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Advance

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Advance

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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 issues 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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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.

Restrictive State and Local Immigration Laws: Solutions in Search of Problems

Pratheepan Gulasekaram* and S. Karthick Ramakrishnan†

In its 2012 *Arizona v. United States* decision, the Supreme Court mostly struck down Arizona’s unilateral attempt to create and enforce its own immigration enforcement scheme, intended to diminish the undocumented immigrant population within the state, and presumably the nation as well. Nevertheless, one important provision of the state law—directing state and local law enforcement officers to check the immigration status of those whom they stop, arrest, or detain—survived the Court’s review and is now in effect. This outcome, both in what was enjoined and what was not, is significant for the field of immigration federalism. Similar cases from Alabama and Georgia will likely be appealed to the Supreme Court, and the laws of several local jurisdictions will be affected by *Arizona* and pending federal court cases. While a majority of the Court reaffirmed federal supremacy in the field of immigration, it also continued the process of carving out areas of appropriate subfederal, i.e. state and local, participation. The *Arizona* dissents viewed state power even more expansively, including one opinion suggesting that states had the inherent authority to expel unwanted persons from within their borders.

An important, yet overlooked, aspect of the case is the factual assumptions about unlawful migration, and the public policy challenges caused by such migration, proffered by both the majority and dissenting opinions. Justice Kennedy, writing for the Court, noted “the pervasiveness of federal regulation does not diminish the importance of immigration policy to the States. Arizona bears many of the consequences of unlawful immigration.” While he did not specify what those consequences are, Justice Scalia’s dissent was much more explicit:

Arizona bears the brunt of the country’s illegal immigration problem. Its citizens feel themselves under siege by large numbers of illegal immigrants who invade their property, strain their social services, and even place their lives in jeopardy. Federal officials have been unable to remedy the problem, and indeed have recently shown that they are unwilling to do so.¹

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The ideas presented in this Issue Brief are developed in detail in Gulasekaram and Ramakrishnan, *The New Immigration Federalism* (awaiting submission, draft on file with authors) (forthcoming 2013), from which we have excerpted selected portions here. In addition, the politicized account of sub-federal immigration lawmaking is developed in detail in Ramakrishnan and Gulasekaram, *The Importance of the Political in Immigration Federalism*, ARIZ. ST. L. J. (forthcoming 2012). This Issue Brief was first released by ACS in November 2012.

¹ 132 S. Ct. 2492, 2522 (Scalia, J. dissenting).

Notably, despite relying on these specific factual claims about the effects of unlawful migration, Scalia neglected to provide sources for these seemingly crucial truths. Judge Posner of the Seventh Circuit Court of Appeals took Justice Scalia to task for this omission, arguing that such assertions are “sufficiently inflammatory to call for a citation to some reputable source of such hyperbole. Justice Scalia cites nothing to support it.”²

Instead of verifying his claims, Scalia relied on the intuitive and seemingly common-sense proposition that demographic changes have been driving Arizona’s immigration policies. By extension then, we might also believe that other states that have enacted similar laws—like Alabama, Georgia, Indiana, and Utah—are justifiably and necessarily forced to act. Indeed, Scalia’s sympathy for the plight of helpless states directly informs his implausible vision of a constitutional order in which states can create their own immigration laws. He, however, is not alone in believing that demographic changes and their attendant policy challenges galvanize and justify subfederal immigration lawmaking. Indeed, many elected officials, advocates, and even scholars have viewed the geographic spread of immigrants, and the geographic spread of restrictive legislation on immigration as intimately linked. For example, Lou Barletta, mayor of a small city in central Pennsylvania that was among the earliest to pass a restrictive ordinance, testified to Congress that “[i]n Hazelton, illegal immigration is not some abstract debate about walls and amnesty, but it is a tangible, very real problem.”³ Immigration scholars, while mostly declining to endorse state and local enforcement schemes, have also assumed the salience of these factors in accounting for the rise of state and local immigration laws.⁴ And, many media reports have also invoked this same wisdom, of immigration-induced changes leading inexorably to policy pressures and legislative action at the local level.⁵

Because of the pervasiveness of this demography-based explanation, we sought to verify the importance of migration shifts and policy problems in the rise of state and local responses. We empirically tested the rationales proffered to support such laws, to wit, increased recent immigration, economic stress, and language isolation. Surprisingly, our analysis revealed that demographic factors associated with new immigration and attendant policy challenges are neither necessary nor sufficient conditions for state and local immigration laws. That is to say, there are thousands of jurisdictions where demographic change does not lead to ordinance activity and there are many jurisdictions where restrictive legislation has been passed in the absence of

² Richard A. Posner, *Justice Scalia is Upset about Illegal Immigration. But Where is His Evidence?*, SLATE, June 27, 2012, http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2012/_supreme_court_year_in_review/supreme_court_year_in_review_justice_scalia_offers_no_evidence_to_back_up_his_claims_about_illegal_immigration_.html.

³ See *Comprehensive Immigration Reform: Examining the Need for a Guest Worker Program: Hearing Before the S.Comm. on the Judiciary*, 109th Cong. 11-13 (2006) (Statement of Hon. Louis Barletta, Mayor, City of Hazelton, Pa.).

⁴ Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 806 (2008) (“A ... factor leading to increased state and local involvement is the changing immigration patterns that have brought non-citizens to new parts of the country...and to suburban and rural areas.... [I]t is notable that the more punitive immigration measures often, although not always, are enacted in areas new to receiving significant populations of non-citizens.”); Cristina Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 609 (2008) (maintaining that the demographic shifts caused by globalization and immigration “are felt differently in different parts of the country, and the disruption immigration causes, as well as the viability of different immigration strategies, will vary...”).

⁵ See, e.g., Alex Kotlowitz, *Our Town*, N.Y. TIMES, Aug. 5, 2007 (Magazine), <http://www.nytimes.com/2007/08/05/magazine/05Immigration-t.html>.

significant local demographic pressures. Admittedly, necessary and sufficient conditions constitute a high bar for empirical verification, as outlier cases can invalidate claims using this deterministic approach. Even adopting a probabilistic approach and running multivariate regressions on state and municipal legislative activity, we find that demographic changes and their attendant policy challenges have no predictive power. Thus, the primary justifications undergirding most scholarly, political, and judicial explanations for this recent spate of state and local immigration regulations have little empirical support.

So, if immigration-induced demographic change does not explain this recent spate of state and local immigration laws, what does? The answer, not coincidentally, returns to where we started. Beyond its unsupported factual claims, commentators criticized Scalia's *Arizona* dissent for stepping outside the proper bounds of judicial temperament, and for its overtly partisan rhetoric. Scalia earned these scathing reviews in large part because of his conspicuous evaluation of the Obama Administration's recent policy decision to defer deportation prosecution for young, law-abiding undocumented students. This policy was announced two weeks *after* oral arguments in *Arizona* and is nowhere in the record or judicial documents relevant to the case. While oddly placed in a judicial opinion, the overtly political flavor of Scalia's dissent is symptomatic of a deeper change in immigration law and policy over the past three decades. Past Presidents like Ronald Reagan and Bill Clinton mustered bipartisan support for their federal immigration overhauls in 1986 and 1996, respectively. Since 2001, however, immigration has increasingly polarized along party lines, with determined and cohesive party-line votes blocking passage of widely-supported comprehensive federal overhaul efforts and very popular stand-alone bills like the DREAM Act.⁶

The role of partisanship and political maneuvering in advancing restrictive legislation is evident not only at the national level, but also at the state and local levels. What most subfederal jurisdictions with immigration enforcement laws share is not economic stress or overconsumption of public goods or heightened violent crime, but rather a partisan composition within their legislative and executive branches that is highly receptive to enforcement heavy proposals. Indeed, our nationwide study of 50 states and over 25,000 local jurisdictions, revealed that—after controlling for the demographic factors—political affiliation was the most important and significant factor in explaining the proposal and passage of these laws. These highly partisan contexts, in turn, serve as fertile ground for external issue entrepreneurs, such as the Immigration Reform Law Institute (IRLI) and Kansas Secretary of State Kris W. Kobach, who offer restrictive laws as pre-packaged solutions in search of immigration problems.

This Issue Brief briefly presents the data and conclusions from our empirical study of state and local immigration laws, and then considers some of the potential implications of these conclusions. It seeks to showcase the importance of partisanship in explaining the spread of state and local laws, while discounting the conventional wisdom that these enactments are organic policy responses to pressing demographic needs. It cautions that judicial opinions, legal theories, and political rhetoric based on these commonly-held assumptions must be reconsidered.

⁶ Among other things, the Development, Relief, and Education for Alien Minors, or "DREAM," Act would provide legal status for certain undocumented youth. For more information, see *The DREAM Act: A Resource Page*, IMMIGRATION POLICY CENTER (Sep. 16, 2010), <http://www.immigrationpolicy.org/just-facts/dream-act-resource-page>; *Americans Agree: Protecting DREAMERS is a No-Brainer*, AMERICA'S VOICE ONLINE (June 2012), <http://americasvoiceonline.org/polls/americans-agree-protecting-dreamers-is-a-no-brainer/>.

I. THE EMPIRICAL VALIDITY OF DEMOGRAPHIC EXPLANATIONS FOR STATE AND LOCAL IMMIGRATION REGULATION

Recently, states and localities have renewed their interest in immigration regulation. The National Council of State Legislatures reports over 7,000 state immigration proposals over the last five years.⁷ States and localities are increasingly considering and passing laws that create state immigration crimes, enact state immigration enforcement schemes, regulate the renting of property to certain non-citizens, penalize businesses for hiring unauthorized workers, and discriminate in the provision of public services. In most instances, the stated aim of this restrictive legislation is to discourage entry or residence of unauthorized immigrants, or what many restrictionists have called “attrition through enforcement.”⁸

Our purpose in this section is to explore why subnational governments have vigorously reentered the field of immigration regulation, testing widely held assumptions regarding this question. More specifically, we ask: *Why do some places in the United States adopt restrictive legislation while others adopt more permissive legislation?* We focus on this question because if states and localities are responding to objectively measurable policy challenges, we would expect that other jurisdictions facing similar population changes and concerns would be likely to consider and replicate these legislative solutions.⁹ We answer the question as it involves state laws and local ordinances, and we analyze corresponding sets of legislative data: a collection of state legislation and local ordinance information from 2005–2010.¹⁰ In analyzing this data, our goal is to determine the relative importance and weight of several factors that have been proffered by commentators and elected representatives to explain the recent spate of subnational lawmaking. These commonly accepted explanations comprise what we term the “conventional” theory or model of subnational immigration regulation.

A. THE CONVENTIONAL EXPLANATION FOR STATE AND LOCAL LAWS

The conventional explanation for the recent spate of state and local laws should be familiar to anyone paying attention to immigration policy. It holds that the policy stalemate at the federal level, combined with the pressure created by the public policy challenges of recent and rapid demographic changes, compel states and localities to legislate in a field they would rather avoid, but now have no choice but to enter. In this explanation, federal inaction and subfederal activity are independent phenomena, unconnected both theoretically and descriptively—federal inaction simply happens, and that pre-existing fact serves as the starting point for analysis. Accordingly, state and

⁷ Brooke Meyer & Ann Morse, 2011 Immigration-Related Laws and Resolutions in the States (Jan. 1–Dec. 7, 2011), National Conference of State Legislators, <http://www.ncsl.org/issues-research/immig/state-immigration-legislation-report-dec-2011.aspx>.

⁸ S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010) (explicitly invoking this frame in Section 1 of the law) (“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.”), *available at* <http://www.azleg.gov/legtext/49leg/2r/bills/sb1070s.pdf>.

⁹ See, e.g., Cristina M. Rodríguez, *Significance of the Local*, *supra* note 4, at 609.

¹⁰ A prior version of the research in this section appears in S. Karthick Ramakrishnan & Tom Wong, *Partisanship, Not Spanish: Explaining Municipal Ordinances Affecting Undocumented Immigrants*, in *TAKING LOCAL CONTROL: IMMIGRATION POLICY ACTIVISM IN U.S. CITIES AND STATES* (Monica Varsanyi, ed. 2011).

local lawmaking is framed as a necessary response, occasioned by objectively understood, unique public policy challenges faced by particular jurisdictions.¹¹

This sentiment was neatly encapsulated by Governor Jan Brewer of Arizona in her signing statement accompanying the passage of S.B. 1070, which created a state immigration enforcement scheme and provided state criminal penalties for immigration violations:

The bill I'm about to sign into law—Senate Bill 1070—represents another tool for our state to use as we work to solve a crisis we did not create and the federal government has refused to fix.... The crisis caused by illegal immigration and Arizona's porous border.¹²

The City of Valley Park, Missouri also highlights specific problems purportedly caused by unlawful immigrants:

[I]llegal immigration leads to higher crime rates, subjects our hospitals to fiscal hardship and our residents to substandard quality of care, contributes to other burdens on public services, increasing their costs and diminishing their availability, diminishes our overall quality of life, and endangers the security and safety of the homeland.¹³

The chief virtue of this conventional explanation is its simplicity and intuitive appeal; in other words, it just seems right. In addition to the widespread acceptance that immigration policy has reached a stalemate at the national level, it also makes intuitive sense that rapid migration and demographic change are causing significant social dislocation and prompting redistribution of some public goods. In addition, a current economic study suggests that the fiscal benefits of immigration are more likely to be concentrated at the national level, while any short-term fiscal costs are more likely to be borne by specific localities, particularly with respect to the provision of public education, social services, and emergency room care.¹⁴ Similarly, news stories have devoted extensive coverage of complaints by state and local government officials over overcrowded housing, schools, and emergency rooms.¹⁵ And, it is evident that immigrants in recent years have been moving to “new destinations”—areas with little or no history of immigrant settlement in the past century.¹⁶ The emergence of these new

¹¹ Cristina M. Rodríguez, *Significance of the Local*, *supra* note 4 at 575 (discussing the “familiar rhetoric” of federal failure as the justification of state and local involvement).

¹² Press Release, Arizona Governor Jan Brewer, Statement by Governor Brewer on the signing of Senate Bill 1070 (Apr. 23, 2010), http://azgovernor.gov/dms/upload/PR_042310_StatementByGovernorOnSB1070.pdf.

¹³ Valley Park, Mo., Ordinance 1722, § 1 C (2008) (stating purpose of city's illegal immigrant employment and rental law). *See also*, H.B. 56 § 2, 2011 Reg. Sess. (Ala. 2011) (“the State of Alabama finds that illegal immigration is causing economic hardship and lawlessness.”).

¹⁴ NATIONAL RESEARCH COUNCIL, *THE NEW AMERICANS: ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION* 254-296, (James P Smith & Barry Edmonston eds., 1997).

¹⁵ *See Lou Dobbs Tonight: Broken Borders* (CNN television broadcast May 2, 2007); *See also* Alex Kotlowitz, *Our Town*, *supra* note 5.

¹⁶ These so-called “new destinations” include places ranging from rural Kansas and North Carolina to suburbs in Long Island and Georgia that have had little recent history of immigration. *TWENTY-FIRST CENTURY GATEWAYS: IMMIGRANT INCORPORATION IN SUBURBAN AMERICA* (Brookings Institution Press, Audrey Singer, Susan Wiley Hardwick & Caroline Brettell, eds., 2008).

destinations augments the narrative of rapid, recent demographic change that many assume to cause state and local legislative reactions. Despite the several appealing aspects to this model of demographically-induced legislative action, upon closer evidentiary analysis, this model does not hold.

B. EMPIRICALLY TESTING THE CONVENTIONAL MODEL

1. *Hypothesized Factors Necessitating State and Local Response*

Using our original data set of about 25,000 localities,¹⁷ we tested the importance of the following factors hypothesized to contribute to the proposal or passage of sub-national immigration regulation:

- *Population of New Immigrants, and Growth of Latino and Foreign-Born Populations*¹⁸
- *High Proportions of Linguistically-Isolated Households*
- *Overcrowded Housing*
- *Latino Share and Naturalized Share of the Citizen Population*
- *Economic Stress and Relative Group Deprivation*
- *State-Level Policy Climate*
- *Local Economic Interests*
- *Party Composition of the Electorate*

Immigrant criminality or increase in crime-rate could also be added as a hypothesized demographic factor causing state and local response. However, we do not independently test that hypothesis with our data set, and thus do not include it in our list of hypothesized and tested factors. Instead, we rely on the substantial empirical work already completed in this area by social scientists. They have proven that increased immigrant criminality is a “myth,” with lower incarceration rates amongst recent immigrants than the native-born population.¹⁹ Further, in many jurisdictions passing restrictive ordinances, overall crime and violent crime have decreased in the past several years, in the same time span that the demographic problems purportedly caused by undocumented immigrants have captured state and local attention.²⁰

Finally, while the presence or absence of prior state legislation is a potentially important factor in explaining municipal ordinance activity on immigration, it is also

¹⁷ Our information on restrictive activity at the municipal level is based on lists collected by various legal defense organizations and validated by making phone calls to jurisdictions noted as considering or passing ordinances, as well as by monitoring news stories on local ordinances. We merged information on the proposal and passage of ordinances with census data from the larger universe of over 25,000 localities (municipalities, villages, and places). We use the shorthand “cities” to refer to these types of government, to contrast them with county governments. At the state level, two graduate student research assistants coded legislative summaries provided by the National Conference of State Legislatures based on their topic, valence, and severity.

¹⁸ We use “recent immigrants” as a proxy measure for the likelihood of a high unauthorized migrant population. It is not possible to attain accurate data on numbers of unauthorized migrants in most localities, but we expect recent immigrants to be composed of a high percentage of unauthorized migrants. In addition, using this broader description accounts for the “new destinations” trope in current restrictionist discourse.

¹⁹ See RUBEN G. RUMBAUT AND WALTER A. EWING, IMMIGRATION POLICY CENTER, SPECIAL REPORT, THE MYTH OF IMMIGRANT CRIMINALITY AND THE PARADOX OF ASSIMILATION: INCARCERATION RATES AMONG NATIVE AND FOREIGN BORN MEN 1-2 (Spring 2007).

²⁰ Randal C. Archibold, *On Border Violence, Truth Pales Compared to Ideas*, N.Y. TIMES, June 19, 2010 (“the rate of violent crime at the border, and indeed across Arizona, has been declining, according to the Federal Bureau of Investigation...”), <http://www.nytimes.com/2010/06/20/us/20crime.html>.

important to explain what factors, if any, explain restrictive laws at the state level. Many of the factors that we hypothesize to predict local legislative activity are also relevant for state activity, albeit at a different scale. Thus, we are able to obtain measures of the population of new immigrants, the growth of Latino and foreign-born populations, and the unemployment rates of whites and blacks at the state level.

2. Data and Statistical Findings²¹

a. CITIES

In our dataset of over 25,000 cities across the United States, from May 2006 to December 2011, 125 had proposed restrictive ordinances and 93 had proposed pro-immigrant ordinances, including measures limiting cooperation with federal authorities on deportations.²² On the restrictionist side, approximately 63 percent of proposals had passed, about 12 percent had been voted down or tabled, and a quarter were still pending. On the “pro” side, the vast majority of proposals had passed, with only two pending and one classified as failed or tabled.

Cities with restrictive policies are but a small fraction of the thousands of communities in the United States that are transforming due to recent international migration. Among cities that passed restrictive ordinances, new immigrants averaged about 3 percent of the total resident population, slightly higher than the 1 percent average for cities across the country.²³ This small difference in the proportion of new immigrants diminishes even further in significance when conducting a statistical analysis that controls for other explanatory factors.

Even taking the case of a restrictionist city with the highest proportion of recent immigrants—Herndon, Virginia, where recent immigrants accounted for 14.5 percent of the town’s residents in 2000—we find that 129 other cities took no action, despite having even higher proportions of recent immigrants, including 23 with recent immigrants accounting for over 25 percent of the town’s residents. Indeed, the majority of jurisdictions that can claim to share the necessary demographic factors—such as growth in immigrant populations, having a recently-arrived immigrant population, or a high proportion of Spanish-speakers among immigrants—do not propose or pass immigrant-related laws.

Even if immigration-induced change within a jurisdiction is insufficient, by itself, to provoke legislative response, might such change be a shared characteristic of enacting jurisdictions? We find that 29 out of the 79 localities that have passed restrictive

²¹ We have not included a full explanation of our data set, our statistical methods, and models here. Readers interested in reviewing the statistical work and analysis in greater detail may contact the authors (karthick@ucr.edu or pgulasekaram@scu.edu). In addition, Ramakrishnan and Gulasekaram, *The Importance of the Political in Immigration Federalism*, ARIZ. ST. L.J. (forthcoming 2012), contains a richer discussion of both the quantitative and qualitative empirical work referenced herein.

²² The restrictive ordinances in our sample include measures whereby local governments use their official capacities to enforce federal immigration laws or to address perceived negative societal consequences of illegal immigration. Illegal Immigration Relief Act (IIRA) ordinances and variants of them constitute the majority of these restrictive measures. IIRAs commonly refer to the fiscal and governance challenges arising from the presence of illegal immigrants. The pro-immigrant ordinances in our sample include resolutions and mandates that express opposition to immigration raids and restrictionist national legislation, those barring the use of public funds to enforce immigration laws, and those with explicit “sanctuary” policies whereby local officials do not inquire about legal status and do not notify immigration authorities about the status of individuals unless they are convicted of serious crimes.

²³ These figures are means (averages). We use data from the 2000 Census, given missing data in the 2005–9 American Community Survey file. The corresponding median figures are 1.72% for restrictive ordinance cities, and 0.16% for cities in the nation as a whole.

ordinances (or 37% of the cases) have recent immigrant populations that are below the national average for cities. Indeed, in a fifth of the cases (16 out of 79), recent immigrants accounted for fewer than 0.5 percent of the city's residents, and in these places the proportion of Spanish-dominant households was less than 3 percent of all households in the city.

In order to arrive at more systematic answers about the conditions under which cities may consider and pass restrictive ordinances, we ran a multivariate regression that can show the contribution of each individual factor while controlling for all other factors.²⁴ How do each of these potential explanations fare?

Population of New Immigrants, and Growth of Latino and Foreign-Born Populations. Having an immigrant population that is composed primarily of recent arrivals (or, having experienced a recent upsurge in Latino or immigrant populations) is not associated with restrictive ordinances. Indeed, it is associated with a greater likelihood of pro-immigrant legislation. Our alternative measure, of the growth of the foreign-born population between 1990 and 2000, or between 2000 and 2007, also has no statistically significant relationship with restrictive ordinance activity, although it is associated with a lower likelihood of pro-immigrant ordinances. Finally, a fast-growing Latino population in the locality, regardless of their citizenship and immigration status, is associated with a marginally greater likelihood of restrictive ordinances being proposed, but not passed.

Linguistically-isolated Households & Overcrowded Housing. Factors related to recent arrivals, such as the proportion of households that are exclusively Spanish-speaking and the proportion of households that are overcrowded, also bore no relationship to the proposal or passage of restrictive ordinances up until 2007. Since then, however, the growth of Spanish-speaking households has made a marginal difference in the probability of restrictive proposal and passage (increasing by 4% and 7%, respectively). These effects pale in comparison to those associated with local contexts of partisanship, discussed below.

Latino share and naturalized share of the citizen population. We included these measures in two separate equations given their high level of collinearity. These factors do not bear any significant relationship to the proposal and passage of local ordinances, whether restrictive or permissive. This further reinforces findings from other studies of local immigrant incorporation that immigrant electoral power may be less important in predicting local government policies toward immigrants today than in the past.²⁵

²⁴ Importantly, we remained attuned to issues of multicollinearity, where putting two factors that are closely related into the same explanatory model produces erratic results for those factors. Since some of these factors are highly correlated, we ran alternative model specifications instead of putting every factor in the same regression model. For full model results, see our working paper Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *The Importance of the Political in Immigration Federalism* (unpublished manuscript), http://karthick.com/workingpapers_assets/GR-submission-2-23.pdf. We used CLARIFY to simulate the effects on the dependent variable of changes in each individual variable while holding other variables at their means. See Michael Tomz, Jason Wittenberg & Gary King, *CLARIFY: Software For Interpreting And Presenting Statistical Results*, 8 J. OF STAT. SOFTWARE 1-30 (2003).

²⁵ S. KARTHICK RAMAKRISHNAN & PAUL G. LEWIS, IMMIGRANTS AND LOCAL GOVERNANCE: THE VIEW FROM CITY HALL, SAN FRANCISCO, CA: PUBLIC POLICY INSTITUTE OF CALIFORNIA (2005).

Economic stress and relative group deprivation. There is no support for the contention that economic stress or relative deprivation (as measured by absolute or relative poverty rates, respectively) among white residents is related to the proposal or passage of restrictive legislation. Indeed, when relative measures of poverty are used, cities with whites who are relatively better off than Latinos are more likely to propose restrictive policies. However, when it comes to the passage of policies, there is no significant relationship. Finally, black relative deprivation is indeed associated with a higher likelihood of restrictive proposals, but not policy passage. It is unlikely that blacks are driving the proposal of restrictive legislation in most of these cities, since in none of these places are blacks the majority, and they are over a third of the population in only one case (Norristown, PA).

State-level policy climate toward immigrants. This factor bears no significant relationship to ordinance activity at the local level. For state-local dynamics, neither the “steam valve” model (localities adversely reacting to state-level policy) nor the “demonstration effect” model (mimicking state level activity) are at play.

Local economic interests. The prevalence of industrial sectors that are heavily dependent on immigrant workers is not significantly related to local ordinances, with one important exception: the likelihood of restrictive policies being passed is much lower in places where agriculture accounts for a sizable number of jobs. It is important to note, however, that the effects are evident in the stage of ordinance passage, but not ordinance proposal. This suggests that policy entrepreneurs in agricultural areas may have overreached by pushing for restrictive policies only to find an organized opposition from local businesses to such plans.²⁶

Partisan composition. Among our hypothesized factors, partisanship has the strongest and most consistent effects. After controlling for all other factors, cities in Republican-majority areas are about 2.5 times more likely to *propose* restrictive ordinances, and they are about 4 times as likely to *pass* such ordinances compared to Democratic-majority areas. By contrast, on the pro-immigrant side of enforcement, cities in Democratic-majority counties were about 4 times as likely as those in Republican-majority areas to propose and pass such legislation.

b. STATES

During this same period, legislation at the state level was much more common, with 1,321 laws enacted between 2005 and 2010. Of these, we coded 317 as restrictive, with at least one such law passed in 46 states. These laws ranged in terms of their policy area (e.g., education, law enforcement, public benefits) and in their severity (e.g., ranging from revoking licenses of notaries public who have been denaturalized, to laws denying access to state public benefits to unauthorized immigrants).²⁷ Taking into consideration only those restrictive laws that we classified as having a significant

²⁶ Cf. Michael Mintrom, *Policy Entrepreneurs and the Diffusion of Innovation*, 41 AM. J. POL. SCI. 738, 765 (1997) (noting the effects of strong union opposition).

²⁷ 2007 ENACTED STATE LEGISLATION RELATED TO IMMIGRANTS AND IMMIGRATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, 2-34 (rev. Jan. 31, 2008), <http://www.ncsl.org/print/immig/2007Immigrationfinal.pdf>.

impact on a state's unauthorized immigrant resident population,²⁸ the number of laws during this time period drops to 155, with Arizona passing the most laws (15), followed by Virginia (10), and Georgia (9).

Illustrating again that demographic change is not sufficient to produce restrictionist legislation, of the top 25% of states where new immigrants make up a sizable portion of the overall population, only 6 of 13 states passed significant restrictive laws during this time. In the multivariate regressions, we test for several variations of demographic change, including the proportion of new immigrants, the proportional change in the foreign born population, and the absolute level of immigration in the area. On the other end of the demographic spectrum, we find that 9 of 12 states at the bottom quartile on this measure passed restrictive laws. Indeed, the passage of restrictive laws is highest for this bottom quartile of states, and lowest among the top quartile. Clearly demographic disruptions caused by recent immigration are also not necessary for state-level restrictive action.

In our multivariate regression analysis that controls for various other factors, the state-level models reveal no support for the hypothesis that restrictive legislation is more likely in states where immigrants have arrived recently, or alternatively, states with the biggest growth in the foreign-born population. Indeed, in some variations of our model, we find less restrictive activity in states with recent immigrant populations. For most of our demographic factors (including poverty rates and growth of the immigrant population), the findings are inconsistent, perhaps due to the small number of cases being analyzed (50 states).

In the case of partisanship, however, the results are consistently significant. After controlling for various demographic factors, states with a majority of Republican voters have passed more than twice as many significant pieces of restrictive legislation (four, on average, during this period) as those states with a high proportion of Democratic voters (1.6, on average). Another way to look at the state results is to differentiate between those states with multiple pieces of significant restrictive legislation (three or more) versus the rest. Republican-majority states are nearly 300% more likely to be in this group than Democratic-majority states.²⁹ Finally, we also update the analysis to account for laws enacted outside of the 2005-2010 period, by analyzing all current state laws on enforcement and work verification.³⁰ Here, too, we find that partisanship has the strongest effect on the existence of restrictive state-level policies, and that factors such as the growth of the foreign-born population or the recency of the immigrant population do not matter.

C. PARTISANSHIP AND THE POLITICAL PROCESS

To sum up, our analysis shows that the restrictive responses of local governments to undocumented immigration are largely unrelated to the objectively measurable demographic pressures credited in the conventional model of subnational immigration

²⁸ The legislative summaries were coded on an ordinal scale of 1: "low impact" and 2: "high impact" on immigrant rights and/or access to benefits, based on the provision's likely effects on immigrant life chances and the number of immigrants likely to be affected.

²⁹ We report findings based on the partisanship of electorates in order to provide a comparable basis of comparison to our local partisanship measures. The results on partisanship are similar when using measures of party control of the state legislature.

³⁰ We utilize a resource available via Findlaw that summarizes current state-level policies and code it on the same restrictive to permissive scale (low to high) as in our analysis of enacted legislation in the 2005–2007 period. State Immigration Laws, FINDLAW, <http://immigration.findlaw.com/immigration-laws-and-resources/state-immigration-laws/>. Data is current as of December 31, 2011.

regulation. Our evidence discounts the saliency of recent immigrant population growth, the proportion of Spanish language-dominant households, and local economic and wage stress in the proposal and passage of such laws. These ordinances are also largely unrelated to the electoral empowerment of Latinos, given that places with large proportions of Latino residents and citizens are no more or less likely to propose legislation, whether restrictive or pro-immigrant.

Instead, we find that political factors not commonly cited by proponents of state and local immigration laws are more important.³¹ Importantly, 67 percent of cities with restrictive ordinances are in Republican-majority counties. Although we do not have finer-grain data on partisanship for all localities in the United States, we were able to obtain such data on places with restrictive ordinances.³² Here, too, we find that a high proportion of restrictive ordinances (77%) have passed in Republican-majority cities. And, partisanship has, by far, the strongest relationship at the state level. At the state level, nearly two-thirds of restrictive states had a Republican majority of voters during this time period, and for those who have passed major pieces of restrictive legislation on enforcement and employer verification, the proportion of Republican-majority states is much higher (94%).³³

Thus, our fundamental conclusion on partisanship and subfederal immigration regulation leads to three important questions: (1) *Why is partisanship at the sub-national level relevant to legislation on immigration?* (2) *How is partisanship utilized to enact immigration laws in places where demographic pressures are inconsequential?* and (3) *Who is utilizing and mobilizing the partisanship dynamic to achieve these legislative goals?* Due to space constraints, we limit the discussion here of the political dynamics that help explain these statistical findings, saving a larger exploration for our book project,³⁴ but we sketch some brief answers to these questions below.

First, there is ample survey evidence to indicate that Republican voters, and especially those who are active in party primaries, care intensely about immigration and hold restrictive views on the matter.³⁵ When this pattern in public opinion gets harnessed through the primary process, Republican-heavy areas have enabled primary challengers to mobilize against incumbents on the immigration issue. Republican incumbents, in turn, have either been defeated by more restrictivist challengers, or they have themselves taken more conservative positions on immigration to avoid primary defeat.³⁶

Even in many cities where elected offices are often nonpartisan, contexts of local partisanship nevertheless continue to matter, as policy activists find it easier to

³¹ The partisan composition of the area plays an important role, second only to city size. However, because city size is positively associated with both pro and restrictive ordinances, party composition is the only factor that displays statistically significant and theoretically consistent effects (negative on the restrictive side and positive on the pro side).

³² Local party registration data for localities obtained from the voter statistics firm Aristotle, Inc.

³³ This compares to 57% of states with a Republican majority of voters in 2004.

³⁴ Karthick Ramakrishnan and Pratheepan Gulasekaram, *The Importance of the Political in Immigration Federalism*, ARIZ. ST. L. J. (forthcoming 2012).

³⁵ Frank Newport, *Republicans Prioritize Immigration; Dems, Financial Reform*, GALLUP, (April 30, 2010), <http://www.gallup.com/poll/127607/republicans-prioritize-immigration-dems-financial-reform.aspx>; Lymari Morales, *Americans' Immigration Concerns Linger*, GALLUP, (January 17, 2012), <http://www.gallup.com/poll/152072/Americans-Immigration-Concerns-Linger.aspx>.

³⁶ This was evident in Arizona as far back as 2004 and 2006, as long-standing Republican incumbents such as Congressman Jim Kolbe faced competitive primary elections by challengers focusing on immigration and border-control issues. See Joseph Lelyveld, *The Border Dividing Arizona*, N.Y. TIMES, Oct. 15, 2006 (Magazine), <http://www.nytimes.com/2006/10/15/magazine/15immigration.html>.

promote restrictive legislation on immigration in Republican-heavy areas. For example, in 2010, the *Los Angeles Times* reported on the successful attempts of a local Tea Party activist in getting Republican-dominant cities in Southern California, such as Temecula and Murrieta, to pass restrictive measures, after failing to do the same in larger, politically diverse cities, such as Riverside and Ontario.³⁷ Even though city councils in California are nonpartisan bodies, the proportion of Republican voters in these cities nevertheless still matters for interest representation. Thus, even for nonpartisan elections and governmental bodies, Republican Party registration still signals the potential opportunities for policy entrepreneurs to promote restrictive legislation.

Second, political dynamics at the subnational level on immigration are also tied to political dynamics at the national level. This is particularly true in the case of restrictive local policies on immigration, where activist groups such as the Federation for American Immigration Reform (FAIR) and NumbersUSA have sought to stall moderate legislation at the federal level that includes some form of legalization, while at the same time fomenting restrictionist legislation at the state and local level. Rather than hoping or waiting for federal legislative efforts at bipartisan immigration reform to stall, since 2004 these organizations have pursued a dual strategy: They purposefully promote legislative gridlock at the federal level, and then cite the very national legislative inaction they helped foment to justify restrictive solutions at the local level.³⁸

Finally, since 2006, the work of proliferating legislation at the subnational level has found its strongest champion in Kris Kobach, a former law professor who has served as legal counsel for many states and localities that have passed restrictive legislation, both in an individual capacity and as an employee of the Immigration Reform Law Institute (IRLI), the legal branch of the restrictive group FAIR. Not only has Kobach provided legal counsel for cities such as Hazleton, PA and Farmers Branch, TX, he has also played a pivotal role in the crafting of legislation in many of the same jurisdictions, including cities like Hazleton, and states such as Arizona and Alabama.³⁹ Thus, while restrictive policies may have local sponsors in each jurisdiction, the evidence we have analyzed from a variety of news reporting reveals a nationally-involved group of actors (who we term “restrictive issue entrepreneurs”) who are advancing—through political rhetoric, legal justification, and the design and promotion of legislation—a proliferation of subnational policies aimed at “attrition through enforcement,” or

³⁷ Phil Willon, *Conservative Inland Empire Cities Crack Down on Illegal Workers*, L.A. TIMES, Feb. 14, 2011, <http://articles.latimes.com/2011/feb/14/local/la-me-0212-e-verify-20110214>.

³⁸ Our article, Ramakrishnan and Gulasekaram, *The Importance of the Political in Immigration Federalism*, ARIZ. ST. L. J. (forthcoming 2012), details the legislative involvement of FAIR and NumbersUSA. In 2004, while FAIR was striving to push back against legalization efforts in Washington D.C. following calls for comprehensive immigration reform by George W. Bush and John McCain, it also gave financial backing to Arizona’s Proposition 200 campaign, a measure modeled after California’s Proposition 187 that sought to deny unauthorized immigrants access to many public benefits. Steven Wall, *Efforts Against Illegal Immigrants Rise*, SAN BERNARDINO SUN, Nov. 9, 2004. Indeed, pro-immigrant advocacy organizations in Washington D.C. saw FAIR’s foray into Arizona as connected to its D.C.-based legislative strategy, as it sought to push back against moderate legislation being offered by Arizona’s Congressmen Jim Kolbe, Jeff Flake, and Senator John McCain. Interview with immigration advocacy organization (Apr. 12, 2012); see also Jim Behnke *The Tres Amigos – Kolbe, Flake, McCain*, SIERRA VISTA HERALD REVIEW, January 8, 2004.

³⁹ George Talbot, *Kris Kobach, the Kansas Lawyer Behind Alabama’s Immigration Law*, PRESS-REGISTER (Mobile, AL), October 16, 2011.

making living and employment conditions so inhospitable to unauthorized immigrants as to encourage their departure.⁴⁰

While it is also possible for pro-immigration advocates to pursue a similar strategy—of promoting federal gridlock as a fruitful condition for subnational action—our review of news coverage and interviews with permissive and restrictive organizations in Washington, D.C., shows that pro-immigrant organizations still push for federal solutions as optimal policy, particularly on matters pertaining to immigration enforcement.⁴¹ Accordingly, the integrationist strategy has focused on Congress enacting comprehensive immigration reforms that they hope will include DREAM Act provisions and other pathways to legalization. Meanwhile, pro-immigrant efforts on matters such as sanctuary city policies and in-state tuition for undocumented students are driven mostly by local sponsorship, with little coordination in activity.⁴² By contrast, restrictive proposals often feature local sponsors and national organizations and individual issue entrepreneurs, with model legislation that is replicated across jurisdictions.⁴³ Importantly, the main national organizations promoting the spread of restrictive local measures (NumbersUSA and FAIR) are the same ones who also have played a prominent role over the past two decades in derailing congressional efforts on immigrant legalization, keeping viable a plausible case for local action.⁴⁴

Thus, while local contexts of partisanship matter on both the restrictive and pro-immigrant sides of local legislation, the dynamics that produce them are more local in the case of permissive policies, while federated and coordinated with national organizations in the case of restrictive legislation. As we discuss in the next section, these differences may have some significant implications for considerations of federalism, including the relevance of functionalism, availability cascades, and party federation in producing this subnational variation in immigration policies.

II. IMPLICATIONS FOR IMMIGRATION FEDERALISM

As our empirical investigation shows, in subnational immigration regulation, demography is not dispositive. By in large, subnational regulations are not organic responses to demographic change, brought on by intractable public policy challenges.

⁴⁰ NUMBERSUSA, *How Attrition Through Enforcement Works* (noting that immigration raids would be unnecessary if federal, state, and local enforcement effectively make “living illegally . . . more difficult and less satisfying over time”), <https://www.numbersusa.com/content/learn/issues/american-workers/how-attrition-through-enforcement-works.html>. See also Michael Williamson, *Self-Deportation Proponents Kris Kobach, Michael Hethmon Facing Time of Trial*, WASH. POST, April 24, 2012 (quoting an Oklahoma representative who notes that Kobach and his partner at IRLI, Michael Hethmon “were the face and the muscle behind the effort that really synthesized it into a movement. Do I think it would have happened without them? Most certainly it would not have.”), http://www.washingtonpost.com/politics/time-of-trial-for-proponents-of-self-deportation/2012/04/24/gIQAe6lheT_story.html.

⁴¹ We note here that this could also be influenced by the different legal analysis (federalism, preemption) applicable to pro-immigrant state and local ordinances (which often do not mention citizenship status at all), in contrast to the legal analysis of enforcement-type state and local provisions (which use immigration status as a trigger).

⁴² Interview with Angela Kelley, Center for American Progress (2011); Interview with Frank Sharry, America’s Voice (2012); Interview with Clarissa Martinez, NCLR (2012).

⁴³ For more details, see our book Pratheepan Gulasekaram and Karthick Ramakrishnan, *Immigration Federalism: Its Political Underpinnings and Legal Implications* (unpublished manuscript). See also Ian Gordon, *How Did Harsh Immigration Laws Spread to Your Statehouse*, MOTHER JONES, March/April 2012; MODEL LEGISLATION, IMMIGRATION REFORM LAW INSTITUTE, www.irli.org/laws (last visited Oct. 11, 2012).

⁴⁴ See Ramakrishnan and Gulasekaram, *The Importance of the Political in Immigration Federalism*, *supra* note 34.

Instead, our data and analysis suggest that interested policy actors present pre-made solutions to politically receptive jurisdictions, regardless of the underlying demographic pressures in those jurisdictions. This conclusion challenges existing theories and assumptions regarding the rise, proliferation, and utility of subnational immigration regulations.⁴⁵ Specifically, we draw a contrast with “functionalist” theories of state and local action that assume the salience of demographic-change for policy expression, and with “steam-valve” theories, which suggest that state and local restrictionist policies relieve pressure on national restrictionist efforts. Finally, we query the significance of our empirical conclusions for judicial evaluations of subfederal immigration laws.

The fact that partisanship matters more than any other factor suggests that, above all else, subnational immigration policy expression reflects naked political preference and opportunistic use of party polarization.⁴⁶ This conclusion contradicts the assumptions made by scholars who have argued that what is “missing” from debates over the constitutionality of subfederal enactments is “a functional account that explains why state and local measures have arisen over the past five to ten years, and how this reality on the ground should reshape our conceptual and doctrinal understandings of immigration regulation.”⁴⁷ Professor Cristina Rodriguez is correct that purely legal, constitutional debates over subfederal involvement in immigration—focusing on federalism and preemption questions—miss crucial “on the ground” factors that should influence judicial and popular evaluations of these laws. However, the missing reality is not necessarily the new demography and geography of immigration; rather it is the new politics of immigration.⁴⁸

The political and partisan dynamics of immigration suggests that the various state and local policy instantiations are not the type of policy experimentation imagined by the Supreme Court⁴⁹ and legal scholars.⁵⁰ Our model proposes that restrictive subfederal laws are being proliferated and replicated in multiple jurisdictions, not because the legislation presents a unique method of addressing an emerging public policy concern, but rather because the political conditions are ripe for replication. Thus, the policy “experimentation” and replication currently occurring in the immigration field has little demonstrative value to other jurisdictions;⁵¹ it changes the terms and tenor

⁴⁵ An in-depth exploration of the theoretical and constitutional implications of our empirical investigation is featured in Gulasekaram and Ramakrishnan, *The New Immigration Federalism* (forthcoming 2013) (draft on file with authors).

⁴⁶ See *supra* Part I; see also, Cass Sunstein, *Deliberative Trouble*, 110 YALE L.J. at 74–6 (2000) (showing how limited private information tends to make people follow others, and reach more extreme policy positions).

⁴⁷ Rodriguez, *The Significance of the Local*, *supra* note 4, at 571.

⁴⁸ We hasten to add that functionalist accounts of subfederal legislation may serve the important purpose of carving out a normative space for local involvement. It may very well be normatively desirable, as Rodriguez argues, to locate and institute integrationist measures at the local level. Further, we agree with Professor Rodriguez’s underlying point that uniformity in immigration policy across the nation may not be necessary or normatively desirable. *Id.*, at 611.

⁴⁹ *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

⁵⁰ See Matthew Parlow, *A Localist’s Case For Decentralizing Immigration Policy*, 84 DENVER U. L. REV. 1061 (2007); Huntington, *Immigration Federalism*, *supra* note 4; Rodriguez, *The Significance of the Local*, *supra* note 4 at 609 (“And perhaps most importantly, local experimentalism will be of tremendous value in this context.”).

⁵¹ Many of these ordinances, however, do demonstrate the social and economic pitfalls of local regulation. Several states have abandoned or reconsidered their enforcement-heavy approaches after enactment, and after experiencing the consequences of such laws.

of the national debate on immigration, but does not solve the “on the ground” problems referenced by Rodriguez.

In addition, “steam-valve” theories of subnational policy proliferation also require reconsideration. It is tempting to agree with Professor Peter Spiro’s intuition that lee-way for isolated, subfederal anti-immigrant regulation relieves pressure to promote the same restrictive policies as federal legislation.⁵² Thus, as per his “steam-valve” theory, even if subfederal restrictionist measures primarily reflect raw political preference (and not necessary responses to pressing policy problems), those measures in isolated localities could serve a normatively desirable purpose by providing a relatively contained outlet for anti-immigrant feelings.⁵³ Specifically addressing Arizona’s SB 1070 and the constitutional challenge to the law, Professor Spiro argues that “in the long run, immigrant interests will be better helped if the Supreme Court upholds S.B. 1070.... [If the Court strikes it down], anti-immigrant constituencies will redouble their efforts to enact tougher laws at the federal level.”⁵⁴

The manner in which these subfederal enactments have been proliferated, however, indicates that Spiro’s causal story must be reversed: Suppression of subfederal law-making does not promote effectuation of restrictionist measures at the federal level;⁵⁵ rather, purposeful suppression of moderate or compromised federal lawmaking provides the receptive legislative backdrop for promotion of extreme measures at the subfederal level. The issue entrepreneurs’ goal is to continue proliferation in every jurisdiction that is politically ripe for legislation. Each successive enactment builds, rather than dissipates, momentum. Specifically, in the immigration context, we suggest that interested policy activists coordinate activity between the local and federal levels so that legislative activity at the federal level does not stand as an obstacle to further subfederal proliferation.⁵⁶ In other words, part of the receptive context for continued subfederal policy proliferation is the strategic stalling of federal legislative responses, until an acceptable de facto national consensus on restrictionist policies can be instituted at the federal level.

Finally, our conclusions might have implications for the way courts evaluate state and local immigration laws. First, the doctrinal basis for subfederal participation in immigration requires that states establish the “vital necessity” of their immigration regulation.⁵⁷ In *Chy Lung v. Freeman* (1875), the Court found unconstitutional a California law that purported to allow state officials to make immigration decisions. In doing so, the Court seemed to leave open the possibility that states might constitutionally enact immigration enforcement laws, but only if Congress failed to act and it

⁵² Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1636 (1997) (“Affording the states discretion to act on their preferences diminishes the pressure on the structure as a whole; otherwise, because you don’t let off the steam, sooner or later the roof comes off.”).

⁵³ The limitation has to be defined in terms of the quantity of subfederal jurisdictions; quality-wise, it is difficult to suggest that Alabama’s recent immigration law—which has had the effect of driving immigrant children out of school—is relatively harmless, even if it occurs only within an individual state.

⁵⁴ Peter J. Spiro, *Let Arizona’s Law Stand*, N.Y. TIMES, Apr. 22, 2012, <http://www.nytimes.com/2012/04/23/opinion/let-the-arizona-law-stand-then-wither.html>.

⁵⁵ *Id.*; Spiro, *Learning to Live*, *supra* note 51 at 1630 (“One must look to the consequence of such suppression and the possibility that frustrated state preferences may actually prompt the effectuation of anti-alien measures at the federal level.”).

⁵⁶ See Gulasekaram and Ramakrishnan, *The Importance of the Political in Immigration Federalism*, ARIZ. ST. L. J. (forthcoming 2012) (using qualitative empirical data to show the highly networked and coordinated work of immigration issue entrepreneurs at the federal and subfederal levels).

⁵⁷ *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875).

was absolutely necessary for states to protect themselves from paupers and criminals.⁵⁸ Leaving aside whether Congress' recent failures to pass federal immigration law constitute the inaction described in *Chy Lung*, our conclusion undermines the narrative of necessity foregrounded in the purpose statements of the several state and local immigration laws at issue. By extension then, our analysis casts doubt on judicial opinions that rely on these unsubstantiated claims of state need. While any single jurisdiction might face objectively measurable policy challenges related to immigration, systemic claims of immigrant-induced problems cannot be substantiated.

Moreover, when enacting jurisdictions are selected because of their partisan composition (and not their demographic conditions), state and local immigration policy proliferation fails to achieve most federalism values. Traditional federalism theory suggests some constitutional leeway might be justified for subfederal policy experimentation that attempts to address regionally-specific concerns. However, as we have shown, demographic change and its attendant policy problems are not common to enacting jurisdictions. Therefore, any replication of subfederal immigration policies does not represent the type of useful policy experimentation imagined in traditional federalism theory. Indeed, restrictionist advocacy groups produce pre-packaged immigration legislation that restrictionist issue entrepreneurs shop to receptive jurisdictions, regardless of whether that legislation responds to policy challenges within the jurisdiction. In short, the current spate of state and local immigration laws are an example of solutions to imagined problems; these jurisdictions are not Justice Brandeis' idealized "laboratories of policy experimentation."

III. CONCLUSION

Ultimately, Justice Scalia's indignation about Arizona's inability to defend itself from "bearing the brunt of the country's illegal immigration problem" is a rhetorically compelling story, but one that lacks empirical support. Unintentionally, however, his foray into an extra-judicial, political missive against the Administration's prosecutorial priorities sheds a spotlight on the genesis and essence of the current trend of restrictionist state immigration laws. These laws do not arise naturally out of economic or social necessity; instead they largely are the products of political opportunism. In the end, Scalia's dissent showcases why untested assumptions about undocumented immigrants are so dangerous. They help form the basis of impossible theories of the Union, whereby every state possesses the inherent power to expel inhabitants; they change the constitutional conversation about state immigration regulation, building an unsubstantiated empirical case for the necessity of state intervention; and finally, they obscure the highly partisan, well-organized mechanism at work in the creation of these restrictive laws.

The continuing importance of national immigration legislation was evident once again during President Obama's victory speech on the eve of his re-election in November 2012. In the speech, Obama spoke of "fixing our immigration system" as one of four important policy priorities for his second term.⁵⁹ The same week, news outlets ran front-page stories with Republican strategists signaling a desire to pass

⁵⁸ *Id.* ("We are not called upon by this statute to decide for or against the right of a state, in the absence of legislation by Congress, to protect herself by necessary and proper laws against paupers and convicted criminals from abroad.... Such a right can only arise from a vital necessity for its exercise, and cannot be carried beyond the scope of that necessity.").

⁵⁹ *Audio and Transcript: Obama's Victory Speech*, Nat'l Public Radio, Nov. 6, 2012, <http://www.npr.org/2012/11/06/164540079/transcript-president-obamas-victory-speech>.

immigration reform to improve their party's standing among Latinos.⁶⁰ Despite this seeming optimism, the party dynamics we uncovered will make such national legislative change difficult to achieve. Because immigration politics over the past decade has become victim to intense party polarization, very few, if any, moderate Republicans remain to create bipartisan reform. Further, as we have noted, the dynamics of our federalist system incentivize members of Congress to heed the more extreme nationalistic and xenophobic views of their state and local party compatriots. Finally, even if there is modest bipartisan support for measures such as immigrant legalization, it remains to be seen whether Congress will be able to design legislation that "wipes the slate clean" on state and local immigration laws, invalidating existing ones and preempting the growth of future subfederal legislation on immigration. Without such preemptive legislation, it is likely that the network of restrictive issue entrepreneurs will continue their efforts to proliferate legislation at the subfederal level.

⁶⁰ See Carrie Budoff Brown, Jake Sherman, & Manu Raju, *2012 Election Puts Spotlight on Immigration Reform*, POLITICO, Nov. 8, 2012, <http://www.politico.com/news/stories/1112/83552.html>; Brian Bennett, Hector Becerra & David Lauter, *Latino Role in Election to Fuel New Immigration Reform Push*, L.A. TIMES, Nov. 8, 2012, <http://articles.latimes.com/2012/nov/07/nation/la-na-latinos-20121108>.

Title IX and the New Spending Clause

Emily J. Martin*

At oral argument in the cases challenging the Affordable Care Act, when Paul Clement argued that the law's expansion of Medicaid exceeded Congress's Spending Clause powers because it left states with no realistic option of refusing to carry out the expansion, Justice Ginsburg seemed troubled. "Let me ask you another thing, Mr. Clement," she began:

Most colleges and universities are heavily dependent on the government to fund their research programs and other things, and that has been going on for a long time. And then Title IX passes, and a government official comes around and says to the colleges, you want money for your physics labs and all the other things you get it for, then you have to create an athletic program for girls. And the recipient says, I am being coerced, there is no way in the world I can give up all the funds to run all these labs that we have, I can't give it up, so I'm being coerced to accept this program that I don't want.

... [I]f your theory is any good, why doesn't it work any time ... someone receives something that is too good to give up?¹

Many others have been asking the same question since the Supreme Court's decision in June, which held that Congress unconstitutionally coerced the states when it conditioned states' continued receipt of Medicaid funding on the states expanding Medicaid coverage to all adults under 133 percent of poverty. On SCOTUSblog and NPR's All Things Considered, Kevin Russell, of the Supreme Court litigation boutique Goldstein & Russell, opined that one of the case's major impacts "will be to revive claims that several significant civil rights statutes, enacted under Congress's Spending Power, are unconstitutional."² In the *New York Times*, constitutional law expert Pamela Karlan wondered whether the decision would "hamstring" efforts by Congress to condition federal funding on nondiscrimination requirements.³ *Ed Law*

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¹ Transcript of Oral Argument at 21:18, *Nat'l Fed. Of Ind. Business v. Sebelius*, 132 S. Ct. 2566 (No. 11-393), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-400.pdf.

² Kevin Russell, *Civil rights statutes put at risk by health care decision*, SCOTUSBLOG (Jun. 29, 2012, 9:54 AM), <http://www.scotusblog.com/2012/06/civil-rights-statutes-put-at-risk-by-health-care-decision/>; Carrie Johnson, *All Things Considered: How the Health Care Ruling Might Affect Civil Rights*, NATIONAL PUBLIC RADIO (NPR radio broadcast July 10, 2012), available at <http://wgbhnews.org/post/how-health-care-ruling-might-affect-civil-rights>.

³ Pamela S. Karlan, *No Respite for Liberals*, N.Y. TIMES, at SR 1 (July 1, 2012).

Challenges Loom After Health Care Ruling, ran a headline in *Education Week*, identifying Title IX as a potentially affected statute.⁴

This issue brief surveys the legal landscape in which Title IX finds itself in the wake of the Supreme Court's Spending Clause analysis in *NFIB v. Sebelius*.⁵ It analyzes the structure and function of Title IX and sets out the key legal distinctions between Title IX and the ACA's Medicaid expansion, providing a roadmap for litigators who inevitably will confront challenges to Title IX's constitutionality by defendants facing Title IX claims. It demonstrates why Title IX remains a wholly constitutional exercise of Congressional authority.⁶

I. THE SUPREME COURT'S NEW SPENDING CLAUSE JURISPRUDENCE

In March 2010, the 111th Congress passed The Patient Protection and Affordable Care Act, as amended by the Health Care and Education Reconciliation Act of 2010,⁷ commonly known as the Affordable Care Act (ACA). Among many other provisions, the ACA significantly expanded the reach of the cooperative state-federal Medicaid program.⁸ Beginning in 2014, the ACA requires states to provide Medicaid coverage to all adults under age 65 with incomes below 133 percent of the federal poverty level (FPL).⁹ Previously, federal law did not require that adults' eligibility for Medicaid be based solely on income level. Instead, states were required to cover low-income children and certain categories of low-income adults: primarily pregnant women below 133 percent of the FPL, very low-income parents, and elderly and disabled Supplemental Security Income beneficiaries.¹⁰ In addition, states were required to provide a limited form of Medicaid coverage to certain low-income Medicare beneficiaries, covering costs that they would otherwise be required to share under Medicare.¹¹ As a result, many states currently do not provide Medicaid to childless adults at all and cover parents only at income levels far below 133 percent of the FPL.¹² The ACA further provides that the federal government will bear the entire cost of this coverage expansion for the first two years; the federal share thereafter will be reduced gradually to 90 percent.¹³

⁴ Mark Walsh, *Ed. Law Challenges Loom After Health-Care Ruling*, TEACHHUB (Oct. 8, 2012, 2:33 PM); <http://www.teachhub.com/ed-law-challenges-loom-after-health-care-ruling>; *See also* Mark Walsh, *Health-Care Ruling Has Implications for Education Spending*, EDUCATION WEEK SCHOOL L. BLOG (Jun. 28, 2012, 4:44 PM), http://blogs.edweek.org/edweek/school_law/2012/06/medicaid_ruling_has_implicatio.html.

⁵ *Nat'l Fed. Of Ind. Business v. Sebelius*, 132 S. Ct. 2566 (2012) [hereinafter *NFIB*].

