What's the Big Idea?

Recommendations for Improving Law and Policy in the Next Administration

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Introduction

Senator Elizabeth Warren

Ideas matter.

Eight years ago, the United States was facing the worst economic crisis since the Great Depression. Wall Street firms had gambled away the hard-earned savings of hard-working Americans and sent the stock market into a tailspin. Ordinary folks who were conned into purchasing homes they could not afford saw their homeownership dreams slip away. College graduates ready to enter the workforce were stranded with mountains of debt and no meaningful job prospects.

There's no question that the Obama Administration had its work cut out for it. And it took some big ideas to make real change. A record stimulus pumped money—and jobs—into an imploding economy. The Dodd-Frank Wall Street Reform and Consumer Protection Act helped reel in some of the shadiest Wall Street practices and created a new consumer watchdog, the Consumer Financial Protection Bureau. The Affordable Care Act expanded health insurance coverage to over 11 million Americans.

The country stepped back from the brink, but the problems were bigger and more systemic — and the continued attachment to the ideas born of trickle-down economics cramped our response and prevented full recovery.

Now, as the country continues to wrestle with pressing questions that will define this generation and the next, the need for big ideas is clearer than ever. The next administration must confront a tangle of interwoven problems. How will we address the growing income and wealth gap between the top 1% and everybody else? How will we rethink and rebuild a broken criminal justice system that disproportionately locks up and disenfranchises black and brown Americans? How will we ensure that the water our kids drink and the air they breathe are clean and safe? How will we expand and defend gender equity and LGBTQ rights? How will we ensure that non-citizens are treated fairly and humanely? How will we make our government work to advance the interests of all Americans, not just those with the deepest pockets and the highest-paid lobbyists?

ACS convened some of the nation's leading experts to explore these and other questions facing our nation. In this "Big Idea" report, experts tackle issues from voting to privacy, and each discusses three top recommendations for the next administration. These recommendations are intended to expand horizons for the next administration as it determines how to protect the gains of the last administration and double down on the fight for transformative change.

Big ideas will face fierce opposition. The wealthy and well-connected will not simply give up their massive influence in Washington. If the next administration refuses to do their bidding and their Republican friends in Congress fail to crush those big ideas, then billionaires and big businesses have already set up the mechanism to turn to another ally — the judiciary. Over the last few decades, powerful interests have worked to tilt the scales of justice to favor the wealthy and well-connected, undoing some of the greatest gains in the last half century. Recent judicial decisions have opened the floodgates to secret political spending; allowed giant corporations to squirm out of their responsibilities to provide contraceptive care to their female employees; and permitted corporations to slip mandatory arbitration clauses and class action bans into consumer contracts. Decisions like these push the promise of equality, opportunity, and justice further and further out of the reach of American families, workers, students, small businesses, and entrepreneurs.

Powerful interests know that the key to maintaining their stranglehold on the judiciary is appointing judges sympathetic to their interests and alien to the struggles of ordinary Americans. Senate Republicans have demonstrated that they will do whatever it takes — even grinding the judicial nominations process to a halt — to ensure that the judiciary works only for them and their wealthy friends. Since the start of the Obama Administration, they have led a campaign to hamstring the judicial nominations process in an effort to preserve the corporate tilt of the judiciary. The way Senate Republicans see it, if the judiciary won't work for them and their big business friends, they will make sure it doesn't work at all.

But they're not going to win — not if everyone else has something to say about it. ACS has been on the front lines of the battle for our courts, shining light on the ways that justice is skewed in favor of the very rich and blind to the plight of ordinary Americans. ACS has been in the lead, but we all have a stake in this fight. We must demand that the next administration adopt big ideas that will make real change, but we must work just as hard for a fully-functioning judiciary that dispenses equal justice under law.

I am glad to have this chance to help ACS introduce new ideas into a public debate about how our country can address some of the most significant problems we face. In a proud tradition that upholds the vision of a truly fair and just society as our north star, ACS challenges each of us to engage with those ideas and to fight for a future that lives up to our ideals.

Setting a Voting Rights Agenda in An Era of "Legal" Disenfranchisement

Franita Tolson

The U.S. Supreme Court's recent decision in *Shelby County v. Holder* rendered voting rights more vulnerable than they have been in a generation by limiting Congress's enforcement authority under the Fourteenth and Fifteenth Amendments. But this does not mean that the next administration does not have tools at its disposal for mitigating the limitations that the Court has placed on federal authority. By capitalizing on Supreme Court case law that engages in a broad reading of federal power under the Elections Clause, the new administration can set a legislative agenda that prevents further rollbacks of voting rights protections and limits restrictive voting laws. This strategy is the best way to navigate a political environment that has proven to be insufficiently protective of the right to vote.

Setting a Voting Rights Agenda in An Era of "Legal" Disenfranchisement

Franita Tolson*

As the first presidential election conducted without the full protections of the Voting Rights Act of 1965, it is no surprise that the 2016 election season has had its share of voting-related mishaps and litigation. In Maricopa County, Arizona, for example, voters waited for over five hours to cast a ballot in the state's March primary, leading voting rights advocacy groups to file a lawsuit challenging Arizona's chaotic election practices.[1] Likewise, North Carolina's 2013 omnibus election bill, which added a strict voter identification requirement, modified provisional voting, and reduced early voting days, made it difficult for thousands to participate in the state's 2016 primary election. Indeed, voters across the country experienced numerous problems in attempting to cast a ballot—from voter purges in New York to faulty voting machines in Texas to outdated caucus systems in Maine and Kansas—virtually no state was immune to a voting related disaster.[2]

While some of these issues are inevitable, many of them stem from restrictive voting laws and administrative error. Seventeen states have enacted partisan voting restrictions that will face their first test in the November 2016 presidential election, and many of these laws are designed to shrink the electorate.[3] Courts, for their part, have been inconsistent in striking down these regulations.[4] Disenfranchisement has become the norm in American elections due to the federal government's reluctance to create a robust framework that places positive obligations on states to ensure broad enfranchisement.

In this essay, I propose three steps that the new Presidential Administration can take to address the void that was left by the *Shelby County* decision and to protect the right to vote against burdensome state law restrictions and administrative error.

I. Use An Untapped Source of Authority for Election Regulations: The Elections Clause

In order to prevent states from enacting laws that undermine the right to vote, the new Administration must first focus its resources on seeking new election legislation that builds on recent case law recognizing the breadth of Congress's authority to regulate federal elections under Article I, Section 4 of the Constitution, which is commonly referred to as the Elections Clause. Pursuant to the Elections Clause, states may regulate the "Times, Places and Manner of holding Elections for Senators and Representatives," but this

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[1] *See Groups Seek Emergency Relief and Judicial Oversight for Elections in Maricopa County, Arizona* (July 7, 2016) https://lawyerscommittee.org/press-release/groups-seek-emergency-relief-judicial-oversight-elections-maricopa-county-arizona/.

[2] *See* Jim Kessler, *Want to Help End Voter Suppression? Junk the Caucuses,* Wash. Post (June 21, 2016) https://www.washingtonpost.com/opinions/want-to-help-end-voter-suppression-junk-the-caucuses/2016/06/20/2dfe75b0-372a-11e6-8f7c-d4c723a2becb_story.html.

[3] *See* Rick Schmitt, *Law of Democracy,* Stanford Lawyer (June 3, 2016), https://law.stanford.edu/stanford-lawyer/articles/law-of-democracy/.

[4] *Compare* Frank v. Walker, 768 F.3d 744 (7th Cir. 2014) (upholding Wisconsin's voter identification law) *with* Veasey v. Abbott, 796 F.3d 487 (5th Cir. 2015) (holding that Texas's voter identification law violated Section 2 of the Voting Rights Act). *See infra* note 14.

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authority is subject to Congress's power to "at any time make or alter such Regulations."[5] The Supreme Court recently embraced a robust reading of Congress's authority under the Clause, authority that the new Administration can reference in seeking to enact its legislative agenda, and that, to date, remains notably underutilized.[6] By focusing on the Elections Clause as a source of authority, the next Administration can set a legislative agenda that makes two significant changes in how federal elections are administered: 1) it can reinstitute a system of federal administrative oversight for congressional elections; and 2) it can impose minimum safeguards for state voter identification laws as applied to federal elections. These two changes will address many of the challenges that voters have faced, not only in the 2016 election cycle, but in the years since the Supreme Court significantly narrowed the protections of the Voting Rights Act.

II. Reinstitute A Regime of Federal Oversight for Congressional Elections

In *Shelby County v. Holder*, the Supreme Court held that the coverage formula of section 4(b) of the Voting Rights Act, which determined those jurisdictions that had to preclear all changes to their election laws with the federal government under section 5 of the Act, unduly infringed the states' sovereign authority over elections because the formula did not account for the decrease in racial discrimination in voting over the last three decades.[7]

Since the decision, voting rights activists have lobbied Congress to enact a new coverage formula, but most of the existing proposals would only cover 4-5 southern states, would possibly exclude many northern and western states that have also enacted restrictive voting legislation, or would face possible invalidation if litigated before a Supreme Court looking for contemporary evidence of racial discrimination. One alternative is for Congress to institute a regime of federal supervision of all phases of registration and voting in national elections if 10,000 people within any given congressional district request federal oversight. This proposal, a significant expansion of Section 3(a) of the Voting Rights Act, would appoint election officers from the two major political parties to oversee congressional elections from registration to the certification of the winners.[8] While these officers could not directly interfere with the state law that governs federal elections or the state's administration of those laws, they would have investigative power that would allow them to inspect voter registration lists, observe the polls on Election Day, and secure evidence of voter disenfranchisement. Most important, this evidence of voter disenfranchisement could be used as a basis for bailing a jurisdiction into the preclearance regime of section 5 of the Voting Rights Act.

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[5] The Elections Clause provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. art. I, § 4, cl. 1.

[6] Ariz. v. Inter Tribal Council of Ariz., 133 S. Ct. 2247, 2253-54 (2013).

[7] Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (codified as amended at 52 U.S.C. § 10301 (2012)).

[8] Under Section 3(a) federal officials observe polling places and provide written reports to the Department of Justice about any potential VRA violations. This proposal builds on the scheme, and also borrows from prior efforts in the nineteenth century to employ federal oversite of congressional elections. *See* the Enforcement Act of February 28, 1871, 16 Stat. 433; Federal Elections Bill of 1890, H.R. 10958, 51st Cong. (1st Sess. 1890).

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Instituting federal oversight of congressional elections would address many of the objections that the Supreme Court had with respect to the coverage formula and would remedy the problems with building a record of discrimination that plagued the prior reauthorization of section 5.[9] Federal oversight would allow election officials to see firsthand the effects of the discriminatory measures enacted by the states in recent years. For example, federal oversight could address situations in which states as diverse as Georgia, Michigan, and New York have failed to process voter registrations, engaged in voter purges, and made it difficult for minorities to access absentee ballots.[10] Having boots on the ground can challenge the post-racial narrative of the *Shelby County* decision and exhibit the need for continued federal oversight of congressional elections.

As the 2016 primary elections show, a significant amount of disenfranchisement also occurs because of poll worker error. Federal oversight could help address this problem as well. The courts have litigated the issue of poll worker error, but the resolution is unsatisfactory, at best. For example, in *Northeast Ohio Coalition for the Homeless v. Husted*, a federal district court entered a consent decree that prohibited the invalidation of ballots due to failures by poll workers to follow state law. In order to prevail in a case like this, however, voters must come forward with evidence that the poll worker failed to follow state law, evidence that many voters do not have in the wake of the election.[11] At the other extreme is an Ohio law prohibiting poll workers from assisting voters in order to avoid such errors—a prohibition that places a substantial burden on voters who legitimately may need help filling out the ballot.[12] Policing congressional elections would work to mitigate this error as a source of disenfranchisement because federal election supervisors will help ensure that poll workers, many of whom are poorly trained, are properly following state law. Federal oversight would also allow poll workers to continue to help those voters in need so that these individuals can properly exercise their right to vote.

III. Impose Minimum Safeguards for State Voter Identification Laws

As states pass an array of new laws that make voting more difficult, commentators have questioned whether Congress has the authority to regulate restrictions like voter identifications laws in order to combat the negative effects of these new regulations. One issue that is unresolved is whether voter identification laws are "manner" regulations that Congress can regulate under the Elections Clause, or voter qualification standards that states have sole authority to regulate under Article I, Section 2 of the Constitution.

There is a non-frivolous argument that Congress can regulate voter qualifications under

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[9] *See* Shelby Cty. v. Holder, 133 S. Ct. 2612 (2013). Although Congress found that the majority of DOJ objections included findings of discriminatory intent, *Shelby Cty.*, 133 S. Ct. at 2639 (Ginsburg, J., dissenting), it is not clear that these changes were made with discriminatory intent sufficient to violate the Constitution, *see id.* at 2629 (majority opinion).

[10] *Democracy Diminished: State and Local Threats to Voting Post-* Shelby County, Alabama v. Holder, NAACP http://www.naacpldf.org/document/states-responses-shelby-decision.

[11] Northeast Ohio Coalition for the Homeless v. Husted, Case No. 2:06-CV-896 (S.D. Ohio April 19, 2010), http://www.clearinghouse.net/chDocs/public/VR-OH-0081-0017.pdf.

[12] *Id.* at 76.

the Elections Clause, at least to the extent that such voter qualification standards are inextricably intertwined with regulating the times, places, and manner of elections. Requiring that a voter show identification at the polls in order to cast a ballot for purposes of either preventing fraud or ensuring the integrity of the electoral process aligns more with regulating the mechanics of the actual election than with determining whether a person is qualified to vote. With a voter identification law, the state already knows that a prospective voter is qualified to cast a ballot, and only needs to verify the person's identify to prevent potential fraud. As such, voter identification laws can be framed as "manner" regulations, and Congress, through the Elections Clause, can institute procedural safeguards that prevent states from prioritizing their interest in ensuring the integrity of the electoral process over a prospective voter's right to cast a ballot.[13]

While upholding Indiana's voter identification law, the Supreme Court's 2008 decision in *Crawford v. Marion County* did not resolve the issue of whether some variations of these laws in other states can pose a more severe burden on the right to vote than others.[14] The new Administration could arguably lobby Congress to pass a law that requires states to produce nonpartisan and empirical evidentiary support to justify their voter identification laws as applied to federal elections instead of relying on mere assertions of their regulatory interests. Functionally, what this means is that, Congress could require a state to produce evidence that its voter identification law is designed to address a specific, documented problem. For example, voter fraud was a prominent feature of the 2004 gubernatorial election in Washington state, where the election was decided by a 133-vote margin and felons, unregistered, and deceased voters cast 1678 illegal votes.[15] Washington would be well within its authority to adopt a voter identification law in light of its documented history of voter fraud. In contrast, Wisconsin's voter identification law, recently invalidated by a federal district court, is difficult to justify given that there had not been any voter impersonation in recent Wisconsin elections. Federal legislation would permit a state like Washington to further its interest in combatting voter fraud with a voter identification law tailored to address its specific problem, but require a state like Wisconsin to adopt a significantly less restrictive voter identification law that has a minimal effect on the electorate's composition relative to the benefits that the state hopes to derive from the law.

Such legislation would also help courts distinguish between relatively innocuous laws that do little harm while serving a real state interest, and those that are overly strict and would

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[13] Under the Elections Clause, Congress can regulate so-called mixed elections, where its regulations can encompass any part of an election involved in the selection of congressmen, from the primary to the general election. *See* In re Coy, 127 U.S. 731, 752 (1888). Thus, it is not much of a stretch to interpret Congress's authority as extending to state voter qualification standards that are also closely intertwined with the times, places and manner of federal elections.

[14] *See* Crawford v. Marion Cty. Election Bd., 553 U.S. 181 (2008). In fact, federal courts recently struck down strict voter identification laws in Wisconsin and Texas and demanded that the states "soften" their requirements. *See* Frank v. Walker, NC, 11-C-1128 (E.D. Wis. July 19, 2016), Veasey v. Abbott, NC, 14-41127 (5th Cir. July 20, 2016).

[15] H.R. Rep. No. 109-666, at 7 & n.16 (2006) (citing Transcript of Oral Decision, Borders v. King County, No. 05-2-00027-3 (Wash. Super. Ct. June 6, 2005)), http://moritzlaw.osu.edu/electionlaw/litigation/documents/oraldecision.pdf, [http://perma.cc/H7V7-L9NN].

disenfranchise an unacceptable number of voters. For example, South Carolina enacted a voter identification law in 2011, Act R54 ("R54"), in order to "deter voter fraud and enhance public confidence in the electoral system," despite the fact that the record contained no evidence of actual fraud.[16] Nevertheless, a federal district court upheld the law because, as compared to other states, "South Carolina's [voter identification law] would fall on the less stringent end."[17] Notably, the law contains a "reasonable impediment provision" that requires election officials to count the ballots of voters who present a previously acceptable non-photo form of identification and sign affidavits stating their reason for not having acceptable identification.[18] When the district court upheld the law, it found that the reasonable impediment provision made the law flexible enough that it did not abridge the voting rights of racial minorities.[19] In contrast, the voter identification laws enacted in both Texas and North Carolina would not be acceptable for use in federal elections because they are insufficiently protective of the right to vote. Under both laws, voters can present only limited forms of identification; provisional voting is burdensome; the laws were passed for partisan reasons; and they are significantly less inclusive than the prior regulations. Under this proposal, federal law could bar these states' voter identification laws, specifically as they apply to federal elections, because the burdens on the electorate are not sufficiently justified by any legitimate, nonpartisan state interests.[20]

The Elections Clause may also provide authority for Congress to limit other state election laws that undermine turnout and unduly burden the right to vote, provided that the regulation applies to the times, places and manner of federal elections, including: reductions in early voting days, limitations on the ability of voters to cast provisional ballots, and the use of a caucus system instead of a primary to select candidates for Congress. The Elections Clause is a tremendous source of federal power that limits the ability of states to infringe voting rights through procedural regulation, and the new Administration should tap into this authority in order to improve voter access to the ballot.

