

Advance

The Journal of ACS Issue Briefs

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Advance

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

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

We are pleased this year to include an article by Dominic LoVerde, the winner of the first annual American Association for Justice Class Action Litigation Group National Law Student Writing Competition.

Redefining Employment for the Modern Economy*

Brishen Rogers

The explosive growth of “platform economy” companies such as Uber has brought public attention to a longstanding issue facing workers in this country: the fissuring of employment.¹ Fissuring comes in many forms, but three are especially important:

- *Misclassification.* Some companies improperly classify workers as independent contractors rather than employees, or require individual workers to form sole proprietorships or even franchises, such that workers have no legal employer.
- *Subcontracting.* Other companies (“user firms”) hire labor through contractors or temporary agencies. Such workers have a legal employer—the third-party agency—but user firms may exert or share power over working conditions.
- *Franchising.* Still other companies, especially in the restaurant, retail, and hotel sectors, carry out business through franchising arrangements. Franchisors may maintain power over franchisees’ business operations, and therefore over working conditions, while disclaiming employment duties toward franchisees’ workers.

All three schemes tend to deprive workers of their rights under employment laws, which generally do not protect independent contractors and do not effectively protect many subcontracted workers or workers for franchisees. The sums involved can be significant. One journalist estimated that if Uber were found to employ its drivers, it would owe them an additional \$4 billion per year in the U.S. alone.² The number of workers impacted is also quite large. Wage and Hour Administrator David Weil estimates that there are “over 29 million workers in just five industries affected by the fissured workplace, including in the construction, hospitality, janitorial, personal care, and home health care industries.”³

The sudden visibility of such issues in the platform economy has sparked various law reform proposals. Most prominently, commentators and even lawmakers have suggested that Congress create a new legal category of worker that would slot between “employee” and “independent contractor,” with limited employment rights.⁴ This Issue

* This issue brief was initially published in October 2016.

¹ See generally DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* (2014).

² Steven Gandel, *Uber-nomics: Here’s What It Would Cost Uber To Pay Its Drivers as Employees*, FORTUNE (Sept. 17, 2015, 2:12 PM), <http://fortune.com/2015/09/17/ubernomics/> [<https://perma.cc/X2EF-MNSR>].

³ David Weil, Testimony at Hearing on “Make It in America: What’s Next?” (July 28, 2015). See also SARAH & CATHERINE, *INDEPENDENT CONTRACTOR VS. EMPLOYEE: WHY INDEPENDENT CONTRACTOR MISCLASSIFICATION MATTERS AND WHAT WE CAN DO TO STOP IT*, at 4 (Nat’l Emp. L. Project ed., May 2016), (as many as 30% of employers misclassify at least some workers).

⁴ See, e.g., Seth D. Harris & Alan B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The “Independent Worker”* 2 (Hamilton Project, Discussion Paper 15-10, 2015), http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf; James Surowiecki, *Gigs with Benefits*, NEW YORKER (July 6, 2015), <http://www.newyorker.com/magazine/2015/07/06/gigs-with-benefits>.

Brief argues that such a reform would be unwise. Ethically speaking, contracted workers are no less deserving of basic protections than employees, especially when they don't have a choice as to their employment status. Practically speaking, existing tests for employment are already very confusing, and adding a new category will only compound matters, increasing litigation and enforcement costs. Doing so may also lead companies to downgrade employees into this new category to avoid various legal duties.

This Issue Brief instead proposes that Congress expand the test for employment status under wage/hour, discrimination, and collective bargaining laws. Part I discusses the challenges of defining employment with precision, drawing from the Uber and Lyft suits. Part II assesses proposals for an intermediate category of worker. Part III then argues that reforming federal definitions of employment would be preferable to creating a new intermediate classification.

I. THE CHALLENGE OF DEFINING EMPLOYMENT

There are basically two legal tests for employment, both of which rely on lists of factual elements to determine the nature of the parties' relationship. The "control test" under the common law of agency governs most federal employment statutes.⁵ It defines an employment relationship as a relationship of control: the employer plans out tasks, gives orders, and monitors performance. An independent contracting relationship is different and involves an individual who runs his or her own separate business. As one judge put it, the "paradigm of an independent contractor" is one who sells "only expertise."⁶

In applying the control test, the Restatement of Agency instructs courts to consider multiple factors including the worker's skills, the duration of the parties' engagement, the method of payment, and the putative employer's ability to terminate the worker at will.⁷ Unfortunately, such factors can cloud, rather than illuminate, the central question in such cases: whether the worker is truly in business for him- or herself. Many employment relationships, after all, are not defined by rigid task definition and control. The Second Restatement of Agency gives the examples of a cook or gardener hired in a manor. Either might bristle if their employer sought to exert minute control over their work—yet both are unquestionably employees since they are not running independent businesses.⁸ More fundamentally, the control test is a poor way to determine responsibility for working conditions, since it was designed to determine liability to *third parties* for workers' torts—not to remedy power imbalances in the labor market.⁹

Legislatures have often responded by defining employment more broadly in worker-protective statutes. Some states create a legal presumption that anyone providing

⁵ See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992) (common law "control test" applies to ERISA); *NLRB v. United Insurance*, 390 U.S. 254, 256 (1968) (affirming that the proper test for employment under the NLRA is the "control test").

⁶ See *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1545 n.3 (7th. Cir. 1987) (Easterbrook, J., concurring).

⁷ RESTATEMENT (SECOND) OF AGENCY § 220 (AM. LAW INST. 1958).

⁸ *Id.* at § 220 cmt. d; see also *Lauritzen*, 835 F.2d at 1540 (Easterbrook, J., concurring) (stating focus on "right to control" is over broad, as it would sweep in nearly all suppliers as employees of their clients).

⁹ See, e.g., Alan Hyde, *Legal Responsibility for Labour Conditions Down the Production Chain*, in CHALLENGING THE LEGAL BOUNDARIES OF WORK REGULATION 83, 94 (Judy Fudge, Shae McCrystal, & Kamala Sankaran, eds., 2012). Brishen Rogers, *Toward Third-Party Liability for Wage Theft*, 31 BERKELEY J. EMP. & LAB. L. 1, 6 (2010) [hereinafter Rogers, *Toward Third-Party Liability*].

services to a business is an employee, shifting the burden of proof on that key question.¹⁰ In the federal Fair Labor Standards Act (FLSA),¹¹ Congress discarded the control test and instead defined “employ” as including “to suffer or permit to work.”¹² Congress’ targets were garment manufacturers and “jobbers” who placed contractual intermediaries between themselves and sweatshop workers.¹³ By framing the test in the passive voice, Congress imposed an affirmative duty on firms to prevent violations both within their enterprises and among their first-tier suppliers.¹⁴ Interpreting such statutory language, courts and agencies have developed various multi-factor tests¹⁵ to determine whether “as a matter of economic reality,” rather than contractual form, “the individual is dependent on the entity,” as opposed to being in business for themselves.¹⁶

The difficulties associated with applying such tests are apparent in the Uber and Lyft misclassification suits. In the two most prominent cases, drivers alleged that the companies misclassified them as independent contractors and therefore owed them, among other things, back wages (in the Lyft case) and work-related expenses (in both cases).¹⁷ The suits arose under California law, which has a broad test for employment.¹⁸

¹⁰ *Nayanan v. EGL, Inc.*, 616 F.3d 895, 900 (9th Cir. 2010) (applying a presumption of employment under California workers’ compensation and wage/hour laws).

¹¹ 29 U.S.C. § 203(g) (1938) (defining “employ” as “suffer or permit to work.”) *See also Darden*, 503 U.S. at 326 (stating that the FLSA definition “stretches the meaning of ‘employee’ to cover some parties who might not qualify as such under a strict application of agency law principles”).

¹² 29 U.S.C. § 203(g). *See also Darden*, 503 U.S. at 326. Congress later applied the same definition of employment to agricultural workers under the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1807–72 (1983).

¹³ Mark Anner, Jennifer Bair & Jeremy Blasi, *Towards Joint Liability in Global Supply Chains: Addressing the Root Causes of Labor Violations in International Subcontracting Networks*, 35 COMP. LAB. L. & POL’Y J. 1, 17 (2014).

¹⁴ U.S. Dep’t of Labor, Wage & Hour Div., Administrator’s Interpretation No. 2015-1 at 3 (July 15, 2015) (summarizing Department’s interpretation of that test as determining relationships of economic dependence) [hereinafter “Dep’t of Labor Memorandum”].

¹⁵ *E.g.*, *Antenor v. D & S Farms*, 88 F.3d 925, 929 (stating that the factors to consider in determining the employment classification of farm workers include: “(1) The nature and degree of the grower’s control of the farmworkers; (s) the degree of the grower’s supervision, direct or indirect, of the farmworkers’ work; (3) the grower’s right, directly or indirectly, to hire, fire, or modify the farmworkers’ employment conditions; (4) the grower’s power to determine the workers’ pay rates or methods of payment; (5) the grower’s preparation of payroll and payment of the workers’ wages; (6) the grower’s ownership of the facilities where the work occurred; (7) the farmworkers’ performance of a line-job integral to the harvesting and production of saleable vegetables; and (8) the grower’s and labor contractor’s relative investment in equipment and facilities.”).

¹⁶ Dep’t of Labor Memorandum, *supra* note 14, at 3 (summarizing and discussing case law to this effect).

¹⁷ *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1070 (N.D. Cal. 2015); *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1135 (N.D. Cal. 2015).

¹⁸ *California applies a test derived from S.G. Borello & Sons, Inc., v. Dep’t of Indus. Relations*, 769 P.2d 399, 407 (Cal. 1989) (noting the following factors: (a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee; ... [as well as the following factors] (1) the alleged employee’s opportunity for profit or loss depending on his managerial skill; (2) the alleged employee’s investment in equipment or materials required for his task, or his employment of helpers.; (3) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer’s business.”).

In March 2015, two federal judges in San Francisco denied the companies' motions for summary judgment, holding that the drivers had raised material questions of fact on the issue of employment.¹⁹

Judge Edward Chen's opinion in the Uber case reasoned that the level of control exerted by Uber over drivers seemed analogous to that FedEx exercised over its drivers in a case finding employment, especially given the role of customer feedback and complaints in ensuring a particular level of service.²⁰ It cited cases holding that workers may set their own hours and still be legal employees, so long as the putative employer exerts substantial control while they are on the clock.²¹ It noted that Uber could apparently end contracts with drivers at will,²² which it described as important because the right to discharge a worker at will gives a putative employer "the means of controlling the [putative employee's] activities."²³ Yet it held that the factors were inconclusive, especially given past courts' divergent applications of them.²⁴

In the Lyft case, Judge Vince Chhabria struck a telling metaphor: if the case reached a jury, it would be "handed a square peg and asked to choose between two round holes."²⁵ Lyft drivers are not classic independent contractors, since they are actually at the core of Lyft's business and often work for the company for years. Yet, the Judge reasoned, they are not classic employees either, since they were able to set their own hours and had minimal contact with Lyft managers, and since Lyft didn't exercise control over their appearance.²⁶

Both cases illustrate how workers face an uphill battle even despite favorable law. Multi-factor tests enable defendants to develop multiple issues of fact, which can distract attention from the remedial goals of employment legislation. Indeed, even in states with favorable laws such as California, advocates report it is difficult to convince courts that such laws sweep as broadly as they do.²⁷

II. "INDEPENDENT WORKER" PROPOSALS AS A FALSE START

Given these challenges—which, it bears repeating, courts confronted for *many decades* prior to the emergence of on-demand labor platforms²⁸—various commentators have advocated for a new legal category of worker. A leading proposal by Seth Harris and Alan Krueger suggests that legislatures define a category of "independent workers" who would have protections against discrimination and rights to collective bargaining (albeit under a new and undefined legal regime), but no rights to

¹⁹ *Cotter*, 60 F. Supp. 3d at 1070 (alleging failure to pay minimum wages and reimburse drivers for expenses); *Uber II*, 82 F. Supp. 3d at 1135–6 (alleging failure to pass on gratuities and reimburse for expenses).

²⁰ *Uber II*, 82 F. Supp. 3d at 1140.

²¹ *Id.*

²² *Id.* at 1149 n.19.

²³ *Id.* at 1139 (quoting *Ayala v. Antelope Valley Newspapers, Inc.*, 327 P.3d 165, 171 (2014)).

²⁴ *Id.* at 1140–41 (summarizing cases that drew different inferences from requirements that drivers wear uniforms, and from drivers' use of personal vehicles).

²⁵ *Cotter*, 60 F. Supp. 3d. at 1081.

²⁶ *Id.* at 1081.

²⁷ NAT'L EMP. L. PROJECT, CONTRACTED WORK POLICY OPTIONS 4 (Mar. 2015), <http://www.nelp.org/content/uploads/2015/03/Subcontracting-Policy-Templates.pdf>.

²⁸ *See, e.g.*, *NLRB v. Hearst Pub's Inc.*, 322 U.S. 111, 121 (1944) ("Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent, entrepreneurial dealing.")

unemployment benefits, wage and hour protections, or workers compensation.²⁹ Harris and Krueger see this category of independent workers as narrow, largely limited to workers who “operate in a triangular relationship” in which they “provide services to customers identified with the help of intermediaries.”³⁰ Their main target is workers for Uber, Lyft, Handy, TaskRabbit, Instacart, and similar firms, though their proposal would also reach beyond such workers.

While Harris and Krueger highlight various failings of our current employment benefits system, their proposal has significant drawbacks. The first and most important is that it would make employment status litigation even more confusing—and therefore more expensive—by forcing courts to delineate the boundaries between *three* legal categories rather than two. Notably, while Harris and Krueger highlight the difficulties of defining employment with precision, they do not propose legally operative language that would distinguish independent workers from other categories of worker. Courts would therefore be left to determine the boundary cases, likely drawing on the confusing tests discussed above.

Second, while the proposal seeks to encourage firms to “level up” by reclassifying independent contractors as independent workers, it seems just as likely to encourage firms to “level down” by reclassifying employees as independent workers. That is a serious risk, especially since the universe of workers on online labor platforms is very small—a recent study estimated that only 0.5% of adults work on them each month.³¹

Third, the proposal may overcomplicate collective bargaining. It would revise antitrust law to enable independent workers to organize and bargain, steering clear of our existing labor law regime both because “independent workers” would not be employees, and because that regime is widely regarded as outdated. But the proposal doesn’t explain how workers’ concerted action would then be governed. Would restrictions on strikes and picketing be imported from the National Labor Relations Act (NLRA)? Would firms have a duty to bargain with independent workers’ unions? If so, when, and who would determine whether they were bargaining in good faith? What duties would unions of independent workers bear toward represented workers? Rather than require courts or a new administrative agency to address such questions, it seems simpler to leave them in the competence of the National Labor Relations Board (NLRB), which has over 75 years of experience.

Fourth and finally, the proposal lets companies off the hook for some very basic obligations, such as minimum wages and overtime. Harris and Krueger argue that it is difficult or even impossible to measure work hours for Uber drivers since they may perform personal tasks while they have the app turned on, and since they may use multiple ridesharing apps at the same time. The argument is reasonable, but it concedes too much. Recordkeeping has long been complicated for on-call workers and workers who have down time while at their jobs. It is premature to carve out an exception from the governing regulations before considering in full how existing laws and regulations

²⁹ See Harris & Krueger, *supra* note 4. Harris and Krueger also suggest that independent workers be eligible for employer tax withholding and payroll tax, issues this Issue Brief does not cover.

³⁰ *Id.* at 9.

³¹ DIANA FARRELL & FIONA GREIG, PAYCHECKS, PAYDAYS, AND THE ONLINE PLATFORM ECONOMY: BIG DATA ON INCOME VOLATILITY 5 (J.P. Morgan Chase & Co. Inst., ed. Feb. 2016), <https://www.jpmorganchase.com/corporate/institute/document/jpmc-institute-volatility-2-report.pdf>. In comparison, one recent study estimated that 16% of workers are in temporary work, independent contracting, on-call work, or contracted-out work. Lawrence Katz & Alan Krueger, *The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015* (NBER Working Paper No. 22667, 2016), https://krueger.princeton.edu/sites/default/files/akrueger/files/katz_krueger_cws_-_march_29_20165.pdf.

may apply.³² Moreover, Uber already requires drivers to accept a certain percentage of referrals and sometimes guarantees drivers certain compensation by the hour, strongly suggesting that it already monitors both their hours and their activities.³³ If the problem is that drivers use multiple platforms, finally, Uber could classify drivers as employees and require them to use its platform exclusively—especially given recent evidence that only 14% of workers use more than one labor platform.³⁴ In general, the growth of contingent work arrangements counsels for more worker protections rather than fewer.

III. REDEFINING EMPLOYMENT

Rather than creating a new category of worker, it would be both simpler and fairer to expand and clarify the scope of employment under the core federal labor/employment statutes.³⁵ That redefinition should target the three primary forms of fissuring: misclassification, subcontracting, and franchising. Ideally, an omnibus bill would do the following:

1. Redefine employment per the “suffer or permit” test and specify that the “suffer or permit” test defines employment *very* broadly;
2. Define workers in certain highly fissured industries as the legal employees of firms who contract with them individually for labor, and/or the joint employees of user firms who obtain their labor through subcontracting or franchising arrangements;
3. Develop concrete guidance for courts to apply in other industries, or direct an expert agency to do the same; and
4. Place the burden of proof on the party seeking to avoid employment status and implement other procedural and remedial reforms.³⁶

A. DEEPER INTO THE SUBSTANTIVE DEFINITION

In clarifying the meaning of “suffer or permit,” Congress could endorse the Department of Labor’s (DOL’s) recent analysis of that question. In a 2015 interpretive

³² Under the FLSA the key distinction is between workers who are “waiting to be engaged” (and therefore not working) and workers who are “engaged to wait” (and therefore working). *Fact Sheet #22: Hours Worked Under the Fair Labor Standards Act (FLSA)*, WAGE & HOUR DIV., U.S. DEP’T OF LABOR (July 2008), <https://www.dol.gov/whd/regs/compliance/whdfs22.pdf>; Harris & Krueger, *supra* note 4, at 9 (noting this rule but arguing that drivers are likely “waiting to be engaged” since they can perform personal tasks while they have apps on).

³³ ROSS EISENBREY & LAWRENCE MISHLE, *UBER BUSINESS MODEL DOES NOT JUSTIFY A NEW “INDEPENDENT WORKER” CATEGORY* (Econ. Pol’y Inst. ed., 2016), <http://www.epi.org/publication/uber-business-model-does-not-justify-a-new-independent-worker-category/> [<https://perma.cc/T9H4-86SK>].

³⁴ FARRELL & GREIG, *supra* note 32, at 23.

³⁵ The discussion below considers the FLSA, the National Labor Relations Act (NLRA), Title VII of the Civil Rights Act of 1964 (Title VII), and other antidiscrimination statutes. Such a reform should also be considered for other employment statutes, including the Employee Retirement Income Security Act (ERISA), the Occupational Health and Safety Act (OSHA), and tax-related statutes such as the Federal Insurance Contributions Act (FICA) and the Federal Unemployment Tax Act (FUTA). FICA is especially important given the sums involved for misclassified workers.

³⁶ In determining how the party bearing such a burden could rebut it, Congress or agencies could draw on states’ experiences applying the “ABC” test for employment that is used in a majority of state unemployment insurance laws. See CATHERINE RUCKELSHAUS ET AL., *WHO’S THE BOSS: RESTORING ACCOUNTABILITY FOR LABOR STANDARDS IN OUTSOURCED WORK* 35–36 (Nat’l Emp. L. Project ed., May 2014) (explaining that, under the “ABC” test, a party seeking to evade responsibility must show that “(1) an individual is free in fact from control or direction over performance of the work; (2) the service provided is outside the usual course of the business for which it is performed; and (3) an individual is customarily engaged in an independently-established trade, occupation, or business”).

memorandum, the DOL wrote that courts in misclassification cases “should be guided by the FLSA’s statutory directive that the scope of the employment relationship is very broad,” and should ultimately seek “to determine whether the worker is economically dependent on the employer (and thus its employee) or is really in business for him or herself (and thus its independent contractor).”³⁷ In a separate memorandum, the DOL has held that economic dependence also defines “vertical joint employment” relationships, or relationships in which a user firm obtains labor through a subcontracting arrangement, or enters into a franchising arrangement with a worker’s employer.³⁸

Given that workers have found it difficult to convince courts that FLSA’s “suffer or permit” standard actually means what it says, Congress could also provide concrete guidance for how to apply that test in practice, or direct an agency to do the same. That guidance could include a list of enumerated industries whose workers will always be the employees or joint employees of whoever purchases their services, whether directly or through an intermediary. A key starting point is industries where agencies and states have recognized that misclassification or labor-only subcontracting is especially common, including construction, farm labor, home health care, hospitality, garment manufacturing, janitorial, on-demand labor platforms, restaurant work, security services, and warehouse work.³⁹

That guidance could also clarify that common law notions of control play a minor role in employment status cases and identify factors that indicate whether the worker is truly in business for him or herself. As noted by the DOL,⁴⁰ the following considerations are key:

- Whether the putative employer could carry out its business without the work at issue;
- Whether the worker exerts the sort of managerial skill characteristic of an independent business or trade, such as advertising his or her services, negotiating contracts with terms specific to each job, and deciding which jobs to perform and when to perform them, all free from any direction from the putative employer;
- How the worker’s investment in capital goods or other business resources compares to the putative employer’s investment;
- Whether the putative employer dictates regularized contract terms to workers, contractors, or franchisees.

B. PROCEDURAL AND REMEDIAL REFORMS

The ordinary burden of proof in civil litigation, of course, rests with the plaintiff. In employment status cases, that can be quite unfair given the resource disparities between the parties. Many states have responded in their unemployment compensation statutes by creating a presumption that anyone who performs work for another is the

³⁷ Dep’t of Labor Memorandum, *supra* note 14, at 2.

³⁸ U.S. Dep’t of Labor, Wage & Hour Div., Administrator’s Interpretation No. 2016-1 (Jan 20, 2016).

³⁹ See Weil, *supra* note 3 (noting some such industries); CAL. LAB. CODE § 2810 (West 2013) (imposing special duties on “[i]ndividuals contracting for labor or services with construction, farm labor, garment, janitorial, security guard, or warehouse contractors”); CAL. LAB. CODE § 2810.3 (West 2013) (holding firms jointly liable for wage/hour and workers compensation violations by contractors hired to perform “labor within [their] usual course of business.”). In an ongoing case that could have far-reaching ramifications for franchising arrangements, the NLRB alleges that McDonalds is the joint employer of its franchisees workers. See *McDonald’s USA, LLC, a Joint Employer, et al.*, 363 NLRB No. 14, slip op. (2016).

⁴⁰ See generally Dep’t of Labor Memorandum, *supra* note 14, at 6–10, 13–14.

other's employee, then requiring the other to disprove employment status.⁴¹ Such an approach has proven a workable means of deterring misclassification.

Congress could also deter misclassification by enhancing remedies.⁴² For example, it could entitle workers to liquidated damages upon a finding of misclassification, and double or treble damages for pecuniary harms suffered as a result of misclassification. It could also require companies to disclose to workers their classification, the implications of their classification, how the law determines employee and independent contractor status, and how to contest that classification before the DOL or other agencies; it could then presume misclassification when such information is not provided.⁴³

Finally, Congress should consider adding a private right of action to the FLSA's "hot goods" provision, which permits the Secretary of Labor to enjoin the transport or sale of goods produced in violation of the Act and to seek monetary damages from those holding the goods. That provision extends responsibility well beyond the boundaries of traditional employment, and can be a very effective means of ensuring wage/hour compliance.⁴⁴

C. ACT-SPECIFIC CONSIDERATIONS

These reforms would have various act-specific effects that are worth noting briefly.

Under the FLSA, a more expansive definition of employment ought to be coupled with several additional reforms. First, the FLSA has an antiquated "collective action" procedure, rather than a standard class action procedure, such that workers must affirmatively opt in to a suit. Reform is warranted there. Second, Congress should clarify that questions of employment status may not be subject to arbitration.⁴⁵ And third, the FLSA exempts taxi drivers from its overtime provisions; reform to that provision is warranted on grounds of fairness to drivers as well as on public safety grounds.⁴⁶

Agencies may also need to update rules around joint employers' responsibilities. The Family and Medical Leave Act's (FMLA) joint employer rules, for example, designate a "primary" and a "secondary" employer with different duties.⁴⁷ Such a distinction may become necessary in antidiscrimination cases. The NLRB's current standard, which requires that joint employers bargain only over terms and conditions of employment that they possess the authority to control, seems workable even under an expanded definition of employment.⁴⁸

⁴¹ See RUCKELSHAUS ET AL., *supra* note 37.

⁴² Notably, the NLRB Division of Advice issued a memorandum finding that an employer's misclassification of employees as independent contractors is an unfair labor practice. Off. Gen. Couns., Nat'l Labor Relations Bd., Advice Memorandum, Pacific 9 Transportation, Inc., No. 21-CA-150875, (Dec. 18, 2015), http://hr.cch.com/ELD/AdvicememoPac921_CA_150875_12_08_15_.pdf.

⁴³ These provisions were included in the proposed federal Payroll Fraud Prevention Act of 2015, which would have amended the definition of employment under the FLSA but not other statutes. H.R. 3427, 114th Cong. (2015), <https://www.congress.gov/114/bills/hr3427/BILLS-114hr3427ih.pdf>.

⁴⁴ 29 U.S.C. § 215(a)(1) (1950) (stating that "good faith" purchasers are exempted from the statute).

⁴⁵ See, e.g., *D.R. Horton*, 357 NLRB 184 (2012) (holding that class action waiver in employment arbitration agreement violates the NLRB); *accord* *Morris v. Ernst & Young*, No. 13-16599, 2016 WL 4433080 (9th Cir. Aug 22, 2016); *but see* *Murphy Oil USA, Inc. v. N.L.R.B.*, 808 F.3d 1013 (5th Cir. 2015) (rejecting NLRB's theory in *D.R. Horton*).

⁴⁶ 29 U.S.C. § 213(b)(17).

⁴⁷ *Fact Sheet #28N: Joint Employment and Primary and Secondary Employer Responsibilities Under the Family and Medical Leave Act*, WAGE & HOUR DIV., U.S. DEP'T OF LABOR, <https://www.dol.gov/whd/regs/compliance/whdfs28n.pdf>.

⁴⁸ See *Miller & Anderson, Inc.*, 364 NLRB No. 39, slip op. at 10–11 (2016).

Finally, redefining employment status as detailed here would expand coverage under federal antidiscrimination statutes including Title VII, the Age Discrimination in Employment Act, and the Americans with Disabilities Act. This would reduce the complexity of emerging claims that Uber and other companies may be discriminating against drivers by making employment decisions on the basis of biased customer feedback.⁴⁹ While expanding the scope of those Acts' coverage may seem to impose onerous burdens on employers, employers are already prohibited from discriminating against independent contractors on the basis of race under Section 1981 of the Civil Rights Act of 1866,⁵⁰ and both Title VII and Section 1981 have long held employers responsible for various harms perpetrated by third parties.⁵¹ Moreover, causal standards under existing antidiscrimination doctrine are fairly stringent, typically requiring plaintiffs to prove intent to discriminate, which should prevent employers from bearing undue burdens.

V. CONCLUDING OBSERVATIONS

While the challenges faced by workers in the platform economy are generating a great deal of attention, policymakers should not lose sight of broader trends toward fissuring that impact a far, far larger proportion of the workforce. Since employment is fundamentally a legal status, and often a contested one, even seemingly targeted reforms may have far-reaching legal consequences. Significant reforms of our labor and employment laws should focus broadly on that group of workers, and generally should enhance rather than limit their rights.

ABOUT THE AUTHOR

Brishen Rogers is Associate Professor of Law at Temple University Beasley School of Law, where he teaches torts, employment discrimination, and a seminar on current issues in labor law. His current research focuses on how new technologies are both altering the world of work and creating new opportunities for social and political mobilization. Professor Rogers received his J.D., *cum laude*, from Harvard Law School and his B.A., *with high distinction* from the University of Virginia. Prior to law school, he worked as a community organizer promoting living wage policies and affordable housing, and spent several years helping organize workers as part of SEIU's "Justice for Janitors" campaign. Professor Rogers thanks Craig Becker, Annette Bernhardt, Kelly Ross, and Catherine Ruckelshaus for comments on an earlier draft. He can be reached at brogers@temple.edu and found on twitter @brishenrogers.

⁴⁹ Compare Noah Zatz, *Beyond Misclassification: Gig Economy Discrimination Outside Employment Law*, ON LABOR (Jan. 19, 2016), <https://onlabor.org/2016/01/19/beyond-misclassification-gig-economy-discrimination-outside-employment-law/> (outlining possible causes of action that do not require a finding of employment status).

⁵⁰ 42 U.S.C. § 1981.

⁵¹ See *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (holding that companies may be vicariously liable for sexual harassment by supervisors that does not lead to a tangible employment action); Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357 (2009) (outlining the prevalence of employer liability for harassment by third parties).

Arbitration as Wealth Transfer*

Deepak Gupta and Lina Khan

One of the many ways in which the late Justice Scalia had an outsized impact on the shape of our law was his embrace of forced arbitration clauses—clauses, hidden in the fine print of standard-form contracts, that allow corporations to remove themselves from the civil justice system and deny consumers and workers any right to band together to hold those corporations accountable.

In recent years, Justice Scalia wrote a series of opinions—each on behalf of the same five-Justice majority—reinterpreting the Federal Arbitration Act and dramatically swinging the balance in favor of corporations: 2010’s *Rent-A-Center v. Jackson*, holding that an arbitrator (rather than a court) can decide whether the arbitration clause is unfair;¹ 2011’s *AT&T Mobility v. Concepcion*, granting companies the unfettered right to enforce clauses that ban class actions;² and 2013’s *American Express Co. v. Italian Colors Restaurant*, requiring enforcement even when doing so has the practical effect of completely precluding redress under a law enacted by Congress.³

In the words of one federal judge, this trend has been “among the most profound shifts in our legal history.”⁴ The person who fills Justice Scalia’s seat will thus have an equally profound opportunity to become part of a new majority capable of reversing course and restoring the rights of American consumers and workers.⁵ The stakes are hard to overstate. In the wake of *Concepcion*, companies across sectors have quietly modified their contracts with employees and consumers to include terms requiring arbitration and banning class actions, blocking access to the courts.⁶ Cases that previously would have been litigated and publicly recorded are now either diverted to private arbitration or, even more troublingly, not brought at all. As a practical matter, these decisions allow many businesses to sidestep large swathes of law.

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¹ *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010).

² *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011).

³ *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

⁴ See Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES, Oct. 31, 2015, <http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html> (quoting federal judge William G. Young).

⁵ Lydia DePillis, *One Huge Reason Why the Next Supreme Court Appointments Will Matter for Workers*, WASH. POST (Feb. 12, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/02/12/one-huge-reason-why-the-next-supreme-court-appointments-will-matter-for-workers/>.

⁶ Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623 (2012); Gilles, *Killing Them with Kindness: Examining Consumer-Friendly Arbitration Clauses after AT&T Mobility v. Concepcion*, 88 NOTRE DAME L. REV. 825 (2012); Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a ‘Privatization of the Justice System,’* N.Y. TIMES, Nov. 1, 2015, <http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html>. One study found that most franchisors have not adopted forced arbitration clauses in the wake of *Concepcion*, but, as the authors acknowledge, these findings “necessarily are limited to franchise agreements and may not be generalizable to consumer and employment contracts.” Peter B. Rutledge & Christopher R. Drahozal, “Sticky” Arbitration Clauses? *The Use of Arbitration Clauses after Concepcion and Amex*, 67 VAND. L. REV. 955 (2014).

