

TABLE OF CONTENTS | FALL 2014

The Voting Rights Amendment Act of 2014: A Constitutional Response to *Shelby County*

William Yeomans, Nicholas Stephanopoulos, Gabriel J. Chin, Samuel Bagenstos, and Gilda R. Daniels

***McCutcheon v. FEC* and *Roberts v. Breyer*: They're Both Right and They're Both Wrong**

Alan B. Morrison

Deconstructing the Right to Counsel

Lauren Sudeall Lucas

Unequal Treatment? The Speech and Association Rights of Employees: Implications of *Knox* and *Harris*

Catherine Fisk and Erwin Chemerinsky

Enhancing Due Process in Targeted Killing

Deborah Pearlstein

Corporate Religious Liberty: Why Corporations Are Not Entitled to Religious Exemptions

Caroline Mala Corbin

The Constitutional Case for Limiting Public Carry

Lawrence Rosenthal

The Transgender Tipping Point: An Overview for the Advocate

Dr. Jillian T. Weiss



AMERICAN
CONSTITUTION
SOCIETY FOR
LAW AND POLICY

1333 H St., NW, 11th Floor
Washington, D.C. 20005
www.ACSLaw.org
202-393-6181

Copyright © 2014 American Constitution Society for Law and Policy

Advance

The Journal of ACS Issue Briefs

TABLE OF CONTENTS

1	Introduction	
3	The Voting Rights Amendment Act of 2014: A Constitutional Response to <i>Shelby County</i>	<i>William Yeomans, Nicholas Stephanopoulos, Gabriel J. Chin, Samuel Bagenstos, and Gilda R. Daniels</i>
25	<i>McCutcheon v. FEC</i> and <i>Roberts v. Breyer</i> : They're Both Right and They're Both Wrong	<i>Alan B. Morrison</i>
43	Deconstructing the Right to Counsel	<i>Lauren Sudeall Lucas</i>
55	Unequal Treatment? The Speech and Association Rights of Employees: Implications of <i>Knox</i> and <i>Harris</i>	<i>Catherine Fisk and Erwin Chemerinsky</i>
73	Enhancing Due Process in Targeted Killing	<i>Deborah Pearlstein</i>
95	Corporate Religious Liberty: Why Corporations Are Not Entitled to Religious Exemptions	<i>Caroline Mala Corbin</i>
107	The Constitutional Case for Limiting Public Carry	<i>Lawrence Rosenthal</i>
123	The Transgender Tipping Point: An Overview for the Advocate	<i>Dr. Jillian T. Weiss</i>

ACS BOARD OF DIRECTORS

David M. Brodsky, *Chair*
Timothy W. Burns
Elizabeth J. Cabraser
Mariano-Florentino Cuéllar
Maria Echaveste
Peter B. Edelman
Michael J. Faris
Julie Fernandes
David C. Frederick
Nancy Gertner
Linda Greenhouse
Reuben A. Guttman
Dennis J. Herrera
Dawn Johnsen

Brad S. Karp
William P. Marshall
Robert Raben
Judith Scott
Reva Siegel
Paul M. Smith
David A. Strauss
Harry Susman
Christine A. Varney
Rebecca Favret, *Student Board
Member, University of Richmond
School of Law*
Sophie Kim, *Student Board Member,
Harvard Law School*

ACS BOARD OF ADVISORS

Brooksley E. Born
Myron M. Cherry
Mario M. Cuomo
Drew S. Days III
Walter E. Dellinger III
Christopher Edley, Jr.
Jay W. Eisenhofer
Faith E. Gay

Shirley M. Hufstedler
Frank I. Michelman
Abner Mikva
William A. Norris
James T. O'Hara
Janet Reno
Stephen D. Susman

Caroline Fredrickson, *President*

Advance

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

Each issue of *Advance* features a collection of articles that emanate from the work of ACS's network of scholars, advocates and practitioners, and features a selection of Issue Briefs written for ACS in the preceding year on a variety of topics. 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.

The Voting Rights Amendment Act of 2014: A Constitutional Response to *Shelby County**

William Yeomans, Nicholas Stephanopoulos, Gabriel J. Chin, Samuel Bagenstos, and Gilda R. Daniels

Introduction: An Overview of the Voting Rights Amendment Act of 2014

William Yeomans**

The Voting Rights Act of 1965 (“VRA”) has been described as “the most effective civil rights law in the history of the United States.”¹ No provision of the VRA has been more effective than the preclearance requirement of Section 5.² Prior to the Supreme Court’s 2013 decision in *Shelby County v. Holder*,³ a formula in Section 4 of the VRA⁴ identified nine states and jurisdictions in six more (collectively “covered jurisdictions”)⁵ with a pervasive history of racial discrimination in voting. As covered jurisdictions, they were required to prove to the United States Attorney General or a three-judge court in the District of Columbia that any proposed voting change did not have the purpose and would not have the effect of discriminating on the basis of race or language minority status. If the Attorney General objected within 60 days, the change could not go into effect. If he remained silent or the jurisdiction obtained a declaratory judgment, the change could proceed. The preclearance provisions proved so successful that Congress reauthorized them four times since 1965, most recently in 2006.

In *Shelby County*, the Supreme Court, in a 5-4 decision, held the Section 4 coverage formula unconstitutional, asserting that it was not adequately grounded in “current conditions.”⁶ It did so even though Congress, when it reauthorized the VRA in 2006 by votes of 390 to 33 in the House and 98 to 0 in the Senate, compiled over 15,000 pages of evidence showing the persistence of racial discrimination in voting in the covered jurisdictions.⁷ The Court left in place Section 5, which contains the preclearance requirement, and invited Congress to craft a new coverage formula, which

* This issue brief was initially published in May 2014.

** Fellow in Law and Government, American University Washington College of Law.

¹ Richard L. Engstrom, *Race and Southern Politics*, 10 ELECTION L.J. 53, 53 (2011).

² See 42 U.S.C. § 1973c (2012).

³ 133 S. Ct. 2612 (2013).

⁴ 42 U.S.C. 1973b (2012).

⁵ See *Jurisdictions previously covered by Section 5*, U.S. DEP’T OF JUSTICE, http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited May 7, 2014).

⁶ *Shelby Cnty.*, 133 S. Ct. at 2629.

⁷ *Id.* at 2635-36 (Ginsburg, J., dissenting).

would, in turn, bring Section 5 back to life. Representatives James Sensenbrenner (R-WI) and John Conyers (D-MI) have done just that, introducing the bipartisan Voting Rights Amendment Act of 2014 (“VRAA”).⁸ Senator Patrick Leahy has introduced identical legislation in the Senate.⁹

The VRAA attempts to fill the hole *Shelby County* opened in four ways. It would: 1) create a new coverage formula that would be based on recent violations of voting rights laws and would update coverage determinations annually; 2) expand judicial bail-in to allow courts to order preclearance as a remedy for proven violations of voting laws prohibiting racial and language discrimination; 3) create a new standard for preliminary relief to prevent use of potentially discriminatory voting changes until they can be reviewed by a court; and 4) increase the transparency of voting changes to allow for identification of problematic provisions.

This Issue Brief, a collaborative effort of five authors, analyzes the major aspects of the VRAA and their constitutionality. The section below provides an overview of the legislation. The four sections that follow contain analyses of the constitutionality of each of the bill’s four key provisions. These analyses conclude that the relevant provisions of the VRAA are constitutional exercises of congressional power and should be upheld if challenged in court.

A. THE COVERAGE FORMULA

Section 3 of the VRAA would create a new “rolling trigger” coverage formula.¹⁰ Under the new formula, each year, the Attorney General would look back fifteen years to determine whether, within that time frame, five voting rights violations had occurred within any given state, including one violation committed by the state itself, and whether three voting rights violations had occurred within any local jurisdiction. If so, the state or jurisdiction would be required to preclear voting changes for ten years from the date of the most recent violation. In addition, if a single violation had occurred in a local jurisdiction combined with extremely low minority turnout, as defined in the bill, for the preceding fifteen years, that jurisdiction too would be subject to preclearance. Voting rights violations counted in the formula would include final judgments finding violations of the Fourteenth and Fifteenth Amendments or Section 2 of the VRA, objections by the Attorney General pursuant to Section 5, and denials of declaratory judgments granting preclearance pursuant to Section 5.

Although it is impossible to identify with certainty the jurisdictions that would be covered until the Attorney General makes the annual determination of extremely low minority turnout, if implemented today, the formula likely would capture Georgia, Louisiana, Mississippi, Texas, and a few jurisdictions outside those states. The rolling trigger ameliorates concern that the bill’s initial coverage is too limited by ensuring that future violations can trigger the extension of coverage. This feature also obviates the need for periodic reauthorization.

The bill states that an Attorney General’s preclearance objection to the imposition of a “photo identification” requirement for voting will not count in calculating coverage. As a three-judge court held in denying preclearance of a photo identification law enacted by Texas and as a district court recently held in striking down a Wisconsin photo identification law, such laws can indeed disproportionately burden minority

⁸ H.R. 3899, 113th Cong. (2014) [hereinafter “VRAA”].

⁹ S. 1945, 113th Cong. (2014).

¹⁰ See VRAA § 3.

voters.¹¹ Their special treatment in the coverage formula appears to be part of the price required to initiate bipartisan legislation, a bargain that should be revisited during consideration of the bill. The exemption likely would not affect the initial coverage determinations, but could affect coverage in future years.

B. JUDICIAL BAIL-IN

Section 3 of the Voting Rights Act authorizes a court to impose preclearance as part of the remedy for a finding of a violation of the Fourteenth or Fifteenth Amendment.¹² This rarely used provision has taken on increased significance after *Shelby County*, both because it remains the sole means of extending preclearance until a new formula is enacted and because it offers an indisputably constitutional means of doing so. Section 3 answers the Court's requirement that preclearance coverage reflect current conditions by basing coverage on a finding of a recent constitutional violation. It also allows a court to shape the preclearance requirement to fit the violation and authorizes the court to determine whether it or the Attorney General will conduct preclearance reviews.

Currently, however, Section 3 requires a showing of intentional discrimination, which can be a high hurdle in voting cases where intentions can be complex, multifaceted, hidden, and difficult to prove. For that reason, Congress amended Section 2 of the VRA in 1982 to clarify that a showing of a discriminatory result was sufficient to establish a violation of that section. Because Section 2 has become the principal litigation tool for vindicating rights under the VRA, there is typically no need to find a constitutional violation, which means there is rarely a basis to invoke the bail-in remedy.

The VRAA, therefore, would amend Section 3 of the VRA to allow a violation of Section 2 of the VRA or “any Federal voting rights law that prohibits discrimination on the basis of race, color, or membership in a language minority group” to serve as a predicate for judicial imposition of preclearance.¹³ This amendment responds directly to *Shelby County* by recognizing that a more limited formula such as the VRAA's may leave problematic jurisdictions uncovered, and bases the imposition of preclearance in those instances on a judicial finding of a current condition that violates federal law.

Unfortunately, the strengthening of Section 3 is marred by a provision that states that a violation of Section 2 that is based on “the imposition of a requirement that an individual provide a photo identification” cannot serve as a predicate for imposing preclearance.¹⁴ As with the similar carve-out in the coverage formula, removing this exception would improve the legislation.

C. PRELIMINARY RELIEF

Preclearance was so effective because it ensured that potentially discriminatory voting changes would be reviewed *before* they could impose harm. The alternative—attempting to undo a tainted election after the fact—can be difficult or impossible. The contracted scope of preclearance, therefore, makes it essential to provide a fast

¹¹ See *Frank v. Walker*, Nos. 11-CV-01128, 12-CV-00185, 2014 WL 1775432, at *33 (E.D. Wis. Apr. 29, 2014); *Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012), *vacated and remanded*, 133 S. Ct. 2885 (2013).

¹² See 42 U.S.C. § 1973a(c) (2012).

¹³ VRAA § 2(a).

¹⁴ *Id.*

and effective means for blocking, in advance of an election, the implementation of voting changes that may be discriminatory.

Section 6 of the VRAA addresses this need by reducing the traditional four-factor standard for preliminary relief¹⁵ to a single inquiry. In a departure from the traditional test, the bill does not require the complaining party to make a showing on the merits of its claim, but instead authorizes a preliminary injunction if “the court determines that, on balance, the hardship imposed upon the defendant by the issuance of the relief will be less than the hardship which would be imposed upon the plaintiff if the relief were not granted.”¹⁶ The bill also offers a series of factors that a court must consider in balancing the harms, including whether the challenged change would replace a practice that was implemented because of prior voting rights litigation, whether the change was adopted within 180 days of an election, and whether the jurisdiction has failed to provide timely or complete notice of the change.¹⁷ Presumably, a finding that any of these factors is present should tilt the balance in favor of the party challenging the change.

D. NOTICE AND TRANSPARENCY

Prior to *Shelby County*, covered jurisdictions were required to submit every voting change to the Attorney General or a three-judge court. That reporting requirement guaranteed that problematic changes would reach the attention of federal officials and voting rights advocates. The VRAA recognizes that compensating for that lost reporting is essential to ensuring the protection of voting rights. It does so by imposing new transparency measures.

Section 4 of the VRAA would require jurisdictions to publicize and describe, within forty-eight hours, any voting change affecting a federal election that occurs within 180 days of the election.¹⁸ It would also require that jurisdictions report, prior to thirty days before an election for federal office, on the polling place resources in use for the election, including the location of polling places, the voting age population identified by demographic group, the number of registered voters served broken down by demographic group, the number of voting machines and poll workers assigned, and the dates and hours of operation of polling places.¹⁹

Significantly, the bill would also mandate reporting of changes in “the constituency that will participate in an election for Federal, State, or local office or the boundaries of a voting unit or electoral district” for such an election.²⁰ The bill would require detailed reporting of demographic data, as well as voting data for the previous five years, for any county or parish, municipality with a population greater than 10,000, and school district with a population over 10,000. This provision recognizes the historic and continuing sensitivity of redistricting and changes between at-large and district-based methods of election.

* * *

¹⁵ See *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008).

¹⁶ VRAA § 6(b).

¹⁷ See *id.*

¹⁸ See *id.* § 4(a).

¹⁹ See *id.*

²⁰ *Id.*

The requirement that jurisdictions with a history of discrimination in voting pre-clear voting changes has been an indispensable tool in overcoming attempts to block access to the ballot and dilute the strength of minority votes. Yet the persistence—and disturbing proliferation—of such attempts in the aftermath of *Shelby County*²¹ makes it clear that a modern, effective VRA is still needed today.

The VRAA addresses the significant gaps in the protection of voting rights created by *Shelby County*. Because it represents a bipartisan effort to create legislation that can move, it does not do so perfectly. Some will argue that the new formula for preclearance is underinclusive, although the rolling trigger provides a mechanism for drawing in jurisdictions that misbehave.

Additionally, the bill's two provisions providing special treatment for photo identification laws will inspire debate and test the limits of compromise.

The difficulties faced by the current Congress in dealing with major legislation signal that the path to enactment will not be easy. Congress should, however, rouse itself to respond to the Supreme Court's ruling. It should revive the concern for the voting rights of all people that animated the enactment and repeated reauthorization of the VRA, and pass the Voting Rights Amendment Act of 2014.

²¹ See, e.g., *How Formerly Covered States and Localities are Responding to the Supreme Court's Voting Rights Act Decision*, NAACP LEGAL DEF. & EDUC. FUND, <http://www.naacpldf.org/document/states-responses-shelby-decision> (last updated Apr. 24, 2014).

The Coverage Formula

Nicholas Stephanopoulos*

The *Shelby County* Court’s main criticism of the coverage formula that Congress adopted when it reauthorized Section 5 in 2006 was that the formula was irrational because it relied on obsolete data. In a key passage, the Court observed, “Coverage today is based on decades-old data and eradicated practices. The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s.”²² The Court also emphasized that the disparities in registration and turnout that had existed in that era subsequently had vanished.²³ These features rendered the formula unreasonable and hence unconstitutional in the Court’s eyes: “If Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula. It would have been irrational for Congress to distinguish between States in such a fundamental way based on 40-year-old data[.]”²⁴

The new coverage formula clearly does not fall victim to this critique. First, its reliance on *recent* voting rights violations means that it indeed is “based on current conditions.”²⁵ As noted earlier, only violations that occurred in the last fifteen years count toward the preclearance determination. Violations that occurred earlier are not taken into account, and the preclearance assessment is made anew each year, dropping older violations from consideration and adding newer ones. Although the fifteen-year window reaches into the past to some degree, this is inevitable with any formula that makes use of events that already have transpired. And the new formula’s fifteen-year reach is eminently defensible given that the prior formula was upheld by the Court in 1980 when it extended sixteen years into the past,²⁶ and in 1999 when it extended backward by thirty-five years.²⁷

The new formula not only relies on current data; it also does so *reasonably* to distinguish between jurisdictions with greater and lesser levels of racial discrimination in voting. Racial discrimination in voting, of course, is not easy to observe or prove. Government officials almost never admit to engaging in discrimination, and at least as a constitutional matter, discriminatory intent (not merely effect) must be established. Given these constraints, past voting rights violations are a sensible—indeed, obvious—proxy for levels of racial discrimination in voting. If a constitutional violation has occurred, then a jurisdiction necessarily has engaged in precisely the conduct that the VRA aims to prevent. If a violation of Section 2 has taken place, then a jurisdiction has employed (or tried to employ) a policy that “results in a denial or abridgement of the right . . . to vote on account of race or color.”²⁸ This formulation is tightly interwoven with the constitutional standard, especially since discriminatory results typically are the best available evidence of discriminatory intent. And if a

* Assistant Professor of Law, The University of Chicago Law School.

²² *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2627 (2013).

²³ *See id.* at 2618-19, 2625-26.

²⁴ *Id.* at 2630-31.

²⁵ *Id.* at 2631.

²⁶ *See City of Rome v. United States*, 446 U.S. 156 (1980).

²⁷ *See Lopez v. Monterey Cnty.*, 525 U.S. 266 (1999).

²⁸ 42 U.S.C. § 1973(a) (2012).

violation of Section 5 has transpired, then a jurisdiction attempted to adopt a policy with either the “purpose” or “effect” of “denying or abridging the right to vote on account of race or color.”²⁹ This language is even closer to the constitutional test since it explicitly refers to discriminatory purpose.

Of course, there is no obvious reason why the preclearance line has to be drawn at five violations (for a state) or three violations (for a political subdivision). But every statutory line has to be drawn somewhere, and the VRAA’s choices are quite defensible. Notably, over the twenty-five year period between the 1982 amendments to Section 2 and the 2006 reauthorization of Section 5, federal courts found approximately five Section 2 violations per year.³⁰ Over this period, the Department of Justice also objected annually to approximately twenty-five policy changes under Section 5 (though these objections necessarily were limited to formerly covered areas).³¹ That at least five or three violations have occurred in a state or subdivision during the preceding fifteen years therefore means that a jurisdiction has accounted for a vastly disproportionate share of all voting rights violations over this period. It does not mean that a jurisdiction is clearly worse than a peer with four or two violations in the relevant timespan, but such precision is never expected for statutory distinctions.

Accordingly, the new coverage formula is constitutional if it is assessed according to *Shelby County*’s requirements that it be based on current data and distinguish reasonably between jurisdictions with greater and lesser levels of racial discrimination in voting. The fifteen-year window for voting rights violations is *more* current than was the prior formula when it was upheld in 1980 and 1999. And jurisdictions with at least five or three violations during the previous fifteen years are egregious as a group, and certainly more objectionable than jurisdictions that lack such poor records.

While this concludes the analysis based on *Shelby County*’s actual holding, it is also important to consider certain dicta suggesting that preclearance itself may no longer be a permissible remedy in the Court’s view. The Court commented that states subject to preclearance “must beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own.”³² The Court also stressed that “things have changed dramatically” with respect to voting rights due to increases in minority turnout, fewer evasions of court decrees, and greater numbers of minority candidates holding office.³³ According to the Court, these improvements mean that the claim that sufficiently “exceptional” conditions to justify preclearance no longer exist has “a good deal of force.”³⁴

The VRA, of course, was enacted under Congress’s *Fifteenth* Amendment powers as well. Moreover, even if the *Boerne* standard applies, the preclearance requirement satisfies it. As described above, racial discrimination in voting continues to be a serious problem in parts of the country, which justifies a potent congressional response. For its part, preclearance is *not* a particularly onerous requirement (especially for

²⁹ *Id.* § 1973c(a).

³⁰ Specifically, there were 123 published findings of Section 2 liability over this period. See Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643, 655 (2006), available at <http://sitemaker.umich.edu/voting-rights/files/finalreport.pdf>.

³¹ See *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2639 (2013) (Ginsburg, J., dissenting) (noting that there were 626 preclearance denials over this period).

³² *Id.* at 2624 (majority opinion).

³³ *Id.* at 2625.

³⁴ *Id.* at 2625, 2631.

jurisdictions that have complied with it for decades), and it is quite effective at identifying and blocking instances of discrimination.

For several reasons, the Court should not embrace these dicta. First, for the Court to hold that preclearance is now intrinsically invalid would be inconsistent with its explicit invitation to Congress to “draft another formula based on current conditions.”³⁵ There would be no point to drafting another formula, of course, if any such formula would be deemed unconstitutional. Second, while improvements have occurred over the last few decades, serious racial discrimination in voting continues to plague parts of the country. As Congress found in 2006, shocking instances of first-generation discrimination—the prosecution of minority candidates, the intimidation of minority voters, the cancellation of elections that minorities are expected to win—still take place with some frequency.³⁶ Second-generation offenses, in particular the use of at-large electoral systems and discriminatory district plans, are even more common.³⁷ Such violations resulted in more than 600 denials of preclearance over the 1982-2006 period, more than 800 policies being withdrawn or modified after the Department of Justice requested more information, and more than 600 successful Section 2 suits in formerly covered areas.³⁸ These conditions seem no less “exceptional” than those faced by the Court when it last upheld the preclearance requirement in 1999.³⁹

Finally, and perhaps most importantly, the question of whether preclearance is still necessary is not one for the Court to answer in the first instance. The Court repeatedly invoked the language of “rationality” in *Shelby County*,⁴⁰ and Justice Ginsburg emphasized (without being corrected) that “[t]oday’s Court does not purport to alter settled precedent establishing that the dispositive question is whether Congress has employed ‘rational means.’”⁴¹ Accordingly, the relevant test is not whether *the Court* believes that preclearance is still required, or even whether preclearance is a “congruent and proportional” response to ongoing constitutional violations.⁴² Instead, the issue is whether *Congress* chose rational means to achieve a legitimate end. And on this point, no one doubts that ending racial discrimination in voting is a valid aim, and it is equally clear that preclearance is at least *rational* related to this goal. Because it is more difficult for jurisdictions to enact discriminatory policies if these policies must first be approved by a federal body, preclearance has at least some tendency to reduce discrimination. The Court’s own language thus foreshadows what the result should be in a frontal challenge to preclearance: It should be upheld because it cannot possibly be deemed irrational.

A. POTENTIAL AREAS FOR IMPROVEMENT

While the VRAA’s coverage formula is constitutional in its current form, it could be improved by incorporating metrics beyond judicial judgments and preclearance

³⁵ *Id.* at 2631.

³⁶ *See id.* at 2640-41 (Ginsburg, J., dissenting) (recounting some of the congressional findings).

³⁷ *See id.* at 2634-35 (discussing some of these barriers).

³⁸ *See Shelby Cnty., Ala. v. Holder*, 679 F.3d 848, 872 (D.C. Cir. 2012), *rev’d*, 133 S. Ct. 2612 (2013) [hereinafter *Shelby Cnty. I*].

³⁹ *See Lopez v. Monterey Cnty.*, 525 U.S. 266, 282-85 (1999).

⁴⁰ *See Shelby Cnty.*, 133 S. Ct. at 2625, 2627, 2628, 2629, 2630, 2631.

⁴¹ *Id.* at 2638 (Ginsburg, J., dissenting).

⁴² *See City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (setting forth “congruence and proportionality” standard for exercises of congressional power under *Fourteenth* Amendment).

denials. To begin with, even if one believes that court actions are an excellent proxy for levels of racial discrimination in voting, judicial *judgments* are not synonymous with all judicial *activity*. In particular, courts often approve settlements between parties rather than themselves deciding cases on the merits. And at least with respect to Section 2, the gap between judicial judgments and all judicial activity is quite large. Between 1982 and 2006, there were 68 published Section 2 findings of liability in covered areas, and 123 published Section 2 findings of liability nationwide.⁴³ But, including unpublished dispositions (primarily court-approved settlements), there were 653 successful Section 2 suits over this period in covered areas alone.⁴⁴ The published findings of liability thus are only the tip of the Section 2 iceberg. To capture properly the full set of Section 2 violations, it would be advisable for the new formula to take into account all Section 2 activity, not just Section 2 judgments.

Which jurisdictions would be subject to preclearance if all Section 2 activity was considered? The answer depends on the exact details of the formula, but some clues can be found in the D.C. Circuit's *Shelby County* decision. As the court noted, if the threshold for preclearance were set at five successful Section 2 suits per million residents over the 1982-2006 period (including settlements), then Alabama, Arkansas, Georgia, Mississippi, Montana, North Carolina, South Carolina, South Dakota, and Texas would be covered.⁴⁵ All of the states covered by the VRAA's formula would be covered by this test as well, except for Louisiana, which would fall right below the threshold.⁴⁶ Covered as well would be Alabama, Arkansas, Montana, North Carolina, South Carolina, and South Dakota, all of which (except Montana) were covered in part or in full by the prior formula or were bailed in under Section 3.

The new formula also could be improved by recognizing that successes in court are an imperfect proxy for levels of racial discrimination in voting. Suits are not brought against many potentially discriminatory policies, and even suits that *are* brought may fail for reasons unrelated to the claims' merits—e.g., insufficient resources, difficulties developing evidence, unreceptive judges, etc. Fortunately, there do exist indicia of discrimination that are unaffected by the vagaries of litigation. Probably the most prominent of these is racial polarization in voting, that is, the extent to which minorities and non-minorities diverge in their electoral preferences. As Justice Ginsburg observed in *Shelby County*, racial polarization “increases the vulnerability of racial minorities to discriminatory changes in voting law” by magnifying the electoral payoff of such changes.⁴⁷ In the 2008 presidential election, then, the nine states in which white and black voters differed by at least sixty percentage points in their vote shares for Barack Obama were Alabama, Arkansas, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, and Texas.⁴⁸ All of these states except Tennessee were covered by the prior formula or were bailed in.

Another promising metric is the prevalence of racially discriminatory attitudes among white voters. Such attitudes may make *de jure* discrimination more likely, and they are conducive as well to a finding of discriminatory purpose, which is required

⁴³ See Katz et al., *supra* note 9, at 655-56.

⁴⁴ See *Shelby Cnty. I*, 679 F.3d at 868.

⁴⁵ See *id.* at 875-76.

⁴⁶ See *id.*

⁴⁷ *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2643 (2013) (Ginsburg, J., dissenting).

⁴⁸ Exit poll data from 2008 is available at *Election Center 2008—Results*, CNNPOLITICS.COM, <http://www.cnn.com/ELECTION/2008/results/polls.main> (last visited May 7, 2014). Unfortunately, 2012 exit poll data is not available for all states.

for there to be a constitutional violation. According to cutting-edge survey research, the six states that have the highest proportions of whites whose views of blacks' intelligence and work ethic are more negative than the national median are Alabama, Louisiana, Mississippi, South Carolina, Texas, and Wyoming.⁴⁹ All of these states except Wyoming previously were covered jurisdictions.

The point of this discussion is *not* that the new formula must take into account Section 2 settlements, racial polarization in voting, or the prevalence of racially discriminatory attitudes in order to pass constitutional muster. Section 2 judgments, judgments of constitutional violations, and denials of preclearance are, in combination, a reasonable proxy for levels of racial discrimination in voting, and that is all that is necessary for the new formula to be upheld. The point, rather, is that the formula could be *strengthened*, for both legal and policy purposes, by incorporating these additional metrics. The additional metrics provide valuable further evidence about where racial discrimination in voting is concentrated in contemporary America. Such evidence would be helpful legally, because it would confirm that the formula is distinguishing accurately between jurisdictions with greater and lesser levels of discrimination. And it would be helpful as a matter of policy too, because it would ensure that the formula is targeted at (and only at) the country's most problematic jurisdictions.

⁴⁹ See Christopher S. Elmendorf & Douglas M. Spencer, *The Geography of Racial Stereotyping: Evidence and Implications for VRA Preclearance After Shelby County*, 102 CAL. L. REV. (forthcoming 2014) (manuscript at 38, available at <http://www.law.uchicago.edu/files/files/The%20Geography%20of%20Racial%20Stereotyping.pdf>).

The Expansion of the Section 3 Bail-In Remedy

Gabriel J. Chin*

Since enactment, Section 3 of the Voting Rights Act has provided for “bail-in,” sometimes called the “pocket trigger,” allowing courts to require preclearance of future voting changes in jurisdictions found to have denied voting rights but not previously covered by Section 5. The VRAA revises and expands Section 3 in a manner attentive to and respectful of the Supreme Court’s concerns in *Shelby County*.

The existing version of Section 3 provides that a court finding a violation of the Fourteenth or Fifteenth Amendments warranting equitable relief, in addition to all other forms of relief, “shall retain jurisdiction for such period as it may deem appropriate.”⁵⁰ While jurisdiction is retained, “no voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced unless and until the court finds that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.”⁵¹ Alternatively, the jurisdiction’s proposed change can go into effect if submitted to the Attorney General and the Attorney General fails to object.

Section 3, then, provides for case-by-case imposition of a preclearance requirement. Although bail-in under Section 3 has effects quite similar to being deemed a “covered jurisdiction” under Section 4, one difference is that the U.S. district court with jurisdiction to approve any change and to end preclearance is the one hearing the underlying lawsuit, not the U.S. District Court for the District of Columbia. Also, bail-in provides considerably more flexibility than Section 4 coverage. Jurisdiction is not to be retained forever, but only for “such period as [the district court] may deem appropriate.” As courts have interpreted Section 3, imposition of bail-in as a remedy is discretionary, and a court may, in its discretion, impose preclearance on only certain types of electoral changes.⁵² Arkansas, New Mexico, counties in California, Florida, Nebraska, and South Dakota, and the City of Chattanooga, Tennessee have been bailed in under Section 3.⁵³ Many of these jurisdictions were bailed in based on consent decrees. This means that the jurisprudence of Section 3 is relatively undeveloped compared to other provisions of the Act. This is an advantage in the sense that the Court will have the opportunity to construe the Section in ways that it deems constitutional.

In its existing version, Section 3 might serve to mitigate some of the effects of *Shelby County*.⁵⁴ Indeed, the Department of Justice is currently seeking to bail-in North

* Professor of Law, University of California-Davis School of Law.

⁵⁰ 42 U.S.C. § 1973a(c) (2012).

⁵¹ *Id.*

⁵² See Travis Crum, Note, *The Voting Rights Act’s Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992, 2007-08 (2010).

⁵³ *Id.* at 2010.

⁵⁴ Michael Ellement, *Preclearance Without Statutory Change: Bail-in Suits Post-Shelby County*, 32 YALE L. & POL’Y REV. INTER ALIA 1, 6 (Sept. 7, 2013, 11:45 AM), http://ylpr.yale.edu/inter_alia/preclearance-without-statutory-change-bail-suits-post-shelby-county.

Carolina⁵⁵ and Texas⁵⁶ under the current version of Section 3. However, because bail-in is limited to cases in which a court finds a constitutional violation, the availability of the remedy is limited. Accordingly, the VRAA would extend Section 3 by providing that a jurisdiction may be bailed in not only based on violations of the Fourteenth and Fifteenth Amendments, but also for violations of the Voting Rights Act itself or “any Federal voting rights law that prohibits discrimination on the basis of race, color, or membership in a language minority group.”⁵⁷ It excepts, however, violations of Section 2 of the Voting Rights Act that are based on unlawful imposition of a photo identification requirement; such a violation cannot be the predicate for bail-in.

The basic constitutionality of Section 3 was not questioned in *Shelby County*, and indeed, bail-in does not implicate many of the concerns of the Court in *Shelby County*.⁵⁸ First, coverage is based on a finding of specific, current misconduct by the jurisdiction to be covered. As Justice Thomas explained, “discriminatory intent does tend to persist through time[;]”⁵⁹ accordingly, the Court is likely to find a recent violation to be a sufficient predicate for the imposition of preclearance. Historical conditions and events from generations ago, which the Court found insufficient in *Shelby County*, are not relevant. Second, coverage is imposed on a case-by-case basis by a local court, which is likely to be aware of conditions and circumstances in the area. For both of these reasons, the Court is likely to find Section 3 bail-in more justifiable than the formula at issue in *Shelby County*; it implies no punishment for decades-old misconduct or lack of equal state sovereignty. Also, while Section 5 was always nominally temporary, it was subject to repeated extensions, and a majority of the Court feared that it might be practically permanent. By contrast, Section 3, while a permanent provision, contemplates temporary and targeted relief.

One aspect of the revised Section 3 likely to be challenged in court is its availability as a remedy based on findings of non-constitutional violations, in particular, violations of Section 2 of the Voting Rights Act. Section 2 prohibits state voting policies and procedures, under some circumstances, when they have a discriminatory result, even if the policies do not violate the Constitution *per se*.⁶⁰ Some have argued that Section 2 is unconstitutional to the extent that it goes beyond constitutional

⁵⁵ United States v. North Carolina, No. 1:13CV861 (M.D.N.C.); *see also* Press Release, U.S. Dep’t of Justice, Office of Pub. Affairs, Justice Department to File Lawsuit Against the State of North Carolina to Stop Discriminatory Changes to Voting Law (Sept. 30, 2013), <http://www.justice.gov/opa/pr/2013/September/13-crt-1096.html>.

⁵⁶ United States v. Texas, No. 2:13CV263 (S.D. Tex.); *see also* Press Release, U.S. Dep’t of Justice, Office of Pub. Affairs, Justice Department to File New Lawsuit Against State of Texas Over Voter I.D. Law (Aug. 22, 2013), <http://www.justice.gov/opa/pr/2013/August/13-ag-952.html>.

⁵⁷ *See* VRAA § 2(a).

⁵⁸ Since *Shelby County*, courts have continued to treat Section 3 as valid. *See* Allen v. City of Evergreen, No. 13-CV-0107-CG-M, slip op. at 2-5 (S.D. Ala. Jan. 13, 2014) (granting plaintiffs’ unopposed motion to “bail in” City of Evergreen, Alabama, with respect to two types of voting changes, noting that “Section 3’s provisions have long applied equally to all states and localities, and have been imposed in numerous cases”). *See also* Ala. Legislative Black Caucus v. Alabama, No. 2:12-CV-691, 2013 WL 6925681, at *106 n.38 (M.D. Ala. Dec. 20, 2013) (three-judge court) (Thompson J., dissenting) (“A jurisdiction may still be required to obtain preclearance of redistricting plans, even after *Shelby County*, under the ‘bail-in’ provision of § 3 of the VRA.”).

⁵⁹ United States v. Fordice, 505 U.S. 717, 747 (1992) (Thomas J., concurring) (citing *Hazelwood School Dist. v. United States*, 433 U.S. 299, 309-10, n.15 (1977)).

⁶⁰ *See* 42 U.S.C. § 1973(a) (2012).

violations.⁶¹ To be sure, if Section 2 is itself invalid, then imposing any remedies based on its violation would also be unconstitutional. Similarly, the Court's interpretation of Section 2 would automatically affect the scope of a revised Section 3. But taking the *Shelby County* majority at its word suggests that Section 2, and therefore Section 3, is on firm constitutional ground. The Court emphasized that its "decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2."⁶² To the extent that Section 2 is valid, so too are various reasonable methods of enforcing it.

The Court might well have written favorably of Section 2 because, in operation, it has not been construed to apply to actions which merely have a discriminatory effect. Rather, courts applying Section 2 look at the "totality of the circumstances" to determine whether racial discrimination in voting has occurred.⁶³ As Professor Justin Levitt has explained, while discriminatory impact is a necessary part of a Section 2 claim, there also must be "danger signs demonstrating enhanced risk of perpetuating past or present misconduct."⁶⁴ Professor Christopher Elmendorf has similarly explained that Section 2 can be understood as smoking out unconstitutionally discriminatory action which is otherwise not remediable.⁶⁵ As such, "calling section 2's test a 'results test' is something of a misnomer" given that it has long been understood to require more than "mere disproportionality in electoral results."⁶⁶

The United States has a long tradition, ranging from strong reluctance to absolute prohibition, disfavoring putting legislators in the witness box under oath to find out the real reasons for enactment of a particular law. The Court's clear statement that Section 2 was not called into question should be understood as recognizing that some proxy methods of evaluating legislative intent are therefore necessary. The alternative is that significant unconstitutionally-motivated actions will too easily survive judicial challenge.

Understanding Section 2 as a method of finding otherwise irreparable constitutional violations makes violation of Section 2 a reasonable basis for bail-in. This is particularly so because Section 3 will be applied to a state, municipality, or other governmental entity on a case by case basis, after a court has evaluated the nature of the Section 2 violation and other relevant facts, such as the presence or absence of other recent misconduct. Moreover, any bail-in order will be individually tailored as to duration and as to the types of covered electoral changes. For these reasons, the VRAA's expansion of the availability of the bail-in remedy is a constitutional means of remedying racial discrimination in voting.

⁶¹ Roger Clegg & Hans A. von Spakovsky, "Disparate Impact" and Section 2 of the Voting Rights Act (Mar. 17, 2014), <http://www.heritage.org/research/reports/2014/03/disparate-impact-and-section-2-of-the-voting-rights-act>.

⁶² *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2631 (2013).

⁶³ 42 U.S.C. § 1973(b) (2006).

⁶⁴ *From Selma to Shelby County: Working Together to Restore the Protections of the Voting Rights Act: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. 5 (2013) (questions for the record submitted by Sen. Al Franken for Justin Levitt), available at http://redistricting.ils.edu/files/_%20Levitt%20responses%20to%20Franken%20QFRs.pdf. Such "danger signs" include, but are not limited to, seven potential indicia of discrimination identified in a 1982 Senate Judiciary Committee Report. *Id.* at 6 (citing S. REP. NO. 97-417, at 28-29 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 205-06).

⁶⁵ See Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PA. L. REV. 377 (2012).

⁶⁶ *United States v. Blaine Cnty., Mont.*, 363 F.3d 897, 909 (9th Cir. 2004).

The Preliminary Injunction Provision

Samuel Bagenstos*

Section 6 of the VRAA would make preliminary injunctive relief available in voting rights cases based purely on an assessment of the balance of hardships, without any inquiry into the merits.⁶⁷ Section 6 provides that a court addressing a request for a preliminary injunction in a voting rights case “shall grant the relief if the court determines that, on balance, the hardship imposed upon the defendant by the issuance of the relief will be less than the hardship which would be imposed upon the plaintiff if the relief were not granted.”⁶⁸ The provision goes on to state that when a plaintiff seeks a preliminary injunction against a *change* in a voting practice, the balance-of-hardships analysis should consider whether the former voting practice was adopted as a remedy in, or as part of a settlement of, previous voting rights litigation.⁶⁹

Section 6 would represent a departure from the usual federal court preliminary injunction standards under which a court can grant preliminary relief only after an inquiry into not just the balance of hardships but also the chances of success on the merits, whether the plaintiff will suffer irreparable harm in the absence of relief, and the public interest.⁷⁰ There is nothing about these usual standards that is constitutionally required, however. To the contrary, the Supreme Court has recognized that Congress has the power to override such equitable principles.⁷¹ As the Court has explained, “when district courts are properly acting as courts of equity, they have discretion *unless a statute clearly provides otherwise*.”⁷² “Courts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute.”⁷³

Although it is unusual for Congress to depart from the standard criteria for granting preliminary relief, it is hardly unprecedented. For example, the stay-put provision of the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1415(j), prohibits school districts from unilaterally changing a disabled student’s educational placement while due-process proceedings are pending. Numerous courts have held

* Frank G. Millard Professor of Law, The University of Michigan Law School.

⁶⁷ As currently drafted, Section 6’s text would appear to make both preliminary *and* permanent relief in voting rights cases depend solely on the balance of hardships. But the plain intent of the provision is to apply to requests for preliminary injunctions only, and the text will presumably be changed to make that intent clear.

⁶⁸ VRAA § 6(b).

⁶⁹ *See id.*

⁷⁰ *See* *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008). The courts of appeals after *Winter* are divided regarding whether a plaintiff seeking a preliminary injunction under the ordinary test must always show that he or she is *likely* to succeed on the merits, or whether, instead, a plaintiff who makes a sufficiently strong showing of irreparable harm can obtain preliminary relief based merely on identifying serious questions going to the merits. *See* Bethany M. Bates, Note, *Reconciliation After Winter: The Standard for Preliminary Injunctions in Federal Courts*, 111 COLUM. L. REV. 1522 (2011).

⁷¹ *See, e.g., Miller v. French*, 530 U.S. 327 (2000) (Congress had power, in the Prison Litigation Reform Act, to require district courts to grant automatic stays in certain cases involving prison conditions); *TVA v. Hill*, 437 U.S. 153, 194 (1978) (in Endangered Species Act, Congress displaced courts’ equitable discretion and determined that balance of equities favored preserving endangered species). *See also* *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) (“Of course, Congress may intervene and guide or control the exercise of the courts’ discretion[.]”).

⁷² *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 496 (2001) (emphasis added).

⁷³ *Id.* at 497.

that this provision directs courts to impose “an ‘automatic’ preliminary injunction, meaning that the moving party need not show the traditionally required factors (e.g., irreparable harm) in order to obtain preliminary relief.”⁷⁴ Rather, “[t]he statute substitutes an absolute rule in favor of the status quo for the court’s discretionary consideration of the factors of irreparable harm and either a likelihood of success on the merits or a fair ground for litigation and a balance of hardships.”⁷⁵ Congress itself balanced the relevant equitable factors and determined that the harm entailed by disruption of a disabled child’s educational environment categorically outweighs any countervailing benefits and justifies preliminary relief to leave the child where she is while a dispute is pending.⁷⁶

Section 6 of the VRAA would represent a more moderate exercise of the same power. By adopting Section 6, Congress would be determining that the disenfranchising effect of a new voting law would necessarily cause sufficient irreparable harm to justify freezing the status quo in place, so long as the party challenging the law can show that the balance of hardships tips in its favor. By requiring the court to engage in an inquiry into the balance of hardships—something the IDEA does not even *permit*—the VRAA’s preliminary-injunction provision reflects less of a break from traditional equity practice, and thus rests on even firmer ground than does the stay-put provision.⁷⁷ Section 6 thus fits comfortably within the pattern of Congress’s previous exercises of its power to balance the relevant considerations and alter the standards for preliminary relief in particular contexts.

Section 6 is also a valid exercise of Congress’s power to enforce the Fourteenth and Fifteenth Amendments. Because Section 6 applies uniformly across all of the states, it does not implicate the “equal sovereignty” principle that led the Court to invalidate the Voting Rights Act’s coverage formula in *Shelby County*. Nor does Section 6 impermissibly seek “to decree the substance of the Fourteenth Amendment’s [and Fifteenth Amendment’s] restrictions on the States.”⁷⁸ Even Justice Scalia, who takes the narrowest view on the Court of the power to enforce the Reconstruction Amendments, has endorsed Congress’s authority to adopt “measures that do not restrict the States’ substantive scope of action but impose requirements directly related to the facilitation of ‘enforcement’—for example, reporting requirements that would enable violations of the Fourteenth Amendment to be identified.”⁷⁹ In its

⁷⁴ *Joshua A. v. Rocklin Unified Sch. Dist.*, 559 F.3d 1036, 1037 (9th Cir. 2009) (quoting *Drinker ex rel. Drinker v. Colonial Sch. Dist.*, 78 F.3d 859, 864 (3d Cir. 1996)).

⁷⁵ *Zvi D. ex rel. Shirley D. v. Ambach*, 694 F.2d 904, 906 (2d Cir. 1982).

⁷⁶ *See R.B. ex rel. Parent v. Mastery Charter Sch.*, 762 F. Supp. 2d 745, 756 (E.D. Pa. 2010) (“The stay-put provision represents Congress’s policy choice that the danger of excluding a handicapped child entitled to an educational placement from that placement was much greater than the harm of allowing a child not entitled to an educational placement to remain in that placement during the pendency of judicial proceedings.”) (internal quotation marks omitted), *aff’d*, 532 F. App’x 136 (3d Cir. 2013).

⁷⁷ Other statutes relax the preliminary injunction standard without eliminating the success-on-the-merits prong. The Petroleum Marketing Practices Act (“PMPA”), 15 U.S.C. § 2805(b)(2), for example, authorizes a preliminary injunction if the plaintiff’s franchise has been terminated, the plaintiff has shown “sufficiently serious questions going to the merits to make such questions a fair ground for litigation,” and the balance of hardships tips in the plaintiff’s favor. *See Mac’s Shell Serv., Inc. v. Shell Oil Products Co., LLC*, 559 U.S. 175, 193 n.12 (2010). If Congress were to amend the VRAA to include a “serious questions going to the merits” requirement, such a step would place Section 6 on still firmer ground.

⁷⁸ *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

⁷⁹ *Tennessee v. Lane*, 541 U.S. 509, 560 (2004) (Scalia, J., dissenting).

unanimous opinion in *United States v. Georgia*,⁸⁰ the Court held that, *at the least*, Congress has enforcement power in the circumstances Justice Scalia identified.

Fully consistent with Justice Scalia's test, Section 6 does not impose any new substantive standard on the states. To the contrary, it merely adopts a remedial rule that serves to facilitate enforcement of the underlying rights secured by the Constitution and the voting rights laws. Federal courts have repeatedly recognized that the harms caused by holding an election under procedures that are later held unlawful cannot be fully undone after the election is held.⁸¹ When a court concludes, after an election, that the state held the election under procedures that violated federal law, the court is forced to choose between two deeply problematic options: (1) waiting until the next election to provide relief, thus forcing the successful plaintiffs to wait years for redress of the violations of law; or (2) requiring the state to run the election over again, thus imposing great burden and expense, "disrupt[ing] the state's interest in assuring the finality of the election results,"⁸² and likely forcing the election to be held at an unusual and inconvenient time that affects the composition of the electorate. Although courts have the *power* to void elections held under unlawful procedures,⁸³ they are understandably hesitant to do so. Section 6 would reflect a congressional determination that, given the harms of re-running elections, the preferable course where the balance of hardships tips toward the plaintiff is to freeze prior voting practices in place until a court can determine whether new practices violate federal law. Under the remedial theory of congressional power adopted in *Georgia*, that determination is valid and need not be subjected to the "congruence and proportionality" analysis that applies when Congress seeks to impose more searching prophylactic *substantive* requirements on states.⁸⁴

Even if a court were to hold that the "congruence and proportionality" test *does* apply to Section 6, the provision would still be constitutional. Unlike any of the provisions the Supreme Court has struck down under that test, Section 6 imposes no new substantive requirement on states.⁸⁵ Nor does it even alter the remedies that a court

⁸⁰ 546 U.S. 151, 158-59 (2006).

⁸¹ See, e.g., *Council of Alt. Political Parties v. Hooks*, 121 F.3d 876, 883 (3d Cir. 1997) ("If the plaintiffs lack an adequate opportunity to gain placement on the ballot in this year's election, this infringement on their rights cannot be alleviated after the election."); *Spencer v. Blackwell*, 347 F. Supp. 2d 528, 537 (S.D. Ohio 2004) (granting preliminary injunction, shortly before an election, against allowing challengers into polling places on election day). See also *United States v. Berks Cnty., Pa.*, 250 F. Supp. 2d 525, 540 (E.D. Pa. 2003) ("Federal courts have recognized that the holding of an upcoming election in a manner that will violate the Voting Rights Act constitutes irreparable harm to voters.").

⁸² *Doe v. Walker*, 746 F. Supp. 2d 667, 682 (D. Md. 2010).

⁸³ See *Pope v. Cnty. of Albany*, 687 F.3d 565, 570 (2d Cir. 2012).

⁸⁴ See *Georgia*, 546 U.S. at 158-59; *Lane*, 541 U.S. at 558-59 (Scalia, J., dissenting).

⁸⁵ Cf. *Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327, 1334-1337 (2012) (opinion of Kennedy, J., announcing judgment of the Court) (Family and Medical Leave Act's self-care provision gave individuals substantive rights that went well beyond the rights recognized in the Court's Fourteenth Amendment cases); *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 372-373 (2001) (same for Americans with Disabilities Act's employment provisions); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 86 (2000) (Age Discrimination in Employment Act "prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard"); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 643 (1999) (Patent Remedy Act provided a remedy for states' acts of patent infringement, without more, but "a State's infringement of a patent, though interfering with a patent owner's right to exclude others, does not by itself violate the Constitution"); *City of Boerne v. Flores*, 521 U.S. 507, 533-34 (1997) (Religious Freedom Restoration Act gave individuals substantive rights that went well beyond the rights recognized in the Court's Free Exercise Clause cases).

may award on a finding of liability. Section 6 simply changes the process for granting preliminary relief while the litigation proceeds. The minimal impact of that provision, when measured against the extensive history and pattern of state deprivations of constitutional rights in the voting area—a pattern that, as the Supreme Court itself recognized, extends across the Nation⁸⁶—makes it fully congruent and proportional to the underlying Fourteenth and Fifteenth Amendment rights.

