

Advance

The Journal of ACS Issue Briefs

TABLE OF CONTENTS

| | | |
|-----|---|--|
| 1 | Introduction | |
| 3 | The Troubling Turn in State Preemption: The Assault on Progressive Cities and How Cities Can Respond <i>Richard Briffault, Nestor Davidson, Paul A. Diller, Olatunde Johnson, and Richard C. Schragger</i> | |
| 23 | Curbing Excessive Force: A Primer on Barriers to Police Accountability <i>Kami N. Chavis and Conor Degnan</i> | |
| 45 | Access to Data Across Borders: The Critical Role for Congress to Play Now <i>Jennifer Daskal</i> | |
| 59 | Expanding Voting Rights Through Local Law <i>Joshua A. Douglas</i> | |
| 77 | Sex Discrimination Law and LGBT Equality <i>Katie R. Eyer</i> | |
| 93 | Troubling Legislative Agendas: Leveraging Women's Health Against Women's Reproductive Rights <i>Michele Goodwin</i> | |
| 107 | Coming to Terms with Term Limits: Fixing the Downward Spiral of Supreme Court Appointments <i>Kermit Roosevelt III and Ruth-Helen Vassilas</i> | |
| 121 | A Pragmatic Approach to Challenging Felon Disenfranchisement Laws <i>Avner Shapiro</i> | |
| 135 | The <i>Bivens</i> Term: Why the Supreme Court Should Reinvigorate Damages Suits Against Federal Officers <i>Stephen I. Vladeck</i> | |
| 143 | Restoring the Balance Between Secrecy and Transparency: The Prosecution of National Security Leaks Under the Espionage Act <i>Christina E. Wells</i> | |
| 159 | Parallel State Duties: Ninth Circuit Class Actions Premised on Violations of FDCA Reporting Requirements <i>Connor Karen</i> | |

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Advance

Advance, the Journal of the Issue Briefs of the American Constitution Society for Law and Policy (ACS), is published annually. 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 us.

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

We hope you find this issue's articles, which span a range of topics, engaging and edifying.

The Troubling Turn in State Preemption: The Assault on Progressive Cities and How Cities Can Respond*

Richard Briffault, Nestor Davidson, Paul A. Diller,
Olatunde Johnson, and Richard C. Schragger

In an era of paralysis and increasingly bitter partisan conflict at the national level, cities have become a critical source of innovation across a wide array of policy areas that advance inclusion, equitable opportunity, and social justice. In recent years, cities and other local governments have taken the lead in enacting minimum wage and paid sick leave policies, expanding the boundaries of civil rights, responding to emerging environmental threats, tackling public health challenges, and advancing other important progressive goals.

Increasingly, however, states have been working to shut down this local innovation through legislation that either overrides—“preempts”—local policies or withdraws authority from local governments. North Carolina’s success in blocking the city of Charlotte’s ordinance extending municipal non-discrimination protections to gay, lesbian, bisexual and transgender people appropriately sparked national outrage, but it is only one high-profile example. States have left almost no area of local policy free from preemption—increasingly expressing political differences through a legal tool originally designed to protect legitimate state interests in uniformity and to police against truly recalcitrant localities. The trend toward intrusive state oversight has been most notable in—but is by no means exclusive to—states with conservative state governments that are home to progressive cities, and these conflicts have been growing in recent years.

As troubling as the current wave of preemption has been, states are also now edging into new, uncharted legal territory by seeking to punish cities and even individual local officials who defy them. States have adopted statutes that threaten to withhold funding and expose cities to private liability in preemption conflicts as well as enacted laws that seek to impose personal civil penalties—and in some instances, even potential *criminal* liability—on mayors, city council members, police chiefs and other local officials who defy state legislation.

In the face of all of this, some cities, officials, and citizens have been fighting back, defending against preemption with claims based on state constitutional “home rule” immunity, state constitutional constraints on unfairly targeting local governments, as well as federal equal protection, due process, and other constitutional arguments. Despite their limited formal authority, cities have sometimes been successful in protecting local democracy. Overall, while the legal structure of intrastate preemption does not favor cities, given the contemporary landscape of increasing state hostility, there is an urgency to thinking creatively about new legal arguments, as well as building on instances of successful local advocacy, where they can be found.

* This Issue Brief was initially published in September 2017.

This Issue Brief canvasses the current wave of preemption and the primary legal theories that these state-local conflicts present, as well as claims that might arise as these battles continue.¹ The Brief also explores other possibilities for strengthening home rule to advance progressive local policymaking at a moment when cities increasingly stand on the front lines of economic justice, civil rights, sustainable development, and so many other critical policy domains.

Of course, preemption can be an important progressive tool for states to check local parochialism, as fights over exclusionary zoning have amply demonstrated. Any legal strategy to bolster local democracy must be calibrated to take into account this countervailing concern so that strong federal and state laws on civil, labor, environmental and other rights remain an important baseline that localities cannot undermine. That said, the current wave of preemption has all too often focused on displacing progressive local policy innovation.

I. HOME RULE AND IMMUNITY FROM STATE OVERRIDE

To understand current state-local conflicts, it is helpful to start—briefly—with some basics. Cities derive their power to determine their own policies as well as the contours of their independence through what is known as home rule.² Home rule has two aspects: initiative and immunity.³ The power of initiative “enable[s] local governments to undertake actions over a range of important issues without having to run to the state for specific authorization.”⁴ This aspect of home rule in the United States is widespread, with at least forty states delegating some significant, presumptive authority to local governments—typically cities, but in some states also counties—to initiate policies without prior state legislative authorization. The power of immunity, by contrast, “protect[s] local government decisions concerning local action from displacement by state law.”⁵

¹ Under the Trump Administration, *federal*-local conflicts are emerging as a troubling flashpoint, with conflicts over so-called “sanctuary cities” as an early example. This Issue Brief focuses on *state*-local conflicts, recognizing that many of the same concerns are at issue when the federal government acts to preempt local (and state) policymaking.

² Historically, home rule reflected dissatisfaction with the “scant authority” provided to cities by an early American rule of construction known as Dillon’s Rule. See Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1124 (2007). Dillon’s Rule, developed by Judge John F. Dillon in the late 1800s, stands for the idea that “municipalities possess[] only those powers indispensable to the purposes of their incorporation as well as any others expressly bestowed upon them by the state.” *Id.* at 1122–23. Generally, a Dillon’s Rule regime provides “few opportunities for cities to engage in substantive policymaking.” *Id.* at 1123. At the end of the nineteenth century, discontent with Dillon’s Rule reached a critical mass, and “states gradually began to grant more substantive policymaking power ... to their cities.” *Id.* at 1124. This initial form of home rule, called *imperium in imperio*, or simply *imperio*, “granted substantive lawmaking power to cities, but generally limited this authority to matters of ‘local concern’,” with the interpretation of “local concern” left to the state courts. *Id.* at 1124–25. Beginning in the 1950s, a second wave of home-rule reform focused on creating “a more flexible and less formalistic method for distributing power to cities,” granting “police powers” to local governments through statutes, “subject to denial of power in a particular substantive field by specific act of the state legislature.” *Id.* at 1125; see also Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENV. U. L. REV. 1337, 1338–39 (2009). This method presumed “that cities would have any power the state possessed, unless the state legislature had exclusively reserved power over a particular subject matter to the state.” Diller, *supra*, at 1125.

³ RICHARD BRIFFAULT & LAURIE REYNOLDS, *CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW* 346 (8th ed. 2016).

⁴ *Id.*

⁵ *Id.* Currently roughly fifteen states provide some form of home rule immunity. See Paul A. Diller, *Reorienting Home Rule: Part 2—Remedying the Urban Disadvantage Through Federalism and Localism*, 77 LA. L. REV. 1045, 1066 (2017).

Within the basic framework of home rule, important features vary by state. First, home rule regimes can be rooted in the state constitution, defined by state statute, or derived from a hybrid model, with the state constitution structuring home rule but leaving it to the legislature to elaborate. Similarly, in some states, the state constitution authorizes, but does not compel, the legislature to create a system of home rule for municipalities.⁶ In some states, the judiciary has interpreted state statutes delegating broad power to local entities as implicitly rejecting an older, restrictive rule of construction.⁷ In other states, the state legislation granting power to local governments makes clear that this restrictive view no longer applies.⁸ Constitutional home rule is generally more protective of local authority than statutory delegations, both because it is harder to amend state constitutions and, of course, because constitutions trump statutes.

Whether constitutional or statutory, home rule provisions generally delegate presumptive power to local governments across a broad swath of subjects, often with limitations over specific subject matters, such as the power to tax or create felony offenses,⁹ or substantive power over “civil or private law.”¹⁰ The National League of Cities (NLC) has usefully broken down home rule into structural, personnel, regulatory, and fiscal categories.¹¹ *Structural authority* is the power to design one’s type of government, including issues such as the number of city councilors, whether elections are by district or at-large, the length of terms, and rules for how campaigns are financed. *Personnel authority* is the power to manage and set compensation and benefits for a city’s personnel. *Regulatory power*, what the NLC calls “functional” authority, includes the “police power” authority to regulate for the health, safety, welfare, and morals of the community. This authority is arguably the most significant form of home rule for preemption purposes because cities often rely on this strand when they impose requirements on private businesses or property owners.

On *fiscal home rule*—the authority to raise revenue, borrow money, and spend—many state constitutional restrictions and statutes highly constrain local authority, although the details vary significantly by state. Some states specifically exclude taxing

⁶ In some states, moreover, the foundations for home rule may be different for different types of government. The state constitution may create home rule for cities but not for counties, or vice versa. In some states, the constitution singles out specific cities for home-rule powers. *E.g.*, MD. CONST. art. XI-A, § 1 (establishing home rule for the city of Baltimore and counties). In others, the constitution or statutes establish a population minimum, or an opt-in requirement through the adoption of a charter that triggers home rule authority. *E.g.*, COLO. CONST. art. XX, § 6 (minimum population of 2,000 to adopt municipal home rule charter); WASH. CONST. art. XI, § 10 (requiring population of 10,000 for city to frame charter). Some states, by contrast, automatically provide home rule to cities of a certain size but allow them to opt out. *E.g.*, ILL. CONST. art. VII, §§ 6(a), (b) (allowing cities of 25,000 or greater to opt out of home rule).

⁷ See *supra* note 2 (discussing Dillon’s Rule, the older, restrictive view of local authority).

⁸ Compare *State v. Hutchinson*, 624 P.2d 1116, 1127 (Utah 1980) (holding that “the Dillon Rule of strict construction is not to be used to restrict the power of a county under a grant by the Legislature of general welfare power or prevent counties from using reasonable means to implement specific grants of authority”), with IND. CODE § 36-1-3-3 (2017) (abrogating anti-local judicial canons of statutory construction).

⁹ *E.g.*, IOWA CONST. art. III, § 38A (“[Municipalities] shall not have power to levy any tax unless expressly authorized by the general assembly.”); DEL. CODE ANN. tit. 22, § 802 (2017) (excluding the “power to define and provide for the punishment of a felony” from grant of power to municipalities). See generally Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409 (2001).

¹⁰ See Paul A. Diller, *The City and the Private Right of Action*, 64 STAN. L. REV. 1109, 1110 (2012).

¹¹ NAT’L LEAGUE OF CITIES, CITIES 101—DELEGATION OF POWER, <http://www.nlc.org/resource/cities-101-delegation-of-power> (last visited Sept. 8, 2017).

authority from their grant of home-rule powers.¹² Other states presumptively grant the power to tax through their home-rule provisions, but impose numerous other restrictions in separate constitutional or statutory provisions.¹³ In light of the various restrictions many states have imposed, commentators consider fiscal home rule the weakest category of city authority.¹⁴

A final category can be added to the four identified by the NLC. In addition to their regulatory powers, cities may use their ability, akin to that of other market actors, to enter into contracts, sell or lease property, or provide services to affect the behavior of the firms with which they do business. This “*proprietary*” authority enables them to require contractors who work on municipal projects to pay a higher wage or offer workplace benefits not required of other firms,¹⁵ or impose higher standards of non-discrimination on services they offer, such as housing and public transportation.¹⁶

Breaking down home rule into these categories is helpful in assessing the immunity, if any, that state constitutions confer on local lawmaking from state override. In states with pure “legislative” systems of home rule, where the constitution grants all powers to cities minus those preempted by the legislature, every and all local power can be preempted so long as the legislature is sufficiently clear about its intent. With other forms of home rule, however, the situation is more complicated. In some states, personnel, structural, proprietary, and some regulatory issues may enjoy outright or modified immunity to preemption.¹⁷ In a handful of states, the constitution expressly allows for certain local enactments to trump state law.¹⁸ In other states, supreme courts have read state constitutions as protecting certain local enactments—usually structural, proprietary, or personnel—from state override or imposing certain conditions on state override. As discussed below, moreover, the state constitution and the judiciary in some states require that in order to preempt effectively, state laws must be of a “general” or “uniform” nature. In some states, this requirement is merely formalistic—preemptive legislation must treat all home-rule cities or counties equally. In other states, the requirement contains a substantive component: courts inquire into whether the preemptive legislation truly addresses a “statewide concern,” as determined by the judiciary.¹⁹

¹² See, e.g., IOWA CONST. art. III, § 38A; see also MASS. CONST. AMEND. art. 2, § 7 (withholding from cities and towns “the power to ... levy, assess and collect taxes [and] to borrow money or pledge the credit of the city or town”).

¹³ E.g., CAL. CONST. art. XIII A (limiting local governments’ ability to raise revenue through property and other taxes).

¹⁴ See, e.g., Erin Adele Scharff, *Powerful Cities?: Limits on Municipal Taxing Authority and What to Do About Them*, 91 N.Y.U. L. REV. 292, 296 (2016).

¹⁵ See, e.g., Scott L. Cummings & Steven A. Boutcher, *Mobilizing Local Government Law for Low-Wage Workers*, 2009 U. CHI. LEGAL F. 187, 193-94 (noting that “the most common approach to the living wage ... is to tie living wage compliance to a direct financial relationship between the city and private employer”).

¹⁶ Some of the earliest civil rights legislation at any level of government were local ordinances that emerged in the late 1940s preventing racial and national origin discrimination in city-owned and operated housing. See Pamela H. Rice & Milton Greenberg, *Municipal Protection of Human Rights*, 1952 WIS. L. REV. 679, 684.

¹⁷ Preemption can come through ordinary state legislation or from voters, through referenda or initiatives.

¹⁸ E.g., COLO. CONST. art. XX, § 6 (declaring that local charters and ordinances involving “local and municipal matters ... shall supersede ... any law of the state in conflict therewith”).

¹⁹ E.g., *Jacobberger v. Terry*, 320 N.W.2d 903, 905-06 (Neb. 1982) (upholding statute requiring district elections for Omaha city council due to state concern for more proportional representation of socioeconomic classes in local governing body).

All told, then, home rule defines local autonomy through both the power to initiate policy and the ability to protect that policymaking from state displacement.²⁰

II. LOCAL INNOVATION AND STATE HOSTILITY: THE NEW PREEMPTION

States have traditionally exercised preemptive oversight to advance legitimate state interests in uniformity or to rein in local governments whose actions have clear negative effects beyond their borders or interfere with state regulatory programs. In recent years, however, without much attention or national appreciation, states have increasingly shifted toward using preemption as a tool to block local initiatives in areas of local concern, with many conflicts focused on areas of progressive policy facing conservative backlash at the state level.²¹

This Part canvasses several paradigmatic examples of state overrides—in labor and employment, civil rights, environmental protection, public health and firearms safety, as well as with sanctuary cities—to illustrate how sweeping preemption of local policymaking is becoming. It then explains the rise of “punitive preemption”—legislation that goes beyond merely overriding local policy to punishing local governments and local officials over policy disagreements.

A. LOCAL POWER UNDER SIEGE

Labor and employment is an area where cities have played an essential role in raising the minimum wage and expanding worker benefits above the level set by federal and state law. In the face of that progress, at least twenty-five states have preempted local authority over private-sector minimum wage rules.²² At least eighteen states preempt local authority to regulate the amount of paid or unpaid leave that private

²⁰ For a survey of the current landscape of home rule in every state, as well as other background on preemption, see <https://www.urbanlawcenter.org/enter-leap>.

²¹ For excellent discussions of the full breadth of contemporary preemption practices, see NATIONAL LEAGUE OF CITIES, *CITY RIGHTS IN AN ERA OF PREEMPTION: A STATE-BY-STATE ANALYSIS* (2017), available at <http://nlc.org/preemption> (discussing state preemption of local policies in the areas of minimum wage, paid sick leave, anti-discrimination, the sharing economy, municipal broadband, tax and expenditures, public health, plastic bags, firearm safety, inclusionary zoning and rent control); Lori Riverstone-Newell, *The Rise of State Preemption Laws in Response to Local Policy Innovation*, 47 *PUBLIUS* 403 (2017) (canvassing preemption conflicts).

²² These states include Alabama, see ALA. CODE 25-7-41(b) (2017); Arkansas, see ARK. CODE ANN. § 11-4-221 (2017); Colorado, see COLO. REV. STAT. § 8-6-101(3)(a) (2017); Florida, see FLA. STAT. § 218.077(2) (2017); Georgia, see GA. CODE ANN. § 34-4-3.1 (2017); Idaho, see IDAHO CODE § 44-1502(4) (2017); Indiana, see IND. CODE § 22-2-2-10.5 (2017); Iowa, see IOWA CODE § 331.304(12) (2017); Kansas, see KAN. STAT. ANN. § 12-16,130 (2017); Kentucky, see *Kentucky Rest. Ass’n v. Louisville/Jefferson Cty. Metro Gov’t*, 501 S.W.3d 425 (Ky. 2016); Louisiana, see LA. STAT. ANN. § 23:642(B) (2017); Michigan, see MICH. COMP. LAWS ANN. § 123.1385 (West 2017); Mississippi, see MISS. CODE ANN. § 17-1-51 (2017); Missouri, see MO. REV. STAT. § 290.528 (2017); North Carolina, see 2017 N.C. Sess. Laws 4 § 1; Oklahoma, see OKLA. STAT. tit. 40, § 160 (2017); Oregon, see OR. REV. STAT. § 653.017 (2015); Pennsylvania, see 43 PA. CONS. STAT. § 333.114a (2017); Rhode Island, see 28 R.I. GEN. LAWS § 28-12-25; South Carolina, see S.C. CODE ANN. § 6-1-130 (2017); Tennessee (2013), see TENN. CODE ANN. § 50-2-112 (2017); Texas, see TEX. LAB. CODE ANN. § 62.0515 (West 2017); Utah, see UTAH CODE ANN. § 34-40-106 (West 2017); and Wisconsin, see WIS. STAT. § 104.001 (2017). Ohio also attempted to preempt local minimum wage regulations (see OHIO REV. CODE ANN. § 4111.02 (West 2017)), but the statute has been struck down at the trial court level for violating the state constitution’s single subject rule, see *City of Bexley v. State of Ohio*, (Court of Common Pleas, Franklin County, June 2, 2017, Case No: 17CV-2672); but see *City of Hudson v. State of Ohio* (Court of Common Pleas, Summit County, July 7, 2017, Case No: CV-2017-03-1103) (finding the same statute did embrace a single subject). See also NATIONAL LEAGUE OF CITIES, *supra* note 21 (discussing minimum wage and paid sick leave preemption).

employers provide their employees.²³ And at least eleven states preempt local authority to regulate other types of benefits that private employers provide their employees.²⁴

In the civil rights arena, Arkansas, North Carolina, and Tennessee have enacted legislation that—despite taking somewhat different forms—effectively preempted local antidiscrimination laws that are more protective than state law.²⁵ To avoid language that facially repeals protections for particular social groups, some of these state preemptive measures have been framed as the protection of “intrastate commerce.” Yet each of these states acted after one of their cities adopted a local ordinance expanding antidiscrimination protection on the basis of sexual orientation or gender identity. For example, after the City Council in Charlotte enacted an ordinance that prohibited businesses from discriminating against customers on the basis of sexual orientation or gender identity and permitted transgender individuals to use facilities corresponding to their gender identity, North Carolina passed legislation to preempt the Charlotte ordinance.²⁶ In addition to prohibiting local antidiscrimination laws pertaining to employment and public accommodations, the North Carolina law required that “[p]ublic agencies ... require multiple occupancy bathrooms or changing facilities ... be designated for and only used by individuals based on their biological sex” and defined

²³ These states include Alabama, *see* ALA. CODE § 11-80-16 (2017); *see also* ALA. CODE § 25-7-41 (2017); Arkansas, *see* ARK. CODE ANN. § 11-4-221 (2017); Florida, *see* FLA. STAT. § 218.077 (2017); Georgia, *see* GA. CODE ANN. § 34-4-3.1 (2017); Indiana, *see* IND. CODE § 22-2-16-3 (2017); Iowa, *see* IOWA CODE § 331.304(12) (2017); Kansas, *see* KAN. STAT. ANN. § 12-16,130 (2017); Louisiana, *see* LA. STAT. ANN. § 23:642 (2017); Michigan, *see* MICH. COMP. LAWS ANN. § 123.1388 (West 2017); Mississippi, *see* MISS. CODE ANN. § 17-1-51 (2017); Missouri, *see* MO. REV. STAT. § 290.528 (2017); NORTH CAROLINA, *see* 2017 N.C. Sess. Laws 4 § 1; Oklahoma, *see* OKLA. STAT. tit. 40, § 160 (2017); Oregon, *see* OR. REV. STAT. § 653.661 (2015) (sick leave); South Carolina, *see* S.C. CODE ANN. § 41-1-25 (2017); Tennessee, *see* TENN. CODE ANN. § 7-51-1802 (2017), and Wisconsin, *see* WIS. STAT. § 103.10(1m) (2017). Arizona’s preemption of local paid sick and family leave policies (*see* ARIZ. REV. STAT. ANN. § 23-204 (2017)), was recently struck down at the trial court level as violating the state’s Voter Protection Act, which essentially prevents the state Legislature from tampering with voter-approved initiatives such as the 2013 initiative that protected local laws on minimum wage and “other benefits” from state preemption. *See* United Food and Commercial Workers Local 99 v. Arizona (Superior Court, Maricopa County, CV2016-092409, August 30, 2017). Ohio also attempted to preempt local leave regulations in the same statute that covered minimum wage regulations (*see* OHIO REV. CODE ANN. § 4113.85 (West 2017)), leading to the same litigation split over the single-subject question. *See supra* note 22.

²⁴ These states include Alabama (2016), *see* ALA. CODE § 25-7-41 (2017); Arizona (2013), *see* ARIZ. REV. STAT. ANN. § 23-204 (2017); *see also* ARIZ. REV. STAT. ANN. § 23-205 (2017) (scheduling); Florida (2013), *see* FLA. STAT. § 218.077 (2017); Georgia (2004), *see* GA. CODE ANN. § 34-4-3.1 (2017); Indiana (2013), *see* IND. CODE § 22-2-16-3 (2017); Kansas (2013), *see* KAN. STAT. ANN. § 12-16,130 (2017); Michigan (2015), *see* MICH. COMP. LAWS ANN. § 123.1386 (West 2017) (including wages or benefits in the prevailing community), *see also* MICH. COMP. LAWS ANN. § 123.1391 (West 2017) (cannot require giving of specific fringe benefits or covering expenses), and MICH. COMP. LAWS ANN. § 123.1389 (West 2017) (scheduling and hours); Missouri (2015), *see* MO. REV. STAT. § 290.528 (2017); North Carolina (2016), *see* 2017 N.C. Sess. Laws 4 § 1; Tennessee (2013), *see* TENN. CODE ANN. § 7-51-1802(c) (2017) (health insurance benefits); and Pennsylvania (1996), *see* Bldg. Owners & Managers Ass’n of Pittsburgh v. City of Pittsburgh, 985 A.2d 711, 714 (Pa. 2009) (holding that Pennsylvania state law prohibits certain municipalities from regulating businesses by determining their “duties, responsibilities, or requirements.”).

²⁵ *See* Intrastate Commerce Improvement Act, ARK. CODE ANN. §§ 14-1-402-403 (2015); 2016 N.C. Sess. Laws 3 §§ 1-3 *repealed by* 2017 N.C. Sess. Laws 4 § 1; Equal Access to Intrastate Commerce Act, TENN. CODE ANN. § 7-51-1802 (2017). *See infra* text accompanying notes 26-27 (discussing the North Carolina statute).

²⁶ *See* 2016 N.C. Sess. Laws 3 §§ 1-3 *repealed by* 2017 N.C. Sess. Laws 4 § 1.

“biological sex” as “[t]he physical condition of being male or female, which is stated on a person’s birth certificate.”²⁷

Preemption of local environmental protection is also growing. Seven states, including Oklahoma and Texas, for example, have explicitly preempted local regulation of hydraulic fracturing, or fracking,²⁸ and the Colorado Supreme Court invalidated two cities’ restrictions on fracking and the storage of fracking waste within the cities’ limits in 2016, on the grounds that they conflicted with the state Oil and Gas Conservation Act.²⁹ Arizona, Idaho, New York, and seven other states explicitly preempt localities from banning plastic bags.³⁰ And twenty-nine states explicitly preempted local pesticide regulation, as of 2013.³¹

On the public health front, thirty-one states have some form of preemption of local regulation of tobacco products³² and at least seven states preempt local regulation of e-cigarettes.³³ Nine states currently preempt local actions with respect to nutrition and food policy, with laws ranging from barring local regulations that require nutrition labeling, as in Alabama, to barring local laws that prevent restaurants from including toys in children’s meals, as in Wisconsin.³⁴ Similarly, forty-three states have enacted broad preemption statutes related to firearms and ammunition, with eleven states

²⁷ See *id.* The Act further defined “public agencies” to include, among other entities, the state executive, judicial and legislative branches, including the University of North Carolina system. See *id.* After much controversy, the North Carolina bill was superseded by a replacement statute that nonetheless still preempted local governments from regulating “access to multiple occupancy restrooms, showers, or changing facilities.” 2017 N.C. Sess. Laws 4 § 2. The replacement statute also prohibits—until December 1, 2020—local governments from regulating private employment practices or regulating public accommodations.

²⁸ See Riverstone-Newell, *supra* note 21, at 411. Oklahoma’s 2015 preemptive statute provides that political subdivisions “may not effectively prohibit or ban any oil and gas operations, including oil and gas exploration, drilling, fracture stimulation, completion, production, maintenance, plugging and abandonment, produced water disposal, secondary recovery operations, flow and gathering lines or pipeline infrastructure,” with few exceptions, see OKLA. STAT., tit. 52, § 137.1 (2016), and the 2015 Texas statute is similar. See TEX. NAT. RES. CODE ANN. § 81.0523 (West 2017).

²⁹ *City of Longmont v. Colo. Oil & Gas Ass’n*, 369 P.3d 573, 585 (Col. 2016).

³⁰ *State Plastic and Paper Bag Legislation*, NATIONAL CONF. OF STATE LEGS., <http://www.ncsl.org/research/environment-and-natural-resources/plastic-bag-legislation.aspx>; 2017 NY Sess. Laws Ch. 7 (McKinney).

³¹ Most of these states’ laws read very similar to the American Legislative Exchange Council’s (ALEC) *Model State Preemption Act*. This Model Act states that “No city, town, county, or other political subdivision of this state shall adopt or continue in effect any ordinance, rule, regulation or statute regarding pesticide sale or use, including without limitation: registration, notification of use, advertising and marketing, distribution, applicator training and certification, storage, transportation, disposal, disclosure of confidential information, or product composition.” Matthew Porter, *State Preemption Law: The Battle for Local Control of Democracy*, BEYOND PESTICIDES, available at <http://www.beyondpesticides.org/assets/media/documents/lawn/activist/documents/StatePreemption.pdf>.

³² Ctr. For Disease Control & Prev. Preemption on Advertising, Licensure, Smoke-free Indoor Air, and Youth Access (2016), <https://www.cdc.gov/statesystem/preemption.html>.

³³ These states include ARK. CODE ANN. § 26-57-267 (2017); IOWA CODE § 453A.56 (2017); NEV. REV. STAT. § 202.249(4) (2017); OKLA. STAT. tit. 37 § 600.10 (2017); S.C. CODE ANN. § 16-17-504 (2017); S.D. CODIFIED LAWS § 34-46-6 (2017); WASH. REV. CODE § 70.345.210 (2017). See also Patrick Kabat, Note, “*Till Naught But Ash Is Left To See*”: *Statewide Smoking Bans, Ballot Initiatives, and the Public Sphere*, 9 YALE J. HEALTH POL’Y, L. & ETHICS 128, 137-45 (2009) (examining the landscape of state preemption of the local regulation of second-hand smoke).

³⁴ ALA. CODE § 20-1-7 (2017); ARIZ. REV. STAT. ANN. § 44-1380 (2017); FLA. STAT. § 509.032(7) (a) (2017); GA. CODE ANN. § 26-2-373(a) (2017); KAN. STAT. ANN. § 12.16,137 (2017); MISS. CODE ANN. § 75-29-901 (2017); OHIO REV. CODE ANN. § 3717.53 (West 2017); UTAH CODE ANN. §§ 10-8-44.5, 17-50-329 (West 2017); WIS. STAT. § 66.0418 (2017).

absolutely preempting all municipal firearm regulations, including New Mexico, which took the extreme step of amending its state constitution to enshrine the ban.³⁵

Finally—although this brief survey does not come close to covering the entire range of contemporary preemption legislation³⁶—the issue of sanctuary cities is emerging as another front in state-local conflicts.³⁷ While Arizona, Georgia, Indiana, Missouri, and North Carolina all had bans against sanctuary cities that predated last fall’s presidential election,³⁸ since the election and President Trump’s targeting of this issue in one of his first Executive Orders,³⁹ Mississippi and Texas have both passed sweeping preemption bills,⁴⁰ while the Governor of Virginia vetoed a similar set of restrictions,⁴¹ and similar provisions have been introduced in a number of states.⁴²

B. THE TROUBLING EMERGENCE OF PUNITIVE PREEMPTION

The examples above illustrate ways in which current preemptive laws are fundamentally altering the nature of local power. But adding to this is the emergence of an even more troubling form of preemption that seeks to punish local governments and local officials for disagreeing with their states.

Traditionally, state preemption simply rendered local measures ineffective but now states want to go further and actually punish cities and their officials for adopting preempted measures -- or even failing to formally repeal local laws that have been rendered legally ineffective. Arizona, for example, now provides that local

³⁵ These states are Arkansas, *see* ARK. CODE ANN. § 14-54-1411 (2017); Indiana, *see* IND. CODE § 35-47-11.1-2 (2017); Iowa, *see* IOWA CODE § 724.28 (2017); Kentucky, *see* KY. REV. STAT. ANN. § 65.870 (West 2017); Michigan, *see* MICH. COMP. LAWS ANN. § 123.1102 (West 2017); New Mexico, *see* N.M. CONST. art. II, § 6; Oregon, *see* OR. REV. STAT. § 166.170 (2017); Rhode Island, *see* 11 R.I. GEN. LAWS. § 11-47-58 (2017); South Dakota, *see* S.D. CODIFIED LAWS §§ 7-18A-36, 8-5-13, 9-19-20 (2017); Utah, *see* UTAH CODE ANN. § 76-10-500 (2017); and Vermont, *see* VT. STAT. ANN. tit. 24 § 2295 (2017). *See generally* Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82 (2013) (arguing that Second Amendment doctrine should distinguish between urban and rural localism in the latitude allowed for local regulation of firearms).

³⁶ Two other notable areas of preemption, among others, include municipal broadband (with seventeen states preempting local authority) and the sharing economy (with at least thirty-nine states preempting local control in various forms). *See* NATIONAL LEAGUE OF CITIES, *supra* note 21.

³⁷ The term “sanctuary city” is contested, but generally refers to local governments that adopt inclusive local policies regarding undocumented immigrants. *See* Rose Cuison Villazor, “Sanctuary Cities” and Local Citizenship, 37 FORDHAM URB. L.J. 573, 575-76 (2010) (discussing a range of sanctuary policies).

³⁸ ARIZ. REV. STAT. ANN. § 11-1051 (2017) (effective July 29, 2010); GA. CODE ANN. § 36-80-23 (2017) (effective May 5, 2009); IND. CODE § 5-2-18.2-4 (2017) (effective July 1, 2011); MO. REV. STAT. § 67.307 (2016) (effective January 1, 2009); N.C. GEN. STAT. § 153A-145.5 (2017) (effective October 1, 2015). Although the Arizona law was partially struck down by the Supreme Court in *Arizona v. United States*, 567 U.S. 387 (2012), key preemption provisions remain.

³⁹ *See* Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 25, 2017).

⁴⁰ 2017 MISS. LAWS CH. 383 (S.B. 2710); 2017 TEX. SESS. LAW SERV. CH. 4 (S.B. 4) (Vernon’s). On August 30, 2017, the United States District Court for the Western District of Texas issued a preliminary injunction against a number of provisions of the Texas anti-sanctuary law, Senate Bill 4, federal preemption, First Amendment, Fourth Amendment and Fourteenth Amendment Due Process grounds, which the Fifth Circuit subsequently partially stayed. *See* *City of El Cenizo v. State of Texas*, No. SA-17-CV-404-OLG, 2017 WL 3763098 (W.D. Tex. 2017) (order granting preliminary injunction), *injunction partially stayed by City of El Cenizo v. State of Texas*, No. 17-50762 (5th Cir. Sep. 25, 2017).

⁴¹ H.B. 2000, Reg. Session (Va. 2017); Governor Veto Message: H.B. 2000, March 27 2017, <https://lis.virginia.gov/cgi-bin/legp604.exe?171+amd+HB2000AG>.

⁴² *See* NATIONAL CONFERENCE OF STATE LEGISLATURES, STATE SANCTUARY BILLS (May 8, 2017), *available at* http://www.ncsl.org/Portals/1/Documents/immig/StateSanctuaryBills_050817.pdf.

governments risk losing state funding if they do not act to remove laws that the state Attorney General determines to be in conflict with state law.⁴³

Even more troubling, however, are states that have begun authorizing civil and even *criminal* sanctions against local officials in preemption conflicts. This trend began in 2003, when Oklahoma amended its firearm preemption statute to allow for personal civil liability against officials who vote to enact laws conflicting with the state's firearm preemption statute.⁴⁴ In 2011, Florida went further, enacting a range of sanctions for "knowing and willful violations" of the state's firearm preemption statute. These provisions allow courts to impose civil fines on individual officials of up to \$5,000,⁴⁵ bar officials from using public funds for their legal defense or to reimburse them for the fine,⁴⁶ and provide that violation of the statute constitutes cause for termination of employment or removal from office by the governor.⁴⁷

In 2014, Mississippi amended its firearm preemption statute to include penalty provisions modeled after Florida's punitive law. As in Florida, the Mississippi statute creates a private right of action for declaratory and injunctive relief, granting successful plaintiffs declaratory and injunctive relief and holding any "elected county or municipal official under whose jurisdiction the violation occurred" civilly liable for up to \$1,000, plus attorney's fees and costs that may not be paid (or defended against) through public funds.⁴⁸ And in 2016, Arizona allowed private litigants to pursue personal sanctions against local officials who violate state firearm preemption bills. The Arizona law states that an official found to have violated the preemption law may be subject to termination from office,⁴⁹ allows for a civil penalty of \$50,000 to be imposed against a local government, and creates a private right of action against local governments to recover damages of up to \$100,000 as well as attorney's fees and costs.⁵⁰

⁴³ In 2016, Arizona adopted S.B. 1487, now codified as ARIZ. REV. STAT. ANN. § 41-194.01 (2017), requiring the Arizona Attorney General to investigate local laws at the request of any state legislator, *id.* § 49-194.01(A); if the Attorney General finds the ordinance in conflict with state law or the Arizona constitution, the local government must resolve the violation within 30 days or face a loss of shared state money. *Id.* § 49-194.01(B). The Arizona Supreme Court recently upheld portions of the statute, although expressed concerns about some of the statute's more punitive aspects. See *infra* text accompanying notes 81–85.

⁴⁴ OKLA. STAT. tit. 21, § 1289.24(D) (2017) ("When a person's rights pursuant to the protection of the preemption provisions of this section have been violated, the person shall have the right to bring a civil action against the persons, municipality, and political subdivision jointly and severally for injunctive relief or monetary damages or both."). In November 2003, the Oklahoma Attorney General issued an advisory opinion that the provision did not create civil liability for law enforcement officers seizing unlawfully transported handguns, but the opinion did not address whether the provision would create liability for local officials passing an ordinance in contravention of the preemption statute. Okla. A.G. Op. No. 03-46, 2003 WL 22680002, at *5-7 (Nov. 3, 2003).

⁴⁵ FLA. STAT. § 790.33(3)(c) (2017).

⁴⁶ *Id.* § 790.33(3)(d).

⁴⁷ *Id.* § 790.33(3)(e) held *unconstitutional* by *Marcus v. Scott*, 2014 WL 3797314 (Fla. Cir. Ct.). The law also gives affected individuals and groups a private right of action against local governments for declaratory and injunctive relief, as well as actual damages of up to \$100,000 and attorney's fees. *Id.* § 790.33(3)(f).

⁴⁸ MISS. CODE ANN. §§ 45-9-53(5)(a), (c) (2017). Unlike in Florida, before instituting suit, the affected party must notify the state Attorney General of the alleged violation. If the Attorney General finds a violation, the local government has 30 days to remedy it before the suit may proceed. *Id.* § 45-9-53(5)(b). Local officials who did not vote for the infringing ordinance or who attempted to cure the violation as noted by the Attorney General may claim an affirmative defense. *Id.* § 45-9-53(5)(d).

⁴⁹ ARIZ. REV. STAT. ANN. § 13-3108(J) (2017).

⁵⁰ *Id.* § 13-3108(I), (K).

Perhaps most troubling, Kentucky in 2012 amended its firearm preemption statute not only to create a private right of action,⁵¹ but to impose a criminal penalty on officials: “A violation of this section by a public servant shall be a violation of either KRS § 522.020 [Official misconduct in the first degree] or § 522.030 [Official misconduct in the second degree], depending on the circumstances of the violation.”⁵² This practice appears to be spreading, as Texas this past May included a criminal liability provision in its anti-sanctuary cities preemption legislation.⁵³

III. LEGAL STRATEGIES FOR RESISTING STATE PREEMPTION

Together, the combination of the breadth and range of current state preemption legislation and the rise of punitive preemption risks fundamentally changing the nature of local power just as cities are taking the lead in so many critical areas of policy. Cities and their officials, however, are pushing back. Resistance to the rising abuse of state preemption has involved organizing, coalition building, and political responses. But legal arguments have also been central to how cities are responding. Historically, cities have been understood to be relatively powerless to resist state oversight in a formal sense, and, broadly speaking, that remains true. With states overreaching, however, courts in recent years have sided with cities on a number of grounds. This Part reviews the legal landscape emerging from current conflicts and highlights other legal issues that preemption presents.

A. STATE CONSTITUTIONAL CHALLENGES TO PREEMPTION

The legal grounds on which cities are challenging preemption derive primarily from state constitutional law, on both substantive—home rule and restrictions on special legislation—and procedural grounds.

1. *Direct Constitutional Home Rule Immunity Claims*

In the right circumstances, constitutional home rule can stand as a source of protection for local autonomy in conflicts with states. In *Telluride v. San Miguel Valley Corporation*, for example, the Colorado Supreme Court held that a state statute that sought explicitly to bar a town’s use of eminent domain to acquire parks and open space was an unconstitutional infringement on the town’s home rule authority over matters of local concern.⁵⁴ Of course, many states lack constitutional protection for home rule and even in constitutional home rule states, courts can be wary of vindicating local authority, limiting the scope of constitutional protection to judicially-determined local or municipal spheres.⁵⁵ That said, the case law is sufficiently mixed for

⁵¹ H.B. 500, Reg. Sess. (Ky. 2012); KY. REV. STAT. ANN. § 65.870(4) (West 2017). The prevailing party in such a suit is entitled to attorney’s fees and costs, as well as expert witness fees. *Id.*

⁵² *Id.* § 65.870(6).

⁵³ Texas Senate Bill 4, signed into law in May, would provide that local law enforcement officials face criminal penalties if they fail to comply with immigration detainer requests. *See* Texas Senate Bill 4, § 5.02 (adding a new § 39.07 to the Texas penal code). As noted, *see supra* note 40, the United States District Court for the Western District of Texas enjoined a number of provisions of the bill this past August 30th. *See City of El Cenizo v. State of Texas*, No. SA-17-CV-404-OLG, 2017 WL 3763098 (W.D. Tex. 2017) (order granting preliminary injunction), *injunction partially stayed by City of El Cenizo v. State of Texas*, No. 17-50762 (5th Cir. Sep. 25, 2017).

⁵⁴ *Telluride v. San Miguel Valley Corporation*, 185 P.3d 161, 169-71 (Colo. 2008).

⁵⁵ *See Baker & Rodriguez, supra* note 2, at Part III.

this to be an avenue that local governments in constitutional home rule states will continue to pursue.⁵⁶

2. Generality and Anti-Special Legislation Claims

Another constraint on certain types of state preemptive legislation derives from state constitutional provisions—found in roughly thirty-seven states—that require some form of “generality” or “uniformity” or conversely that prohibit “special” or “local” legislation.⁵⁷ Although the jurisprudence is varied, statutes that relate to persons or things *as a class* likely qualify as general laws, while statutes that relate to *particular* persons or things within a class are special laws.⁵⁸ State statutes may be vulnerable on these grounds because they are “local” in the geographic sense, or discriminate against a particular category, or are applicable only to government entities, instead of including private parties.⁵⁹ Overall, the strongest examples of generality/anti-special legislation principles make clear that individual cities cannot be unfairly singled out, although in many states, the judiciary tolerates circumvention, for example, by permitting legislation that does not expressly identify a particular target jurisdiction, even if in fact by operation only one jurisdiction is affected.⁶⁰

Traditionally, this jurisprudence has not been a significant source of protection for local authority, but there are examples of the principle succeeding, and courts may become more open to these claims as preemption becomes more targeted. For example, in *City of Cleveland v. State of Ohio*, an Ohio trial court recently held that the state’s attempt to preempt Cleveland’s well-known Fannie M. Lewis Resident Employment Law—which sets modest, although important, requirements for the employment of local residents in city-funded projects—violated the state constitution in part because it was not a “general law.”⁶¹ Drawing on long-standing Ohio precedent, the court noted

⁵⁶ Cf. *id.* at 1356 (noting that “the courts have frequently upheld municipal police power regulations in the face of state efforts at control... [making] clear that regulating the ‘health, safety, and welfare’ of a locality is squarely within the scope of local affairs”). Some recent litigation has also involved challenges to the authority or validity of state legislation, as a threshold matter, prior to the question of the legislation’s preemptive effect. See, e.g., *City of Cleveland v. State of Ohio* (Court of Common Pleas, Cuyahoga County, January 31, 2017, Case No: CV-16-868008) (finding that Ohio lacked authority under the Ohio Constitution to enact legislation to preempt local-hire provisions because the relevant constitutional provision the state invoked—Article II, Section 34—requires that such legislation advance the “comfort, health, safety and general welfare of *all* employees”) (emphasis added).

⁵⁷ For an excellent recent examination of the nature and history of this subject (not focused on the context of preemption), see Justin R. Long, *State Constitutional Prohibitions on Special Laws*, 60 CLEV. ST. L. REV. 719, 725-32 (2012).

⁵⁸ Moreover, even for general laws, some states have independent “uniformity” requirements, some of which apply to specific subject matters. The Ohio Constitution, for example, provides that: “All laws, of a general nature, shall have a uniform operation throughout the State; nor, shall any act, except such as relates to public schools, be passed, to take effect upon the approval of any other authority than the General Assembly, except, as otherwise provided in this constitution.” OHIO CONST. art. II, § 26.

⁵⁹ JOHN MARTINEZ, LOCAL GOVERNMENT LAW § 3:23 (2016) (enumerating categories of “special” or “local” laws, but noting that the categories often blur in practice). An example of the kind of state legislative targeting that can be upheld is the use of broad population categories—such as cities of more than one million people—that may have only one member, although very narrow population categories can fail. See BRIFFAULT & REYNOLDS, *supra* note 3, at 307-10.

⁶⁰ See, e.g., *Treadway v. State*, 988 S.W.2d 508, 510-11 (Mo. 1999) (holding that statutes that functionally singled out one city could still be general “because they employ open-ended criteria... [that] identify the counties by factors that change such as by reference to county classification, population, charter status and nonattainment criteria”).

⁶¹ *City of Cleveland v. State of Ohio* (Court of Common Pleas, Cuyahoga County, Case No: CV-16-868008), Judgment Entry, With Opinion and Order Granting Permanent Injunction (Jan. 31, 2017).

that to be a validly preemptive general law, a statute must be part of a statewide, comprehensive enactment that applies uniformly throughout the state, and that regulates conduct generally, rather than focusing solely on municipal authority—a test the Ohio statute could not pass because it was so clearly targeted at limiting the power of localities to act.⁶² Similarly, because the Florida Constitution prohibits laws that single out municipalities in Miami-Dade County, a trial court in Florida recently enjoined a Florida statute that barred the beach community of Coral Gables from regulating Styrofoam containers.⁶³ Although these examples might be outliers, they point to the potential utility of special legislation claims in resisting preemption.

3. *Procedural Claims*

In some states, the constitution requires specific processes in order to pass local or special laws. These additional legislative steps can act as a means of validating preemption or other oversight of local governments. They also, however, can be a potential ground for raising legal challenges if the procedures are not followed.⁶⁴ Beyond procedural mandates tied to special or local laws, most state constitutions contain provisions that impose procedural limitations, such as that legislation address a “single subject” and have a clear title. To ensure transparency, protect against logrolling, and police against attaching unpopular riders to popular bills, single subject rules restrict the subject matter of an enactment by the state’s legislature to one general topic, so that if, for example, a statute addresses preemption of a local ordinance and an entirely unrelated issue, it may be constitutionally vulnerable.⁶⁵ There are a number of similar procedural constraints found in a variety of state constitutions.⁶⁶

Given the haste or lack of transparency with which some preemption legislation is drafted, these once somewhat obscure procedural requirements have new salience. The single-subject rule, for example, led the Missouri Supreme Court in *Cooperative Home Care, Inc., v. City of St. Louis*, sitting en banc earlier this year, to invalidate the

⁶² *Id.* at 4-5.

⁶³ *Florida Retail Federation, Inc. v. The City of Coral Gables* (Circuit Court of the Eleventh Judicial Circuit for Miami-Dade County, Mar. 8, 2017, Case No. 2016-018370-CA-01).

⁶⁴ These states include New York, Florida, Pennsylvania, Oklahoma, Louisiana, Missouri, and Georgia. See Anthony Schutz, *State Constitutional Restrictions on Special Legislation as Structural Restraints*, 40 J. LEGIS. 39, 48 n.40 (2014). Generally speaking, there are two basic procedures invoked procedurally to validate local or special laws: either a supermajority is required, or notice is required. See *Treadway v. State*, 988 S.W.2d 508 (Mo. 1999).

⁶⁵ See generally Rachael Downey et al., *A Survey of the Single Subject Rule as Applied to Statewide Initiatives*, 13 J. CONTEMP. LEGAL ISSUES 579 (2004) (summarizing the application of the single subject rule in states where it is applied to initiatives). Some 43 states have a form of single-subject rule embedded in their constitutions. See Brannon P. Denning & Brooks R. Smith, *Uneasy Riders: The Case for a Truth-in-Legislation Amendment*, 1999 UTAH L. REV. 957, 963; Martha J. Dragich, *State Constitutional Restrictions on Legislative Procedure: Rethinking the Analysis of Original Purpose, Single Subject, and Clear Title Challenges*, 38 HARV. J. ON LEGIS. 103, app. at 165-66 (2001).

⁶⁶ Other general state constitutional procedural constraints on legislation that could be at issue in the preemption context include requirements that all bills be referred to committee, that votes on bills must be reflected in the legislature’s journal, that no bill be altered during its passage through either House so as to change its original purpose, that legislation must “age” for a certain amount of time before being acting upon, and that appropriations bills contain provisions on no other subject. See generally Robert F. Williams, *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement*, 48 U. PITT. L. REV. 797, 798-99 (1987).

state's attempt to preempt St. Louis's 2015 minimum wage ordinance.⁶⁷ The decision, however, highlights a limitation of these kinds of procedural challenges, namely that it remains open to the legislature to re-enact the preemptive statute through proper procedures, as Missouri appears to have done in response to *Cooperative Home Care*.⁶⁸

B. FEDERAL CONSTITUTIONAL CONCERNS

Although many claims that cities are currently asserting in resisting state encroachment are state-based, preemption also raises federal constitutional and statutory concerns, notably around equal protection, voting rights, and potentially the Establishment Clause.

There are at least three related legal theories that might support equal protection challenges to state statutes that preempt local laws.⁶⁹ First, statutes that intentionally discriminate against a protected class, such as race and gender (which arguably includes gender identity), or that impinge on a fundamental right receive some form of heightened scrutiny,⁷⁰ requiring the state to justify the law as furthering a sufficiently important interest (such as privacy or safety). Even without heightened scrutiny, state preemption statutes might be vulnerable if the action is motivated by a "bare desire" to harm a group and is not supported by any legitimate or rational basis, under the Supreme Court's 1996 decision in *Romer v. Evans*.⁷¹ This theory might be applied to statutes enacted with the primary purpose of preempting local ordinances that prohibit

⁶⁷ See generally *Cooperative Home Care, Inc., v. City of St. Louis*, 514 S.W.3d 571 (Mo. 2017) (holding that a statute that sought to preempt local ordinances violated Article III, Section 23 of the Missouri Constitution because the statute contained more than one subject). Another quite recent example can be found in a trial court's decision this past June that an Ohio statute that sought to preempt local minimum wage ordinances that had been attached to a statute regulating dog sales and licensing pet stores violated the single-subject rule in Article II, Section 15(D) of the Ohio Constitution. *City of Bexley v. State of Ohio*, (Court of Common Pleas, Franklin County, June 2, 2017, Case No: 17CV-2672). However, setting up a split in authority, another Ohio trial court found that the same statute did embrace a single subject: "deprive municipal corporations of the ability to regulate such issues by the adoption of local ordinances." *City of Hudson v. State of Ohio* (Court of Common Pleas, Summit County, July 7, 2017, Case No: CV-2017-03-1103).

⁶⁸ See MO. ANN. STAT. § 290.528 (West 2017) (effective August 28, 2017).

⁶⁹ The Fourteenth Amendment of the U.S. Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

⁷⁰ Some lower courts have concluded that distinctions based on sexual orientation should also receive heightened scrutiny. See, e.g., *Smithkline Beecham Corp. v. Abbott Labs.*, 740 F.3d. 471, 484 (9th Cir. 2014) (applying heightened scrutiny to discrimination based on sexual orientation). To receive heightened scrutiny, it is not enough to show a "disparate impact" on a racial group, rather the action must have a classification on its face or must be motivated by intentional discrimination. See *Washington v. Davis*, 426 U.S. 229, 247–48 (1976) (rejecting claim that facially neutrally statute is invalid under Constitution only because it burdens one race more than another).

It is unlikely that preemption laws will facially classify on the basis of race, but some preemption laws have already moved to classify facially on the basis of gender. North Carolina, for instance, recently limited "sex" to "biological sex." See *supra* notes 26–27 (citing North Carolina's law on bathroom access). A strong argument can be made that this is a facial classification, and thus should trigger heightened scrutiny.

⁷¹ *Romer v. Evans*, 517 U.S. 620, 634–35 (1996). *Romer* involved a challenge to Colorado Amendment 2, a state referendum that "prohibit[ed] all legislative, executive or judicial action at any level of state or local government designed to protect" gays and lesbians, in response to local ordinances in three Colorado cities that extended antidiscrimination protections based on sexual orientation. *Id.* at 624. The Court ruled that Amendment 2 violated the equal protection clause, with Justice Kennedy's majority opinion concluding that "laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.* at 634. According to the Court, "[i]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare ... desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Id.* at 634–35 (quoting *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

sexual orientation discrimination, or, more generally provide a basis for arguing that preemption laws violate equal protection when the facts show that these laws are driven by animus—a “bare desire to harm”—towards an unpopular group.⁷² Finally, the Supreme Court has also articulated an equal protection political process rationale that scrutinizes structural actions that place a “special burden” on the ability of minorities to achieve their policy goals in the political process.⁷³ This rationale could apply to statutes that reallocate power from the local level to the state level, although the recent decision of the Supreme Court in *Schuette v. Coalition to Defend Affirmative Action* calls the status of this doctrine into question.⁷⁴

This political process argument is currently being advanced by the plaintiffs in *Lewis v. Bentley*, a case in which several civil rights groups are challenging the State of Alabama’s preemption of the city of Birmingham’s ordinance increasing the minimum wage.⁷⁵ The argument is that by shifting decision-making authority from a city with an African-American majority to a white-dominated state legislature, preemption restructured decisionmaking in a manner that violated equal protection. The Northern District of Alabama, in a February 2017 decision, rejected this argument. Granting the State’s motion to dismiss, the court expressed skepticism of the viability of the doctrine after *Schuette*,⁷⁶ and found unpersuasive the argument that the preemptive statute contained a racial classification.⁷⁷ The decision is currently on appeal before

⁷² The Supreme Court relied on *Romer* several years later in *United States v. Windsor*, 133 S.Ct. 2675 (2013). In *Windsor*, the Court held that DOMA, which effectively preempted state marriage laws, constituted discrimination of an “unusual character,” citing *Romer* and reaffirming the “animus” rationale. *Id.* at 2693 (explaining that “[i]n determining whether a law is motivated by an improper animus or purpose, ‘[d]iscriminations of an unusual character’ especially require careful consideration” and emphasizing that “[t]he Constitution’s guarantee of equality ‘must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot’ justify disparate treatment of that group”) (citing *Romer* and *Moreno*). The Supreme Court, however, has only applied the *Romer* animus rationale in cases in which the classification is present on the face of the statute. *Romer* and *Windsor* do not present this as a limiting principle of animus review, but this factual context appears consistent with the generally high bar for showing animus.

⁷³ See *Hunter v. Erickson*, 393 U.S. 385, 391 (1969); *Washington v. Seattle School District No. 1*, 458 U.S. 457, 467 (1982).

⁷⁴ See *Schuette v. Coalition to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equality by Any Means Necessary (BAMN)*, 134 S.Ct. 1623, 1637–38 (2014) (plurality opinion upholding voter-approved amendment to Michigan constitution prohibiting state universities’ use of race-based preferences in admissions and finding such amendment did not violate precedent of *Hunter* or *Seattle*).

⁷⁵ In August 2015, the Birmingham City Council unanimously passed Ordinance 15-124, providing an incremental increase in the minimum wage for Birmingham employees, starting with \$8.50/hour in July 2016 and increasing to \$10.10/hour in July 2016. See Amended Complaint at 29, *Lewis v. Bentley*, No. 2:16-CV-690-RDP, 2017 BL 29541 (N.D. Ala. Jun. 30, 2016).

⁷⁶ *Lewis v. Bentley*, No. 2:16-CV-690-RDP, 2017 WL 432464, at *13 (N.D. Ala. Feb. 1, 2017) (questioning the “so-called” political process doctrine).

⁷⁷ See *id.* (“[T]he Act has no racial classification and, on its face, calls for uniform economic policy throughout the state.”).

the Eleventh Circuit, but does make clear some of the difficulties in applying the political-process framework.⁷⁸

Finally, preemptive state laws that seek to achieve religious objectives, even with purported secular purposes, could raise Establishment Clause concerns.⁷⁹ Statutes, for example, that preempt local civil rights provisions, even if facially neutral, can be of concern if motivated by a desire to enable business owners to discriminate against LGBTQ people based on religious beliefs. Courts would generally need to probe questions of legislative purpose, principal effects, and level of governmental entanglement with religion to adjudicate these concerns.⁸⁰ This may be a future legal front in preemption battles.

C. PUNITIVE PREEMPTION CHALLENGES

Courts are beginning to adjudicate questions related to issues of punitive preemption where states threaten financial penalties against local governments or local officials face civil or criminal liability. The Arizona Supreme Court in August 2017 upheld some aspects of the state's sweeping new preemption law, S.B. 1487,⁸¹ but sidestepped the constitutionality of the law's financial penalties against localities. In *State ex rel. Brnovich v. City of Tucson*, the court found constitutional the provision of S.B. 1487 that allows a single legislator to request that the state attorney general investigate local laws or other official local action for possible conflicts with state law.⁸² The court did not rule either on the statute's requirement that a city post a bond equal to six months' worth of state shared revenue (which would have been more than \$55 million for Tucson had it applied)⁸³—although it did express some concern about the requirement⁸⁴—or on the provision of the statute that provides for an actual loss of state funding thirty days after the Attorney General declares a local law is preempted.⁸⁵ These kinds of provisions thus remain to be adjudicated.

As to personal liability for officials, the federal District Court in issuing an injunction against the criminal provision in the Texas anti-sanctuary city law found that the

⁷⁸ The Birmingham litigation also includes a claim that the state preemption law, HB 174, violates Section 2 of the Voting Rights Act (VRA), 52 U.S.C. § 10301 (2012). The Complaint alleges that HB 174 results in the denial or abridgement of Birmingham citizens' right to vote because it "reverses a scheme of local control," shifting power "from the city council elected by the majority-black Birmingham electorate to the Legislature elected by the majority-white state electorate." *Lewis*, Amended Complaint, at 37. The Complaint also claims that state legislative elections are not "equally open" to African Americans who have less opportunity to participate and elect representatives of their choice due to the structure of state-wide elections in Alabama. *Id.*; see also *id.* at 25–27. And the Complaint alleges that HB 174 was enacted with the intent of "denying the majority black electorate" the ability to regulate the conditions within their municipality in violation of the VRA. Although the District Court rejected the claim, see *Lewis*, *supra* note 75, at *7–9, it remains to be seen how it will be addressed on appeal.

⁷⁹ The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I.

⁸⁰ *Lemon v. Kurtzman*, 403 U.S. 602 (1971), supplies the prevailing Establishment Clause tests. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive governmental entanglement with religion.'" *Id.* at 612–13. If the government's action or law violates any of these tests, it will be found unconstitutional.

⁸¹ Codified at ARIZ. REV. STAT. ANN. § 41-194.01 (2017).

⁸² *State ex rel. Brnovich v. City of Tucson*, 399 P.3d 663, 666 (Ariz. 2017), as amended (Aug. 17, 2017).

⁸³ *Id.* at 667.

⁸⁴ *Id.*

⁸⁵ *Id.* at 669 n. 2 (reserving the question of the constitutionality of ARIZ. REV. STAT. ANN. § 41–194.01(B)(1) (2017)).

provision raised Fourteenth Amendment Due Process vagueness concerns.⁸⁶ Lack of clarity about what constitutes the kind of “policy” or “action” necessary to trigger criminal liability for local officials—in light of the significant consequences of assessing such liability—could signal recurring concerns under the Fourteenth Amendment and analogous state constitutional provisions.⁸⁷

There are a number of other grounds on which legislation that seeks to punish local officials for acting in their democratically-elected capacities might also be vulnerable.⁸⁸ Preemption laws imposing civil or criminal sanctions on elected officials, for example, may violate legislative immunity, a common law principle extended to local elected officials in *Bogan v. Scott-Harris*.⁸⁹ In *Bogan*, a unanimous Supreme Court held that local officials are entitled to “absolute immunity from civil liability for their legislative activities.”⁹⁰ The Court further held that the acts of “voting for an ordinance” and “signing into law an ordinance” were legislative acts.⁹¹ This principle—articulated in *Bogan* in the context of interpreting a federal civil rights statute—is untested in the state preemption context, but legislative immunity has long roots in the common law.⁹²

Imposing liability—or even simply the threat of expensive litigation—on a local official for fulfilling their official duties could also amount to an unconstitutional restriction on local officials’ free speech rights under either the federal First Amendment

⁸⁶ *City of El Cenizo v. State of Texas*, No. SA-17-CV-404-OLG, 2017 WL 3763098 at *26 (W.D. Tex. Aug 30, 2017) (order granting preliminary injunction), *injunction partially stayed by City of El Cenizo v. State of Texas*, No. 17-50762 (5th Cir. Sep. 25, 2017).

⁸⁷ Cf. Joseph Tartakovsky, *Firearm Preemption Laws and What They Mean for Cities*, 54:5 MUN. LAWYER 9 (Sept./Oct. 2013), <http://www.gibsondunn.com/publications/Documents/Tartakovsky-Firearm-Preemption-Laws-ML-09.2013.pdf>. Justice Gould of the Arizona Supreme Court, concurring in the recent Tucson firearms preemption decision, *see supra* note 82, would have found the state statute’s provision requiring local governments to post a bond unenforceable because it is “incomplete and unintelligible.” *Brnovich*, 399 P.3d at 683 (Ariz. 2017). Although not quite an explicit void for vagueness argument, this concurrence used very similar reasoning.