Despite the gravity of these changes, forced arbitration has attracted relatively little public attention. One obstacle is that few Americans are even aware of the clauses that govern a growing number of contractual relationships in their lives.⁷ Another is that arbitration—as a legal issue at the intersection of contract law, civil procedure and federalism—can seem abstract and esoteric. Yet when the public *is* informed about this private system of justice, its opinion is clear: A recent poll of likely voters in the 2016 election found that a whopping 75% supported the right of bank customers to take complaints to court, rather than being forced into private arbitration.⁸

Apart from the presidential election and the heated debate over how to fill Justice Scalia's seat, the next several months also offer a more specific opportunity for reform: a new rule by the Consumer Financial Protection Bureau (CFPB) restricting forced arbitration in consumer finance contracts. Increased public attention will be critical to this process. Following its statutory mission,⁹ the CFPB in March 2015 released a study concluding that forced arbitration clauses have broadly suppressed consumer claims.¹⁰ In light of its findings, the CFPB is now considering rules that would ban companies from including clauses that block class actions. Although this policy would restrict these clauses in only one segment of the economy (consumer finance), it would be an important first step in restoring consumer rights in markets where information asymmetries and the general imbalance of power are most severe. Moreover, the move could set a compelling precedent and could spur other agencies as well as members of Congress to prohibit the practice in other arenas. This opening for reform means that now is the time for public pressure. As we saw most recently with the FCC's net neutrality rules, forceful public engagement on a regulatory issue can be decisive, emboldening officials to adopt strong rules even in the face of heavy corporate lobbying and attack.¹¹

Given the pressing need for public attention, this Issue Brief offers a fresh way to understand and talk about forced arbitration: as a wealth transfer. It argues that the rise and prevalence of forced arbitration clauses should be understood as both an outcome of and contributor to economic inequality, and that the national conversation about economic inequality should therefore include the debate over forced arbitration. Given the extreme levels of inequality in the United States—with the richest 0.1% of the country now holding the same share of national wealth as the bottom 90%¹²—the connection between arbitration and inequality is worth exploring in depth. Here, we

⁷ In a 2014 Consumer Financial Protection Bureau (CFPB) survey of credit-card holders, for example, half of all respondents said they did not know whether they had the right to sue their credit-card issuer in court, and more than a third of those who were bound by forced-arbitration clauses still believed, incorrectly, that they could take the company to court. CONSUMER FINANCIAL PROTECTION BUREAU, ARBITRATION STUDY § 3, at 19 (2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [hereinafter CFPB Study].

⁸ Americans for Financial Reform & Center for Responsible Lending, *1,000 Likely 2016 National Voters*, LAKE RESEARCH PARTNERS (2015), [HTTP://OURFINANCIALSECURITY.ORG/WP-CONTENT/UPLOADS/2015/07/TOPLINES.AFRCL.PUBLIC.070715.PDF](http://ourfinancialsecurity.org/wp-content/uploads/2015/07/TOPLINES.AFRCL.PUBLIC.070715.PDF) (poll of 2016 likely voters on Dodd-Frank Wall Street Reform and Consumer Protection Act and the activities of the CFPB).

⁹ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, Title X, § 1028, 124 Stat. 1376 (codified in 12 U.S.C.A. § 5518(a)).

¹⁰ See CFPB Study, *supra* note 7.

¹¹ Gautham Nagesh, *How HBO's John Oliver Helped Move the Needle on Net Neutrality*, WALL ST. J. (Feb. 5, 2015, 5:05 PM), <http://blogs.wsj.com/washwire/2015/02/05/how-hbos-john-oliver-helped-move-the-needle-on-net-neutrality/>.

¹² Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data*, NAT'L BUREAU OF ECON. RESEARCH Working Paper No. 20625, Oct. 2014.

examine this connection in three areas: antitrust, consumer protection, and wage-and-hour law. More generally, this Issue Brief seeks to draw attention to the distributive features and effects of civil procedure. While there is growing recognition that changes in areas of substantive law (banking law, for instance, or tax law) may contribute to inequality, less attention is paid to the role of procedural law. Those interested in addressing extreme wealth distribution should recognize procedures—including arbitration—as both a site and source of inequality.

The connection between inequality and arbitration exists, on the one hand, because many industries today are highly consolidated.¹³ Concentration at the firm level has handed a relatively small number of companies outsized influence over the contractual terms that govern most transactions. This same consolidation has further tilted the balance of power away from workers and consumers, rendering them largely captive to whatever contractual terms businesses choose to impose. On the other hand this connection also exists because, as this Issue Brief sketches out, arbitration has regressive effects. By both suppressing claims and yielding outcomes less favorable to workers and consumers, arbitration most likely transfers wealth upwards.

We follow in a long line of scholarship that recognizes our legal system as a mechanism of transferring wealth.¹⁴ Legal scholars Guido Calabresi and Richard Posner have discussed the distributive effects of tort law.¹⁵ Building on this idea, the business community has built an entire movement premised on the idea that tort law indefensibly transfers wealth from small business owners to trial lawyers.¹⁶ Although research estimating the actual effects of tort law on local economies is limited, “[t]he risks of tort liability allegedly include the unjustified transfer of wealth and the deterrence of valuable economic activity.”¹⁷

Scholars have similarly noted redistributive effects beyond tort law. When Congress passed the Copyright Term Extension Act—extending copyright protection on existing

¹³ Theo Francis & Ryan Knutson, *Wave of Megadeals Tests Antitrust Limits in the U.S.*, WALL ST. J., Oct. 18, 2015, <http://www.wsj.com/articles/wave-of-megadeals-tests-antitrust-limits-in-us-1445213306> (“A growing number of industries in the U.S. are dominated by a shrinking number of companies”); *How Mergers Damage the Economy*, N.Y. TIMES, Oct. 31, 2015 (“In too many industries, [] competition just doesn’t exist anymore.”); Lina Khan & Sandeep Vaheesan, *How America Became Uncompetitive and Unequal*, WASH. POST, June 13, 2014, https://www.washingtonpost.com/opinions/how-america-became-uncompetitive-and-unequal/2014/06/13/a690ad94-ec00-11e3-b98c-72cef4a00499_story.html; Jason Furman & Peter Orszag, *A Firm-Level Perspective on the Role of Rents in the Rise in Inequality*, Presentation at “A Just Society” Centennial Event in Honor of Joseph Stiglitz (Oct. 16, 2015).

¹⁴ This is not to suggest these scholars hold wealth distribution to be a primary aim of law; rather, they observe redistribution as an effect.

¹⁵ Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L. J. 499 (1961); GUIDO CALABRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (Yale Univ. Press ed., 1970); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (Little Brown & Co. ed., 1973).

¹⁶ For example, the Heritage Foundation describes how a Texas Supreme Court decision invalidating a cap on medical malpractice damages spurred a host of lawsuits, resulting in “[t]he economic transfer of wealth from professionals and business owners to plaintiffs’ lawyers.” Joseph Nixon, *Ten Years of Tort Reform in Texas: A Review*, 2830 HERITAGE FOUND. (July 26, 2013). A video from the U.S. Chamber Institute for Legal Reform, an arm of the U.S. Chamber of Commerce, captures generally the perspective animating the tort reform movement: “[T]oday we have become the global leader in excessive lawsuits, a distinction that costs our economy billions of dollars (\$264 billion)—that’s around \$850 per year for every man, woman, and child in the country. Excessive litigation hurts everyone and hampers America’s ability to compete in the global economy. Annually, litigation drains over \$100 billion from small business owners, the majority of whom must pass this burden on to consumers in the form of higher prices, or to their employees as benefit cuts and hiring freezes.” *What We Do*, U.S. CHAMBER INST. FOR LEGAL REFORM, <http://www.instituteforlegalreform.com/about-ilr/what-we-do> (last visited Jan. 7, 2016).

¹⁷ Frank B. Cross, *Tort Law and the American Economy*, 96 MINN. L. REV. 28 (2011).

copyrightable material by 20 years—experts described the law as a wealth transfer from individual users to large, rights-holding companies.¹⁸ Scholars have also argued that curbing unjust wealth transfers was a primary aim of the Sherman Antitrust Act.¹⁹ Others have even identified legal uncertainty writ large as transferring wealth from poor to rich.²⁰

This tradition is less developed in areas of procedural law. While the unequal effects of our civil procedure system on low-income and indigent litigants are acknowledged, rarely are changes to civil procedure itself framed as wealth transfers. Identifying the distributional effects of civil procedure not only clarifies the stakes of cases like *Concepcion*, but also may help draw public attention to issues that are by nature dry, obscure, and technical.

I. HOW WE GOT HERE: FORCED ARBITRATION’S HISTORY IN A NUTSHELL

Until the 1920s federal courts refused to enforce arbitration agreements. But in the early decades of the century, as the number of corporate transactions—and, by extension, disputes—grew, businesses wanted courts to give arbitration agreements the force of law.²¹ Arguing that arbitration would relieve congested courts, business interests lobbied Congress to let them set up private solutions that would be faster and cheaper than public courts. When officials expressed concern that arbitration would let “the powerful people... come in and take away the rights of the weaker ones,” supporters of arbitration legislation assured them that the device would be used only between consenting merchants of roughly equal bargaining power, and not against workers or consumers.²² In 1925, the Federal Arbitration Act (FAA) passed Congress with a unanimous vote.

For much of the twentieth century, arbitration largely worked as Congress had intended: to resolve the sorts of fact-based contractual disputes that arise between businesses in the course of routine transactions—concerning whether a party had complied with the terms of payment, for example, or delivered goods at the right place and right time.²³ Federal statutory claims were categorically outside the FAA’s reach, as were all claims brought by workers and all claims brought in state court. The insertion of arbitration clauses into mass contracts with consumers or workers was unheard of.

Starting in the 1980s, however, the U.S. Supreme Court issued a series of decisions that would begin to steer us down an entirely new path. One key moment came in 1983, when the Court declared that the FAA reflected a “federal policy favoring arbitration.”²⁴ The idea that Congress had intended arbitration as *preferable* to courts,

¹⁸ Richard E. Epstein, *Congress’s Copyright Giveaway*, WALL ST. J., Dec. 21, 1998 (“Removing these works from the public domain works a huge uncompensated wealth transfer from ordinary citizens to Disney, Time Warner and other holders, corporate and individual, of preexisting copyrighted material”).

¹⁹ Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982).

²⁰ Uri Weiss, *The Regressive Effect of Legal Uncertainty*, TEL AVIV UNIV. LAW FACULTY PAPERS 30 (2005).

²¹ Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99 (2006); IMRE SZALAI, *OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA* (Carolina Academic Press ed., 2013).

²² Moses, *supra* note 21, at 106-107.

²³ *Id.* at 111.

²⁴ *Moses H. Cone Mem’l Hosp. v. Mercury Constr.*, 460 U.S. 1 (1983).

rather than just as an alternative, was not founded in legislative history.²⁵ Still, the Court's language suggested as much, and future judges would lean on it as they razed the walls that had kept arbitration in its place.

Two successive decisions cemented what might have been a quirky deviation into a major turning point. In 1984, the Supreme Court heard a case brought in California by 7-Eleven franchisees against their parent company, Southland, which had included in their contracts a binding arbitration clause.²⁶ California outlawed these clauses, recognizing that franchisees usually lacked power to negotiate these terms. Yet Southland argued that its contract overrode state law. Drawing on the Court's interpretation from the previous year—that Congress had intended a “federal policy favoring arbitration”—a seven-to-two majority of the Supreme Court ruled for Southland, eroding the power of states to limit how companies use arbitration.

In a striking dissent, Justice Sandra Day O'Connor criticized the majority for ignoring legislative history. “Today's decision is unfaithful to congressional intent, unnecessary, and ... inexplicable,” she wrote. “Although arbitration is a worthy alternative to litigation, today's exercise in judicial revisionism goes too far.”²⁷

It would soon go farther. In 1985, the Supreme Court heard *Mitsubishi v. Soler Chrysler-Plymouth*, a case in which a car dealer had sued the Japanese firm for violating antitrust laws, and Mitsubishi had pushed to arbitrate.²⁸ The car dealer noted that the FAA allowed companies to use arbitration only to settle disputes about contracts they had written, not to interpret laws Congress had passed, like the Sherman Antitrust Act. A five-justice majority—continuing its recent pattern of pro-arbitration decisions—sided with Mitsubishi. Arbitrators could now rule on actual statutory law—civil rights, labor protections, as well as antitrust—despite having no accountability or obligation to the public.

In a powerful dissent, Justice John Paul Stevens warned that there were great dangers in allowing “despotic decision-making,” as he called it, to extend to law like antitrust. “[Arbitration] is simply unacceptable when every error may have devastating consequences for important businesses in our national economy, and may undermine their ability to compete in world markets,” he wrote.²⁹

In the span of these three decisions, the Supreme Court had drastically enlarged the scope of arbitration. And against the backdrop of a movement claiming excessive lawsuits were strangling small businesses, courts would continue to expand the realms in which companies could compel arbitration. In the 1995 case *Allied Bruce*, the Supreme Court permitted the use of arbitration clauses by companies in routine consumer contracts.³⁰ This prompted Justice O'Connor to remark that, “over the past decade, the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation.”³¹ In 2001, the Court ruled against a group of Circuit City workers, holding that employers could use arbitration clauses in contracts with employees

²⁵ See *Moses*, *supra* note 21.

²⁶ *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

²⁷ *Id.* at 36 (O'Connor, J., dissenting).

²⁸ *Mitsubishi v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985).

²⁹ *Id.* at 657.

³⁰ *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995).

³¹ *Id.* at 283 (O'Connor, J., concurring).

despite statutory language to the contrary.³² In 2004, a court ruled that arbitration clauses were enforceable against illiterate consumers;³³ a separate court ruled that they were enforceable even when a blind consumer had no knowledge of the agreement.³⁴

Yet the real landmark decision came in 2011, in *AT&T Mobility v. Concepcion*. Vincent and Liza Concepcion had sued AT&T in federal court in California, alleging that the company had engaged in false advertising by claiming that their wireless plan included free cell phones—a practice that had shortchanged millions of consumers out of about \$30 each. When they tried to litigate as a class, AT&T pointed to the fine print in their contract, which included a class action ban.

The Concepcions pointed out that class action bans violated California law. Many state and federal courts had forbidden class action bans, on the grounds that individuals often had no practical way to make a claim unless they joined with other plaintiffs to share the cost of litigating. Allowing companies to eliminate this right in “take-it-or-leave-it” contracts would effectively let corporations violate laws with little risk of accountability.

The district court and the Ninth Circuit Court of Appeals both ruled for the Concepcions, holding that AT&T’s terms were unconscionable and that nothing in the FAA preempted this arbitration-neutral rule of state law.³⁵ When the case reached the Supreme Court, eight state attorneys general, as well as a group of civil rights organizations, consumer advocates, employee rights groups, and prominent law professors, weighed in, arguing that permitting class action bans would enable companies to evade entire realms of law. But the Supreme Court, in a five-to-four split, ruled that AT&T’s contract was enforceable, opening the door for companies to ban class actions routinely in their fine print.

At this point, one limit on class action bans remained: if a ban eliminated the *only way* someone could bring a case, it would be unenforceable. But in 2013, the Supreme Court razed even this protection in a case pitting a group of small merchants—including Italian Colors, a family restaurant in Oakland, California—against American Express.³⁶ This time around, the same five-judge majority ruled that arbitration clauses containing class action bans were enforceable—even when it meant citizens had no way to “effectively vindicate” their rights and were left with no recourse.

II. HOW FORCED ARBITRATION TRANSFERS WEALTH UPWARDS

Given the Court’s decisions, forced arbitration clauses and class action bans are now a basic feature of form contracts. Amazon, Comcast, Wells Fargo, Ticketmaster,

³² *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). This decision is impossible to square with both the statutory text and legislative history. As one of the FAA’s architects explained in 1923:

It is not intended this shall be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now, that is all there is in this.

A Bill to Make Valid and Enforceable Written Provisions or Agreements for Arbitration, Hearing Before the Senate Judiciary Committee, 67th Cong. 9 (1923).

³³ *Wash. Mut. Fin. Grp. v. Bailey*, 364 F.3d 260, 264-66 (5th Cir. 2004).

³⁴ *Am. Gen. Fin. Servs., Inc. v. Griffin*, 327 F. Supp. 2d 678, 683 (N.D. Miss. 2004).

³⁵ *Laster v. T-Mobile USA, Inc.*, No. 05CV1167DMS AJB, 2008 WL 5216255, at *2 (S.D. Cal. Aug. 11, 2008) *aff’d sub nom*; *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009) *rev’d sub nom*. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

³⁶ *Italian Colors*, 133 S. Ct. at 2304.

Dropbox, Goldman Sachs, P.F. Chang's, and Uber are just some of the many businesses that have modified their contracts with consumers or workers to include these terms.³⁷ A CFPB report studying the prevalence and effects of arbitration found over 88% of mobile wireless contracts and 99% of storefront payday loans are now subject to forced arbitration.³⁸ As of 2010, 27% of the non-unionized American workforce was estimated to be subject to forced arbitration.³⁹ While we are not aware of more recent figures, and more empirical work is necessary, it seems fair to assume that this share has increased in the wake of decisions legalizing class action bans alongside forced arbitration.

Existing inequality both reflects and facilitates the growing prevalence of forced arbitration clauses. As described above, scores of industries today are oligopolistic, dominated by a handful of players. This level of concentration has handed a relatively small number of firms outsized influence over the contractual terms that govern most transactions. For example, Comcast and TimeWarner together control at least 57% of the national broadband market, and around 63% of Americans live in areas where they can choose only between these two providers.⁴⁰ Some cities—including Boston and the Twin Cities—are served by only one company, leaving residents with no choice at all.⁴¹ One or two companies, as a result, now set the contractual terms for a significant share of U.S. broadband consumers. The same is increasingly true of local hospitals, commercial banks, and airlines, to name a few. Under such diminished competition, consumers have no bargaining power and largely sign contracts on a take-it-or-leave-it basis.

Moreover, there is reason to believe that arbitration doesn't just reflect existing inequality, but further perpetuates it. Our litigation system, through which significant sums of money change hands, is a giant wealth-transfer mechanism. To our knowledge, no studies have tallied or even estimated the total amount exchanged. One of the best snapshots available is a study by Brian Fitzpatrick, who examined all of the class action settlements that occurred in 2006 and 2007.⁴² He found that district court judges approved 688 class action settlements over the two-year period, involving over \$33 billion in awards. Securities matters made up the biggest share of the settlements, followed by labor and employment, consumer, employee benefits, civil rights, debt collection, antitrust, commercial, and other.

³⁷ Myriam Gilles, *Killing Them with Kindness*, *supra* note 6; Jean R. Sternlight, *Disarming Employees: How American Employers are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309 (2015); Lina Khan, *Thrown Out of Court*, WASH. MONTHLY, June/July/Aug. 2014, http://www.washingtonmonthly.com/magazine/junejulyaugust_2014/features/thrown_out_of_court050661.php.

³⁸ CFPB Study, *supra* note 7, § 2, at 8.

³⁹ Fulbright Litigation Trends, *Fulbright's 7th Annual Litigation Trends Survey Report*, FULBRIGHT & JAWORSKI, LLP (2010), <http://adrresources.com/docs/adr/2-2-2188/informe-fulbright-2010-fulbright-jaworski-litigation-survey.pdf>.

⁴⁰ Shalini Ramachandran, *New FCC Broadband Benchmark Lifts Comcast's Share to Nearly 60%*, WALL ST. J. (Jan. 29, 2015, 5:17 PM), <http://blogs.wsj.com/corporate-intelligence/2015/01/29/comcast-bulks-up-on-broadband>. Others estimate their joint share could be as high as 75%. See William Conlow, *Quantifying Comcast's Monopoly Power*, TECHDIRT (Aug. 1, 2014), <https://www.techdirt.com/articles/20140726/10180428015/quantifying-comcasts-monopoly-power.shtml>.

⁴¹ Kate Cox, *Here's What the Lack of Broadband Competition Looks Like on a Map*, CONSUMERIST (Mar. 7, 2014), <http://consumerist.com/2014/03/07/heres-what-lack-of-broadband-competition-looks-like-in-map-form>.

⁴² Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811 (2010).

Because plaintiffs in securities class actions can span a host of groups—be it teachers unions whose savings are tied up in pension fund indexes or corporate managers whose salaries are largely paid through stock compensation—it is difficult to assess whether and how these suits redistribute in any one particular direction. With labor and employment, consumer, employee benefits, debt collection, and some antitrust cases, by contrast, it seems reasonable to assume that the sums won through these suits generally effect downward distribution.⁴³ Class action settlements comprise a small part of litigation outcomes as a whole, but, at minimum, Fitzpatrick’s numbers suggest that the sums transferred through litigation in total is quite large.

Below we explore how arbitration’s wealth transfer effects play out in three different areas: wage-and-hour law, consumer law, and antitrust.

A. WAGE THEFT

The growing prevalence of forced arbitration clauses in employee contracts significantly curbs workers’ ability to hold their employers accountable for labor violations. For example, at a time when, according to federal and state officials, “more companies are violating wage laws than ever before,”⁴⁴ workers have found themselves increasingly unable to recover stolen wages from their employers.⁴⁵

Wage theft occurs in several forms, and employers sometimes engage in multiple forms of violations simultaneously. Some employers pay workers less than the legally required minimum wage, fail to pay workers legally required rates for overtime work, or wrongfully deduct pay. In other cases, employers commit “off-the-clock” violations, requiring workers to come in early or stay late while failing to compensate them for that additional time. Laws against wage theft are massively under-enforced,⁴⁶ which means that joining a collective lawsuit is frequently a worker’s only means for rightful compensation. Forced arbitration clauses and class action bans block this vital path for redress, enabling employers to steal workers’ wages with impunity.⁴⁷ Because wage theft is already regressive, practices that enable it, like forced arbitration clauses, transfer wealth upwards.

⁴³ Granted, it is likely that enforcement of these laws will not *always* transfer wealth from poor consumers and workers to rich executives and stockholders. At least some lawsuits will be brought by consumers or employees who are richer than at least some managers or stockholders. And, as arbitration proponents frequently point out, it is theoretically possible that the amounts saved by companies in the form of litigation and settlement costs will be passed on to consumers in the form of lower prices. We are aware of no empirical research that shows this to be the case. Notably, the empirical analysis that does exist suggests the obverse: that forced arbitration clauses do not lead to lower consumer prices. In its arbitration study, the CFPB found that companies forced to drop their arbitration provisions did not go on to raise prices, despite facing greater exposure to class action litigation risk. CFPB Study, *supra* note 7, at § 10. On balance, therefore, we think the redistributive effects of these suits are progressive.

⁴⁴ Steven Greenhouse, *More Workers are Claiming ‘Wage Theft,’* N.Y. TIMES, Aug. 31, 2014, <http://www.nytimes.com/2014/09/01/business/more-workers-are-claiming-wage-theft.html>.

⁴⁵ Brady Meixell & Ross Eisenbrey, *An Epidemic of Wage Theft is Costing Workers Hundreds of Millions of Dollars a Year*, ECON. POL’Y INST. (Sept. 11, 2014), <http://www.epi.org/publication/epidemic-wage-theft-costing-workers-hundreds>.

⁴⁶ *Winning Wage Justice: An Advocate’s Guide to State and City Policies to Fight Wage Theft*, NAT’L EMP’T LAW PROJECT 17-18 (Jan. 2011), <http://www.nelp.org/content/uploads/2015/03/WinningWageJustice2011.pdf>.

⁴⁷ It is worth noting that some low-wage employers do not provide workers with contracts at all. These workers—usually the most vulnerable to wage theft—are therefore not directly affected by forced arbitration clauses and class action bans. The trend may still affect these workers in a broader sense, given that these contractual terms promote and normalize a general culture of impunity.

Experts estimate the sum of wages stolen nationally to be as high as \$50 billion a year, “a transfer from low-income employees to business owners that worsens income inequality.”⁴⁸ In Los Angeles, for example, low-wage workers lose \$26.2 million in wage theft violation every week, or \$1.4 billion annually.⁴⁹ In New York, meanwhile, wage theft is estimated to cheat 2.1 million workers across the state out of a cumulative \$3.2 billion in wages and benefits.⁵⁰ Nor is the phenomenon isolated to a handful of firms or industries. A 2009 study that surveyed more than 4,000 workers in low-wage industries found that 76% had been underpaid or not paid at all for their overtime hours.⁵¹ The report found that wage theft is prevalent across sectors—including retail, restaurants and grocery stores, domestic work, manufacturing, construction, janitorial, security, dry cleaning, laundry, car washes, and nail salons.⁵²

Through class action lawsuits, workers have recovered millions of dollars in unpaid wages from their employers. In 2009, for example, Walmart agreed to pay \$40 million in unpaid wages as part of a settlement with thousands of former and current employees.⁵³ To resolve a class action dispute, Staples paid \$42 million in back pay to its assistant store managers,⁵⁴ and Schneider Logistics paid \$21 million to its workers.⁵⁵ In other recent examples, New Jersey truck drivers filed suit and recovered \$2 million in back wages,⁵⁶ New York car wash workers \$3.5 million,⁵⁷ and cheerleaders for the Oakland raiders \$1.25 million.⁵⁸

Once a company introduces a forced arbitration clause with a class action ban, these suits vanish. A worker’s only chance at recourse then is individual arbitration, which studies suggest disfavor workers. For example, a 2011 study of employment arbitration outcomes found that the employee win rate in arbitration was lower than employee win rates reported in employment litigation trials, and that both the median and mean award amounts were “substantially lower” than award amounts reported

⁴⁸ Meixell & Eisenbrey, *supra* note 45.

⁴⁹ Ruth Milkman et al., *Wage Theft and Workplace Violations in Los Angeles: The Failure of Employment and Labor Law for Low-Wage Workers*, INSTIT. FOR RESEARCH ON LABOR AND EMP’T (2010), <http://www.labor.ucla.edu/downloads/wage-theft-and-workplace-violations-in-los-angeles-2>.

⁵⁰ Adivi Sen, *By a Thousand Cuts: The Complex Face of Wage Theft in New York*, CTR. FOR POPULAR DEMOCRACY (2015), <http://populardemocracy.org/sites/default/files/WageTheft%2011162015%20Web.pdf>.

⁵¹ Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in American Cities*, UNPROTECTED WORKERS, http://www.unprotectedworkers.org/index.php/broken_laws/index. (last visited Jan. 11, 2016).

⁵² *Id.*

⁵³ Dave Copeland, *Wal-Mart Will Pay \$40m to Workers*, BOSTON.COM (Dec. 3, 2009), http://www.boston.com/news/local/massachusetts/articles/2009/12/03/wal_mart_will_pay_40m_to_workers.

⁵⁴ Donna Goodison, *Staples to Pay \$42M to Settle Wage Claims*, BOSTON HERALD (Jan. 30, 2010), http://news.bostonherald.com/business/general/view/20100130staples_to_pay_42m_to_settle_wage_claims.

⁵⁵ *Carrillo v. Schneider Logistics*, 823 F. Supp. 2d 1040 (C.D. Cal. 2011).

⁵⁶ Erik Ortiz, *Raymour & Flanigan Drivers get \$2M for OT*, PRESS OF ATLANTIC CITY (July 8, 2009), http://www.pressofatlanticcity.com/business/article_394857c2-233c-517c-9dd2-fcf148daac8c.html.

⁵⁷ Libby Nelson, *Car Wash Chain to Pay \$3.4 Million in Back Wages*, N.Y. TIMES (June 30, 2009, 4:38 PM), <http://cityroom.blogs.nytimes.com/2009/06/30/car-wash-chain-will-pay-34-million-in-back-wages/>.

⁵⁸ Robin Abcarian, *Cheerleaders’ Wage-Theft Lawsuit to Cost Oakland Raiders \$1.25 Million*, L.A. TIMES (Sept. 4, 2014), <http://www.latimes.com/local/abcarian/la-me-ra-raiders-settle-cheerleader-lawsuit-20140904-column.html>.

in employment litigation.⁵⁹ This in itself suggests that forced arbitration in the employee context transfers wealth upwards.

Yet comparing outcomes in litigation and arbitration actually underestimates the regressive effect, since it fails to capture individuals dissuaded from initiating action altogether. Scholars observe that this sort of “claim suppression” is a primary effect of forced arbitration and class action bans.⁶⁰ Although some commentators argue that arbitration offers employees a more accessible venue for redress than litigation,⁶¹ “available empirical evidence now shows that mandatory employment arbitration is bringing about the opposite result—*eroding* rather than boosting employees’ access to justice by suppressing employees’ ability to file claims.”⁶² This evidence reveals that employees covered by forced arbitration provisions “almost never file arbitration claims.”⁶³

As a result, the class action recoveries workers obtained even a few years ago are increasingly out of reach. The claims of those who *do* file suit are usually dismissed, and fewer workers file suit at all.⁶⁴ Employers annually steal, and will continue to steal, billions of dollars from workers—yet arbitration clauses will keep workers from claiming any of it back. This interplay likely transfers wealth upwards.

B. CONSUMER CLAIMS

Research shows that forced arbitration is widespread across consumer markets; both academics and journalists have documented its prevalence in industries ranging from nursing homes and online retail to auto dealers and cell phone providers. For insight into the effects of arbitration in consumer markets, we look to the CFPB’s March 2015 study. The report is based on filings with the American Arbitration Association (AAA), which administers the vast majority of consumer financial arbitration cases. Although the report examines just one segment of the economy, it is by far the most comprehensive empirical study to date on outcomes in consumer arbitration.

The CFPB found that a large share of financial products and services are now subject to forced arbitration, including 44% of checking accounts, 83% of prepaid cards, 86% of private student loans, 88% of mobile wireless contracts, and 99% of storefront payday loans.⁶⁵ Over 85% of contracts with arbitration clauses include class action bans. Market concentration, meanwhile, magnifies the effects. For example, although only 16% of credit card issuers include arbitration provisions in their contracts, over 50% of credit card loans outstanding are subject to them.⁶⁶ Were it not for

⁵⁹ Alexander J. S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1 (2011).

⁶⁰ As David S. Schwartz writes, “[t]he compelling logic of what is commonly called ‘mandatory arbitration’ is that it is intended to suppress claims,” and “[n]othing is more claim-suppressing than a ban on class actions, particularly in cases where the economics of disputing make pursuit of individual cases irrational.” David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND L.J. 239, 240, 242 (2012). See also Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2015) (“The result has been the mass production of arbitration clauses without a mass of arbitrations. Although hundreds of millions of consumers and employees are obliged to use arbitration as their remedy, almost none do so—rendering arbitration not a vindication but an unconstitutional evisceration of statutory and common law rights”).

⁶¹ See, e.g., Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559 (2001).

⁶² Sternlight, *supra* note 37, at 1312.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ CFPB Study, *supra* note 7, § 2, at 8.

⁶⁶ *Id.* at § 2, at 10.

an antitrust settlement requiring certain credit card issuers to drop their arbitration provisions, the share of loans subject to arbitration would be 94%.⁶⁷

This rise of forced arbitration eliminates what had been a key means of consumer redress. Between 2008 and 2012, 422 consumer financial class action settlements garnered more than \$2 billion in cash relief for consumers and more than \$600 million in in-kind relief.⁶⁸ These figures underestimate the consumer benefit generated by these class action suits, given that several settlements also required companies to change their business practices. As the CFPB notes, cases “seldom provided complete or even any quantification of the value of this kind of behavioral relief.”⁶⁹ Nor does monetary relief capture the deterrence value of class action suits, the threat of which can serve as a powerful check on corporate wrongdoing.