To be sure, a state might argue that Section 6 violates its sovereignty by preventing it from putting into effect a change to voting procedures in the absence of a finding that the change violates federal law. But the suspension will be only temporary. And the temporary suspension authorized by Section 6 promotes the core purpose of preliminary relief in federal courts—to ensure that the plaintiff does not experience irreparable harm before the court has the opportunity to decide whether the defendant’s action violates federal law.⁸⁷ Finally, any harm to the state will be mitigated by two factors. First, Section 6 authorizes a preliminary injunction only when “the hardship imposed upon the defendant by the issuance of the relief will be less than the hardship which would be imposed upon the plaintiff if the relief were not granted.”⁸⁸ Where a court determines that the harm to the state of issuing a preliminary injunction will outweigh the benefit to the plaintiffs, Section 6 will not authorize a preliminary injunction. Second, after issuing a preliminary injunction that suspends the operation of a state voting law, a court can be expected to expedite its consideration of the merits. By following that procedure, the court can ensure that any suspension of a state voting practice lasts only so long as is necessary to avoid harm to voters while determining, once and for all, whether that practice violates federal law.

For all of these reasons, the VRAA’s preliminary injunction provision would be a valid exercise of Congress’s power to enforce the Fourteenth and Fifteenth Amendments. That provision would make a change to the preliminary injunction standards that, while unusual, is far from unprecedented. And it would fit comfortably within the congressional authority that the Supreme Court has recognized.

⁸⁶ See *Nw. Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009).

⁸⁷ See John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 565 (1978).

⁸⁸ 22 VRAA § 6(b).

Notice and Transparency

Gilda R. Daniels*

Congress and the courts have consistently recognized the importance of notice and transparency to foster public confidence in elections and to protect voting rights. For example, the National Voter Registration Act (“NVRA”) requires states to make records pertaining to voter registration activities available for public inspection and photocopying.⁸⁹ The Fourth Circuit noted that this requirement “promotes transparency in the voting process” and “the integrity of federal elections.”⁹⁰ Further, the court held that the provision “embodies Congress’s conviction that Americans who are eligible under law to vote have every right to exercise their franchise, a right that must not be sacrificed to administrative chicanery, oversights, or inefficiencies.”⁹¹

To that end, the VRAA contains provisions designed to increase notice and transparency of elections and to restore some, but not all, of the benefits of the prior preclearance regime. An often-overlooked aspect of preclearance was that it required robust disclosure of changes to voting laws by covered jurisdictions.⁹² To obtain preclearance, covered jurisdictions had to provide the Department of Justice (“DOJ”) with information explaining proposed voting changes, including the differences between the prior procedure and the new one, the reasons for the change, and the anticipated effect on members of racial or language minority groups.⁹³ In complex changes such as redistricting and annexation, DOJ often received additional information, such as demographic data, maps, and election returns data.⁹⁴ The information was kept on file with DOJ and was made available to civil rights groups and other interested parties upon request.⁹⁵ DOJ also provided interested individuals and groups with regular notices of new submissions, and posted weekly information online.⁹⁶ This enabled the public to serve as a partner with the federal government to prevent discrimination in voting.

Shelby County thus leaves a significant gap in the public’s ability to monitor the practices of those jurisdictions, especially at the local level, where voting changes are difficult to monitor and may receive scant media attention. Unsurprisingly, then, since *Shelby County*, many jurisdictions have moved forward with previously

* Associate Professor of Law, University of Baltimore School of Law.

⁸⁹ 42 U.S.C. § 1973gg-6(i)(1) (2012).

⁹⁰ *Project Vote/Voting for America, Inc. v. Long*, 682 F.3d 331, 339–40 (4th Cir. 2012).

⁹¹ *Id.* at 334–35.

⁹² See Michael Halberstam, *The Myth of “Conquered Provinces”: Probing the Extent of the VRA’s Encroachment on State and Local Autonomy*, 62 HASTINGS L.J. 923, 955–56 (2011).

⁹³ See 28 C.F.R. § 51.27.

⁹⁴ See *id.* §§ 51.27(q); 51.28.

⁹⁵ See *id.* § 51.50.

⁹⁶ See *id.* § 51.32; *Notices of Section 5 Activity Under Voting Rights Act of 1965, As Amended*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/crt/about/vot/notices/noticepgp.php> (last visited May 7, 2014).

challenged or blocked voting changes.⁹⁷ For example, jurisdictions in Georgia have implemented or sought to implement a number of changes, such as the redistricting of the Fulton County Commission, which decreased the size of majority-minority districts,⁹⁸ and a proposal in Athens, Georgia to close almost half of its twenty-four polling places and replace them with two early voting facilities located in police stations—closures that would force some voters to travel three hours to reach the new polling places.⁹⁹ In Greene County, Georgia, the County Board of Commissioners revised its redistricting plan decreasing the percentage of African-American voters in a majority-minority district to less than fifty-one percent.¹⁰⁰ Augusta-Richmond, Georgia has moved its county elections from November to the summertime, when African-American turnout is usually lower.¹⁰¹

A striking example of local “chicanery” has taken place in Beaumont, Texas. Whites in Beaumont had sought since 2011 to eliminate a four-person African-American majority school board by changing the board from seven single-member districts to five single-member districts and two at-large seats—a change that would in all likelihood reduce African-American representation.¹⁰² When this change was blocked by Section 5, supporters of the change sought to circumvent Section 5—and the democratic process—by having three white candidates submit candidacy papers for the seats of three incumbent African-American board members immediately before the filing deadline for the 2013 election, even though their terms were not due to expire until 2015. When the school district rejected the filings, the challengers sued, claiming based on a novel interpretation of state law that the seats should have been up for re-election, and that since the filing deadline had passed, they were entitled to the seats unopposed.¹⁰³ After *Shelby County*, a state court has allowed Beaumont’s redistricting plan to proceed, although it denied the white candidates’ attempts to be seated unopposed. The Beaumont case underscores both that adequate notice regarding the composition of districts, changes in redistricting schemes, and

⁹⁷ See, e.g., *How Formerly Covered States and Localities are Responding to the Supreme Court’s Voting Rights Act Decision*, NAACP LEGAL DEF. & EDUC. FUND, available at <http://www.naacpldf.org/document/states-responses-shelby-decision> (last updated Apr. 24, 2014); Sarah Childress, *After Shelby, Voting-Law Changes Come One Town at a Time*, FRONTLINE, Aug. 8, 2013, <http://www.pbs.org/wgbh/pages/frontline/government-elections-politics/after-shelby-voting-law-changes-come-one-town-at-a-time>.

⁹⁸ See *Election may change Fulton commission makeup, priorities*, ATLANTA JOURNAL-CONSTITUTION, Mar. 13, 2014; David Wickert, *Fulton Redistricting*, ATLANTA JOURNAL-CONSTITUTION, May 19, 2013, at B1.

⁹⁹ See Spencer Woodman, *Voting Rights at Risk in Georgia*, ROLLING STONE, Nov. 4, 2013, <http://www.rollingstone.com/politics/news/voting-rights-at-risk-in-georgia-20131104>.

¹⁰⁰ See *id.*; Billy W. Hobbs, *Rhodes addresses injustice concerning redistricting map in Greene County*, LAKE OCONEE NEWS, Aug. 15, 2013, http://www.msgr.com/lake_oconee_news/news/article_84967866-05da-11e3-801e-0019bb2963f4.html.

¹⁰¹ 13 Officials originally sought to move the Augusta elections to July. See *Court ruling revives effort to move Augusta elections to July*, AUGUSTA CHRON., June 29, 2013. Ultimately, they were moved to May, with any runoff elections to be held in July. See *Governor Deal Signs Bill Moving Elections to May*, AUGUSTA CHRON., Jan. 22, 2014.

¹⁰² 14 See Zachary Roth, *Breaking Black: The Right-Wing Plot to Split a School Board*, MSNBC.COM, Oct. 17, 2013, updated Jan. 30, 2014, <http://www.msnbc.com/msnbc/blacks-texas-town-fear-return-old-days>.

¹⁰³ All three of the challengers had lost to the three African-American incumbents in a previous election. The last-minute nature of their filing made it clear that they had no interest in putting the incumbents on notice of their interpretation until after the 2013 filing deadline had passed. The incumbents understandably had not filed re-election papers by the 2013 deadline since their terms were not due to expire until 2015.

candidate qualification information is essential, and that racial discrimination in voting is still an unfortunate reality.

In an effort to restore some of the benefits of Section 5, the VRAA would require states and political subdivisions to publicize certain information pertaining to voting changes. First, states and localities would be required to publicize, within 48 hours, any changes to voting practices and procedures that occur 180 days before a federal election.¹⁰⁴ Second, no later than 31 days before a federal election, states and localities would have to publicize detailed information about polling place resources, including the number of voting machines and poll workers assigned to each precinct or polling place.¹⁰⁵ Finally, for federal, state, or local elections, states and jurisdictions would have to publicize any changes to the constituency that will participate in the election or to the boundaries of electoral districts within ten days of making such changes.¹⁰⁶ Notice would be provided within the affected jurisdictions and on the internet. If a jurisdiction did not comply, the VRAA would prohibit it from denying or abridging a citizen the right to vote based on the individual's failure to comply with the change.¹⁰⁷

A. CONGRESSIONAL AUTHORITY TO REQUIRE NOTICE IN ELECTIONS

In addition to Congress's Fourteenth and Fifteenth Amendment authority to address racial discrimination in voting, the Constitution's Elections Clause serves as a viable and important tool in Congress' ability to regulate federal elections. The Elections Clause requires states to prescribe "[t]he Times, Places, and Manner of holding Elections for Senators and Representatives," but mandates that "Congress may at any time by Law make or alter such Regulations[.]"¹⁰⁸

Recently, the Supreme Court, in an opinion by Justice Scalia, strongly affirmed Congress's authority to regulate federal elections, noting that "[t]he [Elections] Clause's substantive scope is broad[.]" and that Congress may, if it desires, "alter [state] regulations [for federal elections] or supplant them altogether."¹⁰⁹ The Court emphasized that congressional authority to "make or alter" the "Times, Places, and Manner" of federal elections is grounded in "comprehensive words" that "embrace authority to provide a complete code for congressional elections[.]"¹¹⁰ Such authority applies "not only as to times and places, but in relation to *notices*, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the

¹⁰⁴ See VRAA § 4(a) (proposed VRA § 6(a)).

¹⁰⁵ See VRAA § 4(a) (proposed VRA § 6(b)). Any changes to polling place resources after the deadline of 31 days prior to the election must be publicized within 48 hours. See *id.*

¹⁰⁶ See VRAA § 4(a) (proposed VRA § 6(c)).

¹⁰⁷ See VRAA § 4(a) (proposed VRA § 6(e)).

¹⁰⁸ U.S. CONST. Art. I, § 4, cl. 1. The only exception to Congress's authority to "make or alter such Regulations" is that Congress may not change "the Places of chusing Senators." This has no real-world implications today given that under the Seventeenth Amendment, Senators are chosen by popular vote and on the same ballots as congressional elections, rather than by state legislatures.

¹⁰⁹ *Arizona v. Inter Tribal Council of Ariz.*, 133 S. Ct. 2247, 2253 (2013); see also *Foster v. Love*, 522 U.S. 67, 69 (1997) (finding Congress' Elections Clause authority "well settled... to override state regulations" involving federal election administration matters) (internal citation omitted).

¹¹⁰ *Id.* (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)).

fundamental right involved.”¹¹¹ Thus, the phrase “manner of holding elections” grants Congress authority to regulate the entire federal election process, including voter registration and ballot counting. Congress has previously used this authority with the enactment of the NVRA and the Help America Vote Act (“HAVA”).

The Elections Clause clearly provides Congress with authority to require the type of notice in the VRAA pertaining to federal elections. The Court has explicitly embraced congressional authority over “notices” pertaining to federal elections.¹¹² And if Congress may actively “alter” or “supplant” state laws governing federal elections, then surely it may require that states merely inform the public, in a timely fashion, of any changes to such laws and procedures. Finally, the VRAA’s notice requirements apply nationwide and therefore do not implicate the “equal sovereignty” concerns in *Shelby County*. Thus, all of the VRAA’s notice provisions regarding federal elections are squarely within Congress’s Elections Clause power.

As to the VRAA’s provision requiring notice of changes to electoral constituencies and election boundaries for state and local elections in addition to federal ones, the primary authority for this requirement is likely Congress’ power to enact “appropriate legislation” to enforce the Fifteenth Amendment’s prohibition on racial discrimination in voting.¹¹³ For several reasons, this provision is an appropriate exercise of Fifteenth Amendment power, whether this power is subject to the “rationality” standard used by the Court in *Shelby County*¹¹⁴ or even the stricter “congruence and proportionality” test the Court has invoked in Fourteenth Amendment cases.¹¹⁵ First, it is well-documented that processes such as redistricting, reapportionment, and manipulation of “at-large” elections have been used for racially discriminatory purposes.¹¹⁶ Indeed, less than two years ago, a federal court found Texas’s congressional and state Senate redistricting plans to have been enacted with a discriminatory purpose,¹¹⁷ and post-*Shelby* developments such as those described above confirm that these processes continue to serve as vehicles for racial discrimination. Moreover, public notice is a minimal intrusion on state sovereignty. Unlike preclearance, notice requirements do not delay or prevent the enactment of state or local laws. Nor do they establish new rights or abrogate states’ sovereign immunity—measures that the Supreme Court has sometimes found exceed congressional authority if they are not adequately tailored to remedying state discrimination.¹¹⁸ Rather, the VRAA merely requires states and jurisdictions to provide the public with information about certain voting changes. Such a requirement is a reasonable and appropriately-tailored response to the history of discrimination associated with these types of voting changes.

¹¹¹ *Smiley*, 285 U.S. at 366 (emphasis added).

¹¹² *Id.*

¹¹³ U.S. CONST. amend. XV, § 2.

¹¹⁴ See *Shelby Cnty.*, 133 S. Ct. at 2625, 2627-31.

¹¹⁵ See *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

¹¹⁶ See, e.g., *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986) (“This Court has long recognized that multi-member districts and at-large voting schemes may operate to minimize or cancel out the voting strength of racial [minorities in] the voting population.”) (internal citations omitted); *Rogers v. Lodge*, 458 U.S. 613, 616 (1982) (describing how at-large elections can dilute minority votes); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (finding that a racially gerrymandered district violated the Fifteenth Amendment).

¹¹⁷ *Texas v. United States*, 887 F. Supp. 2d 133, 161, 166 (D.D.C. 2012), *vacated and remanded*, 133 S. Ct. 2885 (2013).

¹¹⁸ See *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999); *City of Boerne*, 521 U.S. at 532.

B. TAKING NOTICE A STEP FURTHER: THE VOTER IMPACT STATEMENT

While the VRAA is a good first step, notice does not begin to replace the strength of Section 5. The legislation's enforcement provision should be clarified and strengthened.¹¹⁹ Moreover, a stronger approach would be for jurisdictions to provide "Voter Impact Statements" ("VIS") to function as a notice mechanism and provide affected voters an opportunity to comment *prior* to implementation.¹²⁰ The concept of a VIS is modeled after Environmental Impact Statements ("EIS"), which have been required since 1969 under the National Environmental Policy Act ("NEPA"). NEPA requires federal agencies to conduct an assessment of the environmental effects of their activities when they plan to undertake major actions that could "significantly affect the quality of the human environment."¹²¹ EISs fill the information void and provide notice and transparency in environmentally affected areas before the government undertakes the project at issue.

A VIS would differ from the VRAA notice requirement because it would not only require a jurisdiction to publicize a proposed change, but also to demonstrate that it has vetted the proposal to ensure that it does not adversely impact the voting rights of any group. If an adverse impact would occur, the VIS proposal would require the jurisdiction to publicize the alternatives it considered, in contrast with the VRAA, under which a jurisdiction's notice requirements are met once it publicizes the change. While the VRAA would be a welcome start, Congress should use all means within its authority to ensure that the public can assess voting changes prior to execution to guarantee that the fundamental right to vote is not overly burdensome for the most vulnerable voters.

¹¹⁹ The VRAA states that "the right to vote of any person shall not be denied or abridged because the person failed to comply with any change made by a State or political subdivision" if the state or jurisdiction failed to provide proper notice. VRAA § 4(a) (proposed VRA § 6(e)). While this language appears to bar jurisdictions from enforcing consequential voting changes if notice is not given, it should be clarified to make it explicit that states may not implement voting changes absent the required notice.

¹²⁰ See generally Gilda R. Daniels, *A Vote Delayed Is a Vote Denied: A Preemptive Approach to Eliminating Election Administration Legislation that Disenfranchises Unwanted Voters*, 47 U. LOUISVILLE L. REV. 57 (2008).

¹²¹ 42 U.S.C. § 4332(2)(C) (2012).

McCutcheon v. FEC and Roberts v. Breyer: They're Both Right and They're Both Wrong*

Alan B. Morrison**

In *McCutcheon v. FEC*,¹ the Supreme Court held that the current aggregate limit on the total amount of money that an individual may contribute to all federal candidates, parties, and political action committees in an election cycle—now \$123,200—violates the First Amendment rights of those who would like to give more. According to the opinion of the four-Justice plurality, written by Chief Justice John Roberts, as long as donors abide by the contribution limits applicable to candidates (\$5200), political parties (\$32,400 for national parties and \$10,000 for state or local parties), and political action committees, commonly known as PACs (\$5000), Congress may not constitutionally impose an aggregate cap to prevent circumvention of those limits—or for any other reason.² Justice Stephen Breyer dissented. In his view, there are both substantial possibilities of donors being able to direct their contributions in ways that evade limits on candidate contributions and other valid reasons that support a reasonable ceiling on spending in electoral races beyond the avoidance of corruption or the appearance of corruption that the majority has defined quite narrowly.

Given this chasm between the two justices, how can they both be right and both be wrong? The answer is that the Chief Justice is right that the prior decisions of the current Court, as well as some of its predecessors dating back to *Buckley v. Valeo*,³ almost certainly support his conclusion on the invalidity of aggregate limits, and in particular, the lack of merit in the FEC's defense of the limits in *McCutcheon*. On the other hand, Justice Breyer has by far the better argument that our democracy and the Constitution permit campaign finance laws that prevent more than what the majority will allow. According to the majority, the only justifications for contribution or spending limits are to prevent corruption or the appearance of corruption, which the

* This Issue Brief was initially published in October 2014.

** The writer is the Lerner Family Associate Dean for Public Interest & Public Service Law, George Washington University Law School where he teaches constitutional law. He has been counsel in a number of campaign finance cases, mainly defending those laws. He is currently lead counsel for the plaintiffs in *Wagner v. FEC* (D. C. Cir 13-5162) (en banc argued Sept 30, 2014), a challenge to the constitutionality of the law that forbids individuals who have contracts with the federal government from making *any* contributions to a candidate, political party, or PAC in connection with any election to a federal office.

¹ *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434 (2014).

² Justice Clarence Thomas concurred, but would have overturned the portion of *Buckley v. Valeo*, 424 U.S. 1 (1976), that applied less than strict scrutiny to limits on campaign contributions established by the Federal Election Campaign Act (FECA) and held that the aggregate limits failed that stringent test.

³ *Buckley v. Valeo*, 424 U.S. 1 (1976). *Buckley* held, briefly, that limits on contributions to candidates and PACs could withstand First Amendment scrutiny, but that limits on personal spending by candidates from their own funds, total spending by candidates from all sources, and independent expenditures by other individuals violate the First Amendment. It was the first case to directly address whether the spending of money in elections was subject to First Amendment protection and is the basis for most of the Court's campaign finance jurisprudence.

majority has interpreted to include no more than bribery or its appearance. But an even more basic flaw in the majority's approach is that it elevates election-related speech in the form of spending money above all other values. In doing so, it seemingly ignores a number of Supreme Court decisions that permit reasonable limits on other types of political or ideological speech that are comparable to campaign contributions and expenditures, such as those banning political speech in or near polling places on Election Day,⁴ those regulating the volume of concerts that might disturb residents late in the evening or early in the morning,⁵ and a law criminalizing the burning of a draft card to protest the Vietnam War.⁶ Although the majority seems unlikely to alter its basic position any time soon, change can only take place by creating the climate in which the flaws in *Buckley* discussed below are exposed and a basic re-examination in this area becomes acceptable.

I. DEFENDING AGGREGATE LIMITS, THEN AND NOW

The aggregate limits that were struck down in *McCutcheon* have been narrowly defended as a way to prevent circumvention of the contribution limits set forth above, mainly with respect to limits on contributions to candidates. That was the basis on which an earlier version of the law, with an aggregate limit of \$25,000, was upheld in *Buckley*.⁷ But at that time, although there were limits on how much an individual could give to a candidate (\$1000) and a PAC (\$5000), there were no limits on contributions to a political party. Thus, if there were a hotly contested U.S. Senate race in the donor's home state, he could make a \$1000 contribution to his preferred candidate and make an unlimited (as long as it was not formally earmarked) contribution to the candidate's national party, expecting that it would be largely used to support that candidate and effectively circumventing the contribution limit for candidates. Hence the aggregate limit, while not preventing circumvention, limited its impact. Shortly after *Buckley* was decided, Congress stepped in to impose a more effective remedy: it set a limit on contributions to political parties in addition to those applicable to candidates and PACs. But when the challenge to aggregate limits was renewed in 2012, the only ground on which the law could be defended was the "anti-circumvention" argument because the Court had cut off other, more persuasive justifications as inconsistent with the First Amendment.

One reason that the law imposing aggregate limits was not challenged for so many years after *Buckley* was that even very wealthy donors do not mind being able to say, "I've maxed out" when the inevitable (lawful) solicitation calls arrive. In addition, as discussed more fully below, those who had maxed out were not frozen out because *Buckley* allowed them to make unlimited independent expenditures on their own, so long as they refrained from coordinating with the candidate or his party. And, of course, under the old \$25,000 ceiling upheld in *Buckley*, as well as the limit of \$123,200 struck down in *McCutcheon*, there were not many individuals who could afford that much after-tax generosity, let alone had a desire to spend that much for a candidate who might not win. Until Shaun McCutcheon and the Republican National Committee filed suit, no one objected enough to the aggregate limit to take it to court.

⁴ *Burson v. Freeman*, 504 U.S. 191 (1992).

⁵ *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

⁶ *United States v. O'Brien*, 391 U.S. 367 (1968).

⁷ *See Buckley*, 424 U.S. 1.

Breyer’s dissenting opinion in *McCutcheon* makes a solid case for the proposition that *some* circumvention on the limits on contributions to candidates may happen unless there is an aggregate cap. Justice Breyer provides three complex examples of how that might happen, which appear to be dependent on a significant number of contributors who are willing to spend several million dollars, a limited number of candidates among whom the money will be divided, party and PAC officials willing to restrict their contributions and other spending to a small number of candidates, and substantial planning (not rising to the level of unlawful coordination) among all participants. Moreover, Justice Breyer’s conclusion that the beneficiaries of such spending will surely be grateful for the indirect assistance is almost certainly correct, but it does not suffice under the majority’s view of the First Amendment: “government regulation may not target the general gratitude a candidate may feel toward those who support him or his allies or the political access such support may afford.”⁸

In his plurality opinion, the Chief Justice does not seriously argue that such circumvention is impossible. Rather, his position is that it will not happen often, that it takes a real effort in planning and execution to pull it off, that attempts may fail, and that, all in all, the likelihood of serious circumvention is quite speculative and does not justify the burdens on those who wish to donate larger sums to support more of their candidates and parties in federal elections. In addition, the Court also suggested a number of less restrictive alternatives, while admitting that some may not work and that others may be invalid. In short, given what the majority saw as the limited ways in which political donations may constitutionally be controlled, and the heavy thumb that the First Amendment places on the scale opposing such restrictions, it is hardly surprising that the *McCutcheon* Court found the anti-circumvention rationale to be wanting.

Moreover, the additional money that will be unleashed as a result of *McCutcheon* is not likely to be great, because it applies only to the very few individuals who are in a position to give more than \$123,200. This is especially true when the result is compared with the impact of a decision like *Citizens United v. FEC*,⁹ where the Court gave for-profit corporations the green light to spend as much money as they want on independent expenditures. The Court previously destroyed the viability of systems providing for public financing of elections by banning efforts to offset the spending and fundraising of candidates who opt out of such systems.¹⁰ And since the ultra-rich can already contribute as much as they want to PACs that make only independent expenditures but not contributions, also known as Super PACs, it is unclear how much added damage *McCutcheon* will do. Indeed, there are some who believe that *McCutcheon* will have the positive effect of directing money toward political parties and candidates, who tend to be less willing to engage in attack ads than are those who make independent expenditures.

II. ROBERTS WAS RIGHT, THE SEEDS WERE SOWN

There are two reasons why the anti-circumvention rationale should not have succeeded in 1976, let alone today. If circumvention were a problem, the fix that Congress did impose—putting a limit on how much could be given to political parties and/or how much parties could give to any candidate—was the much more direct way of

⁸ *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1441 (2014).

⁹ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

¹⁰ *Arizona Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011).

dealing with the problem. At the very least, it should have been the first response, with aggregate limits as a backup if it did not work.

Second, avoiding end runs on other limits was almost surely not what Congress had in mind when the aggregate limits were originally enacted. There is no need to delve into legislative history to establish that fact. The statute itself is quite clear that aggregate limits were part and parcel of the overall plan of Congress to cap the amount of spending in federal elections, through five separate, but inter-related limits: (1) limits on contributions to candidates and PACs; (2) limits on how much a candidate could spend from his or her personal funds and those of immediate family members; (3) caps on total candidate spending (with different numbers for the President, Senate and House); (4) limits on independent expenditures by individuals; and (5) aggregate individual limits. All of those laws were designed to take what Congress considered to be excess spending out of federal elections, with aggregate limits of \$25,000 as one of the tools to achieve that goal. The *Buckley* Court upheld contribution limits (1), but struck down expenditure limits (2) through (4) as improper attempts to limit speech, in violation of the First Amendment.

Once the Court set aside those expenditure limits, there was no way that aggregate limits (5) could be sustained as a means of limiting overall spending. The Court in *Buckley* nonetheless sustained the \$25,000 limit on an anti-circumvention rationale that was not the basis for the law, nor a ground urged by its defenders. Indeed, as the Court noted, this issue “has not been separately addressed at length by the parties,” and the briefs filed by the United States and the principal intervenors defending the law (Common Cause and the Center for Public Financing of Elections) did not argue that the aggregate limits were enacted for that purpose.¹¹ For these reasons, unless the *Buckley* Court was in error in its expenditure rulings, Chief Justice Roberts was right in concluding in *McCutcheon* that anti-circumvention could not support today’s limits. However, as I now argue, although the *Buckley* Court was correct in setting aside the particular expenditure limits challenged there, it did so on much broader grounds than were necessary, with the result that a number of campaign finance laws that were subsequently set aside might have been sustained had narrower rationales been employed.

III. HOW BUCKLEY COULD HAVE BEEN NARROWER

A. CANDIDATE EXPENDITURE LIMITS

When the *Buckley* Court struck down dollar limits on personal spending by candidates from their own funds and total spending by a candidate from all sources, there is one argument that could have, and should have, proven decisive on its own, without the need to treat the unlimited spending of money in elections as no different from the unlimited making of speeches while standing on a soapbox in Lafayette Park. The main impact of both sets of candidate spending limits would be on challengers, in part because incumbents have many advantages, from name recognition, to taxpayer-paid staff, to franking privileges, and the ability to help out constituents. The *Buckley* Court specifically recognized these advantages in the context of discussing whether they rendered the contribution limits unconstitutional.¹² The Court nevertheless upheld the contribution limits because they applied equally to incumbents and challengers on their face, and then stated that, because it concluded that the expenditure

¹¹ *Buckley v. Valeo*, 424 U.S. 1, 38 (1976).

¹² *Id.* at 31 n.33.

limits were unconstitutional regardless of incumbent advantages, it did not have to “express any opinion with regard to the alleged invidious discrimination resulting from the full sweep of the legislation as enacted.”¹³ Thus, it did not address whether the candidate expenditure limits themselves resulted in invidious discrimination.

The Court’s decision to rule more broadly on the candidate expenditure issue has had serious consequences for many campaign finance laws, which might have been avoided if it had chosen the narrow ground that, although the statute treated incumbents and challengers identically, the undisputed and very significant incumbent advantages destroyed that facial equality. Such a ruling would have been based more on Equal Protection than First Amendment principles, and it would have given Congress an opportunity to cure that defect. Thus, however unlikely it may be that Congress (or any legislative body) would ever consider evening up the incumbent advantage—for example, by allowing challengers to spend greater amounts than incumbents or appropriating funds for challengers to offset the advantages of incumbency—a decision based on Equal Protection grounds would have been far less controversial given the Court’s other Equal Protection rulings. It would also have been more prudent for the Court to have issued a narrower ruling and given Congress the opportunity to remedy that defect rather than holding that no expenditure limits could ever be upheld.¹⁴

There is a second, and also more limited, basis why both sets of candidate expenditure limits should have been set aside: the actual limits in the law were chosen by those whose re-election races would be affected by what those limits were. One does not have to be a complete cynic to appreciate that those amounts would be determined with one eye on the anticipated needs of the officeholder and another on the concern that a challenger might use personal funds or simply out-fundraise the incumbent. For example, the Court found that incumbency helped create an Equal Protection violation in *Baker v. Carr*,¹⁵ where incumbents controlled the apportionment process that determined which voters would choose the winner in the legislators’ bids for re-election.¹⁶

A ruling on the basis that the limits cannot be set by those who will be most affected by them would have left room for Congress and the states to enact expenditure limits that did not suffer from that problem. One option, which is not available at the federal level and not in all states, is the initiative process, by which citizens could determine the proper spending levels, without the inherent bias that incumbent legislators have. Another option would be to create a non-partisan commission, similar to those enacted by a number of states to deal with the analogous problem of incumbent self-protection in drawing legislative districts, to set appropriate spending levels that would take into account the needs of both challengers and incumbents. Those options might not have been enacted, but they should have been available. More important, relying on the more narrow approach would have provided a better basis on which to decide the issue of the validity of limits on independent

¹³ *Id.*

¹⁴ In his dissent in *Citizens United*, Justice John Paul Stevens indicated that incumbent protection could be used in an appropriate case to strike down some campaign finance laws. See *Citizens United v. Fed. Elections Comm’n*, 558 U.S. 310, 461-62 (2010).

¹⁵ *Baker v. Carr*, 369 U.S. 186 (1962).

¹⁶ See also *Gibson v. Berryhill*, 411 U.S. 564 (1973) (upholding the district court’s conclusions that the State Board of Optometry was so biased by prejudice and pecuniary interest that it could not constitutionally conduct hearings looking toward the revocation of plaintiffs’ licenses to practice optometry in competition with Board members).

expenditures and not set a precedent that foreclosed all future efforts at placing any limits on campaign expenditures, no matter how they were written or by whom.

In combination, or standing on their own, the incumbents' advantages, coupled with their ability to write rules that would maximize their protection and minimize the ability of non-incumbents to mount a successful attack, should have been more than enough to strike down the candidate expenditure limits at issue in *Buckley* without relying on an untested claim that the government never has an interest in limiting total spending in any and all circumstances.

B. INDEPENDENT EXPENDITURES

Having ruled broadly that expenditure limits imposed on candidates were unconstitutional, the *Buckley* Court followed the same approach for independent expenditure limits, which are those imposed on persons other than candidates and their committees. In contrast to what the Court did with contributions, where it recognized the First Amendment's applicability but allowed reasonable limits, it treated independent expenditures like candidate expenditures and ruled that no limits were permissible for either. According to the Court, spending money directly to support or oppose a candidate was a pure First Amendment activity, and therefore the government could never decide how much was too much. Once again, as with candidate expenditure limits, there were three narrower grounds that the Court could have and should have used to strike down the limit on independent expenditures, which was only \$1000 in 1974.

First, the \$1000 statutory ceiling was identical to the one applicable to direct contributions. Actually, it was only half, because \$1000 contributions could be made in both a primary and a general election, but there was no comparable allowance for independent expenditures. The Court upheld limits on contributions because of the potential for their creating the appearance of corruption on the part of recipient. The Court claimed that independent expenditures are different from direct contributions in that they will have no impact on the level of appreciation that a candidate may have toward the independent spender. One need not fully accept that claim to agree that independent spending limits of half what a contributor could do make no sense and cannot be sustained under the First Amendment. Second, the independent limit applied even if the donor made no direct contributions, suggesting that they were identical in impact to direct contributions, or even worse because they could be made only for a primary or a general election, but not both, unlike direct contributions. Third, the \$1000 limit applied to races for president as well as the House of Representatives, even though the impact in those two contexts would be very different. Thus, the Court could simply have said that \$1000 for all elections was unreasonably low, and Congress could have decided how to respond, including imposing higher limits that might have been upheld.

However, the Court did more: it not only said the \$1000 limit was too low, but it announced a blanket rule that *no* limits on independent spending would ever be acceptable. Not only was such a broad rule unnecessary to decide the case before it, but it was terribly unwise. The basic issue in *Buckley* was whether the spending of money in elections was subject to the First Amendment. While there were decisions of the Court that bore on the question, FECA, as amended in 1974, was the first comprehensive federal system for regulating campaign finance activities, and thus the Court was entering uncharted First Amendment waters. Until FECA, there was no

ban on cash contributions, no disclosure or reporting requirements, no limits on spending, and no agency to manage the new system.¹⁷

When the Court decided *Buckley*, there was no record of how a new system like FECA, as substantially modified by *Buckley*, might operate in practice, let alone how the rules on contributions and independent expenditures would play out for supporters (or opponents) of a particular candidate. The case was briefed and argued on an expedited basis so that the rules could be known for the upcoming 1976 elections. The Court's lengthy opinion, covering a multitude of issues, was handed down less than three months after argument. For all those reasons (and perhaps more), the Court should have proceeded cautiously, deciding only what it had to decide, and leaving broader pronouncements on the relation between campaign spending and the First Amendment to another day.

To be sure, deciding which limits on independent expenditures were unreasonable would not be easy. However, the Court has shown that it is able to decide when a state has been too strict.¹⁸ For starters, if an individual can give \$5000 to a broad-based PAC, which in turn can give that amount to candidates, \$5000 would surely be the lowest possible limit on independent expenditures that could be sustained. Perhaps a more generous number, such as the \$32,000 now allowed to be given to national parties, would be more reasonable. Even permitting an amount equal to the aggregate limit of \$123,200 at issue in *McCutcheon* would not cause the kind of massive imbalance between what the very few can afford and what the rest of the country can spend. Moreover, if there were a reasonable cap on independent expenditures, there might never have been a *Citizens United*, and at least business corporations could be held to that level, which would be a significant improvement over the current rule. Indeed, if Congress had originally enacted more reasonable independent expenditure ceilings, it is not at all clear that they would have been challenged by anyone, just as the contributions limits for federal candidates have not been tested since *Buckley*, in part because the contribution limits were raised substantially in 2003 and are now indexed for inflation.

The main reason that the Court did not take a narrow approach in striking down the \$1000 limit on independent expenditures is that the proponents of the law relied on a quite different rationale for defending it. As both the Government and the intervenors saw it, independent expenditures on behalf of a candidate were no different from direct contributions. Thus, to allow more than \$1000 would, in their view, result in a wholesale evasion of the basic candidate contribution limits, even if the expenditures were made truly independently of the candidate. Under that approach, even a \$5000 ceiling on independent expenditures would be unacceptable, although surely less so than no limit at all.

Moreover, the independent expenditure limit was part of a larger goal of the supporters of FECA: to limit the total amount of money spent in federal elections. To

¹⁷ A ban on contributions by corporations had existed since 1906, followed by a ban applicable to government contractors enacted in 1940. The 1906 law was expanded in 1947 to forbid union contributions and independent expenditures by both unions and corporations, but no overall challenges had been made to those laws. There had been a limit on contributions to candidates of \$5000 since 1940, but it was essentially a dead letter because there was no means to enforce it. Further, while the 1939 Hatch Act broadly regulated what federal, and then certain state, employees could do politically, the Act never prohibited those employees from making political contributions, although it did impose some restrictions on making contributions akin to time, place, and manner regulations.

¹⁸ See e.g. *Randall v. Sorell*, 548 U.S. 230 (2006) (setting aside the contribution limits as unreasonably low).

achieve that goal, the law included both contribution and expenditure limits, with the most significant being the cap on how much candidates could spend in their own election races. Congress had enacted detailed spending limits for congressional races, largely based on population, in which it decided how much was “enough” to spend. The clearest example of what Congress sought to achieve involved presidential elections, where Congress actually *reduced* the amount that could be spent from what had been spent in 1972, to \$10 million in the primaries and \$20 million in the general election. According to Congress, there was already too much money being spent in federal elections, and independent expenditures had to be capped at quite low levels or its new system would be thoroughly undermined. In effect, having set the goal at capping spending regardless of the source, the supporters were boxed in and could not argue that, even if \$1000 might be too low for an independent expenditure cap, Congress should be given a chance to come up with a more acceptable number.

Not only did Congress wish to reverse the overall spending in federal elections, but it was also clear in its desire to put a ceiling on how much any individual could spend. The principal stated justification for candidate contribution limits was to reach beyond laws forbidding bribery and enact limits that would avoid the appearance of corruption that arose when large donations to candidates appeared to buy favors or preferred access. However, Congress also set a limit of \$50,000 on what a candidate and his immediate family could donate to the candidate’s own campaign. The *Buckley* Court quite sensibly rejected an anti-corruption rationale for that limit because a candidate cannot corrupt himself by giving his own or his immediate family’s money to his campaign. Moreover, the fact that this limit was part of a law that placed overall limits on campaign spending by candidates made its defense even more difficult.

C. AGGREGATE LIMITS, THEN AND NOW

Given the outcomes of these other challenges in *Buckley*, what is most surprising is that the aggregate limits provision was sustained at all. Not only was it part of a plan to place overall limits on spending in federal elections, but the anti-circumvention rationale that the Court accepted was never advanced in the briefs or legislative history. Indeed, the principal loophole that the Court said was being plugged—the absence of a limit on individual contributions to political parties—seems to have been an oversight that Congress repaired soon thereafter. Thus, even though the aggregate limits in 2014 were more than five times what they were in 1976, they were almost impossible to defend because the main loophole had already been closed. For these reasons, it is hard to quarrel with Chief Justice Roberts’s conclusion in *McCutcheon* that the aggregate limits do not prevent circumvention of the contribution limitations laws, which are the only limits that the Court has upheld. Moreover, because the *Buckley* Court had ruled that spending (as opposed to contributing) by individuals cannot be capped, the true goal of aggregate limits is out-of-bounds and thus an anti-circumvention rationale cannot save them.

For those reasons, the loss of aggregate limits was surely not unexpected and is also not likely to make the current situation much worse. The Center for Responsive Politics said that it could identify only 646 individuals who maxed out in the 2012 election cycle when the limit was \$117,000, but who still managed to contribute about \$94.6 million in federal races.¹⁹ Thus, it is not clear how many will be in a position, let alone willing, to give appreciably more money in any election cycle than they

¹⁹ See Bob Biersack, *McCutcheon’s Multiplying Effect: Why An Overall Limit Matters*, OPEN SECRETS (Sept. 17, 2013), <http://www.opensecrets.org/news/2013/09/mccutcheons-multiplying-effect-why/>.

could pre-*McCutcheon*. Even with aggregate limits, the spending spicket was not turned off because independent expenditures were not capped. That is true whether the expenditure was directly made by the supporter, or made to a PAC which only made independent expenditures. Indeed, to the extent that lifting the aggregate limits may free up money to go to political parties (which may be one reason why the Republican Party sued along with Mr. *McCutcheon*), instead of to independent committees, parties are generally regarded as more responsible and less likely to engage in negative and sometimes factually erroneous advertising.

All of this discussion leads to two conclusions regarding the Chief Justice's decision in *McCutcheon*. First, while perhaps not literally compelled by prior rulings, *McCutcheon* applied them faithfully and had to take only a very small step in order to conclude that anti-circumvention required a far closer fit to justify the aggregate limits than the series of complicated and unlikely-to-occur events that the dissent postulated. Second, while increasing to some degree the amount of money that will be spent on federal elections, the change is not likely to be significant, either for the donor or for the system as a whole, especially when compared to the impact of earlier rulings. It is these prior rulings, however, that sowed the seeds for the current system, and it is Justice Breyer's dissent in *McCutcheon*, combined with the dissent of Justice Stevens in *Citizens United*, that show how the Court should have ruled.

IV. BREYER IS RIGHT ON THE FUNDAMENTAL ISSUE

As I have tried to show, *McCutcheon* is a very small and almost certainly inevitable step from the Court's recent campaign finance decisions. More important, those decisions, such as *Citizens United* and *Arizona Tribal Council*, are the end product of the portion of *Buckley* concluding that *any* limit on independent spending by individuals violates the First Amendment, which, according to the majority of the current Court, privileges the right to spend money in elections over all other values. That conclusion follows from *Citizens United*, where the Court overruled *Austin v. Michigan Chamber of Commerce* and found free speech, in the form of unlimited spending by corporate speakers, trumped all other considerations.²⁰ Thus, if any change is to come in our campaign finance laws, the Court must re-consider the *Buckley* holding that all limits on individual expenditures violate the First Amendment.

For the reasons I gave above, I do not take issue with the conclusion that a limit of \$1000 on independent expenditures by individuals is unconstitutional because that figure is unreasonably low. But suppose the number in 1976 was \$1,000,000: would, or should, the result be the same, and if not, why not? I leave aside the question of whether anyone would have wanted to bring such a challenge, or would have had standing to do so, at a time when total spending by individuals, mainly in the form of contributions before the current rules were in place, was only a tiny fraction of what it is today. As I now explain, if Congress were to set reasonable limits on independent expenditures, they should be upheld because other interests our society values to

²⁰ *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

sustain our democracy must be taken into account alongside the First Amendment and are sufficient to support such limits on the biggest spenders today.²¹

A. THE STEVENS AND BREYER DISSENTS

The heart of this argument is contained in the dissents of Justice Stevens in *Citizens United* and Justice Breyer in *McCutcheon* and consists of two prongs: (1) the majority has defined corruption too narrowly, and (2) however corruption is defined, there are other constitutionally permissible reasons supporting campaign finance regulation that the majority has simply discarded in favor of unlimited expenditures. As to the proper meaning of corruption, Justice Stevens observed:

Corruption can take many forms. Bribery may be the paradigm case. But the difference between selling a vote and selling access is a matter of degree, not kind. And selling access is not qualitatively different from giving special preference to those who spent money on one's behalf. Corruption operates along a spectrum, and the majority's apparent belief that *quid pro quo* arrangements can be neatly demarcated from other improper influences does not accord with the theory or reality of politics.²²

In response to the majority's objection that there were no examples of dollars exchanged for votes, Justice Stevens rejoined that it "would have been quite remarkable if Congress had created a record detailing such behavior by its own Members. Proving that a specific vote was exchanged for a specific expenditure has always been next to impossible: Elected officials have diverse motivations, and no one will acknowledge that he sold a vote."²³

For further support, Justice Stevens went to the trial record in *McConnell v. FEC*²⁴ and in particular to the findings of the district court which provided "a remarkable testament to the energy and ingenuity with which corporations, unions, lobbyists, and politicians may go about scratching each other's backs."²⁵ He then quoted extensively from those findings which established the close relation between the makers of independent expenditures and those candidates that the expenditures sought to assist. Those findings included routinely notifying candidates when ads were run, with members expressing appreciation for those ads, in particular "when negative issue advertisements are run by these organizations, leaving the candidates free to run positive advertisements and be seen as 'above the fray.'"²⁶ Those findings also

²¹ Perhaps the easiest way to see how spending by the largest donors has exploded since the days before FECA is to look at what the biggest donors spent then and now. When FECA was enacted, Stuart Mott was the example of excess spending on the Democratic side. He gave \$350,000 to George McGovern's Presidential campaign in 1972, plus \$50,000 in personal expenses. W. Clement Stone on the Republican side gave more than \$2 million to Richard Nixon in 1972. In today's dollars, those would be about \$1 million and \$11 million. In 2012 Sheldon Adelson spent about \$150 million on federal elections, while David and Charles Koch are reportedly planning on spending \$300 million in the 2014 election cycle to support Republican campaigns, and Tom Steyer is planning on spending \$100 million, mainly to support candidates who support action to deal with climate change.

²² *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 447-48 (2010).

²³ *Id.* at 455.

²⁴ *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003).

²⁵ *Citizens United*, 558 U.S. at 448 (Stevens, J., concurring in part and dissenting in part) (citing *McConnell*, 540 U.S. 93 (2003)).

²⁶ *Id.*

showed “that Members suggest that corporations or individuals make donations to interest groups with the understanding that the money contributed to these groups will assist the Member in a campaign [and that] [a]fter the election, these organizations often seek credit for their support.”²⁷ His conclusion best sums up the illogical narrowness of the majority’s understanding of abuses of the election process:

Many of the relationships of dependency found by Judge Kollar-Kotelly seemed to have a *quid pro quo* basis, but other arrangements were more subtle. Her analysis shows the great difficulty in delimiting the precise scope of the *quid pro quo* category, as well as the adverse consequences that *all* such arrangements may have. There are threats of corruption that are far more destructive to a democratic society than the odd bribe. Yet the majority’s understanding of corruption would leave lawmakers impotent to address all but the most discrete abuses.²⁸

In *McCutcheon*, Justice Breyer similarly objected to the limited reach of the majority’s view of corruption as confined to quid pro quo corruption, which he understood the majority to have defined “to mean no more than ‘a direct exchange of an official act for money’ [and which] does *not* include efforts to garner influence over or access to elected officials or political parties.”²⁹ He then argued:

[T]he anticorruption interest that drives Congress to regulate campaign contributions is a far broader, more important interest than the plurality acknowledges. It is an interest in maintaining the integrity of our public governmental institutions. And it is an interest rooted in the Constitution and in the First Amendment itself.³⁰

Justice Breyer put it this way in explaining why excessive spending of any kind is a form of corruption not protected by the First Amendment:

It derails the essential speech-to-government-action tie. Where enough money calls the tune, the general public will not be heard. Insofar as corruption cuts the link between political thought and political action, a free marketplace of political ideas loses its point.³¹

Furthermore, according to Justice Breyer, the majority’s cramped understanding of the meaning of the appearance of corruption made “matters worse [by leading] the public to believe that its efforts to communicate with its representatives or to help sway public opinion have little purpose. And a cynical public can lose interest in

²⁷ *Id.* at 449.

²⁸ *Id.*

²⁹ *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1446 (2014) (Breyer, J., dissenting) (internal citations omitted).

³⁰ *Id.* at 1466-67.

³¹ *Id.* at 1467.

political participation altogether.”³² In his view, this broader meaning of corruption is rooted in the First Amendment and these laws are a

constitutional effort to create a democracy responsive to the people—a government where laws reflect the very thoughts, views, ideas, and sentiments, the expression of which the First Amendment protects. Given that end, we can and should understand campaign finance laws as resting upon a broader and more significant constitutional rationale than the plurality’s limited definition of “corruption” suggests.³³

Because *McCutcheon* was a case about contributions, not independent expenditures, Justice Breyer did not discuss other factors besides corruption that would support campaign finance regulation, whereas Justice Stevens did so in his dissent in *Citizens United*. Thus, Justice Stevens noted that the Court had previously expressed

a concern to *facilitate* First Amendment values by preserving some breathing room around the electoral “marketplace” of ideas, the marketplace in which the actual people of this Nation determine how they will govern themselves. The majority seems oblivious to the simple truth that laws [limiting independent expenditures] do not merely pit the anticorruption interest against the First Amendment, but also pit competing First Amendment values against each other.³⁴

His conclusion, although directed at corporations, is equally applicable to wealthy individuals like Shaun McCutcheon. Whether they are using their great wealth to directly fund candidates, political parties, or unaffiliated PACs that make direct contributions, or they are spending their money by making independent expenditures on their own, or donating to committees that make the expenditures for their supporters,

At bottom, the Court’s opinion is thus a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt. It is a strange time to repudiate that common sense. While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics.³⁵

³² *Id.* at 1468.

³³ *Id.*

³⁴ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 473 (2010) (Stevens, J., concurring in part and dissenting in part) (emphasis in original internal citations omitted).

³⁵ *Id.* at 479.

