



# Advance

*The Journal of ACS Issue Briefs*

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# Advance

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Each issue of *Advance* features a collection of articles that emanate from the work of ACS's 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](http://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.



# Dignity and the Eighth Amendment: A New Approach to Challenging Solitary Confinement

Laura Rovner\*

Solitary confinement irreparably harms people. For those who have endured long-term isolation, it is not an overstatement to describe it as a living death: “Time descends in your cell like the lid of a coffin in which you lie and watch it as it slowly closes over you. When you neither move nor think in your cell, you are awash in pure nothingness.... Solitary confinement in prison can alter the ontological makeup of a stone.”<sup>1</sup> U.S. Supreme Court Justice Samuel Miller, who was a physician as well as a lawyer, recognized the harms of solitary confinement as far back as 1890, observing that:

A considerable number of the prisoners [subjected to solitary confinement] fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others, still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.<sup>2</sup>

Thus it was more than a century ago, as Justice Kennedy recently reminded us,<sup>3</sup> that the Supreme Court first recognized the harm solitary confinement causes and nearly declared it unconstitutional. Yet, despite this unequivocal condemnation of solitary confinement by the nation’s highest court, over the course of the century that followed—and especially the last three decades—most states and the federal government have significantly increased their use of penal isolation. Today, conservative estimates place the number of people in solitary confinement at over 100,000.<sup>4</sup> And they are there largely with the blessing of the federal courts.

While the Eighth Amendment’s prohibition against cruel and unusual punishment appears to provide mechanisms to challenge the use of long-term solitary confinement, the way the federal courts have interpreted the amendment in the past two decades has rendered judicial review virtually meaningless, resulting in an unprecedented

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<sup>1</sup> JACK HENRY ABBOTT, IN THE BELLY OF THE BEAST 44–45 (1981).

<sup>2</sup> In re Medley, 134 U.S. 160, 168 (1890) (finding unconstitutional on *ex post facto* grounds a statute that required death-sentenced prisoners to be held in solitary confinement prior to their executions).

<sup>3</sup> Davis v. Ayala, 135 S. Ct. 2187, 2209 (June 18, 2015) (Kennedy, J., concurring).

<sup>4</sup> Sarah Baumgartel et al., *Time-In-Cell: The ASCA-Liman 2014 National Survey of Administrative Segregation in Prison*, YALE LAW SCHOOL 1, 3 (2015), [http://www.law.yale.edu/documents/pdf/Liman/ASCA-Liman\\_Administrative\\_Segregation\\_Report\\_Sep\\_2\\_2015.pdf](http://www.law.yale.edu/documents/pdf/Liman/ASCA-Liman_Administrative_Segregation_Report_Sep_2_2015.pdf) (approximating that “between 80,000 and 100,000 people were in isolation in prisons as of the fall of 2014”).

number of people being held in conditions of extreme solitary confinement. Part I of this Issue Brief examines the nature of solitary confinement and how it developed in the U.S. Part II discusses (in broad outlines) the current jurisprudence of Eighth Amendment solitary confinement litigation. Finally, Part III offers some reasons for optimism going forward and one promising path to achieving meaningful reforms through constitutional challenges to the practice.

### I. SOLITARY CONFINEMENT: WHAT IT IS AND HOW WE GOT HERE

While there is some variation among prisons, the conditions in solitary confinement (also referred to as administrative segregation, special housing units (SHUs), disciplinary segregation, control units, penal isolation, and restrictive housing) typically share a common set of features.<sup>5</sup> Prisoners spend twenty-two to twenty-four hours each day alone in their cells, which are about the size of a Chevy Suburban. They sleep on concrete slabs with a thin piece of foam on top. The cell has a concrete or metal shelf that can be used as a desk, and another piece of concrete in front of it that functions as a stool. Cell doors are typically solid metal with metal strips along the bottom that help prevent communication with prisoners in other cells. Some cells have a small narrow window; others do not have access to any natural light.

For whatever period of time a prisoner is held in solitary confinement, virtually every aspect of his life occurs in his eighty square foot cell. A prisoner in segregation eats all of his meals there, within arm's reach of his toilet. He is usually denied many services and programs provided to non-segregated prisoners, such as educational classes, job training, drug treatment, work, or other kinds of rehabilitative or religious programming. To the extent that a person in solitary receives any programming, it is typically provided in-cell through written materials or via a television screen, though some people in solitary are prohibited from having televisions, radios, art supplies, and even reading materials. For the one hour per day (on average) that prisoners in solitary are permitted to leave their cells, they are taken to a small, kennel-like cage to exercise, and even the time there is spent alone.<sup>6</sup> Access to family visits and phone calls is limited; any visits that do occur take place through thick glass and over phones. And prisoners in solitary confinement typically are not permitted any human touch, except when the correctional officers shackle them to escort them from location to location.

The U.N. Special Rapporteur on Torture has deemed these conditions torture, if a person is forced to endure them for more than fifteen days.<sup>7</sup> Yet, many prisoners in the U.S. are held in segregation for years or even decades.

The U.S. has experimented with solitary confinement for nearly two centuries. Eastern State Penitentiary, built in Philadelphia by the Quakers in 1829, was the

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<sup>5</sup> See Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 448 (2006).

<sup>6</sup> Sometimes these exercise periods are not even outside. See e.g., *Anderson v. Colo. Dept. of Corrections*, 887 F. Supp. 2d 1133, 1137–38 (D. Colo. 2012).

<sup>7</sup> Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *The Istanbul Statement on the Use and Effects of Solitary Confinement*, U.N. DOC. A/63/175, annex (Dec. 9, 2007); see also Statement of Juan Mendez, U.N. Special Rapporteur on Torture to the General Assembly's Third Committee, *In Third Committee, Special Rapporteur on Torture Calls on States to Seriously Reconsider Whether Death Penalty Amounts to Cruel, Inhuman Treatment*, GAOR (Oct. 18, 2011), <http://www.un.org/press/en/2012/gashc4046.doc.htm>.

nation's first supermax prison.<sup>8</sup> The men who served their sentences there spent years in isolation, on the theory that solitary confinement would not only punish them, it would also rehabilitate them by providing an opportunity to seek forgiveness from God. The belief was that isolation would bring penitence; thus the prison gave rise to the term "penitentiary." But, according to Charles Dickens, who visited there in 1842, instead of becoming penitent and rehabilitated, the men housed at Eastern State were, "dead to everything but torturing anxieties and despair."<sup>9</sup> He further observed, "[t]he system here, is rigid, strict and hopeless solitary confinement. I believe it ... to be cruel and wrong ... I hold this slow and daily tampering with the mysteries of the brain to be immeasurably worse than any torture of the body."<sup>10</sup>

From a rehabilitation perspective, the Eastern State experiment with solitary confinement was a failure, and "the Pennsylvania System" (as it became known) was abandoned by 1913. While this could—and should—have led to solitary confinement's demise, a trifecta of events instead helped produce a resurgence in its use. First, the 1980s witnessed a shift in correctional philosophy away from rehabilitation and toward a theory of "incapacitate and punish."<sup>11</sup> Driven by a belief that "nothing works" to rehabilitate people in prison,<sup>12</sup> correctional systems dramatically reduced or eliminated treatment programs. Second, changes in sentencing, probation, and parole policy during this period caused incarceration rates across the country to rise dramatically.<sup>13</sup> Finally, the deinstitutionalization movement and closure of many state mental health facilities resulted in the influx of thousands of people with mental illness into communities that lacked the necessary services and supports, ultimately leading to many mentally ill individuals being incarcerated in jails and prisons.<sup>14</sup>

These events, in the aggregate, produced extraordinary overcrowding in the nation's prisons,<sup>15</sup> and with it, unsurprisingly, an increase in prison violence. Efforts to curb this violence coupled with the shift in correctional philosophy away from rehabilitation and toward incapacitation led to unprecedented growth in the number of supermax cells in the late 1980s and early 1990s. Believing that "criminals were harder"<sup>16</sup> and could not be rehabilitated, the only option in the minds of many correctional

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<sup>8</sup> Technological advances allow current supermax conditions to achieve an unprecedented level of isolation. When surveillance and, in some places, visits and therapy occur remotely via video screen, prisoners may literally not see another person for days on end. Some commentators liken this level of confinement to Michel Foucault's conception of total control over others because it so thoroughly separates prisoners from the outside world and so severely constrains them. *See generally*, Laura Matter, *Hey, I Think We're Unconstitutionally Alone Now: The Eighth Amendment Protects Social Interaction As A Basic Human Need*, 14 J. GENDER RACE & JUST. 265, 284–85 (2010).

<sup>9</sup> Keramet Ann Reiter, *The Most Restrictive Alternative: A Litigation History of Solitary Confinement, in U.S. Prisons*, in STUDIES IN LAW, POLITICS, AND SOCIETY 71, 72 (Austin Sarat ed., 2012).

<sup>10</sup> *Id.*

<sup>11</sup> Dr. Craig Haney, *The Hardening of Prison Conditions*, Lecture at the Thirteenth Annual Liman Colloquium, YALE LAW SCHOOL (Mar. 4, 2010), *available at* [http://ylsqtss.law.yale.edu:8080/qtmedia/events10/LimanPanel1\\_030410\\_s.mov](http://ylsqtss.law.yale.edu:8080/qtmedia/events10/LimanPanel1_030410_s.mov).

<sup>12</sup> *See* Robert Martinson, *What Works? Questions and Answers About Prison Reform*, 35 THE PUBLIC INTEREST 22 (1974).

<sup>13</sup> *See, e.g.*, SHARON SHALEV, SUPERMAX: CONTROLLING RISK THROUGH SOLITARY CONFINEMENT 28–29 (2009).

<sup>14</sup> *Id.*

<sup>15</sup> *See* *Brown v. Plata*, 131 S. Ct. 1910 (2011).

<sup>16</sup> *See generally* Roy D. King, *The Rise and Rise of Supermax: An American Solution in Search of a Problem*, 1 PUNISHMENT & SOC'Y 163 (1999).

administrators was to isolate prisoners from one another—as completely as possible for as long as possible.<sup>17</sup>

During this period, the federal courts also were undergoing a shift in philosophy. While, in the late 1960s courts began to abandon the longstanding “hands off” doctrine<sup>18</sup> that had effectively precluded judicial review of virtually all prison conditions, this shift was short-lived. In the ensuing decades, the Supreme Court—particularly during the Rehnquist era—while not returning entirely to the hands off doctrine, has significantly scaled back judicial scrutiny of prison conditions by developing standards of deference to constrain the lower courts.<sup>19</sup> As a result, federal courts often give correctional officials considerable (sometimes complete) deference “defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them.”<sup>20</sup>

## II. EIGHTH AMENDMENT CHALLENGES TO SOLITARY CONFINEMENT

Generally, constitutional challenges to solitary confinement have been grounded in the Eighth Amendment’s prohibition against cruel and unusual punishment.<sup>21</sup> The Eighth Amendment prohibits the infliction of “cruel and unusual punishments.”<sup>22</sup> In determining whether a particular form of punishment is cruel and unusual, the Supreme Court interprets the Amendment “in a flexible and dynamic manner.”<sup>23</sup> This means that “[n]o static ‘test’ can exist by which courts determine whether conditions of confinement are cruel and unusual, for the Eighth Amendment ‘must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.’”<sup>24</sup>

To prevail on an Eighth Amendment conditions-of-confinement claim, a prisoner must satisfy a two-prong test with objective and subjective components.<sup>25</sup> The

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<sup>17</sup> One commentator describes this evolution of the proliferation of supermax confinement incisively: “Seemingly powerless to combat the rampant violence and pervasive idleness that often accompanies incarceration, the warehouse prison-type operates without the pretense that it does anything other than store and recycle offenders.” James E. Robertson, *The Rehnquist Court and the “Turnerization” of Prisoners’ Rights*, 10 N.Y. CITY L. REV. 97, 125 (2006).

<sup>18</sup> Prior to the prison reform movement that began in the 1960s, the predominant view of the federal courts was that prisoners had no legal right to humane conditions of confinement that could be judicially enforced. Consequently, they maintained a “hands-off” approach to prison cases, often citing concerns about separation of powers, federalism, and lack of judicial expertise in prison management. See MALCOLM FEELEY & EDWARD RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW COURTS REFORMED AMERICA’S PRISONS* 30–31 (1998); LYNN S. BRANHAM, *THE LAW OF SENTENCING, CORRECTIONS, AND PRISONERS’ RIGHTS* 335–36 (6th ed. 2002).

<sup>19</sup> In *Bell v. Wolfish*, which is widely regarded as the first clear signal of the end of the reform movement, Justice Rehnquist observed that although the Court had acknowledged in prior cases that prisoners have rights, “our cases have also insisted on a second proposition: simply because prison inmates retain certain constitutional rights does not mean that these rights are not subject to restrictions and limitations.” 441 U.S. 520, 545 (1979).

<sup>20</sup> *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003).

<sup>21</sup> The use of long-term solitary confinement also implicates the due process clauses of the Fifth and Fourteenth Amendments, which prohibit the government from depriving a person of life, liberty, or property without due process of law. Unlike the Eighth Amendment, which is the primary focus of this Issue Brief, rather than prohibiting harsh or atypical prison conditions, due process safeguards are intended to ensure that people are not caused to suffer deprivations in error or without reason.

<sup>22</sup> U.S. CONST. amend. VIII.

<sup>23</sup> *Gregg v. Georgia*, 428 U.S. 153, 171 (1976).

<sup>24</sup> *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

<sup>25</sup> *Wilson v. Seiter*, 501 U.S. 294, 299–304 (1991).

objective prong requires the prisoner to demonstrate that the challenged condition is sufficiently serious to merit review, either because it deprives him of a “basic human need” or because the condition presents a “substantial risk of serious harm.”<sup>26</sup> The subjective prong requires a showing that prison officials acted with “deliberate indifference” in imposing or maintaining the condition despite knowing about the harm or risk of harm.<sup>27</sup>

With respect to the objective prong, people who have brought Eighth Amendment challenges to long-term isolation have asserted that solitary confinement deprives them of several basic human needs, including normal human contact and social interaction, environmental and sensory stimulation, mental and physical health, exercise, sleep, nutrition, meaningful activity, and safety.<sup>28</sup> They also assert that these deprivations cause them serious physical and psychological harm and that they are at substantial risk of future harm if the isolation continues.<sup>29</sup>

Most federal courts to consider whether the use of long-term solitary confinement violates the Eighth Amendment have held that it does not, except in situations where the person is a juvenile or has a pre-existing mental illness. Those exceptions are grounded in the idea that youth and mental illness make people more vulnerable to the harmful effects of isolation. For example, in the leading case, *Madrid v. Gomez*, a federal district court likened the placement of persons with mental illness in solitary confinement to “putting an asthmatic in a place with little air to breathe.”<sup>30</sup> For that reason, the court held that confining people with mental illness in supermax conditions could not “be squared with evolving standards of humanity or decency” because the risk of exacerbating their mental illness was so grave—“so shocking and indecent—[that it] simply has no place in civilized society.”<sup>31</sup>

Yet, the court also held that confining people who were *not* mentally ill in identical conditions was *not* a violation of the Eighth Amendment. The court explained that “while the conditions in the SHU may press the outer bounds of what most humans can psychologically tolerate, the record does not satisfactorily demonstrate that there is a sufficiently high risk to all inmates of incurring a serious mental illness from exposure to conditions in the SHU to find that the conditions constitute a per se deprivation of a basic necessity of life.”<sup>32</sup>

The *Madrid* case was decided in 1995, but other courts have largely adopted its distinction between prisoners with mental illnesses and those without when considering

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<sup>26</sup> *Farmer v. Brennan*, 511 U.S. 825 (1994); *Helling v. McKinney*, 509 U.S. 25 (1993).

<sup>27</sup> *Farmer*, 511 U.S. at 836–38.

<sup>28</sup> *Ashker v. Brown*, 2014 U.S. Dist. LEXIS 75347 (N.D. Cal. June 2, 2014); *see also* *Silverstein v. Fed. Bureau of Prisons*, 559 Fed. App’x 739 (10th Cir. 2014), *Madrid v. Gomez*, 889 F.Supp. 1146 (N.D. Cal. 1995), *rev’d and remanded*, 150 F.3d 1010 (9th Cir. 1998); *Ruiz v. Johnson*, 37 F.Supp. 2d 855 (S.D. Tex. 1999). Arguably, all of these human needs could be viewed as elements or subcategories of the basic human need for safety. Importantly, the Supreme Court has held that to prove the objective prong of an Eighth Amendment violation, a prisoner must demonstrate the “deprivation of a single, identifiable human need.” “[O]verall conditions,” the Court held, are too “amorphous” to constitute an Eighth Amendment violation. *Wilson v. Seiter*, 501 U.S. 294, 304–05 (1991).

<sup>29</sup> *Helling*, 509 U.S. at 33.

<sup>30</sup> *Madrid*, 889 F.Supp. at 1265.

<sup>31</sup> *Id.* at 1266.

<sup>32</sup> *Id.* at 1267.

Eighth Amendment claims about solitary confinement.<sup>33</sup> One of the most striking examples of this is *Silverstein v. Federal Bureau of Prisons*, in which the U.S. Court of Appeals for the Tenth Circuit held that Thomas Silverstein's *thirty-year* confinement in extreme isolation did not constitute cruel and unusual punishment.<sup>34</sup> This case brings into sharp focus the way Eighth Amendment conditions-of-confinement jurisprudence has evolved, particularly with respect to solitary confinement.

Despite recognizing that the conditions in which prison officials confined Silverstein were the most isolating in the entire federal prison system and that his three decades of solitary confinement was unprecedented, the Tenth Circuit nevertheless held that his conditions did not violate the Eighth Amendment. The court based most of the rationale for its holding on security concerns—Silverstein was convicted of three murders while in custody, including the murder of a correctional officer in 1983. Although thirty-one years had passed since the murders, and Silverstein had maintained a violence-free record ever since (and was in his sixties), the court nevertheless deferred completely to prison officials, who claimed that no lessening of Silverstein's isolation was possible without threatening institutional safety. Indeed, the court's deference to prison officials was so absolute that it denied Silverstein a trial in which the court could have considered evidence that there were ways to ease his isolation without jeopardizing security. The beginning and end of the court's inquiry into the prison official's asserted penological interests can be summed up by its statement that "the opinion of a prison administrator on how to maintain internal security carries great weight and the courts should not substitute their judgment for that of officials."<sup>35</sup>

For those who take seriously the idea that the Eighth Amendment imposes moral limits on what the state may do to people as punishment,<sup>36</sup> the Tenth Circuit's approach to analyzing security issues is troubling for two reasons. First, the Eighth Amendment's two-pronged test does not expressly contemplate the role of the prison's penological interest.<sup>37</sup> While the prison's reason for putting someone in solitary is obviously relevant to the question of whether doing so is cruel and unusual, the lack of a coherent doctrinal structure has resulted in courts varying considerably in their analysis of whether, how, and how much they consider an asserted penological interest in determining whether the Eighth Amendment has been violated.

Second, there is a separate issue about how much deference courts should give to that asserted interest. While the Supreme Court has held that other constitutional rights are less strong in prison because they must give way to legitimate penological

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<sup>33</sup> See, e.g., *Jones-El v. Berge*, 164 F. Supp. 2d 1096 (W.D. Wis. 2001) (placing seriously mentally ill prisoners in Wisconsin supermax violates the Eighth Amendment); *Austin v. Wilkinson*, No. 4:01-CV-071, Doc. 134 at \*27 (N.D. Ohio Nov. 21, 2001) (order granting preliminary injunction) (noting that the defendants offered little opposition to a preliminary injunction prohibiting the placement of seriously mentally ill prisoners at the Ohio supermax); *Ruiz*, 37 F. Supp. 2d at 915 (finding that prison conditions can pose too great a threat to the psychological health of mentally ill inmates, violating the Eighth Amendment).

<sup>34</sup> *Silverstein*, 559 Fed. App'x. at 739. I teach in the Civil Rights Clinic at the University of Denver College of Law, which was counsel to Silverstein in this case.

<sup>35</sup> *Id.* at 754 (quoting *Whitley v. Albers*, 475 U.S. 312, 321–22 (1986)).

<sup>36</sup> See *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting) ("The standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment.").

<sup>37</sup> For a more in-depth discussion of this issue, see Brittany Glidden, *Necessary Suffering?: Weighing Government and Prisoner Interests in Determining What is Cruel and Unusual*, 50 AM. CRIM. L. REV. 1815 (Fall 2012).

interests,<sup>38</sup> the Court has affirmed that those limits do not apply to claims of cruel and unusual punishment because “[t]he whole point of the amendment is to protect persons convicted of crimes.”<sup>39</sup> Accordingly, the Court has held that affording “deference to the findings of state prison officials in the context of the [E]ighth [A]mendment would reduce that provision to a nullity in precisely the context where it is most necessary.”<sup>40</sup>

Despite this, the *Silverstein* court—and other courts that have considered the constitutionality of solitary confinement under the Eighth Amendment—have heavily weighted prison administrators’ asserted penological interest and have given enormous deference to the judgments of prison staff, going so far as to profoundly minimize or ignore evidence that conflicts with those judgments. The result has not only produced judicial decisions sanctioning the use of prolonged or indefinite solitary confinement, it has also perverted Eighth Amendment jurisprudence more broadly.<sup>41</sup>

In addition to the deference the *Silverstein* court gave to the prison’s asserted penological interest, the court also relied on the fact that Silverstein had not been diagnosed with a serious mental illness prior to his thirty years in isolation. Further, the court found that the mental health issues he developed during his time in solitary—including an anxiety disorder, cognitive impairment, hopelessness, inability to concentrate, memory loss, and depression—were “minor mental health symptoms” and therefore his thirty years of isolation was not “sufficiently serious so as to ‘deprive him of the minimal civilized measure of life’s necessities.’”<sup>42</sup>

Not only did the Tenth Circuit disregard the harm Silverstein had already suffered, it also disregarded the risk of harm that indefinite solitary confinement posed to Silverstein in the future. In *Helling v. McKinney*, the Supreme Court expressly recognized the “risk of harm” formulation of the objective prong, holding that “[t]he Amendment . . . requires that inmates be furnished with the basic human needs, one of which is ‘reasonable safety.’ . . . [A] remedy for unsafe conditions need not await a tragic event.”<sup>43</sup> In *Helling*, the plaintiff asserted that his exposure to tobacco smoke from other prisoners subjected him to cruel and unusual punishment. In rejecting the state’s argument that the Eighth Amendment is not violated absent a showing of current harm, the Court emphasized that prison authorities may not “ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year.”<sup>44</sup> The Court went on to explain:

[T]he Eighth Amendment requires more than a scientific and statistical inquiry into the seriousness of the potential harm and the

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<sup>38</sup> Other constitutional rights—for example, First Amendment rights to free expression, association, and exercise of religion; due process; equal protection, etc.—are limited by the very deferential, rational basis test established by the Supreme Court in *Turner v. Safley*, 482 U.S. 78, 89–92 (1987).

<sup>39</sup> *Johnson v. California*, 543 U.S. 499, 511 (2005) (“[T]he integrity of the criminal justice system depends on full compliance with the Eighth Amendment”) (quoting *Spain v. Proconier*, 600 F.2d 189, 193–94 (9th Cir. 1979)).

<sup>40</sup> *Id.*

<sup>41</sup> An especially troubling basis for this deference is sometimes found in courts’ invocation of separation of powers principles. In such cases, courts contend that prison administration is uniquely the province of the executive branch and that separation-of-powers concerns counsel judicial restraint. While this argument is not without merit, taken too far it represents abdication of the judicial role. *See, e.g., Plata*, 131 S. Ct. at 1928–29 (“courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration”).

<sup>42</sup> *Silverstein*, 559 Fed. App’x. at 758.

<sup>43</sup> *Helling*, 509 U.S. at 33–34.

<sup>44</sup> *Id.*

likelihood that such injury to health will actually be caused.... It also requires a court to assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk. In other words, the prisoner must show that the risk of which he complains is not one that today's society chooses to tolerate.<sup>45</sup>

One of the reasons the Tenth Circuit held that indefinite solitary confinement did not pose a constitutionally significant risk of harm to Silverstein in the future was its determination that in conditions of confinement cases where a plaintiff asserts a future risk of mental harm, “[t]he *actual extent* of any ... psychological injury is pertinent in proving a substantial risk of serious harm.”<sup>46</sup> Aside from the fact that a requirement of current harm as a precondition for asserting a risk of future harm appears nowhere in *Helling* or its progeny, the Tenth Circuit’s formulation of the “risk of harm” element situates the determination of whether a condition is “sufficiently serious” in the character of the prisoner-plaintiff rather than the nature of the conditions themselves.

Framing the inquiry in this way also allowed the *Silverstein* court to disregard substantial evidence of the negative psychological effects of isolated prison confinement.<sup>47</sup> That evidence includes studies documenting a recurring cluster of harms suffered by people in long-term isolation, including “ruminations or intrusive thoughts, an oversensitivity to external stimuli, irrational anger and irritability, difficulties with attention and often with memory” as well as “a constellation of symptoms indicative of mood or emotional disorders ... emotional flatness or losing the ability to feel, swings in emotional responding, and feelings of depression or sadness that did not go away.”<sup>48</sup> Finally, “sizable minorities ... report symptoms that are typically only associated with more extreme forms of psychopathology—hallucinations, perceptual distortions, and thoughts of suicide.”<sup>49</sup> Over and over again, there are reports of people who have spent long periods in solitary suffering the same symptoms of harm—so much so that researchers refer to this cluster as “SHU syndrome.”<sup>50</sup> Harvard psychiatrist Dr. Stuart Grassian published research in 1983 (the year Silverstein was put in solitary) documenting brain function abnormalities of people held in isolation.<sup>51</sup> Studies from all over the world detail the “psychologically precarious state of persons confined under penal isolation, [including] the pain and suffering that isolated prisoners endure.”<sup>52</sup> Further, “[t]he data that establish these harmful effects have been collected in studies conducted

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<sup>45</sup> *Id.* at 36.

<sup>46</sup> *Silverstein*, 559 Fed. App’x. at 754 (quoting *Benefield v. McDowall*, 241 F.3d 1267, 1272 (10th Cir. 2001)).

<sup>47</sup> Haney Aff., Attach. 2 at 7, *Silverstein v. Fed. Bureau of Prisons*, 2011 WL 4552540 (D. Colo. 2011) *aff’d*, 559 Fed. App’x. 739 (10th Cir. 2014), available at <http://solitarywatch.com/wp-content/uploads/2011/05/declaration-of-dr-craig-haney-in-silverstein-case.pdf>.

<sup>48</sup> *Id.* at 12; see also Craig Haney, *Mental Health Issues in Long-Term Solitary and ‘Supermax’ Confinement*, 49 CRIME & DELINQ. 124, 134–41 (2003), available at <http://www.supermaxed.com/NewSupermaxMaterials/Haney-MentalHealthIssues.pdf> (detailing the findings of Dr. Haney’s study of California’s Pelican Bay supermax prison, including the prevalence of psychopathological symptoms of isolation).

<sup>49</sup> Haney Aff., Attach. 2, *supra* note 47, at 7; see also Haney, *supra* note 48, at 134–41.

<sup>50</sup> See e.g., Stuart Grassian, *The SHU Syndrome: Psychopathological Effects of Solitary Confinement*, AM. J. OF PSYCHIATRY 1450–54 (1983).

<sup>51</sup> *Id.*

<sup>52</sup> Haney Aff., Attach. 2, *supra* note 47, at 3.

over a period of several decades, by researchers from several different continents who had diverse academic backgrounds and a wide range of professional expertise.”<sup>53</sup>

Despite this overwhelming body of evidence, the Tenth Circuit found that there was no triable issue of fact as to whether Silverstein faced a substantial risk of future harm as he entered his fourth decade of indefinite and extreme isolation— isolation that continues to this day. Moreover, the court’s approach to its analysis shifted the inquiry away from the core constitutional question of whether such confinement is inconsistent with the “evolving standards of decency that mark the progress of a maturing society.”<sup>54</sup> As Silverstein’s extreme case demonstrates, the Tenth Circuit’s approach would make it difficult for any prisoner-plaintiff to prevail in an Eighth Amendment challenge to his solitary confinement.

### III. A WAY FORWARD

To date, the Constitution—as interpreted by the federal courts—has not functioned as a robust check on the use of solitary confinement, but there may be reason for cautious optimism. As with the confluence of events that produced a massive expansion in the use of supermax confinement starting in the early 1980s, the U.S. is now on the cusp of another convergence of factors that may swing the pendulum in the opposite direction.

First, we appear to be approaching a societal consensus that solitary confinement causes people harm and pain. The overwhelming and ever-growing body of psychological and medical evidence documents what we know intuitively—that human beings need social interaction and meaningful activity, and they suffer without it.<sup>55</sup> Indeed, this borders on common sense; it is why solitary confinement is a regular feature of torture regimes. Additionally, neuroscience research has increasingly demonstrated that the harmful effects of solitary confinement appear not only in the reports of those who are forced to endure it, but also in brain imagery and testing, which reveal that changes can occur in the brain after even (comparatively) brief periods of solitary confinement.<sup>56</sup>

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<sup>53</sup> *Id.* at 7.

<sup>54</sup> *Trop*, 356 U.S. at 100–01.

<sup>55</sup> It is therefore unsurprising that there are increased rates of suicide and self-harm among prisoners held in prolonged isolation. In one study of California’s prison system, researchers found that 2% of the prison population is housed in isolation, but accounted for 42% of all prison suicides from 2006 to 2010. *Striking Against Solitude*, WASH. POST, Aug. 4, 2013, at A18. This finding was replicated in a study published in the *American Journal of Public Health* in 2012, in which the correctional psychiatrist Fatos Kaba and colleagues analyzed about 244,699 jail admissions New York City between 2010 and 2013, and found that although 7.3% of prisoners admitted during this period were consigned to solitary, accounting for 53.3% of acts of self-harm and 45% of potentially fatal acts of self-harm. Similarly, a 1995 study of federal prisoners found that 63% of suicides occurred among people in solitary. THE DEPARTMENT OF JUSTICE, PRISON SUICIDE: AN OVERVIEW AND GUIDE TO PREVENTION 55 (1995), available at <https://s3.amazonaws.com/static.nicic.gov/Library/012475.pdf>.

<sup>56</sup> See e.g., Stephanie Pappas, *Mystery of How Social Isolation Messes with Brain Solved*, LIVE SCIENCE (Sept. 13, 2012, 2:10 PM), available at <http://www.livescience.com/23169-social-isolation-changes-brain.html>; Rita Hari & Milamaaria V. Kujala, *Brain Basis of Human Social Interaction: From Concepts to Brain Imaging*, 89 PHYSIOLOGICAL REV. 453, 454 (2009); Roy F. Baumeister & Mark R. Leary, *The Need to Belong: Desire for Interpersonal Attachment as a Fundamental Human Motivation*, 117 PSYCHOL. BULL. 497, 497 (1995); Nadia Ramlagan, *Solitary Confinement Fundamentally Alters the Brain, Scientists Say*, ADVANCING SCI., SERVING SOC’Y (Feb. 15, 2014), <http://www.aaas.org/news/solitary-confinement-fundamentally-alters-brain-scientists-say>.

In short, “we now know that prolonged social deprivation has the capacity to literally change who we are, physically as well as mentally.”<sup>57</sup>

In light of this, a broad array of medical and mental health organizations, human rights groups, religious entities, and even correctional administrators have denounced the use of long-term isolation and called for its elimination or reduction.<sup>58</sup> And those who have the most expertise about the harm of long-term isolation—the people who are confined there—have raised public consciousness through writing, art, and most recently, massive hunger strikes by California prisoners held for decades in solitary confinement.<sup>59</sup> Public awareness about the harm of solitary confinement is growing, and public opinion is changing as a result.

Second, the international community has almost universally condemned the use of long-term isolation. In 2011, the U.N. Special Rapporteur on Torture concluded that prolonged solitary confinement is prohibited by the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture, and declared that the use of solitary confinement for more than fifteen days constitutes torture.<sup>60</sup> Amnesty International, Human Rights Watch, and the World Health Organization are just a few of the many international human rights organizations that have condemned the use of penal isolation in the U.S. Earlier this year, the High Court of Ireland refused to extradite a man wanted by the U.S. on terrorism-related charges because it found that if convicted, he was at risk of being held in isolation indefinitely at the federal supermax prison in Florence, Colorado, in conditions that violate the Irish Constitution.<sup>61</sup> In short, the U.S. is an outlier in the degree to which it uses long-term isolation, rendering it dramatically out of sync with international human rights standards.

Third, recent bipartisan calls for criminal justice reform are gaining traction, including reforms to address mass incarceration in general and solitary confinement in particular. The motivation behind those calls varies (politics do make strange bedfellows). Traditional critics of solitary confinement are largely motivated by concerns about the humane treatment of people in prison. Those concerned with law and order cite research demonstrating the higher recidivism rates of people released straight from solitary to the street as a reason to reexamine the practice. For some, the interests are purely economic: prison is expensive, and solitary confinement is considerably more so.<sup>62</sup> The alignment of these interests has prompted some states to experiment with

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<sup>57</sup> Dr. Craig Haney, Testimony before the California Senate and Assembly Committee on Public Safety, Hearing on CDCR’s New Policies on Inmate Segregation: The Promise and Imperative of Real Reform (Feb. 11, 2014) at 6 [hereinafter CDCR Testimony].

<sup>58</sup> For example, the American Psychiatric Association, Physicians for Human Rights, the National Alliance for the Mentally Ill, the National Religious Campaign Against Torture, and Pope Francis have all condemned the use of solitary confinement.

<sup>59</sup> See, e.g., Benjamin Wallace-Wells, *The Plot from Solitary*, N.Y. MAG., Feb. 26, 2014, available at <http://nymag.com/news/features/solitary-secure-housing-units-2014-2/#>.

<sup>60</sup> Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Special Rapporteur on Torture Tells Third Committee Use of Prolonged Solitary Confinement on Rise, Calls for Global Ban on Practice*, U.N. DOC. GA/SHC/2014 (Oct. 18, 2011), available at <http://www.un.org/press/en/2011/gashc4014.doc.htm>. The Special Rapporteur’s view comports with standards laid out by the Istanbul Statement on the Use and Effects of Solitary Confinement, the ICCPR Human Rights Committee, and the United Nations Office of the High Commissioner for Human Rights.

<sup>61</sup> *Attorney General v. Ali Charaf Damache*, [2015] IEHC 339, (Ir.), available at <http://www.bailii.org/ie/cases/IEHC/2015/H339.html>.

<sup>62</sup> SOLITARY WATCH, FACT SHEET: THE HIGH COST OF SOLITARY CONFINEMENT, <http://solitarywatch.com/wp-content/uploads/2011/06/fact-sheet-the-high-cost-of-solitary-confinement.pdf> (last visited Sept. 8, 2015).

ways to reduce their use of solitary confinement, many of which have produced positive results.<sup>63</sup> At the federal level, the Senate has held two hearings about the use of solitary confinement, and in his recent speech on criminal justice delivered at the annual convention of the NAACP, President Obama reported that he has asked Attorney General Loretta Lynch to “start a review of the overuse of solitary confinement across American prisons.”<sup>64</sup>

These converging forces have set in motion state legislation, correctional agency initiatives, and executive actions, which, individually and in combination, have begun to reduce the number of people in long-term isolation in state and federal prisons—especially children and those with mental illness.<sup>65</sup> State legislatures are increasingly prohibiting the use of solitary confinement for people with mental disabilities<sup>66</sup> and juveniles,<sup>67</sup> an interesting parallel with the evolution of death penalty legislation and jurisprudence.

But we know that children and people with mental illness are not the only ones harmed by prolonged isolation. While these two groups are especially vulnerable to grave harm, “all individuals will still experience a degree of stupor, difficulties with thinking and concentration, obsessional thinking, agitation, irritability, and difficulty tolerating external stimuli (especially noxious stimuli).”<sup>68</sup> Although acute symptoms may subside, many prisoners will likely suffer permanent harm because of such confinement.<sup>69</sup> Disturbingly, this harm also may include “lasting personality changes—especially a continuing pattern of intolerance of social interaction, leaving the individual socially impoverished and withdrawn, subtly angry and fearful when forced into social interaction.”<sup>70</sup> It is these long-term effects that likely led to the recent, tragic suicide of Kalief Browder, who, as a juvenile, spent three years at Rikers Island—nearly two of those years in solitary confinement—based on charges that prosecutors ultimately dropped.<sup>71</sup>

<sup>63</sup> See Alison Shames et al., *Solitary Confinement: Common Misconceptions and Emerging Safe Alternatives*, VERA INST. OF JUSTICE (2015), [http://www.vera.org/sites/default/files/resources/downloads/solitary-confinement-misconceptions-safe-alternatives-report\\_1.pdf](http://www.vera.org/sites/default/files/resources/downloads/solitary-confinement-misconceptions-safe-alternatives-report_1.pdf) (discussing alternatives used by several states, including Maine, Colorado, and Washington).

<sup>64</sup> President Barack Obama, Address at the NAACP Conference (July 14, 2015), available at <https://www.whitehouse.gov/the-press-office/2015/07/14/remarks-president-naacp-conference>; see also Peter Baker & Erica Good, *Critics of Solitary Confinement are Buoyed as Obama Embraces their Cause*, N.Y. TIMES (July 21, 2015), [http://www.nytimes.com/2015/07/22/us/politics/critics-of-solitary-confinement-buoyed-as-obama-embraces-cause.html?mc=edit\\_tnt\\_20150721&nid=63690974&ntemail0=y](http://www.nytimes.com/2015/07/22/us/politics/critics-of-solitary-confinement-buoyed-as-obama-embraces-cause.html?mc=edit_tnt_20150721&nid=63690974&ntemail0=y).