⁸⁸ Another recent direct challenge to official personal liability in preemption, in a Florida case, sidestepped the question of the validity of such liability. Relying on the 2011 Florida statute that subjected individual local officials to liability for promulgating local ordinances that regulate firearms, *see supra* text accompanying notes 45-47, two firearms-rights groups sued Tallahassee, its mayor, and three city commissioners individually regarding two preempted ordinances—passed in 1957 and 1984, respectively—that prohibited the discharge of firearms in certain areas or city properties. *Florida Carry, Inc. v. City of Tallahassee*, No. 1D15-5520, slip op. at 3-4 (Fla. Dist. Ct. App. Feb. 3, 2017) (citing ordinances). Although the city had not enforced either provision for years, the ordinances remained on the books. *Id.* at 4-5. The plaintiffs argued that by failing to repeal the ordinances, the city was liable under the punitive preemption statute. In a technical, narrow holding, an intermediate state appellate court held that in not repealing the old ordinances, the city had not actually “promulgated” preempted ordinances as required for penalties to kick in under the statute, *id.* at 22, thus sidestepping the more challenging constitutional questions at issue.

⁸⁹ *Bogan v. Scott-Harris*, 523 U.S. 44, 44 (1998).

⁹⁰ *Id.* at 46.

⁹¹ *Id.* at 55.

⁹² *Bogan* was a case interpreting federal law—namely, 42 U.S.C. § 1983. The Court held that § 1983 incorporates legislative immunity for local officials, in part because the common law did so in 1871, when Congress passed the original statute. The legislative immunity recognized in *Bogan*, therefore, is not a free-floating concept, but rather one rooted in the history of the particular federal statute the plaintiffs attempted to use to impose liability. Its applicability may be limited, therefore, when the state legislature has spoken clearly to override this common-law doctrine.

It also bears noting that number of state constitutions—43 by one count—contain provisions analogous to the U.S. Constitutions Speech or Debate clause, providing immunity to legislators for legislative acts. U.S. CONST. art. I, § 6, cl. 1; Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures*, 45 WM. & MARY L. REV. 221, 224 (2003). By their own texts, however, these provisions apply only to state legislators. *Id.* app. at 308-18 (listing all 43 provisions as of 2002), and it thus might require constitutional amendment to extend to local officials.

or under applicable state constitution provisions.⁹³ In *Nevada Commission on Ethics v. Carrigan*, the Supreme Court rejected a city councilor’s First Amendment challenge to a state ethics commission’s decision to censure him for failing to abstain from voting on a hotel and casino project application in which he had an interest.⁹⁴ In doing so, the Court held that restrictions on legislators’ votes are not restrictions on their “speech” for First Amendment purposes.⁹⁵ The scope of the *Carrigan* decision, however, might be limited by the relatively minor penalty imposed (a mere censure) and the fact that it concerned conflict-of-interest rules, which the Court noted date back to the early years of Congress.⁹⁶ Provisions that penalize, rather than condition, the exercise of individual local legislative authority may be more vulnerable.⁹⁷

By criminalizing and punishing local democracy, moreover, this strain of preemption may be found to violate the structure of home rule in states that have established it in their constitutions. Many state courts interpret their constitutional home rule provision as protecting the ability of local voters to choose their form of government. By criminalizing or punishing a city or local official for simply retaining laws on the books that are no longer enforceable, as is always the case with validly preempted local legislation, these statutes arguably infringe on the ability of local units to express themselves as they see fit, even if they cannot implement local policy that conflicts with state law.

IV. CODA: AFFIRMATIVELY—IF CAREFULLY—REINFORCING LOCAL DEMOCRACY

This Issue Brief has focused primarily on current and potential litigation challenges to the troubling wave of preemptive legislation now roiling local governance. There are more affirmative approaches to strengthening home rule, however, that may play an important role in legal strategies to respond to preemption. Working to prevent preemption before such legislation passes can be effective, but can also be challenging; in the right circumstances, advocates can seek to repeal preemptive legislation, or look to ballot initiatives to preserve local democracy. More ambitiously—and keeping an eye on the potential for long-term advocacy to protect the space for local innovation—it

⁹³ See Tartakovsky, *supra* note 87 at 8 (arguing that punitive preemption will lead to self-censorship by municipal officials and “may effectively prohibit public discussion of an entire topic”) (internal quotations and citation omitted).

⁹⁴ *Nevada Commn. on Ethics v. Carrigan*, 564 U.S. 117, 117-18 (2011).

⁹⁵ *Id.* at 125.

⁹⁶ *Id.* at 122-23; *id.* at 134 (Alito, J., concurring) (disagreeing with the majority that a legislator’s vote is not speech, but concurring because the conflict-of-interest “recusal rules [for early Congresses] were not regarded during the founding era as impermissible restrictions on freedom of speech”).

⁹⁷ Recently, in a challenge to Texas’s punitive anti-sanctuary law, the United State District Court found that a provision forbidding local officials from “endors[ing]” any policy that would “materially limit immigration law” was overbroad and vague and impermissible viewpoint discrimination under the First Amendment. *City of El Cenizo v. State of Texas*, No. SA-17-CV-404-OLG, 2017 WL 3763098 (W.D. Tex. 2017) (order granting preliminary injunction), *injunction partially stayed by City of El Cenizo v. State of Texas*, No. 17-50762 (5th Cir. Sep. 25, 2017).

may be possible to look to state constitutional change.⁹⁸ In the original home rule movement at the turn of the century and again in the post-World War Two wave of home-rule reform,⁹⁹ advocates made some progress embedding home rule reforms in state constitutions. It may be time to revive those movements.

As a final note, as mentioned at the outset of this Issue Brief, it is important to keep in mind that efforts to reinforce local authority and autonomy must recognize that for all of their progressive potential, local governments can also be parochial and exclusionary—or worse—and that there are fundamental constitutional values that must remain state-wide and national in scope as a baseline. It is thus necessary to preserve preemption as an appropriate tool to respond to local exclusion and parochialism, even as cities push back against state overreach entirely unrelated to this kind of oversight. What is needed, then, is a long-term law reform effort to reinvent home rule, beginning with a new understanding of localism that explicitly reflects progressive values, recognizing that to be legitimate, local democracy must be inclusive and equitable. In the balance between uniformity and preserving space for local innovation, devolution should be vindicated to the extent that it reinforces—or at least does not impede—equitable, just policy.

CONCLUSION

At just the moment when so many cities have taken a leading role in advancing a range of progressive goals—from expanding opportunity to advancing social justice to protecting the environment—states are increasingly stepping in to block them. This Issue Brief has surveyed major fault lines emerging in this contemporary clash of state and local governments. There are legal strategies to be tested and policy battles to be waged. But what is clear is that much more needs to be done to protect local democracy.

⁹⁸ In addition, the apparent relationship between politically gerrymandered state legislatures and more aggressive preemption cannot be ignored. See Paul A. Diller, *Reorienting Home Rule: Part 1—The Urban Disadvantage in National and State Lawmaking*, 77 LA. L. REV. 287, 336-42 (2016) (describing the partisan bias in state legislatures after 2010). For more on post-2010 gerrymandering of state legislative and U.S. House of Representative districts, see DAVID DALEY, *RATF**KED: HOW THE DEMOCRATS WON THE PRESIDENCY BUT LOST AMERICA* (2016). Many of the states that have seen the most ferocious preemption conflicts are decidedly “purple”—e.g., Florida, Michigan, North Carolina, Ohio, and Wisconsin—yet their state legislatures have nonetheless consistently attacked local progressive priorities. As articulated by the district court in *Gill v. Whitford*, a case now pending before the U.S. Supreme Court, intentional political gerrymandering after 2010 allowed a conservative-leaning legislative majority in Wisconsin to lock itself into power. *Gill v. Whitford*, 218 F. Supp. 3d 837, 837 (W.D. Wis. 2016), cert. granted (June 19, 2017) (No. 16-1611). The Supreme Court’s resolution of *Gill*, as well as continuing efforts in some states to amend constitutions to prohibit political gerrymandering, may help reduce the frequency and intensity of state preemption of progressive local policies. See, e.g., *Ariz. State Leg. v. Ariz. Ind. Redistricting Comm’n*, 135 S. Ct. 2652, 2658 (2015) (reviewing and upholding, as applied to U.S. House districts, Arizona’s Proposition 106 from 2000 that aimed to end partisan gerrymandering “for congressional as well as state legislative districts”); see generally *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363 (Fla. 2015) (invalidating politically gerrymandered districts under the voter-approved “Fair Districts Amendment” to the state constitution of 2010).

⁹⁹ See *supra* note 2.

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¹⁰⁰ The authors wish to thank Jared Make and Dilini Lankachandra, from the organization A Better Balance, and Ben Beach and Miya Chen, from the Partnership for Working Families, as well as Professor Laurie Reynolds and Professor Jennifer Pomeranz, for their input on this research project. Research was supported by the Rockefeller Family Fund and the Open Society Foundations.

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Curbing Excessive Force: A Primer on Barriers to Police Accountability*

Kami N. Chavis & Conor Degnan

Because Philando Castile's girlfriend live streamed his last moments on Facebook, many are familiar with how he died at the hands of a police officer. On July 6, 2016, Officer Jeronimo Yanez saw Mr. Castile driving near the state fairgrounds with his girlfriend and her daughter. According to Officer Yanez, he believed that Mr. Castile's "wide-set nose" appeared to match surveillance video of a suspect involved in an armed robbery that occurred days earlier.¹ Because police officers had pulled over Mr. Castile multiple times in the past, he knew to have his seatbelt fastened, and gave the officer his insurance card.² Mr. Castile also informed Officer Yanez that he was carrying a firearm.³ Before he could assure Officer Yanez that he was not going for his gun, Officer Yanez fired seven shots, killing him. In his last breath Mr. Castile exclaimed, "I wasn't reaching for it."

Mr. Castile is just one of several unarmed African-American men who have died at the hands of the police over the last several years. Although tensions between police and communities of color have long been an issue, a succession of recent allegations of excessive force by police officers has garnered widespread public attention and admonition. The names of Michael Brown in Ferguson,⁴ Eric Garner in Staten Island, Tamir Rice in Cleveland, Freddie Gray in Baltimore, and Walter Scott in North Charleston⁵ are etched in the public consciousness as rally points for those who call for increased police accountability.

Police accountability has sparked fierce debate among scholars, media pundits, and the public at large.⁶ A 2016 Gallup poll highlights the stark divide in Americans' views of police, with just over half of Americans polled expressing a great deal or quite a lot

* This Issue Brief was initially published in April 2017.

¹ Christina Capecchi & Mitch Smith, *Officer Who Shot Philando Castile Is Charged with Manslaughter*, N.Y. TIMES, (Nov. 16, 2016), https://www.nytimes.com/2016/11/17/us/philando-castile-shooting-minnesota.html?_r=0.

² *Id.*

³ MINN. STAT. § 62A.714 (1)(b) ("Display of permit; penalty. (a) The holder of a permit to carry [a weapon] must have the permit card and a driver's license, state identification card, or other government-issued photo identification in immediate possession at all times when carrying a pistol and must display the permit card and identification document upon lawful demand by a peace officer, as defined in section 62B.84, subdivision 1.").

⁴ Jon Swaine & Oliver Laughland, *Darren Wilson Will Not Face Federal Charges in Michael Brown Shooting*, THE GUARDIAN (Mar. 4, 2015), <https://www.theguardian.com/us-news/2015/mar/04/darren-wilson-federal-criminal-charges-michael-brown-shooting>.

⁵ Joseph P. Williams, *Why Aren't Police Prosecuted*, U.S. NEWS (July 13, 2016), <https://www.usnews.com/news/articles/2016-07-13/why-arent-police-held-accountable-for-shooting-black-men>.

⁶ Chris Fuchs, *Debate Over Police Accountability, After Peter Liang Conviction, Spans Generations*, NBC NEWS (Feb. 29, 2016), <http://www.nbcnews.com/news/asian-america/debate-over-police-accountability-after-peter-liang-conviction-spans-generations-n527926>.

of trust in the police,⁷ while 14% expressed very little or no confidence in the police.⁸ Unreliable governmental data may prevent us from knowing exactly how pervasive police shootings are in the United States, but a project of *The Guardian* to track the number of people killed by law enforcement suggests that roughly 1,090 people were killed by the police in 2016.⁹ These incidents include justified uses of force, suicide by cop, and excessive uses of force. Meanwhile, failure to hold individual police officers accountable for seemingly egregious uses of excessive force, coupled with a perceived lack of police accountability more generally, has led to increased political activism, most notably through the Black Lives Matter movement, as well as occasional civil unrest among members of some of the most deeply affected communities.

Despite increased public scrutiny, prosecution of officers involved in shootings is quite rare. According to data Philip Stinson at Ohio's Bowling Green State University collected, since 2005, only thirteen officers have been convicted of murder or manslaughter for a fatal, on-duty shooting.¹⁰ During the same timeframe, only fifty-four officers nationwide were criminally charged after they shot and killed someone in the line of duty. As of April 11, 2015, twenty-one of the officers had been acquitted and eleven were convicted, with the remaining twenty-two cases either pending or filed in the "other" category. The high acquittal rate is perhaps even more troubling given that in 80% of these cases, one of the following occurred: there was a video recording of the incident, the victim was shot in the back, other officers testified against the shooter, or a cover-up was alleged.¹¹

Even when what appears to be an excessive use of police force is captured on video, prosecutors often decline to prosecute the officers (e.g., the shooting of Tamir Rice) or juries fail to convict them if the case goes to trial (e.g., the shooting of Walter Scott). So what are the challenges to holding police officers accountable? Criminal prosecutions are notoriously difficult, but tort suits, internal investigations, and citizen oversight also have not been a panacea of reform. When a police officer is accused of using excessive force, they are afforded a multitude of protections that are unavailable to civilian defendants. These protections have proven to be effective shields for officers from both criminal and civil liability and in many cases lead to public mistrust of police, particularly in communities of color.

This Issue Brief summarizes some of the traditional mechanisms for holding police accountable for misconduct, offers a critique of each, and ends with suggestions for the future of police accountability. Part I focuses on some of the legal and structural impediments to police accountability including the inherent conflicts of interest that frequently prevent local prosecutors from prosecuting police officers accused of using excessive force. Part I also discusses how the doctrine of qualified immunity shields

⁷ Frank Newport, *U.S. Confidence in Police Recovers from Last Year's Low*, GALLUP (June 14, 2016), <http://www.gallup.com/poll/192701/confidence-police-recovers-last-year-low.aspx> (finding that only 56% of Americans have a great deal or quite a lot of confidence in the police. This figure is up from 52% in 2015).

⁸ *Id.*

⁹ *The Counted: People Killed by Police in the U.S.*, GUARDIAN, <https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database> (last visited Mar. 27, 2017).

¹⁰ Matt Ferner & Nick Wing, *Here's How Many Cops Got Convicted of Murder Last Year for On-Duty Shootings*, HUFFINGTON POST (Jan. 13, 2016), http://www.huffingtonpost.com/entry/police-shooting-convictions_us_5695968ce4b086bc1cd5d0da. This figure does not include instances where civilians died in police custody or were killed by other means or situations where officers faced lesser charges.

¹¹ *Id.*; see also Williams, *supra* note 5 ("A Wall Street Journal report in 2015 found approximately 1,200 people had been killed by police, but no officers were found guilty of murder or manslaughter.").

officers from civil liability when a suspect is harmed or dies in police custody. Part II explores how the Department of Justice (DOJ) has failed to properly leverage its authority to investigate patterns or practices of unconstitutional policing to increase police accountability. Part III discusses potential solutions, including the impact police-worn body cameras, prosecutorial independence, and increased civil oversight may have on police accountability.¹²

I. STRUCTURAL AND LEGAL CHALLENGES TO POLICE ACCOUNTABILITY

Criminal and civil liability are two of the avenues available to hold individual police officers accountable for excessive use of force. Unfortunately, criminal prosecution of police officers seems precluded in all but the most exceptional cases, while qualified immunity often insulates officers from civil liability. Even where civil suits are successful or victims receive settlements, prosecutors rarely pursue criminal charges against police officers for excessive force.¹³

A. INHERENT CONFLICTS OF INTEREST BETWEEN LOCAL PROSECUTORS AND THE POLICE

Experts have long argued that the lack of criminal prosecutions for excessive force is the result of the inherent conflict of interest that arises when local prosecutors are charged with investigating and prosecuting police officers.¹⁴ This conflict largely stems from the symbiotic relationship between prosecutors and the police.¹⁵ Prosecutors depend on the police for evidence, information, and witnesses.¹⁶ The police rely on prosecutors to provide legal advice and convict civilian defendants.¹⁷ If one entity fails to perform their duties as expected, the other suffers.

The police serve on the front lines of the criminal justice system. Police officers conduct investigations, gather evidence, and make arrests.¹⁸ These important functions occur largely out of the public view and are crucial to the success of any prosecution. Furthermore, police investigations usually implicate important constitutional rights that must be respected to avoid later challenges, including rights enshrined in the Fourth, Fifth, and Sixth Amendment.¹⁹ It is therefore paramount that prosecutors have full faith in the police.

Additionally, police officers are the primary fact gatherers and are afforded great deference when deciding how to build a case against a defendant.²⁰ Police officers can choose which leads to track down and decide what facts are relevant to a

¹² 42 U.S.C. § 14141 (2000).

¹³ See, e.g., Kimberly Kindy & Kimberly Kelly, *Thousands Dead, Few Prosecuted*, WASH. POST (Apr. 11, 2015), <http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/> (“Only in rare cases do prosecutors and grand juries decide that the [force] cannot be justified”).

¹⁴ Kami Chavis Simmons, *Increasing Police Accountability: Restoring Trust and Legitimacy Through the Appointment of Independent Prosecutors*, 49 WASH. U. J. L. & POL’Y 137 (2015).

¹⁵ Kindy & Kelley, *supra* note 13.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See generally *Terry v. Ohio*, 392 U.S. 1 (1968); *Miranda v. Arizona*, 384 U.S. 435 (1966); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

²⁰ Elizabeth E. Joh, *The New Surveillance Discretion: Automated Suspicion, Big Data, and Policing*, 10 HARV. L. & POL’Y REV. 15 (2016).

particular case. Prosecutors also rely on the police to inform them of any exculpatory evidence they may be constitutionally obligated to share with defense counsel.²¹ Furthermore, many local prosecutors personally know most of the officers that work in their jurisdiction.²²

These close ties results in a clear conflict of interest when prosecutors are called to prosecute police officers.²³ It seems questionable that prosecutors can maintain professional objectivity when investigating and prosecuting such close professional allies.²⁴ Furthermore, if a prosecutor's office successfully prosecutes an officer, resentment and distrust may jeopardize future cases. The tensions between supporting a trusted ally and zealously investigating and prosecuting criminal conduct is why prosecutors have an unwaivable conflict of interest when prosecuting police officers.

Since the police are the primary fact gatherer in any case, their testimony and credibility are crucial to the success of a criminal prosecution. According to former prosecutor Paul Butler, a prosecutor's main function is to ensure the fact finder believes a police officer's testimony.²⁵ At the same time, prosecutors are sworn to serve the public guided solely by their commitment to justice.²⁶ When civilians are charged with a crime, the prosecutor must do everything to ensure an officer testifying in that case is credible and trustworthy. Anytime an officer is accused of excessive force, his or her credibility and reasonableness is called into question.²⁷ This may jeopardize any pending or future cases involving that particular officer. Even beyond that particular officer's credibility, accusations of misconduct can undermine the entire department, as civilians question whether police officers are performing their duties in accordance with the law. When a prosecutor charges a police officer with excessive force, therefore, the prosecutor risks undermining the very trustworthiness he or she may need for justice to be done in other cases.²⁸

At least one commentator equates the conflict arising in police defendant cases with situations in which a prosecutor is charged with a crime.²⁹ Prosecutors routinely conflict out of cases where another prosecutor from the same office is charged with a crime. This decision to conflict out is usually voluntary and is likely done to maintain the appearance of impartiality.³⁰ If prosecutors are so quick to conflict out of a case where a fellow prosecutor is charged with a crime, then why do prosecutors not recuse themselves when police officers stand accused?

The inherent conflicts that arise when prosecutors are called to investigate the police are also analogous to those that arise when the police investigate themselves. Internal affairs investigations face conflicts of interest because many officers do not "want to

²¹ Emily Gillespie, *Legal System, Law Enforcement at Odds Over Brady List*, THE COLUMBIAN (Nov. 15, 2015), <http://www.columbian.com/news/2015/nov/15/legal-system-law-enforcement-at-odds-over-the-brady-list/>.

²² Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447 (2016).

²³ Kindy & Kelly, *supra* note 13.

²⁴ *Id.*

²⁵ Levine, *supra* note 22.

²⁶ *Id.*

²⁷ Conor Friedersdorf, *Judging the Cops: When Excessive Force Trumps Resisting Arrest*, ATLANTIC (Mar. 21, 2015), <https://www.theatlantic.com/national/archive/2015/03/where-excessive-force-meets-resisting-arrest/388297/>.

²⁸ See generally Gabriel J. Chin & Scott C. Wells, *The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233 (1998).

²⁹ Levine, *supra* note 22.

³⁰ *Id.*

be seen as violating the ‘code of silence’ endemic in police culture or as disloyal to their fellow officers.”³¹ A clear example of this conflict of interest is the Danziger Bridge shooting cover-up in the wake of Hurricane Katrina. In that case, the supervisors tasked with investigating the officers who shot several unarmed civilians participated in the department’s cover-up attempt, and were later indicted for their participation.³²

When so few accusations of excessive force are subject to criminal investigation, it is important the prosecutors responsible for those cases evaluate them seriously and objectively.³³ Unfortunately, it may be difficult for a prosecutor to remain neutral when he or she is called to investigate their closest and most trusted professional ally.

B. THE GRAND JURY AS A PROP FOR PROSECUTORS IN POLICE CASES

When police officers are accused of excessive force, prosecutors can opt to present the case to a grand jury rather than make the charging decision themselves. On its face, this process seems to eliminate the inherent bias of local prosecutors, discussed above, by presenting evidence to an impartial group of people who make up the grand jury and allowing them to decide whether to indict. Too often, however, the grand jury operates as a tool for local prosecutors to effectively relieve themselves of the responsibility to make a charging decision and insulate themselves from public backlash if the grand jury does not indict.³⁴ Any appearance of objectivity dissolves when one considers the process by which a case is presented to the grand jury.

Generally speaking, the prosecutor plays a crucial role in grand jury proceedings. The prosecutor controls the proceedings by obtaining the evidence, calling witnesses, and instructing the grand jury members on the law.³⁵ Members of the grand jury are lay persons that are likely inexperienced with legal matters and therefore inclined to rely on the prosecutor.³⁶ With this much control over the process, it is a dubious assertion to say presenting a case to the grand jury removes bias from the charging decision in excessive force cases. The rate at which grand juries vote to indict police officers compared to civilian defendants justifies this skepticism. For example, in the span of one year, out of 150,000 potential federal prosecutions, only eleven grand juries refused to indict.³⁷ Over the same year period, less than a third of the 11,000 cases alleging police misconduct resulted in criminal charges.³⁸ This significant disparity is almost certainly influenced by the inherent conflict of prosecutors investigating police officers.

Observers have fiercely criticized the prosecutor’s behavior and use of the grand jury in the failed indictment of Officer Darren Wilson for the shooting death of Michael Brown in Ferguson, Missouri.³⁹ Transcripts from the proceeding show prosecutors

³¹ Kami N. Chavis, *Body-Worn Cameras: Exploring the Unintentional Consequences of Technological Advances and Ensuring a Role for Community Consultation*, 51 WAKE FOREST L. REV. 985 (2016).

³² See *Ex-New Orleans Cops Get Prison Time in Danziger Bridge Shootings*, CNN (Apr. 4, 2012), <http://www.cnn.com/2012/04/04/justice/louisiana-danziger-bridge-case/index.html>.

³³ Marshall Miller, *Police Brutality*, 17 YALE L. & POL’Y REV. 149, 154 (1998).

³⁴ Joshua Hegarty, *Who Watches the Watchmen? How Prosecutors Fail to Protect Citizens from Police Violence*, 37 MITCHELL HAMLINE L. J. PUB. POL’Y & PRAC. 305 (2016).

³⁵ Douglas P. Currier, *The Exercise of Supervisory Powers to Dismiss a Grand Jury Indictment—A Basis for Curbing Prosecutorial Misconduct*, 45 OHIO ST. L. J. 1077, 1079 (1984).

³⁶ *Id.*

³⁷ Mark Motivan, *Federal Justice Statistics 2010—Statistical Tables*, BUREAU OF JUSTICE STATISTICS, (Dec. 2013), <http://www.bjs.gov/content/pub/pdf/fjs10st.pdf>.

³⁸ Hegarty, *supra* note 34, at 320.

³⁹ Jake Halpern, *The Cop*, THE NEW YORKER (Aug. 10, 2015), <http://www.newyorker.com/magazine/2015/08/10/the-cop>.

cross examining potential witnesses whose testimony may have supported criminal charges by suggesting a police officer is allowed to shoot a fleeing suspect regardless of the officer's fear of the suspect.⁴⁰ One commentator noted that the grand jury operated more as a trial court with the prosecutors serving as defense attorneys.⁴¹ Similar questionable prosecutorial behavior occurred during the grand jury proceedings against the officers involved in the shooting of twelve-year old Tamir Rice. In that case, the prosecutor, Timothy McGinty, presented three expert reports that stated the shooting was appropriate,⁴² described the death of Tamir Rice as "a perfect storm of human error,"⁴³ and successfully recommended the grand jury decline to indict.⁴⁴ The unusual nature of the proceedings in these cases casts doubt on the fairness of the grand jury and the impartiality of the prosecutor.⁴⁵ It also calls into question the value of the grand jury system in any excessive force case.

The inability to indict the officers in these cases defies the old adage that a prosecutor can get a grand jury to indict a ham sandwich.⁴⁶ Given what we have learned about prosecutor behavior from these high-profile cases, and the relatively low indictment rate in excessive force cases in general, it seems reasonable that, even when not making charging decisions themselves, prosecutors' conflicts of interest often results in grand juries unwilling to indict police officers.

If conflicts of interest prevent local prosecutors from pursuing cases against police officers or discouraging grand juries to indict, then why does the federal government not step in to prosecute the police? Federal officials can intervene and prosecute officers under 18 U.S.C. §§ 241 and 242 when states fail to effectively prosecute police officers.⁴⁷ Under these statutes, however, federal prosecutors must prove not only that a violation occurred, but the officer willfully violated someone's constitutional rights.⁴⁸ In addition, DOJ policy is to defer to state prosecution of police officers, with potential federal prosecution serving only as a back-stop.⁴⁹ Therefore, the vast majority of excessive force cases are handled in state court, where prosecutors with inherent conflicts of interest too often either refuse to prosecute the police or rely on grand juries to dispose of nearly all excessive force cases.

C. DIFFICULTY IN OVERCOMING QUALIFIED IMMUNITY

Under Section 1983 of Title 42 of the U.S. Code, a citizen who believes he or she was the victim of excessive force may seek civil damages against the responsible law enforcement officer for depriving the citizen of his or her constitutional right to be free from unwarranted government intrusion. The advantages of § 1983 suits compared

⁴⁰ *Id.*

⁴¹ Victoria Knott, *Reconsidering the Use of the Grand Jury: Eliminating Prosecutorial Discretion to Indict Law Enforcement Officers*, 38 T. JEFFERSON L. REV. 202, 225 (2016).

⁴² Hegarty, *supra* note 34, at 322.

⁴³ Jamil Smith, *The Tamir Rice Rule*, NEW REPUBLIC (Dec. 29, 2015), <https://newrepublic.com/article/126737/tamir-rice-rule>.

⁴⁴ *Id.*

⁴⁵ Hegarty, *supra* note 34, at 321 ("The transcripts were then released to the public, which is unusual when considering that grand jurors are sworn to secrecy.").

⁴⁶ Ben Casselman, *It's Incredibly Rare for a Grand Jury to Do What Ferguson's Just Did*, FIFTYTHREEEIGHT (Nov. 24, 2014), <https://fivethirtyeight.com/datalab/ferguson-michael-brown-indictment-darren-wilson/>.

⁴⁷ Chavis Simmons, *supra* note 14, at 501–02.

⁴⁸ Ivana Dukanovic, *Reforming High-Stakes Police Departments: How Federal Civil Rights Will Rebuild Constitutional Policing in America*, 43 HASTINGS CONST. L. Q. 911, 914 (2016).

⁴⁹ Chavis Simmons, *supra* note 14, at 502.

to criminal charges are: there is a lower burden of proof required to prevail; citizens may sue the government directly; and a successful action results in compensation for victims and their families.

The doctrine of qualified immunity, however, creates a significant hurdle for plaintiffs seeking relief under § 1983.⁵⁰ This immunity is available to state actors, such as police officers, and shields them from civil liability, provided they did not violate an individual's constitutional rights. Therefore, in order to recover damages in a § 1983 action, a plaintiff must prove to the court or jury that the officer violated "clearly established" law at the time of the incident.⁵¹ This standard is highly deferential to the state actor, leading courts to dismiss many, if not most, cases prior to trial. The result is that too often courts have no opportunity to assess the accusations of excessive force and reviewing courts, including the Supreme Court, never have the opportunity to evaluate those lower courts' assessments. As a result, the unconstitutionality of seemingly egregious behavior never has the chance to become "clearly established" law, stymieing efforts to increase accountability or secure institutional reform.⁵²

Plaintiffs must overcome two substantial hurdles if they hope to succeed in a § 1983 action. First, the plaintiff must prove the officer's use of force was objectively unreasonable, and second, the law was so clearly established at the time of the incident, that a reasonable officer must have known the force was objectively unreasonable.⁵³ The court decides whether the facts alleged show the officer's conduct violated a constitutional right and whether a right is clearly established. Some say the qualified immunity defense "provides ample protection to all but the plainly incompetent or those who knowingly violate the law."⁵⁴ Consequently, victims of police force face an uphill battle to prove liability.

The seminal Supreme Court cases *Tennessee v. Garner*⁵⁵ and *Graham v. Connor*⁵⁶ and their progeny establish the legal standard applied in excessive force cases. The Court in *Garner* held that apprehension of a suspect through the use of deadly force constitutes a seizure subject to the Fourth Amendment's reasonableness requirement.⁵⁷ Courts "must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion."⁵⁸ This balancing test takes into account the totality of the circumstances, considering not only when the seizure was made but also the manner of seizure. The Court further held that "deadly force may not be used unless it is

⁵⁰ 42 U.S.C. § 1983 (2000) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.").

⁵¹ Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. L. & CRIMINOLOGY 489 (2008).

⁵² Alexandra Holmes, *Bridging the Information Gap: The Department of Justice's "Pattern or Practice" Suits and Community Organizations*, 92 TEX. L. REV. 1241 (2014).

⁵³ Tahir Duckett, *Unreasonably Immune: Rethinking Qualified Immunity in Fourth Amendment Excessive Force Cases*, 53 AM. CRIM. L. REV. 409 (2016).

⁵⁴ *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

⁵⁵ 471 U.S. 1 (1985).

⁵⁶ 490 U.S. 386 (1989).

⁵⁷ *Garner*, 471 U.S. at 11–12.

⁵⁸ *Id.* at 8 (citing *United States v. Place*, 462 U.S. 696, 703 (1983)).

necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.”⁵⁹ Furthermore, the Court advised that officers should provide a warning where feasible prior to application of deadly force.⁶⁰

The Court further clarified the constitutional requirements for application of force in *Graham v. Connor*. The Court held that use-of-force scenarios must be analyzed under the Fourth Amendment’s objective reasonableness standard.⁶¹ The reasonableness of the officer’s actions are judged from the perspective of a reasonable officer on scene taking into account the fact that “officers are often forced to make split-second decisions—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.”⁶² This evaluation is made without regard to the underlying intent or motivation of the officer at the time force is applied.⁶³ Additional considerations include the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of officers or others, whether the suspect displays an apparent, deadly weapon, and whether the suspect is actively resisting arrest or attempting to evade arrest by flight.⁶⁴

In addition to the framework discussed above, the Supreme Court provides further protection under the “could have believed standard” and the “mistaken belief standard” for assessing the reasonableness of an officer’s actions. The Court set forth the “could have believed standard” in *Hunter v. Bryant*.⁶⁵ Police officers are absolved of liability “if a reasonable officer could have believed [the conduct] to be lawful, in light of clearly established law and the information the [] officer possessed.”⁶⁶ This standard precludes liability if an officer incorrectly, yet reasonably, believes their use of force was lawful. This protection is described as a mistake of law defense that protects officers that misinterpret clearly established law.

While the *Hunter* case involved a mistake of law, the case of *Saucier v. Katz* involves mistakes of fact.⁶⁷ The Court held in *Saucier* that officers are immune from suits where a reasonable officer could have believed that his or her conduct was lawful relying on facts that later prove to be false. The Court went on to say “if an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed.”⁶⁸ In *Saucier* situations, an officer can make a mistake as to the facts *and* the level of force

⁵⁹ *Id.*

⁶⁰ *Id.* at 11–12 (“[I]f the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.”).

⁶¹ *Graham v. Connor*, 490 U.S. 386, 397 (1989).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 396.

⁶⁵ 112 S. Ct. 534 (1991).

⁶⁶ *Id.* at 536 (explaining that a Ninth Circuit panel previously held that the secret service agents were entitled to qualified immunity for arresting the plaintiff without a warrant because the warrant requirement, at the time, was not clearly established in situations where the arrestee consented to law enforcement agents’ entry into a residence).

⁶⁷ 121 S. Ct. 2151 (2001).

⁶⁸ *Id.* at 2158.

necessary, provided it was objectively reasonable at the time the force was applied in light of any mistake of fact.⁶⁹

Case law and scholarly comment reveals that overcoming qualified immunity is a nearly insurmountable burden.⁷⁰ Police officers are afforded every benefit of the doubt. The force used is judged from the perspective of an officer on scene without the benefit of hindsight at the precise moment the force was used.⁷¹ Reasonable mistakes based on mistaken beliefs of both law and facts usually serve to insulate officers from liability. The test is not whether less drastic means were available, but whether the officer's actions were objectively reasonable.⁷² Given these protections, it is not surprising that many civil suits against police officers fail.

II. THE UNREALIZED POTENTIAL OF DOJ'S PATTERN OR PRACTICE AUTHORITY

The previous sections focused on bars to accountability when a single officer is accused of excessive force. But what happens when an entire agency is accused of a pattern or practice of engaging in constitutional violations? Allegations of systemic police abuse of citizens are a complex problem without a straightforward cure.⁷³ While it is easy to identify the misconduct of individual officers when isolated incidents occur, these individual instances of misconduct may indicate the existence of a larger problem that permeates an entire law enforcement agency.⁷⁴ Therefore, reform efforts must address both the individual officers and the culture of the police department that fosters unconstitutional policing.

For this reason, in 1994, as part of the Violent Crime Control and Law Enforcement Act, Congress adopted 42 U.S.C. § 14141, which authorizes the DOJ to seek injunctive relief against law enforcement agencies that demonstrated a “pattern or practice of conduct by law enforcement officers ... that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.”⁷⁵ Congress adopted § 14141 after recognizing the need for systematic reform of law enforcement agencies.⁷⁶ Prior to its enactment, there was no federal mechanism available to enjoin law enforcement agencies' unconstitutional practices.⁷⁷ Many of the pattern or practice actions to date have resulted in reforms that aim to rehabilitate problem departments through the implementation of early warning tracking systems,

⁶⁹ See *Pearson v. Callahan*, 129 S. Ct. 808 (2009) (holding that, in resolving qualified immunity claims, courts need not first determine whether the facts alleged by a plaintiff make out a violation of a constitutional right).

⁷⁰ See, e.g., *Brosseau v. Haugen*, 125 S. Ct. 596 (2004); *Armstrong v. Village of Pinehurst*, 810 F.3d 892 (4th Cir. 2016); *Fenwick v. Pudimott*, 778 F.3d 133 (D.C. Cir. 2015); *Henry v. Purnell*, 652 F.3d 524 (4th Cir. 2011); *Milstead v. Kibler*, 243 F.3d 157 (4th Cir. 2001).

⁷¹ *Malley v. Briggs*, 475 U.S. 335, 395 (1986).

⁷² J. Michael McGuinness, *Practical Considerations in Prosecuting and Defending Police Misconduct Claims: Investigations, Law, Expert Evidence, Strategy and Tactics* (Georgetown University Law Center Continuing Legal Education, 2006 WL 5839041, 2006).

⁷³ Chavis Simmons, *supra* note 51, at 496.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 506–07 (explaining that the predecessor to § 14141, the Police Accountability Act, was passed in response to the Rodney King beating and was the result of a subcommittee investigative report that identified police misconduct as endemic and concluded that the federal government lacked statutory authority to address patterns or practices of police misconduct).

⁷⁷ *Id.*

mandating collection of racial profiling data, and implementing mechanisms for citizen oversight.⁷⁸

There is no consensus among scholars as to the impact of § 14141, though critiques abound.⁷⁹ Whether enforcement is limited by resources, political will, or a failure to fairly and effectively identify law enforcement agencies for which investigation is appropriate,⁸⁰ it is our conclusion that § 14141 is all bark and no bite. To understand why, one must consider the manner in which the DOJ has chosen to exercise its authority under § 14141.

For the most part, rather than filing lawsuits, the DOJ prefers to use the threat of litigation to pressure targets of an investigation to agree to a negotiated settlement.⁸¹ For many years, the focus on negotiated settlements saved both time and money and allowed the DOJ to review more departments.⁸² While this tactic has resulted in some successful enforcement efforts, the practical effect has been a neutering of the statute and exclusion of the public from the negotiation process.

The policy of negotiating settlements and working with law enforcement to achieve reform carried the day until the DOJ arrived in Alamance County. A two-year DOJ investigation of the Alamance County Sheriff's Department had revealed widespread racial profiling of Hispanics.⁸³ The investigation uncovered significant indications of racial bias, the most egregious example being a captain who sent "his subordinates a videogame premised on shooting Mexican children, pregnant women, and other 'wetbacks.'"⁸⁴ This "systematic racial profiling of Latinos"⁸⁵ permeated the department, including the sheriff himself. Therefore, it is perhaps unsurprising that when the DOJ proposed that Alamance work with federal officials to develop a plan for reform, the sheriff declined to negotiate.⁸⁶ This failure to cooperate led the DOJ to pursue the first lawsuit under § 14141 since enactment of the statute in 1994.⁸⁷

Nearly a year after the case was argued, District Judge Thomas D. Schroeder issued his opinion. In a 253-page opinion, Judge Schroeder held that the DOJ failed to show a pattern or practice of unconstitutional behavior.⁸⁸ The judge found "no evidence that any individual was unconstitutionally deprived of his or her rights under the

⁷⁸ Kami Chavis Simmons, *New Governance and the "New Paradigm" of Police Accountability: A Democratic Approach to Police Reform*, 59 CATH. U. L. REV. 373 (2010).

⁷⁹ Stephen Rushin, *Competing Case Studies of Structural Reform Litigation in American Police Departments*, 14 OHIO ST. J. CRIM. L. 113 (2016).

⁸⁰ *Id.*; see Chavis Simmons, *supra* note 51, at 518–19 ("In addition, because authority to seek injunctive relief rests solely with DOJ, enforcement of the statute is completely reliant on the limited resources available within the Department of Justice. Thus, even an administration with a commitment to aggressively enforce the legislation would be limited to the available departmental resources. As with any federal mandate, without adequate appropriations from Congress to fund the enforcement of DOJ pattern or practice litigation, DOJ could be forced to shift its priorities to other civil rights agendas.").

⁸¹ Chavis Simmons, *supra* note 51, at 493–94.

⁸² Rushin, *supra* note 79, at 136.

⁸³ *Id.* at 137.

⁸⁴ *Id.*

⁸⁵ Michael Biesecker, *U.S. Files Civil Rights Complaint Against N.C. Sheriff*, ASSOCIATED PRESS (Dec. 21, 2012), <http://www.myrtlebeachonline.com/news/local/article16638044.html>.

⁸⁶ Rushin, *supra* note 79, at 137. Additionally, "[t]he Alamance County commissioner, all white," strongly supported Sheriff Johnson's resistance to federal intervention, "praising his hard-line stance against illegal immigration." *Id.* (citing David Zucchini, *North Carolina Town Split Over Sheriff's Treatment of Latinos*, L.A. TIMES (Nov. 23, 2012), <http://articles.latimes.com/2012/nov/23/nation/la-na-sheriff-20121124>).

⁸⁷ *Id.* at 138.

⁸⁸ *United States v. Johnson*, 122 F. Supp. 3d 272 (2015).

Fourth or Fourteenth Amendment.”⁸⁹ The judge further rejected statistical evidence the DOJ offered purporting to show a pattern of discrimination.⁹⁰ Though the judge made certain to scold the Sheriff’s Department for their decisions to use racial epithets and slurs, these instances of bias were deemed insufficient to show a pattern or practice that violated constitutionally protected rights.⁹¹

The failure of the Alamance County trial is significant. The DOJ’s first attempt to *mandate* reform through the exercise of its authority under § 14141 resulted in devastating defeat. Unfortunately, the Alamance County case may lead more law enforcement agencies to resist negotiated settlements with the DOJ. Before the Alamance County case, police departments had little in the way of examples to gauge their chances of successfully defending a § 14141 suit. Agencies now have a benchmark of comparison for their own conduct. This may give some departments the confidence to resist negotiated settlements, forcing the DOJ to either abandon efforts to encourage reform in those departments or forego less resource intensive negotiated settlements for litigation that has now proven to be riskier than previously thought. This places the utility of § 14141 in jeopardy, since its reforms have, up to this point, depend significantly on departments’ willingness to negotiate with the DOJ.

While the district court held that the DOJ failed to establish a pattern or practice, it did not clearly establish the standard of proof required for success.⁹² Consequently, the trial of the Alamance County Sheriff’s Department unfortunately raises more questions than it answers. What evidence must the DOJ put forth to establish a pattern or practice within the meaning of the statute? Will the success of the Alamance County Sheriff’s Department encourage other departments to push back against DOJ intervention? Can the DOJ successfully reform an agency under § 14141 without the cooperation of the agency itself?

The DOJ announced it will appeal the district court decision, providing the appellate court the opportunity to clarify many of these issues.⁹³ Unfortunately, unless and until those answers are provided, it is an open question whether the DOJ can successfully convince a district court to enjoin agencies under § 14141 at trial despite evidence of egregious behavior, such as that presented in the Alamance case.

In addition to the open question of the DOJ’s ability to successfully litigate pattern or practice cases, the infrequency with which the DOJ undertakes such investigations calls into question its ability to identify problem police departments. Some of this difficulty stems from the DOJ’s reliance on records produced by the departments it is tasked with investigating.⁹⁴ Records of use-of-force situations are often inaccurate or incomplete.⁹⁵ Without adequate records, the DOJ cannot properly identify whether a problem exists within the department and whether pursuing an investigation is appropriate. Relying on records produced by the department being investigated is

⁸⁹ Michael D. Abernethy, *Judge Dismisses DOJ Case Against Johnson, Finds No Evidence of Unconstitutional Practices*, TIMES NEWS (Aug. 7, 2015), <http://www.thetimesnews.com/article/20150807/NEWS/150809283/?Start=1>.

⁹⁰ Rushin, *supra* note 79, at 138.

⁹¹ *Id.*

⁹² *Id.* at 139.

⁹³ Anna Johnson, *Despite DOJ Appeal, Alamance Sheriff’s Office Once Again Eligible for State, Federal Grants*, TIMES NEWS (Oct. 29, 2015), <http://www.thetimesnews.com/article/20151029/NEWS/151028706>.

⁹⁴ Chavis Simmons, *supra* note 51, at 516–17.

⁹⁵ *Id.*

counter-productive to reform efforts, as departments have strong incentives to stay off the DOJ's radar.

Furthermore, there are concerns that § 14141 fails to capture individual instances of misconduct, as it only targets misconduct that rises to a pattern or practice of misconduct.⁹⁶ It is easy to identify egregious instances of police misconduct involving one or a few bad officers in an isolated case. It is more difficult to string together instances of misconduct such that it constitutes a pattern or practice as required by the statute.⁹⁷ Victims of isolated incidents of abuse are left only with the traditional tort remedies in state court. For example, federal intervention in a jurisdiction whose policies would be considered inadequate or subpar when compared to other jurisdictions would not be possible unless a pattern of misconduct had emerged. Thus, § 14141's requirement that there be a pattern or practice of unconstitutional behavior might shield certain jurisdictions from scrutiny.

Finally, Congress granted sole discretion to initiate suits enjoining unconstitutional practices to the executive branch under § 14141.⁹⁸ Therefore, Congress precluded private citizens from suing for injunctive relief when they fall victim to a department's unconstitutional practice. The lack of a private cause of action leaves § 14141 vulnerable to the political whim of the administration in power. The current Attorney General, Jeff Sessions, has already noted his disdain for federal intervention in local law enforcement agencies and it is almost certain that enforcement of the pattern or practice authority will be severely curtailed, if not halted altogether under his leadership.⁹⁹

III. SOLUTIONS TO INCREASE POLICE ACCOUNTABILITY

The previous sections have described several impediments to police accountability at both the state and federal level that may explain why police officers are rarely held accountable for their actions when excessive force is alleged. Commentators have identified several avenues for reform to increase both transparency and accountability when officers are accused of excessive force.

A. PROMOTING ENFORCEMENT UNDER § 14141

Despite various shortcomings in its pattern or practice authority, there are several ways that the DOJ could improve its use of § 14141. First, the DOJ should commit to vigorously litigating § 14141 cases in which a law enforcement agency refuses to enter into a consent decree. If the DOJ backs down after the district court's adverse ruling in the Alamance County case, other departments may "roll the dice" and decline to come to an agreement with the DOJ. The threat of time consuming, costly litigation, and the negative publicity such litigation will create are critical to bringing non-compliant law enforcement agencies to the negotiating table.

The DOJ should also pursue more consent decrees as opposed to memoranda of agreement (MOAs). Some refer to consent decrees as "MOA[s] with teeth" because they are formal, court ordered settlements that provide for judicial oversight.¹⁰⁰ An

⁹⁶ *Id.* at 517.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Sheryl Gay Stolberg & Timothy Williams, *Obama Races to Overhaul Police in Baltimore and Chicago Before Trump Era*, N.Y. TIMES (Jan. 10, 2017), https://www.nytimes.com/2017/01/10/us/police-racial-bias-baltimore-chicago-obama-trump.html?_r=0.

¹⁰⁰ See Dukanovic, *supra* note 48, at 919 (citing Darrell L. Ross, *Civil Liability*, in CRIMINAL JUSTICE 186 (Elisabeth Roszmann Ebben ed., 6th ed. 2014)).

MOA is simply a contract between the government and a suspect department without any real judicial enforcement ability.¹⁰¹ The benefit of consent decrees is they allow for the “federal government, states, and localities to agree on proactive systems of preventing future misconduct and civil rights violations.”¹⁰² If the department fails to carry out its obligations under a consent decree, the judiciary can step in to provide the appropriate remedy.¹⁰³

The New Orleans Police Department (NOPD) consent decree represents one of the most comprehensive agreements the DOJ has entered to date, and should serve as a model for future consent decrees.¹⁰⁴ Most notable is the degree of transparency incorporated into the development of the decree and selection process for the monitor. Pursuant to the consent decree, the NOPD must implement significant policy changes regarding “use of force, illegal stops, searches and arrests, custodial interrogations, photographic line-ups, discriminatory policing, community engagement, recruitment, training, officer assistance and support, performance evaluations and promotions, supervision, [and] misconduct investigations.”¹⁰⁵ This consent decree focuses particularly on the NOPD’s standards regarding use of force. It requires the NOPD to regulate uses of force ranging from empty-hand control, in which the officer uses bodily force to gain control, to lethal force.¹⁰⁶

Following the establishment of a consent decree, a special monitor is appointed to ensure compliance on the part of the department. This monitor is usually a team of consultants who have prior experience in law enforcement management, pattern or practice litigation, or other professional management reforms.¹⁰⁷ The monitor provides quarterly reports detailing the department’s compliance efforts. When the monitor determines the department has sufficiently complied with and satisfied at least 94% of the agreement and the district court accepts the judgment, the monitor team disbands.¹⁰⁸ Consent decree monitoring and reform can take anywhere from a few years to over a decade. In order to improve enforcement under § 14141, the DOJ could require closer to 100% compliance with the terms of the consent decree. While this may increase the time a department remains subject to a consent decree, requiring departments to more substantially comply may be necessary to ensure reform is complete and lasting.

The DOJ should also conduct follow up studies of targeted agencies to determine the extent to which reforms are durable past the monitoring phase.¹⁰⁹ The DOJ admits it has “not studied the long-term outcomes at the law enforcement agencies it has targeted.”¹¹⁰ The DOJ’s current model focuses on agencies under consent decrees achieving certain benchmarks, at which point the agency is again left to its own devices. Unless there is some mechanism to ensure that the measures undertaken to

¹⁰¹ *Id.* at 920.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 920–921.

¹⁰⁵ *Id.* at 921 (citing Consent Decree Regarding the New Orleans Police Dept. at 1, *United States v. City of New Orleans*, 35 F. Supp. 3d 788 (2013) (No. 2:12-cv-01924-SM-JCW)).

¹⁰⁶ *Id.*

¹⁰⁷ Dukanovic, *supra* note 48, at 920 (citing Samuel Walker & Morgan Macdonald, *An Alternative Remedy for Police Misconduct: A Model State “Pattern or Practice” Statute*, 19 GEO. MASON U. CIV. RTS. L.J. 479, 511 (2009)).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Kimbriell Kelly et al., *Forced Reforms, Mixed Results*, WASH. POST (Nov. 13, 2015), <http://www.washingtonpost.com/sf/investigative/2015/11/13/forced-reforms-mixed-results/>.

address unconstitutional policing practices will create durable reforms, departments run the risk of slipping back into old habits once the DOJ, monitors and courts have turned their attention elsewhere. This risk is particularly acute as a department's personnel turns over, eroding the institutional memory of the reasons certain policies and procedures are necessary to ensure constitutional policing.¹¹¹

For example, in 1997, the Pittsburgh Bureau of Police became the first law enforcement agency subject to a consent decree under § 14141.¹¹² In the years since satisfying the consent decree, the Bureau has engaged in questionable practices that include “absence of timely and independent investigations into officer misconduct, extreme uses of excessive force, and shuffling of police chiefs.”¹¹³ It is possible that the underlying causes of these incidents could have been addressed through additional monitoring and review after the termination date of the consent decree.

One observer found that DOJ officials support creating follow-up teams to return to agencies previously under consent decree to assess their continued compliance and prevent backsliding.¹¹⁴ To ensure reform is permanent, the DOJ should incorporate this follow-up process into consent decrees.¹¹⁵ Ideally, DOJ would include a follow-up clause in every consent decree, but in reality, the DOJ may not have sufficient resources to follow-up with every department. Therefore, it is necessary to tailor follow-up efforts by identifying signs of resistance early in the process, under the theory that departments resistant to reform may also be more likely to backslide. Follow-up requirements could incentivize departments to sustain reform and avoid further federal intervention.

Unfortunately, the near-term future of § 14141 investigations is uncertain, given the election of Donald Trump and the appointment of Jeff Sessions as Attorney General. Prior to Trump's inauguration, the DOJ signed a consent decree with the Baltimore Police to address concerns over a pattern or practice of constitutional violations.¹¹⁶ The administration also released a report concerning excessive use of force by the Chicago Police Department. The Chicago Police Department appears receptive to working with the DOJ; however, reform efforts are in flux under the Trump Administration.¹¹⁷ Attorney General Sessions has been a fierce critic of federal intervention that forces local police to adopt reforms, calling federal consent decrees “undemocratic” and an “end run around the democratic process.”¹¹⁸ In a March 31, 2017, memorandum to U.S. attorneys and DOJ department heads, Attorney General Sessions stressed the need for local accountability, asserting that, “[i]t is not the

¹¹¹ Dukanovic, *supra* note 48, at 532–33.

¹¹² *Id.* at 532.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Appointing a permanent internal monitor in the department may be a useful additional safeguard. This solution is more effective in departments with significant internal deficiencies. This method of oversight, though used with success in reforming the LAPD, may be too intrusive federal intervention. Departments are likely inclined to consent to some external oversight for a period of time and the possibility of follow-up investigations before consenting to appointment of a permanent neutral monitor. *Id.* at 930–31.

¹¹⁶ Kami N. Chavis, *The Future of Police Reform Under the Trump Administration*, REG. REV. (Feb. 13, 2017), <http://www.regblog.org/2017/02/13/chavis-police-reform-trump-administration/>.

¹¹⁷ Mark Berman & Matt Zaptosky, *Chicago Police Officers Have Pattern of Using Excessive Force, Scathing Justice Dept. Report Says*, WASH. POST (Jan. 13, 2017) https://www.washingtonpost.com/news/post-nation/wp/2017/01/13/justice-dept-to-announce-results-of-investigation-into-chicago-police/?utm_term=.0e19832c9a3c.

¹¹⁸ Chavis, *supra* note 116.

responsibility of the federal government to manage non-federal law enforcement agencies.”¹¹⁹ He further directed his staff to review all “existing or contemplated consent decrees ... ensure that they fully to promote” these principles.¹²⁰ On April 3, 2017, DOJ lawyers unsuccessfully sought to delay implementation of a consent decree with the embattled Baltimore Police Department that was announced towards the end of the Obama administration.¹²¹ These signals from the Trump administration and Attorney General Sessions suggest that we will witness a substantial curtailment of pattern or practice investigations in the coming years, placing the future of § 14141 as a viable tool to promote police accountability in doubt.

B. IMPLEMENTING POLICE BODY-WORN CAMERAS

Widespread adoption and implementation of body-worn cameras could potentially mitigate some difficulty victims of police misconduct experience, especially in § 1983 cases. Body cameras objectively capture interactions police officers have with citizens. This is valuable given the objective reasonableness standard applied in officer use-of-force cases. Furthermore, if the victim passes away, body camera footage is the most reliable evidence to rebut an officer’s account of the event. A camera has no agenda, it simply records what happens.

A threshold question when an officer is accused of excessive force is whether the force applied was objectively reasonable at the moment it was applied.¹²² If a prosecutor, court, or jury determines the force applied was reasonable, then criminal and civil penalties are no longer available. As discussed above, the reasonableness of the force applied depends on several factors, including, the actions of the suspect, the presence and proximity of weapons, and the immediacy of the threat to officers and others.¹²³ Without body camera footage, it becomes the word of a victim or other witnesses against the officer regarding the nature of the interaction leading to the use of force.

The problem with this dynamic is, generally, the victims in excessive force cases are not sympathetic victims.¹²⁴ Furthermore, juries tend to believe police officers are credible people who tell the truth.¹²⁵ Couple this with the fact that the account of the officer that applied the force is usually bolstered by the reports of other officers present when the force was applied. If a jury is inclined to believe one officer over the victim, they will surely believe multiple officers corroborating each other’s accounts over that of the victim. When used correctly, body cameras resolve this dilemma by offering an unbiased perspective, in real time, of the interaction between the officer and victim.¹²⁶ The

¹¹⁹ Memorandum from Jefferson B. Sessions III, U.S. Attorney General, to Heads of Department Components and U.S. Attorneys (Mar. 31, 2017), <https://www.documentcloud.org/documents/3535148-Consentdecreebaltimore.html>.

¹²⁰ *Id.*

¹²¹ Sheryl Gay Stolberg & Eric Lichtblau, *Sweeping Federal Review Could Affect Consent Decrees Nationwide*, N.Y. TIMES (Apr. 3, 2017), https://www.nytimes.com/2017/04/03/us/justice-department-jeff-sessions-baltimore-police.html?_r=0.

¹²² *Malley v. Briggs*, 475 U.S. 335, 395 (1986).

¹²³ McGuinness, *supra* note 72.

¹²⁴ See John V. Jacobi, *Prosecuting Police Misconduct*, 2000 WIS. L. REV. 789, 798 (2000).

¹²⁵ Lisa A. Skehill, *Cloaking Police Misconduct in Privacy: Why the Massachusetts Anti-Wiretapping Statute Should Allow for the Surreptitious Recording of Police Officers*, 42 SUFFOLK U. L. REV. 981, 998 (2009) (“Juries are often more inclined to believe police officers over a citizen, who may have a criminal record, when that citizen makes an allegation of police misconduct.”).

¹²⁶ Kami Chavis Simmons, *Body-Mounted Police Cameras: A Primer on Police Accountability vs. Privacy*, 58 HOW. L. J. 881 (2015).

recording will show the actions of all parties captured, in addition to statements given by officers and the victim.¹²⁷ Furthermore, it will show the exact length of time between first contact and the application of force.¹²⁸ This recording takes much of the guess work out of the equation and serves as a check for the reliability of the officers' reports.

Additionally, there is research indicating the presence of body cameras deters police misconduct.¹²⁹ For example, a study in Rialto, California, randomly assigned cameras to officers then collected data for a year.¹³⁰ The results of the study are promising. Reported use-of-force incidents on shifts without body cameras were double that of shifts where officers were equipped with a body camera.¹³¹ Throughout the department, use-of-force incidents dropped by 60% and citizen complaints dropped by 88%.¹³² Similar results have been found across multiple studies in different cities.¹³³ These results are promising, as they suggest the presence of body cameras can prevent misconduct before it occurs, because when officers and citizens know they are being recorded, it changes the way they interact with one another.

Body cameras benefit both the public and the police. When a person is killed by a police officer during an encounter, citizens often demand accountability. Determining whether the officer was at fault is often difficult without a truly objective means to evaluate the officer's conduct. Body cameras are a tool capable of providing the objective perspective necessary to ensure accountability. As a result, body cameras can aid in holding officers accountable for misconduct, because citizens will have access to valuable information to rebut officer claims that force was reasonable.¹³⁴ Cameras can also insulate officers from liability against frivolous complaints of misconduct by allowing officers to use the footage to support the reasonableness of their actions.¹³⁵ In fact, some police chiefs have publicly endorsed the use of body cameras as a law enforcement tool. One chief encourages his officers to let citizens know the camera is recording believing that "it elevates behavior on both sides of the camera."¹³⁶

Body cameras alone will not clear the path for successful litigation of legitimate excessive force cases. This is due, in part, to the standards used to establish qualified immunity, which remain unaffected by the use of body cameras. When assessing the reasonableness of an officer's use of force, courts and juries must still take into account that "officers are forced to make split second decisions in situations that are tense, uncertain, and rapidly evolving." This allows officers to argue that even if, in hindsight, video appears to show unreasonable use of force, in the heat of the moment their decision to use force was, in fact, objectively reasonable. Department policies regarding use of force can also affect how courts assess the reasonableness of an officer's use of force. Unfortunately, too many departments fail to provide sufficiently robust

¹²⁷ *Id.* at 885.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 886.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Chavis, *supra* note 116, at 987–88.

¹³⁵ *Id.*

¹³⁶ *Id.*

guidelines against the unnecessary use of force.¹³⁷ Additionally, in those cases in which video can establish that the use of force was objectively unreasonable, a victim of excessive force must still show that the officer violated a “clearly established” law.¹³⁸ Until the Supreme Court revisits the standard set in *Garner*, *Connor* and their progeny victims of excessive force will find only limited success in using body camera footage to hold police accountable.

C. AVOIDING CONFLICTS OF INTEREST THROUGH INDEPENDENT PROSECUTORS

As discussed above, local prosecutors face an inherent conflict of interest when called to prosecute police officers.¹³⁹ To resolve this conflict, local prosecutors should be required to recuse themselves when police officers in departments with which they work are accused of excessive force.¹⁴⁰ The best way to ensure neutrality in the prosecution of police officers is to bring in an impartial prosecutor from outside the district. Policies could include appointing a prosecutor from a neighboring district, or the state’s attorney general’s office to handle excessive force cases.¹⁴¹

1. Appoint Prosecutors from Neighboring Districts

Assigning prosecutors from neighboring districts to handle cases involving officers’ excessive use of force offers several advantages. First, it removes the appearance of impropriety on the part of the prosecution. Prosecutors and law enforcement from different jurisdictions rarely come into contact with one another. An outside prosecutor likely does not have as close of a working relationship with the officer and therefore, arguably, faces less of a conflict of interest. The independent prosecutor will feel less restricted to investigate and charge an officer and is less likely to use the grand jury process to avoid an indictment.

Second, prosecutors from neighboring districts in the same state are already familiar with the laws and procedure in the state where they practice. Therefore, an appointed, outside prosecutor will be well versed in the laws, allowing officer cases to proceed as any normal criminal case.

Finally, district attorneys’ offices routinely require prosecutors to recuse themselves when conflicts arise in other situations, such as when another member of their office is accused of a crime.¹⁴² Therefore, it would be relatively seamless for district attorneys’ offices to simply extend this policy of recusal to cover officer cases.