⁶ While this issue brief focuses on Title IX, its analysis regarding the Spending Clause can be applied in key respects to Title VI of the Civil Rights Act of 1964, § 504 of the Rehabilitation Act, and the Age Discrimination Act of 1975, all antidiscrimination laws that apply to federally funded programs and activities and all of which Title IX mirrors in structure.

⁷ Patient Protection and Affordable Care Act, § 2005, Pub. L. No. 111-148, 124 Stat. 119-1025 (2010).

⁸ 42 U.S.C. § 1396a.

⁹ 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII).

¹⁰ *See* 42 U.S.C. § 1396a(a)(10)(A).

¹¹ *See id.*

¹² States currently must provide Medicaid to children under age 6 with family income up to 133 percent of the FPL and children ages 6 through 18 with family income up to 100 percent of the FPL. 42 U.S.C. §§ 1396a(a)(10)(A)(i)(IV), (VI), (VII), 1396a(l)(1)(B)-(D), 1396a(l)(2)(A)-(C).

¹³ Affordable Care Act, § 2005.

Since 1982, every state has participated in Medicaid, but the federal Medicaid statute makes such participation optional—though, of course, a state will only receive federal Medicaid funding if it participates in the program. The federal government generally pays between 50 and 83 percent of a state’s Medicaid costs, depending on income levels in the state¹⁴—far less than the federal share of the ACA Medicaid expansion. In order to provide insurance to low-income individuals, each state can accept federal funding to operate and design its own Medicaid program within the parameters set by the federal government, including the expansion of coverage required by the ACA, *or* turn down that funding and create a totally different program with state money only, or no program at all.

Following the enactment of the ACA, state attorneys general and others challenged the ACA’s expansion of Medicaid eligibility, arguing that withholding Medicaid reimbursement to a state unless that state complies with the expansion of its Medicaid program exceeded Congress’s powers under the Spending Clause and violated the Tenth Amendment. The plaintiff states argued that they would be coerced into contributing state funds toward the expanded Medicaid coverage because failure to comply with these increased requirements would expose them to a potential penalty loss of all Medicaid funding. Medicaid represents 40 percent of all federal funds that states receive, and the majority of states currently receive more than \$1 billion in Medicaid funding each year.¹⁵ Accordingly, the states argued, because they had no realistic option to turn down this funding, the federal government was unconstitutionally coercing them to undertake the ACA’s Medicaid expansion by conditioning future Medicaid funding on implementation of the expansion.¹⁶

Seven Justices held that Congress’s Spending Clause power did not permit it to condition all future Medicaid funds to a state on the state’s implementation of the ACA’s Medicaid expansion. Justice Roberts wrote the narrower (and thus controlling) opinion on this issue, which Justice Breyer and Kagan joined.¹⁷ While Justices Ginsburg and Sotomayor would have held that the Medicaid expansion was wholly constitutional, they joined Justices Roberts, Breyer, and Kagan in holding that an appropriate remedy for any constitutional violation was to sever the enforcement mechanism permitting all Medicaid funds to be withheld from a state that failed to implement the expansion from the Medicaid expansion itself—and this was the holding of the Court.¹⁸ (Justices Scalia, Thomas, Alito, and Kennedy would have struck down the entire ACA to remedy the violation.¹⁹)

As a result of the Supreme Court’s decision, the ACA therefore still provides for the expansion of Medicaid, but states that fail to comply with that expansion may not be penalized by the loss of their existing Medicaid funding. Instead, the federal government may only withhold the federal funding associated with the Medicaid expansion.

An important basis for this result was Justice Roberts’ view of the Medicaid expansion not as an enhancement of the existing Medicaid program, but rather as a new

¹⁴ 42 U.S.C. § 1396d(b).

¹⁵ KENNETH R. THOMAS, CONG. RESEARCH SERV., 7-5700, THE CONSTITUTIONALITY OF FEDERAL GRANT CONDITIONS AFTER *NFIB v. SEBELIUS* 2 (July 17, 2012).

¹⁶ Brief of State Petitioners at 32-48, *State of Florida v. Dep’t of Health and Human Services*, No. 11-400, (S. Ct. Jan. 10, 2012) (addressing coercion through Medicaid funding).

¹⁷ *NFIB*, 132 S. Ct. at 2601-08.

¹⁸ *Id.* at 2641-42.

¹⁹ *Id.* at 2667-76.

program layered on top of the existing Medicaid program.²⁰ Central to the Court's decision that Congress could not withhold all Medicaid funding if states did not undertake the Medicaid expansion, is Justice Roberts' conclusion that conditions that "take the form of threats to terminate other significant independent grants... are properly viewed as a means of pressuring the States to accept policy changes."²¹

The Court also emphasized the sheer size of Medicaid and its importance to state budgets in finding the enforcement mechanism unconstitutionally coercive. As noted by the Court, "Medicaid spending accounts for over 20 percent of the average State's total budget, with federal funds covering 50 to 83 percent of these costs."²² It is by far the largest federal grant to states.²³ The size of the federal grant is such, the Court concluded, that no state could voluntarily turn it down, while "[t]he legitimacy of Congress's exercise of the spending power... rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'"²⁴ Contrasting the Medicaid expansion to the Court's 1984 decision in *South Dakota v. Dole*,²⁵ which concluded that Congress did not unconstitutionally coerce the states or exceed its Spending Clause powers when it conditioned a small portion of federal highway funds to a state on the requirement that the state adopt legislation setting the drinking age at 21, the Court reasoned:

It is easy to see how the *Dole* court could conclude that the threatened loss of less than half of one percent of South Dakota's budget left that State with a 'prerogative' to reject Congress's desired policy, 'not merely in theory but in fact.' The threatened loss of over ten percent of a State's overall budget, in contrast, is economic dra-gooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.²⁶

No state has in fact ever been penalized with loss of its entire Medicaid funding for failure to meet program requirements, but the Court dismissed this fact as insignificant, characterizing the threat of loss of all Medicaid funding as "a gun to the head."²⁷

The holding marked a dramatic departure from previous Spending Power jurisprudence. Never before in the nation's history has legislation enacted pursuant to Congress's Spending Power been found to unconstitutionally coerce the states. Indeed, the Court had previously expressed skepticism that the states, as sovereigns, could ever be coerced by a promise of federal funds, as it was always in their power to say no. In rejecting a coercion challenge to an unemployment insurance law passed pursuant to the Spending Power, for example, the Court noted in 1937, "Nothing in the case

²⁰ See *id.* at 2605-06 ("The Medicaid expansion... accomplishes a shift in kind, not merely degree.... Indeed, the manner in which the expansion is structured indicates that while Congress may have styled the expansion a mere alteration of existing Medicaid, it recognized it was enlisting the States in a new health care program.").

²¹ *Id.* at 2604.

²² *Id.*

²³ See *id.* at 2605 ("The Federal Government estimates that it will pay out approximately \$3.3 trillion between 2012 and 2019 in order to cover the costs of pre-expansion Medicaid."); see also *id.* at 2662 ("Medicaid has long been the largest federal program of grants to the States.") (Scalia, J., et al, dissenting).

²⁴ *Id.* at 2602 (citing *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

²⁵ *South Dakota v. Dole*, 483 U.S. 203 (1987).

²⁶ *NFIB*, 132 S.Ct. at 2605, quoting *Dole*, 483 U.S. at 211-12.

²⁷ *Id.* at 2604.

suggests the exertion of a power akin to undue influence, if we assume that such a concept can *ever* be applied with fitness to the relations between state and nation.”²⁸ As the Court stated in that case and reaffirmed in *Dole*, “[T]o hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties... Till now the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems.”²⁹ In *Dole*, the Court noted that a state’s sovereignty was not compromised when a state could “adopt the simple expedient of not yielding” to the alleged federal coercion.³⁰ Based on these statements, federal courts of appeals consistently rejected claims that Spending Power laws such as Medicaid coerced the states into accepting the terms on which the federal funds were offered, concluding that states in fact were just presented “hard political choices” by these laws, which did not implicate the Constitution.³¹

While seven justices agreed that enforcement of the Medicaid expansion through the threatened loss of all Medicaid funding was unconstitutionally coercive, and thus dramatically changed Spending Power jurisprudence, the Court did not clearly identify a test to apply in future cases.³² As a result, observers and commentators, soon, no doubt, to be joined by litigants, are raising questions about the constitutionality of a host of other Spending Power laws and programs, including Title IX.

II. TITLE IX’S POWERFUL ANTIDISCRIMINATION MANDATE

Forty years ago, Congress enacted Title IX of the Education Amendments of 1972, providing that entities receiving federal funding may not discriminate on the basis of sex in education programs or activities. Modeled on Title VI of the Civil Rights Act of 1964, which prohibits race and national origin discrimination by recipients of federal funds, Title IX has had a revolutionary effect in opening educational opportunities to women and girls over the past forty years. It swept away the once common practice of holding women to higher standards in higher education admissions and artificially capping their enrollment in elite colleges and universities. While women received less than 20 percent of Ph.D.’s in life sciences in 1972, today they receive slightly more than half, and the percentage of engineering Ph.D.’s received by women, although still far too low, has increased from zero percent in 1972 to about 20 percent today.³³ Only seven percent of high school athletes were girls in 1972, but today girls are 41 percent of those playing high school sports.³⁴ Six times as many women participate in college athletics as did at the time of Title IX’s passage.³⁵ As the

²⁸ *Chas. C. Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937) (emphasis added).

²⁹ *Dole*, 483 U.S. at 211 (quoting *Steward Machine*, 301 U.S. at 589-90).

³⁰ *Id.* at 210.

³¹ *California v. United States*, 104 F.3d 1086, 1092 (9th Cir. 1997); *see also, e.g.*, *Van Wyhe v. Reisch*, 581 F.3d 639, 652 (8th Cir. 2009); *Jim C. v. United States*, 235 F.3d 1079, 1082 (8th Cir. 2000) (en banc); *Kansas v. United States*, 214 F.3d 1196, 1203-1204 (10th Cir. 2000); *Padavan v. United States*, 82 F.3d 23, 28-29 (2d Cir. 1996); *Nevada v. Skinner*, 884 F.2d 445, 448-49 (9th Cir. 1989); *Oklahoma v. Schweiker*, 655 F.2d 401, 413-14 (D.C. Cir. 1981).

³² *See, e.g.*, *NFIB*, 132 S. Ct. at 2606. (“We have no need to fix a line.... It is enough for today that wherever that line may be, this statute is surely beyond it.”).

³³ NATIONAL COALITION FOR WOMEN AND GIRLS IN EDUCATION, TITLE IX: WORKING TO ENSURE GENDER EQUALITY IN EDUCATION, CELEBRATING 40 YEARS, at 22 (2012), <http://www.ncwge.org/PDF/TitleIXat40.pdf>.

³⁴ *Id.* at 8.

³⁵ *Id.*

result of Title IX, students facing sexual harassment now have a legal remedy.³⁶ Pregnant students are no longer routinely expelled from high school.³⁷

Title IX's nondiscrimination guarantee reaches all of the operations of any educational institution that receives federal funding.³⁸ For example, Title IX extends not only to the "traditional educational operations" of a college receiving federal funding, but also to "faculty and student housing, campus shuttle bus service, campus restaurants, the bookstore, and other commercial activities," of the college, as well as its other operations.³⁹ In addition, any education program or activity operated by an entity that receives federal funding is also covered by Title IX. For example, if a hospital receives federal funding for a particular clinic, then any educational programs operated by the hospital are covered by Title IX.⁴⁰

Title IX is enforceable not only by a private right of action, which provides a vehicle for injunctive relief and damages,⁴¹ but also by the federal agencies providing the financial assistance to the relevant institution, with the Department of Justice playing a coordinating role, in close consultation with the Department of Education.⁴² Federal agencies investigate and resolve administrative Title IX complaints against funding recipients.

When an agency concludes that a federal funding recipient has violated Title IX, it must first seek to resolve the violation through voluntary compliance by the recipient.⁴³ If attempts to achieve voluntary compliance are unsuccessful, the matter may be referred to the Justice Department, which has the authority to bring litigation to resolve the violation.⁴⁴ Alternatively, an agency has the power to terminate federal funding based on a Title IX violation, but only after it determines that "compliance cannot be secured by voluntary means."⁴⁵ A formal hearing, an express finding of failure to comply, and an approval of fund termination by the agency head must precede any termination of funds.⁴⁶ In addition, prior to any termination of funds, the agency must also file a report providing the grounds for the decision to terminate funds with the House and Senate legislative committees having jurisdiction over the relevant program and wait 30 days before terminating funds.⁴⁷ Funding can be terminated only

³⁶ See *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).

³⁷ See 34 C.F.R. § 106.40 (2012).

³⁸ 20 U.S.C. § 1687. This language was added to Title IX by the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988), which overturned the Supreme Court's decision in *Grove City College v. Bell*, 465 U.S. 555 (1984) (holding that Title IX's antidiscrimination rule applied only to the particular aspect of an institution's operations that actually received federal funding), and restored Title IX's broad reach, as well as the broad reach of other antidiscrimination laws tied to federal funding.

³⁹ S. REP. NO. 64 at 17 (1988), *reprinted in* 1988 U.S.C.C.A.N. 19.

⁴⁰ 20 U.S.C. § 1687; *see also, e.g., Jeldness v. Pearce*, 30 F.3d 1220 (9th Cir. 1994) (holding that educational activities operated by prisons receiving federal funds were bound by Title IX); U.S. DEP'T OF JUSTICE, CIV. RTS. DIV., TITLE IX LEGAL MANUAL at 53, n. 28 and accompanying text (Jan. 11, 2001), <http://www.justice.gov/crt/about/cor/coord/ixlegal.pdf>.

⁴¹ See *Cannon v. University of Chicago*, 441 U.S. 677 (1979) (finding an implied private right of action under Title IX); *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992) (finding a right to recover damages for intentional violations of Title IX).

⁴² See Exec. Order No. 12,250, 3 C.F.R. 298 (1980), *available at* <http://www.archives.gov/federal-register/codification/executive-order/12250.html>.

⁴³ 42 U.S.C. § 2000d-1.

⁴⁴ *Id.* (authorizing compliance with Title IX to be effect "by any other means authorized by law"); 34 C.F.R. § 100.8 (2012).

⁴⁵ 42 U.S.C. § 2000d-1.

⁴⁶ Procedure for Effecting Compliance, 34 C.F.R. § 106.71 (2012); 34 C.F.R. § 100.8 (2012).

⁴⁷ *Id.*; 20 U.S.C. § 1682.

when the particular funding stream at issue is directly financing discrimination or financing an activity that is infected with discrimination.⁴⁸

III. TITLE IX AND THE NEW SPENDING CLAUSE

As noted above, Justice Roberts' decision for the Court in *NFIB v. Sebelius* does not set out any precise test for determining whether a Spending Power program is unconstitutionally coercive,⁴⁹ but a fair analysis of the holding demonstrates that because Title IX is markedly different from the challenged Medicaid expansion in key ways, Title IX is constitutional, even under the Court's re-envisioning of Spending Power jurisprudence.

First, it is important to note that Title IX's mandate applies to private entities receiving federal money, as well as public entities, in contrast to the Medicaid program where the challenged provisions applied only to states. *NFIB*'s Spending Power analysis is driven solely by a professed concern for "ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system."⁵⁰ Thus, the *NFIB* analysis has no applicability to Spending Power statutes as applied to private actors and casts no shadow whatsoever over Title IX's applicability to private federal funding recipients. Title IX also reaches local governments receiving federal money. Given that *NFIB* is singular as a case finding unconstitutional coercion in violation of the Spending Clause, it is unclear if coercion claims are even available to local governments, or whether such claims, if available, would be subject to the same legal standard as applied to claims by states, but there are potentially important differences between the two contexts.⁵¹

Even as applied to state governments, however, Title IX is sharply distinct from the Medicaid expansion. Much of the Spending Power analysis in *NFIB* suggests that Medicaid is uniquely situated in Spending Power jurisprudence because of the sheer size of the program as a percentage of state budgets. "Medicaid spending accounts for over 20 percent of the average State's total budget, with federal funds covering 50 to 83 percent of those costs," Justice Roberts' opinion emphasized, concluding that the "threatened loss of over 10 percent of a State's overall budget" left states with no choice but to comply.⁵² The opinion of Justices Scalia, Kennedy, Thomas, and Alito (which provided the additional four votes to the three votes for Justice Roberts' opinion) further observed:

The States are far less reliant on federal funding for any other program. After Medicaid, the next biggest federal funding item is aid to support elementary and secondary education, which amounts to 12.8% of total federal outlays to the States, and equals only 6.6% of all state expenditures combined.... [E]ven in states with less than average federal Medicaid funding, that funding is at

⁴⁸ 42 U.S.C. § 2000d-1.

⁴⁹ See *supra* note 32 and accompanying text.

⁵⁰ 132 S. Ct. at 2602.

⁵¹ Compare *Printz v. United States*, 521 U.S. 898, 931 n.15 (1997) (refusing to distinguish between state and local government for purposes of Tenth Amendment analysis) with *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 690 n. 54 (1978) (distinguishing between state and local governments for purposes of sovereign immunity analysis).

⁵² *NFIB*, 132 S. Ct. at 2604, 2605 (Opinion of Roberts, C.J.).

least twice the size of federal education funding as a percentage of state expenditures.⁵³

Four of the justices in the majority thus drew an explicit contrast between Medicaid funding (and states' ability to refuse it) and federal education funding. Given the Court's emphasis on the unique size of Medicaid, on its face *NFIB's* Spending Clause analysis applies only to Medicaid, and indeed, only to the ACA's very particular type of Medicaid expansion.⁵⁴

Title IX's nondiscrimination rule, of course, attaches not only to aid to support elementary and secondary education, but to any federal funding received by an educational institution and to any federal funding received by an institution that operates an educational program or activity—a much more difficult to calculate category of federal outlays to states. Key differences between the design and operation of the Medicaid expansion and the design and operation of Title IX, however, mean that the size of the federal outlay to which Title IX's requirements attach is largely beside the point for the purposes of Spending Power analysis, even if the total amount of this funding were to rival federal Medicaid funding. The crucial difference lies in the structure of Title IX and the potential penalty for noncompliance.

When the Court considered Medicaid, it considered a funding stream structured as a single, large federally-funded program. Thus, the Court focused on the size of the entire Medicaid grant received by states and states' dependence on that entire Medicaid grant when it considered whether the ACA's expansion of Medicaid eligibility as a condition of future receipt of Medicaid funding was unconstitutionally coercive. Title IX is fundamentally different in its structure from Medicaid as it existed either before or after the ACA expansion. It is not a single federally-funded program, but rather a condition imposed on multiple, separate federal funding streams, each of which operates independently.

The relevance of this difference is made clear by the potential penalty faced by states that fail to comply with Title IX. Through language known as the "pinpoint provision," Title IX narrows and limits the adverse effects of federal fund termination. This provision states that when a federal agency terminates or refuses to grant funding based on a Title IX violation, "such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and *shall be limited in its effect to the particular program, or part thereof*, in which such noncompliance has been so found."⁵⁵ The seminal case interpreting this language is *Board of Public Instruction v. Finch*,⁵⁶ a case that arose under Title VI—the source of Title IX's identical pinpoint provision.⁵⁷ In *Finch*, a Department of Health, Education, and Welfare (HEW) hearing officer made findings that a school district had not made adequate progress toward racial desegregation, and that the district had instead sought to perpetuate a dual school system through its school construction program. Based on these findings, a final order was entered by the Commissioner of Education terminating "any class of Federal financial assistance" to

⁵³ *Id.* at 2663-64.

⁵⁴ See *id.* at 2606 (distinguishing the ACA expansion of Medicaid from all previous Medicaid expansions and amendments).

⁵⁵ 20 U.S.C. § 1682 (emphasis added).

⁵⁶ 414 F.2d 1068 (1969).

⁵⁷ See 42 U.S.C. § 2000d-1.

the district “arising under any Act of Congress” administered by HEW, the National Science Foundation, or the Department of the Interior.

The Fifth Circuit vacated this termination of funding, holding that it exceeded the Commissioner of Education’s power under Title VI. The Commissioner’s order had terminated federal funding pursuant to three separate statutes—“one concern[ing] federal aid for the education of children of low income families; one involv[ing] grants for supplementary educational centers; [and] the third provid[ing] special grants for the education of adults who have not received a college education.”⁵⁸ But the Commissioner had made no specific findings as to whether each of these federal grants had been used to support unlawfully segregated education, or if discrimination in one federally funded activity caused discriminatory treatment in the other activities funded by separate federal streams.

The court held that in the absence of such findings, the termination of all three federal funding streams to the school district violated the pinpoint provision. The court focused on the provision’s requirement that a termination of funding be “limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found,” and concluded that the term “program” referred not to generic categories of programs operated by a recipient (for example, educational programs) but rather to the program of assistance administered by the federal government pursuant to a particular statute.⁵⁹ Thus, an agency’s fund termination order must be based on grant-statute-specific findings of noncompliance. As the court explained:

If the funds provided by the grant are administered in a discriminatory manner, or if they support a program which is infected by a discriminatory environment, then termination of such funds is proper. But there will also be cases from time to time where a particular program, within a state, within a county, within a district, even within a school (in short, within a “political entity or part thereof”), is effectively insulated from otherwise unlawful activities. Congress did not intend that such a program suffer for the sins of others.... Each [statutory program] must be considered on its own merits to determine whether or not it is in compliance with the Act. Schools and programs are not condemned *en masse* or in gross, with the good and the bad condemned together, but the termination power reaches only those programs which would utilize federal money for unconstitutional ends. Under this procedure each program receives its own “day in court.”⁶⁰

The *Finch* court made clear that a program should not be considered “in isolation from its context”; if discrimination has (for example) affected the make-up of the entire student body of the school, then a program offered within the school may in some instances be infected by discrimination, even if it is not itself actively discriminating.⁶¹ But by limiting the termination power to activities that are either actually

⁵⁸ *Finch*, 414 F.2d at 1074.

⁵⁹ *Id.* at 1072 (quoting 42 U.S.C. § 2000d-1). Further, the court concluded, even if “program” was meant to refer to generic categories of aid, such as “aid to schools” the parenthetical phrase, “or part thereof,” must be given meaning. *Id.* at 1077.

⁶⁰ *Id.* at 1075, 1078 n.11. See also *Gautreaux v. Romney*, 457 F.2d 124 (7th Cir. 1972).

⁶¹ *Id.* at 1079.

discriminatory or infected by a discriminatory environment, vindictive terminations of funds are avoided and innocent beneficiaries of programs untainted by discrimination are protected.⁶²

The *Finch* holding has been consistently followed by courts and federal agencies and remains in effect today. While the Civil Rights Restoration Act of 1988 amended Title IX's definition of "program" to clarify that Title IX applies to all the operations of an educational institution that receives federal funding and all the educational operations of an institution if any part of the institution receives federal financial assistance,⁶³ this did not affect the pinpoint provision, which limits fund termination to the particular program "or part thereof" found to have discriminated or been infected by discrimination. Thus, to the extent the Civil Rights Restoration Act broadened Title IX's definition of "program," the "or part thereof" language of the pinpoint provision ensured that the federal power to terminate funds to states or other recipients remained unchanged, as legislative history and implementing regulations make clear.⁶⁴

Therefore, Title IX does not contemplate or permit a wholesale termination of (for example) federal education funding to a state in the absence of a showing of sex discrimination infusing and infecting the entirety of a state's federal education funds. As a result, Title IX is not unconstitutionally coercive under *NFIB*. After all, the opinion of the Court did not hold that the expansion of Medicaid was unconstitutionally coercive; rather, it held that the potential penalty of loss of all Medicaid funding for failure to comply with the expansion was unconstitutional. A majority of five Justices agreed that any constitutional violation in the Medicaid expansion was wholly cured by limiting the potential penalty states faced. In other words, as Justice Roberts' decision states, "Nothing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that States accepting such funds comply with conditions on their use. What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing funding."⁶⁵ In the language of *NFIB*, Title IX is a condition that "govern[s] the use of the funds" provided to the state, rather than a condition that "take[s] the form of threats to terminate other significant independent grants."⁶⁶ Because Title IX requires that any termination of federal funds based on sex discrimination be specific to the grant money that funds the discrimination, it is in complete conformity with the *NFIB* holding requiring the penalty for refusing to expand Medicaid be limited to the loss of federal funding associated with the expansion of Medicaid.

⁶² *Gautreaux*, 414 F.2d at 1075.

⁶³ 20 U.S.C. § 1687. See *supra* note 388 and accompanying text.

⁶⁴ See S. REP. NO. 100-64, at 20 (June 5, 1987) (noting that the CRRA leaves in effect the *Finch* rule that "Federal funds earmarked for a specific purpose would not be terminated unless discrimination was found in the use of those funds or the use of the funds was infected with discrimination elsewhere in the operation of the recipient"); Conforming Amendments to the Regulations Governing Nondiscrimination Under the Civil Rights Restoration Act of 1987, 65 Fed. Reg. 68050, 6805 (codified at 34 C.F.R. pts. 100, 104, 106, and 110) (Nov. 13 2000) ("It is important to note that these changes do not in any way alter the requirement of the CRRA that a proposed or effectuated fund termination be limited to the particular program or programs 'or part thereof' that discriminates or, as appropriate, to all of the programs that are infected by the discriminatory practices."); U.S. DEP'T OF JUSTICE, CIV. RTS. DIV., TITLE IX LEGAL MANUAL at 149, n. 124 and accompanying text (Jan. 11, 2001), <http://www.justice.gov/crt/about/cor/coord/ixlegal.pdf>.

⁶⁵ 132 S.Ct. at 2607.

⁶⁶ *Id.* at 2604.

IV. TITLE IX AND THE FOURTEENTH AMENDMENT

Title IX is not only an appropriate exercise of Congress's Spending Power; as applied to states; it is also an appropriate exercise of Congress's authority to enforce the Equal Protection Clause under Section 5 of the Fourteenth Amendment. Even if a court were somehow to conclude, despite the differences in structure and scope between the Medicaid expansion and Title IX, that Title IX exceeded Congress's Spending Power when applied to states receiving federal funding, Title IX would nevertheless apply to these states as an appropriate exercise of Congress's Section 5 power.

The Equal Protection Clause protects against sex discrimination by state actors. Distinctions on the basis of sex are impermissible unless they are substantially related to an important state interest and based on an exceedingly persuasive justification.⁶⁷ Section 5 of the Fourteenth Amendment gives Congress the power to "enforce," by "appropriate legislation" this constitutional guarantee.⁶⁸ Title IX is just such an appropriate enforcement of the Equal Protection Clause's antidiscrimination mandate.

The Supreme Court has set out guidance for determining when a statute "appropriately" enforces the Equal Protection Clause. Congress determines what legislation is necessary to secure the guarantees of the Fourteenth Amendment, and "its conclusions are entitled to much deference."⁶⁹ In determining whether legislation is valid under Section 5, the Court has often asked whether Congress had evidence of a pattern of state constitutional violations that the legislation targeted,⁷⁰ although the Court has also noted that lack of such a legislative record "is not determinative of the § 5 inquiry."⁷¹ A legislative record is likely less relevant when Congress targets discriminatory practices that are otherwise amply demonstrated in the historical record and recognized in court decisions, as is the history of unconstitutional sex discrimination by states.⁷²

"Legislation enacted under § 5 must be targeted at 'conduct transgressing the Fourteenth Amendment's substantive provisions,'"⁷³ but Congress is not limited to narrowly prohibiting acts forbidden by the Fourteenth Amendment itself.⁷⁴ Instead, "Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct."⁷⁵ Legislation that goes beyond the Fourteenth Amendment's own requirements is appropriate under Section 5 when there is "congruence and proportionality between the

⁶⁷ E.g., *United States v. Virginia*, 518 U.S. 515 (1996).

⁶⁸ *City of Boerne v. Flores*, 521 U.S. 507, 517 (1997).

⁶⁹ *Id.* at 536.

⁷⁰ *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003).

⁷¹ *Kimel v. Florida Board of Regents*, 528 U.S. 6, 91 (2000); *Florida Prepaid v. College Savings Bank*, 527 U.S. 627, 646 (1999); see also *City of Boerne*, 521 U.S. at 532.

⁷² E.g., *Virginia*, 518 U.S. at 531-32 (observing that women "have suffered ... at the hands of discriminatory state actors during the decades of our Nation's history"); *J.E.B. v. Alabama*, 511 U.S. 127 (1994) (concluding that "our Nation has had a long and unfortunate history of sex discrimination, a history which warrants the heightened scrutiny we afford all gender-based classifications today"); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 n. 10 (1982) ("History provides numerous examples of legislative attempts to exclude women from particular areas simply because legislators believed women were less able than men to perform a particular function.").

⁷³ *Coleman v. Maryland Court of Appeals*, 132 S.Ct. 1327, 1334 (2012).

⁷⁴ "Congress' power 'to enforce' the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel*, 528 U.S. at 81.

⁷⁵ *Hibbs*, 538 U.S. at 727.

injury to be prevented or remedied and the means adopted to that end.”⁷⁶ The Supreme Court has noted that because gender-based classifications are subject to heightened scrutiny under the Constitution, it is “easier for Congress to show a pattern of state constitutional violations” justifying legislation under Section 5 when targeting sex discrimination than it is to show a pattern of state constitutional violations justifying Section 5 legislation when targeting discrimination subject only to rational basis review under the Equal Protection Clause. This is because classifications on the basis of sex are presumptively unconstitutional, so evidence of a history of such classifications by states will in general establish a history of constitutional violations.⁷⁷

Significant evidence of a pattern of unconstitutional discrimination on the basis of sex in education undergirds Title IX. The Supreme Court itself has taken judicial notice of the “volumes of history” documenting sex discrimination in education, including unconstitutional discrimination by states.⁷⁸ The exclusion of women from public education is part of the long history of states’ discrimination on the basis of sex that the Court has acknowledged on numerous occasions.⁷⁹

Moreover, when Congress passed Title IX in 1972, it had before it significant evidence of unconstitutional sex discrimination in public schools. For example, as summarized by the House Report on the bill:

During the course of extensive hearings on higher education, much testimony was heard with respect to discrimination against women in our institutions of higher education. Testimony revealed that women are required to meet higher admission standards than men. One instance cited to the Committee occurred at the University of North Carolina where admission of women at the freshman level was “restricted to those who are especially well qualified.” No similar restriction existed for male students. A 1964 report of the Virginia Commission for the Study of Educational Facilities in the State of Virginia pointed out that 21,000 women students were turned down for college entrance in the State of Virginia while not one male student was rejected. On the graduate level, testimony revealed that the situation worsens.⁸⁰

Senator Birch Bayh, the lead sponsor of Title IX, decried “an arbitrary and compulsory ration of 2½ men to every woman at a State university,” and noted the Department of Psychology at Berkeley had not hired a woman since 1924.⁸¹ Data before Congress showed that in higher education “women are under-represented or placed in positions with little power in decision making” and that “[t]his is particularly true in the large *public* institutions.”⁸² Reports relied on by Congress showed that leading public law schools had no or almost no women faculty members.⁸³

⁷⁶ *Coleman*, 132 S.Ct. at 1334.

⁷⁷ *Hibbs*, 538 U.S. at 735.

⁷⁸ *Virginia*, 518 U.S. at 531; *Id.* at 536-38; 542-44.

⁷⁹ *See, e.g., supra* note 72.

⁸⁰ H.R. REP. NO. 92-554 (Oct. 9, 1971), *reprinted in* 2 U.S.C.C.A.N. 72-48, 2511.

⁸¹ 117 CONG. REC. 30,156 (Aug. 5, 1971).

⁸² 117 CONG. REC. 2658 (Feb. 11, 1971) (statement of Rep. Mink) (emphasis added).

⁸³ 118 CONG. REC. 3939 (Feb. 15, 1972) (data drawn from the Association of American Law Schools Directory of Law Teachers entered into the record by Sen. Bayh).

Congress also had evidence that both public and private colleges provided women with markedly lower levels of scholarship aid than men. A survey of students, more than half of whom were enrolled in public colleges or universities, found that men received larger scholarships and aid packages, while women took out more loans to attend college, despite the fact that the women reported receiving higher college grades than the men did.⁸⁴

The rampant discrimination uncovered by Congress included discrimination in elementary and secondary public education. A report on sex bias in the public schools entered into the Congressional Record in 1971 documented “women assigned to sex-segregated classes, teachers who favor[ed] their male students, and guidance counselors who discourage[d] [women] from many careers.”⁸⁵ It summarized the widespread practice of assigning girls to home economic courses and boys to shop courses. It described how the leading public high schools in New York City admitted only a handful of girls and had only admitted any beginning in the previous two years as the result of legal action, and noted that specialized public vocational high schools in New York City focusing on automobiles, aviation, and the electrical industries were closed to girls, who instead were offered courses in typing, stenography, and cosmetology.⁸⁶ Another report concluded that a survey of city boards of education found that sex segregation in high school vocational programs was “the rule rather than the exception,” with many more vocational programs being offered to boys than girls.⁸⁷

In short, evidence before Congress documented an overwhelming culture of sex stereotyping, gender steering, and sex discrimination in education in the United States, including both public and private institutions.⁸⁸ For example, a Ford Foundation-funded report on higher education relied on by Congress concluded, “Discrimination against women, in contrast to that against minorities, is still overt and socially acceptable within the academic community.”⁸⁹

In 1988, when Congress passed the Civil Rights Restoration Act, restoring the broad reach of Title IX after its coverage had been narrowed by the Supreme Court, Congress reinforced and updated these findings, again documenting ongoing, persistent sex discrimination in public education, including discrimination in athletics programs and employment, and sexual harassment of students.⁹⁰ In fact, a primary impetus for enacting the Civil Rights Restoration Act was Congress’s concern about

⁸⁴ 118 CONG. REC. 5759 (Educational Testing Service study entered into the record by Sen. Bayh).

⁸⁵ 117 CONG. REC. 25,507 (July 14, 1971) (statement of Rep. Abzug); see also 117 CONG. REC. 39,253 (Nov. 4, 1971) (statement of Rep. Sullivan) (noting discrimination against women in employment at state universities, including University of Connecticut, where 33 percent of instructors, but only 4.8 percent of full professors, were women, the University of Massachusetts, where only two out of 65 women on faculty had tenure, and the University of Michigan, where even in traditionally female courses of study, women professors were grossly underrepresented).

⁸⁶ *Id.* at 25,508.

⁸⁷ 118 CONG. REC. 3936 (Feb. 15, 1972) (report entered into the record by Sen. Bayh).

⁸⁸ This evidence included seven days of hearings on discrimination against women in education, which documented discriminatory practices ranging from public universities expressing preferences for males in job postings, to overt discrimination against women in admissions to public medical schools, to biased counseling discouraging women from pursuing certain fields and certain degrees. See generally *Hearings on Discrimination Against Women, Before the Special Subcmte. on Educ. of the House Cmte. on Education and Labor* (1970), available at http://repositories.lib.utexas.edu/bitstream/handle/2152/12878/Chisholm_DiscriminationAgainstWomenI.pdf?sequence=2.

⁸⁹ 118 CONG. REC. 5803 (Feb. 28, 1972) (statement of Sen. Bayh).

⁹⁰ E.g., *Hearings on the Civil Rights Restoration Act of 1987 Before the Sen. Labor and Human Resources Cmte.*, S. Hrg. 100-374, at 264-78 (1987).

ongoing, invidious sex discrimination in college athletics, which included the athletic programs at public colleges and universities.⁹¹

Through this evidence and much more like it, the legislative history of Title IX and the Civil Rights Restoration Act reinforces the long pattern of sex discrimination in education, repeatedly recognized by the Supreme Court, and amply demonstrates widespread violations of the guarantee of equal protection of the law by state actors. Moreover, the forty years since passage of Title IX provide numerous examples of ongoing sex discrimination by states (as well as by localities and private actors), highlighting the continuing need for these protections.⁹² For these reasons, Title IX rests on a firm basis as a remedy for a pattern of constitutional violations.

The differences in scope between the Equal Protection Clause and Title IX as applied to state actors are relatively minor,⁹³ and so the statute easily meets the “congruence and proportionality” test. Title IX expressly targets discrimination on the basis of sex, discrimination that is presumptively unlawful under the Constitution when undertaken by state actors. Given the established history of unconstitutional sex discrimination in public education, little more is necessary to demonstrate that Title IX is a congruent and proportional response. As the Eighth Circuit noted in concluding that Title IX is Section 5 legislation, “Because the Supreme Court has repeatedly held that [the Fourteenth Amendment] proscribe[s] gender discrimination in education, ... we are unable to understand how a statute enacted specifically to combat such discrimination could fall outside the authority granted to Congress by § 5.”⁹⁴ The Supreme Court has soundly rejected the notion that in the face of evidence of gender discrimination by states, “Congress [can] do no more in exercising its sec. 5 power than simply proscribe such discrimination.”⁹⁵ Title IX’s proscription of such discrimination, which is in some important respects *narrower* than the Equal Protection Clause,⁹⁶ does not dramatically depart from the Constitution’s own and is clearly permissible under Section 5.

For example, Title IX protects against discrimination on the basis of pregnancy as a form of sex discrimination.⁹⁷ In *Nevada Department of Human Resources v. Hibbs*, upholding the Family and Medical Leave Act’s family leave provisions as Section 5 legislation enforcing the Equal Protection Clause, the Supreme Court made clear that legislation protecting against gender stereotypes and discrimination that focused on

⁹¹ See *id.*

⁹² E.g. *Mansourian v. Regents of Univ. of Cal.*, 602 F.3d 957 (9th Cir. 2010) (reversing and remanding district court dismissal of claims that state university discriminated in violation of Title IX and the Constitution based on denial of athletic opportunities to women wrestlers); *Jennings v. Univ. of N.C.*, 482 F.3d 686 (4th Cir. 2007) (en banc) (reversing district court’s grant of summary judgment and finding that coach’s alleged behavior to female soccer team member, if proven, constituted sexual harassment in violation of Title IX and possibly the Constitution); *Williams v. Bd. of Regents of Univ. Sys.*, 477 F.3d 1282 (11th Cir. 2007) (reversing dismissal of claim that state university violated Title IX based on its inadequate response to sexual assault of female student by male varsity athletes); *Communities for Equity v. Mich. High Sch. Athletic Ass’n*, 459 F.3d 676 (6th Cir. 2006) (finding that state athletic association violated Title IX and the Constitution by scheduling high school sports seasons in a discriminatory manner).

⁹³ See *Fitzgerald v. Barnstable*, 555 U.S. 246, 257 (2009).

⁹⁴ *Crawford v. Davis*, 109 F.3d 1281 (8th Cir. 1997).

⁹⁵ *Hibbs*, 538 U.S. at 737.

⁹⁶ E.g. *Hogan*, 458 U.S. at 732 (noting that Title IX does not reach admissions policies of undergraduate institutions that have from their establishment admitted only students of one sex, while the Equal Protection Clause has no such exception).

⁹⁷ *Chipman v. Grant County School Dist.*, 30 F. Supp. 2d 975 (1998); 34 C.F.R. § 106.40(b).

women as “mothers or mothers-to-be” was permissible under Section 5.⁹⁸ Title IX’s protections against pregnancy discrimination and discrimination on the basis of parental status similarly respond to and prevent unconstitutional practices based on gender stereotypes.

Indeed, multiple courts of appeals have recognized that Title IX is not only Spending Power legislation, but also Section 5 legislation.⁹⁹ As the Supreme Court recognized in *Hibbs*, Congress can rely on more than one source of constitutional authority in passing a single statute.¹⁰⁰ Congress did not explicitly identify Section 5 as a source of authority when it initially enacted Title IX, but the Supreme Court reiterated in *NFIB* itself that “[t]he ‘question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.’”¹⁰¹ As the Eighth Circuit explained when it determined that Title IX was Section 5 legislation, as well as Spending Clause legislation, the inquiry is an objective one: “As long as Congress had such authority [to legislate] as an objective matter, whether it also had the specific intent to legislate pursuant to that authority is irrelevant.”¹⁰² Moreover, when Congress passed the Civil Rights Remedies Equalization Act in 1987 in order to abrogate states’ Eleventh Amendment immunity in Title IX suits, it specifically relied not only on the Spending Clause, but also on Section 5.¹⁰³ Congress’s explicit recognition that Section 5 empowered it to provide remedies against states in Title IX cases provides strong reinforcement for the conclusion that Title IX, as applied to state actors, enforces the Equal Protection Clause.

For all these reasons, Title IX is not only valid Spending Clause legislation, it is also valid Section 5 legislation. Indeed, even Paul Clement, no friend to federal mandates, suggested as much when he responded to Justice Ginsburg’s question regarding Title IX during the *NFIB* arguments. “I guess the question for this Court would be whether or not Section 5 of the 14th Amendment allowed Congress to do that,” he concluded.¹⁰⁴ Section 5 most assuredly does permit Congress to do just that.

⁹⁸ *Hibbs*, 538 U.S. at 736.

⁹⁹ *Crawford*, 109 F.3d at 1283; *Escue v. Northern Ok. College*, 450 F.3d 1146, 1152 (10th Cir. 2006); *Franks v. Kentucky Sch. for the Deaf*, 142 F.3d 360, 363 (6th Cir. 1998); *see also Doe v. Univ. of Illinois*, 138 F.3d 653, 660 (1998), *vacated*, 526 U.S. 1142 (1999).

¹⁰⁰ *Hibbs*, 538 U.S. at 726-27 (noting that Congress relied on Commerce Clause Power and Section 5 power in enacting the FMLA).

¹⁰¹ *NFIB*, 132 S.Ct. at 2598 (quoting *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948)); *see also EEOC v. Wyoming*, 460 U.S. 226, 243 n. 18 (1983).

¹⁰² *Crawford*, 109 F.3d at 1283. The two court of appeals decisions holding or suggesting that Title IX is not Section 5 legislation were reversed or disapproved by the Supreme Court on other grounds. *See Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390, 1398-99 (11th Cir. 1997), *rev’d*, 526 U.S. 629 (1999); *Rowinsky v. Bryan Ind. Sch. Dist.*, 80 F.3d 1006, 1012 (1996), *disapproved by* 526 U.S. 629 (1999). Moreover both courts holding or suggesting that Title IX was not Section 5 legislation based their analysis on the theory that Title IX’s structure and legislative history indicate that Congress relied on its Spending Clause power in passing the statute; yet, Any argument that Congress can only rely on multiple sources of constitutional authority when it explicitly says it is doing so is impossible to reconcile with the Supreme Court’s recent reiteration that Congress need not recite any magic words of intent in order to exercise available constitutional powers.

¹⁰³ *See* 131 CONG. REC. 22,346 (1985) (describing legislation as “clearly authorized” by the Spending Clause and Section 5); S. Rep. No. 388, 99th Cong., 2d Sess. 27 (1986).

¹⁰⁴ Transcript of Oral Argument at 22:10, *Nat’l Fed. Of Ind. Business v. Sebelius*, 132 S. Ct. 2566 (No. 11-393), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-400.pdf.

V. CONCLUSION

In the wake of the *NFIB* decision, defendants in Title IX litigation, and other litigation arising under Spending Power antidiscrimination laws, will no doubt seek to expand the Court's holding to undermine these crucial protections. Supreme Court precedent, including the *NFIB* decision itself, provides a clear roadmap for repelling these attacks. The fundamental principle that the federal government can ensure that its funds are not spent in support of invidious discrimination remains robust. Title IX remains strong.

The New Wave of Election Regulation: Burden without Benefit

Justin Levitt^{*}

In 2008, for the first time in the nation's history, a candidate identifying (at least in part) as a member of a racial minority group was a major party's nominee for President of the United States. The overwhelming significance of this milestone has obscured, if only by comparison, the fact that the 2008 electorate was in some ways also quite distinctive. More than 130 million Americans, millions more than ever before, successfully cast a ballot. In aggregate, turnout was about 63% of eligible electors—the highest rate since 1960, and the third highest since 1920.¹

Yet the volume of voters itself masks a substantial and substantially noteworthy change in the character of those who were successfully motivated and able to exercise the franchise. Generally, white non-Hispanic turnout has exceeded minority turnout by a substantial margin; the gap has exceeded 10 points in every election since 2000—other than 2008.² In 2008, the gap narrowed substantially, with non-Hispanic white turnout estimated at 66.1%, and minority turnout estimated (at the highest level in a decade) at 56.8%. In 2010, as in most midterm years, the turnout wave receded, but the gap remained closer than in the past midterm elections of the decade.³

Then, over the last two years, America witnessed a flurry of election legislation. Unfortunately, the new regulations include several controversial laws that exact real burdens on real Americans. Moreover, available data suggest that these burdens fall unequally; while 2008 saw advances toward a voting population that more equitably approximates the electorate as a whole, 2010 represented a step backward, and the

^{*} Associate Professor of Law, Loyola Law School, Los Angeles. This Issue Brief is adapted from invited testimony delivered to the Senate Judiciary Committee, and from *Election Deform: The Pursuit of Unwarranted Electoral Regulation*, 11 ELECTION L.J. 97 (2012), both of which are drawn from research conducted at (and with the assistance of) the Brennan Center for Justice at NYU School of Law. Thanks to Jason Campbell for suggested edits. All errors are my own. This Issue Brief was first released by ACS in June 2012.

¹ See Michael McDonald, 2008 General Election Turnout Rates (last updated Mar. 31, 2012), http://elections.gmu.edu/Turnout_2008G.html; Press Release, Curtis Gans, African-Americans, Anger, Fear, and Youth Propel Turnout to Highest Level Since 1960 (Dec. 17, 2008), <http://www.american.edu/spa/cdem/upload/2008pdfoffinaledited.pdf>.

² Turnout data by race and ethnicity were compiled from the U.S. Census Bureau's Current Population Survey. See U.S. Census Bureau, Voting and Registration, Population Characteristic (P20) Reports and Detailed Tables ["Current Population Survey"] (last updated Sept. 28, 2011), <http://www.census.gov/hhes/www/socdemo/voting/publications/p20/index.html>. For a discussion of the limits of this data source in assessing turnout, see Michael McDonald, 2008 Current Population Survey Voting and Registration Supplement (last updated May 17, 2010), http://elections.gmu.edu/CPS_2008.html.

³ *Id.*

new laws threaten to continue an unfortunate regressive pattern.⁴ Crucially, these burdens are not only real and inequitable but also unnecessary, which renders them suspect as a matter of constitutional law⁵ and fundamentally flawed as a matter of public policy.⁶ Not only do they make it more difficult for eligible Americans to vote, but they do so without any meaningful benefit.

Voters' opportunities to register, to take advantage of early voting, and to vote on Election Day itself have all been limited by new, and apparently unjustified, electoral legislation. While photo identification requirements continue to receive tremendous scrutiny ahead of this fall's elections, other new burdens should not be lost in the shuffle. This Issue Brief first focuses on provisions in a new Florida law that exemplify new restrictions on registration and on voting before Election Day. It then evaluates the landscape of voter identification laws across the country, critically analyzing the laws' purported justifications and benefits.

I. REGISTRATION AND EARLY VOTING

In 2011 and 2012, several states renewed their efforts to restrict voter registration and to limit opportunities for citizens to cast valid ballots in advance of Election Day. Florida managed to do both at once, inconveniencing voters and local election officials alike while offering little meaningful benefit to the election process. Florida's new law, HB 1355,⁷ presents a useful vehicle to examine similar legislation around the country.

A. RESTRICTIONS ON VOTER REGISTRATION

HB 1355 is Florida's latest in a series of attempts to restrict voter registration.⁸ In 2005, ostensibly concerned by organizations allegedly withholding registration forms that they collected, the legislature sharply restricted voter registration drives.⁹ These

⁴ Some believe that the new laws' impact reflects deliberate intent. *See, e.g.*, Michael A. Memoli, *Bill Clinton Warns Against Stifling Economic Growth in Debt Ceiling Deal*, L.A. TIMES, July 6, 2011 (quoting Pres. Bill Clinton as saying: "They are trying to make the 2012 electorate more like the 2010 electorate than the 2008 electorate.").

⁵ Election regulation must be sufficiently tailored to sufficiently weighty state interests in order to justify burdens on the electorate; the degree of scrutiny varies with the extent of the relevant burden. *See Crawford v. Marion County Election Bd.*, 553 U.S. 181, 190-91 (2008) (plurality); *id.* at 209-11 (Souter, dissenting).

⁶ I follow Professor Spencer Overton's lead in finding a careful and empirically grounded cost-benefit analysis of election legislation crucial not only to constitutional scrutiny, but also to evaluations of proposed regulations' merit as public policy. *See* Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 634-37 (2007).

⁷ 2011 Fla. Laws ch. 40 (H.B. 1355). The law is currently subject to a court challenge. *League of Women Voters of Florida v. Browning*, No. 4:11-cv-00628 (N.D. Fla. filed Dec. 15, 2011).

⁸ In addition to the restrictions mentioned in the text, Florida's practices precluding voter registration in the event of minor errors on registration forms were challenged in *Diaz v. Cobb*, 541 F. Supp. 2d 1319 (S.D. Fla. 2008), and *Florida State Conference of the NAACP v. Browning*, 522 F.3d 1153 (11th Cir. 2008); Florida's error-laden practices for purging the registrations of voters based ostensibly on disenfranchising convictions were challenged in *NAACP v. Harris*, No. 01-0120 (S.D. Fla. filed Jan. 10, 2001).

⁹ 2005 Fla. Laws ch. 277, § 7 (H.B. 1567). These allegations are disputed. It is clear that the volume of submitted registration forms increases exponentially as the registration deadline approaches. *See, e.g.*, Declaration of Glenn T. Burhans, Jr., In Support of Motion for Preliminary Injunction, ex. E, Fla. State Conference of the NAACP v. Browning, No. 4:07-cv-402 (N.D. Fla. 2007) (No. 6). It is possible that this represents the late submission of early-completed forms. But it more plausibly reflects the increasing volume of individuals completing forms as the registration deadline approaches. I am aware of no published study comparing the date on which registration forms are completed by electors (which is written on the form itself) to the dates on which those forms are submitted to officials (which is stamped on the form and/or entered in official systems); such a study would provide an empirical basis for assessing the degree to which completed forms are withheld.

restrictions included substantial fines for each and every form delivered to elections officials more than 10 days after the form was completed.¹⁰ The fine structure was sufficiently severe to cause the nonpartisan League of Women Voters to stop its Florida voter registration activity for the first time in the organization's 67-year history.¹¹

In subsequent litigation, a federal court rightly recognized that voter registration drives entail core political speech, protected by the First Amendment and inextricably intertwined with efforts to “persuade others to vote, educate potential voters about upcoming political issues, communicate their political support for particular issues, and otherwise enlist like-minded citizens in promoting shared political, economic, and social positions.”¹² And it rightly recognized that undue efforts to restrict registration drives impermissibly limit both political speech and association. The court explained that Florida provided no evidence supporting the need for its 2005 fine structure—and preliminarily enjoined this portion of the law.¹³

One year later, the legislature enacted an amended statute;¹⁴ the new law retained the 10-day deadline, but substantially reduced and capped total fines, and exempted organizations from fines due to situations beyond their control. The new law was challenged, and upheld based on the more tailored regulatory structure—and based on the fact that the law did not place any direct preconditions on the protected activity of conducting a voter registration drive.¹⁵

HB 1355 marks a severe step backward on both fronts flagged by the courts: it is no longer tailored to any existing problem, and imposes serious pragmatic obstacles to organizations as preconditions of conducting voter registration drives. It requires any individual or group to fill out an official state form before offering to help distribute, collect, and submit the registration form of anyone other than immediate family; this registration includes the name, address, and sworn declaration of each individual soliciting or collecting registration forms, whether employee or casual volunteer.¹⁶ Groups may not collect and turn in a single form until they have been issued a number by the state; individuals who are not working with organized groups are subject to the same requirements. The law requires that every individual and group account for every registration form used by any volunteer, including blank forms printed from public websites; county officials have new *daily* reporting requirements.¹⁷ And without any indication that the ten-day deadline of prior law was insufficient to compel the prompt return of completed forms, the deadline has now become just 48 hours, with any waiver for extenuating circumstances now solely in the hands of the Secretary of State, a partisan elected official.¹⁸

These requirements are striking. Before offering to touch a voter registration form from anyone other than a family member, citizens volunteering their time must wait for permission from the government. In addition to tracking each and every registration form, blank or complete, volunteers must ensure that each form they collect is

¹⁰ League of Women Voters of Florida v. Cobb, 447 F. Supp. 2d 1314, 1322 (S.D. Fla. 2006).

¹¹ *Id.* at 1325.

¹² *Id.* at 1333.

¹³ *Id.* at 1338.

¹⁴ 2007 Fla. Laws ch. 30 (C.S.H.B. 537).

¹⁵ League of Women Voters of Florida v. Browning, 575 F. Supp. 2d 1298, 1321-22 (S.D. Fla. 2008).

¹⁶ On its face, the statute applies to “any” assistance with voter registration. Regulations have narrowed the statutory scope to either soliciting for collection or collecting voter registration applications. FLA. ADMIN. CODE r. 1S-2.042(2)(b), (3) (2012).

¹⁷ FLA. STAT. § 97.0575(2) (2012); FLA. ADMIN. CODE r. 1S-2.042(5), (7)(c) (2012).

¹⁸ FLA. STAT. § 97.0575(3) (2012).

delivered to county officials within 48 hours, or face substantial fines issued or waived at the discretion of a partisan official.

These are stark limitations of, and penalties on, fundamental public engagement. They are the most restrictive provisions in the country, though recent legislation in Texas has some similar hallmarks.¹⁹ They should trouble observers and policymakers across the political spectrum. Indeed, far *less* onerous regulations of political campaign spending in Florida were recently challenged as severe constitutional burdens by the Institute for Justice.²⁰

Given its burdens, the law will have some predictable effects—few of which meaningfully increase the reliability of the registration system. Instead, the law has caused both Democracia USA, one of the larger civic engagement organizations in Florida dedicated to empowering the Latino electorate, and the League of Women Voters, a nonpartisan civic engagement enterprise of unparalleled lineage, to shut down all voter registration activity within the state.²¹

When voter registration drives are unable to offer their assistance, citizens lose one vital means to ensure that they are properly registered to vote—not merely new registrants, but also the 14% of Floridians who move within the state and need to re-register.²² Moreover, the population impacted by such restrictions is not evenly distributed. According to the U.S. Census Bureau's Current Population Survey,²³ minority citizens disproportionately register and re-register through voter registration drives: while 6% of non-Hispanic white voters reported registering through a voter registration drive in 2008, twice as many—12% of Hispanic voters and 13% of non-Hispanic African-American voters—reported registering through a drive.²⁴ Statistics from non-presidential years are similarly lopsided.²⁵

These new restrictions on civic participation are particularly troublesome in that they put trusted volunteer organizations out of the voter registration business

¹⁹ 2011 Tex. Gen. Laws ch. 507 (H.B. 1570) (amending TEX. ELEC. CODE §§ 12.006, 13.031, 13.047).

²⁰ See *Worley v. Roberts*, No. 4:10-cv-00423 (N.D. Fla. filed Sept. 28, 2010).

²¹ Letter from Lee Rowland & Mark Posner to Chris Herren, Chief, Voting Section, Civil Rights Div., Dep't of Justice, at 14-15 (July 15, 2011), <http://www.scribd.com/doc/60105826/Florida-HB-1355-Sec-5-Comment-Letter>; Lizette Alvarez, *Florida Passes Bill to Limit 3rd-Party Voter Registration*, N.Y. TIMES, May 5, 2011, at A20.

²² U.S. Census Bureau, 2005-2009 American Community Survey, tbl. B07003, available at <http://factfinder2.census.gov/faces/nav/jsf/pages/searchresults.xhtml> (last visited May 1, 2012).

²³ Data were retrieved using the U.S. Census Bureau's DataFerrett application, <http://dataferrett.census.gov/run.html>, for the Current Population Survey, Nov. 2006, Nov. 2008, and Nov. 2010.

²⁴ The statistics, drawn from the Current Population Survey, include individuals who report registering to vote in a particular manner. This tally may overrepresent the true total—for example, by excluding voters who did not know how they were registered, but were registered through a source other than a voter registration drive. This tally may also underrepresent the true total—for example, the figures for registration drives do not include voters who reported registering through the mail (19% of registrants in 2008), or at a school, hospital, or on campus (4% of registrants in 2008), both of which were likely to involve groups assisting with the registration process. Hispanic voters and African-American voters reported using both of these latter categories (mail and school/hospital/campus) at higher rates than non-Hispanic white voters.

Although the self-reporting captured in the Current Population Survey may raise some concerns about the accuracy of the data as an absolute matter, there does not appear to be reason to expect systematic bias in the *relative* rates at which individuals report that they were registered through voter registration drives.