So how do consumers fare under the new regime? Although various factors usually render it difficult to compare litigation and arbitration outcomes, the CFPB’s report includes a case study that resembles a controlled-experiment comparison. The study examines outcomes in a multidistrict class action, filed against twenty-three banks for illegally charging consumers millions of dollars in excessive overdraft fees.⁷⁰ In total, debit cardholders reached eighteen settlements through the litigation, resulting in \$1 billion in cash relief for over twenty-eight million consumers. Not all account holders were able to join the class, however, because nine of the twelve banks with arbitration clauses moved to enforce them. Five of the banks succeeded, getting their cases moved to arbitration, while four eventually chose to settle, giving individuals the chance to opt-out and arbitrate instead. As of February 2015, CFPB could not verify that any of the consumers who had pursued claims outside of the class action litigation—either because they had chosen to opt out or because banks had forced them to arbitrate—received any relief at all.⁷¹ In a class proceeding against one of the banks that had compelled arbitration, the arbitrator dismissed claimants’ contract and tort claims, and consumers were awaiting an answer on their federal statutory claims.⁷² Of the 242 opt-outs, no more than three consumers brought overdraft claims before the AAA, and any who might have lost.⁷³ Meanwhile, the twenty-eight million consumers who had secured settlements through litigation saw money transferred directly to their bank accounts.⁷⁴

Because information on both the opt-outs and those forced to arbitrate is incomplete, we cannot say with total certainty that those who pursued arbitration received no money at all. The thirty-two consumers who won money awards from AAA arbitrators in 2010 and 2011 *could* have included victims of unfair overdraft fee practices. But even the most generous reading of these outcomes strongly suggests that arbitration is an inferior means of redress for consumers than is class action litigation. That a

⁶⁷ *Id.* at § 2, at 9-11.

⁶⁸ *Id.* at § 1, at 16.

⁶⁹ *Id.*

⁷⁰ *Id.* at § 8, at 39-46 (discussing *In Re Checking Account Overdraft Litig.*, MDL 2036. 685 F.3d 1269 (11th Cir. 2012)).

⁷¹ Specifically, 173 consumers opted out of the settlement with Chase, thirty-four opted out of the settlement with M&I, and thirty-five opted out of the settlement with Compass Bank. *Id.* at App. A, at 108-09.

⁷² *Id.* at § 5, at 86-87.

⁷³ “No more than three” because CFPB does not know precisely whether the three opt-outs that did go on to file claims through arbitration had been involved in the overdraft litigation specifically, or some other class action suit. *Id.* at App. A, at 104.

⁷⁴ *Id.* at § 8, at 40 & 45-46.

maximum of *three* of the 242 opt-outs moved to arbitrate, too, suggests that forced arbitration suppresses claims.⁷⁵

Moreover, arbitration seems to favor businesses over consumers not just relative to litigation, but in an absolute sense too: the CFPB found that, within arbitration, companies are far more successful than consumers. According to the Bureau's report, businesses won relief in 93% of the business-initiated cases in which arbitrators reached a decision on the merits. In the disputes that businesses won, they received ninety-eight cents for every dollar they had claimed; taking into account the disputes where they lost, they recovered ninety-one cents for every dollar claimed. In disputes initiated by consumers, by contrast, arbitrators provided relief to consumers in 27% of cases and awarded them an average of forty-seven cents for every dollar claimed. Among consumer-initiated disputes as a whole, consumers won an average of thirteen cents for every dollar they had claimed.⁷⁶ While a host of factors may account for the disparity in outcomes, it seems fair to conclude that businesses are satisfied with arbitrator decisions at higher rates than are consumers.

The distributive implications of forced arbitration in consumer finance seem clear. As more cases are diverted to arbitration, consumers will likely both win at lower rates and receive lower sums than they would through class action litigation. The cost of bilking consumers—be it by design or through negligence—will drop, given that consumers pursue claims through arbitration at far lower rates than they do through litigation, and those who do file arbitration claims seem to be less successful. Moreover, because arbitration proceedings are private, businesses shed the risk of reputational damage. So long as wrongful acts are sufficiently lucrative, firms can build in the occasional arbitration payment as a cost of business. As financial institutions can acquire greater sums from consumers with greater impunity, wealth is transferred upwards.

The distributive implications of forced consumer arbitration are especially pronounced given that the primary users of payday loans and prepaid cards—which include arbitration clauses at particularly high rates—are low-income consumers. This suggests that those most vulnerable to exploitation by financial institutions are those most likely to lack effective redress.

C. ANTITRUST

One area of law especially vulnerable to the preclusive effects of arbitration is antitrust. A primary example of this dynamic was at play in *Italian Colors*, the case in which a small business owner alleged that American Express was illegally abusing its market power. Troublingly, firms that possess monopoly power can enact a sort of “double punch” by imposing arbitration terms that insulate the abuse of that same power. As Justice Kagan warned in her dissent in that case, “The monopolist gets to use its

⁷⁵ Anecdotes suggest that defense lawyers recognize the suppressive effect of arbitration clauses. As a recent news story reported, “[Lawyers believe] they may have found, in the words of one law firm, the ‘silver bullet’ for killing off legal challenges. In an industry podcast, two lawyers discussed the benefits of using arbitration to quash consumers’ lawsuits. The tactic, they said, is emerging at an opportune time, given that debt collectors are being sued for violating federal law. The beauty of the clauses, the lawyers said, is that often the lawsuit ‘simply goes away.’” Jessica Silver-Greenberg & Michael Corkery, *Sued Over Old Debt, and Blocked From Suing Back*, N.Y. TIMES, Dec. 22, 2015, <http://www.nytimes.com/2015/12/23/business/dealbook/sued-over-old-debt-and-blocked-from-suing-back.html>.

⁷⁶ These figures exclude cases in which consumers were disputing debts they were alleged to owe. Including outcomes in those disputes, consumers won some form of relief in 20% of cases and recovered an average of twelve cents for every dollar they claimed. CFPB Study, *supra* note 7, at § 5, at 41-45.

monopoly power to insist on a contract effectively depriving its victims of all legal recourse.”⁷⁷ In this way, “a company could use its monopoly power to protect its monopoly power, by coercing agreement to contractual terms eliminating its antitrust liability.”⁷⁸

In *Italian Colors*, American Express achieved just that, by coupling a forced arbitration clause with a class action ban. Because proving antitrust damages today requires costly economic analysis, private plaintiffs generally cannot bring suits unless they can split expenses, be it through joining as a class or sharing costs some other way. Since American Express had effectively prohibited all cost-sharing arrangements, upholding the arbitration clause would deprive the plaintiff of any economically viable way to pursue a claim. By ruling for American Express, the Court handed firms a tool to deflect private antitrust suits—a gift for monopolistic companies, who can use their market power to impose contractual terms that shield abuses of that same market power from liability.

Two consequences stand out: first, antitrust enforcement suffers as a whole, and second, this erosion of antitrust enforcement transfers wealth from low-income to high-income individuals.

Although the Court’s holding enables firms to deflect only *private* suits, there’s sound reason to think that a fall-off in private claims will injure enforcement as a whole. For one, private litigation has been a traditional mainstay of antitrust enforcement. Indeed, Congress even designed the antitrust statutes in order to promote private suits, not only creating a private right of action but also awarding private parties treble damages and injunctive relief. As the Court has noted, Congress created these private rights “not merely to provide private relief” but “to serve as well the high purpose of enforcing the antitrust laws.”⁷⁹ Moreover, “Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws.”⁸⁰ Second, private and public enforcement often work in conjunction, as public officials draw on information revealed through private suits to build their own cases.⁸¹ Anemic private enforcement undermines the antitrust statutes as a whole.⁸²

Weaker antitrust, in turn, exacerbates economic inequality, by enabling wealth transfers from consumers, workers, and small businesses to the executives and shareholders of large firms. While the connection between extreme market concentration and wealth distribution has been overlooked for decades, the current inequality crisis is drawing new attention to the ways in which undue market power transfers wealth upwards.⁸³

Abuse of market power contributes to inequality in a number of ways. Most obviously, monopolistic and oligopolistic firms often hike consumer prices. For example,

⁷⁷ *Italian Colors*, 133 S. Ct. at 2313 (Kagan, J., dissenting).

⁷⁸ *Id.* at 2314.

⁷⁹ *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 130–31 (1969).

⁸⁰ *Minn. Mining & Mfg. Co. v. N.J. Wood Finishing Co.*, 381 U.S. 311, 318 (1965).

⁸¹ Joshua P. Davis & Robert H. Lande, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement*, 48 GA. L. REV. 1 (2013).

⁸² Einer Elhauge, *How Italian Colors Guts Private Antitrust Enforcement by Replacing it with Ineffective Forms of Arbitration*, 38 FORDHAM INT’L L.J. 771 (2015).

⁸³ See, e.g., Khan & Vaheesan, *supra* note 13; Robert Reich, *The Political Roots of Widening Inequality*, AM. PROSPECT (Spring 2015), <http://prospect.org/article/political-roots-widening-inequality>; ROBERT REICH, *SAVING CAPITALISM: FOR THE MANY, NOT THE FEW* (2015); Dave Dayen, *Bring Back Antitrust*, AM. PROSPECT (Fall 2015), <http://prospect.org/article/bring-back-antitrust-0>; Jason Furman & Peter Orszag, *A Firm-Level Perspective on the Role of Rents in the Rise in Inequality*, NAT’L BUREAU OF ECON. RESEARCH, Oct. 16, 2015; Paul Krugman, *Challenging the Oligarchy*, N.Y. REVIEW OF BOOKS, Dec. 17, 2015, <http://www.nybooks.com/articles/2015/12/17/robert-reich-challenging-oligarchy/> (reviewing Robert Reich’s *Saving Capitalism: For the Many, Not the Few*).

a host of studies documents how consolidation across the healthcare industry has enabled hospitals, health insurers, and pharmaceutical companies to charge consumers more for the same goods and services.⁸⁴ Businesses also use their dominance to suppress workers' wages. In 2006, for instance, around 20,000 registered nurses filed a class action suit alleging that hospitals in and around Detroit had colluded to keep their wages low. Three hospitals settled for more than a combined \$48 million; litigation against a fourth is still pending. Similarly, in 2010, a group of high-tech companies—including Adobe, Apple, Google, Intel, Intui, and Pixar—were found to have squashed competition by agreeing not to poach or solicit each other's employees. Four of the firms ultimately settled a private suit for \$415 million, providing relief to 64,000 software engineers. Lastly, firms with monopoly power can extract wealth from smaller businesses. *Italian Colors* originated in a suit brought by Alan Carlson, the owner of a family restaurant in Oakland, California, who alleged that American Express had been using its monopoly power in premium and corporate credit cards to force merchants to accept ordinary cards at much higher rates than what rivals charged. An economist analyzing the excess fees charged to the *Italian Colors* plaintiffs estimated that the company's tactics cost Carlson's restaurant nearly \$500 a year—a transfer of income from his business to American Express.⁸⁵

Since forced arbitration clauses and class action bans tend to preclude private anti-trust suits, the rise of arbitration will enable firms with monopolistic power to abuse that power with greater impunity. Insofar as anticompetitive behavior transfers income from consumers, workers, and small businesses to the owners and managers of larger firms, the expansion of arbitration will lead to regressive wealth distribution.

III. CHANGE ON THE HORIZON

After a decade of rampant growth in the reach of forced arbitration clauses, several promising developments are finally on the horizon. In the courts, a shifting balance of power following the appointment of a replacement for Justice Scalia could break the narrow, five-to-four majority that has handed so many victories to corporate supporters of mandatory arbitration. Given statutory *stare decisis*, however, even a change in the Court's personnel will not be enough.

Promising efforts are now underway in other branches of government to roll back the Supreme Court's recent expansion of forced arbitration. The most promising development, as noted above, is that the CFPB is currently formulating rules to curb class action bans in consumer finance contracts. The agency is expected to issue a Notice of Proposed Rulemaking in the coming months. In October 2015, the agency's Small

⁸⁴ Zack Cooper et al., *The Price Ain't Right? Hospital Prices and Health Spending on the Privately Insured*, HEALTH CARE PRICING PROJECT, Dec. 2015; Leemore Dafny et al., *More Insurers Lower Premiums: Evidence from Initial Pricing in the Health Insurance Marketplaces*, NAT'L BUREAU OF ECON. RESEARCH Working Paper No. 20140, May 2014.

⁸⁵ Joint App. at 96, *Italian Colors*, 133 S. Ct. 2304 (No. 12-133), available at <http://guptawessler.com/wp-content/uploads/2012/05/12-133ja.pdf>. While Carlson's complaint focused on the swipe fee costs incurred by merchants—and hence the transfer of wealth from small businesses to credit card companies—the swipe fee system more generally institutes a systemic wealth transfer from low-income to high-income consumers. This is because credit card use is strongly correlated with consumer income, and merchants pass on swipe fees in the form of higher retail prices to all customers. Cash buyers therefore end up subsidizing the cost of credit cards, while lacking access to the rewards and financial perks that credit card users enjoy. The Boston Federal Reserve estimates that the swipe fee system generates a yearly transfer of \$1,282 from the average cash payer to the average card payer. Scott Schuh et al., *Who Gains and Who Loses from Credit Card Payments?: Theory and Calibrations*, FED. RESERVE BANK OF BOSTON PUB. Policy Paper No. 10-03, Aug. 31, 2010, <https://www.bostonfed.org/economic/ppdp/2010/ppdp1003.pdf>.

Business Advisory Review Panel released an outline of proposals that hints at what the Bureau is likely to consider. At the top of the agenda was a regulation barring class action bans—returning to consumers the ability to band together and hold companies accountable, either in court or in arbitration. The panel also committed to continuing to study arbitration, proposing a regulation requiring companies to submit data on claims filed and awards won in mandatory arbitration proceedings. Not on the table, for the moment, is any total ban on mandatory arbitration clauses or more surgical restrictions on features such as prospective waivers of federal statutory rights, clauses requiring excessive fees, or clauses requiring arbitration in distant venues.⁸⁶ And, given that CFPB’s purview is limited to consumer finance, even a complete ban on forced arbitration by the agency would fail to limit the use of arbitration in other consumer contexts, in employment, and in most antitrust cases.

A more direct way to address the use of forced arbitration, of course, would be for Congress to amend the Federal Arbitration Act. Some members of Congress have sought to do just that with two bills introduced in the years since the Supreme Court’s pro-arbitration decisions. The Arbitration Fairness Act, introduced in 2015, would amend the FAA to bar the enforcement of mandatory pre-dispute arbitration clauses in cases involving consumer rights, worker rights, civil rights, and antitrust—all categories, the proposed bill notes, in which individuals or potential classes of individuals now “have little or no meaningful choice whether to submit their claims to arbitration.”⁸⁷ And, in February 2016, a bipartisan group of Senators introduced a far broader bill, the Restoring Statutory Rights and Interests of the States Act. Concluding that *Concepcion* and *Italian Colors* have resulted “in millions of people in the United States being unable to vindicate their rights in State and Federal courts,” this proposed legislation would amend the FAA to ban enforcement of pre-dispute arbitration clauses in cases involving any “individual or small business concern.”⁸⁸ Although these broad bills have little chance of enactment in the foreseeable future, they do help generate attention and lay down a marker for future progress. They may also help lead to more targeted legislation for politically favored groups—such as nursing home patients, farmers, or veterans.

It’s important that public interest advocates publicize efforts on both fronts, supporting efforts by both the CFPB and Congress, and injecting arbitration into the Supreme Court confirmation fight. Because the U.S. Chamber of Commerce is already gearing up to attack any potential rules,⁸⁹ public engagement will be critical.

We offer this Issue Brief partly in an effort to facilitate that public engagement. Understanding the regressive effects of arbitration enables advocates to frame the problem not only as a deprivation of venerated procedural rights but also as a massive upwards wealth transfer—a useful hook, given that economic inequality tops many debates in policy and politics today. We offer it, too, to illustrate the more general point that the distributive effects of civil procedure deserve close and extensive

⁸⁶ CONSUMER FINANCIAL PROTECTION BUREAU, SMALL BUSINESS ADVISORY REVIEW PANEL FOR POTENTIAL RULEMAKING ON ARBITRATION AGREEMENTS 2–3 (2015), http://files.consumerfinance.gov/f/201510_cfpb_small-business-review-panel-packet-explaining-the-proposal-under-consideration.pdf.

⁸⁷ Arbitration Fairness Act of 2015, H.R. 2087, 114th Cong. § 2(3) (2015).

⁸⁸ Restoring Statutory Rights and Interests of the States Act of 2016, S. 2506, 114th Cong. §§ 2(a)(3), 3(a)(2) (2016).

⁸⁹ Evan Weinberger, *Coming CFPB Arbitration Rules Face Multiple Legal Fights*, LAW 360 (Oct. 7, 2015), <http://www.law360.com/articles/711916/coming-cfpb-arbitration-rules-face-multiple-legal-fights>; Jessica Silver-Greenberg & Michael Corkery, *Efforts to Rein in Arbitration Come Under Well-Financed Attack*, N.Y. TIMES, Nov. 15, 2015.

examination. Though there is growing recognition that changes in substantive law and legal regimes helped usher in the extreme levels of inequality we see today, the role of procedure is understudied. That needs to change. As Congressman John Dingell once said, “I’ll let you write the substance, you let me write the procedure, and I’ll screw you every time.”⁹⁰

ABOUT THE AUTHORS

Deepak Gupta is the founding principal of Gupta Wessler PLLC, an appellate litigation boutique in Washington, DC, with an emphasis on workers’ and consumers’ rights, class actions, and constitutional law. As an advocate in key battles over forced arbitration, he argued before the U.S. Supreme Court for the respondents in *AT&T Mobility v. Concepcion*, represented a nationwide class of merchants in *American Express v. Italian Colors*, and has supported policy solutions through Congress and the Executive Branch. Before founding his firm in 2012, Gupta served as Senior Litigation Counsel and Senior Counsel for Enforcement Strategy at the Consumer Financial Protection Bureau at the agency’s founding. For seven years previously, he was an attorney at Public Citizen Litigation Group, where he founded and directed the Consumer Justice Project and was the Alan Morrison Supreme Court Project Fellow. Gupta is also an Adjunct Professor of Law at Georgetown and American universities.

Lina Khan is a fellow with the Open Markets Program at New America, where she researches industry consolidation and its political economic effects, with a particular focus on the connection between market structure and democracy, and the evolution of antitrust law. She has written for *The American Prospect*, *New Republic*, *Quartz*, *Salon*, *Washington Monthly*, and *The Washington Post*, among other publications. While a reporter and policy analyst with New America, Khan published a major feature story on the growing problem of forced arbitration for *Washington Monthly*’s summer 2014 issue. She also served as policy director for Zephyr Teachout’s 2014 gubernatorial campaign in New York. Khan studied political theory at Williams College and is presently a student at Yale Law School. She was a summer associate at Gupta Wessler PLLC in 2015.

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⁹⁰ *Regulatory Reform Act: Hearing on H.R. 2327. Before the Subcomm. on Admin. Law and Governmental Regulations of the House Comm. on the Judiciary*, 98th Cong. 312 (1983) (statement of Rep. John Dingell).

The New Normal: Unprecedented Judicial Obstruction and a Proposal for Change*

Michael Gerhardt and Richard Painter

As President Barack Obama enters the last few months of his second term, his judicial nominees have been facing unprecedented obstruction. Although he has had more judges confirmed than President George W. Bush—329 to 327—including two Supreme Court appointments, President Obama is on track, because of Senate obstruction, to have the lowest rate of judicial confirmations for a president in the latter two years of his term since the early 1950s. The obstruction has gone further, denying any confirmation hearings whatsoever for President Obama’s nomination of D.C. Circuit Chief Judge Merrick Garland to fill the Supreme Court seat vacated as a result of Justice Antonin Scalia’s death in mid-February 2016. The delay in getting any Senate action on the Garland nomination, which was made in March, is now the longest in history for a Supreme Court nomination.

None of the mechanisms adopted within the Senate to prevent a minority within the body, even a substantial one, from stifling the process, address the newest form of obstruction. More than a decade ago, in 2005, the Gang of 14¹—a group of seven Republicans and seven Democrats—forged a deal to prevent a change in the Senate rules on filibusters and to ensure Senate action on pending judicial nominations unless there were “extraordinary circumstances.” Unfortunately, within a few years, several of the brokers of the deal left the Senate (and the Gang), the definition of what constitutes “extraordinary circumstances” was easily manipulated, and obstruction increased. Indeed, it increased to the point at which a majority of the Senate in 2013, then under Democratic control, took the extreme step of approving an understanding of the Senate that lowered the number of votes needed to overcome filibusters of lower court and executive branch nominations from a super majority of 60 to a simple majority within the Senate. The virtual dismantling of judicial filibusters strengthened majority control over the judicial confirmation process, but it left open exactly the circumstances undermining the judicial confirmation process today—a majority’s determination to shut down entirely the judicial confirmation process, even for the Supreme Court, for what can only be called purely partisan reasons and indisputably at the expense of a strong, independent federal judiciary.

In fact, there are 54 of President Obama’s judicial nominations pending before the Senate, including one to the U.S. Supreme Court and seven to the federal courts of

* This issue brief was initially published in October 2016.

¹ The members of the Gang of 14 were Senators Robert Byrd (D-WV); Lincoln Chafee (R-RI); Susan Collins (R-ME); Mike DeWine (R-OH); Lindsey Graham (R-SC); Daniel Inouye (D-HI); Mary Landrieu (D-LA); Joseph Lieberman (D-CT); John McCain (R-AZ); Ben Nelson (D-NE); Mark Pryor (D-AR); Ken Salazar (D-CO); Olympia Snowe (R-ME); and John Warner (R-VA). See Michael Gerhardt & Richard Painter, “Extraordinary Circumstances:” *The Legacy of the Gang of 14 and a Proposal for Judicial Nominations Reform*, AM. CONST. SOC’Y 1 n.1 (Nov. 2011), www.acslaw.org/sites/default/files/Gerhardt-Painter_-_Extraordinary_Circumstances.pdf.

appeal, while 108 total current and known future vacancies judicial vacancies remain, 35 of which are considered emergencies based upon, among other things, extremely high caseloads.² With the unprecedented lack of action on Judge Garland's pending nomination, the Supreme Court is also understaffed, with only eight justices, and thus prone to avoid taking—or being able to resolve in any clear, enduring way—significant constitutional disputes over whose resolution the justices might have differing views. A Court with eight justices is paralyzed or ineffective in close cases, and the precedent created by this unprecedented obstruction, which has nothing to do with the nominee's qualifications, but rather simply aims to bar a president of the opposite party from ever filling the vacancy, is likely to have only disastrous consequences for the Court, the Constitution, and the nation. It ushers in an era in which payback will become the new normal in the judicial selection process.

In this Issue Brief, we analyze the institutional obstruction of judicial nominations by a majority in the Senate, particularly in the form of doing nothing, and offer a modest proposal for facilitating a process that would give nominees the hearings they deserve and increase the likelihood that each level of the federal judiciary is at full strength. Most important is the imperative that each nominee receives a prompt hearing and an up-or-down vote so either the vacancy is filled or, if the majority chooses to reject the nominee, the president can nominate someone else to fill the vacancy. In the first part, we briefly examine the origins and consequences of the current obstruction of judicial nominations. In Part II, we propose a standard for the Senate to follow in its consideration of judicial nominations, namely, for senators to commit themselves to ensuring a fair process for every nominee, including giving a hearing to every qualified nominee and to stating openly their reasons for or against confirmation. In the final part, we argue that this standard not only fits within the finest traditions of the Senate but also ensures that the federal judiciary does not become a hostage in the partisan warfare that unfortunately characterizes far too much of the legislative process. We challenge senators to forego inaction as an option on judicial nominations and instead to commit themselves openly to a fully staffed judiciary and to go on the record to explain the reasons for their support—or opposition to—particular nominations, including those to the United States Supreme Court.

I. THE RISE AND CONSEQUENCES OF MAJORITARIAN OBSTRUCTION

While a majority vote of the Senate is the only way for a judicial nomination to be confirmed, there are many ways to defeat one. First, the full Senate could vote to reject the nomination. In fact, the Senate has rejected nearly one in five Supreme Court nominations, and the Senate has rejected many other judicial nominations. The most recent instance in which the Senate rejected a lower court nomination was the Senate's 1999 rejection of President Clinton's nomination of Ronnie White to a U.S. District Court judgeship in Missouri.³ Second, the full Senate could not take any action or table a nomination. However, with respect to the Senate's doing this with respect to the Supreme Court one would have to go as far back as the 1800s, when the Senate tabled or took no action and therefore effectively nullified, several Supreme Court nominations, including President Jackson's nomination of Roger Taney as an Associate

² *Judicial Emergencies*, U.S. COURTS ADMIN. OFF., <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/JudicialEmergencies.aspx>.

³ Judge White was subsequently renominated by President Obama and confirmed in 2014.

Justice of the Supreme Court.⁴ Moreover, the Senate may still filibuster a Supreme Court nomination, which, in fact, has been done only once: to prevent then-Justice Abe Fortas from becoming Chief Justice, an action that had no impact on the number of voting justices on the Court. Third, the Senate Judiciary Committee could vote to reject a nomination or the Committee Chair could fail to take a final vote—or, for that matter, any other action, including holding a hearing—on a nomination. Indeed, any individual senator within the majority, particularly any on the Judiciary Committee, may place a hold on a nomination or take advantage of the blue slip process, which allows a senator within the majority to defeat any nomination to a judgeship within his or her own state by simply choosing not to return the blue slip form. And, of course, the Senate Majority Leader controls the flow of business onto the Senate floor and in committees and therefore may refuse at any time, on behalf of his caucus, to allow any action, in a committee or otherwise, on a nomination.

Within the last year, the most troubling instance of this latter form of obstruction is the current Majority Leader Mitch McConnell's decision not to hold any confirmation proceeding for anyone nominated by President Obama to the Supreme Court. Indeed, Senator McConnell announced this obstruction within hours of Justice Scalia's death in February, weeks before President Obama nominated Chief Judge Merrick Garland of the U.S. Court of Appeals for the District of Columbia. Though several Republican senators had encouraged the President to consider Judge Garland for the vacancy, and the nominee has won the highest possible ratings from the American Bar Association and praise from other judges (including the Chief Justice of the United States), the Senate Judiciary Committee, led by Senator Chuck Grassley, scheduled no hearings on the nomination and none is now possible until after the election. The stated reason for the opposition is to give the American people the opportunity to choose which president they want to make the nomination, and many senators who support the obstruction maintain that it is unusual in a presidential election year for the Senate to hold hearings, much less confirm, a Supreme Court nominee.

To be sure, there is no good precedent for the Senate to delay a Supreme Court nomination until the outcome of the next presidential election. In American history, 19 presidents have made Supreme Court appointments during presidential election years or in the lame duck sessions after the election. Among the most famous of these is President John Adams' appointment of John Marshall as Chief Justice a few months after he had been defeated for reelection in 1800. In the 20th century, five presidents have made Supreme Court appointments during presidential election years, including 1916 (during which President Wilson made two Supreme Court nominations, including Louis Brandeis) and 1988 (during which the Senate confirmed President Reagan's nomination of Anthony Kennedy to the Supreme Court). In the last 100 years, every Supreme Court nominee, except for two, has received a hearing before the Senate Judiciary Committee, and the two exceptions—Douglas Ginsburg and Harriet Miers—withdrawed their nominations prior to any hearings.

The costs of a majority's refusing to act—indeed, refusing to take action of any kind—on judicial nominations are high, particularly when the obstruction is, as it

⁴ President Jackson later successfully nominated Taney to be Chief Justice of the United States. Such obstructionist conduct by the Senate can be a symptom of— or the cause of—political crisis and instability. The 1830s through 1860s are an example of a response to a growing political crisis. But our Country's political stability is undermined if every time a political faction does not get what it wants it claims that the country is in a constitutional crisis and that each branch of government should hunker down to protect itself from the other two.

plainly is now, not based on a nominee's credentials or merit. First, it leaves federal courts understaffed, as the Supreme Court has been since the middle of February 2016. Unfortunately, it is unlikely the Senate will take action on the Garland nomination—or any other nomination to the Supreme Court—before early next spring. The Senate Majority Leader has dismissed any chance for the Senate to consider Garland after the election, though some senators from within his party have raised the possibility. Even so, confirmation hearings take time to plan, the Committee would need time to vote and issue its report, and there would have to be a debate and a vote on the floor of the Senate. All that takes time, though there is enough time after the presidential election to hold a hearing on Judge Garland's nomination, given his strong support across the political spectrum and unquestionable qualifications.

Second, the inaction is not grounded in a defensible principle and does not do the Senate credit. Even if senators agree not to allow a vote on a judicial nomination until after the election, they do not question the nominee's credentials or qualifications. While some senators defend their opposition by contending that the American people should choose which president will make the next Supreme Court nomination(s), it is unclear how many, if any, of them would actually defer to the voters' choice of placing that responsibility in the hands of their chosen president. Some senators have insisted on the need to ensure the next nominee is like Justice Scalia in his approach to interpreting the Constitution, but depending upon who wins the next election, this prospect could be remote. Come the first week in November, some of these senators may wish they had not rolled the obstruction dice and instead had given Judge Garland a fair hearing and a vote. Furthermore, if voters are angry with the obstruction, it could affect the outcome of the November elections, including to the Senate itself.

The prospect of the Senate's approving no one is not out of the question, but the failure of the Senate to confirm anyone to fill a Supreme Court vacancy is ultimately an attack on the Court itself. That degree of obstruction weakens the courts as a third, independent branch, for it leaves the Court with only eight justices and thus prone to four-to-four decisions that have no legal significance. If the obstruction goes further to block other Supreme Court vacancies from being filled, the Court will become even more under-staffed and incapable of performing the unique functions that the Constitution had vested in "one" Supreme Court. Furthermore, if one of the remaining justices has to recuse from a case because of a conflict involving a party (whether because of stock ownership or some other reason), the Court could decide a case with a 4-3 vote, setting itself up for possible reversal of its own opinions once the Court is fully staffed with nine justices and there is another case involving different parties but the same legal issue.

Third, well-qualified, well-meaning judicial nominees at every level are subject to distortions of their records and their characters. President Obama—like Presidents Bill Clinton and George W. Bush before him—has in all or almost all instances taken care to nominate to judgeships people whose qualifications and views of the law are within the mainstream of American jurisprudence. The American Bar Association, among other organizations, has given the highest possible ratings for virtually all of the nominations that have been obstructed, including that of Merrick Garland to the Supreme Court. None of the President's judicial nominees have threatened the basic doctrine of American law or shown resistance to following settled Supreme Court precedent, much less any serious ethical breaches. For the most part, President Obama's nominees, like the judicial nominations made by Presidents Clinton and Bush, have been widely admired by people from both parties, and all of them have come from the mainstream of practice, judicial service, or teaching.

Fourth, the obstruction of President Obama's judicial nominees, including Judge Garland for the Supreme Court, is establishing a terrible precedent. If a qualified nominee's philosophy is not far outside the mainstream and poses no threat to established legal doctrine or the proper functioning of American courts, and if a nominee has committed no serious ethical breaches, an appropriate basis for objecting to a nomination likely does not exist. An appropriate basis for obstructing the nomination so senators will not even have a chance to vote on it clearly does not exist. Obstruction under such circumstances merely damages the federal courts, including the Supreme Court, holding them, in effect, as hostages or collateral damage in ongoing partisan warfare. Under our Constitution, the federal courts are the only branch of the national government that is meant to be above politics not a captive to it.

II. ANOTHER PROPOSAL FOR REFORM

Senators and commentators have long called for reform of the judicial confirmation process. While the majority's dismantling of filibusters of lower court judicial nominations is the most recent successful reform of the process, the Senate has yet to provide a floor vote on every judicial nomination, which has been the express goal of many senators. Indeed, the arguments that Senator John Cornyn made against filibustering lower court nominations are as apt today as they were when he expressed them in 2003:

Instead of fixing the problem [with the judicial confirmation process], we nurse old grudges, debate mind-numbing statistics, and argue about who hurt whom first, the most, and when. It is time to end the blame game, fix the problem, and move on. Wasteful and unnecessary delay in the process of selecting judges hurts our justice system and harms all Americans. It is intolerable no matter who occupies the White House and no matter which party is the majority party in the Senate. Unnecessary delay has for too long plagued the Senate's judicial confirmation process. And filibusters are by far the most virulent form of delay imaginable.⁵

Unfortunately, Senator Cornyn changed course and in 2011 voted to support a filibuster of Goodwin Liu's nomination to the Ninth Circuit. Most of the objections made to almost entirely stall lower court nominations and the Garland nomination seem to be the kind of "old grudges" to which we thought Senator Cornyn had objected more than a decade ago.