IV. Conclusion

The U.S. Supreme Court's recent decision in *Shelby County v. Holder* rendered voting rights more vulnerable than they have been in a generation by limiting Congress's enforcement authority under the Fourteenth and Fifteenth Amendments. But this does not mean that the next Administration does not have tools at its disposal for mitigating the limitations that the Court has placed on federal authority. By capitalizing on Supreme Court case law that engages in a broad reading of federal power under the Elections Clause, the new Administration can set a legislative agenda that prevents further rollbacks of voting rights protections and limits restrictive voting laws. This strategy is the best way to navigate a political environment that has proven to be insufficiently protective of the right to vote.

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[16] South Carolina v. United States, 898 F. Supp. 2d 30, 43–44 (D.D.C. 2012).
[17] *Id.* at 46.
[18] *Id.* at 41.
[19] *Id.* at 39.
[20] For more on the voter identification laws in North Carolina, South Carolina and Wisconsin, see Franita Tolson, P*rotecting Political Participation through the Voter Qualifications Clause of Article I,* 56 B.C. L. Rev. 159 (2015).

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Dark Money, Black Hole Money, and How to Solve It

Ciara Torres-Spelliscy

Dark money has the potential to do real damage to the public's faith in elections. At worst, dark money, or its cousin black hole money, could be hiding foreign sovereign spending in American elections. And this type of secretive political spending thwarts accountability for voters and other stakeholders. Congress should act to address dark money. But even without Congressional action, regulators at the Federal Election Commission, the Securities and Exchange Commission, and the Internal Revenue Service should tighten up their reporting requirements to require political spenders to list their underlying donors so that the voting public has a complete picture of who is trying to influence their vote. If the next administration takes this issue seriously and prioritizes new agency rules to address the issue, then the 2016 election could be the last election rife with dark money.

Dark Money, Black Hole Money, and How to Solve It

Ciara Torres-Spelliscy*

This election year, playwright Lin-Manuel Miranda told the 2016 graduates of the University of Pennsylvania, "[e]very story you choose to tell, by necessity, omits others from the larger narrative." This is true. But American elections are missing a key part of the story: exactly who is funding political ads. Between 2010 and 2014, there was $600 million of dark money spent in federal elections alone.[1] That total will only grow in the 2016 election. Dark money is a product of poor disclosure rules by election administrators that allow individuals and entities to mask their involvement in political spending. But this is a solvable problem that the new administration should tackle.

Here, "dark money" refers to untraceable political spending. Dark money is money that has been routed through an opaque nonprofit — thus concealing its true source from voters and investors alike. The source of dark money could be individuals, unions, associations, nonprofits, or for-profit businesses. Political spenders have been clever at exploiting the gaps in regulation between the IRS and elections regulators, which make dark money possible. But as Trevor Potter and Bryson B. Morgan remind us, "[t]his lack of disclosure is not to be confused with anonymity. The sources of these funds are likely well known to candidates and party elites, but withheld from the public."[2]

Dark money is discernable at the federal level because there are requirements at the FEC to report certain types of political spending on political ad buys, but if an underlying donor does not earmark her money going into a dark money nonprofit, then the nonprofit does not have to report that donation to the FEC. As a result, the public knows when the nonprofit spends the money on political ads, but doesn't know from whom the money originated.

But there is other political spending that is not reported to the FEC. For example, money that is spent on an ad that is aired over 60 days before a federal election that lacks words of express advocacy like "vote for" or "vote against" is not regulated by the FEC, even if the ad includes criticism or praise of candidates for federal office in an election year. Thus any money spent on such an early "sham issue ad" is not reported to the FEC in any way. The money spent on this type of ad is what I refer to as "black hole" money. We know that this black hole money is being spent because we can see that there are advertisements that mention candidates, which are not being reported as political expenditures to any regulator.

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[1] Kathy Kiely, *Former IRS Official Sees Dark Money Scandal Brewing*, Moyers & Co. (Apr. 12, 2016), http://billmoyers.com/story/former-irs-official-sees-dark-money-scandal-brewing/; Karoli Kuns, *How Dark Money Shields Political Donors*, Newsweek (June 30, 2015), http://www.newsweek.com/how-dark-money-shields-political-donors-348852; AP & Reuters, *Most Expensive Midterms Ever: The Power of* Citizens United *and Anonymous 'Dark Money' Revealed as Spending nears $4 Billion*, Daily Mail (Nov. 4, 2014), http://www.dailymail.co.uk/news/article-2819897/Most-expensive-midterms-power-Citizens-United-anonymous-dark-money-revealed-spending-nears-4billion.html#ixzz48kE7j11f.

[2] Trevor Potter & Bryson B. Morgan, *The History of Undisclosed Spending in U.S. Elections & How 2012 Became the "Dark Money" Election*, 27 Notre Dame J.L. Ethics & Pub. Pol'y 383, 385 (2013).

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But just like with dark money ads, the public does not know who is behind the black hole ads either.

I. Don't Blame *Citizens United* for Dark Money

As I explain in my new book Corporate Citizen?, dark money was a problem that predated *Citizens United v. FEC* (2010).[3] Arguably, dark money was the original sin in Watergate. The reason for keeping certain money raised by the 1972 reelection campaign of Richard Nixon secret was easy enough to discern. Corporate contributions to the campaign were illegal, but there was a gap in the law which failed to require disclosure for months in early 1972 and Nixon's fundraisers thought they could get away with hiding it.[4] Some of the illegal corporate dark money gathered by Nixon's reelection campaign ended up funding the Watergate burglary.[5]

Citizens United may have facilitated more money in American elections by inviting in new spending by corporations and unions, but the decision did not cause the uptick in dark money. Indeed, *Citizens United* upheld the constitutionality of disclosure of the underlying sources of money in politics by a vote of 8 to 1. But because of the dark money problem, Americans often don't know what they don't know about money in politics. Not everyone thinks dark money is a bad thing,[6] and reasonable people can disagree about whether campaign finance reforms that would require more transparency are desirable.

II. Contemporary Dark Money in Federal Elections

In the post-*Citizens United* era, the high water mark for the aggregate amount of dark money was the 2012 election when President Barack Obama was defending his presidency against Governor Mitt Romney.[7] According to the Center for Responsive Politics, in 2012 most of the dark money flowed through social welfare 501(c)(4) groups—to the tune of $257 million; while $55 million in dark money went through 501(c)(6) trade associations. By contrast, the highest percentage of dark money (47%) in a federal election was in 2010.[8] Dark money in the 2016 election got off to a fast pace.[9] But as of October 11, 2016, comparatively less dark money – $99 million from all sources – has been spent in the 2016 race.[10]

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[3] Ciara Torres-Spelliscy, Corporate Citizen? An Argument for Separation of Corporation and State (2016).

[4] Richard Reeves, President Nixon: Alone in the White House 462 (2002).

[5] Andy Kroll, *Follow the Dark Money*, Mother Jones (July/Aug. 2012), http://www.motherjones.com/politics/2012/06/history-money-american-elections.

[6] John Riches, *The Victims of "Dark Money" Disclosure: How Government Reporting Requirements Suppress Speech and Limit Charitable Giving*, Goldwater Inst. (Aug. 5, 2015), http://goldwaterinstitute.org/en/work/topics/constitutional-rights/free-speech/the-victims-of-dark-money-disclosure-how-governmen/.

[7] Potter & Morgan, *supra* note 2, at 385.

[8] Elizabeth Garrett, *Campaign Finance in the Hybrid Realm of Recall Elections*, 97 Minn. L. Rev. 1654, 1696 (2013).

[9] Tom Kertscher, *Ten Times More 'Dark Money' has been Spent for 2016 Elections, U.S. Sen. Tammy Baldwin Says*, PolitiFact (Nov. 5, 2015), http://www.politifact.com/wisconsin/statements/2015/nov/05/tammy-baldwin/ten-times-more-dark-money-has-been-spent-2016-elec/.

[10] *Political Nonprofits (Dark Money)*, Ctr. for Responsive Pol., (last updated Oct. 11, 2016), https://www.opensecrets.org/outsidespending/nonprof_summ.php.

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The $699 million in dark money (and counting) leaves the public wondering what might be hiding among that money. One of the possible sources that could be hiding among that dark, unaccountable and unaccounted money is foreign money. And foreign money seeking to influence American elections could be from foreign private sources or foreign governments. For example, CITGO is an oil company owned by the government of Venezuela. While CITGO has American gas stations, it is doubtful that Americans want foreign sovereign-owned CITGO to have any say over American energy policies or who is elected to American offices. As far as the public record shows, CITGO has not spent in American elections. But the $699 million dark money problem could be hiding that type of spending in plain sight.

III. Ways to Fix the Dark Money Problem at the Federal Level

Judge Richard Posner worries that campaign finance reform is hampered because "[l]imited terms in office (with or without term limits) truncate politicians' time horizons; and interest-group politics, operating with vast sums of money on a complex decentralized system of government strongly biased to the status quo, has little trouble pushing needed reforms off beyond those horizons."[11] But difficult is not impossible, and here's where policies may change.

In Congress, new legislation could re-clarify that all of the underlying sources paying for political ads in federal elections must be disclosed over a reasonable threshold. Such legislation, including the DISCLOSE Act of 2010, aims to bring greater transparency to spending in federal races. But this Act was narrowly defeated in a Republican filibuster. At least for the past few years, Congress has shown little appetite to act. A new Congress that arrives in January 2017 should adopt transparency legislation to end dark money. In the meantime, congressional deadlock does not serve as an insurmountable barrier to reform at the federal level. In terms of the dark money problem, multiple federal agencies have jurisdiction and therefore could implement significant reforms.

A. FEC Reform

The federal government needs a strong and functioning agency to enforce its campaign finance laws and the current FEC is failing in that charge. The issue is structural and ideological. The FEC is made up of three Democratic appointees and three Republican appointees, but the Commission needs four votes to act on anything. The two factions can rarely agree, resulting in frequent 3-3 ties. The effect of the 3-3 ties is that enforcement actions are dropped, and individuals who have asked for advisory opinions get no guidance from the agency on the meaning of the law.[12] Adding a seventh vote or appointing

[11] Richard A. Posner, The Crisis of Capitalist Democracy 387 (2010).
[12] Fred Wertheimer & Don Simon, *The FEC: The Failure to Enforce Commission*, Am. Const. Soc'y (Jan. 2013), https://www.acslaw.org/sites/default/files/Wertheimer_and_Simon_-_The_Failure_to_Enforce_Commission.pdf.

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Commissioners who are willing to put partisanship aside to uphold the rule of law would solve this problem of deadlock.

Another structural problem at the FEC is very high-level regulatory capture. Congress controls the FEC's budget, and the Senate confirms the Commissioners, but the FEC is supposed to regulate members of Congress running for reelection. Furthermore, the agency does not have random audit power over the candidates that file campaign finance reports. The FEC lost its random audit power roughly four years into its existence because Congress did not like being audited.[13] This basically put the Congress on the honor system not to break campaign finance laws.[14] Congress should reauthorize random FEC audits.

The FEC has jurisdiction over political ads in federal elections. When a nonprofit reports to the FEC, under the current rules, only the donors of earmarked funds are reportable. This allows for Alice in Wonderland FEC filings, claiming that millions have been spent in a federal election, but identifying no particular source of the funds. The FEC should adopt new rules which require reporting the source of all funds spent in federal elections, not just the earmarked ones.

B. SEC Rulemaking

The Securities and Exchange Commission (SEC) also has a role to play in lessening dark money, and has acted before in the area of money in politics. In 2010, the SEC promulgated an anti-pay-to-play rule that applies to the investment advisers to public pension funds. SEC Rule 206(4)-5 prevents investment advisers from exchanging large contributions for the ability to manage a public pension fund's investments. Under Rule 206(4)-5, investment advisers can choose to be big fundraisers for municipal and state candidates or they can advise public pension funds, but they cannot do both simultaneously.[15] Explaining why such a rule was needed, Andrew J. Donohue, Director of the SEC's Division of Investment Management, explained, "[p]ay-to-play serves the interests of advisers to public pension plans rather than the interests of the millions of pension plan beneficiaries who rely on their advice. The rule we are proposing today would help ensure that advisory contracts are awarded on professional competence, not political influence."[16]

The SEC could address the issue of dark money through a new rule as well. Support for the SEC's improving disclosure requirements of corporate political activity is also high among the general public. According to a 2015 poll, a super majority (88%), including

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[13] Kenneth A. Gross, *The Enforcement of Campaign Finance Rules: A System in Search of Reform*, 9 Yale L. & Pol'y Rev. 279, 300 n.50 (1991).

[14] *No Bark, No Bite, No Point: The Case for Closing the Federal Election Commission and Establishing a New System for Enforcing the Nation's Campaign Finance Laws*, Project FEC 72-73 (2002), http://www.democracy21.org/uploads/%7BB4BE5C24-65EA-4910-974C-759644EC0901%7D.pdf.

[15] Political Contributions by Certain Investment Advisors, 17 Fed. Reg. 41,018 (July 14, 2010) (codified at 17 C.F.R. § 275.206(4)-(5).

[16] Curtis C. Verschoor, *We Need to Stop Pay-to-Play Corruption*, Strategic Fin. 16 (Sept. 2009), http://www.imanet.org/PDFs/Public/SF/2009_09/09_09_ethics.pdf.

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both Republicans and Democrats, wants the SEC to have a transparency rule for corporate political spending.[17] Many members of boards of directors also want an SEC rule. According to the BDO Board Survey conducted in September 2015, "[a]lthough some companies voluntarily disclose corporate political spending voluntarily, a majority (53%) of public company board members believe that the SEC needs to develop mandatory disclosure rules for corporate political contributions."[18]

In 2011, ten corporate law professors filed a petition with the SEC asking for the Commission to promulgate a new rule requiring transparency for corporate political spending by publicly traded companies. By mid-2016, the petition had over 1.2 million signatories including institutional investors, state treasurers, members of Congress and former Chairs of the SEC.[19] This is the most public comments any SEC petition has ever received in the history of the Commission, and the next administration should act on this clear mandate.

C. IRS Rulemaking

The IRS has jurisdiction over the tax exempt 501(c)(4)'s and 501(c)(6)'s that are being used to funnel dark money in politics. This funneling of dark money could be remedied by up to date rules at the IRS over the appropriate use of nonprofits for political spending. In 2014, the IRS started a rule-making, which could have clarified exactly what counts for tax purposes as "candidate-related political activity."[20] After being roundly criticized in over 100,000 public comments, the IRS decided to scrap the rule and go back to the drawing board. But as of October 2016, the IRS had done nothing to fix the rules for nonprofits that facilitate dark money, or black hole money. This should be a priority issue when the new administration takes office.

IV. Conclusion

Dark money has the potential to do real damage to the public's faith in elections. At worst, dark money or its cousin black hole money, could be hiding foreign sovereign spending in American elections. But even if it is all domestic, this type of secretive political spending thwarts accountability for voters and other stakeholders. Congress should act to address dark money. But even without Congressional action, regulators should tighten up their reporting requirements to require political spenders to list their underlying donors so that the voting public has a complete picture of who is trying to influence their vote. If the next administration takes this issue seriously, then the 2016 election could be the last election rife with dark money.

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[17] *New MAYDAY.US Poll: Voters of Every Political Stripe Agree on the Need for Fundamental Reform to the Campaign Finance System*, MAYDAY.US (Sept. 25, 2015), http://blog.mayday.us/post/129846704150/new-maydayus-poll-voters-of-every-political.

[18] *2015 Board Survey*, BDO U.S. (Oct. 2015), https://www.bdo.com/insights/assurance/client-advisories/2015-board-survey#sthash.TiOcNaKP.dpuf.

[19] Jennifer Taub, *Still Too Big to Fail: Opportunities for Regulatory Action Seven Years after the Bear Stearns Rescue*, Corp. Reform Coal. 23 (May 7, 2015), http://www.citizen.org/documents/still-too-big-to-fail-crc-report.pdf.

[20] IRS REG-134417-13 (2014).

Frameworks for Immigration Reform

Cristina M. Rodríguez

The current state of our immigration system satisfies almost no one. The fundamental challenge for any future administration will be to restore a sense of humanity and fairness to the system, while bolstering its credibility as a well-managed regime that advances the long-term interests of the United States. Today, immigration policy consists instead of crisis and politics-driven ad hoc measures. Building and governing a better system demands action by Congress, but it also requires ongoing recalibration of the tools of administration and enforcement. Legislative reform and executive action can be pursued simultaneously, though lasting transformation by Congress is long overdue and should be prioritized in a political calculus early in an administration. Shaping our system into a more humane and ordered one will entail at least three objectives:

Objective #1: Shrinking the domain of enforcement to build a more just system

Objective #2: Preventing illegal immigration from arising and then persisting

Objective #3: Addressing causes of migration to enable policy that reflects national priorities

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The following discussion will highlight a handful of policy tools that are eminently available, as well as aspirational reforms that will take a significant legislative effort, to advance these objectives.