²⁵ In 2006, 8% of non-Hispanic white voters reported registering through a voter registration drive, compared to 11% of Hispanic voters and 11% of non-Hispanic African-American voters; in 2010, 6% of non-Hispanic white voters reported registering through a drive, compared to 14% of Hispanic voters and 12% of non-Hispanic African-American voters.

unnecessarily. There is no compelling policy need for such burdens on informal voter registration on campuses, in houses of worship, at casual gatherings of friends, and in the many other circumstances in which people help their fellow citizens without first creating a bureaucratic reporting and tracking apparatus. Florida already had legal provisions requiring voter registration forms to be delivered in timely fashion.²⁶ Florida already had legal provisions vigorously defended in court as ensuring the accuracy of information on those forms.²⁷ Florida already had legal provisions penalizing intentional wrongdoing in the registration process.²⁸ The new regulations impose a burden out of proportion to their incremental benefit.

Indeed, the new regulations might well *increase* the expense to election officials. Only the most formally structured voter registration drives will, practically, be able to comply with the advance documentation requirement; less formal citizen organizations will find it prohibitively impractical to ensure that volunteers at bake sales have submitted sworn paperwork before they offer to help send in a neighbor's voter registration form. Many of these larger, structured drives have historically conducted quality assurance, reviewing forms for errors or suggestions of impropriety, and flagging those forms for election officials to expedite processing. The 48-hour time limit on returning forms, however, is likely to constrain organizational ability to conduct centralized quality review. Instead, rational organizations seeking to forego liability will likely curtail centralized quality assurance in favor of speedy delivery, shifting processing and error-correction costs unnecessarily to the county supervisors.

B. RESTRICTIONS ON EARLY VOTING

Florida's new restrictions extend beyond voter registration. At least since 1998, Florida has allowed electors to vote ballots in-person before Election Day.²⁹ Such votes could originally be cast as soon as absentee ballots were available, on any day that the county supervisor's office was open. Beginning in 2004, the state limited its early voting period to the two weeks before Election Day; the next year, the legislature eliminated early voting on the Monday before an election.³⁰ Jurisdictions were required to offer early voting for 8 hours per weekday, and 8 hours in the aggregate per weekend—96 early-voting hours total—but had discretion to apportion those weekend hours as they chose.

HB 1355 changes the early voting schedule again, restricting local authority. The new early vote period runs from Saturday (10 days before Election Day) to Saturday (3 days before Election Day), with 6–12 voting hours per day.³¹ If county supervisors choose to offer the maximum permissible early vote schedule under HB 1355, voters would continue to have 96 total early-voting hours.

The allocation of these hours, however, represents a significant change for the worse. The most significant restriction is that jurisdictions no longer have the option to offer early voting on the Sunday before Election Day.³² This was an option that

²⁶ FLA. STAT. § 97.0575(3) (2010).

²⁷ *Id.* § 97.053(6).

²⁸ *Id.* §§ 104.011, 104.012, 104.0615.

²⁹ 1998 Fla. Laws ch. 129, § 17 (C.S.S.B. No. 1402).

³⁰ 2004 Fla. Laws ch. 252, § 13 (C.S.S.B. No. 2346); 2005 Fla. Laws ch. 277, § 45 (H.B. 1567).

³¹ FLA. STAT. § 101.657(1)(d) (2010).

³² Georgia's new law (HB 92) has a similar effect: it closes early voting on the Friday before Election Day. GA. CODE § 21-2-385(d) (2011). In this respect, Ohio's new law (HB 194) is even more restrictive: it precludes early voting on *any* Sunday during the early voting period. OHIO REV. CODE § 3509.01(B)(3) (2011).

several counties had offered in the past, as a service to their constituents, many of whom work long hours during the week, are more available on the weekend, and are most energized just before Election Day. The list of jurisdictions choosing to offer early voting on the Sunday before Election Day in the past includes the state's largest, most urban, and most diverse counties. Under HB 1355, the state has precluded these counties from offering the service they wished to offer.

The change directly impacts a notable form of mobilization in Florida: many houses of worship encourage their congregations to discharge their civic obligations after fulfilling their spiritual ones.³³ After Sunday morning church services, many congregants traveled to the polls in the counties that offered Sunday voting. HB 1355 removes the option, on the most important Sunday in the voting cycle.

As with the restriction on registration drives, the elimination of early voting on the Sunday before the election does not fall evenly on the population as a whole. In the past, minority citizens disproportionately voted on the final Sunday before Election Day.³⁴ In 2008, for example, African-Americans represented 13% of the total voters, and 22% of the early voters, but 31% of the total voters on the final Sunday; Hispanic citizens represented 11% of the total voters, and 11% of the early voters, but 22% of the total voters on the final Sunday. Notably, the pattern is similar in 2010: African-Americans represented 12% of the total voters, and 13% of the early voters, but 23% of the voters on the final Sunday; Hispanics represented 9% of the total voters, and 8% of the early voters, but 16% of the voters on the final Sunday.

These costs of eliminating the final Sunday from early voting are particularly notable, because restricting county flexibility has no appreciable upside. Before HB 1355, counties had the option to offer early voting on the final Sunday before Election Day *if they wished*. If Sunday voting were beneficial for voters or cost-effective for officials, county supervisors could decide for themselves to open early voting stations; if not, the supervisors could opt to use the weekend time exclusively on Saturday instead. HB 1355 removes that flexibility, forcing the counties to shut their early-voting doors on Sunday whether they would prefer to do otherwise or not. For counties that had previously offered Sunday voting, HB 1355 can only increase inconvenience, and in some circumstances, expense.

II. VOTER IDENTIFICATION RESTRICTIONS

Registration and early voting, targeted by laws like the Florida statute examined above, are not the only subjects of recent and unjustified election legislation. The past two years have also brought renewed efforts to limit opportunities for citizens to demonstrate their identity at the polls. This paper devotes disproportionate attention to this issue, because of the disproportionate degree of misinformation it seems to have engendered.

³³ See Douglas C. Lyons, Commentary, "Souls to the Polls" Strategy Fighting Vote Suppression, FT. LAUDERDALE SUN-SENTINEL, Oct. 8, 2011.

³⁴ In order to determine the race and ethnicity of early voters by day, I retrieved the individual early vote information from county Early Voting Reports, at <https://doe.dos.state.fl.us/fvrscountyballotreports/FVRSAvailableFiles.aspx>, and matched voters' unique registration numbers to the registration records on Florida's voter file, which list self-reported race and ethnicity. The percentages listed in the text represent conservative estimates of the impact on minority voters: voters of unknown race or ethnicity were treated for purposes of this analysis as white. If any such citizens were actually minority voters, the relevant percentages would be correspondingly higher.

In 2011, four states—Kansas,³⁵ Tennessee,³⁶ Texas,³⁷ and Wisconsin³⁸—passed new laws requiring most citizens to show particular types of government-issued photo identification cards in order to cast a ballot at the polls that can be counted.³⁹ Pennsylvania has done the same in 2012.⁴⁰ The considerable misinformation surrounding these laws impedes reliable cost-benefit analysis. Though it is beyond the scope of this piece to clarify all of the relevant misinformation, it is nevertheless worth addressing a few of the more substantial and oft-repeated myths.

A. THE CURRENT IDENTIFICATION LANDSCAPE

Before 2011, only two states in the country—Indiana⁴¹ and Georgia⁴²—required government-issued photo identification in order to cast a ballot at the polls that can be counted. The new states above represent disturbing additions, but they remain a small minority of jurisdictions.

Instead, the vast majority of states allow citizens a broader set of options to prove their identity, without sacrificing any appreciable measure of security. The alternatives range from signature comparisons, to sworn affidavits, to documents like utility bills, bank statements, and employee IDs. Some of these other states ask those without government-issued photo ID to vote provisional ballots that are counted if no further evidence places a voter's identity in doubt.⁴³ And all of these identification provisions are layered atop the security safeguards of the federal Help America Vote Act of 2002

³⁵ 2011 Kan. Laws ch. 56, § 11 (H.B. 2067) (amending KAN. STAT. § 25-2908).

³⁶ 2011 Tenn. Laws ch. 323, §§ 1, 7 (S.B. 16) (amending TENN. CODE § 2-7-112).

³⁷ 2011 Tex. Laws ch. 123, §§ 9, 14 (S.B. 14) (amending TEX. ELEC. CODE §§ 63.001, 63.0101). On March 12, 2012, the Department of Justice objected to preclearance of the law under the Voting Rights Act; Texas has since turned to the courts for preclearance. Letter from Thomas E. Perez, Asst. Att'y Gen., U.S. Dep't of Justice, to Keith Ingram, Dir. of Elections, Tex. Sec'y of State (Mar. 12, 2012); *Texas v. Holder*, No. 1:12-cv-00128 (D.D.C. filed Jan. 24, 2012).

³⁸ 2011-12 Wis. Laws Act 23, §§ 1-2 (2011 A.B. 7) (amending WIS. STAT. § 5.02). As of this writing, there were four separate challenges to Wisconsin's new law. *See* *League of Women Voters of Wis. v. Walker*, No. 2011-cv-004669 (Dane County Circuit Ct. filed Oct. 20, 2011); *Milwaukee NAACP v. Walker*, No. 2011-cv-005492 (Dane County Circuit Ct. filed Dec. 16, 2011); *Frank v. Walker*, No. 2:11-cv-01128 (E.D. Wis. filed Dec. 13, 2011); *Jones v. Deininger*, No. 2:12-cv-00185 (E.D. Wis. filed Feb. 23, 2012).

³⁹ Other states are sometimes reported as requiring photo ID, but permit at least some alternatives. For example, Alabama's 2011 law requires either photo ID or sworn voucher by two election officials; it is not clear whether the voucher provision will reliably operate to allow eligible individuals without identification to vote a valid ballot. 2011 Ala. Laws 673 (H.B. 19). As of this writing, it does not appear that H.B. 19 has been submitted for preclearance under the Voting Rights Act. *See* U.S. Dep't of Justice, Notices of Section 5 Activity Under Voting Rights Act of 1965, As Amended, <http://www.justice.gov/crt/about/vot/notices/noticepg.php> (last visited Apr. 1, 2012). Similarly, South Carolina's new law, 2011 S.C. Laws 27 (H.B. 3003), allows voters to submit an affidavit in lieu of the preferred photo ID, if the voter "suffers from a reasonable impediment that prevents the elector from obtaining photograph identification," whereupon the voter will submit a provisional ballot deemed valid unless there are grounds to believe that the affidavit is false. *Id.* § 5 (amending S.C. Code § 7-13-710(D)(1)(b), (D)(2)); S.C. Att'y Gen. Op. to Marci Andino, Executive Dir., S.C. Election Comm'n, Aug. 16, 2011, <http://www.scag.gov/wp-content/uploads/2011/08/andino-m-os-9319-8-16-11-Photo-ID-Voter-ID-legislation.pdf>. As with Alabama, it is not clear whether this provision will reliably operate to allow eligible individuals without identification to vote a valid ballot. On December 23, 2011, the Department of Justice formally objected to preclearance; South Carolina has since turned to the courts. Letter from Thomas E. Perez, Asst. Att'y Gen., Civil Rights Div., Dep't of Justice, to C. Havird Jones, Jr., Esq., S.C. Asst. Deputy Att'y Gen. (Dec. 23, 2011), <http://www.scribd.com/fullscreen/76397390>; *South Carolina v. United States*, No. 1:12-cv-00203 (D.D.C.).

⁴⁰ 2012 Pa. Laws 18 (H.B. 934) (amending 25 PENN. STAT. §§ 2602, 3050).

⁴¹ IND. CODE §§ 3-5-2-40.5; 3-11-8-25.1 (2012).

⁴² GA. CODE § 21-2-417 (2011).

⁴³ *See, e.g.*, FLA. STAT. § 101.048(2)(a) (2012).

(“HAVA”), which requires that each of a jurisdiction’s first-time voters registering by mail have her identity confirmed—either by verifying her social security digits or driver’s license number against reliable lists, or by presenting reliable documentation from a long and inclusive menu—before her ballot may be counted.⁴⁴

These other 43 states offer alternatives for a reason. They recognize that there are some legitimate, eligible American citizens who do not possess government-issued photo identification cards. And they do not wish to make it unduly difficult for these citizens to exercise the most fundamental right in our constitutional order.

B. EVALUATING THE BURDEN OF RESTRICTIVE IDENTIFICATION RULES

There is no question that government-issued photo ID makes many common practices easier. Those without such ID will find it more difficult to take advantage of many of the privileges of modern society. Still, the purported inability of Americans to function without government-issued photo identification is frequently exaggerated. Proponents of restrictive ID laws often assert that it is impossible to board an airplane, drink a beer, check in at a hotel, or enter a federal building without government-issued photo ID.⁴⁵ These claims are both untrue and irrelevant.

Personal experience proves the falsity of the above assertions. Recently, I was asked to testify at a U.S. Senate hearing evaluating newly restrictive electoral laws.⁴⁶ When I arrived at the Los Angeles airport, my wallet contained two credit cards, a firing range card, a health insurance card, a blood donor card, a coffee shop frequent visitor card, and a few business cards—but no photo ID, government-issued or otherwise. The TSA officer at the airport check-in station examined my boarding pass, and asked me to step aside for additional questions; another officer reviewed my non-photo documents, and asked a bit more. I was then asked to step through the (regular) security line, where my bags were screened, and a backscatter image was taken. The procedure lasted approximately ten minutes longer than the procedure experienced by those in the same line who had photo ID on hand. This was policy, not parlor trick; the relevant federal agencies have consistently maintained a policy permitting those without particular photo ID to board a plane after additional screening.⁴⁷

After clearing security, I enjoyed a beer in the airport Chili’s—without using photo ID. When I arrived in Washington, I checked into my hotel—without using photo ID. I then made my way into the Dirksen Senate building, to the Committee’s hearing room—without using photo ID. Commercial vendors and federal governments alike have demonstrated that when it is financially or politically important to extend access even to citizens without certain photo identification, such citizens can be accommodated with minimal disruption to normal business practices.

⁴⁴ 42 U.S.C. § 15483(b) (2006).

⁴⁵ See, e.g., Hans A. von Spakovsky, Opinion, *Not a Race Card*, NAT’L REV., Aug. 29, 2011; State Rep. Daryl Metcalfe, Opinion, *Plan Would Assure Integrity of Elections*, MORNING CALL (Allentown, Pa.), June 19, 2011.

⁴⁶ See *New State Voting Laws: Barriers to the Ballot?: Hearing Before the S. Comm. on Judiciary, Subcomm. on Constitution, Civil Rights & Human Rights*, 112th Cong. (Sept. 8, 2011) (statement of Justin Levitt), available at <http://judiciary.senate.gov/pdf/11-9-8LevittTestimony.pdf>.

⁴⁷ See, e.g., JUSTIN LEVITT, ANALYSIS OF ALLEGED FRAUD IN BRIEFS SUPPORTING CRAWFORD RESPONDENTS 23 (2007), <http://www.truthaboutfraud.org/pdf/CrawfordAllegations.pdf>; see also *Gilmore v. Gonzales*, 435 F.3d 1125, 1129-30, 1133 (9th Cir. 2006).

Moreover, even if government-issued photo ID were required in order to board a plane or (another frequent falsehood) purchase full-strength Sudafed,⁴⁸ access to those conveniences is deeply beside the point. The franchise is referenced in two Articles and at least ten Amendments of the Constitution.⁴⁹ It is central to our constitutional order, a fundamental right protected vigorously for all eligible citizens once it is granted to some.⁵⁰ Access to Sudafed is simply of a different magnitude. No American ever gave her life to preserve a fundamental constitutional right to buy decongestants.

There is also no question that most citizens, including most of those reading this piece, have valid photo ID. But the right of the franchise—and the responsibility to ensure its continued reasonable access—is not limited to the individuals perusing these pages, or even to the majority of the eligible American public. Voting is a fundamental right for more than just most of us.

It is, concededly, difficult to pin down the precise number of eligible American citizens who do not have the identification required by the most restrictive states above. But of the methods that have commonly been used to estimate this population, one stands out as fundamentally flawed: analyzing turnout. Many commentators have attempted to extrapolate, from past voting patterns, the degree to which change in participation for any given election is due to the impact of particular ID laws.⁵¹ These studies' methods vary, and they report different results. But more fundamentally, the basic approach is flawed. It is, for a start, conceptually incomplete: even if turnout provided an accurate assessment of the impact on past voters, it would cover only the impact on *past voters*, without any assessment at all of the impact on eligible Americans who have not yet participated but have every right to participate in the future. Any answer that turnout studies provide is an answer to the wrong question.

Moreover, even if turnout provided the right measure of impact, we are not yet reliably able to mine the available data for useful information on the question presented. It is difficult to parse the impact of any given legal change based on a few years of turnout data in a few jurisdictions. For example, proponents often cite the change in turnout—particularly minority turnout—in Georgia and Indiana before strict ID laws (in 2004) and after strict ID laws (in 2008), as evidence that ID laws did not impose any substantial impediment on the voters in those states, including the minority electorate.⁵² Both states, of course, were newly battleground states in 2008, with a minority candidate at the top of a major-party ticket for the very first time. Under those circumstances, any reasonable observer should have expected extraordinary increases in minority turnout, with or without ID laws. Without far more information,

⁴⁸ Lizette Alvarez, *G.O.P. Legislators Move to Tighten Rules on Voting*, N.Y. TIMES, May 29, 2011, at A1 (“If you have to show a picture ID to buy Sudafed, ... you should show a picture ID when you vote,” Gov. Nikki Haley said this month when she signed the bill into law in South Carolina, using a common refrain among Republicans.”); Kris W. Kobach, Opinion, *The Case for Voter ID*, WALL ST. J., May 23, 2011 (“Carrying a photo ID has become a part of American life. You can’t ... buy full-strength Sudafed over the counter without one.”). In truth, federal law permits the purchase of Sudafed with non-photo identification. See 21 U.S.C. § 830(e)(1)(A)(iv)(I)(aa) (2006); 8 C.F.R. § 274a.2(b)(1)(v)(B) (2012).

⁴⁹ See U.S. CONST. art. I, § 2, 4; *id.* art. II, § 1; *id.* amends. I, V, XII, XIV, XV, XVII, XIX, XXIII, XXIV, XXVI.

⁵⁰ *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 210 (2008).

⁵¹ See, e.g., Hans A. von Spakovsky, Opinion, *ID Laws Ensure Election Integrity*, USA TODAY, June 12, 2011; see also generally Brief of R. Michael Alvarez et al. as Amici Curiae in Support of Petitioners at 10-14, *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008) (Nos. 07-21, 07-25) (reviewing such studies).

⁵² See, e.g., Hans A. von Spakovsky, Opinion, *Voter ID Was a Success in November*, WALL ST. J., Jan. 30, 2009.

it is impossible to know whether a 19% increase in turnout⁵³ reflects, say, a 15% increase because of the circumstances of the 2008 election with a 4% increase because of ID laws, or a 30% increase because of the 2008 election and an 11% decrease because of ID laws.

This is a specific example of a general problem: in any given election, turnout may be affected by the competitiveness of high-profile races, candidate quality, fundraising and campaign spending, the media environment, the presence or absence of salient ballot measures, the efforts of mobilization groups on the ground, other legal restrictions or policies that facilitate access, and a host of other conditions, including the weather on Election Day. Without thousands of data points to account for all of the other factors that could instead be driving turnout up or down, it is unreliable to draw conclusions about the impact of identification rules by looking at how many people vote in a given election.⁵⁴

Instead of reading the uncertain tea leaves of turnout, another methodology is available to determine how many eligible citizens have the sort of identification documents required by the most restrictive state laws: ask them. Several surveys have asked eligible Americans about the documentation they possess, with varying conclusions.

Some of this research surveys registered voters.⁵⁵ A 2008 survey found that 4.9% of *registered voters* nationwide did not have current government-issued photo ID; an additional 3.1% of respondents did not have current government-issued photo ID listing their full legal name (rather than, for example, a nickname or maiden name).⁵⁶ Another 2008 survey found that 5.7% of *registered voters* nationwide did not have a current valid driver's license or passport; an additional 1.1% of respondents had those documents, but not listing their full legal name.⁵⁷ Still another 2008 survey found that 1.2% of *registered voters* in Indiana, Maryland, and Mississippi did not have any government-issued photo ID, but did not inquire whether the subjects' ID was current or reflected their full legal name.⁵⁸ A 2007 survey found that 13.3% of *registered voters* in Indiana did not have a current government-issued photo identification card; an additional 3% of respondents did not have current identification listing their full legal name.⁵⁹

Other research surveys voting-age American citizens, whether currently registered or not. A 2007 survey found that 16.1% of *voting-age citizens* in Indiana did not have current government-issued photo identification; an additional 2.8% of respondents

⁵³ This was Georgia's increase from 2004 to 2008. See Michael McDonald, United States Election Project, Voter Turnout, http://elections.gmu.edu/voter_turnout.htm (follow "Turnout 1980-2012.xls" hyperlink) (last visited May 1, 2012).

⁵⁴ See Robert S. Erikson & Lorraine C. Minnite, *Modeling Problems in the Voter Identification—Voter Turnout Debate*, 8 ELECTION L.J. 85 (2009).

⁵⁵ As explained above, such numbers understate the impact of strict identification requirements, because they do not include eligible Americans who may participate in the future.

⁵⁶ Matt A. Barreto, New Empirical Evidence on Access to Photo ID, http://faculty.washington.edu/mbarreto/research/voterid_090611.pdf (last visited May 1, 2012).

⁵⁷ Email from Charles Stewart III, MIT, to Justin Levitt, Loyola Law School (Sept. 6, 2011, 13:27 PST); R. MICHAEL ALVAREZ ET AL., 2008 SURVEY OF THE PERFORMANCE OF AMERICAN ELECTIONS, FINAL REPORT (2009), available at <http://www.vote.caltech.edu/drupal/files/report/Final%20report20090218.pdf>. The same survey found that 4.7% of respondents had no valid driver's license or passport, but did have other government-issued photo identification; the survey did not inquire whether this latter ID was current.

⁵⁸ Robert A. Pastor et al., *Voting and ID Requirements*, 40 AM. REV. PUB. ADMIN. 461 (2010).

⁵⁹ Matt A. Barreto et al., *The Disproportionate Impact of Voter-ID Requirements on the Electorate—New Evidence from Indiana*, 42 PS: POL. SCI. & POL. 111, 113 (2009).

did not have current identification listing their full legal name.⁶⁰ And a 2006 survey found that 11% of *voting-age citizens* nationwide did not have current government-issued photo identification.⁶¹

Each of the above surveys appears reliable. Some of the variance can be explained by the difference in the questions asked (e.g., whether particular forms of ID are specified, or whether the ID is current) or the difference in the target population; some of the variance may simply reflect differences from state to state. Additional variance may simply reflect the natural variability inherent in surveys, which are estimates and subject to different weighting schemes and margins of uncertainty.

But even choosing the most conservative estimate—a survey targeting registered voters in select states, rather than the electorate as a whole, and without assessing whether the ID in question was current or reflected the same name on the registration rolls—1.2% of registered voters do not have the identification required by the most restrictive states. Even this conservative result amounts to an impact reaching more than two million registered voters if applied nationwide.⁶² And the larger estimates show an impact reaching more than twenty-two million voting-age citizens.⁶³

Moreover, every study to have examined the issue has found that those without government-issued photo identification are not evenly spread across the electorate. Just as the surveys differ in their overall assessment of the magnitude of the problem, they differ in their assessment of magnitude of the disparate impact. But the available data clearly show that those without government-issued photo ID are more likely to be nonwhite, more likely to be either younger voters or seniors, more likely to be from low-income households, and more likely to have less formal education.⁶⁴ And while I am not aware of a reliable measurement of the incidence of government-issued photo ID among persons with disabilities, there is reason to be concerned that they, too, are less likely to have the documents required by the most restrictive states.

These impacts are both substantial and statistically significant. For example, one 2008 survey found that while 3.7% of responding white *registered voters* nationwide did not have current valid government-issued photo identification, 7.3% of Latino voters and 9.5% of African-American voters lacked this ID.⁶⁵ And among *voting-age citizens*, a 2006 national survey found that 8% of white citizens but 16% of Latino voting-age citizens and 25% of African-American voting-age citizens do not have current, valid, government-issued photo identification.⁶⁶ While other studies differ in the precise magnitude of these (and other) differential ID rates, all show a substantial effect, with historically underrepresented groups much less likely to have current government-issued photo identification.

⁶⁰ *Id.* at 113.

⁶¹ See BRENNAN CENTER FOR JUSTICE, CITIZENS WITHOUT PROOF: A SURVEY OF AMERICANS' POSSESSION OF DOCUMENTARY PROOF OF CITIZENSHIP AND PHOTO IDENTIFICATION 3 (2006), available at http://www.brennancenter.org/page/-/d/download_file_39242.pdf.

⁶² See U.S. ELECTION ASSISTANCE COMM'N, THE IMPACT OF THE NATIONAL VOTER REGISTRATION ACT OF 1993 ON THE ADMINISTRATION OF ELECTIONS FOR FEDERAL OFFICE 2007–2008, at 29 (2009) (reporting at least 174,101,505 active registered voters as of the 2008 general election).

⁶³ See U.S. Census Bureau, 2006 American Community Survey, tbl. B05003, available at <http://factfinder2.census.gov/faces/nav/jsf/pages/searchresults.xhtml> (last visited May 1, 2012) (reporting 206,287,902 voting-age citizens as of the 2006 survey period).

⁶⁴ See sources cited *supra* notes 56–61.

⁶⁵ Barreto, *supra* note 56.

⁶⁶ BRENNAN CENTER FOR JUSTICE, *supra* note 61.

These statistics are not merely important for their reflection of the status quo, but for their reflection of significant impact into the future. It often takes ID to get ID. For example, Arkansas seems to require most native-born citizens to provide an official copy of a birth certificate to obtain a government-issued photo identification card,⁶⁷ and seems to require government-issued photo identification to obtain an official copy of a birth certificate.⁶⁸

Even without this sort of vicious loop, those without current government-issued photo ID often face some difficulty in procuring it. All states of which I am aware require documentation to procure state-issued identification. Even when the identification card itself is offered free of charge,⁶⁹ an individual without identification must collect this documentation, which involves time and expense, and travel (without driving) to a government office open during limited (working) hours, which involves time and expense. Official copies of birth certificates cost between \$7 and \$30 depending on the state, with a median of \$15; expedited processing will cost more.⁷⁰ A passport costs at least \$55, and a replacement naturalization certificate costs \$345.⁷¹

Moreover, some eligible citizens will simply not be able to procure the requisite underlying documentation, no matter how much they are able to spend or how much time they are able to take. In August 2011, South Carolina's Attorney General recognized, in a formal opinion interpreting the state's new identification law, that there are legitimate electors

who have a valid reason, beyond their control, which would prevent them from obtaining a Photo ID. One such reason which is obvious is that there are numerous South Carolinians, generally over age 50, who do not have a birth certificate. A primary cause is that, decades ago, many babies were not born in hospitals, but were delivered by midwives and thus no birth certificates were obtained.⁷²

These eligible Americans have names. Neither Mrs. Naomi Gordon and her brother, Mr. Raymond Rutherford were able to obtain government-issued photo ID in South Carolina.⁷³ Both apparently had their names misspelled on their birth certificates by midwives; Mr. Rutherford has the particular difficulty of possessing a birth certificate

⁶⁷ See Ark. Driver Services, Frequently Asked Questions, <http://www.dfa.arkansas.gov/offices/driverServices/Pages/FAQ's.aspx#e> (last visited May 1, 2012).

⁶⁸ See Ark. Dep't of Health, Birth Records, Frequently Asked Questions, <http://www.healthy.arkansas.gov/programsServices/certificatesVitalRecords/Pages/BirthRecords.aspx> (last visited May 1, 2012).

⁶⁹ In some states, there is a further concern that officials will not suitably publicize the existence of a voter identification card offered free of charge, in an attempt to capture the incremental revenue provided by identification card fees. See, e.g., Jessica Vanegeren & Shawn Doherty, *Top DOT Official Tells Staff Not to Mention Free Voter ID Cards to the Public—Unless They Ask*, CAPITAL TIMES (Madison, Wis.), Sept. 7, 2011.

⁷⁰ Nat'l Center for Health Statistics, Where to Write for Vital Records, <http://www.cdc.gov/nchs/w2w/w2w.pdf> (last updated Mar. 2012).

⁷¹ U.S. Dep't of State, Passport Fees, http://travel.state.gov/passport/fees/fees_837.html (last updated Feb. 14, 2011); U.S. Citizenship and Immigration Services, Form N-565, Application for Replacement Naturalization/Citizenship Document, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextchannel=db029c7755cb9010VgnVCM10000045f3d6a1RCRD&vgnextoid=a910cac09aa5d010VgnVCM10000048f3d6a1RCRD> (last updated July 27, 2011).

⁷² S.C. Att'y Gen. Op., *supra* note 39.

⁷³ See, e.g., Email from Dr. Brenda Williams to Voting Section, re File #2011-2495 (Aug. 14, 2011, 18:59 ET).

with an incorrect spelling and a Social Security card with a correct spelling. They have been told that they have to have their names changed through the courts before they will be able to get government-issued photo ID.

Nora Elze, in Savannah, Georgia, was 88 last year, and had been married for 65 years.⁷⁴ But because the name on her birth certificate (her maiden name) and the name on her out-of-state ID (her married name) do not match, she has to produce a 65-year-old marriage license in order to obtain government-issued photo identification. At last report, she had not found the marriage license, and had not been able to acquire the necessary identification.

Royal Masset, former political director of the Texas Republican Party, discussed a personally relevant situation in the press:

I was a big fan of voter ID until the federal government declared my mother Aimee dead [¶] I found there was no way of proving her alive. Invalid 91 year olds do not have driver's licenses, passports, employment badges, gun permits & etc. Since I'm taking care of her in my home she has no bills with her name and address. I can't even get her a birth certificate since she lacks the ID necessary for a notary to verify. Under HB 218 my mother, who is a registered voter in Austin, cannot vote in Texas. Anyone who says all legal voters under this bill can vote doesn't know what he is talking about. And anyone who says that a lack of IDs won't discriminate against otherwise legal minority voters is lying.⁷⁵

Agnes Cowan and her husband lost many of their personal documents in a fire, including her husband's veterans' ID card.⁷⁶ At 81 in 2008, and confined to a wheelchair, Ms. Cowan said that it was virtually impossible for her to cobble together replacement documentation in order to get a government-issued photo ID before Georgia's 2008 primary election, making it the first major election that Ms. Cowan had missed in 63 years.

In 2006, Eva Steele was an Arizona resident; her son was an Army reservist deployed in Iraq. Her disabilities left her in a wheelchair and unable to drive. "I don't have a driver's license," she said. "I don't get utility bills. I've never had a passport. I don't have property tax statements. All I did was raise my children and teach them to be good citizens and to vote. And now I'm the one who's on the outside looking in."⁷⁷

Birdie Owen was displaced from Louisiana after Hurricane Katrina, where her birth certificate was lost in the storm. Without a birth certificate, she found herself unable to get a state-issued photo identification card in Missouri.⁷⁸

⁷⁴ JoAnn Merrigan, *Savannah Woman Told She Needs Proof of Marriage to Get Driver's License*, WSAV, Aug. 29, 2011, <http://www2.wsav.com/news/2011/aug/29/savannah-woman-told-she-needs-proof-marriage-get-d-ar-2337843/>.

⁷⁵ Posting of Peggy Fikac to Texas Politics, *A Republican, His Mother, and Voter ID*, <http://blog.chron.com/texaspolitics/2007/04/a-republican-his-mother-and-voter-id/> (Apr. 24, 2007, 17:16 CT).

⁷⁶ Denise Dillon, *Elderly Couple Loses ID in Fire, Fear They Can't Vote*, FOX 5 ATLANTA, July 14, 2008, available at http://electionlawblog.org/wp-content/uploads/20080714-GA_cowan.pdf.

⁷⁷ E.J. Montini, *A Soldier's Mother is Denied Her Right to Vote and to Speak*, ARIZ. REPUBLIC, Aug. 13, 2006; Joyce Purnick, *Stricter Voting Laws Carve Latest Partisan Divide*, N.Y. TIMES, Sept. 26, 2006.

⁷⁸ Robin Carnahan, *Elections Can't Really be Fair, Free and Accurate if Eligible Voters Can't Vote*, HUFFINGTON POST, May 9, 2008, http://www.huffingtonpost.com/robin-carnahan/elections-cant-really-be_b_101030.html.

The stories above represent just a selection of the reports of individuals—real American citizens—without government-issued photo identification. The reliable statistics cited above indicate that there are many others.

C. THE LACK OF JUSTIFICATION FOR RESTRICTIVE IDENTIFICATION RULES

As with the other restrictions discussed earlier in this piece, the heavy costs on Mrs. Gordon and other eligible American citizens are not justified by any substantial benefit. Requirements to present certain identification documents at the polls are often justified by the need to prevent election fraud. And there are, indeed, prevalent concerns about malfeasance—fraud or coercion using absentee ballots,⁷⁹ registration fraud,⁸⁰ vote buying,⁸¹ and schemes involving coopted officials.⁸² These are real, legitimate concerns, and should be both prevented and punished, where doing so does not exact an even greater cost to the system and to legitimate electors therein. But not one of these despicable acts could possibly be curbed by limiting the ways in which pollworkers ask voters to prove their identity.

Identification rules provide even theoretical protection against only one form of malfeasance: someone who arrives at the polls and pretends to be someone else. As I have previously described,⁸³ the available evidence demonstrates that the incidence of any fraud that identification rules could prevent is extraordinarily rare.⁸⁴ Though it does occur, there are only a handful of recent accounts. During this same period, hundreds of millions of ballots have been cast. The most notable significance of the incidents that have surfaced is how rare they appear to be.

Even fewer of these allegations stand up to real scrutiny. Indeed, careful investigation has more often than not debunked, not confirmed, allegations of impersonation

⁷⁹ See, e.g., *Pabey v. Pastrick*, 816 N.E.2d 1138, 1144-46 (Ind. 2004); Anastasia Hendrix, *City Workers: We Were Told To Vote, Work for Newsom*, S.F. CHRONICLE, Jan. 15, 2004, at A1; Matthew Purdy, *5 Bronx School Officials Are Indicted in Absentee Ballot Fraud*, N.Y. TIMES, Apr. 25, 1996.

⁸⁰ Such reports often involve rogue workers hoping to cheat nonprofits out of an honest effort to register real citizens. See, e.g., Todd C. Frankel, *Eight Are Accused in Alleged Voter Scam*, ST. LOUIS POST-DISPATCH, Dec. 22, 2007; Keith Ervin, *Felony Charges Filed Against 7 in State's Biggest Case of Voter-Registration Fraud*, SEATTLE TIMES, July 26, 2007. These forms are usually subject to the safeguards of HAVA, 42 U.S.C. § 15483(b) (2006), which flags potentially invalid registration forms for further security measures before a corresponding ballot can be cast. I am aware of no recent substantiated case in which such registration fraud has resulted in a fraudulent vote.

⁸¹ See, e.g., Beth Musgrave, *Three Sentenced in Bath Vote Fraud*, LEXINGTON HERALD-LEADER, Sept. 25, 2007; Nicklaus Lovelady, *Investigation Into Vote Fraud in Benton County Nets 14th Arrest*, MISS. CLARION-LEDGER, Aug. 31, 2007; Tom Searls, *Six To Learn Fate in Lincoln Vote Buying Case*, CHARLESTON GAZETTE (W.Va.), May 3, 2006, at 1C.

⁸² See, e.g., Eva Ruth Moravec, *Woman, 81, Jailed in Vote-Fraud Case*, SAN ANTONIO EXPRESS-NEWS, Oct. 5, 2010; *United States v. Brown*, 494 F. Supp. 2d 440, 486 n.73 (S.D. Miss. 2007), *aff'd*, 2009 WL 485709 (5th Cir. 2009); Michael Cass, *Poll Worker Indicted in Vote Probe*, THE TENNESSEAN, Dec. 20, 2007; Manny Garcia & Tom Dubucq, *Unregistered Voters Cast Ballots in Dade: Dead Man's Vote, Scores of Others Were Allowed Illegally, Herald Finds*, MIAMI HERALD, Dec. 24, 2000; Grand Jury Report, In the Matter of Confidential Investigation R84-11 (N.Y. Sup. Ct., Kings County, 1984), available at http://electionlawblog.org/wp-content/uploads/1984_grand_jury_report-r84-11.pdf.

⁸³ See, e.g., JUSTIN LEVITT, THE TRUTH ABOUT VOTER FRAUD (2007), available at <http://www.brennancenter.org/content/resource/truthaboutvoterfraud/>; *In Person Voter Fraud: Myth and Trigger for Disenfranchisement?: Hearing Before the S. Comm. on Rules & Admin.*, 110th Cong. (Mar. 12, 2008) (statement of Justin Levitt), available at http://brennan.3cdn.net/02f93775d26a119ad0_dam6iyw3s.pdf; *Hearing on S.B. 14 Before the H. Select Comm. on Voter Identification and Voter Fraud*, 2011 Leg., 82nd Sess. (Tex. Mar. 1, 2011); *Hearing on S.B. 362 Before the H. Comm. on Elections*, 2009 Leg., 81st Sess. (Tex. Apr. 6, 2009); *Hearing Before the H. Comm. on Elections*, 2008 Leg., 80th Sess. (Tex. Jan. 25, 2008).

⁸⁴ Other scholars have confirmed these conclusions. See, e.g., LORRAINE C. MINNITE, THE MYTH OF VOTER FRAUD (2010).

fraud at the polls. Reports of “dead voters,” often based on matching voter lists to other data sources, are the most common ... and the most flawed.⁸⁵ Death records contain errors, listing people as dead who are actually alive. Voter records contain errors, reflecting data entry mistakes and legitimate voters signing the pollbooks on the wrong line. Voters with the same names and dates of birth as deceased individuals are—false—assumed to be one and the same.⁸⁶ When researchers expend the effort to follow through, these errors become clear. A 2008 investigation of 48 purported “dead voters” in Dallas, for example, revealed only clerical error, voter mistake, and confusion; of all the cases investigated, “none involved a fraudulently cast vote.”⁸⁷ A 2007 investigation of approximately 100 “dead voters” in Missouri revealed that every single purported case was properly attributed either to a matching error, a problem in the underlying data, or a clerical error by elections officials or voters.⁸⁸ A 1999 Hawaii investigation, after reviewing precinct pollbooks and calling allegedly deceased citizens, similarly found that not one of 170 potential “dead voters” actually reflected fraud.⁸⁹

The most prominent recent examination of voter fraud—the evidence presented to the Supreme Court in *Crawford v. Marion County Election Board*⁹⁰—precisely fits the overall pattern described above. There were many claims of wrongdoing and irregularity, but few that even alleged the sort of fraud that in-person identification rules could possibly prevent, and a tiny portion, if any, that substantiated the allegations.

Because the Supreme Court represented such a high-profile forum, it provided the most prominent focal event to date for supporters of an identification law to justify their support by showing their rationale to be real. *Crawford* was a national stage for those who believe in-person impersonation fraud to be a legitimate concern to present their proof. In the case, the lower courts cited several media accounts that, the courts claimed, reflected reports of in-person impersonation fraud.⁹¹ In the Supreme Court, respondents and *amici* supporting respondents added citations to more than 250 reports, encompassing decades of elections.

⁸⁵ See, e.g., Posting of Justin Levitt to Election Law Blog, New Report of Potential “Dead Voters” in South Carolina ... And It’s Not Even Halloween, <http://electionlawblog.org/?p=27864> (Jan. 12, 2012, 15:46 PT).

⁸⁶ Michael P. McDonald & Justin Levitt, *Seeing Double Voting: An Extension of the Birthday Problem*, 7 ELECTION L.J. 111 (2008).

⁸⁷ Rudolph Bush, *Vote Fraud Review Comes Up Empty*, DALLAS MORNING NEWS, Dec. 14, 2008.

⁸⁸ Steve Chamraz, “The Dead List” Backstory ..., News 4 Daily Briefing, May 7, 2007, available at http://dev.beloblog.com/KMOV_Blogs/n4dailybriefing/2007/05/the_dead_list_backstory.html; see also SECRETARY OF STATE CATHY COX, THE 2000 ELECTION: A WAKE-UP CALL FOR REFORM AND CHANGE 11 n.3 (2001), available at http://sos.georgia.gov/acrobat/elections/2000_election_report.pdf.

⁸⁹ Waite David, *Review Turns Up No Signs of Fraud*, HONOLULU ADVERTISER, Mar. 16, 1999, at A1.

⁹⁰ 553 U.S. 181 (2008). The *Crawford* case is often said to have validated laws requiring photo identification at the polls. It did no such thing. In *Crawford*, the fractured court rejected the plaintiffs’ challenge to the law as overbroad, in light of the limited evidence in the record on the extent of the law’s burdens. *Id.* at 188-89, 200-03 (Stevens, J.). Part of the difficulty is that the case was a pre-enforcement challenge, brought before Indiana’s law was put into effect and therefore without direct evidence of past harm. See generally Justin Levitt, *Crawford—More Rhetorical Bark than Legal Bite?*, BRENNAN CENTER FOR JUSTICE, May 2, 2008, http://www.brennancenter.org/blog/archives/crawford_more_rhetorical_bark_than_legal_bite/.

That is, without solid proof of burden in the record, Indiana’s asserted justifications were deemed legally sufficient to sustain the law against the particular facial challenge that was lodged. The Court did not issue a blanket statement declaring restrictive identification laws to be legal. Indeed, six Justices recognized that restrictive ID laws might unduly burden some voters, particularly poor and elderly citizens. *Crawford*, 553 U.S. at 199 (Stevens, J.); *id.* at 209-22 (Souter, J., dissenting); *id.* at 237-39 (Breyer, J., dissenting).

⁹¹ *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 826 (S.D. Ind. 2006); see also *id.* at 793-94; *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 953 (7th Cir. 2007).

I thoroughly examined every one of these citations.⁹² The evidence of in-person impersonation fraud was strikingly sparse. Most cited reports reflected allegations that could not possibly be related to in-person impersonation fraud and which an ID law could not possibly fix (e.g., absentee ballot problems, vote-buying schemes, or ballot tampering), or allegations that did not mention whether the alleged wrongdoing was committed in-person or through more susceptible absentee ballots.⁹³ Two reports involved single votes that were the product of official pollworker misconduct or forged documentation, which also could not be prevented by laws requiring pollworkers to examine documentation.⁹⁴ Two reports involved unsuccessful attempts to vote in the name of another.⁹⁵

That left, since 2000, nine allegations of votes that might have involved ballots cast by impersonators, which ID rules might have prevented. There is also an alternative explanation for each of the nine votes: either pollworker error or voter confusion might have caused a different, legitimate elector to sign the wrong line of the pollbook, or a data entry error might have caused an elector's voter record to register a vote for an election when no corresponding voter ever signed in at the polls.⁹⁶ There are plentiful reports of similar mistakes, with fathers confused for sons, and vice versa.⁹⁷ Investigation of the pollbooks themselves could distinguish fraud from error, but in my research to date, I have not been able to find any evidence that the necessary investigation was undertaken.

This evidence is remarkable. There have been credible allegations of impersonation at the polls. But they are notable for their rarity. In the most prominent forum to date for collecting such allegations, proponents of these rules cited nine votes since 2000 that were caused either by fraud that in-person identification rules could possibly stop ... or by innocent mistake. During the same period, 400 million votes were cast, in general elections alone.⁹⁸ Even assuming that each of the nine votes were fraudulent, that amounts to a relevant fraud rate of 0.000002 percent. Americans are struck and killed by lightning more often.⁹⁹ And every year, there are far more reports of UFO sightings.¹⁰⁰

⁹² LEVITT, *supra* note 47; Justin Levitt, *Crawford—Just the Facts*, BRENNAN CENTER FOR JUSTICE, Apr. 30, 2008, http://www.brennancenter.org/blog/archives/just_the_facts/.

⁹³ LEVITT, *supra* note 47, at 2.

⁹⁴ Cass, *supra* note 82 (discussing one incident in Tennessee in 2007); Garcia & Dubucq, *supra* note 82 (discussing one incident in Florida in 2000).

⁹⁵ Madeline Friedman, *Anatomy of Voter Fraud*, HOBOKEN REPORTER, July 1, 2007 (discussing one attempt in New Jersey in 2007); LARRY J. SABATO & GLENN R. SIMPSON, *DIRTY LITTLE SECRETS* 292 & n.70 (1996) (discussing one attempt in California in 1994).

⁹⁶ LEVITT, *supra* note 47, at 2.

⁹⁷ See, e.g., Will Garvey, *My Opportunity for Voter Fraud*, LINCOLN TRIBUNE, July 20, 2011 (revealing that a vote ostensibly cast in the name of Will Garvey IV was actually cast by his father, Will Garvey III); Michael Mayo, *Determined Voters Tackle the Obstacles and Triumph*, FT. LAUDERDALE SUN-SENTINEL, Nov. 5, 2008 (revealing that a vote ostensibly cast in the name of Michael Curry was actually cast by his son, Michael Curry, Jr.).

⁹⁸ McDonald, *supra* note 53.

⁹⁹ Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Service, *Lightning Safety: Medical Aspects of Lightning*, <http://www.lightningsafety.noaa.gov/medical.htm> (last visited May 1, 2012); Ron Holle, *Lightning Fatalities by State, 2001–2010* (2011), *available at* http://www.lightningsafety.noaa.gov/stats/01-10_deaths_by_state.pdf.

¹⁰⁰ See, e.g., UFO Casebook, *Breaking UFO News Reports*, <http://www.ufocasebook.com/> (last visited May 1, 2012).

Some have claimed that the incidence of alleged in-person impersonation fraud is low because this fraud is difficult to detect.¹⁰¹ This is distinct from the issue of whether the fraud is difficult to prosecute: littering clearly exists, but is difficult to address through the criminal justice system, because the wrongdoer is not easily identified. Here, not only are there virtually no prosecutions of in-person impersonation fraud, but there are even strikingly few reports of potential impersonation. It is as if individuals were complaining about littering, but could find no garbage in the street.

For those believing in impersonation at the polls, the answer is that this sort of fraud is simply difficult to detect. In truth, there are multiple means to discover in-person impersonation fraud, all of which should yield many more reports of such fraud if it actually occurred with any frequency. An individual seeking to commit in-person impersonation fraud must, at a minimum, present himself at a polling place, sign a pollbook, and swear to his identity and eligibility. There will be eyewitnesses: pollworkers and members of the community, any one of whom may personally know the individual impersonated, and recognize that the would-be voter is someone else.¹⁰² There will be documentary evidence: the pollbook signature can be compared, either at the time of an election or after an election, to the signature of the real voter on a registration form, and the real voter can be contacted to confirm or disavow a signature in the event of a question.¹⁰³ There may be a victim: if the voter impersonated is alive but later arrives to vote, the impersonator's attempt will be discovered by the voter. If the impersonation is conducted in an attempt to influence the results of an election, it will have to be orchestrated many times over, increasing the likelihood of detection.

As in all law enforcement, none of these detection mechanisms are perfect. Yet in hundreds of millions of ballots cast, they have yielded only a handful of potential instances of in-person impersonation fraud, precisely during a period when investigating voter fraud was expressly deemed a federal law enforcement priority,¹⁰⁴ and when private entities were equipped and highly motivated to seek, collect, and disseminate such reports.¹⁰⁵ The phone should have been ringing off the hook, but instead there was barely a A more logical explanation for the extraordinary rarity of reported impersonation fraud at the polls is that such fraud is extraordinarily rare. It is an extremely inefficient means to influence an election. For each act of in-person impersonation fraud in a federal election, the perpetrator risks five years in prison and a \$10,000 fine under federal law, in addition to penalties under state law.¹⁰⁶ In return, the perpetrator gains at most one incremental vote. It is understandable that few individuals believe such a trade-off worthwhile.

¹⁰¹See, e.g., *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 953 (7th Cir. 2007).

¹⁰²See *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 226-29 (2008) (Souter, J., dissenting).

¹⁰³It is no answer that the individual may have submitted a fraudulent registration form in a fictitious name, presumably outside of the presence of an election official, before arriving in person to vote in that fictitious name. Federal law already contemplates this hypothetical and unlikely possibility by providing that any registrant new to the jurisdiction who submits a registration form by mail must at some point, and through a broad range of means, offer reliable proof of his identity before voting. 42 U.S.C. § 15483(b) (2006).

¹⁰⁴See Eric Lipton & Ian Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, N.Y. TIMES, Apr. 12, 2007.

¹⁰⁵See, e.g., Republican National Committee, *You Can't Make This Up!* (July 2008), <http://web.archive.org/web/20080709002402/http://www.gop.com/ycmtu.htm>.

¹⁰⁶42 U.S.C. § 1973i(c) (2006).

D. BALANCING COSTS AND BENEFITS

In weighing the costs and benefits of restrictive identification rules, the limited incidence of any fraud that these rules could prevent is significant. Because most American citizens have the identification required, the number of eligible voters without ID is relatively small. But even the most conservative estimates of impact show that the “cure” of restrictive identification is—mathematically—half a million times worse than the ostensible disease. Even if only 1.2% of registered voters do not have the required identification, burdening 1.2% of the voters in order to address a 0.000002% fraud rate betrays an alarming devotion to disproportion. Put differently, burdening more than two million registered voters to address nine potential fraudulent votes seems a particularly poorly tailored means to “safeguard” our most precious constitutional right.

It is true that, as with any election regulation, a photo identification rule could prove outcome-determinative in a close election.¹⁰⁷ Indeed, in at least one race—a tie vote for an Indiana school board seat in 2010 with one provisional ballot cast by a voter without the requisite identification—it already has.¹⁰⁸ Given the known facts about the incidence of the burden of such laws and the incidence of the rate of alleged fraud, it is substantially more likely that the Indiana school board election was resolved by unnecessarily excluding an eligible voter, and not by preventing a would-be fraudulent ballot.¹⁰⁹ The most restrictive identification laws erect a real barrier to millions of real citizens in order to increase existing protections against an unlikely hypothetical. It is like amputating a foot in order to prevent a potential hangnail.

Indeed, preliminary evidence indicates that restrictive identification rules may have *already* prevented more individuals from voting than any incidence of fraud to justify the impact. The evidence submitted in *Crawford* cited nine potentially fraudulent votes—nationwide and over seven years—that strict identification rules might have prevented. The individual stories above represent just some of the individual stories of citizens without government-issued photo ID, more than nine of whom have already been prevented from casting valid ballots due solely to restrictive ID laws. And there are many more. In just one Indiana county, in just one off-cycle limited-turnout election in 2007, 32 voters cast ballots that could not be counted because of Indiana’s new restrictive identification law; fourteen of these voters had previously voted in at least ten elections.¹¹⁰ In the 2008 presidential primary election, approximately 321 Indiana

¹⁰⁷ See von Spakovsky, *supra* note 51.

¹⁰⁸ Christin Nance Lazerus, *School Race Hinges on Voter’s ID*, GARY POST-TRIBUNE, May 14, 2010; Bill Dolan, *Lake Ridge School Officials Asked to Break Candidate Tie*, NWI.COM, May 25, 2010, http://www.nwitimes.com/news/local/lake/article_99e4f7b7-45eb-54de-8c3b-38196a4abe43.html; Carmen M. Woodson-Wray, *Glen Johnson’s Credentials Not Good Enough for Lake Ridge School Board*, GARY CRUSADER, June 12, 2010, <http://chicagocrusader.com/news-detail.aspx?newsid=589>

¹⁰⁹ It is not possible at present to resolve the question definitively: under the Help America Vote Act, it is extremely difficult for independent researchers to further investigate the identity and eligibility of any given provisional voter. See 42 U.S.C. § 15482(a) (2006) (“Access to information about an individual provisional ballot shall be restricted to the individual who cast the ballot.”); IND. CODE § 3-11.7-6-3(c) (2012) (implementing the provision in Indiana); Response to Informal Inquiry 08-INF-28 from Heather Willis Neal, Ind. Public Access Counselor, to J. Bradley King, Co-Director, Ind. Election Div., Aug. 22, 2008, <http://1.usa.gov/HLVycj> (interpreting the Indiana law); Michael J. Pitts & Matthew D. Neumann, *Documenting Disenfranchisement: Voter Identification During Indiana’s 2008 General Election*, 225 J.L. & POL. 329, 335-37 (2009) (describing the hurdles to identifying individual provisional voters).

¹¹⁰ Brief for Respondent Marion County Election Bd. at 8-10, *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008) (Nos. 07-21, 07-25).

ballots seem to have been rejected because of the identification law;¹¹¹ in the general election, 902 Indiana ballots seem to have been rejected because of the identification law.¹¹² Similarly, in a 2007 off-cycle Georgia election, 33 voters' ballots were rejected because of that state's new, restrictive identification law,¹¹³ and in the 2008 presidential primary, 254 Georgian ballots were rejected because of the new law.¹¹⁴ It is impossible to know how many other voters without the proper identification came to the polls but did not cast provisional ballots (which would not have counted without identification), or how many declined to make the trip to the polls in the first instance (which would have been futile). And though it is theoretically possible that each of the provisional ballots listed in this paragraph represented a fraudulent vote, there is no further evidence to support that conclusion.

Despite their demonstrated impact on many American citizens, some seek to justify overly restrictive ID laws by claiming that they will at least increase public confidence in the election process. On its own, this justification for a substantial burden is open to question: there is a significant danger to democratic participation in allowing the unfounded fears of the many to burden the fundamental constitutional rights of the few.¹¹⁵ Moreover, even if public confidence alone were a legitimate reason to exact regulatory cost, it is not clear, even in theory, that restrictive identification laws would have a unidirectional impact: such laws might increase the confidence of those who believe that the system is presently endangered by fraud or potential fraud, but might also decrease the confidence of those who believe that the system is presently designed to unnecessarily burden or exclude eligible voters.¹¹⁶

Finally, in addition to the negligible benefits of the laws starkly limiting valid voter ID, it is worth noting real costs of such policies, even beyond the cost to legitimate citizens who do not have the necessary identification. Indeed, as with the registration and early-vote policies reviewed above, the new ID laws may well be *counterproductive*. For example, Georgia has dramatically limited the identification that citizens may use to vote at the polls, but also offers no-excuse absentee voting without similar restrictions.¹¹⁷ While the comparative freedom of absentee voting may be seen by some to

¹¹¹Michael J. Pitts, *Empirically Assessing the Impact of Photo Identification at the Polls Through an Examination of Provisional Balloting*, 24 J.L. & POL. 475 (2008).

¹¹²Pitts & Neumann, *supra* note 109.

¹¹³Shannon McCaffrey, *Votes of Some Who Lacked Photo ID in November Didn't Count*, THE LEDGER-ENQUIRER (Columbus, Ga.), Jan. 29, 2008.

¹¹⁴*In Person Voter Fraud: Myth and Trigger for Disenfranchisement?: Hearing Before the S. Comm. on Rules & Admin.*, 110th Cong. (Mar. 12, 2008) (statement of Robert A. Simms, Ga. Deputy Sec'y of State, at 5); see also Shannon McCaffrey, *More Than 400 Voters Lacked Photo IDs in Feb. 5 Primary*, THE LEDGER-ENQUIRER (Columbus, Ga.), Feb. 14, 2008 (reporting 296 voters without ID casting provisional ballots that were not counted).

¹¹⁵See, e.g., *Weinschenk v. Missouri*, 203 S.W.3d 201, 218-19 (Mo. 2006) ("[I]f this Court were to approve the placement of severe restrictions on Missourians' fundamental rights owing to the mere perception of a problem in this instance, then the tactic of shaping public misperception could be used in the future as a mechanism for further burdening the right to vote or other fundamental rights.... The protection of our most precious state constitutional rights must not founder in the tumultuous tides of public misperception.").

¹¹⁶Available data suggest empirical uncertainty to complement the theoretical concerns. Restrictive identification laws do not appear to make citizens feel measurably more secure about the integrity of their elections. See Stephen Ansolabehere & Nathaniel Persily, *Vote Fraud in the Eye of the Beholder*, 121 HARV. L. REV. 1737 (2008).

¹¹⁷GA. CODE §§ 21-2-380-81, 21-2-417 (2011). In contrast, the new laws in Kansas and Wisconsin also sharply restrict the documentation that absentee voters may use to prove their identity. KAN. STAT. §§ 25-1122, 25-2908(h) (2011); WIS. STAT. §§ 5.02(6m), (16c), 6.79(2), 6.85-87 (2012).

mitigate the burden on voters without government-issued photo ID,¹¹⁸ it will also predictably drive more voters into the absentee system, where fraud and coercion have been documented to be real and legitimate concerns. That is, a law ostensibly designed to reduce the incidence of fraud is likely to increase the rate at which voters utilize a system known to succumb to fraud more frequently.