Several of the proposals we made in an earlier ACS Issue Brief that we believed would have realized Senator Cornyn's stated objective of putting an end to the filibuster in all but the most exceptional circumstances, are even more apt today than they were when he made them several years ago.⁶ First, we suggested that, "Senate confirmation hearings should never be delayed provided that the nominee has complied with reasonable requests for information from the Judiciary Committee. Committee rules, or norms, should provide that a hearing must be scheduled for a date within 90 days of when the president sends a nomination to the Senate."

⁵ John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J.L. & PUB. POL'Y 181, 227 (2003).

⁶ See Gerhardt & Painter, *supra* note 1.

Second, we urged the Senate to adhere to the agreement it made in 2011 “to bar the use of anonymous holds—and to forego similar mechanisms—to delay any nomination.”⁷ As we explained then, “‘Secret’ holds—where the senator does not reveal a reason for holding up a nomination or sometimes even his or her own identity—have been particularly noxious, but regardless, no single senator should be permitted to delay either a Committee or floor vote on a judicial nomination.” We urged further that, “[i]n keeping with the Senate’s overwhelming agreement to bar anonymous holds of judicial nominations, senators should agree to accommodate brief delays of up to 30 days for a Committee or floor vote if a senator with the support of one other senator states a good reason for the delay, and why his or her concerns could not have been addressed earlier, but otherwise the scheduled vote should proceed as planned.” We continue to believe “the most appropriate reason for delay to be a specified need for more information that is critical to the Committee’s evaluation of a nominee’s integrity and qualifications. Fishing expeditions and delay for delay’s sake are never legitimate.”

Third, we suggested that every judicial nominee should come to the Senate with a presumption that he or she will at least get a prompt hearing before the Senate Judiciary Committee (within 60 days). This presumption should be explicit and will place the burden on any senators who are disposed to oppose the nomination to make their case publicly.

Fourth, as we suggested in our earlier Issue Brief, “once a judicial nominee has been reported out of the Judiciary Committee and the nomination has been sent to the Senate floor, the presumption in the Senate should be that a majority of ‘yes’ votes are needed to confirm the nominee. Such an up or down vote should occur within less than 120 days “of the nomination and we expect that would be the end of the process for almost all nominees.”

Each of these four suggestions is important for curbing either a minority or majority determined to block judicial nominations for any reasons other than their actual merits. In whatever phase of the process senators wish to oppose a judicial nomination, the least they owe to the American people and to ensuring a strong, independent judiciary is to state their objections publicly. We believe the best mechanism for implementing this requirement, as well as our other suggestions, is through an agreement between the majority and minority leaders of the Senate. This mechanism will require each caucus’ members to abide by the agreement, to consider sanctioning any member who does not abide by it, and to keep their respective members completely committed to the objectives of allowing every judicial nomination the opportunity to receive a hearing and making public the reasons for any opposition. An agreement between the majority and minority is the same mechanism that was used in 2013 to fix the problem with anonymous holds over judicial nominations, and it is the only kind of mechanism that can guarantee that our federal courts, including the Supreme Court, will be fully staffed and capable of exercising their constitutional functions as the third branch of government.

III. THE ADVANTAGES OF COMPROMISE

The future of obstruction of judicial nominations in the Senate does not turn on the constitutionality of the obstructive tactics employed, whether they are in defense

⁷ *Id.* at 6 (citing Paul Kane, *Senate Leaders Agree on Filibuster Changes*, WASH. POST (Jan. 27, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/27/AR2011012703379.html>).

of the filibuster,⁸ holds, or inaction by the Senate Judiciary Committee or the Senate as an institution. A debate over their constitutionality misses the point, perhaps deliberately so. The future of delay still turns, as it did when we wrote our first Issue Brief several years ago, on a simple policy question—whether a delay or reaching a final vote on a judicial nomination, whatever it may be, is in the best interests of the country, the president, the Senate, and the federal judiciary. When framed in this manner, we think the answer is obvious and even more compelling than it was when we wrote in 2013.

More specifically, we believe that our proposal has several advantages compared with the present inaction in the Senate. First, senators who oppose action of any kind should be required to state openly their reasons for doing so. Ideally, any opposition to Committee or floor action should be able to state its reasons clearly in the form of a resolution on which the full body would vote. This would ensure that everyone's position on the need for obstruction is on the record and available for the American people to assess. Second, our current proposal, like our last one, only envisions delay, not permanent blockage of a judicial nominee, as is now the case with over 50 of President Obama's judicial nominees, including his nomination of Merrick Garland to the Supreme Court. As England recognized when it reformed the House of Lords in the Parliament Act of 1911, delay by a minority—or any Senate leader or faction—is perhaps an appropriate tool to slow the momentum of a majority, but delay of a vote should not be permanent in a government that is supposed to reflect the will of the people.⁹

This proposal we believe is more than enough to prevent “extreme” nominees from being confirmed to the federal judiciary, including the Supreme Court. The most effective way of avoiding extreme appointments to the federal bench is not the filibuster, but the political process itself. Nobody has control over the conduct of judges after they are confirmed to lifetime positions, and yet the president will be held accountable if someone he puts on the bench makes judicial decisions that are outside the mainstream (or whose integrity, temperament, and judgment are seriously in question). The president will pay a political penalty for nominating unqualified or ideologues to the courts, not only at the polls, but in the much greater scrutiny that the Senate, the public, and the judgment of history are likely to give to his nominees, generally. Senators who vote to confirm extreme nominees or nominees whose ethics, judgment, and integrity are demonstrably deficient, and who defend such nominees in Committee and on the floor also will pay a political price if these nominees' views depart from prevailing public opinion and the general qualifications we expect from judicial nominees from either party. In sum, the checks and balances of the political process are sufficient to keep extremists or otherwise unqualified people off the courts without any minority blockage power in the Senate and without inaction backed by a majority's leadership.

We believe that a final benefit of this proposal is that it will improve the Senate institutionally. We think that this proposal, or one like it, is in the best traditions of the Senate. Just like the original agreement of the Gang of 14 and the agreement to bar anonymous holds of judicial nominations, our proposal provides a bipartisan

⁸ For a review of the constitutional arguments pertaining to the recent delays of judicial nominations, see Josh Chafetz & Michael J. Gerhardt, Debate, *Is the Filibuster Constitutional?*, 158 U. PA. L. REV. PENNUMBRA 245 (2010), <https://www.pennlawreview.com/online/158-U-Pa-L-Rev-PENNumbra-245.pdf>.

⁹ The Parliament Act of 1911, which was subsequently amended by the Parliament Act of 1949, allowed the House of Lords to delay, but no longer permanently block, bills from the House of Commons. The Act imposed a maximum delay by the House of Lords of one month on revenue bills and a maximum delay of one year on other bills. The United Kingdom continues to consider proposals for further reform of the House of Lords to bring it closer into alignment with the principle of majority rule.

solution to a problem that has hurt leaders from both parties and the judicial nominees whom they have supported.

We fully appreciate the tradition among senators to respect each other's autonomy, and our proposal does not seek to diminish that autonomy. It asks senators to explain the principles and justifications motivating their votes to each other, the president, and judicial nominees; it establishes a presumption of merit to which every judicial nominee is entitled; and it ensures that there will be action on every judicial nomination and the likelihood of a fully staffed and functioning third branch of government.

IV. CONCLUSION

We will have to wait until after the November elections for any movement on any pending judicial nominations and until after the next presidential inauguration for any further meaningful reform of the confirmation process to be implemented. Until then, we can expect the Senate to continue to do what it has been doing: obstructing virtually all of the President's judicial nominations, regardless of their merit and the damage done to the proper functioning of the Supreme Court and the third branch in general.

In 2013, we expressed deep-seated concern over the price to be paid in our constitutional system for the political games senators have been playing for years over judgeships, with both sides playing and often switching sides as their relative positions change. Since then we have seen a vacancy arise on the Supreme Court, powerful senators refuse to even hold a hearing and instead hold the President's nomination of Merrick Garland hostage to the next election, the chairman of the Senate Judiciary Committee excoriate not only President Obama but also Chief Justice John Roberts with the meritless accusation that they are "politicizing the courts" when in fact it is the Senate itself that has done so. The rule of political power drives the executive and legislative branches of our government, but the Constitution does not contemplate those two branches overrunning the third branch, which is supposed to stand for the rule of law.

The present impasse is unacceptable, with the real prospect of the status quo becoming a Senate opposed to fairly processing judicial nominations. If that persists, voters will undoubtedly continue to lose confidence in our republican form of government and increasingly believe that elected leaders are in it for themselves, rather than for the good of the country. Just as bad, the federal courts will become nothing more than spoils of political gamesmanship and will lose their capacity as an independent, fully functioning third branch of government that is above—not captive to—partisan politics. The proposal we have outlined here is our renewed attempt to turn that prospect aside and restore meaningful, bipartisan respect for an independent, fully functioning judiciary.

ABOUT THE AUTHORS

Michael Gerhardt is the Samuel Ashe Distinguished Professor of Constitutional Law at the University of North Carolina. He has specialized in constitutional conflicts and been active as a special counsel, scholar, adviser, expert witness, and public commentator on all the major conflicts between presidents and Congress over the past quarter century. Gerhardt's extensive public service has included advising congressional leaders and White House officials and frequently testifying before major committees in the House and the Senate on a wide range of constitutional issues. Gerhardt is the only legal scholar to participate in Supreme Court confirmation hearings for five of the eight justices currently sitting on the Supreme Court. He served as Special Counsel to the Clinton White House on Justice Stephen Breyer's confirmation hearings. Gerhardt has published op-eds for major newspapers throughout the country, including *The New*

York Times, *Washington Post*, and *LA Times*, and has been regularly interviewed as an expert on constitutional law by all major networks, media outlets, cable television, national newspapers and magazines, and National Public Radio. Gerhardt received a B.A. from Yale University, M.Sc. from the London School of Economics, and J.D. from the University of Chicago. After graduation from law school and before entering academia, he clerked for two federal judges (Chief Judge Robert McRae of the U.S. District Court for the Western District of Tennessee and Judge Gilbert Merritt of the U.S. Court of Appeals for the Sixth Circuit), served as Deputy Media Director for the first Senate campaign of Vice President Al Gore, Jr., and practiced law with the firm of Miller, Cassidy, Larroca & Lewin in Washington, D.C.

Richard Painter is the S. Walter Richey Professor of Corporate Law at the University of Minnesota Law School. He received his B.A., *summa cum laude*, in history from Harvard University and his J.D. from Yale University, where he was an editor of the *Yale Journal on Regulation*. Following law school, he clerked for Judge John T. Noonan Jr., of the United States Court of Appeals for the Ninth Circuit. From February 2005 to July 2007, he was Associate Counsel to the President in the White House Counsel's office, serving as the chief ethics lawyer for the President, White House employees and senior nominees to Senate-confirmed positions in the Executive Branch. His book, *Getting the Government America Deserves: How Ethics Reform Can Make a Difference*, was published by Oxford University Press in January 2009. He has written op-eds on government ethics for various publications, including *The New York Times*, *Washington Post*, and *L.A. Times*, and he has been interviewed several times on government ethics and corporate ethics by national news organizations, including appearances on CNN News, Fox News, and National Public Radio. Painter has on four separate occasions provided invited testimony before committees of the U.S. House of Representatives or the U.S. Senate.

How the ADA Regulates and Restricts Solitary Confinement for People with Mental Disabilities*

Margo Schlanger

In a landmark decision two decades ago, United States District Judge Thelton Henderson emphasized the toxic effects of solitary confinement for inmates with mental illness. In *Madrid v. Gomez*, a case about California's Pelican Bay prison, Judge Henderson wrote that isolated conditions in the Special Housing Unit, or SHU, while not amounting to cruel and unusual punishment for all prisoners, were unconstitutional for those "at a particularly high risk for suffering very serious or severe injury to their mental health . . ."¹ Vulnerable prisoners included those with pre-existing mental illness, intellectual disabilities, and brain damage. Henderson concluded that "[f]or these inmates, placing them in the SHU is the mental equivalent of putting an asthmatic in a place with little air to breathe."²

In Pelican Bay and elsewhere, constitutional litigation has led to orders excluding prisoners with serious mental illness from solitary confinement.³ Nevertheless, people with mental disabilities remain vastly overrepresented in prison and jail restrictive housing units⁴ because they are frequently difficult to manage in the general prison population and because they often decompensate once in solitary and commit further disciplinary infractions. One important, but not yet fully utilized tool to address this problem is the Americans with Disabilities Act (ADA). The ADA enacts a textual and purposive commitment to individuation and modification when governmental approaches fail to allow people with disabilities equal access to programs, services, and activities. Properly understood, the ADA requires prisons and jails to do much more than most are currently doing to keep prisoners with disabilities out of solitary confinement.⁵ Moreover, designed to help achieve equality rather than prevent overwhelming harm, the ADA bans conditions milder than those reachable by an Eighth Amendment deliberate indifference lawsuit, when those conditions are discriminatory.

* This issue brief was initially published in May 2016.

¹ *Madrid v. Gomez*, 889 F. Supp. 1146, 1265 (N.D. Cal. 1995).

² *Id.*

³ For a compilation of extant orders, see *Special Collection: Solitary Confinement*, CIVIL RIGHTS LITIG. CLEARINGHOUSE, <http://www.clearinghouse.net/results.php?searchSpecialCollection=40> (last visited Apr. 11, 2016).

⁴ ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: USE OF RESTRICTIVE HOUSING IN U.S. PRISONS AND JAILS, 2011-12, at 6-7 (Oct. 2015), available at <http://www.bjs.gov/content/pub/pdf/urhuspj1112.pdf> (relating that prisoners with mental illness reported having spent time in restrictive housing at about twice the rate of other prisoners).

⁵ This theme is explored in depth in Brittany Glidden & Laura Rovner, *Requiring the State to Justify Supermax Confinement for Mentally Ill Prisoners: A Disability Discrimination Approach*, 90 DENV. U. L. REV. 55 (2012).

In this Issue Brief, I argue that solitary confinement of prisoners with mental illness or intellectual disabilities frequently constitutes disability discrimination, challengeable under Title II of the ADA⁶ and the Rehabilitation Act⁷—federal statutes that proscribe discrimination on the basis of disability in state and local government services and federally conducted or supported services, respectively.

After briefly setting out the trends in solitary confinement litigation and the statutory framework supporting ADA and Rehabilitation Act challenges, I describe three ways in which the ADA and the Rehabilitation Act restrict and regulate prisons' and jails' use of solitary confinement for prisoners with disabilities.⁸ I also evaluate three potential defenses, arguing that even when factually supported and accepted, each of the three requires individuated planning and therapeutic and disability-supportive practices that would curb prison and jail overuse of solitary confinement for prisoners with disabilities.⁹

I. TRENDS IN THE SOLITARY CONFINEMENT DEBATE

As American incarceration rates ballooned in the 1980s and 1990s, so too did our prisons' and jails' use of solitary confinement and other forms of restrictive housing.¹⁰ Between prisons and jails—federal, state, and local—an estimated 90,000 to 115,000

⁶ 42 U.S.C. § 12131 *et seq.* Title II provides, in relevant part, “[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. § 12132.

⁷ 29 U.S.C. § 794 *et seq.* The Rehabilitation Act provides, in relevant part, “No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any [Federal] Executive agency.” § 794(a).

⁸ A very useful summary of the overall statutory framework and its application to prisons and jails is included in *Miller v. Smith*, United States’ Memorandum of Law as Amicus Curiae on Issues under the Americans with Disabilities Act and Rehabilitation Act that are Likely to Arise on Summary Judgment or at Trial, No. 6:98-cv-109-JEG (S.D. Ga. June 21, 2010), *available at* http://www.ada.gov/briefs/miller_amicus.pdf. Note that this brief was filed in June 2010, and there were new regulations—though not very different in pertinent part—published September 2010.

⁹ I do not here address two peripheral issues that may turn out to matter a great deal for lawyers. There is an argument with some textual and caselaw support that the Prison Litigation Reform Act attorneys’ fee cap does not apply to ADA or Rehabilitation Act claims. *See, e.g.,* *Armstrong v. Davis*, 318 F.3d 965, 973-74 (9th Cir. 2003) (fees in suits enforcing the Americans with Disabilities Act and the Rehabilitation Act are not limited by the PLRA because these statutes have fee provisions separate from § 1988). In addition, several courts have held that the PLRA’s exhaustion requirement compels prisoners suing under the Rehabilitation Act to first complain to the U.S. Department of Justice (DOJ), under 28 C.F.R. § 39.170. That seems very wrong (and because the cases are all or nearly all pro se, it has not been extensively briefed), but it is a potential pitfall that needs to be considered and managed. *Compare, e.g.,* *William G. v. Pataki*, No. 03-cv-8331-RCC, 2005 WL 1949509, at *5-6 (S.D.N.Y. Aug. 12, 2005) (requiring use of the DOJ procedure) *with, e.g.,* *Veloz v. New York*, 339 F. Supp. 2d 505, 517-18 (S.D.N.Y. 2004), *aff’d*, 178 Fed. App’x. 39 (2d Cir. Apr. 24, 2006) (declining to so require).

¹⁰ *See, e.g.,* Roy D. King, *The Rise and Rise of Supermax: An American Solution in Search of a Problem?*, 1 PUNISHMENT & SOC’Y 163 (1999).

prisoners live in solitary confinement today.¹¹ These tens of thousands of men and women are confined to twenty-two or more daily hours of in-cell lockdown, with minimal chance for social interaction, programming, or occupation.

Advocacy efforts to reverse this trend have been intense and longstanding, and seem finally to be approaching fruition. President Obama recently wrote an op-ed in *The Washington Post* describing current practices as “an affront to our common humanity,”¹² and three Supreme Court justices have inveighed against solitary confinement in recent, separate writings.¹³ Many corrections leaders are themselves beginning to seek change. The Association of State Correctional Administrators (ASCA), the national organization representing directors of state correctional agencies, last year released a report that begins, “Prolonged isolation of individuals in jails and prisons is a grave problem drawing national attention and concern.” The report also explicitly “supports ongoing efforts to . . . limit or end extended isolation.”¹⁴

Litigation continues to be a key lever for reform in this area; lawsuits push for change, and both settlements and litigated orders have modeled what that change could look like.¹⁵ Nearly all that litigation has proceeded chiefly under the Eighth Amendment’s Cruel and Unusual Punishments Clause.¹⁶ I argue in this Issue Brief that ADA and Rehabilitation Act cases have an important role to play going forward.

II. ADA AND REHABILITATION ACT STATUTORY FRAMEWORKS

The ADA and Rehabilitation Act protect individuals with disabilities from discrimination in a variety of contexts—including incarceration. The U.S. Supreme Court

¹¹ The Association of State Correctional Administrators and Yale Law School’s Liman Program together surveyed state prison systems, and found a solitary usage rate of 6%, which works out to about 90,000 state prisoners. See LIMAN PROGRAM & ASS’N OF STATE CORR. ADM’RS, TIME-IN-CELL: THE ASCA-LIMAN 2014 NATIONAL SURVEY OF ADMINISTRATIVE SEGREGATION IN PRISON 3, 15 (Aug. 2015), available at https://www.law.yale.edu/system/files/area/center/liman/document/asca-liman_administrativesegregationreport.pdf. If the usage rate in jails is half that—a reasonable estimate—another 24,000 jail inmates are added, for a total of about 115,000. The Bureau of Justice Statistics estimated a lower usage rate in 2011: 4.4% of prison inmates and 2.7% of jail inmates—which worked out to total about 90,000. See *Table: Estimated Number of Persons Under Correctional Supervision in the United States, 1980-2014*, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, <http://www.bjs.gov/index.cfm?ty=kfdetail&iid=487> (last visited Apr. 13, 2016). Similar rates in 2014, the most recent year for which we have solid prison and jail population data, would add up to 89,000. Finally, the DOJ’s 2005 Census of State and Federal Correctional Facilities included data that 80,000 prisoners were housed in restrictive housing in state or federal prisons (jails are excluded). See *Census of State and Federal Adult Correctional Facilities, 2005 (ICPSR 24642)*, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, available at <https://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/24642?q=24642> (last visited Apr. 13, 2016).

¹² Barack Obama, *Why We Must Rethink Solitary Confinement*, WASH. POST (JAN. 25, 2016), https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce_story.html.

¹³ See *Davis v. Ayala*, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring) (“[R]esearch still confirms what this Court suggested over a century ago: Years on end of near-total isolation exact a terrible price.”), *reh’g denied*, 136 S. Ct. 14; *Glossip v. Gross*, 135 S. Ct. 2726, 2765 (2015) (Breyer, J. dissenting; joined by Ginsburg, J.) (“[I]t is well documented that such prolonged solitary confinement produces numerous deleterious harms.”), *reh’g denied*, 136 S. Ct. 20.

¹⁴ TIME-IN-CELL, *supra* note 11, at i, iii.

¹⁵ For a timeline listing and linking to the key cases, and their settlements, see Amy Fettig & Margo Schlanger, *Milestones in Solitary Reform*, SOLITARY WATCH, <http://solitarywatch.com/resources/timelines/milestones/> (last visited Apr. 11, 2016).

¹⁶ For pretrial detainees, cases are formally brought under the Due Process Clause, but tend to apply the same test as under the Eighth Amendment. See, e.g., *United States’ Proposed Complaint-in-Intervention, Nunez v. City of New York*, No. 1:11-cv-05845 (S.D.N.Y. Dec. 18, 2014), available at <http://www.clearinghouse.net/chDocs/public/JC-NY-0055-0006.pdf>.

has explained that the Rehabilitation Act guarantees “meaningful access” to qualified individuals with a disability to each federally conducted or supported program, service, or activity.¹⁷ The Court has also held that ADA Title II’s reference to “services, programs, or activities” encompasses the operations of prisons and jails.¹⁸ Prisoners with disabilities can bring lawsuits under the ADA or the Rehabilitation Act if they can show that they are: 1) disabled within the meaning of the statutes;¹⁹ 2) “qualified” to participate in the relevant program; and 3) excluded from, not allowed to benefit from, or subjected to discrimination²⁰ in the program because of their disability.²¹ The Rehabilitation Act does not define “qualified individual with a disability,” but the ADA does. That definition provides:

[A]n individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.²²

Reasonable modification is thus ADA Title II’s (and Title III’s) equivalent of the more familiar “reasonable accommodation” requirement in Title I of the ADA, which addresses employment discrimination.²³

Between the two statutes, every American prison and jail is covered. The ADA’s Title II covers all non-federal jails and prisons—its definition of “public entity” includes state and local government agencies, without respect to federal support.²⁴ The Rehabilitation Act also covers most state and local prisons and jails, because they

¹⁷ *Alexander v. Choate*, 469 U.S. 287, 301 (1985). The Rehabilitation Act provides “No otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any [Federal] Executive agency.” 29 U.S.C. § 794(a).

¹⁸ *Pa. Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 210–11 (1998).

¹⁹ Under both the ADA and the Rehabilitation Act, a person has a disability if: (i) a physical or mental impairment substantially limits one or more of his or her major life activities; (ii) he or she has a record of such an impairment; or (iii) he or she is regarded as having such an impairment. 29 U.S.C. § 705(20)(B); 42 U.S.C. §§ 12102(1)-(2). Particularly relevant here, “mental” impairments are expressly included if they substantially limit major life activities. The ADA regulations on the definition of disability, 28 C.F.R. § 35.104(1)(i), are quite capacious. Moreover, in the ADA Amendments Act of 2008, Congress clarified and broadened the definition. Under the Amendments Act, an impairment constitutes a disability even if it: (1) only substantially limits one major life activity; or (2) is episodic or in remission, if it would substantially limit at least one major life activity if active. ADA Amendments Act of 2008, Pub. L. No. 110-325 Sec. 3, 122 Stat. 3553, 3556.

²⁰ Discrimination can mean categorical “exclu[sion] from participation in or ... deni[al of] the benefits of the services, programs, or activities of a public entity,” but the language “or be subjected to discrimination by any such entity” makes it clear that discrimination is also broader. 42 U.S.C. § 12132. The concept is further developed in caselaw and the ADA regulation. *See discussion infra* Parts II & III.

²¹ 42 U.S.C. § 12132; 29 U.S.C. § 794(a).

²² 42 U.S.C. § 12131(2).

²³ *See* 42 U.S.C. §§ 12111(8)-(9).

²⁴ 42 U.S.C. § 12131(1).

receive federal financial assistance.²⁵ Federal agencies, while not included under Title II, are covered by the Rehabilitation Act.

All prison and jail officials therefore are forbidden from discriminating against prisoners with disabilities in all their facilities' services, programs, or activities—including in the use and rules governing solitary confinement.

III. THREE APPROACHES TO CHALLENGING SOLITARY CONFINEMENT UNDER THE ADA

The key source for understanding what constitutes disability discrimination is the ADA's Title II regulations, which add considerable detail to the statutory non-discrimination requirements set out in Part II and, as legislative regulations, are entitled to substantial deference.²⁶ They includes a ban against disparate treatment of inmates with disabilities; a requirement for reasonable modifications to policies and practices when needed to achieve equality of those with disabilities; and a mandate to maximize integration of those with disabilities in services, programs, and activities.²⁷

A. DISPARATE TREATMENT AND DISPARATE IMPACT

1. *Disparate Treatment*

Most simply, isolating prisoners “because of” their serious mental illness, intellectual disability, or physical disability violates the statutory ban against disparate treatment. The ADA regulations explain that public entities must afford qualified people with disabilities the same opportunity as non-disabled people to benefit from the entity's services. This means a prison or jail may not, because of an inmate's disability, deny the inmate the “opportunity to participate” in a service offered to other inmates, may not provide an alternative service “that is not equal to that afforded others,” and must provide aids, benefits or services that would enable the inmate to “gain the same benefit, or to reach the same level of achievement as that provided to others.”²⁸

A prison violates this regulation if it assigns people with disabilities to segregation cells—where prisoners are denied most prison privileges, programs, activities, and services—simply because of their disability. This kind of assignment is far from unheard of. For example, in *Armstrong v. Brown*, the district court held that the state was “regularly housing *Armstrong* class members [prisoners with mobility

²⁵ See 29 U.S.C. § 794(b)(1)(A) (defining “program or activity” as “a department, agency, special purpose district, or other instrumentality of a State or of a local government”). For indexes to federal support, see *Possible Federal Sources of Assistance to Federally Assisted Programs or Activities*, U.S. DEP'T OF JUSTICE (Aug. 6, 2015), <http://www.justice.gov/crt/possible-federal-sources-assistance-federally-assisted-programs-or-activities> (last updated Aug. 6, 2015).

²⁶ See 42 U.S.C. § 12134(a); see also *Olmstead v. L.C.*, 527 U.S. 581, 597-98 (1999) (“Because the Department is the agency directed by Congress to issue regulations implementing Title II, ... its views warrant respect. We need not inquire whether the degree of deference described in [*Chevron*] is in order”). ADA regulations are also consistent with, but newer, more detailed, and sometimes stricter than Rehabilitation Act regulations. See 42 U.S.C. § 12201(a) (“nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. §§ 790 *et seq.*) or the regulations issued by Federal agencies pursuant to such title”); 42 U.S.C. § 12134(b) (“regulations ... shall be consistent with ... the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on Jan. 13, 1978), applicable to recipients of Federal financial assistance under section 794 of Title 29.”).

²⁷ 28 C.F.R. § 35.130(d) (2011).

²⁸ 28 C.F.R. § 35.130(b)(1).

impairments] in administrative segregation due to lack of accessible housing ...”²⁹ Similarly, in a U.S. Department of Justice’s (DOJ) findings letter addressing conditions of confinement at the Pennsylvania State Correctional Institution at Cresson—a key document in the development of the law governing solitary confinement under the ADA—the DOJ concluded that the ADA required Cresson to “modify its policies and practices so prisoners with serious mental illness or intellectual disabilities are not automatically or categorically housed in segregation and instead receive the services they need.”³⁰ These findings were based on a disparate treatment theory.³¹ That is, they accused the state of intentional disability discrimination, not merely of imposing a neutral policy that had a disparate impact on prisoners with disabilities.

2. *Disparate Impact*

But what if a housing assignment is not directly motivated by the prisoner’s disability (and the prison’s inability to otherwise cope with that disability), but by some conduct *caused by* the disability? For example, what if the prison officials place a prisoner in solitary confinement not because he has a serious mental illness, but because of misconduct whose origin is serious mental illness? The caselaw on this question has arisen outside the prison and jail context—mostly in employment discrimination cases—but is relevant to how courts might consider the issue in a prison or jail case.

A minority of courts categorize decisions that penalize a disabled employee’s misconduct as nonetheless “because of disability,” and therefore, similarly, illegal disparate treatment.³² The majority of courts, however, have rejected disparate treatment liability where the employee plaintiffs’ disability caused conduct that was, in turn, the reason for the defendant’s adverse action. In some of these cases, however, the courts have—sometimes explicitly—left open the alternative theories of disparate impact and reasonable accommodation/modification.

The most prominent example is the Supreme Court’s decision in *Raytheon Co. v. Hernandez*, an ADA employment action in which the Court rejected the Ninth Circuit’s holding that a ban on rehiring past employees who had been dismissed for misconduct constituted disability discrimination when the misconduct in question was caused by a disability. In an opinion by Justice Thomas, the Court explained that the challenged practice did not constitute disparate treatment—and that it could not be attacked by a disparate impact claim because the plaintiff had not timely raised

²⁹ Order Granting Motion for Further Enforcement, *Armstrong v. Brown*, No. 4:94-cv-02307 (N.D. Cal. Feb. 3, 2015), 2015 WL 496799, available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0001-0040.pdf>.

³⁰ See Letter from Thomas E. Perez, Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to The Honorable Tom Corbett, Governor of Pa., *Re: Investigation of the State Correctional Institution at Cresson and Notice of Expanded Investigation*, 33-34 (May 31, 2013), available at http://www.justice.gov/sites/default/files/crt/legacy/2013/06/03/cresson_findings_5-31-13.pdf [hereinafter *Cresson Letter*].

³¹ The DOJ’s *Cresson* finding was a bit ambiguous on this issue. The sentence before the one just quoted mentions “methods of administration that have the effect of subjecting prisoners with serious mental illness or intellectual disabilities to discrimination,” which sounds more like disparate impact than disparate treatment. *Id.* But when the DOJ restated its position in a subsequent filing, in *Coleman v. Brown*, the theory was more firmly grounded in disparate treatment language. See Response of the United States of America to Defendants’ Motion in Limine No.4: To Exclude the Statement of Interest, *Coleman v. Brown*, 2:90-cv-00520-LKK-DAD (E.D. Cal. Nov. 12, 2013), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0002-0041.pdf>.

³² See Kelly Cahill Timmons, *Accommodating Misconduct Under the Americans with Disabilities Act*, 57 FLA. L. REV. 187, 211-22 (2005). Professor Timmons catalogs cases that have found that a response to disability-caused misconduct occurs “because of” disability.

disparate impact.³³ Similarly, Judge Richard Posner wrote in *Matthews v. Commonwealth Edison Co.*,³⁴ the most-cited of these misconduct cases, that disparate treatment was the wrong label for this kind of claim: “If [a dyslexic plaintiff] wants to show instead that reading quickly is not a necessary qualification for the job in question—then he has to switch to the disparate-impact approach and challenge the qualification on the basis of its effect and its reasonableness rather than on the basis of its motivation.” Both these opinions identified disparate impact as the appropriate theory when plaintiffs allege that a general rule or policy penalizing their conduct has the effect of discriminating against them because of their disability.