I. Objective #1: Shrinking the Domain of Enforcement

Arrest, detention, and removal all play legitimate roles in a democratic system and can be structured constitutionally. But today's enforcement regime is stunningly complex, necessitating a massive bureaucracy full of tensions. Enforcement also tears apart lives and families. As the challenge grows in scale, enforcement can damage whole communities and divert resources from investigation of serious dangers, such as drug and human trafficking, as well as constructive integration policies.

The Obama administration has sought to "perfect" the removal system by focusing on recent border crossers and those who have committed serious crimes, and by deferring removal of sympathetic groups, such as unauthorized immigrants brought to the U.S. as children (Deferred Action for Childhood Arrivals (DACA)). This work ought to continue. But to create a more just and workable system, we must reduce the very need for enforcement by shrinking its domain.

The first step will be deciding whether and how to continue the previous administration's Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), which

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remains enjoined by the Fifth Circuit Court of Appeals in *Texas v. United States*.[1] Deferring the removal of large categories of non-citizens with strong equities would help enable a more targeted enforcement policy while providing repose to millions of people.[2] But the President's power to do so remains mired in legal uncertainty because of the Supreme Court's inability to reach a majority in its review of the Fifth Circuit.[3] Teeing up the legality of DAPA for a fully constituted Court is thus essential for any future administration's flexibility, in immigration enforcement as well as other domains where opponents might allege failure to enforce the law. In particular, the Fifth Circuit has called into question the executive's ability to extend work authorization through regulation—a long-standing and vital tool in managing immigration enforcement.[4]

An administration also should consider other means of administrative relief, such as providing deferred action to categories of non-citizens other than those covered by the two major Obama initiatives. Even the Fifth Circuit appears to have accepted the government's authority to defer removal of large categories. But the next administration will be bound by the Office of Legal Counsel opinion that limits categorical grants of deferred action to instances consistent with congressional priorities,[5] unless the Department of Justice rescinds that opinion. The next Department of Homeland Security (DHS) could extend its policy of granting "parole in place" (and therefore lawful presence) to the immediate relatives of those serving in the military to other groups.[6] The parole power is based in statute and is a recognized path to work authorization, though it must be exercised "for urgent humanitarian reasons or significant public benefit."[7] DHS could, for example, parole currently present noncitizens eligible for permanent residency based on family relationships but who remain inadmissible for having entered without being "admitted or paroled."[8]

These forms of executive action, however, only shrink the domain of enforcement on a discretionary basis and do not address public and congressional pressure to properly enforce the law. Lasting change requires legislative reform, in two ways: retrospective and prospective. The centerpiece of any immigration reform bill must be a legalization

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[1] *See* Texas v. United States, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided Court*, United States v. Texas, 136 S.Ct. 2271 (2016), *reh'g denied*, United States v. Texas, No. 15-674, 2016 WL 5640497 (Oct. 3, 2016).

[2] Some estimates suggest that DAPA, when combined with DACA, would provide relief to nearly five million people. *See* Randy Capps, et al., *Deferred Action for Unauthorized Immigrant Parents: DAPA's Potential Effects on Families and Children*, Migration Pol'y Inst. (2016), http://www.migrationpolicy.org/research/deferred-action-unauthorized-immigrant-parents-analysis-dapas-potential-effects-families.

[3] The Supreme Court denied the Obama Administration's petition for rehearing on October 3, 2016, leaving its affirmance by an evenly divided Court in the prior term as its last word for now.

[4] Pursuing the pending litigation ultimately provides the quickest and surest route to Supreme Court review. Because DAPA is currently enjoined only on a preliminary basis, the government could take the case to trial and eventually back to the Supreme Court. A future administration could begin a new case altogether by rescinding the Obama policy guidance on DAPA and formulating a new relief program to address concerns expressed by the lower courts, including subjecting any policy to notice and comment. But this route would be time-consuming and should not be necessary under existing administrative law doctrines, pace the Fifth Circuit.

[5] The Department of Homeland Security's Authority to Prioritize the Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others, 38 Op. O.L.C. (Nov. 19, 2014), https://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf (concluding it would be unlawful to grant deferred action to parents of DACA recipients).

[6] *See* U.S. Citizenship and Immigration Services Policy Manual, Chapter 3, https://www.uscis.gov/policymanual/HTML/PolicyManual.html# (last visited Aug. 3, 2016).

[7] 8 U.S.C. §1182(d)(5).

[8] 8 U.S.C. §1182(a)(6)(A).

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program for the nearly 11 million unauthorized immigrants living and working in the United States, to secure their status from changes in administration and to enable them to become fully contributing members of the society they call home. The path to legalization should be strewn with as few hoops as the political process will allow. Simplicity in design will facilitate the administration of legalization, ensure that it reaches as broad a population as possible, and accelerate the integration of the legalizing population. The bill passed by the Senate in 2013, for example, would have tied legalization to border enforcement benchmarks and permitted naturalization only after more than a decade of lawful residency. These sorts of constraints create bureaucratic complications and delay full integration, which social science research suggests can be heavily affected by one's legal status, as well as the legal status of parents.[9]

Prospectively, Congress ought to pare down the grounds of removal written into the Immigration and Nationality Act (INA), which have expanded dramatically since the late 1980s and now include minor offenses, such as minor drug crimes and misdemeanors. Congress should also pare down the definition of "aggravated felony,"[10] which carries the most severe immigration consequences under current law, to the very serious offenses it originally covered, such as murder and rape, or to repeat offenses. The INA also should contain more stopgaps to serve equitable interests. For instance, the severity of removal could be tempered through application of graduated sanctions for offenses deemed problematic, such as permitting re-entry to the United States after a short period of time for minor offenses (as opposed to applying the same five-year or life-time limits to all offenses). The law might also include a statute of limitations for how long criminal offenses may warrant removal.[11]

These changes can help ensure that government targets enforcement resources at non-citizens who truly pose public safety dangers while reducing the very need for detention and other enforcement tools that pose the greatest risks to civil rights. DHS, in turn, will be better positioned to adopt data-driven enforcement policies that reflect consistent fidelity to law, require less opaque discretionary decision-making, and engender less public opposition.[12]

II. Objective #2: Preventing Illegal Immigration

An overarching goal of reform should be preventing illegal immigration from arising at all. Especially when large in scale, illegality poisons our political debates by making government seem feckless, delegitimizing immigration altogether, and blocking discussion of the sort regime that would best serve the country's interests and values.

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[9] *See* Frank D. Bean, Susan K. Brown, & James D. Bachmeier, Parents Without Papers: The Progress and Pitfalls of Mexican American Intergration (2016).

[10] *See* 8 U.S.C. § 1101(a)(43)(2012).

[11] For discussion of proposals of this sort, see Daniel J. Kanstroom, *Smart(er) Enforcement: Rethinking Removal, Structuring Proportionality, and Imagining Graduated Sanctions*, 30 Va. J.L. & Pol. 465, 488-92 (2015).

[12] For proposals for a sound and administrable enforcement policy, see David A. Martin, *Resolute Enforcement Is Not Just for Restrictionists: Building a Stable and Efficient Immigration Enforcement System*, 30 Va. J.L. & Pol. 411 (2015).

The nature of illegal immigration has changed dramatically in recent years. The era of mass illegal immigration of Mexicans over the border has ended.[13] To the extent illegal immigration presents a problem today, it consists of people fleeing extreme violence and deprivation in Central America, and even more so of noncitizens who overstay their visas.[14] As a phenomenon, illegal immigration is a product of our laws and their interaction with variables that transcend our borders. It therefore can be controlled partially through law, but that law must be able to address unpredictable economic and demographic changes. To manage unforeseen circumstances, the law must facilitate ex ante systemic flexibility to channel future flows. The INA also should contain better ex post tools to address illegal immigration once it has arisen, as will be inevitable to some degree in any system.

Ex ante systemic flexibility will come by creating a selection system that does not set in stone the numbers and types of immigrants who may enter each year, but rather permits entries to vary with changes in the labor market and other factors that determine inflows and outflows. The most ambitious proposal advanced by experts in recent years—the creation of an independent commission to set annual admissions numbers for employment-based migration—deserves serious consideration.[15] Such a reform would require major legislation, but it would yield two crucial benefits: giving the Executive Branch authority to adjust the system to respond to changing realities, especially in the labor market; and providing a forum for expert economic analysis to inform our labor policy. Such a reform would not only help prevent illegal immigration, it also would give rise to a more data-driven and context-sensitive labor immigration policy.

How precisely to structure any future migration also must be considered. Temporary worker programs have become flashpoints of controversy in recent debates, and they certainly have ignominious histories of producing exploitation and illegal immigration.[16] But a well-designed temporary program can help channel future flows without producing these pathologies. The keys to such a program include ensuring visa portability so that employers cannot easily exploit workers, and providing a path to long-term residency for workers who develop equities in the U.S.—an inevitable result of migration, even among workers who originally intend to work in the country only briefly.

Reforming our system to include better ex post tools for addressing illegal immigration when it does arise would also create a more rational regime and a healthier political debate. A simple reform would be for Congress to change the registry date in the INA.[17]

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[13] *See, e.g.*, Robert Warren & Donald Kerwin, *Beyond DAPA and DACA: Revisiting Legislative Reform in Light of Long-Term Trends in Unauthorized Immigration to the United States*, 3 J. On Migration & Hum. Security 80, 87 (2015) (noting that unauthorized arrivals from Mexico reached their peak in 2000 and have dropped to their lowest levels since the 1970s).

[14] *Id*. at 101. The U.S. has made little progress in tackling the overstay problem. Technological solutions to track entries and exits have not proven viable and may not yet be a good investment of resources. But the sooner a visa violator can be identified and removed, the less likely his or her case will ripen into a humanitarian case for relief.

[15] *See* Doris Meissner, Et Al., Immigration and America's Future 41-43 (2006). Such a commission would not and ought not supplant a system of family migration, a cornerstone of our immigration policy.

[16] For a discussion of the trade-off between high numbers of temporary workers and migrants' rights, see Martin Ruhs & Philip Martin, *Numbers v. Rights: Trade-offs and Guest Worker Programs*, 42 Int'l Migration Rev. 249-65 (2008).

[17] *See* 8 U.S.C. § 1259 (2012).

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Registry permits a person who has been in the country since a specified date to adjust to lawful status, but the current statutory date of 1972 means the provision essentially benefits no one today. Congress ought to make the date more current and delegate authority to the Executive Branch to adjust the date under certain circumstances, or through notice and comment rulemaking. This authority would help create an orderly, small-scale, and semi-regular process of legalization—a welcome alternative to the protracted "amnesty" debate we currently face.

III. Objective #3: Addressing Root Causes

An ideal immigration system would maximize benefits to the United States and consist of migration that is truly voluntary, welcomed, and in pursuit of greater opportunity, not in response to deprivation or injustice. To achieve this, our policy must be consistently attentive to the root causes of migration—an attention that also will serve objectives 1 and 2.

Having such aspirations emphatically does not mean failing to attend to U.S. obligations, both legal and moral, to respond to refugee crises, especially those that result in part from U.S. foreign policy. Indeed, given the small number of Syrian refugees the United States has admitted in recent years and the sluggishness of the resettlement process, a renewed commitment to a humanitarian immigration policy is in order and should involve resource commitments in the form of a better staffed asylum corps and expansion of the public-private infrastructure for resettlement. But a foreign policy linked to immigration policy can make these crises less urgent or even stave them off altogether.

The obvious place to focus today is on Central America, where extreme gang-related violence and economic deprivation have combined to produce surges in migrants at our southern border—a flow that some studies suggest may persist into the foreseeable future.[18] This persistence would undermine our pursuit of objectives 1 and 2, in addition to being a humanitarian calamity. At a surface level, steps such as devising a system of orderly in-country processing could help prevent the hardships associated with the unauthorized journey to the United States. And the United States also should be working closely with Mexico, which has been responsible for high numbers of apprehensions of Central Americans before they even arrive at the U.S. border, to ensure adequate screening of migrants for asylum claims, as well as decent treatment by Mexican enforcement officials. But a complete strategy must involve cooperation between the United States and Mexico to address the underlying factors producing migration—a strategy that requires more explicitly tying immigration and foreign policy together in public policy debates and inter-agency deliberations.

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[18] *See* Muzaffar Chishti & Faye Hipsman, *Increased Central American Immigration to the United States May Prove an Enduring Phenomenon*, Migration Pol'y Inst. (Feb. 18, 2016), http://www.migrationpolicy.org/article/increased-central-american-migration-united-states-may-prove-enduring-phenomenon.

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Each of the objectives outlined above has the same overarching purpose—to transform U.S. immigration policy from a crisis-driven arena to one based on strategic planning, long-term interests, and democratic ideals. Our admissions system is long overdue for a variety of reforms to simplify a bewildering bureaucracy, to better recruit skilled immigrants, and to improve family reunification. But the rhetoric of crisis and government failure consistently stymies consideration of how to build such a system, making it difficult for the American public to see immigration as a phenomenon that serves the national interest. The world will always produce crises that evolve into shocks to our immigration system. But by changing the law to shrink the domain of enforcement, create tools to forestall illegal immigration, and link immigration policy to the root causes of migration, the United States might stand a chance of building a regulatory regime with the right long-term priorities.

Strengthening Workers' Rights

Samuel R. Bagenstos

In recent years, the legal rights of workers have increasingly been central to domestic policymaking. The Fight for $15 movement has called attention to the need for an increase to the minimum wage, but that should only be the beginning. Several other steps are necessary to ensure that workers can experience equality and dignity at work and can bargain effectively with those who hire them. This essay urges three key steps: (1) reversing the at-will presumption, (2) ensuring that legal rules adapt to the new economic realities of work, and (3) affirming employers' responsibility for workplace harassment. Some of these proposals can be achieved administratively; others would require new legislation. Some are relatively light lifts; others would be very difficult to accomplish. But each responds to an important limitation of existing law and is exceptionally important for the future of the American workplace.

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I. Reverse the At-Will Presumption

Begin with the most foundational issue—and the one that would require the heaviest lift to address. American employment law applies a background rule of employment at will. Under the canonical formulation of that rule, an employer or employee can terminate the employment relationship at any time, for *any* reason or no reason at all. Although the rights of employers and employees to terminate the relationship at will are formally symmetrical, workers often need a particular job more than employers need a particular worker. This is especially true in times of high unemployment. When a worker knows she can be fired at will, she loses substantial bargaining power over the terms and conditions of her employment and can be forced to accept restrictions on privacy, dignity, and freedom both in and out of the workplace. And the existence of the at-will presumption deters courts from recognizing protections for employees' out-of-work privacy and speech.

Of course, it is no longer true, as a matter of formal law, that an employer may dismiss a worker for any reason. Most notably, antidiscrimination laws prohibit employers from acting based on a worker's protected characteristics, and both antidiscrimination laws and whistleblower protection laws prohibit employers from retaliating against workers for speaking out on matters that the law protects. And federal labor law prohibits employers from dismissing workers for engaging in union organizing (though the process for proving such a violation is slow and the penalties are weak).

The at-will presumption makes it difficult to enforce these laws. Because the at-will rule allows employers to terminate workers for entirely irrational reasons, it makes it easy for employers to come up with supposedly permissible explanations for their actions and thus evade liability when they in fact acted for forbidden reasons.[1] Overturning the at-will rule

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[1] *See* Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 Tex. L. Rev. 1655, 1670 (1995); *see generally* Joseph E. Slater, *The "American Rule" that Swallows the Exceptions*, 11 Emp. Rts. & Emp. Pol'y J. 53 (2007).

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will help to enforce the laws already on the books that prohibit discrimination and protect whistleblowing and union organizing.

Although American law generally applies the at-will presumption, just-cause termination provisions apply in most collective bargaining agreements. And, since 1987, the State of Montana has required "good cause" for terminating employees who have completed a probationary period. The Montana Wrongful Discharge from Employment Act defines "good cause" as "reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason." Nationwide adoption of the Montana model would protect workers against arbitrary and opportunistic behavior by their employers, and it would facilitate the enforcement of other important workplace regulations.

II. Ensure That Legal Rules Adapt to the New Economic Realities of Work

In recent years, scholars and policymakers have directed attention at the "fissuring" of the workplace. As Professor and Assistant Secretary of Labor David Weil detailed in his book, *The Fissured Workplace*, "[t]he modern workplace has been profoundly transformed," such that "[t]he basic terms of employment—hiring, evaluation, pay, supervision, training, coordination—are now the result of multiple organizations." Thanks to sophisticated franchising and contracting-out arrangements, the brand-name enterprises that sell goods and services to the public often do so through workers who are not directly on their payroll—though those same workers often must act in a manner and achieve results specified by those brand-name enterprises. According to research by economists Alan Krueger and Lawrence Katz, the number of workers in "alternative arrangements"—including independent contractors, contracted-out workers, on-call workers, and temp-workers—increased from 10 percent of the workforce in 2005 to 16 percent in 2015.[2] (Despite the extensive press coverage that online platform-based companies such as Uber have received, workers for such companies constitute only about 0.5 percent of the workforce.)

