Cir. 2008) (conduct that "included sexually suggestive comments about Mire's appearance, inquiries about her sexual activity, and requests to fondle her or have sex with her" from multiple male coworkers constituted pervasive harassment); *Waltman v. Int'l Paper Co.*, 875 F.2d 468 (5th Cir. 1989) (no dispute over whether harassment was "based on sex" in case of woman plaintiff harassed by male workers; evidence that "several different employees touched [plaintiff] in a sexual manner and directed sexual comments toward her . . . [and] of ongoing sexual graffiti on the walls" sufficient to make claim of hostile environment, *id.* at 477); *Hernandez v. Wangen*, 938 F. Supp. 1052, 1058 (D.P.R. 1996) ("[c]onduct, as alleged in this case which includes the spanking of an employee's buttocks, repetitive sexual advances, repetitive sexual comments, and the physical touching" were sufficient to sustain a plaintiff's claim against her male coworker), the *Spearman* Court stated that "[t]he plaintiff must still show that he was harassed because of his sex." *Id.* at 1085. Similarly, even though the conduct at issue suggested the presence of sex stereotyping, the court stated that "remarks at work that are based on sex-stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on [the plaintiff's] gender in making its decision." *Id.* (quoting *Price Waterhouse*

The Second Circuit used similar logic to dismiss the plaintiff's claims in *Simonton v. Runyon*.⁶³ In that case, the plaintiff was repeatedly called a "fucking faggot" and told "go fuck yourself fag," "suck my dick" and "so you like it up the ass?"⁶⁴ Co-workers placed pornographic photos in his work area, sent him male dolls and a copy of *Playgirl* magazine, and posted his name in the employee bathroom along with the names of celebrities who had died of AIDS.⁶⁵ Although Simonton produced substantial evidence of the explicitly sexual nature of the harassment he endured, the court found that the evidence failed to state a claim under Title VII because of the harassers' anti-gay motivations.⁶⁶ Its dismissal, it stated, was "informed by Congress's rejection, on numerous occasions, of bills that would have extended Title VII's protection of people based on their sexual preferences."⁶⁷ "The law is well-settled in this circuit and in all others to have reached the question that Simonton has no cause of action under Title VII because Title VII does not prohibit harassment or discrimination because of sexual orientation."⁶⁸ In other sexual harassment cases brought by LGBT-identified employees based on the theory that the harassers' actions involved sex stereotyping pursuant to *Price Waterhouse*, courts have dismissed such claims on the ground that the harassers' conduct was motivated by sexual orientation bias rather than gender stereotyping, despite the reality that sex stereotyping motivations and anti-LGBT animus are often, and were in these cases, inextricably linked.⁶⁹

v. Hopkins, 490 U.S. 228, 251 (1989)). The court then found that the plaintiffs' problems with his coworkers stemmed from "his apparent homosexuality. . . . [H]e was not harassed because of his sex (i.e. not because he is a man)." *Id.*