<sup>65</sup> See Shames et al., *supra* note 63; see also *Solitary Confinement: Resource Materials*, ACLU 14, <https://www.aclu.org/files/assets/Solitary%20Confinement%20Resource%20Materials%2012%2017%2013.pdf#page=14> (last visited Aug. 26, 2015) (listing legislation by state).

<sup>66</sup> S. 64, 69th Leg. (Colo. 2014), available at [http://www.leg.state.co.us/clics/clics2014a/csl.nsf/fsbillcont2/CC49C5479FE8AD7487257C300062140/\\$FILE/064\\_enr.pdf](http://www.leg.state.co.us/clics/clics2014a/csl.nsf/fsbillcont2/CC49C5479FE8AD7487257C300062140/$FILE/064_enr.pdf) (enacted); L.B. 548, 104th Leg. (Neb. 2015), available at <http://nebraskalegislature.gov/FloorDocs/104/PDF/Slip/LB598.pdf> (enacted); H.R. 26, 148th Leg. (Del. 2015), available at <http://legis.delaware.gov/LIS/LIS148.NSF/93487d394bc01014882569a4007a4cb7/77c64b1cb4da4bf385257dce0073e45b?OpenDocument> (as introduced on Jan. 29, 2015).

<sup>67</sup> See, e.g., Michael Winerip and Michael Schwartz, *Rikers to Ban Isolation for Inmates 21 and Younger*, N.Y. TIMES, Jan. 13, 2015, available at [http://www.nytimes.com/2015/01/14/nyregion/new-york-city-to-end-solitary-confinement-for-inmates-21-and-under-at-rikers.html?\\_r=0](http://www.nytimes.com/2015/01/14/nyregion/new-york-city-to-end-solitary-confinement-for-inmates-21-and-under-at-rikers.html?_r=0).

<sup>68</sup> Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL’Y 325, 332 (2009).

<sup>69</sup> *Id.* at 332–33.

<sup>70</sup> *Id.* at 353.

<sup>71</sup> Jennifer Gonnerman, *Kalief Browder, 1993–2015*, NEW YORKER, June 7, 2015, available at <http://www.newyorker.com/news/news-desk/kalief-browder-1993-2015>.

In addition to this trio of factors, there is a fourth trend emerging that is relevant to future constitutional challenges to solitary confinement: the Supreme Court's increasing reliance on human dignity as a substantive value underlying and animating constitutional rights.

#### A. THE SUPREME COURT'S INCREASED USE OF DIGNITY IN CONSTITUTIONAL DECISION-MAKING

Although “dignity” appears nowhere in the text of the Constitution, “it is routinely invoked to make extremely foundational points, [including] that dignity is the motivating force behind the whole Constitution itself: ‘the essential dignity and worth of every human being [is] a concept at the root of any decent system of ordered liberty.’”<sup>72</sup> Beginning in the 1940s, the concept of dignity began gaining traction in the Supreme Court's constitutional jurisprudence.<sup>73</sup> Many scholars attribute the increase in its use to Justice William Brennan, who “emphasized that the fundamental value at the crux of American law is ‘the constitutional ideal of human dignity,’ believ[ing] that the Constitution, and particularly the Bill of Rights, ‘expressed a bold commitment by a people to the ideal of libertarian dignity protected through law.’”<sup>74</sup> Although there is disagreement about whether the Court has explicitly *recognized* human dignity as a constitutional value, there is considerable evidence that—especially in recent years—the Court has *treated* it as such.

The Supreme Court's recent decision in *Obergefell v. Hodges*<sup>75</sup> arguably represents its most significant reliance on a dignity interest in recent years, but it is far from novel. In the last 220 years, the Justices have invoked the term in more than 900 opinions, with an uptick in its use by the Roberts Court following a brief period of non-use during the Burger and Rehnquist eras.<sup>76</sup> The Court has invoked dignity in conjunction with the First, Fourth, Fifth, Sixth, Eighth, Ninth, Eleventh, Fourteenth, and Fifteenth Amendments,<sup>77</sup> and “the Court's repeated appeals to dignity, particularly in majority opinions, appear to parallel its greater willingness to proffer dignity as a substantive value animating our constitutional rights.”<sup>78</sup>

Of course, this begs the question of exactly what the Court means when it invokes dignity within the ambit of legal rights. The Court recognizes that “[d]ignity is ‘admittedly an ethereal concept’ which ‘can mean many things’ and therefore suffers from an inherent vagueness at its core.”<sup>79</sup> However, particularly in the Eighth Amendment context, the Court has appeared to embrace the notion of “inherent dignity” described by Alan Gewirth as “a kind of intrinsic worth that belongs equally to all human beings

<sup>72</sup> Rex D. Glensy, *The Right to Dignity*, 70 COLUM. HUM. RTS. L. REV. 93 (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)).

<sup>73</sup> See, e.g., *In re Yamashita*, 327 U.S. 1, 29 (1946) (Murphy, J., dissenting) (“If we are ever to develop an orderly international community based upon a recognition of human dignity it is of the utmost importance that the necessary punishment of those guilty of atrocities be as free as possible from the ugly stigma of revenge and vindictiveness”).

<sup>74</sup> Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 171 (2011).

<sup>75</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>76</sup> Henry, *supra* note 74, at 171.

<sup>77</sup> See *id.* at 173 nn.18–26 (collecting cases).

<sup>78</sup> *Id.* at 181.

<sup>79</sup> Hugo Adam Bedau, *The Eighth Amendment, Human Dignity, and the Death Penalty*, in *THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES*, 145, 145 (Michael Meyer & William Parent eds., 1992).

as such, constituted by certain intrinsically valuable aspects of being human.”<sup>80</sup> It is a “necessary, not a contingent, feature of all humans; is permanent and unchanging, not transitory or changeable; and ... it sets certain limits to how humans may justifiably be treated.”<sup>81</sup>

## B. DIGNITY AND THE EIGHTH AMENDMENT

I say the Supreme Court embraced dignity “particularly in the Eighth Amendment context” because it is there that the Court has arguably expressed one of its clearest commitments to the notion of dignity as animating a constitutional right. In *Trop v. Dulles*, the Court announced the modern Eighth Amendment standard, which mandates that a given punishment must conform to “the evolving standards of decency that mark the progress of a maturing society.”<sup>82</sup> In articulating this standard, the Court declared that “the basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”<sup>83</sup>

A review of the Court’s Eighth Amendment jurisprudence in the wake of *Trop* reveals that when the Court has held a challenged punishment to be unconstitutional, it has—explicitly or implicitly—examined the relationship between the Eighth Amendment and human dignity and been unable to “square the accused state practice with the individual’s dignitary interest.”<sup>84</sup>

In the death penalty context, for example, the Court drew on dignity and evolving standards of decency in prohibiting the execution of juveniles,<sup>85</sup> as well as people with intellectual disabilities<sup>86</sup> or mental illness so severe that they have been declared insane.<sup>87</sup> In *Ford v. Wainwright*, the Court considered whether inflicting the death penalty on a person who had been found insane violated the Eighth Amendment. Observing the “natural abhorrence civilized societies feel” at executing people who are insane, as well as the national “intuition that such an execution simply offends humanity,” the Court held the practice unconstitutional. Significantly, the Court considered not only the dignity interests of the condemned prisoner, but it also sought “to protect the dignity of society itself from the barbarity of exacting mindless vengeance.”<sup>88</sup>

Similarly, in *Atkins v. Virginia*, the Court invoked dignity and decency in holding that the execution of people with intellectual disabilities is unconstitutional. Emphasizing that the Eighth Amendment draws on “the evolving standards of decency that mark the progress of a maturing society,” the Court explained that whether the execution of a person with an intellectual disability violates the Eighth Amendment “is

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<sup>80</sup> Alan Gewirth, *Human Dignity As the Basis of Rights, in THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES*, 10, 12 (Michael Meyer & William Parent eds., 1992). See also Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT’L L. 655, 679 (2008).

<sup>81</sup> See Gewirth, *supra* note 80, at 12.

<sup>82</sup> *Trop*, 356 U.S. at 100–01. Justice Warren, writing for the majority, adopted this approach from *Weems v. United States*, 217 U.S. 349 (1910), in which the Court held unconstitutional the punishment of twelve years of hard labor in iron chains for falsifying public records. In *Weems*, the Court repeatedly referenced the Eighth Amendment requirement that punishment must be humane according to existing standards of decency, explaining that the Eighth Amendment is “progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by humane justice.” *Id.* at 378.

<sup>83</sup> *Id.* at 99.

<sup>84</sup> Glensy, *supra* note 72, at 123–24.

<sup>85</sup> See *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>86</sup> See *Atkins v. Virginia*, 536 U.S. 304 (2002).

<sup>87</sup> See *Ford v. Wainwright*, 477 U.S. 399 (1986).

<sup>88</sup> *Id.* at 409.

judged not by the standards that prevailed in 1685 when Lord Jeffrys presided over the ‘Bloody Assizes’ or when the Bill of Rights was adopted, but rather by those that currently prevail.”<sup>89</sup> As a measure of those standards, the Court cited state legislatures’ widespread and growing condemnation of the execution of people with intellectual disabilities, and ultimately held that the practice violates the “dignity of man” underlying the Eighth Amendment.

In *Roper v. Simmons*, the Court examined the constitutionality of executing juveniles and looked not only to national opinion, but also examined whether the practice faced international condemnation.<sup>90</sup> Noting that the U.S. was the only country that permitted the death penalty for juveniles, the Court observed that the laws of other nations confirmed the Court’s view that certain punishments must be prohibited “to secure individual freedom and preserve human dignity.”<sup>91</sup> The Court relied on those values, which it deemed “central to the American experience” and “essential to our present-day self-definition and national identity,” in holding that the execution of juveniles violates the Eighth Amendment.<sup>92</sup>

In those cases where the Court has held that a prison condition violates the Eighth Amendment, it has similarly invoked dignity as a rationale. In *Hope v. Pelzer*, for example, the Court grounded its decision in the language of human dignity and decency, holding that an Alabama prison’s use of a hitching post as punishment for a prisoner’s disruptive conduct during a work detail violated the Eighth Amendment.<sup>93</sup> The majority opinion examined societal standards to assess whether use of the hitching post violated contemporary standards of decency, and ultimately determined that “the obvious cruelty inherent in this practice” is impermissible “under precepts of civilization which we profess to possess.”<sup>94</sup>

More recently, the Court again drew on dignity and decency in its 2011 decision in *Brown v. Plata*, in which a class of California prisoners asserted Eighth Amendment claims for harms caused by severe and pervasive overcrowding in the state’s prisons.<sup>95</sup> The majority characterized California’s prison conditions as “grossly inadequate.”<sup>96</sup> In describing the constitutional violations suffered by prisoners needing mental health treatment, the Court noted that overcrowding caused California prisoners to have a suicide rate eighty percent higher than the national prison population.<sup>97</sup> Due to bed shortages, at least one suicidal prisoner was “held in a cage for nearly 24 hours, standing in a pool of his own urine, unresponsive and nearly catatonic.”<sup>98</sup>

In analyzing the plaintiffs’ claims, the Court explained that although “prisoners may be deprived of rights that are fundamental to liberty,” they still “retain the essence of human dignity inherent in all persons ... that animates the Eighth Amendment prohibition against cruel and unusual punishment.”<sup>99</sup> The Court expressly

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<sup>89</sup> *Atkins*, 536 U.S. at 311.

<sup>90</sup> *Roper*, 543 U.S. at 575–78.

<sup>91</sup> *Id.* at 578.

<sup>92</sup> *Id.*

<sup>93</sup> *Hope v. Pelzer*, 536 U.S. 730, 745 (2002). The Court characterized Hope’s experience on the hitching post as “antithetical to human dignity—he was hitched to the post for an extended period of time in a position that was painful, and under circumstances that were both degrading and dangerous.” *Id.*

<sup>94</sup> *Id.* at 742.

<sup>95</sup> *Plata*, 131 S. Ct. at 1910.

<sup>96</sup> *Id.* at 1923.

<sup>97</sup> *Id.* at 1924.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 1928.

characterized the deprivation of a basic life necessity—here medical and mental health care—as conduct that is “incompatible with the concept of human dignity and has no place in civilized society.”<sup>100</sup> This holding reaffirmed the principle that certain prison conditions violate the Eighth Amendment because they are inconsistent with how a decent society treats even those it despises the most.

### C. A DIGNITY-BASED APPROACH TO SOLITARY CONFINEMENT CHALLENGES

Although conditions of confinement cases are notoriously difficult for prisoners to win, the various political, social, scientific, economic, and legal trends that are converging suggest that we may be approaching a moment in history when the Supreme Court could be receptive to a constitutional challenge to long-term isolation. Indeed, Justice Kennedy all but invited such a challenge in his recent concurrence in *Davis v. Ayala*.<sup>101</sup> Clearly troubled by the fact that the petitioner had been held in solitary confinement during the twenty-five years since he was sentenced to death, Justice Kennedy highlighted some of the harms associated with long-term isolation, as well as a “new and growing awareness in the broader public of the subject of corrections and of solitary confinement in particular.”<sup>102</sup> While recognizing the need to defer to the discretion of prison officials that “temporary” solitary confinement may be useful or necessary in “some instances,” he observed that “research still confirms what this Court suggested over a century ago: Years on end of near total-isolation exact a terrible price.”<sup>103</sup> He then concluded: “In a case that presented the issue, the judiciary may be required, within its proper jurisdiction and authority, to determine whether workable alternative systems for long-term confinement exist, and, if so, whether a correctional system should be required to adopt them.”<sup>104</sup>

As discussed earlier, to prevail in such a case, the plaintiffs would need to demonstrate either that their conditions in solitary confinement are sufficiently serious so as to deprive them of a basic human need or put them at substantial risk of serious harm; they also must show that prison officials knew of the harm (or risk of harm) and recklessly disregarded it. Given the overwhelming body of research and evidence documenting the harms solitary causes, if the Court were to find the objective prong satisfied, proving the subjective prong would presumably be considerably less onerous.<sup>105</sup> For that reason, the analysis below focuses primarily on the objective prong.

In evaluating the objective prong, lower courts, guided by evolving standards of decency, are showing increased receptivity to the idea that the consequences of long-term solitary confinement present a substantial risk of serious harm. For example, in *Ashker v. Brown*, a class action brought on behalf of men confined in California’s notorious Pelican Bay prison, the district court recently held that the plaintiffs’ claim that their ten to twenty-eight year periods of solitary confinement had deprived them of the basic human needs of “normal human contact, environmental and sensory stimulation, mental and physical health, physical exercise, sleep, nutrition, and

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<sup>100</sup> *Id.*

<sup>101</sup> *Davis*, 135 S. Ct. at 2208 (Kennedy, J. concurring). Justice Kennedy acknowledged that the issue of solitary confinement had “no direct bearing on the precise legal questions presented by this case.” *Id.*

<sup>102</sup> *Id.* at 2210.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> While the subjective prong requires actual awareness on the part of prison officials, that awareness may be inferred where the risk to the prisoner is obvious (*Farmer v. Brennan*, 599 U.S. 825, 842 (1994)) or from the litigation itself.

meaningful activity” established a serious risk of harm that satisfied the objective prong of Eighth Amendment analysis.<sup>106</sup> Similarly, the court in *U.S. v. Corozzo* refused to apply a state statute that would cut off a defendant’s visits from his family on the grounds that “human beings require the company of other humans to stay healthy.”<sup>107</sup> In so holding, the court noted that “[s]ubstantial research demonstrates the psychological harms of solitary confinement and segregation.”<sup>108</sup>

Given that the Eighth Amendment’s objective prong inquiry is situated in the “evolving standards of decency” framework, in evaluating a claim of cruel and unusual punishment, a reviewing court is required to consider the current state of society’s knowledge about the harms of solitary confinement. In the “Angola 3” litigation, which involved three prisoners who had been in solitary confinement in the Louisiana State Penitentiary for more than thirty years, the district court held that “social interaction and environmental stimulation are basic human needs.”<sup>109</sup> To reach this conclusion, the court rejected the defendants’ argument that the list of basic human needs the Supreme Court had recognized to date was exhaustive and that the prison had therefore not deprived plaintiffs of a basic human need. Instead, the court relied on the notion that the Eighth Amendment is grounded in evolving standards of decency to find that, in light of judicial recognition that the Eighth Amendment protects mental as well as physical health, social interaction and environmental stimulation are basic human needs. The court asserted that in our modern social and legal landscape, “recognizing social interaction and environmental stimulation as basic human needs is hardly going out on a radical limb.”<sup>110</sup>

As the Seventh Circuit has explained, “[t]he conditions in which prisoners are housed, like the poverty line, is a function of a society’s standard of living. As that standard rises, the standard of minimum decency of prison conditions, like the poverty line, rises too.”<sup>111</sup> And there is ample evidence that with respect to human contact, social interaction, and environmental stimulation, the “standard of living” is indeed rising.

It is this last piece that may be the tipping point if the Supreme Court were to hold that long-term solitary confinement is unconstitutional. The Court has said that while “prisoners may be deprived of rights that are fundamental to liberty,” they nevertheless “retain the essence of human dignity inherent in all persons ... [that] animates the Eighth Amendment prohibition against cruel and unusual punishment.”<sup>112</sup> The overwhelming body of medical and mental health research demonstrates that social interaction and environmental stimulation are basic human needs. The deprivation of them has been described by Professor Craig Haney as a “painfully long form of social death,” observing that “[t]hese are people consigned to living in suspended animation, not really part of this world, not really removed from it, and not really part of any other world that is tangibly and fully human.”<sup>113</sup> In that sense, solitary confinement deprives a person “of what we ordinarily think of as a life; of the structure of a life; of a social

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<sup>106</sup> Doc. 191 at 8, *Ashker*, 2014 U.S. Dist. LEXIS 75347 (N.D. Cal. June 2, 2014). On September 1, 2015, the parties agreed to a landmark settlement in the case that will effectively end indeterminate, long-term solitary confinement in all California state prisons. See Ian Lovett, *California Agrees to Overhaul Use of Solitary Confinement*, N.Y. TIMES, Sept. 1, 2015.

<sup>107</sup> *U.S. v. Corozzo*, 256 F.R.D. 398, 401 (E.D.N.Y. 2009).

<sup>108</sup> *Id.*

<sup>109</sup> *Wilkerson v. Stadler*, 639 F.Supp.2d 654, 679 (M.D. La. 2007).

<sup>110</sup> *Id.* at 678.

<sup>111</sup> *Davenport v. DeRobertis*, 844 F.2d 1310, 1315 (7th Cir. 1988).

<sup>112</sup> Henry, *supra* note 74, at 225.

<sup>113</sup> CDCR Testimony, *supra* note 57, at 8.

life; of meaningful activities and commitments; in short, of the most elemental form of human dignity.”<sup>114</sup>

What is additionally important for Eighth Amendment purposes is that the eviscerating effect of solitary confinement is not only an affront to the dignity of the people held in isolation, it also diminishes our collective dignity and humanity. This notion of “collective virtue as dignity” is “rooted in communitarianism” and “addresses how members of civilized societies ought to behave and ought to be treated in order to respect the collective dignity of humanity.”<sup>115</sup> Often proffered as a moral justification against the use of torture (especially in the wholly fictitious but emotionally compelling ‘ticking time bomb’ scenario<sup>116</sup>), the Supreme Court has invoked the construct of collective virtue as dignity in the Fourth Amendment and due process contexts.<sup>117</sup> It is especially relevant in the Eighth Amendment context because “the content of human dignity is a corollary of ... cultural, political, constitutional, and other conditions, which can evolve and change in the course of history.”<sup>118</sup>

We are in the midst of such an evolution with respect to the use of solitary confinement. But we can no longer solely depend on hunger strikes and the pain (and sometimes lives) of the people who are locked away to ensure that this often-invisible aspect of our justice system comports with the values of a maturing society. It is time for the federal courts, consistent with evolving standards of decency, to change the course of history.

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<sup>114</sup> R. George Wright, *What (Precisely) Is Wrong with Prolonged Solitary Confinement?*, 64 SYRACUSE L. REV. 297, 310–11 (2014).

<sup>115</sup> Henry, *supra* note 74, at 220–21.

<sup>116</sup> See David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425 (2005).

<sup>117</sup> Henry, *supra* note 74, at 226–28 (discussing *Rochin v. California*, 342 U.S. 165 (1952) (Fourth Amendment) and *Gonzales v. Carhart*, 550 U.S. 124, 132 (2007) (due process)).

<sup>118</sup> Doron Shultziner, *Human Dignity – Functions and Meanings*, 3 GLOBAL JURIST TOPICS 1, 5 (2003).



# To Protect the Right to Vote, Look to State Courts and State Constitutions

Joshua A. Douglas\*

What is the right to vote? This question has befuddled courts, law professors, historians, and policymakers for years. We hear that the right to vote is “fundamental,”<sup>1</sup> the “essence of a democratic society,”<sup>2</sup> and “preservative of all rights.”<sup>3</sup> We know that voting is sacred. Yet we are still searching for a solution to the puzzle of how best to protect voting rights. On the fiftieth anniversary of the Voting Rights Act, as voting rights advocates and scholars reflect on the history of voting protections and propose new reforms, the answer to this question is right in front of us: state constitutions and state courts.

Part of the difficulty in protecting the right to vote as robustly as possible is that the U.S. Constitution does not provide an explicit individual right to vote. This might seem surprising given that voting is one of our most cherished rights.<sup>4</sup> But the U.S. Constitution confers only “negative” rights, or prohibitions on governmental action, as opposed to specifically stated grants of individual liberties.<sup>5</sup> Yet virtually every state constitution confers the right to vote to its citizens in explicit terms. Moreover, the U.S. Constitution directs the inquiry over voter eligibility to state sources.<sup>6</sup> As Justice Scalia recently declared, the Elections Clause of the U.S. Constitution “empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them,”<sup>7</sup> and instead leaves voter eligibility rules to the states.

Why, then, has this avenue of protecting the right to vote not garnered more support? There are several possible reasons. First, even though state courts are primary actors in shaping the right to vote, most people pay less attention to state judges than to their federal counterparts. The media, for example, spend relatively little time

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<sup>1</sup> E.g., *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966); see also Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL’Y 143, 145 (2008); Richard L. Hasen, *Bush v. Gore and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U.L. REV. 377, 378–79 (2001).

<sup>2</sup> *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

<sup>3</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

<sup>4</sup> See Douglas, *supra* note 1, at 144–45.

<sup>5</sup> See, e.g., Cynthia Soohoo & Jordan Goldberg, *The Full Realization of Our Rights: The Right to Health in State Constitutions*, 60 CASE W. RES. L. REV. 997, 1005 (2010).

<sup>6</sup> U.S. CONST. art. I, § 4.

<sup>7</sup> *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2250 (2013).

covering state voting rights decisions.<sup>8</sup> Most election law scholars focus primarily on decisions from the U.S. Supreme Court. This is inherently backward given how active state courts are in regulating the voting process.<sup>9</sup> Another, and perhaps weightier, reason is that state courts, much like federal courts, have largely underenforced the right to vote because they have too closely followed federal voting-rights jurisprudence. A renewed focus on the power of state constitutions and state judges provides a solution for how best to protect the fundamental right to vote.

This Issue Brief details the scope of voting rights under state constitutions, an overlooked source of the right to vote. Part I considers both the lack of a federal constitutional right to vote and the explicit right mentioned in virtually all state constitutions. Part II describes recent state-level voter ID cases, providing a summary of how courts facing litigation over voter ID laws have employed their state constitutions. Part III contends that state courts, instead of simply following narrow federal jurisprudence in “lockstep,” should give broader, independent force to their explicit state constitutional provisions conferring the right to vote. Part IV highlights how different state judges construe their state constitutions, either broadly or narrowly, with respect to voting rights and posits that we should consider both judicial ideology and the method of judicial selection if we seek broad enforcement of these state constitutional provisions. Finally, an Appendix presents a chart, initially published in the *Vanderbilt Law Review*, illustrating all fifty state constitutions and the language they employ for the right to vote.<sup>10</sup>

## I. CONSTITUTIONAL PROVISIONS ON THE RIGHT TO VOTE

There are two sources of constitutional rights: the U.S. Constitution and state constitutions. Because the former is the “Supreme Law of the Land,” it provides the “floor” of individual rights.<sup>11</sup> State constitutions, on the other hand, can grant more robust rights. Following this formula, although the U.S. Constitution merely implies the right to vote, almost all state constitutions explicitly enumerate this right. Because the right to vote provides the foundation of our democracy,<sup>12</sup> we must understand comprehensively the differing scope of federal and state constitutional protection. This Part provides details on how the U.S. Constitution and each of the fifty state constitutions treat the right to vote.

### A. THE LACK OF A SPECIFICALLY ENUMERATED FEDERAL RIGHT TO VOTE

As stated above, the U.S. Constitution does not confer the right to vote explicitly. Rather, it sets limitations on the government’s ability to curtail voting rights. The Constitution mentions individual voting seven times—in Article I, Section 2 and in the Fourteenth, Fifteenth, Seventeenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth

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<sup>8</sup> See Dmitry Bam, *Voter Ignorance and Judicial Elections*, 102 KY. L.J. 553, 567 (2014) (citing Martin Kaplan, Ken Goldstein & Matthew Hale, *Local News Coverage of the 2004 Campaign: An Analysis of Nightly Broadcasts in 11 Markets*, Local News Archive 9–12, 28–29 (Feb. 15, 2005), <http://www.localnews-archive.org/pdf/LCLNAFinal2004.pdf>).

<sup>9</sup> As a general matter state courts issue thousands more decisions than federal courts every year, affecting millions more people. See Neal Devins & Nicole Mansker, *Public Opinion and State Supreme Courts*, 13 U. PA. J. CONST. L. 455, 456–57 (2010).

<sup>10</sup> See Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 144–49 (2014).

<sup>11</sup> See generally *Michigan v. Long*, 463 U.S. 1032, 1068 (1983) (noting that a state constitution may afford greater protections than the U.S. Constitution).

<sup>12</sup> See *Wesberry v. Sanders*, 376 U.S. 1, 17–18 (1964).

Amendments—but none of those provisions actually grant a right to vote to U.S. citizens.<sup>13</sup> Article I, Section 2 provides that, in electing members of the House of Representatives, “electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.”<sup>14</sup> That is, the U.S. Constitution does not provide the qualifications for voters itself but instead delegates that responsibility to the states, applying state eligibility rules to federal elections. The Seventeenth Amendment has the same language for the election of U.S. Senators.<sup>15</sup> The Fourteenth Amendment’s “Reduction in Representation” Clause provides that if a state denies the right to vote to eligible citizens (except based on participation in a rebellion or other crime), the state loses representation in its Congressional delegation.<sup>16</sup> This clause does not provide citizens the right to vote as an explicit liberty but instead details a potential penalty states will suffer if they deny that right. The Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments all speak in the passive voice, providing that the right to vote “shall not be denied” according to race (Fifteenth),<sup>17</sup> sex (Nineteenth),<sup>18</sup> ability to pay a poll tax (Twenty-Fourth),<sup>19</sup> or age (Twenty-Sixth).<sup>20</sup>

Given all of these textual sources of the right to vote—albeit negatively implied—it might seem surprising that the U.S. Supreme Court has not relied on these provisions but instead has located the federal right to vote within the Fourteenth Amendment’s Equal Protection Clause.<sup>21</sup> The genesis of modern voting-rights jurisprudence comes from *Baker v. Carr*, a 1962 case in which the Supreme Court declared that “[a] citizen’s right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution.”<sup>22</sup> Subsequent cases placed the right to vote squarely within the Fourteenth Amendment’s Equal Protection Clause. For example, in *Harper v. Virginia Board of Elections*, the Court acknowledged that although the U.S. Constitution does not specifically confer a right to vote in state elections, “once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.”<sup>23</sup>

Later cases, however, lowered the judicial scrutiny that regulations on the right to vote receive. In *Anderson v. Celebrezze* and *Burdick v. Takushi*, the Court developed a framework for considering federal constitutional challenges to state voting

<sup>13</sup> Cf. Laurence H. Tribe, *Erog v. Hsub and Its Disguises: Freeing Bush v. Gore from Its Hall of Mirrors*, 115 HARV. L. REV. 170, 208 (2001) (contrasting the fact that “nothing in the U.S. Constitution mentions a ‘right to vote’ in a presidential election” with the U.S. Supreme Court’s statement in *Bush v. Gore* that “[w]hen the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental”). There have been frequent calls to amend the U.S. Constitution to include an explicit grant of the right to vote, but these proposed amendments so far have not had much traction. See, e.g., H.R.J. Res. 44, 113th Cong. (2013), available at <http://www.gpo.gov/fdsys/pkg/BILLS-113hjres44ih/pdf/BILLS-113hjres44ih.pdf>.

<sup>14</sup> U.S. CONST. art. I, § 2.

<sup>15</sup> *Id.* amend. XVII.

<sup>16</sup> *Id.* amend. XIV, § 2.

<sup>17</sup> *Id.* amend. XV.

<sup>18</sup> *Id.* amend. XIX.

<sup>19</sup> *Id.* amend. XXIV.

<sup>20</sup> *Id.* amend. XXVI.

<sup>21</sup> *Bush v. Gore*, 531 U.S. 98, 105 (2000); *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964); see AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 186 (2012).

<sup>22</sup> *Baker v. Carr*, 369 U.S. 186, 208 (1962).

<sup>23</sup> *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 665 (1966).

regulations.<sup>24</sup> Known as the *Anderson-Burdick* “severe burden” test, courts first determine whether the state law in question imposes a severe burden on voters.<sup>25</sup> If it does, then the Court applies strict scrutiny review.<sup>26</sup> If the burden is less than severe, however, then the Court applies a lower, intermediate level of scrutiny, in which it balances the burdens the law does impose against the state’s regulatory interests. If the state’s interests outweigh the burden on voting, then the state law is valid, despite the fact that it nevertheless might restrict a so-called fundamental right.<sup>27</sup> At the federal level, in other words, some state impediments to voting are constitutionally permissible, so long as the burden is not too severe. The federal constitutional protection for the right to vote is thus not particularly robust, either textually or under recent case law.

## B. STATE CONSTITUTIONAL GRANTS OF THE RIGHT TO VOTE

In contrast to the U.S. Constitution, all fifty states provide explicit voting protection for their citizens. This section sets out the scope of that right, detailing state constitutional provisions on voter qualifications.

Forty-nine states explicitly grant the right to vote through specific language in their state constitutions.<sup>28</sup> Most of these provisions directly define who is eligible to vote, such as Wisconsin’s, which states that “[e]very United States citizen age 18 or older who is a resident of an election district in this state is a qualified elector of that district.”<sup>29</sup> That is, state constitutions grant voting rights to all individuals who are citizens of the United States, residents of the state for a certain period preceding the election, and over eighteen years old. Certain state constitutions then explicitly deny voting rights to convicted felons or mentally incompetent persons.<sup>30</sup> A few state constitutions allow the state’s legislature to enact other “necessary” voting procedures to root out fraud or protect the integrity of the election process.<sup>31</sup> But at bottom, state constitutions include specific language granting voting rights to the state’s citizens.

As an added level of protection, twenty-six states include a provision in their constitutions stating that elections shall be “free,” “free and equal,” or “free and open.”<sup>32</sup> Although these terms might seem amorphous, several state courts have construed this language as guaranteeing all eligible voters access to the ballot. As Kentucky’s highest court long ago explained—in a passage that several other courts have cited<sup>33</sup>—a constitutional provision declaring elections to be “free and equal” is “mandatory”: “It applies to all elections, and no election can be free and equal, within its meaning, if any substantial number of persons entitled to vote are denied the right to do so.”<sup>34</sup>

<sup>24</sup> *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)); *Anderson v. Celebrezze*, 460 U.S. 780, 793 (1983).

<sup>25</sup> *Id.*

<sup>26</sup> *Burdick*, 502 U.S. at 433–34.

<sup>27</sup> See generally Douglas, *supra* note 1, at 174 (discussing how the use of the severe burden test suggests that the Court does not always consider the right to vote to be a “fundamental right”).

<sup>28</sup> See *infra* Appendix. The only state constitution that does not include explicit language granting the right to vote is Arizona’s, which instead provides that no one shall have the right to vote unless they meet the citizenship, residency, and age requirements. This language still grants the right to vote, albeit in the reverse of all other states, because it provides who may *not* vote (no one unless they meet the state’s eligibility requirements).

<sup>29</sup> WIS. CONST. art. III, § 1.

<sup>30</sup> See, e.g., KY. CONST. § 145.

<sup>31</sup> See, e.g., DEL. CONST. art. V, § 1; MD. CONST. art. I, § 7.

<sup>32</sup> See *infra* Appendix.

<sup>33</sup> *Gunaji v. Macias*, 31 P.3d 1008, 1016 (N.M. 2001).

<sup>34</sup> *Wallbrecht v. Ingram*, 175 S.W. 1022, 1026–27 (Ky. 1915).

Finally, fifteen state constitutions mirror the U.S. Constitution in delineating voting rights through indirect, negative language declaring when the state may not infringe the right to vote on the basis of certain characteristics.<sup>35</sup> Table 1 summarizes these state constitutional provisions on the right to vote.

TABLE 1: STATE CONSTITUTIONAL PROVISIONS ON THE RIGHT TO VOTE

State Constitutional Provision	Number of States
Explicit grant of the right to vote	49
Elections shall be “free,” “free and equal,” or “free and open”	26
Implicit grant of the right to vote through negative language	15

In sum, state constitutions go well beyond the U.S. Constitution in protecting the right to vote. Unlike the U.S. Constitution, these state constitutional provisions explicitly grant the right to vote to all citizens who meet simple qualification rules. As discussed below, state courts should not interpret such broad constitutional provisions to be coextensive (or in “lockstep”) with the more limited federal jurisprudence of the U.S. Supreme Court. Indeed, the U.S. Constitution explicitly points to state voter eligibility rules for determining voter qualifications in federal elections, suggesting the paramount importance of these state constitutional provisions. State court jurisprudence also should be more robust than federal law because state constitutions go further than the U.S. Constitution in specifically conferring voting rights. That is, a faithful understanding of federal and state constitutional structure and of the differences between how each document grants voting rights counsel toward recognizing state constitutions’ independent force.

## II. STATE JUDICIAL METHODS OF INTERPRETING STATE CONSTITUTIONS

State courts construe state constitutional provisions regarding individual rights either in lockstep with federal jurisprudence or more independently and robustly. This Part outlines the lockstep and non-lockstep methods and explains how state courts have construed voting-rights provisions under each interpretive lens in recent voter ID litigation.

### A. LOCKSTEP

The U.S. Constitution establishes the federal floor of individual rights because the Supremacy Clause forbids states from providing less protection than what the U.S. Constitution guarantees.<sup>36</sup> When state courts lockstep, they follow the U.S. Supreme Court’s lead in construing the scope of these individual rights, and in essence analyze the analogous rights in the state constitution as conferring the same level of protection

<sup>35</sup> See *infra* Appendix.

<sup>36</sup> U.S. CONST. art. VI, cl. 2; see Paul H. Anderson & Julie A. Oseid, *A Decision Tree Takes Root in the Land of 10,000 Lakes: Minnesota’s Approach to Protecting Individual Rights Under Both the United States and Minnesota Constitutions*, 70 ALB. L. REV. 865, 875 (2007).

as their federal counterparts.<sup>37</sup> State courts that follow the lockstep approach will provide the exact same protection for the right as federal courts do under the U.S. Constitution.<sup>38</sup> But this is problematic when federal protection is insufficient, as is the case with voting rights.

Lockstepping is fairly common with regard to the right to vote.<sup>39</sup> A prominent, recent example comes from the Wisconsin Supreme Court. On July 31, 2014, the Wisconsin Supreme Court issued two opinions, one 5-2 and the other 4-3, upholding the state's voter ID law, following both the U.S. Supreme Court and prior state court decisions in its analysis.<sup>40</sup>

Initially two Wisconsin trial courts held that the state's voter ID law imposed an impermissible qualification for voting under the Wisconsin Constitution.<sup>41</sup> In both cases, plaintiffs challenged the voter ID requirements *only* under the Wisconsin Constitution, not the United States Constitution. Specifically, the plaintiffs invoked Article III, Section 1 of the Wisconsin Constitution, which provides that all persons age 18 or older are qualified electors of the district in which they reside.<sup>42</sup> Presumably, the plaintiffs focused their argument on the Wisconsin Constitution and did not invoke the Fourteenth Amendment's Equal Protection Clause because they wished to avoid an analysis under the U.S. Supreme Court's 2008 decision in *Crawford v. Marion County*,<sup>43</sup> in which the Court upheld a similar Indiana law under the *Anderson-Burdick* "severe burden" balancing test. This proved successful at the trial court, with one court explicitly distinguishing *Crawford* by noting, "this case is founded upon the Wisconsin Constitution which expressly guarantees the right to vote while *Crawford* was based upon the U.S. Constitution which offers no such guarantee."<sup>44</sup>

But that strategy failed before the Wisconsin Supreme Court, largely because that court followed the U.S. Supreme Court's lead to construe the state constitution. The Wisconsin Supreme Court upheld the state's voter ID requirement, adopting federal jurisprudence for the state constitutional question to conclude that the law did not add an additional qualification to vote and did not impose an undue burden on voting.<sup>45</sup> In the 5-2 decision, the court found that the voter ID provision did not add an additional qualification to vote beyond what the state constitution allows; in the 4-3 decision, the majority found that the voter ID requirement was not overly burdensome.<sup>46</sup>

<sup>37</sup> See *id.* at 875, 880.