Disparate impact is certainly available, in theory. The ADA’s Title II regulations include two uses of the word “effect,” which unambiguously reference a disparate impact theory of liability.³⁵ These two provisions forbid “criteria or methods of administration” that have the “effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability,” or have the “purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity’s program with respect to individuals with disabilities.” In addition, the regulation suggests a disparate impact approach when it states, “A public entity shall not impose or apply eligibility criteria that screen out or *tend to screen out* an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.”³⁶ Moreover, there is caselaw holding that ADA Title II disparate impact claims do state a private cause of action.³⁷ Consequently, a disparate impact challenge to a prison rule that is disproportionately adverse to prisoners with disabilities seems plausible as a matter of theory. Moreover, the defense (“necessary for the provision of the service, program, or activity”) seems narrow indeed.

Nonetheless, as a strategic matter, disparate impact claims—under the ADA as under other civil rights statutes—make judges extraordinarily suspicious, and are notoriously difficult to win. In fact, courts have been so hesitant to find disparate impact liability that it is more a hypothetical theory of liability than a practical approach to vindicating an individual’s or group’s rights.³⁸ So, could a challenge to assignment of prisoners to solitary confinement because of disability-related misconduct be framed as a disparate impact claim? The relevant caselaw and regulations suggest that the

³³ *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003).

³⁴ 128 F.3d 1194, 1196 (7th Cir. 1997).

³⁵ See 28 C.F.R. §§ 35.130(b)(3)(i)-(ii).

³⁶ 28 C.F.R. § 35.130(b)(8) (emphasis added).

³⁷ See, e.g., *Ability Ctr. of Greater Toledo v. City of Sandusky*, 181 F. Supp. 2d 797, 798 (N.D. Ohio 2001), *aff’d*, 385 F.3d 901 (6th Cir. 2004); *Wisconsin Cmty. Servs., Inc. v. City of Milwaukee*, 465 F.3d 737, 753 (7th Cir. 2006).

³⁸ There are remarkably few examples of successful disparate impact litigation under *any* civil rights statute in the past 15-20 years, including only a handful under the ADA’s Title II. See *May v. Sheahan*, No. 99-cv-0395, 1999 WL 543187 (N.D. Ill. 1999) (holding that the ADA forbids the jail’s hospital shackling policy, because it had a more severe impact on disabled inmates, who are likely to spend more time in hospitals—but granting the defendant qualified immunity on this issue); *Crowder v. Kitigawa*, 81 F.3d 1480, 1483 (9th Cir. 1996) (striking down a dog quarantine that kept service-dog users from travelling to Hawaii, because “Congress intended to prohibit... those forms of discrimination which deny disabled persons public services disproportionately due to their disability.”); *Coleman v. Zatechka*, 824 F. Supp. 1360 (D. Neb. 1993) (citing disparate impact language to support requiring the University of Nebraska to treat a student with a disability like other students in assignment of dormitory roommates, notwithstanding the University’s explanation that its exclusion of the plaintiff was not because of her disability but because of her need for occasional personal attendant care).

answer is yes—but practical experience counsels strongly against it. And disparate impact theory is not necessary for the kinds of challenges contemplated here: a plaintiff would be on more solid strategic ground—with stronger precedents and a firmer basis in the regulations—attacking the same policies or practices but framing the legal claim as a prison’s failure to implement reasonable modification.³⁹

B. REQUIRING PRISONS TO MAKE REASONABLE MODIFICATIONS

Relying on a “reasonable modification” theory to challenge conditions of confinement also starts with the Title II ADA regulations, the relevant portion of which states:

A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.⁴⁰

A failure to implement a reasonable modification needed by a person with a disability is a type of discrimination; under the ADA, a prison must “take certain proactive measures to avoid the discrimination proscribed by Title II.”⁴¹ Under this theory, the claimed reasonable modifications could cover the *route into solitary*, the *conditions in solitary*, and the *route out of solitary*.

The ADA supports prisoners with disabilities who seek adjustments to the *route into solitary* by, for example, asking for modifications to policies and practices that:

- Fail to take account of mental illness or intellectual disability in making housing decisions, which often assign disabled prisoners to double cells in which conflict and violence are likely.⁴²
- Provide inadequate mental health care more generally, including a variety of obstacles to obtaining treatment.⁴³ Without treatment, prisoners with mental illness are more likely to run into trouble of various kinds, leading them to solitary, either as a disciplinary or management response.

³⁹ These types of liability are best considered as conceptually separate. *See Wis. Cmty. Servs., Inc.*, 465 F.3d at 753 (quoting *Wash. v. Ind. High Sch. Athletic Ass’n, Inc.*, 181 F.3d 840, 847 (7th Cir. 1999)) (ADA Title II liability “may be established by evidence that (1) the defendant intentionally acted on the basis of the disability, (2) the defendant refused to provide a reasonable modification, or (3) the defendant’s rule disproportionately impacts disabled people.”); *McPherson v. Mich. High Sch. Athletic Ass’n*, 119 F.3d 453, 460 (6th Cir. 1997) (holding that plaintiff could establish liability by offering evidence that the defendant “could have reasonably accommodated his disability, but refused to do so [or] it might be possible under the ADA for the plaintiff to rely on a disparate impact theory.”) (internal citations omitted); *Henrietta D. v. Bloomberg*, 331 F.3d 261, 276–77 (2d Cir. 2003) (“[A] claim of discrimination based on a failure reasonably to accommodate is distinct from a claim of discrimination based on disparate impact.”).

⁴⁰ 28 C.F.R. § 35.130(b)(7). The separate requirement of program accessibility has a similar defense that no “fundamental alteration in the nature of the service, program or activity or ... undue financial or administrative burdens” are required. 28 C.F.R. § 35.150(a)(3).

⁴¹ *Chisolm v. McManimon*, 275 F.3d 315, 324-25 (3d Cir. 2001); *see also Tenn. v. Lane*, 541 U.S. 509 (2004) (describing the reasonable modification requirement as prophylactic).

⁴² *See, e.g., Madrid*, 889 F. Supp. at 1221.

⁴³ *See, e.g., Agreed Order, Rasho v. Baldwin*, No. 1:07-CV-1298-MMM-JAG (C.D. Ill. May 8, 2013), at 3-4, *available at* <http://www.clearinghouse.net/chDocs/public/PC-IL-0031-0008.pdf>; Plaintiff’s Response to Motion for Summary Judgment, *Anderson v. Colo.*, No. 10-cv-01005-WYD-KMT (D. Colo. July 21, 2011), *available at* <http://www.clearinghouse.net/chDocs/public/PC-CO-0017-0006.pdf>; Plaintiff’s Trial Brief, *Anderson v. Colo.*, No. 10-cv-01005-WYD-KMT (D. Colo. Apr. 23, 2012), *available at* <http://www.clearinghouse.net/chDocs/public/PC-CO-0017-0007.pdf>.

- Use solitary confinement as a routine management technique to cope with the difficulties presented by prisoners with disabilities.⁴⁴
- Treat behavior that manifests serious mental illness or intellectual disability as a disciplinary rather than mental health or habilitation matter.⁴⁵

The ADA similarly entitles prisoners with disabilities to modifications of the *conditions in solitary*. As the DOJ has found, for those prisoners whose disabilities mean they simply cannot be safely managed in general population, prisons retain the “obligation to provide the prisoners with the opportunity to participate in and benefit from mental health services and activities, and other services, programs, and activities to which prisoners without disabilities have access.”⁴⁶ Even if a prison has a safety interest in substantial physical isolation, that should not mean that prisoners with disabilities are denied phone calls, books, education, rehabilitative programming, exercise, and the like.⁴⁷

Prisons should also accommodate disabled prisoners’ particular, disability-related vulnerability to the conditions of isolated confinement by softening those conditions.⁴⁸ Prisoners with mental illness and intellectual disabilities are less resilient to the absence of social interaction and the enforced idleness of solitary confinement. Consequently, these features should be modified for them; they could, for example, receive controlled programming, increased recreation hours, expanded access to educational materials and similar accommodations.⁴⁹ This applies even to disabled prisoners whose path into solitary was unconnected to their disability.⁵⁰

The eligibility criteria for various kinds of in-unit programming or services—visits, phone calls, various property privileges, group therapy, etc.—should also be adjusted so those criteria do not deprive prisoners with disabilities the opportunity to participate in and benefit from those programs. Otherwise, such criteria unlawfully “screen out” prisoners with disabilities from “fully and equally enjoying” such programs or make it difficult for them to “obtain the same result [or] gain the same benefit” from these programs.⁵¹

Finally, the ADA requires modifications to the *route out of solitary*—that is, to eligibility and step-down type requirements for prisoners in solitary confinement or other high-security housing that are ill-suited or even impossible for prisoners with

⁴⁴ Cresson Letter, *supra* note 30, at 1.

⁴⁵ See, e.g., Private Settlement Agreement, Disability Advocates, Inc. v. New York State Office of Mental Health, No. 1:02-cv-04002-GEL (S.D.N.Y. Apr. 27, 2007), at 12, *available at* <http://www.clearinghouse.net/chDocs/public/PC-NY-0048-0002.pdf>; Settlement Agreement and General Release, Disability Rights Network of Pennsylvania v. Wetzel, No. 1:13-cv-00635-JEJ (M.D. Pa. Jan. 9, 2015), at 16, *available at* <http://www.clearinghouse.net/chDocs/public/PC-PA-0031-0003.pdf>.

⁴⁶ Cresson Letter, *supra* note 30, at 37 (citing 28 C.F.R. § 35.130(b)).

⁴⁷ For an account of a litigation making this point, see Glidden & Rovner, *supra* note 5.

⁴⁸ This argument was made by the plaintiffs in Disability Advocates, Inc. v. N.Y. State Office of Mental Health, 1:02-cv-04002-GEL (S.D.N.Y. May 28, 2002) (case description available at <http://www.clearinghouse.net/detail.php?id=5560>). The stressful conditions of isolated confinement, and attendant lack of access to programs, including post-release planning, were claimed in that case to have an impermissibly harsh and more frequent impact upon inmates with serious mental illness.

⁴⁹ See, e.g., Settlement Agreement, Peoples v. Fischer, No. 1:11-cv-02694-SAS (S.D.N.Y. Dec. 16, 2015), *available at* <http://www.clearinghouse.net/chDocs/public/PC-NY-0062-0011.pdf>.

⁵⁰ See, e.g., Stipulation, Parsons v. Ryan, No. 2:12-cv-00601 (D. Ariz. Oct. 14, 2014), at 8, *available at* <http://www.clearinghouse.net/chDocs/public/PC-AZ-0018-0028.pdf>.

⁵¹ 28 C.F.R. § 35.130(b)(8) & (1)(iii).

disabilities.⁵² Indeed, the same theory could reach denials of opportunities for a route out of prison altogether, if parole is denied on the basis of a solitary stint, or on lack of completion of rehabilitative programming that is unavailable to those in solitary.

Anti-discrimination remedies like these—narrowing the route in, softening the conditions, and widening the route out of solitary—have been incorporated in the dozen or so major solitary confinement settlements in recent years.⁵³ The claims have also gotten some, albeit limited, support in federal district court opinions. In a couple of cases, district courts have held that the ADA requires modification of disciplinary procedures.⁵⁴ Similarly, at least one court has held that administrative classification processes used to put prisoners into solitary confinement must be reasonably modified to take account of the needs of prisoners with disabilities.⁵⁵ And finally, a recent district court opinion accepted a reasonable modification argument seeking greater access for prisoners with disabilities to a solitary confinement “step-down” program.⁵⁶

C. CHALLENGING SOLITARY CONFINEMENT AS A VIOLATION OF ADA'S INTEGRATION MANDATE

The ADA regulations include a provision, usually termed the “integration mandate,” which directs that “A public entity shall administer services, programs, and activities in *the most integrated setting appropriate* to the needs of qualified individuals with disabilities....”⁵⁷ The regulation that deals specially with program access in prisons and jails adds some detail to this general mandate. It provides, in pertinent part:

(b)(2) Public entities shall ensure that inmates or detainees with disabilities are housed in the most integrated setting appropriate

⁵² See Plaintiff's Response to Motion for Summary Judgment, *supra* note 45; Plaintiff's Trial Brief, *Anderson v. Colo.*, No. 10-cv-01005-WYD-KMT, 2011 WL 1195393 (D. Colo. Mar. 30, 2011); *Sardakowski v. Clements*, No. 12-cv-01326-RBJ-KLM, 2013 WL 3296569 (D. Colo. July 1, 2013) (argued by the same counsel before the same judge as *Anderson*). See also Plaintiff's Response to Defendants' Motion for Summary Judgment, *Sardakowski v. Clements*, No. 12-cv-01326-RBJ-KLM (D. Colo. Dec. 26, 2013), available at <http://www.clearinghouse.net/chDocs/public/PC-CO-0024-0001.pdf>.

⁵³ See, e.g., sources cited *supra* notes 44-54.

⁵⁴ See *Purcell v. Pa. Dep't of Corr.*, No. 00-cv-181J, 2006 WL 891449, at *13 (W.D. Pa. Mar. 31, 2006) (finding a genuine issue of material fact as to whether a “reasonable accommodation” was denied when the Department of Corrections refused to circulate a memo to the staff concerning a prisoner's Tourette's Syndrome to explain that some of his behaviors were related to his condition, not intentional violations of prison rules); *Scherer v. Pa. Dep't of Corr.*, No. Civ.A. 3:04-cv-00191, 2007 WL 4111412, at *44 (W.D. Pa. Nov. 16, 2007) (because the prisoner's misconduct may have been a result of his mental illness, “the lack of modification of its disciplinary procedures to account for ... [his] mental illness ... possibly resulted in a violation of Title II of the ADA.”).

⁵⁵ See *Biselli v. Cnty. of Ventura*, No. 09-cv-08694 CAS (Ex), 2012 U.S. Dist. LEXIS 79326, at *44-45 (C.D. Cal. June 4, 2012) (placement in administrative segregation based on conduct specifically linked to mental illness, without input from mental health staff, may constitute a violation of the ADA).

⁵⁶ See *Sardakowski v. Clements*, No. 12-cv-01326-RBJ-KLM, 2013 WL 3296569, at *9 (D. Colo. July 1, 2013), (rejecting a motion to dismiss for failure to state a claim given plaintiff's argument “that he has been unable to complete the requirements of the leveling-out program successfully because of his mental impairment and because CDOC officials have prevented him from obtaining adequate treatment and accommodation so that he may progress out of solitary confinement.”). See also Reporter's Transcript: Hearing on Motion for Summary Judgment and Final Trial Preparation Conference, *Sardakowski v. Clements*, No. 12-cv-01326-RBJ-KLM (D. Colo. Feb. 25, 2014), at 41, available at <http://www.clearinghouse.net/chDocs/public/PC-CO-0024-0002.pdf> (rejecting defendants' motion for summary judgment on the same claim).

⁵⁷ 28 C.F.R. § 35.130(d) (emphasis added).

to the needs of the individuals. Unless it is appropriate to make an exception, a public entity—

(i) Shall not place inmates or detainees with disabilities in inappropriate security classifications because no accessible cells or beds are available;

(ii) Shall not place inmates or detainees with disabilities in designated medical areas unless they are actually receiving medical care or treatment; [and]

(iii) Shall not place inmates or detainees with disabilities in facilities that do not offer the same programs as the facilities where they would otherwise be housed....⁵⁸

Prisons often house prisoners with disabilities in various kinds of special housing that are, if not quite solitary confinement, at least close to it; they impose far more locked-down time than ordinary housing, restrict access to property, limit various privileges, etc. This kind of dedicated housing for people with disabilities (as well as infirmary assignments that do not actually provide medical care or treatment) violate the plain dictates of the ADA's regulations if the housing area is not "the most integrated setting appropriate" to the prisoners' needs.⁵⁹

Similarly, a prison would violate the regulation if, for example, all the mental health housing is high security, so that prisoners who would otherwise have access to gentler conditions in minimum or medium security are forced into harsher environments in order to get treatment.⁶⁰ As already described, in *Armstrong v. California* the Northern District of California found that the plaintiff prisoners, who had mobility impairments, were being housed in solitary confinement simply because there were no accessible cells available elsewhere.⁶¹ This, the district court held, violated the clear terms of the provisions quoted above.

More commonly, though, confinement of prisoners with disabilities to restrictive housing is not because of a shortage of accessible cells elsewhere, but rather because prisons choose to manage difficult, disability-related behavior with solitary confinement rather than less harsh housing assignments and services. In *Olmstead v. L.C.*, the Supreme Court required states to deinstitutionalize people with disabilities who had been unjustifiably assigned to receive various state-provided services in segregated institutions rather than in the community.⁶² In prison or jail, when solitary confinement is triggered by a prisoner's disability (and resulting conduct), that means that prison services are provided in a setting that lessens the prisoner's contact with other, non-disabled prisoners. This is "segregated" not only in the way the term is used in prison,

⁵⁸ 28 C.F.R. § 35.152.

⁵⁹ 28 C.F.R. § 35.130(d).

⁶⁰ This argument was made in some detail by the plaintiffs in the pioneering case *Disability Advocates, Inc. v. N.Y. State Office of Mental Health*, 1:02-cv-04002-GEL (S.D.N.Y. 2007) (description available at <http://www.clearinghouse.net/detail.php?id=5560>).

⁶¹ See Order Granting Motion for Further Enforcement, *Armstrong v. Brown*, No. C 94-2307, 2015 WL 496799 (N.D. Cal. Feb. 3, 2015), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0001-0040.pdf>.

⁶² 527 U.S. 581 (1999). For more on *Olmstead* and its implementation, see Civil Rights Division, U.S. Dep't of Justice, Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.* (June 22, 2011), available at http://www.ada.gov/olmstead/q&a_olmstead.pdf.

but also in the way the term is used in the *Olmstead* opinion to describe civil institutionalization, which the Court held can be a form of unlawful discrimination.⁶³

The ADA's integration mandate presumes that such segregation is harmful. That is, the regulation itself bans an under-justified decision to isolate people with disabilities from other, non-disabled people; plaintiffs need not demonstrate how that decision hurts them. In addition, a decade of litigation under *Olmstead* in other settings has established that the solution for violations of the integration mandate is the provision of services in integrated settings that avoid the need to segregate.⁶⁴ For example, in *United States v. Delaware*, an *Olmstead* settlement between the DOJ and the state of Delaware required statewide crisis services to “[p]rovide timely and accessible support to individuals with mental illness experiencing a behavioral health crisis, including a crisis due to substance abuse.”⁶⁵ The settlement detailed numerous items that would form a “continuum of support services intended to meet the varying needs of individuals with mental illness.” This included Assertive Community Treatment teams—multidisciplinary groups including a psychiatrist, a nurse, a psychologist, a social worker, a substance abuse specialist, a vocational rehabilitation specialist and a peer specialist—to “deliver comprehensive, individualized, and flexible support, services, and rehabilitation to individuals in their home and communities,” and various kinds of case management.⁶⁶ And it provided for “an array of supportive services that vary according to people’s changing needs and promote housing stability” and “integrated opportunities for people to earn a living or to develop academic or functional skills.”⁶⁷ Other *Olmstead* decrees contain similar provisions.⁶⁸

The Delaware and other *Olmstead* cases provide a very helpful model for how prisons could comply with the integration mandate, managing the needs of prisoners with disabilities to keep them out of the segregated solitary confinement setting. The possibilities are broad: provision of mental health treatment and other supports, perhaps assignment to a one-person cell to minimize intra-cell conflict, and many more.

IV. THREE ADA DEFENSES

Prisons and jails faced with challenges to the ways they use solitary confinement for prisoners with disabilities have several available defenses. They can argue that the requested modifications would “fundamentally alter” their programs; that the modifications pose real safety risks; or that solitary confinement is actually helping the disabled prisoners get effective access to services. In this part, I explore those defenses,

⁶³ The plaintiffs in California’s *Coleman* litigation, a class action on behalf of prisoners with serious mental illness, have made the fullest version of this argument. In the end, the District Court did not address the argument, ruling entirely on constitutional grounds. See Notice of Motion & Motion for Enforcement of Court Orders & Affirmative Relief Re: Improper Housing & Treatment of Seriously Mentally Ill Prisoners in Segregation, *Coleman v. Brown*, 2:90-cv-00520-LKK-JFM (E.D. Cal. May 6, 2013), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0002-0066.pdf>; Plaintiffs’ Post-Trial Brief Regarding Enforcement of Court Orders and Affirmative Relief Regarding Improper Housing and Treatment of Seriously Mentally Ill Prisoners in Segregation, *Coleman v. Brown*, 2:90-cv-00520-LKK-DAD (E.D. Cal. Jan. 21, 2014), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0002-0065.pdf>.

⁶⁴ See Samuel R. Bagenstos, *The Past and Future of Deinstitutionalization Litigation*, 34 CARDOZO L. REV. 1 (2012).

⁶⁵ Settlement Agreement, *U.S. v. Delaware*, 1:11-cv-00591-LPS (D. Del. July 6, 2011), at 3, available at <http://www.clearinghouse.net/chDocs/public/PB-DE-0003-0002.pdf>.

⁶⁶ *Id.* at 5-6.

⁶⁷ *Id.* at 7-8.

⁶⁸ See *Special Collection: Olmstead Cases*, CIVIL RIGHTS LITIG. CLEARINGHOUSE, <http://www.clearinghouse.net/results.php?searchSpecialCollection=7> (last visited Apr. 11, 2016) (listing cases).

and explain how even their successful invocation would assist reform, by requiring careful, individuated consideration of the needs of prisoners with disabilities—the very type of consideration that could curb prison and jail overuse of solitary confinement.

A. FUNDAMENTAL ALTERATION/UNDUE FINANCIAL AND ADMINISTRATIVE BURDEN

As already noted, the ADA’s obligation to make “reasonable modifications in policies, practices, or procedures” is not unbounded; a modification is not required if it would “fundamentally alter the nature of the service, program, or activity.”⁶⁹ The separate ADA requirement of ready program accessibility is cabined by similar language—public entities need not take an action that they “can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens.”⁷⁰ Thus the major obstacle to ADA reasonable modification liability is a prison’s defense that the requested modification would “fundamentally alter” the policy, practice, or procedure, or, pose “undue financial and administrative burdens.” Just as “reasonable modification” is the analog to Title I’s “reasonable accommodation” requirement, “fundamental alteration” and “undue burden” are the analogs of Title I’s “undue hardship.”

Whether the particular change to a prison policy or practice a prisoner with a disability seeks is a fundamental alteration, which a prison is not required to undertake, or rather a reasonable modification that it must, is determined by a fact-intensive analysis. The burden the modification imposes is a key part of the calculus—both its cost (in comparison with the agency’s budget) and any other onerous features.⁷¹ In addition, the nature of the requested change matters; as in so many situations, whether it is considered fundamental turns in part on the level of generality used to describe the program and its “essential aspect[s].”⁷² Is the essence of solitary confinement its restrictive nature, or that it adequately safeguards safety and security? Is the essence of prison discipline that it punishes misconduct, or that it punishes culpable misconduct? And so on.

These kinds of arguments put the onus on the jail or prison to justify why they cannot make a requested change, if not for everyone, than for this particular disabled prisoner. The idea that some aspects of a program or policy are fundamental—but others are not—means that prisoner restrictions that have been treated as irrevocably bound together are conceptually untied, encouraging more individuation, more flexibility. As Professors Brittany Glidden and Laura Rovner summarized the point, “Because the accommodations should be specific and individualized, prison officials must demonstrate why in each case the particular prisoner cannot receive the requested services. As a result, it becomes more difficult for the prison to rely on generalized assertions of ‘safety’ to support the deprivations and instead forces an articulation of the reason for the particular condition.”⁷³ If the prison asserts a narrow defense, this may amount to a substantial concession—for example, a defense focusing on safety risks posed by a prisoner’s requested physical proximity to other people cannot justify bans on non-contact visits. If the defense is too broad, the court may well find for the plaintiff.

⁶⁹ 28 C.F.R. § 35.130(b)(1)(7).

⁷⁰ 28 C.F.R. § 35.150(a)(3).

⁷¹ *Olmstead*, 527 U.S. at n.16.

⁷² See *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 663 (2001).

⁷³ Glidden & Rovner, *supra* note 5, at 69.

B. LEGITIMATE SAFETY REQUIREMENTS AND DIRECT THREAT

The ADA regulations provide two defenses related to health and safety. The first allows that:

A public entity may impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities. However, the public entity must ensure that its safety requirements are based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities.⁷⁴

The second regulatory defense similarly provides:

(a) This part does not require a public entity to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others.

(b) In determining whether an individual poses a direct threat to the health or safety of others, a public entity must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.⁷⁵

These defenses allow prison officials to argue that changes to solitary confinement policies would pose a “direct threat” to others, and therefore, the ADA does not require accommodations in those circumstances. Similarly, the prison could argue that their challenged decisions are based on “legitimate safety requirements” for the safe operation of their services, programs, or activities, including classification, housing, and mental health services.

The direct threat defense had its origin in *School Board of Nassau County v. Arline*, in which the Supreme Court held (without a statutory or regulatory textual hook) that a direct threat under Section 504 of the Rehabilitation Act requires a showing of a significant risk to the health or safety of others that could not be eliminated or reduced to an acceptable level by reasonable modification of policies, practices, or procedures.⁷⁶ This requirement was then codified for ADA Titles I and III, and incorporated into the Title II regulations.⁷⁷ As the Supreme Court has explained, “The direct threat defense must be ‘based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence.’”⁷⁸ The defense also requires an “individualized assessment” of the plaintiff’s safety risk, including the likelihood and severity of the potential harm.

⁷⁴ 28 C.F.R. § 35.130(h).

⁷⁵ 28 C.F.R. § 35.139.

⁷⁶ 480 U.S. 273, 278-88 (1987).

⁷⁷ See 42 U.S.C. § 12113(b), 42 U.S.C. § 12182(b)(3), and 35 C.F.R. § 35.139 (codifying the “direct threat” defense in the Title I and III statutes and Title II regulations, respectively).

⁷⁸ *Echazabal v. Chevron*, 536 U.S. 73, 86 (2002); see also *Bragdon v. Abbott*, 524 U.S. 624, 649 (1998) (“[T]he risk assessment must be based on medical or other objective evidence.”).

Generally, public entities denying an individual with a disability the opportunity to participate in and benefit from services, programs, and activities on the basis of direct threat bear a “heavy burden,” in proving their claims. The same would presumably be true of legitimate safety criteria.⁷⁹ But of course, courts are very deferential to prison officials’ claims of danger. Arguments center on whether the prison has “ensure[d] that its safety requirements are based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities,”⁸⁰ and whether the claim of direct threat is appropriately based on “individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.”⁸¹

As the DOJ further explained in a brief filed in 2013, “[P]risoners with disabilities cannot be automatically placed in restrictive housing for mere convenience . . . the individualized assessment should, at a minimum, include a determination of whether the individual with a disability continues to pose a risk, whether any risk is eliminated after mental health treatment, and whether the segregation is medically indicated.”⁸²

As with the fundamental alteration defense, the direct threat/legitimate safety requirement defenses push prisons and jails to individuate, to provide reasonable modifications, and to accommodate individuals with mental disabilities.

C. EFFECTIVE SERVICES

As I explained in Part II, ADA regulations generally restrict jails and prisons from adopting “different or separate aids, benefits, or services” for individuals with mental disabilities.⁸³ The regulations do provide an exception, if differentiation or separation is necessary to ensure that the disabled prisoner has access to “aids, benefits, or services that are as effective as those provided to others.”⁸⁴ A prison seeking to fend off a challenge to placement of prisoners with disabilities in solitary confinement or high-security mental health housing might argue that the housing assignment is needed in order to provide adequate services (e.g., safety) to those prisoners, and therefore authorized by the regulations. But if that were the case, one would expect conditions of confinement to be as therapeutic as possible. This defense, then, encourages prisons and jails to demonstrate a softer, more individuated, less punitive form of isolation in order to prevail. In the absence of that kind of evidence—which could rarely be produced—this defense is simply implausible.⁸⁵ In addition, any arguments plaintiffs make explaining how prisons could have avoided solitary confinement by undertaking reasonable modifications will undermine the idea that a separate “benefit” (solitary) was necessary.

⁷⁹ See, e.g., *Lockett v. Catalina Channel Express, Inc.*, 496 F.3d 1061, 1066 (9th Cir. 2007); *Doe v. Deer Mountain Day Camp, Inc.*, 682 F. Supp. 2d 324, 347 (S.D.N.Y. 2010); *Celano v. Marriott Int’l, Inc.*, No. C 05-4004 PJH, 2008 WL 239306, at *16 (N.D. Cal. Jan. 28, 2008).

⁸⁰ 28 C.F.R. § 35.130(h).

⁸¹ 28 C.F.R. § 35.139(b).

⁸² Response of the United States of America to Defendants’ Motion in Limine No.4: To Exclude the Statement of Interest, *Coleman v. Brown*, 2:90-cv-00520-LKK-DAD (E.D. Cal. Nov. 12, 2013), available at <http://www.clearinghouse.net/chDocs/public/PC-CA-0002-0041.pdf> (and Appendix).

⁸³ 28 C.F.R. § 35.130(b)(i)(iv).

⁸⁴ *Id.*

⁸⁵ See Cresson Letter, *supra* note 30, at 11-12.

V. CONCLUSION

Eighth Amendment lawsuits have been a crucial impetus to solitary confinement reform—producing strong evidence of the damage solitary wreaks, judicial statements condemning that damage, and models of solutions that get and keep prisoners out of solitary. But the high bar Eighth Amendment liability demands has failed many individuals with disabilities. Notwithstanding two decades of precedents that emphasize the vulnerability of prisoners with mental disabilities to the toxicity of solitary confinement, such prisoners remain overrepresented in restrictive housing. Prisons and jails resort too easily to isolating prisoners with disabilities instead of treating them and modifying policies and practices that would allow equal access to programs, services, and activities.

To an extent not yet fully implemented, the ADA requires jails and prisons to work at keeping prisoners with disabilities out of solitary confinement and instead promote disabled prisoners' access to programs. This Issue Brief has offered a guide to the various provisions and theories that emerge from carefully reading and analyzing the regulations, the limited caselaw, and recent litigation documents. The overall theme is one of individuation. The ADA and its regulations require prison and jail officials to offer very robust justification for the isolation and disadvantaging of prisoners with disabilities; alternatives, which frequently require modification to policies or practices, are generally reasonable, and therefore compelled. This route can lead to fewer prisoners with disabilities in solitary confinement, and less harsh conditions for those whose isolation survives review. The ADA will not stop solitary, but it can reduce its use and severity for prisoners with mental disabilities.

ABOUT THE AUTHOR

Margo Schlanger is the Henry M. Butzel Professor of Law at the University of Michigan. She teaches constitutional law, torts, and classes relating to civil rights (recent seminars include Civil Rights and Homeland Security, and Police and Surveillance Reform) and to prisons (such as Prisons and the Law, and the Constitutional Law of Incarceration). She also founded and runs the Civil Rights Litigation Clearinghouse.

Professor Schlanger is the court-appointed monitor for a statewide settlement dealing with deaf prisoners in Kentucky, and she serves on the Department of Homeland Security's Advisory Committee on Family Residential Centers. She took a two-year leave from the University in 2010 and 2011, serving as the presidentially appointed Officer for Civil Rights and Civil Liberties at the U.S. Department of Homeland Security. As the head of civil rights and civil liberties for DHS, she was the Secretary's lead advisor on civil rights and civil liberties issues; in that capacity, she testified before Congress; chaired the Privacy, Civil Rights, and Civil Liberties Subcommittee of the federal Information Sharing Environment's Information Sharing and Access Interagency Policy Committee; chaired the Interagency Coordinating Council on Emergency Preparedness and Individuals with Disabilities; served on the first U.S. Delegation to the U.N. Universal Periodic Review; and met with community leaders and groups across America to ensure that their perspectives regarding civil rights and homeland security were considered in the Department's policy process.

Professor Schlanger earned her J.D. from Yale in 1993. She served as book reviews editor of the *Yale Law Journal* and received the Vinson Prize. She then served as law clerk for Justice Ruth Bader Ginsburg of the U.S. Supreme Court from 1993 to 1995. From 1995 to 1998, she was a trial attorney in the U.S. Department of Justice Civil

Rights Division, where she worked to remedy civil rights abuses by prison and police departments and earned two Division Special Achievement awards.