Other circuits have also held that hostile work environment claims are not actionable if they are motivated by anti-LGBT animus. See e.g., *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 264 (3d Cir. 2001) (hostile work environment claim fails where plaintiff was subjected to vulgar statements regarding his sexual orientation and practices accompanied by physical assault and graffiti because the plaintiff's "claim was, pure and simple, that he was discriminated against because of his sexual orientation"); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 258-59 (1st Cir. 1999) ("The record makes manifest that the appellant toiled in a wretchedly hostile environment. That is not enough, however, to make his employer liable under Title VII: no claim lies unless the employee presents a plausible legal theory, backed by significantly probative evidence, to show, inter alia, that the hostile environment subsisted 'because of such individual's race, color, religion, sex, or national origin.'"); *Soto-Martinez v. Colegio San Jose, Inc.*, No. 08-2374, 2009 U.S. Dist. LEXIS 82510, at *10 (D.P.R. Sept. 9, 2009) ("Plaintiffs submit conclusory allegations, which we cannot consider, that Soto-Martinez was discriminated because of his gender. The only factual allegations proffered by Plaintiffs are that Soto-Martinez suffered from verbal harassment that insinuated that he was a homosexual. These allegations are certainly not enough to sustain a Title VII hostile work environment claim."); *Ianetta v. Putnam Invs., Inc.*, No. 00-10385-JLT, 2002 U.S. Dist. LEXIS 3277, at *14-15 (D. Mass. Feb. 25, 2002) ("The most that is presented by the evidence is that Putnam has an animosity toward homosexuals which amounted to discrimination, but sexual orientation is not protected by Title VII."); *Trigg v. N.Y. City Transit Auth.*, No. 99-CV-4730, 2001 U.S. Dist. LEXIS 10825, at *20 (E.D.N.Y., July 26, 2001) ("An objective reading of the words uttered by Seabrook about which Trigg complains drives to the conclusion that it is his homosexuality at which they are aimed and not his gender. If the lack of civility, boorishness, or intolerance of Seabrook is deemed to be discriminatory, it is discriminatory against Trigg because he is a homosexual and not because he is a man.").

⁶³ 232 F.3d 33 (2d Cir. 2000).

⁶⁴ *Id.* at 35.

⁶⁵ *Id.*

⁶⁶ *Id.* at 36.

⁶⁷ *Id.* at 35.

⁶⁸ *Id.*

⁶⁹ See, e.g., *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 759-60 (6th Cir. 2006) (LGBT plaintiff's allegations that harassers repeatedly questioned his masculinity, and directed women's sanitary napkins at him, as well as subjected him to sexually explicit acts such as restraining him and then forcibly simulating sex with him, and repeatedly touching his crotch, were not actionable because they failed to demonstrate

C. STATE STATUTES

The gap in federal law has not been filled by state statutes that ban discrimination based on LGBT status. Twenty-nine states, including all of the South, and most of the Midwest and West, afford no employment discrimination protections for gays and lesbians. Moreover, the twenty-one state statutes that offer some protection generally are significantly limited in scope.⁷⁰ Three of them do not protect workers who are perceived to be gay.⁷¹ Five of them do not allow attorney's fees, which would make it difficult for many to file suits. Another five do not allow an award of attorney's fees unless a court, rather than an administrative action, is filed.⁷² Further, only twelve states protect against discrimination based on gender identity.⁷³ Under this patchwork of laws, whether an LGBT employee who suffers discrimination will have any recourse will turn on where he or she happens to live. Employees in the majority of jurisdictions can be discriminated against without consequence.

Moreover, state laws are no substitute for federal protection. As revealed by a 1998 statistical study by Marieka Klawitter and Victor Flatt of the effects of non-discrimination clauses on gay and lesbian couples, state laws had no significant impact on the incomes of the census registered gay and lesbian couples.⁷⁴ The authors of this study suggest that this is because states lack the resources and administrative infrastructure to enforce these ordinances. In contrast, the federal government has a well-developed apparatus to investigate and enforce employment discrimination statutes in the form of the Equal Employment Opportunity Commission (EEOC). As Professors Klawitter and Flatt point out, the same was true for employment discrimination based on race. Before passage of Title VII, twenty-five states had laws prohibiting race discrimination in employment. Yet significant economic gains for African-Americans did not occur until after passage of Title VII.⁷⁵