<sup>38</sup> See *id.* at 881.

<sup>39</sup> As one commentator notes, lockstepping is the prevailing norm for most state constitutional adjudication. See Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 338 (2002).

<sup>40</sup> *Milwaukee Branch of the NAACP v. Walker*, 357 Wis.2d 469 (Wisc. 2014); *League of Women Voters of Wis. Educ. Network v. Walker*, 357 Wis.2d 360 (Wisc. July 31, 2014).

<sup>41</sup> See *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, No. 11 CV 4669, 2012 WL 763586 (Wis. Cir. Ct. Mar. 12); *Milwaukee Branch of the NAACP v. Walker*, No. 11 CV 5492, 2012 WL 739553 (Wis. Cir. Ct. Mar. 6, 2012).

<sup>42</sup> See WIS. CONST. art. III, § 1.

<sup>43</sup> *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 204 (2008).

<sup>44</sup> *Milwaukee Branch of the NAACP*, 2012 WL 739553 at \*1.

<sup>45</sup> *Milwaukee Branch of the NAACP*, 357 Wis.2d at 469; *League of Women Voters of Wis. Educ. Network*, 357 Wis.2d at 360.

<sup>46</sup> *Milwaukee Branch of the NAACP*, 357 Wis.2d at 469; *League of Women Voters of Wis. Educ. Network*, 357 Wis.2d at 360. Justice Crook joined the majority in *League of Women Voters*, the 5-2 decision, but joined the dissent in *Milwaukee Branch of the NAACP*, the 4-3 ruling. He wrote separately in *League of Women Voters* to explain that his decision in that case rested largely on the fact that the plaintiffs brought only a facial challenge to the law. He dissented in *Milwaukee Branch of the NAACP*, however, finding that the plaintiffs had presented enough evidence of specific burdens the law imposed on voters.

Throughout both cases, the Wisconsin Supreme Court relied heavily on the U.S. Supreme Court's jurisprudence and analysis in *Crawford*. In fact, in the 4-3 decision, the court explicitly followed the Supreme Court's lead in *Crawford* by stating that it would "structure [its] discussion of plaintiffs' challenges to [the voter ID law] consistent with the method of analysis employed in *Burdick* and *Anderson*..."<sup>47</sup> Although the court did not explicitly state that it was lockstepping the scope of voting rights under Wisconsin's Constitution with the U.S. Constitution, its mode of analysis placed the two protections of the right to vote in "absolute harmony."<sup>48</sup> This interpretation means that Wisconsin's explicit grant of voting rights in its constitution is in lockstep with the U.S. Constitution's Equal Protection Clause—even though those two provisions are textually and substantively different. The U.S. Constitution does not explicitly grant the right to vote, while the Wisconsin Constitution does, yet the court construed the two constitutions to be coextensive and therefore substantively identical. This suggests that the Wisconsin Constitution's explicit grant of the right to vote is irrelevant because the court simply followed the U.S. Constitution's lead even though it lacks the same substantive provision.

In sum, even though virtually every state constitution contains a provision that explicitly grants the right to vote to its residents, many state courts, like the Wisconsin Supreme Court, have not construed those provisions to have any separate meaning from federal voting-rights jurisprudence under the U.S. Constitution. Instead, these state courts use the lockstep method to define the scope of the clauses in their constitutions, typically rejecting challenges to a state's practice in the process. This analysis has an inherent dissonance, as state courts are lockstepping a *specific* and *explicit* state voter qualification provision with federal court interpretation of the *implied* right to vote within the general language of the federal Equal Protection Clause. The result is often a derogation of citizens' constitutional right to vote.

## B. NON-LOCKSTEP

Instead of using a lockstep approach, some state courts recognize that their constitutions go further than the U.S. Constitution in conferring voting rights. This methodology gives state constitutions significant authority in protecting individual rights because it is not hampered by the more limited federal analysis.

State courts employing a non-lockstep approach start with the notion that their state constitution may be broader than the U.S. Constitution.<sup>49</sup> A court's analysis thus begins and often ends with the state constitution, and the court considers the federal floor only if the state constitution does not cover the right in question.<sup>50</sup> Federal constitutional interpretation is merely persuasive in non-lockstep state jurisprudence, with no presumptive validity.<sup>51</sup>

The Missouri Supreme Court, in its 2006 voter ID decision, set out the reasons for using this state-focused method quite nicely, contrasting the voter protection provisions in both the U.S. and Missouri Constitutions.<sup>52</sup> The Missouri court recognized that,

<sup>47</sup> *Milwaukee Branch of the NAACP*, 357 Wis.2d at 490.

<sup>48</sup> See Robert F. Utter & Sanford E. Pitler, Speech, *Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 IND. L. REV. 635, 645 (1987).

<sup>49</sup> See *Anderson* & *Oseid*, *supra* note 36, at 885.

<sup>50</sup> See *id.* at 885; see also Utter & Pitler, *supra* note 48, at 647.

<sup>51</sup> Utter & Pitler, *supra* note 48, at 647.

<sup>52</sup> *Weinschenk v. State*, 203 S.W.3d 201, 211–12 (Mo. 2006) ("The express constitutional protection of the right to vote differentiates the Missouri constitution from its federal counterpart . . .")

although both the U.S. Constitution and the state's constitution safeguard the right to vote, the broader state constitution provides independent and explicit voting protection.<sup>53</sup> So construed, the voter ID law violated the Missouri Constitution's conferral to Missouri citizens of a "fundamental right to vote."<sup>54</sup> The court acknowledged that the U.S. Constitution still provides a floor of protection under the Fourteenth Amendment's Equal Protection Clause.<sup>55</sup> But the court, while giving credence to the U.S. Constitution's more limited protection of voting rights, focused its analysis on the Missouri Constitution. Missouri's constitution goes beyond the federal floor, so regardless of whether the law was permissible under the U.S. Constitution, the court invalidated it under the state constitution using the non-lockstep methodology. Similarly, the Arkansas Supreme Court, in rejecting that state's voter ID law more recently, also recognized the primacy and independence of the state constitution's conferral of voting rights.<sup>56</sup> The court found that the four qualifications listed in the Arkansas Constitution (U.S. citizen, Arkansas resident, over 18, and lawfully registered) "simply do not include any proof-of-identity requirement."<sup>57</sup> The court also refused to rely on *Crawford* or on cases from other jurisdictions, explaining that "those courts interpreted the United States Constitution or their respective states' constitutions, and here, we address the present issue solely under the Arkansas Constitution."<sup>58</sup>

The main benefit of the non-lockstep approach for the constitutional right to vote is that it gives full force to the broader protection of voting rights contained within state constitutions. Federal case law interpreting the Equal Protection Clause is still important because it furnishes a baseline of constitutional protection for the right to vote, couched in terms of equality. It therefore provides a framework for a lower limit on the kinds of election regulations states may impose. But state constitutions are more explicit than the U.S. Constitution when it comes to the right to vote. State constitutions, interpreted through a non-lockstep methodology, thus confer a more robust complement to federal Equal Protection Clause analysis. As explained below, there are strong reasons for a widespread adoption of a non-lockstep approach for all state constitutional cases involving the fundamental, constitutional right to vote.

### III. A NON-LOCKSTEP APPROACH PROVIDES THE BEST INTERPRETATIVE METHOD FOR THE RIGHT TO VOTE

#### A. THE PROBLEMS WITH LOCKSTEPPING THE CONSTITUTIONAL RIGHT TO VOTE

Textually and jurisprudentially, a non-lockstep analysis presents the best approach to construe the constitutional right to vote. There are at least three reasons to reject a lockstep methodology to interpreting voting rights under state constitutions.

First, the text of the U.S. Constitution says that *states* will determine voter qualifications.<sup>59</sup> The U.S. Constitution does not define who has the right to vote; it delegates that responsibility to the states. In turn, and unlike the U.S. Constitution, state constitutions specifically grant voting rights to the state's residents. Therefore, if we are

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<sup>53</sup> *Id.* at 216 ("Here, the issue is constitutionality under Missouri's Constitution, not under the United States Constitution.").

<sup>54</sup> *Id.* at 212–13 (citing MO. CONST. art. I, § 25).

<sup>55</sup> *Id.* at 216.

<sup>56</sup> See *Martin v. Kohls*, 444 S.W.3d 844 (Ark. 2014).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> U.S. CONST. art. I, § 2, cl. 1; U.S. CONST. amend. XVII.

faithful to the U.S. Constitution's delegation of voter eligibility rules to the states, then there is little with which to lockstep, beyond the amorphous standards of the Equal Protection Clause. It is incongruent to lockstep a state's more specific voting rules with a completely different general provision of the U.S. Constitution that actually says nothing directly about the right to vote.

Second, the history of the constitutional structure for voting rights portends a greater role for state definitions of the right to vote. Well before the adoption of the U.S. Constitution, state constitutions already granted the right to vote to the state's citizens. The Founding Fathers likely felt no need to insert a right-to-vote provision in the U.S. Constitution due to the preceding direct state grants of that right.<sup>60</sup> Instead, the drafters provided in Article I, Section 2 that voter eligibility for federal elections was dependent on state eligibility rules. This provision was a "compromise, an outgrowth both of an ideologically divided constitutional convention and the practical politics of constitutional ratification," but it was possible specifically because state constitutions already conferred the right to vote.<sup>61</sup> Accordingly, we need not locate the right to vote in the Fourteenth Amendment's Equal Protection Clause, especially given that it exists already within state constitutions.<sup>62</sup>

Third, lockstepping goes against the ideal of judicial federalism, which suggests that state constitutions should play a significant role in protecting individual liberties. As Justice Brennan explained in his seminal *Harvard Law Review* article, state courts should give their constitutions independent force when they disagree with U.S. Supreme Court decisions on an important issue of individual liberties.<sup>63</sup> State courts that robustly protect rights can help to check more restrictive federal jurisprudence and, ultimately, national power.<sup>64</sup> State courts should therefore use a state-focused, federalist-driven, non-lockstep method that allows them to recognize state constitutions as more protective of voting rights than the U.S. Constitution.

## B. THE PRESUMPTIVE INVALIDITY OF ELECTION LAWS THAT ADD VOTER QUALIFICATIONS

A non-lockstep approach to state constitutional interpretation of the right to vote rejects the U.S. Supreme Court's *Anderson-Burdick* standard as too deferential to state regulation of elections, as that test fails to recognize the explicit right of suffrage within state constitutions. But in its place, state courts need a workable test that elevates the importance of the fundamental right to vote while still allowing jurisdictions

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<sup>60</sup> For a fuller historical picture of founding era understanding of the Elections Clause and voter qualification rules, see Kirsten Nussbaumer, Republican Election Reform and the American Montesquieu 12–13 (June 28, 2011) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1898406](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1898406) (discussing the tradition of "fixing suffrage" through constitutional text).

<sup>61</sup> See ALEXANDER KEYSAR, *THE RIGHT TO VOTE* 21 (2009).

<sup>62</sup> Amar, *supra* note 21, at 186–87 (explaining that, at the time of its adoption, the Fourteenth Amendment's Equal Protection Clause was not understood to encompass voting rights).

<sup>63</sup> William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977); cf. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1221 (1978) (positing that "constitutional norms which are underenforced by the federal judiciary should be understood to be legally valid to their full conceptual limits, and federal judicial decisions which stop short of these limits should be understood as delineating only the boundaries of the federal courts' role in enforcing the norm").

<sup>64</sup> See James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1033 (2003) ("State judicial rejection of excessively narrow Supreme Court precedents concerning the scope of individual rights helps check national power in at least four ways.").

to run their elections. Again, the solution is right in front of us: the structure of state constitutions. Courts simply need to apply faithfully what state constitutions say.

### 1. *State Constitutional Structure*

As discussed above, all but one state constitution explicitly grants to its citizens the right to vote. Most of these constitutional provisions are couched in mandatory terms: all citizens “*are* qualified electors” or “*shall* be entitled to vote” so long as they are U.S. citizens, residents of the state for a certain time, and over eighteen years of age.<sup>65</sup>

State constitutions, as previously noted, also delegate authority to state legislatures to regulate elections, but this comes only *after* the state constitutions confer voting rights. That is, the right to regulate elections is derivative of the people’s right to vote. As one Wisconsin trial court considering a voter ID law explained, the citizenry of the state ratified the constitution, so the citizen’s right to vote arises first, and legislative authority to alter that right follows.<sup>66</sup> In addition, the constitutional power state legislatures enjoy is based on permissive language and is often limited to regulating only certain aspects of the election process. Pennsylvania citizens, for example, “*shall* be entitled to vote at all elections subject ... to such laws requiring and regulating the registration of electors as the General Assembly *may* enact.”<sup>67</sup> Other state constitutions allow legislatures to pass laws involving absentee balloting or felon disenfranchisement.<sup>68</sup> Some state constitutions also permit the legislature to enact laws to “preserve the integrity” of elections or “guard against abuses of the elective power.”<sup>69</sup>

State constitutions thus grant the right to vote in mandatory terms and only secondarily delegate legislative control to regulate some aspects of the election process. The constitution, not the legislature, confers the right to vote, so the legislature’s power cannot completely override this constitutional grant. A primary conferral of the right to vote, which then may be subject to legislative authority, is the only way to understand properly both the textual and contextual grant of voting rights. That is, the legislature’s power cannot outweigh the mandatory nature of the constitution’s voting protection. Courts construing these provisions in harmony, then, must give full effect to the mandatory, explicit nature of voting rights while still providing the legislature with room to regulate elections consistent with constitutional authorization.

### 2. *A Two-Part Test for the State Constitutional Right to Vote*

Given the foregoing analysis, a court considering a state constitutional challenge to an election regulation should ask two separate questions: (1) whether the law at issue infringes upon the explicit constitutional grant of voting rights by adding an additional qualification, and then (2) whether the exercise of the legislature’s power can outweigh that mandatory right. The plaintiff should have the burden of showing that the regulation in question imposes an additional voter qualification, while the state should have the ultimate burden of justifying such a law.

A plaintiff satisfies his or her initial burden under this proposed test by showing that the law creates categories—those who may vote and those who may not—based

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<sup>65</sup> See, e.g., PA. CONST. art. VII, § 1.

<sup>66</sup> Order Granting Motion for Temporary Injunction, Milwaukee Branch of the NAACP v. Walker, No. 11 CV 5492, 2012 WL 739553 (Wis. Cir. Mar. 6, 2012).

<sup>67</sup> PA. CONST. art. VII, § 1 (emphasis added).

<sup>68</sup> See, e.g., FLA. CONST. art. V, § 4 (registration and absentee balloting); KAN. CONST. art. V, § 2 (felon disenfranchisement).

<sup>69</sup> See, e.g., COLO. CONST. art. IV, § 11; N.M. CONST. art. V, § 1.

on additional criteria not listed in the state constitution. For example, a voter ID law, in a state in which many voters do not have an ID and face substantial burdens in obtaining one, can be seen as an additional qualification because those voters who satisfy all other eligibility rules still may not vote without possessing an ID. Having an ID has become a qualification. In this scenario (which is the reality in most states with strict ID requirements) a voter ID law does more than just enforce the constitutionally-enumerated eligibility rules, because those who meet the valid qualifications may still suffer disenfranchisement if they do not also have the ID. Put another way, if *every* voter possessed a valid ID, then the ID law would not be an additional qualification because it would not impose a status requirement on voters that some people cannot easily meet. Everyone would still be eligible to vote regardless of the voter ID law because everyone would have one, and the law would be regulating the process of voting instead of delineating an additional qualification. But that is not the reality of many of today's voter ID laws. To be sure, a voter ID law in a state in which everyone owned an ID still might impose an added burden on voters—of bringing and presenting the ID—but this is different in kind from distinguishing between which voters may cast a ballot based on possession of an ID when not everyone can easily obtain one. If having an ID is not a universal trait, or the state does not otherwise accommodate those without one, then the requirement turns into an additional voter qualification.

Once a plaintiff demonstrates that a law imposes an additional qualification on the right to vote, it is then the *state's* burden to show why the law is a permissible exercise of its legislative authority. To do so, the legislature must present specific findings on why the law in question does not infringe the state constitution's explicit provision of voting rights to its citizens. Without specific findings, a legislature might curtail the constitutional right to vote through general legislative declarations—contrary to the text and structure of state constitutions.

This proposal flips the normal burden in constitutional voting-rights litigation. Under the federal *Anderson-Burdick* test, the plaintiff has the obligation to show that the law in question burdens the right to vote to a severe level.<sup>70</sup> If the plaintiff cannot do so, then a lockstepping state court following *Anderson-Burdick* will apply an intermediate balancing test that largely defers to the state's justifications for the law.<sup>71</sup> In essence, "laws pertaining to electoral mechanics carry a strong presumption of constitutionality, even though they touch upon the fundamental rights of voting and political association."<sup>72</sup> Under *Anderson-Burdick*, then, the plaintiff assumes the ultimate burden of proving the law's invalidity by demonstrating the barriers the law imposes on voting rights, and the court typically credits whatever justification the state posits for its election regulation.<sup>73</sup> A court following *Anderson-Burdick* will reverse the presumption of validity and hold the state to a higher threshold only if the court finds that the law imposes a severe burden.<sup>74</sup>

Flipping the normal federal framework and imposing a presumption of invalidity to laws that add voter qualifications is justified because state constitutions already support this analytical move. They explicitly confer the right to vote as an initial

<sup>70</sup> *Burdick*, 504 U.S. at 434.

<sup>71</sup> *Id.*; see Joshua A. Douglas, *(Mis)trusting States to Run Elections*, 92 WASH. U. L. REV. 553 (2015).

<sup>72</sup> Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313, 336 (2007).

<sup>73</sup> See *id.* at 323; *Burdick*, 504 U.S. at 434; see also Douglas, *supra* note 71 (discussing the Court's undue deference to states in the interest prong of the constitutional analysis).

<sup>74</sup> See Elmendorf, *supra* note 72, at 336–37.

matter, subject only later to a grant of power that the state legislature may invoke. This is evident through the mandatory nature of the voting-rights provisions, the permissive language authorizing legislative regulation, and the simple fact that a legislature's power cannot override the explicit constitutional conferral of the fundamental right to vote. Courts should therefore consider a law that adds additional voter qualifications to be *presumptively invalid* under the state constitution because the law is contrary to the constitution's explicit grant of the right to vote. The state should then have the burden of overcoming that presumption with direct evidence showing that the law is consistent with the state constitution's specific conferral of legislative power to regulate elections.

This two-part, burden-shifting analysis is akin to strict scrutiny, requiring the state to justify an election regulation by demonstrating how it is tied specifically to the legislature's power.<sup>75</sup> The U.S. Supreme Court has recognized that "under our Constitution ... the States are given the initial task of determining the qualifications of voters who will elect members of Congress."<sup>76</sup> A close analysis of state constitutions reveals that those documents explicitly grant the right to vote in unequivocal terms, subject only to a few enumerated status qualifications and to the legislature's authority, which is limited to certain areas in most states. Thus, state constitutions themselves suggest that legislatures must justify the imposition of additional voter qualifications that infringe the right to vote. An analysis that is similar to federal strict scrutiny review comes directly from the state constitutional text and structure, as well as the fundamental nature of the right to vote.<sup>77</sup>

This formulation does not require widespread judicial oversight of elections, however, as states should be able to overcome the presumption of invalidity in most instances for run-of-the-mill election-administration laws. States need to regulate how an election should operate. Many election-related laws, moreover, do not impose additional voter qualifications but instead are about other mechanics of the election process, such as ballot access requirements for candidates or campaign finance regulations.<sup>78</sup> But when a plaintiff can demonstrate that a particular law adds an additional voting qualification beyond what the state constitution permits, courts should consider the law presumptively invalid under the constitutional text. The state should then have the burden of showing with specific evidence why it was justified in passing that law. This mode of analysis is most faithful to a non-lockstep approach to constitutional protection of the right to vote and adheres most closely to state constitutional text and structure.

#### IV. SELECTING JUDICIAL CANDIDATES WHO WILL ROBUSTLY PROTECT THE RIGHT TO VOTE

Some state judges are better than others in broadly construing voting rights and therefore are more likely to adopt the two-part analysis described above. After all, a

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<sup>75</sup> Using heightened scrutiny and rejecting deference to state legislatures for impediments to voting rights was the original formulation of the Warren Court's right-to-vote decisions. *See, e.g., Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 627–28 (1969) ("Accordingly, when we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a 'rational basis' for the distinctions made are not applicable.").

<sup>76</sup> *Storer v. Brown*, 415 U.S. 724, 729–30 (1974) (citing U.S. CONST. art. I, § 2, cl. 1).

<sup>77</sup> *See, e.g., Sanford Levinson, One Person, One Vote: A Mantra in Need of Meaning*, 80 N.C. L. REV. 1269, 1295 (2002).

<sup>78</sup> *See Douglas, supra* note 1, at 178 (distinguishing between laws that directly impact voters with laws that only tangentially affect voters by regulating other aspects of the election process).

judge who is predisposed to lockstep the state constitutional protection of voting rights with limited federal jurisprudence or otherwise narrowly construe the right to vote is unlikely to follow the proposed test. An evaluation of state right-to-vote cases may tell us whether ideologically liberal versus conservative judges, as well as elected versus appointed judges, are better at broadly construing the state-conferred constitutional right to vote. If the right to vote is the most fundamental right in our democracy,<sup>79</sup> then we should favor judges who will issue rulings that robustly protect that right for all voters. This Part provides a jumping off point for analyzing how ideology and methods of judicial selection may help to determine how a potential judge will construe the constitutional right to vote. Although the data is preliminary, and further studies are needed, it appears that liberal and appointed judges may be better at robustly construing the right to vote as compared to their conservative and elected counterparts.

#### A. POLITICAL IDEOLOGY

Liberal judges tend to view individual rights broadly, granting fuller protection to plaintiffs asserting these rights against state regulation, while conservative judges analyze them more narrowly.<sup>80</sup> For example, court decisions in Wisconsin, Michigan, and Georgia have seemingly tracked the sitting judges' ideologies, with the liberal judges ruling in favor of broader protection of the right to vote and conservative judges going in the opposite direction.<sup>81</sup> Of course, ideology is not the only driver of judicial decision making, as legal analysis is based on law, precedent, and the facts of a particular case.<sup>82</sup> That said, ideology often correlates with the outcome in a case, especially on highly-partisan issues such as election law and voting rights.<sup>83</sup> It should come as no surprise, then, that a judge's analysis of the constitutional right to vote often correlates with his or her ideology. The link between ideology and interpretation of the constitutional right to vote is most poignant in decisions on voter ID laws.<sup>84</sup> Most (although not all) of the state judges ruling on voter ID laws in the past decade have

<sup>79</sup> See Joshua A. Douglas, *The Foundational Importance of Voting: A Response to Professor Flanders*, 66 OKLA. L. REV. 81 (2013).

<sup>80</sup> Prior empirical studies have shown that liberal and conservative judges rule differently on various election law issues. For example, Professors Adam Cox and Thomas Miles have found that ideology, based on the partisanship of the appointing President, correlates strongly with how a federal judge rules in a Voting Rights Act case. See Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 19–25 (2008). Similarly, Professors Michael Kang and Joanna Shepherd have found that state judges' rulings are often consistent with the views of the political parties that funded their election campaigns. See Michael S. Kang & Joanna M. Shepherd, *The Partisan Foundations of Judicial Campaign Finance*, 86 S. CAL. L. REV. 1239 (2013).

<sup>81</sup> See Joshua A. Douglas, *State Judges and the Right to Vote*, 77 OHIO STATE L.J. 1 (forthcoming 2016). An important caveat is required here: I am not attempting a quantitative empirical analysis, and the sample size is relatively small, so the conclusions are necessarily tentative. Also, the direction of influence is unclear: does ideology affect the decision, or is the decision simply evidence of the judge's ideology? But the analysis at least provides a first step in showing that the political identity of the judges may matter when deciding a voting rights controversy.

<sup>82</sup> See, e.g., Kyle C. Kopko, *Partisanship Suppressed: Judicial Decision-Making in Ralph Nader's 2004 Ballot Access Litigation*, 7 ELECTION L.J. 301, 302 (2008).

<sup>83</sup> See, e.g., Kyle Kopko, *The Effect of Partisanship in Election Law Judicial Decision-Making* (2010) (electronic theses and dissertation, Ohio State University), available at [https://etd.ohiolink.edu/etd.send\\_file?accession=osu1275415061&disposition=inline](https://etd.ohiolink.edu/etd.send_file?accession=osu1275415061&disposition=inline).

<sup>84</sup> See Christopher S. Elmendorf, *Undue Burdens on Voter Participation: New Pressures for A Structural Theory of the Right to Vote?*, 35 HASTINGS CONST. L.Q. 643, 647 (2008).

followed their ideological predilections.<sup>85</sup> Liberal judges construe the constitutional right to vote broadly and therefore view voter ID laws skeptically, while conservative judges do the opposite.<sup>86</sup>

Although not *every* Democratic or liberal judge is going to invalidate a voter ID law, and not *every* Republican or conservative judge is going to uphold a voter ID requirement, there is still a discernable trend, particularly regarding the scope of protection afforded to the constitutional right to vote under state constitutions. It may not be possible to categorize all judges along an ideological spectrum, and a judge's constitutional analysis on this issue may have nothing to do with his or her personal ideological predilections. Moreover, voter ID laws come in different shapes and sizes, and some laws – such as the ones in Rhode Island or Colorado<sup>87</sup> – do not necessarily infringe the fundamental right to vote or impose a qualification because all voters can easily comply with no added burden. Regardless, the analysis shows that *who* is deciding these cases can matter a great deal<sup>88</sup> because liberal-leaning judges seem to understand more clearly that state constitutions provide broad protection to the individual right to vote that goes beyond federal jurisprudence.

## B. JUDICIAL SELECTION

Voting rights cases often involve challenges to state laws that have the effect of making it harder for typically disfavored groups to vote, such as poor people, minorities, felons, or people with disabilities. Perhaps judges are more likely to rule broadly in construing voting rights for these individuals if the judges are more isolated from the political process by being appointed instead of elected, or if they face merely a retention election instead of a campaign against an opponent. Prior studies show that elected judges tend to pay more attention to public opinion than appointed judges or judges who must win only a “yes” or “no” retention vote to stay on the bench.<sup>89</sup> Retention elections for appointed judges are usually boring affairs with little political drama, but elected judges must actively campaign because they must beat an opponent who also wants the seat.<sup>90</sup> The theory, then, is that an elected judge may be less likely to rule in favor of a political minority than an appointed judge who will not worry as much about the potential backlash from a vigorous campaign.<sup>91</sup>

The initial evidence suggests that, for issues that are not already highly ideological, appointed judges or judges who will face only retention elections are better at broadly construing the right to vote and including political minorities in the democratic

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<sup>85</sup> For a detailed discussion of ideology and recent state court voter ID decisions, see Joshua A. Douglas, *State Judges and the Right to Vote*, 77 OHIO STATE L.J. 1 (forthcoming 2016).

<sup>86</sup> See Elmendorf, *supra* note 82.

<sup>87</sup> See Justin Levitt, *Rhode Island Voter ID Follow-up*, ELECTION LAW BLOG (May 23, 2012), <http://electionlawblog.org/?p=34694>; *Colorado Common Cause v. Davidson*, No. 04-CV-7709, 2004 WL 2360485 (Colo. Dist. Ct. Oct. 18, 2004).

<sup>88</sup> See Elmendorf, *supra* note 84, at 647 (considering both federal and state voter ID decisions and finding that, as of 2008, “there have been fourteen votes by Democratic judges against the constitutionality of photo-ID requirements, and only three votes indicating that the requirement at issue is permissible. For Republican judges, the respective numbers are three (against constitutionality) and fifteen (for constitutionality).”)

<sup>89</sup> See Damon M. Cann & Teena Wilhelm, *Case Visibility and the Electoral Connection in State Supreme Courts*, 39 AM. POL. RES. 557, 570 (2011).

<sup>90</sup> See Andrea McArdle, *The Increasingly Fractious Politics of Nonpartisan Judicial Selection: Accountability Challenges to Merit-based Reform*, 75 ALB. L. REV. 1799, 1805–06 (2011–2012).

<sup>91</sup> See e.g., Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 694 (1995).

process.<sup>92</sup> For instance, courts in California, Iowa, and Tennessee ruled that the state could not disenfranchise the (former felon) plaintiffs who brought suit, thus limiting the scope of the states' felon disenfranchisement laws; judges in these states are appointed initially and must withstand retention elections to keep their seats.<sup>93</sup> These cases exemplify how appointed judges tend to rule broadly and independently of federal jurisprudence when construing their state constitutions' grant of the right to vote, especially in cases involving felon disenfranchisement or the voting process.<sup>94</sup> This finding adds data to the robust and complex debate over methods of judicial selection.

## V. CONCLUSION

There have been myriad calls for Congress or the federal courts to fix voting-rights jurisprudence to give broader protection to the individual right to vote.<sup>95</sup> But the solution is in plain sight if state courts simply read state constitutions faithfully to their text and independently from federal jurisprudence. In locating the right to vote, we too often look solely at the implied right under the U.S. Constitution's negative language and the Equal Protection Clause. Construing a voting regulation under the U.S. Constitution, however, presents only half of the inquiry. Almost all state constitutions grant citizens the right to vote through explicit, direct language. Yet many state courts interpret their own state's constitution to be in lockstep with federal constitutional law.

This lockstepping approach is backwards. The U.S. Constitution directs the inquiry about voting qualifications to the states, not the other way around.<sup>96</sup> Moreover, it makes little sense to lockstep a state constitution's specific grant of voting rights with the very different implied right under the general language of the federal Equal Protection Clause. Courts construing restrictions on voting rights should consider the broader scope of state constitutions.

The U.S. Supreme Court in recent years has contracted the scope of the right to vote under the federal Equal Protection Clause.<sup>97</sup> A renewed, independent focus on state constitutions and their explicit grant of the right to vote is textually faithful to both the U.S. and state constitutions and will restore the importance of the most foundational right in our democracy. The best way to achieve this renewed focus is to select judges who will embody and protect the fundamental importance of the right to vote.

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<sup>92</sup> For a detailed discussion of methods of judicial selection and recent state court voting rights cases, see Joshua A. Douglas, *State Judges and the Right to Vote*, 77 OHIO STATE L.J. 1 (forthcoming 2016).

<sup>93</sup> *League of Women Voters of Cal. v. McPherson*, 145 Cal. App. 4th 1469 (Cal. App. 2006); *Chiodo v. Section 43.24 Panel*, 846 N.W.2d 845, 847 (Iowa 2014); *May v. Carlton*, 245 S.W.3d 340, 345 (Tenn. 2008).

<sup>94</sup> See Douglas, *supra* note 92.

<sup>95</sup> See, e.g., Jamin Raskin, *A Right-to-Vote Amendment for the U.S. Constitution: Confronting America's Structural Democracy Deficit*, 3 ELECTION L.J. 559, 572 (2004); see also Brad Plumer, 'We Have to Fix That,' but Will We?, WASH. POST (Nov. 8, 2012), [http://www.washingtonpost.com/politics/decision2012/we-have-to-fix-that-but-will-we/2012/11/08/c83b4976-29ca-11e2-bab2-eda299503684\\_story.html](http://www.washingtonpost.com/politics/decision2012/we-have-to-fix-that-but-will-we/2012/11/08/c83b4976-29ca-11e2-bab2-eda299503684_story.html).

<sup>96</sup> U.S. CONST. art. I, § 2.

<sup>97</sup> See Douglas, *supra* note 1, at 151–57.

VI. APPENDIX<sup>98</sup>

## STATE CONSTITUTIONS' CONFERRAL OF THE RIGHT TO VOTE

	Explicit Grant of the Right to Vote	Elections Shall Be “Free,” “Free and Open,” or “Free and Equal”	Implicit Grant of the Right to Vote Through Negative Language
Alabama <sup>99</sup>	“shall have the right to vote”		
Alaska <sup>100</sup>	“Every citizen ... may vote”		
Arizona <sup>101</sup>		“All elections shall be free and equal”	“No Person shall be entitled to vote ... unless”; “shall not be denied or abridged”
Arkansas <sup>102</sup>	“any person may vote”	“Elections shall be free and equal”	
California <sup>103</sup>	“may vote”		“may not be conditioned by a property qualification”
Colorado <sup>104</sup>	“shall be qualified to vote”	“free and open”	
Connecticut <sup>105</sup>	“shall be ... an elector”		“No person shall be denied ... enjoyment of his or her civil or political rights”
Delaware <sup>106</sup>	“shall be entitled to vote”	“All elections shall be free and equal”	
Florida <sup>107</sup>	“shall be an elector”		

<sup>98</sup> This Appendix appeared initially in Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 144–49 (2014). It is reprinted here with permission.

<sup>99</sup> ALA. CONST. art. VIII, § 177.

<sup>100</sup> ALASKA CONST. art. V, § 1.

<sup>101</sup> ARIZ. CONST. art. II, § 21; *id.* art. VII, § 2.

<sup>102</sup> ARK. CONST. art. III, §§ 1–2.

<sup>103</sup> CAL. CONST. art. II, § 2; *id.* art. I, § 22.

<sup>104</sup> COLO. CONST. art. VII, § 1; *id.* art. II, § 5.

<sup>105</sup> CONN. CONST. art. VI, § 1; *id.* art. I, § 20.

<sup>106</sup> DEL. CONST. art. V, § 2; *id.* art. I, § 3.

	Explicit Grant of the Right to Vote	Elections Shall Be “Free,” “Free and Open,” or “Free and Equal”	Implicit Grant of the Right to Vote Through Negative Language
Georgia <sup>108</sup>	“shall be entitled to vote”		
Hawaii <sup>109</sup>	“shall be qualified to vote”		“No citizen shall be disfranchised, or deprived”
Idaho <sup>110</sup>	“is a qualified elector”		“No power ... shall at any time interfere with ... the right of suffrage”
Illinois <sup>111</sup>	“shall have the right to vote”	“All elections shall be free and equal”	
Indiana <sup>112</sup>	“may vote”	“All elections shall be free and equal”	
Iowa <sup>113</sup>	“shall be entitled to vote”		
Kansas <sup>114</sup>	“shall be deemed a qualified elector”		
Kentucky <sup>115</sup>	“shall be a voter”	“All elections shall be free and equal”	
Louisiana <sup>116</sup>	“shall have the right to register and vote”		
Maine <sup>117</sup>	“shall be an elector”		

<sup>107</sup> FLA. CONST. art. VI, § 2.

<sup>108</sup> GA. CONST. art. II, § 1, ¶ II.

<sup>109</sup> HAW. CONST. art. II, § 1; *id.* art. I, § 8.

<sup>110</sup> IDAHO CONST. art. VI, § 2; *id.* art. I, §§ 19, 20.

<sup>111</sup> ILL. CONST. art. III, §§ 1, 3.

<sup>112</sup> IND. CONST. art. II, §§ 1, 2.

<sup>113</sup> IOWA CONST. art. II, § 1.

<sup>114</sup> KAN. CONST. art. V, § 1.

<sup>115</sup> KY. CONST. §§ 6, 145.

<sup>116</sup> LA. CONST. art. I, § 10(A).

<sup>117</sup> ME. CONST. art. II, § 1.

	Explicit Grant of the Right to Vote	Elections Shall Be “Free,” “Free and Open,” or “Free and Equal”	Implicit Grant of the Right to Vote Through Negative Language
Maryland <sup>118</sup>	“and every citizen ... ought to have the right of suffrage”; “shall be entitled to vote”	“elections ought to be free and frequent”	
Massachusetts <sup>119</sup>	“have an equal right to elect officers”	“All elections ought to be free”	
Michigan <sup>120</sup>	“shall be an elector and qualified to vote”		
Minnesota <sup>121</sup>	“shall be entitled to vote”		“No member of this state shall be disfranchised”
Mississippi <sup>122</sup>	“is declared to be a qualified elector”		
Missouri <sup>123</sup>	“are entitled to vote”	“free and open”	
Montana <sup>124</sup>	“is a qualified elector”	“free and open”	“No person shall be denied the equal protection of the laws”
Nebraska <sup>125</sup>	“shall ... be an elector”	“shall be free”	
Nevada <sup>126</sup>	“shall be entitled to vote”; also calls voting a “privilege”		“There shall be no denial of the elective franchise at any election”

<sup>118</sup> MD. CONST. DECLARATION OF RIGHTS, art. I, § 7; MD. CONST. art. I, § 1.

<sup>119</sup> MASS. CONST. pt. I, art. IX.

<sup>120</sup> MICH. CONST. art. II, § 1.

<sup>121</sup> MINN. CONST. art. VII, § 1; *id.* art. I, § 2.

<sup>122</sup> MISS. CONST. art. XII, § 241.

<sup>123</sup> MO. CONST. art. VIII, § 2; *id.* art. I § 25.

<sup>124</sup> MONT. CONST. art. IV, § 2; *id.* art. II, §§ 4, 13.

<sup>125</sup> NEB. CONST. art. I, § 22; art. VI, § 1.

<sup>126</sup> NEV. CONST. art. II, § 1.