This approach is, however, susceptible to criticism. State prosecutors from neighboring jurisdictions are still vulnerable to some of the pressures local prosecutor’s face.¹⁴³ Potential conflicts could arise because of political pressures, the impact that aggressive

¹³⁷ A survey of ninety-one law enforcement agencies revealed that only one-third “require officers to de-escalate situations, when possible, before using force” or “exhaust all other reasonable alternatives before resorting to using deadly force.” DERAY MCKESSON, ET AL., CAMPAIGN ZERO, POLICE USE OF FORCE POLICY ANALYSIS 4, 6 (Sept. 20, 2016), <https://static1.squarespace.com/static/56996151cbced68b170389f4/t/57e1b5cc2994ca4ac1d97700/1474409936835/Police+Use+of+Force+Report.pdf>.

¹³⁸ Chavis, *supra* note 116.

¹³⁹ See generally *supra*, Part I.

¹⁴⁰ Levine, *supra* note 22, at 1477–87.

¹⁴¹ *Id.*

¹⁴² *Id.* at 1488.

¹⁴³ *Id.* at 1495–96.

prosecution of a police officer could have on a prosecutor's relationship police in their own district, and the statewide influence that powerful police unions can exert.¹⁴⁴

2. *Appoint State Attorneys General*

Appointing the state attorney general's office to handle police cases is another way to remove bias from the process. If the attorney general's office handles all police cases, this will foster the opportunity for prosecutors to specialize in the prosecution of officer cases. Additionally, if all officer cases are handled from a central location, it is easier to collect data on these types of cases.¹⁴⁵ The attorney general's office is also less susceptible to the local and personal influences that may cause conflicts with prosecutors from neighboring districts.¹⁴⁶

One commentator notes that most states have a procedure in place for the attorney general's office to step in when a district attorney's office identifies a conflict.¹⁴⁷ However, the attorney general's office rarely takes over a case absent the district attorney's office's voluntary recusal.¹⁴⁸ Increasing public and political support for this approach may incentivize district attorneys to conflict out of officer cases and allow the attorney general's office assume responsibility for these prosecutions.

3. *Special Prosecutor Laws and Their Shortcomings*

To date, only Connecticut has enacted legislation to allow for the appointment of a special prosecutor in police-related deaths.¹⁴⁹ Under the law, police-involved death cases are referred to the Division of Criminal Justice and the state's chief attorney is empowered to, at his or her discretion, appoint a special prosecutor.¹⁵⁰ Other states lawmakers have attempted to introduce similar legislation requiring independent prosecutors in use of force cases, including Missouri and Pennsylvania.¹⁵¹ In other states, such as New York, the executive branch has taken the lead in enacting reform. After a grand jury failed to indict the officers involved in the death of Eric Garner, New York Governor Andrew Cuomo issued Executive Order No. 147, which directs the state attorney general to prosecute cases where unarmed civilians die at the hands of the police.¹⁵²

There are two primary criticisms of existing statutes or executive action relating to independent prosecutors. First, in both Connecticut and New York an independent prosecutor may only be appointed in instances where an officer's use of force results in death. However, there is a strong argument that independent prosecutors should

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 1490.

¹⁴⁶ *Id.*

¹⁴⁷ Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 550–55 (2011).

¹⁴⁸ *Id.* at 551–52.

¹⁴⁹ Chavis Simmons, *supra* note 14.

¹⁵⁰ CONN. GEN. STAT. § 51-277(a) (2012).

¹⁵¹ Mike Lear, *MO Rep, Sen Want Special Prosecutors in All Police Shootings*, MISSOURINET (Oct. 13, 2014), <http://www.missourinet.com/2014/10/13/two-mo-lawmakers-want-special-prosecutors-in-all-officer-involved-shootings/>; *Press Release, Sen. Art Haywood, Haywood to Seek Independent Prosecutor for Deadly-Force Incidents* (Dec. 19, 2014), <http://www.senatorhaywood.com/haywood-to-see-independent-prosecutor-for-deadly-force-incidents>; see also *Special Prosecutors: Investigations and Prosecutions of Police Use of Deadly Force*, FED'N OF AM. SCIENTISTS (Dec. 12, 2014), <https://www.fas.org/sgp/crs/misc/specpro.pdf> (citing Conn. Gen. Stat. § 51-277(a) (2012)).

¹⁵² Noah Remnick, *Cuomo's Order for Special Prosecutor in Police Deaths Is Criticized*, N.Y. TIMES (July 9, 2015), <http://www.nytimes.com/2015/07/09/nyregion/cuomos-order-for-special-prosecutor-in-police-deaths-is-criticized.html>.

also be utilized when the amount of force is excessive, resulting in significant injuries, yet falls short of lethal force. Second, it is important to recognize that if the office that is conflicted is allowed to choose their replacement, this could undermine the independence that the law seeks to create. Therefore, legislation addressing the appointment of independent prosecutors should specifically include a mechanism to ensure objectivity in choosing a special prosecutor, by requiring the state attorney general or the DOJ to appoint the special prosecutor.

D. PROMOTING CITIZEN OVERSIGHT

A final way to improve police accountability is for jurisdictions to establish a means for citizen oversight in police cases through the creation of civilian review boards.¹⁵³ Such a board could assist the prosecutor and law enforcement in investigating allegations of excessive force.¹⁵⁴ Members could include community leaders, retired law enforcement, local attorneys, and former judges.¹⁵⁵

Though civilian review boards can increase the sense that police are accountable to the community, there are several issues that constrain civilian review boards. First, critics have long argued that civilian review boards are generally “weak, ineffective, and poorly led.” Too often, these boards’ oversight is largely retrospective, making them ineffective at addressing police misconduct until well after it occurs.¹⁵⁶ These boards generally lack any real power to hold officers or departments accountable.¹⁵⁷ Because they typically neither have access to the entire court file, nor the power to investigate while the case is ongoing, civilian review boards often do not gain access to valuable information until well after the case is resolved.¹⁵⁸ Second, these boards are plagued by lack of funding.¹⁵⁹ Without money to pursue investigations, it is difficult to fully evaluate the case. This limits the number of cases the board can review, forcing them to pick their battles, much like the DOJ under § 14141.

Finally, existing review boards generally have limited leverage over the police departments they are tasked with investigating.¹⁶⁰ They can usually only report their findings and make a recommendation to the chief of police or the local government, who have the ultimate enforcement authority to either carry out or ignore the review board recommendation. Additionally, because these boards often include an equal number of current or former law enforcement officers as civilians, they are viewed as overly sympathetic to the interests of police officers, even in cases involving excessive use of force.¹⁶¹ While these boards need to work closely with local law enforcement

¹⁵³ Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841, 872 (2012) (“Approximately twenty percent of large police departments have some form of civilian review.”); David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1802–03 (2005) (“The vast majority of big-city police departments are now subject to some form of civilian oversight. The institutional structure of that oversight varies widely.”).

¹⁵⁴ Levine, *supra* note 22, at 1494.

¹⁵⁵ *Id.*

¹⁵⁶ Chavis Simmons, *supra* note 14.

¹⁵⁷ *Id.*

¹⁵⁸ See Thomas Moriarty, *Court Order Leaves Newark Police Review Board Toothless, Activists Say*, N.J.COM (Dec. 15, 2016), http://www.nj.com/essex/index.ssf/2016/12/injunction_against_newark_police_review_board_prom.html (detailing a 2016 injunction, which limited the investigatory and subpoena power of the Newark Civilian Review Board).

¹⁵⁹ Joanna C. Schwartz, *Who Can Prosecute the Police?*, 2016 U. CHI. LEGAL F. 437 (2016).

¹⁶⁰ *Id.*

¹⁶¹ Levine, *supra* note 22, at 1495–96.

and government, disproportionate association with law enforcement leadership can run the risk of over-sympathizing with the very entities they are tasked with overseeing.¹⁶² If review boards are designed to include individuals who are motivated to seek justice, not play sides, they will have more legitimacy in the eyes of the public and will more effectively review cases with independence and impartiality.

Currently, there are more than 200 citizen oversight entities in existence across the country with various structural models.¹⁶³ For example, the Berkeley, California, citizen review board conducts its independent investigations alongside the police department's internal affairs division.¹⁶⁴ The D.C. Office of Police Complaints makes the facts and their findings in a case available to the public, thereby increasing transparency.¹⁶⁵ In Flint, Michigan, prior to its dissolution, the Office of the Ombudsman's citizen review board maintained independence in the face of local pressures by having the city council appoint members.¹⁶⁶ The Office of Professional Accountability in Seattle, Washington, has an office a few blocks away from the police department so civilians can file complaints about police conduct without having to go to a police station.¹⁶⁷

As these examples demonstrate, civilian review boards need to have real power to effectuate change.¹⁶⁸ To ensure they have the power they need to be effective, jurisdiction should design civilian review boards with the following features:

- Power to subpoena, investigate, and bring charges against officers.¹⁶⁹
- Authority to compile reports they can distribute to the general public summarizing their findings and recommendations.
- Membership that includes licensed attorneys to participate in the review process with the authority to file suit against an officer under § 1983.
- Adequate funding to conduct thorough investigations.
- Freedom from political influence with a non-partisan board committed to increasing accountability.¹⁷⁰

While there are positive aspects of existing civilian review boards, no single board combines each of the features described above. However, if properly implemented, civilian review boards can provide the public with the opportunity to have its voice heard and the power to effectuate lasting reforms.

¹⁶² *Id.*

¹⁶³ Martin Kaste, *Police Are Learning to Accept Civilian Oversight, But Distrust Lingers*, NPR (Feb. 21, 2015), <http://www.npr.org/2015/02/21/387770044/police-are-learning-to-accept-civilian-oversight-but-distrust-lingers>.

¹⁶⁴ CATO INST., *Civilian Review Boards*, POLICEMISCONDUCT.NET, [HTTPS://WWW.POLICEMISCONDUCT.NET/EXPLAINERS/CIVILIAN-REVIEW-BOARDS/](https://www.policemisconduct.net/explainers/civilian-review-boards/) (last visited Apr. 17, 2017).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Kaste, *supra* note 163.

¹⁶⁸ Michael P. Weinbeck, Note, *Watching the Watchmen: Lessons for Federal Law Enforcement from America's Cities*, 36 WM. MITCHELL L. REV. 1306, 1317 (2010) ("[A] corollary flaw of civilian oversight agencies is their inability to require discipline."); *but see* Schwartz, *supra* note 159, at 872 ("[A] quarter of ... civilian review boards have independent investigatory authority.").

¹⁶⁹ Levine, *supra* note 22, at 1494.

¹⁷⁰ *Id.*

CONCLUSION

Police officers are tasked with a valuable function in our society—keeping individuals and communities safe from violence and crime and maintaining public order. Discharging these duties may put a police officer's own personal safety at risk. Current policies and legal standards reflect the belief that to maintain public safety and their own safety police must be allowed to use force when discharging their duties. *Because* of this ability to use force, however, our legal system must also provide mechanisms to hold law enforcement officers accountable. When a police officer's use of excessive force injures or kills an individual, or when a police department engages in a pattern of unconstitutional behavior, public trust is eroded and tensions between police officers and the communities they serve are heightened. A failure to hold law enforcement officers and agencies accountable further deepens this mistrust and threatens their legitimacy. Holding law enforcement accountable for misconduct, therefore, is inextricably linked with maintaining the safety of our communities and enforcing the rule of law.

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Kami Chavis is a Professor of Law and Director of the Criminal Justice Program at Wake Forest University School of Law. In 2015, she was appointed as a Senior Academic Fellow at the Joint Center for Political and Economic Studies. She has substantial practice experience and writes and teaches in areas related to criminal law, criminal procedure and criminal justice reform. After receiving her J.D. from Harvard Law School, she worked as an associate at private law firms in Washington, D.C. In 2003, she became an Assistant United States Attorney for the District of Columbia, involving her in a wide range of criminal prosecutions and in arguing and briefing appeals before the District of Columbia Court of Appeals. Professor Chavis frequently makes presentations on law-enforcement issues and is a leader in the field of police accountability. Her articles have appeared in the *American Criminal Law Review*, the *Ohio State Journal of Criminal Law*, the *Journal of Criminal Law and Criminology*, the *University of Alabama Law Review*, and the *Catholic University Law Review*, and other legal journals. She writes in the areas of police and prosecutorial accountability, federal hate crimes legislation and enforcement, and racial profiling. She was elected to the American Law Institute in 2012. She has appeared on CNN, CTV, and NPR. She has written for the *New York Times* and the *Huffington Post*, and has been quoted in the *Wall Street Journal*, *BBC News*, *U.S. News and World Report*, *International Business Times*, *Deutsche Welle*, and other outlets regarding police accountability and the structural reform of law enforcement agencies.

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Access to Data Across Borders: The Critical Role for Congress to Play Now*

Jennifer Daskal

In December 2013, the government served a warrant on Microsoft, demanding emails associated with a particular email account. Microsoft refused to comply. The data was stored on a server in Dublin, Ireland, and according to Microsoft, the demand was an impermissible exercise of the government's warrant authority. The government fought back, arguing that Microsoft, as a Washington-based company, could access the data from within the United States, and that this was therefore a territorial—and perfectly permissible—exercise of its authority.

At the heart of the dispute is the Stored Communications Act (SCA), a more than 20-year old statute that both protects the privacy of and regulates the disclosure of stored communications content.¹ The statute, written before there was any such thing as the global Internet, is silent as to its territorial reach. Under longstanding Supreme Court precedent, this means that it is to be interpreted as if it only applies within the territory of the United States.² But that leaves open the key question presented by what is now known as the “Microsoft Ireland case”: Does the location of the data or the location of the provider that discloses the data control? Microsoft contends it is the former, while the government asserts the latter. The case is now pending before the Supreme Court.³

Federal magistrate and district court judges in the Southern District of New York sided with the government, but the Second Circuit reversed.⁴ The result, at least for the Second Circuit: U.S. warrant authority only extends to data stored within the United States, even if the crime is local, the target of the investigation is local, and the *only* foreign government nexus to the data is that the data happens to be stored in that foreign government's jurisdiction. If there isn't a workable framework for cooperation with the relevant foreign government or if law enforcement can't actually identify the relevant data location, the government is simply out of luck; there may be no way for law enforcement to lawfully compel production of the data, no matter how serious the

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¹ 18 U.S.C. §§ 2701-2712 (2012).

² See, e.g., *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255 (2010) (emphasizing the “long-standing principle of American law that ‘legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’”) (citations omitted).

³ See *United States v. Microsoft*, 2017 WL 2869958 (Mem) (Sup. Ct. Oct. 16, 2017) (granting cert).

⁴ See *In re Warrant to Search A Certain E-Mail Account Controlled and Maintained by Microsoft*, 829 F.3d 197, 201-02 (2d Cir. 2016); *In re Warrant to Search A Certain E-Mail Account Controlled and Maintained by Microsoft*, 855 F.3d 53, 54 (2d Cir. 2017) (denying rehearing en banc).

crime. Even the judge who authored the Second Circuit's opinion recognized that this was not a satisfactory result and urged Congress to step in and update the statute.⁵

Meanwhile, a handful of magistrates and district court judges have come out the other way in analogous disputes involving Google and Yahoo!, ordering the tech companies to disclose customer data stored overseas.⁶ But this result creates problems as well: It essentially says that the U.S. can compel the production of any and all data under the control of a U.S.-based provider, without regard to the potentially legitimate countervailing interests of foreign governments. This sets a concerning precedent that, if adopted widely, would make it harder for the United States to safeguard the data of its own citizens and residents and likely undercut privacy on a global scale. Such rulings also undercut U.S. business interests—which will find it harder to compete globally if and when they are perceived (rightly or wrongly) as a gateway for U.S. surveillance.

With the Supreme Court poised to hear the case, the need for congressional action is greater than ever. The Court is presented with the same stark choice that has faced the lower courts: Either Microsoft wins, and U.S. law enforcement access to data turns on the happenstance of where it happens to be held. Or the government wins, and it can compel the production of data anywhere, without any statutory obligation to take into account countervailing considerations, including the potential legitimate interest of foreign governments in safeguarding the data of their citizens and residents. Neither is a satisfactory result.

Meanwhile, other provisions of the SCA are causing significant problems for foreign law enforcement when investigating criminal activity involving data that happens to be U.S.-held. This is due to provisions that preclude U.S.-based companies from disclosing stored communications content, such as emails, to foreign law enforcement, regardless of the equities in a particular case.⁷ Consider, for example, U.K. law enforcement seeking emails of an alleged U.K.-based perpetrator in a London murder involving a U.K.-based victim. If the alleged perpetrator used a U.K.-based email service provider, the U.K. officials would likely be able to access that data within weeks, if not days or hours. If, however, he were using Gmail or another U.S.-based provider, the U.K. officials would need to make a diplomatic request for the data—what is known as a “mutual legal assistance request”—and then wait for the United States to respond. This is a

⁵ *In re Warrant to Search Certain E-Mail Account Controlled and Maintained by Microsoft*, 855 F. 3d at 55 (Carney, J., concurring) (“It is overdue for a congressional revision [to the SCA] that would continue to protect privacy but would more effectively balance concerns of international comity with law enforcement needs and service provider obligations in the global context in which this case arose.”)

⁶ See *In re Search Warrant to Google, Inc.*, No. 17-mj-532 (N.D. Ala. Sept. 1, 2017), slip op. 23; *In re Search Warrant No. 16-960-M-1 to Google*, No. 16-960, 2017 WL 3535037, at *11 (E.D. Pa. Aug. 17, 2017), *aff ’g* 232 F. Supp. 3d 708 (E.D. Pa. Feb. 3, 2017); *In re Search of Content Stored at Premises Controlled by Google Inc.*, No. 16-mc-80263, 2017 WL 3478809, at *5 (N.D. Cal. Aug. 14, 2017), *aff ’g* 2017 WL 1487625 (N.D. Cal. Apr. 25, 2017); *In re Search of Information Associated with [redacted]@gmail.com That is Stored at Premises Controlled by Google, Inc.*, No. 16-mj-757, 2017 WL 3445634, at *27 (D.D.C. July 31, 2017), *aff ’g* 2017 WL 2480752 (D.D.C. June 2, 2017); *In re Search of Information Associated with Accounts Identified as [redacted]@gmail.com*, No. 16-mj-2197, 2017 WL 3263351, at *9 (C.D. Cal. July 13, 2017); *In re Search Warrant to Google, Inc.*, No. 16-4116, 2017 WL 2985391, at *12 (D.N.J. July 10, 2017); *In re Two Email Accounts Stored at Google, Inc.*, No. 17-M-1235, 2017 WL 2838156, at *4 (E.D. Wis. June 30, 2017); *In re Search of Premises Located at [Redacted]@yahoo.com*, No. 17-mj-1238 (M.D. Fla. Apr. 7, 2017), slip op. 3.

⁷ The SCA prohibits providers from turning over the content of communications, except in a limited number of situations. See 18 U.S.C. §§ 2702, 2703(a) (2016). While a “governmental entity” may compel such production, pursuant to a lawfully issued warrant, governmental entity is defined as “a department or agency of the United States or any State or political subdivision thereof.” 18 U.S.C. § 2711(4) (2012). Thus, foreign governments do not qualify.

lengthy process, requiring multiple Department of Justice reviews and a U.S. attorney to ultimately obtain a U.S. warrant for the data based on the U.S. standard of “probable cause” before transmitting the data to the U.K., a process that has been estimated to take an average of ten months and in many cases much longer.⁸ This is so even if the *only* U.S. nexus to the crime is that the data happens to be U.S.-held.

Foreign law enforcement organizations chafe at the notion that they have to employ U.S. process to access data sought in the investigation of local crime involving non-U.S. citizens that are located outside the United States. And their investigations are stymied as a result. They are thus incentivized to pursue a range of concerning responses, including the following: the unilateral extraterritorial assertion of their own compulsory disclosure obligations, thereby putting companies in the middle of a potential conflict of laws, having to decide which law to comply with and which to violate; mandatory—and costly—data localization measures, policies that require data to be maintained locally as a way of ensuring access to it; and pursuit of alternative, and often surreptitious, means of accessing the data, including expanded lawful hacking authority and pursuit of broad decryption mandates.⁹

In fact, finding a solution to this problem is described by U.K. diplomats as one of the top diplomatic priorities of the United Kingdom vis-à-vis the United States. The U.K.’s Deputy National Security Advisor, Paddy McGuinness, has now testified in both the House and the Senate on the issue—highlighting its importance to the U.K. government.¹⁰ And while the United States and United Kingdom have drafted an agreement that would facilitate U.K. access to data of non-U.S. citizens and residents in the investigation of serious crime, subject to baseline substantive and procedural requirements, the agreement cannot be implemented without legislation amending the SCA.

The good news is that these issues have now been the subject of hearings and legislative efforts in the House and Senate. Of note, Senators Orrin Hatch (R-UT) and Christopher Coons (D-DE) and Representatives Tom Marino (R-PA) and Suzan DelBene (D-WA) have introduced legislation in their respective chambers—the International Communications Privacy Act (ICPA)¹¹—which is designed to address the problem identified in the Microsoft Ireland litigation. While there is room for improvement (as discussed in more detail below), the legislation is an important starting point that shifts the focus away from the location of data to the location and identity of the target as a key factor in determining jurisdiction. Importantly, it mandates that the U.S. government obtain a warrant before accessing communications content. This is

⁸ The President’s Review Group on Intelligence and Communication Technologies, *Liberty and Security in a Changing World* 226-229 (Dec. 12, 2013), https://obamawhitehouse.archives.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf. See also Vivek Krishnamurthy, “Cloudy with a Conflict of Laws: How Cloud Computing Has Disrupted the Mutual Legal Assistance Treaty System and Why It Matters,” *Berkman Klein Center Research Publication No. 2016-3* (Feb. 18, 2016), <https://ssrn.com/abstract=2733350> (highlighting problems with the mutual legal assistance system).

⁹ For a more in-depth analysis of this issue, see Jennifer Daskal, *Law Enforcement Access to Data Across Borders: The Evolving Security and Rights Issues*, 8 J. NAT’L SECURITY L. & POL’Y 473 (2016).

¹⁰ See *Law Enforcement Access to Data Stored Across Borders: Facilitating Cooperation and Protecting Rights Hearing Before the S. Subcomm. on Crime and Terrorism of the S. Comm. on the Judiciary*, 115th Cong. (2017) (statement of Paddy McGuinness), <https://www.judiciary.senate.gov/meetings/law-enforcement-access-to-data-stored-across-borders-facilitating-cooperation-and-protecting-rights>; *Data Stored Abroad: Ensuring Lawful Access and Privacy Protection in the Digital Era: Hearing Before the H. Comm. on the Judiciary*, 115th Cong. (2017) (statement of Paddy McGuinness), <https://judiciary.house.gov/wp-content/uploads/2017/06/McGuinness-Testimony.pdf>.

¹¹ S. 1671, 115th Cong. (1st Sess. 2017); H.R. 5323, 114th Cong. (2d Sess. 2016).

something already being done as a matter of practice and is required as a matter of law in the Sixth Circuit; codifying this rule would ensure its continued application.¹²

Draft legislation designed to allow the U.S.-U.K. agreement to be implemented and to allow for analogous agreements with other rights-respecting nations has been sent from both the Trump and Obama administrations to Capitol Hill.¹³ Specifically, the draft legislation would authorize the executive branch to enter into executive agreements with foreign governments that would permit, on a reciprocal basis, direct access to the communications content of foreigners located outside the United States, so long as a long list of substantive and procedural safeguards are met. Here, too, there is room for improvement, as also discussed below. But as a whole, it is an approach that Congress should endorse—and adopt.

In this Issue Brief, I examine these issues in more detail—providing additional detail on the problem, the need for congressional involvement, and the ideal legislative path forward.

It should be said at the outset that this Issue Brief addresses only one piece of SCA reform that is needed—namely the problems and challenges associated with access to data across borders. Separate bills are also pending that would, among other things, set procedural and substantive rules governing the acquisition of geo-location data; set much-needed time limits on the use of so-called “gag orders,” which prevent service providers from informing their customers that their data has been accessed by the government; and codify the warrant requirement for communications content (in the event it is not clarified as part of these cross-border reforms).¹⁴ These are all pieces of the SCA that also need updating.

I. THE SOURCE OF THE PROBLEM

Until relatively recently, evidence sought in the investigation of local crime tended to be locally held. Of course, exceptions existed—when, for example, a sophisticated criminal ring spirited stolen goods across borders. But those cross-border moves took a great deal of effort. And for the most part local officials investigating local criminal activity could look locally. They could obtain a warrant for, say, the house or office of a suspect, and, if available, find the sought-after evidence nearby—certainly within the state’s territorial jurisdiction. And even if the suspect were making phone calls to conspirators across a territorial border, law enforcement could listen in to those communications as they crossed local telecommunications networks.

¹² See *U.S. v. Warshak*, 631 F. 3d 266, 288 (6th Cir. 2010) (holding that “[t]he government may not compel a commercial ISP to turn over the contents of a subscriber’s emails without first obtaining a warrant based on probable cause”).

¹³ *Data Stored Abroad: Ensuring Lawful Access and Privacy Protection in the Digital Era: Hearing Before the H. Comm. on the Judiciary*, 115th Cong. (2017) (statement of Richard W. Downing, Acting Deputy Assistant Attorney General), <https://judiciary.house.gov/wp-content/uploads/2017/06/Downing-Testimony.pdf>. Almost identical draft legislation introduced by the Obama Administration is available here: <https://www.documentcloud.org/documents/2994379-2016-7-15-US-UK-Biden-With-Enclosures.html#document/p1/>. Specifically, the draft legislation requires an Attorney General-issued certification that the “domestic law of the foreign government, including the implementation of that law, affords robust substantive and procedural protections for privacy and civil liberties in light of the data collection and activities of the foreign government that will be subject to the agreement” and lists a number of factors to be considered in making this determination, including whether the foreign government “demonstrates respect for the rule of law and non-discrimination.”

¹⁴ See, e.g., ECPA Modernization Act of 2017, S. 1657, 115th Cong. (1st Sess. 2017); see also H.R. 387, 115th Cong. § 4 (1st Sess. 2017); see also Email Privacy Act, S. 1654, 115th Cong. (1st Sess. 2017).

But the rise of a globally interconnected communications network, coupled with the growing use of encrypted communications technology, has changed that reality. Increasingly, sought-after data is neither locally held nor locally accessible. Rather, law enforcement increasingly finds itself seeking data stored across borders, even in the investigation of a local crime.

Consider for example a resident of France who uses Gmail. Her data is not likely to be stored in France. In fact, it is likely moved around with some frequency, very likely across multiple borders. Even if it transits through France, it is likely to be encrypted en route. Moreover, these locational choices are made by a third-party provider—in this case Google—that manages her data and moves it around for reasons of efficiency, tax purposes, and energy costs. There may be absolutely no connection between the French resident and where her data happens to be held—other than the fact that a private company decided to put it there. The same is true for U.S. users—as well as most users around the world.

The law has not caught up to the reality. The drafters of the SCA were writing before there was a global Internet. Their silence as to its territorial scope reflected the world as they knew it at that time. They simply couldn't have imagined the kind of globally interconnected Internet that exists today, with data crossing borders across the globe at the speed of light, sometimes stored in multiple places simultaneously, sometimes divided and distributed across multiple jurisdictions, and largely based on the business decisions of third-party providers. The drafters never grappled with the complicated jurisdictional issues that this reality generates.

Given the silence of the statute, the Second Circuit applied the long-standing assumption that location of property (in this case data) delimits territorial jurisdiction. But such a data location-driven approach to jurisdiction fails to reflect the underlying normative interests that this long-standing rule is meant to protect.

Consider, for example, the long-standing international law rule that prohibits State A from unilaterally accessing property in State B, absent State B's consent. Such a rule makes good sense for tangible, non-divisible property. The prospect of foreign law enforcement officials surreptitiously crossing a border to search one's property—or even worse, seize it and spirit it back across the border—is concerning. Such a system runs counter to principles of democratic accountability, undercuts the rule of law, and almost certainly creates international conflict given the prospect of two different sovereigns claiming interest in the same, non-divisible piece of property.

To avoid these problems, both domestic and international rules require that, as a general matter, U.S. law enforcement employ what is known as “mutual legal assistance process” (MLA) if it seeks property in another country. This process entails U.S. law enforcement making a diplomatic request to the foreign government for the property. The foreign government then assesses the request, and if it deems the request appropriate, accesses the property according to its own rules and procedures. The same goes for foreign law enforcement seeking data in the United States.

But data is different than other forms of tangible property in three key ways:

- *First*, data can be accessed without any state agent—or third-party acting on the behest of the state—crossing a border. This means there is no physical, tangible entry by foreign law enforcement or any agent of foreign law enforcement in the accessing of data across borders. There may still be an intrusion, but it is not a physical, tangible one.
- *Second*, data can be copied, with the original left intact—still available for use by the data subject (the individual with a possessory and privacy interest

in the data) and still available to be accessed by the host state. The divisibility of data thus reduces the concern about friction resulting from two sovereigns seeking control over a singular piece of indivisible property.

- *Third*, and critically, the mobility of data coupled with the fact of third-party control means that there may be no connection between the location of the data and the foreign government, other than the fact that a third-party chose to place it there. As a result, there is no principle of democratic accountability protected by a rule that delimits jurisdiction based on location. There also might not be any link between the location of the data and the key sovereign interests that the jurisdictional rules regarding enforcement are largely meant to protect—namely, the sovereign interest in prosecuting criminal activity with a territorial nexus and the sovereign interest in protecting one’s own citizens and residents.

Together, these factors make data location a particularly poor basis for delimiting law enforcement access. Such a rule will inevitably be both over and under-inclusive—granting governments control over data in which they have no legitimate interest and precluding governmental access to data in which they have legitimate interests simply because of a third-party decision to move it across territorial borders.

What is instead needed is a set of rules that better reflects the key interests at stake: rules that ensure the United States and other countries can regulate access to their own residents and citizens data, consistent with principles of democratic accountability and consistent with the sovereign interest in protecting the privacy interests of one’s own residents and citizens. Rules also should ensure that such access is conditioned on respect for the rule of law and pursuant to baseline substantive and procedural protections designed to protect privacy and prevent abuse.

In what follows, I suggest ways to amend the SCA in light of this reality—starting first with the question of law enforcement access to extraterritorially-located data, and second, turning to the issue of foreign law enforcement to U.S.-held data.

II. A MICROSOFT IRELAND SOLUTION

The Electronic Communications Privacy Act’s (ECPA)¹⁵ silence as to the territorial reach of the government’s warrant authority means that the Supreme Court must divine the 1986 Congress’s intent. In so doing, it will be presented with one of two stark choices: either the warrant authority reaches all U.S.-controlled data, regardless of location or other potentially relevant considerations; or it reaches only that data that happens to be located within the territorial boundaries of the United States. Neither answer is satisfactory.

Rather than leave the issue to the Court to work out, Congress should now step in and clarify the territorial scope—as numerous judges have urged.¹⁶ In fact, even the

¹⁵ The SCA was enacted as Title II of ECPA.

¹⁶ See, e.g., *In re Warrant to Search Certain E-Mail*, 829 F.3d 197, 233 (2d Cir. 2016) (Lynch, J., concurring) (“Although I believe that we have reached the correct result as a matter of interpreting the statute before us, I believe even more strongly that the statute should be revised...”); *In re Warrant to Search Certain E-Mail*, 855 F.3d at 55 (Carney, J., concurring) (urging Congress to act); see also *id.* at 62 (Jacobs, J., dissenting) (noting the possibility of congressional action); *id.* at 68 (Cabrane, J., dissenting) (same).

companies litigating the cases recognize that this is a matter better left for Congress.¹⁷ A legislation solution should reflect the following three key principles:

First, U.S. law enforcement access to stored communications content should not turn on the happenstance of where it is held. This is a particularly poor basis for delimiting law enforcement jurisdiction. It means that U.S. law enforcement will be unable to access sought-after data in the investigation of serious crime, even in situations where the target and victim are both U.S. citizens, and even if the place where the data is located has absolutely no connection to the case or individuals being investigated.

Second, U.S. law enforcement should be required to obtain a warrant to compel production of communications content, regardless of where it is held, even if it is located overseas.¹⁸ This is something that is required by the Sixth Circuit¹⁹ and is done by the executive branch as a matter of practice, but is not required by statute. The SCA's outmoded distinctions based on type of service provider and length of time of storage—pursuant to which data stored 180 days or less is protected by the warrant requirement but data stored longer is not—should be eliminated.²⁰

Third, U.S. law should respect the legitimate interests of foreign governments in delimiting access to data of their own citizens and residents—much as the United States correctly insists on when foreign governments seek the data of U.S. citizens and residents. This is important as a means of standard setting—something that will ultimately inure to the benefit of U.S. citizens and residents. As the home to some of the world's largest tech companies that control so much of the world's communications content, this may not seem particularly important now. But as foreign-based companies gain a greater share of the market, it will be increasingly important to put in place protections that ensure respect for U.S. rules governing access to U.S. person data. It is also a means of protecting U.S. companies and thus the economy. Rightly or wrongly, much of the rest of the world fears what they see as pervasive U.S. surveillance. A rule that permits U.S. law enforcement to access U.S.-held data anywhere around the world, without regard to any countervailing considerations, feeds into these fears and makes it harder for U.S.-based service providers to compete globally. The Microsoft Ireland case—and the way in which the issue ultimately gets resolved—is being watched not just in the United States, but all around the world precisely for this reason.

The recently introduced International Communications Privacy Act (ICPA) is a good place to start.²¹ It requires a warrant for all stored communications content, shifts the focus away from the location of the data to the nationality and location of

¹⁷ See, e.g., *Facilitating Cooperation and Protecting Rights: Hearing on Law Enforcement Access to Data Stored Across Borders Before the Subcomm. on Crime and Terrorism of the S. Comm. on the Judiciary*, 115th Cong. (2017) (statement of Brad Smith), <https://www.judiciary.senate.gov/imo/media/doc/05-24-17%20Smith%20Testimony.PDF> (emphasizing that “litigation is not a substitute for policy-making” and urging Congress to update ECPA); Br. in Opposition, *supra* note 5, at 3 (“Congress alone has the authority and the institutional competence to craft a new legislative scheme for a world not anticipated in 1986.”); Kent Walker, *Digital Security and Due Process: A New Legal Framework for the Cloud Era*, The Keyword (June 22, 2017), <https://www.blog.google/topics/public-policy/digital-security-and-due-process-new-legal-framework-cloud-era/>.

¹⁸ If, as Microsoft contends, the SCA only regulates domestic stored communications, its protections (including the warrant requirement) would not extend to data that is stored outside the United States. See *In re Warrant to Search Certain E-Mail*, 855 F.3d at 73 (Raggi, J., dissenting) (warning that “the same reasoning that leads the panel to conclude that § 2703(a) warrants cannot reach communications that Microsoft has stored in Ireland might also preclude affording § 2702(a) privacy protections to such materials.”)

¹⁹ *Warshak*, 631 F.3d at 288.

²⁰ See 18 U.S.C. §§ 2703(a)-(b) (2012).

²¹ S. 1671, 115th Cong. (1st Sess. 2017); H.R. 5323, 114th Cong. (2d Sess. 2017).

the target, and seeks to accommodate—on a reciprocal basis—foreign governments’ interests in protecting the data of their own citizens and residents. That said, it does so through a complicated and cumbersome scheme that only comes into play if and when a foreign government seeking the data of a U.S. citizen or legal permanent resident self-certifies that it will, among other things, provide reciprocal notice and an opportunity to object, *and* the Attorney General and Secretary of State determine that a number of conditions are met.²² As a practical matter, the list of so-called “qualifying foreign governments” is likely to be null, or at least very small, in the short to medium term. The legislation also somewhat unusually gives qualifying countries an opportunity to come to U.S. court and effectively move to quash the warrant.²³

Such a scheme should be supplemented—and perhaps replaced—with a requirement that courts do a comity analysis *any time* the U.S. government is knowingly seeking the data of a foreigner located outside the United States and that request creates a conflict of laws. This would codify something that is now done as a matter of discretion, ensuring that such judicial review takes place and codifying the factors the court must consider in issuing the warrant, including the location of the crime, victim, and alleged perpetrator; the seriousness of the crime; the importance of the data to the investigation of the crime; the possibility of accessing the data via other means; U.S. interest in prosecuting the offense; and the relevant foreign governmental interest.

An alternative, broader proposal would require such comity analysis any time the U.S. government is knowingly seeking the data of a foreigner located outside the United States, without regard to the question of whether there is a conflict of laws. In such a situation, the courts would then take into account the existence (or not) of such conflicts. This has the advantage of ensuring that potential foreign government interests are taken into account in *all* situations in which the United States is seeking the data of a foreigner outside the United States. However, it has the arguable disadvantage of putting an additional burden on the requesting law enforcement officials and courts that are then required to do the comity analysis in a broader number of cases.

Importantly, either scheme would require such a comity analysis in *all* situations in which the United States is seeking the data of a non-citizen located outside the United States and the relevant conditions apply, irrespective of any separate executive branch agreement on reciprocal notice and opportunity to object. Such a mechanism would ensure that the interests of foreign governments are considered, thus setting a precedent that the United States would want and expect other countries to engage in if accessing the data of U.S. citizens and residents. It would also address concerns about unbounded U.S. surveillance.

At the same time, it would protect the interests of the United States in getting access to data in serious cases. It would avoid giving foreign governments a right to access U.S. courts or hold up issuance of warrants in legitimate cases, and it would not in any way preclude the United States from negotiating the kind of agreements provided for in ICPA—requiring reciprocal notice and an opportunity to object—anytime the United States determined it was in its interest to do so.

²² S. 1671 § 3, 115th Cong. (1st Sess. 2017). Among other things, the Attorney General, in consultation with the Secretary of State, must determine that the foreign country “affords robust substantive and procedural protections for privacy and civil liberties” and “adheres to applicable international human rights statutes.”

²³ *Id.* Additionally, the legislation fails to specify who is to be provided notice if the target is a foreign citizen of State A located in State B. Is it State B or State A or both?

In sum, Congress can and should step in now to ensure that the relevant interests are taken into account by adopting the kind of nuanced solution that Congress, not courts, is equipped to provide.

III. FOREIGN GOVERNMENT ACCESS

The problem of foreign government access is the exact converse of the problem presented by the Second Circuit's ruling in the Microsoft Ireland case. It, too, has roots in the SCA—stemming from provisions that prohibit U.S.-based providers from disclosing communications content to foreign law enforcement.²⁴ This prohibition applies even if law enforcement is seeking the email account of a foreigner located outside the United States in the investigation of a solely foreign crime. Because U.S.-based providers now control so much of the world's data, and because so much information is now digitalized, this has become an increasingly potent problem for foreign law enforcement.

The Obama and Trump administrations have proposed almost identical legislation to begin to address the concerns of foreign governments.²⁵ The legislation would amend the SCA to permit foreign governments in specified circumstances to directly access the content of communications from U.S.-based providers. Specifically, it would permit the executive branch to enter into agreements with partner governments that would permit those governments to directly request specified communications content from U.S.-based providers, subject to a number of limitations.

The draft legislation includes three key sets of conditions on how these agreements would be operationalized:

First, there are limits on the kinds of countries that could be eligible for these expedited data-sharing agreements. Such agreements only would be permitted with respect to countries that have been certified by the Attorney General, in conjunction with the Secretary of State, as affording “robust substantive and procedural protections for privacy and civil liberties” with respect to data collection and the other activities subject to the agreement. This helps protect against foreign governments gaining access to data in order to harass or otherwise abuse.

Second, there are several procedural and substantive requirements that must be met regarding the substance of each request made pursuant to such a system.

- The partner government could *not* directly access the data of a U.S. citizen or legal permanent resident or any person located in the United States; those requests would still need to be made through the MLA process. This reflects the principle that U.S. law should govern access to the data of U.S. citizens, legal permanent residents, and persons located in the United States. Conversely, U.S. law should not control foreign government collection of information on foreigners outside the United States, so long as the foreign government satisfies minimum procedural and substantive standards in the way it accesses, processes, and uses such data.
- Various measures are in place to further protect data of U.S. persons (defined to include citizens and legal permanent residents) and others in the United

²⁴ As with questions of a U.S. warrant's reach, there is an open question as to whether the SCA applies to all data held by U.S.-based companies or only data that happens to be located in the United States. According to the Second Circuit's reasoning, it would be the latter. *In re Warrant to Search A Certain E-Mail Account Controlled and Maintained by Microsoft*, 829 F. 3d. 197, 222 (2d Cir. 2016).

²⁵ Testimony by Downing, *supra* note 13.

States: First, the foreign government could not target a non-U.S. person with the purpose of obtaining data concerning a U.S. person or other person located in the United States. Second, the foreign government would be prohibited from disseminating content of a U.S. person to a U.S. authority unless it relates to significant harm or threat of such harm to the U.S. or U.S. persons. Third, non-relevant data, including data of U.S. persons, must be sealed, segregated, and deleted.

- Requests must be particularized, lawful, and based on articulable and credible facts; and they must be reviewed or overseen by a court or other independent authority.
- Intercept orders must be of a fixed, limited duration and permitted only when that same information could not be obtained by a less intrusive method.
- Acquired data must also be subject to minimization procedures, including requirements that non-relevant information be sealed, segregated, and deleted.
- Acquired data cannot be used to infringe freedom of speech.

Third, the draft legislation imposes accountability and review mechanisms. Specifically, agreements would be a maximum of five-years in duration, unless renewed. Partner governments must provide for periodic compliance reviews by the United States, and the United States reserves the right to rescind any aspect of the agreement for which compliance is lacking. The draft legislation also specifies that the U.S. must be granted a reciprocal right of access to foreign-held data.

This DOJ-proposed legislation is not perfect and would benefit from some modifications. Specifically, the legislation should explicitly require judicial “authorization” as opposed to “review or oversight” of compulsion orders for content. It should provide for enhanced accountability and transparency mechanisms, by, among other things, requiring governments to publish data on the number and type of requests made pursuant to these agreements. It should require partner countries to explicitly disavow data localization mandates. And it should provide an explicit mechanism that permits third-party providers to submit requests to the U.S. government for additional review if there are questions about whether or not the requirements are met—and be protected from foreign government compliance demands in the interim.

But it is, in general, an approach to be applauded, as I and numerous others have urged elsewhere.²⁶ It reflects the normative position that foreign governments should be able to access their own citizens’ and nationals’ data, so long as they abide by

²⁶ See, e.g., David Kris, *U.S. Government Presents Draft Legislation for Cross-Border Data Requests*, LAWFARE (July 16, 2016, 8:07 AM), <https://www.lawfareblog.com/us-government-presents-draft-legislation-cross-border-data-requests>; Testimony, Brad Smith, *supra* note 17; Walker, *supra* note 17; Tiffany Lin & Mailyn Fidler, *Cross-Border Data Access Reform: A Primer on the Proposed U.S.-U.K. Agreement* 8, Berkman Klein Center for Internet & Society (Sep. 7, 2017) (concluding that, despite concerns, “the proposed legislation could be a huge step forward in updating an outdated system that was not designed for the today’s technological paradigm and was not built for such a high volume of requests”), <http://nrs.harvard.edu/urn-3:HUL.InstRepos:33867385>. Jennifer Daskal & Andrew K. Woods, *Congress Should Embrace the DOJ’s Cross-Border Fix*, JUST SECURITY (Aug. 1, 2016, 8:03 AM), <https://www.justsecurity.org/32213/congress-embrace-doj-cross-border-data-fix/>; *Facilitating Cooperation and Protecting Rights: Hearing on Law Enforcement Access to Data Stored Across Borders Before the Subcomm. on Crime and Terrorism of the S. Comm. on the Judiciary*, 115th Cong. (2017) (statement of Jennifer Daskal), <https://www.judiciary.senate.gov/imo/media/doc/05-24-17%20Daskal%20Testimony.pdf>. See Peter Swire and Deven Desai, *A ‘Qualified SPOC’ Approach for India and Mutual Legal Assistance*, LAWFARE (Mar. 2, 2017, 12:14 PM), <https://www.lawfareblog.com/qualified-spoc-approach-india-and-mutual-legal-assistance> (suggesting a mechanism for expanding agreements to a wider range of countries).

baseline requirements in how they access and manage data. And it lays out with specificity the procedural and substantive standards that are required, using U.S. leverage as the repository of so much of the world's data as an incentive for partner nations to comply. This is important. These are standards that ultimately protect U.S. persons in addition to their foreign counterparts with whom they are in communication. Meanwhile, it ensures that U.S. standards continue to apply to the direct collection of data from U.S. persons and residents.

The United States and United Kingdom reportedly have drafted an agreement that comports with these requirements, although the agreement cannot be implemented until the U.S. Congress first amends the SCA to permit these types of agreements to go forward.

Some have objected to this agreement on the grounds that it would permit foreign governments to bypass the mutual legal assistance process. In particular, some have expressed concern that these agreements permit access upon a showing of a “reasonable justification based on articulable and credible facts,” as compared to the “probable cause” standard that is now demanded when a U.S. warrant is obtained.²⁷ As an initial matter, it is not obvious that the “reasonable justification based on articulable and credible facts” standard is in fact lower than—and certainly not significantly lower than—that of probable cause.²⁸ But even if the critics are correct, it is not clear why the United States should insist on imposing its particular, and idiosyncratic, probable cause standard, so long as sufficient substantive and procedural standards are in place. Continued insistence on the probable cause standard—a standard that makes little sense to the rest of the world—is likely to doom such agreements, thus further feeding the incentives for data localization mandates and other surreptitious means of accessing data. If that happens, the United States will have *no* say in the standards that are applied.

Critics also worry that there are insufficient protections for U.S. person information.²⁹ But this critique fails to account for the significant protections in place for U.S. person information—including the limits on both direct and indirect targeting of U.S. person information, the restrictions on dissemination of U.S. person information, and the auditing that is required. And it too reflects a misguided assumption that the status quo is permanent. If we instead move to a world in which foreign governments access such data unilaterally (either via data localization mandates, extraterritorial claims that prevail, or surreptitious means) *none* of these protections for U.S. person data will be put in place.

Importantly, the legislation reflects an attempt by the United States to use its current leverage as the home for so much of the world's data to insist on—and ideally raise—baseline substantive and procedural baseline protections. And in fact, the interactions with the U.K. suggest that such benefits are possible. As the negotiations over this draft agreement were ongoing, the U.K. government passed new legislation that, for the first time in U.K. history, provides for judicial oversight of warrants for

²⁷ See, e.g., Center for Democracy & Technology, “Cross-Border Law Enforcement Demands: Analysis of the US Department of Justice’s Proposed Bill” (Aug. 17, 2016), <https://cdt.org/files/2016/08/DOJ-Cross-Border-Bill-Insight-FINAL2.pdf>; ACLU, Amnesty International, and HRW Letter Opposing Department of Justice Proposal on Cross Border Data Sharing (Aug. 9, 2016), <https://www.aclu.org/letter/aclu-amnesty-international-usa-and-hrw-letter-opposing-doj-proposal-cross-border-data-sharing>.

²⁸ See, e.g., *U.S. v. Ortiz*, 669 F.3d 439, 446 (4th Cir. 2012) (probable cause requires nothing more than a “reasonable ground”—which is “less demanding than a standard requiring a preponderance of the evidence for the belief”); *Illinois v. Gates*, 462 U.S. 213, 231-32 (1983) (defining probable cause as a “practical, non-technical standard” that turns on the “assessment of probabilities”) (citations omitted).

²⁹ See ACLU, Amnesty International, and HRW, Letter, *supra* note 27.

communications content.³⁰ The U.K. government reportedly endorsed such judicial review provisions because it, among other reasons, wanted to meet the judicial review standards demanded by the United States.

In sum, the draft legislation is something that should be pursued, albeit with some improvement. It relies on the United States' unique position as the home of the world's largest tech companies to set baseline substantive and procedural standards governing the collection of data—ideally helping to elevate the standards that apply. The generation of such standards will ultimately inure to the benefit of U.S. citizens and residents that may be subject to foreign government collection of their data. But this is a time-limited opportunity. As foreign-based service providers gain increasing shares of the market and foreign governments successfully impose data localization mandates, foreign governments will be able to access sought-after data locally—without ever having to make cross-border requests to the United States. The United States then will have little to nothing to say about the standards that apply, even with respect to the U.S. person data that is stored in foreign jurisdictions and either directly or incidentally collected by foreign governments. This would be an unfortunate result.³¹

CONCLUSION

Governments increasingly need digital evidence that is located across borders in the investigation of local crime. The rules have not yet caught up to that reality. Congress has a critically important role to play in revising those rules—and doing so in a way that accommodates the relevant security, privacy, sovereignty, and economic interests at stake. This is not an issue that should be delegated to the Supreme Court, which is not in the position to address the complicated interests at stake with the kind of nuance they deserve. Several judges and other commentators have urged the same.³² The time to act is now.

³⁰ See Investigatory Powers Act 2016 c. 25 (Eng.), § 23, http://www.legislation.gov.uk/ukpga/2016/25/pdfs/ukpga_20160025_en.pdf. While the legislation has been defined as a “snoopers charter” that authorizes broad-based surveillance the addition of judicial review procedures is an example of an additional *check* on U.K. authorities that had not previously been in place. *Id.*

³¹ For a more in-depth analysis of this issue, see Jennifer Daskal, *Law Enforcement Access to Data Across Borders: The Evolving Security and Rights Issues*, 8 J. NAT'L SECURITY L. & POL'Y 473 (2016).

³² *In re Warrant to Search A Certain E-Mail Account Controlled and Maintained by Microsoft*, 829 F.3d at 222 (2d Cir. 2016) (Lynch, J., concurring (emphasizing the “the need for congressional action to revise a badly outdated statute”); *In re Warrant to Search A Certain E-Mail Account Controlled and Maintained by Microsoft*, 855 F.3d at 55 (2d Cir. 2017) (Carney, J., concurring in the order denying rehearing en banc) (arguing that the SCA is “overdue for a congressional revision that would continue to protect privacy but would more effectively balance concerns of international comity with law enforcement needs and service provider obligations in the global context in which this case arose”); Brad Smith, *U.S. Supreme Court Will Hear Petition to Review Microsoft Search Warrant Case While Momentum to Modernize the Law Continues in Congress*, MICROSOFT ON THE ISSUES (Oct. 16, 2017), <https://blogs.microsoft.com/on-the-issues/2017/10/16/us-supreme-court-will-hear-petition-to-review-microsoft-search-warrant-case-while-momentum-to-modernize-the-law-continues-in-congress/>; Kent Walker, *Digital security and due process: A new legal framework for the cloud era*, GOOGLE BLOG (June 22, 2017), <https://www.blog.google/topics/public-policy/digital-security-and-due-process-new-legal-framework-cloud-era/>. See also Jennifer Daskal, *There's No Good Decision in the Next Big Data Privacy Case*, N.Y. TIMES (Oct. 18, 2017), <https://www.nytimes.com/2017/10/18/opinion/data-abroad-privacy-court.html>.

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Expanding Voting Rights Through Local Law*

Joshua A. Douglas

In an episode of the television show *The West Wing*, middle school students from a fictional children’s advocacy group called “Future Leaders for Democracy” try to convince White House Communications Director Toby Ziegler that children should enjoy the right to vote.¹ After largely agreeing with their various substantive arguments for children’s suffrage, Toby strategizes, “Well, I’d go for lowering the age in increments and I wouldn’t start at the federal level.”

The real-life push for expanded suffrage has tracked Toby’s advice. Throughout the country, local jurisdictions are debating whether to expand the right to vote in local elections for various constituencies, such as younger Americans, noncitizens, and nonresident property owners. For instance, in November 2016, Berkeley, California decided to lower the voting age to sixteen for its school board elections and San Francisco voters narrowly rejected a referendum to reduce the voting age to sixteen for all of its city elections. Some small jurisdictions have already lowered the voting age or otherwise expanded the right to vote in local elections for other interested groups, such as noncitizens or nonresident property owners. These local voting rules are significant in their own right, and they also may foreshadow expanded suffrage in state or federal elections.

If states are “laboratories of democracy” that can try out various reforms, then municipalities can be “test tubes of democracy” that may experiment with different voting rules. These expansions can then “trickle across” to other municipalities, and eventually “trickle up” to states or Congress, which will more likely adopt reforms that are working well at the local level. Thus, it is important to highlight the first movers on expanded voting rights, as they may serve as catalysts for more widespread changes. Robust protection of the right to vote depends on local voting rules as an early component of the reform effort.

This Issue Brief—a condensed version of a scholarly article that appeared in the *George Washington Law Review*²—completes the picture of what it means to enjoy the right to vote in America. The right to vote is a constitutional right inherent in the U.S. Constitution and all state constitutions. But it is also a locally conferred right, at least in some cities and towns. This expansion of voting rights at the local level will constitute a significant part of the debate on the right to vote for years to come.

I. TODAY’S LOCAL EXPANSIONS OF THE RIGHT TO VOTE

In recent years, municipalities across the country have enacted, or at least debated, local ordinances regarding the right to vote. Cities and towns have lowered the voting age in local elections to sixteen, granted the right to vote to noncitizens, expanded access for property-owning nonresidents, and called for greater overall inclusion for

* This Issue Brief was initially published in October 2017.

¹ *The West Wing: A Good Day* (NBC television broadcast Mar. 2, 2005).

² See Joshua A. Douglas, *The Right to Vote Under Local Law*, 85 GEO. WASH. L. REV. 1039 (2017).

those otherwise disenfranchised, such as felons. This section examines these ordinances to highlight the grassroots nature of voting rights reform and demonstrates that localism should be an important consideration for anyone concerned about protecting the constitutional right to vote.

A. LOWERING THE VOTING AGE

In 2013, the city of Takoma Park, Maryland—a suburb of Washington, D.C.—passed a charter amendment lowering the voting age for city elections to sixteen. Section 601(a) of that governing document now reads:

Every person who (1) is a resident of the City of Takoma Park, (2) is at least sixteen (16) years of age or will be sixteen (16) years of age on or before the date of the next City election, (3) has resided within the corporate limits of the City for 21 days immediately preceding the City election, (4) does not claim voting residence or the right to vote in another jurisdiction, and (5) is registered to vote in accordance with the provisions of this charter, is a qualified voter of the City except as provided in subsection (b) of this section.³

Subsection (b) then denies voting rights to felons serving a prison sentence, those who have been judged mentally disabled, and anyone convicted of vote buying. Lowering the voting age expanded the voter rolls in Takoma Park by about 350 people.⁴ Council Member Tim Male sponsored the ordinance as a way to increase citizen participation in local elections.⁵ In crafting the law, Male took the advice of Rob Richie, the director of a national organization called FairVote, who thought of the idea when he read a report from Denmark saying that younger teenagers were more likely to vote than older teens.⁶

The movement in Takoma Park began with a municipal Right to Vote Resolution.⁷ That resolution noted that

local governments like ours have the power to enact laws and procedures for local elections that meet or surpass federal and state election standards, that create more accountable representation, that uphold voting rights, that encourage increased voter participation, and that promote greater awareness of our political process through civic education.⁸

³ TAKOMA PARK, MD., MUN. CODE art. VI, § 601(a) (2016), <http://www.codepublishing.com/MD/TakomaPark/#!/takomaparkch/TakomaParkCH06.html#06>.

⁴ See Annys Shin, *Takoma Park 16-Year-Old Savors His History-Making Moment at the Polls*, WASH. POST (Nov. 3, 2013), https://www.washingtonpost.com/local/takoma-park-16-year-old-savors-his-history-making-moment-at-the-polls/2013/11/03/89f00962-425c-11e3-b028-de922d7a3f47_story.html.

⁵ See *id.*

⁶ See *id.* I am a member of the “Leadership Circle” for a FairVote initiative called “Promote Our Vote.” See *Leadership*, PROMOTE OUR VOTE, <http://www.promoteourvote.com/leadership.html> [<https://perma.cc/5BHG-6FHJ>] (last visited May 28, 2017).

⁷ City of Takoma Park, Md., Res. 2013-25 (May 13, 2013), http://www.promoteourvote.com/uploads/9/2/2/7/9227685/takoma_park_right_to_vote_resolution.pdf.

⁸ *Id.*

The resolution then affirmed that the right to vote is a fundamental right, established a Task Force on Voting, and called on federal and state officeholders to take actions that will protect voting rights. On expanding voting opportunities, the resolution specifically directed the Task Force to “[r]ecommend actions by the City before the 2013 elections to promote new suffrage opportunities and other participation in City government for and by residents who have turned 16, same-day voter registration and residents who are currently on parole or probation as a result of a felony conviction.”⁹ The Task Force’s recommendations led to the ordinance that, among other things, lowered the voting age in Takoma Park.

Takoma Park’s initial experience with lowering the voting age—albeit a sample of one town with a small population—is instructive. In the November 2013 election, which included an incumbent mayor with only a write-in challenger and no contested city council elections, 44% of the newly enfranchised and registered sixteen- and seventeen-year-olds went to the polls, as compared to an overall turnout rate of 11%.¹⁰ Similarly, in Takoma Park’s 2014 election, 134 individuals aged sixteen or seventeen registered to vote, and about half of them showed up, far exceeding the 10% turnout rate among the rest of the city’s voters.¹¹ Although the raw numbers for this one city are small, and the novelty of gaining voting rights could wear off in subsequent elections, the potential is huge if extrapolated to a larger metropolis. Turnout among eighteen- to twenty-four-year-olds nationwide is the lowest among all age groups,¹² but that trend is reversible if sixteen- and seventeen-year-olds begin a habit of voting earlier in their lives when they are not also dealing with moving, entering the workforce, or beginning college. Assuming that younger voters turn out in sufficient numbers, they could impact who is elected and the policies that affect them. Takoma Park showed that this reform is achievable city by city throughout the country.

Hyattsville, Maryland, was the next locality to heed this message. In January 2015, the Hyattsville City Council voted to lower the voting age for town elections to sixteen.¹³ In the next election, newly registered sixteen- and seventeen-year-olds voted at a rate of 25%, helping the town exceed its turnout goal.¹⁴

These successes in two small Maryland towns have been harbingers of the reform movement in larger cities.¹⁵ Berkeley, California, recently lowered the voting age to

⁹ *Id.*

¹⁰ See J.B. Wogan, *Takoma Park Sees High Turnout Among Teens After Election Reform*, GOVERNING (Nov. 7, 2013), <http://www.governing.com/news/headlines/gov-maryland-city-sees-high-turnout-among-teens-after-election-reform.html>.

¹¹ Elena Schneider, *Students in Maryland Test Civic Participation and Win Right to Vote*, N.Y. TIMES (Jan. 9, 2015), <http://www.nytimes.com/2015/01/10/us/politics/students-in-maryland-test-civic-participation-and-win-right-to-vote.html>.

¹² See THOM FILE, U.S. CENSUS BUREAU, YOUNG-ADULT VOTING: AN ANALYSIS OF PRESIDENTIAL ELECTIONS, 1964–2012, at 2 (2014), <https://www.census.gov/prod/2014pubs/p20-573.pdf>.

¹³ See HYATTSVILLE, MD., CHARTER & CODE art. IV, § C4-1 (2015), <http://www.hyattsville.org/DocumentCenter/Home/View/340> (“Every person who is a citizen of the United States, is at least sixteen (16) years of age, resides in the State of Maryland, resides within the corporate limits of the City and is registered in accordance with the provisions of this Charter shall be a qualified voter of the City. Every qualified voter of the City shall be entitled to vote at any or all City elections.”).

¹⁴ See Rebecca Bennett, *Ward and Warner Election Winners; City Exceeds Voter Turnout Goal*, HYATTSVILLE LIFE & TIMES (May 12, 2015, 6:12 PM), <http://hyattsvillelife.com/ward-and-warner-election-winners-city-exceeds-voter-turnout-goal/>.

¹⁵ In addition to lowering the voting age in municipal elections, many states allow seventeen-year-olds to vote in party primaries if they will be eighteen by Election Day. See *Voting in Primaries at 17 Years Old*, BALLOTPEdia, https://ballotpedia.org/Voting_in_primaries_at_17_years_old [https://perma.cc/V57X-Z7ZC] (last visited May 28, 2017).

sixteen for its school board elections.¹⁶ In San Francisco, members of the San Francisco Youth Commission have been advocating for the city to lower the voting age for municipal and school district elections.¹⁷ Although the measure passed the City's Board of Supervisors, a referendum on the issue failed by a 52%–48% margin in 2016.¹⁸ Given this close outcome, advocates plan to put the question on the ballot again in 2020.¹⁹ Reformers are also working to petition the Chicago City Council to consider this change.²⁰

Similarly, Washington, D.C., has debated whether to pass an ordinance allowing sixteen- and seventeen-year-olds to vote in presidential and local elections.²¹ Advocates note that the city's lawmakers "barely listen[ed] to the District's youths amid a spike in violence" during the summer of 2015 and that lowering the voting age would give younger individuals more political power.²² The D.C. proposal goes further than the Maryland or California examples because it lowers the voting age not just for city elections but for the presidential election as well. As one proponent explains, "It's not just about having young people vote It's about creating a new generation of lifelong voters."²³

Meanwhile, advocates in Lowell, Massachusetts, who under Massachusetts law must secure the state legislature's approval to lower the voting age in municipal elections, won the support of the State Senate in 2013 but have not yet convinced the State House.²⁴ Legislators in New Mexico and youth council members in Richmond, California, are planning to introduce bills to lower the voting age for city elections or at least school board elections.²⁵ The movement also has gained the support of

¹⁶ See Aleah Jennings-Newhouse et al., *City Measures T1, U1, V1, W1, X1, Y1, Z1, AA Pass; Measures BB, CC, DD Fail*, DAILY CALIFORNIAN (Nov. 9, 2016), <http://www.dailycal.org/2016/11/09/city-measures-t1-u1-v1-w1-x1-y1-z1-aa-pass-measures-bb-cc-dd-fail/>.