There is also a substantial monetary cost associated with restrictive identification laws. As the Brennan Center has documented, courts approving restrictive ID requirements have required not only that the state offer free identification cards to eligible citizens who do not otherwise have the necessary ID, but also that the state prepare an education campaign sufficient to warn the electorate that their votes will not count absent the required ID.¹¹⁹ These requirements amount to a real fiscal impact of millions of dollars. To produce just 168,000 identification cards in Indiana, the state estimated a \$1.3 million dollar cost, with additional revenue loss of \$2.2 million, which exceeds the Indiana Election Division's total budget for the 2009-2010 fiscal year—even before accounting for any education costs.¹²⁰ And a more comprehensive fiscal note in Missouri estimated the costs of a photo ID law at \$6 million for the first year, with about \$4 million in recurring costs.¹²¹ Moreover, increasing any restrictions at the polls—ID or otherwise—will likely lead to an increase in the number of voters needing to cast provisional ballots. These ballots must be printed, collected, and processed, all of which leads to increased cost (and increased uncertainty in the event of a close election). In tight budgetary times, these costs also weigh heavily on the ledger against unnecessarily restrictive ID requirements.

III. CONCLUSION

This Issue Brief reviews several new state laws impacting the voting process, and finds their assessment of costs and benefits wanting. There are other new policies of concern as well, beyond the scope of this piece—including repeals of election-day registration and repeals of practices easing the restoration of civil rights for those who have been convicted. As a theoretical matter, none of the above policies make it impossible to vote. Neither did the poll tax, when it was in place. But in practice, these barriers increase the burdens to eligible citizens of exercising the franchise, and appear to do with unequal impact. More disturbing, the restrictions are unnecessary and unjustified, and in some cases, even potentially counterproductive.

Courts are rightly loath to interfere with the enacted policies of democratically accountable bodies. When those bodies' work product increases the burdens of democratic participation, however, it renders public accountability less effective and impairs the vitality of our representative system. Such policy is only constitutionally justified when the provisions exacting burden are sufficiently tailored to achieving sufficiently weighty regulatory interests.¹²² Nor is this a standard for the courts alone: litigation may be the forum of last resort, but the constitutional mandate applies to

¹¹⁸*But see* Justin Levitt, *Long Lines at the Courthouse: Pre-Election Litigation of Election Day Burdens*, 9 ELECTION L.J. 19, 23-24 (2010) (arguing that absentee ballots should not be considered substitutes for the ability to vote in person).

¹¹⁹*See* VISHAL AGRAHARKAR ET AL., THE COST OF VOTER ID LAWS: WHAT THE COURTS SAY (2011), available at http://www.brennancenter.org/content/resource/the_cost_of_voter_id_laws_what_the_courts_say/.

¹²⁰*Id.* at 1-2.

¹²¹*Id.* at 1.

¹²²*Crawford v. Marion County Election Bd.*, 553 U.S. 181, 190-91 (2008) (plurality); *id.* at 209-11 (Souter, dissenting); *id.* at 237 (Breyer, dissenting).

every governmental policymaker. Only by devoting more attention to hard-nosed assessments of the costs and benefits of election regulation—and to the rationale for these regulatory decisions—can we be sure that elections are conducted with the integrity necessary to command our allegiance.

Promoting Opportunity through Impact Statements: A Tool for Policymakers to Assess Equity

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Debates over the size and scope of federal spending have dominated the political discourse over the last several years. While much discussion centers on the amounts of spending going towards various programs, less attention has been focused on ensuring that taxpayer funds, wherever they are expended, invest in greater opportunity for all communities. The American ideal of opportunity rests on the belief that everyone should have a fair chance to achieve his or her full potential, and is in keeping with core values: equal treatment, economic security and mobility, a voice in decisions that affect us, a chance to start over after misfortune or missteps, and a sense of shared responsibility for each other as members of a common society.

Governmental bodies can expand opportunity each time they support or control any number of projects, from highways and mass transit lines, to schools and hospitals, to land use and economic development, to law enforcement and environmental protection. With prudent management of these projects, they can improve access to quality jobs, housing, education, business opportunities, and good health, among other opportunities, and thus better serve all people in the United States fairly and effectively. All too often, however, such projects perpetuate or even deepen unequal opportunity and further isolate affected communities from resources.

A coordinated process is needed to ensure that public funding complies with anti-discrimination laws and not only confronts barriers to opportunity that affect regions throughout the United States, but also builds the foundation necessary to give all communities a chance to achieve economic security and mobility. We therefore propose that administrative agencies use an Opportunity Impact Statement (OIS) process as part of their evaluation of ongoing and proposed government funded projects and programs. The OIS process is a logical outgrowth of existing statutes, regulations, and executive orders that already require data collection, public participation, and pre- and post-award analysis as part of an administrative agency's civil rights compliance measures.

This issue brief will proceed in four parts. Part I will highlight post-Hurricane Katrina reconstruction efforts as one example demonstrating the need for Opportunity Impact Statements. Part II will describe the proposed OIS process—including the submission and analysis of relevant data, the weighing of public participation, and the

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analysis of any discriminatory impact—and the process’s overall benefits. Part III will apply the OIS in the context of illustrative housing and transportation projects. This section will explore how the OIS can be helpful in those contexts, which are critically important for opportunity and equal access. Part IV of the brief will demonstrate how the U.S. Department of Justice’s mandate to ensure compliance with civil rights laws empowers it to secure interagency cooperation and successful implementation of the OIS procedure.

I. THE NEED FOR OPPORTUNITY IMPACT STATEMENTS

The reconstruction of the Gulf Coast in the years after Hurricane Katrina presents a strong example of the pitfalls and the potential of government investment decisions. In the years after the storm, the reconstruction of the Gulf Coast only exacerbated inequalities that had already existed in the region before the storm.¹ Due to failed housing policy, lack of transportation, and discrimination that shut out many people of color from reconstruction jobs,² African-American and Latino evacuees were more than twice as likely to be unemployed two months after the storm as their white counterparts.³ Lucrative federal hurricane recovery contracts that had the potential to reinvigorate local businesses and economies went mostly to large, out-of-state companies; as of May 2006, local businesses in Alabama, Louisiana, and Mississippi had received only 18 percent of those contracting funds.⁴ Minority contractors, too, were largely overlooked in the initial contract awards.⁵

Bush Administration policies played a key role in narrowing the opportunities for equal employment and economic growth in the post-Katrina reconstruction effort by limiting labor and equal opportunity protections. On September 8, 2005, President George W. Bush announced the suspension of the Davis-Bacon Act in the Gulf Coast, eliminating a guarantee that federally contracted workers would receive local prevailing wages, and thus making it harder for unionized contractors to receive federal reconstruction funds.⁶ The next day, the U.S. Department of Labor suspended requirements that government contractors have an affirmative action plan addressing

¹ For pre-Katrina inequalities, see generally U.S. Equal Employment Opportunity Commission, EEOC Litigation Settlements April 2003, *available at* <http://archive.eeoc.gov/litigation/settlements/settlement04-03.html> (EEOC finding that New Orleans-based construction giant, The Industrial Company, “engaged in discriminatory recruitment and hiring practices on a nationwide basis which prevented African Americans from being hired into construction positions because of their race.”); *Alcorn v. City of Baton Rouge*, 2002-0952 (La. App. 1 Cir. 12/30/04); 898 So.2d 385 (holding that the Baton Rouge Police Department had subjected African American police officers to recurring acts of racial discrimination and racial harassment); and ARLOC SHERMAN & ISAAC SHAPIRO, CTR. ON BUDGET & POLICY PRIORITIES, ESSENTIAL FACTS ABOUT THE VICTIMS OF HURRICANE KATRINA (2005), <http://www.cbpp.org/files/9-19-05pov.pdf>.

² See JUDITH BROWN-DIANIS ET AL., AND INJUSTICE FOR ALL: WORKERS’ LIVES IN THE RECONSTRUCTION OF NEW ORLEANS (2006), *available at* <http://www.advancementproject.org/sites/default/files/publications/workersreport.pdf>.

³ Jared Bernstein, Economic Policy Institute, *Katrina Evacuees Face Extreme Levels of Joblessness*, Nov. 17, 2005, http://www.epi.org/economic_snapshots/entry/webfeatures_snapshots_20051109/ (citing Bureau of Labor Statistics special tabulations from the Current Population Survey, Oct. 2005).

⁴ U.S. GOV’T ACCOUNTABILITY OFFICE, HIGHLIGHTS: AGENCY CONTRACTING DATA SHOULD BE MORE COMPLETE REGARDING SUBCONTRACTING OPPORTUNITIES FOR SMALL BUSINESSES, GAO-07-205 (2007), *available at* <http://www.gao.gov/products/GAO-07-205>.

⁵ See Hope Yen, *Minority Firms Getting Few Katrina Contracts*, ASSOCIATED PRESS, Oct. 4, 2005, *available at* <http://www.sddt.com/news/article.cfm?SourceCode=200510041a1>.

⁶ Thomas B. Edsall, *Bush Suspends Pay Act In Area Hit By Storm*, WASH. POST, Sept. 9, 2005, at D03.

the employment of women, minorities, and people with disabilities, if the companies were first-time government contractors working on the reconstruction effort.⁷

And as the employment opportunities and protections in the post-Katrina years diminished, a series of public investment decisions made it even harder for low-income communities of color to remain in the region. After the hurricane, the government permanently closed Charity Hospital where nearly three-quarters of the patients were African American and 85% had income levels below \$20,000.⁸ The education system had been dismantled since the hurricane, and most of the public schools were replaced by charter schools with selective admission policies and enrollment caps, to the exclusion of thousands of predominantly low-income children of color.⁹

On the housing front, instead of reopening the public housing units in New Orleans that could have been preserved with some repairs, the U.S. Department of Housing and Urban Development and the Housing Authority of New Orleans closed most of the city's public housing, securing some developments with fences and razor wire and installing shutters over the windows and doors of others.¹⁰ Finally, when Louisiana created the Road Home Homeowner Assistance Program, intended to rebuild communities by providing grants to homeowners whose homes had been damaged in the storms, evidence suggested that the grants for African-American homeowners were more likely to be based on pre-storm values of their homes as opposed to the cost of damage (often leaving them without enough money to rebuild), while white homeowners were more likely to receive grants based on the actual cost of repairs.¹¹

The limitations on labor and equal opportunity protections, as well as the inequitable application of federal resources, significantly diminished the opportunities and heightened the inequalities in the Gulf Coast.¹² Because the natural devastation traced long-standing disparities in neighborhood investments that had disadvantaged African-American and poor communities, 73% of all of those displaced in Orleans Parish were African American.¹³ And those who remained displaced after the storm were typically younger, poorer, more likely to be African American, and more likely to have children than those who stayed or migrated into the region.¹⁴ As a result, the socio-demographic composition of New Orleans and its surrounding area in the post-Katrina years was significantly altered. In the year after the hurricane hit, the African American population in the metropolitan area as a whole declined from 38%

⁷ Jonathan D. Glater, *Storm and Crisis: Labor; Contractors Get Affirmative Action Exemption*, N.Y. TIMES, Sept. 20, 2005, <http://query.nytimes.com/gst/fullpage.html?res=9E06E0DB1630F933A1575AC0A9639C8B63>.

⁸ Judith Browne-Dianis & Anita Sinha, *Exiling the Poor: The Clash of Redevelopment and Fair Housing in Post-Katrina New Orleans*, 51 HOW. L.J. 481, 484 (2008).

⁹ *Id.*

¹⁰ *Id.* at 488.

¹¹ See Greater New Orleans Fair Housing Action Center v. U.S. Dep't of Hous. & Urban Dev., 639 F.3d 1078 (C.A.D.C. 2011); see also NAACP LEGAL DEFENSE FUND, FACT SHEET: FAIR HOUSING AND CIVIL RIGHTS GROUPS FILE FEDERAL LAWSUIT IN POST-KATRINA HOUSING DISCRIMINATION CASE 2 (2008), available at http://naacpldf.org/files/road_home_factsheet.pdf.

¹² For more information on this case study, see THE OPPORTUNITY AGENDA, JOBS AND BUSINESS: THE STATE OF OPPORTUNITY FOR WORKERS RESTORING THE GULF (2006), http://opportunityagenda.org/files/field_file/Katrina%20Jobs.pdf. See also THE OPPORTUNITY AGENDA, HOUSING: WELCOMING KATRINA'S VICTIMS BACK HOME (2006), http://opportunityagenda.org/files/field_file/Katrina%20Housing.pdf.

¹³ Browne-Dianis & Sinha, *supra* note 8, at 483.

¹⁴ See WILLIAM H. FREY, AUDREY SINGER & DAVID PARK, BROOKINGS INST., RESETTLING NEW ORLEANS: THE FIRST FULL PICTURE FROM THE CENSUS (2007), http://www.brookings.edu/~media/Files/rc/reports/2007/07katrinafreysinger/20070912_katrinafreysinger.pdf.

in 2005 to 31% in 2006, while the white population in the area increased from 53% to 65% overall.¹⁵

Imagine, instead, that the federal government had allocated its investments in the rebuilding of the Gulf Coast through the lens of greater and more equal opportunity. The U.S. Department of Housing and Urban Development, for example, could have considered the demographics of New Orleans neighborhoods to ensure that rebuilding rules and the disposition of habitable public housing did not unnecessarily prevent African Americans and other groups from returning to the city. In addition to maintaining fair labor and equal employment opportunity rules, it could have assessed contractor workforce recruiting and hiring practices compared with the regional pool of qualified workers. Evaluating these factors, to determine how taxpayer funds should be deployed after a cataclysmic disaster with deep racial and socioeconomic implications, could have produced both a more equitable and a more prosperous region. More broadly, there is an ongoing need for federal agencies and other actors to assess—through a systematic and informed approach—how their decisions advance equal opportunity and comply with anti-discrimination laws.

Our recommended Opportunity Impact Statement process creates a comprehensive and coordinated enforcement protocol with consistent metrics to facilitate compliance with anti-discrimination protections. It provides a comprehensive tool that public bodies, affected communities, and the private sector can use to achieve programmatic goals and to promote programs and projects that offer equal and expanded opportunity for everyone in a community or region. Drawing from best practices found in the application of other types of impact statements, the OIS effectuates crucial equal opportunity protections while increasing the efficacy of review procedures.

In authorizing, funding, and regulating projects, all levels of government have a responsibility to keep the doors of opportunity open to everyone. There is a substantial body of statutes, regulations, and executive orders designed to ensure that recipients of federal funds do not discriminate, in either purpose or effect, on the basis of race, color, ethnicity, disability, gender, or other social characteristics. Although agencies are obliged to enforce these laws, enforcement mechanisms have been significantly neglected over most of the past several decades.¹⁶ The OIS assesses the impact on equal opportunity of proposed or existing federally-funded projects, facilitates public input, and ensures compliance with a range of equal opportunity laws tied to federal spending. These include: Title VI of the Civil Rights Act of 1964;¹⁷ Title VII of the Civil Rights Act;¹⁸ Title IX of the Education Amendments;¹⁹ Section 504 of the

¹⁵ *Id.* at 7.

¹⁶ See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, HOUSING AND COMMUNITY GRANTS: HUD NEEDS TO ENHANCE ITS REQUIREMENTS AND OVERSIGHT OF JURISDICTIONS' FAIR HOUSING PLANS (2010), *available at* <http://www.gao.gov/new.items/d10905.pdf>; U.S. GOV'T ACCOUNTABILITY OFFICE, WOMEN'S EARNINGS: FEDERAL AGENCIES SHOULD BETTER MONITOR THEIR PERFORMANCE IN ENFORCING ANTI-DISCRIMINATION LAWS (2008), *available at* <http://www.gao.gov/new.items/d08799.pdf>; U.S. GOV'T ACCOUNTABILITY OFFICE, U.S. GOV'T ACCOUNTABILITY OFFICE, WITHIN-SCHOOL DISCRIMINATION: INADEQUATE TITLE VI ENFORCEMENT BY EDUCATION'S OFFICE FOR CIVIL RIGHTS (1991), *available at* <http://archive.gao.gov/d38t12/143730.pdf>; U.S. GOV'T ACCOUNTABILITY OFFICE, ACTIONS TAKEN TO IMPLEMENT TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 (1980), *available at* <http://archive.gao.gov/f0202/112097.pdf> ("Neither the Department of Justice nor many Federal agencies with assistance programs subject to title VI have effectively implemented title VI requirements.").

¹⁷ 42 U.S.C. §§ 2000d-1 to 2000d-7 (1964).

¹⁸ 42 U.S.C. §§ 2000e to 2000e-17 (1964).

¹⁹ 20 U.S.C. §§ 1681-1688 (1972).

Rehabilitation Act;²⁰ the Age Discrimination in Employment Act;²¹ the Americans with Disabilities Act;²² the Uniform Relocation Act;²³ Executive Order 11246;²⁴ Executive Order 12898;²⁵ and Executive Order 12250.²⁶ Title VI, for example, prohibits discrimination on the basis of race, ethnicity, or national origin in programs receiving federal financial assistance.

Under Title VI and other equal opportunity statutes or their implementing regulations, government-funded programs may not intentionally discriminate based on covered characteristics like race, nor may they discriminate in practice through an unjustified disparity on those bases. For example, under regulations implementing Title VI, a *prima facie* disparate impact claim arises if a program disproportionately excludes or burdens members of a particular racial or ethnic group, relative to their representation in the larger population. Unless the policy or practice causing the disparate impact is found to be essential to the fund recipient's mission, the program or activity cannot receive federal assistance.²⁷ And even where such a finding is made, government assistance remains impermissible if a less discriminatory alternative exists to achieve the intended purposes.²⁸

The OIS process has the potential to better facilitate, coordinate, and expedite review and compliance under these anti-discrimination provisions, including Title VI. On both the federal and state levels, impact statements are a well-established mechanism intended to ensure that policymakers have full awareness of the impact of proposed rules or actions.²⁹ Fiscal impact statements from the non-partisan Congressional Budget Office, for example, outline the costs and benefits of legislation, and many states have adopted similar financial analyses for legislative action.³⁰ Iowa, Connecticut, and Minnesota have established impact statements that review proposed changes in criminal justice policy to determine whether such action will exacerbate or reduce

²⁰ 29 U.S.C. § 794 (1973).

²¹ 39 U.S.C. § 621 (1967).

²² 42 U.S.C. §§ 12101-12213 (1990).

²³ 42 U.S.C. §§ 4600-4655 (1970) (The URA is not traditionally considered an equal opportunity law, but it requires fair and equitable treatment of persons dislocated by federally funded projects, relocation assistance to displaced persons that minimizes financial and emotional impact, and improvement of the housing condition of displaced persons living in substandard housing.).

²⁴ 30 Fed. Reg. 12,319 (Sept. 24, 1965) (requiring affirmative action in employment decisions by federal and federally-assisted construction contractors and subcontractors).

²⁵ 59 Fed. Reg. 7629 (Feb. 16, 1994) (requiring that no racial, ethnic, socioeconomic, or other group of people bear disproportionate environmental burdens resulting from industrial, commercial, or government operations or policies).

²⁶ 45 Fed. Reg. 72,995 (Nov. 4, 1980) (requiring the coordination, implementation, and enforcement by Executive agencies of federal equal opportunity statutes).

²⁷ See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1970); *Larry P. v. Riles*, 793 F.2d 969, 982 (9th Cir. 1981).

²⁸ See *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985); see also *Ward's Cove Packing Co. v. Atonio*, 490 U.S. 642, 660 (1989).

²⁹ See, e.g., Nat'l Conf. of State Legislatures, Preparation of Fiscal Analyses, <http://www.ncsl.org/legislatures-elections/elections/fiscal-impact-statements.aspx> (last visited Mar. 29, 2012); State of Oregon, Staff Measures Summaries Home Page, <http://www.leg.state.or.us/comm/sms/SMS01Frameset.html> (last visited Mar. 29, 2012); South Carolina Budget & Control Board, Office of State Budget—Fiscal Impact Statements, <http://www.budget.sc.gov/OSB-fiscal-impact.phtml> (last visited Mar. 29, 2012).

³⁰ *Id.*

racial disparities in sentencing and incarceration.³¹ Another well-known impact statement is the Environmental Impact Statement (EIS) that the National Environmental Policy Act³² requires federal agencies to prepare, based on available data and investigation, when a project is likely to have a significant effect on the environment. The EIS compares the proposed project to other alternative approaches, and invites public scrutiny and public comment, thus facilitating informed and democratic decision making in the pursuit of sustainable development.

The proposed Opportunity Impact Statement pursues similar goals in the context of opportunity. The OIS is designed to promote careful consideration of significant positive and negative opportunity impacts arising from proposed federally-funded projects. It also creates a single formal evaluation procedure that both ensures meaningful public participation in the agency's consideration of the proposed action and avoids duplicative or uncoordinated attempts at complying with equal opportunity mandates after the fact.

While this issue brief focuses on illustrations of the OIS as it could be applied by federal agencies, it is important to note that states, localities, and private actors would also benefit from initiating use of an OIS. At all levels, the OIS serves to provide a comprehensive, efficient framework to better ensure compliance with existing law.

II. ELEMENTS OF THE OPPORTUNITY IMPACT STATEMENT

Using empirical data, as well as community input and investigation, the Opportunity Impact Statement assesses the extent to which a publicly funded project will expand or contract opportunity for all (e.g., would jobs be created or lost; would affordable housing be created or destroyed?) and the extent to which it will equitably serve residents and communities of different races, incomes, and other diverse characteristics (e.g., would displacement or environmental hazards be equitably shared by affected communities?). These factors are considered in the context of communities' differing assets, needs, and characteristics. Experience shows that simply asking these types of questions and requiring a thorough and public response will have a positive effect on the development of publicly subsidized or authorized projects. Also, where necessary, it will help identify and address potential and actual violations of equal opportunity laws in a timely manner. The OIS will help ensure that all funded projects comply with equal opportunity laws, and can also help determine which projects should be given priority for funding because of their positive impact on opportunity.

The OIS would require both a funding applicant and its government funding agency to evaluate whether or not its program will have an unlawful disparate impact on the basis of protected characteristics before implementing the program. To accomplish this analysis, the OIS process would utilize: data collection and review; public comment and participation; prioritization of equitable projects; and transparency and accountability.

³¹ See H.F. 2393, 82nd Gen. Assem., Reg. Sess. (Iowa 2008); 2008 Conn. Legis. Serv. P.A. 08-143 (H.B. 5933) (West); Relating to the Findings of the Commission on Reducing Racial Disparities in the Wisconsin Justice System and the Creation of the Racial Disparities Oversight Commission, Wis. Exec. Order No. 251 (2008); see also Marc Mauer, *Racial Impact Statements: Changing Policies to Address Disparities*, CRIM. JUST., Winter 2009, at 16.

³² Pub. L. 91-190 (1970) (codified as amended at 42 U.S.C. §§ 4321-4347 (2006)).

A. DATA COLLECTION AND REVIEW

To adequately protect equal opportunity, government entities must rely on data collection and the analysis of comparative statistical data to detect any patterns or practices of intentional discrimination,³³ as well as any impermissible disparate impacts that a program or activity may have on a particular group.³⁴

Under Title VI, the specific form and methodology by which federal fund recipients must collect data for the determination of any disparate impact is decided largely at the discretion of federal agencies.³⁵ But data collection is clearly within each agency's authority. Given the evidentiary structure for assessing liability for discrimination under civil rights law, moreover, collection and analysis of relevant data are clearly necessary in order to ensure compliance. Due to the common structure and legislative goals of Title VI, Title IX, and Section 504 of the Rehabilitation Act of 1973,³⁶ the data collection requirements described in this section are similarly required to comply with these other civil rights laws. To effectively enforce equal opportunity mechanisms, federal agencies should collect demographic data—disaggregated by race or ethnicity,³⁷ or, in the case of other equal opportunity mandates, gender, disability, familial status, religion, or age—regarding the jurisdiction or metropolitan area in which the relevant program or activities are to take place, as well as the populations that would be burdened and benefited by negative and positive impacts of those programs or activities.

Individual federal agencies have already made some efforts to require this type of data collection by federal funding applicants.³⁸ Federal agencies, and not federal fund applicants or recipients, bear the ultimate responsibility for determining civil rights

³³ See, e.g., *Wywill v. United Companies Life Ins. Co.*, 212 F.3d 296, 302 (5th Cir. 2000) (“Often, an illegal pattern and practice [of discrimination] is revealed with statistical proof.”) (citing *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 875 (1984)); *Equal Employment Opportunity Comm. v. Dial Corp.*, 469 F.3d 735, 741 (8th Cir. 2006) (“[S]tatistics combined with anecdotal examples of discrimination may establish a pattern or practice of regular, purposeful discrimination.”); *Cooper v. Southern Co.*, 390 F.3d 695, 724 (11th Cir. 2004) (“[I]n a ‘pattern and practice’ disparate treatment case, ‘the plaintiff must prove, normally through a combination of statistics and anecdotes, that discrimination is the company’s ‘standard operating procedure.’”).

³⁴ See, e.g., *Grant v. Bethlehem Steel Corp.*, 635 F.2d 1007, 1015 (2d Cir. 1980) (“discriminatory racial impact is frequently evidenced by statistics”) (citing *Int’l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15, 339 (1977); *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977)); *Muñoz v. Orr*, 200 F.3d 291, 300 (5th Cir. 2000) (“Claims of disparate impact under Title VII must, of necessity, rely heavily on statistical proof.”) (citing *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 987 (1988)).

³⁵ See *Madison-Hughes v. Shalala*, 80 F.3d 1121, 1125 (6th Cir. 1996) (stating that, under Title VI, “data collection is left to HHS’s discretion”).

³⁶ See, e.g., *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1980) (interpreting these statutes similarly).

³⁷ See 28 C.F.R. § 42.406(b) (2011) (listing “[t]he population eligible to be served by race, color and national origin” as an example of data to be collected under the preceding provision”).

³⁸ See, e.g., U.S. Dep’t of Transp. Title VI Regulations, 49 C.F.R. § 21.7 (2011) (“Every application by a State or a State agency for continuing Federal financial assistance to which this part applies ... shall *as a condition to its approval and the extension of any Federal financial assistance pursuant to the application:* (1) Contain or be accompanied by a statement that the program is (or, *in the case of a new program, will be*) conducted in compliance with all requirements imposed by or pursuant to this part, and (2) provide or be accompanied by provision for such methods of administration for the program *as are found by the Secretary to give reasonable guarantee* that the applicant and all recipients of Federal financial assistance under such program *will comply* with all requirements imposed by or pursuant to this part.”) (emphasis added); U.S. Dep’t of Transp. Order No. 1000.12, Implementation of the Department of Transportation Title VI Program (1977) (“Each operating element shall, in developing its Title VI program, examine in detail the nature and structure of programs and activities for which it provides Federal financial assistance, *require information of applicants and recipients to determine compliance, and establish requirements* so as to ensure that the purpose of its Title VI program is achieved.”) (emphasis added).

compliance.³⁹ It is therefore necessary that federal agencies regularly collect and review data submitted by the funding applicants or recipients in compliance with equal opportunity mandates. Affirmative efforts by all federal agencies to ensure that this type of demographic data is collected are necessary to ensure that discriminatory disparate impacts are not created or exacerbated through the use of government monies.⁴⁰

To determine whether an unlawful disparate impact exists based on the collected data and in violation of Title VI or its counterparts, federal agencies should engage in comparative scrutiny of any statistical disparities between the relevant jurisdiction as a whole (e.g., a city or metropolitan area, a school district, a qualified labor force) and the populations who will be benefited and burdened by the federally funded program or activity (e.g., people benefited by a bus route or light rail, attendance zones of a new school building, people displaced by demolition or exposed to environmental hazards).⁴¹ Federal agencies should collect and analyze such data as a condition for approving the allocation or disbursement of federal financial assistance.

Numerous examples of the proper analysis exist from case law prior to *Alexander v. Sandoval* (in which the Supreme Court ruled that no private cause of action exists to enforce Title VI regulations).⁴² For example, in the late 1970s, when the New York City Board of Education was suspected of racially discriminatory teacher assignment practices, the U.S. Department of Health, Education, and Welfare (HEW) compared the average percentage of minority teachers in academic high schools within the entire system with the percentage of minority teachers at high schools with high concentrations of minority students.⁴³ After analyzing the data, HEW determined that the

³⁹ Memorandum from Bill Lann Lee, Acting Assistant Attorney Gen., U.S. Dep't of Justice, Civil Rights Div., to the Executive Agency Civil Rights Directors 4-5 (Jan. 28, 1999), available at <http://www.justice.gov/crt/about/cor/Pubs/blkgnt.php> (citing 28 C.F.R. § 42.408(c) ("Where a federal agency requires or permits recipients to process Title VI complaints, the agency ... shall retain a review responsibility over the investigation and disposition of each complaint.")).

⁴⁰ Executive Order 12898, regarding Environmental Justice, reaffirms the authority and, in some cases, obligation of funding agencies to collect and analyze racial and ethnic data in advance, in order to determine the potential discriminatory effect of a regulated facility, program or activity. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994) ("[E]ach Federal agency, whenever practicable and appropriate, shall collect, maintain and analyze information on the race, national origin, income level, and other readily accessible and appropriate information for areas surrounding facilities or sites *expected to have* substantial environmental, human health, or economic effect on the surrounding populations, *when such facilities or sites become the subject of a substantial Federal environmental administrative or judicial action*. Such information shall be made available to the public unless prohibited by law.") (emphasis added).

⁴¹ Within the litigation schema, where a complainant shows a causal connection between a facially neutral policy and a disproportionate and adverse impact on a protected Title VI group, see *N.Y.C. Envtl. Justice Alliance (NYCEJA) v. Giuliani*, 214 F.3d 65, 70 (2d Cir. 2000). The recipient of federal funds must show that the policy causing a discriminatory effect is "necessary to meeting a goal that [i]s legitimate, important, and integral to the [recipient's] institutional mission." *Sandoval v. Hagan*, 7 F. Supp. 2d 1234, 1278 (M.D. Ala. 1998), *aff'd*, 197 F.3d 484 (11th Cir. 1999), *overruled on other grounds*, *Alexander v. Sandoval*, 530 U.S. 1305 (2000). Thus, to both anticipate and prevent potential litigation, it is necessary that federal and federally funded programs collect legitimate and comprehensive documentation to prove that any facially neutral programs or activities with discriminatory effects are necessary to the institutional missions of the recipient. In the context of litigation, once the federal fund recipient can prove that the policy causing the discriminatory effect is necessary to its institutional mission, the burden would shift to the provider of federal funds to show whether a comparably effective alternative practice exists which would result in less disproportionality. *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993). However, is it to the advantage of prospective federal fund recipients to make this inquiry *before* the inception of their proposed activities, and for ongoing federal fund recipients to explore these alternatives and shift their programming accordingly as soon as is practicable.

⁴² *Alexander v. Sandoval*, 532 U.S. 275 (2001).

⁴³ See *Board of Educ. v. Califano*, 584 F.2d 576, 583-85 (1978).

racial assignment of faculty within the system showed, with statistical significance, an absence of minority teachers at certain academic (i.e., nonvocational) high schools,⁴⁴ and subsequently denied federal funding to the Board of Education. Because the analyzed data established a prima facie case of disparate racial impact in violation of Title VI, and the Board of Education “failed to present a sufficient justification for the racial disparities in teacher and staff assignments,”⁴⁵ the Second Circuit Court of Appeals in *Board of Education v. Califano* determined that HEW did not err in its denial of federal funding.⁴⁶

Comparing data to determine whether an inappropriate disparate impact exists is similarly appropriate in the employment context. In *Bridgeport Guardians, Inc. v. Bridgeport*, for example, when promotions to the position of police sergeant were strictly based on the rank-order results of an examination, the plaintiffs compared the applicants selected for promotion under the strict use of the examination with the pool of applicants eligible for the promotion.⁴⁷ Determining that the comparison revealed that eligible African American and Hispanic candidates were disadvantaged by strict rank-order use of the examination at a statistically significant rate,⁴⁸ the Second Circuit affirmed the district court’s finding that the plaintiffs had established a prima facie case of disparate impact in violation of Title VII of the Civil Rights Act of 1964.⁴⁹ Although the defendants showed that the “examination was content valid and justified by the City’s business needs,” the court found that the plaintiffs had sufficiently rebutted that evidence by showing that the City could have chosen an alternative method of evaluating the examination results “to alleviate the disparate racial effect of the examination without disserving its legitimate interests.”⁵⁰

Instituting an OIS process would strengthen existing data collection requirements and would allow federal agencies to analyze a project or program’s relative ability to expand or diminish access to opportunity within a region *before* the allocation or disbursement of federal funds, thus proactively effectuating civil rights mandates.

B. PUBLIC PARTICIPATION AND ACCESS TO INFORMATION

While data collection and analysis are crucial to anticipating and preventing unlawful discrimination and promoting opportunity for all communities, they are not enough. Because discrimination, and in particular, discriminatory impacts of facially neutral policies or practices, is not often readily apparent, federal agencies must enable the public to access information on proposed policies and activities and to

⁴⁴ *Id.* at 584-85.

⁴⁵ *Id.* at 589.

⁴⁶ *See id.*

⁴⁷ *Bridgeport Guardians, Inc. v. Bridgeport*, 933 F.2d 1140, 1146-48 (1991).

⁴⁸ *Id.* at 1147 (“The Mann-Whitney analysis revealed that the 1989 examination resulted in a pattern that, comparing the scores of White candidates against African American candidates, would occur by chance only once in 10,000 times, and that, comparing the scores of White candidates against Hispanic candidates, would occur by chance only twice in 10,000 times. Given that an occurrence rate of anything less than once in 20 times is not reasonably attributable to chance, the court appropriately found that the pattern of the test scores here, whose occurrence rate was one in 10,000 and two in 10,000, had statistical significance.”).

⁴⁹ *Id.* at 1148.

⁵⁰ *Id.*

meaningfully participate in the regulatory review process.⁵¹ It is important that federal agencies take specific steps, where relevant, for participation by members of the public with limited English proficiency;⁵² persons with disabilities;⁵³ American Indians, Alaskan Natives, and Tribes;⁵⁴ and other groups relevant to equal opportunity enforcement who might otherwise face barriers.

To the extent practicable, public comment should be facilitated for all proposed projects or programs in the form of community meetings, written public comment submissions, and academic and social science research and analysis. Requiring an active analysis of public comment in the OIS can help funding recipients anticipate consequences that their own data might have missed. Advocates working in the environmental justice sector, as one example, have been developing strategies for meaningful public engagement.⁵⁵

Some of these strategies have been used in the transportation context. For example, the Federal Transit Administration's (FTA) Circular (used to communicate instructions and information to the FTA), titled, "Title VI and Title VI-Dependent Guidelines for Federal Transit Administration Recipients,"⁵⁶ states:

Recipients should make these determinations [of specific public involvement measures] based on the composition of the population affected by the recipient's action, the type of public involvement process planned by the recipient, and the resources available to the agency. Efforts to involve minority and low-income people in public involvement activities can include both comprehensive

⁵¹ See Exec. Order No. 12,898, 59 Fed. Reg. 7629, Sec. 5-5 (Feb. 11, 1994) (providing for public participation and access to information in environmental regulation). Because the negative societal effects of unintentionally discriminatory environmental programs and activities may be similarly present in recipient programs and activities outside the arena of environmental regulation, this important provision of Executive Order 12898 should be extended to the proactive process of considering equal opportunity compliance in all federal and federally assisted programs and activities.

⁵² See Exec. Order No. 13,166, 65 Fed. Reg. 50121 (Aug. 16, 2000) (reaffirming the obligation to eliminate limited English proficiency as an artificial barrier to full and meaningful participation in all federally assisted programs and activities).

⁵³ See, e.g., U.S. Dep't of Transp. Section 504 Regulations, 49 C.F.R. § 28.110(b) (2011) ("The Department shall provide an opportunity to interested persons, including individuals with handicaps, agency employees with handicaps, and organizations representing individuals with handicaps, to participate in the self-evaluation process [of its current policies and practices] by submitting comments (both oral and written).").

⁵⁴ See, e.g., U.S. Dep't of Transp. Order No. 5301.1, Department of Transportation Programs, Policies, and Procedures Affecting American Indians, Alaska Natives, and Tribes (1999) ("Consult with Indian tribes before taking any actions that may significantly or uniquely affect them. This process may be supplemented by seeking information from other relevant sources and may be required by specific laws, regulations, and executive orders.").

⁵⁵ See, e.g., Cheryl Simrell King et al., *The Question of Participation: Toward Authentic Public Participation in Public Administration*, 58 PUB. ADMIN. REV. 317, 317 (1998), available at http://www.centerforurbanstudies.com/documents/service/King_The_Question_of_Participation.pdf (arguing that the principal public participation methods used by government agencies—public hearings, public meetings, and notice and comment rulemaking procedures alone—frequently do not create conditions necessary for effective, or "authentic" public participation).

⁵⁶ FED. TRANSIT ADMIN., U.S. DEP'T OF TRANSP., CIRCULAR: TITLE VI AND TITLE VI-DEPENDENT GUIDELINES FOR FEDERAL TRANSIT ADMINISTRATION RECIPIENTS (2007), available at http://www.fta.dot.gov/documents/Title_VI_Circular_4702.1A.pdf.

measures, such as placing public notices at all [locations]... and measures targeted to overcome linguistic, institutional, cultural, economic, historical, or other barriers that may prevent minority and low-income people and populations from effectively participating in a recipient's decision-making process.

Effective practices include:

- (1) Coordinating with individuals, institutions, or organizations and implementing community-based public involvement strategies to reach out to members in the affected minority and/or low-income communities.
- (2) Providing opportunities for public participation through means other than written communication, such as personal interviews or use of audio or video recording devices to capture oral comments.
- (3) Using locations, facilities, and meeting times that are convenient and accessible to low-income and minority communities.
- (4) Using different meeting sizes or formats, or varying the type and number of news media used to announce public participation opportunities, so that communications are tailored to the particular community or population.
- (5) Implementing DOT's policy guidance concerning recipients' responsibilities to LEP [limited English proficiency] persons to overcome barriers to public participation.⁵⁷

When developing a process for considering public input in federal funding decisions, all agencies should consider incorporating the FTA's language into their public participation plans.

C. RESPONSE TO FINDINGS

The results of Opportunity Impact Statements can both ensure compliance with equal opportunity laws and help federal agencies decide which projects are most worthy of support. If, based on the data collected and reviewed and the public comments submitted, a federally funded program is shown to have a disproportionate adverse effect on a particular community covered by Title VI or other equal opportunity statutes, the funding applicant or recipient should be required to "prove a substantial

⁵⁷ *Id.* at IV-4, IV-5.

legitimate justification for its practice.”⁵⁸ Absent that showing, or if a less discriminatory alternative is found, federal funding should not go forward.⁵⁹

More broadly, however, the results of Opportunity Impact Statements can help to determine public spending priorities even in the absence of a civil rights violation. When choosing among two or more applicants for federal assistance that are otherwise equally attractive, funding agencies should select the applicant whose OIS indicates it will produce greater and more equal opportunity, even if none of the putative programs would actively violate equal opportunity laws.

D. TRANSPARENCY AND ACCOUNTABILITY

In 2009, when the Recovery Accountability and Transparency Board created Recovery.gov, the website used to track the government’s stimulus allocations, they set a new and heightened standard for government transparency.⁶⁰ Previously, the Office of Federal Financial Management had only been able to collect information on the initial recipients of federal funds.⁶¹ However, after 2009, they were able to collect a second level of data—this time, on the secondary entities to which their initial grants had been distributed.⁶²

The OIS process would fulfill the public’s elevated expectations of transparency through a public, written report, as well as a record of the goals, data, analysis, and public comments that led to the report’s conclusions. Interactive online and geographical information system mapping applications can further increase the accessibility of reports. The report will guide governmental and community decision making regarding the proposed project, while providing guidelines for the future development and regulation of projects that are ultimately approved. Moreover, the OIS serves as a uniform record across agencies demonstrating good faith efforts to comply with equal opportunity requirements.

⁵⁸ See *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985).

⁵⁹ The primary means of enforcing compliance with Title VI is through voluntary agreements with the recipients—fund suspension or termination is a means of last resort. Accordingly, if an agency believes an applicant is not in compliance with Title VI, the agency has three potential remedies: (1) resolution of the noncompliance (or potential noncompliance) “by voluntary means” by entering into an agreement with the applicant, which becomes a condition of the assistance agreement; or (2) where voluntary compliance efforts are unsuccessful, a refusal to grant or continue the assistance; or (3) where voluntary compliance efforts are unsuccessful, referral of the violation to the Department of Justice for judicial action. Agencies may also defer the decision whether to grant the assistance pending completion of a Title VI (Title IX, or Section 504) investigation, negotiations, or other action to obtain remedial relief. U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIVISION, TITLE VI LEGAL MANUAL, at Sec. XI (2011), *available at* <http://www.justice.gov/crt/about/cor/coord/vimannual.php>. Also note that, before denying or terminating federal funds to an applicant/recipient, a four step process should be undertaken: “(1) the agency must notify the recipient that it is not in compliance with [Title VI] and that voluntary compliance cannot be achieved; (2) after an opportunity for a hearing on the record, the ‘responsible Department official’ must make an express finding of failure to comply; (3) the head of the agency must approve the decision to suspend or terminate funds; and (4) the head of the agency must file a report with the House and Senate legislative committees having jurisdiction over the programs involved and wait 30 days before terminating funds. The report must provide the grounds for the decision to deny or terminate funds to the recipient or applicant.” *Id.* at Sec. XI(C) (citing 42 U.S.C. § 2000d-1 (2006); *see also, e.g.*, 45 C.F.R. § 80.8(c) (2011)).

⁶⁰ Gregory Korte, *Recovery.gov a Model for Transparency*, USA TODAY, Sept. 28, 2010, http://www.usatoday.com/tech/news/2010-09-28-stimulus28_ST_N.htm.

⁶¹ *Id.*

⁶² *Id.*

III. AGENCY-SPECIFIC APPLICATIONS OF THE OIS MODEL

The Opportunity Impact Statement has broad potential for use by federal agencies, as well as recipients, and for independent use by states, localities, and private actors who seek to comply with equal opportunity responsibilities while expanding opportunity for all. The following section highlights its potential application to transportation and housing, two areas of crucial importance in furthering access to opportunity.

A. TRANSPORTATION

The Department of Transportation (DOT) encompasses federal agencies that work on issues of air, road, rail, and sea transportation, as well as oil and gas pipelines.⁶³ The DOT's spending and policies have a tremendous impact on American life, shaping how individuals and whole communities travel to jobs, health care, commerce, and schools. Although the DOT is obligated to ensure equal access to the benefits of such travel, as well the equal sharing of the burdens that transportation projects can create, those responsibilities have faltered due to the lack of consistent, comprehensive oversight.⁶⁴ Independent reviews throughout the years have identified weaknesses in the DOT's past enforcement of funding criteria that an OIS could help address. For example, the United States Government Accountability Office found that "there was substantial variation in the extent to which states prioritized [highway projects funded by the American Recovery and Reinvestment Act] in economically distressed areas and how they identified these areas. Due to the need to select projects and obligate funds quickly, many states first prioritized projects based on other factors and only later identified whether these projects fulfilled the requirement to give priority to projects in economically distressed areas."⁶⁵

To remedy these concerns, the DOT has full authority to implement all aspects of an Opportunity Impact Statement process on a pilot, targeted, or universal and permanent basis. Title VI authorizes agencies to ensure compliance by withholding funds or "by any other means authorized by law."⁶⁶ The administrative authority to implement this procedure is further amplified by relevant executive orders.⁶⁷ Requiring and analyzing data regarding the potential discriminatory impact of programs being considered for federal funding falls well within this mandate and is consistent with the Department's responsibility "to effectuate its provisions by issuing rules, regulations, or orders of general applicability,"⁶⁸ and freedom "to utilize all the resources at its

⁶³ DOT Agencies, <http://www.dot.gov/DOtagencies.htm> (last visited Dec. 10, 2010). Agencies under the umbrella of the DOT include the Federal Aviation Administration, Federal Highway Administration and the Federal Railroad Administration, among others.

⁶⁴ For example, in September 2009, Public Advocates filed a successful civil rights administrative complaint with the Federal Transit Administration (FTA) challenging a \$492 million Bay Area airport connector project, for failure to conduct the equity assessment required by FTA's Title VI rules. More information available at: <http://www.publicadvocates.org/bartoakland-airport-connector-oac>.

⁶⁵ U.S. GOV'T ACCOUNTABILITY OFFICE, RECOVERY ACT: STATES' USE OF HIGHWAY INFRASTRUCTURE FUNDS AND COMPLIANCE WITH THE ACT'S REQUIREMENTS, TESTIMONY BEFORE THE COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE, HOUSE OF REPRESENTATIVES 6, 4 (2009), available at <http://www.gao.gov/new.items/d09926t.pdf>; see also U.S. COMM'N ON CIVIL RIGHTS, TEN-YEAR CHECK-UP: HAVE FEDERAL AGENCIES RESPONDED TO CIVIL RIGHTS RECOMMENDATIONS? 71-72 (2002), available at <http://www.law.umaryland.edu/marshall/usccr/documents/tenyrcheckupvol2.pdf>.

⁶⁶ 42 U.S.C. § 2000d-1 (2006).

⁶⁷ See Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (Nov. 4, 1980); Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

⁶⁸ See *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973); see also 42 U.S.C. § 2000d-1 (1964).

disposal and to seek creative ways to gather necessary information to make preliminary compliance decisions.”⁶⁹

An OIS process would enable the DOT to collect the information necessary to prioritize equal opportunity compliance in its funding decisions, create equal opportunity oversight and quality assurance, engage community and advocacy groups in planning and policy development, and provide clear prospective guidance to the states in their efforts to comply with equal opportunity laws.

1. Data Collection within the DOT

The DOT Title VI regulations already authorize the level of data collection that would be required under the OIS process, though these have lacked proper enforcement in the past. For example, DOT regulations require that both fund recipients and sub-recipients “have available for the Secretary racial and ethnic data showing the extent to which members of minority groups are beneficiaries of programs receiving federal financial assistance.”⁷⁰ An OIS pre- or post-approval data collection requirement would simply provide a more uniform and predictable approach to fulfilling this requirement. Although this analysis directly references the DOT requirements under Title VI of the Civil Rights Act of 1964, courts have recognized the common structure and legislative goals of Title VI, Title IX of the Education Amendments of 1972,⁷¹ and Section 504 of the Rehabilitation Act of 1973, and have interpreted them similarly.⁷² The data collection and analysis requirements laid out in the DOT Title VI regulation and order are similarly required to comply with these other civil rights laws as well.⁷³

The DOT’s authority to collect data regarding possible discriminatory disparate impact is further evident in its order effectuating Executive Order 12898, which addresses environmental justice concerns. The DOT order states, in part:

[T]o assure that disproportionately high and adverse effects on minority or low income populations are identified and addressed, DOT shall collect, maintain, and analyze information on the race, color, national origin, and income level of persons adversely affected by DOT programs, policies, and activities, and use such information in complying with this Order.⁷⁴

⁶⁹ See Memorandum from Bill Lann Lee, Acting Assistant Attorney Gen., U.S. Dep’t of Justice, Civil Rights Div., to the Executive Agency Civil Rights Directors 4-5 (Jan. 28, 1999), *available at* <http://www.justice.gov/crt/about/cor/Pubs/blkgmnt.php> (stating that a final determination as to whether there has been a violation of Title VI remains the responsibility of the Federal agency, and not the recipient of Federal funds, and that the Federal agency is “free to utilize all the resources at its disposal and to seek creative ways to gather necessary information to make preliminary compliance decisions”).

⁷⁰ 49 C.F.R. § 21.9(b) (2011).

⁷¹ Title IX applies, with a few specific exceptions, to all aspects of education programs or activities (including education or training programs) operated by recipients of federal financial assistance. U.S. Dep’t of Justice, Civil Rights Division, Overview of Title IX of the Education Amendments of 1972 (2009), <http://www.justice.gov/crt/about/cor/coord/ixovervw.php>.

⁷² See, e.g., *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1980).

⁷³ See 49 C.F.R. 27.7(a)-(c) (2011).

⁷⁴ U.S. Dep’t of Transp. Order 5610.2, Department of Transportation Order to Address Environmental Justice in Minority Populations and Low-Income Populations 18378 (1997), *available at* <http://www.fra.dot.gov/Pages/128.shtml>.

2. Public Input and Participation for DOT Projects

Public input is an essential factor in the Opportunity Impact Statement because it can illuminate possible consequences that the DOT's data collection alone might miss. By engaging diverse public participation at the approval stage, moreover, the Department can lay the groundwork for wide utilization of programs that are later approved. Several DOT orders direct its agencies to involve the community when undertaking new projects. The authority for the DOT solicitation and consideration of public input regarding disparate impacts of federally funded projects can be found, among other places, in the DOT Title VI Order, which specifically requires the DOT Director of Civil Rights to "[d]isseminate information to and provide *continuous and meaningful consultation with the public concerning the Department's Title VI program*, including, in appropriate situations, the provision of material in languages other than English."⁷⁵ Public input and participation are similarly required by the DOT to effectuate Section 504 of the Rehabilitation Act,⁷⁶ and another DOT order (5301.1) includes a similar public participation requirement for all programs, policies, and procedures that affect "American Indians, Alaska Natives, and Tribes."⁷⁷

These DOT orders emphasize the need for a public input and participation process in any coordinated effort to effectively and expeditiously implement the DOT's civil rights compliance efforts and inform its decision-making. Serious dedication to these principles could help the DOT better understand the potential impact of its projects and allow it to avoid negatively or unfairly impacting the communities.

3. Project Analysis

Once data has been collected, the DOT body reviewing the OIS must determine whether there is a potentially unlawful disparate impact. The agency should compare the demographic composition of the most relevant jurisdiction in which the project would be located with the demographic composition of the populations that would be benefited and burdened by the project. The existing DOT Title VI regulations provide examples that concretize the agency's role in analyzing comparative impact information. Regulations for DOT agencies (such as the Federal Highway Administration and others)⁷⁸ require the collection and analysis of comparative data. For instance, in order to ensure that transportation routes equitably serve all communities and are "convenient to the disadvantaged areas of nearby communities to enhance employment opportunities for the disadvantaged and minority population," the agency must compare neighborhood demographic data for the jurisdiction in question with the demographic characteristics of proposed routes.

⁷⁵ U.S. Dep't of Transp. Order No. 1000.12, Implementation of the Department of Transportation Title VI Program (1977) (emphasis added), *available at* <http://www.acogok.org/Newsroom/Downloads08/title6report.pdf>.

⁷⁶ 49 C.F.R. § 28.110(b) (2011).

⁷⁷ U.S. Dep't of Transp. Order No. 5301.1, Department of Transportation Programs, Policies, and Procedures Affecting American Indians, Alaska Natives, and Tribes (1999), *available at* <http://isddc.dot.gov/OLPFiles/OST/009273.pdf>.

⁷⁸ 49 C.F.R. § 21, App. C(a)(1)(viii)-(ix), App. C(a)(2)(vi)-(vii), App. C(a)(3)(iii) (2011).

This comparative analysis to determine disparate impact is also amply reflected in the case law.⁷⁹ Such cases make clear that to properly determine whether a disparate impact exists, the DOT reviewing body must analyze the comparative benefits and burdens of a project or policy across the racial, ethnic, and other characteristics covered by the equal opportunity laws. If a proposed federally funded program is shown to have a disproportionately adverse effect, the agency should determine that a *prima facie* case of discrimination arises, thus raising the presumption that funding will be denied. The funding applicant or recipient should then be given the opportunity to “prove a substantial legitimate justification,”⁸⁰ rooted in demonstrated facts, for its presumptively discriminatory practice. But even if the federal fund applicant or recipient is able to show a “substantial legitimate justification” for its challenged practice, funding may still not go forward if “an equally effective alternative practice which results in less racial disproportionality” exists.⁸¹ This is a factual inquiry in which public input is crucial.

As an example, the original plans for the Central Corridor Light Rail Transit project in Minnesota ran through predominantly African American and Asian American neighborhoods between St. Paul and Minneapolis and provided the fewest number of stations relative to the number of transit riders in those neighborhoods, compared to other neighborhoods.⁸² It was only after each community filed a civil rights complaint with the Federal Transit Authority that the region’s metropolitan planning organization agreed to install additional stops in the minority communities.⁸³ And even with the stations approved, the communities are currently being offered little to ensure that market-driven transit oriented development does not displace existing small businesses and low-income residents.⁸⁴

Employing an OIS process in the planning of transportation investments could effectively avoid these situations. In the case of the Central Corridor Light Rail Transit project, as a *condition* of receiving or continuing government funding for the plan, the local metropolitan planning organization would be held to their existing civil rights requirements to collect data showing the relative benefits and burdens the project would have on access to opportunity for local communities; consult and address any social science research on the project’s impact on the local area; and actively solicit, engage, and document public concerns and testimonies regarding the project’s effects.

⁷⁹ See *Bryan v. Koch*, 627 F.2d 612, 616 (2d Cir. 1983) (regarding a city’s decision to close a hospital, finding a *prima facie* case of discrimination by “comparing the 98% minority proportion of the [federally funded hospital’s] patients with the 66% minority proportion of the patients served by the City’s municipal hospital system”); *Meek v. Martinez*, 724 F. Supp. 888, 898 (S.D. Fla. 1989) (*prima facie* case established upon showing that inclusion of irrelevant factors in formula for distributing funds pursuant to Older Americans Act reduced funding to “high minority” districts by 45%, 37%, 18%, and 15%); *Larry P. v. Riles*, 793 F.2d 969, 982-83 (9th Cir. 1984) (regarding an IQ test used to place children in “educable mentally retarded” programs, court found a “clear demonstration of discriminatory impact” where “black children as a whole scored ten points lower than white children on the tests, and that the percentage of black children in E.M.R. classes was much higher than for whites”); see also *Shannon v. U.S. Dep’t. of Hous. & Urban Dev.*, 436 F.2d 809, 821 (3d Cir. 1970) (*prima facie* case proven through segregative impact of housing policy); *Coal. of Concerned Citizens Against I-670 v. Damian*, 608 F. Supp. 110, 127 (S.D. Ohio 1984) (*prima facie* case of disparate impact discrimination in the context of a proposed highway project).

⁸⁰ *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985).

⁸¹ U.S. Dep’t of Transp. Order No. 1000.12 (1977).

⁸² Gen Fujioka, Planners Network: The Organization of Progressive Planning, *Transit-Oriented Development and Communities of Color: A Field Report*, Winter 2011, http://www.plannersnetwork.org/publications/2011_winter/fujioka.html.

⁸³ *Id.*

⁸⁴ *Id.*

The agency would then analyze the data presented to determine if any impermissible disparate impacts arise and, if the funding applicant could provide no substantial legitimate justification for its plan or if there was a less discriminatory alternative to the plan, the public funding would not go forward. By engaging in this process at the front end, community groups would no longer have to engage in the prolonged and cumbersome process of filing civil rights complaints after a project has been approved in order to have their voices heard. And, throughout the project's development, as a condition of continued funding, transportation agencies would have the necessary information and analysis available to consistently uphold the promise of equal opportunity for all of the communities they affect.

B. HOUSING AND URBAN DEVELOPMENT

Title VI and the Rehabilitation Act similarly cover the U.S. Department of Housing and Urban Development. In addition, Section 3608(e)(5) of the Fair Housing Act (Title VIII) requires HUD to "administer [housing and urban development] programs ... in a manner affirmatively furthering the policies of [the Fair Housing Act]."⁸⁵ The policies of the Fair Housing Act are, among others, "to provide, within constitutional limitations, for fair housing throughout the United States";⁸⁶ to "remove the walls of discrimination which enclose minority groups";⁸⁷ and to foster "truly integrated and balanced living patterns."⁸⁸ In other words, they include both non-discrimination and integration. An Opportunity Impact Statement mechanism would greatly assist HUD's success in upholding that mandate and should be incorporated into any revisions of the HUD regulations that clarify the "affirmatively furthering fair housing" (AFFH) requirement.

The obligation to affirmatively further fair housing applies to grantees of all of HUD's housing and community development programs, and, as part of a certification that they will abide by their affirmative fair housing obligations, these grantees are required to conduct an analysis of impediments (AI) to fair housing within their area, take appropriate actions to overcome those impediments, and maintain records reflecting the analysis and the actions taken.⁸⁹ The AI involves an "assessment of conditions, both public and private, affecting fair housing choice for all protected classes."⁹⁰ This encompasses "actions, omissions or decisions" which "restrict housing choices or the availability of housing choices,"⁹¹ or which have the effect of doing so, based on "race, color, religion, sex, disability, familial status, or national origin,"⁹² including "[p]olicies, practices, or procedures that appear neutral on their face."⁹³ HUD's suggested AI format includes a housing profile that describes "the degree of segregation

⁸⁵ 42 U.S.C. § 3608(e)(5) (2006).