	Explicit Grant of the Right to Vote	Elections Shall Be “Free,” “Free and Open,” or “Free and Equal”	Implicit Grant of the Right to Vote Through Negative Language
New Hampshire <sup>127</sup>	“shall have an equal right to vote”	“All elections are to be free”	“The right to vote shall not be denied to any person because of the non-payment of any tax.”
New Jersey <sup>128</sup>	“shall be entitled to vote”		
New Mexico <sup>129</sup>	“shall be qualified to vote”	“All elections shall be free and open”	“and no power ... shall at anytime interfere to prevent the free exercise of the right of suffrage”
New York <sup>130</sup>	“shall be entitled to vote”		
North Carolina <sup>131</sup>	“shall be entitled to vote”	“All elections shall be free”	
North Dakota <sup>132</sup>	“shall be a qualified elector”		
Ohio <sup>133</sup>	“has the qualifications of an elector”		
Oklahoma <sup>134</sup>	“are qualified electors”	“the free exercise of the right of suffrage”	“The State shall never enact any law restricting or abridging the right of suffrage”
Oregon <sup>135</sup>	“is entitled to vote”	“All elections shall be free and equal”	

<sup>127</sup> N.H. CONST. pt. I, art. XI.

<sup>128</sup> N.J. CONST. art. II, § 1, ¶ 3.

<sup>129</sup> N.M. CONST. art. VII, § 1; *id.* art. II, § 8.

<sup>130</sup> N.Y. CONST. art. II, § 1.

<sup>131</sup> N.C. CONST. art. VI, § 1; *id.* art. I, § 10.

<sup>132</sup> N.D. CONST. art. II, § 1.

<sup>133</sup> OHIO CONST. art. V, § 1.

<sup>134</sup> OKLA. CONST. art. III, § 1; *id.* art. II, § 4; *id.* art. I, § 6.

<sup>135</sup> OR. CONST. art. II, §§ 1, 2.

	Explicit Grant of the Right to Vote	Elections Shall Be “Free,” “Free and Open,” or “Free and Equal”	Implicit Grant of the Right to Vote Through Negative Language
Pennsylvania <sup>136</sup>	“shall be entitled to vote”	“Elections shall be free and equal”	
Rhode Island <sup>137</sup>	“shall have the right to vote”		
South Carolina <sup>138</sup>	“shall have an equal right to elect officers”; “shall be an elector”; “is entitled to vote”	“free and open”	
South Dakota <sup>139</sup>	“shall be entitled to vote”	“free and equal” (two different clauses)	
Tennessee <sup>140</sup>	“shall be entitled to vote ... and there shall be no other qualification attached to the right of suffrage”	“free and equal”	“right of suffrage ... shall never be denied to any person”
Texas <sup>141</sup>	“shall be deemed a qualified voter”		
Utah <sup>142</sup>	“shall be entitled to vote in the election”	“All elections shall be free”	“The rights ... to vote ... shall not be denied or abridged”

<sup>136</sup> PA. CONST. art. VII, § 1; *id.* art. I, § 5.

<sup>137</sup> R.I. CONST. art. II, § 1.

<sup>138</sup> S.C. CONST. art. I, § 5; *id.* art. II, §§ 4, 5.

<sup>139</sup> S.D. CONST. art. VI, § 19; *id.* art. VII, § 1, 2.

<sup>140</sup> TENN. CONST. art. IV, § 1; *id.* art. I, § 5.

<sup>141</sup> TEX. CONST. art. VI, § 2.

<sup>142</sup> UTAH CONST. art. IV, §§ 1, 2; *id.* art. I, § 17.

	Explicit Grant of the Right to Vote	Elections Shall Be “Free,” “Free and Open,” or “Free and Equal”	Implicit Grant of the Right to Vote Through Negative Language
Vermont <sup>143</sup>	“all voters ... have a right to elect officers”; “shall be entitled to all the privileges of a voter”	“ought to be free and without corruption”	
Virginia <sup>144</sup>	“all men ... have the right of suffrage”	“all elections ought to be free”	
Washington <sup>145</sup>	“shall be entitled to vote”	“free and equal”	
West Virginia <sup>146</sup>	“shall be entitled to vote”		“Nor shall any person be deprived by law, of any right, or privilege”
Wisconsin <sup>147</sup>	“is a qualified elector”		
Wyoming <sup>148</sup>	“shall be entitled to vote”	“open, free, and equal”	“The rights ... to vote ... shall not be denied or abridged”

<sup>143</sup> VT. CONST. ch. I, art. VIII; *id.* ch. II, § 42.

<sup>144</sup> VA. CONST. art. I, § 6.

<sup>145</sup> WASH. CONST. art. VI, § 1; *id.* art. I, § 19.

<sup>146</sup> W. VA. CONST. art. IV, § 1; *id.* art. III, § 11.

<sup>147</sup> WIS. CONST. art. III, § 1.

<sup>148</sup> WYO. CONST. art. VI, §§ 1, 2; *id.* art. I, § 27.



# Police Body-Worn Cameras: Evidentiary Benefits and Privacy Threats

Marc Jonathan Blitz\*

Should police departments require officers to wear cameras that record their interactions with the public? If so, when and how should these recordings take place? Who should have access to the video data police gather, and under what circumstances?

These questions are not entirely new. The Oakland police force began using body-worn cameras in 2010,<sup>1</sup> and the debate over their merits goes back even further. But in the wake of widespread protests that followed the police-involved killings of Michael Brown in Ferguson, Missouri, Eric Garner in Staten Island, New York, Walter Scott, in North Charleston, South Carolina, and Freddy Gray, in Baltimore, Maryland, body-worn cameras have become a central policy proposal. Numerous police departments, including Ferguson's, have begun requiring police to use body-worn cameras.<sup>2</sup> Many other departments are considering their adoption. Even the federal government has weighed in. In the wake of intense protests over the grand jury finding in the Ferguson case, President Obama proposed a "Body Worn Camera Partnership Program," in which the federal government would spend \$75 million to help local governments "purchase 50,000 body worn cameras."<sup>3</sup>

Proponents of police body-worn cameras argue that they represent a game changing technology that can improve police accountability. A visual record of what occurs during a police encounter makes it more difficult for officers to deny excessive use of force or other abuse when it happens and more difficult for accusers of police to fabricate abuse or misconduct where it is absent. These benefits come not only in the form of more accurate fact-finding after an incident, but also in deterrence of wrongdoing beforehand. As one police chief said of the cameras used by his department, "Everyone is on their best behavior when the cameras are running. The officers, the public,

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<sup>1</sup> Matier & Ross, *Police Body Cameras Don't Catch People at Their Finest Hour*, SAN FRANCISCO CHRON. (May 3, 2015), <http://www.sfchronicle.com/bayarea/article/Police-body-cameras-don-t-catch-folks-at-their-6239647.php>.

<sup>2</sup> See Elisha Fieldstadt, *Should Every Police Officer Be Outfitted with a Body-worn Camera?*, NBC NEWS (Nov. 26, 2014), <http://www.nbcnews.com/storyline/michael-brown-shooting/should-every-police-officer-be-outfitted-body-worn-camera-n256881> (noting that Ferguson police began wearing body cameras after the Michael Brown shooting); Drew Harwell, *The Body-worn Camera Industry Is 'Feeling Phenomenal' After Ferguson*, WASH. POST (Dec. 3, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/12/03/the-body-worn-camera-industry-is-feeling-phenomenal-after-ferguson/>.

<sup>3</sup> Andrea Peterson, *President Obama Wants to Spend \$75 Million to Buy Police Bodycams*, WASH. POST (Dec. 1, 2014), <http://www.washingtonpost.com/blogs/the-switch/wp/2014/12/01/president-obama-wants-to-spend-75-million-to-buy-police-bodycams/>.

everyone.”<sup>4</sup> Moreover, like other video footage gathered by law enforcement cameras—such as those mounted above city streets or on the dashboards of police vehicles—footage from body-worn cameras can provide valuable evidence in solving crimes.

But the rush to adopt and implement body-worn cameras has also generated intense skepticism and criticism. Police body-worn cameras, critics point out, threaten privacy in much the same way the state threatens citizens’ privacy anytime it records their activities. Such a threat is especially worrisome where police cameras record details from inside people’s homes or other private areas. But it may also raise privacy concerns, albeit less significant ones, where cameras record people in public spaces. Citizens’ expectations of privacy are, of course, lower in streets and parks than they are at home, and they cannot insist that their actions in these places remain free from police monitoring. This doesn’t mean, however, that they should expect that every encounter with the police will be part of a permanent video record, accessible to anyone who wishes to obtain it through an open records law, or Freedom of Information Act, request.

What makes such sacrifices in privacy even worse, in the view of critics, is that society may receive far less in return than some proponents of the body-worn cameras believe. Videos from body-worn cameras are not the objective, dispute-ending evidence that some regard them as. When a police body-worn camera records an event, it will record only from a certain location and angle. Some of what occurs during a police encounter may occur outside the camera’s field of view or in conditions too dark to capture in detail. A camera on a police officer’s uniform will show what happens in front of the police officer, but not the officer. And if the camera needs to be triggered before it starts recording, it may miss the precipitating event that would provide greater context for and clarity to the encounter.

How then should citizens and government officials respond to these differing stances on body-worn cameras? The most common response seems to be a middle ground that encourages police to adopt the cameras, but to do so thoughtfully. This includes awareness of these cameras’ limits and a system of robust safeguards to protect the privacy of those they record. Police organizations, civil rights groups, and policy centers all embrace such a middle ground. The Police Executive Research Forum (PERF), for example, notes that while cameras have numerous potential benefits, “departments must anticipate a number of difficult questions—questions with no easy answers.”<sup>5</sup> The ACLU, likewise, argues that the cameras can improve police accountability but “*only* if they are deployed within a framework of strong policies to ensure they protect the public without becoming yet another system for routine surveillance of the public, and maintain public confidence in the integrity of those privacy protections.”<sup>6</sup> The Constitution Project also stresses that “[t]he use of body-worn cameras worn by law enforcement agencies presents a number of potential benefits as well as risks.” As Professor Howard Wasserman writes, in his own call for careful implementation, the “ultimate effectiveness of body-worn cameras depends on the hard details of implementation.”<sup>7</sup>

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<sup>4</sup> POLICE EXEC. RESEARCH FORUM, IMPLEMENTING A BODY-WORN CAMERA PROGRAM: RECOMMENDATIONS AND LESSONS LEARNED (2014) [hereinafter POLICE EXEC. RESEARCH FORUM], available at <http://ric-zai-inc.com/Publications/cops-p296-pub.pdf>.

<sup>5</sup> *Id.*

<sup>6</sup> Jay Stanley, *Police Body-Mounted Cameras: With Right Policies in Place, a Win for All*, ACLU (Oct. 9, 2013), <https://www.aclu.org/technology-and-liberty/police-body-mounted-cameras-right-policies-place-win-all>.

<sup>7</sup> Howard Wasserman, *Moral Panics and Body-worn Cameras*, 92 WASH. U. L. REV. (forthcoming 2015).

This Issue Brief endorses this increasingly popular middle ground position, emphasizing two points that deserve close attention from policy-makers, citizens, and courts as police body-worn camera programs take shape. First, while it is important not to treat body-worn cameras as a “magic bullet” that will solve all problems in police interaction with citizens,<sup>8</sup> it is equally important not to overstate their disadvantages. Cameras do not provide a neutral window into reality, but they do provide visual evidence that is often far better than what fact-finders would have otherwise. Even when camera evidence is flawed, it is often far better than eyewitness accounts, especially when such eyewitness accounts are given long after the events. Moreover, properly educated police and courts can take stock of body-worn cameras’ limitations when creating departmental policies and legal rules about the use of cameras and the video they generate.

Second, camera evidence does carry significant risks to privacy, may chill police-citizen interactions, and may enable other misuses of government-controlled videos. Once video evidence is available, public officials, journalists and ordinary citizens may well want to view it for purposes beyond those the body-worn cameras were adopted to meet. A body-worn camera policy that gives adequate weight to privacy may sometimes have to limit access to video recordings. Members of the public may wish to see an unredacted video of another citizen’s encounter with a police officer (over the objection of the citizen filmed). Some might insist that any video captured by a police body-worn camera be available to the public under open records laws, but as The Constitution Project points out, “most state open records laws were written before the use of body-worn cameras and may not take into account the privacy issues presented by their use.”<sup>9</sup> There may thus be good reason to prevent wide dissemination of “unredacted or unflagged” video, unless the citizens recorded agree to such dissemination.<sup>10</sup> Police may understandably want to use video not just for investigations of violent encounters, but also to train police or periodically assess their on-the-job performance.<sup>11</sup> But an adequate privacy protection regime requires strong safeguards for the privacy of the citizens and, to some extent, the police officers depicted.

## I. A BRIEF OVERVIEW OF BODY-WORN CAMERAS AND BODY-WORN CAMERA POLICIES

Before looking at the benefits and risks of police body-worn cameras, it is useful to understand the technology and policies police departments have adopted, and other organizations have suggested, for use of such cameras. As the name suggests, a body-worn camera is a small camera that is clipped to a police officer’s uniform, on his chest or possibly to head-gear, such as glasses or a head-mount. It can then record video of

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<sup>8</sup> See *id.* at 3 (stating that “[w]hile body-worn cameras are a good idea and police departments should be encouraged and supported in using them, it is nevertheless important not to see them as a magic bullet.”); See Neil Richards, *Can Technology Prevent Another Ferguson*, CNN (Sept. 2, 2014, 3:29 PM), <http://www.cnn.com/2014/09/02/opinion/richards-ferguson-cameras/> (arguing that “[t]he rhetoric surrounding [] the police cameras ... suffers from” the belief that technology can fix every social problem.).

<sup>9</sup> THE CONSTITUTION PROJECT, *THE USE OF BODY-WORN CAMERAS BY LAW ENFORCEMENT* 5 (2015).

<sup>10</sup> *Id.*

<sup>11</sup> See POLICE EXEC. RESEARCH FORUM, *supra* note 4, at 7 (“Many police agencies are discovering that body-worn cameras can serve as a useful training tool to help improve officer performance.”); INT’L ASS’N OF CHIEFS OF POLICE, *CONCEPTS AND ISSUES PAPER: BODY-WORN CAMERAS* 5 (2014), available at <http://www.aele.org/iacp-bwc-mp.pdf> (“Unusual or even routine events recorded on tape can be used in basic academy and in-service training to reinforce appropriate behavior and procedures, to demonstrate inappropriate practices and procedures, to enhance interpersonal skills and officer safety habits, and to augment the instructional routines of field training officers and supervisory personnel.”).

the area in front of it and audio of the surrounding environment. The camera is either activated by the officer wearing it or automatically triggered by a sound, movement, or other stimulus. There are two brands that are currently the market leaders in the body-worn camera industry: Taser's AXON Body-worn cameras and VieVu's PVR. Other companies offering body-worn camera technology include FirstVu, Scorpion, Wolfcom USA, and Mutiview.

Body-worn cameras are hardly the first technology police have used to gather video evidence for investigations. Police experimented with installing closed-circuit TV (CCTV) cameras over public streets in the 1970s and 1980s.<sup>12</sup> The video captured by these cameras was often too grainy to be useful. But CCTV cameras gained renewed popularity in 1990s and 2000s, when numerous cities took advantages of powerful new camera and computer technology to record large stretches of urban public space.<sup>13</sup> Washington, D.C., New York, and Chicago, all embraced such public cameras systems, as did many small communities.<sup>14</sup> Police also embraced mobile cameras in the 1980s and 1990s, by fitting the dashboards of police vehicles with a camera (or dashcam) to record traffic stops and other police encounters on the road.

In their primer on police-worn body-worn cameras, Alex Mateescu, Alex Rosenblat, and danah boyd observe that body-worn cameras are only the latest step in a decades-long experimentation by police with various forms of video surveillance.<sup>15</sup> Even before the recent, intense news coverage of deadly police encounters, many police and other officials considered body-worn cameras a possible answer to the problem that dashcams recordings cover only those law enforcement encounters occurring near a police vehicle. Many cities, including Oakland, California, Rialto, California and Mesa, Arizona have adopted body-worn camera programs.

Rialto and Mesa are the sites of the most prominent pilot studies done to date in the United States to measure the effect of body-worn cameras.<sup>16</sup> Both studies found the use of the cameras correlated with significant reductions in complaints about police and use-of-force incidents,<sup>17</sup> although Mateescu, Rosenblat and boyd warn that drawing general conclusions may be premature.<sup>18</sup> Michael White similarly warns that these pilot studies leave certain questions unanswered and calls for more research. Discussing the Rialto and Mesa studies, as well as other body-worn camera studies performed

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<sup>12</sup> See Quentin Burrows, *Scowl Because You're On Candid Camera: Privacy and Video Surveillance*, 31 VAL. U.L. REV. 1079, 1103 (1997).

<sup>13</sup> See Marc Jonathan Blitz, *Video Surveillance and the Constitution of Public Space, Fitting the Fourth Amendment to a World That Tracks Image and Identity*, 82 TEX. L. REV. 1349, 1350–54 (2004).

<sup>14</sup> See Marc Jonathan Blitz, *The Fourth Amendment Future of Public Surveillance Remote Recording and Other Searches in Public Space*, 63 AM. U. L. REV. 21, 24–25 (2013).

<sup>15</sup> ALEXANDRA MATEESCU ET AL., POLICE-WORN BODY-WORN CAMERAS, WORKING PAPER, DATA & SOCIETY RESEARCH INSTITUTE 4-5 (2015).

<sup>16</sup> POLICE FOUND., SELF-AWARENESS TO BEING WATCHED AND SOCIALLY DESIRABLE BEHAVIOR: A FIELD EXPERIMENT ON THE EFFECT OF BODY-WORN CAMERAS ON POLICE USE OF FORCE (2013) (describing the results of a large-field experiment in Rialto, California), *available at* <http://www.policefoundation.org/sites/g/files/g798246/f/201303/The%20Effect%20of%20Body-Worn%20Cameras%20on%20Police%20Use-of-Force.pdf>; HAROLD RANKIN, END OF PROGRAM EVALUATION AND RECOMMENDATIONS: ON-OFFICER BODY CAMERA SYSTEM (Mesa Police Department, 2013) (describing results of Mesa, Arizona on-body camera study); *see also* POLICE EXEC. RESEARCH FORUM, *supra* note 4, at 5–6.

<sup>17</sup> See RANKIN, *supra* note 16; *see* POLICE FOUND., *supra* note 16, at 8 (finding, in a study of Rialto Police Department's use of cameras, that "[s]hifts without cameras experienced twice as many incidents of use of force as shifts with cameras").

<sup>18</sup> See MATEESCU ET AL., *supra* note 15, at 7.

internationally,<sup>19</sup> White notes that “several of the empirical studies have documented substantial decreases in citizen complaints as well as in use of force by police and assaults on officers.”<sup>20</sup> However, it is unclear precisely how body-worn cameras might generate such outcomes.<sup>21</sup>

Despite these unanswered questions, the past year has seen far more calls for widespread adoption of body-worn camera programs—including from residents in cities where some of the widely reported police shootings occurred and from the White House. Where body-worn cameras were not previously used, government officials have advocated or, in some cases, insisted on them. In 2013, for example, Judge Shira Scheindlin ordered New York City police officers to wear cameras as part of a one-year pilot program in her ruling on stop-and-frisk searches.<sup>22</sup> Articulating criticism that is now raised more frequently, New York’s mayor at the time, Michael Bloomberg, responded that the cameras were “a solution that is not a solution to the problem” and would not prevent disputes from arising over whether police frisks were justified.<sup>23</sup>

While there are still many unanswered questions about how body-worn cameras will operate and how effective they will be, studies and analyses by PERF and others in the last few years have already begun to identify and address some of the key challenges body-worn cameras raise.<sup>24</sup> This work thus helps reduce, to at least some extent, the risk Wasserman warned against, that police will adopt body-worn cameras as part of a “moral panic,” without adequate consideration of their limits and dangers.<sup>25</sup> This Issue Brief will address these questions, including when recording should be permitted or mandated, how recordings should be stored, and who should have access to the recordings. It will also offer recommendations regarding these concerns.

## II. THE POTENTIAL BENEFITS AND LIMITS OF VIDEO SURVEILLANCE

Those concerned with the rush to adopt police body-worn cameras warn that the hopes placed on them are likely to far outweigh their real benefits. Professor Neil Richards, for example, cautions against seeking a quick “technological fix” for deep-seated “cultural and social problems” such as “[p]olice brutality, profiling, racism and economic inequality.”<sup>26</sup> Professor Justin Hansford takes an even dimmer view of police body-worn cameras, noting that in many cases they “could do more harm than good to the cause of protecting citizens from police violence,” because their “footage

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<sup>19</sup> Studies have been conducted in cities including Phoenix, Arizona, Plymouth, England, and Renfrewshire/Aberdeen, Scotland. See MICHAEL D. WHITE, POLICE BODY-WORN CAMERAS: ASSESSING THE EVIDENCE, DEPARTMENT OF JUSTICE: OFFICE OF JUSTICE PROGRAMS 5–6 (2014).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Floyd v. City of New York*, 959 F. Supp. 2d 540, 563 (S.D.N.Y. 2013) (finding New York use of stop-and-frisk searches violated the Constitution, and ordering remedies including “a trial program requiring the use of body-worn cameras in one precinct per borough.”).

<sup>23</sup> See Joseph Goldstein, *Judge Rejects New York Stop-and-Frisk Policy*, N.Y. TIMES (Aug. 12, 2013), <http://www.nytimes.com/2013/08/13/nyregion/stop-and-frisk-practice-violated-rights-judge-rules.html> (the City appealed Judge Scheindlin’s rule but ultimately agreed to voluntarily dismiss its appeal); See *Floyd v. City of New York*, 770 F.3d 1051, 1056 (2d Cir. 2014).

<sup>24</sup> See POLICE EXEC. RESEARCH FORUM, *supra* note 4.

<sup>25</sup> Wasserman, *supra* note 7, at 7.

<sup>26</sup> Neil Richards, *Can Technology Prevent Another Ferguson*, CNN (Sept. 2, 2014, 3:29 PM), <http://www.cnn.com/2014/09/02/opinion/richards-ferguson-cameras/>.

provides a one-sided view of the interaction, allowing outsiders to scrutinize the citizens' every move, but leaving them blind to the police officers' behavior."<sup>27</sup>

Such critiques provide an invaluable warning that body-worn camera evidence is unlikely to deliver all of the benefits some expect. But still it may—even with its limits and flaws—be valuable for two major reasons. First, it may be a significant improvement on the evidentiary record that jurors and others normally have in a world *without* such video evidence. Second, a body-worn camera program can be structured in a way that partly accounts for these limits instead of ignoring them.

#### A. VIDEO EVIDENCE VS. EYEWITNESS ACCOUNTS

Even if it cannot provide a decisive, dispute-ending answer to the question of what happened during a police encounter, a video record of an encounter can at least give jurors a starting point. While subject to interpretation, video may provide a far more solid foundation for further investigation than eyewitness testimony, the reliability of which has been called into serious question in recent years.<sup>28</sup> These mental recordings are, in many respects, far more problematic as evidence than video footage. First, eyewitness testimony is constrained by the psychological limits on human attention. Human beings cannot consciously focus on, and remember, everything that happens in front of them. They typically focus only on those elements of the action that are prominent or otherwise important. In the absence of video surveillance, eyewitness testimony is generally the only kind of “visual” evidence that fact-finders will have of a police encounter.

To be sure, this failure to notice an important detail can also affect the way a fact-finder perceives and understands the sequence of events captured in a video. Video, however, has features that make it easier to correct for this problem. A court can rewind and rescreen a video for jurors, who might notice elements of the event on a second or third viewing that they did not notice on a first. Moreover, a detail missed or misunderstood by one fact-finder watching a video might be noticed, or more accurately understood, by another. By contrast, while effective cross-examination might reveal the flaws in a witness's perception or memory, jurors or judges cannot—in the absence of a video—compare it against any raw visual data to reach an independent conclusion about what happened.

Such video can still be subject to biased interpretation (as discussed below). But in the case of eyewitness testimony, the viewer's biases do not simply exert a powerful influence on how visual data is interpreted; they shape the visual data itself. Biases are built into the eyewitness record in a way they are not built into a video of the scene. Video, of course, is far from a comprehensive record of what occurred, but it is less likely (absent very careful and conscious manipulation of the camera or microphone) to be as skewed by emotions or personal loyalties as human memory.

In fact, many of the same features that make video evidence more potentially damaging for privacy than unrecorded human observation also make it far better as evidence. As Justice Harlan wrote in *United States v. White*, recording technology creates a record that insures “full and accurate” capture of “all that is said, free of the possibility of error and oversight that inheres in human reporting.”<sup>29</sup> This overstates

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<sup>27</sup> Justin Hansford, *Body-worn Cameras Won't Stop Police Brutality. Eric Garner is Only One of Several Reasons Why*, WASH. POST (Dec. 4, 2014), <http://www.washingtonpost.com/posteverything/wp/2014/12/04/body-cameras-wont-stop-police-brutality-eric-garner-is-only-one-of-several-reasons-why/>.

<sup>28</sup> See *State v. Henderson*, 27 A.3d 872 (N.J. 2011).

<sup>29</sup> *United States v. White*, 410 U.S. 745, 787 (1971).

the objectivity of video evidence, but it correctly emphasizes that a detailed video record threatens privacy far more than does a witness's recounting. This may be, in part, because video is more vivid than a retelling. But it is also because the video record provides more information, and cannot be accused of misremembering or fabricating events in the way human memory can. A video or audio recording of a conversation or event leaves room for interpretation. But it typically does not leave the person it records the freedom to deny that the recorded words were ever spoken or the recorded events ever happened. For example, when former LA Clippers' owner Donald Sterling was recorded making racist statements in a phone conversation, he could claim that the words were misunderstood or out of context, but (unless he attacked the authenticity of the recording) he could not deny that the words were his. Thus, as Justice Harlan points out, a recorded individual is not as free to "reformulate a conversation"—or tell a more favorable account—as he would be if it was merely his word against someone else's. He is constrained by the need to make any narrative he provided fit with "a documented record."<sup>30</sup>

While this constraint is sometimes undesirable, in criminal investigations it is better to prevent people from being able to "reformulate a conversation" or retell a narrative free of documented evidence's constraints. This is precisely the kind of constraint that evidentiary systems are designed to impose on their participants when it subjects them to oath, observation, and cross-examination. Whatever its imperfections, then, video evidence is often a significant improvement upon the evidence that would be available without it, such as eyewitness testimony. This is significant for judicial hearings where, as Professor Frederick Schauer points out, what matters is not whether the evidence is inherently strong or weak, but whether it is better than the alternative.<sup>31</sup>

Moreover, when video cameras are monitoring police, they are also a potentially valuable constraint on misuse of state power. As author and technologist David Brin emphasizes, by giving citizens access to video feeds showing police and other government actors, video technology becomes a key tool by which citizens can make sure that government does not abuse its power when it is using force, or when it is watching individuals with an eye to possible arrest or other government action.<sup>32</sup>

Joshua Fairfield and Eric Luna similarly note that when "government and corporate entities gather and tap the stores of information about the populace, [t]his creates a dangerous imbalance where only the most powerful public and private actors may draw upon data about the general population."<sup>33</sup> Correcting this imbalance, they argue, is especially important in cases where camera footage or other digital evidence can exonerate a criminal defendant. "The defense bar," they note, "recognize[s] that a client being on camera, or being recorded, or being geo-located, can be ... an important tool for establishing innocence."<sup>34</sup>

The availability of video may also prove valuable in helping to address racial bias and excessive use of force by providing evidence that is, in some ways, better than eyewitness testimony. Video evidence seems to have been important in prompting

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<sup>30</sup> *Id.* at 788.

<sup>31</sup> Frederick Schauer, *Can Bad Science Be Good Evidence? Neuroscience, Lie Detection, and Beyond*, 95 CORNELL L. REV. 1191, 1213 (2010) ("The question is ... whether there are sound reasons to prohibit the use of evidence of witness veracity that is likely better, and is at least no worse, than the evidence of witness veracity that now dominates the litigation process.").

<sup>32</sup> See DAVID BRIN, *THE TRANSPARENT SOCIETY: WILL TECHNOLOGY FORCE US TO CHOOSE BETWEEN PRIVACY AND FREEDOM* (1999).

<sup>33</sup> Joshua Fairfield A.T. & Eric Luna, *Digital Innocence*, 99 CORNELL L. REV. 981, 985 (2014).

<sup>34</sup> *Id.* at 988–989.

South Carolina prosecutors to file murder charges in a police officer's April 4, 2015 shooting of Walter Scott.<sup>35</sup> Moreover, while the video footage of the chokehold that killed Eric Garner did not result in judicial accountability, it did subject the police to a kind of democratic accountability. Because the video was not confined to the grand jury room, it resulted in widespread criticism of police in the media, including conservative commentators who were far more willing to give the officer the benefit of the doubt in the Ferguson killing, where there was no video. In fact, a Bloomberg News poll showed that "60 percent of Americans disagree with the lack of an indictment against officer Daniel Pantaleo, whose chokehold apparently led to Garner's death in July," whereas only 36 percent felt that Darren Wilson should have been indicted for the death of Mike Brown in Ferguson.<sup>36</sup> According to some observers, it is camera footage that accounts for this difference. As the differing reactions to the Brown case compared to the Garner and Scott cases suggest, video footage is far more able than eyewitness testimony to shift the debate from questions about what occurred in a police encounter to questions about how a just and well-functioning society should prevent excessive use of police force. While public opinion alone does not assure that laws or government policies will change, it is often a necessary precondition to provoke such change. Consequently, video footage may better catalyze strong public opinion, increasing the odds for policy reform.

#### B. THE EVIDENTIARY LIMITS OF VIDEO SURVEILLANCE

There is ample reason to think that video footage of police encounters can offer significant benefits in monitoring police and holding them accountable, as well as exonerating those officers who are subject to false accusations of wrongdoing. As noted earlier, the pilot studies in Rialto, California and Mesa, Arizona offer some support for this expectation.

But a documented record cannot serve as a constraint on fact-finders if the judicial system allows fact-finders to ignore it or interpret it in a way viewers would normally find implausible or unreasonable. Many media reports reflected such concerns after a grand jury decided not to indict New York police officer Dan Pantaleo after the death of Eric Garner. CNN reported that "police use of force has remained relatively static despite the increasing popularity of camera phones over the years,"<sup>37</sup> and that people "took to Twitter to question the usefulness of body-worn cameras if a grand jury won't indict an officer who was caught on video using a maneuver banned by his own police department."<sup>38</sup> The New York Times likewise quoted experts who observed that police body-worn cameras "are no 'safeguard of truth,'" noting that it was not only "the footage of Eric Garner's death" and the subsequent failure to indict which revealed "the shortcoming of video as evidence," but also the video of "Rodney King's

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<sup>35</sup> See Alan Blinder & Marc Santora, *Officer Who Killed Walter Scott is Fired, and Police Chief Denounces Shooting*, N.Y. TIMES (Apr. 8, 2015), [http://www.nytimes.com/2015/04/09/us/walter-scott-shooting-video-stopped-case-from-being-swept-under-rug-family-says.html?\\_r=0](http://www.nytimes.com/2015/04/09/us/walter-scott-shooting-video-stopped-case-from-being-swept-under-rug-family-says.html?_r=0) (noting "swift action taken by local prosecutors after the video surfaced").

<sup>36</sup> Aaron Blake, *Why Eric Garner is the Turning Point Ferguson Never Was*, WASH. POST (Dec. 8, 2014), <http://www.washingtonpost.com/blogs/the-fix/wp/2014/12/08/why-eric-garner-is-the-turning-point-ferguson-never-was/>.

<sup>37</sup> Eliot C. McLaughlin, *After Eric Garner: What's the Point of Police Body-worn Cameras*, CNN (Dec. 8, 2014, 7:41 PM), <http://www.cnn.com/2014/12/04/us/eric-garner-ferguson-body-worn-cameras-debate/>.

<sup>38</sup> *Id.*

1991 beating by Los Angeles police officers.”<sup>39</sup> More specifically, say some critics, even video that clearly depicts police use of excessive force will not give police the sense that they are accountable for their actions where: (1) the substantive law makes it difficult for a jury to find police guilty in such case, regardless of video evidence;<sup>40</sup> and (2) state or local government will not act vigorously to hold officers accountable for excessive use of force.

In addition, although video is superior in many ways to the unreliable memories of eyewitnesses, its purported accuracy may lull jurors into ignoring its limits. Even events visible in the camera footage will almost always require interpretation, and jurors will only engage in such interpretation after lawyers (or parties or witnesses) provide information necessary to place the video in a larger narrative. Viewers of video, just like eyewitnesses, may simply fail to notice important details, events or objects when their attention is focused elsewhere, perhaps by lawyers or witnesses explaining the scene. Moreover, to a far greater extent than eyewitness testimony, video likely provides jurors with an illusion of objectivity. Jurors recognize that witnesses can lie or misremember, especially if cross-examination of a witness reveals awkwardness, inconsistencies, or lapses in memory. Jurors may well be less aware of how video evidence can be selective and subject to interpretation, including interpretations which distort, rather than clarify what happened in a police encounter. Jurors are more likely to believe that seeing events in a video is akin to witnessing the events with their own eyes.

Jurors may also bring biases to interpreting a video. Furthermore, they might be oblivious to these biases and believe, wrongly, that video “speaks for itself” by providing an undistorted picture of the events it depicts. Commentators, for example, have harshly criticized a 2007 Supreme Court decision, *Scott v. Harris*,<sup>41</sup> for treating a video of a police chase as establishing—with enough certainty to justify summary judgment in favor of the police—that the plaintiff’s own reckless driving had caused the accident that left him a quadriplegic.<sup>42</sup> The Court posted the video and insisted that it “speak[s] for itself,” but Justice Stevens’ dissent found the video was subject to multiple interpretations.<sup>43</sup> So too did commentators. A study by Professors Daniel Kahan, David Kauffman, and Donald Braman, found that different subjects of an experiment interpreted the video in different ways. Some subjects found that the plaintiff was behaving recklessly, but others saw the video as showing the police at fault.<sup>44</sup> This may suggest

<sup>39</sup> Vivian Yee and Kirk Johnson, *Body-worn Cameras Worn by Police Officers Are No ‘Safeguard of Truth,’ Experts Say*, N.Y. TIMES (Dec. 6, 2014), [http://www.nytimes.com/2014/12/07/nyregion/body-worn-cameras-worn-by-police-officers-are-no-safeguard-of-truth-experts-say.html?\\_r=0](http://www.nytimes.com/2014/12/07/nyregion/body-worn-cameras-worn-by-police-officers-are-no-safeguard-of-truth-experts-say.html?_r=0).

<sup>40</sup> See Carol D. Leonnig, *Current Law Gives Police Wide Latitude to Use Deadly Force*, WASH. POST (Aug. 28, 2014), [http://www.washingtonpost.com/politics/current-law-gives-police-wide-latitude-to-use-deadly-force/2014/08/28/768090c4-2d64-11e4-994d-202962a9150c\\_story.html](http://www.washingtonpost.com/politics/current-law-gives-police-wide-latitude-to-use-deadly-force/2014/08/28/768090c4-2d64-11e4-994d-202962a9150c_story.html) (noting that “[t]he law that determines when police can use deadly force generally gives officers considerable leeway.”); Ian Ayres and Daniel Markovitz, *Ending Excessive Police Use of Force Starts with New Rules of Engagement*, WASH. POST (Dec. 25, 2014), [http://www.washingtonpost.com/opinions/ending-excessive-police-force-starts-with-new-rules-of-engagement/2014/12/25/7fa379c0-8a1e-11e4-a085-34e9b9f09a58\\_story.html](http://www.washingtonpost.com/opinions/ending-excessive-police-force-starts-with-new-rules-of-engagement/2014/12/25/7fa379c0-8a1e-11e4-a085-34e9b9f09a58_story.html) (“existing rules of engagement for police in the United States invite violence, not just when officers act abusively but also when their conduct falls clearly within the limits of the law.”).

<sup>41</sup> 550 U.S. 372 (2007).

<sup>42</sup> *Id.* at n.5.

<sup>43</sup> *Id.* (Stevens, J. dissenting) (noting that although the Court believed “no reasonable person could view the videotape and come to the conclusion that deadly force was unjustified . . . the three judges on the Court of Appeals panel apparently did view the videotapes entered into evidence and described a very different version of events.”).

<sup>44</sup> See Daniel M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009).

that video must be subject to close analysis by fact-finders who are informed of how video is created and its limits.

Still, video evidence from other sources has long been admissible in spite of these concerns and will continue to be a part of judicial proceedings. Even those scholars who, in the wake of *Scott v. Harris*, highlighted the dangers of video's false objectivity, have not argued for denying jurors and judges the chance to see video evidence. They have instead argued for measures that would help fact-finders view evidence more skeptically and evaluate it more carefully. They have explored, for example, how opposing parties' might clarify—in cross-examination—how videos might be subject to alternative interpretations, or how such courtroom discussions might make jurors more aware of what the video failed to capture. The same approach seems warranted for video evidence that comes from police body-worn cameras. A thorough answer to this challenge requires a more detailed consideration of fact-finders' psychology and perception of video evidence than there is space for here, but it is helpful to explore one of the more pressing issues, which is how to address partial or absent body-worn camera evidence.<sup>45</sup>

The potential value of video evidence has a downside. Its absence, or failure to capture a particular event, may unfairly harm one side of a dispute. This possibility worries both parties in a legal forum. When body-worn cameras are switched off (or left off) during uses of police force, they fail to capture evidence that might be crucial to a court determining whether police misconduct occurred.<sup>46</sup> In Albuquerque, New Mexico for example, body-worn cameras were mandated by police rules but have “been used sporadically—police use cameras when it suits them, and they don't when it doesn't.”<sup>47</sup> A lack of video evidence can also unfairly undercut a police officer's account. Even where a body-worn camera program is in place, cameras might fail to record, not because police turn them off, but because they malfunction.<sup>48</sup> In some circumstances, police may have good reason to turn off their camera—to avoid capturing video or audio of an informant, to protect the privacy of a victim or a witness who would otherwise refrain from speaking with them, or to avoid capturing the inside of a home they are searching.<sup>49</sup> Some model body-worn camera rules, in fact, not only allow police to turn off cameras in such situations, but require them to do so.<sup>50</sup> However, where

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<sup>45</sup> One other question that has generated some disagreement is whether police should be able to rely on body-worn camera evidence in documenting a use-of-force or other incident and, if so, whether they should have access only to their own body-worn camera evidence, or that generated by other officers' cameras. This Issue Brief does not examine this topic, but it is worth noting that where body-worn camera rules do allow police to use body-worn camera evidence in writing reports, it should be made clear to fact-finders that that the documentation is not an entirely independent source of evidence based solely on the officers' memory of the event and interviews with witnesses. See POLICE EXEC. RESEARCH FORUM, *supra* note 4; see Letter from Wade Henderson, Pres. & CEO, The Leadership Conference, to President's Task Force on 21st Century Policing (Jan. 30, 2015), available at <http://civilrightsdocs.info/pdf/policy/letters/2015/2015-01-30-letter-to-task-force-on-21st-century-policing.pdf>.