that the action occurred "because of sex."); *Kay v. Independence Blue Cross*, 142 Fed. Appx. 48, 51 (3d Cir. 2005) (evidence that included a coworker telling plaintiff, "[y]ou are just so gay;" that she was happy that there were "real men" on the floor; statements that "[a] real man in the corporate world would not come to work with an earring in his ear. But I guess you will never be a 'real man'!!!!!!"; and coworkers calling plaintiff the terms "faggot" and "fem," based on which the district court had found sex stereotyping, "compel[] the conclusion that the reprehensible conduct that Kay alleges was motivated by sexual orientation bias rather than gender stereotyping"); *Webb v. Int'l Bhd. of Elec. Workers, Local Union No. 654*, No. 04-3613, 2005 U.S. Dist. LEXIS 21381, at *29-30 (D. Pa. Sept. 23, 2005) ("[A]lthough some of the harassment alleged by Webb involves ridicule of his appearance - his lips and his pierced ears - that could perhaps in some situations be motivated by gender stereotyping, the broader context of the harassment, including the more offensively obscene remarks and drawings, alleged by Webb, makes it clear that this conduct implicated sexual orientation bias. Webb's own rendition of the facts includes his belief that at least two of his alleged harassers wrongly believed him to be homosexual. . . . [N]o reasonable jury could find that the harassment alleged by Webb, reprehensible though it was, was motivated by gender stereotyping rather than by sexual orientation bias.").

⁷⁰ HUMAN RIGHTS CAMPAIGN, FEDERAL LEGISLATION, EMPLOYMENT NON-DISCRIMINATION ACT (2010), http://www.hrc.org/law_and_elections/enda.asp (lasted visited July 27, 2010).

⁷¹ The Williams Institute, *Analysis of State Laws and Executive Orders Prohibiting Employment Discrimination Against LGBT People*, in Documenting Discrimination on the Basis of Sexual Orientation and Gender Identity in State Employment 15-2, available at http://www.law.ucla.edu/williamsinstitute/programs/employmentreports_ENDA.html (last visited July 27, 2010).

⁷² *Id.*

⁷³ Human Rights Campaign, *supra* note 70. Ten states that have not passed statutes have gubernatorial executive orders that in theory prohibit discrimination against state employees. Still, not one of these orders allows for a private right of action; a mere six of them provide the authority to investigate a victimized employee's grievance. See Williams Institute, *supra* note 71, at 15-3.

⁷⁴ Klawitter & Flatt, *supra* note 17, at 658.

⁷⁵ *Id.* at 663.

II. THE EMPLOYMENT NON-DISCRIMINATION ACT: PROVIDING THE SAME BASIC PROTECTION FROM DISCRIMINATION THAT OTHER EMPLOYEES POSSESS

Title VII established an important principle in American law: Employment decisions should be based on a person's qualifications and job performance, rather than on characteristics unrelated to their work. Until now, however, that principle has not been applied to employment decisions based on a person's sexual orientation or gender identity. The Employment Non-Discrimination Act, which is currently being considered by Congress, would at last forbid these types of discrimination.

By design, ENDA is modeled on the employment protections offered by Title VII, here extended to apply to sexual orientation and gender identity.⁷⁶ ENDA would make it illegal to discriminate against employees when it comes to hiring, termination, compensation, promotion, and most terms and conditions of employment based on either sexual orientation or gender identity, or the perception of either. It would also protect workers from discrimination because they associated with other workers with disfavored sexual orientations or gender identities, and would protect all workers from retaliation if they complained about discrimination based on sexual orientation or gender identity. It would cover the same employers currently covered by Title VII: Federal, state and local governments, private employers with fifteen or more employees, unions, and employment agencies. It would therefore give the same basic protection from discrimination based on sexual orientation and gender identity that is currently accorded by Title VII to race, color, religion, sex and national origin.

ENDA would also provide the same procedures and remedies available to other employees under Title VII. Sexual orientation and gender identity claims would come within the purview of the EEOC, the federal agency that enforces Title VII. Available remedies would include: awarding back or front pay; promotion, hiring or reinstatement; reasonable accommodations that would return the employee to the circumstances that he or she would have been in had the discrimination not occurred; and, attorney's fees, expert witness fees, and court costs.⁷⁷

Further, ENDA provides the same blanket exclusion for particular types of employers from its coverage that Title VII exempts from the ban on religious discrimination.⁷⁸ In other words, those employers who are currently not covered by Title VII's ban on religious discrimination would, on passage of ENDA, also be exempt from the prohibition on discrimination based on LGBT status. Title VII contains two such exemptions that would be incorporated into ENDA.⁷⁹ The first, section 2000e-1(a), provides that Title VII "shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."⁸⁰ This provision has been routinely applied by courts under Title VII to exempt a broad variety of

⁷⁶ S.1584, 111th Cong. § 2 (2009); H.R. 3017, 111th Cong. § 2 (2009) (sexual orientation is defined as "homosexuality, heterosexuality, or bisexuality," and gender identity is described as "the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth").