These developments put pressure on three aspects of the legal architecture of employment relations. First, they raise questions about who is a given worker's "employer." Under all of the major sources of labor and employment law, legal obligations run from an employer to its own workers. But when a worker is paid by one company, while being supervised day to day by a second company, pursuant to rules set by a third company, it may be unclear which company is the employer. This uncertainty creates crucial gaps in legal protections. In its recent *Browning-Ferris* decision, the NLRB took a major step toward addressing this problem by articulating a new "joint employer" standard, providing that, two or more entities will each be treated as employers of the same workers if they each

[2] *See* Anna Louie Sussman & Josh Zumbrun, *Contract Workforce Outpaces Growth in Silicon-Valley Style 'Gig' Jobs*, Wall St. J. (Mar. 26, 2016).

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"possess[] sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining."[3] In January 2016, the Department of Labor issued guidance that made clear the broad scope of joint employment under the Fair Labor Standards Act.[4] The next administration should continue these efforts, and should work, through agency interpretations, litigation, and even legislation, to make clear that similarly broad joint-employer liability applies under other employment statutes—notably the antidiscrimination laws. The goal should be to harmonize the definition of employer across all relevant labor and employment law regimes, to provide consistent protection for workers and clarity for those who hire them.

Second, these developments raise questions about just what workers count as "employees." Particularly in "gig economy" jobs in which individuals seek assignments on online platforms, workers may set their own hours, they may be paid by the task rather than by the time worked, they may be responsible for their own tools and equipment (such as their cars, in the case of Uber drivers), and they may be free from direct supervision when they perform their work. Some employers, lawyers, and even courts might understand these and other aspects of the relationship to make it appropriate to treat these workers as independent contractors rather than employees. Most federal labor and employment law protections apply only to workers who meet the (hazy) legal definition of "employee." "Gig economy" workers might well be able to meet that definition in many cases, though the ambiguity of the definition makes it an uncertain prospect.

Whether or not they constitute "employees" in any traditional sense, workers in "gig economy" jobs are just as vulnerable to discrimination, just as in need of wage-and-hour and workplace safety protection, and just as deserving of the right to organize and bargain collectively as are any other workers. Consider Uber drivers. Given "strong empirical evidence suggesting that consumers of services—including, specifically, taxi cab passengers—engage in race discrimination when they interact with service providers," there is ample reason to believe that those drivers, who rely on ratings from their riders, need protection from race based discrimination.[5] As to wages, a recent study estimated that "Uber drivers in late 2015 earned approximately $13.17 per hour after expenses in the Denver market (which includes all of Colorado), $10.75 per hour after expenses in the Houston area, and $8.77 per hour after expenses in the Detroit market"[6]—all below the $15 per hour focal point of recent organizing efforts. And the right to organize and bargain collectively is a key mechanism by which our law empowers workers to promote their rights to fair treatment, adequate pay, and safe working conditions. As Senator Elizabeth Warren has explained, "every worker should have the right to organize, period. Full-time, part-time, temp workers, gig workers, contract workers – those who provide the labor should have the

[3] Browning-Ferris Indus. of California, Inc., 362 NLRB No. 186 at 2 (Aug. 27, 2015).
[4] *See* Wage & Hour Div., U.S. Dep't of Labor, Administrator's Interp. No. 2016-1 (Jan. 20, 2016).
[5] Benjamin Sachs, *Uber: A Platform for Discrimination?*, On Labor (Oct. 22, 2015).
[6] Caroline O'Donovan & Jeremy Singer-Vine, *How Much Uber Drivers Actually Make Per Hour*, BuzzFeed News (June 22, 2016), https://www.buzzfeed.com/carolineodonovan/internal-uber-driver-pay-numbers.

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right to bargain as a group with whoever controls the terms of their work, and they should be protected from retaliation or discrimination for doing so."

There are two basic ways to address this problem. One would be to make clear that the definition of "employee" reaches "gig economy" workers, such as Uber drivers, who are subject to significant control by the party who hired them. Applying this common-law control test, the California and Oregon Labor Commissioners determined that Uber drivers are employees and therefore subject to the protections of labor and employment laws,[7] and drivers have pressed the issue in several court cases. The other would be to create a new category of workers, standing in between employees and independent contractors, who would receive at least some of the protections of employment law (such as nondiscrimination and the right to organize and bargain collectively), though they would not receive others (such as minimum wage and overtime guarantees). Former Acting Secretary of Labor Seth Harris and economist Alan Krueger have been the most prominent proponents of such a third category.[8] The creation of such a legal category would provide crucial protections to "gig economy" workers, but it would also encourage employers to classify more traditional contingent workers into that category. Because "gig economy" workers make up such a small percentage of the workforce—about one half of one percent—it would be better to ensure that those workers are protected by existing categories, rather than to create a new, intermediate status.

The third way in which recent developments have put pressure on the architecture of workplace protections is by highlighting the limitations of our employer-based system of providing benefits. Most workers receive health insurance, retirement plans, family and sick leave, vacation time, and other benefits from their employers. Part-time and contingent workers, however, may not receive these benefits—and workers classified as independent contractors will also often not receive them.

To solve this problem, we should to the greatest extent possible decouple these key benefits from a worker's employment relationship. The Affordable Care Act took an important step toward providing health insurance to those who do not receive it at their workplace, though its effects have been limited by several states' refusal to take up the Medicaid expansion. The next administration should build on the ACA by creating a public option for older workers who are not yet eligible for Medicare and otherwise expanding access to health insurance.[9] The federal government should also expand Social Security so workers do not depend as heavily on employer-based retirement programs. Finally, as Senator Warren and others have proposed, the government should set up a paid leave program, whereby all workers—regardless of where they work—can "accrue proportional credits toward a

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[7] *See* Berwick v. Uber Tech., Inc., No. 11-46739 EK (Cal. Lab. Comm'r, June 3, 2015); Advisory Opinion of the Comm'r of the Bureau of Labor and Indus. of the State of Oregon Regarding: The Employment Status of Uber Drivers (Oct. 15, 2015).

[8] *See* Seth D. Harris & Alan B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker*," (Hamilton Proj. Discussion. Paper 2015-10, Dec. 2015).

[9] For a set of proposals along these lines, see Timothy Stoltzfus Jost & Harold Pollack, *Key Proposals To Strengthen the Affordable Care Act*, Century Found. (Nov. 23, 2015).

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certain number of days a year for any purpose" and "have some paid family and medical leave to insure against longer absences [for] serious illness or to care for a newborn."[10] These proposals will relieve the pressure on our current employment-based benefits system.

III. Affirm Employer Responsibility for Discriminatory Harassment

A recent report of the EEOC's Workplace Harassment Task Force finds that discriminatory harassment unfortunately remains widespread in American workplaces and often goes unreported. The legal rules governing employer responsibility for harassment are a key part of the problem. Under the Supreme Court's *Faragher* doctrine, when supervisors engage in harassment that does not result in a "tangible employment action" such as a firing or demotion, the employer can escape liability by establishing an affirmative defense. To make out this defense, the employer must show that it took reasonable steps to prevent and correct harassment and the victim did not take reasonable steps to avail herself of the preventive and corrective opportunities the employer provided.[11] And when someone who is not a supervisor engages in harassment, the employer is responsible only if the employer itself was negligent in failing to detect and prevent the discrimination. The Supreme Court has defined "supervisor" in this context narrowly, to include only those individuals who have the power to fire, demote, or effect some other "tangible employment action."[12] Even people who have substantial day-to-day power over other employees—and thus would often be referred to as supervisors in everyday speech—will not meet this standard.

In part as a result of these rules, employers have implemented extensive employee training programs, and they have created reporting structures to enable workers to complain about harassment. Unfortunately, available evidence indicates that these employer policies often serve a largely symbolic function rather than reducing the incidence of discrimination.[13] Worse, the establishment of ineffective reporting structures puts workers who are subject to harassment in a bind: If a worker reports the misconduct early, the harassment is unlikely to stop, and the reporting employee is likely to be subject to retaliation; but if the worker does not report the misconduct early, a court is likely to find that she acted unreasonably and that the employer therefore is not responsible.[14] And, indeed, courts often treat the establishment of symbolic anti-discrimination policies as exonerating employers of responsibility for harassment that occurs in their workplaces.

To solve this problem, the next administration should pursue an amendment to antidiscrimination laws that would make an employer liable, without proof of negligence or the possibility of an affirmative defense, for discriminatory harassment committed by any of its employees. Such an amendment would give employers an incentive to adopt internal

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[10] *See* Nick Hanauer & David Rolf, *Shared Security, Shared Growth*, Democracy (Summer 2015).
[11] *See* Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).
[12] *See* Vance v. Ball State Univ., 133 S. Ct. 2434 (2013).
[13] *See*, *e.g.*, Lauren B. Edelman, *Working Law: Courts, Corporations, and Symbolic Civil Rights* (forthcoming 2016).
[14] *See* Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. Rev. 859 (2008).

policies and practices that would reduce the incidence of harassment; for every act of harassment avoided, an employer would reduce its liability. Symbolic policies, that do not in fact reduce harassment, would no longer enable an employer to avoid liability. Congress should also consider amending the antidiscrimination laws to expand protections against retaliation, so employees who complain about individual acts of harassment are protected from adverse consequences of complaining, even if the harassment has not yet reached the "severe or pervasive" level necessary to violate antidiscrimination laws.[15] With these changes, the law can provide far more effective protection against workplace harassment.

IV. Conclusion

This paper has outlined three key goals the next administration can pursue to advance the rights of workers to effective bargaining power, fair wages and hours, and nondiscrimination and dignity at work. Not all of these goals can be achieved quickly or easily, though the next administration could make progress on some of them right away. But all are exceptionally important for the future of the American workplace.

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[15] *Id.* at 915-16.

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Creating an Infrastructure of Opportunity

K. Sabeel Rahman

Many of the inequalities we face in today's economy are not just a product of increased risk faced by poor families, contingent workers, and the like; rather they are products of deeper structural disparities in access to opportunities. Equal opportunity is not about fair competition or risk mitigation; it is fundamentally about freedom. If the goal is to provide freedom for each of us to develop the lives and experiences we have reason to value, then the purpose of social policies must be understood in terms of enabling access to those goods, services, and opportunities whose presence in turn enables that freedom—and whose absence narrows it. We can think of these as public goods in which our policies must invest. These public goods are not physical infrastructure like roads or bridges; they are a kind of "social infrastructure of opportunity" that makes possible a wider array of stable, secure life pathways. We must think of goals like universal healthcare, universal benefits like child care support, and universal access to pensions as the shared "infrastructure of opportunity" that can ease the precarity and poverty experienced by too many in America today. Practically, we must reevaluate our social contract and welfare policies in two further steps: identifying those elements of social infrastructure that are most critical, and developing a mix of public provision and regulatory oversight to ensure access to those goods and services.

Creating an Infrastructure of Opportunity

K. Sabeel Rahman*

From presidential candidates to social scientists to philanthropists and activists, there is a growing realization that economic inequality is one of the most critical policy challenges of the 21st century economy. The widening income gap between the richest 1% of families and everyone else has become an increasingly commonplace starting point for many policy debates. But the problem of economic inequality goes much deeper than these disparities in income: many families and individuals face an increasingly unstable and precarious economic existence, with vanishing opportunities to improve their and their children's economic wellbeing.

First, the ranks of the extreme poor have grown sharply in recent years. Since the Clinton administration's welfare reform of 1996, we have seen a widespread collapse of welfare rolls and benefits at the state level reducing the value and effect of long-standing programs like Aid to Families with Dependent Children and Temporary Assistance for Needy Families to nearly nothing. Funding levels have been capped by block granting; states have used their discretion over welfare spending to cut benefits and increase barriers to access in the face of budgetary pressures, and the value of benefits have eroded due to inflation.[1] Today, over 1.5 million households live on less than $2 per day, with little access to either cash or government benefits, reflecting a shockingly ubiquitous, deepening, and diverse experience of poverty in America today.[2]

Second, a larger share of workers in today's economy exist outside of the conventional labor, wage, and social insurance protections accompanying full-time work. Whether it is workers in the "on-demand" or "gig" economy dependent on freelancing or contingent labor to make ends meet, or the explosion of the low-wage precarious workforce in industries like fast food, restaurant workers, apparel, and the like, these workers by and large do not have pensions, unemployment insurance, or even pathways towards better jobs. The "fissuring" of the workplace has obviated the old twentieth-century social contract. Through outsourcing and franchising, many industries have shuttled their workers outside of the lead corporation, and are no longer responsible for providing these benefits.[3] This same pattern is reflected by the rise of the "gig" economy, where companies leverage new technologies like online platforms to match consumers and service providers, without the cost or hassle of employing those providers directly. This is a great deal for the companies and for consumers, but leaves the workers and service providers in a highly insecure position,

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[1] *See, e.g.*, Jordan Weismann, *The Failure of Welfare Reform*, Slate (June 1, 2016) http://www.slate.com/articles/news_and_politics/moneybox/2016/06/how_welfare_reform_failed.html.

[2] *See, e.g.*, Kathryn Edin and H. Luke Shaefer, *$2.00 a Day: Living on Almost Nothing in America* (2015).

[3] David Weil, The Fissured Workplace (2014). *See also* Saru Jarayaman, Forked (2016); David Rolf, The Fight for Fifteen (2016).

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lacking in access to these basic social contract benefits.[4] As a result, a growing number of activists and policymakers are grappling with how to provide these basic benefits to a population that exists outside of conventional full-time work.

Many of the inequalities we face in today's economy are not just a product of increased risk faced by poor families, contingent workers, and the like; rather they are products of deeper structural disparities in access to opportunities. Equal opportunity is not about fair competition or risk mitigation; rather, it is fundamentally about freedom—the freedom "to do and become things we otherwise could not."[5] In other words, the American social contract has collapsed. Equality of opportunity understood as *freedom* better expresses the multidimensional and multifaceted nature of human development: rather than seeking to expand access to specific pathways (such as through college admissions, or by incentivizing particular kinds of full-time employment), this view of equal opportunity as freedom calls for us to enable a wide array of life choices—what Joseph Fishkin calls "opportunity pluralism."

If the goal is to provide this kind of freedom for each of us to develop the lives and experiences we have reason to value, then the purpose of social policies must be understood in terms of *enabling access* to those goods, services, and opportunities whose presence in turn enables that freedom—and whose absence narrows it. We can think of these as public goods in which our policies must invest. These public goods are not physical infrastructure like roads or bridges; they are a kind of "social infrastructure of opportunity" that makes possible a wider array of stable, secure life pathways.

Equality of opportunity understood as economic and social freedom therefore requires equal and universal access to a variety of public goods that not only *enable* such opportunity, but also *protect against* the problems of bottlenecks and domination that arise if these goods were to be provided more exclusively, or privately. Combating inequality in today's economy thus requires that we invest in these public goods, as a way of affirmatively promoting a more robust form of equality.

I. Reconceptualize Existing Programs and Goals to Create an Infrastructure of Opportunity

The social contract is not just about protecting individuals and families from insecurity or economic risks; it is also about *unlocking opportunity*, about enabling economic and

[4] *See, e.g.*, K. Sabeel Rahman, *Curbing the New Corporate Power*, Boston Rev. (May 4, 2015), http://bostonreview.net/forum/k-sabeel-rahman-curbing-new-corporate-power.
[5] Joseph Fishkin, Bottlenecks: A New Theory of Equal Opportunity (2014).

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social inclusion, about making it possible for all members of our society to develop safe, secure, and meaningful careers, life plans, and experiences. To make this broader notion of equal opportunity possible, we need to provide a wider array of universally accessible public goods—goods and services that can unlock this potential. We must think of goals like universal healthcare, universal benefits like child care support, and universal access to pensions as the shared "infrastructure of opportunity" that can ease the precarity and poverty experienced by too many in America today.

Practically, we must reevaluate our social contract and welfare policies in two further steps: identifying those elements of social infrastructure that are most critical, and developing a mix of public provision and regulatory oversight to ensure access to those goods and services.

II. Systematically Prioritize Societal Needs that Should Be Publicly Met

Which goods and services must a 21st century social contract prioritize?

As we debate how to redesign the social contract and welfare policies for the twenty-first century, we should focus most centrally on those goods which are necessary components of the infrastructure of opportunity: those goods that enable a wide array of life opportunities, whose lack creates bottlenecks, and whose private provision risks subordination or exploitation.

Specifically, goods that meet each of these three criteria are particular candidates for more dedicated public provision or regulation to ensure equal access: goods where (1) access enables and unlocks a variety of life opportunities and plans; (2) where more limited access might create bottlenecks narrowing opportunity and freedom; and (3) where private provision places users in positions of subordination, domination, or exploitation.