⁸⁶ 42 U.S.C. § 3601 (2006).

⁸⁷ 114 Cong. Rec. 9563 (1968) (statement of Rep. Celler).

⁸⁸ 114 Cong. Rec. 3422 (1968) (statement of Sen. Mondale).

⁸⁹ OFFICE OF FAIR HOUS. & EQUAL OPPORTUNITY, U.S. DEP'T OF HOUS. & URBAN DEV., FAIR HOUSING PLANNING GUIDE, VOL. 1, 102 (1996), available at <http://www.nls.gov/offices/fheo/images/fhpg.pdf>; Michael Allen, Counsel, Relman & Dane, PLLC, Testimony to the National Commission on Fair Housing and Equal Opportunity Public Hearing 2 (Sept. 22, 2008), available at http://www.prrac.org/projects/fair_housing_commission/boston/allen.pdf.

⁹⁰ OFFICE OF FAIR HOUS. & EQUAL OPPORTUNITY, *supra* note 89, at 2-7.

⁹¹ *Id.* at 2-8.

⁹² *Id.*

⁹³ *Id.* at 2-17.

and restricted housing by race, ethnicity, disability status, and families with children; [and] how segregation and restricted housing supply occurred.”⁹⁴

Experience in the field encountering discriminatory housing practices has made clear that these existing mechanisms have been necessary, yet insufficient, in practice.⁹⁵ As noted in a thorough report by the Leadership Conference on Civil Rights, now the Leadership Conference on Civil and Human Rights, the ineffectiveness of the AI process is largely due to the absence of specific regulations regarding the necessary elements of an AI, or the criteria for approval.⁹⁶ This assessment of the AI process was echoed in a September 2010 report by the Government Accountability Office.⁹⁷ These findings mirror the experience of fair housing groups, civil rights attorneys, and individuals around the country struggling to secure fair housing.

In 2007, for example, Westchester County settled a suit that alleged that, despite strong evidence of racial segregation within the county, Westchester continually certified under the AI process that it was affirmatively furthering fair housing.⁹⁸ Although Westchester County submitted periodic AIs and continued to receive HUD funding, its AIs failed to mention race discrimination or racial segregation, they included “no analysis of whether these might operate to diminish fair housing choice,” and they “refused to identify or analyze community resistance to integration on the basis of race and national origin as an impediment.”⁹⁹ Using an analysis which a federal court later invalidated,¹⁰⁰ Westchester County argued that income was a “better proxy for determining need than race when distributing housing funds,” and that race was “not among the most challenging impediments” to fair housing in Westchester.¹⁰¹

An Opportunity Impact Statement process would ensure compliance with the requirement to affirmatively further fair housing by incorporating: specific metrics that must be taken into account to ensure equal housing opportunity for all Americans, as well as assessing integrative and segregative effects of proposed housing projects or programs; an improved data collection process, which would allow for further inclusion and consideration of both public comment and independent analysis; and a stronger process for oversight, review, and administrative enforcement.

The OIS requirement should attach at an early stage, so that information regarding fair housing impact may inform the design, prioritization, and selection of projects, instead of serving merely as a final hurdle to be overcome. Where the information submitted is inadequate on its face to ensure that fair housing will be affirmatively furthered, funding should be denied or withheld by the agency pending a revised OIS that meets the basic criteria described above. The regulations should disfavor, moreover, projects that may affirmatively further fair housing in one narrow respect while

⁹⁴ *Id.* at 2-28.

⁹⁵ Dr. Jill Khadduri, Former Director of the Division of Policy Development at HUD, Testimony in Support of *Thompson v. Hous. and Urban Dev.*, Civ. Act. No. MJG-95-309 (D. Md. 2006) 39 (Aug. 19, 2005), available at http://www.prrac.org/projects/fair_housing_commission/atlanta/khadduri.pdf.

⁹⁶ LEADERSHIP CONFERENCE ON CIVIL RIGHTS, FAIR HOUSING OBLIGATIONS OF FEDERAL GRANTEEES (2008), <http://www.civilrights.org/publications/reports/fairhousing/obligations.html>.

⁹⁷ U.S. GOV'T ACCOUNTABILITY OFFICE, HOUSING AND COMMUNITY GRANTS: HUD NEEDS TO ENHANCE ITS REQUIREMENTS AND OVERSIGHT OF JURISDICTIONS' FAIR HOUSING PLANS (2010), available at <http://www.gao.gov/new.items/d10905.pdf>.

⁹⁸ See *Anti-Discrimination Ctr. of Metro N.Y. v. Westchester County*, 495 F. Supp. 2d 375, 377-78 (S.D.N.Y. 2007).

⁹⁹ Allen, *supra* note 89, at 3. See also *Anti-Discrimination Ctr. of Metro N.Y.*, 495 F. Supp. 2d 375.

¹⁰⁰ *Anti-Discrimination Center of Metro N.Y.*, 495 F. Supp. 2d at 387.

¹⁰¹ Allen, *supra* note 89, at 3.

having a disparate or segregative effect in another respect. For example, a proposal for mixed income housing that would be integrated in its predicted occupancy, but would overwhelmingly displace low income, minority homeowners, should be disfavored for funding.

Appropriate public investment—based on an agency’s consideration of existing data, active public engagement, and considerations of the relative burdens and benefits placed on all communities that a project affects—can expand opportunity within a region in deep and lasting ways. As an example, in Texas, when \$3 billion of government funding was being allocated to provide for disaster recovery in the wake of the 2008 hurricanes Ike and Dolly, the initial allocation plan was to spread the funding across the state with little to no oversight of the local planning agencies to ensure that the funds increased equal opportunity as required by civil rights mandates.¹⁰² But, after two prominent fair housing groups, Texas Appleseed and the Texas Low Income Housing Information Service, filed a complaint with HUD showing that the plan did not direct aid to the most-damaged regions and the people with the fewest resources and violated federal civil rights and fair housing laws, the HUD secretary, Shaun Donovan, rejected the initial planning proposal and Texas negotiated an agreement with the advocates that will ensure that a majority of the money will be spent rebuilding devastated communities and helping the most vulnerable residents rebuild their lives.¹⁰³ As a result of this agreement, in the Houston-Galveston area alone, this reallocation of funding could produce 3,000 jobs over the next few years.¹⁰⁴

An OIS process would ensure that these types of successes in public investment can be duplicated in all regions of the United States, without relying on the few active community groups to file complaints with government agencies after funding plans have already been approved. By engaging in an OIS process before funding is allocated, government agencies will have the structure available to appropriately analyze the benefits and burdens that a publicly funded project might have within a region and, as was the case in Texas, reallocate funds in ways that increase opportunity and adhere with existing civil rights mandates.

IV. DEPARTMENT OF JUSTICE OVERSIGHT OF AGENCY COMPLIANCE

Because past efforts to comply with the equal opportunity mandate have been inconsistent across and between agencies, implementation of the Opportunity Impact Statement mechanism would be greatly enhanced by the creation of an interagency working group in the arena of equal opportunity compliance. Interagency working groups have been a feature of past Executive Orders¹⁰⁵ and create a mechanism for ensuring that policies and practices across agencies are consistent and manageable. The Department of Justice is best positioned to oversee such an entity.

¹⁰²See Op-Ed, *HUD Steps Up in Texas*, N.Y. TIMES, June 13, 2010, at A22, available at <http://www.nytimes.com/2010/06/14/opinion/14mon3.html>.

¹⁰³*Id.*

¹⁰⁴See *Ike Rebuilding Could Bring Jobs*, ASSOCIATED PRESS, Oct. 15, 2010, available at http://www.texasappleseed.net/index.php?option=com_docman&task=doc_download&gid=483&Itemid=.

¹⁰⁵See, e.g., Exec. Order 12,866, 58 Fed. Reg. 190 (Oct. 4, 1993) (creating a Regulatory Working Group which would “serve as a forum to assist agencies in identifying and analyzing important regulatory issues”); Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994) (creating an Interagency Working Group on Environmental Justice which would oversee the development and implementation of all agency efforts to collect, analyze, and disseminate information on the adverse environmental and health impacts of Federal programs and activities on protected populations).

Under Executive Order 12250 (E.O. 12250), the Department of Justice (DOJ) is charged with ensuring the consistent and effective implementation of Title VI and other civil rights laws applicable to the recipients of federal financial assistance.¹⁰⁶ Because the Supreme Court has held that victims of disparate impact discrimination have no private right of action to enforce regulations implementing Title VI,¹⁰⁷ under the guidance of the DOJ, federal agencies must be particularly vigilant in their role as enforcers of these disparate impact regulations.

While some of the responsibilities set forth in E.O. 12250 have been fulfilled by past administrations, many have not. For example, the Federal Coordination and Compliance Section within the Civil Rights Division of the Justice Department—technically the hub of implementation for E.O. 12250—has never been empowered to coordinate adequately with other agencies, nor accomplish the full range of functions set out in the Executive Order.¹⁰⁸ Furthermore, while most agencies have issued regulations implementing Title VI within their spending activities, some still have not. Because both the Attorney General and the Administrator of the Office of Information and Regulatory Affairs (OIRA) share a central and continuing interest in ensuring that equal opportunity laws are complied with in all federal and federally assisted programs, it is of paramount importance that the Equal Opportunity Interagency Working Group is created, and that all members of the Opportunity Working Group are required to report issues relating to the equal opportunity compliance of their particular departments or agencies.

V. CONCLUSION

Policymakers are charged with ensuring that federal assistance meets the needs of all Americans. The Opportunity Impact Statement is intended to bring the voice of affected communities, structured efficiency, and balanced analysis to the table in the context of opportunity. The OIS would provide a comprehensive and fair evaluation of significant opportunity impacts, as well as reasonable alternatives, providing decision-makers and the public with full information and allowing for the minimization of adverse impacts.¹⁰⁹ On the federal, state, or local level, implementation of the OIS can help balance the need for efficiency in review of necessary government-funded projects with evidence-based evaluation and transparency.

The Opportunity Impact Statement carries the potential to expand opportunity greatly in communities around the country while encouraging public accountability and civic engagement. Moreover, it is a flexible tool that can be applied to any number of projects, big or small. We believe that providing the Opportunity Impact Statement is an important step in realizing our society's promise as a land of opportunity.

¹⁰⁶ Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (Nov. 4, 1980).

¹⁰⁷ *Alexander v. Sandoval*, 532 U.S. 275 (2001).

¹⁰⁸ See U.S. GOV'T ACCOUNTABILITY OFFICE, GENDER ISSUES: WOMEN'S PARTICIPATION IN THE SCIENCES HAS INCREASED, BUT AGENCIES NEED TO DO MORE TO ENSURE COMPLIANCE WITH TITLE IX 13 (2004), *available at* <http://www.gao.gov/new.items/d04639.pdf> ("Although Executive Order 12250 requires Justice to coordinate the implementation and enforcement by executive agencies of various nondiscrimination provisions of civil rights laws, including Title IX, it has no legal authority to make agencies conduct required compliance activities. Justice officials reported that aside from reminding the agencies of the need to comply with Title IX regulations and providing the agencies with guidance and technical assistance, there is little they can do to ensure compliance with Title IX.").

¹⁰⁹ These goals have been articulated in tools such as the Environmental Impact Statement, as created by NEPA, Pub. L. 91-190 (1970) (codified as amended at 42 U.S.C. §§ 4321-4347 (2006)).

Nevada Commission on Ethics v. Carrigan: Recusing Freedom of Speech

Jeffrey M. Shaman*

N*evada Commission on Ethics v. Carrigan*¹ is one of those cases where the Supreme Court reached the right result for the wrong reasons—in this instance, egregiously wrong reasons. In the course of its opinion in *Carrigan*, the Court precipitously abandoned well-established First Amendment principles and methodology, opting instead for a more restrictive approach that limits freedom of speech. This was particularly surprising, given that in recent years the Court has been inclined to follow prevailing First Amendment jurisprudence. Under the leadership of Chief Justice John Roberts, the Court has made a number of decisions that adhere to accepted First Amendment doctrine and that strengthen the constitutional protection for freedom of expression.² Even in cases where the Roberts Court rejects free speech claims, it usually does so without forsaking settled First Amendment principles or methodology.³ In *Carrigan*, however, the Court chose to go in a different direction.

The case arose when Michael Carrigan, as an elected member of the City Council of Sparks, Nevada, voted to approve a casino project for which his long-time friend and campaign manager had worked as a paid consultant. After receiving and investigating complaints against Carrigan, the Nevada Commission on Ethics ruled that Carrigan's action violated a state ethics rule prohibiting public officials from voting on legislative matters with respect to which they have a conflict of interest. Carrigan claimed that the Commission's ruling violated his right to freedom of speech under the First Amendment. However, in an opinion written by Justice Scalia, the Supreme Court ruled that there had been no violation of the First Amendment. Given that there is much to question about the Scalia opinion, it is surprising that it was joined in full by no less than seven other justices. Only Justice Alito, who filed a separate opinion concurring in the judgment,⁴ saw fit to raise a (partially) divergent view.⁵

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¹ Nevada Commission on Ethics v. Carrigan, 564 U.S. ___, 131 S.Ct. 2343 (2011).

² See *Citizens United v. FEC*, 558 U.S. 50, 130 S.Ct. 876 (2010); *United States v. Stevens*, 559 U.S. ___, 130 S.Ct. 1577 (2010); *Doe v. Reed*, 561 U.S. ___, 130 S.Ct. 2811 (2010); *Snyder v. Phelps*, 562 U.S. ___, 131 S.Ct. 1207 (2011); *Brown v. Entertainment Merchants Assoc.*, 564 U.S. ___, 131 S.Ct. 2729 (2011); *Sorrell v. IMS Health Co.*, 564 U.S. ___, 131 S.Ct. 2653 (2011); *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. ___, 131 S.Ct. 2806 (2011).

³ See *Holder v. Humanitarian Law Project*, 561 U.S. ___, 130 S.Ct. 2705 (2010); *Christian Legal Society Chapter of University of California Hastings College of Law v. Martinez*, 561 U.S. ___, 130 S.Ct. 2971 (2010).

⁴ *Carrigan*, 131 S.Ct. at 2354-55 (Alito, J., concurring in part and concurring in the judgment).

⁵ Although joining the Scalia opinion for the Court, Justice Kennedy additionally filed a concurring opinion noting that the case did not concern anything other than an asserted First Amendment right to engage in the act of casting a vote. *Id.* at 2352-54.

As delineated by Justice Scalia, the case presented the issue of whether the act of casting a vote by an elected state official is a form of constitutionally protected speech. In approaching that issue, Justice Scalia, who believes that the Constitution should be interpreted according to its original understanding,⁶ attempted to discern the meaning of the First Amendment at the time it was ratified in 1791. His opinion stated:

[A] universal and long-established tradition of prohibiting certain conduct creates a strong presumption that the prohibition is constitutional Laws punishing libel and obscenity are not thought to violate “the freedom of speech” to which the First Amendment refers because such laws existed in 1791 and have been in place ever since. The same is true of legislative recusal rules.⁷

It should be noted that Justice Scalia’s claim that laws punishing obscenity have existed since 1791 is incorrect. Although laws banning libel were commonplace in 1791, laws banning obscenity were virtually nonexistent at that time.⁸ In fact, the very first prosecution for obscenity in the United States did not occur until 1815, almost a quarter century after the ratification of the First Amendment.⁹ Justice Scalia’s error calls attention to one of the hazards of originalism as a method of constitutional interpretation, namely, that the justices sometimes get history wrong.¹⁰

Moreover, Justice Scalia’s reliance on the original understanding of the First Amendment as the controlling source of its meaning is a departure from long-standing First Amendment jurisprudence. Throughout the years the Supreme Court’s interpretation of the First Amendment rarely has been determined by its original understanding.¹¹ The development of First Amendment doctrine, beginning with the seminal opinions of Justice Holmes, has been essentially non-originalist in its methodology.¹² The Court’s decision in *Roth v. United States*, ruling that obscenity is not within the protection of the First Amendment, makes reference to the history of the First Amendment and the intent of its framers,¹³ but otherwise the original understanding of the First Amendment has played a minor role in its interpretation.¹⁴ Much of the doctrine developed by the Court regarding freedom of speech cannot be explained by the original understanding of the First Amendment, and some of the Court’s most important decisions concerning freedom of speech cannot be squared with the original understanding of the First Amendment. For example, at the time of the First Amendment’s framing, all fourteen states had criminal laws prohibiting profanity and blasphemy, yet no one could seriously assert today that such laws do not

⁶ See Antonin Scalia, *Common-Law Courts in A Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 37-41 (Amy Gutmann ed., 1997); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852-54 (1989).

⁷ *Carrigan*, 131 S.Ct. at 2348.

⁸ Geoffrey Stone, *Sex, Violence, and the First Amendment*, 74 U. CHI L. REV. 1857, 1861-63 (2007) (“Indeed, the most striking fact about that era was the absence of any laws regulating such material.”)

⁹ *Id.* at 1863.

¹⁰ See Jeffrey M. Shaman, *The End of Originalism*, 47 SAN DIEGO L. REV. 83, 91-93, 98-102 (2010).

¹¹ See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 923-24 (3d ed. 2006).

¹² See, e.g., *Schenck v. United States*, 249 U.S. 47 (1919); *Abrams v. United States*, 250 U.S. 616, 624-31 (1919) (Holmes, J., dissenting); *Gitlow v. New York*, 268 U.S. 652, 672-73 (1925) (Holmes, J., dissenting).

¹³ *Roth v. United States*, 354 U.S. 476, 482-83 (1957).

¹⁴ See CHEMERINSKY, *supra* note 11.

violate the First Amendment.¹⁵ And the long-standing historical pedigree of laws punishing libel did not stop the Supreme Court from ruling in *New York Times v. Sullivan* that such laws were constitutionally circumscribed by the First Amendment.¹⁶

Be that as it may, Justice Scalia was determined in *Carrigan* to adhere strictly to originalist methodology, and he devoted a good portion of his opinion to documenting the historical lineage of legislative recusal rules. Yet Justice Scalia was not content to accept the historical record concerning legislative recusal rules on its face. After surveying the historical record showing that legislative recusal rules have been “commonplace for over 200 years,”¹⁷ Justice Scalia sought an explanation as to why legislative recusal rules were not considered to violate the First Amendment. “How can it be,” he wondered, “that restrictions upon legislators’ voting are not restrictions upon legislators’ protected speech?”¹⁸ Unfortunately, the disquisition that Justice Scalia devised in response to that query led him on a convoluted course of problematic reasoning. He began by asserting that:

The answer is that a legislator’s vote is the commitment of his apportioned share of the legislature’s power to the passage or defeat of a particular proposal. The legislative power thus committed is not personal to the legislator but belongs to the people; the legislator has no personal right to it. As we said in *Raines v. Byrd*, 521 U.S. 811, 821 (1997) ... the legislator casts his vote “as trustee for his constituents, not as a prerogative of personal power.”¹⁹

By this account, when casting a vote, a member of the legislature acts as a trustee or representative of the people and has no personal right to his or her vote. Still, this hardly explains why an ethics rule that restricts a member of the legislature from voting does not violate the First Amendment. Even when acting as a representative of the people—indeed, *especially* when acting as a representative of the people—a member of the legislature should be entitled to full constitutional protection for his or her legislative functions. Suppose that a legislator was denied the right to vote due to race or religion—surely no one would claim that there was no constitutional violation because the legislator did not have a personal right to vote.²⁰ Whether a legislator’s vote is considered the exercise of a personal right or a right held in trust for the people

¹⁵ In *Cohen v. California*, 403 U.S. 15 (1971), the defendant was convicted of disturbing the peace for being in a courtroom while wearing a jacket inscribed with the words “Fuck the Draft.” The Supreme Court overturned the conviction on the ground that it violated the First Amendment. The Court has given First Amendment protection to profane speech in several other cases. *See, e.g., Rosenfeld v. New Jersey*, 408 U.S. 901 (1972).

¹⁶ *New York Times v. Sullivan*, 376 U.S. 254 (1964).

¹⁷ *Nevada Commission on Ethics v. Carrigan*, 564 U.S. ___, 131 S.Ct. 2343, 2348 (2011).

¹⁸ *Id.* at 2350.

¹⁹ *Id.* at 2350. Justice Scalia added that:

In this respect, voting by a legislator is different from voting by a citizen. While “a voter’s franchise is a personal right,” “[t]he procedures for voting in legislative assemblies ... pertain to legislators not as individuals but as political representatives executing the legislative process.” *Coleman v. Miller*, 307 U.S. 433, 469–470 (1939) (opinion of Frankfurter, J.).

²⁰ *See McDaniel v. Paty*, 435 U.S. 618 (1978), in which the Supreme Court held that the Free Exercise Clause of the First Amendment was violated by a provision of the Tennessee Constitution barring ministers and priests from serving as members of the legislature.

whom the legislator represents is irrelevant to the question of whether the First Amendment is violated by a law barring a legislator from voting.

The more relevant inquiry, which should have been addressed initially, is whether a legislator's vote is an expressive act—in other words, symbolic speech—within the scope of the First Amendment. In Justice Scalia's view, the vote of a member of the legislature is a non-symbolic act.²¹ Indeed, he goes so far as to insist that voting has no symbolic meaning at all:

There are, to be sure, instances where action conveys a symbolic meaning—such as the burning of a flag to convey disagreement with a country's policies, see *Texas v. Johnson*, 491 U. S. 397, 406 (1989). But the act of voting symbolizes nothing. It *discloses*, to be sure, that the legislator wishes (for whatever reason) that the proposition on the floor be adopted, just as a physical assault discloses that the attacker dislikes the victim. But neither the one nor the other is an act of communication.²²

This statement is confusing, if not incoherent. As Justice Scalia sees it, burning a flag symbolizes disagreement with policy, but the act of voting “symbolizes nothing.” Does not the act of voting against a measure, like the act of burning a flag, symbolize “disagreement with policy?” Conversely, does not the act of voting for a measure symbolize agreement with policy? According to Justice Scalia, the act of voting has more in common with a physical assault than with flag-burning because voting “discloses” the view of a legislator, but does not “communicate” it. This seems to be the quintessence of splitting hairs; one wonders why Justice Scalia thinks that disclosing a view does not entail communication of a view. The Merriam-Webster dictionary defines both “communicate” and “disclose” as meaning “to make known” and Thesaurus.com lists the two words as synonyms of each other, yet Justice Scalia has somehow gotten it into his mind that a legislator's vote discloses information but does not communicate information.

Justice Scalia believes that in casting a vote a legislator is performing a governmental act as a representative of his or her constituents rather than expressing a message or opinion.²³ But, sadly, the Justice has fallen prey to a false dichotomy; the act of casting a vote and the expression of a message or opinion are in no way mutually exclusive. Yes, casting a vote as a member of the legislature is the performance of a governmental act, but at the same time it is an expressive act that communicates meaning. It was on this point that Justice Alito parted company with Justice Scalia. To Justice Alito, casting a vote clearly is an expressive act. As he explained:

Voting has an expressive component in and of itself. The Court's strange understanding of the concept of speech is shown by its suggestion that the symbolic act of burning the American flag is speech but John Quincy Adams calling out “yea” on the Embargo Act was not.²⁴

²¹ *Carrigan*, 131 S.Ct. at 2350.

²² *Id.* at 2350 (emphasis in original).

²³ *Id.* at 2351 n.5.

²⁴ *Id.* at 2354 (Alito, J., concurring in part and concurring in the judgment).

Justice Alito further noted that “our history is rich with tales of legislators using their votes to express deeply held and highly unpopular views, often at great personal or political peril.”²⁵ To illustrate the point, Justice Alito recounted Sam Houston’s deeply unpopular vote against the Kansas-Nebraska Act of 1854, as well as John Quincy Adams’ vote in favor of the Embargo Act of 1807, a vote that very likely cost him his Senate seat.²⁶

Unmoved by the invocation of history in this instance, Justice Scalia dismissed this line of thought in a paragraph dripping with sarcasm, insulting not only to Justice Alito, but also to members of legislative bodies across the nation:

How do [legislators] express those deeply held views, one wonders? Do ballots contain a check-one-of-the-boxes attachment that will be displayed to the public, reading something like “() I have a deeply held view about this; () this is probably desirable; () this is the least of the available evils; () my personal view is the other way, but my constituents want this; () my personal view is the other way, but my big contributors want this; () I don’t have the slightest idea what this legislation does, but on my way in to vote the party Whip said vote ‘aye’?”²⁷

Leaving aside the acrimony of this diatribe, one is struck by how illogical it is. Justice Scalia ignores that the vote of a legislator expresses whether the legislator favors or opposes the measure in question. This, in itself, is important information concerning the affairs of government. That a legislator’s vote does not express the specific reason underlying the vote in no way vitiates the fact that the vote expresses whether the legislator favors or opposes the measure. It makes no sense to claim that because a legislator’s vote does not impart a specific reason for favoring or opposing a measure, it therefore expresses nothing at all. If, during a referendum campaign, an individual makes a speech or circulates a flyer that says nothing more than “Vote Yes on Proposition XYZ,” surely that would count as speech, despite the fact that no specific explanation was manifest in support of Proposition XYZ.²⁸ And just as surely, a legislator’s vote should count as speech even though unaccompanied by a specific explanation for it.

In regard to expressive quality, one might also compare the act of casting a vote to the act of making a financial contribution to a political campaign, which the Court has long recognized as an expressive activity within the scope of protection afforded by the First Amendment.²⁹ Deborah Hellman maintains that giving money to a political campaign clearly is less expressive than voting for a proposed bill.³⁰ Furthermore, if the act of casting a vote has a number of possible meanings, the same is true of the act of making a campaign contribution, which, after all, may be made for a wide

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 2350.

²⁸ See *Doe v. Reed*, 561 U.S. ___, 130 S.Ct. 2811, 2817 (2010).

²⁹ See *Buckley v. Valeo*, 424 U.S. 1, 25-29 (1976); *Randall v. Sorrell*, 548 U.S. 230, 246-53 (2006).

³⁰ Deborah Hellman, *Why Power Isn’t Speech*: Nevada Commission on Ethics v. Carrigan and the Unraveling of Campaign Finance Doctrine, BALKINIZATION (June 14, 2011, 3:56 PM), <http://balkin.blogspot.com/2011/06/why-power-isnt-speech-nevada-commission.html>.

variety of reasons.³¹ Yet the Court has never doubted that campaign contributions are a First Amendment activity expressive in nature.

In his concurring opinion in *Carrigan*, Justice Alito asserted that in addition to incorrectly analyzing the expressive character of voting, Justice Scalia's position was at odds with *Doe v. Reed*,³² which had just been decided in the preceding Supreme Court term. *Reed* presented the question of whether the First Amendment was violated by a provision in the State of Washington Public Records Act requiring that the names and addresses of all persons who signed a referendum ballot petition be publicly disclosed. The Court eventually upheld the provision in question on the ground that it preserved the integrity of the electoral process by combating fraud, detecting invalid signatures, and fostering government transparency and accountability. The Court reached that conclusion, however, only after first concluding that the provision was subject to review under the First Amendment because it restricted an expressive activity:

An individual expresses a view on a political matter when he signs a petition under Washington's referendum procedure. In most cases, the individual's signature will express the view that the law subject to the petition should be overturned. Even if the signer is agnostic as to the merits of the underlying law, his signature still expresses the political view that the question should be considered "by the whole electorate." In either case, the expression of a political view implicates a First Amendment right.³³

As Justice Alito explained, in *Reed* the state argued that its law did not impinge upon freedom of speech because signing a petition is "a legally operative legislative act and therefore does not involve any significant expressive element." In an opinion written by Chief Justice Roberts,³⁴ the Court rejected the state's argument:

It is true that signing a referendum petition may ultimately have the legal consequence of requiring the secretary of state to place the referendum on the ballot. But we do not see how adding such legal effect to an expressive activity somehow deprives that activity of its expressive component, taking it outside the scope of the First Amendment.³⁵

From Justice Alito's perspective, *Reed* stands for the proposition that the act of voting, whether by a member of the public or a member of the legislature, has an expressive character that is not cancelled simply because it may affect the outcome of the legislative process:

³¹ *Id.*

³² *Reed*, 130 S.Ct. at 2811.

³³ *Id.* at 2817 (citations omitted).

³⁴ Justice Roberts delivered the opinion of the Court, which was joined by Justices Kennedy, Ginsburg, Breyer, Alito, and Sotomayor. Justices Breyer and Alito filed concurring opinions. Justice Sotomayor filed a concurring opinion, in which Justices Stevens and Ginsburg joined. Justice Stevens filed an opinion concurring in part and concurring in the judgment, in which Justice Breyer joined. Justice Scalia filed an opinion concurring in the judgment. Justice Thomas filed a dissenting opinion.

³⁵ *Reed*, 130 S.Ct. at 2818.

Just as the act of signing a petition is not deprived of its expressive character when the signature is given legal consequences, the act of voting is not drained of its expressive content when the vote has a legal effect.³⁶

Justice Scalia, although concurring in the judgment in *Doe v. Reed*, did not join the majority opinion, declaring that he “doubt[ed] whether signing a petition that has the effect of suspending a law fits within ‘the freedom of speech’ at all.”³⁷ In *Carrigan*, Justice Scalia insisted that *Reed* did not establish the expressive character of voting. He claimed that:

[*Reed*] held only that a citizen’s signing of a petition—“core political speech,”—was not deprived of its protected status simply because, under state law, a petition that garnered a sufficient number of signatures would suspend the state law to which it pertained, pending a referendum. See *Reed*, 561 U. S., at ____ (slip op., at 6); *id.*, at ____ (slip op., at 3) (opinion of Scalia, J.). It is one thing to say that an inherently expressive act remains so despite its having governmental effect, but it is altogether another thing to say that a governmental act becomes expressive simply because the governmental actor wishes it to be so. We have never said the latter is true.³⁸

Notice that in denying that *Reed* stands for the proposition that voting has an expressive character, Justice Scalia cited his own (concurring) opinion in *Reed* and not the majority opinion, which he had declined to join. His view of *Reed* stands in marked contrast to what the majority opinion actually stated. As noted above, the majority in *Reed* rejected the argument that providing operative legal effect to an expressive activity somehow deprives that activity of its expressive component.³⁹ To the contrary, the majority opinion in *Reed* explicitly stated that “[p]etition signing remains expressive even when it has legal effect in the electoral process.”⁴⁰ Justice Scalia’s account of *Reed*, then, is a blatant revision of what was clearly stated in the majority opinion of that case. It is a ploy to override the majority opinion in *Reed* with Justice Scalia’s own concurring opinion that was joined by no other justice on the Court. In addition, it should not be overlooked that in discussing *Reed*, Justice Scalia described the act of signing a petition as “inherently expressive,” but refused to recognize the same expressive quality in a legislator’s act of casting a vote. Why Justice Scalia believes that signing a petition is inherently expressive but casting a vote is not remains a mystery.

Justice Scalia’s opinion in *Carrigan* is deeply flawed, prompting one to wonder what led him to write such an unsatisfactory discourse. It seems he went astray at the start of his opinion, by focusing his analysis on the original meaning of the First Amendment. Once down that path, there was no turning back for Justice Scalia, and one mistake led to another. After surveying the historical record to find that legislative recusal rules have been “commonplace for over 200 years,”⁴¹ Justice Scalia was at

³⁶ Nevada Commission on Ethics v. Carrigan, 564 U.S. ___, 131 S.Ct. 2343, 2354-55 (2011) (Alito, J., concurring in part and concurring in the judgment).

³⁷ *Reed*, 130 S. Ct. at 2832 (Scalia, J., concurring in the judgment).

³⁸ *Carrigan*, 131 S.Ct. at 2351.

³⁹ *Supra*, at notes 34-35.

⁴⁰ *Reed*, 130 S.Ct. at 2818.

⁴¹ *Carrigan*, 131 S.Ct. at 2348.

pains to rationalize why such rules did not contravene the original understanding of the First Amendment. The only explanation he could adduce was that a legislator's vote was a non-expressive act that did not implicate the First Amendment. As it unfortunately turned out, though, that explanation depended upon a good deal of legerdemain, not to mention the outright denial of reality.

In *Carrigan*, had Justice Scalia, instead of wandering down the originalist byway, adhered to prevailing First Amendment doctrine, the case could have been decided with the same result but without repudiating the expressive value of a legislator's vote. Under the First Amendment, in considering a challenge to a law, the Court normally weighs the character and magnitude of an injury to freedom of speech against the precise interests put forward by the government as justification for the law in question.⁴² Had the Court followed this process in *Carrigan*, there would have been no need to deny the expressive quality of a legislator's vote; rather, the inquiry could have focused on a determination of whether there was constitutional justification for the Nevada ethics rule prohibiting public officials from voting on legislative matters with respect to which they have a conflict of interest. In *Timmons v. Twin Cities Area New Party*⁴³ and *Burdick v. Takushi*,⁴⁴ two cases involving restrictions upon voting procedures that Justice Scalia cited in his opinion in *Carrigan*, the Court explained that regulations that impose severe burdens on the First Amendment right to vote call for strict judicial scrutiny and must be narrowly tailored to advance a compelling state interest; while regulations imposing less severe burdens on the right to vote trigger less exacting scrutiny, according to which a state's "important regulatory interests" will usually suffice to justify "reasonable, nondiscriminatory restrictions."⁴⁵ Under either standard, the Nevada rule prohibiting public officials from voting on legislative matters concerning which they have a conflict of interest should be upheld as constitutional because the rule was narrowly designed to serve the state interest of preventing corruption and the appearance of corruption. There is no doubt that this is a strong state interest sufficiently compelling under the highest level of scrutiny to justify the Nevada ethics rule.⁴⁶

Given Justice Scalia's escalating commitment to originalism, it is not surprising that in *Carrigan* he chose to abandon well-established First Amendment principles in favor of an originalist approach. Nor is it surprising that Justice Thomas joined the Scalia opinion in *Carrigan*, as he, too, is devoted to the originalist cause—on occasion more radically so than Justice Scalia.⁴⁷

What is surprising, however, is that so many other justices in *Carrigan* were willing to join an opinion opting for an originalist approach to the First Amendment while forsaking firmly-established First Amendment doctrine. Aside from Justices Scalia and Thomas, no other justice on the Court previously has shown a strong inclination

⁴² *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (citing *Anderson v. Celebrezze*, 470 U.S. 780, 789 (1983)).

⁴³ *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997).

⁴⁴ *Burdick*, 504 U.S. at 428.

⁴⁵ *Timmons*, 520 U.S. at 359; *Burdick*, 504 U.S. at 434.

⁴⁶ See *Buckley v. Valeo*, 424 U.S. 1, 25-29 (1976); *McConnell v. Federal Election Commission*, 540 U.S. 93, 143-44 (2003).

⁴⁷ See *United States v. Lopez*, 514 U.S. 549, 584-85, 601-02 (1995) (Thomas, J., concurring); *United States v. Morrison*, 529 U.S. 598, 627 (2000) (Thomas, J., concurring); *M.L.B. v. S.L.J.*, 519 U.S. 102, 138-39 (1996) (Thomas, J., dissenting); *McDonald v. City of Chicago*, 561 U.S. 3025, 130 S.Ct. 3020, 3058-88 (2010) (Thomas, J., concurring); *Brown v. Entertainment Merchants Assoc.*, 564 U.S. ___, 131 S.Ct. 2729, 2751-62 (2011) (Thomas, J., dissenting).

to follow an originalist path, especially not when doing so entails turning away from prevailing constitutional principles. Most of the justices presently on the Court have written or signed on to opinions that adhere to long-standing non-originalist First Amendment methodology. In recent years, the Court has decided a number of free speech cases in which that methodology played a dominant role.⁴⁸ Justice Scalia's originalist approach in *Carrigan* is an aberration that flies in the face of proven First Amendment principles.

Moreover, it is dismaying that so many justices signed on to such a flawed opinion, by turns incoherent, illogical, and disrespectful of precedent. It is particularly puzzling that Chief Justice Roberts was willing to join an opinion skewing his circumspect analysis in *Doe v. Reed*, written just the previous term.⁴⁹ Inexplicably, no less than seven members of the Supreme Court signed on to the Scalia opinion in *Carrigan* and thereby implemented the dubious ruling that the vote of a member of a legislature is a non-expressive act entitled to no protection whatsoever under the First Amendment. Perhaps the day will come when the Supreme Court will repudiate the tortured logic displayed in *Carrigan* and will restore the principle that a legislator's vote is an expressive act under the First Amendment that may not be restricted except where there is a strong reason to do so. Short of that, one can only hope that Justice Scalia's opinion in *Carrigan* will fade into obscurity, one of those anomalous expositions that reached the right result for all the wrong reasons.

⁴⁸ See *Citizens United v. FEC*, 558 U.S. 50, 130 S.Ct. 876 (2010); *United States v. Stevens*, 559 U.S. ___, 130 S.Ct. 1577 (2010); *Holder v. Humanitarian Law Project*, 561 U.S. ___, 130 S.Ct. 2705 (2010); *Doe v. Reed*, 561 U.S. ___, 130 S.Ct. 2811 (2010); *Christian Legal Society Chapter of University of California Hastings College of Law v. Martinez*, 561 U.S. ___, 130 S.Ct. 2971 (2010); *Snyder v. Phelps*, 562 U.S. ___, 131 S.Ct. 1207 (2011); *Sorrell v. IMS Health Co.*, 564 U.S. ___, 131 S.Ct. 2653 (2011); *Brown v. Entertainment Merchants Assoc.*, 564 U.S. ___, 131 S.Ct. 2729 (2011); *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. ___, 131 S.Ct. 2806 (2011).

⁴⁹ See *supra*, at notes 32-41.

The Converging Logic of Federalism and Equality in Same-Sex Marriage Recognition

Mae Kuykendall*

Federalism is a powerful engine of change, permitting experimentation by states, thus spreading innovation and allowing local normative input into local institutions. But federalism is also a part of the glue binding the nation into one whole, with states respectful of legal statuses created in other states. State “sovereignty” allows states to create experiments with which other states may not interfere. The Supreme Court interprets and serves as a correcting force for state regulations and laws that impose an extra-territorial effect on the laws of other states.¹ Such a process allows experimentation and protects the cohesiveness of a unified nation, in which citizens in a mobile society may be assured of consistent expectations without regard to differences among the states about policy choices.

Federalism has emerged as a testing ground for determining what role equality principles will play in deciding the marriage rights of same-sex couples and in encouraging the movement toward the acceptance of same-sex marriage.² Recent federal court decisions underline the adaptive capacity of federalism: lower federal courts have carved out new protections for same-sex marriages from adverse treatment under federal law³ and the Ninth Circuit has developed a fact-intensive approach specifically rejecting California’s withdrawal of marriage terminology from provisions in California law yet retaining all the rights of marriage for same-sex couples.⁴ In contexts limited to the form and effect of specific denials of legal status to marriages, analysis under the Equal Protection Clause plays a role in paring back on adverse treatments of same-sex marriage. More states have changed their marriage laws to authorize same-sex marriage.⁵ There is, thus, a basis for optimism about the benefits—measured enhancement of equality and softening of conflict which a federalist path to gradual social change can provide. But the extent to which federalism and equality do and will serve as accelerators of change is unclear, as is the probable pace of change. There is still no clear command for states to respect the marital status

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¹ James E. Gaylord, *State Regulatory Jurisdiction and the Internet: Letting the Dormant Commerce Clause Lie*, 52 VAND. L. REV. 1095, 1097 (reviewing constitutional provisions used by the Supreme Court to discipline state legislation that imposes an extraterritorial effect).

² Jane S. Schacter, *Splitting the Difference: Reflections on Perry v. Brown*, 125 HARV. L. REV. F. 72, 74 (2012) (suggesting that “federalist incrementalism,” which preceded *Perry* and avoids seeking a national mandate for same-sex marriage, is equality-enhancing over time).

³ See *infra* note 6.

⁴ *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012).

⁵ See *infra* note 8 and accompanying text.

created by other states for same-sex couples. Federalism as national glue is playing a weak role in family law. More of the energy federalism releases could be harnessed to direct state judicial attention, in the evolving context of same-sex marriage, to the gendered rules of marriage and to support stable expectations for married couples.

Without equality in a full partner role, federalism does not energize marriage law or encourage responsiveness to changing patterns of living. It can slight civility. More modestly, federalist tools, supplemented by equality analysis, help judges construct methods to check some adverse treatment of same-sex marriage rights.⁶ The recent federal court cases using such tools illustrate the potential as well as the limitations of federalism when not partnered with principles of equality.⁷ These cases provide a glimpse at how a fusion of equality and federalism could become a powerful force for respecting and strengthening both values. The potential of federalism in a deep partnership with equality is the subject of this Issue Brief.

Part I of this Issue Brief presents an account of the current state of the law governing the rights of same-sex couples to legal marriage within the premises of federalism, with specific reference to marriage portability. The picture is a mixed one of moderate progress, combining long-term social change with the incrementalism that federalism fosters. Over time federalism has produced greater marriage equality for same-sex couples while states retain primary control over defining and recognizing marriage.

Part II addresses the limitations of the current logic of federalism in fostering a gradual path to marriage equality. The progress toward same-sex marriage access and equality is heartening. Yet so long as federalism is understood as a bargain allowing some states to create same-sex marriages, and other states to void them, marriage equality is an oxymoron.

Finally, part III of this Issue Brief proposes that the Supreme Court infuse marriage federalism with the strong medicine of general equality jurisprudence. Strong state policy interests once rationalized non-recognition of marriages, based on a disapproval of the immutable identity of the spouses, as in the instance of miscegenation. That understanding of equality within federalism is from another day. Doctrinal relics of the past need not prevent a federalist solution to modern-day inequalities that disrupt and disrespect mainstream family ties.

I. MARRIAGE FEDERALISM IN TRANSITION

A. THE CONCEPT OF FEDERALISM

First, let us examine federalism in “*status quo*” and, as recent cases might encourage, its further development in marriage law affecting same-sex couples. Depending on how you do the count, eight states and the District of Columbia now issue licenses

⁶ Tobias Barrington Wolff, *Interest Analysis in Interjurisdictional Marriage Disputes*, 153 U. PA. L. REV. 2215 (2005) (providing a set of guidelines for identifying state interests that are legitimate in light of constitutional rights jurisprudence affecting same-sex relationships).

⁷ Four federal courts have recently found Section 3 of the Defense of Marriage Act, discussed *infra* text accompanying notes 13-14, unconstitutional. *Massachusetts v. U.S. Dept. Health & Human Serv.*, 682 F.3d 1 (1st Cir. 2012); *Windsor v. United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012); *Golinski v. U.S. Office of Pers. Mgmt.*, 781 F. Supp. 2d (N.D. Cal. 2011); *Pedersen v. U.S. Off. Pers. Mgmt. v. Bipartisan Legal Advisory Group of the U.S. H.R.*, No. 3:10-cv-1750 (VLB) 2012 WL 3113883 (D. Conn. 2012).

to same-sex couples for marriage under state law.⁸ Notably, most of those states permit out-of-state couples, including same-sex couples, to marry during a brief visit to the state, in addition to providing marriage rights for their own residents.⁹ Many states deny all recognition to marriages of couples of the same sex.¹⁰ A few states do not authorize same-sex marriages, but nonetheless recognize the legal status for couples who have married in another state and are domiciled in the state.¹¹ Normally because marriage creates property interests, federal law would defer to the state's classification of the interest.¹² Because of the Defense of Marriage Act ("DOMA"), however, same-sex marriage has the unusual distinction of having no standing in the federal law as a property-related state legal status.¹³ Specifically, Section 3 of DOMA provides that in determining the meaning of any aspect whatever of federal law, the word "marriage" only refers to the union of a man and a woman and "spouse" only refers to a person of the opposite sex who is a husband or wife.¹⁴ So for the special case of same-sex marriage, the federal government treats a legal status that confers state property rights as having no existence insofar as the usual federal benefits that go with marital status are concerned.

The result of the state *status quo* is that all same-sex couples, if able and willing to travel to marry in a state that authorizes same-sex marriage, are able to receive some part of the benefits of marriage. For these couples, such benefits consist of the gratification of a state-authorized ceremony even if the marriage is not "portable" to their

⁸ Connecticut, Iowa, Maryland, Massachusetts, New Hampshire, New York, Vermont, Washington, and Washington, D.C. have same-sex marriage on the books, either from court action or legislative action, or a combination. The Maryland and Washington state laws are on hold pending voter initiatives to cancel them. Maine had same-sex marriage that voters canceled, but a vote is pending to reinstate same-sex marriage.

⁹ New Hampshire is an exception, with a strong "reverse evasion statute." N.H. REV. STAT. ANN. § 457:44 (2012) ("No marriage shall be contracted in this state by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every marriage contracted in this state in violation hereof shall be null and void."). If every state had such a statute, the effect would be a purist state-by-state treatment of same-sex marriage, confining the ceremonial benefits of a wedding to state residents and drawing a marriage fence around each state, "walling in and walling out" same-sex marriages. But such a flat rule would be at odds with the tradition that allows couples to fall in love and marry where and when they wish. By licensing-driven convention and marriage-friendly customs, weddings are local yet marriage has no fixed tie to place—marriages are generally portable, and it is a status that stays with the couple, regardless of location.

¹⁰ For a recent chart showing which states deny recognition to same-sex marriages, see ALISON M. SMITH, CONG. RESEARCH SERV., RL 31994, SAME-SEX MARRIAGES: LEGAL ISSUES, Table 1. State Statutes Defining "Marriage," 30-32 (2012), available at <http://www.fas.org/sgp/crs/misc/RL31994.pdf>.

¹¹ Some states have provisions that seem to permit recognition of either evasive or migratory marriages, although the recognition granted to evasive marriages is subject to doubt. N.M. STAT. ANN. § 40-1-4 (West 2012). See also N.M. Op. Att'y Gen. No. 11-01, 2011 WL 111243 (2011). The Maryland Attorney General's opinion recognizes the ambiguity in discerning between evasive and migratory marriages. 95 Md. Op. Att'y Gen. 50 (2010), <http://www.oag.state.md.us/Opinions/2010/95oag3.pdf> (indicating that courts might be "least sympathetic to [grant] recognition of the marriage" for evasive marriages, but Maryland has never had a statute specifically denying recognition, and "factual inquiry required to distinguish 'evasive' marriages from others might" be "impractical."). An attempt to give a precise enumeration of the states that recognize out-of-state marriages, either evasive or migratory, is frustrated by the ambiguity in how various provisions should be and are construed. See *supra* note 10 for an effort at compilation.

¹² Abraham Bell & Gideon Parchomovsky, *Of Property and Federalism*, 115 YALE L.J. 72, 72 & n.1 (2005) ("Property law in the United States is largely the domain of the states, not the federal government.").

¹³ Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7 and 28 U.S.C. § 1738C).

¹⁴ *Id.*

home state,¹⁵ and, for a much smaller number, both the ceremony and a claim to the status itself in their state of residence. For those who enjoy a legally recognized marriage in their state of residence, they receive the same in-state benefits as other couples. In this sense, federalism has already achieved some measure of relief for same-sex couples who aspire to marriage for practical protections or to be given a state stamp of approval. It is part of the legal landscape of the United States. However, this approach presents limitations.

An optimistic interpretation of a measured state-to-state federalism, which combines deference to state policies on marriage with an anticipated ending of DOMA, depicts a spreading emergence of same-sex marriage in individual states and an increasingly positive national environment.¹⁶ In this picture, federalism allows breathing space for equality-enhancing but fact-and-state-specific judicial interventions to deflect the rankst of unjust treatments of same-sex couples.¹⁷ In recent work,¹⁸ I challenge that sanguine but patient view of progress for its accepting the premise of incremental federalist medicine as the single alternative to a Supreme Court holding establishing same-sex marriage as a fundamental right. I argue there, as I do here, that the Supreme Court can and should energize federalism, informed directly by equal protection, by requiring states to recognize same-sex marriages created in other states, without exception.¹⁹

B. EQUALITY AS A CENTRAL PLAYER

In a symposium article in 2005, Tobias Wolff urged a period of careful parsing by state courts of the exact interests states then had in non-recognition.²⁰ He argued that many interests that once would have been cited by states to argue against same-sex marriage have been ruled out through a series of decisions. These decisions include the Supreme Court's protection of same-sex intimacy,²¹ a ruling that imposes a rule against animus-based laws reflecting the moral views of the state majority that affect disfavored minorities,²² and a decision reinforcing the right to travel from state to state under the Privileges and Immunities Clause.²³ In 2005, Wolff envisioned a period in which state courts would apply these new rulings on a case-by-case basis to

¹⁵ A recent film about the weddings of a couple who married in every state that authorized same-sex marriage, before their own state of New York enacted a marriage reform taking out the gender requirement in marriage licensing law, attests to the significance for couples of such legal ceremonies. Kayla Webley, *Married & Counting: One Gay Couple, Seven Weddings*, TIME, Aug. 8, 2012, <http://entertainment.time.com/2012/08/08/married-counting-one-gay-couple-seven-weddings-countless-happy-tears/> (“For any gay couple to get married at this point in our history makes a statement, but what they are doing...there’s something aggressively joyful about it,” says Vince, the officiant of the New Hampshire wedding, in the film.”).

¹⁶ Such an approach is consistent with the depiction by Schacter of recent trends in litigation. Schacter, *supra* note 2.

¹⁷ *Id.*; see also Wolff, *supra* note 6.

¹⁸ Mae Kuykendall, *Equality Federalism: A Solution to the Marriage Wars*, 15 U. PENN. J. CON. L. (forthcoming 2012); Mae Kuykendall, *A Way Out of the Same-Sex Marriage Mess*, N.Y. TIMES, May 24, 2012 at A31.

¹⁹ *Id.*

²⁰ Wolff, *supra* note 6, at 2216.

²¹ *Lawrence v. Texas*, 539 U.S. 558 (2003).

²² *Romer v. Evans*, 517 U.S. 620 (1996).

²³ *Saenz v. Roe*, 526 U.S. 489 (1999). See Wolff, *supra* note 6, at 2216 (treating the legitimacy of various state interests as being “in serious doubt” after these cases).

pare away state interests used to rationalize non-recognition that are no longer constitutionally supportable.²⁴

My vision bears a family resemblance to Wolff's reliance on state court judges, except that I propose that the Supreme Court require that states incorporate a robust principle of equal protection directly into the recognition rules written by the states. The first step in a new robustness for equality principles in recognition rules would be to require every state to treat all same-sex marriages domiciled in the state as marriages under the state's marriage law. A focus on equality principles isolates same-sex marriage conceptually from marriages that states reasonably choose not to recognize, such as marriages involving some form of bad conduct by the parties,²⁵ or marriages that lack any rooting anywhere in American law.²⁶

Such a move by the Court would allow state courts to put aside recondite arguments about whether marital status exists and instead use their judicial resources to sort out whether marriage law should be doctrinally identical for both traditional marriages and same-sex marriages, or whether there are any defensible reasons for not treating all aspects of marriage identically under Equal Protection jurisprudence.²⁷ I argue that infusing the treatment of marriage with a principle of equality, in a strong alliance with federalism, allows states to remain the laboratory for writing and judging marriage law. Such a resolution would justify the deference of federal courts to the primary role of states in family law and would accelerate the pace of change, releasing the energies of state courts to focus on real-world issues that may arise within all marriages.

Let's consider, though, what might be the specific features of a more gradualist federalist approach that delivers some progress for same-sex couples but allows variation in their rights. How does the general picture sort out for differently situated couples? What are the positive features of the status quo, assuming possible federal recognition and state responsibility for creating and recognizing same-sex marriages? What are the downsides for these couples and what does it say about our shared values?

As noted, the benefit of a gradualist federalist approach, such as exists now and has been described by Schacter,²⁸ is that any same-sex couple in the United States, if not ineligible by kinship or age and if the pair has adequate means, may participate in a legal marriage ceremony in an American state. So states retain their desired control over which marriages to license, and couples have the ability to make use of the laws in a chosen state. Until 2003, no ceremony uniting a same-sex couple in a marriage pursuant to the law of a state could occur anywhere in the United States.²⁹ Since that time, couples have been able to travel to participate in a legal ceremony that carries significance for them. This positive development coexists with a proviso: couples who marry out-of-state in order to avoid local laws prohibiting same-sex marriage, as a general rule, have their marriages rendered void by their state of domicile and face a

²⁴ See Wolff, *supra* note 6, at 2216.

²⁵ Lewis A. Silverman, *Vermont Civil Unions, Full Faith and Credit, and Marital Status*, 89 KY. L.J. 1075, 1091 (2000-01) (discussing evasive marriages in contravention of a post-divorce waiting period).

²⁶ See *infra* text accompanying note 60.

²⁷ Peter Nicolas, *The Lavender Letter: Applying the Law of Adultery to Same-Sex Couples and Same-Sex Conduct*, 63 FLA. L. REV. 97 (2011) (arguing that equality principles require the application of adultery laws to same-sex couples and same-sex conduct).

²⁸ See Schacter, *supra* note 2.

²⁹ *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003).

poorly understood and uncertain patchwork of laws.³⁰ So, their marriages are invested with personal meaning reinforced by state participation and with a public significance, despite being widely understood as legal nullities. By comparison, same-sex couples who marry in their state of residence and remain there receive all the rights that their state offers to same-sex couples. Further, in an exception to the general rule, some couples who marry in their state of residence and later relocate to a state that does not authorize same-sex marriages, may nonetheless receive marriage recognition from their new state of residence.³¹ For example, Maryland has for some time recognized as valid same-sex marriages contracted in another jurisdiction, and Maryland continues to recognize such marriages while a referendum³² is pending to veto a recently enacted law that would expand the state's marriage licensing laws to include same-sex couples. So a couple can travel from Baltimore to Boston, marry, and return to Baltimore with full recognition by the state of Maryland as a married couple. Because of DOMA, however, no same-sex marriage valid within the state of a couple's domicile will attain the significant federal benefits other married couples enjoy by virtue of the same state legal status.

As a result of the combination of federal and state law barring recognition of same-sex marriages, same-sex couples miss out on benefits other married couples obtain merely by virtue of their legal status. Specifically, for now, they miss out on every benefit extended by the federal government to married couples.³³ As previously explained, Section 3 of DOMA declares that no marriage other than between a man and woman is a marriage for purpose of any federal law anywhere in the federal code.³⁴ That means certain married couples cannot file joint tax returns as married couples. They cannot pass on Social Security benefits upon death or sponsor an immigrant spouse for residence in the United States. Military spouses receive no death benefits.

And, with the prevailing assumptions about federalism, they miss out on one standard feature of marriage: portability. If a couple relocates from a domicile in which they received an official state stamp of approval for their relationship—a marriage—to a domicile where same-sex marriage is prohibited, the new state domicile has the power to void the marriage. And many states do exactly that. Though traditionally a migratory marriage is treated with more generosity than evasive marriages, the strong “DOMA”-like statutes passed by individual states tend to use sweeping language that seems to call for the state's total non-recognition for any purpose of same-sex

³⁰ States have a patchwork of conflicts of law rules. Many states have enacted constitutional amendments generally banning gay marriage. For a simple, straightforward explanation of these rules, see Wolff, *supra* note 5, at 2241. See also Michael E. Solimine, *Interstate Recognition of Same-Sex Marriage, The Public Policy Exception, and Clear Statements of Extraterritorial Effect*, 41 CAL. W. INT'L. L. J. 105 (2010) (explaining the variations in conflicts of law principles affecting marriage). The harshest treatment of so-called “evasive marriages” by an authorizing state is illustrated by the “reverse evasion statute” of New Hampshire, a state with same-sex marriage. N.H. REV. STAT. § 457:44 (1979) (“No marriage shall be contracted in this state by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every marriage contracted in this state in violation hereof shall be null and void.”).

³¹ See *supra* note 11 and accompanying text.

³² John Wagner, *Same-sex marriage headed to ballot in Md.*, WASH. POST (June 7, 2012, 6:34 PM ET), http://www.washingtonpost.com/blogs/maryland-politics/post/same-sex-marriage-headed-to-ballot-in-md/2012/06/07/gJQAVCn3LV_blog.html.

³³ See U.S. GOV'T. ACCOUNTABILITY OFFICE, GAO-04-353R, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT (2004), <http://www.gao.gov/new.items/d04353r.pdf> (identifying 1,138 rights and privileges afforded to married couples under the United States Code).