⁷⁷ *Id.*

⁷⁸ S.1584 § 6; H.R. 3017 § 6.

⁷⁹ S.1584 § 6; H.R. 3017 § 6.

⁸⁰ 42 U.S.C. § 2000e-1 (1964).

churches, faith-based ministries, and religious educational institutions.⁸¹ The second exemption, section 2000e-2(e)(2), protects religious hiring in sectarian education by providing, that:

[I]t shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if [the institution] is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.⁸²

ENDA also narrows the protections otherwise available under Title VII in particular ways where claims of sexual orientation or gender identity are at stake, in order to avoid any contention that LGBT employees would receive “special rights” under the law.⁸³ Thus, ENDA specifically prohibits the use of affirmative action as a remedy for LGBT discrimination, although this remedy is sometimes available for race and gender discrimination.⁸⁴ It also excludes the use of a “disparate impact” theory of discrimination for LGBT claims, a theory available for other claims of discrimination, which allows employees to sue for employer actions that disproportionately affect a protected class. Further, the bill explicitly permits employers to institute reasonable dress and grooming standards.⁸⁵ ENDA also states that it may not be interpreted to require the equal provision of benefits to same-sex partners.⁸⁶

Finally, ENDA exempts the armed services from its coverage.⁸⁷ It therefore has no effect on current military policies for LGBT service members.⁸⁸ It also does not apply to veterans’ benefits.⁸⁹

While some opponents of ENDA have contended that its passage might portend an explosion of litigation that would overwhelm the EEOC and federal courts with a flood of claims, the evidence belies this contention. A 2007 cost estimate by the

⁸¹ See, e.g., *LeBoon v. Lancaster Jewish Cmty. Ctr Ass’n*, 503 F.3d 217 (3d. Cir. 2007) (Jewish community center, which operated a variety of programs, including a summer camp and preschool, and published a newspaper, exempted); *Hall v. Baptist Mem’l Health Care Corp.*, 215 F.3d 618 (6th Cir. 2000) (college associated with Baptist churches exempted); *Killinger v. Samford Univ.*, 113 F.3d 196 (11th Cir. 1997) (similar); *Spencer v. World Vision, Inc.*, 570 F. Supp. 2d 1279 (W.D. Wash. 2008) (nonprofit Christian humanitarian organization exempted); *Saeemodarae v. Mercy Health Services*, 456 F. Supp. 2d 1021 (N.D. Iowa 2006) (Catholic hospital exempted); *EEOC v. Presbyterian Ministries, Inc.*, 788 F. Supp. 1154 (W.D. Wash. 1992) (retirement home operated by Presbyterian Church exempted); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972) (Salvation Army exempted).

⁸² 42 U.S.C. § 2000e-2.

⁸³ S.1584 § 8(a); H.R. 3017 § 8(a).

⁸⁴ See *id.*

⁸⁵ S.1584 § 5; H.R. 3017 § 5 (employers may limit the dressing and grooming standards of individuals participating in a gender transition to that gender the individual is transitioning to, or has transitioned).

⁸⁶ S.1584 § 8(b); H.R. 3017 § 8(b).

⁸⁷ S.1584 § 7(a); H.R. 3017 § 7(a).

⁸⁸ See S.1584 § 7; H.R. 3017 § 7.

⁸⁹ S.1584 § 7(b); H.R. 3017 § 7(b).

