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Rachel Levinson-Waldman



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Washington, D.C. 20005
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202-393-6181

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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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Separation of Powers and Federalism

The Separation of Powers and Federalism Issue Group addresses the proper balance of power between the three branches of government, as between the federal government and the states.

Saved by the Supreme Court: Rescuing Corporate America

Alan B. Morrison*

There may be a recession still underway, and millions of Americans are without jobs or working for far less than they used to be paid, but Corporate America is doing just fine. It has record profits, and even with the recent downturn, stocks have rebounded very nicely from their low point in 2009. And collectively, American corporations are sitting on trillions of dollars in cash. They are well-armed with high paid lobbyists, their political committees are revved up and ready to go for 2012, and the Supreme Court has freed them from the law that forbade them from using their own money to fund independent political ads so that they can elect their favorites and defeat those who might try to pass laws that make life more difficult for them. In short, Corporate America is the perfect picture of a “have” in the world of “haves” and “have nots.”

One reason that profits have increased for Corporate America is that the Supreme Court has been a major ally. Since the late 1980s, on almost every occasion where big corporations have had a case of major significance in the High Court, the Court has ruled in their favor. In most cases, the companies had not lost a legislative battle or gone to the Court to protect a right that had been swept aside. With few exceptions, they never asked anyone else to fix a problem, but preferred to let the Court help them out, as it was more than willing to do. The Court has come to their rescue on a wide range of both procedural and substantive issues, with a number of these cases coming in the Court’s most recent term.

To be sure, the Court does not always side with Big Business, as evidenced by the failure of the Chamber of Commerce to persuade the Court that the Arizona law imposing more serious punishments on those who hire illegal immigrants than does federal law is not preempted by the federal statute.¹ And in another preemption case this past term, *Williamson v. Mazda Motors*, the Court permitted an injured passenger to sue a car manufacturer under state law over an alleged defect that was not subject to any direct federal standard.² In the overall scheme, these cases and others that went against a corporate party seem to be of only modest importance, because they applied to relatively few situations, rather than making a broad rule that is unfavorable to similarly situated defendants. They do at least demonstrate that the High Court does not always rule as Corporate America would like. Rather, my point is that, in the cases that really count, you can bet on Big Business winning in the Supreme Court.

Many people who see “Supreme Court” and “Corporate America” in the same sentence immediately think of the 2010 decision in *Citizens United v. FEC*, in which the Court used the First Amendment to strike down the long standing federal law that

* Lerner Family Associate Dean for Public Interest & Public Service, George Washington University Law School. The author was an unpaid adviser or co-counsel for one of the parties or an amicus in a number of cases discussed in this Issue Brief. This Issue Brief was first released by ACS in October 2011.

¹ Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1973 (2011).

² 131 S. Ct. 1131, 1134 (2011).

prohibited corporations from using their own money to make independent expenditures—mainly in the form of political ads—in connection with federal elections.³ Because there are also “dozens of [similar] state laws,”⁴ the ruling loosened millions of dollars to be used to affect elections ranging from the president and governors, to members of Congress and state legislatures, to Attorneys General and District Attorneys, and, more perniciously, to the 39 states that elect judges at one level or another. It is not clear how many corporations will take advantage of this newly found right, or whether its use will be limited to some companies or some elections. What is clear, however, are certain facts surrounding the ruling that highlight how aggressively the Court has been in rescuing corporations, even when they do not ask the Court for that help.

First, *Citizens United* was not a case in which the Court was backed into a corner and had to decide whether corporations could make unlimited independent expenditures. As Justice Stevens’ dissent points out, there were three statutory grounds on which the Court could have ruled for the plaintiff.⁵ Moreover, in the trial court, the plaintiff had abandoned the broad claim that the Court eventually upheld, and as a result there was no proper record on which to decide the case.⁶ Indeed, in order to reach that issue, the Court set the case for re-argument and ordered the parties to brief whether the ban on independent expenditures by for-profit corporations violated the First Amendment.⁷ Finally, because the actual plaintiff was a non-profit corporation, the only way that the for-profit aspect was in the case was because the plaintiff accepted very small amounts of money from for-profit companies, and some of that money *might* have been used to support the expenditure found to violate federal law.⁸ Since the plaintiff was not a for-profit corporation, the Court could sensibly have said that it would await a case in which such a plaintiff brought the issue to the Court. Perhaps even more significant, in the most recent battle in Congress over campaign finance laws, no one ever proposed that the ban on corporate independent expenditures be lifted or modified, and several business groups actually supported the extension of the 1974 law to close certain loopholes as they related to corporate involvement in federal elections. Even assuming that there was a reasonable First Amendment case to be made on this question, the Court’s eagerness to reach out in a singularly inappropriate case for deciding the question demonstrates that the majority had made up its mind as to how it would rule and was simply looking for any vehicle by which to announce its preferred outcome.⁹

Citizens United was a decision that immediately hit home to the average American, but most of the Court’s pro-business rulings are much less known and less obviously pro-business, which is just what you would like if you were a corporate CEO or gen-

³ 130 S. Ct. 876, 913 (2010).

⁴ *Id.* at 969 (Stevens, J., dissenting).

⁵ *Id.* at 936-38.

⁶ *Id.* at 931-32.

⁷ *Id.* at 932.

⁸ *Id.* at 937.

⁹ This past June, the Court struck down Arizona’s limited public financing system that had been in effect for a dozen years and that gave participating candidates additional funding when their opponents and those who made independent expenditures to support an opponent gave above the amount that the participating candidate was allowed to spend. *See* *Ariz. Free Enter. Club’s Freedom Pac v. Bennett*, 131 S. Ct. 2806 (2011). Systems like Arizona’s were seen as one way to counteract the impact of *Citizens United*, and thus this decision can also be characterized as pro-corporate.

eral counsel. For convenience, I have grouped them under two main headings below, “The More Technical the Better” and “Seemingly Small Changes That Really Matter.” Within the first, I discuss changes that are often thought of as procedural, but have very significant real world consequences. Included in that part is the long-running and highly successful effort by the Court to sweep a large portion of the civil court docket into arbitration, the forum of choice for corporations when sued by individuals. Within the “Small Changes” portion, I will discuss the Court’s rulings seriously cutting back on punitive damages, the limitations imposed when shareholders try to sue wrongdoers other than the company that issued their stock, and the various ways in which the Court has made drug companies less subject to suit.

I. THE MORE TECHNICAL THE BETTER

A. “CLARIFYING” THE RULES OF PROCEDURE

As Congressman John Dingell said when he was chair of the House Energy Committee,

Most people think of the procedure as just being kind of amorphous, and you don’t have to worry much about it. The procedure is exquisitely important.... I’ll let you write the substance of a statute, and you let me write the procedure, and I’ll screw you every time.¹⁰

No one understands this better than the Supreme Court as it has tightened a number of procedural rules in the past two decades that have made litigation life much better for defendants, which mostly translates into better for corporations.

First there was the decision in *Daubert v. Merrell Pharmaceuticals, Inc.*,¹¹ in which the Court “clarified” the standard in the Federal Rules of Evidence for deciding whether to accept testimony of an expert witness. The Court had several options as to how to interpret the existing rule, and while it did not choose the most restrictive, the choice it did make, as construed by it and the lower courts, has made it considerably more difficult for a party to qualify an expert witness for trial. In doing so, Justice Blackmun pronounced a new test, not found in the text of the rule or elsewhere.

In theory, this should have been a neutral change since the rule applies to both sides’ witnesses. But that is not the impact for two reasons: plaintiffs often have the obligation to provide expert testimony as part of their basic case, and unless they can find a qualified expert, the defense does not have to worry about getting their own. In addition, the defendant, usually a corporation, is generally much better funded and has people on its payroll that the company can use as experts. That may or may not have been the intention of the Justices in the majority, but that is its real world impact. There is a debate about how harmful the change is to plaintiffs, but there is not much debate that the new interpretation hurts plaintiffs more than it hurts defendants.

Unlike legislation, which must be passed by both chambers of Congress and signed by the president, changes in the Federal Rules of Evidence and Procedure do not have

¹⁰ Craig Oren, *Be Careful What You Wish For: Amending the Administrative Procedure Act*, 56 ADMIN. L. REV. 1141, 1141 (2004) (citing *Regulatory Reform Act: Hearing Before the Subcomm. on Administrative Law and Government Relations of the H. Comm. on the Judiciary*, 98th Cong., 312 (1983)).

¹¹ 509 U.S. 579 (1993).

to run that gauntlet. Instead, there is a committee structure in place to consider all changes in the Federal Rules and make recommendations to the Supreme Court. In that process, the appropriate committee—composed of federal judges, law professors, and practitioners from both the plaintiff and defense side—takes a systematic look at an area of the rules, obtains needed empirical and other research, considers alternative proposals, seeks input from all segments of the Bar on a specific proposal, makes a recommendation with a detailed explanation of what it did and why, and then forwards it up the line until it eventually reaches the Supreme Court. But in *Daubert*, the Court short-circuited that far more open and democratic process and created, in effect, its own original rule, which is considerably different from the common understanding of the pre-existing rule of evidence. The problem is not only that *Daubert* is too favorable to defendants—which it is—but that the Court saw a problem and decided to “solve” it on its own, with only amicus briefs to inform it of additional considerations. And even the amici had no opportunity to comment on the Court’s standard, which it created on its own and announced only in its opinion.

The next significant, and probably even more blatant end-run on the rules process, occurred in the Court’s decisions in *Bell Atlantic Corp. v. Twombly*,¹² and *Ashcroft v. Iqbal*,¹³ both of which decided that greater specificity was required in pleadings than had been previously required. In theory, the change applies to pleadings by defendants as well as plaintiffs, but in practice the impact of the change falls almost entirely on the plaintiff who now must satisfy a heavier burden to avoid dismissal. The requirement is especially harsh where only the defendant has access to the information needed to satisfy the higher burden and will not make it available unless a court proceeding requires it to be produced. The defendant in *Twombly* was a large telephone company, while the defendants being sued by Iqbal in his civil rights case were the Attorney General and the Director of the FBI. The significance of *Iqbal* is that it removed any doubt that the pleading standard announced in *Twombly* was in any way limited to the facts of that case, which involved a massive class action under the federal antitrust laws, where wide-ranging discovery was sought, and where the plaintiff had arguably pled only a theory that was not viable under existing law. *Iqbal*, by contrast, involved an individual action, claiming a routine constitutional violation, in which the lower courts had already carefully circumscribed discovery, yet the Court extended *Twombly* to cover this case as well.

Again, while there is a debate about how much more burdensome the new pleading standard is, almost no one claims that there is not a new standard and that it surely imposes *some* additional burden on plaintiffs in *some* cases and that at least *some* plaintiffs will not get their day in court as a result of the new interpretation of the existing rule. Indeed, the *Twombly* Court overruled part of a major Supreme Court opinion regarding the pleading standard that had been universally cited as the leading authority in this area.¹⁴ I do not argue here that the outcome is wrong—although I think it is harmful and unjust—but make the more basic point that the Court concluded that there was a problem with the existing pleading standard and decided that it need not involve the rules committee in solving the problem, but that it could do so on its own. The main beneficiary, not surprisingly, is Corporate America, as was clear

¹² 550 U.S. 544 (2007).

¹³ 129 S. Ct. 1937 (2009).

¹⁴ 550 U.S. at 561-63 (overruling *Conley v. Gibson*, 355 U.S. 41 (1957)).

from the outcome in *Twombly*, which overturned the lower court's refusal to dismiss the case.

This term's decision in *Wal-Mart Stores, Inc. v. Dukes*,¹⁵ dealt a serious blow to all class actions, but a particularly harmful one to employment discrimination cases. It did so by greatly ratcheting up the requirements for showing a common question required for class certification, and then upset the widely held understanding that back pay in employment discrimination cases could be routinely awarded if the court found a violation of Title VII and ordered the defendant to end its discriminatory practices.

The plaintiffs in *Wal-Mart* had succeeded in certifying an unusually large class of women who, they alleged, were systematically underpaid by *Wal-Mart* and given far fewer promotions than their comparable male counterparts. Their claim, which was backed up by detailed statistical analyses, was that, although the company had a written anti-discrimination policy,¹⁶ it had a contrary corporate culture of male domination and preferences that was absorbed by the local managers who were given wide discretion in matters of pay and promotion and regularly acted to the disadvantage of female employees.¹⁷ After extensive discovery and a lengthy hearing, the district judge found the allegations credible and supported by substantial proof.¹⁸ He then certified a nationwide class for purposes of determining liability and awarding back pay for loss of wages and promotion for what could be as many as one million women, a ruling that was largely affirmed by a closely divided Ninth Circuit *en banc*.¹⁹

That the Supreme Court overturned class certification was not a surprise to many, given the strong anti-litigation bias the Court had shown in the other cases discussed in this Issue Brief. In addition, there were certain aspects of the claim that made it seem counter-intuitive: how could *Wal-Mart* be charged with discrimination when the relevant decisions were made by local managers in approximately 3400 stores, with no central control over who was paid how much or who was selected for promotion, even if found to produce statistically significantly adverse treatment for women? What is surprising is that the five Justice majority did so by ruling that the requirement of a common question, which had always been assumed not to place a heavy burden on the plaintiffs, was now a major hurdle to certification where the challenge was to unwritten rules or practices that harmed the plaintiffs and could only be proven by circumstantial evidence. In many class actions, employment or otherwise, there will be a written rule or practice that harms the plaintiff class, such as strength requirements for firefighters or IQ tests for maintenance workers, whose application is undisputed, and the principal issue is whether the requirement offends Title VII. But given the increasing sophistication of companies in avoiding blatant Title VII violations, we are likely to see more *Wal-Mart* type situations, in which the policy is unstated, but the harm is real, and the plaintiffs will be kept out of court, at least if the case is brought on a company-wide basis.

Undoubtedly, the size of the plaintiff class, the fact that the class included some women who had eventually been promoted, and some who were not underpaid, also troubled the Court. It may be that *Wal-Mart* will, in the end, only stand for the proposition that some classes of great size, seeking relief under some theories of liability,

¹⁵ 131 S. Ct. 2541 (2011).

¹⁶ *Id.* at 2553.

¹⁷ *Id.* at 2547-49.

¹⁸ *Id.* at 2549.

¹⁹ *Id.*

cannot be certified under Rule 23. It also remains possible that smaller classes, based on a single store, state, or region, could be certified, using national statistics and applying them locally. At the very least, this part of the ruling will provide enormous ammunition for defense counsel in all class actions. Moreover, given the Court's emphasis on what plaintiffs have to prove, and not merely allege, at the class certification stage, it will require plaintiffs to take extensive and costly pre-certification discovery, but with the increased likelihood that the class will not be certified and that plaintiffs, which means their lawyers, will lose their investment. Or they may just decide not to bring the case at all, which does not seem to bother the *Wal-Mart* majority in the slightest.

The other part of *Wal-Mart* was in many respects more surprising because it was unanimous in rejecting the effort to use Rule 23(b)(2) – which is easier to satisfy than is Rule 23(b)(3) – to bring in claims for back pay, in addition to the primary relief of ordering the defendant to cease violating Title VII. Although the Court rejected *Wal-Mart*'s argument that monetary relief can never be awarded under Rule 23(b)(2), it said that it could not be awarded in this case, but did not explain in what other kinds of cases it would be appropriate. What is most disturbing to employment lawyers who represent plaintiffs is that, ever since Title VII was enacted, it has been the uniform understanding and practice that monetary relief in the form of back pay was available after an injunction had been granted so that the plaintiffs would be made whole, and so that defendants would have proper incentives to conform their conduct to the law.

To be sure, the Court was troubled that class members who wished to bring their monetary claims on their own could not opt-out of this part of the case, although no one had asked these plaintiffs to afford such an opportunity. In addition, plaintiffs had proposed using a formula for deciding who would receive back pay and in what amounts, and the Court was insistent that the defendant had a right to question the use of the formula in at least some cases. And it surely did not help the class that the formula would have been applied on a nationwide basis to several hundred thousand women who might be eligible for back pay. But those were not the stated grounds for the broad ruling denying back pay under Rule 23(b)(2).

It remains to be seen how damaging the back pay aspects of *Wal-Mart* will be in other cases. It may be that granting an opt-out, which is unlikely to be utilized unless a class member has an unusually large claim, and allowing a defendant to show why a generally applicable formula is not appropriate for at least some class members, will solve the problem for most classes. But it also may be that, in the end, no monetary relief will be available under Rule 23(b)(2) and that the requirements of Rule 23(b)(3), particularly that the common questions predominate over the individual questions, may make class certification for monetary relief in employment cases impossible under the Rule as written. At the very least, defendants in employment class actions, and probably in at least some other kinds of class litigation, will argue that *Wal-Mart* precludes class-wide monetary relief except under Rule 23(b)(3), which will increase their bargaining position over both class certification and settlement on the merits.

Another procedural ruling that greatly favors defendants was *J. McIntyre Machinery, Ltd., v. Nicastro*.²⁰ The Court there held that the plaintiff, who was injured on the job by a three-ton scrap metal stripper, could not sue the British manufacturer in state court in New Jersey where the plaintiff was injured by the allegedly defective machine.²¹ It found that the Due Process Clause of the Constitution pre-

²⁰ 131 S. Ct. 2780 (2011).

²¹ *Id.* at 2785.

cluded the state from entertaining that lawsuit because the company had never done business in New Jersey, but had instead used an Ohio distributor to sell its products in the United States.²² Where, one might ask the majority, could the plaintiff have sued in the United States? What about Ohio where the distributor was located or Las Vegas where the company regularly sent representatives to tout its products and where the plaintiff's employer had first learned of the McIntyre machine that it later purchased? Would the holding have been different if the manufacturer were in Oregon, and everything else were the same? The Justices did not say.

The concurring opinion by Justice Breyer, joined by Justice Alito, seemed to focus on the lack of proof by the plaintiffs of a necessary connection with New Jersey, as well as a concern about hand-crafted products of an artisan ending up in some distant part of the country, and a lawsuit being brought there, as well as the effect that a favorable ruling for plaintiffs would have on claims arising out of conduct on the Internet.²³ Most first semester law students would have no trouble distinguishing the artisan case from the three ton scrap machine, but the concurrence did not see it that way. As for the Internet, the Court could have done what it often does in such situations: add a footnote saying that Internet cases are different and are not controlled by this decision.

Taking a very mechanical view of the Due Process Clause, and showing a heightened focus on the role of sovereignty, the plurality suggested that, because the sovereignty of the United States is not limited, plaintiff might be able to sue in federal court, possibly even in New Jersey.²⁴ If the Due Process Clause is supposed to protect defendants from being sued in distant forums, why is New Jersey federal court appropriate, but a state court across the street is not? Similarly, assuming that the defendant could be sued in Ohio, where it shipped the machines for further distribution, or even in Nevada where it regularly went to promote its business, how are they significantly *more* convenient than New Jersey? And if Due Process is about reasonable expectations, does anyone really suppose that the manufacturer had any special concern about *where* in the US it might be sued, once it told its distributor to sell as many machines as possible, with no geographic limitations whatsoever?

Plaintiffs' lawyers are upset with this decision for several reasons. First, it will give defendants in many product liability cases another issue to raise, causing additional expense and delay, which always favors defendants. Second, some courts may follow *McIntyre* and force plaintiffs to sue in an inconvenient location, increasing their costs, or not suing at all if they can only sue in England or perhaps Nevada. Third, the ruling is another judicial weight on the scales of justice in favor of defendants, even if very few cases end up being dismissed for Due Process reasons. Looking at *McIntyre* as part of a larger pattern makes it more understandable as another decision that makes litigation more difficult for plaintiffs to maintain and easier for corporations to defeat.

Another 2011 decision falling in the procedural category is the below-the-radar ruling in *Schindler Elevator Corp v. United States ex rel Kirk*.²⁵ In this False Claims Act case, the plaintiff, a former employee of defendant, alleged that defendant had filed false reports with the government about its compliance with certain statutes de-

²² *Id.* at 2791.

²³ *Id.* at 2791-94.

²⁴ *Id.* at 2790.

²⁵ 131 S. Ct. 1885 (2011).

signed to give veterans certain preferences in employment when working for government contractors. Prior to filing suit, plaintiff had used the Freedom of Information Act (FOIA) to obtain copies of certain filings by defendant, as well as agency statements that no responsive records were found for some periods. Under the False Claims Act, individuals can sue on behalf of the government to recover money owed the government, but the basis of such suits cannot be “reports” issued by the government. The theory for that exception is that, if the government already has the information, it alone should decide whether to sue the alleged wrongdoer.

In *Schindler*, the Court held that responses to FOIA requests, regardless of their contents, were “reports” and thus information provided under FOIA could not be the basis of the suit,²⁶ even where the government—the beneficiary of the exception—argued that the statute should not apply to routine responses to FOIA requests.²⁷ The result is that some significant number of False Claims Act cases will be dismissed for using FOIA to gather facts, or will be dismissed under *Iqbal* for not having facts that could only be obtained under FOIA. Once again, by a seemingly modest ruling that “simply interprets” what Congress wrote, it will be much harder to sue companies for falsifying information provided to the government by those doing business with it.

B. IT’S JUST A CHANGE IN FORUM

Over the past two decades the Court has decided a number of cases interpreting the Federal Arbitration Act (FAA).²⁸ In virtually every one, it has ruled in favor of sending the case to arbitration or allowing the arbitrator to decide important legal or factual questions. Its constant refrain, over the vehement opposition of the individuals who want their day in court and not before an arbitrator, is that arbitration does not alter anyone’s legal rights, but simply involves a change in forum.²⁹

There are a number of reasons why most people do not see arbitration as just another forum. In our public courts, judges and juries are free, but the parties have to pay for arbitrators. Discovery—the ability to gather vital information from the other side—is generally limited or not available at all in arbitration. Arbitrators often come with an industry background and are chosen for repeat business because they have ruled “reasonably” in the past, unlike jurors who come from the pool of individuals more closely resembling consumers and workers, or judges who are elected or appointed as state officials. All of those differences and more, such as guaranteed secrecy, are why companies love arbitration, and why consumers, workers, and lawyers who represent them generally want to stay as far away from arbitration as possible. Besides, if arbitration were such a good deal for plaintiffs, then they would choose to arbitrate once the dispute arose, and the “agreement” to arbitrate would not have to be forced on them in their contracts. To see what a stretch the Court has made to enable corporations to require arbitration whenever they choose, a little background on the FAA is useful.

²⁶ *Id.* at 1889.

²⁷ Brief for United States as Amicus Curiae Supporting Respondent, *Schindler Elevator Corp. v. United States ex rel Kirk*, 601 F.3d 94 (2d Cir. 2010) (No. 09-1678-cv), 2011 WL 246073.

²⁸ 9 U.S.C. §§ 1 *et seq.* (2006).

²⁹ See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (“By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.”).

The FAA was enacted against a background of courts refusing to enforce agreements by businesses to submit their disputes to arbitration. Under the FAA those agreements were made enforceable, and the federal courts were given the power to assure compliance with the law. That basic approach is not the source of the present controversy. What is controversial has been the vast extension of enforcing pre-dispute arbitration agreements between businesses, to situations in which the other party is consumer or an employee, where the corporation has all the bargaining power, and the arbitration clause is included if the person wants the product being sold or the job being offered. But to the Supreme Court, this change in context is beside the point, and all contracts include an arbitration clause are strictly enforced. This is not the place for a full recounting of the path to arbitral supremacy, but a few examples of how the reach of the FAA has been expanded will illustrate the enormous gift that the Court has bestowed on Corporate America, which is able to insert mandatory arbitration clauses in all manner of contracts with no realistic way for consumers or employees to object.

In 1925, the scope of Congress's Commerce Clause power, which is the basis of the FAA, was understood to be quite limited, yet the Court has applied the Act to an extent that would have been unthinkable when it was passed, although quite routine today. When a homeowner sued an exterminator for failure to honor a contract to handle a pesticide problem, the Court upheld a mandatory arbitration clause since the pesticides and materials used to repair the house came from outside the state, and hence there was "a contract evidencing a transaction involving commerce" as required for the FAA to apply.³⁰ Similarly, when employees of Circuit City sued their employer, the Court by a 5-4 vote construed the exclusion for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" not to apply to them, and so they were subject to the mandatory arbitration of the Act.³¹ As the dissent pointed out, Congress expressly excluded from it the only workers that satisfied the existing law on what Congress could constitutionally cover under the Commerce Clause.³² The result is that employees, who could not constitutionally have been subject to the FAA at the time it was written, are now covered by it because, according to the majority, Congress drafted the exclusion too narrowly!

As noted, the FAA was written to deal with businesses refusing to abide by agreements with other businesses to employ arbitration to resolve their disputes. As the *Terminex* and *Circuit City* cases illustrate, the Court construes the FAA to reach ordinary consumer contracts as well as employment contracts. Furthermore, it has allowed companies to insist on arbitration of claims based on federal and state statutes designed to protect consumers and employees, and not just contract disputes.³³ And it has ruled that a collective bargaining agreement can include a requirement that all claims of union members against the employer, including both contractual and statutory, must go to arbitration and not to court, even though the member has no choice on whether to sign the agreement and hence surely did not consent to have her claims arbitrated.³⁴

³⁰ *Allied-Bruce Terminex Companies, Inc. v. Dobson*, 513 U.S. 265, 268 (1995).

³¹ *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001).

³² *Id.* at 133-35 (Souter, J., dissenting).

³³ *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

³⁴ *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009).

This year, in *AT&T Mobility LLC. v. Conception*, the most far-reaching of the Court's arbitration rulings, again by a 5-4 vote, it allowed a company to include in its standard form contract a waiver of the right to sue or participate in any class action, based on the contract, or on any state or federal law.³⁵ *AT&T* was a perfect case for a class action because the company had sold consumers a cell phone package, which included a two year service contract, in which the phone was "free." The customer was nonetheless billed \$30, the amount that the State of California imputed as a sales tax. Either the company was within its rights in advertising its phone as free, or it was not, and the answer should have been the same for everyone—a perfect case for a class action, even under *Wal-Mart*. The company had a program that was designed to make the arbitration route look attractive to an individual, but arbitration would help the millions of people who bought cell phones from AT&T only if everyone pursued their individual \$30 claims in arbitration, which of course they would not do. The bottom line is that every company will insist in their contracts with their employees and customers that all disputes must be arbitrated and that no class actions will be allowed. That, in turn, means that lawyers will decline to take most of these cases. More than any other decisions, the Court's rulings under the FAA have re-shaped the litigation landscape for Corporate America and have made it much less likely that consumer or employees can prevail and that wrongdoing can be deterred or remedied.

Despite the fact the five Justices who comprise the majority in FAA cases generally consider themselves to be originalists, their approach to statutory interpretation is decidedly modern. If they had been true to their asserted belief that courts should read statutes as they were written by the Congress that enacted them, the majority should have said something like this in deciding these cases: "The FAA was written to enforce business to business agreements to arbitrate. It contained an exception for all employees that Congress could constitutionally have covered in 1925. It was passed before this Court greatly expanded the reach of the Commerce Clause, before most of the consumer and investor protection laws were enacted, and before Title VII and other federal and state anti-discrimination laws became law. We shall construe the law to be limited to the circumstances that led to its passage and to its scope as the Congress that enacted would have understood its reach. We leave to Congress the decision as to whether to extend it beyond its origins and, if so, in what respects. We are fully confident that the corporate parties that are asking us to apply it to circumstances unimaginable by the Congress of 1925 will be more than able to protect their interests when proposals to expand the FAA are debated there." But it did not.

II. SEEMINGLY SMALL CHANGES IN SUBSTANTIVE LAW REALLY DO MATTER

One of Corporate America's first substantive targets was punitive damages, which are generally available under state law. Rarely awarded in practice, because they require that the defendant engage in truly outrageous conduct, and often over-turned or significantly reduced on appeal, they are nonetheless greatly despised by all manner of defendants. As defendants see it, punitive damages might be very large in any given case, and they always represent a direct rebuke to a company that claims it is behaving ethically, even if its conduct injured the plaintiff. Corporations also claim that the potential for juries to reach outrageous results causes them to settle cases that should have been fought, or to pay too much for those that should be settled. But instead of

³⁵ 131 S. Ct. 1740 (2011).

going to state legislatures, where their lobbyists would surely have protected their interests, they went to the Supreme Court and asked it to bail them out.

For a period of time, the Court turned down their pleas, finding generally that the portion of the Constitution cited did not apply to punitive damages.³⁶ The Court was rightly concerned that, if there was a constitutional basis to challenge punitive damages awards, the Court would be flooded with cases and that it would be very hard to draw lines between permissive and excessive punitive damages on any principled basis. Eventually, the corporate onslaught wore down the Court, and in a case in which the Alabama courts had upheld a \$2 million punitive damages verdict when a dealer lied to a customer about whether the car had been in a wreck and the damage painted over, the Court ruled that this verdict was too high.³⁷ To reach that conclusion, the Court had to rely on the long discredited theory of substantive due process from the *Lochner* era, under which the Court substituted its judgment in matters of economics for those of the states and Congress. Recognizing that it had a problem in deciding which punitive awards were excessive, it began to impose so-called “procedural safeguards” on state courts.³⁸ When that did not solve the problem, it prohibited states from taking into account similar conduct outside its borders, and it imposed guidelines for an appropriate ratio of actual damages to punitive damages, with the outside figure of 9 to 1.³⁹ Finally, when a federal maritime case involving the infamous Exxon-Valdez oil spill came to the Court, it was able to exercise its traditional common law powers and held that anything beyond one to one would generally be excessive in that context.⁴⁰

Again, this is an area where the Court should have said, “Take your complaints to the state legislatures or even Congress.” The states have shown considerable willingness to tackle “tort reform” especially in the medical malpractice area, and they should at least have been asked to fix the perceived problem legislatively. Moreover, it is much easier for a legislature to draw lines and balance the relevant interests, than it is for courts, especially the Supreme Court whose only tool is the Due Process Clause of the Constitution. But since the Court made up its mind to “do something” about punitive damages, it used the only means it had to achieve the desired end.⁴¹

³⁶ See *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989) (Eighth Amendment inapplicable to punitive damages); see also *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993) (Due Process satisfied by award in this case).

³⁷ See *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

³⁸ *Cooper Industries Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) (requiring state courts to apply *de novo* standard of review in punitive damages cases).

³⁹ See *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). By contrast, the same majority, in the same term, rejected a claim that a sentence of 25 years in prison, with no chance of parole, for stealing three golf clubs, was not excessive under the Eighth Amendment in *Ewing v. California*, 538 U.S. 11 (2003); see also Alan B. Morrison, *Your Money or Your Life*, LEGAL TIMES, May 19, 2003.

⁴⁰ See *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008). Unlike most of the cases discussed in this Issue Brief, the punitive damages rulings do not conform to the normal ideological lines on both sides. Thus, Justices Scalia and Thomas have refused to apply substantive due process to state court judgments, although they did support the limits in *Exxon*. On the other side, Justice Souter wrote *Exxon*, and he and Justices Stevens and Breyer generally went along with imposing various limits on punitive damages.

⁴¹ By contrast, federal antitrust law is an area that Congress has largely delegated to the courts. Thus, when the Supreme Court made it harder to prove antitrust violations by overturning long-standing precedent that treated certain conduct as a *per se* violation, and instead made it subject to rule of reason analysis, *State Oil Co. v. Khan*, 522 U.S. 3 (1997) (overruling *Albrecht v. Herald Co.*, 390 U.S. 145 (1968)), it could not properly be charged with usurping the legislative or rulemaking functions, although those deci-

Interpreting the federal securities laws to protect alleged wrongdoers is another area where the Court has increasingly, although not uniformly, favored Corporate America, as three sets of cases illustrate. In some cases, the plaintiffs claim that not only is the company issuing the stock alleged to have engaged in fraud, but so have others such as joint venturers and underwriters who might be liable as aiders and abettors, and who may, unlike the company, still have assets. When several of those cases reached the Court, it narrowly construed the law to preclude secondary liability for the others, although they could be liable if plaintiffs made the unlikely showing that they had actually relied on the not-generally-public statements of these other participants.⁴² Just last term in *Janus Capital Group Inc. v. First Derivative Traders*,⁴³ the Court held that owners of a mutual fund could not sue the related company that supplied misleading information to the company in which the plaintiffs had invested, because their company, which had no assets, had actually “issued” the false information, and only the company that issued the stock could be sued. The result was that the alleged wrongdoer was able to avoid liability and the plaintiffs had no one from whom they could recover, even if they proved that there was fraud.

Finally, in *Morrison v. National Australia Bank Ltd.*,⁴⁴ the plaintiffs alleged that a Florida subsidiary of the Australian company in which they bought stock had provided false information to the parent, which had caused plaintiffs to lose money. The Court said that, even though the alleged fraud was committed in the United States, our courts could not entertain lawsuits brought by our citizens, involving stock issued and traded overseas, and that the SEC was also prohibited from suing the alleged wrongdoer.⁴⁵ In the securities fraud area, the Court’s rulings have been somewhat more favorable to plaintiffs than in others, so that it could not be said that the results have been entirely pro-corporate, but the trend is generally favorable for defendants and their insurers, especially in the cases that really matter.

Drug companies have also done quite well in the Court, with some notable exceptions where the issue has been preemption. While the plaintiff in *Wyeth v. Levine*,⁴⁶ defeated a defense of preemption where the jury found that the company had failed to provide adequate warnings for the drug that seriously injured the plaintiff, claimants in these cases must still establish the factual basis for their case on the merits. On the other hand, in *PLIVA, Inc. v. Mensing*,⁴⁷ the Court ruled that the maker of a generic drug had no obligation to notify the FDA when it had knowledge that the warning labels that were proposed by the original manufacturer and approved by the FDA understated a serious risk from the product. Because generic manufacturers cannot unilaterally change the label, and have no duty to ask the FDA to do so, they cannot, said the 5-4 majority, be sued no matter what they know of the risks that caused a plaintiff’s injuries. That ruling is a wholesale “get out of jail free card” for the generic drug

sions were a significant help to corporate defendants charged with antitrust violations by consumers or competitors.

⁴² See *Stoneridge Investment Partners, Inc. v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008); *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994).

⁴³ 131 S. Ct. 2296 (2011).

⁴⁴ 130 S. Ct. 2869 (2010).

⁴⁵ *Id.* at 2882-86, 2888.

⁴⁶ 555 U.S. 555 (2009).

⁴⁷ 131 S. Ct. 2567 (2011).

industry, and an especially harmful one for patients now that generics represent 75% of the drugs sold in this country.⁴⁸

In the Medicaid law, Congress required drug companies to provide entities that serve Medicaid patients with drugs priced at the lowest price they charge any customer, with certain limited exceptions. Congress gave the Department of Health & Human Services (HHS) the duty to enforce the law, but not the staff or money to carry out that function. Several counties decided to try to sue to recover damages for what they believed to be violations of this law, but the Supreme Court held that only HHS could seek such a remedy, even though the states and localities suing were paying much of the cost of these overcharges.⁴⁹

The final drug case handed down this term was *Sorrell v. IMS Health, Inc.*,⁵⁰ a challenge to a Vermont law that effectively prohibited drug companies from paying pharmacies to give them doctor, but not patient, specific information on what a doctor was prescribing so that their sales force could tailor their pitch to the habits of each doctor. The majority (5-4) treated the law as a form of censorship and found the interest of the doctors in not being subjected to that kind of scrutiny insufficient to sustain the law.⁵¹ The result is that policy of Vermont and two other states to shield doctors from what they concluded was inappropriate promotion of drugs has been invalidated.

III. CONCLUSION

Corporate America has not won every case in the Supreme Court in the past two decades, but it has prevailed in most of the important ones. By important I mean a decision that either wins the case outright for this defendant or erects a major barrier to the plaintiff proceeding, whereas most plaintiff wins enable them to preserve a verdict won at trial or avoid an early defeat. In addition, many of the favorable decisions for defendant companies are broadly applicable, making those victories even more significant. Indeed, I can think of no truly significant case in the last decade that Corporate America has lost.

In reaching those results, the Court has come to the rescue of Corporate America when other branches of the federal or state government were available and better suited to the job, but had not even been asked, let alone had they turned the companies down. The Court proceeds boldly when caution seems the wiser course, and it is apparently quite unconcerned with the victims of corporate abuse or with allowing alleged wrongdoing to go unremedied. Its distaste for lawsuits by consumers and employees that seek to recover money damages is evident, and its desire to slow down the use of the courts rarely checked. Whatever else the Court may do in other areas, there is little doubt what will happen when the stakes are high and Corporate America is in the Supreme Court.

⁴⁸ *Id.* at 2583.

⁴⁹ *Astra USA, Inc. v. Santa Clara County*, 131 S. Ct. 1342 (2011).

⁵⁰ 131 S. Ct. 2653 (2011).

⁵¹ *Id.* at 2659.

Restoring Access to Justice: The Impact of *Iqbal* and *Twombly* on Federal Civil Rights Litigation

Joshua Civin and Debo P. Adegbile*

I. INTRODUCTION

The names Yick Wo, Heman Sweatt, Pete Hernandez, Clarence Gideon, Annie Harper, Mildred and Richard Loving, and Willie Griggs are barely known to the American public, but the nation they helped forge is their lasting legacy. These individuals went to court, and their ability to do so literally changed our understanding of citizenship,¹ access to education,² jury service,³ the right to counsel,⁴ access to the voting booth,⁵ marriage,⁶ and equal employment opportunity.⁷ Indeed, much of our nation's progress toward the Constitutional aspiration of a "more perfect Union" occurred because these and other ordinary people have had ready access to litigate meritorious but often novel or difficult-to-prove cases in our courts.

Of course, this majestic view of courts and individuals' access to them does not tell the entire story. Lawsuits are by their very nature adversarial, slow, uncertain, and often inefficient, as well as frustrating for litigants, lawyers, and courts. And, to be sure, some are ill-founded. Yet, while few seriously contend that litigation is the exclusive way to achieve progress, it often is a vital tool for doing so and has proven particularly essential in the area of civil rights.

Recently, however, in a pair of decisions, the Supreme Court skewed the balance away from access to courts by elevating the threshold standard that all plaintiffs must meet to pursue legal claims. In *Bell Atlantic Corp. v. Twombly*⁸ and *Ashcroft v. Iqbal*,⁹ the Court suddenly and without clear necessity overturned well-settled law and imposed a more stringent standard for federal cases to survive. These decisions, by dramatically frontloading litigation and inviting judges to substitute their threshold personal judgments in place of evidence, go far beyond the familiar "verdict first, trial second" problem of which high-profile defendants complain. Instead, under *Twombly* and *Iqbal*, we now risk a world in which meritorious claims face "dismissal first, trial never."

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¹ See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

² See *Sweatt v. Painter*, 339 U.S. 629 (1950).

³ See *Hernandez v. Texas*, 347 U.S. 475 (1954).

⁴ See *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁵ See *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966).

⁶ See *Loving v. Virginia*, 388 U.S. 1 (1967).

⁷ See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

⁸ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

⁹ *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

In this Issue Brief, which draws upon and updates Congressional testimony by the NAACP Legal Defense & Educational Fund, Inc. (LDF),¹⁰ we analyze the detrimental impact of *Iqbal* and *Twombly* on our legal system in general and on civil rights in particular. We then review the broad mobilization urging Congress to overturn these decisions and restore the pleading standard that, for decades, has enabled civil rights litigants to root out discrimination wherever it exists. In our view, immediate Congressional action is needed to ensure that *Twombly* and *Iqbal* do not create an undesirable safe harbor that effectively places some defendants beyond the reach of civil rights laws.

II. THE CRITICAL IMPORTANCE OF A LIBERAL PLEADING STANDARD

When the Federal Rules of Civil Procedure were adopted in 1938, they transformed civil litigation by establishing a liberal standard for what plaintiffs must plead in their complaints to initiate a federal lawsuit and withstand a motion to dismiss. This liberal standard repudiated failed earlier approaches which, in effect, treated pleading requirements as traps for far too many meritorious claims. Notably, Rule 8(a)(2) requires only that a plaintiff's complaint include "a short and plain statement of the claim showing that the pleader is entitled to relief." And Rule 8(e) emphasizes that "[p]leadings must be construed so as to do justice."

Drawing on his experience as a federal judge for over 40 years and as a member of the team that assisted LDF's first Director-Counsel Thurgood Marshall in litigating *Brown v. Board of Education*, Judge Jack Weinstein of the U.S. District Court for the Eastern District of New York explained the purposes of these liberal rules:

[T]hey were optimistically intended to clear the procedural clouds so that the sunlight of substance might shine through. Litigants would have straightforward access to courts, and courts would render judgments based on facts not form. The courthouse door was opened to let the aggrieved take shelter.¹¹

Almost two decades after the Federal Rules were adopted, the Supreme Court recognized that a liberal pleading standard was essential to the emerging civil rights movement. In *Conley v. Gibson*, African-American railroad workers sued their union for failing to protect them from demotion and discharge on the same basis as white workers.¹² The case was part of a larger strategy, led by visionary civil rights attorney Charles Hamilton Houston, to ensure that unions treated all members fairly, regardless of their race.

In 1957, the Court ruled unanimously that the complaint could proceed. It noted that if the allegations were proven, there was a "manifest breach of the Union's statu-

¹⁰ See *Has the Supreme Court Limited Americans' Access to Courts?: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 4-5, 253-69 (2009) (statement of John Payton, LDF President and Director-Counsel); *Access to Justice Denied: Ashcroft v. Iqbal: Hearing Before the Subcomm. on the Constitution, Civil Rights & Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 77-92 (2009) (statement of Debo P. Adegbile, LDF Associate Director-Counsel).

¹¹ Jack B. Weinstein, *The Role of Judges in a Government Of, By, and For the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 108 (2008) (citations and quotation marks omitted).

¹² *Conley v. Gibson*, 355 U.S. 41, 43 (1957).

tory duty to represent fairly and without hostile discrimination all of the employees in the bargaining unit.” Rejecting the union’s argument that the workers’ complaint failed to identify specific facts to support their “general allegations” of discrimination, the Court held that “the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim.” Rather, “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 which would entitle him to relief.” According to the Court, a “fair notice” approach to pleading was sufficient because discovery and other pretrial procedures provided appropriate mechanisms to reveal the precise nature of claims and narrow disputed facts and issues prior to trial.¹³

Thus, *Conley* affirmed that the purpose of the Federal Rules’ pleading standard was to eliminate procedural barriers at the beginning of litigation that could prove fatal even to a meritorious claim: “The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.”¹⁴ In *Conley*, the Court dramatically rebuffed efforts by a defendant and its counsel to inoculate themselves from charges of stark discrimination through pleading gymnastics.

Placed in the civil rights context, the liberal pleading standard is a critical prerequisite to ensure that victims of discrimination can take full advantage of federal statutory safeguards. It is not an overstatement to say that the key successes of civil rights litigation in the last half century were due, in part, to the liberal pleading standard set forth in the Federal Rules and reinforced by the Supreme Court in *Conley*.

III. OVERTURNING WELL-ESTABLISHED PRECEDENT: *TWOMBLY* AND *IQBAL*

For five decades after *Conley*, the Supreme Court repeatedly affirmed this “fair notice” approach designed to prevent excessive obstacles at the pleading stage and facilitate adjudication of civil rights claims and other litigation on the merits.¹⁵ During those five decades, the Court rebuffed efforts by district and appellate courts to heighten pleading standards, and no Justice ever “express[ed] any doubt” about the “adequacy” of *Conley*’s interpretation of Rule 8.¹⁶

Cracks in *Conley*’s foundation emerged three years ago in *Twombly*. The 7-2 majority opinion, authored by now-retired Justice Souter, held that, at least with respect to antitrust claims, *Conley*’s no-set-of-facts language “has earned its retirement.” Instead, *Twombly* promulgated a new and stricter “plausibility” standard, ruling that a plaintiff in an antitrust case will survive a motion to dismiss only if he or she pleads “enough facts to state a claim to relief that is plausible on its face.”¹⁷

Twombly left open whether this new plausibility standard broadly applied to all civil cases. Last year, in *Ashcroft v. Iqbal*, the Court made clear that it did.¹⁸ *Iqbal* went much further than *Twombly* in its deviation from the *Conley* framework.

¹³ *Id.* at 45-48.

¹⁴ *Id.* at 48.

¹⁵ See, e.g., *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993).

¹⁶ *Bell Atlantic v. Twombly*, 550 U.S. 544, 578 (2007) (Stevens, J., dissenting) (emphasis in original).

¹⁷ *Id.* at 563, 570.

¹⁸ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009).

Whereas *Twombly* endorsed *Conley*'s dictate that a complaint need do no more than give "fair notice" of the plaintiff's claims and grounds for relief,¹⁹ *Iqbal* declined even to cite this well-established principle, and the decision substantially undermined it in practice.

In *Iqbal*, a Muslim Pakistani citizen—arrested along with hundreds of other individuals in the days following the September 11, 2001 terrorist attacks and detained in federal custody—alleged that he was subjected to an unconstitutional policy of "harsh conditions of confinement on account of his race, religion, or national origin." In addition to suing lower-level prison officials, *Iqbal* named former U.S. Attorney General John Ashcroft as the "principal architect" of the policy and identified FBI Director Robert Mueller as "instrumental in [its] adoption, promulgation, and implementation."²⁰

Writing for a narrow five-justice majority, Justice Kennedy did not question the right of plaintiff Javaid Iqbal to proceed with his lawsuit against lower-level prison officials (who subsequently settled). But the Court held that the claims against Ashcroft and Mueller should be dismissed because *Iqbal*'s complaint did not plead facts "sufficient to plausibly suggest [their] discriminatory state of mind." For a complaint to survive a motion to dismiss under the new plausibility standard, *Iqbal* clarified that the litigant must plead specific and non-conclusory "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." In making that determination, a court is to "draw on its judicial experience and common sense." Applying this standard, the Court considered whether it was more plausible that lawful or discriminatory intent motivated Ashcroft and Mueller and found the former was more "likely."²¹

In an unusually strong dissent, Justice Souter contended that the majority had "misapplie[d]" the *Twombly* decision that he had authored. He insisted that *Iqbal*'s complaint "as a whole" should have survived a motion to dismiss because it gave Ashcroft and Mueller "fair notice" of the claims and grounds upon which they rested.²²

IV. INSTITUTIONALIZING DISADVANTAGES FOR CIVIL RIGHTS PLAINTIFFS

Twombly and *Iqbal* drastically altered *Conley*'s pleading requirements. In the words of Professor Arthur Miller, a well-respected civil procedure expert, the substitution of plausibility pleading for notice pleading is "a philosophical sea change in American civil litigation."²³ Cases can now be dismissed at first glance, without the benefit of any discovery or meaningful fact-finding. This outcome, while not certain in every case, is fundamentally at odds with Congress's intent to provide effective enforcement of our nation's civil rights laws. Short-circuiting litigation through artificial procedural barriers undermines our national interest in robust and expansive application of these laws.

¹⁹ *Twombly*, 550 U.S. at 555.

²⁰ *Iqbal*, 129 S. Ct. at 1942, 1944 (alteration in original).

²¹ *Id.* at 1949-52.

²² *Id.* at 1955, 1961 (Souter, J., dissenting) (citing *Twombly*, 550 U.S. at 555, and *Conley*, 355 U.S. at 47) (quotation marks omitted).

²³ *Access to Justice Denied: Ashcroft v. Iqbal: Hearing Before the Subcomm. on the Constitution, Civil Rights & Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 6 (2009) (statement of Arthur R. Miller, Professor, N.Y.U. Sch. of Law).

The imposition of a heightened pleading standard effectively converts a motion to dismiss into one for summary judgment—but without any of the corresponding procedural protections or opportunities for factual development.²⁴ Confronted with a motion to dismiss, district courts must now sift through the plaintiff’s complaint in order to conduct a complex, two-pronged inquiry. First, a judge is required to identify and disregard all “conclusory” statements. Second, focusing only on specific factual allegations, the judge must assess the strength of the “showing” for each claim by weighing whether the plaintiff’s allegations are plausible. This judicially-mandated appraisal of the facts at the pleading stage comes uncomfortably close to supplanting adjudication on the merits by jury trial.²⁵ Moreover, these judgments are virtually unreviewable because trial courts are granted wide discretion to conclude that a claim is implausible and, thus, dismiss a complaint without permitting critical factual development of discrimination allegations.

The Court’s insistence in *Iqbal* and *Twombly* that a complaint must include non-conclusory factual support for each claim institutionalizes a disadvantage for plaintiffs. In contrast to *Conley*’s “fair notice” requirement, plausibility pleading compels plaintiffs to provide more of an evidentiary foundation to withstand a defendant’s motion to dismiss. Yet, because the Federal Rules typically permit plaintiffs to obtain discovery only if they survive a motion to dismiss, many plaintiffs will be denied the very tools needed to support meritorious claims and, thus, wrongdoers will escape accountability. As Professor Robert Bone explains, “strict pleading will screen some meritorious suits, even ones with a high probability of trial success but a probability that is not evident at the pleading stage before access to discovery.”²⁶ The result is a revival of precisely the sort of pleading gamesmanship that the Federal Rules were designed to avoid.

The new emphasis on factual specificity is especially onerous for civil rights plaintiffs. In many civil rights cases, most, if not all, pertinent information is within the exclusive province of the defendant—through its agents, employees, records, and documents. For instance, when a plaintiff alleges she was the victim of a discriminatory practice, she typically must expose the defendant’s “private, behind-closed-doors conduct,” including “particular meetings and conversations, which individuals were involved, when and where meetings occurred, what was discussed, and, ultimately, who knew what, when, and why.”²⁷

This “information asymmetry” for civil rights plaintiffs at the pleading stage is compounded in intentional discrimination cases, where liability turns on proof of subjective intent. Without depositions and other discovery tools or the all-too-rare revelations from a whistleblower, it is extremely costly—and often impossible—for plaintiffs to obtain specific facts to substantiate a defendant’s state of mind, even with support from the most capable and committed lawyers. Disparate-impact claims,

²⁴ See Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15, 18 (2010); Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 833-34 (2010); Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J. L. & POL’Y 61, 66, 98 (2007).

²⁵ See Kenneth S. Klein, *Ashcroft v. Iqbal Crashes Rule 8 Pleading Standards on to Unconstitutional Shores*, 88 NEB. L. REV. 261, 264-65 (2009).

²⁶ Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849, 879 (2010).

²⁷ Howard A. Wasserman, *Iqbal, Procedural Mismatches, and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157, 168-69 (2010).

where proof of intentional discrimination is not required, could also be more difficult under *Iqbal* and *Twombly* because such claims often turn on analysis of statistical data that is usually under the exclusive control of defendants.²⁸

Iqbal and *Twombly* may be particularly effective in frustrating efforts to redress the subtle and sophisticated types of discrimination that are more commonplace in today's society than instances of overt racial animus. As the Third Circuit has noted:

Anti-discrimination laws and lawsuits have “educated” would-be violators such that extreme manifestations of discrimination are thankfully rare. Though they still happen, the instances in which employers and employees openly use derogatory epithets to refer to fellow employees appear to be declining. Regrettably, however, this in no way suggests that discrimination based upon an individual's race, gender, or age is near an end. Discrimination continues to pollute the social and economic mainstream of American life, and is often simply masked in more subtle forms. It has become easier to coat various forms of discrimination with the appearance of propriety, or to ascribe some other less odious intention to what is in reality discriminatory behavior. In other words, while discriminatory conduct persists, violators have learned not to leave the proverbial “smoking gun” behind. As one court has recognized, “defendants of even minimal sophistication will neither admit discriminatory animus or leave a paper trail demonstrating it.”²⁹

Because these subtle and sophisticated forms of discrimination are designed to be undetectable, a stricter pleading standard risks insulating wrongdoers and, therefore, depriving litigants of the ability to vindicate critical civil rights. As a result, defendants may be less likely to admit wrongdoing because *Iqbal* and *Twombly* effectively preclude victims of discrimination from obtaining access to facts that defendants can keep from public view.

V. THE DANGEROUS SUBJECTIVITY OF PLAUSIBILITY PLEADING

Iqbal adds another pernicious element to the new litigation reality. Under *Iqbal*, the assessment of plausibility is a “context-specific task,” in which a court must “draw on its judicial experience and common sense.”³⁰ In contrast to *Conley*'s objective “fair notice” approach, the highly subjective nature of the *Iqbal* framework “is and should be a frightening thought,” as Judge Shira Scheindlin of the U.S. District Court for the Southern District of New York has explained:

When courts are told to draw on experience and common sense that means that predictability will vanish because every judge has

²⁸ Recognizing these concerns, a New York federal district court recently held that, even under *Iqbal*, “[i]t would be inappropriate to require a plaintiff to produce statistics to support her disparate impact claim before the plaintiff has had the benefit of discovery.” *Jenkins v. N.Y. City Transit Auth.*, 646 F. Supp. 2d 464, 469 (S.D.N.Y. 2009).

²⁹ *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1081-82 (3d Cir. 1996) (quoting *Riordan v. Kempiners*, 831 F.2d 690, 697 (7th Cir. 1987)).

³⁰ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009).

had different experiences and has a different definition of common sense. What we will see is that depending on a judge's views of various types of claims, one judge will dismiss a claim where another would have let it survive.³¹

Iqbal itself highlights the subjectivity of the Court's new plausibility standard. The Second Circuit and the four dissenting Justices concluded that the crisis triggered by the events of September 11, 2001 made it "plausible" that top government officials had condoned a discriminatory policy of mass arrests. By contrast, the same crisis, in the view of the Supreme Court majority, made legitimate law enforcement purposes for the policy more "likely," thus rendering purposeful discrimination implausible. The majority made this determination notwithstanding the cautionary historical precedent of the internment of Japanese Americans during World War II, which was endorsed at the time by the Supreme Court but has been widely condemned as an egregious violation of constitutional rights.³²

As civil rights litigators, we understand that a careful examination of the facts can alter judges' initial preconceptions. A powerful example comes from *Swann v. Charlotte-Mecklenburg Board of Education*, a landmark school desegregation case litigated by LDF. In a rather remarkable passage, the district court judge acknowledged that it was only through litigation that he had come to appreciate the gravity of the discrimination that African-American school children experienced:

The case was difficult. The first and greatest hurdle was the district court. The judge, who was raised on a cotton farm which had been tended by slave labor in his grandfather's time, started the case with the uninformed assumption that no active segregation was being practiced in the Charlotte-Mecklenburg schools, that the aims of the suit were extreme and unreasonable, and that a little bit of push was all that the Constitution required of the court.

Yet, after the plaintiffs presented reams of evidence to support their claims, "they produced a reversal in the original attitude of the district court."³³

Of course, the benefits of close scrutiny of the facts are not limited to the courthouse. In one well-documented legislative example, Representative Henry Hyde commented that his initial views changed during the 1982 reauthorization of the Voting Rights Act. In an opinion piece, he wrote:

As the ranking Republican member of the House Judiciary Committee's subcommittee on civil and constitutional rights, I came to this issue with the expressed conviction that, indeed 17 years was enough. . . . Then came the hearings. Witness after wit-

³¹ Shira A. Scheindlin, Judge, U.S. District Court for the Southern District of New York, Remarks at the Inn of Court Dinner: The Future of Litigation 4-5 (Jan. 13, 2010), available at <http://www.nylj.com/nylawyer/adgifs/decisions/020510scheindlin.pdf>.

³² *Korematsu v. United States*, 323 U.S. 214 (1944). *But see id.* at 235 (Murphy, J., dissenting) (condemning the Court's decision as "one of the most sweeping and complete deprivations of constitutional rights in the history of this nation"). Congress has publicly apologized and authorized payment of reparations for the internment. 50 U.S.C. app. § 1989 (2006).

³³ *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 66 F.R.D. 483, 484-85 (W.D.N.C. 1975).

ness testified to continuing and pervasive denials of the electoral process for blacks. As I listened to testimony before the subcommittee I was appalled by what I heard. . . . As long as the majestic pledge our nation made in 1870 by ratifying the 15th Amendment remains unredeemed, then its redemption must come first.³⁴

Representative Hyde's candid comments attest to the powerful ways in which a full evidentiary record can challenge assumptions, change minds, and affect one's perception of "common sense." Yet, *Twombly* and *Iqbal* place excessive emphasis on inherently limited pleading-stage facts and, therefore, deny plaintiffs—and by extension society as a whole—precisely this opportunity to focus on determining whether, in fact, discrimination and other civil rights violations persist.

The question is not whether a judge's experience can add something to the assessment of cases—it does and we rely upon it. But evidence can and should play a role in tempering judicial experience or "common-sense." The danger of the Supreme Court's new pleading standard is that it denies victims of racial and other forms of discrimination the opportunity to challenge the preconceptions of judges and the broader public by exposing persisting impediments to justice and equal opportunity that, on their face, may seem implausible but, lamentably, remain an aspect of American life. History is full of implausible events, and the most egregious civil rights violations are often the most implausible. One example is the exoneration of nearly 10% of the African-American community of Tulia, Texas, when it came to light, after an investigation by LDF and others, that these individuals were arrested in a drug "sting," based on the uncorroborated testimony of a single undercover agent who had a history of disciplinary misconduct.³⁵

VI. DOCUMENTING THE HARM TO CIVIL RIGHTS

Our concerns about *Iqbal* and *Twombly* are not merely hypothetical. It is already evident from initial data, anecdotal evidence from practitioners, and our own qualitative monitoring of cases that these two Supreme Court decisions are impeding litigants from pursuing serious allegations of civil rights violations.