³⁴ 1 U.S.C. § 7.

marriage.³⁵ These state DOMA's deploy state control over their own marriage law to invalidate a same-sex marriage; section 2 of the federal-level DOMA was passed by Congress with the goal of reinforcing the state's power, already being exercised under choice-of-law principles,³⁶ to reject out-of-state marriages.³⁷ Section 3 of DOMA, as noted above, takes same-sex marriages out of the definition of marriage in federal law.³⁸ Even if section 3 of DOMA were repealed or held unconstitutional by the Supreme Court, a subsequent move by a married same-sex couple to a state that rejects the validity of all same-sex marriages would cause the loss of all federal marriage benefits that the couple enjoyed in the state that treated their marriage as a legal marriage. Some same-sex couples would have a *de facto* tax on their mobility, rendering them less able than other couples to relocate for economic betterment or other factors.³⁹

C. EQUALITY PRINCIPLE AND FEDERAL COURTS

In fact, the inequality at the federal level created by DOMA may be ending soon. In an unbroken string of victories in federal courts, couples challenging the cancellation of their marriages for federal purposes have prevailed. Conspicuously, they have prevailed in a unanimous First Circuit opinion,⁴⁰ in a well-reasoned Southern District of New York opinion,⁴¹ in a district court opinion in Connecticut,⁴² and in a bankruptcy court holding.⁴³ Affirming companion district court opinions in cases brought by the Commonwealth of Massachusetts and seven same-sex couples, the First Circuit relied primarily on principles of equal protection, but also made an overt appeal to principles of federalism that allow each state to make its marriage law.⁴⁴ The Court observed, importantly for future debate and litigation, that the question "couples issues of equal protection and federalism."⁴⁵

Here is the critical federalism passage in the opinion:

³⁵ The better view is that there should be a presumption in favor of construing the provision, unless it is entirely without ambiguity, as only directed to prevent gay couples from claiming a right to marry under state law but not denying recognition to marriages legally contracted in another state. See Wolff, *supra* note 8, at 2241, (describing the Clear-Statement Rule adopted by some courts to mitigate provisions voiding certain kinds of marriages).

³⁶ See Solimine, *supra* note 30.

³⁷ Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7 and 28 U.S.C. § 1738C).

³⁸ *Id.*

³⁹ Couples even worry about the possible effect and regret the symbolism of non-recognition in nearby states where their status lacks recognition. The couple who married in every state that granted them marriage rights, finally marrying in their home state of New York, felt a sense of vulnerability: "But even on one of the happiest days of their lives, after the ceremony, the couple remarks how perplexing it is that they had just hosted another beautiful wedding, but if they were to get in their car and drive across a bridge to New Jersey they would no longer be married." See Webley, *supra* note 15.

⁴⁰ Massachusetts v. U.S. Dept. Health & Human Serv., 682 F.3d 1 (1st Cir. 2012).

⁴¹ Windsor v. United States, 833 F. Supp. 2d 394 (S.D.N.Y. 2012).

⁴² Pedersen v. U.S. Office of Pers. Mgmt., No. 3:10-cv-1750 (VLB), 2012 WL 3113883 (D. Conn. 2012). See Joanna Grossman, *The Defense of Marriage Act (DOMA) Takes Another Bullet: How Can It Survive?*, JUSTIA'S VERDICT (Aug. 7, 2012), <http://verdict.justia.com/2012/08/07/the-defense-of-marriage-act-doma-takes-another-bullet>, for a lucid and thorough analysis of the opinion in *Pedersen*.

⁴³ Golinski v. U.S. Office of Pers. Mgmt., 781 F. Supp. 2d (N.D. Cal. 2011).

⁴⁴ Massachusetts, 682 F.3d at 7.

⁴⁵ *Id.*

[M]any Americans believe that marriage is the union of a man and a woman, and most Americans live in states where that is the law today. One virtue of federalism is that it permits this diversity of governance based on local choice, but this applies as well to the states that have chosen to legalize same-sex marriage. Under current Supreme Court authority, Congress' denial of federal benefits to same-sex couples lawfully married in Massachusetts has not been adequately supported by any permissible federal interest.⁴⁶

The opinion by the First Circuit panel addresses the weight of the federal interest using equal protection analysis.⁴⁷ The panel notes that it may not apply “heightened scrutiny” because Supreme Court precedent⁴⁸ regarding the level of scrutiny afforded sexual orientation precludes it.⁴⁹ Rather, the panel cites numerous cases in which the Supreme Court has held state laws to violate equal protection, using rational basis review.⁵⁰ The common factors are that the group burdened has been “historically disadvantaged or unpopular, and the statutory justification seemed thin, unsupported or impermissible.”⁵¹

Such equal protection cases have had to do with legislation aimed at keeping “hippie communes” from receiving food stamps,⁵² a local zoning ruling denying a zoning variance to a home for the mentally disabled,⁵³ and an odd state constitutional amendment designed to prevent any jurisdiction anywhere in the state from protecting gay people from discrimination on the basis of their sexual orientation.⁵⁴ The Supreme Court gives such laws an especially skeptical look without announcing that classifications affecting such persons will henceforth be subject to a form of heightened scrutiny. Thus, the Court imposes a discipline on laws that carry an odor of especially weak justification and a relatively easy-to-discern motive to harm, or treat with

⁴⁶ *Id.* at 16. There is a risk that this federalism interpretation will become iconic in marriage equality. While it acknowledges that the Supreme Court has the power to shape new law, it sets up a powerful rhetorical appeal, available in future litigation, in favor of a view of federalism as a “hands-off” bargain among sovereign entities. See text *infra* accompanying notes 60-68 for further discussion.

⁴⁷ *Id.* at 3.

⁴⁸ See 16B AM. JUR. 2d *Constitutional Law* § 857 n.4 (2012). Standard rational basis scrutiny is the level of scrutiny sought by lawyers defending a law or rule that is being attacked as a violation of the Equal Protection Clause. In economic cases, but also in cases where the Court does not find intentional discrimination, rational basis review has been seen as virtually certain to result in a finding favorable to the law's constitutionality. See Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1077 (2011). The rationale is that much law does not need judicial oversight to protect the interests of citizens from legislative majorities, since the political process provides adequate protection on the basis of equal access and political compromise. See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 719 (3d ed. 2009). Rational basis is thus highly deferential to lawmakers and to government actions, allowing made-up reasons to carry the day if they are remotely plausible. See, e.g., *U. S. R. R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980). Heightened, or intermediate, scrutiny requires that a law advance an important governmental interest in a way that is substantially related to that interest. See *Craig v. Boren*, 429 U.S. 190, 197 (1976). Strict scrutiny requires a compelling governmental interest, and the law must be narrowly tailored to achieve that interest. See *Korematsu v. United States*, 323 U.S. 214, 216-18 (1944). If there is an approach to achieve the interest that is less burdensome to the interest affected, or what judges call a less restrictive alternative, the law fails.

⁴⁹ *Massachusetts*, 682 F.3d at 4.

⁵⁰ *Id.*

⁵¹ *Id.* at 5.

⁵² *U.S. Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973).

⁵³ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

⁵⁴ *Romer v. Evans*, 517 U.S. 620 (1996).

insufficient regard, an unpopular group. However, where new laws do not provide indicia of suspicion in the form of red flags filled with the winds of possible bias and poor rationales, these decisions leave open the possibility for legislatures to deal with these categories without triggering heightened judicial scrutiny. The Supreme Court has never labeled such cases or has announced that such a distinctive form of review exists. Even if it does exist, there has been no statement that this form of review has special resonance for cases about gay rights. Undoubtedly for that reason, in her *Windsor* opinion, Judge Jones of the Southern District of New York took pains to disclaim any use of rational basis “with bite,” only applying standard rational basis scrutiny and finding the law to have no rational basis.⁵⁵

The First Circuit, and, with greater caution, the Southern District of New York, thus combine tools used by the Supreme Court in equal protection analysis with a view of states as having a primary role in the making of marriage law.⁵⁶ Blending the two ideas, these courts find the *federal* interests in invading a state domain by disregarding state-authorized marriages licensing laws to render all same-sex marriages a nullity for federal law, far too thin, or nonexistent, to justify the inequality caused by DOMA’s across-the-board definitional death sentence for state-created marriages.⁵⁷

So far so good for an advocate of gay marriage rights. While the First Circuit emphasizes that precedent does not permit the panel to hold that gay marriage is a fundamental right, it usefully applies equal protection analysis to invalidate a federal law that burdens gay marriage as a category. In this regard, federal courts are coalescing around similar reasoning on the meaning of federalism for state prerogatives in marriage law vis-à-vis Congress.⁵⁸ Federal courts agree that Congress must accept for federal law the marriage law of the states rather than fashion one independent of the various states’ laws authorizing marriages, and equality reasoning plays a role in reaching a conclusion about federalism.

II. THE GAP IN EQUALITY AND FEDERALISM REASONING IN THE DOMA CASES: A SLOW PACE FOR CHANGE

The emphasis placed on federalism by the First Circuit as enabling a “diversity of governance based on local choice”⁵⁹ leaves a gap in the path by which same-sex marriage could become available and valid for all same-sex couples in the United States, wherever located. The First Circuit treats the right of some states to *authorize* same-sex marriages under their law as the equivalent of other states’ rights to *exclude* gay marriage.⁶⁰ Seemingly, the opinion means a fairly straight-forward, “What’s good for the goose is good for the gander.” Some states can create gay marriage, and some states can ban gay marriage entirely. They can, in effect, *unmarry* couples.

That seeming equivalency is wrong. Instead, one simple but complicated-sounding legal reason refutes this argument, supported by general logic about federalism, equality, and legal orderliness and fairness.

⁵⁵ *Windsor v. United States*, 833 F. Supp. 2d 394, 402 (S.D.N.Y. 2012).

⁵⁶ *Massachusetts*, 682 F.3d at 7-8.

⁵⁷ See *supra* text accompanying note 14.

⁵⁸ See also *In re Balas*, 449 B.R. 567 (C.D. Cal. 2011).

⁵⁹ *Massachusetts*, 682 F.3d at 16.

⁶⁰ *Id.*

A. THE LEGAL POINT: CREATION AND VOIDING OF SAME-SEX MARRIAGE

The simple, legal-sounding point is premised on the difference between the state interest in not *creating* same-sex marriages and the state interest in *voiding* marriages created in other states.⁶¹ There is a discernible difference between a state's interests in concluding there is no right to same-sex marriage under its marriage licensing statutes and the interests of another jurisdiction in deciding what treatment to give a marriage authorized by a state. This is what the First Circuit recognized when it held that the federal government cannot void same-sex marriages for federal purposes even where same-sex marriage is not a fundamental right. That is, the view that a state does not have an obligation under fundamental rights analysis to authorize same-sex marriages does not mean that the status is so insubstantial that anything follows in terms of the treatment of that status by a different jurisdiction. Once a state authorizes a same-sex marriage, the marriage acquires real legal substance—it is not a vaporous apparition.

Thus, we come to the legal point. By voiding the legal substance created by another state, the non-recognition of same-sex marriage has *extra-territorial* effect. For the novice in law, one might believe that a state that creates a same-sex marriage that then “travels” with a couple intending to reside in another state is imposing an extra-territorial effect on that other state. But, in law, the extra-territorial effect is the opposite. By cancelling a marriage made by another state, the voiding state is reaching out and imposing adverse effects outside the state, including, should Section 3 of DOMA be found unconstitutional, the cancellation of federal benefits.⁶²

This effect is especially strong for couples who marry in Massachusetts as domiciliaries, live there for 10 years or so, and then move to Texas. Under the theory that each state can say who is married, because that's the federalism bargain, Texas can cancel a 10-year marriage with three children, two dogs, and a gerbil. Texas can and will cancel a marriage whatever the impact on the couple's welfare. If one of the couple is severely ill and needs the health benefits of the other, Texas law still cancels the marriage. There is no concern either for the impact on the life expectancy of someone's spouse or for any child's possible loss of parental guidance and affection. This result is a little easier to stomach for an *evasive* marriage,⁶³ where a couple travels to Massachusetts from Texas, marries and returns to Texas, and is told they are not properly married.

B. FEDERALISM, EQUALITY, LEGAL ORDERLINESS, AND FAIRNESS

The easy assumption that Texas's right to reject an evasive marriage makes sense takes us to the general logic about federalism, equality, and legal orderliness and fairness. While we may agree that Texas should be able to reject evasive marriages that create harm to one of the parties, or which have no legal presence in the United States in any state, same-sex marriages have attained a stature in the United States that renders them unique.⁶⁴ The dogmatic voiding by states of marriages of two people legally competent to marry has implications for federalism, equality, and legal

⁶¹ Some authors argue that a due process violation occurs when a state voids the same-sex marriage of a couple who relocates from a state that recognizes the marriage of the couple. See Steve Sanders, *The Constitutional Right to (Keep Your) Same-Sex Marriage*, 110 MICH. L. REV. 1041 (2012). One weakness in this approach is that couples who marry in the United States are on notice of this lack of portability.

⁶² See *supra* text accompanying notes 38-39.

⁶³ See generally MARY E. RICHMOND & FRED S. HALL, MARRIAGE AND THE STATE 187-204 (1929).

⁶⁴ See *supra* note 8 for a listing of states that authorize same-sex marriage.

orderliness and fairness that are not raised by the rejection of underage marriages or marriages that do not occur under the law of any American state. Thus, contesting the reasonableness and fairness of voiding evasive same-sex marriages brings us back to the possible difference between a state interest in declining to authorize same-sex marriages and a state interest in voiding them. Such a concern with fairness within this special marriage context also requires that we contest part of the reasoning of the First Circuit—the idea of a federalism bargain that gives one state a license to cancel out-of-state same-sex marriages in exchange for the right of another state to create them, with the federal government respecting both state actions as “diversity of governance based on local choice.”⁶⁵

Contesting the First Circuit’s rhetoric requires applying their own skeptical analysis (of the federal interest in cancelling state marriages for federal purposes) to the state interest in voiding same-sex marriages made in another state. As a reminder, even absent section 3 of DOMA, a state’s ability to cancel a marriage under its own laws would put many couples back into the same situation they currently face under section 3: It would cancel spousal Social Security benefits, tax-filing status, military death benefits, and spousal immigration rights.⁶⁶

The extra-territorial effect, in a mobile society, demonstrates that the state interest in such a radical act is paper thin, indeed nonexistent. For the cancellation of a 10-year marriage that winds up located in a strong anti-gay-marriage state, the disproportion between any state interest in declaring the marriage nonexistent and the impact on the couple and their children, if any, of the harsh voiding dogma is large. Voiding is in extreme opposition to the protective rules for other marriage pairings. Marriages are traditionally subject to a strong presumption favoring their validity; judges apply canons of construction to save them from possible legal infirmities associated with failure to observe formalities in forming them.⁶⁷ The policy rationales are numerous, including protection of children and preventing the opportunistic resort by a spouse to a formalistic claim, especially after years of marriage, that there is not a marriage and hence no obligations at all. A wealthy spouse who wishes to disrupt a long-term marriage in Massachusetts could game the system by moving to a non-recognizing state and thus complicate adjudication of support and other obligations; while a judgment in the home state might ultimately be required to be enforced as a judgment under Full Faith and Credit,⁶⁸ there are perverse incentives introduced into the ground rules for the marriages of same-sex couples. Subjecting some state marriages to the vagaries of varying state laws and the possible bad faith of a spouse is not an effective defense of marriage, but a step in diluting its social meaning and prestige. So long as states help maintain marriage as a social good, the overall legal environment should properly reinforce, not undermine, its status as a formative relationship promoting stability for family health. Equality principles and humane policy support protection of marital family units from disruption justified by thin claims of state interest.

The concept of a “federalism bargain” is flawed. Such a view treats the provision of marriage rights to a significant subset of the citizenry in support of dignity and legal stability as the federalist equivalent of state-mandated cancellation of long-standing marriages. The purported equivalency of two such radically different acts toward citizens is insufficiently reasoned and is even indifferent to the vital interests of

⁶⁵ *Massachusetts*, 682 F.3d at 16.

⁶⁶ See U.S. GOV’T. ACCOUNTABILITY OFFICE, *supra* note 33.

⁶⁷ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971).

⁶⁸ U.S. CONST. art. IV, § 1.

Americans and their families. Federalism and equality are stronger partners than can be depicted in such a picture of a “fair bargain,” with a harmonious equipoise of humane policy and arbitrary disruption viewed as a perfect *federalist* equity. An abstract equity for narrow state preferences lacks the constitutional or moral force to supersede the deeply entrenched ideal of equality for citizens.

Similarly, the refusal to recognize a marriage created through travel and immediate return to a domicile, in a single nation that contains numerous states that authorize such marriages, is an arrogant rejection of many marriages and would, absent DOMA, have a negative extra-territorial effect. Without DOMA, the primary effect of the refusal would be to prevent federal recognition of a same-sex marriage; in practical terms, it would cause harm to marital interests outside the state. Any valid state interest simply lacks weight when compared to the potential harm inflicted.

The couple will still be present in the state, with the expressive meaning of the marriage status that a state conferred. The couple will still assert rights and press for forms of recognition. Indeed, a Texas couple who married in D.C. demanded that the Dallas Morning News include their marriage in the paid wedding announcements.⁶⁹ After a period of resistance based on the state law denying recognition to gay marriages, and offering only inclusion in civil union announcement section, the paper relented.⁷⁰ It now prints same-sex wedding announcements.⁷¹

The eventual printing of the Texas wedding announcement illustrates the sense of neighborliness that the question of recognition can release, by comparison with the frequent reaction to a demand for state law to be rewritten to authorize same-sex marriage. Even in a period of raucous public discourse enabled by the internet and political polarization, civility often prevails in interactions that feel person-to-person. Denial of a courtesy to a newcomer or a neighbor, if it takes the form of an insistent refusal to honor or acknowledge that person’s legally contracted marital status, becomes a breach of fair play and equal respect. American civility lays claim to a common culture around which surprising courtesies can arise between nominal adversaries.⁷²

The local response to mobile same-sex couples also illustrates that there is a gap between a state’s interest in not creating same-sex marriages, and its interest in denying their existence. Lawyers argue that, if the Supreme Court were willing to say there is no state interest in refusing to recognize a same-sex marriage, there would be no

⁶⁹ See Michael Jones, *Hey Dallas Morning News: Same-Sex Marriage Announcements Belong in the Weddings Section*, CHANGE.ORG (Aug 20, 2012), <http://www.change.org/petitions/hey-dallas-morning-news-same-sex-marriage-announcements-belong-in-the-weddings-section>.

⁷⁰ John Wright, *Dallas Morning News Confirms That It Will Publish Same-Sex Marriage Under Weddings*, DALLASVOICE.COM (July 1, 2011), <http://www.dallasvoice.com/dallas-morning-news-confirms-publish-same-sex-marriages-weddings-1081987.html>.

⁷¹ Dani Heffernan, *Wedding Announcement for Gay Couple Printed in Dallas Morning News*, GLAAD (July 18, 2011), <http://www.glaad.org/comment/2820>; Frederick W. Rayner & David S. Gebhart, *Wedding Announcement*, THE DALLAS MORNING NEWS, Jan. 15, 2012, <http://www.legacy.com/celebration/dallasmorningnews/celebrations-announcement.aspx?n=frederick-william-rayner&aid=155470531>.

⁷² The extreme example in our history is the frequency of amicable interactions between Northern and Southern soldiers during the Civil War, in which their common attachment to the abstract ideals and the cultural life of the United States allowed them to fraternize with real affection for one another, despite their opposed readings of abstract ideals such as freedom. REID MITCHELL, *CIVIL WAR AND SOLDIERS: THEIR EXPECTATIONS AND THEIR EXPERIENCES* 36-38 (1988) (discussing “the enemy encountered” and describing the effect of “reduc[ing] phantoms to flesh and blood” and recognizing the common “Americanness” of enemies imagined as monstrous savages). Differing understandings by soldiers of abstractions about threats to freedom lost salience in one another’s presence as “the common humanity of the enemy” became apparent. *Id.* at 38.

state interest in refusing to authorize a same-sex marriage.⁷³ Common sense believes that legal argument, as does the willingness of even conservative states to recognize out-of-state gay marriages. The key example is Wyoming, where Republican legislators appealed to the state motto, the Equality State, to argue against and vote down a proposed law that would refuse recognition to gay marriages made in other states.⁷⁴

III. EQUALITY FEDERALISM: A PATH TO MARRIAGE FAIRNESS

A. FEDERALISM PRINCIPLES

If there is a disposition in some states, and in politics, to distinguish what state law will facilitate, and what the state will accept from another state, there is also room for the Supreme Court to see a different interest at play in state marriage licensing law and rules that void same-sex marriages. Clearly, some conservative state lawmakers perceive a difference between writing local marriage law to express local understanding as compared with using their voiding powers that actually harms the material interests of couples.⁷⁵ Federal courts can likewise construct a judicial scale to measure differing interests as a support for differing legal constructs affecting marriage.

In constructing such a scale, the judicial methodology on which federal district and circuit court judges place reliance in Equal Protection jurisprudence, in light of precedents created by the Supreme Court, is to apply the correct level of judicial scrutiny to test the law against constitutional principles.⁷⁶ The standard summary of the Supreme Court's development of levels of judicial scrutiny is that it is three-tiered.⁷⁷ Because lawyers feel most comfortable using clearly distinct categories given a stamp of approval by the Supreme Court, lawyers organize their arguments to courts to persuade judges to choose and then apply favorably for their client one of the commonly-known levels of scrutiny: rational basis, intermediate or heightened scrutiny, and strict scrutiny.⁷⁸

⁷³ Several of my colleagues have made this argument to me, with one adding the pragmatic prediction that after a period of states move one by one to grant same-sex marriage rights, the Supreme Court will, in the manner of its decision to sweep away laws against interracial marriage, "mop up the rest." Email from Brian Kalt to Mae Kuykendall (May 24, 2012, 9:24:44 PM) (on file with author).

⁷⁴ Aaron LeClair, *Anti-gay Marriage Bill Defeated in Senate*, LARAMIE BOOMERANG (Wyo.), Mar. 3, 2011, <http://www.laramieboomerang.com/articles/2011/03/03/news/doc4d6f23246ab30937837749.txt>. The bill was deemed in conflict with a state constitutional provision: WY. CONST. art. I, § 2.

⁷⁵ "This bill does nothing more than to strip away liberties that have been granted by other states," said Rep. Ruth Petroff. "We go from being the Equality State to the Strip-Away-Liberty State." LeClair, *supra* note 74.

⁷⁶ The University of Missouri at Kansas City School of Law has a website that provides basic summaries of constitutional doctrine. For a useful tutorial concerning levels of judicial scrutiny, see Doug Linder, *Levels of Scrutiny Under the Equal Protection Clause*, EXPLORING CONSTITUTIONAL CONFLICTS, <http://law2.umkc.edu/faculty/projects/ftrials/conlaw/epscrutiny.htm> (last visited Aug. 8, 2012).

⁷⁷ *Id.*

⁷⁸ 16B AM. JUR. 2D *Constitutional Law* § 857 n.4 (2012) ("When a court finds that a classification system treats similarly situated persons differently and so implicates equal protection, it must determine which level of scrutiny should be employed to evaluate the constitutionality of that classification: (1) the rational basis test to determine whether a statutory classification bears some reasonable relationship to a valid legislative purpose; (2) the heightened scrutiny test to determine whether a statutory classification substantially furthers a legitimate legislative purpose; or (3) the strict scrutiny test to determine whether a statutory classification is necessary to serve some compelling state interest.).

The neat separation of equal protection into three separate categories has critics.⁷⁹ Most of these critics, among whom have been Supreme Court justices writing in opinions, argue that the tiers of review obscure the interests affected by placing too much weight on the initial choice of the tier to be used, with insufficient care in describing the precise nature of the interest and the burden placed on it.⁸⁰ Justice Marshall argued strongly for a sliding scale that was sensitive to the interests implicated in light of their connection to core constitutional protections.⁸¹ In effect, such a critique argues that tiers of review weaken judicial oversight of laws that deny equal treatments to citizens. In the context of race, Barnes and Chemerinsky further develop the view that Equal Protection jurisprudence is weakened by the three-tiers approach to judicial oversight.⁸²

As explained above, the Supreme Court occasionally engages in a more elaborate form of rational basis review known generally as rational basis with bite.⁸³ When this occurs, the Court's analysis is very fact specific.⁸⁴ The Court looks at a particular law burdening a group, and at the claimed need for the law, and reaches a skeptical view of the law. In effect, the Court concludes that the law really is irrational.

Laws banning same-sex marriage should invite similar treatment. The general practice by states of completely voiding same-sex marriages is, concededly, a little different than a single law motivated by the dislike, for example, of hippies,⁸⁵ because different states created the form of non-recognition individually and at different times. But much of the spread of an intensified statement of non-recognition happened in a relatively compressed time period that began when Hawaii appeared on the verge of marrying same-sex couples.⁸⁶ The process reappears even today, with the recent harsh North Carolina law⁸⁷ that strives to cover nearly every base in order to reject any form of union, from whatever source, between people of the same sex.

⁷⁹ For discussions over time of these critical views, see Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L. J. 161, 163-65 (1984); Suzanne B. Goldberg, *Equality without Tiers*, 77 S. CAL. L. REV. 481, 518-27 (2004); Barnes & Chemerinsky, *supra* note 48, at 1077-87.

⁸⁰ Barnes & Chemerinsky, *supra* note 48, at 1079-80.

⁸¹ *San Antonio Indep. Sch. Dist. v. Rodriguez* - 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting) (arguing the Court jurisprudence revealed a "spectrum of standards" in Equal Protection jurisprudence that "clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending... on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.").

⁸² Barnes & Chemerinsky, *supra* note 48, at 1077-87.

⁸³ Kenji Yoshino explains that "[t]he claim that the canon has closed on heightened scrutiny classifications must be tempered by acknowledging the Court's use of a more aggressive form of rational basis review." Even though the Court itself has not labeled the offshoot of rational basis 'with bite,' it is commonly understood this way." Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 757 (2011) ("[A]cademic commentary has correctly observed that 'rational basis review' takes two forms: ordinary rational basis review and 'rational basis with bite review.'").

⁸⁴ For example, in *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985), Justice White carefully reviews the several rationales, including the location of a proposed home for the mentally disabled on a 100-year flood plain, for denying a zoning variation and found them wanting in light of facts about other zoning variations that were granted.

⁸⁵ See *supra* text accompanying note 53.

⁸⁶ *Baehr v. Lewin*, 582 P.2d 44 (Haw. 1993). Hawaii voters then passed by referendum a state constitutional amendment banning same sex marriage. HAW. CONST. art I, § 23 (originally HB 117).

⁸⁷ N.C. CONST. art. XIV, § 6 ("Marriage between one man and one woman is the only domestic legal union that shall be valid or recognized in this State.").

The laws take relatively similar forms, and often are embedded in state constitutions.⁸⁸ While voters vote for them, the laws are often drafted by anti-gay advocacy groups, who write and campaign for laws that may well be far more extreme than the voters would actually demand.⁸⁹ Many people vote to affirm that, in their understanding, marriage is heterosexual and that their state law should continue to express that view. Few voters likely understand the more esoteric parts of the laws, which have to do with a complex body of law called “conflicts of law.” Indeed, conflicts of law is so complex that one scholar stands out for his mastery of the ins and outs of conflicts of law in connection with marriage.⁹⁰

The prevalence of strong bans enacted by referendum brings us into the presence of the barest claim to raw majority control, one that comes without any reasoned basis, or, at best, “justification that seems thin, unsupported or impermissible.”⁹¹ Again, as noted, the referenda texts are written by strong anti-gay groups who seize a sledge hammer to smash all hope for gay couples who find themselves within the borders of a state.⁹² If the average scholar is daunted by the subject of conflicts of law conventions, one might pause at treating with the deference due the law-making process the majoritarian vote to enact an extreme state DOMA law or constitutional amendment. Concededly, some rejections of same-sex marriages that came into legal existence outside a state are part of preexisting, or legislature-enacted state law, but there are fine points about whether explicit statements disavowing gay marriages should be read to also require non-recognition.⁹³ Most non-recognition law is either ill-considered voter initiatives written by extreme forces, or an obsolete overhang from an era when there were no same-sex marriages and the rules were little applied to any marriage.⁹⁴

B. POTENTIAL PATHWAYS TO SAME-SEX MARRIAGE

In the First Circuit opinion, there is a subtle yet powerful convergence of federalism principles and equality principles. The result is a repudiation of the federal interest in withholding federal marriage status from state-created marriages. A similar convergence is possible to create national gay marriage without declaring same-sex

⁸⁸ See e.g., *id.*; MICH. CONST. art. I, § 25 (“[T]he union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.”).

⁸⁹ See Martha Waggoner, *Amendment One, North Carolina Gay Marriage Ban, Passes Vote*, HUFFINGTON POST (May 8, 2012), www.huffingtonpost.com/2012/05/08/amendment-one-north-carolina_n_1501308.html (indicating that the amendment broadly applies to all unmarried couples, and could have negative unintended consequences for victims of domestic violence). See also Speaker Brian Brown, Eagle Forum San Diego Convention 2012, <http://www.efsdconvention2012.com/BrianBrown.html> (last visited Aug. 9, 2012) (biography claiming credit for placing Prop 8 on the ballot in California and variously describing anti-marriage activities aimed at same-sex couples in Maine, New Jersey, New York, Maryland, Rhode Island, New Hampshire, Minnesota, and North Carolina).

⁹⁰ The academic expert, without peer, is Andrew M.M. Koppelman, whose writings on the subtleties of non-recognition, and the possible avenues to chip away at those applications that go past a point of defensibility under current understandings, are extensive and authoritative. See, e.g., Andrew Koppelman, *The Limits of Strategic Litigation*, 17 LAW & SEXUALITY 1 (2008); ANDREW KOPPELMAN, SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES (2006); Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143 (2005); Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921 (1998); Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 IOWA L. REV. 1 (1997).

⁹¹ Gill v. U.S. Office of Pers. Mgmt., 699 F. Supp. 2d 374 (D. Mass. 2010).

⁹² See *supra* text accompanying note 95.

⁹³ Wolff, *supra* note 6, at 2241.

⁹⁴ Sanders, *supra* note 61, at 1436-38.

marriage a fundamental right that all states must enact and administer. The Supreme Court need only recognize that strong non-recognition norms, classifying for negative treatment marriages created by numerous sister states and accepted culturally by increasing numbers of citizens, do not have a sufficient rationale to justify the harm they do to interests outside the state. At the same time, the Court could decide, as a prudential matter, to leave the writing of state marriage law to the states.

The Court need not decide whether same-sex marriage is a fundamental right under substantive due process or whether equality principles require an end to state rules barring same-sex couples from receiving a state marriage license; the Court can foreclose the need to respond to any demand that it articulate a limiting principle for other hypothesized variants on traditional marriage. The Supreme Court can rather recognize that marriage exists in the American states and apply strong equality principles within the context of comity among the states. With such an approach, the judicial workload for folding in equality principles to the legal marriages in their states would fall to state judges given a charge to adapt marriage law. These judges, with a strong concern for equality principles, could accommodate changing understandings of family and citizenship with which states must grapple.⁹⁵ Where the reach of the equality principle could be arguable, state judges could play the common law role of gradually developing an evolving legal understanding of core guiding principles. If a state court makes a call that is plainly antithetical to equality principles, such as not allowing a same-sex spouse to inherit by intestacy, a district court could quickly remedy the problem. But the primary judicial forum for working through the equality principle, enunciated as applicable to same-sex marriage status, would be that of state judges in family court and state appeals courts. Rather than hearing arguments about the threshold question of marital status, state judges could consider how equality rules affect existing marriages that lack the component of differing genders.⁹⁶ State court energy could be directed to more productive questions that arise in connection with American marriages, and could set aside a fruitless use of judicial resources debating existential imponderables. If the Court took that tack, the worst injustices and dignitary harms would be averted while permitting some role for local choice and releasing judicial energies to focus on real-world family problems.

IV. CONCLUSION

Family and marriage law is a special case in the federalism process. Today, this body of law reflects the nation's lingering willingness to allow experimentation, *and* permits states to disrespect, on the basis of distaste for gender identity of the adult pairs, marital statuses created by other states. Family and marriage law is also special in that marriage, though a common term widely used and understood, is increasingly a mystery in its gender logic and in its power to define the contours of a legal status that combines individuals into a legal unit. State courts are working through the gender logic of the marriage "essentials," in a range of contexts. So, even as we all know what marriage is, the courts are working to rationalize, and in some respects to *redefine*, the institution in a society with evolving beliefs about gender roles and marriage internal arrangements. State legislatures and state courts are providing needed deliberation and policy in light of changing patterns and meanings of equality and the purposes of marriage.

⁹⁵ Wolff, *supra* note 6, at 2216.

⁹⁶ See, e.g., Nicolas, *supra* note 27.

As the states struggle to adjust marriage law to a changing world of sex equality, same-sex marriage incongruously remains, in the prevailing understanding of federalism, a minority practice lacking the real marital substance that mandates: a) state judicial protection of the marriages of similarly situated opposite-sex couples; and b) for such marriages, an additional shield of protective constitutional doctrine. The different weight attached to an identical legal status, depending on the identity of the members, is wholly at odds with norms of equality contained in the Fourteenth Amendment and in opposition to law's function as a source of order and stability. No other ascribed identity of two spouses would be subject to such a view of the federalist deal as a fair bargain.⁹⁷ Nor does treating the marital aspirations and marital status of some couples as subject to disruption by factors external to the marriage serve the interests of family unity and respect for marriage. A society committed to the equality of persons under the law may not treat marriages with such disdain. To ensure a fairer treatment of marriage, equality is needed as a strong partner to federalism, not merely an occasional helper.

To be fair, some of the resistance to gay marriage is based on sincerely motivated views that traditional marriage should have a special status because it's good for society. Marriage advocate David Blankenhorn recently acknowledged, however, that many who oppose same-sex marriage are simply anti-gay.⁹⁸ Because of the prevalence of anti-gay bias in some opposition to same-sex marriage, Blankenhorn ended his advocacy against same-sex marriage.⁹⁹ Yet Blankenhorn maintained his view that society benefits from traditional marriage and, in an ideal world free of animus, it would have a special status because it's good for society. Without adopting that view, one may yet conclude that state control over the writing of marriage law may properly reflect views about the good of marriage, even in the absence of an empirical proof. At the same time, the rejection of marriages created elsewhere has a strong association with animus and has no discernible purpose in today's mobile population traveling and relocating within one nation and one culture. Even if one generously credits the intense opposition to same-sex marriage recognition as benign in intent, the lack of ability in litigation to present an empirically sound¹⁰⁰ or logically plausible reason, the reliance on a view of states as islands of marriage sovereignty,¹⁰¹ and the implicated indifference to family welfare,¹⁰² support an ending to a state license to kill healthy marriages.

Might a constitutional partnership between equality and federalism permit federal courts to end wholesale state rejections of a common marital status yet stay out of the state marriage licensing laws? By making astute use of a Constitution structured around individual rights and state prerogative, can the Supreme Court fashion a constructive, defensible compromise? Such an outcome would conserve court resources,

⁹⁷ See *supra* text accompanying note 48 for the Southern District's use of a federalist bargain rationale positing a tradeoff between states' rights both to create and to destroy marriages.

⁹⁸ David Blankenhorn, Op-Ed., *How My View on Gay Marriage Changed*, N.Y. TIMES, June 22, 2012, http://www.nytimes.com/2012/06/23/opinion/how-my-view-on-gay-marriage-changed.html?_r=1&ref=opinion.

⁹⁹ *Id.*

¹⁰⁰ *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 953-91 (N.D. Cal. 2010), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012).

¹⁰¹ See *supra* Part II.B.

¹⁰² Sanders, *supra* note 61, at 1421, 1450 ("If two people who were once married are suddenly rendered legal strangers to one another, property rights are potentially altered, spouses disinherited, children put at risk, and financial, medical, and personal plans and decisions thrown into turmoil.").

avoid a high-octane confrontation with state officials, and restore the orderly treatment of a critical family-protective legal status.

The Court, or as Justice Brennan would remind us, five justices will decide the matter. Putting before them a path to vindicating federalism, ideals of equality, and social peace surely has much to recommend it.

Scapegoating Social Security Disability Claimants (and the Judges Who Evaluate Them)

Jon C. Dubin* and Robert E. Rains†

Last year, an account of an Administrative Law Judge (ALJ) who awarded social security disability benefits in 99% of the cases before him produced a feeding frenzy in conservative media about renegade ALJs and the need to curtail the Social Security Administration's (SSA) disability program.¹ This development came on the heels of a variety of similar articles that: (1) criticized the rise in disability benefit rolls; and (2) contained the supposition that the increase is largely a function of recent changes in the substantive eligibility standards that have authorized benefits for new, more subjective and supposedly less worthy medical conditions like mental illness and pain.²

A recent article by Professor Richard Pierce in the Cato Institute's Fall 2011 issue of *Regulation* fuses these two strands of thought and media anecdotes.³ Pierce asserts that the SSA ALJs, emboldened by the discretion inherent in the new and increasingly subjective standards for disability based on "nonexertional" impairments and limitations,⁴ such as mental illness and pain, are giving away benefits to undeserving claimants. And they are doing so without any meaningful check on their actions. Pierce then suggests that by according ALJs essentially unreviewable policy-making authority, the system is unconstitutional. He further posits that the primary value of ALJ hearings, over the paper file evaluations that occur at earlier stages of the disability decision-making process, is to provide the opportunity to evaluate the claimant's demeanor. This purpose, he believes, is significantly overrated.

Pierce also cites as evidence of inaccuracy or untrustworthiness the significant variation in ALJ decision rates and what he characterizes as the high and increasing rate at which ALJs reverse agency denial decisions. Therefore, rather than seeking to reform the disability hearing system, Pierce proposes that the entire SSA ALJ corps

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¹ Damian Paletta, *Disability-Claim Judge Has Trouble Saying 'No,'* May 19, 2011, <http://online.wsj.com/article/SB10001424052748704681904576319163605918524.html>; Damian Paletta, *Social Security Judge Retires Amid Probe*, WALL ST. J., July 18, 2011, <http://online.wsj.com/article/SB10001424052702303795304576454490618129186.html>; Damian Paletta, *Ex-Judge's Disability Rulings Probed*, WALL ST. J., Nov. 25, 2011, <http://online.wsj.com/article/SB10001424052970203764804577056490750827440.html>.

² See, e.g., *Disability Payments: The Elephant in the Waiting Room*, ECONOMIST, Mar. 10, 2011, <http://www.economist.com/node/18332928>; James Ledbetter, *America's Hidden Welfare Program*, SLATE, Sept. 13, 2010, http://www.slate.com/articles/business/moneybox/2010/09/americas_hidden_welfare_program.html.

³ Richard J. Pierce, Jr., *What Should We Do About Social Security Disability Appeals?*, REGULATION, Fall 2011, at 34.

⁴ Nonexertional limitations are simply any limitations other than those on standing, sitting, lifting, carrying, walking, pushing, or pulling. See 20 C.F.R. § 404.1569a (2011).

and ALJ hearing stage be abolished. According to Pierce, the savings from this measure should then be used to fund a large scale program of continuing disability reviews to reevaluate current disability beneficiaries to remove the undeserving from the lot. These measures would, in turn, arguably help avert a default in the Social Security disability trust fund in the next few years.⁵

Policy is often initiated, and sometimes adopted, based on popular misconceptions, partial truths, commonly repeated falsehoods, and isolated anecdotes with unfortunate consequences.⁶ Because neither the Pierce proposal's media-anecdote-driven factual assumptions nor core legal suppositions about the identified problem are well-founded and because the proposed solutions are both misguided and unsound, this initiative, and other similar initiatives, should be non-starters. This Issue Brief explains: (1) how Pierce misinterprets the problem; (2) why the SSA ALJ system is constitutional; and (3) why Pierce's proposed solutions are misguided.

I. THE PROBLEM IS MISINTERPRETED

The increase in disability applications and awards and resulting strain on the social security trust fund are neither principally a function of ALJ unsupported decision-making nor a product of increasingly liberalized and lenient substantive disability standards for evaluating nonexertional impairments and limitations.

First, ALJ decisions amount to a relatively small portion of disability awards, comprising fewer than 25% of total annual awards.⁷ SSA utilizes a multi-stage administrative review process, requiring claimants to have their applications decided at an initial evaluation stage and then to be reconsidered before having an opportunity for a hearing before an ALJ. Approximately 75% of favorable decisions are made at the initial and reconsideration stages.⁸ In the vast majority of jurisdictions, initial and reconsideration determinations are made not by SSA, but by state agencies known as state "disability determination services" (DDSs) under contract with the SSA to make these decisions. Thus, whatever can be gleaned about the consequences of a large number of disability awards, the predominant decision-makers are those at the state agencies and not the ALJs. Thus, Pierce's foundational assertion that "most of the increase in the proportion of the population that has been determined to be permanently disabled is attributable to ALJ decisions,"⁹ is erroneous.

⁵ *Id.*

⁶ See, e.g., Cheryl Bernard, *Caution Nation-Builders: Gender Assumptions Ahead*, 32 FLETCHER F. WORLD AFF. 25, 31 (2008) ("In discussions concerning gender-related policies, the extent to which anecdotes, suppositions and vaguely anthropological personal theories rule the day can often be astonishing. Clearly, these are not the foundations upon which a policy that directly affects half the population should rest. Instead such policies should be informed by fact."); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1161 (1992) ("[A]necdotes contribute little to developing a meaningful picture of the situation about which we are concerned. It makes a difference if for every ten anecdotes in which an undeserving plaintiff bankrupts an innocent defendant, one, ten, one hundred, or one thousand equal and opposite injustices are done to innocent plaintiffs.").

⁷ See SSA ODPMI (OFFICE OF DISABILITY PROGRAM MANAGEMENT INFORMATION), FISCAL YEAR 2010 WORKLOAD DATA: DISABILITY DECISIONS (2010).

⁸ *Id.* There are currently 10 "prototype states" (not all of which are actual states), in which most claims bypass the reconsideration stage. See 64 Fed. Reg. 47,218 (Aug. 30, 1999) and 71 Fed. Reg. 45,890 (Aug. 10, 2006). Since the vast majority of claims must go through the reconsideration stage before the claimant can seek an ALJ hearing, this article will generally describe the system as having four administrative levels.

⁹ Pierce, *supra* note 3, at 34.

Second, the cited media anecdotes do not support the generalization that ALJ decision-making largely rewards unworthy recipients. The anecdotes focus largely on one particular ALJ who granted benefits in 100% of cases he decided in the first six months of 2011. This is an anomaly and does not accurately reflect either the norm or the range of ALJ decision-making. The *Wall Street Journal* series, for example, focuses on this one unusually high-granting ALJ rather than the vast bulk of ALJs with rates around the agency decisional norm, much less those at the other end of the bell curve who significantly deviate from the norm in the other direction and rarely grant benefits. For example, the agency's most recent ALJ quarterly data reveal that there is an ALJ with an approval rate as low as 12.7% and a significant group below 25% percent.¹⁰ The average approval rate for fiscal year 2011 was 58%.¹¹

Indeed, it is demonstrative of how unrepresentative the featured ALJ's performance was that he was not only suspended (as acknowledged by the articles), but saw fit to resign his post rather than fight for his continued employment. While Pierce notes that there are many other "outlier" ALJs (besides the one in the headlines) with grants rates above the norm, he also fails to account for the large number around the norm and the consequences of the many "outliers" with grant rates well below. The reality, of course, as with so many distributions of human beings, is that individual ALJ grant rates form a bell curve, with the great majority of ALJs being well within the agency norm.

Of course, mistakes can and are made by ALJs (and state agency adjudicators) in both directions. As Pierce points out, there are costs to taxpayers and the public when a claimant is mistakenly awarded benefits. Pierce also emphasizes the social, fiscal, and economic costs of "male worklessness" from disability awards.¹² And these costs are undoubtedly real and considerable (as with women's worklessness too!). However, the latter statement assumes that withdrawal from the workforce by disability claimants is largely voluntary. The modesty of benefit awards relative to wages undermines that assertion.¹³ As Professor Jerry Mashaw has explained, "it is difficult to imagine that a person who can continue to work will instead leave work to seek disability benefits that pay (on average) one-third of the mean wage, require a six month waiting period for application, a two-year waiting period for medical benefits, and provide any benefit to fewer than one-half of those who apply."¹⁴

More fundamentally however, there are also significant societal costs when claimants are improperly denied benefits. These costs include the concrete consequences from increased home foreclosures and evictions, homelessness, family dissolutions, bankruptcies, welfare payments, strains on Medicaid and other residual indigent

¹⁰ SOCIAL SECURITY ADMINISTRATION, PUBLIC USER FILES, ALJ DISPOSITION DATA, FY 2012 (For Reporting Purposes: 10/01/2011 Through 01/27/2012), http://www.ssa.gov/appeals/DataSets/03_ALJ_Disposition_Data.html (last visited Feb. 29, 2012); see also Mike Chalmers, *Delaware Legislators Push for Deep Look at Social Security Denials: Dover Office Rejects High Rate of Claims*, DELAWAREONLINE, Mar. 1, 2012, <http://www.delawareonline.com/article/20120301/NEWS/203010324?gcheck=1> (describing low approval rate ALJs in Dover, Delaware hearing office and impact on claimants).

¹¹ SSA ODPMI (OFFICE OF DISABILITY PROGRAM MANAGEMENT INFORMATION), FISCAL YEAR 2011 WORKLOAD DATA: DISABILITY DECISIONS (2011).

¹² Pierce, *supra* note 3, at 34.

¹³ See Jon C. Dubin, *The Labor Market Side of Disability Benefits Policy and Law*, 20 S. CAL. REV. L. & SOC. J. 1, 60 & n.248 (2011).

¹⁴ Jerry L. Mashaw, Book Review, 20 J. HEALTH POL'Y & L. 225, 226 (1995) (reviewing EDWARD H. YELIN, *DISABILITY AND THE DISPLACED WORKER* (1993)).

health care systems from postponed care, and sometimes even death.¹⁵ They also include the appellate litigation and legal system costs of further appeals from improper benefit denials in federal court. Finally, these costs also include the social malaise and frustration generated from a perception that the social contract has failed and that a government insurance system which most claimants have been required to pay into for decades on the promise of protection in the event of disability, has proven illusory.¹⁶

Third, Pierce's suggestion that greater accuracy and consistency would be achieved by relegating virtually all agency decision-making to the state agency DDS's paper review process is also unfounded for a number of reasons. State agency adjudicators handling the initial and reconsideration disability determinations have considerably less training, education, and relevant experience for the task than federal ALJs. The state adjudicators are civil servants and need not even have a basic university bachelor's degree in some states.¹⁷ In contrast, federal ALJs must be lawyers for at least seven years, pass an examination, and then score competitively well after a series of interviews to obtain one of these highly coveted jobs.¹⁸ The assumption that state adjudicators are better or even comparably equipped to issue accurate decisions in applying a complex federal statute, regulations, and guidelines belies common sense.

Nor would abolition of the ALJ hearing process eliminate significant human variation in disability approval rates by agency decision-makers. It would simply shift the variation to the state agency, non-hearing levels. There are dramatic and unexplained variations among the state agencies that handle initial and reconsideration decisions. Thus, in 2010, the DDS for Mississippi granted initial claims in 24.9% of cases, whereas the DDS for New Hampshire granted initial claims in 49.5% of them.¹⁹ Are residents of New Hampshire truly so much more impaired than those of Mississippi? In the smaller number of situations where SSA makes initial and reconsideration determinations, the disparities are even more marked. In 2010, the Atlanta Region Disability Program Branch (DPB) awarded benefits in 18.4% of initial claims, while the New York Region DPB awarded benefits in 58.4% of initial claims.²⁰ Thus, while

¹⁵ See, e.g., *Work or Die*, N.Y. TIMES, May 23, 1983, <http://www.nytimes.com/1983/05/23/opinion/work-or-die.html>; see generally *Schweiker v. Chilicky*, 487 U.S. 412, 416–17 (1988) (describing “the terrible effects on individual lives” from wrongful disability benefits denial decisions).

¹⁶ In addition to claimants for disability insurance benefits, there are also many claimants for Supplemental Security Income (SSI) under Title XVI of the Social Security Act. These individuals typically suffer from chronic, even lifelong, impairments, such as mental retardation, and have either never worked and paid FICA taxes or have only worked sporadically at marginal employment, so as not to be insured for disability purposes or to be insured at a level which produces only a very low monthly disability insurance benefit. SSI is paid out of general revenues as a welfare program and not out of the disability trust fund. See Linda G. Mills & Anthony Arjo, *Disability Benefits, Substance Addiction and the Undeserving Poor: A Critique of the Social Security Disability Independence and Program Improvements Act of 1994*, 3 GEO. J. ON FIGHTING POVERTY 125, 128 (1996).

¹⁷ See, e.g., NEB. DEPT. OF EDUC., DDS ADJUDICATOR TRAINEE (2007), <http://insidende.education.ne.gov/humanresources/RE-DESIGN/ClassSpecs/DDSAdjTraineeFinalJune07.pdf>.

¹⁸ See U.S. OFFICE OF PERSONNEL MANAGEMENT, QUALIFICATION STANDARD FOR ADMINISTRATIVE LAW JUDGE POSITIONS, <http://www.opm.gov/qualifications/alj/alj.asp> (last visited Feb. 29, 2012).

¹⁹ SSA SAOR (STATE AGENCY OPERATIONS REPORT), SOCIAL SECURITY DISABILITY AND SUPPLEMENTAL SECURITY INCOME (SSI) DISABILITY CLAIMS ALLOWANCE RATES INITIAL AND RECONSIDERATION ADJUDICATIVE LEVEL FISCAL YEAR 2010 BY NATION, REGION AND STATE (2011).

²⁰ *Id.*

citing significant variation in disability approval rates as a reason to abolish the ALJ hearing process,²¹ Pierce's proposed remedy will not supply the cure.²²

Moreover, another factor relevant to the differential and higher rates of benefit approval at the ALJ hearing stage over the state agency process, is the greater vulnerability to agency pressure to restrict awards at the state level. Both a rarely unanimous United States Supreme Court and a recent CBS investigative study have found that state disability agency personnel experience significant pressure to deny claims.²³ Federal ALJs, while intermittently experiencing pressure to limit benefit approvals as well,²⁴ are at least insulated with "good cause" Administrative Procedure Act job security, as Pierce has explained.²⁵ In the past few years, while the ALJ approval rate has significantly exceeded the state agency rates, the ALJ rate has nevertheless decreased from 63% in 2009 to 62% in 2010 to 58% in 2011.²⁶ Approval rates are also on the decline at the state agency level from 36.9% and 13.8% respectively at the initial and reconsideration stages in 2009 to 35.4 and 12.7% at these respective stages in 2010.²⁷ The lower and diminishing state agency approval rates are also likely influenced by the documented greater downward pressure on approvals by, and greater employment vulnerability of, state agency personnel vis-à-vis their federal ALJ counterparts. If, as a consequence, the state agencies are denying a greater proportion of meritorious claims, it follows that the ALJs will see a higher ratio of such valid claims on appeal at the hearings.

But fourth and more fundamentally, by calling into question the accuracy of ALJ favorable decisions simply because they reach a different result from those at the state agencies, Pierce fails to take into account critical distinctions in decision-making at the respective levels. Because of these distinctions, the evidentiary records before the ALJs at the hearing are not the same and sometimes bear little relationship to those before the state agency. Accordingly, the resulting ALJ decision is often not so much a rejection of the state agency's judgment as it is an entirely new, (*de novo*) decision based on a broader and more layered panorama of the claimant's condition.

When compared to their state agency level counterparts, ALJs more frequently have highly developed medical evidence and narratives from claimants' treating physicians at hearings. At the DDS level, agency adjudicators work with, and rely most

²¹ Pierce, *supra* note 3, at 36.

²² See *infra* notes 81–84 and accompanying text for suggestion of a less drastic yet more inclusive remedy to the "outlier" decision-maker problem that would address significant outlier deviation at both the DDS and ALJ levels.

²³ See *Bowen v. City of New York*, 476 U.S. 467, 475 n.5 (1986); "Failing the Disabled, Investigation: Disability Benefits System Harbors Culture of Denying Help to Even the Most Unfit to Work, CBS NEWS, Jan 15, 2008, http://www.cbsnews.com/stories/2008/01/15/cbsnews_investigates/main3718129.shtml.

²⁴ See note 82 *infra* and accompanying text.

²⁵ Pierce, *supra* note 3, at 36–37.

²⁶ SSA ODPMI (OFFICE OF DISABILITY PROGRAM MANAGEMENT INFORMATION), FISCAL YEAR 2011 WORKLOAD DATA: DISABILITY DECISIONS (2011); SSA ODPMI (OFFICE OF DISABILITY PROGRAM MANAGEMENT INFORMATION), FISCAL YEAR 2010 WORKLOAD DATA: DISABILITY DECISIONS (2010); SSA ODPMI (OFFICE OF DISABILITY PROGRAM MANAGEMENT INFORMATION), FISCAL YEAR 2009 WORKLOAD DATA: DISABILITY DECISIONS (2009).

²⁷ SSA SAOR (STATE AGENCY OPERATIONS REPORT), SOCIAL SECURITY DISABILITY AND SUPPLEMENTAL SECURITY INCOME (SSI) DISABILITY CLAIMS ALLOWANCE RATES INITIAL AND RECONSIDERATION ADJUDICATIVE LEVEL FISCAL YEAR 2010 BY NATION, REGION AND STATE (2011); SSA SAOR (STATE AGENCY OPERATIONS REPORT), SOCIAL SECURITY DISABILITY AND SUPPLEMENTAL SECURITY INCOME (SSI) DISABILITY CLAIMS ALLOWANCE RATES INITIAL AND RECONSIDERATION ADJUDICATIVE LEVEL FISCAL YEAR 2009 BY NATION, REGION AND STATE (2009). State agency disposition data for FY 2011 were not yet available at the time of this writing.

heavily on, state medical advisors who have never treated or even examined the claimants in question. There is also a much higher degree of representation by counsel at the ALJ stage, which almost always makes a significant difference in the amount, quality and presentation of medical and other evidence.²⁸

ALJs have the discretion to call Medical Experts (MEs) and Vocational Experts (VEs) to testify at hearings on certain medical and vocational issues and sometimes are required by SSA policy or court order to do so. ALJs can also order additional consultative medical examinations by medical specialists, and subpoena medical reports and records from treating physicians, hospitals, educational institutions, or employers, all to obtain a fuller and more accurate record than that assembled at the DDS.

And the ALJ hearings provide far more than the mere opportunity for evaluating “demeanor,” as Pierce emphasizes; they also provide a forum to explain confusing aspects of conditions and treatment and clarify ambiguous aspects of the record through responsive face-to-face inquiries at the hearing. Claimants have the first true opportunity to describe matters not likely apparent from the paper records before the DDS, such as the side-effects of prescribed medication, the negative synergies from the combined or cumulative consequences of multiple impairments, and the burdens and limitations of various treatment regimens.

Face-to-face opportunities are particularly valuable in cases involving mental impairments. Such claimants diagnosed with either mental retardation²⁹ or psychiatric illness are classic “poor historians” who are often unable to provide SSA with accurate medical and work histories and lack insight into the nature of their disabilities. It is not uncommon for the claimant with mental limitations to allege disability based only on a perceived and often undocumented physical condition. A competent representative who can take the time to interview the claimant and obtain the full medical and mental health records can often demonstrate disabling mental impairments which the claimant cannot or will not assert, and can call supporting witnesses to testify at the hearings. In contrast, the state disability agencies do not interview the claimants, much less seek information from potential witnesses.

Finally, on this point, Pierce’s citation of a significant increase in general ALJ “reversal” rates as further evidence of ALJ decisional untrustworthiness is factually unsupported.³⁰ In reality, ALJ approval rates are near a quarter-century low at 58% in 2011.³¹ They have fluctuated significantly over the past 25 years, reaching a high of 72.3% in 1994 to a low of 56.9% in 1998. It was 59.4% in 1980.³² Thus, Pierce’s assertion that “the average ALJ grant rate...h[as] increased dramatically over the past three decades [and that] [t]he net effect has been a doubling of the proportion of the population that has been determined to be disabled,”³³ is false.

Fifth, Pierce’s subsidiary assumption that an increasingly liberal and subjective substantive disability standard for evaluating nonexertional limitations is a principal

²⁸ See William J. Popkin, *The Effect of Representation in Nonadversary Proceedings—A Study of Three Disability Programs*, 62 CORNELL L. REV. 989 (1977).

²⁹ Pierce never mentions mental retardation or persons with intellectual disabilities, in his attack on supposedly unmeasurable nonexertional mental impairments.

³⁰ Pierce, *supra* note 3, at 36.

³¹ See note 11 *supra*.

³² See STAFF OF H. COMM. ON WAYS & MEANS, 110TH CONG., BACKGROUND MATERIAL AND DATA ON THE PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS (“GREEN BOOK”) 1–90, table 1–40 (Comm. Print 2008), available at <http://democrats.waysandmeans.house.gov/media/pdf/111/ssgb.pdf>.