This list of necessities for equal opportunity might include:

- Universal and portable benefits for all workers, including Social Security, paid leave, and unemployment insurance;
- Universal and portable access to healthcare;
- Equal access to child support services, such as pre-K, child care, or universal child credits;[6]
- Fair and equal access to financial services;[7] and

[6] *See, e.g.*, Clio Chang, *Why Democrats Must Embrace a Universal Child Allowance*, New Republic (Mar. 21, 2016), https://newrepublic.com/article/131784/democrats-must-embrace-universal-child-allowance.
[7] *See* Mehrsa Baradaran, How the Other Half Banks (2015) (describing the possibility for a "public option" in banking). *See also* K. Sabeel Rahman, Democracy Against Domination (2016).
[8] *See, e.g.*, Matthew Desmond, Evicted: Poverty and Profit in the American City (2016).

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- Fair and equal access to affordable housing.[8]

And indeed, we already have a recent, high-profile example of a modern rediscovery of this ethic of publicly providing necessities that unlock and enable downstream opportunities and wellbeing: the healthcare reform debate. Healthcare is a perfect example of the kind of social public good described above. Access to healthcare has massive downstream effects expanding individual wellbeing and enabling a wider array of opportunities and life pathways as individuals become freer to change jobs, start businesses, or pursue new opportunities without the risk of losing healthcare.

III. Ensuring Prioritized Programs Are Truly Accessible

Next, we must consider how to provide these goods in a more universal and equally accessible way for all. When we think about how to provide these necessities, we should consider several key design principles to ensure that access is truly universal and equal. This might involve direct public provision, or some combination of public oversight and private provision.

Past generations of progressive reformers have envisioned three parallel strategies to ensure equal and universal access to these necessities.[11] First, some services were publicly provided by the government directly. Indeed, this was the era of municipalization, where city governments began to experiment with direct provision of utilities and key services. Second, these services might be provided by imposing public obligations on private firms—a kind of "utility" model of regulation imposing "common carrier" and nondiscrimination obligations, requiring these firms to serve all comers and avoid discrimination, and to offer fair and relatively accessible pricing. Third, some state chartered providers might be created not exclusively, but rather as "public options" competing with other private providers. A public option would provide these goods and services on a non-profit basis, and comporting with public values such as nondiscrimination and serving marginalized constituencies. Meanwhile, because the public option competes in the marketplace, it also facilitates market-based competitive modes of contestation. The public option offers a "plain vanilla" version of the service that creates price and service pressures against which other market actors have to compete.[9]

The healthcare debate once again provides a compelling example. Universal access to care removes a bottleneck narrowing these life choices. It also frees individuals from the exploitation and dominance of health insurance providers who can impose unfair terms by virtue of controlling and limiting access to a vital necessity. Such universal access might be achieved through direct public provision—such as through proposals to expand Medicare to

[9] *See* Rahman, *supra* note 4.

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allow all citizens to buy in—or through public regulation of private providers—such as the Affordable Care Act's attempt to expand access to the private health insurance market via a combination of minimum standards for health insurance plans, regulatory oversight, and subsidies. Or access might be ensured by a hybrid approach where private insurers compete alongside a "public option".

Indeed, as we rethink the social contract for the 21st century, we should consider designing the structure of these critical goods and services with an eye towards universal access, prioritizing the following principles:[10]

- Portability – access to these goods should not be contingent on work status;
- Universality – access to these goods should be available to all, not means-tested;
- Visibility and simplicity – these goods should be easy to sign up for, with minimal barriers to uptake;
- Public control and accountability – whether through direct public provision, the use of a public option, or stringent utility-style regulatory oversight, these goods must be policed to ensure they are fair, accessible, and not exploitative or unduly restrictive.

This approach to conceptualizing equality and public goods does not offer a blueprint for what policies to implement, but it does offer an important framework for thinking through what a 21st century approach to welfare and poverty policy, social policy, the social contract, and social insurance might look like. In an era of deepening inequalities and widespread economic insecurity, it is critical that we invest in those public goods and services that can serve as a new infrastructure for opportunity, providing economic security and stability, and enabling more individuals and families to pursue a wider range of opportunities and life possibilities. This means zeroing in on those goods and services most critical to unlocking such opportunities and preventing the inverse risks of bottlenecks and exploitation. It also means contemplating a more public-serving approach to designing the delivery of and access to these services, ensuring they are truly universal and accessible to all, through a combination of public provision and public oversight. Inequality remains the central economic challenge of this century. Investing in public goods to unlock and enable genuine equality of opportunity offers a framework for progressive economic policy that is up to the challenge.

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[10] For a modern recovery of the public option idea, see Adam Levitin & Susan Wachter, *The Public Option in Housing Finance* (Geo. Pub. Law & Legal Theory Working Paper Series, Paper No. 1966550, 2012), http://ssrn.com/abstract=1966550. *See also* Robert Hockett & Saule Omarova, *"Private" Means to "Public" Ends: Governments as Market Actors* (Cornell Legal Study Research Paper No. 13-84, 2013), http://ssrn.com/abstract=2222444.

[11] On the creation of portable and universal benefits decoupled from full-time work, see Nick Hanauer & David Rolf, *Shared Security, Shared Growth*, 37 Democracy (2015), democracy journal.org/magazine/37/shared-security-shared-growth/. *See also* David Rolf, Shelby Clark, & Corrie Watterson Bryant, *Portable Benefits in the 21st Century*, Aspen Inst. (2016), https://assets.aspeninstitute.org/content/uploads/files/content/upload/Portable_Benefits_final.pdf; *Common Ground for Independent Workers: Principles for Delivering a Stable and Flexible Safety Net for All Types of Work*, Medium (Nov. 10, 2015), https://medium.com/the-wtf-economy/common-ground-for-independent-workers-83f3fbcf548f#.4a6bp4nx5; Shayna Strom & Mark Schmitt, *Protecting Workers in a Patchwork Economy*, Century Found. (Apr. 7, 2016), https://tcf.org/content/report/protecting-workers-patchwork-economy/.

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Three Recommendations for the Next Administration to Improve Access to Justice

Paul Bland

The civil justice system plays a critical role in protecting Americans and enforcing a large number of very important laws that form the "rules of the road" (as President Obama has described them) to ensure a fairer playing field. Unfortunately, our civil justice system has been under a tireless assault for decades. Corporate America has regularly and repeatedly sought to gut the enforcement of environmental, securities, antitrust, consumer protection and civil rights laws. Billions of dollars have been spent on lobbying, public misinformation campaigns, state judicial elections, and a host of other activities consciously aimed at influencing the attitudes of the public and decision makers against the right to a jury trial.

The next administration should push back against this assault on the civil justice system and push to expand access to justice. This principal should animate the next administration's legislative agenda, regulatory initiatives and judicial appointments. There are three specific issues that need to be addressed and provide opportunity for meaningful reform. These include: ending forced arbitration for consumer, worker, medical, securities and antitrust claims; reining in overly broad federal preemption of state laws protecting consumers and others; and expanding legal services and public defender services for low income people.

Three Recommendations for the Next Administration to Improve Access to Justice

Paul Bland*

The civil justice system plays a critical role in protecting Americans and enforcing a large number of very important laws that form the "rules of the road" (as President Obama has described them) to ensure a fairer playing field. The system is designed to compensate people who have been injured or cheated; to deter illegal corporate behavior; and to guarantee important civil rights, such as the right to be free of discrimination based upon race or gender. But that's not all. Additionally, the system's environmental laws are essential to protecting Americans' water and air and to ensure that we do not destroy the sustainability of our earth; consumer protection laws protect Americans against predatory lending, bait-and-switches, false advertising and numerous other abusive practices; securities laws protect the investment markets from fraud; antitrust laws fight against anti-competitive behavior that raises prices and concentrates power excessively; and on and on.

Unfortunately, our civil justice system has been under a tireless assault for decades. Ever since the famous "Powell Memo" of the early 1970s (a reaction against the passage of the first environmental and consumer laws, which called for a corporate counter-attack against them),[1] there has been a concerted campaign attacking the court system. Corporate America has regularly and repeatedly sought to gut the enforcement of environmental, securities, antitrust, consumer protection, and civil rights laws. Billions of dollars have been spent on lobbying, public misinformation campaigns, state judicial elections, and a host of other activities consciously aimed at influencing the attitudes of the public and decision makers against the right to a jury trial—that constitutional guarantee that was so important to our Founding Fathers, but is now defamed and caricatured as a cause of "jackpot justice," supposedly due to ignorant, prejudiced people playing "reverse Robin Hood." This campaign has also sought to demean and mischaracterize "trial lawyers," though curiously no one runs ads in movie theaters or on billboards attacking lawyers who represent well-heeled corporations that want to avoid any accountability for polluting the environment; it just seems to be lawyers who represent individuals against corporations who are portrayed and lampooned as greedy sharks.

This politicization of the judiciary has been accompanied by an intense pressure for the selection or election of judges who have strong deregulatory impulses and a deep suspicion of litigation. And over the years, the majority of justices on the U.S. Supreme Court became increasingly conservative, looking to place constraints on class actions, narrowing the doctrine of when a citizen has standing to bring a lawsuit in order to close courthouse doors, and placing a heavy emphasis on ordering America's economy through private contracts rather than statutory or common laws. As an example of the notion that private contracts

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[1] Memorandum from Lewis F. Powell, Jr. to Eugene B. Sydnor, Jr., Chairman, Educ. Comm., U.S. Chamber of Commerce (Aug. 23, 1971), http://law2.wlu.edu/deptimages/Powell%20Archives/PowellMemorandumTypescript.pdf.

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(invariably drafted by the stronger party and rarely, if ever, read by the individuals subject to them) are replacing positive law, we need to look no further than the change in how insurers and HMOs are "regulated" today as compared to 40 years ago. Rather than having the relationship between an individual and her health plan governed by historic doctrines of fraud or negligence, those relationships are now largely governed by the Employee Retirement Income Security Act (ERISA), which provides far weaker remedies than insureds had prior to the Act's passage (an ironic fact, given that the Act was passed with the strong support of unions and progressive advocates for workers). And in 2013, in the *Italian Colors Restaurant v. American Express* case, five members of the U.S. Supreme Court held that small businesses had waived their right to any meaningful remedy under the antitrust laws in favor of a forced arbitration clause, with the arbitration clause being enforced even though it was undisputed that the clause would require businesses with claims of $5,000 to $15,000 to each spend $500,000 to $1 million to pursue their rights under the antitrust laws.[2] The next administration should push back against this assault on the civil justice system, and push to expand access to justice. This principal should animate the next administration's legislative agenda, regulatory initiatives, and judicial appointments. This brief essay will suggest three specific issues that need to be addressed:

1. End forced arbitration for consumer, worker, medical, securities, and antitrust claims;
2. Rein in overly broad federal preemption of state laws protecting consumers and others; and
3. Expand legal services and public defender services for low income people.

I. Forced Arbitration

Forced arbitration has been scrutinized by numerous journalists, academics, and policymakers, and there is an enormous literature detailing its failings. This essay will focus on just four issues: (a) arbitration companies have powerful incentives to favor the corporations that select them through their standard form contracts; (b) few individuals understand that they are supposedly voluntarily "choosing" arbitration, as fine print contracts slip these provisions by people in language that they do not notice or understand; (c) forced arbitration is secretive and not transparent; and (d) arbitration has the effect of suppressing claims and making cases simply disappear.

Arbitrators are more likely to have a pro-corporate defense attitude than are judges or juries. In the employment setting, extensive empirical evidence demonstrates that workers are less likely to win cases in arbitration than they would be in court. Moreover, when workers *do* prevail in arbitration, the average award is only 20% to 25% of what the average award is in court.[3] These results are not surprising, given the incentives that govern arbitration.

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[2] Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013).

[3] Katherine Stone & Alexander Colvin, *The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of Their Rights*, Econ. Pol'y Inst. 21 (Dec. 7, 2015), http://www.epi.org/files/2015/arbitration-epidemic.pdf ("[T]he average damages in federal court are nearly four times as large and in state court well over five times as large as in mandatory arbitration.").

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Arbitrators charge by the hour, and a large number of people are competing for this work. Corporations draft the fine print contracts that consumers and employees sign, and thus corporations select the private arbitration companies that will be charging fees (and whose arbitrators will be charging high hourly rates). There are also numerous examples of arbitrators being blackballed if they rule in favor of individuals and against corporate defendants, and not being selected as arbitrators again.[4] Accordingly, the private companies who want to serve as arbitrators and who want to be selected by corporations need to have pools of arbitrators who are largely congenial to corporate defendants, and need to steer their systems in favor of corporations.

The supporters of forced arbitration and class action bans like to talk about this as a "voluntary choice" that consumers make. This is rarely true. Almost no consumers meaningfully "choose" to enter into arbitration clauses. These fine-print, legalese documents are slipped by consumers in ways that ensure they will never notice them. The Consumer Financial Protection Bureau's (CFPB) extensive study of forced arbitration in lending concluded that "[c]onsumer beliefs about credit card dispute resolution rights bear little to no relation to the dispute resolution provisions of their credit card contracts. Most consumers whose agreements contain arbitration clauses wrongly believe that they can participate in class actions."[5]

Forced arbitration is a far less transparent system than the civil justice system. Reporters are generally not allowed to be present in arbitrations and proceedings are closed to the public. The outcomes of arbitrations are very hard to determine for most cases, and the facts presented to arbitrators are very hard to track down. Many arbitration clauses or arbitration companies require even stricter secrecy, imposing gag rules on consumers and employees. Finally, a broad body of empirical data demonstrates that only a tiny number of consumers actually file claims in arbitration, as opposed to the number who pursue claims if they are allowed access to the courts. As the CFPB study conclusively demonstrates, the principal real world impact of arbitration clauses is to suppress claims, and make cases simply disappear.

Forced arbitration is unfair in the context of disputes between individuals and large powerful parties. The next administration should end it. The next administration should push for the passage of the Arbitration Fairness Act, introduced by Sen. Al Franken and Rep. Hank Johnson. It should appoint judges who will not reflexively expand the power for corporations to replace our system of laws with contracts drafted by the stronger party. It should look for opportunities to address this serious problem through administrative regulations, such as having the Centers for Medicare and Medicaid Services prohibit

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[4] Robert Berner, *Banks vs. Consumers (Guess Who Wins)*, Bloomberg Bus. Wk. (June 5, 2008), http://www.bloomberg.com/news/articles/2008-06-04/banks-vs-dot-consumers-guess-who-wins.

[5] *Arbitration Study: Report to Congress Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act Section* 1028(a), Consumer Fin. Protection Bureau 11 (Mar. 2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

nursing homes and similar entities from receiving any payments from Medicaid or Medicare if they place arbitration clauses in admission agreements.

Moreover, the current leadership of the CFPB has taken a huge step to address one of the most egregious abuses surrounding forced arbitration. The next administration should commit to appointing equally strong leaders who will preserve and build upon those improvements, rather than allow banking interests to roll them back.

II. Sweeping Preemption

Federal laws protecting consumers, workers, the environment, and other important causes should serve as a floor and not a ceiling for those protections. One particularly egregious example in which this is not currently the case comes from the banking and lending industry. Most states have (and have had) statutes that give consumers private rights of action that offer far more generous prospects for holding lenders responsible for predatory lending and deceptive practices than any equivalent federal laws. Unfortunately for many consumers, there have been a great many instances where federal courts have held that consumer lawsuits that would have been likely to have reined in abusive and unfair banking practices were preempted by the federal banking laws. This was particularly true in the 2000s. As many Members of Congress noted when they passed the Dodd-Frank Wall Street Reform and Consumer Protection Act, the widespread problem of federal courts throwing out state court suits based on state consumer protection laws in favor of federal law was a substantial factor in the epidemic of fraud and predatory lending that led to the crash of the economy in 2008 and millions of foreclosures.[6]

The problem was greatly exacerbated by the fact that the leading federal agencies regulating banking in the U.S. prior to Dodd-Frank were badly captured by the lending industry, and worked far more aggressively to protect the industry than they did to protect consumers. When states attempted to take steps to protect consumers, federal agencies intervened to block those cases.

There are numerous examples of similar problems in areas of worker and environmental protection, and consumer protection outside of the lending sphere. The next administration should act decisively to ensure that federal law only overrides state laws when it is necessary to provide greater (rather than weaker) protections for workers, consumers and the environment. There are some federal statutes that embody overly broad and unwise rules of federal preemption that should be amended (the sweeping language of the ERISA, for example, has been interpreted to strip insureds and workers of very important state law rights). In other cases, federal statutes do not necessarily require unfair or unwise

[6] S. Rep. No. 111-176, at 175 (Apr. 30, 2010). In addition, two years before Dodd-Frank was passed, two academics who were very influential with the Congressional supporters of Dodd-Frank wrote a widely cited article detailing how federal banking agencies had affirmatively harmed consumers through overly aggressive preemption of state consumer protection laws. *See* Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. Pa. L. Rev. 1, 90, 92–3 (2008).

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preemption, but have been interpreted harmfully by federal agencies (sometimes agencies with overly close relationships to the industries they are charged with regulating), and agency rulemakings should commence to correct the problem.

III. Legal Services and Public Defenders

For millions of Americans, a wide range of crucial legal services are unattainable. While private lawyers who represent consumers and workers are willing to handle many types of cases on a contingency basis (meaning that the lawyers do not charge the clients unless and until they win the case), there are a number of legal needs (such as family law services, or cases involving an entitlement to public benefits) which the private bar is not able to handle. Accordingly, for many important rights, legal services lawyers offer the only avenue to access to justice for low income persons.