In one of the first of what we suspect will be numerous empirical assessments, Professor Patricia Hatamyar concluded that, holding other variables constant, the odds of a district court granting a motion to dismiss in the two years after *Twombly* was decided were 1.8 times greater—and in the four months after *Iqbal* was decided over four times greater—than under *Conley's* notice pleading standard. In constitutional civil rights cases, the impact was particularly dramatic. In the two years prior to *Twombly*, the rate at which motions to dismiss were granted in such cases was an already high 50%. Post-*Twombly* but pre-*Iqbal*, the rate increased five percentage points to 55%. And in the four months after *Iqbal*, the rate increased to 60%.³⁶

³⁴ Henry J. Hyde, Op-Ed, *Why I Changed My Mind on the Voting Rights Act*, WASH. POST, July 26, 1981, at D7.

³⁵ NATE BLAKESLEE, TULIA: RACE, COCAINE, AND CORRUPTION IN A SMALL TEXAS TOWN (2005).

³⁶ Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 556 (2010). Hatamyar acknowledges that there are limitations to her approach. For instance, her calculations of overall dismissal rates include cases where Rule 12(b)(6) motions were granted with leave to amend. Two other empirical analyses using similar methodologies have also documented the detrimental impact of the Court's new heightened pleading standard on civil rights cases. See Joseph Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*,

Preliminary data from the Federal Judicial Center reveal a similar trend in civil rights cases. On average in the 11 months pre-*Twombly*, 27.8% of motions to dismiss were granted in civil rights employment cases, whereas in the 11 months post-*Iqbal*, 35.2% were granted—more than a seven percentage point increase. For other civil rights cases, the grant rate for motions to dismiss increased by 11 percentage points, from 25.9% to 36.9%.³⁷

Equally as significant, a forthcoming study by Professor Alex Reinert, who represented *Iqbal* in the Supreme Court, demonstrates that there is little correlation between sparsely pled complaints and lack of merit. Reinert reviewed federal appellate court decisions between 1990 and 1999 that reversed district courts' improper dismissals under *Conley*'s liberal pleading standard. Although these cases would now be vulnerable to dismissal under *Iqbal* and *Twombly*, the plaintiffs were at least as successful on the merits as other litigants were during the same period.³⁸

At this early stage, however, it would be a mistake to focus solely on quantitative data to assess the implications of *Iqbal* and *Twombly*. We also need to look qualitatively at the newly announced plausibility standard as it has been applied in particular cases.

Some courts have candidly acknowledged that complaints that could have survived a motion to dismiss under *Conley* require dismissal under *Iqbal* and *Twombly*. For example, in *Kyle v. Holinka*, a Wisconsin district court initially allowed an African-American prisoner to challenge a policy of racially segregated cell assignments. The plaintiff alleged numerous statements by prison officials acknowledging this segregation policy, including one by a manager who stated, "This is the way we do it here." There was no question that those officials were subject to suit. The dispute centered on whether the plaintiff should also be able to proceed against higher-ranking prison officials. The court first allowed the plaintiff's claims against all of the defendants to proceed, but after *Iqbal*, it reconsidered its holding. Granting the higher-level officials' motion to dismiss on the ground that the plaintiff failed to allege any facts showing that they implemented the discriminatory policy, the district court noted that the Supreme Court had "implicitly overturned decades of circuit precedent in which the court of appeals had allowed discrimination claims to be pleaded in a conclusory fashion."³⁹

Another example is *Ocasio-Hernandez v. Fortuno-Burset*, a case filed by 14 former maintenance and domestic employees of the Puerto Rico governor's mansion who claimed they were terminated due to their political affiliation. They were fired less than two months after a change in administration, and replaced by individuals belonging to the new governing party. The district court dismissed the plaintiffs' political discrimination claims under 42 U.S.C. § 1983 on the ground that they had not alleged sufficient facts showing that the defendants knew of the plaintiffs' political

2009 U. ILL. L. REV. 1011 (2009); Kendall W. Hannon, *Much Ado About Twombly?: A Study of the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1812 (2008).

³⁷ We calculated these figures using the Federal Judicial Center's tables and graphs on motions to dismiss, updated through April 2010. See MOTIONS TO DISMISS: INFORMATION ON COLLECTION OF DATA (2010), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Motions_to_Dismiss_060110.pdf. These figures do not include motions denied in part and, thus, likely underestimate the impact of *Iqbal* and *Twombly*.

³⁸ Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. ___ (forthcoming 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1666770.

³⁹ *Kyle v. Holinka*, No. 09-cv-90-slc, 2009 WL 1867671, at *1 (W.D. Wis. June 29, 2009).

affiliation or that a causal connection existed between their affiliation and their termination.⁴⁰

The court wrote that its ruling was mandated by *Iqbal*, “although draconianly harsh to say the least.” It noted that defense counsel, who was experienced in political discrimination litigation, had not even filed a motion to dismiss under the pre-*Iqbal* standard and that the case had been fast-tracked for trial before *Iqbal* was decided. The court lamented:

[E]ven highly experienced counsel will henceforth find it extremely difficult, if not impossible, to plead a [S]ection 1983 political discrimination suit without “smoking gun” evidence. In the past, a plaintiff could file a complaint such as that in this case, and through discovery obtain the direct and/or circumstantial evidence needed to sustain the First Amendment allegations. . . . Certainly, such a chilling effect was not intended by Congress when it enacted Section 1983.⁴¹

Just as in *Ocasio-Hernandez*, other federal courts are now faulting plaintiffs for failing to plead facts that would be difficult, if not impossible, to obtain without the benefit of discovery. Consider, for instance, the case of Kevin Williams. Cleveland, Ohio, officials arrested him on charges in connection with a robbery and shooting at Double Exposure Deli. For eight months, they kept him in jail and continued to prosecute him, *even though* there was exculpatory videotape evidence that he was working as a janitor in a movie theater over ten miles away at precisely the moment when the shooting occurred. Prior to trial, all charges were dismissed against Williams based on the videotape and other evidence. Williams then sued the City of Cleveland and various officials alleging a violation of his constitutional rights. The district court acknowledged that Williams alleged facts sufficient to demonstrate that the City ignored exculpatory evidence in his case. Nevertheless, the court dismissed Williams’ complaint against the City without even providing him an opportunity to amend because he “has not alleged facts from which it can be inferred that this conduct is recurring or that what happened in his case was due to City policy.”⁴² To be sure, the district court accurately followed settled law that a city can be held liable for a constitutional rights violation only if the injury resulted from a municipal policy or custom;⁴³ but filling the evidentiary gaps that the court identified at the pleading stage would require precisely the sort of information that a victim of such a constitutional violation would rarely, if ever, be able to uncover without discovery.⁴⁴

⁴⁰ *Ocasio-Hernandez v. Fortunato-Burset*, 639 F. Supp. 2d 217, 223-24 (D. P.R. 2009).

⁴¹ *Id.* at 226 n.4.

⁴² *Williams v. City of Cleveland*, No. 1:09-1310, 2009 WL 2151778, at *1-2, *4 (N.D. Ohio July 16, 2009). For similar reasons, another district court recently dismissed a challenge to a jurisdiction’s traffic stop policies while noting that it was “uncomfortable with [*Iqbal*’s] pleading standard as now applied, especially in the context of Section 1983 and municipal liability.” *Hutchinson v. Metro. Gov’t of Nashville & Davidson County*, 685 F. Supp. 2d 747, 752 (M.D. Tenn. 2010).

⁴³ *See Monell v. Dep’t of Soc. Servs. of N.Y.*, 436 U.S. 658 (1978).

⁴⁴ *Iqbal* may also limit the ability of plaintiffs to bring lawsuits against government officials in their capacity as supervisors—an issue that was not even briefed by the parties. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1957 (2009) (Souter, J., dissenting); *see also Dodds v. Richardson*, No. 09-6157, 2010 WL 3064002, at *15-19 (10th Cir. Aug. 6, 2010) (Tymkovich, J., concurring) (assessing *Iqbal*’s impact on the law of supervisory liability).

Another category of cases reveal the difficulty that judges have had in applying the new plausibility standard without engaging in fact-finding and, thus, effectively displacing the critical role that a jury trial is supposed to play under our Constitution, laws, federal rules, and political traditions. For example, a district court in Arizona dismissed a complaint by Frank Vallejo, a Mexican-American disabled veteran who was turned away for lack of sufficient identification when he attempted to vote in a Tucson election. City officials conceded that they wrongfully denied Vallejo a provisional ballot as required by law. The key factual issue was whether or not this error was, as Vallejo alleged, the result of a discriminatory municipal practice or procedure; if that allegation proved true, the City could have been liable under the Voting Rights Act. Prior to *Iqbal* and *Twombly*, it had never been the case that a federal court was authorized to resolve such a contested issue at the pleading stage. Relying on these cases, however, the district court effectively made findings of fact in favor of the City that the failure to issue a provisional ballot “in no way affected the standard, practice, or procedure of the election.”⁴⁵

As this case reveals, there are judges, as well as many Americans, who assume that intentional racial discrimination is unlikely to be a plausible explanation because it is such an aberration from 21st century societal norms. Evidence that can be gained through the discovery process should be permitted once again to act as a necessary check on untethered judicial assessments of plausibility.

Of course, when judges draw on their experience and common sense, it does not always result in hostility towards civil rights. One example is a ruling by Judge Weinstein, whose criticism of the Supreme Court’s heightened pleading standard we quoted above. Drawing upon his own judicial experience and common sense, as *Iqbal* requires him to do, Judge Weinstein denied the New York City Police Department’s motion to dismiss two plaintiffs’ allegations that they were falsely arrested, imprisoned, subjected to an illegal strip search, and maliciously prosecuted. Judge Weinstein’s rationale for this decision was that “[i]nformal inquiry by the court and among the judges of this court, as well as knowledge of cases in other federal and state courts, has revealed anecdotal evidence of repeated, widespread falsification by arresting police officers of the New York City Police Department.”⁴⁶ While Judge Weinstein’s description may be accurate, it is disturbing that judges are now required to depart so substantially from the historical standard in which legal sufficiency was determined within the four corners of the complaint. Perhaps this was precisely the point that Judge Weinstein was making.

A prime example of the subjectivity of the newly-heightened pleading standard is a suit brought by the City of Baltimore against Wells Fargo. The City alleged that Wells Fargo engaged in predatory lending practices that led to a disproportionately high rate of foreclosure in the City’s African-American communities that, in turn, caused financial harm to the City, including decreased property tax revenue and increased costs for boarding up and managing vacant properties. A federal judge denied Wells Fargo’s motion to dismiss, concluding that the claims were “sufficiently plausible and grounded in fact to permit the case to proceed to full-fledged merits discovery.”⁴⁷ Thereafter, however, the case was reassigned to another judge who disagreed with his

⁴⁵ Vallejo v. City of Tucson, No. CV-08-500 TUC DCB, 2009 WL 1835115, at *3 (D. Ariz. June 26, 2009).

⁴⁶ Colon v. City of N.Y., Nos. 09-CV-8, 09-CV-9, 2009 WL 4263362, at *2 (E.D.N.Y. Nov. 25, 2009).

⁴⁷ Mayor & City Council of Baltimore v. Wells Fargo Bank, N.A., 631 F. Supp. 2d 702, 704 (D. Md. 2009).

predecessor. The new judge granted the bank's motion to dismiss the City's amended complaint, after concluding that the allegations of a "causal connection" between Wells Fargo's predatory practices and the "generalized type of damages claimed by the City" were implausible.⁴⁸

While our focus is on the civil rights areas in which we litigate, these are not the only types of cases in danger of unwarranted dismissal under the heightened pleading standard. *Iqbal's* expansion of *Twombly* to all civil cases places in jeopardy innumerable personal injury and consumer cases, most of which require full development of the facts before facing a dispositive motion. For example, even in a straightforward slip-and-fall case, a district court dismissed a complaint as insufficient post *Iqbal*, holding that "the Plaintiff has failed to allege any facts that show how the liquid came to be on the floor, whether the Defendant knew or should have known of the presence of the liquid, or how the Plaintiff's accident occurred." This is a fact pattern that, as any first-year law student well knows, calls for at least limited discovery because the plaintiff typically has no other means of uncovering most of this information. Nevertheless, the district court concluded that the complaint did not merit discovery in reliance upon *Iqbal*.⁴⁹

The detrimental impact of *Twombly*, and especially *Iqbal*, is increasingly apparent both in civil rights cases and more generally. Defense lawyers have not been shy about portraying *Iqbal* and *Twombly* as extremely favorable decisions for their clients, and there is evidence that defendants have become increasingly vigorous in their filing of motions to dismiss.⁵⁰ Thus, *Iqbal* and *Twombly* require plaintiffs to expend far more time and resources crafting their complaints. "Corporate America, conversely, has reason to be happy" especially because these cases "have helped companies fight investor claims arising from the recent market meltdown."⁵¹

Moreover, a number of courts have applied *Twombly* and *Iqbal* to dismiss cases with prejudice, thereby foreclosing any opportunity to amend the complaint once more information is acquired.⁵² But even if civil rights plaintiffs are permitted to re-plead after a district court grants a motion to dismiss, it is often a pyrrhic victory when, as in many civil rights cases, critical information is within the exclusive possession of the defendant. At best, it delays the day when justice can be achieved in meritorious cases, and this is, in itself, an impediment for plaintiffs and a benefit for defendants. In addition, the new regime is becoming a factor when litigators assess which

⁴⁸ *Mayor & City Council of Baltimore v. Wells Fargo Bank, N.A.*, 677 F. Supp. 2d 847, 850 (D. Md. 2010). The City was granted leave to file a second amended complaint, which it has done. The new complaint focuses on specific damages suffered by the City in regard to specific houses that became vacant due to Wells Fargo's lending activities.

⁴⁹ *Branham v. Dolgencorp, Inc.*, No. 6:09-CV-00037, 2009 WL 2604447, at *2 (W.D. Va. Aug. 24, 2009). The plaintiff was permitted to amend her complaint to add further details, including the fact that one of the defendant's employees had just mopped the floor. See Amended Complaint, *Branham v. Dolgencorp, Inc.*, No. 6:09-CV-00037 (W.D. Va. Dec. 9, 2009). The defendant did not file a new motion to dismiss, and the parties ultimately settled. Whether this case represents a sensible application of a rule designed to deter costly or frivolous lawsuits or an unnecessary return to pleading formalism we leave our readers to decide.

⁵⁰ See, e.g., Ashby Jones, *Why Defense Lawyers Are Lovin' the Iqbal Decision*, Law Blog, WALL ST. J., May 19, 2009, <http://blogs.wsj.com/law/2009/05/19/why-defense-lawyers-are-lovin-the-iqbal-decision/>.

⁵¹ Nathan Koppel, *Wall Street Banks Feast on Twombly/Iqbal Rulings*, Law Blog, WALL ST. J., May 19, 2009, <http://blogs.wsj.com/law/2010/09/10/wall-street-banks-feast-on-twomblyiqbal-rulings>.

⁵² See, e.g., *Vallejo v. City of Tucson*, No. CV-08-500 TUC DCB, 2009 WL 1835115, at *2-4 (D. Ariz. June 26, 2009).

cases to file, and this may lead to a chilling effect for civil rights enforcement, which often depends upon private attorneys general for vindication.⁵³

VII. SUBSTANTIAL UNCERTAINTY IN *IQBAL*'S WAKE

Iqbal and *Twombly* have also created uncertainty and doctrinal inconsistency in the federal courts. In particular, lower courts are struggling to reconcile *Iqbal* and *Twombly* with the Supreme Court's prior case law.

For instance, some courts have exhibited confusion about the impact of *Iqbal* on the Supreme Court's 2002 decision in *Swierkiewicz v. Sorema N.A.* The plaintiff in *Swierkiewicz* alleged that his employer discriminated against him because of his national origin and age. The district court dismissed the complaint on the ground that the plaintiff had not alleged facts supporting each element of a *prima facie* case of discrimination under the well-known burden-shifting standard set forth in *McDonnell Douglas Corp. v. Green*.⁵⁴ In a unanimous decision by Justice Thomas, the Court expressly rejected this heightened pleading standard for employment discrimination cases. It held that a plaintiff need not allege specific facts establishing each element of a *prima facie* case to survive a motion to dismiss.⁵⁵

For several reasons, we believe *Swierkiewicz* remains good law. *Iqbal* did not even cite *Swierkiewicz*, and the Supreme Court has repeatedly insisted that it "does not normally overturn, or so dramatically limit, earlier authority *sub silentio*."⁵⁶ Moreover, *Twombly* explicitly distinguished *Swierkiewicz* and affirmed its continuing vitality.⁵⁷

While some courts have adopted this position,⁵⁸ others—including the U.S. Court of Appeals for the Third Circuit—have concluded that *Twombly* and *Iqbal* overruled *Swierkiewicz*.⁵⁹ This conclusion has already resulted in unwarranted dismissals of employment discrimination claims at the pleading stage, denying plaintiffs the opportunity to obtain discovery to support their allegations. For instance, in *Adams v. Lafayette College*, a 51-year-old man claimed discrimination under the Age Discrimination in Employment Act. Among his allegations was that he was penalized for minor infractions whereas younger employees were not. The district court "disregarded" these allegations as "legal conclusions" because they were "unsupported by any factual basis as to who these other comparators are, what comparable situations have arisen as between himself and those younger co-workers, and whether the al-

⁵³ Elizabeth J. Cabraser, Partner, Loeff Cabraser Heinmann & Bernstein, LLP, ACS Convention Panel: Access to Federal Courts after *Iqbal* and *Twombly* (July 18, 2010), available at <http://www.acslaw.org/node/16380>.

⁵⁴ 411 U.S. 792 (1973).

⁵⁵ *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002).

⁵⁶ *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000).

⁵⁷ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 569-70 (2007).

⁵⁸ See, e.g., *Swanson v. Citibank, N.A.*, No. 10-1122, 2010 WL 2977297, at *3-4 (7th Cir. July 30, 2010) (affirming the "validity" of *Swierkiewicz*); *Rouse v. Berry*, 680 F. Supp. 2d 233, 236 (D.D.C. 2010) (disavowing any retreat from *Swierkiewicz* at least "[i]n the context of a fairly straightforward employment discrimination complaint"); *EEOC v. Propak Logistics, Inc.*, No. 1:09-cv-311, 2010 WL 3081339, at *4-5 (W.D.N.C. Aug. 6, 2010); *Gillman v. Inner City Broad. Corp.*, No. 08 Civ. 8909, 2009 WL 3003244, at *3 (S.D.N.Y. Sept. 18, 2009); *EEOC v. Scrub, Inc.*, No. 09 C 4228, 2009 WL 3458530, at *2 (N.D. Ill. Oct. 26, 2009); *EEOC v. Universal Brixius, LLC*, 264 F.R.D. 514, 515-17 (E.D. Wis. 2009).

⁵⁹ *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210-11 (3d Cir. 2009). Cf. Thomas, *supra* note 24, at 18 (noting that *Swierkiewicz* "effectively may be dead"). More recently, however, another Third Circuit panel questioned *Fowler's* analysis of *Swierkiewicz* and dismissed it as dicta. See *In re Ins. Brokerage Antitrust Litig.*, Nos. 08-1455, 08-1777, 07-4046, 2010 WL 3211147, at *9 n.17 (3d Cir. Aug. 16, 2010).

leged penalties or suspensions he has received are comparatively harsher than those of his colleagues.” While the district court was correct that, in this case, “[d]isparate treatment of otherwise similarly situated individuals [was] an integral facet of the employment discrimination claim,” identifying such individuals and their comparable experiences often cannot be accomplished without discovery, including access to the employer’s records and depositions of other employees.⁶⁰

It is also unsettled whether *Twombly* and *Iqbal* apply to affirmative defenses—although a majority of federal district courts have thus far held that they do.⁶¹ If *Twombly* and *Iqbal* do apply, defendants would be compelled to make substantial additional investments in preparing their answers, because it is now commonplace to plead a laundry list of affirmative defenses in conclusory language with few, if any, supporting factual allegations. But to exempt defendants’ answers from the new heightened pleading standard for complaints would only further institutionalize the disadvantages that *Iqbal* and *Twombly* have imposed upon plaintiffs in civil rights cases and other civil litigation.

Iqbal and *Twombly* may increase defendants’ burden in another respect. In *Gordon v. City of Moreno Valley*, a federal district court denied a motion to dismiss claims by African-American barbershop operators that they were targeted for unusually aggressive administrative health and safety inspections based on their race. In so doing, the court emphasized the weakness of the defendants’ alternative explanations proffered in an attempt to demonstrate that the complaint was implausible. For instance, defendants suggested that there were more African-American than white barbershops in the area, but the court noted that the pleadings contained no facts to support that assertion and defendants failed to offer such facts in their briefing.⁶²

Another area of uncertainty has resulted from the Supreme Court’s failure to give substantive content to the plausibility standard set forth in *Iqbal* and *Twombly*. In a decision denying dismissal of a former state prisoner’s claim that officials failed to properly investigate and protect her from numerous sexually abusive encounters with a prison guard, a federal district court judge in Massachusetts ruled that “a complaint should only be dismissed at the pleading stage where the allegations are so broad, and the alternative explanations so overwhelming, that the claims no longer appear plausible.”⁶³ And the Seventh Circuit recently opined that the key question is whether the plaintiff “give[s] enough details about the subject-matter of the case to present a story that holds together.”⁶⁴ We think these cases provide the correct reading of *Iqbal* and *Twombly*, but they are by no means the consensus view and the standard is sufficiently malleable that dismissal results will vary widely.⁶⁵

⁶⁰ *Adams v. Lafayette College*, No. 09-3008, 2009 WL 2777312, at *3, *4 (E.D. Pa. Aug. 31, 2009).

⁶¹ *See, e.g., Castillo v. Roche Labs., Inc.*, No. 10-20876-CIV, 2010 WL 3027726, at *2 (S.D. Fla. Aug. 2, 2010); *Francisco v. Verizon South, Inc.*, No. 3:09-cv-737, 2010 WL 2990159, at *6-8 (E.D. Va. July 29, 2010). *But see, e.g., McLemore v. Regions Bank*, Nos. 3:08-cv-0021, 3:08-cv-1003, 2010 WL 1010092, at *13 (M.D. Tenn. Mar. 18, 2010) (“*Twombly* and *Iqbal* did not change the pleading standard for affirmative defenses.”).

⁶² *Gordon v. City of Moreno Valley*, 687 F. Supp. 2d 930, 944-45 (C.D. Cal. 2009).

⁶³ *Chao v. Ballista*, 630 F. Supp. 2d 170, 177 (D. Mass. 2009).

⁶⁴ *Swanson v. Citibank, N.A.*, No. 10-1122, 2010 WL 2977297, at *3 (7th Cir. July 30, 2010).

⁶⁵ *See id.* at *5-11 (Posner, J., dissenting). It also remains to be seen whether state courts will apply *Iqbal* and *Twombly* to heighten state pleading standards. *See McCurry v. Chevy Chase Bank*, 233 P.3d 861, 863-64 (Wash. 2010) (declining to adopt the “drastic change in court procedure” of revising Washington state pleading standards to align with *Iqbal* and *Twombly*).

Especially while the law remains unsettled on these and other points, practitioners should aggressively resist motions to dismiss because, as it is important to emphasize, *Twombly* and *Iqbal* do not guarantee an adverse outcome, and indeed some courts have limited their reach. Still, the informational asymmetries and subjectivity of the plausibility pleading standard present obstacles that even the most sophisticated civil rights litigator will have difficulty surmounting.

VIII. ENCROACHMENTS ON CONGRESS AND THE RULEMAKING PROCESS

In *Iqbal* and *Twombly*, the Supreme Court also usurped by judicial fiat the deliberative and inclusive process that Congress has established under the Rules Enabling Act for amending the Federal Rules.⁶⁶ A broad coalition, ranging from civil rights groups like LDF to religious freedom advocates like the Alliance Defense Fund, has mobilized to urge Congress to resist this encroachment on its own prerogatives and the rule-making process that it has established. Congressional intervention to restore the liberal notice pleading standard that governed prior to *Iqbal* and *Twombly* would be entirely consistent with other actions that legislators have taken over the years to promote access to the courts for civil rights litigants—for example, through the creation of private rights of action and fee-shifting statutes to encourage legal representation.

In Congress, momentum is building for a restoration of *Conley*'s liberal notice pleading standard. A bill was introduced in the Senate in July 2009, with Senator Arlen Specter (D-PA) as the lead sponsor. Companion legislation was introduced in the House of Representatives in November 2009 by Representative Jerrold Nadler (D-NY).⁶⁷ Hearings have been held in both the Senate and the House.⁶⁸

Opponents of these bills contend that Congress should wait until the impact of *Twombly* and *Iqbal* becomes clearer. But, as we explained above, there is already qualitative and quantitative evidence that the newly-heightened pleading standard has inhibited victims of discrimination from vindicating their civil rights. Certainly, further empirical analysis should be encouraged, and it is for this reason that the bills pending in Congress not only restore *Conley*'s pleading standard but also permit amendments through the deliberative rulemaking process set forth under the Rules Enabling Act. In the meantime, civil rights litigants should not bear the burden while any changes to long-standing pleading rules are being assessed.⁶⁹ The pending bills, therefore, restore the *Conley* status quo so that, while further review is underway, litigants are free of uncertainty and the opportunity for plaintiffs to enter the courthouse is undiminished.⁷⁰

⁶⁶ 28 U.S.C. §§ 2071 *et seq.* (2006).

⁶⁷ The House bill is the Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. (2009). The Senate bill is the Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. (2009).

⁶⁸ *Access to Justice Denied: Ashcroft v. Iqbal: Hearing Before the Subcomm. on the Constitution, Civil Rights & Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. (2009); *Has the Supreme Court Limited Americans' Access to Courts?: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2009); *Hearing on H.R. 4115, the Open Access to Courts Act of 2009, Before the Subcomm. on Courts & Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. (2009).

⁶⁹ Consider that even the recently enacted Lilly Ledbetter Fair Pay Act, which successfully overturned an adverse Supreme Court decision, did not alleviate the high cost of the denial of any personal redress to Ledbetter herself for the pay discrimination she experienced. See *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), *abrogated by Lilly Ledbetter Fair Pay Act of 2009*, Pub. L. No. 111-2, § 3, 123 Stat. 5, 5-6 (codified at 42 U.S.C. § 2000e-5(e)(3)(A)).

⁷⁰ *Has the Supreme Court Limited Americans' Access to Courts?: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 7-9, 84-113 (2009) (statement of Stephen B. Burbank, Professor, Univ. of Pa. Law

This approach makes sense because the benefits of plausibility pleading remain in doubt. A primary concern animating *Iqbal*, *Twombly*, and their defenders is the alleged burden imposed on defendants when a district court denies a motion to dismiss and permits potential victims of discrimination to obtain discovery. We do not discount that there are cases, small in number but large in stakes, where discovery can become protracted and costly. But Professor Miller has aptly noted that “[f]or the great body of federal litigation, *Twombly-Iqbal*’s medicinal cure may be far worse than the supposed disease.”⁷¹

First, the new plausibility standard, even on its most favorable reading, overcorrects for concerns about defendants’ discovery burdens. In a recent survey, the Federal Judicial Center determined that median expenditures for discovery, including attorneys fees, were relatively small, ranging from 1.6% to 3.3% of the client’s stake in the case. In this study, a majority of lawyers also reported that, in the average case, the costs of discovery were not excessive in proportion to their clients’ stakes in the case and that discovery costs had “no effect” on the likelihood of settlement.⁷² Additionally, it is important to note that the costs of discovery in high-stakes cases can be affected by delay or obstructionist tactics by defendants. Eliminating the opportunity for discovery through a heightened pleading standard does not address such non-cooperative defendant conduct.

Second, federal judges have proven quite capable of dealing with the vast majority of frivolous lawsuits through robust case management. *Iqbal* and *Twombly* deprive federal courts of the flexibility to allow potentially meritorious claims to proceed because they require an all-or-nothing decision at the pleading stage. By contrast, effective use of case management tools permits courts to provide protection for defendants while allowing plaintiffs some discovery to facilitate assessment of the merits of their claims. For instance, Justice Breyer noted in his *Iqbal* dissent that the “phased discovery” approach, which had been endorsed by the Second Circuit below and has been utilized by other courts in similar circumstances, could have addressed concerns about excessive burdens on Ashcroft and Mueller; the district court initially could have restricted discovery to lower-level government defendants and then subsequently determined, based on the material that the plaintiff obtained, whether there were sufficient grounds to warrant discovery from high-level defendants.⁷³

The Federal Rules provide a variety of other effective tools for ascertaining whether a plaintiff had sufficient evidence to warrant proceeding to trial. For instance, Rule 11 requires certain representations, subject to sanction, about the legitimacy of claims

Sch.); Clermont & Yeazell, *supra* note 24, at 850-59. Not only did the Court short-circuit the traditional rule-making process, but it also entirely ignored that, through this process, amendments to the liberal pleading standard that governed prior to *Iqbal* and *Twombly* have been repeatedly considered and rejected. See Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749, 1751-52 n.18 (1998).

⁷¹ *Access to Justice Denied: Hearing on Ashcroft v. Iqbal Before the Subcomm. on the Constitution, Civil Rights & Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 24 (2009) (statement of Arthur R. Miller, Professor, N.Y.U. Sch. of Law).

⁷² EMORY G. LEE, III & THOMAS E. WILLGING, FEDERAL JUDICIAL CENTER, NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 2 (2009), available at [http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf). A subsequent Federal Judicial Center survey identified more mixed perceptions among attorneys about the costs of discovery but, unlike the prior study, it was not supported by statistical evidence of costs in particular cases. See EMORY G. LEE, III & THOMAS E. WILLGING, FEDERAL JUDICIAL CENTER, ATTORNEY SATISFACTION WITH THE FEDERAL RULES OF CIVIL PROCEDURE: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 2 (2010), available at [http://www.fjc.gov/public/pdf.nsf/lookup/costciv2.pdf/\\$file/costciv2.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/costciv2.pdf/$file/costciv2.pdf).

⁷³ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1961-62 (2009) (Breyer, J., dissenting).

and the likely evidentiary support which will follow from discovery. Rule 12(e) provides defendants with an opportunity to file a motion for a more definite statement when a plaintiff's complaint is "so vague or ambiguous that a party cannot reasonably prepare a response." Rule 16 allows federal trial judges to use status conferences and strict timetables to shape the pretrial process. Under Rule 26, discovery normally may not proceed until the parties have adopted or the judge has ordered a discovery plan. And of course, Rule 56 remains available to parties who wish to seek resolution of a case prior to expending the resources associated with taking it to trial. Litigants have successfully employed these devices for decades. Congress should be loath to allow an end-run around these established procedures, particularly one that jeopardizes its longstanding legislative goal of robust enforcement of civil rights laws.

Third, on the other side of the ledger, the costs of plausibility pleading for plaintiffs and society at large cannot be discounted. As we explained above, a heightened pleading standard comes at the expense of a key pillar of our democracy: the guarantee of ready access to the courts. As Congress and the courts have repeatedly recognized, significant public benefits result when ordinary citizens pursue litigation that boldly defends and enhances civil rights. Professor Bone perceptively posits:

If constitutional rights protect important moral interests, then the harm from failing to vindicate a valid constitutional claim must be measured in moral terms too. This means that the cost side of the policy balance includes moral harms, and moral harms must be accorded great weight.⁷⁴

In the wake of *Iqbal* and *Twombly*, plaintiffs have been compelled to increase the length and detail of their complaints, investing in expensive investigations to track down factual details before discovery is available. Defendants are forced to respond in kind.⁷⁵ Satellite litigation over the tactics investigators use and the propriety of contact with whistleblowers and confidential sources will likely only increase. Proposed fixes within the existing Federal Rules, such as encouraging pre-suit discovery,⁷⁶ could be ameliorative, but they are not a substitute for a legislative fix because they are unlikely to adequately and consistently address the problem of information asymmetry in complex cases and eliminate the dangerous subjectivity that plausibility pleading has interjected into civil litigation, with its particularly detrimental impact for civil rights plaintiffs.

IX. CONCLUSION

For five decades, when reviewing a complaint for sufficiency, courts were directed to view allegations in the complaint in the light most favorable to the plaintiff and draw all reasonable inferences in her favor. The Supreme Court's new plausibility pleading standard undermines these presumptions and gives the benefit of the doubt to the defendant. And with each passing day, courts are using *Iqbal* and *Twombly* to turn away potentially meritorious claims—without the benefit of any fact-finding.

⁷⁴ Bone, *supra* note 26, at 879.

⁷⁵ Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 533 (2010).

⁷⁶ See, e.g., Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65 (2010); Edward A. Harnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473 (2010).

Simply put, the costs to civil rights are too great if Congress does nothing to address this harmful new development that has not only “revolutionized the law on pleading” but also “destabilized the entire system of civil litigation.”⁷⁷ Time and again, Congress has acted to encourage individuals to serve as private attorneys general and to robustly enforce constitutional and statutory rights. At this critical juncture in our nation’s history, we are hopeful that Congress will recognize that immediate steps are necessary to reaffirm in the clearest terms that, as Rule 8(e) emphasizes, “[p]leadings must be construed so as to do justice.”

⁷⁷ Clermont & Yeazell, *supra* note 24, at 823.

No Exception to the Rule: The Unconstitutionality of State Immigration Enforcement Laws

Pratheepan Gulasekaram*

Much scholarly and judicial ink has recently been spilled analyzing and determining the fate of several state and local laws that purport to control immigration, or at least critical aspects of immigrants' lives.¹ The Supreme Court has adjudicated disputes between federal and sub-federal entities in this arena for almost 150 years, siding overwhelmingly with the federal government and striking down state and local laws. Despite this historical and doctrinal background, in the last decade, jurisdictions from across the country have renewed these debates with particular vigor, once again enacting laws that impact the lives of non-citizens, especially undocumented ones.² Such laws run a wide gamut, involving state and local officers in immigration enforcement, penalizing businesses for the hiring of unauthorized workers, requiring non-citizens to carry proof of lawful status, sanctioning landlords for renting to undocumented persons, demanding documentation for voting, and preventing localities from enacting sanctuary-type provisions.³ Predictably, these ordinances have galvanized bitterly contested court battles to determine their constitutionality.⁴ Scholarly commentary, litigation, and judicial evaluation of these laws have focused primarily on the propriety of state and local involvement in the ostensibly federal realm of immigration regulation.

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¹ See, e.g., *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007) (enjoining city's anti-illegal immigrant ordinance), *aff'd in part, vacated in part* by 620 F.3d 170 (3d Cir. 2010), *cert. granted and judgment vacated* by No. 10-772, 2011 WL 2175213 (U.S. June 6, 2011); Gabriel Chin, et al., *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 25 GEO. IMMIGR. L.J. 47 (2010); Pratheepan Gulasekaram & Rose Villazor, *Sanctuary Ordinances & Immigration Federalism: A Dialectical Analysis*, 55 WAYNE L. REV. 1661 (2010); Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557 (2008); Michael Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084 (2004).

² See generally Migration Policy Institute, National Center on Immigrant Integration Policy, *State and Local Immigration Regulation*, available at <http://www.migrationinformation.org/integration/regulation.cfm>.

³ See generally National Conference of State Legislatures, *State Laws Related to Immigration and Immigrants*, available at <http://www.ncsl.org/default.aspx?tabid=19897>; National Conference of State Legislatures, *Chart of 2011 Enacted Immigration-Related Laws and Resolutions in States*, available at <http://www.ncsl.org/default.aspx?TabId=23362>.

⁴ See, e.g., *Chamber of Commerce of the United States v. Whiting*, 131 S. Ct. 1968 (2011) (upholding the Legal Arizona Worker's Act); *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011) (striking down Arizona's SB 1070); *Lozano v. City of Hazleton*, 620 F.3d 170 (3d Cir. 2010) *cert. granted and judgment vacated* by No. 10-772, 2011 WL 2175213 (U.S. June 6, 2011).

The state of Arizona has made itself ground zero for such battles, attempting repeatedly through legislation to vindicate states' ability to participate in immigration regulation. Arizona's elected officials have garnered significant national attention with passage of the Legal Arizona Workers Act (LAWA),⁵ upheld in the Supreme Court's recent *Chamber of Commerce of the United States v. Whiting* opinion,⁶ and SB 1070,⁷ the notorious state immigration enforcement law, much of it enjoined by the Ninth Circuit in its *U.S. v. Arizona* opinion.⁸ Arizona has recently asked for Supreme Court review, and many predict the case will make its way to the high court in the near future.

In this resurgent contest over sub-federal participation in immigration policy and enforcement, the state of Arizona won the most recent battle with *Whiting*. There, the Court upheld LAWA, which mandates that businesses in the state use the federal E-Verify system to check the legal status of their employees, and then penalizes employers who continue to hire unauthorized workers by revoking their licenses to do business. Based on this decision, some believe that the Court is poised to re-align federal-state immigration responsibilities, and argue that *Whiting* portends a new era in which states may freely engage in immigration enforcement.⁹

That proposition, and the limits of sub-federal immigration regulation, will be tested if the Court decides to grant certiorari in *Arizona*. SB 1070, inter alia, provides state criminal penalties for violations of federal immigration law, requires non-citizens to carry proof of lawful status, and grants state law enforcement officers the latitude to discover immigration violations and enforce immigration law. Importantly, Arizona has made clear its regulatory purpose in enacting SB 1070:

“The legislature declares that the intent of this act is to make attrition through enforcement the public policy of all state and local government agencies in Arizona. The provisions of this act are intended to work together to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.”¹⁰

In doing so, Arizona boldly declares that it intends to participate in the reduction of unlawfully present persons and thus, announces its entry into the core of immigration enforcement and policy.

This Issue Brief concludes that while *Whiting* may be a welcome sign for sub-federal entities desirous of using legal sanctions to discourage local businesses from hiring unauthorized workers, it does not otherwise alter the division of power between the nation and states vis-à-vis immigration policy. Fundamentally, *Whiting* sheds little light on the Court's potential decision in *Arizona*. While states may carve out limited

⁵ Legal Arizona Workers Act of 2007, ARIZ. REV. STAT. §§ 23-211, 212, 212.01 (2010).

⁶ 131 S. Ct. 1968 (2011).

⁷ Support Our Law Enforcement and Safe Neighborhoods Act, S.B. 1070, amended by H.B. 2162 (Ariz. 2010).

⁸ 641 F.3d 339 (9th Cir. 2011).

⁹ See, e.g., Kris Kobach, *Law and Border*, NATIONAL REVIEW, July 4, 2011, available at <http://www.nationalreview.com/articles/271090/law-and-border-kris-w-kobach?page=1>; John C. Eastman & Karen J. Lugo, *Arizona's Immigration Storm*, 12 ENGAGE 68 (2011), available at http://www.fed-soc.org/doclib/20110603_EastmanLugoEngage12.1.pdf; Ilya Shapiro, *S.B. 1070: Constitutional but Bad Policy*, CATO INSTITUTE, July 13, 2011, http://www.cato.org/pub_display.php?pub_id=13354.

¹⁰ S.B. 1070 § 1.

regulatory power in the business-licensing area, the larger and more important field of immigration enforcement and policy should remain the sole province of the federal government. Undoubtedly, viewed at the highest level of generality, LAWA and SB 1070 are both state laws intended to discover and disincentivize the presence of undocumented immigrants. However, state business licensing penalties that punish employers are necessarily different than state criminal immigration laws that punish undocumented immigrants and seek to achieve “attrition through enforcement.” Indeed, even apart from the putative objects of enforcement of the respective laws, several factors differentiate SB 1070 from LAWA, including historical background, the nature of the legal claims and analysis, the identity of the plaintiffs, the nature of regulations, and the ramifications of the decisions in other constitutional areas. As such, anti-immigrant and restrictionist forces will celebrate a pyrrhic victory with *Whiting*, but may be disheartened by the final outcome in *Arizona*.

To be clear, this is a discussion relevant to more than an isolated, outlier state or city. Arizona is not alone. Inspired by SB 1070, Alabama passed, and is currently defending in court, an even more punitive state immigration enforcement law.¹¹ So, too, have Georgia and other states.¹² In addition, the consequences of *Whiting* and *Arizona*, will determine the viability of several current and nascent sub-federal enactments currently in litigation. Already, in the wake of *Whiting*, the Court vacated and remanded *Lozano v. Hazleton*,¹³ in which plaintiffs challenged the city of Hazleton, Pennsylvania’s ordinance penalizing rental of property to undocumented persons and regulating businesses that hire unauthorized workers.¹⁴ By clarifying the responsibility for immigration and immigrant control between federal and non-federal entities, these cases will affect broad swaths of our national population, including the nearly 40 million non-citizens and the estimated 11-12 million undocumented persons residing in our midst.¹⁵ The sooner the Supreme Court curbs over-enthusiastic state assertions of immigration enforcement authority, the sooner state and local governments, police, and public education and social systems can regain the trust of, and continue serving, all state residents and communities, including the 4 million U.S.-citizen children of undocumented parents.¹⁶

Part I of this Issue Brief examines the Court’s methodology and reasoning in the business-licensing case, concluding *Whiting*’s preemption framework cannot justify broader state immigration enforcement schemes. While federal law expressly contemplates and permits certain state licensing sanctions, in contrast, enforcement schemes like SB 1070 do not fall into any recognized exceptions in federal law, run afoul of

¹¹ Alabama Taxpayer and Citizen Protection Act of 2011, Ala. Laws 535, *et seq.* (2011); Richard Fausset, *U.S. Sues over Alabama Immigration Law*, L.A. TIMES, Aug. 2, 2011, available at <http://articles.latimes.com/2011/aug/02/nation/la-na-alabama-immigration-20110802>.

¹² GA. CODE §§ 16-5-46, 17-5-100 (2011); S.C. CODE §§ 16-9-460, 23-6-60 (2011); MISS. CODE §71-11-3(c)(i) (2011).

¹³ *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007), *aff’d in part, vacated in part by* 620 F.3d 170 (3d Cir. 2010), *cert. granted and judgment vacated by* No. 10-772, 2011 WL 2175213 (U.S. June 6, 2011).

¹⁴ Julia Preston, *Judge Voids Ordinance on Illegal Immigrants*, N.Y. TIMES, July 27, 2007, available at <http://www.nytimes.com/2007/07/27/us/27hazleton.html>; Associated Press, *Pennsylvania Town Enacts Strict Illegal Immigration Ordinance*, FOX NEWS, July 14, 2006.

¹⁵ JEFFREY S. PASSEL & D’VERA COHN, PEW HISPANIC CTR. UNAUTHORIZED IMMIGRANT POPULATION: NATIONAL AND STATE TRENDS 2010 (2011), available at <http://pewhispanic.org/files/reports/133.pdf>.

¹⁶ JEFFREY S. PASSEL & D’VERA COHN, PEW HISPANIC CTR. A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES iii, Fig. 4 (2009), available at <http://pewhispanic.org/files/reports/107.pdf>.

federal policy, and incite violations of other important constitutional provisions. Part II considers more wide-ranging immigration federalism concerns occasioned by sub-federal enactments like LAWA and SB 1070. Again, here, this paper concludes that the nature of interaction between federal and sub-federal sovereigns militates against state power to criminalize unlawful presence and enforce immigration policy, other than through federally approved, cooperative agreements. Finally, Part III explores the meaning and significance of this recent spate of sub-federal activity, arguing that while SB 1070 and its ilk will not withstand judicial scrutiny, they nevertheless sound a useful warning and provide a blueprint for federal immigration reform.

I. DISTINGUISHING EMPLOYER SANCTIONS LAWS FROM BROADER IMMIGRATION ENFORCEMENT SCHEMES

Courts tasked with evaluating sub-federal policies that purport to control immigration, or some aspect of immigrants' lives, generally focus on structural power analysis—that is, the allocation of regulatory power between federal and sub-federal sovereignties. A long line of cases, starting from *Chy Lung v. Freeman*,¹⁷ to *Hines v. Davidowitz*,¹⁸ *Graham v. Richardson*,¹⁹ *De Canas v. Bica*,²⁰ and finally to contemporary cases like *Whiting*, showcase this basic framework. Although some of these cases measure state law against constitutional norms and structure,²¹ courts are generally wont to avoid constitutional pronouncements unless necessary.²² In the immigration context, the Supreme Court's avoidance of constitutional rulings in favor of statutory decisions generally results in more favorable outcomes for immigrants.²³

Grounded in the Supremacy Clause of the U.S. Constitution,²⁴ the immigration preemption framework operates from granular, textual comparison between particular state and federal statutes to more nebulous assessments of state schemes against constitutional structure. Congress may expressly preempt sub-federal enactments by legislating its preemptive intent into a federal statute. Even if Congress has not legislated its preemptive intent, sub-federal laws may still be invalidated if the Court finds that it is impossible to comply with both federal and sub-federal law at the same time, or when sub-federal law is an obstacle to accomplishing the full purpose and objec-

¹⁷ 92 U.S. 275 (1875) (striking down California law regulating immigration from China, stating that the federal government has the exclusive power to regulate immigration).

¹⁸ 312 U.S. 52 (1941) (striking down Pennsylvania alien registration scheme).

¹⁹ 403 U.S. 365 (1971) (striking down Arizona law denying noncitizens' eligibility for public assistance).

²⁰ 424 U.S. 351 (1976) (upholding, prior to passage of IRCA, California's employer-sanctions law for hiring of unauthorized workers).

²¹ See, e.g., *United States v. Arizona*, 641 F.3d 339, 367-69 (9th Cir. 2011) (Noonan, J., concurring) (arguing that SB 1070 interferes with national foreign policy prerogatives, and is therefore unconstitutional on that basis).

²² *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Building*, 408 U.S. 568, 575 (1988) (discussing doctrine of constitutional avoidance and stating "[if] an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."); cf. *Chamber of Commerce of the United States v. Whiting*, 131 S. Ct. 1068 (2011) (focusing solely on narrow, statutory preemption analysis).

²³ Hiroshi Motomura, *Immigration Law after a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 548-49, 565 (noting that subconstitutional rulings have been more favorable to immigrants).

²⁴ U.S. CONST. art. VI, cl. 2.

tives of federal law. More generally, if the Court finds that the Congress intended to occupy the entire regulatory field, state laws in that field are also preempted.

Beyond these preemption methodologies which focus on textual analysis and the interplay between federal and sub-federal enactments, in the immigration arena, courts will sometimes apply “constitutional” preemption analysis, under which they will strike down a state or local ordinance that attempts to regulate “pure immigration law.”²⁵ Constitutional preemption, which can be found even in the absence of enacted federal law, occurs when sub-federal laws attempt to govern entry and exit of noncitizens, and the conditions under which they remain in the country.²⁶ It is based in the federal government’s plenary power over immigration and the federal power to conduct foreign affairs.²⁷

Part I.A explains how the Court employed the express preemption methodology in *Whiting* to uphold the state business-licensing law. Despite that favorable result for states, Part I.B will show that *Whiting*’s reasoning and methodology actually portend the invalidation of SB 1070 and other state immigration enforcement schemes. Finally, Part, I.C discusses other constitutional defects with SB 1070.

A. EXPRESS PREEMPTION AND STATE REGULATION OF BUSINESS-LICENSING: THE LIMITATIONS OF *WHITING*

In the immigration context, the Supreme Court has consistently struck down sub-federal lawmaking using preemption analysis. Rarely, sub-federal enactments have survived, but only when the state or locality has regulated in an area of traditional state concern, and when the federal government had not disapproved of state action. The most relevant example is *De Canas v. Bica*, in which the Court upheld a 1971 California law that imposed fines on in-state employers who knowingly employed unlawfully present persons if such hiring adversely affected lawfully present workers.²⁸ In preserving California’s employer sanctions law, the Court in *De Canas* noted that while the “power to regulate immigration is unquestionably...a federal power,” states nevertheless retain broad police powers over the employment relationships of workers within the state.²⁹

De Canas would seem to make LAWA an easy case, but for the fact that Congress can respond to state enactments like the California employer sanctions law upheld in *De Canas* (assuming Congress acts within its Article I powers). Indeed, in 1986, Congress exercised those powers by enacting the Immigration Control and Reform Act (IRCA) expressly to preempt state laws that sanction employers for the hiring of unauthorized persons.³⁰ Taking direct aim at laws like California’s unauthorized worker law, IRCA explicitly prohibited sub-federal entities from enacting “any State or local law imposing civil or criminal sanctions (other than through licensing and

²⁵ See Stumpf, *supra* note 1, at 1600-01.

²⁶ *Hines*, 312 U.S. at 56-60; see also *Toll v. Moreno*, 45 U.S. 1, 10 (1982) (striking down Maryland’s law denying certain nonimmigrant state residents in-state tuition rates, and stating “Our cases have long recognized the preeminent role of the Federal Government with respect to the regulation of aliens within our borders.”).

²⁷ *Chae Chan Ping v. United States (Chinese Exclusion Cases)*, 130 U.S. 581 (1889) (determining that Congress’ power to exclude aliens was immune from searching judicial inquiry, and was grounded in the federal government’s power to conduct foreign affairs); see also THE FEDERALIST No. 4, at 40-44 (John Jay) (Clinton Rossiter ed., 1961).

²⁸ *De Canas*, 424 U.S. 351 (1976).

²⁹ *Id.* at 354-56.

³⁰ 8 U.S.C. § 1324a(a)(1)(A) (2006).

similar laws) upon those who employ...unauthorized aliens.”³¹ This provision, a by-product of one of Congress’ prior attempts to pass comprehensive federal immigration reform, provides Arizona with a plausible and specific defense for LAWA, as Congress appears to have gone out of its way to note that state licensing penalties were to be treated differently than direct employer sanctions.

Read together then, *De Canas* and IRCA stand for the proposition that state regulation of employment relationships between state employers and unlawfully present persons is permissible, if the federal government has not otherwise prohibited it.³² Thus, the question left for the Court in *Whiting* was an exceedingly narrow one: Did LAWA count as a “licensing” law within the exception written into IRCA? It is a question that the Court answered with in-depth textual analysis and interpretation, focusing primarily on the meaning of “licensing or similar law.”³³ In fact, the five-member majority took pains to distinguish state licensing laws in the employment field from all other manner of state regulation that could affect immigrants.³⁴

This analytic methodology, itself, is the primary indication of the limited utility of *Whiting* to states’ arguments in cases involving other types of state laws. The Court eschewed broad pronouncements regarding the Constitution’s division of federal-state responsibility in the area of immigration in favor of a detailed comparison of LAWA’s text to the text of IRCA and the federal Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). This methodological point is important because it limits *Whiting*’s reach to the specific context of business licensing-type laws that sanction employers for hiring unauthorized workers. While LAWA achieves the same result as the pre-IRCA California employer sanctions law, IRCA’s text and its licensing exception at least provide a colorable basis upon which to uphold LAWA. Importantly, the Court’s reasoning requires that, if Congress were to amend IRCA to erase the licensing exception, LAWA would also be plainly unconstitutional. Further, absent the licensing exemption, any state attempt to make the federal E-Verify mandatory would also be preempted, as the Court would have no basis to believe the federal government authorized states to legislate in the immigration-employment arena.

B. INAPPLICABILITY OF *WHITING* TO SB 1070 AND JUDICIAL ANALYSIS OF STATE ENFORCEMENT SCHEMES

Despite upholding state business-licensing policies that target employers of unauthorized workers, the Court will most likely strike down state immigration enforcement schemes like SB 1070. Unlike Arizona’s plausible argument for LAWA, the state’s entire legal defense of its unilateral decision to criminalize unlawful presence and

³¹ *Id.* § 1324a(h)(2).

³² Note that this should not be read as an endorsement of either expanded federal use of E-Verify as some have proposed, or approval of state business-licensing schemes like LAWA. Despite *Whiting*, federal and state use of E-Verify will still lead to risk of erroneous prosecution. 131 S. Ct. at 1991 (2011) (Breyer, J., dissenting). Further, serious concerns remain about the expansion of E-Verify into the employment space, as a matter of sound policy. See *How Expanding E-Verify Would Hurt American Workers and Business*, (Immig. Pol’y Center), Mar. 2, 2010, available at http://www.immigrationpolicy.org/sites/default/files/docs/Everify_030210.pdf.

³³ See *Whiting*, 131 S. Ct. at 1978-79, 1987-88 (Breyer, J., dissenting) (reasoning that LAWA cannot be fairly termed a “licensing or similar law”, and is therefore preempted by IRCA).

³⁴ *Id.* at 1981, 1983 (“IRCA expressly preempts some state powers dealing with the employment of unauthorized aliens and it expressly preserves others.... [LAWA] falls within ... the confines of the authority Congress chose to leave to the States....” The majority also noted that the several cases in which state laws were preempted involved “uniquely federal areas of regulation.”)

participate in immigration enforcement rests dubiously on a few disparate Immigration and Nationality Act (INA) provisions that recognize a narrow and well-defined role for states in enforcement matters. No provision in the federal scheme approximates the specificity and lucidity of IRCA's carved-out exception for licensing penalties that formed the *sine qua non* of the Court's *Whiting* opinion. In addition, the Court will strike down laws like SB 1070 because they intrude on the traditionally federal area of immigration enforcement. Defining immigration violations and then enforcing them is a field occupied by federal law, leaving room only for supervised, directed, and enumerated forms of state involvement.

Arizona's SB 1070 attempts to discourage and diminish the presence of undocumented immigrants within the state by (1) requiring local law enforcement officers to determine the immigration status of any detainee or arrestee they suspect is an unauthorized immigrant,³⁵ (2) levying state criminal penalties for failure to comply with federal alien registration laws or carry a registration document,³⁶ (3) providing state criminal penalties for unauthorized persons who solicit or perform work,³⁷ and (4) allowing warrantless arrest of persons based on probable cause that the arrestee is removable from the U.S.³⁸ None of the enjoined provisions of SB 1070 are saved by any textual exception in the federal immigration law analogous to IRCA and its express exemption for business licensing.

States like Arizona, that have enacted SB 1070-type ordinances essentially advance two major arguments in defense of their laws to overcome preemption claims: (1) state immigration laws mirror federal law and are therefore not preempted; and (2) federal immigration law provides for state involvement in immigration enforcement, and therefore state immigration enforcement schemes are not preempted.³⁹ In addition, states may advance a theory of inherent state power to enact and enforce immigration laws.⁴⁰ This final catch-all theory of state immigration power directly implicates constitutional, as opposed to primarily statutory, questions, and will be addressed later in this Issue Brief.

As both the federal trial court in Arizona and the Ninth Circuit Court of Appeals held, neither of the states' primary defenses survives analysis.⁴¹ First, the Supreme Court has already held that state law can be preempted even when the state's purpose echoes the goals of a federal policy.⁴² Further, laws like SB 1070 do not mirror the mechanism and consequences of federal law. SB 1070 attaches criminal penalties to

³⁵ Support Our Law Enforcement and Safe Neighborhoods Act, S.B. 1070 § 2(B), *amended by* H.B. 2162 (Ariz. 2010).

³⁶ *Id.* § 3.

³⁷ *Id.* § 5(C).

³⁸ *Id.* § 6.

³⁹ See Defendants Response to Plaintiff's Motion for Preliminary Injunction, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. CV 10-1413-PHX-SRB).

⁴⁰ See, e.g., Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179 (2005); Eastman & Lugo, *supra* note 9, at 68 ("Arizona Has Sufficient Inherent Police Power to Authorize Enforcement of Federal Immigration Law Alongside Federal Authorities.").

⁴¹ See *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010), *affirmed by* 641 F.3d 339 (9th Cir. 2011).

⁴² See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) ("The conflicts are not rendered irrelevant by the State's argument that there is no real conflict between the statutes because they share the same goals.... The fact of a common end hardly neutralizes conflicting means....") (citing *Gade v. Nat'l Solid Wastes Mgmt. Assn.*, 505 U.S. 88 (1992)).

conduct and action that federal law only treats as a civil violation.⁴³ Noncitizens who are unlawfully present after having entered lawfully—a category into which approximately 40% of the unlawfully present population falls—are deportable through the civil removal process, but have not otherwise committed any federal crime.⁴⁴

In addition, as *Whiting's* discussion of IRCA highlights, federal law punishes employers who hire undocumented workers, but does not attach criminal penalties to unlawfully present persons solely for seeking employment. Because LAWA mimicked this basic structure, it survived preemption analysis; it also punished employers without penalizing the workers themselves. Based on *Whiting's* reasoning, if Arizona had included criminal penalties against unauthorized workers as part of LAWA, the law would certainly have been declared unconstitutional; it would not have mirrored federal law, and IRCA's licensing exception would not have provided safe harbor. SB 1070, in comparison, criminalizes exactly this behavior, levying sanctions on unlawfully present persons for the state crime of seeking employment while unauthorized to work. By definition then, SB 1070, with its criminal penalties, is not a facsimile of federal law.