B. CASE AUTHORITY SUPPORTING RESTRICTIONS ON SPEECH IN FURTHERANCE OF OTHER VALUES

There is significant Supreme Court authority to support the argument that massive independent expenditures can produce serious negative consequences and that, therefore, granting them total First Amendment immunity is misplaced. In *Caperton v. A.T. Massey Coal Co.*,³⁶ the Court held, 5-4, in an opinion by Justice Kennedy, that there was a due process violation arising from a litigant's massive financial support—mainly through independent expenditures—for the election of a judge on the West Virginia Supreme Court.³⁷ Specifically, a vote for the donor in a case pending at the time of the election was decisive in reversing a judgment against that donor. Despite what everyone seemed to recognize to be inappropriate influence on a pending case, the breadth of the opinion in *Buckley* presented a clear bar to laws limiting independent expenditures, even for judicial elections, which were never considered by the Court in *Buckley*.³⁸ The only option at the time of *Caperton* was an after-the-fact due process claim in circumstances that cried out for modest prophylactic rules that would prevent such conduct before it occurred. Justice Stevens fully appreciated this point in his *Citizens United* dissent.³⁹ However, the majority, without further explanation, simply rejected the notion that there was any connection between a due process violation stemming from independent expenditures and the constitutionality of a law designed to limit those expenditures before they occurred.⁴⁰

There is also case law substantiating the argument that the First Amendment does not always trump all other interests in campaign finance cases. Recently, the Court upheld the law that bans all contributions and independent expenditures from individuals who are neither U.S. citizens nor permanent resident aliens.⁴¹ The plaintiffs were a lawyer and a doctor from Canada and Israel, who were lawfully in the United States under three-year work visas, and there could be no doubt that the modest amounts of money that they wanted to spend came from their own lawful earnings in this country. Because of the broad definition of expenditure, the law banned even

³⁶ *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009).

³⁷ The dissent, written by Chief Justice Roberts, did not disagree that the donor had exerted improper influence, but disagreed that the conduct violated the Due Process Clause, or that the federal courts could draw sensible lines in this area.

³⁸ For well over a century, most states have conducted elections for some or all of their judges, but it is only in recent years that the amounts of money raised for those elections, both direct contributions and more recently independent expenditures, have become significant. See generally, Alicia Bannon, Eric Velasco, Linda Casey, Lianna Reagan, *The New Politics of Judicial Elections, 2011–2012: How New Waves of Special Interests Spending Raised the Stakes for Fair Courts*, THE BRENNAN CENTER FOR JUSTICE (2013), <http://newpoliticsreport.org/content/uploads/JAS-NewPolitics2012-Online.pdf>. See also, Joanna Shepard, *JUSTICE AT RISK: AN EMPIRICAL STUDY OF CAMPAIGN CONTRIBUTIONS AND JUDICIAL DECISIONS*, THE AMERICAN CONSTITUTION SOCIETY (JUNE 2013), http://www.acslaw.org/ACS%20Justice%20at%20Risk%20%28FINAL%29%206_10_13.pdf. As harmful as unlimited independent expenditures are in elections for legislatures and executive branch officials at all levels, they are far more pernicious in judicial elections where the electorate is generally ill-informed about the candidates, and where expenditures that would be considered modest in a race for governor or state Senate can have an outcome-determinative impact. At the very least, given the due process concerns raised by the impact of campaign spending on particular cases in court, the Court should not assume that independent expenditures in judicial races are as benign as the Court assumed for other elections in *Buckley*.

³⁹ See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 458-459 (2010) (Stevens, J., concurring in part and dissenting in part).

⁴⁰ *Id.* at 360 (majority opinion).

⁴¹ *Bluman v. Fed. Election Comm'n*, 132 S. Ct. 1087 (2012), *summarily aff'd* 800 F. Supp.2d 281 (D.D.C. 2011).

yard signs, candidate buttons, or letters of support—if the individual paid money to acquire them. The lower court upheld the law under Congress’ power over aliens, and the Supreme Court decided that the decision was so plainly right that it did not need further briefing and oral argument. Surely, if that same law had also forbidden the plaintiffs from speaking out against the President in Lafayette Park, no one would have claimed that the law could be upheld just because the speaker was not a U.S. citizen. I would have come out the other way on the merits in *Bluman*, but the point of the case, at a minimum, is that the First Amendment does not automatically trump all other interests when the law involves spending money for contributions or independent expenditures.⁴²

Another line of cases provides further support for the argument that the First Amendment should not always prevail over all other interests. The cases are factually distinguishable from the campaign finance context, and are at best analogies, but they do undermine the absoluteness that *Buckley* and *Citizens United* conveyed. Perhaps the most significant case holding that political speech does not trump all other values is *Burson v. Freeman*⁴³ The Court there stated the question presented as follows: “Whether a provision of the Tennessee Code, which prohibits the solicitation of votes and the display or distribution of campaign materials within 100 feet of the entrance to a polling place, violates the First and Fourteenth Amendments.” The plaintiffs were passing out materials designed to inform and/or persuade voters, but there was no evidence that they were actually disrupting the election by their activities. Nonetheless, the Court found that other interests, such as the potential for disruption, overrode their First Amendment right to communicate about an election being held that day. For these purposes, the correctness of where the Court struck the balance is irrelevant. Rather, the point is that the Court’s holding that engaging in election-related speech is not the answer to all questions where the First Amendment is at issue.⁴⁴

Other examples are cases like *Ward v. Rock Against Racism*,⁴⁵ in which the Court upheld what it has called “time, place, and manner” restrictions on otherwise fully-protected speech by sustaining a ban on loud speech during certain hours as a means of preserving the quiet enjoyment of one’s home. A candidate for office would surely lose a case in which he was accused of violating an ordinance that banned sound trucks from blaring at more than 100 decibels at midnight in a residential neighborhood, despite a claim that he was simply exercising his First Amendment right to support his campaign for elected office. Laws like that are upheld as long as they are content neutral and leave “reasonable” alternative means by which the speaker can get his message to his intended audience. Whether such reasonable alternatives are available, and under whose definition of reasonable, may present difficult questions at the margins, but that has not caused the Court to abandon its decisions sustaining those kinds of limitations.

Then there is *United States v. O’Brien*,⁴⁶ where the Court upheld a conviction of a man who burned his draft card in circumstances that everyone agreed constituted a

⁴² Disclosure: I was an informal adviser to the lawyers for the plaintiffs in *Bluman*.

⁴³ *Burson v. Freeman*, 504 U.S. 191, 193 (1992).

⁴⁴ *Burson* was followed in *Marlin v. D.C. Bd. of Elections & Ethics*, 236 F.3d 716 (D.C. Cir. 2001), *cert denied*, 532 U.S. 1039 (2001), where the plaintiff only wanted to wear a campaign button in the polling place, but the court upheld the law forbidding even that. I assisted the losing plaintiffs in both cases.

⁴⁵ *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

⁴⁶ *United States v. O’Brien*, 391 U.S. 367 (1968).

protest against the Vietnam War. The Court concluded that, because the statute served the legitimate goal of assuring that all draft-age men had their draft cards with them at all times, the interference with free speech did not override that purpose. I disagree with the decision on the merits, largely because the asserted interest seemed to be created out of whole cloth, with no basis in the history of the law or in how the draft laws were implemented. But the principle that free speech, even that protesting government action, can sometimes be trumped by other interests, is quite correct and can be used to defend reasonable limits on independent expenditures where those limits advance strong interests in preserving our democracy and in not having those with extreme wealth dominate our political debates.

The *Buckley* ruling rejecting all limits on independent expenditures rests on the theory that any dollar limit imposes a ceiling on the total amount of speech that can be made, but, in a practical sense, so do time, place, and manner rules. There are only 24 hours in a day to speak, and if some times of the day are off limits to a person handing out leaflets door-to-door (such as between 9 p.m. and 9 a.m.), that law places a ceiling on the number of people that the speaker can engage. Or take the sound truck example: many more people will hear my message if I can use a very forceful amplifier, although it is likely to disturb, and perhaps even harm the hearing of, some of those who are close by. Again, the result is an effective cap on speech, but one that is constitutional because our society recognizes other values besides free speech that sometimes outweigh the First Amendment value of such speech, let alone spending that enables such speech to be made by others. If anything, laws regulating how much money can be spent should stand on stronger constitutional footing than the laws in these analogous cases because spending money is not an act of speech itself, but receives First Amendment protection because it enables speech to take place.

Other analogies could be advanced—some closer and others less close than these—but none fit exactly. However, they all identify one principle that does fit this issue exactly: in some situations, even pure political speech may be constitutionally limited by other important societal interests unrelated to speech. Perhaps those who support *Buckley*'s holding on independent expenditures would accept that principle, but conclude that the interests put forth in capping independent expenditures are insufficient to justify any limits whatsoever. That argument might prevail, but it would be quite a different argument than the one that persuaded the Court in *Buckley*. Rather, the argument that persuaded the Court in *Buckley* in effect dismissed as illegitimate any interest other than that of an individual being able to spend as much money as he chooses to make independent expenditures in support of a candidate for elected office.

V. BUCKLEY RE-ENVISIONED

In *Lawrence v. Texas*,⁴⁷ Justice Kennedy said the decision in *Bowers v. Hardwick*, “was not correct when it was decided, and it is not correct today.”⁴⁸ I am less sure that the *Buckley* ruling on independent expenditures was wrong when it was decided, but it is surely wrong today. Perhaps the primary reason for that change is that the amounts of money now being spent were unthinkable in 1976 when the Court approved annual aggregate contribution limits of \$25,000. While the extent of the

⁴⁷ *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁴⁸ *Id.* at 578 (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

increase in spending in elections is outside the purview of this issue brief, it has been thoroughly documented in other publications.⁴⁹

In arguing that some limits on independent expenditures are constitutional, I do not contend that contributing or spending money in elections is entirely outside the protection of the First Amendment. But the Court has never held, and never should hold, that giving money to a candidate to be used to speak is an activity that the First Amendment wholly precludes from being regulated. Surely, no one, even Justice Thomas, would argue that making a contribution to an elected official with an express agreement that the official will speak on behalf of the contributor, let alone cast a vote in support of a bill or nomination that he favors, whether technically bribery or not, is beyond regulation. The reason is that there are other values in our society besides the freedom to speak, whether through words or through dollars. This is why the Court has upheld reasonable limits on campaign contributions even when they cannot be characterized as bribery or even quid pro quo favoritism.

My principal objection to legislative line-drawing in the area of campaign spending is that, as long as incumbents draw the lines, they will set spending levels to give maximum advantage to themselves at the expense of their challengers. As is true for line drawings used to establish district boundaries for legislative seats, incumbent self-protection is a very forceful incentive. Moreover, even if the ceiling were to be set by a truly neutral body, with the goal of keeping campaign spending to a “reasonable” level, there may be no neutral standards by which the appropriate amount of spending can be determined. In addition, because the circumstances of each election inevitably differ, a single spending rule is likely to be in error in a fair number of cases, more likely on the low, rather than the high side, when the First Amendment would counsel the opposite result.

Equally important, as long as contribution limits are in place, there is a real world limit to how much any candidate can raise and therefore realistically spend. Put another way, limiting the supply of money by limiting the size of contributions puts an effective limit on spending by most candidates. If some candidates raise much more money than others, that may be because they are more popular than their opponents, which is what elections are supposed to decide. Of course, that theory fits less well with self-funded candidates, but in general voters do not seem to support those whose main financial backing comes from their own personal or family wealth. And if some self-funded candidates do prevail, in part because of how much they have donated to their own campaigns, that does not seem a heavy price to pay to enable individuals who choose to spend their own money to gain elected office to continue to do so, especially when it is spent to get a campaign off the ground to the point where others will support it. Finally, as the Eric Cantor example shows, even when an incumbent raises more than \$5 million and his opponent raises only \$200,000, money is sometimes not the deciding factor.⁵⁰

⁴⁹ For a recent history of increased spending, see *Total Cost of US Elections (1998-2012)*, OPEN SECRETS, <https://www.opensecrets.org/bigpicture/>; see also *Total Outside Spending by Election Cycle, Excluding Party Committees*, OPEN SECRETS, https://www.opensecrets.org/outsidespending/cycle_tots.php. For a longer history, see also Dave Gilson, *The Crazy Cost of Becoming President, From Lincoln to Obama*, MOTHER JONES (Feb. 20, 2012, 7:00 AM), <http://www.motherjones.com/mojo/2012/02/historic-price-cost-presidential-elections>. See also note 21, *supra*.

⁵⁰ See David A. Fahrenthold, Rosalind S. Helderman, and Jenna Portnoy, *What Went Wrong for Eric Cantor?*, THE WASHINGTON POST (JUNE 11, 2014), http://www.washingtonpost.com/politics/what-went-wrong-for-eric-cantor/2014/06/11/0be7c02c-f180-11e3-914c-1fbd0614e2d4_story.html.

The ultimate question that requires re-examination is whether it is correct that any limits on what anyone may spend on independent expenditures in elections violates the First Amendment. My goals here were not to answer that question definitively but rather (1) to identify the unnecessarily broad ruling in *Buckley* on the \$1000 limit on independent expenditures in FECA as the source of the current problems that the Court has created in the campaign finance area; (2) to describe in general terms an alternative way to look at the issue; (3) to show that the Court has recognized other countervailing interests in other First Amendment cases, and found some of them strong enough to trump First Amendment interests; and (4) to urge that the Court take those and other interests into account in its rulings on expenditure limitations in future campaign finance cases.

This essay is just the beginning of a journey in which I and others will explore this issue from a perspective not taken by the majority of the Court so far. I have no illusions that the Court—especially the current one—will suddenly realize the error of its ways and change its approach to campaign finance laws and the First Amendment. But change can only come with a re-focus on the causes of the current situation, which means a re-examination of the independent expenditure rationale in *Buckley*, instead of obsessing about *Citizens United* and perhaps now *McCutcheon*. Justice Breyer's dissent is fundamentally right about balancing the First Amendment and other legitimate interests of society, but to get to that point, the Court needs to return to the erroneous part of *Buckley* from which the current decisions inevitably flow.

Deconstructing the Right to Counsel*

Lauren Sudeall Lucas**

Last year marked the fiftieth anniversary of *Gideon v. Wainwright*, the Supreme Court's landmark decision making the right to counsel in criminal cases applicable to the states.¹ While the occasion offered cause to celebrate, many commentators found good reason to lament the numerous ways in which *Gideon*'s promise has fallen short through its implementation. Among the many notes sounding in this discussion of *Gideon* were renewed calls to extend the right to counsel to the civil context, as researchers highlighted the many unmet legal needs of indigent civil litigants.²

Nearly one million low-income Americans are denied help from legal aid providers every year because of insufficient funding resources.³ With the number of Americans living in poverty on the rise since the economic downturn in 2008,⁴ the lack of legal resources for indigent civil litigants is alarming, particularly considering the significant likelihood of adverse outcomes for pro se litigants accessing the legal system.⁵ As Laura Abel has written, many of the legal problems facing low-income individuals concern "the most important aspects of their lives: custody of their children, the ability to remain in their long-term housing, compensation for work they have performed, and government benefits enabling them to put food on the table and obtain health care."⁶

In the criminal context, the right to counsel is necessarily tethered to the Sixth Amendment. In previous work, I have highlighted the shortcomings of the Sixth Amendment with regard to structural indigent defense reform, some of which stem

* This Issue Brief was initially published in July 2014.

** Assistant Professor, Georgia State University College of Law. Many thanks are due to my research assistant, Lindsay Anglin, whose contributions to this Issue Brief were invaluable. I am grateful also to my colleagues at Georgia State University College of Law and to participants in the Poverty Law Conference held last fall at American University Washington College of Law for helping me to think through some of the ideas presented here. My experience as a practitioner has been primarily in the realm of indigent criminal defense, but I am grateful to my husband and the many other lawyers who provide much needed assistance to poor civil litigants across this nation.

¹ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

² See, e.g., AM. BAR ASS'N, ABA TOOLKIT FOR A RIGHT TO COUNSEL IN CIVIL PROCEEDINGS 4–7 (2010) (recognizing the acute justice gap between the civil legal needs and the available legal assistance for low-income Americans); LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 18 (2009), available at http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf (concluding that "only a small fraction of the legal problems experienced by low-income people (less than one in five) are addressed with the assistance of a private attorney (pro bono or paid) or a legal aid lawyer").

³ LEGAL SERVS. CORP., *supra* note 2, at 12.

⁴ AM. BAR ASS'N, ABA TOOLKIT, *supra* note 2, at ii (noting that the number of individuals in America living in poverty has increased from 49.6 million in 2005 to more than 63 million in 2011).

⁵ See Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 46–66 (2010) (citing numerous studies finding represented litigants fare better in housing, family law, and small claims cases, among others).

⁶ Laura Abel, *A Right to Counsel in Civil Cases: Lessons from Gideon v. Wainwright*, 15 TEMP. POL. & CIV. RTS. L. REV. 527, 527 (2006).

from its sole focus on the role of counsel.⁷ Not only does the exclusive focus on “counsel” mean that the right is vulnerable to nominal satisfaction,⁸ but a singular emphasis on attorney conduct and the effect of that conduct in a given case also limits the extent to which background forces bearing on that conduct—such as the deprivation of resources—remain within reach of judicial intervention. Nonetheless, there are many reasons why, limitations aside, counsel is specifically necessary in the adjudication of criminal cases.⁹ In the civil context, however, there is no parallel constitutional right,¹⁰ and thus a robust debate has emerged about how best to address the needs of indigent litigants filing or defending against civil claims who cannot effectively navigate the system without assistance.¹¹

Amidst this debate, described in greater detail below, several questions linger: How can we avoid the pitfalls experienced by the criminal right to counsel post-*Gideon*? And how do we decide which approach will best serve civil litigants in need of assistance, without purely resorting to an analysis of case outcomes?¹² An outcome-centric analysis ignores other important values at stake, including client satisfaction and reduction of client anxiety. Moreover, focusing purely on outcome (as does the Sixth Amendment analysis) raises the danger that external variables will distort the analysis of the means provided for assistance. For example, if the client has a particularly hard case to win on the facts and the analysis focuses only on outcome, the quality of the assistance provided may be rendered indeterminable or irrelevant.

This Issue Brief sets forth an organizational framework for evaluating the proposals emerging from the access to civil justice debate and for charting a path forward. It suggests that, rather than focusing on the formal requirement of counsel, embodied in a lawyer standing by the client’s side, we should distill the right down to its core elements, exploring the role counsel is intended to serve and why it is needed in civil as well as criminal cases. By deconstructing the right to counsel, which often serves as a proxy for these otherwise unarticulated values, we can create a framework for evaluating alternative proposals, expand the array of possibilities by which this growing need can be met, and potentially lay the groundwork for a newly formulated, more substantive version of the right.

⁷ Lauren Sudeall Lucas, *Reclaiming Equality to Reframe Indigent Defense Reform*, 97 MINN. L. REV. 1197, 1205 (2013).

⁸ *Id.* at 1202–03.

⁹ *E.g.*, Johnson v. Zerbst, 304 U.S. 458, 462–63 (1938) (holding that the Sixth Amendment “embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel.”).

¹⁰ *See* Turner v. Rogers, 131 S. Ct. 2507, 2516 (2011) (noting that “the Sixth Amendment does not govern civil cases”).

¹¹ *See, e.g.*, AM. BAR ASS’N, REPORT TO THE HOUSE OF DELEGATES 1, 3 (2006), available at <http://abanet.org/leadership/2006/annual/onehundredtwelvea.doc> (advocating a categorical right to counsel in areas of “basic human need,” defined as shelter, sustenance, safety, health, and child custody); Thomas M. Burke, *A Civil Gideon? Let the Debate Begin*, 65 J. Mo. B. 5, 5–6 (2009); Russell Engler, *Turner v. Rogers and the Essential Role of the Courts in Delivering Access to Justice*, 7 HARV. L. & POL’Y REV. 31, 34–35 (2013) (describing the needs of indigent civil litigants and the resulting “push for an expanded civil right to counsel”); Paul Marvy & Laura Klein Abel, *Current Developments in Advocacy to Expand the Civil Right to Counsel*, 25 TOURO L. REV. 131, 132 (2009) (“Around the country, state and local bar associations, access to justice commissions, and local advocacy groups are working to expand the [civil] right to counsel in their jurisdictions.”).

¹² *Cf.*, *e.g.*, Laura K. Abel, *Turner v. Rogers and the Right of Meaningful Access to the Courts*, 89 DENV. U. L. REV. 805, 816 (2012) (suggesting that, in evaluating “procedural safeguards” post-*Turner*, courts should consider empirical data on (1) the process at issue in the case and (2) the outcomes of those cases where assistance was provided compared to those where it was not).

I. THE “CIVIL RIGHT-TO-COUNSEL” DEBATE

As part of the aforementioned debate, practitioners, scholars and commentators have proposed many different solutions to address the needs of unrepresented civil litigants. For purposes of this piece, I have focused only on those aspects of the debate that apply to poor litigants bringing or defending against claims in areas of “basic human need”¹³—such as shelter, sustenance, safety, health, and child custody—and not civil claims across the board.

Some have argued for a civil right to counsel or “civil *Gideon*,” which would in many ways parallel the criminal right to counsel.¹⁴ Many within that group have argued that we can learn from *Gideon*’s failings to better implement the right in the civil context—for example, by implementing more stringent standards for representation and ensuring adequate funding.¹⁵ To that end, the American Bar Association has established principles to guide policymakers and others in the creation of the right to counsel for civil litigants encompassing, *inter alia*, appointed counsel with limited caseloads, adequate training and experience, and adequate compensation to ensure quality representation.¹⁶ Because the civil right to counsel is not tied to the Sixth Amendment, different scholars have proposed grounding the right in federal constitutional due process,¹⁷ federal equal protection law,¹⁸ state procedural due process,¹⁹ state statutory law,²⁰ and even in the court’s inherent powers.²¹

Recognizing the inescapability of resource, funding, and perhaps political limitations, other commentators have suggested a number of alternatives to the creation of

¹³ See *supra* note 11.

¹⁴ See Simran Bindra & Pedram Ben-Cohen, *Public Civil Defenders: A Right to Counsel for Indigent Civil Defendants*, 10 GEO. J. ON POVERTY L. & POL’Y 1, 2 (2003) (arguing for an absolute right to counsel for indigent civil defendants, including the creation of a civil public defender’s office); *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322, 1331 (1966) (applying the Court’s rationale for a criminal right to counsel to the civil context).

¹⁵ Abel, *supra* note 6, at 538–55.

¹⁶ AM. BAR ASS’N., ABA TOOLKIT, *supra* note 2, at 41–44.

¹⁷ Martha F. Davis, *Participation, Equality, and the Civil Right to Counsel: Lessons from Domestic and International Law*, 122 YALE L.J. 2260, 2280–81 (2013). *Contra* Turner v. Rogers, 131 S. Ct. 2507, 2520 (2011) (holding that, despite the importance of the liberty interest at stake, the right to counsel is not constitutionally required in civil contempt proceedings, under a due process analysis).

¹⁸ See Andrew Scherer, *Why People Who Face Losing Their Homes in Legal Proceedings Must Have a Right to Counsel*, 3 CARDOZO PUB. L. POL’Y & ETHICS J. 699, 719–20 (2006) (asserting that the failure to assign counsel to tenants facing eviction implicates rights to equal treatment under federal and state statutory law because of its disparate impact on people of color). *But see* Joan Grace Ritchey, *Limits on Justice: The United States’ Failure to Recognize a Right to Counsel in Civil Litigation*, 79 WASH. U. L.Q. 317, 336–39 (2001) (noting the unlikelihood of the Supreme Court using equal protection doctrine as a basis for the civil right to counsel because of the Court’s refusal to establish the poor as a suspect class).

¹⁹ See, e.g., AM. BAR ASS’N, REPORT TO THE HOUSE OF DELEGATES, *supra* note 11, at 8 (citing decisions in Maine, Oregon, Alaska and California, where state supreme courts found a state constitutional right to counsel in certain cases); Clare Pastore, *Life After Lassiter: An Overview of State-Court Right-to-Counsel Decisions*, 40 CLEARINGHOUSE REV. 186, 186–89 (2006).

²⁰ See, e.g., State ex rel. McQueen v. Cuyahoga Cnty. Court of Common Pleas, 135 Ohio St. 3d 291, 2013-Ohio-65, 986 N.E.2d 925, 930 (2013) (holding that indigent litigants have a statutory right to counsel under Ohio state law for reviews of court-imposed guardianships); Scherer, *supra* note 18, at 718–19 (discussing the civil legal contexts in which New York statutory law guarantees an absolute right to counsel, including certain family law and mental illness related proceedings).

²¹ See *In re Smiley*, 330 N.E.2d 53, 55 (N.Y. 1975) (“Inherent in the courts and historically associated with the duty of the Bar to provide uncompensated services for the indigent has been the discretionary power of the courts to assign counsel in a proper case to represent private indigent litigants.”); *Caron v. Betit*, 300 A.2d 618, 619 (Vt. 1972) (finding that the court has inherent “power to require attorneys to serve and protect vital interests of uncounseled litigants where circumstances demand it”).

a full-fledged constitutional or statutory right.²² Deborah Rhode suggests a qualified right to aid in civil contexts, under which individuals would be entitled to aid of a reasonable cost and lawyers would only be used when they were the most cost-effective service providers.²³ Rhode also advocates for innovative delivery models, like online intake and form filing and unbundled, discrete legal services, in addition to pro se assistance, non-lawyer services, and court reform.²⁴ Russell Engler has proposed a three-prong “context-based” approach to the civil right to counsel that first requires judges, clerks, and other key players in the court system to assist unrepresented civil litigants in “preventing the forfeiture of rights due to the absence of counsel.”²⁵ Engler’s approach then advocates the creation—and evaluation—of less lawyer-intensive services and providers in less complex cases.²⁶ When the first two prongs are insufficient to meet civil litigants’ needs in particular cases, Engler supports the establishment of a civil right to counsel in those cases where a “substantial injustice” would result from the absence of counsel.²⁷

Others, taking what is perhaps a more cynical or more pragmatic view, have concluded that the establishment of a civil right to counsel is either unlikely or unwise.²⁸ At one extreme, Benjamin Barton argues against a “civil *Gideon*” and instead proposes pro se court reform that better prepares pro se litigants to appear in court, such as allowing clerks to give advice, creating form pleadings, providing greater transparency and clarity in court processes, and establishing online dispute resolution.²⁹ Building on Barton’s work, Jessica Steinberg advocates “demand side reform,” through which the rules currently governing courts would be modified to support unrepresented litigants’ participation in the legal system.³⁰ Steinberg urges courts to dismantle the procedural, technical, and evidentiary rules that prevent pro se litigants from successfully resolving their claims.³¹

Yet others have proposed the formation of a new right—for example, an “access to justice” right.³² According to Deborah Perluss, “access to justice is a separate and

²² See, e.g., Jeanne Charn, *Celebrating the “Null” Finding: Evidence-Based Strategies for Improving Access to Legal Services*, 122 YALE L.J. 2206, 2232 (2013) (proposing a “pragmatic approach [to the civil right to counsel] that seeks to maximize self-help and similar ‘lawyer-less’ and ‘lawyer-lite’ services”); cf. Engler, *Turner v. Rogers*, *supra* note 11, at 42–43, 47 (advocating for a comprehensive access-to-justice strategy, including effective legal assistance short of full representation by counsel).

²³ Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 LOY. L.A. L. REV. 869, 896 (2009).

²⁴ *Id.* at 897–902 (“Courts and legislatures need to modify current rules to permit greater assistance from competent nonlawyers.”).

²⁵ Russell Engler, *Towards a Context-Based Civil Right to Counsel Through “Access to Justice” Initiatives*, 40 CLEARINGHOUSE REV. 196, 198–200 (2006).

²⁶ *Id.* at 200–01.

²⁷ *Id.* at 201–02.

²⁸ See, e.g., Rebecca Aviel, *Why Civil Gideon Won’t Fix Family Law*, 122 YALE L.J. 2106, 2109–10, 2112 (2013) (arguing that a civil right to counsel in the family law context ignores the nature of the proceedings at issue and incorrectly assumes the primacy of a formal, lawyer-centric adversary system as the preferred means for resolving custody and other family law disputes).

²⁹ Benjamin H. Barton, *Against Civil Gideon (and for Pro Se Court Reform)*, 62 FLA. L. REV. 1227, 1270–74 (2010).

³⁰ Jessica K. Steinberg, *Demand Side Reform in the Poor People’s Court*, 47 CONN. L. REV. __ (forthcoming 2015) (manuscript at 49) (on file with author).

³¹ *Id.* at 49, 57–62.

³² Deborah Perluss, *Keeping the Eyes on the Prize: Visualizing the Civil Right to Counsel*, 15 TEMP. POL. & CIV. RTS. L. REV. 719, 720 (2006); cf. Abel, *Turner v. Rogers*, *supra* note 12, at 822–23 (advocating for elaboration on the right to meaningful access to the courts that the Supreme Court established in *Turner*).

independently enforceable right, substantive in form, personally applied, and distinguishable from the procedural rights and components of due process.”³³ Such a right would require courts to make an individualized determination of an unrepresented litigant’s “ability to meaningfully participate in the proceedings and functions of the court” and, if needed, to appoint counsel in the pursuit of justice.³⁴

As this cursory overview makes clear, there has been much debate about which approach would best alleviate the systemic gap in legal services for indigent litigants. Rather than propose a wholly new solution, which would be difficult given all of the work that has already been done in this area, I suggest that deconstructing the right to counsel into its various components can help to isolate the values driving the discussion and provide a framework for evaluating the merits of different approaches as they would operate in a particular context.

II. DECONSTRUCTING THE RIGHT TO COUNSEL

Revealing the centrality of the lawyer’s role to the ethos of those engaged in this debate, it is telling that the discussion about access to civil justice for poor individuals is often referred to as a discussion about the civil right to counsel. Focusing on the provision of “counsel” alone is flawed, however, in that it myopically aims the debate at a tangible surrogate for greater ends from which effectiveness is not guaranteed and whose availability necessarily will be limited to those with the greatest need. Even those advocating for a civil right to counsel do not argue that it would or should apply in every civil proceeding; rather they have attempted to isolate the areas of greatest importance, in which counsel is most needed, or in which counsel may have the greatest impact.³⁵

In practice, the exclusive focus on counsel creates a binary solution set in which the tangible entity—counsel—is either provided or not (with relief often only available when counsel is not present at all)³⁶ and pits those faced with a systemic problem against one another in a zero-sum resource game. It also creates the danger of an all-too familiar scenario post-*Gideon* where the superficial appointment of counsel may suffice to remedy the alleged violation. At its worst, such nominal enforcement may create an appearance of legitimacy that frustrates access and is detrimental to or stagnates efforts for future reform.

A. CREATING A VALUE-BASED FRAMEWORK

Rather than viewing the appointment of counsel as a panacea, I suggest that the salience of counsel serves as a proxy for other core values we assume will be satisfied by the appointment of a lawyer. The process of deconstructing the right to counsel

³³ Perluss, *supra* note 32, at 720.

³⁴ *Id.*

³⁵ See AM. BAR ASS’N, REPORT TO THE HOUSE OF DELEGATES, *supra* note 11, at 3 (supporting a categorical right to counsel in areas of “basic human need,” defined as shelter, sustenance, safety, health, and child custody).

³⁶ For example, in the context of civil claims regarding the deprivation of the criminal right to counsel (i.e., claims brought under 42 U.S.C. § 1983), those cases that have been most likely to gain traction are those alleging deprivation of resources leading to the complete denial of counsel, meaning that no lawyer is present at all. See, e.g., *Lavallee v. Justices in the Hampden Superior Court*, 812 N.E.2d 895, 899–900 (Mass. 2004) (addressing an attorney shortage caused by low compensation, which led to indigent defendants being without representation); *New York Cnty. Lawyers’ Ass’n v. State*, 763 N.Y.S.2d 397, 399–400 (N.Y. Sup. Ct. 2003) (addressing statutory fee caps on attorney compensation, which resulted in an insufficient number of available attorneys for indigent defendants).

thus begins with asking why representation by counsel is so important and what purposes it is intended to serve.³⁷ This Issue Brief suggests that four core values underlie the importance of counsel's role: access, fairness, efficiency, and legitimacy.³⁸

1. Access

Access, which is arguably counsel's most important responsibility, signifies the lawyer's knowledge of relevant law and procedure; her ability to maneuver through what can be a complicated legal system; her familiarity with relevant actors and institutions; and her role in translating the client's needs into legal claims and translating legal process into terms that the client can understand.³⁹ As one commentator noted, the rationale behind adopting a right to counsel for both civil and criminal litigants is essentially the same: ignorance of the law.⁴⁰ The Supreme Court highlighted the value of access in *Turner v. Rogers*, when it held that unrepresented litigants have a right to meaningful access to the courts,⁴¹ which one scholar has defined as the ability to identify the critical issues in one's case and present relevant evidence regarding those issues.⁴² For purposes of serving as an evaluation metric, "access" has both quantitative and qualitative components. The former refers to the number of potential clients who will be able to benefit from the proposed mechanism; the latter refers to the quality, or degree, of access afforded by the mechanism.

Given its definition, it is clear how a lawyer can provide access, but access also may be met by non-lawyer alternatives. For example, many scholars have proposed pro se court reforms that would better prepare unrepresented litigants to appear in court by creating form pleadings, allowing clerks and other court personnel to give advice and answer questions, and providing greater transparency and clarity in court processes.⁴³ In fact, a number of courts, such as Maricopa County Superior Court in Arizona, already assist litigants in understanding court procedures by providing them with court-approved forms, sample pleadings, and clear instructions to follow.⁴⁴ Beyond forms, some scholars advocate for judges to take a more active role in their cases involving pro se litigants by, for example, explaining the judicial process, instructing litigants on procedural actions, asking questions to ensure pro se litigants understand the proceedings, and explaining the kinds of evidence that can and can-

³⁷ For a description of how the provision of counsel can address the needs of self-represented litigants, see John M. Greacen, *Self-Represented Litigants and Court and Legal Services Responses to Their Needs: What We Know* (2002), available at http://lri.lsc.gov/sites/lsc.gov/files/LRI/pdf/02/020045_selfrep_litigants_whatweknow.pdf.

³⁸ Cf. Robert Hornstein, *The Right to Counsel in Civil Cases Revisited: The Proper Influence of Poverty and the Case for Reversing Lassiter v. Department of Social Services*, 59 CATH. U. L. REV. 1057, 1102 (2010) (revisiting *Lassiter*, and arguing that the *Mathews v. Eldridge* test should "be less formulaic and embrace a broader range of concerns that reflect fundamental values, such as equality, dignity, fairness, and the legitimacy of the process").

³⁹ James A. Bamberger, *Confirming the Constitutional Right of Meaningful Access to the Courts in Non-Criminal Cases in Washington State*, 4 SEATTLE J. FOR SOC. JUST. 383, 389–90 (2005) (listing core competencies of litigants, all of which are compromised in pro se proceedings).

⁴⁰ Ritchey, *supra* note 18, at 336–39.

⁴¹ See *Turner v. Rogers*, 131 S. Ct. 2507, 2519–20 (2011). Notably, however, the Court ultimately held that, in some cases, non-legal assistance might be "constitutionally sufficient" and that there is no categorical right to counsel in civil contempt proceedings. *Id.*

⁴² Abel, *Turner v. Rogers*, *supra* note 12, at 808.

⁴³ See, e.g., Barton, *supra* note 29, at 1270–74; Richard Zorza, *Turner v. Rogers: The Implications for Access to Justice Strategies*, 95 JUDICATURE 255, 258 (2012).

⁴⁴ Benjamin P. Cooper, *Access to Justice Without Lawyers*, 47 AKRON L. REV. 205, 209–10 (2014).

not be considered.⁴⁵ Outside of the courthouse, private companies (which I am not necessarily endorsing here) such as LegalZoom, Inc. offer online legal document preparation that “enables consumers to more easily navigate the legal system without any further assistance from a lawyer.”⁴⁶ While some of these alternatives may have drawbacks in specific legal contexts, under strict guidelines and oversight, they have potential in some cases to satisfy the value of “access” for non-represented litigants.

2. Fairness

Fairness exemplifies the lawyer’s role in an adversarial process where there is an opponent who is represented by counsel, or who is otherwise buttressed by the authority of the state, and who therefore possesses an advantage if the poor litigant remains *pro se*.⁴⁷ As one commentator recognized, cases where an unrepresented litigant faces a represented one “represent the ultimate breakdown of an adversary system that depends upon a rough equality between the parties in the quest for justice.”⁴⁸ Issues of fairness may also exist not only where the other side is represented by counsel, but where power imbalances exist due to the nature of the proceedings or the burden of proof that a defendant must meet.⁴⁹ For example, in civil contempt proceedings for nonpayment of child support, the proceedings may be unfair even where both parties are unrepresented because of the power imbalance between the parties and the heavy burden placed on the nonpaying parent to “show cause as to why he or she should not be held in contempt.”⁵⁰ Because power imbalances have such a negative effect on the fairness of the proceedings, some commentators propose the right to counsel be granted first, or at a minimum, to unrepresented parties in such cases.⁵¹

As with the value of access, it is obvious how representation by a lawyer—particularly where the opposing party is represented—might provide a balance of power and ensure the fairness of the proceedings.⁵² Non-lawyer alternatives can also level the playing field, particularly where they shift the proceeding to a non-adversarial format and avoid active litigation, which by its nature is adversarial.⁵³ One such alternative is online dispute resolution.⁵⁴ As one scholar notes, online arbitration, in addition to its convenience and cost savings, can protect parties from intimidating or threatening

⁴⁵ Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J.L. ETHICS & PUB. POL’Y 367, 375–76 (2008).

⁴⁶ Cooper, *supra* note 44, at 210–11.

⁴⁷ See *Flores v. Flores*, 598 P.2d 893, 895 (Alaska 1979) (finding that fairness dictates that an unrepresented parent should be entitled to counsel in child custody proceedings where the other parent is represented by counsel).

⁴⁸ Russell Engler, *Shaping a Context-Based Civil Gideon from the Dynamics of Social Change*, 15 TEMP. POL. & CIV. RTS. L. REV. 697, 711 (2006).

⁴⁹ See, e.g., *id.* at 711–13; John P. Gross, *The True Benefits of Counsel: Why “Do-It-Yourself” Lawyering Does Not Protect the Rights of the Indigent*, 43 N.M. L. REV. 1, 20–21 (2013).

⁵⁰ Gross, *supra* note 49, at 20–21.

⁵¹ Engler, *Shaping A Context-Based Civil Gideon*, *supra* note 48, at 711–13.

⁵² Aviel, *supra* note 28, at 2122–23.

⁵³ There are many contexts in which an adversarial format may not be desirable or the most effective means for resolving the parties’ claims. Rebecca Aviel contends that “civil *Gideon*” advocates often ignore the nature of the proceedings at issue and incorrectly assume the primacy of a formal, lawyer-centric adversary system as the preferred means for resolving custody and other family law disputes. Aviel, *supra* note 28, at 2109–10, 2112; see also *id.* at 2122–23 (explaining that in the majority of cases, lawyers can undertake a joint representation of the couple to offer guidance and advice, explain the process to the clients, draft agreements, and partner with therapists, financial advisors, and other professionals to ensure “access to legal advice in a posture that steers clear of the adversarial paradigm that so many families wish to avoid”).

⁵⁴ See Barton, *supra* note 29, at 1273–74.

face-to-face encounters with their adversaries, particularly in situations of power disparity where individual consumers face a group of corporate attorneys.⁵⁵

Another example might be found in pro se court reforms,⁵⁶ which can come in many forms: courts designed solely for pro se litigants, the provision of limited advice by clerks and court personnel, form pleadings and manuals to assist pro se litigants in understanding court processes.⁵⁷ Or, as Jessica Steinberg suggests, courts might overhaul their procedural and evidentiary rules—and their conception of the judicial role—such that the system is more accessible to non-lawyers.⁵⁸ Under this paradigm, the resources of the court (and, less directly, the state) are no longer providing support solely to the opposing party, but also to the indigent claimant or defendant. In contrast to pure pro se representation, which leaves the system unaltered, pro se-oriented court reforms can reorient the system entirely such that the lawyer's role is not as critical and any disadvantage to the pro se litigant is therefore minimal. An additional benefit of pro se court reform (satisfying not only fairness, but the other core values as well) is its ability to assist a larger number of pro se litigants at no cost to the litigants and little cost to the courts.⁵⁹

3. *Efficiency*

The value of efficiency encompasses the idea that representation by lawyers, with their legal knowledge and procedural expertise, should result in expedient and cost-effective resolutions of civil claims. According to the Model Access Act promulgated by the American Bar Association, providing a right to counsel for indigent litigants will “result in greater judicial efficiency by avoiding repeated appearances and delays caused by incomplete paperwork or unprepared litigants.”⁶⁰ Moreover, assistance from counsel may safeguard the accuracy of the proceedings, which in turn promotes efficiency by rendering the need for appellate review unnecessary.⁶¹

In 2009, the California legislature passed the Sargent Shriver Civil Counsel Act, which established a model program guaranteeing the right to counsel in critical areas of civil law, with the stated goal of increasing efficiency in a court system bogged down by pro se litigants.⁶² Whether the program does in fact increase efficiency and result in cost savings for taxpayers remains to be seen, as it will not be evaluated until 2016; the program nonetheless demonstrates how counsel may satisfy the need for efficiency.

On the other hand, some commentators contend—and the Supreme Court has agreed⁶³—that providing counsel can hinder efficiency, where counsel introduces a

⁵⁵ Amy J. Schmitz, “Drive-Thru” Arbitration in the Digital Age: Empowering Consumers Through Binding ODR, 62 BAYLOR L. REV. 178, 203–04 (2010).

⁵⁶ See, e.g., Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 987–89 (2012).

⁵⁷ Barton, *supra* note 29, at 1270–74.

⁵⁸ Steinberg, *supra* note 30, at 57–67.

⁵⁹ See Barton, *supra* note 29, at 1270–74.

⁶⁰ AM. BAR ASS'N., ABA TOOLKIT, *supra* note 2, at 12, § 1.F; see also Daniel C.W. Lang, Note, *Utilizing Nonlawyer Advocates to Bridge the Justice Gap in America*, 17 WIDENER L. REV. 289, 309 (2011).

⁶¹ Debra Gardner, *Justice Delayed Is, Once Again, Justice Denied: The Overdue Right to Counsel in Civil Cases*, 37 U. BALT. L. REV. 59, 74 (2007).

⁶² Brian Brophy, *A Civil Right to Counsel Through the States Using California's Efficiency Project As A Model Toward A Civil Gideon*, 8 HASTINGS RACE & POVERTY L. J. 39, 57–59 (2011).

⁶³ *Turner v. Rogers*, 131 S.Ct. 2510, 2511 (2011).

“degree of formality” into the proceedings that causes delay.⁶⁴ Thus, substitute mechanisms, such as online intake, telephone hotlines, self-help informational websites, and other technological improvements for legal aid programs, may—at least in some contexts—be a preferable means to achieve efficiency.⁶⁵ For example, since 2000, the Legal Services Corporation has sponsored a Technology Initiative Grants Program to fund technological innovations by existing legal aid providers, including creating websites, developing online intake systems, building mobile applications, and automating legal forms and documents.⁶⁶ In addition to improving access to legal services and increasing the number of individuals who may benefit, use of technology in this manner can provide pro se litigants with the resources to resolve their disputes more efficiently.

4. Legitimacy

Legitimacy represents the idea that requiring counsel, and all of the formality that accompanies counsel’s appointment, provides adequate recognition to what is at stake in a given proceeding and fosters confidence in the process through which legal claims are resolved.⁶⁷ As one scholar has argued, the right to counsel serves not only to protect the rights of individual defendants in individual trials, but also to protect the integrity of the development of the law by ensuring that the legal principles that result are the product of a legitimate adversarial process.⁶⁸ Legitimacy is ultimately about our perception of how the system operates: How is the system perceived both by clients and by outsiders? Do we believe that the system is designed such that “justice”—which encompasses notions of truth and accuracy—will result?

In making judgments about the legitimacy of the judicial process, we must adapt to a less formalized notion of legitimacy: if the goal is for clients to have more confidence in and feel better about the system, it is not necessarily clear that providing a lawyer in a suit will suffice, although it may be one means toward that end. Relying on findings from several empirical studies comparing the success and experience of unrepresented litigants to represented ones, Jean Sternlight asserts that “attorneys can help empower clients to stand up for themselves, and to express their own perspectives.”⁶⁹ Even in simpler cases, Sternlight finds that many clients will not feel comfortable representing themselves and that having an attorney provides clients with emotional support in addition to legal expertise.⁷⁰

In a study of alternatives to full representation by counsel, however, researchers compiled data on clinics, self-help centers, and hotlines, including data on client satisfaction with the assistance received, and most reported high levels of client satisfaction.⁷¹ For example, the Van Nuys Legal Self-Help Center in Los Angeles reported that center-assisted clients in both family and housing cases felt a “high level of satis-

⁶⁴ Gross, *supra* note 49, at 20–21 (noting that “lawyers have the ability to make what should be ‘straightforward’ determinations needlessly complex”).

⁶⁵ Richard Zorza, *Access to Justice: The Emerging Consensus and Some Questions and Implications*, 94 JUDICATURE 156, 162–63 (2011).

⁶⁶ *TIG’s Impact*, LSC TECHNOLOGY INITIATIVE GRANTS, <http://tig.lsc.gov/about-us/tigs-impact> (last visited July 1, 2014).

⁶⁷ See, e.g., Hornstein, *supra* note 38, at 1104 (providing counsel to those unable to afford counsel “preserves their human dignity and, therefore, the legitimacy of the judicial process and the rule of law”).

⁶⁸ Nancy Leong, *Gideon’s Law-Protective Function*, 122 YALE L.J. 2460, 2462 (2013).

⁶⁹ Jean R. Sternlight, *Lawyerless Dispute Resolution: Rethinking a Paradigm*, 37 FORDHAM URB. L.J. 381, 404 (2010).

⁷⁰ *Id.*

⁷¹ Engler, *Connecting Self-Representation*, *supra* note 5, at 68–72.

faction and reduction in confusion and anxiety.”⁷² This is particularly noteworthy given the difference in outcomes achieved by litigants in these two areas: while center-assisted clients in family cases fared better than unassisted litigants, those in housing cases achieved outcomes indistinguishable from unassisted litigants.⁷³ Legitimacy, then, is dependent not just upon outcomes, but also on how litigants feel about their interaction with the justice system and the assistance they receive—whether through representation by counsel or alternative means.

III. POST-DECONSTRUCTION: LOOKING FORWARD

Utilizing the above-described framework can achieve several worthwhile aims. First, it can serve as a guide to prioritize and evaluate the effectiveness of various policy proposals, including those proffered as “substitute procedural safeguards” under *Turner v. Rogers*.⁷⁴ For example, provision mechanisms might be evaluated using a four-prong test: (1) whether the method for providing assistance ensures that the party is able to effectively articulate and make informed decisions regarding her claims or defenses; (2) whether the resolution process provides one party with an unfair advantage over the other(s); (3) whether the mechanism renders more efficient resolution of claims; and (4) whether the process for resolving claims provides adequate recognition of the rights at stake and for an adequate remedy.

Second, by eschewing the notion that the appointment of counsel is the only adequate solution, the framework encourages a larger range of possible mechanisms for the resolution of legal claims—some of which may provide assistance for larger numbers of possible litigants, or help avoid litigation altogether. At the same time, it can help make the case that counsel is in fact necessary for an individual litigant—i.e., because counsel is the only means by which the core values can be satisfied in a given case. Ultimately, it provides a broader and more flexible basis for reform.

In some cases, for example, non-counsel alternatives, such as pro se court reform, may satisfy the core values more effectively than the appointment of a lawyer.⁷⁵ Pro se court reforms that allow individuals to interface directly with the courts in a clear and streamlined manner—with the support of court or other non-lawyer personnel—can provide similar qualitative access in the context of less complex claims and much greater quantitative access than individual legal representation. Technological innovations also have the capacity to reach a broader audience and to increase the efficiency of dispute resolution. Moreover, to the extent that such reforms require the parties to a dispute to interface through the same technology, they contribute to fairness by placing all parties on equal footing and removing some of the atmospheric and other less tangible advantages that are characteristic of formal legal representation. Depending on the nature of the relationship between the party and her counsel—particularly in light of the often overburdened and underresourced position of

⁷² *Id.* at 70.

⁷³ *Id.*

⁷⁴ *Turner* held that there is no categorical right to counsel in civil contempt proceedings (for failure to pay child support); due process can be satisfied instead by “substitute procedural safeguards.” *Turner v. Rogers*, 131 S. Ct. 2507, 2511 (2011); see *Zorza*, *Turner v. Rogers*, *supra* note 43, at 258 (asserting that *Turner*’s focus on procedural substitutes for counsel will bring attention to neutral court-based services, including informational centers, informational materials, and neutral assistance from court staff).

⁷⁵ Stephanos Bibas, *Shrinking Gideon and Expanding Alternatives to Lawyers*, 70 WASH. & LEE L. REV. 1287, 1291 (2013) (arguing that to “shrink the need, cost, and complexity of legal services in most cases” would “not only be simpler, cheaper, and more politically palatable, but also make the law more transparent and intelligible”).

legal services attorneys—it may be that individuals benefiting from pro se court reform leave their experience with a sense that the system is designed to provide them with an effective means of resolving their claims in a just and fair manner rather than the impression that they have been dealt a weak hand in a system that is otherwise impenetrable to the legally unindoctrinated.