¹⁷ See Laura Dudnick, *Youths Seek to Lower Voting Age to 16 in SF*, S.F. EXAMINER (Jan. 6, 2015), <http://archives.sfexaminer.com/sanfrancisco/youths-seek-to-lower-voting-age-to-16-in-sf/Content?oid=2916012>.

¹⁸ See Press Release, Vote16USA, *Historic Measure Almost Passes: More than 172,000 Vote to Extend Voting Rights to 16-Year-Olds for Municipal Elections* (Nov. 28, 2016), <http://vote16usa.org/press-release-historic-measure-almost-passes-more-than-172000-vote-to-extend-voting-rights-to-16-year-olds-for-municipal-elections/>.

¹⁹ See *id.*

²⁰ See *Lower the Voting Age in Chicago*, CHANGE.ORG, <https://www.change.org/p/chicago-city-council-lower-the-voting-age-in-chicago-7eb9e713-a4f1-470f-812d-6c09f97492bf> [https://perma.cc/HX6Z-EYER] (last visited Mar. 26, 2017).

²¹ See Youth Vote Amendment Act of 2015, D.C. Council B21-0468 (2015), <http://lims.dccouncil.us/Download/34820/B21-0468-Introduction.pdf>.

²² See Aaron C. Davis, *16-Year-Olds in D.C. Could Vote for President in 2016, Under Proposal*, WASH. POST (Nov. 3, 2015), https://www.washingtonpost.com/local/dc-politics/16-year-olds-in-dc-could-vote-for-president-in-2016-under-proposal/2015/11/03/3175fede-825d-11e5-8ba6-ccc48b74b2a7_story.html.

²³ See Patrick Madden, *Unlikely Advocates Push to Give 16-Year-Olds A Vote—and a Voice*, NPR (Jan. 18, 2016, 3:54 PM), <http://www.npr.org/2016/01/18/463489043/unlikely-advocates-push-to-give-16-year-olds-a-vote-and-a-voice>.

²⁴ Elena Schneider, *Students in Maryland Test Civic Participation and Win Right to Vote*, N.Y. TIMES (Jan. 9, 2015), <http://www.nytimes.com/2015/01/10/us/politics/students-in-maryland-test-civic-participation-and-win-right-to-vote.html>.

²⁵ See Yamiche Alcindor, *Campaign to Lower Voting Age to 16 in Local Races Ignites a Debate*, N.Y. TIMES (Dec. 9, 2015), <http://www.nytimes.com/2015/12/10/us/politics/campaign-to-lower-voting-age-to-16-in-local-races-ignites-a-debate.html>.

advocacy groups, such as Generation Citizen, a nonpartisan organization that focuses on youth participation in politics and has begun an initiative called Vote16USA.²⁶

Strong policy arguments favor lowering the voting age.²⁷ First, turning sixteen has “special significance” in our society, as that is when most states allow individuals to obtain driver’s licenses and have part-time jobs, and require them to pay taxes on their wages.²⁸ Next, the National Youth Rights Association highlights the fairness aspect of lowering the voting age: prosecutors may charge adolescents as adults if they commit crimes, but younger individuals may not participate in our democracy in a more positive way through voting.²⁹ Additionally, turning eighteen (the current voting age in most places) is a volatile time in people’s lives, when they are leaving home for the workforce or college and are often mobile; sixteen-year-olds, by contrast, are more rooted in their current community, uniquely knowledgeable about local issues, and just as intellectually competent as an eighteen-year-old to select their leaders. Finally, studies show the potential for a “trickle up” effect: the younger a person begins to vote, the more likely they will sustain that habit throughout their lives.³⁰

Lowering the voting age would also help to achieve greater fairness in political representation. Young adults are underrepresented: they comprise a significant share of the population but have no political power until they are eighteen years old. As Professor Jane Rutherford has explained:

Currently, children are vastly underrepresented politically. Although they are counted for the purpose of determining the number of representatives and constitute twenty-six percent of an average congressional district, they cannot vote, nor can anyone else vote on their behalf. In this sense, they share the plight of women before the adoption of the Nineteenth Amendment. Their numbers swell the political power of their communities, but that political power is not shared by them.³¹

Sixteen-year-olds are mature enough—or at least as mature as individuals aged eighteen or older—to inform themselves sufficiently and make rational voting decisions. Professor Vivian E. Hamilton surveyed various fields, such as behavioral and developmental psychology and social and cognitive neuroscience, to show that

²⁶ See Generation Citizen, *Young Voices at the Ballot Box: Advancing Efforts to Lower the Voting Age*, <http://generationcitizen.org/wp-content/uploads/2016/03/GC-Voting-Age-Paper-2015-12-07-11.pdf> [https://perma.cc/ER52-6243] (last visited May 28, 2017). I am a member of the Vote16USA Advisory Board.

²⁷ See generally Joshua A. Douglas, *In Defense of Lowering the Voting Age*, 165 U. PA. L. REV. ONLINE 63 (2017), <http://www.pennlawreview.com/online/165-U-Pa-L-Rev-Online-63.pdf>.

²⁸ See *Lower the Voting Age*, FAIRVOTE, <http://www.fairvote.org/reforms/right-to-vote-amendment/lowering-the-voting-age/> (last visited Mar. 26, 2017). Although choosing any age might seem arbitrary, sixteen makes the most sense given that our society imposes various adult-like obligations at that age, such as obeying the driving laws and paying taxes on part-time wages. Psychological studies also support sixteen as the appropriate age to begin voting.

²⁹ See *Top Ten Reasons to Lower the Voting Age*, NAT’L YOUTH RTS. ASS’N, <http://youthrights.org/issues/voting-age/top-ten-reasons-to-lower-the-voting-age/> (last visited May 28, 2017).

³⁰ See, e.g., Yosef Bhatti & Kasper M. Hansen, *Leaving the Nest and the Social Act of Voting: Turnout Among First-Time Voters*, 22 J. ELECTIONS PUB. OPINION & PARTIES 380, 397 (2012), http://www.promoteourvote.com/uploads/9/2/2/7/9227685/leaving_the_nest_and_the_social_act_of_voting.pdf.

³¹ Jane Rutherford, *One Child, One Vote: Proxies for Parents*, 82 MINN. L. REV. 1463, 1465 (1998) (footnote omitted) (advocating not to lower the voting age but instead to give a child’s representative a proxy vote to increase children’s political influence).

individuals reach an adult-like capacity to make competent decisions such as voting by age sixteen.³² The studies conclude that the ability of young individuals to engage in well-informed and rational decisionmaking is highly context-specific: “adolescents reliably reach adultlike cognitive-processing capacities by ages fifteen or sixteen, but . . . numerous factors (e.g., situations involving high levels of emotion or stress, peer pressure, or time pressure) will predictably compromise their cognitive performance.”³³ Voting, however, is not a situation that typically entails unusual emotion, stress, or even peer pressure (given the secret ballot).³⁴ Voting instead requires civic engagement and knowledge. In a study using national survey data, researchers found that sixteen- and seventeen-year-olds scored about the same as adults on measures of political tolerance, skill, efficacy, and interest:

[C]ivic knowledge increases between ages 14 and 16 and then changes relatively little thereafter, although, 18-year-olds might be slightly higher in civic knowledge than are 16-year-olds. Most important . . . , 16-year-olds apparently know as much about the American political system as do many young adults; indeed, the average score for 16-year-olds is higher than the averages for civic knowledge for 19-, 21-, and 23-year-olds, all of whom are entitled to vote.³⁵

The study concludes that “[b]ased on . . . developmental trajectories . . . , there is little empirical reason to award the vote to 18-year-olds but to deny it to 16-year-olds.”³⁶ In another study of around one thousand adolescents, researchers found that “scores [of cognitive ability] increased between ages 11 and 16 and then leveled off, with no improvement after this age.”³⁷ Adolescents gain the cognitive capacity to begin civic participation by at least age sixteen, but the psychological studies do not support lowering the voting age to individuals younger than sixteen.

To those who think that sixteen-year-olds are too impulsive or immature to vote, or that their brains are not yet fully developed, psychologists note that there is a variation in cognitive capacity depending on the tasks adolescents are completing. Sixteen-year-olds may not be as developed as older individuals to avoid impulsive, rash judgments, but they are just as competent to make reasoned decisions like voting. As one psychology professor explains:

³² Vivian E. Hamilton, *Democratic Inclusion, Cognitive Development, and the Age of Electoral Majority*, 77 BROOK. L. REV. 1447 (2012).

³³ *Id.* at 1452; *see also id.* at 1449 (noting that “by midadolescence, when making unpressured, considered decisions—like those required to privately cast a ballot in an election that has unfolded over time—their cognitive competencies are mature.”).

³⁴ *Id.* at 1511–12 (“Elections unfold over a period of time, giving voters the opportunity to deliberate and evaluate options without undue pressure. Many sources of information are readily available over a period of time as well, which voters can use as a kind of scaffolding or heuristics to help them evaluate their choices—broadcast debates, endorsements of candidates, party affiliations, etc. Voting itself is done anonymously and in private, which diminishes the concern that adolescents’ choices will be unduly pressured or influenced by peers.”).

³⁵ Daniel Hart & Robert Atkins, *American Sixteen- and Seventeen-Year-Olds Are Ready to Vote*, 633 ANNALS AM. ACAD. POL. & SOC. SCI. 201, 207–08 (2011).

³⁶ *Id.* at 213.

³⁷ Laurence Steinberg et al., *Are Adolescents Less Mature than Adults?: Minors’ Access to Abortion, the Juvenile Death Penalty, and the Alleged APA “Flip-Flop,”* 64 AM. PSYCHOLOGIST 583, 592 (2009) (arguing for greater allowance for sixteen-year-olds to make their own health care decisions).

Adolescents' judgment in situations that permit measured decision-making and consultation with others—what psychologists call “cold cognition”—is just as mature as that of adults by 16....

... Cold cognition is relevant to matters such as voting.... Adolescents can gather evidence, consult with others and take time before making a decision. Adolescents may make bad choices, but statistically speaking, they won't make them any more often than adults.³⁸

Even if sixteen- and seventeen-year-olds are mature enough to vote, some may argue that their parents will place an undue influence on them, in essence giving the parents a second vote through their children. But the evidence refutes this objection. Leading up to the Scottish Independence vote in September 2014, a research study found that children aged sixteen and seventeen would not just copy their parents; just under half of them had opposing views and planned to vote differently from their parents.³⁹ Advocates for lowering the voting age also note that “undue influence” of husbands was an argument against women's suffrage, and yet wives obviously do not always follow their husbands at the ballot box.⁴⁰

Both sound policy and political theory strongly favor lowering the voting age. The key democratic ideal should be a desire to include as many people as possible in the electorate to improve democratic legitimacy. The mechanism by which we accomplish this voter expansion is extremely important. Local ordinances have begun the reform effort. Victories in small towns can have a “trickle across” and “trickle up” effect, moving to other cities and then states around the country. These municipal laws can serve as the catalyst for nationwide expansion of the right to vote.

B. NONCITIZEN VOTING

In most local elections in America, and in all federal elections, only U.S. citizens may vote.⁴¹ But that is not the rule for all local elections. Indeed, the U.S. Supreme Court has long recognized that “citizenship has not in all cases been made a condition precedent to the enjoyment of the right of suffrage. Thus, in Missouri, persons of foreign birth, who have declared their intention to become citizens of the United States, may under certain circumstances vote.”⁴² Indeed, “it appears to be settled doctrine that, so far as the federal Constitution is concerned, alien suffrage is entirely

³⁸ Laurence Steinberg, *A 16-Year-Old Is As Good as an 18-Year-Old—or a 40-Year-Old—at Voting*, L.A. TIMES (Nov. 3, 2014, 5:15 PM), <http://www.latimes.com/opinion/op-ed/la-oe-steinberg-lower-voting-age-20141104-story.html>; see also Joshua Gans, *Why It's Time to Give Children the Right to Vote*, FORBES (Apr. 20, 2012, 5:17 PM), <http://www.forbes.com/sites/joshuagans/2012/04/20/its-time-to-give-children-the-vote/>.

³⁹ See Emma Langman, *Scottish Independence: Research Finds Young Voters 'Don't Copy Parents'*, BBC NEWS (Mar 4, 2014), <http://www.bbc.com/news/uk-scotland-scotland-politics-26265299>; see also JAN EICHHORN, SCOTCEN SOC. RESEARCH, WILL 16 AND 17 YEAR OLDS MAKE A DIFFERENCE IN THE REFERENDUM? 12 (2013), http://www.scotcen.org.uk/media/205540/131129_will-16-and-17-years-olds-make-a-difference.pdf (“Overall, just 56% of young people propose to vote the same way as the parents who gave permission for them to be interviewed.”).

⁴⁰ See Carrie Kirby, *The Case for Letting Teens Vote in Local Elections*, CITYLAB (Oct. 6, 2015), <http://www.citylab.com/politics/2015/10/the-case-for-letting-teens-vote-in-local-elections/408853/>.

⁴¹ For a history of citizenship requirements for voting, see RON HAYDUK, DEMOCRACY FOR ALL: RESTORING IMMIGRANT VOTING RIGHTS IN THE UNITED STATES (2006).

⁴² *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 177 (1874).

discretionary—neither constitutionally compelled nor constitutionally forbidden.”⁴³ The history of voting rights shows an expansion, and then contraction, of the right to vote for noncitizens.⁴⁴ “[T]he United States has a long history of noncitizen voting,” at least until the 1920s, when xenophobia stemming from World War I reduced voting opportunities across the country for noncitizens.⁴⁵ Even though many people may equate voting with the privilege of citizenship, localities have expanded the right to vote for noncitizens.

Currently, only Takoma Park (which also lowered its voting age) and five other Maryland towns allow noncitizens to vote in all municipal elections.⁴⁶ The Takoma Park rule came about in 1992 after “a task force ‘started redrawing voting districts to match the 1990 census and noticed that many districts in the city of 15,000 had disproportionate shares of noncitizens.’”⁴⁷

Some large jurisdictions allow resident noncitizens to vote in certain elections where these individuals may have a particular interest, such as for the school board. Chicago, for instance, allows noncitizens to vote in school council elections, as did New York City from 1968 until 2002, when the city disbanded its elected school boards.⁴⁸ Two Massachusetts towns, Cambridge and Amherst, also have passed laws granting the right to vote to noncitizens, but these ordinances cannot go into effect unless the state legislature approves them.⁴⁹

Other jurisdictions are now debating whether to expand the voter rolls to include noncitizens. New York City already allows noncitizens to vote in its Participatory Budgeting elections, which help to direct the allocation of tax funds for specific projects.⁵⁰ The City is further considering an ordinance to allow noncitizens to vote in all elections, which would add up to 800,000 people to the voting rolls.⁵¹ The proposal, debated in 2013, would allow noncitizen legal residents who have lived in New York City for six months to vote in mayoral and city council elections.⁵² The sponsor of the bill argued that “it’s unfair to deny voting rights to law-abiding noncitizens who pay taxes: ‘They contribute to society but are ultimately disenfranchised because they

⁴³ Gerald L. Neuman, “*We Are the People*”: *Alien Suffrage in German and American Perspective*, 13 MICH. J. INT’L L. 259, 292 (1992).

⁴⁴ See HAYDUK, *supra* note 41, at 4.

⁴⁵ See Virginia Harper-Ho, *Noncitizen Voting Rights: The History, the Law and Current Prospects for Change*, 18 LAW & INEQ. 271, 271, 282 (2000) (advocating for the expansion of voting rights for resident aliens in local elections); see also *id.* at 273 (“During the nineteenth century, at least twenty-two states and territories gave voting rights to aliens.” (citing Leon E. Aylsworth, *The Passing of Alien Suffrage*, 25 AM. POL. SCI. REV. 114, 114–16 (1931))).

⁴⁶ TAKOMA PARK, MD., MUN. CODE art. VI, § 601(a) (2016) (requiring voters to be “residents” of Takoma Park); see Tara Kini, Comment, *Sharing the Vote: Noncitizen Voting Rights in Local School Board Elections*, 93 CAL. L. REV. 271, 296 (2005).

⁴⁷ Harper-Ho, *supra* note 45, at 311 (quoting *Takoma Park Asks Whether to Give Non-Citizens a Say*, BALT. SUN, Oct. 27, 1991, at 5B).

⁴⁸ Kini, *supra* note 46, at 271 n.1.

⁴⁹ *Id.*; cf. *infra* Section III.B.

⁵⁰ See NEW YORK CITY COUNCIL, PARTICIPATORY BUDGETING RULEBOOK 9 (2016), http://labs.council.nyc/wp-content/uploads/2016/05/PBNYC-2016_2017-Rulebook.pdf; *Participatory Budgeting*, NEW YORK CITY COUNCIL, <http://pbnyc.org/> (last visited May 28, 2017).

⁵¹ See Aliyah Frumin, *NYC Lawmakers Consider Allowing Non-Citizen Immigrants to Vote*, MSNBC (May 13, 2013, 8:47 AM), <http://www.msnbc.com/hardball/nyc-lawmakers-consider-allowing-non-citizen-i>.

⁵² See Erin Durkin, *Council Weighs Bill to Give Noncitizen Immigrants Voting Rights*, N.Y. DAILY NEWS (May 9, 2013, 9:44 PM), <http://www.nydailynews.com/news/politics/council-weighs-bill-give-noncitizen-immigrants-voting-rights-article-1.1340007>.

cannot vote.”⁵³ Although thirty-one of the fifty-one New York City Council Members supported the ordinance, Mayor Michael Bloomberg opposed it, and the Speaker of the Council blocked a final vote on the law.⁵⁴ The measure could come before the City Council again, especially as Mayor Bill de Blasio might support the idea.⁵⁵ These examples show that the debate on noncitizen voting is occurring around America,⁵⁶ as well as internationally, such as in Toronto, Vancouver, and various European countries.⁵⁷

Both theoretical and practical reasons support the expansion of voting rights to noncitizens. As Professor and now Congressman Jamie Raskin has explained, “the disenfranchisement of aliens at the local level is vulnerable to deep theoretical objections since resident aliens—who are governed, taxed, and often drafted just like citizens—have a strong democratic claim to being considered members, indeed citizens, of their local communities.”⁵⁸ Put another way, “[a]s a practical matter, noncitizens do not have political power because they do not have the right to vote; inherent in this lack of voting power is an absence of electoral power.”⁵⁹ Under a prevailing theory of democracy, the government is legitimate only by the consent of the governed, which includes noncitizens who must follow the law; those with equal responsibilities in society should have an equal right to vote.⁶⁰ Moreover, local residents—whether they are citizens or not—care about, and should have a say in, local affairs. Allowing them to vote facilitates greater participation in the community, which may encourage these voters to become citizens.⁶¹ Expanding noncitizen voting could affect more than ten million legal noncitizen residents in the United States.⁶²

From a theoretical standpoint, local jurisdictions should espouse and implement a broad theory of democracy. Lawful permanent residents have a stake in the governance of their local communities. At a minimum, noncitizens have a particular interest in school board elections, as they legally send their children to public school. But beyond the substance of this policy recommendation, the location of the debate is also important:

⁵³ *Id.*

⁵⁴ See John Fund, *Will New York City Give Non-Citizens the Right to Vote?*, NAT'L REV. (Apr. 6, 2015, 9:40 AM), <http://www.nationalreview.com/corner/416495/will-new-york-city-give-non-citizens-right-vote-john-fund>.

⁵⁵ See *id.*

⁵⁶ See *Around the U.S., I VOTE*, http://www.ivotenyc.org/?page_id=473 [https://perma.cc/VV6C-3VWH] (last visited May 28, 2017) (providing summary of the debate in various states).

⁵⁷ See Ayelet Shachar, *Earned Citizenship: Property Lessons for Immigration Reform*, 23 YALE J.L. & HUMAN. 110, 130 n.91 (2011).

⁵⁸ Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1394 (1993).

⁵⁹ Harper-Ho, *supra* note 45, at 310–11.

⁶⁰ See *id.* at 295–98; see also Bryant Yuan Fu Yang, Note, *Fighting for an Equal Voice: Past and Present Struggle for Noncitizen Enfranchisement*, 13 ASIAN AM. L.J. 57, 58 (2006) (advocating for noncitizen voting rights “to promote assimilation, to grant equity, to protect their civil rights, and to provide a viable solution to educational inequities within public schools”).

⁶¹ Kini, *supra* note 46, at 272 (“Noncitizen voting in local elections promotes civic participation and citizenship because it gives noncitizens a stake in their communities and a sense that they can make a difference. Exposure to the benefits of civic participation at the local level encourages noncitizens to naturalize so that they can then also participate in state and federal elections.”). See generally Kathleen Coll, *Citizenship Acts and Immigrant Voting Rights Movements in the US*, 15 CITIZENSHIP STUD. 993 (2011), <https://www.usfca.edu/sites/default/files/pdfs/faculty/pub-coll-2011citizenshipstudies.pdf> (highlighting the impact of enfranchising noncitizens in local elections on “notions of national belonging”).

⁶² See Harper-Ho, *supra* note 45, at 284.

this discussion is occurring—and should continue to occur—at the local level. Municipal laws have driven the movement to expand the franchise to noncitizens.⁶³

C. NONRESIDENT VOTING

Various jurisdictions, such as vacation towns, allow nonresident property owners to vote. Eleven states have statutes explicitly permitting nonresidents to vote in local elections if the local jurisdictions so choose.⁶⁴ For instance, in Jefferson County, Tennessee, nonresident property owners who register their property with the local election office may vote in the city's elections.⁶⁵

Delaware's rule is particularly franchise-enhancing. The state's statute provides that if a municipality allows nonresidents to vote, then the municipality may not amend its charter to take that right to vote away.⁶⁶ In essence, the Delaware law is a one-way ratchet: jurisdictions may expand, but not restrict, voting rights in local elections for nonresidents.

The rationale for these rules is to give those who own property a say in the policies that may affect their investment, even if the owners do not live in the town full-time. For instance, the Town of Mountain Village, Colorado, explicitly justified in its town charter its decision to allow nonresident property owners to vote:

1. Like many resorts, the nature of the economy and the life-style of the people of the Town are, and will in the future remain, unusual. Furthermore, the fact that many of the Town's present and future residential and commercial property owners maintain their primary residences outside of the Town, making them part-time second-home non-residents, is also unusual. Although these facts are not substantially different from most resort towns, they are very unusual for conventional small as well as large towns.
2. The framers of this Charter took cognizance of the above-mentioned singular state of affairs, most especially the fact that a large number of the property owners of the Town are, and will continue to be, only part-time residents of their Town by granting to them the right to vote on those issues that are strictly limited in nature to Town matters.⁶⁷

⁶³ See Raskin, *supra* note 58, at 1396–97 (“If the democratic argument for alien suffrage in our history can be recaptured and reconstructed, it is possible that Takoma Park will become an early precedent for grass-roots constitutional politics in the twenty-first century.”).

⁶⁴ See *Voting by Nonresidents and Noncitizens*, NAT'L CONF. ST. LEGISLATURES (Feb. 27, 2015), <http://www.ncsl.org/research/elections-and-campaigns/non-resident-and-non-citizen-voting.aspx>. These states are Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Nebraska, New Mexico, Oregon, Tennessee, and Wyoming. See *id.* (citing statutes). The National Conference of State Legislatures also lists Montana as allowing local jurisdictions to pass nonresident voting ordinances, but the Montana legislature repealed that provision in 2015. See MONT. CODE ANN. § 7-13-2255 (2015).

⁶⁵ See, e.g., *Non-Resident Property Rights Voting*, JEFFERSON COUNTY, TENN., <http://www.jeffersoncountyttn.gov/government/election-commission/non-resident-property-rights-voting/> [https://perma.cc/4JHJ-6PL9] (last visited May 28, 2017).

⁶⁶ DEL. CODE ANN. tit. 22, § 835(b) (2011) (“No municipal corporation charter which permits non-resident persons to vote in any municipal election or to hold any municipal office shall be amended, pursuant to this chapter, so as to eliminate or limit the right of nonresident persons to vote or hold office, nor shall the percentage of nonresident officials allowed or required be changed.”); see also *Nonresident Property Owners and Voting in Local Elections: A Paradigm Shift?*, CANVASS: STATES & ELECTION REFORM, Oct. 2008, at 1–2, http://www.ncsl.org/Portals/1/documents/legismgt/elect/Canvass_Vol5A.pdf.

⁶⁷ May v. Town of Mountain Vill., 132 F.3d 576, 579 (10th Cir. 1997) (quoting Section 1.4(b) of the town's charter).

In a challenge to the Mountain Village charter under the Federal Equal Protection Clause, the Tenth Circuit held that because the rule was franchise-expanding instead of franchise-restricting, rational basis review applied.⁶⁸ Under that standard, the Town had a reasonable justification for allowing nonresident property owners to vote: they “have a sufficient interest in Town affairs.”⁶⁹ Similarly, a Colorado state court ruled that although the Town could not enact a rule that is more restrictive than the state constitution’s voter qualification requirements, it could expand voting rules to enfranchise more people for local elections.⁷⁰

Nonresident property owners also have become involved in the political discussion in their communities. For instance, some nonresidents have won seats on the local city council in Rehoboth Beach, Delaware.⁷¹ Indeed, nonresidents have substantial influence in Rehoboth Beach given that they make up about three-fourths of all property owners.⁷²

Yet nonresident property owners likely cannot force a jurisdiction to allow them to vote; a state may validly impose a “single domicile” rule to require voters to choose between voting in their place of domicile or their vacation home.⁷³

In sum, nonresident property owners have enjoyed expansion of the right to vote in jurisdictions where the municipality has determined that they have a particular stake in the local elections.⁷⁴ In this way, local laws play a significant role in dictating the size and scope of the electorate.

II. POLICY IMPLICATIONS OF EXPANDING VOTING RIGHTS FOR LOCAL ELECTIONS

Debate on local voting rights is nascent yet robust. More and more jurisdictions are contemplating whether to expand the franchise or otherwise alter the rules for local

⁶⁸ *Id.* at 580 (“Of critical importance to any decision here is the fact that Section 2.4(b) of the Town Charter does not restrict the right to vote—it expands it to include nonresidents owning real property in the Town.”).

⁶⁹ *Id.* at 582; *see also* *Glisson v. Mayor & Councilmen of Savannah Beach*, 346 F.2d 135, 137 (5th Cir. 1965) (“It is apparent from the face of this legislation that there could be a logical and sensible reason for permitting non-residents owning property in the municipality to vote in the municipal elections on an equal basis with resident persons whether or not they are property owners. The nexus between the two is that each of them obviously has an interest in the operation of the city government.”).

⁷⁰ *May v. Town of Mountain Vill.*, 969 P.2d 790, 795–96 (Colo. App. 1998). It is unclear, however, how a court might construe a local ordinance that grants multiple votes for individuals who own multiple properties in the locality; granting people additional votes could, in theory, violate the “one person, one vote” principle of *Reynolds v. Sims*, 377 U.S. 533 (1964), because some people will have a greater say than others. There might also be a vote dilution concern with respect to resident voters who do not own property.

⁷¹ *See* Lisa A. Phillips, *The Principle of 2nd Home, 2nd Vote*, N.Y. TIMES (June 22, 2007), <http://www.nytimes.com/2007/06/22/realestate/greathomes/22politics.html>.

⁷² *Id.* Nonresident political activity also encompasses more than just voting: “For Rehoboth Beach’s concerned part-timers, involvement often goes beyond the voting booth. Some say they routinely stretch their weekends to attend Monday night meetings of the board of commissioners, the city’s governing body.” *Id.*

⁷³ *See, e.g.,* *Wit v. Berman*, 306 F.3d 1256, 1260, 1263 (2d Cir. 2002) (upholding New York Election Law that forbids individuals from voting in multiple locations against challenge from voters who own vacation homes). *But see* Ashira Pelman Ostrow, Note, *Dual Resident Voting: Traditional Disenfranchisement and Prospects for Change*, 102 COLUM. L. REV. 1954, 1958 (2002) (arguing that “excluding dual residents from voting in a second-home community simply because they are also registered to vote in another community violates the Equal Protection Clause”).

⁷⁴ As an international analogy, some countries allow nonresident citizens who live in a different country to vote in the homeland’s elections. *See* Caroline Carter, Note, *The Right to Vote for Non-Resident Citizens: Considered Through the Example of East Timor*, 46 TEX. INT’L L.J. 655, 671 (2011).

elections.⁷⁵ Localities should expand voting rights because doing so will include more people in the process, create a habit of voting (especially for younger voters), make government more responsive to local constituencies, and enhance the legitimacy of the winners. If there are explicit state constitutional or legislative hurdles to local control of elections, then states should reform their laws. Courts, when faced with a challenge to a local rule expanding the franchise, should defer to the local ordinance with a presumption of validity if there is any room under state law to allow the voter expansion.

A. BENEFITS OF EXPANDING THE ELECTORATE

Localities should reform their rules on the right to vote by broadening the electorate. In particular, cities and towns should enact ordinances that affirm the importance of voting and expand voter access. As Alexis de Tocqueville once said, “local assemblies of citizens constitute the strength of free nations.... A nation may establish a system of free government, but without the spirit of municipal institutions it cannot have the spirit of liberty.”⁷⁶

Political inclusiveness is inherently desirable to increase the legitimacy of elected officials.⁷⁷ A common theory of democracy is that the people subject to a government and its laws must collectively consent to societal rules through elections.⁷⁸ Increased participation will help to make elected officials more responsive to the local population. As a general rule, then, greater participation is good for democratic legitimacy.

People are closest to their local representatives.⁷⁹ If democratic legitimacy stems from enjoying the consent of the governed, then the “governed” should include as many competent people as possible who have a stake in governmental affairs. Local governments pass many laws that have real world effects every day. Individuals often are actively involved in their community debates; democracy flourishes the most at the local level. Broadening the right to vote in local elections is thus paramount to achieving a well-functioning democracy.

⁷⁵ See Joshua A. Douglas, *Local Democracy on the Ballot*, 111 NW. U. L. REV. ONLINE 173, 178–84 (2017), <http://northwesternlawreview.org/online/local-democracy-ballot>.

⁷⁶ 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 60 (Henry Reeve trans., Colonial Press 1899).

⁷⁷ See John Payton, *Democracy and Diversity*, 35 PEPP. L. REV. 569, 572, 581–82 (2008); cf. Grutter v. Bollinger, 539 U.S. 306, 332 (2003) (“Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.”).

⁷⁸ See, e.g., DAVID M. ESTLUND, *DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK* 66 (2008) (“Democracy, the authorization of laws collectively by the people who are subject to them, is inseparable from voting.”); see also Hamilton, *supra* note 32, at 1476 (“A typical account of democracy provides that, *in order for a political system to qualify as democratic, the people subject to its laws must collectively authorize them*. A democratic government thus derives its authority from the ‘the people’ who are the individual members of the political community.” (footnote omitted)).

⁷⁹ As Professor Heather Gerken has described, our political system is highly decentralized, with important governmental units that are even smaller than cities or towns. Thus, she argues, recognizing “federalism-all-the-way-down” would include an inquiry into the processes of special-purpose governmental units. See Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 22 (2010). Considering “federalism-all-the-way-down” provides further support for expanding voting rights for the smallest governmental units that hold elections.

Localities should expand the right to vote by adopting a theory of democracy that favors inclusiveness.⁸⁰ Crafting a local right-to-vote ordinance will force communities to delineate who has a stake in local governance. This action will make local governments more responsive to all of their constituents and better expositors of local democracy.

B. LOCAL JURISDICTIONS AS “TEST TUBES OF DEMOCRACY”

Over eighty years ago, Justice Louis Brandeis famously referred to the states as “laboratories of democracy” that can experiment with different laws to see what works best. “[A] single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”⁸¹ Yet although we have fifty states—fifty laboratories—we also have tens of thousands of cities and towns that also make laws that affect their citizens.⁸² Each of these municipalities also could enact local laws to “try novel social and economic experiments,”⁸³ such as on the right to vote. If states are laboratories of democracy, then municipalities are, in essence, “test tubes of democracy,” experimenting with democratic processes on an even smaller scale.⁸⁴

The prevailing notion of voting rights law is that “eligibility to vote is defined in the first instance by state law, although the contours of that state law are subject to a series of overriding federal constraints.”⁸⁵ But local government law may also play a role. Municipalities can expand voting rights in local elections if there are no explicit state constitutional or legislative impediments and so long as local jurisdictions have the power of home rule.⁸⁶ We must recognize the importance of local laws in defining and shaping the electorate, at least for municipal elections. Moreover, these local rules can have a nationwide impact as they spread throughout the country.

⁸⁰ Cf. *Holder v. Hall*, 512 U.S. 874, 897 (1994) (Thomas, J., concurring in the judgment) (“The choice [between governmental structures] is inherently a political one, and depends upon the selection of a theory for defining the fully ‘effective’ vote—at bottom, a theory for defining effective participation in representative government. In short, what a court is actually asked to do in a vote dilution case is ‘to choose among competing bases of representation—ultimately, really, among competing theories of political philosophy.’” (quoting *Baker v. Carr*, 369 U.S. 186, 300 (1962) (Frankfurter, J., dissenting))).

⁸¹ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

⁸² See Richard Briffault, *Home Rule and Local Political Innovation*, 22 J.L. & POL. 1, 31 (2006) [hereinafter Briffault, *Home Rule*] (“[I]f the fifty states are laboratories for public policy formation, then surely the 3,000 counties and 15,000 municipalities provide logarithmically more opportunities for innovation, experimentation and reform. Thousands of local governments provide thousands of arenas for innovation and for testing the costs and benefits of those innovations.”); Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 346 (1990) (“There are more than 82,000 local governments in the United States....”).

⁸³ *New State Ice Co.*, 285 U.S. at 311 (Brandeis, J., dissenting).

⁸⁴ See, e.g., Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1114 (2007) (“In the sheer number of laboratories offered, local governments dwarf the mere 50 states: there are 15,000 municipalities and 3,000 counties, as well as 35,000 special-purpose districts.” (footnotes omitted)); Robert C. Holmes, *The Clash of Home Rule and Affordable Housing: The Mount Laurel Story Continues*, 12 CONN. PUB. INT. L.J. 325, 332 (2013) (“Local self-government also promotes policy innovation and experimentation. Similar to federalism’s facilitation of state-level innovation, local autonomy permits local governments to serve as ‘laboratories of democracy’ and ‘to try novel social and economic experiments without risk to the rest of the country.’” (quoting *New State Ice Co.*, 285 U.S. at 311 (1932) (Brandeis, J., dissenting))).

⁸⁵ Pamela S. Karlan, *Framing the Voting Rights Claims of Cognitively Impaired Individuals*, 38 MCGEORGE L. REV. 917, 919 (2007).

⁸⁶ I discuss these potential legal impediments in the full article off of which this Issue Brief is based. See Joshua A. Douglas, *The Right to Vote Under Local Law*, 85 GEO. WASH. L. REV. 1039 (2017).

Local laws are easier to pass than state or federal legislation. Local ordinances typically are more “streamlined,” meaning that “there is a greater possibility that more single-issue laws overall will be passed via local governments than by higher levels of government.”⁸⁷ As the Utah Supreme Court has recognized,

the history of our political institutions is founded in large measure on the concept—at least in theory if not in practice—that the more local the unit of government is that can deal with a political problem, the more effective and efficient the exercise of power is likely to be.⁸⁸

Local governments are more effective because they are closer to their constituents.⁸⁹ Moreover, localities often elect their officials in “nonpartisan” elections, which might temper the partisanship that infiltrates state and federal lawmaking.⁹⁰ In essence, passing a right-to-vote ordinance at the local level is easier than through a statewide or federal constitutional amendment or statutory change.

Local laws can spread throughout the country once other jurisdictions see the new rules working well.⁹¹ Social movements may begin after one locality adopts a reform to great success, causing other municipalities to emulate the first mover. Justice Brandeis’s invocation of the “laboratories of democracy” metaphor posits that states will adopt the best ideas tested initially in one courageous state.⁹² Yet cities and towns may be even more important in being the first movers, particularly for social issues.⁹³ As Professor Diller explains:

City policy experimentation is a catalyst for change at the state and national levels. From gay rights to the environment to public health, cities and other forms of local government are adopting new and innovative policies in the wake of inaction by the higher levels of government.

⁸⁷ See Kellen Zale, *Urban Development Legislation for Cities, by Cities*, 67 ME. L. REV. 266, 267 (2015).

⁸⁸ State v. Hutchinson, 624 P.2d 1116, 1121 (Utah 1980).

⁸⁹ See Michael M. O’Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 860 (2004) (“Individual citizen voice grows as the size of the electorate shrinks; ... if fifty state-level ‘laboratories of democracy’ are good, then the tens of thousands of laboratories provided by local government might be even better.”).

⁹⁰ See Karen I. Chang, Note, *The Party’s Over: Establishing Nonpartisan Municipal Elections in New York City*, 11 J.L. & POL’Y 579, 579 (2003) (“Today, a majority of the nation’s cities utilize nonpartisan elections, and sixty of the seventy-five largest U.S. cities have elected their mayors in nonpartisan elections.” (footnote omitted)); Nancy Northup, Note, *Local Nonpartisan Elections, Political Parties and the First Amendment*, 87 COLUM. L. REV. 1677, 1677 (1987) (“Most local elections in America are nonpartisan.”). Of course, local consideration of election rules could lead to an increase in the partisanship of local elections.

⁹¹ See Briffault, *Home Rule*, *supra* note 82, at 32 (noting that local experimentation entails few external costs but many external benefits in “providing new information about the consequences of particular innovations”); *see also supra* Part I.

⁹² See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Justice O’Connor, in discussing the women’s suffrage movement and the fact that Wyoming was the first state to allow women to vote when it became a state in 1890, noted that, “Courts and commentators frequently have recognized that the 50 States serve as laboratories for the development of new social, economic, and political ideas.” *FERC v. Mississippi*, 456 U.S. 742, 788 (1982) (O’Connor, J., concurring in the judgment in part and dissenting in part).

⁹³ See, e.g., *Sims v. Besaw’s Café*, 997 P.2d 201, 213 n.3 (Or. Ct. App. 2000) (en banc) (noting that “municipalities tend to be the proving grounds—in terms of both need and public acceptance—for nondiscrimination policies that later are adopted at state and national levels”).

....

Cities have increasingly led in enacting new policies in a wide variety of areas, including living-wage laws, workers' rights, global warming reduction, public financing of campaigns, trans fats regulation, affordable housing, universal health care, environmental protection, gay rights, and smoking prevention.⁹⁴

Municipalities were the first governmental entities to pass laws on these significant social issues, which then eventually spread to other cities and states:

These examples illustrate a widespread pattern of policy innovation: a policy first embraced by a city proves itself manageable and popular at the local level before percolating "out" to other cities and "up" to the state level. Without the possibility of city experimentation, these policies might have never been embraced by other jurisdictions.⁹⁵

The movement for expanded voting rights also can begin at the local level and radiate out to other cities and then states in a "trickle across" and "trickle up" mechanism. For instance, many Americans disagree with existing policies that disenfranchise felons who have completed their sentences.⁹⁶ Advocates could look to local jurisdictions to reform the law. Successes at the local level, with felons voting in municipal elections without any issues, will then arm supporters with better evidence on the positive aspects of felon re-enfranchisement and will help to bolster democratic representation.⁹⁷ Smaller victories at the municipal level can breed broader wins city by city and state by state. As advocates for a Municipal Right to Vote ordinance explain:

Municipal reform is often overlooked, but it can be one of the most efficient and potent methods of fostering political change. The Municipal Right to Vote Initiative seeks to have cities call for a constitutional right to vote and to pledge to enact ordinances and charter changes in the spirit of that proposed amendment, thereby

⁹⁴ Diller, *supra* note 84, at 1113–14, 1117–18 (footnotes omitted) (arguing for state courts to adopt a theory of "intrastate preemption that facilitates good-faith policy experimentation by cities, while discouraging parochial and exclusionary municipal action").

⁹⁵ *Id.* at 1119.

⁹⁶ See John Ghaelian, *Restoring the Vote: Former Felons, International Law, and the Eighth Amendment*, 40 HASTINGS CONST. L.Q. 757, 780 (2013) ("Public opinion polling conducted on the matter also demonstrates a national consensus against felon disenfranchisement."); Jeff Manza et al., *Public Attitudes Toward Felon Disenfranchisement in the United States*, 68 PUB. OPINION Q. 275, 280–81 (2004), http://as.nyu.edu/docs/IO/3858/Public_Attitudes_Towards_Felon_Disenfranchisement_Laws_in_the_US.pdf; Matt Ferner, *Americans Don't Think Ex-Offenders Should Lose Their Right to Vote*, HUFFINGTON POST (Apr. 26, 2016, 6:41 PM), http://www.huffingtonpost.com/entry/ex-convict-voting-rights_us_571fb9d5e4b0b49df6a95746.

⁹⁷ See Lynn Eisenberg, Note, *States as Laboratories for Federal Reform: Case Studies in Felon Disenfranchisement Law*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 539, 576 (2012) (noting that "the 'laboratories of democracy' approach can and has applied to the expansion of voting rights," including through the repeal of felon disenfranchisement rules).

building both political support for an amendment and showcasing what it would mean for protecting and expanding suffrage.⁹⁸

Municipalities should pass an ordinance on voting rights that expands the electorate for local elections to those who have a direct, personal stake in the outcome.

Of course, local political actors could alter voting rules to entrench themselves in power, which is a more concerning use of local voting rights.⁹⁹ Local politicians could enact ordinances that reduce voting opportunities or exclude certain groups of voters. Yet the fact that the federal and state constitutions provide a baseline for voting rights protection tempers that concern. A local jurisdiction cannot deny the right to vote to anyone who is a citizen of the United States, a resident of the state and locality, at least eighteen years old, and not mentally incompetent.¹⁰⁰ In addition, under the U.S. Constitution, municipalities may not discriminate on the basis of sex, race, or other protected characteristics,¹⁰¹ and local jurisdictions also may not limit the electorate by espousing a narrow view of who they believe has an actual stake in the outcome.¹⁰² Federal and state statutes also prevent discrimination in voting.¹⁰³ Thus, if legislating directly on *who* may vote, local jurisdictions can go nowhere besides up, expanding voter access.

With greater attention to voting rules, however, municipalities also could enact indirect measures to restrict voting. Jurisdictions could, for example, legislate on where to place precincts, reduce the number of machines at certain polling sites, or make redistricting decisions that effectively exclude some people from the relevant jurisdiction.¹⁰⁴ Although not about voter qualifications per se, these rules could effectively hamper the right to vote for some people. In fact, in the wake of the Supreme Court's decision in *Shelby County v. Holder*¹⁰⁵ invalidating a provision of the Voting Rights Act, many (typically Republican-controlled) jurisdictions have passed laws that have

⁹⁸ Usman Ahmed et al., *A Municipal Right to Vote*, NAT'L CIVIC REV., Summer 2008, at 52, 52, http://deepblue.lib.umich.edu/bitstream/handle/2027.42/60453/215_ftp.pdf?sequence=1.

⁹⁹ See Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 647 (1998); David Schleicher, *The Boundary Problem and the Changing Case Against Deference in Election Law Cases: Lessons from Local Government Law*, 15 ELECTION L.J. 247, 247 (2016).

¹⁰⁰ See U.S. CONST. amend. XIV, § 2; Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 101–05 (2014) (highlighting state constitutional rules for voter eligibility); see also Michael T. Morley, *Remedial Equilibration and the Right to Vote Under Section 2 of the Fourteenth Amendment*, 2015 U. CHI. LEGAL F. 279, 283 (pointing to Section 2 of the Fourteenth Amendment as delineating the scope of the constitutional protection for the right to vote); Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 WASH. L. REV. 379, 384–85 (2014) (arguing for an expansive understanding of Congress's authority to regulate the right to vote under the Fourteenth Amendment).

¹⁰¹ See Douglas, *supra* note 100 at 151.

¹⁰² *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 629, 632 (1969).

¹⁰³ See, e.g., 52 U.S.C. § 10301 (2012) (Federal Voting Rights Act); CAL. ELEC. CODE §§ 14025–14032 (West 2003) (California Voting Rights Act).

¹⁰⁴ See, e.g., *Arizona Democrats Say Cost-Saving Resulted in Voter Suppression*, WTKR (March 23, 2016, 3:11 PM), <http://wtkr.com/2016/03/23/arizona-democrats-say-cost-saving-resulted-in-voter-suppression/> (“Liberal activists are demanding an investigation into what they see as possible voter suppression as a result of Maricopa County officials' decision to reduce the number of polling stations as a cost-saving measure.”).

¹⁰⁵ 133 S. Ct. 2612 (2013).

the goal, or at least effect, of disenfranchising minority voters.¹⁰⁶ For this reason, courts should train a more skeptical eye on measures that *restrict* the right to vote. From a normative perspective, we should encourage more, not less, voter participation as a means of creating a better functioning and more representative democracy. The more people who participate, the more likely the winning candidate actually will reflect the desires of the majority of the population, thereby improving the representative's legitimacy. Thus, enfranchising additional people should not come with a license to pass laws that restrict voting rights. In contrast, jurisdictions should freely experiment with laws that *expand* voter access in a nondiscriminatory way. That is, measures that expand the right to vote are qualitatively different from rules that (directly or indirectly) restrict democratic participation, so local governing bodies and courts should treat the two kinds of measures differently.

Of course, states that oppose these local voter expansions could pass state laws that expressly preempt local action.¹⁰⁷ But states should not do so for all of the policy reasons discussed above: municipalities should have the power to dictate the scope of their own governmental structures and electorate, and localities should experiment and innovate with their voting rules. If a state legislature insists on preempting local voting laws, however, then the solution is to elect different state representatives who will support local democracy.

CONCLUSION

Strong policy arguments support an expansion of the right to vote for local offices. History shows that some individuals initially gained the right to vote through municipal ordinances. Enhanced local voting rights will produce a more representative local government, create a habit of voting for various groups such as younger voters that will ameliorate low turnout, and strengthen local democracy.

In some states, supporters of local voting rules must pass a state constitutional amendment or legislative fix. These states should change their laws to give municipalities a say in who can vote for local offices. In states where municipalities already have more control over their elections, any new voting rules may result in legal challenges. Courts should defer to local laws that expand the franchise, while training a more skeptical eye on voter restrictions. This deference best comports with a notion of democracy that favors inclusivity and permits local jurisdictions to experiment with different forms of representation.

The time is ripe, then, for every jurisdiction in the United States to expand the local electorate—for sixteen- and seventeen-year-olds, noncitizens (who are lawful permanent residents), nonresident property owners, felons, or anyone else that the local population believes has a sufficient tie to the community, stake in local governance, and cognitive ability. Local expansions of the right to vote will help to improve our democracy by including more people in the democratic process.

¹⁰⁶ See Harry Baumgarten & Jacob Zionce, *Shelby County v. Holder's Biggest and Most Harmful Impact May Be on Our Nation's Smallest Towns*, CAMPAIGN LEGAL CTR. (June 20, 2016), <http://www.campaignlegalcenter.org/news/blog/shelby-county-v-holder-s-biggest-and-most-harmful-impact-may-be-our-nation-s-smallest>; *Democracy Diminished: State and Local Threats to Voting Post-Shelby County*, Alabama v. Holder, NAACP LEGAL DEF. & EDUC. FUND (June 9, 2016), <http://www.naacpldf.org/publication/democracy-diminished-state-and-local-threats-voting-post-shelby-county-alabama-v-holder>.

¹⁰⁷ See Richard Briffault, et al., *The Troubling Turn in State Preemption: The Assault on Progressive Cities and How Cities Can Respond*, ACS ISSUE BRIEF (Sept. 28, 2017), <https://acslaw.org/preemption>.

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Sex Discrimination Law and LGBT Equality*

Katie R. Eyer

Federal law offers a host of protections against discrimination on the basis of sex. Title VII of the Civil Rights Act of 1964 proscribes sex discrimination in employment. The Fair Housing Act prohibits sex discrimination in housing. Title IX prohibits sex discrimination in education by institutions that receive federal funds. And the Constitution proscribes sex discrimination unless the government has “an exceedingly persuasive justification.”¹

In implementing these laws, the courts have arrived at a number of common-sense principles (i.e., doctrines) for how they should be applied:

- It is sex discrimination for a decision-maker to take the sex or gender of the victim “into account” when taking an adverse action against them.²
- It is sex discrimination if, but for the sex of the victim, they would not have experienced discrimination.³
- Sex discrimination includes gender discrimination, i.e., discrimination targeting an individual because they don’t comport with the decision-maker’s view of how persons of a particular sex should act, behave, or think.⁴

As set out below, the logic of these well-established doctrines (as well as others) compels the conclusion that sexual orientation and gender identity discrimination are, necessarily, also sex discrimination. Nevertheless, courts historically refused to extend

* This Issue Brief was initially published in August 2017. For other ACS Issue Briefs that touch on related issues, see Katie Eyer, *Protecting Lesbian Gay Bisexual and Transgender (LGBT) Workers: Strategies for Bringing Employment Claims on Behalf of Members of the LGBT Community in the Absence of Clear Statutory Protections* (2006), https://www.acslaw.org/sites/default/files/Eyer_on_Protecting_LGBT_Workers--FINAL_0.pdf; Maxine Eichner, *The Employment Non-Discrimination Act: Requiring Fairness for All Employees Regardless of Sexual Orientation or Gender Identity* (2010), <https://www.acslaw.org/files/ENDAbrief9-2-2010.pdf>; Dr. Jillian T. Weiss, *The Transgender Tipping Point: An Overview for the Advocate* (2014), https://www.acslaw.org/sites/default/files/Weiss_-_The_Transgender_Tipping_Point.pdf. In addition, this author has a recent book chapter that describes narrower (non-per se) arguments that can be made for coverage of LGBT employment discrimination plaintiffs under federal and state anti-discrimination law. See Katie Eyer, *Lesbian, Gay, Bisexual and Transgender Employees*, in REPRESENTING LESBIAN, GAY, BISEXUAL AND TRANSGENDER CLIENTS (Kirby G. Upright & Tiffany L. Palmer eds., 3d ed. 2016) [hereinafter Eyer, *Lesbian, Gay, Bisexual and Transgender Employees*], <https://ssrn.com/abstract=2674612>.

¹ United States v. Virginia, 518 U.S. 515, 531 (1996). This list is not exhaustive. One could also add, for example, the Equal Credit Opportunity Act, The Affordable Care Act, and the Equal Pay Act. Many states and localities also have laws prohibiting sex discrimination. Note that while the remainder of this Issue Brief focuses on statutory analysis (instead of constitutional arguments), many of the same doctrinal arguments could be made vis-à-vis the application of the constitution’s sex discrimination protections to anti-LGBT discrimination. If such discrimination were treated as sex discrimination under the constitution, intermediate scrutiny would apply (rather than the lowest level of review, rational basis review, which is currently what most courts apply to anti-LGBT discrimination).

² See, e.g., Price Waterhouse v. Hopkins, 490 U.S. 228, 239–40 (1989).

³ See, e.g., L.A. Dep’t of Power & Water v. Manhart, 435 U.S. 702, 711 (1978).

⁴ See, e.g., Price Waterhouse, 490 U.S. at 250–51.

sex discrimination protections to LGBT litigants, arguing that such protections cannot have been what Congress intended.⁵

Starting in the 2000s, and accelerating in the 2010s, this trend has reversed. Numerous courts and agencies now hold that gender identity discrimination is per se sex discrimination, and increasing numbers are reaching the same conclusion with regard to sexual orientation discrimination. As LGBT individuals have achieved greater social acceptance in our society, courts have been more willing—and able—to see that the faithful application of sex discrimination doctrine proscribes discrimination against them.⁶

This Issue Brief sets out the reasons why both sexual orientation and gender identity discrimination necessarily must be considered sex discrimination under well-established anti-discrimination doctrine. It also responds to the most common arguments raised against such a conclusion. Finally, the Issue Brief concludes by briefly discussing the reasons why, despite the move towards coverage of anti-LGBT discrimination under federal sex discrimination law, explicit formal statutory prohibitions on sexual orientation and gender identity discrimination remain important.

I. SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION ARE ALSO SEX DISCRIMINATION

As described below, faithful application of established anti-discrimination law doctrine leads inevitably to the conclusion that sexual orientation and gender identity discrimination are also sex discrimination. As the Seventh Circuit put it in the recent case of *Hively v. Ivy Tech Community College*, “it is actually impossible to discriminate on the basis of sexual orientation [or gender identity] without discriminating on the basis of sex.”⁷ Thus, all instances of sexual orientation and gender identity discrimination should also be considered “sex” discrimination under federal law.

A. DISCRIMINATION “BECAUSE OF” SEX HAS OCCURRED WHERE SEX OR GENDER IS TAKEN “INTO ACCOUNT”

In the early years following the enactment of Title VII,⁸ employers argued that the statute’s proscriptions did not prohibit all employer consideration of or use of sex—that some forms of sex-based decision-making were not discriminatory.⁹ This approach

⁵ See, e.g., *Ulane v. E. Airlines*, 742 F.2d 1081, 1084–87 (7th Cir. 1984); *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 329–32 (9th Cir. 1979), *abrogated by* *Nichols v. Azteca Rest. Enter.*, 256 F.3d 864 (9th Cir. 2001).

⁶ Cf. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015) (“The nature of injustice is that we may not always see it in our own times.”).

⁷ See *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 351 (7th Cir. 2017) (en banc) (addressing sexual orientation discrimination).

⁸ Many of the legal principles described herein were established in the context of Title VII, the federal law prohibiting employment discrimination on the basis of sex. Because the federal sex discrimination laws typically include very similar operative language (“because of...sex” or “on the basis of sex”) the federal courts have held that legal principles deriving from one area of sex discrimination law can and should be “borrowed” in other sex discrimination contexts. See, e.g., *Summy-Long v. Pa. State Univ.*, 226 F. Supp. 3d 371, 411 (M.D. Pa. 2016) (“Title IX freely borrows the jurisprudence of Title VII.”) (quoting *Dawn L. v. Greater Johnstown Sch. Dist.* 586 F. Supp. 2d 332, 381 (W.D. Pa. 2008)).

⁹ See Cary Franklin, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 HARV. L. REV. 1307, 1333–58 (2012).

has, however, been rejected by the Supreme Court, which has repeatedly held that use of sex as a decision-making criterion violates Title VII.¹⁰

The Court perhaps articulated this principle most clearly in *Price Waterhouse v. Hopkins*, where it stated:

Congress' intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute. In now-familiar language, the statute forbids an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment," or to "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of* such individual's ... sex." 42 U.S.C. §§ 2000e-2(a)(1), (2) (*emphasis added*). We take these words to mean that gender must be irrelevant to employment decisions.¹¹

It is easy to see how this proscription on the consideration of sex is violated in the context of discrimination based on sexual orientation and/or gender identity. Indeed, it is literally impossible to discriminate based on sexual orientation or gender identity without taking the sex of the victim "into account." (For example, you can't discriminate against a female employee for marrying a woman without taking the employee's sex into account. Similarly, you can't discriminate against a transgender employee for dressing in accordance with their gender identity, not their birth sex, without taking the employee's sex—as well as their gender presentation—into account). Thus, any time sexual orientation or gender identity discrimination takes place, the defendant has acted "because of" sex, and is in violation of the statute.¹²

B. BUT-FOR DISCRIMINATION IS PROSCRIBED

Related to the proscription on taking sex or gender into account is the well-established principle that if a victim of discrimination would have been treated differently "but for" their protected class status, actionable discrimination has occurred. Thus,

¹⁰ See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239–40 (1989); *L.A. Dep't of Power & Water v. Manhart*, 435 U.S. 702, 711 (1978); *UAW v. Johnson Controls*, 499 U.S. 187, 197–200 (1991). Under Title VII, there is a narrow defense available to employers who discriminate based on sex, where they can show that sex was a "bona fide occupational qualification" (BFOQ). See 42 U.S.C. § 2000e-2(e) (2012).

¹¹ *Price Waterhouse*, 490 U.S. at 239–40. Note that the application of the principles articulated in this passage of *Price Waterhouse* to statutes other than Title VII may be complicated by post-*Price Waterhouse* case law—holding, in the context of other anti-discrimination laws, that "because of" connotes but-for causation. See, e.g., *Gross v. FBL Fin. Servs.*, 557 U.S. 167 (2009). As set out below, sexual orientation and gender identity discrimination also count as discrimination even under the more rigorous "but-for" standard. And Title VII itself retains the lower causation standard articulated in *Price Waterhouse*. See 42 U.S.C. § 2000e-2(m) ("[A]n unlawful employment practice is established when the complaining party demonstrates that ... sex ... was a motivating factor for any employment practice.").

¹² See, e.g., *Hively*, 853 F.3d at 346–47 (embracing this reasoning as to both sexual orientation and gender identity discrimination); *Boutillier v. Hartford Pub. Sch.*, 221 F. Supp. 3d 255, 267–68 (D. Conn. 2016) (embracing this reasoning in the context of sexual orientation discrimination); *Baldwin v. Foxx*, No. 0120133080, 2015 WL 4397641, *4–5 (E.E.O.C. July 15, 2015) (same); *Lusardi v. McHugh*, No. 0120133395, 2015 WL 1607756, *7 (E.E.O.C. Apr. 1, 2015) (embracing this reasoning in the context of gender identity discrimination); *Macy v. Holder*, No. 0120120821, 2012 WL 1435995, *7 (E.E.O.C. Apr. 20, 2012) (same).

the Supreme Court held early on—and has consistently adhered to the principle—that employer actions that do not “pass the simple test of whether the evidence shows ‘treatment of a person in a manner which, but for that person’s sex, would be different’ ... constitute[] discrimination.”¹³

There is no question that discrimination based on sexual orientation and gender identity is “but for” the sex (or the perceived sex) of the victim.¹⁴ Thus, when an employer engages in sexual orientation discrimination—firing a man because he is together with, or sexually attracted to, other men—the employer would not, by definition, have treated a woman who engaged in identical conduct (dating or marrying men) or had identical desires (sexual attraction to men) the same way. Similarly, an employer who fires a transgender woman for wearing a dress to work has done so because of the employer’s perception that the employee is a man who should not be wearing dresses.¹⁵ But for the employee’s perceived sex, the treatment of the employee would have been different.

C. GENDER STEREOTYPING IS PROHIBITED

The Supreme Court has also made clear that gender stereotyping—requiring women or men to comply with the stereotypes associated with their sex—is discrimination “because of ... sex.”¹⁶ As the Court put it in *Price Waterhouse*, “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for, ‘[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.’”¹⁷ Thus, in *Price Waterhouse*, the Court found that a woman partnership candidate was subjected to discrimination “because of sex” where she was denied partnership because she did not sufficiently meet partners’ expectations of what a woman should be (feminine in dress, appearance, and demeanor).¹⁸

¹³ See *Manhart*, 435 U.S. at 711; see also *Johnson Controls*, 499 U.S. at 200.

¹⁴ See, e.g., *Hively*, 853 F.3d at 345–47 (embracing this reasoning as to both sexual orientation and gender identity discrimination); *Smith v. City of Salem*, 378 F.3d 566, 574 (6th Cir. 2004) (embracing this reasoning in the gender identity context); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000) (same); *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1161 (C.D. Cal. 2015) (same); *Hall v. BNSF Ry. Co.*, No. C13-2160 RSM, 2014 WL 4719007, at *3–5 (W.D. Wash. Sept. 22, 2014) (same); *Schroer v. Billington*, 577 F. Supp. 2d 293, 307–08 (D.D.C. 2008) (adopting a similar theory in the gender identity context); *Foxx*, 2015 WL 4397641, at *5 (embracing this reasoning in the sexual orientation context); see also *Christiansen v. Omnicom Grp.*, 852 F.3d 195, 201–04 (2d Cir. 2017) (Katzmann, J., concurring) (embracing this reasoning in the sexual orientation context, but recognizing that the panel was bound by circuit precedent).