Even though laws like SB 1070 use federal immigration status as the touchstone for state criminal consequences, and are ostensibly enacted to help ensure enforcement of federal immigration law, such state policies still violate federal prerogatives. Decisions to use congressionally-defined immigration status as the trigger for civil and criminal consequences are left to the federal executive, not to individual states. As part of the executive's Article II duties, the President is tasked with "taking care" that federal laws are carried out.⁴⁵ Using this authority, the prosecutorial branch of the Department of Homeland Security routinely issues directives on the priority order for arrest of unlawfully present persons, and the use of prosecutorial discretion and deferral for some unlawfully present persons.⁴⁶ As federal courts have held, this discretion and its impact on on-the-ground enforcement is integral to defining the limits and meaning of federal enforcement law and policy.⁴⁷ Thus, states' adopting different schemes to

⁴³ See 8 U.S.C. § 1229a (2006) (delegating removability decisions to immigration judges, not federal courts); *Harisidades v. Shaughnessy*, 342 U.S. 580 (1952) (reaffirming that deportation is a civil procedure, not a criminal one). SB 1070 makes it a state crime to be unlawfully present, subject to prosecution in a state court; in comparison, the Immigration and Nationality Act generally treats unlawful presence as a civil transgression, subject to an administrative procedure. See Margaret Stock, *Arizona v. United States: The Tail Wagging the Dog on Regulating Immigration Enforcement*, SCOTUS Blog, July 14, 2011, available at <http://www.scotusblog.com/2011/07/arizona-v-united-states-the-tail-wagging-the-dog-on-regulating-immigration-enforcement/>.

⁴⁴ 8 U.S.C. § 1227(a)(1)(C)(i) (2006). The remaining unlawfully present persons are likely those who entered without inspection. In addition to making one removable, unlawful entry can be charged as a federal misdemeanor under 8 U.S.C. § 1325, although federal authorities routinely do not—either because of resource constraints or exercises of discretion—prosecute it. See Ingrid Eagly, *Prosecuting Immigration*, 104 Nw. U. L. REV. 1281, 1329-1334 (2010).

⁴⁵ U.S. CONST. art. II, § 3.

⁴⁶ Memorandum from John Morton, Director of U.S. Immigration and Customs Enforcement, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens 3 (June 17, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>; see also Memorandum from William J. Howard, Principal Legal Advisor, U.S. Immigration and Customs Enforcement, Prosecutorial Discretion (Oct. 24, 2005), available at <http://www.shusterman.com/pdf/prosecutorialdiscretionimmigration1005.pdf> (setting out reasons, principles, and guidelines for exercise of prosecutorial discretion by federal immigration prosecutors).

⁴⁷ *United States v. Arizona*, 641 F.3d 339, 351-52 (9th Cir. 2011) ("By imposing mandatory obligations on state and local officers, Arizona interferes with the federal government's authority to implement its

achieve ostensibly similar goals fails to mirror these nuances of federal policy, and further, usurps the President's power of execution.⁴⁸

The state's second major claim—that federal law already contemplates state involvement in enforcement—also does not survive preemption inquiry. SB 1070 is a unilaterally-created, federally-unsupervised state enforcement scheme that requires enforcement of all manner of criminal and civil immigration law violations. Devastating to Arizona's argument, federal law envisions state cooperation in immigration enforcement only for certain criminal violations or under direct supervision and express agreement with the federal government.

Federal law, in isolated and circumscribed instances, permits state involvement in immigration enforcement. Section 287(g) of the INA authorizes the federal government to enter into a "written agreement" with a state to allow qualified state officers to perform investigations and detentions of non-citizens.⁴⁹ Other sections of 8 U.S.C. §1357 permit, without written agreement, voluntary communication of state officers with federal officials regarding the immigration status of an individual and the cooperation of state officers with the federal officials.⁵⁰ Further, 8 U.S.C. §1252c authorizes state officials to arrest and detain individuals who have illegally reentered the country after deportation, and §1324 allows state officers to arrest those who might be smuggling, transporting, or harboring unlawful migrants.

While these isolated sections of the INA permit state involvement in immigration enforcement, that permission is bound to particular circumstances.⁵¹ Under 287(g), general state involvement in immigration law enforcement can occur only under written agreement with the federal government and under conditions in which the federal officials have provided training to local officers on immigration enforcement. Thus, the only state assistance contemplated by 287(g) is closely supervised, contractually agreed upon cooperation; not the freewheeling, unilateral state enforcement envisioned by SB 1070. Sections 1252c and 1324 are limited to defined conduct (illegal re-entry and smuggling, respectively) and deal with criminal, not civil, violations. Because Congress has already contemplated state participation in immigration enforcement, but relegated such cooperation to specific crimes or under specific procedures, the Court will most likely rule that Congress has occupied the field and SB 1070 is impliedly preempted.

priorities and strategies in law enforcement....[§ 2B] interferes with Congress' delegation of discretion to the Executive Branch in enforcing the INA."); *Lozano v. City of Hazleton*, 620 F.3d 170, 212 (2010) ("The Supreme Court has consistently found state and local laws which alter the careful balancing of objectives accomplished by a federal law to be pre-empted...."), *cert. granted and judgment vacated by* No. 10-772, 2011 WL 2175213 (U.S. June 6, 2011).

⁴⁸ Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2062-65 (2008) ("De facto policy is still policy, and federal immigration law is a matter of inaction as much as affirmative decisionmaking. Consequently, any decisions by state and local officials put them in conflict with the knowing balance of enforcement and tolerance that constitutes federal immigration law.").

⁴⁹ 8 U.S.C. §1357(g) (2006).

⁵⁰ *Id.* at §1357(g)(10).

⁵¹ The Secure Communities Program also bears mentioning for its use of state and local law enforcement officers in immigration enforcement. Under S-Comm, the fingerprints of state and local arrestees are automatically checked against federal criminal and immigration databases, ostensibly to identify criminal noncitizens. *See* Secure Communities, U.S. Immigration and Customs Enforcement, http://www.ice.gov/secure_communities. S-Comm, in contrast to the types of state involvement discussed in this Issue Brief, is a federal program, created and administered by DHS, utilizing sub-federal arrest authority to further immigration goals in a manner dictated by the federal government.

Indeed, to rule otherwise is to accept implausible and logically flawed premises. The Court would have to read federal authorization for states to participate in certain instances, under fixed conditions, as a general authorization for states to unilaterally participate in immigration law enforcement under conditions determined by the state itself. Relatedly, it would have to interpret the federal law's isolated permissions for particular types of state involvement—and exclusion of others—as somehow meaning that Congress really meant to include what it excluded from the statute. In other words, the Court would have to, under the guise of preemption analysis, wholly rewrite the INA and render several sections of federal immigration law superfluous and toothless. Why list particular crimes and conditions of state cooperation if the federal statute is to be read to authorize state enforcement under any circumstances for any type of immigration violation? Congress need not have bothered to deliberate and legislate the 287(g) system of federally-supervised, written agreements between the federal and states governments if it was actually authorizing unwritten, unwelcome, unsupervised, and untrained state and local immigration enforcement. Statutory drafting and federal court interpretation of that drafting simply doesn't work the way Arizona needs it to, and for good reason.

Under this well-established interpretative framework, the state's only recourse is to persuade the Court of a highly dubious proposition: that states have inherent constitutional authority to enforce all manner of federal immigration law, without agreement or permission from the federal government. Such a reading drastically alters the long-standing constitutional balance between the federal and state governments vis-à-vis immigration enforcement. The Supreme Court has never endorsed a unilateral expansion of state law enforcement power into a historically federal domain. To the contrary, the Supreme Court has long been wary of state intrusion into federal immigration law.⁵² In the end, to support this implausible claim, states are forced to rely on one, non-binding, Office of Legal Counsel Memorandum from the George W. Bush administration in 2002 supporting states' claims of inherent authority to enforce immigration laws.⁵³ But before that recent turn, the OLC had long-been convinced of the exact opposite conclusion.⁵⁴ More importantly, the legal reasoning used

⁵² See *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875); *Hines v. Davidowitz*, 312 U.S. 52, 62 (1941) (“That the supremacy of the national power in the general field of foreign affairs, including power over immigration, naturalization, and deportation, is made clear by the Constitution was pointed out by authors of the *Federalist* in 1787, and has since been given continuous recognition by this Court.”). Further, circuit courts have expressed concern and doubt about state or local authority to enforce immigration law generally, or the civil provisions of federal immigration law, specifically. See Michael Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. CONST. L.J. 1084, 1089-95 (2004) (citing *Gonzales v. City of Peoria*, 722 F.2d 468 (9th Cir. 1983) (upholding city police arrest for criminal violations of immigration law, but assuming that federal law preempts state and local authority to enforce civil immigration law) and *Carrasca v. Pomeroy*, 313 F.3d 828 (3d Cir. 2002) (questioning New Jersey park ranger authority to detain individuals for immigration violations)). In addition, note that Professor Hiroshi Motomura has powerfully critiqued the civil-criminal distinction drawn by *Gonzales v. Peoria*, arguing that any sub-federal immigration arrest (civil or criminal) usurps the critical discretionary stage of immigration enforcement from the federal government and will likely change federal enforcement priorities and consume federal resources. Hiroshi Motomura, *The Discretion That Matters, Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1846-49 (2011).

⁵³ Memorandum from Jay S. Bybee, Assistant Attorney Gen., U.S. Dep't of Justice, to John Ashcroft, Attorney Gen., U.S. Dep't of Justice, Non-Preemption of the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations (Apr. 3, 2002) (on file with author).

⁵⁴ Memorandum from Teresa Wynn Roseborough, Deputy Assistant Attorney Gen., U.S. Dep't of Justice, Assistance by State and Local Police in Apprehending Illegal Aliens (Feb. 5, 1996), available at <http://www.justice.gov/olc/immstopo1a.htm>; Memorandum from Joseph R. Davis, Assistant Attorney

by Assistant Attorney General Jay S. Bybee to reach his ahistorical and unprecedented 2002 opinion has been roundly criticized as “mak[ing] little sense”⁵⁵ and “misconstr[uing]” prior decisions.⁵⁶ Thus, what might be mistakenly interpreted as a two-sided debate, in truth, boils down to one aberrant view set against a consistent narrative distrustful of state intrusion into immigration enforcement.⁵⁷

Beyond this comparison between federal and sub-federal laws, the identity of the respective plaintiffs and enforcement targets make the SB 1070 case easy to resolve against the state of Arizona. Whereas *Whiting* was brought by private business interests represented by the U.S. Chamber of Commerce, the plaintiff in *U.S. v. Arizona* is the federal government itself. This fact is significant because the Supreme Court is likely to give more weight to the federal government’s attempt to protect erosion of its own power than it is to a private party asserting that the federal government’s supremacy was violated by state action.⁵⁸ Indeed, while the U.S. is jealously guarding its control over immigration enforcement in the SB 1070 case, the U.S.’s briefing to the Court in *Whiting*, in contrast, explained that mandatory use of E-Verify would not overburden the federal government’s data systems. In essence, the federal government in that case disagreed with the contention that its prerogatives would be compromised by state action.

C. OTHER CONSTITUTIONAL FLAWS IN STATE IMMIGRATION ENFORCEMENT SCHEMES

Of equal or greater concern than those bringing the respective suits, are those against whom the laws will be enforced. Just like the federal policy effected by IRCA, business-licensing laws strike at employers. IRCA and these state licensing laws reduce the incentive for job-seeking migration by punishing businesses that hire unauthorized workers; importantly, they do not punish the putative unauthorized employees themselves. This policy reflects the shared moral and legal culpability for undocumented migration between business enterprises and the migrants themselves. While migrants may make decisions to circumvent lawful entry procedures, their ability to obtain employment in the United States is in the hands of employers willing to hire them. The federal decision to focus workplace immigration enforcement on employers, and not unauthorized workers, reflects the underlying notions that some citizens also bear responsibility for undocumented migration and that workers require protection regardless of immigration status.

Enforcement schemes like SB 1070, in contrast, mobilize the might of state governments directly against undocumented persons. This is more than simply a rhetorical or trivial distinction. Indeed, state enforcement directly against undocumented persons for immigration violations raises grave constitutional concerns of racial injustice

Gen., to Assistant Director—Legal Counsel, Federal Bureau of Investigation, Handling of INS Warrants of Deportation in Relation to NCIC Wanted Person File, (Apr. 11, 1989), available at http://www.aclu.org/files/images/asset_upload_file438_29970.pdf.

⁵⁵ Wishnie, *supra* note 52, at 1095.

⁵⁶ Press Release, American Civil Liberties Union, Secret Immigration Enforcement Memo Exposed (Sept. 7, 2005), available at <http://www.aclu.org/immigrants-rights/secret-immigration-enforcement-memo-exposed>.

⁵⁷ See generally Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 966, 975-78 (2004).

⁵⁸ Kevin R. Johnson, *S.B. 1070: Federal Preemption and Why the Court Won’t Address Civil Rights Issues*, SCOTUSBlog, July 11, 2011, <http://www.scotusblog.com/2011/07/s-b-1070-federal-preemption-and-why-the-court-won%E2%80%99t-address-civil-rights-issues/>.

and due process separate from the preemption and structural power concerns.⁵⁹ Supporters of SB 1070 implausibly argue that racial profiling against Latinos and others who “look” foreign or undocumented will not occur because the law expressly forbids law enforcement officers “to consider race, color, or national origin in implementing the requirement of [the law] except to the extent permitted by the United States or Arizona Constitution.”⁶⁰

First, it belies logic and human experience to believe that this statutory language will prevent implicit use of race, color, and apparent national origin, when officers are tasked with determining the legal status of an individual whom they have “reasonable suspicion” to believe is unauthorized, or when they need “probable cause” to believe the individual has committed a removable offense. Second, by allowing use of these constitutionally suspect factors “to the extent” permitted by U.S. or Arizona law, the statute perversely endorses use of race, color, and national origin by local police officers.⁶¹ In *U.S. v. Brignoni-Ponce*, a 1975 Supreme Court decision regarding U.S. border enforcement actions near the U.S.-Mexico border, the Court reasoned that “the likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor.”⁶² Not to be outdone, the Arizona Supreme Court opined that while “Mexican ancestry” and “Hispanic appearance” alone may not be sufficient to constitute reasonable suspicion, those factors coupled with a “dress” or “hair style” associated with Mexican identity could be.⁶³ Further, under the Court’s Fourth Amendment jurisprudence, officers may escape liability by proffering any objectively reasonable basis for stopping and investigating an individual—even a pre-textual one that masks the officers’ true motivations.⁶⁴

Given this legal backdrop, the “prohibition” written into SB 1070 not only fails to prevent racially disparate enforcement, it actually appears to encourage it.⁶⁵ Even with SB 1070 yet to go into effect, Arizona officials, including vocal proponent of rigorous enforcement, Sheriff Joe Arpaio, have repeatedly been sued for violating the civil rights of immigrants.⁶⁶ Empowering state and local law enforcement officers to en-

⁵⁹ See generally Kevin R. Johnson, *How Racial Profiling Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005 (2010).

⁶⁰ See Carol Swain, *Why the Court Should Uphold S.B. 1070*, SCOTUS Blog, July 14, 2011, <http://www.scotusblog.com/2011/07/why-the-court-should-uphold-s-b-1070/> (“Fears of racial profiling are overblown because the law specifically forbids law enforcement officials from considering ‘race, color, or national origin’ in making decisions about immigration matters.”); see also Shapiro, *supra* note 9 (“Note also that racial profiling is not at issue here. S.B. 1070 bends over backwards to make clear that it does not allow (let alone require) any use of race not permitted under federal law....”).

⁶¹ See Chin, et al., *supra* note 1, at 47, 65-68.

⁶² 422 U.S. 873, 885-888 (1975).

⁶³ *State v. Gonzales-Guitierrez*, 927 P.2d 776, 780 (Ariz. 1996).

⁶⁴ *Whren v. United States*, 517 U.S. 806, 813 (1996) (upholding plainclothes officers stop and drug arrest, where ostensible reason for stop was a traffic violation, which plainclothes officers were not lawfully allowed to make, and stating “We think these cases foreclose any arguments that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved.”).

⁶⁵ Chin, et al., *supra* note 1, at 68.

⁶⁶ Press Release, Center for Constitutional Rights, One Year After Arrest and Detention CCR Legal Observer to Arizona Immigration Protest Files Suit against Maricopa County, Sheriff Joseph Arpaio, and County Officials (July 29, 2011), available at <http://ccrjustice.org/newsroom/press-releases/one-year-after-arrest-and-detention%2C-ccr-legal-observer-arizona-immigration-protest-files-suit-again>; *Federal Judge Faults Arizona Sheriff in Immigration Raid*, FOX NEWS LATINO, Apr. 27, 2011, available at <http://latino.foxnews.com/latino/news/2011/04/27/federal-judge-faults-arizona-sheriff-immigration-raid/>; Martha Neil, *Unprecedented DOJ Suit Seeks Documents from Sheriff Joe Arpaio for Civil Rights Probe*, ABA JOURNAL,

force federal immigration law and new state immigration crimes will only exacerbate civil liberties concerns. Thus, aside from preemption problems with state immigration enforcement schemes, the equality and due process concerns alone are sufficient basis upon which the Court could and should declare them unconstitutional.

In sum, the Court's decision to uphold LAVA against preemption claims does not predict the same for SB 1070. While both clearly intend to discourage the presence of undocumented immigrants, federal law contemplates the existence of state business-licensing laws through a textual exception in federal immigration law itself. And, even with this express exception, *Whiting* is neither a unanimous nor far-reaching opinion. At most, *Whiting* stands for the proposition that state business-licensing laws that regulate employers will not reflexively be struck down. Arizona's SB 1070, in contrast, is not saved by a textual exception to the federal regulatory scheme that defines civil and criminal immigration violations and prescribes the circumstances for federal and state cooperation in enforcement of those laws. A state's decision to create its own immigration crimes and engage its law enforcement officers in civil and criminal immigration regulation, untethered from federal oversight, violates basic notions of federal supremacy and likely creates equal protection and due process concerns as well.

II. IMMIGRATION REGULATION: FEDERAL V. STATE DOMAINS

While the Court's analysis will likely focus on the statutory preemption framework discussed above, the recent increase in sub-federal immigration enactments—from employer sanctions to rental ordinances to state immigration crimes—raises a more elemental question about the respective roles of federal and sub-federal governments vis-à-vis immigrants and immigration. Even as courts wrestle with the intricacies of statutory interpretation and congressional intent to determine conflicts between federal and state laws in this area, courts must also make judgments about the proper allocation of immigration power and the power over immigrants.

Consider, for example, the business-licensing laws that target employers of unauthorized workers. Both *Whiting*, and *De Canas* before it, rely on the notion that employer relationships are traditionally the province of states, even if immigration control has traditionally been the province of the federal government. In essence, courts must make some determination—whether explicitly or implicitly—regarding where they think any particular regulation falls on the spectrum of traditional state sovereignty and control versus constitutionally-conferred federal power. Focusing specifically on enforcement schemes like SB 1070, this federalism balance tips in favor of the federal government.

As mentioned above, Arizona could prevail in the SB 1070 case if the Court were to rule that states have inherent power to enforce immigration laws. To do so, however, effects lasting and permanent change to the constitutional order. It would render the realm of immigration federalism beyond the future reach of either Congress or state lawmakers, and deprive them of the opportunity to engage in iterative legislating vis-

Sept. 2, 2010, available at http://www.abajournal.com/news/article/feds_sue_arpaio_to_get_docs_1st_time_in_30_years_a_sheriff_hasnt_cooperated/ (discussing U.S. DOJ seeking documents concerning sweeps conducted by Arpaio that allegedly violated the constitutional rights of immigrants). The suit has since been settled.

à-vis immigration enforcement. In this regard, the evolution from *De Canas* to IRCA to *Whiting* marks an on-going legislative conversation between state and federal governments. Because the Court made a limited, statutory ruling in *Whiting*, Congress could in the future, delete IRCA's exemption and invalidate LAWA. Alternatively, if Congress is not bothered by the result in *Whiting*, it could choose to leave IRCA unmodified and allow states to continue enacting business-licensing laws. In contrast, were the Court to hold that states have inherent authority in immigration enforcement, it would leave the federal government no ability to set its immigration priorities through policy debate and representative governance.

Undoubtedly, regulating for the public welfare and maintaining local policing are within the traditional province of states.⁶⁷ But, the creation of a state scheme of immigration crimes and local enforcement of federal immigration laws are exactly the types of sub-federal policy the Court has repeatedly struck down.⁶⁸ This is because, at base, defining immigration crimes and calibrating enforcement are things that the federal government—and only the federal government—has historically done. Although some states had immigration laws in the early and middle parts of the 19th Century,⁶⁹ those existed before Congress began exercising its power of naturalization and foreign commerce to establish federal legislation defining the qualifications, conditions, and procedures for entry, residence, and expulsion from the country. Since the late 1800's, the basics of immigration law—entry, exit, naturalization, and duration and conditions of stay—have been under federal control. State participation, in areas such as business-licensing, welfare provision, and supervised, cooperative enforcement, have all been at the pleasure and discretion of the federal government, permitted by delegations and exceptions legislated into federal policy.

When Arizona or any other state boldly announces that the intent of their policy is “attrition through enforcement,” it unambiguously declares its intention to enter the core of immigration law and policy. The Court of Appeals reached the same conclusion, labeling SB 1070 the state’s “own immigration law enforcement policy.” Notably, this section of SB 1070 was not enjoined, as the District Court concluded that “[t]he Court cannot enjoin a purpose; the Arizona Legislature is free to express its viewpoint and intention as it wishes, and Section 1 has no operative function.” While the statute’s purpose alone cannot define crimes or enforcement, it clearly affects how law enforcement officers interpret the operative sections of the law. And, because it expressly states Arizona’s desire to rid itself of the undocumented immigrant population through enforcement—an exclusively federal function—it could indeed be sufficient basis to declare the entirety of the statute unconstitutional under constitutional preemption principles.

Aside from usurping core immigration policy functions, the other problem with state immigration enforcement policies is their subversion of federal immigration priorities. Like Arizona, the federal government is interested in discovering and appre-

⁶⁷ *United States v. Lopez*, 514 U.S. 549 (1995) (“Under the theories the Government presents in support of [the constitutionality of the federal law], it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign.”).

⁶⁸ *See Chy Lung v. Freeman*, 92 U.S. 275 (1875) (striking down California’s policy of requiring bonds from arriving to non-citizens); *Hines v. Davidowitz*, 312 U.S. 52 (striking down state scheme of alien registration).

⁶⁹ *See Gerald L. Neuman, The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833 (1993).

hending unlawfully present persons. However, given the scale of the issue, the complexity of immigration status and removability determinations, economic realities, and resource limitations, the federal government does not arrest and remove all unlawfully present persons.⁷⁰ This is especially true as applied to noncitizens who have not committed serious crimes or otherwise broken immigration laws. In fact, as prioritized by the Director of Immigration and Customs Enforcement (ICE), federal field agents and prosecutors are to focus their attention on those undocumented persons who (1) are national security risks, (2) are serious felons or have lengthy criminal records, (3) are known gang members, and (4) have an egregious record of immigration violations.⁷¹ Arizona's SB 1070, by requiring the discovery of legal status of stopped and detained individuals, those who fail to carry an alien registration document, those who solicit work without authorization, and those whom officers believe may have committed a removable offense, subverts the federal government's priority order. Indeed, Arizona's law appears intentionally crafted to catch the most easily discoverable and least culpable among unlawfully present persons, in the dogged pursuit of "attrition" regardless of national public safety priorities.

Relatedly, state enforcement schemes necessitate substantial federal involvement. State business-licensing sanctions are, for the most part, wholly contained state actions. State authorities handle the investigation, prosecution, and punishment of LAWA violations. The federal government's involvement is limited to the state's use of the federal E-Verify database to check the lawful work status of the individual employee. The United States, writing *amicus curiae* in *Whiting*, confirmed that such usage was consistent with its purpose in creating the program, and that mandatory usage by all Arizona businesses would not overburden the system.⁷² Further, once the federal database is accessed and issues a response, state prosecutors and state courts are responsible for punishing the offending employer. The statute requires the state to "notify" federal authorities, but the federal government need not take any action. Arizona accomplishes its goals without further federal involvement.

Enforcement schemes like SB 1070, however, are not self-contained and require substantial federal resources to complete. Arizona's goal of "attrition"—i.e., reduction in the presence of unlawfully present persons—can only truly be realized by prosecution and removal of those persons from the United States. Although individuals convicted under the various provisions of SB 1070 must satisfy state criminal punishments, the state of Arizona cannot remove them. Only the federal government can issue a Notice to Appear in front of an immigration judge and an Order of Removal, and actually, physically remove an individual from the country.⁷³ State immigration arrest authority, even for federally-defined immigration crimes, alters the dynamics, priorities, and resource-use of the federal civil removal system. SB 1070 compounds the existing problem of state arrests for federal criminal immigration violations by

⁷⁰ See Motomura, *supra* note 48; see also Motomura, *supra* note 52; Robert Pear, *Fewer Youths to be Deported in New Policy*, N.Y. TIMES, Aug. 19, 2011, at A1, available at http://www.nytimes.com/2011/08/19/us/19immig.html?_r=1&cscp=1&sq=obama%20deportation%20priority&st=cse.

⁷¹ See Morton, *supra* note 46, at 3; see also Howard, *supra* note 46 and accompanying text.

⁷² Brief for the United States as Amicus Curiae Supporting Petitioners at 31-34, *Whiting v. Arizona*, 131 S. Ct. 1968 (2011). Notably, separate concerns regarding the accuracy and reliability of the E-Verify system and database abound, and could have constituted an independent basis to strike down LAWA. See *Whiting*, 131 S. Ct. at 1991-92 (Breyer, J., dissenting) (noting E-Verify's error rate and possibility of aggravating the risk of erroneous prosecutions).

⁷³ 8 U.S.C. §§ 1229, 1229a, 1229b, 1229c, and 1231 (2006).

funneling state arrests for federal civil immigration violations and state arrests for state criminal immigration violations into the federal system. It thereby exponentially increases the burdens on a federal enforcement and removal scheme of limited capacity.⁷⁴ In stark contrast to *Whiting*, where the federal government acquiesced in and encouraged Arizona's use of federal resources, in the SB 1070 context, the U.S. responded by filing suit against the state; doing so unequivocally expresses the federal government's disagreement with this form of resource diversion by a state.

These problems with a state immigration enforcement scheme—its subversion of national enforcement priorities, its inability to effect removal, its deterrence of non-citizen residence within the state, and its necessitation of substantial federal involvement—contribute to a final national problem: uniformity in immigration policy. When imagined as a subset of U.S. foreign policy or as an expression of Congress' uniform power over naturalization, immigration law, as a constitutional matter, must be harmonized and unitary.⁷⁵ By creating state criminal penalties based on unlawful presence and activity in the United States, and embarking on a unilateral path of attrition through enforcement, Arizona has essentially decided to part ways with the nation as a whole, and other individual states who retain fidelity to federal immigration policy. Such a position is undesirable vis-à-vis relations with foreign nations.⁷⁶ Further, since Arizona cannot actually remove unlawfully present persons, the only possible outcome of rigorous SB 1070 enforcement is movement of immigrants, both lawful and unlawful, into other states. Effectively, Arizona exports its perceived public policy problems to neighboring states.⁷⁷ These types of state policies violate fundamental principles of free movement enshrined in the Constitution,⁷⁸ create state regulatory races to the bottom,⁷⁹ and undermine uniform national responses to national problems.

Undoubtedly, even with regard to immigrants and immigration, the Constitution and federal statutes tolerate some differentiation and policy experimentation. LAWA and state business-licensing laws are one example. In addition, federal law delegates to states the power to deny state welfare benefits to certain non-citizens;⁸⁰ and some states allow undocumented students to pay in-state tuition at state universities.⁸¹ In these instances, states have taken non-uniform positions vis-à-vis immigrants. But these variations are permitted in state policies using (1) the states' own resources, in

⁷⁴ See Morton, *supra* note 46.

⁷⁵ THE FEDERALIST Nos. 11, 22 (Alexander Hamilton), Nos. 4, 5 (John Jay) (Clinton Rossiter ed., 1961); cf. U.S. CONST. art. I, § 8, cl. 4 (empowering Congress to create a Uniform Rule of Naturalization).

⁷⁶ Howard Fischer, *Mexico Asks U.S. Court to Reel in 'Overbroad Net' Cast by SB 1070*, ARIZ. DAILY STAR, June 23, 2010, available at http://azstarnet.com/news/local/border/article_e694e2d0-78ee-5ffb-9595-09dba3b1a030.html.

⁷⁷ Keith Cunningham-Parmer, *Forced Federalism: States as Laboratories of Immigration Reform*, 62 HASTINGS L.J. 1673, 1692-98 (2011) (arguing that state immigration laws export costs to other states, and as such, violate an important condition of state policy experimentation).

⁷⁸ *Saenz v. Roe*, 526 U.S. 489, 498 (1999) (striking down as unconstitutional, California's durational residency requirement for public assistance and stating "the 'constitutional right to travel from one State to another' is firmly embedded in our jurisprudence.").

⁷⁹ Cf. *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 523 (1935) (striking down state economic protectionist legislation, and stating "The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that, in the long run, prosperity and salvation are in union, and not in division.").

⁸⁰ 8 U.S.C. §§ 1621, 1622 (2006).

⁸¹ National Conference of State Legislatures, *In-State Tuition and Unauthorized Immigrant Students*, (July 8, 2011), available at <http://www.ncsl.org/default.aspx?tabid=13100> (listing states with such policies).

(2) areas of extensive and traditional state regulation, and pursuant to (3) federal permission for states to engage in the activity. They lend no support to state immigration enforcement schemes. Unlike the examples cited, state immigration enforcement laws like SB 1070 strike at the heart of federal immigration prerogatives. They are attempts to control the entry, exit, and stay of non-citizens, in a manner unauthorized by federal law, and requiring the expenditure of substantial federal resources. Therefore, the disharmony created by Arizona’s—and other isolated states’—unilateral exclusion policy cannot be tolerated in our federalist system.

In addition to corrupting federal-subfederal interactions, state enforcement schemes also upset intra-state dynamics by requiring local officers to perform tasks beyond their training, and inappropriately diverting local resources away from local community policing. SB 1070 §6 asks local law enforcement officers to arrest individuals if the officer has probable cause to believe the person to be arrested has committed a removable offense. Determining what constitutes a “removable offense,” however, is no simple task. There exists no database or convenient list of removable offenses; rather, whether an offense is a removable offense requires careful adjudication by those trained in immigration law. And, the INA contains several exceptions, waivers, and defenses to removal, even if one has committed a removable offense. As Justice Alito noted in *Padilla v. Kentucky*, “professional organizations and guidebooks ... are right to say that ‘nothing is ever simple with immigration law’—including the determination whether immigration law clearly makes a particular offense removable.”⁸² Given this complex immigration background, it is a mystery how local police officers in Arizona will determine proper arrestees under this provision.

Relatedly, by mandating that local officers perform tasks outside their expertise, state immigration enforcement schemes undermine local policing efforts themselves.⁸³ Sub-federal immigration enforcement schemes alienate immigrant communities and cannibalize state and local resources that should be used for traditional policing efforts. Thus, they perversely decrease public safety. Notably, these allegations are not the propaganda of immigrant-activist groups; rather, they are the expert opinion of those with the greatest experience and knowledge of local policing dynamics. Many state and local officials, including local law enforcement organizations, have resisted the calls to engage in immigration enforcement because of the toll it takes on the traditional public safety duty of state and local police.⁸⁴ The position taken by these state and local officials—and by jurisdictions enacting sanctuary ordinances—underscores a lurking reality likely to influence the Court: immigration enforcement simply does not look or feel like the type of regulatory activity in which sub-federal entities should engage in a federalist system that divides responsibility for national and local public policy challenges.

⁸² *Padilla v. Kentucky*, 130 U.S. 1473, 1490 (2010) (Alito, J., concurring).

⁸³ Rick Su, Commentary, *The Overlooked Significance of Arizona’s New Immigration Law*, 108 MICH. L. REV. First Impressions 76 (2010), available at <http://www.michiganlawreview.org/assets/f/108/su.pdf> (noting how SB 1070 ties the hands of local law enforcement agencies that may not want to enforce immigration law because of the effect on local communities).

⁸⁴ POLICE EXECUTIVE RESEARCH FORUM, POLICE CHIEFS AND SHERIFFS SPEAK OUT ON LOCAL IMMIGRATION ENFORCEMENT (2008), available at [http://policeforum.org/library/critical-issues-in-policing-series/Immigration%28\\$25%29.pdf](http://policeforum.org/library/critical-issues-in-policing-series/Immigration%28$25%29.pdf); see also Julia Preston, *Police Chiefs Wary of Immigration Role*, N.Y. TIMES, Mar. 4, 2011, at A15; Randal C. Archibold, *Arizona’s Effort to Bolster Local Immigration Authority Divides Law Enforcement*, N.Y. TIMES, Apr. 22, 2010, at A16; Julia Preston, *States Resisting Program Central to Obama’s Immigration Strategy*, N.Y. TIMES, May 6, 2011, at A18 (states declining participate in Secure Communities program instituted by the federal government).

III. THE LESSON OF ARIZONA AND SB 1070: THE NEED FOR FEDERAL IMMIGRATION REFORM

One thing that the authors and supporters of restrictive state immigration laws, on the one hand, and immigrant-activists and opponents of such measures, on the other, can agree on: U.S. immigration policy needs fixing. These opposing camps may vehemently disagree on the substantive particulars of immigration reform. However, at base, both recognize that the unlawful migration should be addressed, and that something should be done regarding those unlawfully present persons already in the country.

Proponents of sub-federal immigration regulation, like SB 1070 and LAWA, use as their starting point, the fact that United States law has been violated by those who enter or remain unlawfully present. From this original sin, enforcement advocates argue that any dalliance in capturing and deporting unlawful migrants breeds disrespect for the rule of law, and governmental leniency towards this group may encourage more unlawful entry and presence.⁸⁵ This position is not without any merit.

The real problem is that, from this starting point, enforcement advocates draw the wrong conclusion. Migration has been, and always will be, a fact of human existence. Human movement to find work or reunite with family would be unremarkable, but for the legal construction of political borders between nation-states. But, these man-made demarcations have never, and will never, stem the tide of migrants in search of work and improved opportunities for themselves and their families. Further, the United States relies on, and requires, significant migration to fill its economic needs in both high-skilled and labor sectors.⁸⁶ Increased border vigilance and enforcement, combined with a mismatch between actual labor needs and lawful entry visas, has only led to increases in the undocumented population, greater number of border deaths, and increases in human smuggling prices paid to cartels and coyotes.⁸⁷ These are the hard and uncontroversial economic, social, and human facts.

Thus, the crisis of legal legitimacy created by unenforced or ineffective federal immigration law (cited by advocates as reason for state involvement) cannot be solved by robust state and local enforcement of those federal laws. The sensible resolution to this perceived crisis requires enacting immigration laws that account for the geographic, economic, and social realities and needs of the United States and the population of putative immigrants. Rational immigration policy that reflects our country's true needs means increasing the number of lawful entry visas for both temporary and permanent workers. In addition, it requires eliminating or restructuring per-country limits on visas that have created insurmountable waitlists and backlogs from countries of

⁸⁵ See, e.g., 149 CONG. REC. 29947-48 (2003) (Statement of Sen. Sessions) ("America's strength is based on its commitment to the rule of law....In the world of immigration laws, a façade of enforcement that holds no real consequences for law breakers is both dangerous and irresponsible.").

⁸⁶ Jonah Lehrer, *Why America Needs Immigrants*, WALL ST. J., May 14, 2011, available at <http://online.wsj.com/article/SB10001424052748703730804576313490871429216.html>; Demetrious G. Papademetriou, Doris Meissner, Marc R. Rosenblum & Madeleine Sumption, *Aligning Temporary Immigration Visas with U.S. Labor Market Needs: The Case for a New System of Provisional Visas*, Migration Policy Institute 13-16 (2009), available at http://www.migrationpolicy.org/pubs/Provisional_visas.pdf.

⁸⁷ CHAD C. HADDAL, YULE KIM & MICHAEL JOHN GARCIA, *BORDER SECURITY: BARRIERS ALONG THE U.S. INTERNATIONAL BORDER*, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS 18-20, 26 (2009), available at <http://www.fas.org/sgp/crs/homsec/RL33659.pdf>; Mary Fan, *When Deterrence and Death Mitigation Fall Short: Fantasy and Fetishes as Gap-Fillers in Border Regulation*, 42 LAW & SOC'Y REV. 701 (2008); Wayne Cornelius, *Controlling Unauthorized Immigration from Mexico: The Failure of Prevention through Deterrence and the Need for Comprehensive Reform*, Immigration Policy Center 6 (2008), available at <http://www.immigrationforum.org/images/uploads/CCISbriefing061008.pdf>.

high immigration like Mexico, China, and India. Unsurprisingly, the majority of the unlawfully present population—whether through illegal entry or visa overstay—hails from countries with years-long waiting lists for lawful entry.⁸⁸ Finally, a rational immigration policy requires practical responses to the existing undocumented population, currently estimated to number 11 to 12 million persons. On this score, immigration reform must at least include the DREAM Act to ensure that undocumented college students and military personnel have the opportunity to remain in and benefit the country.⁸⁹

While mass deportation might be the emotional, knee-jerk response of restrictionist forces, it is clearly fantastical. Further calls for mass deportation will only exacerbate the crisis of legitimacy already plaguing immigration policy. Arizona's SB 1070 has the potential to criminalize the estimated 400,000 unlawfully present persons in the state. Actual discovery and prosecution of this entire population, and their subsequent removal, is practically impossible. In total, with current resources and capacity, the federal government can only deport a maximum of 400,000 noncitizens per year nationwide.⁹⁰ Thus, SB 1070 only widens the gap between law and on-the-ground realities, further increasing the legitimacy crisis in immigration law. In contrast, the suggested comprehensive immigration reforms better match law, reality, and need, thus producing greater fidelity to our nation's immigration law.

The existence of SB 1070, its copycats, and the general increase in sub-federal immigration regulation, is an indication of the urgent need for this reform. In passing LAWA, then-Governor, now-Secretary of DHS Janet Napolitano, described Arizona as backed into a corner by the lack of federal leadership. She noted that despite the fact that LAWA might be a “business death penalty,”⁹¹ pressing public policy concerns occasioned by unlawful immigration compelled Arizona to take sub-optimal legislative steps. The empirical validity of this claim aside, these types of enactments from across the country are a clear message that federal immigration reform is not just a national priority, it is a national imperative.

Just as undocumented migration is an unchangeable fact in the absence of immigration reform, so too will be sub-federal immigration laws like LAWA and SB 1070. While the United States and advocacy groups are likely to prevail in their suits against these emerging laws, valuable public resources have been squandered both enacting and defending those laws, and subsequently, protesting and challenging those laws. Even if the Court ultimately strikes down SB 1070, it is a virtual certainty that the next generation of sub-federal immigration laws, slightly modified from the original version, will emerge, perhaps from Arizona again. *Whiting*, *U.S. v. Arizona*, *Lozano*, and their ilk are the beginning of an absurd cycle, not its end. The message to the citizenry and elected officials—both federal and sub-federal—is that the sooner we address our immigration concerns through systemic, nation-wide reform, the sooner we can channel resources to other important national priorities.

⁸⁸ PASSEL & COHN, *supra* note 16.

⁸⁹ Julia Preston, *After a False Dawn, Anxiety for Illegal Immigrant Students*, N.Y. TIMES, Feb. 9, 2011, at A15, available at <http://www.nytimes.com/2011/02/09/us/09immigration.html>.

⁹⁰ See Howard, *supra* note 46.

⁹¹ David G. Savage, *The Enforcer of Border Laws*, L.A. TIMES, Nov. 23, 2008, available at <http://articles.latimes.com/2008/nov/23/nation/na-napolitano23>.

The Assault on Public Sector Collective Bargaining: Real Harms and Imaginary Benefits

Joseph E. Slater*

Perhaps the most striking political development in 2011 is the widespread and aggressive assault on public sector collective bargaining rights. While the most highly publicized and most significant changes have taken place in Wisconsin and Ohio, moves are afoot in a number of states. These changes represent the most radical revisions to labor law in the U.S. in decades, and they have set off a political firestorm.

This brief will argue that these attacks are deeply misguided. They serve no purpose beyond a partisan attempt to weaken a key supporter of the Democratic party and they do not address budget deficits. Instead, they take away a core right that has been recognized in the vast majority of the United States for up to half a century, a right that is considered fundamental in much of the industrialized world, a right that helps individual teachers, firefighters, police officers, and other public employees in their day-to-day lives at the workplace, a right that helps sustain a vital middle class, and a right that helps ensure talented and skilled people will find public service an attractive career option.

This Issue Brief will provide background on the development and functioning of public sector labor laws in the U.S., discuss the current political debates over such laws (including debates over whether public sector workers are “overpaid”), explain some of the most prominent recent legislation in this area (including, but not limited to, laws in Ohio and Wisconsin), and critique the proposed changes.

I. HISTORY AND BACKGROUND OF PUBLIC SECTOR UNIONS AND PUBLIC SECTOR LABOR LAW

A. HISTORICAL UNDERPINNINGS

Public sector labor law in the U.S. developed on a somewhat different track than private sector law. The National Labor Relations Act (NLRA) of 1935 gave private sector workers across the country the right to bargain collectively, but the NLRA excludes public sector workers. This was likely in large part due to constitutional concerns: back then, it appeared unclear whether Congress had the power under the Commerce Clause to pass the NLRA itself, and contemporary Tenth Amendment doctrine would have been a huge challenge to applying a national labor law to the states. Also, fear of strikes by public workers inhibited the development of public sector labor law.¹ The U.S. was unusual in this regard. Notably, in other western democra-

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¹ For additional historical detail, see JOSEPH E. SLATER, PUBLIC WORKERS: GOVERNMENT EMPLOYEE UNIONS, THE LAW, AND THE STATE, 1900-1962 (2004).

cies, public sector workers and their unions have long had mostly the same rights as private sector workers.

Despite having no legal rights to bargain collectively before the 1960s, public sector unions organized and represented their members in a variety of ways. Unions of postal workers formed in the late 19th century. Some public sector unions that are prominent today, such as the American Federation of Teachers and the International Association of Firefighters, formed in the first two decades of the 20th century. AFSCME formed in the 1930s. Interestingly, the Building Service Employees Union (the BSEU, which today is the SEIU) has represented many public sector employees since as far back as the 1920s and 1930s.

These unions represented their members in a variety of ways, from lobbying for civil service laws which protected public workers from arbitrary discharge by political machines, to training and educating workers, to actual informal negotiations with public employers. Such negotiations, in the 1930s-50s, produced actual contract-like agreements in a number of cases, even though no law authorized collective bargaining.

The first public sector labor law was passed in Wisconsin in 1959. By that time, the reality of public sector union organizing and activity on the ground was starkly at odds with the lack of any legal rules granting public sector unions any rights. Significantly, the Wisconsin law as passed in 1959 and amended in 1962, dealt with the strike fear by barring strikes through the creation of alternative means to resolve bargaining impasses: mediation, fact-finding, and (this came a bit later) binding “interest” arbitration. By 1967, twenty-one states had adopted some type of public sector labor law authorizing collective bargaining, and soon the vast majority of states had adopted them.

B. PUBLIC SECTOR UNIONS AND MODERN LABOR LAW RULES

Public sector unions became one of the labor movement’s biggest success stories. For some time, the union density rate in the public sector has been around 40 percent, while the private sector rate is now less than 8 percent.² Indeed, as of 2009, there were more government employees than private sector employees who were union members.³

Public sector labor law is still generally set by state and local laws (the only federal public sector labor laws are those that apply to employees of the federal government), and these laws vary significantly. But the overwhelming majority approach is to grant collective bargaining rights. Today, thirty-one states and the District of Columbia allow public employees generally to bargain collectively; eleven permit some but not all categories of public employees to bargain collectively, and only eight states generally bar public workers from bargaining collectively.⁴

Beyond that, there is some variation in the different collective bargaining laws. For example, of the states that permit collective bargaining, only twelve permit any public employees to strike. Statutes that allow bargaining but not strikes (the most common approach) use varying processes for resolving bargaining impasses, including fact-finding, mediation, and usually ending in some form of binding “interest arbitration.”

² In 2009, 36.8% of public employees were members of unions, and 40.7% were covered by union contracts. See BUREAU OF LABOR STAT., U.S. DEPT. OF LABOR, NEWS RELEASE USDL-11-0063, UNION MEMBERS – 2010, Table 3 (2010), available at <http://www.bls.gov/news.release/pdf/union2.pdf>.

³ In 2009, 7.9 million public workers and 7.4 million private sector workers were union members. See *id.*

⁴ See JON O. SHIMABUKURO, COLLECTIVE BARGAINING AND EMPLOYEES IN THE PUBLIC SECTOR, U.S. CONGRESSIONAL RESEARCH SERVICE REPORT, at 3-4 (Mar. 30, 2011).

Approximately thirty states use some form of interest arbitration.⁵ In this system a neutral arbitrator (or sometimes a tripartite board) holds a hearing, evaluates evidence, follows statutory criteria, and makes a binding decision as to the terms of the collective bargaining agreement. Significantly, statutes providing for binding interest arbitration almost always include specific criteria which the arbitrator must consider and evaluate in making the arbitration award. The employer's ability to pay is a standard factor the arbitrator must consider, as are the pay and conditions of similar employees (often called "comparables").⁶ Other legal rules vary across jurisdictions, notably on scope of bargaining (often somewhat narrower than in the private sector) and coverage of employees (some public sector laws cover supervisors).⁷

Binding interest arbitration is the "quid pro quo" for strike bans. It typically is used after both mediation and fact-finding. These processes for resolving collective bargaining impasses in the public sector have been a success. A recent, careful analysis by labor relations experts concluded that:

The dispute-resolution processes (mediation, fact-finding, and arbitration) put in place as substitutes for the right to strike have performed well in avoiding work stoppages and producing contract settlements that reflect the criteria included in state statutes Newer "interest-based" approaches for increasing the problem-solving potential of bargaining have been tried in a number of public (and private) sector settings, and offer opportunities for further improvements in negotiations and day-to-day contract administration.⁸

Interest arbitration has worked as intended during the recent economic downturn. Employers have successfully invoked "employer ability to pay" criteria in arbitrations across the country. For example, in a recent interest arbitration case from Minnesota, the arbitrator explained that "the vast majority of cities in the Employer's comparison group are proposing 0% [wage increases] for 2010 Some cities and counties are settling at 0%"⁹

Further, considerable evidence shows that collective bargaining rights with binding interest arbitration reduces strikes. Studies have found that illegal strikes are most likely to occur in states with no collective bargaining rights, as opposed to states with

⁵ RICHARD KEARNEY, LABOR RELATIONS IN THE PUBLIC SECTOR 264-65 (3d ed. 2001).

⁶ See Arvid Anderson & Loren A. Krause, Interest Arbitration: The Alternative to the Strike, 56 FORDHAM L. REV. 153, 158-63 (1987).

⁷ See generally MARTIN H. MALIN, ANN C. HODGES & JOSEPH E. SLATER, PUBLIC SECTOR EMPLOYMENT: CASES AND MATERIALS (2d ed. 2010); KEARNEY, supra note 5.

⁸ David Lewin et al., *Getting it Right: Empirical Evidence and Policy Implications from Research on Public-Sector Unionism and Collective Bargaining* 3 (Employment Pol'y Research Network, Labor and Employment Relations Ass'n, 2011), available at <http://ssrn.com/abstract=1792942>.

⁹ City of West St. Paul v. Law Enforcement Labor Services, Inc., Local 72 (Police Officer Unit), BMS Case No. 09-PN-1062 (Jan. 19, 2010) (Miller, Arb.). Other interest arbitration cases citing the economic downturn in ruling for employers include Ill. Dep't of Central Mgmt. Serv. v. Int'l Bhd. of Teamsters, Local 726 (State Police - Master Sergeants Interest Arbitration), Case No. S-MA-08-262, Arb. Ref. 08.208 (Jan. 27, 2009) (Benn, Arb.); Metro. Council, Metro Transit Police Dep't & Law Enforcement Labor Services, Inc., Local No. 203 - Police Administration & Command Employees, BMS Case No. 08-PN-1141 (Feb. 27, 2009) (Bognanno, Arb.).

bargaining rights.¹⁰ Notably, in Ohio, the number of strikes went down dramatically after Ohio passed its public sector labor law in the early 1980s, *even though the Ohio statute permitted most public employees to strike*. This is because the Ohio law, like almost all collective bargaining statutes, had effective mechanisms to settle impasses short of strikes (mediation and fact-finding), and the threat of strikes made both sides take these mechanisms seriously.¹¹

II. THE 2010 ELECTIONS AND POLITICAL ATTACKS ON PUBLIC SECTOR UNIONS

Despite the data and realities described above, by early 2011 it became clear that some Republican politicians had targeted public sector unions, and thus began attacks unprecedented in modern times. The rhetoric suggested that public sector workers were not sharing the pain that private sector workers felt during the Great Recession that began in 2008. This crisis did, in fact, cause significant cuts in public employment. By the fall of 2010, the number of workers employed by local governments had dropped to the lowest level since October 2006, and the drop in local government employment from August to September 2010 was the biggest one-month decline since 1982.¹² Also, public employers have imposed involuntary furloughs (mandatory days off without pay) as well as staffing cuts, on employees, including unionized employees. Between 2007 and 2009, over half the states implemented mandatory furloughs. In 2010, California and New York ordered furloughs for a combined total of more than 250,000 state employees.¹³

Still, the recession provided an opportunity for some to argue not only that public workers are overcompensated, but also to blame various economic and budget woes on public sector unions and their right to bargain collectively. Thus, for example, a *Wall Street Journal* editorial last spring made the remarkable claim that “America’s most privileged class are public union workers.”¹⁴ The *New Republic* titled an article, “Why Public Employees are the New Welfare Queens.”¹⁵ Republican politicians began echoing these sentiments. “We have a new privileged class in America,” said Indiana Governor, Mitch Daniels, who rescinded state workers’ collective bargaining power on his first day in office in 2006. “We used to think of government workers as underpaid public servants. Now they are better paid than the people who pay their salaries.”¹⁶

¹⁰ Lewin, et al., *supra* note 8, at 13-14.

¹¹ Martin H. Malin, *Public Employees’ Right to Strike: Law and Experience*, 26 U. MICH. J.L. REFORM 313, 365 (1993) (finding that there “have been far fewer strikes in Ohio since they were legalized.”).

¹² Local governments employed 14.2 million, or 76,000 fewer people in September than August, the biggest one-month decline since July, 1982. Of the jobs cut, 50,000 were in education. Simone Baribeau & Ashley Lutz, *Local Government Employment in U.S. Falls to Lowest Since 2006*, BLOOMBERG (Oct. 8, 2010), available at <http://www.bloomberg.com/news/2010-10-08/local-government-employment-in-u-s-falls-to-lowest-since-2006.html>.

¹³ Stephen F. Befort, *Unilateral Alteration of Public Sector Collective Bargaining Agreements and the Contract Clause*, 59 BUFF. L. REV. 1, 12 (2011), available at http://www.buffalolawreview.org/past_issues/59-1/Befort.pdf.

¹⁴ Editorial, *The Government Pay Boom*, WALL ST. J., Mar. 26, 2010, at A18, available at <http://online.wsj.com/article/SB10001424052748704281204575003101210295246.html>.

¹⁵ Jonathan Cohn, *Why Public Employees Are the New Welfare Queens*, THE NEW REPUBLIC, Aug. 8, 2010, available at <http://www.tnr.com/blog/jonathan-cohn/76884/why-your-fireman-has-better-pension-you>.

¹⁶ Ben Smith & Maggie Haberman, *Pols Turn on Labor Unions*, POLITICO, June 10, 2010, available at <http://www.politico.com/news/stories/0610/38183.html>.

Taking what in other times might have been considered a politically risky stance, Massachusetts governor Mitt Romney asked, “Why should taxpayers pay for health care for public employees that we don’t have ourselves?”¹⁷

A. COLLECTIVE BARGAINING RIGHTS ARE NOT CORRELATED WITH STATE DEFICITS

Proponents often claim that because public workers are overcompensated, they are a significant cause of state deficits. But the correlation simply isn’t there. At a recent hearing on this issue, Rep. Mike Quigley observed that states that allow public sector collective bargaining on average have a 14 percent deficit relative to their budgets, while states that bar collective bargaining have 16.5 percent deficits.¹⁸ For example, Texas, which has essentially no public sector collective bargaining and very low levels of unionization, has one of the worst budget deficits in the nation. Nevada, which has no collective bargaining rights for state employees, has one of the largest state budget deficits in the country. In contrast, some states with strong public sector bargaining laws, including those at the center of these debates, have smaller than average deficits. Wisconsin was projected to have a deficit of 12.8 percent of its budget in FY 2010, Ohio 11 percent, and Iowa 3.5 percent.¹⁹ In contrast, North Carolina, which bars all public sector collective bargaining is running a projected deficit of 20 percent in 2012.²⁰ This is in large part because public employees are not, in fact, overcompensated.

B. PUBLIC EMPLOYEES ARE NOT “OVERCOMPENSATED”

While studies on this point do not all agree, the more careful studies show that, comparing similar workers with similar credentials in similar jobs, public employees are more often paid less than comparable private sector workers.

Studies that find public workers are overpaid tend to look at gross average pay or median pay but do not take into account the different types of jobs in the public sector and, sometimes, the different kinds of workers. Simply looking at aggregate data from the Bureau of Labor Statistics makes it seem as if public workers earn more on average than private workers, but the gap disappears completely when one compares similar workers (including age, experience, and education) in similar jobs.²¹ There are many more professional jobs in the public sector, and fewer unskilled service jobs. For example, the federal Office of Personnel Management recently concluded that two of the main studies purporting to show that federal employees were paid more than private sector workers (from the Heritage Foundation and the Cato Institute) were inaccurate. The figures on which Cato and Heritage relied, from the Bureau of Economic Analysis, “look only at gross averages, including retail and restaurant service workers and other entry-level positions that reduce private sector average pay in comparison to

¹⁷ Jess Crosby, *Public Sector, Public Good*, AFL-CIO BLOG, Apr. 22, 2010, <http://blog.aflcio.org/2010/04/22/public-sector-public-good/#more-28473>.

¹⁸ *House Panel Debates State Budget Problems, Whether Bargaining Rights Need to Be Cut*, 25 LABOR RELATIONS WEEKLY (BNA) 700 (2005).

¹⁹ DAVID MADLAND & NICK BUNKER, CTR. FOR AMERICAN PROGRESS, STATE BUDGET DEFICITS ARE NOT AN EMPLOYEE COMPENSATION PROBLEM 4 (2011), <http://www.americanprogressaction.org/issues/2011/03/pdf/statebudgetissuebrief.pdf>.

²⁰ Joseph McCartin, *Convenient Scapegoat, Public Workers under Assault*, DISSENT, Spring 2011, available at <http://www.dissentmagazine.org/article/?article=3825>.

²¹ See *id.*

the Federal average, which does not include many of these categories in its workforce.” Also, the federal sector includes a significantly higher percentage of highly specialized and professional employees, who are actually paid less than their private sector counterparts.²²

Taking such factors into account, many studies have found that public workers are, on the whole, paid less than similar private sector workers doing similar jobs. A recent study from the National Institute on Retirement Security concluded:

Wages and salaries of state and local employees are lower than those for private sector workers with comparable earnings determinants (e.g., education). State employees typically earn 11 percent less; local workers earn 12 percent less Over the last 20 years, the earnings for state and local employees have generally declined relative to comparable private sector employees

Benefits (e.g., pensions) comprise a greater share of employee compensation in the public sector [Still] state and local employees have lower total compensation than their private sector counterparts. On average, total compensation is 6.8 percent lower for state employees and 7.4 percent lower for local workers, compared with comparable private sector employees.²³

Also, economists at the Center for Economic and Policy Research studied workers in New England, and found that while the average state or local government employee there earns higher wages than the average private-sector worker, that is because public workers are, on average, older and much better educated. Specifically, over half of state and local government employees in New England have a four-year college degree or more, and 30 percent have an advanced degree. Only 38 percent of private-sector workers have a four-year college degree or more, and only 13 percent have an advanced degree. Also, the typical state and local worker is about four years older than the typical private sector worker. After adjusting for these factors, public sector wages were generally lower than private sector wages. While the lowest paid public workers earned slightly more than their private sector counterparts, for engineers, professors, and others in the higher-paid professional jobs, the wage penalty for being a public worker was almost 13 percent.²⁴

Such studies have been done for states across the nation and for specific public employers. For example, a study from Georgia State University analyzing data from across the nation found that “[h]olding constant education, estimated work experience, occupation, location, race, and gender,” public employees “earned 4 to 6% less

²² Laura D. Francis, *OPM, NETU Dispute Reports that Feds Paid Twice as Much as Public Sector*, 48 GOVERNMENT EMPLOYEE RELATIONS REPORTER (BNA) 994 (2010).