<sup>46</sup> See Jay Stanley, *Police Body-worn Cameras: The Lessons of Albuquerque*, ACLU (Mar. 24, 2015, 11:25 AM), <https://www.aclu.org/blog/free-future/police-body-cameras-lessons-albuquerque?ct=ga&cd=CAEYACoUMTUzMDMwNTkzODUzMTgyNzYxMzgyGjkwNzAzZGRlZjJjM2YzZWm6Y29tOmVuOIVT&usg=AFQjCNHUKPgmW5nJrW9O8hwxAJcA5sSbw&redirect=blog/criminal-law-reform-immigrants-rights-technology-and-liberty-free-speech/police-body-cameras-le>; see Nat'l Law Enforcement Policy Center, Concepts and Issues Paper (2014).

<sup>47</sup> See Stanley, *Lesson of Albuquerque*, *supra* note 46.

<sup>48</sup> POLICE EXEC. RESEARCH FORUM, *supra* note 4, at 28.

<sup>49</sup> *Id.* at 23–24.

<sup>50</sup> INT'L ASS'N OF CHIEFS OF POLICE, BODY-WORN CAMERAS MODEL POLICY 1 (2014), available at <http://www.ael.org/iacp-bwc-mp.pdf>.

jurors come to expect cameras, they may simply assume that in the absence of video evidence, nothing can convincingly corroborate a police officer's account.

To address these concerns, current and proposed rules for body-worn cameras contain before-the-fact protections intended to assure completeness and impartiality of recordings at the time a police officer decides to capture an event on camera. The International Association of Chiefs of Police (IACP) model rules, for example, mandate recording "all contacts with citizens in the performance of official duties,"<sup>51</sup> except in specified circumstances where recording is forbidden—such as recording undercover officers or informants or where a subject enjoys a reasonable expectation of privacy.<sup>52</sup> They also specify that deactivation of the camera is permitted when the event has concluded or an officer's contact with a witness, victim, suspect, or arrestee has ended.<sup>53</sup> Other model rules give officers more leeway to make their own judgments about when recording is appropriate.<sup>54</sup> The IACP model rules also require police to document their reasons for turning a camera off.<sup>55</sup> As the PERF report notes, police may typically do so either by making a statement explaining their action just before the camera is switched off, or by documenting their reasons soon afterwards. The rules also require immediate reporting of a malfunction or loss of a camera.<sup>56</sup>

Such rules regarding when to record have generated some debate. The ACLU, for example, advocated for a regime in which cameras operate almost all of the time. This would prevent officers from being tempted to switch the cameras off in situations that could adversely impact the officer or his colleagues. However, PERF is likely correct that officers will sometimes have to be left with some discretion to switch off cameras. This would admittedly come with a high risk to a body-worn camera program's legitimacy. As PERF notes, if citizens come to expect that police encounters will be captured on video, they may well be skeptical when police rely on justification for not recording an event that is later in dispute, especially if there is ambiguity in what counts as justification for turning off a camera.<sup>57</sup>

Protections against selective video evidence might also come in the form of technological safeguards, which can include the camera design itself. As Mateescu, Rosenblat, and Boyd note:

Many body-worn camera models offer various safeguards to ensure that the data is not manipulated. The AXON Body by TASER International forbids users from deleting a video on the camera and marks the video with a security hash, which verifies that the video hasn't been tampered with. The FirstVu HD from Digital Alley offers optional software that logs each use of the video and generates a chain of custody report.<sup>58</sup>

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> POLICE EXEC. RESEARCH FORUM, *supra* note 4, at 22–23.

<sup>55</sup> INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 50, at 2.

<sup>56</sup> *Id.*

<sup>57</sup> POLICE EXEC. RESEARCH FORUM, *supra* note 4, at 28 (noting that "people often expect that officers using body-worn cameras will record video of everything that happens while they are on duty" and that "these expectations can undermine an officer's credibility if questions arise about an incident that was not captured on video.").

<sup>58</sup> MATEESCU ET AL., *supra* note 15, at 6.

The after-the-fact protections are less controversial. To ensure that footage is quickly and safely preserved, the model body-worn camera rules require that video footage be “securely downloaded no later than the end of the officer’s shift. Each file shall contain information related to the date, body-worn camera identifier, and assigned officer.”<sup>59</sup> The rules state, “Officers shall not *edit, alter, erase*, duplicate, copy, share, or otherwise distribute in any manner body-worn camera images and information without the prior written approval of the chief or the chief’s designee.”<sup>60</sup> They also strictly limit attempts to delete video footage, stating that “[r]equests for deletion of portions of a recording from a body-worn camera (e.g., in the event of a privileged or personal recording) must be submitted in writing to the chief in accordance with state records retention laws.”<sup>61</sup> As IACP says in its explanation for its model rules:

Officers should never erase or in any manner alter recordings. The agency must maintain strict managerial control over all devices and recorded content so that it can ensure the integrity of recordings made by officers. Failure of officers to assist in this effort or the agency to take managerial control over recordings can risk the credibility of the program and threaten its continuation as a source of credible information and evidence.<sup>62</sup>

Courts and legal rules also provide some means for addressing the problems of missing or deleted videos. Of course, where incomplete video evidence raises significant dangers of unfair prejudice, courts may use some of the same rules—from the Federal Rules of Evidence (FRE) or its state analogues—that they use to address other problematic evidence. Under Rule 403 of the FRE, courts may exclude evidence even where it is relevant “if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”<sup>63</sup> Under Rule 106, they can require a party to show a complete version of a video from which they have used only a segment.<sup>64</sup>

Courts might also use adverse jury instructions, or impose other sanctions, to discourage police from unjustifiably turning off body-worn cameras. As a general matter, when “potentially relevant evidence is destroyed prior to the commencement of litigation or the service of a discovery request under the Federal Rules of Civil Procedure, the court may sanction the party responsible for the destruction of evidence pursuant to its inherent authority.”<sup>65</sup> Such a sanction may consist of “giving an adverse jury instruction,” but in serious cases, courts may also grant the sanction of dismissal

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<sup>59</sup> LABOR RELATIONS INFORMATION SYSTEM, BODY-WORN CAMERAS POLICY (2014), <http://www.Iris.com/wp-content/uploads/2014/09/Model-Body-Camera-Policy.pdf>.

<sup>60</sup> *Id.* (emphasis added).

<sup>61</sup> *Id.*

<sup>62</sup> See NAT’L LAW ENFORCEMENT POLICY CENTER, *supra* note 46.

<sup>63</sup> FED. R. EVID. 403.

<sup>64</sup> FED. R. EVID. 106 (“[i]f a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time.”). A court might apply this rule not only to “statements,” but to video recordings, as some state courts have for analogous state rules of evidence. *E.g.*, *Bunch v. State*, 123 So. 3d. 484, 493 (2013) (citing *Wells v. State*, 604 So. 2d. 271, 277–78 (Miss. 1992)) (stating that while the rule refers “only to writings and recorded statements,” Mississippi law “applies the rule equally to video recordings.”).

<sup>65</sup> *Maxim v. E.P. Holdings*, 2014 WL 200545, at \*2 (D. Nevada 2014).

or default against the party that destroyed the evidence. Just as courts often instruct the jury to presume that intentionally destroyed evidence was unfavorable to the party destroying it, so they could instruct juries to presume that a gap in video footage of a police confrontation is unfavorable to a police officer who has turned off a body-worn camera or dashcam, unless that officer can supply a justification for turning off the camera, or explain that it was due to a malfunction or otherwise unintentional.

This rule has sometimes been invoked to sanction the destruction of evidence from police dashboard cameras. In *Peschel v. City of Missoula*, for example, the district court sanctioned the city for failing to preserve evidence recorded by a dashcam. The court noted that the dashcam video was the “best evidence [of] what occurred during the arrest” that led to Peschel’s suit against the police for excessive use of force.<sup>66</sup> In other cases, courts refused to apply sanctions (or dismiss a government’s claim or charge) because there was insufficient evidence that: 1) dashcam video existed;<sup>67</sup> 2) police’s destruction of the video was done in bad faith; or 3) some other improper motive existed to justify a sanction.<sup>68</sup>

Courts could conceivably apply such sanctions not simply to destruction of video created by body-worn cameras, but also in circumstances where an officer fails to capture such video by turning the camera off. The New York Civil Liberties Union, for example, has suggested that “department disciplinary rules should create a presumption against the officer for failing to record an interaction when required to do so (rebuttable through evidence of mechanical malfunction). In court proceedings, a presumption against the officer’s version of events could be employed to encourage recording of interactions.”<sup>69</sup>

One question courts would confront under such a regime is precisely when a failure to record would trigger such a presumption. PERF and others have suggested that there are circumstances where police officers might justifiably turn off cameras. The New York Civil Liberties Union rule, in comparison, is more limited, allowing only evidence of malfunction to rebut the presumption. Importantly, if a department’s body-worn camera policies incorporate reasonable justifications for turning off a camera, courts should rightly be expected to take these policies into account when considering evidentiary presumptions.

In many cases, one of the best antidotes to the potential confusion generated by body-worn cameras might come from *other* cameras. Consider a recent New Jersey case in which footage from a dashboard camera seemed consistent with police accounts that a suspect had responded to police with violence.<sup>70</sup> The video showed police yelling at the suspect to “stop resisting” and stop trying to take the officer’s gun.<sup>71</sup> The suspect

<sup>66</sup> *Peschel v. City of Missoula*, 664 F. Supp. 2d 1137, 141-1145 (D. Mont. 2009).

<sup>67</sup> *E.g.*, *Clayton v. Columbia Casualty Co.*, 547 Fed.Appx. 645, 652 (2013) (refusing to apply sanctions for alleged destruction of video from a “dashboard camera” because “[a]ppellants have not provided any evidence the video existed.”).

<sup>68</sup> *Martin v. State*, 2011 WL 3518050 \*4; \*5 (Tex. Ct. App. 2011) (memorandum opinion) (finding lack of evidence that police officer’s “decision not to mark the tape as evidence” was done in bad faith in ruling on a motion to suppress evidence).

<sup>69</sup> *Listening Session on Technology and Social Media: President’s Task Force on 21st Century Policing*, NYCLU (Jan. 31, 2015), <http://www.nyclu.org/content/testimony-regarding-risks-of-police-body-worn-cameras>.

<sup>70</sup> Sasha Goldstein, *Police Dash Cam Video Exonerates New Jersey Man, Indicts Cops*, N.Y. DAILY NEWS (Feb. 25, 2014, 8:14 PM), <http://www.nydailynews.com/news/crime/police-dash-cam-video-exonerates-nj-man-implicates-cops-article-1.1701763>.

<sup>71</sup> *Id.*

was charged with “eluding police, resisting arrest, and aggravated assault on an officer.”<sup>72</sup> But prosecutors dropped the charges upon finding video evidence from a second patrol car showed that the suspect “sat peacefully in his car with his hands in the air as the officers broke the window.”<sup>73</sup> This case dramatically demonstrates both the limits of video evidence (from the first, original dashcam) as well as its value (in the later-discovered second dashcam). Just as there were multiple dashcam videos for police officials and prosecutors to review in this case, there are likely to be multiple body-worn camera videos when more than one officer is on the scene. Moreover, as CCTV cameras, cell phone cameras, and perhaps aerial surveillance video become more common, courts, prosecutors and defense attorneys will have still more video evidence to draw upon, raising the possibility that gaps in one video will be filled in by information from another video.

### III. PROTECTING PRIVACY RIGHTS IN A POLICE BODY-WORN CAMERA PROGRAM

#### A. FOURTH AMENDMENT LIMITS

Whatever their benefits for insuring police accountability, video cameras carry costs for our privacy. Like all cameras that capture citizens as they go about their lives, cameras worn by police may transform ephemeral and forgettable actions into permanent and easily shared records of our activity. Moreover, because these records would involve interaction with law enforcement, the segments of our lives they capture might be among those we are least comfortable sharing with others.

Some critics of body-worn cameras have warned that by routinely recording the activities of citizens that unfold in front of a police officer, government would be engaging in a Fourth Amendment search.<sup>74</sup> Such a search is generally impermissible under the Constitution, unless police obtain a warrant based upon probable cause, or can otherwise demonstrate the search is reasonable. However, police body-worn cameras are unlikely, in most circumstances, to raise Fourth Amendment concerns. Under the Fourth Amendment, the Supreme Court has said repeatedly that police officers are not required to “close their eyes” to action that is visible to everyone else. As Justice Scalia recently wrote, the Court has never “deviated from the understanding that mere visual observation does not constitute a search.”<sup>75</sup> Nor has the Court held that officers violate the Fourth Amendment by taking pictures of that which is already visible to them.<sup>76</sup> In short, where an officer has a right to be, he generally may look at, photograph, or record his surroundings, free of Fourth Amendment limitations. His doing so reduces individuals’ privacy somewhat, but according to the Court’s precedent, not in a way that intrudes upon the private space that the Fourth Amendment is meant to shield from government surveillance.

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. CONST. amend. IV.

<sup>75</sup> *United States v. Jones*, 132 S. Ct. 945, 953 (2012).

<sup>76</sup> *See* *U.S. v. Jackson*, 213 F.3d 1269, 1280 (10th Cir. 2000) (“The use of video equipment and cameras to record activity visible to the naked eye does not ordinarily violate the Fourth Amendment.”).

When a person is in a private space, like a home, he is protected not only from police observation, but also from police presence.<sup>77</sup> An officer cannot even enter the home, let alone view and record it, without either a search warrant or a resident's permission. On the other hand, if an officer is already in a place that she has a right to be—walking or driving on the streets she is charged with patrolling—or she has permissibly entered a private space, the police officer no longer has to worry about crossing a boundary that the Fourth Amendment generally bars her from crossing.

There are, however, two reasons that police body-worn cameras might in some circumstances raise Fourth Amendment problems. First, when police enter a home pursuant to a valid search warrant, that warrant typically does not give them a right to examine *everything* in a home. Rather, the Fourth Amendment's language itself requires that a warrant specify "the place to be searched, or the person or things to be seized."<sup>78</sup> For example, a search warrant may allow police officers to search a home's garage for evidence of methamphetamine production, but not give police authority to search any other part of the home. Or a warrant may give police authority to search an entire home for guns or other weapons, but not give them the right to rummage through spaces within the home—computers, personal diaries, or small desk drawers—where such weapons could not possibly be found. One problem with police body-worn cameras, or other video footage police take of a home search is that it can allow police to exceed the scope of their warrant by capturing footage that may reveal evidence from areas of the home they are not permitted to examine. For example, if police video footage records papers that are lying on a table when they enter, they may later be able to magnify the images they capture and read documents they would not have been permitted to read during the course of their search.

Under the "plain view" exception to the warrant requirement, police are typically permitted to examine items in, or areas of, a home that are outside the scope of their warrant if two conditions are met: (1) the item or area is visible to them from where they have a right to be; and (2) the incriminating character of the object they wish to examine is "immediately apparent."<sup>79</sup> Body-worn cameras, however, would allow police to capture footage of visible items, the incriminating character of which is *not* immediately apparent, but becomes apparent only when the video is viewed, paused, rewound, and then subjected to further magnification or analysis. Moreover, even where police body-worn cameras avoid capturing any evidence outside the warrant's scope, the footage they capture can intensify the privacy harm resulting from a search. Even when they stay scrupulously within the scope of their warrant, a person may well feel that his or her privacy has been far more violated when police not only enter their home, but create a potentially permanent record of the details within it. As the Court recognized in *Kyllo v. United States*, the Fourth Amendment is based upon the assumption that the home is a bastion of privacy, observing, "In the home ... all details are intimate details, because the entire area is held safe from prying government eyes."<sup>80</sup> It seems odd that the same constitutional privacy protections that allow "prying government eyes" into our houses only briefly, and with unusually compelling reasons to enter, would let them make a permanent record of it.

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<sup>77</sup> See *Payton v. New York*, 445 U.S. 573, 586 (1980) ("[S]earches and seizures inside a home without a warrant are presumptively unreasonable.").

<sup>78</sup> U.S. CONST. amend. IV.

<sup>79</sup> See *Arizona v. Hicks*, 480 U.S. 321 (1987).

<sup>80</sup> *Kyllo v. United States*, 533 U.S. 27, 37 (2001).

In *Wilson v. Layne*, the Supreme Court found that police violated a suspect's right to be free from unreasonable search and seizure when they not only entered a house after obtaining a warrant for arrest, but brought with them a reporter and a photographer from the *Washington Post*. They filmed and broadcasted the police's entrance into the home and the encounter with the suspect's parents, who owned and lived in the home.<sup>81</sup> The *Wilson* Court stated that the Fourth Amendment "require[s] that police actions in execution of a warrant be related to the objectives of the authorized intrusion," and that "the presence of reporters inside the home was not related to the objectives of the authorized intrusion."<sup>82</sup> By contrast, where police are donning the same body-worn cameras that they are supposed to wear in all encounters with the public—especially in encounters that might involve violence—they would have a much stronger argument that the use of the camera *is* related to the objectives of an authorized intrusion.<sup>83</sup>

Perhaps because of the legal uncertainty surrounding in-home recording, some police departments have taken the position that they will only record from body-worn cameras within a home when they have permission from a home's occupant.<sup>84</sup> This is one possible solution to the problem because consent can allow a search of areas or items that would otherwise be off limits to police. In such cases, there is no need to try to stretch the "plain view" doctrine beyond its natural limits. It is important, however, that such consent not only encompass the search itself, but also the video recording that comes with it. Of course, some police departments may worry that this will deprive them of valuable evidence. A violent encounter between a police officer and a suspect may occur within a house, during a search. A suspect may claim that police failed to accurately identify themselves and that the suspect used force to counter what he believed to be a break in and attack. Police may dispute this account. It may be, given the cost to privacy from an unauthorized in-home recording, that in these circumstances, fact-finders will have to rely primarily on other evidence to decide which side is telling the truth.

Alternatively, police, courts and citizens can consider other privacy protection regimes and analyze whether they comply with Fourth Amendment requirements. Police may adopt a policy that their body-worn cameras *will* routinely record their surroundings as they search, but that *no one* will preserve or view this video footage unless a violent encounter or other basis for a complaint has arisen shortly after the search. It is true that video footage may capture images of items police do not have a right to search, or allow for the possibility of a detailed analysis of items they have a right to view during the search but not to seize. However this may not raise Fourth Amendment problems if there are strict protocols in place that prevent any government officials from ever viewing such a video, except where an emergency has arisen, requiring this evidence. In any event, recordings in homes or other private areas raise the most serious Fourth Amendment and privacy concerns.

It is also conceivable that Fourth Amendment problems will arise even where police use body-worn cameras in public. The Supreme Court has repeatedly held that even

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<sup>81</sup> See *Wilson v. Layne*, 526 U.S. 603 (1999).

<sup>82</sup> *Id.* at 611.

<sup>83</sup> See *United States v. Fautz*, 812 F. Supp. 2d 570, 616 (2011) (finding that videotaping of a suspect's apartment during a search was permissible under the Fourth Amendment, given that officers' purpose in videotaping was "to protect themselves against potential claims of liability for damage or disruption to personal property.").

<sup>84</sup> See POLICE EXEC. RESEARCH FORUM, *supra* note 4.

where police use technology to enhance or record observations in public spaces, they are not conducting a search because individuals cannot expect that their public movements and actions will be shielded from observation.<sup>85</sup> If someone walks or drives on a public street, or strolls through a park, they cannot justifiably express surprise or objection when they are viewed by others who have a right to be in these places, including police officers whose job it is to patrol them.

In recent years, however, many Court observers have argued that while our privacy expectations in public areas may be much lower than they are in our houses, they are not non-existent. Routine government surveillance and tracking of our public activities may reveal much we do not want to share with the world. Indeed, in 2012, five Supreme Court justices, concurring in *United States v. Jones*,<sup>86</sup> stressed that we do not expect to be subjected to ongoing warrantless surveillance in public spaces.<sup>87</sup> As Justice Sotomayor wrote, our reasonable expectations of privacy may well be violated by GPS surveillance that “generates a precise, comprehensive record of a person’s public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.”<sup>88</sup>

For two reasons, however, these arguments for extending the Fourth Amendment to cover public activities do not place significant limits on police body-worn cameras. First, they are just hints and arguments, not holdings that the Supreme Court has reached in any Fourth Amendment case. To be sure, a number of lower courts have, in the wake of *Jones*, applied what Professor Orin Kerr calls “the mosaic theory” to hold that when government collects too much information about a person’s movements and activities, it may trigger Fourth Amendment protections.<sup>89</sup> But it is unclear if the Supreme Court will endorse this view of the Fourth Amendment. The Justices in *Jones* did so only in concurring opinions and postponed much of the analysis they would need to make this a workable doctrine.

In any event, there is a second reason that even the lower court holdings applying the mosaic theory are unlikely to apply it to police body-worn cameras. Unlike a GPS device attached to a person’s car, as was the case in *Jones*, police body-worn cameras generally do not follow a target from place to place, unless the police officer bearing that camera is following a suspect continuously. Body-worn cameras do not allow the government to create a comprehensive, days-long record of his activities without committing staff to such a tracking project. Indeed, in the case of body-worn cameras, the government can be said to be focusing its cameras not only on any one civilian’s activity, but on its *own* activity. This is something government likely has a right to do without Fourth Amendment restraint. It can keep records of how its officials behave

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<sup>85</sup> See, e.g., *Knotts v. United States*, 480 U.S. 276, 281 (1983) (“A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.”).

<sup>86</sup> *Jones*, 132 S. Ct. at 945.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 955. The author of this Issue Brief has previously argued that the Fourth Amendment should be extended to protect against certain forms of intrusive surveillance in public, particularly, any time the government engages in “remote recording” of activities outside an official’s natural field of vision and hearing. This would include the government using a drone-mounted camera to record things its operator could not otherwise see. See Marc Jonathan Blitz, *Video Surveillance and the Constitution of Public Space, Fitting the Fourth Amendment to a World That Tracks Image and Identity*, 82 TEX. L. REV. 1349, 1350-54 (2004); see Marc Jonathan Blitz, *The Fourth Amendment Future of Public Surveillance Remote Recording and Other Searches in Public Space*, 63 AM. U. L. REV. 21, 24-25 (2013).

<sup>89</sup> See Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311 (2012).

and, to the extent that these records occasionally and briefly sweep in video footage of citizens, this is a necessary incident to monitoring government officials.

Matters might be different if police do not merely capture footage, but also aggregate the footage they obtain from body-worn cameras, and perhaps combine it with footage captured from dashcams, CCTV cameras, or other evidence of a person's transactions. While an individual officer's camera is unlikely to capture anything close to a days-long record of a person's activity, it can gather evidence that might contribute to such a record. To the extent that this raises a Fourth Amendment or other privacy problem, however, it is a problem raised not primarily by capture of the video, but by what is done with it afterwards.

## B. RULES FOR RECORDING: TRIGGERS, STORAGE, AND DISSEMINATION OF VIDEO FOOTAGE

Since the Fourth Amendment likely places few restrictions on the use of police body-worn cameras in public spaces, the privacy risks created by body-worn cameras must be addressed in other ways, including: (1) state and local law; (2) police rules and privacy policies; and (3) norms and judgments made by police officers. Some of these privacy safeguards might shield citizens (or their effects) from the camera's gaze. Others place controls on what occurs after the police make the recording by limiting how long police may keep the recording, who may access it (either within or outside the police department), and what uses government may make of the recording in court or elsewhere.

### 1. *Triggers*

First, state law might prevent police from employing body-worn cameras. In some states, for example, wiretap laws require that both parties consent to recording of audio conversations. Such laws could conceivably make it illegal for police in some circumstances to record interactions with citizens without their consent. As the Police Executive Research Forum (PERF) report notes, many police departments in such states have "successfully worked with their state legislatures to have the consent requirement waived for body-worn cameras."<sup>90</sup>

Second, many police departments are adopting policies that require officers to activate their body-worn cameras only during specific types of encounters. PERF notes that a common approach among jurisdictions that have adopted body-worn cameras "is to require officers activate their cameras when responding to calls for service and during law-enforcement related encounters and activities, such as traffic stops, arrests, searches, interrogations, and pursuits."<sup>91</sup> Police departments also frequently give officers discretion to turn cameras off, so long as the officer provides a reason for doing so, giving police leeway to minimize the damage to citizens' privacy. Moreover, even with controls on use (discussed below), once a police encounter is recorded, there is at least some chance the video will become public, making it important to carefully consider what police record with their on-body cameras.

Perhaps surprisingly, the ACLU, despite its long-standing criticism of government surveillance, has argued for more extensive recording by police. "The ideal policy for body-worn cameras... would be for continuous recording throughout a police officer's shift, eliminating any possibility that an officer could evade the recording of abuses

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<sup>90</sup> POLICE EXEC. RESEARCH FORUM, *supra* note 4.

<sup>91</sup> *Id.*

committed on duty.”<sup>92</sup> Given discretion, officers might manipulate the recording, “undermining their core purpose of detecting police misconduct.”<sup>93</sup> The ACLU position finds support in some of the points considered earlier regarding jurors’ perceptions of such evidence.

There are at least two significant problems with a regime of continuous recording. First, as the ACLU acknowledges, such a system would assure that the video captures some record of everything an officer does on the job. Even though the camera is pointed away from the officer, it will capture some visual and audio record that contains a comprehensive record of movements, activities, and statements throughout the day. There is, of course, a lower expectation of privacy in this or other government-related work than there is in people’s lives outside the workplace. But that does not mean police officers should have every word they say recorded for possible review. Especially when they are not interacting with citizens, police may have as legitimate an expectation to privacy in their activities as others. Second, a sense of privacy may be crucial not only to police officers’ morale, but to their ability to collect evidence important to solving crimes. Some potential witnesses will be far less likely to talk with a camera running, especially if they fear retaliation from others in the community for their cooperation. While concerns regarding police privacy might be resolved by strict controls on video access, such controls likely would not be enough to ease the fears of a witness unwilling to talk with a camera running.

For these reasons, even those—like the ACLU—who favor continuous recording have been open to systems that allow for interruptions, so long as they are well-protected against manipulation. The ACLU, for example, suggests police explore an automated recording system where cameras are triggered not by a human decision, but by loud voices, the movements associated with a pursuit, or other external stimuli indicating the presence of a confrontation.<sup>94</sup> Chicago’s extensive system of street cameras alerts observers when the camera detects movement possibly associated with dangerous activity. Such a system, however, may sometimes fail to start when it is needed. Even if such an automated system is not the right one for police body-worn cameras, the ACLU remains correct that any system for protecting privacy interests should limit police discretion to turn off cameras when the footage is necessary. One additional possibility is for the judicial system and police departments to adopt rules that penalize police officers for shutting off cameras without grounds to do so. As noted above, many police departments already require a police officer to explain in writing, or on the camera recording itself, why he stopped recording. So long as courts and police departments independently and thoroughly assess these justifications, this might be sufficient to assure cameras are off only when they need to be. As discussed in Part II, an alternative incentive to keep the cameras on when necessary can come from rules of evidence.

## 2. Storage

Apart from rules about when the cameras should record, states and police departments will also need laws or regulations to determine how video footage is handled after the recording. Here, PERF, the ACLU, and many others appear to be in agreement that police should generally keep videos no longer than necessary to assure police accountability or to adjudicate a claim of police abuse. They should also keep a careful

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<sup>92</sup> See Stanley, *Police Body-Mounted Cameras*, *supra* note 6.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

record of who accesses any video footage and allow such access only for a legitimate purpose. Much of a police officer's day may not involve encounters with citizens, let alone any confrontations. And where police peacefully interact with citizens, the potential for a complaint or charge may be extremely low. In such cases, the PERF report suggests that departments keep video for only 60 to 90 days.<sup>95</sup> The ACLU likewise argues that in cases where confrontations have not occurred, the storage time for video should be days or weeks, not months or years.<sup>96</sup>

### 3. Dissemination and Use

Access should likewise be carefully controlled to assure against the "mission creep" that often occurs when an official decides that surveillance tools employed and justified for an important public safety purpose can also be helpful in addressing another, far less significant government end. Professor Jeffrey Rosen points out that CCTV cameras were initially justified in England as tools for fighting terrorism, but then grew to be more often used by authorities to target shoplifters and loiterers.<sup>97</sup> Some skeptics have argued that the same shift can happen and is happening with body-worn cameras, with some police departments using footage not to detect, deter, or stop abuses of police power, but to discipline minor deviations from other rules, such as uniform policy. While sacrificing some privacy to reveal criminal violence or government abuse of force may be justifiable, it is not as clear that it is worth better information about minor disciplinary infractions.

Perhaps the most difficult challenge facing state and local governments as they try to control what happens to recorded and stored police videos stems from state open records laws. Such laws could potentially allow citizens, or Internet trolls, to mine video for embarrassing footage. Under such circumstances, video that is captured to stop police abuse instead becomes a tool for a different kind of abuse that citizens inflict on each other: to hurt political or workplace rivals; to use against an opponent in a civil lawsuit; or simply to attract attention on YouTube or other sites. One article, for example, notes that "[d]isturbing outtakes from Cop Candid Camera get out too easily in some places," and notes that a video of a man admitting to marijuana possession to a police officer ended up on YouTube.<sup>98</sup>

Defenders of open records law are understandably reluctant to roll them back. Police video footage will often contain information that is of tremendous importance for police watchdogs.<sup>99</sup> While police departments can and do monitor their own officers' behavior, modern democracies do not typically trust the state to monitor itself. They sometimes need investigative journalists or reform advocates to uncover information about practices that the government itself has ignored, overlooked, or hidden. But where state open records laws place no limits on access to and malicious use of footage of a traffic stop, the possible privacy damage from police body-worn cameras

<sup>95</sup> POLICE EXEC. RESEARCH FORUM, *supra* note 4.

<sup>96</sup> See Stanley, *Police Body-Mounted Cameras*, *supra* note 6.

<sup>97</sup> Jeffrey Rosen, *A Cautionary Tale for a New Age of Surveillance*, N.Y. TIMES (Oct. 7 2001), <http://www.nytimes.com/2001/10/07/magazine/07SURVEILLANCE.html?pagewanted=6>.

<sup>98</sup> Kashmir Hill, *A Future in Which Every Police Officer Wears a Body Cam Isn't Entirely Rosy*, FORBES (Nov. 5, 2014, 3:54 PM), <http://www.forbes.com/sites/kashmirhill/2014/11/05/a-future-in-which-every-police-officer-wears-a-body-cam-isnt-entirely-rosy/>.

<sup>99</sup> See Toby McIntosh & Lauren Harper, *Backlash Develops Over Body Cam Footage*, FREEDOM INFO (Feb. 26, 2015), <http://www.freedominfo.org/2015/02/backlash-develops-over-release-of-body-cam-footage/> (noting that, "[i]f the footage isn't available, 'body cam' supporters say, the promise of having silent watchdogs over police-citizen interactions will go unfulfilled.").

will be far more significant. It thus makes sense to consider laws that place significant limits on individuals' access to police video that does not depict them. For example, The Constitution Project and the Center for Democracy and Technology have proposed that police generally be barred from disseminating "unredacted or unflagged" video of citizens' encounters with police, unless such dissemination is agreed to by citizens shown in the video.<sup>100</sup>

#### IV. CONCLUSION

State surveillance cameras sometimes trigger worries about an Orwellian future. Writers have expressed alarm at the possibility of being subject to monitoring everywhere in public space, from cameras mounted above streets or fixed in police-operated drones. But cameras can also provide a safeguard against public abuse of power. The current enthusiasm for body-worn cameras is at least, in part, an embrace of this possibility. As University of Pittsburgh School of Law Professor David A. Harris suggests, rather than providing a means of unconstitutional surveillance, body-worn cameras might help assure that police respect the demands of the Fourth Amendment by documenting police searches and seizures.<sup>101</sup> Although the ACLU usually opposes expanded government surveillance, it notes that body-worn cameras can serve as an important check against police brutality.<sup>102</sup> With such benefits in mind, numerous police departments and government officials, including President Obama, have quickly embraced body-worn cameras. However, critics warn that this embrace of police video focuses too much on using technology to solve policing problems that instead require social and cultural changes and ignores the ways in which body-worn cameras, like other more familiar surveillance cameras, give the state power to watch over citizens without giving citizens power to watch back.

In examining some of the key issues law enforcement currently face in the use of body-worn cameras, this Issue Brief concludes that critics are mistaken when they dismiss or minimize body-worn cameras' potential benefits as evidence. But police departments, courts and other government entities that adopt and use body-worn camera evidence will have to work hard to realize these benefits and minimize the risks to privacy they entail. To accomplish this, police departments and other government entities may have to adopt robust evidentiary and privacy safeguards together with the cameras' innovative technology.

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<sup>100</sup> THE CONSTITUTION PROJECT, *supra* note 9; *Comments to President's Task Force on 21st Policing*, CENTER FOR DEMOCRACY AND TECH. (Jan. 21, 2015), [http://www.cops.usdoj.gov/pdf/taskforce/01-31-2015/Public\\_Testimony\\_January\\_31.pdf](http://www.cops.usdoj.gov/pdf/taskforce/01-31-2015/Public_Testimony_January_31.pdf).

<sup>101</sup> See David A. Harris, *Picture This: Body-Worn Video Devices (Head Cams) As Tools for Ensuring Fourth Amendment Compliance By Police*, 43 TEXAS TECH. L. REV. 357, 359 (2010).

<sup>102</sup> See Stanley, *Police Body-Mounted Cameras*, *supra* note 6.



# Another Attack on Election Reform: Congressional Redistricting Commissions

Alan B. Morrison\*

## I. INTRODUCTION

Many Americans, in Arizona and elsewhere, believe that our democracy could be improved by reducing money in politics and by assigning the drawing of district lines for the U.S. House of Representatives and state legislatures to bodies that are less subject to political gerrymandering than state legislatures. In 1998, the citizens of Arizona, acting through the State's initiative process, passed a law providing for public financing of state elections, with the amount of money available to candidates who opted into the system dependent in part on how much money was spent to support their opponents. In short, publicly financed candidates would receive an initial sum that would be supplemented if and when their opponents raised more than that initial sum. In *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*,<sup>1</sup> the Supreme Court, by a vote of 5-4, held that the First Amendment prohibited such a system of supplemental funding. The majority concluded that it penalized those making independent expenditures by making those expenditures less valuable because they would trigger additional state funds for the candidate they opposed. Given the Court's rulings in other cases such as *Citizens United v. Federal Election Commission*,<sup>2</sup> and *McCutcheon v. Fed. Election Comm'n*,<sup>3</sup> it is not surprising that proponents of campaign finance reform are now pressing for a constitutional amendment to re-balance the Supreme Court's rules for financing elections.

It is Arizona's second effort at electoral reform, also passed by an initiative two years after public financing was approved by the voters, that is currently before the Supreme Court. On March 2, 2015, the Court will hear oral argument in a constitutional challenge to the Arizona law that takes congressional redistricting out of the hands of the state legislature and assigns that job to an independent commission.<sup>4</sup> The claim is that Article I, Section 4 of the U.S. Constitution, The Elections Clause,<sup>5</sup>

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<sup>1</sup> *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011).

<sup>2</sup> *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

<sup>3</sup> *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434 (2014).

<sup>4</sup> *Arizona State Legislature v. Arizona Independent Redistricting Commission*, No. 13-1314, 135 S. Ct. 2652 (2015).

<sup>5</sup> "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the places of Chusing [sic] Senators." U.S. CONST. art. I, § 4.

requires that the “Legislature” of each state perform the task of drawing congressional districts and that assigning it to another entity is unconstitutional.<sup>6</sup>

Allowing state legislatures to draw district lines is thought to produce two evils: incumbent protection and gerrymandering (enabling the party in control to draw districts in a way likely to produce more seats for that party than would result based on its overall strength in the state). One way to combat these evils is to create a non-partisan commission, independent of the legislature, to do the line drawing, which is what Arizona voters did. The pending challenge does not object to the form of the Arizona Commission, or argue that the goals underlying the initiative are ill-advised or unconstitutional. Rather, the claim is that the U.S. Constitution requires that *only* a state legislature may draw the lines for that state’s congressional districts and that *any* assignment to another body is forbidden.