³³ Pierce, *supra* note 3, at 25.

cause of benefit increases also reflects a number of misperceptions. The Social Security Act and agency regulations require that all impairments be supported by appropriate clinical and objective methodologies.³⁴ Pierce confuses and mislabels nonexertional limitations and impairments as entirely subjective and undocumentable in contrast to exertional conditions. This contrast is falsely drawn. Nonexertional limitations can be objectively and clinically evaluated; exertional limitations and impairments can be supported by subjective symptomatology.

Nonexertional limitations are simply any limitations other than those on standing, sitting, lifting, carrying, walking, pushing, or pulling. Thus, examples of nonexertional limitations include visual limitations from blindness, auditory limitations from deafness and severe pulmonary sensitivity to environmental irritants. They are all objectively documentable. Other nonexertional limitations include restrictions that usually flow from the same objectively documented physical impairments that produce exertional restrictions on standing, walking, and lifting, such as postural or manipulative restrictions on bending, stooping, reaching, kneeling, fine and gross manipulation, crawling or balancing. Even the most objectively documentable physical impairments often produce some postural or manipulative nonexertional limitations that must be evaluated.³⁵ Thus, when Pierce indicates that there has been a significant (323%) increase in ALJ approval decisions for claimants with nonexertional restrictions,³⁶ this statistic, without more context, has little meaning.

Strictly speaking, if a disability approval decision were based solely on a claimant's nonexertional restrictions, this would mean the claimant's condition imposed no limitations on standing, sitting, walking, lifting, carrying, pushing, or pulling. Yet, Pierce identifies, for example, musculoskeletal condition cases as a major category in the burgeoning constellation of nonexertional impairment ALJ approval decisions.³⁷ It would be a remarkably rare case for a claimant determined disabled based solely on a musculoskeletal condition, such as severe arthritis, to be impaired solely due to nonexertional restrictions and lacking any restriction on exertional functions.

Nor is the pain that flows from objectively and clinically documented impairments, such as musculoskeletal conditions, necessarily classifiable as a nonexertional restriction; it depends on whether the pain produces exertional or nonexertional limitations as described above. Pain can produce both exertional and nonexertional limitations which can contribute to a disability.³⁸ And while the existence of a potential pain-producing impairment can and must be medically determinable and objectively and clinically documented,³⁹ it is true that there is no definitive scientific device for ascertaining the precise degree and extent of pain (whether exertional or nonexertional) that flows from such an objective impairment.⁴⁰ However, numerous studies, including a congressionally mandated Pain Commission report, have rejected the suggestion that faking or malingering cannot be sufficiently screened in the SSA adjudicative process. The Pain Commission report specifically found that "there is a clear

³⁴ See 42 U.S.C. §§ 423(d)(3), (d)(5)(A) (2011).

³⁵ See Jon C. Dubin, *Overcoming Gridlock: Campbell After a Quarter-Century and Bureaucratically Rational Gap-Filling in Mass Justice Adjudication in the Social Security Disability Programs*, 62 ADMIN. L. REV. 937, 943, 974-75 & nn. 149-52 (2010).

³⁶ Pierce, *supra* note 3, at 35.

³⁷ *Id.*

³⁸ See Social Security Ruling 96-8p, 61 Fed. Reg. 34,474, 34,475 (July 2, 1996); see also 20 C.F.R. § 404.1569a (2011).

³⁹ See *supra* note 34.

⁴⁰ See *Bunnell v. Sullivan*, 947 F.2d 341, 347 (9th Cir.1991) (en banc).

consensus that malingering is not a significant problem [and] that it can be diagnosed by trained professionals, medical and other.”⁴¹

More to the point of Pierce’s suggestion about the temporal relationship between the increase in disability awards and pain standards, it is worth noting that the courts have always interpreted the Act as requiring the evaluation of pain and its resulting exertional and nonexertional limitations in the disability determination process. The agency agrees that the most recent pain statutory standard (adopted in the 1980s) and its regulations merely conform to both case law and longstanding prior agency practice.⁴² Accordingly, the evaluation of pain is neither a new development nor a new requirement. As such, the suggestion that the SSA’s pain standards, as applied by ALJs or otherwise, are a significant new cause of the increase in benefit applications and allegedly unwarranted new recipients is not well-supported.

Moreover, apart from temporal inaccuracy, the “blame the new pain standard” assertion is questionable on other grounds. The assertion conjures nostalgia for an earlier, perhaps mythical, era in the disability benefit programs’ history when claimants largely established eligibility with conditions that presumably produced no pain, or in which pain was otherwise irrelevant to the claimants’ disabling exertional limitations. This categorical proposition is medically dubious and undermined by the failure to delineate what painless (or pain –irrelevant), yet exertionally limiting medical conditions predominated in this earlier period. However, to the extent claimants largely established eligibility without ever experiencing pain from their exertionally limiting impairments in an earlier unspecified time period, it does not necessarily follow that a proportionate increase in documented severe pain among those more recently found disabled would reflect a loosening or liberalization of eligibility criteria or decision-making as opposed to a tightening to restrict claims by persons with pain-free conditions.

Similarly, there have been no significant new changes to the Act to require evaluation of cognitive and psychiatric nonexertional mental impairments in disability determinations, as these conditions have always been potentially disabling impairments under SSA standards.⁴³ Thus, the mere presence of mental impairment eligibility, whether evaluated by ALJs or otherwise, is also not a new development that could account for a significant recent increase in benefit applications and recipients. And while there are also no definitive objective measurements of the precise degree and extent of mental impairments, psychiatrists and psychologists routinely provide professional and clinical evaluations and severity assessments of patients diagnosed with mental retardation or a psychiatric illness. They employ professionally accepted clinical and diagnostic criteria in their assessments and these professional assessments inform the disability determination.⁴⁴ Indeed, professional assessments of mental impairment severity are widely accepted as bases for determining a host of other legal

⁴¹ COMMISSION ON THE EVALUATION OF PAIN, U.S. DEP’T OF HEALTH AND HUMAN SERVS., REPORT 12 (1986); *see id.* at 71-72 (elaborating on Commission’s conclusion that malingering is not a significant problem in the disability evaluation process); *see also* NATIONAL ACADEMY OF SCIENCES INSTITUTE OF MEDICINE, PAIN AND DISABILITY: CLINICAL, BEHAVIORAL AND PUBLIC POLICY PERSPECTIVES 152 (Marian Osterweis et al. eds., 1987) (finding that “there is no evidence that malingering is common in the SSA disability context”); DEBORAH STONE, THE DISABLED STATE 135 (1984) (stating that “[t]he clinical literature frequently discusses the problem of distinguishing genuine from faked pain... [and] [t]here is fairly wide agreement that clinicians can recognize patient deception....”).

⁴² Dubin, *supra* note 13, at 52 n.218.

⁴³ *Id.*

⁴⁴ *See* DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 2000); 20 C.F.R. pt. 404, subpt. P., app. 1 (Listings 12.02–08) (2011).

determinations, often with somewhat more at stake, such as imposition of capital punishment, competency for trial with substantial incarceration on the line, and the need for civil commitment or other significant infringements on basic liberty. In short, Pierce's assertion that a claim for disability benefits for claimants with mental impairments or pain may neither be refuted nor supported through accepted diagnostic criteria and professional evaluation⁴⁵ is erroneous.

Moreover, to the extent new or recent changes in substantive disability standards have affected disability rates they have most likely diminished those award rates. Virtually every amendment to the Social Security Act in the past forty-five years (with the exception of a few provisions of the 1984 Disability Benefits Reform Act) and virtually every recent regulatory change, have rendered the substantive disability standard more strict.⁴⁶ Benefits based on substance abuse, alcoholism, and for most immigrants, and for persons with outstanding felony warrants have been eliminated; other impairments like obesity and diabetes have been removed as separate disabilities, and medical standards for conditions such as HIV, mental retardation, and certain rheumatological disorders have been made stricter.⁴⁷ Benefits have also been expressly restricted for claimants deemed capable of performing no gainful employment other than previously performed work which no longer even exists in the American economy.⁴⁸

The current SSA Commissioner, Michael Astrue, a long-time Republican appointee who served in the Reagan and George H.W. Bush administrations before being appointed SSA Commissioner by President George W. Bush, has characterized the substantive disability standard as "very tough" in a 2008 CBS investigation titled "Failing the Disabled."⁴⁹ The standard is unquestionably strict relative to disability benefit standards in other developed Western countries. Its strictness is further underscored by the significant percentage of claimants who die within two years of receiving benefits and the substantial majority of those who remain out of work even after being denied benefits.⁵⁰

Sixth, there are myriad other factors which more properly explain the increase in Social Security disability applications and resulting benefit awards. To be insured for the Social Security Disability Insurance program, a worker must participate in covered work, resulting in contributions to the Social Security Trust Fund through employee

⁴⁵ See Pierce, *supra* note 3, at 35.

⁴⁶ Dubin, *supra* note 13, at 51–53 & nn.218–20; see also *id.* at 25–26 n.95.

⁴⁷ See *id.*; see also Charles Martin, *Opposing View: Disability Benefits Remains a Vital Lifeline*, USA TODAY, Feb. 3, 2012, <http://www.usatoday.com/news/opinion/story/2012-02-02/Social-Security-disability-claimants/52940212/1?loc=interstitialskip>.

⁴⁸ Dubin, *supra* note 13, at 53 n.220 (citing 68 Fed. Reg. 51,153, 51,159 (Aug. 26, 2003) (codified at 20 C.F.R. §§ 404.1560(b)(3), 416.960(b)(3) (2003)); *Barnhart v. Thomas*, 540 U.S. 20 (2003) (sustaining agency denial based on ability to perform previous job as elevator operator, even though the job no longer exists in significant numbers in the American economy and the claimant was found unable to adjust to alternative work)).

⁴⁹ "Failing the Disabled," *Investigation: Disability Benefits System Harbors Culture of Denying Help to Even the Most Unfit to Work*, CBS NEWS, Jan 15, 2008, http://www.cbsnews.com/stories/2008/01/15/cbsnews_investigates/main3718129.shtml. Pierce's suggestion that the eligibility standard is so lenient or inclusive that anyone with a little anxiety, depression, or pain has "a plausible claim for permanent disability benefits," is unfounded. See Pierce, *supra* note 3, at 35. It is like the assertion that anyone who needs glasses has a plausible claim of disability based on blindness. However, agency regulations establish a preliminary screening step or process to winnow out medically non-severe claims that do not significantly restrict basic work functions. See 20 C.F.R. § 404.1520(c) (2011); see also *Bowen v. Yuckert*, 482 U.S. 137 (1987).

⁵⁰ Dubin, *supra* note 13, at 51–53 & nn.218–20.

payroll (FICA) taxes from that work. Applications are up due to the increasing size of the covered work force and insured worker population compared to the 1960's, 70's and 80's. Women, African-Americans and other minorities are now working in SSA-covered employment settings in much greater numbers than in the period before fruition of the civil rights and women's rights movements.⁵¹

In addition, because the substantive disability standard has always significantly credited advanced age in the disability calculation, the baby boom demographic bump has produced significantly more 50–64 year olds in the advantaged substantive categories in recent times than in the 60's, 70's and 80's.⁵² Other causes of the increase in benefit applications and awards include: recurrent or sustained economic recessions; a trend toward corporate downsizing of less productive workers;⁵³ the elimination or reduction of other benefit programs for people with disabilities and people living in poverty; the rise in the Social Security retirement age to 66; declining access to quality ongoing and preventive health care for low-wage workers; transformations in the low wage economy; the rise in community-based alternatives to institutional care for claimants with mentally illness; outreach efforts to homeless persons with disabilities; state and local welfare agency requirements that certain persons apply for federal disability benefits; and technological, scientific, medical, and psychiatric diagnostic advances that more readily reveal clinical and objective bases for impairments and their severity, among other reasons.⁵⁴

II. THE SSA ALJ SYSTEM IS NOT UNCONSTITUTIONAL

Pierce attempts to buttress his argument that SSA ALJs should be eliminated by asserting that “the present method of SSA disability decision-making is clearly unconstitutional.”⁵⁵ His argument is premised on the theory that Social Security ALJs are “officers of the United States,” rather than “employees,” and are therefore subject to the Appointments Clause of the Constitution, Article II, Section 2, Cl. 2. If this is true, then he further argues that it is unconstitutional that the Commissioner of Social Security cannot directly remove an SSA ALJ, but rather can only petition the Merit Systems Protection Board to remove an ALJ for “good cause.” In support of these

⁵¹ See generally KATHY A. RUFFING, CENTER ON BUDGET AND POLICY PRIORITIES, WHAT THE 2011 TRUSTEES REPORT SHOWS ABOUT SOCIAL SECURITY 8 (2011); MARY POOLE, THE SEGREGATED ORIGINS OF SOCIAL SECURITY: AFRICAN AMERICANS AND THE WELFARE STATE (2006).

⁵² See RUFFING, *supra* note 51, at 8.

⁵³ The Center For Economic and Policy Research has recently pointed out that the total numbers of social security disability applicants and beneficiaries could be rising because many companies since the mid 1990s have “striven to downsize to save money and increase productivity.” As the Center explained:

[A]n implication of this downsizing is that less productive workers will lose their job. A worker who is downsized out of a job at age 50, who may actually have serious mental and or physical problems that limit their ability to work, will have a very difficult time finding a new job. Such a person may well end up getting disability whereas in prior times a company may have been willing to keep them on the payroll until retirement.

See CENTER FOR ECONOMIC AND POLICY RESEARCH, *Rising Disability Claims and Higher Productivity Growth*, Feb. 13, 2012, <http://www.cepr.net/index.php/blogs/beat-the-press/rising-disability-claims-and-higher-productivity-growth>.

⁵⁴ See NATIONAL ACADEMY OF SOCIAL INS., REPORT OF THE DISABILITY POLICY PANEL, BALANCING SECURITY AND OPPORTUNITY: THE CHALLENGE OF DISABILITY INCOME POLICY 6–7, 59–71 (1996); see also RUFFING, *supra* note 51, at 8.

⁵⁵ Pierce, *supra* note 3, at 40.

propositions, Pierce relies on two decisions, one by the Supreme Court and one by the United States Court of Appeals for the District of Columbia Circuit, which not only fail to support his position, but actually rebut it.

Pierce argues that “the holding in the Supreme Court’s 2010 opinion in *Free Enterprise Fund v. Public Company Accounting Oversight Board* (PCAOB) applies directly to SSA ALJs.”⁵⁶ This is demonstrably inaccurate. In its decision, the Supreme Court explicitly noted that “our holding also does not address that subset of independent agency employees who serve as administrative law judges.”⁵⁷ The *Free Enterprise Fund* case focused on the President’s power to remove “officers” who make policy for the executive branch of government. But Social Security ALJs do not, and cannot, make policy for SSA. Rather, their job is to apply SSA policy in order to adjudicate claims for benefits. The Supreme Court recognized this critical distinction between ALJs and the Public Company Accounting Oversight Board, explaining “unlike members of the Board, many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions”⁵⁸ This precisely describes the function of Social Security ALJs. Strikingly, although all ALJs are experienced attorneys, they are not even permitted to interpret decisions of the federal circuit courts of appeals on their own. Rather, they must await SSA’s issuance of “Acquiescence Rulings” instructing them what policy SSA is taking toward any circuit court opinion.⁵⁹

The other case relied upon by Pierce in support of his conclusion that SSA ALJs are clearly “officers of the United States” is the D.C. Circuit’s decision in *Landry v. FDIC*.⁶⁰ There are several flaws with Pierce’s reliance on *Landry*. First, the case did not even address ALJs in the Social Security system. Second, as acknowledged by Pierce, the *Landry* court ruled that the FDIC ALJs at issue in that case are *not* officers of the United States, but rather are “employees.”⁶¹ Thus Pierce is interpreting a case that held that other ALJs are not “officers of the United States” to clearly mandate that SSA ALJs are such “officers.”

A critical underpinning of Pierce’s rationale is his belief that:

[t]he SSA’s rules allow an appeal of an ALJ decision to a higher authority in the agency only at the behest of an applicant whose application for benefits has been denied by an ALJ. ALJ decisions that grant benefits are final. They are not reviewable by any institution of government.⁶²

There is no factual or legal basis for these assertions. Under SSA’s regulations, the final administrative authority, SSA’s Appeals Council, does have the authority to review any ALJ decision—granting or denying benefits—on its “own motion.”⁶³ Any experienced Social Security practitioner (including both authors of this Issue Brief)

⁵⁶ *Id.*

⁵⁷ *Free Enterprise Fund v. PCAOB*, 130 S. Ct. 3138, 3160 n. 10 (2010).

⁵⁸ *Id.*

⁵⁹ 20 C.F.R. §§ 404.985, 416.1485 (2011). *See also* 63 Fed. Reg. 24,927, 24,931 (1998).

⁶⁰ 204 F.3d 1125 (D.C. Cir. 2000).

⁶¹ *Id.* at 1134.

⁶² Pierce, *supra* note 3, at 40.

⁶³ 20 C.F.R. §§ 404.969, 416.1469 (2011); *See* Charles H. Koch, Jr. & David A. Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration’s Appeals Council*, 17 FLA. ST. U. L. REV. 199, 246–49 (1990).

has had the experience of having had “defeat snatched out of the jaws of victory” by the Appeals Council’s own motion review of a favorable ALJ decision. Indeed, recently SSA’s Appeals Council has been more aggressive in undertaking reviews in thousands of cases of ALJ decisions granting benefits. In fiscal year 2011, SSA established a Quality Review initiative in which it reviewed a computer-generated sample of approximately 3,700 unappealed favorable ALJ decisions.⁶⁴

Over four decades ago, in *Richardson v. Perales*,⁶⁵ the Supreme Court confronted multiple challenges to the conduct of Social Security hearings, including the role of the SSA administrative law judge (then known as a “hearing examiner”). The Court upheld both the conduct of such hearings and the role of the hearing examiner. While Pierce’s precise claim of unconstitutionality was not before the Court in *Perales*, it seems highly unlikely that more than forty years later, the Court would overturn a system that it lauded as “designed, and working well, for a government of great and growing complexity.”⁶⁶

III. THE PROPOSED SOLUTIONS ARE MISGUIDED

The ALJ hearing abolition proposal would produce undesirable consequences. For one, it would overwhelm an overburdened federal judiciary with requests for judicial review since all appeals from the agency paper file decisions would proceed directly to federal court without the screening buffer of the hearing stage. Consider that in fiscal year 2010, the state DDSs denied over 625,000 claims (87% of 719,270) at the reconsideration level, whereas ALJs denied or dismissed approximately 235,500 claims (out of 619,887 claims, ALJs dismissed 13% and denied 25%).⁶⁷ Even if one were to assume that same percentage of denials appealed to federal court, this would represent more than a doubling of federal court filings. But dismissals, unlike denials, are usually not appealable for jurisdictional reasons, so the real comparison is probably between, 625,000 denials at the state DDS level and 161,000 denials at the ALJ level.

Moreover, unsuccessful applicants today must have been rejected at all four administrative levels (initial determination, reconsideration, ALJ hearing, and Appeals Council) before seeking judicial review in federal court. Although Pierce is curiously silent on the subject of SSA’s fourth administrative level, the Appeals Council, one must assume that he would eliminate that, too. Indeed, Pierce bases his argument that ALJ decision-making is unconstitutional on his erroneous belief that ALJ decisions constitute the final decision of SSA on disability claims. In fact, it is the Appeals Council, not the individual ALJ, which can either make the final decision itself or formally adopt the ALJ’s decision as the final decision of SSA.⁶⁸ In either event, the Appeals Council’s action is the last agency action prior to court review. Under Pierce’s constitutional theory, then Administrative Appeals Judges at the Appeals Council must also be engaging in unconstitutional decision-making. In fiscal year 2010, the Appeals Council denied approximately 61,425 claims (74% of 83,008). Thus, if the system eliminated appeals to ALJs and to the Appeals Council, then, using the fiscal

⁶⁴ See ODAR Updates Hearing Level and Appeals Council at San Antonio NOSSCR Conference, NOSSCR SOCIAL SECURITY F., Oct. 2011, at 1, 9.

⁶⁵ 402 U.S. 389 (1971).

⁶⁶ *Id.* at 410.

⁶⁷ *Fiscal Year 2010 Workload Data: Disability Decisions*, NOSSCR SOCIAL SECURITY F., Feb. 2011, at 11.

⁶⁸ 20 C.F.R. §§ 404.981, 416.1481 (2011).

year 2010 figures, the potential number of annual appeals to federal court would skyrocket from 61,425 to over 625,000!

Additionally, applicants who have been rejected at only two administrative levels without ever having had the opportunity for a face-to-face encounter with any decision-maker will be far more likely to seek judicial review than unsuccessful applicants in the current system. It is readily predictable that a higher percentage of applicants denied at two levels would seek review in federal court than currently seek review after four levels of denial. Compounding this burden on the federal courts, judicial review would become far more difficult without the more focused records produced through ALJ hearing adjudication.

More fundamentally, the ALJ abolition proposal is an indirect and circuitous response to the perceived problem. The proposal responds to perceived substantive disability standard concerns and larger Social Security trust fund insolvency problems through an entirely procedural solution—eliminate ALJs and abolish a hearing right. This will simply make it procedurally more difficult to prove disability under the perceived disfavored standards and thus reduce the amount of awards in ways that are not calculated to produce greater fairness, accuracy, equity or even efficiency in light of the strains on federal court judicial review resources.

Pierce's secondary proposal for funding another large scale, indiscriminate, continuing disability review (CDR) program is misguided as well. The article notes that "[d]uring the period 1980-83, the SSA reviewed a large number of prior awards. It found that 40% of the beneficiaries whose cases it reviewed were not disabled."⁶⁹ However, by as early as 1984, federal officials were reporting that while over 470,000 people had been removed from the disability rolls, 160,000 had already been reinstated after appeals, and another 120,000 cases were pending.⁷⁰ Moreover, this wholesale purge of the Social Security rolls caused incredible hardship to many disabled persons and produced a large public outcry and widespread congressional condemnation.⁷¹ SSA should preserve CDR funding for a targeted program that focuses on benefit recipients with conditions that are identified as ameliorable over time.

Finally, the larger trust fund solvency issue is a joint Social Security Old Age Survivors Insurance (OASI) Trust Fund and Social Security Disability Insurance (DI) Trust Fund issue. The Congressional Budget Office has most recently projected that the DI Trust Fund will be exhausted in 2017.⁷² But the same report notes that this came close to happening in 1994 and Congress simply redirected revenue from the OASI Trust Fund to the DI Trust Fund. The remedy of allocating payroll taxes between the DI and OASI Trust Funds—which has been employed on several occasions in either direction—is available today, as well.⁷³ The CBO estimates that if the OASI and DI Trust Funds were to be combined (which would not entail any increase in FICA taxes), "funds would be exhausted in 2038," rather than 2017.⁷⁴

⁶⁹ Pierce, *supra* note 3, at 38.

⁷⁰ See Robert E. Rains, *A Specialized Court for Social Security?*, 15 FLA. STATE L. REV. 1, 8 (1987).

⁷¹ See *Schweiker v. Chilicky*, 487 U.S. 412, 416–17 (1988) ("The Social Security Administration itself apparently reported that about 200,000 persons were wrongfully terminated Congress was also made aware of the terrible effects on individual lives that CDR had produced."); see *id.* at 416 (disability reform legislation drafted in response to the excesses of the CDR program "was enacted without a single opposing vote in either Chamber.").

⁷² CONGRESSIONAL BUDGET OFFICE, CBO'S LONG TERM PROJECTIONS FOR SOCIAL SECURITY: ADDITIONAL INFORMATION (Aug. 2011), <http://www.cbo.gov/doc.cfm?index=12375>.

⁷³ See RUFFING, *supra* note 51, at 6.

⁷⁴ CONGRESSIONAL BUDGET OFFICE, *supra* note 72.

The bottom line is that the longer term solution to Social Security trust fund solvency and comprehensive Social Security reform requires rational and comprehensive thought and planning and direct solutions, not indirect and piecemeal procedural diversions. A number of such proposals that involve realistic and equitable approaches to provide long-term stability to the trust fund beyond 2038 exist.⁷⁵ And it bears repeating that the insurance obligations and expectations for workers paying into the Social Security system over decades of their work lives are no less settled for disabled workers than for retired workers or workers' survivors.

Concern for the overall solvency of the trust funds is certainly valid, if frequently overblown, for political purposes. And certainly persons with disabilities who are able to work and want to work, even if only part-time and on an occasional basis, should be able to do so. Ironically, one of the ideas that Pierce first posits, and then rejects, merits serious consideration. He suggests that employers be given incentives to accommodate an individual's disabilities in various ways.⁷⁶ This would be highly desirable, and of course, some employers already engage in such practices. Unfortunately, the Americans with Disabilities Act (ADA) of 1990, has not yet created significantly expanded employment opportunities for persons with disabilities through the often limited nature of mandated accommodations.⁷⁷ The enactment of the Americans with Disabilities Amendments Act of 2008 has the potential to provide greater scope to the employment provisions of the original ADA. One can only hope that the Supreme Court will give the ADA Amendments a more generous interpretation than it repeatedly accorded the original ADA's employment provisions.⁷⁸ However, even an expanded ADA may not reach many persons with the degree of medically and vocationally disadvantaged profiles that usually lead to disability benefit awards.⁷⁹ And the Supreme Court has recognized that the SSA's disability benefit programs and the ADA provide separate yet non-mutually exclusive remedies for the population of persons with disabilities.⁸⁰

Finally, with respect to the problem of substantial adjudicatory decisional variation, there is a less drastic and more targeted alternative to the overinclusive, underinclusive and blunderbuss remedy of ALJ abolition. Indeed, Pierce raises and largely rejects a less sweeping alternative, a systematic review of outlier ALJs' decisions.⁸¹ He notes that some prior agency review efforts to evaluate or review exclusively only favorable ALJ decisions (or only decisions by ALJs with high benefit approval rates) have garnered an unfavorable reception by the courts. Such one-sided review programs, conducted by the agency which employs the ALJ, has a chilling effect on ALJ

⁷⁵ See, e.g., RESTORING AMERICA'S FUTURE, BIPARTISAN POLICY CENTER, DEBT REDUCTION TASK FORCE 70–83 (2010).

⁷⁶ Pierce, *supra* note 3, at 37.

⁷⁷ See Samuel R. Bagenstos, *The Americans With Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 1017–19 (2003) (citing studies showing a small decline in employment participation by disabled persons since the ADA's passage).

⁷⁸ See ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, § 2.

⁷⁹ See Mark C. Weber, *Disability and the Law of Welfare: A Post Integrationist Examination*, 2000 U. ILL. L. REV. 889, 910 (noting that only the more medically and vocationally disadvantaged claimants are eligible for benefits and are therefore less likely qualified for jobs for which ADA reasonable accommodation may be required since ADA "qualification" requires the ability to perform the jobs' essential functions); Motoko Rich, *Disabled, but Looking for Work*, N.Y. TIMES, Apr. 6, 2011, www.nytimes.com/2011/04/07/business/economy/07disabled.html ("[O]ne question is: How many of these beneficiaries could work, given the right services and workplace accommodations? Social Security officials say relatively few.").

⁸⁰ See *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795 (1999).

⁸¹ Pierce, *supra* note 3, at 38.

decision-making, sends an unmistakable message to ALJs to limit claimant-favorable decisions to avoid scrutiny, and treads on the claimant's due process right to an impartial decision-maker.⁸² However, to the extent a remedy is sought to reduce significant overall decisional variation, and not merely the claimant-favorable variety, a review system predicated on significant deviation from the decisional norm in either direction sends no similar particular message and has been sustained against a facial challenge.⁸³

Such a systematic, evenhanded outlier review program would continue to supply a considerably less drastic and more targeted alternative to the problem of decisional variation than complete ALJ abolition. This remedy could also be applied to substantial outlier state agency adjudicators who decide a much greater proportion of cases than ALJs and therefore commit a much greater proportion of errors. The reviews could include targeted investigation of the reasons for the substantial statistical deviations from the norm, supplementary education, and training. Where the substantial decisional disparities reflect a systematic pattern of disregard or indifference to governing law, basic facts, or settled procedure, discipline should be sought.⁸⁴

IV. CONCLUSION

The population of claimants with disabilities or various claimant subpopulations (and the ALJs who judge them) should neither be discriminated against nor scapegoated in the search for remedies to improve the Social Security Disability adjudication system and in the laudable and necessary process of achieving comprehensive Social Security reform. As the working population ages and the eligibility age for full Social Security retirement benefits gradually rises to 67 (and perhaps beyond), it is simply inevitable that we will see a higher percentage of persons validly receiving disability benefits. It would be a breach of the social contract to deny them those benefits through a procedural dodge—particularly one so ill-suited to addressing the perceived problems. As Vice President Hubert Humphrey once said, “[t]he moral test of government is how that government treats those who are in the dawn of life, the children; those who are in the twilight of life, the elderly; those who are in the shadows of life; the sick, the needy and the handicapped.”⁸⁵

⁸² See *Stieberger v. Heckler*, 615 F. Supp. 1315, 1393-98 (S.D.N.Y. 1985).

⁸³ See *Nash v. Bowen*, 869 F.2d 675, 681 (2d Cir. 1989).

⁸⁴ See, e.g., *Soc. Sec. Admin., Office of Hearing and Appeals v. Anyel*, 58 M.S.P.R. 261 (1993) (finding that ALJ's decisional independence did not extend to systematic disregard of binding law and governing procedure, and that a high rate of adjudicatory error can establish good cause for removal and recommending suspension or greater sanction).

⁸⁵ Hubert H. Humphrey, Speech at Dedication of Hubert H. Humphrey Office Building and Headquarters of the United States Department of Health and Human Services (Nov. 1, 1977).

“After” the War on Drugs: The Fair Sentencing Act and the Unfinished Drug Policy Reform Agenda

Kara Gotsch*

In August 2010, U.S. President Barack Obama signed into law the Fair Sentencing Act, legislation that limits the harsh punishments that were enacted during the 1980s for low-level crack cocaine offenses. At the Oval Office signing ceremony, President Obama was joined by Democratic and Republican congressional leaders who had championed reform.

That day, the President’s press secretary, Robert Gibbs, told a reporter, “I think if you look at the people that were there at that signing, they’re not of the political persuasions that either always or even part of the time agree. I think that demonstrates... the glaring nature of what these penalties had... done to people and how unfair they were.”¹

Gibbs was referring to the five- and ten-year mandatory minimum sentences prescribed under federal law for defendants caught in possession for personal use or with the intent to sell as little as five grams of crack cocaine. The drug penalties were the harshest ever adopted by the U.S. Congress and were set at the height of the nation’s “war on drugs,” a time of significant concern—and misunderstanding—about crack cocaine.

The Fair Sentencing Act was welcomed by civil rights and community activists, but the compromise measure fell short of the changes they had sought for two decades. The new law reduces, but does not eliminate, a sentencing disparity that disproportionately impacts African Americans and entangles too many low-level drug offenders in the federal criminal justice system. At the same time, the bipartisan cooperation that led to passage of the Fair Sentencing Act was historic at a time when intense partisan wrangling over a broad range of issues on Capitol Hill dominated debate and stymied action.

This year marks the 40th anniversary of the war on drugs, a war that was officially declared by President Richard Nixon on June 17, 1971. The anniversary provides an opportunity to assess the war’s weapon of choice—drug sentencing laws. This issue brief will consider the efforts to pass the Fair Sentencing Act in response to the “war on drugs”’ failed sentencing policies of the past twenty-five years. It will also discuss the Act’s contribution to a broader movement to address disproportionate punishment and ensure a fairer justice system.

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¹ Robert Gibbs, White House Press Secretary, Press Briefing (Aug. 3, 2010), *available at* <http://www.whitehouse.gov/the-press-office/press-briefing-press-secretary-robert-gibbs-832010>.

I. MASS INCARCERATION AND DRUG SENTENCING

The United States leads the world in incarceration with 2.3 million people confined in federal and state prisons and local jails. This nation's "war on drugs" over the last four decades, more than any other single factor, has fueled this historic incarceration boom. The number of people behind bars for drug offenses has increased more than 12-fold since 1980. About half a million people are incarcerated for a drug offense today, compared to an estimated 41,000 in 1980.²

Until the late 1970s, the number of prisoners had remained relatively flat for nearly a half century. Even as the country's overall population grew by 55 percent from 1940 to 1970, the number of prisoners nationwide remained around 200,000. But by the 1980s, the prison population began to climb and has continued to increase ever since. What changed in the 1980s were political initiatives responding to the emergence of a new drug, crack cocaine, in urban and minority communities. Public fears of increased crime and violence, amplified by sensationalist media accounts, created a political climate that favored promises to get "tough" on drugs by stiffening drug offense penalties.

The Anti-Drug Abuse Acts of 1986 and 1988, signed by President Ronald Reagan, instituted hefty mandatory minimum sentences for drug offenses, including mandatory penalties for crack cocaine offenses that were the harshest ever adopted for low-level drug offenses. Defendants possessing as little as five grams of crack cocaine were subject to a mandatory minimum sentence of five years in prison. Defendants with at least 50 grams were subject to a ten-year mandatory minimum sentence. The severity of crack cocaine penalties was especially striking when compared to powder cocaine, a chemically similar substance, which, like crack cocaine, is used more consistently across racial and ethnic lines than popular perception holds. For powder cocaine, the threshold amounts to trigger the five- and ten-year mandatory sentences were 100 times greater than for crack (e.g., 500 grams instead of five grams and five kilograms instead of 50 grams). This huge gap became known as the 100-to-1 sentencing disparity.

The uneven approach to federal cocaine sentencing was quickly adopted by many state governments, some of which enacted policies even more extreme than those being set at the federal level. For example, in 1989, Missouri adopted a 75-to-1 sentencing disparity between crack and powder cocaine, whereby someone convicted of selling six grams of crack cocaine faces the same prison term—a ten-year mandatory minimum—as a person who sells 450 grams of powder cocaine. In 1990, Oklahoma set a 6-to-1 quantity-based sentencing disparity that required a ten-year mandatory minimum sentence for possessing five grams of crack cocaine and 28 grams of powder cocaine.

II. CONSEQUENCES OF U.S. DRUG LAWS

According to Congress' legislative history, the federal drug sentences enacted during the 1980s were intended to impose stiff penalties on drug "kingpins" and high-level drug traffickers. However, research conducted by the U.S. Sentencing Commission, an independent judicial body created by Congress in 1984, found that the quantities for crack cocaine offenses were set too low to accomplish the objective of punishing high-level traffickers. Moreover, the mandatory minimum structure, which took away judicial discretion at sentencing, failed to differentiate between

² MARC MAUER & RYAN S. KING, *THE SENTENCING PROJECT, A 25-YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOCIETY* (2007), available at http://www.sentencingproject.org/doc/publications/dp_25yearquagmire.pdf.

defendants' roles and culpability. In 2002, the Sentencing Commission warned that crack cocaine penalties "apply most often to offenders who perform low-level trafficking functions, wield little decision-making authority, and have limited responsibility."³ Sentencing Commission data from 2005 found that low-level crack cocaine offenders, such as street-level dealers, lookouts, and couriers, comprised 61.5 percent of the 5,033 individuals charged and sentenced for crack offenses in federal court that year.⁴

The increased incarceration of drug offenders stemming from the 1980s policy changes represented the most significant source of growth in the federal prison system. In 1980, the 4,749 federal prisoners convicted of drug offenses nationwide constituted one-quarter of the federal prison population.⁵ By 2009, over half of federally sentenced prisoners (95,205) were incarcerated for drug offenses.⁶ The accompanying cost to house federal prisoners has also increased to \$6.3 billion in 2011, up almost 1,800 percent since 1980.⁷ Despite this enormous investment, federal prisons are operating at 35 percent above capacity.⁸ Double and triple bunking is commonplace, as is the utilization of non-housing areas for sleeping quarters.

In addition to the disproportionately severe penalties associated with federal crack cocaine offenses, which tended to be low-level and non-violent, the impact of the sentencing disparity has fallen disproportionately on African Americans despite evidence that the prevalence of drug use is similar across racial and ethnic groups, suggesting disparate enforcement of facially neutral policies. An estimated two-thirds of all crack cocaine users are white or Hispanic,⁹ and surveys of users suggest that they generally purchase their drugs from sellers of the same racial and ethnic background.¹⁰ Nevertheless, 79 percent of federal crack cocaine defendants in 2010 were African American.¹¹ Generally, African Americans are more likely to be sentenced to prison, and once there, serve more time for a drug offense than are white drug defendants charged with comparable offenses.¹²

³ U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS—COCAINE AND FEDERAL SENTENCING POLICY (2002), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/200205_RtC_Cocaine_Sentencing_Policy/200205_Cocaine_and_Federal_Sentencing_Policy.pdf.

⁴ U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS—COCAINE AND FEDERAL SENTENCING POLICY (2007), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/200705_RtC_Cocaine_Sentencing_Policy.pdf.

⁵ SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2003, BUREAU OF JUSTICE STATISTICS 519, tbl. 6.57 (Kathleen Maguire ed., 2003), *available at* <http://www.albany.edu/sourcebook/pdf/t657.pdf>.

⁶ Heather C. West & William J. Sabol, *Prisoners in 2009*, BUREAU OF JUSTICE STATISTICS BULLETIN, Dec. 2010, *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/p09.pdf>.

⁷ Federal Bureau of Prisons, *2011 Budget and Performance Summary—Federal Prison System*, *available at* <http://www.justice.gov/jmd/2011summary/html/fy11-bop-bud-summary.htm>.

⁸ *Budget Hearing Before the Subcomm. on Commerce Justice, Science, and Related Agencies of the H. Comm. on Appropriations*, 112th Cong. (2011) (statement of Harley G. Lappin, Director, Federal Bureau of Prisons), *available at* http://appropriations.house.gov/_files/031511BOPDirectorStatement.pdf.

⁹ SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, RESULTS FROM THE 2005 NATIONAL SURVEY ON DRUG USE AND HEALTH, Detailed Table J, Table 1.43A (2006).

¹⁰ Dorothy Lockwood, Anne E. Pottieger & James A. Inciardi, *Crack Use, Crime by Crack Users, and Ethnicity*, in *ETHNICITY, RACE AND CRIME* 21 (Darnell F. Hawkins ed., 1995).

¹¹ U.S. SENTENCING COMM'N, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. 34, *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/Table34.pdf.

¹² U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING 122 (2004); BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1994 85 tbl. 6.11 (1998); BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2003 112, tbl. 7.16 (2004).

The racial disparity associated with crack cocaine sentencing contributed to a negative perception of the U.S. justice system in communities of color.¹³ Indeed, U.S. District Judge Reggie Walton testified before Congress that jurors in his courtroom had refused to convict guilty defendants because “they were not prepared to put another young black man in prison knowing the disparity existed between crack and powder in those... cases.”¹⁴ Judge Walton believed the perceived racial injustice associated with crack cocaine sentences was ample justification for reform. The Sentencing Commission also noted the obvious racial disparity associated with federal crack cocaine cases, prompting the Commission to declare in 2004 that “[r]evising the crack cocaine thresholds would better reduce the [sentencing] gap than any other single policy change, and it would dramatically improve the fairness of the federal sentencing system.”¹⁵

III. POLITICAL CONTEXT FOR REFORM

Many factors contributed to the political atmosphere that finally enabled this long-debated sentencing reform to move forward in 2010. In January 2005, the U.S. Supreme Court deemed the sentencing guidelines issued by the Sentencing Commission discretionary,¹⁶ increasing public discourse around drug sentencing policy, particularly the 100-to-1 cocaine sentencing disparity. There was a convergence of views, among the President, lawmakers, sentencing and legal experts, civil rights and community activists, and just about every prominent newspaper editorial board in the country, that the 100-to-1 cocaine sentencing disparity was unjust and required immediate reform.

Over the course of 12 years, the Sentencing Commission issued four reports to Congress on the consequences of crack cocaine sentencing policy, and each time, urged reform. After its 2007 report, the Commission proposed an amendment to the U.S. Sentencing Guidelines that would lower the recommended sentencing range for crack cocaine offenses, a guideline which judges consult when making sentencing decisions. The changes to the guidelines went into effect on November 1, 2007, thereby reducing the average crack cocaine sentence by 15 months. The mandatory minimums set by Congress did not change and judges were required to uphold the mandatory sentences unless narrow circumstances allowed for a departure.

In December 2007, after holding a hearing and receiving comments from over 30,000 individuals and organizations, the Sentencing Commission voted to make its crack cocaine sentencing guideline amendment retroactive. This proved to be very controversial among some Republican lawmakers on the Judiciary Committees in the U.S. Senate and the U.S. House of Representatives, as well as with then-Attorney General Michael Mukasey, who warned of a resulting violent crime wave if retroactivity was broadly applied. However, federal law gives the Commission the authority to make guideline reductions retroactive without requiring congressional approval, and the Commission’s December 2007 vote stood. As of April 2011, 16,433 people in prison had been granted a sentence reduction (averaging 26 months). The Commission’s analysis of recidivism among those released due to the 2007 retroactivity amendment

¹³ See generally PAUL BUTLER, LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE (2009).

¹⁴ *Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong. (2009) (testimony of U.S. District Court Judge Reggie Walton).

¹⁵ U.S. SENTENCING COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING (2004).

¹⁶ *United States v. Booker*, 543 U.S. 220 (2005).

shows rates of recommitments to prison after release (30.4 percent) consistent with recidivism rates for those crack cocaine offenders released prior to the availability of the sentence reduction benefit (32.6 percent).¹⁷

The Sentencing Commission's advocacy around crack cocaine sentencing reform was critical to emboldening Congress to finally take steps to change the harsh mandatory minimum penalties. First, the Commission's extensive research and data collection provided an important factual foundation, serving both to educate lawmakers and to provide community activists with ammunition for reform. Second, since the Commission is comprised of sentencing experts, including federal judges and lawyers, its recommendations enjoyed widespread credibility. Both Democratic and Republican lawmakers considered the Commission a reliable source of information and analysis.

In addition to the contributions of the Sentencing Commission, a committed and effective advocacy coalition had developed many years earlier to educate Congress and the public about the tragic consequences of this extreme sentencing policy. Civil rights organizations like the National Association for the Advancement of Colored People (NAACP) and the American Civil Liberties Union (ACLU), as well as criminal justice reformers including The Sentencing Project, had been calling for elimination of the sentencing disparity since the Sentencing Commission issued its first report to Congress on this topic in 1995. A reinvigorated campaign, overseen by the Open Society Policy Foundation, brought together a progressive constituency that employed aggressive lobbying strategies over a period of several years, including national lobby days in Washington, DC, call-in days designed to flood Capitol Hill offices with calls for reform from constituents, and ongoing media coverage featuring stories of those incarcerated under the harsh sentencing regime. Over time, the coalition broadened to also encompass legal organizations, faith-based groups (including Christian conservatives), and law enforcement.

In response to this pressure, legislation to address the crack cocaine sentencing disparity had been introduced in every congressional session for over a decade, but little progress was made. The breakthrough finally came in 2009, when Senator Richard Durbin (D-Illinois) introduced his bill to eliminate the crack cocaine sentencing disparity. As Chairman of the Senate Judiciary Committee's Subcommittee on Crime and Drugs, Durbin held a hearing that featured testimony by Assistant Attorney General Lanny Breuer in favor of eliminating the sentencing disparity. Breuer's statement marked the first time since 1986 that any administration had endorsed the elimination of the disparity. This position, which was then repeated publicly numerous times by Attorney General Eric Holder, sent an important message to the Democratic-led Congress that sentencing reform was a priority for the Obama Administration. During his campaign for president, Barack Obama endorsed the elimination of the disparity, and after his election, the issue was highlighted on the White House website as an important civil rights priority.

After many months of negotiations in the Senate, Senator Durbin's legislation, the Fair Sentencing Act, was brought before the Senate Judiciary Committee, where a compromise version was approved. The compromise quickly passed through the

¹⁷ Memorandum from Kim Steven Hunt, Senior Research Assoc. & Andrew Peterson, Research Assoc., Office of Research and Data, to Chair Saris, Commissioners & Judith Sheon, U.S. Sentencing Comm'n (May 31, 2011), *available at* http://www.ussc.gov/Research/Research_Projects/Miscellaneous/20110527_Recidivism_2007_Crack_Cocaine_Amendment.pdf.

Senate under unanimous consent,¹⁸ and a few months later, it was approved by voice vote¹⁹ in the House. The resulting legislation reduced the 100-to-1 disparity to 18-to-1. The five-year mandatory minimum was now triggered when a defendant possessed for distribution at least 28 grams (1 ounce) of crack cocaine. (Previous Sentencing Commission reports had defined a mid-level operator in the drug trade as someone who sold an ounce of crack cocaine in a single transaction.) The penalty triggers for powder cocaine remained unchanged, but the legislation also increased financial penalties and raised the sentencing guidelines for cases in which a defendant uses violence or is the leader of a drug operation. Senator Jeff Sessions (R-Alabama), a longtime conservative leader, supported narrowing, but not eliminating, the sentencing disparity. Senator Sessions and others on the Senate Judiciary Committee, both Republican and Democrat, refused to support legislation that treated the two forms of cocaine the same, indicating the persisting influence of long-held misconceptions that crack cocaine is more harmful than powder cocaine and makes its users violent.

IV. BITTERSWEET VICTORY

Passage of the Fair Sentencing Act in 2010 marked the first time in 40 years that Congress eliminated a mandatory minimum sentence. The bill struck the five-year mandatory minimum sentence for simple possession of five grams of crack cocaine, the only commonly abused drug to trigger a mandatory sentence for mere possession. Under federal law, a conviction for possession of other drugs would likely result in probation rather than a prison sentence.

The last time Congress had approved any kind of sentence reduction occurred 16 years earlier, when it created a “safety valve” that allowed judges to avoid a mandatory minimum sentence if a defendant met certain criteria, including being charged with a non-violent offense and having a minimal criminal record. Slow progress in achieving federal sentencing reform signals how risky most politicians still consider drug and crime issues to be. By supporting a proposal to lessen penalties, many in Congress feared they would be leaving themselves vulnerable in the next election. Political cover was essential, including clear bipartisan support and avoiding a roll call vote, which would have specifically identified a Member of Congress who voted in favor of the sentence reductions. Despite the political hesitance, both Republicans and Democrats spoke in favor of the Fair Sentencing Act and those who eventually sponsored the legislation in the Senate encompassed some of the more conservative and more liberal members of each party.²⁰

¹⁸ Unanimous consent agreements permit expedited consideration of legislation, and are often used for routine or non-controversial matters, but can also be employed for sensitive issues. “A Senator may request unanimous consent on the floor to set aside a specified rule of procedure so as to expedite proceedings. If no Senator objects, the Senate permits the action, but if any one Senator objects, the request is rejected.” U.S. Senate Reference, Glossary, http://www.senate.gov/reference/glossary_term/unanimous_consent.htm.

¹⁹ In the House of Representatives, voice votes can be conducted in which individual Members’ votes are not recorded: “As many as are in favor say ‘Aye’. As many as are opposed, say ‘No’.” On issues that lawmakers may consider controversial, a voice vote allows legislation to move forward without linking each Member to a recorded vote. *See* How Our Laws Are Made, <http://thomas.loc.gov/home/lawsmade.bysec/consideration.html#voting>.

²⁰ Cosponsors of the Fair Sentencing Act of 2010 included Senators Dick Durbin (D-Illinois), Patrick Leahy (D-Vermont), John Kerry (D-Massachusetts), Jeff Sessions (R-Alabama), Tom Coburn (R-Oklahoma), and Orrin Hatch (R-Utah).

Each year, an estimated 3,000 people will benefit from the sentencing changes, resulting in an average reduction of two years for those impacted. The Sentencing Commission estimates that the overall federal prison population will decline by 3,800 people in ten years as a result of the reform.²¹

The advocacy coalition that helped advance the Fair Sentencing Act had sought the complete elimination of the sentencing disparity. While most members of the coalition endorsed the compromise legislation, coalition members remain committed to ending the disparity. Despite the sentencing improvements, the new quantity triggers will still entangle people far less consequential in the drug markets than the major traffickers, those who the federal government claims to prioritize in its enforcement. This continued pursuit of low-level offenders absorbs resources that would be better directed at apprehending more troublesome contributors to the illegal drug trade, including large-volume operators and distribution organizations that are particularly violent or linked to especially violent suppliers in other countries.

The reform coalition has also sought application of the new law to people sentenced under the discredited 100-to-1 disparity. The Fair Sentencing Act did not account for retroactive application of the new mandatory minimums, and many thousands of people in prison are still enduring excessive mandatory sentences handed down under the old law. The stories of people incarcerated weighed heavily on the reform debate. It would be cruel if the long history of injustice would now be forgotten by policymakers.

While the new law became effective in August 2010, the final sentencing guidelines implementing the sentencing scale took effect on November 1, 2011. At the same time, and as a result of a unanimous decision by the Sentencing Commission reached in June 2011, the new guidelines apply to people currently incarcerated for a crack cocaine offense. The Sentencing Commission estimates that 12,000 people will benefit from a sentence reduction averaging 37 months.²² Applications for a sentencing guideline reduction are reviewed and decided by a federal judge. Expedited releases will take place over several years.

Some law enforcement officials and many Republican Members of the House and Senate Judiciary Committees urged the Commission to vote against retroactivity of the guidelines with claims that moving average sentences from 13 years to 10 years would result in increased crime and violence. However, Commissioners received public comment from over 40,000 citizens and organizations in support of retroactivity. Moreover, recent data on recidivism among crack cocaine offenders found no likelihood of increased rates of reincarceration resulting from shorter prison terms. Attorney General Holder testified at a Commission hearing in June 2011 in support of retroactivity, saying “[E]nsuring a fair and effective criminal justice system ... requires the retroactive application of [the crack cocaine] guideline amendment.”²³ The Obama Administration’s support for retroactivity boosted public attention and interest in the Commission decision, although the Administration endorsed a more limited application than what the Commissioners eventually instituted. Moreover, after many

²¹ U.S. Sentencing Comm’n, *Prison Impact Model*, FY2009 Datafile.

²² Memorandum from Office of Research and Data & Office of General Counsel, to Chair Saris, Commissioners & Judith Sheon, U.S. Sentencing Comm’n (May 20, 2011), *available at* http://www.ussc.gov/Research/Retroactivity_Analyses/Fair_Sentencing_Act/20110520_Crack_Retroactivity_Analysis.pdf.

²³ *Retroactive Application of the Proposed Amendment to the Federal Sentencing Guidelines Implementing the Fair Sentencing Act of 2010: Hearing Before the U.S. Sentencing Comm’n.*, (2011) (statement of Eric H. Holder, Jr., Attorney General of the United States).

months of pressure from the reform community, Attorney General Holder reversed course on the U.S. Justice Department's directive to federal prosecutors on cases not yet sentenced for crack cocaine offenses committed prior to the Fair Sentencing Act's passage on August 3, 2010. For almost a year, federal prosecutors contested arguments by defense counsel and some judges that those newly sentenced crack cocaine defendants could not benefit from the mandatory minimum changes enacted by Congress if their conduct occurred prior to the Act. After numerous rulings against the Justice Department's position and with several appellate court cases pending, Attorney General Holder issued a new directive in July 2011 that "pipeline" cases would now benefit from the reduced sentencing structure. On November 28, 2011, the Supreme Court granted cert in *Dorsey v. United States* and *Hill v. United States* and will consider whether the Fair Sentencing Act applies to those defendants who committed an offense prior to enactment but were sentenced afterwards.

Additional options are available to better address the sentencing disparities for those incarcerated, including bipartisan legislation introduced by Representatives Robert "Bobby" Scott (D-Virginia) and Ron Paul (R-Texas) in June 2011, the Fair Sentencing Clarification Act. This legislation would apply the new quantity triggers for the crack cocaine mandatory minimums for all conduct committed prior to the August 2010 enactment of the Fair Sentencing Act, regardless of the defendant's sentencing date. Given the strong opposition to the law by the current House Judiciary Chair, Representative Lamar Smith (R-Texas), near-term success for this legislation is unlikely. A final opportunity for retroactive relief lies with President Obama and his constitutional authority to grant prisoner commutations. On November 21, 2011, he issued his first commutation ever. The beneficiary, Eugenia Jennings, had been sentenced to a 22-year sentence for selling about 13 grams of crack cocaine. Many thousands of federal prisoners, like Eugenia Jennings, also deserve the President's clemency.

V. BUILDING MOMENTUM

In the United States, most law enforcement activity is conducted by state and local governments; only a fraction of cases are pursued at the federal level. Drug offenders constitute 18 percent of state prisoners and overall rates of incarceration for drug offenses are at an all-time high.²⁴ Moreover, among those incarcerated in state prison for a drug offense, six in ten persons have no history of violence or high-level drug selling activity.²⁵ The consequences of mass incarceration brought on by the "war on drugs" persist at all levels.

Fortunately, 2009 saw the first decline in the overall state prison population in almost 40 years. The changes at the state level are linked to new policies enacted to curb corrections growth and spending by investing in alternatives to incarceration, limiting time served in prison, and enhancing reentry services to curb rates of prisoner recidivism. Progress in stabilizing prison growth at the state level is in marked contrast to the federal prison system, which has increased at 2.5 times the rate of state prisons since 2000, 4.1 percent vs. 1.5 percent.²⁶

State policy reform may be a model for the federal criminal justice system, which endures many of the same crowding and budget burdens as the states. Passage of the

²⁴ West & Sabol, *supra* note 6.

²⁵ MAUER & KING, *supra* note 2.

²⁶ West & Sabol, *supra* note 6.

Fair Sentencing Act was an important first step for the federal criminal justice system, but it is a long way from accomplishing the broader reform agenda of reducing excessive penalties for low-level offenses that significantly impact the size of the federal corrections population, limiting costs and ensuring justice for all.

Efforts are underway among the advocacy community to build upon the sentence reduction embraced by the Fair Sentencing Act and to capitalize on the reform movement that has been gaining momentum at the state level. For example, during the federal deficit debates of 2011, a letter sent to Capitol Hill—calling for sentencing reforms that would stop the growth of the federal prison system and reduce costs—was supported by 80 organizations, including the American Correctional Association, Drug Policy Alliance, United Methodist Church, National Organization for Women, and Leadership Conference on Civil and Human Rights. Reforms outlined included:

- making retroactive congressional reforms to crack cocaine sentencing;
- diverting low-level offenders from incarceration;
- enhancing elderly prisoner release programs;
- expanding time credits for good behavior; and
- eliminating mandatory minimum sentences for drug offenses.

In 2011, the Obama Administration proposed recalculating prisoner time credits for good behavior by increasing time off by seven days to 54 days per year. The Administration also proposed a program to earn 60 days off of a prisoner's sentence for participation in rehabilitative programs. For example, prisoners working at least 180 days in prison industries programs, which maintain government contracts to produce items like furniture, solar panels, and clothing, could receive up to 60 days per year off their sentence. Both provisions have been incorporated into bipartisan legislation that was approved by the Senate Judiciary Committee in July 2011.

With the changes in the makeup of Congress resulting from the November 2010 elections, the prospects for advancing a broader sentencing reform agenda are uncertain. Representative Lamar Smith (R-Texas) was the only Member of Congress to speak in opposition of the Fair Sentencing Act. In January 2011, he became Chairman of the House Judiciary Committee; any substantive criminal justice reform initiatives in the House of Representatives will be considered by his Committee first.

At the same time, some of Representative Smith's Republican colleagues have been vocal about the need for change. For example, a prominent Subcommittee Chairman on the House Appropriations Committee, Representative Frank Wolf (R-Virginia), has applauded state-level reform efforts to reduce incarceration levels and promote rehabilitation. Representative Wolf has expressed interest in examining some of these efforts for federal implementation. He has also been critical of funding requests to expand federal prison capacity and called for an examination of ways to address federal prison overcrowding without increased spending, namely through sentencing reforms. Moreover, for fiscal year 2012, his Committee awarded \$70 million in funding to Second Chance Act programs that help prisoners transition to communities after incarceration in order to reduce recidivism. His support for the reentry initiative sharply contrasted with Senate appropriators who chose to zero-out these funds while increasing appropriations for federal prisons by \$300 million over 2011 allotments.

VI. CONCLUSION

A new awareness of the problems that plague the American criminal justice system is clearly emerging. After taking office, President Obama's national drug policy director, a longtime police official, rejected use of the term "war on drugs." It was a promising beginning and the Administration's support for reforming crack cocaine sentencing was consistent with the rhetoric. After decades of adding and escalating mandatory minimum sentences, Congress and the White House, for the first time, stepped away from the cycle of ever-harsher penalties. Given the United States' role as the principal architect and major proponent of a drug control system that has emphasized "zero-tolerance" and criminal sanctions, the passage of the Fair Sentencing Act is a milestone for U.S. policy.