In other cases, such as housing cases involving landlord-tenant disputes, counsel may be the best means available to meet the need at issue. In one study of evictions in New Haven, Connecticut, researchers found that represented tenants were more than three times as likely to avoid eviction as were unrepresented tenants.⁷⁶ Similarly, a study of New York’s Housing Court discovered that only sixteen percent of represented tenants default versus twenty-eight percent of unrepresented tenants, and represented tenants are far less likely to have an order of eviction entered against them compared to unrepresented tenants.⁷⁷ Non-counsel alternatives may not fare as well in this context. For example, in compiling data from numerous studies of legal aid housing clinics, Russell Engler found that clinic-assisted tenants fared little better than unrepresented ones.⁷⁸ Although clinic-assisted tenants felt that they had been granted adequate recognition of the rights they had at stake (thereby achieving legitimacy), the clinic assistance was “largely ineffective unless paired with assistance in court.”⁷⁹ One scholar argues that all non-counsel alternatives in the housing context—including pro se court reform, form pleadings, technological improvements, and limited assistance—can help pro se tenants but cannot satisfy the need for full representation by counsel because they fail to guarantee fair and impartial adjudication.⁸⁰ In such cases, then, counsel may be required to ensure that all four core values of the framework are satisfied.

Third, the value framework has potential to better inform and foster more constructive dialogue among policymakers about the best way to accomplish shared goals on a system-wide level, rather than devolving into a war over specific entities, fought in terms of numbers and dollars. When the only currency for reform is lawyers, there is little room for negotiation or creativity. However, when the menu for reform includes many options, there is more reason to have a constructive conversation about which would be the best fit and why. This framework could serve as a basis for such a discussion. Seeking a sound basis for future policy decisions, many commentators have called for increased data collection to evaluate the effectiveness of various mechanisms providing an alternative to full representation by counsel; this framework could also be used to develop metrics to analyze such data.

Last, to the extent that we wish to remain within the rights-based paradigm but to think outside the narrow confines of a right to counsel, this framework provides a substantive foundation for what a right of access to justice might entail and what sorts of mechanisms could provide a remedy for violation of the right.

⁷⁶ Steven Gunn, *Eviction Defense for Poor Tenants: Costly Compassion or Justice Served?*, 13 YALE L. & POL’Y REV. 385, 413 (1995).

⁷⁷ Carroll Seron, et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City’s Housing Court: Results of A Randomized Experiment*, 35 LAW & SOC’Y REV. 419, 427–29 (2001).

⁷⁸ Engler, *Connecting Self-Representation*, *supra* note 5, at 69–70.

⁷⁹ *Id.* at 67.

⁸⁰ Scherer, *supra* note 18, at 732.

IV. CONCLUSION

The need for access to civil justice is growing, and resources available to serve that need are scarce. The articulation of the value-based framework described herein is not intended to undermine efforts to extend the right to counsel, particularly where it is the best or only effective solution to satisfy that need. Recognizing, however, that resources are limited, and that representation by a lawyer may sometimes be an imperfect solution, it is meant to both broaden and organize the debate about how to best secure access to justice for low-income individuals with civil legal needs.

The ability to approach the issue with a more open mind will allow those invested in reform to take advantage of trends not only in legal practice, but also in legal education. In light of the increased emphasis on clinics and experiential learning at law schools, the emergence of incubator-style post-graduate practice programs, the suggestion of an apprenticeship model for third-year law students, and an increased focus on non-J.D. programs, a tool is needed to evaluate how and when different models for providing civil legal assistance will be most appropriate or effective. Achieving positive outcomes for litigants cannot serve as the only metric by which to evaluate proposed alternatives, and we should be wary of solutions that are vulnerable to nominal satisfaction. As I suggest here, we might instead look for guidance to the values served by effective legal representation: access, fairness, efficiency, and legitimacy. By straying from the formal right to counsel and instead isolating its core elements, which may be met by other means, we gain additional flexibility and the potential not only to reach more in need, but also to achieve greater effectiveness in ensuring access to justice for all.

Unequal Treatment? The Speech and Association Rights of Employees: Implications of *Knox* and *Harris**

Catherine Fisk & Erwin Chemerinsky**

I. INTRODUCTION

In 2012, the Supreme Court held in *Knox v. SEIU, Local 1000* that a union representing government employees may assess money from the employees whom it represents to support political activity only if those employees first opt in to supporting political expenditures.¹ In reaching this holding, the Court reasoned that public sector employees have a First Amendment right to refuse to contribute money to support the political speech of their union and that protection of that First Amendment right requires states to allow such assessments only if the employees first opt to make a financial contribution. *Knox* is the latest in a long series of Supreme Court cases delineating when a union selected as the exclusive bargaining representative by the majority of employees in a workplace violates the First Amendment rights of dissenting employees by acting on behalf of the majority. The Court's next case in this line, *Harris v. Quinn*, which was argued in January and will be decided later this year, presents the question whether home care workers who are state employees have a First Amendment right to refuse to pay the union anything for the services the union is statutorily obligated to provide them.² The petitioners in *Harris* invite the Court to overrule decades of precedent and hold that the First Amendment prohibits a union representing government employees from collecting dues or fees from dissenting employees. In colloquial terms, the petitioners in *Harris* seek to have the Supreme Court declare that, as a matter of the First Amendment, all government employment must be on a "right-to-work" basis.³

The petitioners' argument in *Harris* went beyond simply the payment of the employees' fair share of the cost of contract negotiation and administration. They argued that bargaining on behalf of employees is petitioning the government and "political in nature," even when it addresses wages, and it violates the First Amendment to require dissenting employees to support the union's bargaining.⁴ As the Justices recognized at oral argument, the logical extension of the petitioners' argument is that the First Amendment invalidates any statute allowing employees to bargain collectively on the

* This Issue Brief was initially published in February 2014.

** Catherine Fisk is Chancellor's Professor of Law, and Erwin Chemerinsky is Dean and Distinguished Professor of Law, at the University of California, Irvine School of Law.

¹ 132 S. Ct. 2277 (2012).

² 656 F.3d 692 (7th Cir. 2011), cert. granted, 134 S. Ct. 48 (2013).

³ Transcript of Oral Argument at 21, *Harris v. Quinn*, __ S. Ct. __ (2014) (No. 11-681).

⁴ *Id.* at 5, 17.

basis of exclusive representation.⁵ While the petitioners noted that the *Harris* case itself did not require the Court to consider whether empowering a union to be the exclusive representative of employees for purposes of negotiating wages and working conditions necessarily involves compelled speech with respect to those employees who disagree with the majority representative's positions, their brief invited the Court to find collective bargaining on the basis of exclusive representation to be unconstitutional. This Issue Brief will analyze *Harris*, *Knox*, and other leading Court cases to assess union representation and the First Amendment, contradictions in applied standards of associational speech, and the future of public sector collective bargaining.

II. UNION REPRESENTATION AND THE FIRST AMENDMENT

In both private sector and governmental employment, when a majority of employees choose union representation and the union is recognized by the employer or certified by the labor relations agency, the union has the power and responsibility to negotiate with the employer over terms of employment and to enforce the collective bargaining agreement on behalf of every employee in the unit, not just union members and not just those who voted for the union. Union-represented employees need not join the union; even in states that do not bar union security devices (that is, in non-right-to-work states) employers and unions cannot constitutionally enforce an agreement requiring employees to join the union. The most that a union can require is that union-represented employees pay an "agency fee" or "fair share fee" for the union's services in negotiating and administering the contract.⁶ Thus, whether or not employees are union members, if they are represented by a union, not only do they receive the wage and benefits gains associated with union representation (typically about seventeen percent more than earned by comparable nonunion workers), they also have the right to free assistance from the union in enforcing their contractual and, in some cases, statutory rights against the employer.⁷

The Supreme Court long ago rejected the argument that the First Amendment prohibits unions and employers from requiring all represented employees to pay fees to support the union's contract negotiation and administration functions.⁸ In a case arising under the Railway Labor Act, the Court reasoned that nonunion members "share in the benefits derived from collective agreements negotiated by the railway labor unions but bear no share of the cost of obtaining such benefits."⁹ The Court also found that labor statutes allow employers and unions to enter into contracts requiring employees "to share the costs of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes."¹⁰ The Court held, however, that Congress did not intend to allow such contracts to require employees to subsidize the union's political speech.¹¹ In *Abood v. Detroit Board of Education*, the Court held that nonunion government employees can be required to

⁵ *Id.* at 19–20.

⁶ *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963).

⁷ *See* 14 Penn Plaza, LLC v. Pyett, 556 U.S. 247, 271 (2009) (finding a union duty to represent employees in arbitration of statutory claims when the agreement incorporates statutory rights); *Vaca v. Sipes*, 386 U.S. 171, 177 (1967) (finding a union duty to represent employees in contractual grievance procedure).

⁸ *Int'l Ass'n of Machinists v. S.B. Street*, 367 U.S. 740 (1961); *Ry. Emps. Dep't v. Hanson*, 351 U.S. 225 (1956).

⁹ *Street*, 367 U.S. at 773.

¹⁰ *Id.* at 764.

¹¹ *Id.*

pay fair share fees to support collective bargaining because they benefit from it, but they cannot be required to support union political activities unrelated to contract negotiation and administration.¹²

In a ruling prior to *Abood*, however, the Court cautioned that limits on the right of unions to charge nonmember employees for political expenditures must not be allowed to restrict the ability of the union to convey its own political message:

[M]any of the expenditures involved in the present case are made for the purpose of disseminating information as to candidates and programs and publicizing the positions of the unions on them. As to such expenditures an injunction would work a restraint on the expression of political ideas which might be offensive to the First Amendment. For the majority also has an interest in stating its views without being silenced by the dissenters. To attain the appropriate reconciliation between majority and dissenting interests in the area of political expression, we think the courts in administering the Act should select remedies which protect both interests to the maximum extent possible without undue impingement of one on the other.¹³

The Court's focus on protecting the speech rights of the union, however, vanished in subsequent cases.

The notion that contractually required union membership involved compelled speech in violation of the First Amendment has long been controversial. As Justice Frankfurter noted, unionized employees remain free to speak on all issues regardless of the union's position. They "are in no way subjected to such suppression of their true beliefs or sponsorship of views they do not hold.... No one's desire or power to speak his mind is checked or curbed. The individual member may express his views in any public or private forum as freely as he could before the union collected his dues."¹⁴ Frankfurter also rejected the notion that union political advocacy coerced dissenting employees in a way that union bargaining or grievance processing did not.¹⁵ Unions throughout American history have served their members not only at the bargaining table and in grievance arbitration, but also by advocating in the legislature for improved working conditions, and have been crucial in enacting legislation on "compulsory education, an eight-hour day, employer tort liability, and other social reforms."¹⁶ Indeed, Frankfurter observed, "[t]he notion that economic and political concerns are separable is pre-Victorian.... It is not true in life that political protection is irrelevant to, and insulated from, economic interests. It is not true for industry or finance. Neither is it true for labor."¹⁷

Having created the requirement that unions may charge dissenting employees only for the costs germane to contract negotiation and enforcement, the Court created an elaborate set of rules governing the process by which dissenting employees may opt

¹² 431 U.S. 209, 235–37 (1977).

¹³ *Street*, 367 U.S. at 773.

¹⁴ *Id.* at 805–06.

¹⁵ *Id.* at 814–15.

¹⁶ *Id.* at 800.

¹⁷ *Id.* at 814–15.

out of union “political” spending.¹⁸ Unions must maintain a system for employees to challenge the union’s accounting and determination of dissenters’ fair share of chargeable expenses, must notify employees annually about the system, and allow employees to make annual objections. This is called a *Hudson* notice.¹⁹ The Court also stipulated the kinds of expenses that are and are not chargeable to objectors.²⁰ Objecting employees may be compelled to pay their fair share of “the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.”²¹ Under this standard, unions may charge objecting employees for the costs of negotiating and administering the collective bargaining agreement as well as the costs associated with the union’s national convention, the union’s social activities, certain litigation expenses, and the portions of the unions’ publications reporting on chargeable activities.²²

In addition to these rules, under section 14(b) of the National Labor Relations Act (“NLRA”), states can enact laws invalidating any contractual term requiring union-represented employees to share the cost of the union’s services in bargaining and administering a contract. Twenty-four states have enacted such laws, which are known as “right-to-work” laws,²³ although the name prompts strong objection from union supporters. In these states unions must represent all workers equally—with respect to both collective bargaining and administration—even those workers who exercise their state-law right to pay exactly nothing for the union’s representation. There have been numerous efforts to extend the right-to-work regime nationally by introducing legislation in Congress to ban all union security arrangements.²⁴ In right-to-work states, unions are still required by law to provide services to all of the employees that they represent, but the union cannot require all employees to pay their fair share of the

¹⁸ Unions must provide an accounting of annual expenditures to enable dissenters to challenge the union’s determination of which expenses are chargeable. *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 310 (1986).

¹⁹ See, e.g., *Id.*; *Air Line Pilots Ass’n v. Miller*, 523 U.S. 866, 878 (1998) (“With the *Hudson* notice, plus any additional information developed through reasonable discovery, an objector can be expected to point to the expenditures or classes of expenditures he or she finds questionable.”).

²⁰ *Locke v. Karass*, 555 U.S. 207 (2009) (finding that litigation expenses are chargeable if the subject of the litigation is chargeable); *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 524 (1991) (holding that local bargaining representatives may charge objecting employees their pro rata share of costs associated with chargeable activities).

²¹ *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 448 (1984). Implementing that standard, the Court adopted a three-part test for determining whether the expenses are chargeable to dissenters: (1) whether they support “activities germane to collective bargaining”; (2) whether they involve “additional interference with the First Amendment interests of objecting employees” beyond that “already countenanced” by union representation; and (3) if so, whether the additional interference is “nonetheless adequately supported by a governmental interest.” *Id.* at 455–56.

²² *Id.* at 448–54; see also *Lehnert*, 500 U.S. at 519 (reiterating test and elaborating on chargeability analysis).

²³ *Right-to-Work Resources*, NAT’L CONF. ST. LEGISLATURES, <http://www.ncsl.org/issues-research/labor/right-to-work-laws-and-bills.aspx> (last visited Sept. 7, 2013). See Kenneth Glenn Dau-Schmidt & Winston Lin, *The Great Recession, the Resulting Budget Shortfalls, the 2010 Elections and the Attack on Public Sector Collective Bargaining in the United States*, 29 HOFSTRA LAB. & EMP. L.J. 407, 428–31 (2012) (summarizing recent legislative developments).

²⁴ See, e.g., National Right-to-Work Act, S. 504, 112th Cong. (2012). A business-funded nonprofit organization, the National Right to Work Committee and a legal defense foundation of the same name have pushed for over fifty years to enact right-to-work legislation both at the state level and nationally. See *About NRTWC*, NATIONAL RIGHT TO WORK COMMITTEE, www.nrtwc.org/about-2/ (last visited Jan. 26, 2013).

costs of contract negotiation or administration.²⁵ As a result, in right-to-work states, employees who wish to form a union are effectively forced to subsidize the provision of the union benefits to coworkers who refuse to support the union.²⁶

In *Knox v. SEIU, Local 1000*, and in *Harris v. Quinn*, the Court appears to be on a path to do by judicial decision that which the National Right to Work Legal Defense Foundation has tried to accomplish through legislation for decades: to require the right-to-work regime for every public sector workplace and, perhaps, in the private sector as well. *Knox* took the first step by concluding that the First Amendment prohibited the Service Employees International Union (SEIU), which represents many public employees in California, from adopting a temporary assessment of one quarter of one percent of an employee's wage in order to fund a campaign to defeat two ballot measures without first notifying every represented employee and giving them an opportunity to opt out of the assessment. The case originated when a class of employees represented by the National Right to Work Legal Defense Foundation filed suit challenging the temporary assessment.²⁷ In a broad opinion by Justice Alito, the Court held that any special assessment or dues increase may be levied only after issuing a separate notice and *only on those employees who opt in*.²⁸ Remarkably, Justice Sotomayor's concurrence and Justice Breyer's dissent both pointed out the question of whether the Constitution requires an opt in system was not briefed or argued in the case or discussed in the courts below.²⁹

Knox is significant in that it is the first time the Supreme Court has said that an *opt out* system is not sufficient to protect nonunion employees from compelled speech and that an *opt in* regime is constitutionally required. The broad language of the Court's majority suggests that five Justices may not be content to limit their new rule to special assessments but rather are poised to say that opt in is always constitutionally required. Moreover, as became evident in the oral argument in *Harris*, the most disturbing dicta in the Court's *Knox* opinion calls into question the constitutionality of collective bargaining based on exclusive representation and majority rule.

In *Harris*, the Court granted certiorari to review a decision of the Seventh Circuit holding that home care workers who are state employees do not have a First Amendment right to refuse to pay the union for the collective bargaining services the union is statutorily obligated to provide them.³⁰ In its reasoning, the Seventh Circuit found that the home care workers were state employees and, therefore, under the Supreme Court cases discussed above, there was no First Amendment infirmity with an Illinois public sector labor statute allowing the union and the state employer to enter into an agreement requiring the home care workers to pay their share of the union's bargaining and contract administration expenses. The National Right to Work Foundation, however, argued that the statute is unconstitutional because negotiating over pay for home care workers is speech on a matter of public concern and, therefore, union representation is compelled speech in violation of the First Amendment.

²⁵ *Hughes Tool Co.*, 104 N.L.R.B. 318, 327–29 (1953) (holding that union cannot charge nonmembers a fee in a right-to-work state because such employees, though not members or fee-payers, are nevertheless statutorily entitled to union representation).

²⁶ See Catherine Fisk & Benjamin Sachs, *Restoring Equity in Right to Work*, 4 U.C. IRVINE L. REV. (forthcoming 2014), available on SSRN at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2325158.

²⁷ Plaintiffs' Verified Class Action Complaint at 10, *Knox v. Westly*, No. 2:05-cv-02198-MCE-KJM, 2008 WL 850128 (E.D. Cal. 2008).

²⁸ *Knox v. Service Employees International Union, Local 1000*, 132 S. Ct. 2277 (2012).

²⁹ *Id.* at 2298 (Sotomayor, J., concurring); *id.* at 2306 (Breyer, J., dissenting).

³⁰ *Harris v. Quinn*, 656 F.3d 692 (7th Cir. 2011), *cert. granted*, 134 S. Ct. 48 (2013).

III. THE FIRST AMENDMENT PRINCIPLES RELEVANT TO ASSOCIATIONAL SPEECH

Knox and *Harris* involve three interrelated strands of First Amendment jurisprudence: the right to be free from compelled speech, the expressive rights of associations, and the speech rights of government employees.

A. COMPELLED SPEECH

The Court has long been inconsistent in deciding what constitutes compelled speech, when forcing the use of private property for speech is compelled speech, and when mandatory financial contributions—the issue in *Knox* and *Harris*—are compelled speech.

The initial Supreme Court case concerning compelled speech was *West Virginia State Board of Education v. Barnette*, which declared unconstitutional a state law that required that children salute the flag.³¹ Justice Robert Jackson, writing for the Court, famously said:

[T]he compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind.... If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.³²

The Court followed this principle in other cases, such as in *Wooley v. Maynard*, where it ruled that an individual could not be punished for blocking out the portion of his automobile license plate that contained the New Hampshire state motto, “Live Free or Die.”³³ Both *Barnette* and *Wooley* involved actual compulsion to speak or to display a message. *Knox* and *Harris*, of course, involved neither. And it is notable that the Supreme Court found in both *Barnette* and *Wooley* that the First Amendment simply required that people be able to opt out. In *Barnette*, the Supreme Court did not prevent schools from beginning each day with a flag salute; it simply said that children could opt out and not participate. In *Wooley*, the Court said that those who object to “Live Free or Die” on their license plate could opt out by putting tape over it. The Court did not require that New Hampshire have those who wanted the phrase on their license plates make a special effort to get it.

Apart from the rare law, like that in *Barnette*, that forces someone to utter words, the Court has not been consistent in deciding whether there is compelled speech when a person or entity is forced to convey a message. In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc. (FAIR)*, the Court rejected a claim that requiring universities to allow military recruiters equal access to campus interviewing as a condition for receipt of federal funds was impermissible compelled speech.³⁴ In *FAIR*, the Court insisted that expending money to enable a third party to convey a message is

³¹ 319 U.S. 624, 642 (1943).

³² *Id.* at 633, 642.

³³ 430 U.S. 705, 713 (1977).

³⁴ 547 U.S. 47, 62 (2006).

not compelled speech because one remains free to express whatever views one may have on the matter in question.³⁵

Reconciling *Knox* and *Harris* with *FAIR* is difficult because identifying compelled speech is harder than the Supreme Court has acknowledged. For example, if officials of a state university aggressively campaign for a ballot initiative for a tax increase to prevent drastic budget cuts, they are using money paid by students in tuition and fees. Is this compelled speech for those employees or students who favor low taxes? If a large corporation lobbies for legislation on favorable tax treatment for corporations, is that compelled speech for those employees or shareholders who favor higher corporate taxes to fund better social services or deficit reduction?

The Court has also considered compelled speech under the First Amendment when the government forces people to use their property for speech by others, and the cases in this area are also difficult to reconcile. The Court has held that the First Amendment is violated if the government forces owners to make their property available for expressive purposes. For example, in *Miami Herald Publishing Co. v. Tornillo*, the Supreme Court unanimously invalidated a state law that required newspapers to provide space to political candidates who had been verbally attacked in print.³⁶ Similarly, in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, the Court declared unconstitutional a utility commission regulation that required that a private utility company include in its billing envelopes materials prepared by a public interest group.³⁷

In contrast, in other cases the Court has found no compelled speech when an entity is forced to use its property or resources to convey a message with which it disagrees. For example, in *PruneYard Shopping Center v. Robins*, shopping center owners argued that their First Amendment rights were violated by a California Supreme Court ruling that protestors had a right to use their property for speech under the state constitution.³⁸ The Court distinguished *Wooley* and explained that the shopping center is:

not limited to the personal use of appellants[,]... [but] is instead a business establishment that is open to the public to come and go as they please. The views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner.³⁹

Nor has the Court been consistent in deciding whether mandatory financial contributions constitute compelled speech. In *Abood v. Detroit Board of Education*,⁴⁰ the Court said that the nonmembers of a union could be required by contract to pay a charge to subsidize the collective bargaining activities of the union but that it violated the First Amendment to require the nonmembers to pay for ideological causes with which they disagreed. In *Keller v. State Bar of California*,⁴¹ the Court said that the state bar could use compulsory dues only if the dues were “reasonably incurred

³⁵ *Id.* at 60.

³⁶ 418 U.S. 241, 256–58 (1974).

³⁷ 475 U.S. 1, 20–21 (1986).

³⁸ 447 U.S. 74 (1980).

³⁹ *Id.* at 87.

⁴⁰ 431 U.S. 209.

⁴¹ 496 U.S. 1 (1990).

for the purpose of regulating the legal profession or ‘improving the quality of the legal service available to the people of the State.’”⁴² The Court explained that the Bar could collect dues from all members to pay for bar-related activities, but that dues “may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative[.]”⁴³

In sharp contrast to *Abood* and *Keller*, the Court upheld mandatory student activity fees at public universities. In *Board of Regents of the University of Wisconsin System v. Southworth*, the Court unanimously upheld the permissibility of requiring college students to pay money each semester to a fund that subsidizes student activities.⁴⁴ Conservative University of Wisconsin law students challenged their having to pay the university’s student activities fee, part of which was given to groups with which they disagreed.⁴⁵ Justice Kennedy, writing for the Court, said that such a fee is constitutional so long as the university distributes the funds in a viewpoint-neutral manner.⁴⁶

Southworth cannot be easily reconciled with *Abood* and *Keller*. In all three cases, there were compelled contributions. In all three cases, the challengers objected that their money was being spent to support political activities with which they disagreed. The difference is that in *Southworth*, the Court upheld the compelled expenditures because it accepted the importance of having student activity fees and the right of universities to convey messages with which some students disagree. In *Abood* and *Keller*, by contrast, the Court did not find a sufficiently important interest in requiring support for the political activities of a union or a state bar. In other words, the distinction is not in whether there was compelled speech but in whether it was sufficiently justified in the Court’s view.

Even where the Court has prohibited the use of mandatory financial contributions to fund political or ideological causes, the Court has been inconsistent in what it defines as political or ideological. For example, a state bar may charge dissenting members to fund a public relations campaign focusing on improving the reputation of lawyers generally, but a union may not charge dissenting employees to fund a similar campaign focusing on explaining to employees and to the general public the advantages of union representation for teachers.⁴⁷ Other than that some courts consider the poor reputation of lawyers to be a more pressing problem than public skepticism of teachers’ unions, there is no basis to distinguish why one is not unconstitutional compelled speech and the other one is. The Court’s inconsistency in defining when compulsory contributions can be used for more or less “political” purposes emerged as a salient issue in *Harris v. Quinn*, in which the petitioners insisted that negotiation over wages paid with Medicaid funds was speech on a matter of public concern and, more generally, that exclusive representation for purposes of negotiating wages paid with public funds is unconstitutional.⁴⁸

⁴² *Id.* at 14 (quoting *Lathrop v. Donohue*, 367 U.S. 820, 843 (1961)).

⁴³ *Id.* at 16.

⁴⁴ 529 U.S. 217, 220–21 (2000).

⁴⁵ *Id.* at 221.

⁴⁶ *Id.* at 234.

⁴⁷ Compare *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 528 (1991) (holding that public relations efforts designed to bolster the reputation of teachers are not chargeable), with *Kingstad v. State Bar of Wisconsin*, 622 F.3d 708, 719 (7th Cir. 2010) (holding that state bar’s PR campaign is chargeable even though *Lehnert* held a union PR campaign is not because building public confidence in the organized bar is “very different” from building confidence in teachers or their union).

⁴⁸ Brief for Petitioners at 28–29, *Harris v. Quinn*, 134 S. Ct. 48 (2013) (No. 11–681).

One other area where the Court has considered mandatory assessments and again has been inconsistent is in the context of government requirements that agricultural producers contribute to funds for product advertising. In *Glickman v. Wileman Bros. & Elliott, Inc.*⁴⁹ and *United States v. United Foods, Inc.*,⁵⁰ the Court came to opposite conclusions about the constitutionality of such programs. In *Glickman*, the Court upheld regulations issued pursuant to the Agricultural Marketing Agreement Act of 1937 that required fruit producers to contribute funds to pay for generic advertising for fruit.⁵¹ Justice Stevens, writing for the majority in a 5-4 split, said that “requiring respondents to pay the assessments cannot be said to engender any crisis of conscience. None of the advertising in this record promotes any particular message other than encouraging consumers to buy California tree fruit.”⁵² But four years later, in *United States v. United Foods, Inc.*, the Court invalidated the requirement for mandatory assessments for product advertising contained in the Mushroom Promotion, Research, and Consumer Information Act.⁵³ In a six-to-three decision, the Supreme Court declared the mandatory assessments on mushroom producers unconstitutional. Justice Kennedy, writing for the majority, began by emphasizing that the law forced the challengers to express “[t]he message... that mushrooms are worth consuming whether or not they are branded” instead of its preferred message that its brand was superior to the others.⁵⁴ Justice Kennedy wrote: “First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors,” and therefore, “the compelled funding for the advertising must pass First Amendment scrutiny.”⁵⁵

In sum, the Court has been markedly inconsistent on at least four distinct questions: (1) When does the ability of a speaker to express her own views prevent compelled funding of an organization’s speech from being regarded as compelled speech? (2) When are forced monetary contributions a violation of the First Amendment? (3) When does allowing opt out satisfy the First Amendment? (4) When is there a sufficiently compelling interest to justify compelled speech with no opt out? The inconsistency was highlighted in *Harris*, in which the parties and the Court recognized the difficulty of deciding that unions cannot collect fair share fees without limiting the ability of integrated state bars to require lawyers to pay bar dues.⁵⁶

B. THE RIGHTS OF ASSOCIATIONS

There is another interrelated strand of First Amendment law that underlies the Court’s decision in *Knox*: the rights of the association as opposed to those of its dissenting members. In *Knox*, the Court gave no weight whatsoever to the First Amendment rights of the entity, the union, or the union’s majority who wanted to express a political message. Rather, the focus was entirely on protecting dissenting members who did not want to support the union’s opposition to ballot initiatives which would have been quite harmful to unionized government employees.⁵⁷

⁴⁹ 521 U.S. 457 (1997).

⁵⁰ 533 U.S. 405 (2001).

⁵¹ *Glickman*, 521 U.S. at 463, 476–77.

⁵² *Id.* at 472.

⁵³ 533 U.S. at 408–09.

⁵⁴ *Id.* at 411.

⁵⁵ *Id.*

⁵⁶ Brief for Respondents at 19, *Harris v. Quinn*, 134 S. Ct. 48 (2013) (No. 11-681).

⁵⁷ *Knox v. Service Employees International Union, Local 1000*, 132 S. Ct. 2277, 2289 (2012).

Yet, in other contexts, the Court has made exactly the opposite choice, favoring the free speech of the entity and its majority over that of any dissenters. The most obvious example of this was the Court's decision in *Citizens United v. Federal Election Commission*, which held that restrictions on independent expenditures by corporations violated the First Amendment.⁵⁸ The Court held that corporations have free speech rights and that limits on independent expenditures are unconstitutional restrictions of core political speech.⁵⁹ The Court was emphatic on the importance of protecting the speech rights of the corporate entity. It declared:

The censorship we now confront is vast in its reach. The Government has muffled the voices that best represent the most significant segments of the economy. And the electorate has been deprived of information, knowledge and opinion vital to its function. By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests.⁶⁰

The Court was untroubled by the fact that spending from general corporate revenues meant that the corporation was spending the shareholders' money on political activities without their consent and even against their political views.

Earlier Supreme Court decisions that had justified restrictions on corporate political expenditures were in part based on the need to keep shareholders' money from being spent on political matters in a manner they might oppose.⁶¹ Prior to *Citizens United*, corporations could spend money on political campaigns by creating political action committees that raised funds for those activities.⁶² In this way, all of the corporate funds spent on campaigns were raised from those who wanted to support the corporation's political activities. But *Citizens United* held that this was not enough to satisfy the free speech rights of corporations; the First Amendment gave to them the right to spend unlimited amounts of money from corporate treasuries to elect or defeat candidates.⁶³

In *Citizens United*, the Court rejected the notion that restrictions on how an organization spends general treasury money are justified by the need to protect dissenting shareholders' rights. The Court offered three reasons for rejecting the compelled speech argument. First, protecting dissenters within the entity does not justify restricting the First Amendment rights of the entity to spend money because it gives the

⁵⁸ 558 U.S. 310, 372 (2010).

⁵⁹ *Id.* at 365.

⁶⁰ *Id.* at 354 (citations and internal quotation marks omitted).

⁶¹ *See, e.g.,* *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 658, 666 (1990), *overruled by Citizens United*, 558 U.S. 310 (justifying the restriction on corporate spending in elections); *see also* *McConnell v. FEC*, 540 U.S. 93, 204 (2003), *overruled by Citizens United*, 558 U.S. 310 (explaining that having corporations engage in political expenditures through political action committees "allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members") (quoting *FEC v. Beaumont*, 539 U.S. 146, 163 (2003)).

⁶² *See McConnell*, 540 U.S. at 203 ("The ability to form and administer separate segregated funds... has provided corporations and unions with a constitutionally sufficient opportunity to engage in express advocacy.").

⁶³ *Citizens United*, 558 U.S. at 365 ("No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.").

government power to restrict the speech activities of the entity.⁶⁴ Second, dissenters can protect their interests “through the procedures of corporate democracy.”⁶⁵ Third, a restriction on the entity’s political expenditures is both overinclusive and underinclusive as a method of protecting the First Amendment rights of dissenters. It was overinclusive because some dissenters might support the expenditures and underinclusive because it did not ban all speech that dissenters might oppose, just some political expenditures.⁶⁶ In a prior corporate campaign finance case, the Court rejected the purported state interest in protecting dissenting shareholders from subsidizing corporate political speech by pointing out that the restriction on corporate speech did not cover “business trusts, real estate investment trusts, [and] labor unions.”⁶⁷

All of the same objections could be made regarding restrictions on union speech, and the same arguments could be made for allowing the union to speak over the objections of nonmembers.⁶⁸ First, preventing unions from spending some of their general treasury on political messages restricts the entity’s speech in the name of protecting the dissenters. Second, employees have an array of legal protections to enable them to challenge the leadership, and can decertify the union. It is entirely unclear whether dissenting employees have more or less power to challenge the actions of union leadership than do dissenting shareholders under the procedures of corporate democracy.⁶⁹ Third, the Court never even mentioned overinclusiveness and underinclusiveness in addressing the constitutionality of the rules protecting dissenters in *Knox*. If a restriction on corporate political speech is constitutionally infirm because it is underinclusive in not protecting other organizational dissenters, it is difficult to see why a law that targets only labor unions is not similarly underinclusive and therefore constitutionally infirm. A ban on all union political expenditures is overinclusive in disregarding whether the dissenting employee opposes all or only some of the union’s political messages, just as a ban on all corporate independent political expenditures is overinclusive. For example, some California public sector employees might have opposed one of the ballot measures that the SEIU levied the assessment to defeat (which would have given the governor the unilateral power to cut appropriations for public employee compensation) even if they supported the other (which would have required employees to opt in to union political expenditures). There is no reason why the overbreadth and the underbreadth problems are any different in *Citizens United* as opposed to *Knox*.

⁶⁴ *Id.* at 361.

⁶⁵ *Id.* at 362 (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 794 (1978)).

⁶⁶ *Id.*; see also *Bellotti*, 435 U.S. at 793 (holding the statute in question was underinclusive because “[c]orporate expenditures with respect to a referendum are prohibited, while corporate activity with respect to the passage or defeat of legislation is permitted”).

⁶⁷ *Bellotti*, 435 U.S. at 793.

⁶⁸ In *Citizens, United and Citizens United: The Future of Labor Speech Rights?*, 53 WM. & MARY L. REV. 1, 39–46 (2011), Professor Charlotte Garden pointed out the inconsistencies between *Citizens United* and the dues objector cases. She suggested *Citizens United* might be the basis for asserting a challenge to the labor cases to expand not just “what unions are permitted to say but also with what money they can say it.” *Id.* at 46. Our argument is consistent with hers, although we take a somewhat different approach.

⁶⁹ Corporate law scholars have refuted the notion that shareholders can control corporate political speech through the channels of corporate democracy for decades, certainly since Victor Brudney’s classic 1981 article, *Business Corporations and Stockholders’ Rights Under the First Amendment*, 91 YALE L.J. 235 (1981); see also Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 84 (2010) (acknowledging corporate speech is not dependent on shareholder input and recommending lawmakers adopt rules requiring shareholder input).

The Court believes corporate political spending is not compelled speech and union political spending is. The reason for this is stated in an earlier campaign finance case, *First National Bank of Boston v. Bellotti*: workers are compelled to fund union political speech but shareholders are not because the latter can simply sell their shares in the corporation but the former would have to quit their job.⁷⁰ As Professor Benjamin Sachs has explained, the notion that quitting a job to avoid an objectionable contract term is coercion but selling shares in a corporation is not does not withstand careful scrutiny, particularly (but not exclusively) in those instances in which people cannot sell their shares because they are participants in a pension fund.⁷¹ The amount of compulsion inflicted by organizational speech may vary among types of speech and organization, but the differences are ones of degree.

Other cases, too, have protected the free speech rights of the association with little concern about the rights of dissenting members. Consider, for example, *Boy Scouts of America v. Dale*,⁷² which held that freedom of association protects the right of the Boy Scouts to exclude gays in violation of a state's antidiscrimination statute.⁷³ The Court's only effort to reconcile the compelled speech cases of union dues and the organizational free speech rights of *Dale* and *Rumsfeld v. FAIR* was in *Davenport v. Washington Education Ass'n*, which upheld a state law requiring that nonmembers opt into supporting union political activities.⁷⁴ In that case, Justice Scalia explained that *Dale* and *FAIR* are irrelevant because the Washington prohibition on union political speech "does not compel respondent's acceptance of unwanted members or otherwise make union membership less attractive."⁷⁵ If, however, there is a First Amendment right of an organization to express itself over the objection of dissenters, there is no reason why that right should apply only to expelling members and firing employees, and not to how the organization spends money. If the Boy Scouts' First Amendment right to express a homophobic message trumps Dale's statutory right to be free from discrimination, there is no reason why a teachers' union's right to oppose charter schools and vouchers should not trump its members' rights to espouse them.

C. SPEECH RIGHTS OF GOVERNMENT EMPLOYEES

A third important strand of free speech law is directly relevant to the facts of *Knox* and *Harris*: the First Amendment rights of government employees. The *Knox* rule that government employees have a First Amendment right not to be charged for a special assessment that the union will use in part for political activities unless they opt into paying for this charge is difficult to reconcile with the Court's other decisions which give little or no protection for the speech rights of government employees. For example, in *Garcetti v. Ceballos*, the Court held that there is no First Amendment protection against adverse employment action for the speech of government employees made on the job and within the scope of their duties.⁷⁶ Although the Supreme

⁷⁰ 435 U.S. at 794 n.34.

⁷¹ Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After Citizens United*, 112 COLUM. L. REV. 800, 808–09, 833–44 (2012) (concluding that both avoiding investments in the stock market and working in unionized jobs in order to avoid subsidizing objectionable political speech involve coercion and impose unacceptable costs).

⁷² 530 U.S. 640 (2000).

⁷³ *Id.* at 643–44.

⁷⁴ 551 U.S. 177, 191–92 (2007).

⁷⁵ *Id.* at 187 n.2.

⁷⁶ 547 U.S. 410, 421 (2006).

Court long had held that there was some constitutional protection for the speech of government employees,⁷⁷ it ruled against Ceballos by drawing a distinction between speech “as a citizen” as opposed to “as a public employee”; only the former is protected by the First Amendment. Justice Kennedy opined: “[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”⁷⁸

The distinction between speech as an employee and speech as a citizen is highly questionable; after all, government employees do not give up their citizenship when they enter their workplace. But if there is such a distinction, the government employees in *Knox* were being asked to pay the assessment precisely because they were government employees and were speaking in this capacity through their union. Similarly, in *Harris*, the fair share fees are being used to obtain better pay and working conditions for all unionized home care workers.

In a series of cases, beginning with *Pickering v. Board of Education*, the Court has held that the speech of government employees, when off the job, is protected only if it involves a matter of public concern and only if, on balance, the employee’s speech rights outweigh the employer’s interests in the efficient functioning of the office.⁷⁹ Phrased another way, the employee can prevail only if: (1) he or she convinces the court that speech was the basis for the adverse employment action; (2) the court concludes that the speech is related to matters of public concern; and (3) the court decides that, on balance, the speech interests outweigh the government’s interests in regulating the expression for the sake of the efficiency of the office. Not surprisingly, government employees do not usually succeed under this test.⁸⁰

Harris illustrates the inconsistency in the Court’s treatment of the free speech rights of government employees. It is difficult, to say the least, to understand why nonunion government employees have a First Amendment right to refuse to pay for the cost of union political activity, even where the activity seeks legislation to improve working conditions, while those same employees have no First Amendment right to engage in partisan political activity or to blow the whistle on allegedly wrongful governmental conduct.⁸¹

By imposing an opt in rule on one category of association (labor organizations) and for one category of speech (political expenditures), the majority in *Knox* created a legal rule that discriminates both against certain speakers (unions) and on the basis

⁷⁷ See, e.g., *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) (holding that government employee’s speech is protected by the First Amendment if it involves a matter of public concern and does not unduly interfere with the functioning of the workplace).

⁷⁸ *Garcetti*, 547 U.S. at 421.

⁷⁹ 391 U.S. at 571–73 (holding that a public school teacher’s letter to a newspaper criticizing the board’s allocation of funds is protected since the subject was a matter of public attention and the letter did not impede employee’s daily duties or interfere with regular school operations); see *United States v. National Treasury Employees Union*, 513 U.S. 454, 465–66 (1995) (holding that government employees’ expressive activities addressed to public audience outside the workplace and unrelated to government employment was protected); *Connick v. Myers*, 461 U.S. 138, 146 (1983) (holding that a public employee’s questionnaire distributed among staff members is not protected because it concerned internal office policy and was not a matter of public concern).

⁸⁰ See Richard Michael Fischl, *Labor, Management, and the First Amendment: Whose Rights Are These, Anyway?* 10 CARDOZO L. REV. 729, 732–36 (1989) (noting the breadth of employers’ First Amendment rights and the narrowness of employees’ First Amendment rights).

⁸¹ *U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548 (1973); *Garcetti*, 547 U.S. 410 (2006).

of certain types of speech (political expenditures). Reducing the ability of a union to make political expenditures sacrifices the First Amendment rights of the association and its members to the rights of nonmembers.

Another troublesome implication of the *Knox* opinion is that some of its stray language casts doubt on the location of the line between chargeable germane expenses and nonchargeable political expenses. It is this thread of the *Knox* reasoning that the *Harris* petitioners emphasize in arguing that the payment of fair share fees to a union representing home care workers who are paid with Medicaid funds constitutes compelled political speech. The *Knox* majority noted that a public sector union “takes many positions *during collective bargaining* that have powerful political and civic consequences” and therefore that agency fees “constitute a form of compelled speech and association that imposes a significant impingement on First Amendment rights.”⁸² Moreover, the *Knox* majority derided the notion that political activities, even in support of the union’s contract negotiation goals, could be chargeable.⁸³ Prior decisions (*Ellis v. Bhd. of Ry., Airline & S.S. Clerks*⁸⁴ and *Lehnert v. Ferris Faculty Ass’n*⁸⁵), however, held that some political activity is chargeable because it is part of the union’s effort to secure its collective bargaining agreement (as, for example, where an executive or legislative body can reject or modify an agreement negotiated by a government agency). Yet in *Knox*, the majority challenged the independent auditors’ determination that fifty-six percent of the prior year’s expenditures were chargeable by rejecting how the SEIU had characterized the germaneness of some expenses, including lobbying.⁸⁶ Further, the majority noted:

Public-employee salaries, pensions, and other benefits constitute a substantial percentage of the budgets of many States and their subdivisions. As a result, a broad array of ballot questions and campaigns for public office may be said to have an effect on present and future contracts between public-sector workers and their employers.⁸⁷

Having thus insisted that even ordinary public sector collective bargaining is “a form of compelled speech and association that imposes a ‘significant impingement on First Amendment rights’” and questioned whether “the Court’s former cases have given adequate recognition to the critical First Amendment rights at stake,”⁸⁸ the *Knox* majority disparaged the justification for unions charging nonmembers even for germane services. The majority said that “free-rider arguments, however, are generally insufficient to overcome First Amendment objections” and that recognizing the free-rider justification in the past was “an anomaly ... we have found to be justified by the interest in furthering ‘labor peace.’”⁸⁹

⁸² *Knox v. Service Employees International Union, Local 1000*, 132 S. Ct. 2277, 2289 (2012) (emphasis added) (internal citations and quotation marks omitted).

⁸³ *Id.* at 2294.

⁸⁴ 466 U.S. 435, 447–48 (1984).

⁸⁵ 500 U.S. 507, 522–24 (1991).

⁸⁶ *Knox*, 132 S. Ct. at 2294.

⁸⁷ *Id.* at 2295.

⁸⁸ *Id.* at 2289 (quoting *Ellis*, 466 U.S. at 455).

⁸⁹ *Id.* at 2290 (quoting *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 303 (1986)).

IV. THE FUTURE OF PUBLIC SECTOR COLLECTIVE BARGAINING

Justice Alito's majority opinion in *Knox* does more than just threaten the political influence of unions. It contains language that, if misconstrued, could be used to attack the entire architecture of public sector collective bargaining on the basis of exclusivity and majority rule, and it is this language that the petitioners in *Harris* emphasize. In *Knox*, Justice Alito said, "by allowing unions to collect *any* fees from nonmembers and by permitting unions to use opt out rather than opt in schemes when annual dues are billed, our cases have substantially impinged upon the First Amendment rights of nonmembers."⁹⁰ Moreover, in a footnote, Justice Alito suggested that because "a union's money is fungible," a union's expenditure of objectors' fees "entirely for nonpolitical activities" might be problematic because "it would free up other funds to be spent for political purposes."⁹¹

On that analysis, requiring dissenters to pay *any* money to the union may result in the union using the dissenters' money to fund political activities. If the Court were to follow that path, the entire system of distinguishing chargeable and nonchargeable expenses is insufficient to protect objectors because the same dollar that a nonmember pays the union for contract administration might find its way into a political account, even if a different dollar is placed in the chargeable category. This would mean that *Abood* is no longer enough to protect the rights of employee-objectors.⁹²

However, the notion that an organization's money is fungible cuts two ways. In *Davenport*, the union argued that the restriction on union expenditures of money in politics infringed the union's First Amendment rights under *Bellotti* and *Austin*.⁹³ Justice Scalia dismissed the contention: the restriction is not "on how the union can spend 'its' money." Rather, he said, it was a restriction on how the union could spend "other people's money."⁹⁴ The opinion insisted that the only reason the law burdened the union's use of its members' dues was because the union "chose to commingle those dues with nonmembers' agency fees."⁹⁵ Alito's position that any compelled contribution violates dissenters' rights because funds are commingled cannot be reconciled with Scalia's position that restrictions on unions' expenditures *do not* violate the union's rights because the funds are commingled (oddly, Alito and Scalia joined both opinions). If all money is fungible, then the entire basis for *Abood* and *Davenport*

⁹⁰ *Id.* at 2295 (emphasis added).

⁹¹ *Id.* at 2293 n.6.

⁹² This part of the *Knox* opinion sits uneasily against the Court's earlier approach to circumstances when compelled funding of an organization is compelled speech. In *Glickman*, the Court attempted to distinguish its upholding of compelled subsidies for agricultural commodity ads with *Abood*'s prohibition of subsidies for union speech. The Court said "*Abood*, and the cases that follow it, did not announce a broad First Amendment right not to be compelled to provide financial support for any organization that conducts expressive activities. Rather, *Abood* merely recognized a First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one's 'freedom of belief.'" *Glickman v. Wileman Bros. & Elliot*, 521 U.S. 457, 471 (1997) (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235 (1977)). As Robert Post pointed out, it is unclear whether the issue is compelled speech or compelled association. If the problem is compelled association rather than speech, and payment of agency fees is association, then it is unclear why distinguishing between germane and nongermane expenditures alleviates the problem of compelled association, unless one believes that placing dollars in different accounts is a form of association. Robert Post, Tabor Lecture, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in United Foods, Zauderer, and Abood*, 40 VAL. U. L. REV. 555, 571-73 (2006).

⁹³ *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 186 (2007).

⁹⁴ *Id.* at 187.

⁹⁵ *Id.* at 187 n.2.

falls apart: none of it is “other people’s money” and all of it is the union’s. In sum, if unions have the same First Amendment rights as corporations to spend on politics, then it violates the union’s rights for the government to restrict unions’ political speech, just as it violates corporations’ rights.

V. CONCLUSION

A long line of Supreme Court cases stretching back to the 1930’s recognizes the many governmental interests in protecting the rights of employees to unionize and bargain collectively on the basis of exclusivity and majority rule. These include the macroeconomic benefits of allowing employees to bargain from a position of collective strength to improve wages and working conditions; the desirability of fostering workplace democracy; and the benefits to employees, employers, and the public of allowing bargaining by one union instead of many representatives claiming authority as a bargaining agent.⁹⁶ Employees who can elect representatives to determine the terms of employment on an equal footing with management learn habits of self-government and political efficacy.⁹⁷ Unions historically have been extraordinarily important political and social associations for their members. The desire of employees to join together in a common cause to govern themselves, to learn and teach the value of social solidarity, to improve their working conditions, and to express their vision for a better political economy is foundational to the freedom of association protected by the First Amendment.⁹⁸ The drive for equality of bargaining power, self-determination, and fairness is as important in the public sector as it is in the private sector, for in neither context is management by executive fiat consistent with democratic principles.

Public employee unionization and bargaining enhances the transparency and accountability of government. Unions have more power than individual employees or citizens to force the government to reveal its budget priorities and to force a debate

⁹⁶ See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33–34 (1937) (upholding the constitutionality of the National Labor Relations Act on the basis of the government’s interests in promoting economic growth by facilitating equality of bargaining power between employers and employees). See generally JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 35–44 (1983) (discussing the purposes of the Wagner Act with reference to historical materials, including the promotion of economic stability, the enhancement of equality of bargaining power, and the nurturing of political democracy by enhancing workplace democracy).

⁹⁷ See Raymond L. Hogler, *The Historical Misconception of Right to Work Laws in the United States: Senator Robert Wagner, Legal Policy, and the Decline of American Unions*, 23 *HOFSTRA LAB. & EMP. L.J.* 101, 144 (2005) (surveying literature on connection between unionism and social capital and asserting that unionism promotes development of social capital); Anne Marie Lofaso, *In Defense of Public-Sector Unions*, 28 *HOFSTRA LAB. & EMP. L.J.* 301, 308–17 (2011) (surveying political science literature on participatory democracy and the connection between political democracy and social unit democracy).