## II. STANDING

In its order granting review in this case, the Supreme Court directed the parties to brief an issue that the Commission had not raised in its motion to affirm: whether the Arizona legislature has standing to challenge the alleged violation. The Court has been quite aggressive in dismissing cases arising from the federal courts based on lack of standing. The most recent example occurred in the pair of same-sex marriage cases before the Court two years ago. In the case challenging Section 3 of the Defense of Marriage Act (DOMA), although the parties agreed that the Court could hear the case, the Court appointed law professor Vicki Jackson to argue that there was no standing.<sup>7</sup> In the end, the Court, by a vote of 6-3, agreed that it could decide the merits, and 5 Justices found the challenged provision of DOMA unconstitutional. On the same day, by a margin of 5-4 (with some of the Justices switching their positions in both directions), the Court declined to decide the claim that California’s ban on same-sex marriages was unconstitutional, finding that the party defending the law had no standing to appeal the district court’s adverse ruling.<sup>8</sup>

While the two same-sex marriage cases reflect the Court’s general disposition to deny standing, especially in cases with political overtones, its decision in *Raines v. Byrd*<sup>9</sup> is more similar to the case against the Arizona Redistricting Commission. At issue in *Raines* was the constitutionality of the Line Item Veto Act that had recently been passed by Congress, giving the President authority to prevent spending on items that he thought unwise but which were part of a larger bill that he could not or would not veto. Members of Congress sued over the veto’s constitutionality, as expressly authorized in that Act. The Supreme Court found that there was no “case or controversy” under Article III and dismissed their case for lack of standing. According to the Court, the members had suffered no injury in their personal capacities, but only as members of Congress. The Court relied in part on the fact that Congress as a whole had not sued and that the plaintiffs were, in effect, trying to win in court a victory that they had lost in Congress. While the Arizona legislature as a whole has sued in the present case, it is unclear how much that will distinguish this case since the very law that was being challenged in *Raines* authorized individual members of Congress to sue.

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<sup>6</sup> The law applies to the districts for the Arizona State Legislature, but the challenge asserted in this case only applies to congressional redistricting because the constitutional provision relied on by the challengers applies only to elections to Congress.

<sup>7</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2684 (2013).

<sup>8</sup> *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

<sup>9</sup> *Raines v. Byrd*, 521 U.S. 811 (1997).

If the Court were inclined to uphold the standing of the Arizona legislature, it should consider the implications for other cases involving congressional or, in some instances, senatorial standing. For example, in *Goldwater v. Carter*,<sup>10</sup> the Court declined to reach the merits of a challenge by eight Senators (and others) to the President's decision to withdraw from the U.S.'s treaty with Taiwan. Plaintiffs sued on the ground that, when the Senate has approved the creation of the treaty relationship on the front end, it must likewise approve its termination on the back end. There was no opinion for the Court explaining why it declined to reach the merits, but several Justices found there to be problems with standing that were exacerbated by the lack of support from the Senate as a whole. If the Court upholds the standing of the Arizona legislature in the current case, would that give the full Senate standing to object to future U.S. withdrawals from Senate-approved treaties? Suppose that the President entered an executive agreement on trade with other countries, claiming that he had the power to do so unilaterally. Could Congress go to court if it obtained a majority vote in both the House and Senate, based on claims that the agreement either had to be approved as a treaty, requiring two-thirds of the Senate, or as a law, requiring majority approval of both houses of Congress?

Similarly, last term in *National Labor Relations Board v. Noel Canning*,<sup>11</sup> the Court sustained a challenge to the President's exercise of the limited recess appointment powers granted to him by the Constitution, where the challenger was directly injured by a decision of an agency with a majority of recess appointees. Suppose the President decided to make recess appointments for positions such as ambassadorships or in the Departments of State or Defense, for which no private party is likely to be able to establish the kind of injury the Court has required in *Noel Canning* and similar cases. Would a resolution passed by the Senate authorizing a suit to challenge such appointments overcome the *Raines* standing objection? The Court will not necessarily have to decide these other questions when it decides whether the Arizona legislature has standing, but it surely needs to keep them in mind.

Another factor that may affect the Court's thinking in the Arizona case is that there are others who might have standing, depending in part on what harms they allegedly suffered, a fact that influenced some of the Justices in *Raines*. Among those who might have standing here are a political party that did better under the prior legislatively-determined districts; a candidate or member of the House whose prior district was much more favorable than the one drawn by the Commission; and perhaps voters who preferred the former system because more of their candidates were likely to be elected under it than under the Commission's system. Unlike the claim of diminished legislative power advanced by the appellant (and seconded by its amicus National Council of State Legislatures), those other potential plaintiffs would have claims of direct injury to them as political parties, candidates, or voters and not just a disagreement with how the voters of Arizona decided to allocate the legislative function of drawing congressional district lines.

The U.S. Solicitor General filed an amicus brief in support of the Commission on both standing and the merits. It is not surprising that the Executive Branch has urged the Court to take a narrow view of standing, but its main argument concerning

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<sup>10</sup> *Goldwater v. Carter*, 444 U.S. 996 (1979).

<sup>11</sup> *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014).

jurisdiction is actually one based on ripeness.<sup>12</sup> The Solicitor General points out that the initiative at issue did not divest the Arizona legislature of the power to write redistricting laws and, since the passage of the initiative, the legislature has not attempted to pass such a law. But if it did enact one in opposition to what the Commission did, the Arizona Secretary of State, who must implement such laws, might agree with the legislature on its constitutional argument. In that case, there would be no need for the legislature to go to court. But at least until it has enacted a plan that differs from one that the Commission has promulgated, the Solicitor General argues that the legislature has suffered no injury and any claim that it might have is not yet ripe. In addition, if such an impasse is reached, the Solicitor General suggests that bringing the case in state, rather than federal, court, may ease the path to the Supreme Court because some states have standing rules that are less demanding than those applicable to the federal courts.

The Solicitor General's suggested approach has two benefits that the Court may find attractive. First, the Court need not say the Arizona legislature can never sue on its claim, just not yet. Second, it can avoid trying to distinguish the standing issues in the present case, and in *Raines*, from the state legislature's standing in *Coleman v. Miller*.<sup>13</sup> In *Coleman*, the Court upheld the standing of state legislators whose stake in the case was not personal to them, the very problem the Court identified as fatal in *Raines*. To be sure, the case came to the Supreme Court from a state court, but unless the requirements of Article III as applied by the Court differ based on whether the case came from a state rather than a federal court, that difference would not support a different standing result.

The Court has been tough on standing, and because it is a requirement of Article III and cannot be overcome even by a statute creating a right to immediate judicial review (as was present in *Raines*), a finding of standing here will be a decidedly uphill battle. On the other hand, when the Court wants to get to the merits, it does. For example, the fact that no one had yet been harmed by the Affordable Care Act's "individual mandate," requiring that most, but not all, individuals have health insurance starting in 2014, did not prevent the Court from deciding the constitutionality of the mandate in 2012.<sup>14</sup> Further, if the Court decides to reach the merits in this case, it's almost certain that it won't be to affirm the lower court's ruling upholding the constitutionality of the Arizona Commission.

### III. INTERPRETATION OF ARTICLE I, SECTION 4

Turning to the merits, there are two basic arguments to uphold the Commission. First, the reference in Article I, Section 4 to the "Legislature" does not dictate which legislative powers, including the initiative power, must be used to do the redistricting. The second, which is not raised by the Commission, is that the Elections Clause in Article I, Section 4, on which the Arizona legislature relies, has no bearing on redistricting. Rather, it only deals with the mechanics of how congressional elections are conducted and in no way constrains a state in deciding how to draw congressional districts.

The first argument is that the Elections Clause does no more than make it clear that decisions about how federal elections are to be conducted must be made by the legislative branch and not by, for example, the executive or judicial branch of a state.

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<sup>12</sup> The line between standing and ripeness is not always clear. See *National Park Hospitality Association v. Department of Interior*, 538 U.S. 803, 811, 813–17 (2003) (majority dismissing case on ripeness grounds, with Justice Stevens concurring on basis of lack of standing).

<sup>13</sup> *Coleman v. Miller*, 307 U.S. 433 (1939).

<sup>14</sup> *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012).

Thus, the Clause’s reference to the “Legislature” applies broadly to a state’s entire legislative power, which, as the lower court explained, “plainly includes the power to enact laws through initiative.”<sup>15</sup> The Arizona legislature argues that the reference to the legislature was express and meant to be exclusive; the fact there were no initiatives in 1789 means that they are simply not included in this grant of power, just as they would be excluded from any grant of federal legislative power as an alternative to Congress. On the other side, supporters of the Commission ask, quite sensibly, why the Framers would have wanted to preclude states from making their own choices as to how to allocate their legislative functions between their legislatures and other processes, such as amending their constitutions to take certain choices off the table for a state legislature. They also note that, unlike the limit on the federal government, any supposed limit here would raise questions of federalism.

The Arizona legislature’s insistence that it has the exclusive power to draw district lines relies on the argument that the Framers “delegated” to the state legislatures the power to make rules relating to the conduct of Congressional elections. Ironically, that argument seems to turn federalism on its head. Federalism is the principle that unless the federal government was expressly granted a power, or states were expressly denied one, states maintain the power to make all the laws they need by default. Accordingly, the Elections Clause is merely a means of assuring that *federal* interests in federal elections could be protected if necessary, not that the federal government magnanimously allowed the states to make time, place, and manner rules for the conduct of elections that they would otherwise be unable to do.

If the narrow reading of Article I, Section 4 is accepted, it would have ramifications far beyond striking down the Commission. If a Commission is off limits, voters might seek to tie the hands of the legislature by amending the state constitution to require that all congressional districts be as compact and contiguous as possible, and providing state courts with *de novo* review of the lines drawn including the right to re-draw the lines if the legislature has not complied with these requirements. Would that also run afoul of Section 4 because it significantly reduces the power of the legislature, or would it be sustained because the legislature retains its formal, but very much diminished, role?

Section 4 covers the “Times, Places, and Manners” of holding congressional elections, subject to a congressional override. Assuming that Congress has not acted, suppose a state amended its constitution to require that polls be open from 6 am to 9 pm, that the only places where ballots can be cast are public schools, or that certain kinds of voting machines are forbidden. Would such an amendment unconstitutionally restrict the future power of the state legislature over congressional elections? If so, why would the Framers have wanted to forbid a state from making those kinds of choices in its constitution?

Similarly, the Arizona Constitution allows the voters to override legislation, in whole or in part, through a referendum process. If the voters acted under that power regarding a redistricting law passed by the legislature, would that also violate Section 4 by placing the final decisional authority outside the legislature? Or, as the brief of the Commission points out, would requiring state legislatures to enact all laws relating to the times, places, and manners of congressional elections override state laws that give localities the power to decide, for example, what kinds of voting machines will be used, what hours the polls will be open for early voting, and how the ballot should be designed in light of the many local races and local ballot issues that are presented

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<sup>15</sup> *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm’n*, No. CV-12-01211-PHX-PGR-MMS-GMS, 2014 WL 465908 (D. Ariz., 2014).

to the voters? Perhaps such a system might be justified if there were sound reasons to support imposing such constraints on the states, but the Arizona legislature has not offered any justification that is consistent with principles of federalism or the need for limited federal supervision of congressional elections.

There is another argument against a narrow reading of “Legislature” that is based on the text of Section 4 itself. If Section 4 is applicable to redistricting (a question which is discussed in more detail below), and if a state carries out its process of redistricting in an unreasonable way, such as by delegating its function to a partisan commission, there is a built-in remedy that is far less of an intrusion on principles of federalism—Congress can change the result by utilizing its express powers under that very provision. Having Congress solve any problem created by a state’s exercise of its Section 4 powers would preserve for the states generally the option of using their initiative powers under that Section, while enabling Congress to repair the specific problem before it. Indeed, as both the Solicitor General and the Commission argue in their briefs, Congress has enacted a law—2 U.S.C. § 2a(c)—that sets forth rules for what will happen if a state fails to re-draw the district lines for members of the House of Representatives. In its current form, that statute looks to state “law,” and not to what the state “legislature” did, a change that was first made when initiatives began to be used. Thus, even if the term “Legislature” were read literally, as the Arizona lawmakers suggest, 2 U.S.C. § 2a(c) is a federal override, expressly authorized by the Constitution, thereby curing any potential problem.

#### IV. AN ALTERNATIVE TO ARTICLE I, SECTION 4

The second argument in favor of upholding the Arizona Redistricting Commission avoids construing the term “Legislature” in Article I, Section 4 by concluding that the provision has no bearing on the question at all. The starting place for this claim is the language at issue: “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the place of chusing [sic] Senators.”<sup>16</sup>

To begin, the phrase “Times, Places, and Manner of holding Elections” does not, in ordinary parlance, include the substance of what the voters will decide when electing Representatives and Senators. Indeed, those subjects are covered elsewhere. For Senators, the Seventeenth Amendment now mandates that there be two from each state elected on a state-wide basis for six year terms, with no district lines to be drawn,<sup>17</sup> thereby making any redistricting function in Section 4 irrelevant for one of the two bodies expressly covered by it. For Representatives, Article I, Section 2, requires that the apportionment of Representatives be based on population, with each State to have at least one representative.<sup>18</sup> If the Framers were intent on prescribing how a state must allocate its seats in the House, and requiring that it be done by the state legislature, this is the place one would expect to find such a mandate, and not in a provision dealing with “holding Elections”<sup>19</sup> for both Representatives and Senators. Moreover, Article I, Section 2 specifies that the members of the House shall be “chosen every second Year by the People of the several States,” adding that “the Electors in each State

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<sup>16</sup> U.S. CONST. art. I, § 4.

<sup>17</sup> U.S. CONST. amend. XVII.

<sup>18</sup> U.S. CONST. art. I, § 2, cl. 3.

<sup>19</sup> U.S. CONST. art. 4, cl. 1.

shall have the Qualifications requisite for Electors for the most numerous Branch of the State Legislature.”<sup>20</sup> Given these specific requirements for elections to both Houses, it seems quite odd that the Framers would have indirectly – and through the phrase “Times, Places and Manners of holding Elections” – imposed an additional limitation on the sovereign states, with no obvious justification for doing so.

Given the importance of assuring that congressional districts are fairly apportioned, it would be strange for the Framers not to have provided for any federal role in the districting process until it added Section 4, near the end of the process of drafting Article I, and then to have done so by such an indirect method. As the Commission points out, Section 4 assures a federal role in the conducting of elections for federal offices, and there is no hint anywhere that the provision was intended to limit states in their choice of how their laws are made. Yet that is what the Arizona legislature suggests Section 4 did. What Justice Scalia said about significant changes in regulatory legislation applies equally to what the Framers did in deciding by whom redistricting decisions must be made: they did not, “one might say, hide elephants in mouseholes.”<sup>21</sup>

Furthermore, although not in the Constitution and arising in a different context, the phrase “time, place and manner” is used to distinguish those kinds of modest, temporal limits on First Amendment activities that do not violate the Constitution, in contrast to those that interfere with the substance of what the speaker wishes to say.<sup>22</sup> In the present case, the challenge to the Commission is a direct challenge to the substance of the choice that Arizona has made. This comparison to the phrase “time, place and manner” in First Amendment jurisprudence further supports the conclusion that Section 4 of the Elections Clause is not directed at which governmental body within a State may and may not draw districting lines for the House of Representatives, but at assuring that it be done by whatever means the state has chosen to enact laws relating to elections.

Taking the redistricting out of Section 4 has, at least in theory, one possible downside for those who wish to reduce gerrymandering. It could potentially strip Congress of the power to address it, leaving voters with no federal remedy. In the Court’s most recent decision holding that the federal courts cannot remedy partisan gerrymandering, it concluded that the choice among remedies lacked judicially manageable standards by which lines can be redrawn and hence involved a political question. The Court suggested, but did not hold, that Congress has the power under Article I, Section 4, to set standards, and perhaps even draw the lines itself to replace those of the States.<sup>23</sup> It even cited a number of laws enacted by Congress dealing with the rules for creating House districts, though many of those laws could be defended as “necessary and proper”<sup>24</sup> to implement Article I, Section 2, which is discussed above.<sup>25</sup> Thus, if the Court were to determine that Article I, Section 4 does not speak to redistricting, it would arguably deprive Congress of a means for addressing gerrymandering. On the other hand, the existence of the laws cited by the Court does not establish that Section 4 is the *only* basis on which they could be defended, let alone that Section 4 also speaks to the precise means by which states must draw their congressional districts. Accordingly, even if the Court were to rule that Section 4 does not speak to how district lines may or must be drawn, and thereby reject the challenge to the Arizona Commission, it would not

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<sup>20</sup> U.S. CONST. art. I, § 3, cl 2.

<sup>21</sup> *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 468 (2001).

<sup>22</sup> *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

<sup>23</sup> *Vieth v. Jubelirer*, 541 U.S. 267, 274–77 (2004).

<sup>24</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>25</sup> U.S. CONST. art. I, § 2.

automatically preclude Congress from setting requirements for redistricting under Section 2. Even if that were the result, it would hardly be a loss for reformers because of the virtual certainty that Congress will never undertake such an effort, let alone actually enact a law that would make gerrymandering much less likely to occur.

There is also a federalism argument against allowing the Court to step in and overrule a state that decides to employ an independent commission to draw House district lines on “Times, Places, and Manners” grounds. Assuming, contrary to the arguments made above, that Congress has no authority other than Section 4 with respect to House elections, it is difficult to identify the federal interest in overruling *how* a state chooses to exercise the redistricting function under its own constitution. It is perfectly understandable why the Framers would have wanted Congress to have a backup role on the rules applicable to what happens on Election Day, but it is far less obvious why that rationale would carry over to allowing the federal judiciary to second-guess a state’s internal lawmaking norms for drawing legislative districts applicable to the House of Representatives.

## V. CONCLUSION

For those who still sustain a hope that non-partisan redistricting commissions can reduce the likelihood of partisan gerrymandering, and thereby increase democracy in the process of selecting members of the House of Representatives, they should be rooting hard that the Court rejects the position of the Arizona legislature.

# Defending the Constitutionality of Race-Conscious University Admissions

Vinay Harpalani, J.D., Ph.D.\*

## INTRODUCTION

For the last several decades, affirmative action in higher education—and specifically the use of race-conscious policies in university admissions<sup>1</sup>—has been one of the most charged legal and political issues in America. Several states, including California, Washington, Florida, Arizona, Nebraska, Oklahoma, and New Hampshire, have enacted state laws prohibiting race-conscious policies.<sup>2</sup> Although the U.S. Supreme Court has heard many cases related to race-conscious university admissions,<sup>3</sup> the legal debates continue. In its October 2015 term, the Court will again consider *Fisher v. University of Texas at Austin*,<sup>4</sup> just two years after initially hearing the case.

The Supreme Court has thus far ruled that race-conscious university admissions policies are constitutional if they meet certain requirements. But for the past four decades, with each case it has considered, the Court has made those requirements more stringent. The Court's 1978 decision in *Regents of the University of California v. Bakke* was its first major statement on the issue; and its subsequent rulings in *Gratz v. Bollinger* (2003), *Grutter v. Bollinger* (2003), and *Fisher v. University of Texas at Austin* (I) (2013) elaborated on the constitutional doctrine. In *Schuette v. Coalition to Defend Affirmative Action, Integration, and Immigrant Rights and Fight for Equality by Any Means Necessary* (2014),<sup>5</sup> the Court ruled that states can enact bans on race-conscious policies, but *Schuette* did not consider the merits of these policies. Now, *Fisher* (II) will further consider the constitutionality of race-conscious admissions policies.

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<sup>1</sup> This issue brief mostly refers to “race-conscious university admissions” rather than “affirmative action,” because the latter technically defines a broad range of policies beyond admissions and beyond the realm of education, even though in common parlance it is often used more specifically as a synonym for race-conscious university admissions. Nevertheless, this issue brief does use “affirmative action” in that more specific manner when citing to sources. Also “university” in the context of this issue brief refers to all institutions of higher education with selective admissions, not just those which technically meet the definition of a university.

<sup>2</sup> See *Affirmative Action: State Action*, NAT'L CONF. OF ST. LEGIS. (Apr. 2014), <http://www.ncsl.org/research/education/affirmative-action-state-action.aspx>.

<sup>3</sup> *Defunis v. Odegaard*, 416 U.S. 312 (1974); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Texas v. Lesage*, 528 U.S. 18 (1999); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) [hereinafter *Fisher* (I)]. The Court did not rule on the merits in *Defunis* and *Lesage*, and it also remanded *Fisher* (I) to the Fifth Circuit, eventually leading to *Fisher* (II).

<sup>4</sup> *Fisher v. Univ. of Texas at Austin*, 758 F.3d 633 (5th Cir. 2014), *cert. granted*, 135 S. Ct. 2888 (2015) (Mem.) [hereinafter *Fisher* (II)].

<sup>5</sup> *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary* (BAMN), 134 S. Ct. 1623 (2014).

The basic constitutional question around race-conscious university admissions is relatively simple. Under the Equal Protection Clause of the Fourteenth Amendment, can a university consider an applicant's race when making selective admissions decisions? For a university to use race as part of its admissions process, it must meet the strict scrutiny test. Its race-conscious admissions policy must fulfill a compelling state interest, and the policy must be narrowly tailored to meet that interest. Nevertheless, the nuances of strict scrutiny—as applied to race-conscious university admissions—have become quite complicated and contentious. Given the politically charged nature of race in America, universities, policymakers, and advocates need to understand constitutional doctrine and how it both intersects with and diverges from the political debates on affirmative action.

## I. OVERVIEW OF THE CURRENT LEGAL DOCTRINE ON RACE-CONSCIOUS UNIVERSITY ADMISSIONS

The Supreme Court has repeatedly ruled that the educational benefits of student body diversity are a compelling state interest which can justify universities' use of race in admissions, as long as these universities meet particular narrow tailoring requirements.<sup>6</sup> The Court has also given deference to universities' expertise in defining how their own educational missions comport with the diversity rationale,<sup>7</sup> but *Fisher* (I) clearly states that universities receive “no deference” on narrow tailoring.<sup>8</sup> Universities thus bear the burden of showing that use of race in admissions is necessary to achieve their compelling interest in diversity.

### A. COMPELLING STATE INTEREST—THE DIVERSITY RATIONALE

Justice Powell's concurring opinion in *Bakke* first articulated that diversity is a compelling state interest.<sup>9</sup> Nevertheless, *Bakke* was a plurality ruling, with no majority opinion and no other Justice joining Justice Powell's opinion. As such, the diversity rationale remained controversial as a constitutional matter until 2003, when the Court heard the two University of Michigan cases: *Gratz v. Bollinger* and *Grutter v. Bollinger*.<sup>10</sup> In *Grutter*, Justice O'Connor authored a 5-4 majority opinion affirming diversity as a compelling interest and elaborating on its contours. *Grutter* upheld the University of Michigan Law School's admissions policy—a holistic admissions plan that considered race in a discretionary and flexible manner, as one factor in the individualized review of applicants. Simultaneously, in *Gratz*, the Court struck down Michigan's undergraduate admissions policy for the College of Literature, Science, and Arts on narrow

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<sup>6</sup> *Bakke*, 438 U.S. at 311–12 (Powell, J., concurring); *Fisher* (I), 133 S. Ct. at 2418 (quoting *Grutter*, 539 U.S. at 325).

<sup>7</sup> *Fisher* (I), 133 S. Ct. at 2419 (citing *Grutter*, 539 U.S. at 328–30.)

<sup>8</sup> *Id.* at 2420.

<sup>9</sup> See *Bakke*, *supra* note 6.

<sup>10</sup> Prior to *Gratz* and *Grutter*, the Fifth Circuit declined to follow Justice Powell's view in *Bakke*. *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996), *abrogated by Grutter*, 539 U.S. 306 (stating “any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment.”). In response to *Hopwood*, the Texas state legislature passed the Top Ten Percent Law, which was signed by then Governor George W. Bush. TEX. EDUC. CODE ANN. § 51.803 (1997) (guaranteeing admission to UT to top students (originally top 10 percent of each graduating class) in all Texas public high schools.). This law later became the basis for the *Fisher* litigation, and it has since been amended several times to limit the number of students automatically admitted to UT. TEX. EDUC. CODE ANN. § 51.803(a-1) (2015).

tailoring grounds. That policy used a mechanical point system which automatically awarded 20 points on a 110 point scale to all minority applicants.<sup>11</sup>

*Grutter* set the unequivocal precedent for diversity as a compelling state interest. In *Fisher (I)*, a case against the University of Texas at Austin (UT), the Court again affirmed the diversity rationale, even as it remanded the case to the Fifth Circuit. *Fisher (I)* stated that “[a] court may give some deference to a university’s ‘judgment that such diversity is essential to its educational mission,’ provided that diversity is not defined as mere racial balancing and there is a reasoned, principled explanation for the academic decision.”<sup>12</sup> However, the Court also held that universities receive “no deference” on narrow tailoring,<sup>13</sup> and it ordered the Fifth Circuit to conduct a more stringent review of whether UT needs to use race to achieve its compelling interest in diversity.

### 1. Societal Benefits of Diversity

Justice O’Connor’s majority opinion in *Grutter* remains the most comprehensive authority on the educational benefits of diversity as a compelling interest. On a broad, societal level, *Grutter* notes that “the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.”<sup>14</sup> Justice O’Connor’s opinion also referenced national security, civic participation, and representative leadership as macro-level reasons why diversity in universities’ student bodies is a compelling interest. She cited several expert reports and studies to support this conclusion.<sup>15</sup>

Here, the particular importance of diversity in educational settings echoes prior civil rights decisions. In its opinion in *Sweatt v. Painter*, the Court noted the importance of “interplay of ideas and the exchange of views” to legal education.<sup>16</sup> *Brown v. Board of Education* then stated that education is “the very foundation of good citizenship” and “a principal instrument” in teaching cultural values and facilitating social adjustment.<sup>17</sup> Diversity adds significantly to that interplay and exchange, thus preparing future citizens and leaders to succeed in a global world.

### 2. Classroom and Campus Benefits of Diversity

*Grutter* also highlighted micro-level aspects of the diversity rationale: the educational benefits of diversity on campus and in the classroom. Justice O’Connor notes that these benefits include facilitating “cross-racial understanding” and “break[ing] down racial stereotypes.”<sup>18</sup> Her opinion also refers to the diversity-related goal of enrolling a “critical mass” of underrepresented minority students. *Grutter* poses two general definitions of “critical mass”: (1) “[N]umbers such that underrepresented minority students do not feel isolated or like spokespersons for their race”; and (2)

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<sup>11</sup> See *Gratz*, 539 U.S. at 277–78. In the context of university admissions, this Issue Brief uses the term “minority” to refer specifically to groups which are commonly underrepresented at institutions of higher education. Typically, this includes African Americans, Latina/os, and Native Americans—and these groups are the primary referents here. Nevertheless, some Asian American sub-groups are also underrepresented at many universities, and in other contexts, Asian Americans face disadvantages similar to other minority groups.

<sup>12</sup> *Fisher (I)*, 133 S. Ct. at 2413–14.

<sup>13</sup> *Id.* at 2420.

<sup>14</sup> *Grutter*, 539 U.S. at 330.

<sup>15</sup> *Id.* at 330–32.

<sup>16</sup> *Sweatt v. Painter*, 339 U.S. 629, 634 (1950).

<sup>17</sup> *Brown v. Board of Educ. of Topeka, Kan.*, 347 U.S. 483, 493 (1954).

<sup>18</sup> *Grutter*, 539 U.S. at 330.

Presence of “a variety of viewpoints among minority students” such that “racial stereotypes lose their force.”<sup>19</sup>

Under either definition, critical mass is difficult to measure—especially since *Bakke* precluded any numerical target or set-aside for minority students.<sup>20</sup> In the *Fisher* (I) oral argument at the Supreme Court, neither Plaintiff Fisher nor UT could give a specific definition of critical mass.<sup>21</sup> Plaintiff’s counsel stated that it was UT’s burden to define critical mass,<sup>22</sup> while UT only referred to numbers such that minority students do not feel “like spokespersons for their race.”<sup>23</sup> The Court’s opinion in *Fisher* (I) did not provide any further guidance and focused on the “educational benefits of diversity” rather than critical mass per se.<sup>24</sup> Nevertheless, critical mass was still a component of the argument on remand,<sup>25</sup> and it may well play a role when the Supreme Court hears *Fisher* (II).

## B. NARROW TAILORING REQUIREMENTS

*Bakke*, *Grutter*, *Gratz*, and *Fisher* (I) also articulated the narrow tailoring requirements for race-conscious admissions policies. A narrowly tailored race-conscious admissions policy must not have numerical targets or quotas for any minority groups.<sup>26</sup> It cannot automatically award points based on an applicant’s race and cannot consider the applicant’s race in an inflexible, non-discretionary manner.<sup>27</sup> Rather, when considering an applicant’s race, the admissions policy must do so in a flexible manner through individualized review,<sup>28</sup> and race cannot be the predominant factor in admissions decisions. Race must be considered alongside other diversity factors,<sup>29</sup> and a race-conscious admissions policy must not unduly burden members of any racial group.<sup>30</sup> Universities must adequately explore race-neutral alternatives to replace their race-conscious admissions policies, inquiring whether those race-neutral alternatives can attain the same educational benefits of diversity.<sup>31</sup> Additionally, universities must eventually phase out the use of race as an admissions factor and conduct periodic reviews to ascertain if using race is still necessary.<sup>32</sup>

### 1. Flexible, Individualized Consideration of Race

Flexible, individualized consideration of race, through individualized review of each applicant, is the hallmark feature of a constitutional race-conscious admissions policy. It is the main feature that distinguished the *Grutter* plan from those struck

<sup>19</sup> *Id.* at 319–20.

<sup>20</sup> *Bakke*, 438 U.S. at 316 (Powell, J., concurring); see also *Fisher* (I), 133 S. Ct at 2418.

<sup>21</sup> Vinay Harpalani, *Fisher’s Fishing Expedition*, 15 U. PA. J. CONST. L. HEIGHT. SCRUTINY 57 (2013).

<sup>22</sup> Transcript of Oral Argument at 16–17, *Fisher* (I) (2012) (No. 11-345), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/11-345.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-345.pdf).

<sup>23</sup> *Id.* at 47.

<sup>24</sup> Vinay Harpalani, *Narrowly Tailored but Broadly Compelling: Defending Race-Conscious Admissions After Fisher*, 45 SETON HALL L. REV. 761, 787 (2015) [hereinafter *Broadly Compelling*].

<sup>25</sup> *Id.*; see also *Fisher* (II), 758 F.3d at 654–57.

<sup>26</sup> *Grutter*, 539 U.S. at 334.

<sup>27</sup> See *Gratz*, 539 U.S. at 270–72.

<sup>28</sup> *Grutter*, 539 U.S. at 336–37.

<sup>29</sup> *Id.* at 337.

<sup>30</sup> *Id.* at 341 (O’Connor, J., dissenting) (quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 630 (1990)).

<sup>31</sup> *Grutter* 539 U.S. at 339.

<sup>32</sup> *Id.* at 342.

down in *Bakke* and *Gratz*. The Supreme Court has repeatedly stated that numerical set-asides and quotas for admission by racial group are unconstitutional, because such programs negate individualized consideration of race and insulate minority applicants from competition with non-minorities. Similarly, the Court found the rigid point system in *Gratz* to be unconstitutional because it automatically rewarded all minority applicants in exactly the same manner.

All of the Supreme Court's rulings on race-conscious admissions policies thus underscore the importance of individualized consideration. It is not at play in the *Fisher* litigation, as Plaintiff Fisher conceded that UT's admissions policy was a *Grutter*-type plan and questioned only the need for such a plan in the wake of race-neutral alternatives.

## 2. Race-Neutral Alternatives

The requirement to consider race-neutral alternatives is the main controversy in the *Fisher* litigation. But what does it mean for a university to adequately explore race-neutral alternatives to attain diversity, and what exactly is an adequate race-neutral alternative? *Fisher* (I) addressed the former question, while *Fisher* (II) may shed more light on the latter.

*Grutter* held that “[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative[,]” but that it does “require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.”<sup>33</sup> *Fisher* (I) affirmed the first part of this statement and elaborated on the latter: “[S]trict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice” to produce the educational benefits of diversity.<sup>34</sup> In *Fisher* (I), the Supreme Court found that the Fifth Circuit had not applied strict scrutiny when affirming UT's admissions policy. It remanded the case to determine whether Texas's Top Ten Percent Law, which grants automatic admission to UT for top Texas public high school students, was a race-neutral alternative that produced adequate diversity. On remand, the Fifth Circuit conducted a more stringent review and concluded again that UT had met its burden, by demonstrating that it needs a race-conscious admissions policy, in addition to the Top Ten Percent plan, to achieve its compelling interest in diversity.<sup>35</sup>

*Grutter* held that lottery admissions systems or lowered academic standards across the board were not adequate race-neutral alternatives, because these would require universities to change their missions and decrease their student selectivity.<sup>36</sup> Ironically, *Grutter* also stated that percentage plans which grant automatic admission, such as UT's Top Ten Percent Law, were not adequate alternatives because they would not work for graduate and professional schools.<sup>37</sup> *Grutter* noted that such plans preclude individualized review for all diversity factors—but it is possible that *Fisher* (II) will abrogate this and find percentage plans to be adequate race-neutral alternatives for public undergraduate admissions, at least in some instances.<sup>38</sup>

There are other challenges that come up in the consideration of race-neutral alternatives. It is difficult enough to measure the educational benefits of diversity—much

<sup>33</sup> *Id.* at 339.

<sup>34</sup> *Fisher* (I), 133 S. Ct. at 2420.

<sup>35</sup> *Fisher* (II), 758 F.3d at 659–60.

<sup>36</sup> *See Grutter*, 539 U.S. at 309.

<sup>37</sup> *See id.* at 340.

<sup>38</sup> Vinay Harpalani, *Fisher v. Texas, the Remix*, SCOTUS NOW (July 18, 2015), <http://blogs.kentlaw.iit.edu/iscotus/fisher-v-texas-the-remix/>.

less to tie particular benefits to race-neutral or race-conscious admissions processes. If a university bears the burden of doing so, then it seems that a court could always strike down a race-conscious admissions policy simply because the university did not adequately demonstrate this link. Universities will need to be vigilant in devising measures, gathering data, and conducting studies to assess the nexus between educational benefits and race-conscious policies.

## II. NOTABLE ISSUES FOR *FISHER* (II)

In *Fisher* (II), the Supreme Court will consider a number of issues that were left open in *Fisher* (I), when it remanded the case rather than making a ruling on the merits. This time, the Court is likely to rule on the merits. The basic question in *Fisher* (II) remains the same: Can UT use race as part of its supplemental holistic admissions policy, in addition to the Top Ten Percent plan that it employs to admit the vast majority (approximately 80 percent) of its incoming class? Plaintiff Abigail Fisher contends that the Top Ten Percent Law itself admits a “critical mass” of underrepresented minority students, so UT does not need to use a race-conscious policy for students admitted through the supplemental holistic plan. UT, on the other hand, contends that it has not achieved sufficient diversity with the Top Ten Percent plan alone.

The issues in *Fisher* (II) will touch on the compelling interest and narrow tailoring prongs of strict scrutiny. The Court will likely consider whether qualitative diversity (diversity within racial groups) is part of the compelling interest articulated in *Grutter*, whether the end point of race-conscious admissions can be defined in terms of critical mass, and whether it is problematic that the Top Ten Percent Law relies on racial isolation in Texas public schools to generate diversity.

### A. QUALITATIVE DIVERSITY (DIVERSITY WITHIN RACIAL GROUPS)

*Fisher* (II) will differ from its predecessor, as the Court delves deeper into the merits and UT changes its strategy in defending its race-conscious policy. In the initial *Fisher* litigation, UT’s primary argument focused on *quantitative* diversity: numbers of minority students in particular types of classes. UT contended that it had not attained a “critical mass” because a large percentage of its seminar courses—where more classroom discussion actually takes place—had few or no Black, Latina/o, or Asian American students. Conversely, *Fisher* (II) will focus more on *qualitative* diversity: how UT’s race-conscious policy contributes to diversity *within* racial groups and the educational benefits of such within-group diversity.<sup>39</sup>

UT did briefly raise its within-group diversity argument in *Fisher* (I) at the Supreme Court (not in the lower courts), but the *Fisher* (I) opinion did not consider the issue. On remand, however, diversity within racial groups became a much more central part of UT’s argument. UT focused on how Black and Latina/o students admitted under its supplemental holistic policy were qualitatively different from the Black and Latina/o students admitted under the Top Ten Percent Law. Plaintiff Fisher countered that UT has not established that its supplemental holistic policy actually contributes to diversity

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<sup>39</sup> See Vinay Harpalani, *Diversity Within Racial Groups and the Constitutionality of Race-Conscious Admissions*, 15 U. PA. J. CONST. L. 463, 528–30 (2012) [hereinafter *Diversity Within Racial Groups*]; Devon Carbado, *Intraracial Diversity*, 60 UCLA L. REV. 1130 (2013); Elise Boddie, *Critical Mass and the Paradox of Colorblind Individualism in Equal Protection*, 17 U. PA. J. CONST. L. 781 (2015).

within racial groups, or that such within-group diversity has educational benefits unattainable via the students admitted under the Top Ten Percent Law.<sup>40</sup>

### 1. Deference on Defining the Compelling Interest

The Supreme Court heard some of the arguments on qualitative diversity in *Fisher* (I), but this time it will likely rule on them. The baseline issue here is the standard of review, and in accordance with its *Grutter* and *Fisher* (I) precedents, the Court should defer to UT on defining its diversity-related educational goals, such as the benefits of qualitative diversity. Such benefits are part of a university's compelling interest in diversity: its educational goals and mission. In *Fisher* (I), Justice Kennedy's majority opinion stated: "A court may give some deference to a university's 'judgment that such diversity is essential to its educational mission,' provided that diversity is not defined as mere racial balancing and there is a reasoned, principled explanation for the academic decision."<sup>41</sup> Qualitative diversity is on its face more than just racial balancing, as the whole point is to achieve diversity within racial groups rather than particular numbers or percentages of each racial group. Additionally, there are clear reasoned, principled explanations for seeking qualitative diversity, in terms of its educational benefits: it serves to break down racial stereotypes and to reduce racial isolation.