²³ KEITH A. BENDER & JOHN S. HEYWOOD, NAT’L INST. ON RETIREMENT SECURITY, OUT OF BALANCE: COMPARING PUBLIC AND PRIVATE COMPENSATION OVER 20 YEARS 3 (2010), http://www.nirsonline.org/storage/nirs/documents/final_out_of_balance_report_april_2010.pdf.

²⁴ Jeffrey Thompson & John Schmitt, *The Wage Penalty for State and Local Government Employees in New England* 8 (Ctr. for Econ. and Pol’y Research, Political Econ. Research Inst., U. Mass., Amherst, Working Paper Series, No. 232, 2010), available at <http://www.cepr.net/documents/publications/wage-penalty-2010-05.pdf>.

than comparable private sector workers in 1990, 2000, and 2005-06.²⁵ Focusing more narrowly, a study by the chief economist in the office of the New York City Comptroller found that employees in the New York City municipal workforce are paid 17 percent less on average than their private sector counterparts.²⁶

The Economic Policy Institute (EPI) has compared public and private sector compensation in a number of individual states, including Michigan, Ohio, and Wisconsin, states with relatively strong union presence and relatively robust public sector collective bargaining statutes. For Michigan, the study concluded that, after controlling for education, experience, organizational size, gender, race, ethnicity, citizenship, and disabilities, full-time state and local government workers are undercompensated by approximately 5.35% compared to the private sector (2.9% when annual hours worked are factored in).²⁷ For Wisconsin, the study found that public employees are undercompensated by 8.2% (4.8% when annual hours worked are factored in).²⁸ For Ohio, the study found public workers are undercompensated by 5.9% (3.5% when hours are factored in).²⁹

An EPI study made similar findings on a national scale. Looking at public and private workers nationwide, it found a slight undercompensation of public employees on a cost per hour basis, after controlling for education, experience, hours, employer size, gender, race, ethnicity, and disability. On average, full-time state and local employees are undercompensated by 3.7%, in comparison to similar private-sector workers.³⁰

A very recent overview, surveying the research on this issue, concluded:

The existing research, much of which is very current (completed within the past two years), shows that, if anything, public employees are underpaid relative to their private-sector counterparts. While public-sector benefits are higher than private sector counterparts, total compensation (including health care and retirement benefits) is lower than that of comparable private-sector employees. Erosion of public-sector pay and benefits will make it harder for public employers to attract, retain and motivate the workforce needed to provide public services.³¹

²⁵ Gregory B. Lewis & Chester S. Galloway, *A National Analysis of Public/Private Wage Differentials at the State and Local Levels by Race and Gender* 22 (Georgia St. U. Andrew Young School of Pol'y Studies, 2011), available at <http://ssrn.com/1768190>.

²⁶ See John Herzfeld, *Municipal Pay Below Private Sector, New York City Comptroller Study Finds*, 46 DAILY LABOR REPORTER (BNA) A-10 (2011).

²⁷ Jeffrey H. Keefe, *Are Michigan Public Employees Over-Compensated?* 9 (Econ. Pol'y Inst., Briefing Paper No. 293, 2011), available at http://epi.3cdn.net/ac5a7563f793ddf366_89m6b5vrv.pdf.

²⁸ Jeffrey H. Keefe, *Are Wisconsin Public Employees Over-Compensated?* 9-10 (Econ. Pol'y Inst., Briefing Paper No. 290, 2011), available at http://epi.3cdn.net/9e237c56096a8e4904_rkm6b9hn1.pdf.

²⁹ Jeffrey H. Keefe, *Are Ohio Public Employees Over-Compensated?* 8 (Econ. Pol'y Inst., Briefing Paper No. 296, 2011), available at http://epi.3cdn.net/6ddeb152266bf6714f_6xm6b955l.pdf.

³⁰ The study found a smaller compensation penalty for local government employees (1.8 percent) than for state government workers (7.6 percent). Jeffrey H. Keefe, *Debunking the Myth of the Overpaid Public Employee*, 1 (Econ. Pol'y Inst., Briefing Paper No. 276, 2010), available at http://epi.3cdn.net/8808ae41b085032c0b_8um6bh5ty.pdf.

³¹ Lewin, et al., *supra* note 8, at 2.

C. PENSIONS

Many of the real and perceived financial problems in public employee compensation involve pension plans. Notably, public sector pension benefits and rules in most states are *not* set through collective bargaining, but rather through statute and regulation.³² Also, while some state plans have significant underfunding problems, in the aggregate, public sector pension plans currently account for a total 3.8% of state and local spending, which does not seem obviously out of balance.³³

It is also crucial to note that while some states with robust collective bargaining laws have serious problems involving pension funding, so do states with essentially no public sector labor laws and very little presence by public sector unions: notably, Mississippi, Louisiana, Virginia and Kentucky.

Still, the problem is real, at least in a number of places. Causes range from stock market declines, to underfunding due to questionable actuarial assumptions and/or political pressure to divert funds to other projects, to some over-generous benefit formulas.

Certainly the stock market declines in recent years contributed to significant underfunding in a number of places. This, in turn, put additional strains on already-weakened public budgets. As *Politico* explained:

A recent study from the Pew Center on the States found that states are short \$1 trillion toward the \$3.35 trillion in pension, health care and other retirement benefits states have promised their current and retired workers, the product of a combination of political decisions and the recent recession.

But the immediate cause of the new spotlight on public sector unions is the collapse in tax revenues that came with the 2008 Wall Street crash, something that union leaders bitterly note is not their fault.³⁴

Further, in some cases, the problems have been exaggerated. A coalition of ten organizations representing state and local government employers issued a “fact sheet” on January 26, 2011 stating that state and local government pension funds on the whole “are not in crisis.” It concluded that “[m]ost state and local government employee retirement systems have substantial assets to weather the economic crisis; those that are underfunded are taking steps to strengthen funding.”³⁵ Another independent study explains that:

the extent of public pension liabilities varies widely among the states and local governments. Some pension plans are fully funded, while others have seen their funding levels drop below 80 percent. In most cases, pension funding shortfalls are the result of the cyclical nature of the economy, which was particularly severe in the

³² See, e.g., HAW. REV. STAT. § 89-9(d) (2010); IOWA CODE § 20.9 (2009).

³³ Alicia H. Munnell, Jean-Pierre Aubry & Laura Quinby, *The Impact of Public Pensions on State and Local Budgets* 1, (Ctr. for Retirement Research, Boston College, 2010), available at <http://www.policyarchive.org/handle/10207/bitstreams/95884.pdf>.

³⁴ Smith & Haberman, *supra* note 16.

³⁵ *Public Pensions ‘Not in Crisis,’ Group Says, Pointing to ‘Substantial Assets’ for Long Run*, 49 GOVERNMENT EMPLOYEE RELATIONS REPORTER (BNA) 162, (2011).

2008–2009 period. In a minority of cases, unfunded liabilities can be directly traced to the failure of public officials to properly fund the pension system over a period of many years.³⁶

Also, states have cut back on their contributions to public employee pension plans; one study estimates this has increased the funding shortfall by \$80 billion. Public employers did not make all the necessary contributions to pension plans when the stock market was booming, relying on the politically-convenient assumption that these good times would continue.³⁷ One area for potential reform would be to tighten the rules on the actuarial assumptions that can be used in public sector pension financing. Notably, the law that governs private sector pensions on this and other issues, the Employment Retirement Income Security Act (ERISA), does not apply to the public sector.

Further, the benefit levels in many public sector pensions systems are far from overly-generous. State pensions in Massachusetts average less than \$26,000 a year.³⁸ Also, nearly a third of all state and local government employees do not earn Social Security retirement benefits. This is because public employment in some states is not covered by Social Security. One survey reported the following average pension benefits:

- California—\$2,008 per month or \$24,097 per year;
- Colorado—\$2,278 per month or \$27,339 per year (and no Social Security);
- Florida—\$1,468 per month or \$17,617 per year; and
- Ohio—\$1,961 per month or \$23,525 per year (and Ohio is one of the states where Social Security does not cover public employment).³⁹

To the extent real problems exist, they can and have been addressed independently of collective bargaining issues. In the period from January 2010 to September 2010 alone, nineteen states amended their public employee pension statutes. These laws increased employee contributions to retirement plans, reduced benefits, or did both. For example, Illinois passed a law in May 2010 altering benefits for all of the state’s five pension systems, including raising the retirement age, limiting pension raises, capping maximum benefits, and ending public pensions for retirees who work another public job.⁴⁰ Georgia also made changes to its “re-employment after retirement” rules such that if a retiring employee has not reached normal retirement age on the date of retirement and returns to any paid service, the employee’s application for retirement is nullified.⁴¹ In October 2010, California enacted changes to its pension plan for state employees. Under the new law, current employees will increase the amount they con-

³⁶ CTR. FOR STATE AND LOCAL GOVERNMENT EXCELLENCE, STATE AND LOCAL PENSIONS: AN OVERVIEW OF FUNDING ISSUES AND CHALLENGES 2 (2011), available at <http://www.slge.org/vertical/Sites/%7BA260E1DF-5AEE-459D-84C4-876EFE1E4032%7D/uploads/%7BDE913A11-1C4F-475D-BF0E-1662B0C67612%7D.PDF>.

³⁷ MADLAND & BUNKER, *supra* note 19, at 7.

³⁸ Crosby, *supra* note 17.

³⁹ National Institute of Retirement Security, *Pensionomics: Measuring the Economic Impact of State and Local Pension Plans*, (compiling state by state data on average state and local pension benefits), available at http://www.nirsonline.org/index.php?option=com_content&task=view&id=184&Itemid=88.

⁴⁰ Smith & Haberman, *supra* note 16; see 2009 Ill. Leg. Service, Public Act 96-525; see e.g., 40 ILL. COMP. STAT. 5/14-103.12 2009 (final compensation).

⁴¹ See Tripp Baltz, *Facing Long-Term Pension Problems, States Are Turning to Legislative Fixes*, 48 GOVERNMENT EMPLOYEE RELATIONS REPORTER (BNA) 1156 (2010).

tribute toward their retirements, newly hired employees will have less generous pension benefits, and the pension will be calculated based on the average high three years of salary, not the single highest year. The law also contains transparency provisions that require the California Public Employees' Retirement System to submit specific information to the legislature, governor, and state treasurer regarding contribution rates, discount rates used to calculate liabilities, alternative discount rates, and various other assumptions.⁴²

III. THE LAWS AND PROPOSED LAWS AT ISSUE

A. WISCONSIN

Prior to the 2011 developments, Wisconsin had two fairly similar public sector labor statutes, one covering local and county government employees, and the other state employees. Ironically, the former was the nation's first state law permitting public sector collective bargaining in country, enacted in 1959. The bill recently passed and signed by Governor Scott Walker would make sweeping revisions to these laws (except for certain employees in "protective occupations," mainly police and fire). While the bill is currently enjoined, it would make the following changes, among others.

First, it would eliminate collective bargaining rights entirely for some employees: University of Wisconsin (UW) system employees, employees of the UW Hospitals and Clinics Authority, and certain home care and child care providers.

Second, it would generally limit collective bargaining to bargaining over a percentage of total base wages increase that is no greater than the percentage change in the consumer price index. No other issues could be negotiated.

Third, it would make Wisconsin a "right to work" jurisdiction, meaning that it would be illegal for unions and employers to agree to "fair share" union security clauses.⁴³ Further, the law would make it illegal for an employer to agree to automatic dues deduction for employees who wish to pay dues.

The bill also makes some highly unusual changes. It would enact an unprecedented mandatory recertification system under which every union would face a recertification election every year. And the union would only be recertified if 51 percent of the employees in the collective bargaining unit – not merely those voting – voted for recertification. So, if a bargaining unit had 400 members and the recertification vote was 201 favoring union representation and 100 against, the union would be decertified, because 201 is less than 51 percent of 400. The bill also limits the duration of collective bargaining agreements to one year, which is very unusual in labor law. Further, it requires that employees pay one half of all the required contributions to their retirement system. Previously, the amount of employee contributions was negotiable (*e.g.*, the employer could agree to pay part or all of the employee contributions).

As of this writing, the Wisconsin law has not yet gone into effect, as it was enjoined by Judge Maryann Sumi of the Dane County Circuit Court on March 18, 2011. The injunction was granted on the grounds that the Wisconsin state legislature passed the law in violation of a statutory requirement that 24 hours' notice must be given before

⁴² S.B. X6 22, 2010 Ext. Sess. (Cal. 2010). See Laura Mahoney, *Governor to Sign Pact With Rollbacks of Pensions 100 Days Into Fiscal Year*, 195 DLR (BNA) A-18, (2010).

⁴³ A "fair share" agreement is an agreement between a union and employer that members of a union bargaining unit will be required to pay either regular union dues or, for employees who object, that portion of their union dues which go to activities related to collective bargaining. The most significant activities related to collective bargaining are contract negotiations and grievance and arbitration handling. The most significant activity not related to collective bargaining is political activity.

passing such a law. The case is now pending before the Wisconsin Supreme Court. Other legal challenges are likely, some based on the process and some based on the substance of the law. Some unions and public employers are signing contracts in this period, as contracts in place as of the effective date of the law are not covered by the law. Setting the table for further complications later, defenders of the bill argue that if they prevail in the Wisconsin Supreme Court, the “effective date” of the law will be retroactive to March 25.

The law has prompted considerable political activity, from massive protests in Madison to recall efforts aimed at both Republicans (six currently pending) who voted for the bill and Democrats (three pending) who fled the state in an attempt to block the bill by preventing a legislative quorum. A recent state supreme court justice race between David Prosser and JoAnne Kloppenburg was obviously affected by the politics of this issue (as of this writing, Prosser has a small lead, but there will be a recount).

B. OHIO

Prior to recent amendments, Ohio had a public sector labor law applicable to most public employees. Enacted in the early 1980s, it even allowed most public workers to strike. The new bill recently signed into law, SB-5, was designed to profoundly alter this law. SB-5 may soon be on hold for a referendum process, as described further below. But as passed, it would do the following things, among others.

SB-5 eliminates collective bargaining rights entirely for certain employees, including at least most college/university faculty, lower level supervisors in police and fire departments, and employees of charter schools. It also limits the bargaining rights of some other employees: *e.g.*, regional council of government employees and certain members of the unclassified civil service could bargain only if the public employer elects to do so.

For employees who can bargain, SB-5 would eliminate both the right to strike for public employees who currently have that right (all public employees with the exception of police, fire, and a few other small categories), and the right to binding interest arbitration at impasse for employees who could not strike under preexisting law. SB-5 provides stiff penalties (removal and loss of two days pay for each day striking) for striking or instigating a strike. Encouraging or condoning a strike is also forbidden.

Instead, the parties are left to mediation and fact-finding, and if these do not lead to an agreement, the governing legislative body can simply choose to adopt the employer’s final offer. A majority of the union or the employer can reject a fact-finder’s recommendations (previously, a two-thirds vote was required to reject). If either side rejects the recommendations, the parties’ last best offers will be submitted to the legislative body of the public employer to make a selection. The law requires the public employer’s last best offer to become the agreement if the legislative body fails to choose. For certain employers, if the legislative body selects the last best offer that costs more and the CFO of the legislative body cannot or refuses to determine whether sufficient funds exist to cover the agreement, the last best offers will be submitted to the voters. Unlike the previous law, in which parties could mutually agree to a wide range of procedures to resolve impasses, this is the only impasse procedure SB-5 allows.

SB-5 also bars “fair share” agreements. It also prohibits public employers from agreeing to provide payroll deductions for any contributions to a political action committee without written authorization from the individual employee.

Further, it restricts the scope of bargaining and expands the list of subjects that are inappropriate for collective bargaining. It specifies that the following are not bargain-

able: (1) employer-paid contributions to retirement systems; (2) health care benefits (except the amount of the premium the employer and employees pay, although the provision of health care benefits for which the employer is required to pay more than 85% of the costs is not negotiable); (3) privatization or contracting out of a public employer's work; and (4) the number of employees required to be on duty or employed. It also permits public employers to not bargain on any subject reserved to the management of the governmental unit, even if the subject affects wages, hours, and terms and conditions of employment. It bars collective bargaining agreements (CBAs) from providing for an hourly overtime payment rate that exceeds the overtime rate required by the Fair Labor Standards Act (FLSA). It also bars CBAs from containing provisions for certain types of leave to accrue above listed amounts or to pay out for sick leave at a rate higher than specified amounts. It bars grievances and arbitrations based on past practice of the parties.

SB-5 further restricts bargaining in education, including a bar on negotiating minimum number of personnel, anything restricting the employer's ability to assign personnel, and maximum number of students assigned to a class or teacher. Also, employers cannot agree to any restriction on the public employer's authority to acquire any products, programs, or services from educational service centers.

The bill also gives greater rights for a public employer in a state of fiscal emergency or under "fiscal watch" to terminate, modify, or negotiate the agreement.

The law appears to repeal the "contract bar" rule. And it repeals the provision requiring the public sector labor law to be liberally construed.

SB-5 is also facing challenges. Currently, a petition drive is underway to place repeal of the law on the ballot in November, 2011. If enough signatures are gathered, the law will be, essentially, put on hold until the referendum vote.

C. OTHER STATES

While Wisconsin and Ohio have gotten the most press, other states where Republicans control most or all of state government have also passed bills limiting the collective bargaining rights of public workers.

In Michigan, the recently enacted Local Government and School District Fiscal Accountability Act allows the governor to appoint an "emergency manager" for local governments experiencing a "financial emergency." The manager can reject, modify, or terminate any terms of CBAs with public sector unions. A pair of Detroit municipal pension funds have filed suit alleging that this violates the Contracts Clause of the Constitution. Also in Michigan, a proposed bill would provide even harsher penalties for striking teachers, including the sanction of suspending or revoking teaching licenses.

On March 30, 2011, the New Hampshire House approved legislation (H.B. 2) that would eliminate the negotiated terms of employment for public workers and make them "at-will" employees at the end of a CBA's term. Also, on April 20, the New Hampshire Senate passed a "right to work" bill that would apply to both public and private sector unions. Both Houses passed the latter bill by margins exceeding those necessary to override a gubernatorial veto.

Alabama passed a statute making it a crime to arrange for public employee payments "by salary deduction or otherwise" to PACs or organizations including unions that use part of the money for "political activity." That law has been enjoined by the U.S. District Court for the Northern District of Alabama, on the grounds that the statute is overbroad regarding activities the First Amendment protects and/or that it is too vague to provide adequate notice. The state is appealing.

Idaho has recently enacted a series of bills which curtail teachers' collective bargaining rights. S.B. 1108 limits such bargaining to wages and benefits. It also eliminates teacher seniority protections during layoffs and replaces tenure-track contracts for new teachers with renewable agreements of one or two years. As in Ohio, this bill is facing a campaign for repeal via a referendum.

Indiana passed a statute significantly limiting the scope of bargaining for teachers, e.g., by forbidding the parties to contractually agree to what were formally "permissive" topics of negotiation (those which unions and employers are legally allowed to agree to but are not required to negotiate over unless both sides agree). It also appears to bar arbitration over contract grievances, and substitute fact-finding for arbitration in impasse resolution.

Oklahoma recently repealed a 2004 law requiring cities with populations of at least 35,000 to bargain collectively with unions. As in Wisconsin, this change does not affect police and firefighters, who, in Oklahoma, are covered by a separate statute. However, a separate bill is pending that would affect the rights of police and fire to binding arbitration.

In all these states, the issues are highly partisan, with Republicans generally backing these moves, and Democrats opposing them. The political battles are not expected to end any time soon. Currently, public opinion seems to favor those opposed to stripping collective bargaining rights from public workers.⁴⁴

IV. RESTRICTING COLLECTIVE BARGAINING RIGHTS IS BAD PUBLIC POLICY

As shown above, considerable evidence strongly contradicts claims that these laws are necessary to deal with budget problems, or even that they would help with budget problems. Public workers are not "overpaid," problems in pension underfunding that do exist are generally not related to collective bargaining rights, and there is no real correlation between collective bargaining rights and the levels of state deficits.

Further, many of the adopted rules on their face have no relation to state budgets or employee compensation; instead, they are meant to damage unions as institutions. First, "right to work rules" that bar "fair share" agreements have nothing to do with state budgets or employee compensation. Such rules only go to whether unions can require employees in a union bargaining unit to pay that portion of union dues which go to activities related to collective bargaining. Right to work rules have been criticized in that they permit "free riders," as unions continue to have a duty to fairly represent employees in a union bargaining unit even if such employees are not paying any dues. But just as importantly, whether employees pay dues to a union or not has no impact on public budgets.

The Wisconsin statute features two additional rules which clearly do not relate to the state budget. First, the bill bars automatic dues deductions for employees who want to pay dues to the union, even if the employer would agree to it. Second, the bill's onerous and unprecedented provisions for yearly recertification requiring a majority of the entire bargaining unit has no purpose other than to make it very difficult for a union to stay certified. Indeed, when pressed in a Congressional hearing recently,

⁴⁴ See, e.g., *More Americans Back Unions Than Governors in State Disputes*, GALLUP, Apr. 1, 2011 (reporting that 48% of respondents support the unions and 39% support the governors), available at <http://www.gallup.com/poll/146921/Americans-Back-Unions-Governors-State-Disputes.aspx>; *Have Republicans Lost the Public Relations War Over Public Sector Unions?* OUTSIDE THE BELTWAY, Mar. 3, 2011 (analyzing N.Y.Times-CBS, NBC-Wall Street Journal, and Rasmussen polls with similar results), available at <http://www.outsidethebeltway.com/have-republicans-lost-the-public-relations-war-over-public-sector-unions/>.

Wisconsin Governor, Scott Walker, could not justify this rule in terms of the state budget. In labor law generally, once a union has been certified, its status can be challenged if 30% of the members of the bargaining unit request an election to do so, and the union can be de-certified in the election if a majority of those voting choose that option. This long-established rule in both the public and private sectors correctly balances the need for stability in labor relations with the concept that a union should not represent employees if a majority of the employees does not wish it.

The real impetus behind these bills is that some Republicans wish to damage unions institutionally because unions support Democrats more frequently than Republicans. For example, in a fundraising letter, Wisconsin State Senate Majority Leader, Scott L. Fitzgerald, explained that the goal of the Wisconsin legislation was “to break the power of unions . . . once and for all.” Further, in a Fox News interview, Fitzgerald said, “If we win this battle and the money is not there under the auspices of the unions, certainly what you’re going to find is President Obama is going to have a much more difficult time getting elected and winning the state of Wisconsin.”⁴⁵

Often, these bills are not even supported by actual public employers. For example, the executive director of the Wisconsin School Board Association wrote the Wisconsin legislature, while that state’s bill was pending, as follows:

Many [Wisconsin Association of School Board] members are gravely concerned that the changes in the . . . bill limiting the scope of collective bargaining would wipe away the ability of local school boards to use the bargaining process in ways that enhance local control by telling local school boards they are prohibited from deciding whether to enter into a contract on any item other than wages; and would immeasurably harm the collaborative relationships that exist between school boards and teachers and may lead to job actions and other disruptions of educational services that will harm the educational quality in our public schools.⁴⁶

Further, taking away collective bargaining rights is actively harmful. As a recent study by labor relations experts explained:

Challenges to the freedom of association and the right to bargain collectively places the United States out of sync with established international human-rights principles. Collective bargaining has historically served to increase consumer purchasing power, assure voice in the workplace, and provide checks and balances in society. Models for collective bargaining in the public sector have incorporated alternative dispute-resolution mechanisms to protect the public interest.⁴⁷

As to the first point, Article 23 of the United Nations’ Universal Declaration of Human Rights stresses the importance of collective bargaining rights for all workers,

⁴⁵ Michael Winship, *Labor Pains and the GOP*, SALON, Apr. 1, 2011, available at http://www.salon.com/news/politics/war_room/2011/04/01/labor_fights_republicans_sharia_law_michael_winship.

⁴⁶ Lewin, et al., *supra* note 8, at 20.

⁴⁷ *Id.* at 3.

including public employees. So does the 1998 International Labor Organization Declaration on Fundamental Principles and Rights at Work (the U.S. is a signatory to this document). In the latter document, the U.S. pledged “to promote and to realize . . . the principles concerning the fundamental rights” defined in the Declaration, the first of which is, “freedom of association and the effective recognition of the right of collective bargaining.” Human Rights Watch and Amnesty International have publically declared that at least some of the legislation described above violates international human rights standards. Human Right Watch has noted that the U.S. also is a party to and bound by its obligations under the International Covenant on Civil and Political Rights, which guarantees everyone the right to protect his or her interests through union activity, including collective bargaining.⁴⁸

Further, contrary to stereotypes, unions do not cause inefficiencies; in fact, they can improve efficiency. Data showing that unions have a positive effect come from sources that range from international surveys to analyses of specific types of employers. In 2002, the World Bank released a report based on more than 1,000 studies of the effects of unions and collective bargaining. This report found that countries with high unionization rates tend to have higher productivity, less pay inequality, and lower unemployment. It found that workers who belong to unions are generally better trained than their non-union counterparts and that unions also help retain workers. Also, having a large number of workers represented by unions tended to have a stabilizing and beneficial effect on a country’s economy.⁴⁹ On a more specific level, there are studies of particular types of public sector unions in the U.S. For example, evidence shows that unionization of teachers correlates positively with higher student scores on standardized tests and higher graduation rates.⁵⁰

Freeman and Medoff’s influential industrial relations book, *What Do Unions Do?*, found that giving workers voice through unions often helped productivity. The higher productivity is due in part to lower rates of turnover, improved managerial performance in response to unions, and cooperative labor-management relations at the plant level. Further, unions promote the ability of individual workers to speak freely, allow workers to deal with management efficiently with one collective voice, gain information for workers, monitor employer behavior, and equalize bargaining power.⁵¹

A survey of the literature on unions and efficiency concluded that there “is scant evidence that unions act to reduce productivity . . . while there is substantial evidence that unions act to improve productivity in many industries.”⁵² While this view is not unanimous, the combined teaching of most studies is that unions can increase productivity in many to most circumstances, and can decrease it in others. In either case,

⁴⁸ Michelle Amber, *Human Rights Groups Say State Measures On Workers’ Rights Violate International Law*, 49 GOVERNMENT EMPLOYEE RELATIONS REPORTER (BNA) 438 (2011).

⁴⁹ TOKE AIDT & ZAFIRIS TZANNATOS, UNIONS AND COLLECTIVE BARGAINING: ECONOMIC EFFECTS IN A GLOBAL ENVIRONMENT (2003).

⁵⁰ Robert M. Carini, Brian Powell & Lala Carr Steelman, *Do Teacher Unions Hinder Educational Performance? Lessons Learned from State SAT and ACT Scores*, 70 HARV. EDUC. REV. 437 (2000).

⁵¹ RICHARD FREEMAN & JAMES MEDOFF, WHAT DO UNIONS DO? 94-110, 162-80 (1984).

⁵² Dale Belman & Richard Block, *The Impact of Collective Bargaining on Competitiveness and Employment: A Review of the Literature*, in BARGAINING FOR COMPETITIVENESS: LAW, RESEARCH AND CASE STUDIES 51 (Richard Block ed., 2003). Also, an overview paper explains that “analyses of the union effect on firms and the economy have generally found unions to be a positive force, improving the performance of firms and contributing to economic growth [citing studies].” Lawrence Mishel with Matthew Walters, *How Unions Help All Workers* 15 (Econ. Pol’y Inst., Briefing Paper 2003) available at <http://www.epi.org/page/-/old/briefingpapers/143/bp143.pdf>.

the effect is usually not great.⁵³ Further, in recent years, new problem-solving innovations in labor management negotiations have brought new efficiencies to union workplaces: keeping the efficiencies brought by worker voice and a highly-skilled workforce, while eliminating certain types of work rules that may be less appropriate to modern workplaces.⁵⁴

In troubled times such as these, unions can be part of the solution. When New York City was facing dire financial problems in the mid-1970s, unions helped save the city by agreeing to pay freezes, deferrals and cuts, giving back certain fringe benefits, negotiating productivity enhancement provisions in labor agreements, and investing in public employee pension funds. Indeed, the unions in Wisconsin were willing to agree to a series of significant cuts in pension and pay; the unions drew the line, properly, at the very right to bargain collectively.

Most broadly, since the 1930s, unions have been vital in bringing working class Americans into the middle class. It is no secret that the decline of the labor movement in the private sector in the past few decades has been accompanied by an unprecedented increase in wealth and income inequality in the U.S. Indeed, inequality levels in the U.S. today unfortunately much more resemble a third world country than other, first-world democracies. Without unions, workers are far more vulnerable to pressures of other powerful groups.

As professor Matthew Finkin recently explained, “a robust pluralist democracy requires the active participation of all of society’s stakeholders [T]he primary vehicle for the working class to participate in the political process is through organizations of their own choosing in which they actively participate, which means unions,” and “the weakening of unions . . . is unhealthy for American democracy.”⁵⁵ Policymakers, along with the American public, should reject such moves.

V. CONCLUSION

In conclusion, public sector labor law as it has existed for decades has worked well. State deficits are not caused by public sector bargaining rights. Multiple studies have shown that, after adjusting for type of worker and type of job, most public sector workers are underpaid compared to their private sector equivalents. While some public sector pension funds have real funding problems, these are not generally the fault of collective bargaining. This is true in part because in the vast majority of states, public sector unions (unlike private sector unions) are not legally permitted to negotiate over pension benefits. It is also true because other factors – notably the stock market crash of 2008 and some questionable actuarial assumptions – are the main causes of the funding problems. The radical and reactionary amendments to public sector statutes some states have adopted will thus not help budgets, but they will hurt working people and public services. And of course, when public workers are harmed, the general public is harmed; for instance, when a teacher is unable to bargain with respect to a reasonable student-teacher ratio, it is students who are harmed. The attacks on collective bargaining are best understood as partisan politics, and that is no justification for removing a longstanding, important right for working men and women.

⁵³ Richard Freeman, *Is Declining Unionization of the U.S. Good, Bad, or Irrelevant?*, in UNIONS AND ECONOMIC COMPETITIVENESS 156 (Larry Mishel & Paula Voos eds., 1992) (“The majority of studies find that union firms have higher productivity, but there are well-documented exceptions.”).

⁵⁴ Lewin, et al., *supra* note 8, at 23-26.

⁵⁵ *Id.* at 28.

When Excessive Public Defender Workloads Violate the Sixth Amendment Right to Counsel Without a Showing of Prejudice

Laurence A. Benner*

In his keynote address at the National Symposium on Indigent Defense, Attorney General Eric Holder candidly acknowledged the well-documented fact that public defender offices across the country are overloaded with too many cases.¹ About three out of every four county-funded public defender offices have attorney caseloads which exceed nationally recognized maximum caseload standards.² Caseloads are so excessive that in many jurisdictions, defense counsel are unable to perform core functions such as conducting an adequate factual investigation into guilt or innocence. In Florida, for example, the annual felony caseload of individual public defenders increased to 500 felonies per year while the average for misdemeanor cases rose to an astonishing 2,225.³ In Tennessee, six attorneys handled over 10,000 misde-

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¹ Attorney Gen. Eric Holder, Keynote Address to the U.S. Dep't of Justice Nat'l Symposium on Indigent Defense: Looking Back, Looking Forward, 2000-2010 (February 18, 2010), *available at*: <http://www.justice.gov/ag/speeches/2010/ag-speech-100218.html>. Materials presented at the symposium are available at http://www.ojp.usdoj.gov/BJA/topics/inddef_index.html. For additional studies documenting longstanding problems in the delivery of indigent defense services, *see also* ABA CRIMINAL JUSTICE SECTION, THE STATE OF CRIMINAL JUSTICE 149-158 (2009); NAT'L RIGHT TO COUNSEL COMMITTEE, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009); Laurence A. Benner, *The Presumption of Guilt: Systemic Factors that Contribute to Ineffective Assistance of Counsel in California*, 45 CAL. W. L. REV. 263 (2009) [hereinafter Benner, *The Presumption of Guilt*]; NAT'L LEGAL AID & DEFENDER ASSOC., EVALUATION OF TRIAL-LEVEL INDIGENT DEFENSE SYSTEMS IN MICHIGAN: A RACE TO THE BOTTOM (2008); ABA STANDING COMMITTEE ON LEGAL AID & INDIGENT DEFENDANTS, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE (2004); NAT'L LEGAL AID & DEFENDER ASSOC., FINAL REPORT OF THE NATIONAL ADVISORY COMMITTEE ON INDIGENT DEFENSE SERVICES (1996); Laurence A. Benner, *Tokenism and the American Indigent: Some Perspectives on Defense Services*, 12 AM. CRIM. L. REV. 667 (1975); LAURENCE A. BENNER & ELIZABETH L. NEARY, NAT'L LEGAL AID & DEFENDER ASSOC., THE OTHER FACE OF JUSTICE (1973).

² *See* DONALD J. FAROLE, JR. & LYNN LANGTON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: CENSUS OF PUBLIC DEFENDER OFFICES 2007, COUNTY-BASED AND LOCAL PUBLIC DEFENDER OFFICES, 2007 (2010), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/clpdo07.pdf>, reporting that 73% of all county-based and local public defender offices exceeded maximum attorney caseload standards recommended by the ABA, NLADA, The National Study Commission on Defense Services and the President's National Advisory Commission on Criminal Justice Standards and Goals (discussed *infra*). Defender systems organized at the state level fared no better, experiencing a 20% increase in caseload from 1999 to 2007 while gaining only a 4% increase in staffing. Fifteen of twenty-two state-wide defender systems operated with attorney caseloads that exceeded national standards in 2007. *See id.*

³ NAT'L RIGHT TO COUNSEL COMM., *supra* note 2, at 68.

meanors annually, spending on average less than one hour per client.⁴ The maximum annual caseload recommended by the American Bar Association and the President's National Advisory Commission on Criminal Justice Standards and Goals is only 150 felony cases or 400 misdemeanor cases per full time attorney.⁵

The traditional legal remedy for such abridgement of the Sixth Amendment right to counsel, has been an ineffective assistance of counsel claim, made after conviction under *Strickland v. Washington*.⁶ A recent study of over 2,500 ineffective assistance of counsel (IAC) claims found, however, that only a tiny fraction (4%) of such claims were successful.⁷ To establish a violation of the Sixth Amendment under *Strickland's* two pronged test, counsel's deficient performance must be both professionally unreasonable and prejudicial.⁸ To establish prejudice a defendant must show there is a reasonable probability that the outcome would have been different. While establishing the "prejudice" prong has always been extremely difficult, the Supreme Court has recently increased the difficulty even further, declaring in *Harrington v Richter* that the "likelihood of a different result must be substantial, not just conceivable."⁹ Demonstrating prejudice because of an excessive caseload is thus problematic. Even if counsel conducted little or no investigation due to an excessive caseload, for example, how does one determine, sometimes years after the event, what a prompt and thorough investigation would have uncovered? Moreover, if favorable evidence is later uncovered, it is often, as one judge candidly admitted, "impossible to know" in a post-conviction proceeding what effect the evidence would have had on the jury.¹⁰ Attempting systemic reform through post-conviction ineffective assistance of counsel claims is thus not an effective option. Even when successful, the deterrent impact of an individual case is small and further marginalized by the fact that relief is usually granted only after years of protracted litigation.

This Issue Brief discusses a litigation strategy which avoids *Strickland's* prejudice prong by focusing on the *absence* of counsel at a critical stage of the proceedings, rather than the *ineffectiveness* of counsel's conduct. As *Gideon v. Wainwright*¹¹ and its progeny established, the Sixth Amendment guarantees the assistance of counsel at each critical stage of the proceedings against an accused. The strategy outlined here is premised upon the argument that the period between arraignment and trial---the investigatory stage---is a critical stage at which the accused is entitled to counsel's assistance. In sum, the argument is that because excessive caseloads make it impossible for defense counsel to conduct a reasonable investigation into factual innocence and/or mitigating circumstances relevant to punishment, this inability to provide

⁴ *Id.*

⁵ See ABA STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (2002), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf>. See also NAT'L ADVISORY COMM. ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS 276 (1976) (creating Standard 13.12, which establishes maximum annual caseload standards for publicly provided defense counsel).

⁶ 466 U.S. 668 (1984).

⁷ Benner, *The Presumption of Guilt*, *supra* note 1, at 324.

⁸ *Strickland*, 466 U.S. at 687.

⁹ *Harrington v. Richter*, 131 S. Ct. 770, 792 (2011). *Harrington* involved the failure to call forensic experts.

¹⁰ *Sears v. Upton*, 130 S. Ct. 3259, 3264 (2010). In a *per curiam* opinion the U.S. Supreme Court held that the judge's failure to "engage with the evidence" was error. *Id.* at n.9. That does not, however, diminish the difficulty judges face in having to make the assessment of prejudice.

¹¹ 372 U.S. 335 (1963).

“core” assistance of counsel renders counsel constructively absent at a critical stage of the proceedings.

As discussed below, *Powell v. Alabama*,¹² *Geders v. United States*,¹³ and the Supreme Court’s recent decision in *Kansas v. Ventris*,¹⁴ (which dealt with the timing of a Sixth Amendment violation) establish that a constitutional violation occurs without regard to any showing of prejudice when counsel is prevented from providing assistance during a critical stage of the proceedings.¹⁵ There is thus a completed violation of the Sixth Amendment prior to trial. This is a “structural defect,” rather than a product of erroneous decision-making by counsel in an individual case. Because core assistance by counsel has not been provided, the framework in which the trial proceeds is altered, resulting in a criminal justice system that “cannot reliably serve its function as a vehicle for the determination of guilt or innocence.”¹⁶ Therefore, *Strickland* does not apply and proof of prejudice is not required.¹⁷ This strategy makes it possible to bring a cause of action which focuses not on the individual case, but instead on the system as a whole by showing a systemic violation of the right to counsel prior to trial. Because the Sixth Amendment violation is established at the time the inability to investigate arises, this makes class action injunctive relief an appropriate remedy prior to the trial of any individual case.¹⁸

I. PROVIDING COUNSEL UNDER CIRCUMSTANCES WHICH PRECLUDE THE OPPORTUNITY FOR INVESTIGATION VIOLATES THE SIXTH AMENDMENT

It has been long established that the failure to investigate factual innocence and circumstances mitigating punishment violates the Sixth Amendment’s guarantee of the right to the assistance of counsel. The Supreme Court first recognized the importance of defense counsel’s duty to conduct a “prompt and thorough-going investigation” in the pathmarking right to counsel case, *Powell v. Alabama* (1932).¹⁹ In that case, six black youths were charged with the rape of two white women, a capital offense in Alabama at that time. Although attorneys were appointed to represent the defendants, the trial commenced almost immediately without giving counsel an opportunity to conduct any meaningful investigation. The Supreme Court held that the

¹² 287 U.S. 45 (1932).

¹³ 425 U.S. 80 (1976).

¹⁴ 129 S. Ct. 1841 (2009).

¹⁵ “The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding.” *United States v. Cronin*, 466 U.S. 648, 659 n.25 (1984) (citing *Geders*; *Herring v. New York*, 422 U.S. 853 (1975); *Brooks v. Tennessee*, 406 U.S. 605, 612-13 (1972); *Hamilton v. Alabama*, 368 U.S. 52 (1961); *White v. Maryland*, 373 U.S. 59, 60 (1963) (per curiam); *Ferguson v. Georgia*, 365 U.S. 570 (1961); and *Williams v. Kaiser*, 323 U.S. 471, 475-76 (1945)).

¹⁶ *Rose v. Clark*, 478 U.S. 570, 577-78 (1986).

¹⁷ As the Supreme Court explained in *Arizona v. Fulminate*, 499 U.S. 279 (1991), structural defects “defy analysis by harmless error standards” because they involve speculative inquires into what “might have been.” *Id.* at 309. Examples of structural defects requiring no showing of prejudice include the absence of counsel, *Gideon v. Wainwright*, 372 U.S. 335 (1963), interference with counsel’s representation at a critical stage, *Geders*, the improper disqualification of privately retained counsel, *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), and representation by counsel with conflicting interests, *Holloway v. Arkansas*, 435 U.S. 475 (1978); *Cuyler v. Sullivan*, 446 U.S. 335 (1980). See Part VI, *infra*.

¹⁸ See *Hurrell-Harring v. New York*, 930 N.E.2d 217 (N.Y. 2010). This case is discussed further *infra*.

¹⁹ 287 U.S. 45, 58 (1932).

state's duty to provide counsel in a capital case was "not discharged by an assignment at such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."²⁰ The Court emphasized that the time between arraignment and trial was "perhaps the most critical period of the proceedings" because that is when "consultation, thorough-going investigation and preparation [are] vitally important."²¹ The fact that counsel were unable to conduct any meaningful investigation was thus central to *Powell's* holding that the defendants' right to counsel was violated.

A. NATIONAL STANDARDS

It was against this constitutional backdrop that the ABA promulgated its Standards for Criminal Justice which marked out the duties of defense counsel. Standard 4-4.1 provides:

Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction The duty to investigate exists regardless of the accused's admissions or statements to defense counsel²²

The Supreme Court has relied upon this and other ABA Criminal Justice Standards as evidence of the norms of professional conduct when finding that counsel's failure to conduct a proper investigation violated the right to effective assistance of counsel. Noteworthy examples include *Wiggins v. Smith* (2003),²³ *Rompilla v. Beard* (2005),²⁴ and more recently, *Porter v. McCollum* (2009)²⁵ and *Padilla v. Kentucky* (2010).²⁶

²⁰ *Id.* at 71.

²¹ *Id.* at 57.

²² ABA STANDARDS FOR CRIMINAL JUSTICE, DEFENSE FUNCTION AND PROSECUTION FUNCTION 126, Defense Function Standards 4-1.3(e) (3d ed. 1993) [hereinafter ABA STANDARDS, DEFENSE AND PROSECUTION], available at <http://www.abanet.org/crimjust/standards/prosecutionfunction.pdf>; ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES 11.4.1(C) (1989); see also ABA STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES 68-69, Standard 5-5.3 (3d ed. 1992), available at <http://www.abanet.org/crimjust/standards/providingdefense.pdf>.

²³ 539 U.S. 510 (2003) (holding that counsel's failure to investigate defendant's family and social history which would have uncovered mitigating evidence relevant to penalty phase of a prosecution for capital murder violated the Sixth Amendment).

²⁴ 545 U.S. 374 (2005) (holding that counsel's failure to review a readily available court file which would have led to mitigation evidence in a death penalty case constituted ineffective assistance).

²⁵ 130 S. Ct. 447 (2009) (holding that counsel's failure to investigate defendant's military records which would have disclosed defendant had received two purple hearts during the Korean War and suffered from PTSD was ineffective assistance). It should be noted that although a *per curiam* opinion in *Bobby v. Van Hook*, 130 S. Ct. 13 (2009) stated it was not appropriate to treat the more detailed 2003 ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases as "inexorable commands," the trial in that case occurred eighteen years before those standards were promulgated. The Court, moreover, reaffirmed the vitality of both *Wiggins* and *Rompilla* in *Porter*.

²⁶ 130 S. Ct. 1473 (2010). *Padilla* held that the failure to investigate the immigration consequences of a felony guilty plea and to advise a defendant of the risk of deportation constituted ineffective assistance.

ABA Criminal Justice Standards also provide that:

Defense counsel should not carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation, endangers the client's interest in the speedy disposition of charges, or may lead to the breach of professional obligations.²⁷

In 1973, the National Advisory Commission on Criminal Justice Standards and Goals (NAC) adopted national caseload standards, which were recognized in the ABA's *Ten Principles of a Public Defense Delivery System* as a maximum that "should in no event be exceeded."²⁸ These national standards specify that one full-time attorney should be assigned no more than 150 non-capital felony defendants per year, or 400 non-traffic misdemeanor defendants, or 200 juvenile clients respectively. Because criminal justice systems differ significantly from state to state and even within a state, such national standards undoubtedly are too high in some jurisdictions, given local laws, court structure, logistical considerations, prosecutorial charging and plea bargaining policies, and judicial sentencing norms. Only an actual workload assessment based upon time studies can determine the maximum number of defendants an individual attorney can effectively represent in a given jurisdiction. The National Center for State Courts, for example, undertook a workload assessment for the Maryland Public Defender Office in 2005, and recommended substantially lower caseloads than those set by the national standards.²⁹ Nevertheless the national standards are a reliable barometer of caseload pressure.

B. A CASE STUDY: THE CRISIS IN CALIFORNIA

Having established the first public defender office in Los Angeles in 1914, California has always been regarded as a leader in providing indigent defense services. A recent study for the California Commission on the Fair Administration of Justice, however, found that over half of the institutional public defender offices in that state had caseloads which exceed the national standards.³⁰ Those offices also reported problems in obtaining adequate investigative resources. This is significant because the maximum attorney caseload standards are predicated upon adequate investigative assistance. All (100%) of the responding California offices that employed staff investigators reported having excessive investigator workloads.³¹ The recommended standard is one investigator for every three attorneys.³² In three counties, there was only one investigator

²⁷ ABA STANDARDS, DEFENSE AND PROSECUTION, *supra* note 22.

²⁸ ABA STANDING COMM'N ON LEGAL AID AND INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 2 (2002) (giving commentary on the "Fifth Principle"), *available at*: <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf>. These standards, approved by the American Bar Association House of Delegates in February 2002, were created to assist governmental officials and "constitute the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney." *Id.* at Introduction.

²⁹ BRIAN J. OSTROM, MATTHEW KLEIMAN & CHRISTOPHER RYAN, NAT'L CENTER FOR STATE COURTS, MARYLAND ATTORNEY AND STAFF WORKLOAD ASSESSMENT 35 (2005), *available at* http://www.ncsconline.org/WC/Publications/Res_WorkLd_MDAtty&StaffWkLdAs05Pub.pdf.

³⁰ Benner, *The Presumption of Guilt*, *supra* note 1, at 266 n.4 & 285.

³¹ *Id.* at 288.

³² NAT'L STUDY COMM'N ON DEFENSE SERVS., GUIDELINES FOR LEGAL DEFENSE SYSTEMS, Standard 4.1 (1976).

for every eight attorneys. One of these offices had handled ten death penalty cases during the year. Two rural offices had no investigator on staff and one of those reported having significant difficulty in obtaining court approval for funds to obtain investigative assistance.³³ Also revealing was the fact that all of these California defender offices reported that they had difficulty interviewing prosecution witnesses. More than one quarter (27%) classified this problem as “serious.”³⁴

The difficulty created by the lack of adequate investigative assistance was further aggravated by several additional factors. First, virtually all of these offices had no contact with an indigent defendant until they were appointed at the arraignment, several days after arrest. This delay jeopardizes the ability to preserve evidence and makes it more difficult to locate witnesses which may be favorable to the defense. Second, there was substantial evidence that prosecutors were not complying with their statutory and constitutional obligations to provide essential information to the defense through discovery procedures. An overwhelming majority (over 90%) of both defenders and experienced private criminal defense attorneys reported that prosecutors failed to turn over evidence favorable to the defendant (*Brady* evidence) and delayed providing even routine information to which the defense is entitled in discovery. Third, and perhaps most importantly, it was documented that felony cases are routinely disposed of at a disposition conference held approximately a week after the arraignment. Where the prosecutor presents a “take it now or lose it” offer at this stage, pressure is thus placed upon the defendant to accept the plea bargain before there has been time to conduct any meaningful investigation.

The failure to have adequate investigative assistance, coupled with systemic factors such as delayed appointment of counsel, inadequate discovery, and pressure to resolve cases early, seriously exacerbates the problem of excessive caseloads. The California experience, unfortunately, is not atypical. In fact, in many jurisdictions, the situation is graver. For county-based public defender offices, 40% do not have any staff investigators at all. With respect to those that do, moreover, only 7% have investigator-to-attorney ratios that meet the national standard.³⁵

II. WHEN DOES A VIOLATION OF THE SIXTH AMENDMENT RIGHT TO COUNSEL OCCUR?

A. *KANSAS V. VENTRIS*

The Supreme Court’s recent decision in *Kansas v. Ventris*³⁶ sheds new light on the timing of a Sixth Amendment violation. *Ventris* involved a violation of the rule established in *Massiah v. United States*.³⁷ *Massiah* held that the government cannot use a secret undercover informant to deliberately elicit incriminating statements from an indicted defendant who is represented by counsel. The rationale for the *Massiah* rule is that the confrontation between a defendant and a government informant seeking to obtain incriminating statements is a critical stage of the prosecution against the accused. Therefore the surreptitious interrogation by the informant deprived the defendant of counsel’s assistance at that critical stage. In *Ventris*, in an opinion by Justice Scalia, the Supreme Court held that the Sixth Amendment is violated at the time the

³³ Benner, *The Presumption of Guilt*, *supra* note 1, at 289.

³⁴ *Id.*

³⁵ Farole & Langton, *supra* note 2.

³⁶ 129 S. Ct. 1841 (2009).

³⁷ 377 U.S. 201 (1964).

statement is improperly elicited by the government informant in the absence of counsel, rather than when the statement is admitted at trial.³⁸ Because the right to counsel is violated at the time the uncounseled statement is induced, there is no need to show prejudice.

The *Ventris* holding is relevant to the excessive caseload problem because it logically follows that a violation of the Sixth Amendment likewise occurs at the time a public defender has such an excessive caseload that he or she is precluded from being able to conduct a prompt investigation. As Justice Scalia recognized in *Ventris*, the “core” of the Sixth Amendment right to counsel “has historically been and remains today, the opportunity for a defendant to consult with an attorney, and to have him investigate the case and prepare a defense for trial.”³⁹ The window of opportunity for conducting that investigation is thus a “critical stage” of the proceedings.⁴⁰ Especially in jurisdictions where the majority of felony cases are disposed of by guilty pleas that are entered less than forty-five days after filing,⁴¹ the inability of defense counsel to conduct a prompt investigation thus amounts to nonrepresentation at this critical investigative stage.⁴²

Because excessive workloads prevent defense attorneys from fulfilling their “core” investigative function, a substantive violation of the Sixth Amendment occurs *prior to trial*.⁴³ Following *Ventris*, the violation occurs at the moment a public defender office

³⁸ *Ventris* was arrested for murder. At trial *Ventris* took the stand and portrayed himself as a mere bystander. In rebuttal, the prosecutor called a jailhouse informant who had been placed in *Ventris*' cell to obtain incriminating statements. The informant testified that *Ventris* had admitted shooting and robbing the deceased. On appeal it was conceded that the manner in which the jailhouse snitch had been employed violated *Massiah*. However, the Court held it was permissible to use the defendant's tainted statements for impeachment. Rejecting the defendant's argument that his right to counsel was violated by the admission of the statements at trial, the Court held that the right to counsel violation occurred not at trial but “at the time of the interrogation.” *Ventris*, 129 S. Ct. at 1846. Because the issue was therefore not the need to prevent a violation of the right to counsel at trial, but rather to determine only the scope of the remedy for a past violation of the right, the Court concluded that excluding the statements during the rebuttal stage was not justified because exclusion of the statements from the prosecution's case-in-chief was already a sufficient sanction to deter future violations.

³⁹ *Id.* at 1844-55.

⁴⁰ In *Powell v. Alabama*, 287 U.S. 45 (1932), the Court recognized that the period between arraignment and trial was “perhaps the most critical period” of the proceedings against an accused. *Id.* at 57. After *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Court established various “touchstones” for defining what is a critical stage. As Professor LaFave has pointed out, one test is whether “a potential opportunity for benefitting the defendant as to the ultimate disposition of the charge through rights which could have been exercised by counsel” has been lost and whether that “lost opportunity” could be “regained by actions subsequently provided counsel could have taken.” WAYNE LAFAVE, ET AL., CRIMINAL PROCEDURE 599 (5th ed. 2009). When the opportunity for investigation is lost due to appointment of counsel with an excessive caseload, the opportunity to conduct a prompt investigation cannot be regained by subsequent appointment of appellate counsel who may not investigate until many months if not years after the event.

⁴¹ See, e.g., CALIFORNIA JUDICIAL COUNCIL, 2010 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS 1999-2000 THROUGH 2008-2009 115-16, 127-28 (disclosing that, during fiscal year 2008-09, disposition of 71% of all felony filings in the state of California occurs in less than ninety days, while 56% are disposed of in less than forty-five days).

⁴² See *White v. Maryland*, 373 U.S. 59 (1963). There, the defendant pled guilty at a preliminary hearing without counsel. Although the plea was non-binding and was later withdrawn when counsel was subsequently appointed, testimony revealing the defendant had pled guilty was admitted at his trial. Although the defendant made no objection to this evidence because the defense was insanity not factual innocence, the Court nevertheless reversed, ruling that the entry of the plea was a critical stage and no showing of prejudice was required. *Id.* at 60.

⁴³ This argument was first presented by the author in a review of Supreme Court cases at the NLADA Annual Conference in Denver. Laurence A. Benner & Marshall J. Hartman, Supreme Court Review, Nat'l

accepts new indigent appointments under circumstances that preclude the ability to promptly investigate the merits of the defendant's case, both with respect to factual innocence or mitigating circumstances reducing punishment. That inability can be shown mathematically by conducting a Workload Assessment using time studies similar to those designed by the National Center for State Courts to determine when additional judges are needed.

B. USING TIME STUDIES TO MAKE OBJECTIVE WORKLOAD ASSESSMENTS

Using the National Center for State Courts' methodology, time studies have been employed to create objective data which can translate raw caseload filings into actual workload. By measuring real events such studies accurately reflect the unique practice environment in a particular jurisdiction, including logistical considerations and other operational characteristics that impact defense representation.

To provide a much simplified explanation, one component of the study involves making a determination of the number of hours staff attorneys have available for case related activities and in-court representation. The second component involves recording the amount of time actually spent providing representation for different types of cases.

Analyzing time spent on particular aspects of representation for different types of cases makes it possible to classify cases based upon their complexity, thus creating a more precise tool for measuring the workload created by a given mix of cases. The Workload Assessment conducted by the University of Nebraska's Public Policy Center for the Lancaster County Public Defender, for example, identified seventeen different case types.⁴⁴

Dividing the amount of time needed to provide representation for a given annual caseload by the number of hours available from an individual staff attorney determines the number of attorneys needed to handle that caseload. The Workload Assessment can thus be used to support a chief defender's judgment to declare a public defender office unavailable to take additional cases. Guideline 6 of the ABA's Eight Guidelines of Public Defense Related to Excessive Workloads specifically states that a public defender "is obligated to seek relief from the court" when alternative options for dealing with an excessive caseload have been exhausted or are unavailable.⁴⁵ By documenting that the office has inadequate resources to conduct the necessary client interviews and investigations, this data objectively establishes that the acceptance of additional cases will result in a substantive violation of the Sixth Amendment right to counsel's assistance.

By establishing the number and type of pending cases an individual attorney has open, it can also be shown, using data from such a Workload Assessment, that an individual staff attorney's excessive workload prevents them from having the ability to meet their constitutional obligation to investigate and prepare for trial if they accept new cases. This data can thus provide an evidence-based method for determining

Legal Aid and Defender Association Annual Conference (Nov. 20, 2009).

⁴⁴ See ELIZABETH NEELEY, UNIV. OF NEB. PUB. POLICY CTR., LANCASTER COUNTY PUBLIC DEFENDER WORKLOAD ASSESSMENT JULY 2008, *available at* <http://ppc.unl.edu/project/LancasterCountyPublicDefenderWorkloadAssessment>. For additional studies, see Nat'l Ctr. for State Courts, Indigent Defense Resource Guide, <http://www.ncsc.org/topics/access-and-fairness/indigent-defense/resource-guide.aspx> (last visited Feb. 11, 2011). See also Dennis R. Keefe, Weighted Caseload Studies and Time Records in Controlling Excessive Caseloads: One Public Defender Office's Experience, Presentation at Nat'l Symposium on Achieving the Promise of the Sixth Amendment: Non-Capital and Capital Defense Services, Univ. of Tenn. Coll. of Law (May 20, 2010).

⁴⁵ ABA, EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO EXCESSIVE WORKLOADS 3 (2009).

when an attorney has an ethical duty not to accept new assignments, by demonstrating that they would be placed in a position of having a conflict of interest between new and presently existing clients.⁴⁶

III. WHY *STRICKLAND* AND THE PREJUDICE REQUIREMENT ARE INAPPLICABLE

It is important to point out that the claim here is one of nonrepresentation, rather than ineffective representation. As the state of New York's highest court recently held in *Hurrell-Harring v. New York*, a civil action to obtain injunctive relief will lie where "systemic" deficiencies result in the denial of "core" assistance by counsel, despite the nominal appointment of counsel.⁴⁷ As the court recognized there, the "question presented by such claims ... is whether the State has met its obligation to provide counsel, not whether under all the circumstances counsel's performance was inadequate or prejudicial."⁴⁸ Such a lawsuit therefore does not raise the "contextually sensitive claims that are typically involved when ineffectiveness is alleged" because case-specific decisions made by individual attorneys are not at issue.⁴⁹ Thus, *Strickland* is not applicable.