⁹⁸ See James Gray Pope, *Labor’s Constitution of Freedom*, 106 *YALE L.J.* 941, 942–44 (1997) (describing the pervasiveness and significance of unionists’ vision of the right to organize, bargain, and strike as a form of insurgent constitutionalism that placed great significance on freedom of association). See generally Thomas C. Kohler, *Setting the Conditions for Self-Rule: Unions, Associations, Our First Amendment Disclosure and the Problem of DeBartolo*, 1990 *WIS. L. REV.* 149 (1990) (arguing that the Court’s reconciliation of the First Amendment with the National Labor Relations Act is based on a reductionist view of unions as limited purpose organizations focused on economic issues and ignores unions’ significant role as associations).

about such priorities.⁹⁹ Of course, unions do not always use their collective power to advocate for government policies that everyone would deem wise. Left-wing critics of police and prison guards' unions criticize these unions' support for punitive incarceration policies, just as right-wing critics of teachers' unions blame them for the failures of the public schools.¹⁰⁰ Leaving aside the obvious fact that the blame for punitive criminal sentencing laws and lousy public schools should be laid at the door of many people and organizations beyond unionized guards and teachers, the problem is not the employees through their union acting as a group; the problem is that people are not always wise. Eliminating the right of employees to bargain as a group will not suddenly improve schools or reduce government budget problems. After all, some states without public sector bargaining rights have weak public schools and large deficits, and other states with public sector bargaining rights have strong schools and small deficits.¹⁰¹

Government employee unionization proved necessary for the same economic reasons that private sector employees joined unions: to ensure decent wages and working conditions. In times of fiscal crisis, government employers historically have cut pay dramatically and unfairly, often paying employees in IOUs. For example, in Chicago during the Great Depression, the Board of Education paid teachers and other school employees in scrip for over a year and then, when a court invalidated the scrip system, paid them nothing at all for months on end.¹⁰² There is room for policy debate about how much government employees—teachers, park rangers, bus drivers, police officers, or DMV clerks—should be paid, what cause should be necessary to terminate their employment, when they should be eligible to retire, and what kind of retirement and health care benefits they should receive. But there is no reason to believe that policy debate will be better resolved by unilateral managerial dictate than by bilateral negotiation between government agencies and their employees' unions.

⁹⁹ See Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 *Duke L.J.* 1, 30–34 (2009) (discussing from the standpoint of government transparency the undesirable consequences of cases limiting the free speech rights of government employees).

¹⁰⁰ See, e.g., Mike Dennis, *The California Prison Guards Union: Still Profiting from Incarceration-mania*, Cal. Progressive Message (March 4, 2011), <http://caprogressivemessage.com/2011/03/04/the-california-prison-guards-union-still-profiting-from-incarceration-mania/> (criticizing the California Prison Guards Union's support for punitive incarceration policies); Richard D. Kahlenberg, *Bipartisan But Unfounded: The Assault on Teachers' Unions*, *Am. Educator* (Am. Federation of Teachers), Winter 2011–2012, at 14, available at <http://www.aft.org/pdfs/americaneducator/winter1112/Kahlenberg.pdf>.

¹⁰¹ Catherine Fisk & Brian Olney, *Labor and the States' Fiscal Problems*, in *WHEN STATES GO BROKE* 253–55 (Peter Conti-Brown & David A. Skeel, Jr., eds., 2012).

¹⁰² Joseph E. Slater, *PUBLIC WORKERS* 102 (2004); see also Stephen F. Befort, *Unilateral Alteration of Public Sector Collective Bargaining Agreements and the Contract Clause*, 59 *Buff. L. Rev.* 1, 10–11 (2011) (recounting incidents in various periods of recession in which governments facing fiscal crises furloughed employees or paid them in IOUs).

Enhancing Due Process in Targeted Killing*

Deborah Pearlstein**

I. INTRODUCTION

The legality and wisdom of U.S. targeted killing¹ operations in areas outside of active hostilities has been the subject of vigorous debate for more than a decade.² While there is broad agreement that there are at least some circumstances in which targeted killing may be lawful—in an armed conflict, or in national self defense—there remains a world of dispute over *how* those operations can be conducted in a way that complies with domestic and international law. Among those requirements, at the least for U.S. citizens, the Fifth Amendment to the U.S. Constitution prohibits the government from depriving any “person” of “life, liberty, or property without due process of law.”³

Despite the relative clarity of the Fifth Amendment command, some argue that due process in any traditional sense cannot rationally apply in any national security-related use of force.⁴ It may be one thing to require giving notice and an opportunity to be heard before deprivations of life in peacetime, but giving an individual target advance notice that he is about to be attacked is anathema to effective warfare.⁵ Especially when the use of force is in response to an imminent threat—when time is of the essence—advance process would render ineffective even an otherwise lawful use of force. Because of such concerns, the United States (and every nation in the world) is party to the Geneva Conventions, treaties recognizing that different rules apply in war.⁶ Like the Due Process Clause, the Geneva regime—also known as the law of war or law of armed conflict (LOAC)—is concerned with legality and fairness, but it far more realistically accounts for such interests in these exceptional circumstances.

* This Issue Brief was initially published in October 2013.

** Assistant Professor of Law, Cardozo Law School, Yeshiva University.

¹ “Targeted Killing,” “targeting,” “drone operations” and “targeting operations” are terms that are used interchangeably in this Issue Brief and entail the use of lethal force by the U.S. government against targets in the interest of national security.

² See, e.g., Dana Priest, *CIA Killed U.S. Citizen in Yemen Missile Strike: Action’s Legality, Effectiveness Questioned*, WASH. POST, Nov. 8, 2002, at A1; *New York Times Co. v. U.S. Dep’t of Justice*, 915 F. Supp. 2d 508 (S.D.N.Y. 2013).

³ U.S. CONST. amend. V; see also *Boumediene v. Bush*, 553 U.S. 723, 743 (2008) (holding that the Constitution may apply extraterritorially even to non-citizens, and that its application depends on a set of factors).

⁴ See, e.g., Department of Justice White Paper, “Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or An Associated Force,” at 6, available at http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf [hereinafter DOJ Targeting White Paper]; see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 580 (2004) (Thomas, J., dissenting).

⁵ See, e.g., Wells Bennett, “Jeff Powell on Targeted Killing and Due Process,” LAWFARE BLOG (JUNE 21, 2013, 6:00 AM), <http://www.lawfareblog.com/2013/06/jeff-powell-on-targeted-killing-and-due-process/>.

⁶ See generally GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* (2010) (discussing Geneva regime).

The due process inquiry may seem equally absurd to those who worry about the legitimacy of any lethal targeting. Much of the Supreme Court's due process jurisprudence addresses the deprivation of property—involving a category of assets the loss of which may be far more readily compensated if the government's seizure was in error. The Court's due process cases involving the deprivation of liberty, likewise, rest at least implicitly on the possibility that any errors that occur may be remedied, substantially if not entirely, by a detainee's release.⁷ In some of those cases, the Court has recognized that an after-the-fact civil suit for damages may be all the process due when no pre-deprivation hearing could have made a difference, as in a death the state caused accidentally, or in exigent circumstances.⁸ But where, as in many targeting operations, the state deliberately plans in advance to deprive an individual of life, an act it undertakes elsewhere only in administering the death penalty, it regularly provides a set of procedures that dwarf those offered in any of the Court's standard due process cases.

Despite such important objections, it is worth taking seriously what procedural due process requires in targeted killing. Both the Supreme Court and the Executive Branch have now embraced due process to assess the legality of various U.S. uses of force against Al Qaeda and associates.⁹ As the Court has long recognized, U.S. citizens are protected by the Constitution wherever they are in the world.¹⁰ Even when they are deprived of their liberty in wartime, due process affords all "persons" a right to notice of the reasons for the deprivation, and an opportunity for their opposition to be heard once any exigency has passed.¹¹ Although the Supreme Court has never addressed whether the Constitution applies extraterritorially to non-citizens in the targeting context, as it does in other circumstances,¹² the U.S. decision to target U.S. citizen Anwar Al Awlaki in Yemen, and the suspected continued presence of other U.S. citizens in core Al Qaeda,¹³ make the issue indisputably salient.

Conversely, the argument that it is never possible to provide advance process in lethal targeting operations is false. The decision to target Al Awlaki, like many U.S. targeting operations, did not arise in exigent, or what may be called "dynamic," circumstances. Targets in the current environment are often identified, vetted, and reviewed over days or even months—more than enough time for some pre-targeting process to be followed.¹⁴ Notably, there may well be adequate time for deliberate

⁷ See, e.g., *Hamdi*, 542 U.S. at 538; *Kansas v. Hendricks*, 521 U.S. 346 (1997) (civil commitment of mentally ill sex offenders); *United States v. Salerno*, 481 U.S. 739 (1987) (pretrial detention of dangerous adults); *Schall v. Martin*, 467 U.S. 253 (1984) (pretrial detention of dangerous juveniles); *Addington v. Texas*, 441 U.S. 418 (1979) (civil commitment of mentally ill); *Humphrey v. Smith*, 336 U.S. 695 (1949) (court martial of American soldiers).

⁸ Cf. *County of Sacramento v. Lewis*, 523 U.S. 833, 840 & n.4 (1998) (expressing no view on whether denial of post-deprivation compensation for loss of life due to state negligence would violate procedural due process).

⁹ See *Hamdi*, 542 U.S. at 508; DOJ Targeting White Paper, *supra* note 4, at 5-9; see also President Barack Obama, Speech on Drone Policy at the National Defense University (May 23, 2013), available at <http://www.nytimes.com/2013/05/24/us/politics/transcript-of-obamas-speech-on-drone-policy.html?pagewanted=all> ("[I] do not believe it would be constitutional for the government to target and kill any U.S. citizen—with a drone, or a shotgun—without due process") [hereinafter Obama NDU Speech].

¹⁰ *Reid v. Covert*, 354 U.S. 1, 6 (1957).

¹¹ *Hamdi*, 542 U.S. at 544; *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

¹² Cf. *Boumediene v. Bush*, 553 U.S. 723, 743 (2008).

¹³ See, e.g., Global al-Qaeda: Affiliates, Objectives, and Future Challenges: Hearing Before the H. Foreign Affairs Subcomm. on Terrorism, Nonproliferation, and Trade, 113th Cong. (2013) (statement of Seth G. Jones, Associate Director, Rand Corporation), available at <http://www.rand.org/pubs/testimonies/CT396-1.html>.

¹⁴ See *infra*, Part III.C.

process even when the legal justification for the U.S. use of force is the exercise of national self defense. Consider, for example, President Clinton's use of military force to target suspected Al Qaeda training camps in Afghanistan, and a pharmaceutical factory in Sudan, following the 1998 attacks on U.S. embassies in East Africa.

Indeed, current military doctrine requires a relatively elaborate process in advance of all deliberate targeting operations—that is, operations with 24 hours or more lead time.¹⁵ That the military itself recognizes it has both the time and the interest in taking such steps already suggests that some advance process is possible. Moreover, military procedures provide an important starting point for assessing whether the process provided is constitutionally adequate. In holding that the United States was required to afford due process to a U.S. citizen seized on the Afghan battlefield, the Supreme Court recognized that due process requirements in wartime detention might be met by existing military procedures adopted for the purpose of implementing U.S. treaty obligations under the law of war.¹⁶ Before it is possible to dismiss the application of constitutional due process in targeting as either hopelessly impractical, or hopelessly inadequate, it is necessary to begin with a serious assessment of existing procedures.

Finally, even if one believes the Constitution does not directly apply, any government agency must pursue some kind of process before engaging in lethal targeting operations—from deciding who and what to target, to assessing whether the person or facility struck was in fact the intended subject. The Court's framework for analyzing the adequacy of process afforded provides a useful, logical structure for any evaluation of U.S. drone operations: assessing whether targeting processes serve both the government's interests and those of the individual, and whether alterations in existing procedures may help minimize error. Highlighting those interests and risks of error, due process analysis provides a method for understanding not only how to conduct targeting operations lawfully, but also how to make them more effective policy.

This Issue Brief examines the procedural requirements of the Due Process Clause when the United States uses lethal force in areas outside of active hostilities abroad. After a brief primer on the constitutional law of procedural due process, the Issue Brief explores how that law applies in deliberate targeting of planned targets. The category of deliberate targeting, explained below, is recognized in military targeting doctrine; in legal terms, it may arise either whether the U.S. use of force is in connection with an ongoing armed conflict,¹⁷ or in the exercise of national self defense.¹⁸ Applying the framework set forth by the Court in *Mathews v. Eldridge*,¹⁹ and adopted in *Hamdi v. Rumsfeld*,²⁰ the Issue Brief reviews military targeting doctrine, and considers whether due process might require additional or enhanced procedures. Among the Issue Brief's conclusions: (1) it advances constitutional due process to provide clear and public notice of those particular nations or organizations with which the United States considers itself at war; (2) the inclusion of an opposition advocate—a military professional tasked with advancing arguments in opposition to any targeting

¹⁵ JOINT PUBLICATION 3-60: JOINT TARGETING, Jan. 31, 2013, at x, accessed through <http://blogs.cfr.org/zenko/2013/08/05/jp360-joint-targeting-and-us-targeted-killings/> (last visited Aug. 21, 2013) [hereinafter JP3-60].

¹⁶ *Hamdi*, 542 U.S. at 544 (opinion of O'Connor, J.).

¹⁷ See, e.g., Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

¹⁸ See, e.g., Prize Cases, 67 U.S. 635 (1863).

¹⁹ 424 U.S. 319, 333 (1976).

²⁰ 542 U.S. 507 (2004).

decision—may reduce the risk of error in deliberate targeting settings; (3) the recently released “U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the U.S. and Areas of Active Hostilities,” announcing that targeters must possess a “near certainty that the terrorist target is present,” brings the burden of proof for deliberate targeting in these settings more in line with constitutional due process than existing military doctrine; (4) where adequate pre-deprivation process is not possible (as in exigent circumstances), a post-deprivation hearing is required.

A final caveat. This Issue Brief is not intended to address the centrally important threshold issue of when the United States may lawfully engage in lethal targeting. There are serious questions about the nature of the present armed conflict against Al Qaeda and associated groups, as the United States defines it.²¹ There are likewise serious questions under U.S. and international law about how ‘imminent’ a threat must be before the Executive may use lethal force in national self defense,²² and about what role lethal targeting should play in U.S. counterterrorism strategy generally.²³ This Issue Brief does not address any of those issues. Rather, it assumes that targeted killing can be lawful under some circumstances. We have faced wars and actual and imminent attacks in the past; we will face them again. This Issue Brief is intended to help advance our thinking on what process should be followed in targeting decisions when we do.

II. A PRIMER ON PROCEDURAL DUE PROCESS

When Americans think about what rights accompany “due process of law,” it is commonly the U.S. criminal trial process that comes to mind—with its rich array of rights to public trial by jury, assistance of counsel, to call and confront witnesses, and to be protected against self-incrimination, among others.²⁴ Yet while the Due Process Clause has functioned to enrich the already robust set of procedural rights to which criminal defendants are entitled under other constitutional provisions,²⁵ “the right to be heard before being condemned to suffer grievous loss of *any kind*, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.”²⁶ Whether the deprivation is of the property interest at stake in the

²¹ See, e.g., International Committee of the Red Cross, “International Law and the Challenges of Contemporary Armed Conflicts,” Oct. 2011, pp. 10-11, available at <http://www.icrc.org/eng/resources/documents/report/31-international-conference-ihl-challenges-report-2011-10-31.htm>.

²² Compare, e.g., THOMAS FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* (2009), with Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Non-State Actors*, 106 AM. J. INT’L. L. 769 (2012) (describing contrasting theories of self defense).

²³ Compare, e.g., Daniel Byman, “Why Drones Work: The Case for Washington’s Weapon of Choice,” FOREIGN AFFAIRS, July/Aug. 2013, <http://www.foreignaffairs.com/articles/139453/daniel-byman/why-drones-work?page=show>, with Audrey Kurth Cronin, “Why Drones Fail,” FOREIGN AFFAIRS, July/Aug. 2013 (debating the policy wisdom of targeted strikes).

²⁴ See, e.g., U.S. CONST. amend. VI (affording defendants a “right to a speedy and public trial, by an impartial jury..., to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel”).

²⁵ See, e.g., *Ake v. Oklahoma*, 470 U.S. 68 (1985) (due process requires appointment of psychiatrist where defendant’s sanity at the time of the offense is significant factor at trial).

²⁶ *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

seizure of assets, or the loss of liberty from commitment of the mentally ill, the Constitution requires procedures to ensure fundamental fairness.²⁷

Yet while the Court has long recognized the guarantee of at least some process surrounding losses of life, liberty or property, exactly how much process is “due” has depended substantially on the circumstance. Critically, *judicial* process is always an option, but is “neither a required, nor even the most effective, method of decision making in all circumstances.”²⁸ Recognizing the rapid growth of executive branch administrative agencies in adjudicating rights over the past century, the Court has instead established a set of minimum requirements to be followed by any government actor affecting a deprivation: the person facing the loss must have “notice of the case against him and opportunity to meet it,”²⁹ in “a meaningful time and in a meaningful manner.”³⁰ Beyond these two essential elements, all other features—including the timing and content of notice and the formality of the hearing—may be flexible, depending on “the competing interests involved.”³¹

The understanding that what process was due would depend on a balancing of interests under the circumstances crystallized in the 1976 case, *Mathews v. Eldridge*, in which the Court determined how much process was due before an individual could be deprived of property:³²

[D]ue process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.³³

Notably, the *Mathews* test assesses not only the absolute value of the interests at stake on either side—including the degree of the deprivation at issue—but also whether deprivation decisions could be made relatively more accurate if existing procedures were changed or enhanced.

A wide variety of procedures have been found to satisfy constitutional due process under this standard. In *Hamdi v. Rumsfeld*,³⁴ for instance, the Court applied *Mathews* to determine what process was due U.S. citizen Yaser Hamdi, detained while allegedly operating with the Taliban in Afghanistan. Recognizing that even Hamdi was entitled to “notice of the factual basis for his classification [as an ‘enemy

²⁷ *Id.* As Justice Frankfurter put it: “[D]emocracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.”

²⁸ *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) (citing *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 143 (1940)).

²⁹ *McGrath*, 341 U.S. at 171-172 (Frankfurter, J., concurring).

³⁰ *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

³¹ *Goss v. Lopez*, 419 U.S. 565, 579-80 (1975) (temporary school suspension) (“There need be no delay between the time ‘notice’ is given and the time of the hearing.”).

³² *Mathews*, 424 U.S. at 334 (“[D]ue process is flexible and calls for such procedural protections as the particular situation demands.”).

³³ *Id.* at 335; see also *id.* at 341.

³⁴ 542 U.S. 507 (2004).

combatant’], and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker,”³⁵ a plurality of the Court embraced the parties’ shared view that whatever process was due was required not amidst the exigencies of initial capture “on the battlefield,” but when “the determination is made to *continue* to hold those who have been seized.”³⁶ Most critical was the airing of opposition: “Any process in which the Executive’s factual assertions go wholly unchallenged or are simply presumed correct without any opportunity...to demonstrate otherwise falls constitutionally short.”³⁷

III. DUE PROCESS IN LETHAL TARGETING

This part considers how the *Mathews* test applies in lethal targeting, taking each *Mathews* factor in turn: (1) the individual interest at stake; (2) the government interest; and (3) the risk of error in current procedures, and the likelihood that additional procedures will reduce it.

A. INDIVIDUAL INTEREST

The individual interests at stake in lethal targeting are enormous. As the Department of Justice (DOJ) White Paper put it: “No private interest is more substantial” than life.³⁸ Despite this, *Mathews* doctrine would suggest that it is necessary to distinguish between two categories of people who might be killed in a targeted strike: individuals who are the intentional object of targeting, and those not the intentional objects of targeting. For individuals who are deliberate targets, there is a personal and acute interest in not being killed or injured. As noted, the only other setting in which the government may deprive individuals of their lives in a non-exigent setting follows criminal conviction and sentencing to death—a circumstance to which fully half of the Bill of Rights is devoted in establishing process constraints on the government’s power.³⁹

A second category of individuals are civilians who are killed while not the subject of attack—collateral damage in military doctrine. The United States has acknowledged at least three U.S. citizens who were not specifically targeted have been killed by U.S. drone operations.⁴⁰ While these individuals suffer precisely the same magnitude of deprivation as those intentionally targeted, the Court has at times held since *Mathews* that while injuries caused by willful government misconduct, or perhaps even “recklessness or gross negligence,” may constitute a “deprivation” within the

³⁵ *Id.* at 533. Just as the Court has recognized the role of experts elsewhere in administrative law, *see, e.g., Parham v. J.R.*, 442 U.S. 584, 607 (1979) (in commitment of mentally ill, “[d]ue process has never been thought to require that the neutral and detached trier of fact be law trained or a judicial or administrative officer”), an “appropriately authorized and properly constituted military tribunal” in Hamdi’s case could afford sufficient neutrality as a decision-maker. Where a decision turns in substantial part on a professional assessment, a member of the profession can suffice as a decision-maker, provided “he or she is free to evaluate independently” conditions based on established professional procedures and techniques. *Parham*, 442 U.S. at 607-08 (noting “that all sources of information that are traditionally relied on by physicians and behavioral specialists should be consulted”).

³⁶ *Hamdi*, 542 U.S. at 534.

³⁷ *Id.* at 537.

³⁸ DOJ Targeting White Paper, *supra* note 4, at 2.

³⁹ *See* U.S. CONST. amends. I (public trial), IV, V, VI, VIII. Because many of those protections are not textually applicable in this setting, and because it is not the standard the Court has adopted—*Mathews* remains the focus here.

⁴⁰ Letter from Att’y Gen. Eric Holder to Sen. Patrick J. Leahy (May 22, 2013), *available at* <http://www.justice.gov/slideshow/AG-letter-5-22-13.pdf>.

meaning of the Due Process Clause, injuries resulting from mere negligence or a “lack of due care” on the state’s part are not “deprivations” in the same sense.⁴¹ As the Court has reasoned, because no form of pre-deprivation process could address the risk that a state agent would act negligently, some form of *post-deprivation* “process” in that context may be sufficient to satisfy constitutional requirements.⁴² Thus, one might argue, collateral victims of strikes who suffer injury as the result of simple negligence are entitled to no more as a matter of procedural due process than, for example, a post-deprivation civil action for damages.

This Issue Brief rejects the view that no “deprivation” is affected in due process terms in the context of collateral targeting deaths. As discussed below, there are important questions as to whether changes in existing targeting procedures can minimize risks of collateral losses. But the notion that certain objective losses of property or even life do not count as “deprivations” in a constitutional sense because the government did not fully intend to cause the loss has been, at best, a doctrinal fiction. From the individual victim’s point of view, the interest in life and the nature of the deprivation are indistinguishable from those of the deliberate target.

More to the point, because the law of war does not prohibit states from inflicting some collateral damage in war fighting, it cannot be assumed that collateral deaths are necessarily *unintentional*, in the sense that the no-deprivation cases contemplate. Our treaty obligations—as enforced through U.S. implementing regulations—require only that targeting not “be expected to cause incidental loss of civilian life, injury to civilians ... excessive in relation to the concrete and direct military advantage anticipated.”⁴³ It may often be that while a commander ordering a targeted strike does not *wish* to kill civilians, he orders the strike in full knowledge that the deaths of civilians are a near certain result, concluding the strike is justified because those deaths are not “excessive” compared to the advantage gained. In other words, the United States might lawfully—and intentionally—decide to attack a site or group of individuals in an armed conflict, even though it can predict at least some civilians are likely to die.⁴⁴

That some civilian deaths may be in this sense lawful does not, however, obviate the application of due process. To the extent LOAC targeting results in “erroneous” civilian deaths, i.e. killing more civilians than the military reasonably expected it would intentionally kill, or killing civilians it erroneously believed were targetable combatants—it may be possible to enhance pre-deprivation procedures that help minimize the risk of such errors. None of this is to suggest that procedures to avoid error in target selection and in collateral damage assessments need be identical. On the contrary, military doctrine recognizes that there are distinct inquiries—and

⁴¹ See, e.g., *Daniels v. Williams*, 474 U.S. 327, 333-34 (1986) (“[L]ack of due care suggests no more than a failure to measure up to the conduct of a reasonable person. To hold that injury caused by such conduct is a deprivation within the meaning of the Fourteenth Amendment would trivialize the centuries-old principle of due process....”).

⁴² *Parratt v. Taylor*, 451 U.S. 527 (1981).

⁴³ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Int’l Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, Art. 51 [hereinafter Additional Protocol I]; see also Chairman of the Joint Chiefs of Staff Instruction, CJCSI 3160.01, D-A-7, Feb. 13, 2009, available at http://www.aclu.org/files/dronefoia/dod/drone_dod_3160_01.pdf [hereinafter CJCSI 3160.01].

⁴⁴ See United States Naval War College, “Collateral Damage Estimate Briefing,” YouTube (Oct. 23, 2012), <http://www.youtube.com/watch?v=AvdXJV-N56A> (describing “conscious decision” as one of the causes of collateral damage, in which a commander conducts proportionality analysis required by law of war and concludes anticipated level of collateral injury is legally and politically tolerable) [hereinafter Naval War College Briefing].

distinct procedures—involved in first selecting whom to target, and in then examining whether and how to minimize any “collateral” costs of that targeting decision.⁴⁵ But to the extent the Constitution permits any differences in the treatment of different kinds of individual losses, it is because they involve different kinds of error and potential procedural fixes, not because there is a qualitative difference in the kind of deprivation at stake.

B. GOVERNMENT INTEREST

The government likewise can claim interests of surpassing importance in targeting where it is lawfully engaged in an ongoing armed conflict, or where it seeks to defend the nation against an armed attack. In the DOJ White Paper’s appropriate characterization, “the government’s interest in waging war, protecting its citizens, and removing the threat posed by members of enemy forces is . . . compelling.”⁴⁶ Yet as a matter of law and policy, the government’s interests are both broader and narrower than just these. As the Court has recognized repeatedly, government interests are multi-layered and complex, reflecting society’s interests at large. Thus, for example, while the government has a compelling interest in ensuring that those who commit crimes are punished, its interest in “prevailing at trial . . . is necessarily tempered by its interest in the fair and accurate adjudication of criminal cases.”⁴⁷

Here too, the interests in “waging war” and “removing threats” are not unqualified. They are matched by aligned interests in fighting war effectively, in avoiding error, and in complying with the international legal obligations the government has recognized constrain its use of force—all interests reflected in many of the government’s own statements of policy and practice. Department of Defense (DOD) guidelines instruct that all members of DOD components must comply with the law of war in all operations.⁴⁸ Targeters and planners are required to “understand and be able to apply the basic principles of international law as they relate to targeting,”⁴⁹ and judge advocates must be “immediately available and should be consulted at all levels of command to provide advice about law of war compliance during planning and execution of exercises and operations . . . [to] prevent possible violations of international or domestic law.”⁵⁰ This interest in law compliance emerges not only to avoid legal liability, but also to secure support of foreign allies, on whose cooperation U.S. policy depends, and to avoid antagonizing foreign enemies. The U.S. Army Counterinsurgency Field Manual, for example, emphasizes that “it is vital for commanders to adopt appropriate and measured levels of force and apply that force precisely so that it accomplishes the mission without causing unnecessary loss of life or

⁴⁵ See *infra*, Part III.C.

⁴⁶ DOJ Targeting White Paper, *supra* note 4, at 6.

⁴⁷ See, e.g., *Ake v. Oklahoma*, 470 U.S. 68, 79 (1985) (“[A] State may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained. We therefore conclude that the governmental interest in denying Ake the assistance of a psychiatrist is not substantial, in light of the compelling interest of both the State and the individual in accurate dispositions.”); see also, e.g., *Morrissey v. Brewer*, 408 U.S. 471, 483–84 (1972) (public interest includes not revoking parole “because of erroneous information or . . . an erroneous evaluation of the need to revoke parole”).

⁴⁸ See, e.g., Department of Defense Directive No. 2311.01E, May 9, 2006, available at <http://www.dtic.mil/whs/directives/corres/pdf/231101e.pdf> [hereinafter DODD 2311.01E].

⁴⁹ See, e.g., JP 3-60, *supra* note 15, at App. A-1.

⁵⁰ *Id.* at A-7.

suffering,” lest force undermine critical local population support.⁵¹ In all events, military doctrine recognizes that devoting limited resources to the wrong targets is costly in absolute terms and in opportunities lost.⁵² In assessing any “fiscal and administrative burdens on government that the additional procedural requirement would entail,”⁵³ thorough analysis requires considering whether the cost of any additional procedures might offset cost savings achieved in avoiding erroneous strikes.

C. RISKS OF ERROR AND VALUE OF PROCEDURAL CHANGE

The third *Mathews* factor—requiring consideration of “the risk of an erroneous deprivation through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards”—is in many respects the most complex to evaluate.⁵⁴ What is the risk in targeting operations that an individual may be deprived of life “erroneously”? One challenge is purely informational. The military has long struggled to gather meaningful data on whether and why a targeting error has occurred. While a bomb damage assessment is the final, required step in all military targeting operations,⁵⁵ and the United States has also typically conducted strategic bombing surveys in past conflicts to assess the impact of aerial bombing campaigns, data supporting those efforts are often substantially incomplete.⁵⁶ The total destruction of a building, for instance, may be observable at a distance, but smaller targets, or different kinds of damage, may be identified after the fact only through the use of more proximate collection methods that may not be available. While technological advancements, particularly those associated with the ability of unmanned aircraft to hover over targets for extended periods, may address some of these problems, official damage assessments in the current conflict remain classified. The unofficial counts of civilian deaths in drone attacks that do exist suffer from some of the same problems of incomplete information, or information of uncertain reliability.⁵⁷

The public focus on civilian deaths associated with U.S. drone operations also obscures a set of conceptual issues in assessing risks and identifying potentially beneficial procedural correctives. Statistics estimating the raw number or rates of civilian casualties obscure the many different kinds of decision-making errors that may lead to civilian injury. One set of potential errors attends the decision about which

⁵¹ DEPARTMENT OF THE ARMY, FIELD MANUAL 3-24, at 1-142 (Dec. 2006); *see also id.* at 1-150 (“The more force applied, the greater the chance of collateral damage . . . Using substantial force also increases the opportunity for insurgent propaganda to portray lethal military activities as brutal.”); *id.* at 1-141 (“An operation that kills five insurgents is counterproductive if collateral damage leads to the recruitment of fifty more insurgents.”).

⁵² *See, e.g.*, JP 3-60, *supra* note 15, at II-13 (collateral damage estimation goal is to “maximize the employment efficiency of forces through application of enough force to create the desired effects while minimizing collateral damage and waste of resources”). For more on the costs of drones and support operations, *see* JOSHUA FOUST & ASHLEY S. BOYLE, AMERICAN SECURITY PROJECT, THE STRATEGIC CONTEXT OF LETHAL DRONES (2012).

⁵³ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

⁵⁴ *Id.*

⁵⁵ JP 3-60, *supra* note 15, at D-5.

⁵⁶ *See, e.g.*, THOMAS KEANEY & ELIOT COHEN, U.S. DEPT. OF THE AIR FORCE, GULF WAR AIR POWER SURVEY SUMMARY REPORT 138 (1993) (“Few assertions about the Gulf War could command as much agreement as the inadequacy of bomb damage assessment.”).

⁵⁷ *See* STANFORD LAW SCHOOL INTERNATIONAL HUMAN RIGHTS AND CONFLICT RESOLUTION CLINIC, NYU SCHOOL OF LAW GLOBAL JUSTICE CLINIC, LIVING UNDER DRONES: DEATH, INJURY, AND TRAUMA TO CIVILIANS FROM U.S. DRONE PRACTICES IN PAKISTAN 32-53(2012) (critiquing methodologies of existing estimates).

individuals should be the targets of lethal force in the first instance. For example, if a man identified as John Smith is “erroneously” killed in a drone strike, his death may have been “erroneous” because the government was wrong (as a matter of law or fact) in deciding that John Smith was an appropriate target of attack. Alternatively, the man’s death may have been “erroneous” because although the government was right that John Smith was an appropriate target, the government realizes after the strike that the person the drone ultimately hit was not, in fact, John Smith. Either of these types of errors might be called “positive identification” errors, or PID errors. Unclassified reports by military targeting experts suggest these kinds of errors account for the substantial majority of “erroneous” strikes.⁵⁸

Whether it is possible to minimize such PID errors should be a significant focus of due process analysis. It is precisely this kind of objective risk of error that due process is designed to remedy. It was the kind of risk the Supreme Court identified as of concern in Hamdi’s case—the possibility that he was not an “enemy combatant” as a matter of law or fact, as the government alleged but was, for example, a humanitarian aid worker mistakenly detained.⁵⁹

PID errors are not, however, the only reason an innocent person may be killed by a drone strike. Another set of errors are what might be called technical in nature: a malfunction of the targeting weapon, an error involving target mapping or guidance, a last-second decision by a victim to enter the target zone without the knowledge of targeters or after the weapon has been fired, or errors involving standing U.S. estimates of objects potentially subject to collateral damage (the composition, purpose, or size of buildings in an area, the population density of a given neighborhood). Deaths that result from such ‘technical’ errors are obviously no less tragic, and it may be that more can be prevented by continued improvements in weapons technology, mapping, social and cultural intelligence, and more. But military targeting experts also suggest technical errors account for a small proportion of collateral deaths.⁶⁰ More important here, it seems unlikely that any decision-making process *at the targeting stage* will help address them.

Finally, as noted above, it is also possible that an innocent victim’s death was the product of “conscious decision.”⁶¹ That is, a calculation by the government that even though it could predict in advance that the strike would likely result in, for example, a child’s death, the attack that killed her was, as the law of war provides, not “excessive

⁵⁸ See Naval War College Briefing, *supra* note 44 (describing targets identified as lawful military targets “in error”); see also CJCSI 3160.01, *supra* note 43, at D-A-7 (“Recent operational feedback indicate that most collateral damage incidents result from target misidentification.”); Gregory S. McNeal, *Targeted Killing and Accountability*, 101 GEORGETOWN L. J. (forthcoming 2013) (“When collateral damage did occur [in Iraq and Afghanistan], 70% of the time it was attributable to failed (e.g. mistaken) identification. The remaining 22% were attributable to weapons malfunction and a mere 8% were attributable to proportionality balancing—e.g. a decision that anticipated military advantage outweighed collateral damage.”) (based on a small set of interviews conducted).

⁵⁹ Hamdi v. Rumsfeld, 542 U.S. 507, 530 (2004) (opinion of O’Connor, J.) (“Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property”) (internal quotations omitted); see also, e.g., Parham v. J.R., 442 U.S. 584 (1979).

⁶⁰ See Naval War College Briefing, *supra* note 44

⁶¹ See *id.*

in relation to the expected military advantage gained.”⁶² While it is surely possible that some form of proportionality “error” may occur, it is a mistake to view all collateral deaths that are the result of such a proportionality calculation as “erroneous” in the *Mathews* sense. Judgments about the relative value of the “military advantage gained” through the destruction of a target are both substantive in nature, and subjectively dependent on the defined policy goal to be achieved. These policy goals should be publicly known and debated. But they are in this respect distinct from the objective type of error that procedural corrections may be able to remedy.

As the foregoing should suggest, the answer to the question—which, if any, substitute procedures might help avoid erroneous targeting—depends centrally on which kind of error, if any, produced the result. While technical errors and proportionality errors occur, they are both less frequent and less susceptible to redress through targeting stage procedures. The analysis that follows thus focuses on how process might reduce the risk of PID error, described above. As *Mathews* requires, the analysis begins with a description of existing procedures. It then considers how additional procedures might impact the risk of error and the interests at stake.

1. Existing Process for Deliberate Targets

a. Process Sources and Methods

The description of the targeting process here is based on the doctrine set forth in DOD’s *Joint Publication 3-60: Joint Targeting* (JP 3-60). Prepared under the auspices of the Chairman of the Joint Chiefs of Staff (CJCS), JP 3-60 is intended to provide detailed guidance on how to conduct the “planning, coordination, and execution of joint targeting” operations by the U.S. military. Together with instructions promulgated by the CJCS,⁶³ the manual sheds light on the stages of the targeting process from target selection to post-strike investigation. It is important to note, however, that, JP 3-60 is at best an approximate description of current targeting procedures. In addition to common differences between what rules say on paper and how they function in practice, it is unclear how these rules interact with announced White House guidelines regarding, for example, the degree of certainty required for assessing a target is present.⁶⁴ Even within the military, many CJCS instructions remain publicly unavailable. JP 3-60 is also not intended to, and does not, answer critical questions such as who may be targeted under the law of war.⁶⁵

⁶² CJCSI 3160.01, *supra* note 43, at Enclosure D (implementing Additional Protocol I, art. 51(5) (b) (indiscriminate attacks include an attack “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”)); *see also* Additional Protocol I, art. 52(2) (“Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”).

⁶³ For a listing of current CJCS directives, see http://www.dtic.mil/cjcs_directives/support/cjcs/cjcsi_comp.pdf

⁶⁴ Press Release, The White House, Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities (May 23, 2013), *available at* <http://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism> (requiring “near certainty that the terrorist target is present” before conducting lethal targeting) [hereinafter White House Fact Sheet].

⁶⁵ DOJ Targeting White Paper, *supra* note 4, at 16 (leaving undefined what counts as “direct participation in hostilities” rendering an individual targetable within the law of war).

JP 3-60 also distinguishes between deliberate targeting operations—involving planned targets and a non-exigent time frame (a day or more)—and dynamic operations—typically involving operations to be carried out within 24 hours, including against unanticipated targets of opportunity. Many of the highest profile U.S. targeting operations in recent years have been deliberate in nature. U.S. citizen Anwar Al Awlaki, for instance, was apparently placed on targeting lists a year or more before he was killed by a U.S. drone in Yemen.⁶⁶ Indeed, assembling and vetting lists of potential targets is hardly a new phenomenon; it has been a central feature of targeting doctrine in, at a minimum, an armed conflict setting. At the same time, the steps in the deliberate targeting process are also generally followed in dynamic targeting. Although processes may be substantially “compressed” in dynamic targeting,⁶⁷ there is always some form of positive identification process. LOAC requires under any circumstances that states distinguish between civilians and combatants, and target only combatants; indiscriminate targeting of civilians is a war crime.⁶⁸ While some procedural changes will prove infeasible if applied to more exigent circumstances, not all such adaptations will be.

As *Hamdi* suggests, military regulations implementing international law provide an important starting point for due process analysis.⁶⁹ If the military has determined it is feasible to adhere to *at least* this level of pre-deprivation process, then this process may provide a useful constitutional minimum to which any U.S. agency targeting authority must adhere. Examining the deliberate targeting process also demonstrates the substantial procedural architecture that already exists in U.S. operations, an architecture that performs many functions familiar to administrative procedure: information gathering, analysis, briefing, decision-making. It thus corrects what appears to be a common misapprehension about the possibility of any pre-deprivation process, and about the role the law already plays in day-to-day targeting decisions.

b. Current Procedures

The initial steps of the target development process below the policy level are opaque in manual descriptions, in part because suggestions may come from a wide range of government components.⁷⁰ Once a target is nominated by a combatant command, it becomes easier to describe a standardized process of vetting and validation.⁷¹ *Vetting* is conducted by an interagency group of military and intelligence

⁶⁶ See, e.g., *Al-Aulaqi v. Obama*, 727 F.Supp.2d 1 (D.D.C. 2010) (The existence of such “lists” has been a central feature of public reporting on targeting operations based on anonymous official sources); See, e.g., DANIEL KLAIDMAN, *KILL OR CAPTURE: THE WAR ON TERROR AND THE SOUL OF THE OBAMA PRESIDENCY* (2012).

⁶⁷ See, e.g., JP 3-60, *supra* note 15, at J-3 (“In a dynamic targeting environment, well-organized, and inclusive target vetting sessions are critically important due to compressed timelines”).

⁶⁸ See Additional Protocol I, *supra* note 43; JP 3-60, *supra* note 15, at A2.

⁶⁹ *Hamdi v. Rumsfeld*, 542 U.S. 507, 538 (2004) (opinion of O’Connor, J.) (“[M]ilitary regulations already provide for such process in related instances, dictating that tribunals be made available to determine the status of enemy detainees who assert prisoner-of-war status under the Geneva Convention.”) (citing Headquarters Depts. of Army, Navy, Air Force, and Marine Corps, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees*, Army Regulation 190–8, ch. 1, § 1–6 (1997)).

⁷⁰ JP 3-60, *supra* note 15, at II-5—II-10; *id.* at II-12 (“[It] is imperative that procedures be in place for additions or deletions to [target] lists and that those procedures are responsive and verifiable,” but not specifying procedures).

⁷¹ *Id.* at II-4.

officials,⁷² and assesses the accuracy of the intelligence supporting the placement of the target on a candidate list.⁷³ Drawing on target-related intelligence, operational, planning, and legal information collected and stored in an electronic target folder (ETF),⁷⁴ the interagency group verifies the candidate target's identification, his location, function, description, and significance.⁷⁵ The interagency vetting participants then vote on whether to move forward with a target, with votes recorded in the ETF.

The list produced by the interagency vetting group is then forwarded to a Joint Targeting Coordination Board (JTTCB) for target validation. *Validation* assesses whether the target meets command objectives, and whether the target is lawful under the law of war and existing rules of engagement. The JTTCB is typically chaired by a military commander, and includes military staff, other agencies and multinational partners that may be involved, subject matter experts in lethal and non-lethal targeting methods, and judge advocates—legal officers tasked with ensuring compliance with U.S. and international law and rules of engagement.

At both the vetting and validation stages, CJCS instructions require “all commanders, observers, air battle managers, weapons directors, attack controllers, weapons systems operators, intelligence analysts, and targeting personnel” to establish “positive identification” (PID) of each target.⁷⁶ Those responsible for PID have a duty to establish with “reasonable certainty that a functionally and geospatially defined object of attack is a legitimate military target in accordance with the Law of War and applicable Rules of Engagement.”⁷⁷ All core participants in the process—at the interagency level, at the JTTCB, and through the chain of command—thus have independent obligations to conclude with reasonable certainty that the target is an appropriate one as a matter of fact and law. (Recently released White House guidelines setting forth procedures for counterterrorism operations outside areas of active hostilities suggest a higher degree of certainty required.⁷⁸ Those guidelines are discussed below.)

Also beginning with vetting and validation, CJCS instructions require the same actors to “identify potential collateral concerns” in targeting, applying a method known as collateral damage estimation (CDE). CDE is to ensure “application of enough force to create the desired effects while minimizing collateral damage and waste of resources.”⁷⁹ Personnel trained in CDE methodology⁸⁰ estimate any “unintended or incidental damage” likely to be caused “to persons or objects not the intended target and...not lawful targets.”⁸¹ Recognizing the difference between

⁷² Defense Department General Counsel, Joint Targeting Cycle and Collateral Damage Estimation Methodology (CDM), Nov. 10, 2009 (listing participants as including the initial combatant command nominator, as well as Armed Services Joint Staff Intelligence, Central Intelligence Agency, Defense Intelligence Agency, National Security Agency, and National Geospatial-Intelligence Agency), *available at* http://www.aclu.org/files/dronefoia/dod/drone_dod_ACLU_DRONES_JOINT_STAFF_SLIDES_1-47.pdf [hereinafter DOD Joint Staff Slides].

⁷³ JP 3-60, *supra* note 15, at GL-15.

⁷⁴ *Id.* at II-11.

⁷⁵ DOD Joint Staff Slides, *supra* note 72.

⁷⁶ CJCSI 3160.01, *supra* note 43, at A6; see also JP 3-60, *supra* note 15, at II-21 (describing technical methods for establishing PID).

⁷⁷ CJCSI 3160.01, *supra* note 43, at A6 (emphasis added).

⁷⁸ White House Fact Sheet, *supra* note 64.

⁷⁹ JP 3-60, *supra* note 15, at F-1.

⁸⁰ *Id.* at II-14.

⁸¹ DOD Joint Staff Slides, *supra* note 72.

those who may be properly targeted and not—a core principle of the law of war—is thus a central part of the function of CDE analysts.⁸²

From these findings, CDE analysts produce a numerical estimate of collateral casualties. This number is then used to conduct the proportionality determination the law of war requires—that is, whether the collateral effects of the proposed attack are “excessive in relation to the expected military advantage gained.”⁸³ The ‘expected military advantage gained’ by the destruction of the target is also expressed in numerical terms, in the form of a “non-combatant value” (NCV)—a subjective valuation selected by a commander or more senior policy official.⁸⁴ The proportionality calculation may thus be done quickly. If the NCV is greater than the CDE, then the target may be struck consistent with the law of war.

On completion of its validation process, the JTTCB places the resulting names on a new targeting list. The candidate list is sent to the military component commander to approve or reject targets, and identify the method to be used for engagement (lethal or non-lethal). The commander bases his decision on “a comprehensive briefing” by a force planning team, which puts forward a recommended plan and explains the rationale behind the decisions, including collateral damage estimates. The component commander may then modify the plan, or may ask his superior for additional guidance or to modify the objective. Again, the commander is bound by the CJCS requirement that there be “reasonable certainty” both that the defined target is legitimate under the law of war and rules of engagement, and that there has been due diligence in the estimate of collateral damage. (Again, for operations outside areas of active hostilities, the White House appears to have adopted an additional standard in this regard, namely, that there be “*near-certainty* that no civilians will be killed or injured — the highest standard we can set.”⁸⁵)

If the component commander approves a plan, operations and intelligence staffs brief the plan to the Joint Forces Commander, likewise bound by the “reasonable certainty” requirement. In addition to reviewing PID and CDE findings provided by the briefers, the Joint Forces Commander is also charged with identifying and classifying targets as “sensitive.”⁸⁶ Sensitive targets are those estimated to have effects beyond those permitted under existing rules of engagement—for example, when the strike may produce a special environmental hazard (like a chemical weapons plume); when the estimated collateral damage exceeds a set threshold; or when the targeting may produce “adverse political ramifications” or “public sentiment.”⁸⁷ Finding that a

⁸² Additional Protocol I, *supra* note 43. Military staff also examine whether collateral damage may be mitigated by a different method of engagement (including non-lethal force); and, relying in part on pre-existing classified population density tables, showing the average population density by day and night depending on the type of structure involved (residential structures, rail stations, manufacturing districts, etc.), *see* Naval War College Briefing, *supra* note 44, whether the composition, size or purpose of structures within the collateral effects radius, or the time of the strike, might limit anticipated collateral losses. *Id.* To be qualified as a CDE analyst, staff must complete a 40-hour course, including training in the applicable law of war; they must also master mission-specific rules of engagement and policies. CJCSI 3160.01, *supra* note 43, at D-E-1.

⁸³ DOD Joint Staff Slides, *supra* note 72; CJCSI 3160.01, *supra* note 43 (implementing Additional Protocol I, art. 51).

⁸⁴ Strikes involving “sensitive” targets, such as those with a higher likelihood of civilian injury, or serious political consequences, must be approved by the President or the Secretary of Defense. DOD Joint Staff Slides, *supra* note 72 (citing classified instruction CJCSI 3122.06).

⁸⁵ Obama NDU Speech, *supra* note 9.

⁸⁶ CJCSI 3160.01, *supra* note 43, at D-4

⁸⁷ *Id.* at GL-7.

target is “sensitive” in any of these respects triggers an additional process in which final review and approval must come from the President or Secretary of Defense.⁸⁸

With the final approval of the Joint Forces Commander or more senior authority if required, staff begins the planning and execution of the operation.⁸⁹ Among the final stages in execution is another PID check. Here called combat identification (CID), it is “the process of attaining an accurate characterization of detected objects in the operational environment to support an engagement decision.”⁹⁰ Operations personnel also carry out target validation again as a final step before engagement. Validation here includes confirmation again that the target meets command objectives, a final CDE analysis based on current information, and an assessment that the strike complies with the law of war and rules of engagement.⁹¹

2. Alternative Procedures

In determining whether the procedures just described satisfy constitutional due process, *Mathews* directs that we evaluate “the fairness and reliability of the existing pre-termination procedures, and the probable value, if any, of additional procedural safeguards.” There is much to commend in the JP 3-60 doctrine, including: the development of a record in the ETF supporting a targeting decision; the integration of legal personnel in multiple stages of review; and the obligation on all participants to establish a degree of certainty surrounding the facts and law supporting a decision to pursue a lethal strike. But by any *Mathews* measure of due process, JP 3-60 procedures fall short of the fundamental minimum: there is no notice to deliberate targets and no opportunity, pre or post-deprivation, for a potential target to be heard.⁹² This section considers whether there is any meaningful way to remedy these gaps with additional safeguards.

a. Notice

As the Court long ago recognized, the right to be heard “has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.”⁹³ Yet as with other aspects of procedural due process, the timing and content of notice has depended on how best to accommodate “the competing interests involved.”⁹⁴ Notice must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”⁹⁵ The Court has thus upheld, for example, constructive notice provisions, by which nonresidents of a jurisdiction, or those whose addresses were unknown, were given notice by publication.⁹⁶ Courts have likewise approved terrorist asset freezing laws that provide only post-deprivation notice to those whose assets are subject to forfeiture. As several courts have recognized, foreign terrorist organizations are not entitled to pre-deprivation

⁸⁸ *Id.* (citing classified instruction CJCS 3122.06).