Similarly, even a casual reader of the news should be aware that the public defenders of America are chronically, consistently, badly underfunded. Many criminal defense lawyers for indigent persons have absurdly huge case dockets, and despite remarkable efforts often struggle to provide an appropriate defense. It is an enormous injustice to have many people jailed—sometimes for the rest of their lives—without giving them access to a fair and adequately funded legal defense. Far too many states have underfunded their public defender corps in ways that deprive low income persons of a fair defense. The next administration must end this practice by fighting for greatly expanded funding for legal services. The Justice Department should investigate state and local governments which underfund indigent criminal defense to the point that it threatens the civil rights of the accused. And the President needs to personally raise the salience of this issue by speaking of it in the context of the need for civil and criminal justice reform.

IV. Conclusion

Far too often, access to justice in America has become something that is available to corporations and the very well heeled, and has become out of reach for many other Americans. The next administration should make it a top priority to address this problem with energy and commitment.

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Enhancing Trust and Legitimacy of Policing

Tracey Meares

A crisis in policing that drew national attention three years ago with the death of teenager Michael Brown in Ferguson, Missouri at the hands of a police officer, has sparked a national conversation in which we are asking ourselves, "What are police for;" "How should policing agencies carry out their jobs;" and "What role should citizens play in structuring that role and holding police accountable to the goals and projects that citizens nominate?" The answers to these questions revolve fundamentally around changing the narrative of policing from one centered in the concept of "public safety" to one centered in the concept of "public security."

There are three policies that the federal government should encourage state and local law enforcement to adopt that will help us to begin moving in that direction. First, law enforcement agencies must commit to protecting all lives as a central part of their mission, which, among other things, requires meaningful review of police use of force by a review board composed of both police officials and civilians. Second, law enforcement agencies must regularly train police officers in the ideas of procedural justice and legitimacy and not simply aggressive police tactics aimed at crime reduction. Finally, law enforcement agencies must better reflect the communities they serve, including addressing historic gender disparities in policing by hiring more women.

Enhancing Trust and Legitimacy of Policing

Tracey Meares*

Almost weekly this summer it seemed that the news media reported on an incident in which police killed or shot a civilian—often unarmed and a person of color. Less frequently, there was the shocking news of police officers being targeted and killed by snipers. These tragic events have shaped our understanding of the current crisis in policing that began three years ago with the death of teenager Michael Brown in Ferguson, Missouri at the hands of a police officer. A national conversation was sparked then, which has continued and grown. We are asking ourselves, "What are police for;" "How should policing agencies carry out their jobs;" and "What role should citizens play in structuring that role and holding police accountable to the goals and projects that citizens nominate?" The answers to these questions revolve fundamentally around changing the narrative of policing from one centered in the concept of "public safety" to one centered in the concept of "public security." And there are three policy recommendations that will help us move in that direction.

The idea of public safety emphasizes the role of police in keeping people safe from one another. It might even promote aggressive policing for the purpose of averting private predation. The idea of public security on the other hand does not lose sight of the role of law enforcement in keeping crime down; however, public security recognizes that people do not feel safe in their communities when they are subject to government overreach—especially government overreach carried out in the name of the pursuit of public safety. To put it simply, crime reduction cannot be its own warrant. To achieve public security, legal authorities and especially policing agencies must commit to building trust among citizens.

To that end, the President's Task Force on 21st Century Policing[1] outlined a number of recommendations—59 to be exact—designed to enhance public trust and legitimacy of policing agencies while also insuring public safety.[2] The foundation of those recommendations is the first one, which exhorts agencies to make legitimacy and procedural justice central to the mission of policing.[3]

Researchers have studied public evaluations of police officers, judges, political leaders, managers, and teachers, and the findings—which are the bases for procedural justice—are consistent; conclusions regarding legitimacy are tied more closely to judgments of the

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[1] I served as a member of this task force, which President Obama commissioned "to identify best policing practices and offer recommendations on how those practices can promote effective crime reduction while building public trust." To this end, "the task force conducted seven public listening sessions across the country and received testimony and recommendations from a wide range of community and faith leaders, law enforcement officers, academics, and others to ensure its recommendations would be informed by a diverse range of voices." President's Task Force on 21st Century Policing, *Final Report of the President's Task Force on 21st Century Policing*, Dep't of Justice iii (May 2015), http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf [hereinafter Final Report].

[2] *Id*. at iii–iv.

[3] *See id.* at 11.

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fairness of *actions* than to evaluations of the fairness or effectiveness of *outcomes*.[4] In the social psychological literature, judgments regarding fairness depend primarily upon a model that has four dimensions.[5] First, participation is an important element. People report higher levels of satisfaction in encounters with authorities when they have an opportunity to explain their situation and perspective on it. Second, people care a great deal about the fairness of decision-making by authorities. That is, they look to indicia of decision-maker neutrality, objectivity and factuality of decision-making, consistency in decision-making, and transparency. Third, people care a great deal about how they are treated by organization leaders. Specifically, people desire to be treated with dignity, with respect for their rights and with politeness. Fourth, in their interactions with authorities, people want to believe that authorities are acting out of a sense of benevolence toward them. That is, people attempt to discern why authorities are acting the way they do by assessing how they are acting. They want to trust that the motivations of the authorities are sincere, benevolent and well-intentioned—what we call motive-based trust. Basically, members of the public want to believe that the authority they are dealing with—let's say a police officer—believes that they count. And the public makes this assessment by evaluating how the police officer treats them.

This dynamic is inherently relational, not instrumental. Rather than being primarily concerned with outcomes and individual maximization of utility, legitimacy-based compliance is centered upon individual identity. One implication of this is that when police generate good feelings in their everyday contacts, it turns out people also are motivated to help them fight crime.[6] And we can expect all of this to lead to lower crime rates in communities. Additionally, safer communities are not the only important result of law enforcement authorities and other representatives of government treating people with dignity and fairness. Another potential result is healthy and democratic communities. Finally, research shows that this approach leads to policing that is better and healthier for cops on the street.

Commitment to procedural justice principles requires cultural change, and, of course such cultural change requires policy and organizational change. Here are three on which to focus.

I. Make the Commitment to Protecting *All* Lives Central to the Mission of Policing

In the United Kingdom it is quite rare for a person to lose their life at the hand of a police officer. In the United States it is not at all rare. Even while current legal structures may often

[4] *See* Tom R. Tyler, *Enhancing Police Legitimacy*, 593 The Annals 84, 91 (2004) (making this point and collecting various studies).

[5] *See generally*, Steven L. Blader & Tom R. Tyler, *A Four-Component Model of Procedural Justice: Defining the Meaning of a "Fair Process,"* 29 Personality & Soc. Psychol. Bull. 7447 (2003) (finding support for an hypothesized four-component model of procedural justice wherein people are influenced by two aspects of formal procedures of the group—those that indicate quality of decision-making and those that relate to quality of treatment, and additionally people are separately influenced by two aspects of authorities with whom they deal—the quality of the decisions authorities make and the quality of treatment they receive from authorities); E. Allen Lind & Tom R. Tyler, The Social Psychology of Procedural Justice (1988); Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, 25 Advances Experimental Soc. Psychol. 115, 158–59 (1992).

[6] Tom R. Tyler, Why People Cooperate (2011); Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 Ohio St. J. Crim L. 231 (2008).

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find that a police officer's action to take someone's life ultimately is justifiable, that does not mean we should unreflectively accept that such a death is optimal. As I noted in a recent op-ed in *The Washington Post*, "ask whether the Federal Aviation Administration would be satisfied by the statement that a plane crash that took a single life was the result of a 'perfect storm' of circumstances,"[7] which was the conclusion that former Cuyahoga County District Attorney Timothy McGinty reached in deciding not to pursue criminal charges against the officers who shot and killed twelve-year-old Tamir Rice.[8] In the case of a plane crash, we would expect every aspect of the machine and those operating it to be examined, questioned and overhauled to ensure that the incident did not occur again. After all, safety is the cornerstone of the FAA's mission—safety for everybody, not just pilots and other crew members. Note, though, that the "perfect storm" response is a common one after a police shooting, and too many accept this response without reflection. A real commitment to regular sentinel review of police shootings and other use of force actions (the policy change) will hopefully lead to a culture change—the idea that we can all decide that too many people are dying without having to find fault in every situation in which loss of life occurs. The President's Task Force on 21st Century Policing recommended that law enforcement agencies conduct sentinel review by establishing Serious Incident Review Boards including police and civilians to review cases involving officer-involved shootings.[9] Although the National Institute of Justice (NIJ) has already put out a Request for Proposals to encourage and test the benefits of sentinel review,[10] the new administration could further support sentinel review by providing federal funding to jurisdictions seeking to carry it out.

II. Make the Commitment to Regularly Train Police Officers in the Ideas of Procedural Justice and Legitimacy

It bears repeating: crime reduction is not self-justifying. Too many interactions between police and citizens occur because police are engaged in the policing of low-level offenses ostensibly for the purpose of crime reduction. The President's Task Force on which I served noted, however, that aggressive police action can have the counterproductive result of destroying the very reservoir of trust on which communities and policing agencies depend to function properly.[11] As I have previously noted, "[i]t is shortsighted to credit the benefits that groups such as African Americans receive from plummeting crime rates without acknowledging the costs to them in terms of enforcement. Research is clear that how people are treated is central to how they view police and other legal authorities—even

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[7] Tracey L. Meares, *Policing Should Move Beyond Crime Reduction*, Wash. Post (July 20, 2016), https://www.washingtonpost.com/opinions/policing-should-move-beyond-crime-reduction/2016/07/20/f561df64-4cf3-11e6-aa14-e0c1087f7583_story.html.

[8] *See* Timothy Williams & Mitch Smith, *Cleveland Officer Will Not Face Charges in Tamir Rice Shooting Death*, N.Y. Times (Dec. 28, 2015), http://www.nytimes.com/2015/12/29/us/tamir-rice-police-shootiing-cleveland.html?_r=0.

[9] *Final Report*, *supra* note 1, at 22 ("2.2.6 Action Item: Law Enforcement agencies should establish a Serious Incident Review Board comprising sworn staff and community members to review cases involving officer-involved shootings and other serious incidents that have the potential to damage community trust or confidence in the agency. The purpose of this board should be to identify any administrative, supervisory, training, tactical, or police issues that need to be addressed.").

[10] Nat'l Inst. of Justice, *NIJ's Sentinel Events Initiative*, Dep't of Justice (June 17, 2016), http://www.nij.gov/topics/justice-system/Pages/sentinel-events.aspx (detailing the NIJ's efforts to investigate and fund further research into the feasibility of sentinel event review).

[11] *Final Report, supra* note 1.

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more than whether police are effective at reducing crime."[12] It is possible to teach police officers about the theories of trust building through procedural justice. My colleague, Tom Tyler and I have worked with the Chicago Police Department to develop such training, and that training has been delivered to thousands of officers in Chicago and across the country.[13] As *The New York Times* recently reported,[14] there is new evidence of its effectiveness. For instance, the President's Task Force on 21st Century Policing outlines a number of actions that state and local agencies can take to insure that agency staffs are appropriately trained and educated.[15] Some states already have adopted legislation to require this training or have modified Peace Officer and Standards Training (POST) requirements, which set minimum selection and training standards for a state's law enforcement agencies, to adopt training that includes concepts of procedural justice. For its part, the Department of Justice through Bureau of Justice Assistant initiatives could further incentivize state and localities to adopt these trainings.

III. Help Policing Agencies to Hire More Women

While policing agencies have become more diverse over time, one area that has remained persistently impervious to change is the percentage of women who work in the profession. The numbers of women in law enforcement appear to top out at around 12.7%, well below the representation of women in the general population.[16] Our police forces should include more women because our forces should reflect the communities that they serve. There is also evidence that increasing the gender diversity of our forces will have beneficial effects along key metrics, such as the levels of force used in interactions.[17] During my service on the President's Task Force on 21st Century Policing, we heard testimony from female police leaders who noted that some professions organized around shift work seemed to be more open to women than does policing. One such profession is emergency room nursing. Emergency room nursing is a high-stakes, stressful job not unlike policing. The work can be organized in ways that allow nurses to work part time and still be available for other kinds of work—especially caregiving. While caregiving is not limited only to women, it was clear to Task Force members that if the profession of policing were more open to part-time work, it likely would be easier for more women to engage in the profession just as they do

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[12] Meares, *supra* note 7.

[13] *See* Daniela Gilbert et al., *Procedural Justice and Police Legitimacy: Using Training as a Foundation for Strengthening Community-Police Relationships*, Cal. Partnership for Safe Communities 3–4 (2015), https://www.bja.gov/bwc/pdfs/Procedural-Justice-and-Police-Legitimacy-Paper-CPSC-Feb-2015.pdf.

[14] *See* Tina Rosenberg, *Barriers to Reforming Police Practices*, N.Y. Times (Aug. 2, 2016), http://www.nytimes.com/2016/08/02/opinion/barriers-to-reforming-police-practices.html; Tina Rosenberg, *A Strategy To Build Police-Citizen Trust*, N.Y. Times (July 26, 2016), http://www.nytimes.com/2016/07/26/opinion/a-strategy-to-build-police-citizen-trust.html?_r=2.

[15] *Final Report, supra* note 1, at 51–60.

[16] *See* Kim Lonsway et al., *Equality Denied: The Status of Women in Policing*: 2001, Nat'l Ctr. for Women & Policing 4 (2002), http://www.womenandpolicing.org/PDF/2002_Status_Report.pdf ("Women currently comprise 12.7% of all sworn law enforcement positions among large municipal, county, and state law enforcement agencies in the United States with 100 or more sworn officers. . . . In small and rural police agencies, women hold only 8.1% of all sworn positions. Women of color are virtually absent, with a representation of 1.2%.").

[17] Drake Baer, *If You Want Less Police Violence, Hire More Female Cops*, N.Y. Mag. (July 15, 2016), http://nymag.com/scienceofus/2016/07/more-female-cops-less-police-violence.html. It should go without saying that the gender of any given officer is not dispositive of their proclivity to use force, an example being the shooting of Terence Crutcher in Tulsa last month by Officer Betty Shelby.

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in nursing, allowing police departments to take advantage of the benefits that a more gender-balanced police force can offer.

These are three quick action ideas that build upon work already being done at the federal, state, and local levels. Of course, much more expansive and deeper work needs to be done in this area. We have begun the important work of changing the narrative. We simply need to make good on its promise.

Considering Religious Accommodation

Douglas NeJaime

Religious liberty has emerged as a powerful objection to same-sex marriage and LGBT equality and to abortion and contraception. Unable to maintain prohibitions on abortion, contraception, and same-sex marriage, opponents have invoked religious liberty to continue to oppose these practices. The accommodation of the religious liberty claims in this context may burden those whose conduct law has only recently come to protect.

Complicity-based conscience claims, claims of those who object to indirectly participating in purportedly sinful conduct, raise particular concerns for an approach to religious accommodation that seeks to mediate the impact of accommodation on third parties. Religious exemptions from laws of general application should be limited to circumstances in which the exemptions do not inflict targeted material or dignitary harms on other citizens or obstruct the achievement of major social goals. If provided, religious accommodations should be structured so as to shield other citizens from material and dignitary harm. Where this is not feasible or practical, religious accommodation is likely inappropriate.

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Considering Religious Accommodation

Douglas NeJaime*

Religious liberty has emerged as a powerful objection to same-sex marriage and LGBT equality. Indeed, the dissenting opinions in *Obergefell v. Hodges* warned of coming conflicts over religious exemption. Since *Obergefell*, those opposed to same-sex marriage have sought to pass expansive religious exemption laws that would allow government officials as well as secular for-profit businesses to refuse to provide goods and services to same-sex couples.

Religious liberty has also emerged as a powerful objection to abortion and contraception. In *Burwell v. Hobby Lobby Stores*, employers challenged the Affordable Care Act's contraceptive coverage requirement, asserting that covering contraception in health insurance benefits would make the employers complicit in employees' use of contraceptives the employers deemed "abortifacients." Religious objections to the ACA continued in *Zubik v. Burwell*, in which religiously affiliated nonprofits objected to the government's framework for accommodating those with religious objections to providing contraceptive coverage in insurance. Rejecting the government's accommodation, which required the employers' to notify the government of their objection, these organizations asserted that such notice would make them complicit in their employees receiving contraception through alternative means.

These religious liberty claims are part of a broader political dynamic. When opponents have been unable to maintain prohibitions on abortion, contraception, and same-sex marriage, they have invoked religious liberty to continue to oppose the newly protected practices. As Ryan Anderson put it in the *National Review* before *Obergefell*: "Whatever happens at the Court will cause less damage if we . . . highlight the importance of religious liberty. Even if the Court were to one day redefine marriage, governmental recognition of same-sex relationships as marriage need not and should not require any third party to recognize a same-sex relationship as a marriage." In turning to claims of religious liberty, opponents shift from speaking as a majority seeking to enforce traditional morality through generally applicable laws, to speaking as a minority seeking exemptions from generally applicable laws that depart from traditional morality. Indeed, those advocating broad religious exemptions appeal to pluralism and nondiscrimination as a basis on which to restrict and limit the recently protected rights of others.

How might law and policy approach the claims to religious accommodation asserted in today's culture-war conflicts?