The complaint in *Hurrell-Harring* alleged that due to inadequate funding and staffing, the indigent defense system was "structurally incapable" of providing legal representation at critical stages prior to trial as required by the Constitution.⁵⁰ A multitude of systemic deficiencies were identified, including the fact that in some circumstances, misdemeanor defendants were not provided counsel at arraignment.⁵¹ Even after counsel was appointed, however, the complaint alleged as independent claims that attorneys had no meaningful contact with their clients and investigative services essential to preparing a defense were not provided.⁵² One plaintiff, for example, was held in jail awaiting disposition of misdemeanor charges for 148 days and did not see his attorney for four months.⁵³ The Court declared this period between arraignment and trial to be a critical stage at which the absence of counsel "may be more damaging than denial of counsel during the trial itself."⁵⁴

The Supreme Court held in *Rothgery v. Gillespie County*⁵⁵ that the right to counsel attaches when an arrestee is brought before a judicial officer who informs him of the charge and places restrictions upon his liberty by setting bail. This is typically called an arraignment. Where an excessive caseload prevents counsel from being able to meet and confer with a client, undertake necessary legal research and conduct an appropriate factual investigation within a reasonable time after arraignment, the defendant has been deprived of core assistance at a critical stage. As the Supreme Court

⁴⁶ See ABA Formal Opinion 06-441, Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation (May 13, 2006).

⁴⁷ *Hurrell-Harring v. New York*, 930 N.E.2d 217, 224-26 (N.Y. 2010).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Brief for Plaintiff-Appellants at 8, *Hurrell-Harring v. New York*, 930 N.E.2d 217 (N.Y. 2010) (No. 2010-0066).

⁵¹ *Id.* at 4.

⁵² *Id.* at 7.

⁵³ *Id.* at 5.

⁵⁴ *Id.* (quoting *Maine v. Moulton*, 474 U.S. 159, 170 (1985)).

⁵⁵ 554 U.S. 191 (2008).

stated in *United States v. Cronin*: “If no actual ‘Assistance’ ‘for’ the accused’s ‘defense’ is provided, then the constitutional guarantee has been violated. To hold otherwise could convert the appointment of counsel into a sham . . . Assistance begins with the appointment of counsel, it does not end there.”⁵⁶

The Supreme Court has recognized a completed violation of the right to counsel without any showing of prejudice in a number of different contexts. *Gideon* itself did not require a showing of prejudice where counsel is not provided at trial. Other cases include: *Hamilton v. Alabama*⁵⁷ (counsel not provided at arraignment), *White v. Maryland*⁵⁸ (uncounseled guilty plea), *Herring v. New York*⁵⁹ (counsel prohibited from making closing argument), *Holloway v. Arkansas*,⁶⁰ and *Cuyler v. Sullivan*⁶¹ (representation by counsel with conflicting interests). In none of these cases was an actual showing of prejudice demanded because counsel either was not present at all or was prevented from providing assistance and was therefore constructively absent.

In *Geders v. United States*,⁶² the Court also did not require a showing of prejudice where the trial court prevented counsel from consulting with defendant during an overnight recess that occurred between his direct testimony and cross-examination. As the Court subsequently explained in *Perry v. Leeke*, where it distinguished *Strickland*, the actual or constructive denial of the assistance of counsel “is not subject to the kind of prejudice analysis that is appropriate in determining whether the quality of a lawyer’s performance itself has been constitutionally ineffective.”⁶³

Finally, the Supreme Court has recognized a Sixth Amendment violation of the right to counsel, without any showing of prejudice, when a defendant has been erroneously denied the right to retain private counsel of their choice. In *United States v. Gonzalez-Lopez*, the Court refused to engage in “a speculative inquiry into what might have occurred in an alternate universe,”⁶⁴ holding, “We have little trouble concluding that erroneous deprivation of the right to counsel of choice, ‘with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as ‘structural error’.”⁶⁵

The search for prejudice when an indigent defendant is deprived of the assistance of counsel during the investigative stage is likewise “a speculative inquiry” because it is impossible to know, often years later, what witnesses or evidence might have been uncovered had a prompt investigation been conducted. It would indeed turn *Gideon*

⁵⁶ *United States v. Cronin*, 466 U.S. 648, 654 (1984).

⁵⁷ 368 U.S. 52 (1961).

⁵⁸ 373 U.S. 59 (1963).

⁵⁹ 322 U.S. 853 (1975).

⁶⁰ 435 U.S. 475 (1978).

⁶¹ 446 U.S. 335 (1980).

⁶² 425 U.S. 80 (1976).

⁶³ *Perry v. Leeke*, 488 U.S. 272, 280 (1989) (citing *Strickland v. Washington*, 466 U.S. 668, 692 (1984)). *Perry* upheld a trial judge’s order preventing a defendant from consulting with his lawyer during a brief recess immediately after defendant’s direct testimony and before cross-examination. Applying the nondiscussion of testimony rule applicable to all witnesses, the Court held that “when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying.” *Id.* at 281. The Court distinguished *Gedders* on the ground that topics discussed during an overnight recess “would encompass matters that go beyond the content of the defendant’s own testimony -- matters that the defendant does have a constitutional right to discuss with his lawyer, such as the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain.” *Id.* at 284.

⁶⁴ *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006).

⁶⁵ *Id.*

on its head to hold that a rich defendant is not required to show prejudice when deprived of counsel of her choice, but a poor defendant must show prejudice when the government has defaulted in its obligation to provide “core” assistance of counsel at a critical stage of the proceedings against her.

When the underfunding of indigent defense systems result in such excessive caseloads that defense counsel is unable to conduct a “prompt and thorough-going investigation,”⁶⁶ the government denies the assistance of counsel to which the defendant is entitled. County officials who cut public defender budgets thus violate the Sixth Amendment when they deprive defendants of the resources needed to provide “core” assistance of counsel—that is, a prompt and meaningful attorney-led investigation into guilt or innocence and mitigating circumstances, in compliance with national standards. The same is true for county officials who provide indigent defense services through a system of flat fee contracts awarded to the lowest bidder without making adequate provision for investigation. By viewing the period between arraignment and trial as a critical stage during which counsel-led investigation is required, the systemic failure to provide indigent defendants with counsel who have sufficient time and resources to be able to undertake that investigation gives rise to a cause of action for systemic relief.

IV. HOW THIS STRATEGY CAN BE INCORPORATED INTO THE FEDERAL GOVERNMENT’S RESPONSE TO THE INDIGENT DEFENSE CRISIS

Hurrell-Harring was brought in state court under New York’s civil procedure rules permitting declaratory judgments.⁶⁷ 28 U.S.C. 2201 also contains a similar authority for a federal court to provide declaratory relief to parties regarding “any controversy within its jurisdiction.”⁶⁸ Pursuant to its authority under §5 of the Fourteenth Amendment, Congress also has the power to enforce the Sixth Amendment by creating a federal cause of action for equitable and declaratory relief.⁶⁹ During the 111th Congress, Senators Leahy and Franken sponsored Senate Bill 3842, which authorized the Attorney General of the United States to file a civil action to obtain equitable and declaratory relief to eliminate any “pattern and practice . . . by government officials .

⁶⁶ *Powell v. Alabama*, 287 U.S. 45, 58 (1932).

⁶⁷ N.Y. C.P.L.R. § 3001 (McKinney 2010).

⁶⁸ 28 U.S.C.A. § 2201 (West 2010) provides:

In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

⁶⁹ “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” U.S. CONST. amend. 14, § 5. *Gideon v. Wainwright*, 372 U.S. 335 (1963), established that the Sixth Amendment is a fundamental right incorporated within the rights protected by the Due Process Clause of the Fourteenth Amendment. *See also Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (upholding law suits brought under the Civil Rights Act of 1964). Congress’s intent to override sovereign immunity must be clearly expressed. *Quern v. Jordan*, 440 U.S. 332 (1979) (holding that Congress did not express such intent with sufficient clarity in 42 U.S.C. §1983). Official immunity is also no bar to injunctive relief. *Pulliman v. Allen*, 466 U.S. 522 (1984). While the abstention doctrine may pose an obstacle to such suits, *see Younger v. Harris*, 401 U.S. 37 (1971) (holding that a federal court could not interfere in a state criminal prosecution by restraining the prosecutor from proceeding), the concerns giving rise to that doctrine are muted when bringing a class action for prospective relief against a pattern and practice of unconstitutional conduct which Section 5 was clearly meant to address.

. . . with responsibility for the administration of programs or services which provide appointed counsel to indigent defendants, that deprives persons of their rights to assistance of counsel protected under the Sixth Amendment and Fourteenth Amendment.”⁷⁰

The bill died in Committee at the end of the session, but has been reintroduced as S. 250 in the 112th Congress and referred to the Judiciary Committee. This type of legislation is precisely what is needed if federal enforcement of the Sixth Amendment is to become a meaningful reality. Because of the present economic downturn, budget cuts have stripped public defender offices of the resources needed to provide assistance at the critical stage of investigation. Moreover, as has been described in a previous article,⁷¹ a disturbing trend has been seen in states like California, where counties are now seeking to abolish institutional public defender offices which have developed a cadre of experienced career professional defense attorneys. To avoid the higher cost of such career professionals, who as county employees often have compensation and benefits on a par with their counterparts in the prosecutor’s office, these counties have sought to privatize indigent defense services by awarding contracts for those legal services to the lowest bidder.

A case in point is Fresno County, California. In fiscal year 2006-2007, the institutional Public Defender had seventy-six staff attorneys and nineteen investigators. Although it was already handling felony and misdemeanor caseloads twice the maximum allowed by national standards, by 2010 the office had been cut to only forty-eight staff attorneys and nine investigators. Because of these severe budget cuts, the Chief Defender, in compliance with ethical standards, declared the office unavailable to accept new cases and the court had to appoint private counsel to some new cases.⁷² Instead of restoring the Public Defender’s staff, the County responded by putting out an RFP soliciting bids from private contractors to do the work of the public defender’s office.⁷³

In theory, contract defenders can provide competent services if properly regulated by standards and accountability mechanisms to ensure adequate representation by

⁷⁰ The Justice for All Reauthorization Act of 2010, S. 3842, 111th Cong. (2010), contains a section proposing the “Effective Administration of Criminal Justice Act of 2010,” which provided:

(1) UNLAWFUL CONDUCT- It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by officials or employees of any governmental agency with responsibility for the administration of justice, including the administration of programs or services that provide appointed counsel to indigent defendants, that deprives persons of their rights to assistance of counsel as protected under the Sixth Amendment and Fourteenth Amendment to the Constitution of the United States.

(2) CIVIL ACTION BY ATTORNEY GENERAL- Whenever the Attorney General has reasonable cause to believe that a violation of paragraph (1) has occurred, the Attorney General, for or in the name of the United States, may, in a civil action, obtain appropriate equitable and declaratory relief to eliminate the pattern or practice.

⁷¹ See, e.g., Laurence A. Benner, *The California Public Defender: Its Origins, Evolution and Decline*, 5 CAL. LEGAL HIST. 173 (2010).

⁷² Brad Brannon, *Fresno Co. Public Defender Cuts May Backfire*, FRESNO BEE, Sept. 25, 2010, available at <http://www.fresnobee.com/2010/09/24/2091363/fresno-co-public-defender-cuts.html>.

⁷³ County of Fresno, Request for Proposal Number 962-4878, Oct. 20, 2010, available at www2.co.fresno.ca.us/0440/Dwnpgitms/962-4878%20Bid%20Notice.doc. The RFP was subsequently withdrawn.

qualified personnel.⁷⁴ Recent research, however, indicates this has not occurred, as no enforcement mechanism exists to ensure that greed does not trump justice.⁷⁵ One contract defender, for example, explained that he was able to handle an extremely high volume of cases (exceeding by several magnitudes the maximum allowed by national standards) because he pled 70% of the defendants guilty at the first court appearance after spending only about thirty seconds with the defendant to explain the prosecutor's offer.⁷⁶ Obviously no investigation was undertaken in these cases where the contract defender met the defendant for the first time in court. There has also been a race to the bottom as entrepreneurial lawyers engage in bidding wars to gain these government contracts. One contract defender, for example, who operated on a budget that was less than a third of the prosecutor's budget, was nevertheless replaced, despite support from local judges, after being undercut by a bid almost 50% less than his submission.⁷⁷

When privatization schemes that are concerned only about cost fail to provide representation at the investigation stage, the strategy discussed here for finding that this failure constitutes a completed violation of the Sixth Amendment will allow successful intervention to provide a remedy. The same is equally true with respect to institutional defender offices that have suffered staffing cuts that prevent them from conducting reasonable investigations.

This approach also can be used to justify federal assistance to state indigent defense systems. In addition to providing a means of enforcing the right to counsel through litigation, there ought to be a means to reimburse state and local governments for bringing their indigent defense systems into constitutional compliance. The argument for federal assistance is compelling because it is the federal Constitution that requires providing the assistance of counsel. For over thirty years, there have been demands for such federal assistance in the form of a national Center for Defense Services. In 1977, the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants, together with the National Legal Aid & Defender Association (NLADA) and the National Clients Council, prepared a "Discussion Proposal" for such a Center.⁷⁸ The basic concept underlying the proposal was the cre-

⁷⁴ See Benner, *The Presumption of Guilt*, *supra* note 1, at 307 & 347-48 recommending: (1) that contracts based upon a flat fee per case should be prohibited because of the serious danger they present to the integrity of the criminal justice system, and (2) that contract bidders should be required to submit details concerning the number, qualifications and cost of attorneys, staff investigators and other support services they would employ, including the supervisory structure and case management information system necessary to ensure adequate supervision of individual providers and overall monitoring of the contractor's performance. See also NAT'L LEGAL AID & DEFENDER ASSOCIATION, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENT CONTRACTS FOR CRIMINAL DEFENSE SERVICES (1984), available at http://www.nlada.org/Defender/Defender_Standards/Negotiating_And_Awarding_ID_Contracts#threethree.

⁷⁵ See Benner, *The Presumption of Guilt*, *supra* note 1, at 300-07 reporting examples of contract defenders that have no staff investigators or other support personnel and give inexperienced attorneys extremely heavy caseloads. When a lawyer is paid by the case, the contract can be profitable only if there are few trials. Not surprisingly, contract defenders were much less likely to take a case to trial than institutional public defenders. *Id.* at 316.

⁷⁶ *Id.* at 305.

⁷⁷ *Id.* at 306.

⁷⁸ ABA STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, THE CENTER FOR DEFENSE SERVICES: A DRAFT DISCUSSION PROPOSAL FOR THE ESTABLISHMENT OF A NONPROFIT CORPORATION TO STRENGTHEN INDIGENT DEFENSE SERVICES (1977). Copy #37 of the Discussion Draft is on file with the author, who as National Director of Defender Services of NLADA participated in drafting the proposal. In 1979 Senator Edward Kennedy became involved in sponsoring a bill to create a center for defense services. *Defense Services Bill Still in the Works*, 65 ABA JOURNAL 1629 (1979).

ation of an independent federally-funded granting entity constructed upon the following four principles:

- (1) federal funding for the improvement of defense services must be structured so as to provide continuity and stability over a significant number of years;
- (2) financial support should be instituted through a grant in aid program;
- (3) the funding program should contain incentives for local communities to maintain and augment their current efforts; and
- (4) the entity administering the program must be independent of any of the three branches of the federal government.⁷⁹

Based upon these principles federal assistance grants could fund an independent Center for Indigent Defense Improvement in each state requesting such assistance. Recognizing that a one-size-fits-all approach to standards is unworkable given the number and complexity of variables that impact defense representation, the Center's first task would be to conduct an audit of the indigent defense delivery systems of each county in the state. Using the methodology outlined above for conducting Workload Assessments, the audit would determine the need for additional attorneys, investigators, and other support personnel. Each county would then have its own individually tailored workload standards.

After determining appropriate staffing levels, the Center would then certify that a county is in constitutional compliance when those staffing levels are met.⁸⁰ Upon satisfaction of these requirements the county would then be reimbursed by federal grants equaling the amount required to bring the county's indigent defense system into compliance with its own locally established standards. A condition of continued reimbursement would be a requirement that the Center receive from each county basic statistical data sufficient to permit the Center to monitor the health of the indigent defense delivery system. In the event excessive caseloads reappeared and were not corrected within a reasonable period, the Center would have the power to revoke the county's certification and stop reimbursement. The negative publicity from de-certification, the legal impact this would have on ineffective assistance of counsel claims arising from that county (as well as providing a basis for a lawsuit to order compliance), and of course, the financial impact of withdrawal of federal reimbursement, would provide strong incentives for voluntary compliance with the maximum workload levels established by the Center.

Although obtaining funding for indigent defense will be difficult in the short term, given current economic realities, there are nevertheless many areas in which savings can be realized if we rethink how we spend our criminal justice dollars. The California Commission on the Fair Administration of Justice, for example, concluded that the state could save \$126.2 million if the death penalty were to be abolished in favor of life

⁷⁹ ABA STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, *supra* note 78, at 53-54.

⁸⁰ The author is indebted to Marshall J. Hartman, former National Director of Defender Services for NLADA who originally proposed the idea that defender offices should be accredited the same as police departments and departments of correction. In compliance with national standards, certification would also be conditioned upon the professional independence of the Public Defender being assured. See ABA STANDING COMM'N ON LEGAL AID AND INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (2002). This could be done by creating an independent nonpartisan Board of Trustees to oversee the office.

without parole.⁸¹ Reclassifying some non-violent misdemeanor offenses and making them infractions, scaling back mandatory minimum sentences instead of constructing new and costly prisons, and reforming the bail system so that the percentage paid by defendants to a private bail bondsman goes instead to the government, are examples of other alternatives that could also be considered.⁸²

V. CONCLUSION

We often lose sight of the fact that the average American, if accused of a serious crime, does not have the financial resources to obtain quality legal representation and the investigative and other supporting services necessary for an adequate defense.⁸³ All Americans therefore have a stake in ensuring that publically provided defense services deliver representation of the highest quality because anyone's son, daughter, relative, or friend could become caught up in the web of the criminal justice system and be wrongfully accused. Sadly, *Gideon's* promise of equal justice for all, regardless of wealth, remains unfulfilled after almost half a century. By recognizing that the period from arraignment to trial is a critical stage at which an indigent accused must be provided with counsel's assistance, we take an important first step in turning back the crisis facing the delivery of indigent defense services. In taking that step, we renew our commitment to restoring confidence in the fairness of our criminal justice system.

⁸¹ CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, FINAL REPORT 156 (2007), available at <http://www.ccfaj.org/documents/CCFAJFinalReport.pdf>.

⁸² Illinois, for example, abolished commercial bondsmen in 1963. See 725 ILL. COMP. STAT. §5/110-7 (West 2011), upheld in *Schilb v. Kuebel*, 404 U.S. 357 (1971).

⁸³ More than eight out of ten criminal defendants prosecuted in California Superior Courts, for example, require appointment of counsel. Benner, *Presumption of Guilt*, *supra* note 1, at 311. A nationwide poll conducted by Bankrate.com reported that fewer than four out of ten American adults have an emergency savings fund. Laura Bruce, *Bankrate Survey: Most Americans Fail the Emergency-fund Test*, BANKRATE, June 21, 2006, <http://www.bankrate.com/brm/news/sav/20060621a1.asp>.

The National Voter Registration Act Reconsidered

Estelle H. Rogers *

I. INTRODUCTION

“The Congress finds that: (1) the right of citizens of the United States to vote is a fundamental right; and (2) it is the duty of the Federal, State, and local governments to promote the exercise of that right....”

The right to vote in the United States has been recognized as central to the essence of citizenship. Yet, voting has been encumbered by onerous procedures and gross inequities for many decades. In the late 19th and early 20th centuries, southern states routinely excluded the poor—particularly racial minorities—through a complex web of poll taxes, residency requirements, and literacy tests that often went unenforced against whites. In the north, party bosses, more frequently than laws, effectively controlled the size and color of the electorate.¹ Even after the monumental Voting Rights Act of 1965, which addressed some of the most glaring and invidious techniques used to exclude racial minorities, many of the elaborate state laws and administrative rules that discouraged voter registration and voting remained.

Concerned that nearly 44% of the eligible electorate did not vote in the 1992 election, the U.S. House of Representatives felt compelled to act. Although legislation could not address all of the factors that contributed to that discouraging statistic, it was believed that simplifying and improving the voter registration process would eliminate a major barrier to low participation in the future. Congress passed the National Voter Registration Act of 1993 (NVRA) for that purpose.

In 2011, a year that saw unprecedented state legislative activity *constricting* the rights of voters, it seems that a reconsideration of the efficacy of this important civil rights law is in order. A flurry of laws requiring production of limited types of photographic identification at the polls received the most attention and have frequently been dubbed “the new poll tax.” However, proof of citizenship laws, limits on early voting and Election Day registration, and onerous restrictions on “third-party” voter registration efforts were proposed and passed with regularity as well. Most of these provisions have a particularly damaging impact upon members of minority groups, people

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¹ See Dayna L. Cunningham, *Who Are to be the Electors*, 9 *YALE L. & POL’Y REV.* 370 (1991).

with disabilities, the elderly, and young people. It is against this backdrop that the NVRA is reconsidered here.²

The NVRA has four stated purposes:

- To increase the number of citizens who register;
- To encourage governments to enhance participation in voting;
- To protect the integrity of the electoral process; and
- To ensure accurate and current registration rolls.³

The primary means Congress chose to accomplish the first and second goals were mandates that voter registration be offered at venues not generally used for that purpose—e.g., motor vehicle offices,⁴ public assistance agencies, and agencies serving persons with disabilities—as well as other offices to be designated by the states; and that a simplified federal mail-in voter registration form be created to make registration widely accessible and easy to accomplish. The integrity of the electoral process and accuracy of the voter roll would be ensured by a duty imposed upon the states to engage in regular list maintenance procedures aimed at “cleaning” the voter list without disenfranchising eligible voters. In addition, the law imposed criminal penalties for intimidation and fraud.

Two caveats should be mentioned. First, the NVRA applies only to federal elections. However, states quickly learned that creating a dual registration system was unduly complicated and costly. Consequently, for all practical purposes, the NVRA is used by the states to govern voter registration across the board. Second, the law does *not* apply to states that have no voter registration at all (North Dakota) and certain states that have same-day registration for federal elections (Idaho, Minnesota, New Hampshire, Wisconsin, and Wyoming).⁵

While a number of states have challenged Congress’s authority to enact the NVRA, citing the Constitution’s broad grant of authority to the states in the conduct of elections, the courts have consistently upheld the constitutionality of the NVRA under the Tenth Amendment, and grounded it as well in Congress’s authority to enforce the 14th and 15th Amendments.⁶

This Issue Brief surveys some of the NVRA’s successes and failures as a statutory scheme designed to create a national policy on voter registration. It includes an assessment of what has been accomplished, as well as suggestions for what might be done to achieve the level of civic participation envisioned by the statute’s drafters in 1993. After a brief treatment of the historical context of the NVRA, this Issue Brief focuses on two of its most important provisions—voter registration at public agencies, and administration and voter list maintenance—where remedial action could significantly improve voter participation and election administration.⁷ The Brief concludes with a discussion of how increased enforcement could further the aims of the NVRA.

² Litigation challenging some of these laws under the NVRA are in preparation at this writing but are beyond the scope of this Issue Brief.

³ 42 U.S.C. § 1973gg(b) (1993).

⁴ A small number of DMVs had already offered voter registration services.

⁵ 42 U.S.C. § 1973gg-2(b) (1993).

⁶ For an excellent survey of early challenges to the NVRA, see Kurtis A. Kemper, Annotation, *Validity, Construction and Application of National Voter Registration Act*, 185 A.L.R. FED. 155 (2003).

⁷ Two other significant sections of the statute do not receive extensive discussion here. Nevertheless, they should be noted briefly. First, Section 5, which gives the NVRA its popular name, requires motor ve-

The NVRA has significant untapped potential to solve many of the problems we continue to experience in our voter registration system, problems that have profound consequences on Election Day. Although statutory reforms are one important way to address these problems, it would be prudent for policy makers and civic reformers to make full use of the law we already have, even as they consider other more elaborate and comprehensive proposals to totally revamp voter registration in the future.

II. AGENCY REGISTRATION (SECTION 7)⁸

“Each state shall designate agencies for the registration of voters in elections for Federal office.”

Without question, the least obeyed mandate of the NVRA is the requirement that social service agencies and offices serving the disabled provide voter registration services similar to motor vehicle offices. While this requirement was a promising way of reaching out to citizens who did not interact with DMVs, such as those too impoverished to drive or own cars, the reality has not measured up to the promise.⁹ This disappointing track record is due to widespread non-compliance with the mandates of Section 7 and an overall failure of enforcement by the Department of Justice, not due to any lack of clarity in the statute itself.

In 1995-1996, although the NVRA was not fully implemented in all states, the 43 states and the District of Columbia that reported to the Federal Election Commission (the relevant agency at that time), managed to register 2.6 million new voters through public assistance agencies. But by 2005, that number had plummeted to 540,000, a drop of 79%.¹⁰ This lack of compliance and a concomitant lack of enforcement have perpetuated the disparities the statute sought to correct. According to data published by the U.S. Census Bureau, an adult American citizen in the lowest income quintile was 20% less likely to be registered to vote at the time of the 2008 presidential election than an adult citizen in the highest income quintile. In 2008, 85% of adult citizens in households reporting incomes of more than \$100,000 per year were registered to

hicle agencies to offer voter registration services. Though not without its enforcement problems, the “motor voter” provision has been widely accepted by the states and has achieved dramatic results, generating millions of new and updated registrations. In some states, more than half of registrations routinely emanate from motor vehicle offices. On the other hand, Section 6, which created the mail-in voter registration form, has not been such a success story. While the intent of this provision was to simplify the registration process by devising an abbreviated “federal form” that would be acceptable in all jurisdictions, state-imposed restrictions have hampered this effort from the start. Onerous identification requirements and documentary proof of citizenship are only the latest state laws and procedures that complicate the process. Clearly, the “postcard” form envisioned by the NVRA’s authors has taken on a lot of excess baggage.

⁸ A note about the numbering of the NVRA’s sections: Each is numbered in the statute as 1973gg-#, such as 1973gg-5. Each section of the NVRA, however, is numbered two greater than its “gg” equivalent. Thus, 1973gg-5 is the same as “Section 7” of the NVRA.

⁹ Unfortunately the public agency registration provision did not mirror the simple one-step DMV process, as advocates had hoped. A legislative compromise (which was necessary in order to avoid a gutted agency registration provision or no agency registration at all) created the more cumbersome multi-step process in Section 7. See H. R. REP. NO. 103-66, at H.2082 (1993) (Conf. Rep.).

¹⁰ DOUGLAS R. HESS & SCOTT NOVAKOWSKI, PROJECT VOTE AND DEMOS, UNEQUAL ACCESS: NEGLECTING THE NATIONAL VOTER REGISTRATION ACT, 1995-2007 3 (2008).

vote.¹¹ As income levels dropped, so did voter registration.¹² Compared with the 85% registered in the highest income quintile, only 65% of adult citizens in households earning less than \$25,000 per year were registered at the time of the 2008 election.¹³

In jurisdictions where agencies have been serious about voter registration, dramatic numbers of newly registered voters have been reported. In contrast, in states that fell out of compliance, the numbers dropped precipitously. For example, at the time several civil rights organizations filed suit against Ohio in 2006,¹⁴ the number of voter registration applications originating from Ohio's public assistance agencies had sunk to an all-time low of just over 42,000 for the two year period, 2005-2006,¹⁵ from the initial figure of over 100,000 for the first two years of NVRA implementation, 1995-1996.¹⁶ The settlement of the case in late 2009 and the subsequent implementation of a compliance agreement resulted in hundreds of thousands of low-income Ohio citizens applying to register to vote through the Department of Job and Family Services. Ohio processed over 246,000 applications through public assistance agencies in 2009-2010, a nearly six-fold increase from pre-lawsuit levels.¹⁷ When Missouri public assistance agencies instituted an NVRA compliance plan in the wake of a similar lawsuit followed by a court order requiring compliance,¹⁸ agency voter registration numbers rose dramatically from 15,568 in 2005-2006¹⁹ (pre-lawsuit) to over 121,000 applications in 2009-2010²⁰ (post-settlement), almost an eight-fold increase.

While no state laws directly prevent or impede the participation of state agencies in voter registration programs, the fact that the state's chief election official, usually the secretary of state, does not exercise power over the heads of agencies is a structural problem that contributes to non-compliance. This problem was pointed out starkly in the trial court opinion in *Harkless v. Blackwell*²¹ where the court found that the secretary of state could not be held responsible for the failure of agencies to offer voter registration in compliance with the NVRA. However, the Sixth Circuit reversed the trial court's decision, making it clear that the coordination function assigned by the NVRA to the state's chief election officer includes ensuring that state agencies

¹¹ DOUGLAS HESS & JODY HERMAN, PROJECT VOTE, REPRESENTATIONAL BIAS IN THE 2008 ELECTORATE 1 (Nov. 2009), available at <http://www.projectvote.org/component/content/article/237-Electorate%20Composition/528-representational-bias-in-the-2008-electorate-.html> at 25, tbl.10.

¹² However, the gap between rich and poor—though still sizable and disconcerting—narrows considerably when it comes to which voters actually cast a ballot. In 2008, for example, 83% of those registered from households earning less than \$25,000 per year cast a ballot, compared with 94% of registered voters from households earning over \$100,000 per year. *Id.*

¹³ *Id.*

¹⁴ *Harkless v. Blackwell*, 467 F. Supp. 2d 754 (N.D. Ohio 2006).

¹⁵ See U.S. ELECTION ASSISTANCE COMM'N, THE IMPACT OF THE NATIONAL VOTER REGISTRATION ACT ON THE ADMINISTRATION OF ELECTIONS FOR FEDERAL OFFICE, 2005-2006 tbl.2b (2007) [hereinafter EAC, 2005-2006].

¹⁶ See FED. ELECTION COMM'N, THE IMPACT OF THE NATIONAL VOTER REGISTRATION ACT 1995-1996 tbl.2 (1997).

¹⁷ See U.S. ELECTION ASSISTANCE COMM'N, THE IMPACT OF THE NATIONAL VOTER REGISTRATION ACT ON THE ADMINISTRATION OF ELECTIONS FOR FEDERAL OFFICE, 2009-2010 tbl.2a (2011) [hereinafter EAC, 2009-2010].

¹⁸ ACORN v. Scott, No. 08-CV-4084-NKL, 2008 WL 5272059 (W.D. Mo. Dec. 17, 2008), *settled sub nom.* ACORN v. Levy.

¹⁹ See EAC, 2005-2006, *supra* note 15, tbl.2b.

²⁰ See EAC, 2009-2010, *supra* note 17, tbl.2a.

²¹ 467 F. Supp. 2d 754 (N.D. Ohio 2006), *rev'd and remanded sub nom.*, *Harkless v. Brunner*, 545 F.3d 445 (6th Cir. 2008).

comply with the statute.²² To the extent that there are shortcomings in state law regarding the chief election officer's responsibilities, those could be addressed by amendments to state statutes.

Many states have been lax in complying with Section 7, and the registration figures from agencies reflect wide swings from year to year, county to county, and agency to agency. In addition, the reporting requirements²³ have been widely disregarded. Consequently, even the degree to which states comply or are successful in registering new voters is largely unknown.²⁴ State officials often reveal ignorance of the law, and training materials are inadequate.

In the early years of the NVRA, several states challenged the agency registration requirement in lawsuits testing the constitutionality of the NVRA generally, as well as more narrowly focused litigation to construe the meaning of particular terms in the statute ("offices," "public assistance," and "primarily engaged"). Advocacy groups sued several states for failing to provide agency registration. In *ACORN v. Miller*,²⁵ for example, the governor of Michigan had issued an executive order prohibiting state agencies from registering voters until the federal government paid the state's expenses for administering the program. The courts soundly rejected the state's position. In general, the upshot of the legal challenges from both directions was the validation of the constitutionality of agency registration and a broad reading of the language of Section 7.²⁶

By and large, it has not been the courts that have stood in the way of agency registration programs but the agencies themselves, as well as both state and federal recalcitrance to enforce the law. Missouri, where a federal court issued an injunction ordering the state's largest public assistance agency to provide registration materials and assistance to its clients, provides a clear example of the importance of Section 7 and the immediate impact of compliance.²⁷ Missouri agencies registered over 26,000 voters in the first six weeks, and a total of over 79,000 Missourians in the six and a half months following the court's order, compared to only 15,568 registered by all Missouri public assistance agencies in all of 2005-2006.²⁸

In *United States v. Tennessee*,²⁹ the parties entered into a consent agreement whereby Tennessee agreed to (1) implement uniform procedures for the distribution, collection, transmission and retention of voter registration applications; (2) implement mandatory, annual NVRA training programs for all counselors and employees whose

²² *Brunner*, 545 F.3d at 452.

²³ 11 C.F.R. § 9428.7 (2009).

²⁴ Four states, Iowa, Massachusetts, New Mexico, and Virginia, failed to report any data for publication in the 2009-2010 EAC Report. In addition, at least seven states (California, Delaware, Iowa, Maine, Missouri, Ohio and Virginia) misreported the number of voter registration forms received from public assistance agencies. See EAC, 2009-2010, tbl.2a (2011).

²⁵ *ACORN v. Miller*, 912 F. Supp. 976 (W.D. Mich. 1995), *aff'd*, 129 F.3d 833 (6th Cir. 1997).

²⁶ See also *Nat'l Coal. for Students with Disabilities Educ. and Legal Def. Fund v. Gilmore*, 190 F.3d 600 (4th Cir. 1998); *United States v. New York*, 255 F. Supp. 2d 73 (E.D.N.Y. 2003); *Nat'l. Coal. for Students with Disabilities Educ. and Legal Def. Fund v. Taft*, No. Civ.A. 2:00-CV-1300, 2002 WL 31951263 (S.D. Ohio Nov. 18, 2002); *United States v. Tennessee*, No. 3-02-0938 (M.D. Tenn. Sept. 27, 2002); *Nat'l Coal. for Students with Disabilities Educ. and Legal Def. Fund v. Scales*, 150 F. Supp. 2d 845 (D. Md. 2001); *ACORN v. Fowler*, No. 97-0287, 1998 WL 42578 (E.D. La. Feb. 3, 1998), *aff'd*, 178 F.3d 350 (5th Cir. 1999).

²⁷ *ACORN v. Scott*, No. 08-CV-4084, 2008 WL 2787931 (W.D. Mo. July 15, 2008).

²⁸ State of Missouri, NVRA Reports for 2008, on file with the author. For extensive background on Missouri's performance under Section 7, see also http://www.projectvote.org/images/publications/State-Specific%20Documents/Missouri/Missouri_NVRA_report_2007-web.pdf.

²⁹ *United States v. Tennessee*, No. 3-02-0938 (M.D. Tenn. 2002).

responsibilities included providing Tennessee driver's licenses, public assistance, or services to residents with disabilities; and (3) ensure the timely collection of voter registration applications and transmittal to the appropriate county election officials. After signing the consent decree in 2002, agency registrations in Tennessee immediately shot up more than five-fold. Tennessee has been a national leader in public agency registrations ever since, registering at least 120,000 low-income voters biennially and ranking among the top three states in each EAC report since the consent decree.³⁰ Tennessee reported 124,709 voter registration applications at public assistance offices in 2009-2010.³¹

A. RECOMMENDATIONS FOR SECTION 7

The failure of Section 7 has largely been a failure of leadership. In general, state election officials have failed to notify agencies that they are not in compliance, let alone exercise any regulatory authority over them. Similarly, state agency directors have not made registration a priority with their employees. Many state offices admit to having no registration forms on hand for several years running; many employees do not even know they are required to offer registration. Even agency directors are often in the dark. Compounding the problem has been the Justice Department's lax enforcement of Section 7. Given the recent spate of restrictive state voting legislation, federal enforcement efforts—of all of the voting rights laws—are more critical than ever. The following are five suggestions that would ensure that Section 7 would function as Congress intended:

1. *Fix Agencies' Administrative Procedures.*

Many of the roadblocks to Section 7 compliance are due to administrative procedures within the agencies themselves. At a minimum, each agency should appoint an accountable NVRA coordinator to ensure that personnel are trained, that voter registration is consistently offered, that forms are properly transmitted, and that data is kept and reported to the Election Assistance Commission. Agencies should also institute improvements to their registration processes. For example, requiring that a receipt be given to anyone filling out an application with a number to call in case the registration card doesn't arrive creates a "paper trail" showing an application was filed. Those voters might then be able to avoid voting by provisional ballot on Election Day.³² Obviously, a "paperless" system, whereby the form is transmitted electronically to the election office while the client is in the agency, is the ideal.

2. *Increase Department of Justice Enforcement of Section 7.*

The Department of Justice must commit to energetic enforcement of Section 7. There was almost no enforcement activity during the first decade of this century. Thus far, even in the current administration, DOJ has initiated only two Section 7 cases, both in 2011: first in Rhode Island,³³ a case including both Section 5 and Section 7

³⁰ See EAC, 2003-2004, tbl.2; EAC, 2005-2006, tbl.2b; EAC, 2007-2008, tbl.2b.

³¹ See EAC, 2009-2010, tbl.2a.

³² For detailed recommendations on how public agencies can improve administration of voter registration responsibilities, see Douglas Hess and Scott Novakowski, *Unequal Access: Neglecting the National Voter Registration Act, 1995-2007*, Project Vote, 2008, available at www.projectvote.org/policy-reports-and-guides.

³³ *United States v. Rhode Island*, 1:11-cv-00113-S-LDA (D.R.I. filed Mar. 18, 2011).

claims, and then in Louisiana,³⁴ two months after Project Vote, and the NAACP Legal Defense Fund (along with New Orleans attorney Ronald Wilson) filed a similar lawsuit against Louisiana.³⁵ (In contrast, during the same period, advocacy organizations, Project Vote, Demos, and the Lawyers' Committee for Civil Rights Under Law, filed suits against Georgia, Indiana, and New Mexico, as well as the Louisiana case mentioned above.)

Despite its infrequency over the past decade, there is no doubt that enforcement action by the Department of Justice gets results. For example, before DOJ's intervention in 2002, public agency voter registrations in Tennessee had fallen by more than 60% from the early years of implementation to only 49,636 for 1999-2000.³⁶ The results of the consent decree in that lawsuit were immediate and dramatic, as noted above (p. 6), with more than 120,000 registrations for each biennial period since.

While the pace of the DOJ Voting Section's NVRA litigation has been slow, the Civil Rights Division did issue comprehensive guidance to states on their obligations under the NVRA in 2010. The "FAQ" document³⁷ is "designed to provide information and guidance" to election officials and the general public as to what is required by each section of the NVRA. This document is a major step forward by the Justice Department, which is finally sending the message that the NVRA is an important civil rights statute that merits serious attention by the states.

3. Expand the Number of Agencies that Offer Voter Registration.

The limited number of agencies that offer voter registration should be greatly expanded. The President should commit his administration to this goal, and issue an Executive Order, if necessary. It is possible that autonomous federal programs, such as the Veterans Administration³⁸ and Social Security, could simply be directed to offer voter registration. Other agencies, operating in partnership with the states, could be ordered to agree to designation as voter registration sites. In recent years, attempts by several voting rights organizations to expand registration through a painstaking process of agency-by-agency advocacy have borne little fruit, though talks with the U.S. Citizenship and Immigration Service (USCIS), with the goal of having voter registration offered at naturalization ceremonies, have been encouraging.

In addition to expansion at the federal level, the NVRA gives the states wide latitude to designate additional agencies, including both private and federal entities, with their consent. This power has not been widely used, and states should be encouraged to think creatively to reach out to programs that interact with the public, particularly traditionally disenfranchised groups. Unemployment agencies and job training sites, for example, would be opportune venues to reach many low-income citizens.

4. Clarify that Each State's Chief Election Officer is Responsible for Implementing Section 7.

The states' chief election officers must be accountable for Section 7 compliance, and indeed for NVRA compliance generally. While the statute makes this explicit in

³⁴ United States v. Louisiana, 3:11-cv-00470-JJB-DLD (M.D. La. filed July 12, 2011).

³⁵ Ferrand v. Schedler, No. 11-cv-926 (E.D. La. 2011).

³⁶ FEC, 1999-2000, *supra* note 16, tbl.2.

³⁷ http://www.justice.gov/crt/about/vot/nvra/nvra_faq.php.

³⁸ One bill presently pending in Congress, S. 1264, the Veteran Voting Support Act, would permit the facilities of the Department of Veterans Affairs health care system to be designated as voter registration agencies.

Section 10 by making the chief election official “responsible for the coordination of State responsibilities,” the courts have sometimes absolved them of real responsibility, apparently finding that “coordination” is something less than “responsibility.” The Department of Justice FAQs, cited above, make it clear that the chief state election official is fully responsible for NVRA compliance, and even suggests that the state might appoint a dedicated state official for this purpose (Question 41).

5. Make Use of Technological Advances to Improve the Registration Process.

Improvements in technology have made the efficient, simultaneous registration process more realistic for agencies, as well as DMVs. As states upgrade their information systems, their obligations (and opportunities) to offer voter registration should be kept in mind. The DOJ FAQ document makes it clear that states should integrate voter registration into agency protocols whenever they are upgrading their technological systems (Question 24). Delaware has been at the forefront of such efforts, and Colorado and Washington are not far behind.

III. ADMINISTRATION AND LIST MAINTENANCE (SECTION 8)

“Each state shall insure that any eligible applicant is registered to vote... and conduct a general program that makes a reasonable effort to remove the names of ineligible voters.”

A. SUBMISSION AND ACCEPTANCE OF FORMS

Section 8 sets a number of standards for the administration of federal elections that are widely misunderstood or ignored. First, it makes clear that forms filed through motor vehicle offices (Section 5) or state agencies (Section 7) are deemed submitted when given to such agencies, not when received at the state election office. Consequently, a lag in the transmission of forms by a state agency should not prejudice the voter. Nevertheless, if the agency were to be so late that a form did not arrive at the election board prior to the election, presumably the voter would be required to vote provisionally. Given the wide variances in states’ and counties’ rules for counting provisional ballots, the voter should not be forced into this risky position

A related “administration” issue was raised in *ACORN v. Edgar*, one of the early tests of the efficacy of the NVRA as a whole.³⁹ Plaintiffs challenged, among other things, Illinois’s regulation requiring that anyone submitting the federal registration form must also file an Address Verification Form before the registration could be effective. The court held that this provision violated Sections 8(a)(1) and 8(b)(1) of the NVRA.

...[W]hat controls here is that [the Illinois regulations] are indeed invalid because they violate [NVRA] §§ 8(a)(1) and 8(b)(1) by imposing a requirement that is not authorized by those provisions. If any question existed in that respect (and it does not), both H.Rep. 14 and S.Rep. 30 expressly provide that an applicant’s “registration is *complete*” when the application form alone is tendered to the appropriate office (or on the postmark date if the application form is mailed).

³⁹ *ACORN v. Edgar*, No. 95-C-174, 1995 WL 532120 (N.D. Ill. Sept. 7, 1995).

In other words, the state is precluded from imposing additional formal requirements because 8(a)(1) defines registration as complete upon acceptance of a “valid voter registration form,” and 8(b)(1) requires state activities to protect the integrity of the electoral process to be uniform and nondiscriminatory.

Section 8 also requires the state to send the voter a notice of the disposition of his registration application.⁴⁰ We have seen widespread violation of this law in recent years, when voter registration drives have submitted hundreds of forms at a time. Election officials in some jurisdictions, perhaps overwhelmed by the processing job ahead of them, have been known to hand forms back to the registration workers and tell them to correct real or perceived errors in the forms by contacting the applicants. This is not the responsibility of the registration workers, and is indeed inconsistent with the law.⁴¹ Nonetheless, it continues to occur, and given the recent growth of registration drives, will likely happen with increasing frequency in the future.

It is also important to note that there is no federally-imposed time limit on the mailing of disposition letters, and some offices, particularly when faced with heavy registration, leave this task to the last minute, preventing any meaningful opportunity for the voter to correct errors or omissions.

B. VOTER LIST MAINTENANCE

Often referred to as “purging,” the removal of a voter from the roll may only be accomplished under certain narrowly defined circumstances. This may be the least understood and most contravened subsection of the NVRA as a whole. Several provisions have proven especially problematic for local election officials.

A general “list cleaning” program (to remove ineligible voters on the grounds of change of address) may not be conducted within 90 days of a primary or general election. Such a program must be “uniform, nondiscriminatory, and in compliance with the Voting Rights Act.”⁴² For example, a mailing only to a particular zip code, or only to Spanish-surnamed voters, is not permitted.

In addition, the failure of a registered voter to actually vote cannot be, by itself, a ground for removal from the voter roll.⁴³ Nevertheless, there is a popular misconception that non-voting justifies purging. In 2008, a bill introduced in the Mississippi legislature would have required voters to “re-register” if they registered prior to October 1, 2008 and failed to vote in any election between November 3, 2008 and December 31, 2009.⁴⁴ Fortunately, this provision was later dropped from the bill, but the fact that a state senator could have seriously proposed it, in light of the obviously contrary federal law, is alarming.

One of the legitimate grounds for removal of a voter from the rolls under most states’ laws is a felony conviction.⁴⁵ The embarrassing case of Florida’s felon list in 2000 provides an important object lesson in just how complicated the application of this seemingly simple procedure can be. In matching the Florida Voter Registration Database (VRD) to a national list of felons, the process matched the first four letters of the first name, middle initial, gender, and last four digits of the Social Security

⁴⁰ 42 U.S.C. § 1973gg-6(a)(1)(2) (1993).

⁴¹ 42 U.S.C. § 1973gg-6(a)(2) (1993).

⁴² 42 U.S.C. § 1973gg-6(b)(1) (1993).

⁴³ 42 U.S.C. § 1973gg-6(b)(2) (1993).

⁴⁴ S.B. 2910, Reg. Sess. (Miss. 2008).

⁴⁵ Pending federal legislation, the Democracy Restoration Act (H.R.2212), would set a uniform minimum standard for felon re-enfranchisement with respect to federal elections.

number (when available), and used approximate matches for last name (matching on 80 percent of the letters in the last name) and date of birth. Certain name variations were also explicitly taken into account (Willie could match William; John Richard could match Richard John). The result of this flawed “match” was that approximately 15 percent of the names removed from the VRD were not felons at all and were improperly removed.⁴⁶

It is incumbent upon the state periodically to send “felon lists” to the Board of Elections, but based upon the Florida experience, several safeguards should be implemented. First, the lists must contain enough data, matched exactly, to ensure that the felon cannot be confused with any other voter of the same or similar name. Second, the state’s rule for re-enfranchisement (if any) must be well publicized to the prison authorities and the prison population. Upon exiting the penal system, the prisoner must be fully informed of his voting status, including what, if any, steps he may take to have his voting rights restored. An affirmative duty must be imposed on parole and probation officers to review these rules with their clients at appropriate junctures. In the razor-close Washington governor’s race in 2006, for example, it became clear that many former felons had never been apprised of their rights. The legislature subsequently acted to require authorities to brief all prisoners leaving the system.⁴⁷

The removal of a voter based on a change of address is the most complicated part of the statute. Of course, any voter may *request* to be removed, but this occurs rarely. People who move are apt to notify several government agencies, commercial entities, and friends before they ever think of the Board of Elections. Their failure to notify, therefore, is unlikely to have a nefarious motive—such as the intention to vote in two different jurisdictions. Overwhelmingly, it is due to inadvertence.

Fortunately, the NVRA provides safeguards to ensure that the board of elections removes a voter’s name only where it can be certain that she has left the jurisdiction. The law requires that removal of the voter from the voter roll on the ground of a change of residence can only occur (a) if the voter confirms in writing that she has changed address, or (b) if she fails to respond to a forwardable notice and then does not vote or appear to vote in the next two federal general elections after the notice is mailed.⁴⁸

In other words, the law requires both an attempt by the state to directly communicate with the voter and the passage of a substantial period of time thereafter in order to be satisfied that she has moved elsewhere. Unfortunately, as discussed below, the application of this process has been widely misconstrued by state and local election officials.

C. HAVA AND DATABASE MATCHING

The protocol that is required before a voter may be removed from the roll (mandated by NVRA Section 8 (c)(1) and outlined above) has been further undermined as an unintended consequence of the state database requirement of the Help America Vote Act (HAVA).⁴⁹ Now that states are required to create and maintain an electronic statewide database of registered voters, some states have attempted to match a new registrant’s data with existing databases of drivers’ license numbers, state identification numbers, or Social Security numbers, and deny registration to an applicant whose

⁴⁶ See Gregory Palast, *The Wrong Way to Fix the Vote*, WASH. POST, June 10, 2001, at B1.

⁴⁷ WASH. REV. CODE § 29A.08.520 (2009).

⁴⁸ 42 U.S.C. § 1973gg-6(c)(1) (1993).

⁴⁹ Help America Vote Act of 2002, 42 U.S.C. § 15483 (2006).

data does not match. This use of databases is inconsistent with the HAVA requirement, which contemplated database matching as a “shortcut” for the voter who registered by mail who, if matched, would not be required to present ID at the polling place when voting for the first time. (HAVA Sec. 303(b) provides that, ordinarily, a first-time voter who registered by mail must present ID at the polling place.) As the court in *Washington Association of Churches v. Reed* emphasized, “the language of this section makes clear that HAVA requires matching for the purpose of verifying the identity of the voter...but not as a prerequisite to registering to vote.”⁵⁰

In another variation on the misuse of the state database, some states have formed regional compacts to share voter registration information, with the object of rooting out duplicate entries—voters who have moved from one state to another without canceling registration in the prior state.⁵¹ Again, it is important to note that the overwhelming majority of these duplications occur through inadvertence and not criminal intent. It is also obvious, in this mobile society, that there are bound to be duplicate registrations of the same voter, giving rise to the inference that the voter has changed residence. But that inference is only the *beginning* of the process. Two states that suspect they each have the same person on the rolls cannot unilaterally (or bilaterally, as the case may be) cancel the voter’s registration in the state where he registered first. Rather, the first state is obligated by the NVRA to send a forwardable letter to the voter and follow the procedure set out in §1973gg-6(d). Instead, some states are simply dropping voters from the rolls in the mistaken assumption that their interstate matching process is a substitute for the NVRA.⁵²

Despite frequent violations of Section 8, it has been litigated relatively rarely. In those instances where cases were filed, the litigation yielded mixed results. In *United States v. Pulaski County*,⁵³ for example, the parties entered into a consent decree in 2004, whereby the county, without admitting liability, agreed to take certain corrective actions that ensure compliance with the list maintenance requirements of section 8. The specific actions included an agreement not to remove a registrant from the list of eligible voters (1) except at the registrant’s request; (2) as provided by Arkansas law by reason of criminal conviction or mental incapacity; or (3) as provided in the NVRA at Section 1973gg-6 [Section 8]. Defendants agreed to provide the United States with a list of all registrants listed as inactive in the county and to send confirmation cards to each registrant on the list, postage prepaid by forwardable mail, as part of a process intended to restore to the active list any voter who had been improperly purged and to prevent future improper removal from the voter rolls. The decree also required Defendants to conduct certain pre-election mailing and media campaigns to provide information on registration and polling locations. Finally, the parties agreed that

⁵⁰ *Washington Ass’n of Churches v. Reed*, 492 F. Supp. 2d 1264, 1269 (W.D. Wash. 2006) (stipulated final order and judgment).

⁵¹ The compact states include Iowa, Kansas, Missouri, and Nebraska in one agreement, joined later by South Dakota and Minnesota; and another spearheaded by Kansas, and including Arizona, Arkansas, Colorado, New Mexico, Oklahoma, and Texas. Louisiana, though not participating in any ongoing compact, did inquire of a number of far-flung jurisdictions soon after Hurricane Katrina, to determine whether displaced Louisianans had registered to vote in other states.

⁵² Louisiana’s process is especially problematic and clearly illegal. Instead of invoking the state equivalent of NVRA Sec. 8, the state has applied a different state statute explicitly intended for cases of suspected fraud, which provides a truncated notice process, for those voters identified as “matches” with the jurisdictions sharing registration data with Louisiana after Hurricane Katrina—many of them merely temporary residences for these “refugees.”

⁵³ No. 4-04-CV-389 SWW (E.D. Ark. 2004).

Defendants would take actions on Election Day to ensure that poll workers had the tools to help voters to vote in their correct precinct, correct their registration address and vote a regular ballot, or, failing that, to vote a provisional ballot.

Not all Section 8 litigation has had such a positive outcome. For example, the issue in *United States v. Missouri*⁵⁴ turned on whether the state or local election officials have authority over the list maintenance process. Under Missouri law, the court held that the state was not responsible for enforcement of the NVRA as against local election authorities.⁵⁵ However, the degree of local compliance would be a factor to be weighed in assessing whether the state is reasonably conducting a general list maintenance program. Needless to say, this decision casts doubt on the import of the NVRA's requirement that the state designate a responsible "chief election official," and potentially requires aggrieved parties to mount lawsuits against multiple local governmental entities to ensure statewide compliance. (However, the more recent DOJ FAQ document, at Question 41, clarifies that state NVRA responsibility is indeed centralized and multiple lawsuits should not be necessary.)

Some jurisdictions cancel a registration if the letter notifying the applicant of its disposition comes back as undeliverable. Michigan, Maryland, and Colorado statutorily require cancellation under those circumstances. The court in *Miller*⁵⁶ held that Michigan's statute to that effect was consistent with Section 8 (a)(1). In doing so, the court failed to recognize that an eligible voter's identification card might be returned for reasons other than ineligibility. Such a voter, who has no way of knowing of the non-delivery, may show up at the polls on election day and have no recourse, no matter what the reason for the non-delivery. However, the U. S. District Court for the Eastern District of Michigan issued a preliminary injunction against the same practice in *United States Student Assn. Fd. v. Land*, and the Sixth Circuit refused to issue an emergency stay of the injunction, holding, among other things, that the state was unlikely to prevail on the merits.⁵⁷ The District of Colorado took a contrary position in 2010, when it held that Colorado's bounced back mail provision did not violate Section 8(d) of the NVRA.⁵⁸

Although Section 6(d) of the NVRA provides that a non-deliverable disposition notice "may" be followed by the protocol described in the list maintenance section (Section 8) of the NVRA, well-intentioned voters are shut out of the process routinely. If the "may" in this section is really intended as a "must," as would better serve the intent of the statute as a whole, then the statute should be amended accordingly.

The impact of procedural hurdles for "movers" is felt most acutely by certain demographic groups, notably young, low income, and minority voters.⁵⁹ Florida led the way in implementing a procedure to alleviate this problem when it enacted "permanent portable" registration, whereby a voter registered anywhere in the state may simply update his registration upon voting if he moves anywhere else in the state.⁶⁰ This reform was applauded as a boon to election administration by county officials of both parties. Unfortunately, it was a casualty of 2011's omnibus election reform law in

⁵⁴ 535 F.3d 844 (8th Cir. 2008).

⁵⁵ The Missouri litigation relates to the Secretary of State's responsibility for Section 7 agency registration compliance, discussed more fully in the prior section. See text accompanying notes 21 and 22.

⁵⁶ See note 25.

⁵⁷ *U.S. Student Ass'n Found. v. Land*, 546 F.3d 373 (6th Cir. 2008).

⁵⁸ *Common Cause of Colo. v. Buescher*, 750 F. Supp. 2d 1259 (D. Colo. 2010).

⁵⁹ HESS & HERMAN, *supra* note 11, at 22, 23, 28, 30.

⁶⁰ FLA. STAT. ANN. § 101.045 (West 2010).

Florida. Now, only movers within the same county may update at the polls, and others must file new paperwork.⁶¹

D. RECOMMENDATIONS FOR SECTION 8

The administration of registration provisions of Section 8 are, for the most part, drafted clearly but nevertheless have been widely ignored. Significantly increased awareness and enforcement of these provisions is necessary to fulfill the potential of Section 8. The Department of Justice guidance goes a long way toward clarifying the mandates of the statute, but the Department has rarely gone to the next level, filing lawsuits against states and counties that violate it. In addition, certain portions of Section 8, including the list maintenance provisions (Section 8 (b)-(d)), have been so widely misunderstood that they may need to be amended if improved enforcement efforts fail to yield a concrete change in states' practices.

1. Ensure Applications are Forwarded in a Timely Manner.

Receipt of an application at a motor vehicle or other designated agency is deemed to be the date of application, irrespective of when (or if) it is received by the appropriate election office, and this provision should be enforced if violated. In addition, the statute should be amended to provide a remedy in this situation, so that a voter is not unfairly penalized and forced to vote by provisional ballot, which may or may not be counted. Instead, if the voter affirms under penalty of perjury that she applied at a specific office on a specific date, and affirms that she meets all of the eligibility requirements, she should be permitted to vote by regular ballot.