⁸⁹ JP 3-60, *supra* note 15, at II-19.

⁹⁰ *Id.* at II-21.

⁹¹ *Id.* at II-29.

⁹² *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004).

⁹³ *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

⁹⁴ *Goss v. Lopez*, 419 U.S. 565, 579-80 (1975) (temporary school suspension) (“There need be no delay between the time ‘notice’ is given and the time of the hearing.”).

⁹⁵ *Dusenbery v. United States*, 534 U.S. 161, 168 (2002).

⁹⁶ *Mullane*, 339 U.S. at 320.

process that would effectively afford them a chance to “spirit [otherwise seizable] assets out of the United States.”⁹⁷

The argument against pre-deprivation notice in an exigent setting is compelling. But it is far from clear that the same reasoning applies in the context of deliberate targeting. First, deprivation of assets and deprivation of life are categorically different losses. As the Seventh Circuit emphasized in the asset seizure context, if the seizure later proved unjustified under the law, wrongfully designated organizations were entitled to pursue a statutory remedy for just compensation.⁹⁸ Put differently, post-deprivation process could afford targets a “meaningful” opportunity to contest the legality of the action, and remedy any wrongful loss.⁹⁹ As noted above, post-deprivation remedies are far less “meaningful” when the life is already lost.

Second, while there are circumstances in which a post-deprivation remedy may be the only possible mechanism for providing process to wrongful victims of lethal force, as noted below, not all forms of pre-deprivation notice run counter to government interests. There can be little doubt that Osama bin Laden, Anwar al Awlaki, and other key terrorist suspects knew well in advance of their deaths that the United States sought to capture or kill them. In bin Laden’s case, two U.S. Presidents, the Congress, and the courts had publicly named bin Laden and Al Qaeda’s leadership as part of an organization with which the United States was at war.¹⁰⁰ In some contrast, Awlaki appears to have become aware of his inclusion on a U.S. list of terrorist suspects to kill or capture through repeated, widely quoted government statements.¹⁰¹ Targets like bin Laden, Awlaki and others had *constructive* notice that they were sought by the United States. Whatever one’s view of the underlying legality of these particular actions, the U.S. government evidently determined that such notice *served* U.S. interests in those cases.

In this regard, it is possible to conceive of forms of notice in deliberate targeting that would enhance the fairness of pre-deprivation process without necessarily compromising government interests. For instance, if the U.S. justification for the lawful use of force is the existence of an armed conflict, it advances constitutional due

⁹⁷ *Global Relief Found. v. O’Neill*, 315 F.3d 748 (7th Cir. 2002) (“Nor does the Constitution entitle GRF to notice and a pre-seizure hearing, an opportunity that would allow any enemy to spirit assets out of the U.S.”). As the Seventh Circuit put it in that context, “postponement is acceptable in emergencies.” *O’Neill*, 315 F.3d at 754; *cf.* *Nat’l Council of Resistance of Iran v. U.S. Dep’t of State*, 251 F.3d 192 (D.C. Cir. 2001) (“The Secretary must afford to the entities under consideration notice that the designation [of foreign terrorist organization] is impending. Upon an adequate showing to the court, the Secretary may provide this notice after the designation where earlier notification would impinge upon [U.S.] security and other foreign policy goals.”).

⁹⁸ *O’Neill*, 315 F.3d at 754 (“Opportunity to obtain recompense under [existing federal statute] if the blocking turns out to be invalid, provides the private party with the very remedy that the Constitution names: just compensation.”).

⁹⁹ *See Parham v. J.R.*, 442 U.S. 584 (1979) (determination by neutral physician whether statutory admission standard is met required before confinement of child in mental hospital).

¹⁰⁰ *See, e.g.*, President George W. Bush, Address to Joint Session of Congress (Sept. 21, 2001) (noting that “[o]ur war on terror begins with al Qaeda,” and demanding that Taliban government “[d]eliver to United States authorities all of the leaders of Al Qaeda who hide in your land”); President Barack Obama, Remarks on National Security (May 21, 2009) (“[W]e are indeed at war with al Qaeda and its affiliates.”); *Al-Bihani v. Obama*, 590 F.3d 866, 878 (D.C. Cir. 2010) (citing AUMF), *reh’g denied en banc*, 619 F.3d 1 (2010).

¹⁰¹ *See, e.g.*, *Al-Aulaqi v. Obama*, 727 F.Supp.2d 1 (D.D.C. 2010); Keith Johnson, *U.S. Seeks Cleric Backing Jihad*, WALL ST. J. (March 26, 2010), <http://online.wsj.com/article/SB10001424052748704094104575144122756537604.html> (quoting senior U.S. intelligence official as describing Awlaki as “considered al Qaeda,” and quoting CIA Director Leon Panetta that Awlaki is “someone that we’re looking for”).

process interests to provide clear and public notice of those particular nations or organizations with which the United States considers itself at war. Conversely, publication of only more generalized notice—for example, that the United States is engaged in an armed conflict against forces “associated with” named enemies—raises more substantial due process concerns.¹⁰² For the same reasons due process prohibits vagueness in other areas of law—that it is unfair to expect individuals to conform their conduct to the law or avoid its consequences if they do not know what the law is—it would be deeply problematic to deprive a U.S. citizen of life or liberty because he was, for example, a member of an organization against which the United States was only secretly at war.¹⁰³

If the U.S. justification for the use of force is the exercise of self defense, particularly in response to an armed attack,¹⁰⁴ constructive notice of this type may be equally valuable, so long as it does not “impinge upon the security” of the United States.¹⁰⁵ While courts have rightly recognized that there is no requirement of pre-deprivation notice when it would enable “asset flight” or would otherwise compromise government response in exigent circumstances,¹⁰⁶ they have also recognized that such circumstances, even in the context of national security, do not always exist. Thus, in rejecting the government’s argument that groups were not entitled to prior notice that they were being considered for designation as a “foreign terrorist organization” under the Antiterrorism and Effective Death Penalty Act, the D.C. Circuit emphasized that there had been no showing in that case that a minimal form pre-designation notice would interfere with the government’s legitimate foreign policy goals.¹⁰⁷ Such circumstances are equally imaginable in the U.S. government’s targeting operations. Indeed, as the government made clear in litigating about Awlaki’s then-prospective targeting, if Awlaki chose to appear peacefully to challenge the government’s reported position that he had orchestrated the attack on a Detroit-bound civilian airliner, he would be “under no danger of the U.S. government using lethal force against him.”¹⁰⁸

As such illustrations highlight, constructive notice may have the effect of reducing the risk of error in several respects. In self defense settings, such notice opens the possibility that nations, organizations or individuals within them identified as responsible for an attack against the United States might peacefully challenge the accuracy of such a finding. While it seems unlikely individuals actually intent on attacking the

¹⁰² See, e.g., Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay, *In re Guantanamo Bay Detainee Litigation*, Misc. No. 08-442 (TFH) (D.D.C. Mar 13, 2009) (arguing that “the AUMF is not limited to persons captured on the battlefields of Afghanistan” nor to those “directly participating in hostilities,” but that “[u]nder a functional analysis, individuals who provide substantial support to al-Qaida forces in other parts of the world may properly be deemed part of al-Qaida itself”).

¹⁰³ Cf. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999).

¹⁰⁴ U.N. Charter art. 51.

¹⁰⁵ *Nat’l Council of Resistance of Iran v. U.S. Dep’t of State*, 251 F.3d 192 (D.C. Cir. 2001).

¹⁰⁶ *Al Haramain Islamic Found. v. U.S. Dep’t of Treasury*, 686 F.3d 965, 985 (9th Cir. 2012).

¹⁰⁷ *Nat’l Council of Resistance of Iran*, 251 F.3d at 208 (suggesting the State Department provide notice that: “We are considering designating you as a foreign terrorist organization, and in addition to classified information, we will be using the following summarized administrative record. You have the right to come forward with any other evidence you may have that you are not a foreign terrorist organization.”).

¹⁰⁸ *Al-Aulaqi v. Obama*, 727 F.Supp.2d 1, 17 (D.D.C. 2010) (“Defendants have made clear—and indeed, both international and domestic law would require—that if Anwar Al-Aulaqi were to present himself in that manner, the United States would be ‘prohibit[ed] [from] using lethal force or other violence against him in such circumstances.’”) (internal citations omitted).

United States would avail themselves of such an opportunity, the prospect remains that those who have been wrongfully identified—those for whom targeting would be an error—would take advantage of any opportunity to protest.

In an armed conflict setting, broad public dissemination of the identity of the organizations subject to targeting can bring important clarity not only to the public at large (including those who may wish to take steps to protect themselves from collateral injury), but also to the large and diverse array of U.S. government, contract, and often allied multinational personnel engaged in targeting operations, all of whom share an obligation to verify the factual and legal propriety of striking a given target. As it stands, the process manuals and other guidance discussed here are silent on questions of who may be targeted, and the DOD manual setting forth U.S. policy on who is targetable in armed conflict remains incomplete. Different targeting lists are maintained by different U.S. agencies, even different branches of the armed services.¹⁰⁹ Indeed, in recent testimony before the Senate Armed Services Committee, the Assistant Secretary of Defense for Special Operations and Low-Intensity Conflict was uncertain whether there existed a formal list of organizations and entities the administration has determined to be co-belligerents of al Qaeda (and thus subject to targeting).¹¹⁰ While it is unclear when and why PID errors persist, it seems plausible that the more organizations and personnel are involved, and the less clarity there is on the scope of targeting operations, the more likely it is for first order PID errors to occur. That is, the more likely it is that targeters nominate or strike individuals who are not legitimate military targets in fact or law.¹¹¹

b. Opportunities to Be Heard

The Constitution requires some hearing before the government may deprive a person of liberty or property, so that the party opposing action may challenge the government's findings.¹¹² But the kind of hearing due process requires varies greatly depending on the circumstances. The role of neutral arbiter, for instance, need not in all instances be filled by a judicial officer, but may at times be performed by a professional expert, trained in the applicable technical and legal standards, so long as he or she is authorized to independently evaluate information, rely on established professional procedures, and decide freely and without fear of sanction for or against the course of action the government recommends.¹¹³ A formal evidentiary hearing is likewise not always required, particularly where there is meaningful post-deprivation relief available.¹¹⁴ What is indispensable to due process, however, is that there is some

¹⁰⁹ Jo Becker & Scott Shane, *Secret 'Kill List' Proves a Test of Obama's Principles and Will*, N.Y. TIMES, May 29, 2012, at A1.

¹¹⁰ *To Receive Testimony on the Law of Armed Conflict, the Use of Military Force, and the 2001 Authorization for Use of Military Force: Hearing Before The S. Comm. on Armed Services*, 113th Cong. (2013) available at <http://www.armed-services.senate.gov/hearings/event.cfm?eventid=dff260f50b247719c4fa9f1e3daf7232>.

¹¹¹ *Cf.*, e.g., MAJ. GEN. GEORGE R. FAY, AR 15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE 112–13, 118–19 (2004) (“DoD’s development of multiple policies on interrogation operations for use in different theaters or operations confused Army and civilian Interrogators....”); LT. GEN. ANTHONY R. JONES, ARTICLE 15-6 INVESTIGATION OF THE ABU GHRAIB PRISON AND THE 205TH MILITARY INTELLIGENCE BRIGADE 5 (2004) (“Confusion about what interrogation techniques were authorized resulted from the proliferation of guidance and information....”).

¹¹² See *supra* note 35.

¹¹³ *Parham v. J.R.*, 442 U.S. 584 (1979).

¹¹⁴ See *supra* note 35.

“opportunity to present reasons... why proposed action should *not* be taken.”¹¹⁵ A pre-deprivation hearing is an essential “check against mistaken decisions.”¹¹⁶

For individuals who are the object of deliberate targeting or those who are among collateral deaths resulting from PID errors, the weight of the individual interest at stake, the absence of any government interest in mistaken targeting, the risk of PID error, and the relative weakness of damages as compensation for an erroneous loss of life—all these suggest that a post-deprivation hearing alone is likely inadequate to satisfy due process. It is indeed difficult to conceive a theory of due process that would require a pre-deprivation hearing before depriving an individual of government benefits, for example, but not require any such hearing before depriving that individual of his life.¹¹⁷

What seems most acutely missing from the existing pre-deprivation process is a chance for the threatened individual to present the reasons why the proposed action should not be taken. Elsewhere in law where the individual most affected cannot represent his own interests, courts commonly recognize the value of having another actor to fulfill that role.¹¹⁸ In this context, it is likewise possible to imagine an institutional role of opposition advocate, charged with conducting a simultaneous but independent evaluation of the factual and legal basis for the targeting decision, with a view to developing the best reasons why the strike should *not* be taken. To the extent such an actor engaged in early-targeting-cycle analyses—vetting or validation, or initial CDE analysis, for example—their participation would seem to add little to the government’s existing burden. It would shift or augment by one the allocation of responsibility among the substantial number of targeting personnel, including legal officers, already engaged.

At the same time, there is reason to expect that an officer charged with making the negative case could substantially reduce the risk of error inherent in such operations. Anecdotal evidence from recent U.S. counterterrorism experience suggests that the inclusion of an institutionally assigned “red team” to a decision-making process can sharpen analysis, particularly in the face of shifting and uncertain information.¹¹⁹ Such a mechanism is also consistent with longstanding findings of organization theorists, who have recognized the value of competitive internal decision-making mechanisms to identify and correct error.¹²⁰ Particularly if the layers of review built into the existing process are insufficiently independent from each other—if succeeding review layers rely on or defer to earlier determinations without verifying previous findings—an internal opposition advocate could help address organizational pathologies like

¹¹⁵ *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985) (emphasis added); *id.* at 533 (“pre-termination hearing need not definitively resolve the propriety” of action, but is “an initial check against mistaken decisions”).

¹¹⁶ *Id.* at 545 (citing *Goldberg v. Kelly*, 397 U.S. 254 (1970)).

¹¹⁷ See *Goldberg*, 397 U.S. at 261.

¹¹⁸ See, e.g., *Whitmore v. Arkansas*, 495 U.S. 149 (1990) (“next friend” standing).

¹¹⁹ Michele L. Malvesti, Policy Considerations in Combating Terrorism: Decision-Making Under Conditions of Risk and Uncertainty, *Combating Terrorism at West Point Occasional Papers Series*, p. 7 (Jan. 2012), available at http://www.ctc.usma.edu/wp-content/uploads/2012/01/CTC_CTRisk_MM_040112.pdf (describing the utility of a CIA “red team” assessment of the evidence supporting the bin Laden raid).

¹²⁰ See, e.g., IRVING L. JANIS, *GROUPTHINK* 142–58 (2d ed. 1982); Todd R. La Porte, *Challenges of Assuring High Reliability When Facing Suicidal Terrorism*, in *SEEDS OF DISASTER, ROOTS OF RESPONSE: HOW PRIVATE ACTION CAN REDUCE PUBLIC VULNERABILITY* 99 (Philip E. Auerswald et al. eds., 2006).

this kind of shirking or logrolling, tendencies that can make even a tentative recommendation seem an irreversible judgment.¹²¹

Including an opposition advocate in the deliberate targeting process is unlikely to address all forms of error. To the extent late-stage combat identification is responsible for PID errors—that is, in the final CID and CDE checks before a strike is executed—it is less certain how such additional process is consistent with government interests in carrying out what may by then be time-sensitive operations. Opposition advocates are likewise unlikely to help limit the kind of technical errors that might lead to erroneous deaths in targeting. As noted above, these are the kinds of errors for which it seems unlikely any decision-making procedures *at the targeting stage* will help. It is for just such kinds of errors that the Court has recognized the due process significance of post-deprivation remedies. Whether erroneous deaths are caused by state negligence, or by the kind of mistakes that inevitably accompany some exigent circumstances, a formal, post-deprivation hearing, conducted in a civil or administrative setting by a neutral, independent arbiter, is a necessary component of due process in targeting.

c. Burden of proof

A final feature of procedural due process is worth considering—what law calls the standard of proof required to “instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.”¹²² The law has generally tended to assign burdens of proof depending on the importance society places on the interests at stake: facts in a dispute between private parties for money damages need only be proven by a “preponderance of the evidence,” for example, while facts necessary to convict a defendant in a criminal case must be proven “beyond a reasonable doubt.”¹²³ Intermediate burdens—like a requirement of clear and convincing evidence—have been used to determine, for example, when a person may be deprived of liberty indefinitely because she is a danger to herself or others. Given “the uncertainties of psychiatric diagnosis,” courts reason, “requiring a state to prove mental illness ‘beyond a reasonable doubt’” imposes a burden the state cannot meet, erecting “an unreasonable barrier to needed medical treatment.”¹²⁴

CJCS instructions give targeting personnel the responsibility to establish to a “*reasonable certainty* that a functionally and geospatially defined object of attack is a legitimate military target in accordance with the Law of War and applicable Rules of Engagement.”¹²⁵ Is that standard of proof sufficient to satisfy due process in targeting outside areas of active hostilities? Even more than the individual interest at stake in avoiding erroneous commitment to a potential lifetime of indefinite detention, the weight of both individual and government interests in avoiding erroneous targeting, coupled with the recognized incidence of PID errors in such operations, suggests the preponderance of the evidence standard is too low in a deliberate targeting setting. While it is unclear what “reasonable certainty” demands, to the extent it is only the certainty that the identification is more likely than not, it falls short of due process

¹²¹ See, e.g., Scott D. Sagan, *The Problem of Redundancy Problem: Why More Nuclear Security Forces May Produce Less Nuclear Security*, 24 RISK ANALYSIS 935, 939 (2004).

¹²² *Addington v. Texas*, 441 U.S. 418, 423 (1979) (internal quotations omitted).

¹²³ See *id.* at 423-24.

¹²⁴ *Id.* at 418.

¹²⁵ CJCSI 3160.01, *supra* note 43.

requirements. At the same time, because armed conflict is often waged with information gaps difficult or impossible to bridge, requiring proof ‘beyond a reasonable doubt’ seems as unreasonable here as it was to the Court in evaluating civil commitment for dangerousness.

New White House guidelines require a “near certainty that the terrorist target is present,” as well as a “near certainty that non-combatants will not be injured or killed,” before conducting lethal targeting outside an area of active hostilities.¹²⁶ If this is intended to strengthen the “reasonable certainty” standard, bringing it in line with proof required before depriving individuals of their liberty, it is a step forward. If the foregoing analysis is correct, it is not only wise as a matter of policy, it is required to comply with due process under the U.S. Constitution.

IV. CONCLUSION

Profound disagreements about the legality and wisdom of U.S. targeting practices remain, but the pressing need for their resolution should not stand in the way of incremental improvements. In evaluating the targeting process, the public and individual interests are aligned; both favor identifying and implementing procedures that can reduce the risk of tragic error.

¹²⁶ White House Fact Sheet, *supra* note 64.

Corporate Religious Liberty: Why Corporations Are Not Entitled to Religious Exemptions*

Caroline Mala Corbin**

INTRODUCTION

One of the main questions before the Supreme Court in *Sebelius v. Hobby Lobby Stores, Inc.*¹ and *Conestoga Wood Specialties Corp. v. Sebelius*² is whether large for-profit corporations are entitled to religious exemptions under the Free Exercise Clause or the Religious Freedom Restoration Act. In particular, the plaintiffs seek religious exemptions from the Affordable Care Act's so-called "contraception mandate."³

Hobby Lobby Stores, Inc. and Conestoga Wood Specialties Corp. are closely-held, for-profit corporations. Earning roughly \$3 billion in annual revenue, Hobby Lobby operates a nationwide chain of arts and crafts stores with over 13,000 full-time employees. Conestoga Wood manufactures wood cabinets and employs around 950 people. As large for-profit corporations, they are required by the Affordable Care Act to provide health insurance to their employees, and that health insurance must cover preventive care without any cost sharing from those employees.⁴ For women, preventive care includes access to FDA-approved contraception, including morning-after pills such as Plan B.

The owners of Hobby Lobby and Conestoga Wood, the Green family and the Hahn family, respectively, oppose abortion on religious grounds, viewing it as an "intrinsic evil and a sin against God to which they are held accountable."⁵ The lawsuits name themselves and their corporations as plaintiffs. That is, they first argue that the contraception mandate violates their religious conscience as individuals because owning a company whose health insurance plan must cover morning-after

* This Issue Brief was initially published in January 2014.

** Professor of Law, University of Miami School of Law. Several arguments are based on an earlier piece, *Corporate Religious Liberty* (August 2013) (available on SSRN).

¹ 134 S. Ct. 678 (Mem) (2013) (granting petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit).

² 134 S. Ct. 678 (Mem) (2013) (granting petition for writ of certiorari to the United States Court of Appeals for the Third Circuit).

³ The circuits have split, with the Seventh and Tenth Circuit Courts of Appeals holding that for-profit corporations can bring religious liberty claims, and the Third, Sixth, and D.C. Courts of Appeals holding that they cannot.

⁴ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (codified as amended in scattered sections of Titles 26 and 42 of the U.S. Code).

⁵ *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 382 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 678 (Mem) (2013).

pills forces them to facilitate abortion.⁶ This question has been discussed elsewhere, and is not addressed here.⁷ Rather, this issue brief focuses on the corporate plaintiffs and the claim that the contraception mandate violates the religious conscience of the corporation qua corporation, and that the corporation is therefore entitled to a religious exemption.

This is an entirely novel claim. It is also without merit. The Free Exercise Clause and the Religious Freedom Restoration Act protect the religious practices of individuals and churches. They do not, and should not, extend to the for-profit corporate form for at least three reasons. First, corporate religious liberty makes no sense as free exercise is understood to (a) protect an individual's relationship with the divine and (b) respect the inherent dignity of the individual. Furthermore, *Citizens United v. Federal Election Commission*⁸ provides no theoretical foundation for corporate religious liberty. The justifications for extending free speech protection to for-profit corporations do not translate into the free exercise context. Second, there is no precedent for the claim that for-profit corporations are entitled to religious liberty exemptions; on the contrary, precedent such as *United States v. Lee*⁹ points in the other direction. Third, recognizing corporate religious liberty will benefit employers at the expense of their employees, who risk losing protection of the employment laws as well as their own free exercise rights.

I. THE ILLOGIC OF CORPORATE RELIGIOUS LIBERTY

Whether a constitutional provision's shelter should extend to corporations depends not on whether corporations are "persons" but on what that clause is meant to protect. At its heart, religious liberty protects the religious conscience of human beings. Sometimes people practice their faith individually, sometimes communally in voluntary religious associations. But what the Free Exercise Clause unquestionably protects are uniquely human attributes: a person's relationship with the divine or a person's inherent dignity. Corporations do not have a relationship with God or other divinity. Nor do they possess inherent dignity such that we must respect the exercise of their beliefs. Consequently, while religious liberty protects religious individuals and their churches, synagogues, mosques, temples, and other houses of worship, it makes no sense to extend religious liberty to for-profit corporations.

⁶ In fact, there is no burden on religious conscience. Both Hobby Lobby's Green family and Conestoga's Hahn family object to abortion rather than contraception. Accordingly, they limit their opposition to morning-after pills like Plan B, which they believe kill fertilized eggs. They are wrong. Morning-after pills prevent ovulation. See, e.g., International Federation of Gynecology and Obstetrics (FIGO), *Mechanism of Action: How Do Levonorgestrel-Only Emergency Contraception Pills (LNG ECPs) Prevent Pregnancy*, March 2011, available at http://www.figo.org/files/figo-corp/MOA_FINAL_2011_ENG.pdf (last accessed Jan. 13, 2013) (summarizing studies); Kristina Gemzell-Danielsson et al., Review Article: *Emergency Contraception—Mechanisms of Action*, 87 *Contraception* 300, 301 (2013). Consequently, there actually is no clash between plaintiffs' religious obligations and the contraception mandate. See generally Caroline Mala Corbin, *Abortion Distortions*, 71 *Wash. & Lee L. Rev.* (forthcoming 2014).

⁷ See, e.g., Caroline Mala Corbin, *The Contraception Mandate*, 107 *Nw. U. L. Rev.* 1469 (2013); Frederick Mark Gedicks, *With Religious Liberty for All: A Defense of the Affordable Care Act's Contraception Coverage Mandate*, ACS Law and Policy Issue Brief (2012).

⁸ 558 U.S. 310 (2010).

⁹ 455 U.S. 252 (1982).

A. THE FREE EXERCISE CLAUSE PROTECTS RELIGIOUS CONSCIENCE

Whether a for-profit corporation is considered a “person” is not dispositive. Although the Supreme Court has held that corporations are “persons” for some constitutional provisions,¹⁰ that recognition simply means that the Court has decided that it makes sense to apply those particular clauses to corporations. The Court has also held that various clauses do not apply to corporations.¹¹ Thus, the real question is whether it is logical to extend the Free Exercise Clause, and consequently, the Religious Freedom Restoration Act (RFRA), to for-profit corporations.¹² It is not.

1. Protection of Individuals

Religious liberty is meant to protect religious individuals and their voluntary religious associations. People may disagree as to why, but no one disputes that the Free Exercise Clause protects individual religious conscience. Those religiously inclined might argue, as did James Madison in his Memorial and Remonstrance Against Religious Assessments, that “[i]t is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him.”¹³ Accordingly, the state should not hinder anyone from meeting her religious obligations. As Justice Souter explained, “the [Free Exercise] Clause was originally understood to preserve a right to engage in activities necessary to fulfill one’s duty to one’s God.”¹⁴

A more secular reason to protect religious practice focuses on individual autonomy and dignity, a touchstone of constitutional rights. One need not agree with someone’s religious beliefs in order to conclude that there is value in respecting her decision to follow them. The Free Exercise Clause furthers individual autonomy and dignity by recognizing people’s right to make decisions about their spirituality. Accordingly, the state should not demean people by forcing them to act contrary to their conscience. The underlying assumption is that people possess inherent dignity. “This dignity gives man an intrinsic worth, a value *sui generis* that is ‘above all price and admits of no equivalent.’”¹⁵ While the relationship between conscience, autonomy, and dignity is not straightforward, the three are inextricably linked, and the bottom line is that respecting religious autonomy/conscience is very much about respecting the inviolable dignity of the human person.

It should be fairly apparent that neither the religion-based nor the dignity-based justification for protecting individual religious conscience translates to corporations.

¹⁰ For example, the Supreme Court has held that corporations are persons protected by the Fourteenth Amendment’s guarantee of equal protection and procedural due process. *Santa Clara Cnty. v. S. Pac. R.R. Co.*, 118 U.S. 394, 396 (1886) (equal protection); *Covington & L. Tpk. Rd. Co. v. Sandford*, 164 U.S. 578, 592 (1896) (procedural due process).

¹¹ For example, the Supreme Court has declined to grant corporations full Fourth Amendment privacy rights, *United States v. Morton Salt Co.*, 338 U.S. 632, 650-52 (1950), and any Fifth Amendment right against self-incrimination. *Hale v. Henkel*, 201 U.S. 43, 74-75 (1906). It has also held that corporations are not persons for purposes of the Privileges and Immunities Clause of the Fourteenth Amendment. *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 177 (1869).

¹² There is no indication, and the plaintiffs do not argue, that the exercise of religion for purposes here differs under the Free Exercise Clause and RFRA.

¹³ James Madison, *Memorial and Remonstrance Against Religious Assessments* para. 1, as reprinted in *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, app. at 64 (1947).

¹⁴ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 575-76 (1993) (Souter, J., concurring) (adding the caveat “unless those activities threatened the rights of others or the serious needs of the State”).

¹⁵ IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* ix (John Ladd trans. and ed., Library of Liberal Arts 1965) (1797).

As for the religious justification, corporations, unlike natural people, do not have a relationship with God. They do not feel shame or sorrow for failing to fulfill their religious duties. There is no point in excommunicating them because they have no soul.¹⁶ As for the dignity justification, corporations, unlike natural people, possess no inherent dignity. They are not ends in themselves. On the contrary, corporations are a means to an end—artificial entities designed to facilitate economic growth. That is not a criticism, but a description of their intended purpose. In short, the Free Exercise Clause is designed to protect human attributes that, as insentient and instrumental entities, for-profit corporations lack. Consequently, for-profit corporations should not be entitled to Free Exercise Clause protection.

2. *Protection of Churches*

Free Exercise Clause protection also extends to churches, synagogues, mosques, temples, and other houses of worship (“churches” for short). Protecting churches facilitates individual religious practice. After all, while religious practice may be a solitary endeavor for some, for others it is a group activity. As the Supreme Court has noted, “[f]or many individuals, religious activity derives meaning in large measure from participation in a larger religious community.”¹⁷ To fully protect individual religious conscience, it is necessary to protect associations of religious individuals.

Proponents of corporate religious liberty argue that because nonprofit religious corporations like churches are protected by the Free Exercise Clause, then for-profit religious corporations ought likewise be protected since they are the same in all important respects. They both take the corporate form, and they both are institutions through which people exercise their religion. Nonetheless, the reasons we protect churches do not ultimately apply to corporations.

Actually, the justifications and appropriate scope of free exercise protection for churches is hotly contested. This disagreement takes place along various dimensions. One issue relevant to corporate religious liberty is whether the Free Exercise Clause protects churches as a proxy for the individuals associated with them or protects churches qua churches.¹⁸ In other words, can churches be rights-holders separate and apart from the individuals that compose them?

One approach argues that we protect religious institutions only because we protect religious individuals, and any protection for churches is derived from protection of its individual members. This approach offers little support to for-profit corporate religious liberty claims, which focus on corporate “conscience” rather than individual conscience. In any event, as discussed below, the corporation cannot be said to merely represent an aggregation of its individual members.

¹⁶ Liam Séamus O’Melinn, *Neither Contract nor Concession: The Public Personality of the Corporation*, 74 GEO. WASH. L. REV. 201, 251 (2006) (“[Sir Edward] Coke famously proclaimed that corporations ‘have no souls’....”); cf. John Coffee, Jr., “No Soul to Damn, No Body to Kick:” *An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 386 n.2 (1981) (“In the thirteenth century Pope Innocent IV forbade the practice of excommunicating corporations on the unassailable logic that, since the corporation had no soul, it could not lose one.”).

¹⁷ Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 342 (1987).

¹⁸ Compare, e.g., Richard C. Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917 (2013) with Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273 (2008) and Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79 (2009). The former argue that any free exercise protection for churches is derived from its members while the latter argue that churches qua churches are entitled to free exercise protection.

Another approach argues that churches are entitled to free exercise protection separate and apart from their members. Under this approach, churches qua churches are religiously significant. Churches further religious liberty not only because people worship communally but also because religious liberty “depended historically on the freedom of the Church as an independent spiritual authority.”¹⁹ For example, interfering with church autonomy “may disrupt ‘the free development of religious doctrine.’”²⁰ In addition, many view their church as a sacred entity: “[T]he church is the institutional expression of what is other-worldly, holy, entitled to reverence.”²¹

The logic of this churches-qua-churches approach falters when confronted by for-profit corporations. There are several significant differences between churches and for-profit corporations. The most obvious one is that the practice and promulgation of religion is the overriding purpose of a church. Even assuming that an arts-and-crafts store or wood cabinet business is capable of exercising religion—itsself a debatable proposition²²—it is unlikely to be its principal goal. By definition, for-profit corporations exist to make money; otherwise they would be nonprofit.

Second, for-profit corporations do not share the unique qualities that have been cited to justify churches’ preferential treatment. In the eyes of their followers, churches are sacred houses established by God. For-profit corporations are not. Churches are the source of theological truth. For-profit corporations are not. Indeed, to argue that the two are indistinguishable would negate the reasons to treat churches as entitled to special autonomy in the first place.

Third, both approaches envision the church as an association of voluntary members. As with other associations, a church is a group of people who voluntarily join together to pursue common interests or goals. In the case of churches, the interests and goals are religious. Under the churches-as-proxy approach, the church is essentially the sum of the individuals who belong to it. Under the churches-qua-churches approach, the sum may be greater than its parts, but its parts are still people who voluntarily choose to associate with it.

This assumption is highlighted in the sole Free Exercise Clause case where the Supreme Court granted a religious exemption to an entity rather than individuals, the relatively recent *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*.²³ This decision could be viewed as endorsing the churches-qua-churches approach rather than churches-as-proxy approach, as the Supreme Court sided with the institution against an individual member and held that the religion clauses required a “ministerial exception” that spares churches from discrimination suits by their ministers.

¹⁹ Richard W. Garnett, *The Freedom of the Church*, 4 J. Catholic Soc. Thought 59, 81 (2007) (citation omitted).

²⁰ Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1392 (1981) (citation omitted).

²¹ Richard W. Garnett, *Pluralism, Dialogue, and Freedom: Professor Robert Rodes and the Church-State Nexus*, 22 J.L. & RELIGION 503, 514 (2007).

²² *Conestoga*, 724 F.3d at 385 (quoting *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F.Supp.2d 1278, 1291 (W.D. Okla. 2012), *rev’d and remanded*, 723 F.3d 1114 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (Mem) (2013)) (“General business corporations do not, separate and apart from the actions or belief systems of their individual owners or employees, exercise religion. They do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors.”).

²³ 132 S.Ct. 694 (2012).

In addition to scattered language describing churches as voluntary associations,²⁴ the Court justified the exemption by emphasizing the voluntary nature of the minister's association: It is permissible to exclude ministers from anti-discrimination law's protection because they have consented to the church's rather than the court's adjudication of their employment disputes. As the Supreme Court noted, "All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it."²⁵ In other words, the association is exempt from otherwise applicable laws because all who are affected by the exemption have consented to it. Thus, to the extent that there is free exercise protection for churches, it is free exercise protection for voluntary religious associations.

For-profit corporations, however, are not voluntary religious associations. One of the main characteristics of the modern corporation, limited liability, precludes that conclusion.²⁶ An association is understood to be the alter-ego of its members. So, for example, an association has standing only if, among other things, its individual members would have standing to sue in their own right.²⁷ The point of limited liability, however, is to create a legal entity that is separate from its owners. Limited liability ensures that corporate owners are liable only for the amount they have invested. The corporation's debts are not the owners' debts, and vice-versa. So while an association assumes the association and its members are essentially one and the same, limited liability insists that the corporations and its owners are not. To equate the two, as the Third Circuit recently observed in *Conestoga Wood Specialties Corp. v. Secretary of U.S. Department of Health and Human Services*, "would eviscerate the fundamental principle that a corporation is a legally distinct entity from its owners."²⁸ Thus, even closely held corporations, where the owners (or at least some of them) are also the managers, cannot qualify as associations. When the owners are not the managers, the associational argument, already implausible, becomes absurd.

Once employees are factored into the analysis, it becomes more obvious than ever that a for-profit corporation cannot be described as a voluntary association. Cashiers, clerks, and other employees simply are not members of Hobby Lobby Stores, Inc. the way they are members of their church or other voluntary association. People join associations because "they are persuaded by the principles of the association."²⁹ People take jobs because they have to. They need the paycheck. One response might be that while employment itself may be an economic necessity, employment at these particular corporations may be voluntarily chosen precisely because of their religious principles. This claim is neither empirically supported nor is it likely to be: with 13,000 employees nationwide and Title VII's bar on religious discrimination, Hobby

²⁴ For example, the concurrence starts its discussion by observing that "[t]hroughout our Nation's history, religious bodies have been the preeminent example of private associations . . ." *Id.* at 712 (Alito, J., concurring). In explaining why church autonomy includes the power to remove unwanted ministers, it refers to the rights of "voluntary religious associations," *Id.* at 713; and relies on the Court's pre-eminent (if controversial) freedom of expressive association case. *Id.* at 712 (citing *Boys Scouts of Am. v. Dale*, 530 U.S. 640 (2000)).

²⁵ *Hosanna-Tabor*, 132 S.Ct. at 713 (Alito, J., concurring) (citation omitted).

²⁶ The modern corporation's other features, like perpetual life, further undermine an association view since corporations potentially last forever while the people that compose them do not.

²⁷ *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

²⁸ 724 F.3d at 389.

²⁹ Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639, 745 (2002) ("The members of a voluntary association join, and remain members, because they are persuaded by the principles of the association . . . rather than because of motivations of money or the threat of state sanctions.").

Lobby Stores, Inc. is bound to be religiously diverse.³⁰ The assumption that employees are always able to choose employers whose values match their own also relies on a *Lochner* era view of employment opportunities.

For-profit corporations are not just like churches. For-profit corporations are not voluntary associations that serve as a proxy for their members, so that it cannot be argued that protecting a corporation is essentially protecting its members. Nor do for-profit corporations share the distinguishing features that arguably justify granting churches-qua-churches free exercise protection. In short, the theoretical justifications for free exercise protection for individuals and their churches do not extend to for-profit corporations.

B. CITIZENS UNITED IS INAPPOSITE

Nor does *Citizens United v. Federal Election Commission*³¹ provide a justification for corporate religious liberty. Citing *Citizens United*, the Tenth Circuit Court of Appeals reasoned that since corporations have First Amendment free speech rights, it necessarily followed that corporations have First Amendment free exercise rights: “We see no reason the Supreme Court would recognize constitutional protection for a corporation’s political expression but not for its religious expression.”³² In fact, there is a very good reason to distinguish the two.

It is widely understood that the Free Speech Clause protects the free flow of speech in order to promote: (1) a marketplace of ideas, (2) democratic self-government, and (3) individual autonomy, self-expression, and self-realization. Notably, audiences are as important as speakers in free speech theory. The marketplace of ideas benefits those who receive the information. Likewise, access to political criticism, opinion, and reporting helps recipients of that information monitor their elected representatives and vote wisely. Thus, while there is a tendency to focus on the free speech rights of speakers, the free speech rights of audiences are central in free speech jurisprudence.

In *Citizens United* and its major precursor in the corporate political speech realm, *First National Bank of Boston v. Bellotti*,³³ the Supreme Court emphasized that the Free Speech Clause reached the political speech of corporations not because corporations have the right to speak, but because audiences have the right to hear that political speech. The Supreme Court first underscored speech’s role in participatory democracy: “It is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes.”³⁴ The Court then explained that audiences have the right to political speech even if its source is a corporation. Corporations, after all, “contribute to the ‘discussion, debate, and the dissemination of information and ideas’ that the First Amendment seeks to foster.”³⁵ It is for this reason, and this reason only, that “the Court has ... rejected the argument that political speech of corporations ... should be treated differently [than the speech of natural persons] under the First Amendment.”³⁶

³⁰ The career page of the company’s website states that “Hobby Lobby is an Equal Opportunity Employer.” CAREERS: HOBBY LOBBY, <http://www.hobbylobby.com/careers> (last visited Jan. 5, 2014).

³¹ 558 U.S. 310 (2010).

³² *Hobby Lobby Stores, Inc.*, 723 F.3d at 1135 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (Mem) (2013).

³³ 435 U.S. 765 (1978).

³⁴ *Citizens United*, 558 U.S. at 341.

³⁵ *Id.* at 342 (quoting *Bellotti*, 435 U.S. at 783).

³⁶ *Citizens United*, 558 U.S. at 342 (quoting *Bellotti*, 435 U.S. at 776).

In short, corporate political speech is protected because of audiences' free speech right to receive political information rather than corporations' free speech right to speak. Consequently, while their political speech may be protected, corporations are not actual free speech rights-holders even under *Citizens United*. Furthermore, the audience-focused free speech justification for protecting corporate speech has no counterpart in free exercise jurisprudence. Thus, *Citizen United* provides neither theoretical nor precedential support for corporate religious liberty.

II. THE LACK OF PRECEDENT FOR CORPORATE RELIGIOUS LIBERTY

Not surprisingly, Supreme Court precedent is consistent with a view of the Free Exercise Clause that does not include corporate religious liberty. Indeed, the Supreme Court has never recognized for-profit corporations' right to religious liberty, and as acknowledged by the D.C. Circuit Court of Appeals, "ha[s] expressed strong doubts about that proposition."³⁷ Nonetheless, plaintiffs invoke two lines of cases. The first involves non-profit corporations and the second involves individuals who operated businesses. As it turns out, however, the plaintiffs in the first are essentially churches, while the plaintiffs in the second are individuals. As already discussed, protection for churches and individuals does not lead to protection for for-profit corporations.³⁸

A. NONPROFIT CORPORATION CASES BROUGHT BY CHURCHES

The argument that the Supreme Court has already recognized the free exercise rights of nonprofit corporations, and therefore free exercise rights for for-profit corporations naturally follow, is unavailing for several reasons. First, all but one of the cases actually involved churches. Second, as discussed above, churches hold a distinctive place in religion clause jurisprudence. Third, the non-profit corporation cases actually reflect a healthy degree of skepticism towards corporate religious liberty.

Although plaintiffs argue that it is well-established that the Free Exercise Clause covers nonprofit corporations, they are unable to cite to more than a handful of cases.³⁹ Of these cases, all but one involve churches. The only non-church plaintiffs, the religious schools in *Bob Jones University v. United States*, saw their free exercise challenge summarily rejected.⁴⁰ The schools asserted that they should be exempt from the IRS's anti-discrimination requirements because the regulations clashed with their biblically-based religious beliefs.⁴¹ The Supreme Court assumed without deciding that the schools' religious liberty was at stake, and then held that the state's compelling interest overrode whatever religious burden might exist.⁴² The Supreme Court devoted only a few sentences to dismissing the free exercise claim.⁴³ Given its ambiguous treatment of the schools' religious interests and its unambiguous rejection of the

³⁷ *Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208, 1213-14 (D.C. Cir. 2013).

³⁸ *Cf. Id.* at 1214 ("When it comes to the free exercise of religion ... the [Supreme] Court has only indicated that people and churches worship.").

³⁹ *Hosanna-Tabor*, 132 S. Ct. 694 (2012); *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006); *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. 520 (1993); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

⁴⁰ 461 U.S. 574 (1983).

⁴¹ *Id.* at 602-03.

⁴² *Id.* at 604 (holding that "whatever burden denial of tax benefits [imposed] on petitioners' exercise of their religious beliefs," the state's compelling interest in eliminating discrimination overrode it).

⁴³ *Id.*

schools' suits, *Bob Jones* is too thin a reed upon which to build expansive claims about religious liberty for all incorporated entities.

Furthermore, in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*,⁴⁴ the Court suggested that any concern for the religious liberty of religious organizations probably does not extend to for-profit corporations. In upholding a statutory exemption that allowed religious organizations to discriminate based upon religion in employment,⁴⁵ the concurrences emphasized that the holding is limited to nonprofit organizations⁴⁶ pursuing nonprofit activities.⁴⁷

In short, Supreme Court cases involving religious corporations have been nonprofit churches with one exception in which the Court summarily rejected the free exercise claim. When the Supreme Court has specifically mentioned for-profit corporations, it was to distinguish them from nonprofit religious corporations.

B. BUSINESS CASES BROUGHT BY INDIVIDUALS

Plaintiffs next claim the Supreme Court is poised to recognize free exercise claims of for-profit corporations because it has already recognized the free exercise claims of businesses in *United States v. Lee*⁴⁸ and *Braunfeld v. Brown*.⁴⁹ Neither case supports the religious exemptions sought by Hobby Lobby or Conestoga Wood. First, the plaintiffs in these cases were natural people, not corporations. Second, the Supreme Court expressed great discomfort with religious exemptions for employers that burden their employees.

In *United States v. Lee*, an Amish employer sought an exemption from social security taxes on the grounds that they undermined Amish beliefs about taking care of their own.⁵⁰ Just like plaintiffs opposing the contraception mandate, the plaintiff here believed complying with a government-mandated insurance program would be sinful.⁵¹ Unlike the mandate cases, however, the plaintiff was a person, Edwin D. Lee, not a for-profit corporation. The same was true in *Braunfeld v. Brown*.⁵² In *Braunfeld*, Orthodox Jewish shop owners who closed their shops on Saturday, the Jewish Sabbath, sought exemption from a law requiring retail stores to close on Sunday.⁵³ Even assuming their businesses were incorporated (the briefs and opinions are silent on the issue), Abraham Braunfeld, Isaac Friedman, Alter Diamant, S. David Friedman, and Joseph R. Friedman asserted the religious liberty claims on their own behalf, not on behalf of any business entity.

⁴⁴ 483 U.S. 327 (1987).

⁴⁵ *Id.* at 339.

⁴⁶ *Id.* at 340 (Brennan, J., concurring) (“I write separately to emphasize that my concurrence in the judgment rests on the fact that these cases involve a challenge to the application of § 702’s categorical exemption to the activities of a nonprofit organization.”).

⁴⁷ *Id.* at 348-49 (O’Connor, J., concurring) (noting that the holding is limited to the nonprofit activities of a religious organization and emphasizing that “the question of the constitutionality of the § 702 exemption as applied to for-profit activities of religious organizations remains open”).

⁴⁸ 455 U.S. 252 (1982).

⁴⁹ 366 U.S. 599 (1961).

⁵⁰ 455 U.S. at 257 (“The Amish believe that there is a religiously based obligation to provide for their fellow members the kind of assistance contemplated by the social security system.”).

⁵¹ *Lee*, 455 U.S. at 255.

⁵² The majority and dissent were in agreement on this point. *Braunfeld*, 366 U.S. at 601 (describing plaintiffs as “merchants in Philadelphia who engage in the retail sale of clothing and home furnishings”); *id.* at 611 (Brennan, J., concurring and dissenting) (“[A]ppellants are small retail merchants, faithful practitioners of the Orthodox Jewish faith.”).

⁵³ *Id.* at 611.

Furthermore, in both cases the business owners lost. In rejecting Lee's claim, the Supreme Court emphasized that employers may not impose on their employees in the name of religion:

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.⁵⁴

This passage, whether read expansively or narrowly, suggests that for-profit employers are not entitled to religious exemptions that impose on their employees. Under an expansive reading, religious exemptions are simply not available for commercial actors, even if they are individuals: When religious observers ("followers of a particular sect") voluntarily ("as a matter of choice") engage in commerce ("enter into commercial activity"), they must follow the same rules as other commercial actors even if contrary to their religious practices ("the [religious] limits they accept on their own conduct ... are not to be superimposed on the statutory schemes which are binding on others in that activity").

A more narrow reading of this passage is that commercial actors are not entitled to religious exemptions that interfere with laws designed to protect employees.⁵⁵ For example, the *Lee* Court noted with approval that while social security law exempted religious employers who were self-employed, the exemption did not reach religious employers who employed others.⁵⁶ To do so, as the end of the quotation explains, would be to impose the employer's religious beliefs and practices onto employees who may not share them.⁵⁷

Neither *United States v. Lee* nor *Braunfeld v. Brown*, with their human rather than corporate plaintiffs, supports corporate religious liberty. In fact, even more explicitly than it did in *Amos*, the Supreme Court in *Lee* intimated that free exercise exemptions stop where commercial activity starts. At the very least, for-profit employers are not entitled to a religious exemption if that exemption "operates to impose the employer's religious faith on the employees."⁵⁸

⁵⁴ *Lee*, 455 U.S. at 261.

⁵⁵ *Cf.* *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 294 (1985) ("[B]y entering the economic arena and trafficking in the marketplace, the [religious] foundation has subjected itself to the standards Congress has prescribed for ... employees.") (citation omitted).

⁵⁶ *Lee*, 455 U.S. at 261 ("Congress drew a line in [I.R.C.] § 1402(g), exempting the self-employed Amish but not all persons working for an Amish employer.").

⁵⁷ The Court has also denied religious exemptions even when the employees share their employers' beliefs. In *Tony & Susan Alamo Foundation*, both employers and employees protested application of the Fair Labor Standards Act minimum wage requirements at a religious nonprofit engaged in commercial activities. The Court rejected their Free Exercise Clause claim, holding "[l]ike other employees covered by the Act, the [employees] are entitled to its full protection. Furthermore, application of the Act to the Foundation's commercial activities is fully consistent with the requirements of the First Amendment." 471 U.S. at 305.

⁵⁸ *Lee*, 455 U.S. at 261.

III. THE HARM OF CORPORATE RELIGIOUS LIBERTY

Religious exemptions for for-profit corporations are problematic not just because they are without theoretical or precedential foundation, but because they will harm actual living employees. To start, for-profit corporations will seek exemptions from laws—such as the contraception mandate—that are meant to protect their employees. In addition, corporate religious liberty will come at the expense of employees' individual religious liberty.

Religious accommodations have always raised the concern that religious observers would become above the law.⁵⁹ This worry is less pressing when the exemption does not impose on others.⁶⁰ But often religious exemptions do burden others. When a Sabbath observer refuses weekend shifts, odds are a co-worker will be stuck with them.⁶¹ The greater the burden-shifting, the more problematic the exemption.⁶² When considering the issue in the health care context, recall that the contraception mandate applies only to corporations with more than fifty employees. To grant large corporate businesses an exemption is to affect hundreds (Conestoga) if not thousands (Hobby Lobby). Furthermore, these corporations are seeking exemptions from laws that are designed to protect employees. What basic healthcare or wage security or workplace safety laws for employees might be challenged next?⁶³ Corporate religious liberty would leave employee protections vulnerable to religious exemptions.