¹⁵ In some circuits, this analysis would be more complicated in contexts where a dress code was applicable, by virtue of the fact that some circuits have created a judicial carve-out from the ordinary rule that but-for discrimination is proscribed in order to permit for sex-differentiated dress codes. See, e.g., *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104 (9th Cir. 2006) (en banc). Note that the Supreme Court has never endorsed a “dress code” exception to the rule that but-for discrimination is prohibited sex discrimination. Indeed, *Price Waterhouse*—which makes clear that employers cannot informally require employees to dress in ways that comport with social expectations about gender-specific attire—strongly suggests a contrary rule. *Price Waterhouse*, 490 U.S. at 250–53.

¹⁶ *Price Waterhouse*, 490 U.S. at 250–51. As the Seventh Circuit recognized in its recent en banc decision in *Hively v. Ivy Tech*, this conclusion follows logically from Title VII’s proscription on but-for discrimination. In every context in which a victim is subjected to discrimination for failure to conform to the gender stereotypes associated with their actual or perceived sex, that discrimination would not have occurred “but for” their sex. *Hively*, 853 F.3d at 346–47.

¹⁷ *Price Waterhouse*, 490 U.S. at 251.

¹⁸ *Id.* at 250–51.

Again, prohibitions on gender stereotyping are necessarily violated when an institution or employer subjects an individual to sexual orientation or gender identity discrimination. This is perhaps most obvious in the gender identity context, where courts have observed that, “[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. . . . There is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms.”¹⁹

So, too, in the sexual orientation context, discrimination based on sexual orientation necessarily rests on an employee’s failure to conform to a core gender stereotype: that men should only have sexual attractions to women, and that women should only have sexual attractions to men. As the District of Massachusetts put it in an early case, “In fact, stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women. . . . The harasser may discriminate against an openly gay co-worker, or a co-worker that he perceives to be gay, whether effeminate or not, because he thinks, . . . ‘real’ men should date women, and not other men.”²⁰

D. OTHER DOCTRINES

There are a number of other well-established anti-discrimination doctrines that also lead to the conclusion that sexual orientation and/or gender identity discrimination are sex discrimination.

For example, case law in the circuit courts has long recognized that “associational discrimination”—discrimination because of one’s association with someone of a particular protected class membership—is discrimination “because of . . .” the plaintiff’s protected class status. The majority of these cases have arisen in the context of interracial relationships, where the courts have recognized that “[w]here a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of his race.”²¹ As the court in *Hively v. Ivy Tech Community College* recently recognized, this same logic applies in

¹⁹ Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011) (citation omitted). For other cases embracing similar reasoning, see, e.g., Whitaker v. Kenosha Unified Sch. Dist., 858 F.3d 1034, 1047–51 (7th Cir. 2017); Dodds v. U.S. Dep’t of Educ., 845 F.3d 217, 221 (6th Cir. 2016); Barnes v. City of Cincinnati, 401 F.3d 729, 737–38 (6th Cir. 2005); Smith, 378 F.3d at 571–75; Schwenk v. Hartford, 204 F.3d 1187, 1201–03 (9th Cir. 2000); Rosa, 214 F.3d at 216; Fabian v. Hosp. of Cent. Conn., 172 F. Supp. 3d 509, 521–27 (D. Conn. 2016); Mickens v. General Elec. Co., No. 3:16CV-00603-JHM, 2016 WL 7015665, at *3 (W.D. Ky. Nov. 28, 2016); Roberts v. Clark Cty. Sch. Dist., 215 F. Supp. 3d 1001, 1011–15 (D. Nev. 2016); Finkle v. Howard Cty., 12 F. Supp. 3d 780, 787–89 (D. Md. 2014), *dismissed on other grounds* 640 Fed. Appx. 245 (4th Cir. 2016); Schroer, 577 F. Supp. 2d at 303–06; Lopez v. River Oaks Imaging & Diagnostic Grp., 542 F. Supp. 2d 653, 658–61 (S.D. Tex. 2008); Mitchell v. Axcan Scandipharm, No. Civ.A. 05-243, 2006 WL 456173, at *2 (W.D. Pa. Feb. 17, 2006); Tronetti v. TLC HealthNet Lakeshore Hosp., No. 03-CV-0375E(SC), 2003 WL 22757935, at *4 (W.D.N.Y. Sept. 26, 2003); Macy v. Holder, No. 0120120821, 2012 WL 1435995, *5–9 (E.E.O.C. Apr. 20, 2012).

²⁰ Centola v. Potter, 183 F. Supp. 2d 403, 410 (D. Mass. 2002). For other cases embracing similar reasoning, see *Hively*, 853 F.3d at 346–47; Boutillier v. Hartford Pub. Sch., 221 F. Supp. 3d 255, 269 (D. Conn. 2016); Winstead v. Lafayette Cty. Bd. of Cty. Comm’rs, 197 F. Supp. 3d 1334, 1344–47 (N.D. Fla. 2016); EEOC v. Scott Med. Health Ctr., 217 F. Supp. 3d 834, 840–42 (W.D. Pa. 2016); Videckis v. Pepperdine Univ., 150 F. Supp. 3d 1151, 1159–61 (C.D. Cal. 2015); Isaacs v. Felder Servs., 143 F. Supp. 3d 1190, 1194 (M.D. Ala. 2015); Terveer v. Billington, 34 F. Supp. 3d 100, 116 (D.D.C. 2014); Koren v. Ohio Bell Tel. Co., 894 F. Supp. 2d 1032, 1037–38 (N.D. Ohio 2012); Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002); see also *Christiansen*, 852 F.3d at 205–06 (Katzmann, J., concurring) (embracing this reasoning in the sexual orientation context, but recognizing that the panel was bound by circuit precedent).

²¹ Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 892 (11th Cir. 1986); see also, e.g., Holcomb v. Iona Coll., 521 F.3d 130, 132–39 (2d Cir. 2008).

the context of sexual orientation discrimination, where the plaintiff, of necessity, has been discriminated against “because of [her] sex” where she is subjected to discrimination because of same-sex romantic associations (had she been a man, a relationship with or attraction to a woman would not have led to discrimination).²²

In addition, as a number of courts have recognized, it is unquestionable that Title VII’s prohibition on discrimination “because of... religion” (and related prohibitions under other civil rights laws) would be violated were an individual subjected to discrimination because of a religious conversion.²³ Thus, a former Christian who is targeted for discrimination because he has converted to Judaism has been subjected to actionable discrimination “because of... religion”—regardless of whether non-convert Jews or Christians are subjected to discrimination. So, too, transgender plaintiffs—who are targeted because they have changed their sex or gender presentation—are unquestionably subjected to discrimination “because of... sex.”

II. COUNTER-ARGUMENTS

What are the counter-arguments that exist against this straightforward reasoning? As set forth below, there are two common arguments on which defendants and courts have relied. First, it is argued that Congress did not intend the inclusion of sexual orientation and gender identity as protected classes, and thus discrimination on those bases cannot be actionable. Second, it is argued that it can’t be sex discrimination to discriminate based on sexual orientation or gender identity because under such a regime, both men and women may be treated equally badly. As set out below, both of these arguments are inconsistent with existing Supreme Court authority.

A. CONGRESS DIDN’T INTEND IT

By far the most common argument against reading the sex discrimination laws to proscribe sexual orientation and gender identity discrimination—both historically and today—is that Congress did not intend it. There are two variants of this argument. First, advocates and some courts have argued that the enacting Congress (in 1964, when Title VII was enacted, or at whatever date the applicable law was enacted) surely did not intend to prohibit sexual orientation or gender identity discrimination.²⁴ Second, advocates and some courts have contended that the actions of post-enactment Congresses (in introducing, and not passing legislation that would directly proscribe “sexual orientation” and “gender identity” discrimination) make clear that sexual orientation and gender identity discrimination cannot already be prohibited as sex discrimination.²⁵ As set out below, both of these arguments are inconsistent with modern Supreme Court statutory interpretation precedents. It is also worth noting that they have nothing to do with the internal logic of the well-established doctrines discussed above. Rather, they are arguments for carving LGBT people out of otherwise applicable protections under sex discrimination law, based on contrary congressional intent.

²² *Hively*, 853 F.3d at 347–49; *see also Boutillier*, 221 F. Supp. 3d at 268; *Isaacs*, 143 F. Supp. 3d at 1193–94.

²³ *See, e.g., Schroer*, 577 F. Supp. 2d at 306; *Fabian*, 172 F. Supp. 3d at 527; *Macy*, 2012 WL 1435995 at *11.

²⁴ *See, e.g., Ulane v. E. Airlines*, 742 F.2d 1081, 1085–87 (7th Cir. 1984).

²⁵ *Id.*

1. *Congress Didn't Intend It ... (in 1964, in 1968, in 1972... Whenever the Relevant Sex Discrimination Law Was Passed)*

The first variant of the congressional intent argument relies on a common-sense intuition: that surely the enacting Congress (in 1964 when Title VII was enacted, or in the shortly following time frames for enactment of the other sex discrimination laws), did not intend to prohibit sexual orientation and gender identity discrimination. This intuition—that Congress in 1964 would not have chosen to prohibit sexual orientation or gender identity discrimination—may well be correct. But under existing Supreme Court precedent, this type of reasoning is not a basis for refusing to apply an otherwise applicable law. Thus, for example, in the context of responding to an identical argument against allowing a cause of action for same-sex sexual harassment, Justice Scalia stated for the Court that:

We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII. As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the *provisions of our laws rather than the principal concerns of our legislators by which we are governed*. Title VII prohibits “discriminat[ion] ... because of ... sex” in the “terms” or “conditions” of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.²⁶

Precisely this same reasoning applies in the context of application of the sex discrimination laws to sexual orientation and gender identity discrimination. The language that Congress enacted—prohibiting discrimination “because of sex”—literally proscribes sexual orientation and gender identity discrimination (which, as set forth above, are always “because of” sex). As in *Oncale v. Sundowner Offshore Services, Pennsylvania Department of Corrections v. Yeskey*, and other cases, the fact that Congress did not

²⁶ *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79–80 (1998) (emphasis added); *see also* Pa. Dep’t of Corr. v. *Yeskey*, 524 U.S. 206, 212 (1998) (“[Even] assuming [the ADA’s statement of findings and purpose] ... proves, as petitioners contend, that Congress did not ‘envisio[n]’ that the ADA would be applied to state prisoners,’ in the context of an unambiguous statutory text that is irrelevant. As we have said before, the fact that a statute can be ‘applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.’”) (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985)).

anticipate—and might even have opposed—a particular application of broad statutory language is not a basis for refusing to apply the statute as written.²⁷

*2. Subsequent Congresses Introduced, but Did Not Pass,
Legislation Explicitly Proscribing Sexual Orientation
and Gender Identity Discrimination*

A second variant on the congressional intent argument notes that subsequent Congresses have introduced (but not enacted) legislation that would prohibit “sexual orientation” and “gender identity” discrimination explicitly.²⁸ Thus, some courts and advocates have reasoned that sexual orientation and gender identity discrimination cannot already be proscribed under existing law.

Again, this argument runs afoul of existing Supreme Court statutory interpretation precedents. While the Court has not been entirely consistent, it has most often rejected the notion that Congress’s failure to enact subsequent legislation is relevant to the interpretation of a previously enacted statute. As the Court put it in *Central Bank of Denver v. First Interstate Bank of Denver*, in deciding whether § 10(b) of the Securities Exchange Act provided a cause of action to private parties for “aiding and abetting” liability:

Central Bank, for its part, points out that [after the enactment of Securities Exchange Act § 10(b)], bills were introduced that would have amended the securities laws to make it “unlawful ... to aid, abet, counsel, command, induce, or procure the violation of any provision” of the 1934 Act. ... These bills prompted “industry fears that private litigants, not only the SEC, may find in this section a vehicle by which to sue aiders and abettors,” and the bills were not passed. ... According to Central Bank, these proposals reveal that those Congresses interpreted § 10(b) not to cover aiding and abetting. We have stated, however, that failed legislative proposals are

²⁷ A slightly different variant of this argument—characterized by some advocates as “statutory originalism”—has emerged recently in the LGBT cases, and is equally unmeritorious. First, the central defining concept of “statutory originalism”—that courts should look to the “original public meaning” of laws—is a theory developed by academics, which has barely made inroads into constitutional law jurisprudence, and has not done so at all in the statutory context. *Cf. Hively*, 853 F.3d at 360 (Sykes, J. dissenting) (one of the only references to this term in the statutory context anywhere in the federal case law, made only in dissent). More importantly, even if one applies the closest analog to so-called “statutory originalism” in the Court’s actual statutory interpretation jurisprudence—looking to dictionary definitions contemporary to the enacting Congress (a practice sometimes, albeit irregularly, followed by the Court)—it does not do anything to defeat the reasoning that sexual orientation and gender identity are per se sex discrimination. Even if one defines sex in its narrowest way—as the state of being a man or a woman—discrimination based on sexual orientation and gender identity is still literally discrimination “because of ... sex,” as delineated above. Moreover, it is not clear that historic dictionaries defined sex exclusively in this way, as opposed to as including those characteristics which define one as male or female, including gender characteristics. *See, e.g., Fabian*, 172 F. Supp. 3d at 526.

²⁸ In 1974, Representatives Bella Abzug (D-NY) and Ed Koch (D-NY) introduced the Equality Act of 1974, which would have explicitly prohibited sexual orientation discrimination in employment, housing and public accommodations. Jerome Hunt, *A History of the Employment Non-Discrimination Act*, CTR. FOR AM. PROGRESS (July 19, 2011) <https://www.americanprogress.org/issues/lgbt/news/2011/07/19/10006/a-history-of-the-employment-non-discrimination-act/>. Since that time, there have been numerous bills introduced in Congress which would provide explicit protections for the LGBT community. The most recent version of the legislation, also called the Equality Act, would amend the Civil Rights Act of 1964 to explicitly ban sexual orientation and gender identity discrimination, while also legislatively recognizing that sexual orientation and gender identity discrimination are sex discrimination. *See* Equality Act, H.R. 2282, 115th Cong. (2017).

“a particularly dangerous ground on which to rest an interpretation of a prior statute.” ... “Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.”²⁹

This principle applies equally in the context of proposals which have not been passed in the LGBT context. Indeed, several of the congressional sponsors of one such measure recently submitted an amicus brief in an LGBT sex discrimination case to affirm that, in their view, sex discrimination law already proscribes “sexual orientation” and “gender identity” discrimination.³⁰ As those legislators explained, they nevertheless felt it important to sponsor the recent Equality Act (which would provide explicit protections for sexual orientation and gender identity as their own categories) in order to codify existing holdings (that anti-LGBT discrimination is sex discrimination), to “avoid further confusion” and to “put the public on clear notice that LGBT status is an explicitly protected characteristic under federal law.”³¹

B. WE KNOW IT CAN'T BE SEX DISCRIMINATION BECAUSE MEN AND WOMEN ARE TREATED EQUALLY BADLY

Congressional intent arguments have been by far the most common argument (historically and today) against applying sex discrimination laws to anti-LGBT discrimination. However, as those congressional intent arguments have increasingly been challenged, advocates and judges have begun to also address the doctrinal arguments (discussed above) on their own terms. The principal response that advocates and judges have offered is to contend that despite the straightforward analyses laid out above—showing that disparate treatment based on sex necessarily occurs in any sexual orientation or gender identity case—sex discrimination can't have occurred, since men and women would be treated equally badly by the defendant (i.e., a gay man would be treated just as badly as a lesbian woman).³² Thus, this argument purports to identify the fatal flaw in sex discrimination arguments for LGBT equality: they are *really* about sexual orientation, or *really* about gender identity, not about sex per se.

This logic quickly runs out if one considers how this argument—that but-for discrimination is OK if *both* groups are subjected to the same adverse treatment—would translate to other areas of anti-discrimination law. As such consideration demonstrates, the “equal application” theory is not (and should not be) a defense to but-for consideration of race, sex, and other protected categories. For example:

- Bob is an African American man who works for a nursing home. He is told not to work with a white client who does not want to have an African American attendant. The employer says they simply have a policy of “respecting the preferences” of their clients. This is race discrimination, even if the employer

²⁹ Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 186–87 (1994); *see also* United States v. Craft, 535 U.S. 274, 287 (2002); Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002, 1015 (2017).

³⁰ Brief Amici Curiae of Five Members of Congress in Support of Plaintiff-Appellant's Petition for Panel Rehearing or Rehearing En Banc, *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339 (7th Cir. 2017) (No. 15-1720), 2016 WL 4662263.

³¹ *Id.* at *9.

³² *See, e.g., Hively*, 853 F.3d at 365 (Sykes, J., dissenting).

would have also told a white worker not to work with an African American client who expressed race-based preferences.³³

- Jane is denied employment in a male prison. The employer suggests that they simply want to have same-sex prison guards employed at all prisons. This is sex discrimination even if a man would have been denied employment in a female prison.³⁴
- Joanne is a salesperson. She is an aggressive and successful salesperson, whose appearance is not stereotypically feminine. She is not promoted, and is told that if she wishes to be promoted, she needs to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.” This is sex discrimination, even though the employer might have also declined to promote an “insufficiently” masculine man.³⁵
- James, a white man, marries Karen, an African American woman. James’s employer fires him, telling him he thinks that people should “stick with their own kind.” This is race discrimination, even if James’s employer would have also fired an African American man who married a white woman.³⁶

All of the above fact patterns—based on real cases—involve circumstances where, but for the employee’s race or sex, they would have been treated differently. In many of them, defendants argued that they were not engaging in discrimination, because they would apply the same adverse criteria to those of the opposite sex or race. Both the lower courts and the Supreme Court itself have long rejected these arguments.³⁷

But, one might argue, the LGBT sex discrimination cases are different, because the employer’s or institution’s *motives* there are not to discriminate on the basis of sex, but rather to discriminate on the basis of sexual orientation or gender identity. This argument, too, has been rejected by the Supreme Court. As the Court has made clear across a series of cases, where sex is a “but-for” cause of the discrimination, it does not matter that the employer’s or institution’s motives may have been benign—or even that they are capable of articulation in entirely non-sex based terms.³⁸ Rather, an employer or institution in such circumstances has engaged in sex discrimination, and

³³ For a factually analogous case, see *Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908 (7th Cir. 2010).

³⁴ For a factually analogous case, see *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (concluding that Alabama regulation in this case “explicitly discriminates against women on the basis of their sex”—but finding it justified based on Title VII’s narrow “bona fide occupational qualification”/BFOQ defense).

³⁵ For a factually analogous case, see *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

³⁶ For a factually analogous case, see *Holcomb v. Iona Coll.*, 521 F.3d 130 (2d Cir. 2008).

³⁷ Indeed, the Supreme Court rejected this argument as early as its seminal decision in *Loving v. Virginia*, 388 U.S. 1, 7–11 (1967) (rejecting the state’s “equal application” argument in support of its anti-miscegenation law, which alleged that since both blacks and white were equally proscribed from inter-racially marrying, there was no race discrimination).

³⁸ See, e.g., *UAW v. Johnson Controls*, 499 U.S. 187, 197–200 (1991) (noting that the employer’s motive in adopting a fetal protection policy—to protect unborn offspring—did not mean that “but-for” discrimination was not sex discrimination); *L.A. Dep’t of Power & Water v. Manhart*, 435 U.S. 702, 711–13 (1978) (where employer alleged that its intent simply was to adjust pension contributions to match actuarial longevity, and data supported this argument, nevertheless finding sex discrimination where “the evidence shows ‘treatment of a person in a manner which but for that person’s sex would be different.’”); cf. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 543–44 (1971) (per curiam) (employer who clearly did not discriminate against women as a group, since they hired large majorities of women into the disputed position, still had engaged in sex discrimination where mothers, but not fathers, of pre-school aged children were barred from employment).

must defend their actions, if at all, under some affirmative defense (such as Title VII’s “bona fide occupational qualification”/BFOQ defense).³⁹

III. WHY CLEAR, EXPLICIT PROTECTIONS ARE IMPORTANT⁴⁰

As set out above, faithful application of existing sex discrimination law should lead to the conclusion that sexual orientation and gender identity discrimination are already prohibited under federal law. The arguments against applying sex discrimination law to sexual orientation and gender identity discrimination are unpersuasive and contradict long-standing principles of anti-discrimination law and statutory interpretation. Nevertheless, advocates have continued to push for explicit protections for the LGBT community, such as the Equality Act, which would amend the Civil Rights Act of 1964 to include sexual orientation and gender identity.⁴¹ As set out below, such political efforts remain important for a number of reasons.

A. THE LAW REMAINS UNSETTLED

Although the underlying legal principles that lead to the conclusion that sexual orientation and gender identity discrimination are sex discrimination have long existed, it is only in the last fifteen years that courts and agencies have begun to apply those doctrines to find LGBT individuals to be categorically protected.⁴² Prior to that time, courts most often rejected per se sex discrimination arguments by LGBT plaintiffs, summarily concluding that to do so would run afoul of the presumed contrary congressional intent.

Some of these cases did address the type of arguments set out above, and were simply wrongly decided under neutral principles of anti-discrimination and statutory interpretation law.⁴³ In other cases litigants did not even raise the arguments delineated above, relying instead on narrower theories, like behavior-based gender stereotyping.⁴⁴ Nevertheless, these older cases—and their holding that sexual orientation (and, much more rarely in recent years, gender identity) are not categorically sex

³⁹ See sources cited *supra* note 38.

⁴⁰ In keeping with the focus of this Issue Brief on statutory arguments, this section focuses its arguments only on why clear, explicit statutory protections against anti-LGBT discrimination are important. Again, however, similar arguments could be made about the value of having discrimination against the LGBT community be declared “suspect” or “quasi-suspect” under the Constitution (even if sex discrimination arguments are also viable).

⁴¹ See Equality Act, H.R. 2282, 115th Cong. (2017).

⁴² In the context of interpreting the federal statutes, this trend towards considering anti-LGBT discrimination to be categorically sex discrimination began sooner for transgender plaintiffs than for gay and lesbian plaintiffs. The earliest cases adopting a per se (or close to per se) argument for finding anti-transgender discrimination to be sex discrimination were decided in the early 2000s, whereas such arguments did not begin to gain significant traction in the sexual orientation context until the last 5 years.

⁴³ For example, both *Ulane* and *DeSantis* were cases in which the plaintiff had raised some arguments for why anti-LGBT discrimination should be considered per se sex discrimination, albeit not all of those arguments delineated above in Part I. See *Ulane v. E. Airlines*, 742 F.2d 1081, 1083–87 (7th Cir. 1984); *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 329–32 (9th Cir. 1979). Moreover, both *Ulane* and *DeSantis* have been at least partially abrogated by later circuit precedents. See, e.g., *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1047–50 (7th Cir. 2017); *Schwenk v. Hartford*, 204 F.3d 1187, 1201–03 (9th Cir. 2000).

⁴⁴ For example, in the Third Circuit, the arguments set out in *supra* Part I, were raised in neither of the major precedential cases which established the legal framework applicable to claims by gay and lesbian employees. See *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257 (3d Cir. 2001); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285 (3d Cir. 2009).

discrimination—remain binding circuit precedent in many circuits.⁴⁵ There are also circuits that currently lack any binding precedent at all on the applicability of sex discrimination law to LGBT plaintiffs, especially in the area of transgender rights.⁴⁶

This patchwork of precedents means that LGBT plaintiffs face an uncertain legal landscape when they bring sex discrimination claims. Even judges who are persuaded by such plaintiffs' legal arguments may be bound by pre-existing circuit precedent, unless the circuit decides to go en banc (an extremely rare occurrence in most circuits). As a result, many LGBT sex discrimination claims—especially in the sexual orientation context—still fail today, as courts apply older precedents that had carved out exclusions for sexual orientation (and to a lesser extent gender identity) discrimination.⁴⁷ Moreover, this legal uncertainty surrounding coverage no doubt has other important consequences, making it much less likely that employers, schools and landlords will simply refrain from engaging in sexual orientation and gender identity discrimination, and making it more difficult for LGBT plaintiffs to find private attorneys willing to represent them.

These problems may be especially acute in the areas where plaintiffs have traditionally struggled the most to persuade courts of their sex discrimination claims—straightforward sexual orientation discrimination (not tied to non-gender stereotypical appearance or demeanor), and access to sex-segregated facilities for transgender plaintiffs. In these contexts, courts have traditionally been most reluctant to afford sex discrimination coverage, and have only recently begun to come out the other way.⁴⁸ Thus, there are significant reasons to believe that—absent the intervention of Congress or the Supreme Court—it may be years before there is nationwide consistency in finding anti-LGBT discrimination to be covered by the federal sex discrimination laws.⁴⁹

B. DETERRENCE AND MORAL MESSAGING ARE IMPORTANT

Even were the Supreme Court to take up the issue of sex discrimination coverage for LGBT employees, students and others today, there would remain important reasons to amend existing law to include specific coverage for sexual orientation and gender identity discrimination. Including LGBT people in anti-discrimination law protections

⁴⁵ See, e.g., *Christiansen v. Omnicom Grp.*, 852 F.3d 195, 201–06 (2d Cir. 2017) (Katzmann, J., concurring) (endorsing a variety of arguments for why sexual orientation discrimination is sex discrimination, but noting that there was circuit precedent holding to the contrary); *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1255–56 (11th Cir. 2017) (holding against lesbian plaintiff without considering her arguments, because the circuit was bound by circuit precedent). Following the decision in *Christiansen*, the Second Circuit elected to go en banc on the issue of whether sexual orientation discrimination is per se sex discrimination. See Order, *Zarda v. Altitude Express*, No. 15-3775, <https://www.employmentmattersblog.com/wp-content/uploads/sites/5/2017/06/Order.pdf>. Those en banc proceedings remain pending as of this writing.

⁴⁶ It appears, for example, that the D.C. Circuit has no binding precedent at the circuit level on this issue.

⁴⁷ On the issue of sexual orientation cases still failing under Title VII, see generally Katie Eyer, *Brown Not Loving: Obergefell and the Unfinished Business of Formal Equality*, 125 YALE L.J. F. 1, 8 n. 31 (2015). For a recent example in the gender identity context, see, for example, *Johnston v. Univ. of Pittsburgh*, 97 F. Supp. 3d 657 (W.D. Pa. 2015).

⁴⁸ See, e.g., Eyer, *supra* note 47, at 8 n. 31 (straightforward sexual orientation); Weiss, *supra* note *, at 7 (restroom access).

⁴⁹ In theory, another path to nationwide consistency would be for the courts to afford administrative deference to the decisions of federal agencies such as the EEOC which hold that sexual orientation and gender identity discrimination are per se sex discrimination. But while such deference arguments are plausible, see, e.g., Eyer, *Lesbian, Gay, Bisexual and Transgender Employees*, *supra* note *, at n. 13, the courts have thus far shown relatively little interest in this argument.

via sex discrimination law is legally correct and straightforward under existing anti-discrimination law. But it seems unlikely to have the deterrence and moral impact that amending the anti-discrimination laws to explicitly include sexual orientation and gender identity would have.

1. Deterrence

One of the most important functions of anti-discrimination law is to deter discrimination. If the deterrence mission of anti-discrimination law is effective, the community knows that discrimination is legally prohibited, and thus they do not engage in it. The gay employee is not fired when they put the photograph on their desk of their same-sex spouse. The transgender student is allowed to use a restroom consistent with her gender identity and gender presentation. Deterrence is important because the vast majority of those subjected to discrimination will not pursue claims (because of resource constraints, a desire to move on, lack of knowledge that the real reason was discrimination, etc.). Thus, anti-discrimination law's impact is severely constrained if it relies on case-by-case legal enforcement (as opposed to a *fortiori* deterrence) to effectuate change.⁵⁰ Deterrence is also important because what most people want is not a lawsuit—but to never experience discrimination to begin with.

There are significant reasons to believe that legislation like the Equality Act—explicitly prohibiting sexual orientation and gender identity discrimination—would fulfill the deterrence function of anti-discrimination law much better than simply interpreting sex discrimination law to provide such coverage. That is certainly true under the current regime, in which there is a patchwork of case law and agency determinations finding anti-LGBT discrimination to be covered. But even were the Supreme Court to impose consistency nationwide, holding that anti-LGBT discrimination is sex discrimination, it seems unlikely that this would have a comparable deterrent effect as explicit protections for the LGBT community.

There are a number of reasons for this. Deterrence can only operate where a person knows that their conduct is unlawful. A law explicitly prohibiting sexual orientation and gender identity discrimination would ensure this knowledge better than a legal decision interpreting sex discrimination law. Most would-be discriminators are not lawyers, but rather are line level supervisors, landlords, and teachers. Sometimes, as in the case of harassment, they are even co-workers or students. It seems straightforward that an explicit law prohibiting sexual orientation and gender identity discrimination would do a better job of informing all of these multiple constituencies that sexual orientation and gender identity discrimination are unlawful than a legal decision based on a theory that even judges are today debating. No matter how legally straightforward the sex discrimination analysis may be, it will never be as straightforward as simply saying that sexual orientation and gender identity discrimination are prohibited.

2. Moral Messaging

The deterrence rationale dovetails into a second reason why amending anti-discrimination law to include explicit bans on sexual orientation and gender identity discrimination law is important: moral messaging. The modification of anti-discrimination law to include a new protected class is an important occurrence. Unlike judicial decisions interpreting the anti-discrimination laws, which are issued frequently, adding new protected categories to the federal anti-discrimination laws (whether by

⁵⁰ This is, of course, most true for constituencies that lack access to political or legal channels of authority, such as students, prisoners, and the poor.

amendment or via new legislation) is very rare. When such categories are added, it signals a national moral consensus that such discrimination runs counter to our national ethos regarding the types of distinctions that are appropriate to draw.

A law amending federal law to include explicit protections against sexual orientation and gender identity discrimination would include this type of moral messaging. It would signal that we, as a national community, view anti-LGBT discrimination as generally inappropriate—sufficiently inappropriate to be labeled unlawful. Because civil rights legislation is so difficult to pass, the passage of such legislation could rightly be taken to mean that large majorities of the national community share a commitment to LGBT equality.⁵¹ In contrast, a sex discrimination decision—even by the Supreme Court—would not send such a clear message about how the moral salience of anti-LGBT discrimination is viewed by our national community.

There are reasons to believe that such moral messaging is independently important to the effectiveness of anti-discrimination law. There have long been debates about whether anti-discrimination law has the capacity to change morality, and surely there are limits to its ability to do so.⁵² But for those in the middle—who are not committed to an anti-LGBT perspective—it seems likely that the moral message of anti-discrimination law matters. And to the extent that anti-discrimination law does have the capacity to persuade, in addition to simply proscribing, its impact will no doubt be greater.

CONCLUSION

As courts and agencies around the country have increasingly recognized, “it is ... impossible to discriminate on the basis of sexual orientation [or gender identity] without discriminating on the basis of sex.”⁵³ In every instance of sexual orientation or gender identity discrimination the plaintiff has experienced an adverse action that—but for his or her sex—would have been different. This is classic sex discrimination, and under well-established anti-discrimination law should be proscribed.

Courts have traditionally resisted this conclusion by pointing to the presumed intent of Congress not to provide protections for sexual orientation or gender identity discrimination. But there are often many specific applications of a statute that an enacting Congress might not have anticipated or approved of, and the Supreme Court’s doctrine has made clear that that is not a reason for carving out an exception to the law. Moreover, the Court has repeatedly stated that the conduct of later Congresses (like in introducing, but not enacting, the Equality Act) is to be given little weight in interpreting a statute.

Courts and agencies are increasingly adopting this straightforward reasoning. What seemed an absurd result to judges 30 years ago—that LGBT individuals might have

⁵¹ Polling in fact bears out that this is already true—that large majorities of Americans believe that federal anti-discrimination legislation should exist prohibiting sexual orientation and gender identity discrimination. *See, e.g., Growing U.S. Majority Agrees: Transgender Americans Deserve Equal Treatment on the Job and in Public Accommodations: 2 in 3 Americans Today Favor Federal Nondiscrimination Protections for LGBT People*, THE HARRIS POLL (Oct. 11, 2016) <http://www.theharrispoll.com/business/2016-Out-Equal-Workplace-Survey.html>.

⁵² There have long been debates on the ability of the law to influence public morality. For two recent perspectives, *see, for example*, Kenworthy Bilz & Janice Nadler, *Law, Moral Attitudes, and Behavioral Change*, in THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW (Eyal Zamir & Doron Teichman, eds. 2014); Linda C. McClain, *The Civil Rights Act of 1964 and “Legislating Morality”: On Conscience, Prejudice, and Whether “Stateways” Can Change “Folkways,”* 95 BOSTON U. L. REV. 891 (2015).

⁵³ *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 351 (7th Cir. 2017) (en banc) (addressing sexual orientation discrimination).

protections under federal anti-discrimination law—no longer seems so. And led by anti-discrimination law’s dictates, as opposed to judicial assumptions about what the law “must” mean, there can be little doubt that anti-LGBT discrimination is indeed sex discrimination.⁵⁴

Nevertheless, clear explicit prohibitions on sexual orientation and gender identity discrimination remain important. Large majorities of Americans believe that discriminatory actions—like firing a worker because they are gay or transgender—are wrong. We should have federal laws that reflect these national commitments—and that provide the most clear, unambiguous guidance possible to our employers, schools, landlords and businesses regarding their obligations under anti-discrimination law.

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⁵⁴ Cf. *Phillips v. Martin Marietta Corp.*, 411 F.2d 1, 4 (5th Cir. 1969), *vacated*, 400 U.S. 542 (1971) (finding that a rule against hiring women with pre-school aged children was not sex discrimination within the meaning of Title VII, since, “The common experience of Congressmen is surely not so far removed from that of mankind in general as to warrant our attributing to them such an irrational purpose [as to prohibit an employer from refusing to hire mothers of young children] in the formulation of this statute.”).

Troubling Legislative Agendas: Leveraging Women's Health Against Women's Reproductive Rights

Michele Goodwin*

Beyond any doubt, women's reproductive healthcare is in serious jeopardy domestically and abroad due to federal and state policies promulgated by lawmakers in the United States. Shortly after taking office, President Donald Trump issued an executive order reinstating and expanding the "Mexico City Policy," which literally silences medical providers abroad from speaking about certain reproductive healthcare options, including abortion, for women and girls in nations receiving U.S. AID funds.¹ Activists refer to the Mexico City Policy as the "Global Gag Rule" because, in addition to prohibiting nongovernmental organizations from utilizing U.S. funds for voluntary abortion services, it prevents organizations from using their own funds to provide advice or information both on a public and private basis.

Equally, in 2017, Congress enacted legislation essentially permitting states to discriminate against medical providers that perform abortions. The president immediately signed that legislation into law, which now places Title X reproductive health services in jeopardy for poor men and women in the United States. According to the new law, states can choose whether to ban organizations that perform abortion services from reimbursement for providing services unrelated to abortion. Because Title X specifically supports reproductive health services for indigent Americans, those most likely to suffer will be America's poorest women, girls, and men who rely on these providers. Those hardest hit will surely be in rural communities already suffering from other social and economic conditions. For most poor people in the United States, the only health providers nearby who accept Title X funding also provide abortions. If states bar these providers from reimbursement for providing contraceptive and other reproductive health services, such as HIV screenings, testing for sexually transmitted diseases, and cancer screenings, where will Americans living in poverty go?

However, it would be a mistake to read this policymaking as confined to the federal government and congressional legislating. To the contrary, a virtual renaissance against women's reproductive health privacy and autonomy is taking shape throughout the United States with the enactment of more antiabortion and contraception laws in recent

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¹ The Mexico City Policy, otherwise known as the "Global Gag Rule" or "Global Gag Order," was originally launched by President Ronald Reagan at the Second United Nations International Conference on Population in Mexico City, in August of 1984. Policy Statement of the United States of America At the United Nations International Conference on Population, 2d Sess., Mexico City, Mexico (Aug. 6–13, 1984), http://www.uib.no/sites/w3.uib.no/files/attachments/mexico_city_policy_1984.pdf.

years than in the collective forty years prior. These measures, commonly referred to as “targeted regulations of abortion providers” (TRAP) laws, include a myriad of restrictions on abortion, forcing women to wait 24, 48, and even 72 hours, not counting weekends, between medical visits to terminate a pregnancy. Some states require counseling at crisis pregnancy centers that purposefully mislead pregnant women with false claims that abortions cause cancer and mental illness. Some states even force women to receive unnecessary and intrusive vaginal ultrasounds and to hear a script produced by the state and read by the doctors as a condition of terminating pregnancies.

These laws occupy a troubling space in American reproductive healthcare. However, lawmakers erroneously justify these types of mandates as bundles of informed consent processes that supposedly benefit women. In reality, these laws cause substantial and undue burdens on women’s reproductive healthcare access and interfere with fundamental reproductive healthcare rights. Yet, lawmakers view each enactment of these laws as a victory and persist in their problematic enactment of bills that impose constraints on women and providers of abortion services. For example, despite the Supreme Court striking down two Texas TRAP law provisions in *Whole Woman’s Health v. Hellerstedt* in 2016,² including one related to ambulatory surgical centers, in 2017 Minnesota legislators sponsored legislation similar to that already ruled unconstitutional by the Court.

Lawmakers erroneously claim that laws restricting abortion and contraceptive access further women’s health. Nothing could be further from the truth. In the United States, a woman is fourteen times more likely to die from pregnancy and childbirth than from obtaining a legal abortion.³ Being pregnant is far more dangerous than not being in that condition. The harms are even greater for African American women, who are 3.5 times more likely than their white counterparts to die during pregnancy and childbirth.⁴ Stunning data from the Central Intelligence Agency confirms the dire status of pregnancy in the United States: women are less likely to die during pregnancy in Bosnia than in the United States.⁵

Indeed, the United States leads all developed nations in maternal and infant mortality.⁶ In fact, a recent study published in the *Journal of Obstetrics and Gynecology* found that, rather than meeting international goals to decrease maternal mortality, “[t]he estimated maternal mortality rate (per 100,000 live births) for 48 states and Washington, DC (excluding California and Texas, analyzed separately) increased by 26.6%, from 18.8 in 2000 to 23.8 in 2014.”⁷ While “California showed a declining trend,” the rate of deaths in Texas “had a sudden increase in 2011–2012”.

² 136 S. Ct. 2292 (2016).

³ See Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 OBSTETRICS & GYNECOLOGY 215, 216 (2012).

⁴ *Pregnancy Mortality Surveillance System*, CDC, <https://www.cdc.gov/reproductivehealth/maternalinfanthealth/pmss.html> (last visited July 10, 2017); Mary Beth Flanders-Stepans, *Alarming Racial Differences in Maternal Mortality*, 9 J. PERINATAL EDUC., 50–51 (2000) (noting the disparity in maternal death rates between Black and white women at 2–6 times greater).

⁵ *World Factbook: Maternal Mortality Rate*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2223rank.html> (last visited July 10, 2017).

⁶ *Id.*

⁷ Marian F. MacDorman, et al, *Is the United States Maternal Mortality Rate Increasing? Disentangling Trends from Measurement Issues*, 128 OBSTETRICS & GYNECOLOGY 447 (2016).

Actually, Texas is ranked as the most dangerous place among developed nations for pregnant women, due to extremely high rates of maternal mortality.⁸ The pregnancy death rate in Texas doubled within a two year period, from the already high rate of 18.6 in 2010 to over 37 in 2012, placing it well beyond rates in developed and even many developing nations. The data is similarly stark in Mississippi, Louisiana, and other states that have reduced abortion access to one clinic in the state.⁹ As the medical evidence shows, restrictions on reproductive healthcare in some instances is a death sentence for American women. Sadly, given that more than half of the pregnancies in the United States are unintended, legislative attacks on reproductive healthcare access for some women will become a matter of life or death. For many other women, unwanted and unintended children may result in poverty and other medical and social hardships.

This Issue Brief provides a cursory update on *Whole Woman's Health v. Hellerstedt*,¹⁰ the most recent development in the Court's abortion jurisprudence, and situates that case within the broader framework of legislation and jurisprudence on reproductive healthcare access, from the landmark *Roe v. Wade*,¹¹ which recognized a constitutional right to terminate a pregnancy, to the more recent *Planned Parenthood v. Casey*,¹² which established the undue burden standard that is now used to evaluate restrictions on that right. It draws from prior scholarship to highlight why healthcare advocates correctly perceive TRAP legislation as an attack on women, because such laws directly undermine women's health and safety, while chipping away and truncating their constitutional rights.

I. TEXAS HOUSE BILL 2 AND THE LEGISLATIVE LANDSCAPE

Whole Woman's Health concerned the constitutionality of two new Texas Health and Safety Codes that were created by the controversial H.B. 2.¹³ Section 171.0031, or the "admitting-privileges requirement," mandated "[a] physician performing or inducing an abortion must, on the date the abortion is performed or induced, have active admitting privileges at a hospital that is located not further than 30 miles from the location at which the abortion is performed or induced."¹⁴ The second provision, related to Texas Health and Safety Code section 245.010, required that, at a minimum, "an abortion facility must be equivalent to the minimum standards adopted under Section 243.010 for ambulatory surgical centers."¹⁵

⁸ *Id.*; Sophie Novack, *Texas' Maternal Mortality Rate: Worst in Developed World, Shrugged off By Lawmakers*, TEX. OBSERVER (June 5, 2017), <https://www.texasobserver.org/texas-worst-maternal-mortality-rate-developed-world-lawmakers-priorities/>; Katha Pollitt, *The Story Behind the Maternal Mortality Rate in Texas Is Even Sadder Than We Realize*, NATION (Sept. 8, 2016), <https://www.thenation.com/article/the-story-behind-the-maternal-mortality-rate-in-texas-is-even-sadder-than-we-realize/>.

⁹ For example, data reveals and increase, rather than decrease, in maternal mortality. JUANITA GRAHAM, MISS. STATE DEP'T HEALTH, PREGNANCY-RELATED MATERNAL MORTALITY, MISSISSIPPI, 2011-2012, [HTTP://MSDH.MS.GOV/MSDHSITE/_STATIC/RESOURCES/5631.PDF](http://msdh.ms.gov/msdhsite/_static/resources/5631.pdf).

¹⁰ 136 S. Ct. 2292 (2016).

¹¹ 410 U.S. 113 (1973).

¹² 505 U.S. 833 (1992).

¹³ Act of Jul. 18, 2013, ch. 1 (HB 2), §§ 1–12, 2013 Tex. Sess. Law Serv. 4795–802 (West) (codified at TEX. HEALTH & SAFETY CODE ANN. §§ 171.0031, 171.041–.048, 171.061–.064) (amending TEX. HEALTH & SAFETY CODE ANN. §§ 245.010–.011, 164.052, 164.055) [hereinafter H.B. 2]

¹⁴ TEX. HEALTH & SAFETY CODE ANN. § 171.0031(a) (West 2015).

¹⁵ TEX. HEALTH & SAFETY CODE ANN. § 245.010(a).

The Texas legislature enacted H.B. 2 on July 18, 2013, in the wake of political chaos that included impassioned floor speeches by proponents and opponents, late night legislating, pro-choice protestors descending in droves at the capitol building, and a robust filibuster by state Senator Wendy Davis. The protests, including Davis's filibuster and clamorous chants to disrupt the roll-call vote, resulted in broad news coverage throughout the United States. According to Davis, "[t]he fight for the future of Texas [was] just beginning."¹⁶

In the end, however, abortion rights activists suffered a painful defeat while anti-abortion activists proudly proclaimed the newly enacted H.B. 2 to be one of the most restrictive measures to regulate abortion access in the United States.¹⁷ As described above, H.B. 2 required physicians to obtain admitting privileges at local hospitals within a 30 mile radius of the abortion clinic. The law also banned abortions at twenty weeks or later, except in cases of severe fetal abnormality and maternal health endangerment. H.B. 2 prohibited the use of abortion-by-medication, except as permitted by the Food and Drug Administration (FDA). Finally, the law required all abortion facilities to comply with ambulatory surgical center requirements. That is, Texas legislators mandated that all abortion facilities operating in their state acquire all the equipment necessary to resemble and function as emergency surgical centers—even if not medically necessary.

According to the Texas Policy Evaluation Project, within months of the law's enactment, the number of abortion clinics in Texas dramatically declined by 56%; from 41 licensed clinics to 18.¹⁸ The number of legal abortions in Texas also declined,¹⁹ due to the reduced number of clinics in the state. Wait periods for an abortion increased by nearly three weeks,²⁰ also attributable to fewer clinics legally permitted to operate in Texas. Longer wait periods produced serious barriers and harsh consequences, particularly for poor women, because H.B. 2 also enacted a ban on abortions after 20 weeks. Many women reported that the Texas restrictions placed an undue burden on their constitutionally-protected right to an abortion by constructing significant,

¹⁶ Morgan Smith et al., *Abortion Bill Finally Bound for Perry's Desk*, TEX. TRIB. (July 13, 2013, 12:17 AM), <http://www.texastribune.org/2013/07/13/texas-abortion-regulations-debate-nears-climax/>.

¹⁷ Becca Aaronson, *House Approves Abortion Restrictions*, TEX. TRIB. (July 10, 2013, 11:23 AM), <http://www.texastribune.org/2013/07/10/take-two-house-debates-proposed-abortion-regulation/>; Manny Fernandez, *Abortion Restrictions Become Law in Texas, but Opponents Will Press Fight*, N.Y. TIMES (July 18, 2013), <http://www.nytimes.com/2013/07/19/us/perry-signs-texas-abortion-restrictions-into-law.html>; Jordan Smith, *Updated: Senate Passes House Bill 2: Rejected Amendments, Dramatic Speeches, and Finally a Vote*, AUSTIN CHRON. (July 12, 2013, 11:48 PM), <http://www.austinchronicle.com/daily/news/2013-07-12/senate-considers-house-bill-2/>.

¹⁸ See TEX. POLICY EVALUATION PROJECT, ACCESS TO ABORTION CARE IN THE WAKE OF HB2, http://www.utexas.edu/cola/txpep/_files/pdf/AbortionAccessafterHB2.pdf; see also Manny Fernandez & Erik Eckholm, *Court Upholds Texas Limits on Abortions*, N.Y. TIMES (June 9, 2015), <https://www.nytimes.com/2015/06/10/us/court-upholds-texas-law-criticized-as-blocking-access-to-abortion.html>; *Fewer Abortion Clinics in Texas*, N.Y. TIMES (June 10, 2015), <http://www.nytimes.com/interactive/2014/08/04/us/shrinking-number-of-abortion-clinics-in-texas.html>.

¹⁹ See TEX. POLICY EVALUATION PROJECT, ABORTION WAIT TIMES IN TEXAS: THE SHRINKING CAPACITY OF FACILITIES AND THE POTENTIAL IMPACT OF CLOSING NON-ASC CLINICS, (Oct. 5, 2015), http://sites.utexas.edu/txpep/files/2016/01/Abortion_Wait_Time_Brief.pdf (finding six months after the first three provisions of H.B. 2 were enforced, the number of abortions performed in Texas fell by 13% compared to the same six-month period one year earlier).

²⁰ Stephen Young, *Texas Women Face Long Abortion Waits in HB2's Wake*, DALL. OBSERVER (Oct. 6, 2015, 4:00 AM), [HTTP://WWW.DALLASOBSERVER.COM/NEWS/TEXAS-WOMEN-FACE-LONG-ABORTION-WAITS-IN-HB2S-WAKE-7658610](http://www.dallasobserver.com/news/texas-women-face-long-abortion-waits-in-hb2s-wake-7658610); Mark Reagan, *HB2 Increasing Wait Times for Women Seeking Abortion Services*, SAN ANTONIO CURRENT (Oct. 6, 2015, 8:06 AM), <http://www.sacurrent.com/Blogs/archives/2015/10/06/hb2-increasing-wait-times-for-women-seeking-abortion-services>.

insurmountable barriers to access.²¹ One such example could be found in the Rio Grande of Texas, where only one abortion clinic operated. With its closure, the nearest clinic to perform abortion services would have been 230 miles away, a 12 hour roundtrip car ride.²² In this context, researchers recorded a dramatic uptick in the number of women who sought to self-induce abortions. They estimated that between 100,000 to as many as a quarter of a million women in Texas attempted self-induced abortions.²³

H.B. 2, and the movement that swept the legislation into existence, bore the signs of a larger trend, emblematic of strategic legal and policy efforts to systemically erode reproductive healthcare rights. H.B. 2 was typical of legislation emerging in 2013, in that it substantively and strategically burdened women's reproductive healthcare rights. Lawmakers in 35 states proposed over 300 abortion rights restrictions in 2013.²⁴ Seventy of those restrictions were enacted.²⁵ The laws emanated from 22 states²⁶ and represented the second highest number of reproductive rights restrictions passed in one legislative session.²⁷ According to the National Women's Law Center, "[n]o year from 1985 through 2010 saw more than 40 new abortion restrictions; however, every year since 2011 has topped that number."²⁸ In fact, more anti-abortion legislation was enacted between 2010 and 2014 than in every other year since *Roe v. Wade* combined.

II. WHOLE WOMAN'S HEALTH AND THE IMPACT OF TRAP LAWS

The litigation following Texas's passage of H.B. 2 highlighted not only the devastating impacts on reproductive healthcare access for women in Texas, but also exposed how federalism is now a powerful tool in undermining abortion rights. After successful litigation at the District Court level, challengers of the law suffered a terrible defeat in the Fifth Circuit, where the abortion regulation provisions were upheld under the

²¹ *Id.*

²² *About Us*, WHOLE WOMAN'S HEALTH, <http://wholewomanshealth.com/about-us.html> (last visited Dec. 1, 2015).

²³ See TEX. POLICY EVALUATION PROJECT, KNOWLEDGE, OPINION AND EXPERIENCE RELATED TO ABORTION SELF-INDUCTION IN TEXAS (Nov. 17, 2015), http://liberalarts.utexas.edu/txpep/_files/pdf/TxPEP-Research-Brief-KnowledgeOpinionExperience.pdf; TEX. POLICY EVALUATION PROJECT, TEXAS WOMEN'S EXPERIENCES ATTEMPTING SELF-INDUCED ABORTION IN TEXAS (Nov. 17, 2015), http://liberalarts.utexas.edu/txpep/_files/pdf/TxPEP-Research-Brief-WomensExperiences.pdf.

²⁴ *States Where They Think We're Dumb: Abortion Access Under Attack in 2013*, ACLU, <https://www.aclu.org/maps/states-where-they-think-were-stupid-abortion-access-under-attack-2013> (last updated Aug. 5, 2013).

²⁵ Elizabeth Nash et al., *Laws Affecting Reproductive Health and Rights: 2013 State Policy Review*, GUTTMACHER INST., <http://www.guttmacher.org/statecenter/updates/2013/statetrends42013.html> (last visited July 19, 2014); see, e.g., ARK. CODE ANN. § 20-16-1405 (West 2016) (prohibiting abortion after 20 weeks unless there is a risk of death or serious injury to the pregnant woman); N.D. CENT. CODE § 14-02.1-05.3 (West 2016) (prohibiting abortion after 20 weeks except in the case of a medical emergency); ALA. CODE § 26-23E-9 (West 2016) (requiring abortion or reproductive health centers be classified as ambulatory health care occupancy); MISS. CODE ANN. § 41-41-107 (West 2016) (making it unlawful for any person other than a physician to administer an abortion-inducing drug).

²⁶ Those 22 states were: Alabama, Arkansas, Indiana, Iowa, Kansas, Louisiana, Maryland, Michigan, Missouri, Mississippi, Montana, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Virginia, and Wisconsin.

²⁷ *2013 State Level Abortion Restrictions: An Extreme Overreach into Women's Reproductive Health Care*, NAT'L WOMEN'S LAW CTR., http://www.nwlc.org/sites/default/files/pdfs/2013_state_legislation_factsheet_1-27-14.pdf (last visited Jan. 28, 2014).

²⁸ Heather D. Boonstra & Elizabeth Nash, *A Surge of State Abortion Restrictions Puts Providers—and the Women They Serve—in the Crosshairs*, 17 GUTTMACHER POL'Y REV. 9, 9 (2014), <https://www.guttmacher.org/sites/default/files/pdfs/pubs/gpr/17/1/gpr170109.pdf> (explaining that states enacted 92 abortion restrictions in 2011, 43 restrictions in 2012, and 70 restrictions in 2014).

less scrutinizing rational basis standard.²⁹ In November 2015, the Supreme Court granted certiorari in *Whole Woman's Health*, taking up only two provisions of the law—the ambulatory surgical center and admitting privileges provisions—and vacating the Fifth Circuit Court of Appeals ruling, essentially restoring the original District Court injunctions.

In a 5–3 decision, the Supreme Court struck down the provisions in question. The Court specifically observed that “prior to the enactment of H.B. 2, there were more than 40 licensed abortion facilities in Texas,” and that number “dropped by almost half leading up to and in the wake of enforcement of the admitting-privileges requirement that went into effect in late-October 2013.”³⁰ Quoting directly from the District Court opinion and writing for the majority, Justice Breyer cautioned:

- “If the surgical-center provision were allowed to take effect, the number of abortion facilities, after September 1, 2014, would be reduced further, so that ‘only seven facilities and a potential eighth will exist in Texas.’”³¹
- The state’s claim “that these seven or eight providers could meet the demand of the entire state stretches credulity.”³²
- And, the “two requirements erect a particularly high barrier for poor, rural, or disadvantaged women.”³³

One critical aspect of the *Whole Woman's Health* decision was that the Court dispelled the notion that the Texas law actually served pregnant patients’ interests. The Court chipped away at the notion that laws such as H.B. 2 safeguard women’s health while not constraining abortion rights.

A. ADMITTING PRIVILEGES

Citing an amicus brief from the Society of Hospital Medicine, the Court noted the “undisputed” fact that “hospitals often condition admitting privileges on reaching a certain number of admissions per year.”³⁴ As such:

[I]t would be difficult for doctors regularly performing abortions at the El Paso clinic to obtain admitting privileges at nearby hospitals because “[d]uring the past 10 years, over 17,000 abortion procedures were performed at the El Paso clinic [and n]ot a single one of those patients had to be transferred to a hospital for emergency treatment, much less admitted to the hospital.”³⁵

Writing for the majority, Justice Breyer explained that “[i]n a word, doctors would be unable to maintain admitting privileges or obtain those privileges for the future, because the fact that abortions are so safe meant that providers were unlikely to have any patients to admit.”³⁶ Moreover, amicus briefs filed by Medical Staff Professionals and the American College of Obstetricians and Gynecologists (ACOG) clarifying that

²⁹ *Whole Woman's Health v. Cole*, 790 F. 3d 587 (2015).

³⁰ *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2301 (2016).

³¹ *Id.*

³² *Id.* at 2302.

³³ *Id.*

³⁴ *Id.* (citation omitted).

³⁵ *Id.* at 2312.

³⁶ *Id.*

“admitting privileges ... have nothing to do with the ability to perform medical procedures”³⁷ provided a persuasive factual foundation for the Court. In the latter brief, ACOG specifically related that “some academic hospitals will only allow medical staff membership for clinicians who also accept faculty appointments.”³⁸

Justice Breyer took special note of a particular gynecologist with nearly 40 years of practice experience who, despite experience in delivering over 15,000 babies, was yet unable to obtain hospital admitting privileges at the seven hospitals within a 30 mile radius of his office. The Court cited a letter from one of the nearby hospitals that explained the refusal to provide the doctor admitting privileges was “not based on clinical competence considerations.”³⁹ To that end, the Court concluded that “[t]he admitting privileges requirement does not serve any relevant credentialing function.” Instead, the law resulted in numerous clinic closures throughout the state of Texas and placed inordinate, unjustifiable burdens on pregnant women.

For example, after H.B. 2’s enactment, the number of women living more than 150 miles from a clinic providing abortion services increased from about 86,000 to 400,000. In addition, the number of women residing in a “county more than 200 miles from a provider” increased from 10,000 to 290,000.⁴⁰ The Court concluded that, when taken together, increased distance to a provider (which is not dispositive of an undue burden) and other factors that resulted in the dramatic number of clinic closures constituted an undue burden on the right to abortion and thus did not meet the constitutional threshold laid out in *Casey*.

It is worth taking note of the dissenting Justices’ response to the majority analysis on this point. The dissenting Justices conjectured that while some clinics possibly closed because of the conditions imposed by the enactment of H.B. 2, other clinics may have ceased operation under the purpose and intent of the law to weed out bad actors, and therefore “force unsafe facilities to shut down.”⁴¹ Notably, the Justices’ speculations were not rooted in any evidence—and none was proffered by the state to support such a conclusion.

B. SURGICAL-CENTER REQUIREMENTS

The second issue the Court turned to was whether H.B. 2’s surgical-center requirement violated the constitutional standards set forth in *Casey*. Prior to the enactment of H.B. 2, “Texas ... required abortion facilities to meet a host of health and safety requirements.”⁴² Specifically, Justice Breyer noted that Texas law already required clinics that perform abortions to develop, complete, and maintain: environmental and physical requirements; annual reporting; infection control; record keeping; patients’ rights standards; quality assurance mechanisms; disclosure requirements; and anesthesia standards among others.⁴³ Moreover, clinics performing abortions in Texas are subject to random and unannounced inspections as a means of monitoring compliance with nearly a dozen separate standards. In fact, the Texas Administrative Code, Title

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 2313.

⁴⁰ *Id.*

⁴¹ *Id.* at 2343.

⁴² *Id.* at 2314.

⁴³ *Id.* at 2314 (citing TEX. ADMIN. CODE, tit. 25, §§ 139.4, 139.5, 139.55, 139.58; §§ 139.43, 139.46; § 139.48; § 139.49; § 139.50; § 139.59); *see also* TEX. ADMIN. CODE §§ 139.23, 139.31; TEX. HEALTH & SAFETY CODE ANN. § 245.006(a) (West 2010)).

25, § 139.33 and Texas Health & Safety Code Annotated § 245.011 impose criminal penalties for failure to comply with the aforementioned regulations and for violating reporting guidelines.

As the Court observed, the state's new ambulatory surgical-center mandate added "detailed specifications relating to the size of the nursing staff, building dimensions, and other building requirements" to the already extensive requirements the state of Texas imposed on abortion providers prior to H.B. 2.⁴⁴ The requirements included a full surgical suite "with an operating room that has 'a clear floor area of at least 240 square feet,'" as well as preoperative rooms and postoperative recovery suites, with specified traffic patterns, wall arrangements, shelving arrangements, specific types of ventilation, heating, and air conditioning among other requirements. Again siding with the District Court, the Court found the new stipulations did not benefit patients nor promote any greater safety and that, "risks are not appreciably lowered for patients who undergo abortions at ambulatory surgical centers as compared to nonsurgical-center facilities."⁴⁵ In other words, women were no better off receiving an abortion at an ambulatory care facility than at a previously licensed facility. In addition, the new law offered "no benefit when complications arise in the context of an abortion produced through medication."⁴⁶

Perhaps even more compelling to the Court was important evidence that legal abortions performed at clinics prior to the enactment of H.B. 2 were safe. As Justice Breyer wrote, "[t]he record also contains evidence indicating that abortions taking place in an abortion facility are safe—indeed, safer than numerous procedures that take place outside hospitals and to which Texas does not apply its surgical-center requirements."⁴⁷ To emphasize this point, the Court noted that a colonoscopy, which takes place outside of a surgical center and hospital setting, "has a mortality rate 10 times higher than an abortion," and liposuction (also performed outside of a surgical center and hospital) has a mortality rate that "is 28 times higher than the mortality rate for abortion."⁴⁸

Justice Breyer concluded that:

The upshot ... [of this] record evidence, along with the absence of any evidence to the contrary, provides ample support for the District Court's conclusion that "[m]any of the building standards mandated by the act and its implementing rules have such a tangential relationship to patient safety in the context of abortion as to be nearly arbitrary."⁴⁹

According to Justice Breyer, "we conclude that neither of these provisions confers medical benefits sufficient to justify the burdens upon access that each imposes"⁵⁰ on women in Texas. Simply put, by placing substantial obstacles in a woman's path to a legal abortion, the state of Texas created an undue burden on abortion access, in violation of the Constitution.

⁴⁴ *Whole Woman's Health*, 136 S. Ct. 2292 (2016).

⁴⁵ *Id.* at 2315 (citation omitted).

⁴⁶ *Id.* at 2315.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 2316.

⁵⁰ *Id.* at 2300.

III. THE PROBLEM WITH *WHOLE WOMAN'S HEALTH*

Abortion rights activists heralded the Supreme Court's 5–3 decision that H.B. 2's admitting privileges provision and the surgical center requirements substantially interfered in a woman's ability to seek a previability abortion. Activists and scholars view the case as a substantial victory and reframing of the abortion debate. On the one hand, they are right. Substantively, *Whole Woman's Health* upholds the legacy of *Roe v. Wade* and protects the constitutionality of abortion rights.⁵¹ Linguistically, not once in the case does the Court mention the word fetus in contestation with a woman's right to end a pregnancy. Moreover, the case was a landmark for women, because the Court actually focused on the burdens experienced by women; thus, moving away from treating pregnant women as third parties in their reproductive health.⁵² So, what is wrong with the case?