2. Enforce States' Obligation to Send Applicants Disposition Notices.

Second, the statute charges the "appropriate State election official" with sending a disposition notice to the applicant.⁶² As noted earlier, some election authorities have flouted this duty by handing registration forms back to those who submitted them on behalf of applicants. This is clearly prohibited by the law, and must be enforced against state or county election officials. Further, there is no time limit imposed by the statute on the duty to send a disposition letter, sometimes rendering a letter useless to the voter if she is out of time to fix or complete her application.

3. Monitor Compliance with the Narrow Circumstances Permitting Removal of Voters from the Rolls.

Election authorities are constrained from removing the name of a registrant except under certain limited circumstances—either at the request of the registrant, under state law by reason of criminal conviction or mental incapacity, or under a general list maintenance program to remove names because of death or change of residence.⁶³ The Department of Justice has now issued clear guidance (Question 29) as to the meaning of "uniform, nondiscriminatory" list maintenance programs to give notice to election administrators as to what the law requires. It is too early to tell if this has been sufficient to change state practice.

⁶¹ Currently in the preclearance process pursuant to Section 5 of the Voting Rights Act: Florida v. United States, No. 1:11-cv-1428 (D.C. Cir. filed Aug. 1, 2011).

⁶² 42 U.S.C. § 1973gg-6(a)(2) (1993).

⁶³ 42 U.S.C. § 1973gg-6(a)(3-4) (1993).

4. Ensure Accurate Lists of Felons.

Section 8 should impose an explicit, affirmative duty upon states to provide adequately detailed felon lists to the election board and regularly to supply lists of prisoners exiting the system (in states where re-enfranchisement is possible). Given recent experience with significant error rates in “felon purges,” the same 90-day rule applicable to purges based on address changes should be applied to felon purges as well. In other words, any list cleaning process designed to systematically remove felons may not be conducted within 90 days of a federal election. Upon release, all prisoners must be informed of their right to be re-enfranchised, where applicable, and the process for achieving that status. (In light of the importance of voting rights in the prisoner’s reintegration into society, administrative burdens to accomplish re-enfranchisement should be kept to a minimum. Unfortunately, even amending the NVRA will probably have no impact on this state-law issue.)

5. Clarify that a Failure to Vote is Not Grounds for Removing a Voter from the Rolls.

The Department of Justice FAQ (Number 30) goes a long way toward clarifying the circumstances under which purging is (and is not) allowed. However, the Department should not shy away from initiating litigation against jurisdictions that fail to comply with the law. The relevance of one’s failure to vote in two federal elections is misconstrued by the public at large, and frequently by election officials, as if it were an independent basis for removal from the rolls rather than a delineation of a time period. For example, in 2008 in Miami-Dade County, a number of African American voters who had not voted in many years and had not moved in all that time were told they were not on the rolls. This is a particularly important clarification demanded by the past 18 years’ experience with the NVRA, and the statute may need to be amended to clarify this provision if increased enforcement does not remedy the problem.

6. Make the Purge Protocol Mandatory When Mail is Returned as Undeliverable.

As noted previously, the NVRA should be amended to *require* that the Section 8 purge protocol be observed when a disposition letter or voter registration card is returned as undeliverable. Currently, election officials “may” use this process but are not required to.

7. Enforce the Purge Protocol Against States that Purge on the Basis of Matching Lists.

The practice by election administrators of rejecting registrations or purging voters on the basis of the matching of lists—both intrastate and interstate—is in clear contravention of the NVRA. Unfortunately, the DOJ FAQ fails to address this problem directly. If enforcement efforts fail to curb these practices, new language should be added to the NVRA or to HAVA to clarify the legally permissible uses of the match process.

8. Require an Exact Match and Provide Meaningful Notice.

Finally, it is essential that there be an exact match, using adequate data fields, before anyone is removed from the voter roll, whether on account of death, felon status, or change of residence. In addition, meaningful notice to the voter must be required before removal. The right to vote is too important, and the opportunities to correct such errors too limited, to permit anything less. Experience has shown the match pro-

cesses used by some states to be too error-prone to allow them to continue, and the law should be clarified and, if necessary, amended in light of this experience.

IV. ENFORCEMENT OF THE NVRA

Although it is tempting to conclude that the dearth of litigation under the NVRA over the past 18 years is evidence that the statute's meaning is clear and its goals are being attained, that is far from true. Instead, particularly in the last decade, the Department of Justice has shown little will to enforce the law against the states, despite widespread and obvious violations. Nor have the states done much to keep their own houses in order. To cite only one glaring example, agency and DMV registration in many localities have suffered from a lack of oversight across the board, and the states' chief election officials must be held accountable for NVRA implementation, as the statute requires. It is also noteworthy that the Department of Justice has never used the criminal penalties of Section 12,⁶⁴ which provides for fines and imprisonment in cases of intimidation or fraud perpetrated upon voters, even though instances of such conduct have been documented.⁶⁵

Further, the private right of action provided in Section 11⁶⁶ has been shown, as a practical matter, to be a highly imperfect vehicle for enforcing the law. (It is important to note here that the Department of Justice may sue on behalf of the United States, without a private plaintiff, making the Department's role even more indispensable in vindicating violations of voting rights under the law.) Individual plaintiffs are almost impossible to identify until it is too late for them to achieve a meaningful remedy—the ability to register and to vote. Often, an individual who has been harmed by an NVRA violation will not know it until she appears at the polling place and is told she is not on the roll because, for example, her form was never sent from the disability agency to the election board. Conversely, an individual who eventually registers successfully is, arguably, no longer injured by an earlier violation of the NVRA, and would no longer have standing to sue under the statute.

As a way of circumventing the difficulty of finding individual plaintiffs, some organizations—such as unions or civic groups—have sued on behalf of their members. However, this strategy has also been far from universally successful. For example, in *ACORN v. Fowler*, the Fifth Circuit upheld the Louisiana District Court's judgment that ACORN lacked standing to enforce the NVRA list maintenance provisions on behalf of its members against the state because it could not demonstrate it had suffered any harm as an organization or as a representative of its members that was

⁶⁴ 42 U.S.C. § 1973gg-10 (1993).

⁶⁵ See, e.g., PEOPLE FOR THE AMERICAN WAY AND THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *THE LONG SHADOW OF JIM CROW: VOTER INTIMIDATION AND SUPPRESSION IN AMERICA TODAY* (2004); Bob Herbert, Opinion, *Suppress the Vote?*, N.Y. TIMES, Aug. 16, 2004; Garance Franke-Ruta and Harold Meyerson, *The GOP Deploys*, THE AMERICAN PROSPECT, Feb. 1, 2004; *Judge Limits Some S.D. Poll-Watcher Activity*, ASSOCIATED PRESS, Nov. 2, 2004; Judy Normand, *Controversy Greeted Early Voting*, PINE BLUFF COMMERCIAL, Oct. 22, 2002; Kevin Duchscherer, *Callers Question Registered Minnesota Voters' Eligibility*, STAR TRIBUNE, Oct. 29, 2004. In 2006, for example, Project Vote contacted the FBI in Dallas to report an incident in which an intimidating postcard was sent to a voter, threatening him with incarceration if he was a victim of voter fraud or was brought to the polls by a political group suspected of voter fraud. The FBI declined to investigate, much less prosecute the offense. A subsequent complaint to the Department of Justice Office of Professional Responsibility, dated April 21, 2008, has never been answered. A copy of the letter may be found at http://www.projectvote.org/images/publications/Justice%20Department%20Correspondence/OPR_Complaint.pdf.

⁶⁶ 42 U.S.C. § 1973gg-9 (1993).

traceable to the actions of the defendant election official.⁶⁷ Similarly, in *Diaz v. Hood*, the union plaintiff was dismissed by the District Court on the grounds that it had failed to identify any member who was personally aggrieved by the conduct complained of. Eventually, however, the appellate court reversed this decision.⁶⁸

In *Harkless v. Blackwell*,⁶⁹ the trial court held that ACORN did not have standing to make a Section 7 claim because it “failed to allege anything except ‘a setback to its abstract social interests.’”⁷⁰ Fortunately, the Sixth Circuit reversed this decision, but without substantively addressing the organizational standing issue.⁷¹

Clearly, the combination all of these factors constitutes a “perfect storm” to deny meaningful relief for NVRA violations. If the Department of Justice fails in its duty to enforce the law, *and* organizational standing is denied, *and* individual plaintiffs are difficult to identify until they have been irrevocably deprived of their rights—the promises of the NVRA are hollow indeed. Surely, some remedial action must be taken.

V. CONCLUSION

The National Voter Registration Act was heralded as a landmark law that would usher in a new era of universal, or nearly universal, enfranchisement and political participation. Yet registration problems were widely believed to be the most important issue of the 2008 election, as hanging chads were in 2000 and long lines in 2004. Clearly, the promise of the NVRA is a long way from fulfillment.

Without reiterating the recommendations included above, we note that there are several categories of improvements that would greatly enhance the efficacy of the NVRA, and thus the enfranchisement of previously unreached voters.

The President of the United States, himself a former voter registration organizer and NVRA litigator, has extensive executive authority to breathe new life into the NVRA by exercising leadership over the Department of Justice and over other cabinet-level departments whose programs are or should be voter registration agencies. Even without addressing the contours of the president’s power to issue Executive Orders to expand the number of voter registration agencies, he could accomplish a great deal merely by convening the relevant agency and program directors and making it clear what the law requires of them right now. He should also direct additional agencies to accept designation as voter registration sites by states—something the Veterans Administration, under the previous administration, refused to do.

The Department of Justice, in particular, is key to the success or failure of the NVRA, and should provide much-needed enforcement of Sections 7 and 8. The Department has the duty to sue states that are out of compliance, and, to date, lawsuits have been few and far between. The Department’s issuance of the FAQ guidance explains what is expected of the states under the law, elucidates the standards that will

⁶⁷ *ACORN v. Fowler*, No. 97-0287, 1998 WL 42578 (E.D. La. Feb. 3, 1998), *aff’d*, 178 F.3d 350 (5th Cir. 1999).

⁶⁸ *Diaz v. Hood*, 342 F. Supp. 2d 1111 (S.D. Fla. 2004); *Diaz v. Sec’y of Fla.*, No. 04-15539, 2005 WL 2402748 (11th Cir. Sept. 28, 2005).

⁶⁹ See note 21.

⁷⁰ *Harkless*, 467 F. Supp. 2d at 761.

⁷¹ Although standing was ultimately decided in favor of organizational plaintiffs in two of the cases noted above, a decision by the U.S. Supreme Court in a challenge to certain environmental regulations, *Summers v. Earth Island Institute*, 129 S. Ct. 1142 (2009) could prove problematic in the future, as it establishes a stringent test for organizational standing, requiring a claim of actual or imminent harm to named individuals that would result from the challenged regulations.

be used in assessing compliance, and sets out best practices. This document has been an important step forward, but only a step. Were the Department to take full advantage of its powers, including its unique ability to initiate litigation on behalf of the people of the United States, the registration and list maintenance procedures set forth in the NVRA could be fully enforced, to the benefit of the voters.

Many state election officials have likewise taken a rather passive approach to their responsibilities under the NVRA. Each state's chief election official must ensure that the state's registration form is easy to use, that election administrators do not impose unreasonable restrictions on registration drives, and that motor vehicle, disability, and social service agencies consistently fulfill their duties under the NVRA. In addition, some states have not fully complied with their obligation under the NVRA to designate additional state, federal, and private agencies as voter registration sites, and they should do so. Experience has shown that entities that serve low-income and minority citizens can be very effective voter registration agencies when they are committed to compliance with the law. This program can and should be expanded.

Finally, legislative changes could give the law more clarity—and more teeth. There are specific sections of the NVRA that, experience has shown, would benefit from clarified language. However, a caveat is in order. Legislation is generally a long, hard road, and its outcome is often unexpected, and sometimes unwelcome.

The debate that seemed so urgent after the 2008 election, including “universal registration,” “automatic registration,” and “internet registration,” has not yet materialized. Whether because of a lack of political will, the ascendancy of other pressing issues, or for other reasons, Congress has yet to address the many ambitious proposals to expand enfranchisement and streamline the process. In the meantime, the NVRA remains a powerful tool that should not be ignored. If it were—finally—vigorously enforced and faithfully interpreted, this 18-year old statute could well be the transformative law that its authors envisioned.

The Standardless Second Amendment

Tina Mehr* and Adam Winkler**

It is often said that there are 20,000 gun control laws in the United States. In *District of Columbia v. Heller*¹ and *McDonald v. City of Chicago*,² the Supreme Court held that the Second Amendment guaranteed individuals a right to possess firearms for personal protection—rulings that called into question the constitutionality of many of those laws, whether enacted by federal, state, or local governments. Predictably, the two Supreme Court decisions triggered a wave of lawsuits across the nation. But the lower courts have discovered that the Supreme Court failed to give them adequate guidance on how to resolve gun control controversies. As a result, courts have used a variety of divergent standards and approaches in Second Amendment cases. Second Amendment doctrine is profoundly unsettled.

Ironically, the only consistency in the lower court cases is in the results. Regardless of the test used, challenged gun laws almost always survive. Since *Heller* federal and state courts have ruled on Second Amendment challenges in over 200 cases, with the government successfully defending gun control in nearly every case. Only the two bans on handguns in Washington, D.C. (*Heller*) and Chicago (*McDonald*) have been invalidated on Second Amendment grounds. One other provision of federal law, which bans gun possession as a condition of bail in child pornography cases, has been invalidated on procedural due process grounds.³

In this Issue Brief, we examine this dichotomy in the lower courts and explain how *Heller* and *McDonald* failed to provide sufficiently clear standards for the resolution of Second Amendment questions. We also analyze the implications of today's unsettled doctrine for the next major set of controversies to confront the courts: whether the Second Amendment right extends beyond the home and, if so, what restrictions on that right are permissible.

I. THE LACK OF SUPREME COURT GUIDANCE

The Supreme Court's landmark rulings in *Heller* and *McDonald* clarified that the right to keep and bear arms was an individual right unrelated to service in state militias. The opinions, which were long on the history of the Second Amendment (guaranteeing an individual right) and the Fourteenth Amendment (incorporating the Second Amendment right to apply to the states), provided limited guidance about how to differentiate gun laws allowed by the Constitution from those that are not.

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¹ *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (interpreting the Second Amendment to protect an individual right to possess firearms in the home for self-defense).

² *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (interpreting the Fourteenth Amendment to incorporate the Second Amendment against state and local governments).

³ *See United States v. Arzberger*, 592 F. Supp. 2d 590 (S.D.N.Y. 2008).

Traditionally, the Supreme Court articulates a standard of review for lower courts to apply to laws burdening fundamental rights. In *Heller* and *McDonald*, however, the Supreme Court declined to establish a clear standard or test for the Second Amendment.

The Court did suggest some outer limits to the Second Amendment. In *Heller*, the Court invalidated Washington, D.C.'s ban on handguns in the home because such firearms were in "common use" by "law-abiding" individuals.⁴ While the Court did not articulate a standard for determining whether a weapon is in common use, it did distinguish "dangerous and unusual" weapons like machine guns. The implication is that some firearms or firearms characteristics can be restricted, like plastic guns, large capacity magazines, and perhaps even assault weapons (semi-automatic, military-style guns). Ordinary rifles and shotguns, which are in many places more commonly owned than handguns, are likely protected. The Court also invalidated Washington, D.C.'s requirement that lawfully owned firearms be disassembled or locked at all times in the home, making self-defense with a gun impossible.⁵ From these two holdings, *Heller* makes clear that the Second Amendment guarantees a right to possess a functional handgun (and probably a rifle or shotgun) in the home.

The Supreme Court also emphasized that the arms right is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."⁶ Recognizing that "gun violence is a serious problem,"⁷ the Court held that the right "is not unlimited":⁸

[N]othing in our opinion should be taken to cast doubt on long-standing prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.⁹

These laws—which one lower court termed "well-rooted, public safety-based exceptions"¹⁰—are, the Supreme Court explained, "presumptively lawful."¹¹ Moreover, the Court explicitly stated that this list of presumptively lawful gun controls "does not purport to be exhaustive."¹² In *McDonald*, the Court reiterated this list of public safety exceptions.¹³

Because not all gun laws fit comfortably within the public safety exceptions recognized by the Court, the lower courts would benefit from a generally applicable standard of review or test. But even though the question of the appropriate standard was extensively briefed in both *Heller* and *McDonald*, all the Court would say was that two particular methods were inappropriate. First, the Court rejected rational basis review because that standard, which bars arbitrary and capricious laws, already ap-

⁴ *Heller*, 128 S. Ct. at 2817-18 ("The handgun ban amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society . . .").

⁵ *See id.* at 2817.

⁶ *Id.* at 2816.

⁷ *Id.* at 2822.

⁸ *Id.* at 2816.

⁹ *Id.* at 2816-17.

¹⁰ *United States v. Chafin*, No. 2:08-00129, 2008 WL 4951028, at *1 (S.D. W. Va. Nov. 18, 2008).

¹¹ *Heller*, 128 S. Ct. at 2817 n.26.

¹² *Id.*

¹³ *McDonald*, 130 S. Ct. at 3047.

plies to all legislation and would render the Second Amendment irrelevant.¹⁴ Second, the Court rejected what it called the “freestanding ‘interest-balancing’ approach”¹⁵ endorsed by Justice Stephen Breyer’s dissent in *Heller*, which would ask whether the burden on the individual is disproportionate to the law’s benefits. The majority did not reject ordinary standards of review like intermediate or strict scrutiny, even though such standards are occasionally referred to, somewhat erroneously, as interest balancing tests. The majority explicitly noted that Justice Breyer’s formulation was distinct from “the traditionally expressed levels” of review and the majority stated that “no other enumerated constitutional right” was subject to such a test.¹⁶ Of course, intermediate and strict scrutiny are widespread in constitutional doctrine.

Finally, as discussed below, the Court also indicated that prohibitions on concealed carry of firearms in public were likely constitutional.¹⁷

But while the Court did offer *some* guidance, the Court’s unwillingness to articulate a generally applicable standard of review or set of guidelines poses a considerable challenge to the lower courts. Scores of gun control laws have been challenged and the lower courts, confronted with a newly recognized right, do not know how to decide whether or not those laws are constitutionally permissible.

II. THE CONFUSION IN THE LOWER COURTS

In the absence of adequate guidance from the Supreme Court, the lower courts take widely divergent approaches to determining the constitutionality of gun control. Regardless of the approach, however, courts tend to give lawmakers considerable leeway to regulate guns given the importance of the underlying government interest in minimizing gun violence.

A. CATEGORICAL APPROACH

The most common approach adopted by the lower courts is what might be termed “categorical”: the courts articulate various categories of activity that are within the scope of the Second Amendment (and thus protected) or outside the scope of the Amendment (and thus unprotected).¹⁸ To determine what categories of gun laws are constitutionally permissible, lower courts usually look to the public safety exceptions listed out in *Heller* and repeated in *McDonald*. In approximately 80% of the more than 200 post-*Heller* cases, the courts upheld gun control by arguing that the challenged law was among those public safety exceptions or was sufficiently similar. Reasoning by analogy to *Heller*’s list, the courts have upheld, for example, bans on possession by substance abusers,¹⁹ illegal aliens,²⁰ and people convicted of domestic violence misdemeanors.²¹

Heller characterized the ban on possession by felons and the mentally ill as “long-standing,” which could be read as an independent requirement for possession bans under the Second Amendment. The lower courts, however, have not read this language to be so

¹⁴ *Heller*, 128 S. Ct. at 2817 n.27.

¹⁵ *Id.* at 2821.

¹⁶ *Id.*

¹⁷ *Id.* at 2816.

¹⁸ See Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375 (2009).

¹⁹ See, e.g., *United States v. Richard*, 350 F. App’x 252, 260 (10th Cir. 2009).

²⁰ See, e.g., *United States v. Yanez-Vasquez*, No. 09-40056-01-SAC, 2010 WL 411112, at *3-4 (D. Kan. Jan. 28, 2010).

²¹ See, e.g., *United States v. White*, 593 F.3d 1199, 1205 (11th Cir. 2010).

limiting.²² Bans on possession of firearms by people involved in domestic violence are not longstanding yet the courts have uniformly upheld the federal law imposing this burden. Indeed, not even the felon and mentally ill possession bans themselves are truly longstanding; the federal ban on *possession* by even nonviolent felons and the mentally ill was enacted in 1968—less than a decade before Washington, D.C.’s invalidated ban on handguns.

In several cases, the courts have upheld laws that restrict guns in “sensitive places.” Although the Supreme Court did not clarify what made a place too sensitive for guns, lower courts have held that airports,²³ National Parks,²⁴ and post office parking lots²⁵ can be made off limits. As one court explained, sensitive places are “where large numbers of people, often strangers (and including children), congregate for recreational, educational, and expressive activities.”²⁶ Such reasoning would be equally applicable to restaurants, movie theatres, university campuses, public transportation, stadiums, playgrounds, shopping or commercial districts, parking lots, and potentially even sidewalks in densely populated areas.

B. STRICT SCRUTINY

Given that the Supreme Court held that the Second Amendment protected the “fundamental right” to possess arms in defense of the home, some courts have reasoned that strict scrutiny should apply to gun laws.²⁷ These courts usually argue that fundamental rights automatically trigger strict scrutiny. Descriptively, the courts are wrong; in numerous areas of constitutional doctrine the Supreme Court has held that a right is “fundamental” but that some other, lesser standard of review applies.²⁸ Although nearly all of the Bill of Rights has been applied to the states on the grounds that the rights involved were “fundamental,” strict scrutiny is only applied in cases arising under the First and Fifth Amendment in the Bill.²⁹ Strict scrutiny is not applied in cases arising under the Fourth, Sixth, Seventh, Eighth, Ninth, or Tenth Amendments. Even in the First and Fifth Amendments, strict scrutiny is only used selectively, with less demanding standards applied to, among other things, restrictions on commercial speech, content-neutral speech laws, sex discrimination, generally applicable laws burdening the free exercise of religion, and takings of property.

Although strict scrutiny is often called “‘strict’ in theory and fatal in fact,”³⁰ to date no court applying strict scrutiny under the Second Amendment has invalidated a

²² The Lautenberg Amendment, passed in 1996, bars persons convicted of a domestic violence misdemeanor from possessing firearms. A separate provision prohibits those subject to a domestic order of protection from possessing firearms so long as the order is in effect. 18 U.S.C. 922(g)(9).

²³ *United States v. Davis*, 304 F. App’x 473 (9th Cir. 2008).

²⁴ *United States v. Masciandaro*, 648 F. Supp. 2d 779, 790-91 (E.D. Va. 2009).

²⁵ *United States v. Dorosan*, 350 F. App’x 874 (5th Cir. 2009).

²⁶ *Masciandaro*, 648 F. Supp. 2d at 790-91.

²⁷ *See, e.g., United States v. Booker*, 570 F. Supp. 2d 161 (D. Me. 2008); *United States v. Montalvo*, No. 08-CR-004S, 2009 WL 667229, at *3 (W.D.N.Y. Mar. 12, 2009).

²⁸ For a detailed discussion, *see* Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227 (2006).

²⁹ Outside of the Bill of Rights, strict scrutiny also applies in cases arising under the Fourteenth and Fifteenth Amendment. *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (Fourteenth Amendment); *Rice v. Cayetano*, 528 U.S. 495 (2000) (Fifteenth Amendment).

³⁰ The classic statement belongs to Gerald Gunther, *The Supreme Court, 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). In fact, strict scrutiny is not really fatal in fact in any area of constitutional law. *See* Adam

gun control law. The underlying governmental end of nearly all gun laws is public safety, which is clearly a compelling government interest. The narrow tailoring prong of strict scrutiny, which is often the greatest hurdle for challenged laws elsewhere in constitutional doctrine, has not proven to be a significant barrier for gun control yet. In some cases, the courts merely conclude the law satisfies the narrow tailoring requirement without much analysis. In other cases, narrow tailoring is satisfied by the fact that the challenged laws are not applied broadly to the public at large but target a narrow class of gun owners. In *United States v. Erwin*, for example, the district court explained that prohibitions on possession by people subject to a domestic violence restraining order are narrowly tailored because the ban only applies after a court determines someone is a “credible threat to the physical safety” of an intimate partner or child.³¹ As a result, the federal law imposed “narrowly crafted limits on when a citizen may possess a firearm.”³² Other courts reason that because the Supreme Court acknowledged the validity of felon possession bans even though many felonies do not involve violence, any law more precisely tailored than the felon ban satisfies strict scrutiny’s fit requirement.³³

C. INTERMEDIATE SCRUTINY

Some courts have held that intermediate scrutiny is the appropriate standard for Second Amendment challenges.³⁴ One factor influencing these courts is that the public safety exceptions recognized in *Heller* would not have satisfied a higher level of review.³⁵ Felon possession bans are not really narrowly tailored because nonviolent felons, like people convicted of perjury or obstruction of justice, are disarmed. In addition, by calling the public safety exceptions “presumptively constitutional,” *Heller* appeared to reject strict scrutiny, which presumes that challenged laws are unconstitutional.

*Heller v. District of Columbia (Heller II)*³⁶ is illustrative. The district court upheld multiple provisions of Washington, D.C.’s strict gun laws, which were revised in the wake of the Supreme Court’s decision striking down the District’s handgun ban. Rejecting strict scrutiny, the court held that burdens on the “core Second Amendment right” must be “substantially related to an important government interest.”³⁷ Under intermediate scrutiny, legislatures are permitted “to paint with a broader brush” than required by strict scrutiny.³⁸ The court found that District’s detailed registration re-

Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006).

³¹ *United States v. Erwin*, No. 1:07-CR-556 (LEK), 2008 WL 4534058, at *1 (N.D.N.Y. Oct. 6, 2008).

³² *Id.* at *2.

³³ *See United States v. Booker*, 570 F. Supp. 2d 161 (D. Me. 2008).

³⁴ *See, e.g., United States v. Schultz*, No. 1:08-CR-75-TS, 2009 WL 35225, at *5 (N.D. Ind. Jan. 5, 2009) (felon possession ban “substantially related” to that important governmental objective of public safety); *United States v. Radencich*, No. 3:08-CR-00048(01)RM, 2009 WL 127648, at *4-5 (N.D. Ind. Jan. 20, 2009) (same); *United States v. Tooley*, No. 3:09-00194, 2010 WL 2380878, at *12, *15 (S.D.W. Va. June 14, 2010) (domestic violence misdemeanor ban “is reasonably tailored in proportion to the important interest it attempts to further”).

³⁵ *See, e.g., United States v. Bumm*, No. 2:08-cr-00158, 2009 WL 1073659, at *3 (S.D.W. Va. Apr. 17, 2009); *United States v. Chafin*, No. 2:08-00129, 2008 WL 4951028, at *2 (S.D.W. Va. Nov. 18, 2008).

³⁶ *Heller v. District of Columbia (Heller II)*, 698 F. Supp. 2d 179 (D.D.C. 2010).

³⁷ *Id.* at 188.

³⁸ *Id.* at 191.

quirements, which among other things mandated applicants to submit to fingerprinting, firearms training, and a vision test, satisfied this standard.

After recognizing the “‘levels of scrutiny’ quagmire,” the Seventh Circuit, ruling en banc in *United States v. Skoien*,³⁹ also applied intermediate scrutiny. The court explained that the interest underlying the federal law banning gun possession by individuals convicted of a domestic violence misdemeanor—“preventing armed mayhem”—was “an important governmental objective.” Given that domestic violence involving a gun poses significant dangers, the court also held that there was a “substantial relation between [the law] and this objective.”⁴⁰

Under intermediate scrutiny, one question is how much evidence is necessary to support the challenged laws. In *Heller II*, the court stated that “‘quantum of empirical evidence needed . . . [varies] up or down with the novelty and plausibility of the justifications raised.’”⁴¹ In that case, the evidence was mainly testimony offered in legislative hearings before the Council of the District of Columbia; the court asked whether the lawmakers had sufficient evidence to conclude that the restrictions substantially furthered public safety. In *Skoien*, the court relied instead on empirical social science studies that showed the danger of firearms in domestic violence incidents.⁴² The court did not require that those studies be irrefutable or require that the challenger have the opportunity to counter them with studies of his own. Indeed, it is not even clear that the government should bear any burden of proof. The Supreme Court said that its examples of public safety exceptions were presumptively lawful, suggesting the burden should be placed on the challenger to prove the laws go too far.

D. HYBRID SCRUTINY

In a handful of cases, courts have held that the standard of review varies depending on the nature of the burden on Second Amendment rights. These courts generally hold that when a law burdens the “core” right of self-defense in the home with a firearm, a higher standard of review applies than when a law burdens more peripheral elements of the Second Amendment. In *United States v. Chester*, for example, the circuit court held that strict scrutiny was appropriate for laws that limited the core right recognized in *Heller* but intermediate scrutiny applied to other burdens on gun rights.⁴³ In other cases, courts hold that burdens on core Second Amendment rights only trigger intermediate scrutiny and some lesser standard (or none at all) applies to the rest. *Heller II* was of this latter sort: the district court applied intermediate scrutiny to registration and training requirements because they impacted the core right to possess a firearm in the home.⁴⁴

In distinguishing core Second Amendment rights from peripheral ones, the courts hold that most gun laws only impact the outer edges of the Second Amendment. No state or major city still bans handguns or otherwise prohibits a person from having a functional firearm in one’s privately owned home—the basic core right in *Heller*.

³⁹ *United States v. Skoien*, No. 08-3770, 2010 WL 2735747, at *3 (7th Cir. July 13, 2010) (en banc).

⁴⁰ *Id.* at *12.

⁴¹ *Heller II*, 698 F. Supp. 2d at 191 (quoting *Nat’l Ass’n of Mfrs. v. Taylor*, 582 F.3d 1, 15 (D.C. Cir. 2009)). See also *United States v. Miller*, 604 F. Supp. 2d 1162, 1172 (W.D. Tenn. 2009) (“Also, because the government objective is exceptionally compelling in this area, Congress must have wider latitude to combat the great social harm inflicted by gun violence.”).

⁴² *Id.* at *5-6.

⁴³ *United States v. Chester*, 367 F. App’x 392, 398-99 (4th Cir. 2010).

⁴⁴ *Heller II*, 698 F. Supp. 2d at 191.

Among those laws held not to impact core Second Amendment rights are laws banning assault weapons and large capacity magazines⁴⁵ and laws banning possession of firearms with obliterated serial numbers.⁴⁶

Still other courts have looked to whether the law in question amounted to a “substantial” or “direct” burden on the right to bear arms.⁴⁷ If so, then a heightened form of scrutiny may apply. If the law is only an “incidental and minimal” burden, however, the law will be upheld. This type of reasoning—often termed “undue burden” analysis—is found elsewhere in constitutional law, most notably in cases involving the right to marry, abortion, religious freedom, and expressive association.⁴⁸ In the Second Amendment context, courts have held that laws regulating guns and the manner in which they are possessed are not substantial burdens on the right. For example, the Indiana Court of Appeals recently asked whether a gun law was a “material burden on a core value.”⁴⁹

E. REASONABLE REGULATION

Prior to *Heller*, state courts interpreting state constitutional provisions on the right to bear arms consistently adjudicated gun laws under a “reasonable regulation” standard.⁵⁰ In fact, this has been the preferred standard under state law since the 1800s, and no state traditionally applied strict scrutiny or even intermediate scrutiny to gun control. The reasonable regulation standard asks whether a law effectively destroys or nullifies the ability of law-abiding people to possess firearms for self-defense. If so, the law is unconstitutional; if not, the law is deemed to be only a regulation, not a prohibition, of the right.

There is considerable confusion in the courts about the nature of this test, which is easily confused with rational basis review. Under rational basis, even a complete ban on all civilian firearms might be constitutional because a legislator could rationally believe that the prohibition furthers the government’s legitimate objective of reducing gun violence. Under reasonable regulation, however, a complete ban on firearms would be unconstitutional because it effectively destroys, rather than merely regulates, the right. Reasonable regulation requires that law-abiding people have some ability to access firearms to use for self-defense. Compared to rational basis, reasonable regulation is a heightened form of review.

Even in the wake of *Heller*, state courts continue to use the reasonable regulation standard.⁵¹ One of the questions posed by *Heller* is whether this well-established state constitutional law jurisprudence will be completely displaced by the Second Amendment. If the courts hold that a more stringent form of review applies to gun control under the Second Amendment, lawyers will eventually stop raising challenges

⁴⁵ *Id.* at 195.

⁴⁶ *United States v. Marzzarella*, 595 F. Supp. 2d 596 (W.D. Pa. 2009).

⁴⁷ *See, e.g., United States v. Hendrix*, No. 09-cr-56-bbc, 2010 WL 1372663 (W.D. Wis. 2010).

⁴⁸ *See Eugene Volokh, Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1454-55 (2009).

⁴⁹ *Lacy v. State*, 903 N.E.2d 486 (Ind. Ct. App. 2009).

⁵⁰ *See Adam Winkler, Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683 (2007).

⁵¹ *See, e.g., Students for Concealed Carry on Campus v. Regents of the Univ. of Colo.*, No. 09CA1230, 2010 WL 1492308, at *11 (Colo. Ct. App. Apr. 15, 2010) (“the reasonable exercise test . . . not the rational basis test, is the appropriate test”); *State v. Whitaker*, 689 S.E.2d 395, 404-05 (N.C. Ct. App. 2009) (law “is a reasonable regulation which is fairly related to the preservation of public peace and safety”) (internal quotations omitted); *Wilson v. State*, 207 P.3d 565 (Alaska Ct. App. 2009).

on the basis of state law. The case law developed in more than 40 states over the course of the past century would be rendered irrelevant. So far, however, the difference is only procedural given that lower courts continue to uphold gun control regardless of the standard applied.

III. THE RIGHT OUTSIDE OF THE HOME

The confusion in the lower courts makes it difficult to know how one should analyze the most important questions that remain open after *Heller* and *McDonald*: does the Second Amendment right extend beyond the home and, if so, what limits on public possession of firearms are constitutionally permissible?

Because both *Heller* and *McDonald* only addressed the constitutionality of laws banning private possession of handguns in the home, the Supreme Court did not believe it necessary to determine if individuals have a right to bear arms in public. Indeed, the Supreme Court in *Heller* stressed the importance of self-protection in the home throughout its opinion, leading lower courts to read the right recognized in that case narrowly. This was part of the reasoning behind one court's decision to uphold a ban on loaded firearms in vehicles traveling in National Parks.⁵² A California appellate court also held that a gun owner did not have a Second Amendment right to possess firearms in his own driveway because that area of his property was "accessible to the public."⁵³

Yet there remains considerable controversy. Some language in *Heller* might be read to suggest a right to possess a weapon in public. For example, the Court referred to the "individual[']s] right to possess and carry weapons in case of confrontation."⁵⁴ The text's reference to "bear" arms also might imply a right to possess arms in public, although guns can be borne and carried within the home for self-defense.

Whether individuals have a right to possess a firearm outside the home is currently being litigated most prominently in a series of cases filed since *McDonald* challenging restrictions on concealed carry of firearms, including in New York and California. Restrictions on concealed carry are among the oldest, most longstanding restrictions on firearms. First enacted in the early 1800s, limits on hidden firearms have been commonplace ever since.⁵⁵ As the *Heller* Court itself recognized, "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues."⁵⁶ This language appears to condone outright *prohibitions* on concealed carry—far more burdensome than most current state laws, which allow concealed carry conditioned on a permit. It is no surprise therefore that lower courts since *Heller* have upheld restrictions on concealed carry without a permit.⁵⁷

⁵² See *United States v. Masciandaro*, 648 F. Supp. 2d 779, 790-91 (E.D. Va. 2009).

⁵³ *People v. Yarbough*, 86 Cal. Rptr. 3d 674 (Ct. App. 2008).

⁵⁴ *District of Columbia v. Heller*, 128 S. Ct. 2783, 2797 (2008).

⁵⁵ See CLAYTON E. CRAMER, *CONCEALED WEAPON LAWS OF THE EARLY REPUBLIC: DUELING, SOUTHERN VIOLENCE, AND MORAL REFORM* (1999).

⁵⁶ *Heller*, 128 S. Ct. at 2816.

⁵⁷ *United States v. Hall*, No. 2:08-00006, 2008 WL 3097558, at *1 (S.D. W. Va. Aug. 4, 2008) ("[T]he prohibition, as in West Virginia, on the carrying of a concealed weapon without a permit, continues to be a lawful exercise by the state of its regulatory authority notwithstanding the Second Amendment."); *Swaitt v. Univ. of Neb.*, No. 8:08CV404, 2008 WL 5083245, at *2 (D. Neb. Nov. 25, 2008); *People v. Flores*, 86 Cal. Rptr. 3d 804 (Ct. App. 2008).

Even if states or cities completely ban concealed carry, it is possible that the courts will require that individuals be allowed to carry firearms openly as an alternative method of armed self-defense in public. Some of the nineteenth century cases relied upon in *Heller* reasoned that concealed carry bans were acceptable because individuals could still open carry. Yet by the beginning of the twentieth century, several states barred both open and concealed carry without any constitutional difficulty.⁵⁸

Licensing for concealed carry presents the courts with another challenge. While courts have uniformly upheld licensing for possession of firearms generally since *Heller*, some licensing policies for concealed carry give government officials, typically the chief of police, discretion to determine whether an applicant has sufficiently good reason or cause to carry. These laws continue a long tradition of conditioning gun rights on a public showing of trustworthiness and reliability. Colonial governments, for example, disarmed persons unwilling to swear an oath of loyalty to the Revolution. In the early twentieth century, many states enacted the Uniform Firearms Act, promoted by the National Rifle Association, which limited permits to suitable persons. States like Missouri and North Carolina restricted gun permits to people “of good moral character.”⁵⁹ Still, if the right to carry a weapon in public is constitutionally protected—a question that remains far from clear—laws providing a government official unfettered discretion to issue licenses are problematic. Such discretion is subject to abuse and states should at a minimum provide adequate avenues to appeal the rejection of an application in a timely and inexpensive manner.

IV. CONCLUSION

Justice Breyer’s dissent in *McDonald* pointed to the many difficult questions left unanswered by the Court’s two Second Amendment decisions:

Consider too that countless gun regulations of many shapes and sizes are in place in every State and in many local communities. Does the right to possess weapons for self-defense extend outside the home? To the car? To work? What sort of guns are necessary for self-defense? Handguns? Rifles? Semiautomatic weapons? When is a gun semi-automatic? Where are different kinds of weapons likely needed? Does time-of-day matter? Does the presence of a child in the house matter? Does the presence of a convicted felon in the house matter? Do police need special rules permitting pat-downs designed to find guns? When do registration requirements become severe to the point that they amount to an unconstitutional ban? Who can possess guns and of what kind? Aliens? Prior drug offenders? Prior alcohol abusers? How would the right interact with a state or local government’s ability to take special measures during, say, national security emergencies?⁶⁰

His prediction of disorder in the courts has come true: the lower courts are struggling with Second Amendment cases, using a wide variety of approaches to determine

⁵⁸ See, e.g., WYO. COMP. LAWS ch. 52, § 1 (1876) (prohibiting anyone from “bear[ing] upon his person, concealed or openly, any fire arm or other deadly weapon, within the limits of any city, town or village.”).

⁵⁹ See, e.g., MO. REV. STAT. §§ 564, 630 (1959); N.C. GEN. STAT. § 14-404 (Supp. 1965).

⁶⁰ *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3126-27 (2010) (Breyer, J., dissenting).

the constitutionality of gun control. Nevertheless, even in the absence of sufficient guidance about how to analyze Second Amendment controversies, the lower courts have consistently read *Heller* and *McDonald* to permit lawmakers wide latitude to protect public safety through gun laws.

The Slow, Tragic Demise of Standing in Establishment Clause Challenges

Steven K. Green*

Sometimes dramatic shifts in Supreme Court jurisprudence come about suddenly and with little warning; witness the abrupt changes that took place with the Court's holdings in *United States v. Lopez* (effectively gutting sixty years of deference to regulations under the Commerce Clause) and *Employment Division v. Smith* (reconfiguring the standard of review in Free Exercise jurisprudence).¹ More commonly, though, change comes gradually. Even the most significant case of the twentieth century, *Brown v. Board of Education*, was preceded by a series of decisions that chipped away at the doctrine of "separate but equal."² Gradual doctrinal change is the preferred alternative as it allows for buy-in by stakeholders, including constitutional lawyers and scholars, even if they disagree with the ultimate outcome. But sometimes, stakeholders feel they are mere observers of an incremental tidal wave of seemingly inevitable change, as if they are minor players in a fatalistic Greek tragedy in which the eventual outcome has already been determined.

Possibly I overstate matters for effect, but recent holdings by the Supreme Court and the Seventh Circuit Court of Appeals (among others) concerning the standing doctrine in Establishment Clause cases suggest we may be witnessing the slow death of taxpayer standing for challenges to government funding of religion, as well as the whittling away of non-taxpayer "injury" standing for many non-funding challenges to the Establishment Clause (e.g., those concerning government sponsored religious displays).³ To an extent, the changes should not be surprising, as both the taxpayer exception and the generous definition of injury for non-economic violations have always had shaky foundations. These were artificial rules designed to get around equally artificial aspects of the Court's general standing jurisprudence. Still, this demise of the Court's own standing doctrine has not been pretty to watch. The once stable rule from *Flast v. Cohen*—finding an exception to the ban on taxpayer standing for Establishment Clause challenges—is being carved up like a Thanksgiving turkey, such that before long, only the bones and a few unpalatable portions of standing will remain.⁴ One is almost drawn to jump on board the wagon of Justices Antonin Scalia

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¹ *Lopez*, 514 U.S. 549 (1995); *Smith*, 494 U.S. 872 (1990).

² *Brown*, 347 U.S. 483 (1954). See *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Okla. State Regents for Higher Ed.*, 339 U.S. 637 (1950).

³ See *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011); *Hein v. Freedom From Religion Found.*, 551 U.S. 587 (2007); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *Freedom From Religion Found. v. Obama*, 641 F.3d 803 (7th Cir. 2011). See also *In re Navy Chaplaincy*, 534 F.3d 756 (D.C. Cir. 2008).

⁴ See *Flast v. Cohen*, 392 U.S. 83, 105-06 (1968).

and Clarence Thomas who advocate a quick, though not merciful, end to the doctrine.⁵ But the stakes are too high to drink such poison. Not only will these changes keep otherwise qualified plaintiffs out of court and make bringing an Establishment Clause challenge more difficult, but conservative members of the Court seem intent on immunizing certain branches and functions of the government from any judicial review of some “establishing” practices. By deciding not to decide certain classes of challenges, courts will effectively be throwing Establishment Clause questions, such as the constitutionality of the National Motto “In God We Trust,” to the politically elected branches. Political expediency, rather than constitutional fealty, will become the rule of law, and Justice Robert Jackson’s immortal statement about withdrawing questions of constitutional rights from “the vicissitudes of political controversy” and placing them “beyond the reach of majorities and officials” will be stood on its head.⁶

What follows is an analysis of the recent holdings on Establishment Clause standing, with my own observations of why such changes were inevitable given the way in which the Court had constructed the doctrine. I close by arguing for a reevaluation of the core understanding of injury for Establishment Clause purposes.

I. A BRIEF PRIMER ON STANDING

Standing requirements are essentially a form of self-imposed judicial restraint⁷ that serve what Professor Mark Rahdert has called a “dispute resolution aim:” to ensure that the matter before the court is capable of proper and effective adjudication. Standing asks the parties to demonstrate “adversariness.”

It also asks whether the record the parties are likely to develop will be sufficient to illuminate the legal issues, allow authoritative resolution, facilitate relief, and enable confinement of resulting precedent to an appropriate range of similar settings. And it asks whether the parties involved possess the kind of interest in the outcome that will ensure an adequate precedential basis for determining the rights of others who might become involved in similar disputes.⁸

When a court dismisses a case or claim for lack of standing, it essentially declines to hear an otherwise cognizable constitutional claim because the party bringing the action is not sufficiently vested in the matter (i.e., not personally or uniquely injured), or the claim exists at a level of abstraction such that it lacks a sufficient connection to an action by the defendant or undermines the court’s ability to afford meaningful relief. Related to the standing doctrine are the courts’ twin aversions to announcing advisory opinions or trespassing on the realms of the other branches of government. Still, implicit within the standing rules, and consistent with the Court’s assertion that it remains the ultimate arbiter of the meaning of the Constitution, is the assumption that some appropriate party does (or should) exist to bring a focused claim to enable the

⁵ *Hein*, 551 U.S. at 618 (Scalia, J., concurring).

⁶ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

⁷ See *Newdow*, 542 U.S. 1 (2004) (“The standing requirement is born of ‘an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.’”) (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984)).

⁸ Mark C. Rahdert, *Forks Taken and Roads Not Taken: Standing to Challenge Faith-Based Spending*, 32 CARDOZO L. REV. 1009, 1059-60 (2011).

Court to fulfill its role of judicial review. Unfortunately, as scholars and constitutional lawyers have frequently charged, courts apply standing rules inconsistently, if not arbitrarily, which suggests that decisions may turn as much on the judges' view of the merits of a conflict, rather than on its justiciability.⁹

Many standing determinations come down to the issue of injury, termed "injury-in-fact," i.e. whether the plaintiff has suffered a "concrete and particularized" injury (not a hypothetical one) that exists currently or in the near future. The purpose of this inquiry, the Supreme Court has oft noted, is to ensure that this particular plaintiff has a stake in the lawsuit and can hone the issues for the court's resolution. The assumption is that a direct and particularized injury will steel the party's resolve to litigate vigorously the case in a way that a party suffering less direct harm will not.¹⁰ The Court has contrasted these positions as being "particularized" versus "generalized" injuries, but it has never adequately explained why one suffering an injury shared by many cannot assume the role of a vigorous litigant, other than to blindly characterize shared injuries as always being abstract in nature.¹¹ In a sense, the rule against hearing generalized interests is counterintuitive, as adjudicating a claimed injury shared by many, rather than addressing it piece-meal, would be a better use of judicial resources.

This distinction between particularized injuries and generalized grievances explains the Court's general rule against taxpayer standing, i.e. standing asserted by a taxpayer in a case challenging government expenditures on the grounds that taxpayer funds are being used for unconstitutional purposes. The Court has been highly skeptical of such standing on the grounds that an interest of a taxpayer is one shared by the public at large, and such interest is "too indeterminable, remote, uncertain and indirect to furnish a basis for [a challenge to an] expenditure."¹² In addition, the argument is that a taxpayer's connection to any particular government expenditure "is comparatively minute and indeterminable" such that an injury is impossible to trace. This sounds closer to a *de minimus* rule rather than one abhorring generalized injuries ("interest in the moneys of the treasury . . . is shared with millions of others"), but the result is the same.¹³

II. ESTABLISHMENT CLAUSE STANDING

A. THE BASIC RULES

In 1952, in *Doremus v. Board of Education*, the Supreme Court applied its rule prohibiting taxpayer standing to turn back a challenge to a state law authorizing teacher-led Bible reading in the public schools. At the same time that it determined that the taxpayer's financial interest was too indeterminate, the justices also minimized the significance of the plaintiffs' non-pocket book injury as being only a psychic affront over a religious difference.¹⁴ But applying the taxpayer standing prohibition strictly would have prevented the enforcement of a central aspect of the

⁹ See Suzanna Sherry, *Four Pillars of Constitutional Doctrine*, 32 CARDOZO L. REV. 969, 978-85 (2011).

¹⁰ *Flast*, 392 U.S. at 101 (noting the purpose of standing is to ensure that the dispute "will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.").

¹¹ See *United States v. Richardson*, 418 U.S. 166, 189-91 (1974).

¹² *Doremus v. Bd. of Educ.*, 342 U.S. 429, 433 (1952).

¹³ *Frothingham v. Mellon*, 262 U.S. 447, 487 (1923).

¹⁴ See *Doremus*, 342 U.S. at 434.

Establishment Clause—ending the practice of non-preferential financing of religious ministries—where government expenditures for religion would harm all citizens equally.¹⁵ And so, in *Flast* the Court carved an exception to allow taxpayer challenges to government expenditures where the litigant could demonstrate a connection between the legislative enactment authorizing the expenditure and the purported constitutional violation. As a result of *Flast*, any taxpayer could allege that a legislative appropriation on behalf of religion violated the Establishment Clause, regardless of her own connection to the entity or institution receiving the government funds. Armed with this weapon, individuals and groups such as the ACLU, Americans United for Separation of Church and State, and the Freedom From Religion Foundation were able to mount a host of successful challenges to funding programs.¹⁶

Fourteen years after *Flast*, in *Valley Forge College v. Americans United for Separation of Church and State*, the Court qualified the taxpayer standing exception to emphasize that the exception applied only to expenditures made pursuant to Congress' Article I, §8 taxing and spending powers. The aid to religion in *Valley Forge*—a transfer of government property to a religious college—occurred via congressional authority under the Property Clause, Article IV, §3. The Court's reading of *Flast* was technically correct, though it elevated that aspect of the holding over others (the *Flast* Court's emphasis on Congress' taxing and spending authority was chiefly due to the facts that were before them, and the Court left open the question of whether "other specific limitations" existed). Besides its narrow reading of *Flast*, Justice Rehnquist's *Valley Forge* opinion evinced hostility toward the exception, generally, by noting that the alleged government wrong-doer in the case was not Congress but a federal agency (a distinction the Court had not made in *Flast*), and the nature of the plaintiffs' injury was of a generalized gripe (the plaintiffs' injury was only "psychological," and such "injury [was not] sufficient to confer standing . . . even though the disagreement is phrased in constitutional terms. . . . [T]he Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing."). As such, *Valley Forge* emphasized that the *Flast* exception to taxpayer standing prohibition was in fact that, an *exception* to the default rule, and *Valley Forge* reiterated that the way to evaluate taxpayer interests with respect to Establishment Clause claims was to look for their injury-in-fact.¹⁷

The question of plaintiff injury has also arisen in the context of challenges to another area of Establishment Clause litigation: those involving government-owned or sponsored displays of religious items and symbols, such as Christmastime crèches and Ten Commandments monuments. Since *Valley Forge*, a tension has existed within the injury segment of standing analysis. *Valley Forge* stated that regardless of the intensity of one's beliefs, a psychological offense caused by government conduct does not amount to a concrete injury sufficient to confer standing.¹⁸ However, in *Lujan v. Defenders of Wildlife*, the Court subsequently acknowledged (grudgingly, via Justice

¹⁵ THOMAS J. CURRY, *THE FIRST FREEDOMS* 222 (1986).

¹⁶ *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947). Everson, of course, pre-dated *Flast*, but the Court allowed a taxpayer-based suit regardless.

¹⁷ *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464 *passim* (1982). The Court built on earlier holdings in *United States v. Richardson*, 418 U.S. 166 (1974), and *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974), which refused to allow taxpayer standing for challenges pursuant to other sections under Article I.

¹⁸ *Valley Forge*, 454 U.S. at 465. *Accord Schlesinger*, 418 U.S. at 217.

Scalia) in a non-Establishment Clause context that a more particularized injury of an aesthetic or psychological nature may suffice.¹⁹ A desire and some future plan to access a site for recreational use, for example, can serve as a noneconomic injury that confers standing.²⁰ As a result, lower courts have struggled over what is a sufficient noneconomic injury to bring a challenge to a religious display on government property or to a government proclamation endorsing religion. Courts have generally determined that plaintiffs have alleged a sufficient personal injury if they have some direct contact with the offending item/action or if they alter their behavior to avoid coming into such contact. In essence, if the religious display impairs the plaintiff's potential enjoyment of the property, she has alleged sufficient noneconomic injury, even if she has incurred minimal costs, experienced minimal distress or inconvenience, or has yet to encounter the offending item. Although a potentially unlimited number of people may share the plaintiff's situation, provided she can allege her own contact, inconvenience, etc., she has a particularized injury.²¹ Although this generous interpretation of noneconomic injury varies slightly between the circuits, until recently, all circuits have recognized this distinction from the *Valley Forge* "mere psychological" rule. Even the Supreme Court accepted this level of injury in its early religious display cases, and only recently, in *Salazar v. Buono*, has this accepted form of injury been questioned.²²

B. THE PROBLEM WITH THE RULES

Like standing rules applied to other types of constitutional claims, the rule requiring a particularized injury has the effect of weeding out less desirable plaintiffs and claims in the Establishment Clause context. But a tension has always existed in applying a standard injury requirement to Establishment Clause cases. The overarching problem is that a focus on demonstrating a particularized injury highlights only one aspect of the Clause's purpose—to prevent government coercion or favoritism with respect to matters of faith—to the detriment of an equally important value—that of reaffirming jurisdictional boundaries between the Church and the State. Several scholars have referred to this as the "structural" function of the Establishment Clause—to disable the government of all authority to act religiously. Unlike other potential constitutional violations, the injuries that flow from many Establishment Clause wrongs are inherently "generalized;"²³ "the damage, broadly speaking, accrues to society as a whole rather than to individuals as such."²⁴ Professors Chip Lupu and Bob Tuttle have argued that:

¹⁹ 504 U.S. 555, 562-63 (1992) (citing *Sierra Club v. Morton*, 405 U.S. 727 (1972)) (recognizing aesthetic injuries in addition to economic injuries).

²⁰ *Id.*

²¹ See *Suhre v. Haywood County*, 131 F.3d 1083 (4th Cir. 1997); *Harris v. City of Zion*, 927 F.2d 1401 (7th Cir. 1991); *Foremaster v. City of St. George*, 882 F.2d 1485 (10th Cir. 1989); *Saladin v. City of Milledgeville*, 812 F.2d 687 (11th Cir. 1987); *ACLU v. Rabun County Chamber of Commerce*, 698 F.2d 1098 (11th Cir. 1983).

²² *Salazar v. Buono*, 130 S. Ct. 1803 (2010); *Allegheny v. ACLU*, 492 U.S. 573 (1989); *Lynch v. Donelley*, 465 U.S. 668 (1984).

²³ Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1 (1998).

²⁴ Note, *Nontaxpayer Standing, Religious Favoritism, and the Distribution of Government Benefits: The Outer Bounds of the Endorsement Test*, 123 HARV. L. REV. 1999, 1999 (2010).

The Establishment Clause occupies a unique role within the Bill of Rights. As constructed over the past half-century, it frequently involves questions of government voice and structure, as well as more conventional constitutional concerns about individual coercion. Where the Clause is seen as a structural limitation on government, the question of what constitutes an “injury” takes on a different coloration than under other Bill of Rights provisions, where the relevant injury is individuated, material, and more visible. . . . The concerns at stake in most Establishment Clause cases are public, not private²⁵

In essence, with respect to claims that the government is funding religion in a non-preferential manner, such that no religious body is preferred or excluded from receiving benefits, the Establishment Clause injury is shared by all of us, equally, or by none of us.

The same “generalized” injury exists with many instances of governmental expropriation of religious imagery and symbolism for its own purposes. So, for example, where the government’s endorsement of religion is ecumenical—such as with a presidential call for nonsectarian prayer—the offense is to the structural restraint on the government’s use of religion more than it is to a generally held offense at the action. Therefore, in both funding and symbolism cases, requiring a particularized injury is inapposite to the constitutional wrong. By resting the ability to challenge an Establishment Clause violation upon the necessity of demonstrating an injury, the Court in *Flast* set the standing inquiry down a particular path, one that may have now reached a dead end.

III. RECENT DEVELOPMENTS IN TAXPAYER STANDING

One could argue that the demise of the *Flast* taxpayer exception is not of recent making; that it suffered a near-mortal wound in *Valley Forge* in 1982 and has been living on borrowed time ever since. Yet *Valley Forge*, when read narrowly, excluded only a small segment of potential claims and claimants: those wishing to challenge a financial benefit to religion that did not originate through a legislative appropriation. The vast majority of challenges to funding programs, e.g., teacher salary supplements, educational equipment and supplies, tax deductions and credits, tuition vouchers, faith-based social services, have involved a legislative appropriation and have not been affected by the holding in *Valley Forge*. In fact, in 1988 in *Bowen v. Kendrick*, the Court (surprisingly, via Chief Justice Rehnquist) appeared to blunt the force of *Valley Forge*’s “congressional versus executive action” distinction by noting that most programs administered by executive agencies receive authorization through a congressional appropriation.²⁶ Still, the *Valley Forge* decision stood as a boundary, and a warning, to potential litigants and claims.

The hostility to permissive standing, generally, and within the Establishment Clause context, in particular, as the Court’s conservative wing demonstrated in *Valley Forge*, came to full flower in 2007. In *Hein v. Freedom From Religion Foundation*, members of the Wisconsin-based organization relied upon taxpayer standing to chal-

²⁵ Ira C. Lupu & Robert W. Tuttle, *Ball on a Needle: Hein v. Freedom From Religion Foundation, Inc. and the Future of Establishment Clause Adjudication*, 2008 BYU L. REV. 115, 133-34 (2008).