To make matters worse, granting religious exemptions to for-profit corporations will exacerbate the power imbalance between employers and employees. There is no denying the immense power of corporations. As Justice Stevens observed in his *Citizens United* dissent, corporations “inescapably structure the life of every citizen.”⁶⁴ This enormous power is no less true vis-à-vis their own employees. Indeed, the inequality between for-profit corporations and those who labor for them is unfortunately a defining characteristic of American society. While corporations' power over employees is not the same as the government's, it is potentially just as coercive. This is especially true when the corporation is the gatekeeper to basic human needs like preventive health care.⁶⁵ Thus, exempting for-profit employers from laws meant to protect employees will increase their power to the detriment of their employees.

⁵⁹ *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 879 (1990) (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1878)) (“Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”).

⁶⁰ For example, allowing sacramental use of hoasca, an otherwise illegal drug, does not burden any third party. *Cf. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

⁶¹ *Cf. Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985).

⁶² Frederick Mark Gedicks and Rebecca Van Tassell argue that when the burden-shifting is great enough, as it is with the contraception mandate cases, the religious exemption violates the Establishment Clause. *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. (forthcoming 2014).

⁶³ See, e.g., *Hobby Lobby Stores, Inc.*, 723 F.3d at 1174 n.8 (Briscoe, C. J., concurring in part and dissenting in part) (arguing that corporate religious liberty might let corporations owned by Jehovah Witnesses exclude blood transfusions from their health care policies, Scientologist corporations exclude antidepressants or emergency psychiatric care, and Muslim, Jewish or Hindu owned business exclude any medical treatment that contain pig or cow, including anesthesia, intravenous fluids, and gelatin-coated pills); *Korte v. Sebelius*, 735 F.3d 654, 691-92 (7th Cir. 2013) (Rovner, J., dissenting) (arguing that corporate religious liberty might let corporations deny FMLA leave to same-sex parents).

⁶⁴ *Citizens United*, 558 U.S. at 465 (Stevens, J., dissenting).

⁶⁵ The contraception mandate litigation would have been avoided if the United States had government-provided single payer health care as most other industrialized countries do.

Even more troubling for those who place a premium on religious conscience, corporate religious liberty will potentially trample on employees' religious rights. Religious obligations can point towards contraception use as well as away from it. For example, according to one expert, "in the thinking of mainstream Protestant Christian Ethics ... nearly no aspect of life is more sacred, closer to being human in relation to God, than bringing new life into the world to share in the gift of God's grace and God's covenant."⁶⁶ Parents should not bring new life into the world unless "the conditions into which the new life is being born will sustain that life in accordance with God's intention for the life to be fulfilled."⁶⁷

Consequently, a corporation's withholding of contraception coverage will impose on, for example, a mother who has strong beliefs, beliefs rooted in her deeply-held faith, that she could not fulfill her parental responsibilities if she had any (more) children. In other words, enabling a large corporation to act according to its beliefs will make it harder for employees to follow theirs. Maybe this burden shifting from employer to individual employee would be acceptable if association were entirely voluntary. But in the case of employees of for-profit corporations, it is not. The end result is that recognizing corporate religious liberty will make religious liberty more available for the elite, and more scarce for everyone else.

CONCLUSION

Corporate religious liberty is theoretically unjustified, without precedent, and potentially very harmful. The Free Exercise Clause and the Religious Freedom Restoration Act are meant to protect human beings—their relationship with God, their inherent dignity, and their voluntary religious associations. None of these rationales apply to for-profit corporations. Not surprisingly, while the Supreme Court has recognized the religious liberty of individuals and of churches, it has never extended religious liberty to for-profit corporations. On the contrary, the Court has suggested that free exercise exemptions are not available to employers in the commercial context if they "impose the employer's religious faith on the employees."⁶⁸ Finally, corporate religious exemptions privilege the (illogical) "religious rights" of powerful corporations over the employment rights and religious rights of employees.

⁶⁶ *McRae v. Califano*, 491 F.Supp. 630, 700 (E.D.N.Y. 1980), *rev'd sub nom.*, *Harris v. McRae*, 448 U.S. 297 (1980).

⁶⁷ *McRae*, 491 F.Supp. at 700.

⁶⁸ *Lee*, 455 U.S. at 261.

The Constitutional Case for Limiting Public Carry*

Lawrence Rosenthal**

Perhaps the single most important question arising in the wake of the Supreme Court’s holding that the Second Amendment protects an individual right to keep and bear arms, even for purposes unrelated to service in an organized militia, is whether the Constitution permits limitations on the ability to carry firearms in public. For high-crime, unstable urban neighborhoods, an absolute constitutional right to carry firearms would likely cripple the type of problem-oriented, preventative policing that has successfully driven guns and drugs off of many urban streetscapes and has produced concomitant reductions in violent crime. This Issue Brief addresses the constitutional status of laws that endeavor to facilitate preventative policing by limiting the right to carry firearms in public.

I. INTRODUCTION

The Second Amendment is the only provision in the Bill of Rights with a preamble: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”¹ Relying on the Second Amendment’s preamble, which contemplates that those exercising the right to keep and bear arms should be “well regulated,” and the U.S. Supreme Court’s approach when the government attempts to regulate other core rights, this Issue Brief attempts to define the scope of the government’s power to regulate the ability of individuals to carry firearms in public places.

Contemporary Second Amendment jurisprudence is traceable to the Supreme Court’s 5-4 decision in *District of Columbia v. Heller*,² recognizing, for the first time, an individual right to keep and bear arms. Relying on evidence of what the terms of the Second Amendment meant in the framing era, a majority of the Court concluded that the “right of the People” referred to an individual right,³ while “Arms” included “all instruments that constitute bearable arms, even those that were not in existence at the time of the founding,”⁴ but excluded “dangerous and unusual weapons.”⁵ The right to “keep” arms, the majority concluded, meant the right to possess them,⁶ and the right to “bear” arms meant the right to “carry[] for a

* This Issue Brief was initially published in December 2014.

** Professor of Law, Chapman University Fowler School of Law. This paper is adapted from *The Limits of Second Amendment Originalism and the Constitutional Case for Gun Control*, which will appear in the Washington University Law Review. A pre-publication draft is available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2414681.

¹ U.S. CONST. amend. II.

² 554 U.S. 570 (2008).

³ *Id.* at 579–81.

⁴ *Id.* at 581, 582.

⁵ *Id.* at 627.

⁶ *Id.* at 582.

particular purpose—confrontation.”⁷ As for the preamble, the majority concluded that it would not have been understood in the framing era to “limit or expand the scope of the operative clause,” but instead merely “announce[d] the purpose for which the right was codified: to prevent elimination of the militia.”⁸

The Court then considered whether the right to keep and bear arms was infringed by the District’s prohibition on the registration and possession of handguns and its requirement that firearms be locked or otherwise stored in an inoperable condition. The Court wrote that “the inherent right of self-defense has been central to the Second Amendment right,” adding that the District of Columbia’s “handgun ban amounts to a prohibition on an entire class of ‘arms’ that is overwhelmingly chosen by American society for that lawful purpose,” and that the ban “extends, moreover, to the home, where the need for defense of self, family, and property is most acute.”⁹ The Court noted that “[f]ew laws in the history of our Nation have come close to the severe restriction of the District of Columbia’s handgun ban. And some of them have been struck down.”¹⁰ Inasmuch as “the American people have considered the handgun to be the quintessential self-defense weapon,” it follows, the Court wrote, that “a complete prohibition on their use is invalid.”¹¹ As for the trigger-lock requirement, because it required that “firearms in the home be kept inoperable at all times,” this prohibition “makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional.”¹²

II. THE STAKES

It takes little imagination to see how an expansive conception of Second Amendment rights that undermines virtually all gun regulation could facilitate criminal activity. For example, there is considerable evidence that members of criminal street gangs carry firearms at elevated rates.¹³ The same is true of those involved in drug trafficking.¹⁴ This should not be surprising; those engaged in unlawful but intensely competitive enterprises will often turn to violence as a means of enhancing their position in illegal, if lucrative, markets. For example, there is ample evidence that homicides spiked in major cities following the introduction of crack cocaine,

⁷ *Id.* at 584. In his dissent, to which Justice Souter, Justice Ginsburg and Justice Breyer joined, Justice Stevens asserted that, “there is no indication that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution.” *Id.* at 637 (Stevens, J., dissenting).

⁸ *Id.* at 578, 599.

⁹ *Id.* at 628.

¹⁰ *Id.* at 619.

¹¹ *Id.* at 629.

¹² *Id.* at 630.

¹³ See, SCOTT H. DECKER & BARRICK VAN WINKLE, *LIFE IN THE GANG: FAMILY, FRIENDS, AND VIOLENCE* 175–76 (1996); JOSEPH E. SHELEY & JAMES D. WRIGHT, *IN THE LINE OF FIRE: YOUTHS, GUNS, AND VIOLENCE IN URBAN AMERICA* 95–103 (1995); Scott H. Decker, *Youth Gangs and Violent Behavior*, in *THE CAMBRIDGE HANDBOOK OF VIOLENT BEHAVIOR AND AGGRESSION* 388, 391–92 (Daniel J. Flannery et al. eds., 2007) [hereinafter *CAMBRIDGE HANDBOOK OF VIOLENT BEHAVIOR*]; C. Ronald Huff, *Comparing the Criminal Behavior of Youth Gangs and At-Risk Youth*, in *AMERICAN YOUTH GANGS AT THE MILLENNIUM* 78, 83 (Finn-Aage Esbensen, Stephen F. Tibbets & Larry Gaines eds., 2004) [hereinafter *GANGS AT THE MILLENNIUM*]; Alan J. Lizotte et al., *Factors Influence Gun Carrying Among Urban Males Over the Adolescent-Young Adult Life Course*, 38 *CRIMINOLOGY* 811, 812–13 (2000).

¹⁴ See, e.g., SHELEY & WRIGHT, *supra* note 13, at 75–76, 83–93; Lizotte et al., *supra* note 13, at 814–16, 826–28.

which created new competitive opportunities and pressures.¹⁵ The prevalence of violent competition, in turn, is likely to increase the rate at which offenders, and others in the community, carry firearms.

Indeed, gang researchers have found that the prevalence of violence in gang-dominated neighborhoods serves to make firearms more pervasive in those communities.¹⁶ Researchers have similarly found that a perception of danger in high-crime neighborhoods becomes a stimulus for the carrying of firearms as a means of self-protection.¹⁷ As Jeffrey Fagan and Deanna Wilkinson's ethnographic study of at-risk youth in New York explains, when inner-city youth live under the increasing threat of violence in an environment in which firearms are prevalent, not only are they more likely to arm themselves, but they become increasingly likely to respond to real or perceived threats and provocations with lethal violence, creating what Fagan and Wilkinson characterize as a contagion effect.¹⁸ A study of homicide in New York, for example, found evidence that firearms violence stimulated additional firearms-related violence in nearby areas.¹⁹ Fagan and Wilkinson have labeled this phenomenon an "ecology of danger" in which the need to carry firearms and be prepared to use them came to be seen as essential.²⁰ Ironically, this does not make those who carry firearms in high-crime neighborhoods safer; to the contrary, even though gang members carry firearms at elevated rates, they also experience vastly higher homicide victimization rates than the public at large.²¹

Some have claimed that laws expanding the right to carry firearms in public, specifically permitting concealed carry of firearms, have produced reductions in crime.²² This conclusion has faced fierce criticism.²³ Even a leading advocate for the right to possess firearms has pronounced the evidence in support of this theory

¹⁵ See, e.g., ALFRED BLUMSTEIN & JACQUELINE COHEN, DIFFUSION PROCESSES IN HOMICIDE 6–9 (Nat'l Crim. Just. Ref. Serv., July 17, 1999); Alfred Blumstein & Joel Wallman, *The Crime Drop and Beyond*, 2006 ANN. REV. SOC. SCI. 125, 131 (2006).

¹⁶ See, e.g., James C. Howell, *Youth Gang Homicide: A Literature Review*, 45 CRIME & DELINQ. 208, 216 (1999).

¹⁷ See BLUMSTEIN & COHEN, *supra* note 15, at 4–5; SHELEY & WRIGHT, *supra* note 13, at 102–03, 110–13; Jeffrey Fagan & Deanna Wilkinson, *Guns, Youth Violence, and Social Identity*, in CRIME AND JUSTICE VOL. 24: YOUTH VIOLENCE 105, 174 (Michael Tonry & Mark H. Moore eds., 1998); Lizotte et al., *supra* note 13, at 813–14.

¹⁸ See Fagan & Wilkinson, *supra* note 17.

¹⁹ See Jeffrey Fagan, Deanna L. Wilkinson & Garth Davies, *Social Contagion of Violence*, in CAMBRIDGE HANDBOOK OF VIOLENT BEHAVIOR, *supra* note 13, at 688, 701–10. For a similar finding about Chicago, see Elizabeth Griffiths & Jorge M. Chavez, *Communities, Street Guns and Homicide Trajectories in Chicago, 1980–1995: Merging Methods for Examining Homicide Trends Across Space and Time*, 42 CRIMINOLOGY 941, 965–69 (2004).

²⁰ Fagan & Wilkinson, *supra* note 17, at 174.

²¹ See, e.g., DECKER & VAN WINKLE, *supra* note 13, at 173; Sudhir Venkatesh, *The Financial Activity of a Modern American Street Gang*, in GANGS AT THE MILLENNIUM, *supra* note 13, at 239, 242. Gang members also appear to experience other forms of violent victimization at elevated rates. See, e.g., Chris L. Gibson et al., *Using Propensity Score Matching to Understand the Relationship between Gang Membership and Violent Victimization: A Research Note*, 26 JUSTICE Q. 624, 639–41 (2012).

²² See, e.g., JOHN R. LOTT, JR., MORE GUNS, LESS CRIME 170–336 (3d ed. 2010); John R. Lott & David B. Mustard, *Crime, Deterrence, and Right-To-Carry Concealed Handguns*, 26 J. LEG. STUD. 1 (1997).

²³ See, e.g., NAT'L RES. COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 125–51 (Charles F. Wellford et al. eds., 2005); DAVID HEMENWAY, PRIVATE GUNS, PUBLIC HEALTH 100–04 (2004); ROBERT J. SPITZER, THE POLITICS OF GUN CONTROL 69–73 (5th ed. 2012); see MARK V. TUSHNET, OUT OF RANGE: WHY THE CONSTITUTION CAN'T END THE BATTLE OVER GUNS 85–95 (2007).

unpersuasive.²⁴ Furthermore, no gun rights advocate has claimed that expanding concealed carry in high-crime, urban neighborhoods—where levels of drug and gang-related violence are common—reduces crime. As we have seen, for example, gang members and drug traffickers carry firearms at elevated rates but also experience elevated rates of homicide victimization. Similarly, the fact that permit-holders under existing schemes seem unlikely to commit crimes does not necessarily apply if a robust Second Amendment right ultimately made the right to carry available to a far broader class of individuals.

A related claim is that firearms are used for defensive purposes at very high rates.²⁵ While other work has cast great doubt on this claim, even the advocates of this view concede that increasing the number of residents carrying firearms does not operate to make high-crime neighborhoods safer.²⁶ To the contrary, there is good reason to suspect that the prevalence of firearms in such neighborhoods produced the phenomenon of the drive-by shooting, which is a common tactic of criminal street gangs.²⁷ When gang members believe that an intended target may be armed, they are more likely to employ this tactic because it enables them to both approach and leave the target quickly and enjoy the benefits of tactical surprise.²⁸ Finally, some argue that history suggests that racial and other minorities have found firearms of particular value for purposes of self-defense, although these claims are unaccompanied by empirical evidence that the use of firearms have enabled minorities to achieve acceptable (or even enhanced) levels of personal security.²⁹ The persistence of high rates of firearms-related crime and its contagion effects instead suggest a powerful argument to the contrary. The presence of guns in high-crime areas, it seems, serves to perpetuate violence and crime in these areas.

It would seem to follow that police tactics designed to make it more difficult and risky for offenders to carry guns in public would reduce the risk of violent confrontation and increase the difficulties facing criminal enterprises engaged in violent competition. Indeed, there is something approaching consensus among criminologists that one of the very few interventions that consistently reduces rates of violent crime involves aggressive patrols targeting statistical concentrations of crime and focusing

²⁴ See Gary Kleck, *Gun Control after Heller and McDonald: What Cannot Be Done and What Ought To Be Done*, 39 FORDHAM URB. L.J. 1383, 1411–15 (2012).

²⁵ See, e.g., GARY KLECK, TARGETING GUNS: FIREARMS AND THEIR CONTROL 193–211 (1995).

²⁶ See, e.g., PHILIP J. COOK & JENS LUDWIG, U.S. DEP'T OF JUSTICE, GUNS IN AMERICA: NATIONAL SURVEY ON PRIVATE OWNERSHIP AND USE OF FIREARMS 8–11 (May 1997); HEMENWAY, *supra* note 23, at 66–69, 239–40; SPITZER, *supra* note 23, at 64–65.

²⁷ See, e.g., H. Range Hutson et al., *Drive-by Shootings by Violent Street Gangs in Los Angeles: A Five-Year Review from 1989 to 1993*, 3 ACAD. EMERGENCY MED. 300, 302 (1996).

²⁸ See WILLIAM B. SANDERS, GANGBANGS AND DRIVE-BYS: GROUNDED CULTURE AND JUVENILE GANG VIOLENCE 65–74 (1994).

²⁹ See, e.g., Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 349–58 (1991); Nicholas Johnson, *Firearms Policy and the Black Community: An Assessment of Modern Orthodoxy*, 45 CONN. L. REV. 1491, 1516–53 (2012).

on finding guns.³⁰ There is, for example, substantial evidence that stop-and-frisk tactics targeting these statistical “hot spots” have played an important role in New York City’s crime decline.³¹ Although, there is evidence as well that in recent years New York’s enthusiasm for a tactic that it regards as effective has produced such high rates of stop-and-frisk that the tactic has perhaps reached, if not exceeded, the point of diminishing returns.³²

If the Second Amendment conferred a right to carry firearms in public, however, the ability to execute a policing strategy aimed at driving guns off the streetscape would be sharply circumscribed, if not altogether eliminated. The Fourth Amendment’s prohibition on unreasonable search and seizure, for example, permits the use of stop-and-frisk tactics only when an officer reasonably believes that criminal activity is afoot.³³ If the Second Amendment granted individuals a right to carry firearms in public, the Fourth Amendment would necessarily prohibit search and seizure based on a police officer’s reasonable belief that an individual was armed.³⁴ Even if a permit were required to carry firearms in public places, if the Second Amendment were understood to require that permits be made liberally available, the Fourth Amendment could well prohibit any form of investigative detention to determine if an individual reasonably believed to be carrying firearms had the proper permit, just as it prohibits the police from stopping vehicles to determine if drivers possess the requisite license and registration.³⁵

³⁰ See NAT’L RES. COUNCIL, *supra* note 23, at 230–35; Blumstein & Wallman, *supra* note 15, at 136–37; Jacqueline Cohen & Jens Ludwig, *Policing Crime Guns*, in *EVALUATING GUN POLICY: EFFECTS ON CRIME AND VIOLENCE* 217, 238–39 (Jens Ludwig & Philip J. Cook eds., 2003); Philip J. Cook, Anthony A. Braga & Mark H. Moore, *Gun Control*, in *CRIME AND PUBLIC POLICY* 257, 289 (James Q. Wilson & Joan Petersilia eds., 2010); Jens Ludwig, *Better Gun Enforcement, Less Crime*, 4 *CRIMINOLOGY & PUB. POL’Y* 677, 701–08 (2005); Edward F. McGarrell, *Reducing Firearms Violence Through Directed Patrol*, 1 *CRIMINOLOGY & PUB. POL’Y* 119, 126–30 (2001); Lawrence W. Sherman, *Reducing Gun Violence: What Works, What Doesn’t, What’s Promising*, in *PERSPECTIVES ON CRIME AND JUSTICE: 1999–2000 LECTURE SERIES* 69, 78–79 (2001); Lawrence W. Sherman & John E. Eck, *Policing for Crime Prevention*, in *EVIDENCE-BASED CRIME PREVENTION* 295, 308–10 (Lawrence W. Sherman et al. eds., rev. 2006); Lawrence W. Sherman & Dennis Rogan, *Effects of Gun Seizures on Gun Violence: Hot Spots Patrol in Kansas City*, 12 *JUST. Q.* 673, 675–86 (1995); Cody W. Telep & David Weisburd, *What Is Known About the Effectiveness of Police Practices in Reducing Crime and Disorder?*, 15 *POLICE Q.* 331, 340–41 (2012).

³¹ See, DENNIS C. SMITH & ROBERT PURTELL, *AN EMPIRICAL ASSESSMENT OF NYPD’S “OPERATION IMPACT”: A TARGETED ZONE CRIME REDUCTION STRATEGY* 49–50 (2007); FRANKLIN E. ZIMRING, *THE CITY THAT BECAME SAFE: NEW YORK’S LESSONS FOR URBAN CRIME CONTROL* 131–44 (2012); Jeffrey Fagan, Garth Davies & Jan Holland, *The Paradox of the Drug Elimination Program in New York City Public Housing*, 13 *GEO. J. ON POVERTY L. & POL’Y* 415, 418, 442–53 (2006); David Weisburd, Cody W. Telep & Brian A. Lawton, *Could Innovations in Policing Have Contributed to the New York City Crime Drop even in a Period of Declining Police Strength? The Case of Stop, Question, and Frisk as a Hot Spots Policing Strategy*, ___ *JUSTICE Q.* ___ (forthcoming), available at <http://www.tandfonline.com/doi/abs/10.1080/07418825.2012.754920#preview>.

³² See, e.g., Stephen J. Schulhofer, Tom R. Tyler & Aziz Z. Huq, *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 *J. CRIM. L. & CRIMINOLOGY* 335, 349–53 (2011).

³³ See, e.g., *Florida v. J.L.*, 529 U.S. 266, 269–74 (2000).

³⁴ For an opinion discussing the potential of the Second Amendment to circumscribe stop-and-frisk tactics directed at armed suspects, see *United States v. Williams*, 731 F.3d 678, 690–94 (7th Cir. 2013) (Hamilton, J., concurring in part and concurring in the judgment).

³⁵ See *Delaware v. Prouse*, 440 U.S. 648, 655–63 (1979) (stops of vehicles to check license and registration violate the Fourth Amendment in the absence of probable cause, or at least reasonable suspicion that the driver does not have proper license and registration or has committed some other offense); see also *City of Indianapolis v. Edmond*, 531 U.S. 32, 40–48 (2000) (road blocks in high-crime areas where all vehicles are stopped and checked for guns and drugs violate the Fourth Amendment).

In addition to prohibiting police from independently inquiring about an individual's authorization to carry a firearm, laws targeting possession or carrying of firearms by only convicted felons are of limited efficacy in preventing violent crimes. One leading study found that only about 43 percent of adult homicide offenders in Illinois had a prior felony conviction.³⁶ Another found that about 41 percent of adults arrested for felony homicide and just 30 percent of adults arrested for all felonies in Westchester County, New York, had a prior felony conviction, and just 33 percent of all adults arrested for felonies in New York State had a prior felony conviction.³⁷ Thus, even assuming officers on patrol can effectively enforce these laws by somehow identifying convicted felons on the streetscape through tactics consistent with the Fourth Amendment, these laws would permit many offenders to remain armed, and perhaps even prompt drug traffickers and criminal street gangs to recruit younger individuals without criminal records to lawfully carry the firearms necessary to protect their criminal enterprises.

In short, a broad Second Amendment right to carry firearms in public would likely pose a substantial inhibition on the ability of the authorities to prevent violent crime—and thereby disrupt the ecology of danger in high-crime neighborhoods—through regulations that make it risky to carry guns in public.

III. THE PUZZLE OF REGULATORY POWER IN *HELLER*

In *Heller*, the Supreme Court went to some lengths to make clear that some limitations on the right to keep and bear arms—that is, to possess and carry firearms in case of confrontation—are consistent with the Second Amendment. The Court wrote: “Like most rights, the right secured by the Second Amendment is not unlimited.”³⁸ “For example,” the Court observed, “the majority of 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or its state analogues.”³⁹ Moreover, “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons or the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools or government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”⁴⁰ The Court added that it “identif[ied] these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.”⁴¹ In a subsequent decision, in which the Court concluded that the Second Amendment is applicable to state and local governments through the Fourteenth Amendment, four of the five Justices in the majority referred to *Heller*'s discussion of presumptively lawful regulations, stating that “[d]espite municipal respondents’ doomsday proclamations, incorporation does not imperil every law regulating firearms.”⁴²

It is not obvious, at least at first blush, how to reconcile the Second Amendment, as interpreted in *Heller*, with the very laws that the Court labeled presumptively

³⁶ See Philip J. Cook, Jens Ludwig & Anthony A. Braga, *Criminal Records of Homicide Offenders*, 294 JAMA 598 (2005).

³⁷ See Philip J. Cook, *Q&A on Firearms Availability, Carrying, and Misuse*, 14 N.Y. ST. BAR ASS'N GOV'T L. & POL'Y J. 77, 80 (2012).

³⁸ *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

³⁹ *Id.* (citations omitted).

⁴⁰ *Id.* at 626–27 (footnote omitted).

⁴¹ *Id.* at 627 n.26.

⁴² *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3047 (2010) (plurality opinion).

lawful, even though those laws prevent some individuals from exercising their right to keep and bear arms—that is, to possess and carry firearms in common civilian use. Consider, for example, statutory prohibitions on the possession of firearms by convicted felons. As Professor Eugene Volokh has observed, “[f]elons may need arms for lawful self-defense as much as the rest of us do.”⁴³ Thus, if *Heller* prohibits all laws that impose very severe burdens on an individual right of armed self-defense, it is entirely unclear why convicted felons can be entirely deprived of that right consistent with *Heller*’s account of the Second Amendment’s original meaning.

It is unclear how to reconcile *Heller*’s focus on the original meaning of the Second Amendment with prohibitions on the possession of firearms by convicted felons. These laws have little originalist support; they did not become common until early in the twentieth century in the wake of a crime wave following the First World War.⁴⁴ Don Kates nevertheless argued that these laws can be sustained because most felonies in the framing era were punished by death and forfeiture of property, effectively extinguishing the right to keep and bear arms in a manner analogous to contemporary laws barring felons from possessing firearms.⁴⁵ Kevin Marshall, however, has observed that the imposition of capital punishment and forfeiture upon a felony conviction was far from universal in the framing era.⁴⁶ Even absent the universal imposition of capital punishment and forfeiture, Kates and others have contended that framing-era rhetoric often associated the right to bear arms with the full membership in the polity afforded to law-abiding citizens, which could presumably be forfeited as a consequence of criminal misconduct.⁴⁷ Marshall and others have replied that, although there were some framing-era proposals that would have carved out from the right to bear arms those who had committed crimes or were otherwise dangerous or untrustworthy, the text of the Second Amendment was not framed in those terms; indeed, it protected a right of all people, not merely those regarded as virtuous or law-abiding.⁴⁸ All this suggests that we have some analytical work to do if we are to reconcile prohibitions on the possession of firearms by convicted felons with the majority’s reading of the Second Amendment in *Heller*.

Heller’s most direct consideration of laws limiting the ability of individuals to carry firearms in public is its discussion of the presumptive validity of laws prohibiting the carrying of concealed weapons. In the 1820s and 30s, laws prohibiting the

⁴³ Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1499 (2009).

⁴⁴ See, e.g., C. Kevin Marshall, *Why Can’t Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL’Y 695, 698–728 (2009).

⁴⁵ See Don B. Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 266 (1983).

⁴⁶ See Marshall, *supra* note 44, at 714–16. For helpful explications of the limited use of capital punishment for felony convictions in the framing era, see, e.g., STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 53–70, 94–100 (2002); Jeffrey K. Sawyer, “Benefit of Clergy” in *Maryland and Virginia*, 34 AM. J. LEG. HIST. 49, 57–67 (1990).

⁴⁷ See, e.g., Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations and Criminological Considerations*, 60 HASTINGS L.J. 1339, 1359–62 (2009); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 480–81 (1995).

⁴⁸ See Carlton F.W. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1374–76 (2009); Marshall, *supra* note 44, at 712–13; Allen Rostron, *Justice Breyer’s Triumph in the Third Battle Over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 731–32 (2012).

carrying of concealed firearms emerged in the wake of a surge in violent crime.⁴⁹ Although laws prohibiting open carry were more often than not invalidated, concealed-carry bans were generally upheld against constitutional challenge under the Second Amendment or state-law analogues.⁵⁰ Some commentators find originalist support for these laws in the fourteenth-century Statute of Northampton, which they believe was understood as a broad prohibition on carrying firearms because of their potential to alarm others.⁵¹ Yet, a concealed weapon, precisely because it is hidden from view, cannot alarm others unaware of its presence. Instead, as Professor Volokh has noted, those jurisdictions that drew a distinction between concealed and open carry seem to have proceeded on the view that law-abiding persons carried weapons openly, while concealed carry was thought suspicious or threatening.⁵² There is ample expression in nineteenth-century decisions to this effect.⁵³ Professor Volokh rightly questions, however, whether this view has fair application to contemporary circumstances, in which many might find open carry far more alarming than a discreetly concealed firearm.⁵⁴ There is surely more than a little merit to this point. Thus, whether framing-era practice provides fair analogical support for analyzing the contemporary scope of the right to carry weapons in public, whether openly or concealed, is far from clear.

In short, we have yet to discover how to reconcile the operative clause of the Second Amendment—conferring as it does, at least according to a majority of the Supreme Court, an unqualified individual right to possess and carry firearms—with the laws regarding both convicted felons and concealed carry that the Court has labeled presumptively lawful.

IV. REGULATORY POWER AND THE PREAMBLE

Perhaps we are unable to reconcile the Second Amendment with what the Supreme Court described as longstanding and presumptively lawful regulations because we have confined our consideration of the Second Amendment to its operative clause. By

⁴⁹ See, e.g., CLAYTON E. CRAMER, *CONCEALED WEAPON LAWS OF THE EARLY REPUBLIC: DUELING, SOUTHERN VIOLENCE, AND MORAL REFORM* 2–3, 139–41 (1999); ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* 166–69 (2011); Robert Leider, *Our Non-Originalist Right To Bear Arms*, 89 IND. L.J. 1587, 1599–601 (2014).

⁵⁰ See, e.g., CRAMER, *supra* note 49, at 4; Saul Cornell & Nathan DeDino, *A Well-Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 516–17 (2005); Leider, *supra* note 49, at 1606–19; Jonathan Meltzer, Note, *Open Carry for All: Heller and Our Nineteenth-Century Second Amendment*, 123 YALE L.J. 1486, 1510–16 (2014).

⁵¹ See, e.g., Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 CLE. ST. L. REV. 1, 8–30 (2012); Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1317–18 (2009).

⁵² See Volokh, *supra* note 43, at 1522–23. For an analysis along similar lines, see Meltzer, *supra* note 50, at 1518–20; and Leider, *supra* note 49, at 1602–05.

⁵³ See, e.g., *State v. Reid*, 1 Ala. 612, 1840 WL 229 *3 (1840) (“[A] law which is intended merely to promote personal security, and to put down lawless aggression and violence, and to that end inhibits the wearing of certain weapons, in such a manner as is calculated to exert an unhappy influence upon the moral feelings of the wearer, by making him less regardful of the personal security of others, does not come in collision with the constitution.”); *Nunn v. State*, 1 Kelly 243, 1846 WL 1167 *8 (Ga. 1846); *State v. Smith*, 11 La. Ann. 633, 1856 WL 4793 (La. 1856) (“Th[e Second Amendment] was never intended to prevent the individual States from adopting such measures of police as might be necessary, in order to protect the orderly and well disposed citizens from the treacherous use of weapons not even designed for any purpose of public defence, and used most frequently by evil-disposed men who seek an advantage over their antagonists, in the disturbances and breaches of the peace which they are prone to provoke.”).

⁵⁴ See Volokh, *supra* note 43, at 1521–23.

referring to the existence of “[a] well regulated Militia,” the preamble expressly contemplates continued regulatory authority. Moreover, *Heller* concluded that the original meaning of the term “Militia” refers not to “the organized militia,” but rather “all able bodied men.”⁵⁵ Thus, the Court added, the militia was originally understood as comprised of “the body of all citizens capable of military service, who would be expected to bring the sorts of lawful weapons that they possessed at home to militia duty.”⁵⁶ Thus, the class that is to be “well regulated” consists of all who are able-bodied and capable of military service, regardless of whether they are actually enrolled in an organized militia. In short, *Heller* treats the militia and those entitled to exercise the right to keep and bear arms as, for all practical purposes, synonymous. Moreover, given that the framing-era understanding was that the right would be exercised by those subject to regulatory authority, it would do serious violence to the original understanding to disaggregate the right from the existence of regulatory authority.

As for the original meaning of the phrase “well regulated,” the first edition of Webster’s dictionary defined “regulated” as “[a]djusted by rule, method or forms; put in good order; subjected to rules or restrictions.”⁵⁷ *Heller*, for its part, stated that the original meaning of the phrase was “the imposition of proper training and discipline.”⁵⁸ These terms, of course, are expansive. They contemplate not merely training, but also rules and “discipline,” which could conceivably embrace everything from a forfeiture of the right to keep and bear arms as a consequence of misconduct, to a variety of prophylactic measures that endeavor to reduce the likelihood of misconduct.⁵⁹

Thus, even utilizing the same methodology the Court embraced in *Heller*, premised on the Court’s account of the purported original meaning of the Second Amendment, we find ample power to enact prophylactic regulations. Plainly, a “well regulated Militia” could well be subject to a variety of prophylactic rules intended to minimize the likelihood of misconduct, rather than only to rules that punish misconduct after-the-fact. Indeed, we have seen prophylactic firearms regulation throughout history, from the early nineteenth-century prohibitions on concealed carry to the more recent prohibitions on the possession of firearms by convicted felons. In the framing era, classes of individuals such as slaves, freed blacks, and people of mixed race were frequently prohibited from owning or carrying guns. Some states even

⁵⁵ *District of Columbia v. Heller*, 554 U.S. 570, 596 (2008) (citing the Act of May 8, 1792, ch. 33, 1 Stat. 271) (The Court added that the first militia act, enacted the year after the Second Amendment’s ratification, defined the militia as “each and every free, able-bodied white male citizen between the ages of 18 and 45 . . .”).

⁵⁶ *Id.* at 627. This capacious definition of “Militia” is consistent with that of most scholars who have advanced the view that the Second Amendment protects an individual right. *See, e.g.*, Kates, *supra* note 45, at 214–18.

⁵⁷ NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 54 (1828); *see also* SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE IN WHICH WORDS ARE DEDUCED FROM THEIR ORIGINALS cdlxxvi (6th ed. 1785) (defining “regulate” as “[t]o adjust by rule or method” or “[t]o direct”).

⁵⁸ *Heller*, 554 U.S. at 597.

⁵⁹ *See, e.g.*, Miller, *supra* note 51, at 1318–19 (“The imposition of proper discipline assumes someone with authority to impose discipline and presumes some consequence for drilling without adequate discipline [O]nce the people exercise their right to keep and bear arms as a people’s militia and spill out into the street, then that right is textually constrained by the militia clauses in the Constitution. Those clauses curtail the authority of the people’s militia to assemble spontaneously.”) (footnotes omitted). For a discussion of the evidence demonstrating that the framing generation regarded broad and effective regulation of the militia as critical, *see* Patrick J. Charles, *The Constitutional Significance of a “Well-Regulated Militia” Asserted and Proven with Commentary on the Future of Second Amendment Jurisprudence*, 3 NORTHEASTERN U.L.J. 1, 5–7, 87–97 (2011).

extended the bar to Catholics or whites unwilling to swear allegiance to the Revolution. It was widely believed by both England and the Founders that only those loyal to the government possessed a right to bear arms, with others facing sanctions including disarmament.⁶⁰ Laws requiring the safe storage of firearms or gunpowder or barring loaded firearms indoors were common as well.⁶¹

To be sure, a fair construction of the Second Amendment must accommodate both the right found in the operative clause and the regulatory authority acknowledged in the preamble. Fortunately, the problem of accommodating a core right and legitimate regulatory interests is not a new one in constitutional law. The Court has frequently addressed this tension through a methodology that assesses the extent of the burden placed on the core right, such as free speech, reproductive freedom, and travel, by a challenged regulation. For example, the First Amendment protects the right to speech, press and association, but there are any number of legitimate governmental interests that support regulation in a variety of areas, including the political process. Similarly, with respect to abortion, the Court has faced the challenge of attempting to balance both right and regulatory authority, with the Court concluding that a woman has a cognizable liberty interest under the Due Process Clause in deciding whether to terminate her pregnancy, while determining that the government has a legitimate interest in safeguarding health, maintaining medical standards, and protecting potential life.⁶² Even for constitutional rights as non-controversial as travel and access to the courts, the Court has upheld a durational residency requirement to obtain a divorce because it imposed no absolute bar to travel or access to the courts, while advancing legitimate governmental interests in assuring that an individual has an adequate attachment to the forum state before it endeavors to adjudicate an action for divorce.⁶³

In the First Amendment context, for example, the Court mediates between right and regulation by subjecting regulations imposing what are regarded as severe burdens on First Amendment rights to strict scrutiny, while regulations imposing more modest burdens are upheld if reasonable.⁶⁴ Thus, the Court evaluates regulations that compel disclosure of the identities of those involved in the political process through a test that assesses the strength of the governmental interest in disclosure in light of the magnitude of the burden imposed on First Amendment rights.⁶⁵ Similarly, in the reproductive rights context, the Court has concluded that, “[o]nly where state regulation imposes an undue burden on a woman's ability to make this decision [to terminate a pregnancy] does the power of the State reach into the heart of the liberty protected by the Due Process Clause.”⁶⁶ The Court subsequently explained that “[w]here it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order

⁶⁰ See Charles, *supra* note 59, at 97–98.

⁶¹ See, e.g., WINKLER, *supra* note 49, at 113–17; Cornell & DeDino, *supra* note 50, at 506–12.

⁶² *Roe v. Wade*, 410 U.S. 113, 153–54 (1973).

⁶³ See *Sosna v. Iowa*, 419 U.S. 494, 405–09 (1972).

⁶⁴ See, *Wash. St. Grange v. Wash. St. Repub. Party*, 552 U.S. 442, 451–52 (2008); *Crawford v. Marion Cnty. Elec. Bd.*, 553 U.S. 181, 189–91 (2008); *id.* at 204–05 (Scalia, J., concurring in the judgment); *Clingman v. Beaver*, 544 U.S. 581, 592–97 (2005); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *Burdick v. Takushi*, 504 U.S. 428, 433–34 (1992); *Rosario v. Rockefeller*, 410 U.S. 752, 760–62 (1973).

⁶⁵ See, e.g., *Doe v. Reed*, 130 S. Ct. 2011, 2818 (2010).

⁶⁶ *Planned Parenthood of Southeast Pennsylvania v. Casey*, 505 U.S. 833 (1992). *Accord*, *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007); *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000).

to promote respect for life . . .”⁶⁷ A Court that embraces regulation of the constitutional rights to speech and reproductive freedom surely should be no less tolerant of regulation when it comes to firearms.

Although none of these contexts is precisely analogous to firearms regulation, in each case the Court confronted both a core right and a legitimate governmental interest in regulating the exercise of even the right itself. Such regulations have been expansive, going beyond incidental burdens created by regulations not directed at the exercise of the right.⁶⁸ Sufficiently serious burdens that threaten to negate the right are invalidated, or at least subjected to demanding review, while less serious burdens can be sustained under the less demanding review employed by the Court.

Importantly, an approach that keys judicial scrutiny to the extent to which a challenged regulation burdens the core right minimizes the extent to which the judiciary must engage in difficult predictive or empirical judgments about the efficacy of challenged regulation. Since very severe burdens are virtually per se invalid, little inquiry into their justification will be required beyond that typical in strict-scrutiny litigation. For less severe burdens, a degree of deference to legislative judgment is appropriate.

Not only does the Second Amendment reflect a textual commitment to regulation, as we have seen, the historical understanding of the Second Amendment reflects acceptance of prophylaxis. When it comes to keeping and bearing arms, those thought to pose unreasonable risks have long been regarded within the ambit of regulatory power. This type of prophylaxis inheres in the framing-era limitation on the right to bear arms to loyal white males, the nineteenth-century prohibitions on carrying concealed firearms, and the more recent prohibitions on the possession of firearms by convicted felons and dangerous misdemeanants. After all, a militia could hardly be well regulated if it contained individuals whom the government regarded as presenting undue threats to public safety. Moreover, there are enormous methodological difficulties in demonstrating the effect of any one regulation, in isolation, on crime rates, and therefore it would be enormously difficult to mount a convincing empirical demonstration of a particular regulation’s efficacy in maintaining public safety.⁶⁹ Given these difficulties and the long history of permitting such regulation without demanding rigorous empirical proof of efficacy for all except regulations that impose the most severe burdens on Second Amendment rights, debates over efficacy should be regarded as raising issues of policy rather than constitutional law. Thus, considerable deference to legislative conclusions is warranted, as courts applying *Heller* have concluded.⁷⁰

⁶⁷ *Gonzales v. Carhart*, 550 U.S. at 158.

⁶⁸ Laws that are not targeted at the exercise of a right are generally thought to impose only incidental burdens and trigger more deferential review. *See, e.g.*, *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 67–68 (2006) (law requiring military access to law school recruiting series applied to schools who object to military policies); *Emp. Div. v. Smith*, 494 U.S. 872, 877–80 (1990) (law prohibiting use of controlled substances applied to religious-motivated user); *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 704–07 (1986) (law requiring closure of business constituting a public nuisance applied to a bookstore); *United States v. Albertini*, 472 U.S. 675, 688–89 (1985) (law prohibiting entry to a military base applied to a demonstrator).

⁶⁹ For a general discussion of the difficulties in assembling empirical evidence of the efficacy of gun-control laws, see TUSHNET, *supra* note 23, at 77–85.

⁷⁰ *See*, *Drake v. Filko*, 724 F.3d 426, 436–37 (3d Cir. 2013); *Schrader v. Holder*, 704 F.3d 980, 990 (D.C. Cir. 2013); *Kachalsky v. County of Westchester*, 701 F.3d 81, 97 (2d Cir. 2012); *Cf. McDonald v. City of Chi.*, 130 S. Ct. 3020, 3050 (2010) (plurality opinion) (warning against “requir[ing] judges to assess the costs and benefits of firearms restrictions and thus to make difficult empirical judgments in an area in which they lack expertise”).

V. THE SCOPE OF REGULATORY AUTHORITY OVER PUBLIC CARRY

We can now return to the question posed at the outset of this Issue Brief—What is the scope of governmental power to regulate the ability of individuals to carry firearms in public places? At the outset, one can question whether *Heller* has any application outside of the home. *Heller* indicates that the interest in lawful armed defense is particularly compelling in “the home, where the need for defense of self, family, and property is most acute.”⁷¹ Some commentators, stressing these points as well as the enhanced regulatory interests that come into play when firearms are brought into public places, argue that Second Amendment rights do not extend outside the home.⁷² Yet, as we have seen, there is some historical precedent for protecting the right to carry firearms in public, at least openly, although the rationale for distinguishing between open and concealed carry seems to have little contemporary application. Still, while the historical evidence is in conflict, there is some historical precedent for prohibitions on carrying firearms openly.⁷³ Moreover, as historian Saul Cornell has noted, virtually all the nineteenth-century laws and judicial decisions drawing a distinction between concealed and open carry were in the South, where the need to carry arms may have been regarded as greater, given the prevalence of slavery, which created a perceived need to remain armed in light of the dangers that slaves were frequently thought to present.⁷⁴ Yet, in the North, broader prohibitions on carrying arms in public seem to have been generally regarded as within the scope of the police power.⁷⁵ In the face of this cacophony, the historical evidence seems to supply little reliable basis for resolving the constitutionality of a law prohibiting the carrying of firearms in public.

To be sure, a blanket ban on carrying firearms in public seems difficult to reconcile with *Heller*’s account of the original meaning of the Second Amendment. As we have seen, *Heller* concluded that the original meaning of the right to bear arms meant the right to “carry[] for a particular purpose—confrontation.”⁷⁶ Of course, many if not most confrontations occur outside the home; the most natural understanding of the right to bear or carry arms is not limited to the interior of the home. This inference is reinforced by *Heller*’s caution that its holding does not “cast doubt on ... laws forbidding the carrying of firearms in sensitive places such as schools or government buildings....”⁷⁷ This dictum, of course, suggests that in locations other than sensitive places, the Second Amendment confers some right to carry firearms. Perhaps the most important reason to reject a view of Second Amendment rights that limits firearms to the home is *Heller*’s pronouncement that the Second Amendment codified a right of lawful armed defense, and the need to defend oneself is not limited to the home.

⁷¹ *Heller v. District of Columbia*, 554 U.S. 570, 628 (2008).

⁷² See, e.g., Michael C. Dorf, *Does Heller Protect a Right to Carry Guns Outside the Home?*, 59 SYRACUSE L. REV. 225, 231–33 (2008); Miller, *supra* note 51, at 1297–355.

⁷³ See Charles, *supra* note 51, at 31–41; Saul Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities*, 39 FORDHAM URB. L.J. 1695, 1707–24 (2012). For judicial opinions upholding bans on open-carry laws, see, for example, *Fife v. State*, 31 Ark. 455, 1876 WL 1562, at *4 (1876); *Hill v. State*, 53 Ga. 472, 474 (1874); *English v. State*, 35 Tex. 473, 1872 WL 7422, at *3 (1871); *Andrews v. State*, 50 Tenn. 165, 1871 WL 3579, at *11 (1871).

⁷⁴ See Cornell, *supra* note 73, at 1716–25.

⁷⁵ *Id.* at 1719.

⁷⁶ *Heller*, 554 U.S. at 584.

⁷⁷ *Id.* at 626.

Still, one might question how much weight *Heller* should receive on this point. Recall that *Heller* sought only “to enjoin the city from enforcing the bar on the registration of handguns ... and the trigger-lock requirement insofar as it prohibits the use of ‘functional firearms within the home.’”⁷⁸ Accordingly, discussion in *Heller* of whether Second Amendment rights extend outside the home was dictum unnecessary to the decision. Beyond that, in response to the argument that the phrase “bear arms” was ambiguous because it often referred to carrying arms in military service, the *Heller* Court concluded that this phrase “unequivocally bore that idiomatic meaning only when followed by the preposition ‘against,’ which was in turn followed by the target of the hostilities.”⁷⁹ Significantly, this stops short of a claim that the phrase was unambiguous; indeed, the Court acknowledged that “the phrase was often used in a military context ...”⁸⁰ Even on the Court’s limited claim, Professor Saul Cornell has argued the historical evidence on this point was not nearly as clear as portrayed by the Court.⁸¹ One post-*Heller* review of the historical evidence identified ample evidence that the phrase “bear arms” often had a military meaning in the framing-era, even when not followed by “against.”⁸² In light of this evidence, in an appropriate case in which the contours of the right to bear arms are at issue, the Court might revisit the question whether the phrase “bear arms” is sufficiently ambiguous to warrant resort to the preamble as an interpretive aid. To the extent that the phrase “bear arms” is ambiguous, resort to the preamble is of particular importance to perform what *Heller* called the preamble’s “clarifying function.”⁸³ This suggests that when it comes to the right to bear firearms—a right not squarely at issue in *Heller*—the regulatory authority contemplated by the preamble is of particular force. Indeed, this may explain why prophylactic regulations that disqualify even an entire class from possession of firearms, such as convicted felons, fall within the scope of regulatory power. The Second Amendment’s preamble represents a commitment to regulatory authority found nowhere else in the Bill of Rights.

As we have seen, the rationale supporting the nineteenth-century distinction between concealed and open carry has little contemporary resonance. Since the preamble preserves not framing-era practice but the power to well-regulate, it would seem to follow that limiting the right to carry firearms in contexts in which it seems to present unacceptable threats to public safety is more faithful to the preamble than preserving the now-obsolete historical rationale for distinguishing between concealed and open carry. A complete prohibition on carrying operable firearms in any public place renders the Second Amendment right to bear firearms for self-defense nugatory, or nearly so, and would likely be invalid.⁸⁴ But most courts to consider the

⁷⁸ *Id.* at 576.

⁷⁹ *Id.* at 586 (emphasis in original).

⁸⁰ *Id.* at 587.

⁸¹ See Saul Cornell, *Heller, New Originalism, and Law Office History: “Meet the New Boss, Same as the Old Boss,”* 56 UCLA L. REV. 1095, 1109–10 (2009). For Professor Cornell’s pre-*Heller* assessment of the historical evidence regarding the original meaning of this phrase, see Saul Cornell, *The Original Meaning of Original Understanding: A Neo-Blackstonian Critique*, 67 MD. L. REV. 150, 162–64 (2007).