While *Whole Woman's Health* represented a judicial victory for those who seek to safeguard and preserve abortion rights, the case nevertheless further rooted the primacy of the Supreme Court's flawed framework in *Planned Parenthood v. Casey*.⁵³ In that decision, the Court rejected *Roe*'s trimester doctrine as "rigid," and expanded the State's interest in potential life to include the entire period throughout a woman's pregnancy.⁵⁴ Unlike Justice Blackmun's opinion in *Roe*, Justice Kennedy's plurality opinion in *Casey* neglected to focus on the unique nature of an unintended and unwanted pregnancy in a woman's life. Justice Blackmun explained in *Roe* that an unwanted pregnancy imposed a range of financial, physical, social, and even psychological hardships on women.⁵⁵ Furthermore, Justice Blackmun emphasized the social stigmas and shaming that often resulted from unwed pregnancies.⁵⁶

In *Roe*, Justice Blackmun explained, a state's imposition of motherhood onto women who would not otherwise determine that for themselves is a severe injury.⁵⁷ Blackmun wrote: "Maternity, or additional offspring, may force upon the woman a distressful life and future," burdened by potentially imminent psychological trauma.⁵⁸ The Court stated that "there is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically, and otherwise to care for it."⁵⁹

Justice Blackmun reflected on the fact that anti-abortion laws actually fit within strategic lawmaking of a "relatively recent vintage."⁶⁰ For example, "those laws, generally proscribing abortion or its attempt at any time during pregnancy except when necessary to preserve the pregnant woman's life, are not of ancient or even of common-law origin,"⁶¹ he wrote. Rather, as he described, the laws derived from "statutory changes, effected, for the most part, in the latter half of the 19th century,"⁶² when Anthony Comstock launched his notorious anti-vice campaigns against contraception,

⁵¹ *Id.* at 2321.

⁵² *See id.* at 2313, 2317–18.

⁵³ 505 U.S. 833 (1992).

⁵⁴ *Id.* at 872–73, 876.

⁵⁵ *Roe v. Wade*, 410 U.S. 113, 153 (1973).

⁵⁶ *Id.*

⁵⁷ *Id.* at 153.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 129.

⁶¹ *Id.*

⁶² *Id.*

abortion, naked images—even in medical books—and vice generally, which ultimately resulted in federal bans on contraception and 24 states enacting similar prohibitions on contraception and abortion.⁶³

But in *Casey*, Justice Kennedy sidestepped analysis focusing on pregnant women and the potential detriments caused by pregnancy. Instead, the Court established that states have a “profound interest” in potential life.⁶⁴ As such, the Court found that States could take actions to ensure that pregnant women made “informed” choices related to their pregnancies.⁶⁵ Moreover, the Court emphasized that laws designed to influence pregnant women’s decisions to choose childbirth over abortion would not be invalidated.⁶⁶ Instead, prior to viability, only laws that placed “substantial obstacles” in the path of a woman seeking an abortion would be struck down.⁶⁷ And, while the Court did not define a substantial obstacle, by its ruling it made clear that parental notification, a 24 hour waiting period, and measures to secure “informed consent” were not so odious as to violate this constitutional right.⁶⁸

The *Casey* framework rests on perpetuating the misleading medical notion that abortions are likely psychologically regrettable and potentially unsafe to such a degree that women (even after weeks of pregnancy) would benefit from states mandating 24 hours or more for women to ponder their decisions.⁶⁹ In other words, a woman could come to regret her decision *if she did not wait 24 hours*. In reaching that conclusion, the Court granted far too much character to a state’s conception of a woman’s pregnancy, coloring it with stigma and shame that *Roe* sought to relieve.⁷⁰ As such, *Casey* not only perpetuated the notion that abortions are risky (the very premise of women *needing* a wait period), despite evidence to the contrary, but also the belief that women are uninformed decision-makers even in matters as important as their health.⁷¹

Casey reified the stereotype that women lack the capacity to make informed decisions about terminating their pregnancies *without* involvement by the state.⁷² Indeed, the extent to which the Court overturned *Akron I*⁷³ and *Thornburgh*,⁷⁴ both of which insist that an informed consent law cannot be used solely to deter a woman from making the decision to terminate a pregnancy, bears examination, because the Court granted states license to literally and figuratively reframe abortion and to create their own narratives, which presently in many states include inaccuracies and mistruths associating abortions with breast cancer, sterility, severe infections, medical

⁶³ *The Pill, People & Events: Anthony Comstock’s “Chastity” Laws*, PBS, http://www.pbs.org/wgbh/amex/pill/peopleevents/e_comstock.html (last visited Oct. 16, 2016) (“The driving force behind the original anti-birth control statutes was a New Yorker named Anthony Comstock [who as] a devout Christian ... was offended by explicit advertisements for birth control devices ... soon identified the contraceptive industry as one of his targets.”).

⁶⁴ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 878 (1992).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 886–87, 895.

⁶⁹ *Id.* at 882.

⁷⁰ *See id.* at 882.

⁷¹ *See id.* at 882–85.

⁷² *See id.*

⁷³ 462 U.S. 416, 444 (1983).

⁷⁴ 476 U.S. 747, 762 (1986).

complications, and psychoses.⁷⁵ The Court states imposing information requirements does not interfere with a constitutional right to privacy, because the privacy right exists between a woman and her doctor.⁷⁶

Problematically, the Court's flawed jurisprudence in *Casey*, and thus the broader domain of abortion law, grants states power to construct the types of proxies for constitutional obstructionism and discrimination as carried out by Texas. Thus, the weakness in *Whole Woman's Health* was the Court's failure to engage in a third wave of abortion jurisprudence that builds on a reproductive justice framework. This type of framework would take into account an evolved understanding of women's autonomy right and social, mental, and cultural capacities. A third wave abortion jurisprudence would build on the empirical record so robustly taken up by Justice Blackmun in *Roe*, demonstrating the entrenched nature of sex discrimination in society that results in added discrimination and stigma across employment and pay against women who bear children. Such an analysis would include considering how race and class barriers and discrimination continue to uniquely and disparately harm pregnant women and inhibit them from pursuing the futures they imagine for themselves. In fact, a third wave jurisprudence would finally begin to unpack a sturdy sex equality framework within the space of reproductive health.

CONCLUSION

What accounts for TRAP lawmaking? Some commentators and scholars point to conservative values surreptitiously influencing legislatures or pressure from the "alt-right" in the political and legislative processes.⁷⁷ Professor Caitlin Borgmann explains that "[v]iewed in this light, abortion restrictions are transformed into measures that promote women's health and well-being and that protect women from the exploitation and deception of abortion providers." Some scholars argue that anti-abortion efforts reflect religious fundamentalism creeping into the legislative space.⁷⁸ Still others maintain that implicit and explicit bias explains anti-choice lawmaking; they argue men

⁷⁵ See Chinué Turner Richardson & Elizabeth Nash, *Misinformed Consent: The Medical Accuracy of State-Developed Abortion Counseling Materials*, 9 GUTTMACHER POL'Y REV. 6 (2006), https://www.guttmacher.org/sites/default/files/article_files/gpr090406.pdf.

⁷⁶ *Casey*, 505 U.S. at 883.

⁷⁷ See, e.g., Caitlin E. Borgmann, *The Meaning of "Life": Belief and Reason in the Abortion Debate*, 18 COLUM. J. GENDER & L. 551, 558–63 (2009) (noting, "[t]he conservative portrayal of fetuses as persons pervades public discourse about abortion 'now results in 'the embryo or fetus treated as a legal person in many contexts outside abortion'"); Hannah Fingerhut, *On Abortion, Persistent Divides Between—and Within—the Two Parties*, PEW RES. CTR. (April 8, 2016), <http://www.pewresearch.org/fact-tank/2016/04/08/on-abortion-persistent-divides-between-and-within-the-two-parties-2/>.

⁷⁸ See, e.g., Diane di Mauro & Carole Joffe, *The Religious Right and the Reshaping of Sexual Policy: An Examination of Reproductive Rights and Sexuality Education*, 4 SEXUALITY RES. & SOC. POL'Y 67, 73 (2007) (noting that "[t]he Religious Right has [so] skillfully capitalized on the power of ultrasounds" that the result has included shifts in legislation and millions diverted to pregnancy crisis centers); Karen F.B. Gray, *An Establishment Clause Analysis of Webster v. Reproductive Health Services*, 24 GA. L. REV. 399, 418 (1990) (arguing that government enacted abortion statutes reflect pressure from the groups aligned with religiously motivated, anti-abortion beliefs.); *Issue Ranks Lower on the Agenda: Support for Abortion Slips*, PEW RES. CTR. 1, 21–23 (2009), <http://www.pewforum.org/files/2009/10/abortion091.pdf> (explaining "[r]eligious beliefs hold much stronger sway over those who oppose abortion than over those on the pro-choice side of the abortion issue.").

simply do a poor job legislating on behalf of women.⁷⁹ Reva Siegel brilliantly describes this type of legislating as resting “on traditional assumptions about women’s natural obligations or instrumental uses as mothers.”

Despite the meaningful victory represented in *Whole Woman’s Health v. Hellerstedt*, the Court evaluated only two questions related to the legislation and did not address the broader plethora of laws described above, that prevail against women in states like Missouri, Mississippi, North Dakota, South Dakota, and Wyoming where only one abortion clinic remains.⁸⁰ Indeed, it would be a mistake to read *Whole Woman’s Health* as representing a fundamental change to abortion access on the ground level, because the conditions in many states continue to so significantly burden and stigmatize that right, particularly for poor women.

Moreover, given federal proscriptions on taxpayer dollars aiding pregnant women who seek abortion under the Hyde Amendment framework,⁸¹ TRAP legislation uniquely and fundamentally harms poor women. Unequivocally, TRAP laws do not provide a legitimate basis for denying abortion access and importantly, they actually place women’s health in danger. Ironically, the solution may be a return to the principles of *Roe v. Wade*, where the Court actually considered the life circumstances of women.

In *Roe*, the Court ruled that a right to terminate a pregnancy is rooted in the right of privacy, “whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people.”⁸² This privacy right, according to the Court, “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”⁸³

Clearly, *Roe* did not resolve women’s inequality. However, the Court made an important intervention in the advancement of women’s reproductive health. Sadly, forty years later, women’s reproductive healthcare autonomy and privacy are under direct threat, notwithstanding *Whole Woman’s Health*.

⁷⁹ CATHARINE A. MACKINNON, *WOMEN’S LIVES, MEN’S LAWS* 143 (2005) (arguing that the criminalization of abortion is an equal protection issue, because: “pregnancy can be experienced only by women, and because of the unequal social predicates and consequences pregnancy has for women, any forced pregnancy will always deprive and hurt members of one sex only on the basis of gender.”); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 366 (1992) (“[R]egulators may adopt particular means for protecting unborn life because stereotypical assumptions about the maternal role lead them to underestimate the impact of fetal-protective regulation on women.”).

⁸⁰ Esme Depres, *U.S. Abortion Rights Fights*, BLOOMBERG NEWS (July 7, 2016), <https://www.bloomberg.com/quicktake/abortion-and-the-decline-of-clinics>.

⁸¹ *Harris v. McRae*, 448 U.S. 297 (1980) (establishing that even in instances where maternal health is threatened, the government does not place an “obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services, encourages alternative activity deemed in the public interest.”). *Id.* at 315.

⁸² *Roe v. Wade*, 410 U.S. 113, 153 (1973).

⁸³ *Id.*

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Coming to Terms with Term Limits: Fixing the Downward Spiral of Supreme Court Appointments^{*}

Kermit Roosevelt III & Ruth-Helen Vassilas

After an awkward and acrimonious fourteen months shorthanded, the Supreme Court is back to nine Justices. But if there is one thing people should be able to agree on after the tumultuous process of replacing Justice Scalia—the Republican blockade of President Obama’s nominee, the Democratic filibuster of President Trump’s, the Senate’s nuclear destruction of its centuries-old procedural rule for approving nominees—it is that our process for appointing Supreme Court Justices is broken.

In this issue brief we describe the problems that beset the current appointment process and propose a solution: term limits for Supreme Court Justices. While parts of our analysis may be novel, the solution certainly is not: it mirrors the practice of the rest of the Western world and is now being promoted by law and policy thinkers from across our political spectrum. The proposals may differ in some details, but there is broad consensus that term limits would constitute a desirable reform.

There is slightly more disagreement about how term limits might be implemented. Some scholars believe that a constitutional amendment would be required. That would be bad news for term limit proponents, as the U.S. Constitution is notoriously difficult to amend. We believe, however, that this view is mistaken. An amendment would not be necessary; a properly drawn statute could implement term limits for Supreme Court Justices without offending the constitutional guarantee that federal judges shall hold office during good behavior. We believe the case in favor of joining the majority of the world in establishing term limits for our highest court is compelling and hope that sharing this perspective and the proposal for its implementation will increase its appeal.

In Part I of this Issue Brief, we describe the problem and in Part II we identify its source. Changes in American society, most notably the rise of a two-party system, have placed additional stress on the nomination process. Because these political changes were not anticipated by its drafters, our Constitution has no method of resolving the strain. As a result, there is now a fundamental lack of agreement on when, whether, and under what conditions a president has the right to appoint a Supreme Court Justice. Part III explains how fixed eighteen-year terms for Supreme Court Justices will help resolve the current problems. Part IV sets out the details of the proposal and explains how it could be implemented without a constitutional amendment.

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I. THE PROBLEM

A. PARTISANSHIP IN APPOINTMENTS AND RETIREMENTS

With each new episode of partisan rancor over the Supreme Court, there comes an attempt to pinpoint the moment the appointment process went wrong and to fix the blame on one side or another. The Right often points to the defeat of Ronald Reagan's nominee Robert Bork; the Left counters that it began with the racist questioning of Thurgood Marshall by segregationist southern Senators.¹ In fact, however, partisan misbehavior began long before either of those nominations.

The history of playing politics with Supreme Court appointments goes back to the earliest days of our Republic. In the year 1800, a lame-duck Federalist Congress reduced the size of the Court to deny incoming President Thomas Jefferson an appointment.² Jefferson's party, upon taking control of Congress, repealed that measure and later added one seat to the Court to give Jefferson an additional appointment. By the early-to-mid nineteenth century, blocking presidents' Supreme Court nominations was a well-established possibility. Presidents John Quincy Adams, Millard Fillmore, and John Tyler all saw nominations defeated.³ Extreme partisan court-tampering maneuvers continued during the Civil War, when the Republican Congress increased the size of the Court to ten to ensure a pro-Union majority.⁴ After Abraham Lincoln's assassination, Congress shrank the Court to seven to deny President Andrew Johnson appointments. Once Ulysses S. Grant was elected, Congress returned the number of seats to nine.⁵

Partisan battles over the appointment process are bad enough as a general matter, as these squabbles tend not to promote the interests of the nation as a whole. But more specifically, the interaction of life tenure with partisan politics has spawned a number of other undesirable consequences. The end result, as explained below, is to reduce the quality of our Supreme Court in terms of individual Justices and to distort the Court's relation to the national political process.

With respect to the Justices themselves, the current system gives presidents incentives to pick a young nominee, rather than the best qualified, to maximize the length of their influence on the Court.⁶ Older candidates, no matter their status or abilities, may be eliminated for reasons of age alone. Franklin D. Roosevelt, for example, ignored advice to appoint 70-year-old Learned Hand in 1942, deciding instead to use his eighth nomination on 48-year-old Wiley Rutledge.⁷ Other seasoned candidates,

¹ See generally STEPHEN CARTER, *THE CONFIRMATION MESS* (1994) (addressing the political chaos that comes with nominating and confirming Justices).

² Erick Trickey, *The History of the "Stolen" Supreme Court Seats*, SMITHSONIAN.COM (Mar. 20, 2017), <http://www.smithsonianmag.com/history/history-stolen-supreme-court-seats-180962589/>.

³ See *id.* (giving an overview of the Supreme Court history and specifically explaining the Senate blocked John Tyler from filling a seat before the election, rejected his first nomination, sat on two qualified candidates for over a year then accepted one out of his next two nominations).

⁴ *Id.*

⁵ See generally Jean Edward Smith, *Stacking the Court*, N.Y. TIMES (July 26, 2007), <http://www.nytimes.com/2007/07/26/opinion/26smith.html> (giving a history of parties tampering with the number of Supreme Court seats).

⁶ See Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 801 (2006) (noting presidents have consistently nominated candidates who are around 50-55 years old, despite the continuous increase in life expectancy).

⁷ John T. Noonan Jr., *Master of Restraint*, N.Y. TIMES (May 1, 1994), <http://www.nytimes.com/1994/05/01/books/master-of-restraint.html?pagewanted=all>.

like Richard Posner, have noted they are disqualified from the running because they are “too old”⁸ or because of uncertainty about how long they will live.⁹

Once on the Court, Justices tend to stay there a long time—sometimes longer than they should. Some Justices remain on the bench after they are no longer capable of performing at their best, or even at an acceptable level of professional competence. Justice William O. Douglas, for example, refused to step down even after he had a debilitating stroke.¹⁰ In part, this happens simply because of life tenure: Supreme Court Justices may prefer to hold their jobs as long as possible in order to retain the power, status, and satisfaction that accompany the position.

But it is the combination of both life tenure and partisan considerations which produces the phenomenon of strategic retirement. Justices often time their departures from the Court not with reference to their fitness, or even their enjoyment of the job, but based upon the politics of the president who will appoint their replacement. Justice Douglas, for example, said he would not resign until there was a Democratic president.¹¹ Justice Thurgood Marshall, likewise, was determined to serve until a Democrat took office.¹² With sight and hearing failing, beset by increasingly severe health problems, he would tell his incoming clerks, presumably in jest, “If I die, prop me up and keep on voting.”¹³ When, on election night, it appeared that Al Gore would win the 2000 Presidential election, Justice O’Connor exclaimed the outcome was “terrible” because it meant delaying her retirement plans another four years to avoid a Democrat naming her successor.¹⁴

As the path to Senate confirmation has grown more difficult, Justices seeking to ensure an ideologically comparable replacement must increasingly look to retire not only when their preferred party controls the White House, but must also consider Senate politics. When President Obama was still in office, for example, many urged Justice Breyer and Justice Ginsburg to retire. Justice Ginsburg dismissed the suggestion with the observation, “And who do you think Obama could have nominated and got confirmed that you’d rather see on a court?”¹⁵

These pressures help to explain why the Justices’ tenures are longer now than ever before. For the Supreme Court’s first thirty-two years, Justices averaged only 7.5 years on the Court. From 1941-1970 Justices averaged 12.2 years. Then, from 1971 to 2000 a 14-year jump brought the average Justice tenure to 26.1 years, with many Justices serving over 33 years.¹⁶

⁸ Debra Cassens Weiss, *Posner Has “Absolutely No Desire” To Join SCOTUS, Which “Isn’t a Real Court,”* A.B.A. J. (Nov. 11, 2013), http://www.abajournal.com/news/article/posner_has_absolutely_no_desire_to_join_scotus_which_isnt_a_real_court.

⁹ See Philip D. Oliver, *Systematic Justice: A Proposed Constitutional Amendment To Establish Fixed, Staggered Terms for Members of the United States Supreme Court*, 47 OHIO ST. L.J. 799, 803 n.32 (1986) (noting Senator Garland of Arkansas advised President Cleveland he regarded himself disqualified for SCOTUS because of age).

¹⁰ Smith, *supra* note 5.

¹¹ Oliver, *supra* note 9, at 825 (citing *Douglas Finally Leaves the Bench*, TIME (Nov. 24, 1975), at 69).

¹² Richard Lacayo, *Marshall’s Legacy: A Lawyer Who Changed America*, TIME (June 24, 2001), <http://content.time.com/time/magazine/article/0,9171,157412,00.html>.

¹³ *Id.*

¹⁴ *Pivotal Justice Upset by Prospect of a Gore Win*, BLADE (Dec. 19, 2000), at A6.

¹⁵ Gail Collins, *The Unsinkable R.B.G.*, N.Y. TIMES (Feb. 20, 2015), <https://www.nytimes.com/2015/02/22/opinion/sunday/gail-collins-ruth-bader-ginsburg-has-no-interest-in-retiring.html>.

¹⁶ Calabresi & Lindgren, *supra* note 6, at 778.

B. AN OUT OF TOUCH COURT?

The increasing length of judicial service yields older serving individual Justices¹⁷ and a higher average age of the Supreme Court. Neither is a desirable outcome. With Justices serving for over thirty years, the Court may lose its connection to the present day. It tends to lag behind the elected branches in terms of its sense of the world, reflecting not the political consensus of today, but one from decades ago.

The potential gap between the Court and modern America would be less concerning if the Constitution gave us clear right answers to legal questions, which never varied from decade to decade. But this understanding of the Constitution is theoretically implausible and, theory aside, it is obviously inconsistent with the Court's practice over our history.¹⁸ The Supreme Court *does* change its mind, and replacing older Justices with new ones is one of the main engines driving that change. The question is how quickly, and perhaps more important how regularly, that process of replacement should occur.

There is something to be said for a deliberate pace, in that it makes the Court a natural anchor that slows the rate of social transformation. But one can have too much of a good thing, and a Court that is out of touch with society is more likely to frustrate needed reforms than to preserve traditional wisdom. The clash between the Supreme Court and the administration of Franklin D. Roosevelt—the New Deal vs. the nine old men¹⁹—is an illustration. Like it or not, the New Deal reflected the constitutional understandings of the American people and their elected representatives, understandings that are now fundamental to the organization of our economically integrated society. The Supreme Court could not ultimately stand in its way, and it did no one any favors by resisting as long as it did.

C. THE VAGARIES OF REPLACEMENT OPPORTUNITIES

Generally speaking, and in many cases that were controversial when decided, the Court has been a majoritarian institution, enforcing the will of a national majority against outlier states.²⁰ This should not be surprising. Presidents nominate Justices who share their constitutional visions, and presidential elections allow the American people a voice in the interpretation of the Constitution.²¹ A political coalition that

¹⁷ See *id.* at 783 (noting the average Justice retirement age in 2006 was the highest it had ever been at 78.7 years old).

¹⁸ See generally KERMIT ROOSEVELT III, *THE MYTH OF JUDICIAL ACTIVISM* 47–58 (2008) (describing theories of constitutional change).

¹⁹ See Noonan Jr., *supra* note 7 (noting one of the reasons FDR put younger Justices on the court was because they contrasted to the sitting Justices he referred to as the “nine old men”).

²⁰ This is the pattern followed by *Brown v. Board of Education*, *Loving v. Virginia*, *Lawrence v. Texas*, and *Obergefell v. Hodges*. See generally BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009) (arguing the Court has always been shaped by the American public and its view of the Constitution).

²¹ This was, notoriously, the stated reason behind the Republican refusal to consider Merrick Garland. Amita Kelly, *McConnell: Blocking Supreme Court Nomination “About a Principle, Not a Person,”* NPR (Mar. 16, 2016), <http://www.npr.org/2016/03/16/470664561/mcconnell-blocking-supreme-court-nomination-about-a-principle-not-a-person>. Less dramatically, the Republican Party platform for many years has contained a plank devoted to the reversal of *Roe v. Wade*. On the other side, President Obama stated while campaigning in 2008 that his ideal Justice, “...has a sense of what’s happening in the real world and recognizes that one of the roles of the court is to protect people who don’t have a voice.” Linda Hirshman, *After 45 Years of Conservative Rulings, Here’s What a Liberal Supreme Court Would Do*, WASH. POST (Feb. 19, 2006), https://www.washingtonpost.com/opinions/after-45-years-of-conservative-rulings-heres-what-a-liberal-supreme-court-would-do/2016/02/19/efa63ad4-d589-11e5-b195-2e29a4e13425_story.html?utm_term=.23c33b6103c1.

wins a presidential election is rewarded with the opportunity to influence the direction of the Supreme Court.

Or at least it should be. But as just noted, Justices tend to time their retirements based on the President who will appoint their replacement. In consequence, the partisan balance on the Court shifts much more slowly than it otherwise might. We can go decades without a Republican president replacing a Democratic appointee or vice-versa. And when such cross-party appointments do occur, they tend to be the result of random chance, when sudden death or undeniable incapacity prevent a strategic retirement.

Working in concert, strategic retirement and the uncertainties of life have produced a system whereby some presidents get no appointments and others a large number. Depending on how many appointments they get, and more crucially whether they can replace a Justice appointed by the other party, some presidents have no opportunity to shift the ideological balance on the Court and some have the chance to transform it dramatically. And, most important, the degree of presidential influence has no necessary link to the success of the president or her party in winning the support of the American people.

Hot spots, where some presidents get several nominations within a single term, can result in one party locking up the court for a long period of time—as the Republicans did at the beginning of the 20th century and the Democrats did following the New Deal²²—leaving the next Chief Executive without an appointment. Such was also the case when President Nixon got four Supreme Court nominations in five years, abruptly shifting the Court to the right and leaving President Carter, a few years later, with none.²³ Several other presidents left the White House with no Supreme Court legacy, including William Harrison, Zachary Taylor and Andrew Johnson. Other presidents had luck closer to Nixon's: Andrew Jackson had six nominations and both William Howard Taft and President Eisenhower had five.²⁴ Presumably due to the Justices' extended tenures, presidential terms devoid of appointments are occurring with more frequency, evidenced by Jimmy Carter's term, Bill Clinton's second term, and George W. Bush's first term.²⁵

Put all these factors together and you have a mess. Justices serve longer than they should. Vacancies occur infrequently and unpredictably. The stakes for each nomination are high, and the parties are naturally invested in wringing whatever partisan advantage they can from the process. The President has incentives to pick not the most qualified candidate, but someone young who has never expressed a controversial view. The Court thus produced is neither composed of the best judges available nor related in any logical way to the national political dialogue about the meaning of our Constitution and the best method of interpreting it.

II. HOW WE GOT HERE: PARTISAN POLITICS IN A NONPARTISAN CONSTITUTION

How did we get here? There have been a number of changes since the Framers' day that have contributed to the current situation. Increased life expectancy, for instance, has altered the consequences of life tenure. In post-colonial times, the average life

²² Calabresi & Lindgren, *supra* note 6, at 813.

²³ *Id.* at 737.

²⁴ Jeremy Berke, *How Many Supreme Court Appointments Every President Has Made*, BUS. INSIDER (Mar. 17, 2016), <http://www.businessinsider.com/supreme-court-nominations-of-presidents-2016-3>; *Judgeship Appointments by President*, U.S. CTS., <http://www.uscourts.gov/judges-judgeships/authorized-judgeships/judgeship-appointments-president> (last visited May 4, 2017).

²⁵ Calabresi & Lindgren, *supra* note 6, at 737.

expectancy was somewhere between 35 and 50 years old,²⁶ and the Framers presumably did not anticipate that Justices would routinely serve for 30 years or more. (Indeed, as noted, average tenure in the Founding era was less than ten years.)

But the fundamental reason that our system for appointing Supreme Court Justices is malfunctioning in these ways is the rise of the party system. The Framers, as is well known, did not anticipate the role that political parties would play in our system of governance. The party system—especially our modern two-party system—has played havoc with a number of constitutional structures. One obvious example is the original method for electing the president and vice-president. Assuming that presidential elections would be based on something like a nonpartisan assessment of merit, the Framers decided that the highest vote-getter should be President and the second-place finisher Vice-President.²⁷ In a world without political parties, that would plausibly yield the best and second-best candidates filling the top two offices in the Executive Branch, where they might be expected to cooperate on the task of governing. But once the presidential election became a contest between ideologically opposed parties, that system predictably produced a president from one party and a vice president from another. Now the top two positions were staffed by ideological opponents whose relations would be tense, as they were between the Federalist President John Adams and his Democratic-Republican Vice-President Thomas Jefferson.

Presidential elections are a discrete process that can be revised in isolation, and the Twelfth Amendment did so.²⁸ But the party system also has effects that are harder to correct. Separation of powers is a structural device that the Framers used to protect individual liberty, on the assumption that individuals in government would feel loyalty to their offices and branch of government and resist expansive claims of authority from the other branches. But this institutional loyalty is, in the modern world, overwhelmed by party loyalty. A Congress controlled by the same party as the president shows little interest in checking abuses of power or investigating wrongdoing; a Congress controlled by the opposite party tends to launch witch hunts and do what it can to make the president fail in order to recapture the White House in the next election. It is hard to think of a discrete change to the Constitution that could fix this problem.

For present purposes, however, the most important consequence of the party system is that it interferes with the appointment process the Framers designed. In a world without parties, nomination and confirmation of Supreme Court Justices would presumably be relatively straightforward. Whenever a vacancy arose, the president would nominate a replacement, and if that person met some threshold criterion of merit, the Senate would confirm. The president would have no incentive to do anything but nominate the most qualified candidate, and the Senate no reason to do anything but vote based on merit.

Introduce the party system, however, and the incentives change. The president now has an incentive to nominate the youngest and most extreme person she can get away with; the Senate has an incentive to demand moderate nominees from the other party and to block anyone they can in the hopes of transferring the nomination to the next

²⁶ *How Things Have Changed in Philadelphia Since the 1787 Convention*, CONST. CTR. (May 25, 2016), <https://constitutioncenter.org/blog/how-things-have-changed-since-1787/>; Christopher Ingraham, *Why It's Time To Get Serious About Supreme Court Term Limits*, WASH. POST (Feb. 13, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/02/13/why-its-time-to-get-serious-about-supreme-court-term-limits/?utm_term=.3dfba069029c.

²⁷ Dewey Clayton, *Picking the President*, 13 INSIGHTS ON L. & SOC'Y, no. 1, Fall 2012.

²⁸ *Id.*

president. Nominees have an incentive to mouth platitudes about how judges are umpires, not players, and to reveal as little as they can about their actual approach to deciding cases. Unsurprisingly, the two sides have engaged in a pattern of escalating misbehavior and reprisals, culminating in the Garland blockade and the destruction of the filibuster to confirm Neil Gorsuch.²⁹

The fundamental problem is that what was supposed to be a nonpartisan decision has become an object of partisan contention, and the two sides cannot agree on what the basic rules are. They cannot agree, that is, about when, whether, or under what circumstances a president has the right to appoint a Justice. Because the Framers did not imagine that this would become a partisan issue, the Constitution gives no guidance. It says that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint” Justices.³⁰ But this does not tell us when the Senate may withhold consent, nor whether they may ever properly decline to consider *any* nominee put forward by a particular president.³¹

When Justice Scalia died and Republican Senators openly refused to consider any Obama appointee, both parties used the Constitution’s ambiguity to justify their outlook on the Senate’s duty. Democrats viewed this obstruction as a constitutional violation, noting that the Constitution does not expressly give the Senate the right to refuse to exercise its power of advice and consent.³² Republicans countered that Article III does not require denial by formal procedure.³³ They maintained the Senate can decide that refusal to consider constituted a form of “advice and consent.” As Ted Cruz put it, they were “advising” the President not to make an appointment.³⁴

In our view, it is relatively easy to offer sensible answers to these questions.³⁵ The Senate is supposed to play some role in the process, and it can vote down nominees who stray too far from its constitutional preferences.³⁶ It should not, however, engage in a blanket refusal to consider any nominee from a particular president unless there

²⁹ Matt Flegenheimer, *Senate Republicans Deploy “Nuclear Option” To Clear Path for Gorsuch*, N.Y. TIMES (Apr. 6, 2017), <https://www.nytimes.com/2017/04/06/us/politics/neil-gorsuch-supreme-court-senate.html>.

³⁰ U.S. CONST. art. II, § 2.

³¹ See Noah Feldman, *Obama and Republicans Are Both Wrong About the Constitution*, BLOOMBERG (Feb. 17, 2016), <https://www.bloomberg.com/view/articles/2016-02-17/obama-and-senate-are-both-wrong-about-the-constitution> (noting that “the Constitution really doesn’t answer the question of what the president or the Senate must do.”).

³² The Alliance for Justice, for instance, circulated a letter signed by 356 law professors, arguing that the Senate has a “constitutional duty” to consider a nominee. Press Release, Alliance for Justice, Over 350 Law Professors Urge Senators To Fulfill Their Constitutional Duty (Mar. 7, 2016), <http://www.afj.org/press-room/press-releases/over-350-law-professors-urge-senators-to-fulfill-their-constitutional-duty>. See also Alan M. Dershowitz, *Ask Neil Gorsuch About Merrick Garland*, BOSTON GLOBE (Feb. 6, 2017), <https://www.bostonglobe.com/opinion/2017/02/02/ask-neil-gorsuch-about-merrick-garland/hB1lMt89367mAGj-DlgJ7sM/story.html>. (suggesting that originalists must agree “that the Senate has a constitutional obligation either to consent or deny consent to a president’s nominee”).

³³ Michael D. Ramsey, *Why the Senate Doesn’t Have To Act on Merrick Garland’s Nomination*, ATLANTIC (May 15, 2016), <https://www.theatlantic.com/politics/archive/2016/05/senate-obama-merrick-garland-supreme-court-nominee/482733/>.

³⁴ Jeff Stein, *The Strongest Republican Arguments for Block President Obama’s Supreme Court Pick*, VOX (Feb. 15, 2016), <https://www.vox.com/2016/2/15/11008764/why-republicans-scalia-obama>.

³⁵ One of us (Roosevelt) signed a letter circulated by the American Constitution Society offering essentially this view of the duties of the President and the Senate. See <https://www.acslaw.org/sites/default/files/Con%20Law%20Scholars%20on%20Scotus%20Vacancy.pdf>

³⁶ For an expanded discussion of the appropriate role of the Senate, see CHRISTOPHER L. EISGRUBER, *THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS* (2007).

is substantial reason to dispute that president's legitimacy—a situation that might arise with an unelected president, but should not occur otherwise.³⁷

These answers are reasonable, but one thing that partisanship does most reliably is to overwhelm reason.³⁸ Instead, the confirmation process provides us the unedifying sight of partisans on both sides switching their positions to fit their current preferences.³⁹ Worse, each side's transgressions offer justification for the other side doing something more extreme the next time it holds power. Neither reason nor good faith has staying power in such circumstances. We are in a downward spiral, and the Constitution offers no way out.

III. THE SOLUTION

The solution, however, is simple. All we need to do is to provide a relatively definite answer to the fundamental question raised above: when, whether and under what circumstances a president has the right to appoint a Justice. This can be done easily by establishing fixed terms (we suggest eighteen years) for Supreme Court Justices. With appropriately staggered terms, each President will then predictably be able to nominate—and appoint—two Justices per four-year Presidential term.

Imposing term limits would solve, or at a minimum greatly improve, almost all of the problems that now plague the appointment process. In terms of which Justices will make up the bench, fixed terms will do three things. First, they will eliminate the incentive for the president to pick someone young rather than the best candidate available: it will increase the possibility of a Justice Learned Hand, Henry Friendly, Richard Posner, or Guido Calabresi. Second, fixed terms will reduce the problem of Justices staying longer than they should in order to strategically time their retirement. Third, fixed terms will reduce the danger that the Court will represent a political or constitutional consensus that the American people have long rejected. The problems will not be totally eliminated: it is possible for a Justice to lose ability during a fixed term and refuse to retire, and actuarial realities may always push in favor of youth. But they will all be greatly reduced.

³⁷ Before the Garland nomination, the Senate had in some cases denied any appointments to particular presidents, but in every case these were presidents who had attained office via succession rather than election: the Senate stalled or rejected nine nominations by President Tyler, took no action on three of President Fillmore's nominations, delayed the confirmation of President Lyndon B. Johnson's nominee (Justice Blackmun) for nearly thirteen months, and took no immediate action to approve Andrew Johnson's nomination of Henry Stanbery. Gabriel Malor, *There's Ample Precedent for Rejecting Lame Duck Supreme Court Nominees*, *FEDERALIST* (Feb. 13, 2016), <http://thefederalist.com/2016/02/13/ample-precedent-for-rejecting-supreme-court-nominees/>; See generally Robin Kar & Jason Mazzone, *The Garland Affair: What History and the Constitution Really Say about President Obama's Powers to Appoint a Replacement for Justice Scalia*, 91 N.Y.U. L. REV. ONLINE 53 (2016) (noting that refusal to consider a Supreme Court nominee had occurred before only with unelected presidents). An elected president under impeachment might also be deemed sufficiently illegitimate to warrant denial of consideration of any nominee.

³⁸ See Dan Kahan, *Climate-Science Communication and the Measurement Problem*, 36 *ADVANCES POL. PSYCHOL.* 1, 14 (2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2459057.

³⁹ See Jonathan H Adler, *No, Obstruction of Neil Gorsuch Is Not About Merrick Garland*, *WASH. POST* (Feb. 1, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/02/01/no-obstruction-of-neil-gorsuch-is-not-about-merrick-garland/?utm_term=.4b1984893d82 (reviewing hypocrisy and partisan retaliation in Senate consideration of Supreme Court nominees); See also Julie Hirschfeld Davis, *Joe Biden Argued for Delaying Supreme Court Picks in 1992*, *N.Y. TIMES* (Feb. 22, 2016), https://www.nytimes.com/2016/02/23/us/politics/joe-biden-argued-for-delaying-supreme-court-picks-in-1992.html?_r=0 (asserting that Joe Biden proposed blocking President Bush's nominee in the same way Republicans blocked President Obama's).

In terms of the nomination process, fixed terms will lower the stakes of each nomination. If the political players know that each president will get two appointments per term, not every confirmation need be a scorched-earth battle. They need not worry that the nominee who speaks so fervently of judicial humility will wield a different agenda for thirty years as Justice.

Most important, term limits will make the transformation of the Supreme Court a predictable and rational process. It might be nice if judging were a mechanical task, if our Constitution were written so that it could be applied with no resolution of clashing values, balancing of competing visions, or decisions affected by judicial ideology and life experience. (Actually, we think that Constitution would probably not be a good one.) But in any case, that is not the Constitution we have, and it has never been the practice of the Supreme Court.⁴⁰

The question at hand is not whether personal or subjective factors can be eliminated from judging—they cannot. The question is whether the power to pick Justices, who will invariably differ in their resolution of certain questions, should be awarded by partisan maneuvering subject to random inflections, or whether it should be tied in a consistent and predictable way to success in a national election. We live now under the system of partisanship and random chance; term limits would take us to the system of order and predictability. It is hard to see any reason why this would not be an improvement, and indeed among experts in the field there is broad and bipartisan consensus in support of term limits.⁴¹

IV. HOW TO GET THERE: IMPLEMENTATION

The Constitution provides that federal judges, including Supreme Court Justices, shall hold their offices during “good behavior” and can be removed only by impeachment.⁴² The most straightforward path to the desired conclusion would be to add to Article III a provision specifying that Supreme Court Justices shall serve fixed eighteen-year terms.

The Constitution, however, is notoriously difficult to amend. Obtaining supermajority support in both houses of Congress and then ratification by three-quarters of state legislatures is an onerous task. For an amendment with partisan implications, it is almost impossible, since even a party on the ropes will usually retain enough strength to block an amendment. We do not believe that term limits for Supreme Court Justices

⁴⁰ See generally Kermit Roosevelt III, *Interpretation and Construction: Originalism and Its Discontents*, 34 HARV. J.L. & PUB POL’Y 99 (2011) (noting inevitability of judicial discretion).

⁴¹ The nonpartisan advocacy organization Fix the Court, for instance, has 22 law professors from across the political spectrum as signatories to its current term limits proposal. See [cite]. In 2009, a similar group of 33 academics, practitioners, and former judges sent a recommendation for term limits to the Vice President, Attorney General, and chairs of the House and Senate Judiciary Committees. See Jack M. Balkin, *Reforming the Supreme Court*, BALKINIZATION BLOG (Feb. 13, 2009), <https://balkin.blogspot.com/2009/02/reforming-supreme-court.html>; see also Emma Baccellieri, *Term limits for U.S. Supreme Court Justices?*, SEATTLE TIMES (July 27, 2015), <http://www.seattletimes.com/nation-world/term-limits-for-us-supreme-court-justices/>. The criticism most often put forward is that life tenure is necessary to protect judicial independence. This strikes us as mistaken. Judicial independence exists as long as judges are shielded from punishment or reward for their decisions. A fixed 18-year term with senior status thereafter protects them from punishment just as well as life tenure. The possibility of reward exists: after 18 years, a Justice could, for instance, move to a lucrative position inside an industry or corporation she had favored while on the Court. But a Justice with life tenure is free to do so at any time, so the fixed term makes things no worse from that perspective.

⁴² U.S. CONST. art. III, § 1 (“The judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior.”); U.S. CONST. art. II, § 4.

does have a partisan valence, as evidenced by the bipartisan support it commands.⁴³ Nonetheless, a constitutional amendment is sufficiently difficult that an alternative path would be preferable, if such a path exists.

One alternative some have suggested is to use nonbinding mechanisms. Judges could be awarded substantial bonuses for retiring at the end of a fixed term.⁴⁴ Or they could be punished for staying longer, not by reducing their salaries (which the Constitution forbids)⁴⁵ but perhaps by denying them the assistance of clerks⁴⁶ or forcing them to spend time serving on lower courts, as Justices used to.⁴⁷ Neither of these proposals strikes us as either normatively appealing or likely to be consistently effective—most probably, they will be ineffective in precisely the most important instances.

Another idea is to seek promises from the Justices themselves, before confirmation, that they will retire at the end of a fixed term.⁴⁸ But such a promise is unenforceable and, again, likely to prove ineffective precisely when it is needed most. It is easy to imagine a Justice deciding that the needs of the nation and the Constitution outweigh words uttered under pressure years ago. (As the English judge Baron Bramwell once wrote, explaining his change of position from one case to another, “The matter does not appear to me now as it appears to have appeared to me then.”⁴⁹) Congress could, of course, impeach a Justice who refused to retire at the appointed hour, but impeachment is difficult—conviction and removal from office requires a two-thirds supermajority in the Senate⁵⁰—and falls prey to the same partisan dysfunction as the confirmation process.

Another suggestion is to impose not a term limit but a mandatory retirement age.⁵¹ This solution is both ineffective and discriminatory. It would exacerbate the current incentive to overlook better candidates in favor of youth, and it would do nothing to regularize the appointment process in terms of tying appointments to the national election. It is also clearly in conflict with the “good behavior” provision of Article III, and could hence be implemented only via constitutional amendment.

Luckily, Supreme Court term limits require neither constitutional amendment nor any of the other aforementioned methods: they can be created through statute. Several proposals exist for statutorily setting term limits for Supreme Court justices.⁵² We believe the details are of secondary importance: any proposal that leads to fixed terms would be a dramatic improvement. What we present here is not intended to follow any proposal in all its details; it is rather an overview of the features we think are most

⁴³ Erwin Chemerinsky, *Ted Cruz Is Right: The Supreme Court Needs Term Limits*, NEW REPUBLIC (July 2, 2015), <https://newrepublic.com/article/122225/ted-cruz-right-supreme-court-needs-term-limits>.

⁴⁴ Jack M. Balkin, *Reforming the Supreme Court*, BALKINIZATION BLOG (Feb. 13, 2009), <https://balkin.blogspot.com/2009/02/reforming-supreme-court.html>.

⁴⁵ U.S. CONST. art. III, § 1 (“The Judges, both of the supreme and inferior Courts, ... shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”).

⁴⁶ Calabresi & Lindgren, *supra* note 6, at 874.

⁴⁷ Balkin, *supra* note 44.

⁴⁸ Calabresi & Lindgren, *supra* note 6, at 871.

⁴⁹ *Andrews v. Styrap* [1872] 26 LT 704 (Exch.) 706 (Eng.).

⁵⁰ The Senate tries impeachment proceedings, and conviction requires a two-thirds majority of the members present. U.S. CONST. art. I, § 3, cl. 6.

⁵¹ Calabresi & Lindgren, *supra* note 6, at 815 n.128.

⁵² *Id.* at 824 n.171; *Term Limits*, FIX THE COURT, <http://fixthecourt.com/fix/term-limits/> (last visited May 4, 2017); Balkin, *supra* note 44.

essential, an explanation of why they are important, and an account of why they are consistent with the Article III guarantee of office during good behavior.⁵³

Supreme Court Justices will serve a fixed term of eighteen years. Appointments shall be staggered so that each elected president will have two Supreme Court appointments: one in the first year and one in the third year. The number of active Justices, performing the work of deciding cases, will stay at nine.⁵⁴ As each new Justice is appointed, the most senior Justice on the Court will move to senior status, retaining a full salary, the option of sitting on lower courts, and the availability to serve as an active Justice if the need arises.⁵⁵

As described in Part III, setting the term at eighteen years fixes the main problems we have identified. It does, however, raise three new problems: how to deal with vacancies that arise outside the normal timeframe, what to do with current Justices, and whether a fixed term is constitutional. We address these in turn.

First, the question of vacancies is a difficult one—but difficult largely because different competing answers seem adequate. When a Justice retires or otherwise leaves the Court after a president's first year appointment, but before the third year, some proposals suggest that the president should make his third-year nomination early.⁵⁶ While this seems easy enough, it will produce a short-handed Court unless the Justice who left happens to be the one whose term was next to expire. We believe that an unscheduled vacancy should be handled by appointing a Justice to serve the remainder of the departed Justice's term. This appointment could be made by the president, or it could be achieved by recalling the most junior of the Senior Justices. There is not much to choose between these two solutions, but we prefer giving the appointment to the president as the most recent winner of a national election, rather than recalling Justice appointed by the winner of a decades-old election.

A vacancy occurring after a president's third year appointment is a bit trickier. One solution, proposed in some of the draft statutes, is to allow the president to make an appointment which would cancel the next scheduled appointment and allow the appointed Justice to serve extra time to bring the process back on schedule. This is plausible, but it strikes us as undesirable because it amplifies the effect of randomness: it would allow the president to take an appointment from her successor.

The solution we believe is both simplest and most sensible is to give the sitting president an extra appointment—though only to fill the remainder of the term for the vacant seat. While this still results in an additional nomination for the President, it would be for a reduced term and with the added benefit that a president would have additional leeway to select a seasoned judge who may otherwise have been rendered ineligible because of age.

Second, the issue of what will happen to current Justices is also a difficult one, this time because no solution seems fully satisfactory. One idea is to simply apply the statutory timeframe to them, so that when a president makes his first appointment under the eighteen-year framework, the most senior sitting Justice will become a Senior

⁵³ These include the proposals of several authorities listed within this Issue Brief. See *FIX THE COURT*, *supra* note 52; Oliver, *supra* note 9; Calabresi & Lindgren, *supra* note 6.

⁵⁴ As discussed below, there may be a transition period when the number of active Justices rises, given the undesirability of forcing current Justices to take senior status.

⁵⁵ Such a need for a Senior Justice to fill in could arise to break a tie in the event the Supreme Court is waiting on Senate approval for an appointment (such as in the case of Justice Scalia's vacancy) or if a Justice recuses herself, leaving an even-numbered bench.

⁵⁶ *FIX THE COURT*, *supra* note 52; Balkin, *supra* note 44.

Justice.⁵⁷ The problem with this is that presidents will not only be appointing a Justice; they will effectively be removing one as well. Current Justices might resent this, since they took office with different expectations; moreover, because the process that put the current Justices on the Court was our amalgam of partisanship and chance, removals will also have partisan effects unrelated to success in national elections.

If we do not apply the eighteen-year term limit to sitting Justices, there are two possibilities. Either the fixed term appointments will begin upon enactment, while current Justices retain their seats (thus enlarging the active Supreme Court)⁵⁸ or they will begin only when sitting Justices leave, phasing in the term-limited Court as the current Justices leave.⁵⁹ In our view, the former solution is preferable because it will immediately connect the appointment process to success in national elections. Waiting for current Justices to leave, even if their successors serve only eighteen years, retains the problems of strategic retirement and random vacancies.

Third, there is a question as to whether the process described is consistent with Article III.⁶⁰ We believe it is. We believe that Congress has the power to determine which Justices of the Supreme Court shall be active and which shall be senior, provided that it does so in a manner that does not compromise judicial independence. This proposal, by providing lengthy, nonrenewable terms, does not increase the ability of the political branches to exert pressure on individual Justices.⁶¹ By accelerating turnover, it will make the Court as an institution more responsive to the outcomes of national elections, but it will do so in a rational manner, and that is the best response to the rise of the party system. Partisan considerations have corroded the appointments process, and regularization of appointments is a way to reduce their effect.

If retention of the title of Supreme Court Justice and full salary are not enough to comply with Article III, there is an alternative that might pass muster. The president could appoint new Justices to lower federal courts first, from which they would then be eligible to serve on the Supreme Court by designation for eighteen years.⁶² After that term, they would return to full active service on the court to which they had been appointed. Some scholars argue this would be unconstitutional because the Appointments Clause “contemplates a separate office of Supreme Court Justices.”⁶³ That is true, but the existence of that separate office does not establish that other judges may not serve on the Supreme Court by designation. By the same token, the Constitution contemplates a separate office of lower federal judge, but it is well established that

⁵⁷ Oliver, *supra* note 9, at 825.

⁵⁸ This reflects the view and proposal of Fix the Court. FIX THE COURT, *supra* note 52.

⁵⁹ Balkin, *supra* note 44.

⁶⁰ See generally Calabresi & Lindgren, *supra* note 6 (arguing term limits likely cannot be imposed without a constitutional amendment).

⁶¹ Compared to some of the things Congress has done for clearly partisan reasons—increasing and decreasing the size of the Court, eliminating the entire 1802 Term—term limits seem a very minor intrusion.

⁶² Calabresi & Lindgren, *supra* note 6, at 855.

⁶³ See *id.* at 859–60 (arguing a judge serving on lower federal courts and the Supreme Court would be inconsistent with the Constitution’s Appointments Clause which contemplates the two as separate offices).

Supreme Court Justices can serve on lower courts by designation. In a reverse fashion, lower federal judges could plausibly serve fixed eighteen-year Supreme Court terms.⁶⁴

CONCLUSION

The drafters of the Constitution were brilliant, and the system they designed works very well in a number of ways. But their failure to foresee the party system means that several of the structural provisions of the Constitution do not work as they were intended to or fail to account for the problems created by partisan politics.

The process for appointing Supreme Court Justices is perhaps the starkest example of this. Because the Constitution contemplates a nonpartisan appointment process, it fails to answer the question over which the two parties now battle: when a president is entitled to appoint a Supreme Court Justice. The partisan struggle over Supreme Court nominations negatively affects both the composition of the Court and its relation to the other branches of government and the American people. The recent drama over the Garland and Gorsuch nominations should convince anyone paying attention that our appointment process is in shambles. Precisely because it focuses public attention on the process, however, that drama gives us an exceptional opportunity to fix what is broken.

For such a serious problem, which regularly shows us our elected officials at their worst, the broken appointment process has a surprisingly simple solution. Term limits for Supreme Court Justices will solve or drastically ameliorate essentially all of the problems we now encounter. Unsurprisingly, the proposal has widespread support.⁶⁵ In one version or another, it has been endorsed by politicians like Ted Cruz and Paul Ryan, by Justices like Chief Justice Roberts and Justice Breyer, and even by the American people.⁶⁶ It is high time to do away with the “when they go low, we go lower” mentality that characterizes our appointment process today. By statute, we can end the cycle of political finger-pointing and fix our broken Court.

⁶⁴ See PAUL D. CARRINGTON & ROGER C. CRAMTON, *The Supreme Court Renewal Act: A Return to Basic Principles*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES (Roger C. Cramton & Paul D. Carrington eds., 2006) (making the argument that just as Justices used to circuit-ride [for a period of 121 years], so too can federal judges serve on the Supreme Court before returning to become judges once more). The Calabresi objection may be that under our proposal, the President would never actually appoint anyone to the “separate office” of Supreme Court Justice. But under our proposal there would never be a vacancy that needed to be filled by such an appointment, so we do not see the problem.

⁶⁵ See Baccellieri, *supra* note 41 (noting the wide, bipartisan support for Supreme Court term limits).

⁶⁶ Ingraham, *supra* note 26; FIX THE COURT, QUOTES ON SUPREME COURT TERM LIMITS FROM JUSTICES, ELECTED OFFICIALS, ACADEMICS, AND PUNDITS (Dec. 2016), <http://fixthecourt.com/wp-content/uploads/2016/12/Quotes-on-term-limits-December-2016.pdf>.

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A Pragmatic Approach to Challenging Felon Disenfranchisement Laws*

Avner Shapiro¹

In the two states with the lowest percentage of minorities, Vermont and Maine, a citizen's criminal history in no way affects his or her right to vote. Not so in the rest of the country. Some states disenfranchise felons for the duration of their time in prison. Others keep felons disenfranchised until they have completed both their prison and probation time. Some other states extend the disenfranchisement period to include parole. And in a few states, citizens who commit felonies can lose their right to vote for life.²

While there may be strong policy arguments against these felon disenfranchisement laws, legal challenges have usually failed. Although Section 2 of the Voting Rights Act ("Section 2") does not require plaintiffs to satisfy the Equal Protection Clause's demanding intent requirement and is usually the most robust tool for challenging discrimination in voting, advocates have never succeeded in using it to prevent states from disenfranchising individuals convicted of felonies.

To date, all of the Section 2 challenges to felon disenfranchisement laws have been facial challenges, involving efforts to strike down felon disenfranchisement statutes in their entirety. In this issue brief, I argue that courts would be more receptive to an as-applied Section 2 lawsuit focusing only on disenfranchised African-American ex-felons convicted of low-level, non-violent drug offenses.³

In the first part of this issue brief, I discuss the extent to which felon disenfranchisement laws have become a serious impediment to minority political participation. Then I explain why, in most contexts, Section 2 is often an effective tool for combating discrimination in voting. Next, I review a series of circuit court decisions where the

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¹ The views expressed in this essay are solely those of the author. His views do not necessarily reflect, nor are they necessarily consistent with, those of his employer, the U.S. Department of Justice.

² CHRISTOPHER UGGEN, SARAH SHANNON & RYAN LARSON, SENTENCING PROJECT, 6 MILLION LOST VOTERS: STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT 4 (2016), <http://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016>.

³ Ex-felons are individuals convicted of felonies who have fully completed their sentences, including any probationary period, and are no longer under the supervision of the state penal system. For the purposes of this article, when I refer to low-level drug offenses, I am principally referring to felony convictions for drug possession, rather than drug trafficking. It should be noted that while certain states currently disenfranchise almost all of those convicted of felonies, regardless of whether the felony conviction was for a relatively minor drug offense such as possession of drugs, the criminal justice system responds to convictions for minor drug offenses very differently from how it responds to more serious felony convictions. Those convicted of a low-level drug-related felony offense routinely do not serve a day in prison for committing the crime. For instance, of the approximately 165,360 convicted in state court of the felony of drug possession, only approximately 53,910 (or 32.6%) received sentences involving prison time. Indeed, 23% of these individuals were sentenced *only* to treatment for drug addiction. BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2006—STATISTICAL TABLES 2-3, (Dec. 2009), <http://www.bjs.gov/content/pub/pdf/fssc06st.pdf>.

courts have nonetheless rejected facial challenges to felon disenfranchisement laws under Section 2. I then argue that felon disenfranchisement remains vulnerable to an as-applied challenge under Section 2. In this section of the issue brief, I discuss how the rationales the courts have relied upon for declining to invalidate felon disenfranchisement laws in their entirety under Section 2 suggest that courts would be receptive to a properly crafted as-applied challenge. Finally, I also argue that the type of as-applied challenge advocated here is consistent with what has worked in the past in the context of constitutional challenges to felon disenfranchisement and other types of vote denial and abridgement practices.

I. FELON DISENFRANCHISEMENT HAS METASTASIZED INTO THE COUNTRY'S GREATEST IMPEDIMENT TO MINORITY POLITICAL PARTICIPATION

While felon disenfranchisement has been a longstanding practice in many states, in recent decades, there has been a dramatic increase in the number of citizens disqualified from voting because of it.⁴ Since 1976, the number has climbed from roughly 1.2 million to approximately 6.1 million.⁵ The dramatic increase has been propelled primarily by our roughly forty-year “War on Drugs,” and the mass criminalization and incarceration of those either using or distributing illegal drugs.⁶

Felon disenfranchisement laws interact and operate in tandem with the effects of past discrimination and the current discriminatory practices pervading the criminal justice system to disenfranchise a large and grossly disproportionate swath of the Hispanic and African-American electorate. African Americans have been especially impacted. Approximately 2.2 million of the roughly 6.1 million Americans prevented from voting by felon disenfranchisement laws are African-American. Over 7.4 percent of the adult African American population is disenfranchised compared to 1.8 percent of the non-African American population. In certain states, felon disenfranchisement laws have had an even more extreme effect on African-American political participation. The African-American disenfranchisement rate is roughly 21% in Florida, 21% in Tennessee, 22% in Virginia, and 26% in Kentucky.⁷

In many of the states with the highest rates of minority disenfranchisement, the vast majority of those prevented from voting are no longer incarcerated or under probation or parole supervision. Instead, they are ex-felons living in their communities after having completed their sentences. The twelve states currently disenfranchising many of their ex-felons are Alabama, Arizona, Delaware, Florida, Iowa, Kentucky, Mississippi, Nebraska, Nevada, Tennessee, Virginia, and Wyoming.⁸

In a 2014 speech, Attorney General Eric Holder eloquently spoke of why he and a number of other leaders in the field of law enforcement came together to file an amicus brief in 2005 in support of a facial challenge to Florida's felon disenfranchisement law. He characterized felon disenfranchisement laws as “too unjust to tolerate.” He explained,

⁴ See Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1156 (2004) (noting that the numerical impact of criminal disenfranchisement is “greater than at any point in our history”).

⁵ UGGEN ET AL., *supra* note 2, at 4.

⁶ See Heather Schoenfeld, *The War on Drugs, the Politics of Crime, and Mass Incarceration in the United States*, 15 J. GENDER RACE & JUST. 315 (2012); see also Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1274–76 (2004).

⁷ UGGEN ET AL., *supra* note 2, at 3, 10–11, 16.

⁸ *Id.*

“At worst, [felon disenfranchisement] laws, with their disparate impact on minority communities, echo policies enacted during a deeply troubled period in America’s past—a time of post-Civil War repression. And they have their roots in centuries-old conceptions of justice that were too often based on exclusion, animus, and fear.”⁹

II. SECTION 2: OFTEN A ROBUST TOOL FOR COMBATING DISCRIMINATION IN VOTING

Outside of the felon disenfranchisement context, Section 2 has often been an effective tool for combating discrimination in voting. Section 2 prohibits any “voting qualification or prerequisite to voting or standard, practice, or procedure” that “results in a denial or abridgement” of the right to vote “on account of race or color.”¹⁰

While the 15th Amendment and the Equal Protection Clause only prohibit intentional discrimination,¹¹ Section 2 prohibits actions which have either the purpose or the *result* of denying or abridging the right to vote on account of race, color, or membership in a language minority group.¹² Section 2 prohibits “not only voting practices borne of a discriminatory intent, but also voting practices that ‘operate, designedly or otherwise,’ to deny ‘equal access to any phase of the electoral process for minority group members.’”¹³

To determine whether a voting practice violates the Section 2 results standard, a court must decide whether “as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice.”¹⁴ The inquiry is not whether the challenged practice standing alone causes disproportionality, but rather whether the practice “interacts with social and historical conditions” to produce an “inequality in the opportunities enjoyed by [minority] and white voters.”¹⁵

The statute provides that when assessing whether racial and ethnic minorities have an equal opportunity to participate in the political process, a court should consider the “totality of circumstances.”¹⁶ Courts are guided in this inquiry by a non-exhaustive list of nine factors originally developed in court cases and then included in the Senate Report accompanying the 1982 Amendments to the Voting Rights Act.¹⁷ Those factors—often referred to as the “Senate Factors”—include the jurisdiction’s history of official discrimination, whether voting patterns are polarized along racial lines, the extent to which the socioeconomic effects of discrimination hinder access to the

⁹ Eric Holder, Att’y Gen., Remarks on Criminal Justice Reform at Georgetown University Law Center (Feb. 11, 2014), in DEP’T JUST. NEWS, <https://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-on-criminal-justice-reform-georgetown>.

¹⁰ 52 U.S.C. § 10301(a).

¹¹ *City of Mobile v. Bolden*, 466 U.S. 55, 62, 67 (1980).

¹² 52 U.S.C. § 10301(b); *see also* *United States v. Charleston Cty.*, 365 F.3d 341, 345 (4th Cir. 2004).

¹³ *Charleston Cty.*, 365 F.3d at 345.

¹⁴ *Thornburg v. Gingles*, 478 U.S. 30, 44 (1986); *see also* S. REP. NO. 97-417, at 28 (1982).

¹⁵ *Gingles*, 478 U.S. at 47.

¹⁶ 52 U.S.C. 10301(b); *see also* *Gonzalez v. Arizona*, 624 F.3d 1162, 1193 (9th Cir. 2010), *aff’d sub nom.* *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013).