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Racism in the U.S. Criminal Justice System: Institutionalized Genocide?*

Nkechi Taifa

David Simon, creator of the popular HBO series *The Wire* and commentator in director Eugene Jarecki's documentary *The House I Live In*, once characterized the drug war as a "holocaust in slow motion."¹ Filmmaker Michael Moore tweeted that the water crisis in Flint, Michigan was "a version of genocide."² Brazen police killings are far from new but increasingly terrifying as the result of smart phones, with even barber shop chatter describing the situation as genocidal. And a Shadow Report compilation of police violence and torture submitted to the United Nations (UN) in 2014 used genocide as its backdrop.³

On the launch of his 1903 treatise, *The Souls of Black Folk*, historian W.E.B. DuBois prophesized that "the problem of the twentieth century is the problem of the color-line," referring to the pernicious role of race in society. And now, more than 100 years later, his prognosis is even more ominous as my scrutiny of international law dictates that conditions facing twenty-first century Black America could have parallels to genocide.

I. INTRODUCTION

I coined the arguably contentious phrase "institutional genocide" as a framework through which to analyze the evolving jurisprudence of international human rights doctrine to selected conditions impacting Black people in the United States.⁴ The terminology is neither radical ranting nor rank rhetoric. It uses the international definition of genocide as a lens to scrutinize today's criminal punishment system and its impact on the Black community, although the impact of racism in other systems, such as education⁵ or health care,⁶ could likewise be so examined.

* This issue brief was initially published in October 2016. The views expressed in this Issue Brief are solely those of the author.

¹ *Inside the "War on Drugs,"* HARV. MAG. (Mar. 28, 2013), <http://harvardmagazine.com/2013/03/inside-the-war-on-drugs>.

² Michael Moore (@MMFlint), TWITTER (Dec. 19, 2015, 7:13 PM), <https://twitter.com/mmflint/status/678367616650444800>.

³ WE CHARGE GENOCIDE, POLICE VIOLENCE AGAINST CHICAGO'S YOUTH OF COLOR (2014), <http://report.wechargegenocide.org/downloads/un-report-we-charge-genocide.pdf>.

⁴ See, e.g., Freddie Allen, *The IBW "Black Paper" Seeks To Energize Activists*, L.A. SENTINEL (Sept. 6, 2013), <https://lasentinel.net/the-ibw-black-paper-seeks-to-energize-activists.html>.

⁵ See, e.g., Joy Resmovits, *American Schools Are Still Racist, Government Report Finds*, HUFF. POST (Mar. 21, 2014), http://www.huffingtonpost.com/2014/03/21/schools-discrimination_n_5002954.html.

⁶ See, e.g., megalopolisuk, *Medical Apartheid Part 1*, YOUTUBE (Feb. 27, 2007), <https://www.youtube.com/watch?v=H6oHn72QUno>.

The backdrop for my analysis is the scholarship of Critical Race Theory,⁷ which provides an expanded framework of thinking on issues of race and social reality. For example, the term “genocide” appears to singularly conjure in most minds images of fiery ovens and atrocious massacres. As such, there is often a blanket denunciation of the applicability of the term to the United States. This censure is understandable, albeit myopic. Seldom do critics dispassionately examine the internationally accepted parameters of the term “genocide,” and then methodically apply that definition to the impact of the United States’ criminal justice system on a particular racial group.⁸ For if one were to do so, I suggest that manifestations of genocide against a substantial segment of the Black populace in the United States could be plausible.

The purpose of this Issue Brief is to advance the scholarly dialogue with respect to the applicability of international human rights doctrine to domestic United States conditions; in this case, the application of the international definition of genocide to the Black community as it is impacted by the U.S. criminal justice system. My premise is that the United States has moved beyond institutional racism⁹ in the administration of its punishment system, to manifestations of genocide.

Nothing in this argument is intended to compare or equate genocides throughout history. Each is abhorrent with its own mass atrocity. All must be remembered with their victims respected and sufferings honored.

I first present the definition of genocide embraced by the international community and analyze its adoption as ratified by the United States. Next, I tackle a presumptively fundamental barrier to my thesis—the issue of intent—and theorize how that hurdle might be overcome. In the classic story-telling tradition of many critical race theorists,¹⁰ I then briefly introduce the inter-generational characters in Aunt Nettie’s neighborhood—a stylized composite of a community impacted by the devastating realities of the criminal justice system over the past forty years. Finally, I discuss, in a cursory fashion, policies and practices highlighted by the composite, demonstrating their far-reaching and grave implications, which I proffer, in many respects, parallel the definition of genocide against a substantial segment of the U.S. Black population within the framework of both international and domestic law.

⁷ Critical Race Theory is the legal scholarship movement developed in the mid-1970s as a result of discontent with the failure of Critical Legal Studies to adequately address race in its analysis and criticism of the American legal system. See CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberle Crenshaw et al., eds., 1996). Critical Race Theorists often advance innovative thoughts, tactics and strategies with which to analyze legal doctrine related to race.

⁸ For example, Professor Randall Kennedy has criticized the paradigm of genocide in the United States, noting, that “no one ... has come forward with credible evidence to suggest that American drug policy is truly genocidal—that is, deliberately designed to eradicate a people.” Randall Kennedy, Symposium, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1261 (1994). Professor Kennedy’s definitional reference to genocide however, is underinclusive. In selectively paraphrasing the Genocide Convention, he omits provisions that are addressed in this Paper and leaves the reader to off-handedly dismiss any correlation applied to conditions within the United States.

⁹ “Institutional racism ... is a theory of racism wherein unwarranted racially disparate treatment is codified within the structural fabric of social institutions and manifests routinely without the need for a discrete actor to overtly perpetrate a discriminatory act.” Nkechi Taifa, *The “Crack/Powder” Disparity: Can the International Race Convention Provide a Basis for Relief?*, AM. CONST. SOC’Y (May 2006), https://www.acslaw.org/sites/default/files/Taifa_-_Crack_Powder_Disparity.pdf [hereinafter *The Crack/Powder Disparity*].

¹⁰ A predominate theme within critical race jurisprudence is the active use of storytelling—which includes narrative, parable, chronicles and anecdotes—with which to analyze and challenge the “majoritarian mindset—the bundle of presuppositions, received wisdoms, and shared cultural understandings persons in the dominant group bring to discussions of race.” Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461, 462 (1993).

II. APPLICATION OF THE TERM “GENOCIDE”

A. THE INTERNATIONAL DEFINITION OF GENOCIDE

In 1948 the UN General Assembly adopted the International Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).¹¹ This Convention confirmed that “genocide, whether committed in time of peace or in time of war, is a crime under international law which [the Contracting Parties] undertake to prevent and to punish.”¹² Genocide, the Convention declares, is the committing of certain acts “with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.”¹³ According to the international convention, the following acts constitute genocide:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group; [or]
- (e) Forcibly transferring children of the group to another group.¹⁴

Pursuant to the Genocide Convention, however, genocide is not the only punishable act. Related acts, such as conspiracy, incitement or attempts to commit genocide, and complicity in genocide, are equally punishable.¹⁵ Furthermore, the international definition concludes by reminding the Parties that those who commit genocide or any other of the related acts “shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”¹⁶

B. THE LENGTHY PROCESS OF U.S. RATIFICATION

The UN General Assembly adopted the Genocide Convention in 1948 without dissent, with the United States being the first nation to sign. Indeed, the United States’ delegation played a pivotal role in drafting the international Convention; however, it took the United States thirty-eight years to give its advice and consent to ratification.

¹¹ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

¹² *Id.* at art. I.

¹³ *Id.* at art. II.

¹⁴ *Id.*

¹⁵ *Id.* at art. III.

¹⁶ *Id.* at art. IV.

One of the articulated reasons for this unconscionable delay was the fear that Blacks in America would use the treaty to their advantage.¹⁷

According to Stephen Klitzman, chairman of an American Bar Association committee that chronicled the history of the Genocide Convention's ratification process, the Genocide Convention had set a record "as the most scrutinized and analyzed non-military treaty ever to be considered by the Senate."¹⁸ The Senate Foreign Relations Committee held hearings for thirteen days. More than 200 witnesses, representing divergent views, testified. The hearing's transcript was more than 2,000 pages long.¹⁹

Nearly forty years after its adoption by the United Nations, and after scores of other nations had already ratified it, the U.S. Senate finally gave its advice and consent to ratification, subject to the enactment of implementing legislation under federal law. By this point, political leaders in the United States felt comfortable that enactment of anti-segregation laws mooted concern over attacks against American racial practices of the 1950s and 1960s.²⁰ The Senate also took the extra step of inserting language to limit the scope of the Genocide Convention within U.S. law.

Implementing legislation was now critical because the Genocide Convention, distinct from later international human rights treaties such as the International Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Racial Discrimination, incorporated a provision that the Contracting Parties agree to enact the necessary legislation in their respective jurisdictions prior to depositing the ratification documents with the United Nations.²¹ This provision was significant, in that it ensured that ratification of the Genocide Convention would not be a symbolic gesture, but would have the full force of laws and the authority to enact penalties.

¹⁷ That fear was not without substance. In 1951, three years after the passage of the Genocide Convention by the United Nations, W.E.B. DuBois and over ninety others presented the United Nations with a petition chronicling the genocidal sufferings, murder, mental assault and crimes against humanity inflicted against Black people. Twenty years later this petition was published in the book, *CIVIL RIGHTS CONGRESS, WE CHARGE GENOCIDE: THE HISTORIC PETITION TO THE UNITED NATIONS FOR RELIEF FROM A CRIME OF THE UNITED STATES GOVERNMENT AGAINST THE NEGRO PEOPLE* (William L. Patterson ed., 1970). The documented reasons for delay included the anxieties of segregationists that ratification would subject the United States to punishment under the Convention, based on the country's treatment of Native American and Black people. This fear was illustrated by the concerns of Ohio Senator John Bricker, who was alarmed at the thought that literally thousands of discriminatory federal and state laws could automatically be invalidated by application of international human rights law in domestic courts. See Stephen H. Klitzman, Craig H. Baab & Brian C. Murphy, *Ratification of the Genocide Convention: From the Ashes of "Shoah" Past the Shoals of the Senate*, 33 *FED. BAR NEWS & J.* no. 6, July-Aug. 1986, at 257, reprinted in *The Genocide Convention Implementation Act: Hearing on H.R. 807 Before the Subcomm. on Immigration, Refugees, & International Law of the H. Comm. on the Judiciary*, 100th Cong. (1988) (statement of Stephen Klitzman) [hereinafter *Ratification of the Genocide Convention*].

¹⁸ See *Ratification of the Genocide Convention*, *supra* note 17.

¹⁹ Yet, despite this voluminous record and the fact that the Foreign Relations Committee favorably reported the pact five times prior to 1985 (1970, 1971, 1973, 1976, and 1984), the treaty never came to vote in the full Senate until February 1986. See *id.*

²⁰ See Nkechi Taifa, Symposium, *Codification or Castration? The Applicability of the International Convention to Eliminate All Forms of Racial Discrimination to the U.S. Criminal Justice System*, 40 *HOW. L.J.* 641, 652 (1997). See also THOMAS BUERGENTHAL, *INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL* 281-82 (1995).

²¹ Genocide Convention, *supra* note 11, at art. V.

C. THE UNITED STATES CODIFICATION

On April 4, 1988, President Ronald Reagan signed the Genocide Convention Implementation Act.²² This Act codified the international Genocide Convention in U.S. law, making various changes to limit its applicability, perhaps because the Senate feared the language as originally composed. These changes included: (1) adding the terms “specific” before “intent,” and “substantial” in front of “part;” and (2) defining “mental harm” as the permanent impairment of mental faculties, particularly referring to the application of narcotic drugs. Thus, the Genocide Convention, as codified in U.S. law reads (with the significant additions highlighted in bold, and omissions designated by brackets) as follows:

“Whoever, whether in time of peace or in time of war, in a circumstance described in subsection (d) and with the **specific** intent to destroy, in whole or in **substantial** part, a national, ethnic, racial, or religious group as such—

(1) kills members of that group;

(2) causes serious bodily injury [or mental harm] to members of that group;

(3) causes the **permanent impairment of the mental faculties of members of the group through drugs, torture, or similar techniques;**

(4) subjects the group to conditions of life that are intended to cause the physical destruction of the group in whole or in part;

(5) imposes measures intended to prevent births within the group; or

(6) transfers by force children of the group to another group; shall be punished as provided in subsection (b).”²³

III. THE PROBLEM WITH INTENT

Many of the disparities in the criminal justice system arise from institutional and structural racism, in which “public policies, institutional practices, cultural representations, and other norms work in various, often reinforcing ways to perpetuate racial group inequity.”²⁴ As such, the “specific intent” prong, as inserted by the United States, is a fundamental hurdle to use of this treaty in U.S. law. It is a difficult hurdle, given the restrictive manner in which U.S. courts have historically construed the intent requirement within a general equal protection analysis involving criminal justice issues.²⁵ It seems obvious that few public officials, private individuals, or

²² Genocide Convention Implementation Act of 1987, Pub. L. No. 100-606, 102 Stat. 3045 (1988), *as amended by* The Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, tit. VI, § 60003(a)(13), 108 Stat. 1796 (1994) (codified at 18 U.S.C. § 1091 (2009)).

²³ 18 U.S.C. § 1091(a).

²⁴ ASPEN INST. ROUNDTABLE ON CMTY. CHANGE, STRUCTURAL RACISM AND COMMUNITY BUILDING 11 (2004), https://assets.aspeninstitute.org/content/uploads/files/content/docs/rcc/aspen_structural_racism2.pdf.

²⁵ Jeffrey A. Kruse, *Substantive Equal Protection Analysis Under State v. Russell, and the Potential Impact on the Criminal Justice System*, 50 WASH. & LEE L. REV. 1791 (1993).

constitutionally responsible officials will explicitly state, “I have the specific intent to destroy, in whole or in substantial part, your racial, ethnic or religious group.” More recently, however, in the seminal stop-and-frisk case *Floyd v. City of New York*, a federal judge in the Southern District of New York found discriminatory intent based on circumstantial evidence.²⁶ Still, the Supreme Court has yet to abandon its long-standing tradition requiring direct evidence of intent.²⁷

Despite the lower court finding in *Floyd* that intentional discrimination could be found based on both statistical and anecdotal evidence,²⁸ as I stated in *The “Crack/Powder” Disparity: Can the International Race Convention Provide a Basis for Relief?*:

Scholars have argued ... that the current intent standard “ignores the way racism works” and because racial inequality can manifest “irrespective of the decisionmakers’ motive,” the remedy to that inequality must likewise not be dependent upon provable intentional conduct. “Sophisticated racists have learned to code their language and not leave behind a trail of racism.” Although cognizable reasons may exist for courts declining to extend an equal protection remedy beyond cases of provable intentional discrimination, such arguments, no matter how colossal they may appear, should not continue to be allowed as justification to circumscribe justice.... Current equal protection analysis must not be allowed to block consideration of creative solutions.²⁹

Unless the Supreme Court adopts the analysis in *Floyd* or sanctions similar use of ancillary evidence to prove discriminatory intent, we should look to international jurisprudence, which understands that racism manifests in various forms, allowing intent to be gleaned through actions and impact. For example, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), which the United States has ratified but not made self-executing, allows laws and practices that have an invidious discriminatory impact to be condemned, regardless of specific intent, reaching both conscious and unconscious forms of racism.³⁰ Thus, if the intent standard of the Genocide Convention, as ratified by the United States, were to be interpreted in accordance with the intent standard in CERD, then the paradigm of genocide against a substantial portion of the Black populace in the United States resulting from institutionalized or structural racism in the criminal justice system could, in fact, be plausible and actionable.

Leaving the intent prong aside, let us go back to the definition of genocide and analyze how the impact of racism in the criminal punishment system could fit that mold. In this vein, the term “institutional genocide” is a formulation illuminating the severity inherent in the international nomenclature, while acknowledging that there may be complications with the U.S. interpretation of intent. In the criminal punishment context, institutionalized genocide is the aggregate impact of discriminatory

²⁶ *Floyd v. City of New York*, 959 F.Supp.2d 540 (S.D.N.Y. 2013).

²⁷ *United States v. Armstrong*, 517 U.S. 456 (1996). The Supreme Court ruled in *Armstrong* that, in order for a defendant to be entitled to discovery based on a claim of selective prosecution because of race, the defendant must prove the prosecution was motivated by discriminatory intent.

²⁸ *Floyd*, 959 F. Supp. 2d at 562.

²⁹ *The “Crack/Powder” Disparity*, *supra* note 9, at 5 (citations omitted).

³⁰ International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195.

treatment of a community—embedded in laws, policies, and practices of institutions involved in policing, prosecution, and sanctions—which has the effect of destroying, in whole or substantial part, a racial, ethnic or religious group. Such destruction manifests through killings, bodily or mental harm, and destructive conditions of life, to name a few factors. This destruction may not be the result of conscious choice or intentional, deliberate decision-making. Indeed, in addition to being perpetrated through individual acts, discriminatory treatment is embedded within the structure, policies, and practices of whole institutions.

There is a broader social context that underlies the criminal justice system in the United States, which disproportionately impacts African Americans. It is a social context permeated by the poverty, rampant unemployment, poor housing and homelessness, inadequate education, harmful health outcomes, and diminished life opportunities of “disordered neighborhoods.”³¹ With such an array of interrelated risk factors, the conditions of life in neighborhoods of concentrated poverty often result in the destruction of not only individuals, but also entire families and generations. The cumulative effect of these conditions almost guarantees the involvement of many young inner city Blacks in the criminal justice system. Ultimately, unmet social needs provide fuel for the cycle of incarceration.³² Even the vast majority of African Americans who do not come from poverty nevertheless share a heritage on this land of enslavement, segregation, and unequal treatment based on race, often embedded in institutions and generally implicit in policies and practices. These structural arrangements result in killings and bodily and mental harm, on top of appalling conditions of life.

Are these conscious acts intended to cause such destruction? Are they the unconscious effects of structural racism in the criminal justice system? Or do they constitute institutionalized genocide? The following section will attempt to answer these questions by analyzing the life of the fictional “Aunt Nettie” through the framework of the U.S. interpretation of the international definition of “genocide.”

IV. AUNT NETTIE’S NEIGHBORHOOD AND BREAKING DOWN THE SAGA

Aunt Nettie, the elderly lady who lives up the street, has seen and heard it all. Whether viewed first hand from her porch or heard from news reports flashed across her T.V. screen, her community’s narratives are representative of countless chronicles in neighborhoods across the country depicting aspects of the definitional prongs of genocide. Aunt Nettie’s life is saturated with accounts of seemingly senseless police killings of Black men, women and children. When she was a little girl, Nettie’s grandfather was executed for the murder of a White woman in Georgia, despite the fact that he was fifty miles away at a family reunion at the time. He proclaimed his innocence to the end. Now in her later years, Nettie knows the dilapidated conditions around her are commonplace in her neighborhood. For decades she knew the children in her neighborhood ate paint chips from crumbling ceilings and walls, never realizing they contained deadly lead. So when the reports came out about poisoned water from lead pipes in Flint, Michigan, she could only shake her head in agony.

³¹ “Disordered neighborhoods” also refers to “policing styles and outcomes, crime, social control, social disorganization, neighborhood decay, foreclosure, and fear of crime.” Danielle Wallace & Christopher Scott, *Neighborhood Disorder*, OXFORD BIBLIOGRAPHIES (July 24, 2013), <http://www.oxfordbibliographies.com/view/document/obo-9780195396607/obo-9780195396607-0154.xml>.

³² See Nkechi Taifa & Catherine Beane, Symposium, *Integrative Solutions to Interrelated Issues: A Multi-Disciplinary Look Behind the Cycle of Incarceration*, 3 HARV. L. & POL’Y REV. 283 (2009).

Aunt Nettie was scared to sit on her front porch that day. The previous night another Black youth was gunned down by law enforcement, this time right on her block, so she contented herself to pulling back her curtains and peering out the window. She watched the aging African American men gather at their daily abode—the street corner in front of the liquor store. She watched as her nephew Larry walked past them. Larry was recently released from serving a twenty-year mandatory minimum drug sentence and Nettie knew he was anxious to get back on his feet. She watched the teens hanging out by the alley with no employment prospects in sight and noticed the middle school students who frequented the fast-food restaurant on their way home from class, many of whom had never been to a “sit-down” restaurant in their lives. She watched her pregnant, drug-addicted niece Tanisha slowly ambling up the stairs to the apartment she let her boyfriend use as a drug-selling haven. Little did Aunt Nettie know that circumstances would dictate that Tanisha would never get to raise the child she would deliver. Just yesterday, Aunt Nettie witnessed Tanisha’s little brother, Terrence, get arrested for carjacking. But despite the desolate and painful conditions of life surrounding her neighborhood, Aunt Nettie beamed when she saw her grandnephew Little Ray bounce down the street toward her door.

A. “KILLING MEMBERS OF THE GROUP”

Racially biased executions and extrajudicial killings against Black people—whether by lynch mobs or officers of the law, fall within the first definitional prong of the Genocide Convention. Aunt Nettie’s grandfather, executed in a White victim case, is representative of hundreds of Black men who have been convicted of killing Whites and sentenced to die and countless others murdered before even getting to the courthouse. While the facts may differ in individual cases, the constant factor—death sentences or extrajudicial killings where the race of the victim is White—remains. This is further demonstrated by a U.S. General Accounting Office study, which found evidence indicating a pattern of racial disparities in the charging, sentencing, and imposition of the death penalty, and concluded that those who murdered Whites were more likely to be sentenced to death than those who murdered Blacks.³³

Furthermore, there are disproportionately high rates of the use of excessive and deadly force by police officers against people of color, with more and more occurrences coming to light as the result of video technology. Despite the lack of an adequate federal database of fatal police shootings, even a cursory scrutiny of academic studies, legal rulings and media investigations reveals evidence of intentional and implicit bias by police against Blacks, from traffic stops to unjustified police killings.³⁴ The young Black man shot dead by police in Aunt Nettie’s neighborhood is reminiscent of increasing numbers of African Americans murdered by the very police officers sworn to protect them. The Genocide Convention does not provide guidance as to what numbers constitute “a group” and there has yet to be any United States-based litigation delineating such. However, even discounting the legacy of lynchings³⁵ in this country by

³³ U.S. GEN. ACCOUNTING OFF., GGD-90-57, DEATH PENALTY SENTENCING RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (Feb. 1990), <http://www.gao.gov/assets/220/212180.pdf>.

³⁴ See Kia Makarechi, *What the Data Really Says About Police and Racial Bias*, VANITY FAIR (July 14, 2016), <http://www.vanityfair.com/news/2016/07/data-police-racial-bias>; Justin Feldman, *Roland Fryer Is Wrong: There Is Racial Bias in Shootings by Police*, OPENSCHOLAR@HARVARD: JUSTIN FELDMAN (July 12, 2016), <http://scholar.harvard.edu/jfeldman/blog/roland-fryer-wrong-there-racial-bias-shootings-police>.

³⁵ See EQUAL JUSTICE INITIATIVE, *LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR* (2d ed. 2015), http://www.eji.org/files/Lynching_in_America_2d_Ed_Summary.pdf.

private individuals and racially biased capital punishment³⁶ by the state, I submit that racially biased police killings of unarmed Blacks³⁷ alone is probative of “killing of members of the group.”

B. CAUSING SERIOUS BODILY INJURY, MENTAL HARM OR PERMANENT IMPAIRMENT OF MENTAL FACULTIES

Under the international definition of genocide, it is possible to destroy a group of people without actual killing, that is why the definition includes, “causing serious bodily or mental harm to members of the group” or, as interpreted and codified by the United States, “caus[ing] serious bodily injury to members of the group,” and “caus[ing] the permanent impairment of the mental faculties of members of the group through drugs, torture or similar techniques.” Although the United States sought to confine the reach of the international definition through its restrictive interpretation of “mental harm,” substantial numbers of African Americans have nevertheless been bodily harmed and mentally impaired. Whether such injuries are caused by drugs, disproportionate racial imprisonment, solitary confinement, or torture, they are all exacerbated as the result of centuries of untreated, multi-generational trauma, analytically described as “Post Traumatic Slave Syndrome.”³⁸

While in prison, Aunt Nettie’s son Larry was incarcerated in a special housing unit within a super maximum prison. Confined for twenty-three hours a day in a sealed, windowless cell, with no work, training, or other programs, Larry was subjected to regimes of extreme social and sensory deprivation. Many in his unit also suffered from severe mental illness due to the lack of environmental stimulation, leading to traumatic and serious psychiatric consequences. Prison authorities have defended such units as being necessary to contain violent, disruptive prisoners; however, Amnesty International asserts that conditions in some units violate international standards for the humane treatment of prisoners and exceed what is necessary for security purposes.³⁹ The total U.S. prison and jail population has exceeded the two million mark. Nearly half of that population is African American, with Black men in the United States incarcerated at a rate five times higher than Blacks were under apartheid South Africa. The increase in the prison population is neither evidence of rising crime and nor an indication of more criminal activity by African Americans. Rather, it is a reflection of destructively lengthy sentencing policies that have had a disproportionate impact on African Americans.

Still, the health consequences of mass incarceration are often overlooked. As a result of prison overcrowding and the lack of appropriate correctional health care, tuberculosis spreads rapidly. In New York City, where a particularly virulent, multi-drug resistant form of the disease broke out, eighty percent of known cases were traced to prisons.

³⁶ See Richard C. Dieter, *The Death Penalty in Black and White: Who Lives, Who Dies, Who Decides*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/death-penalty-black-and-white-who-lives-who-dies-who-decides>.

³⁷ See Rich Juzwiak & Aleksander Chan, *Unarmed People of Color Killed by Police 1999-2014*, GAWKER (Dec. 8, 2014), <http://gawker.com/unarmed-people-of-color-killed-by-police-1999-2014-1666672349>.

³⁸ “Post Traumatic Slave Syndrome” posits that centuries of chattel slavery in the United States, followed by the residual impacts of multi-generational oppression and institutionalized racism without the opportunity to heal or access societal benefits, result in predictable destructive patterns of behavior. *Post Traumatic Slave Syndrome*, DR. JOY DEGRUY, <http://joydegruy.com/resources-2/post-traumatic-slave-syndrome/> (last visited Oct. 21, 2016).

³⁹ AMNESTY INT’L, UNITED STATES OF AMERICA: HUMAN RIGHTS VIOLATIONS: A SUMMARY OF AMNESTY INTERNATIONAL’S CONCERNS 22 (Mar. 1, 1995), <https://www.amnesty.org/en/documents/amr51/025/1995/en/>.

Moreover, the rate of HIV infection in the prison population is proliferating. Given the disproportionate numbers of African Americans who are incarcerated, and the cycling of people in and out of prison, a public health crisis has been created with disastrous consequences for not only Black prisoners but their families and communities as well.

Another stark example illustrating the genocidal definition of bodily or mental harm was the systematic torture that was inflicted on at least 125 African American suspects in police custody on Chicago's Southside to extract confessions between 1972 and 1991. The torture techniques included electric shocks to genitals, suffocation with plastic bags, hot radiator burnings, and mock executions, all under the command of Lt. Jon Burge of the Chicago Police Department.

Burge's legacy of torture left festering wounds that remain open to this day. Many survivors continue to suffer from nightmares and flashbacks, grappling with post-traumatic stress disorder that has gone untreated for decades. They live under a shroud of shame, guilt, and anguish that undermines their ability to form relationships and share community with others. Survivors' family members were also left to contend with their secondary trauma in isolation, after their fathers, sons and partners were ripped from them. As whispers of the torture spread, entire communities lived in fear that they or their loved ones would be disappeared from street corners or homes into the bowels of police stations to be tortured and terrorized. The torture, like lynchings, served to terrorize entire African American communities.⁴⁰

The UN Committee Against Torture was dismayed by Lt. Burge's systematic use of torture. The committee reviewed the issue of police violence in Chicago and it expressed "deep concern at the frequent and recurrent police shootings or fatal pursuits of unarmed black individuals."⁴¹ As the result of a multi-faceted mobilization incorporating community activism and advocacy, Chicago became the first U.S. municipality to provide a reparations settlement to victims of racially motivated police violence.⁴²

⁴⁰ Joey Mogul, *Reparations: A Blueprint To Address Systemic Police Violence*, PEOPLE'S LAW OFF., <http://peopleslawoffice.com/reparations-a-blueprint-to-address-systemic-police-violence/> (last visited Oct. 21, 2016).

⁴¹ See Press Release, We Charge Genocide, Chicago Police Violence Against Black and Latino Youth Called Out by United Nations Committee (Nov. 31, 2014), <http://wechargegenocide.org/press-release-chicago-police-violence-against-black-and-latino-youth-called-out-by-united-nations-committee-against-torture/>; see also WE CHARGE GENOCIDE, *supra* note 3, at 2.

⁴² Chicago, Ill., Reparations for Burge Torture Victims Ordinance (May 6, 2015), https://www.cityofchicago.org/content/dam/city/depts/dol/supp_info/Burge-Reparations-Information-Center/ORDINANCE.pdf. The ordinance provides a formal apology from the city; free tuition at Chicago city colleges; psychological counseling and prioritized access to select city services; a requirement that the Burge torture cases and police brutality be taught as part of the curriculum in Chicago city schools; and the creation of a public memorial in remembrance of the torture and its survivors. The ordinance also provides compensation to living survivors from a \$5.5 million dollar city fund. See *City of Chicago Reparations for Burge Torture Victims—Frequently Asked Questions*, CITY OF CHI., http://www.cityofchicago.org/city/en/depts/dol/supp_info/burge-reparations-information/burge-reparations--frequently-asked-questions.html (last visited Oct. 21, 2016).

C. INFLECTING CONDITIONS CALCULATED TO BRING ABOUT PHYSICAL DESTRUCTION

The people in Aunt Nettie's neighborhood have lived all their lives in an under-resourced environment with substandard schools and a lack of meaningful jobs. Many of the children grew up with health deficits from lead poisoning and the lack of fresh food sources in their community. Who knows what impact these educational, health and economic disadvantages may have on people subjected to them? Such conditions of life—exacerbated by the extra scrutiny of police officers deployed to the area—do not make Aunt Nettie's neighborhood safer, but instead result in more people from her community being arrested, prosecuted, convicted, and imprisoned.

For instance, Young Terrence's arrest and adjudication as a juvenile for car theft increased the likelihood that he later would be arrested and incarcerated as an adult. Studies have revealed that if youth like Terrence are sent to an adult prison, they are "500% more likely to be sexually assaulted, 200% more likely to be beaten by staff, and 50% more likely to be attacked with a weapon" than if they had been confined in a juvenile facility.⁴³

After his release from prison, the conditions of life confronting Aunt Nettie's son, Larry, appeared calculated to ensure he would not succeed. In fact, he told Aunt Nettie that every time he disclosed his felony conviction on a job application or during an interview, he was not hired or, if he lied to get a job, he was fired when his record was discovered. "Aunt Nettie, I even received my GED in prison, and wanted to enroll in some college courses once I was released, but they said I couldn't receive financial aid because of my drug conviction. When I got out of prison, I didn't have medical insurance, and no place to live. And to make matters worse, when I go out to look for a job, I'm often stopped on the streets by the police and harassed for no reason."

More than 600,000 people return home each year from state and federal prisons. Despite the passage of the 2008 Second Chance Act⁴⁴ and Obama Administration reentry initiatives,⁴⁵ outdated laws and policies have made the transition process from prison life to society increasingly difficult, creating challenges that not only negatively impact formerly incarcerated people, but also have a rippling effect on their families and communities. Many of these barriers to reentry into society arise in the areas of housing, employment, public benefits, education, family reunification, and participation in the political process.

Although Aunt Nettie smiled when she saw Little Ray approach her door, she did not realize that based on his third grade test scores, a prison bed was already being reserved for him. The long-term impact of being denied healthy conditions of life, coupled with the disruption and disintegration of families and diminished life prospects wrought by mass incarceration, result in incalculable damages to substantial numbers of African Americans.