⁸² See Nathan Kozuskanich, *Originalism in a Digital Age: An Inquiry into the Right to Bear Arms*, 29 J. EARLY REPUB. 585, 589–605 (2009). See also *Aymette v. State*, 2 Tenn. 154, 1840 WL 1554, * 3 (1840) (“The words ‘bear arms,’ too, have reference to their military use, and were not employed to mean wearing them about the person as part of the dress.”).

⁸³ *Heller v. District of Columbia*, 554 U.S. 570, 578 (2008).

⁸⁴ For judicial opinions reaching this conclusion, see *Moore v. Madigan*, 702 F.3d 933, 940–42 (7th Cir. 2012); see also *People v. Aguilar*, 2 N.E.2d 321, 325–28 (Ill. 2013).

question have upheld less complete prohibitions that require individuals to obtain a permit and demonstrate particularized need to carry a firearm for self-defense.⁸⁵

On this point, however, judicial opinion is divided; a panel of the Ninth Circuit concluded that in a state where open carry is prohibited, a policy allowing applicants to obtain a concealed-carry permit only on a showing of particularized need to carry firearms for self-defense violates the Second Amendment. The court concluded such a policy did not “allow[] the typical responsible, law-abiding citizen to bear arms in public for the lawful purpose of self-defense.”⁸⁶ It added that “[t]he challenged regulation does no more to combat [the state's public safety concerns] than would a law indiscriminately limiting the issuance of a permit to every tenth applicant.”⁸⁷ The panel cautioned, however, that it “consider[ed] the scope of the right only with respect to responsible, law-abiding citizens,” adding that “[w]ith respect to irresponsible or non-law abiding citizens, a different analysis—which we decline to undertake—applies.”⁸⁸ This qualification was presumably compelled by *Heller*'s admonition that it “d[id] not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*.”⁸⁹

Yet, the panel's claim that the rights of irresponsible or non-law-abiding citizens were not at stake in the question whether to require applicants to demonstrate particularized need to carry concealed firearms for purposes of lawful armed defense rather misses the point of prophylactic regulation. While the criminal history of an applicant for a carry permit can be readily ascertained, whether he is a responsible, law-abiding citizen, as well as the actual purpose for which he seeks to carry, are not so easy to know. *Heller* went to some pains to make clear that the Second Amendment protection turns on the purpose for which individuals keep or bear arms: “From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right [to keep and bear arms] was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”⁹⁰ While some persons carry firearms for lawful purposes, others carry firearms with different ends in mind. It is, however, enormously difficult to know why any particular individual is carrying a firearm. For just this reason, a prophylactic rule that limits the likelihood of misuse in contexts in which others are at greatest risk seems amply justified. There is, of course, a considerable likelihood that some individuals who are not responsible, law-abiding citizens will obtain concealed-carry permits if permits must be issued to anyone not disqualified by a prior conviction who proclaims a generalized desire to carry firearms for self-defense. This is precisely the context in which the case for prophylactic regulation is strongest, given the inevitable error rate in any effort to make predictive judgments about persons who wish to carry firearms in public, especially when applicants proclaim only a generalized and conclusory interest in carrying firearms for lawful purposes. As we have seen, both the Second

⁸⁵ See, e.g., *Drake v. Filko*, 724 F.3d 426, 435–40 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865, 876–83 (3d Cir. 2013); see also *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011) (upholding statute prohibiting loaded handguns in vehicles within a national park).

⁸⁶ *Peruta v. County of San Diego*, 742 F.3d 1144, 1169 (9th Cir. 2014).

⁸⁷ *Id.* at 1178 (second brackets in original) (quoting *Woollard v. Sheridan*, 863 F.Supp.2d 462, 474–75 (D. Md. 2012), *rev'd sub nom.* *Woollard v. Gallagher*, 712 F.3d 865, 876–83 (3d Cir. 2013)).

⁸⁸ *Id.* at 1150 n.2.

⁸⁹ *Heller v. District of Columbia*, 554 U.S. 570, 595 (2008).

⁹⁰ *Id.* at 626.

Amendment's preamble and the history of firearms regulation suggest that the right to bear arms permits a wide variety of prophylactic regulations, and argues for a measure of deference to legislative assessments of the efficacy of and justification for such regulation.

Using a showing of particularized need protects Second Amendment rights in cases in which the core constitutional interest in lawful self-defense is most plainly implicated, supplying an administrable basis to decide whether applicants are likely to be responsible, law-abiding citizens, while denying applications that present substantial risk of error. This criterion is probably as reliable as the nineteenth-century criterion of requiring open carry to determine the likely purpose for which firearms are carried, and a good deal better suited to the contemporary urban landscape. Although, in the nineteenth century, prohibiting only concealed carry may have been a reasonable approach to identifying those individuals most likely to be carrying firearms for an improper purpose, that rationale has little contemporary application. Additionally, a constitutional requirement that licenses must be liberally granted could well produce potent Fourth Amendment limitations on the ability of the authorities to stop armed individuals and determine whether they are properly licensed, further undermining prophylactic policing.

Equally important, the view that rigorous permit requirements operate as a rationing system fails to acknowledge that when the law enables police to keep guns off the streets in high-crime urban areas, the likelihood of violent confrontations that prove fatal is reduced. In these areas, it may be effectively impossible to have a “well regulated Militia” if everyone not disqualified by a prior conviction can carry firearms “in case of confrontation.”⁹¹ Conversely, a system in which either open or concealed carry must be permitted could prove constitutionally vulnerable precisely because it might do little to keep guns off the streets and thereby reduce firearms-related crime, at least if the Second Amendment is understood—not unreasonably—to require that a challenged enactment make some meaningful contribution to public safety.

Especially in high-crime jurisdictions riven by gang and drug crime, carrying firearms in public may be accompanied by unacceptable risks, and for that reason warrants prophylactic restriction.⁹² Indeed, there is a long tradition of more restrictive firearms regulation in urban areas.⁹³ If the Second Amendment permitted the development of concealed-carry prohibitions directed at those who carried firearms under circumstances that were thought to pose unacceptable risks, surely the Second Amendment permits regulations directed at analogous contemporary threats. Given the difficulty in assessing the purpose of someone carrying firearms in public—at least prior to the point at which someone is shot—a requirement that an individual be licensed and demonstrate some special need to carry the firearm serves a far more important public purpose than the largely outdated judgment that law-abiding persons are more likely to engage in open and not concealed carry. Such an approach has the added benefit of preserving the ability of the police to take action to stop and search individuals who they reasonably suspect to be unlawfully armed and dangerous. This is the kind of “discipline” to which a well-regulated militia would surely submit.

⁹¹ *Id.* at 592.

⁹² *Cf.* Lawrence Rosenthal, *Second Amendment Plumbing after Heller*, 41 URB. LAW. 1, 10–20 (2009).

⁹³ *See* Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 108–20 (2013).

VI. CONCLUSION

Two years after *Heller*, in his dissent from the Court's decision to apply the Second Amendment to the state and local gun-control laws in *McDonald v. City of Chicago*,⁹⁴ Justice Stevens wrote "[F]irearms have a fundamentally ambivalent relationship to liberty. Just as they can help homeowners defend their families and property from intruders, they can help thugs murder innocent victims."⁹⁵ One need not agree with Justice Stevens' ultimate conclusion in *McDonald* to acknowledge his point. Even while *Heller* upheld a Second Amendment right to carry firearms, laws providing lengthier sentences for criminals who carry firearms have been invariably upheld as well.⁹⁶ It is hard to think of any other constitutional right the exercise of which could be used as a sentencing enhancement, yet this result seems entirely consistent with *Heller's* admonition that the Second Amendment "[i]s not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."⁹⁷

One similarly need not embrace *Heller's* enthusiasm for originalism to agree that history tells us something important about the Second Amendment. Firearms rights and regulation have always been twinned—in the English Bill of Rights; the Second Amendment's preamble and operative clause; and in the evolving history of firearms regulation. Indeed, no right is more Janus-faced than the right to keep and bear arms. Thus goes the constitutional case for gun control—and nowhere is gun control more important than when it comes to the task of getting guns off the streetscape in our most violent and unstable neighborhoods. The least privileged among us face enough difficulties without having to live in communities in which gang members cannot be disarmed until someone is shot, and someone else is willing to testify. This reality suggests that regulations limiting public carry in urban areas could possibly survive constitutional challenge post-*Heller*.

⁹⁴ 130 S. Ct. 3020 (2010).

⁹⁵ *Id.* at 3107.

⁹⁶ *See*, *United States v. Napolitan*, 762 F.3d 297, 311 (3d Cir. 2014); *United States v. Bryant*, 711 F.3d 364, 368–70 (2d Cir. 2013); *United States v. Greeno*, 679 F.3d 500, 520 (6th Cir. 2012); *United States v. Potter*, 630 F.3d 1260, 1261 (9th Cir. 2011) (*per curiam*); *United States v. Jackson*, 555 F.3d 635, 636 (7th Cir. 2009); *People v. Cisneros*, No. 09CA2717, 2014 WL 1671766 (Co. Ct. App. 2014).

⁹⁷ *Heller v. District of Columbia*, 554 U.S. 570, 626 (2008).

The Transgender Tipping Point: An Overview for the Advocate*

Dr. Jillian T. Weiss**

Time Magazine recently declared “The Transgender Tipping Point,” asserting that “another social movement is poised to challenge deeply held cultural beliefs.”¹ Until recently, however, transgender people have remained relatively hidden from public consciousness, due in part to the severe stigma against them. They have largely been regarded as strangers to the law, and are often without legal protection because of their transgender identity. Though there have been great strides in providing that protection under the current Administration, the conservative nature of law means it will take years to change the legal regime that routinely withholds rights from transgender people, and progress may be reversed if politics takes a turn to the right. Therefore, it is crucial that progressive advocates act now to advance and consolidate these civil rights gains for transgender people.

Estimates suggest there are approximately 15 million transgender people in the world today, with about 700,000 located in the United States. Transgender refers to people whose gender identity (internal sense of gender) or whose gender expression (social gender characteristics) is not that traditionally related to the sex they² were assigned at birth.³ Examples of well-known transgender people today include Chaz Bono, Laverne Cox and Janet Mock. Transgender identity is not a new phenomenon, and there is a long history of transgender communities reaching into prehistory.

* This Issue Brief was initially published in November 2014.

** Dr. Jillian T. Weiss has a J.D. and a Ph.D. in Law, Policy & Society. Currently Professor of Law and Society at Ramapo College of New Jersey, her research area is gender identity and law. She has authored over 50 academic publications, presentations and other scholarly works, as well as approximately 40 articles and interviews for media organizations including The New York Times and Associated Press. Dr. Weiss provides legal representation to transgender employees in cases involving gender identity and gender expression discrimination. She also consults with private and public organizations regarding gender identity policy and employee gender transitions, including Harvard University, Boeing and New York City. Her volunteer work includes serving as a member of the Board of Directors of Lambda Legal, the oldest and largest U.S. national legal organization whose mission is to safeguard and advance the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV through impact litigation, education and policy work. She is also Chair of the annual Transgender Law Institute, currently held at the National LGBT Bar Association’s annual Conference.

¹ Katy Steinmetz, *The Transgender Tipping Point*, TIME MAGAZINE (May 29, 2014), <http://time.com/135480/transgender-tipping-point/>.

² While the pronoun “they” is traditionally used only to relate to a plural antecedent in standard English, some transgender people choose to use “they” in preference to the gendered pronouns “he” or “she.” Others prefer gender-neutral pronouns such as “ze” and “hir.” (To those who object that such pronouns sound disturbingly odd, note that the same objection was raised regarding the title “Ms.” when it was first introduced, but that objection is no longer considered valid.) However, most use standard pronouns to refer to their gender identity.

³ *Transgender* is an “umbrella” term that includes: people who receive medical treatment in aid of sex reassignment from that assigned at birth; those who identify as a sex different from birth assignment without medical treatment; those who consider themselves “gender non-conforming;” and those who live part-time or dress part-time in a different gender role. Many terms are used to refer to transgender persons, such as transsexual, cross-dresser, and neutrois (non-binary gender). The meaning of transgender is ambiguous, because different portions of the community attribute various shades of meaning to it. For further discussion, see Section C of this article, “Ethical Considerations.”

Until recently, transgender people have been considered strangers to the law, not entitled to protection from discrimination based on their gender identity or expression. Discrimination against transgender people has long been rampant in all areas of public and private life, including employment, education, housing, credit, public accommodations, child custody, out-of-home care for youth, incarceration, health care and marriage.⁴ When transgender people attempted to use laws for protection, courts told them that the state recognized only their sex assigned at birth, and legislators did not intend to protect them. However, this situation is changing, due in part to the willingness of some judicial officials to recognize that interpretations of law that exclude transgender persons from relief are incorrect and unjust.

This Issue Brief will review the changing landscape of law that can be used to protect transgender people. While the issues herein are novel and interesting on a theoretical level, the importance of this Brief lies in the practical use that advocates who are new to the issue can make of it to help transgender people. The intense suffering of many transgender people, particularly people with low income and people of color, cries out for relief. The emphasis here is on reference to information that can be used to demonstrate the existence of rights. Keep in mind that there are decades of legal decisions holding that transgender people have no protection, and these decisions will not be reviewed in detail. The following sections review selected changes in law regarding civil rights, government relations, health care and marriage. The brief finishes with a discussion of ethical considerations in transgender advocacy.

I. THE MEANING OF SEX HAS EXPANDED TO INCLUDE GENDER AND GENDER IDENTITY

There has been a change in the social understanding of sex over the past sixty years, and this has led to transgender people receiving increased legal protection. Early judicial opinions from the 1970s and 1980s said that transgender people did not receive protection from sex discrimination because sex discrimination then referred only to discrimination based on being a male or female, which was distinguished from a change in sex. For example, in *Ulane v. Eastern Airlines*,⁵ the U.S. Court of Appeals for the Seventh Circuit held, on this basis, that an airline pilot who alleged that she was fired because of transsexual status had no cause of action under the federal Civil Rights Act of 1964 (often referred to as “Title VII”). However, over time, the meaning of the term sex has been increasingly interpreted to include gender and gender identity.⁶

⁴ See generally GRANT, JAIME M., LISA A. MOTTET, JUSTIN TANIS, JACK HARRISON, JODY L. HERMAN, AND MARA KEISLING, *INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY*, (2011). This study found that transgender people were four times more likely to live in extreme poverty, had double the general rate of unemployment, and nearly all (90%) experienced discrimination at work. Most reported harassment in school (78%) and a significant number left school because of harassment (15%). Many transgender people experienced homelessness because of housing discrimination (19%), while 53% experienced harassment in places of public accommodation, 22% were denied equal treatment by a government agency or official, 29% reported police harassment, 19% were refused medical care, 57% reported significant family rejection, and 41% reported attempting suicide, a rate 25 times higher than the general population.

⁵ 742 F.2d 1081 (7th Cir. 1984).

⁶ Jillian T. Weiss, *Transgender Identity, Textualism, and the Supreme Court: What Is The “Plain Meaning” of “Sex” In Title VII Of The Civil Rights Act Of 1964?* 18 Temp. Pol. & Civ. Rts. L. Rev. 573, 597-617 (2009) (using shifting historical meanings to argue that sex includes gender and gender identity). While gender is often used interchangeably with sex in court decisions, it is generally agreed among academics that gender is now used to refer discretely to the social, psychological and behavioral elements of sex.

In 1989, in the case of *Price Waterhouse v. Hopkins*, the U.S. Supreme Court held that penalizing an individual for failing to conform to gendered norms of behavior constitutes a form of sex-based discrimination.⁷ This development was first recognized by an appellate court in 2000, in the decision of the U.S. Court of Appeals for the Ninth Circuit in *Schwenk v. Hartford*.⁸ There, a transsexual prisoner filed a civil rights suit against a male prison guard, seeking damages as a result of the guard's alleged attempted rape of the plaintiff under the federal Gender Motivated Violence Act.⁹ The Court noted that "*Ulane* has been overtaken by the 'logic and language of *Price Waterhouse*' and that Title VII prohibits discrimination based on 'sexual identity,' not just based on biological sex." In its 2008 decision in *Schroer v. Billington*, the U.S. District Court for the District of Columbia dismissed the spurious distinction between sex and change of sex.¹⁰ The Court noted that Title VII also included protection from religious discrimination, and that "no court would take seriously the notion that 'converts' are not covered by the statute. Discrimination 'because of religion' easily encompasses discrimination because of a change of religion." This developing understanding of sex as a term of art has opened the door to transgender people claiming rights based on laws referring to sex. Because the case law regarding many of the areas discussed below is less developed, the voluminous case law under Title VII should be referenced as analogous.

II. SUBSTANTIVE ISSUES

A. CIVIL RIGHTS

1. Employment

Laws protecting transgender people from employment discrimination based on gender identity or expression have been passed in 18 states at the time of this writing.¹¹ A few other states have court rulings holding that transgender employees are included in other protected categories, such as sex or disability.¹² Over 140 municipalities have laws prohibiting employment discrimination based on gender identity. Examples of cities with strong laws include New York City, San Francisco and D.C.

While Title VII contains no specific protection for gender identity or expression, it has been interpreted by the U.S. Courts of Appeals for the Sixth and Eleventh Circuits as providing protection for employment discrimination based on transgender status.¹³ Many federal district courts have held similarly. The U.S. Equal Employment Opportunity Commission (EEOC) has held that its offices and staff

⁷ 490 U.S. 228 (1989).

⁸ 204 F.3d 1187 (9th Cir. 2000).

⁹ 42 U.S.C. §13981(c).

¹⁰ 577 F. Supp. 2d 293 (D.D.C. 2008).

¹¹ These are California, Colorado, Connecticut, Delaware, Hawaii, Iowa, Illinois, Maryland, Massachusetts, Maine, Minnesota, New Jersey, New Mexico, Nevada, Oregon, Rhode Island, Vermont and Washington.

¹² See, e.g., *Jane Doe v. Electro-Craft Corp.*, No. 87-B-132 (N.H. Sup. Ct. 1988) (construing sex); *Buffong v. Castle on the Hudson*, 824 N.Y.S.2d 752 (N.Y. Sup. 2005) (construing sex); *Shepley v. Lazy Days RV Center, Inc.*, FCHR Order No. 06016 (Fla. Comm. Hum. Rel. 2006) (Fla. Human Relations Act) (construing sex); *Mitchell v. Axcan Scandipharm, Inc.*, 2006 WL 456173 (W.D. Pa. 2006) (construing sex). See also *Enriquez v. West Jersey Health Systems*, 2001 N.J. Super. LEXIS 283 (N.J. Super. 2001) (construing disability.) There is controversy about assertion of disability causes of action. See Section C below, "Ethical Considerations." Also, note that the federal Americans with Disabilities Act (ADA) contains a specific transgender exclusion, except for gender identity disorders resulting from physical impairments.

¹³ *Smith v. City of Salem*, 378 F. 3d 566 (6th Cir. 2004); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).

should interpret Title VII to include discrimination based on transgender status.¹⁴ Significantly, the EEOC decision held that there is no distinction between sex discrimination and gender stereotyping causes of action, and that discrimination based on gender identity or expression is *per se* sex discrimination. A recent federal executive order, enforceable through the Office of Federal Contract Compliance, prohibits discrimination by federal contractors based on gender identity or expression.¹⁵

It should be noted that some state and municipal laws offer less attractive enforcement mechanisms and remedies, and federal law may provide more relief. In addition, the EEOC has listed transgender issues as a priority area in its most recent strategic enforcement plan at the time of this writing, and has been more active in enforcement in this area than many state and municipal administrative bodies. Therefore, advocates for transgender persons should research which jurisdiction offers the best chance of relief for a transgender employee experiencing discrimination.

There are additional protections for public employees. The U.S. Court of Appeals for the Eleventh Circuit found that discrimination against a public employee based on transgender identity violates the Equal Protection Clause of the U.S. Constitution.¹⁶ There is also a line of cases finding that discrimination against public employees based on sexual orientation violates constitutional rights, and these are likely applicable to gender identity or expression as well.¹⁷ A federal executive order specifically prohibits discrimination against federal public employees based on gender identity or expression,¹⁸ and some states have similar orders.¹⁹ The federal Merit Systems Protections Board also provides protections for transgender federal civil service employees through the Office of Special Counsel.

2. Education

Transgender young people often experience several issues in education, including bullying in school, school discipline for gender expression, an unwillingness of school authorities to permit or acknowledge gender transition, and participation in gendered sports. There are anti-bullying laws and policies in many states,²⁰ and many of these explicitly include gender identity or expression.²¹ The U.S. Department of Education Office for Civil Rights promulgated a “significant guidance document” in 2014, specifically stating that transgender students are protected from violence in schools by Title IX of the United States Education Amendments of 1972.²² Schools have been held liable for not taking prompt and effective action when they are on notice of bullying based on sexual orientation, and it is likely that the same is true when bullying is based on gender identity or expression.²³

¹⁴ *Macy v. Holder*, Appeal No. 0120120821 (E.E.O.C. Apr. 20, 2012).

¹⁵ Exec. Order No. 13672, 79 Fed. Reg. 42971 (July 23, 2014).

¹⁶ *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).

¹⁷ See, e.g., *Miguel v. Guess*, 112 Wn. App. 536, 51 P.3d 89 (2002) (equal protection); *Weaver v. Nebo School Dist.*, 29 F. Supp. 2d 1279 (D. Utah 1998) (First Amendment).

¹⁸ Exec. Order No. 13672, 79 Fed. Reg. 42971 (July 23, 2014).

¹⁹ See Exec. Order No. 8 (Del. 2009); Governor’s Policy Statement (Ind. April 26, 2005); Exec. Order No. 07-24 (Kan. 2007); Exec. Order No. 2008-473 (Ky. 2008); Exec. Order No. 2007-24 (Mich. 2004); Exec. Order No. 33 (N.Y. 2011); Exec. Order No. 2003-10 (Pa. 2003); Exec. Order No. 1 (Va. 2014).

²⁰ See generally STOP BULLYING, <http://www.stopbullying.gov/> (last visited Oct. 31, 2014).

²¹ THE HUMAN RIGHTS CAMPAIGN, STATEWIDE SCHOOL ANTI-BULLYING LAWS & POLICIES (2014).

²² Catherine E. Lhamon, UNITED STATES OFFICE OF EDUCATION, OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE, 5, (April 2014) (citing 20 U.S.C. § 1681 *et seq.*).

²³ See, e.g., *Nabozny v. Podlesny*, 92 F.3d 446, 457 (7th Cir. 1996).

Students receive protection against discipline for gender expression under the First Amendment, as in *Doe v. Yunits*,²⁴ where a state court addressed discipline of a transgender student for wearing gender non-conforming clothing. Courts and administrative agencies have also ruled that denying a transgender student the use of gender-appropriate restrooms violates state human rights statutes.²⁵

Schools should accommodate transgender students by allowing them to use their preferred name whether or not they have had a legal name change. While some school administrators are under the misimpression that a court order is required to do so, the law generally permits use of any name so long as it is not for purposes of financial fraud. Some leave the student's legal name in the computer system but put the preferred name in classroom documents. Another option is for schools to simply make a note of the student's gender identity so that teachers and classmates are respectful.

Transgender students are increasingly being permitted to participate on gender-appropriate sports teams. The National Collegiate Athletic Association has adopted a policy permitting transgender men who have received a medical exception for treatment with testosterone to participate on male sports teams.²⁶ Transgender women who have completed one calendar year of testosterone suppression may participate on female sports teams.²⁷ More than half a dozen states have adopted rules to allow transgender high school students to compete on teams that correspond with their gender identities rather than the sex listed on their school records, and another half dozen more are considering similar regulations.²⁸ A California law is the first to specifically guarantee that transgender students are allowed to play school sports on gender-appropriate teams.²⁹

3. Housing

The U.S. Department of Housing and Urban Development (HUD) has enacted regulations prohibiting taxpayer-subsidized housing providers, including those who have loans insured by the Federal Housing Administration (FHA), from inquiring into or discriminating against renters based on sexual orientation or gender identity.³⁰ Under another HUD rule, FHA-insured mortgage financiers are prohibited from making loan decisions based on sexual orientation or gender identity.³¹ The HUD regulations also clarify the definition of "family" to include LGBT families.³² Based

²⁴ 2000 WL 33162199, at * 3-4 (Mass. Super. Ct.), *aff'd sub nom, Doe v. Brockton Sch. Comm.*, No. 2000-J-638 (Mass. App. 2000).

²⁵ *Doe v. Regional School Unit 26*, 86 A.3d 600 (Me. 2014); *see also Mathis v. Fountain-Fort Carson School District 8*, Charge No. P20130034X (Col. Div. Civ. Rts., June 17, 2013).

²⁶ For clarification on terminology, *see supra* Section C.1.

²⁷ NCAA OFFICE OF INCLUSION, NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES, NCAA Inclusion of Transgender Student-Athletes 13 (NCAA 2010), available at http://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf.

²⁸ Changing Sex, and Changing Teams, *New York Times* (May 6, 2013).

²⁹ *See* section 221.5 of the California Education Code (2013).

³⁰ 24 C.F.R. § 5.105. *See also* 77 F.R. No. 23 (February 3, 2012).

³¹ 24 C.F.R. § 203.33.

³² 24 C.F.R. § 5.403; § 574.3.

on these rules, HUD filed a federal lawsuit against an RV Park that discriminated against a transgender person.³³ Several states have similar rules.³⁴

4. Credit

As previously mentioned, FHA-insured mortgage financiers are prohibited from making loan decisions based on sexual orientation or gender identity. The U.S. Court of Appeals for the First Circuit has ruled that the federal Equal Credit Opportunity Act and a similar state law prohibit discrimination based on gender expression in other areas of lending.³⁵ It is likely that many other federal and state courts would be open to the argument that, based on an analogy to Title VII cases, discrimination in lending based on gender identity or expression would violate the federal and state credit opportunity acts.

5. Restroom Accommodations

While there are some unfavorable precedents from previous decades, courts have recently showed favor to arguments that transgender people are entitled to gender-appropriate restroom facilities in public places. As noted above in the education context, courts and administrative agencies have ruled that denying a transgender student the use of gender-appropriate restrooms violates state human rights statutes. Under the regulations in force in New York City, D.C. and San Francisco, denial of gender-appropriate restroom accommodations in public places violates those ordinances. The EEOC has recently taken the stance in several complaints before it that denial of gender-appropriate restroom facilities in the workplace is a violation of Title VII. In *Freeman v. Realty Resources Hospitality*,³⁶ the Maine Superior Court ruled that the Maine Human Rights Act protected transgender persons from discrimination, including ensuring appropriate access to restrooms. However, despite these promising signs, transgender legal advocates consider this a legal area that contains some serious potential minefields. Litigation should be very carefully considered, including consulting national experts in the field, before rushing ahead with a lawsuit in a jurisdiction with conservative courts that could result in more difficult precedents. It should be noted that dressing rooms present an even more sensitive situation, and litigation in that context must be considered even more carefully.

B. GOVERNMENT RELATIONS

1. Identity Documents

The failure of identity documents to reflect the appropriate name and sex of a transgender person can cause constant outing, creating risks of violence and denial of services such as gender-appropriate health benefits or housing, and marriage licenses. These identity documents include birth certificates, driver licenses, and passports,

³³ United States Dept. of Housing and Urban Dev. v. George Toone and In Toone Services, LLC, FHEO Nos. 06-12-1130; 06-121363-8 (ALJ) (2013). The action was settled prior to court decision.

³⁴ These include California, Connecticut, Colorado, Hawaii, Illinois, Iowa, Maine, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Washington, and Vermont. See Secretary Julian Castro, *Ending Housing Discrimination Against Lesbian, Gay, Bisexual and Transgender Individuals and Their Families*, U.S. DEP'T. OF HOUSING AND URBAN DEV., [HTTP://WWW.HUD.GOV/LG-BTHOUSINGDISCRIMINATION](http://www.hud.gov/LG-BTHOUSINGDISCRIMINATION). Some municipalities also have similar regulations, such as D.C., New York City and San Francisco.

³⁵ *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000).

³⁶ *Freeman v. Realty Resource Hospitality, LLC, d/b/a Denny's of Auburn*, No. CV-09-199 (State of Maine Androscoggin Superior Court, May 27, 2010).

among many others. Many jurisdictions permit changing such documents to reflect the appropriate information. However, the evidence required and procedural difficulties vary substantially. For example, some jurisdictions permit document changes with the provision of a letter from a mental health professional stating that the person has undergone treatment and is now of the specified gender. Others require affidavits of surgeons specifying descriptions of the specific surgical treatment completed.³⁷ Some jurisdictions require a lengthy court process for change of name with publication in a newspaper of record, which can raise safety concerns and prevent access by low-income persons. Others permit the transaction to be handled by going to a local administrative agency, such as a motor vehicle department or a passport agency. You can find state by state lists of how to change birth certificates³⁸ and driver licenses³⁹ online, as well as how to change passports,⁴⁰ immigration documents,⁴¹ and social security accounts.⁴² The patchwork quilt of laws and agencies governing identity documents makes this one of the most difficult tasks accompanying gender transition.

2. Child Custody

In the area of child custody, there are two different issues to be addressed. One is the challenge to the fitness of a transgender parent, and the other is the challenge to the legal parental status of transgender parents.⁴³

The universal standard for decisions by a court about child custody is the “best interests of the child.” It is not uncommon for the allegation to be made during court proceedings that exposure of a child to a transgender parent will cause psychological harm to the child. In such situations, courts should look at traditional factors, such as parenting skills. In one case, for instance, the court upheld a transgender parent’s shared parenting plan because there was no evidence in the record that the parent would not be a “fit, loving and capable parent.”⁴⁴ There are about ten reported opinions in which transgender and other gender-nonconforming parties were involved in custody disputes that reached favorable conclusions for the transgender party.⁴⁵ It is crucial, in such child custody situations, to consider obtaining the services of a competent forensic psychologist who can assess the individual situation

³⁷ However, the American Medical Association has adopted a resolution stating that transgender people should be permitted to change identity documents without requiring surgery.

³⁸ *Changing Birth Certificate Sex Designations: State-by-State Guidelines*, LAMBDA LEGAL, <http://www.lambdalegal.org/publications/changing-birth-certificate-sex-designations-state-by-state-guidelines>.

³⁹ *Driver’s Licenses Policies by State*, NATIONAL CENTER FOR TRANSGENDER EQUALITY, HTTP://TRANSEQUALITY.ORG/RESOURCES/DL/DL_POLICIES.HTML.

⁴⁰ *U.S. Passports and International Travel: Gender Reassignment Applicants*, U.S. DEP’T. OF STATE, <http://travel.state.gov/content/passports/english/passports/information/gender.html>.

⁴¹ *Policy Memorandum No. 602-0061: Adjudication of Immigration Benefits for Transgender Individuals*, U.S. DEP’T. OF HOMELAND SECURITY (April 10, 2012), http://www.uscis.gov/sites/default/files/USCIS/Outreach/Feedback%20Opportunities/Interim%20Guidance%20for%20Comment/Transgender_FINAL.pdf.

⁴² *RM 12012.200 Changing Numident Data for Reasons Other Than Name Change*, U.S. SOCIAL SECURITY ADMIN. (Sept. 30, 2013), <https://secure.ssa.gov/poms.nsf/lnx/0110212200>.

⁴³ *See Protecting the Rights of Transgender Parents and Their Children*, AMERICAN CIVIL LIBERTIES UNION AND THE NATIONAL CENTER FOR TRANSGENDER EQUALITY (March 2013), https://www.aclu.org/files/assets/aclu-tg_parenting_guide.pdf.

⁴⁴ *Mayfield v. Mayfield*, 1996 WL 489043 (Ohio App. 5th Dist. Aug. 14, 1996).

⁴⁵ Shannon Shafron Perez, Comment, *Is It A Boy Or A Girl? Not The Baby, The Parent: Transgender Parties In Custody Battles And The Benefit Of Promoting A Truer Understanding Of Gender*, 9 Whittier J. Child & Fam. Advoc. 367, 377 (2010).

and also apprise the court of the studies showing that transgender parentage does not cause harm to children.⁴⁶

Transgender people may form a family with a spouse or partner in many ways, including through sexual intercourse, insemination (of partner's or donor sperm), surrogacy and adoption. In the event of a breakup or death in the family, the legal status of transgender parents may be challenged, especially when they are not biologically related to the child. Some courts have recognized the validity of post-transition marriage, and recognition of that validity is an important step in securing parental rights.⁴⁷ In light of a flurry of recent federal court decisions striking down bans on same-sex marriage, arguments in favor of validity can be expected to be more successful. The specific question of parental rights in post-transition marriages, however, is still unsettled. Where marriage is restricted to different-sex couples, reliance on marriage to establish parental rights is even more risky. Successful arguments have been made in courts, challenging the validity of a post-transition marriage and removing the presumption of parentage and adoption validity. Changing gender markers on legal documents does not guarantee the validity of the marriage. In all states, second-parent adoption and clear agreements about parentage, especially where assisted reproduction is involved, are important steps in helping to secure parental rights.

Custody issues have also arisen in the situation where a non-transgender parent is raising a transgender child. These issues have been raised by child welfare authorities, who may believe that the child is being misled or mistreated by parents, and by spouses in custody cases, who may believe that the child is going through a temporary phase. Transgender Youth and Family Allies is an organization that provides information to parents of transgender children about how to avoid and address such situations.

3. *Youth in out-of-home care*

Transgender children in child welfare, juvenile justice and homeless systems of care often face obstacles from staff unfamiliar with transgender issues. These obstacles may include resistance to or denial of the right to wear gender-appropriate clothing, denial of privileges due to assertion of transgender identity, and harassment or physical violence from staff or other children. Some systems seek to change the gender identity of the transgender children in their care or to deny them transgender health care. Because these facilities are often gender-segregated, issues of gender-appropriate housing can also arise. The Child Welfare Protection League has published comprehensive "Best Practices Guidelines" for serving LGBT youth in out-of-home care.⁴⁸ Because these children are under state care, constitutional protections apply and should protect these transgender children from violations of their right to gender autonomy.⁴⁹ These constitutional protections include, as detailed in other contexts above, protection of liberty interests under the Due Process Clause, right to equal treatment and care under the Equal Protection Clause, and the right to free expression under the First Amendment.

⁴⁶ See, e.g., Green. R. *Transsexual's Children*, 2 International Journal of Transgenderism, 4, (Dec. 1998).

⁴⁷ See *supra* Section 4.

⁴⁸ SHANNAN WILBER, CAITLIN RYAN, AND JODY MARKSAMER, CWLA BEST PRACTICE GUIDELINES, (2006).

⁴⁹ See Jillian T. Weiss, *Gender Autonomy, Transgender Identity and Substantive Due Process: Finding a Rational Basis for Lawrence v. Texas*, 5 Journal of Race, Gender & Ethnicity, 1 (2010).

4. Transgender People in Detention and Incarceration Facilities

Transgender people who are incarcerated in jails and prisons, and those detained in immigration holding facilities, face serious risk of harm from other detainees. However, prisons are restricted from subjecting prisoners to certain kinds of risks under the Eighth Amendment to the Constitution and prison officials, and the government that employs them, can be subject to liability for “deliberate indifference” to a transgender prisoner’s needs for protection and health care.⁵⁰

Because jails, prisons, and immigration holding facilities are always gender-segregated, rarely are transgender people in detention or incarceration facilities allowed gender-appropriate housing without certain kinds of surgical intervention. Transgender women who have had genital surgery and are living as women are generally classified and housed according to their reassigned sex. Transgender men who have had genital surgery, however, even though living as men, may be placed in female prisons if there is a serious risk of violence. Transgender people who have not had genital surgery are generally classified according to their birth sex for purposes of prison housing. This situation puts male-to-female transgender women at particular risk of violence. Accordingly, transgender women in male prisons or detention centers are sometimes separated from other prisoners. This is referred to as “administrative segregation,” and often involves solitary confinement. While this provides greater protection than being housed in the general population, it results in exclusion from recreation, educational and occupational opportunities, and association with others. Solitary confinement for long periods of time is increasingly being seen as inappropriate because of its severe effect on mental health.

These routine practices may be changing in light of conflicts with the Prison Rape Elimination Act (PREA), which requires that prisons make such housing decisions on a case-by-case basis. PREA calls for statistics to be gathered on prison sexual assault, including prison sexual assault of transgender people. It applies to immigration detention facilities as well. PREA also requires that people in detention and incarceration facilities be granted adequate access to complaint mechanisms. It also created the National Prison Rape Elimination Commission and charged it with developing standards for the elimination of prison rape. Those standards went into effect in 2012 and require that all people in detention and incarceration facilities be screened for risk of sexual victimization and given individualized determinations. The standards explicitly recognize that gender non-conforming people have additional risk and state that a transgender prisoner’s own views with respect to safety shall be given serious consideration.⁵¹ The regulations also require that transgender people in detention and incarceration facilities have an opportunity to shower separately from others, and that their placement and programming assignments be assessed at least twice per year. In addition, transgender people in incarceration facilities may not be placed in involuntary administrative segregation, including solitary confinement, unless there is no other means of protection possible, and then only up to 30 days in length. They are also entitled to access to programs while in segregation.

Because these regulations are fairly new, it is likely that many prisons and detention centers are not following the regulations correctly. It is, nevertheless, a sign of progress for the safety and health of transgender people living in prisons and detention facilities. In another sign of progress, an increasing number of localities—including

⁵⁰ Farmer v. Brennan, 511 U.S. 825 (1994) (finding liability for failure to protect transgender prisoner).

⁵¹ 28 C.F.R. § 115.42.

Cook County, IL, Cumberland, ME, Denver, CO and Washington, DC—have had success with policies that classify prisoners by gender identity rather than sex assigned at birth.⁵² Finally, in recent cases, courts have found that transgender prisoners are also entitled to transgender-related health care, such as provision of hormones in appropriate cases.⁵³

C. HEALTH CARE

There is increasing acceptance of the principle that one cannot be excluded from health care simply because of transgender status. Fifteen states have laws prohibiting gender identity discrimination in health care facilities.⁵⁴ Nine state insurance commissioners have issued bulletins advising that they interpret the state statute prohibiting gender identity discrimination to also prohibit discrimination in health care insurance.⁵⁵ More significantly, the U.S. Department of Health and Human Services (HHS) has indicated that it interprets the Affordable Care Act, Section 1557,⁵⁶ prohibiting sex discrimination, to include discrimination based on gender identity.

There has also been significant movement toward ending discrimination in the provision of transgender-related health care. HHS's interpretation of the Affordable Care Act as prohibiting discrimination based on gender identity will likely apply to hormone replacement therapy and psychotherapy. However, it remains unclear whether this non-discrimination provision will apply to transition-related surgery.⁵⁷ While many insurers still have exclusions for any transgender-related medical care, there is an increasing trend towards voluntary renunciation of such exclusions, and the American Medical Association (AMA) has called for an end to such exclusions.⁵⁸ The federal Office of Personnel Management is allowing, but not requiring, insurers to add coverage through their Federal Employee Health Benefit plans. With regard to Medicare, HHS has issued a ruling stating that its previous blanket exclusion of transgender-related health care is no longer reasonable under the Agency's stan-

⁵² See *Transgender Prisoners In Crisis*, LAMBDA LEGAL (2013), http://www.lambdalegal.org/sites/default/files/publications/downloads/transgender_prisoners_in_crisis.pdf.

⁵³ *Battista v. Clarke*, 645 F.3d 449 (1st Cir. 2011) (ordering provision of hormone therapy); *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011) (striking down Wisconsin Inmate Sex Change Prevention Act); *Adams v. Fed. Bureau of Prisons*, 716 F. Supp. 2d 107 (D. Mass. 2010) (reversing policy preventing transition-related care unless evidence of start prior to incarceration). See *Kosilek v. Spencer*, 889 F. Supp. 2d 190 (D. Mass. 2012), (granting an incarcerated's request for sex reassignment surgery, which has been reversed, pending an *en banc* hearing).

⁵⁴ These are California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Maine, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington, as well as D.C. and Puerto Rico. See also *Health Care and Transgender People*, National Center for Transgender Equality, NATIONAL CENTER FOR TRANSGENDER EQUALITY (March 2014), http://transequality.org/Resources/HealthCareRight_UpdatedMar2014_FINAL.pdf.

⁵⁵ These are California, Colorado, Connecticut, Illinois, Massachusetts, Oregon, Vermont, and Washington, as well as D.C. Maryland has protection for state employees. However, some of these do not apply to certain areas of coverage, such as state employees, self-insured companies, or Medicaid.

⁵⁶ 42 U.S.C. § 18116.

⁵⁷ HHS indicated on its website in June 2014 that it does not consider this to require transition-related surgery, but the site was subsequently removed. See *Questions and Answers on Section 1557 of the Affordable Care Act*, U.S. DEP'T. OF HEALTH & HUMAN SERVICES, [HTTP://WWW.HHS.GOV/OCR/CIVILRIGHTS/RESOURCES/LAWS/SECTION1557_QUESTIONS_ANSWERS.HTML](http://www.hhs.gov/OCR/CIVILRIGHTS/RESOURCES/LAWS/SECTION1557_QUESTIONS_ANSWERS.HTML).

⁵⁸ See American Medical Association (AMA), Policy H-180.980 (opposing the denial of coverage based on sexual orientation or gender identity); see also AMA Policy H-185.950 (supporting public and private health insurance coverage for treatment of gender identity disorder as recommended by patient's physician).

dards.⁵⁹ Such care may include provision of hormones (such as estrogen or testosterone), mastectomy or genital surgery. Facial feminization surgery (FFS) and breast augmentation surgery are also often considered crucial by transgender women because of the risks of denials of service and violence involved in gender ambiguity. But while the status of FFS and breast augmentation are important safety considerations, these generally do not fall within the “reasonable and necessary” care clause found in all health insurance policies to date. As shown by the Affordable Care Act interpretations and the efforts of state insurance commissioners, there has been significant movement in ending discrimination against transgender people in health care, but there is also uncertainty as to how the rules and regulations will be applied to all forms of transgender health care.

D. MARRIAGE

In jurisdictions that recognize marriage equality, there is no issue regarding the marital status of a transgender person, regardless of the sex of their partner. In jurisdictions not recognizing marriage equality, however, the situation is more complex. If the jurisdiction also refuses to recognize gender transition for purposes of marriage, then the marriage can only be valid if a transgender person seeks to marry someone of the opposite sex based on sex assigned at birth. In such jurisdictions, a transgender woman can never marry a man, regardless of medical treatment, surgery, or changes in birth certificate.⁶⁰ The same is true of a transgender man marrying a woman.⁶¹ However, if the state does recognize gender transition for purposes of marriage, then a post-transition opposite-sex marriage is valid based on the reassigned sex (i.e., a transgender woman may marry a man, and a transgender man may marry a woman).⁶² If the marriage occurred pre-transition, there is nearly universal agreement that such a marriage remains valid, though both spouses are now of the same sex, and despite state laws against same-sex marriage. Thus, if one partner of a married opposite-sex couple transitions to another gender, the marriage is generally presumed to be valid. The U.S. Customs and Immigration Service has issued a policy memorandum recognizing a transgender person’s marriage to a person of the opposite sex under certain conditions.⁶³

III. ETHICAL CONSIDERATIONS

⁵⁹ See Department of Health and Human Services Departmental Appeals Board Appellate Division NCD 140.3, Transsexual Surgery, Docket No. A-13-87, NCD Ruling No. 2576 (May 30, 2014).

⁶⁰ See, e.g., *In re Gardiner*, 42 P.3d 120 (Kan. 2002) (holding that sex reassignment is not recognized for purposes of marriage under Kansas law).

⁶¹ See, e.g., *Kantaras v. Kantaras*, 884 So. 2d 155 (Fla. Dist. Ct. App. 2004), *rev. den.* 898 So. 2d 80 (Fla. 2005) (holding that sex reassignment is not recognized for purposes of marriage under Florida law).

⁶² See, e.g., *Beatie v. Beatie*, 2014 Ariz. App. LEXIS 156 (Ariz. Ct. App. 2014); see *Radtke v. Misc. Drivers*, 867 F. Supp. 2d 1023 (D. Minn. 2012); see *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976); see *In Re Lovo-Lara*, 23 I. & N. Dec. 746 (BIA 2005); see *In re Heilig*, 816 A.2d 68 (Md. 2003).

⁶³ See *Adjudication of Immigration Benefits for Transgender Individuals Policy Memorandum 602-0061*, US CUSTOMS AND IMMIGRATION SERVICE (April 10, 2012), http://www.uscis.gov/sites/default/files/USCIS/Outreach/Feedback%20Opportunities/Interim%20Guidance%20for%20Comment/Transgender_FINAL.pdf (marriages are recognized if the transgender person legally changed gender, subsequently married, and the marriage is recognized in the jurisdiction where it was entered into).

A. TERMINOLOGY

There are various nomenclatures used by different segments of the LGBT community to refer to transgender people, and disagreements about who is under the transgender “umbrella.” It is most important to show respect for a person’s gender identity or expression as they self-identify. For example, the term “transvestite” was more widely used in the past and is still used by some, but for the most part, is not preferred as it was a 19th-century medical term that facilitated a pseudo-scientific understanding of sexuality. Therefore, unless someone specifically identifies that way, it would be considered derogatory to identify a transgender person as a transvestite. Similarly, some prefer to identify as a *transsexual* man or woman, rather than a transgender man or woman. Those self-identifications should be respected. Further, some community members consider gay people who dress in drag, whether for performance or as part of a gay identity, to be within the transgender umbrella. Others are offended by this idea. In non-U.S. cultures, those who would here be considered transgender or transsexual may identify as gay, though it is in such instances a reference to gender identity, rather than sexual orientation alone. Because of this, it is important to ask, if you are not sure, how a transgender person identifies their gender identity or expression. If unsure, it is generally considered appropriate to ask whether someone identifies as transgender, or prefers some other label or no label at all.

A person who transitions from male to female has a female gender identity. Therefore, if we are to respect their gender identity, they are considered a transgender woman. Conversely, one who transitions from female to male has a male gender identity, and is considered a transgender man. Generally, failure to adhere to this convention is considered highly offensive to transgender people. In addition, many transgender people do not feel that they were correctly assigned a sex at birth. Therefore, any formulation that implies they “used to be a man,” or “changed sex,” may not be looked upon favorably by some. They would prefer to say that they were “assigned” male at birth, but that they were always female, or vice versa for a transgender man. For similar reasons, the term “biological sex” has some problematic implications as well.

The fact of transgender identity does not necessarily imply any particular sexual orientation. Just because someone transitions from male to female does not automatically mean that they prefer male partners, or vice versa. They may also be bisexual, meaning that they may have romantic interest in someone of any sex.

B. LEGAL CLAIMS

With regard to the use of disability statutes to provide protection for transgender people based on the presence of “gender dysphoria” in the Diagnostic and Statistical Manual of the American Psychiatric Association, one should exercise caution. Some transgender people are offended by the idea that their identity is considered a “disability.” Others feel that, if it is useful to use that category to obtain vital assistance from the courts, then they will do so. Yet others feel that there should be no stigma attached to a disability, and have no issue with it at all. Thus, in considering such an issue, transgender advocates should be sure that a transgender person to whom they are offering assistance is in agreement with whatever decision is made.

It might seem to be a good idea, in representing a transgender person, to find out their surgical status. This, however, may be controversial, and discretion is advised. Although a case may seem to be bolstered by the fact that a transgender person has had certain types of medical or surgical treatment, in many situations, such as

employment discrimination or changing a U.S. passport, the information is in fact irrelevant. Requesting disclosure of such information when unnecessary is generally considered problematic. However, in other cases, such as those involving change of birth certificate or validity of marriage in certain jurisdictions, it may be necessary to elicit such information. An advocate should consider whether surgical status is a necessary legal criterion before requesting the information, and certainly before disclosing the information in a public complaint or in discovery. In the discovery phase of litigation, a vigorous argument for the privacy of such information should be made to the court.

C. RESOURCES

There is a network of non-profit organizations around the country that has expertise in transgender issues and may be able to provide legal assistance or referrals to local private law firms for further assistance. These organizations include Lambda Legal Defense and Education Fund, the Transgender Legal Defense and Education Fund, the Transgender Law Center, the National Center for Lesbian Rights, and Gay and Lesbian Advocates and Defenders. The National Center for Transgender Equality, which specializes in policy advocacy, may be able to provide helpful information about substantive issues. Each organization has different resources and capacities, and a call to all of them to request information and assistance is advisable.

IV. CONCLUSION

Transgender people facing legal issues are particularly vulnerable because the law has long been hostile to their claims. This is, however, changing in certain jurisdictions. Judicial and law enforcement officers are beginning to understand that being transgender is a matter of gender identity and gender expression, rather than an illness or character defect. The laws are slowly changing to recognize that discrimination based on transgender identity or expression is prohibited sex discrimination. The law regarding civil rights, government relations, health care, and marriage are moving towards this recognition. It is important that the public recognize that the severe oppression faced by transgender people can and will be changed as people in the larger community come to understand and advocate for the right of transgender people to live with the equal dignity and equal rights promised by the Constitution of the United States.