¹⁷ *Gingles*, 478 U.S. at 36–37; *see also* *Clark v. Calhoun Cty.*, 88 F.3d 1393, 1396 (5th Cir. 1996); S. REP. NO. 97-417, at 30.

political process, and the tenuousness of the justification for the challenged practice.¹⁸ The Senate Factors were developed largely in the context of assessing whether an election standard, practice or procedure discriminates against minorities by impermissibly diluting the value of their vote.¹⁹ No one factor is dispositive and “there is no requirement that any particular number of factors be proved, or [even] that the majority of them point one way or the other.”²⁰ Instead, “the question whether the political processes ‘are equally open’ depends upon a searching practical evaluation of the ‘past and present reality.’”²¹

In the last couple of years, as the courts have had to grapple with challenges to voter ID laws and other claims of vote denial and abridgement, the Fourth, Fifth, and Sixth Circuits have each adopted the same new two-element framework for analyzing these cases under Section 2.²² Under the new framework for vote denial and abridgement cases, plaintiffs can establish a violation if they show that: (1) the challenged standard, practice, or procedure imposes a discriminatory burden on minority voters—meaning that it disproportionately impacts them; and (2) the burden is, in part, caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class.²³ This new two element framework adds to and draws upon the Senate Factors courts have relied upon in the past to analyze vote dilution cases.²⁴ Though only adopted in three circuits, this very workable framework is likely to be more broadly adopted over the next few years if other circuits find themselves grappling with vote denial and abridgement cases.

The Supreme Court has emphasized the broadness of Section 2’s reach, recently proclaiming in *Shelby County v. Holder* that it imposes a “permanent, nationwide

¹⁸ *Gingles*, 478 U.S. at 36–37; S. REP. NO. 97-417, at 28–29. The nine Senate Factors are: (1) The extent to which voting in the elections of the state or political subdivision is racially polarized; (2) The extent to which members of the minority group have been elected to public office in the jurisdiction; (3) The extent of any history of official discrimination in the state or political subdivision that touched upon the right of the members of the minority group to register, vote, or otherwise participate in the democratic process; (4) The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment, and health, which hinder their ability to participate effectively in the political process; (5) The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group; (6) If there is a candidate slating process, whether the members of the minority group have been denied access to that process; (7) Whether political campaigns have been characterized by overt or subtle racial appeals; (8) Whether elected officials are unresponsive to the particularized needs of the members of the minority group; and (9) Whether the policy underlying the State’s or the political subdivision’s use of the contested practice ... is tenuous. *Id.*

¹⁹ *Ohio Conference of NAACP v. Husted*, 768 F.3d 524, 554 (6th Cir. 2014), *vacated on other grounds* by No. 14–3877, 2014 WL 10384647, at *1 (6th Cir. Oct. 1, 2014) (“Unsurprisingly, then, the case law has developed to suit the particular challenges of vote dilution claims. A clear test for Section 2 vote denial claims—generally used to refer to any claim that is not a vote dilution claim—has yet to emerge.”).

²⁰ *LWV v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014) (quoting S. REP. NO. 97-417, at 29); S. REP. NO. 97-417, at 30.

²¹ S. REP. NO. 97-417, at 30 (footnote omitted).

²² *LWV*, 769 F.3d at 240; *Husted*, 768 F.3d at 554; *Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016).

²³ *See supra* note 22.

²⁴ The *en banc* panel that recently decided the Texas voter ID case explained that with vote denial and abridgement cases, the Senate Factors “should be used to help determine whether there is a sufficient causal link between the disparate burden imposed and social and historical conditions produced by discrimination.” *Veasey*, 830 F.3d at 245. In other words, the Senate Factors should be used “to examine causality under the second part of the two-part analysis.” *Id.*

ban on racial discrimination in voting.”²⁵ Section 2 “prohibits all forms of voting discrimination” that lessen opportunity for minority voters.²⁶ Though most Section 2 cases have involved state action that discriminates against minorities by reducing or diluting the value of their vote—such as cases involving claims against discriminatory redistricting plans or at-large methods of election—plaintiffs have used Section 2 to strike down various discriminatory vote denial and abridgement practices, including the imposition of barriers on the ability to register to vote,²⁷ restrictive voter ID laws,²⁸ reductions in the period available for early in-person voting,²⁹ unequal access to voter registration,³⁰ unequal access to polling places and early voting sites,³¹ and underrepresentation of minority poll officials.³²

III. FACIAL CHALLENGES TO FELON DISENFRANCHISEMENT LAWS UNDER SECTION 2 HAVE FAILED

While voting rights advocates have effectively used Section 2 to combat many different types of discriminatory voting practices, they have had almost no success when attempting to use the statute to strike down felon disenfranchisement practices. Six circuits have reviewed and ultimately rejected Section 2 challenges to state felon disenfranchisement laws: the First, Second, Fourth, Sixth, Ninth, and Eleventh Circuits.³³

In the most recent of the felon disenfranchisement cases reviewed by a federal circuit court—*Farrakhan v. Gregoire* (*Farrakhan II*)—the Ninth Circuit narrowed the scope of an earlier decision in which it had held that facial challenges to felon disenfranchisement laws can be mounted under Section 2. In *Farrakhan II*, the court held that—unlike other Section 2 cases—plaintiffs bringing facial challenges to felon disenfranchisement laws must prove that the state’s “criminal justice system is infected by intentional discrimination or that the felon disenfranchisement law was enacted with such intent.”³⁴

The First and Second Circuits concluded that the felon disenfranchisement laws they reviewed, neither of which involved ex-felons, could not be facially challenged under Section 2.³⁵ In *Simmons*, the First Circuit noted at the outset that the case concerned a facial challenge to a law that is “among the narrowest of state felon disenfranchisement provisions” in the nation because it only denied the right to vote to

²⁵ *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2631 (2013).

²⁶ *Thornburg v. Gingles*, 478 U.S. 30, 45 n.10 (1986).

²⁷ *LWV*, 769 F.3d at 239.

²⁸ *Veasey v. Perry*, 830 F.3d 216 (5th Cir. 2016) (en banc).

²⁹ *Ohio Conference of the NAACP v. Husted*, 43 F. Supp. 3d 808 (S.D. Ohio 2014), *aff’d*, 768 F.3d 524 (6th Cir. 2014), *vacated on other grounds by* No. 14–3877, 2014 WL 10384647, at *1 (6th Cir. Oct. 1, 2014).

³⁰ *Operation PUSH v. Allain*, 674 F. Supp. 1245 (N.D. Miss. 1987), *aff’d sub nom.* *Operation PUSH v. Mabus*, 932 F.2d 400 (5th Cir. 1991).

³¹ *Spirit Lake Tribe v. Benson Cty.*, No. 10-cv-095, 2010 WL 4226614 (D.N.D. Oct. 21, 2010); *Brown v. Dean*, 555 F. Supp. 502 (D.R.I. 1982); *Brooks v. Gant*, No. 12-cv-5003, 2012 WL 4482984 (D.S.D. Sept. 27, 2012).

³² *Harris v. Graddick*, 615 F. Supp. 239 (M.D. Ala. 1985).

³³ *Simmons v. Galvin*, 575 F.3d 24 (1st Cir. 2009); *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006); *Howard v. Gilmore*, No. 99-2285, 2000 WL 203984, at *1 (4th Cir. Feb. 23, 2000); *Wesley v. Collins*, 791 F.2d 1255, 1259–61 (6th Cir. 1986); *Farrakhan v. Gregoire* (*Farrakhan II*), 623 F.3d 990 (9th Cir. 2010) (en banc).

³⁴ *Farrakhan II*, 623 F.3d at 993 (alteration in original).

³⁵ *Simmons*, 575 F.3d 24 (holding that plaintiffs failed to state a claim under Section 2 when they challenged Massachusetts’s law disenfranchising currently incarcerated felons); *Hayden*, 449 F.3d 305 (holding that plaintiffs cannot mount a challenge to a statute that disenfranchises incarcerated felons and parolees under Section 2 of the VRA).

currently incarcerated felons.³⁶ In *Hayden*, an *en banc* panel of the Second Circuit explained that, “it is important to emphasize, [the challenged New York statute] disenfranchises only currently incarcerated prisoners and parolees.”³⁷ In his concurring opinion, Judge Sack asserted, “Today’s decision, of course, explicitly leaves the issue [of disenfranchisement of ex-felons] open.”³⁸

When the Fourth and Sixth Circuits reviewed challenges to state felon disenfranchisement laws under Section 2, both circuits rejected the plaintiffs’ claims based on plaintiffs’ failure to plead a sufficient nexus between race and the disenfranchisement of felons.³⁹ In so doing, both of these circuit courts appeared to assume that a challenge to a state disenfranchisement law can be brought under Section 2 if appropriately pled.

In *Johnson v. Florida*, the Eleventh Circuit, sitting *en banc*, went further, construing Section 2 as inapplicable to a Florida constitutional provision that disenfranchises ex-felons as well as current felons.⁴⁰ However, the opinion does not address whether its holding insulates every application of a disenfranchisement provision. Indeed, as discussed below, the stated rationale underlying its holding suggests otherwise.

Finally, a significant number of judges in the circuits that have reviewed and rejected challenges to felon disenfranchisement provisions would have gone the other way on those cases. Four of the thirteen judges serving on the *en banc* panel in the *Hayden* case would have allowed plaintiffs to go forward with their facial challenge to New York’s felon disenfranchisement provision.⁴¹ Two of the twelve judges in the *Johnson* case found that plaintiffs’ challenge to Florida’s felon disenfranchisement provision was cognizable.⁴² And in *Farrakhan II*, four of the eleven judges parted company from the majority to the extent that the majority suggested that proof of discriminatory intent is required to prevail in a Section 2 challenge to a felon disenfranchisement provision.⁴³

These judges indicated that, in their view, courts should focus on the standard Section 2 Senate Factors to determine whether, under the totality of the circumstances, a felon disenfranchisement provision violated Section 2.⁴⁴ Then-Judge Sotomayor, one of the dissenters in *Hayden*, explained her position as to whether Section 2 reached New York’s felon disenfranchisement provision as follows:

I fear that the many pages of the majority opinion and concurrences—and the many pages of the dissent that are necessary to explain why they are wrong—may give the impression that this case is in some way complex. It is not.

It is plain to anyone reading the Voting Rights Act that it applies to all “voting qualifications[s].” And it is equally plain that [New York’s felon disenfranchisement provision] disqualifies a group of

³⁶ *Simmons*, 575 F.3d at 30–31.

³⁷ *Hayden*, 449 F.3d at 314.

³⁸ *Hayden*, 449 F.3d at 339 (Sack, J., concurring).

³⁹ *Howard v. Gilmore*, No. 99-2285, 2000 WL 203984, at *1 (4th Cir. Feb. 23, 2000); *Wesley v. Collins*, 791 F.2d 1255, 1259–61 (6th Cir. 1986).

⁴⁰ *Johnson v. Florida*, 405 F.3d 1214 (11th Cir. 2005) (*en banc*).

⁴¹ *Hayden*, 449 F.3d at 343 (Parker, J., dissenting); *id.* at 362 (Calabresi, J., dissenting); *id.* at 367 (Sotomayor, J., dissenting); *id.* at 368 (Katzmann, J., dissenting).

⁴² *Johnson*, 405 F.3d at 1239–44 (Wilson, J., concurring in part and dissenting in part); *id.* at 1244–51 (Barkett, J., dissenting).

⁴³ *Farrakhan v. Gregoire (Farrakhan II)*, 623 F.3d 990, 995–96 (9th Cir. 2010) (*en banc*) (Thomas, J., concurring).

⁴⁴ *Id.* at 997.

people from voting. These two propositions should constitute the entirety of our analysis. Section 2 of the Act by its unambiguous terms subjects felon disenfranchisement and all other voting qualifications to its coverage.⁴⁵

Notwithstanding the dissenting opinions of then-Judge Sotomayor and other jurists, the fact remains that the majorities on the circuits that have reviewed facial challenges to felon disenfranchisement laws under Section 2 have consistently treated those cases very differently from other vote denial cases and have ultimately rejected such challenges.

IV. FELON DISENFRANCHISEMENT REMAINS VULNERABLE TO AN AS-APPLIED CHALLENGE UNDER SECTION 2

To date, the Supreme Court has never reviewed a Section 2 case relating to felon disenfranchisement, and the circuit courts have only reviewed Section 2 challenges to the felon disenfranchisement laws themselves rather than to the application of those laws.⁴⁶

Even though the courts have not yet considered a Section 2 as-applied challenge to a felon disenfranchisement law, there is nothing novel about challenging the application of a law under Section 2. The statute explicitly states that no “voting qualification ... shall be ... *applied* by any State ... in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.”⁴⁷ Moreover, the statute’s reference to voting “practice[s] or procedures” clearly encompasses the procedures for reinstating disenfranchised ex-felons that would be the focus of an as-applied felon disenfranchisement suit.

Not only does the statutory text speak for itself when it comes to the appropriateness of using Section 2 to challenge a particular application of a felon disenfranchisement law, plaintiffs have successfully used the statute in this way in other contexts. Examples of Section 2 as-applied cases include: *Dillard v. Town of North Johns*, where plaintiffs successfully challenged the way elected officials in the Town of North Johns applied Alabama’s candidacy requirements, rather than the requirements themselves;⁴⁸ *Ohio Conference of the NAACP v. Husted*, where plaintiffs succeeded in obtaining a preliminary injunction after challenging the application of state law related to early in-person voting;⁴⁹ *Spirit Lake Tribe v. Benson County*, where plaintiffs successfully challenged how local officials applied state law related to polling place locations;⁵⁰ and *Harris v. Graddick*, where plaintiffs went forward with a challenge to the discriminatory application of a law related to the selection of poll officials.⁵¹

⁴⁵ *Hayden*, 449 F.3d at 367–68 (Sotomayor, J., dissenting).

⁴⁶ In 2010, the ACLU attempted an “as-applied” challenge to Arizona’s disenfranchisement scheme under the Equal Protection Clause of the Fourteenth Amendment. *Harvey v. Brewer*, 605 F.3d 1067 (9th Cir. 2010). The case targeted practices similar to the ones this author proposes could be the focus of a lawsuit under Section 2 of the VRA. The 9th Circuit affirmed the district court’s decision to grant defendants’ motion to dismiss. For reasons explained below, the author believes voting rights advocates would have more success were they to seek to vindicate the rights of similarly situated voters under a Section 2 theory.

⁴⁷ 52 U.S.C. § 10301(a) (emphasis added).

⁴⁸ 717 F. Supp. 1471, 1473–76 (M.D. Ala. 1989).

⁴⁹ 43 F. Supp. 3d 808 (S.D. Ohio 2014), *aff’d*, 768 F.3d 524 (6th Cir. 2014), *vacated on other grounds* by No. 14–3877, 2014 WL 10384647, at *1 (6th Cir. Oct. 1, 2014).

⁵⁰ No. 2:10-cv-095, 2010 WL 4226614 (D.N.D. Oct. 21, 2010).

⁵¹ 615 F. Supp. 239 (M.D. Ala. 1985).

Given the Supreme Court's stated preference for as-applied constitutional challenges to statutes, there is good reason to believe that courts would be similarly receptive to plaintiffs who pursued the more restrained and conservative approach of challenging a specific application of a felon disenfranchisement law under Section 2 instead of a wholesale challenge to the law. As the Supreme Court has stated, facial challenges are "the most difficult ... to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."⁵² Indeed, in *Washington State Grange v. Washington State Republican Party*, the Supreme Court made clear that facial challenges are "disfavored."⁵³ The Court explained that such claims often rely on speculation as to the consequences of the law; "run contrary to the fundamental principle of judicial restraint" by, among other things, "formulat[ing] a rule ... broader than is required by the precise facts to which it is applied";⁵⁴ and "threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution."⁵⁵

A. CIRCUITS PROVIDE GUIDANCE AS TO WHAT APPLICATIONS VIOLATE SECTION 2

The rationales undergirding the majority opinions of the circuits that have reviewed felon disenfranchisement provisions suggest that courts will be receptive to a Section 2 suit challenging the application of a felon disenfranchisement provision to ex-felons, convicted of low-level, non-violent drug offenses felonized in the modern era.

First, much of the logic behind not extending Section 2 to felon disenfranchisement would not apply to a case focused on vindicating the rights of ex-felons only. In *Hayden*, the court stated that the Section 2 claim under its review—a facial challenge to a New York law that disenfranchised otherwise qualified felons still serving their criminal sentences—brought the Voting Rights Act into direct conflict with the state's strong constitutionally protected interest in determining how to run and administer its penal system.⁵⁶ The court went on to note that challenges to felon disenfranchisement provisions which also disenfranchised ex-felons "may not as clearly implicate the state's interest in the administration of prisons."⁵⁷ By taking this guidance a step further and focusing a claim on *only* those who have completed their sentence and who are no longer living under the supervision of the state penal system, voting rights advocates could avoid the conflict entirely.

The *Simmons* and *Hayden* courts also reasoned that since Section 2 concerns ensuring that voters can "fully participate in the political process," Congress could never have intended it to reach those who are incarcerated. The *Hayden* court explained, "There is no question that incarcerated persons cannot 'fully participate in the political process'—they cannot petition, protest, campaign, travel, freely associate, or raise funds. It follows that Congress did not have this subpopulation in mind when the VRA Section at issue took its present form in 1982."⁵⁸ This line of reasoning

⁵² *United States v. Salerno*, 481 U.S. 739, 745 (1987).

⁵³ 552 U.S. 442, 450 (2008).

⁵⁴ *Id.* (citing *Ashwander v. TVA*, 297 U.S. 288, 346–47 (1936) (Brandeis, J., concurring)).

⁵⁵ *Id.* at 451.

⁵⁶ *Hayden v. Pataki*, 449 F.3d 305, 327 (2d Cir. 2006).

⁵⁷ *Id.* at 328 n.23.

⁵⁸ *Id.* at 321; *see also Simmons v. Galvin*, 575 F.3d 24, 40–41 (1st Cir. 2009).

also counsels for targeting a claim only on the disenfranchised who are no longer incarcerated and have the ability to fully participate in the political process.

Second, the circuit courts have indicated that they would be more receptive to a Section 2 claim focused exclusively on crimes felonized in the modern era. The *Johnson* court expressed concerns about the potential conflict between Section 2 and the Penalty Clause of Section 2 of the Fourteenth Amendment, and the *Hayden*, *Simmons*, and *Johnson* courts refused to extend Section 2's reach to felon disenfranchisement cases if it allowed plaintiffs to challenge laws "deeply rooted in the Nation's history."⁵⁹ Plaintiffs would avoid these issues entirely if their Section 2 claim focused exclusively on the application of a felon disenfranchisement law to citizens disenfranchised for committing low-level drug crimes.

In *Johnson*, the court explained that because the Penalty Clause generally exempts felon disenfranchisement provisions,⁶⁰ Section 2 of the Voting Rights Act must be interpreted as not reaching felon disenfranchisement provisions to avoid "a serious constitutional question."⁶¹ Plaintiffs could avoid the perceived conflict with the Penalty Clause by explicitly limiting their challenge to relatively recent applications of a felon provision never envisioned at the time of the Fourteenth Amendment's ratification.

Language found in the Reconstruction and Enabling Acts that Congress passed when readmitting the Confederate States into the Union supports the argument that the Penalty Clause is not in tension with a Section 2 claim focused exclusively on low-level, recently felonized drug crimes. The Reconstruction and Enabling Acts, enacted by the same Congress that a few months earlier had submitted the Fourteenth Amendment to the States for ratification, conditioned readmission on the States not depriving citizens of their right to vote, except with regard to such crimes as "are now felonies at common law," or "rebellion."⁶² Just as those two federal statutory laws, which prohibited states from disenfranchising citizens who had committed non-common law felonies, were not in conflict with the Penalty Clause, Section 2 would also not be in conflict if it were applied in a lawsuit challenging disenfranchisement based on a few types of crimes that do not meet the definition of "rebellion" or a "felony at common law."

In *Harvey v. Brewer*, the court rejected plaintiffs' argument that the language of the Reconstruction and Enabling Acts supported their Equal Protection claim challenging Arizona's application of its felon disenfranchisement law only to felonies not at common law. While the court found that the language of the Reconstruction and Enabling Acts did not have to be reconciled with the type of disenfranchisement

⁵⁹ *Hayden*, 449 F.3d at 338 (Sack, J., concurring); *Simmons*, 575 F.3d at 34; *Johnson v. Florida*, 405 F.3d 1214, 1228 (11th Cir. 2005) (en banc).

⁶⁰ The Penalty Clause of Section 2 of the Fourteenth Amendment states: "[W]hen the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." U.S. CONST. amend. XIV, § 2.

⁶¹ *Johnson*, 405 F.3d at 1228–30 (citing *Richardson v. Ramirez*, 418 U.S. 24, 55 (1974) (rejecting challenge to felon disenfranchisement provision under Equal Protection Clause, in part, because "the exclusion of felons from the vote has an affirmative sanction in Section 2 of the Fourteenth Amendment")).

⁶² *Harvey v. Brewer*, 605 F.3d 1067, 1075–77 (9th Cir. 2010) (citing 15 Stat. 73 (1868); 14 Stat. 428, § 5 (1867)). Neither "rebellion" nor "felonies at common law" encompass the types of less serious, recently felonized crimes that could be successfully challenged under the Voting Rights Act. *See id.* at 1071 (accepting that drug offenses are statutory crimes that are not felonies at common law).

permitted under the Fourteenth Amendment,⁶³ language in the decision strongly suggests that the court would have viewed such a case differently were it brought under Section 2 of the Voting Rights Act instead of the Equal Protection Clause. The court explained, “Simply because the Fourteenth Amendment does not itself prohibit States from enacting a broad array of felon disenfranchisement schemes does not mean that Congress cannot do so through legislation—provided, of course, that Congress has the authority to enact such a prohibition.”⁶⁴

A concern articulated by both the *Johnson* and *Hayden* majorities closely related to the perceived conflict between Section 2 facial challenges to felon disenfranchisement laws and the Penalty Clause is that extending Section 2’s reach to encompass the felon disenfranchisement cases before them would mean that plaintiffs could challenge laws and practices no different from those “deeply rooted in the Nation’s history.”⁶⁵ An “as-applied” challenge directed at decisions to apply felon provisions at low-level drug crimes felonized in the modern era, with consequences only apparent in recent decades, would sidestep this issue as well. Such challenges would leave the “deeply rooted” felon disenfranchisement provisions themselves standing. Moreover, preventing large numbers of otherwise qualified voters from voting for life because they either used or distributed drugs has nothing to do with “deeply rooted” traditions. Instead, this type of mass disenfranchisement for the commission of a generally unreported crime that, according to social scientists, is routinely enforced in a racially discriminatory and profoundly disproportionate manner is a recent phenomenon.⁶⁶

A focus on less serious, recently felonized crimes would also make it more difficult for courts to interpret a felon disenfranchisement case as at odds with the Voting Rights Act’s legislative history. The majority in *Hayden* reasoned that since the Congressional Record establishes that Congress explicitly rejected the idea of including felon disenfranchisement as one of the tests or devices it would ban outright under Section 4 of the Act, Congress likely did not intend for Section 2 to encompass the type of disenfranchisement provision the court had before it.⁶⁷ This logic holds only to the extent that a court perceives a Section 2 felon disenfranchisement challenge as an attempt to circumvent Congress’s decision in 1965 not to ban felon disenfranchisement statutes outright. A suit that only concerns those disenfranchised for the commission of low level drug offenses would avoid this perceived conflict with Section 4’s legislative history as these offenses first became felonies years after the enactment of the Voting Rights Act.⁶⁸

The *Hayden* majority also opined that the absence of an explicit discussion in the Congressional Record that Section 2 reached felon disenfranchisement was further

⁶³ *Id.*, at 1076–77.

⁶⁴ *Id.*

⁶⁵ *Johnson*, 405 F.3d at 1228; see also *Hayden v. Pataki*, 449 F.3d 305, 338 (2d Cir. 2006) (Sack, J., concurring); *Farrakhan v. Gregoire (Farrakhan II)*, 623 F.3d 990, 993 (9th Cir. 2010) (en banc).

⁶⁶ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 59–139 (2010) (citing HUMAN RIGHTS WATCH, *PUNISHMENT AND PREJUDICE: RACIAL DISPARITIES IN THE WAR ON DRUGS* (May 1, 2000), <https://www.hrw.org/legacy/reports/2000/usa/>); KATHERINE BECKETT & THEODORE SASSON, *THE POLITICS OF INJUSTICE: CRIME AND PUNISHMENT IN AMERICA* (2004); MARC MAUER, SENTENCING PROJECT, *THE CHANGING RACIAL DYNAMICS OF THE WAR ON DRUGS* (Apr. 2009), <http://www.sentencingproject.org/wp-content/uploads/2016/01/The-Changing-Racial-Dynamics-of-the-War-on-Drugs.pdf>.

⁶⁷ *Hayden*, 449 F.3d at 318–19; see also *Farrakhan II*, 623 F.3d at 993.

⁶⁸ ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* 307–32 (2016); JAMES KILGORE, *UNDERSTANDING MASS INCARCERATION: A PEOPLE’S GUIDE TO THE KEY CIVIL RIGHTS STRUGGLE OF OUR TIME* 59–72 (2015).

indication that Section 2 had no application to the case before it.⁶⁹ By this, the court was not suggesting that every voting practice, procedure, or qualification challenged under Section 2 had to be discussed in the Congressional Record. Instead, the court was simply voicing concern about the absence of discussion in the Congressional Record relating to the type of felon disenfranchisement provision under its consideration when Congress was fully aware that these provisions existed at the time it enacted the Voting Rights Act and Section 2's results standard.⁷⁰ Presumably, a court reviewing a different type of challenge that focused exclusively on recent applications of a felon disenfranchisement provision—applications with impacts felt only after the enactment of the Voting Rights Act and Section 2's results standard—would not engender the same type of concerns from a reviewing court.⁷¹

Third, courts will be much more receptive to a Section 2 lawsuit targeting an outlier application of a felon disenfranchisement statute. Courts have indicated that they have resisted applying Section 2's results standard to felon disenfranchisement laws, in part, because they are aware that doing so would inevitably require invalidating numerous longstanding laws existing in much of the country. Indeed, in *Farrakhan II*, before the court foreclosed using the Section 2 results standard to facially challenge felon disenfranchisement laws, it noted, "Today, an overwhelming number of states—including all states in our circuit—disenfranchise felons."⁷² A lawsuit targeting what has become the outlier practice of disenfranchising disproportionate numbers of African-American ex-felons convicted of low-level drug crimes would avoid this concern entirely.

Indeed, the fact that only a small number of states have chosen to pursue this outlier practice speaks to the tenuousness of its justifications. Why is it that some of the states with the most pronounced histories of discrimination against African-Americans are the same states that are now most aggressively pursuing the practice? Why is it that states like Florida are disenfranchising individuals for life merely for committing the crime of possessing more than 20 grams of marijuana or growing a single marijuana plant when these are offenses that are not even treated as misdemeanors in parts of the country?⁷³ Why is it that these outlier states are disenfranchising ex-felons for having committed low-level drug crimes that social scientists tell us are especially susceptible to discriminatory enforcement practices?⁷⁴ Thus, we see that tenuousness, pretext, and the foul odor of underlying discriminatory intent is that much more discernable when the focus is on the outlier practice of disenfranchising ex-felons for committing low-level drug offenses. For this reason too, there is reason to anticipate that courts will be more receptive to this type of an as-applied Section 2 challenge.

B. AN APPROACH CONSISTENT WITH WHAT HAS WORKED IN THE PAST

The idea that courts could be receptive to a Section 2 claim targeting how a state applies its felon disenfranchisement law to a sympathetic subset of those impacted by the law is consistent with what has worked in the context of constitutional challenges.

⁶⁹ *Hayden*, 449 F.3d at 316–17.

⁷⁰ *Id.* at 322–23.

⁷¹ See FACT SHEET: TRENDS IN U.S. CORRECTIONS, SENTENCING PROJECT 3 (2014). <http://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf> (reporting that "the number of Americans incarcerated for drug offenses has skyrocketed from 41,000 in 1980 to nearly a half million in 2014.").

⁷² *Farrakhan II*, 623 F.3d 993.

⁷³ *Florida Laws & Penalties*, NORML (2017), <http://norml.org/laws/item/florida-penalties>.

⁷⁴ ALEXANDER, *supra* note 66, at 59–139.

In the one example of where an equal protection challenge to a criminal disenfranchisement statute was successful both at the circuit court level and at the Supreme Court—*Hunter v. Underwood*—plaintiffs prevailed by focusing on a subset of crimes where application of criminal disenfranchisement most clearly involved racial discrimination and where the legitimate rationale was most obviously tenuous.⁷⁵ In *Hunter*, the Supreme Court struck down a criminal disenfranchisement provision of the Alabama Constitution as violative of the Equal Protection Clause of the Fourteenth Amendment to the extent that it disenfranchised persons convicted of crimes involving “moral turpitude,” as determined at the discretion of the Boards of Registrars.⁷⁶ Plaintiffs prevailed not by attempting to obtain voting rights for all those disenfranchised by Alabama’s criminal statute, but by getting the Court to set aside only those parts of the criminal disenfranchisement law most clearly adopted with the intention of disenfranchising blacks and leaving most of the law undisturbed.

The crimes involved in *Hunter* were misdemeanors, not felonies. But just as Alabama would not have been able to insulate itself from the Court’s decision in *Hunter* by felonizing crimes of moral turpitude that had previously been misdemeanors, States cannot insulate themselves simply by felonizing certain crimes that historically would have been either misdemeanors or would not have been regarded as crimes at all where those crimes disproportionately affect African-American voters. Today, a significant portion of the African-American population has been disenfranchised because of felonized, non-violent drug offenses;⁷⁷ crimes considered so minor that they routinely do not involve any type of a prison sentence.⁷⁸ These are crimes that only became felonies in the 1970s.⁷⁹ And they are unreported crimes often enforced by police who exercise their discretion in a discriminatory manner.⁸⁰ These drug crimes are, in many ways, the “crimes of moral turpitude” of today; they are the crimes most vulnerable to court challenges under Section 2.

At the district court level, plaintiffs have also had some success when they have focused on challenging how a felon disenfranchisement law has been applied to certain individuals or to a subset of felons. In *Hobson v. Pow*, the court invalidated an Alabama law disenfranchising persons convicted of the crime of “assault and battery on the wife.”⁸¹ There was no comparable provision disenfranchising women for “assault and battery on the husband.” The court held that the law violated the Equal Protection Clause because it was a gender based classification for which the state had presented no reasonable justification.⁸² And in *Williams v. Taylor*, the court of appeals vacated and remanded for trial a convicted felon’s claim that local election officials in Marshall County, Mississippi selectively removed him from the list of registered voters because of his race and political association.⁸³ The court held that while the plaintiff, as a

⁷⁵ 471 U.S. 222 (1985).

⁷⁶ *Id.* at 226, 229–30.

⁷⁷ See BUREAU OF JUSTICE STATISTICS, *supra* note 3, at 2–3.

⁷⁸ *Id.*

⁷⁹ HINTON, *supra* note 68, at 307–32 (2016); KILGORE, *supra* note 68, at 59–72 (2015).

⁸⁰ Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN.L. & POL’Y REV. 257, 261–77 (2009) (discussing the role of race in shaping enforcement of the country’s drug laws).

⁸¹ 434 F. Supp. 362 (N.D. Ala. 1977).

⁸² *Id.* at 367.

⁸³ 677 F.2d 510 (5th Cir. 1982).

convicted felon, had no right to vote under state law, “he has the right not to be the arbitrary target of the Board’s enforcement of the statute.”⁸⁴

Finally, in the recent *Frank v. Walker* (*Frank II*) case, the Seventh Circuit allowed an as-applied challenge to Wisconsin’s treatment of those most burdened by the state’s voter ID law to go forward after earlier rejecting a broader facial challenge to the law.⁸⁵ The court explained that although it would not strike down Wisconsin’s voter ID law in its entirety because the application of the statute to the vast majority of voters is “amply justified,” plaintiffs may still prevail on a claim focused on voters “who just can’t get acceptable photo ID with reasonable effort.”⁸⁶

All of these examples suggest that courts will be more willing to embrace Section 2 felon disenfranchisement claims limited to vindicating the rights of a narrow band of voters such as low-level, minority drug offenders where the state’s justifications are most tenuous and the impact most discriminatory.

CONCLUSION

While federal courts have declined thus far to strike down felon disenfranchisement laws under Section 2 of the Voting Rights Act, that does not mean that they can never run afoul of Section 2. Careful review of appellate court decisions in this area of the law suggests that courts may be receptive to an as-applied challenge targeting a state’s disenfranchisement of otherwise qualified minority voters who have completed their sentences, but are nonetheless disenfranchised because they at some point committed a non-violent, low-level drug offense.

Of all the circuit opinions addressing felon disenfranchisement laws, *Johnson* goes the furthest in limiting the ability of plaintiffs to challenge such laws under Section 2. However, *Johnson* is limited both by the Supreme Court’s decision in *Hunter* and its own internal logic. For these reasons, even in the Eleventh Circuit, states would be sorely mistaken if they assumed that *Johnson* automatically immunizes them from any type of a challenge under Section 2.

The Eleventh Circuit may find itself wrestling with felon disenfranchisement issues very soon. On September 26, 2016, a group of leading voting rights advocates filed a complaint against Alabama’s current felon disenfranchisement law.⁸⁷ In the complaint, plaintiffs fashion their case as a facial challenge, and they state that they seek to strike down the state’s felon disenfranchisement law in its entirety.⁸⁸ In addition to constitutional claims, the complaint includes a claim that the current law violates Section 2.⁸⁹ The case is an unusually strong one because it challenges Alabama’s use of a provision very similar to the intentionally discriminatory and vague “moral turpitude” provision the Supreme Court struck down in *Hunter v. Underwood*.⁹⁰

Even if the court concludes that intentional discrimination does not infect the entirety of Alabama’s felon disenfranchisement statute or decides not to apply Section 2’s results standard to strike down the law in its entirety, it may still require Alabama to modify

⁸⁴ *Id.* at 517.

⁸⁵ *Frank v. Walker* (*Frank II*), 819 F.3d 384, 385–87 (7th Cir. 2016).

⁸⁶ *Id.* at 387–88.

⁸⁷ Class-Action Complaint for Declaratory and Injunctive Relief, *Thompson v. Alabama*, No. 2:16-cv-783, 2016 WL 5405634 (M.D. Ala.) (Sept. 26, 2016).

⁸⁸ *Id.* at 3.

⁸⁹ *Id.* (“Plaintiffs pray that this Court strike down this discriminatory system in its entirety as racially discriminatory, unconstitutional, and unlawful under Section 2 of the Voting Rights Act”).

⁹⁰ *Id.* at 2–3, 5–9, 23–39.

how it goes about applying its law. Depending on how plaintiffs develop the record, the Court may decide that Alabama's law violates Section 2 to the extent that it ensnares individuals who remain disenfranchised after fully completing their sentences for committing low-level drug offenses or other relatively minor statutory offenses.⁹¹

In sum, although advocates have failed in the past when attempting to challenge felon disenfranchisement under Section 2, they may have more success going forward. There is reason to believe that, if a case is properly framed, courts will, at the very least, be receptive to using Section 2 to limit certain especially harmful and discriminatory applications of a felon disenfranchisement law, such as a state's refusal to reinstate the voting rights of citizens who have already paid their debt to society for the commission of a low-level drug offense.

ABOUT THE AUTHOR

Avner Shapiro currently serves as a trial attorney in the Voting Section of the Civil Rights Division of the U.S. Department of Justice where he has participated in litigating Division voting rights cases under Section 2 of the Voting Rights Act, including: the successful challenge to North Carolina's roll back of early voting, elimination of same day voting and out-of precinct voting, and its photo ID law; the successful challenge to Texas's photo ID law; and successful challenges to at-large methods of election in Port Chester, NY, and Blaine County, MO. He has also served as a Special Litigation counsel at the Division's Special Litigation Section where he supervised investigations into and litigation against police departments, jails, prisons, and departments of corrections engaging in patterns or practices of constitutional violations, and in the Division's Criminal Section where he prosecuted hate crimes and color of law cases. The author also currently serves as a Commissioner on the Montgomery County Council's Commission on People with Disabilities of Montgomery County, MD. The author thanks Chris Asta, currently an associate at WilmerHale, for reviewing and providing suggestions as to how to improve a draft of this brief. The views expressed in this essay are solely those of the author. His views do not necessarily reflect, nor are they necessarily consistent with, those of his employer, the Department of Justice.

⁹¹ This type of cabining of the law's reach would be fully consistent with how the Fifth Circuit's en banc panel recently decided to mitigate the discriminatory effect of Texas's voter ID law by requiring the lower court to craft a remedy that would allow the narrow band of voters most burdened by the law to vote without a photo ID. *Veasey v. Abbott*, 830 F.3d 216, 269–272 (5th Cir. 2016).

The *Bivens* Term: Why the Supreme Court Should Reinvigorate Damages Suits Against Federal Officers*

Stephen I. Vladeck

Two of the most important cases that the Supreme Court will hear during its current Term involve the availability of “*Bivens* remedies”—judge-made causes of action that allow individuals to seek damages against federal officers who violate their constitutional rights.¹ That may be a mouthful, but, in a nutshell, *Bivens* is the only mechanism today through which individuals whose constitutional rights were violated by the federal government can obtain legal relief once the violation has ceased.

Although cases raising the scope of *Bivens* don’t tend to generate the same headlines as those involving hot-button social issues such as abortion, affirmative action, health care, and immigration, the more general principle of which *Bivens* is a critical element—that federal courts have an obligation to provide remedies for unconstitutional federal government conduct—is a bulwark of our constitutional system. Without such remedies, there would be little reason for federal officers to comply with the Constitution—especially those provisions that are least likely to be protected through the political process. And as Justice John Marshall Harlan II wrote in his concurring opinion in *Bivens*, “it would be ... anomalous to conclude that the federal judiciary ... is powerless to accord a damages remedy to vindicate social policies which, by virtue of their inclusion in the Constitution, are aimed predominantly at restraining the Government as an instrument of the popular will.”²

In recent years, however, lower courts have embraced just such an anomalous understanding, and have, for arguably the first time in American history, left a growing array of plaintiffs (with meritorious constitutional claims) with no legal remedies whatsoever. And although these rulings have received some support from the Justices, the Supreme Court has yet to issue a decision squarely calling *Bivens* into question—or, more importantly, directly holding that a private citizen claiming a constitutional violation has no possible remedy. But two cases the Justices will decide this spring raise fundamental questions about the continuing viability of *Bivens*—and, in the process, about the broader role of the federal courts as a check on unconstitutional federal government conduct. To be sure, both *Ziglar v. Abbasi* and *Hernandez v. Mesa* (in which I am co-counsel to the Petitioners)³ confront the Supreme Court with additional questions beyond the existence of a *Bivens* remedy. But now more than ever, as this Issue Brief

* This Issue Brief was initially published in January 2017.

¹ See *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

² *Id.* at 403–04 (Harlan, J., concurring in the judgment).

³ Needless to say, the views expressed herein are mine alone, and do not necessarily reflect the views of the Petitioners in *Hernandez* or my co-counsel.

explains, these cases also present a critical opportunity for the Justices to reassert the role of *Bivens*—and, through it, the judiciary—in vindicating the basic rights conferred by the Constitution, and in properly holding the federal government to account.

I. THE ROAD TO *BIVENS*

Shortly after the Civil War (and the post-Civil War amendments, which enshrined new federal constitutional constraints on state actors), Congress created a general cause of action for anyone whose constitutional rights were violated by state officials. That remedy, codified today at 42 U.S.C. § 1983, has been an indispensable mechanism for holding state officers accountable for violations of the federal Constitution—and for ensuring not just the supremacy of federal law, but the role of the federal courts as a bulwark against unconstitutional state conduct. But Congress has never seen fit to provide a similar remedy against *federal* officers. Instead, victims of constitutional violations by *federal* officers have historically been left to asserting their constitutional rights as defenses to state (or federal) enforcement proceedings, or, more significantly, to judge-made civil remedies—remedies that, for the better part of the Nation’s first two centuries, derived from *state*, rather than *federal* law. A pre-Civil War Supreme Court decision rejected the argument that federal jurisdiction in such cases ought to be exclusive,⁴ and the Court would still explain as late as 1963 that, “When it comes to suits for damages for abuse of power, federal officials are usually governed by local law.”⁵

By that point, however, several flaws in the original model had crystallized. First, although it had been possible to loosely analogize certain constitutional protections to state tort law (*e.g.*, vindicating Fourth Amendment violations through trespass), that analogy did not hold up well as applied to many of the other constitutional rights (such as equal protection) into which the courts were then breathing new life. Second, the same period saw federal courts more routinely asserting the power to *enjoin* unconstitutional conduct by the federal government—even though, as with damages, no statute expressly authorized them to provide such relief—creating both a strange jurisdictional asymmetry between prospective and retrospective relief against federal officers and a precedent for a more aggressive federal judicial role. Third, and related, the 1950s and 1960s brought with them the rise of what Judge Henry Friendly called “the new federal common law,” pursuant to which federal courts identified more specific—and more analytically coherent—grounds on which to fashion judge-made (as opposed to statutory) rules of decision, defenses, and causes of action.⁶

These developments came to a head in *Bivens*—a case arising out of an unconstitutional raid of a home by six agents of the Federal Bureau of Narcotics (today’s DEA). *Bivens*—who was never charged as a result of the unlawful search, and therefore had no opportunity to vindicate his rights through a motion to suppress—instead sought damages directly under the Fourth Amendment for the violation. Tellingly, the Nixon administration’s argument in response was not that the Constitution denied *Bivens* a remedy; it was that the appropriate remedy for his constitutional claim was provided by New

⁴ *Teal v. Felton*, 53 U.S. (12 How.) 284 (1852).

⁵ *Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963) (citing *Slocum v. Mayberry*, 15 U.S. (2 Wheat.) 1, 10, 12 (1817)); see also Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 87–90, 135–37 (1997).

⁶ Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 389–91 (1964); see also Louise Weinberg, *The Monroe Mystery Solved: Beyond the “Unhappy History” Theory of Civil Rights Litigation*, 1991 BYU L. REV. 737, 761.

York state law—and that judge-made *federal* damages remedies would only be appropriate in cases in which they were “indispensable for vindicating constitutional rights.”⁷

Writing for a 5-3 majority (with Justice Harlan concurring in the judgment), Justice William Brennan disagreed. So long as Congress had not provided an adequate, alternative remedy, and so long as the dispute did not involve “special factors counseling hesitation in the absence of affirmative action by Congress,” private individuals whose constitutional rights had been violated by federal officers were entitled to pursue damages remedies in the federal courts. To be sure, valid defenses—including official immunity—might still preclude relief on the merits in such cases. The key contribution of *Bivens* was to suggest that, where there were no such obstacles, and where a plaintiff was entitled to relief on the merits, the federal courts had the authority to award damages—not just to vindicate the constitutional rights of private individuals, but, in the words of Chief Justice William Rehnquist, “to deter individual federal officers from committing constitutional violations.”⁸

II. *BIVENS* AFTER *BIVENS*

The 45 years in which *Bivens* has been on the books can best be broken down into two periods: Expansion and retrenchment. Thus, in the Supreme Court’s first two cases after *Bivens* to revisit the 1971 ruling, the Court expanded its analysis to also encompass equal protection claims under the Fifth Amendment’s Due Process Clause,⁹ and claims against federal prison officials under the Cruel and Unusual Punishments Clause of the Eighth Amendment.¹⁰ And although the *Bivens* dissenters had objected that judicial recognition of a self-executing cause of action for damages was an arrogation of judicial power and a usurpation of the legislative function, Congress, when it amended the Federal Tort Claims Act in 1974 (the statute authorizing ordinary tort suits against the federal government), signified its *approval* of *Bivens*—extending the FTCA to encompass intentional torts by law enforcement officers while expressing its view of the FTCA as complementing, rather than displacing, such judge-made remedies.¹¹

Beginning in the 1980s, though, the narrative grew more equivocal. First, the Supreme Court began declining to recognize *Bivens* remedies in cases in which federal statutes provided *any* remedy to redress the underlying constitutional harm—even where the statutory remedy was not commensurate with the kind of damages that would have been available under *Bivens*. Thus, for example, in *Schweiker v. Chilicky*, the Court held that the Social Security Act’s remedy for wrongful termination of benefits—which was nothing more than the restoration of benefits and payment of any unlawfully withheld funds—was enough to preclude a damages claim under the Fifth Amendment’s Due Process Clause.¹² Second, in a pair of cases brought by servicemember plaintiffs, the Court for the first time identified “special factors counseling hesitation” against recognizing a *Bivens* remedy, holding that separation of powers considerations militated against the civilian federal courts fashioning remedies for servicemembers against their superior officers.¹³ Subsequent Supreme Court decisions

⁷ Brief for Respondents at 24, *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (No. 301), 1970 WL 116900.

⁸ *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 71 (2001).

⁹ *Davis v. Passman*, 442 U.S. 228 (1979).

¹⁰ *Carlson v. Green*, 446 U.S. 14 (1980).

¹¹ *See id.* at 19–20.

¹² *Schweiker v. Chilicky*, 487 U.S. 412 (1988).

¹³ *United States v. Stanley*, 483 U.S. 669 (1987); *Chappell v. Wallace*, 462 U.S. 296 (1983).

expanded this “special factors” analysis to encompass claims against government *agencies* (as opposed to individual officers),¹⁴ and claims against private prison corporations,¹⁵ even though the plaintiffs in both cases may well have been able to pursue relief under *Bivens* or state law against different defendants.

But the most significant development for *Bivens* during this time period is also the least understood: Whereas the choice that cases like *Bivens* had thus far presented was, as in *Bivens* itself, between federal damages remedies and state damages remedies, Congress in 1988 amended the FTCA to provide that *all* state-law tort claims against federal officers acting within the scope of their employment had to be brought in federal court under the FTCA (but not *Bivens* claims, which were expressly exempted).¹⁶ As Professor Carlos Vázquez and I have argued at some length, thanks to the *Bivens* exemption, the 1988 amendment—known as the Westfall Act—was actually *unclear* as to whether it also applied to state-law claims for federal *constitutional* violations, such as that which the Nixon administration had supported in *Bivens*. Indeed, as we’ve explained, there are compelling reasons to conclude that it did not—and that it left intact the power of state courts to provide damages against federal officers for constitutional violations.¹⁷

But what *is* clear about the Westfall Act on this point is how it has been read by every subsequent court—to (perhaps incorrectly) also encompass state-law claims for federal constitutional violations. In other words, whereas the choice the *Bivens* Court faced was between state-law damages and damages under the federal Constitution, the choice that federal courts have confronted in post-1988 *Bivens* cases (at least where there is no alternative remedy) is “*Bivens* or nothing.” And increasingly, the lower courts, at least, have chosen “nothing,” without acknowledging the dramatically different consequences of such a ruling today as compared to before the Westfall Act. Indeed, as I’ve summarized elsewhere, there are now decisions from at least six different circuits refusing to infer *Bivens* remedies for private plaintiffs who would otherwise be left with *no* remedy for violations of their constitutional rights under state or federal law.¹⁸

Part of the lower courts’ justification for the rising hostility to *Bivens* can be traced to Justice Antonin Scalia’s concurrence in a 2001 *Bivens* case—*Malesko v. Correctional Services Corp.* Writing for himself and Justice Clarence Thomas, Scalia attacked *Bivens* head-on, decrying it as a “relic of the heady days in which this Court assumed common-law powers to create causes of action,” powers that the Court was in the midst of dramatically scaling back in the context of *statutory* claims.¹⁹ Thus, he concluded, *Bivens* and the two other Supreme Court decisions approving comparable claims ought to be limited to their facts.²⁰

But the rest of the Court has never endorsed such skepticism, and for good reasons: First, unlike statutory rights (the existence and scope of which are wholly a matter of legislative grace), constitutional rights are the province of the federal judiciary, which

¹⁴ *FDIC v. Meyer*, 510 U.S. 471 (1994).

¹⁵ *Malesko*, 534 U.S. 61.

¹⁶ See 28 U.S.C. § 2679(b) (1988).

¹⁷ See Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the Bivens Question*, 161 U. PA. L. REV. 509 (2013).

¹⁸ See Stephen I. Vladeck, *The Demise of Merits-Based Adjudication in Post-9/11 National Security Litigation*, 64 *DRAKE L. REV.* 1035 (2016).

¹⁹ *Malesko*, 534 U.S. at 75 (Scalia, J., concurring).

²⁰ *Id.*

is “supreme in the exposition of the law of the Constitution,”²¹ including the means by which that law must be enforced. Second, and related, the purpose of constitutional rights is to constrain the political branches, and not the other way around. Thus, whatever separation of powers problems might arise from judicial recognition of implied statutory remedies, recognition of implied *constitutional* remedies is a central means of vindicating, rather than aggrandizing, separated powers. Third, as Justice Harlan emphasized in his *Bivens* concurrence, objections to *Bivens* remedies sounding in judicial power ring especially hollow in light of the far more coercive authority the federal courts have long (and rightly) exercised to *enjoin* unconstitutional federal conduct without an express cause of action.

Perhaps for those reasons, the Supreme Court in the 15 years since *Malesko* has continued to express skepticism about *Bivens*, but nothing more—and has yet to hold, in a case presenting a private plaintiff for whom the choice really is “*Bivens* or nothing,” that the plaintiff should be left with nothing. Instead, in cases such as *Wilkie v. Robbins*,²² *Hui v. Castaneda*,²³ and *Minnecci v. Pollard*,²⁴ the Court has relied upon alternative federal and state remedies as its justification for refusing to recognize a *Bivens* claim. And when cases have come to the Justices presenting the starker choice—between *Bivens* and nothing—their approach, at least until this Term, has been to duck the matter by denying certiorari.

But on October 11, the Justices granted certiorari in *Abbasi*, in which one of the questions presented was whether non-citizen immigration detainees could pursue a *Bivens* claim arising out of their allegedly unconstitutional treatment while detained as part of the post-9/11 roundup of Muslim and Arab immigrants in and around New York (a divided panel of the Second Circuit had said “yes”). On the same day, the Justices also granted review in *Hernandez*—a case arising out of a U.S. Border Patrol agent’s allegedly unconstitutional cross-border shooting of an unarmed 15-year-old Mexican national. And, most curiously, although the lower court rulings in *Hernandez* had focused on whether the Constitution even applied in such a case (and, if it did, the agent’s entitlement to a qualified immunity defense—which the en banc Fifth Circuit unanimously sustained), the Justices *added* to the cert. grant in *Hernandez* the question whether “the claim in this case [may] be asserted under *Bivens*.” Taken together, then, the grants in *Abbasi* and *Hernandez* bespeak a renewed interest on the Justices’ part in *Bivens*—and in a pair of cases, unlike any *Bivens* case the Court has heard since the Westfall Act was enacted, in which the choice truly is “*Bivens* or nothing.”

III. THE STAKES OF ABBASI AND HERNANDEZ

Although they took very different paths to the Supreme Court, *Abbasi* and *Hernandez* both have at their core constitutional claims for which there are no alternative remedies. In *Abbasi*, the plaintiffs are eight non-citizens who lacked lawful immigration status at the time they were arrested as part of the post-9/11 roundup—but who also were, as the Court of Appeals concluded, “unquestionably never involved in terrorist activity.” The plaintiffs did not challenge their arrest and detention, but rather a series of decisions taken by both lower-level and senior FBI, DOJ, and immigration officials to subject them to the same harsh and punitive treatment as those detainees

²¹ *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

²² 551 U.S. 537 (2007).

²³ 559 U.S. 799 (2010).

²⁴ 132 S. Ct. 617 (2012).

who *were* terrorism suspects, arguing that such carelessness violated their rights under the Free Exercise Clause of the First Amendment, the Fourth Amendment, and the Due Process Clause of the Fifth Amendment. In a lengthy, divided decision, the Second Circuit allowed the plaintiffs' *Bivens* claims under the Fourth and Fifth Amendments to proceed, but held that the First Amendment claim would require extending *Bivens* into a "new context," and was thus not appropriately the basis for a *Bivens* claim.

In her dissent, Judge Raggi argued that "national security" was a special factor counseling hesitation before recognizing a cause of action under the Fourth and Fifth Amendments. As she wrote, "when, as here, claims challenge official executive policy (rather than errant conduct by a rogue official—the typical *Bivens* scenario), and particularly a national security policy pertaining to the detention of illegal aliens in the aftermath of terrorist attacks by aliens operating within this country, Congress, not the judiciary, is the appropriate branch to decide whether the detained aliens should be allowed to sue executive policymakers in their individual capacities for money damages."²⁵

But whereas the lower courts *have* at times invoked "national security" as a special factor counseling hesitation before recognizing a *Bivens* remedy, the Supreme Court has never followed suit—perhaps because, as in *Abbasi*, it would effectively immunize government officers from any constitutional violations arising out of policies labeled as being related "national security," even when the alleged violations themselves have no plausible connection to national security considerations. Indeed, overreaching out of a desire to protect the country may very well go to the *reasonableness* of the government's conduct under the Fourth Amendment, or the strength of the government's interest under the Fifth Amendment. But to allow it to cut against a cause of action altogether is to foreclose relief even when the government's conduct is unreasonable under the Fourth Amendment or lacks a sufficiently strong interest under the Fifth Amendment. In other words, there are easy and obvious ways adequately to accommodate the government's legitimate concerns in these cases without using *Bivens* analysis to foreclose all relief.

And although the *Abbasi* case brings with it at least the specter of national security, it is difficult to see a similar shadow looming over the *Hernandez* case—where the constitutional claim is simply that a single, rogue officer (what Judge Raggi called "the typical *Bivens* scenario") committed an unjustified act of lethal force against an unarmed Mexican boy while patrolling the U.S.-Mexico border. In opposing certiorari in *Hernandez*, the government suggested that "foreign relations" concerns are a special factor justifying judicial skepticism of a *Bivens* remedy—even though the Mexican government has repeatedly clamored *for* a U.S. remedy (including in an amicus brief filed in the Supreme Court last month), given the unavailability of means by which Officer Mesa can be held to account under Mexican law. The government has also suggested that "extraterritoriality" is a special factor—that courts should never recognize *Bivens* claims where the underlying conduct took place across the U.S. border, analogizing to the presumption against extraterritorial application of statutes. But again, this both ignores the difference between constitutional and statutory rights and conflates the merits with the cause of action question. *Hernandez* raises an important and interesting question about how the Fourth and Fifth Amendments apply in the unique context of the U.S.-Mexico border—one of the questions on which the Court granted review. But if either provision *does* apply, and if Officer Mesa's conduct violated the victim's constitutional rights, then to decline to recognize a *Bivens* remedy in *Hernandez*

²⁵ *Turkmen v. Hasty*, 789 F.3d 218, 265 (2d Cir. 2015) (Raggi, J., concurring in part and dissenting in part).

is potentially to sanction such reckless conduct in the future—since there will never be a way to obtain injunctive relief *before* such an unlawful shooting takes place.

Don't get me wrong—there may indeed be cases in which there are compelling reasons why the federal courts should stay their hand before allowing a plaintiff to sue directly under the Constitution for damages. The critical point, though, is that such special factors must be reasons to disfavor judicial intervention *assuming* that the plaintiffs' allegations are true, that their rights were violated, and that no defense otherwise precludes recovery. That is, even when the plaintiff should win, we should be of the view that no remedy is appropriate.

The problem both *Abbasi* and *Hernandez* highlight is the blurring of these necessarily distinct ideas—and, in the process, the potential categorical foreclosure of damages remedies to enforce constitutional rights. As Seventh Circuit Judge Ann Williams wrote in 2012, such a restrictive approach to *Bivens* portends “a doctrine of constitutional triviality where private actions are permitted only if they cannot possibly offend anyone anywhere. That approach undermines our essential constitutional protections in the circumstances when they are often most necessary. It is no basis for a rule of law.”²⁶

CONCLUSION

The timing of the upcoming oral arguments in *Abbasi* and *Hernandez* is more than a little ironic: *Abbasi*, the second case to be heard on Wednesday, January 18, will be the very last argument that the Justices hear during the Obama administration. And *Hernandez*, which will be argued in February, is likely to be one of the very first cases in which the Justices will hear from the Trump Justice Department. But whatever else separates the two administrations, one point of common cause will surely be their opposition to recognition of *Bivens* remedies in either case.

It was not true in *Bivens*—and has not been true in most of the *Bivens* cases to reach the Supreme Court in the ensuing decades—that the federal judiciary was properly presented with a choice between a remedy under *Bivens* or nothing. But it *is* true in both *Abbasi* and *Hernandez*. As Justice Harlan explained 45 years ago, “it is important, in a civilized society, that the judicial branch of the Nation's government stand ready to afford a remedy in these circumstances.”²⁷ Indeed, it may be more important now than ever.

²⁶ *Vance v. Rumsfeld*, 701 F.3d 193, 230–31 (7th Cir. 2012) (en banc) (Williams, J., dissenting), *cert. denied*, 133 S. Ct. 2796 (2013).

²⁷ *Bivens*, 403 U.S. at 411 (Harlan, J., concurring in the judgment).

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Restoring the Balance Between Secrecy and Transparency: The Prosecution of National Security Leaks Under the Espionage Act*

Christina E. Wells

The game of leaks is an important one in the United States. Most people acknowledge that the government has compelling reasons to keep some information secret, especially information related to national security. Yet it is widely known that government officials routinely leak secrets to the press and that such leaks “have played an important role in the governance of the United States since its founding.”¹ Leaks maintain the transparency necessary to keep government officials accountable to their constituents.

Unwanted leaks to the press have always irritated presidents, but criminal prosecution of such leaks was relatively rare.² That situation changed dramatically with the Obama Administration, which “prosecuted more leakers of classified information than all previous administrations combined.”³ The Trump Administration has also signaled that it will aggressively pursue leaks to the press, arguing that the “staggering number of leaks undermin[es] the ability of our government to protect this country.”⁴ Prosecution of leakers has occurred largely under the Espionage Act of 1917 (“Espionage Act”), the primary law government officials use to pursue unauthorized disclosures of national security information.

This increase in Espionage Act prosecutions is quite worrisome. Transparency and accountability sit in delicate balance with the need for secrecy. Leaks of national security information to the press are a critical aspect on the accountability side of the equation. Until recently the situation involving unauthorized leaks to the press was understood to involve a “détente” where the law “ceded to the government broad powers to keep secrets but afforded news organizations broad freedom to publish secrets once those secrets were in the hands of journalists, largely irrespective of how those secrets got there.”⁵ Prosecutions of leaks to the press threaten to undermine

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¹ Mary-Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 IND. L.J. 233, 249 (2008).

² David Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 534-36 (2013).

³ Heidi Kitrosser, *Leak Prosecutions and the First Amendment: New Developments and a Closer Look at the Feasibility of Protecting Leakers*, 56 WM. & MARY L. REV. 1221, 1225 (2015).

⁴ Julia Edwards Ainsley, *Trump Administration Goes on Attack Against Leakers, Journalists*, REUTERS (Aug. 4, 2017, 11:24 AM), <https://www.reuters.com/article/us-usa-trump-sessions-leaks-idUSKBN1AK1UR>.

⁵ David McCraw & Stephen Gikow, *The End to an Unspoken Bargain?: National Security and Leaks in a Post-Pentagon Papers World*, 48 HARV. C.R.-C.L. REV. 473, 473 (2013); see also ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 80 (1975).

government accountability by tipping the previous balance decidedly in favor of secrecy. Unfortunately, the lack of clarity associated with the language and history of the Espionage Act allows prosecutions of those who leak to the press to occur and suggests that the tilt toward secrecy will continue unless Congress and the courts intervene.

This Issue Brief reviews the relationship between secrecy, transparency and accountability in the United States, including the role of anonymous leaks. It also examines the threat that increased Espionage Act prosecutions pose to government accountability and discusses why changes to the Espionage Act are necessary to preserve an appropriate balance between government secrecy and transparency.

I. A BRIEF HISTORY OF SECRECY, TRANSPARENCY AND LEAKS IN THE UNITED STATES

A. THE BALANCE BETWEEN SECRECY AND TRANSPARENCY/ACCOUNTABILITY

Secrecy and transparency both play important roles in effective governance. Although the U.S. Constitution does not explicitly speak to broad governmental powers regarding secrecy, the Supreme Court has recognized a constitutional basis for executive branch secrecy in two areas—assertions of executive privilege and classification of national security information.⁶ Such secrecy is necessary for effective conduct of military action, diplomatic relations, and implementation of foreign policy.⁷ However, the Supreme Court has recognized that the government’s secrecy rights are not absolute. For example, with executive privilege, i.e., the qualified privilege to withhold confidential communications between the president and his advisors in litigation, the Court will not accept generalized assertions of harm but instead requires identification of specific military secrets or other harm before the executive branch may withhold such communications during the course of a lawsuit.⁸

The Court’s reluctance to grant the president an absolute right to secrecy reflects the view that democratic forms of government must be transparent and accountable in order to claim legitimacy.⁹ As courts recognize, much of the information officials want to keep secret also often touches on important policy issues even if the information pertains to national security: “No decisions are more serious than those touching on peace and war; none are more certain to affect every member of society. Elections turn on the conduct of foreign affairs and strategies of national defense, and the dangers of secretive government have been well documented.”¹⁰ Yet national security is one of the hardest areas in which to find a suitable balance between secrecy and transparency.