⁴³ *Fact Sheet: Juvenile Justice System*, ACLU, <https://www.aclu.org/fact-sheet-juvenile-justice-system> (last visited Oct. 21, 2016).

⁴⁴ *See Second Chance Act*, COUNCIL OF STATE GOV'TS JUSTICE CTR., <https://csgjusticecenter.org/nrrc/projects/second-chance-act/> (last visited Oct. 21, 2016).

⁴⁵ *See* Press Release, White House Off. of the Press Sec'y, Fact Sheet: President Obama Announces New Actions to Promote Rehabilitation and Reintegration for the Formerly Incarcerated (Nov. 2, 2015), <https://www.whitehouse.gov/the-press-office/2015/11/02/fact-sheet-president-obama-announces-new-actions-promote-rehabilitation>.

D. IMPOSING MEASURES TO PREVENT BIRTHS OR TRANSFERRING CHILDREN BY FORCE TO ANOTHER GROUP

Not only was Aunt Nettie disappointed that Tanisha allowed her boyfriend to sell drugs from her apartment, she was shocked when Tanisha was arrested and sent to prison. She did not realize that drug conspiracy laws sweep within their ambit those who answer telephones and take messages, as well as those who actually sell drugs. Tanisha was shackled intermittently throughout her pregnancy and when her baby was born, she was immediately shackled to the bed.⁴⁶ Her son was later placed in a foster home with influential, White parents who were intent on adopting him.⁴⁷ Equally egregious, the fifteen-year mandatory minimum sentence she received took her out of her childbearing age, meaning she would never have the chance to reproduce again.

The Sentencing Project reports that from 1989 to 1994, the criminal justice control rates for African American women increased seventy-eight percent (a rate greater than that of any other demographic group studied).⁴⁸ This was more than double the increase for African American men and for White women and more than nine times the increase for White men. Although the numbers of incarcerated Black women have significantly decreased since 2000,⁴⁹ the astronomical incarceration of substantial numbers during their key reproductive years has negatively impacted the entire group's ability to give birth. Likewise, as the result of their lengthy sentences many, like Tanisha, have had their parental rights terminated, a trend that is arguably illustrative of "transferring children from one group to another."

V. CONCLUSION

In response to the ideas this Issue Brief posits, one may ask, "But is it deliberate? Why is it important that the conditions confronting Black people in the criminal justice system be viewed as genocidal? What is wrong with just saying that the system is racist?" In response, I would argue that the horror of overt and institutional racism has

⁴⁶ Shackling pregnant women violates the International Convention on Civil and Political Rights and the U.N. Convention Against Torture—treaties that have been ratified by the United States—and is violative of other international law standards as well. INT'L HUMAN RIGHTS CLINIC, UNIV. OF CHI. LAW SCH., CHI. LEGAL ADVOCACY FOR INCARCERATED MOTHERS & ACLU, *THE SHACKLING OF INCARCERATED PREGNANT WOMEN: A HUMAN RIGHTS VIOLATION COMMITTED REGULARLY IN THE UNITED STATES* (Aug. 2013), <https://ihrclinic.uchicago.edu/sites/ihrclinic.uchicago.edu/files/uploads/Report%20-%20Shackling%20of%20Pregnant%20Prisoners%20in%20the%20US.pdf>.

⁴⁷ The Adoption and Safe Families Act of 1997 requires a state to file a petition for termination of parental rights when a child has been in foster care for 15 of the most recent 22 months. *See* Adoption and Safe Families Act of 1997, Pub. Law 105-89, tit. I, § 103(a), 111 Stat. 2115 (1997) (codified at 42 U.S.C. § 675(5)(E) (2016)). This almost assures that children of parents serving mandatory minimum sentences will be adopted, if there is no acceptable relative to intervene. There is concern that as the result of incarceration, disproportionate numbers of Black children are being removed from birth families and transracially adopted, without serious focus on home-based services, reunification, or kinship care. *E.g.*, J. Toni Oliver, *Adoptions Should Consider Black Children and Black Families*, N.Y. TIMES (Feb. 3, 2014), <http://www.nytimes.com/roomfordebate/2014/02/02/in-adoption-does-race-matter/adoptions-should-consider-black-children-and-black-families>. Indeed, it can be argued that involuntarily severing parental rights from incarcerated people who are disproportionately African American triggers the genocidal element, "transfers by force children of the group to another group." This is not meant to suggest that all, or even most, transracial adoptions contribute to genocide.

⁴⁸ MARC MAUER & TRACY HULING, SENTENCING PROJECT, *YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER* (Oct. 1995), <http://www.sentencingproject.org/wp-content/uploads/2016/01/Young-Black-Americans-and-the-Criminal-Justice-System-Five-Years-Later.pdf>.

⁴⁹ Marc Mauer, *The Changing Racial Dynamics of Women's Incarceration*, SENTENCING PROJECT (Feb. 2013), <http://sentencingproject.org/wp-content/uploads/2015/12/The-Changing-Racial-Dynamics-of-Womens-Incarceration.pdf>.

not been repugnant enough to prompt a critical mass of the American population to demand that their elected leaders fashion structural solutions. Therefore, scholars, advocates, and activists—particularly those whose communities are most affected by racism—must raise the ante and advance creative, audacious, and untested theories. Perhaps applying the intensified nomenclature of genocide will shock the conscience of the public to intensify actions to remedy the problem. Perhaps the stark juxtaposition of the internationally accepted definition of genocide and the impact of racism in the U.S. criminal justice system will spark needed change in laws, policies, and practices.

Is the impact of racism in the criminal justice system genocidal against a substantial portion of the Black populace? I submit yes. As long as the lives of the people in Aunt Nettie's neighborhood and African American communities as a whole are being destroyed; as long as discriminatory treatment is embedded in police departments, prosecutor's offices, and courtrooms, and the perception of unequal justice is perpetuated throughout the system; and as long as legislatures continue laws and policies that have a damaging effect, there will be dire consequences for Black people. This Issue Brief has presented the case that the cumulative impact of destructive treatment against Blacks in the criminal justice system, combined with challenging conditions of life negatively impacting generations, constitutes institutionalized genocide—the human rights crisis facing twenty-first century Black America.

ABOUT THE AUTHOR

Nkechi Taifa is Advocacy Director for Criminal Justice at the Open Society Foundations, working to influence policy in support of comprehensive justice reform. Taifa focuses on issues involving sentencing reform, law enforcement accountability, re-entry of previously incarcerated persons, prison reform and clemency. Taifa also convenes the Justice Roundtable, a Washington-based advocacy network advancing federal criminal justice reform. Prior to joining the Open Society, Taifa was the founding director of Howard University School of Law's Equal Justice Program, and was adjunct professor at both Howard Law and American University Washington College of Law. Taifa has served as legislative counsel for the American Civil Liberties Union, public policy counsel for the Women's Legal Defense Fund, and as a staff attorney for the National Prison Project. She has also been in private practice, specializing in representing indigent adults and juveniles. Taifa has served on many different public interest boards, and as an appointed commissioner and chair of the District of Columbia Commission on Human Rights. Taifa received her JD from George Washington Law School, and BA from Howard University.

The Contraception Mandate Accommodated: Why the RFRA Claim in *Zubik v. Burwell* Fails*

Caroline Mala Corbin

INTRODUCTION

Does filing paperwork in order to obtain a religious exemption from a law constitute a substantial burden on religious liberty? That is the main question posed by *Zubik v. Burwell*, which the Supreme Court is slated to hear on March 23, 2016. In *Zubik*, which consolidates several different cases,¹ religiously affiliated nonprofit employers argue that the Affordable Care Act's contraception mandate² violates the Religious Freedom Restoration Act (RFRA) by substantially burdening their religious conscience.³ Under RFRA, religious objectors need not comply with any federal law that imposes a substantial religious burden unless the government can demonstrate that the law passes strict scrutiny.⁴ Notably, the contraception mandate actually exempts the nonprofits from its requirements. Nonetheless, these employers complain that even informing the government that they seek an exemption makes them complicit in the sin of contraception and therefore amounts to a substantial religious burden.⁵ Their claim should fail. Filing paperwork to obtain a religious exemption does not constitute a substantial burden on religion. If it did, then almost anything would amount to a substantial religious burden.

Because there is no RFRA violation without a substantial religious burden, the analysis could end there. However, if the simple procedure for receiving a religious exemption were treated as a substantial burden, then the next question in *Zubik* would be whether the contraception mandate passes strict scrutiny. Under RFRA, laws that

* This issue brief was initially published in March 2016.

¹ *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229 (D.C. Cir. 2014); *Geneva College v. U.S. Dep't of Health & Human Servs.*, 778 F.3d 422 (3d Cir. 2015); *E. Baptist Univ. v. Burwell*, 793 F.3d 449 (5th Cir. 2015); *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151 (10th Cir. 2015).

² While the ACA guarantee of cost-free contraception might be better described as “the birth control benefit” or “the contraception coverage guarantee,” this issue brief follows the courts and uses the term “the contraception mandate.”

³ The challenge is a statutory rather than constitutional challenge. RFRA offers more expansive protection than the Free Exercise Clause. In *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), the Court held that if a law is neutral and generally applicable—that is, if a law does not target religion for adverse treatment and applies broadly—then it does not violate the Free Exercise Clause. Given that the goal of the contraception mandate is to improve health care and not to penalize religious organizations, most courts to address the free exercise question have found the mandate to be neutral and generally applicable. See, e.g., *Priests for Life*, 772 F.3d at 267-69; *Little Sisters of the Poor Home for the Aged*, 794 F.3d at 1196-99.

⁴ Under RFRA, the federal government “shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability” unless “it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. § 2000bb-1.

⁵ The D.C. Circuit Court of Appeals described this claim as “extraordinary and potentially far reaching.” *Priests for Life*, 772 F.3d at 245.

satisfy strict scrutiny must be obeyed, regardless of the religious burdens imposed. To pass strict scrutiny, the government's goal must be of the highest order, and there cannot be another way to accomplish that goal. Given the importance of women's equal access to essential health care, and the exemption granted to the nonprofits, the mandate does in fact meet the requirements of strict scrutiny, thereby providing a second reason why the nonprofits' RFRA claim should fail.

I. THE CASE: ZUBIK V. BURWELL

A. THE CONTRACEPTION MANDATE

The contraception mandate is part of the Affordable Care Act (ACA). The ACA requires that employer-sponsored health insurance plans cover basic preventive care without any cost-sharing—no deductibles or co-pays. To help determine what preventive services to include, the Department of Health and Human Services commissioned a study from the independent Institute of Medicine.⁶ Finding contraception to be vital to women's health, the Institute of Medicine recommended that preventive care include FDA-approved contraception.⁷

Zubik v. Burwell is not the first RFRA challenge to the contraception mandate. In 2014, the Supreme Court ruled in *Hobby Lobby Stores, Inc. v. Burwell* that under RFRA, closely-held for-profit corporations with religious objections to contraception are entitled to an exemption from the mandate. *Hobby Lobby* focused on for-profit companies because nonprofit organizations had already been accommodated. First, the mandate does not apply to houses of worship or other “religious employers” as defined by the IRS. Thus, religious institutions that predominately serve and employ people of their own faith—such as churches, synagogues, and mosques—are completely exempt. Second, religiously affiliated non-profit institutions that employ people of many different faiths and often accept significant funding from the federal and state governments—such as schools, hospitals, nursing homes, and social service providers⁸—do not have to pay for contraception or even include it in their health care plans. Instead, once a religiously affiliated nonprofit declares its religious opposition to contraception, the responsibility for contraception coverage passes to its insurance carrier: the nonprofit's health care insurer or, if the nonprofit is self-insured, a third-party administrator must provide and pay for a separate policy. Indeed, the Supreme Court in *Hobby Lobby* pointed to this accommodation as a reason why the contraception mandate's application to religious for-profits like Hobby Lobby was not narrowly

⁶ The Institute of Medicine is an arm of the National Academy of Sciences tasked with “help[ing] those in government and the private sector make informed health decisions by providing evidence upon which they can rely.” See *About the IOM*, NAT'L ACADEMY OF SCIENCES, <http://iom.nationalacademies.org/About-IOM.aspx#sthash.pZMs5sBa.dpuf> (last visited Mar. 2, 2016).

⁷ INSTITUTE OF MEDICINE, CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS (2011), <https://iom.nationalacademies.org/Reports/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps.aspx> [hereinafter CLINICAL PREVENTIVE SERVICES FOR WOMEN].

⁸ Among complaining nonprofits are social services providers such as Catholic Charities of South East Texas, Catholic Charities of Fort Worth, Catholic Charities of Erie, and Little Sisters of the Poor Home for the Aged, and several schools including East Texas Baptist University, Houston Baptist University, University of Dallas, Southern Nazarene University, Oklahoma Baptist University, Mid-America Christian University, Thomas Aquinas College, Catholic University, Geneva College, and Erie Catholic Cathedral Preparatory School.

tailored.⁹ If this accommodation worked for religious nonprofits, the Court suggested, then why not for religious for-profits?

A nonprofit may obtain its exemption in two ways. It can either sign a short self-certification declaring that it is a religious nonprofit that “opposes providing coverage for some or all of any contraceptive services that would otherwise be required to be covered” and mail the form to its health insurance company (or its third-party administrator for self-insured plans),¹⁰ or the nonprofit may provide a similar notice, along with the name and contact information of its insurer (or third-party administrator), directly to the Department of Health and Human Services.

B. THE CLAIM

Despite the ability to opt out of contraception coverage, multiple religiously affiliated nonprofit employers complain that the religious accommodation itself imposes a substantial religious burden in violation of RFRA. According to these employers, signing a two-page form or sending a letter triggers the provision of contraception to their employees, thus making the employer complicit in sin. For example, Little Sisters of the Poor Home for the Aged argues that to facilitate contraception use “would violate their public witness to the sanctity of human life and human dignity.”¹¹ Other nonprofits argue that “taking the actions required of them under the regulations would make them complicit in wrongdoing and create ‘scandal’ in violation of Catholic moral teaching.”¹² The sincerity of their objections is not in question.

All but one of the courts of appeals to consider the claim (including the Second, Third, Fifth, Sixth, Seventh, Tenth, and the D.C. Circuits) has held that filing the exemption paperwork does not impose a substantial religious burden. Most decisions stop there, since RFRA only protects against substantial burdens on religion. The D.C. Circuit Court of Appeals added that, despite the nonprofits’ claim that the contraception mandate neither advances a compelling state interest nor is narrowly tailored, the mandate does in fact pass strict scrutiny.¹³

II. SUBSTANTIAL BURDEN ANALYSIS

A. SUBSTANTIAL BURDEN IS A LEGAL QUESTION FOR COURTS TO DECIDE

Who decides what counts as a substantial religious burden for purposes of RFRA is central to the substantial burden analysis in *Zubik*.¹⁴ The nonprofits claiming a RFRA violation insist that substantial burden is a subjective religious question for the religious objector to decide. They assert that once a religious objector claims that a particular statutory requirement amounts to a substantial burden *as a matter of*

⁹ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2782 (2014) (“[T]he HHS regulations fail the least-restrictive-means test. HHS itself has demonstrated that it has at its disposal an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs.”).

¹⁰ This two-sided, single sheet of paper is known as EBSA Form 700. *See, e.g., Little Sisters of the Poor Home for the Aged*, 794 F.3d at 1207 (reprinting form).

¹¹ *Little Sisters of the Poor Home for the Aged*, 794 F.3d at 1167.

¹² Brief for Petitioners in Nos. 14-1418, 14-1453, & 14-1505 at 2, *Zubik v. Burwell*, No. 14-1418 (U.S. Jan. 4, 2016) [hereinafter Brief for Petitioners 1].

¹³ *See, e.g., Priests for Life*, 772 F.3d at 256-67.

¹⁴ *E. Texas Baptist Univ.*, 793 F.3d at 456 (“A preliminary question—at the heart of this case—is the extent to which the courts defer to a religious objector’s view on whether there is a substantial burden.”).

religious belief, then, as long as they are sincere,¹⁵ it amounts to a substantial burden under RFRA *as a matter of law*. According to them, “courts have neither the authority nor the competence to second-guess the reasonableness of those sincere beliefs.”¹⁶ Failure to defer to the objectors’ assessment of substantial burden is akin to passing judgment on their religious faith, which is barred by the Establishment Clause.¹⁷

Most circuit courts have rightly rejected this claim. Automatic deference to religious objectors seeking religious exemptions (1) misreads the language of RFRA and (2) overlooks the courts’ authority to rule on factual and legal matters that are well within their institutional authority and competence. Ultimately, “[w]hether a law imposes a substantial burden on a party is something that a court must decide, not something that a party may simply allege.”¹⁸

1. RFRA’s Language

As RFRA’s language makes explicit, strict scrutiny is triggered only by substantial burdens on religion, not all burdens on religion. To simply assume a substantial burden whenever a sincere religious objector claims one exists essentially reads the substantial burden requirement out of RFRA. “If plaintiffs could assert and establish that a burden is ‘substantial’ without any possibility of judicial scrutiny, the word ‘substantial’ would become wholly devoid of independent meaning.”¹⁹ Indeed, one would be hard-pressed to find exemption-seekers likely to argue that a challenged law burdens their practice of religion, but not substantially.

Without some objective evaluation of burden, all burdens imposed by federal laws would become eligible for accommodation. For example, D.C. parishioners could argue that issuing traffic tickets or adding a bicycle lane in front of their church imposes a substantial religious burden on them by making it much more difficult to park for Sunday services.²⁰ In short, every sincere religious protestor would be entitled to a religious exemption from any federal law that did not pass strict scrutiny.²¹

2. Courts’ Authority

Although courts cannot and should not rule on theological questions, claims of substantial religious burden often depend on purely secular factual and legal assumptions courts can and should resolve. For example, imagine a vegetarian opposed

¹⁵ RFRA only protects sincere religious beliefs; the sincerity of the nonprofits’ beliefs is not at issue in *Zubik*.

¹⁶ Brief for Petitioners in Nos. 15-35, 15-105, 15-119, & 15-191 at 2, *Zubik v. Burwell*, No. 14-1418 (U.S. Jan. 4, 2016).

¹⁷ *Cf. Emp’t Div.*, 494 U.S. at 887 (“Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.”); *Hernandez v. C.I.R.*, 490 U.S. 680, 699 (1989) (“It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretations of those creeds.”).

¹⁸ *Mich. Catholic Conference & Catholic Family Servs. v. Burwell*, 807 F.3d 738, 747 (6th Cir. 2015).

¹⁹ *Little Sisters of the Poor Home for the Aged*, 794 F.3d at 1176; *see also Catholic Health Care Sys. v. Burwell*, 796 F.3d 207, 218 (2d Cir. 2015) (“[T]he fact that a RFRA plaintiff *considers* a regulatory burden substantial does not make it a substantial burden. Were it otherwise, no burden would be insubstantial.”).

²⁰ *Cf. Perry Stein, D.C. Church Says a Bike Lane Would Infringe upon its Constitutional ‘Rights of Religious Freedom’*, WASH. POST (Oct. 14, 2015).

²¹ *Catholic Health Care Sys.*, 796 F.3d at 218 (“If RFRA plaintiffs needed only to assert that their religious beliefs were substantially burdened, federal courts would be reduced to rubber stamps, and the government would have to defend innumerable actions under demanding strict scrutiny analysis.”).

to a compulsory vaccination law because her religion condemns killing animals and she thinks (erroneously) that the mandated vaccine contains animals. She argues she is entitled to a religious exemption because facilitating any animal death imposes a substantial burden on her religious conscience. Although she believes that animals were killed in the manufacture of the vaccine, she is wrong. She has made a factual mistake: vaccine production does not involve animals at all. While it would be inappropriate for a court to question whether her religion truly bans all animal slaughter, it is well within a court's competence to find that the vaccine is animal-free and therefore simply does not implicate the vegetarian's sincere religious opposition to animal slaughter. In short, while courts may not draw conclusions about the objector's religion, they should draw conclusions about the underlying legal or, as in this hypothetical, factual, bases for the religious claims.

In fact, courts possess not only the ability but also the responsibility to evaluate whether burdens are substantial enough to merit accommodation under RFRA, including the burdens caused by the contraception mandate's regulatory scheme. After all, it is not just the rights of religiously affiliated nonprofit employers that are at stake, but the rights of those who may be affected by a religious accommodation, such as the nonprofits' employees and students. In any event, subjecting to strict scrutiny laws that impose only negligible burdens on those seeking to circumvent them is not the balance RFRA, with its substantial burden requirement, envisions. And as the next part explains, the religious burden in this case is indeed slight, notwithstanding the sincere beliefs of the religious objectors.

B. THE MANDATE'S ACCOMMODATION DOES NOT IMPOSE A SUBSTANTIAL BURDEN

In evaluating whether the contraception mandate regulatory scheme imposes a substantial burden on the objecting nonprofit employers, it is important to remember that the objection is not to mandatory contraception coverage but to the mechanism allowing them to opt-out of contraception coverage. This accommodation makes *Zubik v. Burwell* fundamentally different from *Hobby Lobby Stores, Inc v. Burwell*, where the for-profit company was not excused from providing contraception coverage. Here, in contrast, no religiously affiliated nonprofit is required to include any objectionable contraception in its health care plan.²² Instead, all such entities must do is provide notice of their objections and the name and address of their insurance company or third-party administrator if they notify the Department of Health and Human Services instead of their insurance carriers.²³

The opt-out procedure relieves the religiously affiliated nonprofit employers of all responsibility for contraception coverage.²⁴ Once a nonprofit expresses its objection, the law shifts responsibility to the insurance companies, who are required to step in and provide, pay for, and inform employees and students of the separate contraception

²² Cf. *Little Sisters of the Poor Home for the Aged*, 794 F.3d at 1171 (“Before we present our analysis of the issues, we wish to highlight the unusual nature of Plaintiffs’ central claim, which attacks the Government’s attempt to accommodate religious exercise by providing a means to opt out of compliance with a generally applicable law.”).

²³ See, e.g., *Priests for Life*, 772 F.3d at 237 (noting that “[t]hat bit of paperwork is more straightforward and minimal than many that are staples of nonprofit organizations’ compliance with law in the modern administrative state.”).

²⁴ See, e.g., *Priests for Life*, 772 F.3d at 236 (“Delivery of the requisite notice extinguishes the religious organization’s obligation to contract, arrange, pay, or refer for any coverage that includes contraception.”).

coverage they are offering. The insurance company's contraception policy is unconnected to the nonprofit's health care plan. Moreover, the regulations forbid the insurance company from charging the nonprofits in any way for the costs of the contraception. Finally, the insurance company's notice to employees and students must be separate from any materials distributed on behalf of the nonprofit, and it must clarify that the nonprofit plays no part in the contraception coverage. "In sum, both opt-out mechanisms let eligible organizations extricate themselves fully from the burden of providing contraceptive coverage to employees, pay nothing toward such coverage, and have the providers tell the employees that their employers play no role and in no way should be seen to endorse the coverage."²⁵

At the most basic level, the objecting nonprofits misunderstand how the contraception mandate works. Their belief that they are complicit in the sin of contraception use rests on the assumption that their written refusal triggers the provision of contraception. For example, one college argues "that as the trigger-puller or facilitator the college shares responsibility for the extension of [contraception] coverage to its students, faculty, and staff."²⁶ As a matter of law, they are wrong.²⁷ Their paperwork does not cause contraception coverage. The Affordable Care Act does. It is federal law, not the completion of any form, that creates the insurance companies' obligation to cover contraception. All the paperwork does is extricate the nonprofit organizations from the coverage.²⁸ "By participating in the accommodation, the eligible organization has no role whatsoever in the provision of the objected-to contraceptive services."²⁹

Equally erroneous is the nonprofits' claim that the accommodation forces them to facilitate contraception use because the government essentially commandeers their health care plans. In fact, as explained, the government exempts their plans. Instead, it requires the insurance companies—private insurance carriers like Aetna and Blue Cross/Blue Shield—to issue separate plans. "So when [a nonprofit] tells us that it is being 'forced' to allow 'use' of its health plans to cover emergency contraceptives, it is wrong. It's being 'forced' only to notify its insurers (including third-party administrators), whether directly or by notifying the government ... that it will not use its health plans."³⁰

Thus, the courts' rejection of the complicity claim does not turn on any evaluation of the religious doctrine of complicity.³¹ Rather, it stems entirely from the courts'

²⁵ *Priests for Life*, 772 F.3d at 250.

²⁶ *Wheaton Coll. v. Burwell*, 791 F.3d 792, 796 (7th Cir. 2015); see also *Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 435 (3d Cir. 2015) ("The appellees' essential challenge is that providing the self-certification form to the insurance issuer or third-party administrator 'triggers' the provision of the contraceptive coverage to their employees and students.").

²⁷ The circuit courts did not mince their words in rejecting this assumption. *Little Sisters of the Poor Home for the Aged*, 794 F.3d at 1180 ("They do not."); *E. Texas Baptist Univ.*, 793 F.3d at 459 ("Not so."); *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 613 (7th Cir. 2015) ("That's not correct."); see also *Geneva Coll.*, 778 F.3d at 438 ("However, this purported causal connection is nonexistent."); *Mich. Catholic Conference & Catholic Family Servs.*, 807 F.3d at 750 ("Plaintiffs are fundamentally wrong in their understanding of how the law actually works.").

²⁸ *Little Sisters of the Poor Home for the Aged*, 794 F.3d at 1173-74 ("Although Plaintiffs allege the administrative tasks required to opt out of the Mandate make them complicit in the overall delivery scheme, opting out instead relieves them from complicity."); *Geneva Coll.*, 778 F.3d at 441 ("Far from 'triggering' the provision of contraceptive coverage to the appellees' employees and students, EBSA Form 700 totally removes the appellees from providing those services.").

²⁹ *Geneva Coll.*, 778 F.3d at 438.

³⁰ *Wheaton Coll.*, 791 F.3d at 795.

³¹ Cf. *Geneva Coll.*, 778 F.3d at 435 ("Without testing the appellees' religious beliefs, we must nonetheless objectively assess whether the appellees' compliance with the self-certification procedure does, in fact, trigger, facilitate, or make them complicit in the provision of contraceptive coverage.").

rejection of the erroneous legal conclusions on which the complicity claim is based. As Judge Posner observed, “[t]his is an issue not of moral philosophy but of federal law. Federal courts are not required to treat [the nonprofit’s] erroneous legal interpretation as beyond their reach.”³² Whatever deference might be owed to a nonprofit’s interpretation of its own religious beliefs, courts should not defer to the nonprofit’s interpretation of federal law.³³ After all, if there is one area over which federal courts have authority, it is the interpretation of federal law. The nonprofits’ opposition is based on legal error.³⁴ Courts should not be, and for the most part have not been, deferential when they encounter obvious legal error.³⁵

III. STRICT SCRUTINY ANALYSIS

Even if the contraception mandate substantially burdened the nonprofits’ religious beliefs, RFRA specifically provides that such burdens must be tolerated if the law in question passes strict scrutiny. This one does. The contraception mandate advances compelling government interests, and the accommodation provided to objecting nonprofits is the least restrictive means of accomplishing those interests.

A. COMPELLING STATE INTEREST

Although the *Hobby Lobby* majority assumed without deciding that the contraception mandate advances compelling state goals, five Justices (the four dissenters plus Justice Kennedy) have stated that the contraception mandate passes the first prong of the strict scrutiny test. Granted, Justice Kennedy’s controlling concurrence was somewhat tepid, but he did acknowledge that the mandate furthers “a compelling interest

³² *Univ. of Notre Dame*, 786 F.3d at 623; *see also id.* (“[T]he courts cannot substitute even the most sincere religious beliefs for legal analysis.”).

³³ *Cf. id.* at 612 (“Although *Notre Dame* is the final arbiter of its religious beliefs, it is for the courts to determine whether the law actually forces *Notre Dame* to act in a way that would violate those beliefs”); *Geneva Coll.*, 778 F.3d at 436 (“[T]here is nothing about RFRA or First Amendment jurisprudence that requires the Court to accept [the appellees’] characterization of the regulatory scheme on its face.” (quoting *Mich. Catholic Conference & Catholic Family Servs. v. Burwell*, 755 F.3d 372, 385 (6th Cir. 2014))).

³⁴ Mistakes of law are not the only errors underlying the nonprofits’ complicity claims. Some of the objecting nonprofits such as East Texas Baptist University and Oklahoma Baptist University are not religiously opposed to contraception but are opposed to abortion. Their objections to the mandate flow from the erroneous belief that four of the FDA-approved contraceptives act as abortifacients and kill fertilized eggs. However, neither of the two morning after pills, Plan B and Ella, work in the way the nonprofits think the medicine works. Although the FDA approved them before fully understanding whether they prevented fertilization or implantation, every reputable scientific study to examine the pills’ mechanism has concluded that these pills prevent ovulation—and therefore fertilization—from occurring in the first place. *See, e.g., Mechanism of Action: How Do Levonorgestrel-Only Emergency Contraception Pills (LNG ECPs) Prevent Pregnancy*, INT’L FED’N OF GYNECOLOGY AND OBSTETRICS (FIGO) & INT’L CONSORTIUM FOR EMERGENCY CONTRACEPTION (2011), http://www.figo.org/sites/default/files/uploads/MOA_FINAL_2011_ENG.pdf (summarizing studies); James Trussell et al., *Emergency Contraception: A Last Chance to Prevent Unintended Pregnancy*, PRINCETON UNIV. (Jan. 2016), <http://ec.princeton.edu/questions/ec-review.pdf> (same); *see also Wheaton Coll.*, 791 F.3d at 795 (“There is no evidence to suggest that either of the FDA-approved emergency contraceptive options . . . works after an egg is fertilized.”). In sum, the scientific consensus is that morning-after pills prevent fertilization, not implantation. As with legal error, courts should not be deferential when they encounter obvious scientific error.

³⁵ *Little Sisters of the Poor Home for the Aged*, 794 F.3d at 1191 (“RFRA does not require us to defer to their erroneous view about the operation of the ACA and its implementing regulations.”).

in the health of female employees.”³⁶ Justice Ginsburg, writing for the dissenters, emphasized that “the Government has shown that the [mandate] furthers compelling interests in public health and women’s well-being. Those interests are concrete, specific, and demonstrated by a wealth of empirical evidence.”³⁷

Contraception is crucial to women’s health—over 99 percent of women who have ever had sex have relied on contraception. By preventing unintended pregnancies, birth control allows women to better space their children. Contraception also improves prenatal care, which can help prevent complications, because women with unintended pregnancies receive later and less adequate prenatal care.³⁸ Pregnancy carries with it a host of risks, and is contraindicated for women with certain health issues.³⁹ Furthermore, contraception is not only used to prevent pregnancy. For example, millions of American women use hormonal birth control mainly to manage a host of medical issues.⁴⁰ The Institute of Medicine recommended that contraception be fully covered precisely because it is so essential to women’s well-being.

Contraception is also essential to women’s autonomy and equality. Women cannot be autonomous agents without the power to decide what happens to their own bodies, and women cannot be equal participants in the social, economic, and political life of this country without the ability to control when or whether to have children.⁴¹ There is also a strong argument—and one endorsed by the EEOC—that a health insurance plan that covers basic preventive care without covering contraception, which only women and almost all women rely on, amounts to sex discrimination in violation of Title VII.⁴² If nothing else, as Justice Kennedy noted in his *Hobby Lobby* concurrence, women have long been paying more for their health care than men.⁴³ Studies reveal that “in general, women of childbearing age spend 68% more in out-of-pocket health care costs than men.”⁴⁴

The nonprofits argue that even though women’s health and equality may be compelling interests, the contraception mandate cannot be said to advance those interests given all the exceptions to it. They point out that grandfathered plans, employers with fewer

³⁶ *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring); see also *id.* at 2785-86 (“As to RFRA’s first requirement, the Department of Health and Human Services (HHS) makes the case that the mandate serves the Government’s compelling interest in providing insurance coverage that is necessary to protect the health of female employees, coverage that is significantly more costly than for a male employee.”).