Congressional Budget Office (CBO) predicts far more modest effects.⁹⁰ According to the CBO, the EEOC expects that the passage of ENDA would increase its annual caseload by 5 percent, and would require adding 60 to 80 staff persons.⁹¹ It estimated that ENDA would likely cause an insignificant increase in the workload of the federal courts because of the relatively small number of cases that would reach them.⁹² An earlier report of the General Accounting Office (“GAO”) that gathered data concerning the utilization of state laws prohibiting sexual orientation discrimination found that less than 3 percent of all the employment discrimination complaints filed in each of these states were based on sexual orientation.⁹³ The report concluded that “relatively few formal complaints of employment discrimination on the basis of sexual orientation have been filed, either in absolute numbers or as a percentage of all employment discrimination complaints.”⁹⁴

III. CONCLUSION

A half century ago, Eleanor Roosevelt eloquently observed that human rights begin:

“[i]n small places, close to home—so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighborhood he lives in; the school or college he attends; the factory, farm, or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere.”⁹⁵

⁹⁰ STAFF OF CONG. BUDGET OFFICE, 110TH CONG., REPORT ON COST ESTIMATE OF H.R. 3685 EMPLOYMENT NON-DISCRIMINATION ACT (2007).

⁹¹ *Id.* at 2.

⁹² *Id.*

⁹³ See U.S. Gen. Accounting Office, Sexual-Orientation Based Employment Discrimination: States’ Experience with Statutory Prohibitions 11-13 (GAO/OGC-98-7R) (1997) (the average annual rates were as follows for each state: California, 1.05%; Connecticut, 1.36%; District of Columbia, 2.52%; Hawaii, 2.76%; Massachusetts, 2.17%; Minnesota, 3.10%; New Jersey, 1.27%; Rhode Island, 1.85%; Vermont, 2.94%; and Wisconsin, 1.1%); see also William B. Rubenstein, *Do Gay Rights Laws Matter?: An Empirical Assessment*, 75 Southern Cal. L. Rev. 65 (2002). Rubenstein persuasively argues that the low percentages reported by the GAO are not evidence that gays and lesbians are not using these laws, but rather that they reflect the lower rates of gay workers who are employed as compared to, for example, women workers or minority workers. When Rubenstein accounted for the number of gays in the workforce compared to other protected populations, he concluded that in most states that have these statutes, sexual orientation complaints fall somewhere between the rates of sex and discrimination filings. Given the relatively small percentage of gays and lesbians in the workforce, however, Rubenstein concludes that “even the relatively frequent filing of discrimination complaints by gay workers will not swamp government agencies.” *Id.* at 66-68; see also Badgett, Sears, Lau, & Ho, *supra* note 5, at 579-80 (reaching conclusion that although the raw number of complaints filed based on sexual orientation was small in states that had LGB antidiscrimination provisions, when the relatively low rates of LGB persons in the general population were factored in, “the actual number of sexual orientation discrimination complaints per gay person . . . were roughly equivalent to the number of sex-based discrimination complaints per woman”).

⁹⁴ U.S. Gen. Accounting Office, *supra* note 93. No similar studies have been conducted on the complaint rates for states that currently prohibition discrimination based on sexual identity. See Badgett, Sears, Lau, & Ho, *supra* note 5, at 580.

⁹⁵ Eleanor Roosevelt, Remarks At Presentation Of Booklet On Human Rights, In Your Hands, To The United Nations Commission On Human Rights, United Nations, New York, (Mar. 27, 1958).

A substantial number of LGBT employees in the United States currently experience discrimination at their jobs—many on a weekly, even daily basis. These employees seek nothing other than to be judged fairly based on their work performance, rather than on their sexual orientation or gender identity. Yet, unlike other workers, they currently have no recourse under the law. The passage of ENDA is a modest, pragmatic step that would help ensure that these workers are judged fairly, based on their work performance rather than on their sexual orientation or gender identity. In this way, ENDA would bring us closer toward realizing the vital promise of ensuring that all persons are treated with equal justice, equal opportunity, and equal dignity under the law.