The president’s classification authority illustrates this problem. Executive Order No. 13,526, issued by President Obama in December 2009, authorizes the president to restrict access to several categories of information, including information related

⁶ *United States v. Nixon*, 418 U.S. 683, 705-08 (1974); *Dep’t of the Navy v. Egan*, 484 U.S. 518, 527 (1988).

⁷ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (“Secrecy in respect of information gathered... may be highly necessary, and the premature disclosure of it productive of harmful results.”); *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (“The [g]overnment has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence.”).

⁸ *Nixon*, 418 U.S. at 710-13.

⁹ 9 THE WRITINGS OF JAMES MADISON 103 (G. Hunt ed. 1910) (“A popular Government, without popular information, or means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both.”).

¹⁰ *United States v. Morison*, 844 F.2d 1057, 1081 (4th Cir. 1988) (Wilkinson, J., concurring).

to military plans, foreign government information, intelligence activities, and weapons of mass destruction.¹¹ Under the order, the president may restrict access only if “unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security.”¹² The order also identifies levels of classification, such as “top secret,” “secret,” and “confidential.”¹³ These designations define the danger to national security that each level of classification poses if information is disclosed and provide important guidance to agency officials regarding who has access to the material.¹⁴ Finally, the order prohibits classification of information to conceal illegal behavior, malfeasance, inefficiency, or other embarrassing information.¹⁵

At first glance, Executive Order 13,526 attempts to balance secrecy and accountability. It allows classification of only certain kinds of information, sets standards of harm that disclosure of information should cause in order to be classified, and admonishes officials not to classify information simply to avoid embarrassment or wrongdoing. Nevertheless, the classification system has been subject to abuse practically from the beginning of its existence. Executive officials’ tendency to wrongly classify (or overclassify) information is well-documented.¹⁶ An enormous amount of information remains secret that should not under the terms of the order itself. Furthermore, Executive Order 13,526 considers only the danger to national security and ignores any benefit that disclosure might pose to the public interest. Thus, it allows for one-sided balancing in favor of secrecy.

Although Congress can enact legislation to require greater access to information,¹⁷ its efforts in this arena have fallen far short. Congress passed the Freedom of Information Act (“FOIA”) in 1967, which gives access to “any person” seeking documents held by executive agencies.¹⁸ In passing FOIA, Congress recognized that “[a] democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies.”¹⁹ Unfortunately, FOIA’s numerous exemptions undercut Congress’s attempt to inform its constituents. More specifically, FOIA allows agency officials to withhold properly classified national security information.²⁰ Because agency officials have enormous discretion to make withholding decisions under the exemption, over-withholding is a serious problem. Legal challenges to withholding decisions are expensive. Furthermore,

¹¹ Exec. Order No. 13,526 § 1.4 (2009). Each president can issue an order or update a previous order.

¹² *Id.*

¹³ *Id.* at § 1.2.

¹⁴ For example, the term “‘top secret’ shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security that the original classification authority is able to identify or describe.” *Id.* at § 1.2(a)(1). In contrast, information classified as “secret” need only “cause serious damage to the national security.” *Id.* at § 1.2(a)(2).

¹⁵ *Id.* at § 1.7(a).

¹⁶ *Examining the Costs of Overclassification on Transparency and Security: Hearing Before the Committee on Oversight and Government Reform*, 114th Cong. __ (2016) (Statement of J. William Leonard, Former Director Information Security Oversight Office), <https://oversight.house.gov/wp-content/uploads/2016/12/Leonard-ISOO-Statement-Overclassification-12-7.pdf>; Christina E. Wells, “National Security” Information and the Freedom of Information Act, 56 ADMIN. L. REV. 1195, 1198-1205 (2004).

¹⁷ *Egan*, 484 U.S. at 530.

¹⁸ 5 U.S.C. § 552(a)(3) (2016).

¹⁹ H.R. REP. NO. 89-1497, at 2429 (1966).

²⁰ FOIA’s national security exemption includes information “specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy” and which is “in fact properly classified.” 5 U.S.C. § 552(b)(1). FOIA contains an additional eight exemptions for material on other topics. See 5 U.S.C. § 552(b)(2)-(9).

in disputes over agency withholding decisions under the national security exemption, judges are often quite deferential to the government even though Congress amended FOIA in 1974 to allow judges to engage in independent review of the propriety of classification decisions.²¹ Once the government has met its burden of establishing the applicability of an exemption, courts often defer to government affidavits outlining the classification level of the information, describing the documents withheld, and the procedures used to arrive at the decision to classify and withhold.²²

B. LEAKS AND LEAKERS—THE SYMBIOSIS BETWEEN GOVERNMENT OFFICIALS AND THE PRESS

With formal routes to obtaining government information cumbersome and marginally effective, an informal system of leaks to journalists arose, at least in part, to fill the gap. In fact, observers note that “leaking classified information occurs so regularly in Washington that it is often described as a routine method of communication about government.”²³ Many of those leaks contain valuable policy information that informs public decision-making. Most famously, Daniel Ellsberg leaked the Pentagon Papers to the *New York Times* and *Washington Post* during the Vietnam War. More recently, highly publicized news stories include leaked information about the National Security Administration’s (NSA) conclusions regarding Russia’s attempts to hack election software during the 2016 U.S. elections,²⁴ the CIA’s ability to bypass encryption on smartphones,²⁵ the NSA’s data collection regarding U.S. citizens and allies,²⁶ the U.S. government’s failed attempt to disrupt Iran’s nuclear program,²⁷ a foiled suicide bomber attack on a U.S.-bound airline,²⁸ and the treatment of prisoners at Abu Ghraib and Guantanamo Bay.²⁹ Many of these leaks have had a profound effect on public opinion and, consequently, on U.S. policy.

The classic conception of those who leak involves an image of a mid- to low-level government insider who views themselves as a whistleblower, attempting to shed light on government wrongdoing, or who simply wants to bring something to the public’s

²¹ Congress amended FOIA in response to a Supreme Court decision, *EPA v. Mink*, 410 U.S. 73 (1973), which held that judges could review only the procedures used in classification decisions and not the substantive propriety of a particular classification decision. The amendments added the current language requiring that the exemption apply only to information “properly classified pursuant to . . . Executive Order.” 5 U.S.C. § 553(b)(1)(B).

²² Wells, *supra* note 16, at 1206-07; see also Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 713 (2002).

²³ William E. Lee, *Deep Background: Journalists, Sources, and the Perils of Leaking*, 57 AM. U. L. REV. 1453, 1467 (2008).

²⁴ Matthew Cole et al., *Top-Secret NSA Report Details Russian Hacking Effort Days Before 2016 Election*, THE INTERCEPT, (June 5, 2017, 3:44 PM), <https://theintercept.com/2017/06/05/top-secret-nsa-report-details-russian-hacking-effort-days-before-2016-election/>.

²⁵ *Vault 7: CIA Hacking Tools Revealed*, WIKILEAKS (Mar. 7, 2017), <https://wikileaks.org/ciav7p1/>.

²⁶ Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, THE GUARDIAN (June 5, 2013, 6:05 PM), <http://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order>.

²⁷ Michael Isikoff, *Ex-CIA Officer Charged With Leak to Reporter*, NBC NEWS (Jan. 6, 2011, 4:10 PM), http://www.nbcnews.com/id/40951509/ns/us_news-security/t/ex-cia-officer-charged-leak-times-reporter/#.Wbb-d9VSzcs.

²⁸ Scott Shane & Eric Schmitt, *Qaeda Plot to Attack Plane Foiled, U.S. Officials Say*, N.Y. TIMES (May 7, 2012), <http://www.nytimes.com/2012/05/08/world/middleeast/us-says-terrorist-plot-to-attack-plane-foiled.html>.

²⁹ James Risen, *G.I.’s Are Accused of Abusing Iraqi Captives*, N.Y. TIMES, Apr. 29, 2004, at A15; Dana Priest & Joe Stephens, *Pentagon Approved Tougher Interrogations*, WASH. POST, May 9, 2004, at A1.

attention during an important policy debate or other initiative. Certainly, people leak for such reasons. Chelsea Manning, for example, asked of others “If you saw incredible things, horrible things, things that belonged in the public domain and not in some server stored in a dark room in Washington, D.C.—what would you do?”³⁰

But this conception of those who leak to the press is incomplete. Many leaks actually originate at higher levels of government, such as with presidents and high-level administrative officials.³¹ Their motives for leaking to the press vary considerably. They may range from a desire to gain public support for policy agendas or to float a trial balloon to determine the public’s response to a proposed initiative.³² Some officials leak information to the press as a means of communicating with other officials or legislators, or to gain the upper hand in a debate.³³ Some leak as a form of retribution—i.e., to retaliate against critics or political enemies.³⁴

These motives shed light on why historically the executive branch rarely attempted to prosecute leaks to media outlets. Many leakers attempt to further policy agendas rather than expose government wrongdoing. Thus, the game of leaks is integral to governance in the United States. It makes no practical sense to engage in full-throated, even-handed pursuit of leaks that could put everyone in an administration at risk.³⁵ However, pursuing only those leaks an administration dislikes—usually from low- to mid-level leakers—leaves an administration open to claims of retaliatory prosecution or that it is manipulating the information it wants the public to receive.³⁶ Finally, aggressively pursuing leakers puts government officials’ relationships with the press at risk by increasing distrust between administrative officials and the very media actors upon whom they rely to disseminate their policy agendas.³⁷ A government that openly prosecutes press publications is unlikely to find receptive journalists when it needs or wants to leak information for its own purposes.

In the last decade, however, the Obama and Trump Administrations have increased prosecutions of leakers and taken increasingly worrying actions against the press. Most of these prosecutions involved leaks by low- to mid-level employees or officials who sought to shed light on government programs, rather than by high-level administrative officials.

³⁰ Anna Mulrine, *Bradley Manning Trial: Leakers Julian Assange and Daniel Ellsberg Weigh In*, THE CHRISTIAN SCIENCE MONITOR (July 26, 2013), <https://www.csmonitor.com/USA/Justice/2013/0726/Bradley-Manning-trial-Leakers-Julian-Assange-and-Daniel-Ellsberg-weigh-in>. Other leakers may be less focused on wrongdoing and more focused on simply revealing perceived important information buried so deeply that FOIA requests would not discover it. David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 259 (2010).

³¹ Lee, *supra* note 23, at 1468-70; Pozen, *supra* note 2, at 529-30.

³² Papandrea, *supra* note 1, at 251-53; Pozen, *supra* note 2, at 532.

³³ Lee, *supra* note 23, at 1468-69; Papandrea, *supra* note 1, at 252-54.

³⁴ Lee, *supra* note 23, at 1468-69.

³⁵ *Id.* at 1467-68.

³⁶ Papandrea, *supra* note 1 at 254; McCraw & Gikow, *supra* note 5, at 492-94.

³⁷ Pozen, *supra* note 2, at 530-31 (describing symbiotic relationship between government officials and press).

C. RECENT PROSECUTION TRENDS IN THE OBAMA AND TRUMP ADMINISTRATIONS

Prior to the Obama Administration, there were three prosecutions of individuals who leaked national security information to the press under the Espionage Act.³⁸ The Obama and Trump administrations, however, have pursued at least nine such prosecutions. For example, federal law enforcement officials prosecuted (1) Thomas Drake, a senior NSA official, for providing classified information regarding alleged NSA mismanagement to the *Baltimore Sun*, (2) former CIA officer Jeffrey Sterling for disclosing classified information about the U.S. government's attempt to sabotage Iran's nuclear program to *New York Times* reporter James Risen, (3) Stephen Kim for disclosing classified information about North Korea's nuclear program to *Fox News* reporter James Rosen, and (4) former CIA officer John Kiriakou for disclosing information about the CIA's detention and interrogation program to a reporter.³⁹ In addition, the military instituted court martial proceedings against Private Chelsea Manning for downloading and delivering to Wikileaks a multitude of classified diplomatic cables and other military information.⁴⁰ Federal officials also indicted Edward Snowden, a former NSA contract employee for downloading and leaking classified information related to NSA data collection programs to *The Guardian* (UK) and *Washington Post*.⁴¹ Recently, Trump Administration officials indicted Reality Winner, a former contract employee, for leaking a classified NSA document about Russian attempts to interfere in the 2016 elections.⁴²

In contrast to their pursuit of leakers, Presidents Obama and Trump have paid lip service to the need for a free press. President Obama stated that his administration would not criminally pursue journalists because a free press is "essential for our democracy... Journalists should not be at legal risk for their jobs."⁴³ Yet, Obama Administration officials engaged in actions that put a free press at risk, including subpoenaing journalists' phone records and emails, and naming journalists as unindicted co-conspirators in Espionage Act prosecutions of leakers.⁴⁴ Trump's Attorney General, Jeff Sessions, also acknowledged "the important role that the press has," but stated he was not inclined to read that freedom broadly, noting that the media's rights were "not unlimited" and

³⁸ Samuel Morison was convicted of violating the Espionage Act for leaking photographs to a defense publication. *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988). Anthony Russo and Daniel Ellsberg were prosecuted under the Espionage Act for leaking the Pentagon Papers to the *Washington Post* and *New York Times* but the charges were dismissed. Melville B. Nimmer, *National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case*, 26 STAN. L. REV. 311, 314 (1974). In 2005, State Department analyst Lawrence Franklin pled guilty under the Espionage Act to leaking classified information about Iran to lobbyists. David Johnston, *Former Military Analyst Gets Prison Term for Passing Information*, N.Y. TIMES, Jan. 21, 2006, at A14.

³⁹ See Stephen P. Mulligan & Jennifer K. Elsea, *Criminal Prohibitions of Leaks and Other Disclosures of Classified Defense Information*, CRS Report (March 7, 2017) at 20-23, <https://fas.org/sgp/crs/secrecy/R41404.pdf>. For a discussion of other prosecutions, see *id.* at 23-25.

⁴⁰ *Id.* at 21-22.

⁴¹ *Id.* at 24.

⁴² Cole, *supra* note 24.

⁴³ Barack Obama, Remarks by the President at the National Defense University (May 23, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

⁴⁴ Leonard Downie, Jr., *The Obama Administration and the Press: Leak Investigations and Surveillance in Post-9/11 America*, COMMITTEE TO PROTECT JOURNALISTS (Oct. 10, 2013), <https://cpj.org/reports/2013/10/obama-and-the-press-us-leaks-surveillance-post-911.php>.

that “[t]hey cannot place lives at risk with impunity.”⁴⁵ He implied that the Trump Administration would curtail an Obama policy against subpoenaing journalists for the identities of their sources in leak cases.⁴⁶ The Trump Administration has also labeled some publishers of national security information, like Wikileaks, as “hostile intelligence services” for publishing information that other countries could use to the disadvantage of the United States.⁴⁷ This characterization seems to differ from the Obama Administration’s official statement that Wikileaks stood on the same footing as mainstream news organizations and journalists.⁴⁸

II. THE ESPIONAGE ACT AND ITS INTERPRETATION

A. THE ACT

Several discrete laws exist for punishing unauthorized disclosure of national security information.⁴⁹ Because of its relative breadth, the Espionage Act is the primary law on which government officials rely. Although much of the Act targets classic espionage activities, such as spying,⁵⁰ it does contain provisions that arguably allow punishment of leakers and publishers of national security information.

Sections 793(d) prohibits persons with lawful possession of information from “willfully” communicating, distributing, or attempting to communicate or distribute to “any person not entitled to receive it:”

any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation.⁵¹

Section 793(e) uses essentially the same language but punishes those who have “unauthorized possession” of the specified government information or documents and who

⁴⁵ Kevin Johnson, *Attorney General Jeff Sessions Announces Broad Crackdowns on Leaks, Issues Warnings to the Press*, USA TODAY (Aug. 4, 2017, 11:22 AM), <https://www.usatoday.com/story/news/politics/2017/08/04/jeff-sessions-justice-department-triples-number-leak-investigations/539476001/>.

⁴⁶ Callum Borchers, *Jeff Sessions Might Subpoena Journalists to Reveal Leakers. Mike Pence Once Fought Against That.*, WASH. POST. (Aug. 4, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/08/04/jeff-sessions-might-subpoena-journalists-to-reveal-leakers-mike-pence-once-fought-against-that/?utm_term=.ef11ece47cf0.

⁴⁷ Morgan Chalfant, *CIA Head: Wikileaks a ‘Non-state Hostile Intelligence Service,’* THE HILL, (Apr. 13, 2017, 3:44 PM), <http://thehill.com/policy/cybersecurity/328730-cia-director-wikileaks-a-non-state-hostile-intelligence-service>.

⁴⁸ Sari Horwitz, *Julian Assange Unlikely to Face U.S. Charges Over Publishing Classified Documents*, WASH. POST, (Nov. 25, 2013), https://www.washingtonpost.com/world/national-security/julian-assange-unlikely-to-face-us-charges-over-publishing-classified-documents/2013/11/25/dd27decc-55f1-11e3-8304-caf30787c0a9_story.html?utm_term=.6cee804d1443.

⁴⁹ Relevant laws include 18 U.S.C. § 641, which criminalizes knowing theft of government property, 50 U.S.C. §§ 3121-26, which punishes disclosing the identity of covert intelligence agents, 18 U.S.C. § 952, which punishes employees who willfully publish diplomatic code, and 42 U.S.C. § 2274, which prohibits disclosing information related to nuclear energy or weapons. For more discussion, see Mulligan & Elsea, *supra* note 39, at 7-12.

⁵⁰ Section 794, for example, penalizes transmission of certain information related to national defense to a foreign government or foreign political or military party. 18 U.S.C. § 794. Courts have referred to this section as punishing “classic spying” incidents. *Morison*, 844 F.2d at 1065.

⁵¹ 18 U.S.C. § 793(d).

disclose it to persons unauthorized to receive it.⁵² Sections 793(d) and (e) also contain clauses prohibiting the willful retention of material listed in each statute. Section 798 prohibits any knowing and willful disclosure of classified information concerning communications intelligence activities to an unauthorized person or any use of it in any manner prejudicial to the interests of the U.S. or for the benefit of a foreign nation.⁵³ Section 793(g) punishes any two or more people who conspire to violate any section of the Espionage Act.⁵⁴

With the exception of Section 798, which specifically punishes the disclosure of “classified information,” the provisions of the Espionage Act apply to the disclosure of information “relating to national defense.” Courts interpret this term in light of the presidential classification system.⁵⁵ Thus, whether disclosure of information is to a person “unauthorized to receive it” or is by a person with lawful or unlawful possession depends on whether the information is classified. The courts also require that the information that is the subject of the prosecution be “closely held.” This requirement is not synonymous with classified information but rather requires that the government have secured the information in addition to its being classified—e.g., by not leaking the information via other avenues.⁵⁶

Reading the Espionage Act in light of this gloss, it is apparent that a “government insider ... could, theoretically, face Espionage Act prosecution for passing virtually any classified information to a third party, including a journalist.”⁵⁷ Most government insiders who leak classified information to the press do so intentionally and with knowledge that they may be violating the law, a state of mind which meets the definition of “willful” in the statute.⁵⁸ Since the leaks involve classified information, the insider arguably knew disclosure had the potential to cause harm. Finally, members of the public, including the press, are “not entitled to receive” information under the classification system and thus are prohibited from receiving it under Sections 793(d) and (e). They would also be an “unauthorized person” under Section 798.

Journalists are similarly at risk under the law. Third parties, such as media actors who disclose classified information, could qualify as persons with “unauthorized possession” of information under Section 793(e). Publication could qualify as “communication” of that information to members of the public, who are not authorized to receive it under the Act. Since publication was likely intentional, the only question would be whether the media “had reason to believe” the information could be used to injure the U.S. or aid a foreign nation. Media publication of information concerning specified communications intelligence activities, such as the NSA’s surveillance programs of U.S. citizens, could also fall under Section 798, which makes “communication” of such information to an “unauthorized” person illegal.

Application of these provisions to leaks to third parties is not, however, as straightforward as it appears. Substantial questions arise regarding the requirement that a leaker or third-party discloser have “reason to believe” that their disclosure potentially causes harm to the U.S. or aids a foreign nation. Must the government prove malicious

⁵² *Id.* at § 793(e).

⁵³ *Id.* at § 798(a)(3).

⁵⁴ *Id.* at § 793(g).

⁵⁵ See, e.g., *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988).

⁵⁶ *Morison*, 844 F.2d at 1071; *United States v. Rosen*, 445 F. Supp. 2d 602, 621 (E.D. Va. 2006); *id.* at 639-40.

⁵⁷ Kitrosser, *supra* note 3, at 1232.

⁵⁸ *Morison*, 844 F.2d at 1071.

intent or bad faith on the part of leakers or third-party disclosers of information, or is it enough that they knew their disclosure violated the law and could potentially harm national security? To what extent must the harm the government fears from disclosure be concrete or simply possible? The law's language does not clearly answer these questions.

Additionally, Harold Edgar and Benno Schmidt's exhaustive review of the Espionage Act's legislative history found that it "may fairly be read as excluding criminal sanctions for well-meaning publication of information no matter what damage to the national security might ensue and regardless of whether the publisher knew its publication would be damaging."⁵⁹ Thus, the Act arguably does not apply to third-party publishers of information at all—at least to the extent they are "well-meaning." And as discussed below, the Supreme Court's First Amendment jurisprudence, which largely developed after adoption of the Act, also supports this conclusion. Unfortunately, lower courts recently have tended to side with the government in Espionage Act prosecutions.

B. THE ESPIONAGE ACT IN THE COURTS

The Supreme Court has not decided a case involving Espionage Act charges against leakers or publishers. The closest the Court ever came to such a decision involved Daniel Ellsberg's leak of the Pentagon Papers, a classified history of the U.S. military's strategy in Vietnam, to the *Washington Post* and *New York Times*.⁶⁰ The Court's decision centered on its concern that a court order barring publication amounted to an unconstitutional "prior restraint."⁶¹ However, some justices intimated that *post*-publication criminal sanctions might be appropriate, specifically referencing the Espionage Act.⁶² The government did not pursue the newspapers but it did pursue criminal sanctions against Daniel Ellsberg until a court dismissed the charges due to government misconduct.⁶³

1. Leakers

The government's decision to pursue Daniel Ellsberg in the Pentagon Papers case reflects a common theme in the Supreme Court's jurisprudence—the free speech rights of government employees are limited compared to the rights of other citizens. The Court recognizes that the government as employer has different interests in regulating the speech of employees than when regulating the speech of citizens at large.⁶⁴ This is especially true when employees undertake a position of confidence and trust, such as when their job gives them access to classified information.⁶⁵ However, even in these cases, the Court acknowledges the public's interest "in receiving the well-informed views of government

⁵⁹ Harold Edgar & Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929, 937 (1973).

⁶⁰ *New York Times v. United States*, 403 U.S. 713, 714 (1971).

⁶¹ The Supreme Court defines a prior restraint as an "administrative or judicial order[] forbidding certain communications... in advance of the time the communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993).

⁶² *Id.* at 730 (White, J., concurring) (noting the availability of "specific and appropriate criminal laws... [that] are of colorable relevance to the circumstances of this case"); *see also id.* at 743 (Marshall, J., concurring); *id.* at 753 (Burger C.J., dissenting); *id.* at 759 (Blackmun J., dissenting).

⁶³ *See Nimmer, supra* note 38, at 314.

⁶⁴ *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968).

⁶⁵ *Snepp v. United States*, 444 U.S. 507, 507-08 (1980).

employees.”⁶⁶ Thus, the government’s interests do not necessarily give it carte blanche to regulate speech; rather, the free speech rights of public employees to comment on issues of public concern must be balanced against government interests.⁶⁷

Lower federal courts applying the Espionage Act, however, have refused to find the First Amendment implicated at all. *United States v. Morison* involved the prosecution of an employee who leaked top secret photographs of a Soviet aircraft carrier to the editor of *Jane’s Defense Weekly*, a defense periodical that published information about international naval operations.⁶⁸ Although the court admitted that the defendant had not engaged in espionage, it found that the defendant’s actions fell within Sections 793(d) and (e) of the Act. The court characterized Morison’s decision to take and leak photographs as “theft” that did not implicate any First Amendment rights.⁶⁹ More recently, in Stephen Kim’s prosecution for leaking information about North Korea’s nuclear program to *Fox News*, the court similarly refused to find the First Amendment applicable.⁷⁰ According to the court, “those who accept positions of trust involving a duty not to disclose information they lawfully acquire while performing their responsibilities have no First Amendment right to disclose that information.”⁷¹

First Amendment issues aside, courts also generally interpret the terms within the Espionage Act against leakers. For example, courts have rejected a defendant’s argument that the statute requires the government to show defendant’s bad faith to harm the U.S. or aid another country.⁷² They do so despite the explicit requirements in Sections 793(d) and (e) that the government show leakers had reason to believe disclosure could be used to injure the U.S. or aid a foreign nation. These courts have occasionally disregarded the “reason to believe” requirement when the defendant has leaked documents as opposed to orally communicated the information,⁷³ but some seem to dispense with the requirement for any communication.⁷⁴ Since most cases involve leaking documents to journalists, this reading of the Espionage Act effectively means that the government need only show that the defendant willfully leaked the material and knew that the disclosure potentially could cause harm.

2. Publishers

The First Amendment rights of publishers are more firmly established than the rights of leakers, but even here the law is somewhat murky. Although some Justices in the Pentagon Papers case intimated post-publication criminal sanctions might be appropriate, they did not elaborate further. Later Supreme Court cases suggest that prosecutions of the press for publication of national security information may be constitutionally problematic. These decisions impose a high burden on government officials who attempt to impose criminal sanctions on the press for publication of truthful and lawfully acquired confidential information. In *Landmark Communications, Inc. v. Virginia*,

⁶⁶ *Garcetti v. Ceballos*, 547 U.S. 410, 413 (2006).

⁶⁷ *Pickering*, 391 U.S. at 568.

⁶⁸ *United States v. Morison*, 844 F.2d 1057, 1060-61 (4th Cir. 1988).

⁶⁹ *Id.*

⁷⁰ *United States v. Kim*, 808 F. Supp. 2d 44, 57 (D.D.C. 2011) (finding that the “Defendant’s First Amendment challenge lacks merit”).

⁷¹ *Kim*, 808 F. Supp. 2d at 57 (citing *Boehner v. McDermott*, 484 F.3d 573, 579 (D.C. Cir. 2007). See also *United States v. Drake*, 818 F. Supp. 2d 909, 920-22 (D. Md. 2011) (finding First Amendment inapplicable to Drake’s prosecution for taking and retaining classified information he leaked to a reporter).

⁷² *Morison*, 844 F.2d at 1068.

⁷³ *Drake*, 818 F. Supp. 2d at 916-18.

⁷⁴ *Kiriakou*, 898 F. Supp. 2d. at 926.

for example, the Court overturned the conviction of a newspaper publisher for violating a state law prohibiting the publication of confidential judicial disciplinary pleadings. According to the Court, the state's legitimate interest in confidentiality could not justify criminal sanctions for publication.⁷⁵ *Bartnicki v. Vopper*, similarly involved a media defendant convicted for broadcasting an audio tape containing a private conversation.⁷⁶ The tape had been obtained by the media in violation of wiretapping laws. The Court found that the state could not punish a publisher of information of value to public discourse who had otherwise lawfully acquired the information even though someone else had broken the law to gain access to the information.⁷⁷

Unfortunately, these later decisions still leave unanswered questions. Importantly, they did not involve publication of national security information. Because the Justices tried to limit the decisions to their facts,⁷⁸ it is unclear whether courts will apply similarly high standards in Espionage Act prosecutions. After all, the Court has previously twisted its otherwise protective free speech rules in cases involving national security concerns.⁷⁹ Thus, whether a journalist "lawfully acquired" information that she knows has likely been leaked in violation of the Espionage Act or a government official's confidentiality obligations could be an open question and could become the centerpiece of future arguments.⁸⁰ Furthermore, it is unclear whether the courts will apply the Supreme Court's usually very high intent requirements should the government pursue Espionage Act prosecutions of publishers.⁸¹

Only one lower court decision, *United States v. Rosen*, has discussed whether the Espionage Act can be applied to non-government insiders who disclose national defense information.⁸² *Rosen* involved two political lobbyists for AIPAC, an organization that lobbies Congress and the executive branch on "issues of interest to" Israel.⁸³ The government accused defendants, in their positions as lobbyists, of conspiring to violate Section 793(e) of the Espionage Act by cultivating relationships with federal officials, gaining access to sensitive information, and disseminating it to persons not entitled to receive it, such as the media, foreign policy analysts, and officials of other governments.⁸⁴

Since the case did not involve disclosure by government insiders, the court did not immediately reject the defendant's First Amendment argument. Instead, the court found that the lobbyists' interests implicated core First Amendment values since gathering information and discussing it "is indispensable to the healthy functioning of a representative government."⁸⁵ This was true even for information the government attempted to keep secret because the government tends "to withhold reports of

⁷⁵ *Id.* at 838.

⁷⁶ *Bartnicki v. Vopper*, 532 U.S. 514, 518-21 (2001).

⁷⁷ *Id.* at 528.

⁷⁸ *Landmark Comm.*, 435 U.S. at 840; *Bartnicki*, 532 U.S. at 529.

⁷⁹ Christina Wells, *Contextualizing Disclosure's Effects: WikiLeaks, Balancing and the First Amendment*, 97 IOWA L. REV. BULL. 51, 57-58 (2012).

⁸⁰ See Papandrea, *supra* note 1, at 295.

⁸¹ See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1941) (noting that government can punish incitement of unlawful action only if it is "directed to inciting or producing imminent lawless action and likely to incite or produce such action"); see also *Schneiderman v. United States*, 320 U.S. 118, 125 (1943); *Taylor v. Mississippi*, 319 U.S. 583, 589-90 (1943); *Thornhill v. Alabama*, 310 U.S. 88, 104-05 (1940).

⁸² *United States v. Rosen*, 445 F. Supp. 2d 602, 611-14 (E.D. Va. 2006).

⁸³ *Id.* at 607-08.

⁸⁴ *Id.* at 608.

⁸⁵ *Id.* at 633.

disquieting developments and to manage news in a fashion most favorable to itself.”⁸⁶ Ultimately, however, the court noted that defendants’ disclosure of government secrets “must yield to the government’s legitimate efforts to ensure the ‘environment of physical security which a functioning democracy requires.’”⁸⁷

Applying the Espionage Act to defendants, the court construed Section 793(e) as punishing only intentional disclosure of “closely held” information that a defendant knew was “‘potentially damaging to the United States or ... useful to an *enemy* of the United States.’”⁸⁸ The court allowed the defendants to show they did not know their disclosures could potentially damage the United States or aid its enemies by arguing that government officials regularly leaked information to them as a form of “back channel diplomacy.”⁸⁹ However, an appeals court later implied that the lower court’s interpretation “impose[d] an additional burden on the prosecution not mandated” by Section 793(e).⁹⁰ As a result, there is some question as to whether other courts will follow the lower court in *Rosen* and require a heightened intent standard.

III. TROUBLING DEVELOPMENTS AND SUGGESTIONS FOR CHANGE

A. GOVERNMENT REACTION TO THE RISE OF NONTRADITIONAL MEDIA

The current situation involving interpretations of the Espionage Act is worrisome. Government insiders who leak to media actors have virtually no defense against prosecution when their leaks contribute to public debate, cause no harm, and when their motives are unrelated to espionage. Recent government prosecutions seem unrelated to any potential harm caused and, instead, seem designed to chill all disclosure. For example, the former Director of the Information Security Oversight Office, J. William Leonard, stated in hearings before Congress that in the *Rosen*, *Drake* and *Manning* prosecutions “the government abused the classification system and used it not for its intended purpose of denying sensitive information to our nation’s enemies but rather to carry out an entirely different agenda.”⁹¹ Furthermore, courts rarely allow defendants charged with Espionage Act crimes to raise over-classification or wrongful classification as a defense. Indeed, wrongly classified documents have been used as the basis for indictments.⁹² Finally, by finding the First Amendment inapplicable to leakers, lower courts ignore the public’s interest in receiving information that the Supreme Court recognizes is part of the balancing involved in other public employee speech cases. Thus, the government’s attempt to chill all unwanted leaks will hurt the public in addition to stopping leakers. It will also lead to a one-sided and manipulative version of events, since high level government officials will still leak information they want the public to receive.

⁸⁶ *Id.*

⁸⁷ *Id.* (quoting *Morison*, 844 F.2d at 1082).

⁸⁸ *Id.* at 639-40 (quoting *Morison*, 844 F.2d at 1084).

⁸⁹ *United States v. Rosen*, Memorandum Opinion, Nov. 2, 2007, at 7-8, <http://www.fas.org/sgp/jud/aipac/memop110207.pdf>. Prosecutors later dismissed the case against defendants, complaining that the court’s “knowledge” requirement established an impossibly “high” evidentiary burden. Eli Lake, *Case Against AIPAC Lobbyists Dropped*, WASH. TIMES (May 2, 2009), <http://www.washingtontimes.com/news/2009/may/02/fed-drop-charges-against-aipac-staffers/>.

⁹⁰ *United States v. Rosen*, 557 F.3d 192, 199 n.8 (4th Cir. 2009).

⁹¹ See *supra* note 16 (statement of J. William Leonard), at 3-4.

⁹² *Id.*

Although court decisions suggest that media publishers enjoy greater immunity from publication, the rights of publishers are also somewhat in doubt. *Rosen* allowed prosecution of non-government disclosers of classified information. Furthermore, the courts involved apparently disagreed as to the appropriate mental state required to prosecute third-party disclosers. Both developments are concerning in light of the evolving relationship between leakers and media actors, and the government's increasing hostility toward the press.

The classic leak scenario generally involves a symbiotic relationship between mid-to high-level officials leaking confidential material to a member of the institutional press. Websites such as Wikileaks independently and anonymously submit documents about government and corporate activity. Such websites feel far less pressure to refrain from publishing information that high level officials want to remain secret because there is no symbiotic relationship. Thus, their disclosures often include releases of information that are unsanctioned, generalized, made out of a sense of grievance, or by people who see themselves as whistleblowers. They are also the type of disclosures the government most wants to control.

Not surprisingly, government officials have tried to portray these third-party actors as akin to terrorists who can be prosecuted under the Espionage Act, rather than as journalists with good intentions.⁹³ Senator Dianne Feinstein claimed that the founder of Wikileaks was an “agitator intent on damaging our government.”⁹⁴ CIA Director Mike Pompeo called Wikileaks “a non-state hostile intelligence service often abetted by state actors like Russia.”⁹⁵ The Senate Intelligence Committee recently reached the same conclusion in a provision in its annual Intelligence Authorization bill.⁹⁶ *Rosen* unquestionably opened the door to prosecution of third-party disclosers of information who, unlike mainstream journalists, are not in symbiotic relationships with the government.

It is, however, foolish to think that prosecutions would end with such actors. Successful characterization of non-traditional media actors as national security threats could destabilize our understanding about publication of confidential information by *any* source. Officials and legislators have intimated that traditional media violates the Espionage Act for publishing documents leaked to Wikileaks.⁹⁷ Furthermore, once we decide that some media actors are less trustworthy than others, nothing stops us from applying such distinctions to undermine all forms of journalism. In an era where the current administration labels as “fake news” any leaks that it cannot control,⁹⁸ such an approach would be especially troubling. The executive branch's ability to use conspiracy charges against journalists or to subpoena journalists for their sources or other

⁹³ Ewan McAskill, *Julian Assange Like a Hi-Tech Terrorist, Says Joe Biden*, THE GUARDIAN (Dec. 19, 2010, 1:20 PM), <https://www.theguardian.com/media/2010/dec/19/assange-high-tech-terrorist-biden>.

⁹⁴ Dianne Feinstein, Op-Ed., *Prosecute Assange Under the Espionage Act*, WALL ST. J., Dec. 7, 2010, at A19.

⁹⁵ Warren Strobel & Mark Hosenball, *CIA Chief Calls Wikileaks a ‘Hostile Intelligence Service’* REUTERS (Apr. 13, 2017, 4:11 PM), <https://www.reuters.com/article/us-cia-wikileaks/cia-chief-calls-wikileaks-a-hostile-intelligence-service-idUSKBN17F2L8>.

⁹⁶ S. 1761, 115th Cong. (1st Sess. 2017). Section 623 of the bill states “[i]t is the sense of Congress that WikiLeaks and the senior leadership of WikiLeaks resemble a non-state hostile intelligence service often abetted by state actors and should be treated as such a service by the United States.” *Id.* at § 623.

⁹⁷ McCraw & Gikow, *supra* note 5, at 491.

⁹⁸ Daniella Silva, *Trump Claims ‘Fake News’ on Twitter Rant After Return from Abroad*, NBC NEWS, (May 28, 2017, 8:27 PM), <https://www.nbcnews.com/politics/donald-trump/back-home-trump-goes-twitter-offensive-against-leaks-fake-news-n765641>.

information, as it has done in the past, is an especially potent weapon with which to harass those media actors that the administration holds in special disfavor.

B. A WAY FORWARD

Clearly, the détente that once existed regarding secrecy and transparency has broken down. If we are to preserve an appropriate balance that prevents us falling into pernicious patterns of secrecy, more specific action must be taken. With respect to government insiders who leak information, Congress (and courts) should act to clarify the Espionage Act and provide some protection for leakers. This does not mean that government insiders should be able to leak with impunity, but numerous scholars and experts have noted that statutory protections can prevent abusive prosecutions. Amending the Espionage Act to impose a clear and high intent requirement would protect leakers who have no malicious intent.⁹⁹ Congress could also provide affirmative defenses or other possible defense tools to government insiders. For example, Congress could allow a defendant to show that the information leaked was wrongfully classified or that they had a reasonable belief that by disclosing classified information they would expose government malfeasance to public scrutiny.¹⁰⁰

Courts can similarly protect leakers and preserve security by requiring a showing of more concrete harm from disclosure. The current requirements defer to the government, essentially taking at face value officials' claims that disclosure is "potentially" damaging to the United States or useful to another nation.¹⁰¹ A requirement that government officials justify their claims of harm prevents excessive secrecy and focuses officials on their real concerns, which actually improves decision-making.¹⁰² Finally, courts must recognize the very real First Amendment rights of government insiders even as they leak information.¹⁰³ Although such rights do not give leakers free rein to release information, they can inform the extent to which leakers should be afforded some protections in prosecutions, as opposed to being characterized simply as thieves.

Steps similarly should be taken to protect third-party publishers of information. Congress should move back toward the Espionage Act's original intent—i.e., that the Espionage Act was not meant to apply to "well-meaning" publication of information regardless of the harm it causes. Congress should adopt standards that allow punishment only for intentional publication of classified material that the publisher knows is likely to cause imminent and grave harm to national security and which does not

⁹⁹ Mary-Rose Papandrea, *National Security Information Disclosures and the Role of Intent*, 56 WM. & MARY L. REV. 1381, 1426-41 (2015); Derigan A. Silver, *National Security and the Press: The Government's Ability to Prosecute Journalists for the Possession or Publication of National Security Information*, 13 COMM. L. & POL'Y 447, 483 (2008); *Espionage Act and the Legal and Constitutional Issues Raised by WikiLeaks: Hearing Before the H. Comm. On the Judiciary*, 111th Cong. 66-69 (2010) (comments of Stephen I. Vladeck, Professor of Law), https://fas.org/irp/congress/2010_hr/esp-wl.html.

¹⁰⁰ See *Espionage Act Hearings*, *supra* note 99 (Vladeck comments suggesting affirmative defense); Yochai Benkler, *A Public Accountability Defense for National Security Leakers and Whistleblowers*, 8 HARV. L. & POL'Y REV. 281, 305 (2014) (suggesting public accountability defense).

¹⁰¹ *Morison*, 844 F.2d at 1071.

¹⁰² Christina E. Wells, *State Secrets and Executive Accountability*, 26 CONST. COMMENT. 625, 629 (2010).

¹⁰³ Mary-Rose Papandrea, *Leaker, Traitor, Whistleblower, Spy: National Security Leaks and the First Amendment*, 94 B.U. L. REV. 449, 450-51 (2014); Heidi Kitrosser, *Free Speech Aboard the Leaky Ship of State: Calibrating First Amendment Protections for Leakers of Classified Information*, 6 J. NAT'L SEC. L. & POL'Y 409, 409-10 (2013).

contribute to public debate.¹⁰⁴ Defenses regarding wrongful classification of information should be available. If prosecutions of third-party actors occur without such amendments to the Espionage Act, courts should play an active role in ensuring that First Amendment principles requiring intent to cause imminent harm are superimposed on the current Act.

As importantly, Congress should amend the Espionage Act to make clear that its inchoate liability provisions, especially provisions providing for conspiracy liability such as Section 793(g), do not apply to any third-party publishers who publish or disclose information in accordance with the above standards.¹⁰⁵ These actors should not be at risk simply because they have received information (even if knowingly) from another person who may have violated the law. Receipt of this type of confidential information is the core of a journalist's work. Bringing conspiracy charges for publishing classified information will choke the flow of information altogether. It will force third-party disclosers to take significant steps to avoid receiving classified information. In addition, failure to do so could subject them to subpoenas and other investigations as law enforcement officials attempt to determine their sources. The institution of journalism as an independent investigative check on government would be completely undermined as a result.

CONCLUSION

For decades, there existed a shared understanding about the role of leaks in the balance between secrecy and transparency. Conventional wisdom held that the government had broad power to keep national security information secret, but the press also had broad authority to publish that information once received. Furthermore, those who leaked were rarely pursued under criminal laws. This understanding, however, did not result from clearly stated rules of law. Rather, it resulted from pragmatic concerns that constrained the government's actions, combined with assumptions about the meaning of complex and ambiguous laws governing the release of national security information. Our shared understanding has now broken down. As the government increasingly pursues prosecutions of those who leak national security information to the press, it is time to clarify the law so that the pre-existing balance between secrecy and transparency does not tip too far toward secrecy.

¹⁰⁴ See, e.g., Geoffrey R. Stone, *Government Secrecy vs. Freedom of the Press*, 1 HARV. L. & POL'Y REV. 185, 213 (2006); Papandrea, *supra* note 1, at 297-303.

¹⁰⁵ Stephen I. Vladeck, *Inchoate Liability and the Espionage Act: The Statutory Framework and the Freedom of the Press*, 1 HARV. L. & POL'Y REV. 219, 229-30 (2006); Papandrea, *supra* note 1, at 303-04.

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Parallel State Duties: Ninth Circuit Class Actions Premised on Violations of FDCA Reporting Requirements*

Connor Karen

Recent Ninth Circuit cases relating to violations of reporting requirements imposed by the Federal Food, Drug and Cosmetic Act (“FDCA”) present new possibilities for plaintiffs’ attorneys in consumer cases. While multidistrict or “mass tort” litigation has always been possible in this area of law, the Ninth Circuit, in its most recent cases clarifying the scope of potential liability arising from violations of the FDCA’s reporting requirements, has opened the door for a new theory of liability that allows for a new wave of consumer class action litigation.¹

I. REGULATORY BACKGROUND

The FDCA Medical Device Amendments of 1976 established three classes of medical devices: Class I (General Controls), Class II (Performance Standards), and Class III (Premarket Approval).² Class I devices are the least dangerous and therefore least strictly regulated, while Class III devices are the most strictly regulated due to the potential dangers they present.³ The FDCA’s implementing regulations require that the FDA respond to petitions by citizens for changes to health policy, including reclassification of medical devices, within 180 days.⁴ Since the implementation of the Citizen Petition process, a number of petitions have been submitted requesting that the FDA reclassify or ban medical devices that seem to present an unreasonable risk of illness or injury. Prominent examples include Citizen Petitions to reclassify or ban hip resurfacing systems,⁵ electroconvulsive therapy devices,⁶ intravenous hydroxyethyl starch solutions

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¹ See *McClellan v. I-Flow Corp.*, 776 F.3d 1035 (9th Cir. 2015); *Stengel v. Medtronic, Inc.*, 704 F.3d 1224 (9th Cir. 2013).

² 21 U.S.C. § 360c (2012).

³ *Id.* § 360c(a)(1)(C); *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 343 (2001).

⁴ 21 C.F.R. § 10.30(e)(2).

⁵ JEFFREY G. ROBERTS, CITIZEN PETITION OF OCT. 29, 2005, <https://www.fda.gov/ohrms/dockets/dockets/05p0440/05p-0440-cp00001-01-vol1.pdf>.

⁶ JONATHAN W. EMORD ET AL., CITIZEN PETITION OF AUG. 24, 2016, <http://emord.com/blaw/wp-content/uploads/2016/08/1-ECT-Citizen-Petition.pdf>.

intended to treat low blood volume,⁷ and implantable birth control devices made of nickel,⁸ due to significant amounts of adverse events resulting from use of these devices.

II. DEVELOPMENTS IN CASE LAW

Previous cases brought on behalf of consumers alleging injury resulting from FDA-regulated devices have taken the form of either multidistrict litigation (“mass torts”) or individual actions.⁹ However, the Ninth Circuit, in expanding on Supreme Court precedent, has recently decided two cases that suggest the feasibility of class action litigation as a more direct remedy.¹⁰ The governing Supreme Court cases on violations of FDCA reporting requirements are *Medtronic, Inc. v. Lohr*,¹¹ *Buckman v. Plaintiffs’ Legal Committee*,¹² and *Riegel v. Medtronic, Inc.*¹³

In *Lohr*, a class III pacemaker accessed the market through the 510(k) process as a product “substantially similar” to a pre-Amendments device, meaning it was subject to less restrictive market approval requirements than those typically applied to Class III devices.¹⁴ The plaintiff was injured when her pacemaker failed, and sued under Florida common law for negligence and strict product liability.¹⁵ The Court held that state law claims regarding safety and efficacy reporting for medical devices are only pre-empted under the Amendments if they impose requirements relating to safety and effectiveness that are different from, or in addition to, the FDCA’s data reporting and labeling requirements.¹⁶ The Court held that the plaintiffs’ state law claims were not pre-empted by the FDA’s regulatory regime, because the alleged state duties ran “parallel to” the federal reporting requirements rather than imposing any additional or different requirement.¹⁷

Lohr contrasts with *Buckman*, in which the Court illustrated the limits to state law claims premised on violations of FDCA reporting requirements.¹⁸ In *Buckman*, plaintiffs alleged injuries resulting from implantation of Class III orthopedic bone screws. The manufacturers of the bone screws hired a consultant to handle their FDCA reporting requirements. Alleging that the consultant made affirmative misrepresentations to the FDA during the premarket approval process, plaintiffs claimed that the FDA would not have granted the bone screws access to the market had these misrepresentations not been made.¹⁹ The Court characterized plaintiff’s claim as “state law fraud-on-the-FDA” arising “solely by virtue of the FDCA reporting requirements.”²⁰ As such,

⁷ YOLANDA GIRALDO ET AL., CITIZEN PETITION OF FEB. 8, 2017, <http://www.citizen.org/documents/2358.pdf>.

⁸ MARCUS J. SUSAN & JUSTIN PARAFINCZUK, CITIZEN PETITION OF FEB. 20, 2015, <https://www.regulations.gov/document?D=FDA-2015-P-0569-0001&source=govdelivery>.

⁹ See, e.g., *In re Reglan Litig.*, 142 A.3d 725 (N.J. 2016) (mass tort); see also *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008) (individual action).

¹⁰ See *McClellan v. I-Flow Corp.*, 776 F.3d 1035 (9th Cir. 2015); *Stengel v. Medtronic, Inc.*, 704 F.3d 1224 (9th Cir. 2013).

¹¹ 518 U.S. 470 (1996).

¹² 531 U.S. 341 (2001).

¹³ 552 U.S. 312 (2008).

¹⁴ See 21 U.S.C. § 360c.

¹⁵ *Lohr*, 518 U.S. at 481.

¹⁶ *Id.* at 500.

¹⁷ *Id.* at 501.

¹⁸ *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341 (2001).

¹⁹ *Id.* at 343.

²⁰ *Id.* at 353.

plaintiff's claims were pre-empted by the FDA's regulatory regime.²¹ The main deficiency in the claims pled by the plaintiffs in *Buckman* seems to be the fact that they sued directly for violation of FDCA reporting requirements and did not plead any "parallel" state-law duty of reasonable care.²²

The Ninth Circuit seems to have recognized a window of liability between *Lohr* and *Buckman*, and clarified the theory of parallel state duty liability first in the 2013 case of *Stengel v. Medtronic*,²³ followed by the 2015 case of *McClellan v. I-Flow Corp.*²⁴ In *Stengel*, plaintiffs sued Medtronic Inc. for injuries allegedly resulting from spinal implantation of a pump and catheter manufactured by the company.²⁵ Plaintiffs brought numerous state common law claims, alleging that the manufacturers of the Class III pump and catheter failed to warn the FDA that the device "may have contributed to a death or serious injury" after the device had received premarket approval.²⁶ Defendants argued that plaintiffs' claims were pre-empted. The Ninth Circuit, in rehearing the plaintiff's case *en banc*,²⁷ followed the Supreme Court ruling in *Lohr* by holding that state law tort claims premised on violations of FDCA reporting requirements are not pre-empted as long as the reporting duties alleged under the state law claims run "parallel to" federal reporting requirements.²⁸

The Ninth Circuit further elucidated the scope of potential liability in this area in *McClellan v. I-Flow Corp.*²⁹ The *McClellan* court suggested a specific theory of liability for plaintiffs to pursue when bringing state law "parallel duty" cases premised on violations of FDCA reporting requirements.³⁰ In *McClellan*, the plaintiff sued the manufacturers of a "continuous infusion pump device" intended to administer painkillers, alleging that its use caused chondrolysis of the shoulder and complete shoulder immobility.³¹ The plaintiff brought state law claims for negligent failure to warn and strict liability, alleging that the product was unreasonably dangerous due to a lack of adequate warnings.³²

The district court, referring to the reporting requirements of the FDCA, instructed the jury at trial to "consider federal law discussed at trial."³³ The jury found for defendants, and plaintiffs appealed to the Ninth Circuit.³⁴ Remarkably, the Ninth Circuit held that failing to provide to the jury a negligence *per se* instruction with precise

²¹ *Id.* at 353 ("[W]e think this sort of litigation would exert an extraneous pull on the scheme established by Congress, and it is therefore pre-empted by that scheme.").

²² *Cf.* *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 330 (2008) (holding that a state law claim imposed duties "different from, or in addition to" the federal reporting requirements, and therefore was pre-empted).

²³ *Stengel v. Medtronic Inc.*, 704 F.3d 1224, 1228 (9th Cir. 2013) ("[Section 360k] does not preempt State or local requirements that are equal to, or substantially identical to, requirements imposed by or under the act." (citing 21 C.F.R. § 808.1(d))).

²⁴ 776 F.3d 1035 (9th Cir. 2015).

²⁵ *Stengel*, 704 F.3d 1226-27.

²⁶ *Id.* at 1225-27.

²⁷ *See Stengel v. Medtronic Inc.*, 686 F.3d 1121 (9th Cir. 2012) (ordering, after vote by a majority of nonrecused active judges of the Ninth Circuit, that the decision of a three-judge panel that found plaintiff's claims to be pre-empted be reheard *en banc* under Fed. R. App. Proc. 35(a)).

²⁸ *Id.* at 1228-29.

²⁹ *McClellan*, 776 F.3d 1035.

³⁰ *Id.* at 1041 ("[T]he instruction given was far weaker than the requested *negligence per se* instruction." (emphasis added)).

³¹ *Id.* at 1037.

³² *Id.* at 1037.

³³ *Id.* at 1041.

³⁴ *Id.* at 1038.

reference to the statutes at issue was prejudicial error. It held this way specifically because of the strength of the negligence per se doctrine in the context of FDCA reporting requirement violations.³⁵

This is noteworthy for multiple reasons. First, it appears to be the only mention by circuit courts of the negligence per se doctrine's applicability in cases premised on violations of the FDCA reporting requirements.

Second, the *McClellan* court seems to have explicitly approved the use of the negligence per se doctrine for a *failure to warn claim*. Although failure to warn is not comprised of the same elements as ordinary negligence, the court in *McClellan* nevertheless expressly approved application of the negligence per se doctrine anyway.³⁶ The holding in *McClellan* seems to indicate that the Ninth Circuit is willing to entertain some substantive flexibility in order to facilitate claims premised on violations of FDCA reporting requirements.

Third, application of the negligence per se doctrine seems to render these potential cases much easier to win for plaintiffs. The negligence per se doctrine allows plaintiffs to argue that duty and breach of duty, in a negligence claim, are automatically shown where a defendant has breached a statutory (or regulatory) duty. Therefore, under these cases, all that needs to be shown for plaintiffs to win is (1) applicability of one of the numerous reporting requirements of the FDCA; (2) violation of that reporting requirement; and (3) that the violation of that reporting requirement caused, proximately and directly, the harm suffered by plaintiffs. Moreover, the *McClellan* court took care to address some of the arguments that defendants are likely to make in cases where the plaintiff brings a tort claim against a manufacturer and alleges state law duties parallel to federal reporting requirements.³⁷

III. FORECASTING FUTURE LITIGATION

These cases hint at a largely untapped area of consumer litigation in which plaintiffs harmed by a particular product sue the manufacturers under state common law theories of liability. Rather than bringing claims that “arise solely by virtue of the FDCA reporting requirements,” these plaintiffs would allege theories of liability like negligence or failure to warn that are “premised on a violation of FDCA reporting requirements” and which impose state duties “parallel to federal reporting requirements.”³⁸ The cases of *Stengel* and *McClellan* state clearly that a damages remedy for such claims is appropriate and that these state common law claims are not pre-empted by the FDA's regulatory regime if pled correctly.³⁹ Further, *McClellan* suggests a powerful theory of liability—negligence per se—for plaintiffs to use for these potential claims. Perhaps what is most remarkable how clearly the court delivers this message; it is almost as if the Ninth Circuit made a concerted effort to spur plaintiffs' litigators toward action.

³⁵ *Id.* at 1041.

³⁶ *Id.* at 1041.

³⁷ *Id.* at 1041 (“The appellees would have us conclude that any use of federal law to establish a standard of care is an attempt to enforce the underlying federal provisions, but we do not accept that proposition.”); *id.* (“[Defendants’] attempts to characterize *McClellan*’s claims as torts in form only are poorly explained and unpersuasive.”).

³⁸ *Preemption Cases After the Riegel Decision*, 2 FOOD & DRUG ADMIN. § 26:68 (2016).

³⁹ *McClellan*, 776 F.3d 1035; *Stengel v. Medtronic*, 704 F.3d 1224 (9th Cir. 2013).

Given the claims made possible under *Stengel* and *McClellan*, as well as the Ninth Circuit's demonstrated willingness to entertain a certain amount of substantive flexibility with respect to the negligence per se doctrine,⁴⁰ the Ninth Circuit seems to be facilitating a new wave of litigation over consumer injury resulting from inadequate FDCA reporting.

One might wonder whether the Ninth Circuit might be willing to bend procedurally as well. Negligence per se claims premised on violation of FDCA reporting requirements seem well suited for class action litigation. Putative classes of plaintiffs all suffering similar types of injury resulting from drugs or medical devices, where the manufacturer of such drugs or devices failed to comply with an FDCA reporting requirement, may now satisfy the class certification requirements of Rule 23 of the Federal Rules of Civil Procedure.

Under the doctrine of negligence per se, violation of a statute or regulatory duty automatically proves duty and breach of duty for the purposes of a negligence claim.⁴¹ Therefore, duty and breach of duty in these hypothetical class actions may be satisfied on a common basis by proving that a manufacturer violated a reporting requirement of the FDCA.⁴²

Moreover, in cases premised on violations of FDCA reporting requirements, plaintiffs would likely argue that the device or drug at issue would not have reached the consumer in its dangerous form if defendants had complied with federal reporting requirements. Should courts accept this argument, then the element of actual causation or causation-in-fact in a negligence claim is satisfied on a common basis as well, as a court would not have to look into the individual circumstances of the plaintiffs in resolving causation-in-fact.⁴³ Negligence per se in this context therefore jumps a large hurdle for class certification purposes that many other claims fail to clear: actual causation.⁴⁴

Proximate causation between use of the drug or device in question and a plaintiff's injury still presents individual questions which may threaten certification in the context of traditional opt-out class actions.⁴⁵ A savvy plaintiff's attorney may clear this hurdle by defining the putative class strategically and bifurcating into separate claims for liability and damages, since damages would present individual issues.⁴⁶ Such a strategy may allow for resolution of liability through class proceedings while leaving the individual issues of damages resulting from the drug or device to be determined through

⁴⁰ See *McClellan*, 776 F.3d 1035.

⁴¹ See RESTATEMENT OF TORTS (THIRD) § 14 (2010).

⁴² See FED. R. CIV. P. 23(a)(2), (b)(3).

⁴³ Rather, under *McClellan*, the dispositive issue appears to be whether the device or drug would have been available to consumers in its dangerous form had the manufacturer complied with FDCA requirements. This issue is determinable on a class-wide, rather than individual, basis.

⁴⁴ See, e.g., *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 666 (9th Cir. 2004) (denying certification of a putative class in a civil RICO mail fraud claim because "individualized reliance issues related to plaintiffs' knowledge, motivations, and expectations bear heavily on the causation analysis").

⁴⁵ See FED. R. CIV. P. 23; see also *Mazur v. eBay, Inc.*, 257 F.R.D. 563 (N.D. Cal. 2009) (denying class certification on the grounds that proximate cause presented individual issues which predominated over common questions).

⁴⁶ *Mazur*, 257 F.R.D. at 570-71 (implying that proximate cause is properly analyzed in the damages phase rather than the liability phase of a lawsuit).

multidistrict litigation, or “mass tort” proceedings.⁴⁷ The party seeking bifurcation bears the burden of demonstrating that it is justified given the facts of the case.⁴⁸

If a court takes issue with the traditional opt-out class approach, an “opt-in” class action may be appropriate for this type of claim.⁴⁹ This is because these cases are likely to present generally high, yet variable, damages awards, as well as individualized circumstances of injury.⁵⁰ Based on the tone of *McClellan* and *Stengel*, the Ninth Circuit may be willing to entertain the use of opt-in consumer class actions in the context of injuries caused by violations of FDCA reporting requirements. The opt-in method would be an effective way to address plaintiffs for whom relief is sorely needed due to severe injuries, while saving time and judicial resources by leaving out plaintiffs who do not have much of an interest in the outcome of the suit due to the minimal nature of their injuries.⁵¹

CONCLUSION AND IMPLICATIONS

McClellan and *Stengel* opened the door for a particularly impactful brand of plaintiffs’ tort and product liability litigation with the potential to bolster the FDCA reporting requirements and ensure the safety and efficacy of products that pass through the FDA’s regulatory regime.

Although the recent cases in the Ninth Circuit allow for a more aggressive approach to state law “parallel duty” claims in the form of class actions, the Fairness in Class Action Litigation Act of 2017 threatens to halt class actions in federal court for the foreseeable future.⁵² The Act would require that, as a prerequisite for class certification, plaintiffs’ counsel make an affirmative showing through strong evidence that each individual member of the putative class suffered the same type and scope of injury.⁵³ The Act imposes a menacingly high bar for class certification, and would drastically reduce the number of class actions in federal courts. Moreover, because the question of whether a defendant violated the reporting requirements of the FDCA is likely a federal question,⁵⁴ the Act, if passed, would likely preclude the aforementioned litigation made possible by *Lohr*, *McClellan* and *Stengel*. As a result, plaintiffs’ litigators should act quickly if they intend to bring the cases made possible by *Stengel* and *McClellan* so as not to miss the window of opportunity that closes upon passage of the Act.

⁴⁷ See *M2 Software, Inc., v. Madacy Ent.*, 421 F.3d 1073, 1088 (9th Cir. 2005) (upholding district court’s decision to bifurcate proximate and causation-in-fact where doing so avoided jury confusion and prejudice to the defendants); see also *Rutherford v. Owens-Illinois, Inc.*, 941 P.2d 1203, 1207-08 (Cal. 1997) (“In the first damages phase of trial, the jury was to determine, as to each plaintiff, whether exposure to asbestos was a proximate cause of injury”).

⁴⁸ See, e.g., *Spectra-Physics Lasers, Inc. v. Uniphase Corp.*, 144 F.R.D. 99, 101 (N.D. Cal. 1992).

⁴⁹ See Scott Dodson, *An Opt-in Option for Class Actions*, 115 MICH. L. REV. 171, 187-89 (2016).

⁵⁰ *Id.* at 188 (“[P]erhaps the claims’ high value and individualized nature of proof suggests deference to claimant autonomy.”).

⁵¹ See *id.* at 203.

⁵² See Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act, H.R. 985, 115th Cong. (2017–2018).

⁵³ *Id.*

⁵⁴ See 28 U.S.C. § 1331.