### 2. Educational Benefits of Qualitative Diversity

Justice Powell's concurrence in *Bakke*, which first judicially articulated the diversity rationale, noted the importance of qualitative diversity in the context of selective admissions—focusing on how a university might seek diversity within racial groups in each admitted class:

"[An] Admissions Committee, with only a few places left to fill, might find itself forced to choose between A, the child of a successful black physician in an academic community with promise of superior academic performance, and B, a black who grew up in an inner-city ghetto of semi-literate parents whose academic achievement was lower but who had demonstrated energy and leadership as well as an apparently abiding interest in black power. If a good number of black students much like A but few like B had already been admitted, the Committee might prefer B; and vice versa."<sup>42</sup>

*Grutter* later directly articulated the educational benefits of diversity within racial groups. Justice O'Connor's majority opinion stated that "when a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no 'minority viewpoint' but rather a variety of viewpoints among minority students."<sup>43</sup>

Both *Grutter* and *Fisher* noted the breakdown of racial stereotypes as one of the key educational benefits of diversity,<sup>44</sup> and *Grutter* also notes that having a "variety of viewpoints"—different perspectives and experiences among minority students—

<sup>40</sup> Plaintiff-Appellant's Supplemental Reply Brief at 23, *Fisher* (II), 758 U.S. 633 (2014) (No. 09-50822).

<sup>41</sup> *Fisher* (I), 133 S. Ct. at 2313–14.

<sup>42</sup> See *Bakke*, 438 U.S. at 321 n.55 (Powell, J., concurring).

<sup>43</sup> *Grutter*, 539 U.S. at 319–20.

<sup>44</sup> See *id.*; *Fisher* (I), 133 S. Ct. at 2418.

helps to attain this important goal. One common stereotype of Black and Latina/o students is that they all attend highly-segregated schools in impoverished neighborhoods. Most Black and Latina/o students admitted under the Top Ten Percent Law did attend such schools.<sup>45</sup> In the *Fisher* litigation, UT argues that students admitted via its race-conscious policy have different experiences and perspectives, because many of them attended predominantly White schools in more affluent areas. Thus, UT asserts that its race-conscious policy helps to break down racial stereotypes, allowing UT to fulfill its compelling interest in the educational benefits of diversity.<sup>46</sup>

Solicitor General Donald Verrilli, arguing for the United States in support of UT's race-conscious admissions policy, added to this point at the *Fisher* (I) oral argument. He noted that:

“[U]niversities ... are looking ... to make individualized decisions about applicants who will directly further the education mission ... [f]or example, they will look for individuals who will play against racial stereotypes ... [t]he African American fencer; the Hispanic who has ... mastered classical Greek.”<sup>47</sup>

This argument ties together the compelling interest (breaking down racial stereotypes) and narrow tailoring (flexible, individualized consideration of race) prongs of *Grutter* and *Fisher* (I)—highlighting the internal consistency of qualitative diversity as a constitutionally viable goal. Moreover, there is no race-neutral alternative that allows universities to identify African American fencers or other individuals who explicitly defy racial stereotypes. By definition, any admissions policy that seeks specifically to do so will have to consider race. Thus, qualitative diversity can also speak to the inadequacy of race-neutral alternatives.

Plaintiff *Fisher* countered UT's arguments about qualitative diversity by arguing that assumptions about diversity within racial groups are themselves rooted in racial stereotypes and violate the spirit of the Equal Protection Clause.<sup>48</sup> However, given that both *Grutter* and *Fisher* (I) noted the breakdown of racial stereotypes as part of the compelling interest in diversity, the Court appears to acknowledge that such stereotypes exist and should be addressed. And the only way to address racial stereotypes is to acknowledge their content and attempt to counter it.

There is another potential argument for qualitative diversity as part of *Grutter*'s compelling interest—one that UT has not yet employed in *Fisher* litigation, but which is relevant and could be helpful. At the *Fisher* (I) oral argument, Justice Alito characterized UT's race-conscious admissions policy as a preference for minority students from privileged backgrounds,<sup>49</sup> but this critique is repudiated if the presence of these privileged students supports and enhances the college experience of their less privileged peers.<sup>50</sup> By having a mix of minority students from higher and lower socioeconomic

<sup>45</sup> See Jennifer L. Shea, Note, *Percentage Plans: An Inadequate Substitute for Affirmative Action in Higher Education Admissions*, 78 IND. L.J. 587, 615 (2003).

<sup>46</sup> *Diversity Within Racial Groups*, *supra* note 39, at 513.

<sup>47</sup> Transcript of Oral Argument, *supra* note 22, at 60.

<sup>48</sup> Plaintiff-Appellant's Supplemental Brief at 29, *Fisher* (II), 758 F.3d 633 (5th Cir. 2014) (No. 09-50822).

<sup>49</sup> Transcript of Oral Argument, *supra* note 22, at 58–59.

<sup>50</sup> *Broadly Compelling*, *supra* note 24, at 822; see also Harpalani, *Diversity Within Racial Groups*, *supra* note 39, at 494–95.

backgrounds, the experience of the former, who have often attended predominantly White schools in affluent districts or elite, private schools, may help the latter adjust socially to elite, predominantly White universities and feel less isolated on those campuses. In this way, minority students who have experience navigating elite educational environments may serve as social supports for their less privileged peers. Moreover, student peers are present at social events and in residence halls late at night, when other university services may not be readily available. Universities should consider gathering data and conducting studies to determine if such intragroup social support is occurring, and then use this information to defend their pursuit of qualitative diversity through race-conscious admissions.

### 3. *Qualitative Diversity and Narrow Tailoring*

There are two aspects of narrow tailoring that are related to qualitative diversity. First, as alluded to earlier, the pursuit of diversity within racial groups supports the logic of *Grutter*'s narrow tailoring principles. *Grutter* mandates that race-conscious admissions policies utilize flexible, individualized review rather than conferring the same, automatic benefit to all minority group members. Unlike a racial quota, numerical goal/range, or a *Gratz*-type point system, a constitutional race-conscious policy cannot involve merely identifying an applicant's race and mechanically using that information. Rather, a *Grutter* holistic admissions plan considers race in conjunction with other diversity factors—and thus facilitates qualitative diversity in the admissions process.

Second, however, it is important to note that *Fisher* (I) gives no deference to universities on narrow tailoring. Even if qualitative diversity is a part of the compelling interest and consistent with *Grutter*'s narrow tailoring principles, UT still has the burden of showing that its race-conscious admissions policy actually yields diversity within racial groups. Taking this approach, UT would have to show that its race-conscious policy makes a “unique contribution to diversity” by leading to admission of Black and Latina/o students with different experiences and perspectives than those admitted via the Top Ten Percent Law.

Plaintiff Fisher argues that UT has not demonstrated this, and that UT's race-conscious policy actually works against the asserted interest because it considers socioeconomic status (SES) as an admissions factor along with race.<sup>51</sup> UT may be able to counter that even low SES students who have attended affluent, predominantly White schools—by receiving scholarships to private schools for example—have had different experiences than students admitted under the Top Ten Percent Law. In fact, such non-Top Ten Percent low SES admittees have specifically gained experience navigating elite, predominantly White institutions and thus may be especially poised to serve as social supports for their Top Ten Percent admittee peers, with whom they share a low SES background. Additionally, a unique contribution to diversity need not be predicated solely on SES: geographic or cultural diversity within racial groups could also yield different experiences and perspectives.

The Supreme Court—citing its *Fisher* (I) precedent—will probably require UT to demonstrate specifically that its race-conscious policy leads to admission of Black and Latina/o students who are qualitatively different from those admitted under the Top Ten Percent Law. Whether or not UT can do so in *Fisher* (II), universities should prepare to do this in the future.

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<sup>51</sup> Pet. for Writ of Cert. at 24–25, *Fisher* (II), 135 S. Ct. 2888 (2015) (No. 14-981).

## B. END POINT OF RACE-CONSCIOUS ADMISSIONS

According to *Grutter*, narrow tailoring requires that “race-conscious admissions policies must be limited in time.”<sup>52</sup> The Court has never explicitly required universities to articulate an end point when they will no longer use race in the admissions process, and to have a plan for reaching that end point. Justice O’Connor’s majority opinion included the aspirational statement that 25 years after *Grutter* (in 2028), race-conscious university admissions policies would no longer be necessary,<sup>53</sup> but she later stated that this was not intended as a binding limit.<sup>54</sup> Nevertheless, the end point of race-conscious admissions policies came up in the *Fisher* (I) oral argument,<sup>55</sup> and may well also be an issue in *Fisher* (II).

### 1. *Critical Mass: A Problematic End Point*

In *Fisher* (II), the Court will likely revisit the issue of “critical mass”—a dilemma which took center stage in the *Fisher* (I) oral argument, but which the Court did not address in its *Fisher* (I) opinion. During the oral argument, Chief Justice Roberts questioned UT’s counsel on the “logical end point” of UT’s race-conscious admissions policy. UT’s response was that it would look to surveys indicating whether minority students felt isolated or “like spokespersons for their race”—harking back to one of the definitions of critical mass—to determine if race-conscious admissions policies are still necessary. This is a problematic answer: if race-conscious policies were necessary to obtain a critical mass, it follows logically that such a critical mass would dissipate if UT stopped using them, and minority students would once again feel isolated.<sup>56</sup> Universities must *maintain* critical mass, not simply *attain* it.<sup>57</sup>

Because diversity-related goals are difficult to measure and also affected by malleable factors such as campus environment and social and political context, they do not work well as stopping points for race-conscious admissions. Instead of relying on critical mass as part of the end point, UT can argue that it should only be considered part of the goal—the compelling interest—and not part of the narrow tailoring test. Rather than critical mass, the most logical end point for race-conscious admissions policies would go to the underlying reason that such policies are needed: disparities between minority and non-minority applicants on academic criteria such as grades and standardized test scores.

<sup>52</sup> *Grutter*, 539 U.S. at 342.

<sup>53</sup> *Id.* at 343 (“We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”).

<sup>54</sup> Sandra Day O’Connor & Stewart J. Schwab, *Affirmative Action in Higher Education over the Next Twenty-Five Years: A Need for Study and Action*, in *THE NEXT 25 YEARS: AFFIRMATIVE ACTION IN HIGHER EDUCATION IN THE UNITED STATES AND SOUTH AFRICA* 58 (David L. Featherman et al. eds., 2010) (“[T]hat 25-year expectation is, of course, far from binding on any justices who may be responsible for entertaining a challenge to an affirmative-action program in 2028.”).

<sup>55</sup> Transcript of Oral Argument, *supra* note 22, at 47, 80.

<sup>56</sup> For references and a fuller discussion, see *Broadly Compelling*, *supra* note 24, at 784–85. The prospect of different campus social dynamics for different groups also complicates the notion of critical mass. For example, the *Fisher* litigation has not considered how UT’s race-conscious admissions policy impacts Native American student enrollment. *Diversity Within Racial Groups*, *supra* note 39, at 514–15, 524.

<sup>57</sup> *Broadly Compelling*, *supra* note 24, at 785; see also Stacy L. Hawkins, *A Deliberative Defense of Diversity: Moving Beyond the Affirmative Action Debate to Embrace a 21st Century View of Equality*, 2 COLUM. J. RACE L. 75, 110 (2012).

## 2. Elimination of Academic Disparities as the Logical End Point

While diversity and its educational benefits are the compelling interest that justify use of race in the university admissions process, the need to use race in order to achieve this compelling interest derives mostly from racial disparities on academic criteria such as grades and standardized test scores. In fact, most universities would like to have more racially diverse classes, but such academic disparities preclude them from doing so. Other considerations—such as ensuring race does not become a predominant factor in admissions, maintaining particular grade and standardized test score profiles to preserve their academic reputations, or believing that students with lower grades and test scores would not be academically successful—limit universities' race-conscious admissions policies before they enroll the critical mass that they desire.<sup>58</sup>

In spite of their vast ideological differences, both Justice Ginsburg and Justice Thomas agreed in their respective *Grutter* opinions that race-conscious admissions policies would be necessary as long as there were significant racial disparities on academic criteria.<sup>59</sup> Justice O'Connor also subtly acknowledged this in her *Grutter* majority opinion.<sup>60</sup> The "logical end point" of race-conscious university admissions would occur when significant racial disparities on academic admissions criteria no longer exist, because at that point, universities could achieve sufficient diversity without using race. Of course, eliminating these disparities will require much more progress towards educational equity and racial equity in American society.

## 3. Can Race be Too Small of an Admissions Factor?

Related to the end point debate is Plaintiff Fisher's claim that race had "an infinitesimal impact" on UT admissions—too small to be constitutional because it did not contribute enough to the educational benefits of diversity. The Plaintiffs argued that UT could not identify any students for whom race actually made a difference in the admissions decision.<sup>61</sup> Similarly, in his *Fisher* remand dissent, Judge Garza contended that "[i]f race is indeed without discernible impact, the University cannot carry its burden of proving that race-conscious holistic review is necessary to achieving ... diversity."<sup>62</sup> Throughout the *Fisher* litigation, there has been an unresolved dispute about whether UT's race-conscious policy actually led to the admission of any minority students who would not have been admitted absent the use of race. Regardless, however, there are flaws with the contention that race can be too small of an admissions factor.

First, *Grutter* does not state that a race-conscious policy can be too small to be constitutional, and it actually implies the opposite. Under *Grutter*, universities should gradually phase out race-conscious policies and use race-neutral alternatives "as they develop."<sup>63</sup> Justice O'Connor and the *Grutter* majority implicitly acknowledged that ending the use of race in admissions would entail an incremental process. A logical consequence of this is that at some point, a university's use of race will be very small but still be constitutional. This also informs the end point debate, as universities cannot end race-conscious policies all at once, when some magic critical mass is obtained.

<sup>58</sup> *Broadly Compelling*, *supra* note 24, at 809–12.

<sup>59</sup> For citations and discussion, see *id.* at 811–12 n.236.

<sup>60</sup> For citations and discussion, see *id.* at 811.

<sup>61</sup> For full citations and discussion, see *Broadly Compelling*, *supra* note 24, at 796–97. See also *Fisher* (I), 556 F. Supp. 2d 603, 608 (W.D. Tex. 2008).

<sup>62</sup> *Fisher* (II), 758 F.3d at 672 (Garza, J., dissenting).

<sup>63</sup> *Grutter*, 539 U.S. at 342 (2003).

Rather, they will reach the end point gradually, through elimination of racial disparities on academic criteria, and through experimentation with race-neutral alternatives.<sup>64</sup>

Second, *Grutter* contemplated that admission of small numbers of applicants who defy racial stereotypes would facilitate the educational benefits of diversity, and Solicitor General Verrilli also articulated this stance at the *Fisher* (I) oral argument. A small number of minority students can meaningfully impact diversity on campus. They may form student organizations and sponsor events related to diversity, or they may increase representation in majors and programs where minority students are especially underrepresented. In fact, the whole point of a holistic admissions policy with individualized review is to identify applicants who will have a significant individual impact on the educational benefits of diversity.<sup>65</sup>

Third, even if courts read the diversity rationale more narrowly, there are other practical problems with Plaintiff Fisher's contention that a race-conscious admissions policy can have too small of an impact. Absent a university's admission that it uses race or some other conclusive evidence, it is the impact of race that ultimately must be detected to enforce any proscription on the use of race. If the impact is too small to be detected, then there can be no enforcement of such a proscription: it makes no sense to "smoke out" statistically negligible use of race.<sup>66</sup>

### C. RELIANCE ON RACIAL ISOLATION TO ACHIEVE DIVERSITY

In addition to the central issues of dispute noted above, there is an inherent values conflict in the *Fisher* litigation—the problem of predicating campus diversity on school segregation. This values conflict is particularly germane for Justice Kennedy, whose vote will likely be outcome determinative for *Fisher* (II). In *Grutter*, when the Supreme Court unequivocally recognized the educational benefits of diversity as a compelling interest, Justice Kennedy also affirmed the diversity rationale—even as he dissented from the majority.<sup>67</sup> He restated this affirmance in *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>68</sup> where his concurrence also noted that "[a] compelling interest exists in avoiding racial isolation,"<sup>69</sup>—a notion that would presumably be joined by four other Justices. Justice Kennedy also authored the *Fisher* (I) majority opinion, which once again upheld the diversity rationale.<sup>70</sup> And this past summer, Justice Kennedy joined the liberal Justices in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*—a 5-4 opinion authored by Justice Kennedy which upheld disparate-impact liability under the Fair Housing Act,<sup>71</sup> surprising many observers and showing his sympathy for reducing racial isolation and segregation.

If in *Fisher* (II), the Court precludes UT from using race-conscious admissions, it would essentially be saying that the Top Ten Percent Law—a policy that increases minority representation only because of racial isolation in Texas public high schools<sup>72</sup>—prevents UT from using race to pursue the educational benefits of diversity.

<sup>64</sup> For citations and discussion, see *Broadly Compelling*, *supra* note 24, at 797–98.

<sup>65</sup> For citations and discussion, see *Diversity Within Racial Groups*, *supra* note 39, at 532–33.

<sup>66</sup> See *Broadly Compelling*, *supra* note 24, at 798–807.

<sup>67</sup> *Grutter*, 539 U.S. at 387–88 (Kennedy, J., dissenting).

<sup>68</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 791 (Kennedy, J., concurring).

<sup>69</sup> *Id.* at 797 (Kennedy, J., concurring).

<sup>70</sup> *Fisher* (I), 133 S. Ct. at 2418 (quoting *Grutter*, 539 U.S. at 325).

<sup>71</sup> *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty's Project Inc.*, 135 S. Ct. 2507 (2015).

<sup>72</sup> See *Gratz*, 539 U.S. at 303 n.10 (Ginsburg, J., dissenting); Shea, *supra* note 45, at 615.

This would be an ironic and unfortunate result, predicating diversity in higher education on racial segregation in K-12 schooling. It is also one aspect of a larger contradiction in America: the desire for an anti-essentialist, colorblind society without the will to tangibly address the rampant racial inequalities that exist in this country. Race-conscious admissions policies in higher education are just one small manifestation of this dilemma, in an era where racial segregation in K-12 schooling has actually been increasing for the past 25 years. *Fisher* (II) will again highlight this values conflict in Justice Kennedy's own jurisprudence.

### III. FUTURE CONSIDERATIONS FOR DEFENDING RACE-CONSCIOUS ADMISSIONS

The U.S. Supreme Court has repeatedly found that diversity is a compelling state interest to justify race-conscious admissions policies, and Justice Kennedy has approved of the diversity rationale thrice.<sup>73</sup> It is unlikely that *Fisher* (II) will overturn this precedent. Nevertheless, the Court could strike down UT's race-conscious policy on narrow grounds and open the door for future lawsuits—placing even more pressure on universities to justify and defend their race-conscious admissions policies.

As such, universities should find ways to be proactive in defending their race-conscious admissions policies. This may include collecting and analyzing data on the educational benefits of qualitative diversity, including the different perspectives and the intragroup social support that it yields. Universities should also employ novel strategies to document the educational benefits of diversity on campus. Additionally, universities, policymakers, and advocates should continue to participate in the broader social and political discourse on race-conscious admissions policies, which can affect both the constitutional debate and public opinion on this charged issue.

#### A. RACE-CONSCIOUS CAMPUS SPACES AND THE DIVERSITY RATIONALE

Legal and academic discourse on the benefits of diversity has focused on the presence of a critical mass of minority students in predominantly White settings. However, the most racially diverse environments on many college campuses are actually places where White students may not be a numerical majority or plurality on a regular basis: "race-conscious campus spaces." These are "physical campus locations or campus initiatives and activities that focus on racial identity, whether for a specified racial group or in a more general sense (i.e., a campus lecture or film series on race)." Examples of race-conscious campus spaces are ethnic studies departments and programs, campus cultural centers, residence halls devoted to the study and experiences of a particular racial/ethnic group, and particular events that highlight the experiences and concerns of a given racial or ethnic group. Practically all universities have one or more such race-conscious events, activities, and programs already in existence. And these spaces are salient but largely unexplored venues for the educational benefits of diversity articulated in *Grutter* and *Fisher*.

##### 1. Limitations of the Focus on Classroom Diversity

In *Fisher* (I), UT's defense largely focused on data showing minority underrepresentation in classes—important data without a doubt, but limited in many ways. While minority representation itself can help break down racial stereotypes, it may be difficult to tie classroom diversity numbers to the tangible educational benefits of diversity

<sup>73</sup> See *supra* notes 67–68, 70.

espoused by the Supreme Court. Even small, discussion-oriented classes, such as the ones noted by UT in its Supreme Court brief, may not always focus on cross-racial understanding or bring out different perspectives related to race.

Also, if universities focus simply on classroom diversity, opponents of race-conscious admissions can argue that their interest in diversity is superficial and geared towards appearances. In his *Grutter* dissent, Justice Thomas critiqued the majority's reasoning by characterizing it in such terms: "Classroom aesthetics yield[] educational benefits, [race-conscious] admissions policies are required to achieve [racial diversity], and therefore the policies are required to achieve the educational benefits."<sup>74</sup>

Given the continuing need to defend race-conscious admissions policies, universities should seek to demonstrate that their efforts towards diversity go beyond numbers in classrooms—and they may be able to do so by documenting the educational benefits of racial diversity not only in classrooms, but also in other campus venues. UT did mention campus diversity in *Fisher*, but it did not go beyond overall numbers of different minority groups and general references to educational benefits and student isolation. A more refined and in-depth approach may be necessary, and race-conscious campus spaces provide valuable ground for tangibly documenting the educational benefits of diversity.

## 2. *Educational Benefits of Diversity in Race-Conscious Campus Spaces*

Although race-conscious campus spaces have existed on campuses for several decades,<sup>75</sup> they have not been a significant part of the discourse on the educational benefits of diversity. This is probably because the conventional, erroneous notion of such spaces is that they simply cater to specific groups and promote "institutionalized separatism."<sup>76</sup> For example, Justice Scalia has contended that universities may "talk the talk of multiculturalism and racial diversity in the courts but walk the walk of tribalism and racial segregation on ... campuses—through minority-only student organizations, separate minority housing opportunities, separate minority student centers, even separate minority-only graduation ceremonies."<sup>77</sup> Justice Scalia's view is off-base. Race-conscious campus spaces do not exclude individuals on the basis of race—to do so would almost certainly be unconstitutional. These spaces are quite welcoming to students of all backgrounds, including interested White students. In fact, race-conscious campus spaces have now become the most racially diverse environments on college campuses.

For example, in the W.E.B. Du Bois College House, University of Pennsylvania's residence hall devoted to African American studies, "46 percent of ... residents report a racial identity other than African American."<sup>78</sup> The Du Bois College House website states:

"As the African American theme-based house, and in adhering to its original mission, most of the programs and events in Du Bois College House are based upon the history and culture of people of

<sup>74</sup> *Grutter*, 539 U.S. at 355 (Thomas, J., dissenting). Justice Thomas generally questions the link between racially diverse student bodies and any purported educational benefits. *Id.* at 355–57.

<sup>75</sup> See generally WAYNE GLASKER, *BLACK STUDENTS IN THE IVORY TOWER: AFRICAN AMERICAN STUDENT ACTIVISM AT THE UNIVERSITY OF PENNSYLVANIA, 1967–1990* (Univ. of Mass. Press ed., 2002).

<sup>76</sup> See ARTHUR M. SCHLESINGER, JR., *THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY* 104 (W. W. Norton & Co. ed., 1992); see also Glasker, *supra* note 75, at 115–46.

<sup>77</sup> *Grutter*, 539 U.S. at 349 (Scalia, J., concurring in part and dissenting in part).

<sup>78</sup> Rachel E. Ryan, *Turmoil and Transformation: Du Bois House Turns 40*, PA. GAZETTE, Mar.–Apr. 2013, at 23–24.

the African Diaspora. However, in recognizing the range of diversity within the House's population, we must also acknowledge, not only its role as a microcosm of the Greater American society, but the House's role in preparing our residents for the greater global world. Du Bois College House is one of the most diverse college houses on Penn's campus, and often refers to itself as "the U.N. at UPenn!" This means that the entire staff works hard to ensure that our programming is just as diverse as the population, and that it meets the needs of all residents."<sup>79</sup>

Not only are race-conscious campus spaces quite racially diverse, but they also often focus directly on race-related dialogue and cultural exchange—thus directly facilitating the educational benefits noted in *Grutter* and *Fisher*. The Du Bois College House website notes different events and activities that occur at Du Bois, many of which involve issues related to racial identity and equality, and also celebration of different cultural heritages.<sup>80</sup> The discussions at these events, in conjunction with the diverse student population in Du Bois, epitomizes *Grutter* and *Fisher*'s values of promoting cross-racial interaction and "lessening of racial isolation and stereotypes."<sup>81</sup>

In fact, this view of race-conscious campus spaces itself counters stereotypes of minority students—the mistaken perceptions of tribalism and separatism noted above. Academic and social discourse has historically treated Black-themed residence halls and similar environments as promoting "self-segregation" among groups of minority students. In reality, however, cross-racial interactions and conversations involving race actually occur much more frequently in race-conscious campus spaces than they do in the typical classroom, or in any predominantly White setting. Indeed, such interactions and conversations are the very mission of many race-conscious spaces.<sup>82</sup>

In addition to facilitating the educational benefits of diversity for students of all backgrounds, spaces such as the W.E.B. Du Bois College House also serve another aspect of the compelling interest in diversity: they inherently help minority students feel less isolated. They are some of the few environments on campus where particular groups of minority students might actually be in a numerical majority, and they function as social support centers for minority students.<sup>83</sup> Universities already recognize this function: it was the reason for creating these spaces in the first place.

The link between race-conscious campus spaces and admissions is also fairly clear. There must be a critical mass of minority students for these spaces to be viable and to generate the relevant educational benefits. Of course, by itself, emphasis on race-conscious campus spaces is not enough to defend the constitutionality of race-conscious

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<sup>79</sup> W.E.B. DU BOIS COLLEGE HOUSE, <http://dubois.house.upenn.edu/frontpage> (last visited Mar. 7, 2015); see also Ernest Owens et al., *Appreciating Du Bois as a Loving Home*, DAILY PENNSYLVANIAN (Oct. 15, 2012, 1:14 AM), <http://www.thedp.com/article/2012/10/du-bois-house-council-appreciating-du-bois-as-a-loving-home>.

<sup>80</sup> W.E.B. DU BOIS COLLEGE HOUSE, <http://dubois.house.upenn.edu/frontpage> (last visited Mar. 7, 2015).

<sup>81</sup> *Grutter*, 539 U.S. at 333; *Fisher* (I), 133 S. Ct. at 2418.

<sup>82</sup> Some of these spaces, like the Greenfield Intercultural Center at Penn, focus specifically on bringing together different groups of minority students, including Black, Latina/o, Asian American, and Native American students. See *Campus & Community: Greenfield Intercultural Center*, UNIV. OF PA., <http://www.vpul.upenn.edu/gic/> (last visited Mar. 7, 2015).

<sup>83</sup> For further discussion and additional references, see *Broadly Compelling*, *supra* note 24, at 828–29.

admissions. Nevertheless, it does provide promising and largely unexplored ground for tangible demonstration of the educational benefits of diversity. Universities should systematically document activities and interactions in these spaces—including diversity of students who attend events—as part of defending their admissions policies.

#### B. “MISMATCH” THEORY AND DEFERENCE

Another area of controversy with respect to race-conscious admissions policies is the “mismatch” theory posited by Professor Richard Sander of UCLA School of Law. Mismatch theory contends that, because race-conscious policies allow the acceptance of minority students with lower average grades and standardized test scores than those of accepted non-minority students, admitted minority students often cannot compete adequately with their non-minority counterparts. This results in a “mismatch”—whereby minority students attain poorer outcomes at universities and after graduation.<sup>84</sup>

There have been several critiques of mismatch theory,<sup>85</sup> and a full discussion of it is beyond the scope here. Nevertheless, two points are noteworthy. First, while it could have implications for university policy and decision-making, mismatch theory should not have any impact on the constitutionality of race-conscious admissions. Decisions about the academic credentials of students are part of a university’s mission and should be entitled to deference under *Grutter* and *Fisher* (I).<sup>86</sup> Student selection is one of “four essential freedoms” of universities defined by Justice Frankfurter in *Sweezy v. New Hampshire* (1957).<sup>87</sup> Universities, not courts, possess the relevant expertise on academic credentials and other admissions factors, and they admit students and design their missions based on their expertise.

Second, mismatch theory relies excessively on standardized test scores as indicators of academic outcomes. Universities should continue to review the utility of using standardized tests and consider alternative admissions criteria. The National Association for College Admission Counseling (NACAC) has opined that there may be “more colleges and universities that could make appropriate admission decisions without requiring standardized admission tests such as the ACT and SAT.”<sup>88</sup> There have been pointed critiques that discuss racial biases in standardized testing,<sup>89</sup> and universities should consider the implications of these. Many have already made standardized test scores an optional feature of the application process,<sup>90</sup> and others should consider doing so.

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<sup>84</sup> See RICHARD H. SANDER & STUART TAYLOR, *MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT’S INTENDED TO HELP, AND WHY UNIVERSITIES WON’T ADMIT IT* (Basic Books ed., 2012).

<sup>85</sup> See, e.g., William Kidder & Angela Onwuachi-Willig, *Still Hazy After All These Years: The Lack of Empirical Evidence and Logic Supporting Mismatch*, 92 TEXAS L. REV. 895 (2014); Stacy L. Hawkins, *Mismatched or Counted Out? How Mismatch Theory is Incomplete, What’s Missing, and Why it Matters*, 17 U. PA. J. CONST. L. 869 (2015).

<sup>86</sup> See *supra* notes 7 & 12 and accompanying text.

<sup>87</sup> *Sweezy v. N.H.* by Wyman, 354 U.S. 234, 262–63 (1957) (Frankfurter, J., concurring).

<sup>88</sup> *Report of the Commission on the Use of Standardized Tests in Undergraduate Admission*, NAT’L ASS’N FOR COLL. ADMISSION COUNSELING 7 (Sept. 2008), [http://www.nacacnet.org/research/PublicationsResources/Marketplace/Documents/TestingComission\\_FinalReport.pdf](http://www.nacacnet.org/research/PublicationsResources/Marketplace/Documents/TestingComission_FinalReport.pdf).

<sup>89</sup> See, e.g., William C. Kidder & Jay Rosner, *How the SAT Creates Built-in Headwinds: An Educational and Legal Analysis of Disparate Impact*, 43 SANTA CLARA L. REV. 131 (2002).

<sup>90</sup> *More Colleges Embrace Test-Optional Admissions*, Fair Test, <http://www.fairtest.org/more-colleges-embrace-test-optional-admissions> (last visited Oct. 3, 2015).

### C. DISCRIMINATION AGAINST ASIAN AMERICANS IN UNIVERSITY ADMISSIONS

One other ongoing controversy that complicates the political dynamics of university admissions is discrimination against Asian Americans. In her book, *The Retreat From Race: Asian-American Admissions and Racial Politics*, Professor Dana Takagi describes how beginning in the 1980s, Asian Americans accused elite universities of discriminating against them.<sup>91</sup> The U.S. Department of Education Office of Civil Rights investigated whether several elite universities—including Harvard and UCLA—had violated Title VI of the Civil Rights Act of 1964.<sup>92</sup> Professor Takagi notes that while the initial concern was that Asian American applicants had to have higher grades and standardized test scores than White applicants to be admitted, conservative activists crafted an attack on race-conscious admissions policies from this controversy—contending that these policies discriminated against Asian Americans. Others have also written about this issue, and most recently a group of Asian American students filed lawsuits against Harvard University and the University of North Carolina at Chapel Hill (UNC),<sup>93</sup> claiming that race-conscious admissions policies continue to discriminate against Asian Americans.

Two points are of particular interest here. First, it is essential to make sure that Asian American interests are not pitted against Black and Latina/o interests in the context of university admissions. The gap in academic criteria between Asian American and White admittees is a separate issue from the gap between those groups and Black and Latina/o admittees. Universities can explain the latter gap by their use of race-conscious admissions policies to pursue diversity: it is well known that universities use such policies for this purpose and admit to doing so. While the constitutionality of these policies is debatable, there is no secret about their use.

On the other hand, there is no acknowledged explanation for the gap between Asian American and White admitted students. Professor Thomas Espenshade and Alexandria Walton Radford report that compared to White applicants, Asian American applicants on average must score 140 points higher on the SAT and 3.4 points on the ACT in order to gain admission at elite private and public universities.<sup>94</sup> Universities do not admit to employing race-conscious policies to favor White applicants over Asian Americans; indeed, doing so would constitute overt racial discrimination and xenophobia. Universities bear the burden of articulating a principled, reasonable explanation for the gap in academic credentials between admitted White and Asian American students. If they cannot do so, universities should be required to eliminate this gap. However, this is a separate matter from race-conscious admissions policies designed to facilitate the admission of Black and Latina/o applicants. Courts, policymakers,

<sup>91</sup> DANA Y. TAKAGI, *THE RETREAT FROM RACE: ASIAN-AMERICAN ADMISSIONS AND RACIAL POLITICS* (Rutgers Univ. Press ed., 1998).

<sup>92</sup> *Id.* at 161–66.

<sup>93</sup> *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, No. 1:14-CV-14176 (D. Mass. filed Nov. 17, 2014); *Students for Fair Admissions, Inc., v. Univ. of N.C.*, No. 1:14-CV-00954 (M.D.N.C. filed Nov. 17, 2014). See generally *Project on Fair Representation Announces Lawsuits Challenging Admissions Policies at Harvard Univ. and Univ. of North Carolina-Chapel Hill*, <https://studentsforfairadmissions.org/project-on-fair-representation-announces-lawsuits-challenging-admissions-policies-at-harvard-univ-and-univ-of-north-carolina-chapel-hill/> (last visited Oct. 3, 2015).

<sup>94</sup> THOMAS J. ESPENSHADE & ALEXANDRIA WALTON RADFORD, *NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE COLLEGE ADMISSION AND CAMPUS LIFE 92* (Princeton Univ. Press ed., 2009); see also *id.* at 93 (noting that “an Asian candidate with a 1250 SAT score would be just as likely to be admitted at a private [National Study of College Experience] institution as a white student with an SAT score of 1110, other things being the same.”).

and advocates should not confuse affirmative action with “negative action” against Asian Americans.<sup>95</sup>

Second, policymakers and advocates should be weary of uncritically accepting the “model minority” stereotype of Asian Americans—the idea that Asian Americans have superior cultural values which lead to academic success.<sup>96</sup> The fact is that first and second generation immigrants of all ethnic backgrounds tend to be higher achievers than the rest of the population. Certain segments of the Asian American population also benefited from the occupational preferences of the Immigration Act of 1965, which preferred educated professionals in science and technology, such as engineers, scientists, physicians, and computer programmers.<sup>97</sup> This skewed the overall socioeconomic profile of Asian American immigrants and led to their observed educational successes. However, the occupational preferences were later curtailed, and many recent Asian American immigrants do not enjoy the socioeconomic advantages of their predecessors.<sup>98</sup>

The economic and educational profile of Asian Americans as a whole is complicated, but it is important to underscore a familiar theme: diversity within racial groups. Some Asian Americans groups are underrepresented at universities and considered to be so for affirmative action programs at some institutions. Thus, the issue of Asian Americans and university admissions is complex, and oversimplified assertions must be avoided. Most importantly, advocates should insure that the interests of Asian Americans are not pitted against those of African Americans and Latina/os—as is happening with the recent lawsuits against Harvard and UNC.<sup>99</sup>

## CONCLUSION

Race-conscious admissions policies continue to be a highly charged constitutional and political issue. Universities need to be aware of the subtleties of the legal doctrine on these policies and also devise novel, innovative strategies to defend their race-conscious policies. These strategies might include not only the admissions process itself, but also the design and documentation of the educational benefits of diversity, which can be linked to student body diversity.

Additionally, policymakers and advocates should continue to understand the various political dimensions associated with race-conscious university admissions policies. Beyond the Supreme Court’s pronouncements, several states have enacted bans on such policies through popular referenda or executive or legislative action.<sup>100</sup> However, due to spirited activism and political organizing, one such referendum was defeated in Colorado in 2008.<sup>101</sup> It is imperative that those who advocate for diversity and race-conscious admissions remain politically involved and motivated, as the struggle to defend these important initiatives will continue for the foreseeable future.

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<sup>95</sup> Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin’s Defense of Affirmative Action*, 31 HARV. C.R.-C.L. L. REV. 1 (1996); William C. Kidder, *Negative Action Versus Affirmative Action: Asian Americans are Still Caught in the Crossfire*, 11 MICH. J. RACE & L. 605 (2006).

<sup>96</sup> See Vinay Harpalani, *DesiCrit: Theorizing the Racial Ambiguity of South Asian Americans*, 69 N.Y.U. ANN. SURV. OF AM. L. 77, 139–40 (2013/14).

<sup>97</sup> *Id.* at 141–42.

<sup>98</sup> *Id.* at 142–43.

<sup>99</sup> See *supra* note 93 and accompanying text.

<sup>100</sup> See *Affirmative Action: State Action*, *supra* note 2.