Still, the drug war is deeply entrenched politically and institutionally. Achieving a more profound shift in the nation's approach to drugs will require sustained progress in reforming drug sentencing laws to ensure fair and proportionate penalties, building on the success of the Fair Sentencing Act. A more humane and effective approach to drugs will also require progress on a broader reform agenda, including:

- strengthening funding for evidence-based prevention and treatment;
- re-investing in the communities that have been hardest hit by drug abuse and by the drug war;
- more selectively targeting enforcement to discourage drug market violence; and
- embracing innovative community corrections systems that can provide effective alternatives to incarceration.

How policymakers choose to respond will depend on the persuasiveness of the arguments for reform and the commitment of the advocacy community to advancing the change.

With Religious Liberty for All: A Defense of the Affordable Care Act's Contraception Coverage Mandate

Frederick Mark Gedicks*

The “contraception mandate” of the Patient Protection and Affordable Care Act of 2010 (the “ACA”) poses a straightforward question for religious liberty jurisprudence: Must government excuse religious persons from complying with a law they find burdensome, when doing so would violate the liberty of others by imposing on them the consequences of religious beliefs and practices that they do not share and which interfere with their own religious and other fundamental liberties? To pose this question is to answer it: One’s religious liberty does not include the right to interfere with the liberty of others.

The contraception mandate strikes a careful and sensible balance of competing liberty interests by exempting religious persons and organizations who do not externalize the costs of their religious beliefs and practices onto others who do not share them. It exempts churches that largely employ and serve persons of their own faith, but not religious employers who hire and serve large numbers of employees who do not belong to the employer’s religion or who otherwise reject its anti-contraception values.

That religious liberty is a fundamental constitutional value is not in doubt.¹ Access to contraceptives is also a fundamental constitutional liberty.² Constitutionally guaranteed access to contraception, moreover, is a critical component of the well-being and advancement of women. Control over reproduction has enabled women to time and space their pregnancies, thereby preserving and enhancing their health and that of their new-born children,³ and enabling them to enter the workforce on more equal terms with men.⁴

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¹ See U.S. Const. art. VI, cl.3 (“[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”); *id.*, amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”).

² See *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 380 U.S. 947 (1965).

³ See, e.g., Sylvia Law, *Sex Discrimination and Insurance for Contraception*, 73 WASH. L. REV. 363, 369-70 (1998); Adam Sonfield, *The Case for Insurance Coverage of Contraceptive Services and Supplies without Cost-Sharing*, 14 GUTTMACHER POL. REV. 7, 7-8 (Winter 2011).

⁴ See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992) (“The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”); Sonfield, *supra* note 3, at 9 (Access to oral contraception allowed women to “invest in higher education and a career with far less risk of an unplanned pregnancy,” and resulted in “fewer first births to high school- and college-aged women, increased age at first marriage, increased participation by women in the workforce and more children born to mothers who were married, college-educated and had pursued a professional career.”).

Contraception nevertheless remains a significant expense beyond the reach of many women, because most health insurance plans and policies do not cover them,⁵ or cover them only with substantial patient cost-sharing.⁶ The most effective oral contraceptive drugs cost between \$180 and \$960 per year, depending on the drug prescribed and the area of the country where the prescription is filled, in addition to the prescribing doctor's examination fees which can range from \$35 to \$250 per visit.⁷ Many women experience side effects from the cheapest oral contraceptives (which are usually generic brands) or find that these are less effective for them in preventing pregnancy.⁸ Some of the most inexpensive contraception, such as intrauterine devices ("IUDs") and anti-contraceptive drug implants, have high up-front costs ranging from \$500 to \$800, in addition, again, to one or more examination fees.⁹ Such costs are a significant financial obstacle to the use of contraception by working-class and lower-income women,¹⁰ and simple economics suggests that women of all but the highest income classes are likely to use contraceptives more often and more consistently when they can obtain them at no cost.

The ACA seeks to reduce health care costs and improve public health and well-being by encouraging the use of preventive health care services. It thus requires that group health plans and individual insurance policies cover a range of preventive services without "cost-sharing"—that is, without copayments, coinsurance, deductibles, or other amounts paid by the patient.¹¹ It is widely agreed that contraception use substantially reduces health care costs.¹² Accordingly, administrative rules adopted by the Departments of Health and Human Services, Labor, and the Treasury (collectively, the "Departments") following enactment of the ACA define "preventive health care services" to include FDA-approved contraceptive methods and counseling, including

⁵ See, e.g., Law, *supra* note 3, at 369-70 ("Except for health maintenance organizations (HMOs), about two-thirds of private insurance plans exclude coverage for contraceptive pills, even though virtually all private insurance plans include coverage for other prescription drugs."); C. Keanin Loomis, *A Battle over Birth "Control": Legal and Legislative Employer Prescription Contraception Benefit Mandates*, 11 WM. & MARY BILL RTS. J. 463 (2002) ("[I]t is estimated that forty-nine percent of all health care plans still do not offer prescription contraceptives.").

⁶ See, e.g., Sonfield, *supra* note 3, at 10 ("A 2010 study found that women with private insurance that covers prescription drugs paid 53% of the cost of their oral contraceptives," and that this expense amounted to "29% of their annual out-of-pocket expenditures for all health services.").

⁷ E.g., PLANNED PARENTHOOD, BIRTH CONTROL METHODS—BIRTH CONTROL OPTIONS, <http://www.plannedparenthood.org/health-topics/birth-control-4211.htm> (last visited Oct. 1, 2012) [hereinafter "Birth Control Costs"]; Ctr. for Am. Progress, *The High Costs of Birth Control: It's Not As Affordable As You Think* (Feb. 15, 2012), <http://www.americanprogress.org/issues/women/news/2012/02/15/11054/the-high-costs-of-birth-control/>.

⁸ Cf. Sonfield, *supra* note 3, at 9 ("[O]ne-third of women using reversible contraception would switch methods if they did not have to worry about cost; these women were twice as likely as others to rely on lower-cost, less effective methods.").

⁹ "Birth Control Costs," *supra* note 7; James Trussell et al., *Cost Effectiveness of Contraceptives in the United States*, 79 CONTRACEPTIVES 5, 5-6, 9-10, 13 (2009).

¹⁰ See Law, *supra* note 3, at 392-93.

¹¹ Pub. L. No. 111-148 § 2713, 124 Stat. 131 (codified at 42 U.S.C. § 300gg-13(a)) (2010).

¹² See, e.g., Law, *supra* note 3, at 366-67 & n.13, 394-95; Loomis, *supra* note 5, at 477-78; Sonfield, *supra* note 3, at 10; Trussell, *supra* note 9, at 5.

“emergency contraception” which can prevent pregnancy after intercourse or fertilization, such as Plan B (the “morning-after pill”), Ella (the “week-after pill”), and IUDs.¹³

Some religious organizations and persons objected to the mandate on theological grounds. Roman Catholic teaching, for example, condemns the use of all “artificial” methods of contraception. Catholic universities, hospitals, charities, and other non-profit organizations thus objected to the requirement that their group health plans comply with the mandate, even though they employ and serve large numbers of non-Catholics. Nonprofits affiliated with Protestant denominations and other religions that do not generally condemn contraceptive use objected to the mandated coverage of emergency contraception, which their affiliated religions teach is morally equivalent to aborting a pregnancy—again, even though they employ and service large numbers who do not object to emergency contraception. Finally, a few private for-profit employers engaged in commercial businesses have objected to the mandate on the grounds that it violates the personal religious beliefs of their owners.

The Departments accommodated the objections of religious employers by exempting from the mandate tax-exempt organizations whose mission is the teaching of religious values primarily to members of their own faith through employees of their own faith.¹⁴ In effect, this definition exempted churches and their integrated auxiliaries. Some religious nonprofit and commercial employers continued to object to the mandate because their provision of secular or commercial products and services to persons outside their affiliated faith, and their employment of large numbers of people who do not belong to the faith, left them outside the proposed religious-employer exemption.¹⁵ When the government declined to enlarge the exemption, a number of these religious employers filed suit, arguing that the contraception mandate violated their rights under the Religion Clauses of the First Amendment and the Religious Freedom Restoration Act of 1993 (“RFRA”).¹⁶

The rhetoric of religious employers challenging the mandate loosely frames the issue as an unwarranted federal violation of the religious liberty of nonexempt religious employers, and generally fails even to mention the federal government’s weighty

¹³ Section 2713 of the Public Health Act, enacted as part of the ACA, included within the definition of preventive health care services “such additional preventive care and screenings” not otherwise covered, “as provided for in comprehensive guidelines supported by the Health Resources and Services Administration” (the “HRSA”). 42 U.S.C. § 300gg-13(a)(4) (West 2012). The HRSA subsequently adopted women’s coverage guidelines which include “contraceptive methods and counseling,” defined as “[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.” HRSA, Women’s Preventive Services: Required Health Plan Coverage Guidelines, <http://www.hrsa.gov/womensguidelines/> (last visited Oct. 1, 2012).

¹⁴ The implementing rules define a “religious employer”, as any employer that

- (1) “Has the inculcation of religious values as its purpose”;
- (2) “[P]rimarily employs persons who share its religious tenets”;
- (3) “[P]rimarily serves persons who share its religious tenets”; and
- (4) “[I]s a non-profit organization” under enumerated sections of the Internal Revenue Code which generally refer to “churches, their integrated auxiliaries, and conventions or associations of churches, as well as to the exclusively religious activities of any religious order.”

76 Fed. Reg. 46621, 46623 (Aug. 3, 2011) (citing and describing I.R.C. §§ 6033(a)(1), - (a)(3)(A)(i) & - (a)(3)(A)(iii)).

¹⁵ For a summary of comments for and against the religious-employer exemption, see Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8726-27 (Feb. 15, 2012).

¹⁶ A link to the various lawsuits, which as of the date of this Paper numbered over thirty, is a maintained by the Becket Fund for Religious Liberty at <http://www.becketfund.org/hhsinformationcentral/>.

interests in protecting the religious liberty and enlarging the access to contraceptives of employees who do not share the religious values of their employers.

This Issue Brief demonstrates that the contraception mandate does not violate the Religion Clause or RFRA rights of religious employers.¹⁷ The mandate is a “religiously neutral, generally applicable” law that does not discriminate against religious employers, does not entangle courts or government generally in disputes about theology or internal church governance, and does not “substantially burden” religious exercise. The mandate is additionally justified as the least restrictive means of protecting compelling government interests. Finally, while all these conclusions apply fully to religious nonprofit organizations, they apply with special force to religious owners of secular businesses engaged in for-profit commercial markets.

I. RELIGION CLAUSES

A. FREE EXERCISE CLAUSE

It is well-established that burdens on individual religious exercise imposed by “religiously neutral, generally applicable” laws do not violate the Free Exercise Clause.¹⁸ A free exercise exemption from the societal obligation to obey the law is generally compelled only when the law violates neutrality and generality by discriminating against or targeting religious conduct while leaving comparable secular conduct alone.¹⁹ As a religiously neutral, generally applicable law, the contraception mandate cannot plausibly be challenged under the Free Exercise Clause.

1. Religious Neutrality

A law lacks religious neutrality if it restricts religious practices because they are religious—that is, if it discriminates on the basis of religion.²⁰ Such discrimination occurs when a law defines the class it regulates in religious terms or applies only to certain religious people or to religion generally.²¹ A set of health and animal protection laws, for example, whose effect was to prohibit the animal-sacrifice rituals of a

¹⁷ One federal district court recently rejected Religion Clause and RFRA challenges to the mandate, concluding that religious employers have no right to impose their religious beliefs on employees who reject them, *O’Brien v. U.S. Dep’t Health & Human Servs.*, No. 4:12-CV-476 (E.D. Mo. Sept. 28, 2012), slip op. at 9-22, and two influential state supreme courts have rejected Religion Clause challenges to state contraception mandates identical to that of the ACA on the same ground. *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67 (Cal.), *cert. denied*, 543 U.S. 816 (2004) and *Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459 (N.Y. 2006), *cert. denied*, 552 U.S. 816 (2007). On the other hand, one federal district court has temporarily restrained enforcement of the mandate on RFRA grounds against a single for-profit employer. *Newland v. Sebelius*, Civ. No. 1:12-cv-1123-JLK (D. Colo. July 27, 2012).

¹⁸ *Employment Div. v. Smith*, 494 U.S. 872, 879-80 (1990). The Court has repeatedly affirmed this doctrine in the decades since *Smith* was decided. *See, e.g.*, *Christian Legal Soc. v. Martinez*, 130 S.Ct. 2971, 2993 n.24 (2010); *Gonzalez v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 424 (2006); *Cutter v. Wilkinson*, 544 U.S. 709, 715 (2005); *City of Boerne v. Flores*, 521 U.S. 507, 515 (1997); *Church of the Lukumi Babulu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993); *cf. Hosanna-Tabor Church & Sch. v. EEOC*, 132 S.Ct. 694, 706-07 (2012) (distinguishing *Smith* in recognizing ministerial exception to federal anti-discrimination laws).

¹⁹ *E.g., Lukumi*, 508 U.S. 520 (1993) (invalidating municipal ordinances whose net combined effect permitted virtually all secular and religious killings of animals except those by minority religious sect).

²⁰ *Id.* at 533.

²¹ *Id.* (“[T]he minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context.”); *id.* at 534, 535 (“Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. [] Apart from the text, the effect of a law in its real operation is strong evidence of its object.”).

minority sect while exempting hunting, fishing, and kosher slaughter from that prohibition, constituted a “religious gerrymander” that is not religiously neutral.²²

Some of the anti-mandate plaintiffs argue that the mandate’s religious exemption is not religiously neutral because it burdens the teachings, practices, or beliefs of religious employers that oppose contraception on religious grounds but do not fall within the exemption. The mandate obviously has a greater impact on Catholic and other religious institutions that oppose some or all of the mandated contraception coverage than it has on secular organizations and religious institutions that do not oppose any of the mandated coverage. This religiously disproportionate impact of the mandate, however, does not constitute religious discrimination or gerrymandering. Free exercise doctrine condemns only *intentional* religious discrimination, not religious burdens occurring as the incidental effect of a neutral and general law.²³

The Departments determined that employees of exempt religious employers were likely to adhere to their church’s anti-contraceptive orthodoxy regardless of the cost of the contraceptives, so that exempting such employers from the mandate would enhance religious liberty without significantly intruding upon the religious liberty of employees or undermining the mandate’s regulatory goal of affording women access to no-cost contraception.²⁴ Nonexempt religious employers that oppose contraception, but are participating in a secular or commercial market that delivers goods or services to those outside as well as within the faith largely through employment of persons who are not members of the faith, will almost always have a large number of employees who do not share their employer’s opposition to contraception and would likely use contraceptives (or use them more consistently) if they were available without cost-sharing.²⁵ With respect to such employers, the Departments determined to minimize “religious externalities”—that is, a religious organization’s use of the economic leverage that inheres in an employment relationship to impose its religious anti-contraception beliefs on unbelievers, members of other faiths, and members of the employer’s faith who do not share its understanding of the faith’s requirements. As the Departments observed, exempting religious organizations that participate in secular markets and employ large numbers of nonmember employees “would subject their employees to the religious views of the employer, limiting access to contraceptives, and thereby inhibiting the use of contraceptive services and the benefits of preventive care.”²⁶

There is little doubt that the contraception mandate is religiously neutral. Neither the text of the ACA nor that of the implementing regulations facially discriminates on the basis of religion. Both apply the mandate to covered group health plans and health insurance carriers that are defined in purely secular terms. Nor are the ACA or its implementing regulations religiously gerrymandered or susceptible to discriminatory application that would impose them on only some religious organizations, but not others.²⁷ The only religious language in the regulations relates to the definition of

²² See *id.* at 535.

²³ See *Smith*, 494 U.S. at 878 (The Free Exercise Clause is not violated where a burden on religious practice “is not the object... but merely the incidental effect of a generally applicable and otherwise valid” law.”).

²⁴ 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012).

²⁵ *Id.*

²⁶ *Id.*

²⁷ A religiously discriminatory pattern of enforcing the mandate and the exemption differently against religious employers could violate religious neutrality, *cf.* *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (invalidating race-neutral ordinance applied in racially discriminatory manner), but any challenge on this ground will obviously have to await actual application and enforcement of the mandate and the exemption.

“religious employers” who are exempt from the mandate. Finally, as a matter of constitutional policy, it would make little sense to invalidate a religious exemption as “too narrow” when the free exercise doctrine relieves the government of the obligation to provide any exemption at all. Invalidating religious exemptions that relieve some but not all conceivable free exercise burdens would create the perverse governmental incentive not to allow any exemptions in the first place.²⁸

2. General Applicability

The requirement of “general applicability” is an additional protection against religious discrimination or “targeting”—that is, a protection against laws that pursue legitimate secular objectives only against religious conduct.²⁹ A law satisfies this requirement if it does not focus its burdens solely or mostly on religious organizations or religious individuals.³⁰ A large number of exemptions for secular but not religious conduct often signals a law’s lack of general applicability.

The vast majority of employers subject to the contraception mandate are secular. The mandate contains no secular exemptions, only the “religious employer” exemption. The mandate is thus generally applicable because it pursues its goal of providing widespread no-cost contraceptive coverage through all employers, not just religious ones. The ACA does exempt certain “grandfathered” group insurance plans from the no-cost preventive-care mandate of which the contraception mandate is a part, and also exempts certain religious persons from the entire ACA. Some of the anti-mandate plaintiffs have erroneously argued that when combined with these broader exemptions, the contraception mandate exempts so many persons or institutions that its refusal to exempt *all* religious employers violates the principle of general applicability. However, these exemptions do nothing to undermine the general applicability of the mandate.

a. THE INDIVIDUAL INSURANCE-PURCHASE MANDATE EXEMPTIONS

The ACA exempts certain classes of persons from the mandate to purchase health insurance, such as those who belong to religions that reject the use of health insurance, undocumented aliens, those incarcerated in federal or state prison, those who cannot afford coverage, members of federally recognized Indian tribes, and those granted a hardship exception by HHS.³¹ These exemptions to the “individual insurance-purchase mandate” are irrelevant to analyzing the general applicability of the contraception mandate. Exemptions from the individual-purchase mandate excuse

²⁸ *Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459 (N.Y. 2006) (“To hold that any religious exemption that is not all-inclusive renders a statute non-neutral would be to discourage the enactment of any such exemptions—and thus to restrict, rather than to promote, freedom of religion.”), *cert. denied*, 552 U.S. 816 (2007).

²⁹ See *Church of the Lukumi Babulu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993) (“[L]aws burdening religious practice must be of general applicability. [I]nequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation.”).

³⁰ Since a law that pursues legitimate government objectives only against religious organizations or individuals is not religiously neutral, it is not clear that general applicability has any independent doctrinal significance. The Court itself sees neutrality and generality as merely mutually reinforcing tests: A law that religiously discriminates is usually not generally applicable, and vice versa. *Lukumi*, 508 U.S. at 531; see also *id.* at 557 (Scalia, J., concurring in part and concurring in the judgment) (arguing that the terms “substantially overlap”: Religious neutrality invalidates laws that facially discriminate on the basis of religion, whereas general applicability invalidates facially neutral laws that discriminate on the basis of religion “through their design, construction, or enforcement.”)

³¹ 42 U.S.C. § 5000A(d)-(e) (West 2012).

one from the obligation to *purchase* health insurance coverage, whereas exemption from the contraception mandate excuses one from the obligation to *provide* no-cost contraception coverage in an insurance plan; the one has nothing to do with the other. An exemption from the insurance-purchase mandate would not exempt a person from the contraception mandate (if he or she happened also to be an employer or insurer), and employers or insurers exempted from the contraception mandate would not automatically be exempted from the individual-purchase mandate (if they happened to be individuals). Indeed, the failure of the ACA to provide any exemptions at all from the individual-purchase mandate would not have impacted the contraception or preventive-care mandates, and vice versa.³² The goals of the individual-purchase mandate differ substantially from the goals of the contraception and preventive-coverage mandates. Accordingly, religious employers that are not exempt from the contraception mandate cannot use the exemptions from the individual-purchase mandate to argue that the contraception mandate violates general applicability.

b. THE “GRANDFATHERED PLAN” EXEMPTION

The ACA allows individuals who are satisfied with their existing health care coverage to keep it. Accordingly, the ACA exempts from many of its provisions, including the contraception mandate, group health insurance plans existing on the date on which the ACA was enacted, as long as such plans do not significantly change the coverage they offered as of that date.³³ This exemption is also generally applicable. Religiously sponsored group-insurance plans in existence when the ACA was enacted are as eligible as secularly sponsored plans to maintain their then-existing coverage and preserve their grandfathered-plan exemption from the ACA, including the contraception mandate. Nothing in the text of the relevant statutory and regulatory provisions imposes any greater burdens or requirements on religiously sponsored plans for obtaining and maintaining grandfathered status. Thus, like the individual-mandate exemptions, the grandfathered-plan exemption is also irrelevant to the analysis of the contraception mandate’s general applicability analysis.

* * *

Neither the “religious-employer” exemption to the contraception mandate, the individual exemptions to the individual-purchase mandate, nor the grandfathered-plan exemption to the ACA offers any benefits or advantages to secular employers that are not also available to religious employers. Taken together, the exemptions do not result in the contraception mandate’s being imposed solely or primarily on religious employers. To the contrary, employers subject to the mandate remain overwhelmingly secular notwithstanding these exemptions. Accordingly, none of these exemptions cause the contraception mandate to violate the principle of general applicability.

³² Cf. *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (Exemption of undercover officers from police force’s no-beard policy did not violate principle of general applicability, because exemption of persons not identifiable as police officers had no effect on the policy’s goals of uniformity, morale, and *esprit de corps*.).

³³ Pub. L. No. 111-148 § 1251, 124 Stat. 131 (codified at 42 U.S.C. § 18011) (2010). The Departments view the grandfathered-plan exemption as transitional. Over time, they expect that the sponsors of most grandfathered plans will decide either to abandon grandfathered status and become fully subject to the ACA, or to cease offering group health insurance altogether. 75 Fed. Reg. 34538, 34547, 34548.

B. ESTABLISHMENT CLAUSE

The Establishment Clause prohibits “theological entanglement”—the government’s deciding questions of religious doctrine, intervening on one side or the other of a dispute about such questions, or interfering in the internal governance of religious congregations.³⁴ Some of the mandate-litigation plaintiffs have argued that deciding whether a religious organization has the “inculcation of religious values” as its purpose and applying the other elements of the “religious-employer” exemption violate this anti-entanglement norm. The mandate, however, does not cause theological entanglement.

Courts may not decide religious questions, but they possess full power to decide whether and how the law applies to religious organizations and individuals. Legislative accommodations of religion would be impossible if government were “forbidden to distinguish between the religious entities and activities that are entitled to accommodation and the secular entities and activities that are not.”³⁵ Thus, the “ministerial exception” from federal antidiscrimination laws prohibits courts from deciding whom a congregation must accept as its minister, but courts are nevertheless empowered to decide who is a “minister” for the purpose of determining whether the exception applies to a congregational employment decision.³⁶ Similarly, courts may not decide whether an organization’s decision to call itself a “religion” is theologically justified, but it may decide whether the organization is “religious” for the purpose of applying Internal Revenue Code laws that define charitable income tax deductions.³⁷

The Establishment Clause prohibits a court from telling any religious employer what its values are with respect to contraception use and whether or how it must exercise them, but the Clause does not prohibit a court from deciding whether a religious organization qualifies for the “religious-employer” exemption as an organization that exists to inculcate religious values.³⁸ The exemption, therefore, does not entangle federal courts or the federal government generally in religious doctrine or religious disputes.

* * *

Neither the Free Exercise Clause nor the Establishment Clause provides any plausible basis on which to challenge the contraception mandate. The contraception mandate lies fully within the constitutional limits that these Clauses place on government action.

II. RELIGIOUS FREEDOM RESTORATION ACT

³⁴ See, e.g., *Hosanna-Tabor Evangel. Lutheran Church & Sch. v. EEOC*, 132 S.Ct. 694 (2012); *Serbian E. Orthodox Diocese v. Milivojevic*, 426 U.S. 696 (1976); *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190 (1960); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952).

³⁵ *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 79 (Cal.), *cert. denied*, 543 U.S. 816 (2004).

³⁶ Compare *Hosanna-Tabor Church & Sch. v. EEOC*, 132 S.Ct. 694, 706 (2012) (holding that Religion Clauses encompass a “ministerial exception” that prohibits the application of the Americans with Disabilities Act to a church’s decision to terminate a minister), *with id.* at 707-09 (analyzing whether plaintiff was a “minister” for purposes of the exception).

³⁷ See *Hernandez v. Comm’r*, 490 U.S. 680, 696-97 (1989).

³⁸ Cf. *Larson v. Valente*, 456 U.S. 228, 255 n.30 (1982) (explaining that the Establishment Clause does not preclude government from requiring that organization claiming religious exemption prove that it is religious).

RFRA provides that “[g]overnment shall not substantially burden a person’s exercise of religion even if the burden results from a law of general applicability,” unless the government demonstrates that the burden furthers “a compelling government interest” using “the least restrictive means.”³⁹ This section discusses “substantial burden” under RFRA, while Part III following immediately after, discusses the compelling-interest test, which applies to both free exercise and RFRA claims.

Nonexempt religious employers claim that the contraception mandate violates RFRA because their beliefs and teachings prohibit the use of some or all of the contraceptive coverage that the mandate requires. What follows concludes that (A) the simple addition of mandated contraception coverage to a plan sponsored by a nonexempt religious employer, without any other changes, does not constitute a “substantial burden” on the religious exercise of such employers under RFRA; and (B) even assuming that it did, various alternative means of satisfying the mandate do not constitute burdens on religious practice at all, let alone “substantial” ones.

A. ADDITION OF CONTRACEPTIVE COVERAGE

The government imposes a “substantial burden” on religious exercise when it compels a person or group “to engage in conduct proscribed by their religious beliefs,” or forces them “to abstain from any action which their religion mandates they take.”⁴⁰ Literal compulsion is not necessary for a burden to be “substantial;” “substantial pressure” on a person or group to modify their behavior in a way that violates their beliefs constitutes a substantial burden.⁴¹

The purported burden on nonexempt religious employers consists of requiring them to make contraceptives available through their health care plans, which, it is argued, violates their religious liberty to oppose a practice which they believe to be sinful or immoral. The simple act of adding mandated coverage to an employer’s existing health plan, however, does not substantially burden an employer’s ability to oppose contraception, because it neither requires the employer to use contraceptives, nor to endorse, encourage, or pay any meaningful amount for such use.

1. Use

Nothing in the mandate requires or pressures any employer to use contraceptives. After complying with the mandate, a religious employer remains as free as before to refrain from using contraceptives.⁴² The mandate, therefore, does not burden at all a religious employer’s practice of the anti-contraception tenets of his or her religion.

³⁹ 42 U.S.C. § 2000bb-1(a)-(b) (West 2012). RFRA has been declared unconstitutional as applied to the states, but continues to be fully applicable against federal government action like the contraception mandate. See *City of Boerne v. Flores*, 521 U.S. 507 (1997).

⁴⁰ *Henderson v. Kennedy*, 253 F.3d 12, 16 (D.C. Cir. 2001); *Goodall v. Stafford Cty. Sch. Bd.*, 60 F.3d 168, 172-73 (4th Cir. 1995). There is some question whether a secular for-profit business is a “person” who might “exercise” religion within the meaning of RFRA. *Newland v. Sebelius*, Civ. No. 1:12-cv-1123-JLK (D. Colo. July 27, 2012).

⁴¹ *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981).

⁴² *O’Brien v. U.S. Dep’t Health & Human Servs.*, No. 4:12-CV-476 (E.D. Mo. Sept. 28, 2012), slip op. at 11 (“[P]laintiffs remain free to exercise their religion, by not using contraceptives....”); cf. *Goehring v. Brophy*, 94 F.3d 1294, 1300 (9th Cir. 1996) (Mandatory state university student fee that subsidized health insurance covering abortion did not burden religious exercise of anti-abortion students under RFRA because they “are not required to accept, participate in, or advocate in any manner for the provision of abortion services.”), *overruled on other grounds*, *City of Boerne v. Flores*, 521 U.S. 507 (1997) (RFRA unconstitutional as applied to state action).

2. Endorsement

The mandate does not require any employer to endorse the use of the mandated contraception coverage.⁴³ Nonexempt religious employers who oppose contraception are free to preach against the use of some or all of the covered services and otherwise to urge employees not to make use of them.⁴⁴ Nor is there any implicit endorsement. Under the mandate, employers do not make any decision about the use of mandated contraceptives by their employees; all such decisions are made by each individual employee, who may not even be a member of the employer's faith. It is hard to see, therefore, how employee decisions to use contraceptives constitute a "substantial burden" on the employer's religious liberty right to avoid endorsing contraception use. This is particularly true because medical privacy laws make it impossible to know whether any employees are using contraceptives, and the employer remains free to speak out against contraceptives and to disassociate itself from their use.⁴⁵

3. Facilitation

Nonexempt religious employers also object that the mandate requires them to "facilitate" conduct to which they religiously object. This is true in the sense that the mandate makes contraceptive use cheaper and more accessible; that is, after all, its goal. The relevant question, however, is not whether the mandate makes contraception use by employees of religious employers more likely, but whether any such effect constitutes a substantial burden on the employer's religious exercise.

It is axiomatic that religious employers have no religious liberty right to limit the spending of employee compensation to conform to the employer's religious sensibilities. Health care insurance coverage is simply employee compensation. Instead of compensating employees entirely in wages or salary, the employer pays a reduced wage or salary plus a health insurance benefit. As with other employee compensation, decisions about whether or how to spend one's health care benefit rest entirely with the employee. Compensating an employee with health care insurance that allows her to choose to use contraceptives does not facilitate contraception any more than paying wages or salary that the employee uses to purchase contraceptives outright.⁴⁶

4. Subsidy

Whether the mandate in fact forces nonexempt religious employers to subsidize contraceptive use to which they religiously object may not be answerable in the

⁴³ Cf. *Goehring*, 94 F.3d at 1300.

⁴⁴ *O'Brien*, slip op. at 11 ("[P]laintiffs remain free to exercise their religion ... by discouraging employees from using contraceptives.").

⁴⁵ A useful analogy to this question exists in Establishment Clause doctrine. See Caroline Mala Corbin, *Contraception Mandate* (Sept. 2012) (unpublished manuscript, copy in possession of author, cited with permission). In analyzing use of government funds and in-kind aid by religious organizations, the Court has repeatedly held that government aid that finds its way to religious organizations or individuals as the result of the genuinely independent choices of individuals is not attributable to the government and thus does not violate the Clause. *E.g.*, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S.Ct. 2462 (1993); *Witters v. Dep't of Servs. for Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983). For example, private school voucher programs generally do not violate the Establishment Clause even if the primary beneficiaries are religious schools, because the decision to use the voucher at a religious school is made by individual parents on behalf of their children, and not by the government. *Zelman*, 536 U.S. at 649-51. Similarly, a religious employer's inclusion of contraceptives in health plan coverage cannot reasonably be viewed as an endorsement of their use, when the decision to use them rests solely with individual employees and not with the employer.

⁴⁶ See *O'Brien*, slip op. at 12-13.

abstract.⁴⁷ Even if such a subsidy were found to exist, however, it would not constitute a substantial burden under RFRA. The courts have long held that compelled payment of a neutral and general tax does not burden the taxpayer's religious free exercise even if a portion of the tax funds activities to which the taxpayer objects,⁴⁸ concluding that in such cases the burden on the taxpayer's religious exercise is insignificant because the amount of the taxpayer's funds is minimal and is allocated to the objectionable activities indirectly as the result of the decisions of third parties."⁴⁹ The analysis for compelled employer payment for health plan coverage of mandated contraceptives is virtually the same. The amount allocable to contraception coverage will be a tiny percentage of a plan's reimbursable costs,⁵⁰ and will be incurred indirectly as the result

⁴⁷ There is a broad consensus that the addition of contraception coverage would reduce the net reimbursable costs of any health insurance plan. Coverage of contraception does not appreciably increase the reimbursable costs of a health insurance plan, but substantially reduces substantial reimbursable costs from prenatal care, childbirth, and medical treatment of newborns. *See, e.g.,* Law, *supra* note 3, at 366-67 & n.13, 394-95; Loomis, *supra* note 5, at 477-78; Sonfield, *supra* note 3, at 10. *See generally* Trussell, *supra* note 9, at 5 ("Contraceptive use saves nearly US\$19 billion in direct medical costs each year."). Accordingly, the premiums charged to employers by third-party insurers are not likely to increase and could be even lower when plans add no-cost contraception coverage. *See* 77 Fed. Reg. at 8727-28. For any particular plan, then, its savings in net reimbursable costs avoided by addition of contraception coverage are likely to equal or exceed the costs of mandated contraception coverage. If a nonexempt religious employer sees its health insurance premiums remain the same or decline after adoption of mandated contraception coverage, then the marginal cost to the employer of adopting such coverage is zero or less. In an economic sense, the employer has not "paid" for the addition of the mandated coverage because it has not cost the employer any additional premium. In another sense, however, nonexempt religious employers who include mandated no-cost contraceptive coverage to their health plans are obviously paying for it: They pay a negotiated premium to a third party insurer for employee health care coverage that includes no-cost contraceptive services; some portion of the premium paid would logically seem to be allocable to the provision of contraception services. The subsidy is even more obvious in case of employers who self-insure their health care plans: Such employers will directly reimburse health care providers for the cost of the contraception services they would provide under the mandate. Whether a religious-employer subsidy of contraceptive use in fact exists with respect to the any such employer's health care insurance plan can only be answered by discovery and analysis of the plan in litigation.

⁴⁸ *See, e.g.,* United States v. Lee, 455 U.S. 252 (1982) (mandatory payment of social security and unemployment insurance taxes did not burden employer whose Amish tenets prohibited payment for or acceptance of government benefits); *Goehring v. Brophy*, 94 F.3d 1294 (9th Cir. 1996) (holding that use of portion of mandatory student registration fee to subsidize student health insurance program that covered abortion did not substantially burden religious exercise of students whose beliefs forbid participation in abortions), *overruled on other grounds*, *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding RFRA unconstitutional as applied to state action); *cf. Mead v. Holder*, 766 F. Supp. 2d 16, 42 (D.D.C. 2011) (holding that ACA's individual insurance-purchase mandate did not substantially burden religious exercise of persons whose beliefs "God will provide for their medical and financial needs" when they had historically paid medicare, social security, and unemployment insurance taxes), *aff'd on other grounds*, *NFIB v. Sebelius*, 132 S.Ct. 2566 (2012).

⁴⁹ *Goehring*, 94 F.3d at 1300 (burden is "minimal"); *Mead*, 766 F. Supp. 2d at 42 (burden is "*de minimis*").

⁵⁰ Loomis, *supra* note 5, at 465 & n.8 ("[When the expenses of contraception are pooled, the increase in cost to employers and employees is negligible] 'The added cost for employers providing [contraception] coverage corresponds to \$1.43 per month, which represents a mean increase of less than 1% in employers' costs of providing employees with medical coverage.'") (quoting JACQUELINE E. DARROCH, *COST TO EMPLOYER HEALTH PLANS OF COVERING CONTRACEPTIVES* (1998)).

of the private and independent choices of employees.⁵¹ If this is a burden on the employer's religious exercise at all, it certainly is not "substantial."

5. Existing Off-Label Coverage

Oral and other hormonal contraceptives are often prescribed for reasons other than preventing pregnancy.⁵² Many nonexempt religious employers who oppose the contraception mandate have actually covered the mandated contraceptive services for many years, so long as they are prescribed for a reason other than preventing pregnancy. Roman Catholic "double-effect doctrine," for example, permits the use of contraceptives to treat a variety of conditions unrelated to preventing pregnancy,⁵³ and even some self-insured plans by nonexempt Roman Catholic employers reimburse health care providers for filling contraceptive prescriptions written to treat such conditions. The burden that the contraception mandate imposes on the anti-contraception beliefs of nonexempt religious employers is reduced when such employers already cover the mandated contraceptives for treatment of conditions unrelated to preventing pregnancy. In such circumstances, the mandate does not require the addition of contraceptive coverage in the first place, but only addition of a basis for provider reimbursement when contraception is prescribed.

* * *

The contraception mandate does not require any religious employer to use, endorse, facilitate, or directly pay any meaningful amount for the use of contraceptives. When combined with the fact that many nonexempt religious employers already cover many mandated contraceptives when prescribed for reasons other than preventing pregnancy, any burden the mandate imposes on a religious employer's exercise of its religious anti-contraception tenets approaches the vanishing point.

B. NON-BURDENSOME ALTERNATIVES

As a general matter, religious organizations and individuals may not dictate to the government the conditions on which they will comply with the law. The broad

⁵¹ O'Brien, slip op. at 11, 13.

The burden of which plaintiffs complain is that funds, which plaintiffs will contribute to a group health plan, might, after a series of independent decisions by health care providers and patients covered by [plaintiff's] plan, subsidize *someone else's* participation in an activity that is condemned by plaintiff's religion. This Court rejects the proposition that requiring indirect financial support of a practice, from which plaintiff himself abstains according to his religious principles, constitutes a substantial burden on plaintiff's religious exercise.

... Under plaintiff's interpretation of RFRA, a law substantially burdens one's religion whenever it requires an outlay of funds that might eventually be used by a third party in a manner inconsistent with one's religious values. This is at most a de minimis burden on religious practice.

Id.

⁵² See Rachel K. Jones, *Beyond Birth Control: The Overlooked Benefits of Oral Contraceptive Pills* (Guttmacher Inst., Nov. 2011), at 3.

⁵³ Cf. Alison McIntyre, *Doctrine of Double Effect*, pt. 2, ex. 3, STAN. ENCYC. PHIL. (July 28, 2004, rev. Sept. 7, 2011), <http://plato.stanford.edu/entries/double-effect/> ("A doctor who believed that abortion was wrong, even in order to save the mother's life, might nevertheless consistently believe that it would be permissible to perform a hysterectomy on a pregnant woman with cancer. In carrying out the hysterectomy, the doctor would aim to save the woman's life while merely foreseeing the death of the fetus.").

religious pluralism of American society makes it impractical, if not impossible, to exempt or accommodate every variant of religious practice that might be burdened by neutral and general laws.⁵⁴ Accordingly, it is well established that religiously neutral, generally applicable laws that merely make religious exercise more difficult or expensive without prohibiting it do not violate the Free Exercise Clause.⁵⁵ Thus, when government imposes a religiously neutral, generally applicable obligation that can be satisfied in multiple ways, some of which do not substantially burden religious exercise, the obligation does not constitute a “substantial burden” even if the nonburdensome alternatives are more difficult, more expensive, or less preferred by the religious organization or individual. In other words, a religious employer may not claim a “substantial burden” under RFRA simply because government action interferes with the employer’s preferred manner of operating, so long as other more difficult or expensive ways of complying with the action do not interfere with the employer’s religious exercise.⁵⁶ Applying this analysis, three alternatives to adding mandated contraception coverage do not burden employer religious exercise: the grandfathered-plan exemption, provision of the mandated contraceptives by third-party insurers, and termination of health care coverage.

1. Grandfathered-Plan Exemption

As explained above, subject to certain conditions, the ACA allows health care plans to continue the coverage in existence at the time the ACA was enacted. If a non-exempt religious employer offered a plan without contraceptive coverage as of the day the ACA was enacted, it may continue that plan without adding the mandated contraception coverage. The contraception mandate, therefore, does not constitute a substantial burden on any nonexempt religious employer whose plan qualifies for the grandfathered-plan exemption.

2. Third-Party Insurers

The final interim regulations affirming the religious-employer exemption also announced a one-year enforcement safe harbor for religious organizations that do not qualify as “religious employers” under the exemption, during which the Departments indicated their intention to “work with stakeholders to develop alternative ways of providing contraceptive coverage without cost-sharing” for employees of nonexempt religious employers that object to the mandate.⁵⁷ Specifically, the Departments intend to develop regulations allowing a religious organization to contract with third-party insurers to offer health insurance that does not cover contraception to which they object, so long as the third-party insurer provides the uncovered contraception directly

⁵⁴ *United States v. Lee*, 455 U.S. 252, 261 (1982); *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961).

⁵⁵ *See, e.g., Hernandez v. Comm’r*, 490 U.S. 680, 699 (1980); *Bowen v. Roy*, 476 U.S. 704, 706 (1986) (plurality opinion); *Bob Jones Univ. v. United States*, 461 U.S. 574, 603-04 (1983); *Braunfeld*, 366 U.S. at 606.

⁵⁶ *See, e.g., Mead v. Holder*, 766 F. Supp. 2d 16, 42 (D.D.C. 2011) (finding that individual insurance-purchase mandate was not substantial burden under RFRA where plaintiffs could make a “shared responsibility payment” instead of actually obtaining health insurance); *cf. Petra Presbyterian Church v. Village of Northbrook*, 489 F.3d 846, 851 (7th Cir. 2007) (finding that village’s refusal to allow construction of church in industrial zone was not a substantial burden under RLUIPA where many alternative locations within village were available).

⁵⁷ 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012). The Departments also announced their intention to pursue alternatives for self-insured religious organizations that object to the mandate, but did not identify any potential alternatives. *Id.*

to the organization's employees at no cost.⁵⁸ This alternative should eliminate any conceivable substantial burden for nonexempt religious employers who provide health care coverage through a third-party insurer. The employer is not explicitly or implicitly endorsing or facilitating contraception use, since it is not providing contraceptives. The employer also is not subsidizing contraception use: since contraception coverage does not raise the net health care costs, the premium should be the same whether contraception is covered or not.⁵⁹

Third-party provision of the mandated contraception will not relieve any burdens imposed by the mandate on nonexempt religious employers who self-insure. Self-insurance means that there is no third-party insurer available to such employers with the financial ability and incentive to supply the mandated contraception services without cost-sharing; self-insured employers would have to supply the contraceptives themselves. Self-insurers, however, are free to implement their health insurance plans through third-party insurers who supply mandated contraceptives without cost-sharing. There is no constitutional right to self-insure; indeed, in most states self-insurance is a privilege governed by statute. Switching to a third-party insurer will probably cost the religious employer more and may be undesirable in other ways, but Supreme Court precedent is clear that such burdens are not substantial.

3. *Termination of Plan*

Some comments by nonexempt religious employers on the proposed interim final regulations threatened termination of their health care plans if the religious-employer exemption were not expanded.⁶⁰ For religious employers with less than 50 employees, termination of health insurance coverage constitutes a means of complying with the mandate without burdening such employers' religious anti-contraception beliefs.⁶¹ Employers who feel a religious obligation to provide their employees with health care insurance could supply them with additional salary compensation sufficient to purchase adequate health care insurance on the individual-policy market that the ACA is creating.⁶²

It would be ironic if the effect of a statutory initiative designed to extend health care insurance coverage to the uninsured population resulted in termination of group insurance plans by some nonexempt religious employers. Whether this possibility is an acceptable trade-off for extended contraception coverage, however, is a legislative

⁵⁸ *Id.*

⁵⁹ For a discussion of why the premium should be the same whether contraception is covered or not, see sources cited *supra* note 48 and accompanying text. A nonexempt religious employer can ensure that it is not paying for its insurers' separate provision of no-cost contraceptives by instructing the insurer to calculate the employer's premium as if its employees do not have access to contraceptives.

⁶⁰ 77 Fed. Reg. at 8727.

⁶¹ Employers with less than 50 employees are not required by the ACA to offer health insurance coverage. See 26 U.S.C. § 4980(H)(c)(2)(A) (West 2012). *Cf.* Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 91-92 (Cal.) ("Catholic Charities may ... avoid this conflict by not offering coverage for prescription drugs. The [state contraception mandate] applies only to employers who choose to offer insurance coverage for prescription drugs; it does not require any employer to offer such coverage."), *cert. denied*, 543 U.S. 816 (2004); Catholic Charities of Diocese of Albany v. Serio, 859 N.E.2d 459, 468 (N.Y. 2006) (The state contraception mandate "does not literally *compel*" religious employers "to purchase contraceptive coverage for their employees, in violation of their religious beliefs; it only requires that policies that provide prescription drug coverage include coverage for contraceptives. Plaintiffs are not required by law to purchase prescription drug coverage at all."), *cert. denied*, 552 U.S. 816 (2007).

⁶² *Cf. Serio*, 859 N.E.2d at 468 ("[I]t is surely not impossible, though it may be expensive or difficult, to compensate employees adequately without including prescription drugs in their group health care policies.").

policy choice that does not affect the conclusion that termination of one's health care plan would remove an employer from the contraception mandate, and thus constitutes a non-burdensome way to comply with the mandate.

III. THE COMPELLING INTEREST TEST

A law does not violate the Free Exercise Clause even if it lacks neutrality or generality, so long as it is narrowly tailored to the protection of compelling government interests.⁶³ Similarly, a law does not violate RFRA even if it substantially burdens religious exercise, if it satisfies the compelling interest test.⁶⁴ The contraception mandate satisfies both requirements.

A. GOVERNMENT INTERESTS

The Departments identified multiple government interests implemented by the contraception mandate, including better treatment of conditions unrelated to pregnancy for which contraceptives are often prescribed,⁶⁵ improvement of the health of pregnant women and newborn children,⁶⁶ reduction in the cost of employer-sponsored health care plans,⁶⁷ reduction in workplace inequalities between men and women,⁶⁸ and reduction in the disparate health care costs borne by men and women.⁶⁹ Some of these interests have been held to be individually "compelling,"⁷⁰ or have been found individually to outweigh personal free exercise or other constitutional rights even though not formally labeled "compelling."⁷¹ Any of these interests would individually satisfy the requirement of a compelling government interest. Courts have also

⁶³ *E.g., Lukumi*, 508 U.S. at 546.

⁶⁴ 42 U.S.C. § 2000bb-1(b) (West 2012).

⁶⁵ 77 Fed. Reg. at 8727 ("Contraceptives also have medical benefits for women who are contraindicated for pregnancy, and there are demonstrated preventive health benefits from contraceptives relating to conditions other than pregnancy (e.g., treatment of menstrual disorders, acne, and pelvic pain).").

⁶⁶ *Id.* ("[W]omen experiencing an unintended pregnancy may not immediately be aware that they are pregnant, and thus delay prenatal care. They also may not be as motivated to discontinue behaviors that pose pregnancy-related risks (e.g., smoking, consumption of alcohol). Studies show a greater risk of preterm birth and low birth weight among unintended pregnancies compared with pregnancies that were planned.").

⁶⁷ *Id.* ("[T]here are significant cost savings to employers from the coverage of contraceptives.").

⁶⁸ *Id.* at 8728 ("Researchers have shown that access to contraception improves the social and economic status of women. Contraceptive coverage, by reducing the number of unintended and potentially unhealthy pregnancies, furthers the goal of eliminating this disparity by allowing women to achieve equal status as healthy and productive members of the job force.").

⁶⁹ *Id.* ("[O]wing to reproductive and sex-specific conditions, women use preventive services more than men, generating significant out-of-pocket expenses for women. The Departments aim to reduce these disparities by providing women broad access to preventive services, including contraceptive services.").

⁷⁰ *E.g., Kleindienst v. Mandel*, 408 U.S. 753, 783-84 (1972) ("[P]ublic health needs" are "compelling" government interests."); *Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 498 (10th Cir.1998) ("[P]ublic health is a compelling government interest....").

⁷¹ *E.g., Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357 (1997) (upholding against Speech Clause challenge government restrictions on anti-abortion protests designed to protect unimpeded access to pregnancy-related services); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (upholding against free exercise challenge state restrictions on child labor).

found related interests individually “substantial,” “important,” or “significant.”⁷² Together these related interests might additionally constitute a collectively “compelling” government goal that would outweigh a nonexempt employer’s interest in personal or group free exercise.

B. ALTERNATIVE MEANS

1. Exemption

Wisconsin v. Yoder held that the Amish were entitled to an exemption from a state statute requiring school attendance until age sixteen.⁷³ Acknowledging that the state had an undeniably compelling interest in generally requiring a minimum level of education in its citizens, the Court held that the state nevertheless lacked a compelling interest in applying the statute to the Amish. The Court noted both the strong vocational education that Amish children received from their families and community, as well as the small number and insularity of Amish communities as factors suggesting that exempting them from the minimum attendance requirement would have little effect on the state’s overall goal of an educated citizenry properly equipped to support itself economically and participate in voting and other acts of self-government. Thus, when religiously burdensome government action is subjected to strict scrutiny, an exemption may be the least restrictive alternative if the number of persons exempted is so small that the effect on the government’s regulatory purposes is negligible. The Court has applied this same principle to application of the compelling-interest test under RFRA.⁷⁴

The mandate exists to extend no-cost contraceptive services to as many women as possible. Data are hard to find, but employees of nonexempt nonprofit religious employers in the United States number at least in the hundreds of thousands, if not the millions, while employees of for-profit religious employers engaged in commercial markets number at least in the tens of millions. Enlarging the religious employer exemption to include all religious organizations and all secular for-profit employers owned by persons who object to contraception would substantially undermine the government’s compelling goals due to the very large numbers of employees who would be denied contraception coverage by such an exemption.⁷⁵

⁷² E.g., *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (State’s “compelling interest in eradicating discrimination against its female citizens” justified infringement of associational freedom); *IMS Health, Inc. v. Sorrell*, 630 F.3d 263, 277 (2d Cir. 2010) (States “have substantial interest in both lowering health care costs and protecting public health.”), *overruled on other grounds*, 131 S.Ct. 2653 (2011) (statute not least restrictive means); *United States v. Gregg*, 226 F.3d 253, 268 (2000) (Protecting “a woman’s right to seek reproductive health services” is “important government interest.”); *United States v. Wilson*, 154 F.3d 658, 664 (7th Cir. 1998) (“[P]rotecting women who are in need of reproductive health services” is “significant government interest.”); *Terry v. Reno*, 101 F.3d 1412, 1419 (D.C. Cir. 1996) (“[E]nsuring access to lawful health services and protecting the constitutional right of women seeking abortions and other pregnancy-related treatment” are “important government interests.”); cf. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (“[T]he State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.”).

⁷³ 406 U.S. 205 (1972).

⁷⁴ *Gonzalez v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 429-31 (2006).

⁷⁵ Cf. *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 93-94 (Cal.) (“Catholic Charities argues the Legislature could more widely exempt employers from the [state contraception mandate] without increasing the number of affected women by mandating public funding of prescription contraceptives for the employees of exempted employers. [] But Catholic Charities points to no authority requiring the state to subsidize private religious practices.”), *cert. denied*, 543 U.S. 816 (2004).

2. Direct Government Subsidy

Some nonexempt religious employers have argued that the government could ensure the availability of no-cost contraceptive coverage to women who lack such coverage in their religious-employer group health plans by paying for such coverage itself. Such employers argue that this alternative is inexpensive, and thus a less restrictive alternative to application of the mandate to nonexempt religious employers. However, even if the cost of government provision of no-cost contraception were low, which is doubtful,⁷⁶ a religious person's right to an exemption does not include the right to demand that the government pay for the exemption. The government may do this if it chooses, but it is not constitutionally required to do so. Having the government pay more money to implement the contraception mandate solely to exempt a larger range of religious employers is thus not a constitutionally required less-restrictive alternative.

* * *

The government has multiple interests which individually and together are "compelling" and which are implemented in the least restrictive manner by the mandate. Accordingly, regardless of whether the mandate is found to be a neutral and general law or to substantially burden religious exercise, it still satisfies the doctrinal requirements of the Free Exercise Clause and RFRA.

IV. FOR-PROFIT COMMERCIAL RELIGIOUS EMPLOYERS

The principles and conclusions discussed above apply equally to non-profit and for-profit religious employers. They apply with particular force, however, to for-profit employers. Federal laws prohibiting religious discrimination in employment incorporate national values that condemn an employer's use of the economic leverage of current or prospective employment to penalize employees for their religious practices or to compel them involuntarily to conform to the religious practices of others. Accordingly, it is well established that neutral and general laws that regulate public or commercial markets do not generally constitute "substantial burdens" on religious exercise when the burdened persons or groups have voluntarily entered those markets.⁷⁷ This is particularly the case when exemption from such laws would impose the costs of the employer's religious practices on nonadherents or the government.⁷⁸

⁷⁶ See *supra* text accompanying notes 5-9.

⁷⁷ *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 303-05 (1985) (Application of federal minimum wage standards to a religion's commercial activities held not a burden on religion's free exercise rights.); *Braunfeld*, 366 U.S. at 605-06 (Sunday closing law that "imposed some financial sacrifice" on Orthodox Jewish business owner who observed the Jewish Sabbath did not violate Free Exercise Clause because law "regulates a secular activity" and merely "operates to make the practice of [the owner's] religious beliefs more expensive.").

⁷⁸ See, e.g., *United States v. Lee*, 455 U.S. 252, 261 (1982) ("When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees."); *Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 468 (N.Y. 2006) ("[W]hen a religious organization chooses to hire nonbelievers it must, at least to some degree, be prepared to accept neutral regulations imposed to protect those employees' legitimate interests in doing what their own beliefs permit."), *cert. denied*, 552 U.S. 816 (2007); *cf.* *Estate of Thornton v. Calder*, 472 U.S. 703 (1985) (finding state statute giving employees absolute right to time off on their Sabbath violated Establishment Clause because of burden statute imposed on others); *TWA v. Hardison*, 432 U.S. 63 (1977) (holding Title VII of the Civil Rights Act of 1964 did not give employee right to religious exemption from seniority system because of burden this would impose on other employees).

Churches and other nonprofit religious organizations enjoy narrow exemptions from religious antidiscrimination laws,⁷⁹ but such exemptions have never been granted to for-profit commercial enterprises.⁸⁰ There is good reason for this. Compliance with employment laws is complex and burdensome, and exempting for-profit commercial religious employers from such laws will often result in competitive advantage. More fundamentally, it would enable the use of employment to encourage and even to compel involuntary employee conformance with the employer's religious practices. Finally, the potential number of for-profit commercial religious employers who might claim this exemption is huge; recognizing it would fundamentally distort employment markets in favor of religious employers.

Exempting for-profit commercial religious employers from the contraception mandate would have precisely this effect. Such employers are prohibited from making employment decisions on the basis of an applicant's or employee's religious affiliation or lack thereof, and thus virtually always employ large numbers of people who do not share the religious anti-contraception values of their employer. Granting such employers an exemption from the mandate forces employees to bear the costs of observing the tenets of their employer's religion even when they do not belong to it or interpret those tenets differently.

Just as religious employers may not dictate to the government the conditions on which they will obey the law, they may not dictate the conditions on which government may regulate their participation in public and commercial markets on a for-profit basis.

V. CONCLUSION: RELIGIOUS LIBERTY IS NOT THE RIGHT TO IMPOSE ONE'S RELIGION ON OTHERS

One might argue that the public's interest in the admittedly extensive public non-profit services provided by religious universities, hospitals, charities, and other religious employers justify exempting them from the contraception mandate. But the mandate also provides important public services and protects considerable government interests, notably the enhancement of women's health and the elimination of gender inequities. The resolution of conflicts between such interests and values are properly entrusted to the political branches.

In accordance with the authority granted it by Congress in the ACA, the Executive Branch has crafted regulations appropriate to constitutional and other national values, by generally exempting religious employers from the mandate when doing so does not impose the employers' religious values and practices on employees who do not share them. This is all that religious employers can reasonably expect. To paraphrase one court, religious liberty is a shield, not a sword; it is not to be used to impose one's religion on others.⁸¹ Religious liberty simply does not entail a right in religious employers to force their employees to observe and to pay the costs of anti-contraception beliefs that the employees do not share.

⁷⁹ See, e.g., Civil Rights Act of 1964, Pub. L. 88-352, § 702 (codified at 42 U.S.C. § 2000e-1) (exempting religious employers from the Act "with respect to the employment of individuals of a particular religion to perform work connected with the carrying on" of the religious employer's activities); *Hosanna-Tabor Church & Sch. v. EEOC*, 112 S.Ct. 694 (2012) (upholding judicially created exemption from Civil Rights Act as applied to ministerial employment decisions).

⁸⁰ E.g., *Tony & Susan Alamo*, 471 U.S. at 303-05; cf. *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (upholding § 702 against Establishment Clause challenge, but only as to nonprofit activities).

⁸¹ See *O'Brien v. U.S. Dep't Health & Human Servs.*, No. 4:12-CV-476 (E.D.Mo. Sept. 28, 2012), slip op. at 12 ("RFRA is a shield, not a sword. [I]t is not a means to force one's religious practices on others.").