I. Third-Party Harm Is an Important Limit on Religious Accommodation

Religious liberty claims often do not ask one group of citizens to bear the costs of another's

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religious exercise. In both statutory and constitutional contexts, when religious minorities have sought exemptions based on practices not considered by lawmakers when they adopted the challenged laws, the costs of accommodating their claims have been minimal and spread across the society. For instance, in *Holt v. Hobbs*, the U.S. Supreme Court granted a religious accommodation to a claimant who challenged a rule prohibiting prisoners from wearing beards. Justice Ginsburg pointed out in her concurrence that "accommodating petitioner's religious belief in this case would not detrimentally affect others who do not share petitioner's belief." Similarly, in the constitutional free exercise context, when the Court accommodated Saturday Sabbath observers denied unemployment benefits, the burden of the accommodation did not fall on an identified group of citizens.

In contrast, the religious liberty claims proliferating today seek to exempt a person or institution from a legal obligation to another individual—for instance, from duties imposed by healthcare or antidiscrimination law. For this reason, claims to religious accommodation asserted in conflicts over LGBT equality and reproductive rights are prone to inflict targeted harms on third parties and thus raise concerns less commonly presented by traditional claims for religious exemption.

Concerns about the third-party harms of accommodation are especially acute in culture-war contexts. Claims for religious exemption from laws concerning healthcare and marriage emerge from long-running debate over society-wide norms. Because large, mobilized groups are urged to assert these claims, the number of claims may be significant. Because the claims relate to controversial sexual norms, they have powerful meanings not only for those asserting them but also for those whose conduct is condemned. Accordingly, accommodating the religious liberty claims asserted in conflicts over marriage and healthcare can impose material and dignitary harms on other citizens.

Religious exemptions from laws of general application should be limited to circumstances in which the exemptions do not inflict targeted material or dignitary harms on other citizens or obstruct the achievement of major social goals. If provided, religious accommodations should be structured so as to shield other citizens from material and dignitary harm. Where this is not feasible or practical, religious accommodation is likely inappropriate.

This approach finds ample support in constitutional and statutory law, which limits religious accommodations that would inflict targeted harm on third parties. Concern with third-party harm is also evident in the Court's controversial *Hobby Lobby* decision. Even as the Court recognized exemption claims in far-reaching ways and expansively interpreted the Religious Freedom Restoration Act (RFRA), it also recognized third-party harm as a limit on religious accommodation. Because the government could provide Hobby Lobby's employees contraception without involving their employer, the majority granted the exemption on the assumption that "[t]he effect of the . . . accommodation on the women employed by Hobby Lobby . . . would be precisely zero." Justice Kennedy's concurring opinion pointedly expressed concern with the impact of accommodation on those women protected by the

ACA's provisions, explaining that the accommodation of religious liberty may not "unduly restrict other persons, such as employees, in protecting their own interests."

The *Hobby Lobby* Court was mistaken in its assumption that the effect of accommodation would be "precisely zero," but its reasoning nonetheless shows how third-party harm figures in analysis under RFRA. Even though RFRA does not expressly speak in the register of third-party harm, such harm matters in determining whether unobstructed enforcement of the law is, in the language of RFRA, the "least restrictive means" of furthering the government's "compelling" ends. When government enacts a law—such as a healthcare law or an antidiscrimination law—it often seeks to further both individual and societal interests, and these interests often have both material and expressive dimensions. If the government's interests are compelling and if granting an accommodation would impose material or dignitary harm on the individuals protected by the law or otherwise undermine the societal interests the law promotes, then unimpaired enforcement of the law is likely the least restrictive means of furthering the government's compelling ends.

II. Complicity-Based Conscience Claims, Which Have Proliferated in Culture-War Conflicts, Pose Special Concerns with Third-Party Harm and Thus Warrant Special Scrutiny

Attention to third-party harm raises special concerns with a distinctive form of conscience claim proliferating in today's culture wars—complicity-based conscience claims. These are not the claims of those who object to directly participating in the purportedly sinful conduct—for example, those who refuse to officiate at a same-sex couple's marriage. Instead, these are the claims of those who object to indirectly participating in the purportedly sinful conduct. For example, they object to complying with laws requiring employers to provide insurance coverage for contraception or requiring businesses not to discriminate against LGBT individuals, on the grounds that compliance enables others to engage in sin or endorses that sinful conduct. For example, the employers in *Hobby Lobby* objected to complying with provisions of the healthcare law on the grounds that the law forced them to provide "insurance coverage for items that risk killing an embryo [and thereby] makes them complicit in abortion." And businesses and individuals object to providing goods and services to same-sex couples on the grounds that they would be "participating" in conduct they deem sinful.

To be clear, complicity claims are bona fide faith claims. The distinctive form of these claims, then, is relevant not to questions about sincerity or religious significance but instead to questions about the impact of accommodation on third parties. Complicity claims single out other citizens as sinners, and thus their accommodation can inflict material and dignitary harm on those other citizens.

Furthermore, the specific dynamics of complicity claims increase the likelihood of third-party harm. With complicity claims, the universe of objectors expands, from those directly

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involved to those indirectly involved in the objected-to conduct. Where complicity claims are asserted in long-running culture-war conflicts, the number of potential claimants grows. This is especially likely in regions where majorities still oppose the specific conduct, such as marriage by same-sex couples. In these settings, those otherwise protected by law may experience access barriers to goods and services.

The accommodation of complicity claims can also inflict dignitary harm. Refusals can demean and stigmatize those whose conduct is viewed as sinful. In the culture-war context in which complicity claims are arising, the social meaning of refusals is plainly understood. Even if the objector is not explicit in communicating the basis for refusal, the status-based judgment refusal entails is clear to the recipient.

Complicity-based conscience claims raise particular concerns for an approach to religious accommodation that seeks to mediate the impact of accommodation on third parties. Complicity offers a ground on which to object to efforts to mediate the impact of accommodation on third parties. For example, a healthcare provider with conscience objections to performing particular healthcare services might refer patients to alternate providers. But if that objector raises a complicity-based objection to referring the patient—claiming that such referral would make her complicit in the patient eventually engaging in the sinful conduct—she will deprive the patient of information about alternate services.

Unconstrained, complicity claims undermine the very logic of a system of religious accommodation. *Zubik* illustrates. Religiously affiliated nonprofits challenged the government's method of accommodating employers with religious objections to including contraception in the health insurance benefits they provide their employees. Claiming a violation under RFRA, the organizations asserted that the accommodation—providing notice to the government of the objection—would make them complicit in their employees receiving contraceptive insurance coverage from alternative sources. The employees, the claimants suggested, should simply obtain their own insurance coverage for contraception. The lack of concern for the women protected by the ACA's contraceptive coverage provisions is clearly at odds with the principles articulated in the *Hobby Lobby* decision—a decision that itself involved complicity-based objections. After all, in no way would granting the exemption to the religiously affiliated nonprofits result in "precisely zero" effect on the nonprofits' employees.

In *Zubik*, the Court issued a per curium order remanding the cases and expressing no view on the merits. Nonetheless, the Court provided guidance that made clear that religious accommodation must not impose costs on the third parties protected by the law—the female employees of the objecting employers. Any approach that "accommodates petitioners' religious exercise" must "ensur[e] that women covered by petitioners' health plans 'receive full and equal health coverage, including contraceptive coverage.'" Even though the Court did not weigh in on the merits, its emphasis on protecting the beneficiaries of the ACA's contraceptive coverage requirements is critical. Without this limiting principle, complicity-

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based objections could undermine the government's ability to pursue important societal interests while also administering a workable system of religious accommodation.

III. Religious Exemptions That Do Not Mediate the Impact on Other Citizens Do Not Promote Pluralism

Pluralism is often invoked as a basis on which to grant widespread religious exemptions. Indeed, many who support religious accommodation in the context of same-sex marriage argue that such accommodation will help resolve conflict by allowing citizens with different moral and religious outlooks to coexist.

But religious exemptions do not necessarily promote pluralism. Exemptions can be deployed to enforce indirectly restrictions that, for constitutional or political reasons, cannot be enforced directly. For example, while prohibitions on same-sex marriage are no longer constitutionally permissible, religious exemptions—including for complicity-based objections—can limit and restrict same-sex couples' rights. For opponents of LGBT equality, religious accommodations may facilitate, rather than settle, conflict, allowing that conflict to persist in a new form.

Religious exemptions of a genuinely pluralist kind mediate the impact of accommodation on third parties. An accommodation regime's pluralism is measured, not simply by its treatment of religious objectors, but also by its attention to other citizens who do not share the objectors' beliefs. Exemption regimes that accommodate objections to direct and indirect participation in the lawful actions of other citizens, and fail to mediate the third-party impacts of exemptions, do not promote pluralism. At times, limiting religious accommodation to protect other citizens from material and dignitary harm is the best way to provide for the welfare of a heterogeneous society.

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Modernizing Technology Law for Constitutional Surveillance Reform

Jennifer Granick

The utopian Dream of Internet Freedom will never become a reality, but it doesn't have to be a dystopian cautionary tale either. Technology has thrown the balance of power in surveillance out of alignment, and the law has either stagnated or been weakened in the face of this challenge. Constitutional values are at stake. The "reasonable expectation of privacy" protected by the Fourth Amendment is in flux. It was always a fuzzy standard and inconsistently applied. But now, there are serious questions about whether and how the doctrine will apply to the technological realities of the modern world. The Supreme Court is years away from answering fundamental questions about our government's relationship with its citizens through expanding technological usage. By building both technology and regulatory law for privacy and security, we can ensure the values behind constitutional freedoms without stripping intelligence and law enforcement of tools to protect national security. To begin this process, we must broaden warrant requirements to cover access to most electronic data, place limits on the FISA Amendments Act of 2008 to ensure citizens' data is not swept up in surveillance of foreign targets, and let privacy and encryption technology continue to evolve for use by average citizens.

Modernizing Technology Law for Constitutional Surveillance Reform

Jennifer Granick*

In the first days of the Internet, many early adopters dreamed of the utopian possibilities for the technology. The decentralized structure of the Internet was a design principle intended to make the network more robust, but it had political implications as well. The "end-to-end" structure meant people could more freely create and innovate without needing approval or having to pay to reach an audience. The Internet would be a place where anyone could say anything, and anyone who wanted to hear it would be empowered not only to listen but also to respond—a global conversation would ensue, overcoming borders, class, and government oppression. The Internet would treat censorship as damage, and route around it. It would create a new, more honest, open, and creative society.

Today, this dream seems likely to remain a fantasy. There has been liberation, but today the promise of the open Internet seems more remote. Just a few dominant global platforms structure our online experiences, providing a focus point for governments around the world to censor expression and spy on citizens—and make no mistake; surveillance is a free speech issue.[1]

In the course of providing the public with desirable products and services, global Internet companies record our messages, friendships, web searches and more. If governments are interested in knowing who we are talking to, what we are reading, or even what we think, the data has been recorded by a few large companies. Police can access privately held emails, text messages, web searches, credit card records, social networking posts – our lives are documented for anyone willing to read. What is already a Golden Age for Surveillance is about to go further. The Internet of Things, interconnected software-enabled devices like cars, televisions, and even medical devices will make our activities and bodily functions ever more tracked and collectable to companies and governments alike.

This information collection has impact for both intelligence investigations and for law enforcement. Intelligence—gathering information for situational awareness and foreign affairs—is supposed to be proactive and somewhat predictive. In service of this mission, modern surveillance is both massive and indiscriminate. Where international spying was once government versus government; today it is governments versus individuals around the globe. Spying today means opportunistically collecting information on everyone, in trying to identify threats both known and unknown, so intelligence analysts can use computers to comb through the mass looking for patterns to turn trillions of pieces of "information" into usable "intelligence." This new intelligence paradigm has trickled down to transform traditional law enforcement practices as well. For example, the Federal Bureau of

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[1] *See, e.g.*, *Global Chilling: The Impact of Mass Surveillance on International Writers*, PEN Am. Ctr. (Jan. 5, 2015), https://pen.org/sites/default/files/globalchilling_2015.pdf; Jon Penney, *Chilling Effects: Online Surveillance and Wikipedia Use*, 31 Berkeley Tech. L.J. 117 (2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2769645.

Investigation (FBI) works with the National Security Agency (NSA) to construct and use vast databases of information about foreigners and their American contacts to then search for evidence of criminal activity. And, local police use automated license plate detectors and cell site simulators to track citizens' physical location.

Only secure technology, law, and the good will of government officers stands between people and abusive surveillance or political censorship—and good will has never been enough. American history is rife with stories of improper surveillance of political heroes and harmless groups like Greenpeace, People for the Ethical Treatment of Animals, Dr. Martin Luther King, Jr. and Muhammad Ali.[2]

Privacy law is falling far short of protecting people from massive, abusive, and suspicionless surveillance. Legal protections for our most private data are both uncertain and inadequate. For example, the U.S. Department of Justice says that it can access data that is accessible to service providers without a search warrant—according to our government, your emails, buddy lists, back-ups, social network posts, and networked medical data are *not* private.[3]

This essay will discuss three Big Ideas that the new administration should urge Congress to undertake in order to move toward greater privacy protections from unfounded governmental intrusion in citizens' personal lives.

I. Require Warrants to Access Most Electronic Data

A warrant requirement is important because it means that a judge polices data access, so the government must show probable cause for snooping. It also means that the access has to be targeted, specifically describing what and who are the subjects—no fishing expeditions. The warrant requirement is a limitation on arbitrary police action *and* on mass surveillance. Today, there is very little data collection for which the law mandates a warrant.

Advocates have long been trying to get Congress to reform the 1986 Electronic Communications Privacy Act (ECPA) to make it clear that police officers cannot read your email or track your physical location without a search warrant. Currently, ECPA does not require law enforcement to obtain a warrant to access emails older than 180 days. ECPA is also not entirely clear on when more recent emails are protected by a warrant requirement, although most Internet platforms follow the Sixth Circuit's opinion in *United States v.*

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[2] *See, e.g.*, Eric Lichtblau, *F.B.I. Watched Activist Groups, New Files Show*, N.Y. Times (Dec. 20, 2005), http://www.nytimes.com/2005/12/20/politics/fbi-watched-activist-groups-new-files-show.html?_r=1; Brett Max Kaufmann, *MLK, Spying, and the "Urgency of the Moment,"* Aclu Blog (Jan. 20, 2014, 11:44 AM), www.aclu.org/blog/mlk-spying-and-urgency-moment.

[3] *See* Office of Legal Educ., Dep't of Justice, Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations 6-10 (2009), https://www.justice.gov/sites/default/files/criminal-ccips/legacy/2015/01/14/ssmanual2009.pdf; Defendant DEA's Combined Memorandum in Support of its Cross-Motion for Summary Judgment Against Plaintiffs-Intervenors and Response to Their Motion for Summary Judgment at 17-22, Oregon Prescription Drug Monitoring Program v. Drug Enforcement Administration, No. 12-02023-HA (D. Or. Aug. 20, 2013).

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Warshak which requires a warrant to access email content.[4] Several bills that would reform ECPA, including the Email Privacy Act (H.R. 699)[5] and the ECPA Amendments Act of 2015 (S. 356, H.R. 283),[6] essentially codify the warrant requirement in *Warshak* but have not been passed because surveillance proponents keep using the proposals as an opportunity to weaken existing law, either by expanding government access to email for non-criminal investigations or by reducing already weak legal protections for other categories of data like web browsing history.

Even the "ECPA reform" on the table is not sufficient because much of the law enforcement shenanigans over surveillance are based on ECPA's confusing and outdated tiered treatment of different categories of data. The law enshrines lesser privacy protections for metadata collection than it does for the content of communications across the board. Metadata, a fuzzy blanket term that can include information like email sender and recipient addresses, dialed phone numbers, financial transactions, geolocation information, website addresses, and more, is extremely revealing about people's personal relationships, religious beliefs, and political activities. The differential treatment of metadata and content no longer makes any sense in a world of Big Data analytics. At the same time, statistical insights show that metadata analysis is more misleading than enlightening when it comes to finding unknown terrorists in a haystack of information, and that it is likely to always be so. The law should be updated to protect personal and sensitive information more generally.

II. Limit the FISA Amendments Act of 2008

Section 702 of the FISA Amendments Act authorizes the government to broadly collect, for any foreign intelligence purpose, telephone calls, emails, instant messages, and other communications content where the target is reasonably believed to be a non-U.S. person located outside the U.S.[7] In December 2017, the FISA Amendments Act and section 702 of that Act will sunset. Congress must decide whether to renew the law, reform it, or kill it.

Section 702 is highly problematic both because of the information it allows intelligence agencies to collect without a warrant—including email—and because of the range of people who can be targeted. If section 702 dies, the NSA and the FBI will still be able to wiretap individually targeted foreigners and collect their communications from service providers. However, they will not be able to do so for *any* foreigner talking about *any* foreign intelligence matter. Nor will they be able to collect foreigners' data from Internet companies without judicial supervision—albeit that of the top secret Foreign Intelligence Surveillance Court (FISC). Instead, if the intelligence agencies follow the law, analysts will have to provide probable cause that the foreigner is an agent of a foreign power and get a warrant for the surveillance before capturing a target's communications.