<sup>101</sup> Colorado voters rejected a similar ban in 2008. Colleen Slevin, *Colorado Voters Reject Affirmative Action Ban*, USA TODAY (Nov. 7, 2008, 7:35 PM), [http://usatoday30.usatoday.com/news/politics/2008-11-07-1129194800\\_x.htm](http://usatoday30.usatoday.com/news/politics/2008-11-07-1129194800_x.htm).

# *Friedrichs v. California Teachers Association*: The American Labor Relations System in Jeopardy

Ann C. Hodges\*

**T**he petitioners in *Friedrichs v. California Teachers Association* seek to overturn longstanding law relating to union security in the public sector. A decision in favor of the petitioners will invalidate provisions in thousands of collective bargaining agreements covering millions of workers. Additionally, it has the potential to upend the labor relations system in the United States. To understand how this might be the case, this Issue Brief will review the history of union security and the Supreme Court decisions that upheld union security agreements in the public sector. The Issue Brief will then look at the *Friedrichs* case itself, engaging in an analysis of the case which concludes that the Court should reach the same result as in prior cases.

## I. THE HISTORY OF UNION SECURITY

### A. THE PRIVATE SECTOR

Union security, a method of using agreements with employers to insure that those represented by unions provide support for that representation, has a long history in the United States beginning in the private sector. When the National Labor Relations Act (NLRA) was passed in 1935, it did not bar employer agreements to hire only union members.<sup>1</sup> In 1947, Congress added a provision that barred these “closed shop” agreements but allowed the “union shop,” an agreement that required employees to join the union within 30 days of hire as a condition of employment. Under a union shop agreement, the “membership” was considered only a “financial core” membership, because an employee could only be lawfully terminated for failure to pay dues and fees. The 1947 amendments to the NLRA also permitted states to pass so-called “right-to-work” laws,<sup>2</sup> which barred union security agreements in the state.<sup>3</sup>

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<sup>1</sup> For a summary of the evolution of the law in the private sector, see KENNETH G. DAU-SCHMIDT ET AL., *LABOR LAW IN THE CONTEMPORARY WORKPLACE* 1038-46 (2d ed. 2014); Kenneth G. Dau-Schmidt, *Union Security Agreements Under the National Labor Relations Act: The Statute, the Constitution, and the Court's Opinion in Beck*, 27 HARV. J. ON LEGIS. 51, 57-63 (1990).

<sup>2</sup> “Right-to-work” laws prohibit union security agreements in the states that enact them. The term “right-to-work” is misleading at best as the laws have no bearing on an individual’s right to employment. I use the terminology because it has become dominant and widely recognized.

<sup>3</sup> Historically, right-to-work laws predominated in the south. Analysts of the prevalence of right-to-work laws in the south have concluded that they reflect a culture which prioritizes individualism over collectivism and resistance to national government. In addition, historically, campaigns for right-to-work legislation emphasized preserving existing racial order. See Raymond L. Hogler, *The Persistent Effects of Slavery in the United States: Culture, Legal Policy, and the Decline of American Labor Unions*, in *THE DISUNITED STATES OF AMERICA: EMPLOYMENT RELATIONS SYSTEMS IN CONFLICT* 19, 30 (David Jacobs, et al. eds., 2014).

Subsequently, the Supreme Court interpreted both the Railway Labor Act and the National Labor Relations Act to permit only union security agreements that required payment for collective bargaining and contract administration, but not for political and ideological activities.<sup>4</sup> Interpreting the statutes in this way avoided the constitutional question of whether requiring objecting employees to join the union or pay for political and ideological activities violated the First Amendment.<sup>5</sup> The National Labor Relations Board (NLRB) has formulated rules for union procedures to insure that objectors are provided with the necessary information on how to opt out of payment of full dues and how to challenge the union's allocation of expenses among chargeable expenses, those related to the union's representational duties, and nonchargeable expenses, which are all others.<sup>6</sup>

## B. THE PUBLIC SECTOR

While widespread unionization in the public sector came later than in the private sector, most states adopted labor relations laws similar to the NLRA in dealing with public sector employees.<sup>7</sup> Many of these laws, like the NLRA, permit unions to negotiate what are known as "fair share" agreements with employers, allowing unions to charge employees for the cost of collective bargaining and contract administration. Like the private sector provisions, these laws have come under repeated constitutional challenge.<sup>8</sup> In 1977, the Supreme Court held in *Abood v. Detroit Board of Education* that charging objectors for collective bargaining and contract administration was consistent with the First Amendment, but charging for political or other activities was not.<sup>9</sup> Subsequent challenges led the Court to require specific procedures allowing objectors to opt out of paying full dues and to challenge the union's categorization of expenses.<sup>10</sup> The Court further mandated that unions provide notice to objectors of chargeable expenses, as well as an audit of those expenses, which would facilitate any challenge to the unions' determination of chargeable expenses.<sup>11</sup>

<sup>4</sup> See *Railway Emp. Dept. v. Hanson*, 351 U.S. 225, 238 (1956) ("We only hold that the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments. We express no opinion on the use of other conditions to secure or maintain membership in a labor organization operating under a union or closed shop agreement."); *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 749 (1961) ("Clearly we passed neither upon forced association in any other aspect nor upon the issue of the use of exacted money for political causes which were opposed by the employment," construing the law to require only payment for representational activities to avoid the constitutional question); *Comm'ns Workers of Am. v. Beck*, 487 U.S. 735, 761–62 (1988) (declining to decide whether there was state action but interpreting the NLRA's union security provisions consistent with those of the Railway Labor Act). There is significant doubt, however, about whether state action is involved in the negotiation of a union security agreement in the private sector and thus whether the Court was truly avoiding a constitutional question in these decisions. See *Dau-Schmidt*, *Union Security Agreements*, *supra* note 1, at 66, 70, 111–40.

<sup>5</sup> *Street*, 367 U.S. at 749; *Beck*, 487 U.S. at 761–62.

<sup>6</sup> NLRB, *Employer/Union Rights and Obligations: What Are the Rules About Union Dues?*, <https://www.nlrb.gov/rights-we-protect/employer-union-rights-and-obligations>.

<sup>7</sup> See Joseph Slater, *The Assault on Public Sector Collective Bargaining: Real Harms and Imaginary Benefits*, AM. CONST. SOC'Y FOR LAW AND POL'Y 2 (June 2011), available at [http://www.acslaw.org/sites/default/files/Slater\\_Collective\\_Bargaining.pdf](http://www.acslaw.org/sites/default/files/Slater_Collective_Bargaining.pdf).

<sup>8</sup> The relentless challenges to union finances are funded by several employer-financed organizations, most notably the National Right to Work Legal Defense Foundation, not by individual employees. See *DAU-SCHMIDT ET AL.*, *supra* note 1, at 1055; NAT'L RIGHT TO WORK LEGAL DEF. FOUND., [www.nrtw.org/en/about](http://www.nrtw.org/en/about) (last visited Oct. 20, 2015).

<sup>9</sup> *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 209–10 (1977).

<sup>10</sup> *Chi. Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 310 (1986).

<sup>11</sup> *Hudson*, 475 U.S. at 306–07.

### C. THE RATIONALE FOR ALLOWING UNION SECURITY AGREEMENTS

The United States, unlike most developed countries, has adopted a system of exclusive representation in both the private and public sectors.<sup>12</sup> The exclusive representation system provides that when a majority of employees in a bargaining group select a union representative, that union represents all of the workers regardless of their individual desires. The majority rule is similar to our political system and indeed, the analogy has been regularly applied by courts and commentators analyzing our system.<sup>13</sup> This system benefits the employer and the chosen union, although not necessarily unions as a group. The employer negotiates with one union and administers one uniform contract for the group. Enforcement of the contract is handled by the union, almost exclusively through an internal grievance and arbitration procedure either negotiated by the parties, or in some states required by law. As a corollary to the exclusive representation system, the union is required to represent all of the workers fairly and without discrimination, regardless of their membership status or support of the union. This duty of fair representation is legally enforceable; employees not fairly represented can bring legal action against the union.<sup>14</sup> A third element of the system is the requirement that employees pay for the fair representation that the union is required to provide. This is the fair share fee or financial core membership requirement. The exception to this rule is the inability of unions to charge nonmembers in states that pass right-to-work laws.

Fair share fees are necessary because of the collective action problem that results from some employees obtaining benefits without payment.<sup>15</sup> In such a situation, there is every incentive for even those who support the union to withdraw financial support. Where no one is compelled to pay for a public good, the rational actor will allow others to pay. This is the theory behind payment of taxes in a civil society—the entire community benefits from roads, police and fire protection. Thus, all should pay though each individual may well pay for roads and protection that he or she never uses. Eventually, without mandatory payment for public goods, there is a risk that the entire system will collapse.<sup>16</sup>

The labor relations system was adopted to provide a peaceful method of resolving labor disputes. Congress, in the case of the private sector and federal employment, and the states, for state and local government employees, determined that a system that provided for union representation and collective bargaining when chosen by the employees offered the best option for providing employee voice in the workplace. Employee voice provides benefits to employers, including improved morale and productivity, and information about how to best use employer resources to provide targeted employee benefits and compensation to retain productive workers. Without such information, employers may expend resources without stemming employee

<sup>12</sup> MARTIN H. MALIN ET AL., PUBLIC SECTOR EMPLOYMENT: CASES AND MATERIALS 340 (2d ed. 2011).

<sup>13</sup> See, e.g., *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192, 202 (1944) (“Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents....”); *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 580 (1960) (“A collective bargaining agreement is an effort to erect a system of industrial self-government.”); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967) (“The collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit.”).

<sup>14</sup> See *Vaca*, 386 U.S. at 186–87.

<sup>15</sup> See generally MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 66–97 (1971).

<sup>16</sup> *Id.* at 88 (indicating that rational workers who choose not to pay for what they can obtain for free will result in the demise of unions).

dissatisfaction. Further, widespread labor unrest preceded enactment of the NLRA, and in the public sector, research indicates that creating a system of labor relations and dispute resolution reduces the number and duration of strikes.<sup>17</sup> Courts in both the private and public sectors have recognized these rationales as justification for mandatory fees to support mandatory union representation.<sup>18</sup>

The *Abood* Court recognized that requiring employees to support their collective bargaining representative impacted their First Amendment interests as they might disagree with some or all of the union's activities, even those directly involved in collective bargaining.<sup>19</sup> This is particularly true in the public sector, where the government is the employer and the First Amendment is directly implicated. But the Court also recognized that the exclusive representation system imposed "great responsibilities" on the union requiring substantial expenditures on behalf of all employees.<sup>20</sup> Thus, it held that fair share provisions were necessary to avoid the collective action problem and to effectuate the labor relations system adopted by the state of Michigan.<sup>21</sup>

The Court's subsequent decision in *Lehnert v. Ferris Faculty Association* established that expenses that could be charged to objectors were those "(1) ... 'germane' to collective-bargaining activity; (2) ... justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add[ing] to the burdening of free speech that is inherent in the allowance of an agency or union shop."<sup>22</sup> In that case, the Court found that lobbying expenses and other political activities, except those related to ratification or implementation of the collective bargaining agreement, were not chargeable to dissenting employees.<sup>23</sup> The Court noted that "[i]ndividual employees are free to petition their neighbors and government in opposition to the union which represents them in the workplace."<sup>24</sup>

## II. THE CURRENT CASE: *FRIEDRICHS* IN CONTEXT

### A. THE EXPEDITED PATH TO THE SUPREME COURT

It is the long-settled law described above that the petitioners in *Friedrichs* seek to overturn. Their arguments, however, are the same as those rejected by the Court in these earlier cases. Two recent opinions in union security cases authored by Justice Alito, which questioned the decisions in earlier cases, brought this case to the Court. In *Knox v. SEIU, Local 1000*, the issues before the Court were (1) whether a union had to provide additional notice to bargaining unit employees when it implemented a special assessment to finance opposition to several ballot measures in California; and

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<sup>17</sup> See Janet Currie & Sheena McConnell, *The Impact of Collective-Bargaining Legislation on Disputes in the U.S. Public Sector: No Legislation May Be the Worst Legislation*, 37 J.L. & ECON. 519, 519, 530, 542 (1994) (finding that the costs of labor disputes are highest where there is no framework for bargaining or dispute resolution, including more frequent and longer strikes).

<sup>18</sup> *Abood*, 431 U.S. at 224 ("The desirability of labor peace is no less important in the public sector, nor is the risk of 'free riders' any smaller."); *Beck*, 487 U.S. at 755 ("[S]uch agreements promot[e] stability," quoting S. Rep. No. 105, 80th Cong., 1st Sess. 6 (1947)); *Hanson*, 351 U.S. at 233 ("Industrial peace along the arteries of commerce is a legitimate objective; and Congress has great latitude in choosing the methods by which it is to be obtained."); *Street*, 367 U.S. at 812 ("Congress legislated to correct what it found to be abuses in the domain of promoting industrial peace.")

<sup>19</sup> *Abood*, 431 U.S. at 235.

<sup>20</sup> *Id.* at 221.

<sup>21</sup> *Id.* at 224.

<sup>22</sup> *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991).

<sup>23</sup> *Lehnert*, 500 U.S. at 522.

<sup>24</sup> *Id.* at 521.

(2) whether the assessment was chargeable to dissenters.<sup>25</sup> The union charged a reduced portion of the additional assessment to those who had already indicated a desire not to pay for expenses other than those germane to the union's representation, but offered no additional opportunity for new dissenters. Pontificating far beyond the scope of the questions on which certiorari was granted, Justice Alito attacked the constitutionality of fair share fees and held that for special assessments or dues increases, the union not only had to issue a second notice to bargaining unit employees, but also no charges could be assessed to any employee who did not choose to pay the increase.<sup>26</sup> Accordingly, Justice Alito and the majority imposed an opt-in regime for special assessments, contrary to the opt-out provisions for regular fair share fees. This newly adopted regime presumes that employees choose not to pay and requires them to take affirmative action to pay, rather than requiring affirmative action by those who choose not to pay.

Justice Alito's next opportunity to address the issue came in 2014 in *Harris v. Quinn*.<sup>27</sup> There the question was the constitutionality of fair share fees for home care providers who were employed by both individuals for whom they provided care and the state, which paid their salaries and provided some benefits. In *Harris*, Justice Alito extensively critiqued *Abood* before holding that fair share fees were not chargeable to employees who were not exclusively employed by the state.<sup>28</sup> To the majority, the rationales supporting fair share fees did not apply when the union's bargaining was limited to those terms and conditions of employment controlled by the state.<sup>29</sup> Despite the arguments of the *Harris* petitioners and Justice Alito's criticism of *Abood*, the Court in *Harris* did not overrule *Abood*.

In light of Justice Alito's opinions, however, the *Friedrichs* petitioners, deciding to strike while the iron was hot, asked the lower courts for judgment on the pleadings in their case challenging the constitutionality of fair share fees in the public sector.<sup>30</sup> While the defendants argued that a record was essential to decide the case, the petitioners were determined to get their case to the Supreme Court as quickly as possible, expecting that at least some current justices would be likely to vote to overturn *Abood*. Accordingly, the posture of the case before the Court is one where only the pleadings are at issue and the Court must accept the respondents' (the nonmovant's) pleadings as true.<sup>31</sup>

## B. THE ISSUES BEFORE THE COURT

### 1. *The Weight of Stare Decisis*

The first issue that the petitioners must overcome is the doctrine of *stare decisis*, which weighs against overruling existing precedent absent persuasive justification.<sup>32</sup> The reliance interests that would be adversely affected by overruling *Abood* include the laws of more than 20 states, and thousands of collective bargaining agreements

<sup>25</sup> *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277, 2286–87, 2291–93 (2012).

<sup>26</sup> *Id.* at 2293.

<sup>27</sup> *Harris v. Quinn*, 134 S. Ct. 2618 (2014).

<sup>28</sup> *Id.* at 2638.

<sup>29</sup> *Id.* at 2641.

<sup>30</sup> *Friedrichs v. Cal. Teachers Ass'n*, No. SACV 13-676-JLS, 2013 WL 9825479, at \*2 n.3 (C.D. Cal., Dec. 5, 2013) ("Plaintiffs' ultimate aim-and thus their request for judgment on the pleadings in favor of Defendants-is to have these precedents overturned on appeal."); *Friedrichs v. Cal. Teachers Ass'n*, No. 13-57095, 2014 WL 10076847, at \*1 (9th Cir., Nov. 18, 2014).

<sup>31</sup> *Friedrichs v. Cal. Teachers Ass'n*, No. SACV 13-676-JLS, 2013 WL 9825479, at \*2.

<sup>32</sup> *Harris*, 134 S. Ct. at 2645 (Kagan, J., dissenting).

governing millions of employees.<sup>33</sup> *Abood* has been the foundation not only of numerous cases involving union fees, but of other cases involving mandatory fees, such as state bar dues and university student fees, that would be cast into doubt by a decision overturning it.<sup>34</sup> In light of these interests, it would take a very strong showing to warrant rejecting *Abood*. As the next section will demonstrate, however, *Abood* considered all of the arguments that the petitioners and Justice Alito make and determined that any infringement on First Amendment rights was justified by the government's interest in stable labor relations. Nothing has changed since that decision but the Court and its perception of labor unions. If anything, the case for the government is even stronger because of subsequent Court decisions strengthening the government's hand when it deals with its own employees.

## *2. Abood Redux: The Players Have Changed but the Arguments Remain the Same*

The primary argument of the petitioners is that collective bargaining in the public sector is inherently political because it involves government spending. Thus, they argue, requiring them to pay any money to the union is compelling political speech in violation of their First Amendment rights. Having made that argument, the petitioners then claim that the justifications of labor peace and avoiding collective action problems do not warrant the infringement on speech. Only, they suggest, if free-riding would bankrupt the union would charging objectors be justified.<sup>35</sup>

Justice Alito argued in *Harris* that *Abood* failed to recognize the political character of public sector collective bargaining.<sup>36</sup> Nothing could be further from the truth. The *Abood* petitioners made the same argument, and while the Court recognized that at least some of the decisions of public employers in bargaining are political, it held that this did not require that public sector employees be treated differently than private sector employees in matters of union security, stating:

There can be no quarrel with the truism that because public employee unions attempt to influence governmental policymaking, their activities and the views of members who disagree with them may be properly termed political. But that characterization does not raise the ideas and beliefs of public employees onto a higher plane than the ideas and beliefs of private employees.<sup>37</sup>

Indeed, as the Court pointed out, private sector employees may have objections to the expenditure of union fees but have fewer ways than their public sector counterparts to express their disagreement. Public sector employees even have the right to attend

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<sup>33</sup> *Id.* at 2652.

<sup>34</sup> *Id.* (citing *Keller v. State Bar of Cal.*, 110 S. Ct. 2228 (1990) (state bar fees)); *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 120 S. Ct. 1346 (2000) (public university student fees); *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997) (commercial advertising assessments).

<sup>35</sup> See Brief for Petitioner, *Friedrichs v. Cal. Teachers Ass'n*, cert. granted, 135 S. Ct. 2933 (2015) (No. 14-915), 2015 WL 5261564.

<sup>36</sup> *Harris*, 134 S. Ct. at 2621.

<sup>37</sup> *Abood*, 431 U.S. at 231.

public meetings to oppose directly the positions advocated by their exclusive bargaining representative in collective bargaining.<sup>38</sup>

Further, since *Abood*, the Court has repeatedly found that the government has far greater latitude in dealing with its employees than other citizens.<sup>39</sup> The First Amendment interests of public employees often must yield to the employer's interests in managing its workforce.<sup>40</sup> Indeed, the Court has cautioned against constitutionalizing employment disputes. In *Connick v. Myers*, the Court found that Myers had no constitutional claim when disciplined for her speech about confidence and trust in supervision, office morale and the need for a grievance procedure.<sup>41</sup> These were not matters of public concern, according to the Court. Similarly, in *Borough of Duryea v. Guarnieri*, the Court held that a police chief who alleged that he was retaliated against for filing union grievances and a lawsuit relating to his discharge and denial of overtime, among other complaints, did not have a constitutional claim under the petitions clause for the same reason.<sup>42</sup> Thus, the Court's own precedents suggest that public employee speech and petitions relating to issues subject to collective bargaining do not warrant strong protection under the First Amendment, not because the issues may not be considered political in a broad sense, but because they are not of sufficient public concern to warrant interference with the government's right to manage its employees.

These limitations on the First Amendment rights of public employees derive from the needs of the government as employer. As the Court stated in *Borough of Duryea*:

[A] citizen who accepts public employment "must accept certain limitations on his or her freedom." *Garcetti v. Ceballos*, 547 U.S. 410, 418, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006). The government has a substantial interest in ensuring that all of its operations are efficient and effective. That interest may require broad authority to supervise the conduct of public employees.<sup>43</sup>

This "broad authority" to choose how to manage the workforce should include the authority to adopt a long accepted system of labor relations that includes the elements of exclusive representation, mandatory union representation of all employees and correspondingly, the requirement to pay for that representation. Any limited burden on First Amendment rights caused by the need to insure that unions have sufficient resources to effectively participate in the system is outweighed by the benefits of effective and efficient management of employees and government services that result. Examples abound of government employers and unions working together to reduce government expenditures, improve productivity, improve teacher quality, and improve student achievement, adding weight to the value of the existing system of labor relations.<sup>44</sup>

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<sup>38</sup> *Madison Sch. Dist. v. Wis. Emp. Rel. Comm'n*, 429 U.S. 167, 175-176 (1976). *Cf.* *Emporium Capwell v. W. Addition Cmty. Org.*, 420 U.S. 50 (1975) (upholding as lawful termination of private sector employees who bypassed their union in an effort to deal directly with their employer although their efforts were not inconsistent with union positions.)

<sup>39</sup> *See, e.g.*, *Engquist v. Or. Dep't. of Agric.*, 553 U.S. 591, 599 (2008)

<sup>40</sup> *See, e.g.*, *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

<sup>41</sup> *Connick v. Myers*, 461 U.S. 138, 148 (1983).

<sup>42</sup> *Borough of Duryea, Pa. v. Guarnieri*, 131 S. Ct. 2488, 2491-92 (2011).

<sup>43</sup> *Duryea*, 131 S. Ct. at 2494.

<sup>44</sup> David Lewin, et al., *Getting it Right: Empirical Evidence and Policy Implications from Research on Public-Sector Unionism and Collective Bargaining* 16-21 (2011).

Justice Alito in *Harris* argued that collective bargaining implicates constitutional concerns where individual grievances do not because more government spending is at stake.<sup>45</sup> At bottom, this seems to be a challenge to governmental decisions to adopt *any* regime of bargaining. The claim was properly debunked by Justice Kagan:

And nowhere has the Court ever suggested, as the majority does today, ... that if a certain dollar amount is at stake (but how much, exactly?), the constitutional treatment of an employee's expression becomes any different.

Consider an analogy, not involving union fees: Suppose an employee violates a government employer's work rules by demanding, at various inopportune times and places, higher wages for both himself and his co-workers (which, of course, will drive up public spending). The government employer disciplines the employee, and he brings a First Amendment claim. Would the Court consider his speech a matter of public concern under *Pickering*? I cannot believe it would, and indeed the petitioners' own counsel joins me in that view....

I can see no reason to treat the expressive interests of workers objecting to payment of union fees, like the petitioners here, as worthy of greater consideration. The subject matter of the speech is the same: wages and benefits for public employees. Or to put the point more fully: In both cases (mine and the real one), the employer is sanctioning employees for choosing either to say or not to say something respecting their terms and conditions of employment. Of course, in my hypothetical, the employer is stopping the employee from speaking, whereas in this or any other case involving union fees, the employer is forcing the employee to support such expression. But ... the "difference between compelled speech and compelled silence" is "without constitutional significance."<sup>46</sup>

A related argument of the *Friedrichs* petitioners, mirroring a concern raised by Justice Alito in *Harris*,<sup>47</sup> is that it has proved more difficult than *Abood* anticipated to distinguish between chargeable and nonchargeable expenditures.<sup>48</sup> But again, *Abood* recognized that precise distinctions might be difficult.<sup>49</sup> While there have been challenges to the allocation of expenses, these have been resolved by the courts based on the formula adopted by the Supreme Court in *Lehnert*.<sup>50</sup> The existence of these challenges, financed by the same organizations that fund virtually all of the legal challenges to fair share, cannot be used to support a claim that line-drawing is difficult. A legal standard has been developed and consistently applied and followed to deal with such claims. Litigation has now clearly categorized most major expenditures of

<sup>45</sup> *Harris*, 134 S. Ct. at 2632–33, 2642–43.

<sup>46</sup> *Id.* at 2655–56 (Kagan, J., dissenting) (quoting *Riley v. Nat'l Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988)).

<sup>47</sup> *Id.* at 2631–32.

<sup>48</sup> Brief for Petitioner, *supra* note 35, at \*56–57.

<sup>49</sup> *Abood*, 431 U.S. at 236 (“There will, of course, be difficult problems in drawing lines between collective-bargaining activities ... and ideological activities unrelated to collective bargaining....”).

<sup>50</sup> *Lehnert*, 500 U.S. at 519.

unions, resolving the issues with relatively clear lines between categories. That the powerful and well-funded opponents of unions continue to litigate every conceivable challenge does not demonstrate that the issues are more difficult than first thought.

Another argument set forth by the *Friedrichs* petitioners is that the interests in labor peace and avoiding free riders do not justify fair share fees.<sup>51</sup> The *Abood* Court addressed this issue as well, recognizing that “the desirability of labor peace is no less important in the public sector, nor is the risk of ‘free riders’ any smaller.”<sup>52</sup> The Court further recognized the “great responsibilities” of the exclusive representative, which involve the “expenditure of much time and money.”<sup>53</sup> It is not only *Abood*, but also subsequent decisions such as Justice Scalia’s concurrence in *Lehnert* that acknowledged the importance of avoiding free riders to the achievement of peaceful labor relations.<sup>54</sup> As explained above, fair share fees are an essential element of the labor relations system that cannot be viewed in isolation. While a state would be free to adopt a different system such as Tennessee has done,<sup>55</sup> as the *Abood* Court recognized, the adoption of exclusive representation carries with it the obligation to represent all employees.<sup>56</sup> With that comes the collective action problem described above. And while the petitioners suggest that unions have voluntarily chosen this obligation,<sup>57</sup> under the existing system, the employer can only bargain with the majority representative.<sup>58</sup> Thus, the union that wants to represent employees must use the existing bargaining system adopted by the employer with its accompanying obligations.

It has been argued that fair share is not essential to exclusive representation systems because right-to-work laws bar fair share in some states and the system has survived.<sup>59</sup> Additionally, some point to the federal system, which does not have fair share but has active unions with substantial membership.<sup>60</sup> Neither of these examples is predictive of what would happen if fair share was deemed unconstitutional. First, the federal system has some unique features that make its applicability outside that system unpredictable.<sup>61</sup> Second, most local unions that provide direct representational services are part of larger national organizations that can deploy resources where needed. Without fair share, the resources of these national organizations would be diminished. Research indicates that right-to-work laws encourage free riding and reduce union organizing efforts, as well as the success of union organizing efforts.<sup>62</sup> Additionally, right-to-work states generally have lower union membership rates and lower union representation rates than states with fair share, indicating the greater difficulty of union organizing

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<sup>51</sup> Brief for Petitioner, *supra* note 35, at \*30–44.

<sup>52</sup> *Abood*, 431 U.S. at 224.

<sup>53</sup> *Id.* at 221.

<sup>54</sup> *Lehnert*, 500 U.S. at 521–22, 556 (Scalia, J., concurring).

<sup>55</sup> See Professional Educators Collaborative Conferencing Act of 2011, TENN. CODE ANN. § 49-5-601 (West 2011). The Tennessee system of “Collaborative Conferencing” does not provide for exclusive union representation. Rather, this system permits multiple parties, including non-union employees, to be involved in employment related negotiations with management. *Id.*

<sup>56</sup> *Abood*, 431 U.S. at 224.

<sup>57</sup> Brief for Petitioner, *supra* note 35, at \*24–25.

<sup>58</sup> CAL. GOV. CODE § 3506.5 (West 2012).

<sup>59</sup> Brief for Petitioner, *supra* note 40, at \*30–31.

<sup>60</sup> *Id.* at 31.

<sup>61</sup> Samuel Estreicher, *The Paradox of Federal Sector Labor Relations: Voluntary Unionism Without Collective Bargaining Over Wages and Employee Benefits*, NYU SCH. OF LAW (Sept. 30, 2015), available at <http://ssrn.com/abstract=2663113>.

<sup>62</sup> William L. Moore, *The Determinants and Effects of Right-to-Work Laws: A Review of the Recent Literature*, 19 J. LAB. RES. 445, 464 (1998).

in those states.<sup>63</sup> Reduced resources lead to weaker unions, which could further discourage union membership. Thus the fact that the current system is working does not indicate what would happen if the current system was radically altered. Perhaps the relatively peaceful labor relations of recent years have lulled some into dismissing the possibility of significant disruption by employees deprived of a voice in the workplace, but history tells us that employees without a legal method of voicing their frustration will rise up. The success of the current system in achieving peaceful labor relations should not lead to its demise.

### 3. Consider The First Amendment Rights of Unions and Their Members

An additional argument for rejecting efforts to overrule *Abood* is the impact of the mandatory representation obligation without a corresponding duty to pay on the First Amendment rights of the union and its members. As Catherine Fisk and Margaux Poueymirou have persuasively argued, if requiring union represented employees to pay money for the service they receive is compelled speech,<sup>64</sup> then forcing the union to represent these employees using the money of members is also compelling speech.<sup>65</sup> Although the *Abood* Court did not address this issue, it did not need to do so as it upheld the fair share system. Any consideration of overruling *Abood* must recognize that the union and its members have free speech rights that are violated by abandoning fair share. In addition to forcing union subsidization of speech on behalf of nonmembers, the free riders limit the resources that the union has to expend on political activities on behalf of its members, further impairing the speech rights of unions and their members.<sup>66</sup> As Fisk and Poueymirou urge, reaffirming *Abood* is a reasonable compromise in a situation with conflicting First Amendment rights at stake.<sup>67</sup> It requires all to pay for the services provided and does not mandate payment for political activities. As noted above, payment of fair share fees in no way restrains the employees from expressing their own views on the issues.

### 4. Opt-In v. Opt-Out

The second substantive question at issue in *Friedrichs* is whether the Constitution requires unions to adopt an opt-in scheme for collection of fair share fees in which employees must actively choose to pay full union dues. The systems upheld in many prior cases, including *Abood*, incorporated opt-out provisions under which an employee pays the amount of full dues unless the employee opts out after receiving the legally required notice from the union. There is no evidence in *Friedrichs* suggesting that an opt-out approach imposes a burden on anyone. Indeed the petitioners admit that they have opted out regularly and the union's pleadings establish that it sends a notice of the right to opt-out as required by law and all that is required to opt out is to check a

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<sup>63</sup> *Id.* (finding “accumulating evidence indicates that [right-to-work] laws reduce the long-run extent of unionization by 5 to 8 percent.”). Membership and coverage data by state is available at *Union Membership, Coverage, Density and Employment by State, 2014*, UNION MEMBERSHIP AND COVERAGE DATABASE, <http://www.unionstats.com/> (last visited Oct. 20, 2015). The coverage data show the number and percentage of employees covered by union contracts, which includes both members and nonmembers. *Id.*

<sup>64</sup> And Fisk and Poueymirou make a persuasive argument that it is not. See Catherine Fisk & Margaux Poueymirou, Harris v. Quinn and the Contradictions of Compelled Speech, 48 LOY. L.A. L. REV. 439, 461–470 (2015).

<sup>65</sup> *Id.* at 488.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 490–91.

box and return a form to the union.<sup>68</sup> Further, if as the petitioners allege, inertia will cause some individuals who object to the union's positions to fail to opt out,<sup>69</sup> then an opt-in regime will compound the free rider problem, enhancing the justification for reaffirming *Abood*.<sup>70</sup>

The only union fees case in which an opt-in requirement has been mandated is *Knox*, where the Court imposed an opt-in regime for a mid-year assessment designed primarily to combat ballot initiatives that the union opposed when the notice of the assessment provided no specific opportunity to opt out.<sup>71</sup> The situation was atypical, but the Court created the opt-in without the urging of either party.<sup>72</sup> Justice Alito went so far as to suggest that the opt-out regime was unconstitutional generally,<sup>73</sup> inviting the instant challenge. But opt-out has been approved in cases that compel speech far more directly than fair share fees, which constitute no more than payment for a service provided and accepted. For example in *West Virginia State Board of Education v. Barnette*, the Court found it constitutionally sufficient for First Amendment purposes that students could opt out of saluting the flag and saying the pledge of allegiance.<sup>74</sup> And in *Wooley v. Maynard*, the Court held that individuals who objected to the message on New Hampshire's license plate could simply cover it with tape.<sup>75</sup>

The opt-out system for fair share fees has been repeatedly approved by the Court in a number of cases, albeit without deep specific analysis. Given the careful balancing of the labor relations system and considering the First Amendment rights of all involved, as well as the government's interests in regulating its work force, the Court should not reject it here, especially when there is simply no evidence of any burden on employees using opt-out.

### 5. The Posture of the Case

While most of this Issue Brief has concentrated on the merits of the issues, a case decided on the pleadings is a poor vehicle for reconsidering major constitutional precedent. Many of the petitioners' arguments rely on assumptions, not facts. For example, the petitioners suggest that free ridership is not a serious problem for unions and that they will continue to operate and effectively represent employees without fair share fees.<sup>76</sup> But there is no such evidence in the record because there is no record. Petitioners even fault the union for not making such a showing.<sup>77</sup> Yet petitioners' own actions insured that no factual record exists.

Similarly, there is no evidence that an opt-out regime leads to employees unwillingly subsidizing nonchargeable activities due to inertia or lack of attention. It may well be

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<sup>68</sup> Brief of Respondents Cal. Teachers Ass'n, et al. in Opposition at \*4, *Friedrichs v. Cal. Teachers Ass'n*, cert. granted, 135 S.Ct. 2933 (2015) (No. 14-915), 2015 WL 1518077.

<sup>69</sup> Brief for Petitioner, *supra* note 40, at \*11–14.

<sup>70</sup> Catherine Fisk & Erwin Chemerinsky, *Political Speech and Associational Rights after Knox v. SEIU*, Local 1000, 98 CORNELL L. REV. 1023, 1068 (2013).

<sup>71</sup> *Knox*, 132 S. Ct. at 2286. The union honored opt-out requests received for regular fees, but offered no new opportunity to opt out of the newly implemented assessment for employees who failed to opt out of regular fees. *Id.*

<sup>72</sup> *Id.* at 2306 (Breyer, J., dissenting).

<sup>73</sup> *Id.* at 2290.

<sup>74</sup> Fisk & Chemerinsky, *supra* note 70, at 1048–49 (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642(1943)).

<sup>75</sup> *Id.* (citing *Wooley v. Maynard*, 430 U.S. 705, 713 (1977)).

<sup>76</sup> Brief for Petitioner, *supra* note 40, at \*30–31.

<sup>77</sup> *Id.* at \*31.

that an opt-in regime burdens the First Amendment rights of the union and its members more than an opt-out regime burdens dissenters. However, without an evidentiary record, assumptions about this important question are all that is left. And assumptions, far more subject to the influence of bias than facts, are a poor basis on which to decide serious constitutional issues, particularly when long-standing precedent is at stake.<sup>78</sup>

### III. CONCLUDING THOUGHTS ON A DANGEROUS CASE

Because fair share is an integral part of the existing labor relations system, a decision by the Court holding it unconstitutional could disrupt the entire system and lead to unpredictable results. What we know from history, however, is that without an effective system to resolve labor disputes, the potential for legal and illegal strikes or other disruptive protest increases. The end of fair share will almost certainly weaken unions, although it is unlikely to completely destroy them. While some argue that unions might benefit from a regime that permits only voluntary support by becoming more active and responsive to members,<sup>79</sup> there are enormous resource challenges for unions required to represent workers without a reliable source of funding.

Weaker unions will affect the balance of power in the workplace and society in general. Workers will have fewer vehicles for voice in the workplace. Laws may change in ways unfavorable to workers without powerful union support. Insurgent movements for higher minimum wages and paid leave may be less successful. Lower rates of unionization may exacerbate the already significant economic inequality in the United States.<sup>80</sup>

As the foregoing demonstrates, the rationale for upholding fair share is as strong or stronger today as it was in 1977. Fair share is a bedrock principle of the U.S. labor relations system. The Supreme Court correctly concluded in 1977 that the interests in peaceful and stable labor relations justified any infringement on the First Amendment rights of dissenters. Since that time, the Court has recognized that when acting as an employer, the government has even greater authority to restrict the First Amendment rights of its employees; that fair share fees are payable to a union does not change the calculus.

The Court should leave well enough alone.

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<sup>78</sup> For further analysis of problems with the state of the record, see Catherine Fisk, *Symposium: The Friedrichs Petition Should be Dismissed*, SCOTUSBLOG (Aug. 26, 2015), <http://www.scotusblog.com/2015/08/symposium-the-friedrichs-petition-should-be-dismissed/>.

<sup>79</sup> Michael Oswald, *The Grand Bargain: Revitalizing Labor Through NLRA Reform and Radical Workplace Relations*, 57 DUKE L.J. 691, 723 (2007).

<sup>80</sup> Richard Freeman et al., *How Does Declining Unionism Affect the American Middle Class and Intergenerational Mobility?*, NAT'L BUREAU OF ECON. RES. (October 2015), available at <http://www.nber.org/papers/w21638> (finding a strong relationship between unionization, upward mobility, and membership in the middle class).