²⁶ See *Bowen v. Kendrick*, 487 U.S. 589, 618-20 (1988).

lenge aspects of President George W. Bush’s “Faith-Based Initiative,” particularly the use of White House and Executive Branch monies to fund various faith-based offices within federal agencies and departments, and conferences where, allegedly, administration officials endorsed religion in promoting the program.²⁷ The Seventh Circuit, in an opinion written by noted conservative jurist Richard Posner, held that *Flast* controlled and the plaintiffs had standing.²⁸ A five-justice majority of the Supreme Court reversed and dismissed the case, ruling that FFRF lacked taxpayer standing to bring a challenge because the alleged expenditures came through an administrative action, rather than via a congressional appropriation.²⁹ A three-justice plurality read narrowly the *Flast* holding that taxpayer standing was allowed to challenge an appropriation arising under congressional taxing and spending authority. It decided that because the funds came out of a \$53 million general appropriation to fund the Executive Branch’s “day-to-day activities,”³⁰ and because there was no congressional direction as to their use, the expenditure was not “undertaken pursuant to an express congressional mandate.”³¹ For the plurality, *Flast* had created only a “narrow exception” to the rule against taxpayer standing, and this claim fell outside that rule.³² The plurality also implied that the claim was barred under the *Valley Forge* holding that taxpayers lack standing to challenge “discretionary Executive Branch expenditures” generally (seeming to resurrect the congressional versus executive distinction downplayed in *Kendrick*).³³

As the dissenters asserted, the plurality’s opinion represented a crabbed reading of *Flast* and the purposes behind the taxpayer exception. The “psychic injury” that taxpayers experience when their government funds religious activities remains as great regardless of which branch disburses the check. As the dissent explained, “[w]hen executive agencies spend identifiable sums of tax money for religious purposes, no less than when Congress authorizes the same thing, taxpayers suffer injuries.” And the injury is as great—and possibly worse due to transparency concerns—when the decision to expend money is discretionary rather than mandated by a statute. Separation of powers concerns about reviewing discretionary executive decisions are also no greater than the similar threat presented by judicial evaluation of congressional action, Justice Souter noted.³⁴ The effect of *Hein* is to immunize a potentially large amount of Executive Branch action from judicial review which, “for the purposes of justiciability, makes neither conceptual nor functional sense.”³⁵

Two other aspects of *Hein* are as troubling as its holding. First, the plurality opinion, written by Justice Alito, purported to affirm *Flast*, but did so only grudgingly. Because the desired result could be reached through a formalistic reading of *Flast*,

²⁷ 551 U.S. 587 (2007). The Faith Based Initiative was the Bush Administration’s expansion of “Charitable Choice”—a series of laws enacted during the Clinton presidency which encourage the government to contract with religious based charities to provide social services. See JO RENEE FORMICOLA ET AL., FAITH-BASED INITIATIVES AND THE BUSH ADMINISTRATION: THE GOOD, THE BAD, AND THE UGLY (2003).

²⁸ Freedom From Religion Found. v. Chao, 433 F.3d 989.

²⁹ *Hein*, 551 U.S. 587 (2007).

³⁰ *Id.* at 605.

³¹ *Id.* at 604.

³² *Id.* at 602.

³³ *Id.* at 607-08.

³⁴ *Id.* at 639 (Souter, J., dissenting).

³⁵ Lupu & Tuttle, *supra* note 25, at 153.

stare decisis directed the plurality's approach ("We do not extend *Flast*, but we also do not overrule it. We leave *Flast* as we found it."). But as frequently happens when justices claim they are merely adhering to precedent, the holding just followed now looks slightly different. Justices Scalia and Thomas agreed with the dissenters that the plurality's distinction was wooden, but urged that *Flast* should be overruled. Only Justice Kennedy in the majority embraced *Flast* ("the result reached in *Flast* is correct"). This bodes ill for the future of the *Flast* exception. Despite Kennedy's defense of *Flast*, he could soon be convinced by Scalia's argument that to remain logically consistent, *Flast* (as now interpreted) must either be expanded or gutted.³⁶

The other troubling aspect of *Hein* was Justice Souter's cautious defense of taxpayer standing. Disappointingly, Souter put the constitutional interest at stake squarely within a traditional notion of an injury-in-fact. The interest was "a personal constitutional right not to be taxed for the support of a religious institution," Souter argued. James Madison's infamous "three pence implicates the conscience," he wrote, and "the injury [results] from Government expenditures on religion." By so arguing, Souter sought to maintain the conceptual rationale for allowing challenges to government violations of nonestablishment within the traditional parameters of an injury-in-fact. By so doing, Souter kept the concept of taxpayer standing on a collision course with usual notions of injury, rather than seizing the opportunity to explore other rationales for allowing funding challenges, such as whether the Establishment Clause imposes a structural limitation on the government's action, irrespective of any particularized injury.³⁷

The fall-out from *Hein* only confirmed that "*Flast*'s rule appears to be hanging by a thread over the fires of probable judicial damnation."³⁸ Only weeks following the decision, the Justice Department asked the Seventh Circuit to dismiss a taxpayer challenge to a Veterans Administration policy regarding chaplains serving in VA hospitals.³⁹ And just a few months later, the Seventh Circuit dismissed a challenge by taxpayers to a practice of religious invocations in the Indiana House of Representatives. Relying on *Hein*, the court ruled that the minor internal expenditures by the Indiana House that supported the prayer practice were insufficient to implicate any taxpayer injury.⁴⁰ Such quick developments have caused litigating organizations such as the ACLU, Americans United, and FFRF to reevaluate their litigation plans.

This past term the Supreme Court took another step toward dismantling taxpayer standing with its decision in *Arizona Christian School Tuition Organization v. Winn*.⁴¹ The case, brought by Arizona taxpayers, challenged a state law that gives tax credits for personal and corporate contributions to private "school tuition organizations" which in turn award tuition grants to students attending private schools, including religious schools. The program was likely to be held constitutional based on the Court's decision in *Zelman v. Simmons-Harris*, but rather than ruling on the merits, the Court accepted the petitioners' argument—supported by the Obama Justice Department—that the plaintiff/respondents lacked taxpayer standing. The opinion,

³⁶ *Hein*, 551 U.S. at 615-16.

³⁷ *See id.* at 641-42 (Souter, J., dissenting).

³⁸ Rahdert, *supra* note 8, at 1045.

³⁹ *See Freedom From Religion Found. v. Nicholson*, 469 F. Supp. 2d 609 (W.D. Wis. 2007), *vacated*, 563 F.3d 730 (7th Cir. 2008). Prior to *Hein*, the Justice Department had conceded the plaintiffs' standing and was defending the claim on the merits.

⁴⁰ *Hinrichs v. Bosma*, 400 F. Supp. 2d 1103 (S.D. Ind. 2005), *reversed*, 506 F.3d 584 (7th Cir. 2007).

⁴¹ *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011).

written by Justice Kennedy, again reaffirmed *Flast* but again narrowed its effect. Kennedy wrote that the interest of taxpayers (and their injury) is limited to legislative appropriations of tax money for religion—the “injury” alleged in Establishment Clause challenges to federal spending” is connected to “the very extraction and spending of tax money in aid of religion.”⁴² A *tax credit*, in contrast, involves no extraction or expenditure by the government, Kennedy noted. Any subsidy of religious activity through the tax credit is the result of “private action” and not “traceable to the government’s expenditures.”⁴³ Kennedy acknowledged, as he was forced to by Justice Kagan’s blistering dissent, that “tax credits and governmental expenditures can have similar economic consequences.” However, Kennedy declared, in a feat of syllogistic logic, that when the government declines to tax, “there is no such connection between [the] dissenting taxpayer and [an] alleged establishment.”⁴⁴

Justice Kagan easily dismantled Kennedy’s faulty economic analysis: “[c]ash grants and targeted tax breaks are means of accomplishing the same governmental objective—to provide financial support to select individuals or organizations. . . . Either way, the government has financed the religious activity.”⁴⁵ As Kagan noted, in five previous cases the Court had considered the constitutionality of tax exemptions/deductions/credits in suits brought by taxpayers.⁴⁶ The Court’s facile distinction sets up a catch-22 where a tax break may advance religion but no one is able to bring a challenge. Any continuity between substance and justiciability is destroyed. Kagan also put the Court’s “arbitrary distinction” between direct and indirect expenditures in its larger light. The holding was yet another “end-run [around] *Flast*’s guarantee of access to the Judiciary.” Building on *Hein*, the *Winn* decision may lead to “the effective demise of taxpayer standing,” which “will diminish the Establishment Clause’s force and meaning.”⁴⁷

The cumulative effect of *Valley Forge*, *Hein* and *Winn* is that the alleged funding violation must flow not merely from a congressional appropriation to a program administered by an executive agency, but that Congress must expressly intend and mandate the particular expenditure. And the expenditure must be in cash (forget the “tax” part of *Flast*’s “tax and spend” requirement where it involves tax mechanisms that are used in lieu of a cash grant). Actions that may be clearly “establishing” in appearance and effect to a first year law student—such as a discretionary cash grant to build a house of worship or a dollar-for-dollar tax forgiveness for a religiously owned business—are now potentially immune from challenge.

IV. DIMINISHED NON-ECONOMIC STANDING

The judicial attack on non-economic standing for Establishment Clause challenges has not been as overt as that on taxpayer standing. Nonetheless, there is a growing hostility to allowing plaintiffs to bring suits alleging psychic injuries from their exposure to government endorsements of religion, such as through a state-sponsored religious display or official proclamation endorsing religion.

⁴² *Id.* at 1446.

⁴³ *Id.* at 1447.

⁴⁴ *Id.*

⁴⁵ *Id.* at 1450 (Kagan, J., dissenting).

⁴⁶ *Id.* at 1452-53.

⁴⁷ *Id.* at 1450-51.

As noted above, standing was not an issue in the Court's leading holdings concerning challenges to government sponsored religious displays. So in *Lynch v. Donnelley* (crèche in city park), *Allegheny v. ACLU* (crèche in county courthouse), *McCreary County v. ACLU* (Ten Commandments in courthouses) and *Van Orden v. Perry* (Ten Commandments on grounds of state capital), the justices accepted that the plaintiffs had alleged sufficient injury through their encounters with the allegedly unconstitutional items.⁴⁸ For example, in *Van Orden*, the plaintiff's allegation that he regularly passed by the Ten Commandments monument on his way to the Texas State Law Library drew no comment or challenge. Implicitly, the Court accepted that the plaintiffs' alleged injury was more than the psychic or abstract offense it had decried in *Valley Forge*, *Richardson* and *Schlesinger*. The ripple effect of *Hein* and *Winn*, however, soon impacted this area as well.

An early sign that several justices were eager to reconsider the availability of non-taxpayer standing occurred in the 1996 denial of certiorari in a case challenging the depiction of a Latin cross in a city seal. In *Robinson v. City of Edmond*, the Tenth Circuit held the plaintiff had standing where he had observed the seal but had not altered his conduct to avoid its encounter. Three justices dissented from the certiorari denial (Rehnquist, Scalia, and Thomas) expressing their desire to consider whether standing should be afforded on nothing more than direct exposure to the offending religious symbol.⁴⁹

By the time the Court heard *Salazar v. Buono*, a challenge to the maintenance of a Latin Cross on the Mojave National Preserve, *Hein* had been decided. The Ninth Circuit, in an opinion by Judge Alex Kozinski, rejected the government's characterization of the plaintiffs' injury as being merely ideological, and not an in-fact injury.⁵⁰ Before the high court, the government—now the Obama Administration—reasserted the standing challenge, claiming that Buono lacked a personal injury to challenge the display because he was merely offended at the presence of the cross on public land. Justice Kennedy, speaking for the plurality, side-stepped the government's challenge by noting that the present appeal involved only a question of enforcing a final judgment (which the government had attempted to avoid complying with by transferring the land around the cross to the Veterans of Foreign Wars), an action that Buono had standing to bring as the prevailing party.⁵¹ Still, the plurality reversed the lower court's issuance of an injunction respecting the land transfer, opining that the Court could not assume illicit motives on the part of Congress, and noting as an aside that the government's use of a sectarian symbol may serve valid purposes (“[t]he Constitution does not oblige government to avoid any public acknowledgment of religion's role in society.”).⁵² In their concurrence, Justices Scalia and Thomas echoed the plurality's hostility to Buono's claim on the merits, but argued that his injury-in-fact was still a relevant question. Conflating questions of standing and substance, Scalia argued that Buono would experience no injury if the cross remained on land now purportedly owned by the VFW, though managed by the government.⁵³ Although the ultimate

⁴⁸ See *Lynch*, 465 U.S. 668 (1984); *Allegheny*, 492 U.S. 573 (1989); *McCreary County*, 545 U.S. 844 (2005); *Perry*, 545 U.S. 677 (2005).

⁴⁹ *Robinson v. City of Edmond*, 68 F.3d 1226 (10th Cir. 1995), cert. denied, 517 U.S. 1201, 1202-03 (1996) (Rehnquist, C.J., dissenting).

⁵⁰ *Buono v. Norton*, 371 F.3d 543, 547-48 (9th Cir. 2004).

⁵¹ *Salazar v. Buono*, 130 S. Ct. 1803, 1815-16 (2010).

⁵² *Id.* at 1818 (citing *Lee v. Weisman*, 505 U.S. 577, 598 (1992)).

⁵³ *Id.* at 1826-27 (Scalia, J., concurring).

holding and impact of *Buono* are convoluted, the decision signals an increasing willingness by conservative justices to reconsider questions of standing, particularly with merits claims they find lacking, such as challenges to religious displays.

The fall-out of this trend can be seen in the recent holding of the Seventh Circuit denying plaintiffs standing to challenge presidential prayer proclamations. Relying chiefly on *Valley Forge*, *Richardson* and *Schlesinger*, Chief Judge Frank Easterbrook held that the plaintiffs raised only a generalized grievance and thus lacked any personalized injury (“the President’s proclamations are addressed to plaintiffs, in common with all citizens”).⁵⁴ Easterbrook declared that the plaintiffs merely had “hurt feelings” and “fe[lt] slighted” by the President’s declining to comply with their view of the Constitution, but that a psychological disagreement “is not an ‘injury’ for the purpose of standing.”⁵⁵ To that extent, the holding was consistent with the above trio of cases. But two other aspects of the holding are worrisome. Relying on *Valley Forge*, *Richardson*, *Schlesinger*, and now *Hein*, Easterbrook reaffirmed that some constitutional claims might simply be immune from judicial review by virtue of the actor: “If anyone suffers injury . . . that person is the President, who is not complaining.”⁵⁶ And though the court dispatched the plaintiffs’ standing using current rules, Easterbrook opined that the courts “may need to revisit the subject of observers’ standing.”⁵⁷ Indeed, *Freedom from Religion Foundation v. Obama* affirms what several commentators have observed recently: in light of the cut-back in taxpayer standing in Establishment Clause cases, courts will logically be reexamining the previously permissive rules governing non-taxpayer injuries as well.

V. THE FUTURE

It is likely that we are witnessing a sea change in judicial thinking about how the standing doctrine applies to Establishment Clause challenges. It is also likely that this change is motivated in part by the conservative majority’s general view of Establishment Clause claims. The *Hein* plurality’s “utterly meaningless distinction[]”⁵⁸ between legislative and executive expenditures, and the *Winn* Court’s “novel distinction”⁵⁹ between appropriations and tax expenditures, can only be explained by an underlying hostility to the *Flast* exception. And it is clear that “the effective demise of taxpayer standing—will diminish the Establishment Clause’s force and meaning.”⁶⁰

Blame for the demise of taxpayer standing—and the diminishing of non-taxpayer standing—should not rest solely on the judicial activism of the conservative Supreme Court majority. Equal blame lies with the Court’s Establishment Clause standing jurisprudence generally, and specifically with the initial decision to characterize violations of the Clause as personalized injuries. With some Establishment Clause claims—such as those involving religious discrimination, coercion, or preferences—personalized injury-in-fact exists, and it makes sense to apply traditional standing rules. But other forms of Establishment Clause violations involve infringements that are of a structural nature—where the government has appropriated money in support

⁵⁴ *Freedom From Religion Found. v. Obama*, 641 F.3d 803, 806 (7th Cir. 2011).

⁵⁵ *Id.* at 807.

⁵⁶ *Id.* at 805.

⁵⁷ *Id.* at 807.

⁵⁸ *Hein v. Freedom From Religion Found.*, 551 U.S. 587, 618 (2007) (Scalia, J., concurring).

⁵⁹ *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1450 (2011) (Kagan, J., dissenting).

⁶⁰ *Id.*

of religion in a non-preferential manner or has appropriated religious discourse for its political goals. “Injury” in such cases is not personalized but a violation of a constitutionally endowed group right, one that guarantees that the government cannot assume authority over religious matters. With such claims, there is no reason that a committed individual or group, such as the ACLU, cannot serve as a proxy for us all. There is little risk that such plaintiffs cannot vigorously litigate the case or hone the legal issues for adjudication. Where there have been violations of the structural limits imposed by the Establishment Clause, the rights to be vindicated are of a public, rather than a private nature.⁶¹

Flast started the Court down the wrong road by characterizing the interest of citizens to challenge an appropriation as an injury to taxpayers. The question, the Court stated, was whether a federal taxpayer had a “personal stake and interest.” Her injury was that “h[er] tax money [was] being extracted and spent in violation” of the no-establishment mandate. In other places, the majority called it an infringement on “religious liberty,” whereas Justice Stewart’s concurrence called it “a personal constitutional right.”⁶² On one level, the justices could be forgiven for these characterizations, as they were struggling with the legacy of *Frothingham* and *Doremus*, which had already described the required interest as being one of an injury. Yet despite characterizing the interest as such, the *Flast* Court was not firm that a personal injury was the only constitutional interest at stake. It also suggested that the Establishment Clause serves a structural function as well: the Clause “was designed as a specific bulwark against such potential abuses of government power,” Chief Justice Warren wrote, and it represents “a specific constitutional limitation” on congressional power.⁶³ Justice Fortas, while concurring with the majority, also opined that “the vital interest of a citizen in the establishment issue . . . would be acceptable as a basis for this challenge” “without reference to his taxpayer’s status.”⁶⁴ And Justice Harlan, while dissenting from the Court’s finding of standing, also observed that the true “interests [a citizen] represents, and the rights he espouses, are, as they are in all public actions, those held in common by all citizens.” It made no sense to Harlan to “describe those rights and interests as personal.”⁶⁵ Thus despite the holding, the justices in *Flast* did not reduce the interest in preventing government funding of religion to solely the injury a taxpayer experiences when his extraction is used to support another’s religion. The question before the Court, however, was whether an exception existed to the *Frothingham* and *Doremus* rules against taxpayer standing, and the Court ruled that one did.

Any ambiguity over whether the interest in government fealty to the Establishment Clause was a personal right or a structural interest was settled in *Valley Forge*, which clearly put the interest in the former category. This should not be surprising. In seeking to limit the scope of the *Flast* exception, the conservative majority was inclined to emphasize that standing, for Article III purposes, requires a traditional understanding of injury, which (conveniently) did not exist in that case. The plaintiffs—staffers of Americans United for Separation of Church and State—had sought to vindicate an interest shared by society as a whole: to prevent the transfer of valuable government property to a religious entity to be used for religious education. This was a structural

⁶¹ Esbeck, *supra* note 23; Lupu and Tuttle, *supra* note 25, at 133-137.

⁶² *Flast v. Cohen*, 392 U.S. 83, 101, 103, 106, 114 (1968).

⁶³ *Id.* at 104.

⁶⁴ *Id.* at 104, 115 (Fortas, J., concurring).

⁶⁵ *Id.* at 129 (Harlan, J., dissenting).

interest, but one will look in vain in Justice Rehnquist's opinion for any discussion of such an interest as occurred in *Flast*. Rather, by relying chiefly on the generalized grievance holdings of *Schlesinger* and *Richardson*, Rehnquist effectively closed the door to viewing the constitutional guarantee against religious funding as a corporate right.⁶⁶ After *Valley Forge*, the dye had been cast, such that even liberal justices like Justice Souter in *Hein* would agree that the injury citizens experience by government funding of religion is of a personal nature. And by applying a strict notion of injury-in-fact in funding challenges, judges are invited to do the same with noneconomic claims, particularly where the plaintiffs' offense seems more generalized than personalized.

Unfortunately, the opportunity to reconfigure the justices' thinking about standing in Establishment Clause challenges may have passed. Rather, the Court's majority is moving in the opposite direction to emphasize traditional notions of injury-in-fact while building on *Valley Forge's* formalistic compartmentalizing of government functions. In its unwillingness to concede that a similar injury exists to a taxpayer when the expenditure occurs under the authority of the Executive Branch, or that a tax relief measure is as subsidizing of religion as a cash grant, the Court is exacerbating a widening gulf between justiciability and substance.⁶⁷ Claims with equal constitutional merit will go unheeded. The result of "the effective demise of taxpayer standing," as Justice Kagan noted, "will diminish the Establishment Clause's force and meaning."⁶⁸

⁶⁶ *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 482-87 (1982).

⁶⁷ See Lupu & Tuttle, *supra* note 25, at 136.

⁶⁸ *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1451.

An Evolving Foreclosure Landscape: The *Ibanez* Case and Beyond

Peter Pitegoff* and Laura Underkuffler**

I. INTRODUCTION

Mortgage securitization, subprime lending, a persistently weak housing market, and an explosion of residential mortgage defaults—today’s homeowners and banks face a new and challenging landscape. Recently, courts in several states have issued decisions that alter the terrain for mortgage foreclosures. In Massachusetts, New Jersey, and New York, among other states, courts have dismissed foreclosure actions on the basis of what might seem to be highly technical deficiencies in the pleading or proof. The most well-known—and controversial—in this cluster of cases is *U.S. Bank National Ass’n v. Ibanez*,¹ decided by the Supreme Judicial Court of Massachusetts this year. In *Ibanez*, the court held that two assignee banks failed to obtain legal title to foreclosed properties because they failed to prove that they held valid assignments of the foreclosed mortgages at the moment that the foreclosure proceedings were begun.

The apparent attitude of the courts in these cases can be best summarized by the statement of a New York judge in a comparable context: that courts will not be mere “automatons mindlessly processing paper motions in mortgage foreclosure actions[,] most of which proceed on default.”² Rather, in these cases, courts have held banks, other lenders, and securitized trusts to strict proof of what might otherwise seem to be fairly inferred facts and contractual obligations.

Are these decisions best seen as misguided attempts to temporarily save homeowners (and others) from the pain of foreclosure actions—delays that waste judicial and litigants’ time—when we consider that these foreclosures will, in any event, eventually occur? Or are they justified decisions which establish substantive norms that the real conditions of real estate financing in the twenty-first century demand?

In this Issue Brief, we maintain that the decisions in these cases are not extreme examples of judicial hyper-technicality run amok. Rather, they are attempts to address the radically new foreclosure realities in the age of mortgage securitization and subprime lending—realities that existing laws, on many levels, are inadequate to address.

II. THE CASES IN QUESTION: *IBANEZ* AND OTHERS

The *Ibanez* case was actually two cases, consolidated for hearing. Both dealt with foreclosure actions against homeowners whose mortgages were securitized, prior to foreclosure, through a series of complicated transactions.

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¹ 941 N.E.2d 40 (Mass. 2011).

² *M&T Mortg. Corp. v. Foy*, 858 N.Y.S.2d 567, 572 (N.Y. Sup. Ct. 2008).

In the first case, Antonio Ibanez borrowed \$103,500 for the purchase of a home in Springfield, Massachusetts. The lender was Rose Mortgage, and the loan was secured by a mortgage which listed Ibanez as the mortgagor and Rose as the mortgagee. The mortgage was recorded with the local registry of deeds.³

Several days later, Rose executed an assignment of this mortgage in blank—that is, with no specification of the party to whom it would be transferred. At some point, the name “Option One Mortgage Corporation” was stamped in the blank space, as the assignee. This assignment was recorded. After the stamping, but before recording, Option One executed an assignment of the mortgage in blank. According to U.S. Bank, the mortgage was eventually assigned to: Lehman Brothers Bank, FSB; then to Lehman Brothers Holdings Inc.; then to Structured Asset Securities Corporation; and, ultimately pooled with approximately 1,220 other mortgage loans and assigned to U.S. Bank as trustee for the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2006-Z. This transaction effectively converted the mortgages into mortgage-backed securities that were sold to investors (a process known as securitization).⁴

On July 5, 2007, U.S. Bank foreclosed on the Ibanez property through a statutorily granted power of sale. Under Massachusetts law, a mortgage holder does not have to obtain judicial authorization to foreclose on a mortgaged property, if the power to foreclose is granted by the mortgage itself.⁵ The entity holding the mortgage need only publish notice of intent to foreclose and send notice by registered mail to the property owner of record. At the foreclosure sale, U.S. Bank purchased the Ibanez property for itself. The purchase price was significantly less than the amount of the outstanding debt and the estimated market value of the property.⁶

In September, 2008—more than a year later—U.S. Bank brought an action in court to quiet title to the Ibanez property. In particular, U.S. Bank sought a declaration that any right, title, or interest of the mortgagor (Ibanez) had been extinguished by the foreclosure sale, and that title was vested in the Bank.⁷

The case that was consolidated with *Ibanez* for hearing followed a similar pattern. In that case, Mark and Tammy LaRace gave a mortgage for property in Springfield, Massachusetts to Option One Mortgage Corporation on May 19, 2005. The mortgage was security for a \$103,200 loan. The mortgage was recorded in the local registry of deeds on that day. One week later, Option One executed an assignment of the LaRace mortgage in blank. It was later claimed that the mortgage was assigned to Bank of America on July 28, 2005, as part of a flow sale and servicing agreement. Bank of America was later claimed to have assigned it to Asset Backed Funding Corporation (ABFC) in an October 1, 2005 mortgage loan purchase agreement. ABFC later pooled the mortgage with others and assigned it to Wells Fargo as trustee for the group of now securitized mortgages.⁸

On July 5, 2007, Wells Fargo foreclosed on the LaRace mortgage, using the same statutory power of sale as used in the *Ibanez* case. At the foreclosure sale, Wells Fargo

³ *Ibanez*, 941 N.E.2d at 45-46.

⁴ *See id.* at 46.

⁵ *See id.* at 49; MASS. GEN. LAWS ch. 244, § 14 (2011).

⁶ *See Ibanez*, 941 N.E.2d at 44, 47.

⁷ *See id.* at 44.

⁸ *See id.* at 47-48.

purchased the LaRace property for itself. The purchase price was more than the outstanding debt, but significantly less than the property's estimated market value.⁹

In October of 2008—more than year after the foreclosure sale—Wells Fargo brought a quiet title action, requesting a court declaration that any right, title, or interest that the LaRaces had in the property was extinguished, and a declaration that title was vested in Wells Fargo.¹⁰

In both cases, the mortgagors—Ibanez and the LaRaces—did not initially answer the complaints in the quiet title actions, and U.S. Bank and Wells Fargo moved for entry of default judgments against them. At a case management conference, a judge of the Massachusetts Land Court raised the issue of whether U.S. Bank and Wells Fargo were entitled to foreclose on the properties in view of the fact that the assignments of the mortgages to them were not executed or recorded until *after* the foreclosure complaints were filed and the foreclosure sales were held.¹¹ In other words, although U.S. Bank and Wells Fargo represented in the notices for the foreclosure sales that they were the mortgage holders, they—in truth—had not yet been assigned the mortgages. The assignment to U.S. Bank was executed more than one year after the foreclosure sale in the case of the Ibanez property, and the assignment to Wells Fargo was executed ten months after the foreclosure sale, in the LaRace case. (The court found that this was true, even though the La Race assignment to Wells Fargo declared a date that preceded the foreclosure sale.) The explanation for this state of affairs in both cases was that “the use of postsale assignments was customary in the industry.”¹²

The legal question, thus, was whether an entity which claimed that it was the legal holder of a mortgage at the time of foreclosure, but—in fact—could not prove that it was, could foreclose because the mortgage was proven to have been *later* assigned to it. The appellate court held that it could not. Stressing the power that the statutory scheme grants to mortgage holders—*i.e.*, the power to foreclose without judicial oversight—the court held that “one who sells under a power [of sale] must follow strictly its terms”.¹³ The court noted that “[o]ne of the terms of the power of sale . . . is the restriction on who is entitled to foreclose.”¹⁴ Only a party who is a present legal holder of a mortgage, or his agent, may exercise the power of sale. “Any effort to foreclose by a party lacking ‘jurisdiction and authority’ to carry out a foreclosure under these statutes is void.”¹⁵

For U.S. Bank and Wells Fargo “to obtain the judicial declaration of clear title that they [sought] . . . they had to prove their authority to foreclose under the power of sale and show their compliance with the requirements on which this authority rests.”¹⁶ Having failed to do so, they failed to demonstrate that they acquired good title to the properties.¹⁷

What is not apparent from this bare-bones narrative is the state of the real estate paperwork in these cases. In the *Ibanez* case, among other facts, the assignment of the mortgage to U.S. Bank was claimed to have occurred pursuant to a trust agreement,

⁹ See *id.* at 44, 48.

¹⁰ See *id.* at 44.

¹¹ See *id.*

¹² See *id.* at 45, 49, 54.

¹³ See *id.* at 49-50 (quoting *Moore v. Dick*, 72 N.E. 967 (Mass. 1905)).

¹⁴ See *id.* at 50.

¹⁵ *Id.*

¹⁶ *Id.* at 51.

¹⁷ See *id.* at 55.

which was not in the record. A 273-page private placement memorandum (offering mortgage-backed securities to potential investors) was produced, but U.S. Bank could not produce any mortgage schedule identifying the Ibanez loan among the mortgages included. In addition, U.S. Bank never furnished any evidence that the entity allegedly assigning the mortgage to U.S. Bank – the Structured Asset Securities Corporation – ever held the mortgage.¹⁸ In the *LaRace* case, there was no document in the record reflecting an assignment of the LaRace mortgage by Option One, the original entity, to Bank of America. There was an unexecuted copy of a mortgage loan purchase agreement, which purported to transfer the pooled mortgages from Bank of America to ABFC. However, although the agreement makes reference to a schedule listing the assigned mortgage loans, that schedule was not a part of the trial court record. Wells Fargo submitted a schedule that it represented to identify the assigned loans, but it contained no property addresses, names of mortgagors, or any number that corresponded to the loan number or servicing number of the LaRace property.¹⁹

Two concurring justices wrote of the “utter carelessness with which the plaintiff banks documented the titles to their assets.”²⁰ The justices did not call into question the fact that the mortgagors of the properties in question had defaulted on their obligations. However, the justices expressed that prior to commencing a foreclosure action:

the holder of an assigned mortgage needs to . . . ensure that his legal paperwork is in order. Although there was no apparent actual unfairness here to the mortgagors, that is not the point. Foreclosure is a powerful act with significant consequences, and Massachusetts law has always required that it proceed strictly in accord with the statutes that govern it.

The justices noted that this is particularly true in a state such as Massachusetts, which permits foreclosure without judicial supervision.²¹

A second case of this type, *Bank of New York v. Raftogianis*,²² was decided by the Superior Court of New Jersey last year. The Bank of New York brought an action to foreclose on a mortgage taken out by Michael Raftogianis and Roman Krywopusk, who had borrowed \$1,380,000 from American Home Acceptance, with the debt memorialized by a note and mortgage executed on September 30, 2004. The mortgage described the “Lender” as American Home Acceptance. There was also mention of the Mortgage Electronic Registration System (“MERS”), which is a private corporation which administers a national electronic registry of mortgage interests and servicing rights in mortgage loans.²³ In the mortgage, MERS was described as “a separate corporation that is acting solely as a nominee for Lender and Lender’s successors and assigns.”²⁴ The mortgage was recorded with the county clerk on October 20, 2004.²⁵

¹⁸ See *id.* at 46-47, 52.

¹⁹ See *id.* at 48, 52.

²⁰ See *id.* at 55-56 (Cordy, J., concurring, with whom Batsford, J., joined).

²¹ See *id.*

²² 13 A.3d 435 (N.J. Super. Ct. Ch. Div. 2010).

²³ See *id.* at 442, 440.

²⁴ *Id.* at 442.

²⁵ See *id.*

American Home Mortgage subsequently sold its interests in a group of mortgage loans to American Home Mortgage Securities, LLC. The Mortgage Loan Purchase Agreement that effectuated this transaction contemplated an additional transfer of these mortgage loans to the American Home Mortgage Investment Trust 2004-4 Mortgage Backed Notes, Series 2004-4. The court found that the note and mortgage were securitized without notice to the borrowers.²⁶

The court's description of this transaction, and the documents that accomplished it, presents a picture of complexity that makes the foreclosure process essentially inaccessible to many mortgagors. The description also suggests confusion and lax procedures operating to the detriment of mortgagors.

In or about December 2004, a group of mortgage loans held by American Home Acceptance were securitized. While the court is now satisfied that defendant's loan was among that group . . . , that was not at all clear from the documents initially submitted by plaintiff The securitization of the loan was not referenced in the [foreclosure] complaint, or even in plaintiff's initial motion for summary judgment. (Judges and lawyers who regularly handle foreclosure litigation would probably recognize that the matter involved a loan which had been securitized just from the description of plaintiff in the complaint, such as "The Bank of New York as Trustee for American Mortgage Investment Trust 2004-4 Mortgage Backed Notes, Series 2004-4." There is no apparent reason, however, why a layperson not familiar with the securitization process would recognize that.) . . .

The documents provided in this case are typical of those presented in other matters involving the securitization of mortgage loans. Those documents are lengthy, complex, and difficult to understand. Included in the materials ultimately provided was a Mortgage Loan Purchase Agreement, an Amended and Restated Trust Agreement, an Indenture, and a Servicing Agreement. (The Indenture in this case is in excess of 100 pages, without attachments. An attachment which simply defines the terms used in the Indenture itself contains fifty-five pages.) . . . The transfers or assignments of the underlying mortgage loans involve other complexities.²⁷

Raftogianis and Krywopusk defaulted on the mortgage in October, 2008. The complaint to foreclose was filed on February 9, 2009. The complaint stated that the Bank of New York became owner of the note and mortgage "before the . . . complaint was drafted." The complaint did not refer to the securitization of the loan, any of the entities involved in the securitization process, or any transfer from either American Home Acceptance or MERS. The complaint also provided no information as to who was then in physical possession of the note. Krywopusk filed an answer, counterclaim,

²⁶ See *id.* at 443, 437.

²⁷ See *id.* at 443.

and cross claim on May 6, 2009.²⁸ After the complaint to foreclose was filed, an “Assignment of Mortgage” was executed from MERS to the Bank of New York, as Trustee. The assignment referred to the mortgage securing the Raftogianis/Krywopusk note.²⁹

The Bank of New York moved for summary judgment in January, 2010. “The motion was based on a certification from plaintiff’s counsel providing copies of the note, the mortgage, and the February 2009 [post-complaint] assignment.”³⁰ The subsequent struggle to determine the rudimentary facts of the chain of transactions was described by the court:

Defendant filed written opposition, challenging the validity of the MERS assignment. Plaintiff responded with a certification executed by a supervisor for American Home Mortgage Servicing Inc., the servicer for the loan. While that . . . recited that the note and mortgage had previously been sold to plaintiff, it did that in conclusory terms. No additional documentation was provided. Neither plaintiff’s motion nor plaintiff’s reply to defendant’s opposition addressed the securitization of the debt, or the transfer or negotiation of the underlying note. The court then required the production of the documents executed as a part of the securitization process. The motion was adjourned.³¹

The court’s subsequent frustration with Bank of New York’s inability to document the relevant transactions continued, amidst a flurry of document production and conflicting claims about the possibility of producing relevant documentation. In the end, the Bank of New York never established that it had possession of the Raftogianis/Krywopusk note as of the date that the foreclosure action was filed.³²

Since physical possession of the note was required (under New Jersey law) to commence a foreclosure action, the court held that the Bank of New York failed to establish that it had the right to initiate the action. It further held that establishment of later possession could not retroactively rectify the situation. The court emphasized that “[t]he date of filing can affect substantive rights, and those involved should have the ability to confirm that filing was proper.”³³ For instance, under New Jersey law, “a debtor’s right to cure a default with respect to a residential mortgage, without being responsible for the lender’s fees and costs, will end when the complaint is filed. . . . Similarly, . . . [New Jersey law] provides that certain borrowers facing foreclosure have the right to a six month forbearance, effective with the filing of a foreclosure complaint.”³⁴

The court held that “[p]laintiff was required to establish one basic fact—that as of the time the complaint was filed, it or its agent did have possession of the note on which the action was based.”³⁵ The burden of proof on this issue rested with the Bank

²⁸ See *id.* at 442, 445.

²⁹ See *id.* at 445.

³⁰ See *id.*

³¹ See *id.* at 445-46.

³² See *id.* at 452.

³³ See *id.*

³⁴ *Id.*

³⁵ *Id.* at 459.

of New York. Having failed in its proof, the foreclosure complaint was dismissed without prejudice. Any new complaint would have to be accompanied by a certification confirming that the Bank of New York was then in physical possession of the original Raftogianis/Krywopusk note.³⁶

In a later case, *Wells Fargo Bank v. Ford*,³⁷ the Superior Court of New Jersey ruled against a purported assignee of a mortgage on similar facts. In that case, Sandra Ford borrowed \$403,750 from Argent Mortgage Company and gave a mortgage on her residence in Westwood, New Jersey, to secure the loan. Five days later, Argent purportedly assigned the mortgage and note to Wells Fargo Bank. When Ford allegedly stopped making payments about one year later, Wells Fargo brought a court action to foreclose on the property. Ford, appearing *pro se*, responded that Argent committed predatory and fraudulent acts in connection with the loan and mortgage, and that the assignment to Wells Fargo was invalid.³⁸

Wells Fargo subsequently brought a motion for summary judgment. Ford filed a cross motion for summary judgment, alleging that documents produced by Wells Fargo in the litigation were forgeries, and that she had been overcharged more than \$20,000 in closing costs at the time of closing.³⁹

The Superior Court held that Wells Fargo failed to establish its standing to pursue the foreclosure action. Under New Jersey law, “[a]s a general proposition, a party seeking to foreclose a mortgage must own or control the underlying debt.”⁴⁰ In this case, Wells Fargo could produce no endorsement of the Ford note by Argent to Wells Fargo. In addition, there was no certification by a Wells Fargo officer that, on the basis of personal knowledge, Wells Fargo was the holder and owner of the note. A purported assignment of the mortgage which was produced “was not authenticated in any manner; it was simply attached to a reply brief.”⁴¹ Absent such proof, Wells Fargo could not foreclose.

The final case in this cluster was decided by the Supreme Court of New York last year. In this case, *Deutsche Bank National Trust Co. v. McRae*,⁴² Terry McRae borrowed \$45,000 from First Franklin, a Division of National City Bank of Indiana, in July, 2006. This debt was memorialized by a note and was secured by a mortgage on McRae’s real property in Almond, New York.⁴³

McRae allegedly defaulted on the loan and Deutsche Bank commenced a foreclosure action on January 21, 2009. Deutsche Bank made an application for an order of reference, which was denied by the Supreme Court. The ground cited was Deutsche Bank’s “fail[ure] to submit evidence of the proper assignment or delivery of the Mortgage and/or Note.”⁴⁴

³⁶ *See id.*

³⁷ 15 A.3d 327 (N.J. Super. Ct. App. Div. 2011).

³⁸ *See id.* at 328.

³⁹ *See id.*

⁴⁰ *See id.* at 329 (quoting *Raftogianis*, 13 A.3d 435).

⁴¹ *See id.* at 331.

⁴² 894 N.Y.S.2d 720 (N.Y. Sup. Ct. 2010).

⁴³ *See id.* at 720.

⁴⁴ *See McRae*, 894 N.Y.S.2d. at 721. *See also* N.Y. REAL PROP. LAW § 1321 (Consol. 1963) (allowing plaintiff to request an Order of Reference in the event that a defaulting borrower does not file an appearance within the time allotted, which sends the foreclosure case to a referee to determine the full amount owed by the borrower, if the property can be sold as one parcel, etc.).

The court described how, under New York law, a plaintiff in a foreclosure action “must establish the existence of the mortgage and mortgage note, ownership of the mortgage, and the defendant’s default in payment”⁴⁵ “A mortgage can be assigned in two ways—by the delivery of the bond and mortgage . . . to the assignee with the intention that all ownership interests [are] thereby transferred, or by a written instrument of assignment.”⁴⁶ Neither was demonstrated in this case. There was no proof offered that Deutsche Bank held the note and mortgage when the action was commenced. In the alternative, the written assignment on which Deutsche Bank relied was defective. Although the assignment purportedly assigned the mortgage, it did not assign the underlying obligation. When the court indicated that this situation was insufficient, Deutsche Bank submitted a new copy of the note, “which for the first time contained an endorsement by First Franklin . . . to First Franklin Financial Corporation, and an endorsement in blank by First Franklin Financial Corporation.” However, this endorsement in blank was undated. “In stark contrast,” the court wrote, “the copy of the Note attached to the complaint bears no such endorsements. Obviously, the endorsements were made in response [to the court’s order] . . . , which post-date the commencement of this case . . . , and are ineffective” to ground the filing of the action.⁴⁷

In dismissing the case, the court explained the policy reasons for its action:

[t]oday, with multiple (and often unrecorded) assignments of mortgage obligations and multiple securitizations often related to the same debt, the courts should carefully scrutinize the status of parties who claim the right to enforce these mortgage obligations. For the unrepresented homeowner, the issues of standing and real party in interest status of the foreclosing party are never considered. Without such scrutiny, there is a risk that the courts will give the judicial ‘seal of approval’ to foreclosures against unrepresented homeowners who have little, if any, understanding of these issues, much less the legal significance [of them]⁴⁸

III. POINTLESS PROCEDURAL HURDLES OR THE PROTECTION OF SUBSTANTIVE RIGHTS?

Before assessing the desirability of the *Ibanez* decision and the others like it, we posit several preliminary points. First, in none of these decisions were the foundational legal principles on which they turned anything surprising or new. In each case, the court simply applied long established principles—such as the idea that a foreclosing party must have a present legal right to do so—in reaching the decision that it reached. In no area of the law can a party bring an action, claiming breach of a contract under which it has no present legal rights. Requiring that claimed mortgage assignees or securitization trustees must actually possess the mortgage interests that they assert is simply the implementation of a routine legal principle.

Second, the fact that traditional legal rules support a particular result does not, of course, mean that those rules cannot be altered in particular contexts by courts. That

⁴⁵ *Id.* at 722.

⁴⁶ *Id.*

⁴⁷ *Id.* at 723 (emphasis deleted).

⁴⁸ *Id.* at 724.

is, essentially, what the foreclosing parties in these cases requested. Although decades of law might require—on its face—the dismissals of these actions, the foreclosing parties argued that the complexities of mortgage securitization and multiple assignments in blank require flexibility in the enforcement of what are essentially hyper-technicalities in this context. The law in these states might require that the foreclosing party have a written assignment or actual, physical possession of the mortgage or indebtedness note. However, there was no real dispute in any of these cases that the foreclosing parties were—with the exception of some missing paperwork—the parties who were entitled to do so.

Finally, there was no evidence in any of these cases that the property owners had not, in fact, defaulted. In all of these cases, the property owners implicitly conceded that they had stopped making payments, often for substantial periods. If there was unfairness in the bringing of these foreclosure actions, it was not rooted in the factual question of default.

Indeed, one could argue, all that was accomplished in these cases was a temporary delay of the inevitable. In each of these cases, the complaint was dismissed by the court without prejudice, meaning that the case could be re-filed. The foreclosing parties could simply cure the technical defect—obtain the written assignment or find the missing documents—and file for foreclosure again.

Are there—therefore—any valid reasons for the decisions in these cases?

There are, in fact, several important principles that these decisions embody—principles that are critical to the law in this area, and broader questions of public policy.

A. A HOME MORTGAGE DEALS WITH SHELTER; AS A RESULT, IT IS A PARTICULAR KIND OF CONTRACT THAT IS IMBUE WITH PARTICULARLY IMPORTANT SOCIAL ISSUES AND IMPERATIVES.

In the *Ibanez* case and at least one other,⁴⁹ the mortgages that were threatened with foreclosure were on the debtors' homes. The individual and societal importance of individuals' homes has always been recognized in American law and policy. It is recognized in bankruptcy laws, income tax laws, property tax rates, federal mortgage lending standards, and a myriad of other contexts. In the *Ibanez* case, the court explicitly recognized this factor. It stressed that the securitization of mortgages does not justify carelessness in foreclosure procedures; those mortgages still convey "legal title to someone's home or farm, and must be treated as such."⁵⁰ In the *McRae* case, the court cited mortgage reform legislation in New York in support of its decision. This legislation stated, explicitly, that "it is the expressed policy of the state to preserve and guard . . . the social as well as the economic value of home ownership."⁵¹

The foreclosure crisis of the past three years has certainly intensified awareness of the importance of fairness in residential loans, and the individual and societal costs of loss of home ownership. However, the underlying principle—of the importance of human shelter—has long informed our nation's public policy, and the law's treatment of foreclosure.

⁴⁹ See *Ibanez*, 941 N.E.2d at 46, 47, 52; Ford, 15 A.3d at 328.

⁵⁰ *Ibanez*, 941 N.E.2d at 51-52.

⁵¹ *McRae*, 894 N.Y.S.2d at 721 (quoting N.Y. Real Prop. Law § 265-a(1)(b) (Consol. 2007)).

B. IN FORECLOSURE ACTIONS—PARTICULARLY THOSE THAT INVOLVE MULTIPLE ASSIGNMENTS AND SECURITIZED LOANS—THE BURDEN OF PROOF REGARDING THE RIGHT TO FORECLOSURE MUST BE PLACED ON THE FORECLOSING PARTY.

The *Ibanez* and similar cases discussed here all illustrate two basic truths: (1) complex real estate transactions with multiple (and often undocumented) assignments and the securitization of thousands of mortgages are beyond the assumed understanding of any layperson; and (2) as a result, proof of these transactions, and the claimed right to foreclose, must lie with the foreclosing party.

The complexities of the transactions involved in this cluster of cases, and the seeming attitude (of the financial institutions involved) that property owners need not be made aware of them, are not unique; they are currently rife throughout the industry. During the past decade, when mortgage lending became a scramble for quick profits by loan originators who had no intention of holding and servicing loans, documentation of the millions of assignments and securitizations involved has been by-and-large abysmal. The problems that were present in these cases—missing documents, assignments in blank, unrecorded assignments, post-transaction documentation, and others—have been discovered in foreclosure challenges in many states, and have been the subject of many critical court opinions.

With such rampant problems, the approach that was taken in *Ibanez* and the other cases is the only one that is sensible: the burden of proving the right to foreclose must be placed on the foreclosing party. If a remote assignee or securitization trustee claims the right to foreclose, *it must prove* the legal basis for that claim. It cannot be the case that a remote party can claim the right to foreclose, with the property owner then forced to *disprove* its entitlement to that action. All of the documents and other knowledge of complex transactions are (to the extent that they exist) in the possession of the foreclosing party. As a result, as a practical matter—as well as a matter of fairness—the burden of proving the right to foreclose must be borne by the foreclosing party.

Granting the property owner an entitlement to proof of the transactions involved is, of course, only as good as his ability to enforce it. This leads to the third important principle in this context:

C. IN CASES INVOLVING MULTIPLE ASSIGNMENTS AND/OR SECURITIZED LOANS, JUDICIAL OVERSIGHT OF THE FORECLOSURE PROCESS IS CRITICAL.

In mortgage foreclosure cases involving multiple assignments and securitized loans, a property owner who receives notice of foreclosure from a remote third party or securitization trustee is placed in an impossible situation. Is this party, from whom notice is received, the one actually (legally) entitled to foreclose? If not, and the foreclosure proceeds, the property owner might well remain liable (under the terms of the loan) to the legally entitled party. With whom should the property owner deal, in raising defenses or seeking modification of loan terms under state or federal mandatory mediation or foreclosure protection programs?

To ensure answers to such questions, and to implement mandatory mediation laws, judicial oversight of the foreclosure process is critical. For instance, in response to the foreclosure crisis, several states have enacted statutes that mandate negotiations between property owners and mortgage holders in an attempt to avert foreclosure. In New York, a new statute requires that a court hold a mandatory conference before foreclosure on high-cost or sub-prime home loans, with the purpose being “to allow

the parties to reach agreement on an alternative to foreclosure.”⁵² In Maine, recent legislation has created the Foreclosure Mediation Program, which provides a defaulting borrower with the opportunity to enter into negotiations with the lender, supervised by a trained and impartial mediator, in which loss-mitigation strategies and the possibility of avoiding the foreclosure action are discussed.⁵³

Attempts by property owners to negotiate settlements and avoid foreclosure have been stymied repeatedly by the claims of remote third parties and loan servicers who claim that they have no authority to negotiate. To force production of proof of the right to foreclose, and to require good faith participation by lenders in negotiation, judicial oversight is critical. In addition, the obligation to invoke judicial oversight of the foreclosure process should rest with the foreclosing party. The property owner, with generally little information and less expertise, should not be in the position of having to hire a lawyer to stop the foreclosure process and invoke the court’s protection. If a remote assignee or securitization trustee desires to foreclose, it should be required to file a court action to do so.

The logic behind this principle is obvious in those jurisdictions that require judicial supervision and approval of all foreclosure actions. However, it is not traditionally a part of the law in those jurisdictions that do not require a claimed mortgage holder to submit to the judicial process. In the approximately 29 “non-judicial foreclosure” states, a mortgage holder is empowered to proceed to foreclosure and sale if the mortgage grants the lender that power. Since “non-judicial sale” is a mortgage term that homeowners are very unlikely to appreciate, or feel that they can negotiate, it is safe to assume that most mortgage loans in those states grant lenders that power. Indeed, in the cases of the Ibanez and LaRae loans, the properties were foreclosed and sold prior to any judicial involvement. Judicial scrutiny of the foreclosures in those cases occurred only because—*months* after the sale—the purported mortgage holders chose to initiate quiet title actions. Had they not done so, it is highly unlikely that proof of the right to foreclose, required by the *Ibanez* court, would ever have been required.⁵⁴

“Non-judicial foreclosure” statutes are based on the assumption that mortgage foreclosures are relatively simple affairs between two contracting parties, with relatively simple facts about payment. This might have described most residential mortgage transactions twenty years ago. However, in the world of real estate financing in the twenty-first century, this model reflects none of the realities of most transactions. To give claimed mortgage holders the right to foreclose and sell the properties—unless homeowners can *guess* that the foreclosing party is unauthorized, and *know* that they

⁵² See *McRae*, 894 N.Y.S.2d at 249 (discussing N.Y. C.P.L.R. § 3408 (Consol. 2008)).

⁵³ See 14 ME. REV. STAT. tit. 14, § 6321-A, 6322 (2009). Pursuant to Maine’s Foreclosure Mediation Program, if the borrower chooses to initiate the mediation process, no judgment authorizing the foreclosure and sale of the property can be entered until the mediator’s report is completed and filed with the court. If the parties are unable to come to terms with a strategy to avoid further proceedings during mediation, the ensuing mediator’s report reflects that an agreement could not be reached and the court may then enter a judgment of foreclosure in favor of the lender. Similar legislation has been enacted in several other states. See, e.g., N.Y. C.P.L.R. § 3408 (Consol. 2008); MASS. GEN. LAWS ch. 244, § 35A (2008); N.J. STAT. ANN. § 46:10B-50 (2009).

⁵⁴ In Massachusetts, a solution has been sought for at least one subset of loans, sub-prime loans. The Massachusetts Attorney General and Massachusetts courts have attempted to force pre-sale negotiation in the case of sub-prime loans for individual homes, by labeling them “presumptively unfair” and the product of deceptive trade practices in violation of general consumer protection statutes. See *Commonwealth v. Fremont Inv. & Loan*, 897 N.E.2d 548 (Mass. 2008).

have the right to negotiation, *and* can afford to hire an attorney to file in court—is unrealistic in today’s world and represents poor public policy.

Naysayers will point out that long foreclosure delays characterize the current situation in some states which require judicially approved foreclosures. Because of the spiraling number of defaults on mortgage loans in the past three years, delays in accomplishing foreclosures in New Jersey and New York, for instance, now exceed an average of three years.⁵⁵ This has, in turn, depressed prices for the sales of non-distressed properties and created blocks of blight in some cities.⁵⁶ Judicial review of foreclosures is, however, only part of the problem; other causes include the disorganization of assignment and securitization records, and uncertainty about foreclosure rules on both the state and federal levels.⁵⁷ In addition, disputes about responsibility for deteriorating homes in the process of foreclosure mirrors problems in the foreclosure process itself. In Los Angeles, the City has sued Deutsche Bank, “one of the country’s largest trustees of mortgage-backed securities, seek[ing] hundreds of millions of dollars in penalties.” The Bank is accused of “illegally forcing out tenants, allowing others to live in deplorable conditions and letting scores of empty homes devolve into havens for gang members, squatters and drug dealers.” The Bank’s defense? The City has sued the wrong party. “Loan servicers, not Deutsche, which is the trustee for the properties, are responsible for the maintenance of the properties, said [a Deutsche] spokesman”⁵⁸

There are potential costs to any course of action. The question is whether the efficiency of non-judicial foreclosures in moving foreclosed properties justifies the costs that come with rapid, non-supervised foreclosure powers exercised by alleged third-party assignees and securitization trustees. The better answer is that it does not.

IV. CONCLUSION

Neither *Ibanez*, nor any of the other cases discussed here, forbids mortgage securitization, multiple mortgage and note assignments, or other complex real estate financing transactions. Indeed, the *Ibanez* court itself stressed that a securitization trustee could be shown as a proper assignee if there is a trust agreement which clearly and specifically identifies the mortgage at issue as among those assigned to the trust.⁵⁹ The issue is not the blanket forbidding of complex transactions; it is the protection of all rights, including those of the property owner, when default and foreclosure are claimed.

⁵⁵ See, e.g., Julie Schmit, *Housing Market Recovery Could Be Stalled: Researcher Cites Foreclosure Delays, Which Give Troubled Borrowers Prolonged Time in Homes*, USA TODAY, July 14, 2011, at 2A.

⁵⁶ See *id.*; see also Brady Dennis, *There Goes the Foreclosed-on Neighborhood*, THE PORTLAND PRESS HERALD, July 1, 2011, at A2.

⁵⁷ See Schmit, *supra* note 55.

⁵⁸ See Dennis, *supra* note 56.

⁵⁹ See *Ibanez*, 941 N.E.2d at 53.

Academic Freedom and the Public's Right to Know: How to Counter the Chilling Effect of FOIA Requests on Scholarship

Rachel Levinson-Waldman*

Every state has a mechanism that entitles citizens to request and obtain records produced in the course of official acts.¹ The state statutes enabling this access to public documents—often referred to as state Freedom of Information Act (FOIA) statutes—are intended to make the actions of public employees and representatives transparent, and to foster accountability and debate.² The statutes generally do not ask for the requester's reason for wanting the documents; rather, they assume that the government's operations should be open to the public, and proceed upon that presumption in favor of transparency.

Recently, several groups have used state FOIA statutes to demand materials developed by faculty members as well as emails exchanged among scholars. By potentially squelching debate rather than encouraging it, however, these requests threaten to undermine the purpose of freedom of information laws. Indeed, they pose a significant risk of chilling academic freedom by making scholars reluctant to discuss and explore controversial issues or to collaborate with each other, thereby constraining one of the primary services offered by publicly funded colleges and universities. Moreover, not only does judicial treatment of FOIA requests vary significantly from state to state, but the analysis of requests for documents under these state statutory schemes can diverge substantially from the treatment of requests for the same documents as part of litigation or pursuant to other statutory regimes.

In light of the inconsistent treatment of similar requests by different states or under different circumstances, as well as the potentially competing interests in freedom of scholarly exchange on the one hand and full public disclosure on the other, an approach that harmonizes the handling of these document demands and balances these interests would be of significant value to courts, academics, university administrators, and outside parties alike. This paper proposes several methods by which to regularize the responses to document requests, provide guidance to various stakeholders, and ensure that the significant interest in public access—upon which scholars themselves often rely—does not automatically take precedence over the equally significant interest in open academic exchange.

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¹ *State Public Record Laws*, FOIAAdvocates, <http://www.foiadvocates.com/records.html> (last visited Jun. 23, 2011).

² Although state statutes go by a variety of names—sunshine acts, public records acts, and open records acts, among others—this paper will refer to them generally as state FOIA statutes.

I. THE ISSUE IN CONTEXT: RECENT FOIA REQUESTS

A. UNIVERSITY OF VIRGINIA

In January 2011, the American Tradition Institute Environmental Law Center (ATI), a libertarian, pro-individual rights environmental think tank, joined forces with a Virginia state delegate to serve a records demand on the University of Virginia (UVA). The group requested a wide array of materials related to a former UVA professor, Michael Mann. Professor Mann, now on the faculty at Pennsylvania State University, is best known as the climate scientist who developed the “hockey stick” model of global warming, demonstrating that the Earth’s temperature has increased during the industrialized era. Emails to and from Dr. Mann were at the heart of what became known as “Climategate,” in which climate change skeptics misinterpreted emails released from a hacked server at the University of East Anglia to suggest that global warming was, essentially, a hoax. Although multiple bodies concluded that neither Dr. Mann nor his colleagues engaged in research fraud,³ the emails nevertheless continued to serve as a flashpoint for climate change deniers, who remained convinced that they revealed a scientific conspiracy.