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[4] United States v. Warshak, 631 F.3d 266 (6th Cir. 2010).
[5] Email Privacy Act, H.R. 699, 114th Cong. § 1 (2015).
[6] Electronic Communications Privacy Act Amendments Act of 2015, S. 356, 114th Cong. § 1 (2015); Electronic Communications Privacy Act Amendments Act of 2015, H.R. 283, 114th Cong. § 1 (2015) (identical bill).
[7] 50 U.S.C. § 1881, et seq.

Rolling back section 702 surveillance is important as it is used to target political activists and to collect data about Americans.[8] A *Washington Post* study of PRISM data obtained by Edward Snowden revealed a surprising array of intimate personal information collected and retained by the NSA under 702 including photos of mothers kissing babies and personal medical records; information that is admittedly irrelevant to foreign intelligence.[9] More than half of the 160,000 PRISM files analyzed by *The Washington Post* contained names, e-mail addresses, or other details that the NSA marked as belonging to U.S. citizens or residents, which demonstrates that collecting Americans' international communications is routine under section 702. Once collected, the FBI may search the trove of section 702 data for information about Americans and crime, essentially circumventing citizens' Fourth Amendment protections. Congress must end this "back door search" loophole if it is to restore protection and balance between citizens and law enforcement.

Short of ending section 702's warrantless wiretapping, there is much that Congress could do to narrow its scope to legitimate national security topics. As it stands, Section 702 is incredibly broad, allowing surveillance of foreigners if a "significant purpose" of the collection is foreign intelligence, which can include topics like trade disputes and the price of oil.

III. Let Privacy Technology Evolve

Technology has taken privacy away, ushering in the Golden Age for Surveillance. It has created new security risks: identity theft, phishing, impersonation, stalking, revenge porn, and more. Many consumers willingly give up some privacy and security for easy communications and other valuable online services. But it doesn't have to be that way. It only makes sense to allow people and the companies we contract with to secure our private information.

This means more—and more secure—encryption. Encryption helps human rights workers, activists, journalists, financial institutions, innovative businesses, and governments protect the confidentiality, integrity, and economic value of their activities. However, strong encryption may mean that governments cannot make sense of data they would otherwise be able to lawfully access in a criminal or intelligence investigation.

The encryption dispute has resurfaced despite the debates of the 1970s and 1990s, which resolved tradeoffs between the U.S. government's surveillance/law enforcement missions (potentially thwarted by encryption) and its information assurance/crime

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[8] *See* Ryan Gallagher & Nicky Hager, *In Bungled Spying Operation, NSA Targeted Pro-Democracy Campaigner*, Intercept (Aug. 14, 2016), https://theintercept.com/2016/08/14/nsa-gcsb-prism-surveillance-fullman-fiji/ (desribing NSA surveilance of a New Zealand political activist based on false claims).

[9] Barton Gellman, Julie Tate, & Ashkan Soltani, *In NSA-Intercepted Data, Those Not Targeted Far Outnumber the Foreigners Who Are*, Wash. Post (July 5, 2014), https://www.washingtonpost.com/world/national-security/in-nsa-intercepted-data-those-not-targeted-far-outnumber-the-foreigners-who-are/2014/07/05/8139adf8-045a-11e4-8572-4b1b969b6322_story.html.

prevention missions (furthered by encryption) in favor of allowing for the proliferation of strong encryption. The FBI argues that it should be entitled to defeat encryption during investigations despite technical experts' warnings that the same encryption the U.S. government can defeat will also be defeated by oppressive regimes and criminals. Nevertheless, earlier this year, the FBI tried to force Apple to write a new phone operating system that defeats handset security measures and allows agents to try brute force attacks on encrypted data. Meanwhile, Senators have introduced a "discussion draft" of short-sighted legislation that would punish companies for securing information about their users.[10]

More secure technology—including encryption—can help protect journalists, human rights workers, and those individuals, as well as average citizens, who are at the forefront of political and social evolution. Technology will never completely insulate people from government scrutiny. There will always be informants, eye witnesses, evidence trails, and police ingenuity. But today, the balance is too far on the side of crime and surveillance, and not enough on the side of privacy and personal safety. U.S. law needs to make clear that technical security measures—including encryption—are both legal and desirable.

IV. Conclusion

The utopian Dream of Internet Freedom will never become a reality, but it doesn't have to be a dystopian cautionary tale either. Technology has thrown the balance of power in surveillance out of alignment, and the law has either stagnated or been weakened in the face of this challenge. Constitutional values are at stake. The "reasonable expectation of privacy" protected by the Fourth Amendment is in flux. It was always a fuzzy standard and inconsistently applied. But now, there are serious questions about whether and how the doctrine will apply to the technological realities of the modern world. The Supreme Court is years away from answering fundamental questions about our government's relationship with its citizens: Is there a privacy interest in data held by third parties like Google and Facebook? Can customs agents search all the data on personal electronic devices when crossing the border? Is there a right to be free from ubiquitous geolocation tracking as we move about the public streets? Are computerized queries of digital information Fourth Amendment searches, or does the search only occur when a human views the data? By building both technology and regulatory law for privacy and security, we can ensure the values behind constitutional freedoms without stripping intelligence and law enforcement of tools to protect national security.

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[10] Compliance with Court Orders Act of 2016, S. __, 114th Cong. (2016) (Discussion Draft), https://www.burr.senate.gov/imo/media/doc/BAG16460.pdf.

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Protecting the Environment by Loosening Presidential Control

Lisa Heinzerling

The best way for the next president to protect the environment is to decline to exercise the full range of modern presidential power. Through accretions of presidential power over the past several decades, across administrations of different political parties and regulatory philosophies, presidents and their aides in the White House and in the Executive Office of the President have come to minutely control the regulatory choices of executive agencies. The assertion of presidential power over the details of regulatory policy has elevated politics over expertise in every domain, from the criteria relevant to a decision to the personnel authorized to speak to (and even about) the relevant issues. These developments especially burden environmental protection, where politics often runs counter to expertise and where the people who know the most about problems and solutions may be deeply buried in the bureaucratic structure.

To protect the environment, the next president should loosen the grip on executive agencies in three ways: (1) by uprooting the process of White House review of agencies' rules, (2) by freeing agency personnel to speak with the press without agency press office "minders" or fear of reprisal, and (3) by embracing a generous understanding of citizens' legal rights to challenge environmentally destructive decisions in federal court.

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I. White House Review of Agency Rules

Presidential control comes about in part through White House review of agencies' regulatory initiatives. Since the Reagan administration, presidents have, through executive order, required executive agencies to obtain White House approval of regulatory initiatives.[1] Over time, this process has come to govern not only final regulations, but also proposed regulations, notices of potential regulation, notices pertaining to regulations, and guidance documents.[2] The executive order setting out the process for this review, issued by President Clinton and still in force, prescribes more onerous requirements, such as the preparation of a formal cost-benefit analysis, for especially costly regulations.[3]

For over 30 years, this process has been overseen by the Office of Information and Regulatory Affairs (OIRA), within the Office of Management and Budget. The head of OIRA has come to be known as the White House "regulatory czar," and for good reason: the OIRA administrator decides which rules are reviewed and plays a large role in deciding whether they pass muster. Although the Clinton-era executive order specifies requirements for timing, transparency, and the orderly elevation of contested issues to the president, in practice these provisions have posed little obstacle to delay, secrecy, and confusing power

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[1] This essay concerns executive agencies, not independent agencies whose heads may not be removed by the president except for cause.

[2] Lisa Heinzerling, *Inside EPA: A Former Insider's Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 Pace Envtl. L. Rev. 325 (2014).

[3] Exec. Order No. 12,866, 3 C.F.R. § 638 (1993).

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struggles. Moreover, the very prospect of White House review sometimes discourages agency personnel from even suggesting regulatory actions, and the review process itself leaves many rules and pieces of rules behind. Environmental rules have been particularly hard hit by White House review, given the political power of their opponents and their uneasy fit with formal cost-benefit analysis.

The next president should dismantle this process and start from scratch. The primary method through which the president should exercise control over the executive agencies is the one envisioned in the Constitution: the nomination of "Officers of the United States."[4] The president may, of course, choose these officers based on the conformance between the president's and the officer's views of regulatory policy and priorities. If their paths diverge during the course of the officer's service, the president may fire the officer. In addition, the president may oversee the general progress of the officer in fulfilling the president's overall regulatory mission. But the president and aides in the Executive Office of the President and White House should not veto particular regulations, stall them, change their details, imbue them with their own views of the meaning of the underlying statutes, foist upon them the unwarrantedly narrow criterion of economic efficiency, or subject them to line-by-line editing. The next president should cease those practices and let the agencies do the work Congress has assigned to them.

While the Obama administration has promoted a number of signature initiatives focusing on climate change, such as the Environmental Protection Agency's Clean Power Plan (CPP), the overall record on regulatory climate action is mixed, having suffered from micromanagement by the White House. For example, the EPA had agreed, as of December 2010, to issue rules regulating greenhouse gas emissions from power plants (the sources regulated by the CPP) and oil refineries. The first rule languished until 2014, when the EPA at last proposed the CPP, the implementation of which has been stayed by the Supreme Court; the second rule has never seen the light of day. Moreover, President Obama spent his first term and much of his second overseeing a boom in coal leasing on federal public lands and touting the energy-producing capacity of offshore oil and gas drilling, softening his environmentally problematic "all of the above" energy strategy only in the homestretch of his second term in office.

This is not the forum for a thorough examination of the overall environmental record of the Obama presidency. The point is simply that, when it comes to environmental protection, later actions do not undo the consequences of earlier defaults. Protection of the environment is a matter of chemical, physical, biological, and ecological capacity, not political bandwidth. Restoring the independence of executive agencies would help begin to right a regulatory system that has been too much marked by politics and too little driven by expertise.

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[4] U.S. Const. art. II, § 2.

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II. Minding the Press

Beyond the process of regulatory review, White House interference with agencies' work unsettles agency personnel and discourages decisive action and plain speaking. Anxieties about potential political backlash radiate from White House staff to agencies' political staff and on to their career staff. Everyone gets nervous. No one wants to make a mistake. Anxiety encourages timidity and timidity discourages speaking truth to power. As clarity of purpose and integrity of expertise are essential for strong and sensible environmental protection, environmental protection suffers when the White House runs environmental policy.

The cultivation of anxiety through political interference is especially obvious when one considers the centrally dictated policies that limit the ability of agency career staffers to communicate with the press. In recent years, presidential administrations have limited agency staffers' communications with the press and, when such communications are allowed to occur, have required agency staffers to be chaperoned by press office "minders." These restrictions prevent the public from hearing important, informed, and sometimes dissenting views held by agency staffers. The scientific and technical experts that make up most agencies' core personnel are often the first to spot a problem; recall, for example, the early warnings of EPA career scientist Miguel Del Toral, who helped to uncover the lead contamination of the water system in Flint, Michigan. However, as was true in Flint, the public cannot benefit from the Agency's expertise, and the warnings that might flow from it, if citizens are cut off from Agency experts' views.

Here, too, the solution is for the next president to decline to exercise the full measure of modern executive authority, which has come to include the power to discipline employees for speech related to their official duties. The next president should relax the constraints on federal employees' speech that have taken advantage of this aspect of executive power.

An unfortunate 2006 Supreme Court decision, *Garcetti v. Ceballos*, emboldened presidential administrations to impose more significant constraints on federal employees' contacts with the press. Therein, the Court held that the First Amendment does not protect government employees from discipline based on speech related to their official duties. "When public employees make statements pursuant to their official duties," Justice Kennedy wrote for a 5-4 Court, "the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[5] The irony and risks of this situation should be plain: the employees' speech is least protected when they are speaking in their capacity as public servants, about the public's business.

The federal government has taken full advantage of the Supreme Court's ruling by curtailing federal employees' speech regarding their work. Agencies have developed media

[5] Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).

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policies that channel employees' interactions with the press through public affairs offices and provide for the inclusion of public affairs officials in employees' communications—including interviews—with the press. Understandably, scientists and other technical experts within the agencies have bridled at the policies requiring "minders" for their exchanges with members of the press.

Nothing in the First Amendment, however, *compels* the president to curtail federal employees' communications regarding their work. Indeed, basic First Amendment values such as encouraging the free flow of important information in our society are in considerable tension with federal agency policies that prevent or distort engagement between government personnel and the press. The next president should encourage executive agencies to allow their personnel to communicate with the press about issues of public importance.

III. Embracing Citizens' Access to Federal Courts

In representing executive agencies in the federal courts, the Department of Justice (DOJ) routinely makes a series of arguments that limit citizens' access to federal courts in particular kinds of circumstances and particular kinds of cases. Many of these arguments are especially hard on environmental plaintiffs. To protect the environment, the next president should appoint officials at DOJ who will refrain from offering courts these pathways to denying environmental relief against government entities.

The arguments are familiar to any student of administrative law: there was no agency "action;" if there was agency action, it is not reviewable; if it is reviewable, it is not ripe; if it is ripe, it is not final; and if it is final, the plaintiffs have no standing.[6]

These arguments are not neutral. They have a strong, if subtle, political and philosophical valence. They allow courts to avoid merits mostly in one direction—in defense of agency inaction, not action—and tend to skew against an ambitious regulatory agenda. A particular president and particular aides may agree or disagree with this political and philosophical valence, and may have overarching preferences for access to courts, for continual external checks on both action *and* inaction, and for environmental improvement that transcends individual disputes. A presidential administration with these preferences should be judicious about raising these kinds of arguments in environmental cases.

The risk is that the administration would, with these arguments, win each particular case for executive officials and the executive branch, but lose a larger battle over protecting the planet. Winning in individual cases may offset the environmental harm avoided in other cases. Defending, for example, the EPA's regulatory pressure to move away from coal, embodied in the Clean Power Plan, and simultaneously defending coal leases on public

[6] U.S. Army Corps of Engineers v. Hawkes Co., Inc., 578 U.S. ____ (2016).

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lands, representing 2.3 billion relatively cheap tons of coal, makes little sense from an environmental perspective. In addition, arguments used to win individual cases may reduce external pressure to do more. A fair portion of the regulatory action on climate that has taken place in the Obama administration was brought about by external pressure through citizen petitions and citizen litigation. One understanding of the citizen suits made available by most of our environmental statutes is that the citizen suit supplements government enforcement resources. On this understanding, the government's work protecting the environment is helped, not hurt, by citizen enforcement.

Administrative lawyers are so accustomed to the government's standard set of threshold arguments that it may be almost unimaginable to contemplate a different approach. Yet that is exactly what the Food and Drug Administration (FDA) did in the 1970s. In a "Procedural Regulation" issued in 1975, the FDA concluded that its regulatory mission was best served by *not* making standing arguments, instead taking a strong stand in favor of citizen standing:

> The matters handled by the Food and Drug administration, governing the safety, effectiveness, functionality, and labeling of consumer products that represent over 25 percent of the consumer dollar spent daily in this country, vitally and directly affect the interests of every citizen. Accordingly, applying the standards established in *Sierra Club v. Morton*, 405 U.S. 727 (1972), the Commissioner concludes that every citizen has standing in the courts to contest any action of the agency, and that no objection relating to such standing will be interposed by the agency in such cases. The Commissioner has followed this policy for the past 3 years.[7]

This posture would align with the broad public interest in citizen access to courts in environmental cases. Although courts will consider at least some threshold arguments, such as standing, on their own, the government's forbearance in making these arguments would set a different tone for environmental litigation. Moreover, the government often makes very aggressive threshold arguments that may persuade courts to cut back even further on citizen access to courts in environmental cases. In one recent motion to dismiss a climate case, for example, DOJ wrote: "standing to sue may not be predicated upon an interest which is held in common by all members of the public, because of the *necessarily abstract* nature of the injury all citizens share."[8] To characterize climate-related injuries as "necessarily abstract" not only encourages courts to tighten rules for climate plaintiffs, but also diminishes the factual arguments the government makes when it defends climate rules. In its final brief defending the Clean Power Plan, the government argued: "CO2 and other heat-trapping greenhouse-gas emissions pose a monumental threat to Americans' health and welfare by driving long-lasting changes in our climate, leading to an array of severe negative effects,

[7] Administrative Practices and Procedures, 40 Fed. Reg. 22950 (May 27, 1975).

[8] Federal Defendants' Memorandum of Points and Authorities in Support of their Motion to Dismiss at 15, Juliana et al. v. U.S., No. 15-01517 (D. Or. Nov. 17, 2015); *see also*, Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 220 (1974).

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which will worsen over time. These effects include rising sea levels that could flood coastal population centers; increasingly frequent and intense weather events such as storms, heat waves, and droughts; impaired air and water quality; shrinking water supplies; the spread of infectious disease; species extinction; and national security threats."[9] These injuries are anything but "abstract," and the next president's DOJ should recognize this fact across the run of cases and not only when it suits the government's litigating position.

Each of these ideas for the next administration asks the president to do something unusual: to give up some measure of power. When it comes to environmental protection, however, letting the executive agencies do their work, allowing agency experts to speak to the press without suppression, and embracing citizen access to courts is the best way to build the kind of legacy an ambitious president typically desires.

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[9] Respondent EPA's Initial Brief at 32, West Virginia. v. EPA, No. 15-1363 (D.C. Cir. Mar. 28, 2016), https://www.edf.org/sites/default/files/content/epa_merits_brief_-_march_28_-_2016.pdf.

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