³⁷ *Hobby Lobby*, 134 S. Ct. at 2799 (Ginsburg, J., dissenting).

³⁸ See INST. OF MEDICINE, *THE BEST INTENTIONS: UNINTENDED PREGNANCY AND THE WELL-BEING OF CHILDREN AND FAMILIES* 66 (National Academies Press ed., 1995).

³⁹ CLINICAL PREVENTIVE SERVICES FOR WOMEN, *supra* note 7, at 103-04 (pregnancy contraindicated for women with pulmonary hypertension and cyanotic heart disease).

⁴⁰ Rachel K. Jones, *Beyond Birth Control: The Overlooked Benefits of Oral Contraceptive Pills*, GUTTMACHER INST., (Nov. 2011), available at <https://www.guttmacher.org/pubs/Beyond-Birth-Control.pdf> (oral contraception helps relieve Polycystic Ovary Syndrome, endometriosis, acne, hirsutism, bleeding due to uterine fibroids, amenorrhea, excessive menstrual bleeding (menorrhagia), and severe menstrual pain (dysmenorrhea)).

⁴¹ Cf. *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 856 (1992) (“The ability of women to participate equally in the social and economic life of the Nation has been facilitated by their ability to control their reproductive lives.”).

⁴² If an employer provides health insurance, it cannot discriminate against employees based on their sex, race, or other protected characteristic in its provision. Thus, an employer cannot offer health insurance against all cancers except testicular cancer, or all diseases except those that mainly affect Jews, or all preventive care except care that predominately affects women.

⁴³ *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring) (noting that prior to the Affordable Care Act, insurance for a female employee was “significantly more costly than for a male employee”).

⁴⁴ 155 Cong. Rec. 28,843 (2009) (statement of Sen. Gillibrand); see 78 Fed. Reg. at 39,887 (July 2, 2013).

than fifty employees, and houses of worship are all exempt from the mandate. They maintain that all these exemptions undermine the government's claim that providing no-cost contraception to students and employees is truly a compelling interest.

To start, the nonprofits overstate the reach of the mandate's exemptions. First, the rule regarding the grandfathered plans is less an exemption than a measure "designed to ease the transition of the healthcare industry into the reforms established by the [ACA] by allowing for gradual implementation."⁴⁵ In addition to the fact that grandfathered plans have been steadily losing their grandfathered status,⁴⁶ most grandfathered plans include contraception. Twenty-eight states had their own contraception mandate before the ACA,⁴⁷ and one study found that more than 89% of insurance plans already covered contraception.⁴⁸ Second, the exemption for small employers is not an exemption from the contraception mandate but from the ACA's health care requirement. Any small employer that does offer health care to its employees must comply with the mandate. Finally, for religiously affiliated nonprofits to point to the government's attempt to accommodate churches and other houses of worship as evidence that the government lacks a compelling interest seems more chutzpah⁴⁹ than anything else.⁵⁰

In any event, the existence of exemptions is far from dispositive in assessing the strength of a government interest. Admittedly, the number of exemptions might matter in the face of uncertainty about the importance of the state's interest. For example, when asking for the first time whether the uniform appearance of police officers is truly a compelling state interest, countless exceptions to the dress code may undercut claims that it is. But when the state's interests have long been recognized as compelling—such as promoting the health and equality of women—the existence of exceptions should not change that recognition.

The number of exemptions might also matter if they are so numerous that they raise questions about whether the government's asserted goal is really just a pretext for some illegitimate purpose. In *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*,⁵¹ for example, the city's claim that its ban on animal slaughter was designed to promote animal welfare was belied by exemptions for every kind of animal slaughter except religious sacrifice—the sacramental practice of the Santeria church planning to move into the city. No such religious targeting is at issue here.

Moreover, plenty of laws have been held to advance compelling interests despite their various exemptions. Indeed, most major laws contain exceptions. Title VII does not apply to small employers and its ban on religious discrimination does not apply to

⁴⁵ 75 Fed. Reg. at 34541 (July 17, 2010).

⁴⁶ The percentage of employees in grandfathered plans has already dropped from 56% in 2011 to 25% in 2015. HENRY J. KAISER FAMILY FOUND., 2015 EMPLOYER HEALTH BENEFITS SURVEY (Sept. 2015), <http://buff.ly/1SogmzO>.

⁴⁷ *Grote v. Sebelius*, 708 F.3d 850, 865-66 n.8 (7th Cir. 2013) (Rovner, J., dissenting) (citing NAT'L WOMEN'S LAW CENTER, GUARANTEED COVERAGE OF CONTRACEPTIVES: PAST & PRESENT (Aug. 1, 2012)).

⁴⁸ 78 Fed. Reg. at 39873 (July 2, 2013) (citing A. Sonfield, et al., *U.S. Insurance Coverage of Contraceptives and the Impact of Contraceptive Coverage Mandates*, 36(2) PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH 72-79 (2002)). The mandate makes sure this contraception coverage does not require cost-sharing.

⁴⁹ "[C]hutzpah is when a man kills both his parents and begs the court for mercy because he's an orphan." Alex Kozinski & Eugene Volokh, *Lawsuit, Shmausuit*, 103 YALE L.J. 463, 467 (1993).

⁵⁰ Furthermore, although one might quibble with it, churches and other houses of worship have long been accorded special treatment in religion jurisprudence. *See, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694 (2012) (recognizing ministerial exception from anti-discrimination law for church employers).

⁵¹ *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993).

nonprofit religious organizations, yet no one would dispute that it advances the government's compelling interest in ending discrimination on the basis of sex, race, color, national origin, or religion. Along those lines, the Supreme Court has held that maintaining the uniformity of the tax code is a compelling government interest,⁵² despite the tax code being fairly riddled with exceptions compared to the contraception mandate. In short, the lack of universal contraception coverage does not undermine the government's compelling interests behind the contraception mandate.⁵³

B. NARROW TAILORING

As for narrow tailoring, it is difficult to picture a less intrusive alternative for religiously affiliated nonprofit employers than excusing them from all responsibility for contraception coverage after they certify that they are a religious nonprofit whose faith requires them to exclude contraception from their health care plan. As previously noted, in finding that the mandate as applied to for-profit companies failed strict scrutiny, the *Hobby Lobby* majority pointed to the nonprofit accommodation as a less restrictive means for the government to achieve the mandate's goals. While the Supreme Court was careful to reserve its final judgment for a later day,⁵⁴ it nonetheless observed, "[a]t a minimum, however, [the nonprofit accommodation] does not impinge on the plaintiffs' religious belief that providing insurance coverage for the contraceptives at issue here violates their religion, and it serves HHS's stated interests equally well."⁵⁵ Justice Kennedy wrote that the nonprofit accommodation "equally furthers the Government's interest but does not impinge on the plaintiffs' religious beliefs."⁵⁶ Given that the accommodation itself constitutes a less restrictive alternative, it is hard to imagine that there is a less restrictive alternative to the accommodation.

Nevertheless, the religiously affiliated nonprofits proffer a list of possible alternatives. Among the proposed alternatives is that the federal government supply the contraception itself—never mind that Congress intended the ACA to build upon the existing system of employment-based insurance⁵⁷ or that the odds of Congress creating and funding a new program of no-cost contraception is close to nil in the current political climate.⁵⁸ Moreover, even assuming a hypothetical Federal Contraception

⁵² See, e.g., *Hernandez v. C.I.R.*, 490 U.S. at 699-700 ("[A] substantial [religious] burden would be justified by the 'broad public interest in maintaining a sound tax system ...'") (quoting *United States v. Lee*, 455 U.S. 252, 260 (1982)).

⁵³ Moreover, as the government points out, to hold otherwise would mean that none of the required preventive services could be considered compelling, including cancer screenings and child immunizations. Brief for the Respondents at 63, *Zubik v. Burwell*, No.14-1418 (U.S. Feb 10, 2016) [hereinafter Brief for Respondents].

⁵⁴ *Hobby Lobby*, 134 S. Ct. at 2782 ("We do not decide today whether an approach of this type complies with RFRA for purposes of all religious claims."). Although a few days later the Court granted an emergency injunction against the original accommodation, it suggested that the letter-to-HHS alternative was acceptable. The Court also cautioned that "this order should not be construed as an expression of the Court's views on the merits." *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2807 (2014).

⁵⁵ *Hobby Lobby*, 134 S. Ct. at 2782.

⁵⁶ *Id.* at 2786 (Kennedy, J., concurring).

⁵⁷ *Cf. Univ. of Notre Dame*, 786 F.3d at 625 ("The heart of the Affordable Care Act was a decision to approach universal health insurance by expanding the employer-based system of private health insurance that had evolved in our country, rather than to substitute a new 'single payer' government program.").

⁵⁸ In its brief, the government explains that none of the proposed alternatives "is currently available, and all would require new legislation." Brief for Respondents, *supra* note 53, at 76; see also *id.* at 28 ("[T]he legal authority to implement those alternatives does not now exist.").

Bureau,⁵⁹ the suggestion that a less restrictive alternative to any law requiring a private actor to provide a benefit or service is for the government to provide it instead is highly radical. Imagine a medical practice that refuses to see black patients, or an employer whose health insurance covers cancer screenings for white employees but not Asian ones. Now imagine that the medical practice or employer argues that a law banning race discrimination in public accommodations or employment benefits is not narrowly tailored because the government could directly provide the services/benefits instead. Similar claims about lack of narrow tailoring could be leveled against just about any civil rights or employment or benefits law.⁶⁰ Just as they should be rejected in those contexts, the nonprofits' claim should be rejected here.

Moreover, a proposed alternative is not a less restrictive alternative if it fails to accomplish the government's goals. The *Hobby Lobby* Court approved of the nonprofit accommodation because the Justices believed that it would not disrupt students' or employees' health care. Mindful of the Supreme Court's longstanding disapproval of granting religious exemptions that impose burdens on others,⁶¹ the majority emphasized that "[u]nder the accommodation, the plaintiffs' female employees would continue to receive contraceptive coverage without cost sharing for all FDA-approved contraceptives, and they would continue to face minimal logistical and administrative obstacles because their employers' insurers would be responsible for providing information and coverage."⁶² Indeed, the Supreme Court in *Hobby Lobby* repeated more than once that "HHS has already devised and implemented a system that seeks to respect the religious liberty of religious nonprofit corporations while ensuring that the employees of these entities have precisely the same access to all FDA-approved contraceptives."⁶³

⁵⁹ Cf. *Wheaton Coll.*, 791 F.3d at 798 (imagining a hypothetical "Emergency Contraception Bureau in the Department of Health & Human Services").

⁶⁰ Cf. *Hobby Lobby*, 134 S. Ct. at 2802 (Ginsburg, J., dissenting) ("[W]here is the stopping point to the 'let the government pay' alternative?").

⁶¹ In praising the balance struck by the nonprofit accommodation in *Hobby Lobby*, Justice Kennedy observed: "Among the reasons the United States is so open, so tolerant, and so free is that no person may be restricted or demeaned by government in exercising his or her religion. *Yet neither may that same exercise unduly restrict other persons*, such as employees, in protecting their own interests, interests the law deems compelling." *Hobby Lobby*, 134 S. Ct. at 2786-87 (Kennedy, J., concurring) (emphasis added). The dissent was more direct in highlighting that religious accommodations, whether under the Free Exercise Clause or RFRA, may not substantially burden others: "Accommodations to religious beliefs or observances, the Court has clarified, must not significantly impinge on the interests of third parties." *Id.* at 2790 (Ginsburg, J., dissenting). In other words, "[y]our right to swing your arms ends just where the other man's nose begins." *Id.* at 2791 (Ginsburg, J., dissenting). In support, the dissent cited *Wisconsin v. Yoder*, 406 U.S. 205 (1972), which granted a religious exemption from mandatory school attendance laws for Amish teens after noting that "[t]his case, of course, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred," *id.* at 230, and *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), which rejected a mandatory accommodation for Sabbath observers because it burdened the employer and other employees. In fact, the Supreme Court held the accommodation violated the Establishment Clause in part because of the burdens imposed on others, *id.* at 710-11. See also *id.* at 710 ("The First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities.").

⁶² *Hobby Lobby*, 134 S. Ct. at 2782.

⁶³ *Id.* at 2759.

Unlike the challenged accommodation, which according to the Supreme Court would have “precisely zero” effect on women,⁶⁴ the same could not be said for the nonprofits’ proposals, which range from women buying a special contraception-only plan on the exchanges,⁶⁵ to women obtaining contraception from an expanded Title X program, to offering tax credits or reimbursements to women who purchase it themselves. On the contrary, these proposed alternatives “would add steps—requiring women to identify different providers or reimbursement sources, enroll in additional and unfamiliar programs, pay out of pocket and wait for reimbursement, or file for tax credits (assuming their income made them eligible)—or pose other financial, logistical, informational, and administrative burdens.”⁶⁶ Such disruption is especially problematic for contraception services because, as the D.C. Circuit Court of Appeals emphasized, “[t]he evidence shows that contraceptive use is highly vulnerable to even seemingly minor obstacles.”⁶⁷ Thus, the contraception mandate, with its accommodation for religiously affiliated nonprofit employers, is the least restrictive way to accomplish the government’s compelling interests, and should be deemed to pass strict scrutiny.

IV. CONCLUSION

The religiously affiliated nonprofit organizations argue that their religion bars them from providing contraception. The existing contraception mandate regime ensures that they do not have to. Instead, an accommodation allows the nonprofits to opt-out. Once they give notice, the sole responsibility shifts to third parties to fulfill the contraception mandate. The nonprofits argue that this religious accommodation still forces them to facilitate sin because their notice triggers contraception coverage by their health insurance infrastructure. As a matter of federal law, they are simply wrong. Although courts must defer to religious objectors’ interpretation of their religious beliefs, they need not and should not defer to their interpretation of federal law. Because the accommodation does not impose a substantial religious burden, the nonprofits RFRA claim must fail. RFRA, after all, was not meant to shield religious observers from any and all burdens on their religion, no matter how slight.

Moreover, the contraception mandate regime easily passes strict scrutiny. In fact, as the Supreme Court has implicitly recognized, the existing accommodation, which “seeks to respect the religious liberty of religious nonprofit corporations while ensuring that the employees of these entities have precisely the same access to all FDA-approved contraceptives,”⁶⁸ strikes a balance between the nonprofits’ sincere beliefs and the

⁶⁴ *Id.* at 2760 (“The effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero.”); see also *Priests for Life*, 772 F.3d at 245 (“In holding that Hobby Lobby must be accommodated, the Supreme Court repeatedly underscored that the effect on women’s contraceptive coverage of extending the accommodation to the complaining businesses ‘would be precisely zero.’”).

⁶⁵ “Perhaps the most obvious solution would be for the Government to offer women... the opportunity to sign up for separate, contraceptive-only health plans on the ACA exchange.” Brief for Petitioners 1, *supra* note 12, at 75.

⁶⁶ *Priests for Life*, 772 F.3d at 265; see also *id.* at 245 (“The relief Plaintiffs seek here, in contrast, would hinder women’s access to contraception. It would either deny the contraceptive coverage altogether or, at a minimum, make the coverage no longer seamless.”); *Univ. of Notre Dame*, 786 F.3d at 618 (“All of Notre Dame’s suggested alternatives would impose significant financial, administrative, and logistical obstacles....”).

⁶⁷ *Priests for Life*, 772 F.3d at 265; see also *id.* (“Imposing even minor added steps would dissuade women from obtaining contraceptives and defeat the compelling interests in enhancing access to such coverage.”).

⁶⁸ *Hobby Lobby*, 134 S. Ct. at 2759.

government's compelling interests. To find otherwise would essentially grant the non-profits veto power over the government's own internal actions, and as the Second Circuit noted, "The rights conferred by ... RFRA do not include a right to have the government or third parties behave in a manner that comports with an individual's religious beliefs."⁶⁹ This is especially true when the additional accommodation sought would impose on the rights of students and employees who may not share the objectors' religious beliefs. In sum, "although a religious nonprofit organization may opt out from providing contraceptive coverage, it cannot preclude the government from requiring others to provide the legally required coverage in its stead."⁷⁰

ABOUT THE AUTHOR

Caroline Mala Corbin is Professor of Law at the University of Miami School of Law. Parts of this issue brief draw from *The Contraception Mandate*, 107 NW. U. L. REV. 1469 (2013), Debate (with Steven D. Smith): *The Contraception Mandate and Religious Freedom*, 161 U. PA. L. REV. Online 261 (2013), and *Paperwork as a Substantial Religious Burden*, JURIST (May 22, 2015). I would like to thank Michael Cheah, Sergio Campos, Mary Anne Franks, Lili Levi, Maya Mayan, Helen Louise Norton, Leigh Osofsky, and Steven Schnably for their helpful comments and Sabrina Niewialkouski and Ravika Rameshwar for their excellent research assistance.

⁶⁹ *Catholic Health Care Sys.*, 796 F.3d at 226.

⁷⁰ *Little Sisters of the Poor Home for the Aged*, 794 F.3d at 1183.

Private Litigation and Audit Quality in the 21st Century*

Dominic LoVerde¹

This article addresses the systemic issue of securities fraud and its relationship to accounting practices and the Private Securities Litigation Reform Act of 1995 (“PSLRA”). Since the passing of the Securities Exchange Act in 1933, the securities marketplace benefited from increased transparency, compliance, and certainty. The Securities Act, in pertinent part, made auditors and accountants legally responsible for the quality of their audits. However, due largely to the passage of the PSLRA,² we have witnessed a decrease in transparency and accountability for auditors and, in turn, for the securities marketplace as well.

We are now confronted with the reality that securities laws fail to provide adequate mechanisms to deter corporate fraud in the financial and securities markets; hence, we must reconsider the benefits of private securities litigation and enforcement. Indeed, removing the threat of private litigation caused a decrease in audit quality, which is demonstrated through the dramatic increase in accounting restatements since the PSLRA’s passage in 1995. These frequent restatements reflect the current culture of lax accounting standards, for which investors cannot hold auditors liable. But this has not reduced securities litigation, as the PSLRA ostensibly intended; suits are pursued with regularity against offending companies. Because litigation against auditors and accountants is foreclosed, however, audit quality has plummeted while the problem of fraud remains unchanged.

THE STRUCTURAL ROLE OF PRIVATE ENFORCEMENT MECHANISMS

The United States frequently relies on ex-post laws, in contrast to the European Union’s ex ante laws. This is due in part to America’s value on maintaining low barriers of entry to the marketplace in order to stimulate growth and innovation.³ The primacy of ex-post private enforcement in the American regulatory system is not terribly surprising; in large part, it is due to an outgrowth of America’s inherited regulatory design, which relied largely on private suits brought pursuant to common law doctrines, as opposed to ex ante public regulation of wrongdoing by governmental bodies.⁴ But private litigation serves as a complement to public enforcement of various

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¹ Dominic LoVerde is a 2016 graduate of Loyola University Chicago School of Law. He is currently a law clerk at the United States District Court, Northern District of Illinois.

² 15 U.S.C.A. § 78j (West 2015).

³ Luca Anderlini, Leonardo Felli, Alessandro Riboni, Giovanni Immordino, *Legal Institutions, Innovation and Growth*, London School of Economics and Political Science (June 2012), available at: <http://faculty.georgetown.edu/la2/Growth.pdf>.

⁴ *Id.* at 28.

laws. Restrictions on mechanisms that make private litigation possible may lead to undesirable consequences for the vindication of substantive rights. Regulations and policies without an adequate enforcement mechanism may, and have, rendered regulations patently useless. Appropriate enforcement mechanisms should be allocated to private parties to ensure the proper achievement of regulatory goals. However, with some notable exceptions—for instance, Food and Drug Administration (FDA) approval for pharmaceuticals and other biologics and licensing or permitting requirements under various environmental regulations⁵—the predominant approach to regulation in the United States is to regulate by imposing consequences on those who violate substantive law after the resulting harms have occurred.

This creates a diffuse enforcement system, but the United States currently fails to complete a well-rounded approach to addressing these issues. Other governments, most notably in the European Union, exercise diligence in creating ex-ante laws to regulate industry. Meanwhile, America generally takes the free market approach. However, this approach is currently failing the securities markets because it requires, but is lacking, accountability through the justice system.

Notably, the SEC and courts recognized the inherent value of private securities enforcement mechanisms to supplement the Department of Justice and SEC activity.⁶ However, the judicial activism of the 1990s that catered to corporate interests, in combination with the PSLRA, removed most litigants from the marketplace. This combination decreased the ability of a party to bring meritorious lawsuits, which freed corporate executives from findings of liability and reduced their exposure to risk. In turn, absent private enforcement, there is little incentive for corporate executives and auditors to be transparent and comply with federal disclosure laws.

In 1994, the United States Supreme Court, in *Central Bank of Denver v. First Interstate Bank of Denver*, held that a private plaintiff may not maintain an aiding and abetting suit under § 10(b).⁷ This decision was issued shortly before the passage of the PSLRA. Prior to *Central Bank of Denver*, the federal courts recognized the existence of aiding and abetting liability under Rule 10(b)(5).⁸ The PSLRA bolstered the Court's ruling, which reduced liability for accountants and auditors tasked with monitoring fraud.⁹ Arguably, one of the most significant reforms of the PSLRA was the elimination of joint and several liability, under which auditors and other parties could be named in securities lawsuits.¹⁰ While the elimination of joint and several liability provides significant relief to auditors from litigation, reality has shown that the PSLRA lowered audit quality and thereby reduced investor confidence in markets.

⁵ Steve A. Ramirez, *The Law and Macroeconomics of the New Deal*, 62 MD. L. REV. 515, 564 n.377 (2003).

⁶ *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (stating that private actions are indispensable for the enforcement of securities laws); *Berner v. Lazzaro*, 730 F.2d 1319, 1322 (9th Cir. 1984) (recognizing that SEC resources are only adequate to prosecute the most flagrant abuses).

⁷ *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994).

⁸ In 1994, every circuit court that considered the question recognized the existence of aiding and abetting liability under Rule 10(b)(5). JAMES D. COX ET AL., *SECURITIES REGULATION CASES AND MATERIALS* 695 (7th ed. 2013). The securities litigation bar and other observers were thus surprised when the Supreme Court reversed the course of such jurisprudence in *Central Bank of Denver*.

⁹ Daniel R. Tibbets, *Tarnished Reputations: Gatekeeper Liability After Janus*, 20 Fordham J. Corp. & Fin. L. 745, 745-46 (2015).

¹⁰ Steve Cox, Brian Lee and Dianne Rosen, *Have Big Firms Lost Their Audit Quality Advantage? Evidence From the Returns-Earnings Relation*, 8 J. of Forensic Accounting 274 (2007).

IMPACT ON ACCOUNTING PRACTICES

Accountants are also referred to as “gatekeepers” because they serve as the link between corporate information and every outsider, including regulators, investors, shareholders, creditors, and other parties. The accountant’s role as gatekeeper *should* enhance the consistency, relevancy, and accuracy of a company’s financial information.¹¹ But when those accountants are not threatened with the risk of litigation for their failure to properly audit a company, the quality of audits decreases significantly. As a result of the PSLRA, gatekeepers who aid and abet fraud face a substantially reduced risk of litigation and therefore a substantially reduced risk to their reputational capital. Naturally, risky accounting practices have only increased since the passage of the PSLRA and this serves as a detriment to the credibility of accountants and the integrity of their industry, and results in a markedly drastic decrease in investor confidence.

In addition, the industry has witnessed an increase in accruals since liability for auditors and accountants has been limited, which indicates aggressive accounting practices and the macroeconomic response to the PSLRA.¹² Accounting earnings are essentially the amount of money a company or public corporation earned during a given period of time, usually announced per quarter or annually. Generally Accepted Accounting Principles (“GAAP”) require accounting earnings to be reported in a specific manner. Stock returns reflect economic events from the current year but those same events might continuously affect the firm’s earnings for an extended period of time.¹³ Accordingly, investors need to predict how current economic events impact future earnings and firm value. Investors can be assisted in this process by high quality audits that promote more informative disclosures and consistent information. Conversely, investors and shareholders suffer when disclosures are less informative due to lower quality audits.

Auditors exert less effort and provide lower quality audits in settings where auditor liability is reduced.¹⁴ Notably, scholars have observed that investors perceive that a reduction in audit quality leads management to invest fewer resources in internal controls, which undermines investor confidence in corporate disclosures.¹⁵ As such, it only makes sense that audit quality diminished following passage of the PSLRA.¹⁶ This lack of enforcement infringes on shareholder rights and reduces their access to the courts.

This reality strikes at the core of holding corporate America accountable to its investors and the macroeconomy. In a market where accounting firms fail to exercise due diligence through GAAP principles or engage in aggressive accounting practices, the shareholders and investors suffer. Previously, investor confidence could be restored through using a “big 8” or “big 4” accounting firm. Research had shown “that financial statement quality improves the ability of investors to predict future earnings and that ‘big’ accounting firms provide higher quality audits.”¹⁷ Investors use the accounting information for various purposes but most notably, to help them predict future

¹¹ Lawrence A. Cunningham, *INTRODUCTORY ACCOUNTING, FINANCE AND AUDITING FOR LAWYERS* (6th ed. 2010).

¹² See Lee, Ho Young and Mande, Vivek, *The Effect of the Private Securities Litigation Reform Act of 1995 on Accounting Discretion of Client Managers of Big 6 and Non-Big 6 Auditors*, *Auditing: A Journal of Practice & Theory*, March 2003, available at <http://ssrn.com/abstract=326421>.

¹³ See *supra* note 10.

¹⁴ Jason Smith, *Investors’ Perceptions of Audit Quality: Effects of Regulatory Change*, 31 *Auditing: A Journal of Practice & Theory* 17-38, available at <http://ssrn.com/abstract=1931699>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See *supra* note 10 at 273.

earnings and firm value. The spirit that underlies GAAP is to assist investors to correctly estimate a firm's perpetual earnings or 'earnings power.' With higher quality audits, investors' trust and confidence in the corporation is regained and the corporation's stock performs favorably in the market. However, since the passage of the PSLRA, there has been an apparent loss in the audit quality advantage of big accounting firms.¹⁸ This apparent loss in audit quality is consistent with changes in the audit environment, which includes the increase of non-audit services and, more importantly, the lowered litigation risk for big accounting firms.¹⁹

The PSLRA made it more difficult for investors to hold corporate executives and directors liable when they engage in securities fraud and also stripped joint and several liability for accountants. From a microeconomic perspective, the PSLRA removed a significant deterrent for auditors and accountants. Those deterrents were in the form of monetary losses, loss of reputation, and financial instability. Deterrence has two key assumptions: the first is that specific punishments imposed on offenders will "deter" or prevent potential offenders from committing further crimes. The second is that fear of punishment will prevent individuals from committing similar crimes because the risks are too high.²⁰

Accordingly, the removal of liability and elimination of risk for corporate executives and accountants eliminated a deterrent that influenced their corporate behavior in a positive manner. The PSLRA indirectly motivated "big" accounting firms to be lenient with their clients who choose aggressive accounting methods because the potential litigation costs for auditors declined. These aggressive accounting methods are unchecked and unsupervised. Thus, the financial statements that were designed to provide users with useful guidance to evaluate the effect of economic events on current as well as future earnings no longer serve their purpose. In the macroeconomic sense, aggressive (and possibly fraudulent) accounting practices remain largely unmonitored.

A study by Brian Lee at Prairie View A & M University displayed this reality through empirical data.²¹ Lee's study found that investors were better able to predict future earnings while estimating the value of firms with financial statements audited by big accounting firms using a sample period from 1985-1998.²² This makes sense: the "big" accounting firms have greater resources and are predisposed to handling high profile, complex, and lengthy financial disclosures. However, Lee partitioned the sample into two periods—1985-1995 and 1996-1998. Notably, the predicted audit quality advantage of the big auditors is not found in the later period.²³ Lee concluded that the loss in quality was attributable to enactment of the PSLRA (and related case law) because the Act "restricts legal action against large auditors and potentially allows auditors to adopt more lenient audit procedures that permit their clients to choose more flexible accounting methods."²⁴

It is notable that in light of these post-PSLRA 'lax' accounting standards, the number of securities fraud class actions has returned to, and even exceeded, its

¹⁸ See *supra* note 10 at 273.

¹⁹ *Supra* note 10 at 274.

²⁰ Valerie Wright, "Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment," The Sentencing Project, Nov. 2010, accessed Dec. 12, 2015, available at: <http://www.sentencingproject.org/doc/Deterrence%20Briefing%20.pdf>.

²¹ See *supra* note 10.

²² See *supra* note 10 at 275.

²³ See *supra* note 10 at 275.

²⁴ See *supra* note 10 at 289.

pre-PSLRA level.²⁵ The larger number of filings suggests that either the PSLRA has done little to discourage the filing of “frivolous” suits or the number of accounting frauds has increased significantly.²⁶ Because the PSLRA requires plaintiffs to plead scienter, the PSLRA has led to a significantly greater correlation between litigation and the publication of earnings restatements.²⁷ Accounting restatements are the revision and republication of one or more of a company’s previous financial statements.²⁸ Restatements are an explicit acknowledgement of material omissions or misstatements in the original financial statements.²⁹ In essence, an accounting restatement indicates that material information was excluded from the financial disclosures, which means that investors were subject to misinformation. This misinformation ostensibly affected investors’ financial investment decisions and potentially caused monetary damages.

Accounting restatements provide the necessary factual predicate that the company materially misrepresented their finances and thus often serve to satisfy the PSLRA’s scienter requirement. Research shows that the number of accounting restatements issued since the passage of the PSLRA has increased dramatically.³⁰ In the post-PSLRA period, the risk of being sued for an earnings restatement is significantly greater because the restatement provides the evidence necessary to show a material misrepresentation.³¹ Because the PSLRA precluded suits against auditors and accountants for audit quality, however, these actors, who perform the subpar audits that ultimately lead to earnings restatements, are protected from suit while the company issuing the restatement is legally exposed. The end result is that the PSLRA has led to the deterioration of audit quality, but it has not reduced the incidence of securities fraud.³²

CONCLUSION

Private litigation plays a significant role in United States’ regulatory scheme. However, the PSLRA stripped plaintiffs from having access to the courts against those who aid and abet financial and corporate fraud. Consequently, accountants are no longer liable for their actions, which have led to lower quality auditing practices. This result strikes at the core of American capitalism and creates negative macroeconomic effects. Accountants have a duty to provide quality audits. However, the PSLRA strips the necessary legal mechanism of private litigation for enforcing that duty. Enactment of the PSLRA has therefore not reduced the incidence of fraud in the marketplace, but simply shielded actors responsible for such fraud from legal liability.

²⁵ Marilyn F. Johnson, Karen Nelson, A.C. Pritchard, *Do The Merits Matter More? The Impact of the Private Securities Litigation Reform Act*, available at: <http://ssrn.com/abstract=589221>.

²⁶ *Id.* (citing Elaine Buckberg, Todd Foster, Ronald I. Miller, and Stephanie Planchich, *Recent Trends in Shareholder Class Action Litigation: Bear Market Cases Bring Big Settlements*, National Economic Research Associates).

²⁷ See *supra* note 29, pg. 634.

²⁸ See *supra* note 9.

²⁹ Zoe Vonna-Palmrose and Susan Scholz, *Restated Financial Statements and Auditor Litigation*, American Association of Accounting Headquarters, October 2000, accessed Dec. 12, 2015, available at: <https://www2.aaahq.org/audit/midyear/01midyear/papers/Scholz.pdf>.

³⁰ Susan Scholz, *The Changing Nature and Consequences of Public Company Financial Restatements*, The United States Department of the Treasury, April 2008, available at: https://www.treasury.gov/press-center/press-releases/documents/financialrestatements_1997_2006.pdf (stating that “restatement frequency grew nearly eighteen-fold, from 90 in 1997 to 1,577 in 2006”).

³¹ See *supra* note 25.

³² See *supra* note 25.