Citing to “Climategate” and a “cloud of controversy” surrounding the hockey stick model, the ATI and Republican Virginia Representative Bob Marshall served a FOIA request for an exhaustive range of documents, including all correspondence and related materials between Dr. Mann and any of 39 other scientists, all documents referencing any of those people, and *all* emails to or from Dr. Mann; a wide array of grant-related records; and his computer programs and source codes.⁴ UVA initially asserted that at least some of the materials sought were exempt from disclosure under Virginia’s FOIA statute, but after ATI filed a motion urging the court to compel the university to produce the documents,⁵ UVA and ATI reached an agreement that UVA would share all of the requested documents with ATI.⁶ Under the agreement, ATI’s access to documents that UVA asserts are protected will be subject to a protective or-

³ For a brief listing of the relevant reports, see *Debunking Misinformation About Stolen Climate Emails in the “Climategate” Manufactured Controversy*, UNION OF CONCERNED SCIENTISTS, http://www.ucsusa.org/global_warming/science_and_impacts/global_warming_contrarians/debunking-misinformation-stolen-emails-climategate.html (last visited Jun. 23, 2011). Most recently, the National Science Foundation’s Inspector General concluded that Dr. Mann did not engage in research misconduct. See Douglas Fischer, *Federal Auditors Find No Evidence to Support ‘Climategate’ Accusations*, *The Daily Climate*, (Aug. 22, 2011), available at <http://www.dailyclimate.org/tdc-newsroom/2011/08/feds-clear-climategate-scientist/>; see also Memorandum, Office of Investigation, National Science Foundation, available at <http://www.nsf.gov/oig/search/A09120086.pdf>.

⁴ See American Tradition Institute, *Va. Taxpayers Request Records from University of Virginia on Climate Scientist Michael Mann*, AMERICAN TRADITION INSTITUTE, <http://www.atinstitute.org/american-tradition-institute-va-taxpayers-request-records-from-university-of-virginia-on-climate-scientist-michael-mann/> (last visited Jun. 23, 2011) (providing ATI’s own description of its FOIA request and a link to the request itself).

⁵ See Verified Petition for Mandamus and Injunctive Relief, *Am. Tradition Inst. v. Univ. of Va.*, No. 11-3236 (Va. Cir. Ct. May 16, 2011), available at http://www.atinstitute.org/wp-content/uploads/2011/05/ATI_v_UVA_FOIA_First_Petition_final_5-15-11.pdf.

⁶ See Order on the Protection of Documents, *Am. Tradition Inst. v. Univ. of Va.*, No. 11-3236 (Va. Cir. May 24, 2011), available at <http://www.atinstitute.org/wp-content/uploads/2011/05/ATI-v-UVA-5-24-Protective-Order.pdf> (memorializing the agreement between the parties with the Circuit Court of Prince William County). In late August 2011, UVA produced the first batch of documents to ATI. Anita Kumar, *UVA Turns over Documents in Global Warming Case*, *WASH. POST*, Aug. 25, 2011, available at http://www.washingtonpost.com/blogs/virginia-politics/post/u-va-turns-over-documents-in-global-warming-case/2011/08/25/gIQAUtrWeJ_blog.html.

der that prohibits ATI from using or revealing the documents further.⁷ In addition, ATI can ask the court to issue a ruling on any exemptions claimed for the documents. This agreement was reached in the midst of a challenge by UVA to an almost identical civil subpoena served on the university last year by Virginia Attorney General Kenneth Cuccinelli, related to the Attorney General's allegations that Dr. Mann had committed fraud on the taxpayers by relying on science with which the Attorney General disagrees.⁸ Now that UVA has agreed to produce the documents in response to ATI's FOIA request, it is unclear whether Cuccinelli's litigation will continue or if he will elect to withdraw the subpoena, which was served pursuant to a state statute that requires some showing of fraud to proceed.

B. UNIVERSITY OF WISCONSIN

Two other recent FOIA requests arose out of the thus far successful efforts in Wisconsin to roll back state law enabling public employees to engage in collective bargaining. First, in mid-March 2011, the Wisconsin Republican Party requested the email records of William Cronon, a professor of history, geography, and environmental studies at the University of Wisconsin-Madison. The request targeted all of Professor Cronon's 2011 emails using the terms "Republican," "Scott Walker" (the Wisconsin governor), "recall," "collective bargaining," "rally," or "union," as well as the names of two public employee unions, the Wisconsin Speaker of the Assembly, the state Senate Majority Leader, or any of eight state politicians who had become the subjects of recall efforts.⁹ The request followed closely on the heels of a blog posting by Professor Cronon that outlined the role of the American Legislative Exchange Council, or ALEC, in a variety of conservative state legislative efforts.¹⁰

Wisconsin has one of the strongest open records laws in the country,¹¹ as well as a robust tradition of academic freedom. The University of Wisconsin is well-known for a quote that appears on the entrance to one of its main buildings: "Whatever may be the limitations which trammel inquiry elsewhere, we believe that the great state university of Wisconsin should ever encourage that continual and fearless sifting and

⁷ Letter from UVA president Teresa Sullivan to coalition groups in response to a letter expressing concern regarding academic freedom interests at stake in the ATI case (Apr. 21, 2011), available at <http://www.ucsusa.org/assets/4-21-11-Letter-from-UVA-to-Coalition-Orgs.pdf> (indicating that UVA intends to use "all available exemptions" in responding to the FOIA request). Among other categories of information, the state statute exempts from disclosure "data, records or information of a proprietary nature produced or collected by or for faculty or staff of public institutions of higher education . . . in the conduct of or as a result of research on medical, scientific, technical or scholarly issues . . . where such data, records or information has not been publicly released, published, copyrighted or patented." VA. CODE §2.2-3705.6 (2010).

⁸ For a timeline of Attorney General Cuccinelli's document demand and lawsuit against the University of Virginia, see *Timeline: Legal Harassment of Climate Scientist Michael Mann*, UNION OF CONCERNED SCIENTISTS http://www.ucsusa.org/scientific_integrity/abuses_of_science/va-ag-timeline.html (last visited Jun. 23, 2011). The American Association of University Professors (AAUP) submitted several *amicus* briefs in that litigation in partnership with the ACLU of Virginia, the Thomas Jefferson Center for the Protection of Free Expression, and the Union of Concerned Scientists.

⁹ See William Cronon, *Abusing Open Records to Attack Academic Freedom*, SCHOLAR CITIZEN Mar. 24, 2011, <http://scholarcitizen.williamcronon.net/2011/03/24/open-records-attack-on-academic-freedom/>.

¹⁰ See *Who's Really Behind Recent Republican Legislation in Wisconsin and Elsewhere? (Hint: It Didn't Start Here)*, SCHOLAR CITIZEN (Mar. 15, 2011), <http://scholarcitizen.williamcronon.net/2011/03/15/alec/>.

¹¹ See WIS. STAT. 19.31 to .39 (2011).

winnowing by which alone the truth can be found.”¹² With that commitment to academic freedom in mind, Chancellor Biddy Martin indicated that the university would respond to the records request by undertaking a balancing test, “taking such things as the rights to privacy and free expression into account.”¹³ The chancellor continued: “Scholars and scientists pursue knowledge by way of open intellectual exchange. Without a zone of privacy within which to conduct and protect their work, scholars would not be able to produce new knowledge or make life-enhancing discoveries.” She also highlighted the threat to the integrity of the state’s system of higher education if faculty communications were vulnerable to disclosure, warning that “[h]aving every exchange of ideas subject to public exposure puts academic freedom in peril and threatens the processes by which knowledge is created.”

The university’s formal response to the request identified several specific categories of records that would not be produced, including “intellectual communications among scholars.”¹⁴ Echoing Chancellor Martin’s words, the letter from the general counsel’s office explained: “Faculty members like Professor Cronon often use e-mail to develop and share their thoughts with one another. The confidentiality of such discussions is vital to scholarship and to the mission of this university. Faculty members must be afforded privacy in these exchanges in order to pursue knowledge and develop lines of argument without fear of reprisal for controversial findings and without the premature disclosure of those ideas.” The university concluded that “the public interest in intellectual communications among scholars . . . is outweighed by other public interests favoring protection of such communications.”¹⁵ The state Republican Party has stated that it does not intend to appeal the decision.¹⁶

C. UNIVERSITY OF MICHIGAN, MICHIGAN STATE UNIVERSITY, AND WAYNE STATE UNIVERSITY

¹² See Photograph of plaque at the entrance to Bascom Hall, *available at* <http://www.secfac.wisc.edu/SiftAndWinnow.htm>.

¹³ Letter from University of Wisconsin Chancellor Biddy Martin to the campus community (Apr. 1, 2011), *available at* <http://www.news.wisc.edu/19190>.

¹⁴ See Letter from John C. Dowling, University of Wisconsin-Madison Senior Legal Counsel to Stephan Thompson, Republican Party of Wisconsin Apr. 1, 2011, *available at* <http://www.news.wisc.edu/19196>.

¹⁵ The counsel’s office also explained that it had reviewed Professor Cronon’s emails for any evidence of use of the university’s resources for political or other improper purposes, and had found none. *See id.*

¹⁶ See Doug Lederman, *Wisconsin Stands Up for Professor*, INSIDE HIGHER ED (Apr. 4, 2011), http://www.insidehighered.com/news/2011/04/04/wisconsin_chancellor_cites_academic_freedom_in_shielding_e_mails_from_records_request. In early May, the Wisconsin Republican Party served another FOIA request, this time on the University of Wisconsin-Oshkosh. *See* Letter from Wisconsin Republican Party Executive Director Mark Jefferson to Chancellor Richard Wells of the University of Wisconsin-Oshkosh requesting documents under the state’s FOIA statute (May 5, 2011), *available at* http://www.wisgop.org/sites/default/files/5.5.11_ORR.pdf. The request arose out of an incident in which a criminal justice professor allegedly urged his students during class to sign a petition to recall a state senator. The request asks for emails to or from the professor that refer to Scott Walker, any of several state senators who are the targets of recall petitions (and the treasurer of one of the recall movements), “collective bargaining,” “rally,” “recall,” “petition,” “Republican,” “Wisconsin Progress PAC,” “Democratic Party of Wisconsin,” “Solidarity PAC,” “WEAC” (the Wisconsin Education Association Council), or “AFSCME.” The chancellor of that campus has indicated that the university intends to respond to the request, and has already made the professor’s disciplinary record and a number of underlying emails public—*see, e.g.*, Documents relating to Professor Stephen Richards, <http://www.uwosh.edu/chancellor/communications/documents-relating-to-professor-stephen-richards>—but has not yet responded formally to the request.

Finally, in March 2011, the Mackinac Center, a libertarian public policy think tank in Michigan, served a set of FOIA requests on the labor studies departments at the University of Michigan, Michigan State University, and Wayne State University. After a public outcry, the Mackinac Center explained that it had filed its request because pro-labor resources appearing on the websites of the labor studies centers (particularly at Wayne State) suggested that faculty members may have illegally used university resources for partisan political purposes. The Center proposed that the Michigan state legislature should scrutinize the use of state tax dollars for public higher education.¹⁷

While the Mackinac Center indicated that its request came in the wake of both the furor in Wisconsin over collective bargaining legislation and the debate over Michigan legislation expanding the powers of “emergency financial managers,” the Center’s requests were both broader and narrower than its explanation suggested. Specifically, although the Center referred to the Michigan legislation in its explanation of the requests, the requests in fact appeared to focus only on matters in Wisconsin, not Michigan. With respect to those matters, however, the requests swept far beyond simple concern about misuse of state resources, asking for all emails using the words “Scott Walker,” “Wisconsin,” “Madison,” or “Maddow” (as in Rachel Maddow, who had condemned Governor Walker and the state legislation), as well as “any other emails criticizing the collective bargaining situation in Wisconsin.”¹⁸

As of mid-May, the three universities had notified the Mackinac Center of the cost of fulfilling the requests (less than \$600 for the University of Michigan and Wayne State, and about \$5600 for Michigan State). The Mackinac Center indicated that it would pay for the two less expensive productions and would decide how to proceed with the request to Michigan State.¹⁹ The schools have not yet suggested whether they plan to withhold any of the records under either statutory or common-law exemptions.

These requests pose difficult issues for university administrators, scholars, FOIA experts, advocates of both academic freedom and open government, and others. How should the critical interests in government transparency be balanced with the equally vital interest in robust academic debates? Should an exemption for scholarly communications be included in state FOIA statutes? Before turning to the possible responses to these questions, a closer examination of what is at stake and how FOIA requests have affected scholarship is warranted.

II. THE INTEREST AT STAKE: THE POTENTIAL MISUSE OF FOIA REQUESTS TO CHILL RESEARCH

While FOIA statutes serve a critical public function, making every scholarly exchange vulnerable to a FOIA request in the name of public disclosure could—as the

¹⁷ See Ken Braun, *The Public Purpose of Our ‘Professors’ Email’ FOIA Request*, THE MACKINAC CTR. FOR PUB. POLICY, <http://www.mackinac.org/14863> (last visited Jun. 24, 2011).

¹⁸ See Letter from The Mackinac Center for Public Policy to the Labor Studies Center at the University of Michigan requesting documents under the state’s FOIA statute (Mar. 25, 2011), available at <http://talkingpointsmemo.com/documents/2011/03/mackinac-center-foia.php?page=1>.

¹⁹ See Stephanie Wang, *MSU: FOIA Request Will Cost Thousands to Process*, THE MICHIGAN REVIEW, May 24, 2011, available at <http://www.michiganreview.com/archives/2996>.

Supreme Court has warned about political scrutiny of academics—foster an “atmosphere of suspicion and distrust” and stifle the “marketplace of ideas” that enables public universities to make invaluable contributions to the development of knowledge and to society.²⁰

Indeed, one academic has testified movingly to being the target of FOIA requests designed to halt his research.²¹ Dr. Paul Fischer conducted research at the Medical College of Georgia on children’s recognition of Camel’s “Old Joe” advertising campaign. Fischer was subpoenaed by R.J. Reynolds in litigation involving health warnings on promotional products, although his research was not mentioned in the plaintiff’s complaint, he was not listed as a witness for either side in the litigation, and his advertising research was unrelated to the subject of the suit. The subpoena requested a wide range of information, including contact information for the children who participated in the study, all notes and memos related to the study, and data tapes.

After Fischer successfully moved to quash the subpoena, R. J. Reynolds served a nearly identical records request on the college under the state Open Records Act, and a judge ordered the release of all of the requested documents. Although one of the college’s lawyers agreed with Fischer that R.J. Reynolds was attempting to harass him and other tobacco researchers to discourage future research, the school ultimately disclosed all of the information requested, including the names of the 3- to 6-year-old children who participated in Fischer’s study.²² Soon after, Fischer left the academy and went into private practice.

Similarly, a study on the effects of congressional scrutiny of National Institutes of Health (NIH) grants in 2004 found that over half of the researchers who responded had altered their research in some way after their grants were targeted politically, and fully a quarter reported that they had eliminated “entire topics from their research agendas.” Seventy percent of the participants agreed that the political environment at the time created a “chilling effect,” and over half believed the NIH was likely to reduce funding as a result.²³

Of course, fear of a FOIA request is not the same as fear of reduced governmental funding, and a successful FOIA request will not necessarily result in reduced governmental or institutional support. There are surely a number of scholars who continue to pursue their work in the face of threatened records demands, legislative scrutiny, and more. But it would not be unreasonable, particularly in the current political and funding climate, for scholars and researchers to worry that targeted FOIA requests are an effort to stifle debate rather than to foster it, and to anticipate that already-stressed

²⁰ See *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (“Scholarship cannot flourish in an atmosphere of suspicion and distrust.”); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (“The classroom is peculiarly the marketplace of ideas.”). Indeed, as one court has observed, “the goal of both the FOIA and its exemptions is good government, not disclosure for disclosure’s sake.” *Herald Company, Inc. v. E. Mich. Univ. Bd. of Regents*, 693 N.W. 2d 850, 860 (Mich. Ct. App. 2005).

²¹ Paul M. Fischer, *Science and Subpoenas: When do the Courts Become Instruments of Manipulation?*, 59 LAW & CONTEMP. PROBS. 159 (1996).

²² An attorney for R.J. Reynolds explained in another tobacco case that “[t]he aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive. . . . To paraphrase General Patton, the way we won these cases was not by spending all of Reynolds’ money, but by making the other son of a bitch spend his.” *Id.* at 166 n.37 (quoting Complaint, *Florida v. American Tobacco Co. et al.*, No. CL-1466A0 at 28-29 (Fla. Cir. Ct., Apr. 18, 1995) (memorandum from J. Michael Jordan, legal counsel, R.J. Reynolds)).

²³ See Joanna Kempner, *The Chilling Effect: How Do Researchers React to Controversy?*, 5 PLOS MED. 1571 (2008), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2586361>.

statehouses may be pressured to reduce funding for research at public colleges and universities on ostensibly academic grounds that legislators are ill-equipped to evaluate. In this regard, it is notable that in the NIH controversy described above, an outside advocacy group took credit for compiling the list of grants that became the target of congressional investigation.²⁴

The scholarly communications of social scientists, which were the target of two of the three recent FOIA demands, are both less and more threatened by demands for documents than the scientific research described above. On the one hand, scientific researchers may pursue multiple threads of a theory, or hit multiple dead ends, before hitting an area that is fruitful and publishable. Requiring them to reveal all of those areas of experimentation and failure could simply lead some to stop trying, at least with respect to difficult or controversial areas where funding could be at risk. Moreover, scientists often have a proprietary intellectual property interest in temporarily maintaining the privacy of their research. For this reason, a number of state FOIA statutes contain exemptions for scientific research materials that could constitute trade secrets or be patented, and some even include exemptions for general scholarly work, though very few contain explicit protections for communications among colleagues.²⁵ On the other hand, it is presumed that scientists will, at an appropriate point, share their data and research methodology so that their findings can be tested and refined through peer review and scrutiny. Often the question with respect to the release of scientific research is not “if” but “when.”

By contrast, some of the types of information sought in the recent FOIA requests will not necessarily be published for review by peers or be clearly protected by existing FOIA exemptions for trade secrets and other scientific material. Nevertheless, freedom of inquiry and debate in the social sciences is equally important to the values of academic freedom that the Supreme Court has lauded for the past half-century, as discussed below. As one court has explained, “[c]ompelled disclosure of confidential information would without question severely stifle research into questions of public policy, the very subjects in which the public interest is greatest.”²⁶ And as the Washington Post observed in response to the American Tradition Institute’s FOIA request to UVA, “Academics must feel comfortable sharing research, disagreeing with colleagues and proposing conclusions—not all of which will be correct—without fear that those who dislike their findings will conduct invasive fishing expeditions in search

²⁴ *Id.* at 1572 (stating that the “Traditional Values Coalition, a self-described conservative Christian lobbying group, claimed authorship of the list”).

²⁵ Michigan’s Confidential Research and Investment Information Act, for instance, exempts from disclosure intellectual property or “original works of authorship” that are created by a university employee “for purposes that include research, education, and related activities” until the author has a reasonable opportunity to publish it to the university community or to secure copyright registration. MICH. COMP. LAWS ANN. § 390.1554(Sec. 4(1)(a)) (2011); *see also* South Carolina’s Public Records Act, allowing public bodies to exempt “[d]ata, records, or information of a proprietary nature, produced or collected by or for faculty or staff of state institutions of higher education in the conduct of or as a result of study or research on commercial, scientific, technical, or scholarly issues,” as well as similar “data, records, or information developed, collected, or received by or on behalf of faculty, staff, employees, or students of a state institution of higher education . . . in the conduct of or as a result of study or research on medical, scientific, technical, scholarly, or artistic issues,” including “information provided by participants in research, research notes and data, discoveries, research projects, proposals, methodologies, protocols, and creative works.” S.C. CODE ANN. § 30-4-40(14(A)-(B)) (2010).

²⁶ *Richards of Rockford, Inc. v. Pacific Gas & Electric Co.*, 71 F.R.D. 388 (N.D. Cal. 1976).

of a pretext to discredit them. That give-and-take should be unhindered by how popular a professor's ideas are or whose ideological convictions might be hurt."²⁷

It is therefore especially critical to identify mechanisms by which these communications may be protected, either via explicit exemptions or by a balancing approach that takes into account the value of academic collaboration.

III. JUDICIAL RESPONSES

A. RECOGNITION OF ACADEMIC FREEDOM

Starting in the McCarthy era, in response to threatened incursions by state legislatures and attorneys general into the operations of universities, the Supreme Court accorded special attention to academic freedom, including it within the free speech protections of the First Amendment. In *Sweezy v. New Hampshire*,²⁸ a professor at the University of New Hampshire was interrogated by the state's Attorney General about his affiliations with communism. After the professor, Paul Sweezy, refused to answer a number of questions before a judge, he was found in contempt of court and thrown in jail. A plurality of the Supreme Court held that there had been an "invasion of [Sweezy's] liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread."²⁹ The opinion continued:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.³⁰

A decade later, in *Keyishian v. Board of Regents*,³¹ the Court ruled that requiring faculty at SUNY-Buffalo to sign loyalty oaths affirming they were not members of the Communist party was an unconstitutional violation of their rights to academic freedom and freedom of association. Echoing its earlier invocation of academic freedom as critical to the development of democracy and the search for truth, the Court elaborated:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to

²⁷ Editorial, *Harassing Climate-change Researchers*, WASH. POST, May 30, 2011, at A22, available at http://www.washingtonpost.com/opinions/harassing-climate-change-researchers/2011/05/27/AG1xJMEH_story.html.

²⁸ 354 U.S. 234 (1957).

²⁹ *Id.* at 250.

³⁰ *Id.* Earlier in the decade, Justice Douglas also invoked academic freedom in a dissent, cautioning: "Where suspicion fills the air and holds scholars in line for fear of their jobs, there can be no exercise of the free intellect [I]t was the pursuit of truth which the First Amendment was designed to protect." *Adler v. Bd. of Educ.*, 342 U.S. 485, 509-11 (1952) (Douglas, J., dissenting).

³¹ 385 U.S. 589 (1967).

the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom The classroom is peculiarly the ‘marketplace of ideas.’ The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection.³²

U.S. courts of appeals have also articulated forcefully the values at stake in these cases. In *Dow Chemical Company v. Allen*,³³ the Environmental Protection Agency scheduled cancellation hearings for one of Dow Chemical Company’s herbicides on the basis of studies conducted at the University of Wisconsin, and Dow attempted to issue subpoenas to the study’s researchers for all of their notes, reports, working papers, and raw data. The Seventh Circuit refused to enforce the subpoenas, based primarily on an analysis of Dow’s need for the materials (low) and the burden that forced disclosure would impose upon the researchers (high). The researchers’ affidavits described the harm that would come from enforcing the subpoena, including their inability to subsequently publish the studies (which were incomplete and ongoing) and the potential destruction of months or years of research. The Seventh Circuit upheld the district court’s finding that “the risk of even inadvertent premature disclosure so far outweighed the probative value of and need for the information as to itself constitute an unreasonable burden.”³⁴

The panel majority also took up the question of whether the dispute implicated interests of academic freedom—a claim raised not by either of the parties but by the State of Wisconsin as *amicus*. As the court observed, the State’s argument in a nutshell was that “scholarly research is an activity which lies at the heart of higher education, that it lies within the First Amendment’s protection of academic freedom, and therefore judicially authorized intrusion into that sphere of university life should be permitted only for compelling reasons.”³⁵ While noting that the “precise contours of the concept of academic freedom are difficult to define,” the court cited approvingly to *Sweezy* and *Keyishian*, and opined that it was “clear that whatever constitutional protection is afforded by the First Amendment extends as readily to the scholar in the laboratory as to the teacher in the classroom.”³⁶ The court endorsed a balancing inquiry when it came to weighing the merits of an asserted academic freedom privilege,

³² *Id.* at 603 (internal quotation marks and citations omitted); see also *Rust v. Sullivan*, 500 U.S. 173, 200 (1991) (“[T]he university is a traditional sphere of free expression so fundamental to the functioning of our society.”); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (“[A]cademic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment.”); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) (“The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”); *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring) (“[I]nhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of [the Bill of Rights and Fourteenth Amendment] vividly into operation. Such unwarranted inhibition upon the free spirit of teachers . . . has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice”); *Adams v. Trustees of Univ. of N.C.-Wilmington*, No. 10-1413, 2011 WL 1289054, at *5-6, *9-10, *11 (4th Cir. Apr. 6, 2011) (noting that speech related to scholarship and teaching implicates interests under the First Amendment related to academic freedom).

³³ 672 F.2d 1262 (7th Cir. 1982).

³⁴ *Id.* at 1274

³⁵ *Id.*

³⁶ *Id.* at 1275.

suggesting that “to prevail over academic freedom the interests ... must be strong and the extent of intrusion carefully limited.”³⁷

In this case, the subpoena would have required the University of Wisconsin researchers not only to turn over “virtually every scrap of paper and every mechanical or electronic recording made” during the period that the studies had been proceeding, but also to make available any “additional useful data” that emerged during the course of the dispute.³⁸ As the court added, “It is not unduly speculative to imagine that a large private corporation, through repeatedly securing broad-based subpoenas requiring total disclosure of all notes, reports, working papers, and raw data relating to on-going studies, could make research in a particular field so undesirable as to chill or inhibit whole areas of scientific inquiry.”³⁹ The court therefore concluded that “there is little to justify an intrusion into university life which would risk substantially chilling the exercise of academic freedom.”⁴⁰

Yet despite these powerful statements by our nation’s highest court and appellate courts recognizing the value of academic freedom and its grounding in the First Amendment, courts charged with reviewing scholarly claims of confidentiality in the face of requests for disclosure pursuant to state FOIA statutes have rendered uneven decisions.

B. JUDICIAL TREATMENT OF STATE FREEDOM OF INFORMATION STATUTES

State FOIA statutes vary widely in their treatment of university-related records, ranging across a spectrum from silence to specific exemptions for presidential search materials or documents protected by federal privacy laws to much broader recognition of protection for at least some categories of scholarly materials. State statutes that do articulate an exemption for scholarly materials provide courts (and records custodians) with specific guidance by which to evaluate records requests. Where the statute is silent or ambiguous, however, courts are generally reluctant to second-guess the legislature by reading in an exemption—though some courts will conduct a balancing inquiry, most commonly if directed to do so by the statute itself.

In *State ex rel. Thomas v. Ohio State University*, the Ohio Supreme Court rejected Ohio State University’s assertion that disclosure to animal rights activists of the names and addresses of animal research scientists would have a chilling effect on the scientists’ First Amendment right to academic freedom.⁴¹ The court relied on its decision half a year earlier in *State ex rel. James v. Ohio State University*,⁴² which in turn relied on the U.S. Supreme Court’s 1990 decision in *University of Pennsylvania v. EEOC*.⁴³ In that case, the Supreme Court concluded that tenure records could be disclosed to the Equal Employment Opportunity Commission without violating the university’s as-

³⁷ *Id.*

³⁸ *Id.* at 1276.

³⁹ *Id.* at 1276 n.25.

⁴⁰ *Id.* at 1276-77. *Cf.* *Deitchman v. E.R. Squibb & Sons, Inc.*, 740 F.2d 556 (7th Cir. 1984) (holding that the drug company Squibb, as the defendant in a products liability lawsuit, would be permitted to subpoena some factual information from a non-party University of Chicago cancer researcher because Squibb would otherwise be at a significant disadvantage in litigation). Squibb would not, however, be able to obtain “any material reflecting development of [the researcher’s] ideas or stating ... conclusions not yet published.” *Id.* at 565.

⁴¹ 643 N.E.2d 126 (Ohio 1994).

⁴² 637 N.E.2d 911 (Ohio 1994).

⁴³ 493 U.S. 182 (1990).

served First Amendment right to academic freedom. The Court reasoned that the agency's demand for confidential tenure review materials did not prevent the university and its faculty from exercising their best academic judgment regarding faculty hiring and promotion.

The *University of Pennsylvania* holding arguably stood for a far more limited proposition than the Ohio Supreme Court believed, since the university's academic privilege claim was being weighed against the substantial interest in enforcement of federal anti-discrimination laws. Nevertheless, several state courts, including Ohio's, have relied on it for the proposition that there is no privilege in academic materials.⁴⁴ The *Thomas* court further declined to read in an unstated exemption to the state's open records statute, quoting *James*:

[I]n enumerating very narrow, specific exceptions to the public records statute, the General Assembly has already weighed and balanced the competing public policy considerations between the public's right to know how its state agencies make decisions and the potential harm, inconvenience or burden imposed on the agency by disclosure.⁴⁵

Acknowledging that the release of contact information for the animal research scientists could pose some risk, the Court concluded that the General Assembly "should consider a personal privacy exemption similar to those in [the federal] FOIA."⁴⁶

Similarly, the Florida Supreme Court refused to confer a privilege upon discussions of a new law school dean by a committee advising the president of the University of Florida.⁴⁷ After concluding that the committee performed the type of policy-based and decision-making function that brought it within the purview of Florida's Sunshine Law, the Court added: "[The university] vigorously contend[s] that opening the committee's meetings would threaten dearly held rights of academic freedom. This Court recognizes the necessity for the free exchange of ideas in academic forums, without fear of governmental reprisal, to foster deep thought and intellectual growth." In the absence of a specific exemption, however, the Court declined to shield these materials.⁴⁸

In a case a decade later, New York's highest court was similarly reluctant, in the absence of an explicit statutory exemption, to construe the state's Freedom of Information Law to protect filmstrips used in a college sexuality course. The court

⁴⁴ See, e.g., *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wash. 2d 243, 264-65 (1994); *Students for the Ethical Treatment of Animals v. Huffines*, 399 S.E.2d 340 (N.C. Ct. App. 1991), *aff'd by* 420 S.E.2d 674 (N.C. Ct. App. 1992); *ASPCA v. Bd. of Trustees of State Univ.*, 147 Misc. 2d 847 (N.Y. Sup. Ct. 1990).

⁴⁵ *Thomas*, 643 N.E. 2d at 130 (quoting *James*, 637 N.E.2d at 913-914) (citation omitted).

⁴⁶ *Id.* at 130.

⁴⁷ *Wood v. Marston*, 442 So. 2d 934 (Fla. 1983).

⁴⁸ *Id.* at 941. One dissenting justice expressed concern about the application of the Sunshine Law to the search committee, declaring: "The mission of the universities is not to govern or supervise, but rather is to develop human resources, to discover and disseminate knowledge, to extend knowledge and its application beyond the boundaries of its campuses, and the like In order to insure personal rights of privacy and academic freedom, legislation should be construed so that any intrusion is carefully limited." *Id.* at 943-44 (McDonald, J., dissenting).

ruled that the “breadth of the statutory language,” along with the purpose of the law, “compel[led]” it to hold that the items fell within the scope of the law.⁴⁹

IV. RESOLVING THE DILEMMA

A. STATUTORY EXEMPTIONS

In light of this judicial reluctance to read in unstated statutory exemptions, perhaps the most obvious method to avoid creating the “atmosphere of suspicion and distrust” against which the Supreme Court cautioned in *Keyishian* would be for state legislatures to affirmatively articulate a statutory exemption. Several states already provide broad protection for their faculty members’ papers. New Jersey, for instance, exempts “scholarly records,”⁵⁰ and Ohio exempts “intellectual property records,” defined as records produced or collected by faculty and other employees of state universities “in the conduct of or as a result of study or research on an educational, commercial, scientific, artistic, technical, or scholarly issue . . . that ha[ve] not been publicly released, published, or patented.”⁵¹ Utah is perhaps the most protective of its faculty members’ freedom to communicate without fear of intrusion. The state’s open records statute shields records within the state system of higher education that have been “developed, discovered, disclosed to, or received by or on behalf of faculty, staff, employees, or students of the institution,” including unpublished lecture notes; unpublished research-related notes, data, and other information; confidential information contained in research proposals; unpublished manuscripts; creative works in progress; and “scholarly correspondence.”⁵²

Using one or more of the examples above as a model, states could preserve government transparency while fostering scholarly and academic freedom by carving out scholarly materials and non-administrative communications from the coverage of their FOIA statutes. Language similar to Utah’s would be the most robust, but states desiring more latitude could begin with another’s, such as Ohio. Such statutory exemptions would enable faculty to communicate about a variety of controversial and sensitive issues without self-censorship. The carve-outs would also provide certainty and concrete guidance to scholars, the public, and courts about what matters are outside of the realm of disclosable records. This approach could also help synchronize the treatment of identical materials in the litigation and FOIA contexts—since, as described above and in more detail below, courts have generally been more sympathetic to claims of privilege in litigation than in the context of FOIA requests, resulting in compelled disclosure of documents in some circumstances but not in others.

B. BALANCING ACADEMIC FREEDOM AND DISCLOSURE

As an alternative to an explicit exemption for faculty materials, courts and records custodians could undertake a balancing test when faced with competing claims for disclosure and protection of academic freedom. Indeed, Justice Breyer recently affirmed that a balancing approach is appropriate where constitutional interests come

⁴⁹ *Russo v. Nassau Cnty. Cmty. College*, 623 N.E.2d 15, 19 (N.Y. 1993). As *amici*, the ACLU, the Association of Community College Trustees, and the American Association of University Professors had urged the court to recognize an academic freedom exception for the materials, but the court declined to consider those arguments.

⁵⁰ N.J. STAT. ANN. § 47:1A-1.1 (West 2011).

⁵¹ OHIO REV. CODE ANN. 149.43(A)(5) (West 2011).

⁵² UTAH CODE ANN. § 63G-2-305(40)(a) (West 2010).

into conflict, observing that “[i]n circumstances where ... a law significantly implicates competing constitutionally protected interests in complex ways, the Court balances interests.”⁵³ Some institutions might use a university committee to conduct this inquiry, with judicial review available where the committee’s determination is challenged.⁵⁴ Courts already undertake this balancing test in two contexts: in litigation, where parties serve third-party subpoenas on scholars hoping to obtain relevant information, and in the FOIA context, where they are directed to do so by the state statute or where the courts have imported it into the statute as a common-law gloss on the statutory requirements.⁵⁵ Such an approach is therefore already tested and would allow states that are uneasy about a blanket exception to instead direct a case-by-case inquiry.

In the arena of FOIA requests, Wisconsin courts have articulated one of the clearest expressions of this balancing policy. The state’s Open Records Act is premised on a “presumption of complete public access, consistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.”⁵⁶ Nevertheless, Wisconsin courts incorporate a common-law balancing test into their analysis of Open Records Act requests. In *Osborn v. Board of Regents of University of Wisconsin System*, for instance, a Wisconsin resident and the state Center for Equal Opportunity submitted a request for records of applicants to the University of Wisconsin.⁵⁷ While ultimately ruling that the university was obligated to disclose the records because they did not

⁵³ *Doe v. Reed*, 130 S. Ct. 2811, 2822 (2010) (Breyer, J., concurring) (citation and internal quotation marks omitted); *see also* *Eisen v. Regents of Univ. of Cal.*, 269 Cal. App. 2d 696, 706 (Cal. App. Ct. 1969) (“Impairments of First Amendment rights are ‘balanced’ by determining whether there is a reasonable relationship between the impairment and a subject of overriding and compelling state interest. There can be no doubt that disclosure requirements may impair rights of free speech and association” (citation omitted)).

⁵⁴ The American Association of University Professors recommended such a committee and reaffirmed the utility of a balancing approach in its 1996 Report on Access to University Records. As the Report explained, “[w]hile access confers benefits, it also carries costs and potential dangers, many of which apply with special force to an academic community by virtue of its essential, perhaps unique, mission to search for and disseminate truth by wide-ranging exploration of inchoate ideas and hypotheses, some of which may be seen as dangerous by others in the society. Sound policy requires a balancing of the benefits and costs of open access.” American Association of University Professors, *Report on Access to University Records*, ACADEME 44, 45 (1997). The Report articulated a number of interests that would be served by limitations on access to university documents, including the “need to create and preserve a climate of academic freedom in the planning and conduct of research, free from harassment, public and political pressure, or premature disclosure of research in process”; “the need to create a climate in which the university’s teaching activities are unimpeded and open to innovation and in which controversial issues may be explored without externally imposed limits on what is said, read, or debated”; and “the need to avoid what has been called ‘the chilling effect’ on what is explored and what is taught.” *Id.* With respect to requesters from outside the university community (such as external advocacy groups), the Report suggested that “considerations of privacy, academic freedom, and the desirable insulation of the university from outside pressures, as well as considerations of efficient operation of the educational enterprise, argue in favor of a *strong* or even *compelling* presumption against access to university documents for which a reasonable claim of confidentiality has been made.” *Id.* at 47.

⁵⁵ This approach also has some similarities to the inquiry undertaken by courts in states with anti-SLAPP statutes. Strategic Litigation Against Public Participation (SLAPP) suits are generally libel or conspiracy suits brought against journalists, unions, citizen activists, and others to quell commentary on public issues; many states have “anti-SLAPP” statutes designed to allow the targets to dismiss the suits before they reach the merits stage. *See Responding to Strategic Lawsuits Against Public Participation (SLAPPs)*, CITIZEN MEDIA LAW PROJECT, <http://www.citimedialaw.org/legal-guide/responding-strategic-lawsuits-against-public-participation-slapps> (last visited Jul. 27, 2011).

⁵⁶ WIS. STAT. 19.31 (2011).

⁵⁷ 647 N.W.2d 158 (Wis. 2002).

contain personally identifiable information, the Wisconsin Supreme Court reached that conclusion only after utilizing a balancing inquiry. The Court observed that “we have a presumption of open access to public records, which is reflected in both our statutes and our case law.”⁵⁸ Nevertheless, “[t]he right to inspect public records . . . is not absolute. In certain circumstances, a custodian should deny a request to inspect public records.”⁵⁹ In the absence of a specific statutory exemption, the custodian should “weigh the competing interests involved and determine whether permitting inspection would result in harm to the public interest which outweighs the legislative policy recognizing the public interest in allowing inspection.”⁶⁰

Other states have explicitly written a balancing test into their FOIA statutes. In Michigan, for instance, when the government invokes the “frank communications” exemption to a FOIA request, the statute imposes an obligation “not only [t]o show that disclosure would inhibit frank communications” but also to “articulate why the promotion of frank communications . . . ‘clearly’ outweighs the public’s right to know.”⁶¹ Similarly, Utah’s statute sets out a balancing test for records for which there is no statutory exemption: a court can order that records be kept confidential if “(a) there are compelling interests favoring restriction of access to the record, and (b) the interests favoring restriction of access clearly outweigh the interests favoring access.”⁶²

The ability of courts to undertake a similar balancing inquiry—weighing the interests in access against the interests in non-disclosure—in the context of civil and criminal subpoenas and grand jury investigations further bolsters their capacity to make similar judgments in the FOIA context. The obligation to disclose information may, of course, be both stronger and weaker in the litigation context than in the FOIA arena: stronger in criminal prosecutions and grand jury investigations, where there is often a particularly critical need to obtain information, and weaker with respect to civil subpoenas, where federal rules of civil procedure impose a built-in balancing test and some showing of necessity. Nevertheless, the decisions in this area suggest that the researcher’s interest in free exchange of information and the public’s interest in unimpeded flow of information are critical factors to be weighed in the balance. And in light of the fact that two identical records requests for Dr. Mann’s records at UVA have already yielded very different results—a Virginia state court decision largely sympathetic to the university in the Attorney General’s fraud litigation (currently on review by the state Supreme Court), and an agreement to release all of the documents in response to the FOIA request—it would be sensible to harmonize the treatment of those different demands to ensure that one approach does not simply become a way of circumventing another.

C. A REPORTER’S PRIVILEGE?

A related approach would be to analogize to a journalistic privilege in the balancing inquiry. Indeed, the Delaware legislature has set out a reporter’s privilege that

⁵⁸ *Id.* at 165.

⁵⁹ *Id.* at 166.

⁶⁰ *Id.*

⁶¹ *Herald Co., Inc. v. E. Mich. Univ. Bd. of Regents*, 693 N.W.2d 850, 858 (Mich. Ct. App. 2005), *aff’d* by 719 N.W.2d 19 (Mich. 2006).

⁶² UTAH CODE ANN. § 63G-2-405(1) (West 2010); *see also* California’s Public Records Act, CAL. GOV’T CODE § 6255 (West 2011) (“The agency shall justify withholding any record by demonstrating that . . . on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.”).

protects some scholarly work as well. The statute defines “reporter” to include a “scholar, educator, [or] polemicist,” and permits all “reporters” to decline to testify in non-adjudicative proceedings about either the source or the content of information they have gathered with the intent of disseminating it to the public.⁶³

Some courts have been receptive to this analogy. In *In re Cusumano v. Microsoft Corp.*,⁶⁴ the First Circuit endorsed the use of a balancing test where Microsoft, embroiled in an anti-trust prosecution over its dealings with Netscape, subpoenaed two MIT and Harvard professors for materials underlying their pending book on the war between the two companies.⁶⁵ The professors, who had conducted multiple interviews with Netscape employees under promises of confidentiality, argued that their work warranted protection under a journalists’ privilege. The professors asserted that requiring them to disclose their materials would “endanger the values of academic freedom safeguarded by the First Amendment and jeopardize the future information-gathering activities of academic researchers.”⁶⁶ The court recognized the significant chilling effect that would occur if researchers and academics were unilaterally subject to subpoenas without exception: “If [scholars’] research materials were freely subject to subpoena, their sources likely would refuse to confide in them. As with reporters, a drying-up of sources would sharply curtail the information available to academic researchers and thus would restrict their output [A]n academician, stripped of sources, would be able to provide fewer, less cogent analyses.”⁶⁷ The court therefore concluded that “when a subpoena seeks divulgement of confidential information compiled by a journalist or academic researcher in anticipation of publication, courts must apply a balancing test.”⁶⁸

⁶³ DEL. CODE. ANN. tit. 10, §§ 4320(4), (7), 4321 (2011).

⁶⁴ 162 F.3d 708 (1st Cir. 1998).

⁶⁵ Boston College recently invoked *Cusumano* in response to a document request from the British government. In spring and summer 2011, the government of the United Kingdom served two subpoenas on the college, which maintains an oral history archive of the “Irish Troubles,” the period of sectarian strife in Northern Ireland dating from the 1960s through the 1980s. The subpoenas, which were served pursuant to a criminal assistance treaty between the UK and the United States government, request a range of documents related to interviews of former Irish Republican Army members who had been promised that the materials would remain confidential until their deaths. Boston College asked a federal trial court to quash the subpoena, citing concerns about the free flow of information, particularly confidential information, and urging the court to balance the interests in the criminal investigation against the interests in the protection of academic research: “In *Cusumano*. . . the First Circuit found the interest in protecting academic research materials to be grounded, as is the interest in protecting news reporters’ materials, in the First Amendment. Those precedents are the ones on which Boston College relies in asking this Court to weigh the interest in protecting the academic research at issue here from compulsory disclosure.” Memorandum of Trustees of Boston College in Reply to Government’s Opposition to Motion to Quash Subpoenas and in Opposition to Government’s Motion to Compel at 6, *In re Request from the U. K. Pursuant to the Treaty Between the Gov’t of the U. S. and the Gov’t of the U. K. on Mutual Assistance in Criminal Matters in the Matter of Dolours Price*, No. 1:11-mc-91078-RGS (D. Mass. July 15, 2011) [hereinafter *In re Request from the U.K.*]. The U.S. Attorney’s Office has asserted that “[i]n the face of a subpoena to advance a criminal investigation . . . there is no academic privilege which shields the material from disclosure.” Government’s Opposition to Motion to Quash and Motion for an Order to Compel at 2, *In re Request from the U.K.*, No. 1:11-mc-91078-RGS (D. Mass. July 1, 2011). The oral historians whose materials are targeted have also sought to enter the case as intervenors. The court has not yet ruled on the subpoenas.

⁶⁶ *Id.* at 713.

⁶⁷ *Id.*

⁶⁸ *Id.* at 715. The court issued a similar warning in *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 595-96 (1st Cir. 1980) (footnote omitted), in which it observed that “courts faced with enforcing requests for the discovery of materials used in the preparation of journalistic reports should be aware

A federal district court in California anticipated *Cusumano's* approach by some two decades. In *Richards of Rockford, Inc. v. Pacific Gas & Electric Company*,⁶⁹ a Harvard professor who had conducted confidential interviews with Pacific Gas & Electric employees on a variety of subjects was the subject of a third-party subpoena in a lawsuit against PG&E. In considering the professor's refusal to reveal either the identity of the employees or the substance of their interviews, the court indicated that it would balance the interests in disclosure against the "public interest in maintaining confidential relationships between academic researchers and their sources."⁷⁰ The court reasoned that "society has a profound interest in the research of its scholars, work which has the unique potential to facilitate change through knowledge Compelled disclosure of confidential information would without question severely stifle research into questions of public policy, the very subjects in which the public interest is greatest."⁷¹ Relying on the elements of the qualified journalist's privilege, the court concluded that because the lawsuit was civil, because the researcher was not a party to the lawsuit, and because much of the information was available elsewhere, it would be inappropriate to compel the researcher to produce the materials.⁷²

Indeed, courts have broadly applied the journalist's privilege to anyone engaged in the endeavor of newsgathering and dissemination of information. In *Shoen v. Shoen*, the Ninth Circuit held that anyone gathering information for eventual dissemination, including an investigative author, is protected by a qualified privilege. As the court observed, "society's interest in protecting the integrity of the newsgathering process, and in ensuring the free flow of information to the public, is an interest of sufficient social importance to justify some incidental sacrifice of some sources of facts needed in the administration of justice."⁷³ The court also quoted approvingly two commentators' explanation of the harm that could result from compelled disclosure of information gathered by journalists. In language that could apply equally to scholars, the authors explained that compelled disclosure would harm the ability to gather information by:

damaging confidential sources' trust in the press' [or academics'] capacity to keep secrets and, in a broader sense, by converting the press [or academy] in the public's mind into an investigative arm of prosecutors and the courts. It is their independent status that often enables reporters [or scholars] to gain access, without a pledge of confidentiality, to meetings or places where a policeman or politician would not be welcome. If perceived as an adjunct of the police or of the courts, journalists [or researchers] might well be shunned by persons who might otherwise give them information without a

of the possibility that the unlimited or unthinking allowance of such requests will impinge upon First Amendment rights. In determining what, if any, limits should accordingly be placed upon the granting of such requests, courts must balance the potential harm to the free flow of information that might result against the asserted need for the requested information."

⁶⁹ 71 F.R.D. 388 (N.D. Cal. 1976).

⁷⁰ *Id.* at 389.

⁷¹ *Id.* at 389-90.

⁷² *Id.* at 390 (citing *Baker v. F & F Investment*, 470 F.2d 778 (2d Cir. 1972)).

⁷³ *Shoen*, 5 F.3d at 1292 (citation and internal quotation marks omitted).

promise of confidentiality, barred from meetings which they would otherwise be free to attend and to describe⁷⁴

The Ninth Circuit was so persuaded by this reasoning that it held that the privilege applied even where there had been no offer of confidentiality.

At the same time, consistent with the balancing approach, courts have resisted efforts to assert a blanket privilege for researchers, particularly in the social sciences and particularly where grand juries are concerned. In *United States v. Doe (In re Popkin)*,⁷⁵ an assistant professor of government at Harvard and scholar of the Vietnam War was called to testify to a federal grand jury investigating the Pentagon Papers. Relying on grounds that included a First Amendment scholar's privilege, Samuel Popkin declined to provide certain pieces of information. The First Circuit noted that there is an "important public interest in the continued flow of information to scholars about public problems which would stop if scholars could be forced to disclose the sources of such information."⁷⁶ In the context of the grand jury investigation, however, the court rejected the assertion that conversations among scholars should be protected and ordered Popkin to disclose the names of persons he interviewed and the content of his conversations with Daniel Ellsberg.⁷⁷

In *In re American Tobacco Company*,⁷⁸ the Second Circuit had occasion to consider the scholar's privilege in some detail. Three tobacco companies—American Tobacco, R.J. Reynolds, and Philip Morris—served third-party subpoenas on the Mount Sinai School of Medicine and the American Cancer Society (the Society) in the course of products liability lawsuits. Because the tobacco companies believed that the plaintiffs in the suits would rely on studies directed by researchers at Mt. Sinai and the Society, the companies sought the data underlying the studies. The first set of subpoenas, seeking a broad range of information including the methodology of the studies, questionnaires, and all raw data, was served in the course of state court litigation. A New York state court ultimately quashed the subpoenas, concluding that compliance would "hinder the normal functioning" of the medical school and the Society and could have "a chilling effect and discourage future scientific endeavors." The state court added that the constitutional right of academic freedom, while "not absolute," could be "balanced against other competing interests" and "figure into the legal calculation of whether forced disclosure would be reasonable."⁷⁹

⁷⁴ *Id.* at 1295 (quoting Duane D. Morse & John W. Zucker, *The Journalist's Privilege*, in TESTIMONIAL PRIVILEGES 474-75 (Scott N. Stone & Ronald S. Liebman eds., 1983)).

⁷⁵ 460 F.2d 328 (1st Cir. 1972).

⁷⁶ *Id.* at 333.

⁷⁷ With respect to the demand for Popkin's opinions about who had access to the documents forming the Pentagon Papers, the court declined to enforce the grand jury's request. The author of the decision, Judge Coffin, opined that "[i]n the long run, the quest for opinions would not be a useful investigative tool. If appellant were forced to answer, scholar-sleuths would in the future think long and hard before admitting to an opinion, and grand juries would be without workable means for forcing them to do so." *United States v. Doe (In re Popkin)*, 460 F.2d 328, 335 (1st Cir. 1972). The court agreed on this issue only on the narrower ground that the questions were badly phrased, however. *See id.* at 337 (Aldrich, J., concurring).

⁷⁸ 880 F.2d 1520 (2d Cir. 1989).

⁷⁹ *American Tobacco*, 880 F.2d at 1523-24 (quoting *In re R.J. Reynolds Tobacco Co.*, 518 N.Y.S.2d 729, 731-34 (N.Y. Sup. Ct. 1987)).

Soon after the state court's decision, the tobacco companies served a somewhat narrower set of subpoenas in connection with several lawsuits in federal court, primarily seeking computer tapes that stored the raw data but excluding some confidential information. Mt. Sinai and the Society again moved to quash; the district court denied the motion, concluding that no expert's privilege existed and that the burden of redacting the materials was not "unduly burdensome," though the court did enter a limited protective order.

On appeal, the Second Circuit concluded that the earlier state court decision did not establish a scholar's privilege, and that it stood, at most, for the proposition that "the scholar's interest in his data" was "a factor to be taken into account in weighing the burdens of production."⁸⁰ The court reasoned that a scholar's privilege, if one existed, would have to be analyzed in light of the burdens of compliance and the researchers' interest in their data—in effect, a balancing inquiry. The panel held that the researchers' interest here was outweighed by the tobacco companies' because only data underlying previously published articles were being targeted. The court therefore upheld the district court's decision and declined to modify the protective order.

Taken together, these cases suggest that a balancing inquiry is appropriate where there is tension between significant constitutional and public interests, and that courts are capable of carrying out this balancing process not only in the litigation context but with respect to FOIA requests as well. As in the litigation arena and as with the qualified journalist's privilege, First Amendment academic freedom would not necessarily provide absolute immunity from public document requests for faculty materials, but it would be given serious and thoughtful consideration in the balance.

D. ACADEMICS COULD BE CONSIDERED OUTSIDE THE PURVIEW OF FOIA STATUTES

Finally, scholars may simply not be covered by many state FOIA statutes, which target activity carried out by public officials or on behalf of the public. Michigan's Freedom of Information Act, for instance, defines a "public record" as "a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function"⁸¹ Similarly, the statement of legislative intent underlying Wisconsin's Public Records Law states that citizens are entitled to information regarding "the affairs of government and the official acts of those officers and employees who represent them."⁸²

Seen in this light, it would be consistent to read many state FOIA statutes as not encompassing much work that faculty do. Most government employees are elected, hired, or appointed to carry out a particular governmental agenda; either they participate in forming government policy and thus engage in official acts, or they are working under the direction of those who are and thus carry out duties for the public. Faculty members at public institutions, by contrast, are hired not to pursue a particular governmental agenda, but instead to participate as equal members of the academic community and to engage in creative and innovative scholarship, research, and teach-

⁸⁰ *Id.* at 1528.

⁸¹ MICH. COMP. LAWS § 15.232(e) (2011).

⁸² WIS. STAT. § 19.31.

ing. While their appointment and the subject of their work may well be of interest to the public, the content of that work is not properly a subject of public oversight.⁸³

The American Association of University Professors' 1915 Declaration of Principles on Academic Freedom and Academic Tenure reiterates this dynamic, explaining that in the "relationship between university trustees and members of university faculties," the "latter are the appointees, but not in any proper sense the employees, of the former."⁸⁴ The Declaration conceives of this relative freedom for faculty as the essential precondition for the public service that scholars are understood to provide. As the Declaration explains, it is of critical societal interest

that what purport to be the conclusions of men trained for, and dedicated to, the quest for truth, shall in fact be the conclusions of such men, and not echoes of the opinions of the lay public, or of the individuals who endow or manage universities. To the degree that professional scholars ... are, or ... appear to be, subject to any motive other than their own scientific conscience and a desire for the respect of their fellow experts, to that degree the university teaching profession is corrupted; its proper influence upon public opinion is diminished and vitiated; and society at large fails to get from its scholars, in an unadulterated form, the peculiar and necessary service which it is the office of the professional scholar to furnish.⁸⁵

Whether public-sector faculty should be treated differently from the majority of government employees has become particularly relevant in the wake of the Supreme Court's 2006 decision in *Garcetti v. Ceballos*.⁸⁶ In *Garcetti*, the Supreme Court ruled that when most public employees speak "pursuant to their official duties," they are not protected by the First Amendment.⁸⁷ The majority continued, "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over *what the employer itself has commissioned or created*."⁸⁸

A public university does not, however, "commission or create" its faculty members' speech, and any attempt to do so would be counter to fundamental precepts of academic freedom as well as to the public interest served by state institutions of higher education. In his dissent in *Garcetti*, Justice Souter articulated this tension, explaining that applying the Court's analysis to public-sector faculty could "imperil First

⁸³ See *Fromer v. Freedom of Info. Comm'n*, 90 Conn. App. 101, 108 (Conn. Ct. App. 2005) (holding that presentations created by master gardening instructors in a cooperative extension program were not "public records" because, among other things, the course material did "not pertain to the public's business; it relate[d] to gardening and landscape management." It is, however, unclear how the court would have classified a professor who was part of a standard department rather than an extension program and was more integrated into the work of the university.

⁸⁴ American Association of University Professors, *1915 Declaration of Principles on Academic Freedom and Academic Tenure*, POLICY DOCUMENTS AND STATEMENTS 291-301 (2006), available at <http://www.aaup.org/AAUP/pubsres/policydocs/contents/1915.htm>.

⁸⁵ *Id.* at 294.

⁸⁶ 547 U.S. 410 (2006).

⁸⁷ *Id.* at 421.

⁸⁸ *Id.* at 421-22 (emphasis added).

Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write ‘pursuant to official duties.’”⁸⁹ As Justice Souter added, “Some public employees are hired to ‘promote a particular policy’ by broadcasting a particular message set by the government, but not everyone working for the government, after all, is hired to speak from a government manifesto.”⁹⁰ The majority acknowledged in response that “[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by the Court’s decision,” and therefore declined to decide whether its “official duties” inquiry “would apply in the same manner to a case involving speech related to scholarship or teaching.”⁹¹

Since faculty members at public colleges and universities research and write as part of their official duties, public (as opposed to peer) oversight of the content of those communications would infringe fundamental academic freedom and First Amendment values. Recognizing that faculty members’ substantive communications are not expressed on the public’s behalf (though they certainly have public value), and therefore exempting them in many circumstances from FOIA coverage, would be consistent with the Supreme Court’s recognition from *Sweezy* through *Garcetti* of the special status of scholars.

V. CONCLUSION

State FOIA statutes are a critical mechanism to obtain information and to ensure that public employees and elected representatives are utilizing both the public fisc and the public trust appropriately. A more nuanced approach is called for, however, where countervailing First Amendment interests are implicated, as in the case of scholarly communications and academic freedom. In light of the possibly significant chilling effect upon academic inquiry, particularly in controversial areas, state legislatures and courts would be well-advised to consider incorporating one or more of the approaches suggested above, whether an explicit exemption, a balancing inquiry, or a recognition that faculty members may be outside the scope of most FOIA statutes. Such an approach would help ensure that the public interest in unconstrained scholarly inquiry is given appropriate weight relative to the public’s right to know.

⁸⁹ *Id.* at 438 (Souter, J., dissenting).

⁹⁰ *Id.* at 437.

⁹¹ *Id.* at 425; *see also* *Kerr v. Hurd*, 694 F. Supp. 2d 817, 844 (S.D. Ohio 2010) (“Recognizing an academic freedom exception to the *Garcetti* analysis is important to protecting First Amendment values.”).

